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We allow of the Printing and Publishing of the Book Intituled, *A General Abridgment of Law and Equity*, Alphabetically digested under proper Titles, &c. By Charles Viner, Esq;

W. Lee.
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F. Page.
Law. Carter.
J. Fortescue A.
W. Chapple.
T. Parker.
M. Wright.
Ja. Reynolds.
Tho. Abney.
T. Burnett.
A General Abridgment of Law and Equity

Alphabetically digested under proper Titles

With

Notes and References to the Whole.

By CHARLES VINER, Esq;

Favente Deo.

ALDERSHOT in Hampshire near Farnham in Surry:
PRINTED for the Author, by Agreement with the Law-Patentees.
TABLE
OF THE
Several TITLES, with their Divisions and Subdivisions.

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Good.
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### Notes
- **Table Format**: The table provides a structured overview of titles and their corresponding references, facilitating easy navigation and understanding of the legal terms and concepts.
- **Columns**: The table is organized into columns, with each column representing a different aspect of the titles, such as for life by devise, by implication, and so forth.
- **Rows**: Each row corresponds to a specific title, with details such as how the title is affected by different conditions or circumstances.

This table serves as a comprehensive guide for understanding the various legal titles and their implications, making it a valuable resource for legal professionals and students alike.
With their Divisions and Subdivisions.

To what Time the Will and Devise therein shall relate. 
Alterable or be transferred and go over to another. 
Condition. By what Words. 
What, and what a Limitation. 
What a Condition, and what a Trust. 
Broke, or not. How to be performed. 
Notice what is, and necessary in what Cases. 
Made good in Equity, though void in Law. 
Extent of Condition. Precedent Condition. What is. 
Determination of Condition, Limitation, or Contingency. 
Entry by the Heir for the Condition broken. 
To the Heir. 
How he shall take. Where by De-scent or Purchase. 
Upon Condition. 
In what Case the Heir or Wife shall take an Interest in the Estate. 
By Implication; and what is. 
To Creditor or Legatee, where it is a Satisfaction. 
Immediate Devise, what is. 
In respect of the Incapacity of the first Devisee. 
Lapsed Devise. What is. 
Legacy Lapsed. By Death. 
Of Legatee in Trafator's Life. 
By dying before Day of Payment. 
Extinct in what Cases. 
Survives to the other Legatees. 
Vells in another to whom it is limited over. 
Ademption of a Legacy. 
Content. Necessary in what Cases. 
Who may content. At what Time. 
How it may be made. 
In Law what amounts to it. 
To one where it is to another. 
The Effect of Content to a Legacy. 
Pleading. 
Joint, Legatees or Devisees. 
How, Jointly or severally. 
Payment or Taking to be In what Order. 
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To Infants when to be paid. 
Payment to whom. 
Demand. Necessary in what Cases. 
Payment. How. 
Clear of Deductions. 
Interest payable in what Cases. 
Maintenance allowable out of it. 
Security in what Cases to be given. 
Refunding, and in what Cases. 
Where Refunding is directed by Will to make Equality. How much shall be refunded. 
Remedy for Devisees and Legatees. 
Where the Personal Affects are diminished by Creditors. 
Whole Legacies were charged on 

Lands which prove deficient. 
In what Court. 
In respect of Lands charged &c. 
Chargeable with Legacies, what is. 
Devise. How allotted, or chargeable with Debts or Legacies. 
Specific Legacy. What is. And liable to Contribution &c. in what Cases. 
Defect therein made good or not. 
Refudatory Legates. Who. What shall go to them. Or Where the Part of one shall survive to the other. 
Uncertain. In what Cases Legate may elect. and how. 
Indirect. And who shall take. 
Remainder of Personal Chattels; 
Good or not. 
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Personal and Real Estate jointly with Remainder. 
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By Executors or Trustees &c. 
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By Surviving Executors &c. or Trustees. 
By whom it may be upon Executors or some of them refusing. 
No Person being appointed to sell. 
At what Time it may be. And in what Cases if not sold, the Heir may enter. 
Directly or compelled, by Equity. 
none being appointed to sell. 
Waved or disagreed to. 
Where, if not waived, it must be taken as the Will gives it. 
Qualified or Corrected. 
Money devised to be invested in Land. 
And Vice versa. How construed in Equity. 
Nuncupative Wills and Codicils. 

Dilapidations. 
Cates relating thereto. 

Dilators. 
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Several Defendants. In what Cases they must agree. 
In what Actions allowed or not. 

Disabilities. 
What are, and the Effect thereof. And Pleadings. 

Disagreement. 
As to Lands and Chattels. Good and Necessary, in what Cases, and the Effect thereof. 

Dissent. 
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Against whom. 
Time when. 
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Upon what Recovery. 
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To toll the Entry of what Person. In respect of the Right and Estate.

1. A Man recover'd by Erroneous Judgment, and had Execution and died, and his Heir is in by Defent, he who loit brought a Writ of Error, and revered the Judgment and was restored, he may enter upon the Defent. Br. Enter Cong. pl. 195. cites 9 H. 6. 49.

2. Where a Man disfifes the Heir and dies seised, and his Heir enters, and the Executors fell, the Vendee may enter; For he has no Right, nor no Action; because he has only a Title to enter by the Sale, and therefore he may enter; For otherwise he has no Remedy, per Hals J. Br. Devise, pl. 36. cites r E. 6.

3. Conveyee of a Fine upon Grant and Render is not barr'd of his Entry by Defent. Per Walmly J. Ow. 141. 32 & 33 Eliz. C. B.

4. If a Prebendary, Bishop, or Abbot be disfised, and afterwards he releases to the Diffeifeor, this is an Alienation whereupon a Writ De fine afteniu Capituli may be had; and if the Diffeifeor dies seised, the Successor hath not any Remedy but by this Writ, or by a Writ of Right; but if the Diffeifeor doth not die seised, the Successor may enter, notwithstanding the Release. F. N. B. 195. (B)

5. If a Diffeifeor aliens in Fee, and the Allience dies without Issue, and the Lands seifed, the Diffeifeor may enter, because the Lord comes not to the Land by Defent. Litt. S. 390.

6. For albeit the Allience of the Diffeifeor dies seised, and the Lord by Escheat comes to the Land by Act in Law, yet, because the Land descended not to him, the Entry of the Diffeifeor in respect of the Escheat shall not be taken away. For a dying seised and a Defent, and not a dying seised and an Escheat doth take away the Entry. For (as hath been said) the Defent is the worthier Title. Co. Litt. 240. a.

7. But in that Case, if the Land by Escheat die seised, and the Lord descend to his Heir, that Defent shall take away the Entry of the Diffeifeor. Co. Litt. 240. a.

8. So it is if the Diffeifeor die seised, and the Heir of the Diffeifeor dies without Heir, the Diffeifeor cannot enter upon the Lord by Escheat. So as there is a Diversity as touching the Defent, when after a Defent cauf, the Heir in Fee Simple dies without Heir, for he in the Reversion or Remainder, or one upon the Estate Tail claims in above the Estate Tail, and the Lord by Escheat claims in under the Heir in Fee Simple. Co. Litt. 240. a.

do, but the Lord may take the Diffeifeor as his lawful Tenant. And it is plain that the Law doth not call the Freedom upon the Lord in the same Manner as it does upon the Heir, because the Lord is obliged to answer the feudal Duties to the Lord Paramount, in respect of his Seigniory, whether this Possession was call on him or not; so that in this Case there could be no Failure of Duty, though the Lord does not enter, Gilb. Treat. of Ten. 22.

9. If the Father make a Leafe for Life, and has Issue two Sons, and dies, and the Tenant for Life dies, and the Youngest Son intrudes and dies seised, this Defent shall not take away the Entry of the Eldest. Co. Litt. 243. a.

10. But if the Father had made a Leafe for Years, it had been otherwise; for that the Possession of the Lessee for Years made an actual Freedom in the Eldest Son. Co. Litt. 243. a.
11. So when the one Co-parcener does specially enter, claiming the whole Land, and taking the whole Profits, he gains the one Moiety, viz. of her Sister by Ademption, and yet her dying seised shall not take away the Entry of her Sister, whereas when one Co-parcener enters generally and takes the Profits, this shall be accounted in Law the Entry of them both, and no devolution of the Moiety of her Sister. Co. Litt. 243. b.

12. If a Man be distessed when he is at Large, and the Defcendent is cast during the Time of his Imprisonment, this Defcendent shall bind him. Co. Litt. 259. a.

13. A Reversoner disteises his Tenant for Life, and dies seised, this is a Defcendent to toll the Entry of Tenant for Life. Hob. 323. cited by Hobart Ch. J. as 9 H. 7, but Hobart held, that it will not take away the Entry of a Stranger, because as to him it is an Estate for Life still, and not a fictitious descendible Estate.

14. But if I let Lands for a Term of Years, and another disteises me, and ousts the Tenant, and dies seised, I may not enter, but the Leissee for Years may well enter, because by his Entry he does not oust the Heir, who is in by Defcendent of the Freehold and Inheritance which is descended to him, but only claims the Lands for a Term of Years; so it is of a Tenant by Election, by Statutes Merchant, and the like who have but a Chattle and no Freehold, but otherwise it is of an Estate for Life, or a higher Estate. Litt. S. 411. and Co. Litt. 249. a.

15. If a Woman Distresses' dies seised, having an Husband and Issue by him, [who is Tenant by the Quitesy] and after the Husband dies and the Issue enters, the Entry of the Distressor is not tolled, for that the Issue came not immediately to the Lands by Defcendent after the Death of the Mother &c. but by the Death of the Father. Litt. S. 394. 395.

16. If a Defcendent is cast in Time of Vacation of a Bishop &c. this doth not toll the Entry of the Successor. 2 Inst. 360.

17. If Baron and Feme Tenants in Tail have Issue and are distessed, and a Defcendent is cast, and the Baron dies, and before Entry the Mother dies, the Entry of the Issue is not lawful, because he ought to claim as Heir to both; and as Heir to his Father he is bound by the Defcendent as his Father was, and as Heir to the Mother only he cannot enter, for he had not any Title; but if the Mother had entered and rejoined the Estate Tail, the Discontinuance would be purged, and the Tail is actually vested in the Wife, which after her Death descends to the Issue. 8 Rep. 72. a. Patch. 7 Jac. in Grenley's Case.

18. B. was Assignee of a Term for 99 Years if A. lives so long, B. dies, living A. Grantee of Reversion enters and dies seised before Grant of Administration de Bonis non; yet per Cur. after Administration is granted, Administrator de Bonis non may have a special Action of Trespass. 5 Mod. 484. Hill. 9 W. 3. B. R. Trevellian v. Andrew.

(N. 5) Where Distressor may enter notwithstanding a Defcendent.

1. If a Man abates, intrudes, or distresses another, and makes a Feoffment in Fee, and after the Feoffee dies, the Heir enters and enjoys the first Abator, or Intruder, or Distressor, he shall be adjudged in by this Feoffor against all except those to whom he did the Wrong, and against them he shall be adjudged in as he was when he first entered by Wrong. Quod not. Br. Distress. pl. 23. citas 5 H. 7. 6.
Defcent.

2. A. devises Land to be sold by his Executors; A. dies seized, the
Heir of A. or a Devisee enters, and the Heir or Devisee makes a Feoff-
ment of this Land to B. B. dies seized and the Heir is in by Defcent, yet
the Executors may enter into this Land and sell it; for a Devisee takes
down Rights of Entry, not Titles or Powers, as Entry for Condition
broken, Entry for Mortmain; neither does it take away in the Case of
a Devisee or Patente of Land, where an Abator enters before them
and dies seized, for they have no other Remedy; and Executors have
only a Power; and when they fell the Vendees is in by the Will of the
Devisee paramount the Defcent. Jenk. 184. pl. 75.

3. If I let Lands for 20 Years, and another defeateth me and oufs the
Termor, and dies seized, the Lands descend to his Heir, I may not enter,
and yet the Lessee for Years may well enter, because that by his Entry
he doth not out the Heir who is in by Defcent of the Freehold which
is descended unto him, but only claimeth to have the Land for Term of
Years, which is no Expulsion from the Freehold of the Heir who is in
by Defcent; but otherwise it is where my Tenant for Life is defeised,

4. A Defcent shall not take away the Entry of a Lessee for Years,
nor a Tenant by Elysit or Statute Merchant, or such like as have but a
Chattle and no Freehold, because by their Entry upon the Heir by De-
scent, they take no Freehold from him; but otherwise i. is of an
Estate for Life or any higher Estate. And as a Defcent of a Freehold
and Inheritance shall take away the Entry of him that Right has to a
Freehold or Inheritance, so a Defcent of a Freehold or Inheritance
cannot take away the Entry of him that has but a Chattle, for that no
Defcent or Dying feised can be of the same. Co. Litt. 249 a.

5. A Defcent does not take away the Entry of a Man out of the Realm
at the Time of the dying feised it he were not within the Realm at the
Time of the Diffeis or dying feised. Litt. S. 430.

6. So it is of a Man that is in Prison. Litt. S. 436.

(N. 6) Entry of the Issue Justifiable in what Cases; though the Entry of the Ancestor was not.

1. I f there are Grandfather, Father, and Son, and the Father defeised
the Grandfather and makes a Feoffment in Fee without Warranty, the
Grandfather dies. Albeit the Right descends to the Father, he cannot
by this Right descended enter against his own Feoffment, but if he
die the Son shall enter and avoid the Estate of the Feoffee. Co. Litt;
247. b.

2. So if the Grandfather be Tenant in Tail and the Father defeised him,

(N. 7) Where it tolls the Entry of an Infant, Feme-
Covert &c.

1. Whence Husband and Wife are feised of a Freehold, and after
are drened' by Suit on the Woman's Part, whereby she is to
have all the Land, yet if the Husband continues Possession and dies feised,
this
this Descent shall not take away the Entry, for he was no Diffeiior, because he was legally in at first. Arg. Ow. cites 12 Chit. 22.

2. An Infant who alius may enter upon a Descent had thereof in his Nonage, and e contra upon a Descent had after his full Age, per Littleton, for Law, and it was not denied. Br. Entre cong. p. 129. cites 32 H. 6. 27.

3. In Trepass, it was agreed that the Heir of a Man of no same Memory may as well enter after the Death of his Ancestor upon the Feoffee, or the Feoffee of the Feoffee, as he might in the Case of a Testament made by his Ancestor, when his Ancestor was within Age. Br. Entre Cong. p. 99. cites 12 El. 4. 8.

4. If an Infant be dispeled and a Descent made during his Infancy, yet he may enter upon the Issue which is in by Descent; because no Laches in such Case shall be adjudged in an Infant. Litt. 402.

5. B. Tenant in Tail enfeoffs A. in Fee, A. has Issue within Age and dies. B. abates and dies seised, the Issue of A. being still within Age. This Descent shall bind the Infant; for the Issue in Tail is remitted, and the Law respe's more an ancient Right, in this Case, than the Privilege of an Ancestor that had but a Difcejible Estate. It is said, if the King dies seised of Land, and the Land descends to his Successor, that this shall bind an Infant, for that the Privilege of an Infant in this Case holds not against the King. Co. Litt. 245. a.

6. If Husband and Wife, as in Right of the Wife, have Title and Right to enter into Lands which another hath in Fee, or in Fee Tail, and such Tenant dieth seised &c. In such Case, the Entry of the Husband is taken upon away the Heir which is in by Descent; but if the Husband dieth, then the Wife may well enter upon the Issue which is in by Descent, for that no Laches of the Husband shall turn the Wife, or her Heirs, to any Prejudice nor Loffs in such Case, but that the Wife and her Heirs may well enter, where such Descent is escheated during the Courterure. Litt. 403.

7. If a Feme sole be seised of Lands in Fee and is dispeled and then takes Husband. In this Case the Husband and Wife, as in the Right of the Wife, have Right to enter, and yet the dying seised of the Diffeiior, in that Case, shall take away the Entry of the Wife after the Death of her Husband, and the Reason is, as well for that she is, when she was Sole might have entered and re-continued the Possession, as also it shall be acounted her Folly, that she would take such a Husband which would not enter before the Descent. Co. Litt. 246. a.

8. If a Woman be within Age at the Time of her taking Husband, then the dying seised shall not alter the Decrees of her Husband take away her Entry, because no Folly can be accounted in her; for that she was within Age when she took Husband, and after her Courterure she cannot enter without her Husband. Co. Litt. 246. b.

9. He who was out of his Memory at the Time of such Descent, if he will enter after such a Descent, if an Action upon this be sued against him, he hath nothing to plead for himself, nor to help him, but to say that he was not of Sound Memory at the Time of such Descent &c. And he shall not be received to say this, for that no Man of full Age shall be received in any Plea by the Law to dispele his own Person; but the Heir may well dispele the Person of his Ancestor for his own Advantage in such Case; for that no Laches may be adjudged by the Law in him, which hath no Discretion in such Case. Litt. 405.

10. If
Defcent.

10. If a Man becomes *Nov Compos Mortis by Accident*, as by Grief, Sicknels &c. and he be dispossessed and suffers a Defcent, albeit, he recovers his Memory and Understanding again, yet he shall never avoid the Defcent and so it is a Fortiori of one that has *Lucida Intervalla*. Co. Litt. 247. a.

11. *If one out of the Realm be dispossessed and a Defcent causeth*, yet his Entry is not barred, whether he were in the King's Service or not; *But if he were dispossessed before he went beyond Sea*, his Entry is taken away by the Defcent. Hawk. Co. Litt. 343.

12. *If a Man imprisoned be dispossessed, and a Defcent causeth*, while he is in Prison, yet may he enter; for by Intendment of Law one in prison is kept to close, that he has no Intelligence of Things done abroad, but if he were at large when dispossessed, a Defcent during his Imprisonment binds him. Hawk. Co. Litt. 341, 342.

13. *If an Infant Diifeifor aliens in Fee, and the Alienee dies seized*, and And if the the Lands descendent to his Heir being an Infant, his Entry is tolled, but if the Infant Grantor enters upon the Heir of the Alienee, as he well may, the Defcent being during his Nonage, then the Diifeifor may well enter upon the Diifeifor. Litt. S. 407. 408.

Infant may well enter, either within Age, or after his full Age. Co. Litt. 248. a.

14. *As to Infants, Feve Coverts, Persons Non Compos, the Defcent to the Heir of the Diifeifor does not take away their Entry, because the Infants &c. had a Right of Possession, and the Act of Law cannot take away that Right, since no Liasses can be imputed to them; and since their Negligence is not culpable, it was unjust to make Market of their Titles; and therefore the Lord, when he takes a Relief, is not supposed to transfer any Jus Possessiovis to the Heir of the Diifeifor, since the Feud is not supplanted, by Negligence and Want of a Tenant, to fall into his Hands, and from thence to be relieved to the Heir of the Diifeifor, who has Title thereunto, since if that were Doctrine, a Negligence were supplanted in these uncappable Persons, which the Law does not allow. Gilb. Treat, of Ten. 28, 29.*

15. *But the Non Compos, in this Case, cannot allege the Disability in himself, because he cannot be superseded concisely of it; nor is he allowed ever at any Time to allege it; for when he is once Non Compos, there is no certain Time when he can be adjudged to recover that Disability, until where he is legally committed, and then the Acts during the Lunacy will be set aside and discharged, and afterwards the Commission superseded; for in no other Way can the Non Compos be legally restored to his Right, and to his Capacity of acting. Gilb. Treat, of Ten. 29.*

(N. 8) What shall be said a dying seized of the Fee or Frank-Tenement.

1. If an Infant be dispossessed, and the Diifeifor dies seized, and after the Infant comes to a full Age and the Heir of the Diifeifor dies before he enters; albeit he dies not seised of an actual Seisin, but of a Seisin in Law, yet that Dying seised shall take away the Entry of the Diifeifor, and yet in Pleading, the Second Heir shall make himself Heir to the Diifeifor, and that Land shall not be recovered in Value for the Warranty made of other Lands by the First Heir. But though
though the first Heir had but a Seisin in Law, yet he is within the Words of Littleton, for he was seised, and died seised in his Demise, as of Fee. Co. Litt. 239. a. b.

2. If a Differesor makes a Gift in Tail, and the Deme differences in Fee, and differences the Difference and dies seised, the Defcent shall not take away the Entry of the Difference; for the Defcent of the Fee Simple is abolished and gone by the Remainder, and albeit the Issue be in by Force of the Estate Tail, yet the دون死了 not seised of that Estate, and of Necessity there must be a dying seised. Co. Litt. 238. a. b.

3. No dying seised (where the Tenements comes to another by Succession) shall take away the Entry of any Person &c. as of Prebends, Abbots, Priors, Deans, or of the Parson of a Church or of other Bodies Politick &c. albeit there were 20 Dying seised, and 20 Successors, this shall not put any Man from his Entry. Litt. S. 413.

(N. 9) Entry tolled by Defcent.

Revived in what Cases it may be.

1. Grandfather, Father and Son, the Son disposed H. and intestested the Grandfather, who died seised; the Father entered as Heir to the Grandfather, and leased to the Son for Term of another's Life; the Difference entered, the Son brought Allife and recovered; for the Son had the Fee Simple of which he was Differesor, but is now a Purchaser of the Frank-Tenement for Life, and the Defcent remains not purged; contrary if the Son was Heir to the Defcent. Br. Entire conceivable, pl. 127. cites 13 E. 3. Fitzh. Title 6.

If there be Grandfather, Father and Son, and the Son seised the Grandfather, who dies seised, and the Land descends to the Father, now is the Entry of the Difference taken away; but if the Father dies seised, and the Land descends to the Son, now is the Entry of the Difference revived, and he may enter upon the Son, who shall take no Advantage of the Defcent, because he did the Wrong unto the Difference. But in the Case abovejoin'd, some have said, that where after such Defcent to the Father he made a Lease to the Son for Term of another Man's Life, upon whom the Difference entered, the Son brought an Allife and recovered, and the Reason that has been yielded is, for that the Son had not the Fee Simple which he gained by Difference, but is a Purchaser of the Freehold only from the Father, and the Defcent remains not purged. Contrary it were, as it is there said, if the Son were Heir to the Defcent. But the Book cited there in Fitz. tit. Plac. 6 does not warrant that Case; and I hold the Law to the contrary, viz. that the Difference in that Case shall enter upon the Difference, as well as if the Father had conveyed the whole Fee Simple to the Son, for in that also the Defcent to the Father is not purged. If a Differesor make a Lease to an Infant for Life, and he is discarded, and a Defcent cai, the Infant enters, the Entry of the Difference is lawful upon him. Co. Litt. 238. b.

2. If Land descends to a Daughter within Age, and after she is seised, and the Difference dies seised, and his Heir enters, and after a Son is born, he shall not avoid the Defcent; for he does not claim as Heir to his Sister, nor was he in effe at the Time of the Defcent. Br. Defcent, pl. 49. lays Queer the Reading of Whorwood.

3. If Tenant for Years holds over his Term, he is Tenant at Sufferance, and his Defcent shall not take away Entry; But if Tenant for Term of another's Life holds over his Term, he is an Intruder, and his Defcent shall take away Entry. Quod fuit concelement; per Dyer. Ow. 35. Mich. 13 & 14 Eliz.

4. A.
Defect.

4. A. devised Lands to B. A. Stranger enters and dies seized before any Ow 96.

Entry by Devisee, now is the Devisee without Remedy. Arg 2 Le, Arg S. P.—

147. pl. 182. Trin. 30 Eliz.

The Law does not cast Dower upon the Wif.

Reverfion the claims Heir, whom is in for her Life, and therefore the Heir entered, yet when the right is by her own Act; but when she is endowed, she is in from the Death of her Husband; therefore she has only the naked Possession her Husband had, not any Jus Possifton at all, since it was not of absolute Necessity that she should claim her Dower; but it is of absolute Necessity that the Law does call the Freehold upon the Heir. Now by the Endowment the Possession is implied that the Law cast upon the Heir, because the Heir, as is said, is to from her Husband, and by Consequence there is no Right of Possession as to this Third Part acquired to the Heir at Law, since the Law doth not place him in such Third Part after the Death of the Father; and though the Reverfion belongs to him after the Death of the Mother, yet that is only the Reverfion of that which the Mother possessed, which was a naked Possession; and to he has therein no Right of Possession at all. Gibs. Treat. of Ten. 25. 24.

5. An Entry being taken away by Defect is revived by the Endowment of the Wife of the Deflifer, albeit the Tenant in Dower shall have it but for her Life; for that, though the Heir entered, yet when the right is by her own Act, she can't in by the Heir, but immediately by her Husband being the Deflifer, who is in for her Life by a Title Paramount the dying seized and Defect, and therefore in Judgment of Law, the Defect was to the Freehold, and the Possession which the Heir had is taken away by the Endowment, because the Law adjudges no mean Defect between the Husband and the Wife. Co. Litt. 240. b —

6. If a Deflifer makes a Feeftment on Condition, Feoffee dies, and Feoffor Litt 8 409.

enters for a Breach, the Deflifferee may enter upon him. Hawk, Co. Litt. 333.

makes a Feeftment in Fee on Condition, and the Feoffee dies seized, this gains a Right of Possession to the Heir of the Feoffee; but if the Condition be broken, and the Feoffor enters, he destros the Estate, and the Right of Possession annexed to it; and he being only a Deflifer is in his old Estate, which is a naked Possession without any Right at all. Gibs. Treat. of Ten. 50. —

7. If Leffe for Years is seized, and in Reverfion difeifed, and Diseefor dies difeifed, though the Leffer cannot enter, yet may Leffe enter, by it he defeats not the Freehold that descended to the Heir, but only the claims to have the Land for the Term, which is no Expulsion of the Freehold. Litt. Sect. 411.

who has the Right of Possession; but if he enters after the Defect then he can only hold in the Name of the Freeholder who has the present Right of Possession, which is the Heir of the Deflifer. Gibs. Treat. of Ten. 51.

8. If a Deflifer makes a Gift in Tail, and the Donee both Issue and dies seized, now is the Entry of the Diflifferee taken away; but if the Issue dies without Issue, as the Estate Tail which descended is spent, the Entry of the Diflifferee is revived, and he may enter upon him in the Reverfion or Remainder. Co. Litt 238. b.

9. If after the dying seized of the Deflifer, the Deflifferee abates, against whom the Wife of the Deflifer recovers by Confession in a Writ of Dower; in that Case, though the Defect be avoided, as Littleton here says, yet the Diflifferee shall not enter upon the Tenant in Dower, because the Recovery was against himself; but if he had assigned Dower to her in Pais, some say he should enter upon her. Co. Litt. 241. a.

10. If I be defeifed by an Infant within Age, who alters to another in Fee, and the Alience dies seized, and the Lands descend to his Heir, being an Infant within Age, my Entry is taken away &c. But if the Infant within facts is law.
Defcent.

Defcent gives within Age enters upon the Heir which is in by Defcent, as he well may, for that the same Defcent was during his Nonage, then I may well enter upon the Diffèfè, because by his Entry he has deserted and taken away the Defcent. Litt. 8. 607, 608.

If an Infant diffèfs, this only gives him a naked Possèfion; for he has no Privilege to do Wrong; and if he alien in Fee, his Alienation is voidable. If the Alienèe dies seised, he may enter; for though the Defcent gives a Right of Possèfion against the Diffèfèe, yet it gains no Right from the Infant. If then the Infant recovers, he is a Diffèfèr as he was before, and being only in his former Eftate he has no Right of Possèfion against the Diffèfèe. Gilb. Treat. of Ten. 29, 30.

(N. 10) Prevented; How.

1. In Affèf N. leas'd to P. for Term of Life. P. alien'd to G. in Fee. N. entered for the Alienation, and G. re-enter'd and oufed him, and N. claim'd and always was debating, fo that G. had no peaceable Possèfion, and G. of such Seifin died seised, and his Heir entered, and N. died, and the Heir of N. enter'd upon the Heir of G. and the Entry adjudg'd lawful by reason of the Claim and non-peaceable Possèfion of G. Br. Continual Claim, pl. 8. cites 25 All. 12.

2. By continual Claim duly made, he who makes the Claim may enter upon a Defcent. Br. Enter Congeable, pl. 22. cites 9 H. 4. 5.

3. In Affèf it was admitted that it a Baflard enters, and the Mulier makes continual Claim, and the Baflard dies seised, and his Heir enters, the Mulier may enter, Quod Nota. Br. Continual Claim, pl. 3. cites 14 H. 4. 9. 10.

4. It was agreed that continual Claim shall avoid Warranty collateral descended. Br. Continual Claim, pl. 4. cites 14 H. 4. 13.

5. Tenant in Tail of Land deviable discontinued in Fee, and re-took in Fee, and devised in Fee, and died, the life in Tail is not remitted; for nothing can descend to him by reason of the Devisee, unless the Devisee waives it. Br. Devise, pl. 49. cites 4 M. 1.

(Bishop S. P. held accordingly by Welch, Wenken, and Dyce; and affirmed afterwards at Dinner by Saunders Ch. B. Brown and Whiddon. And yet there is a Dying Seised in the Father of a Fee Simple, but the Devise cut off the Defcent.—The Freehold intestate in Law is in the Devicee before Entry, and nothing descends to the Heir. Co. Litt. 111. a.

(N. 11) Immediate Descendent. What is.

1. In Affèf against Tenant by the Curtesfy, and the Heir, the Ten- ant by Curtesfy surrendered pending the Writ, and died pending the Writ, and yet the Writ awarded good; for the Heir came to the Possèfion by his own Affèf, and then the Writ is once made good, notwithstanding that the Heir by the Surrender be in by Defcent; for the Fee which is descended merges the Frank-tenement; And per Rolf, If the Heir
Defcent.

Heire be impelled by Writ of Entry after the Surrender, he shall be suppos'd in by his Mother, and not by the Tenant by the Curtesy. Br. Difcent, pl. 17. cites 1 H. 6. 1.

2. Where my Father recovers in Mortdancefor, and I sue Execution and enter, I am in by the Grandfather and not by my Father, for he never had Possession. Per Fineux, and non negatur. Br. Difcent, pl. 67. cites 11 H. 7. 12.

3. Feoffment by A. to the Use of the Eldest Son, and Wife in Tail, And 348, for Jointure of the Wife of Lands in B. the Father dies, the Reversion of B. with Lands in C. descends to (the Baron) who devise's by Will Eliz. & C. in Writing the Lands in C. to the Wife for Life for her Jointure, in says that Recompense of Dower and Jointure, and if the Wife claim other Dower or Jointure, the Devis to the Wife to be void. Baron dies, Wife waved the Jointure in B. en Pais, and good. Adjudg'd, that the Waver of the Jointure made immediate Defcent by Relation to the Heir. Mo. "401. Mich. 29 & 30 Eliz. in Cam. Scacc. Butler v. Baker. by the Refusal of the Père ; and 354 says that Wray Ch. J. and Manwood in their Life-time (but no dead) were of the fame Opinion, Mich. 29 & 30 Eliz.

4. Where the Widow had her Frank-Bank of an Estate of Copyhold in Borough-English, and there were several Sons by several Veners, and all but the Eldest died in Life of the Widow, upon her Death he takes as Heir to his Father. Holt's Rep. 165, 166. Trin. & Hill. 5 Ann. B. R. Brown v. Dyer.

(N. 12) One or several. What shall be said one only, or several Degrees of Defcent.

1. In Affile it was granted, that if Diffevor leaves for Life the Remainder over, and the Tenant for Life dies, he in Remainder enters, there the Estate for Life, and the Remainder make only one Degree, and not the Remainder a Degree by itself, for the Estate for Life, and the Remainder, are one and the same Estate in Law. Br. Enter end le per, pl. 9. cites 50 E. 5. 21.

2. If Diffevor makes Feoffment, and bis Feoffee makes Feoffment over, and so on, to that the Writ is come out of the Degrees, and after it comes again to the Possession of the Heir of the Diffevor, yet Writ of Entry in the Per does not lie, as he had it by Defcent; But contra if it had come to the Diffevor himself, for this shall be adjudg'd in the first Degree. Br. Enter end le per, pl. 1. cites 3 H. 6. 38. Per Cotefmore and Cur.

D (N. 13) De-
De scent.

(N. 13) Devested.

1. A More near Heir will devest a Descent of them that were once in by Descent, by a remote Degree. As A. died, having a Daughter, his Wife provisement enfeated of a Son, now this Daughter is Heir, and in by Descent, but when the Son is born, he now shall be Heir, and the other Descent avoided. Arg. Nov. 170, in the Cases of the King v. Bordafton and Adams.

(N. 14) Writ and Count. In what Cases it must be shewn from whom the Descent is, or to whom the Demandant is Heir.

1. IN Formedon in Descendent, if Omission be made of any Son or Brother elder in the Descent who survived his Father, the Writ shall abate, notwithstanding that he did not hold Estate; For he had Right though he was not feised. Thel. Dig. 163. Lib. 11. cap. 50. 81. cites Mich. 4 E. 2. Formedon 48. But fince, the Contrary is adjudged, Mich. 11 E. 2. Formedon 56, where the Writ was awarded good, where no mention was made of the Eldest Son, who had survived his Father; For it is in the Election of the Demandant to name him or not. Per Herle. 8 E. 3. 379. See * 11 H. 4. 72. Agreeing.

2. IN Formedon the Writ was, That after the Death of the Donee it ought to descend to the Demandant, as Coheir and Heir, and by the Count he shou'd How Coheir, and held good. Thel. Dig. 108. Lib. 10. cap. 17. S. 11. cites Patch. 5 E. 2. Formedon 51. But fince, See 11 H. 6. 26. contra.

3. IN Non compos mentis Omission in the Descent of an Elder Brother, who survived the Father, is not material, if he was not seised, or had releas'd, or committed Felony, or such like &c. Thel. Dig. 169. Lib. 11. cap. 50. S. 16. cites Mich. 12 E. 2. Entre 70.

4. IN Formedon by two Sibers, the Writ was, that after the Death of the DONEE, and Jo. his Son, presentes potestatis filiabus le Donee descendere debet &c. and adjudg'd an ill Writ, because there is not any Priority in the Writ, between Jo. and the Demandants. Thel. Dig. 108. Lib. 10. cap. 17. S. 12. cites Mich. 2 E. 3. 45.

5. IN Formedon in Resserter he ought to make Descent from none but those who held Estate. Thel. Dig. 169. Lib. 11. cap. 55. S. 17. cites 3 E. 3. Formedon 43.

6. The Gift was to Jo. and If. his Feme, and to the Heirs which Jo. should beget of the Body of If. and the Writ was, That Jo. mortem Jo. and If. presentes potestatis filiabus le Donee descender debet &c. and held good, that he is made Heir to both. Thel. Dig. 108. Lib. 10. cap. 17. S. 13. cites Hill. 3 E. 3. 68. 94.

7. And
7. And a Writ brought upon such a Gift, making the Demandant Son and Heir to the Father only, was abated. Thel. Dig. 108. Lib. 10. cap. 17. S. 13. cites Trin. 4 E. 3. 157.

8. Where Land is given to one jo. with Alice his Feme in Frank marriage, the Issue in Formardon shall make himself Son and Heir to his Father and to his Mother, notwithstanding that the Words of the Gift are not to the Feme. Thel. Dig. 108. Lib. 10. cap. 17. S. 14, cites Hill. 4 E. 3. 118, and 10 E. 3. 537.

9. In Formardon upon Inferior tenant of the Moiety of a Manor, which was given final cum de' mediate in, making the Defcendent by the Count it is not good to say, That from the Donor the Right descended to one Sister of the one Moiety, or to the other Sister of the other Moiety, but he ought to make the Defcendent in Common to both of the entire, or of the Right of the entire. Thel. Dig. 168. Lib. 11. cap. 50. S. 4. cites Mich. 5 E. 3. 211.

10. In Collage of a Manor, if Nutenure of Pared be pleaded to the Writ, it suffices for the Demandant to maintain that he was Tenant as amply as the Manor was in the Sections of his Co'sin, or as fully as the Demandant demands it. Thel. Dig. 226. Lib. 16. cap. 7. S. 16. cites 5 E. 3. 225.

11. Where Land is given to Jo. and Alice his Feme, and to the Heirs of their two Bodies issuing, who have Issue, and Jo. dies, and Alice survives and dies, the Issue within Age, in Writ of Ward he ought to make the Issue Heir to Alice, because the died Tenant after Jo. Thel. Dig. 169. Lib. 11. cap. 51. S. 2. cites Mich. 7 E. 3. 349, and fays fee 41 E. 3. 15 agreeing.

12. The Writ of Formardon was of a Gift made to R. in Tail, quae pot. Mortem pretiti R. & Gaflis' Fille preti R. Johanni Filio & Heredit preti Gallfridis descendentibus debet &c. and the Writ was abated; because none was made Heir to R. the Donor. Thel. Dig. 109. Lib. 10. cap. 17. S. 1. cites Mich. 10 E. 3. 530. 11 H. 6. 25.

13. In Formardon in Reversion, where one Will was Donor, the Demandant counted Inaninch as the Donor died without Heir, that the Right reverted to Will and from Will inaninch as he died without Heir of his Body, the Right of the Reversion reposed to Alice. as to Ann and Heir of the Will. Sister of Ettien, Father of William, and from Ann he descended &c. to Ro. and Alice, and from Ro. to the Demandant. The Tenant pleaded, that Will had a Brother and Her named Valentine who survived him, of whom Obilation is made in Revert; Judgment of the Count &c. Upon which it was held, that this Plea is to the Action, and not to the Writ. And it was said by Ald. that Obilation of Blood is no Plea but in Writ of Right; for in all other Writs he need not make Mention of those who survived, if they were not seised. Thel. Dig. 168. Lib. 11. cap. 50. S. 6. cites Trin. 10 E. 3. 520.

14. In Formardon of a Gift made to Jo. and Jane his Feme in Tail, and the Demandants were their Sons and Heirs in Gavelkind, the Tenant said, that their Mother's Name was Marint, Judgment of the Writ, and held a good Plea, but not the View. Thel. Dig. 168. Lib. 11. cap. 50. S. 5. cites Hill. 10 E. 3. 490.

15. In Formardon by the Younger Son of Land in Borough-English given in Tail, by the Writ he shall suppose the Defcendent to him as Son and Heir, as if he was Heir at the Common Law, and by his Count he shall make his Defcendent by the Caution; and so it shall be of Land in Gavelkind. Thel. Dig. 87. Lib. 9. cap. 7. S. 32. cites Hill. 11 E. 3. Formardon 30.

16. In Formardon in Reversion by the Writ it was supposed that the Donor was Co'n to the Demandant, and by the Defcendent in the Count it appeared that the Donor was Great-Great-Grandfather to the Demandant, and
and adjudged good; For when a Man paffes Great-Grandfather Paramount, there is no other Form than Capt., and not the Great-Grandfather's Father. Thel. Dig. 84. Lib. 9. cap. 5. S. 25. cites Mich. 15 E. 3. Briet 322. and that to agrees Hill 21 E. 3. 10.

17. Where Land is given in Tail, the Remainder to two and to their Heirs, the Heir of the other shall have Formedon of the Whole as Heir to the Survivor, without supposing by the Writ that his Ancestor survived. Thel. Dig. 108. Lib. 10. cap. 17. S. 5. cites Trin. 18 E. 3. 28.

8 H. 6. 25.

18. In Seire Facias by one Jo, out of a Fine by which Land was render'd to one B. his Grandfather in Tail, and made himself Heir to his Grandfather and Son to his Father, and not Heir to his Father, and adjudged good. And he had not supposed the Death of his Father, and yet good. Thel. Dig. 108. Lib. 10. cap. 17. S. 2. cites Mich. 23 E. 3. 22.

19. In Formedon in Descender the Demandant made himself Heir to his Grandfather, and it was pleaded that the Father of the Demandant was seized after the Death of the Grandfather &c. to which it was replied, that the Seigny of the Father was jointly with his Feoff, and this in the Life of his Grandfather, which estate be continued till he be dead, and that the Feoff is yet alive &c. upon which the Writ was adjudged good. Thel. Dig. 169. Lib. 11. cap. 51. S. 5. cites Trin. 27 E. 3. 81.


22. In Ward by reason of the Nonage of Jo. Son and Heir of Rich. the Defendant said, that Jo. had an Elder Brother who was seized after the Death of the Father, Jo. ought Jo. to be made Heir to his Brother &c. by which the Writ was abated. Thel. Dig. 170. Lib. 11. cap. 51. S. 13. cites Pach. 32 E 3. Gard. 34.

23. In Writ of Right be ought to make mention of all &c. as it is said. Thel. Dig. 168. Lib. 11. cap. 50. S. 6. cites Trin. 35 E. 3. Droit 30 47.

24. The Grandfather, Tenant in Tail, enfeoffed his Son, being within Age, and his Feme, and to the Heirs of the Feme, and died, and after the Son died, and the Issue of the Son brought Formedon against the Feme, making himself Heir to his Grandfather, and the Tenant paid the Writ notwithstanding that it seemed that the Seigny of his Father, after the Death of his Grandfather, was his better Right, and so the Demandant ought to be made Heir to his Grandfather, Quære. Thel. Dig. 169: Lib. 11. cap. 51. S. 6. cites Mich. 38 E. 3. 29.

25. Land was given to one Ro. and Ka. his Feme, and to Jo. their Son, and to the Heirs of the Body of 7o. Remainder to the right Heirs of Ro. and Ka. and one W. Son and Heir of Ro. brought Formedon, supposing the Death of Ro. and Ka. and of Jo. without Issue, and making himself Heir to Ro. only, without alleging that Ro. survived Ka. and the Tenant paid over; Quære. Thel. Dig. 108. Lib. 10. cap. 17. S. 4. cites Mich. 38. E. 3. 31. 18 E. 3. 28. and 24 E. 3. 28.

26. Seire Facias out of a Fine, by which Land was render'd to one Katherine and to her Heirs which Will, her Husband should beget on her Body &c. and one who demanded Execution made himself Heir to William and Katherine, by which the Writ was abated; for he ought to make himself Heir to Katherine alone by the Misser &c. Thel. Dig. 108. Lib. 10. cap. 17. S. 7. cites Mich. 41 E. 3. 24.

27. In
In Writ of Confine, if it appears by the Count and Defent that Writ of Belial lies in the Case, it shall abate. Thel. Dig. 117. Lib. 10. cap. 27. S. 4. cites 46 E. 3. 15.

28. In Reveliment of Ward, supposing the Infant to be Heir to his Father, it was pleaded that after the Death of the Father, the Land descended to one Ra. chief Son of the Father, and so ought the Infant to be made Heir to his Brother &c. adjudged a good Plea. Thel. Dig. 170. Lib. 11. cap. 51. S. 10. cites Mich. 9 H. 4. 3.

29. In Reveliment of Ward, supposing the Infant to be Heir to his Father, it was pleaded to the Writ that his Grandfather survived his Father, and so he should be made Heir to his Grandfather &c. and adjudged a good Plea. Thel. Dig. 170. Lib. 11. cap. 51. S. 11. cites Hill. 14 H. 4. 7.

30. Where Thomas Earl of Lancaster was attainted, which Attainder at the Suit of Henry his Brother was reversed by Parliament in the Time of E. 3. out of which King H. 4. sued Seire Facias for the Manor of which the said Thomas was seised &c. and by the Writ made himself Heir to Thomas and not to Henry who was Party to the Reverfal, and yet adjudged a good Writ. Thel. Dig. 108. Lib. 10. cap. 17. S. 8. cites Hill. 10 H. 4. 7.


32. And where the Land is render'd to the Baron and Feme in Tail, he ought to make himself Heir to both. Thel. Dig. 108. Lib. 10. cap. 17. S. 3. cites 8 H. 6. 47.

33. The Baron and Feme recovered in Cesfravit, and the Heir of the Feme sued Seire Facias, and made himself Son and Heir to the Feme only, and adjudged good; for the Recovery was in Right of the Feme. Thel. Dig. 108. Lib. 10. cap. 17. S. 10. cites Hill. 8 H. 6. 25.

34. If two Men, as Younger Brethren, will make their Title to Land in Gavelkind, they must say that the same Land is of the Tenure and Nature of Gavelkind, which Title out of Mind have been parted, and partable between Heirs Male. Calcth. Reading, 44.

35. The Reverfon in Fee is Part of the old Estate, and if the Owner had the Land as Heir of the Mother, the same shall descend to the Heir on the Mother's Side; So if it was Borough-English or Gavelkind it shall descend accordingly. 3 Wms's Rep. 63. Trin. 1730. in Cafe of Chetter v. Chetter.

(N. 15) Pleadings.

1. In Formedon to say that the Demandant has an Elder Brother in full Life, is a Plea to the Action. Thel. Dig. 168. Lib. 11. cap. 50. S. 7. cites Mich. 18 E. 3. 34.

2. In Affile, the Tenant pleaded a Dying seised of his Grandfather in Fee, and that his Father entered as Heir, and was seised in Fee and died seised, and he entered as Heir, and awarded Ill; for two dyings seised shall be double. Br. Double, pl. 86. cites 30 Afl. 6.

3. If a Man has a Son and is Outlaw'd, and after purchaseth Charter of Pardon, and purchaseth Land and dies, his Son shall inherit him, Per Cockain and Marten J. Br. Defcent, pl. 8. cites 9 H. 5. 9.

4. In Pleading of Defect the Words are, that the Tenements descended &c. ut filio et heredi vel ut Consequitse &c. Heredi &c. And in Jutification of Bailiff, he shall say that he ut Balovos &c. and need not
say that he is Bailiff, or Heir in Fact, Quod Nota; per Cur. Br. Pleadings, pl. 132. cites 5 H. 7. 2.

5. If a Feme conveys to herself Title by Lineal Descent, as Heir of her Father, Tenant in Tail after the Death of her Elder Brother, she shall not shew in her Writ that he is Eldest Son, or that his Brother died without Issue, or that if a Daughter be Heir, to say that her Father had no Son, or that her Brother died without Issue, or is appealed of Death by Brother and Heir, or such like, to say that he had no Feme; for those are intended, till the Contrary be pleaded. But contra upon Collateral Title, as Formedon in Remainder or Reverter, or Writ of Escheat; or there the dying without Issue shall be shewn in the Writ, and the dying without Heir; but there is no Difference between Lineal Descent and Collateral Descent. Br. Faux Latin, pl. 110. cites 7 H. 7. 7.

6. Plaintiff owned of a Box with Charters and Muniments, and made the Descent of the Land from A. to T. and from T. to J. and from J. to the Plaintiff, the Defendant said, that A. had no such Son as T. Father of J. and this is pregnant, viz. that A. had no such Son as T. and that T. was not Father of J. and therefore ill, by which he said that T. was not Father of J. and ill, because he gave no Father to J. by which he said that J. was the Son of P. and not the Son of T. and the others contra. Nota. Br. Pleadings, pl. 20.

7. The Descent is traverseable in no Case but where both Parties claim by the same Person. Per Periam J. Cro. E. 278. in Case of Mafon v. Nevil.

8. Defendant pleaded that he was Heir a Parte Materna, but did not say he was Heir of the whole Blood, and for that Reason the Plea was over-ruled. Per Jeffries C. Vern. R. 442. Hill. 1696. Addison v. Hindmarsh.

(0) Continual Claim.

In what Cases the Claim made by one shall serve for another.

1. If there be Tenant for Life, the Remainder over, and Tenant for Life makes a Claim, and after the Dilettor, he that is seized of, dies seized (a) within the Year, and after the Lessee dies before Entry, he in Remainder shall have Advantage of this Claim, because he himself could not have made a Claim, and the Defent shall not bind the Lessee, and therefore shall not bind the Remainder. Lit. D. 414.

2. But it seems in this Case that if the Lessee for Life makes a Claim, and dies, and after the Dilettor dies seized within the Year, this Defent shall bind the Remainder, because he might have made a Claim after the Death of the Lessee, and he is not privy to the Claim of the Lessee, not coming under him, and the Claim ought to be continued till the Death, which it is not here, ergo.

3. If two Joint-Tenants are dillied, and one makes Claim, and after the Dilettor dies seized within the Year, it seems that this shall not take away the Entry of the other Joint-Tenant, but that this Claim
Claim by one shall serve for both; because the Entry of one is the Entry of both, and otherwise there would be a Separance of the Jointure; which cannot be by such an Act.

4. But it seems in this Case, that if that Jointenant that made a Claim dies, and after the Diffessor dies feised within the Year after the Claim made, that this Descent shall take away the Entry of the Survivor for the Whole, for that though the Claim of one should serve for both during their Lives, by a Consequence to avoid the Separance of the Jointure, yet this Necessity is not in this Case, and the Survivor comes paramount the Claim, and is not privy to it, and so the Claim is determined before the Death of the Diffessor, and as it seems the Claim ought to continue till the dying feised.

But quere this, for it hath been argued for a Point.

5. If the Tenant be diffeised, and makes continual Claim, and dies without Heir, and after the Diffessor dies feised within the Year, this shall bind the Lord by Eateeet, because he comes paramount the Claim, and not in Privity thereof; and he might have made a Claim after the Eateeet.

6. If the Baron makes a continual Claim, and dies, and after the Diffessor dies feised within the Year after the Claim, yet it seems the right shall be bound, because she is not privy to the Claim, nor comes under it, and he himself might have made a Claim. But quere this.

7. If the Father be diffeised, and makes continual Claim, and dies, and after the Diffessor dies feised within the Year after the Claim, yet this shall not bind the Heir of the Father, because he comes in under the Father, and in Privity of Blood and Estate, and therefore he shall have Advantage of the Claim of the Father without any new Claim by himself. 9 V. 4, 5. Curt. Lit. S. 421. added the Claim shall serve for him and his Heirs. Contra 1; E. 4, 23.

8. If a Prior be diffeised, and makes continual Claim, and dies, and after the Diffessor dies feised within a Year after the Claim, in the Time of the Successor, this shall not bind him, because he comes in in Privity of him that made the Claim, and under him. Contra 22 V. 6, 37. b.

(P) Contiual Claim.

Who may make it. Person interested, or a Servant.

1. A Dying feised, and Descent within a Year and Day after Claim. If the Diffesor made, takes not away the Entry of him that claimed, though there be never so many Diffesfions, Alienations or Defcents within that Year and a Day before the Descent, and though it were not made till many Years after the Diffesfion.

Hawk. Co. Litt. 338.

there were Twenty mean Diffesfions; yet the Entry is not taken away; for there can be no jus Possession in the Heir, if the Diffesor has continued the Possession by those solemn Acts that the Law requires, and within the Time that the Law builds a Prerogation of a Determination, if the Diffesor neglects his Entry. But if the Diffesor at Common Law had kept Possession Forty Years, and the Diffesor had entered but half a Year before his Death, yet in that Law, as Littleton remarks, the Heir had not gained the Right of Possession, because no Determination can be presumed if the Diffesor claims within the Time prescribed by the Law. And if the Law cannot presume that the Diffesor has deferred the Right of Possession, it cannot be transferred to the Heir of the Diffesor; nor ought the Lord in such Cases, to accept of his services from such Heirs. Nay Coke says...
2. If a Man be diseased, and the Defeifeor dies sealed within the Year and Day next after the Deifeifion made, whereby the Tenements descended to his Heirs, in this Case the Entry of the Defeifee is taken away; for the Year and Day which should aid the Defeifee in such Case, shall not be taken from the Time of Title of Entry accrued unto him, but only from the Time of the Claim made by him in Manner aforesaid; and for this Cause it shall be good for such Defeifee to make his Claim in as short Time as he can after the Defeifion &c. Litt. S. 226.

3. But this is now holpen by the Statute 32 H. 8. cap. 33. made since Littleton wrote; For if the Defeifeor dies sealed within five Years after the Defeifion, though there be no continual Claim made, it shall not take away the Entry of the Defeifee. But after the five Years, there must be such continual Claim as was at the Common Law. Co. Litt. 256. a.

4. If Tenant for Years, Tenant by Statute Staple, Merchant or Eleet be ousted, and he in the Reverion diseased, the Leitor, or he in the Reverion may enter, to the Intent to make his Claim, and yet his Entry as to take any Profits, is not lawful during the Term, and in the same Manner the Leifor, or he in the Reverion in that Case may enter to avoid a Collateral Warranty, or the Leifor in that Case may recover in an Affife, and so (as some have holden) the Leifor may enter in Case of a Lease for Life to avoid a Defect, or a Warranty. Co. Litt. 250. b.

5. If the Father makes a Claim, and the Defeifeor dies, and then the Father dies, his Heir may enter; because the Defecient was cast in the Father’s Time, and the Right of Entry, which the Father gained by his Claim, shall descend to his Heir; But if the Father make continual Claim, and die, and the Son makes no continual Claim, and within the Year and Day after the Claim made by the Father the Defeifeor dies, this shall toll the Entry of the Son; For that the Defecient was cast in his Time, and the Claim made by the Father shall not avail him that might have claimed himself, and of this Opinion was Littleton in our Books, where he holds, that no continual Claim can avoid a Defect, unless it be made by him that has Title to enter, and in whole Life the dying sealed was. Co. Litt. 250. b. ad finem.

6. Continual Claim does not only extend to the first Defeifer, in whose Possession it was made, but to any other Defeifeer that dies sealed within the Year and the Day after the continual Claim made, and whereas our Author
Author speaks of a second Différeit &c. herein is likewise implied, not
only Abaters and Intruders, or any other Feoffee or Dounce immediate or
mediating, dying feated within the Year and Day of such continual Claim
made. Co. Litt. 255. b.

7. Continual Claim made by a Servant for his Master is good, if he Litt. S. 434;
enters into a Part and claim &c. or if the Master lay, that he dares not
go to any Part of the Land, nor approach nearer than to D. and com-
munds his Servant to go to D. and claim, and the Servant does so, this is
sufficient, though the Servant had no Fear, for he doth as much as he
was commanded to do, and all that his Master durst, or ought by

8. But if the Master be in Health, [and can, and dares go well to Litt. S. 453]
Parcel of the Land to make his Claim] and commands his Servant to
go to the Land and claim &c. In this Case a Claim made by the Servant
as near as he dares is void, for he does not do all that is commanded,
not so much as the Master durft have done. Hawk. Co. Litt.
341.

9. But if the Master be Sick, or a Recluse, so that by reason of his Litt. S. 454.
Order he can't go, and he command his Servant to go and claim for
him, and the Servant goes as near as he dares, by reason of Fear &c. this
is sufficient, though the Command were to go to the Land; and yet re-
gularly, when a Servant does less than the Command, his Act is
void; * for where a Man is forc'd to make Use of his Servant, he is
more favour'd than one who is able to do his own Business; and if the a Note
Servant do as much as it may be presumed his Master would have done
added by
himself, it is sufficient, for Inpotentia excusat legem; when, a Servant the Serve-
exceeds his Master's Command, it is void only so far as he hath ex-

10. The Reason why this Time of a Year and a Day seems to be set by
the feudal Law, is, because the Services appointed seem to be annually
completed; and therefore that was the Time for the Vassal to claim
from his Lord, and the same Time he had to claim from his Lord,
he had to claim from any Différeit for the Uniformity of the Law;
and that the Lord might know who was the Person that he might take
for his Tenant, and that the Lord might receive his feudal Fruits from
the Heir, in Case the Différeit died. And if the Tenant lost the whole
Fief, in Case he did not claim within a Year and a Day, it is fit he
should lose the Right of Possession, in Case he neglects his Claim
upon the Différeit in the same Space that the Heir may be in Peace,
and that the Lord may receive him as a Tenant. For that was by the
Ancients thought to be a violent Presumption of Dereliction, both in the
one Case and the other. But our Law, since it gives a Différeit for all
feudal Duties, doth not presume the Feud derelict, in Case feudal
Services are not paid, since the Lord has a Power to compel the Pay-
ment; and therefore the Law does not induce any Forfeiture in that
Case. But the Law gives the Right of Possession to the Heir, in Case
the Différeit does not claim within the Space mentioned, because there
the Presumption remains of the Dereliction of the Différeit, since the
Entry or Action is the only Way that he has to obtain Possession. Gilb.
Treat. of Ten. 36, 37.
(Q.) What sufficient or amounts to a Claim to avoid a Descent.

1. In Affife N. leas'd to P. for Term of Life, P. alien'd to G. in Fee, N. enter'd for the Alienation, and G. re-enter'd and ousted him, and N. claim'd and always was debating, so that G. had no peaceable Possession, and G. of such Seisin died seized and his Heir enter'd, and N. died, and the Heir of N. enter'd upon the Heir of E. and the Entry adjudg'd Lawful; by reason of the Claim and Non peaceable Possession of G. Br. Continual Claim, pl. 8. cites 25 Alf. 12.

2. It was found by Verdict in the County of Dorset before Justices of Affise, that the Plaintiff, who had Title of Entry after the Death of his Ancestor, abode in the Vill where the Tenants were, and by Parol claim'd the Tenements among his Neighbours, but for doubt of Death he durst not approach the Tenements, and brought Affise upon this Matter as above, and it was awarded that he shall recover, Quod Nona Bene; for this Claim is an Entry in Law. Br. Continual Claim, pl. 9. cites 38 Alf. 23.

3. And See tit. Continual Claim in Littleton, that upon every such Claim the Party shall have Action for the Occupation against the Occupier, which affirms that this is Entry and Seisin. Ibid.

4. In Affise the Tenant pleaded Bar by Grant of Rescission to his Father, and the Tenant for Life attend'd and died, and his Father enter'd and died, and he enter'd as Heir and gave Colour; the Plaintiff reply'd, that after the Grant supposed, his Father was seized in Fee and died seized, and he enter'd as Heir and was seized, and deflected by the Defendant; the Tenant reply'd, that after the Entry of the Father of the Plaintiff, the Father of the Tenant made continual Claim, and there it was agreed that this was no Plea; for he who makes continual Claim, shall do it freely from Year to Year; for if he continues by two Years after the Claim, and dies seized, the Claim shall not beve. Br. Continual Claim, pl. 1. cites 9 H. 4. 5.

5. If Dileisseur makes continual Claim unto the Lands, whereof the Dileisseur or his Donne or Fecoffe is seized, or be in the Rescission or Remainder makes continual Claim upon the Alliance of a particular Tenant guilt of a Forfeiture, before a Defeunt call, they save their Entry thereby notwithstanding the Defeunt. Hawk. Co. Litt. 234.

6. It is to be observed, that the Year and the Day shall be so account'd, as the Day whereon the Claim was made shall be account'd one. As if the Claim were made fecundo die Martii, that Day shall be account'd for one, and then the Year must end the 1st Day of March, and the Day after is the second of March. Co. Litt. 255. a.

7. If a Dileisseur brings an Affise, and the Jury find for him, and the Justices will be advis'd till next Affise, and in the mean Time Dileisseur dies, it seems that the Suit did amount to a continual Claim, inasmuch as no Default was in him &c. Litt. S. 442.

8. If it be objected that if the bringing of Affise should amount to Continual Claim, and every Continual Claim made by the Dileisseur veils the Possession and Freehold in him, therefore if the bringing the Affise &c. should amount to a Continual Claim, that then the Writ should abate. The Answer is, that a Continual Claim is an Entry by Confinement of
Defeint.

19

of Law for the Advantage of the Diffeafe, but not for his Disadvantage. Co. Litt. 263. a.

9. In a Writ of Entry Sur Diffeafe in ait one, supposing that he had not entered but by S. who diffeafe him, the Tenant said that S. died feized, and the Land defended to him and pray’d his Age. The Plaintiff counterfeated his Age; for that he arraigned an Affife against S. who died hanging the Affife and he was oufed of his Age; for that the bringing the Affife amounted to a Claim. Co. Litt. 263. a.

10. If Tenant in Dover alien in Fee with Warranty, and the Heir in the Reversion bring a Writ of Entry in Casa Prociro &c. and hanging the Plea the Tenant dies, the Heir shall not be rebutted or barred by this Warranty, for that the Præcipe did amount to a Continual Claim. Co. Litt. 263. a.

11. The Entry or Continual Claim must purfue the Affife. Co. Litt. 263. b.

12. If an Affife to recover Lands, of which a Fine was levy’d, be brought and discontinued by the Defendant, this (it was said) will not amount to a Claim. Vent. 45. Mich. 21 Car. 2. B. R. Anon.


15. There was a Court before the House, and at the Gate of the House the Heir paid to the Tenant, that he was Heir of the House and Land which he held, and forbid him to pay more Rent to the Defendant, and co instante entered the House. Adjudged to be a sufficient Claim. Skin. 412. pl. 8. Hill. 2 W. & M. in B. R. Anon.

(R) Continual Claim. Within View.

Sufficient in what Cases.

1. In Affife it was found that J. was seised and disseased by M. and that J. claimed it, and seised Died of his Right, and would have entered and could not, nor durst not, and that M. died seised, and his Heir entered, upon which J. claimed and seised the Died &c. and would have entered, and could not, nor durst not, and lo of divers others; and because J. never put his Foot to have entered, nor effay’d to enter, nor it was not found that there was any Doubt of Death, therefore by Award this was no Entry or good Continual Claim, and therefore the Plaintiff, who was in by Defeint, recovered notwithstanding those Claims; for they were nothing wor th. Br. Continual Claim, pl. 10. cites 39 Aff.

11.

2. The Claim is not good if he does not come near to the Land, and that in Sight of the Land, fo that the Passers-by may have Notice, and then this serves for an Entry quod Curia concepit; but it is not mentioned if he durst not enter for Doubt of corporal Id, as in Littleton Tit. Continual Claim. Br. Continual Claim, pl. 1. cites 9 H. 4. 5.

It seems by the Authority of Littleton, that if the Diffeafe come as near the Land as he durst &c. and makes his Claim, this should be sufficient, albeit he be not within the View. Co Litt. 254. a.

3. A
Defcent.

3. A Man defeas'd another and continued descendent half a Year and died, and the Land defended to two, whereof one was an Infant, and the Diffeeree re-entered upon the Heirs, and they brought Affife, and all the Matter was found by Verdict at large, and that the Diffeeree all the Life of the Diffeeree made continual Claim, but did not enter for Doubt of corporal Hurl, but approached as near as he durst for Doubt &c. and found that they did not know of any Menace to the Diffeeree in Disobedience of the Entry, and yet it was awarded that the Entry of the Diffeeree was good, and the Plaintiffs shall not take any thing by their Wit. Br. Continual Claim, pl. 2. cites 12 H. 4. 19, 20.

4. Continual Claim shall not serve without Entry, unlefs it be alleged that the Continual Claim was made at the Land, and that he did not make Entry for Doubt of Death or Battery, and this pleaded accordingly, but if he durst enter, he ought to enter, qued nona, and said that he claimed at the Land all the Life of his Father, and that he durst not enter for Doubt of Battery; Prif, and the others contra. Br. Continual Claim, pl. 4. cites 14. H. 4. 13.

5. Where a Continual Claim shall devest any Estate in any other Person in any Lands or Tenements, there he makes the Claim ought to enter into the Land, or some Part thereof. But where the Claim is not to devest any Estate but to bring him that makes it into actual Possession, there a Claim within the View suffices, As upon a Diffeeree the Heir having the Freehold in Law may claim Land within the View to bring himself into actual Possession. Co Litt. 254. b.

6. If he who has a Title to enter, dares not enter for fear of Battery, Maiming, or Death, if he goes as near as he dares, and claims the Land, he has presciently by his Claim such a Seifin as if he had enter'd in deed, though he never had any Seifin before. But his Fear must concern his Person, for the Fear of his Bounding his Houses, or Loss of his Goods is not sufficient. The Fear of Imprisionment or Mayhem is not only sufficient to make such a Claim equivalent to an actual Entry, but will also avoid a Deed executed by a Man under such Fear; but the Fear of Battery is not sufficient in the latter Case, but in the first it is, for the Re-continuance of an ancient Right is favoured in Law. In pleading some some just Cause of Fear be shewn, and it must be no vain Fear; But in a special Verdict, if the Jury find that the Diffeeree did not enter for fear of corporal Hurt, this is sufficient, and it shall be intended that they had Evidence to prove the same. Hawk. Co Litt. 337, 338.

(S) Pleadings of Continual Claim.

1. ASSISE; Defcent was alleged, and the Plaintiff alleged continual Claim, and the Iffue was taken, that he did not make the Claim in such Place so near as he might see the Land; and it was admitted, and yet it seems that it is Negative Pregnant. Br. Negative &c. pl. 10. cites 9 H. 4. 45.
Detinue.

2. In Trespals, the Defendant pleaded dying seised and Detent, the 
Plaintiff said, that he was seised, and defeised by him who died seised, 
and he made continual Claim, and the other said that he died peace-
ably seised; and no Plea without traveling the Continual Claim; for S. P. And 
he may die peaceably seised notwithstanding the Continual Claim. Br. 
Traverse per &c. pl. 289 cites 14 H. 4. 36.
dying seised. Br. Issues joins, pl. 56, cites S. C.

3. Forcible Entry by E. against K. Priores of D. the Defendant 
said, that M. her Predecessor was seised, till by J. defeised, who infeffed 
A. One Estate the Plaintiff has, and the Predecessor died, and the De-
fendant entered &c. The Plaintiff replied, that A. was seised and died 
seised, and the Plaintiff entered as Heir and was seised, till the Defend-
ant entered with Force. The Defendant rejoined, that her Predecessor 
made Continual Claim all her Life. The Plaintiff furrejoined, that be-
fore M. any Thing had, the said J. was seised in Feo, till defeised by K. 
who infeffed M. the Predecessor, and J. re-entered and infeffed the said 
A. who was seised and died seised as above, and a good Plea to avoid 
the Continual Claim as above. Br. Confes and Avoid, pl. 55. cites 
22 H. 6. 7.

For more of Defent in General, See Sequestration, Heir, Formedon 
Copyhold, Ulcs, And other Proper Titles.

(A) For what Things it lies.

2. Detinue lies for a Bag seised and 100 l. in eadem Baga con-
tenta. 18 H. 6. 20.
3. So Detinue lies for a Bag, and 100 l. in eadem Baga contents, 
without saying the Bag was seised, for the Property is altered. 18 138 (A)
F. N. B. in the new
Notes there:
(C. c) cites
S. C. and 29 E. 5. 20. accordingly,

4. So Detinue lies for Money not in a Bag, though in this Action 
the individual Thing is to be recovered, and the Money may be 
known, Contra H. 3. In B. R. Patch. 1 In B. between 
Wood and Ballet; and Trin. 2 Ina. it lies if the Money was in 
the Piew of another, and the Defendant took it.

Detinue 
be known from other Money. Co. Lit. 286. b.

5. If a Man lends a Sum of Money to another, Detinue lies 
not for it, but Debt. 18 H. 6. 20.
6. Detinue lies of a Piece of Gold of the Price of 22s. though it does not lie of 22s. in Money, for here he demands the particular Piece. *P. 16:* between *Major and Malpore; this being moved in Action of Judgment.


*If he knows the Certainty of them and what Land they concern, or if they are in a Bag sealed, or Chest locked, though he does not know the Certainty of them. Co. Litt. 286, b.*

8. The Heir may have Detinue of *Ration bili parte bournom,* though he never had Possession or Property before. *Br. Detinue de biens,* pl. 30. *cites 39 E. 3. 6.*


10. In *Replevin* the *Plaintiff* got the *Beasts* of the Defendant in *Withernam,* by which he was compelled upon *Issue to Gage thereof Deliverance,* and *Writ issued* to the Sheriff for him to make Livery of the *Withernam,* and the Sheriff returned *Aesoria elagata &c,* by which *Issue'd Withernam* for the Defendant of the Beasts of the Plaintiff, and the Sheriff returned *Nobil,* by which *issued three Capias's,* and after *Exigent,* and by the *Reporter* the Defendant may have *Writ of Detinue* of his Beasts; *Quare inde;* *For it seems that the Delivery in Withernam, by Authority of the Law,* *is a good Bar in Detinue.* *Br. Detinue de biens,* pl. 18. *cites 11 H. 4. 10.*

11. *Debt upon Arrears of Account,* where the *Cafe* was that the *Plaintiff* *lent'd* to the Defendant an *Hobby with Store and Stuff,* and at the *End of the Term* counted that diverse Things were waited and lost; and per *Newton,* Debt upon the *Leafe* lies of the *Rent,* and *Detinue* of the *Goods,* though they are waited or lost, by which the Defendant was admitted to his *Law.* *Br. Detinue de biens,* pl. 8. *cites 20 H. 6. 16.*

12. It seems that where a *Man finds my Goods,* and *doubts himself of them* before that *Action be brought,* then *Action of Detinue* does not lie. *Br. Detinue de biens,* pl. 33. *cites 39 H. 6. 2.*

13. *Detinue of certain Quarters of Barley,* and did not count in *Sacks* or *otherwise,* and *Exception taken,* and it was admitted for *Good,* and *so it is often in Ufe.* *Br. Detinue de biens,* pl. 51. *cites 6 E. 4. 11.*

14. If *I bail Goods to W.* and *he loses them,* and *B. finds them,* he is chargeable to me by *Action of Detinue.* *Br. Detinue de biens,* pl. 40. *cites 12 E. 4. 8.*

15. *But if W. recovers them again,* *B. he is dischag'd against me.* *Ibid.*

16. If the *Obligee be outlaw'd,* and the *King brings Detinue of the Obligation,* if this Matter be *confect'd,* the *King shall have Judgment to recover the Obligation,* per *Brian.* *Br. Detinue de biens,* pl. 52. *cites 4 H. 7. 17.*

17. *Detinue does not lie of Hawks, Hounds, Apes,* or *Popinjays,* or such like, which are *Things of Pleasure,* and are made tame, and were *fore Nature; yet Trespasses lies of them well,* and the *Plaintiff shall recover Damages of the taking,* per *Bradnell & non negatur.* *Br. Detinue de biens,* pl. 44. *cites 12 H. 8. 5.*

18. A.
Detinue.

18. A Writ of Detinue lies in Cafe where a Man delivered Goods or Chattels unto another to keep, and afterwards he will not deliver them back again; then he shall have an Action of Detinue of those Goods and Chattels; and so if a Man deliver Goods or Money put up in Bags, or in a Chest, or in a Cupboard, unto another to keep, and he will not re-deliver the Goods or the Money in the Bags; he to whom they should be delivered shall have a Writ of Detinue for those Goods &c. But if a Man deliver Money, not in any Bag or Chest, to re-deliver back, or to deliver over unto another Stranger; now he to whom the Money shall be delivered, shall not have an Action of Detinue for the Money, but a Writ of Account; because Detinue ought to be of a Thing which is certain; as of Money in Bags, or of a Horse, or of 100 Cows, or such certain Things. F. N. B. 138. (A).

19. If Obligor pay the Money at the Day and Place, though the Obligee will not deliver the Bond, yet the Obligor shall have Detinue for it. Le. 253. in pl. 318. cited to have been fo held Paflch. 25 Eliz. B. R. in Cafe of Cook v. Huac.

20. A Recovery and Judgment was in a base Court in a Plaint in Detinue of 4l. of Money, the Judgment was reversed, because that Action, nor a Replevin, doth not lie of Money, but Debt or Account. Mo. 394. pl. 510. Hill. 37 Eliz. B. R. Banks v. Whetstone.

21. Detinue lies for Goods deliver'd on a general Bailment and stole, and it is no Plea to say he was robbed by J. S. For he has his Remedy over by Trespass or Appeal to have them again. Cro. E. 815. pl. 4. Paflch. 43 Eliz. B. R. Southcote v. Bennet.

22. Detinue lies not for Corn out of a Sack; For it cannot be known from other Corn. Co. Litt. 286. b.

23. Error was brought of a Judgment in Detinue, because the Writ supposes a Detainer de una domo cecat' a Bee-house, which cannot be, that a Detinue should lie of a Houle. The Court held this to be Error, and the judgment was revers'd. Cro. J. 39. pl. 1. Mich. 2 Jac. B. R. Copledike v. Copledike.

24. A Detinue implies a Property in the Plaintiff; per Dodridge J. Roll Rep. 128. Hill. 12 Jac. B. R. cites 6 H. 7. 9. F. N. B. 138. Also the thing detained must be certain, whereof a Property may be known. The Ground of a Detinue is to recover the same thing in individual if it may be had, and if not, then Damages for them, and cites 17 E. 3. 45. 20 E. 3. Office del Court. 18 E. 4. 23. 1 E. 3. 5. 1 R. 3. 5.

25. By the Act of Navigation 12 Car. 2. cap. 18. certain Goods are prohibited to be imported here under Pain of forfeiting them, one Part to the King, another to him or them that will inform, jute, or sue for the same, and it was adjudged in this Case, that the Subject may bring Detinue for such Goods, as the Lord may have replevin for the Goods of his Villen distrained; for the bringing an Action veits a Property in the Plaintiff. 1 Salk. 223. Paflch. 8 W. 3. B. R. Roberts v. Wetherall.

26. If a Common Carrier carries Goods delivered to him, he may detain them till he is paid for the Carriage. Ruled by Holt Ch. J. at Guildhall, May 12. 1 Ann. 1702. 2 Ld. Raym. Rep. 752. Skinner v. Upshaw. So where Goods were delivered to the Carrier by one that stole them, and the Right Owner finding the Goods in the Carrier's Possession demanded them of him, and the Carrier refused to deliver them without being paid for the Carriage, and such Refusal was
Detinue.

was held justifiable; for when they were brought to him, he was obliged to receive and carry them. Per Holt Ch. J. 2 Lat. R. 467; Poch. 2 Anm — but Powell J. said, that a Carrier cannot detain for his Carriage. Ibid. But the Reporter says, more, the contrary has always been held by Holt Ch. J. at Guildhall.

27. Detinue lies of a Box of Writings, and if any of them concern Lands it will be prudent to name it; for that Things which it contains be certain enough; and if any new Action be brought the Defendant shall find that a former Action was brought for the same thing by the name of so many Bundles &c. Per Holt Ch. J. 6 Mod. 87. Mich. 2 Ann. B. R. in Case of the Q. v. Brown.

(B) The Gift of the Action.

1. A Man may have a general Detinue against a Man that finds his Goods. 7 B. 6. 22.
2. If A. by his Deed acknowledges himself to have sold to B. 10 Corps of Hop-Poles for 15 s. per Corp, which he is to deliver to B. at his Garden, when B. shall send his Servant to cord them. Quere if B. may have an Action of Debt in the Definet to render 10 Corps of Hop-Poles upon this Deed, or shall be put upon an Action of Covenant. Hill. 11 Car. B. R. between Touchman and Horden, per Curiam, dubitatur.
3. The Gift of the Action is upon the Detainer; as if Goods are delivered to the Baron and Feme the Detinue shall be only against the Baron; because the Feme had no Possession, and therefore the cannot detain them. Per Doderidge J. Roll Rep. 128. B. R. cites 38 E. 3. 1.
4. A Man took D Integer Damage feasant, and the Owner immediately tender'd to him 7 d. and aver'd that the Damages did not amount to 6 d. and the other refused and impark'd them, yet Replevin lies, and the Issue was taken upon the Tender before the Imparking; but per Horton he ought to have Detinue; for the Taking before the Tender was lawful, therefore Replevin does not lie after the Tender; for Replevin supposes the Tender to be tortious, where it is contrasted to be lawful, therefore he ought to have Detinue, quere. Br. Detinue de biens, pl. 21. cites 12 H. 4.
5. Goods were sold and delivered on Condition, that if the Bargainer paid such a Sum on the 17th of May following then the Bargain and Sale to be void. The Money was paid at the Day. After Judgment for the Plaintiff (the Bargainer) it was allowed that there was not any Delivery by Bailment, but by Bargain and Sale, but the Court held it well enough; for the Condition being performed, he ought to have them again, and then the detaining them is a Tort. Cro. E. 866, 867. pl. 49. Mich. 43 and 44 Eliz. in Com. Scacc. Bateman v. Elman.

6. Detinue lies where a Man comes to Goods either by Delivery or

Fending. Co. Litt. 486. b.

(B. 2) In

* F. N. B.
158. (E)
S. P. as to Goods found.
Detinue.

(B. 2) In what Cases Detinue or Trover lies.

1. WHERE the Bailment is to the Tenant by Indenture, there Covenant may lie against the Executors, but not Detinue, unless by Rea ion of the Possession. Br. Detinue de biens, pl. 19. cites 11 H. 4. 46.

2. If a Man bails 40 l. to W. N. to rebail quando &c. Detinue lies and not Account. Br. Detinue de biens, pl. 41. cites 4 H. 6. 1, 2. per Marten.

3. Contra, if it was delivered to render Account; Note the Diversity. Ibid.

4. He who seizes Goods for the King as Wai\$ &c. and is not Officer accountable to the King, and after desert's him- self of the Possession thereof, now Action of Detinue does not lie ; contra upon a Trover, per Prior, Ch. I., but Danby J. and Littleton were against Prior, and that he is chargeable to the King by the Seilure. Br. Detinue de biens, pl. 33. cites 39 H. 6. 2.

5. If a Man takes my Goods as Trespasser, yet I have Replevin; for this Br. Detinue is of the Property which was in me at the Time of the Taking, but Detinue does not lie; for this is of the Property which is in me at the Time of the Action prosecuted, Per Brian. Br. Detinue de biens, pl. 36. cites 6 H. 7. 9.

6. If a Man bails to me his Goods I am chargeable to him by Action of Detinue, though I bail them over. Per Fitzh. and Shelley J. Br. Detinue, pl. 1. cites 27 H. 8. 33.

7. But if I find Goods, and am out of Possession after lawfully, then I shall not be charged to the Action of Detinue. Ibid.

8. And per Fitzherbert, it he who finds them delivers them over before Action brought, then he is excus'd in Action of Detinue, Quaeris inde; for per Shelly and others, 32 H. 8. if he medles with them he shall be thereof charg'd, though he delivers them over, and per Fitzherbert, 27 H. 8. 29.

* Bailment is transferable in some Cases, but the Trover not; Contra Shelley. Br. Detinue, pl. 1. cites 27 H. 8. 33.

9. Either an Action upon the Case of Trover and Conversion, or any Action of Detinue at the Election of the Plaintiff may be brought for Goods detain'd from him. (22 Car. 1. B. R.) For it is but Justice that the Party should recover his Goods detained in Specie, if they may be had, or else Damages sustained for detaining them, at his Election; for the Defendant is not injured thereby. L. P. R. 17.

10. An Action of Trover and Conversion is in its Nature but an Action upon the Case to recover Damages, (Mich. 22 Car. 1. B. R.) and is not brought to recover the Goods in Specie. But in a Detinue you recover the Things detained in Specie, or the Value of them. L. P. R. 17.

(C) Who shall have it.

[And against whom.]

1. If a Man delivers Goods to L. to deliver to C. C. may have Detinue, for the Property is in him. 9 H. 6. 58. 60. * 39 C. 3. 7. [17.] abridged.

2. C. may have Detinue, though it be of another's Bailment, and all Notes. Br. Detinue de biens, pl. 32. cites 39 E. 3. 17.—Br. Charters de Terre &c. pl. 38. cites S. C. and S. P. accordingly.
2. If a Man delivers Goods to B. and after grants them to D. he shall not have detinue after the Grant. 9 P. 6. 64.

3. But the Grantee shall have Detinue. 9 P. 6. 64.

4. If my Bailee delivers them over to another I may have Detinue against the second Bailee. 11 P. 4. 46. b.

5. So if he delivers them over to him that has Right thereto, yet he is chargeable to me. 9 P. 6. 58.

6. If the Bailee delivers the Thing to another to re-deliver, he may have Detinue against him. 12 P. 4. 18. b.

7. If my Bailee delivers it again to me, he is not chargeable to others who have a Right to the Thing. 7 P. 6. 22.

8. If I deliver a Deed to A. to which B. hath Right, and A. dies, and his Executor takes the Deed, he is not chargeable in Detinue * to me, but only to B. that hath the Right, because he comes to it by the Law. 9 P. 6. 58.

9. If I deliver a Deed to A. to re-deliver, and he loses it, and B. finds it and delivers it to C. who has Right thereto, he is not chargeable afterwards to me in Detinue, because he is not privy to my delivery. 9 P. 6. 58.

10. But if I find a Thing, and another recovers it from me, yet any other that hath the Right may have Detinue against me also. 7 Den. 6. 22.

11. After Divorce made betwixt Husband and Wife, the Wife shall have a Writ of Detinue for the Goods given with her in Frankmarriage. F. N. B. 139. (A) cites Mich. 35 E. 1.

12. If the Father bails Charters to you, and after you are in feoff of the Land, yet the Heir shall have the Charters; for they belong to him to have his Warranty over; Per Knivet Quod non negatur. Br. Charters de terre, pl. 38. cites 39 E. 3. 17.

13. Note, that Bailment of a Deed by a Feme Covert is good if the Baron dies, and she shall have Writ of Detinue, for though the Bailment be void between the Baron and the Bailee, it is good between the Feme and the Bailee, if the Baron dies and the Feme survives, Quod Nota. Br. Bailment, pl. 1. cites 3 H. 6. 50.

14. Where a Lease is made for Life by Deed, the Remainder over in Fee, and the Tenant for Life dies, he in Remainder shall have Action of Detinue of this Deed, for it belongs to him. Br. Charters de terre, pl. 6. cites 9 H. 6. 54.

15. Note by the best Opinion, that if a Man bails a Deed to another to re-bail to him, or to his Heirs, and dies, the Heir shall not have Action upon this Special Bailment, if he does not make to himself Title to the Land. Br. Bailment, pl. 2. cites 9 H. 6. 58.

16. Detinue of a Writing against Executors, and declared, That the Father bailed to the Tenant, in which was contain'd 30 Acres of Land, which
Detinue.

which he had in R. and elsewhere in the County of Middlesex, to re-bail to him and his Heirs, and that the Feoffor made the Defendant Executor and dy'd, and the Father died, and he is Heir to his Father &c. For rescue demanded Judgment of the Court; For this Word elsewhere implies no Certainty where the Land lies, and it may be when he has recover'd the Deed, at another Time he shall charge the Defendant again by Land in another Vill by this Word (elsewhere,) because where a Man demands by Priority of Bailment, there he need not to shew the Certainty of the Land, and for this also, that Land here is not in Demand, because the Declaration was insufficient, and the Defendant before this had pleaded in Abatement of the Writ, therefore the Count awarded. But per Markham, if be demands as Heir, he shall shew where all the Land lies, or otherwise he shall not intitle himself to the Deed. Br. Detinue de biens, pl. 23. cites 19 H. 6. 10.

17. Where I bail a Thing to B. to deliver to C. there C. shall have Action, tho' the Charter, or Thing does not belong to him. Br. Charters de terre, pl. 31. cites 19 H. 6. 41.

18. Detinue of a Charter; Markham said, the Plaintiff has not intitled himself to the Land in the Charter; Per Newton, if my Father was seised in Fee, and bail'd the Charters to you, to re-bail to him or his Heirs, and after the Father aliens the Land and dies, yet his Heir shall have the Deed; The Reason seems to be inasmuch as the Heir may demand the first Warranty, if the Feoffor be impleadeth and vouches the Heir. Br. Charters de terre, pl. 32. cites 19 H. 6. 65.

19. In Trespas, per Prist, if a Man bails Goods to bail over to C. there C. has no Property by it, and yet he may have Action; And so see Action without Property; for by him the Bailor may have Action of Detinue if he does not deliver the Goods to C. and C. may have Action likewise, for if the one or the other recovers, the other is barr'd of Action; For a Recovery makes an End of all; But per Lacon Serjeant, he has Property by the Bailment to C. Quere, For a Gift to me by Livery made to J.S. is good to me, if I agree to it. Br. Detinue de biens, pl. 34. cites 39 H. 6. 44.

20. Detinue; a Man gave in Tail by Deed, and in Confirmation of his Estate gave several other Deeds of the same Land to him, and after the Tenant in Tail seised'd W. B. of this Land, and bai'd all the Deeds to the Defendant, to keep to the Use of W. B. which W. B. and the Issue in Tail, brought several Writs of Detinue of them against the Defendant. And by all the Justices, * the Issue in Tail shall have the Deed of the Gift in Tail; And per Choke J. the Issue shall have the Deed of the Gift in Tail, but not the other Deeds; for they are Chattles, and the Donee may give them. Br. Charters de terre, pl. 36. cites 9 E. 4. 52.

21. But if the Father dies possesse's of them, the Heir shall have them, and not the Executors. Ibid.

22. But if a Man leaves to another for Years, and after confirms or re-leaves to him in Tail, and all by Deed, if he gives the Deed of the Lease, the Issue in Tail may recover it by Action of Detinue; for without the Deed of Lease, the Release or Confirmation cannot enure, and also he shall have Release made to his Father after the Gift; for this perfects his Estate. Br. Charters de terre, pl. 36. cites 9 E. 4. 52.

23. But if I am seised of certain Land, and have several Deeds thereof, and sell the Land, the Feoffor or Vendee shall not have the Charters if I do not give them to him. Ibid.

24. In Detinue of Charters the Plaintiff counted that F. was seised in Fee, and infeff'd him of the Land, to which &c. and after the Feoffor left the Charters, and they came to the Defendant et non Allocator; for he shall not have the Charters though he has the Land, unless the Feoffor gives them to him; for they shall remain to the Feoffor to which to have

25. Where an Abbot and Convent leases to E. for Life by Deed, and the Leffe bale the Deed to B. the Abbot dies, and {E} grants his Interest to B. he shall have the Deed of the Abbot and Convent, for this makes the Estate, and is the Original. Br. Charters de terre, pl. 44. cites 21 H. 7. 33.

Cro. E. 438. pl. 8. S. C. the Court seemed to be divided.


496. pl. 15. S. C. adjudged by Three Justices; but Fenner e contra.

27. If Return irrepleasible be granted, the Owner of the Cattle, or other Goods disfraimed, may come to the Defendant and offer the Arrears &c. and if the Defendant refuse to deliver the Distress, the Plaintiff may have an Action of Detinue, and by that Means recover them, for they are in Nature of a Gage. 2 Inf. 341.

29. If a Man gives Lands in Tail by a Deed indented, and the Donee dies without Heir, the Donor shall have a Writ of Detinue for that Part of the Deed indented which the Donee had. F. N. B. 138. (F).

29. And so if Lands be given to two Men, and the Heirs of one of them; if the Tenant for Life dies, he who has the Fee shall have a Writ of Detinue for that Deed. F. N. B. 138. (F).

(D) Against Whom.

1. If the Bailee of a Thing dies, Detinue lies against his Executors if they take it. 43 C. 3. 29. 11 D. 4 45. b.

But where the Bailment is to the Tenant by Indenture, there is a Deed, but not Detinue, unless by Reason of the Possession, per Thain & Hill, contra Han. and that he shall count against all as Executors. Ib id.

2. If he dies intestate, and a Stranger takes it, Detinue lies against him, or any other to whom it comes. 43 Ed. 3. 29. 11 D. 4 46. b.

3. So it seems during the Life of the Bailee Detinue lies against any other to whom it comes. 43 Ed. 3. 29. contra

4. But if the Bailee of a Thing by Indenture burns it, and dies, his Executor shall not be charged in Detinue, because he shall not be charged without a Possession in him, for the Action dies with the Person. 11 D. 4 46. b.

5. If a Bailee by Indenture delivers the Goods to B. and B. delivers them back to the Bailee, to re-deliver when he is requested, and after recovers in Detinue against the Bailee, yet the first Bailor may also charge
Detinue.

charge him in Detinue, for by his own Act he hath charged himself to both. 3 D. 6. 44.

6. If Writings are bail'd to a Free Sole, and she takes Baron, the Action is well brought against both, and shall not be compell'd to bring it against the Baron alone. Br. Charters de terre, pl. 38. cites 39 E. 3. 17.

7. Detinue shall not be brought against an Abbot and Monk, but against the Monk only. Quod Nota ibidem. Br. Detinue de ieiuis, pl. 15. cites S. C.


1. In Detinue of a Bag of Charters, if the Defendant be returned Nihil, the Plaintiff may have Capias, Per Momray J. because the Bag is only a Chattle; but Belk contra; and then Ca Sa. lies for Execution of the Damages in it, Quaere. Br. Charters de terre, pl. 12. cites 40 E. 3. 25.

2. In Writ of a Chest with Charters lies Proceeds by Capias; Contra in Writ of Charters Special per Thorp, quod Finch conceit. Br. Charters de terre, pl. 13. cites 41 E. 3. 2.

3. Detinue of a Box with Charters, the Sheriff return'd Nihil, and the Plaintiff pray'd Capias, and could not have it; Contra 14 H. 6. 1. For the Box is only a Chattle, but in Detinue of Charters Special, there Capias does not lie. Br. Charters de terre, pl. 14. cites 42 E. 3. 13.

4. Where it appears by the Writ, or by the Declaration in Writ of De- Br. Brief, tinue of Charters, that it is brought of a Chest of Charters inclosed, and of pl. 256. one Charter Special, the Writ shall abate; For of the one lies Diftress infinite, and of the other lies Capias and Exigent, per Pafton J. clearly; Quaere, because this is permitted elsewhere. Br. Charters de terre, pl. 41. cites 14 H. 6. 1.

5. An Action of Detinue of Charters found in Reality; for therein Summons and Severance lies. And for Detinue of Goods a Capias lies, but for Charters in special a Capias does not lie. Co. Litt. 256. b.

there, because the Court cannot be apprized by the Writ, whether they concern the Reality or not. Proceses shall be made by Capias &c. but when the Party appears, and counts, whereby it appears to the Court that the Charters do concern the Reality, then he shall be permitted to appear by Attorney &c. F. N. B. 138. (A) in the new Notes there (c) cites 29 E. 3. 19. ; H. 4. a. and 21 H. 6. 42. accordant, with this Diversity.

6. This Writ is Vicontiel, and shall be sued before the Sheriff in the County if the Plaintiff pleads, or he may sue it in C. B. F. N. B. 138. (A)

7. [But] if a Man sues in any Court a Plaint of Detinue for any Charters which touch and concern Freehold, unless it be in C. B. by the King's Writ, the Defendant may sue a Prohibition to prohibit him &c. and to surcease &c. F. N. B. 138. (C)

8. The Proofs in Detinue is Summons, Attachment, and Diftress. F. N. B. 139. (A)

9. The Plea may be removed by Pone out of the County at the Plaintiff's Suit, without Caufs in the Writ; and at the Suit of the Defendant he ought to shew Cause in the Pone; and this Clause shall be in the End of the Writ. Fiat Executio iijius Brevis, hi caufa fit vera, altera non &c. F. N. B. 138. (D).

I
(D. 3) Abatement of Writ.

1. In Detinue the Writ was de uno scripto obligatorio de Debito; and the Count was de una Carta, and yet was awarded good. Thel. Dig. 84. Lib. 9. cap. 5. S. 19. cites Path. 15 E. 3. Brief 682. and 29 E. 3. Variance 68. agreeing.

2. In Detinue the Writ was de uno Carta, and the Count was of a Confirmation made to his Ancestor with Warreny, and held good. Thel. Dig. 84. Lib. 9. cap. 5. S. 21. cites Pash. 19 E. 3. Detinue 49.

3. In a Writ of Detinue of a Box with Charters, the Defendant came in by Exigent, and by the Count it was showed that a Charter in special touching Frank-tenement was contained in the Box. Upon which it was held by Roff that the Writ should abate, because it appeared by the Count that Exigent did not lie in this Action, but he pleaded over. Thel. Dig. 84. Lib. 9. cap. 5. S. 35. cites Hill. 8 H. 6. 31.

4. In Detinue, Death of the Defendant after Garnishment shall abate the Writ; for he is Party to the Original. Br. Detinue de biens, pl. 55. cites 9 H. 6. 36.

5. Contra the Death of the Garnishee. Ibid.

6. It was held in Detinue of Charters, that if it appears by the Count that one of the Charters does not belong to the Plaintiff, all the Writ shall abate. Thel. Dig. 237. Lib. 16. cap. 10. S. 47. cites 9 H. 6. 54. Quære.

7. It Detinue of Charters, by one if it appears by the Count that one of the Charters concerns the Inheritance of his Feme who is not named, the Writ shall not abate but only for this Charter; by the Opinion of the Court. Quære. For this Exception goes only to the Writ, but if it had been to the Action it had been clear. Thel. Dig. 238. Lib. 16. cap. 10. 50. cites 38 H. 6. 29.

(D. 4) Count. In what Cases a Request must be laid.

1. DETINUE of a Bailment of a Bag of Writings which the Father of the Plaintiff bailed to the Defendant to bail to the Plaintiff, and lay well though it be of another’s Bailment. Br. Charters de terre, pl. 38. cites 39. E. 3. 17.

2. See 8 H. 6. 30. If one brings Detinue of a Charter with Charters, he ought to count that the Charter was lock’d, for otherwise he shall have a general Writ of Charters. F. N. B. 138. (A) in the new Notes there (c) cites 39 E. 3. 7. contra 14 H. 4. 30. and then if it be not a Charter lock’d, he ought to know what Charters specially. 11 H. 6. 9. 49. 14 H. 6. 4.

3. The Plaintiff Counted of a Box and certain Charters and Manuscripts, and declared but of one Charter certain, and did not Count that the Box was sealed or lock’d, Judgment of the Count, and yet the Defendant was awarded to answer. Br. Charters de terre, pl. 21. cites 14 H. 4. 23. 24. 27. and 21 H. 6. 1.

4. In Detinue of Charters the Plaintiff counted that they were deliver’d to Sir H. N. for safe keeping, and that after his Death the same Charter came to the Hands of the Defendant, and did not shew how whether by Bailment, Trover
Detine.

Trover, as Executor, or otherwife. And the Opinion of the Court was, that the Count is good; and so it seems that he is charged Tenant by the Possession. Br. Charters de terre, pl. 22. cites 9 H. 5. 14.

5. Where Lease is made for Life by Deed, the Remainder over in Fee, and the Tenant for Life dies, he in Remainder shall have Action of Detinue of this Deed, because it belongs to him. Br. Charters de terre, pl. 6. cites 9 H. 6. 54.

6. But if one had released by Deed to the Tenant for Life only, this Release does not belong to him in Remainder, and he shall not have thereof Action; but if he demands both by one and the same Writ, and counts accordingly, yet the Writ lies for the one, and not for the other, by the said Opinion; For it may lie in Parcel, and in Parcel not. Ibid.

7. In Detinue of a Cheff open with Charters in it, the Plaintiff declares of two Charters in Special, and of a Cheff and other Charters in general, and does not flow all in certain of each Charter; because it is a Cheff open the Count shall abate; for he ought to show what Charters the others are per Markham J. quod fuit conceffum per Curiam, except Pfaffon, and yet he was in a contrary Opinion the same Year. Br. Charters de terre, pl. 42. cites 14 H. 6. 4.

8. And the Prothonotaries said, that if he counts of a Cheff sealed with certain Charters, and of two Charters in Special concerning Inheritance, the Writ shall abate. And fo note if he counts of a Cheff seal'd, of Charters he need not count of any Charter in Special.

9. And at another Day Iffon J. came and said, that the other Day they deny'd to him the Law, and would'd Books how it was awarded a good Count to count of a Cheff seal'd with certain Charters, and of one Charter Special, and the Justices did not deny him. Br. Charters de terre, pl. 34. cites 14 H. 6. 4.

10. Detinue Sum reddatbona & Catalla, and count'd of three Tallies, each of 10l. and yet the Writ awarded good; contra it seems if he demands three Obligations, there the Writ shall be Special. Br. Detinue de biens, pl. 24. cites 21 H. 6. 29.

11. Detinue Sum reddat bona & Catalla sua and count'd of three Tallies each of 10l. Yelverton pray'd Judgment of the Writ; for it should be quod reddat three Tallies each of 10l. & non Allocatur, and the Writ awarded good; and yet it was not deny'd but that if he had demanded three Obligations, the Writ should have been Special, and not Bona & Catalla. Br. Faux Latin, pl. 36. cites 22 H. 6. 29. 30.

12. In Detinue the Plaintiff count'd that he detain'd a Charter by which three gave to him in Feid all Lands and Tenements which they had in D. jointly with J. A. and did not shew if J. A. then was alive or not; for if another has Title as well as the Plaintiff, he shall not have Action alone. Br. Charters de terre, pl. 9. cites 33 H. 6. 26.

13. Count in Detinue per Inventionem is a new Ufe; for the ancient Ufe is Quod deven. ad Manus &c. without more. Br. Detinue de biens, pl. 10. cites 33 H. 6. 27. per Littleton.

14. Detinue by the Heir of the Feme against the Baron, who cannot be Tenant by the Curtesy, and the Plaintiff convey'd to himself Title as he ought, and that the Feme is dead without Issue, and that he is Heir, and showed How, and that the Evidences came to the Hands of the Defendant by reason of the Marriage &c. and that the Defendant, though often required, was not restored them to the Plaintiff's; and per Prifon and the said Opinion, the Count is not good because he did not allege a Request after the Death of the Wife, for before the Baron had good Cause to retain them. Br. Count, pl. 16. cites 33 H. 6. 29.

15. So in Detinue against Executors of a Bailment to the Testator. Ibid.
Detinue.

16. So of him in Remainder after the Death of the Tenant in Tail without Issue, Requir'd shall be alleged after; Quare. Ibid.

17. If a Man has a Manor and Charters thereof, and gives the Manor in Tail, the Donee shall not have the Charters, if he does not give them to him; for the Donor shall retain them to have the Voucher Paramount, therefore it is sufficient for the Plaintiff to say that he was seised of the Manor &c. and so demand the Charters, per Moyle, to which Choke agreed. But per Danby and Littleton, it suffices against a Stranger to say as above, but not against the Defendant. Br. Charters de terre, pl. 56. cites 7. E. 4. 26.

18. In Detinue of a Chest with Charters seal'd, the Defendant said, that he pledg'd the Box seal'd with Charters to him for 100 l. to him lent, and he is ready to deliver it upon Re-payment of the 100 l. Absque hoc that he detain'd &c. and a good Plea; and yet the Defendant might have wagered his Law thereof when he does not count of a Charter Special, Br. Charters de terre, pl. 62. cites 22 E. 4. 7.

19. Detinue de bonis & Cattallis, and count'd of a Chest of Charters, and therefore ill; for there is a Special Writ thereof given Quod reddit Ciflam cum Chartis &c. For by Gift de Bonis & Cattallis Charters do not pass. Br. Charters de terre, pl. 70. cites 22 E. 4. 12.

20. In Detinue of Charters concerning the Inheritance of Land it is good Policy, if possibly he can, to declare one Charter in Special, and then the Defendant shall not wage his Law. Co. Litt. 286. b.

(D. 5) Pleadings.

1. W. R. I. T of Detinue was de Charta, and the Declaration was of a Confirmation. Br. General Brief, pl. 22. cites P. 19 E. 3. 5 E. 3. 209. and Fizh. Detinue 49.

2. And Detinue of Charters by the Heir may be General in the Writ without naming him Heir, but in the Declaration he shall say Heir &c. Ibid. cites Fizh. Detinue. 54.

3. Detinue of a Writing of 100 l. in which A. was bound to the Plaintiff, which was delivered to the Defendant by the Plaintiff and A. upon a certain Condition in indifferent Hands, and the Condition is broken of the Part of A. The Defendant said that the Writing of a great Sum was delivered to him by them upon Condition contained in an Indenture remaining in the Hands of the Defendant, absque hoc that he receiv'd the Writing contained in the Count and a good Plea, though he did not say of what Sum; for he pleads it to the Action, but if he had pleas'd it to the Writ, he should have shewn what Sum, to the Intent to give a better Writ, and the Issue was entered. That he did not receive the Writing of such a Sum as the Plaintiff count'd; Prit and the others e contra. Br. Charters de terre, pl. 27. cites 21 E. 3. 30.

4. Detinue of Charters by J. Son of T. of W. it is no Plea that the Plaintiff is a Baillard, for he demands only Chattels of which he was in Possession, by which this Challenge was entered, and he was compelled to answer. Br. Charters de terre, pl. 24. cites 38 E. 3. 22.

5. De-
5. *Detinue of a Chest with Charters inclosed or sealed; it is not traversable if the Chest be closed or sealed or not*; per Finch, quod non negatur. *Br. Travers\(e\) per &c. pl. 36. cites 41 E. 3. 2.

6. *In Detinue of Charters in a Chest, it is not traversable whether they were in a Chest or a Hanaper &c.* *Br. Travers\(e\) per &c. pl. 285. cites 44 E. 3. 1.

7. *Detinue of two Boxes with Charters; the Defendant pleaded Redelivery in another County, and it was said there that 7, 8, and 9 H. 2. it was awarded a good Plea. *Quere, for it seems to be Non detinet argumentative, and then taking the General Hius and this Matter in Evidence. *Br. Charters de terre, pl. 17. cites 2 H. 4. 6. and see 22 H. 6. 15. and 11 H. 4. 50.

8. *In Detinue it is no Plea that he baits pas; for the Bailment is not traversable; for he shall answer to the Detinue.* *Br. Detinue de biens, pl. 52. cites 3. H. 4.

9. *Detinue of a Bag with 20 l. The Defendant, as to the Bag pleaded Non detinet, and to the 20 l. he ought to have Action of Debt, &c. non allocatur.* *Br. Detinue de biens, pl. 17. cites 7 H. 4. 13.

10. *By which the Defendant said, that J. N. devised the 20 l. to the Defendant, and made his Co-Executrix, and died, and the Plaintiff took the Plaintiff to the Baron, and after he delivered the 20 l. to the Defendant for his Legacy, Judgment is A\(f\)to; and the Plaintiff said, that they were his Goods, Prift, &c. non allocatur, without traversing that they were the Goods of the Testator, by which the Plaintiff justified to retain the 20 l. for her Dower, &c. non allocatur; for the shall be endowed of the Land and not of the Goods.* *Ibid.

11. *In Detinue of Charters, the Mesne Conveyance was traversed, fell. *Br. Charters de terre, pl. 17. cites 21. H. 4. 28. 27. and 21 H.


4. 2. 9. S. P.

12. *In Detinue, the Plaintiff, or the Garni\(f\)ce may declare of other Bailments than the Defendant acknowledged.* *Br. Detinue de biens, pl. 54. cites 3 H. 6. 50.

13. *In Detinue of Charters [the Defendant demanded] Judgment of the Count, for he has not declared of how much Land the Deed concerns, and therefore Ill per Cur' by which he amended it; for if the Charter be lost or burnt, he shall recover all in Damages, and the Defendant pleaded to the Count, because the Plaintiff did not intitle himself to it, by which he amended his Count, and intituled himself by Gift in Tail to J. by the same Deed and Defect to him &c. by which the Defendant justified, because the Defendant is Sifter and Coheir with the Plaintiff by the same Defect, and the Plaintiff said, that Partition was made between them and this Land allotted to the Plaintiff.* *Br. Charters de terre, pl. 1 cites 3 H. 6. 19.

14. *In Detinue the Plaintiff counted of a Bailment of Charters, and the Defendant said that he found them, and J. N. brought the like Action, abique hoc que he baits; and a good Plea, per Martin, for if he confines the Bailment he would be chargeable to toth, but now he shall nor be charged but to him who Right has.* *Br. Bailment, pl. 5. cites 7. H. 6. 22.

15. *In Detinue of Charters of Land Exigent does not lie, because it founds in the Redut contra of other Writings. By which the Defendant said, that after the Bailment be at B. in another County than the Writ is brought in, delivered the same Box and Charters again, Judgment is A\(f\)to, & and
and a good Plea; because the Defendant in this Action cannot wage his Law; contra in Action in which the Defendant may wage his Law; Note the Diversity. Br. Charters de terre, pl. 29 cites 8 H. 6. 29.

16 In Detinue of Charter the Plaintiff counted that the Deed was delivered to follow the Estates of Land, and that he is Heir to it; this is not double. Br. Charters de terre, pl. 3. cites 9 H. 6. 15.

17. Otherwife, it is if he had counted that it was delivered to deliver to him, and that he is Heir to the Land; Note the Diversity. Ibid.

18. And the Defendant pleaded Fine with Warranty of a collateral Ancestor, and the best Opinion was, that this is no Plea; for though the Plaintiff shall be barred of the Land, yet the Contee has no Right to the Land, and also in Foremost in Remainder, it may be that the Plaintiff may avoid the Fine. Br. Charters de terre, pl. 3. cites 9 H. 6. 15.

19. Detinue against Executors of Bailment made to the Testator of Charters to retain to him or his Heirs, the Executors said, that they delivered them to J. N. who has Title to the Land, and a good Plea by several; for though the Testator may charge himself doubly by his Acceptance, yet Executors, nor he who finds a Deed, shall not be charged but to him who Right has, and it seems that he is no longer chargeable but during the Time that he has the Possession thereof; for Executors, and he who finds a Deed is not bound to keep it, but if they relinquish the Possession they are discharged, but if they break the Deed or burn it 'Tritipsis lies, as appears elsewhere. Br. Charters de terre, pl. 72. cites 9 H. 6. 58.

20. In Detinue of Charters the Defendant pleaded Abatement. Per Babb. this is no Plea; for this Action is mix'd with the Realty, and a Man shall not wage his Law, nor Proceeds of Outlawry does not lie. Br. Charters de terre, pl. 7. cites 9 H. 6. 60.

21. Detinue of three Chefts with Charters, and shew'd what Charters were in each of them, and the Defendant said, that two Chefts came to their Hands severally as Executors, and the Key remain'd always in the Hands of the Plaintiff, which Chefts he is and always has been ready to deliver, and could not have them here for the Greatness of the Carriage, Abique hoc, that he had any other Chefts, and to the third Cheft Non Detinue &c. and the Plea good, notwithstanding that he did not shew what two Chefts they are, by reason that they are lock'd; for though the Plaintiff declares what is in the one, and what in the other, yet the Defendant cannot open them, therefore his Answer good as above. Br. Charters de terre, pl. 8. cites 9 H. 6. 65.

22. In Detinue upon Bailment made by the Plaintiff to the Defendant, he pleaded that after the Bailment the Plaintiff took them, and after they were stolen and waif'd in his Manor, by which be feiz'd as Waif, and a good Plea. Br. Detinue de biens, pl. 46. cites 10 H. 6. 21.

23. Contra if the Goods had been stolen from the Bailee; this is his Folly by his mis-keeping. Ibid.

24. Contra if they had been rob'd from the Bailee. Ibid.

25. See 14 H. 6. 1. the Defendant came in by Exigent, the Plaintiff counts of a Cheft with Charters, and of one Charter in Special, the Defendant pleads to the Charter Non Detinue, and to the Remainder wages his Law inantly, and then was permitted to make an Attorney. F. N. B. 138. (A) in the new Notes there (c).

26. If the Plaintiff recovers against the Defendant, this Recovery is no Bar at another time in Suit of Detinue brought against the Defendant by the Garthouse. Br. Detinue, pl. 30. cites 21 H. 6. 35.

27. In Detinue of two Writings Obligatory the Defendant may say, that they were delivered to him by the Plaintiff and J. N. upon certain Condition, and Abique hoc that they were delivered by the Plaintiff alone, per Alcuin, quod non Negatur. Br. Barr., pl. 29. cites 21 H. 6. 35.

28. It
28. It seems it is no Plea in Detinue of Goods to fly, that before in Detinue and Garnishment against him (the Defendant) he did recover the Goods. Heath's Max. 62, cites 21 H 6. 55.

29. In Detinue of Charters concerning Frank-Tenement, the Plaintiff declar'd upon a Bailment made by himself at A, in the County of Middlesex, the Defendant said, that he re-bail'd them to the Plaintiff at A, in the County of S. Prift, and because the Re-bailment was in another County than the Writ were brought in, and also of Charters, the Defendant cannot wage his Law, therefore a good Plea, per tot. Cur. Br. Charters de terre, pl. 33. cites 22 H. 6. 15.

30. In Detinue of Charters it is a good Plea that be deliver'd them in another County, without anwering to the Detinue, per Laicon, because he cannot wage his Law, quod non Negatur. Br. Charters de terre, pl. 40. cites 37 H. 6. 10, 11.

31. Detinue of a Box with Charters and Muniments concerning the Inheritance of the Plaintiff, and counted of four Charters Special, and said to one that his Father, whose Heir he is, was seif'd of so much Land in D. in Fee, and posseff'd of a Charter, by which f. gave the Land to his Father in Tail, and died, and the Land was descendent to him, and well as to the first Deed, notwithstanding that he said that his Father was seif'd in Fee, and posseff'd of the Deed by which it was given in Tail; for it may be that he disseipted and re-took an Estate in Fee, and yet the Deed belongs to the Heir in Tail, quod Noita. Br. Charters de terre, pl. 47. cites 38 H. 6. 24.

32. And to another counted of a Deed indented by which his Father gave to R. in Tail, who died without Issue, and so the Deed belonged to him, because the Land is reverted to him as Heir &c. And to another Deed, inasmuch as his Father and W, N. were seif'd in Fee, and leas'd to N. for Life, reserving the Remainder to the Father in Fee, and N. died, and the Father died, and he is Heir to him, and so it belongs to him. And to another Deed, by which f. gave certain Land to him and his Feme in Fee, and that the Box and Charters came to the Defendant by Trover. And of the three Deeds the Court held with the Plaintiff; but as to the fourth Deed that the Writ shall abate; for upon Trover the Baron and Feme ought to have you'd in Action, but if it had been of Bailment made by the Baron alone, he alone shall have the Action, and so the Writ shall abate of this Parcel, per Cur. and not in Toto. Br. Charters de terre, pl. 47. cites 38 H. 6. 24.

33. By which as to the other three Charters the Defendant pleaded Re-delivery in another County, and to the Box and other Charters wagg'd his Law, and perform'd it without Challenge. Ibid.

34. Detinue of Charters concerning a Gift in Tail to his Ancestor, whose Heir &c. and that the Deeds were deliver'd upon the Seif of the Donor of the Land in Tail, and that they came to the Hands of the Defendant by Trover. The Defendant said that Ne Dona Pas this Land, Prift, and a good Issue, Quod Noita. Br. Charters de terre, pl. 48. cites 39 H. 6. 5.

35. Contra if the Plaintiff had counted upon Bailment. Ibid.

36. Detinue of Charters by which f. N. gave to the Plaintiff in Tail, or if Cas in Vita be brought which W. gave to her in Tail, Ne dona pas is a good Issue. Br. Traverfe per &c. pl. 333. cites 39 H. 6. 35.

37. In Detinue the Plaintiff demand'd a Deed in which was contain'd, that this same Plaintiff repriz'd the W. of such Land, and did not pay (by which he repriz'd f. N.) in Fact, and yet well; For if he concedes Feoffment, this shall be Evidence against him after, and it may be, that it was deliver'd upon Condition, which was broken of the Part of the Feoffor, and therefore the Deed belongs to the Feoffor again, inasmuch as it shall not remain as an Evidence against him or his Heirs after. Br. Charters de terre, pl. 50. cites 39 H. 6. 36.

28. * De-
39. * Detinue by the Baron and Feme, of the Livery of the Feme, damfolo suit ad 'rehibrand' quando &c. The Defendant said, that before the Feme any Thing had R. Baron of the Feme was possess'd, and dying upon his Bed, Sick, charg'd the Feme to deliver them to the Defendant to his own Use, and made the Feme his Brevitrix and ait, and for, being sole, deliver'd the Goods to the Defendant accordingly, Azure box, that he deliver'd to re-deliver prout &c. and held no Plea; For he may wage his Law, or plead the General Issue. Br. Detinue de biens, pl. 38. cites 2. E. 4. 13.

40. And a Taylor may retain the Garment till he be paid for the Making. Ibid.

41. And where a Man sells his Horse for 40s. he may retain the Horse till he has the 40s. unless it be agreed to pay it at a future Day. Ibid.

42. In Detinue of six Boxes of Charters, the Defendant intitled himself to them, and the Plaintiff said, that he brought his Action of other six Boxes with Evidences, and shew'd what, which are others whereof he has not pleaded in Bar, and inasmuch as he has not answer'd to them, he demanded Judgment &c. and well, per Choke and Danby. Br. Charters de terre, pl. 35. cites 9 E. 4. 23.

43. Detinue of Goods baid'd to A. by the Plaintiff, who baid'd to B. who left them, and the Defendant found them, the Defendant said, that the said B. baid'd them to him to bai to N. which he has done, Azure box, that he found the Goods prout, and by some he shall not traverse the Conveyance where he may wage his Law as here, and Littleton and Brian e contra, and then the Defendant pleaded, that after the Trover B. who left, re-took them, Judgment &c. Br. Detinue de biens, pl. 40. cites 12 E. 4. 8.

44. And in Detinue of Bailment made in Middlens, the Defendant may say, that it was in Essex, upon certain Conditions which he has perform'd, azure box, that it was made in Middlens, this is a good Plea. Per Littleton and Brian, quod fuit conceitum. Ibid.

45. And it was agreed in Detinue of Bailment that it is a good Plea, that it was deliver'd to him to bai to N. which he has done Azure box, that it was baid'd to him to re-bail. Ibid.

46. It is a good Plea that before the Bailment A. was possess'd ut de Propriis, and the Plaintiff took and baid'd them to the Defendant, and A. re-took. Br. Detinue de biens, pl. 40. cites 12 E. 4. 8

47. Or, that after the Bailment the Plaintiff was Outlaw'd, and the Goods seiz'd for the King. Ibid.

48. Or, that they were put in Execution by Judgment upon Recovery of Damages, and those are good Pleas per Littleton and Brian, though he may wage his Law. Ibid.

49. In Detinue of Charters it is a good Plea, that they were build'd to him upon Condition, that if the Feme of the Defendant, Daughter of the Plaintiff survive the Plaintiff, that then he shall render them, and if not, that he shall render them &c. Quod Nota, per Cur. for he is not bound to render them during the Life of the Plaintiff, and the Feme of the Defendant. Br. Charters de Pardon, pl. 49. cites 18 E. 4. 18.

50. In Detinue of Charters by an Abbot, it is a good Plea, that the Predecessor pledg'd them to him for 10l. which is not paid. Br. Charters de terre, pl. 69. cites 21 E. 4. 19.

51. Detinue of a Box seal'd with Charters, and counted upon Trover, the Defendant pleaded that the 1 plaitant baid'd them to him in Pledge till 5l. was paid, and if he will pay it, he will re-deliver them, and no Plea per Briggs, without traveling the Trover, quod non Negatur. Br. Traverse per &c. pl. 260. cites 21 E. 4. 19.

S. P. per Bryan; for otherwise he does not answer the Case. Br. Traverse per &c. pl. 270. cites 21 E. 4. 50.
52. In Detinue of a Horse Price five Marks ad liberandum quando &c. it is no Plea that he deliver'd it to deliver to W. N. which he had done Abique hoc that it was bail'd to re-bail, per Cur. because the Defendant may waive his Law. Br. Detinue de biens, pl. 42. cites 21 E. 4. 55.
53. But per Brian in Detinue of Baitment to re-bail, it is a good Plea that the Plaintiff after the Baitment gave it to the Defendant quod suit concefsion, and yet the Defendant might have waived his Law. Ibid.
54. And that after the Delivery the Horse was sick of divers Infirmities, as Botto, Glanders &c. by which he was dead at K. before Request made by the Plaintiff to re-bail him, and a good Plea. Br. Detinue de biens, pl. 42. cites 21 E. 4. 55.
55. Contro if he bad not said that it was before Request; for if it had been after Request, this had been the Folly of the Defendant; note the Diversity. Ibid.
56. In Detinue the Plaintiff counted upon Trover, the Defendant justi-

fied for Pledges upon Money lent, and per Brian this is no Plea without traversing the Trover; for otherwise he does not encounter the Plaintiff. Ibid.
57. Where a Man brings Detinue of a Good and Cassock, to the Value of 40s. it is no good Count; for he ought to sever the Price of the Good by itself, and so of the Cassock; for if the one be lost so that it cannot be recover'd, he shall recover the whole 40s. for this only, which is not Reason, and therefore it would be Error; per Bryan Ch. J. But the Prothonotaries were against him; and it seems to me that it may be fer-

ver'd by the Verdict, notwithstanding that the Count be general of one entire Sum. Br. Damages, pl. 129. cites 21 E. 4. 77.
58. Detinue of diverse Parcels of Goods, tender of Part of them is a good Plea of them before Verdict. Br. Tender, pl. 39. cites 1 R. 3.
59. Contro after Verdict where the Inquest taxes a Sum in Grofs for Da-

mages of all the Goods, and shall not sever the Damages. Br. Tender, cites 30. cites 1 R. 3.
60. The Plaintiff may count of a Wagon full of Wood ad Valentiam &c. in one Gros Sum. Br. Count, pl. 75. cites 1 R. 3. 2. 3.
61. So of a Bleck of Sheep, Buffet of Grain &c. which are entire, and need not sever the Price of each Thing by itself, nor the Value. Ibid.
62. Detinue upon Trover, the Defendant justified for Divers of the same Goods for Rent arrear, Judgment to Actio, and did not answer to the Trover, and good per Cur. for it is not traversable; But in the Case of 27 H. 8. 33. Shelley said, that in some Case Trover is traversable, which Fitzherbert expressly deny'd. Br. Detinue de biens, pl. 2. cites 27. H. 8. 22.
63. In Detinue for 40 Quarters of Wheat, the Plaintiff declared simpliciter upon a Contratt for Corn; the Defendant pleaded that the Plaintiff was to pay for it immediately when he came for the Corn, otherwise the Contract was to be void; and said that he had deliver'd the Plaintiff 20 Quarters, which the Plaintiff had paid for; but that afterwards be deliver'd 10 Quarters more, which the Plaintiff had not paid for. Held, that the Plea was good without a Traverfe; that the Contract was simple, for the Traverfe ought to be by the Plaintiff (viz.) that the Contract was simple Abique hoc, that it was conditional. Dyer 29. b. 30. a. pl. 201. Hill. 28 H. 8. Anon.
64. A Release of all Actions Personal is a good Plea in Bar in Detinue of Charters. Co. Litt. 286. b.
65. If a Man have Goods deliver'd to him to deliver over to another, and afterwards a Writ of Detinue is brought against him by him who has Right unto the Goods; now if the Defendant, depending the Action, deliv-

ers the Goods over to him to whom they were bailed for him to deliver them,
Detinue.

this is a good Bar in the Action, because he has delivered them according to the Bailment made unto him. F. N. B. 138. (M).

66. Where Detinue is brought of several things, the sure Way is to count specially of the Value of every thing by itself. Jenk. 112. pl. 19.

67. The Plaintiff shall not have more Damages than he counts for; for the Judgment is to have the thing detained, and Damages for the Detention if the thing itself cannot be had. Jenk. 288. pl. 23.

(D. 6) Garnishment.

1. IN Detinue the Plaintiff count’d of a Statute Merchant delivered to the Defendant, who pray’d Garnishment against B and had it, who came and pleaded Release of the Plaintiff, and the Case was, that B was bound in a Statute to the Plaintiff in 100 l. and after the Plaintiff released to B all Actions, and after they two delivered the Writing to the Defendant, upon certain Condition performed to be delivered to the Defendant, and if not, then to the Plaintiff, and the said B pleaded this Release in the Action of Detinue upon the Garnishment, and the Plaintiff demurred because the Delivery was after the Release made, and yet, because the Debt and Sum in the Statute is determined by the Release, and therefore it shall be in vain for the Plaintiff to recover the Writing, and cannot have Action upon it, and therefore he was barred by Award, quod nota. Br. Re-leafes, pl. 30. cites 39 E. 3. 23.

2. In Detinue of Deeds or an Obligation, if the Defendant prays Garnishment, and the Garnishee comes and is at Issue with the Plaintiff and after dies, the Writ shall not abate, but Resummons shall issue against the Defendant, and Scire Facias against the Executors of the Garnishee; But if the Defendant dies, the Writ shall abate, and yet he is out of the Court by the Appearance and Plea of the Garnishee, and the Judgment shall be against the Defendant of the Writing and against the Garnishee of the Damages, and Distresses shall issue against the Defendant to deliver the Writing. Br. Charters de terre, pl. 5. cites 9 H. 6. 36.

3. In Detinue the Defendant pray’d Garnishment against a Stranger, and had it, and two Nihilis return’d, and yet he had Procs(es) at his Prayer to warn him in another County. Br. Procs. pl. 152. cites 6 E. 4. 11.

4. Detinue of Baggs and Charters sealed, the Defendant said that it was delivered to him by the Plaintiff and B upon a certain Condition, and that B is dead, and made no Executor, nor is the Administration committed, and pray’d Scire Facias to warn the Heir of B and the Ordinary, for he does not know whether the Writings are Real or Personal. Per Brian it is not Error, though you have your Prayer, wherefore fee &c. Br. Bailment, pl. 9. cites 14 E. 4. 1.

5. Detinue is brought for a Deed, the Defendant pleads, that the Plaintiff and one A. delivered the Deed to him upon Condition, and that it was to be delivered to the Plaintiff, if the Condition was performed; but it otherwise, to be delivered to A. and that the Defendant does not know whether it be performed or not; and he prays a Scire Facias to warn A. This Scire Facias issues against A. and although 20 Nihilis be returned against A. the Plaintiff shall not have the Writing delivered to him; for the Defendant is not in Fault. If the Garnishee appears, he cannot vary from the Condition alleged by the Defendant; for if he varies, the Plaintiff shall have the Deed by Judgment against the Defendant, and the Garnishee shall also have Detinue against the Defendant, if his Allegation of the Condition is false. Jenk. 101. pl. 96.

(D. 7) Ver-
(D. 7) Verdict.

1. DETINUE of Evidences the Jury found Damages, and did not inquire whether the Evidences were burnt or not, by which new Enquest was awarded. Br. Enquest, pl. 85. cites 20 E. 3. and Fitzh. Office de Court 22.


(E) How the Judgment shall be.

1. IN Detinue of Charters, if the Issue be upon the Detinue, and it is found that the Defendant hath burnt the Charters, the Judgment shall not be to recover the Charters, for it appears that he cannot have them, but he shall recover the Value of the Land in Damages. Contra, 17 Edw. 3. 45. adjudged.

2. In Detinue of 40 Charters, the Defendant offered nine and denied the rest, and so to Issue and delivered the nine, and the Plaintiff received them, and the Defendant was anmer'd for detaining them. Br. Charters de terre, pl. 23. cites 38 E. 3. 3.

3. Detinue was brought of a Bag of Evidences, and of a Charter of the Ful of the Manor of B. to which the Plaintiff is Heir, and she'd how Heir &c. and the Defendant said, that J. N. was possessor of the Bag and Charters, but what Charters were in it he did not know, and died, and the Defendant is Executor to him, and the Baggs and Deeds therein came to him as Executor, and said, that the Lord F. had entered into Part of the Land, and if any of the Charters belonged to him or he did not know, and prayed Scire Facias against the Lord F. &c. Per Martin he shall not have Scire Facias but where he confest the thing demanded which he has not done, and also he ought to make Privity of Bailment, which he has not done. But per Cockain and Babington Scire Facias lies well, Quere, and per Martin they may open the Bag to see to whom the Deeds belong. Contra per Babington and Cokain, for they cannot know upon Sight of them. Br. Scire Facias, pl. 4. cites 3 H. 6. 35.

4. In Detinue, if Judgment be had for the Plaintiff, and afterwards Judgment be reversed, Restitution shall be made to every one that hath Lys. Arg. 2. Brownl. 82. cites 7 H. 6. 42.

5. If the Deed be taken and burnt, the Plaintiff shall have Trespass, and shall recover Damages, but in Detinue thereof he shall recover the Writing itself. Br. Charters de terre, pl. 7. cites 9 H. 6. 60.

6. Where it is awarded in Detinue that the Plaintiff shall recover the Br. Judge Charters demanded if they can be delivered, and 40 s. Damages, and if they cannot be delivered, 10 l. there a Distress only shall issue to make Delivery of the Charters recovered, and if there be return'd in Issues a Nihil, and he does not come and deliver the Charters, Execution shall be awarded. pl. 101 cites.
Detinue.

7. Detinue of a Chest with Charters and Maniments by F. against R. who pleaded, that non Detinæ, and it was found against him to the Damage of 40s. if he may have Livery of the Writings, and if not to the Damage of 40 Marks, by which the Plaintiff had Judgment to recover the Writings, and the Damages of 40s. and Diffrets to the Sheriff to distrain him to make Deliverance returnable, Octob. Mich. at which Day the Defendant was demanded upon Pain of his Sues, and made Default, and no Judgment upon the Default, nor any Sues entered the second or fourth Day of the Octabis, by which the Plaintiff prayed Execution of the Chest with Charters, and at this Day Writ of Error was sued forth. And Note, that at the Day of the Diffrets the Defendant cannot have any Plea to the Matter; for if he appears or makes Default, Execution shall be awarded. But he may say to have the Sues, that the Chest was so great that he could not carry it. But then he shall be awarded to make Deliverance to the Sheriff, and by the Writ of Error their Hands are clos’d, so that they cannot award Execution. Br. Charters de terre, pl. 34. cites 22 H. 6. 41.

8. And per Brown, if the Sheriff had return’d Nihil upon the Diffrets, yet Execution shall be awarded; For a Man shall have but one Diffrets returnable in this Case, Quod Nota. Ibid.

9. Detinue of two Writings, to the one the Garnishee who came by Procese, said, that it was deliver’d upon Condition, that if he should to the Arbitrement of J. N. of all Matters between the Plaintiff and him, that he shall re-serve it, and said, that if awarded, that he shall pay 40s. to the Plaintiff, which he tender’d, and the Plaintiff refused and prayed Livery, and a good Plea, without saying, that he is yet ready; For the 40s. is not in Demand now. And to the other Deed he said nothing, by which the Plaintiff recover’d it without Damages, per Cur. because he has not been delay’d thereof, Quod Nota. Br. Charters de terre, pl. 45. cites 36 H. 6. 26.

10. Detinue upon a Writing of 30 Quarters of Barley, price 23l. and found for the Plaintiff, and they found the Price at the Time accordingly, and when it should be deliver’d to the Plaintiff, at 33s. the Quarter, but at the Time of the making of the Deed, the Price was 20s. and the Plaintiff recover’d the Price, as it was at the Time that it ought to have been deliver’d, Quod Nota, and 33s. the Quarter, 18l. in all, and recover’d the Price and all in Damages as it seems, and not the Barley itself. Br. Detinue de biens, pl. 28. cites 9 E. 4. 49.

11. In Detinue the Plaintiff shall not recover Damages, but where the Thing demanded cannot be re-deliver’d. Per Cur. Br. DetINUE de biens, pl. 48. cites 1 E. 5. 5.

12. But this seems to be of Damages to the Value of the Thing demanded, but it seems that he shall recover Damages for Detinue of the Thing, though the 'Thing itself' be recover’d. Br. Ibid.

13. The Plaintiff declar’d of three Gold Rings, and certain Parcels of Cloth &c. to the Value of 30l. in a Gros Sum, and the Defendant pleaded to all Quod non Detinæ, and the Jury found that he detain’d all to the Damage of 30l. if the Stuff could not be re-deliver’d. And there it is agreed, that the Plaintiff upon offer of the Defendant of Part of the Stuff, is not bound to receive it, but may refuse it if he does not offer all, and then he shall have all the Damages, but if he receives any Part of the Stuff, he has foresaid himself of all the Damages, and therefore, because the Declaration was of a Sum in Gros, and the Defendant pleaded a Plea to all, and the Jury gave intire Damages, and did not fever them in the Verdict or in the Declaration, therefore per Judicium, the Plaintiff
Detinue. Devise.

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till recover'd after long Argument, but this was against the Opinion of several. But it was agreed, that Plea of Tender of Part of the Stuff before Action brought, and that the Defendant refused, is good in Bar; Quod Nosc bene. Br. Detinue debiens, in pl. 48. cites 1 R. 3. 1. 14. If the Bailment be at the Peril of the Bailor, the Bailee shall recover no Damages; for he is not chargeable over to the Bailor. Br. Bailment, pl. 8. cites 3 H. 7. 4.

15. Judgment in Detinue, that the Plaintiff shall recover the Goods See Peters v. or the Value, there shall go to the Sheriff a Diminuens to the Defendant Ad deliberaanda Bona, and if he will not, the Plaintiff shall have the Value as it is tax'd by the Inquest, and so it is in Defendant's Elec- tions to deliver the Goods or Value to the Plaintiff. Per Frowike Ch. J. Kelv 64. b. Trin. 20 H. 7.

16. In Detinue the Plaintiff shall recover the Thing detain'd, and therefore it must be so certain as it may be known; and for this Reason it lies not for Money out of a Bag, or Sack, and so of Corn out of a Sack &c. Co. Litt. 256. b.

17. In Detinue the Thing itself may be recovered; if not the Thing itself, the Value of it, upon the Return of the Sheriff that he cannot find the Thing detain'd; and if he can find it, then the Thing itself, and Damages for the Detention; but let the Plaintiff in Detinue take Care in his Count for Damages; for where the Value of the Thing detain'd exceeds the Count, in this Case he shall recover no more than he has counted; as in Trelpays, Annuity &c. Jenk. 159. pl. 1.

In Detinue the Plaintiff shall have no more Damages than he has declared for; for the Judgment is to have the Thing detain'd, and Damages for the Detention. If the Thing detain'd cannot be had, the Sheriff shall inquire de Damnis, and the Plaintiff shall have Judgment for the Value and Detention upon, and according to, the Sheriff's Return, that he cannot deliver the Thing by the Defendant's Fault. Jenk. 268. pl. 22.

18. In Detinue for a Bond of 20l. where a Verdict is found for the Plaintiff; the Judgment for the Plaintiff ought to be to recover the Bond; or if the Bond cannot be had, then to recover 20l. with Damages and Costs. Judged often so; and not the Bond, or the Value of the Bond; For that leaves the Election to the Sheriff. Jenk. 520. pl. 24.


Devise.

(A) Testament.

What Persons may make it.

1. A Bishop may make a Testament. 2 D. 4. 2. b.
2. So an Archdeacon may. 2 D. 4. 2. b.
3. So a Parson may. 19 H. 6. 44. b.

See tit. Charitable Uses.
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5. But an Abbot or Prior cannot make a Testament, 2 H. 44 b.


7. A Warden of a House that has a Covent and Common Seal cannot make a Testament, 19 H. 6. 44 b. Adjudged (it seems to be intended of the House.)

8. A Feme Covert may make a Testament if the Baron agrees to it after her Death. * 26 Eliz. 3. 71. Mich. 8 Jac. B. Graunt’s Case, per Curiam.

9. A Feme Covert Executrix cannot devise any of the Goods which the hath as Executrix without the Assent of the Husband, or his Agreement after, though she may make an Executor without his Assent. Mich. 8 Jac. B. Graunt’s Case, per Curiam.

10. So a Feme Covert cannot devise Things in Action, which she hath, without the Assent or Agreement of the Husband. Mich. 8 Jac. B. Graunt’s Case, per Curiam.

11. Rot. Parliament. 18 Ed. 3. Anon. 12. the Commons prayed, that where a Constitution was made by the Prelates to take

12. One who had made his Will and became ill, (and as it seems) had lost his Speech, the same Will was delivered into his Hands, and it was said to him that he should deliver it to the Vicar, if it should be his last Will, otherwise he should retain it, and he delivered it to the Vicar, and this was held a good Will. Thel. Dig. 6. Lib. 1. cap. 7. S. 8. cites 44 Alb. 36.


14. Feoffor of Land to Uses of his last Will has the Fee and may make his Will thereof, as if no such Feoffment had been made. And. 246. pl. 259. Mich. 31 & 32 Eliz. Betty v. Trevillian.

15. Lands holden in Knight’s Service are given to J. S. in Tail, fall. To the Heirs Male of his Body Remainder to his Right Heirs. J. S. devised these Lands and after dies without Issue Male, the same is good.
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good for two Parts; yet during his Life he had not any Estate in Possession. Per Egerton Arg. 3 Le. 276. Mich. 33 & 34 Eliz.

16. The King gave Lands to A. in Fee to hold by Knight's Service during his Life, and after to hold in Socage; A. may devise the whole for all the Time, when the Devise took Effect he was Tenant in Socage. Arg. 3 Le. 276. Mich. 33 & 34 Eliz.

17. Administrator cannot devise the Goods he has, as Administrator, nor will they go to his Executor; but on his Death Bed he may give them by Word of Mouth, though not by will. Wentw. of Executors 18.

18. One who has an Estate for Years by Lease, Wardship, or Extent &c. in Right of his Wife, or has the next Assistance of a Church in her Right, cannot by Will give or bequeath any of thee, but notwithstanding they will remain unto his Wife on his Death. Wentw. of Executors 18, 19.

19. A Man outlaw'd in a Personal Action, or a Person attainted of Felony or Treason cannot devise any Chattels Real or Personal. Noy's Comp. La. 99.

20. An Infant of the Age of Eighteen may make a Testament, and but it was constitute Executors for his Goods and Chattels. Co. Litt. 89. b. admitted within Age can't devise his Land, unless the Custum fo extends expressly, that he may devise within Age. Br. Devile, pl. 47. cites 37 H. 6. 5. and 11 H. 4. accordingly.

An Infant of 14 Years of Age may make a Will, and thereby make Executor of his Goods. Noy's Comp. La. 99. — 2 Mod. 315. Trin. 36. Car. 2. B. R. in Case of Smallwood v. Brickhouse it was said per Cur. that the Spiritual Court sometimes allows Wills made by Persons of 14 Years of Age, and the Common Law has appointed no Time, but it wholly depends on the Spiritual Law; and if they adjourn a Person capable, this Court will not meddle, it being a Matter within their Jurisdiction. — 2 Show. 204. Trin. 34 Car. 2. Smallwood v. Berthoule S. C. held accordingly, and that an Appeal lay to the Delegates and that whatsoever our Law Books say concerning it, 'tis only as directed by their Law. — 2 Io. 216. Litchfield (Chancellor's Cafe) S. C. and if the Inferior Court gives Sentence contrary to the Spiritual Law, the Party has Remedy by Appeal. — Gilb. Eq. Rep. 74. Hill. 8. Ann. Hyde v. Hyde, says that in this Case no Devise was made but that a Male Infant of 14 Years of Age, and a Female of 12, might make a Will of a Personal Estate; and Mr. Giblett said it was so agreed by Lord K. Wright, in Case of Sharp v. Sharp, wherein they follow'd the Rule of the Civil Law of Jutifian for their Consent to Marriages at such Ages.

21. Head of a College cannot devise Land to his own College, because when the Devise should take Effect, the College is without a Head, to an imperfect Body and not capable. 4 Le. 233. pl. 357. in Time of Q. Eliz. B. R. Corpus Christi College's Cafe.

22. Same Memory for making of a Will is not always where the Noy. 101 Party can say Yes or No, or has Life in him, nor when he can in S. but S. some Things answer with Senfe. But he ought to have Judgment to apply — discern and to be of perfect Memory, otherwise his Will is void. Resolved per the Judges. Mo. 760. pl. 1051. Pasch. 3 Jac. Combes's Deeds and Cafe.

yet so much thereof as was drawn from him by Practice and Circumstans ought to be made void in Equity (especially where they are made to the Benefit of Strangers) Chan. Rep. 24. 3 Car. in Cafe of Herbert v. Lowdes.

23. Executor cannot devise the Goods which he has as Executor; Per for he has Williams J. Arg. 3 Buls. 7. Hill. 12 Jac.

his own, or to his own Ufe, but he may make a Continuation of the Executorship, and his Executor shall have them as Executor to the first Tenant. Wentw. Off. Executor 17, 18. cites it as resolved. H.11. 30 Eliz. — Wentw. Off. Executor 86. 8. P.

24. A bargains and sells Land to B. upon Condition by Indenture Cro. J 619. enrolled, that upon Payment of 300 l. at the End of three Year it should be void, and that in the Interim the Bargaine shou'd not meddle with the Profits of the Land; the Barganor occupies and makes Blackman a Lease for Five Years and at the Day doth not pay the Money; B. C. adjoign'd doth not enter but (A, occupying it) he devised the Land, and adjudged a good Devise. But if he had been discharged the Devise had been void.
Devise.


25. Tenant in Tail of an Equity of Redemption may devise it for the Payment of his Debts; sic dictum fuit. Vern. 41. pl. 39. Parch. 1682. in Cafe of Turner v. Gwynn.

For in Cafe of Jointtenants, all will survive, but by Act in his Life he may dispose of his Part, and the Affiance may dispose of his Mote by his Will, though it be Half an Horse or Ox, which can't be divided. Vernw. Off. of Executor 18. —— But Partners may if they be ofTenements deviseable. Ltr. S. 287 —— Co. Litt. 185 b. lays the Reason is evident; because there is no Survivor between Partners, but the Part of the one is defeasible, and consequently may be devised.

Vernw. Off Executor 16 lays it may be some Doubt, but seems to incline that he may.

27. Excommunicated Person cannot make a Will, or if he does it cannot be proved. Arg. 9 Mod. 114. Mich. 11 Geo. 1. in Canc. Milford v. Croom & al.

(A. 2) What is a * Will; And tho' it be made in the Form of a Deed.

* A Will is thus defined (viz.) It is a Declaration of the Mind (either by Word or Writing) in disposing of Estates, and to take Place after the Death of the Teltator; and this is called a Will. Carth. 38. Trin. 1. W. & M in B. R. Lea v. Libb. D. 166. pl. 8. Hill.ular S. C. and reports it to have been concluded thus, viz. In Writs &c. in this Will &c. yet held no Will. —— It cannot be a Lait Will, because an Estate was to be executed in the Life of the Teltator. D. 166. pl. 9. S. C. —— 4 Le. 219. pl. 341. 28 Eliz. in Canc. S. C. in totidem Verbis. —— 2 Le. 159. pl. 192. 21 Eliz. in Canc. S. C. in totidem Verbis —— Jenkins. 217. pl. 62. S. C. the Feeblement was made, and the Feeble died before the Stat. 27. H. 8. of Ufes; and related accordingly by all the Judges of England. Jenkins says, that if a Fine, Testament, or Recovery be originally to the Ufe of a Will, and afterwards the Owner of the Land declares by Indenture that a Stranger shall have the Land without a Confirmation; or that any of his Blood shall have it; this Indenture amounts to a Will, and is revocable; In the principal Cache, there is only an Intent; and perhaps his Debts are so great, that no Estate shall ever be made; for it is limited after the Payment of his Debts; And in the principal Cafe, although the Ufe originally be to the Ufe of the Will of A. and to the Fee of the Ufe is in A. Yet the said Indenture before the Statutes of Ufes, declaring, that the Feeble shall convey it to him and his Wife in Tail; he thereby declares the Intent of the Ufe aforesaid to be, that the Feeble shall have the Ufe in Fee to the Intent aforesaid.


3. On a Question, whether a Will or no Will? The Plaintiff produced a Deed indented made between two Parties, the Man and his Son;
Deed.

Son; and the Father did agree to give the Son so much, and the Son did agree to pay such and such Debts and Sums of Money; and there were some particular Expressions resembling the Form of a Will; As, that he was sick of Body, and did give all his Goods and Chattels &c. But the Writing was both sealed and delivered as a Deed; and they gave Evidence, that he intended it for his Last Will, which the Court said, was a good Proof of his Will. Mod. 117. pl. 17. Pauch. 26 Cat. 2. B. R. Green v. Proud. 4. Directions were given for a Conveyance and seffees named, but Blanks left for their Names, in Order to charge Lands with Younger Children's Portions, in pursuance of a Power by Decree, or Will, to charge the same. Deeds drawn and ingrossed were found a Will and the Money decreed, though the Person died before any Thing was executed, and though the Power was not exactly pursed, and though no Writing mentioned the Conveyance to be a Will. Chan. Cafes 265. Mich. 27 Cat. 2. Smith v. Atkion.

were (as he called them) Instructions for Counsel to draw up his Last Will in Form. Upon a Trial directed out of Chancery, a Verdict was found for the Will, and decreed it a good Execution of the Power, and that the Notes were a clear Demonstration of his Intention. —— 3 Keb. 551. pl. 60. Mich. 27 Cat. 2. in Canc. 5 C. It was said Lord K. Finch held that Power to convey by Deed or Will under Hand or Seal was well executed by a Will subscribed by the Name of the Devisor, though never seal'd, there being a full Intent of the Devisor appearing, and decreed accordingly. —— 5 Salk. 277. pl. 6. 5 C. and mentions it as a Will.

A Will, though not signed by the Testator, is good in Equity to charge the Heir at Law in the Reality, as well as the Executor in the Personality. Arg 3 Mod. 15.

5. A Writing purporting an Indenture, but declared by the Party to be a Will, and by which he gave several Legacies and made two Power of Executors, was decreed to be a good Will. Fin. R. 195. 27 Cat. 2. S. C. the Counsel against the

Will gave up the Point as to its not being a Will, and the Lord Keeper agreed that it was a Will. Freen. Rep. 395. pl. 374. 5 C. in Canc. but S. P. as to its being a Will or not, does not appear.

6. If a Man writes the same Will over in another Paper, and declares that to be his Will, that is not aliud Tettamentum, but it is Idem Tettamentum; For the Tettamentum is the Thing contained, and not the Paper; It is just as if a Man makes a Duplicate of his Will, still it is but one Will, per Pemberton Serjeant; Arg. Show. 550. Mich. 4 Jac. 2. B. R. in Cafe of Hitchins v. Batler.

7. After a Testator's Death one Sheet was found in one House, and a second Sheet in another House, yet adjudged a good Will; cited by Dohmen. J. as the Earl of Essex's Cafe. Cumb. 174. Mich. 1 W. & M. in B. R.

(A. 3) Deed and Will referring to each other. Con-Strued How.

1. T estator executed a Deed, in which several Annuities were expressly. Afterwards by his Will he devised such Rents as are mentioned in such Deed, (referring to it) according to the Meaning of his said Deed to his younger Children. It was held, that this is a good Devise in writing of the Annuities; For it refers to the Deed whatever it is, as if it were specially limited in the Will, and is a good Devise to them of the several Annuities. Cro. J. 145. pl. 4. Hill. 4 Jac. B. R. Molinieux v. Molinieux.
2. A. made a Deed of Feoffment without Livery to divers Uses, and afterwards by Will devised the Land to such Persons, and in such Manner as he had appointed by his Deed of Feoffment. It was held to be a good Devise; cited per Tanfield, Cro. J. 145. Hill. 4 Jac. to have been adjudged in the Court of Wards, in Fairfax's Cafe.

3. On Issue out of the Chancery, to try whether the Plaintiff were intitled by two Writings, or any other purporting a Will of J. S. and the Evidence was of a Feoffment to the Use of such Person as J. S. shall Name, and appoint by his last Will, in which Cafe the Devisees are in the Feoffment, and not by the Will; But per Cur. that is only fictitious Juris, but they are not in without the Will, and therefore that is the principal Part of the Title; and such Proof good enough, and pursuant to the Issue, and Verdict for the Plaintiff accordingly. Keb. 579, 571. pl. 24. Mich. 15 Car. 2. B. R. Bartlet v. Rainfden.

4. A having Power to charge Lands with 1500l. sent Notes to Counsel to draw a Conveyance for the charging Land with the 1500l. but without naming to whom or any Feoffees, and dies before any Thing more is done; These Notes in Writing were decreed to charge the Estate, and made as Part of the last Will of A. though no Writing mentioned it to be fo. 1 Chin. Cafes, 265. Mich. 27 Car. 2. Smith v. Allston.

5. A. devised 3000l. to all the Natural Children of B. his Son, by J. S. and directed the Executors to pay it as A. by Deed should appoint. There were some Children born before the Will made, and some after the Will; and before the Declaration by Deed. Then A. by Deed appointed the 3000l. to all the Children of B. by J. S. It was inferred that this depended now upon the Deed, and therefore must refer to the Children born at the Time of the Execution of the Deed. But Ld. C. Parker held, that the Deed referring to the Will is, as to this Purpose to be taken as Part thereof. Wms's Rep. 529, 530. Hill. 1718. Metham v. Duke of Devon.

(B) Devise at the Common Law.

What Estate might be devised at the Common Law.

1. An Estate in Fee could not be devised by the Common Law, because it was presumed, that he did that in Extreme that he would not do in his Health, that it proceeded from the Dispecer of his Mind, by the Anguish of his Disease, or by Short Perturbation, to which he is now more Inclined than he was in his Health.

2. With this agrees the Law of Scotland. Shenn Region Majestatem. 44. 7. 8.

3. He that was possessor of an Estate for Years, might have devised it at the Common Law. 50 Att. 1. admitted.

4. If a Man intestate's others to the Use of him and his Heirs, or generally without expressing any Use he may make a Will after, and alter the Use. Br. Feoffment al' Uses, pl. 36. cites 5 E. 4. 8.

5. But where a Stranger has Interest by the Use, or if it be to the Intent to retake an Estate Tail, there he cannot change the Use after. Ibid. (C) What
(C) *What Thing might have been Devised [at Common Law.]*

1. An Estate for Years might have been devised at Common Law. 50 Att. 1. admitted [that it might be] by him that was possessed thereof.
2. A Guardian by Knight's Service might have devised the Ward of the Body and Land. 26 C. 3. 69. admitted of a Guardian in Socage, where it is held, that it is grantable over.
3. The King cannot give any Thing by his Testament but that which he has in Possession; nor can be devise his Land by his Testament, per Fortescue, clearly. Br. Prerogative, pl. 5. cites 35. H. 6. 25.
4. By the Common Law, no Testament or last Will could be made of Land. 2 Inst. 7.

the Common Law no Lands or Tenements ought to be transferred from one to another but by solemn Livery of Seisin, Master of Record, or sufficient Writing; but (as Littleton, S. 167; says) by certain private Customs in Boroughs they were devisable.

(D) Where it shall be void for the Uncertainty.

1. *F* a Man devises to 20 of the poorest of his Kindred, this is void for the uncertainty which the Court shall adjudge Poor.

Kindred, being his Brothers and Sissters Children, was admitted good as a Trust and Confidence for them, though by reason of other Words in the Will appointing Overseers of the Will, the 20 poor Kindred had no Power to make a Lease of the Term, but that was vested in the Overseers. Mo. 753. pl. 1040. Griffith v. Smith.

2. It was found by Inquest of Office before the Mayor of London, that R. Jurdein was seised of certain Land in London, and devised by his Testament to A. for Life, so that he become a Chaplain to chant for his Life in the Church of S. in L. for the Souls &c. so that after his Decease the Tenements shall remain to two of the best of the Fraternity of the White-Towers of London for ever, to find a Chaplain to chant in the Form aforesaid, per Percy the Remainder is void to the two of the White-Towers; for it is uncertain; which Candilh agreed. Br. Devise, pl. 21. cites 49 Att. 8.

3. Termor of a House bequeaths his House to B. without expressing how S. C. cited. long he should have it. B. shall have the Whole Number of Years. 2 Sid. 151.
For B. cannot have Estate in the House at Will, nor for Term of Life, nor of any Years, or one Year. D. 307. b. pl. 69. Hill. 14 Eliz. Anon.

4. If a Man devises his Land for so many Years as his Executors shall name, it seems ths Devise is not good; But, if it be for so many Years as in the Testator's Life-time this is a good Devise. Swinb. 183. cites Pl. Com. 524. Anon. Hill. 2o Eliz.


6. So it a Devise be to J. S. in Fee, and afterwards in the same Will, the Land be devised to J. D. in Fee, they are Joint-Tenants. And Mead said, that Cale had been often moved, and always ruled; that the Devise is good to them both, and they shall take as Tenants in common, or at least as Joint-Tenants. Ibid.

8. And
7. And Anderson said, and it was agreed by the whole Court, that if a Termor devizeth to J. S. so much of his Term as shall be Arrer at the Time of his Death, this is a good Devise for so much of the Term as remaineth at his Death. - Cro. E. 9. pl. 2. Mich. 24 & 25 Eliz. C. B. Anon.


9. A. devised Blackacre for erecting a School, but names no Devi- vee, so that the Devife being too general is void; then he deviz'd Gr. Acre to B. in Fee, and all his other Lands to C. in Fee. C. shall take Blackacre, though it was not the Meaning of A. Arg. Le. 251. pl. 339. Trin. 32 Eliz. B. R. cites it as held in the Cafe of Bennet, v. French.

10. Sir R. F. devised his Manor of E. to his Executors in Truft, that they shall be feised of 100 Marks, Part of this Manor, to the Ufe of A. and of another Part of the Value of 20 Marks to the Ufe of B. and of another Part of the Value of 201. to the Ufe of C. and that a Division shall be made by his Executors, and that all the Manor shall be valued at 170. and no more. It was adjudged that this was certain enough, and the Left que Ufes shall be Tenants in Common immediately without Di- vision. D. 280. b. Marg. pl. 17. cites Patch. 36 Eliz. B. R. Gibbon v. Warner.

11. A Devife was of two Acres of Land out of four Acres which lay together; this is a good Devife, and Devi- vee shall have Election. D. 280. b. Marg. pl. 17. cites 40 Eliz. Marshall's Cafe.

12. A. feised of Lands, devised them to his Wife for Life, and that after her Death, the same shall remain to my Ifue; and at the same Time he had two Sons, R. and G. and two Daughters, E. and J. Adjudged this Devise of the Remainder to his Ifue, was uncertain what Ifue he intended, he having divers Ifues, and it shall not extend to all his Ifues, for a Will shall be confrmed according to the Intent of the Devisor; where a certain Intent may be collected, but where it is uncertain it is void. Cro. E. 742. Hill. 42 Eliz. B. R. Taylor v. Sayer.

13. A Man having a Brother and a Daughter, devises his Land to his Right Heirs of his Name and Pofferty. Adjudged a void Devife, and it works by Descent. Mo. 860. 861. pl. 1181. Hill. 11 Jac. C. B. Cowden v. Clarke.

14. Where the Husband devises Lands to his Wife for Life, and after her Death to the Heirs Males of any of his Sons, or next of Kin; Roll Ch. J. said, that the Intention of the Testator here is coae & ficca, and fenfencia, and cannot be known, and we ought not to frame a Senfe upon the Words of a Will, where we cannot find the Testator's Meaning. Jerman J. held the Devise was not void, but that the Words are to be interpreted as they fland by Law, and as the Words will bear. Nicholas J. prima facie that the Devise is void, but yet it is question- able. Ask. J. to the same Intent. Roll Ch. J. said, that there is too

15. Devise.

15. If a Man devises all his Lands to one of his Cozins Nicholas Amherst's Daughters, that shall marry a Norton within Fifteen Years and dies, and Nicholas Amherst having Three Daughters, one of them marries a Norton within the Fifteen Years; this is a good Devise to her, notwithstanding the Uncertainty, and the Law supplies the Words who shall first marry &c. Raym. 82. Adjudged. Mich. 15 Car. 2. between Bate v. Amherst.

16. If a Man devise 50 l. to his Servant, if he has several Servants none shall take for the Uncertainty; Per Vaughan Ch. J. Vaugh. 185. Trin. 16. Mich. 20 Car. 2. in Case of Bedell v. Contable.

17. A Devise made to no Person, but the Thing being only devised is void at Law. 2 Ch. Cafes 31. Trin. 32 Car. 2. in Cause of Perne v. Oldfield.

18. A seised of the Reversion of two Milliages in Fee, after the Death of H. had Issue two Sons, C. the Elder and D. the Younger, and also four Daughters, L. M. N. and O. devised his two Milliages to D. and be to have 30 l. a Year for his Maintenance for Ten Years after the Death of his Grandfather, and the Reversion of the Profits to be applied for raising Portions for his Daughters; and if D. die, then he gives the Estate which D. had to L. M. N. and O. Share and Share alike; and adds, if all my Sons and Daughters die without Issue, then he devises it to his Sister and her Heirs &c. A dies. The Grandfather dies. D. enters and dies without Issue. The Four Daughters enter and are seised. O. takes Husband and has Issue and dies, and the Question was, whether the Husband of O. should be Tenant by the Curtesy. Herbert Ch. J. said, they would favour Wills in their Explication, as far as they could, but where Wills are so uncertain, that the Intention may not be collected they ought to fall for their Uncertainty; And he said, that here the Testator might have several Intents, for he might intend, that the Daughters should have but for Life, and then, that the Sons should have it, and upon their Death without Issue, that the Daughters should have it. Or he might intend, that the Sons might have an Estate Tail after an Estate Tail in the Daughters. Or that after the Death of the Daughters it should descend to the Sons in Fee, and if they die without Issue, to the Issue of the Daughters; and if his Sons and Daughters die without Issue, that he might limit a Fee after to his Sister, though there was a Fee before, he might so intend. And therefore he said it was quite uncertain what he intended, and therefore this Clause is void for the Uncertainty, and that there was no Estate Tail in the Daughters, and consequently no Tenancy by the Curtesy. And so it was adjudged, per toto. Cur. Skim. 266. pl. 3. Hill. 2 & 3 Jac. 2. B. R. Price v. Warren.

19. Ejecut and Special Verdict. A Man politic'd of a long Term for Years in Lands, devises them by his Will to Sir St. Andrew St. John, and his two brothers successively, provided that neither of them shall take till after they are married. Rowland the Third Brother dies, Sir St. Andrew dies, the second Brother is Leffer of the Plaintiff. The Question upon this Special Verdict was, whether this was a good Devise to Sir St. Andrew, St. John and his Brothers.

It was objected, that this was a void Devise, for the Uncertainty, who should take first by Reason of the Word successively, and Hob. 313. was cited, the Case of Muffling v. Hobart, and this Case was relied upon; That was a Leafe granted by my Lord Sher ton (by Deed made between him and one Thomas Hobart) of Tenements to the said Thomas Hobart, Habend' to the said Thomas and to Nicholas Hobart, John Hobart, and Henry Hobart, Sons of the said Thomas pro Termino Vitae corum & alterius corum successive diutius vi. centum.
Levile.

was a Guide to the Explication of the Word Successive, viz. that the Eldere should after his Marriage enjoy a joint for his Life, then the 2d and then the 3d, especially when he who is named in the Will is by the Verdict found to be the Eldeff Brother

2 Ld. Raym. Rep. 1314. Ongley v. Peal & C. argued, and Judgment affirmed Nift Cana &c. but Mr. Attorney General, who was to have shewn Caufe, taking ito be clearly against him, never did shew Caufe, and so the Judgment was affirmed again Mr. Ongley, who was a Purchaser for a valuable Consideration by the Advice of Mr. Sergant Pemberton, and Mr. Richard Webb of the Inner-Temple; And the Reporter says his Client told him, that Mr. Webb, on a further and later Consideration, adhered to his former Opinion, that the Devise was void for Uncertainty.

viventium. Thomas and Henry and died. The first Question there was, whether they could take jointly, and the Opinion of the Court was, that they could not take jointly, because Thomas Hobart was only Party to the Deed, and the reit were not named, but by the Habendum, so that they could not take a joint Interest. Then it was a Question, whether they could take by Way of Remainder; and it was held they could not take in Succession for the Uncertainty, who should begin, and who should follow; and by Way of Remainder it cannot be joint, because of the Word Successive. But it was answered now by the Court, that if the Opinion of the Judges had been grounded upon the Word Successive, that though a joint Interest were given by the former Words, they could not take jointly by Caution of the Word Successive, they must have been all named in the Precedents of the Deed, yet it seemed to the Court now, that notwithstanding this Word Successive they must have taken jointly. If a Man leave to Three for Term of Life, or for Years, Habend Successive, yet they shall hold in Jointure, and the Word Successive is void. Br. tit. Leaf 54. Though my Lord Hobart reports, that the Ground of the Resolution of the Court was upon the Word Successive, which of them should take first, yet in 3 Cro. 575. 58. where the same Case is reported, there is no Notice at all taken of the Uncertainty of the Word Successive. It is there held, that they could not take jointly; for the Sons should not take in Possession, because they are not named in the Precedents of the Deed, nor should they by Way of Remainder, for the Intent was to give them the Land in Possession.

In the next Place, the Case of Greenwood v. Tyler was cited; now there was a Writ of Error brought upon that Judgment, and on the Debate on the Writ of Error there were Endeavours to distinguish this Case of Greenwood v. Tyler from that of Windsmore v. Hobart, but that Difference was but very slight, and therefore the Judges advised that the Defendant to compound with the Plaintiff, and so there was no Judgment; but it will be very hard to make a Difference. A Leafe to three Men, Habend Successive is void, because of the Uncertainty, who shall take first, as 1 Le [117. pl.] 446. Secbell and Caell's Cafe. And there are several other Cases upon such Limitations, where they are held to be void for the Uncertainty who shall take first.

But in this Case it was resolved per tot. Cur. That the Plaintiff should have his Judgment, because the Devise is not void for the Uncertainty. This Case differs from the Case of Windsmore v. Hobart. In this Will the Testator names Sir St. Andrew St. John first, and it appears that he was the Eldeff Son. The Devise is to him and his Brothers successively, Sir St. John was to take first, for he was particularly named, and the Word (successively) implies, that the Estate was to go to the next Brother after him. It is plain the Testator had Respect to the Seniority of the Brothers, and therefore named Sir St. John first. In the Case in Hobart, though the Leafe was to the Father and his Three Sons, yet it does not appear whether the Eldeff Son was named first. Secondly, if the Intention of the Testator can be found, that ought to prevail; now the Intent here is plain, by naming the Eldeff Son first, that he had regard to Seniority; it is no more than that the Eldeff Son should have it for Life, and that his two Brothers should take after him; it is plain Evidence of the Intention, though in a Deed or Leafe it must be in more Legal Words than in a Will; yet the Law in such Case will not make the Will void. Thirdly, If the Word (successively) be so imperfect that it cannot be learned who should take first; yet rather than that the Will should be void (successively) shall be rejected, as being a Word of an Imperfect Signification, and the Brothers shall take...
Devise.

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take jointly, had that come to be the Question, and we could have learned the Intention of the Testator; when there are sufficient Words without that Word to give them a Joint Interest, that Word shall be rejected, the Intention being sufficiently certain before, and nobody can here say, but that Sir St. John and his Brothers had a Joint Estate given them before this Word came, and so the Plaintiff has a good Title this Way, and nothing appears to favor the Jointure.

Here it is sufficiently expressed by naming the Elder Brother first, to show that the Estate was to go according to seniority, and so the Second Brother has a good Title for Life and the Plaintiff must have his Judgment; Judgment for the Plaintiff per tot Cur. Ms. Rep. Trin. to Ann. C. B. Ungly v. Peale.

20. It has been said, that if an Estate has been given to a Man and his Issue, it is void for the Uncertainty, because not appearing whether Male or Female; but it has been held and determined since not to be Law, and that it is well enough in a Devise; Per Cur. Am. Gilt. Equ. Rep. 28. Patch. 1 Geo. B. R. in Case of Shaw v. Weigh.

21. A Devise to the Heir Male of E. L. lawfully begotten; and for Want of such Heir to his own Right Heirs; there held good, although not to the Heirs of the Body; those Words of her Body wanting; yet the Description supplied and made good by other Words tanta-amount. 2 Vern. 735. Hill 1716. cites it as adjudged in the Case of Long v. Beaumont.

22. Bill for a Legacy, Testator devises 550 (omitting Pounds) to his Daughter Mary (the now Plaintiff) and he also devises 550l. to his Daughter Barbara &c. The Defendant insists that the Devise of 550 to the Plaintiff is void for Uncertainty, not laying 550 what.

Cowper C. the subsequent Devise to the other Daughter makes this extremely clear that the Testator meant 550l. and it is as certain and good, as if the Word (Pounds) had been expressed. Mich. 3 Geo. in Canc. Freeman v. Freeman.

23. A. and several others of the Town of S. subscribed to a Charity School for Boys and Girls there during their Pleasure. A. being pleased with seeing the Charity-Children, declared that he would leave them something at his Death. A. gave 500l. to the Charity School in S. and there was also a Free School in S. Lord Ch. Parker said, that though the Free-School be a Charity School, yet the Charity-School for Boys and Girls went more commonly by that Name, and as A. was fond of and declared that he would leave the latter a Legacy, decreed it for that School. Mich. 1720. Wms's Rep. 674. Att. General v. Hudson.

24. A. bequeathed to B. and C. her Grandchildren some of her best Linnen. The Master of the Rolls held this void for Uncertainty, and that if it had been the best of my Linnen it had been uncertain, though less so than the other; but he by his decretal Order recommended it to the Refiduary Legatee to give them some of the Tef- tatrix's best Linnen, and said that the Court in Like Cases had sometimes made such Recommendation. At the Rolls. 2 Wms's Rep. 387. Mich. 1726. Peck v. Halfey.

(E) De-
Devise.


Firth. Mort. 
1. If a Rent be granted out of Land devivable by Custom, the Rent may be devised within the Custom, for this is of the same Nature with the Land. 22 Arg. 78. adjudged. Perkin's S. 135. Contra. D. 26 H. 8. 1. Litt. D. 3. 4. Mod. 149. 38.

— Br. Customs, pl. 34. cites S. C. — Br. Rents, pl. 11. cites S. C. — Litt. 585. S. P. admitted. — Mod. 92. Arg. cites Litt. 585, but says the Authorities clash in this Part.

2. Note, that in in London, a Man may devise by Testament to a Common Person, though the Testament be not enrolled. But if he devises in Mortmain, he ought to be a Citizen and Freeman Rehant, and the Testament ought to be enrolled at the next Hystings, and by 38 & 45 E. 3. he ought to be born in London and taxable to Scot and Loz, but Quere inde. Br. Devise, pl. 23 cites 30 H. 8.

3. In some Places the Custom is general, that he may devise any Lands &c. In some Places he may devise Lands only which the Devisee puchased. In some Places he may devise any Estate. In some Places for Life only, &c. Co. Litt. 112. 6.

4. By the Special Custom an Infant may devise Gavelkind Land at the Age of Fifteen Years, as appears in 21 H. 7. 16. and 5 Rep. 84. Perryman's Case touching such particular Customs. 3 Bulilt. 215. Mich. 14 Jac. in aNota, in the Case of Roswell v. Welch.

(E. 2) Devisable by Custom. Pleadings.

1. Where Land is devivable by Custom, the Writ of Ex gratia querela is not incident to it, unless the Custom be so; for in some Vills the Custom is, that the Devisee may enter; and in some Vills, that he shall be put in Seilin by the Baili.; and in some Vills, that he shall have Suit, by Ex gravi Querela; per Thorpe. But Kuiot in a contrary Opinion; therefore when a Man pleads a Recovery in such Vill, it seems that he ought to allege the Custom to be that a Man may have Ex gravi querela in this Vill upon a Devise there. Br. Devise, pl. 43. cites 39 Arg. 6.

2. In Affe the Tenant pleaded in Bar, and the Plaintiff made Title, that all the Lands of the Part of the South of the same Vill, of which Part those Tenements are, have been devisable Time out of Mind, and that J. H. was seised in Fee, and on his Death Bed devised the same Tenements to one E. and his Feme in Fee who was seised, and devised to J. N. Chaplain in Fee, who seised the Plaintiff, who was seised and dispossessed &c. Cand. demanded judgment, because it is alleged that the Tenements of the South Part are devivable, and does not say that they were Parcel of any Fee or of a Borough which has such Custom, and the Vill above is at Common Law, whereby, of common custom, Parcel of a Vill cannot be of other Condition than the Grefi is. Bell. said, We have shewn this this is by Custom before Time of Memory, but Cand. said, Parcel of a Manor cannot by Intentment be devisable where the Whole is not devisable, and where a Vill is Guildable, a Man cannot preferisce that one House, Parcel of the
the Vill, is devisable, to one House in B. cannot be Gavelkind and
departable, where the Rest of the Vill is otherwise; Quod Finch con-
cervit, and Thorp similiter, by which Belk said, That this Part of the
Vill was of the Fee of H. C. and in ancient Time was a Vill Mer-
chant, which Time out of Mind has been devisable &c. Per Thorp this
is not of Record, and the Justices were in Opinion to have given Judg-
ment against the Plaintiff, by which he was non sui, quod not, and
per Cand. all the ancient Boroughs of England appear in the Exchequer
of Record. Br. Customs, pl. 7. cites 39. Aff. 27.

3. In Affize, the Tenant said that W. was seised and died seised, and be-
entered as Heir, the Plaintiff said, that W. was seised in Fee, and that
the Vill of Ludlow, where the Land lies, is inclosed with Walls, and Time
out of Mind has been a Borough, and all the Lands purchased there have
been devisable Time out of Mind, and that W. purchased the same Land,
and on his Death-bed devised it to the Plaintiff, and died, by which the
Plaintiff was seised and devised &c. Per Belk. because he does not al-
lege a Record to prove it a Borough, nor that they have held Phe as a Bo-
rough by Ex gravii Querela, and said, that they have been taxed to the
Fifteenths as a Vill of Upland, and so is a Vill of Upland not ruled as a Bo-
rough, and therefore cannot be devised. Cand. ad idem, where Lands
are devised be shall plead that they are impleaded in the same Vill by Ex gra-
vi Querela; and the Writ shall say, quod omnes possunt legare tenementa sua
tangant catallas, and so it is not alleged here, nor has he alleged that
the Land is Parcel of any Grand Fee which has such Usage; and
after the Opinion of the Justices was against the Plaintiff, and therefore
he was non sui. Br. Customs, pl. 38. cites 40 Aff. 41.

4. A. seised of Gavelkind Land in Fee, holden in Socage, and of other
Lands in Capite, by Will in Writing devised his Copyhold Land to his base
Son and the Heirs of his Body; Whether the Lands in Gavelkind holden
in Socage were devisable by Custum, was the Point. A Case was shewn
where all the Court of C. B. was agreed Mich. 41 & 42 Eliz. that they
were devisable by Custum, but then this Custum must be pleaded, that
the Lands so devised were holden in Socage; for although the Court shall
take Conunence of the Custum of Gavelkind in Kent without pleading it,
yet of this special Custum to devise, or that the Lands are holden in Socage, they ought not to take Conunence of them without special
pleading of the Custum. And afterwards the Jury going from the Bar
to consider of the Matter in the principal Case, fedente Curia, the
Plaintiff was non sui. Cro. C. 561, 562. pl. 6. Mich. 15 Car. 2.

(F) Devise by Custum ; What Estates.

[Or what Estates are devisable in Respect of the Estate
of Devisor.]

1. T ENANT in Tail to him, and the Heirs of his Body, with Br. Devise,
the Reversion expectant in Fee, cannot devise the Land in
Fee to another, though he dies without Issue. 31. Ant. 3. adjudged.

Quare rationem.

to C. his Daughter in Tail, the Remainder to his right Heirs, and died; C took Baron, and devised to her
Baron in Fee, and died without Issue; the Baron took other Feme, and devised to his Feme for Life, the Re-
mainder to two others, and died, the Sister of A. the first Devise entered upon the second Feme, and the
brought Affize; and it was awarded that she take nothing by her Writ; because the Feme who de-
vised had no Power to devise to the Damage of him in Remainder. Brook lays Quare eare; for
the Remainder in Fee expectant upon the Tail was in the same Feme when her Sister was dead; and the
Devise cannot take Effect till after the Death of the Devisor, as appears elsewhere. — Finch. Devise,
pl. 13. cites S. C.
Devise.

In what the Baron Covert cannot devise to her Husband. Cott. 3 Att. 2. admitted; but Brook, Devise 18. makes a devise there- of.

1. A Feme Covert cannot devise to her Husband. Cott. 3 Att. 2.

2. If an Estate be given to Baron and Feme, and the Heirs of their death without issue, the Remainder to the right Heir of the Baron, the Baron may devise this Remainder to the Feme. 27 Att. 60. Curt.

3. A Devise by Cofty one Trust in Tail in Trust is good without any further Act to bar the Intail in Tail; per Ed. Keeper. Chan. Proc. 228 Hill. 1703. in Cafe of Woolnough v. Woolnough.

(G) What Person may devise.

1. A Feme Covert cannot devise any thing that belongs to her Husband without the Assent of her Husband.

2. With this agrees the Law of Scotland. Skene Regiam Bajo. 53. 7.

3. [But] if a Feme Covert devises Goods to another, and the Baron after her Death delivers the Goods accordingly to the Devisee, this shall bind him. 26 Ed. 3. 71. admitted by Maine.

4. Feme Covert, Devise, pl. 31. cites S. C. - If the by her Will makes an Executor, who proves the Will, and after the Probate the Husband delivers the Goods devised unto the Executor, now he has made the Will good, notwithstanding he was not privy to the making thereof; and yet a colourable Argument may be made why it should not be good, by this Delivery of the Goods made by the Husband &c. For in so much as the Wife had not leave of her Husband to make a Will, it is void &c. But it cannot be laid void, for that it is proved. And also it shall be intended, that by the Delivery of the Goods by the Husband unto the Executors of the Wife according to the Will, that he did at the first assent unto the making of the Will, and such Leave or Assent is sufficient by Word &c. Perk. S. 314. - Per North. Mod. 211. Bish. 16 Car. 2. C. B. the Property in such Cafe passes from the Husband to the Legatee; and it is his Gift.

5. A Feme Covert devises Lands and publishes the Will, and then the Husband dies, and after the dies; this is void. So it is of an Infant though he dies after he comes of full Age; But perhaps if they new publish the Will it will make it good. Plow. Com. 344. a. Trin. 10 Eliz.

6. A Woman seised of Land marries with her Brother, and after makes a Will of it, this is not good; the same Law of a Woman professed who takes Husband. Dyers Reading on the Statute of Wills, 2. Cap. 1. S. 9.

7. The Husband and Wife are divorced by Reason of a Pre Contract, at the Suit of the Husband, the Woman files an Appeal, the which depending, she makes a Will of her Land and dies; this is good. Dyers Reading on the Statute of Wills, 2. Cap. 1. S. 13.


9. A.
Devise.

9. A Man who has a Wife not divorced, takes another Wife who is an Intestate, she cannot make a Will. Dyer's Reading on the Statute of Wills. Cap. 1. S. 17.

10. A mad or lunatick Person cannot, during the Time of the Insanity of his Mind, make a Testament of Lands or Goods, but if during his lucid Intervals he make a Testament and it will be good. Swinb. cap. 2. S. 3. 1st Part and 3d Part.

11. So an Idiot, or one that cannot number 20, or tell what Age he is of, or the like, cannot make a Testament; and albeit he make a will, rational, and sensible Will, it is void. Swinb. 71. Part 2. S. 4. (1) 72. (5) 74. (7)

12. So an Old Man, that by Reason of his Great Age is become Childish again, or so forgetful, that he doth forget his own Name, cannot make a Testament. Swinb. 74. Part 2. S. 5. (1) 2.

13. So it is as it seems of a Will made by a Man that is so excess- sive drunk, that he is deprived of the Use of his Reason and Understanding; otherwise if his Understanding be obscured and his Memory troubled, yet may he make a Testament. Swinb. 75. Part 2. S. 6. (1)

14. A Man that is Deaf and Dumb by Nature cannot make a Testament, unless it appears by sufficient Arguments that he understands what a Testament means, and that he has a Desire to make a Testament, for in such Case he may by Signs and Tokens declare his Testament. Swinb. 86. Part 2. S. 10. (2).

15. But a Man that is so by Accident may by Writing or Signs make a Testament; but if he be not able to write, then he is in the same Case with those that are Deaf and Dumb by Nature, viz. if he has Understanding he may make it by Signs, otherwise not all. Swinb. 86, 87. Part 2. S. 10. (2).

16. So may a Man, that is only Deaf and not Dumb; and such as are Dumb and not Deaf, may write their own Testament if they can, or make them by good and sufficient Signs. Swinb. 87. Part 2. S. 10. (3) 4.

17. An Alien born may make a Will and Executors, and be an Exec- utor, and fuc as an Executor, if he be an Alien Friend and not an Alien Enemy. Swinb. 358. Part 5. S. 13. cites in Marg 3 Eliz. Pacia- tius's Cæs.

An Alien purchaseth
Land in Fee;
and makes a
Will, and
after the
King makes him a Denizen, after he dies, this is good. Dyer's Reading on the Statute of Wills. 5: cap. 1. S. 14.

18. If there be a Custom, that all Lands and Tenements within such a Precinct &c. are deservable by all Manner of Persons, which are of the Age of Fifteen, or above such Age. A Devise made of Lands and Tenements by one of such Age is good. But if a Man seized of such Lands and Tenements in Fee, and thereof does inchose a Stranger unto his Use, and his Heirs and dies, and his Heir being of the Age of Fifteen Years makes his Will, and devises the same Land given in Ufe to him, unto a Stranger in Fee and dies, this Devise is not good &c. Perk. S. 504.

19. Debts on a Bond conditioned, that the Wife should make a Will &c. The Defendant pleaded that his Wife did not make a Will; the Jury found that she made a Will &c. the Jury found that she made a Will, and that she was a Feme Covert at the Time of making it; adjudged that it is not properly a Will, she being a Feme Covert, yet it is a Will within the Intent of the Condition, and good. Cro. C 2:9. pl. 5.


20. Fiduciaries for Land in Fee, upon the Demise of Eliza-
beth Peacock, being a Trial at Bar upon Evidence. It was resolved, Cro. E. 27.
17. S.C and
1562 pl. 6. Patch.
26 Eliz. C.
B. Eden v.
Wood S. P.
adjudged.
that
56

Devise.

that if under the Age of Twenty-one Years makes a Will, and after
comes to full Age, and dies without making a New Publication of it, the
Will is void; but it he publisheth it after he is of full Age, then it is
a good Will, and in this Case it appeared that the * Deviseor was born
16 Feb. 1608. and made his Will 14 Feb. 1624. and published it 15
Feb. 1629. and it was agreed that the publishing of it the 15 Feb.
made it a good Will; for he being born 16 Feb 1608. came of
Age 15 Feb. 1629. for the Day before he was born makes up the
Year. And it was agreed, if one makes a Will the same Day he comes
of full Age it is good; and there shall be no Fractions of a Day, and so
it passed for the Plaintiff that the Will was good. MS. Rep. said
to be Lt. Ch. J. Keeling's. Mich. 15 Car. 2. B. R. Herbert
Turbal.

21. Outlawed Persons, though not outlawed but in an Action Perso-
nal, forfett all their Goods and Chattles, and therefore cannot make any
any Testament thereof. But the Outlawed for Felony, forfetting their
Lands, as well as their Goods and Chattles, cannot make any Testa-
ment of either. Though the Outlawed only in an Action Personal may
make his Testament of Lands, yet no fo of his Goods and Chattles.

22. A Man Outlawed in a Personal Action may make Executors;
for he may have Debts upon Contract, which are not forfeited to
the King. Consequently, for the same Reason Administration of such
a Man's Goods may be granted. Godolph. Orph. Leg. 38.

(H) Devise at Common Law.

To what Person.

A Devise ought to be good, and to take Effect at the Time of the
Death 9 of the De-
vilor; and therefore if a Man feited of Land deviseable, devieth the same Lands unto the Priests of a
College, or of a Chantry, and there is not any such College or Chantry at the Time of the Death
of the Devior, and afterwards such a College or Chantry is made, yet the Deviile is void, because
the Deviilees are Purchasers, and when a Man takes Lands or Tenements by Purchase, he ought to be
of Ability to take the same when it falls unto him by the Purchase, or otherwise he shall not have
the same Sec. Perm 5. 505.

A Devise made in Remainder to a Corporation, where there is no such, is void, though there be such
a Corporation made before the Remainder fell. Otherwise, if the Corporation be begun, but no
Head yet chos. Hob. 32. cites 9 H. 6. 22. and 49 E. 3.

2. A Man might have deviseed to an Infant in Ventre sa mere,
though the Deviileor dies before the Infant was born, for he was in
Effe in some * Respect, and the Freehold shall be in the Hre in

3. The Husband may devise to his Wife, though they are but
one Person in Law, for this does not take Effe till after his
Death. Brook Title Devis, 18.

4 If
Devise.

4. If a Man seizes of Land devivable in Fee, devises the same unto 7. S. for Life, the Remainder Eccles. Saneti Andreæ in Holborn &c. and the Devisor dies, it seems the Remainder is good by way of Devise, but otherwise it would be by way of Grant. Perk. S. 509.

5. A Devise may be made to all such Persons to whom a Grant may be made Mutatis mutandis, unless in Special Cases. Perk. S. 505.

(H. 2) By what Persons at Common Law.

1. The Will of Cesy que Us was good that his Executors shall sell the Wood, or that such should have the Land for 12 Years, or that such should take the Profits of the Land till 40s. are paid. Br. Testament pl. 5. cites 14 H. 7. 15.

(I) To whom in respect of the Estate.

1. A Devise in Tail to the Heir, the Remainder out to another, In a Cui in Vita, the Tenant alleged that he is in by Defeint as Heir to his Father, and prayed his Aid, and the Demanda it said that the Land is devivable, and the Father devised it to the Tenant to have to him and to the Heir of his Body, the Remainder over in Fee &c. to the Plaintiff. It seems where the Father devised to his Son and Heir in Fee, the Heir may waive the Devise, and take to the Defeint; Contra where the Remainder is over at super; for there he can’t waive it to the Prejudice of him in Remainde. And See Perkins that where a Man devises for Life the Remainder over in Fee and dies, and the first Devise refuses, he in Remainder may enter immediately; But where a Man leaves for Term of Life, the Remainder over, and the Tenant for Life refuses to take Livery, all is void; Note a Diversity. Br. Devise, pl. 4. cites S. C.

2. Note, it was holden by Chomley Serjeant, Plowden, and many others, in the Case of the President of Corpus Christi College in Oxford, That if the said Master or President of any such College, by his Will devises any Land to his College and dies, such Devise is void; For at the Time when the Devise should take Effect, the College is without a Head, and so not capable of such Devise; for it was then an imperfect Body, and so it was holden by the Judges upon good Advice thereof. 4 Le. 223, pl 357. Tempore Reg. Eliz. B. R. The President of Corpus Christi College’s Cale.

3. If a Man seizes of Land devivable in Fee, he may devise the same Land unto his Executors for Years, for Life, in Tail, or in Fee &c. Perk. S. 508.

(I. 2.) Statutes enabling to Devises.

20 H. 3. cap. 2. Widows may bequeath the Crop of the Ground, as well of their Dowers as of other Lands and Tenements, saving to the Lords of the Fee their Services.

28 H. 4. cap. 11. S. 6. In Case any Incumbent happens to die, and before his Death hath caus’d any of his Glebe Lands to be man’d and toun at his proper Costs and Charges, he may make and declare his Testament of all

For Expositions on these Statutes, see the following Division.
all the Profits of the Corn growing upon the said Globe Lands so manured and sown.

3. 32 H. 8. cap. 1. S. 1. Every Person having any Manors, Lands, Tenements, or Hereditaments, holden in Socage, or of the Nature of Socage-Tenure (and not having any Lands &c. holden of the King by Knights-Service, by Socage-Tenure in Chief, or of the Nature of Socage-Tenure in Chief, nor of any other Person by Knights-Service) shall have Power to give, dispose, will, and devise, as well by his Last Will and Testament in Writing or otherwise, by any Act or Acts lawfully executed in his Life, all his said Manors, Lands, Tenements, and Hereditaments at his Pleasure.

4. All Lands holden in Socage in Chief, if none by Knights-Service.

5. And every Person having any Manors, Lands, Tenements, and Hereditaments of Estate of Inheritance holden of the King in Chief by Knights-Service, or of the Nature of Knight's-Service in Chief, shall have Power by his Last Will, or otherwise by any Act lawfully executed in his Life, give, dispose, will, or assign two Parts of the same Manors, Lands &c. in three Parts to be divided, or as much of the said Manors, Lands &c. as shall amount to the yearly Value of two Parts of the same, to and for the Advancement of his Wife, Preferment of his Children, and Payment of his Debts, or otherwise at his Will and Pleasure.

6. As also of Lands holden of the King by Knight's-Service in Chief, and by Knight's-Service of the King and others.

7. And where Lands are holden by Knight's Service of any other than of the King, and other Lands in Socage.

8. Two Thirds of Lands holden only of the King by Knight's Service and not in Chief, and in Chief of the King, and of others may be devised.

9. 34 & 35 H. 8. cap. 5. The Words Of Estate of Inheritance in 32 H. 8. shall be expounded of Estates in Fee Simple only.

10. And every Person having a Sole Estate, or Interest in Fee Simple, or feiled in Fee Simple in Coparcenary or in common in Fee Simple of any Manors, Lands, Tenements, Rents, or other Hereditaments, in Poilification, Reversion, or Remainder, or of Rents and Services incident to any Reversion or Remainder, and having no Manors, Lands, or Tenements holden of the King, or any other by Knight's-Service, shall have Power to give, dispose, will or devise to any Person or Persons, except Bodies Politick and Corporate, by his last Will and Testament in Writing, or by his Last Will and Testament in Writing, or by an Act lawfully executed in his Life, by himself solely, or by himself and others jointly, severally, or particularly, or by all those Ways, as much as in him of Right is or shall be all his said Manors, Lands, Tenements, Rents, or Hereditaments, or any Rents common, or other Profits out of the same at his own Will and Pleasure.

11. And all Persons having a sole Estate or Interest in Fee Simple, or feiled in Fee Simple in Coparcenary or in common in Fee Simple, of any Manors, Lands, &c. holden of the King by Knight's-Service in Chief, shall have Power to dispose or will to any Person, except Bodies Politick or Corporate, two Parts of the said Manors, Lands &c. as aforesaid, at his Will and Pleasure, and the said Will so declared shall be good for two Parts of the said Lands &c. although the Will be made of the Whole.

12. Of holden of the King and others by Knight's-Service.

13. And shall be good for two Parts, though made of the Whole.

See tit Tenures (O. a).

14. 12 Car. 2. cap. 24. All Tenures by Knight's Service, and by Socage in Capite of the King, are by this Act taken away and discharg'd, and all Tenures turned into free and common Socage, so that now no Person lies under any Restraint in the Disposal of his Lands, but he may devise all or any Part of his Lands by his Last Will and Testament at his Pleasure.

15. 29 Car. 2. cap. 3. Any Estates held pur autre vie or the Life of another, shall be devisable by Will.
(I. 3) What might or may be devised &c.

1. If a Man holds three several Manors of three several Lords in Chivalry, and each of equal Value, he cannot make his Will of two of the other Manors, leaving the third Manor to the Heir, but of two Parts of every Manor; for otherwise he shall prejudice the other two Lords. Br. Testament, pl. 19. cites 35 H. 8.

2. Note, for Law, and by the Chancellor of England and Justices, if the Tenant who holds of the King in Capite, in Chivalry give all his Land to a Stranger by an Act executed in his Life, and dies, yet the King shall have the third Part in Ward, and shall have the Heir in Ward if he be within Age, and if of full Age he shall have the Primer Seisin of the third Part, virtute istius clausurae in the Statute 32 H. 8. 1. Saving to the King, Wards, primer Seisin, Livery &c. by which it appears, that the Intent of the Act is, that the King shall have so much as if the Tenant had made a Will and had died seised; but by all, after, the King is served of his Duty of it, the Gift is good to the Donee against the Heir; quod nota. Br. Testament, pl. 24. cites 2 Eliz.

3. A thing suspended may be devised, as when Husband and Wife S. C. cited were Joint-Tenants of Lands in Fee, and the Queen had a Rent out of it in Fee, which the gives to the Husband and his Heirs; The Husband devises the Rent and dies, it is a good Devise notwithstanding the Suspension. Arg. 3. Le. 154. cites D. 319. [b. pl. 16. Mich.] 15. Eliz. the Statute of 27 H. 8. be devised, by which Devise the Ufe is suspended, and afterwards during the Devisee Cehuy que ufe by his Will devise, that his Feoffees shall re-enter, and then make an Estate to J. S. in Fee, the same is a good Devise, for by that Devise the Truth and Confidence repaid by Cehuy que ufe. in the Feoffees is not suspended; per Wray Ch. J. Le. 237. pl. 543. 18 Eliz. B. R. in Case of Manning v. Andrews.

4. Tenant by Curtesy grants over his Estate, and the Grantee devises it and dies. This was held a void Devise and out of the Statute of Wills, Cro. E. 38. in a Note cites 17. Eliz. Delapet's Case.

5. What one bas as Executor he cannot devide to another; for immediately on his Death the Thing is to the Ufe of the first Teitator, and his Executors have it as Executors of the first Teitator and to his Ufe. Pl. Com 525. b. 19 Eliz. B. R. Bransby v. Grantham.

6. If the Queen grants to one and his Heirs bona & catalla felonum & fugitivorum, or utlagatorum, Fines, Ameretiments &c. within such a Vill or Manor, the Grantee cannot devide the same to another, nor leave them to descend for a third Part, because they are not of any annual Value, and therefore the Statutes do not extend to them. But if a Man be feised of a Manor to which a Leer, or Wait and Stray, or any other Heredimain which is not of any annual Value is appendant or appurtenance, there by the Devise of the Manor with the Appurtenances thereof shall pass as Incidents to the Manor; For since the Statute inables him by express Words to devide the Manor, it inables him consequently to devise it with all its Incidents and Appurtenances. 3 Rep. 32 b. and to have a determined by Alderfon Ch. J. and Peryam J. of C. B. on Conferences with divers other Justices, Palech. 25 Eliz. in Baker's Case.

7. It hath been doubted, whether Tribes are devisable by Will; said per Cur. Le 23. pl. 29. Trin. 26 Eliz. B. R. in Case of Withy v. Saunders.

8. Rent extinguised cannot be devised. 2 And. 194, 195. Trin. 29 Eliz. in pl. 11.

9. The
9. The Words of a Will were, viz. If A. pays his Money due on Mortgage at Michaelmas next (that being the Time of Payment) then I devise that B. shall have it. This Devise of a Possibility is not good; Per Car. 3 E. 195. in pl. 244. Hill. 29 Eliz. C. B. and denied the Case cited by Fennor of 12 E. 2. Fizh. Condition. 9. where such Devise held good.

10. Lands in H. were jointured on the Wife. The Husband, in Consideration she would waive her Jointure in H. devised to her the Manor of T. for her Life. She agreed to the Devise. Resolved by the greater Part of the Justices in Cam. Scaci. that the leaving the Jointure made an immediate Detent by Relation to the Heir, and the Devise was not such a Person having Lands as could dispose of it according to the Statute. Mo. 254. 255. pl. 401. Mich. 29 & 30 Eliz. Butler v. Baker.

11. A Devise of an Assignment in Gross is void, because it is of annual Value, whereas the King shall have the third Part; Per Anderdon Ch. J. but the other three J. held e contra, and so it was adjudged. Ow. 24 Mich. 33 & 34 Eliz. in Cleer's Case.


13. Tenant in Capite of Three Messuages of Two in Fee, and of one in Tail, all being held in Capite, and devis'd all his Mesuages to a Stranger; it was held that the Devise was good within 32 H. 8. for the two Mansions which he held in Fee, and void for the Third. For he being Tenant in Tail of the Third Manor, and that descending to his Issue is a sufficient Performance of the Statute of 32 H. 8. and the Intent of it satisfied. Cro. E. 266 pl. 3. Trin. 34 Eliz. B. R. Jermyngham v. Cornwallis.

14. Liberties appendant to Land are devisable as those, which are arising out of the Land. A *Reversion on an Email, whereunto no Rent is annexed, is devisable, yet it is not of any Annual Value. Cro. E. 360 Mich. 36 & 37 Eliz. C. in Case of Cleer v. Peacock.

15. Where a Man hath a Rent out of Lands to himself and to his Heirs during the Life of another, he cannot devise this Rent, either at Common Law, or by the Statutes 32 & 34 H. 8. of Wills, because he is not feified of an absolute Estate in Fee, but only during the Life of another; and the Statutes require that the Teintor should be feigned of an absolute Estate in Fee. Court divided, and to no Judgment. Cro. E. 804. pl. 5. Hill. 43 Eliz. B. R. Gawen v. Ramts.

16. The Ancient Jewels of the Crown are Heir Looms and shall descend to the next Successor and are not devisable by Testament. Co. Litt. 18. b.

17. If a Man be seised of a House and possessor of divers Heir-Looms, that by Custom have gone with the House from Heir to Heir, and by his Will devested away these Heir-Looms, this Devise is void; for the Will takes effect after his Death, and by his Death the Heir-Looms by ancient Custom are vested in the Heir, and the Law prefers the Custom before the Devise; and so it is if the Lord ought
Devise.

ought to have a Herriot against his Tenant, and the Tenant devises away all his Goods, yet the Lord shall have his Herriot for the Reason aforesaid. Co. Litt. 185. b. 18 An Incumbent seized in Fee of an Advowson devised the next Pre-
sentation viz. that his Executors, two, three, or any one of them, should present J. S. when the Church should become void; though the Church becomes not void by the Death of the De-
visor, this is a good Devise, for though the Will has no Effect but the Death of the Devisor, yet it has an Inception in his Life-time, and this shall make it good. 3 Bult. 425, 43. Trin. 13 Jac. by Do-
deridge J in Case of Harris v. Austin. 19 A naked Possibility cannot be devised, but an Intereft, though it be in Contingency, may; Agreed; per Cur. 2 Roll Rep. 129. Mich. 17 Jac. B. R. in the Case of Child v. Baily. 20 Copyholds are not devisable by Will within the 32 H. 8. of Wills ; Agreed. 2 Roll Rep. 383. Mich. 21 Jac. B. R. in the Case of Roydren v. Malter. 21 In some Cases a Man may devise a Right of Entry, as Ter-
mor devised his Term is outed and died, the Executors enter now the Term Devise is good. Arg. 2 Roll Rep. 426. Hill. 21 Jac. B. R. in the Serjeant's Cafe. and before Regrefs dies, if Executor enters or recovers the Term, the Devise is good. ibid. 22 If A. devises a Term to B. and dies, and B. devises it to C. and dies, and the Executor of A. agrees to the first Devisor, the Devise is good, and the Executor of A. is compellable by C. to allot. Arg. 2 Roll. R. 426. Hill. 21 Jac. B. R. in the Serjeants Cafe. A had a Term for a 1000 Years, and devis'd, and devis'd it to a for Life, Re-
mainder to C. and made D. Executor: C. devis'd his Interest to J. S. the Quefion was thereupon, Whether his Term, if not allotted to by the Executor, and which passed only as an Executory De-
vife, could pass by the Will of C. the Devisor; and held that it was only a Possibility, one that nothing passed, per Holt C. J. who cited Mar. 157 Southward v. Millward. — And Holt said that the Ex-
ecutor must allot to a Legacy, else nothing passes in the Case of a Term, 11 Mod. 127. Trin. 6 Ann. B. R. in Case of Brunker v. Cook. 23 A Choice en Action may be devised; As if A. is in Debt by Bond to B. in 160 l. and B. devises the 100 l. to C. when the Executors have re-
covered against A. they shall pay it to C. and C. shall have no other

24 Where a Man has a Joint-Intereft in Chattles devisable &c. at the
Time of his Death, a Devise made thereof is nothing worth, Causa patet. And where such Chattels are annexed unto the Freehold or Inheritance, so as they cannot be severed from the same by him who has Property in them; then a Devise made by him, who has Property in them is not good Perk. s 526. 25 Ten in Right of the Wife is not devisable by the Husband by Co Litt 57. 344, 345. Hill 9 Car. B. R. cites the Case of Bransby v. Grantham. His. C. 232. Extent &c in Right of his Wife, or has the next Avoidance of a Church in her Right, he cannot by Will bequeath any of those. Wentw. Off. Executors, 15, 19. R. 26 F. 316
26. *Estate by Devise*, as to the Deviseor and Devisee, shall be held as an Estate, and shall pass between them as an Estate by the Devise within the Statute 32 H. 8. per Jones J. Jo. 457. Trin. 16 Car. B. R. And to this Purpose he cited 4 Rep. 53. a.

27. He that has a *Possibility of a Term* after the Death of another may devise it; Decreed. Polplex 44. 16 May, 16 Car. 1. Veizy v. Pinwell.

28. A Devise of a *Lease for Years* to A. S. during his Life, remainder to J. H. who makes his Will and devises the same, and dies; This is void, for it being but a Possibility it cannot be devised, and after the Death of A. B. it shall go to the Executors of J. H. Mar. 137. pl. 209. Mich. 17 Car. Southward v. Millward.

29. Two *Jointants*, and to the *Heir* of one of them he that has the Reversion cannot devise it; Per Windham. Twifden J. said, that there had been Opinions both Ways, and that it had often been a Question. Raym. 40 Mich. 13 Car. 2. B. R.

30. A *Portion* was settled by Deed of A. on B. and C. his Children, as should be unmarried or not provided for at the *Time of the said A*’s decease, at their respective Ages of Twenty-one. B. was married to M. and had some Allowance for Maintenance made him by A. viz. 301. a Year paid to B. during the said B’s Life, and afterwards to M. so long as A. lived, B. devised his Portion to M. his Wife, whom B. made his *Executeur*. Decreed the Portion to M. Ch. Rep. 254. 17 Car. 2. Corbett v. Morris.

31. An *Estate* dependable and determinable upon the *Death of Tenant in Tail*, is not devisable within 32 H. 8. & 34 H. 8 But Estates of Inheritance within that Statute are Estates of Fee-Simple only. Saund. 261. Palfch. 21 Car. 2. in Café of Took v. Glacock.


33. An *Interest in a Trust* is in Equity assailable or devisable; 1 Chan. Café 211. Trin. 23 Car. 2. per Wild J. and agreed by Rainsford and the Master of the Rolls in the Café of Cornbury v. Middleton.


35. The Court said, that the Statute of Wills 32 H. 8. cap. 1. had begotten more Debate, Suits and Troubles than it remedied, and was of greater Mischief than the Common-Law. 3 Keb. 450. pl. 14. Palfch. 27 Car. 2. B. R. in Café of Gunton v. Andrews.

36. If the *Estate of the Deviseor be turned to a Right at the Time of his Death*, the Will cannot operate upon it; Per Ellis J. Mod. 217. Trin. 28 Car. 2. C. B.

37. Ld. Chancellor said he cannot tell, but before the Statute, if a *Mortgage before the Condition broken had made a Devise &c. it is void*; For a Condition is not devisable, but after Forfeiture the Equity of
Devise.

38. A Devise of a Chattel real in gross is good, if the Circumstances about Nuncupative Wills be determined in 29 Car. 2. c. 3. be observed. Sed c ecentum where a Lease &c. is ordered to attend the Inheritance. 2 Can. Cafes. 49. 55. Hill and Trin. 33 Car. 2. Tiffin v. Tiffin.
39. Lands are settled on Marriage, and a Term raised for Daughters Fortunes, the only Child is a Daughter, on whom the Fee devolves the dies an Infant and indebted, and devised away the Portion charged on the Estate, her Heirs intituled the Term was merged in the Daughter; as being also Heir at Law. Matter of the Rolls decreed the Portion to go according to the Will of the Daughter, and so relieved against the Merger. 2 Vern. R. 90. pl. 86. Mich. 1688. Powell v. Morgan.
41. A having Remainder in Tail with Reversion in Fee devised to one Son in Tail, Remainder to the other in fee; it is good, because it alters the Tenure. 1 Salk. 233. pl. 11. Trin. 9 W. 3. B. R. Badger v. Lloyd.
42. J. S. who was to have had a considerable Advantage by a Will, was drawn in by Fraud and false Suggestions, to make a Compromise for his Interest, and to give a Release; Afterwards J. S. being sensible of the Fraud makes his Will, and thereby (after other Legacies) he devises all the Rest of his Goods and Chattels whatsoever, to his Wife, upon Condition, that she paid all his Debts, and made her sole Executrix; and it was held, that his Right to get aside the Release was devisable, and the Words proper for that Purpose. Decreed. Trin. 1701. Abr. Equ. Cafes 175. 176. Trin. 1701. Drew v. Merry.
43. Difféfee devisable, and after re-enters, the Devise is good, because by the Entry he was seized ab Initio, so as he might bring Trespaís; Arg. Quod suit concepium. 1 Salk. 237. Mich. 6. Ann. B. R. in Cae of Bunster v. Cooke.
44. A devises his Manor and before his Decease a Tenancy of years, and after the Teftator dies. The Question is, whether the estates Tenancy shall pass, because the Manor is devised and that is Part of it. for this Tenancy is not devisable as a distinct Thing, but as a Part of the whole which he could devise; Per Holt Ch. J. Gibb. 231. Mich. 6 Ann. B. R. in Cae of —— Bunster v. Cooke.

45. A Man seized of a Reversion expectant on an Estate for Life devi-

ves it, and afterwards Tenant for Life dies, and then the Teftator dies, yet it passes; Per Holt Ch. J. Holt's Rep. 248. pl. 13. Mich. 6 Ann. in Cae of Broncker v. Coke.

In Reversion expectant on an Estate Tail, and before his Death the Tenant in Tail dies without Issue, there Lands will pass though a Reversion only at the Time of making the Will, because he is feised at the Time as much as he can be; and it is a certain present Interest, though to commence in future, and all the Estate he could give he intended him. —— Gibb. 231. S. C. and S. P. by Holt Ch. J. —— 1 Salk. 257. pl. 16. S. C. & S. P. agreed per Cur.

47. A future Interest is devisable. Per Cur. 2 Vern. 679. Hill. 1711.
Greenhill v. Greenhill.
48. Though a Condition be not in Strickness of Law devisable, yet since since the Statute of Uses, the Devise may take Benefit of it by
Devise.


Holt, Ch. J. in the De- late of the Cafe of Brecker v. v. Coke, held strongly in Opinion with this of Serjeant Lovelane, but when he came to deliver the Opinion of the Court he held it not to be Law, and held that 39 H. 6. 18 b. Br. Devife, if. does not warrant that Opin- ion, (to which Powell T. who likewise held otherwise before, now agreed) Holt's Rep. 247, Brecker v. Coke. — Med. 127, 128. S. C. cited and remarked upon by Holt Ch. J. accordingly.

2. Devise of Lands, in which Devise has nothing, and after be- purchases the Land, this is no Devise within the Statute of Wills. Mo. 255. pl. 421. Mich. 29 & 30 Eliz. in Cafe of Euler v. Baker.

S. C. cited yet Holt Ch. J. Holt's Rep. 247, in Cafe of Brecker v. Coke, Mo. 254. pl. 201. S. C. agreed, 248. pl. 322. S. C. agreed by the great- er Part of the Judges and says that of the same Opinion were Wray Ch. J. and Man- wood in their Lives — Poph. 87. S. C. re- solved by the greater Part. See the Cafe of Butler v. Coke Resolved according to this Opinion. Hill. 5 Ann.
ther the Commencement or the End of it was full and perfect, for at the Time of the Writing and the Death, he had no Power in respect of the Joint-Estate of H. to dispose of the Manor of T. and by the Death H. survives to the Wife, and part of T. presently descends to the Heir. (3dly,) The Tenant ought to have a sole Estate as well in the Land which he leaves to descend to his Heir, as in the Land which he devises, but here at the Time of making his Will, and at the Time of his Death he had a Joint-Estate with his Wife, to which she could not agree during the Coverture, wherefore the Tenant had a Power to dispose of but two third Parts of that whereof he was sole feized, either at the Time of making his Will, or at least at the Time of his Death. (3dly,) The Statutes give a Liberty to dispose of two third Parts of &c. what he cannot dispose by some Act executed in his Life-time. This shall not be taken for any of &c. whereof he may dispose two Parts by Authority of this Act; But in this Case he could not make any Disposition of the Manor of H. but only during the Coverture. (4thly,) The Statute intended the Lord should have an equal it as a greater Benefit for his third Part as the Devisee should have for his two Parts, but in this Case the Devisee would have two Parts absolutely, and the King but a Possibility for his third Part. if so be that the Wife should disagree thereto, which would make the King in a worse Condition than the Devisee; for the Wife may not or may refuse, and no Time is fixed for her Refusal. (4thly,) The third Part ought to ascend immediately, without a mean Time, but here it survives to the Wife, and Part of T. descends to the Heir, which ought not to be devested out of the Heir by any subsequent Agreement. If a Man be sealed of three Acres by Knight-Service in Capite and makes a Lease of one of the Acres for Life, and then devises the two Acres and dies; this Devise is void for a third Part of the two Acres. 3 Rep. 25. a. to 37. a. Mich. 33. & 34. Eliz. B. R. Burcher v. Baker.

5. A Man devised all his Lands in A. and afterwards purchased Lands in the same Town, and afterwards one comes to him to take a Lease of this Land newly purchased, which the Tenant refused to Let, and said, that these Lands newly purchased should go as his other Lands; and upon his Death-Beed adds a Codicil to his Will, but says nothing of his purchased Lands, and adjudged that the purchased Land's shall pass 2 Brownl. 74, 75. cited as adjudged. Trin. 37. Eliz. Bedford v. Vernam.

6. Termor devises his Term to B and then mortgages it, and renounces it and dies; B shall have the Reedue. D. 143. b. pl. 55. Marg. cites 40 & 41. Eliz. B. R. Howe's Cafe.


9. If a Man devises all his Lands for Payment of his Debts, and per- S. C. cited choses Lands afterwards, Lord Keeper said he would decree a Sale tho' there were no Precedent Articles. 2 Chan. Cafe. 144. Trin. 35. Car. 2. Prideaux v. Gibbon.

10. If a Man devises a Term for Years which he had not at the Time of the Devise, but purchased some time before his Death, Holt, Ch. J. in delivering
delivering the Opinion of the Court in Cause of Brunker (alias Bunner) 
Holt Ch. J. v. Cook, said he doubted very much whether it would be good. 
Suppose for the Purpoe, one takes a College Lease, and another makes his 
Will, and should devise that Lease away to another, and afterwards the 
Testator should purchase that College Land, subseuent to the making of 
his Will, the Question is Whether this would be a good Devise? 
And said, he was inclined to think this would not be a good Devise. 
11 Mod. 126. Trin. 6 Ann.

12. Holt Ch. J. doubted much it a Chattel Real purchased after the 
Will made will pass by the Will. Gibb. 225. 6 Ann. B. K. in Cause of 
Brunker v. Coke.

Powel J. 

13 Holt Ch. J. in delivering the Opinion of the Court said, 
that 16 Car. 2. Bridgman being Chief Justice, took Notice, that Coke in 
the Case of Butler and Baxter, lays a great Stress upon the Word (having) 
but Bridgman said, he did not take it, that it does depend so much 
on the Word (having) as on the Nature of the Thing, and there all 
the Judges of the Exchequer Chamber agreed with him, and Holt said, 
that mere Judgement ought to be for the Defendant. 1st, Because 
a Will is a Will from the making, unless it be revoked. 2dly, Testator 
must be seized before he can dispose. 3dly, Upon the Difference 
between a Real and Personal Eft. 4thly, Because the Will is re-

14. A Codicil, which concerns only Personal Legacies will not amount 
to a Reproduction of the Will fo as to pass Land purchased after 
Falkland.

15. Equity of Redemption of mortgaged Lands foreclosed or released 
after the making the Will do not pass by a Devise of all his Lands. Mich. 

S. C. cited and admired by the Master of the Rolls, but 
took a Difference 
where the Purchase was before the Will made, and where after; for in the left Case Tefator 
had an Equitable Interest in the Land, and fo having no Title could devise nothing. 2 Wms's 

17 A.
17. A. contraried for the Purchase of Land in Trust for B. the Money to be paid,Pollution to be delivered, and Conveyances to be executed four Months after. In the meantime B. made his Will and devised all his Personal Estate to be sold, and the Money to be laid out in confirm'd Land and fettled together with his Freehold Estate on J. S. and devifes to on a Restraint, and his Heirs all his Lands of Inheritance, having no Lands but theree contraried for, Part of which were Customary. The Conveyances were afterwards executed, and then B. died, but without Republication of his Will. Decree first per Ld Cowper, and now per B. dem Verbis Ld. Harcourt, that the Lands pafs, and that no Surrender of the Customary Lands was necessary, B. having only an Equitable Interest in them. Ch. Prec. 329. Hill. 1711. Greenhill v. Greenhill. 

18. There is a Diversity betwixt the Devise of a Real Estate and the Devise of a Personal Estate; as if I devise all my Real and Personal Estate, and afterwards purchase more of each Kind, only the Personal Estate that is purchased afterwards shall pass. The Reason of this Difference seems to be, that with Regard to the Real Estate bought after the making the Will, supposing that not to pafs, till there is one in Law capable of taking it, (viz.) the Heir; but as to the Personal Estate, if the Executor, though made before the acquiring thereof, does not take it, it is uncertain who shall. Per Ld Chancellor. Wms's Rep. 575. Mich. 1719. in Cave of Wind v. Jekyl & al'.

(I. 5) What Persons may devise Emblements.

1. If a Man be seised of Land in Fee, or in Fee Tail, and sows the Wentw. Land, and devifes the Corn growing upon the Land at the Time Off. of Execu- of his Death unto a Stranger, it is a good Devise, notwithstanding curators 19. S. P.

2. But if the Devisor had devised the Trees growing upon the Land Wentw. at the Time of his Death, the Devise as unto the Trees is void, because Off of Execu- that the Heir of the Devisor shall have them, and not the Executors curators 19. S. P.

3. If a Man seised of Land in Fee, as in Right of his Wife, leaves the same Land for Years unto a Stranger, and the Leffor sows the Land, and afterwards the Wife dies, the Corn not being ripe; In this Case the Leffor may devise the Corn growing upon the Land, and yet his Estate was certain and is determined; but a Thing uncertain was the Consequent on the Determination of his Estate &c. Perk. S. 512.

4. If a Man seised of Lands or Tenements for Life, leaves the same unto a Stranger for Years, and the Leffor dies within the Term of Years, in this Case, if the Corn were growing upon the Lands, and not ripe at the Time of the Death of the Leffor, the Leffor may well devise the same &c. Perk. S. 513.

5. But if after the Seizing the Leffor for Years enioys a Stranger, and before the &c. and the Leffor enters for a Forfeiture, he shall have the Corn &c. Perk. S. 515.

6. So of a Leffor for Years upon Condition, Mutatis Mutandis &c. Ibid.

7. And if the Land be recovered against Leffor for Years in a Writ of Wits, he cannot devise the Corn, notwithstanding it be growing upon the Land at the Time of his Death &c. Ibid.

8. And if Land be recovered against his Leffor by a more ancient Title &c. But otherwise it is if a Common Recovery be had against his Leffor,
in a Writ of Entrep en le Post, or in any other Writ by a false and seigni
Title &c. Perk. S. 515.
9. If a Manor is sold of Land in Fee, thereof in toffs a Stranger in Mort-
gage upon Payment, and not Payment on the Part of the Lessor, at a
certain Day, and the Feoffee is the Land, and the Feoffor pays the Mo-
oney at the Day appointed, and enters, now the Feoffee cannot devise
the Corn growing upon the Land, as it is said, Tamen quare. Perk.
S. 516.
10. If a Manor be put in Execution upon a Statute Merchant, and he
who has the Manor in Execution, has a Ward after the Execution, by rea-
on of the Manor, which Ward is as much worth as the Debt does amount
unto, he whole Lands are put in Execution, shall have a Seire Pacias
against the Comies &c. and shall have his Manor back again; but if
the Comies had seced the Land, he may well devise the Corn growing up-
11. And if a Man be seised of Land in Right of his Wife &c. and seizes
the same Land, and devises the Corn growing upon the Land &c. and
dies before the Corn be severed, the Devisee shall have the Corn, and not
the Wife, but otherwise it is of Grafs not severed at the Time of the
12. If a Diffessor be of Land, and he seizes the Land; Now, if the
Diffessor enters or recovers by a Writ of Aife before the Corn be severed,
he may devise the Corn, and so may not the Diffessor; But otherwise it
should be if the Corn be severed before his Entry, or before his Recovery,
norwithstanding that it remains upon the Land, for then the Diffessor may
devise the same &c. But the Law is otherwise in the same Cae of
Trees severed, which were growing upon the Land &c. Perk. S. 519.
13. And it is said, If Tenant in Tail of Land beased the same Land for
Life, and the Leffe severs the same Land, and the Tenant in Tail dies,
and the Issie in Tail recovers in a Formedon en le Defecimeter, before the Corn
is severed, the Issie in Tail may well devise the Corn, Tamen quare.
Perk. S. 520.
14. If a Man seised of Land in Fee, has Issie a Daughter and dies, his
Femebeing big with Child of a Son, and the Daughter enters and seizes the
Land, and after the Sowing and before the Severance, the Son is born, and
one of his next Friends enters for bis; yet the Daughter may devise the
Corn growing upon the Land Causa puter Perk. S. 521.
15. But if after the Sowing, and before the Son is born, the Mother has
recovered her Dower against the Daughter, and the Land seizes be assigned
unto her by the Sheriff for her Dower in the Allowance of other Lands,
now the Mother may devise the Corn growing upon the Land, and the
16. The Statute of Merton cap. 2. which gives, Quad emnes videm
de cetero possess legere blanda &c. as unto this Point, is but in Affer-
ance of the Common-Law; for if Tenant in Dower &c. seizes the
Land which the holds in Dower, and makes her Executors and dies,
the Corn not being, the Executors shall have the Corn, notwithstanding
they are not severed, by the Common-Law. And to be
short, Tenant in Dower may devise the Corn growing upon the Land,
which he holds in Dower at the Time of her Death, by the Common
Law. And so was the Law taken in 4 H. 3. Devile 6. which was
16 Years before the making of the Statute of Merton &c. Perk.
S. 522.
(I. 6) Good. And what will amount to a Devise.

1. O N E, who had Feoffees seised to his Use, devised by his Will, that his Executors should sell the Woods &c. Per Cabe it is a void Will, for it is prejudicial to the Heir, contrary to Brian and Vavior, for the Statute directs, that all Feoffments, Gifts &c. by Cetty que Usc shall be good, and the same Law of a Will, and he may devise for Years by his Will, and he may devise the Profits or Part of them, till such a Debt be paid, and therefore the Will is good of the Woods, which Wood and Divers agreed, Quod Nota. Br. Feoffments al Usfs. pl. 1r. cites 14 H. 7. 14.

2. If I release all my Lands to A. and his Heirs, this is a good Devise to A. and his Heirs of those Lands; by all the Justices. And. 33. pl 83. Mich. 37 H. 8. Anon.

3. Where a Man had Feoffees to his Use before the Statute of Uses made Anno 27 H. 8. and after the same Statute, and also after the Statue of 32 H. 8. of Wills be willd that his Feoffees make Effate to W. N. and his Heirs of his Body and died, this is a good Will and De- vide, by Reason of the Intention &c. Br. Devile, pl. 43. cites P. 38 H. 8. per Baldwin Shelley and Mountague J. determined for Law.

4. L. infeoffed B. and C. in Truit to perform his Will, and after- wards by his Will declares, that his Feoffees should seised to the Use of J. S. his Daughter, who was his Baitard, this is a good Devi- vide of the Land by the Intention of Devisor. D. 323. pl. 26. Paich. 25 Eliz. Lingen's Cafe.

J. S. Ibid.—Though in the first Cafe the Feoffees cannot stand seised to the said Use. Ibid.

5. A. Will made after this Manner, I have made a Leaf for Tenen- Dale. 34. pl. ty one to J. S. paying but but 10 s. Rent, this is a good Leaf by 24 S. C. the Will; for this Word (I have) shall be taken in the present Tenen- ty as a Deed of Feoffment this Word (Dedi) shall. Mo. 31. pl. 101. This Cafe is the Commend. per 7 J. against

1. 2 Vent. 57. Wright v. Wywell.—2 Lev. 259, 260. S C. Trin. 1 W. & M. in C. B. Powell J. held according to the Cafe in Mo. 31. pl. 101. but the other three Justices e contra.
6. A devised Land to his Wife whom he made Executrix to use at her Pleasure, and requested her to pay his Debts; Per Anderson and Walmley J. against Periam, the Money in her Hands, for which the said Lands, are Ass'ts; but adjournet. Le 224 pl. 306. Mich. 32 & 33 Eliz. C. B. Alexander v. Lady Greatham.  

7. A Rent was devised to J. S. and Claufula Diftributionis; Though Claufula Diftributionis is not Sufficient in a Grant by Deed to create a Rent, yet it was adjudged good here, becaufe it was by Devife. Mo. 592. pl. 798. Trin. 46 Eliz. Kingflwell v. Cawdrey.

8. Doctor Ford by his Will devised certain Lands to his Wife in these Words, (Non per Viam Fidei committit) for which his Son might sue her, but hoping if his Son grew thriftwe, that her Death doe would leave the Remainder of thefe Leafe to him; She married Grey-lil; but before Marriage Greyfyll wrote unto her, that she shoul have the disposing of thofe Leafes at her Death; after the Marriage Greyfl fells the Leafes; Ford brings his Suit in Chancery, and had no Help by the Opinion of the Court. Cary's Rep. 31. 32. cites 31 May. 1 Jac. 1603.

9. One may devife his Eftate by his last Will in such a Manner as he cannot make any Grant or Conveyance thereof in his Life; Resolved, 8 Rep. 95. a. Trin. 7 Jac. the first Revolution in Matthew Manning's Cafe.

10. As if a Man feiled of Sogage Lands in Fee devifes, that if A. pays 100 L. to his Executors, that he shal have the Land to him and his Heirs, or in Tail, or for Life &c. and dies; and afterwards A. pays the 100 L. A. shal have the Land by this Executory Devife, and yet he could not have by any Grant or Conveyance Executory at Common Law; but this it stands well with the Nature of a Devife; Per Cur. 8 Rep. 95. a. Trin. 7 Jac. in Manning's Cafe.

11. A devised his Freehold and Leasehold Lands to B. his Son and Heir (whom he made Executor) excepting 20L. per Annum for seven Years, to be empoyed thus, viz. 100L. to D. his Daughter to be paid within five Years; and 300L. to his Daughter E. within Seven Years; This is a meer Perfonal Legacy, and B. being dead after the seven Years, and not having paid, and no Action lying on Account against B's Executors at Law, or otherwise, D. and E. have their Remedy in Spiritual Court. Cro. J. 279. pl. 9. Pach. 9 Jac. B. R. Love v. Napleifden.

12. A devifed Legacies, and afterwards said to his Executor I would have you increafe them to fuch a Sum. This by the Civil Law is termed Commifium Fidei, and held a good Legacy. Cro. J. 345. pl. 14. Pach. 12 Jac. B. R. Penfon v. Cartwright.

13. Devife to A. but if fuch and fuch Things happen (mentioning them) then the fame shall be removed and put out to the Use of B. When the Contingents happen, B. shall take. Cro. J. 394. pl. 7. Hill. 13 Jac. B. R. Blandford v. Blandford.

14. Devife was of 100L. to B. and that his Executors shou'd double it. This was said to be a Devife of 200L. and the other Side did not oppofe it. Raym. 23. Mich. 13 Car. 2. B. R. in Cafe of Nicholfon v. Sherman.

Legacies so devifed to be doubled are Executory Legacies of the first Testator, and not the Legacies of the Executor, who died before the Action brought, which was afterwards brought against the Executor's Executor. ——Keb. 116. pl. 20. S. C. says, this Point was waived as a sufficient devife of a Legacy, and that it was not at their Diferention.

16. Testator
Devise.

15. Teftator in his Will desires his Executor to give to A. 200l. but left it wholly to the Executor's own free Will How, when, and in what Manner, to dispose of it to him; per Cur. 'tis a good Legacy, and decreed the Payment. Chan. Rep. 246. 16 Car. 2. Brett v. Osley: 1718. Jones

5. P. Only in this Case the Defire was Verbal, but the Defendant own'd it by her Answer. The Words were, You may if you please give 100l. to A. but I leave it entirely to you; Parker C. held it a Trust, and decreed the Money to A. bar if any particular Influence of Mr. Behannon had been assigned in A. it might have forfeited the Trust. 10 Mod. 404 — G. Equ. R. 146. says, that this Decree was against the Opinion of several at the Bar.

16. A Paper Writing left with a Will, and written after, though it will not amount to a Codicil, yet it is a good Declaration of the Intent of the Teftator, whom he intended to take as younger Children by the said Will. Ch. R. 265. 18 and 19 Car. 2 Hawtree v. Trollopl. A. poofied of a Lease for Years, devised it to his Wife, in hopes she would leave it to his Son. This is no Trust; and theafter Husband of the Wife having sold the Term, a Bill was brought by the Son to be relieved, it was dismissed; cited per Finch C. as a Case in Time in the Time of Lord Ch. Egerton. Ch. Cafes 310. Hill. 30 and 31 Car. 2. A. bequeathed his Personal Estate to his Wife for Life, and what she has left at her Death, it is my Will, and I do defire her, that it may be equally distributed between my own Kindred and hers. A. died, and the Widow marrying, a Bill was brought by the Relations to have an Inventory and Security given, because the had only the Use of it during Life; and the Words (what she has left) shall refer to Bona Peritura, or such as may be quite worn out with uting. But it being answer'd, that the Estate being so small that the could not live upon it without spending the Stock, the Matter of the Rolls said, that if that be so, it might alter the Case, and directed the Value to be stated by a Matter, and then he would give further Directions. Ch. Prec. 71. pl. 64. Patch. 1697. Cooper v. Williams.

19. Directions in a Will that the Heir shall renounce all his Right in such Lands to a Younger Son, amounts to a Devise. Ld. Raym. Rep. 187. Patch. 9 W. 3. cited by Treby Ch. J. as a Point lately referred to Holt Ch. J. and himself by the Ld. Chancellor in the Cafes of Hodginton v. Star. A Restit in a Codicil cannot amount to a Devise; as mentioning S. C. & in the Codicil that he had given an Estate Tail to B. whereas the Estate S. P held he gave to B. by the express Words was but an Estate for Life to B. according. Wma's Rep. 54. 55. Hill. 1702. Per Ld. Wright.

20. A Devise in a Codicil cannot amount to a Devise; as mentioning S. C. & in the Codicil that he had given an Estate Tail to B. whereas the Estate S. P held he gave to B. by the express Words was but an Estate for Life to B. according. Wma's Rep. 54. 55. Hill. 1702. Per Ld. Wright.

21. Words of Recommendation or Devise in a Will are always expound- It was said as a Devise; per Matter of the Rolls. Ch. Prec. 202. Trin. 1702. mitted, that the Words I desire, or I will, amount to an Expres Devise; And that if a Devise be to A. for Life, directing him at his Decease to give it to J. S. that amounts only to an Use of it to the Devisee for Life, remainder over to J. S. 2 Vern. 467. pl. 427. Mich. 1704. in Case of Eales v. England. S. C.

22. A. by Will gives 300l. to B. and declares his Will and Devise that B. give the 300l. to M. his Daughter, at his Death, or sooner, if there be Occasion for her Advancement. It was admitted that (I desire) or (I will) amounts to an express Devise; and that it a Devise be to B. for Life, directing him at his Decease to give it to J. S. that amounts only to a Devise of the Use of it to B. Remainder over to J. S. and decreed the
The Noy's take for 24-

1. Being angry with B. his Son, and doubting if B. really was his Son or not, devised almost all his Estate to C. and on delivering this Will to C. A. said to C. that if B. behaved well, he might give him 40l. per Quarter, and if he used well he might give him 40l. a Quarter. Decree B. the 4q. per Quarter. 2 Vern. 559. pl. 507. Trin. 1706. Kingman v. Kingman.

25. A Baron gives all his Estate to his Wife, and says I desire and request my said Wife to give all her Estate which she shall have at the Time of her Death to her and my nearest Relations equally among them. Harcourt Chancellor. The Words of the Will being to very general, both in respect of the Money, and the Persons to take it, it does not amount to a Devise, but it is only a Recommendation to the Wife to make such a Disposition; but if he had desired the would have given it to a particular Person, it is a good Devise and a Trust. A Devise to the nearest Relations is good, and such shall be accounted as are next by the Statute of Distributions. 1712. in Cunc.

26. So a Request or Desire to pay Debts, is as a positive Devise, for a Request to pay Debts can mean nothing but to charge the Land; for the Personal in all Events is liable. Hill. 1715. Trot v. Vernon.—In Sir Oliver Adcob's Case the Devise is Executor, and desired to see the Will performed, and Real and Personal both liable to Debts.

27. Testament bequeath his Personal Estate to his Wife, and adds, I do not doubt but my Wife will be kind to my Child; the Court thought these Words gave a Right to no Child in particular, or a Right to any particular Part of the Estate, but that the Clause was void for Uncertainty. 9 Mod. 122. Hill. 11 Geo. Buggins v. Yeats.

(I. 7) Good. In regard of the Person to whom. Persons capable or not.

1. Persons outlawed in a Personal Action, or Convicted or attainted of Felony or Treason are capable of a Devise, though it is liable to Forfeiture, as the Case is. Noy's Comp. L. 100.

2. A Devise to the Heir of Nicholas, who is an Alien, is void. 1st, Because Nicholas was alive, et nemo est Hares viventes. 2ndly, Nich. being an Alien could not have an Heir. 1 Lev. 59. Hill. 13 & 14 Car. 2. B. R. Collingwood v. Pace.

For this Reason it has been determined, that where
Devise.

4. Upon a Trial at Bar in Ejectment, the Case was this. One Edmund Smith being seized in Fee of the Premises in Question, devises the same to Amy his Widow and her Heirs, Amy was a Papist, and at the Time of the Death of the Testator there was above the Age of Eighteen Years, and being of full Age conveyed the Premises for a valuable Consideration to one Stanton a Protestant and his Heirs, the Lessee of the Plaintiff claimed as Heir at Law of the Testator, and the Defendant claimed under Stanton.

Upon this Case two Questions were made, 1st, Whether the Testator was Compos Mentis or not, at the Time of making the Will. And 2d, Whether the Conveyance made by Amy the Widow, being for a Valuable Consideration was good within the Statute of 3 George 1.

The First of these Questions depending upon a Matter of Fact to be left to the Jury the Counsel for the Lessee of the Plaintiff insisted that if it was against him, yet that this Statute of 3 Geo. 1. does not avoid the Disability created by the Statute of 11 & 12 of W. 3. cap. 4. which disables Papists to take the Purchase, in Regard, that in the Statute of King George there is an express Proviation, that this Part of the Statute of King William, shall, notwithstanding that Statute of King George, be, and remain in full Force, and the Court declared their Opinion to be so, but in Regard, if the other Questions should be with the Plaintiff it would be sufficient to determine the Right, it was left to the Jury, who found that the Testator was Non Compos, and therefore gave a Verdict for the Plaintiff.

Note, it was also made a Question to be determined by the Jury, whether the Conveyance to Stanton was upon a Valuable Consideration, or not, and so three Questions were made, two of which previous to the Question upon the Point in Law on the Constitution of the Statutes, and the Question on this was, whether by the Stat. 3 Geo. 1. cap. 18. S. 4. & 5. this Sale was valid, and the Court held not, that by the Statute 11 & 12 W. 3. cap. 4. S. 4. there are different Provisions for Persons of different Ages, viz. for those under Eighteen by veiling Estates limited to them for the Benefit of their Pollity, and therefore were intended to be able to convey to Protestants; But as to others above Eighteen they are abfolutely disabled from taking any Estate by Purchase, and the Statute of K. George never intended to enable them to convey what they had not, but only to facilitate the Conveyances the others in whom an Estate was vested by the Provifo in the Statute 3 Geo. 1. cap. 18. S. 5. on which this Opinion was given. MS. Rep. Pach. 15 Geo. 2. B. R. Fairclough on the Demise of Borlace v. Newland & al.

5. One Mary Bone by her Will devisd several Estates in Hampshire to Trustees and their Heirs, As to Part for Payment of her Debts, and after to raise a Sum of 5000l. and to pay the same to one William Moor a Defendant in the Cause, or in Default of raising such sum, then to convey to Moor, or as he should direct, and as to the other Lands in Trutl, to pay the Rents and Profits to Mary Lucy the Teftatrix's Mother during her Life, and after to the Defendant Moor during his Life and to raise and pay a further Sum of 4000l. to the Defendant Moor, and then to convey the Remainder of the Lands to the issue Female of Moor in Trutl with other Remainders over.

Soon
Devise.

Soon after the Death of the Testatrix, the Plaintiff purchased of the Defendant Moor, all his Estate and Interest under the Will of Mrs. Bone, and which was conveyed to the Plaintiff by the Defendant Moor, in Consideration of 1400 l. by Indenture of Bargain and Sale enrolled, dated the 29th of January, 1733.

Upon the 28th June 1734 the Plaintiff brought his Bill against the Trustees and against the Defendant Moor, and the Heirs at Law of the Testatrix, to establish the Will and to have the Trusts of the Will performed.

The Defendant Moor in his Answer admitted his Conveyance to the Plaintiff, and that in Respect of great Incumbrances upon the Estates he believed the 1400 l. was the full Value, and as much as his Interest therein was worth at the Time of the Allignment there-of by him to the Plaintiff.

The Trustees submitted to align the Estates as the Court should direct.

The Heirs at Law were all Infants and put in their Answer by Guardian, and insinced if it should appear that Mary Bone did make such Will, as set out in the Bill, which they did not admit, yet that the Devises and Bequests therein to the Defendant Moor are void, insomuch as he was after the 29th September 1700, and at the Time of making the said Will, and of the Doearth of the Testatrix, a Person educated in the Papist Religion, and then and now professing the same, and that in respect thereof, and by an Act of Parliament made in the 11 & 12 W. 3. he is disabled to inherit, or take by Purchase, any Lands or Hereditaments, or any Interest therein within this Kingdom of England, and insinced that the Plaintiff's Purchase is not a Bona Fide Purchase or for a full and valuable Consideration.

After the putting in this Answer, the Plaintiff upon the 29th Nov. 1742. filed a Supplemental Bill charging that the Defendant Moor did upon the 31st of May, 1742. in the King's Bench at Westminster, pursuant to the Stat. 11 George 2. cap. 17. (which was in the Year 1738) entitled an Act for securing the Estates of Papists conforming to the Protestant Religion &c. conform to the Protestant Religion by there taking the Oaths and subscribing the Declaration mentioned in the Statute, and the Plaintiff insinced that thereby his Title to the Premises, if it was before defeasible on Account of the Defendant Moor's being a Papist, is now made good by Virtue of this Statute.

The Infants, by their Guardian, in Answer to this Supplemental Bill, insinced, that if the Defendant Moor did conform at the Time and in the Manner charged, yet that it has not made the Plaintiff's Title to the Premises in Question good, for that they the Defendants did long before the Time of the said Moor's pretended Conformity enter their Claim to the said Premises at the Quarter Sessions of the Peace held for the County of Southampton.

Upon these Bills and Answers the Parties went to Issue, and several Witnesses were examined to prove the Will, and also as to the Fact of the Defendant Moor's Conformity, and to the Question, whether the Indenture of 29 Jan. 1733, was a Bona Fide Purchase, and for a full and valuable Consideration.

Upon the Evidence, the Will appeared to be well proved so that the Questions rested upon the Construction of the Statutes and the Questions, whether there appeared sufficient Evidence of the Defendant Moor's Conformity, and that the Deed of 29 Jan. 1733 was a Bona Fide Purchase and for a full and valuable Consideration. The Statutes upon which the whole depends, are 11 & 12 W. 3. cap. 4. 3 Geo. 1. cap. 18. S. 4. And the Stat. 11 Geo. 2. cap. 17. which Statutes are as follows. The Stat. of 11 & 12 W. 3. cap 4. is intitled,
an Act for the further preventing the Growth of Popery; and so much of it, as relates to the present Question, is in Section 4, which contains two Provisions;

16. That Papists not taking the Oaths within Six Months after their attaining the Age of Eighteen Years shall be incapable to inherit any Lands or Hereditaments;

2d. That Papists shall be disabled and incapable to purchase either in their own Name, or in the Name of any other, or to their Use or in Trust for them, any Lands or Hereditaments, and that all Estates, Terms, or other Interests, or Profits out of Lands immediately, or immediately, to the Use of, or in Trust for, any Papist shall be utterly void, and of none Effect, to all Intent, Constructions, and Purposes whatsoever.

By the Statute of 3 Geo. 1, cap. 18. which is said in the Title of the Act, to be an Act made for the securing of Purchases made by Protetants; and in the 4th Sect. after reciting that some Doubts had arisen upon the Act 11 & 12 W. 3. and upon another Act made in the 1 Jac. 1. and other Acts made against Papists and Papist Recusants, touching the Sale of the Estates of Persons professing the Papist Religion, or incurring the Disabilities and Incapacities in the said Acts mentioned, it is provided, That no Sale for a full and valuable Consideration of any Lands or Hereditaments, or any Interest therein, by any Person being the reputed Owner, or in the Possession or Receipt of the Rents and Profits heretofore made, or hereafter to be made, to and for any Purchaser, and merely and only for the Benefit of Protestants, shall be avoided or impeached for or by Reason or upon Pretence of any of the Disabilities or Incapacities in the said Acts or any of them contained, unless before such Sale the Person entitled to take Advantage of such Disability or Incapacity shall have recovered such Lands, &c., or given Notice of his Claim and Title thereto to such Purchaser, or before the Contract for such Sale shall have claimed the Lands &c., by Reason of such Disability or Incapacity, and have entered such Claim in open Court at the General Session of the Peace for the County wherein the Lands lie, and bona fide, and with due Diligence pursued his Remedy in a proper Court of Justice for the Recovery thereof, the said several Acts above mentioned and referred to, or any thing therein contained, to the contrary notwithstanding.

Provided nevertheless, That whereas it was amongst other things enjoined by the said Statute of 11 & 12 W. 3. that every Papist should be disabled and incapable to purchase, either in their own Names, or in the Name of any other, or to their Use or in Trust for them, any Lands or Hereditaments, and that all Estates, Terms, or other Interests or Profits out of Lands immediately, or immediately, to the Use of, or in Trust for any Papist, shall be utterly void and of no Effect to all Intents, Constructions and Purposes whatsoever; It is hereby declared and enacted, that the said recited Part of the said Act of Parliament shall not be hereby altered or repealed, but the same shall be and remain in full Force as if this Act had never been made.

Then comes the Statute 11 Geo. 2. cap. 17. which is intituled, An Act for securing the Estates of Papists conforming to the Protestant Religion against the Disabilities created by several Acts of Parliament relating to Papists. And after reciting, that Persons professing or educated in the Popish Religion, are, by divers Acts of Parliament, subjected to several Disabilities and Incapacities, which may affect Persons conforming from the Popish to the Protestant Religion, and that many Persons have already conformed and are willing to submit to his Majesty's Government, and that others are likely to do. It is enacted, that all Persons, being reputed Owners, or in Possession or Receipt of the Rents and Profits of any Lands or Hereditaments, or any Interest therein, who have been or are reputed to be Papists, or educated in the Popish Religion, and have conformed to, or hereafter shall conform to, and profess the Protestant Religion,
gion, and have taken or shall take the Oaths of Allegiance, Supremacy, and Abjuration, and subscribe the Declaration in the statute of 30 Car. 2. cap. in the Court of Chancery, B. R. &c. and that all Persons, being Protestants, claiming under such Persons, shall hold, possess, and enjoy all such Lands &c. fixed and discharged from the Disabilities and Incapacities in the said Acts, or any of them, for such Estate or Interest as such Persons would have had if no such Disability or Incapacity had occurred, unless the Person entitled to take Advantage thereof have actually and bona fide recovered, or shall hereafter recover such Lands &c. by judgment or Decree in some Action or Suit, already commenced, or hereafter to be commenced, six Calendar Months at least before the making the Records of such Papists or reputed Popish, taking the Oaths &c. and to be prosecuted with due Diligence; and then follows a Proviso, that the Acts shall not prejudice the Right of any Person who shall have been in Possession two Calendar Months precedent to such Record.  

Note, the very Words of the Statutes are not here inserted, but only what appears to be the Substance of them.  

Now it was argued by Sir Dudley Rider Attorney General, Mr. Murray Solicitor General, Mr. Brown, and Mr. Wilbraham for the Plaintiff,  

That the two Statutes subsequent to the Statute of King William, were made for the Benefit of Protestant Purchasers, and therefore to be favourably construed, and rather to be stretched than otherwise;  

That these Statutes ought to be considered as Acts of State founded on the Principles of civil Policy.  

That the Rights claimed from the Statute of King William are unfavourable Rights, for the Statute was not calculated for the Benefit of the Heir or next of Kin claiming under that Statute; they have no natural Right, the Legislature thought it too much to take away the Estates of Papists and give them to the Publick, and therefore gave them to the next of Kin, or left them to defend, by declaring the Incapacity to take by Purchase; it remained therefore reasonable for the Legislature to model, change, or destroy this Incapacity as they thought fit, and in Construction of what is done for such Purpose, the Right arising from the Incapacity ought not to be favoured in respect of the Imbecility of such Right;  

The great End of the Statute of King George the First, was to induce Papists to sell, and to draw Estates out of their Hands, and has an express Retrospéct, the Words being of Purchases heretofore made or hereafter to be made; and to entitle the Plaintiff to the Benefit of this Statute, to avoid the Effect of the Statute of King William, nothing more need be shewn, than that the Purchafe made by him was a bona fide Purchase, and for a valuable Consideration, and that no Claim was made according to the Saving.  

They considered then the Value of the Estate, by considering how many Years Purchafe it is worth to be fold, and by making Deductions for the Charges and Incumbrances upon it, and for the Subsisting Life upon Part of it; by which Means it was laid to appear not to be worth so much as the 1400l. that was paid, and if the Consideration was full, there is no Ground to say it was not a Bona fide Purchase, and it was not pretended that any Claim was made by the Defendants, the Heirs at Law, till some Years after the Purchase, and no Infancy or Privilege in that Respect, for Laches makes no Difference for such Heirs or next of Kin not designed to be favoured; besides, Infants are bound by general Statutes unless there is an express Saving for their Benefit, as in the Statute of Fines, the Statute of Limitations, and other Statutes.

That
That these Purchases from Papists are often made in a Hurry to avoid Claims, and the Value ought not to be nicely canvassed or weighed in Golden Scales, and ought in general to be esteemed as valuable, if it appears to be a fair and reasonable Purchase; That this is certainly such a Purchase for a valuable Consideration as would be good within the Statute of Eliz. against fraudulent Purchases.

Admitting then that the Defendant Moor was a Papist at the Time of the Devise and Death of the Testatrix, yet the Claim of the Heir at Law is defeated, and the Plaintiff's Purchase established under this Statute of 3 Geo. 1.

But still the Statute of 11 Geo. 2, throws out of the Case the Question on the Purchase and the Value of the Estate; for under that Statute the Heirs at Law are defeated by the Conformity of the Defendant Moor, and we have proved the Record of his taking the Oaths, subscribing the Declaration, and it is not pretended that the Defendants have taken Advantage of the Saving, that they have recovered or been in Possession, or so much as brought any Action or Suit for what they now claim.

The Intent of this Statute was, to put all conforming Papists on the same Foot with Protestant, and is in many Respects in the same Words as the Statute of Geo. 1. unless that here no Consideration is necessary to the Conveyance of a Conformist.

Lord Chancellor. I take the Force of your Argument to be this; That if this Conveyance is taken to be for a valuable Consideration, then it is to be established by the Statute of K. Geo. 1. and if not, yet would be good, though a voluntary Conveyance, under the other Statute; but then if this should appear but a colourable Conveyance upon a delusive hum Consideration, this would not deprive the Defendant Moor of the Right, and would shew the Plaintiff to have no Interest either at Law or in Equity. People that come for Equity must draw their Equity from pure Fountains, and Mr. Moor can have no Decree, for he is a Defendant.

In Answer to this it was observed, that the Defendant Moor had by his Answer admitted the Purchase, and prayed that it might be confirmed.

Mr. Chute and Mr. Cox for the Defendants, the Heirs at Law.

Mr. Chute argued strongly that this Purchase ought to be taken to be delusory and colourable only; that it appears from the Face of the Will, and from the Pleadings in the Cause, that there were many Debts and Charges upon the Estate, and no Account appears to have been ever taken of these Incumbrances, which it can hardly be supposed but there must have been, if this had been a fair Purchase; and the Manner of Defendant Moor's answering, and his Answer not being put in till fix Years after filing the Bill, are strong Evidences on which to lay a Presumption of a collusive Purchase; and if this Conveyance is in itself not for a Valuable Consideration, then it is plainly not helped by the Statute of Geo. 1. and then as to the subsequent Statute of K. Geo. 2. it relates only to the Time to come, and has no Retrospect; the Subjects of the Statute are Papists who shall conform, and Protestant Purchasers from such Papists; But the Right in this Case was previous to this Statute vested in the Heirs at Law by the Statute of King William, and inuits therefore upon the Whole, that this Case is not affected by either of the said two Statutes subsequent to the Statute of King William, and that by the Statute of King William the Estates in question are well vested in the Defendants, the Protestant Heirs.

Mr. Cox on the same Side argued, that the Title of the Defendants, the Protestant Heirs, is clear and indisputable under the Statute of King William, if not impeached or prejudiced by the two subsequent Statutes.
The Statute of King William has two Clauses, 1st, Every Papist, or Person professing the Popish Religion, is disabled and made incapable to purchase any Manors, Lands, Tenements, Rents or Hereditaments in his own Name, or in the Name of others to his Use, or in Trust for him; And 2dly, All Estates, Terms, and any other Interests or Profits whatsoever out of Lands, Tenements or Hereditaments made to or in Trust for the Benefit of the Papist, are made void.

Infers then 1st, That a Devise to a Papist is a Purchase within this Statute.

2d, That a Trust is so likewise; and

3d, That Money to be raised out of Lands is also to be considered as an Interest in Lands, within the Intent and Meaning of the Statute.

That these Points were so settled and solemnly determined in the Case of *Roper and Radcliffe*, which was in the House of Lords in 1713, and since in the Case of Carrick v. Errington. 2 Wms's Rep. 361.

Argues therefore, that all the Estates and Interests devised and given by the Will in Question to the Defendant Moor, are void; and therefore that the Defendants, who are the Protestant Heirs, are entitled from this Statute to take the Benefit of these Devises and Bequests.

The Title of the Defendants being therefore plain under this Statute, the Question will be, Whether that Title is at all hurt or defeated by either of the subsequent Statutes.

The Statute of 3 Geo. 1. cap. 18. recites that Doubts had arisen upon this Statute of King William, and upon an Act made in the first Year of K James 1. and other Acts made against Papist and Popish Refusants; Then comes the Enacting Clause upon which the present Question arises; and immediately after follows a Proviso introduced by the Words provided always, nevertheless, that whereas, and then after reciting the whole Clause in the Statute of King William, it is enacted and declared, that this Statute of King William should not be thereby (that is by that Statute of K. Geo. 1.) altered or repealed, but that the same should be and remain in full Force, as if that Act of King George the 1st had never been made.

Argues therefore, that this Proviso in the Statute of King George 1. wholly and plainly avoids any Effect which that Statute can have upon the Statute of King William; and that to make this Statute of King George 1. confluent with itself, it ought to be taken not to extend to abridge or alter the Statute of King William, but only to the other recited Statutes.

Argues further, that though very much is of Necessity left in doubtful Cases ad Arbitrium Judicis in the Construction of Statutes, yet that where the Words are plain, all Courts of Justice ought to hold themselves bound by the Words, though the Reason for them may not appear plain that a contrary Doctriné might be of most dangerous Consequence, by supposing a kind of Legislative Authority in a Judge whose Office is only Jus dicere non Condere, and that this Argument is the stronger in regard that the Statutes now in Question are (as hath been rightly observed) to be considered as Acts of State and Civil Policy, and ought therefore to be more intricately adhered to, and to receive a Construction according to the strict Words, it being rather the Duty of the Courts of Justice to take such Laws as they find them, than to ferumitize, presume or guess at what was the Foundation or Reason of the Legislature in making such Laws.

Taking therefore this Statute of K. Geo. 1. upon the Words of it, it is plain it can have no Operation or Effect upon the Statute of King William to alter or repeal that Statute; and though it may be said that the enacting Part and Proviso are repugnant, yet what is the Consequence of this, supposing it to be so, the Proviso contains the last Words
Devise.

Words of the Legislature, and therefore ought to be followed; but taking the whole of the Statute together, the Enacting Part may be said to have Reference to the Statute of King James, and the other recited Statute, but not to the Statute of King William, and then the Whole is made consistent. But where a Statute is inconsistent or impossible to be observed Nihil Operatur and it is void, as was expressly held upon the Statute De aportatis Religiofiorum 35 E. 1. 2 Infl. 588.

And in the Case of the Attorney General and the Company of Chelfa Water-Works Hill. 4 Geo. 2. Scace. Fitz-Gib. 195. per Reynolds Ch. B. Comyns and Thomson Barons, the Question being upon the Construction of the late Land-Tax Act, it was held, that where the Provio of an Act of Parliament is directly repugnant to the Purview, the Provio shall stand and be a Repeal of the Purview, as it speaks the Litt Intention of the Makers. And in Ld. Chanc. Hatton's Treatise concerning Statutes and the Exposition thereof, pag. 19. it is said, Ubi Maniflette pugnant Legis Voluntas & Verba, neutrwm sequendum est, Verba, quia non congruunt menti, mens, quia non congruit verbis.

These Words seem, from the Style of them, to be drawn from the Rules of Construction in the Roman Civil Law, and as they appear to have been adopted, and by so great a Man as Lord Chancellor Hatton in the Rules of Construction of the Statutes of this Kingdom, they ought to receive, at least, some Weight.

Mr. Coxe then mentioned a Case which he said he was just then informed of at the Bar, which was in the Court of B. R. and in which it was solemnly determined on a Trial at Bar, about two Terms ago, that this Statute of 3 Geo. I. ought not to be considered as having any Operation or Effect upon the Statute of King William to invalidate or avoid that Statute; But Mr. Coxe not being able to state the Case, Ld. Chancellor said, he could not take it at all into his Consideration; and the Solicitor General said, that Case was not upon such a Construction of the Statute, but depended upon several particular Circumstances.

Mr. Coxe then went on and observed, that supposing the Enacting Part of the Statute of K. Geo. I. should be taken to extend to the Statute of K. Wm. yet it remained still to be considered as a Question, Whether the Purchase made in this Case by the Plaintiff can be taken to be a Purchase for a full and valuable Consideration within the Statute of K. Geo. 1. For if it should not, it would be equally as strong as any of his other Arguments to shew that the present Case is not to be affected by that Statute; But going on to speak to this Point, Ld. Chancellor said, he might eafe himself of that, for that if the Case should appear to depend upon that Question, he should direct it to be tried at Law.

Mr. Coxe said, that supposing this Statute could upon any of his other Arguments be laid out of the Case, the Question would then turn upon the other Statute of the 11 Geo. 2. cap. 17. which was made in the Year 1738, and therefore long after the Death of the Teatarix, who died in 1732, and upon whose Death these Estates under the Statute of K. Wm. vested in her Protestant Heir; And he observed, that this Suit was instituted long before the making the Statute, it appearing that the Bill was filed so long ago as the 28th of June 1734.

Proposes therefore to consider it. Whether this Statute can be taken to have a Retrospect to devest the Estates in Question vested in the Defendants, the Protestant Heirs, under the Statute of K. William? And 2dly, Supposing it may be taken to have such Retrospect, yet whether this can be said to be it fell a Case within the Statute?

As to the first of these Questions he observed, that the Words of the Statute are all of the present or future Time; That any Person being in Possession of any Estates who shall conform, shall hold &c Pur-
chafs therefore to be confirmed by this Statute must be Purchases after the Conformity; and the Word being, plainly implies the present Time; there is an effential Difference, both in Grammar and Common Sense, between the Words being and having been; the Statute therefore cannot be taken confluent with Grammar and Common Sense, to have a Retrospect to the Time past; and the Defendant Moor cannot be taken as a Perfon being in Possifion at the Time of the Statute, because it appears of the Plaintiff's own shewing, that all the Right he ever had was long before the Statute bargained and fold to the Plaintiff, the Purchafe Deed being mentioned to bear Date as it does 29 January 1733. And the Provifio which follows in the Statute cannot be laid to be any Anfwer to this; for though it is thereby provided that the Statute shall not prejudice the Right of any Perfon who shall have been in Possifion, yet that is restrained to Persons having been in Possifion two Kalendar Months preceding the Record of the Conformit's taking the Oaths &c. and therefore brings and refrains the Whole to the grand Subje& of the Statute any Perfon being in Possifion.

To fay then that the Statute might be extended to Times past, would be to deny the known Sense of the Words, and to alter the grand Relative upon which the whole Statute depends; if fuch Conftitution might be made, a Statute might be made to mean any Thing.

Besides, Courts of Justice will not, nor ought, to contrue a Statute to have a Retrospect, without expres Words to warrant fuch Conftitution; and there are many Authorities to maintain this; by the Statute of Gloucefter it is provided, that the Alienation of a Tenant by the Cutteffy fhall not bind his Son; and in Lord Coke's Comment upon this Statute, 2 Inlt. 292. it is laid, this extends to Alienations made after the Statute, and not before, for it is a Rule and Law of Parliament, that regularly Nova Conftitutio futurus formam Imponere debet non Praeteritis.

By the Statute of Westm. 2, cap. 46. after reciting that by the Statute of Merton Liberty was given to Lords of Manors to improve their Waste, fo as they left fufficient Paffure for their Tenants; and after reciting that the Neighbours of fuch Lords, who are also called Forinfei Tenentes, had oppofed this, it is provided that the Statute of Merton fhall extend to them, fufficient Paffure being left. Now Lord Coke's Comment on this Statute, after mentioning those Words of the Statute, Statutum eft de cætero (i.e. the Neighbours and forinfei Tenents) Quod Statutum apud Merton Provi fim inter Dominos & Tenentes fuos Locum habeat de cætero inter dominos & Vicinos is thus, 2 Inlt. 474. This Branch is from the making of this Act an Expofition of the Statute of Merton, fo as now the Statute of Merton does extend inter Vicinum & Vicinum. But though it be an Act of Expofition of a former Act, yet this Expofition fhall take Effect but De cætero, that is, from the making of this Act of Expofition.

He then argued, that though these Statutes are old Statutes, yet that the Rules here laid down are univerfally true and applicable to all Statutes; and that the 2d Inlt. is a Book of the greatest Authority for the Expofition of Statutes, not only for its own intrin fick Worth, and the great Regard that hath been always paid to it, but likewife in Respect of its being published, as it appears it was, by Vote and Order of Parliament.

But there are other Cases upon more modern Acts of Parliament to shew, that the Judges will not by Conftitution, and without expres Words, extend an Act of Parliament to a Retrospect.

In Deiuer and Shutter 2 Show. 16. and reported also in 2 Mod. 310. Sir J Jones. 168. 2 Lev. 227. and 1 Vent. 330. in Aliasmpit on a Parol of Promife to pay a Sum of Money in Consideration of a Marriage, it was found by Special Verdict that the Promife was made be-
before the Statute of Frauds, and that that Statute was made before the
Action brought, by which it is provided, that no Action should be
brought on such Promise unless in Writing; and it was held, that the
Statute should not be taken by a Retrospect to extinguish the Right of
Action, though strongly argued against by Sergeant Maynard for the
Defendant; and this was much stronger than the present Case, for there
there might have been Grounds upon the Words of the Statute to sup-
port a Retrospect.

In Mitchell and Broughton’s Case, 673. on a Contract to
transfer to transfer Stock made but not executed before the Statute of 8 &
9 W. 3. cap. 32. against Stock-Jobbing, it was held, that the Statute
ought not to be taken with a Retrospect to destroy the Contract.

In Cartwright and Cartwright’s Case 302. and 303. in Sergeant and
Plunt’s Case, Chan. Rep. 77. a Will of Lands was made before the
Statute of Frauds, and then the Statute, and after the Teftator died, and
the Will was held good though not executed according to the Statute, for
the Statute is not to be taken to have Retrospect. So in the late Case
of Sherrington and Birchall upon the Statute of Mortmain, it was
decided upon the Opinion of all the Judges, certified the 4th of Decem-
b. 1739, that the Statute should not avoid a Devise in Mortmain, where
the Will was made before the Statute, though the Teftator died after.

In all therefore upon all these Cases, that a Statute is not without
express Words, or merely by Contraction to be taken to have a Retro-
spect, and therefore, that neither the Statute of King Geo. 1. nor the
Statute of the 11 Geo. 2. should be taken to affect the present Case, or
to defeat the Right of the Defendants, the Protestant Heirs of the Te-
fatator; But in regard he cannot premise to say what Weight these
Reasonings may have with the Court, he must of Necessity, in order
to take in the Whole of the Case, suppose for a Moment, that this Statu-
ute should be taken to have a Retrospect, and then other Questions arise
upon it.

1st, Whether upon the Evidence the Defendant Moor can be taken
to have ever been the reputed Owner, or in Possession, or in the Re-
cipient of the Rents and Profits of the Estate in Question? And, 2dly,
Whether it appears upon the Evidence that the Defendant Moor has in
Fact conformed to, and professed the Protestant Religion?

As to the first of these Questions, inuit that the Evidence does not
at all prove the Fact, and therefore that this Case is not a Case within
the Statute. And as to the 2d, observes, that the Statute requires two
Things, the taking the Oaths, and Conformity to the Protestant Reli-
gion. The taking the Oaths is proved, but the Evidence of Conform-
ity is no more than that the Defendant was five or six Times seen at
Church in a Long Space of Time, and that too at different Churches; 
Evidence not sufficient to excuse a Man from the Penalties in the Statu-
tutes of Q. Eliz. and Car. 2. for not going to Church. But in a Case
of this Kind, where the Conformity was directly in Issue, the not pro-
ving of it is the strongest Premption that there is not in Fact any true
and sincere Conformity at all. The great Test, by which a Man is to
sustain himself, a true Conformity to the Religion of this Country, is
receiving the Sacrament according to the Rubrick of the Common
Prayer.

But supposing all these Matters against him, yet he has still another
Hope left for his Client, and though perhaps it may appear a little Para-
doxical at first View, yet hopes it will not be condemned without hearing
the Reasons upon which it stands, and that is upon the several Sav-
ings in the two Acts of Parliament with Regard to which in Respect
that the Defendants, the Protestant Heirs, at the Time of the Decease of

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the Teftatrix, were and still are Infants, infilits that their not purfuing in Time what is required by the Savings in bringing Actions &c. and in Regard here was actually a Lis pendens before the making the laft Statute (no Laches being imputable to Infants) fhall not deprive the Defendants of that Right to the Estates in Question which they have under the Statute of King William, and that they ought still to have the Benefit of performing these Savings when they come of Age.

But yet would not be thought to affeft that Infants are not bound by a general Act of Parliament which to be sure they are, and it is highly fit they should be, but takes this Diftinction, that though an Infant is bound by the general Purview of an Act of Parliament, yet that he is not by collateral Matters relating to fuch Purviews, and to maintain this Diftinction cites Mr. Hale's Pleas of the Crown, 21.

The Reafon of Infant's Privileges is to protect his Property, with Regard to which the Law restrains him from prejudicing himfelf. Besides, in conftruing of Acts of Parliament the Legislature must be taken to be confunct of the Rules of Law, and therefore to know that an Infant cannot bring Actions, and it must therefore in Confrufion be taken that the Privileges of Infants were not intended to be affected by the Savings in thefe Statutes.

Lord Hardwicke Chancellor. This Cafe is brought before the Court in a very extraordinary Shape; first, as not wanting the Aid of the Statute of King Geo. 2. and then as ftrengthened by that Statute under a fupplemental Bill; but the Question will depend on the three Acts of Parliament that have been mentioned; the Statute of King William, the Statute of the 3d of King Geo. 1. and the Statute of 11 Geo. 2.

As to the firft of thefe Statutes, it is mentioned as a Ground of Defability in the Defendant Moor the Devifee, under whom the Plaintiff claims, and to fwear a Right in the Defendants, who claim as the Protestant Heirs of the Teftatrix, and this Statute was, to be fure, made to prevent Papilts from acquiring new Estates.

Then came the Statute of K. Geo. 1. and this Statute, and the Provifo in it have a feeming Repugnancy, and I would take Notice, that the Statute in this Refpect hath alwayes been doubtful; some People have thought that the Provifo restrains the Statute, and it is certainly a very odd Provifo. But I think the Meaning of the Provifo was only ex abundanti Cautela againft Papilts, and was not defigned to affeft Purchaforis, for if it were otherwife, the Security to Protestant Purchaforis under the Statute would be a moft doubtful Security.

I think therefore the Question between the Plaintiff and the Proteftant Heirs upon this Statute, is only whether the Purchase made by the Plaintiff, appears to be a good and valid Purchase or not?

Now, upon this I may fay, I am extremely doubtful, and if the Cafe should turn upon that, I should certainly direct an illufion to try the Faét.

As to the Consideration paid for this Purchase, it is rightly faid, that the Court should not weigh it with Golden Scales, and that the Intention of this Act only, was, that a fair Bona Fide Sale should be made, but then it brings it to the Question, Whether this was fo or not? The Price is not what I lay much Weight on, but there is a Purchase of a Truft Eftate charged with the Payment of Debts and Legacies, and no Account appears to have been taken of the Debts or the Interest thereof, or of the Legacies, and the Purchase appears to have been made without any Privity at all of the Trustees, and it can hardly be imagin'd that fuch a Purchase would have been made between a fair Buyer and Seller, without the Privity of the Trustees, and without any Account being taken of the Charges upon the Eftate.
But I think the Question upon these Matters is avoided by the subsequent Statute of 17 Geo. 2, the Consideration of which is introduced upon the Supplement Bill.

Now, by this Statute it is provided, that all Persons being reputed Owners, or in Possession of any Lands, or any Interest therein, who have been or are reputed to be Papists, and who have conformed to, or hereafter shall conform to the Protestant Religion, and take the Oaths, shall hold and enjoy such Lands, treet and discharged from the Incapacities created by the Statute of King William.

It appears then, that the Defendant Moor hath taken the Oaths, and supposing the Evidence of the Conformity to be sufficient to prove it, I am of Opinion that these Estates would thereby appear to be well vested by the Will in the Defendant Moor under this Statute, supposing the other out of the Cafe, and though it may be said, that supposing the Estate under this Statute to be in the Defendant Moor, yet, that it would not help the Plaintiff, for he must recover upon his own Strength. But as to this I must take the whole Cafe together, and then what are the Admissions in Defendants Answer that this was a good Grant, and for a valuable Consideration, and such as the Defendant prays by his Answer may be carried into Execution and be established, the Grant therefore being as coupled with the Answer, binding to the Defendant, and as the Grant, though Voluntary, would be good under this subsequent Statute, I am bound it there were no other Objections against it, to decree the Trustees to convey to the Plaintiff.

But there are other Questions that arise upon this Statute of K. Geo. 2. First, as Part of the Estate devise to the Defendant Moor was a Reversion, whether a Reversion as such be within the Statute or not; And I am of Opinion that a Reversion is within this Statute, and that the Words of the Statute warrant such Construction, for what is the reputed Ownership of Lands, or any Interest therein? Can it be said that a Reversion is not? It plainly is, and there are equal Conveniences in respect of a Reversion, as there are of Estates in Possession.

But then another and more difficult Question arises, whether this Statute hath any Retrospect.

The Word (Claiming) in the Statute must refer to the present, and all future Times, but then it is to have a Relation, and comes back to the first Words, that all Persons being reputed Owners, and who have been, or are reputed to be Papists, if these Words should be taken to restrain the Statute from having a Retrospect, to what Time should the Statute be taken to refer? Take it in the common Sense, it must commence immediately as a Law, or shall it be referred to the Time of the Conformity, or the Time of taking the Oaths?

Acts of Parliament are to be constru'd according to the vulgar Sense of Words; great Careoneis of Stile is not to be expected from them; and there are several Acts of Parliament wherein these Sort of Particles are to have various Meanings and Interpretations.

The Statute was as a general Law to take away Rights which the Legislature considered to be particularly in their Power; besides, as it is to restore old Rights, and to avoid Forfeitures and Disabilities, the taking the Statutes to have such Retrospect falls within the general Reason of the Thing, and the Justice of the Case, and I think the Defendants, notwithstanding their Intancy, are bound by this Act of Parliament, the Legislature, it they had intended to save the Right of Infants, would have inferred some Clause for that Purpose; And the there are some Statutes, in Criminal Cases, which are held not to bind Infants, yet the general Rule certainly is, that an Infant is bound by an Act of Parliament, unless there is a particular Provision to save his Privilege.
Two Questions then arise upon the Statute, Whether the Defendant Moor was the reputed Owner of these Estates? And it seems clear that at the Time of the Plaintiff’s Purchase he was so, and then by the express Words of the Statute the Titles of Protestants claiming under such Persons are expressly confirmed. And the Question whether suppose a Papist has conveyed for a Consideration not valuable, and then conforms, shall this make the Purchase good, is a Question not to be considered in the present Case; for a voluntary Conveyance would certainly be good under this Statute as a Provision for a Child &c. and with regard to this Statute the Imputations upon this Conveyance are immaterial, for if it was colourable and collusive only, yet this Act don’t affect it; And though the Defendant Moor might under this Head insist, that the Plaintiff hath no Right, either at Law or in Equity, to the Estates in Question; yet as the Defendant by his Answer confirms the Plaintiff’s Purchase, and prays it may be established and fully executed, it must be taken as binding to him, and then in this Light I am of Opinion, that the Plaintiff is intituled to a Decree.

And therefore if the other Question, which arises upon the Statute whether he is sufficient Evidence of the Conformity of the Defendant Moor be laid out of the Case, or should be taken to be sufficient, I should then be obliged to decree for the Plaintiff. But I must say I am not satisfied in this; he might easily have obtained Dispensations for going to Church, though not for receiving the Sacrament, and here is no Evidence of his ever receiving the Sacrament; and as the Proof of Conformity is directly thrown upon him, he ought to have cleared it; and though there is no publick Conformity that the Law takes Notice of further than the going to Church and receiving the Sacrament, yet it is well known that he might solemnly and publickly have renounced the Errors of the Church of Rome, and as nothing of this kind appears, if it is intituled on for the Defendants, the Protestant Heirs, I shall direct an Issue to be tried, whether the Defendant Moor has conformed to the Protestant Religion, or not.

But such Issue being waived by the Counsel for the Defendants, the Heirs, &c. Chancellor declared the Will of Mary Bone, the Testatrix, to be well proved, and decreed the Trustees named in the Will and Defendants in the Case, to convey the Freehold, and to surrender the Copyhold Estates in Question to the Plaintiff and his Heirs; but decreed that the Plaintiff should pay to all the Defendants their Costs of Suit. MS. Rep. 17 Geo. 2. Canc. Wildigos v. Keeble.

(I. 8) Good. As to Persons &c. not in Esse, or not named.

1. A Devise made in Remainder to a Corporation where there is no such, is void, though there be such a Corporation made before the Remainder fall; otherwise, if the Corporation be begun, but no Heir yet chose; per Hobart Ch. J. Hob. 33. cites Aid 33. 9 H. 6. 23 and 49 E. 3.

2. So if I devise Lands in Remainder to the Heirs of J. S it is void, if there be no such J. S. though there be one, and Heirs of him before the Remainder fall; per Hobart Ch. J. Hob. 33. cites 2 H. 7. 13. by Keble.

3. In all Devises there ought to be a Devisee in Esse, who has Power and Capacity to take the Thing devised at the Time when it ought to vest.
Devise.

veft. Plow. 345. a, per Loveleis Serjeant, and the other Jurites prater Walthie Trin. 10 Eliz. said it as a Principle in Law.

4. A devise to the Heirs of the Body of his Wife, if they attain the Age of 14 Years; A dies, leaving no Issue; but the Wife had Issue by a second Husband; per Windham and Moreton J. it is not good, because to a Perfon not in Error, and on a double Contingency; but per Twifden and Keeving J. contra, notwithstanding the double Contingency, it being all one with a Devise to an Infant in Ventre fa mere when he shall be born, and the Contingency is to take Effect within the Com- pas of a Life; and this cannot be by Way of Remainder, though the Wife has an Estate for Life; because it is a new Devise to take Effect on her Death, and is not as a Remainder join'd to his Estate. Lev. 135. Trin. 16 Car. 2. B. R. Snow v. Cutter.

5. Devise of Land to the first Son of A. A. having none at that Time, So a Devise is void. 1 Salk. 229. Trin. 9 W. 3. C. B. Scatterwood v Edge. to the first Male of A. A having no Issue at the Time of the Devise is void. 12 Mod. 278. Scattergood. v. Edge. S. C.

(1. 9) Good or not.

Where it is made to Infant en Ventre fa mere &c.

1. If a Man devise to an Infant en Ventre fa mere, and dies, this is a good Devise, and yet the Infant is not in rerum natura at the Time of the Devise, nor at the Time of the Death of the Devisor; per Babington; Contra per Palfon J. Br. Devise, pl. 32. cites 11 H. 6. 12.

2. A Man devise two Parts of his Lands to his four Youngest Sons in Tail, and if the Infant in Ventre fa mere be a Son, that be shall have the fifth Part, as Cohere with the four Youngest Brothers, and it all five happen to die without Issue Male of their Bodies, that the two Parts shall revert to the next Heirs of the Devisor for ever. The Father died, the Son is born, and after he and three other of the said Sons died without Issue. Sanders, Dyer, Bendloe and Maid held, that the after-born Son shall take nothing, because he was not capable as Purchaser when the Devise took Effect; but Whiddon contra. Dy. 303. b. 304. a. pl. 49. 50. Mich. 14 Eliz. Anon.

Charters may be detain'd for him — 2 Mod. 9. Hill. 26 & 27 Car. 2. in Can. in the Cofe of Nurfe v. Yearworth. Ld. K. Finch, who said, that at Common Law, without all Question, a Devise to an Infant in Ventura fa mere of Lands devisable by Custum was good, so that the Doubt arises upon the statute of H. 8. which enacts, that it shall be lawful for a Man by his Will on Writing, to devise his Lands to any Person or Persons; for in this Case the Devise not being in rerum Naturae, in strictness of Speech is no Perfon, and therefore it has been taken, that such a Devise is void. Mo. and it is left a Quere in the Lord Dyer 450. But in two Cases in C. B. one in the Time when Dc. Ch. J. Hale was Judge there; the other in the Lord Ch. J. Bridgman's Time, it has been resolved, that if there were sufficient and apt Words to describe the Infant, though in Ventura fa mere, the Devise might be good. But in B. R. the Judges since have been divided upon this Point, that as the Law stands now adjudged, this Devise in our Case seems not to be good; but should the Case come now in Quetion, he said, he was not sure that the Law would be so adjudged; for it is hard to disannul an Heir for want of apt Words to describe him; and it is all the Reafon in the World, that a Man's Intent, lying in Extremis, when most commonly he is dettitute of Counsel, should be favoured.

3. If a Man devizes Land to Infant en Ventre fa mere, if he be not It is good if born in the Life of Devisfor, the Devise is void; per Coke and Doderidge. Roll Rep. 110. Mich. 12 Jac. B. R.

25 in Immediate Devise. Per Bridgman Ch. J. Cart. 5. Mich. 16 Car. 2. C. B. in Cafe of Davis v. Kemp.——Windham J. said, that D. 303. b. 304. which faith, that Devise to Infant in Ven-
Devise.

tre fa mere is void has been denied to be Law, and that upon Search, the Roll does not warrant the Judgment reported by him. Sid. 147. in Case of snow v. Tucker. — Lev. 135. S. C. Snow v. Cutler. S. P. and 1695. that Hale Ch. J. and Hide Ch. J. were of the same Opinion. —

Devise to Infant in Venture a mere is good. But Devise to Son in Venture a mere is void. Cart. 87. 98 — In the Case of snow v. Cutler. Lev. 135. Whitham and Morton J. held a Devise to Infant in Venture a mere generally without laying when he shall be born, to be a void Devise; but Twifden and Keeling J. contra. But all agreed, that by adding the Words, when he shall be born makes it a good Devise. — S. P. Per Holt Ch. J. Skin. 589, 580. and cites Snow v. Cutler. — Raym. 162. S. C. accordingly.

2 Mod. 8. 9. 


4. A makes a Leaf of Lands in L. and G. for 99 Years to B. to commence after his Death, in Trust to the Ufe of his left Wif. Afterwards A. by Will directed that Blackacre Part of his Lands in L. should be sold for 20 Years for Payment of Debts and Legacies, and after the Expiration of the said 20 Years to the Heirs of his, the Tefator's, Body, on the Body of his Wife to be begotten, and for Default thereof to B. and his Heirs; And all other his Lands in L. to the Ufe of the Heirs of his Body on the Body of his said Wife &c. and for Default to W. R. for 20 Years, and after to B. and his Heirs. And if A. have no Issue living at the Time of his Death, then he devised Whiteacre Part of his Lands in G. to B. and his Heirs, immediately after the Death of A's Wife (who was jointured therein). A. died, leaving no Issue born, but soon after a Son was born, who lived till after Age, fuffered a Recovery, and devised the Lands to J. S. and died without Issue. Though the Son was not born till after his Father's Death, yet he had an Eflate Tail. And the Ridue of the Term of 99 Years, notwithstanding the Recovery and Will by the Son, was decreed to be align'd to J. S. it being a Term in Truf. Fin R. 155. Mich. 26 Car. 2. Nourfe v. Yearworth.

5. The Law is clear now, that a Devise to an Infant in Venture a mere is good enough, though he be born after the Death of the Tefator, and he shall take by way of Executory Devise when he is born; per North Ch. J. Fream. Rep. 293. pl. (344 b) Trin. 1677. C. B. Anon.

6. Whether the Devise to Infant in Venture a mere is good, has never yet been settled; but there have been Varieties of Opinions in it. The first I find is 11 H. 6. 15. and there Babington thought it good; and Pamton contra. It is in Brook tit. Devife 659. with a Queue. 7 Co. 9. without any decisive Opinion. 1 Roll Ab. 669. 610. with a Dubt' Dy. 393. 394. Devise to Infant in Venture a mere if it be a Son, void; but I hold that not to be Law, because it is Executory and not Contingent; but a fortiori it would be void by way of present Interest. It is again mentioned in Dyer 342. but no Opinion. Mo. 127. and no Opinion 177 adjudged good; but 664. held void. Cro. E. 435. if there be a new Publication of a Will after a Son born, good, focus not. 2 Bulk. 272. not good. 1 Roll Rep. 110 void. Litt. Rep. 253. void. And thus it remained till K. Ch. 2d's Time. In Snow and Cutler's Cafe, Cafe in Sid. 153. and Keb. Court was divided; but in 2 Mod. 9. Chancellor Finch held it good, and my Lord Bridgman held the same with a great Refpect to former Opinions; and I hold it to be good, because the Rule is, that when by the Words of Devifor it apparently is designed for a future Interest or Devife, it is good; and when Devife is to the Son in Venture a mere, without more laying, it is plain he means a future Devife, because by the very Words he takes Notice of his not being in Effe; and that is tantamount, as if he had devise'd to another for a Time, or let it depend to the Heir for a Time, but in a Devife to the first Son of T. S. who has no Son at that Time, none can tell by the Words of Devifor whether he meant it should take prentiely, or futurely, and therefore it is no more than a prenti Devife to a Perfon not in Effe; per Powell J. 12 Mod. 282. Patch. 11 W. 3. C. B. in Cafe of Scattergood v. Edge.

7. Per
Devise.

7. Per Powell J. a Use limited to a Son in Ventre fà mere is void, because no Perfon according to Statute of Uses; but Statute of Wills makes no Mention of Perfon, and that makes the Difference. 12 Mod. 283.

8. A devised 500l. to the eldest Son of B. to be begotten to place him out Apprentice, a Son born after A’s Death shall take. Per Wright K. 2 Vern. 431. pl. 393. Hill. 1701. Nevill v. Nevill.

9. A Devise to Trustees and their Heirs in Trust for A. for Life, and to his first and other Sons in Tail; but if A. dies without an Heir Male, Remainder over this being a Trust may support the Remainder to a Posthumous Son. See 2 Vern. 450. Mich. 1703. in Case of Bamfield v. Popham.

10. A. by his Will devised Land, in Case he should leave no Son at the Time of his Death, to J. S. and his Heirs. A. died, leaving his Wife Priveent enfeint of a Son. The Question was, Whether J. S. the Devisee was intituled to the Land. Ld. C. Parker referred it to the Judges of B. R. who certified, that it was not an absolute Devise, but subject to the Contingency of A’s leaving no Son at the Time of his Death, which they thought had not happened, and therefore that J. S. cannot take; and the Trustee having expressed no Intention in the Will of disinherit his only Son, J. S. is not intituled, and his Lordship agreeing therewith, decreed J. S. to deliver up Possession and account for the Profits received. Wms’s Rep. 486. Mich. 1715. Burdett v. Hopegood.

11. An Executory Devise of an Estate of Inheritance to a Perfon unborn when he shall attain the Age of 21 Years is good, and there is no Danger of a Perpetuity. Cases in Eq. in Ld. Talbot’s Time. 228. Mich 1736. Stephens v. Stephens.

12. This was a Bill brought by Balfet an Infant against his Uncle, to have an Account of the Real and Personal Estate of his Father, upon which several Questions arose; the first related to the Real Estate, and was this. J. Pendarves Balfet, Father of the Infant, settled the Bulk of his Estate in Marriage to himself for Life, Remainder to Trustees to preserve contingent Remainders during the Life of the Father, Remainder to Wife for Life, Remainder to first and every other Son for Life, Remainder to his Brother for Life, who was the now Defendant, but there was no Limitation to Trustees to preserve Remainders if his Wife should be Priveent enfeint. Balfet the Father died, his Wife Priveent enfeint, Balfet the Uncle entered; eight Months after the Son was born, and entered upon his Uncle, and now the Question was, who should have the intermediate Profits upon the Death of the Father to the Birth of the Son.

Ld. Chancellor held, that as to this Point, it must depend upon the Construction of the 10 and 11 W. 3. c. 16. and as to that, it must be considered what was the Mischief intended to be remedied, and what Remedy the Legislature have applied. Now the Defendants say, nothing was intended to be remedied but the vesting of the Remainder, which they say was the only Evil complained of in the Case of Reeves v. Long, in the House of Lords, which was the Foundation and Occasion of that Act; but I am of Opinion this was not the single Mischief that was intended to be prevented, but the whole Evil, and they meant not only to give Posthumous Children Power to enter, but to take the Profits also according to the Intention of Persons making Settlements and Wills too of this Kind, and this appears both from the Title, Preamble, and Proviation of the Statute, and the Words are too plain, that to put any other Construction upon them would be to repeal the Act which says, such Posthumous Child shall take in such Manner as if born in the
Devise.

the Life of his Father. But it was said by the Defendant's Counsel, that the Words take &c. meant only that he should take Remainder in such Manner as Heirs at Law by Devise take who have not intermediate Profits, and that this being a new Law, ought to be considered according to the Rules of Common Law in similar Cases; and it is true, it is a usual manner of construing new Acts according to the old Rules, but to do so in this Case would be repugnant to the Words of the Act, for Heirs by Devise do not take as if born in the Life of their Father; But the Addition of the Words in the Act, although no Trustees to preserve contingent Remainders, clears this of all Objections, and as before that Act all accurate Conveyancers inferred such Limitations, so since they have left them out, which plainly shews their Sense of the Statute. But the Objections on the Part of the Defendant are these, that there must be some Tenant to the Freehold, there must be some body to answer to the Precipe of a Stranger to bring Actions of Trespass &c. and this can be nobody but the Uncle. As to this, I do not know whether it is material for me to consider it, because I can get at it in another Way, but Judges in such Cases must mould and frame such Estates as are agreeable to the plain Intention of the Legislature. It may vest in the Uncle and devest upon the Birth of Son by Relation, and this is agreeable to the Construction of Law in other Instances, as in the Case of Inrollment of Deeds; here tho' a Person has not Title till Inrollment, yet from the Inrollment he is in from the Time of Execution of the Deed. As to the Objection that there is no legal Remedy for the Profits against the Uncle, I think if my Construction of the Act is right, the Son might bring an ejectment and lay his Devise to the Time of the Death of his Father, and every body would be eftopped to say he was not born in the Life of his Father, for how could the Defendant take the Objection? Not till he had entered into the common Rule; And though it is at the Plaintiff's Peril if he lays his Devise before his Title accrued, yet if my Construction is right, his Title did accrue, and it would be immaterial whether he could or could not in Fact make such Devise, because such Estates are only looked upon as Matter of Form, and not real, for infant makes such Estates every Day. But suppose this Point of Law was otherwise, I am of Opinion this Court would make the Uncle a Trustee for the Infant, and that seems to me to be the Meaning of the Act of Parliament, and though it is natural to pursue legal Remedies where such are to be had, yet that is no Reason if they are not to be had why Remedies should not be enforced here. I am therefore of Opinion the intermediate Profits of the fettled Estate must go to the Infant.

(I. 10) Void in respect of the Time of making it, made good or not by some after Act or Accident &c.

1. A Devise of one Jointenant of Land devifiable, which he held in Fee, at his Death jointly with a Stranger, is not good. The same Law is of a Ule in Jointure &c. But if such Devise doth survive all his Companions, then such Devise is good. Perk. S. 500.


A. makes a Feoffment to a Feme Coyrt, and afterwards A. devised the same Land to another, the Husband disagrees, this shall have a Relation between
Devise.

between the Parties, so as the Husband shall not be charged in Damages, but it shall not make the void Devise good. Arg. 2 Mod. 149. Hill. 23 and 29 Car. 2. B. R. in Case of Abram v. Cunningham cites 3 Rep. 28. b. Butler v. Baker.

4. A seised of Black- acre in Tail, and of White- acre in Fee, by Mistake devised the Intail’d Acre, and left the Fee to descend. The Devisee brought a Bill in Chancery, and had a Decree to enjoy, cited per Cur. 2 Vern. 233. Trin. 1691. in the Case of Thomas v. Gyles.

5. If a Man be Non Compos, and not in his right Senes at the Time of making his Will, though he afterwards, never so long before his Death, becomes a Man of Understanding and sound Judgment and Memory, yet the Will is a void Will, and will by no Means be made good; because he wanted the disposing Power at the Time of Disposition, which was the Time of making his Will; per Ld. Ch. J. Trevor, in delivering the Opinion of the whole Court. 11 Mod. 157. Hill. 6. Ann. C. B. in Case of Archer v. Bokenham.

6. So the Law is the same of a Fine Covert; if a married Woman makes a Will, though he becomes a Widow and unmarried before her Death, yet such is a void Devise without Reproduction, for the Law here regards the Time of making only. 11 Mod. 157. per Trevor Ch. J. in delivering the Opinion of the Court. Hill. 6. Ann. C. B. in Case of Archer v. Bokenham.

7. So it is in the Case of an Infant; if he makes a Will, though he be of Age, nay though never so old when he dies, yet it is a void Devise, because he had not Discretion, nor a disposing Mind, at the Time of Making; for it is that which the Law regards in these Cases, and not the Time of the Death of the Tettor; per Trevor Ch. J. 11 Mod. 157. in Case of Archer v. Bokenham.

(K) What shall be a good Devise against Law and Reason.

1. A Devise against Law and Reason is void. 11 P. 6. 13. b. When the Tettor in his Will does not agree with the Rules of Law, there this Intent is void; As if J. S. devises Land to A. in Fee, and if he dies without Heir that B. shall have the Land, this Devise is void to B. because one Fee Simple cannot depend upon another; Per Coke J. Built. 61. Mich 3 Jac.

2. If a Man devises to one for Life, the Remainder to another, * In Roll it is (Female) but in the Year Book it is (Male) when any of his Heirs Females shall have Issue * Male, he shall have the Land; if he in Remainder dies without Issue Male, upon which the Issue Female enters, though the hard Issue Male after, yet he shall not have it by the Limitation, because his Intent is against Reason. 11 P. 6. 14.

3. So if a Devise be to one and his Heirs, and in Case he hath Issue * This is misprinted and should be (14) a Daughter, that the shall have the Land, if the Devisee hath Issue a Son and Daughter, and dies, the Son shall have the Land, though the Daughter took Husband after, and had Issue a Son, he shall not out the other, for his Intent was against Reason. 11 P. 6 * 13. b.

4. If a Man devises a Chattel Personal to one for Life, the Remainder to another, this is a void Remainder. Ditch. 5 Jac. B. per Curiam.

Personal Chattles with Remainder is good or not.
5 If a Man possessed of a Lease for Years of Land devises it to one for Life, the Remainder to another, though the first Devisee hath the whole Estate of the Term in him, and so no Remainder can appear upon it at the Common Law, yet it is a good Devise to the second Devisee by way of Executory Devise. Rich. 5 Jac. B. between Malea and Sir Henry Sackford.


* Roll Rep. 256. pl. 8. S. C. by the Name of Bennet v. Lewknor. adjournatur. In Palm. 50. cites Lewknor's Cafe. S. C. as argued two Terms in the Exchequer, and refused that the Remainder was merely void.—In Roll Rep. no mention is made of the Word (Body) till in a Fourth Limitation to a fourth Son. But in Palm. the Word (Body) is mentioned in the first Limitation to the first Son.—2 Bulk. 28. S. C. the Testator devised, that his Wife should have the Occupation, Maintenance, and Profits of the House and Land to him lefted, if she should live so long unmarried and dwell in the said House, and if she married or died within the Term, that then R. his Eldest Son should have the Occupation for so long as he should live, and have Issue of his Body, and during the same Time repairing the same; And if he died without Issue &c, the Remainder over &c. adjourned a good Remainder.

8. If a Man devises a Term to his Wife, if she lives so long unmarried, and if she marries, then to her Rent out of the Land, and makes the Wife Execurrix, and dies, and the Wife agrees to the Legacies, and after takes Husband, the Rent shall rise to her well enough, though the one had the whole Term in her as Execurrix, for this future Rent shall not be extinct thereby. Rich. 12 Jac. B. R. between Goffe and Haywood. And Pach. 14 Jac. Same Case adjudged.

9. If a Man devises Lands to B. his Younger Son, and his Heirs, and that if he dies without Issue, living A. his Eldest Son, that the Land shall go to A. in Fee; this is a good future Possibility to A. in nature of a Remainder, though it be dependant upon an Event in Fee in B. for a future Possibility by Devise may well depend upon such Event in Fee upon a Collateral Contingent. Rich. 14 Jac. B. R. between Browne and Pells, adjudged per Curtiam, upon Argument upon a Special Verdict.
Devise.

agreed, that a Recovery suffered by B. could not hurt the future Devise; but Doderidge was much against this Opinion, by Reason of the great Mischief that might ensue by making Perpetuities in Devises, and cited Arthur's Case, in Lord's Cafe, but notwithstanding Judgment was affirmed as aforesaid by Lord Justice Coke, in 5 Ch. 194. p. 15. Pells v. Brown, S. C. says, that the Limitation by the Devise was to B. and his Heirs in Perpetuum, and therefore it was resolved by all the Judges, that it was not an Estate Tail in B. but a Fee, and likewise it was said in the Will, paying to C. a third Brother 201 at the Age of Twenty-one Years; both which Clause shows, that he intended a Fee to B. and they all agreed, that the Limitation of the Fee to A. is a Good Limitation, by Way of the Contingency of B's dying without Issue living A. though not by Way of immediate Remission, which all agreed it could not be, but by Way of Executive Devise.

2. Roll. Rep. 196. S. C. argued, and Ib. 216 S. C. adjudged. — Palm. 135 to 131. S. C. argued and adjudged — S. C. cited Arg. Win. 54, 55 as adjudged. — S. C. cited Arg. 4 Mod. 282. S. C. cited Ib. 517. S. C. cited Cro. C. 185 in pl. 4. — S. C. cited Hard. 150. S. C. cited ib. 275. by Latch Arg. said, that it had been adjudged contrary to the Decision in Pell and Brown's Case, if Lands are devised to one and his Heirs, and if he dies without Issue, that the Land shall be to mother and his Heirs, this is no Estate Tail, for it cannot stand with the Rules of Law to devise such an Estate, because it is only a Possibility, and if it should be more, it must be a Fee upon a Fee, and so a Perpetuity, and it cannot be known within what Bounds it shall end, either in Case of Years, or Life, or other Contingencies, and says this was adjudged Mich. 37. & 38. [but mentions no Reign, though it seems to mean Eliz.] C. B. Rot. 1149. — A Devise to A and his Heirs, and if he dies, living his Mother, then the Land to remain to H. and his Heirs; Roll. Ch. J. said, that the Limitation of an Inheritance after an absolute Fee Simple is void; For this would make a Perpetuity, which the Law would not permit, but if it be upon a Contingent Fee Simple it is otherwise. Sty. 138. Pack. 1261. Gay v. Gay.

10. If one before the 27 H. 3. of life had Feoffees to his Ufe, Br. Devise and after that Statute, and the Statute of 32 H. 3. of Wills, he had devised, that his Feoffees should make an Estate to W. N. and the & S. P. by Heirs of his Body, and dies, this had been a good Will by reason of the Intention. 38 D. 8 St. 346. J determined for Law. — S. C. cited by Hobart Ch. J. but says, Quere if the Land were never in Feoffment. Hob. 32. — Br. N. C. 71 b. pl. 316. cites S. C.

11. If after the Statute of 32 D. 3. a Man sealed of Lands en — S. C. cited foils A. and B. thereof, to the Ufe and Intent to perform his Will, per Car. Le. and after by his Will, reciting the said Feoffment, and the Feoffees to 346 Mich. stand sealed to the said Ufe, declares his Will to be, that the said Feoffees, and their Heirs, shall stand and be sealed thereof to the Ufe C. B. in J. S. and the Heirs of his Body, this is a good Devise of the Greek's Land by the Intention of the Deviseur, though by no Certainty. 2 Le. 102. Feoffees could stand sealed to the said Ufe. D. 15 El. 323. 29. pl. 531. S. C. Lingkett's Case per Curiam.


12. A Man sealed of Lands makes his Will, and in this devises, Poph. 188. that J. N. and J. D. and their Heirs, should stand sealed thereof to the Buffett v. Ufe of J. S. &c, though the said Persons have nothing in the Land, yet this is a good Devise to J. S. for either this will amount to a Devise to the Feoffees to the Ufe of J. D. or as an immediate Devise to J. S. for his Intention is apparent that J. S. should have it. Mich. 2 Car. Regis, B. R. between Burfield and Knarborough, for an Inn in Windsor, called the Stater, adjudged per Curiain, upon Evidence to a Jury at War.

by Reason of the Intention; and cited Br. Devise, pl. 48. & 15 Eliz. D. 523. for the Proof of it. — Gibb. 18, Pach. 1 Geo. 2. B. R. a S. C. cited by Raymond Ch. J. in delivering the Opinion of the Court, and said, that though J. N. and J. D. had nothing in the Land, yet the Devise is good to J. S. &c or it shall amount to a Devise to the Feoffees to his Ufe, or to an immediate Devise to him; For the Intention of Testator is plain that I. S. shall have it. — Forbes's Case, S. C. cited by Raymond Ch. J. in & S. C. in totoem Verbis — Le. 533 pl. 416. Mich. 52 Eliz. C. B. Greaves's Case. A was Caved of Lands, and 6 Eliz. int. visited J. N. and J. D. in Ufe to the Ufe of his last Will, by which he willed that his Feoffees should stand sealed
A Termor devised his Term to his Eldest Daughter and her Issue, the Remainder (if she die without Issue within the Term) to the Youngest Daughter &c. The Eldest died without Issue, and her Husband held the Term. Baldwin and Shelly held, that the Youngest Daughter is without Remedy; because it is a void Remainder, being only of a Term, as it is of a Chattel Personal; Englefield contrary, because of the Intent of the Testator. Baldwin said, he agreed that if one devises his Term to J. S. upon Condition that if J. S. dies within the Term, that W. R. shall have it, here he does not give all his Term and Interest to J. S. but to much only as shall incur during his Life, and W. R. shall have the Residue; But in the Principal Case he devises the entire Term to the Eldest Daughter; and said that he moved this Case when he was Serjeant, and that the Court was of his Opinion now &c. D. 7. a. b. pl. 8. 9. Trin. 28 H. 8. Anon.

14. Leave for Years devised that his Wife should have the Occupation of his Lands for so many Years as she should live, and after her Decease the Residue to his Son and his Assigns, and made her sole Executor, and died, the Widow entred and agreed to the Legacy, and afterwards sold the Term, and died before the Lease was expired. Adjudged this was not a Devise of the whole Term to the Wife, but upon a Contingency if the should live so long, and her Interest is determined upon her Death, so that this Sale was void against the Son, because the Remainder was to arise to him upon a Contingency of her dying before the Term expired; therefore the Devise of the Residue to him shall be expanded to precede the Devise to the Wife, that both may stand; for there was no express Estate for Life devised to her, it if she would have been intitled to the whole Term, because in Judgment of Law an Estate for Life is more valuable than for Years. Pl. Com. 519. Hill. 20 Eliz. C. B. Welkden v. Elkington.

(L) Against Law [Remainders of Terms of Years]

1. If A. possessed of a Term for Years, devises it to B. and the Heirs Male of his Body begotten, the Remainder to C. and the Heirs Male of his Body begotten, this is a void Remainder to C. because it is to commence upon a Limitation of the Death of B. without heirs Male of his Body, which is most remote, and by the Devise before to B. and the Heirs Male of his Body begotten. B. had the whole Term, which shall come to his Executors, and not to his Issue, and he hath the whole Power of disposing thereof to whom he pleases during the Term; and if he does not dispose thereof, per his Executors shall have it if he dies without Issue, and it shall not revert to the Executor of A. Patch, 11 Car. B. R. between Lown-hop and Abley, per Curiam, resolved upon a Trial at Barr; and they would not suffer it to be argued for the Clearness thereof, nor to be found specially. Instruct, Mich. 10 Car. Ror. 120.

2. If A. possessed of a Term for 163 Years, devises the Use and Occupation thereof to B. his Brother for Life, and after to the Wife of B. for Life, and after to the Eldest Son of B. for Life, and after such Son...
Devise.

Son dying without Heir Male, to any other Son which B. shall have, one after another in Form aforesaid, and if B. die without Heir Male of his Body, I having yet 136 Years to come of the said Term, and having a Purpose and Desire to have the same kept in my Name, my Will and Meaning is, that the Use, Profit and Occupation of the Premises shall remain and be unto S. for his Life, and after him, unto the Eldest Son that S. shall have for his Life, and after, such Son dying without Heir Male, to any other Son which the said S. shall have, one after another, in Form aforesaid; and if S. die without Heir * Male of his Body, to Richard Xe, with duties Remainders over; and after A. makes the said [B.] and S. his Executors, and dies, and they shall administer, and agree to the Legacy, and after the Wife of B. dies, and B. dies without Issue Male, and S. survives, and hath Issue E. his Eldest Son and J. his Youngest Son, and after makes his Will, and by it devises all his Goods and Chattels to the said E. and makes the said E. his Executor, and dies, and after E. enters, and makes F. his Executor, and dies without Heir Male of his Body, and after F. enters, and makes G. his Executor, and dies; in this Case G. hath good Title to the Land, and not the said J. who was the second Son of S. for to entitle J. to the Land by the Will (who hath no other Title thereto besides the Will) B. ought to die without Issue Male, which is a Limitation by Indemnity of a Perpetuity, and the Eldest Son of S. (who was the surviving Executor) subject E. (under whom G. claims) ought also to die without Issue Male, which is another Limitation of a Perpetuity by Indemnity before J. could have any Thing by the Will, and so a double perpetual Limitation ought to determine before the Remainder limited to the second Son of S. who was the said J. could take Effect; and tho' (as it was objected) here the Estate is not limited to B. and the Heirs Male of his Body, nor to the Eldest Son of S. and his Heirs Male, yet this is all one, though it be admitted that the Executor of B. nor of such Eldest Son of S. should have it so long as the said B. and the Eldest Son should have Issue Male, for the second Son of S. could not have it till B. and the Eldest Son of S. died without Issue Male, and in the mean Time the Executor of the Devise should have it, and this would be all one with the Chief to make such Executors Devices, which would be worse than any Perpetuity, and no Means to back it. 3d. Car. B. R. between Sanders and Cornu, upon a Special Verdict, per Curiam resolved, and they gave a perpetual Rule for Judgment for the Defendant, subject Cornub the Executor against the Plaintiff, who was the second Son of S. but after the Plaintiff procured a Day further till next Term, and in the mean Time the Parties agreed; I being of the Defendant’s Counsel. And Vide my Argument in my Book.

3. If A. possessed of a Term for Years, devises it to B. his * S.C. cited Wife, for 18 Years, and after to C. his Eldest Son for Life, and after to the Eldest Issue Male of C. for Life, though C. had not any Issue Male at the Time of the Devise and Death of the Devise, yet if he had Issue Male before his Death, this Issue Male shall have it as an Executory Devise; for that although there be a Contingent upon a Contingent, and the Issue not in Effe at the Time of the Devise, yet not much as it is limited to him but for Life, it is good, and all one with Bannning’s Case, 8 May, 14 Carol; upon a Reference out of Chancery to Justice Jones, Exche, and Barkeley, between * Cotton and Heath, by them resolved without Question.

4. If A. possessed of a Term devises it to B. his Wife, for Life, * And 62. and after her Death to his Children unpreferred, and after B. dies, C. 61 pl. 155; then S. C. ad-
Devife.

judged.—

then being the only Daughter of A. shall have it; for an Executory Devife that hath a Dependance upon the first Devife may be made to a Person uncertain. Mich. 26. 27 Eliz. B. R. between * Amner and Lodington, per Curiam adjudged, quod vide cited in Matthew Manning's Case. Co. 8. 96. for it was uncertain whether, as long as A. lived, the Daughter should have it, as much as the might have been advanced in the Life of B. and then the should have had nothing.

5. If a Man possessed of a Term for Years devolves it to D. his Wife for Life, and after to William his Eldest Son and his Assigns, and if he dies without Issue then living, to Thomas another Son, this * is a void Devise to Thomas, unaltered as he cannot have it by the Devise, unless the Eldest Son dies without Issue, which is a perpetual Limitation by Intendment of Law; though it was objected that it is limited that, although he hath Issue, yet if that Issue be not living at his Death, yet Thomas shall have it by the Devise, for by the Devise it is given absolutely to the Eldest Son and his Assigns, and after it is devolved to Thomas, if the Eldest dies without Issue, so that the Assignes is to have it till the Eldest dies without Issue; and if Hen should be admitted to make such Devises, there would not be any End of them, nor any Certainty. 

15 Jac. between * Child and Boyly, adjudged per totam Curiam in Camera Scaccarii, in a Writ of Error upon a Judgment in B. R. where it was to also adjudged before per Curiam; and the Judges and Barons said they would not admit a Devise to be made to exceed the Devise in Matthew Manning's Case for the Inconvenience they have seen by it.

6. If the Lefsee for Life devises his Term by Testament, to one for Term of Life; the Remainder over to another, and dies, and the Devisees enters and does not claim the Term but dies, there he in Remainder shall have it; But if the first Devisee had alien'd it in his Life, there he in Remainder had been without Remedy thereof. Br. Chanc. pl. 23. cites 33 H. 8.

7. A. Lefsee of a Paragonage, devolved his whole Lefsee, Term, and Interest to B. Proviso, that if he die, living J. S. then the said Lefsee &c. should remain to J. S. during the Residence of the Term. B. fold the Term. Mon-tague Ch. J. and Hales J. held that J. S. had no Remedy. D. 74. 2. b. pl. 18. Mich. 6 E. 6. Anon.

8. A.
8. A Tenant devised his Term for Years to J. S. for his Life, Remainder to W. R. and made J. S. his Executor and died. J. S. died. All the Justices held the Remainder void; for the first Devise entered's as Executor, and never declared his Intention by any Act to execute the Devise. But Wells, Welton, and Harper, J. agreed that a Remainder of a Term devised to one for Life is good by Devise. D. 227. b. pl. 59 Trin. 10 Eliz. Anon. — The Reporter adds a Quære.

9. A Tenant devised his Term to his Son (then an Infant) when he should be of full Age; and will'd, that his Wife in the mean Time should have the Occupation and Profits thereof, and made her sole Executrix and died; the Widow proved the Will, and sold the Term, and afterwards the Son came of Age. Quære, What Remedy the Son has for the Term? For the Justices differed in Opinion. D. 328. b. pl. 11. Mich. 15 & 16 Eliz. Anon.

10. A being possessed of a Term for 60 Years, devised thus, viz. will that M. my Wife shall have and occupy all the Lands contained in the Lease, for so many Years as she shall live, and after her Death I gave and bequeathed the Reversion thereof to B. my Son, and his Affigns, and made M. sole Executrix, and died. M. proved the Will and entered, claiming only for her Life, the Remainder to B. this Remainder was adjudged good, and this Distinction was made by Manwood and Dyer, that in this Case there was a Separation of the Jus Possessionis from the Jus Proprietatis, that the Intereft and mere Right of the Term is not devolved to M. for any Time, and yet she has an Interest by Possibility in the entire Term if she survives the 60 Years. But after she made her Entry into the Land by Virtue of the Will, and had expressly declared her Agreement to take it as a Legacy, with Remainder to B. according to the Will, waving her Interest as Executrix, she had no Power afterwards to dispose of the Term; So likewise, if A. had bequeathed the whole Term to his Son first, so that M. should have the Occupation and Use of the Land during her Life, this had been good, and she could not alienate the whole Term; and the Words of the Will plainly prove the Testator's Intention to restrain her from alienating the entire Term. D. 358. b. pl. 50, 51, 52. Trin. 19 Eliz. Anon.

11. A Tenant devised his Term to his Son, and further said, that his Will was that his Wife should have the Occupation and Profits of the Lease during the Minority of his Son, so the Intent that with the Profits she might educate his Children and see his last Will performed, and made her his Executrix and died; afterwards she proved the Will, and sold the Term to a Creditor of her Husband's before all the Debts were paid, having other Goods in her Hands sufficient to pay the Debts and Funerals. She educated the Children after the Baton's Death, until her own Death. The Son came to full Age and entered into the Premises, and his Entry was adjudged lawful. Pl. C. 539. b. Hill. 21 Eliz. Parmour v. Yardley.

12. A being possessed of a Term for Years, devised it to M. his Wife for Life, Remainder to her Children unpreferred, and made her Executrix. A. dies. M. assigns to the Legacies. She takes Husband, who sells the Term. M. dies. The Children unpreferred enter. The Court held, that the Lease and the Intereft in it was fo bound, that the Executrix had nothing to do with it any longer than for her own Life, and that the Children unpreferred may enter after her Death, and retain it as a Legacy to them, into whatsoever Hands it shall come &c. but that the common Argument of Remainder was not the Point or material. And. 60. pl. 135. Amner v. Ludington.

Error in B. R. — 3 Le. 89. pl. 128. S. C. and some Words unsee where any are misprinted, as where 5 Le. has (Outier le Main) which in the 5 Le. is, as it should be, (Owel Main) ——

S. C. Jenk 264. pl. 66.
13. A Man poffeffed of a Term for Years in Lands, by his Laft Will devifed the fame to one and the Heirs of his Body begotten, made his Executors and died; the Devifee entred by the Affent of the Executors, has Effue and alient the Term and dies; This Affention bars the Ifue, for a Term of Years cannot be entailed. 4 Inf. 87. cites it as adjudged Trin. 28 Eliz. in B. R. in Peacock's Cafe.

14. If Term for Years be devifed to A. and if A. dies within the Term, Remainder to B. By Defcent of Inheritance to A. Unity of Poffeffion, Grant, or Forfeiture of A. the Remainder is defeated. Mo. 268. pl. 420. Mich. 30 & 31 Eliz. in the Exchequer. Lee v. Lee.

15. If Land be devifed for Years to A. and if he dies within the Years that B. shall have the Remainder of the Years; no All of A. can prejudice the Remainder to B. Mo. 269. pl. 420. Mich. 30 & 31 Eliz. in Scacc. Lee v. Lee.

16. But per Manwood otherwise it is, if one who has a Term devifes his Term with such Remainder, for if he devifes his Term it is all one compleat Estate, by which Power is given to firft Devifee over all the Term for certain Time; but it is not to where the Land is devifed. Mo 269. Lee v. Lee.

17. A. poffeffed of a Term devifed it to A. his Wife, and B. his Son for their Lives, and after to C. his Son and the Heirs Males of his Body and died. A. and B. entered by Force of the Devifee and died. C. fold his Intereft of his Term, and had Ifue D. and died. Anderfon Ch. J. and Walmfley J. to whom it was referred, held, that D. had no Right to the Leafe; for per Walmfley J. D. cannot claim it as Heir Male, for that is not good to convey the Intereft of a Term to him. Cro. E. 143. pl. 11. Trin. 31 Eliz. in Canc. Higgins v. Mills.

18. A. was poffeffed of a Leafe for Years of a Houfe, and divers other Leafe, and had Ifue B. the Plaintiff, and C. the Defendant, and E. a Daughter; and by his Will devifed, that E. should have the said Houfe for her Life, and if she chanced to eare before C. then I will, that C. shall have it upon such reasonable Competition as shall be thought fit by my Overfears, allowing to my other Executors such reasonable Rates as shall be thought meet by my Overfears; and he devifed all his other Lands and Goods to his Executors, and made B. and C. his Executors, and J. S. and W. R. his Overfears, and died. E. entered by the Affent of the Executors and died during the Term. Anderfon, Walmfley, and Kingmille held that the whole Term was in E. and the Remainder void; and Anderfon said, though a Devifee ought to be expounded according to the Intent of Devifor, yet this Intent ought to be guided by the Law, and that if such a Devifee be oulted and is to bring his Action, he ought to shew the Certainty of his Estate, which is the Intire Eatae, and then if E. has the Intire Eatae, the Remainder to C. is void. Cro. E. 795. pl. 42. Mich. 42 & 43 Eliz. C. B. Woodcock v. Woodcock.

19. A Devifee was as follows, viz. The Remainder of all my Goods, moveable or unmoveable, I give my Son John, whom I make my Executor, and to him I give my whole Years that I have in my Farm of Mercourt, and if he dies I give it to my Daughters. John the Executor and Devifee proves the Will, claiming the Leafe according to the Will and dies intestate. The Administrators shall have the Leafe and not the Daughters. 2 And. 183. pl. 105. Anon.

20. A. had Ifue, B. a Son, and two Daughters, D. and E. and having a Leafe, he devifed all his Leafe and Term of Years to B. his Son, and if B. died, then to D. and E. his Daughters, and if the Daughters died, then to his Wife. A. made B. sole Executor, who entered, claiming by the Will, and after Probate of the Will died intestate. B's Widow took Administration and sold the Term to J. S. Upon a Cafe referred out of Chancery, it was certified by Popham, Anderfon, and Walmfley, that as this Cafe is, J. S. the Affent of ought to have the Term,
Term, and the same was decreed accordingly. Trin. 1 Jac. No. 748.

21. Leeffe for Years devilled the Profits of his Term to his Wife for Life, the Remainder to A. for Life, if J. S. his Son-in-law within two Years after his Death be not bound in 100 l. to pay 5 l. per Annum to the said A. for her Life, and if he do become bound, he devistles the Term to the said J. S. and the Heirs Males of his Body, and if he dies without Issue, he devistles the Remainder over. A. died within two Months. J. S. never enter'd into a Bond, but died having Issue Male, and the Issue died during the Continuance of the Term. It was in this Case held, 1st, That it was a good Remainder. 2dly, That the Remainder limited to J. S. upon this Condition precedent was good, and should take Effect, although he never enter'd into a Bond, for he had Time to do it within two Years; and then when A. died within the two Years, the Condition was discharged by the Act of God, and so the Remainder was good. Mo. 758.

Time procured from the Executors.

22. Leeffe for 60 Years devilled it to his Wife and to his Cousin for their Lives, and afterwards to such Persons as should remain in his House in Normington at the Time of their Decease; the Cousin died, and the Wife survived and assigned the Term. Coke and Walmley held, that this Remainder was not good, because it was only a Possibility. But Warburton and Daniel J. contra, and relied upon the Authorities in Welden's Cafe, and Paramount's Cafe, and Pierpoint's Cafe. Et adjournatur. Cro. J. 198. pl. 26. Mich. 5 Jac. B. K. Mallet v. Sackford.

23. A Man being possifled for a Term, devilles the whole Term to A. for Life, and if he dies within the Term, to B. during the Minority of C. and that C. when he comes of full Age shall have the Remainder of the Term, and held a good Devife. Brownl. 41. Trin. 6 jac. Dunnal v. Giles.

but the very Point there is not exactly the same with this.

24. Leeffe for 50 Years of a Mill devilled it to B. after the Death of M. his Wife, and that in the mean Time his Wife shall have the Use and Occupations thereof for Life, he paying 7 l. a Year to B. during her Life, and made M. Executrix and died, leaving no Aliens besides the Term. M. administered and entered, and paid the Rent, and said that B. shall have the Term after her Death, and afterwards the died. Walmley held the Remainder void, but the other four J. held it a good Devife to B. and that he took it not by way of Remainder but by way of Executory Devife, and that there was no Difference where one devilles his Term for Life, the Remainder over, and when he devilles his Land, or Farm, or Leale, or the Ufe, Occupation, or Profits of the Land, for the Law will make such Construction of the Words as may answer the Intent of the Teftator, and marshal them so that his Will shall take Effect. 8 Rep. 94. b. Trin. 7 Jac. Matthew Manning's Cafe.

25. Leeffe for 40 Years devilles the Term to J. S. for Term of his Life if he shall live till it be expired, and if he dies before the Years expire, then the Remainder to E. for Term of his Life; Per Hutton and Harvey the Remainder is not good. Hutt. 74. Hill. 3 Car. C. B. Faulkner's Cafe.
26. Coeby que Trust of a Term with Power to dispone of it by his Life. Will devised it to B. his Son and the Heirs of his Body, Remainder to C. and charged it with divers Legacies and Annuities, and made B. his Executor and died; B. for 1601. foled it to W. L. and C. being one of the Annuitants, sold his Annuity likewife to W. L. and released to him all his Right in the Term. B. died without Issue, and the herein Trustee joint'd with C. in a Grant of his Interest to J. S. Per cur. Cur. The Assignment is not void against W. L. by the Statute of fraudulent Conveyances, but the Remainder to C. was void, and yet the Sale of B. had been good if there had been no Assignment, but the Assignment made it ill; and according to the Opinion of the Court the Jury gave a Verdict for the Plaintiff. Jo. 213. Mich. 5 Car. B. R. Baker v. Sir Wm. Lee.

27. L. F. by Will having a Term for Years, bequeath'd it to his Daughter C. and if it happens my Daughter C. to die before she shall have accomplished the Years of a lawful Age, then the whole Profits of the Premisses to remain and be wholly to W. my Son; and if my Son W. dies before the like lawful Age, then all the Profits of the said Premisses to remain to C. my Daughter surviving; and if the said C. my Daughter, and W. my Son die before the like lawful Age as afo; said, having no Issue of their Bodies lawfully begotten, then all the whole Term of the said Lease, with the Profits &c. I give and devise to my Sifters Children, to be equally divided and distributed amongst them. The Question arising in the Case being, Whether the said C. who died at 18 Years of Age, was to be deemed of full Age, according to the Words of the Will, and the Meaning of the Testator? His Lordship and the Judges are of Opinion, that a lawful Age in general Words (unless it be in a particular Case, as Guardian in Socage) must be construed and taken 21 Years; and therefore are all of Opinion that the said remaining Term, according to the Constitution of the Will, belongs to all the Sifters Children of the said L. F. Chan. Rep. 99. 100. 11 Car. Hartwell v. Ford.

28. A Devise of a Term of 2000 Years to W. for 90 Years, if he lived so long, Remainder to the Heirs Males of his Body, Remainder to B. his Brother for 90 Years, Remainder to the Heirs Males of his Body, Remainder over &c. Bridgman Ch. J. held, the Words (Heirs of his Body) were Words of Limitation, and therefore, when he ceas'd to have Heirs of his Body it is reasobable that the Term limited by the Devise shall cease, and the Remainder being void, this will go again to the Executors of the first Devisee, who in this Case was W. and therefore Judgment was given for the Plaintiff Nisi, that the Remainder were void. Sid. 37. pl. 7. Pach. 13 Car. 2. B. B. Grigg v. Hopkins.

29. The Testator being poetised of a Term of 1000 Years, devised it to M. his Wife for Life, Remainder to A. in Tail, and made his Wife Executrix and died; A. granted the Lands to B. for 1500l. M. the Widow, Executrix married the Defendant, and then assisted to the Legacy. One Question was, Whether he in Remainder could dispone of this Estate during the Life of M. the Tenant for Life? It seems he could not, because he had only a Possibility, and this being by way of Assignment, cannot pass by way of Eaton; because an Interest passes by it. Sid. 188. pl. 16. Pach. 16 Car. 2. B. R. Cooke v. Bellamy.

30. Devise of a Term in Trust for his Wife for Life, then to their two Daughters, and their Heirs, and if they die without Heirs of their Body, then to the right Heirs of the Testator. The Daughters died intestate without Issue and the Mother administrated. The Term was decreed to the Mother and not to the right Heirs of Testator. Fin. R. 398. Mich. 30 Car. 2. Salter v. Stradling, Cleaver and Chaworth.
Devise.

31. If all the Remainder-Men of a Term are living at the Time of
the Devise, it is good; but such Remainder limited to a Person not in- 
being is void. Per Twifden J. said it had been so held. 1 Mod.
32. A Termor for Years devised the Term to M. his Wife, Remainder


to N. his Son for Life, and if N. dies without Issue, then to B. &c. It

was objected, that it was not to N. and his Issue, in which Case it was
agreed that it should go to N. and his Executors, and the Remainder
over void. But here the Devise is to N. for Life, and if he dies with- 
out Issue, the Remainder to B. and so has only an Estate for Life with 

an Executory Devise to B. upon the Contingent of no Issue. But ad-
judged that this Remainder to B. was void, and that a Devise to one and

his Issue, Remainder over is at once with a Devise to one for Life, and if he 
dies without Issue, then to another; For the Remainder of a Term shall 

not depend on a Possibility to remote. Lev. 290. Polch. 22 Car. 2. B.
R. Love v. Windham.

33. Devise of a Trust of a Term for Years to be for Life, and after-
wards to his Issue, Remainder over; decreed that this Remainder is void, 

and that upon the Death of the Tenant for Life, the whole Term veils 
in the Issue; and that if such Issue die without Issue and Intestate, the 

Hill. 29 Car. 2. Warman v. Seaman & al.

34. Leeslee for Years devised the Lands to his Wife for her Life, and

after her Death to the Heirs of her Body, and for want thereof to J. S. and 
dies. The Executor contends to the Legacy, the Wife dies without Issue;
the Quetion was, Whether the Executor of the Husband or the Wife 
should have the Residue of the Term? Per Lord K. the Temailtor 
meant an Intail to the Wife, which cannot be, because then there 
should be a Perpetuity of a Term; and though there be Difference in 

Words when Land of Freehold is devised to one for Life, the 

Remainder afterwards to his Heirs, mediate or immediately, and where 

a Term is fo devised, the Difference is in Words, the Temailtor's Mean-

ing is the fame. 2 Chan. Cases 236, 237. Mich. 29 Car. 2. Bray v.
Buffield.

35. Devise of a Term to his Daughters after the Death of his Wife, 

when he made Executrix; she attented to the Legacies, and aligned the 

Term to one who had purchased the Inheritance, having sufficient Af-
fets to pay her Husband's Debts; the Term was decreed to the Daugh-

v. Smith.

36. A Man possesed of a Term devises it to his Son, and if he dies 

unmarried, and without Issue, then all to go to his Daughters and their 

Executors, and if his Son be married, and has no Issue then living to enjoy 
it, then after the Death of his Son's Wife, he devises it to his said Daugh-
ters; adjudged that the Devise to the Daughters is void, being a Limi-
tation after the Death of their Brother without Issue; for it is not to 

be taken (as objected) that the dying without Issue is to be understood 
without Issue living at his Death, and to the Contingency to happen 
within the Compass of a Life; and if it should be intended of such a 
dying without Issue, yet the Court held it would be void according to 
Child
Child and Baily's Case; for though this has prevailed in Case of a Devise of an Inheritance, as in Pell and Brown's Case, yet it has never prevailed in Case of a Term; and the Court said, they would not extend the Devises of Chattels to make Perpetuities farther than had been done before. 3 Lev. 22. Trin. 33. Car. 2. C. B. Gibbons v. Summers.

37. It is clear, that the legal Estate of a Term for Years, whether it be a long or short Term, cannot be limited to any Man in Fail, with the Remainder over to another after his Death without issue, that is flat and plain; for that is a direct Perpetuity. Per Ld Nottingham. 3 Chan. Cases 28. 33 & 34 Car. 2. in the Duke of Norfolk's Case.

38. If a Term be devised, or the Trust of a Term limited to one for Life, with Twenty Remainders for Life successively, and all the Persons in effect, and alive at the Time of the Limitation of their Estates, those though they like a Possibility upon a Possibility, are all good, because they produce no Inconvenience, they wear out in a little Time with an easy Interpretation. 3 Chan. Cases, 29. Hill. 33 & 34 Car. 2. cited by Ld. Chancellor Nottingham as Allford's Case.

39. Where a Term of 1000 Years was devised to D. for Life, Remainder to E. his Son and the Heirs Males of his Body, Remainder over; Adjudged that the Remainder over to the Heirs Males was void, because it is contingent, (i. e.) if there should happen, that any Part of the Term for Years should remain after the Determination of the Estate for Life; for the Law supposes, that every Estate for Life is of longer Continuance than any Estate for Years; and the Remainder to E. is only a Possibility. 3 Lev. 264. Trin. 1 W. & M. in C. B. Dowe v. Earle.

40. J. S. devised a Leasehold Estate to Martin his Son, his Executors, Administrators and Assigns for ever; but if he die before 21, without Issue, in that Case he devises it over to his Brother. The Question was, Whether the Remainder over was good; It was objected, that it was a Perpetuity, for that the Remainder depends on Martin's dying without Issue; for if he die before 21, though he leaves a Child, and that Child afterwards dies without Issue, Martin may be said to be dead before 21, without Issue; Sed non allocatur, per Cur. Decreed the Remainder over good. 2 Vern. 151. pl. 147. Trin. 1690. Martin v. Long.

41. A. devised a long Term for Years to his Son B. and the Heirs Male of his Body, and if he die without Issue living E. his Mother, then it should go over to his Son C. The Contingency happened, the Devise over to C. is good upon the Reazon and Authority of the D. of Norfolk's Case. Cumb. 208. Trin. 5 W. & M. in B. R. Lamb v. Archer.

And ibid. 162. says a Leasehold Case was cited to be so adjudged in the Exchequer between Smith v. Smith.

1 Salk. 225. pl. 5. S. C. the Limitation held good, the Contingency arising within the Compass of a Life; And the Court denied the Case of Child v. Baily, Smkn. 340. pl. 1. S. C. the Court said, that here was not any of the Inconveniences of Perpetuities; For the Estate is not unalienable, but only during one Life and this upon a Contingency, which might determine within a little Time, if the Party dies; and Judgment Nifi &c.

--- Carth. 266. S. C. the Court without any Difficulty held it a good Limitation by Way of Executory Devise to C. and that it did not tend to a Perpetuity as was suggested, and denied the Case of Child v. Baily, but said, that the established Law in Cases of this Nature is according to the Resolution in the Duke of Norfolk's; And Judgment accordingly. 12 Mod. 44. S. C. says that the Words (Heirs Males of his Body) in the Limitation are void, but that the subsequent Words are good; and the later Words will refrain the former and make them good, and that this differs from the Case of Gibbons v. Somers, for there the Dying without Issue was Indevisive. 8 C. cited by the Master of the Rolls. 2 Wms's Rep. 624. Mich. 1752.

42. A Term of 1000 Years, without Impeachment of Waste, was devised to the Defendant L. and if he die without Issue, then to the Plaintiff. The Plaintiff had got an Injunction to stop Waste, unless Cause; and it was alleged for Cause, that the Plaintiff upon his own showing had no Title, because the Devise to him after the Death of the Defendant
Devise.

fendant without Issue, was void. It was objected that the Devise was not to the Defendant and the Heirs of his Body, as it was in the Duke of Norfolk's Case; and that the Words, if he died without Issue, should be construed, without Issue living at the Time of his Death, which was agreed to be good, in Case it had been so expressed. But here it was held per Lord Keeper, that this being a Devise after dying without Issue generally is void, and thereupon the Cause was allowed, for that it appeared the Plaintiff could have no Title, but that it went to the Defendant, his Executors and Administrators. 2 Freem. Rep. 210. pl. 283. Hill. 1696. Burford v. Lee.

43. One F. being pollfeded of a Term for Years, devyse it to his Wife for Life, and after her Death to R. F. for her Life; and after her Death to T. F. and his Children; and then devyse in this Manner, and if it shall happen the said T. F. to die before the Expiration of the said Term, not having Issue of his Body then living, then to go over to the Plaintiff's for the Residue of the Term, the Defendant's Title was by an Allignment of R. F. and T. F. of all their Estate, Right, Title and Interest. R. F. was dead, and T. F. died without Issue, and the Plaintiff brought this Bill to have an Allignment of the Term pursuant to the Will; all that was inducted upon for the Defendant to difference this Case from the Duke of Norfolk's of a Term, and of Pell and Boulton's Case of a Fee, was, that this Contingency of his dying without Issue, was not confined to his own Death, but that the Words (then living) should relate to the Words (before the Expiration of the Term) and to this went further than any of the Cases had ever yet been carried, for he might have Issue for several Generations; and yet if such Issue failed at any Time before the Expiration of the Term, then it was to go over; and this, in a long Term, tended plainly to a Perpetuity, and therefore ought not to be allowed; but by the Devise to T. F. and his Children, and the subsequent Words (and if he die without Issue) the whole Term was vested in him, and he might dilute thereof as he thought fit; and it could not be restrained by the Words (then living) which related only to the Words (before the Expiration of the Term) and to the Remainder over to the Plaintiff void; but for the Plaintiffs it was argued and decreed, that the Remainder to them was good by Way of Executory Devise, and that the Words (then living) must relate to the Time of Death; for otherwise there would be no Difference between this and the common Limitations of a Term to one, and the Heirs or Issue of his Body; and if he dies without Issue, the Remainder to another, which is void; for there it must likewise be intended, if he die without Issue before the Expiration of the Term, he can limit no Remainder over, because nothing remains then to be limited; but here it being limited over upon this Contingency, if he die without Issue then living, viz. at the Time of his Death, it is good, because the Contingency must happen within one Life, or not at all, upon his Death it will be certainly known whether he leaves Issue or not; if he does, the Contingency can't take Place; if he does not, then it may; and this being to happen within the Comps of a Life, is good as an Executory Devise, and differs in nothing from the Duke of Norfolk's Case, save only that there it was by Provifio; and also upon the Death of another Person, without Issue then living; and here it is upon his own Death, which makes no manner of Difference. Abh. Equ. Cales 193. Trim. 1709. Fletcher's Cafe.

44. A Term was devised to A during his Infancy, and if he live till 21 Years, then to him for Life, and to such of his Children as he should leave it to, and if he shall die without Issue, Remainder over; and it was held good; for the dying without Issue was constr'd to be restrain'd

Arg. on the other Side it was said, that in the above to Cafe the
Devise.

Limitation to the Death of the Party. Arg. Gibb. 317. cites 24 May 1718, as the Cafe of Targate v. Gaunt.

45. In Cafe of the Devise of a Term for Years, where the dying without Issue is confined to a Life then in being, a Devise over is good; per Matter of the Rolls. Ch. Prec. 549. Mich. 1720. Opie v. Godolphin.

46. A. being posseffed of a Term, deviied it to B. and C. and if either of them die, and leave no Issue of their respective Bodies, then to D. The Matter of the Rolls held, that the Devise over was void, and that there is no Diverfity betwixt a Devife to one for Life, and if he die without Issue Remainder over, and a Devife thereof to one for Life with such Remainder, if he die leaving no Issue. Wms's Rep. 664. Mich. 1720. Forth v. Chapman.

47. One posseffed of a Term for Years deviied it to A. for Life, Remainder to the Heirs of A. It feems this shall, on A's Death, go to his Executor, and not to his Heir. 3 Wms's Rep. 29. Hill. Vac. 1729.

S. C. cited Arg. Gibb 1717. 268. Upon Appeal Ld. C. Parker reversed this Decision and faid, that if I devise a Term to A. and if A die without leaving Issue, Remainder over, this in the vulgar and natural Sense must be intended of leaving Issue at his Death and then the Devise over is good and that the Word (die) being the last Antecedent, the Words (without Issue) must refer to that. And the Teller who is type Confiti will be suppos'd to speak in the Vulgar, Common and Natural, and not in the Legal Sense of the Words. And that the Reason why a Devise of a Precedent to one for Life, and if he die without Issue, then to another is in favour of the Issue, that such may have it and the Intent take Place; but that in Cafe of a Devise in like Manner of a Term for Years, those Words (if he die without Issue then to another) cannot be suppos'd to have been intended in favour of such Issue, since they cannot by any Construction have it. Wms's Rep 666, 667. Trin 1725. S. C.

48. A. Tenant for Life demise to Trustees for 99 Years, if he so long lived, in Trust for herself during her Widowhood, and after her Marriage, then in Trust for C. a second Son, and the Heirs of his Body, if he die without Issue, then in Trust for D. her next younger Son. C. died Intestate without Issue. The Question was, Whether the Trust of this Term should go to A. his Mother, as Administratrix to him, subj ect to the Statute of Distributions, or to the next Son in Remainder? And for her it was infifted, that the Limitation over to D. after a Limitation to C. and the Heirs of his Body, being only of the Trust of a Term, was void. To which it was faid, that the only Reason, why the Trust of a Term could not be limited to one and the Heirs of his Body with Remainder over, was, because this would make a Perpetuity, but here the whole Term being to determine on A's Death, there could be no Perpetuity, as if she had made a Lease to a Trustee for 99 Years, if she so long lived, in Trust for C. and the Heirs of his Body; But if C. die without Heirs of his Body living A. then to D. this had been good. But as to this Point the Court gave No Opinion. 2 Wms's Rep. 608. Trin. 1732. in Cafe of King v. Cotton.

49. Devise of a Term was to J. S. in Trust to raise Money for Payment of her Debts and Legacies, and after to permit B. to receive the Rests for his Life, and after to his first &c. Sons in Tail Male, Remainder to Daughters, and in Default of Daughters, or in Cafe of their Death before

21, or
21, or Marriage, then to W. R. for the then Refidue of the Term. B. died of 1 Subtt 1 without having ever had any Issue. It was decreed by the Matter of 2 in the Rolls, that J. S. convey the Refidue of the Term unfold for Pay 3 ment of Debts and Legacies to B. 2 Wms's Rep. 618. 631. Mich. 1732. 4
Stanley v. Leigh.

over of a Personal Estate, a Case was made by Ld. Talbot for the Opinion of the Judges of B. R. who certified the Limitation to be good, the Ld. Hardwick in Mich. 1759. decreed agreeably thereto.

The Attorney General and Mr. Fazakerly cited the Case of 1 Stanely v. Life or Mad, at the Rolls; and said, that upon the Words, if he died without Issue but those Words are not in 2 Wms's Rep. at 516 it was insisted that the Limitation over should take Place, and that those Words should be understood to be Issue at the Time of his Death, and was so allowed by the Court; For that the Limitations to the Sons and the Heirs of their Bodies never taking Place the second Limitation was good, there being no Danger of a Perpetuity. Cases in Chancery at Ld. Talbot's Time. 23. 3 in Case of Clare v. Clare.

59. W. H. being seized and possessed of a considerable Real and Personal Estate, makes his Will on the 16th of Feb. 1717. in these Words; Item, I give and bequeath all my Real and Personal Estate unto my Son F. H. and to the Heirs of his Body, to his and their Use, to be paid unto him in three Years after my Death, and during that Time I make Sir J. N. Executor of this my Will, and after the said three Years expired, I do appoint that my said Son F. H. shall be Executor; and if my said Son F. H. shall die, leaving no Heirs of his Body living, then I give and bequeath so much of my said Real and Personal Estate as my said Son shall be possessed of at his Death to the Goldsmiths Company of London, in Trust for several Charitable Uses mentioned in his Will; But my Will is, that the Company shall not give my said Son any Disturbance during his Life. The Testator dies, and after the three Years F. H. takes upon him the Execution of the Will, and in some Time after fulfills a Common Recovery of the Real Estate; afterwards he makes his Will, and the Defendant his then Wife Executrix thereof, and then dies without Issue. The Court was unanimous, that the Limitation over was void, as the absolute Ownership had been given to F. H. for it is to him and the Heirs of his Body; and the Company are to have no more than he shall have left unspent, and therefore he had a Power to dispose of the Whole; which Power was not expressly given, but it resulted from his Interest; the Words that give an Estate Tail in the Land must transfer the entire Property of the Personal Estate, and then nothing remains to be given over. The Bill was dismissed; Per the Ld. Chancellor, the Matter of the Rolls, and Ld. Ch. B. Reynolds. Gibr. 314. 321. pl. 11. Trin. 5 Geo. 2. in Chancery. Attorney General v. Hall.

51. Devise of a Term to A. for Life, Remainder to the Children A. 1 shall leave at his Death, and if the Children of A. die without Issue, then to B. The Children of A. die without leaving any Issue living at the Time of their Death; this is a good Devise over to B. 3 Wms's Rep. 252. pl. 64. Palef. 1734. Atkinson v. Hutchinson.

52. Where the Words of a Devise of a Leasehold would make an ex- 1 pro's Estate Tail in the Case of a Freehold, there a Devise over of such 2 Leasehold is void; Seems if the Words in the former Devise would in the Case of a Freehold make an Estate Tail only by Implication. 3 Wms's Rep. 259. Palef. 1734. Atkinson v. Hutchinson.

53. In Ejectment at the Sittings at Guildhall the following Case was made for the Opinion of the Court; J. S. being possessed of a Term, deputed it, "To my Wife for her Life, and after her Decease to such of this 1 Child as my said Wife is now supposed to be with Child and coetent of, 2 and his Heirs for ever; Provided always, that if such Child as shall 3 happen to be born as aforesaid, shall die before it has attained the Age 4 of Christomb
Devise.

(Reported in Abr Eq. C. 225.)

"of 21 Years, leaving no Issue of its Body, then the Reversion of one
Third Part to my said Wife, and the other two Thirds to my Sisters A.
and B." The Tenant dying within a Month after, the Wife entered, and enjoyed during her Life, but had no Child or miscarriage; and upon her Death the Question was, Whether, as no Child had ever been born, the Remainders, limited upon his dying under 21 without Issue, could take Effect? And after several Arguments, the Court held that they might; that though formerly there had been Opinions to the contrary, yet according to the Law now settled, the Devise to the Infant in Venere fa mere was well limited, and if any Child had been born, would have pafs'd the Term accordingly. Secondly, that tho' no Child was ever born, yet the Remainders are notwithstanding good; for there being no Devisee, the Devise, though void only Ex post Facto, falls to the Ground as much as if it had been void in its Creation, and this lies in the Remainders immediately; that though the 21st, by which the Remainders are limited is in Words, strictly speaking, Conditional, yet they don't make it a Condition, but only a Limitation. Lastly, That the Contingencies must happen within a reasonable Time, and therefore it may well operate by way of Executory Devise. Trin. 11 Geo. 2 B. R. Andrews on the Demise of Jones v. Fulham

(L. 2) Condition what, and what an Executory Devise.

1. L A N D is devised to A. and his Heirs, and if he dies without His Heirs, B. shall have it, it is no good Devise; but a Devise to A. and his Heirs, if J. S. dies, living A. that B. shall have it, it is good, for it is a new Devise and an Estate created de novo, and does not depend as a Remainder upon the first Devise, or upon the first Estate devised. Arg. 3 Le. 111. cites 29. Ait. 17. Br. Cond' 111. and Devise 16.

2. A Man devised his Term to his Youngest Son, if he lived to the Age of 25 Years and did pay to his Eldest Brother so much Money, and agreed no Estate passed till the Age of Twenty-five Years and Payment of the Money, and the Reafon was, that a Devise Executive may depend upon a Precedent Condition. Winch. 116. cites 29 Eliz. Johnson v. Castle.

3. A Man devised Land to A. and his Heirs, provided, that if he die within Age, that then the Land shall remain to B. and his Heirs; Adjudged a good Remainder; for when he has only a limited Fee a Contingent Fee may depend upon it, but that is not by Way of Remainder but Executory Devise. Palm. 136. cites 33 & 34 Eliz. B. R. Rot. 1140. Hoe v. Gerrard.

4. M. seised of Land in Fee devised it to B. his eldest Son in Fee, to the Intent that he should pay certain Annuities to C. D. and E. his Younger Children, and for Default of Payment, that his Executors should enter and have the Land and pay the Annuities; And if the Executors fail of Payment, then C. D. and E. should enter and have the Land. M died. B. entered and before Payment made Foulment; Adjudged that
Devise.

that this was a good Executor's Devise, and that the Feoffment does not toll the Entry of the Children, because they were Persons certainly known, to whom the Limitation was made, there being a Difference where the contingent Estate is limited to a Person certain and known, and where not, according to Archer's Case, and Wellock and HYmmond's Case; 2 Roll. Rep. 218, 219. Arg. cites it as adjudged, Trin. 42 Eliz. B. R. Pinhloc v. Parker.

5. A Lease for 500 Years devised his Term to his Father for Life, Remainder to his Siter, and the Heirs of her Body. Resolved that this Executory Devise is good. 10 Rep. 46. b. Mich. 10 Jac. Lampter's Case.

6. When all the Fee is given, or vested in a Person, with a Limitation of a Fee to another upon a Contingent; this cannot be a Remainder but an Executory Devise; for a Fee cannot remain upon a Fee. But when Part of the Estate is disposed, as for Life or in Tail, and the Residue given to another upon Contingent, as to the Right Heir of J. S. who is alive, or to such as shall be living in the House at such a Time, this is contingent. 1 Lev. 17. Hill. 12 & 13 Car. 2. B. R. in Case of Plunket v. Holmes.

Remainder, and in Abeyance cites Plow. 35 a. But if the Fee be vested in any Person, and to be vested in another upon a Contingency; this is an Executory Devise. Arg. Raym. 28. Mich. 15 Car. 2. B. R. in Case of Plunket v. Holmes.

7. Devise to Infant En Vente Ea Mere for Fifteen Years, Remainder over is good by Way of Executory Devise; per Bridgman. Raym. 83. Mich. 15 Car. 2. C. B.

8. Devise to T, a Son in Fee, and if he dies without Heir, the Remainder to a Stranger or Siter of the Half-Bled, this is void as a Remainder and as a future Devise; for if T. the Brother died without Heir, the Land escheated and the Lord's Title would precede any future Devise. Per Vaughan Ch. J. Vaughan. 270. Hill. 20 & 21 Car. 2.

9. If my Son G. and my two Daughters M. and K. die without Issue of their Bodies, then all & shall remain and come to my Nephew W. R. and his Heirs. Here no Estate is devised to the Son and Daughters by Implication, the Words only import a Delignation or Appointment of the Time, when the Land shall come to the Nephew, namely, when G. M. and K. happen to die Issueless and not before. For no Estate being created to the Son and Daughters, the Nephew can take nothing by Way of Remainder; for that must descend to the Heir at Law. Now a Remainder cannot depend upon an absolute Fee Simple, that being but the Restidue of an Estate, for when all a Man has of Estate, or any Thing else is given or gone away, nothing remains, and no other or further Estate can be given or dispofed, and therefore no Remainder can be of an absolute Fee Simple; yet in another Respect an Estate in Fee may be devised to one and to be in another upon a Contingency, as Default of paying a Sum, or such an one's dying without Issue living the other, as 2 Cro. 590. Pell v. Brown. If Lands are given not by Way of Grant, but by Way of Devise to B. and his Heirs as long as B. both Heirs of his Body, the Remainder over, such later Devise will be good, though not as a Remainder, but as an Executory Devise, because somewhat remained to be devised when the Estate in Fee Simple determined upon B's leaving no Issue of his Body. If a future Devise may be upon any Contingent after a Fee-Simple, it may as well be upon any other Contingent, if it appear that the Testator intended his Son and Heir should have the Land in Fee-Simple. This Way of Executory Devise after a Fee-Simple of any Nature was in former Ages unknown. It Matters not whether
Devise.

whether the Contingent which shall determine the Fee-Simple, proceeds from the Per son which hath such a determinable Fee, or from another, or partly from him and partly from another; so here the Fee Simple vested in G. by Defeini determines when he and his Two Sisters die without Issue. Vaugh. 259. 270, 271. Hill. 21 & 22 Car.


10. As to my Dwelling House, and the House which A. and B. dwell in, and the Lot over them, I give and Defeini to F. and P. and their Heirs equally; saving, if W. the Daughter of P. lives, she and her Affliges shall enjoy the Half Part. Per Cur. this is no Executory Defeini, nor can be, but it is a good Defeini to W. presently, and Judgment accordingly. 2 Keb. 660. pl. 16. Trin. 22 Car. 2 B.R. Roffinton v. Carnaby.

11. A Defeini was to his Wife for Life, and to a Son after the Death of his Mother, if she should have a Son; and if he dies before he come to Age, then to the right Heirs of the Devifeor, which Devil was died without Issue, his Wife married again; then the Her of the Devifeor, by Bargain and Sale conveyed the Reversion to the Husband and Wife, who had afterwards a Son born. It was adjudged, that the Estacie limited to that Son should not enure by way of Executory Devil, because that is never allowed where a Contingency is limited to depend upon a Freehold capable to support it; for the Mother had a Freehold for Life, and therefore it was adjudged a contingent Remainder to the Son; and the Heir at Law having a Reversion in Fee in him by Defeini, it was held that the Remainder was destroyed by his conveying that Reversion to the particular Estacie for Life to the Mother before her Son was born.


cites S. C. adjudged; for that the Wife's particular Estacion for Life was merged in the Conveyance of the Inheritance to her and her Husband, and consequently when the Remainder came in being there was nothing to support it; for it shall not be proved by the Failure which the Wife had to waive the Egrevi conveyed to her by the Bargain and Sale &c. after the Death of her Husband.

S. P. cited

Arg. 2 Wms's Rep. 2 in Case of Gore v. Gore. ———


12. Where a Contingent is limited to depend on an Estacie of Frank-Tenement which is capable of supporting a Remainder, it shall never be construed an Executory Devise, but a contingent Remainder only. 2 Saund. 388. per Hale Ch. J. Trin. 23 Car. 2. in Case of Purefoy v. Rogers.

S. C. cited by Ed. Talbot;

13. Where a Devise was to A. upon Condition to pay a Sum of Money to B. in Case of Failure that B. may enter, it is no Condition but an Executory Devise; said per Cur. to have been resolved, and that Mary Portington's Case [10 Rep. 36.] was denied to be Law in the Case of Fry v. Porter in B. R. 2. Mod. 26. Patch 27 Car. 2. C. B.

14. A has three Children, B. C. D. and devises Land to each without Limitation of any Estacie, and says, if any of them dies, his Part to remain to the others. A. (the Heir) dies. Quere, What is to be done with his Part; for the Devisee of the Fee upon A. devory'd this particular Estacie to him, and consequently the Remainder to the other; but it shall be good by way of Executory Devise. 2 Lev. 202. Trin. 29 Car. 2. B. R. Forrechive v. Abbot.

Frecm Rep. 243. pl. 258. S. C.
Devise.

attained his said Age, then to B. and his Heirs, and if he dies before his held accord-
Age of 21 Years, to A. the Heirs of the Body of R. W. (the Husband of E.) and to their Heirs for ever, as they should attain their Ages of 21
Years. B. died under 21, living his Father, and leaving M. his Sitter, R. W. died. In this Case E being Executrix had a Term till B. was of Age, and the being Heir, the Land would else have gone to her, had there been no Will, and he could never intend an Inheritance to her to whom he had given a Term, so that the Fee vested in him presently, and he dying without Issue, M. has a good Title as Heir at Law, or the may take by way of Executory Devise as Heir of the Body of her Father, which thought it could not be whilt he was living, yet after his Death she was Heir of his Body and was then of Age, at which Time and not before the was to take by the Will. That E. had only an Estate for Years till B. should or might be of Age; and so per tor. Cur. Judgment for the Defendant. 2 Mod. 289. Trin. 29 & 30 Car. 2. C. B. Taylor v. Biddal.

16. In Case of Non-Payment the Legates may enter and enjoy the Profits of such and such Land till satisfied. No Demand is necessary, for it is no Forfeiture but an Executory Devise though there be a Place and Time appointed for Payment. Per Pemberton Ch. J. at the Affifes, 2 Show. 185. pl. 190. Hill 33 & 34. Car. 2. B. R. Pierion v. Sorrell.

17. J. M. having a Son and four Daughters, being feised of Lands in Fee and of a long Term, devises all his Estate in D. (where the Freehold lies) and likewise in S. (where the Term is) to his Son and his Heirs, and if he dies without Issue unmarrid, then to his four Daughters, and it he marries and dies without Issue then living, and having a Wife, then after the Death of such Wife likewise, to his four Daughters. Holf for the Plaintiff, in the Writ of Error made 2 Points, 1st, Whether hereby an Estate in Tail of the Freehold Lands passed to the Son, and the Remainder to the four Daughters; or whether the Estate to the Son was a Fee, and it came to the Daughters by way of Executory Devise; and that it was a Fee to the Son and good to the Daughters by way of Executory Devise; He cited 2 Cr. 592. Roll Eilate. 835, 836. and this Point was yielded by the Counsel on the other Side, but the other was opposed and not determined. Skin. 144 pl. 16. Mich. 35 Car. 2. B. R. Sommers & Gibbon.

18. If one devises his Estate to the Heir of J. S. and J. S. is living, the Devise shall not be confirmed an Executory Devise, and such a De-
vise is therefore void; but if it were to the Heir of J. S. after the Death by Holt of J. S. that is good, as an Executory Devise; So note the Divinity Ch. J. inter verba de Predenti & verba de Futuro; Per Cur. 1 S. K. 226 Hill.


19. A. seised of Lands in Fee has Issue two Sons, B. and C. A. devises 2 Wms'. Rep. to B. for 20 Years, if he so long live, and after the Determination of this 55. Arg. to the Heirs Male of the Body of B. and in want of such Issue, then to C. in Tail, Remainder to the right Heirs of Devise, this is no Exec-
utory Devise; if it should, the Limitations over are void. It must the Words therefore be a contingent Remainder, and then it is void, because there is nothing but a Term of Years to support it. 4 Mod. 255. Hill, 5 W. & M. B. R. Goodright v. Cornith.

20. An Estate in Futuro and a contingent Precedent makes an Executo-
ry Devise. Per Bridgman Ch. J. Raym. 83. Mich. 15 Car. 2. C. B.
21. J. L. settled in Fee, had three Brothers A. B. and C. and devises these Lands to A. for Life, Remainder to the first Son of A. in Tail Male, and so to the second and third Sons; and for Default of such Issue to B. for Life, and to his first, second Son &c. in like manner; Devise for dies, A. being unmarried; A. marries and dies without Issue born; but the Wife wa\textsuperscript{s} Re\textsuperscript{ev}enent enfent with a Son who is born after; Judgment in C. B. was, that the Posthumous Son had no Title, and it was affirmed here; and they held, that the Remainder to the first Son of A. was a cont\textsuperscript{in}gent Remainder, and so must take Effect according to the Rule in Archer's Case, but at the Time of the Death of A. there was a Default of Issue Male, on which the Estate vested in the Possession of B. and shall not be removed again by the Birth of a Son after. And this is no Executory Devise upon the Rule laid down in 2 Saund. 338, where a contingent Estate is limited to depend on a Freehold capable to support the Remainder, it shall never be construed an Executory Devise. This Judgment was reversed in the House of Lords. 12 Mod. 53. Patch. 6 W. & M. Reeve v. Long.

22. If one Limitation of a Devise is taken to be Executory, then all the subj\textsuperscript{ec}t Limitations must likewise be so taken; for the sever\textsuperscript{al} Limitations of a Devise of one and the same Thing shall never be made to operate several Ways, (viz.) some by way of Executory Devise, and others by way of Remainder; Per Pemberton Sergeant, and not denied. Carth. 310. Trin. 6 W. & M. in B. R. Reeve v. Long.

23. Devise was that A. B. shall take the I\textsuperscript{ll}ues and Profits for Fif\textsuperscript{teen} Years, and then to such Daughters and her Heirs, and if none of the Daughters marry a Norton, and then to such Daughters and her Heirs, and if none of the Daughters marry a Norton then to J. S. and his Heirs, this was ruled an Executory Devise, and that the Fee was in the Interim in J. S. but when one of the Daughters married a Norton, the Interest of A. B. ceased and the whole E\textsuperscript{state} vested in the Daughter. Arg. Skinn. 430. Patch. 6 W. & M. in B. R. in Case of Reeve v. Long. cites it as about 15 Car. 2. in C. B. *Natt\textsuperscript{e}s v. Am\textsuperscript{m}os, sed non alloc\textsuperscript{t}atur; For first this is directly contrary to Archer's Case. 1 Rep. for the particular E\textsuperscript{state} being determined before the Contingency happened, the Remainder never could attach, and it is nec\textsuperscript{ess}arily a Remainder and not an Executory Devise, for it never shall be construed an Executory Devise, but for NEC\textsuperscript{e}llity; where there is any particular E\textsuperscript{state} to support it, there it will be a Remainder and not an Executory Devise.

24. Two Things are requisite to make a Devise Executory, viz. It must be limited on Estate in Fee-Simple, and ought to be limited on a Condition; neither can any Remainder be Executory, where there is a particular E\textsuperscript{state} to support it. Arg. and of the Opinion was the whole Court. 4 Mod. 284. Patch. 6 W. & M. in B. R.

There must be a Limitation after or upon a Fee precedent and must be to take Effect upon a Condition Precedent in both which Cases no Remainder can subsist, and therefore the Law for the Sake of the Testator and to perform his Intent hath stretched itself to make it operate by Way of Executory Devise, in Res magis valeat, Arg. and Judgment accordingly. Carth. 310. in Case of Reeve v. Long.

25. De-
25. Devise to A. and his Heirs, if B. a Stranger die without Issue, Lt. Raym. is Executory, because there is no precedent particular Estate; other.

26. A. having Remainder in Tail with Reversion in Fee, devises, &c. to one Son in Tail, Remainder to the other in Fee; This is good, &c. becaufc it alters the Tenure; for there is a Seignory and Tenancy &c. &c. and created, and Tenant in Tail must hold of him in Reversion, and cites: Rep. of the Supreme Lord; fo that this Devise has a Real Effect, as &c. &c.

27. In Ejectment a Special Verdict was found, viz. R. devi(3365)ed to Trustees for 11 Years, and then to the first Son of A. and the Heirs Males of his Body, and so on to the second, third &c. Sons in Tail Male, provided they, the said Sons, shall take on them my Surname, and in Case they or their Heirs refuse to take my Surname, or die without Issue, then to the first Son of B. in Tail Male, provided he takes my Surname, and if he refuses, or dies without Issue, then to the right Heirs of the Devi(3365)or. A. had no Son at the Time of the Devise, and died without Issue, and B. had a Son who was living at the Time of the Devise, who took the Surname of the Devi(3365)or; The whole Court agreed, 13th That the Devise to the first Son of A. was not a Contingent Remainder, but by way of Executive Devise, because the Precedent Estate is for Years, which cannot support a Remainder; for a Contingent Remainder can never depend upon a Term for Years, because of the Abeyance of the Freehold; nor can it be limited after a Fee, because after such a Difi. no thing remains in the Owner to limit. 1 Salk. 229. Trin. 9 W. 3. C. B. Scattergood v. Edge.

28. A. cited in Fee, devised to J. S. for 11 Years upon certain Trusts, and after he gave the said Lands to the first Issue Male of B. and the Heirs Male of his Body, and by Default to the second &c. provided, J. S. for 11 Years, they should respectively take upon themselves the Surname of Edge, and if the Rem(3365)ainder to the right Heirs of A. Adjudged per three Judges, contra. B. Powell, that this is an Immediate, and not an Executive Devise. 12 Mod. 278. Paclia. 11 W. 3. C. B. Scattergood v. Edge.

29. If B. should have Issue during the Eleven Years, otherwise not; and that is according to Bates and Amerit's Case; For as a Marriage of one of the Daughters with a Norror would not be good after the Fifteen Years, so here an Issue born after the Eleven Years should not take; and if the Devi(3365)se had been to the first Issue to be begotten of B. then he said he would give it to any Issue born during the Life of B but he would not extend it to Pothomous Son. Per Powell J. 12 Mod. 278. Scattergood v. Edge.

If the Devise to the first Son of A be good, then the Devise to the first Son of B is not good; but if that to the first Son of A. be bad, then this to the first Son of B is good; had the Son of A been before the Court, the Judgment must have been against him, because as a Remainder it was void, and as an Executive Devise it was void; for there are either present or future; if present, the Party must be in Effe and Capas at the Time, or all is void; like a Devise to the Right Heirs of J. S. who is living, this is a present Devise, and therefore not like the Case of an Infant in Ventre sa mere. Where future, they must arise within the Compas of a Life; no longer Time has yet been allowed. And he was not for prolonging the Time in Favour of these inconvenient Estates. Secondly he held the Devise to the first Son of A. was not a precedent Condition, but a precedent Estate attended with these Limitations; Judgment was given for the Defendant, Per Treby Ch. J. and afterwards affirmed in B. R. 1 Salk. 232. Trin. 9 W. 3. C. in Case of Scattergood v. Edge.

30. If Devise be to the Heir at Law, paying such and such Legacies &c. and for Default thereof Remainder over; The Heir, till Default, is in by Defect, and the other's Interest is by way of Executory Devise. It is hard to maintain, either by Ufet, or Devise, a Remainder to a Stranger after a present Fee to one that is not Heir at Law. 6 Mod. 241. per Holt. Ch. J. Mich. 3 Ann. B. R. Anon.

31. Devise was of Lands to his Wife for Life, Remainder to C. his second Son in Fee, provided if D. his third Son, shall within three Months after the Wife's Death pay 500 l. to C. his Executors &c. then he devised them to D. and his Heirs. D. died, living the Wife; then the Wife dies. The Heir of D. may enter upon the Lands upon Payment of Tender of the 500 l. It is not a Condition, but an Executory Devise. To Mod. 420. Mich. 5 Geo. 1. Marks v. Marks.

32. T. C. being Tenant for Life, with Remainder to his Wife for Life, Remainder to his own right Heirs, 20th October 1683, made his Will, viz. Item, My Land at W. my Wife Mary is to enjoy for her Life, after her Death is of Right goes to my Daughter Eliza. for ever, provided she has Heirs, but if my said Daughter dies before her Mother or without Heirs, and my said Wife Mary shall marry again and should have Heirs Male, I bequeath all my said Right in W. &c. to her Heirs Male by her second Husband, thinking I can never sufficiently reward her Love. Provided, if my said Wife should marry again, and fail of Heirs Males, and my Daughter should fail of Heirs, then I devise 50 l. Annuity out of W. &c. to my Brother John C. and devised several other Annuities charged on the Land to several Persons who were his Heirs at Law, but he made no Devise of the Land to any one. Mary the Wife died before Elizabeth the Daughter, who died without Heirs, but Mary married a second Husband and had Issue Male. In Ejectment Leilors of the Plaintiff were Heirs at Law, and the Defendant was the Heir Male of the Wife by the second Husband. On Trial a Case for the Opinion of the Court.

The first Objection was, that the first Clause was a Devise to the Daughter in Fee, but yet that was afterwards controuled and qualified by subsequent Words, and it was intended to be to her and the Heirs of her Body only. Said per Cur. the Person to whom the Devise over is, i.e. Heirs Male of the Body of the Wife by a second Husband, he is a Stranger, and where the Devise over is to a Stranger, that will not alter the Construction of the Will from what it would have been without it; So that it will continue a Devise to Eliz. in Fee Simple. So is * 2 Cro. 415. and it is Law now, and not to be drawn in QuestIon though it was once disputed. A Devise to a Stranger will not alter a polite Devise to a Person and his Heirs. But when this Devise is over of a Rent-Charge, or Annuities charged on the Land to the Heirs at Law, that thows what was meant by Heirs in the first Place, and then it will be a Devise to Eliz. and the Heirs of her Body, Remainder to the Heirs Males of the Body of the Wife, with a Devise over to these Annuities, and there is no Difference whether the Devise over be of the Lands or of an Annuity charged on them, becaufe in the last Case he could never intend the Lands themselves should pass to the Persons to whom he had given the Annuities. 2dly. But per Cur. the first Clause is not a Devise to the Wife or to Eliz., for they were settled upon her for Life, and what is said as to the Daughter is only a Declaration of the Devise, what the Estate and Condition of the Estate was, and how she was to enjoy it, and he could

* Hill. 14
Jac. B. R.
Webb v. Hearing.
Devise.

not fay of Right we was to enjoy them if he claimed under the Will. The Consequence of this is, that the Lands descended to Eliz. as Heir at Law, and the Devise to the Heirs Males of the Wife by the second Husband will be contingent; firft, whether Eliz. should die in the Life-Time of the Wife, which must happen within the Compafs of a Life; next Contingency, if the Wife should marry &c. and have Heirs of her Body by a second Husband. But though as in Lloyd and Carey's Café the nght have Heirs after his Death and not within the Compafs of a Life, yet so near as there could be no Inconvenience if it should take Effect an Executory Devife in such a Café. But this is not so here; for if the Words are taken dijunctively, (if my Daughter dies in the Life of her Mother, or without Heirs) the Contingency never happened because the Daughter survived the Mother, so the Devife could never take Effect but will be void; if taken Copulatively, and (or) taken for (and) here it will be hard to turn Words out of their natural Sense and import unless there be a plain Intimation of the Intent of the Devifor so to do. How doth the Devifor intend it (Copulatively?) What Occasion is there for it? For if the Daughter survived the Mother, he might intend it for her in Fee; Why should it be taken, if my Daughter dies without Heirs in the Life-Time of Eliz.

3dly, But if it were fo, the Devife over cannot take Effect, because the Contingency never happened. 4dly, But the Death of the Daughter without Heirs is too remote, and the Devife over is void. The Devife of the Annuities is to take Effect in nature of a Remainder, and if the firt cannot take Effect, all that comes after cannot take Place, it being not to take Effect but as a Remainder, and then not at all. Next (if the Wife should marry again and have a Son, and should die without Heirs Males) this is also too remote, and so the Devife over is void, because to commence upon a Contingency too remote, and it cannot be good by way of Executory Devife, then it must be by way of Remainder, and it cannot be good a sa Remainder, because there is no particular Estate to support it to any one; for there was no particular Estate at all, what went before being only a Declaration of what did belong to the Daughter, and as this contingent Remainder had no particular Estate antecedent to it, it is void. Not good as an Executory Devife, because the Contingency never happened, or if it did happen it was too remote and is void, and therefore the Heirs at Law have good Title. 5thly, if the Son of the Wife by the second Husband could take, he would take Fee Simple, fo that the Tettator was mistaken in the Law; For he thought he had devifed to him but an Estate Tail. Judgment for the Plaintiffs. MS. Rep. Patch. 7 Geo. B. R. Wright v. Hammond.

33. A Term for Years was devifed to A. for Life, Remainder to B. This is an Executory Devife. 9 Mod. 101. Mich 9. Geo. Theobalds v. Duflo.

34. A Devife of Lands to R. B. and his Heirs for ever, upon Condition he pay all my Debts, and Legacies and Funerals, and if he do not pay them, then I devife the Premifses to E. F. (the Defendant) and her Heirs for ever. And as to all the Rest and Residue of my Real and Perfonal Estate whatever, not before herein bequeathed, I give and bequeath to E. F. and her Hears; the Devifee R. B. died before the Devifor, so it was a lapsed Legacy, and the first Quetion the Counsel made, was, whether this was Executory Devife to E. F. By Ch. J. Eyre, &c. tot. Cur. this cannot be an Executory Devife to E. F. unlefs it were an Original Devife, here is no firft Devifee, for he is dead and that Devife is void. Fortescue's Rep. 184, 185. Patch. 2 Geo. 2. C. C. Roe v. Fludd.

35. A having the Reverfion in Fee of Lands settled upon the Marriage of B. his Son in the usual Manner devifes all the Lands in this Settlement
Devise.

Settlement on Failure of Issue of the Body of B. and for Want of Heirs Male of his own Body, to his Daughter F. and the Heirs of her Body. This Will does not give an Estate Tail by Implication to B. the Devisee to F. is Executory and is void, as being on too remote a Contingency. Cases in Equ. in Ld. Talbot's Time, 262. Pach 1733. Lanesborough v. Fox.

36. A. devises his Freehold, Copyhold, and Leasehold, and all his Real and Personal Estate not before devised to Three Trustees, their Heirs &c. in Trust to pay his Son B. an Annuity; and if he should have any Child, or Children the residue of his Rents, during B's Life, for the Education and Benefit of such Child or Children; and after B's decease, a Moiety of the Trust Estate to such Child and Children as he shall leave, their Heirs &c. the other Moiety to his Grandson C. and every other Child and Children of his Daughter 3. their Heirs &c. If B. die without Issue, the first Moiety to C. and other Child or Children of S. and their Heirs &c. and directs an Annual Payment to such Wife as B. shall marry. The Testator died; B. married and had Issue a Son and Daughter, and died; afterwards C. married, and had Issue a Daughter, and died; the Limitation to the Daughter of C. is well supported by the Estates in the Trustees; or if not, is good as an Executory and the Profits &c. shall go to the Children of B. Cases in Equity in Ld. Talbot's Time, 145. Mich. 1735. Chapman v. Blifler.

37. An Executory Devise of an Estate of Inheritance to a Person unborn when he shall attain the Age of Twenty one Years is good; and there is no Danger of of a Perpetuity. Cases in Equity in Ld. Talbot's Time, 228. Mich. 1736. Stephens v. Stephens.

38. Testator devised to A. and his Heirs, and if he die before Twenty-one, then to B. and his Heirs. A. died before Twenty-one, but B. died before him. The Question was, whether B's Heirs should take. It was objected, that the Limitation to B. upon the Contingency of A's dying without Issue, was but an Executory Devise, and that such Devises have always been construed as Possibilities only, and upon that Foundation can neither be aligned, deviled, barred by a Common Recovery, nor descend. But the Court held clearly, that, though B. died in the Life of A. yet his Heirs might well take under the Executory Devise; for that such a Devise is not to be considered as a mere Possibility, but as an Interest vested (though not in Possession) in the same Manner as a Contingent Remainder, and consequently is transferrable. Adjudged upon a Case made at the Affizes, and referred for the Opinion of the Court. Trin. 15 & 14 Geo. 2. Gurnet v. Wood.

(L. 3.) Executory Devise.

Of what it may be.

Sid 285 pl. 1. A Rent de Novo was devised to A. for Life, Remainder to B. in Tail, adjudged that this was a good Rent and Remainder and not an Executory Devise of the Rent after the Death of A. the Devise to A. Devise for Life, and that it was barred by a Common Recovery in Tail, Rer. suffered by B. Lev. 144. Mich. 16 Car. 2. C. B. Smith v. Farnaby. 

mainder to B. in Fee, and that it was by way of Remainder, and not by way of Executory Devise, and therefore barred by the Common Recovery, and Judgment in C. B. affirmed. —— Cart. 52. S. C. states it as a Devise to A, in Tail, Remainder to B. in Tail, the whole Court agreed it to be a Remainder; But Bridgman Ch. J. in delivering the Opinion of the Court said, it is true I may make a Rent Executory,
(L. 4) Executory Devise.

Notes, and Rules.

1. Executory Devises were grounded on the Common-Law, as Isabel since the Goodcheape's Case 49 E. 3 16. a. cited in Ld. Stafford's Case 8. Statute of.

2. Executory Devises were grounded on the Common-Law, as Isabel since the Goodcheape's Case 49 E. 3 16. a. cited in Ld. Stafford's Case 8. Statute of.

3. It was argued, that an Executory Devise not be used, as a Remainder must, to infinite, that the particular Estate determines; but that the Law would support it without a particular Estate, and expect till it could take; but North answered, that then there must be an apparent Intent of the Devise, that it shall not till a certain Time, notwithstanding the particular Estate determines, and that he laid was the Case of Snow and Curier; for there the Devise was to the Heir of J. S. when he comes to the Age of 14. But if there be no such apparent Intent, it must stand, and fall by the Rules of Law. Freem. Rep. 244. Hill 1677, in Case of Snow v. Curier.

4. Favorable Definitions have been always admitted to supply the meaning of Men in their Last Wills; and therefore a Devise to A, till be of Age, then to B, and his Heirs, this is an Estate for Years in A, with a Remainder in Fee to B. And it such a Devise to A, who is also made Executor, or for Payment of Debts, it shall be for a certain Term of Years, viz. for so long as according to Computation he might have attained that Age had he lived. Contingent Remainders are at the Common Law and arise upon Conveyances as well as Wills; one may limit an Estate to A, the Remainder to another, and so it may be by Devise, if the Intent of the Parties will have it so. But as at the Common Law all contingent Remainders shall not be good, so in Wills no such Latitude is given, as it none could be bad; they are subject to the same Rule in Wills as in Conveyances, Per North Cn. J. 2 Mod. 291. Hill. 29 & 30 Car. 2. in C. B. in Case of Taylor v. Biddal.

5. An Executory Devise needs no particular Estate to support it, for it still depend on the Heir till the Contingency happens; it is not like a Remainder
Devise.

mainder at the Common Law, which must vest co instanti that the particular Estate determines; but the Learning of Executory Devises stands upon the Reasons of theold Law, wherein the Intent of the Devisor is to be observed; for when it appears by the Will that he intends not the Devisee to take but in futuro, and no Disposition being made thereof in the mean Time, it shall then defend to the Heir till the Contingency happens; but if the Intent be that he shall take in Præsenti, and there is no incapacity in him to do it, he shall not take in futuro by an Executory Devise. Per North, Ch. J. 2 Mod. 292. Hill. 29 & 30 Car. 2. C. B. in Cafe of Taylor v. Biddal.

6. A Will shall never operate by Way of Executory Devise if it may take Effect by Way of Remainder, that is, if there is a particular Estate sufficient to support it. Per Cur. Carth. 310. Trin. 1 W. & M. in B. R. Reeve v. Long.

7. Nothing shall be construed by Way of Executory Devise, if it will not admit of any other Construction. Arg. says, it is a known Rule in Law. 4 Mod. 258. Hill. 5 W. & M. in B. R. in Cafe of Goodright v. Cornish.

8. In Cafe of Executory Devises, there can be no Limitation over. 4 Mod. 259. Hill. 5 W. & M. in B. R. Goodright v. Cornish.

9. Ever since the Case of Potts v. Brown Executory Devises have been allowed, not absolutely upon a dying without Issue, but dying so in a particular Time, for otherwise Estates might be continued to Perpetuity, which the Policy of the Law will not endure. Arg. 4 Mod. 252. Patch. 6 W. & M. in B. R. in Cafe of Reeve v. Long.

10. An Executory Estate in right within the Compass of a Reasonable Time is good; that Twenty, nay Thirty Years have been thought a reasonable Time. So is the Compass of a Life or Lives; for let the Lives be never so many, there must be a Survivor, and so it is but a Length of that Life; (for Twidmen used to say, the Candies were all lighted at once) but they were not for going one Step farther; because these Limitations make the Estates unalienable, every Executory Devise being a Perpetuity as far as it goes, that is to say, an Estate unalienable, though all Mankind join in the Conveyance; per Cur. Salk. 229. Trin. 9. W. 3. C. B. Scatterwood v. Edge.

11. There are Three Sorts of Executory Estates, one where the Devisee parts with his whole Fee Simple, but upon some contingency qualifies that Disposition, and limits another Fee upon that Contingency, which is altogether new in Law, as appears by 1 Intt. 18. A Fee cannot be limited upon a Fee. The second Sort is, where he gives a future Estate to arise upon a Contingency, and does not part with the Fee at present, but retains it, there are not against Law; for by Common Law one might devise, that his Executor should sell his Land, and in such Cafe the Vendee is in by the Will, and the Fee descends to the Heir in the mean Time. A third Sort of Executory Devises is of Terms, which are well settled in Matthew Manning’s Cafe; and it is dangerous to extend the Boundary of these Executory Devises, which at present is a Life or Lives. Per Powell J. 1. Salk. 229, 230. Trin. 9. W. 3. C. B. in Cafe of Scatterwood v. Edge.

12. The first of these Devises that we find, is Wellock and Hammond’s Cafe, cited 3. Co. Boraston’s Cafe. Cr. El. 294. 4 Leon. 114. and was first countenanced in favour of Provision for Younger Children, and of Land devorable by Custum. * in Pell and Brown’s Cafe; Doderidge did oppose the Opinion of the other Three Judges, as to the Point of its not being barred by Recovery, and the Opinion in 1 Roll. Rep. 335, 836. and Sty. 274. went down with the Judges like chopped Hay,

Devise.

Hay, but since it has been so often passed over, it must not be questioned now, because the Estates of many depend upon it; 12 Mod. 281. Pache. 11 W. 3. in Case of Scattergood v. Edge.

13. For Estates to pass by Executory Devise is only an indulgence allowed by the Law, where otherwise the Words of the Will would be void. Arg. 8 Mod. 223. Hill. 10 Geo. 1.

14. Every Executory Devise is to be considered as an Original Devise not depending upon any precedent Estate given by the Will, but is an Estate, which is to arise and spring up in Possession at the Time appointed for that Purpose, and then and not till then to take Effect as a legal and alienable Estate. And in the mean Time, the Devise is rightly and properly called an Executory Devise. Arg. 2 Wms's Rep. 39. Trin. 1722. In Case of Gore v. Gore.

15. A Confirmation in Favour of Executory Devises to support the Intent of the Testator, will be made either in the said Courts of Law or Equity, if it may be done consistently with the Rules of Law. Cases in Equ. Ld. Talbot's Time 44. Mich. 1734. Hopkins v. Hopkins.

16. The Rule that a Limitation which may arise as a Remainder shall never be construed to be an Executory Devise is true; but this only upon a Supposition that the Party's Intent was, that things should go according to the ordinary Forms, but where they cannot, there extraordinary Methods are used to serve the Intent. A Devise to A. for Life, Remainder to B. and a Devise to a Monk, Remainder over; A. dies in the Testator's Life-Time; B. shall take by way of Executory Devise; and in the latter Case, immediately upon the Testator's Death the Remainder-Man shall take; and yet, if either A. had out lived the Testator, or the Monk been derestricted in the Testator's Life-Time, in both Cases the second Limitation must have been a Remainder. Cases in Equ. in Ld. Talbot's Time, 47. Mich. 1734. Arg. in Case of Hopkins v. Hopkins.

(N) What Things shall be said to be devised by the Will.

1. If a Man, seised of three Tenements of Socage Lands in Fee, and polluted of divers Goods, and of a Lease for Years of certain Lands, devises one Tenement of the Socage Lands to one of his Sons, and another Tenement to one of his Daughters; and in another Clause of the Will it is, Item, I make my two Sons, Seicce, Richard and Richard, my Executors of all my Goods moveable and immovable, and all my Lands, Debts, Duties, and Demands; By this Clause, no Estate in the three Tenements of which the Devise was made in Fee passed to the Executors by Force of the Words, and all my Lands, because that these Words might well be satisfied by the Lease for Years of Land which passed by it, and it appears, the Intent of the Testator was not to pass the Fee Simple Lands, because then this would pass an Estate as well in the Lands which he had before devised to one of his Sons and to his Daughter, and to the Will would be repugnant. Trin 15 Jac. 2. B. R. Rowe's aganist Stanning, adjudged upon a Special Devise. (Also it seems that this is not an express Devise, but he says, that he makes them Executors of his Land in, which must be intended of such Things as belong to Executors.)

2. If A. having nine Children, and polluted of a Lease for Years, devises it in this Manner; I devise my two Rectories (of which the Lease
Leafe was) to be divided between my Children, and that all the
Profits thereof shall remain between my Children; and if my Son Ri-
chard dies, then the two Daughters of Richard shall have his Part; and
if any of the rest of my Children dies, then his Part shall come unto
my Children; and after four of the nine Children die, by which an
equal Part of their four Parts came to Richard, and after Richard
dies; and per Curtiam the Daughters of Richard shall have only
the ninth Part, which was first devis'd to Richard, and nothing of
the four Parts which by the future Devise came to Richard by the
[Death of the] other four Children, for the Devise to them is li-
mited to the first Part of Richard, and the future Devise upon the
Death of the other Children comes after this Limitation. Nich.
to Car. B. R. between Nunner and Belcher, adjudged per Curtiam
upon a Special Verdict, clearly without Argument. Inquiratur,
Trin. 9 Car. B. R. Rot. 983.

3. If a Man be devis'd in Fee of two Houses in D. adjoining the one
to the other, and one is in the Possession of R. and the other in the Pos-
session of B. which is also the Corner-House in the Street of the Town,
and he devises his Corner-House, in the Possession of B. by these
Words only: * this House, which is in the Possession of B. shall
pass, which is the Corner-House, and not the other House, which is in
the Possession of R. though it be next adjoining thereto, for his
Interest appears to be to Jul. 11 Car. B. R. between Blake
and Gold, per Curtiam, adjudged upon a Special Verdict, for an
House in Andover in Contenu Southampton. Inquiratur, Octo.
Car. Rot. 752.


4. If M. seised for Life, the Reversion in Fee to A of a Portion of
Tythes in D. and A hath not any other Land or Hereditaments in D.
and makes his Will in Writing in this Manner; if my Wife, who
goeth with Child, be delivered of a Son, then I give to my Brother B.
100 l. but if be delivered of a Daughter, then I devise all my Fee
Simple Lands whatsoever to the said B. and his Heirs for ever, upon
Condition that my Wife shall hold and enjoy my Fees and Land at D. after
the Death of my Mother; and after appoints other Provision for
the Daughter if his Wife should be delivered of a Daughter, after-
wards A dies, and his Wife afterwards delivered of a Daughter,
in this Case the said Portion of Tythes shall pass to B. by this Will
by the Words of all his Fee Simple Lands whatsoever, for otherwise
his Wife should not have it, nor is the will of any Effect, he not
having any Lands or Hereditaments in D. to supply it. Trin.
1651. between Saunders and Rich, per Curtiam, adjudged upon a Spe-

5. Devise
Devise.

5. Devise of the Swan in Ipswich to his eldest Son A for Life, Remainder to B. Son of A. in Tail Male, Remainder to the right Heirs of the Deviseor, and to the Heirs Male of his Body, Father and Son died without Issue Male. The Father is Tenant for Life, Remainder to the Son in Tail, Remainder to the Father in Tail, the Reversion to the Father in Fee. So the Daughter of B. has the same Reversion by. Decent after the Entails spent. Le. 188. Anon.

6. A Termor of a House for 40 Years devis’d the House to J. S. without limiting any Estate, the Devisee shall have the entire Term, for he cannot have for Life, nor at Will, nor for Term of Years, or of one Year, and therefore the entire Term palls, Per Opinionem Cur. D. 307. b. pl. 69. Hill. 14 Jac. Anon.

7. Testator made his Will thus, viz. I devise the House or Tenement where J. N. dwelleth, called the White Swan, to H. G. The whole House palleth, though J. N. dwelleth but in three Rooms of it; otherwise, if he had devis’d but the House in the Occupation of J. N. and not named it by this particular Name of the White Swan, there perhaps it should not extend to more than was in the particular Occupation of J. N. Cro. C. 129, 130. pl. 4. Mich. 4 Car. B. R. Chamberlaine v. Turner.

8. It is laid that there are Cafes, where Things only in Contingency and Possibility may be devised; as if a Man bequeath Corn that shall grow in such Ground next Year after his Death, or the Wool or Lambs his Flock of Sheep shall yield the next Year after his Death, but in Case there shall be no such Corn, Wool, or Lambs the next Year, the Legacy proves fruitless; yet if the Testator bequeath 20 Quarters of Corn or 20 Lambs, and doth will that the same shall be paid out of the Corn that shall grow, or out of his Flock the next Year, and there be no such Corn, or not so many Lambs the next Year, yet the Devise is good and must be paid. Godolp. Orp. Leg. 419. 3d Part. S. 3d Part. S. 21.

(N. 2) Will.

Good, in respect of the Manner of making and executing thereof.

1. If a Man devises certain Goods to his Executors, or to one of his Executors, to fulfil his Will and dispose for his Soul; this is a void Legacy; for they ought to do it without such Devise. But if they are devised to one of his Executors to his own Use, this is a good Devise. Br. Devise. pl. 25. cites 21 E. 4. 6.

is a void Bequest, because it is no more than what the Law would say, if he had said nothing. So if it was generally to perform his Will. Wentw. Off. Executor 253. The Words in the Legacy are void and superfluous. D. 331. a. b. pl. 21. Hill. 16 Eliz.

2. One learned in the Law took Notes of the Will of one sick, and after writing the Will, but before he sealed it to the Sick, he died; and yet, by the Opinion of the Court, it is a good Will in Writing within 32 H. 5 to convey Socage Land. Dy. 92. a. pl. 2. Mich. 6 E. 6. Sackvil. Brown.

3. The Will of the Deviseor shall always be observed, if it be not impossible, or much against the Law, and in other Special Cases, in such a Case a Man feid of Land devisable yeases the same Land unto a Stranger for Life, and afterwards by his Will devises the Reversion of the same
Devise.

Fame Land unto the Stranger in Fee, and dies, it is a good Devise without Atornment. The fame Law is of a Rent devisable &c. Perk. S. 562.

4. A. went over Sea and wrote such Letter, that he willed that his Lands should go in such Manner; and adjudged a good Devise. Per Popham in Lectura cited Mo. 177. pl. 314. Mich. 24 Eliz. in Weet's Cafe.

5. A Man made his Will thus, I will and bequeath my Land to A. but the Name of the Devisor is not in all the Will; yet this was held per tot. Cur. that by Averment of the Name of Devisor and Proof that it was his Will the Devise was good. 4 Leo. 124. pl. 211. Patch. 29 Eliz. B. R. Anon.

6. D. devised his Lands by Parol; W. N. a Stranger, being present, recited the Words to him, and asked if that was his Will; he affirmed that it was, then W. N. put it into Writing for his own Remembrance, in the Life-time of the Testator, but without his Appointment, and for that Reason it was held by the Justices to be a void Devise; but if it had been read to him, and he approved it, in such Cafe it had been as good as if written by his Appointment. Cro. E. 100. pl. 3. Trin. 30 Eliz. B. R. Nall v Edwards.

7. A Devise may be to the Use of another; agreed. Le 254. pl. 362. Trin. 33 Eliz. in the Court of Wards. Ellis Hartop's Cafe.

8. The Testator gave Infradictions to another to write his Will, and to give his Lands to one of his Sons for Life, but the Writer put it down in Fee; adjudged this was void, because it was not in the Will of the Testator. Mo. 356. pl. 483. Trin. 36 Eliz. B. R. Downhall v Catesby.


10. A Man ought to make a Will by his own Directions and not by Questions; per Mountague Ch. J. and not denied by any of the Justices. Cro. J. 497. pl. 3. Mich. in B. R. in Evidence to a Jury in Cafe of Cranwell v. Sanders.

11. An Actual Devise by Word is no sufficient Ground for a Stranger to write the Will, but there ought to be an Actual Will, and desire that it should be written, and a bare willing is not sufficient, but there ought to be an Actual Willing; agreed, per Cur. All. 54. Patch. 24 Car. B. R. Lawrence v. Kete.

12. And that this Desire ought to be in some short Time after the Devise, so that it was one continued Act; for if the Devise be at one Time, and at another Time the Devisor sends for one to write his Will, a new Declaration will be necessary to make it effectual; agreed Per Cur. on Evidence. All. 54. Patch. 24 Car. B. R. Lawrence v. Kete.

13. An actual Desire of the Husband, that such a certain Person were there to write his Will, was a sufficient Ground for the Wife to send for him, though the Devisor gave no express Directions to do it; Per Cur. agreed. All. 54. Patch. 24 Car. B. R. Lawrence v. Kete.

14. The writing of the Will from the Mouth of Witnesses was sufficient, and it need not be from the Mouth of the Testator; agreed per Cur. All. 55. Patch. 24 Car. B. R. Lawrence v. Kete.

15. Though the Devisor becomes feifiable before the Will is written, yet if it be written before he dies, it is a good Will in Writing. Agreed per Cur. All. 55. Patch. 24 Car. B. R. Lawrence v. Kete.

16. Upon
16. Upon a Trial at Bar on this Court in an Iffue out of Chancery, it was resolved by the whole Court, that if a Man draws up his own Will and sends it to Counsell to be advised of the Legality of it, this is no Will unless it has a Publication after he receives it back from his Counsel. Secondly, it was resolved, that if after his Will came from Counsell with Alterations made by Counsell, if the Party puts his Seal to it, or subscribes his Name, or writes upon it, This is his Will, though there be no Witneffes to it, yet this is a good Publication, because any of thofe declare his Intent that that should be his Will. Thirdly, it was resolved, that though it had no formal beginning, but began, Also I give and bequeath, and though there be Blanks in the Will for the Names of fuch Persons as he faid he had made a Leafe, or a Feoffment to, to perform his Will, and if there be fuch Leafe or Feoffment this is a good Will, and fhall direct thofe Persons to whom fuch Leafe or Feoffment is made, to perform all Things according to the Directions of fuch Will. MS. Rep. (said to be copied from Ld. Ch. J. Kelying's MS.) Trin. 15 Car. 2. B. R. Bartlett v. Randfden & al.

17. One P. devifed a Sum of Money to M. to dispose as Testator S. by Will ball by a private Note appoint, who dies without fuch Appointments, this is a good Bequest to M. for the Testator did not intend it should come to his Executors, but by his Will gave it away from them. I Chau. Cafes 198. Paich. 23 Car. 2. Martin v. Douch.

as he had by Writing under his Hand appointed, but no fuch Writing being to be found, the King appointed the Charity, and the fame was decreed accordingly. Vera. R. 244. Attorney General v. Siderfin.

18. A Will ought to be ambulatory, and to be made freely and voluntarily, and not to be gained by Restraint and Force upon the Party, and Ld. Jefferies faid he did not fee how it can be etteemed a Will otherwise. 2 Vern. 77. Trin. 1688. per Cur. in Cafe of Nelson v. Oldfield.

19. A Man may make his Will in several Writings and at several Times, and if a Will is written in three Severall Sheets of Paper not packed together and subscribed by three Witneffes severally, viz. one Name to each Sheet, this is a good Will within the Statute; Arg. to which Dolben J. agreed. Caith. 37. Trin. 1 W. & M. in B. R.

(N. 3) Will.

Good. Though Rased, Obliterated, or Torn &c.

1. If a Will continues continues in Writing at Testator's Death, though it be left or burned afterwards it stands good, but if at the Time of his Death then the Devife is void; Agreed per Cur. Allen. 55. Paich. 24 Car. B. R. Lawrence v. Kete.

2. A Man made his Will and left it in a Scrivener's Hands for Four Years, and after the Testator's Death it was found known to Pieces by Rats. By this Will Land was devised to A. in Tail, and the Scrivener with the Help of the Pieces, and of his Memory and other Witneffes, caufed it to be proved in the Ecclesiatical Court. It was agreed, that if the Claufe of the Devife to A. could be made out, though by joining of the Pieces it would be a good
good Will. But the Witnesses said, that a Stranger that knew not the Contents of the Will before could not make out that Clause; on which the Court directed the Jury, that if they found that the Will was known before the Deviseor’s Death, then it was for the Plaintiff; if after, for the Defendant; and Jury found for the Defendant in Favour of the Will. Allen. 2. Mich. 22 Car. B. R. Etheringham v. Etheringham.

3. Will of Lands was snatched out of the Executor’s Hands and torn to Pieces by a Younger Brother of the Heir at Law but most of the Pieces especially, such as concerned the Devise of the Land were picked up, and stitched together again. On a Bill for establishing the Will it was Decreed that the Devisees should hold and enjoy against the Heir, and the Heir to convey to them, though no Proof that the Heir directed the tearing. 2 Vern. 441. pl 405. Mich. 1702. Haines v. Haines.

4. A by Will in Writing duly attested by Three Witnesses devised to his Wife a Copyhold Estate in E. — A. on the Day he died directed B. to oblate some Devise, but nothing as to the Copyhold, and then caused a Memorandum to be wrote, that he had examined and approved of the Will as so obliterated and altered in his Presence by B. but did not republish it in Presence of Three Witnesses, but directed B. to carry it to one to write it fair, and before it was brought back he became delirious. Held to be a good Will and the Trustees decreed to surrender accordingly. 2 Vern. R. 498. pl. 449. Pach. 1705. Burkitt v. Burkitt.

Good in Part and Void in Part.

1. A Will of Land and Personal Estate not duly attested in the Presence of Testator, though not good as to the Lands, is yet good as to the Personal Estate; as if a Man makes his Will and gives his Land and 1000 l. to J. S. and has four Witnesses but does not subscribe his Name in their Presence; this is a good Will for the Money, but for the Land it is void, though it is in the very same Paper; per Serjeant Maynard Arg. Show. 545. Mich. 4 Jac. 2 B. R.

2. A leisef of an Estate for a Term of Years, and of a Reversion of the same in Fee-mortgages the Term and afterwards conveys the Inheritance to C. which C. conveys to the Mortgagee. Mortgagee now having the Term and the Inheritance both in him deviles this Estate by Will, all of his Hand-Writing, but not published in the Presence of any Witnesses, to D. for Life, Remainder to E. in Tail, disinteriting thereby the Heir as Law, and adjudged a void Devise. For though it may be good notwithstanding the Stature of Frauds and Perjuries to pay a Term at Law, yet as this Term is connected with the Inheritance and would have defended with that to the Heir at Law, in Case there had been no Will, the Will being void as to the Inheritance shall be void likewise as to the Term, and shall not fetver the one from the other. G. Equ. R. 168. Pach. 8 Geo. 1. in Canc. Whitchurch v. Whitchurch.

1. Note by the Doctors of the Civil Law and Serjeants of the Common Law, that if a Man makes his Testament and names no Executors, this is no Testament, but yet it is his Will of Land in it; For these are not testamentary, but in the first Case, where Executors are wanting, yet the Legacies shall be paid. Br. Testament pl. 20 cites 37 H. 8.

2. But if it appears that he made Part of the Testament and not the whole, there the Legacies shall not be paid. ibid.

4. Will of Chattles and no Executors named, or if all the Executor's Goods or Orp. refuse is no Will at all; but Will of Land devisable by Custom, or Law, but by the Statute is good, though no Executor be named, for Land is not Testamentary by the Course of the Common Law. Finch 45. b. Yet in the Case of Want of Executors as above, Legacies shall be paid, and the Will annexed to Letters of Administration. Finch. 46. b.

4. Note, It was said by Richardson, that if a Man says in his Sicknes, I give zo l. unto j. S. but does not make any Executor, yet J. S. shall recover against him that has the Goods. But Crook J. cited 3 H. 4 that a Devise is void if a Legacy be given and No Executors made. Het. 118 Mich. 4. Car. C. B. in Barley's Case.

5. The Testator made his Will but named no Executors, yet the Court declared the Will to be good. 2. Chan. Rep. 112. 27 Car. 3. Wirall v. Hall.

6. Testator gives all his Personal Estate to his Executor, but leaves a Blank, and dies without naming any Executor, this Devise is void. 2. Chan. Cafes, 51, 52. Patch. 33. Car. 2. Winne v. Littleton.

(N. 6.) Will. Good.

Made beyond Sea, or in a Foreign Language. Concluded How.

1. Stranger of the Low Countries being made a Denizen in England, land, returned into his Country, and dwelling there became sick, and in making of his Will he was advised by Counsel, that by devise of all his Goods, his Lands devisable would pass, and therefore by such Words he declared his Will with the Intention aforefaid, (cetl.) the Testator's Intent was to pass a Fee to the Daughter, but the Will being in Dutch, they had not there the Word (Heir) in Use among them; but that a Devise to Children and their Children pass'd a Fea; but it was answered, that as to the Dutch never using the Word Heir, it signifies nothing; for a Will that concerns Land in England,
Devise.

England, must be so framed as by the Law of England is required for the paffing of Edicts, as has been several times refolved in Cafe of Latin Wills, and the like. Ver. n. 84, 85. in pl. 74. Mich. 1682. and Ibid. 147. Arg. S. P. in Cafe of Lovey v. Smith.

2. A Will was made in French; and the Original proved in French, and underneath in the fame Probate the Will was falsely translated into Eng- liff. It was objected, that the Tranflation must bind being Part of the Probate, and allowed in the Spiritual Court, and that the Application must be thither to correct the Miftakes, which till then must be con- clusive. But the Matter of the Rolls held, that nothing but the Original is Part of the Probate, and the Spiritual Court has no Power to make a Translation, and this Court, in Cafe of a Mittranflation, may determine according to what the Translation ought to be, and so it did in this Cafe. Wms's Rep. 526. Hill. 1718. Le-Fit v. Le-Batt.

(N. 7) Will.

What is good Signing and Attestation.

Before the Statute 29 Car. 2. a Will was written by a Law- yer, and published by the Testator, but not signed by him, being all in 100/e Sheets; and this was adjudged a good Will. Sid. 315. pl. 33. Mich. 18 Car. 2. B. R. Stephens v. Gerard.

2. Twentieth Day of June 1663. Memorandum, That Mr. S. B. did express and declare, that his Brother J. B. and his Heirs should be Heir to the Land. This was wrote by a Doctor of Physick, the Testator being in Bed and very sick, but published by the Testator putting his Seal to it after it was read to him but did not subscribe his Name. The Court allowed this to be a good Will in Writing to convey Lands. Sid. 362. pl. 7. Pach. 22 Car. 2. B. R. Dine v. Monday, alias Bate's Cafe; and Verdict Generally for the Plaintiff.

Jeffries Ch. J. fem'd to hold that a Will wrote all by the Testator's own Hand, and declared in the Presence of three credible Witnesses, would be within the Intention of that Act, though not signed by him according to the Words of the Act in the Presence of three credible Witnesses. Skirn. 227. pl. 5. Hill. 56 and 57. Car. 2. B. R. Anon. — 3 Lev. 1. Lamave v. Stanley. S P. adjudged Pach. 53 Car. 2. C. B. per to Car. And by North Ch. J. Windham and Charlton, Dubinante Levins, the putting the Seal to it had been a sufficient Signing within the Statue. Freem Rep. 538. pl. 727: S C. the Court inclined strongly that it was well enough, for though the Act saith (signed) it is no matter where it is signed, whether at the Top or the Side, or the Bottom; and it is not necessary to write his Name, for some cannot write, and there their Mark is a sufficient Signing; and others have their Name on a Stamp, and that is good enough; and here it is found that the Party writ it all with his own Hand, so there can be no Intention of Fraud. And Levins said, if another had writ the Will, yet this Signing of it had been a good Signing; but writing it with his own Hand, it is clear. — A Legacy was charged upon Lands, but the Witnesses to the Will only proved that the Testator sealed and executed the Will in their Presence, though the Will appeared to be signed with the Nane of the Testator, Cowper C. directed an Issue to try if the Will was duly executed according to the Statue of Frauds 29 Car. 2. Cap. 5. per Cowper C. Ms. Rep. Mich. 3 Geo. in Canc. Freeman v. Freeman.

4. Two Witnesses swore that J. S. the Testator did not publish it as his Will, but that A. B. guided J. S.'s Hand, and J. S. made his Mark but said nothing, nor was he capable. On the other Side it was proved, how that
that J. S. had made two former Wills, and in them had divided his Land
in the like Manner as by this Will, and that he died of a Consum-
tion, and was sensible to the last; and how that three Days after mak-
ing his Last Will, he was sensible and able to discourse, and so con-
tinued till within six Days of his Death, hereupon it was plain to the
Court, that the Witneses had been dealt with; to which the Counsel of
the other Side urged, that if the Witneses were not to be believed,
then there would not be three Witneses to the Will; and so no Will
within the Statute of Frauds and Perjuries. To which Pemberton Ch.
J. answered, that if there were three Witneses to a Will, whereof one
was to his own Knowledge a Thief or Person not credible, yet the
Words of the Statute being satisfied, and he having collateral Proof to
fortify the Will, he would direct a Jury to find it a good Will; and as
to this Case, he said that it was not probable that a Person in his fence
(as they are not able to disprove him to be) would suffer another
to guide his Hand to a Writing and not say any thing, and that
therefore they took it he did publish it. Skin. 79. pl. 20. Mich. 34
Car. 2. B. R. Hudson’s Cafe.
5. And remember’d Digg’s Cafe in C. B. where the Scrivener
wrote the Will and two others were Witneses, the Scrivener swore the
Teftator was Compos, and the two other swore he was not Compos; The
Court stopped these two till Verdict was brought in, which found the
Will a good Will, and then committed the two Witneses to the Fleet,
for that if this was suffered, it would be in any Man’s Power to destroy
another's Will; so likewise did the Court of B. R. here commit the
Witneses, and took Security of the Plaintiff to prosecute them for Per-
jury. Skin. 79. in S. C.
6. The Teftator lying sick in Bed makes his Will, signs, seals, and
publishes it in the Presence of the Witneses, but being ill, orders
them to go and subscribe their Names in another Room; they go into an-
other Room out of the Sight and Presence of the Teftator, and subscribe
their Names, and then return and own their Names to the Teftator, and
he looks upon the Will and says, they have done well; and if this shall be
a good Devise within the Statute of Frauds and Perjuries is the Point.
[But nothing was spoke to this Point.] Skin. 107. pl. 5. Patch. 35 Car.
2. B. R. Riley and Temple.
7. If a Will is written in three several Sheets of Paper not tacked to-
gether, and the other loose Sheets are sweep up in a clean Sheet and the
Witneses subscribe their Names to that clean Sheet, this is a good attesting
the Will; Arg. and it seems agreed by Dolben J. Carth 37. Trin. 1
W. & M. in B. R.
must see all the Pieces of Paper, else it is not good; per Car. 3 Mod. 263. Mich. 1 W. and M. in
B. R. Lea v. Libb.
8 Per Dolben J. the Signing a Will is not necessary to be in the Show. 88.
Presence of the Witneses, but their Subscription must be in Teftator’s S. C. and
Presence. But by Holt Ch. J. the Testimony of the Witneses is to be 10 no
judgment according to all the Statute has made necessary, and the Signing of the Party is the Opinion
one thing necessary, and the Sealing is a Signing. Show. 69. Mich. 1 of Holt.
W. & M. in Cafe of Lea v. Libb.
9. A Will of Lands was made before the Statute of Frauds, and wit-
tified by two only. The Teftator died after the Statute without alter-
ing his Will. The Master of the Rolls thought it a good Will to
pass the Land. But the other Side insisting to have it tried at Law, he
10. A Man devised a Legacy out of his Land and died; and in this
Cafe a Probate of a Will was given in Evidence, it being of 15 Years
standing and the Witneses being three and dead; positive Proof was made
of
of the Death of two of them, and circumstantial Proof of that of the third.


Anon.

G. Enu. R. 265. cites the Case of Le. v. Libbe, as reported by Sergeant Broderick, and that of Dolben J., held the Owners his Hand was a Signing, and no New Writing necessary; but Holt Ch. J. doubted of it.—2 Vern. 429. pl. 391. S. C. but S. P. does not appear.


12. Oliver Earl of Bolingbrooke before the Statute 29 Car. 2. viz. 1668-9 wrote his Will with his own Hand on a Sheet of Paper, and the Writing went to the Bottom of one Side and Half-way on the backside, which Will at the End of it had the Name and Seal of the Earl subscribed, and Notice was taken in his own Hand of some Interjections. At a very little distance at the backside of the same Paper, a Codicil was written, which extended almost to the Bottom of the same. Backside of the Paper, and was dated 1679, which was after the Statute 29 Car. 2. and had the Name of the Devisee subscribed and his Seal affixed; in which Codicil a Legacy, as to a House in Ludgate-Street, &c. was revoked, and the same was thereby devized to Sir And. St. John for Life, and after to his Brothers successively, but Notice was not taken of the Names of his Brothers in the Codicil, but they were named in the Will; at the Top of the Will was written (signed, sealed and published as my last Will and Testament in the Presence of) the same being written here for want of Room below; this was likewise written by the Testator's own Hand, and then the Names of the Three Witnesses were subscribed; two of those Witnesses were dead, and the third was produced at the Trial, who testified that he was Servant to the Testator Oliver Earl of Bolingbroke four Years, and about 27 or 28 Years ago, he and the other Two Witnesses were called up in the Night and sent for into the Earl's Chamber, who produced a Paper folded up, and desired him and the others to set their Hands as Witnesses to it, which they all three did in his Presence but they did not see any of the Writing, nor did the Earl tell them it was his Will, or say what it was, but he believes this to be the Paper, because his Name is there, and the Names of the other Witnesses, and he never witnessed any other Deed or Paper for the Earl. And though the Earl did not set his Name or Seal to the Will in their Presence, yet he had often seen the Earl write, and believes the whole Will and Codicil to be of his Hand-writing. It was infcribed, that upon this Evidence it is apparent that the Codicil was wrote before the Execution of the Will, for otherwise there was no Reason that Witnesses should write their Names at the Top of the first Side of the Will, and the Words wrote by the Testator's own Hand, as the Reason of it, had been false if the Codicil had not been upon that Paper, for there would have been sufficient Room below the Will for the Witnesses to attest it. The Witnesses also says, that the Execution was about 27 or 28 Years ago, which Time is subsequent to the Codicil. The Execution is sufficient within the Statute, for there is no Necessity that the Witnesses see the Testator write his Name, and if he writes these Words, Signed, Sealed and Published as his Will, and prays the Witnesses to subscribe their Names to that, it will be a sufficient Publication of his Will, though the Witnesses do not hear him declare it to be his Will. And Sir John Hollis mentioned.
Devise.

ed a Cafe determined by Lord Chancellor Salisbury before the 29
Car. 2. where a Man wrote his Will with his own Hand, and
also these Words, (Signed, Sealed, and Published in the Presence of)
and no Witneses had subscribed it, it was held to be a sufficient
Publication; And Trevor Ch. J. inclined, that there was sufficient
Evidence to find the Codicil well executed, and the Jury found it ac-
Ougley.

13. A Testator signs his Will, but delivers it as his Act and Deed,
yet well, for this will be sufficient Publication. Hill. 10 Geo.
Canc.

14. A Will charging Land by Virtue of a Power so to do by his last S.P. and the
Will, or any Writing purporting to be his last Will, under his Hand and
Seal attested by Three or more credible Witneses, was not signed by the
Testator in the Presence of Three Witneses, but he acknowledged it
to be his Hand, and declared it to be his Will in the Presence of Three
Witneses and they subscribed their Names in his Presence. Ld. Chan-
cellar King said, that though he himself inclined to think the
Will of the Land good, if the Testator should acknowledge the
Name to be his, and the Witneses should subscribe in the Presence
of the Testator, yet that Point should be referred to the Defen-
dant. And said, that he took this Will to be a good one, and be-
ing so, to be a good Charge, but referred it to the Judges of B. R. to
be made a Cane on this and another Point, but as to this Point of
the Testator's not signing in the Presence of the Witneses, the Cane
should be made upon the Depositions and referring to them, and it was
determined by the Judges of B. R. on Argument that the Will was
void as a Charge, for Want of being sealed. 2 Wms's Rep. 506.

Roll's Opinion as above to Mr. Justice Fortescue Aland, he said it was the Common Practice, and
that he had twice or thrice ruled it to upon Evidence on the Circuit; and that if sufficient, if one
of the three subscribing Witneses swears the Testator acknowledged the Signing to be his own
Hand Writing. And it is remarkable, that the Statute of Frauds does not say, the Testator shall sign
his Will in the Presence of three Witneses, but requires the two three Things; 1st. That the Will
should be in Writing; 2dly. That it should be signed by the Testator; And 3dly. That it should
be subscribed by three Witneses in the Presence of the Testator.

15. Upon an Issue directed out of Chancery, wherein the Question
was, whether a Man was Compos or not at the Time of executing
his Will, it was held by the Ch. J. that it was not necessary that all
the Witneses to the Will should see it executed, if one of them saw it exec-
cuted, and the others were present, he said, it would be sufficient.

16. In Ejecution brought by the Plaintiff, as Heir at Law. The
Question was on a Cane by Confent and left to the Opinion of the Court,
whether it shall be left to a Jury to determine, whether the
Witneses to a Will (being all dead) set their Names in the Presence
of the Testator, and this nearly upon Circumstances, without any posi-
tive Proof. Per Cur. This is a Matter fit to be left to the Jury which
is all referred to the Court. The Witneses by Statute of Frauds ought
to set their Names as Witneses in Presence of the Testatrix, but it is
not required by the Statute that this should be taken Notice of in
the Subscription to the Will; and whether inferred or not, it must
be proved: if inferred, it does not conclude but it may be proved
contrary, and the Verdict may find contrary, then if not conclusively
inferred, the Omision does not conclude it was not so, and therefore
must be proved by the best Proof the Nature of the Thing will ad-
mit of. In Cane the Witneses be dead, there cannot probably be any ex-

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prem. Proof, since at the Execution of Wills few are present but Devi-
fier and Witness; then as in other Cafes the Proof must be cir-
cumstantial, and here are Circumstances; 1st. Three Witnesses have
set their Names, and it must be intended they did it regularly.
2dly, One Witness was an Attorney of good Character, and may be
presumed to understand what ought to be done, rather than the con-
trary. And there may be Circumstances to induce a Jury to be-
lieve that the Witnesses set their Hands in Presence of the Testatrix
rather than the contrary; and it being a Matter of Fact, was proper
to be left to them; as, whether Livery was given on a Feodiment,
when no Livery is indorsed; whether a Deed was executed when only
a Counterpart was produced &c. And the Court was of Opinion
the Plaintiff ought to be noluitid. Comyns's Rep. 531, 532, 533.
17. Will shall not be read on Proof of Witness's Hand unless there
be positive Proof that he is dead. Comyns's Rep. 614. pl. 265. Hill.

(N. 8) Will. Signing and Attestation.

Necessary in what Cafes.

1. THREE Testamentary Schedules, whereof one was without Date, the
Second was wrote (in Witness) but no Witness, the Third conclu-
ed abruptly, yet being wrote by R. H. the Testator, they were declared
to be his Will. Comyns's Rep. 452. cites March, 1710. Wright v.
Walthoe.
2. M. P. sent for a Person to make her Will, gave him Instructions
to do so, when he had wrote it he read it to her, she approved it de-
cleared it to be her Will, sent for three Witnesses to see her execute
it, Signed and Sealed was written, but she died before any other Exe-
cution, yet it was held a good Will, for though the first Sentence for
it was reversed upon an Appeal, yet it was afterwards affirmed
before the Delegates. Comyns's Rep. 452. cites Anno. 1711. Worlick
v. Pellet.
3. If a Will be made of Goods and written in the Parties own Hand
without any Witnesses at all, it is allowed to be good, and the Sta-
trute does not require any Witnesses to Chattles only. Per Gilbert
Ch.B. Gilb. Equ. R. 250. in Cafes in the Exchequer in Ireland, Tem-
pore Geo. 1.
4. A Will of a Real and Personal Estate was prepared in Order
to be executed, though several Blanks in it, and the Testator died before
Execution yet it was held a good Will for the Personal Estate. Co-
myns's Rep. 453. Arg. cites 1721 Brown v. Heath & Pockling-
ton. And says that though more was intended to be done, yet it
shall be good for what is done, as in Butler and Baker's Cafe, 3 Rep.
If a Will be Part writ in the Testator's Life, though more was in-
tended to be written it shall be good as far as it was writ.
5. L. intending to make his Will, pulled a Paper out of his
Pocket, wrote down some Things with Ink, some with a Pencil, and
the' it had no Conclusion, but appeared to be a draught which be intended
after to finish, for it was not signed, but had at the End a Cal-
culation of his Effets, an Account of his Tea-table, and an Order to
pay
(N. 9) Will. Attestation.

Subscribing in Testator's Presence what is.

1. The Witnefles at the Desire of the Testator went into another Room Seven Yards distant to attile the Will in which there was a Window broken through which the Testator might fee them; Per Cur, the Statute required attesting in his Presence to prevent ob- truding another Will in the Place of the true one. It is enough if the Testator might fee, it is not necessary that he should actually see them signing; for at that Rate if a Man should but turn his Back or look off, it would vitiate the Will. Here the Signing was in the View of the Testator; he might have seen it, and that is enough. So if the Testator being fitk should be in Bed and the Curtains drawn. 2 Salk. 688. Paifh. 3 Jac. 2. C. B. Shiels v. Glaflock.

Witnefles withdrew into a Gallery, and there subscribed it, between which Gallery and the Bed-chamber where the Testator lay, there was a Lobby with Glafs-Doors, and the Glafs broken in fome Places; and it was proved that the Testator might fee from his Bed where he lay (through the Lobby and the broken Glafs Windows) the Table in the Gallery where the Witnefles subscribed their Names; and this was adjudged a good Will to pass Lands within the Intent of the Statute, for it fhall be deemed to be subscribed in his Presence, as far as a Man may fee in an Houfe. — 12 Mod. 37. S. P. and 3 Salk. 593. Davy v. Smith. S. P. —— Cumb. 153. Eccellone v. Speke. S. P.

2. One of the Witnefles to a Will of Land swore that he subscribed the Will as a Witnefe in the fame Room, and at the Request of the Testator. Two others swore, that they subscribed the time in the Presence of the Testator. A fourth Witnefe was gone beyond Sea, and fo not examined. Ld. C. Cowper doubted, but at prefent declared no Opinion as to Proof of the Execution by that One Witnefe. Afterwards Ld. Macclesfield upon the Charge coming on before him held, that the bare subscribing by the Witnefles in the fame Room did not necellarily imply it to be in the Testator's Presence, for that it might be in a Corner there in a Clandeiline Fraudulent Way and fo would not be a doing it in Testator's Presence; but that here it being sworn, that he subscribed at Testator's Request and
and in the same Room, this could not be fraudulent and was therefore well enough. Wms’s Rep. 740. Mich. 1721. Longford v. Eyre.

2. The proper Way of examining a Witness to prove a Will of Land is, that the Witnesses should not only prove the executing the Will by the Testator and his own subscribing it in his Presence, but likewise that the rest of the Witnesses subscribed their Names in Testator’s Presence and then one Witness proves the full Execution of the Will. Per LD. C. Macclesfield. Wms’s Rep. 741. Mich. 1725. in Case of of Longford v. Eyre.

3. Upon a Trial at Bar concerning the Execution of a Will, it did not appear upon the face of it, that the Attestation of the Witnesses was made in the Presence of the Testator, which being objected to, a Case was cited where LD. Ch. J. Eyre held it a Matter proper to be left to a Jury, whether they believed it to be so done or not; and Mr. Justice Chappel cited a Case to the same Purpose, Quod Curia conceitit, and held it is not necessary it should be inferred in the Will, that the Attestation was in the Presence of the Testator, though by the Statute it is necessary that it should in Fact be so attested. Patch. 12 Geo. 2. B. R. 

(Croft on Demise of Dalby v. Powell.

(N. 10) Will. Attestation Good.

Subscribing at several Times.

1. A Will made in Writing, and one of the three Witnesses who saw it published, set his Hand to it at another Time, and held good. And so it had been adjudged, as Sir Francis Winnington told the Reporter. Freem. Rep. 456. pl. (664. c.) Mich. 1690. Anon.

2. A Will of Lands attested by three Witnesses, who at several times subscribed their Names at the Request of the Testator, but were not present at once together, was decreed good within the Statute of Frauds. 2 Chan. Cales 109. Trin. 34 Car. 2. Anon.

3. A Will for Land duly signed by Testatrix in the Presence of A. and also published, which A. sett the Will, but is now dead; his Hand was proved; after this the Testatrix called in B. to be a Witness to the Will; she told him it was her Will, and published it as such; after this she called in C. and did the same. The Question was, Whether these Witnesses attesting this Will at several Times, though all in the Presence of the Testatrix was according to the Statute of Frauds and Perjuries; Baron Price held it ill, for the Intent was, that all the Witnesses should be together, that one might testify for the other, and this was a ready way to let in Fraud and Perjury, for after the first Witnesses had attested it there might be a Ruffle or Interlineation in it. Lent. Alliles at Devon 1717.

(N. 11) Will
Devise.

(N. 11.) Will. Attestation Good.

By what Number. By three or less, though touching Land.

1. MORTGAGOR devises the Equity of Redemption, the Estate being forfeited by Non-Payment. But whether this is to be considered as Land, so that three Witnesses were requisite, Non Contract, though it was the Point in Dispute. 2 Ch. Cafes 8. Mich. 31 Car.

2. By the Canon Law, and so by our Law two Witnesses are requisite to prove a Will for Goods and three for Lands. 3 Salk. 396. pl. 1. Anon.

3. A. surrenders Copyhold Land to the Use of his Will, and then makes his Will in Writing, and devises his Freehold and Copyhold to Mich. Chancellor. The Will was all written with his own Hand, but S. C. denied Witness to it. A. made a Codicil reciting the Will, and this codicil had four Witnesses to it. It was urged and not denied that doublets, say, a Copyhold was well devised, for that palled by the Surrender and not by the Will. But Ld. Cowper decreed the Will was not good to Ld. Chancellor, and not being good as a Will, it could not operate as cellar held an Appointment. Ch. Prec. 279. pl. 221. Mich. 1708. Attorney General for Sidney College v. Bains.

a favorable Cae on the one Side, and a Charity on the other, he would consider father of it, and would confer with the Judges in it. — S. C. cited by Ld. Chancellor, Barnard. Chan. Rep. 12. Patch. 1742. and said that in Cae of the Copyhold the Will is good, though it be not attested by any Witnesses at all. So far indeed it is necessary that the Will in such Cae must be in Writing; but when it is in Writing, and signed by the Party, that is sufficient for such Purpose.

4. A. seized in Fee of Copyhold Lands, makes a Surrender to the Use of Sel. Cafes B. and C. and their Heirs to the Use of his Will, and devises the Lands to D. Quære, If Devise of Copyhold Lands is good in this Cae without the Circumstances required by the Statute 29 Car. 2. of Frauds in Devises of Lands be duly observed.

Parker C. of Opinion that the Circumstances required by the Statute of Frauds in Devises of Lands ought to be observed in this Cæ, for by this Surrender the Fee of the Copyhold was in the Surrenderees and only a Truit devised by the Will: which cannot pass by the Devise without the Circumstances required by the Statute of Frauds in Relation to Devises of Land to be duly observed. But the Counsel inferring that a Devise of Copyhold is not within the Statute of Frauds, Ld. Chancellor said, that if the Surrenderer had been only to the Use of the Will, that might have been a Question in this Case, but now it is not; however, he inclined to think it necessary in that Case but would not determine that Point now, that not being the Case before him. MS. Rep. Patch. 7 Geo. Canc. Appleyard v. Wood.

that a Will of a Copyhold Estate does not require three Witnesses: but this is a Devise of a Trust relating to Lands, so within the Words of the Statute of Frauds; the Heir contradicting the Surrender and the Will, this Point was not determined, but two Errors ordered. Though the Chancellor seem'd to be of Opinion, that the Devise of a Trust must enue the Nature of the Estate, and not make it to be necessary to have three Witnesses, as the Copyhold might be devised without three Witnesses; This may be a Question to be determined when the Issues are tried.

5. A. conveyed Lands to Trustees to the Use of them and their Heirs in Trust, that after such Monies raised as therein mentioned, the Trustees L 1
Devise.

should convey to J. S. his Heirs and Assigns, or to such as he or they should direct. The Monies were raised, and J. S. by Will attested only by two Witnesses, devised the Premises to J. N. "Ld. C. Macclesfield" said, that there could be no Question but that the Tract of an Inheritance must be devised in the same Manner as a legal Estate, for, if the Law were otherwise, it would introduce the same Inconveniences as to Frauds and Perjuries as were before the Statute by a Deviser of a legal Estate in Fee Simple, and so hold the Will void, and order'd the Trustees to convey the Premises to the Teftator's Heir at Law. 2 Wms's Rep. 258. Mich. 1724. Wagstaff v. Wagstaff.

6. And Ld. Macclesfield said, that as the Will did not refer to the Deed of Trust, and as J. S. had undertaken to devise the Land as Owner thereof, without any Relation had to the pretended Power, it made it much stronger against the Will. 2 Wms's Rep. 260. Mich. 1724. Wagstaff v. Wagstaff.

7. A Copyhold surrendered to the Use of a Will, and afterwards devised by a Will attested by two Witnesses, or one Witness only, has been adjudged good. But Ld. Macclesfield said that the Copyhold passes by the Surrnder and not by the Will, and that if this Matter had not been settled it would be more reasonable to lay, when I have surrendered my Copyhold to the Use of my Will, that a Will of this my Copyhold shall be so executed, and in such a Manner as by the Act of Parliament a Will of Lands ought to be executed. 2 Wms's Rep. 258. Mich. 1724. in Cafe of Wagstaff v. Wagstaff.

Sel Chan. Cafe. in Ld King's Time S. C. but though this Page is in the State of the Cafe there, yet it says nothing of the Opinion of the Court as to this Matter.


What shall be said to amount to an Attestation by Three.

Carth. 31.
S. C. ad
judged ac
Corb.
174. Lea.
Libb. S. C.
adjudged ac
Corb.
68. S. C. ad

1. THE Teftator made his Will in Writing, subscribed by two Witnesses, and devised all his Lands to W. R. Afterwards he made a Codicil, in which his Will was recited; and this also was attested by two Witnesses, one of which Witnesses was a Witness to the Will, but the other was a new Witness; the Question was, whether this new Witness should make a third to the Will, the Statute requiring that there should be three; and adjudged that he should not. It is true, here are three Witnesses to the Intent and Will of the Teftator, but there are but two to his Will in Writing; it is true like-wise, that there are two Witnesses
Devise.

Witnesses to the Codicil, but those are not Witnesses to the written Will, so that there wants one Witness to the Will in Writing. 3 Salk.


2. On the 11th of May 1705, the Testator sign'd, seal'd, published and declared his Will in the Presence of A. who sign'd as a Witness in the Testator's Presence; afterwards on the 12th of May the Testator sign'd, seal'd, and published in the Presence of B. and C. and other subscribors Witnesses, who sign'd as Witnesses in Testator's Presence. It seems admitted that this was a good Will within the Statute of 29 Car. 2. as to the deviting of Lands. See Gibb. Equ. Rep. 255, 256. in Tempore Geo. 1,

in the Exchequer in Ireland, Lodge v. Jennings.

3. A Surrender was made to a Feoff Covert of Copyhold Lands, with a Power referred to her to surrender it to such Uses as she by Writing, or Last Will, in the Presence of three Witnesses should direct or appoint. She made a Will in Purfuance of her Power executed in the Presence of three Witnesses, and gave it to her Daughter and Heir. Afterwards she made a Surrender, together with her Husband, to the Use of her Husband and his Heirs; but this was made in the Presence of two Witnesses only, who subscrib'd their Names (as Witnesses); but the Deputy-Steward who took the Surrender had not his Name to it. On a Bill by the Husband after the Wife's Death to estabish this Surrender, who would have the Steward be considered as a third Witness, the Daughter, the Defendant, pleaded a Title by the Will, and also demurred, for that the Plaintiff's Title, if any, was only at Law, and he might bring Ejectment. Lord Chancellor seeming to think the Plea good, as a Plea of the Defendant's Title, and the Demurrer good likewise, as a Demurrer to the Plaintiff's Title; but at last he over-ruled the Plea, and allowed the Demurrer. Abr. of Cases in Equ. 42, Trin. 1728. Cotter v. Layer.


Good. In Respect of the Witnesses.

Persons Interested, and in London.

1. Will of Land in London ought to be inrolled in the Hutings, and ought to be proved by Citizens and not by Strangers. Per Southcote. Dal. 117. pl. 11. Anno 16 Eliz. Anon.

2. Where there is a Devise to the Ministers and Churchwardens of Lands for Maintenance of the Poor for ever, any of the Parishioners of the said Parish may be Witnesses to prove the Will. 2 Sid. 139. Mich. 1678. Townfend v. Roe.

3. Child of a Residuary Legatee is no Witness by the Civil Law to prove a Will of a Personal Estate, by which Law only such Wills are determinable; and therefore, where a Writing revoking such Will was sign'd in the Presence of three Witnesses (as the Statute of Frauds requires) whereof one of the three was exceptionable, but the other two were Children of the Residuary Legatee; it was held upon Appeal to the Delegates, that the Children were not to be allow'd as Witnesses. Wms's Rep. 10. Mich. Vac. 1696. Thwaites v. Smith.

by the Testator's own Hand, since in either of those Cases it would have been good without any Witnesses at all. Ibid. 15. and cites Swinh. 3. co.

Le, Raym.
4. By Powell junior Justice. If the Spiritual Court refuse the Evidence of the Son to prove a Will in which the Father is a Legatee, no Prohibition is grantable. And he cited this Case as lately adjudged before Commissioners Delegates. There were three Witnesses to prove a Nuncupative Will, two of them were without Exception, and the third was son to the Legatee; the Statute of Frauds requires three competent Witnesses. The Question therefore was, if these three were sufficient? The Son not being an Evidence by the Spiritual Law; and adjudged they were; because two only were required by the Spiritual Law, and the third was a good Witness within the Intent of the Act of Frauds. Ld. Raym. Rep. 85. Trin. 8 W. 3. Anon.

5. It was resolved, Mich. 8 W. 3. B. R. upon Evidence in a Trial at Bar, viz. That a Legatee cannot be a Witness to prove the Will, because the Legacy is devis'd to him, unless he has released the Legacy. But after such Release he will be a good Witness to prove the Will. But if the Counsel of the other Side have permitted such Legatee to be favour'd, and to be examined as a Witness, without having taken Exception against him, they cannot afterwards except against his Evidence for the Reason that he was a Legatee. Ld. Raym. Rep. 730. Pyke v. Crouch.

6. A. Devisee of Lands in Fee was one of the three Witnesses to the Will, the Will is void quoad the Devisee of the Land to such Witness, so that, with Respect to that, the Will was attested only by two Witnesses. Carth. 514. Hill 11 W. 3. B. R. Hilliard v. Jennings.


Where the Deviseor had Term and Fee in the same Land.
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the Inheritance in his own Name, and devises the Premises to J. W. and made R. Executor. The Will was neither dated, subscribed, or attested, but was all of the Testator's own Hand-writing. R. proved the Will, and attested to the Devise. It was infinest that the Will was good at Law to pass the Term of 500 Years, it being a subsisting Term, and not merged in the Inheritance by Reason of the intermediate Term, which operated as a Grant of the Reversion, and not as of a future Interest, and that the Grant being for 1000 Years to commence from the making, did pass the Reversion for 1000 Years, Quod fuit Concessum per Cur. But the Matter of the Rolls decreed, that as this was a Term which would have attended the Inheritance, and in Equity have gone to the Heir and not to the Executor, and in that Respect to be considered as Part of the Inheritance, and so this Term did not pass by such Will. 2 Wm's Rep. 236. Trin. 1724. Whitchurch v. Whitchurch.

(O.) What Act will [would] revoke it [before the Statute of 29 Car. 2. cap. 3.]

1. If a Man devises Lands by the Statute of 32 H. 8. by Writing, and after revokes it by Parol in Presence of certain Persons, requiring their Testimony of his present Revocation; and says further, that he will alter it when he comes to D. and before he comes there he is murdered, this Will is revoked, though it was not in Writing. D. 13. L. 310. [b. pl.] 81. resolved. (Kite's Case.)

— If a Man makes his Will in Writing, and says then that he will add to it, or alter it, it is not his Will, because not complete nor published for his Will. But if a Man makes his Will, and publisheth it, and after it comes in his Mind to add to it or alter it, and says he will so do, but dies before any Addition or Alteration of it, the first Will shall stand. Resolved by the two Ch. Justices and Ch. Barons in the Court of Wards. Mo. 874. pl. 1222. Rider's Case.

2. If a Man devises Lands to another, and after makes a Feoffment to the Use of his Will, this is a Revocation of the Will. Fose's Case agreed. Cited per Will. Hill. 4 Jac. 3. R. in Frecheville's Case.

making the Will, he made a Feoffment of the Manor to the Use of such Persons, and for such Blakes as he had declared by his Will, bearing Date &c. Adjudged ibid. that the Feoffment was a Countermand of the Will, and yet the countermanded Will was sufficient to declare the Use of the Feoffment, and to no Else to the Crown.

3. If a Man covenants by Indenture to levy a Fine, and that he shall be to the Use of such Persons as he shall nominate by his Will, and after he makes a Will, by which he devises the Lands to certain Persons, and after he levies a Fine in Performance of the said Covenant, this is a Revocation of the Will, though it is levied in Performance of a Covenant which was made before the Will, for the Land cannot pass by Relation to the Time of the Covenant made, but only to the Time of the Fine levied. Trin. 16 Jac. in Cuth Wardamation, between Litwhel and Sitton, agreed per Curiam and Counsel.

4. If a Man devises Lands to one, and afterwards devises it to the S. C. and P. Poor of such a Parish, which is bold, because they have not Capacity to take, yet this is a Revocation. 29 Eliz. Freche's Case adjudged, cited Patch. 41 Eliz. 3. R. Montague's Case.

This Devise.


with the Argument of

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Gibert.

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3. 50
5. So, if he devise it to a Corporation, because the Devise to them is not within the Statute, yet this is a Revocation. Patch. 41 Eliz. B. R.

6. One made his Will and devised all his Lands to A. H. and his Heirs, and afterwards being sick and lying on his Death-Bed (because A. H. did not come and visit him) he affirmed that A. H. should not have any Part of his Lands or Goods. Resolved, that this was not any Revocation of the Will, being but by way of Discourse, and not mentioning his Will; but the Revocation ought to have been by express Words, that he should not have the Lands given to her by the Will, which might shew his Intent to make an express Revocation, otherwise it is not good. Cro. J. 115. pl. 2. Patch. 4. Jac. in B. R. Simmon v. Kirton.

7. If one makes his Will in Writing of Lands, and afterwards upon Communication says, that he has made his Will but that shall not stand, or I will alter my Will &c. These Words are no Revocation of his Will, for they are only Words in Future, and a Declaration what he intends to do. But if he says, I do revoke it, and bear Witness thereof, it is a Declaration of his Purpose, in Present, and it is then a Revocation; and as a Will ought to be by his own Directions, and not by Questions, so ought it to be of the Revocation of it. Cro. J. 497. pl. 3. Mich. 16 Jac. B. R. Cranvel v. Sanders.

8. One made his Will, and afterwards said, I utterly renounce and desist that Will, and will make a New One, are good Words of Revocation. But if they were, That Will shall not stand, I will make a New One, they are not; For the first Words shew a present Purpose of Revocation. Het. 97. Patch. 4 Car. C. B. Allen v. Weitely.

9. A Will in Writing may be revoked by Parol, and revived again by Parol; Per Roll Ch. J. Styr. 343. Mich. 1652. Anon.

10. A Man devised Legacies to his two Brothers, and afterwards in his Sicknes was asked to leave Legacies to his said Brothers, he replied, he would leave them nothing, but devised a small Legacy to his Godson, and died. This Discourse was set down in a Codicil, which, together with the Will, was proved in common Form; This Codicil was not a Revocation of the Legacies given to the Brothers, because the Testator took no Notice of the Will which he had made in the Time of his Health, and non confat what he intended by these Words which were set down in the Codicil. 3 Mod. 256. Patch. 4 Jac. 2. B. R. Arg. cites Cro. C. 51. [pl. 13. Mich. 2 Car. in Canc.] Eyres Cafe.

(P) What Act shall be said a Revocation.

[Al Thing not performed] Pl. 1, 2, 3. [Act done but otherwise void] Pl. 4, 5, 6, 7.

S. P. as that 1. If a Man faith that he will at a future Time revoke a Will which he hath made, this is not any Revocation before other Act done. Mich. 38, 39 Eliz. B. R. per Curtiam.

He shall by
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by Will made at P, and after lying sick at S declared that his Will made at P shall not stand. Resolved that Verba in Future shall be taken futūrē when they refer to a future Act; otherwise when they refer to a present Resolucιon; But per Popham, if he had said, "I will revoke my Will made at P," this is no present Revocation; for it referred to a future Act; But when he says, "It shall not stand," this takes effect presently; and adjudged a present Revocation. Cro. E. 566. pl. 6. Mich. 35 and 36 Eliz. B. R. Burton v. Gowell. —— Cro. J. 197 pl. 2. Mich. 16 J. B. R. Cranwell v. Saunders it was resolved per Cur. upon Evidence that the Words, "I have made my Will, but that shall not stand," or "I will alter my Will etc. are not any Revocation; for they are Words in Future, and a Declaration of what he intends to do.

2. So if he says he will make a Feoffment thereof to another, this is not any Revocation before it is done. Mich. 38, 39 El. B. R. per Popham.

3. If a Man seised in Fee of a Reversion of Lands, devises it by Will in Wri ting to J. S. his Brother, and after Covenants with B upon a Marriage with the Sister of B. to make a Feoffment in Fee of the said Lands, and of other Lands also, which Feoffment shall be to the Use of himself for Life, the Remainder to the said Sister of B. for Life for her Jointure; such Covenent without more is not any Revocation of the Will, for perhaps his Intent will alter before the Performance thereof. Mich. 38, 39 El. B. R. between Montague and Jeffrys, agreed per Curiam.

4. But if after the said Covenant made he makes a Deed of Feoffment accordingly, with a Letter of Attorney to J. N. to make Livery, and the Attorney makes Livery in the other Land in the Name of the Whole, the Feoffee for Life of the Land devised being then in Possession thereof, who never attorned to this Feoffment, by which the Livery as to the Land devised is merely void, yet this is a Revocation of the Will, for here the Intent of the Devisee is fully expressed to have it revoked, unwritten as he hath appointed another to execute it for him. Dibutarur, Mich. 38, 39 El. B. R. between Montague and Jeffrys, Parker. 41 El. B. R. the Land Cale.

by Court or Council. —— Show, Rep. 524. S. C. [as it seems] cited Arg. by Sergeant Marshall, Mich. 4 Jac. that the Feoffment is void, but the Revocation is good. —— S. C. cited 2 Salk. 592. in pl. 1. that though it be a void Act, yet it will revoke a Will. —— Wentv. Oil of Executors 22. S. P.

5. If a Man seised of a Reversion expextant upon an Eallate for Life 2 Salk. 592. devises it to J. S. and after by his Deed grants the Reversion in Fee to J. D. Though the Feoffee never attorns, yet this is a Revocation, in S. C. althou gh as he hath fully showed his Intent that the other should have it, and put it in the Power of the Feoffee. Mich. 38, 39 El. B. R. per Popham and Caundy.

6. So if a Man devises Lands to J. S. and after bar. aims and sells 2 Salk. 192. to J. D. and acknowledges it before a Doctor be i rolled according to the Statute, though it be not enrolled within the six Months, yet they shall be a Revocation of the Will for the Cause aforesaid. Mich. 38, 39 El. B. R. per Popham and Caundy agreed.

7. If a Man devises Lands to another by his Will in Writing, and after he devises it to another by Parol, though this be void as a Will, yet it is a Revocation of the first Will. Mich. 38, 39 El. B. R. per Popham.

8. W. devised Lands in N. to 1/2 of L. Goldsmith, and to his Heirs in Ow. 56. 28 Fee. And afterwards he made a Deed of Feoffment thereof to divers Persons, unto the Use of himself for Life, without Impediment of Wife, the Remainder unto the Devisee in Fee. But before he sealed the Deed of Feoff and the Tenement, be asked one if it would be any Prejudice to his Will? who answered No. And the Devisee asked again, if it would be any Prejudice? because he conceived, that he should not live until Livery was made, and, if it was answered, No. Then he said, that he would seal it, for his this Feoff. Intent
"ment will Intent was, that his Will should stand; And afterwards Livery was
not hurt.
his Will, Periam J. held, that the Feoffment is no Countermand of the Will,
and if it will not, because it was to one and the same Person; But perhaps it had been other-
I will sell wise, if it had been to the Use of a Stranger, although it were not execut-
it?" The
Courts agreed that if he had said, the Court agreed that if he had said, the Will is revoked in that
Part where the Livery is executed. And he said it would have been a
Question, if he had said nothing. Godb. 132. pl. 152 Mich. 29
It shall Eliz. C. B. Winkfield's Case.
not be my
Will, then it is a Revocation; but here his Intent appears that the Will shall stand, and other
Lands being continued in the Feoffment than were devised, and a Letter of Attorney therein to make
Livery in any of the said Lands, and the Attorney made Livery of the other Lands, and so the
Feoffment perfect in part, yet as concerning the Land in Question, the Will is good. —— Gouldsb. 32.

Psal. Ld. 9. The Rule where a subsequent All shall amount to a Revocation by
Keeling, co. cites
Cook v. Bul-
lock S. P. Parker.
299 Gardiner v. Sheldon, S. P. —— Revocations arising from Inconsistencies will never be admitted
but where the Inconsistency is plain and intelligible; therefore if in the Beginning, of a Will Land
is devised to J. S. and after in the same Will the same Land is devised to J. N. the Law will make
them Jointtenants, rather than the latter Part should be esteemed as a Revocation of the former. Arg.
to Mod. 521, 522. Mich. 10 Geo. 1. in Canc.

10. If a Man devises Lands and afterwards Mortgages the same for
Years, and then devises a Fine for Conveyance de Droit come coo &c. and not
a Fine Sur Concessit: this will be a Revocation; but if there had been a
Fine for concessit, it had revokd only Pratante. Per Ld. Chancellor Cow-
per. Patch. 6 Ann. Canc.

(Q) Countermand.

1. If a Man devises Lands to J. S. and after makes a Feoffment in
Fees thereof to a Stranger, to the Use of himself in Fee, though he
had his old Estate, yet it seems this is a Revocation, for his In-
tent was to have it by the new Limitation, and by the Feoffment he
passed the Estate, and the Statute revokd it in him, which is as a new
Purchase. Contra, Nich. 38 39 Eliz. B. R. per Pop-
ham.

2. So if a Man devises Lands to J. S. in Fee, and after makes a
Feoffment thereof to another, to the Use of himself for Life, the Re-
mainder to his Wife for Life, the Remainder to his own right Heirs
in Fee, though here he hath his old Reversion, yet it seems that
it was his Intent to have it pass by the Liberty, and to be in by
the Statute and Limitation, and so as a new Purchase, and there-
fore it seems that this shall be a Revocation of the Fee, as well as
for the Life of the Feem. Contra, B. 39 Et. B. R. be-
tween Montague and Jeffrys, per Titman agreed.

3. If a Man having Feoffees to his Use before the Statute of 27 H. 8.
had devisd the Lands to another, and after the Feoffees had made a
Feoffment of the Land to the Use of the Devisor, and after the Statute
the

D. 73 pl. 9. and 11. in the

The King v.

Shirmpshire.
the Devisor had died, the Land should have passed by the Devise, for
after the feoffment the Devisor had the fame Ufe as he had before.
4. One devolved Lands to his Sifer in Fee, and afterwards made a Leafe Cro. J. 49.
to her for six Years to begin after his Deceafe, and delivered it to a Stran-
ger, to the Ufe of his Sifer, which Stranger did not deliver to her in the
Life of the Testator, but afterwards, which she refused, and claimed the
Inheritance; Resolved, because the Devise and the Leafe made to one — S. C.
and the fame Perfon cannot stand together in one and the fame Per-
son, that it was a Countermand of the Devise; But it was agreed by all
the Judges, that if the Leafe had been made to any other than the
Devisee, it should not have been a Revocation of the Will as to the
Inheritance, but only during the Term. Cro. C. 23, in pl. 16. cited


5. A feoffment by Devisor after the making his Will to A. and B. in
Trufts, to the Ufe of the Devisor and others, till the Devisor limit and
order new Ufes thereof, which he never did, and died, is no Revocation

(R) What Act of the Devisor [is a Countermand of
the Will.]

1. If the Devisor alienates the Land, and repurchases, yet the Will
is revoked. 44 Ec. 3. 33. 44 All. D. 3. 4. P. 35. 143. 55.
Contra, 2 R. 3. 3. b.

2. If before 27 H. 8. Cezuy que Use had devived the Ufe and af-
ter came 27 H. 8. which transferred the Use to the Possession; this
was a Revocation, because the Use was gone by it, and every Man
is Party to the Statute, and by Consequence the Devisor, and
therefore it is a Revocation. D. 3. 4 Bl. 148. 54. 55.
3. E. of a Feme Sole, devided her Lands to a Man and his Heirs, whom
she afterwards married, and then she died without Issue. Adjudged that
her Marriage was a Revocation of her Will, for it being her own vo-
Iuntary Act, it amounts in Law to a Countermand of her Will. Swinb. judged no
Hembling.

4. If a Leafe for 20 Years be bequeath'd to J. S. and after the Testator
makes a Leafe for 15 Years, this is no Revocation, but if the Testator
after his Will made takes a new Leafe for a longer Term so as the former
Leafe is surrendered in Fact or in Law, this is a Revocation, or at least
Annullation, for this is another Leafe, and not that which he had
at the making of the Will. Wentw. Off. of Executors, 22, 23.

N n (R. 2) Will.
Devise.

(R. 2) Will.

Revocation by some other Will.

1. If a Feeme Sole makes a Will the 1st of May and gives Land, and afterwards Marries the 1st, May 20, and May 30 teeth dies. This is a void Will, though she was then dis-covered, and to the Marriage is a Revocation. Pl. C. 344, by Lovelace Serjeant, Trin. 10 Eliz. in Case of Brett v. Rigden.

2. A Man devised Lands to his younger Son and his Heirs, and afterwards he took a Wife, and by another Will in Writing he devised the Lands to his Wife for Life, and pays Yearly to his Son and his Heirs such a Rent. Anderson and Glanvill held it to be no Revocation, but that in this Case both Wills may stand together unless the latter be contrary to the first Will, or that there be an express Revocation, and here his intention appears to be only to provide for his Wife whom he afterwards eponied, and not to alter it as to his Son, and the appointing the Rent to him shews that the Revocation should be to him. The Matter was afterwards ended by Arbitration. Cro. E. 721. pl. 51. Mich. 41, & 42 Eliz. C. B. Coward v. Marthill.

3. If a Man sealed of Land in Fee, thereof enfeoffs a Stranger unto the Intent to perform his Will, and afterwards the Feoffor makes his Will, and devises the same Land unto a Stranger in Fee. In this Will the Feoffor may alter his Will by a later Will, because that in this Case the Devisee shall not have the Land but by Force of the Will, and that cannot take Effect but after the Death of the Deviseur. The same Law is of Land, Tenement, Rent, Common &c. desivable by Canton ued in some Places &c. and also the same Law is of other Chattle Real and Personal devised, Mutatis Mutandis &c. Perk. S. 481.

4. If a Man of found Memory makes two Wills, that is to say, one in the 6th Year of the King, and another in the 8th Year of the same King, and after the Testator being sick in his Death-Bed, and dumb, and a Man in the Presence of his Neighbours, deliver both the Testaments unto the Testator, and he takes them both in his Hand, and one of the Neighbours desires him to deliver back unto them the Testament which he wills should stand and be his last Will, and he delivers back unto them the Testament with the former Date, and keeps the other Testament by him; now the Testament that is delivered back thrice stand, notwithstanding it has the former Date, and was written before the other Testament &c. Perk. S. 479.

5. An Estate in Land [was] devised by Will in Writing, afterwards [Testator] made a verbal Will to revoke it. This is not Revocation. Toth. 286. cites Moggeridge v. Wither, 12 Car.

6. The Testator devised his Lands to W. D. in Tail, and afterwards by a Subsequent Will he devided the same Lands to Eliz. his eldest Daughter for Life, Remainder to her first, second, and third Sons in Tail Male, and gave a Rent Charge of 100l. per Annum to the said W. D. for Life, both which Wills were duly published, but the Testator, a little before he died, declared, that his first Will should stand and be his Will. The Court charged the Jury to inquire if the Publication of the first Will in such Manner after the Publication of his last Will was not a Revocation of the last Will, who found that it was. 2 Sid. 2. 3. Mich. 1657. B. R. Colt v. Dutton.

7. A by Will in Writing devided Lands, and a Year after he made another Will in Writing, but devided no Lands by the last Will. The Court delivered
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delivered their Opinions in this Case, viz. That they were not satisfied with the second Will did revoke the former, because it is not found that any Lands were devised by this second Will, so that it may be, or it may not be, consistent with the former; and where the Matter lands indifferent, the Court will not acquit a Revocation of a former Will solemnly made. But Hale Ch. Baron held, That a second substantive independent Will, though it do not by express Words import a Revocation of a former Will, nor pass any Land, will yet amount in Construction of Law to a Revocation; but here it being in Doubt whether this were so or not, he held there was not sufficient Matter found for the Court to construe it to be a Revocation; for it may be, for aught appears to the contrary, that the second Will in this Case was a Confirmation of the former. Hartr. 376. in pl. 3. Mich. 16 Car. 2. Seymour & Ux. v. Northworthy.

8. 29 Car. 2. cap. 3. S. 22. No Will in Writing concerning any Goods or Personal Estate shall be repealed, nor shall any Clause or Bequest therein be altered, by any Words, or Will by Word of mouth, only, except the same be in the Life of the Testator committed to Writing, and read to the Testator, and allowed by him, and proved to be so done by Witnesses.

9. A devise of 400l. to be laid out in finishing a House, and afterwards lays out as much himself, but the House was not finished. The 400l. shall not be allowed though it was intended that after A. had laid out more than the 400l. he declared a little before his Death, that whether he lived or died that Work should be finished. Vern. 95. pl. 83. Mich. 1682. Husbands v. Husbands.

10. A Will was duly made and signed by the Testator, and a Revocation was wrote on the same Paper but not signed by Testator, it is not sufficient within the Statute of Frauds. 3 Lev. 86. Hill. 34 Car. 2. C. B. Hilton v. King.

11. The Will was made on his Brother, and it was afterwards called a Will, and thereby he did devise the said Lands to his Brother, and the Question was, Whether this last Will was a Revocation of the former? Sergeant Maynard Arg. takes Notice that this Case was (as he says) finely cited, and that they told you two Lawyers were of Opinion it was none, they might have been pleased to have given the Honour to them, and the Sergeant says, it was the Ch. J. Anderson and Glanvill a very learned Judge. And why was it no Revocation? Because they both had it together. This Case Anderson reports as his own Opinion, as a Judgment in the Bench by him and Glanvill, and it seems there was no other Judge upon the Bench. Show 541. Mich. 4 Jac. 2. in Case of Hitchins v. Batter.

12. A Man devise a to his Son his Lands to him and his Heirs. Afterwards he makes another Will, and thereby he did devise the same Lands to his Wife by Life, paying the Son &c. and the Question was, Whether this last Will was a Revocation of the former? Sergeant Maynard Arg. takes Notice that this Case was (as he says) finely cited, and that they told you two Lawyers were of Opinion it was none, they might have been pleased to have given the Honour to them, and the Sergeant says, it was the Ch. J. Anderson and Glanvill a very learned Judge. And why was it so Revocation? Because they both had it together. This Case Anderson reports as his own Opinion, as a Judgment in the Bench by him and Glanvill, and it seems there was no other Judge upon the Bench. Show 541. Mich. 4 Jac. 2. in Case of Hitchins v. Batter.

13. A devise of Lands to J. S. and after devise them, viz. To a Monk. 24thly, To a Corporation. 29thly, To a Person where all are incapable to take these, and Wills, and yet they are a Revocation. Arg. Show. 544. Mich. 4 Jac. 2. in Case of Hitchins v. Batter.

14. A Judgment of a Will which does not appear though found by Verdict, that such a Will was made, but that what the Contents of such Will were, they did not know, is not a Revocation of a former Will. For
Devife.

For such after Will may concern other Lands, or no Lands at all, or may be a Confirmation of the former; Adjudg'd. 2 Salk. 592. pl. 1. Trin. 5 W. & M. in B. R. Hitchins v. Ballet.

15. Revocation must be by a Writing operating as a Will, or by a Writing by which the Testator declares his Intention to revoke the first Will. 3 Salk. 396. pl. 3. Anon.

16. Devise of Lands in S. to his Son A. for 99 Years, determinable upon three Lives, and by his Will charges the said Lands with an Annuity of 40l. per Ann. to his Daughter M. and afterwards devises the same Lands for 99 Years, determinable upon three other Lives, referring 50l. a Year Rent, this is, during the Continuance of the Leafe, a Revocation, but it is no Revocation as to the 40l. per Ann. Annuity, there being Rent enough referred to satisfy that. MS. Tab. Feb. 14th. 1706. Parker v. Lamb.

MS Rep.
Nov. 25.
1734. Hide
v. Mfon.

17. Samuel Mfon of Westminster Eqv. 23 June 1729, made his Will, and two Duplicates of it were executed before three Witnesses, and Mr. Limbrey, and Dr. Calamy (deceased) were made Executors, and one of the Duplicates was delivered to Mr. Limbrey, one of the Executors. Samuel Mfon died 2 Oct. 1730, and about three Weeks before his Death made several Alterations and Obliterations with his own Hand in the Duplicate remaining in his own Custody, making a new Devise of his Real Estate, and a new residuary Legatee, and a new Executor, entirely striking out the Names of the first Devisees, residuary Legatee and Executors, and altered several of the former Legacies, and inferred or interlined new Legacies. And soon after wrote another Will with his own Hand, agreeable in great Measure, but not altogether, to the Will or Duplicate so altered, with the Conclusion in these Words, "In witnesses whereof I the said Testator have to each Sheet set my Hand, and to the Top where the Sheets are fixed together, my Hand and Seal, and to the Last thereof my Hand and Seal, and to a Duplicate of the same Tenor and Date this Day of __ 1730." But there was no sealing or fixing together. Testator soon after began to write another Will, Word for Word with the last, so far as it goes, but went no farther than devising his Lands.

Testator lived six Days after, and was in good Health, and might have finished and executed both or either of the latter Wills if he had thought fit. Testator never sent to or called upon Mr. Limbrey for the Duplicate of the first Will in his Hands, though Mr. Limbrey lived here in Town. After Death of Testator all the Testamentary Papers or Schedules were found lying all in loose and separate Papers, upon a Table in his Closet, not signed or executed, and the Duplicate of the first Will was found on the same Table, altered and obliterated (ut supra) with his Name and Seal thereto, whole and uncancelled.

Upon Controversy in the Prerogative Court Sentence was given for the Duplicate of the first Will in Mr. Limbrey's Hands, and upon Appeal to the Delegates the Sentence was confirm'd by Lord Raymond, Ch. J. of B. R. and Mr. Justice Probyn, Dr. Tindall and Dr. Brampton, (who were all the Delegates present) after four Days solemn Hearing.

And upon the Petition of Hide (the Executor named in the new mention'd Will) a Commission of Review was granted; The Petition was heard before Lord Chancellor King 16th or 17th of March, 1732, and now after farther Hearing &c. before the Commissioners of Review, the former Sentence of the Prerogative Court was again affirmed by Opinion.
Opinion of all the Delegates except Dr. Pinfold, viz. of the Judges, the Ch. Baron Reynolds, Justice Page and Baron Comyns, and two Doctors of the Civil Law, chiefly on the Reason (ut auditi) that the Testator did not intend an Intestate, and by the Alterations and Obliterations in his own Duplicate of his first Will, he appeared only to design a new Will, which as he never perfected, the first ought to stand, and Testator not calling for &c. the Duplicate of his first Will in Mr. Limbrey's Hands, strengthens the Preumption of his Intent, not absolutely to destroy his first Will till he had perfected another, which he never did.

(R. 3) Revocation by some other Will.

Though not good in all Respects.

1. A. By Will duly executed devis'd Lands to B. and after by Carth. 79. another subsequent Will revoking all former Wills subject'd S. C. and P. by the Testator in the presence of three Witnesses, but not attested by them in A's presence, or where A could possibly see them; Adjudged, that the second Will must be a good Will in all Circumstances, to revoke a former Will. 3 Mod. 258. Mich. 1 W. & M. B. R. Eggleton v. Speke alias Petit.

contrary to the Intent of A. For A. plainly design'd it as a Will, and not a Revocation, because it bears the Title of her Will. —— Show 89. S. C. adjudged And there it appears that the Lands were by both Wills devis'd to B. so that the last Will was consistent with the first, and did no ways contradict A's former Intention of giving the Lands to the Defendant. —— S. C. cited. Arg. Wm's Rep. 344 in the Case of Onions v. Tyrer, and argued that the Revoking Intended by the Clause in the Statute (s. 6) was such as should be purely with an Intention to revoke or destroy a former Will. And thereupon Lt. Chancellor said, that he allowed the Case of Ecclefon v. Speke, in regard there the second Will devis'd the Lands to the same Person as the first did, and that therefore it may truly be said that the second Will did not intend to revoke the former, but rather to confirm it; But that had the later Will been otherwise, and there had been no Devis'd of the Land, or had extended only to Personal Estate, then the General Clause of Revoking all former Wills might have been a good Revocation; And if the latter Will had given the Lands to a third Person, it should not let in the Her, the Intention thereof being to give the second Devis'd what it took from the first, without regard to the Her, and if the second took Nothing, the first could lose Nothing. Hill. 1716 ibid. 344, 345. —— Though in a Later Will there is an express Clause of Revoking all former Wills, yet that later Will being void by the Witnesses not attesting it in the Testator's Presence, that would not amount to a Revocation, it being intended to operate as a Will, and not a heri'te as an Instrument of Revocation; per Cooper C. 3 Vern. 542. Hill. 1716. In Case of Onions v. Tyrer, says it was fo adjudged in Case of Ecclefon v. Speke 3 Mod. 548. Show 89 and in Case of Hilton v. King 3 Lev. 86. —— S. P. by Lutwicx J. accordingly; but Montague Ch. J. and street J. e contra 3 Mod. 218. Tran. 4 Jac. 2 C. B. Holl v. Clerk.

2. A subsequent Devis'd to a Person incapable of taking, is a Revocation. And says on of a Precedent Devis'd to a Person capable. 10 Mod. 233. Patch. 13 Ann. in Dom. Proc. in Case of Roper v. Radcliffe.

Said to as good Law, Ibid. —— Devis'd of Lands to A. and afterwards Devisor devis'd the same Lands to B. who was a Papist, both Devises are void; for though the last is void as a Will, yet it is good as a Revocation. NS Tab. July 11, 1715. Roper v. Coullleb.
29 Car. 2. cap. 3. S. 6. NO Devise in Writing of Lands, Tenements, or Heedments, or any Clause thereof shall be revocable, otherwise than by some other Will or Codicil in Writing, or other Writing declaring the same, or by burning, tearing, or obliterating the same by the Tcestor, or in his Presence, and by his Direction and Consent, but shall continue in Force until &c. or unless altered by some other Will or Codicil in Writing, or by some other Writing of the Devisee, signed in the presence of three or more credible Witnesses, declaring the same.

2. A. by Will in Writing, containing of nine Sheets sealed &c. by him, gives all his Real and Personal Estate to B. her Heirs Executors &c. in Trust to pay his Debts and Legacies, and takes Notice, that he sealed every Sheet; afterwards A. directed his Attorney to make a new Will according to such Directions, and on the Attorney's bringing the Paper of Instructions A. signed them, and thinking he had made a new Will tears off eight of the Seals, but being informed otherwise by the Attorney, he said he was sorry, and tore off no more. The latter Declaration in Writing was a sufficient Revocation of the former Will, as to the Personal Estate, but the other remained good for the Real, it being duly executed. 3 Ch. R. 155. Hill. 6 Ann. Hyde v. Hyde.

3. A Man makes his Will in Writing, and signs, seals andpublishes it in the Presence of four Witnesses, who attest and subscribe the same in his Presence; and thereby give to H. P. his Son, and to his Heirs and Assigns for ever, his Lands &c. in the Parish of Wood &c. Dec. 1715. The second of January following he orders one O. to make an Alteration in his Will, and interlines these Words, 'I give unto my Wife A. P. and her Assigns my Lands in W. for her Life, and after her Death to my Son H. and his Heirs.' The Will is read to the Tcestor, and he approves of it, with the Interlineation. He puts his Seal upon the Will in the Presence of three of the same Witnesses, but does not write his Name de Novo, neither do the Witnesses subscribe teares de Novo; Querere, whether this were a good Devise to A. for her Life; the doubt was chiefly upon Par. 6. 29 Car. 2. cap 3, whether this Alteration was not a Revocation within the Statute; Every Bequest is to continue in Force until the same be burnt &c. by the Teactor or his Direction, in his Presence, or unless the same be altered by some other Will, or other Writing of the Devisee signed in the Presence of three or four Witnesses declaring the same. If the Will be signed, it may be in any Part; and per Parker and Eyre, the putting a seal is a good Signing, for by Parker Ch. J. the Intention of the Parties signing it, and the Witnesses attesting, is only that the Witnesses may know it again. This Act is fully penned, and is not to be expounded away.

4. Per Powis here is no Danger of Fraud or Perjury. Here is a new Devise, and not only an Alteration. Per Eyre every Thing is right, save the new subscribing by the Witnesses. The Case of Lee v. Libb. in Show. 68, 69, is right, no Body can say this new Bequest was signed in the Presence of the Tactor. Per Eyre and Parker th. re must be more than a bare Revocation. It must be signed in the Presence of Witnesses; The altering a Will must be understood of a Revoking. i.e. an Alteration by Revocation, the latter implies of the whole Will, the former of any Part, otherwise this altering will clash with the former Clause; so that if the Tector revokes the Whole or Part, it shall be by Will or Writing, signed in the Presence of Witnesses, but they are not obliged to subscribe.
Devise.

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subscribe. Per Eyre is H. P. had been here found Heir at Law, then A. the Leffor of the Plaintiff might have been helped; for if this be an Alteration, fo as H. is not to have the Lands till after A's Death, he will have an Estate by Operation and Implication of Law. Pathch.

A. Townend v. Pearce.

4. A. on making a second Will of Land, which proves void for Want of due Attestation cancels a former duty made of the same Lands and much to the same Effect thinking the last Will perfect. The Sup- portion of the last Will being good and the cancelling it not being with Delign to revoke the Devises as to the Real Estate, but intending to do the same thing by his second Will brings this under the Head of Accident, and Equity will set up the first Will again, and per Cow per decreed accordingly. 2 Vern. 741. Hill 1716. Ontions v. Titter. Eqs Rep 152. Anyons v. Fryers. S. C. that it is no Revocation. —- Equ. Abr. 427. (E) pl. 1. S. C. that it ought to be set up again in Equity.

5. The Teller a little before his Death sent for his Will out of his S. C. cited in the Presence of several Persons, cancelled it and said, I can- cel my Will, and desired them to bear Witness of it; and the next Day told his Physician, be was hot in his Body, but easy at his Heart, and resolved. This was looked upon as a sufficient cancelling the other Duplicate that he had not by him. Comyns's Rep. 453. Trin. 8 Geo. 2. and cites it as so held in Sir Edward Seymour's Cafe, who died 18 Feb. 1762.

duplication being but one Will, and therefore must stand or fall together.

(R. 5) Revocation by Act of God.

If one makes his Will and afterwards becomes Lunatick, whether this Lunacy is a Revocation of a Will made while Compos Men- tis? Charlton J. doubted, but the Reporter, says without Doubt Lunacy is not a Revocation. Vern. 166. Mich. 1682. in Case of Sackville and after becomes Non Lunatick, he cannot countermand his Will, and yet the Difability or Imperfection of Non Lunatick Memory is not any Countermand of it. 4 Rep 61. 2. Manch. 70 and 31 Eliz. C. B Arg in Case of Foulke v. Lambing —— And. 181. pl. 211. S. C. and S. P Arg —— Giblot. 169 pl. 16. S. C. and S. P held accordingly by Anderson Ch. J. For it is common that a Man a little before his Death has no good Memory. But Shuttleworth Serjeant God, he did not agree that Law to be so. Windham J. said, he did not doubt but such a Will should be good; but Robson. J. said, if a Man makes his Will, and after becomes Non Compos Mentis, and then lives three or four Years after, it is no Revision that such a Will shall be good; and he cited 1 Eliz. 1. Nortre. —— Swimb. 68. 40 Part. 2. S. 3. (3) that it does not diminish the proceeding. Follow it, the party became this Infirmary proceeds from the Violation of God, and not by any Voluntary Act of the Party.

(R. 6) Revocation by Act of Law or Alteration of Estate in Devisee.

NOTE, per Yelerton and Markham, if a Man devises his Fidt De- land, and after is disfidel and dies, the Devise is void; for a will, pl 17. Devise cannot take Effect unless the Devisee dies first, and therefore it cites S. C. is a good Pleaf against a Devisee that the Devisee did not die first, not denying the Devise. Quere, if it be a good Pleaf that the Devisee had to the Pint nothing more men-
nothing in the Land at the Time of the Devise; as if he is difdifted
and devifes, and after re-enters &c. Br. Devise, pl. 15. cites 39 H.
6. 18.

2. If the Father by his Will in Writing, devises Lands to his younger Son, and the elder Son knowing thereof enters into the Land and difdifts the Father, and so continues till the Death of the Father, by which the Will is void, yet because it was made void by Deceit and Covin, it shall be madegood in Chancery. Roll's Abr. Chancery (S) pl. 3. Mich. 16 Jac.
by the Lord Chancellor in Rofwell's and Every's Cafe.

3. T. R. had Iliffae by two ferveral Women two Sons, F. his eldef, and W. his younger, and devised his Lands to F. to the Ufe of himself for Life, and after to the Ufe of the Heirs Males of his Body, and for want of fuch Iliffae, to the Heirs Males of W. and the Heirs Males of their Bodies for ever; and for Default of fuch Iliffae to his own right Heirs. And afterwards be made a Land to W. his Son for 30 Years, to begin after his Death, and died without Alteration of his Will. W. enforced and furrendered to F. who let the Land to the Defendants. Re-foled, that this Land made to W. to begin prout was not a Revocation of the whole Devife totally of the Inheritance, but quod the Term only.

Arg. that a confident Devife is no Revocation. — I'd. 528. Arg. cites S. C. — 2 Salk. 952.

4. After a Devife in Fee the Tenant mortgaged the fame for 200l. to be repaid at three Years End, but within the three Years he fell sick and declared he would not alter his faid Will; This is a Revocation. Chan. Rep. 153. 17 Car. 1. Thomas v. North.

5. If one holds Lands in Common with another, makes his Will and devifes all his Lands and after makes a Partition by Agreement and not by Writ according to the Statute, whether this Partition be a Countermand or Quere. Sid. 90. pl. 10. Mich. 14 Car. 2. B. R. Leitrange v. Temple.

6. R. S. and T. are Tenants in Common. T. makes his Will in Writing of his third Part, and after by Indenture and Fine Partition is made between the Tenants in Common; and if this Partition be a Revocation of this Will was the Question. And it seemed to all the Barons, viz. Montague, Littleton, Thurland and Bertric, that it is not any Revocation; But Judgment was not given, because the Plaintiff obtained Leave to difcontinue his Action. Raym. 249 Pafch. 26 Car.

Devise.

not a Revocation, for in every Revocation there are three Things required; 1st, That the Devisee should expressly declare his Mind that his Will should be revoked. 2dly, That the Estate devised ought to be altered, which is an imply'd Revocation. 3dly, That the Thing devised be altered.

7. A devised four Tenements to his Wife in Satisfaction of her Dower, with Election to take the Dower or the Legacy. Afterwards A. sold one of the Tenements and died without new Publication. The Wife imputed to have Satisfaction for the Tenement sold. Per Ed. Chancellor the mutt take the Will as it was at the Time of the Death of her Husband, for till then it is no Will; let her choose the one or the other, but the may not have both. Decreed accordingly. 2 Chan. Cales 24. Hill. 31 & 32 Car. 2. Axtell v. Axtell.


9. Tenant in Tail makes his Will and devises his Land, and then by Bargain and Sale involv'd makes a Tenant to the Preceple, against whom a common Recovery is suffer'd with Voucher of Tenant in Tail to the Use of himself in Fee, this is a Revocation, for by the Bargain and Sale and Recovery all the Estate is altered after the Will. 3 Lev. 108. Hill. 34 Car. 2. C. B. Difter v. Difter.

10. A devised Land to be sold by his Executors for Payment of his Debts, and after conveys it to Trustees for Payment of Debts, this is a Revocation. 2 Chan. Cales 116. Trin. 34 Car. 2. Culpepper v. Aslon.

11. A devised Land, and afterwards mortgaged the same in Fee. This is a Revocation in Law, but otherwise in Equity; Per Churchill M. & L. Pl. 324. Chanc. & 1685. Chanc. & ter of the Rolls. Vern. 329. pl. 325. Trin. 1. Jac. 2. Hall v. Dunch. 5 C. Ed. Chancellor confirm'd the Decree, and declared, that though it was a Revocation at Law, yet in Equity it shall not be taken for a total Revocation, but the Devisee shall be admitted to the Redemption; For the Intent of making the Mortgage could be no other than only to serve his Special Purposes of borrowing Money to supply his present Occasions. 2 Chan. Rep. 297. 299. Hall v. Denc. S. C. decreed and affirmed accordingly.

12. The Statute of Frauds has not taken away Revocations of Laft Wills by Acts in Law; as if the Testator should afterwards make a conformity contrary to the Will or any other Act inconsistent with it; but such Revocations remain as they were before the making of this Statute. Cited Carth. St. Mich. 1 W. & M. in B. R. to have been held per Curiam in their Argument in the Cafe of Eccleton v. Speke.

13. A devised a Lease to his Daughter, and afterwards A. renews the N. Ch. R. Lease; Whether this is a Revocation? 2 Vern. 269. Hill. 1690. Alford v. Earle.

14. A devised Lands in Trust to pay Debts, and then to pay his Wife All the three 200l. per Annum for her Life. A lives many Years after, and his Debts increas'd from 2500l. to 10,000l. the Trustees being bound with him for 8000l. A. by Deed and Fine, in which his Wife the now Plaintiff joind, conveyed the Premises to the said Trustees and their Heirs Mortgage to fall to pay Debts, and the Surplus to him and his Heirs. If this was a Revocation of the Will as to the 200l. per Annum to the Wife? Or if the Suprem; shall if the Surplus after the Debts paid shall not be liable to the 200l. per Annum? Decreed for the Wife. 2 Vern. 240. pl. 225. Mich. 1691. Lady Vernon v. Jones & al.

for particular Purposes, but that after Debts paid, the Widow is to have the 200l. per Ann. Chan. Proc. 32 S. C. — The Devise of the 200l. per Ann. was on Condition for reversion her Daughter. Chan. Proc.
Devife.

The three Commissioners of Opinion, that the Surplus being to his own Right Heir, that was still in his own Power, and should be subject to his Disposal by the Will; and the Cofe of Hall v. Dench was cited, where after a Devife of Lands, the Devife made a Mortgage in Fee, and adjudged that the Devife should have the Equity of Redemption.


Abr. Enq. Cases 411. 412. Trin. 1645. S. C. 2 Salk. Rep. 522. pl. 275. Earl of Lincoln's Cafe S. C. refolved that it was a Revocation, and says that upon Appeal it was so held, in the House of Lords, carried by two Lords only.

2 Salk. 592. pl. 555. 3 S. C. T. Kepp. ever fined of Opinion, that it was not a Revocation, but referred it to the Judges of B. R. by way of a Cafe.

17. A. being an Earl and feised of a good Estate, which he then intended should go with the Title; made several Wills to that Purpofe principally, and with very little Variation. But at length entertaining some Thoughts of marrying M. S. he by Leafe and Release conveyed his whole Estate to J. N. and J. R. and their Heirs, to the Use of A. and his Heirs, till the intended Marriage should take Effect, and after then as to Part in Trust for his intended Wife and her Heirs and Assignes for ever, and as to the Rest to other Uses, with a Provifio of Power of Revocation by his Laft Will and Testament, or any other Deed in Writing attested &c. and for want of such after to be made Will or Deed, then in Trust for A. his Heirs and Assignes for ever. A. died without Marrying; The Devife in the former Wills, and who succeeded to the Honour, exhibited a Bill after A's Death to set aside the Deeds of Leafe and Release, and to have the Will executed, and among other Things inhibited, that not only the Marriage did not take Effect, but also that there never was any serious Outture made by A. on that Behalf. But the Bill was dismissed, and that Diffinition affirmed in the House of Lords. Show. Parliment Caces 154. Earl of Lincoln v. Roll, & al.

18. A. devifed to his Son B. a House &c. for 99 Years, if three Lives live so long, paying C. his Sifter 40 l. per Ann. for her Life. A. afterwards makes a Leafe to J. S. for 99 Years, if three Lives live so long, paying 50 l. per Ann. to A. and his Heirs, and a Fine paid of 300 l. Decreed at the Rolls that it was a Revocation. But reverfed per Wright K. who held it no Revocation; for the Leafe to J. S. commenced immediately in the Life of A. but B's was for 99 Years from A's Deceafe, and though both determinable on 3 Lives, and that possibly J. S.'s Lives might live longest, yet a REVOCATORY Interest passes, and will carry the Rent referred in J. S.'s Leafe. 2 Vern. 495. pl. 446. Paefch. 1705. Lamb v. Parker.

19. The Law requires a Continuance of the fame Intereft, that the Devife had at the Time of making the Will to remain unaltered, even to the Time of his Death; for that any, even the least Alteration of this Intereft, is an actual Revocation of such Will. Per Trevor Ch. J. in delivering the Opinion of the whole Court. 11 Mod. 157. Hill. 6 Ann. C. B. in Cafe of Archer v. Bokenham.

20. At where there is a Tenant in Tail, and he makes a Will, and devises thefe Lands away; now though he has an Inheritance in thofe Lands, and they are his own, and he could dispose of the absolute Inheritance and Fee Simple by Fine and Recovery, yet if after the making such Will, at any Time before his Death, he suffers a Recovery to him and his Heirs, and alters the Estate from a Tail to a Fee, this is
21. And further, where there is Tenant in Fee Simple, and he devises his Lands away to another, and after that, and sometime before his Death makes a Feoffment of thee Lands to another, to the Use of himself and his Heirs; though this to some Purposes is no Alteration, for he is absoloute Owner of the Estate as before, yet this does not make the Will good, but it is a Revocation thereof; and so it was adjudged in the Case of Lord Lincoln, though so small an Alteration was in the Estate. 11 Mod. 158, in Case of Archer v. Bokenham.

22. If a Man deviseth Lands in Fee, and afterwards mortgages the same in Fee to another, this is no total Revocation, but the Equity of Redemption shall pass by the Devise. Admitted to be a settled Rule in Chancery. 1 Salk. 158. pl. 10. Mich. 8 Ann. in Case. York v. Stone.

23. A. articles to purchase Land, and devised those Lands, and after the Date of the Will takes a Conveyance to himself and his Heirs; Quære, Whether this be a Revocation? 2 Vern. 659, at the End of pl. 604. Hill. 1711. Greenhill v. Greenhill.

24. A. by his Will dated in 1703, gave several Pecuniary and Specific Legacies, and then gave all his Real and Personal Estate, after all his Debts and Legacies paid, to B. on Condition he took the Name of A. upon him, and the Heirs Male of his Body, with divers Remainers over; Afterwards in 1709, A. together with J. S. his Trustee, by Lease and Release conveyed several Manors to Trustees and their Heirs, to the Use of himself for Life, without Impeachment of Waft, and that the Trustees and their Heirs should execute such Conveyance and Conveyances thereof as A. by Writing under his Hand and Seal, or by his Last Will &c. should direct or appoint. In 1710 A. died without altering or revoking the said Will, or making any other Appointment touching the said Real Estate. Decreed, that the Lease and Release were a Revocation of the Will. Abr. Equ. Cages, 412. Mich. 1712. Pollen v. Husband.

25. Sir Michael Armyn devises Lands to an Executor for Payment of Debts, and recites that a particular Schedule of them was annexed to the Will, Remainder over; afterwards he mortgages Part of the same Lands, and pays most of the Schedule Debts with the Money. Decreed, that this Mortgage is not a Revocation, neither in all nor Part, and that the Will ought to extend to all the Debts that should be owing at the Time of his Death, and not to the Schedule Debts only, and that the Mortgage was only a Security, and not an Appointment how it should be made, but this Decree was reversed, but without Prejudice to the Heir at Law. MS. Tab. May 21, 1717. Bernadifon v. Carter.

26. A Man had five Sons, and by his Will gave a College Lease to his M. was forfeited second Son, and having made a fulfill Provision by his Will for all his of a Lease other Sons, bequeathed the Surplus of his Estate among all his five Children, for Life, after which the Testator revived the College Lease, and the Eldest Son Will devised brought his Bill as one of the Refiduary Legates, for his Share of this College Lease, supposing the Devise of it to the second Son to be revoked by the subsequent renewing thereof; and this being at that Time folemly Debated, the Master of the Rolls held it a Case of very great Consequence,
Consequence, and that it might prove very inconvenient, and an Hardship to continue that to be a Revocation of the Bequest, which in all probability was intended for the Benefit of the Legatee; his Honour therefore ordered the Matter to state the Matter specially, and referred Cofts, wherupon the Eldest Son was well advised, and proceeded no further in this Cause, but permitted the Second Son to enjoy the Lease devolved to him, notwithstanding the pretended Revocation by the Renewal; so that the Authorities were rather for the Plaintiff than against him. 3 Wms's Rep. 168. cites it as heard at the Rolls, the 15th. June 1722, in the Case of Aden v. Templar.

And his Lordship thought this Case the stronger, because after the Articles entered into, executed a Confirming his Will subject to the Articles, which Confirmation was a Reproduction of his Will, as if he had wrote it over again, or had afterwards, for a Valuable Confirmation, assigned over a Moiety of his Real and Personal Estate to his said Daughter, by which the said Moiety devolved did no longer continue any Part of A's Estate, so that by devising afterwards a Moiety of his Real and Personal Estate, it must be intended the remaining Moiety only, and to have divided that Moiety into Moieties. 2 Wms's Rep. 328. 332. Hill. 1725. Rider v. Wager.

28. Grant of Reversion without Attornment is a Revocation, though the Land did not pass by the Grant for want of Attornment. Went. Off. Executors, 22.

29. Some hold that if Deviseor makes but a Lease, leaving the Freehold as it was, this amounts to a Revocation, but of this Quare, and it a Difference may not be between a Lease for Years and a Lease for Life, which alters the Freehold. Went. Off. Executor 22.

30 Dorothy Kirby by her Will taking Notice that she was Tenant in Common by Devise of her Father with E. Vaughan Wife of Richard Vaughan, to them and their Heirs for ever, equally to be divided between them of the Manor of South-Bemfleec &c. did devise unto Edward Luther and John Kirby and to her Daughter E. Wright and their Heirs, all and singular her Moiety of the said Manor and Lands, upon Trust to sell the same, and by the Money arising by Sale (her Debts and Funerals being discharged) to pay unto Son John Kirby 100 l. and to his two Children John and Elizabeth Kirby 500 l. a piece at their Ages of Twenty-one, and in the mean Time to place out the said two Sums of 500 l. at Interest, and to apply the same for the Education and Maintenance of the said Children &c.

The said Dorothy Kirby and Richard Vaughan, and the said Elizabeth his Wife came to an Agreement to divide the said Manor and Lands, and thereupon by Indenture bearing Date 16 May 1722, between the said Dorothy Kirby and the said Richard Vaughan and Elizabeth
Elizabeth his Wife of the one Part, and C. Jeffreys and John Rhet Gent. of the other Part, reciting and taking Notice that the said Dorothy Kirby, Richard Vaughan and Elizabeth his Wife had agreed to make a just Partition of the said Manor and Lands, therefore they did severally covenant to levy a Fine of all and singular the Measllages, Farms, Lands, Tenements, Woods and Hereditaments, in the said Indenture particularly described, and declared the Uses thereof as to certain Farms and Lands in the same Indenture particularly described to the Use of the said Dorothy her Heirs and Assigns for ever, and as to all other Measllages, Farms, Lands, Tenements, Woods and Hereditaments in the said Indenture particularly described of which no Use is declared to the said Dorothy Kirby, to the Use of the said Richard Vaughan and Elizabeth his Wife, their Heirs and Assigns for ever, which said Fine was levied accordingly.

In the Year 1724, the said Dorothy Kirby departed this Life without revoking altering her said Will and left the said John Kirby her only Son.

Lord Chancellor declared that the Will of the said Dorothy was well proved, but the Question arising whether the Deed dated 16 May, 1722, and the Fine levied purfuant thereto were not a Revocation of the said Will, whereupon his Lordship referred it to the Judges of his Majesties Court of B. R. at Westminster, who were desired to give their Opinion, and certify to the Court, whether the Will of Dorothy Kirby dated 25 January, 1719. As to the Deed of the Lands therein contained was revoked by the Deed of the 16 May 1722, and the Fine levied in Pursuance thereof, and whether the said Dorothy Kirby's Share of the Lands contained in the said Deed of 16 May, 1722, and the Fine levied thereon, or any Part thereof, did pafs by the Will of the said Dorothy Kirby?

To which Question the Judges returned the following Opinion, (viz.)

We are of Opinion that the Will of the said Dorothy Kirby is not revoked by the Deed dated 16 May 1722, and the Fine levied in Pursuance thereof, and that the said Dorothy Kirby's Share of the Lands contained in the said Deed of 16 May, 1722. And the Fine levied thereon do pafs by the Will of the said Dorothy Kirby S. C. and says that the Lord Chancellor concurred with the Opinion of the Judges, and ordered that the said several Trusts in the said Will should be established. But adds, that if A devises Lands and levies a Fine, and the Captian and Deed of Use are before the Will, but the Writ of Covenant is returnable after the Will, this feemes a Revocation, because a Fine operates as such from the Return of the Writ of Covenant, and not from the Captian. See Salk 341. Lloyd v. Lord Say and Seal. And yet this is a hard Case, since by the Captian the Party Conivor does all his Part, and the Rest is only the Act of the Clerk or his Attorney, without any particular Instructions from the Party.

31. Though a Covenant or Articles do not at Law revoke a Will, yet if entered into for a valuable Confederation, amounting in Equity to a Conveyance, they must consequently be an equitable Revocation of a Will, or of any Writing (as by a Feme Covert) in Nature of a Will. 2 Wms's Rep. (624.) Trin. 1731. by Ld. C. King, Cotton v. Layer.

32. John Stamp by Will 30 Nov. 1721. devised all his Real and Personal Estate to Hoese, Froome, and Spillet, upon several Trusts for Charities &c. for diftilling Teachers &c. and 4th December following by Leave and Release, as well for, and in Confederation of the Natural Love and Affection which he bore unto his well beloved Cousin, the said Hoese, and Froome, and his beloved Friend the said Spillet, as of 105. John Stamp the Tettator conveyed all his Real Estate (about 160 l. per Ann.) to the said Hoese, Froome and Spillet and their Heirs, to the Use of them and their Heirs, with a Power of Revocation upon a Tender of 10 s. and after 11th of same December, John Stamp by a Deed of Sale gave all his Q. 9 Persons.
Personal Estate to the same Howe, Froome, and Spiller of the Value of about £1000, referring the Interest &c. to himself for his Life, and in January following John Stamp Teffator died, and Howe, Froome, and Spiller obtained Administration (as Trustees) cum Testamento annexo:

—By the Will an Annuity of £15 per Annum is given to the Heirs at Law.

Bill by Plaintiffs as Heirs at Law to have a Conveyance of the Real Estate as a Trust resulting to them upon Supposition that the Deeds were a Revocation of the Will, and no Ufe &c. sufficiently declared upon the Deeds or otherwise to have two Annuities of £15 per Annum each, and some Legacies under the Will &c.

Mr. Attorney General & al' for the Plaintiffs.—This is a resulting Trust, the Conveyance being without Consideration &c. and cited Co. Litt. 22. 2 Vern. 571. City of London and Garraway and Randal and Hoop, Ibid. 2 Vern. and Pollen and Husband.

Solicitor General for the Defendant. Here is no Trust to result; the Conveyance of the Real Estate is absolute; it is expressed to be for natural Love and Affection, and is to the Grantees and their Heirs to the Ufe of them and their Heirs, so here is no Room for any implied Trust at Common Law, and before the Statute of Ufes a Feoffment for natural Love and Affection would have been sufficient to carry the Ufe as well as the legal Estate; so in a Covenant to hand sealed &c. Resulting Trust is, where a Trust is raised and but Part disposed &c. but here no Trust is raised for any Purpose &c. And where a Conveyance purports to be made for the Benefit of A, it is contrary to the Statute of Frauds to say or prove it for the Benefit of B &c.

Lord Chancellor. The Will begins, I John Stamp having made my Eyes my Overseers and my Hands my Executors &c. intending by this to persuade the World that he had disposed of his whole Estate in his Life-time, and so to disappoint his Wife of the Provision he had agreed to make on her Marriage and her Option to take by the Custom of London, and after specifying the Trusts gives the Trustees, Howe, Froome, and Spiller 320 l. a piece per Annum for their Trouble and Pains.

The Will and Codicil though dated 28 March 1721, yet were not executed till 30 Nov. 1721, then follows the Conveyance of the Real Estate and the Grant of the Personal Estate for the same Consideration of Natural Love and Affection &c. 2 January following Teffator died, and then a Bill brought by the Widow and decreed her a Moiety of the Personal Estate and Dower.

As to the Trustees, who now set up for themselves, they have acted inconsiderately, they proved the Will and paid the 15 l. per Annum till lately &c. and Bill is now brought by the Heirs at Law for a Reconveyance of the Real Estate and for a distributive Share of the Personal Estate. And if, taking of the Deeds as distinct from the Will they are a compleat Disposition of his Real and Personal Estate. No Fraud appears, and though the Conveyance be voluntary and not good against Creditors or the Custom of London, yet it is good against the Heir at Law, and the Consideration as to the Real Estate being 100 l. Money, that is sufficient to raise the Ufe, and for Love and Affection, that imports a Bounty &c. and as to the Personal Estate, there is an Interest referred to the Party for his Life &c.

And another thing in the Conveyance of the Real Estate which destroys a resulting Trust is the Power of Revocation, though the strongest is that which is made in Consideration of Love and Affection.

But the Difficulty is, that it does not appear that Teffator's Intent was altered; and more Benefit designed by the Deeds than by the Will, and so all to be considered as one Transactio, but then it is objected, that.
Devise. 151

that the Deeds make a Revocation of the Will, and then all results for the Heir, but is not clear that this is a Revocation of the Trusts of the Will. The Legal Estate is not given to the Trustees but upon a Contingency, if his Will should be disputed. And therefore now to compleat Teftator's Intent by his Will, whereas he had given his Trustees his Estate upon Contingency only he now gives them the same abso-
lutely. And therefore as by the Will they had the Equitable Interest upon Trust, they now have the legal Interest but still for the same Purpofe.

This is not like Cæses put of Revocations, as of Pullen and Hu-
hand, that was a new Disposition totally, fo LD. Lincoln's Cafe, thofe fhowing an Alteration in the Intent of Teftator, not fo here.—
Obj. How comes Teftator if intended only to compleat &c. not to refer to his Will. Anfwer. It is plain, Teftator intended to defeat his Wife of her Share by the Custom, and therefore might think difpofing by Deed might bind her though mistaken.

It appears the Execution of the Will was but a few Days before Date of the Deeds, and does not appear when the Deeds were ex-
ecuted, and if at the fame Time with his Will it would be clear
without Question, and holds that it was the Teftator's Intent, the
Trustees fhould take nothing but according to his Will, and their
proving the Will fhowed their Thoughts &c. that at that Time they
looked upon themselves as Trustees and that the Will fubfifted, and
now they lay the Will is of no Effect, nor a Legacy to be paid &c.
This while the Matter was fresh in their Minds, and before they
had hardened themselves, and in their Anfwer lay they are to have the Estate for their own Ufe at leaft, subject to the Trusts in the
Will. Wherefore holds it a Trust in them.

As to forfeiture by the Heirs in Cafe of controverting the Will as to the Legacies &c. to them, it is given after to the Trustees upon
the fame Trusts as before and fo revives them &c. but the Trustees
paid the Annuities and the Occafion of disputing the Will is from
Faét after the Will and not upon the Will itself, but this is hard
for the Trustees to infult upon, because they at the fame Time dis-
pute the Will and would put all in their own Pockets.

And holds that there is no Pretence for a refulting Trust, the whole
being difpofed off &c.

(R. 7) Revocation. In Respect of the Manner of
doing it.

1. A S one ought to be of good and sound Memory at the Dispo-
sing, he ought to be at the Revoking; and as he ought to make a
Will by his own Directions, and not by Questions, he ought to re-
voke it of himfelf, and not by Questions; Per Montague Ch. J. and not
Cranvelli v. Saunders.

2. A. bequeathed his Black Gelding to B. and afterwards gives him
away, or fells him and buys another Black Gelding. This new-bought
Horse fhall not pafs by the Will, because it was not the Teftator's at

3. If A. by Will in October in one Year bequeaths his Crop in the
Barn, and lives to the next October 12 Month and fells that Crop and
in fault another Crop, this new or latter Crop shall not pafs by the Will,

(S.) What
(S.) What Act of a Stranger [shall avoid a Will. Difeifin]

2 Le. 165; pl. 197, cites 39 H. 6. 6th. Gouldsb. 111. in pl. 16, cites 39 H. 6. S. P. * If it seems it should be according to Roll 39 H. 6. 18. b. [pl. 23]. — Br. Devise, pl. 15, cites S. C. Fitzh. Devise, pl. 17. cites S. C, but it is not S. P. nor is the point there mentioned, in the Case in the Year-Book.

(T) What Act shall be a Revocation.

[Inconsistency in the Will, or devising the same Thing twice in the same Will.]

1. IN a Will, if there be several Devises of one Thing, the last Devise shall take Effect. Co. Litt. 112. 9.

If one devise Land to J. S. in Fee, and after by the same Will devise that Land to J. D. for Life, both Parts of the Will shall stand; and in Construction of Law, the Devise to J. D. shall be first.

So if a Devise be to J. S. in Fee, and afterwards, in the same Will, the Land be devised to J. D. to Fee, they are Joint-Tenants; per Anderson. And Mead said, That Case had been often moved, and always ruled, that the Devise is good to them both, and they shall take as Tenants in Common, at least as Joint-Tenants. Co. Litt. 9. pl. 2. Mich. 24 and 25 Eliz. C. B. Anon.

2. Where Land in the same Will is first devised to one, and afterwards to another, they shall take it between them, notwithstanding my Lord Cook’s Opinion, that the latter Clause revoked the first. Vern. 30. in pl. 25. Hill. 1681. in Case of Face v. Lance.

(U) In what Cases the whole Estate shall be revoked, which was before devis’d, and where but Part.

1. IF a Man seiz’d in Fee deviseth it to J. S. in Fee, and after leaves it to J. D. for Years, this is not any Revocation of the Fee, but only during the Years. Mich. 38, 39 Eliz. B. R. between Mon-tague and Jeffrys; agreed per Cutiam and Council.

2. So, if after the Devise he leaves it to another for Life, yet this is not any Revocation of the Fee but only during the Estate for Life, for his Intent does not appear further than only during this Estate.
Devise.

Estate. Mich. 38, 39 El. B. R. between Montague and Jeffrys; agreed per Curiam.

3. [320] if a Husband possessed of a Term for 40 Years devises it to his Wife, and after leaves the Land to another for 20 Years and dies, this Lease is not any Revocation of the whole Estate, but only during the 20 Years, and the Wife shall have the Remain by the Devise, 26 El. B. Winton’s Case of Kent, by Equity.

4. If a Man devises Black-Acre to J. S. in Fee, and after upon Marriage between him and A. covenants to make a Feoffment of the said Black-Acre, and of other Land in Fee to the Use of himself t for Life, the Remainder to his new Wife for Life, the Remainder to his own right Heirs, and after * makes a Feoffment accordingly, by which this is not any Revocation as to the Estate or Life of the Feine, yet this is not any Revocation as to the Fee, notwithstanding he made the Feoffment in Fee to the Feoffees, and limited the Remainder to his own right heirs, for this is only his old Reversion without any Alteration. 38, 39 El. B. R. between Montague and Jeffrys, per Curiam agreed; But it seems this is not Law, for his Intent appears to have by the new Limitation which revokes the Will. Lib. stat., 9. 41 El. B. R. same Case.

5. A. by Will devised to B. in Fee, and afterwards by Indenture makes a Lease for Years of the same Lands. This Lease, if not made to the same Person, shall be a Revocation pro tanto only, even at Law. Cro, J. 49. pl. 20. Mich. 3 C. B. Coke v. Bullock.


affirmed the same, and declared, that though such Mortgage was a Revocation at Law, yet in Equity it should not be taken for a total Revocation, but the Devise should be admitted to the Redemption; For the Intent of the Mortgagor’s making the Mortgage, could be no other than only to force his Special Purpose of borrowing Money to supply his present Occasions. Vern. 324. Mich. 1684. Hall v. Dunch. — S. C. cited by Sir Joseph Jekyll Master of the Rolls, and said that the Reason is equally applicable to Mortgages in Fee, or for Years. — And cited also Show Parl. Cases 126. Ld. Lincoln v. Roll, where it was admitted by Counsel of both Sides, that a Mortgage in Fee was not a Revocation of a Devise, because (as the Counsel of the Appellant said) in Equity the Mortgage makes not the Estate another’s, and (as the Counsel of the Respondent said) because a Mortgage is not an Inheritance, but a Personal Estate. 2 Wms. Rep. 649. Hill. 1752 in Cafe of Sutton v. Sutton.

But if the Mortgage is to the Devise, it is a Revocation in toto, but otherwise had it been to a Stranger; per Ld. Macdowell. Ch. Prec. 114. Harkness v. Bailey.


7. A Mortgage was made after a voluntary Settlement, with power The Reason of Revocation and a Will in Confirmation of such Settlement. The Mortgage is a Revocation pro tanto only. Vern. 97. pl. 84. Mich. 1682. Perkins v. Walker.

because the Mortgage does carry upon the Face of it a Decease, and it is not reckoned an Inheritance to the Heir of the Mortgage, but shall be Personal Estate and Affers to pay the Mortgagee’s Debts. Arg. Show Parl. Cases 116. in Case of Lord Lincoln v. Roll. — And because Mortgages are not considered as Conveyances of, but only as Charges upon, the Estate. Abr. Equ. Cases 412. Trin. 1695. S. C.

8. A Will attested by three Witnesses, being of a Real and Personal Estate, may be revoked by a Writing, being a Draught of a Will only, signed by the Tertator without any Wittness as to the Personal Estate, and such Draught is a good Will to dispose of the Personal Estate, and

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such Legatees of the Personalties in the first Will as are left out in the second Will must lose their Legacies, but such as had Legacies by the first Will, chargeable on the Real Estate, if the same Legacies were devised to them by the second Will, they shall still continue chargeable on the Real Estate, and shall be ratified out of it. And so it shall be whether the Legacies be increased or diminished, they being by the second Will made chargeable upon, and to be ratified out of, the Real Estate likewise, which though not sufficient in itself to charge the Real Estate, yet since the Real Estate remained well devised by the first Will, they should be still secured by that Real Estate which was well devised; but for other new absolute Personal Legacies they shall be chargeable only on the Peronal Estate, but shall be the first payable out of it, because the other have the Real ESTATE for their Fund. Per Cowper C. 3 Ch. R. 160. 6 Ann. Hyde v. Hyde.

9. Where at the Time of the making a Will there are Mortgages to the Tæfator it the Equity of Redemption be afterwards bought in or foreclosed, yet they cannot pass without a Reproduction, that being a Revocation pro tanto. 3 Ch. R. 188. Trin. 7 Ann. Litton alias Strode v. Falkland.

10. A devised three Acres of Land to Trustees to permit B. his Daughter to receive the Rents till the marries or dies, and if the marries with Content of the Trustees and Mother, then to convey to her and her Heirs. B marries in A's Life, who settles two of the Acres on B. and her Husband and dies; Per Cowper C. this is no Revocation as to the other Acre. 2 Vern. 720. pl. 639. Mich. 1716. Clarke v. Berkeley.

11. Mr. Bohun having four Daughters A B. C. and D. makes his Will in 1705, and thereby devises several Parcels of his Estates severally to his four Daughters, &c al. he devises to Trustees all his Lands, Tenements and Hereditaments in E and F. or either of them, or near thereto adjoining, in Trust for his Daughter A. until her Marriage or Death, and in Case she marries with the Content of her Trustees, then for her and her Heirs, or for such Person as she shall appoint &c. But in Case she should marry without Content of her Trustees, and forfeit her Estate, then to her other Sistres equally between them &c. Afterwards in 1708 the Plaintiff Clerk marries A. with the Content and Approbation of her Father Mr. Bohun, and he settles upon the Marriage (his Wife joining with him, who had these Lands in Jointure) Part of these Lands devised to her by his Will after the Death of her Mother, and also 7½ per Ann. Fee Farm Rent, which was doubtful if it pass'd by the Will or not.

Afterwards in 1709, Mr. Bohun the Father dies without altering the Will.

Note, Mr. Bohun in a Letter to Mr. Clerk upon the Treaty of Marriage, declares what he will give with his Daughter in Preference, and that she will be a better Fortune at his Death.

12. Quære, If this Devise to his Daughter A. in Fee upon Condition of marrying with the Content of the Trustees be dispenc'd with, or perform'd by her marrying in her Father's Life-time, and with his Content?

20. Quære, If the Father giving and settling upon his Daughter A's Marriage Part of the Lands devised to her by the Will precedent to the Marriage be a Revocation of the whole Devise to her, or only pro tanto, as was settled on her upon the Marriage?

It was argued for the Defendant, that this was a Condition precedent, and till Performance the Estate cannot vail, that it was not perform'd by her marrying with her Father's Content, that Conditions precedent are not aided by a Court of Equity, but must be strictly perform'd.
form'd before the Eltate will vest either in Law or Equity, and to this Purpose the Cases of Fry and Prince in Vent. and Verry and Lord Falkland in Dom. Proc. were cited.

As to the second Point they argued, that this Settlement of Part of the lands devised to her by her Father upon the Marriage, and the 7l. per Ann. Free Farm Rent, (which they inferred was not included in the Devise to her) was a Revocation of the whole Devise to her. There are two Sorts of Revocations, viz. Express'd and Implied. Implied is either where the Testator does some Act subsequent to the Devise, which is inconsistent with, and renders the Devise impossible to take Effect, or where the Testator does some Act which apparently thaws his Mind to be alter'd since the making the Will, and that this Case comes within the last of these Rules, for at the Time of making the Will, Mr. Bohun considered his Daughter A. as a Child wholly unprovided for, and gives her these Lands as her whole Provision, and as to a Child who never had any Portion from him, and therefore at the Time of making his Will, A. was to be considered in a different View from what she was at the Time of his Death, when she was married and had received a Portion, and it cannot be supposed that a Father would make the same Provision for a married Daughter who has had a Portion, as for a Maiden Daughter who never had any Thing from him.

They admitted that her marrying with her Father's Consent in his Life-time, cannot be a Forfeiture so as to vest the Estate in the Devisees over, but the Eltate will descend as undisposed of, and so the come in as one of the Co-Heirs to her Father, for a fourth Part.

But it was intimated on for the Plaintiff, viz. That by the Marriage in the Life-time of the Father, and with his Consent the Condition in the Will was dispensed with by the Act of the Father, who did annex the Condition to the Devise, or else the Condition was performed in Substance by the Marriage with the Father's Consent, and where the Substantial Part and Intent of the Condition is performed, Equity will supply the Defect of Circumstances, and in one Way or other the Estate did vest by the Devise.

As to the second Point it was intimated, that the Lands given by the Father in his Life-time with his Daughter in Marriage, though after the Will made was not a Revocation of the whole Devise to her, but only for to much thereof as was settled by the Father upon her Marriage. When Mr. Bohun made his Will, he took into Consideration the whole Affairs of his Family, viz. The Number of his Children, and the Quantity and Parts of his Eltate, and allotted such Proportions to each Child as he thought proper. He lived a Year after A's Marriage, and if he had design'd that his Daughter A. should have no more of his Eltate than what he gave with her in Marriage, in all Probability in all that Time he would have alter'd his Will accordingly, which is a strong Presumption that his Mind continued, that his Daughter A. should have all the Lands devised to her by the Will, and his giving her Part of them in his Life-time, is no Argument why she should not have the Rest at his Death according to the Will.

Suppose a Father by his Will gives his Daughter 10000l. and afterwards marries her and gives her 5000l. for her Portion, and then dies without revoking his Will, this is clearly not a Revocation of the whole Devise, of 10000l. but only Revocation or Satisfaction post tando, viz. 5000l. and the shall take the other 5000l. by the Will, this is a plain Case, and the same in Reason as the present Case.

Cowper C. was of Opinion, that by the Marriage with the Consent of her Father, the Condition is dispensed with, and the Devise becomes absolute; For Conditions of this Kind, be they Conditions precede
cedent or subsequent, are in Nature of Penalties and Forfeitures, and if the substantial Part and Intent be perform'd, Equity should supply small Defects and favour the Devisee. It is admitted here is no Forfeiture, and shall I take away the Estate from the first Devisee, when it cannot go to the Devisee over, only to let it defend to the Heirs at Law, which certainly was never the Intent of the Testator.

As to the second Point, he held that the Lands settled by the Father upon the Marriage of his Daughter A. is a Revocation only pro tanto of the Lands devised to her, and not of the whole Devise; For implied Revocations ought to be plain and certain, and the Inconformity most apparent, which is not so in this Case; For why may not the Father give his Daughter all these Lands at his Death, though it was not proper for him to part with them all in his Life-time, though he gave Part by Deed, why may he not give her the Reit by Will?

Decree for the Plaintiff the Wife for all the Lands devised to her by the Will. MS. Rep. Mich. 3 Geo in Canc. Clerk & Ux v. Lucy & al'.

12. A. devised his Estate to four in Trust, and afterwards by a Codicil he revoked the Part of his Will, whereby he made two of the four Trustees, and named two others in their Room, this is no Revocation of the other Dispositions in his Will. 9 Mod. 68. Mich. 10 Geo. Acherley v. Vernon.

(X) In what Case Revocation of Part of the Estate shall be of the Whole.

If a Man commands another to write his Will, and thereby give to his Wife an Estate for Life in his Manor of D. and he writes it, that he gives it her for Life, upon Condition that she shall not marry, and this Condition being shewed to the Devisor, he disallows it, yet by this the Estate is not revoked, but only the Condition. Sir Richard Peckham's Case cited, Mich. 38, 39 El. B. R. Per Popham.

(Y) Where by Revocation of Part [of the Things devis'd] all the Things, or Part only, shall be said to be revoked.

If a Man devises three Manors to J. S. and after he says, that the Devisee shall not have the Manor of D. which is one of the three, yet this shall not be any Revocation of the Will for the other two Manors. B. 38, 39 El. B. R. Per Popham.

2. Devise of a Term cared out of an Inheritance for 99 Years before the Statute of 3 & 4 W. & M. cap. 14, of fraudulent Devises in Trust to pay 14 l. per Annum to his Grand Daughter for Life, and after the making this Will the Devisor mortgag'd this Land to another for 500 Years,
Revocation. By Satisfaction, Gift &c.

1. **Devise** by Will, and an Agreement after the Will made about a Portion, and that it was to be in full of what was intended by the Will, ought not to be construed as several Sums. Decreed by the Master of the Rolls, and affirmed by Ld. K. Bridgman. 2 Chan. Rep. 35. 21 Car. 2. Hale v. Action.

2. A. makes B. his Brother Executor by his Will, and gives him all his Real and Personal Estate, and afterwards marrying, by a Codicil makes C. his Wife Executor, C. shall have the Personal Estate, and not B. Vern. 23. pl. 36. Mich. 1681. Wilkinson v. __________

3. A. devis'd to his Daughter two hundred Pounds. Item, I also give her my Household Goods, if she shall not be married in my Life-time; afterwards he gives with her in Marriage above two hundred Pounds and dies, having neither revoked or altered his Will; Per Commissioners, The Legacy is extinguish'd by the Portion after given, and Elkenhead's Case was cited, where Payment in the Testator's Life-time is adjudg'd a Satisfaction of the like Sum devise'd. 2 Vern. R. 115. 1689. Jenkins v. Powell.

A had three Daughters B. & D. and devised to B. 1000l. and after in the same Will devised to B. & D. 1000l. a-piece for their Portions, and charged the last Sums on Land in S. B. married in A's Life-time, and A gave B. 4000l. Portion; Per Ld. Wright, This 4000l. is a Satisfaction of the 1000l. given B. in the Will for her Portion, and a Revocation of the Will pro tanto, but the 1000l. being a General Legacy given, B. must have it, notwithstanding the 4000l. given her for her Portion. Ch. Prec. 182. Hill. 1701. Ward v. Lunt.

4. A. by Will devise'd 1000l. a-piece to five Daughters, and after S. C. cited Legacies paid, gave the Surplus of his Lands equally among his five 2 Vern. 115. Daughters, and gave One Thousand Pounds Portion with one of them in Marriage, she was excluded from the One Thousand Pounds intended by the Will. 2 Vern. R. 257. Hill. 1691, in Cafe of Jeffon v. Jeffon, cited per Cur, as the Cafe of Elkenhead.

5. The Defendant's Testator by his Will gave his 4 Daughters 600l. a-piece, and afterwards married his Eldest Daughter to the Plaintiff, and gave her 700l. Portion; after that he makes a Codicil, and gives 100l. a-piece to his unmarried Daughters, and thereby ratifies and confirms his Will and dies, and the Plaintiff preferred his Bill for the Legacy of 600l. given to his Wife by the said Will; and the only Question was, Whether the Portion given by the Testator in his Life-time should be intended
intended in Satisfaction of the Legacy? And held that it should; and agreed to be the constant Rule of this Court, that where a Legacy was given to a Child, who, afterwards upon Marriage or otherwife, had the like or a greater Sum, it should be intended in Satisfaction of the Legacy, unless the Testator should declare his Intent to be otherwise; and it was said, the Words of ratifying and confirming do not alter the Cafe, though they amount to a new Publication, being only Words of Form, and declare nothing of the Testator's Intent in this Matter. 2 Freem. Rep. 224. pl. 295. Mich. 1698. Irod v. Hurit.

6. A. by Will gave #50/ to C. his Younger Son, and afterwards buys him a Cornet's Commission for #650/ and it was proved he intended to strike so much out of his Will as soon as the Accounts came from London, but he died before they came without altering his Will. Decreed that this shall go in Diminution of the Legacy, and be taken in Satisfaction of so much. Ch. Prec. 263. Mich. 1706. Hoskins v. Hoskins.

7. A. by Will made in 1700 devised 50/ to the Wife of B. and afterwards in 1701 gave B. a Note for 50/ payable on Demand. It was proved that the Note was intended a Satisfaction of the Legacy. It was objected that the Note and Legacy were to different Persons, one to the Wife, the other to the Husband, and if he had died the Wife should have had the Legacy, and B's Executors the Note. Per Matter of the Rolls, it is a Testamentary Question, and Evidence may be received; and disposed the Bill. 2 Vern. 646. pl. 575. Hill. 1709. Chapman v. Salt.

8. A. by a Will gave Legacies to his children, and to his eldest Son 2000/. afterwards he lends him to Italy and lets him have 400/. and being a Merchant, enters on the Debtor-side of his Book, My Son Debtor 400/. Upon a Computation afterwards of his Estate, and finding it deficient, retrenches by Caducit 400/ out of each of the other's Legacies, without taking any Notice of the eldest Son or his 400/. The Matter of the Rolls decreed the whole 2000/. Ch. Prec. 298. Trin. 1710. Bird v. Hooper.

9. A. by Will gave 300/ to his Daughter, proved she married with her Mother's Consent, if not, only 200/. Afterwards in the Life-time of the Father and Mother; she married without Consent of either. He afterwards gave her 200/ and died without altering his Will. let. Mac- 

The Cafe is stated that A. by Will devised to his Daugh- ter 500l. and that afterwards he married her to J. S. and gave her 500l. in Marriage, and Bind four Years after without revoking his Will. After the Father's Death the Husband became Bankrupt, and the Affignees brought a Bill against the Executor of the Father for the 500l. or to have, at least, the 200l. Residue. But let. C. Parker held that giving a Daughter a Portion by Will, and after giving her a Portion in Marriage, is by the Law of all other Nations, as well as of Great Britain, a Revocation of the Portion given by the Will, and that by giving the Portion the Will was so sufficiently revoked, that any other Act of Revocation would be revoking it twice, and dismissed the Bill with Costs. Wm's Rep. 681. Mich. 1720. Hartop v. Whitmore.

10. Bill by the Plaintiff and Ux., against the Defendants, Executors of Mrs. Tryon, to have a Satisfaction for a Note of 500/. and also for a Legacy of 1000/. given to the Plaintiff's Wife.

Mrs. Tryon basing three Daughters (Ann the Plaintiff's Wife, E. and M.) made her Will and thereby devised 1000/. to Ann, 500/. to E. and 500/. to M. &c. After his Will was made, the Plaintiff Mr. Pepper made his Addresses to Ann, and upon a Treaty of Marriage Mrs. Tryon gave a Note for 500/. payable within six Months after Marriage to Mr. Pepper, in Augmentation of her Daughter's Portion left her by her Father, and the next Day the Marriage was had, and upon the Marriage Day Mrs.
Mrs. Tryon, the Mother, was taken ill and died six days after of that illness, without altering or making a new Will, but she did declare, that she did intend that her Daughter Ann should have but 1000l. from her, and that now since she had given her this 500l. she must alter her Will, and for an Attorney to do it, but when she came the was Light-headed and died soon after, and it was said by the Defendants the Executors, that the Aflerts of the Testatrix were not sufficient to pay the Plaintiff the 500l. upon the Note and the 1000l. Legacy, andLikewise the Legacies left to the two other Daughters, and two Points were made in the Cafe, felonet.

1st. If this 500l. Note shall be taken in Part of Satisfaction of the Legacy of 1000l. 2dly, it Parol Evidence shall be admitted to prove the Intention of the Testatrix, and in this Cafe?

Mr. Vernon for the Plaintiff insisted, that the Plaintiff was well intitled to the 500l. upon the Note, and also to the Legacy of 1000l. and that this Cafe did not come within the Rules of constructive or implied Satisfaction in a Court of Equity; that here the Legacy would not be Satisfaction for the Debt due by Note, because the Note was given after the Will made, and consequently could not be the Intention of the Testatrix to discharge the Debt by the Legacy which was not then in Being, and so it has often been held in this Course.

2dly, As to the Parol Evidence that ought not to be admitted to explain the Meaning and Intent of Testatrix, the Will being in Writing, and the Words plain and certain, and cited the Cafe of Litton v. Falkland in Canc. and afterwards in Dom. Proc.

Mr. Mead contra. Admitting that the Legacy of 1000l. cannot be taken as a Satisfaction for the Note of 500l. yet the Note may be construed as a Satisfaction pro tanto of the Legacy, if the Party intended it to be so, and cited the Cafe of Calnady v. Calnady in Canc. The Father by Will gives his Daughter 1500l. for her Portion, and afterwards upon the Marriage of his Daughter gave her 1500l. and died soon after without altering his Will. This 1500l. Portion given by the Father in his Life-time was held as a Satisfaction for the Legacy.

As to the Parol Evidence, he said it was not offered to controul or explain the Will in Writing, but to prove the Intention and Meaning of Mrs. Tryon's giving the Note that he meant it to be in Part of the 1000l. devised by the Will, and that she died before she could alter the Will, as she designed &c.

Parker C. Circumstances of the Testatrix and her Family may be given in Evidence to expound the Will, but not any Parol Declarations to explain the Words of the Will or controul it; that in this Cafe there is no Doubt upon the Words of the Will, but the Question is, if the Testatrix has not advanced Part of the Legacy in her Life-time upon the Marriage of her Daughter, and the Evidence is only as to the Satisfaction, and thereupon admitted the Evidence to be read.

Mastor to see if Aflerts sufficient to pay all the Legacies and upon Report the Court to determine as to the Quantum due to the Plaintiff. MS. Rep. Hill. 9 Geo. Canc. Pepper & Ux. v. Winney & al.

10. Mr. Lannoy, on his Marriage with Mr. Frederick's Daughter, settled 500l. per Annum on her; he after surrendered some Copyhold Estates to the Use of his Will which be made, and gave the Copyhold to his Wife; Mr. Lannoy after levied a Fine, and made a new Settlement, and increased her Jointure 500l. per Annum, but never altered his Will. Ed. Chancellor. The Settlement is a Revocation of the Will, for such Lands are comprised; but the Copyhold is not, and therefore paffes by the Will. Sel. Cases in Ed. King's Time, 49, 49. Tin. 11 Geo. Lannoy v. Lannoy.
11. A Person obliged to lay out True-Money to be settled on herself for Life, Remainder to the Heirs of A, buys Lands not of the Value of the True-Money, and devises those Lands to B, who is Heir at Law to A, and also her own rights Heirs, and gives several Legacies which could not be paid if the Devise were not to be taken as Port of Satisfaction; and for that Reason so decreed. Sel. Cases in Canc. in Ld. King's Time, 63. Mich. 12. Geo. Gibbon v. Scudamore.


1. UPON an Appeal before Sentence to the Delegates it was adjudged, that if a Man makes his Will and disposes of his Personal Estate amongst his Relations, and afterwards both Children and others he went beyond Sea, and being Governor of the Plantations intestate over for an English Woman of his Acquaintance, whom he married and had Children by, and died without any actual Revocation of his Will; yet this total Alteration of the Testator's Circumstances was held an implied Revocation. Wms's Rep. 304. mentions it as a Case cited by Sir John Trevor, which he said he remembered to have been adjudged. And the Reporter in a Note there mentions it to be the Case of Eyre v. Eyre.

3. A. made a Will and devised Lands to B. charged with Legacies to W. R. and J. S. afterwards A. married and had Children and died. The Legatees brought a Bill for their Legacies, but Sir J. Trevor held, that the Marriage and having Children was a Revocation of a Will of Land and dismissed the Bill. Wms's Rep. 304. in a Note there says, this was adjudged 8 December 1701. Brown v. Thompson. But the Reporter adds, that he finds indeed in the Register Book, that Ld. Keeper Wright in July following reversed the Order of Dismission, and decreed Payment of the Legacies; but that in the Abridgment of Cases in Equity, p. 413. it is said that it was on the particular Circumstances of the Case, and that he allowed the Statute of Frauds and Perjuries did not extend to an implied Revocation.

* The Lands were devised to a Feme whom the Testator afterwards married, and who died, leaving her Prevenient Enfant of a Son, which Son would be Heir to the Mother as well as to the Testator; so that Lord Keeper thought this no such Alteration of Circumstances; for that no Injury is done to any Person; and those are provided for whom the Testator was well bound to provide for; And so he established this Will. Abr. Equ. Cas. Trin. 1702. Brown v. Thompson.

4. In Case of great Enmity arising and unreconciled between Testator and Legatee, it seems to be of the Nature of a Revocation implied or presumed. But there may be a Diversity where Testator dies shortly after, and before he comes to the Place where his Will is so as he has no Opportunity of altering the Bequest; and where he lives long afterwards and comes to the Place where the Will is and peruses it, yet makes no Alteration. Went. Off. Ex. 242.
1. If a man devises certain lands, and after aliens the land to a stranger, and repurchases, and after thaws his intent that the said will shall be his will, this is a new publication, and the land shall pass by the devise. * 44 Eliz. 3. 33.

2. If a man had devised an use before the statute of 27 H. 8. by which devise was revoked by the said statute, because the use was transferred into the possession, yet if after the 32 H. 8. of devices he had allowed the said will without new writing, this had been a new publication, and the land had passed by the will. D. 3. 4. 9a. 123. 56. [Putbury v. Trevillian.]

3. If a man devises a term of which he is possessed and after mortgages the term and after forms the condition, and enters, and dies, it seems the devise is void. Contra, 9. 45. 41. Eliz. B. R.

4. If a man devises lands to another, and after makes a fee to the use of his will, though this be a revocation of the will, yet the reference of the feoffment to the will makes it a new publication of the will. Hewitt's case adjudged, cited by White, S. C. adjudged.

5. If a man devises lands in fee to J. S. and after makes a feoffment thereof to a stranger, to the use of himself for life, the remainder to his wife for life, the remainder to his own right heirs, and by the same will makes his daughter executrix, admitting that this is a revocation of the will for the fee, if after the devisor add, and inserts these words in the will with his own hands, titles, I make my wife and my daughter my executors of this my last will and testament, and all for his publication. — Godolphin. 52 pl. 7. Gibbon v. Muelles S. P. —— Gouldsb. 599 pl. 39. Eliz. B. R. between Mungo and Jeffry. P. 41 Eliz. B. R. same case.

(2) New publication.

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6. If a Man be sied of Lands devises all his Lands to J. S. and after purchases the Manor of D. and after writes in his Will, that J. D. shall be his Executor, yet this is not any new Publication to make the Lands pass. 38. 39 Eliz. B. R. per Popham.

7. But it after the Purchase of the Manor of D. he delivers the first Will as his Will, and says, that it shall be his Will without putting any Words thereto, yet this is a new Publication to make the Lands newly purchased to pass. 38. 39 Eliz. B. R. Docket.

Cro. E. 392. pl. 11. Beckford v. Parnecott. S. C. all the Jutices (absent Gawdy) held this a new Publication of his Will, and sufficient by the Words to J. S. and Fenner held that the annexing the Codicil thereto is a new Publication; For wherein affir'md that it should be his Will at that Time; but the other Jutices doubted thereof, because he does not thereby shew any Intent that this Will should be for his purchased Land, nor that he then remembered it. — Mo. 404. pl. 542. Beckford v. Parnecott. S. C. adjudged by three Jutices, but Gawdy doubted. — Gouldsb. 150. pl. 77. S. C but no Judgment. D. 145. a. Marg. pl. 55. cites S. C. as adjudged, and says the main Reason by Fenner, Clinch, and Popham, contra Gawdy, was, that this annexing of the Codicil amounted to a new Publication. — 2 Lev. 144. S. C. cited per Cur. that by re-publishing the Will all passed, because the Words in the Will were sufficient.

9. A Man has Issue Four Sons, viz. A. B. C. and D. and devises Lands to B. and the Heirs of his Body, and after his Death without Issue to C. in Tail, and then to A in Tail, the Remainder to the Right Heirs of the Devisor. B. dies having Issue F. and W. Afterwards the Devisor says, My Will is, that the Son of B. should have the Lands devised to their Father, as they should if their Father had lived and died after me. The Devisor died, F. entered, A. the Eldelst entered; whether if this amounted to a new Publication, so as to intitle the Eldelst Son of B. The Court was divided. Cro. E. 422. pl. 20. Mich. 37 & 38 Eliz. B. R. Fuller v. Fuller. The publication was not in Writing; and the others thought that there was enough before in Writing to make the Issue to have the Land, but there they shall take by Delent, whereas now they are to take by Purchases.

10. A being sied of several Lands in D. makes his Will, and devises his Lands in D. and all other his Lands and Tenements whatsoever unto his Wife, and after purchases other Lands; and then diffcourting with B., B. defers him to let him have those new purchased Lands at the Rate that he bought them; and he answered No, for that he had made his Will and settled his Estate, and intended that his Wife should have his whole Estate. The Court inclined strongly that this was a new Publication and applied particularly to the Lands; and it is no Matter for alleging Quod dixit, Vindice Te sundi, for that must necessarily be intended when the Diff. hath particular Reference
Reference to the Will; and they said, that the Case in 1 Roll Ch. Jus- 
618. of a new Executor made was not resolved; but in the Book it is 

before all the Judges of C. B. they unanimously gave Judgment for the Defendant that the Lands in 
Queftion did not belong to the Heir, but to the Devife by the said Will. — S. C. cited 2 Vern. 
249. as tried before Ld. Ch. J. North in C. B. But the Point there mentioned is, that the Teftator 
saying his Will was in a Box in his Study, amounted to a New Publication.

11. Teftator's saying, my Will in the Hands of J. S. shall stand, amounts 
to a good Reproduction. Refolved per tot. Car. in a Trial at Bar 
on an Issue directed out of Chancery. 2 Show. 48. 31 Car. 2. B. R., 
Anon.

12. A Reproduction is good where a Man gives all his Lands to J. S. 
and then purchases other Lands, and then republished his Will; be- 
cause there if he should write it over again he would use the same Words, 
but where he would have expressed it otherwise if he had wrote it de 
novo the Reproduction will not pass the Lands; Per Scroggs Ch. 
J. to which Jones J. agreed accordingly, 2 Show. 63. Trin. 31 Car. 

13. The Teftator had a Son and Grandfon, both named R. and he de- 
vised his Lands to his Son R. in Fee, and gave a Legacy to his Grand- 
fon R. but R. the Son dying in the Life-time of the Teftator, he now pub- 
lished his Will, and declared that his Intention was, that R. the Grand- 
fon should take by the Will instead of his Father; it was objected that 
this new Publication of the Will by Parol could not alter the Words 
of the written Will, fo as to put a new Senfe on them; for Son and 
Grandfon are different Names of Appellation, and signify dif- 
tinct Perffons; but three Judges were of Opinion, that the Word Son 
in the Will is applicable to the Grandfon, for he is a Son, and more; 
but this Judgment was reverfed on a Writ of Error in B. R., for that no Parol Declaration can carry the Lands to one Perfon, where 
the Words of the Will in Writing they are expressly devifed to 
another, as in this Cafe they were to the Son; and the Teftator him- 
self had in this very Will diftinguifhed between the Son and Grand- 
fon, for he gave his Lands to one and a Legacy to the other, fo that 
this new Publication and Parol Declaration can never make the Word 
Grandfon signify Son in the written Will. 2 Jo. 135. Hill. 31 & 32 

14. New Publication of a Will is favoured in Equity, and a fonder 
Evidence will serve the Turn; Per Churchill Maiter of the Rolls. 

15. One makes his Will, signs it, and declares it in the Preffence of 
three Witneffes, and then makes a Feoffment in Fee, or does other Act 
which amounts to a Revocation, and then new publifts his Will in the 
Preffence of one or two Witneffes, this may be good enough. Quære, 

16. A.
16. A Man at full Age declared in the Presence of several Witnesses, that his Will made when under Age should stand; Per Holloway and Allibon the Will is void by Reason of the first Publication, and the latter Publication will not make it good, because it wants the Circumstances required by the Statute of Frauds and Perjuries, which will never make any Retrospect. And Judgment accordingly Nili &c. Comb. 84. Pach. 4 Jac. 2. B. R. Hawe v. Burton.

17. Though a Surrender of a Lease is a Revocation of the Devise of a Term granted by that Lease in Law, yet the annexing of Codicils will amount to a new Publication of that Will, and be decreed accordingly. N. Ch. R. 162. Hill. 1689. Alford v. Earle.

But since the Statute this must be wri


Since the Statute of Frauds the same Forms are necessary to the republicating a Will as to the first making. Resolved; per Lt. Cooper, Trevor and Tracy. 10 Mod. 98. in Lt. Lanford's Cafe.

By this Codicil he devinced in these Words; Whereas I heretofore made my Will dated 11 October 1684, only executed, took Notice, that his Lands were settled upon his Son Charles and John in Tail Male, and then devised in these Words; In Cafe my Sons shall have no Issue Male, then for the Preservation of my Name and Family, I devise my said Lands unto my Brother Bernard Granville, and the Heirs Males of his Body issueing. B. G. died in the Life of the Testator, having Issue George then Lord Lanflown, by which the Devise to B. G. in Tail Male lapsed. 15 August 1701. the Testator sent for seven Persons and said, I sent for you to be Witnesses to my Will, and sometimes to Witnesses to the Republication of my Will; and then took a Codicil dated 15 August 1701. in one Hand and the Will in the other, he said, This is my Will, whereby I have settled my Estate, and I publish this Codicil as Part thereof, and then signed the Codicil (which lay upon the Table, with the Will) in the Presence of the Witnesses who subscribed it in his Presence.

By this Codicil he devinced in these Words; Whereas I heretofore made my Will, dated 11 October 1684. in which I do not intend wholly to revoke, but in regard to the many Accidents and Alterations to my Family and Estate, I by this Codicil, which I appoint to be taken as Part of my Will, devinced as follows, and then devinced divers Manors &c. to his Son Charles and his Heirs, and 100 l. per Annum to his Nephew, then Lord Lanflown for Life. He then put the Will and Codicil together in a Sheet of Paper, and sealed them up in the Presence of the same Witnessers, but the Will was not unfolded in their Presence, nor did any of them write their Names as Witnesses on or under the Will, or on the same Paper, but on the Codicil only. And by Parker Ch. J. and by the whole Court this was held no Republication; for since the Statute 29 Car. 2. there shall be no Republication by Implication, but the Will must be re-executed, otherwise a Devise of Lands shall not be good. Comyn's Rep.
Devise.


24. Sir William Lytton, by his Will 25 March 1700, devised all his Lands to his nephew Lytton Strode and his Heirs, and directed that he should take the Surname of Lytton; and his Personal Estate he devised to Dame Ruffell his Sister and Lytton Strode, and made them Executors. After his Will made, Sir William Lytton purchased the Equity of Redemption of some Mortgages in Fee, which were mortgaged to him before he made his Will; and 13 Jan. 1704, by a Codicil attested by three Witnesses, he says, I make this Codicil, which I shall add to and be Part of my last Will, which I have formerly made. And the Lord Chancellor Cowper, affiited by Sir John Trevor Master of the Ld. Ch. J. Trevor, and Mr. Justice Tracy, 16 June 1708, decreed that this was not a Republication; for since the Statute 29 Car. 2, there can be no Devise of Lands by an implied Republication, for the Paper in which a Devise of Lands is contained, ought to be re-executed in the Presence of three Witnesses. Comyns's Rep. 383. Mich. 10 Geo. 1 cites Lytton v. Vifcountess Falkland.

and per Cowper C. accordingly. Ibid. 188.

25. A Bequest void at first may by Publication after be made good. As if A. gives to M. his Wife a Piece of Plate &c. and he has no such Wife at the Time, but after marries one of that Name, and then publishes his Will again; Now this shall be a good Bequest. Wentw. Off. Executors 25.

26. A Will revoked may be set on Foot again. 1st. By a Codicil annexed thereunto. 2dly, By adding any Thing to the Will, or making a new Executor. 3dly, By express Speech or Word that it should stand or be his Will. Wentw. Off. of Executors, 24.

27. If one of the Executors Names is stricken out, and a Stee is written over his Head by the Testator, or by his Appointment, now he is revived Executor; So if the Testator express by Word in the Presence of Witnesses, that the Party put out shall yet be Executor; But this is where the Executors Name is not so blotted out but that it may be read and discerned, for else the Stee is upon nothing, and if the verbal Reaffirmance should renew his Executorship, then must the Will be partly in Writing, and partly Nuncupative, his Name not being to be found in the Nuncupative Will. Wentw. Off. of Executors, 25, 26.

(Z. 2) Set aside. For Fraud, Circumvention &c.

1. The Father having one only Child devised the Surplus of his Estate to three Executors in Trust for M. whom he intended to marry, whereas she was a lewd Woman, and a Feme Cover. The Child brought a Bill, the Trust not being fully proved. Two of the Executors declared by Answer, that the Trust was for the said M. but the third declared he conceiv'd it was for the Plaintiff, and that the Father declared no Trust in him for the said M. and the Court decreed for the Child, the Trust not being fully prov'd. Chan. Rep. 101. 11 Car. 1. Ayntworth v. Pollard.

2. A. by Will gives his Lands to his Wife and her Issue, out of the Name and Blood of A. The Plaintiff infils that this Will was contrived by the Wife, contrary to the Intent of A, and against certain Notes written by him, whereby he had settled the said Lands on the Plaintiff.
Plaintiff and his Heirs, after the Decease of the Wife, and proved that the Testator intended to prefer him being of his Name and Blood, and drew Notes for his Will, whereby he gave the Lands to the Wife for Life, and alter to the Plaintiff and his Heirs. But A. left the Perfecting his Will to an Attorney, who prevailed with A. to let the Will be as he should Pen it. It appearing the said W. had declared to several, that she had the Land but for Life, and the Court conceiving A. to be but weak, in regard he left it to the Direction of the Attorney, declared, and is of Opinion that the said Will was a very Innocuous Will, seeking to prefer Strangers before Name and Blood. Chan. Rep. 123. 14 Car. 1. Maundy v. Maundy.

3. If a Man makes a Will in his Sicknes by the over importunity of his Wife, to the End may be quieter, this shall be said to be a Will made by Constraint, and shall not be a good Will. Per Roll Ch. J. in a Trial at Bar. Sty. 427. Mich. 1654. Hacker v. Newborn.

4. The Case was, T. of E. deceased having made a Will, and thereby made his Wife sole Executrix; The Deedant T. the Son being of this Will, came to his Mother in the Life-time of his Father, and perfwad-ed her, that there being many Debts, the Executorship would be trouble-some to her; and declared that he might be named Executor, for that he by reason of his Privilege of Parliament could struggle the better with the Creditors, and perfwad-ed 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 T. the Son gets a new Will, 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 thereto; and the left Will was read over so low, that the Testator could not hear it; and when he call'd 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 Anwers he denied the Will was drawn by his Directions, and that the 50. therein given to his Mother, was without the Testator's Privicy; 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, notwithstanding the Statute of Frauds and Perjuries, 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 Eftate. Vern. 296, 297. pl. 290. Hill. 1684. Thynn v. Thynn.

5. The Plaintiff, a Woman, getting the Assistant over a Young Lady, made her swear to make her Will, and thereof the Plaintiff Executor, and to give her all her Eftate, and when such was made, made her swear not to revoke or alter it. The Young Lady fell Sick, complained of the Ufage, consulted what to do, was much concern'd at the Injury done her Relations by this Will, but afraid of being damned if the altered it, and so died much disturbed. The Will concerned Personal Eftate only, and was proved in the Spiritual Court. The Plaintiff prayed the Affiance of the Court to get at a Term for Years, which was in Trustees for the Testatrix. But Jefferies C. declared, that though the Will being of Personal Eftate only, and being prov'd in the Spiritual Court, could not be controverted here, yet the Plaintiff should have no Aid from this Court, and therefore dismissed the Bill, that he did not see how this could be called a Will, when not Ambulatory as a Will ought to be, nor made freely and voluntary, but gained by Restraint and Force on the Party. 2 Vern. 76. Trin. 1688. Nelson v. Oldfield.
6. A Bill was brought to have a Will set aside, being obtained by Fraud and Circumvention; and my Lord Chancellor was clear of Opinion, that a Will may in Equity be set aside for Fraud or Circumvention. Abr. Eqw. Cases, 133. Mich. 1700. Welby v. Thornton.

of a Real Estate could not be set aside in a Court of Equity for Fraud or Impostion, but must first be tried at Law on De cdr.. Abr. Eqw. Cases 133. This is for the House of Lords, that a Will


8. A devise Land to M. his Mother in Fee. J. S. persuaded her to deed it to M. an Estate for Life only, the Remainder in Fee to himself. Upon a Bill to establish the first Will, because of the III Practices used in obtaining the after Will, Cowper C. directed an Issue in Middlesex, and where the Will was made (though the Lands lay in Shropshire) to try, whether the Will by which the Lands in Fee were devised to M. was the last Will of A. the Testator or not. Win's Rep. 287, 289. Mich. 1715. Gosf v. Tracy.

9. So if J. S. had persuaded the Testator himself in the same Manner, and had after limited the Remainder in Fee to himself, this would have been a good Will in Law, if attested pursuant to the Act of Parliament, but would be set aside in Equity for the Fraud. But as to the Testator's being Non Compos, that is entirely at Law and to be tried there. Per Cowper C. Ibid. 288. S. C.

10. There may be a Fraud in obtaining a Will, that may be relivable in Equity, and of which no Advantage can be taken at Law. Win's Rep. 288. Mich. 1715. Per Cowper C.

11. Bill to be relieved against a Will obtained by Fraud and Impostion upon this Case. The Plaintiff's Son had made a Will in Jan. 1715. (C) pl. 1716, and thereby devised all his Real and Personal Estate to the Plaintiff his Father, but falling II soon after at a great Distance from his Father of a Consumption of which he died, the Defendant persuaded him to make a new Will some short Time before his decease in Death, whereby he devised all his Real and Personal Estate to the Defendant (being his Kinman) upon Trust to pay his Debts and Legacies, but says nothing of the Rejsudates, but there is the general Clause of revoking all former Wills &c. There were several Witnesses to prove an Impostion, and Contrivance, and false Suggestion to induce the Testator to make this new Will, sufficient to satisfy the Court that it was unfairly obtained, but the Will was regularly Signed, Sealed, and Published as Statute 29 Car. 2. of Frauds doth direct, and for a good Will at Law.

It was insifed for the Plaintiff, that this being obtained by Fraud and Contrivance, though duly published according to Law, ought not be set aside in a Court of Equity. That this Court is proper to give Relief in all Cases of Fraud. That a Deed obtained by Fraud and Contrivance is constantly set aside in this Court, and that there is the same Equity to set aside a Will so obtained, and some Cases in a Jury were cited to this Purpose, but none seemed directly in Point of a Jury to inquire Will duly published and good at Law being set aside in this Court for 28 & 1724.
for Fraud, but several Cases were put, wherein it might be reasonable to set aside Wills for Fraud and Imposture.

It was inquired for the Defendant, that there was no Precedent for setting aside a Will duly published for Fraud and Imposture in this Court without a Trial at Law, that it would be of dangerous Consequence and full of Inconveniences to set aside Wills in Equity, which are good at Law. One Witness swears, that the Will was not truly read over to the Testator before Publication, that if this Deposition be true the Will is void at Law, that here were Variety of Evidence, and therefore proper to go to a Trial at Law upon a Devifavit vel non devifavit, or any other Iffue that the Court should think proper to direct, and inquired that without a Trial at Law this Court could not set aside a Will duly published.

It was replied, that the Fraud in this Case depends upon a great Number of Circumstances, and that no Iffue can be framed to take them all in, nor can a Jury well be charged with them; that Fraud is the proper Business of this Court, and that in Case of Fraud it is not necessary to grant a Trial Law.

Parker C. laid, I am very well satisfied that this Will was obtained by Fraud and Imposture by the Evidence that has been read, and that Plaintiff ought to be relieved, but will take two or three Days to consider what Relief is proper in this Case; methinks this Will should stand as to the Creditors to secure their Debts, which are not provided for by the former Will, for in that the Real Estate is not charged with them, but before I will totally set aside this Will, I will consider well of the Consequences. Et poleta (ut audivi) he decreed the Defendant to account for the Personal Estate having just Allowances &c. and to convey the Real Estate to the Plaintiff subject to the Payment of the Debts of the Testator, as a Trustee for the Plaintiff. N. B. This Decree was reversed by the House of Lords as to Fraud, and the Devifee to have the Freehold and Personal Estate subject to Payment of Debts. MS. Rep. Mich. 5 Geo. in Can. Bransby v. Keridge & al.

12. R. Son to the late Earl of Radnor married the only Daughter and Child of B. who was so passionately fond of his Daughter, that whenever he was in his Prentice, he would break out into great Fits of Passion, and weep for Joy to see her. Notwithstanding this great Fondness of his Daughter, one W. took an Opportunity when B. was under an Arreft, and officiously came to bail him, and infinuates into him, that his Son-in-law was the Occasion of his being arrefted; and thereupon wrought to far upon him as to get him into a private Place, where he was removed out of his Son and Daughter's Knowledge, and where he went by a strange Name; no one of his Friends had any Access to him but W. himself, and such as he would permit. R. made frequent Application to be admitted to him, but was refused, which was all in Proof. While he was under this Concealment, W. tampers with one B. that had B's Will in his Custody, and would have had him supprefed that Will, whereby he gave his Estate to his Daughter. It happened, during his being thus secured he fell sick, then there is a Will prepared for him to give this Estate away to W. from his only Daughter; they get Three Witnesses to the Execution of it. This Will was never read over to him; this appears in the Proof; but they got him to execute it; and he dies. Hereupon R. exhibits his Bill in this Court to set aside this Will. There was Proof made of all this Matter that was opened, and this Point of Surprize in obtaining this Will was inquired upon strongly. The Ed. Chancellor at the Hearing was asficted by the Ch. J. Bridgman, the Ch. B. Hales, and J. Rainsford. But notwithstanding all this Proof they could
could not prevail to set aside this Will in this Court; and afterwards, as was when they came into the House of Lords they were of the same opinion, and it ended at last in Relief by the Legislative Power, an Act of Parliament; Cited by Baron Powell. 3 Chan. Cases 61. in Case Duke of Northumberland's A

Newcastle's Will be-
twist Lord Thanet and Lord Clare, and in the Case of Bodmin and Roberts; But where a Deed (which is not revocable as a Will) is gained from a weak Man upon a Misrepresentation, and without any Valuable Consideration, the same ought to be set aside in Equity.


14. Executor of a Will which was obtained by Fraud but proved in the Spiritual Court, decreed as to so much of the Will as subjected the Lands for Payment of Debts it should stand, but as to the rest, the Executor to be a Trustee for the Devisee of the former Will; decreed per Ld. Chancellor but reversed. MS. Tab. March 11, 1727. Kerrick v. Bransby.

(Z. 3) Rafures &c. in a Will. What is to be done.

WHERE there are Rafures in a Will and the Executor submits that the Will should be proved, as if no such Rafures had been made, and annexes to the Will an Instrument purporting such Consent; North K. thought the Executor concluded by this Consent, but said, the Usual Contro in such Cases is to have a Sentence against the Rafure, and then a Probate granted with the Words ralead out, inferred therein. Vern. 256. pl. 249. Mich. 1684. Parker v. Afn.

2. If one of the Executors Names be struck out, and afterwards a Set be wrote over it by the Testator or by his Appointment; Now he is revived Executor. Wentw. Off. Ex. 25, 26.

(Z. 4) In Cases where the Will is set aside, What Allowances shall be made the Executor as to Payments by him.

1. By Will devises his Lands to his Wife during the Minority of his Son, and dies, and has only a Posthumous Son, and gives her Power to make Leaves to raise Money to pay Debts &c. She enters, takes the Profits, and marries. The second Husband lives some Years and takes the Profits of such Land as she had not let, the other Part she had let pursuant to the Will. The Son comes of Age and proves a Revocation of the Will, and prays his Mother may account; It was ordered that the account for all the Profits taken by herself or her Second Husband, and the Reason was, that she should
be said to take them till the Infant was Fourteen Years old as Guardian, and after as Bailiff, and she was to answer as to what her Husband took as in a Devise. And whereas she had paid Legacies charged by the Will on the Lands, it was ordered, that she be allowed thereof. But as for the Leaves made by her, though they were for Fines and full Rents, though she offered to account for the Fines and Rents the Court would not make them good, because the Mother could not, or let, Lands. Ch. Cales 126. Patch. 21 Car. 2. Hele v. Stowell.

(A. a) Consent to a Legacy.

In what Cases it is necessary. To what Thing.

S. P. Per

1. If certain Goods are devised to one, he cannot take them without the Delivery of the Executor. 11 H. 84.

11. cites S. C. — No Devisee may take the Legacy of his own Authority, but ought to have it delivered to him by the Executors, or to sue for it in the Spiritual Court. Br. Devise, pl. 5. cites 2 H. 6. 16.

Bridgem. 54. cites S. C. and 37 H. 6. 8. a where a Diversity is taken as here, and that it is there said that the Thing devised is certain, and a Stranger takes it, the Executor shall have an Action of Trepass; but that in Old N. B. 87. there is no Such Diversity. — Relw. 128. pl. 93. Catus incerti Temporis is a Nota, per Keble, that Devisees of a Thing certain may take it without the Delivery of the Executor; but otherwise of a Thing uncertain. — If a Man devises a Thing uncertain, as the Third Part of the Goods &c. and a Stranger takes it, there is no Remedy but to sue for it in the Spiritual Court; but where he may take it out of the Possession of the Executor? For it may be that the Debts exceed the Goods, and then the Devisee is void. Br. Devise. pl. 6. cites 27 H. 6. 8.

All 39 Hill. 23 Car. B. R. in Case of Ecles v. Lambert in B. R. it was agreed by Counsel, and also by the Court, that though the Legacies were devised in Specie, yet the Legatee could not take them without the Affent of the Executors. — Mar. 157. Mich. 17 Car. Heath J. said, that all the Books hold an Affent necessary, except 2 H. 6. 16. and 27 H. 6. 7. which seem to take a Difference where the Legacy is given in certain, and in Specie, that there it may be taken without Affent; but where it is not given in certain, there it cannot; but he held clearly the Law to be otherwise, and that though it be given in certain, yet the Legatee cannot take it without the Executor's Affent; for if the Executors should be subject to a Devisee, without any Fault in him, or any Means to help himself. — Goods in Specie are devised, yet the Legatees have no Property before the Executor has delivered them, any more than if they had never been devised; Agreed per Counsel on both Sides. St. 54. Mich. 23 Car. in Case of Ecles v. Lambert. — But Legacy has an Interest in them presently. Arg. 53. utante. — Arg. Bridgem. 54. contra, and says in Old N. B. 87. there is no Difference between a Thing certain and Not certain. And Wentw. Off. of Executors 221. that if Tenor bequeath Goods in the Hands of J. S. 15 f. S. yet the Property is not transferred to J. S. without Executor's Affent, though Executor has sufficient for Payment of Debts without them, and therefore Executor may at Common Law recover the Thing or Damages against the Legatee.

2. If a Man possessed of a Lease for Years of Land devises it to another, the Devisee cannot have it, or enter into it without the Affent of the Executor or Administrator. Ch. 39 El. B. R. P. 11 13. B. per Curiam.

S. P. For it may be that all the Goods are not sufficient to discharge the Debts and Funerals; but when the Devisee is made to the Executors, there the Executors may take it; for he has no other Remedy; for he cannot sue against himself and his Companions. Br. Devise, pl. 13. cites S. C. — But when a Chattell is devised to use, the Remainder to another, if the Executors deliver it to itself, and after he dies, there the second may take it; for the first Delivery is executed for all; per Prior and Needham; Contra per Dabny; but Executors ought to make Delivery to the second also. Ibid.

3. If A. devises a Chattell to B. for Life, the Remainder to C, this Chattell cannot be taken without Delivery of the Executor. Br. Executors. pl. 133. cites 37 H. 6. 30. per Prior.

4. And by him if the Executor gives it to another, the Devisee has no Remedy by the Common Law; but it seems that he shall have it, or the Value, by the Spiritual Law. Ibid.

5. If
Devise.

5. If a Legacy be devised thus, let B. have such a Thing, there B. may take it without the Delivery of the Executor. Arg. Stil. 73. in Case of Eeles v. Lambert. cites 2 E. 4. 13.

6. In Trenches per Brian Ch. J. where a Termor devises his Term, the Devisee cannot enter after his Death without Livery of the Executor, by which he said, that the Devisee made the Plaintiff and this Defendant his Executors, by which he entered; and per to 1. Car. he may enter and hold in Severalty. Br. Devise, pl. 24. cites 20 E. 4. 9.

7. If a Man devises by Special Name or generally Goods or Chattels Real or Personal, and dies; The Devisee cannot take them without the Assent of the Executors. Co. Litt. 111. a.

S. P. as to Chattels, tho' heretofore some Opinion has ran otherwise, and in Marg. cites 27 H. 6. 8.

8. When a Man is seised of Lands in Fees and devises the same in Fee or Fee Tail, for Life, or for Years, the Devisee shall enter; for in that Case the Executors have no meddling therewith. Co Litt. 111. a.

9. Lefce for Years on Condition not to alien, or devise to any, but his Children; by devising it to a Stranger the Condition is broken, though the Executor never assents to the Devise. Gro. J. 75. pl. 4. Trin. 3 Jac. B. R. Horton alias Burton v. Horton.

10. If a Legacy be given to one of the Executors themselves, he may take it without any Assent of his Co-Executors, and that before Administration, if he will. Perk. S. 572.

11. If the Testator has Land for the Term of Twenty Years, and he devises the same Land unto one of his Executors, he may enter and occupy the Land according to the Devise without the Assent of the other Executors &c. Perk. S. 572.

12. If the Testator was a Termor for Years and had devised Parcel of the Years unto all the Executors &c. The Stranger who is in Remainder shall not enter, nor occupy without the Assent of the Executors, because it cannot appear, whether they occupy the Lands as Executors or as Devisees. And therefore it shall be taken, that they occupy as Executors, and not as Devisees; for that is more for the Benefit and Profit of the Soul of the Testator; Tamen Quaere, how they shall be adjudged in the Land in such Case &c. Perk. S. 574.

13. If a Man has Land for Term of Years, and makes his Will and devi- ses the same Land unto A. the Wife of J. S. and makes the same J. S. his Executor and dies, and J. S. enters into the Land, and occupies the same, but it does not appear whether he occupies the same as Executor, or in the Right of his Wife, and J. S. makes his Will, but says nothing of the Term in his Will, and makes T. K. his Executor and dies within the Term, it seems that the Wife, who was Devisee, cannot enter into the Land devised unto her without the Assent of or Assent of the Executor of her Husband. Tamen Quaere. Perk. S. 575.

14. As to all Chattels, Real and Personal, devised, if the Executors will not deliver, assign or pay them unto the Devisees, they have no other Remedy but to sue for them in the Spiritual Court, for the Law does more respect the Soul of the Devisee than the Devisees, and therefore the Law will not suffer the Devisees to take their Legacies out of the Possession of the Executors in Defsight of them, because the Legacies shall not be assigned, delivered, or paid, until all the Debts of the Testator be satisfied or paid, in so much as if the Executors assign, deliver, or pay the Legacies before the Debts of the Testator are paid, and there be not sufficient Goods of the Testator to pay his Debts, the Executors shall be charged of their own Goods, &c. Perk. S. 570.

15. Not-
15. Notwithstanding, that a man devises a Chattel Real or Personal by his Will, yet the Executors are bound in Law to pay the Debts of the Deceafed, before they pay or deliver any Legacies. And therefore the Common Law is, that the Devisees of Chattels Real or Personal cannot enter upon the Legacies, nor take them without the Assignment or Delivery of the Executors, or by their Affent, or without the Assignment or Delivery, or Affent of one of them; and the Reason is, because the Soul of the Testator shall not be in Danger for the Non-Payment of his Debt &c. Perk. S. 488.

16. If one devises his Lease-Land to his Executor for Life, the Remainder over, there ought to be a Special Affent thereto by the Executor, as to a Legacy, otherwise it is not executed. Cro. C. 293. pl. 3. Hill. 8 Car. B. R. Roffe v. Bartlet.

17. A Legatee hath not any Interest grantable before Affent, yet he hath an Interest releasable; Per Brampiton Ch. J. Mar. 139. Mich. 17 Car.

18. If an Executor refuses to Affent, he may be compelled by the Spiritual Court. Mar. 96, 97. pl. 167. Trin. 17 Car. C. B. Anon.

19. Testator releases a Bond by Will, it is not good. But Quere, What Affent is requisite to such Bequest? Sid. 422. pl. 11. Trin. 21 Car. 2. B. R. Pigeon v. Hatters.

20. Executors Affent is not material where there is no Devise; as where it was on a Condition precedent, which never happened. Adjudged. Cumb. 433. Trin. 9 W. 3. B. R. Efcourt v. Werry.

(B. a) Who may Consent.

1. A Feme Covert Executrix may content to a Legacy. 7 H. 13. C. 4.

Fitches Executors, pl. 55. cites S. C. that she may pay Legacies — 5 Rep. 27 b. Hill 26 Eliz. B. R. in Russells Case the Court denied the Opinion in 16 H. 6. Release a as to Feme Covert Executrix; for though she is Executrix, yet she can do Nothing to the Property of her Baron; but that without Doubt the Release of the Baron is good. — The Affent of a Feme Covert will not bind herself. But the Affent of the Baron is sufficient where the Wife is Executrix, even though she be within Age, if he be of full Age, but nor if he be under 21, and the above 17, as it seems, unless there are Affets sufficient, which in this Case perhaps may be material, though not in the other. Wentw. Off. of Executors 227. — Sid. 188. pl. 14. Piggot. 16 Car. 2. in Case of Coker v. Bellamy, the Court held, that though anciently it had been a Point, yet since Russells Case in Co. Rep. they supposed it settled, that Feme Covert cannot assent to a Legacy, and so was their Opinion.

2. If there be two Executors and Goods are devised to one, he may assent to his own Legacy, and take the Goods without the Affent of the other. 11 H. 4. 84.

3. If the Testator devises a Lease for Years to his Executors, one Executor without the other may content to the Legacy, as to his own Part, without any Consent made by the others. B. 37 El. B. R. between Pannel and Penny, admitted.

4. An Infant Executor at the Age of 18 Years, may assent to a Legacy; Per Anderdon Ch. J. Cro. E. 719. in pl. 46. Mich. 41 & 42 Eliz. C. B.


5. If there are several Executors the Affent of one only is sufficient. Wentw. Off. of Executors, 223.

(C. a)
(C. a) [Affent to a Legacy.]

At what Time it may be made.

1. If a Man hath a Term for 52 Years, and devises this Term to his Executor after his Legacies paid, and devises 101. to be paid to the Issue of a Stranger when he comes to 21; the Executor shall not have this as a Legacy by any Affent till the Issue comes to 21, and until he has paid him the 101. or made an Agreement with him for it. 6 T. 3 B. between Brand and Dane, per Curiam.

2. But in the said Case, if he devises 401. to be yearly paid to a Stranger for 52 Years, shall this be a Legacy in him presently by his Affent, for that otherwise he should never have it as a Legacy, inasmuch as the 401. is to be paid during all the Term. 6 T. 2 B. dubitatur.

3. A Term was devised to an Executor, who entered before any Probate of the Testament, and occupied the Land for a Year and more, without any Probate, and died. It was ruled that the Property of the Term was lawfully in the Executor by his Entry without any Probate. D. 367. a. pl. 39. Mich. 21 & 22 Eliz. Anon.

4. Wentw. Off. of Executors 225. thinks an Affent cannot be made after a Disaffent. Yet he makes a Quere. Because such Refusal may be controlled by the Spiritual Court or Court of Equity. But he says, that notwithstanding a Decree in such Court, he sees not how any legal Interest can be transferred by that compelled Affent.


6. If the Executor rides or drives in his Coach a Horse bequeathed to him. So it he uses him at Plough, this seems not such Disaffent to the Execution of the Legacy as that the Executor cannot after affent to the Legatee's having thereof. Went. Off. Executors 225.

7. Nor is the Executor's continuing to depasture Land, the Term whereof Teftator devised to J. S. any Disaffent to the Execution of the Legacy. Wentw. Off. Executors 225, 226.

8. But if this Leaf-Land had been leased out by Teftator from Year to Year, and the Executor discharges the Tenant and takes it into his own Hands at the Year's end; This seems to be a Disaffent. Wentw. Off. Executors 226.


10. Where a Term is devised to A. and after the Teftator's Death the Executor takes a new Lease of the same Land for more Years in Possession or to begin presently. By this the Term left by Teftator was surrendered and drowned, so that it could not pass to A. by the Executor's Affent after. Wentw. Off. Executor 226. cites it as held in Cafe of Lowe v. Carter.

11. If a Legatee dies before Affent by the Executor, yet the Legacy will be good, and the Executor may affent afterwards, and this shall be Affets in the Hands of the Executors of the Legatee. Mar. 135. 137. 139. pl. 209. Mich. 17 Car. Southward v. Millard.

12. An Executor, before Probate, may affent to the Delivery of a Legacy, or that the Legatee do take or receive his Legacy. Godolp. Orp. Leg. 144. cap. 20. S. 1.
An Assent after Refusal was allow'd to prevent a Forfeiture, for a Forfeiture shall not bind where a Thing may be done afterwards or any Compensation made for it, unless where there is a Devise over to a third Person. 2 Vent. 352. Hill. 32 & 33 Car. 2. in Canc. Cage v. Ruffell.

(C. a. 2) Assent. How it may be made.

If a Term is devised to J. S. and the Executor affents that J. S. shall have it on Condition, the Devise Per Cur. 4 Rep. 28.b. in pl. 17. Trin. 55

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Cafe.

1. A S S E N T to a Legatee may be on Condition Precedent, as thus;

I am content that if you can get and bring in to me such a Bond in which Testator was bound to J. S. that then you enter upon the Term or take the Corn and Cattle to you bequeathed. Wentw. Off. Executor 236.

2. So of other like Conditions preceding the Assent; as if you get the Consent of my Executor; or if you will pay the Arrears of Rent due to the Testator at his Death; or if you will pay the Wages already due to the Servants attending about the Cattle or Corn to you bequeathed; in such Cases there is no Assent unless the Condition be performed. Wentw. Off. Executor 236.

3. But if it be on Condition subsequent, as thus; I agree you shall have the Thing bequeathed, provided you shall pay 101. yearly to me, or to such Creditor of Testator's, and is like the Cafe of Attornements. Wentw. Off. Executors 236, 237.

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(D. a) What shall be said an Assent in Law to a Legacy.

If a Term be devised to an Executor for a certain Time, the Remainder over, and the Executor enters generally, he shall be adjudged in by the Law as an Executor, and not as a Legatee, because if he should be adjudged in as a Legatee, perhaps this would be a Deedavit, and to the Law would do a Tort, and also by this the Remainder would be upset, and could not be elected by the Dissent of the Executor after, which would be unchivalrous to the Executor. 12 M. & R. between * Par-

nel and Fen, per Curtin adjudged. Co. 10. + Lampet 47. b. adjudged. 11 M. & R. between Ellis and Ostrow, agreed.

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2. If a Man devises a Term to his Executor, and he enters generally, the Law shall lay prima facie that he is in as a Legatee, because this is better for him, and the Law intends that the Executor attested to it, and if he be in Danger of a Devastavit, he may alter after he shall take Effect to be in as Executor, and so explain this general Entry, so there shall not be any Devastavit. Mich. 37 Eliz. B. R. 4 between * Parnel an fen, per Curiam. 19 Eliz. Lord Windsor's Case adjudged, Mich. 11 Ja. B. R. between Ellis and Osborn devixat, though the Executor had sufficient for all Debts, Legacies, and Funeral.

3. If Leftee for [Years] leaves for Years, upon Condition that he shall not alien by Will or otherwise, and he devises it to his Executors who enter generally, it seems that he shall not be said in prima facie, as a Legatee, but as Executor, because if he should be in as Legatee, this should be a Breach of the Condition, and then no Subsequent Election of the Executor to be in as Executor could help it. Contra, 19 Eliz. Lord Windsor's Case adjudged.

and Breach of the Condition, because the General Entry shall be intended as Devixat; Cited by Tanfield; and Penner J. said, that it was so adjudged to his Knowledge. —— S. C. cited as 24 Eliz. Lord Windsor v. Bury, and that if the Legatee had not been Executor, the Condition had been broken. D. 175. Marg. pl. 3.

4. If a Man devises a Term to his Executor and dies, not being indebted, and the Executor enters generally, this shall not be adjudged as a Breach of the Condition, and to a Consent to the Legacy. North, 8 Ja. B. between Hellam and Ley. Dubitatur, Trim. 8 Ja. B. for there may be Debts which are not yet known.

5. If a Man devises a Term to his Executor and dies, and the Executor enters generally, and converts the Profits to his own Use, this is a Consent to the Legacy. Mich. 11 Ja. B. R. in Ellis and Osborn's Case, per Coke.

6. If a Man possesse a Term for certain Years, devises it to another for his Life, with several Remainders over, and makes the first Devise to his Executor, who enters generally, and by Deed, reciting, That whereas he had a certain Etitle for Years in the said Land by the Devise of J. S. who was the Devisor, he grants it to another, this is a good Explanation of this Entry, subject, that he entered as Legatee, and to a Consent to the Legacy. Mich. 15 Ja. B. R. in one Shriene's Case, per torum Curiam.

7. If a Man devises a Term to his Executor and dies, not being indebted, and the Executor enters generally, and says, that his Testator had given no Legacy from him, but had left all to him, admitting that upon the general Entry, he should not be adjudged in as Legatee, it seems these Words should not make any Consent to the Legacy, P. 8 Ja. B. between Hellam and Ley. Dubitatur, Trim. 8 Ja. B.

8. If the Executor delivers to Devisee Goods to him devised to re-deliver them again at such a Day, the fame is a good Affent, and Execution of the Devise, and the Words of the Re-delivery are void. Arg. Le. 130. in pl. 176. cites 2 E. 4. 13.

9. A Term for Years is devixed to A. The Executors of the Devisor entered into the Land to the Use of the Devisee. The Opinion of the Court was, that the fame was a sufficient Possession to the Devisee. 3 Le. 6. pl. 15. 4 Eliz. C. B. Anon.

10. If
10. If a Man poffefled of a Term of Years devifes it to his Wife, for so many of the Years as the fmall live, and after her Deceafe the Remainder of the Term to J. S. and makes his Wife Executrix, and she enters, claiming to have it only for Life, the Remainder to J. S. according to the Devife; in this Cafe this is a good Affent for the Execution of the Residue of the Term to J. S. Plow. C. 516. Hill. 20 Eliz. Welden v. Elkington.

11. If a Term for Years be given to the Wife of the Tefltor during the Minority of the Eldeft Son, to the Intent that she, with the Profits thereof, fhall breed up his Children, the Remainder of the Term to the fame Eldeft Son, and he is made Executrix, and she enters generally, but doth always breed the Children of the Tefltor. This Education is an Affent against her, to veft the Estate to the Eldeft Son. Plow. Com. 539. b. 545. Hill. 21 Eliz. Paramount v. Yardley.

12. Elift is not to be apporation’d. Le. 129. pl. 176. Trin. 30 Eliz. Coleburn v. Mixtine.

An Affent to Devife for Life of a Term, is an Execution of the Devife to him in Remainder. Gouldsb. 96. Arg. cites Pl. C. Welden’s Cafe.

13. Tefltor devifes several Houses; an Entry into one of the Houses is a fufficient Agreement for the Whole; for it is an intire Legacy, and the Entry fhall be adjudged most beneficial to the Devifee. Le. 129. pl. 176. Trin. 30 Eliz. B. R. Coleburn v. Mixtine.

14. If a Term is devifes to J. S. and the Executors agree and affent that J. S. and J. N. fhall have the Term; in this Cafe J. S. fhall have the Term Solely; For after the Affent of the Executors he is in by the Devife. Per Cur. 4 Rep. 28. b. in pl. 17. Trin. 33 Eliz. B. R.

15. Executor declaring that the Tefltor (her Husband) had given her all, and nothing from her, held to be an Affent. Brownl. 132. Trin. 7 Jac. Hellam v. Lee.

16. The Executor, who has the firt Estate devife to him, fays, that He to whom the Remainder was limited fhall have it after his Death; Arg. 2 Brownl. 173. cites it as refolved 8 Rep. 94. b. [Trin. 7 Jac.] in Manning’s Cafe to be a good Execution and Election.

17. The Tefltor devifes a Pecuniary Legacy, and then told his Executor that he had by his Will given such a Legacy, and I would have you increase it to such a Sum, this is calledCommunifm Fidei in the Civil Law; and held a good Legacy. Cro. J. 345 pl. 14.

18. A Devife of a Chattle real to E. for Life, Remainder to J. H. and made Lowe the Husband of E. his Executor. And J. H. devifes it to G. H. and Hen. H. and dies before E. And Lowe fays, if E. my Wife were dead my Estate in the Premifes were ended, and then it remains to the Holloways. This is here an Affent, for he took Notice of it as a Legacy, and that he would have it in that Right, though it would not go to the Devifee of J. H. he dying before E. Mar. 135. pl. 209. Mich. 17 Car. Southward v. Milward.

19. An Executor fhall never be made affent to a Legacy by Imputation, where it is found that he hath not Affets, but there ought to be an exprefs Affent by Reason of the great Prejudice which might come unto him. Per Brampton Ch. J. Mar. 135. 135. pl. 209. Mich. 17 Car. Southward v. Milward.

20. An Affent is a perfecting Act which the Law favours, and therefore it has been adjudged, that where an Executor did contract with the Devife for an Affignment of the Term to him devised, that it was a good Affent to the Legacy; Per Brampton Ch. J. Mar. 139. Mich. 17 Car.

21. Devife
21. Devise of a Term to a Feme for Life, who is Executrix, Remainder to A. the Feme here takes, as Executrix, the whole Term, till she agrees to the Devise, but on Proof, that she said, that she would take the Term according to the Will, this was held an Affent sufficient; so a Cafe was cited were it was ruled that it is good, if she had said that A. was to have the Estate after her. 1 Lev. 25. Pach. 13 Car. 2 B. R. Garret v. Litter.

22. I thank my Husband he hath done kindly by me in giving me this Land and my Son after me. This was a good Affent by Feme Executrix to take as Devisee; And per Windham, the not bringing a Writ of Dower may be taken for an Affent after her Death. And if she said that the Heirs (for whom Lands are devised in Trust) shall have them undivided, it is a good Affent. Keb. 15. in pl. 43. Pach. 13 Car. 2 B. R. cites Cromwell v. Giles.

23. The Testator by his Will directed his Executor to give B. 200l, this is a good Legacy, though he left it to the Executor's own Free-Will, how, when and in what Manner to dispose it, and gave no particular Directions himself; The Court decreed Payment of the 200l. Chan. Rep. 246. 16 Car. 2. Brett v. Ofley.


25. An Affent may be by Implication as well as Express; For if in the Devise or Bequest the Legatee be appointed to do some Act, and the Executor accepts the Performance thereof, this amounts to an Affent. Wentw. Off. of Executors 224.

26. So if a Horse be bequeathed to A. and one offering to buy the Horse, the Executor directs him to go and buy it of A. or if the Executor offers Money to A. for the Horse, this is an Affent. Wentw. Off. of Executors 224.

27. So Acceptance by Executor of a Grant from a Devisee of a Term devised was held to imply an Affent that it should be the Devisee's to grant. Wentw. Off. of Executors 224. cites it as the Cafe of Low v. Carter.

(E. a) In what Cases the Consent to one shall be to another.

If a Man devises a Term to one for Life, the Remainder to another for Life, with several Remainders over, the Consent by the Executor to the first Devisee will be a Consent to all the Remainders. Co. 10. [Dick. 10. Fac.] Lampert's 47. b. agreed.

the first Devisee a Legal Interest is vested in the next Devisees by Act of Law, which cannot be taken from them. 3 Wms's Rep. 11. pl. 3. Trin. 1726. Per Ld. C. Macclesfield. Adams v. Pierce.
2. If a Devisee devises a Term to his Wife, if the so long lives unmarried, and if the marries, that the Wife shall have a Rent out of the Lands, and makes the Wife his Executrix, and dies, and the Wife contents to the Legacy of the Term, and enters into it, and afterwards takes Husband. This Content to the Legacy of the Term is also a Content to the Rent when the contingent happens. Dicb. 19. B. R. between Gosse and Haywood, Patch. 14. Ta. B. Adjudged.

5 Bult. 122. in the Case of Gough v. Howard S. C. and S. P. quod fuit concoctum, per Coke Ch. J.,— Bridg., 53. S. C. cites Pl. Com. 521. b. Welden v. Elkington, that if a Termor devises a Rent or a Common to one, and the Term to another, and dies, and the Executor pays the Rent, or suffers the Devise of the Common to put in his Castle, this is no Affent as to the Term; for the Term is one Thing, and the Profit out of it is another Thing; but there in the Principal Case the Affent of the Executor to the Devisee to occupy the Land was a sufficient Affent to the Remainder of the Term, because the Occupation of the Land and the Land itself is all one; and that in Plowd. Comment. 547. [521. b.] the same agreed, and that the first Affent does go to all. And it is no Affent to the Term, neither can it be taken by Implication to be any Affent to the Devisee of Rent; for every Act that does ensue to another Act by Implication, ought to be such as of Necessity ought to ensue to the other Act which cannot be taken to be otherwise.

4. If A. possessed of a Lease for Years, devises it to his Executors for seven Years, and afterwards to B. for twenty Years, and after to C. and the Heirs Males of his Body begotten, if the Executors agree to the Devise to themselves for seven Years, this is a Content to all the Remainders Patch. 11 Car. between Leventhorpe and Aldby, Per Curiam, Refolved upon Evidence at the Bar. Intraut Dicb. 10. Car. Rot. 129.

5. If a Termor devises the Occupation or Profits of his Land to J. S. for ten Years, and after devises the Land itself to J. D. for the rest of the Term, in this Case, if the Executor attient to the Legacy of J. S. this will be a good Affent to the Execution of the Legacy of J. D. Pl. C. 521. b. Hill. 20. Eliz. in Case of Welden v. Elkington.

6. But if the Occupation of a Book, Glass, or other Chattle Personal be devised to one for Life, and after his Death to another in like Sort. the Affent to the first is not good to the other, for the Occupations are several, and in such Chattle Personal the Occupation is distinct from the Property. Finche's Law 172.


Affent to a Term is an Affent to Rent, on a Condition in lieu of it. Roll R. 248. Gosse v. Heywood.—But an Affent to a particular Estate bequeathed of a Term, is good to all the Remainders 19 Rep. 47. b. the 4th Resolution in Lamper's Case. Wenth. Of Executors, 234. S. P. Because the particular Estate, and the Remainder are all but one Estate in Law. The Executor's Affent to one cannot ensue to another, though of the same Thing except by easy of Remainder. So neither can it any Way where the Things are not the same; except in some very special Cases, as it a Termor bequeathed a Rent to A and the Land itself to B. the Executors affent that A shall have the Rent, is no Affent that B shall have the Land. Yet I think the Affent that B. shall have the Land, implies the Affent that A. shall have the Rent. Wenth. Of Executors, 233.
8. If the Testator has Lands for the Term of 20 Years and devises the Land for Parcel of the Years unto one of his Executors, the Remainder unto a Stranger, if the Executor, who is the Devisee enters and occupies solely, by Force of the Devise, after the Years determined, the Stranger who is the Devisee in Remainder may enter and occupy the Land during the Residue of the Years, if the other Goods of the Testator were sufficient to satisfy and pay all the Testator's Debts. Quere, if the Goods of the Testator be not sufficient to satisfy and pay his Debts? But it seems he may enter notwithstanding that, because the Devise was once executed &c. Perk. S. 573.

9. There was a Devise to A. but that Devise was to be void on a Roll Rep. Condition, and another thing was in such Case devis'd in its room; 243 S. C. Per tot. Cur. an Assent to the first Part of the Will is an Assent to all which is therein contained. 3 Bulit. 123. Mich. 13 Jac. Gough v. Howard.

10. If a Rent is devis'd to one out of a Lease, and the Lease is devis'd to Roll Rep. another, the Executor may assent first to the Rent, and if he assent that Devisee shall have the Term, clearly it is a good Assent to the Rent to charge the Devisee of this Term with the Rent; for he assents to have the Land charged with the Rent, but the Assent to the Devise of the Rent is no Assent to the Devise of the Term, and this is clear, and it is as clear, that an Assent to the Devise of the Term is an Assent to the Devise of the Rent; Per Doderidge. 1 Bulit. 122. Mich. 13 Jac. it is void. And at another Day it was agreed by Coke Ch. J. that it was a good Assent to the Rent.

11. An Assent to the first Devise is an Assent also to him in Remainder; Per Mallet J. Mar. 136. in pl. 209. Mich. 17 Car. cites it as resolved in Lampet's Case and in Matthew Manning's Case.

12. A. makes his Will in these Words, viz. I devise to J. S. all those my Lands in Bramfield in the County of Surry in the Possession of John Abley; whereas in fact A. had not any Lands in Surry, but he had Lands in Bramfield in Hampshire in the Possession of John Abley. And in an Ejectment brought by the Heir of A. for these Lands in Hampshire against the Devisee, it was ruled by Holt Ch. J. that these Lands in Hampshire would pass by this Devise, and the Plaintiff was nonsuit at Winchester Lent Aflfiss 1699. 10 Will. 3. Ld. Raym. Rep. 728. Hafthead v. Seale.

(E. a. 2) The Effect of Assent by Executor.

1. IF Executor delivers to the Devisee Goods to him devised, to redeliver them to him again at such a Day; this is a good Assent to the Devisee. The Words of the Redelivery are void; Per Tanfield. Le. 150. at the Top cites 2 E. 4. 13.

2. An Assent to a void Legacy doth not amount to a Grant, but only that the Legatee should have that which the Teitament had given him, and if the Devise is void, the Assent is void. Plow. Com. 525. b. 526. Patch. 20 Eliz. Bransby v. Grantham.
Devise.

3. Affent, how long forever made after Testator's Death shall relate to Testator's Death for the Advantage of the Legatees, but not to charge him with Waft committed by Executor, for in such Case Waft shall be brought against the Executor in the Tenent, and not against the Devisee in the Tenent. Wentw. Off. Executor 247.


6. If an Infant Executor affents to a Legacy, the Affent is not good, unless there are other Assets for Debts; Per Ld. Keeper. Chan. Cæses, & P. in S. C. 257. Hill. 26 & 27 Car. 2. in Cæse of Chamberlain v. Chamberlain.

7. When a certain Thing, as a Horse or a Cow &c. is devised, as soon as the Executor affents the Property vests in the Legatee, and he may have an Action at Common Law for the Recovery of the Thing; and therefore differs from the Cæse in * 2 Roll 391. for that was for a Legacy, for which the Common Law can give no Remedy; and that is given as the Reason of the Cæse. Freem. Rep. 289. in pl. 339. Pach. 1677. B. R. Barton's Cæse.

8. By the Affent of the Executor an Interest is vested, and the Goods devised are become a Chattel, and is governable by the Common Law. 2 Lev. 269. Mich. 29 Car 2. B. R. Buftard v. Stukely.


11. A Legacy passes not by the Will, but by Affent of Executor to whom the Will is only Directory, so that the Legatee is in by the Executor. 1 Salk. 237, 238. pl. 16. Mich. 6 Ann. B. R. Bunter v. Coke.

(E. a. 3) Affent by Executor. Pleading.

If the Legatee 1. A Seized of Land grants a Lease for Years, and after devised it to B. In an Action B. must shew that he entered into the Land by Leave of the Executor, for he cannot enter without. Sci. 65.


(F. a) Wills.
(F. a) Wills. Devises.

Construction in General.

1. The Deser3 of a Will in Words shall be supplied by Intent of Devisor in making an Estate, but not in the naming the Devisor or Devisee. Arg. 2 Le. 165. in pl. 198. cites 49 E. 3. 3 & 4. the Cae of Whiteavers.

2. There will be a great Difference in a Will between Words of Restraint which do follow general Words, and which do follow particular Words. Per Haughton J. 2 Bulst. 176. in Cae of Mirril v. Nichols. cites 2 E. 4. 29.

3. In Wills the Effect or Intent is more to be regarded then the Form. The Master of the Rolls said, that he was sensible that there was a Diversity of Opinions among the Learned Judges of the present Time, whether the Legal Operation of the Words in a Will, or the Intent of the Teitator shall govern, that for his Part, he should always contend for the Intention, where it is plain, and he thought the Strongest Authorities to be on that Side; for if the Intention be to govern, as it is admitted it must, and not always give Way to the legal Construction, and yet at other Times shall not govern, there will then be no Rule to Judge by, nor will any Lawyer know how to advise his Client, which is a Mischief Judges ought to prevent. 2 Wms's Rep. 673. Mich. 1734.


5. Words in Wills ought to receive such favourable Exposition, that the Intent of the Teitator apparent in the Will shall be perform'd in every Point, and no Set [or not the least Part of it] shall be confounded. And to this Purpoe is the Office of Judges to marshal the Words of Wills, and the rather because for the most Part Wills are made in Extremity, and when there is no Counsel in the Law ready or present, and the Teitators themselves are not for the most Part learned in the Law, nor know how to place Words in good Order, and consequently their Ignorance and Simplicity require a favourable Interpretation of their Words in Wills. Pl. C. 540. b. Arg. Hill. 21 Eliz. in Cae of Paramour v. Yardley.

6. Averment to take away Surplusage is good, but not to encrease, that which is defective in the Will of the Teitator; as where the Clerk writes to J. S. and his Heirs, instead of to the Heirs of J. S. that is Sulfusage. But if Vice versa, it is enlarging. Per Anderfon Ch. J. Godb. 131. pl. 149. Hill. 29 Eliz. C. B.

7. It is the usual Course in the Constrution of Wills to consider all the Clauses of the Will, and to judge upon all the Words of the Will, and not upon one Part only; Per Periam J. Le. 229. in pl. 301. Patch. 31 Eliz. C. B.

8. If the Intent be not apparent out of the Words, then the Words are to be expounded by the Common-Law. Cro. E. 743. pl. 19. Hill. 42 Eliz. C. B. in Cae of Taylor v. Sayer.

not be Mutia or Cena &c. 2 Bulst. 179. Mirril v. Nichols—And such Estate as the Common Law would give upon the like Words, such Estate passles by the Will. See Lav. 40. in Cae of Daniel v. Upley.
Devise.


11. A Will ought to receive Construction by a due Consideration of the Intention of the Testator collected out of all the Parts thereof, so that there be no Repugnancy, but a Concordancy in all Parts thereof. Lane: 118. per Tanfield obiter. Patch. 9 Jac. in the Exchequer.


13. There are Three Rules. 18. No Will ought to be construed per Parcellas, but by Entierties. Secondly, To admit of no Contrariety, or Contradiction. Thirdly, No Nugation, nor any Nugatory Thing ought to be in a Will. Per Croke J. who said these Rules observed will open all the Doors in every Will. 2 Bull. 178. Hill: 11 Jac. in Cafe of Murrill v. Nicholls.

14. Wills and the Construction of them do more perplex a Man than any other Learning, and to make a certain Construction of them, this excide Juris prudentis Arret; But I have learned this good Rule always to judge in such Cases as near as may be and according to the Rules of Law; and so doing I shall not err, and this is a good and a sure Rule, if a Will be plain then to collect the Meaning of the Testator out of the Words of the Will. Per Coke Ch. J. 2 Bull. 139. Mich. 11 Jac. in Cafe of Roberts v. Roberts.

15. These Rules are to be observed in the Explication of Wills. 18. The Intent of the Deviseor. Secondly, The Intent within the Will according to the Law. Thirdly, the Scope of the Will shall be enquired. Fourthly, It should be interpreted, that every Word may have its Effect; For it shall not be intended he would speak contrary Things. Roll R. 319. Hill: 13 Jac. B. R. Per Coke and Dodsridge in the Cafe of Blandiord v. Blandiord.

16. Such an Interpretation is to be made of Wills as that all the Parts thereof may stand together. Arg. 3 Bull. 195. Trin. 14 Jac. cites D. 357. Chick’s Cafe.

17. These Words in a Will, viz. I purpose to devise is all one as if I said, I do devise; for whatsoever may be taken to be the Will of the Teltator is his Will. Arg. 2. Roll Rep. 477, 478. Mich. 22 Jac. B. R. in Cafe of Hurd alias Hind v. Foy.

18. Intent
18. Intent ought to be taken out of the Words and not upon Averment. This Rule is always to be intended where the Intent of the Party, by the Words contained in the Will, may be known; otherwise not. And. 174. pl. St. Hill. 42 Eliz. — By Law no Intent of a Will ought to be averred contrary to the Words of the Will. Godb. 431. pl. 496. Patch. 2 Car. Arg. cites 5 Rep. 68 Cheyne’s Case — 8 Rep. 95. b. S. P. in Manning’s Case — 4 Le. 76. S. P. Arg — 1 Salk. 253. — 2 Ballit. 177. — — 9 Mod. 159 Barker v. Eyles and Smith.

19. If the Intent be indifferent, it shall be taken over the Rules of Conveyances. Lat. 136. Trin. 2 Car. per Whitlock J.

20. A Will shall not be allowed or favoured that is repugnant in itself, nor, 2dly, to cross Ground in Law; Per Doderidge J. Lat. 42. 137. Trin. 2 Car.

21. An uncertain Will is void; Per Doderidge J. Lat. 137. Trin. 2 Car. in Case of Daniel v. Upley.


24. The Meaning of a Testator is to be spelled out by little Hints; Per Hale Ch. J. Arg. Vent. 30. Mich. 24 Car. 2. B. R.

25. Where a certain and determinate Time is appointed for the Payment of a Legacy, and after a contingent Clause is added touching the same Legacy, all the Words of the Will must stand together, which can never be unles, the Contingency happens within the Period of Time appointed for Payment of it, for it happens after the Time it is vain and idle and cannot control the Property of a Personal Chattle, or of Money executed by Payment. Fin. R. 27. Mich. 25 Car. 2. Client v. Bridges.


27. A Will shall be good as far as it may, though it may not hold so far as Testator intended it; Per Lord Keeper. Fin. R. 159. Mich 26 Car. 2. Nurie v. Yarworth. holden void it by any Means it may take Bif-C. Per Gawdy J. 2 Le 43; pl. 57. in Cafe of Inch-ly v. Robinson. 3 Le. 163. S. C. & S. P. by Gawdy. — — And. 197. Arg. In pl. 232.

28. A Will was allowed to work by Fractions, by severing a Term to 2 Mod. 8, attend the Inheritance, and making it a Term in gross in Favour of an Heir unintendedly disfederited, being an Infant En Ventre sa Mere, and so intended only for want of a sufficient Description. Fin. R. 159. Mich. 26 Car. Cordingly.

29. The Devise of a Trufi is not governed by 32 H. 8. and therefore, and because of several Accidents which cannot be foreseen, Chancery doth sometimes dispofe of Truits according to the presumptive Intention of the Parties. Fin. R. 159. Mich. 26 Car. 2. Nurie v. Yarworth.

30. Estates
It is a general Rule, that a Will shall never be construed to disbar
avit an Heir at Law unless such Implication be necessary, and not only
constructive and possible. Raym. 453. Mich. 33 Car. 2. B. R. Per

32. Where there is Construction against Construction, and not Construc-
tion against the Letter of the Will, Equity will favour the next of Kin
before a Devisee that is more remote. Vern. R. 5. pl. 2. Patch. 33
Car. 2. Winn v. Littleton.

Lands also mortgaged to him, devised all his Lands to J. S. who was not his next of Kin; and L.
who was the next of Kin took out Letters of Administration, the Court decreed the Administrator
to have the mortgaged Lands. Ibid.——2 Chan. Cafes, 51. S. C.

33. Devise to his Wife for Life if she do not marry, but if she do mar-
ry, that H. profenly after her Decease enter, have and enjoy all the Land to
him in Tail, the Remainder over. The Construction of this is, fail.
If the marry H. to enter profently, and if she do not marry, then H.
shall enjoy it in Tail with the Remainder over. 3 Lev. 152. Mich.
34 Car. 2. C. B. Laxford v. Cheek.

The same Word in the same Will is of the same Sense. 2 Chan.

The Words (Estates granted) in a Will were construed as if it had
been agreed to be granted. 1 Salk. 225. pl. 2. Mich. 5 W. & M. in B. R.
Milford v. Smith.

No Implication is to be received against express Words. 1 Salk 226.
pl. 4 Hill. 5. W. & M. in B. R. Goodwright v. Cornilh.

The Words (Heirs of the Body) cannot in the same Clause of a
Will be construed Words of Limitation as to Lands, and as to Goods
to be Words of Designation of the Person only intended to take the Goods;
Bergavenny.

Devise of Land to A. during her Widow-hood, or till such Time as
B. her Eldest Son should be 21, and then to B. and his Heirs for ever,
paying to his Son C. and his Daughter D. 40l. a-piece, and failing the
said B. to come to C. and his Heirs for ever, and failing C. to come to
D. and her Heirs for ever, and failing B. C. and D. to come to his
Brother E. H. and his Heirs for ever. This Word (Failing) extends
as well to failing of Payment of the Money, as failing of Heirs or
issue of B. and it is Estate Tail in B. with Remainders in Tail to C.
and D. Remainder over in Fee to E. H. Lutw. 304. 313. Trin. 8

Collateral Papers, Letters, and Sayings of Testator, cannot be taken
Notice of to influence the Construction of a Will; for that would be
to let them in, and make them Part of the Will itself; and by the
Statutes of Frauds and Perjuries every Part of a Will must be in Writ-


Devise.

The Intent of a Will must be certain and agreeable to the Statute, S. C. & S. P.

ing, but before that Statute, where a Will was in Writing, no Collateral Proofs by Papers or Words could be admitted, because a Will was a Compleat and Confummate Act of itself, therefore it must be construed by itself. 1 Salk. 232. pl. 10. Hill. 9 W. 3. in Cane. Berrie v. Falkland.

40. The Construction of Will is more favoured in Law to fulfill the Intent of the Testator, than any Deed or Conveyance executed by him in his Life-time. Therefore, where a Man by Deed gives Land to W. R. and his Assigns for ever, this is only an Estate for Life; but in a Will there very Words make an Estate in Fee. So a Devise to W. R. being his Eldest Son, and his Heirs, after the Death of his Wife, this is a good Estate for Life by Implication in the Will; but it is not so in a Deed. Now per Holt Ch. J. The Reason of this Divinity is not only, that the Testator is intended to be impus Confiniti, but because a Devise is not a Conveyance by the Common Law, but by the Statute; it is true, there were Devises before the Statute of H. 7. but those were not by Common Law, but by Custom, as in Cales of Burgage-Lands; now as Custom enabled Men to dispose their Estates in this Manner, contrary to the Common Law, so it exempted this Kind of Conveyance from the Regularity and Propriety required in other Conveyances; and thus it came to pass, that Will upon the Statute in imitation of those by Custom, gained such favourable Construction. 3 Salk. 127, 128. pl. 10. Hill. 12 W. 3. B. R. Fithcr v. Nicholls.

41. Matter that cannot appear till found, when found is not to be regarded in the Exposition of Wills. 1 Salk. 235. Per Holt Ch. J. Hill. 1 Ann.

42. Words in a Will that are good Sense are not to be transferred, otherwise it is Non-Plastic. Per Holt. 1 Salk. 236. pl. 13. Hill. 1 Ann.

B. R. Cole v. Rawlton.

43. Where a Devise to an Heir gives the same Estate that would de seco., nihil Operatur, and is void. Agreed per Cor. 1 Salk. 242. pl. 8. S. P. by Catiline. Devise to two Daughters, who are in Heirs, makes them Jointenants. D. 510 b. pl. 20. (his) Patch. 18 Eliz. Anon. And. 52. pl. 125. Mich. 16 & 17 Eliz. Eden v. Harris. S. P. and seems to be S. C.


44. Where a particular Estate is expressly devised, a contrary Intent Nor shall be not to be implied by Subsequent Words. 1 Salk. 236. pl. 14. Hill. 2 Ann. in Cane. Popham v. Bamfield.

2 Le. 41. in Case of Inchley v. Robinson. —— 3 Le. 167. —— D. 53. pl. 20.


46. The common and legal Sense of the Words shall be taken, if the Contrary be not plainly and necessarily implied. 1 Salk. 238. Hill. 7 Ann. C. B. Aumbe v. Jones.

47. Where a Will was wrote blindly, and hardly legible, and the Money Legacies were in Figures, and some seemed to have been altered, so that it was difficult of not impossible to read them, or to distinguish what the Legacies were, and particularly in one Place, whether 100l. or 300l. was meant, it was ordered by the Master of the Rolls to be referred to a Master to examine, and see what those Legacies were, and the Master to be assisted by such as were skilled in the Art of Writing. Wms's Rep. 425. Patch. 1718. Malters v. Sir Harcourt Malters.

B b b

48. A.
48. A. having lived long in Canterbury and died there, gave by her Will 50 l. to the Poor of the two Hospitals in Canterbury, (meaning them) and afterwards by a Codicil gave 5 l. a Year to All and Every the Hospitals, (not saying where the Hospitals were). Besides the two Hospitals in the Town, there was a Hospital out of the Town about a Mile, founded by the same Arch-bishop, and governed by the same Statutes. The Matter of the Rolls confined the General Words (all Hospitals) to those in Canterbury, and the rather, because if extended further, they would create a Deficiency, and so in a great Part defeat the Rest of the Will as to plain Legacies, in favour of doubtful ones. For the 5 l. per Ann. would be Perpetuities to whatever Hospitals it should be decreed. Wms's Rep. 421. 426. Patch. 1718. Malters v. Sir Harcourt Matters.

49. A Word mis-wrote in a Will, as (dying with Issue,) for (without Issue,) must be taken in that Sense, which makes the Will consistent with Reason, and good Sense. 8 Mod. 59. 60. Mich. 8 Geo. 1. Burr v. Davall.

50. Clauses seemingly contradictory shall be construed so in a Will as to make all consistent, as where a Devise is of Legacies to several Persons, and to Grand-Children to be paid at their respective Ages of 21, or Marriage, and after by a subsequent Clause he appoints, that all the Legacies thereby devised, shall be paid within one Year after his Death; the last Clause shall refer to the Legacies to the other Person only, and the first Clause to the Grand-Children only. 9 Mod. 154. Trin. 11 Geo. in Canc. Adams v. Clerk.

51. No Words are to be rejected which may be reduced to bear any legal Construction; It is true, if any Words are contrary to Law, or inexpedient, those must be rejected. As where a Devise of Land is to two, and the Survivor and Survivors of them, there the Word (Survivors) shall be rejected. Per King C. 9 Mod. 159. Trin. 11 Geo. in Canc. Barker v. Eyles and Smith.

52. There is a Diversity where a Will passes a Legal Estate, and where it is only Executory, and the Party must come into Composition, in order to have the Benefit of the Will; in the latter Case the Intention shall take Place, and not the Rules of Law; Per Lt. C. King. 2 Wms's Rep. 471. Trin. 1728. (Hill. 1731) in Case of Papillion v. Voice.

53. One devises the Surplus of his Personal Estate to his 4 Executors; this is a joint Bequest, and on the Death of one shall go to the Survivors, as well in the Case of a Legacy as of a Grant. 3 Wms's Rep. 115. Trin. 1731. in Case of Willing v. Baine.

54. All Wills and Deeds must stand as they did at the Time of making them and cannot be made good by any After Act, especially where such Act is Collaterally, and is, upon its happening, such a Consequence, upon which no Estate can commence by Law. Per Ld. C. Talbot. Cates in Chan. in Ld. Talbot's Time. 26 Patch. 1734. in Case of Clare v. Clare.

55. The Devise of a Trust is to be confirmed in the same manner as that of a Legal Estate, and not to be varied by subsequent Accidents. 3 Wms's Rep. 259. Patch. 1734. Atkinson v. Hutchinon.

56. If a Will is general, and that taking his Words in one Sense will make a Compleat Disposition of the whole, whereas taking them in another will create a Chart, they shall be taken in that Sense, which is most likely to be agreeable to his Intent of disposing of his whole Estate according to the Introductory Words of the Will, which were (as touching my Worldly Estate &c. I give, devise, and dispose of the
(F. a. 2) Construction. Contrary to the Words to make the Will take Effect according to Testator's Intention.

1. A. Had Issue two Sons, and devises Black-Acre to the eldest, and if be dies without Issue, or within the Age of 21 Years, that it shall remain to the Youngest. A. died; the Eldest Son had Issue a Daughter, and died within the Age of 21. Adjudged by this Word (or) shall be taken for the Word (and) by Reason of the Intent of the Devise. Arg. 2 Roll Rep. 282. cites 27 Eliz. C. B. Sole v. Gamman.

2. If a Man hath Issue three Sons, and devises Land to the Eldest in Tail, Remainder to the Second in Tail, Remainder to the third in Fee, and the Eldest dies, having Issue in his Father's Life-time, his Issue shall have it without a new Publication, because the Intent of the Devise was not to disinherit any of his Sons, and it may be, he did not know of the Death of his Eldest Son, who was, peradventure, beyond Seas, or elsewhere absent; and there is not any Reason to make such a Construction as to disinherit his Issue, for by such Means many may be disinherited, and the Will is expounded against the Intent of the Devise. But of such a Devise to a Stranger, it may perhaps be otherwise; for the Devisee being dead, the Intent of the Deviseor doth not appear to carry it from his own Heir to the Heir of a Stranger; Per Popham, Ch. J. Cro. E. 424. pl. 20. Mich. 37 & 38 Eliz. B. R. in Case of Fuller v. Fuller.

3. A Man devises a Rent-Charge of 50l. per Annum to his Wife and his Son for their Lives, and the Life of the longer Liver of them; and that after the Son shall attain the Age of 13 Years, he shall have 20l. a Year out of this Rent for his better Maintenance during his Mother's Life. This is a Devise of an entire 50l. per Annum to the Femme until the Son shall attain this Age, and after they are several Rents, and one Joint-Rent; for if the Testator had intended the Rent to be Joint, then this Clause would have been absurd. For if the Rent was Joint, then the Son should have 25l. a Year, being the Moiety of the said Rent of 50l. But the Testator said, the Son should have 20l. a Year Pro Meliori Manutentia, whereas this would be Pro Deteriori Manutentia sua, if the Rent should be continued to be Joint; Per Cur. Saudit. 282. 284. Trin. 21 Car. 2. Duppa v. Mayo.

4. A, devised all his Estate to his two Nieces, J. and E. to be equally divided between them during their Lives, and after the Death of them two, then to the Heirs of J. The Question was, upon the Death of J. living E., whether J. and E. were Joint-Tenants by the Will, or whether the Heir of J. should have the Moiety, now living E. and it was adjudged a Joint-Tenancy to avoid the Hazard of the Devise by making it a Tenancy in Common; for tuppoling it a Tenancy in Common, and that E. had died first, Holt J. asked what would become of the Moiety's Part?
(G. a) Averment. As to Wills before the 29th of Car. 2. Cap. 3.

1. If one devifes Lands to the Heirs of J. S. and the Clerk writes it to J.'s, and his Heirs, the same may be holden by Averment, because the Intent of the Deviser is written and made, and it shall be taken for that which is contrary to his Intent and Good for the Receiver. But if a Devise be to J. S. and his Heirs, and it was written but to the Heirs of J. S. there an Averment shall not make it good to J. S. because it is not in Writing, which the Statute requires; and to an Averment to take away Surplusage is good, but not to increase that which is defective in the Will; Per Anderfon Ch. J. Godd. 131. pl. 149. Hill. 29 Eliz. C. B. Anon.

2. In an Afflile of Noyel Difliefen by A. against B. it was given in Evidence at the Afflile that W. B. was left, and having Issue two Sons and two Daughters, devised his Lands to his younger Son in Tail, and for want of such Issue, to the Heirs of the Body of his eldest Son, and if he dies without Issue, that then the Land shall remain to his two Daughters in Fee. W. B. dies, the younger Son dies without Issue, living the eldest Son, having Issue him who is Tenant in the Afflile. The Tenant produced Witnelves, who affirmed upon their Oaths, that the Deviser declared his Meaning concerning the said Will, that as long as the eldest Son had Issue of his Body, that the Daughter should not have the Land, but the Court utterly rejected the Matter; and Judgment was given for the Plaintiff. 2 Le. 70, pl. 94, 29 Eliz. Chillonner v. Bowyer.

So in...

3. If a Man devifes Land to his Wife for Life generally; this cannot be... where the Intent of the Testator cannot be collected out of the Words of his Will. 4 Rep. 4, a, cited it to be resolved by the two Ch. Justices and all the Court in Mich. 38 & 39 Eliz. in the Court of Wards, in the Case of Leake and Randall.

4. No Averment can be upon a Will to supply an Use or Trust of Land; for a Will of Land devizable by the Statute ought to be in Writing, and if the Trust be not in Writing it is to be rejected by Force of the Statute of 32 H. 8. Cap. 1. of Wills. Jenk. 115, pl. 26, cites 4 Rep. 1. [4. a. by the Reporter in] Vernon's Cafe.

5. A.
5. A hath Issue two Sons, both named John, and conceiving his eldest Son to be dead, he deviseth his Lands by his Will to his Son John generally, when in Truth the eldest Son is living; In this Case the younger Son may allege and give in Evidence the Devise to him, and may produce Witnesses to prove the Intent of the Father; and if no Proof can be made, the Devise shall be void for the Uncertainty. Resolved by Anderlon and Wray Ch. J. 5 Rep. 68. b. Mich. 34 Eliz. in Cheynys Cafe.

6. I give to Kath, my Wife all the Profits of my House and Lands lying in the Parish of Birling and L. at a certain Street there called Brook-Street. Upon a Special Verdict it was found, that there was not any Village or Hamlet called Birling in the said County, and that the Land, supposed to be devided, lyeth in Birling-Street; but no Mans verbal Averment here shall be taken or admitted to be contrary to the Will, which is expressly set out in the Will. 1 Brownl. 132. Trin. 6 Jac. Pacy v. Knollis.

7. A Will is made, and A. is made Executor and no Trust is declared, and Testator at his Death declares, that his Will is for the Benefit of his Children. Hyde Ch. J. asked if this Intent might not be averred, and said, nothing was more common. And per Doderidge J. For the making an Estate you cannot averr otherwise than the Will is, but as to the Disposition of the Estate you may averr. And per Jones J. The Reason of Cheney's Cafe 5 Rep. is, that whoever will devise Lands ought to do it by Writing, and if it be without Writing it is out of the Will, though his Intent be to otherwife. Godb. 432. Pasch. 3 Car. 2. B. R. in Cafe of Evers v. Owen.


9. A Trust may arise by Parol, and the Executor may be a Trustee by the Will of the Testator, though not mentioned in the Will. N. Ch. R. 135. 21 Car. 2. Pory v. Juxon.


(G. a. 2) Averment, or Parol Evidence, allowed in what Cales to explain or supply Defects Wills since 29 Car. 2. Cap. 3.

1. T H O U G H a Parol Averment shall not be admitted to explain a Will, so as to expound it contrary to the Import of the Words, yet when the Words will bear it, a Parol Averment may be admitted, as 5 Rep. 68. to ascerntain the Person, but in no Case to alter the Estate; Per North and Atkins. Freem. Rep. 292. in pl. 343. Trin. 1677. in C. B. in Cafe of Steede v. Berrier.

2. The Father of the Plaintiff and Defendant devised his ESTATE to E. his eldest Son, with a Remainder to his first, second, and third Son, and for Default of such Issue, to his second Son H. with Remainders to his first, second, and third Sons; and so to his third Son &c. Provided that if E. when he enjoyed the ESTATE should have no Issue Male living, that then he should pay 40l. per Annum for the Maintenance of the eldest Son of H. and for his Education, in such manner as was fit for his Degree, until his eldest Son should have a Son produced and living. E. the eldest Son had Issue a Son, who lived three Days and then died; It was in Proof that the
the Eesator did declare that his Intent was, that this 40l. per Annum should be paid in Case E., should have a Son born that should die suddenly after. Per Cur, the Annuity is determined, and a collateral Proot shall not be admitted against the express Words of the Will; and it is probable his Intent was, that the 40l. should be continued to be paid, altho' E. had a Son which died suddenly after; yet now it must be taken upon the Words of the Will, and an Averment of the Intent of the Party contrary to his express Words shall not be received, and to decreed against the Plaintiff. If it had been a Trust, the Intent might have been supplied by Proof; For Cancellor. 2 Freem. Rep. 52, 53. pl. 63. Patich. 1680. In Curia Canc. Chamberlaine v. Chamberlaine.

3. One may aver the Trust of a Personal Estate. Per Ld. Chancellor. Vern. 30 Hill. 1681. Fane v. Fane. 4. A. had Frehold and Copyhold Land, and makes his Will in these Words; I give all my Estate of what kind forever, not before-mentioned by me to my Wife, whom I make my Executrix; and it was held the Copyhold Land did pass, not by Force of the Words alone, but because it appeared that he had made a Surrender of the Copyhold Estate before to the Use of his Will. 12 Mod. 594. In Case of Shaw v. Bull. cites Mich. 32 Car. 2. Rot. 473.

5. A. made his Wife Executrix, whereupon the Son by several Intimations gets his Mother to prevail on his Father to make a new Will, and himself named Executor, declaring he would only be Executor in Trust for her. It appearing to be a Fraud as well as a Trust, North K. decried it notwithstanding the Statute of Frauds, though no Trust was declared in writing. Vern. 296. pl. 290. Hill. 1684. Thyn v. Thyn.

gave to his Godson, but was persuaded by the Wife to give it to her, and promised that she would give the Godson the Part assigned for him, and decreed against the Wife, notwithstanding the Statute of Frauds.—And ibid. 4 in S. C. cites Chamberlain's Case, where a Son and Heir apparent persuaded his Father not to make a Will which he intended to make, and thereby to make certain Provisions for his Younger Children, promising that his Brothers and Sisters should have those Provisions whereupon the Father forbore to make them, and Chancery decreed the Heir to make them.

6. A. devised his Real Estate for Payment of his Debts and makes his Wife Executrix, Parol Proof was admitted to prove A's Declarations, that his Executor should have his Personal Estate disbursed of his Debts. 2 Vern. R. 252. pl. 240. Hill. 1691. Counsel of Gainiborough v. Earl of Gainsborough.

7. A. devised Land to B. to sell and dispose of for Payment of Debts, the Heir sued for the Surplus as his by a Resulting Trust being not disposed of by the Will; Per Cur. the Estate in Law being vested in the Devisee, he should have been admitted to his Proof of A's Parol Declaration, if it had been wanting and necessary. 2 Vern. 253. cited in pl. 240. Hill. 1691. by Hutchins Ld. Commissi white the Case of Crompton v. North.

8. The Surplus by Will was devised to the Wife; Averment was taken that she was intended only as a Trustee for her Son, and that the Testator
Devise.

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fo declared at the making of the Will. And a Decree grounded on declared at the making of the Will. And a Decree grounded on decreed accordingly. 2 Vern. 254. in pl. 230. Hill. 1691. cited by Rawlinson one of the Lords Commissioners, as the Case of King-

mill v. Ogle.

9. Plaintiff endeavouring to have the Will explained by Depositions 2 Vern. R. of Witnelfies touching what the Testator declared and the Instructions he gave for the drawing his Will, Per Cur. Devife concerning Land with S. P. —— be in Writing and we cannot go against the Act of Parliament. 2 ibid 539.


Lands devilled to A. in Tail, A. died in Testator's Life, leaving Issue Male, and then the Will is Re-published, the Court refused to admit Parol Declaration of the Testator, to prove his Intention that the Issue Male of A. should take by the Will. 10 Mod. 99, 99. Mich. 11 Ann. B. R. Lord Landif-
down's Cafe.


a Remembrance over and above their Cofts and Charges he gives 20s. S. C. cited a piece to the Executors; Per Cur. the Will declaring that the Executors were only in Trust, and above declaring for whom the Trust was, the Perfon may be averred, and two of the Executors having by their Anwfer confessed the Trust, and being likewise fully proved that it was the Testator's Intent, and that he declared it a Trust for the Wife; decreed the Trust for her with Cofts against the Adversary Execu-

11. Dower. The Defendant pleads, that the Husband was feifed of the Land in Queftion, and of other Lands in A. and that he by his Will devi'd the Lands in A. to the Demandant, for her Life, and died, and that the Demandant enter'd into them by Virtue of the said Devi'se; and aver's, that the Land devi'ded was devi'ded to her by her Hus-
band in Satisfaction of her Dower; the Demandant demurs. Judgment was given for the Demandant by the whole Court; because the Aver-
ment being of a Matter out of the Will, and not contained in it, ought not to be allowed; and that Leak and Kendal's Cafe, 4 Rep. 4. a. being expres in Point, and always allowed for Law, ought not to be questioned at this Day. But afterwards upon a Bill brought in Canc. by the Defendant being heard by the Lord Chancellor Chawers, he was of Opinion, that in Equity such Averment of the Testator's Intent ought to be admitted, and that the Wife in such Cafe should not have both her Dower and the Land devi'ded; and (as I have heard) decreed in this Cafe accordingly. Ld. Raym. Rep. 438. Hill. 10. W. 3 L.

Lawrence v. Dodwell.

12. Sir R. B. having Issue only Daughters, settled his Estate upon Trustees to sell, fubje& to a Power of Revocation; After-

wards upon the Marriage of his Daughter with the Plaintiff by Deed reciting that his Intent was, that the Manor of C. in Queftion should go to the Issue Male of the Plaintiff, he thereby agreed that if the Plaintiff should be minded to purchase the same to him and to his Heirs, he should have it for 1500l. to be raifed out of this Manor but did not mention whether it should be in Satisfiation of the 1500l. agreed to be allowed the Plaintiff in Cafe he would purchase the same. But a Queftion arose, whether the Plaintiff should be admitted to read Witnefies to explain the Testa-

tor's Meaning in that Particular? and alleged that it might be fo done, the Queftion being only touching the Personal Estate, though it could not be fo in a Will touching Lands, because by the Statute fuch Will must be in writing, and no Averment shall be received out of the Will, but as to a Personal Estate it had been fo done in my Lady Sainsborough's Cafe, in this Court. To which it was an-

fwered,
fwered, per Cur. that what was read there was in Affirmance of the Law upon the Will, which was to carry the Personal ESTATE to the Executor, and that Cafe stood fingly by itself. But in the Case of the Lord Falkland and Cary it was denied that Letters should be read to explain the Agreement, though it was then intituled on, that Letters were writing, and so more certain. And the Matter of the Rolls cited the Case of Leake v. Randall, in Vernon's Case, in the 4 Rep. that a Collateral Thing devis'd by a Will, could not be averted to be in Satisfaction of Dower, unless it did appear to be so by the Will; but here the 1500l. devis'd was not collateral, because it was to arise out of the same Land. 2 Freem. Rep. 245, 246, 247. pl. 313. Hill. 1700. Bromley v. Pettiplace.

13. J. S. having Three Daughters and several Grand-children and Great-Grand-children, made his Will and devise'd the Surplus of his ESTATE to be equally devis'd amongst all his three Daughters and all his Grand-children and Great-Grand-children, that should be living within two Years after his Death, and died; and within two Years after his Death other Grand-children were born; the Plaintiff's examined Witnesses, to prove J. S.'s Intent, that none born after his Death should take; and the Question was, whether they could be admitted to read this Proof, and my Lord Keeper was of Opinion that such Proof might be admitted, so the Witnesses were read, but their Depositions were only that J. S. said so or so, or to that Effect, which my Lord said, signified nothing, for that makes the Witnesses the Judge; and he ought to set down the very Words for the Court to judge of; but without this Proof my Lord held, that the Words in the Will (within two Years after my Death) were to be taken retributively, and extended to none born after, and decreed accordingly, which Decree was affirmed in the House of Lords. Abr. Equ. Cafes. 231. Trin. 1700. Dayrell v. Mole worth.

14. A. devise'd his Real ESTATE to B. and made B. Executor, and wills that out of his Personal ESTATE and a Years Profits of his Real, he should pay his Legacies and devise'd 40 l. per Annum to C. to maintain him at Cambridge; the Executor pleaded Plene administrativ, and it was admitted, that the Will had made above a Year's Profits of the Real ESTATE liable, but on the Evidence of D. that B. promised A. to pay or otherwise A. would have charge'd his Real ESTATE with the Payment of it, the Real ESTATE was decreed at the Rolls to stand charge'd with the Annuity, and Wright K. on Appeal affirmed the Decree. 2 Vern. 506. Trin. 1705. Oldham v. Litchford.

In a Will the Bequest was, I give my Household Stuff, as Bras, Pewter, Linnen, and Woollen whatsoever, except a Trunk under the Chamber.
Devise.

Chamber-Window; the Maker of the Will was examined as a Witness, and swore, that the Testator directed him to insert all his Goods except the Trunk, ordered the Deposition to be read, as in Case of a Devise to Son John, when he had two Sons John, or if the Devise had been his Trunk, when he had Three Trunks. 2 Vern. 517. Mich. 1703. Pendleton v. Grant.

16. A. on delivering his Will to B. to whom he gave almost all his Estate, said, as B. own'd before several Witnesses, that if C. (A's Elder Son) behaved himself well he might allow him 20 l. per Quarter, and if he used that well B. might make it 40 l. per Quarter; Decreed 40 l. per Quarter to C. during Life. 2 Vern. 559. pl. 557. Trin. 1706. Kingman v. Kingman.


owed by Bond to Steel, which was the Obliger's Maiden-name, but though he knew she was married, yet he forgave her Husband's Name, which was Fitch, and this being proved by the Person that drew the Will, and another, the Payment was decreed accordingly. Ch. Decr. 229. S. C.

18. The Construction of making a Legacy to be a Satisfactory, has in the Maker many Cases been carried too far, and it is reasonable in such Cases to admit of Parol Proof as to the Testator's Intention. Per Cowper C. 2 Vern. 594. Mich. 1707. Cuthbert v. Peacock.

Evidence might be received. 2 Vern. 646. Hill. 1709. Chapman v. Salt.

19. J. B. having had a long Acquaintance with D. P. and having 500 l. of her's in his Hands, married E. and afterwards made an Instrument all of his own Hand-writing thus, viz. In the Name of God, Amen. I A. B. of &c. do make this my last Will and Testament for fear of Mortality, till I can settle it more at Large; and I do give and bequeath the Sum of 1000 l. unto D. P. to be paid by my Executor, Administrator, and for sure Payment thereof, I do charge all the Real and Personal Estate which I have in the World, I being very desirous to make a Provision for the said D. P. for several good Reasons inducing me thereunto. In Witness whereof I have hereunto set my Hand this present 7th Day of December, 1704. Signed J. B. and delivered the same unto the said D. P. and about a Fortnight before his Death, which happened in January, 1705. J. B. did declare he had left D. P. an unquestionable Security for 1000 l. charged upon his Real and Personal Estate; and that he had done the same for fear of Mortality, till such Time as he can make a full and compleat Will, which he declared he would do so soon as his Wife was brought to Bed, to see if it were Male or Female. He died suddenly, 6 Feb. 1704. The Widow afterwards came to take Administration to her Husband, and a Caveat being entered by D. P. she appeared and pleaded this Will or Schedule Testamentary, and proved by four Witnesses what is alleged before. She was also examined on Interrogatories, on the Prayer of the Respondent, on which the Depo'd that the was married to J. B. 18 July 1700, at his Chambers in the Inner Temple, by R. H. in ec deceased. (But the Marriage was not inflicted on H. being dead) his Hand was proved. The Cause coming to be heard before the Judge of the Prerogative (Sir Richard Raines) he gave Sentence against the Will, and pronounced that J. B. died Intestate, without any Will at all by him made. On Appeal being heard before the Delagates, among whom were Lord Ch. J. Holt, Baron Price, and Judge Dormer, the Sentence was reversed, and they pronounced for the Will. 2 Ld. Raym. Rep. 1282, 1283. Patch. 6 Ann. B. K. Powell v. Beresford.

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20. There
20. There is Difference between a void Devise and a doubtful and uncertain one. As if J. S. hath several Sons, and a Devise is made to one of the Sons of J. S. this is entirely void, and can never be made good; but if it be only doubtful and uncertain, it must receive its Construction from the Words of the Will, and no Parol Proof or Declaration ought to be admitted out of the Will to alter it, but in Case of Two Sons named John, it is consistent with the Words of the Will, to admit Proof which of them was intended, and the Words in the Will are not at all altered by it, and this is according to Lord Chevneys Cafe 5 Rep. And now since the Statute of Frauds & Perjuries, which orders all Wills to be in Writing, it is much stronger. Per Tracy J. 3 Ch. Rep. 183. Trin. 7 Ann. in Canc. in Cafe of Litton, alias Strode v. Falkland.

Devise.

21. A. made his Wife Executrix, and devised to her the Use of his Table Plate for Life, and after to C. his Grandson, and made no Disposition of the surplus. Proofs were allowed to be read, that A. intended to give the Surplus to his Executrix, it being to keep Imposition or Rule to Equity, but the Proofs being slender and uncertain, the Court laid them out of the Cafe, and considered it only on the face of the Will, and decreed a Distribution; Per Cowper C. 2 Vern. 648. Hill 1709. Lady Granvill v. the Duchefis of Beaufort.

In this Cafe of the Duchefs of Beaufort v. Lady Grandville. MS. Rep. Upon Appeal to the House of Lords, 15th December 1710. The Appellants Counsel insisted that it was proved in the Cafe, that it was the Intent of the Testator that the Appellant should have the Surplus of the Personal Estate to her own Use, which Proof, as it agrees with the Rules of Law to prefer the Legal Title to the Executrix, which of Common Right she has to the Surplus, so it shall prevent and ought to be but the Contraction of Equity, which would create a result of Trust, and make the Executrix to be a Trustee in Equity for the next akin, and for the Reasons (among others) pray'd that the Decree might be reversed, and it was reversed accordingly without Division.

2 Vern. 675. Mich. 1711. Wingfield v. Atkinson. S. P. and cites the Cafe of * Littlebury v. Buckley, as first decreed in the Mayor's Court for the next of Kin, but on Appeal to the House of Lords the Executors were admitted to read Writs, to prove the Testator intended them the Surplus, and on that Point the Lords revers'd the Decree.——Wms's Rep. 114. Hill 1729. S. C. But Bld. 116. says, that this Decree was revers'd in the House of Lords + But denied where it was in Contraudiction to the Common Law. 10 Mod. 99 Lord Lansdowne's Cafe. * Cited 9 Mod. 10——2 Vern. 677.——Cited to Mod. 99 in Lord Lansdowne's Cafe. † They held that Parol Proof ought to be admitted in favour of the Executor's Title, consistent with the Will. S. C. cited in Cafe of Ball v. Smith. 2 Vern. 677. Hill 1711.

Where an Express Legacy is given to the Executor without any further Words, as that it was given for Care and Pains &c. Parol Evidence may in such Cafe be admitted of Testator's Intention, but not where following Words declare a Trust. Per Powis J. in Chancery in the Absence of the Lord Chancellor. 2 Wms's Rep. 161. Trin. 1723, in Cafe of Rushfield v. Careless.

22. A. sent for B. to make his Will, who took it in Characters from his Mouth, read it to him, and be approved theret. B. the next Day brought the Will drawn up in four Sheets of Paper, but the Testator was not sensible and died. After the Testator's Death B. who drew the Will was examined as a Witness. 2 Vern. 647. pl. 577. Hill 1709. Stith v. Pelham.

23. Where the Words stand in Aequilibrio and are so doubtful that they may be taken one way or another, there it is proper to have Evidence read to explain them, and we will consider how far it shall be allowed, and how far not, after it is read, and this is not like the Cafe of Evidence to a Jury, who are easily byas'd by it, which this Court is not, and the Distinction in Cheney's well warrants the Reading of Evidence where the Testator's Intent is doubtful, As where a Man had two Sons,

Supply the Words of a Will. If a Devise be to one of the Sons of J. S. who has several Sons, it is void, and shall not be supplied by Parol Proof. But the Will that must pafs the Land must be in Writing, and must be determined only by what is contained in the written Will.


25. Croft the Testator devised particular lands to his Executors to be paid for Payment of all his proper Debts, and makes A. and B. his Executors, and gave Direction to the Person who drew the Will to give all his Personal Estate to his Executors; but by Mistake that was omitted in the Will, though proved in the Cause by the Person who drew the Will, Supposing then such Parol Evidence of the Intent of the Testator to be good, Quere if the Personal Estate shall be employed in Aid, and Exonerating the Real Estate towards Payment of the Testator’s Debts, notwithstanding the particular Devise of the Personal Estate to the Executors? As to the Parol Evidence of the Intent of the Testator the Will was cited in the Case of Littlebury v. Buckley in Dom. Proc. Harcourt C said, he must continue the Intent of the Testator out of the Words of the Will, and not upon Parol Evidence in this Cause. Parol Evidence was admitted in Littlebury and Buckler’s Case in Dom. Proc. because the Parol Evidence there was an Affirmance of the Right at Common Law in Opposition to a Presumption in Equity, that where the Executor hath a Specific Legacy, the Surplus was not intended to be given to him, but in this Case the Parol Evidence is to controvert the Common Law, and give the Personal Estate to the Executor, which is Assets at Common Law to pay Debts. Decree, That the Executors account for the Personal Estate of the Testator. MS. Rep. Mich. 12 Ann. in Canc. Gale v. Crofts & all.

26. A by Will gave 500 l. to B. and made B Executor, and made no express Disposition of the Surplus. The next of Kin brought a Bill for a Distribution. B. answers and avers the Benefit of the Surplus by Mistake of the Law in that Point, and was denied by Trevor Matter of the Rolls to amend his Anfwer; who decreed, That having wav’d the Surplus by his Anfwer, he should account for it. On Appeal to Ld. Cowper, his Lordship said, it would do very well if this Point concerning the Surplus was once settled and certain either way; yet in this Case, where the Defendant himself had by his Anfwer wav’d any Title to the Surplus, he would not, against his own Confession decree it for him. In Easter Term 1718. the Cause coming before Ld. C. Parker upon a Master’s Report, his Lordship said, he could not but incline to help the Defendant [as to other Matters in Dispute] he being in a way of losing his Rights by Mistake or Misadvice only of his Counsel [as to this Point of the Surplus.] Wms’s Rep. 297, to 300. Mich. 1715. 1718. Rawlins v. Powell.


28. Testator devised his Estate to the right Heirs of his Mother, and S C. Wms’s Proof was admitted to shew that he intended it for the right Heirs of his Grandmother, the Estate coming from her Family, and this was held not Ld. Mac-
not contrary to the Will, and was said to be decreed accordingly. 9 Mod. 10. Pach. 1722. cited as the Case of Harris v. Bishop of Lincoln.

29. Where the explains itself no Evidence Debors shall be admitted. Per Cur. 9 Mod. 11. Trin. 8 Geo. Raithfield v. Carelefs.

30. A Legacy devised to Catherine Earnley was claimed by Gertrude Yardley. There were several Circumstances in the Case to induce a Belief that Gertrude Yardley was the Perfon intended; as that there was no Catherine Earnley that claimed this Legacy, but it proved the Testator's Voice was low and barely intelligible, that Testator usually called the Claimant Gatty, which the Scrivener might easily mistake for Katy, and that Testator for better Information who this Legatee was, directed the Scrivener to J. S. and his Wife, who declared that Gertrude Yardley was the Perfon intended, and also that Testator in his Lifetime had declared be would do well for her by his Will. The Matter of the Rolls at first inclined that the Legacy was void, but afterwards, upon Consideration held it good, being only of a Personal Thing, but had it been of Land it had been otherwise; and he said, that as originally a Bequest of a Legacy was governed by and construed according to the Civil and Canon Law, so shall it be after the making the Statute of Frands, provided there be a Will in Writing. 2 Wms's Rep. 141. Pach. 1723. Beaumont v. Fell.

31. A. by Will gave 5l. a-piece to her nearest Relations, and made C. a Stranger sole Executor, and gave him 5l. for his Care in fulfilling her Will, but made no Disposition of the Surplus. The Scrivener who drew the Will swore, that A. at the Time of making the Will declared her Intention that C. should have the Surplus if any, for that he had been her very good Friend, and her Relations ungrateful to her, and that her Directions to him were to give the Surplus to C. which he would have done expressly but that he thought it needless, as being only what the Law implied. On the other Side was some flight Proof (as the Reporter terms it) that A. had declared her Intentions to give the Surplus of the Personal Estate to her next of Kin. Mr. Justice Powis (who sat in the Ld. Chancellor's Absence) took Notice that here was Parel Evidence on both Sides, and that what the Scrivener swore was contradicted by the Evidence on the other Side, but that there were Words in the Will declaring the Executor to be only a Trustee, 5l. being given him for bis Care in fulfilling the Will, which would amount to a Declaration of Trust, and goes beyond all Parel Proof, and decreed a Distribution amongst the next of Kin, but referred Costs till after the Account taken. 2 Wms's Rep. 158. Trin. 1723. Raithfield v. Carelefs.

32. A. having about 10000l. in Money and upon Securities, by will taking Notice of whether Estate, and that the intended disposing of the same by her Will gave pecuniary Legacies to every Brother and Sister and Half-Brothers and Sisters, and to B. her eldest Brother 500l. and made him Executor, but made no Disposition of the Surplus. Ld. C. Macclesfield said it was neceffary that the Rule of Property should be known, fixed, and certain, that People might know which way to steer, and that the Court had frequently allowed Parel Evidence in Favour of the Executor to prove Testator's Intentions, to rebut that Equity which otherwife would be in Favour of the next of Kin, and cited the Lady Gainsborough's Case, and the Oblinacy of the Drawer, for which the Executor ought not to suffer, and owned that it was dangerous to allow Parel Evidence in Case of Discourses at a Time different from that of making the Will, but that abstracted from that Case it has been admitted. 2 Wms's Rep. 210. Hill. 1723. D. of Rutland v. Dutchefs of Rutland.
33. In Canc. Pasch. 9 Geo. coram Ld. Chanc. A Man devised Lands to two Persons and their Heirs in Trust, to pay some Annuities &c. and he willed, that what remained should go to his Heirs for ever on the Part of his Mother. N. B. This Estate descended from the Grandmother to his Mother, and from her to him. The Question was, Whether he who was Heir of the Mother's Side by the Grandmother should take, because he had also an Heir on the Mother's Side by the Grandfather. Ld. Chanc. admitted Parol Proof to be given of this, that he devised the Heir by the Grandmother, the Estate coming from her. A Devise was to a Son by Name, and his Christian Name was mistaken, but it being added, such a Son in the Service of the Duke of Savoy, Parol Evidence was admitted, and this Son, though his Name was mistaken, had the Estate. So if two Persons of the same Name, Father and the Son, it shall be intended of Father, but Evidence may be admitted to prove which was meant. The Words (shall go and come to my Heirs a parte materna) are no more than a Declaration that the Trustees should not take, and the Lands shall descend according to the old Uses, as if these Words had not been in the Will. Otherwise, if I devise to A. and his Heirs, to the Use of B. for Life, Remainder to C. in Tail, without making any Disposition of the Remainder in Fee, then this Remainder shall go to A. for the Estate was given to A. and his Heirs, and he shall have all except what was particularly limited to B. and C. so that these Words do amount to a Declaration that the two Devisees shall not take this Remainder; But if there are Words in a Devise which expresses that the Devisee shall be only a Trustee for paying Debts or the like, As where an Estate is directed to be sold for that Purpoze, there they shall have nothing but under the Execution of the Trust, and the Surplus shall resulf back to the Heir, as Part of the Estate undivided of. He remembered, and was of Counsel in Cafe of Abbot v. Burton. Hob, and other Books were denied for Law about their Notion of the old Use; and in this Cafe the Remainder in Fee had gone to the Devisees, had not the Devisor declared that it should go in such manner as the Law had limited. But this Will would have had another Construction if there had been any Alteration of the old Use by a Settlement, the Bill being to have an Execution of the Trust. Decree that Trustees should convey to the Grandmother's Heir.

34. A devise all her Hoykold Goods to J. S. and the Surplus of her Personal Estate &c. to J.N. Upon a Reference to a Master and upon whose Report the Cause came on, whereby, though it reported manifest Intentions and Declarations of the Tettatrix that she did not intend her Plate should pass, yet the Master certifying that the Plate was commonly used in the House, the Master of the Rolls rejected all the Evidence touching the Intention of the Party, there being a compleat and plain Will in Writing, which must not be altered or influenced by Parol Proof. 2 Wms's Rep. 419. Trin. 1727. Nichols v. Osborn.

35. A Presbyterian who had three Infant Daughters bred up that Way, and had three Brothers Presbyterians, makes his Will, appointing his Brothers and also a Clergyman of the Church of England Guardians to his three Infant Daughters and dies, having sent his eldest Daughter to his next Brother; the Clergyman gets the two other Daughters into his Custody, and places them at a Boarding School, where they were bred according to the Church of England, and brought his Bill to have the eldest Daughter placed out with the other Daughters; the three Brothers that were Presbyterians brought their Bill to have the two Daughters delivered to them, offering Parol Evidence that the Testator directed and declared he would have his Children bred up Presbyterians. The Court declared no Proof out of the Will ought to be admitted in the Cafe of a Devise of a Guardianship, any more than in the Cafe of a Devise of Land. The Lord Chancellor would do no more than direct the Master to inquire whether...
36. A Bill was brought by the Plaintiffs as next of Kin to the Deceased against the Defendants as Executors, in order to have a Distribution of the Residue of the Personal Estate amongst them. The Defendants set forth in their Answer a Clause of the Will, whereby the Testator gave the Residue of this Estate to the Poor of the Parish of K., in the County of L. Upon this the Parties joined in Communion, and now the Fact disclosed upon the Communion, and stated by Counsel for the Defendants was, that this Parish of K. was not in the County of L., but in the County of N., and likewise that the Testator really thought that this Residue of the Personal Estate should not amount to above 10l. and that be declared so at the Time of making his Will, whereas in Truth it amounted to near 1000l. The Master of the Rolls declared his Opinion to be, that Parol Evidence ought to be admitted to help out the Description of the Parish in this Case, and that this was a settled Rule in Equity; for which Reason he was of Opinion, that the Parish of K., in the County of N., were well intitled under this Will, but he was of Opinion that Parol Evidence ought not to be admitted in Relation to the Quantity of the Thing devised; and therefore he thought the Parish was well intituled to the Whole, accordingly dismissed the Bill. Ex relatione. 2 Barnard. Rep. in B. R. 118, 119. Hill. 5 Geo. 2. 1731. at the Rolls. Brown & al. v. Langley & al.

37. Where the Wife was made Executrix, and a considerable Legacy devised to her, yet the Proof being strong that the Testator intended the Surplus to her own Use, the same was decreed accordingly both at the Rolls and in Chancery. 2 New. Abr. 426. cites Hill. 6 Geo. 2. Hatton Hatton.

38. But where A. possessed of a considerable Personal Estate, made his Will, and thereby devised several Legacies, but gave none to his Executor; and the Question was, Whether Parol Evidence ought to be admitted to prove that the Testator did not intend that the Executor should have the Residue of his Personal Estate, but that the same shall go according to the Statute of Distributions; and it was held clearly that no such Evidence could be admitted, for that this would not be to admit Evidence to oust an Implication, but was to admit Evidence to contradict the Rule of Law, and what appeared on the Face of the Will. 2 New. Abr. 426. cites Hill. 6 Geo. 2. Lady Osborne v. Villiers.

39. One by Will made 23d June 1732, bequeathed to B. the Plaintiff, a Legacy of 500l. and all his Plate, and to the Defendant S. all his Leasehold Mesuages; and after several other Legacies and Bequests as well as deviting some Freehold and Copyhold Lands, he devised as follows, viz.: “And as for the Rest, Residue, and Remainder of my Estate, whether Real or Personal, whereof I am seised or possessed, or which I am any ways intituled to, which I have not hereby devised, given &c., I give and bequeath the same and every Part thereof of and all my Rights, Title, and Interest therein and thereto unto such my Executors, or Executors herein after named, as shall duly take on him or them, the Execution of this my Will, according to the true Intent and Meaning thereof, his or their Heirs, Executors, Administrators, and Assigns, as Tenants in Common and not as Jointtenants.” And afterwards appointed the Plaintiff and Defendant his Executors and so at after died; and the Plaintiff and Defendant proved the Will. The Defendant at the Time of the Will made and at the Testator's Death was indebted to the Testator in 3000l, by Bond dated

whether the School in Hampshire, at which the two younger Children were placed by the Guardian the Clergyman, wasa good and proper School for their Education, giving Liberty to all Parties to apply to the Court as there should be Occasion. 3 Wms's Rep. 51, 53. Trin. 1730. Storke v. Storke.

This Clause on 26th. March 1735 came before the House of Lords on an Appeal, and the Ly. Chancellor's Decree was affirm'd; And the Lords would not allow the Parol Evidence to be read, nor even the Defendant's An-
Devise.

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dated in 1732, in 6000 l. Penalty. A Bill was brought to compel the Defendant to account with the Plaintiff for the Testator's Refiduary Estate, and pay him a Moiety of the said 3000 l. and Interests. And the Defendant brought a Cross Bill to have the Bond delivered up to be cancelled.

It appeared by the Defendant's Answer in the Cross Cause and by the Proofs in both Causes, that the Testator directed to give this Money to the Defendant S and gave the Person concerned in drawing the Will Instructions in Writing accordingly; but he refused to mention it in the Will, insinuating that the Bond would be extinguished, and released of Course by S's being appointed Executor, but the Defendant appearing disheartened with that Opinion, a Case was stated for Counsel's Opinion, who confirmed the same; in Confidence of which the Testator signed and published his Will with full Persuasion that the Bond would be extinguished; and this appeared clearly to be the Intention of the Testator.

Ld Chancellor held, that by confidering the Will, without the Parol Evidence, it will appear clearly from the general Words of devising the Residue viz. all his Real and Personal Estate, which he had not thereby given, to the Residuary Legatees; that this Debt which at the Time was Part of the Personal Estate falls within the Description. The Testator was intitled to this Debt when he made his Will, and at the Time of his Death.

Lord Chancellor said, that he privately thought it was intended that the 3000 l. should go to S. that he privately thought so, but was not at Liberty by private Opinion to make a Constructions against the plain Words of a Will; That none of the Cases were Parol Evidence had been admitted had gone so far as the present Case; the further they go is to rebut an Equity or Refuting Truth; that the Parol Evidence in these Cases tended to support the Intention of the Testator confident with the written Will, and did not contradict the express Words of the Will as in the present Case; That it is better to suffer a particular Mischief than a general Inconvenience, and so * revered a Decree made at the Rolls, and ordered S. * His Lordship's Opinion to account with the Plaintiff B. for the said 3000 l. but no Costs; This was upon an Appeal from the Rolls. Select Cases in Canc. in Lord Talbot's Time 240. Mich. 8 Geo. 2. Brown v. Selwin.

agreeable to this Decree; But several others of the greatest Reputation and Eminence in the Law gave Opinions very different and strongly for Mr. Selwin.

(H. a) Pafs. What Things pass by General Words.

1. WHERES A Man who has Feoffees to his Use leases for Years, rendering Rent, and makes his Will, that his Executors shall have the Profits of his Land for 20 Years, they shall have the Rent; For this is Parcel of the Reversion, and shall go with it; for Celty que Ufe shall have Action of Debr, but the Feoffees shall have the Avowy. Per Fitzherbert and Shelley clearly. Br. Testament, pl. 2. cites 27 H. 8. 12.

2. By the Name of the House the Orchards, Gardens and Backsides will pass. Wentw. Off. of Executors 249.

3. House with Appurtenances will pass Lands belonging to or used with the House, in a Will, though not in a Deed. Wentw. Off. of Executors 249.

Orchard will pass with the House; But a Devise of a House with the Lands appertaining, will pass Lands usually occupied thereby. Per Parker C Wms's Rep. 600. 605. Hill. 1719. Blackborn v. Edgley.
Deyife.

4. By the Bequests of an Indenture of Lease, the Testator's whole Estate in that Lease passing. Wentw. Off. of Executors 239.

5. If one bequeath his Obligation or other Specialty the Debt itself shall go to the Legatee, but by the Common Law the Suit must be in the Executor's Name, and the Debt is recoverable only at Common Law. Wentw. Off. of Executors 249, 250.

6. By the Bequests of Meat, Drink and Clothing, or Alimenta, he shall have, faith the Civil Law, all Lodging, Habitation, and all Things necessary for the Maintenance of Life, viz. as he takes it, Fire, Washing 

7. A Man seised in Fee devises Houses to his Daughter (who was his Hair at Law) when she should attain the Age of 21 Years, and in another Case he devises all the Rest and Residue of his Lands to his Wife for Payment of his Debts and Legacies; the Daughter dies before 21. Held that the Rents and Profits of the Houses should go to the Wife till the Daughter should have attained the Age of 21 Years. Trin. to Ann. C. B. Crockford v. Winfell.

8. A being seised in Fee of a small Parcel of Land by him always employed for producing Corn and Hay for his own Use, and the Plowing was done with his Coach-Horses, and devised that B. should continue to dwell in his House, and to be at the Charge of keeping the Horse in the same Manner as himself did, and the same Number of Servants and Coach-Horses, and for that Purpose allowed B. 1200l. a Year. Lord C. Parkers decree, that the Lands so before constantly imployed and enjoyed, with the House, should continue to be so enjoyed. Hill. 1719. Wms's Rep. 609. 603. Blackbbrn v. Edgley.

(I. a) By what Words Lands will pass.

B Enlowes Sergeant moved this Case: A Man seised of Lands and Tenements in London, devised them by these Words; I will and bequeath unto my Wife Alice my Livelihood in London for Term of her Life. By this Will the Lands in London pass to the Wife by this Word, Livelihood. Note, for Brooke J. said, that it was in ancient Time used in divers Places of this Realm, and had been taken for an Inheritance; To which Dyer agreed. Ow. 30. 4 and 5. Ph. and M. Anon.

1. S. P. Arg. 10 Mod. 526.

2. 3 Le. 78. 
   Eliz. B. R.
   Pl. 118. 
   the S. C. in 
   Eliz. B. R.
   totdem Ver- 
   the S. C. 
   cited Arg. 
   5 Mod. 132.

3. 2 Le. 221. pl. 230. Patch. 16 Eliz. 
   B. R. Anon.

3. If I devise that my Executors shall affign my Lands to J. S. the fame implicatively is a Devises the Lands themselves to my Executors; for otherwise they could not affign. Arg. cites the Opinion of

Wray,
Devise.


4. So, If I will and devife, That A. shall pay Yearly out of my Manor of D. to J. S. 101. the same is a good Devife of the Lands to A. 2 Leon. 165. Pasch. 25 Eliz. B. R. cites it as the Opinion of Wray Ch. J. in the Cafe of the Dean of St. Paul's.

5. One had Houfes and Lands which had been in the Tenures of those which had the Houfes: And he devife his Houfes with the Appurtenances; and it was holden, and fo adjudged by the whole Court, that the Lands did pafs by the Words (with the Appurtenances) for it was in a Will in which the Intent of the Devifeor shall be observed. Godb. 40. pl. 46. Hill. 28 Eliz. in C. B. Harwood v. Higham.

— Le 54. pl. 42. S. C. And by Wray these Words (with all the Appurtenances) are effectual and emphatical Words to enforce the Devife, and adjudge that the Lands pafs.

6. A. having a Term of 70 Years, devife that B. his Eldeft Son, should have the Use and Profit of it for three Years, and after C. his Second Son, should have his Leafe and Term, saving that I will that my Wife shall have half the Issues and Profits of the Land during her Life, bearing and allowing half the Charge thereof. Per Gawdy and Clench J. she has an Interent in the Land; for to have the Issues and Profits, and to have the Land, is all one, and so was the Intent that she should have the Land with the Son for her Life, and if she has no Interest, she can have no Action; For Account lies not for want of Privity. Cro. Eliz. 190. pl. 2. Mich. 32 and 33 Eliz. B. R. Parker v. Plummer.


8. A. devife a Houfe with the Appurtenances; Question was, whether Land in a Field pafs. Popham doubted, but Penner said, it might pafs, and that upon Demurrer in 28 Eliz. it was adjudged accordingly. But it appearing upon Evidence that the Houfe was Copyhold, and the Land Freehold; the whole Court thereupon conceived, that it could not be said Appurtenant, although it had been used with it. Cro. 704. pl. 24. Mich. 41 & 42 Eliz. B. R. Yates v. Clinkard.

9. A. seised of Lands in S. in Com. Midd. and of other Lands in E. in the County of S. made two several Leafe for Years of them, to two several Perfons, referring upon each Leafe 101. Rent; and after he made his Will, viz. As concerning my Lands, I give and bequeath the Rent of 101. a Year in S. in the Parish of E. to my Wife M. during her Life, and after her Devife to my Father, and after his Devife to my Brother G. and if it please God they die without issue, then to P. and I. my Brethren. Item, I give to my Wife my Houfe and Tenements in S. The Defendant married M. and after the Years expired claimed the Lands during the Life of the Wife; it was conceived in this Cafe, that the Word Rent was not sufficient to convey Land by the Statute of Wills. Mo. 640. pl. 880. 44 Eliz. Derrick v. Kerry.

F. F. F. Devife.

fentent was advis'd to bring a Write of Error —— Cro. J. 104. pl. 29. Mich. 3 Jac. S. C. Refolvd't that the Land itself should pafs by this Devife; For it appears, his Intent was to make a D. of all his Lands and Tenements, and that he intended to pafs such an Estate as should have continuance for a longer Time than the Leases should endure; and the Words are apt enough to convey it according to the Common Phrase, and usual Manner of speaking of some Men, who name the Land by their Rents; Wherefore it was adjudged accordingly —— Styr. 508. Mich. 1561. Arg. cites Trin. 3 Jac. Terry's Cafe, but Means S. C.] where a Devife of all his Rents in Tail pafs'd his Lands, because in vulgar Acceptance it is the Rents of Land —— 2 Vern. 429. in pl. 700. S. C. cited by Holt Ch. J. by the Name of Cherry v. Derick; that a Devife of a Rents was adjudged a Devife of the Land itself.
11. A seised of Lands mortgaged them by Deed to J. S. and his Heirs, upon Condition, if A. or his Heirs on the 20 October, 1624, paid to J. S. and his Heirs 100 l. that he might re-enter; Afterwards J. S. seised to J. D. all his Goods, Moneys, Bills, Bonds, Mortgages, and Specialties for Monies, and made him his Executor and died. The 100 l. not being paid J. D. entered. Resolved, those Words (all my Mortgages) made a good Devise of the Lands mortgaged; and Judgment accordingly. Cro. C. 37. pl. 1. Trin. 2 Car. C. B. Crips v. Gryffill.

12. A Devise of his Inheritance was held a Devise of his Lands. Sty. 308. cites 8 Car. in C. B. Spart v. Bent.

13. A Man having Lands in Fee and Lands for Years devises all his Lands and Tenements to A. and the Fee Simple Lands pafs only and not the Leave, but if he had had no Fee-Simple Lands and only Leaves, the Leave for Years would have paffed; Resolved by all the Justices (abente Richardson). Cro. C. 293. pl. 3. Hill 8 Car. B. R. the first Resolution in the Cafe of Role v. Barton.

14. I make Sir Giles Bridges of Witon my Sole Ayre and Executories", it was agreed that this is good, and shall pafs as well the Fee-Simple as the Goods and Chattles; And as to the false English (as this Cafe was) this shall not defeat a Testament when the Intent may plainly appear, and this Point had frequently been argued upon such Testament which Sir Giles Bridges had made with his own Hands, that he did not well know English Words, he being mostly conver vant beyond Sea. 2 Sid. 75. Patch. 1658. B. R. Marret v. Syl.

This Cafe is in Sty. 301. 307. and 519. in the Name of Tailor v. Webb, and adjudg'd accord ingly.

2. Co. 25. Arg. cites it as adjudg'd 13 Car. 2. though the Words were "his Sole Ayre and Executive." But making one Executor of all his Goods, Lands and Chattles, will not pafs Lands of Inheritance, though there was no Term for Years Per Ld. Cowper, and that the Word (Lands) in this Cafe ought not to be rejected as useless, for that in all Probability there might be Rents in Arrear of those Lands, and by making one Executor of his Lands, the Rents of those Lands would pafs. Chan. Prec. 471. 473. pl. 296. Patch. 1717. Piggot v. Pencote. Gilb. Eqa. Rep. 157. S. C. in toto Verbis.

15. I give all to my Mother. Though these Words may include whatever he had to give, either Chattel or Inheritance; yet because it may be all Personal Chattles, or all Real Chattles, or Inheritance, it was taken to be too loose and general to dili herit an Heir at Law and therefore no Land did pafs. Per Powell J. 12 Sidd. 191. Mod. 594. cites the Cafe of Bowntan v. Milbank.

This Cafe is adjudg'd accordingly, and the rather, for that an Heir at Law shall not be dillherited by such doubtful and uncertain Words.—Raym. 97. S. C. resolved accordingly. S. C. cites 7 Mod. 46. Arg. says, it was adjudg'd that a Fee Simple did not pafs by a Particle All, because it was a Relative Word, and had no Substantive joined with it, and therefore it might have been intended All his Castle, All his Goods, or All his Personal Estate, for which Uncertainty it was held void; Yet Twifden J. in that Cafe laid, it was adjudg'd, that if a Man promised to give half his Estate to his Daughter in Marriage, that the Lands as well as the Goods are included.

16. The Free Use of Spaine's Hall devised for a Year, palls the Interest in it for a Year; for Free-Use palls a Right to take the Profits for the Time limited by the Will. 1 Saund. 186. Adjudged, and Judgment affirmed in the Exchequer Chamber. Mich. 26 Car. 2. B. R. Cook v. Gerrard.

17. A Devise of the Profits is a Devise of the Land; Per Ld. Keeper and said he took the Difference to be where the Devise is of the Profits of a Chattel
Devise.

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18. Devife of a Message will carry with it a Garden and Cartelage, otherwife of a Houfe, unlefs it be cum Pertinentis. 2 Chan. Cafes. 27. Pafch. 32 Car. 2. in Cafes of Thomas v. Lane.

19. Devife of the Rent and Profits to A. to be paid by the Executors. Per 2 J. is a Devife of the Lands to A. But Holt feemed strongly to incline that the Executors were Trustees for A. who was adjudg'd a married Woman, and the Will directed that the Husband should have no intermeddling. 1 Salk. 228. pl. 7. Trin. 7. W. & M. in Opinion of Holt Ch. J. B. R. South v. Allen. —Tbid. 93.


20. It is a moft known and esfablished Rule of Law, that an Heir is never to be difinherited but by express Words, or neceffary Implication. Per Lord C. Cowper. Chan. Prec. 473. Pafch. 1717.

(K. a) What passes by the Word (Lands.)

1. A. Being feified of an Houfe in Dale, and of three Houfes and certain Lands in Sale to B. The Houfe in Sale does not pass; because of the express mention of the Houfe in Dale. Adjudged and affirmed in Error. Expreffum facit cellare racitum. Although in Grants of Lands, the Tefiator was feified of Lands, the Intention of the Tefiator is to be purfued; if he had intended to devife the Lands in Sale, he would have mentioned them, as he has mention'd the Houfe in Dale. Jenk. 277. pl. 100.

S. C. adjudg'd, that the Houfe in Sale did not pass. — Cro E. 476. pl. 4. Ewer v. Hayden. S. C. adjudg'd accordingly in B. R. — Ibid. 658. pl. 2. S. C. and Judgment affirmed in the Exchequer Chamber. — And. and Ow. flate it as in Jenk. of only an Houfe in Dale, and Lands and Houfe in Sale, but Cro. flates it that the Tefiator was feified of Houfe and Lands in Both, and de- vided as above. — No. 399. pl. 497. S. C. flated as in Cro. E. fupra, but reports the Judgment to be, that the Houfe should pass by the Devife. — 2 Roll. Rep. 347. S. C. cited by Crook as adjudg'd, and flates it that the Tefiator was feified of Lands and Houfes in both Dale and Sale, and de- vided all his Houfes and Lands in Dale, and all his Lands in Sale, and that the Houfe in Sale did not pass. — S. C. cited as adjudg'd, and affirmed in Error, and flated as before in Roll Rep. S. C. cited as adjudg'd, and flated as in Roll Rep. above; But fays, that if he had devifed all his Lands in Dale, and had not faid any Thing of the Houfe, the Houfe had pafled. Godb. 552. pl. 477.

2. A. devifes that B. shall be Executor of all his Lands; this intends only fuch as he may take as Executor. Noy. 49. 44 Eliz. Clement v. Cafley.

3. If a Man hath Lands in Fee, and Lands for Years, and devifes all his Lands and Tenements, the Fee Simple Lands pass only, and not the Leafe for Years. Cro. C. 293. pl. 3.
4. But if a Man hath a Lease for Years, and no Fee Simple Lands, and devised all his Lands and Tenements, the Lease for Years paffeth; for otherwise the Will would be void. Cro. Car. 293. pl. 3. Hill. 8

5. All my Worth Estate will carry the whole Estate which Tefator ufually comprehended under that Name, though the Lands lay in two Counties contiguous, Hampshire and Suffolk. Fin. R. 432. Mich.
Car. 2. Dormer v. Dormer.

6. If a Man devifeth Lands that are in Mortgage, the Equity of Redemption will pafs to the Devifee; and fo if Copyholds that are in Mortgage are devifed, the Equity of Redemption shall pafs to the Devifee.

7. A mortgaged part of his Copyhold Customary Lands of Inheritance unto B. Afterwards B. surrenders them to the Ufe of his Will, and devifeth them to M. his Wife, for Life, Remainder in Fee to D. the Defendant, and makes M. Executrix; if the Mortgagor redeemeth, a proportionable Share of the Redemption Money shall go to D. according to the Value of the Estate he had in the Land; and this appearing on the Pleadings to be the Fact, though D. who was a Defendant, had no Cross Bill for that Purpofe, nor fo much as inferted it in his Answer, Ld. Chancellor ordered D. his proportionable Part. And the Ordinary Rule of the Court in fuch Cafe was paffed to be, that one Third of the Money should be paid to the Tenant for Life, and the two Thirds Refted to the Remainder Man. Vern. 70. pl. 65. Mich. 1682. in Cafe of Brent v. Bell, &c.

8. Money agreed to be laid out in Lands, shall in Equity be esteemed as Land, and may be devifed as fuch Subject in the firft Place to the Ufe in the Marriage Settlement; per Ld. Harcourt, who declared it per Cowper to be his present Opinion. 10 Mod. 39. Mich. 10 Ann. in Canc. Shorter C. Chan. v. Shorer. Preced. 450. 
[The Cafe of Shorer and Shorer, and Linguen v. Sourays, feem to be S. C.] ——S. C. cited by the Matter of the Rolls. 3 Wms's Rep. 221. as firft decreed by Ld. Harcourt in 1711, and affirmed by Ld. Cowper in 1716. ——And the Reporter in a Note 5 Wms's Rep. 221. fays, It is obfervable, that the Husband might have devifed this Money, (subject to his Wife's Estate for Life) either as Real or Perfonal Estate, according as he fhould have签订了 his Intention. Thus if he had in his Will defcribed it as fo much Money agreed to be laid out in Land, this would have been sufficient to have made it pafs as Perfonal Estate, and by a Will not attested by three Witnesses; but with- out any fuch Interpolation of the Tefator, manifesting his Intention, it remained as Land, and consequently belonging to the Devifee or Representative of the Real, not the Personal, Estate. Determined in the Cafes of Crofts v. Adenbrooke. Hill. 1719. Fulham v. Jones. Mich. 1720, both by the Lord Parker. But more particularly in the Cafe of Edwards v Warwick (Counties.) 2 Wms's Rep. 171.

9. Surviving Trefure to preferve Contingent Remainders devifed as follows, viz. As to fuch Estate as the Lord bad befown upon him, he devifed part to J. S. and his Heirs, and all the rest of his Real Estate to his Wife and her Heirs. The Matter of the Rolls held, that as to the Trufi Estate, though it be fuch Estate, yet the Legal Estate being in the Devifor, in the Eye of the Law it is his Estate and his Property, and therefore paffes by the Devifee of his Estate, and that if he had devifed all the Land whereof he was fefied, thefe Trufi Lands would certainly have paffed, and this without any Inconvenience; for as the Tefator was a Trefure, fo paffes his Devifee. 2 Wms's Rep. 199. 201. Mich. 1723. Marlow v. Smith.

Arg. 10. By a Devife of all his Free Lands, a Portion of Tithe was ad-
judged to pafs. Arg. 9 Mod. 74. Mich. 10 Geo. in Canc.

Arg. 12. Wm's is held Sty. 261. ——See Roll (N) pl. 4. and the Notes there. ——O has no Land in A. but has Tithe there, and devifes all his Land in A. the Tithe as they are illufing out of the Land, and Part of the Profits thereof shall pafs. 7 Wms's Rep. 586. Mich. 1735. Afton v. Afton.
Devise.

11. Fee Farm Rents, or any other Right out of Lands, will pass by a Devise of Lands. 9 Mod. 78. Mich. 10 Geo. 1. in Canc. Arg. in Cafe of Acherley v. Vernon.

12. A Devise of Lands will pass Fee Farm Rents, or any other Right out of Lands; per Cur. 9 Mod. 78. Mich. 10 Geo. in Cafe of Acherley v. Vernon.

13. Copyholds will pass by a Devise of his Real Estate; As where a Contral was made for the Purchase of Lands, some of which were Copyholds, it was adjudged, that by a Devise of his Real Estate, those Copyholds would pass in Equity, Arg. 9 Mod. 75. Mich. 10 Geo. cites the Case of Woodier v. Greenhill.

Chancellor and the Master of the Rolls.

(L. a) Estate in Fee.

By Devise by what Words.

1. If a Man has three Daughters, and devises certain Lands to his Wife for Life, and after her Death to his three Daughters equally to be divided; By those Words no Estate in Fee is devised to the Daughters, but only an Estate for Life. Mich. 15 Jac. 3. B. R. held at Bar between King and Rumble.

proper to have brought thence to this Head of Devise, which it immediately concerns, and may make the same the more complete.

*Cro. J. 448. pl. 28. & C. but nothing said as to this Point, it being only a Part of the Limitation.

2. If a Man devise Land to his Wife for Life, and after her Death to his three Daughters equally to be divided, and if one dies pl. 28. & C. before the others, then the one to be Heir to the other, equally to be divided; But this is not the like wise being only a Part of the Limitation, no Quelion

was made as to this and the former Part, but the Judgment was given on the whole State — See the full State of this Case at (N. a) pl. 7.

3. If A. seized of Land in W. in Fee devises it to B. his Son for Life, and then to remain to C. the Son of B. except B. purchases another house with so much Land, and of so great Value as the said Land in W. 15, for the said C. and then B. shall sell the said Lands in W. as his own Land, and the said B. shall pay to his Sisters 10 l. viz. to each 20s. per Ann. In this Case C. has a Fee in the Land in W. B. not having made any Purchase of other Land, for though the first Words by themselves have not given but an Estate for Life; yet the Word Purchase in the second "Claude imports in Common Partiance an Absolute Purchase in Fee, though a Purchase may be for Life; and the other Words, If he purchases other Land &c. then he shall have Power to sell this, and not before this Purchase. HobART'S Reports. 89. Adjudged 12 Ja. between Green and Amesserd. G g g 4. If
4. If a Man by his Will appoints his Executors to purchase Land of 100l. per Ann. for his Youngest Son; this will be a Fee. Hobart's Reported 89.

5. If a Man devise Land to B. and that he shall pay for it 10l., though it be not to the Value of the Land, yet this is a Fee-Simple. Co. Litt. 9. b.

6. If a Man devise Land to another for ever; this is an Estate in Fee, Tr. 11 Jac. B. R. per Cur., in Case of Whitney v. Welkings. Co. Litt. 9. b.

7. If a Man devise Land to another to give and sell, this b, S. P. is a Fee. Co. Litt. 9. b. Devise to A. for Life, and then to be at her Disposal to any of her Children, gives A. an Estate for Life, with Power to dispose of the Fee. And per Parker Ch. J. the Difference is where a Power is given with a Particular Limitation and Description of the Estate, and where Generally, to Executors to sell or give; For he that can give or sell an Estate in Fee, must have an Estate in Fee; but in this Case the Power is a separate Gift distinguished from the Estate, and the Estate given is a certain and expressly described. 1 Salk. 239, 420. pl. 19, Pech. 10 Ann. B. R. Thomlinson v. Dighton.

8. So a Devise to another in Fee-Simple is a Fee. Co. Litt. pl. 31. cites 9 b.


10. If a Man devise Land to another & Sanguini suo it is a Fee. Co. Litt. 9. b. where Rich. 40 & 41 El. it is cited to be adjudged between Downhall and Catesby.

11. If a Man seised of an House and Land devises the Moiety of his House to his Wife for Life. Item, he devised the other Moiety of his House to J. his Second Son. Item he devised to J. his Second Son the said House, and all the Lands which pertains to it after the Death of the Wife. J. shall have an Estate for Life only after the Death of the Wife and not an Estate in Fee. 3 B. Fawcet's Cafe adjudged.

12. If A. seised in Fee of Land makes his Will in these Words, I bequeath to my Wife my whole Estate paying Debts and Legacies and dies, making his Wife Executrix, his Debts and Legacies being 40l. and his Personal Estate but 5l. his Wife shall have a Fee by
by Force of the said Words, My whole Estate; for those Words extend to his Land according to the Common Parliance, and also to all his Estate in the Land. Tr. 1651. Adjudged per rot. Cur. upon a Special Verdict between Johnson and Kerman. Jn. 1649. Rot. 153.

13. If a Man devises Land to his Son and Daughter equally to be divided; this is not any Estate in Fee but only for Life, for the equal dividing does not go to the Continuance of the Estate but to the several Occupations; with 3 Car. in Chancery. Resolved per Sir Thomas Coventry, Lord Keeper, upon Certificate of Justice Jones, that the Law is such, and that it had been adjudged accordingly in B. R. See Vern. 65. Peyton v. Banks.

14. If a Man seised in Fee of any Lands, and also possessed Jo. 182. S. of certain Leaves of Land, devises the Leaves to J. S. and after his death his Executor all the Residue of his Estates, Mortgages, Goods &c. his Debts paid and Funeral Expenses discharged; Roll 454. This shall pass a Fee to the Executor by the Word Estates being coupled with the Word Goods. Hul. 10 Car. B. R. per Cur. upon a Special Verdict between Wilkinson and Hereman.

15. If a Man seised in Fee of Black Acre and seised also in Fee of other Land upon a Mortgage made to him by J. S. which is not forfeited, and devises Black Acre in Fee to his Brother, and all the Residue of his Goods, Leaves, Mortgages, Estates, Debts, Duties, Demands, Household Stuff, Linnen, Bedding, Bonds, Specialties, and other Things whatsoever whereof he was possessed, he devises to his Wife. In this Case the Wife shall not at all but an Estate for Life in the Lands mortgaged to him and not a Fee; for this is coupled with Chattles, and the Words whereof he was possessed shew that he intended but to pass the Money for which the Land was mortgaged. P. 11 * Car. B. R. adjudged per Cur. upon a Special Verdict between Wilkinson and Hereman.

that he had such Land mortgaged in Fee, and had devised his Mortgage, the Fee had passed. — Jo. 182. pl. 11. S. C. held that she had, at best, but Estate for Life. — S. C. cited by Holt Ch. J. in delivering the Opinion of the Court, 6 Mod. 108. as held that no Freestone passed, and says it was very rightly, because of the particular Words there.

16. If a Man seised in Fee of Land devises his Estate in the Land, this passes a Fee. Hul. 11 Car. B. R. per Cur. in the said Case between Wilkinson and Hereman.
17. If A. seised in Fee of a House and Land leaves it to B. for Ninety-Nine Years, rendering Rent, and after devises it to D. by these Words, I bequeath to D. my House with all the Lands belonging to it for the Term of] Ninety-Nine Years [and] the said D. shall have all my Inheritance, if the Law will allow. By this Devisit the Reversion passes to D. in Fee. Hobart's Reports 2. Adjudget between Widlake and Hardinge.

18. Devise to two & Hereditibus omitting (fus) give a Fee Simple, though otherwise in a Deed by Reason of the Uncertainty. Br. Estates, pl. 4. cites 20 H. 6. 35. that it is so said by some; for that the one shall be taken by Intendment but not the other.

19. A Man devised his Land to J. S. this shall be taken but for Term of his Life. Br. Testament, pl. 18. cites 29 H. 8

20. If I by my Will release to J. S. and his Heirs all my Lands, this is a good Devise in Fee to J. S. and his Heirs, Per all the Justices. And. 33. pl. 83. Mich. 37 H. 8. Anon.

Bend]. 50.
pl. 50. S. C.
in totdem
Verbis.
— S. C. cited
2 Ard. 13.

21. A seised of Black Acre and White Acre in Fee devises both to his Wife for Life, the Remainder of Black Acre to J. S. in fee, and leaves the Fee of White Acre undisposed of, and then said, And I make my Wife my Executrix of my Goods and Land, the Inheritance did not pass; for the Word (Lands) intends such Land as the may have as Executrix. No. 48. 45 Eliz. Clements v. Caffye.

See Supra (K) pl. 9.
and the
Notes there.

22. Devise to B. his Younger Son and his Heirs, and that if he dies without Issue, living A his Eldest Son, that the Land shall remain to A. in Fee. B. has an Estate in Fee and not a Tayle, and A. has only Possibility to have it, if B. dies without issue. Cro. J. 590. pl. 13. Mich. 18 Jac. B. R. Pells v. Brown.

23. When no Estate is limited, the Devisee shall have an Estate according to the Intent of the Devisor, which Intent shall be expounded by the Words in the Will; if not that it be in Special Cases. Perk. S. 555.

24. And therefore if Caffy gave Life of Land, or &c. in Fee, or of a Man seised of Land or &c. deviseable in Fee, devises the same Land by his Will unto J. S. Now J. S. shall have the same for his Life, because the Intent of the Tettator cannot be otherwise taken by the Words of the Will. Perk. 556.


J. S. having a Remainder in Fee, devise all his Remainder to J. N. adjudged that a Fee was devised; cited by Tr. by Ch. J. Palch. 9 W. 5. as a Case lately adjudged in C. B. Ed. Raym. Rep 187.

26. Devise was to his Sister for Life, and after her Decease the whole Remainder of his Lands to his Brother if he survived her; Adjudged that these Words cannot extend to the Quantity of the Land, but to Quantity of Estate in the Land; for the whole Land was given to the Sister for Life, so there could be no Remainder of that; therefore it must be the Remainder of the Estate in the Land, and by Consequence a Fee-Simple passed. Lutw. 761. 764. Trin. 1 Jac. 2. Norton v. Ladd.
Devise.

27. A. seised of Gavelkind-Lands and having two Brothers B. and C. (B. had Issue two Sons H. and J. and J. had Issue two Daughters M. and N. and C. had Issue R. and R. had Issue S.) devised the Lands to H the Son of B. if he lives till Twenty-one, and then his Wife to have the House &c. and if H. die before Twenty-one, then to the next Son of B. and if B. have no Son, then to R. the Son of C. and his Heirs, and if R. dies before Twenty-one and my Wife be dead, then to the next Heir last named, as it shall fall out. H. Son of B. died before Twenty-one without Issue, but J. his Brother entered and died, leaving two Daughters M. and N. The Question was, if J. the Son of B. upon the Death of H. his Brother before Twenty-one took a Fee, or only an Estate for Life, and it seemed to be agreed both by Counsel and Court that B. the Son took only an Estate for Life. Curia adavour vlt. Mich. 6 W. & M. in B. R. Skin. 385. 562. Bevilton v. Hussy.

28. If a Devise were to A. and bis Potestity, it would be only an Estate Tail. Per Ld. Keeper. But the Master of the Rolls thought that a Devise to a Man and his Potestity would create a Fee. 2 Freem. Rep. 268. pl. 336. Mich. 1703. Attorney General v. Bamfield.

29. The Bell Tavern was settled upon A. for Life, Remainder to B. in Tail, Remainder to A. in Fee. A. devises all the House called the Bell Tavern, to B. without paying for what Estate, the Fee passes, otherwise B. could take nothing. MS. Tab. 1705. Cole v. Rawlinson.

(M. a) [Estate in Fee.]

By what Words it may be created. [By Devise.]

This in Roll. tis. Eftate, is Letter (O).

1. If Devise be to a Man and his Successors, this is a Fee; For by the Word Successors is meant Heirs; For the Heir succeed Patri. By Reports. 14 Jac. Webb v. Herring.


2. If a Man devise Land to W. his Son, for Life, and afterwards that it shall remain to Thomas, Son of W. unless W. purchase for Thomas so much Land, of so great Value as the said Land; and devise further, that the said Thomas shall pay 10l. by 20s. per Ann. to his Sitters; in this Case Thomas has Fee in this Land; because the Words unless W. purchase to much Land for Thomas (by which is intended a Fee; and by the Words of so good Value) is intended the Price of all the Land and Estate, and not the Annual Value. S. 15 Jac. B. adjudged between Green and Armitshed.

3. If Devise be to a Man, paying so much Rent Annually to the Cro. J. 415; Poor of such Corporation perpetually, and for Default of Payment the Corporation shall have the Land perpetually; this is a Fee, because the Word Perpetually shows his Intent. By Reports 14 Jac. Webb v. Herring.

S. P. — Roll Rep. 298, 299. pl. 25, S. C. adjudged a Fee. — 2 Bull. 195. S. C. and S. P. reolved. — Bridgman. 852. S. C. and S. P. — Bridgman. 85. S. C. that the Words make a Fee Simple; and for as much as the Charge is to continue for ever, it follows that the Estate must continue; For without the Estate, the Charge cannot be.

H h h

(N. a) Estate
Devise.


Three Jus- tices held, that this was an Eftate Tail in the Daughters; but Dyer held, that there was no Eftate Tail to any of the Daughters, but that each had a Fee Simple conditional upon a Contingent subsequent. 

1. If a Man devise Land to A, his Daughter and her Heirs, and if the fife without Issue that it shall remain to B, his Daughter and her Heirs, and if both die without Issue, to another; This is an Eftate in Tail the an express Eftate in Fee was given. D. 16. Eliz. 330. 20. [b. 331. a. pl.] Clakes Cafe.

2. If a Man devise Land to B, his youngest Son and his Heirs, and if he die without Issue, living A, his eldest Son, that the Land shall remain to A in Fee; This is an Eftate in Fee in B and not a Tail, and only a Possibility in A, to have the Land or not upon the Death of B, without Issue in his Life. Hitch. 18 Ed. B. R. Abjudged per tot. Cur. upon Argument upon a Special Verdict between Brown and Pells.

3. If a Devise of Land be to another, and femini fuo, this is an Eftate Tail. Co. Lit. 9. b.

The Father devised his Lands to his Son G. and his Heirs; and it hie * Fol. 336. die before 21, and without Heirs of his Body, Remain- der over; ad- judged that by the first Clafle G. had an E- state in Fee, the Devife being to him and his Heirs, and the subjeftuent Words (viz.) If he die before 21, and without Heirs of his Body, qualify the Devife, viz. that the Fee Simple fhall not determine, unless he die before 21, and without Issue, and are not Words of Limitation. Swinb. 154. cites Hardr. 148. Hall v. Deeving. [The Cafe was not adjudged, but argued only by Counsel; and Hardr. 150. the Reporter, who argued for the Plaintiff, fays it does not appear what became of the Cafe, or that any Opinion was given by the Court in it.]

5. If
5. If a Man has a Wife, a Son, and three Daughters, and he de- 
vises Land to his Son after the Death of his Wife, and if the three 
Daughters survive the Wife and the Son, and his Heirs, to them for 
their Lives, the Son shall have a Tail, because otherwise the Re-
mainder shall be void, and if it shall be Fee the Daughters should 

3 Bull. 192. S. C. adjudged. But the whole Court agreed this Difference where this is limited (as in the Principal Case) to a Collateral Heir, and where to a meer Stranger; that in the first Case it has been a Fee Simple in the Son, and so the Remainder there had been void; because one Fee Sim-
ple cannot be thus limited upon another; but where the Remainder is limited to a Collateral Heir, 
the same is good, being only an Explanation of the former. — S. C. cited Cr. J. 443 pl. 28. as 
Trin. 12 W. 3. —— S. C. cited Arg. 4 Mod. 117.

6. So if a Man has two Sons and devises to the younger, and 
that if he die without Heir, to the elder in Fee, this is a Tail, for 
it is as much as if he had said, that he devised the younger and to 
the Heirs of his Body, because otherwise the Remainder shall be void, 
the elder being Heir to him. Cr. 4 Id. By Reports per Coke.

7. If a Man has three Daughters, A. B. and C. and devises 
Land in this Manner; I give to Joan my Wife all my Houses and Fee 
Land for her Life, and after her Death I will it to my three Daugh-
ters, A: B. and C. to be equally divided, and if any of them die before 
the other, then the one to be the other’s Heir, equally to be divided, —See (N) 
and if my three Daughters die without Issue, I will it to J. S. and J. 
N. (two Strangers) By this Devise the three Daughters have an 
Estate Tail and not a Fee, for the Intent of the Devise is ap-
parently upon the whole Will, for the Clause (and if they die with-
out Issue) and the Limitation of the Remainder over explains 
what Heir he intended before, when he said, that the one should be 
Heir to the other, otherwise the Remainder would be void. Mich. 
15 Id. B. R. Adjudged clearly per tot. Cur. upon a Special Ver-
dict between Kings and Renvall.

8. If a Man devise Land to his three Daughters equally to be di-
vided, and if one die before the others, that then the one shall be Heir 
only to the other; By those Words the Daughters have not any Estate 
Tail. Mich. 5 Id. B. R. Agreed per Counsel at the Bar, and 
per Cur. between Kings and Renvall.

9. If a Man devise to two for their Lives, the Remainder to their 
two Sons equally to be divided, and to their Heirs and each to be 
Heirs to another, and if both (naming them) die without Issue, 
that it shall remain to the other; This is an Estate Tail by the Li-
mitation of the Remainder over; but by the Words before, without 
those it had been a Fee Simple. P. 12 Id. B. Resolved per Cur. 
between Johnfon and Smart.

10. If a Man settled in Fee devises it to his Wife till his eldest 
Son comes to the Age of 24, and devised 41. to be paid out of 
the Land to his younger Son, and if the eldest Son die, that the youngest 
shall have it, and if he dies, that then it shall be divided between 
his two Daughters, and if they die, that then his Executors shall fell 
it at. By this Devise the eldest Son shall have but an Estate for 
Life, and not any Estate Tail, for his Intent does not appear that 
it should be a Tail. P. 41 Cr. B. R. Adjudged between Leg-
wood and Burris.
Devise.

fulf. 219.
Whiting v. Wilkins
S. C. but 8 flates to
be to R. his
younger
Son, and it terms plainly to be mis-printed, for Roll afterwards mentions E. as the eldest Son. Adjudged per rot. Cur. that by the Words and Meaning of the Will R. had a good Estate Tail.

12. If a Man devises Land to his Wife for Life, and after to his Son, and if his Son dies without Issue, having no Son, that another shall have it, the Son has an Estate Tail to the Heirs Male of his Body by this Devise. Cr. 7 Ja. B. per Cur. between Robinson v. Millik.

Adjudged good Estate Tail.—Mo. 682. pl. 919. Milliner v. Robinson. S. C. but it is stated there that R. devised his Land to his Brother J. and if he died, having no Son, that the Land should remain to W. for Life, and if he died, having no Son, to remain to the right Heirs of the Deviseor. Resolved J. had an Estate Tail to the Issue Male, but W. had it but for Life, or at least to his Heirs Female, for (having no Son) it is merely contingent: Per Popham.—S. C. cited Arg. Litt. Rep. 259. S. C. cited by Hale, Ch. J. as 4 Ja. Robinson's Case; thus, a Devise to A for Life, and if he dies without Issue, then to remain. A took an Entail. 1 Vent. 250.—Powell J. said, as this Case is in Mo. 682; and Roll 837, pl. 12. it differs from the Case put my Ld. Hale, viz. no Express Estate for Life is given to A. But if it be lawful, as put by Ld. Hale, it must be to upon this Implication, that the Devisee ever was Heir at Law, viz. One devisea to A. for Life, and if A. died without Issue, then to A. (the Testator's) right Heir. Now this he said might be allowed to be an Estate Tail in A. without contradicting the Resolution in the principal Case; For where the Devisee over was Heir, there must have been a most necessitary Implication that A. the first Devisee should have an Estate Tail, because the Heir of the Testator was excluded from taking till A. the Devisee died without Issue; which Disposition, he said, serves also to answer Burney's Case put by Ld. Hale in Vent. 250. Wms. Rep. 57. Hill. 1702. in Case of Bamfield v. Popham.

Hale said, that the Words are to his eldest Son for Life, and if he dies without Issue, then to remain. A took an Entail. 1 Vent. 250.—Powell J. said, as this Case is in Mo. 682; and Roll 837, pl. 12. it differs from the Case put by Ld. Hale, viz. no Express Estate for Life is given to A. But if it be lawful, as put by Ld. Hale, it must be to upon this Implication, that the Devisee ever was Heir at Law, viz. One devisea to A. for Life, and if A. died without Issue, then to A. (the Testator's) right Heir. Now this he said might be allowed to be an Estate Tail in A. without contradicting the Resolution in the principal Case; For where the Devisee over was Heir, there must have been a most necessitary Implication that A. the first Devisee should have an Estate Tail, because the Heir of the Testator was excluded from taking till A. the Devisee died without Issue; which Disposition, he said, serves also to answer Burney's Case put by Ld. Hale in Vent. 250. Wms. Rep. 57. Hill. 1702. in Case of Bamfield v. Popham.

13. If a Man devises to his eldest Son for Life, the Remainder to the Sons of his Body lawfully begotten, and if they alien, that his Daughters shall have the same Estate, Remainder to his right Heirs, the eldest Son has but an Estate for Life and no Estate Tail, but his Son shall have it by Purchase, because it is expressly limited that he shall have it only for Life. Dict. 10 Ja. B. per Cur.

14. A had two Sons, B. and C. A. by Wills gave Lands to B. and his Heirs Male for ever, [but] if [his Heir should be] a Female, my next Heir shall pay her 12l. a Year out of the Rentis of the Land, and shall have the rest to himself, I mean my next Heir to him and his Heirs Male for ever. Adjudged per rot. Cur. upon great Consideration, that the Devise to B. was an Estate Tail; for though in Deed it had been a Fee, yet in a Will, to gratify the Intent of the Deviseor, the Law will supply the Words (of his body), and that from the other Words his Intent is apparent that it should be so; and therefore the Lands shall go to C. Ld. Raym. Rep. 185. Pash. 9 W. 3. C. B. Baker v. Wall.

(O. a) By
(O a.) By what Words a Tail may be made by Implication. By Devise.

1. **Devise** to A. till his Heir come to 24 Years of Age, and then he shall have third Part for Life, and if he dies before 24 then he shall have for Life, and after the Decade of A. if the Heir his not any If- fues Remainder to the Daughter of Devitor, Remainder to the right Heirs of Devitor. **The heir comes to 24**, yet he has no Tail but

| Sec. D. 2 & 3 Ha. 123, 38, adjudged. |

2. If Devise be to one in Tail Remainder to another in Tail, Remainder to another in Forma praedita, this last Remainder has a Tail also. **Dubitatur. 5 H. 4. 4.** Otherwise upon a Grant. **Dubitatur. 5 H. 4. 4.**

3. If a Devise one Messuage to her Daughter A. and her Heirs, and another Messuage called his great Devisage to T. his Remembrancer, Daughter, lying of the Age of 8 Years and to her Heirs, and it came to be said, the time before the Age of Sixteen, A. then living, then he wills that his Daughter A. shall have the great House to her and her Heirs Opinions and if A. die without Issue, T. living, then he wills that T. shall have that this and enjoy that Part of A to her and her Heirs, and if both the said Daughters A. and T. die having no Issue, then he devises all to J. S. and his Heirs, in this Case the Daughters have Estates Tail and not a Fee upon a Contingent Judgment. **D. 16 El. 330. 20. by 3 against 1 Taches Case.**

4. If a Man devise Land to R. his Daughter for Life, and if the marry after my decade and have Heir of her Body, then that he shall have it after her Death and the Heirs of their Bodies per cadem Devita. And if the happen to die without issue, then that the I devise it to P. my Daughter &c. This is an Estate Tail to R. and her Heirs shall not take by Purchase upon a Contingent. **Dubitatur Hill. 37 Eliz. 5. between Clark and Dabie.**

Inheritance in her Heir by Devise refting in Abeyance all her Life and settling in the Instant of her Death. **—** Ow 148 Lilt b. Taylor seems to be S. C. but no Judgment, the Court being divided. "Vest 226. S. C. cited by Rainsford — S. C. cited 5 Lev. J. said, that he had heard great his Daughter A. shall have the great House to her and her Heirs Opinions and if A. die without Issue, T. living, then he wills that T. shall have that this and enjoy that Part of A. to her and her Heirs, and if both the said Daughters A. and T. die having no Issue, then he devises all to J. S. and his Heirs, in this Case the Daughters have Estates Tail and not a Fee upon a Contingent Judgment. **D. 16 El. 330. 20. by 3 against 1 Taches Case.**

Mo. 593. pl. 8. 2. S. C. adjudged, that the marry after my decade and have Heir of her Body, then that he shall have it after her Death and the Heirs of their Bodies per cadem Devita. And if the happen to die without issue, then that the I devise it to P. my Daughter &c. This is an Estate Tail to R. and her Heirs shall not take by Purchase upon a Contingent. **Dubitatur Hill. 37 Eliz. 5. between Clark and Dabie.**

Inheritance in her Heir by Devise resting in Abeyance all her Life and settling in the Instant of her Death. **—** Ow 148 Lilt b. Taylor seems to be S. C. but no Judgment, the Court being divided. "Vest 226. S. C. cited by Rainsford — S. C. cited 5 Lev. J. said, that he had heard great his Daughter A. shall have the great House to her and her Heirs Opinions and if A. die without Issue, T. living, then he wills that T. shall have that this and enjoy that Part of A. to her and her Heirs, and if both the said Daughters A. and T. die having no Issue, then he devises all to J. S. and his Heirs, in this Case the Daughters have Estates Tail and not a Fee upon a Contingent Judgment. **D. 16 El. 330. 20. by 3 against 1 Taches Case.**

Mo. 593. pl. 8. 2. S. C. adjudged, that the marry after my decade and have Heir of her Body, then that he shall have it after her Death and the Heirs of their Bodies per cadem Devita. And if the happen to die without issue, then that the I devise it to P. my Daughter &c. This is an Estate Tail to R. and her Heirs shall not take by Purchase upon a Contingent. **Dubitatur Hill. 37 Eliz. 5. between Clark and Dabie.**
[5] 6. If a Man devise that his Land shall descend to his Son and Heir, and that his Executors shall take the Profits of them till his Son dies without Issue; Provise, that if his Son dies without Issue, that then all the Land shall remain to the Right Heirs and Possessor of the Devise and his Name perpetually. This is an Estate Tail in F. clearly. B. 12 In. B. per Cur. between Tunnden and Clerk.

shall take the Profits till his Son should come to Twenty-four Years of Age and then they to make account and satisfy him, Provise that, if &c. Hobart Ch. J. held that the Lands shall come to J. in Tail by the Devise and the Reversion by Defeunt. Ibid. 31. — Mo. 860, 861, pl. 1181. S. C. the Court adjudged the Devise to the Right Heirs of his Name and Possessor to be void, and consequently, that the Reversion descended in Fee to J. the Son. — Brownl. 129. Coroner v. Clerk S. C. but not exactly S. P.

(P. a) Estate for Life by Devise.

In whom an Estate for Life shall be said to be raised by Implication.

1. If a Man devise Land to his Daughter in Tail with diverse Reversions over provided it his Daughter and every one in Reversion permit and suffer T. who now occupies the Land to enjoy it during his Life, this shall not give any Estate for Life to T. because he devises that he should be only permitted to enjoy it upon a Penalty. Rich. 37 El. B. Thomas’s Case, per Cur. Although the Proviso be also idle the Daughter being Heir at Common Law and so is to have Advantage of it, if it be a Condition.

Be Devise pl. 32. cites S. C. & S. P. tempore H. 8 but cites 17 H. 7 17 as to the De- ville of his Goods after the Death of his Wife that his Son shall have them.—Cro. J. 75. cites S. C. and agreed to by all that the Devise of the Land to the Wife is good by Implication. But if such Devise had been to a Stranger after the Death of his Wife, it might peradventure have been otherwise; because the Heir in the Interim might have had it. — S. C. cited by Anderson Mo 133, pl. 269. Patch. 25 Eliz.

2. If a Man devises Land, whereas he is said in Fee, to his Son and Heir after the Death of A. the Wife of the Devise, this shall raise an Estate to A. for Life, because the Devise has shown his Intention that his Heir shall not have it during the Life of his Wife; whereas it had not been for the Devise he would have had it immediately upon his Death. 13 H. 7. 17. b.

3. If Lefsee for Years upon Condition not to * alien it to any but to his Son or Daughters, devises that his Son shall have it after the Death of the Wife of the Devise; This does not give any Estate to the Wife by Implication, because the Son to whom this is devised is not to have it by the Law without the Devise, and therefore the Life of the Wife is only a Limitation of the Time when the Son shall have it from the Executrix, who is to have it in the mean Time. Cr. 3 In. B. R. between Burton and Horton, Per 3. against 2. Note that in this Case...
(Q. a) Estate for Life or otherwise.

By Devise. [By the Words Also, Item &c.]

1. If a Man devise in this Maner, I devise Black-Acre to my Daughter F. and the Heirs of her Body begotten, Item, I devise unto my said Daughter White-Acre; the Daughter shall have but an Estate for Life in White-Acre, for the Word (Item) is not so much as (In the same Maner) Cr. 40. Cl. B. R. per Cir.

2. If a Man devise Black-Acre to one in Tail, and also White-Acre, the Devise shall have an Estate Tail in White-Acre also, for this is all one Sentence, and to the Words which make the Limitation of the Estate go to both. Cr. 14 Cl. B. R. Per Fener cur to be adjudged in Bank.

3. If a Man feiled in Feo of a House and Land and makes his Will in this Maner, I devise the Moiety of my House to my Wife for Life, Item I devise the other Moiety of my House to J. my Second Son; Item, I devise to J. my Second Son all the said House and all the Land that appertains to it after the Death of my Wife. In this Case, by this Will, I shall have an Estate for Life only after the Death of the Wife and not an Estate in Fee. P. 7. Cl. B. adjudged infavvret's Case.

4. In the first Clause there had been no Person named, but the A Man had been, Item, I give the Manor of D. Item, I give the Manor of S. to J. K. and his Heirs, this shall be referred to both the Manors. Per Dyer Ch. J. Mo. 53. pl. 153. Patch. 5 Eliz.

D. to my Second Son Item, I give my Manor of S. to my said Son and to his Heirs. It was resolved by the Judges, that in the first he had but an Estate for Life, and the Item seems to be a new Gift to a greater Preferment in the Second Place for the Amendment of the other; Mo. 53. pl. 153. Patch. 5 Eliz. Anon.

5. I give my Lands in A. to my Son T. in Tail, Also, I bequeath to And. 160. my said Son T. all my Lands in B. and also all my Lands in C. Alfo S. C. As I give judged.
Devife.

S. C. Adjudged—

I give to the said T. my Island called Owsey, to have and to hold all the land demised Premisses to the said T. in Tail, this is an Entail of all the Lands in B. and C. Le. 57. pl. 73. Patch. 29 Eliz. C. B. Wife.

6. A. devised Black-Acre to B. in Fee, and White-Acre to B. in Tail, and afterwards said, I will, that if B. dies without Issue within Age, Black-Acre shal go to J. S. Item, I will, that White-Acre shal go to W. R. and doth not fay in the second Item (if B. dies without Issue within Age) It was adjudged that the second Item shall be without Condition. Godsb. 146. pl. 185. 3 Jac. B. R. Pinder's Case.

7. I devise to my Eldest Son, and bis Heirs, Black-Acre for his Part Item, I devise to my Second Son White-Acre for his Part; it is a Fee in Second Son, because it has Reference to the Part of the Eldest; per Coke, Haughton and Coke. Roll R. 369. pl. 23. Patch 14 Jac. B. R.

B. R. per Coke J the Fee to the Second Son is by reason of the Words (for his Part) and otherwise the omission the Words (to him and his Heirs) would be in Law as a direct Negative, that he should not have it in the same Manner as the Eldest had Black-Acre.

8. I devise Black-Acre to J. S. Item, I devise White-Acre to J. S. and his Heirs; per Coke Ch. J. it is only Estate for Life in Black-Acre; the Item has no Dependence upon the first Clause; but is distinct and several. Roll Rep. 369. pl. 23. Patch 16 Jac.

9. Devife of Land to his Wife for Life, the paying out of the Rents &c. Yearly to S. during his Life, and if my Wife die during the Life of S. I likewise then devise all my said Lands to S. be paying Yearly 3l. out of the said Lands to T. during his Life, and likewise 20s. to L. during his Life. Adjudged that S. had Fee; for L. may not live the Estate for Life to S. and so there would be no Estat to pay it out of. 2 Roll R. 80. Patch. 17 Jac. B. R. Spicer v. Spicer.

10. A. seil in Fee, had three Sons, B. C. and D. and devised Land to B. in Tail, Remainder to C. in Fee, and other Lands to C. in Tail, Remainder to D. in Tail, and then other Lands to D. in Fee. Item, I give Black-Acre to my said Son D. Item, I give to my said Son D. White-Acre; also I will that all Bargains, Grants &c. which I have from J. S. my Son D. shall enjoy, and his Heirs, for ever, and for lack of Heirs of his Body, to my Son C. for ever. Agreed by all, that the Bargains and Grants &c. only were intail'd, and that D. had but Estate for Life in Black-Acre, Green-Acre and White-Acre. Cro. C. 369. pl. 5. Trin. 10 Car. B. R. Spirit v. Bence.

S. C. cited by Vaughan Ch. J. 262.

which shall disinherit an Heir at Common Law, must have a clear and apparent Intent, and not be ambiguous, or any ways doubtful. —— S Mod. 222. Avg. S. P.

11. Devise of White-Acre to J. S. and his Heirs; (and) or (Item) Black-Acre, in both thes Cafes J. S. has Fee Simple in Black-Acre as well as in White-Acre. But if it was, I devise White-Acre to J. S. and his Heirs (and) Item I give Black-Acre (or) Item I give Black-Acre. In these last Cafes J. S. has but Estate for Life in Black-Acre; per Windham J. Sid. 105. at the End of pl. 13. Hill. 14 and 15 Car. 2. B. R.

12. A. had two Sons B. and C. A. devised thus, I Give to C. my Pature in the South-Fields; And also I will that all Bargains, Grants and Covenants which I have from N. Webb, C. shall enjoy, and his Heirs, for ever; and for want of Heirs of his Body, to remain to B. for ever; per rot. Cur. agreed the Words of the Will to disinherit an Heir at Law must be clear and not ambiguous, and therefore that C. had only Estat for Life in South-Fields, and an Estat Tail in the rest. Vaughan 262. Hill 20 and 21 Car. 2. C. B. in Cafe of Gardner v. Sheldon.

13. If
13. If a Man devises Black-Acre to A. and the Heirs of his Body; and also devises White-Acre to the same Person, he hath but an Estate for Life in White-Acre; otherwise had it been (in the same Manner) it had given an Estate Tail; for the Word (also) is not so strong as the Words (in the same Manner). Arg. Mod. 100. pl. 5. Mich. 25 Car. 2. B. R.

14. Devise to A. for Life, and to his Heirs, and for want of Heirs of him, to B. in the same Manner, and for want of Heirs of him, to C. and his Heirs for ever, A. and B. had but Estate Tail, Remainder in Fee to C. 3 Lev. 70. Trin. 34 Car. 2. C. B. Parker v. Thacker.

15. A. feited in Fee had Issue two Sons, and devised all his Land to his Eldest Son, and if he die without Heirs Male, then to his other Son in like Manner gives an Estate in Tail. The Question was, Whether this was an Estate Tail in the Eldest Son? Curia, "Tis plain the Word Body, which properly creates an Estate Tail, is left out; but the Intent of the Testator may be collected out of his Will that he designed an Estate Tail; for without this Devise, it would have gone to his Second Son, if the first had died without Issue. "Tis therefore an Estate Tail. 3 Mod. 123. Hill. 2 and 3 Jac. 2. B. R. Blaxton v. Stone.

16. A. having a Remainder in Fee expectant upon an Estate Tail in the Bell Tavern, and posseffed of several Leaseshold Estates, devises all his Estate, Right, Title and Interest, and all the Term and Terms of Years in whatever be held of J. S. and also the House called the Bell Tavern to J. B. By this Devise B. hath a Fee in the Bell Tavern, because it is but one Sentence coupled by the Word and also) and governed by one Verb, by which the Preposition (in) subintelligitur, and put into Latin, and it is Ac etiam Domo vocat &c. and is carried to the Bell Tavern, and this must be taken to be the Intention of the Testator, who could not intend so vain and useless an Estate as for Life only after an Estate Tail, Adjudged by Powell, Powys and Gould, contra Holt Ch. J. 1 Salk. 234. Hill. 1 Ann. Cole v. Rawlinson.

17. J. S. made his Will thus, viz. I devise an Annuity to H. in Fee; Item, I give my Manor of B. to A. and his Heirs; Item, I devise all my Lands, Tenements and Hereditaments to the said A. Item, I devise all my Goods and Chattles, and whatever else I have not before disposed of, to the said A. be paying my Debts and Legacies, and makes A. Executor. Held, that Item in a Will is usually to introduce new distinct Matters. adly, That Hereditaments is not taken to denote the Measure or Quantity of the Estate, because it has another Meaning. But 3dly, That by the Words whatever else he had not before disposed of, a Fee passed, for this could not have any Effect upon the Personal Estate, because that was fully given away before, and therefore it must extend to Remainders &c. and this enforced by the latter Words (Paying &c.) and the Annuity in Fee. 1 Salk. 239. pl. 18. Hill. 8 Ann. C. B. Hopewell v. Ackland.

18. I devise all my Lands in B. to my Eldest Son; Item, I give to my Second Son C. and my Lands in D. Allo to my Daughter A. R. I give 500 l. to be paid as soon as may be out of the aforesaid Estate and Premises, and within three Years, if it be possible. Per Matter of the Rolls the Second Son has but an Estate for Life, chargeable with the Proportion of the 500 l. and granted a Perpetual Injunction against Wait in the Younger Brother. Hill. 1713. Redoubt v. Redoubt.
(R. a) What Words give Estate for Life, Estate in Tail, or in Fee.

If he die without Issue &c. And how construed.

Swinf 118. cites S. C. as adjudged that the Eldest had an Estate Tail. [But I do not observe the Point resolved here.] 1. THE Testator having two Sons and a Daughter, devised his Lands to his Wife for 10 Years, Remainder to his Youngest Son and his Heirs for ever, and if either of his Sons died without Issue of his Body, then to his Daughter and her Heirs in Fee; the Youngest Son died without Issue in the Life-time of his Father; The Question was, Whether the Eldest Son should have the Land as Tenant in Tail, or Fee Simple by Intendment of Devisee, or whether the Daughter should have it? And all the Justices of C. B. held that this was a good Remainder to the Daughter, notwithstanding Devisee's Death in the Life of the Testator. Dy. 122. a. pl. 20. Mich. 2 and 3 P. & M. Rickman v. Gardner.


3. A. had Issue B. C. D. and E. and devised to his Wife for Life, and after her Death to C. his Son in Tail, and if he dies without Issue, then to his Children; B. had Issue a Son, and died; and C. died without Issue. Resolved, The Son of B. shall not take as one of the Children of the Testator. Vent. 229. cited as Tyler's Cafe. Mich. 34 Eliz. B. R. per Hufe Ch. J. Arg. Vent. 250. Mich. 24 Car. 2 B. R. in the Cafe of King v. Melling.

Mo 422. pl. 590. Sewell v. Garrett. S. C. adjudged that the Issue of R. shall have the Land, and not the Heirs of the Devisee, and in Remainder. And the Word (Or) was adjudged (And.) — Noy 64. Garred v. Soule. S. C. adjudged an Estate Tail in R. — 2 Ver. 377. cites S. P. as adjudged on a Special Verdict, that the Issue of R. should not take, but the Remainder-man, and cites it as the Cafe of Jennings v. Hellier. — 12 Mod. 376, 227. Hill. 11 W. 3. in Cafe of Hilleard v. Jennings, it was said by Holt Ch. J. on citing Cro E. 525. that there is no Necessity to construe (Or) as (And.) For it might be the Design of the Father to hinder him from Marrying till his Age of 21, and he denied that Cafe to be Law.

Mo 561. Bollen's Cafe. S. C. argued; but it was adjudged that A. devised his Feoffees at the Request of his Wife to make Estates according, it was argued that this was a Condition subsequent, but adjudnatur. Goldsb. 134. pl. 33. Hill. 43 Eliz. Bollen v. Bollen.
Devise.


7. Devise to his Wife for Life, Remainder to his Son in Tail; and if he die without Issue, then the Lands to remain to R. W. and his Wife for their Lives, and after their Deceases to the Children. Popham and Gaudy were of Opinion, that they had an Estate-Tail; But Fenner and Clench held, that they had only an Estate for Life. Gouldsb. 139. pl. 47. Hill. 44 Eliz. Anon.

8. A Man devis'd Land to his four Sons in Fee, and if one of them died without Issue, that his Part should survive. In that Case it was held, that if three of them died without Issue, the Fourth had a Fee-Simple, because the subsequent Words were not added by way of Limitation, but of Determination. Arg. Hard. 150. cites Mich. 2 Jac. C. B. Emerson's Cafe. Anon.

9. A Man hath Issue A. and B. and devis'd Lands to A. and if he die without Heirs, that B. his Brother shall have it. It was said by the Court, that that shall create an Estate-Tail in A. because it appears in the Will that the Testator must intend an Estate-Tail; for that it is impossible for him to die without Heirs whilst B. his Brother was alive; and so they said it had been often ruled. Freem. Rep. 74. Trin. 1673. in C. B. Allen v. Spendlove.

10. A devised Lands to J. S. in Fee in Trust for B. and the Heirs of her Body, and if B. die without Issue to C. for Life, and in another Clause in the Will he devised that if B. die without Issue, and C. be then deceased, then, and not otherwise, he gave the Land to J. N and his Heirs, B. died without Issue, and C. survived her and died. Upon a Bill by J. N. against J. S. and the Heir at Law of the Testator to have this Trust executed; Ld. North decreed it for J. N. though C. survived B because the Word (If C. be then deceased) seem'd to be put in to express his Meaning, that C. should be pure to have it for her Life, and that J. N. should not have it till she were dead, and also to have it in Possession. 2 Vent. 363. Hill. 35 & 36 Car. 2. Anon.

11. Upon a Special Verdict the Case was, P. was seized of two Messuages in Fee after the Death of his Brother, and had Issue two Sons, R. his Eldest Son, and N. his Younger Son, and four Daughters, E. M. O. and A. and made his Will in Writing, and devised his two Messuages to N. his Younger Son, and he to have 30 l. per Ann. for his Maintenance for ten Years after the Death of his Grand-father, and the Reversion of the Profits to be applied for raising Portions for his Daughters; and if N. die, then he gives the Estate that N. had to his four Daughters, Share and Share alike; and then further says, And if it shall please God all my Sons and Daughters die without Issue, then he devises it to his Sister and her Heirs &c. The Deviseor dies, the Grand-Lieuten dies, N. enters and dies without Issue; the four Daughters enter and are seised. Adjudged per tot. Cur. that here is no Estate Tail in the Daughters. Skinner. 266. Hill. 2 & 3 Jac. 2. B. R. Price v. Warren.

12. A had two Sons B. and C. A devised Lands to C. and his Heirs, provided that if C. died without Issue, living B. that then B. Pell v. should have the Land, and resolved that this was good to B. by way of Executory Devise, cites Pell v. Brown so adjudged, for C. had no Estate Tail, but a limited Fee. 4 Mod. 283. Patch. 6 W. & M. in B. R. in Case of Reeve v. Long.

As to the Cafe of

not being allowed it must be a void Limitation to B. unless confined to be an Executory Devise to him, and that was the Reason of that Judgment, on purpose that the latent of the Testator might be fulfilled. 4 Mod. 283. in Case of Reeve v. Long.

13. There
13. There was a Provise in a Marriage Settlement, that if the Wife survive the Baron, they not having Issue between them lawfully begotten, then the Wife (whose Estate it was) might revoke and limit new Utks. The Husband died, and left a Son, who died living the Mother; Per Ld. Cowper, Thofe Words are not to be confined to the Moment of the Husband’s Death, but takes all the whole Time of the Wife’s surviving. 2 Vern. 651. Pasch. 1710. Holt v. Burleigh.

Cowper her Power arose whenever the Issue fail’d. Ch. Prec. 293. S. C.

14. Where an Estate is made to A. and the Heirs of his Body, and if he die without Issue, or without Heirs of his Body, Remainder over, this is a good Limitation whenever the Issue fails; Though in that Case if he leaves Issue, he cannot properly be said to die without Issue. Per Ld. Cowper Ch. Prec. 294. Pasch. in Cafe of Holt v. Burleigh.

Wms’s Rep. 158. Patch. 1712. S. C. but adds that the Devife was also viz. in Devife for Payment. As to De- fault of Payment as above, the Trustees devide the Lands to the Legatees for Payment. But as to this it was held, that with respect to the Legatees, if the Legacies take any Effect, the Words of the Will pass a legal Intereft, and the Court does not hinder the Plaintiffs from Proceeding at Law in an Expedition, but dismiffles the Bill; And ibid. Page 200. The Reporter diftinguished this Cafe from the Cafe of Gooding v. Clerk, which was an Eftate in Prem for which no Recovery could be fuffered, and fo there was Danger of a Perpetuity, whereas this was of an Eftate Tail, to that a Recovery fuffered by the Tenant in Tail would have barr’d the 1811. Portions expeâtant thereupon.

16. Devife of Land to A. in Tail, and after A’s Death without Issue to B. A. dies in Teftator’s Life, leaving Issue. The Devife to A. is void, and B. shall take the Remainder prenently. Per Cowper C. though he faid it was againft the Words and Intention of the Will, and also againft a Maxim, that a Heir is not to be disinherited without epxres Words. 2 Vern. 723. Mich. 1716. Hutton v. Simpson.

17. A. devided his Perfonal Eftate to M. provided if he dies without Issue by A. then 80L shall remain to B. and makes M. Executrix, and B. dies, living M. and then M. dies without Issue. Cowper C. took Time to look into the Will, but seemed to be of Opinion for the Devife, and took a Difference between a Devife to one and the Heirs of his Body, and if he dies without Issue, then to remain over, and the Devife in the prefent Cafe which was only to M. generally, and if he dies without Issue &c. That in the firft a Limitation of a Chattle over would be void. But in this Cafe it was not a Devife over, but a Contingent or Condition precedent, which being fulfilled by the Death of M. without Issue, the Devife over may take Place as a New original Devife, and not as a Remainder. For by the Devife to M. the Wife generally, the whole Intereft was not aborbed or taken up, as it was in the Cafe of a Devife to her and her Issue, and therefore upon the happening of the Contingency it might take Place. But this was thought by severall to be all one, and would introduce a Perpetuity, since not confin’d to the Death of the Wife, or any Time certain, and who muft have it in the mean Time. But my Lord would confider of it. Ch. Prec. 493. Hill. 1717. Pinbury v. Elkin.
18. The Words dying without Issue, have a two-fold Meaning viz. without Issue at the Time of his Death, or without Issue whenever the Issue fails. And to "Causes of Inheritance if Lands are devised to one, and in Case he shall die without Issue &c. this gives an Estate Tail by Implication, which shall go to his Issue, and they shall take in Course of Defeint to all succeeding Generations; But to make such a Construction in Case of a Term, which cannot come to the Issue by Defeint is unnecessary, and therefore in such Case, the other Construction of the Words which is most natural and obvious, shall take Place, and it shall be intended in Case of a Devise of a Term with such Words is that (If he dies without Issue living at his Death) and so being confined within the Compass of a Life hinders not the limitation over, but it may well take Place by Executory Devise. G. Equ. R. Pach. 4 Geo. I. Target v. Grant.

Death of the Party, and the Words shall be understood in the legal Sense, for the Support of the Intention of the Parties. But never for the Definition of it. Per Parker C. 10 Mod. 403. Target v. Grant. S. C. & S. P. * And the Words (If A die without Issue) in Case of an Inheritance, are inferred in favour of the Issue, and to let in the Issue after the Death of the Father; But in Case of a Term, these Words cannot have the same Effect; for the Father takes the Whole, which on his Death will not go to his Issue but to his Executors. Per Ld. G. Parker. Wms's Rep. 432. pl. 121. Pach. 1718. S. C.

19. A Devise to E. H. and her Heirs, and if she and D. S. die without Issue, he gives several Annuities charged upon the Premisses to Charitable Uses; Resolved that E. H. had an Estate in Fee. Comyn's Rep. 512. pl. 224. Pach. 9 Geo. C. B. Scrape v. Rhodes & al'.

20. A Devise, that if W. the eldest Son of the Testator should happen to die without Issue, that then, and not otherwise, after W's Death, he devised it over to his Son R. and his Heirs; Held that W. took an Estate Tail by Implication. Comyn's Rep. 372. pl. 186. Trin. 9 Geo. C. B. Walter v. Drew & al'.

21. Sir Geo. Strode by his Will, dated May 21, 1707, devises his Estate in Suffex &c. to his Son Lytton Strode in Tail, Remainder to his Grandson Strode Bedingfield for Life, Remainder to his first, second &c. Sons in Tail Male, provided always and upon Condition, that he the said Strode Bedingfield and his Issue Male should take the Nume and Arms of the Strodes; and in Case he or they should resile or neglect to change or alter their Surname from Bedingfield to Strode, that then the Devise to be void; and then in such Case, he devises the same to his Godson George Darnelly for Life, Remainder to his first, second &c. Sons in Tail Male, upon Condition that the said Darnelly and his Issue Male should take the Name and Bear the Arms of the Strodes; and in Case he or they shall not alter their Surnames from Darnelly to Strode, then that Devise to be void, and in such Case devises the same to his right Heirs for ever. Note, the said Lytton, who was the only Son and Heir to the said Testator Sir Geo. Strode, survived the Testator, but died the latter End of April 1710, without Issue, and without suffering a Common Recovery, and Strode Bedingfield upon his Death entered upon the Estates, and changed his Name to Strode, and in every Respect complied with the above-mentioned Proviso during his Life, and continued in Possession till his Death, which happened in May 1725, without Issue. The Question arising is, Whether the said George Darnelly can take any Estate after the Death of the said George Strode, by Virtue of the Will of the said Sir George Strode the said Strode Bedingfield having during his Life taken upon him the Surname of Strode, and in every other Respect complied with the Will of the said Sir George Strode. This Case was sent by the Ld. Chancellor to the Judges of B. R. for their Opinion, which was as follows, viz. "We are of Opinion, that "George Strode, alias Darnelly cannot take any Estate after the Death of Strode by Virtue of the Will of Sir George Strode above-mentioned,"
mentioned, the said Strode Bedingfield therein named having during his Life taken upon him the Surname of Strode, and in every "other Respet complie'd with the Will of the said Sir George Strode.

R. Raymond.
F. Page.
Ja. Reynolds.
E. Probyn.

The Decree in this Cause was affirmed in the Houfe of Lords. MS. Rep. Amhurst v. Darnelly.

22. A Devise was to Trustees for his Wife so long as she should remain unmarried, then in Trust for such Child and Children as she should leave at his Death, equally to be divided between them, and if either of them die without Issue, then his Share to go to the Survivor, and if both die without Issue, then in Trust for the Defendant. He left two Daughters, who both died without Issue, under Age; and there the Words, dying without Issue, was held to be Issue living at the Death, and to the Limitation to the Defendant allowed to be good. Cafes in Equ. in Ld. Talbot's Time 56, cited by the Solicitor General in the Cafe of Sabbaron v. Sabbaron, as heard the 2d of May 1734. Atkinson v. Hutchinson.

23. A devised to B. for Life, then to such Person as she should marry for her joynite, and after her Death, to the Heirs of the Body of B. and the Executors, Administrators, and Assigns of such Heirs during the Residue of the Term; and for Default of such Issue of B. then to C. This Limitation to C. was held good, the Words being taken to be Heirs living at his Death. Cafes in Equ. in Ld. Talbot's Time 56, cited by the Solicitor General in the Cafe of Sabbaron v. Sabbaron, as heard the 2d of May 1734. Donne v. Merrefield.

and that there were no Words carrying a general Failure of Issue by Reason of the Words (Executors, Administrators, and Assigns) which restrained the Word (Heirs) to immediate Heirs, and that Contingency never happening, the Limitation over was allowed to be good.

(S. a.) What Words give what Estate.

Paying &c.

1. A Seized of a Remainder in Fee after the Death of his Father Tenant for Life, devises thus; I devise to D. my Wife the Land that I have or may have in Resversion after the Death of my Father, yielding and paying therefore yearly during the Life of my Father 40s. This passes only Eate for Life, and no Rent payable till after the Remainder falls by Death of the Father who has no Heir during his Life. D. 371. b. pl. 5. Mich. 22 & 23 Eliz. Anon.

Cro. E. 204. pl. 59. Trin. 31 Eliz. B. R. the S. C. and per Cur. held accordingly.—— Bridgm. 138 cites S. C. and S. P. agreed, and says, the Reason is plain; for it is not limited to be paid out of the Land or Profits, but it is a Payment in Grosf, and it may happen that the Devisee may die before he can receive so much of the Profits.—— 3 Rep. 20. b. 21. a. cites S. C. & S. P. resolved, and cites Br. Estates, pl. 73. 4 E. 6 and Br. Setlements, pl. 18. 29 H. 8. and that D. 371. b. 22 Eliz. no mention is made of the Value of the Land any more than in Cafe of Bargain and Sale of Land in 4 E. 6 Eates 75. and yet the Fee Simple of the Life will pass.—— S. C. of Wellock v. Hammond cited per Cur. Cro. C. 158.——Cart. 225. Mich. 23 Car. 2. C.B. in Thack-
Devife.

3. A devised Lands to C. a younger Son, and willed that C. should pay annually to B. (his Eldest Son) and his Heirs 3l. Resolved that this was an Estate in Fee in C. Cro. E. 744 pl. 22. Hill. 42 Eliz. B. R. Shailard v. Baker.

4. A Man having Illus a Daughter, devises Part of his Land to his N. B. If the Daughter, and the other Part to his Wife for her Life, with the Profits of the Devife to whereof she was to educate his Daughter, and that after her Death this shall remain to his Brother, paying to one 20s. and other 51 Parts, with an Interest, the Land was of the Value of 3l. per Annum; Adjudged that his Brother had a Fee Simple. 6 Rep. 10 tr. Hill. 37 Eliz. C. B. Collier's Cafe.

Daughter with the Profits, or that out of the Profits he should pay so much Money to others, this had been but an Estate for Life; for he is to pay this out of the Profits, and so he is sure to come by no Loss; but in the Cafe before he may die before satisfaction, and therefore it is a Fee Simple; for the Law will tender him that the Devife was for his Brother's Benefit, and not for his Predecessor.

5. A seised in Fee, has three Sons, B. C. and D. and devised to B. Cro. E. 477. and C. and D. severally, certain Parcels of Land, without mentioning of any Estate which they should have, and this was in Reversion after that D. the Death of the Wife, and paying 10l. a-piece to the Daughters, and that if any of the Sons should marry and have Illus Male of their Bodies an Estate tail, and die before his Entry into the Land then his Illus shall have his Part; after which D. takes Wife, and had Illus Male in the Life of the Wife of the Devisee. The Wife of the Devisee dies, D. enters into his Part, S. C. cited and pays his Portion of 10l. a-piece to the Daughters and dies, but he not 2 Show. 39. dying before Entry, had but Estate for Life, according to the express Words of the Will; for Marriage, having Illus Male, and Death before Entry, are three Things precedent to the Tail, and the Words, "Paying 10l. a-piece to the Daughters," makes not a Fee Simple, but is intended for the same Estate as is devised; and Judgment accordingly.


6. If a Man devises to 2 Acres to another, and that he shall pay to his Executors for the same 10l. hereby the Devizee has a Fee Simple by the Intent of the Devisee, though it be not to the Value of the Land. Co. Litt. 9 b.

7. If the Payment is to be out of the Rents and Profits, it is only an Estate for Life. Bridgm. 138. Mich. 15 Jac. Mufchamp. v. Huet.

8. Lands were devised to J. S. and W. R. and they to pay yearly to the Batchelor's Company of Merchant-Taylors in London 6l. 108 pl. 1164 and if they or their Succeffors deny the Payment, then it shall be lawful for the Wardens of the said Company to enter and difcharge the Devisee for them for ever. Resolved that J. S. and W. R. had a Fee. Cro. J. 415. pl. 5. Hill. 14 Jac. B. R. Webb v. Herring.

Reason of the annual Payment without any Regard to the largeness or smallness of the Sum — Roll Rep. 338 pl. 15 S. C. lays the Words to be, to pay yearly (for ever.) Adjuduat —


Bridgm. 84. S. C. lays it to pay (for ever.) And Judgment that the Words make a Fee Simple, and for which the Charge is to continue for ever, it follows that the Estate must continue for ever; for without the Estate the Charge cannot be.
9. If Land be devised to one, and that he shall pay so much yearly to another and to his Heirs, this is a Fee Simple in the Devisee, for he ought to pay this forever; and to be enabled to do this out of the Profits of the Land, he ought to have a Fee Simple in the Land; Per Coke Ch. J. to which Coke J. agreed. 3 S. T. 194. Trim. 14. Jac. Webb v. Herring.

10. A Devise was to M. his Wife for Life, paying 3l. per Annum to Thomas his Son during his Life, and that he should take two Loads of Wood for Fire, and if she died before T. then he devised all his Land to R. his Son, paying to the said T. 3l. per Annum, and paying 20s. a-piece to two of his Sisters; M. died; R. has a Fee. Cro. J. 527. pl. 3. Pach. 17 Jac. B. R. Spicer v. Spicer.

11. A seised of Land, devised it to W. his Son for Life, and afterwards to T. Son of the said W. except the said W. his Son, purchased other Lands of as good Value for the said T. and then the said W. to have the Lands so devis'd, to sell at his Pleasure, and T. to pay his Sisters 10l. a-piece; W. did not purchase Land, but died; T. entailed, and paid 10l. a-piece to his Sisters. Resolved, That T. had a Fee, for the Intent of the Devisor appear'd to be so through the whole Will; For when it is limited to W. for Life, which is an express Estate, and there is no Estate limited to T. but is appointed he shall pay 10l. a-piece to his Sisters, It was an apparent Fee by the Intent of the Devisor, and is so also by the Law. Cro. J. 599. pl. 23. Mich. 18 Jac. in B. R. Greve v. Dewell.

12. The Testator's Wife was secured by Bond to have 40l. during her Life; and the Testator having four younger Sons, and four Houis, devised to every of these younger Sons a Houle, and then comes this Clause, That I have given my said Houis to my said Sons to this Purpose, that they all shall bear Part and Part alike going out of all my Houis, towards the Payment of my Wife's 40l. per Ann. which I am bound to pay. Adjudged that the Sons took only an Estate for Life, and no Fee. Pollex. 543, 544. cites Cro. C. 157. Mich. 4 Car. B. R. Annelley v. Chapman.

13. All the rest of my Goods, Chattles and Lands I give and bequeath to J. S. to discharge all Things in my Will, whom I make my whole and sole Executor, this gives a Fee. Ch. R. 190. 12 Car. 2. Philips v. Hele.

14. Land devised by A. to B. and gave to C. his Daughter 30l. to be paid within a Year after B's Marriage, and 20l. more after B's Death, and made B. his Wife, Executor, and she to pay all Debts which he owed. This gave B. a Fee Simple, and decreed the Lands
Devise.

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16. A Devise of all his Estate paying 40l. a-piece to his Sistres is a Fee Simple; and it appearing that the Personal Estate is not sufficient to satisfy the Legacies, it must consequently be intended his Real Estate; besides the Devisee is not Executor, and therefore it cannot be intended of the Personal Estate. 3 Keb. 49. pl. 23. Trin. 24 Car. 2 B. R. Moor v. Price.

17. A seised of Land, devises it thus, viz. which Land I give to my I give all Son Robert upon this Condition, that be pays unto his Sistres 5 Pounds per my House Ann. the first Payment to be at the first most usual Feast after the Testators Death (the Houses were 16l. per Ann.) is Estate in Fee. 2 Mod. 25. Pach. 27 Car. 2. C. B. Read v. Hatton.

the refusal to maintain him, my Will is, that my Executors shall enter &c Whether the Wife had a Fee the Court was divided. 2 Show. 85. pl. 71. Mich. 31 Car. 2. B. R. Midwinter v. Patridge.

18. If there be a Devise to one upon Condition to pay a Sum of Money and there be a Possibility of a Loss, though not a very probable one, that the Devisee may be damnified, it shall be construed a Fee, and such Construction has always been allow'd in Wills. If A. devise 100l. per Annum to B. paying 20l. it is not likely B. should be damnified, but it is possible he may. 2 Mod. 26. Pach. 27 Car. 2. C. B. in Cofe of Reed v. Hatton.

Loss or Peril of losing, a Fee pass'd; per Ellis J. Cart. 226. Mich. 25 Car. 2. C. B. in Thacker's Cafe.

19. Devise to A. of all his Land which he purchased of J. S. and to The Devisee B. the Lands purchased of J. N. (being 20l. per Ann.) on Condition that B. shall allow C. Meat, Drink, Apparel and convenient Lodging during his Life. A. has only Estate for Life; B. has Fee. 2 Jo. 107. Pach. 30 Car. 2. B. R. Lee v. Withers.

—— 2 Show. 49. pl. 35. Lee v. Stephens. S. C. It was argued, that it was a Fee Simple; For C. has no manner of Provision else, but only an Allowance of Meat and Drink; it is plain the Teflator designed the Maintenance to be for C's own Life, and not what when B. should die, C. should have. And therefore it is clear that B. must have a larger Estate than for his own Life, for otherwise instead of having a Benefit by this Will, he will be damaged and prejudiced by it if he should perform the Teflator's Will, viz. provide for C. during his Life; if this were not a Fee, C. must live, and have no Lodging till the Quarter's Rent be paid, or the Profits come in, and so there would be a Charge without any Profit; For suppose B. should maintain C. for Half a Year, and then die, he would have left by the Will; C. must be provided for daily out of the Land; For which Reason it was adjudged by all the Court, that B. had a Fee Simple. — Pollexf. 339. Lee v. Withr. S. C. argued by Pollexfent, that it was not a Fee, for that the Probability of C's surviving B. and losing his Maintenance, is no Reason to construe it one; But adjudged that it was a Fee.

20. Devise of 120l. Legacy to be paid out of 10l. per Annum within a Adjudged Year, and devised the Lands to A. The Will has not the Word paying; A. has Fee, and it is not a Condition, but a Truitt to pay. 2 Lev. 249. Adjudged by three Justices, but Jones J. c contra. Pach. 31 Car. 2. B. R. Freak v. Lea.

50l. per Ann. in Reversion. 2 Show. 36. Freak v. Lea. —— 2 Jo. 113. S. C. Adjudged, and Judgment affirmed in Cam. Scacc. —— Pollexf. 353. to 360. S. C. adjudged, and Judgment affirmed for the Plaintiff, viz. that a Fee did not pass; but 2 Show. 42. lays, that this seems a Mistake.

21. A. being seised of 10l. per Ann. Lands inPossession, and the Reversion of 34l. per Ann. more expectant upon an Estate for Life, devises a

Al m m

Legacy
Devise.

Legacy of 20l. to B. to be paid in 12 Months out of his Lands, and devises 50l. to C. to be paid in two Years, and 50l. to D. to be paid in the Space of two Years out of his Lands; and having two Sons, W. his Eldet and R. the Younger, devises all his Lands to R. who did not pay the Legacies within the Time. The Court all agreed, that a Fee was devised, because it did appear that the Sum to be paid was more than the Profits of the Land would amount unto in that Time. Freem. Rep. 479, 480. in pl. 657. Trin. 1679. Reake v. Lea.

22. Devise to A. and his Heirs for ever, provided always and on Condition that A. pay to B. 100l. within six Months after 21 Years of Age, and for Default he devises the Lands to B. and her Heirs: And further my Will is, that it A. happens to die without Issue, the 100l. to B. first paid, the Remainder over to C. and D. this was but Estate Tail, Raym. 425. Hill. 32 and 33 Car. 2. B. R. Wilson v. Dyson and Kipping.

A. devised Lands to C. and his Heirs for ever; but if he die leaving no Son, then he devised them to such Son of B. as B. should nominate, charged notwithstanding with such Annuities, Legacies and Payments as hereafter specified; and for want of any Son of B. then to the Eldet Son of D. charged as aforesaid; and gave his Leaves to W. R. and T. S. in Trust for the Benefit of B. for Life, and after B's Death, in Trust for all B's Children; and the Trustees to renew the Leaves. And if the Trustees should not provide Money enough for that Purpoze within a Month after Demand, that the Trustees might mortgage any of the Lands of Inheritance to renew the Leaves, and appointed B. the Executor to pay A's Wife 200l. a Year for Life Half-yearly, without any Deduction whatsoever, and several other Legacies. B. was likewise A's Heir at Law, and made Residuary Legatee. C. died an Infant, without Issue, in A's Life-time, and A. died without Issue. B. proved the Will, and polishe'd Personal Estate sufficient to pay all the Debts and Legacies, and paid them accordingly, leaving the Plaintiffs his Daughters and Heirs. D. had two Sons, E. (the now Defendant) and F. who were living at A's Death; and the Question was, Whether E. the Eldet Son of D. took any, and what Estate? And Lord Somers was of Opinion, that he took only an Estate for Life, and no more; For if Lands are given to a Man Generally, without limiting for what Estate, this makes but an Estate for Life, unless it appears plainly that Testator intended a greater Estate, which it does not here: And the Monies directed to be paid by him cannot infalge it; for they do not any of them affect his Person, and so can only take an Estate for Life. Chanc. Prec. 67. Hill. 1696. Fairfax v. Heron.

If a Will is made by Feme Covert of Lands of Inheritance to J. S. and the Baron dies, and then the Wife, though her Intention is plain, and though after the Decease of the Baron, when the became fui Juris, they might have devis'd the Lands to J. S. or by a Republication have made the former Will good, yet it is not relievable in Equity; per Ld. K. Wright. 2 Vern. 475. Hill. 1704. in Cafe of Clavering v. Clavering.

But Holt Ch. J. held, that the Word Hereditaments gave the Fee, but there being so large a Personal Estate, he was not satisfied to fix the Charge upon the Land. Adjudged a Fee. 11 Mod. 102 S. C. And referring 20l. a Year to be paid to the Ains-Hiipes of A. for ever. Holt's Rep. 235. S. C. — 40s. a Year. 11 Mod. 102 S. C.

S. P. Per Gould. J. but Powell I. seemed to doubt of that, but held it a Fee upon the Reason of the Perpetuity, Holt's Rep. 236. S. C.

25. A. feised in Fee, made his Will, and gave several Personal Legacies, and among other, four Coats to four poor Boys of the Parish of A. for ever, and then devised all his Lands, Tenements and Hereditaments whatsoever, and likewise all his Goods, Chattels, Money and Personal Estate to M. his Wife, and made her Executrix, and left 1000l. Personal Estate. Per Cur, this Devise to M. was a Fee, because it was subject to a Perpetual Charge. 2 Salk. 685. Pach. 4 Ann. B. R. Smith v. Tyndall.

26. In
26. In a Special Verdict the Cafe was found thus, A. by his Will devises Lands to B. and then bequeaths Legacies; and after two or three Legacies to different Persons, he gives 1l. to C. and directs B. to pay it, but gives him two Years Time to pay it. The Jury find the Lands to be 50s. per Annum; and the Question was, what Estate B. had, whether for Life or in Fee. And adjudged to be a Fee. For that the devise here was a Sum in Gros, and a Debtum in Praefenti solvend’ in futuro; and it was a Sum certain to be paid by B. at all Adventures, whether the Land yielded full 5l. or not; and so not like the Cafes where the Sum devised is to arise out of the Profits &c. 11 Mod. 209. pl. 11. Hill. 7 Ann. B. R. Reeves v. Gower in C. B. 


and is thus, viz. A. by Will devised to his Brother R. all his Lands, Tenements and Hereditaments, and all his Personal ESTATE, and whatever else he had in the World, and made him Executor, desiring him to pay his Debts and Legacies. On a Special Verdict in C. B adjudged the Inheritance passed by this Devise; R. the Devisee was the Testator’s Younger Brother, and J. his Eldest Brother left a Daughter.

28. A has a Fee-Simple in a Light-House, and a Term for Years in Land adjoining to it. He makes his Will, and thereby gives to his Son Henry and to his Assigns, all his ESTATE and Interest in the Light-House, Lands, Tenements, and Appurtenances, thereunto belonging, upon fruit, that he pays out of the Rents and Profits of the Term, during the Remainder thereof, 200 l. per Annum. Henry takes a Fee-Simple in such Part of the Premises wherein the Testator had a Fee Simple, and a Term for Ninety-nine Years in such Part of the Premises wherein the Testator only had such Term. Barnard. Chan. R. 311. Hill. 1740. Villiers v. Villiers.

(T. a) Estate for Life in Tail, or Fee, by the Word Estate, or Land &c.

1. Having Three Sons, devised his Lands to his Three Sons equally to be divided, they have Fee-Simple, for if the Younger had no Fees they could not have Estate equal with the Elder, for he has Fee. Cited Het. 64. per Harvey J. to be resolved the 17 Eliz.

2. Devise that his Eldest Son should take the Profits of the Lands; Le. 316. with his Executors, till his Youngest Son should come to the Age of 20. Twenty-two Years, and that then the Youngest Son should have tided the Land to him and the Heirs of his Body, Per Cur. The Eldest Verbis Son has Fee till the Youngest is Twenty-two. Le. 101. pl. 130. Pasch. Vid. 2 Mod. 30 Eliz. B. R. Gates v. Halliwell.

(Taylor v. Biddal where it is adjudged that the General Heir to taking had only Estate for Years till the Devisee should or might be of Age.

3. Devise of Land to A. without further Words is Estate for Life, because the Will would otherwise be void, which was not the Intent of the Devisor; for the Devisee cannot be Tenant at Will to the

his Assigns.
4. One Copartner devises to a Stranger *all her Part and Purparty* without expressing what Estate the Stranger should have, cited per Jones J. and sayd, that this was adjudged only an Estate for Life. *Lat. 1651.* cites Johnfon’s Cafe.


7. That J. S. *shall fell my Land,* he shall fell the Inheritance.

8. A Devise of divers Legacies in Money and then followed a *Devise of Lands.* *All the Rest and Residue of my Money,* *Goods, and Chattles,* and *other Estate whatsoever* I give to J. S. whom I make my Executor; the Tefator had other Lands; per Finch K. Decreed that the other Lands do pafs. *Chan. Cafes.* 262. *Trin. 27* Car. 2. *Tirrel v. Page.*


10. I hear J. S. is inquiring after my Death, but I am resolved to leave him nothing but what his Father left him, but I leave all my Estate to my Wife; there the Wife took all the Real Estate, and the Reason was, because of the other Words, which shew he meant to exclude the Heir at Law. *12 Mod. 394.* in Cafe of Shaw v. Bull cites 3 *Mod. 45.* *[Trin. 36 Car. 2. B. R.]* Reeves v. Winnington.

11. A feïled in Fee of a Messuage and also of Copyhold Lands, makes his Will and in it are these Words: *All the rest of my Estate, whether Freehold or Copyhold, I devise one Third Part to my Wife, and the rest to my Children, equally to be divided between them.* Sergeant Trinder argued, that this carried a Fee, the Word Estate, in legal Signification, being the Interret which he had in the Land; *fed altera Parte minime pararx adjurator.* *Show. 348.* *Pasch.* 4 W. & M. Carter v. Homer.


S. C. argued, 5th adjurator. *Skinn. 193.* S. C. cited by the Reporter and alledged that this carried a Fee, and that it was so enjoyed accordingly.

13. Inheritance shall pas without any other Circumstances to manifést his Intent meerly by Devise of his Estate. 5 Mod. 109. Hill 2 Ann. B. R. per Holt Ch. J. in delivering the Opinion of the Court in Case of Bridgewater (Counteis) v. Duke of Bolton.

all the Testator's Intereat therein. 1 Salk. 246. S. C. — Gibb. 10. Arg. cites S. C. resolved, that all my Estates and Hereditaments in a Will give a Fee.

14. As touching the Worldly Estate it hath pleased God to bestow upon me, I give the same in Manner following, Item I give to my Cousin T. S. all that my Parcel of Land lying in Wallbam-Abby (being the Lands in Question) Item, I give to my said Cousin T. S. my Wearing-Appliares, Linnen, Books, with all other my Estate whatsoever and wheresoever nor herein before given and bequeathed, and him the said T. S. I make the sole Executor of this my Will for performing the same. It was urged, that here he gives only his Apparel, Linnen, Books, with his other Estate, which must be construed with his other Estate of the same Nature, and not an Estate of an higher Nature. Then here the Estate was Copyhold, which passes by the Surrender, not by the Will; and when he surrenders to such Utes as should be declared and expressed by his Will, and in the Clause by which he devises the Copyhold he gives it to T. S. only, without saying any thing of his Heirs; it would be a forced Construction, that the Words (with my other Estate not before bequeathed) should enlarge the Estate before expressly limited to T. S. and after these Words, he adds (him I make my Executor for performing my Will) which Words import, that he intended nothing for him by this Clause, except such Estate as belonged to an Executor. But the Court held, that when he gave all whatsoever, that comprehended all that he had Real or Personal Estate; and when he had surrendered to the Utes declared by his Will, the Will shall have the same Construction as if it had passed the Land itself. Adjourned. But afterwards the Plaintiff was admitted to Judgment. Comyn's Rep. 337. 340. pl. 171. Patch. 6 Geo. C. B. Scott v. Alberry.

15. A seised of Lands in Fee and polisched of a Personal Estate, gave one Third Part of all his Estate whatsoever to his Wife M. and devised to B. his Son and his Heirs, Two Thirds of all his Real and Personal Estate upon Condition to pay his Debts. It was held by Raymond and Eyre Ch. J. and Jekyll Master of the Rolls, without Difficulty, that by those Words, a third Part of the Lands passed, but they conceived that the Wife should only have an Estate for Life therein, the Word Estate being rather a Description of the Thing itself than of the Interest in it, and by the next Clause it appeared, that where the Testator intended to give a Fee he took Care to add the Word (Heirs) to the Word (Estate.) 2 Wms's Rep. 335. pl. 96. Hill 1725. at the Council. Cheifet v. Painter.

16. A Devise of all my worldy Estate, as well Real or Personal, comprizes all he had in the World and gives a Fee. 2 Vern. 693, 691. pl. 615. Trin. 1715. Beachcroft v. Beachcroft.

17. A Devise was, viz. I give and bequeath all my Lands and Estate in C. in N. with the Appurentains to W. E. of St. M. Esg, This gives Devise had N N N a Fee been of

the Matter of the Rolls thought it would not have passed the Fee, but would have been taken according to the Common Acceptation for his Land at such a Place. Ibid. S. C. 2 Wms's Reports 534. S. C. decreed at the Rolls, and his Honour said, that the Law seemed settled in this Point by the Case of Bridgewater (Councils) v. D. of Bolton.

18. A. made his Will thus, viz. As touching my Worldly Estate &c. I devise &c. thereof as follows, Imprimis, I give my Estate at &c. to B. Item, I give my Estate at &c. to C. and then follow these Words, Item, I give to M. all my Estate at N. &c. with all my Goods and Chattels as they now stand for her natural Life, and to my Nephew &c. after her Death, if he will not change his Name to A. If he does not I give him only 20l. to be paid him for his Life out of N. &c. which I give M. upon my Nephew refusing to change his Name, to her and her Heirs for ever. The Question was, whether T. D. was intended to have an Estate for Life only, or in Fee; Ed. C. Talbot was of Opinion, that tho' Introductory Words prove the Testator to have had his whole Estate in View, and that taking the Words in the first Sense will make only a partial Disposition and leave a Remainder, whereas taking them in the last Sense will make a complete Disposition of the whole, and that this Clause of the Devise to M. and T. D. depends upon Construction of the Word Estate, which will be clear from the Sense he hath taken it in through all the other Parts of his Will, where, whensoever he has used it, he has meant thereby to pass the Inheritance, and though the Word (Estate) in Common Speech may not mean an Inheritance, yet it is clear he has meant it so here, and though the Limitation to M. in the first Instance was for Life; yet the Devise to T. D. was in General Words, he thought this could make no Difference, and that no great Stress could be laid upon the incorrect wording, and that the Intent plainly appearing to pass the Inheritance, he decreed an Estate in Fee to T. D. Cates in Equity in Lord Talbot's Time. 157. Mich. 1735. Ibberfon v. Beckwith.

19. The Words (I devife all my Temporal Estate) are the same as (I devife all my Worldly Estate) and pass a Fee and this is the plain-er, where it is afterwards said, all the rest of my Real Estate the Word (Rel) being a Term of Relation. 3 Wms's Rep. 295. Trin. 1734. Tanner v. Wife.

20. Lord Chancellor said, he did believe that there were Cases where this Word Estate has been held to signify barely the Land itself. But all these Cases depend upon their particular Circumstances, and the Evidence of the Testator's Intention arising from these Circumstances. Where the Words were, viz. What I have I intend to settle in this Manner. This shews that he intended to dispose of his whole Interest in the Premises, and it is as strong as if the Testator had said, all my Estate I dispose of in this Manner; and the Case is stronger because of the Word Settle, by this Expression the Testator shews his Intent to make a Settlement of his whole Estate. Barnard. Chan. Rep. 14, 15. Falch. 1740. Tuffnell v. Page.

(U. a) Estate
Devise.

(U. a) Estate for Life, in Tail, or Fee, by the Word Heir, or each other's Heir.

Devise to A. and his Wife Et Heredi de Corpore & uni Heredi di tantum was adjudged an Entail, Per Hale Ch. J. Vent. 228. cites 39. Aff. 20.

2. Devise to A. for Life Remainder to B. and his Heirs males is a Fee and no Entail. Cro. E. 478. in Case of Abraham v. Twigg cites 9 H. 6. 25.

3. Note, it a Man has Issue Three Sons and devises his Land, and S. C. cited, likewise one Part to two of the Sons in Tail, and other Part to the third Son in Tail, and that none of them sell any Part, but that each shall be Heir to the other, and dies; in this Case, it one dies without Issue, his Part shall not revert to the Eldest Son, but shall remain to the other Sons; for those Words (that each shall be the Heir to the other) implies a Remainder, because it is one Will, which shall be intended and adjudged according to the Intent of the Devisee. Br. Devise, pl. 38. cites 7 E. 6.

4. Devise that the Wife shall take the Profits of his Land till M. his Daughter and Heir come to the Age of Sixteen Years, and if M. died, that 7. S. should be her Heir. Manwood held that this is Estate in Tail to M. But Mounson and Harper held, that it is but Estate for Life. 3 Le. 55. pl. 80. Mich. 15 Eliz. C. B. Coniers's Cafe. pl. 345. S. C. in totidem Verbis. Ibid 215.

5. If a Devise be made to A. for Life, and after to the Heir of Devise to A. for Life and so from Heir to Heir for ever for Life. Here are two A. for Life, and after to his Heirs Estates for Life and the other DeVisees have Fee; for Estates for Life cannot be limited by General Words from Heir to Heir, but by Special Words they may; per Wray Ch. J. Le. 258. pl. 345. 18 guitar Number this is an Estate in Fee, but if it be and to the Heirs of such Heir, (such) there is a Contingent Remainder; Per Holt Ch. J. Skim. 550.—Heir is Nomen Calleatisum and in a Will contains Heirs and Heirs of the Heir and gives a Fee. Skim. 563, 564. In Cafe of Bevilton v. Hulley.

6. Devise to A. for Life, and so after to every Person, that should be his Heir, for Life only, this was adjudged Estate in Pohtision to A. and Remainder for Life to the next Heir and not to any more. No. 372. Arg. cites 28 or 18 Eliz. C. B. Haddon's Cafe.

7. A. seised of Lands in Question, had Issue B. C. and D. and Mo. 564. had other twenty Acres of Land in Fee, and devised to C. ten Acres of the twenty, and to D. the other ten Acres. And then devised to B. his other Lands, (the Lands in Question) and said, that when B. should die without Heirs of his Body, that C. should be his Heir, and D. should have his Part, and if either C. or D. should die, that then one of them should be the other's Heir, and died; B. died without Issue. C. died leaving Issue E. upon whom D. entered, but adjudged for E. If by my Will I appoint, that 7. S. shall be Heir of my Land, he shall have it in Fee; for such Estate as the Ancetor had, had Issue such he is to inherit, and therefore the said Word (Heir) in the latter Clause between C. and D. shall give an Estate to the Survivor, because the Brother to whom he is made Heir had but one Part ESTATE to another,
Devise.


3. A. devises that B. shall be his Heir; C. devises Lands to A. and his Heirs. B. shall have these Lands as Heir to A. Arguedo. 2 Sid. 27. cites 1 Car. Rot. 189. alias 149. Sander's Cafe.


9. The Father having three Daughters, A. B. and C. devised his Lands to his Wife till his Heir came of Age, paying to his Heir 10/. per Ann. and to his other Children 20s. a-piece to the same Time. Item, he devised to his two Youngest Daughters B. and C. 140l. a-piece; and that if A. his Heir dies without Heirs before 21, so that the Lands shall come to B. then she to pay the 140l. which was devised to her. The Court held, that A. should have all the Lands, exclusive of her Sitters, by the Words in the Will calling her his Heir, and frequently in the Will mentioning his Heir in the Singular Number; but by the last Words, 'If A. his Heir dies without Heirs, so that the Lands shall come to B. then B. to pay the Portion which the heretofore ought to have had,' is only Eate Tail, and not a Fee Simple. 2 Lev. 162. Hill. 27 & 28 Car. 2. B. R. Tilley v. Collier.

10. A. devised to B. and C. Brothers, several Parcels, and if either die, that the other should be his Heir; B. dies. The Question was, whether C. should have the Fee, or only an Estate for Life? And to that this Diversity was taken, that when a Fee was devised to A. and that if A. died B. should be his Heir, there B. should have a Fee; But when A. had but an Estate for Life by the Devise, there B. should have but for Life by way of Executory Devise, cites Hob. 75. 1 Roll. 836. But Sergeant Maynard said, that when the Case is between Brothers, there the Words may pass an Inheritance, because they, by Intendment, may be Heirs to one another; but if the Case were 'between Strangers,' there, to say that the other shall be his Heir, is no more to than to say, that he shall have the Eate which the other had; But the Court inclined that C. should take but an Estate for Life. Sed Adornatur. Fream. Rep. 293. pl. 344. Trin. 1677. Gynes v. Kemffley.

11. Land was devised to J. S. and his Heirs during the Life of A. in Trust for A. for Life, and after the Decease of the said A. I give it to the Heirs Males of the Body of A. now living,' who has a Son named B. A. takes only an Eate for Life, and the Remainder executes in B. 2 Lev. 232. Mich. 30 Car. 2. B. R. James v. Richardson.

Devise.

12. Devise to A. and such Heir of her Body as shall be living at her Death, and for Default of such, Remainder to B. is Eatee Tail.


(though in the Singular Number is Eatee Tail, but if he go on and says, and to the Heirs of the Body of such Heir, there A. is but Tenant for Life) Inst. 325. cites Archers Café. 1 Rep 66. —


13. Sir, Thomas Trollop devised the Manor of A. to his first Son William for Life, Remainder to th. Heirs Males of his Body, Remainder to his second Son Thomas for Life, and after his Death to the first Heir Male of Body, Remainder to his third Son Christopher, and the Heirs Males of his Body, Remainder in like Manner in Tail to the fourth, fifth &c. Sons.

In an Ejeotive brought on the said Café, Eyre Ch. J pronounced the Resolution of the Court. The Case entirely depends on the Will of Thomas Trollop, Grand-father to the Defendant, and the Question arises upon the Words following. He devises the Manor &c. to his Son Thomas Trollop, for Life and alter to his first Heir Male of his Body lawfully begotten, and for want of such Heir Male, Remainder over.

We are of Opinion that Thomas Trollop had by this Devise an Eatee Tail, consequently the Defendant is entitled as Heir Male of Thomas Trollop. We will consider if the Devise had been to A. and the Heir Male is the Singular Number. 2dly, Whether, as an express Eatee for Life is devis'd before the Words Heir Male, it varies the Café. 3dly, Whether the Word (First) makes any Alteration.

4thly, The legal Operation of the Words (for want of such Heir Male.) He considered the two first Points together, to A. for Life, and after to the Heirs Male of his Body, Remainder over; The first Devise takes an Eatee Tail, notwithstanding the express Eatee for Life. This has been then adjug'd in a Will, and it is not necessary now to consider how it would operate in a Deed; the Words Heirs are necessary to make an Inheritance in Grants. Littleton Sect. 1. It is not to be inter'd from thence that Littleton intended, that if the Word Heir in the Singular Number was made use of, that it would not be an Eatee of Inheritance; though Coke 1st. Inst. 8. b. is of Opinion, that if Land is given to a Man and his Heir in the Singular Number, he hath but an Eatee for Life, yet that Opinion of Coke is not warranted by any Thing in Littleton, and directly contrary to 39 Atl. S. 20. where Lands were given to a Man and His Wife, and one Heir of their Bodies. This was held an Eatee Tail, which could not be under the Word Heir in the Singular Number gives it a descendible Quality; the same Registrum Judicial' Gift made to a Man, and Heredi Malecula held an Eatee Tail, and Co. in 10. 22. a. seems to be of the same Opinion, and the Reasons 1 Inst. 8. are of no great Weight to me. If a Tenant gives to A. for Life, and after to Heir Male, he intends an Eatee Tail, viz. a descendable Eatee, and often so adjug'd. Cro Eliz. 313. Eelota v. Day. 1 Rolls Abr. 832. 839. 2 Rolls Abr. 417. Moor. 593. Ow. 198. (there is no Resolution in that Case, prout Record 39 Eliz. Rot. 467.) Sir T. Jones 111. 113. Gouth v. Goddard, That Heir Male is of the same Sense with Heirs Male, 1 Bulst. 219. 1 Roll. Abr. 836. Stiles 249. 273. 1 Rolls Abr. 627. Paunley v. Lowdale, a very strong Case; where Heir in the Singular Number is Nomen Collectivum, and all one with the Word Heirs, the Case did not turn upon the Words for ever.

Indeed Devise to Father for Life, and after to next Heir Male, and the Heirs Male of such Heir Male, this has been held to be only an Eatee for Life in first Devisee, this is Archers Case, 1 Rep. [66.] 2 Anderson [37.] But the Reason of that Resolution is, because

O o o Words
Words of Limitation are grafted, and annexed to the Heir Male, though in the Report Book the Reason of the Resolution of that Case is said to turn on the Word (next) as Descriptio Personæ; But this is not the true Reason, but the Foundation of such Resolution was as aforesaid; Hale Ch. J. has taken Notice at the true Reason 1 Vent. 215, because the Words of Limitation were annexed to the Word Heir, therefore (Heir) was taken to be but Designatio Personæ; from hence it appears that Devise to A. for Life, and his Heir Male in the Singular Number, and to A. for Life, and his Heirs Male in the Plural Number is the same; and although an express Estate for Life is devised, yet it shall be an Estate Tail. 1 Vent. 214. King v. Helling. Then let us consider the third Point, whether the Word First varies the Case, we are of Opinion that a Devise to A. and his first Heir Male, and to A. and his Heir Male is the same, to the first Son is different, for he is well described and will take by Remainder in his Father's Life; But Heir Male cannot take Effect till after the Death of the Father. The Case of Lordlake v. Lordlake Cro. Eliz. 40. cited contra is quite different, for there it is eldest Issue Male, the Word Eldest is a particular unvariable Description, but the Word First is not so.

As to the 4th Point, if the preceding Words were not strong enough to create an Estate Tail, there would be effectual to carry such an Estate, the Words for want of such Issue, or if he die without Issue, or for Default of such Heir Male, have raised by Implication an Estate Tail. 1 Vent. 239. Birtle's Cafe, and Robinson's Cafe, 231. Birtle's Cafe, to Judgment for the Defendant, who claims as Heir Male of the Body of Thomas the Son. MS. Rep. Trin. 1734. C. B. Dubber v. Trollop.

(W. a) Estate for Life in Tail or Fee. By the Words to Give, Sell, Dispose &c.

Cart. 237.
S. C.

1. THAT J. S. shall sell my Land. He shall sell the Inheritance. 1 Mod. 190. in pl. 21. cites Kelw. 43, 44. 19 H. 8. fol. 9.


Le. 156.


4. Le. 41. pl. 116. S. C. in totodem

3. A. devised Lands to his Wife [Es Intentione] to dispose and employ them on her and his Son at her Will and Pleasure; Per Dyer Welton and Welth, this gives a Fee; and Dyer and Welth held, that the Estate in her is Conditional, because of the Words Es Intentione, which make a Condition in every Devise, though not in Feoffment, Gift or Grant, unless in the King's Cafe, and the Words amount to as much as if he had said, so that she shall not give it over to a Stranger, but to hold this or give it over to his Son. Mo. 57. pl. 162. Patch. 6 Eliz. Anon.

4. Devise to his Wife for Life, and after her Death she give to the same to whom she wills. The Wife has but Estate for Life, but has Authority to
Devise.

5. Devise of Copyhold Lands thus, I devise to A. my House in M. to B. my House in N. to C. my House in O. Moreover, if the said A. B. and C. live till they are 21, and have Issue of their Bodies lawfully begotten, then I give the said Houses to them and their Heirs in Manner aforesaid, to give and sell at their Pleasure, but if one die without Issue of his Body &c. then the other Brothers or Brother shall have all the said Houses in Manner as aforesaid, and if the three die without Issue in like Manner, then to be sold by his Executors &c. no Estate Tail is created by the Will, but when they come to their lawful Age and have Issue, the Fee Simple is settled in them, so as the Residue of the Devise is void, by the first Words of the Will, it was agreed, that the three Devises had but for their Lives. 2 Le. 68. pl. 22. Trin. 27 Eliz. C. B. Brian v. Cawfen.

6. Devise to A. his Wife on Condition she should not marry, and if she died or married, then the Land should remain to A. in Tail, and if A. died without Issue of his Body in the Life of the Wife, and if then the Land should remain to the said Wife to dispose thereof at her Pleasure, and if the said A. survived the said Wife, then the Land should be divided Saltmington, between the Sisers of Devon for A. died without Issue, living the Wife, the Wife has a Fee Simple. Le. 283. pl. 383. Hill. 29 Eliz C. B. Jennor v. Hardies.

7. A. feiled in Fee devises all his Lands to A. his God-son, after the Death of his Wife, and if he fail'd, then he will'd all his Part to the Disposition of his Father. This is a Fee Simple to the Father. Le. 156. pl. 219. Mich. 30 & 31 Eliz. C. B. Whiskon v. Cleyton.

8. Devise to A. to dispose at her Pleasure, and to give it to one of my Sons, to which he pleases; Per two Justices it gives Estate for Life, with Power to dispose of the Fee to one of the Sons; by two other Justices it gives Fee, but only ties her, that she the alien it must be to one of cited Str. the Sons. Lat. 9. 39. 134. Hill. 1 Car. and Trin. 2 Car. Daniel v. Arg. 159. Adjudged that the Wife had not but a Power. Nov. S. C.

A Man devised his Land to another to give, fell, or do thereunto at his Will and Pleasure, This is a Fee Simple; For his Intent shall be taken to give a Fee Simple. Br. Devise pl. 39 cites 7 E. 6. Br. N. C. pl. 432 cites Br. Devise, 38. [but all the Editions of Br. are pl. 59.] and cites 19 H. S. 9. (b) by Norwich, Fitzherbert and more.

If a Man devises Land by such Words, viz. to him, and to his, or to him to do his Pleasure thereunto, it was the Opinion of Fitzherbert and others of C. B. that the Devisee in such Case had a Fee Simple in the said Land. Bendit. 11. pl. 9. 24 H. 8. S. C. cited by Jones J. Lat. 40. in Case of Daniel v. Up ley, and said he had been the same wrote by the Hand of Warburton J. but he said if it was barely thus, viz. I devise Lands to dispose at Will and Pleasure, it shall be intended of the Profits only. And says, that this Case differs from the Case in Hor. N. C. 432. and Br. Devise, 38. (39.) because there it is to dispose at Will and Pleasure, as in this Case of Daniel v. Up ley, but there it is added (and to fell &c.) which is not in this Case, and that Clause made the Case there to be a Fee Simple.

9. A. devised to M. his Wife for Life, and by her to be disposed of to 2 Le. 123. my Children as she shall think fit; M. disposed of the Lands to the Son and his Heirs. By the Opinion of three Judges the Dispo- says, that the Fee Simple, and Atkins Mod. 189. pl. 21. Mich. 26 Car. 2. C. B. Lieue v. Saltmington. held, that if the might dispose of the Fee, but that Windham and Ellis held, (as Sergeant Wilmot reported to him) that the could dispose no more than for her own Life; So adjournad.—Cart 233. Anon. S. C. Vaughan Ch. J. insisted that the Word (dispose) cannot signify give; For none can dispose of more than...
Devise.

than he has, and here the Wife has only an Estate for Life. And if the Words were to be transposed equivalently, viz. "I will and bequeath the Lands in Quilition at my Wife’s Disposal, to such of my Children as she shall think fit," the Children do not take it expressly by the Gift of the Testator; and the Words (at her Disposal) are with Relation to the Children, and not to the Estate; and when she hath disposed of it to any Child, that Child shall have but an Estate for Life; and she has the Nomination and Specification of the Person. And he said Sub-jaures, Sentences mutuiores, non ponderantes. — Freem. Rep. 149 pl. 170 S. C. argued, Sed adjournatur. — Ibid. 162 pl. 180 S. C. argued; and Vaughan and Atkins seem’d to incline that she had Power to dispose of an Estate for Life only; but Windham and Ellis contra; Sed adjournatur. — Ibid. 176 pl. 189. S. C. adjudged by three Judges, contrary to the Opinion of Vaughan, that she might dispose of the Fee — 1 Salk. 239, 240. Pach. 10 Ann. B. R. Tomlinton v Dighton S. P. and Parker Ch. J in delivering the Opinion of the Court said, that this was only an Estate for Life to the Wife, but that the Disposal Power was a distinct Gift; because the Estate given is express and certain, and the Power comes in by Way of Addition, and is a separate Gift dillinguished from the Estate.


11. Devise to dispose at Will and Pleasure is Fee. 6 Mod. 111. Hill. S. P. Per Doderidge. J. but contra per Jones J. — Lit. 42. cites that Whitlock J. held it to be a Fee.

12. Where Lands are devised to a particular Purpose, and that the Death of the Devisee may prevent that Purpose, there the Devisee shall have Fee; Per Holt Ch. J. 6 Mod. 111. Hill. 2 Ann. B. R. cites 6 Rep. Collier’s Cafe.

The disposal Power is a distinct Gift, because the Estate is on a Writ of Error on a Judgment in C. B. Tomlinton v. Dighton. given is express and certain, and the Power comes in by way of Addition. Ibid. — Wms’s Rep. 149 pl. 41. S. C in B. R. adjudged accordingly, that the Wife has only an Estate for Life, with Power to dispose of the Fee, and the Judgment in C. B. was affirmed — 10 Mod. 71. S. C. held accordingly per tot Cert. in B. R.

14. A. among other Legacies gives a Legacy of 5 l. to B. his Brother and Heir, and then makes his beloved Wife C. his sole Heir’s and Executive of all his Lands, Tenements, Goods and Chattels, the same to fall and dispose of as she should think proper, to pay his Debts and Legacies. This is a Gift to her of the Surplus in Fee, and there is no Refulting of the Heir. Cales in Chan. in Ld. Talbot’s Time 269. Mich. 4 Geo. 2. Rogers v. Rogers.

(X. a) Estate for Life, in Tail, or Fee, by the Words Equally to be divided &c.

1. D E V I S E of a House to three Brothers among them, provided always that the House be not sold, but go to the next of the Name and Blood that are Males; this is Estate Tail in every of their Parts. D. 333. b pl. 29. Pach. 16 Eliz. Chapman’s Cafe.

2. A. devised of three Houses, devised them to his Wife for Life, Remainder of one to B. his Son and his Heirs, Remainder of the 3d to C. his Daughter and her Heirs, Remainder of the 3d to D. his Daughter and her Heirs, and if any of his said Issue dy’d without Issue of his or her
Devise.

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1st. her Body, then the other surviving should have Totam illam partem &c. — 3 Le. between them equally to be divided; C. dies leaving Illeue (Husband and Wife being dead before) then B. the Son dies without Illeue ; C. has a Cook S C. Moiety of her Brother's House in Fee (not by the Will but by the accordingly, Common Law.) If the first Sitter had dy'd without Illeue, the Brother and all in had a Fee executed of one Moiety, and a Fee expectant of the other, and the surviving Sitter only Estate for Life. If the Son had dy'd, living the two Sitiers, they would have had Fee in their Brother's House, not by the Will, but by Descents as Coparceners. 2 Le. 2 Petty- 129. pl. 171. Mich. 29 Eliz. B. R. Hawkins's Cafe.

all the Justices held, that by a Devise an Estate for Life only is limited to the Survivor, and the Fee descends by Course of Law as well to the Illeue of C. who first died, as to the Survivor; and that the Words totam illam partem refers only to the House and not to the Estate in it, and to the Estate limited over by the Will is no more than an Estate for Life. — S. C. cited Arg. Cro E. 693.

3. A seised in Fee of an House and possess of Goods, devis'd in The Devise these Words; the rest of my Goods and Lands and Moveables whatsoever, as reported after my Debts, legacies, and funerals paid, to my 3 Children B. C. and D. equally to be divided among them; Adjudged they have Estates but for Life in the House, and are Tenants in common. Mo. 594. pl. 804. Trin. 55 Eliz. Deacon v. Marsh.


4. Devise to two Sons, to be equally divided amongst them; the eldest has Fee, and the youngest only an Estate for Life. Lat. 136. cites it as Taylor v. Hodges.

Nel. Ch. R. has Fee, and the youngest only an Estate for Life. Lat. 136. cites it as Taylor v. Hodges. S. P.

5. Devise to four Sons; adjudged that the third younger had but an N Ch. R. Estate for Life, and the elder being Heir, the inheritance belong to him. 3 Ch. R. 87. cites 4 Car. 1. as the Cane of Taylor v. Hodges.

6. Devise to A. (his eldest Son) in Tail, on a Limitation to cease for Non-payment, Remainder to B. in Tail Male, and so to C. and D. and upon Cefer of A's Estate by Failure, then to B. C. and D. and to their several Heirs for ever, as before is limited, equally to be divided amongst them. On A's Failure this Devise wholly revokes and controls the other Remainders for the former Part, and leaves the Fee Simple expectant in the Heir of the Deviser; Per Bridgman Ch. J. in delivering the Opinion of the Court, and Judgment accordingly. Car. 175. Hill. 18 & 19 Car. 2. C. B. Rundale v. Ely.

7. B. devises to C. and D. and if either died, the other should be his Heir. The Question was, Whether C. or D. had an Estate for Life or in Fee? And it having been argued by Serjeant Borris, that they had but an Estate for Life, Serjeant Maynard was to maintain that he had a Fee, but he threw it off upon another Point. Frem. Rep. 235. pl. 244. Mich. 1657. G. B. Gyles v. Kempe.

8. Devise to A. for Life, the Reversion to B and C. to be equally divided between them; Deceased a Tenancy in common for Life only; so if B. had been Heir at Law, C. would take Estate for Life only. Vern. 65. pl. 51. Mich. 1682. Peiton v. Banks.

9. A. devises seven several Shares in the New River Water to his several Children (by two Venters) in Fee, provided that if any of them die under Age or unmarried, then the Part or Share of him or her be Skinn 249. pl. 5. Midd. 1814. Deacon v. Diccion. Swain. S. C.
Devise.

adjudged accordingly.


10. Bill to have an Account of the Real and Personal Estate of their Father, and a Partition of his Real Estate.

Cafe; B. having several Freehold and Copyhold Lands, devises all his Lands, Goods and Chattels to his three Sons, equally to be divided between them, and devises over and above this vocal to his eldest, provided he gives a lawful good, and general Release to his two younger Brothers, by his Codicil appoints, that if one of his younger Sons should die, or marry in his Minority without Consent of his Executors, then his Portion to go to the other younger Son.

11. In ejectment upon the Demise of Edmund Miller against the Defendants for Lands in Norfolk, a Special Verdict was found to this Effect, viz. that Roger West was seised in Fee of the Lands in Question, and by his last Will in 1697, devised the same to his Wife during her Widowhood, and then in these Words, viz. I devise the same after the Death of my said Wife as aforesaid, unto Edmund Miller and Robert Sharrock during their natural Lives, equally to be divided between them, and after their Decease, then to the next Heirs Male of their Bodies lawfully to be begotten, equally to be divided between them; but in Case either of them the said Edmund Miller and Robert Sharrock depart this Life without such Issue, then I devise the same Estate with the Appurtenances to the other of them for Life, and after his Death to the Heirs Male of his Body lawfully to be begotten, with divers Remaniders over, with a proviso, that if his said Wife, or any of his Devises should cut down or fell any Timber growing upon the Lands devised, other than for Repairs and Fire-woodfor themselves and Family and their respective Tenant's Use to be spent on the Premises, that then they should forfeit their several and respective Estates, and that the said Edmund Miller and Robert Sharrock did by their Devise for themselves and the Heirs Male of their Bodies, make Partition of the said Lands, that they and the Heirs Male of their Bodies should have and hold the said Lands in Severalty, but for no greater or other Estate than they might take by the said Will, and that Sharrock paid a Fine and suffered a common Recovery of the Lands allotted to him and died without Issue, and that the Defendants entered as Heir to the said Sharrock.

Receives for the Plaintiff argued, that Miller and Sharrock had by the Will Estates for Life only, the Devise being in express Words to them, during their natural Lives, and that the following Words, viz. after their Decease, being in the Plural Number, shewed the Testator's Intent to be, that the Heirs Male of their Bodies should not take till both Miller and Sharrock were dead, and that the Words Equally to be
be divided between them, made them Tenants in Common, and that each of them had by Implication of Law a Remainder for Life of the other's Moiety, which appeared to be the Intent of the Testator from the said Words, after their Deceases. Edly, That the Provifo in the Will shewed that the Testator intended them Estates for Life only, for if he had intended them Estates in Tail, he could not have restrained them from cutting down or falling the Timber, and that the Partition made no Alteration in their Estates, because by it they were to have no greater or other Estate than they took by the Will, and that therefore Sharrock by levying the Fine, and suffering the Recovery forfeited his Estate.

Braithwaite Serjeant argued for the Defendants, and upon the first Argument, Parker Ch. J. Eyre and Pratt (Pewis absent) were clear and resolved, that Miller and Sharrock had by the Will Estates Tail in Common executed in them, and held that their Estates were in Common, because the Words equally to be divided between them, are sufficient in a Will to make a Tenancy in Common, though they are not so in a Deed, and that those Words being applied as well to the Estates given to their Heirs Male as to the Estate given to them, made the Estates Tail Estates in Common, and that the Tails were executed in them, because Estates for Life being limited to them, Here in this Case is a Word of Limitation, and that the Words (after their Decease) were to be taken together (i. e.) that after the Decease of Miller, his Moiety should go to the Heirs Male of his Body, and after the Decease of Sharrock, his Moiety should go to the Heirs Male of his Body, and that the Provifio was no Proof that Testator intended Miller and Sharrock Estates for their Lives only, because the Testator intended that Provifio to be extend to all his Devises, and if Miller and Sharrock took only Estates for Life, yet their Heirs Males would be Devises in Tail, and his own right Heirs to whom he gave the Fee were Devises. Judgment per Quer.

(Y. a) Estate for Life, in Tail, or Fee, by the Words Sons, Children, Issue.

1. WHERE a Man devises Lands to his two Sons equally, it is left a Quere, Whether they are Jointenants, or Tenants in Common. Bull. 113. per Cur. cites 34 H. 6. 2. and 28 H. 8. D. 25.

2. A devises Land to B. for Term of his Life, and after his Decease C. cited to the Men-Children of his Body, and if B. dies without any Man-Child Exec. 231. of his Body, then to remain to C. A. dies; B. dies without Issue Male of his Body. Held that B. had Estate to him and the Heirs Male of his Body. And 43. pl. 110. Hill. 6 Eliz. Anon.

3. Deive to his Youngest Son A. Holend aitun A. & Senieer Eixtai. Cro. E. 40. unefhe Anglice the Eldelt Issue Male De Corpes fino Executi, and for pl. 1. Lov. Default of such Issue, Remainder over; per Cur. 'tis only Estate for Life of A. for neither the Words or Intent of them they can make Estate Trinity that Tail, and the Will, as this Case is, makes no Matter in this Case, for it is all one by the Will and by Deed. And 132. pl. 180. Trin. 27 Son at the Eliz. Lovelace's Case.

Life only, and if he then had a Son, 'twas all one; but a Devise to B. and his Issue Male, is an Estate Tail; but here the Word Issue will not permit the Construction. —— 2 Le 35. pl. 45. C. adjudged that an Estate put by a Devise to Life to A. the Remainder to his Edward Son for Life. —— Sav. 75. pl. 154. C. agreed by all the Judges. —— C. cited as adjudged accordingly.

4. Devise
Devife.

A has Estate Tail by necessary Implication, though he has express

4. Devife to A. and if he die without Issue, that this shall remain to B. is Tail; but 'tis not so if his Death without Issue be limited within a certain Time, as before 24 Years of Age, or in Life of another. Per Oennes J. Mo. 464. pl. 656. Pach. 39 Eliz. B. R. Bacon v. Hill.

5. Devife to A and B. His Wife, and after their Deceafe to their Children (they then having Children) This gives Estate to Life to A. and B. and Estate to the Children for Life only; but Devife to A and B's Children or Issues (be then having none) is an Estate Tail. 6 Rep. 16. b. Hill. 41 Eliz. B. R. Wild's Cafe.

It is Estate Tail; but per the other two, 'tis only Estate for Life.—C. C. cited as adjudged accordingly. Bridg. 85. — S. C. cited Vent. 215 in Cafe of King v. Melling; per Hale Ch. J. and Ind. 23. 4. Hale agrees that they take by way of Remainder, and says that this was the only Point adjudged in Wild's Cafe, and there also against the Opinion of Popham and Gawdy. And 423 Hale says, that if in that Cafe the Devife had been to the Children of their Bodies, it would have been an Intail. And Ibid 231. Hale cites S. C. and says that the Court of B. R. were at first divided, but that indeed afterwards it was adjudged an Estate for Life to A. and his Wife; 16. Becuase having limited a Remainder in Tail to B. by the express and usual Words, if he had meant the same Devise in the second Remainder, it is like he would have used the same Words. 32ly, It was not after their Devise to the Children of their Bodies; for then there would be an Eye of an Estate Tail. 33ly, The main Reason was, because there were Children at the Time of the Devise; and that was the only Reason the Resolution went upon in the Exchequer Chamber. And though it be said in the Liner Exchequer Cafe, that if there were no Children at that Time, every Child born after might take by Remainder; it is not had positively that they should take; and it seems to be in Opposition to their taking presently; but however that be, it comes not to this Case; For though the Word Children may be made Nomen Collectivum, the Word Issue is Nominc Collectivum. — 2 Lev. 58. 59. Arg. cites S. C.

Mo. 597. 6. Devife to A. and after his Devise to his Children, shall take by pl. 519. Hill. way of Remainder. 6 Rep. 17. b. Hill. 41 Eliz. B. R. Wild's Cafe.

7. Eliz. Richardson v. Yardley. S. C. per Popham this is an Entail. — Gouldsb. 139. pl. 47. Hill. 43 Eliz. Anon. seems to b: S. C. and Popham and Gawdy were of Opinion, that they had an Estate Tail; But Fenner and Clench thought that they had for Life only. — Devife to Trusties and their Heirs in Trust for B. for Life, Remainder to the Children of B. by her then Husband in Trust that they shall have the Profits thereof when they come of Age. The Children will take a Fee as Tenants in Common. 9 Mod. 104. Bateman v. Roach.

Devife to A. and if he die, having no Son, that it shall remain to B. for Life, and if he die without Issue, having no Son, it shall remain to the right Heirs of Devifor; A. has Estate Tail to Issue Male, B. has but for Life, or at least to the Heirs Females, because having no Son is merely Contingent; per Popham. Mo. 682. pl. 939. Mich. 42 and 43 Eliz. Milliner v. Robinson.

Son was there taken to be used as Nomen Collectivum, and held an Entail; per Hale Ch. J. Vent. 231. cites Hill. 42 and 43 Eliz. Biffield's Cafe. — 2 Brownl. 271. Trin. 7. Jac. B. Robinson's Cafe.

See Estate (P).

8. Devife to A. for Life, Remainder to the next Heir Male, and for Default of such Heir Male, then to remain. Vent. 230. says, that this was paid per Hale Ch. J. to have been adjudged an Estate Tail 43 Eliz. Burley's Cafe.


10. Devife to A. and to the Issue of his Body, is Estate Tail, if A. has no Issue at the Time. But if he had Issue at the Time, then 'tis a Joint

Mo. 597.
Devise.

Joint Devise, or if it be after the Death of A. * to the Issue or Children of A. then they take by Way of Remainder; per Hale Ch. J. Vent. 229.


11. Devise to A. for Life, and after his Decease to the Issue of his Body Vent. 214. by a second Wife, his first Wife being then living, and for want of issue Issue Issue Issue. 1st ed. 1684.

Per two Justices against Hale Ch. J. but reversed in Cam. Seace. 2 Lev. S. C. cited by the Court, and adjudged by two Justices, contra Hale. But a Note is added, that this Judgment was reversed in the Exchequer Chamber — Polutex 105 to 112. S. C. adjudged that it was an Estate Tail, and the first Judgment reversed — 5. Keb. 44. pl. 15. S. C. 52. pl. 21. C. 63. pl. 22. S. C. adjudged, but Judgment reversed, as the Reporter says he heard. — S. C. cited by Raymond Ch. J. in delivering the Opinion of the Court. Gibb. 25. Patch. 1 Geo 2 B. R. — 5. Mod. 384. S. C. cited per Raymond Ch. J. in S. C. and said, that he agreed that Case to be established, but that there is no Occasion to carry it one further, and that if Hale's Opinion is truly reported in that Case, he is clear of Opinion if there had been a Limitation over to the Issue of the Issue. The Devise had taken only an Estate for Life, and the Word Issue had been a Word of Purchase — but where the Devise was to A. for Life only, and after his Decease to the Issue of his Body, it was adjudged that A. took only an Estate for Life; Cited per Cur. S. Mod. 265. as the Case of Birkhouse v. Wells in Chancery.

12. A Devise to such of the Children of A. viz. B. C. and D. as shall N Ch. R. be living at the Death of E. is but Estate for Life to the Children. 3 Ch. R. 56. 19 Jan. 1675. Edwards v. Allen.

his Heirs at Law, and devised to B. C. and D. and such of their Children as are or shall be being of the Bodies of them, or either of them. The Children living are only Tenants in Common for Life, the Reversion in Fee being in B. C. and D. as Coparceners. Fin. 214. Trin. 27 Car. 2. Edwards v. Allen.

13. If a Man be Tenant for Life by a Deed, and after he in Reversion devises it to his Heirs of his Body; this being by several Conveyances, the Estate is not executed; for if a Man is Tenant for the Life of B Remainder to the Heirs of B and Tenant for Life grants his Estate to B. is not Tenant in Fee, but the Estate to the Heirs of B. is in Remainder as it was before; per H. &t Ch. J. Skin. 529. Mich. 6 W. & M. in B. R. in Case of Moore v. Parker.


15. Devise the Issue of B. is only an Estate for Life; so if it had gone on and said, and for want of such Issue to C. though B. had Issue, yet such Issue shall take only an Estate for Life. 2 Vern. 546. by Ld. Keeper. Patch. 1706. in Case of Cook v. Cook.

Life, though the Words for want of such Issue seem to imply an Estate Tail. But to make it so there, must be a double Use made of the Word Issue. First, It is a Word of Implication who were the Performer to take. 2dly. As Words of Limitation to make an Entail which is not to be admitted. Per Ld. Keeper. 2 Vern. 456. S. C.

16. A. bequeathed his Personal Estate to B. and C. and upon either of the Dying without Issue, then to the Survivor, and it both should die without Children then to the Children of the Testator's other Brothers and Sisters. It was held by the Matter of the Rolls that here the Words (dying without Issue) must be taken to be Children living at the Death of their Party. For that it could not be taken in other Sense (viz.) whenever there should be a Failure of Issue, because the immediate Limitation over was to the Surviving Devisee, and it was not probable that if either B. or C. should die leaving Issue, the Q. Q. Q. Survivor
Survivor should live so long as to see a Failure of Issue, which in Notion of Law, was such a Limitation as might endure for ever, and therefore the Testator must be understood of a dying without Children living at the Death of the Parent, and consequently the Devise over good. Wm's Rep. 534. Hill. 1718. Hughes v. Sayer.

17. Devise to A. for Life, & non alterit, and to his Sons, was adjudged an Estate for Life only in A. Arg. 8 Mod. 261. Trin. 10 Geo. cited in Case of Shaw v. Weigh.

(Z. a) Estate in Fee &c.

By other Words, without the Word Heirs, Sons;

Children, Issue.

1. DEVISE to A. in Perpetuam during his Life gives but Estate for Life, for the Words (during his Life) abridge the Interest given before. Arg. Le. 283. cites 15 H. 7. 12.

2. Devisor recited that he was indebted to the Tenant in 1001 in Consideration of the said Sum to be released and discharged to his Executor, he devised the said Land to the said Tenant; Per the Justices, those Words and Matter contained in the Will is sufficient to give Fee-Simple. And. 35. pl. 87. Bryan v. Baldwin.

3. A Man leaved his House and great Demeenes, rendering Rent, and then devized to J. S. all his Faru, the Devisee shall have all the Rent and the Reversion also. Arg. Ow. 89. cites Pl. C. 194.

4. Devise of Land wholly to A. is a Fee-Simple, per Coke Arg. 2 Le 129. pl. 171. Mich. 29 Eliz. B. R. in Hawkins's Cafe.

5. If a Man devise Land to one & Sanguini suo, it is a Fee-Simple, but it be Semini suo, it is an Estate Tail. Co. Litt. 9 b.

6. If a Man devise to A. and his Assignes, without saying (for Ever) the Devisee has but Estate for Life. Co. Litt. 9 b.

7. The Teitator seised of a House in Fee made a Leafe of it to W. for Ninety-Nine Years, and in his Will said, I give and bequeath to A. and his Assignes my House &c. for Ninety-nine Years, and A. shall have my Inheritance if the Law will allow it. A. has a Fee Simple. Hob. 2. pl. 2. Hill 8 Jac. Widlake v. Harding.

8. S. C. cited by Holt Ch. J. 1 Salk. 235. Hill. 1 Ann. B. R. and observes that the Words are "his Lands of Inheritance," and that to the Special Intent, of the Teitator is apparent from the Words of the Will. —— S. C. cited by Holt Ch. J. 11 Mod. 124. and says that Hob. 2 is rightly reported, and wrong in Mo that "Lands of Inheritance" is only a Description of what Lands shall pass. —— S. C. cited 8 Mod. 255. Arg. in Case of Shaw v. Weigh.
8. Devise to A. in Perpetuum is a Fee. But if it be limited after Death of A. to B. in Fee, there A. has only Estate for Life. D. 357.

9. Devise to A. and his Successors is a Fee-Simple without the Word Heirs; For it implies a Fee-Simple, though it wants express Words. Per Coke Ch. J. Mo. 853. in pl. 1164. Trin. 14 Jac. B. R.


10. The Custom of a Manor in Ancient Demesne was that, if a Tenant devised his Land to another without other Words expressing his Intent that Devise should have a Fee-Simple; cited by Warburton J. as the Opinion of Anderdon Ch. J. when he was Ch. J. of C. B. and now Hobart inclined to this Opinion, and by Hutton and Winch he shall have Fee by the Custom, and accordingly it was adjudged. Win. 1. Patch. 19 Jac. C. B. Anon.

11. Ceparener in Fee devised all her Part and Purpart, without paying to him and his Heirs; Resolved that it was only an Estate for Life, because there was no clear Intention that it should be more. Per Jones J. Lat. 136. Hill. 22 Jac.

12. Devise that his Executors grant a Rent Charge to A. in Fee out of his said Lands; By that Devise the Executors have a Fee-Simple in the Land, otherwise they could not make such a Grant. Arg. 4 Le. 158. in pl. 265.

13. Devise to A for Life, and then devises the whole Remainder to B. It is a Fee. Luckw 764. Trin. 1 jac. 2. Norton v. Ladd.

14. Devise of Fee-Farm-Rents, a Fee pallies. 6 Mod. 110. Per Holt Ch. J. in delivering the Opinion of the Court. Hill. 2 Ann. B. R.

15. Where Lands are devised to a particular Purpofe and the Death of the Devisee may prevent that Purpofe, there the Devisee has Fee. 6 Mod. 111. Per Holt Ch. J. in delivering the Opinion of the Court. Hill 2 Ann. B. R. in Cafe of Bridgewater (Dutchefs) v. Bolton (Duke.)

16. In Deeds no other Word will carry a Fee-Simple, but the Word (Heir) whereas in a Will it is otherwife; for that is a new Conveyance by Force of the Statute of 32 H. 8 which says that it shall be lawful for a Man to dispose of his Lands by Will, at his Will and Pleasure; and this is a Reason why a Devise to a Man in Perpetuum passes a Fee Simple at the same Time, that these Words in a Deed gave only an Estate for Life; Per Holt Ch. J. Wms's Rep. 77, 72. Patch, 1705. in Cafe of Idle v. Cook.

17. A. seised in Fee, devised Four Coots to Four Boys, of the Pa- treth of D. for ever, and all his Lands, Tenements, and Hereditaments, and all his Personal Estate to his Wife and her Assignes, it was ad- judged that the Wife had a Fee-Simple, because she took the Lands with a Perpetual Charge. 2 Salk. 685. Patch. 4 Ann. B. R. Smith v. Tindal. S. C. adjudged that the Words of the Will give a Fee, here being Charge for ever, and a sufficient Personal Estate to purchase &c. But he was not satisfied to fix it upon the Land. He went upon the Word Heredimation to make a Fee; the Words Lands and Tenements carry only an Estate for Life, but Heredimation carries the Fee; for if he had not a Fee then it was not his Heredimation; and when he gives his Herediment, he
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Life, and Money given by the Will, that cannot be taken as a Com-
pensation, or Satisfaction for the Fee Simple, which she claims by the Articles &c.

Contra, per the Attorney General, Mr. Mead, and Fazakerly, it was argued, that the Plaintiff was intituled only to an Estate for Life in a third of the Lands by Virtue of the Marriage-Articles; there are no Words of Limitation of Estate; therefore by the Rules of Law it was only an Estate for Life, that a Provision for Life was sufficient, and as much as usual in all Marriage Settlements and according to the common Course and that Articles are to be taken according to the common Course of Such Sort of Agreements &c.

Secondly, If she is at Liberty to make her Election after she has proved the Will, by which she takes much more than an equivalent for the 1500l. agreed to be left her by the Articles, yet the cannot have both; if she elects the Articles she waives the Benefit of the Will; for the Devises by the Will are inconsistent with the Articles, both cannot stand together.

King C. was of Opinion, that the Plaintiff was intituled to a third Part of the Husband’s Lands in Fee Simple, and the Meaning of the Parties was, that whatsoever the Husband should acquire the Wife should have a third of it. Articles are a Promis to do a Thing, and must be construed according to the Intention of the Intention of the Parties and the Common Acceptation of the Words, and that by all my Estate is commonly meant all my Interest it; As to the Second Point, the Plaintiff cannot take the Estates for Life devised to her by the Will, because that is inconsistent with the Claim she makes to the Inheritance of the Third Part by Virtue of the Articles; But as to the Residuum of the Personal Estate that she may take by the Will; for that Claim is not inconsistent with the Articles; and where the Articles and Will are not inconsistent, but both may stand, then she may claim and have the Benefit of both, like the Cafe of the Custom of London, there Children may take both by the Custom and Will, where the Estate is sufficient to satisfy both the Will and the Custom; but a Child in that Cafe shall not take by the Will, if by so doing the Intention of the Testator will be disappointed.

Decree. A third of the Real Estate in Fee and Residue of the Personal to the Plaintiff, Partition of Real Estate to be made by Commissioners. Per Cur.

20. Where an Estate is devised to Trustees upon such Trustees as can- not be supported without a Fee; In such Cafe a Fee shall pass to the Trustees, though the Word Heirs be not mentioned. Arg. 10 Mod. 322. Mich. 10 Geo. 1. in Canc. in Cafe of Acherly v. Vernon.

(A. b) Estate for Life in Tail, or in Fee; By Words first limiting a Fee, or Fee Tail, and then abridg- ing it.

1. A has two Sons and a Daughter and devise Lands to his Wife for ten Years after her Decease, Remainder to his Youngest Son and his Heirs for ever, and if any of his Two Sons die.
Devife.

Eliz. Fuller dyewithout Issue of his Body &c. then to the Land to remain to his Daughter, and her Heirs in Fee; after in the Life of the Father, the Younger Son dies without Issue; this is a good Remainder to the Daughter. D. 122. pl. 20. Mich. 2 & 3 P. & M. Anon.

A devise of Land in D. and S. devised it to his Wife for Life, and after her Death he devised the Lands in D. to B. and his Heirs for ever, and his Lands in S. to C and his Heirs for ever. Item I will that the Survivor of them shall be Heir to the other, if either of them die without Issue. This was held a Devise of an immediate Estate Tail. Cro. J. 695. pl. 8. Mich. 22 Jac. B. R. Chaddock v. Cowley. — S. C. cited Sid. 145. in Case of Collinson v. Wright.

Bendl. 300. 2. W. C. by his Will devised a Mesllage in these Words, viz. I give to A. L. my Cousin the Fee-Simple of my House, and after her Decease to W. her Son. A. L. had an Estate for Life, and her Son a Fee-Simple in Remainder and so it was adjudged. And. 51. pl. 125. Patch. 17 Eliz. Baker v. Raymond. S. C. says it was adjudged that the Son had only a Remainder for Life and the Wife the Fee. —— And so it is cited Mo. 362.

But And. 31. pl. 125. Patch. 17 Eliz. says it was adjudged that B. had an Estate for Life only, Baker v. Raymond. S. C. —— Bendl. 300 pl. 295. S. C. adjudged a Fee in Remainder in B. but that A. had only an Estate for Life. —— S. C. cited 2 Bull. 127. by Coke J. as adjudged an Estate to A. for Life, Remainder to B. for Life, Remainder to A. in Fee. —— Mo. 362. cites S. C. accordingly.

* Quere if the Word (Males) should not have been omitted.

4. If Lands are devised to A. and his Heirs, and if A. dies without Heir of his Body, that then the Land shall remain over. The Donee has only an Estate Tail to him and the Heirs * Males of his Body. Cited by Mead, 3 Le. 183. pl. 183. Mich. 28 Eliz. C. B. as adjudged in the Case of T Cary v. Glover.

5. If a Man devise a House to his eldest Son in Tail, and another House to his second Son in Tail, and the third House to his third Son in Tail; and if any of them die without Issue, the Remainder to the other two equally; this shall be but for Life, for this ensures to the Quantity of the Land, and not to the Quality of the Estate. 2 Brownl. 75. cited per Coke Ch. J. as adjudged 29 Eliz. Coke v. Petwicke.

6. A devised to B. and his Heirs, and if B. die without Issue, then the Land to be sold. B. has an Estate in Fee and not in Tail; for A. disposed of no more of the Estate by the last Words then he did by the first. Bridgm. 3 per Walmley J. Arg. cites 40 Eliz. in B. R.

7. But otherwise if he had devised that if B. died without Issue the Land should remain over; For in this Case he disposes of the Land itself in Remainder. Bridgm. 3 Arg. by Walmley J. cites 40 Eliz B. R. to which Owen agreed.

8. Devise to B. for ever, and after his Decease Remainder to his Heir Male for ever, this is an Estate Tail. Bull. 219. Trin. 10 Jac. B. R. Whiting v. Wilkins.

D. 357. 44. cites S. C. that B. has only an Estate for Life —— So to A. for ever Habend. for Life is but an Estate for Life; per Crew Ch. 3 Lar. 43. 44. Trin. 2. Carr. said it had been adjudged.

10. Devise to his Son and his Heirs after the Death of his Wife, and if his Daughters over-live his Wife and his Son, then the Daughters shall have it for Life, and after their Death to B. and C. they paying
Devise.

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ing annually &c. Resolved, 1st. That the Wife had Estate for Life. 2dly, That the Son had Fee Tail. 3dly, That B. and C. had Fee, by reason of the annual Payment. Mo. 852. pl. 1164. Trin. 14 Jac. B. R. Winterbury's Case.

11. A. devised the Fee of his Land to B. his Wife, Remainder to C. Per Dode- lor Life, Remainder to D. for Life. B. has Estate for Life, and Re- mander expectant, and her Baron shall not be Tenant by the Curtesy; 233. cites Per Crew Ch. J. Lat. 43, 44. Trin. 2 Car.

12. A. had B. his Son, and M. his Daughter, and devised Land to M. and her Heirs, and his Will is, that if B. pay M. 50l. the B. should have the Land; the Money was not paid at the Day appointed. Finch C. took this but in Nature of a Security, though objected that it was a Contingent Devise to B. on Payment, and then too if he had paid he could have had but an Estate for Life, the Remainder or Reversion in Fee to the Daughter. 2 Chan. Cafes. 1. Hill. 30 & 31 Car 2. Bland v. Middleton.

Will in writing gives him on Performance of the Condition, by the express Words of the Will in writing, and the Will can not be Land but in Writing. So that if A. had made such Will in Writing, and then had declared by Pardon that the Son should have the Fee Simple on Payment it would not give him it, yet it was decreed ut Supra. Quere si bene. — But 2 Wm's Rep 175 Trin. 1725, it was fled by Ld. C. Macclleshield, that in all Cafes where there is a Measuring Caf (as he term'd it) between an Executor and an Heir, the latter shall in Equity have the Preference. [And why may it not be the same between an Heir and a Devisee?]


14. Devise of Lands to his two Daughters A. and B. and their Heirs, equally to be divided &c. and if they die without Issue, then I give all my said Lands to my Nephew C. and the Heir Male of his Body, with divers Remainders over; A. dies; B shall hold to her and the Heirs of her Body all the Lands by Way of Remainder by Implication, and no- thing pass'd to C. on the Death of A. Jo. 172. Mich. 33 Car. 2. B. R. Holmes v. Meynell.

15. A Man seised of Lands in Fee had Issue a Son by the first Venter, and two Sons by a second Venter, and devised his Lands to his Eldest Son and his Heirs, and if he die without Heir, to his two other Sons; the Eldest Son died without Issue; and if this was an Estate Tail, or a Fee-Simple, was the Question upon a Special Verdict found; and it was adjudged an Estate Tail, but it was not argued or defended by the other Side; ideo quere. Skinn. 269. Hill. 2 & 3 Jac. 2. B. R. Blackstone and Stone.

16. If a Man devises all his Lands to Henry the Eldest Son of his Bro- ther Thomas, and his Heirs if he live till 21. and if he dies before 21. then to the next Son of Thomas, and if Thomas have no Issue, then to the first Son of his Brother William and his Heirs; By this Devise if Henry dies before 21. his next Brother takes but an Estate for Life, ut Vide- tur. Skinn. 562. pl. 10. Mich. 6 W. & M. in B. R. Bevilton v. Haffey.

17. Devise by the Father to B. his second Son after the Death of his Wife, and to his Heirs for ever, and for want of such Heirs, then to the right Heirs of the Father, is Estate Tail in B. 1 Sulk. 233. Trin. W. 3. 1st Car — Ld. Raym. Rep. 568.

B. R. Notingham v. Jennings.


18. But
18. But if the Devise had been over to a Stranger it had been void, and B had taken a Fee. Ibid.

19. A. the Father havingIssue a Son and two Daughters devise his Estate in Question to his Son and his Heirs; provided nevertheless, that if the Son should die before he comes to the Age of 21, or without Issue of his Body, then it should go to the Daughters; the Father dies, and the Son lives to the Age of 21. The Court inclined against the Plaintiff, viz. That the Son had but an Estate Tail; and so the Devise to the Daughters took Effect, the Son being dead without Issue; for though it is devise to him and his Heirs, yet the latter Words if he die without Issue, make it an Estate Tail; for his Meaning seems to be plain, that if the Son had Issue, that Issue should have it, if not, it should go to the Daughters. Freem. Rep. 509, 510. Mich. 1699. in B. R. Hether. Jennings.

shall be confirmed (And) and cited Cro. E. 524. But per Holt Ch. J. there is no Occasion to continue (Or) as (And) For it might be the Father's Design to hinder him from marrying till 21; And as for the Case of Cro. El. that was adjudg'd an Estate Tail, (that to this Point the Court gave no Opinion) and after Holt denied that Case to be Law. — Cenf. 514 &c. but S. P. does not appear — 12. Raym. 505. S. C. & S. P. accordingly.

20. A Special Verdict finds, that the Grand-father was seised in Fee, and by Will devises thus, I give to my Daughter A. for Life, Remainder to A. L. and his Heirs; and for Default of such Heirs Remainder over. And the Question was, if this be an Estate in Fee or in Tail. Holt Ch. J. said, You will find it a hard Point to find this an Estate Tail. Sir Peter King urged, that it was so; and cited the Case of Idle and Cooke Easter Term 4 Ann. If the Remainder had been to his Brother, or to any Body that had been Heir at Law, it would have been a Tail; for then he could not have died without an Heir, and so a Remainder might properly be; or if it had been De fe exequite or the like; But these Limitations were never carried further. But the Court gave Judgment that this was a Fee, but made the Rule Nihil &c. Note, the Controversy was between the Heir of the Devisee, and the Heir of Devisee, who was no way related to the Devisee. 11 Mod. 207, 208. pl. 10. Hill. 7 Ann. in B. R. Grumble v. Jones.

21. I give and devise my Lands &c. in B. unto my three Daughters M. S. and A. to be equally divided between them, to hold to them their Heirs and Assigns for ever. And if it shall please God that all my three Daughters shall happen to die, and leave no Issue of their Bodies to inherit such Estate as in this my Will is before devised to them, or not be of Age, or make no other Disposal thereof, that then the said Lands shall be vested, and be held and proper Estates of my Kindred S. B. and I do hereby give, devise and bequeath the same to the said S. B. and his Heirs and Assigns for ever accordingly. Provided always that the said S. B. shall pay unto every one of all my Sister's Children, that shall be then in being at the Time of such my Estate falling to him by failure of my Issue the Sums of 100 l. to each and every of them. A. the youngest Daughter died in her Infancy, in the Life-time of W. the Father; S. the second Daughter survived her Father and Mother; and many Years after the case of Age, by her Will made a Disposal of her Interest in the said Premises, by the Name of all her Message, Lands, Tenements and Hereditaments; and M. (now M. M. the Defendant) is now being and married, and has several Children. This Case being sent to the Judges, they made the following Certificate. "We have heard Counsel on both Sides upon the Case, and are of Opinion that the said S. and M. two of the Daughters
Devise.

"Daughters of the said W. S. by virtue of the said Will, and by the
"Death of the said A. their Younger Sitter, in the Life-time of the
"Testator, took an Estate in Fee Simple, in their respective Shares of the
"said Real Estates." His Lordship was of the same Opinion with the
Judges, and was pleased to decree accordingly. Barnard, Chan. Rep.

(A.b. 2) Estate Tail.

Where the Limitation is abridg’d or enlarged by Words
Subsequent.

1. O N E by Will devises all his Lands to B, and his Heirs of his
Body begotten, and afterwards by the same Will devises that if
B. dies the same Lands shall remain to C. in Fee; The Court held that
B. had Estate Tail by the first Words, and not an Estate for Life by
the last Words. And 33. pl. 84. Hill. 14 Eliz. Anon.

2. If Lands be devised to one and his Heirs; and if he die without
Heirs of his Body, that the Land shall remain over, that he had no
greater Estate than to him and his Special Heirs, viz. Heirs Males;
and the Reason was, because the Will took Effect by the first Words.
Godb. 16. pl. 23. cited by Mead as adjudged Pach. 25 Eliz. in
C. B. in Case of Glover v. Tracey.

3. Devise to A. his Son, and the Heirs of his Body, and adds fur-
ther, viz. I will that after the Decease of A. my Land shall remain to
B. Son of A. Adjudged A. had Estate Tail, and his Wife entitled to
Dower. No. 593. pl. 804. Hill. 35 Eliz. Atkins’s Case. it shall re-
main to B. the Eldest Son of A. and to the Heirs of his Body, the Remainder
over to three other Sons in the same Manner; It was adjudged an Estate Tail in A. ——And. 35. pl. 84. Anon. Hill. 14.
Eliz. S. P. held accordingly.—Bendl. 207. pl. 244. S. P. and seems to be S. C. held ac-

4. A. devised Land to B. his Eldest Son, and the Heirs of his Body S. C. cited
after the Death of his Wife; and if B. died living the Wife, then to C. this
Younger Son, and devised other Lands to another Son and the Heirs
cited by L.4 of his Body, and if he died without Issue, then to remain &c. B died C. Parker
living the Wife. It was strongly urged, that his Estate should cease,
for it being said, if he died living the Wife, this was corrective of 227 in Cafe
what went before. But per Cur. it was an absolute Estate Tail in
Irland. And
B. as if the Words had been, if he died without Issue living the Wife; 2 Wms’s.
For he could not be thought to intend to prefer a Younger Son before
the Issue of his Eldest; per Hale Ch. J. Vent. 230. cites Cro. C. 185.

5. Devise was to B. his Son and Heir, and if he die before 21, and
without Issue of his Body then living, the Remainder over &c. B. survived
the 21 Years, and then he sold the Lands, and died: It was held, that
he had a Fee Simple immediately; and by Consequence the Sale was
good; For the Estate Tail was limited to arise upon a Contingency
subsequent. 1 Sid. 148. pl. 9. Trin. 15 Car. 2. B. R. Collinon v.
Wright.

S s s

6. Upon
6. Upon a Special Verdict the Case was; R. G. filed in Fee of Lands in S. by Will in Writing devises to R. Son of his Late Brother, all his Lands commonly called P. and also all other his Lands during his natural Life, and to his Heirs Male of his Body begotten; and for want of such Issue, he the said R. to have the said Estate but during his natural Life, and no longer; and then his Will was, that the aforesaid Estate should descend to P. his Nephew; R.fullers a Common Recovery to the Use of himself and his Heirs, and devises this Land to the Defendants in Fee, and dies without Issue Male; and it was adjudged to be an Estate Tail in R. and fo the Remainder barred by the Recovery, and not an Estate for Life, and so forfeited by the Recovery; for the Words, and for want of such Issue, he the said R. to have but an Estate during his natural Life, is no more than the Law implies; for if Tenant in Tail has no Issue, it resolves into an Estate for Life, and so it was adjudged; the Objection was, that it should be construed thus, viz. I give the Land to A. during his Life, and no longer, in case he has no Issue Male of his Body; and fo an Estate Tail upon a Contingent; and he dying without Issue Male, it is now become but an Estate for Life ab initio, but the Judgment was ut supra. 2 New. Abr. 59, 60. cites it as adjudged Hill. 29 and 30 Car. 2. N. 1. 14. Fountain v. Good.

7. Devise to Father for Life, Remainder to the first Son &c. Remainder to Trustees for 99 Years to support the Remainders, it is a good Term to support the Remainders, notwithstanding the fame is limited and inferred after the Limitation to the first Son (it being in the Case of a Will.) 2 Chan. Rep. 171. 31 Car. 2. in Case of Green v. Roeke.

8. A Remainder in a Codicil cannot amount to a Devise, As mentioning in the Codicil that he had given an Estate Tail to B. whereas the Estate he gives is the express Words was but an Estate for Life to B. and the Tail to his Son. This will not enlarge B's Estate for Life to an Estate Tail. 2 Vern. 449. 451. in Case of Bampfield v. Pop.

(B. b) Estate for Life in Tail or Fee.

By Words first limiting Estate for Life.
Devise. 251

Daughter. It was argued, that M. had a Fee Simple; for immediately on the Death of A. the Remainder vested in B. and vested in him as a Fee Simple, and cannot by Matter subsequent be converted into an Estate Tail, and so it was adjudged. Cro. E. 96. pl. 12. Palech. 30 Eliz. B. R. Smith v. Hawes.

3. A devised Lands to R. his Daughter for Life, and if she marry Mo. 492. pl. after my Death, and have Heir of her Body, then I will that the Heir as, 803; S. C.

yer my Daughter's Death shall have the Land, and to the Heirs of their Bodies begetten; and if my Daughter die without Issue of her Body begetten, then P. T. shall have it to him and his Heirs. f. d. married J. D. and had Issue. It was agreed by all the Julicics, that a Devise to one and the Heirs of his Body is an Estate Tail, and shall go to all the Heirs of his Body; for that the Word Heirs is nomen collectivum. But in the Principal Cafe Gawdy and Fenner held, that she had only an Estate for Life; but Popham e contra; ied adjournatur. Cro. E. 313.


5. Devise to his Son T. and the Heirs Males of his Body for 500 Years, provided he or any of his Issue Male alien the Premises, then to T. S. and his Heirs; Adjudged an Estate Tail, and the Devise for 500 Years is void, because the Teitator intended it to be an Inheritance, for by the Provifo he took Care to advance the Issue of T, whereas if this should be a Term for Years, then by the Defect of the Inheritance, on T. it would be merged, which never was the Intent of the Devisor. Mo. 772. pl. 1067. Trin. 2 Jac. C. B. Lovice v. Goddard.

Years, and with this Winch J. accorded. --- Cro. J. 61. pl. 7. C. B. Anderson and Warburton held the Words (for 500 Years) to be void; but Daniel and Walmsey e contra, that they should not be merely void, but should be construed, that the Estate shall be determined when the 500 Years are expired, viz. that they shall be Tenants in Tail for 500 Years, and if it should be construed a Term only, it would be extinguished by Defect of the Inheritance. --- Mod. 115. in pl. 14. Palech. 26 Car. 2. ld Keeper Punch denied my Ed. Coke's Opinion in Leonard Lovell's Cafe, which faith that in Cafe of a Lease jefted to one and the Heirs Males of his Body, when he dies the Estate is determined; for he said it shall go to his Executors. --- Sel. Cafes in Chan. 50. S. C. of Lovell's cited by Ld. C. Nottingham, and says that Ld. Coke's Error in that Cafe is in saving, that if a Term be devised to the one and the Heirs Males of his Body, it shall go to him or his Executors no longer than he has Heirs Males of his Body; but Ld. Nottingham says, that it was resolved otherwise in Cafe of Lebruthorp v. Allby, 11 Car. B. R. Roll's Abridgment tit. Devive,لد. 613. (L.) pl. 1. For these Words are not the Limitation of the Time, but an absolute Disposition of the Term.

6. A devised to his Wife for Life, Remainder to B. and if he have Issue Male of his Body, then to such Issue, and if no Issue Male, then to C. and so to D. It was adjudged that the Words (if no Issue Male) gave every one an Estate Tail. 9 Rep. 127. b. Hill. 8 Jac. In the Court of Wards, Sunday's Cafe.

should have no Issue Male, Remainder over, was for that Reason rightly adjudged an Estate Tail. Wm's Rep. 51. in Cafe of Bampfield v. Popham.

7. A seised of Black-Acre and White-Acre in Fee, devises both to his Wife for Life, the Remainder in Black-Acre to B. in Fee. Item, I make my Wife Executrix of all my Goods and Lands. The Court held that the Fee of White-Acre is not given here to the Wife; for (Lands) shall in-
tend such Lands as the may have as Executrix; but by Popham other-

wife it had been, if he had said I make my Wife Heir of all my Lands.


8. A Copyholder surrendered to the Use of his Will, and devised to
his fift Son for Life, and after his Death to the Heirs Male of his Body
&c. This was ruled to be an Estate Tail; and this differs from Ar-
cher's Case in 1 Rep. for that the Devise there was for Life, and after
to the Heir Male, and the Heirs of the Body of that Heir Male;
There Words of Limitation being granted upon the Word Heir, it
threw that the Word Heir was used as Designatio Perfíme, and not for
the Limitation of the Eftate. Per Hale Ch. J. Vent. 232. cites 1651.
Hansey v. Lowther.

9. A. fell in Fee, devised his Land to T. his Eldest Son for Life, and
if he dies without issue living at the Time of his Death, then to L. another
Son and his Heirs for ever. T. suffered a Common Recovery, and died
without issue. Resolved that T. has only an Eftate for Life, the Re-
mainder to his Heir not executed; and though the Reverion descended
on him as Heir of A. yet it shall not drown the Eftate for Life against
the express Devife and Intention of the Will, but shall leave an Open-
ing (as they termed it) for the Interpolation of the Remainders when
they shall happen to interpose between the Eftate for Life and the Fee;
and that this being a Contingent Remainder, and not an Executory De-
vice, was barred by the Recovery suffered by B. 1 Lev. 11. Hill. 12

10. Devife to A. for Life, Remainder to his Heir, is a Fee Simple;
For Heirs is Nomen Collectivum. But if he adds, and to his Heirs of
such Heirs, it is for Life only; For Words of Limitation being added to
the Word Heir, it shall be taken as Designatio Perfíme. 3 Salk. 126.

11. Devife to A. and his Heirs in Trust for B. for Life, and after his
Deceafe to the Heirs Male of the Body of B. now living, and to such
other Heirs Male and Female as B. shall have after of his Body, Re-
mainder over B. had at the Time the Will a Son named C. B. had only
an Eftate for Life, and the Remainder was vested in C. on the Death of
Devisor, and was not in Contingency, and the Words (Heirs Males of
the Body of B. now living &c) was a Description of C. Adjudged in
B. R. but revers'd in Canc. Scacc. but that reversed in Dom. Proc. 2

12. Devife was to W. T. for Life, and to his Heirs; and for want of
Heirs to him, then to G. T in like manner; and for want of Heirs of him,
then to W. F. and his Heirs for ever; the two first Devisees died with-
out issue. Adjudged they had an Eftate Tail, because these Words,
(For want of Heirs of him) must be intended Heirs of their Bodies, es-
pecially because W. F. was next Heir as Law to them, and therefore they
could not die Heirs so long as he or any of his Heirs were living.
1 Lev. 79. Trin. 34 Car. 2. C. B. Parker v. Thacker.

13. Devise to A. for Life, and if he have issue Male, then to such
Issue Male and his Heirs, and if he dies without Issue Male, to B. and
his Heirs. A. had but Eftate for Life, and both Remainders are con-
Kime.

Raym. 28.
Plunket v. Holmes, S. C. adjudged
per tot, Car. accordingly
Sid. 47 pl.
6. S. C. Re-
olved. —
Keb. 29 pl.
53. Blanket v. Holmes, S. C adj-
dat
Ibid. 119.
pl. 29. S. C. adjudged accordingly.

Clerk v. Dyv.
S. P. —
Cro F. 313.
S. C. —
S. P. by Hales pl. 1.
Ch. J. Trin.

2 Lev. 477.
S. C. & S. P.
reolved accord-
ingly,
but 335 says,
that the
Cafe was
twice argued upon this Point. Whether it was a Contingent Remainder or an Executory Devife? and
that afterwards, before any Judgment given, the Parties agree'd and divided the Eftate. — S. C. Lt.
Raymond Rep 205. Loddington v. Kime, and resolved per tot Car. that A had only an Eftate for
Life.
to his first &c. Sons in Tail, but if A. die without an Heir Male of his Body S. C and
begotten, Remainder over. A. is only Tenant for Life; for the Words
15. Devise to Trustees and their Heirs on Trust to permit A. to take
the Profits for his Life, and afterwards to stand seised to the Life of
the Heirs of A.'s Body, is a Life in A. and he has an Estate Tail. 2 Salk.
16. A Devise was to B. for Life, without Waifs, with Power to make a S. C. cited
in future, Remainder to his fifth, and so to his sixth son (but no farther) Wms's Rep.
and then followed these Words, If B. should die without Issue Male of his Body, then to C. in Fee. It was resolved by all the Judges of C. B. the Page,
upon a Reference out of Chancery, that there being no Limitation S. C. cited
beyond the fifth Son, and for that there might be a seventh who was S. Mod. 248.
not intended to be excluded, therefore to let in the seventh and
Raymond Ch. J. said, that true it is, it has been held that where an express Estate for Life is de-
voted, in such Case no subsequent Words shall create an Estate Tail by Implication, but this is an
old, antiquated and exploded Opinion, and contrary to the latter Authorities; and in this Case the
subsequent Words, viz. Without committing Waifs, do not control a Devise. It is true, where an
Estate for Life is devised to one, with a Provision immediately for all his Sons successively, and if he
die without Issue, Remainder over, in such Case the Devise hath but an Estate for Life, because
the Words, If he die without Issue, shall be intended a dying without Issue Male as are expressed in the
Will of the Testator, if his Devise be admitted. But Surprise and Bampfield was adjudged elsewhere
there is a great Difference between a Devise to J S for Life, and if he die without Issue, Remainder over,
and a Devise to J. S. (without expressing for what Estate), and if he dies without Issue Remainder over

Devise.

Life—— C cited S. Mod. 356. 239. Arg. ——Raymond Ch. J. in delivering the Opinion of
the Court in the Case of Shaw v. Weight says, that this Case in 5 Wms. 441. was well reported, and
that he heard it argued Seriatim, and that the Case was adjudged that A. took an Estate for Life, and
Point remained unhooked in Chancery and in the House of Lords, so that if there was judged a
good Word of Purchase though an Estate for Life was given to the Father of the Issue. S. Mod. 582. in
Case of Shaw v. Weight——Gibb. 21. S. C. cited by Raymond Ch. J. accordingly; and said, that it
had been said Devise in other Places; it having been brought into Chancery, and by Appeal thence
into the House of Lords, yet Judgment given in C. B. was in all true Places confirmed, and has been
acquiesced in ever since; and thence infers that the Word Issue is properly a Word of Purchase
when the Intent of the Party is apparent.——S. C. cited per Cur. by the Name of Bullington v. 
Barnardiston, 2 Vern. 450 Mich. 1703.——S. C. cited by Parker Ch. J. 10 Mod. 405. to be wrong
reported in Law.
Devise.

it is said that an Implication shall never rise over an express Limitation; so that an Estate devised to A. Life, and after to his first Son and the Heirs of the Body of such first Son, and if A. die without Issue, then the Remainder over, in that Case A. shall not have an Estate by Implication, because there is an express Limitation in Tail to the first Son. 5 Mod. 392. 4st. Geo. 2. in 5 C. —


Upon a Re... 17. Devise to W. L. for Life, he paying 200 l. a-piece to his two Sire for Sitters, and after his Decease to the Heirs Male of the Body of A. the Heirs Male of the Body of every such Heir Male severally and succes-<br>...
Devise.

Resolution of the Court said, that stronger Words could not be invented to make the Issue in Tail take as a Purchaser, than the Words in this Case.—Ibid. 63. S. C. cited Arg. and Ibid. 75. S. C. cited by Raymond C. J. and Ibid. 76. 81. & 87.

19. A Limitation in a Will to one to take and enjoy the Profits of an Estate during his Life, and after his Death to the Heir Male of his Body, would make an Estate Tail, where nothing appears that explains the Testator's Intent to the contrary, otherwise not. Comyn's Rep. 289. Mich. 5 Geo. 1. C. B. White v. Collins.

20. A. devised a Term to B, his Son during his Minority, and if he attained 21. then to him for his natural Life and no longer, Remainder S. C. to such of his Issue as should be begotten as be the said B. should devise the same. And if he should die without Issue, then he devised the Residue of the Devise to his Brother J. N. This was held per Parker C. to be only good — an Estate for Life in A. with a Power of disposing to which of his Issue. Gibb. If he thinks fit, the Words (no longer) plainly shewing this to have been the Intention of the Testator. 10 Mod. 402. Patch. 4 Geo. 1. in held good.

Canc. Target v. Grant.

21. A. by Will devised his Estate to Trustees and their Heirs &c. in Trust, to convey to B, without Waive, Remainder to Trustees during his Life to preserve contingent Remainders, Remainder to his first &c. Son in Tail Male, Remainder to Daughters in Tail General as Tenants in Common, with Power to B. to make a Jointure not exceeding a Moiety; and if B. die without Issue, then he devised the same over. It was objected, that this was an Estate Tail in B. and the rather, for that otherwise the Daughters of the Son of B. could never take, which would be against the Testator's Intention. It was answered, that here was an express Estate for Life to B. and the Words (if B. die without Issue) being only Words of Implication, would not merge or destroy an express Estate for Life according to the Cane of Bampfield v. Popham. But Ld. C. Parker exploded the Notion that Words of Implication should not turn an express Estate for Life into an Estate Tail, and said, that if I devise an Estate to A. for Life, and after his Death without Issue then to B. this will give an Estate to A. according to the Day's Case, 9 Rep. 227 b. But here being a Limitation to B's Son upon his Death and after to his Daughters, the following Words (if B. die without Issue) must be intended, if he should die without Issue, Quere, for that as to what was urged that the Words should create an Estate Tail in B. his Son's Daughters could not take, his Lordship said, there is no express Estate for him, and it did not appear that A. intended that he should take, for he might think, that on B.'s dying without Issue Male, his Name and Family would be determined, for which Reason he might limit it over to the Daughters of B. himself, besides that B. would be Tenant in Tail, and when he is of Age might by docking the Entail give the Preannities to his Daughters. Winn's Rep. 600. 605. Hill. 1719. Blackborn v. Edgley.

22. Devise to B. for Life, and after his Death to the first Son of MS. Tail. His Body, and the Heirs Male of such first Son, and so to the fourth, Re-cites S. C. to Doc. 1750. and B's Devils without Issue of his Body to a Charity; Adjudged and reported in Dom. Proc. that B. had Estate Tail. Arg. Gibb. 13. cites ths, De-Hill. 7 Geo. 1. the Cane of Sutton v. Paman.

For Life and after his Death to the first Son of B. or Issue Male of his Body and to the next Heirs Male of such first son, and for Want of such Issue to the Second in like Manner; but goes not to the third or other Sons. Provided that the said B. or the Heirs Male of his Body shall not commit Waste, or defect the Annuities or Beneficial Bequests in this Will, and then devised Annuities to two Sitters, and after the Death of his two Sitters, the Trustees should apply the Annuities to certain Charities, adjudged in Scace, that this was an Estate Tail: Affirmed in the House of Lords. — This Case as stated by Mr. Williams, who argued this Case in the House of Lords to be thus, that A. was seized of Land in H. in Fee of a Legal Estate, and in S. in Fee of a Trust or Equitable Estate, and by Will devised B. his Nephew and Trustees of the Land in S. to convey his Land to S. to the

Estate.
256
Devise.

Use of his Will, and devised all his Lands in S. and A. to B. for Life, and afterwards to the first Son or Issue Male of his Body lawfully to be begotten, and to the Heirs Male of the Body of such first Son, Remainder to the said B's second Son and his Heirs Male in tail (not carrying the Limitations over to his third or other Sons) and afterwards came this Clause (viz.) that immediately after the Death of the Testator's Nephew without Issue Male of his Body the Premises should go over to Trustees for Charities.
Afterwards B. suffered a Recovery and died without issue, and the Question was, whether the Recovery barred the Charities? And that this upon an Appeal from an Order made by the Baron of the Exchequer to the House of Lords was agreed by all the Lords, as to the Lands in H. in which the Testator had a legal Estate, to be a good Recovery, and the Charities to be barred by it, but the same were adjudged to be to the Trust Lands in S. the Order of the Court of Exchequer was reversed by a Majority, the Effect whereof was only to reserve the Plea allowed by the Exchequer, and so did only put the Respondents to answer over without determining the Right afterwards against them. Wm's Reports 754 Mich. 1721. Attorney General at the Relation of Folkes and Barrley v. Sutton and Payman.

Afterwards in Consequence of this Order, the Barons decreed, that the Recovery by B. of the Trust Estate was void, as contrary to the Trust created by A's Will, and because there had been no Conveyance of the Lands in S. to Trustees, pursuant to the Directions in the Will, and directed a Conveyance and a Perpetual Injunction for quelling Petition. But as to the Lands in H. in which the Testator had the legal Estate, the Court, after a Trial at Law and a Special Verdict found, gave Judgment for the Lessors of the Plaintiff, being of Opinion that B. the Nephew took an Estate Tail in H. and the Court ordered the Tenants to attorn &c. Wm's Rep. 765. in a Note there says, that the Order of the House Lords was 29 Jan 1732, and that the Judgment thereupon in the Exchequer was Parch. 1772, by the Name of Payman being then dead) Attorney General v. Young & al. —— S. C. cited Forreese's Rep. 66. Arg. by the Name of Sutton v. Payman —— S. C. cited Arg. 8 Mod 257.

23. A Devise to E. M. and R. S. during their natural Lives, equally to be divided between them, and after their Devise to the next Heirs Male of their Bodies, but in Case either of them die without such Issue, then I devise the same unto the other of them, and after his Devise to the Heirs Males of his Body, and for Want of such Issue of both of them, then be devised over to others, with a Proviso, that if any of the Devisees cut down Timber, unless for necessary Basons, they should forfeit their Estates; it was held to be an Estate Tail in M. and S. notwithstanding the Estate was limited to their next Heirs Male; this was the unanimous Resolution of the Court of C. B. when the Lord Chancellor prefided there, and was, as I believe, to the Satisfaction of all Welminister-Hall; and when this Case was brought into B. R. by Writ of Error, that Court seemed to be of the same Opinion, but as to the Points of the Pleading, being in a Fornecon, there were debated, but no Question made as to the Limitation of Estate. Forreese's Rep. 84, 85: cited by Forreese J. as Parch. 12 Geo. 1. Seagrave v. Miller.

The Court, said the Words were properly Words of Limitation. They said too if the Words had been in a Deed, as they are in a Will, it would have been beyond all Question, that an Estate Tail had passed to the first Taker. And they laid it down for a Rule, that Words in a Will shall give the very same Estate as such Words in a Deed would, unless the Intent of the Party can be discovered to
25 Devise to A. and B. two Sisters of the Testator equally for their Lives, without committing any Manner of Waif, and if either of my said Sisters A. or B. happen to die leaving Issue, or Issue, then to such Issue or Issue of their Mother's Share, or else in Trust for the Survivor or Survivors of them, and their respective Issue or Issues; and if A. and B. die without Issue, and their Issue or Issues die without Issue, then Remainder over &c. In the Grand Sessions of Wales this was held to be an Estate Tail; Upon Error brought in B. R. this Judgment was reversed; but afterwards the Judgment was reversed in Domino Proc and the first Judgment establisht. Gibb. 7. Patch. 1 Geo. 2. B. R. Shaw v. Weigh.

26. A. devills Lands to his Wife for Life, and for her better Support, he give and bequeath unto her the Sum of 500l. to be raised by her, or by her Executors, or Administrators, by Sale of Timber, or by Sale of any Part of the Premisses, or otherwise, by digging, spinning, and Sale of Coal, or any Part thereof at her discretion, or by the Executors, and Administrator's Choice and Election; and if my said Wife shall happen to die before the said Sum be raised, and afterwards, then to be given her Power, either by Deed or Will in her Lifetime, or upon her Death, to appoint any Person to raise the Sum after her Death in Manner aforesaid; provided nevertheless, that if either my Sistars hereafter named, or such Person, for whom my Trustees hereafter named shall be Trustees, shall pay unto my Wife her Executors &c. the said Sum of 500l. that the said Power of selling shall cease, and after the Decease of my said Wife, I devise all my Estate before mentioned to A. B. C. and the Survivor and Survivors of them, upon the Trusts hereafter mentioned, that is to say, in Trust for my Sistars A. L. and D. E. equally between them during their Natural Lives, without committing any of the Sistars Manner of Waif from and alter the Decease of my said Wife, provided always that what Sum or Sums of Money, in Part, or in full of the said 500l. hereby left to my Wife, shall be really paid to my Wife, her Executors &c. by either of my said Sistars, that in that the Judge, Cade my Will, is, that such Money be likewise raised by getting of Coal on the Premisses only; and if either of my said Sistars happen to die, leaving Issue or Issues of her or his or their Death, be gotten or to be gotten, then in Trust for such Issue or Issues of the Mother's Share, or else in Trust for the Survivor or Survivors of them, and their respective Issue or Issues; and if it shall happen that both my said Sistars die without Issue as aforesaid, and their Issue or Issues to die without Issue or Issue lawfully to be gotten, the Judge of the Estate Tail in the Sistars, in the Great Sessions was reversed. Gibb. 739. Patch. 1 Geo. 2. B. R. the whole Court held that both my said Sistars die without Issue as aforesaid, and their Issue or Issues to die without Issue or Issue lawfully to be gotten, the Judge of the Estate Tail in the Sistars Court held the said Sistars to stand and be intrusted to, and for my Kintman J. S. and the Heirs Mailes of his Body &c. and for Want of such Issue, then in Trust for R. G. &c. And the chief Question was, whether this was an Estate Tail, or an Estate for Life, and it was that it adjudged an Estate Tail in the Siswers, the Great Sessions of the County of F. which Judgment was reversed on a Writ of Error in B. R. But on a Writ of Error in the House of Lords, this last Judgment was reversed and the first establisht, by the Opinion of the Error Elyes Ch. J. Pengelly Ch. B. and Fortescue, J. against the Opinion brought of all the Rest of the Judges, who held it only an Estate for Life in the Sistars, Eue Abr. 184, pl. 28. 28 April 1729. Shaw v. Weigh.

all the Judges should attend in order to deliver the their Opinions, and Mr. Justice Fortescue, Ld. Ch. B. Pengelly, and Ld. Ch. J. Ely were against the Judgment, but all the Rest of the Judges and B.
27. A. by Will devised Land, and also 10000l. to be laid out in Land to the same Uses, viz. the 10000l. to Trustees to purchase Lands to be settled on B. for Life, fans Voule, Remainder to Trustees &c. to preferve &c. Remainder to the Heirs of the Body of B. Remainder over with a Power for B. to make a Jointure. And by the same Will A. devised Lands to B in the very same Manner. It was decreed by the Master of the Rolls, after having taken Time to consider of it, that as to the Lands, an Estate for Life only paffed to B with Remainder to the Heirs of his Body by Purchafe; and as to the 10000l. the Court had evidently Power over that, which therefore should be ftered fo as to make B. Tenant for Life only, and that his Sons should take in Tail Male succedually &c. according to Tegatient's Intention. But L. C. King upon Appeal to him declared, if the De- vice of the Lands, though laid to be Sars Voule, with Remainder to Trustees to preferve &c. Remainder to the Heirs of the Body of yet this Remainer was within the General Rule and muft operate as Words of Limitation and create a vefted Estate Tail in B. But as to the 10000l. his Lordship held, as the Master of the Rolls did, and faid that the Diverfity was where the Will paffes a Legal Estate, and where it only Executory and the Party muft come to this Court in Order to have the Benefit of the Will; that in the later Cafe the Intention should take Place and not the Rules of Law. 2 Wms's Rep. 471. Trin. 1723. (Hill. 1731.) Papillian v. Voice.

28. Upon the Trial of the Issue in this Caufe, the Question was, what Estate the Words in a Will conveyed, which were thefe following. I devise my Lands to A. for Life, and after his Deceafe Remainder to the Heirs-Male of the Body of A. and to the Heirs-Males of fuch Issue Male. The Ch. J. was of Opinion, that they conveyed an Eftate Tail to A. and faid, that the fettled Distinction was, where the Word (Heir) is in the singular Number, and a Limitation made to the Issue of fuch Heir, the Word Heir is considered as a Word of Purchase and a Descriptio Perfune; but wherever the Word (Heirs) is in the Plural Number and a Limitation made to the Issue of fuch Heirs, the Words Heirs is con- sidered as a Word of Defcent and not of Purchafe. Barnard. Rep. in B. R. 367. Trin. 3 Geo. 2. Burnet v. Coby.

29. DeVife to B. and his Heirs lawfully to be gotten, that is to fey, to his first, second, third, and every other Son and Sons succedingly, law- fully to be gotten of the Body of the faid B. and the Heirs of the Body of fuch first, second third. and every other Son and Sons succedingly law- fully infuing, as they fhall be in Seniority of Age and Priority of Birth, the Eldeft always and the Heirs of his Body to be preferred before the Youngeft and the Heirs of his Body, and in Default of fuch Issue then to his Right Heirs for ever. Per Car. B. has only an Eftate for Life and not an Entail; and the viz. and the other Clauses are not contrary but explanatory of what Heirs of the Body of B. the Devifor meant; And Judgment accordingly by the unanimous Opinion of the whole Court. 2 Ld. Raym. Rep. 1561. Mich. 3 Geo. 2 B. R. Lowe v. Davis.

Barnard.
Rep in
B. R. 258.
Law v.
Davis S. C.
adjudged
by 3 J.
abenta
Page J. and
they were
clear of
Opinion
that the
Words un-
der the
viz. afoertained the General Definition of the former and explained the Tegatient's Meaning to be that B. fhould have a bare Eftate for Life, the Remainder to his Sons in Tail, and they thought the Cafe in 2 Vern. 449 [Barnfield v. Pepham] eflenputtihable from this; For there the Words are by Way of Limitation, but here they explain one another.

(C. b) E.
(C. b) Estate for Life, Tail, or Fee, by Implication.
By Way of Enlargement.

1. LANDS were devised to A. and the Heirs Males of his Body
and if he dies without Heirs of his Body, that the Land shall
remain to a Stranger; it was adjudged that the Words (Heirs of the Body) in the Contingent, or Condition, shall not enlarge the Estate precedent, viz. Heirs Males of the Body, but shall be referred to that and no further. Cited by Mead, Mo. 124. pl. 269. Patch. 25

2. The Teflators made his Will in these Words, (viz.) If it shall
please God to take my Son Richard before he shall have Issue of his Bo-
dy, so that my Lands descend to C. his Brother, then &c. all the Justices
agreed, that this was a plain Implication to make this an Estate Tail in Richard by Implication. Owen. 29. 29 Eliz. Colin's Case.

3. A. has B. a Son by a first Venter, and C. and D. by a Second
Venter, and devises Land to C. and D. And if either of them or their
Heirs do sell the same the Gift shall be void. It is a Fee by the In-

4. So where it was, if either of them or their Heirs do sell the
same the Land shall revert, shall not be construed an Estate Tail, when
it does not appear his Intent was to make an Estate Tail, but a

5. A Man devised Lands in London, to his Son and Heirs, after
the Death of his Wife, and if his Daughters outlived his Wife, Son,
and his Heirs, they should have it for Life, and after their Deaths $.
should have it paying 6%. Yearly to the Company of Merchant-
Taylors London, to be bestowed in Charitable Uses. Resolved that
the Wife has Estate for Life by Implication; Secondly, that the Son
had Tail by Implication, and not Fee-Simple; for as long as the
Daughters lived, the Son could not die without Heirs Collateral.
Thirdly, that the Estate to J. S. after the Death of the Daughters
was a Fee-Simple by Reason of the Annual Payment of the Money.
Mo. 852. 853. pl. 1164. 1 Jac. Anon.

6. Devize to A. for his Natural Life, and after his Death, I give S. C. £2 Law.
the same to the Issue of his Body lawfully begotten on a Second Wife, 58. and
and for Want of such Issue to B. and his Heirs for ever. Provided
that A. may make a Jointure of all the Premisses to such Second Wife,
which she may enjoy during her Life. This was adjudged an Estate Tail,
for Life only in A. Per Twifden and Rainstord J. against Hale
upon the Point of Law. For all there agreed that A. took Estate Tail.——S. C. and S. P.

The Power for A. to make a Jointure is no Indication that an Estate for Life only and not
an Estate Tail was intended to pass, because though Tenant in Tail could make a Jointure,
yet not without destroying the Estate Tail by First or Recovery; whereas the Teltor's Inten-
tion might reasonably be that A. should make a Jointure without cutting off the E. Tail, Ched
Arg. as held by Ld. Harcourt and so reversed a Decree of Ld. C. Cowper's in the Case of Bals

7. T. H. had three Sons, T. B. and R. and devises Lands to
B. and R. and if B. dies without Heirs, R. shall have his Part; and
Devife.

and if R. dies without Heirs, T. shall have it. The Question was, what Estate R. had in his Moiety. For it was agreed that B. had an Estate Tail by Implication, by Virtue of the Words subsequent to the Devife, viz. and if B. die without &c. it was argued per Maynard, that R. should also have an Estate Tail, because those Words that did give were the same to both of them; and then when the Testator had by these Words declared what Estate he did intend should pass to B. when he says, I devise to B. and R. the Words being the same to R. shall carry the Estate in the same Manner. Nudigate argued e contra, for that by the first Words, if the Testator had given no farther, but only said, I devise these Lands to B. and R. neither of them had had but Estates for Life; and then when the Testator by subsequent Words enlarges the Estate of one of them (by saying T. shall have it) this Word (it) shall relate only to B.'s Part that was before devised to R. if B. dies without Heir. And the Court inclined to this latter Opinion, that R. had but an Estate for Life in his Moiety, Implications that carry Estates ought to be plain and strong; and so gave Judgment Nullo. Pleem. Rep. 83. pl. 104. Patch. 1673. Allen v. Spendlove.

8. If one devises to his Wife 600l. to be paid to 7. S. for the Lands he purchased of him, and are already settled on his Wife for her Life for Part of her jointure, and the Lands were not settled, this is a Mistake in the Testator, and shall not by Implication amount to a Devise of them to his Wife for her Life, it not appearing that he intended to pass these Lands by his Will. Adjudged per Pollexfen Ch. J. Rokeby and Ventris, but Powell contra, for here appears an Intent that the Wife should have them, and though he is mistaken as to the Way of her taking by the Settlement, the shall have them by such Way as the may, viz. by the Will, rather than his Intent shall be frustrated. 3 Lev. 259. Trin. 1 W. & M. in C. B. Wright v. Wivell.

9. G. C. The Father being seised of the Lands in Question made a Settlement thereof to G. his Son for Life, Remainder to his first &c. Son in Tail Male, Reversion in Fee to G. the Father, who in June 1683 made his Will as follows, viz. As touching my Lands and Tenements &c. my Will is, that if my Son's Wife die during the Life of her Husband without Issue-Male, that then be shall have Power to make a Jointure to any other Wife, and for Want of Issue Male of his said Son, then the Lands shall be and remain to his Son by any other Wife, and his Grand-daughter shall have 4000l. and in Case of Failure of Issue Male by his Son G. then all his Lands shall go to his Grandchildren and their Heirs, Share and Share alike. It will be impossible to make this an Estate Tail by tacking the ESTATE by the Will to the ESTATE for Life in the Settlement on Purpose to support the Contingent Remainder; because the Settlement and Will are two distinct Conveyances, and therefore Judgment was given that this was not Estate Tail. 4 Mod. 316. to 319. Mich. 6 W. & M. in B. R. Moor v. Parker.

10. A. seised of Lands in Fee had Issue two Sons B. and C. and made his Will and devised several Lands to B. and that B. should receive all his Right in Black-Acre (of which the Devisee was then seised) to C. and it was objected, that this was no Devise of the Land to B. only. That if B. should release his Right, this was intended to be only an Estate for Life; but because the Words were (all his Right) it was apparent that A. intended that B. should have Fee, and accordingly they certified their Opinions to the Lord Chancellor. Ld. Raym. Rep. 187. Pash. 9 W. cited by Treby Ch. J. as lately referred by the Lord Chancellor to Holt Ch. J. and himself. Hodgkinson v. Star.
11. Devise to A. for Life, Remainder to the first Son of A. in Tail Male, and so on to the Tenth Son in Tail Male, and if the said A. die without Issue Male of his Body, the Remainder over. Also by a Codicil annexed, he recited whereas he had given an Estate Tail to B. &c. And it was objected, that by the Codicil the Intent of the Deviseur appeared and that by the Will A. had an Estate Tail; for he might have * Posthumous Children and more then Ten Sons. Sed non Allocatur; For where a particular Estate is expressly devised, we will not by any subsequent Clause collect a contrary Intent inconsistent with the first by Implication; and therefore they continued dying without Issue Male, a dying without [sic] Issue Male.

And they said there was a mighty Difference between a Devise to A. and if he die without Issue, then to B. and a Devise to A. for Life, and if he die without Issue, then to B. Adjudged by Wright Ed. Keeper, Holc Ch. J. and Trevor Ch. J. 1 Salk. 236. Hill. 2 Ann. in Can. Popham v. Barmfield.

Thee Words being Words of Limitation only, after an express Estate for Life and being in Default of such Issue could not create an Estate Tail, and the rather too, where it would defeat the Intent of the Tefattor (as where he limited it over to several others in thelike Manner) by impowering A. to whom it was limited to bar all the Subsequent Remainders by a Recovery. Wma's Rep. 335. per Ed. C. Cowper Hill. 1716. Humberton v. Humberton.

12. T. C. being seised in Fee of Lands in W. convey'd the same to the Ufe of B. his Son for Life, Remainder to M. his Wife for Life, Remainder to the right Heirs of B. and dies; B. by his Will devises in these Words (viz.) My Lands in W. my Wife is to enjoy for her Life, and after her Death of Right it goth to my Daughter E. for ever, provided she has Heirs. Now if my said Daughter should die before her Mother, or without Heirs, and my said Wife M. should marry again, and have an Her Male, I beseech him all my Right to that Estate, not thinking I can sufficiently reward her Love. B. died without Issue Male, having only one Daughter E. who died without Issue, and the Leffors of the Plaintiff are Heirs at Law to her, and Co-Heirs of J. C. Brother of the said B. After B's Death, M. married T. H. by whom she had Issue the Defendant. For the Plaintiff it was infinced, that the Leffors of the Plaintiff are the Heirs at Law to whom the Estate belongs, if it is not disposed of otherwise by the Will of B. That by this Will nothing passed to the Defendant; for he could not take but by way of Remainder, or by way of Executory Devise; and he could not take by way of Remainder, because nothing is devised to E. the Daughter; for the Will does not give her any Estate, but only recites the Estate which she had before; for it lays, his Wife shall enjoy for her Life, and after her Deceafe of Right it goes to his Daughter for ever, provided she have Heirs, which is only a Narration or Recital of the Estates as they were by the Marriage Settlement. And afterwards Judgment was given for the Plaintiff upon the first Point, and here was no Devise to E. and then the first Son of the Wife by her second Husband could not take by way of Remainder. Conyns's Rep. 252, 233, 234. pl. 130. Mich. 2 Geo. B. R. Right v. Hammond, &c. a. l.
Devise.

13. If he dies without issue, or before issue, or if he departs not leaving issue, or if he dies not having a son, all these Limitations create an Estate Tail. Arg. 2 Vern. 766. Trin. 1719. in Cafe of Pinbury v. Elkin.

14. The holding an Estate Tail good by Implication is always in Maintenance of the Intention of the Devisee. Arg. 10 Mod. 403. Patch. 4 Geo. 1. in Can. in Cafe of Target v. Grant.

15. And per Parker C. it is ever in favour of the Heir at Law that an Estate Tail is created by Implication, to whom no Estate being given by the Will so as to enable him to take by Purchase, and there being Necessity (if he takes at all) of his taking by Devise, wherefore to support the Intention of the Testator that the Heir should take the Law creates by Implication an Estate Tail in the Ancestor to vest it in the Issue by Devisee. 10 Mod. 403. Patch. 4 Geo. 1. in Can. in Cafe of Target v. Grant.

16. But where there is a Provision how it shall go to the Issue this Reason ceases, as where in the Principal Cafe it was devised to go in Remainder to such of the Issue of the Devisee for Life as the said Devisee for Life should devise the same unto; in this Cafe, until such Devise made by the Devisee, nothing vests in the Issue, Per Parker C. 10 Mod. 403. Patch 4 Geo. in Can. Target v. Grant.

17. R. W. seized in Fee of the Lands in Question had two Sons R. and G. and by his Will devised in them Words, viz. I give to my Wife J. all my Frehold Lands in C. in the County of E. (being the Lands in Question) and after some other Bequests he says, I give to my Son G. my Frehold Lands in C. after my Wife's Decree; and if it shall happen that my Son G. should die before he attain the Age of 21 Years, then the said Lands shall descend to my Son R. and his Heirs for ever; R. was the Eldest Son and Heir of the Testator, G. was his Younger Son by a second Wife; G. attained his Age of 21, and by his Will devised the Lands to his Sister, the Wife of the Defendant and, her Heirs, and then died in the Life of J. his Mother. The Leilor of the Plaintiff claimed under R. and it was referred by Eyre J. whether G. had an Estate in Fee, or only for Life; and it was inferred that G. took a Fee, for if he had only an Estate for Life, he took nothing, and the Devisee that R. his Heir should take if G. died under Age, imports that he should not take, if he did not die under Age; But by Eyre J. here is no Device to the Heir of G. and no one shall take against the Heir without an express Device to him. Judgment for the Plaintiff. Comyns's Rep. 353, 354. pl. 177. Mich. 7 Geo. C. B. Fowler v. Blackwell, & al.

18. If Lands are devised to Trustees, without any Words of Limitation to support the Trust of Estates of Inheritance, they by Implication must have an Estate of Inheritance sufficient to support the Trust; for there is no Difference between a Devise to a Man for ever, and to a Man upon Trusts, which may continue for ever. Adjudged. Eq. Abr. 176. pl. 8. cites Patch. 1 Geo. 2. in B. R. in Cafe of Shaw v. Wright.

19. Mrs. Frances Ellis by Will dated 10 December 1685. devises all her Manors, Millages, Lands, Tenements and Herediments in A. B. and C. in the Counties of Gloucester and Surrey to Thomas Eirl of in the County of Dorset Esq; and Charles Morgan of the Inner Temple Esq; their Heirs and Assigns for ever, upon Trust and Confidence nevertheless; but not upon Condition that they and the Survivor of them, and the Heirs of such Survivor, shall and will in the first Place, out of the Rents, Issue of all profits of the said Manors &c pay and satisfy the several Legacies, Devises and Bequests herein after mentioned, viz. Imprimis, he gives and devises an Annuity of to Jane Matters for Life, and then devises other Annuities for Life to other Persons, to be paid out of the Rents and Profits, and after her Transfer.
reimbursing themselves their Costs and Charges, she doth appoint her Trustees to pay all the Rent and Residue of the Rents, Issues and Profits to the proper Hands of her Daughter Cecil Fiennes, or to such Person or Persons as she shall by any Writing or Writings under her Hand and Seal direct and appoint for and during the Term of her natural Life, and from and after her Death, the Trustees to hand and be paid of the Premises to the Use of the Heirs of the Body of her said Daughter Cecil Fiennes, severally and successively as they shall happen to be in Priority of Birth and Seniority of Age, and to the Heirs of their respective Bodies in Tail general subject to the Payment of the several Annuities. And in Case of Failure of the Issue of the Body of her said Daughter Cecil Fiennes, then to the Use of Lady Catherine Jones &c. Cecil Fiennes and her Husband levied a Fine, and suffered a Recovery of the Premises, and died without Issue, under whom the Defendant Lord Say and Seal claims the Estate, and Lady Catherine Jones claims under the Will of Mrs. Frances Ellis by Virtue of the Remainder limited to her by the said Will.

Talbot, Solicitor General, and Mr. Mead for the Plaintiff, argued, that Cecil Fiennes took only a Trust Estate for Life by the Will, with a Contingent Remainder to the Heirs of her Body in Tail General, and consequently the Fine and Recovery by Cecil Fiennes could not bar the Remainder given to the Plaintiff by the Will of Frances Ellis, that the Direction to the Trustees to pay the Rent and Residue of the Rents and Profits, after Payment of the several Annuities to the proper Hands of Cecil Fiennes, who was a married Woman, was a Bare Trust, and not an Ufe executed by the Statute of 27 H. 8. of Ufes. It was a Trust for her separate Benefit, and for the Benefit of the Annuitants, and to continue it an Ufe executed would subject it to the Power and Control of her Husband, contrary to the plain Intent of the Testatrix.

That the subsequent Limitation to the Heirs of her Body severally and successively as they shall be in Priority of Birth and Seniority of Age, and to the Heirs of their respective Bodies in Tail general, is an Ufe executed by the Statute, and cannot be consolidated with the precedent Trust limited to Cecil Fiennes for Life to create an Estate Tail by Operation of Law in Cecil Fiennes, and thereby put it in her Power to defeat the Intention of the Testatrix. And as to the subsequent Words, viz. in Case of Failure of Issue of the Body of the said C. F. then to the Plaintiff Lady Catherine Jones &c. these Words do not create an Estate Tail in Cecil Fiennes by Implication, but only connect the Remainder over with the Precedent Estate, but don't enlarge the Precedent Estate, because no legal Estate vested in Cecil Fiennes.

The Attorney General and Mr. Lutwidge for the Defendant argued, that if the first Estate devolved to Cecil Fiennes be a Trust, why is not the subsequent Limitation to the Heirs of her Body a Trust likewise? The legal Estate is given to the Trustees and their Heirs, and if the legal Estate passes to them in Fee, all the subsequent Uses are Uses upon an Ufe, and consequently Trusts not executed by the Statute 27 H. 8. and if the Estate given to C. F. for Life, and the subsequent Limitation to the Heirs of her Body be likewise a Trust, then two Trust Estates will be consolidated together, and create an Estate Tail in Equity, and then the Fine and Recovery will operate upon an Estate Tail in Equity, as well as upon an Estate Tail at Law, and bar the Remainders, and in this Case either both Estates are executed by the Statute, or neither, and take it either way, the Remainder to the Plaintiff is barred.

King C. was of Opinion that by the Words of the Will the Ufe was executed in the Trustees and their Heirs during the Life of Cecil Fiennes, and she had only a Trust in the Surplus of the Rents and Profits,
Devises, after Payment of the Annuities during her Life, but by the subsequent Words, viz. That the Trustees should stand feised to the Use of the Heirs of the Body of Cecil Fiennes &c. Subject to the Payment of the Annuities, the Use was executed in the Persons intended to take by Virtue thereof, chargeable with the Payment of the Annuities, and therefore there being only a Trust Estate in the Ancestor, and an Use executed in the Heirs of her Body, those different Interests could not unite so as to create an Estate Tail by Operation of Law in the Ancestor, and decreed accordingly for the Plaintiff, who was next in Remainder under the Will.

(D. b) Estate for Life, in Tail, or Fee. By Words of Restriction or Implication.

1. If a Man devise his Lands to three and to his own Heirs, and that the one shall take the Profits, and dies; the Permort dies; the other shall be compelled by Subpoena to make an Estate, or release to the Heir of the Devisees; for this Devise shall be taken to be to the Use of the Permort for his Life, and after to the Use of the Feoffor and his Heirs; Quod Noto. Br. Feoffments al Ufes, pl. 49. cites 30 H. 6.

2. A. had Issue: B. C. and D. Sons; B. dies leaving his Wife enlent; A. devises to the Child my Son B's Wife now goes with 20 l. Yearly to be paid to the Use of the Child for 20 Years, and if my Son C. die before he has any Issue of his Body, so that my Land descends to D. before he comes to 21 Years, then &c. C. by Implication of the Will had Estate in Tail, as well by the Words (if he die before he hath Issue) if it had been (if he die without Issue). Mo. 127. pl. 275. Patch 25 Eliz. Newton v. Barnardine.

3. If a Copyholder surrenders to the Use of his Will, and after devises part to A. other part to B. and the rest to C. and if A. B. and C. have till of Age, and have Issue, then to them and their Heirs, to give and sell at their Pleasure; and if one of them die without Issue, wills that the other, or others, shall have all the Lands; and if all die without Issue, that his Executors shall sell the same, and give the Money to the Poor. It was agreed by all, that by the first Words of the Will the three Devisees had but an Estate for Life; and afterwards resolved, that no Estate Tail is created by the Will, but that the Fee Simple is settled in them when they came to their lawful Age and have Issue, and to the Residue of the Devisee is void; and Judgment accordingly. 2 Le 68. pl. 92. Trim. 27 Eliz. C. B. Brian v. Caunen.

4. Devise to his Wife for Life, and that after her Decease that his Executors should receive the Profits till 900l. should be raised for the Presumption of his Daughters; and after that Sum was levied, then the Lands shall remain to his right Heirs Males for ever; and if his Heirs Males should disturb his Executors in receiving the Profits, then their Estate shall cease, and the Lands shall be divided amongst his Daughters then living. The Heir Males made a Lease to the Plaintiff's, the Daughters entitled, and the Leffe brought an Ejectment; but Judgment was given against him. Cited by Hobart Ch. J. Hob. 34. as adjudged Mich. 7 Jac. B. R. Rot. 115. as Aihenhurst's Cafe, alias, Aihenhurst v. Curtis.

5. A. devised
Devise.

5. A devised that if his Daughter B. married J. S. then his
Lands should be and remain to B. and the Heirs of her Body, but if B. ~
died without Issue, then after the Death of B. and J. S. they should be
and remain to C. and D. Afterward B. married J. S. and died without a Vern. 571,
Issue. J. S. survived. The Court of Chancery decreed the Profits to and that it
J. S. for Life, but upon Appeal to the Lords this Decree was reversed. Was refroid

6. Devise of Lands in Trust for A. for Life, with Power to make
Wills. Ref. Leaves, and from and after her Devise in Trust for the Heirs Males of
the Body of A. Cowper C. decreed an Estate for Life only, to be con-
voyed to A. and to his first and other Sons in Male Tale. But Ed.
Harcourt decreed an Estate Tail to A. and the Heirs Male of his Body,
it being by Will, but admitted it might be otherwise on Marriage Ar-
ticles founded on the Agreement of Parties. But in a Will you must
take the Words as you find them. 2 Vern. 671. Pach. 1711. Bale v.
Coleman.

7. William Stawell of Bovey Tracey Park in the County of Devon, MS Rep.
by his Will dated 2d June 1702, did devise and bequeath unto William
Coleman of Gainsby in the said County of Devon, Eliz. Bale, Wife
of Christopher Bale Esq. and William Bogan the Son of Walter Bogan
of Gatecomb Eq. and John Legalick of little Henniton, Clerk, all the
Lands, Manors, Tenements, Messuages and Hereditaments whatsoever,
situate in the Counties of Devon and Cornwall, to have and to hold the
same unto the said William Coleman, Eliz. Bale, William Bogan, S C as
and John Legalick, their Heirs and Assigns for ever, to the Intent that
the said W. C. E. William Bogan and John Legalick should after
his Death sell and dispose of all or any Part of the said Lands, Manors
&c. and with the Money to be raised thereby to pay and discharge all his
Debts, and then declared that his Will was, that all his just Debts and the ab-
sumption of his Debts and Legacies should be punctually paid, after which he gave devise and be-
queathed unto the said William Coleman, Elizabeth Bale, William Bogan
and John Legalick, their Heirs and Assigns for ever, equally to be divided
between them, all such Lands, Manors &c. as should be and remain over
and above the Discharge of his Debts and Legacies, and further declared,
that the Estate of Inheritance be had thereby given, devised and bequeathed
unto the said John Legalick, his Heirs and Assigns, was in Trust to, and
for the said William Bogan, his Heirs and Assigns.

Afterwards the said William Stawell made a Codicil, and annexed it
to the Will, dated the 10th of the said Month of June, which was in
these Words, Item, My Will is, that after my Debts and Legacies are
paid, and a Dividend made of the Remainder of my Manors, Lands, Te-

ments, Rents, Reversions and Hereditaments, by and between the
said William Coleman, Eliz. Bale, and William Bogan, and their Heirs
and Assigns, that notwithstanding the express Words in my Will to Eliz.
Bale and her Heirs and Assigns for ever, I do hereby declare, and my
Will, Intent, and Meaning is, and my Desire is, that it be so taken
and confirmed in Law, that that Part of my said Manors, Lands, Ten-

ments
Devise.

ments &c. which shall happen to fall for the Share and Dividend of the said Elizabeth Bale, shall be and remain to such Uses, Intents and Purposes, as are herein after mentioned and expresied, and to, and for no other Use, Intent or Purpose whatsoever, i.e. to and for the Use and Behoof of the said Elizabeth Bale, for and during the Term of her Natural Life, with Power of letting, setting, and leaving all or any Part of such Share or Dividend for 99 Years determinable upon one, two or three Lives, either in Possession or Reversion, and after her Decease to the Use and behoof of her Son my Confin Christopher Bale, for and during the Term of his Natural Life, with the like Power of letting, setting, and leaving in all or any Part of such Share or Dividend for 99 Years, determinable upon one two or three Lives, either in Possession or Reversion, and after the Decease of the said Christopher Bale, then to the Use and Behoof of the Heirs Males of the Body of the said Christopher Bale, lawfully to be begotten, and for Default of such Issue to the Use and Behoof of the said William Coleman, and William Bogan, their Heirs and Assigns for ever, equally to be divided between them.

Some short Time afterwards the Testator died, and there being a Defect in the Will, by not enabling the said John Legaffick to Act as a Trustee for the 4th Part devised unto William Bogan an Intant, and to sell the said Estates, the said Mr. Stawell dying much in Debt, and his Lands being mostly mortgaged &c. an Act of Parliament was in the Second Year of the now Queen, past'd, enabling the said William Coleman and other Trustees, to make Sale of Lands for the Payment of the Debts and Legacies of the said William Stawell deceased, and after the Payment of the said Debts and Legacies, the said Act did direct that the said William Coleman, Eliz. Bale, and John Legaffick, and the Survivor of them the said William Coleman, and Eliz. Bale should make a Division of the Overplus, according to the Directions of the Will. But no Notice is taken of the Codicil in the Act of Parliament.

In Hill. Term 1 Ann. a Fine was levied by Eliz. Bale and her Husband, of a Moaty of all Mr. Stawell's Estate to one Triftran Bowdage, in order that a Common Recovery might therupon be had, and suffer'd (as it was intended) to bar the Estate Tail limited to Christopher Bale the Son, and the Heirs Males of his Body, and accordingly a Precipe was brought by Thomas Bowdage against Trifran Bowdage, who vouch'd Elizabeth Bale and Christopher Bale her Son, who vouch'd over the Common Vouchee, and this Fine and Recovery were declared to be to the Use of Christopher Bale the Son, and his Heirs after the Death of his Mother. Note, at this Time none of the Debts and Legacies of Mr. Stawell were paid, or but to the Amount of 122l.

But the Debts being all now paid, Christopher Bale the Son prefer'd his Bill against Coleman, his Father and Mother, William Bogan and John Legaffick, that they might come to a Dividend of the Overplus of Mr. Stawell's Estate now remaining, after his Debts and Legacies were paid, and intitled, that there being an Estate vested in him and his Heirs after the Death of his Mother, by the said Fine and Recovery, he ought to have such Estate settled in him upon the Dividend.

Mr. Coleman then prefers a Cross Bill against the said Parties, and prays that a Dividend may be made of this Estate, and that the Court would direct what Estate should be limited by the Division-Deeds to the said Christopher Bale the Son, he intiting that his Estate was but in Contingency until after the Debts and Legacies paid, and a Dividend made, and that the Words in the Codicil did declare a Trust of the Dividend of Mrs. Bale's Share, which when it comes to be put in Execution by a Court of Equity, shall be executed according to the Intention of the Testator expres'd in the Codicil, and that the Limita-
Devise.

The Division ought to be after the Death of Mrs. Bale to Christopher Bale her Son, during his Natural Life, with Power of letting and leasing as aforesaid, Remainder to the First and other Sons of the said Christopher Bale the Son, and to the Heirs Males of the Body of such first and other Sons, Remainder over to William Coleman and William Eogan, and their Heirs &c.

Upon the Hearing of this Cause before my Lord Chancellor Cowper, he declared his Opinion for the Plaintiff Coleman, and directed that an Account should be taken of Mr. Stawell's Estate, and that what remained should be divided into four Parts, and that the fourth Part which should fall for the Share of Mrs. Bale, should be limited to the Use of her for Life, with such Power of leasing as in the Codicil, and after her Decease to the Use of Christopher Bale her Son during his Natural Life, with the like Power of leasing, and after his Decease to the First and other Sons of his Body, and to the Heirs Males of the Body of such First and other Sons, Remainder to W. C. and W. B. and to their Heirs and Assigns.

In the Arguments of this Cause two Points were made,

1st. Whether this Overplus should be divided into three Parts or four Parts.

2dly. What Estate was to be limited to Christopher Bale the Son upon such Division as aforesaid.

As to the first Point that depended upon the Words of the Codicil, whereby it was declared that after the Dividend made between the said William Coleman, Elizabeth Bale and John Legaffick their Heirs and Assigns, Mrs. Bale's Share and Dividend should be to such Use as aforesaid; for here the Dividend is mentioned to be made but between three Persons. But my Lord declared that the Estate should be divided into four Parts, one Money whereof was to belong to the said William Eogan; For though the Words here seem to imply, that this Estate ought to be divided into three Parts; yet they have Relation to the Will itself, and by that it is expressly said that the Estate shall be equally divided among Coleman, Bale, Eogan and Legaffick.

As to the second Point my Lord laid, that a Devise would Govern this Cause, i.e. when an Estate was executed, and when it was only executory, and therefore it in this Cause a Devise had been to the Son for his Natural Life, with such a Power of leasing as is before mentioned, and after his Decease to the Heirs Males of his Body; This would have been an Estate Tail in the Son executed; For though the Party's Intention was plain that he should have an Estate for Life only, yet the Law executing these two Limitations into an Estate Tail, Equity will not interpose, but as the Tree falls it must lie. But when an Estate was only Executory, and something was to be done before any Estate could be vested or executed in the Party, this Court will direct the Conveyance, not that it shall be in the Words of the Will, but according to the Intention of the Party. Now in this Cause after the Debts and Legacies paid, the Devise is to Mrs. Bale and her Heirs and Assigns of one 4th Part in Common, and when this Division directed to be made is completed, the Limitation to the Son is to arise out of a divided 4th Part, so that the Codicil is a Declaration of the Use or Truftr of this 4th Part, and though the Words of the Codicil be that it shall be so taken in Laws, yet these Words are not of any Weight, so as to make this a Legal Estate executed.

And then being a Truftr, this Court will direct the Execution of it, and the Intent of the Testator here was plain, that this Son should have but an Estate for Life; For it is limited to him during the Term of his Natural Life, with a Power of leasing for 99 Years, and goes on and falls, and after the Decease of the Son, then to the Heirs Males of his Body, with a Remainder over, and as to an Objection that was made, that it was the Intention of the Devise to that this Son should have an Estate Tail, because he had by the Codicil a greater Power of leasing than was given to a Tenant in Tail by the Statute.
Devise.

It was well observ'd at the Bar, that no such Inference could be made of the Party's Intention, for that the Power of leasing was annexed to the ESTATE for Life, and therefore when that Estate was merged by the Accession of the Estate limited to the Heirs Males of the Body of the Son, the Power of leasing annexed to that Estate was destroyed with it, so that upon the Whole he decreed as above; For in the Cafe of a WILL or ARTICLES where a Thing is to be executed, the Intent of the Party shall be pursued.

A Point in this Cafe was spoken to about the Validity of the Fine and Common Recovery, viz. That the Fine and Recovery could not bar this Estate Tail, (supposing it to be one) it being but a Possibility or a Contingent Interest after the Debts and Legacies paid, and a Division made according to Pell and Brown's Cafe, but no Opinion was given to this Point, because the Fine and Recovery could not signify any Thing as this Cafe stood, seeing my Lord's Opinion was, that C. B. the Son ought to be made Tenant only for Life with Power of Leasing &c.

Afterwards (Paunch 10 Ann.) this Cafe was re-heard before my Lord Keeper, Sir Simon Harcourt upon the Plaintiff Bale's Petition, and my Lord was of an Opinion to vary the former Decree, by directing that Mrs. Bale's divided 4th Part should after her Death be conveyed to the Use of her Son C. Bale in Tail, and the said former Decree was accordingly varied as to this Limitation.

My Lord said, that he had a great Respect for his Predecessor but he must determine Caeus according to his own Conscience, and could not agree with this Decree, and added, that this Cafe differed from the Cafe of Articles, where the Intent of the Parties was to be regarded; They are to be looked upon as Purchasers, the Nature and Matter of these Articles is to fix Estates in Families, and it would be absurd to make such a Construction of them as to be of no Effect. In the Cafe of a Devise there is no Purchaser, no Contract, no Family to be provided for; yet here it is said the Intent ought to govern, but then this must be a manifest and certain Intent, and not an arbitrary one. It must be according as it appears upon the Will, and according to the known Rules of Law, it is not to be left to a Latitude, and as it may be guess'd at. In this Cafe there is a Devise jointly to Trustees till Debts and Legacies are paid. What if the Estate had been charged and subject'd for this Purpose, and after this the Testator had devolved in the same Words as in the present Will? this Court had no Power over it. Doth a Devise of a Legal Estate alter this Cafe? It is the same as if there had been no Trust. Trusts in a Will shall have the same Construction as a Court of Law could make upon the same Words. At Law it is agreed that Christopher Bale would be Tenant in Tail, it is the same Thing here, a Precedent Trust will not alter a Subsequent Estate.

It was argued for the Plaintiff, that the Limitation for Life to the Plaintiff, with Power of leasing, was prima facie an ESTATE for Life, but the Limitation over made him Tenant in Tail by necessary Operation of Law. Equity will not alter a Limitation from what it was at the Common Law, the Limitation of a Trust in a Will must be executed, as the same Words will execute in Cafe of a Legal Estate; whatever the Intention of the Parties is, the Operation of Law must over-rule it, 1 Vent. 214, 215. 2 Lev. 58, 59. The King v. Melling.

In many Settlements a Power of Leasing for longer Terms than is granted or allowed by Law to Tenants for Life, or Tenants in Tail may be appointed them by way of Use, which will be good against the Remainder-Man or Reversioner, though a Tenant in Tail cannot by the 32 H. 8. grant any greater Estate than for 21 Years or three Lives. So the Power here, to C. B. the Son, will have its Effect;
Here are exprely devising Words to C. B. and the Heirs of his Body. It is not Executory but an absolute Disposition. In Marriage Articles Equity interposes to preserve the Estate according to the Contract and Agreement of the Parties.

On the other Side it was infilled upon to have the Purport of the former Decree, and that this Cafe was like to the Cafe of Articles in Consideration of a Marriage.

If this Court could not support the former Decree, upon executing of Conveyance, the Estate for Life limited to the Plaintiff, and the Power annexed to it would ceafe, the Tefťator being no Lawyer, his Intent ought to be follow'd, though he had not express'd it in proper Terms.

In the Cafe of Prin v. Prin, before Lord Chancellor Cowper, Prin gives a Bond to settle an Estate according to Articles, which was to P. for Life, Remainder to the Heirs Males of his Body; He makes a Settlement in the Words, and then fillers a Common Recovery; an Action is brought upon the Bond &c. And it was decreed that P. should execute a New Conveyance, and should settle the Lands to P. for Life, Remainder to his First Son, and the Heirs Males of such First Son; In this Cafe there is no Estate executed, but the Execution is under the Direction of the Court.

In the Cafe of Serjeant Maynard's Will, one Moiety of certain Lands was to be settled upon my Lady Hobart for Life, with a Limitation to Trustees to preserve Contingent Remainders, Remainder to the Heirs Male of her Body; It was decreed that an Estate should be convey'd to the First Son of my Lady Hobart; For when a Person comes here to have a Trust executed, Equity will always follow the Intent of the Testator.

In the Cafe on my Lady Shipwith's Will, where she devis'd an Estate to Leonard, and the Heirs Males of his Body, with Remainder over, but declared that it should not be in his Power to injure the Remainder-Man, the Construction here was that he should be only Tenant for Life, yet this was a Direction contrary to the Words of the Will; For the Intent of the Testator is always the Measure of such Constructions.

On the Reply it was said, that the Lady Shipwith's Will did not come up to the present Cafe; For there was an express Direction that the Remainder-Man should not be injured, and as to Serjeant Maynard's Will, he had cut out a proper Method for creating a great Estate but for the Life of the Lady; For he in the Beginning of the Will directed after her Death a Limitation to Trustees to preserve Contingent Remainders, from whence it was plain that he should have but an Estate for Life. It was decreed as above. MS. Rep. Trin. Vac. 8 Ann. and Pach. 10 Ann. in Canc. Bale v. Colman, & al' et e contra.

8. The Father in his Will taking Notice that his Son J. had much dis-obliged him, declares thus, I do therefore resolve not to give him any more than 20l. a Year for Life, to be paid him Quarterly. NB. This was a Ballard Son, to whom the Father had by a former Will given 80l. a Year, but in the second Will be took Notice of his ill Behaviour at the University, and devises that Estate to his legitimate Son. Per Matter of the Rolls, the Ballard Son shall take nothing by this Will, the Words not amounting to a Devise. Hill 4 Geo. 1717. Holder v. Holder.

9. If an Estate be devised to a Man and his Heirs, and if he die without Issue, Remainder over, these Words are explanatory of the Words Heirs, and make an Estate Tall. Comyns's Rep. 539. pl. 222. Pach. 9 Geo. 2. Brice v. Smith.

Z z z (E. B) Estate
(E. b) Estate for Life, in Tail, or Fee; by Reason of Things precedent, to happen, or to be done.

1. TESTATOR devises that his Son should have the Profits of his Lands till he comes to Twenty-one, and afterwards to him and his Heirs, and if he die before Twenty-one, that then his Daughter shall have it to her and her Heirs. The Son died before Twenty-one. It was ruled that the Daughter should have it. 2 Roll Rep. 157. cites 6 & 7 Eliz. Moulton's Cafe.

2. Devise of Lands to A. till his Eldest Son should be Twenty-four, and that if his Son dye before his Age of Twenty-four without Heir of his Body, then to remain over to B. & C. The Son lived to Twenty-four; this is no Estate Tail; for no Tail was to lie before his said Age, and so can never take Effect, and the Fee-Simple descend and remains in the Son, unless he dies before Twenty-four, and then the Entail vests with the Remainder over 2 Le 11. pl. 16 Hill. 20 Eliz. C. B. Hind v. Sir John Lyon.

3. A. failed in Fee has three Sons B. C. and D. and devised to B. and C. several Certain Part of other Land and to D. the Land in Question without mentioning of any Estate they should have, and this was in Reversion after the Death of the Wife, and with this further Clause, that if any of the Sons should marry and have Issue Male of their Bodies and die before his Entry into the Land, then he wills that his Issue shall have his Part; after which D. takes Wife and has Issue Male in the Lie of the Wife of the Devise: The Wife of the Devisee dies. D. enters into his Part, and pays his Portion of 10 l. a-piece to the Daughters of the Devisee charged by the Devisee, and dies; but he not dying before Entry he had but Estate for Life, according to the express Words of the Will for marrying, having Issue Male, and Death before Entry, are three Things precedent to the Tail; and Judgment accordingly. Mo. 464. pl. 650. Parch. 39 Eliz. B. R. Bacon v. Hill.

4. Devise to A. (his Eldest Son) in Tail on a Limitation to cease for Non-Payment, Remainder to B. in Tail Male, and so to C and D. and upon Cease of A.'s Estate by Failure, then to B. C. and D. and to their several Heirs for ever, as before is limited, equally to be divided among them. On A.'s Failure, this Devise wholly revokes and controls all the Remainders of the former Part and leaves the Fee Simple exspectant in the Heir of the Devisee. Cart. 175. Hill. 18 & 19 Car. 2. C. B. Rundall v. Ely.

5. Devise to M. Daughter of my Son-in-law B. if my Son B happen to have no Issue-Male after the Decease of Wife, and if B. have Issue Male then my Will is, that M. shall have 1 l. paid her in Lieu of the said Lands. Devisee died; the Wife died. B. had Issue-Male then living. Keeling Ch. J. thought it was a perfect Estate Tail in B. and that the 1 l. need not to be tendered to M. but she might sue the Executor for it. 2 Saund. 111. 112. Parch. 22 Car. 2. Allen v. Rivington.

6. Lands
6. Lands were devised to J. S. in Fee in Trust for J. K. and the Heirs of her Body, and if K. died without Issue to J., for Life &c. then comes another Clause that if K. died without Issue, and J. be then dead, then and not otherwise, he gave the Land to J. N. and his Heirs; K. dies without Issue, and J. survived and died. Decreed, that J. N. shall nevertheless have the Estate; for the Sentence ("if and J. be then dead") seems to be put in to express his Meaning, that J. should be sure to have it for her Life; and to shew when J. N. should have it in Possession. 2 Vent. 363, 364. Hill. 35 & 36 Car. 2. in Cane. Anon.

7. A. pollied of a Term devised it to an Infant on Vente Sa Merie, provided it be a Son, and if it be a Son and be dies in its Minority, then to B. The Executor attested, but the Child was a Daughter; it was adjudged on a Special Verdict that B. cannot take, because here is a Condition precedent which never happened and the Executor's Affent is not material, where there is no Devise. Comb. 437. Trin. 9 W. 3. B. R. Etcourte v. Warry.

(F. b) Estate for Life. in Tail, or Fee, by Words of Reference.

1. DEVISE to A. and if he die without Issue living B. that then Adjudged
the Feoffees should be seised to the Use of the said B. and
after his Decease ad infinitum Restorum Hereditum in Perpetuum secludum An-
trinum. Evidentiam inde ante fatham, averring a Deed of Tail 200 years old; Per Wray, it shall be intended the Testator had no Spe-
cial Remembrance of a Deed 200 Years old, and that his Lands
should go according to the Law, according to all his Evidences
which he had of his Lands and that is a Fee-Simple. 2 Le. 23. D. P. 

2. If a Man setled in Fee of White-Acre and Black-Acre devisable, and
devises White-Acre unto f. S. to have and to hold to him and the
Heirs of his Body begotten, and devises Black-Acre unto T. K. to have
and to hold in the same Manner and Form as J. S. holds White-Acre;
By these Words, T. K. shall have an Estate Tail in Black-Acre and the
Reason is, because the Will and the Intent of the Giver shall
be obtained. Pech. S. 361.

3. A. by Died in Consideration of the Marriage of B. his Son and a Salk 225.
Porition with B.'s intended Wife covenants to lcy a Fine to the Use of
B. and his intended Wife for Life, Remainder in Tail to B. Rem-
ainder to the Right Heirs of A. A. left no Fines but made a Will,
in which are these Words; Item, I do ratify and make Good all those
my Estates made or granted in Marriage to B. my Son, according to
the Writing made by me in Trust. B. has Estate Tail. 4 Mod. 

such lands and such Estates as were intended to be conveyed by the Deed and Fine; for the Word
(Grant) in a Will is not to be taken strictly, but largely for any Agreement —— Show 330. 
Wifkinson v. Smith. S. C. held that the Lands pulled by the Will, because the Intention of the
Party does sufficiently appear. —— Comb. 193 Princeford v. Smith. S. C. the whole Court held it

(G. b) What
(G. b) What Words make a Special and what a General Tail.

And S. C. cited Mo.

1. DEVISE to A. and the Heirs Male of his Body, and if be die without Heirs of his Body, then the Remainder to B. and his Heirs Male &c. A. has only a Special Tail; for the sub-quent Words explain the Intent. D. 171. a. pl. 7. Mich. 1 & 2 Eliz. Frenchman’s Cafe.

2. A. devises Land to B. and his Heirs Male, and if be die without Heir of his Body, then the Remainder to B. in Feo. Adjudged that B. has but Special Tail to him and his Heirs Male. D. 171. Marg. pl. 7. cites Hill. 17 Eliz. Anon.

S. C. cited and agreed by Twidden J. Vent. 571. Trin. 26 Car. 2. B. R.

3. A. had Illoe B. and C. by two several Venter and devises to B. and the Heirs Male of his Body, and for Default of such Illoe to the Heirs Male of A. and the Heirs Male of their Bodies, and for Want of such Illoe to the Right Heirs of the Devisee. This is a Limitation in Tail to the Heirs Male of the Body of A. so that C. may claim an Estate Tail, as by Purchase, and it does not vest in B. only as Heir-Male to A. and not by Purchase, nor does the inheritance vest in him. Cro. C. 23. pl. 16. Mich. 1 Car. C. B. Hodgkinson v. Wooth.

4. A. by Will devises to M. his Niece and the Heirs Male of her Body, upon Condition, and provided that the intermarry with and have Illoe Male by one Surnamed Searle, and in Default of both Conditions, he devised to N. (in the same Manner) and in Default thereof he devised to B. for Sixty Years, if he so long live, Remainder to the Heirs Male of the Body of the said B. and their Illoe Male for ever; Adjudged that the Estate devised to M. was a good Estate-Tail, and so was the Estate to N. but it is a special Intail; It is an Estate to her and the Heirs-Male of her Body begotten by a Searle, which is a Middle Intail; not the highest of the least; for it might have been to her and the Heirs of her Body begotten by J. Searle, which had been more particular; yet this is a good Estate-Tail within the Statute de Donis, for it is within the Reason of the Statute; But this is a Limitation and not a Condition and so not barrable by M. and N. by Common Recovery. 2 Salk. 570. pl. 6. Trin. 3 Ann. B. R. Page v. Hayward.

(H. b) Relation. To what Time the Will, and the Devises therein, shall relate.

Cro. E. 532. 1. A. Has a Nephew and a Niece his next of Kin, and devises Lands to his Nephew in Tail, the Remainder to the next of Kin of his Name. Nephew died without Illoe. If the Daughter was married at the Death of A. the shall not take the Land; but if she was unmarried at his Death, tho’ married at the Death of her Brother, and so had not lost her Name, then the should have the Land. Cro. E. 576. pl. 23. Trin. 39 Eliz. C. B. Jobson’s Cafe.

2. Two joint-Lenants, Copyholders in Fee, one surrendered into the Hands of two Tenants to the Use of his late Will, and makes his Will...
of the Land and dies; the Surrender is after presented. Resolved
that it shall bind the Survivor, for being presented it shall relate to


Hill. 1654. in the Case of Swan v. Fenham.

4. A devises four Houfes to his Wife in Satisfaction of her Dower,
and gave her Election to take either the one or the other, the Dower
or the Legacy. Afterwards A. sold one of the Houfes and died with-
out new publishing the Will. The Wife pray'd Satisfaction for the
House sold; but per Finch C. the must take the Will as it was at the
Time of the Death of the Husband, for till then it is no Will. Let her
choose the one or the other, for she may not have both, and decreed
Axtell.

5. Devise of Goods to A. for Life, and after the Deceafe of A. to the
Heir of B. B. dies leaving A. Decreed the Goods to go to him that
was Heirs of B. at B's Deceafe, and not to him that was Heir at the
Death of A. Vern. 35. pl. 34. Hill. 1681. Danvers v. E. of Clar-
rendon.

6. Lands not now in Settlement shall carry Lands that were settled at
the making of the Will, but whose Uses are determined though they
were not determined, but by his Death, as being Tenant in Tail. 3

7. A Will shall have Relation only to Teseator's Death, and not to
the making, for till his Death he is Master of his own Will, and
therefore a Will of a Papfet in Ireland was held to be avoided by a Subse-
quent Statute made in that Kingdom, which enacts, that the Lands of Pa-
pets there shall not be devisable, but descend in Gavelkind. MS.

(I. b) What Words will pass a Reversion in Fee.

1. A Man seised of Lands devisable leaved it for Life, and after de-

Br. Brief de

A cited for the Reverfon to the Plaintiff by Name of all his Lands,

C. cited Tenements, Rents and Services in W. which at the Time of making his

S. cited Testament were and remained in his Hands; and per Cur. Reverfion S. C.

paffen by this Word Tenement, and it was in Manus fuis as a Rever-

cion may be; and it paffen without Atroffment, per Cur. Br. Devife,

S. C. but

pl. 7. cites 34 H. 6. 6.

had nothing but Revolutions. — S. C. cited by Jones J. Mar. 32. Trin. 15 Car.—— S. C. cited

by Powell J. Forrestue's Rep. 27. & Ibid. 229. by Treby Ch. J. in Cafe of Mornington v. Davis,

and his Lordship there held, that the Words (Lands and Tenements) would carry a Reverfionary

Estate, or a Possibility after an Estate Tail —By Devife of all his Inheritance or Hezeitaments a


2. A. leaved his Rent and great Demesnes rendering Rent, and did

Pl. C. 195.

devife to B. all his Farm; the Devifee shall have all the Rent and the

b. S. P. by

Owen 89. cites Pl. Com. 194.

Browne J. and Dyer

Eliz. in Cafe of Wrotefley v. Adams.

3. A. devised all his Lands to his Executors for ten Years, to perform

Le 180 pl.

tis Will and the Will of his Father (in which divers Legacies were

given) to hold to them and every of them, and they to take the Pro-

S. C. 25 S. P.

fits for ten Years to the Use of his Will, and then to sell the Land and dis-

4 A

tribute
Devise.

tribute the Money on the said Will. The Testator was seised of Land in Fee in Possession, and of a Reversion after an Estate for Life. Gawdy held, that the Reversion was not devised, because no Profit could be taken of it, but all the other Judges contra, for the Intent was to perform the two Wills and to pay Debts &c. and perhaps the Estate in Possession was not sufficient; but per Wray, if it had been found that the Land in Possession was sufficient to perform the Will of both, it might perhaps have altered the Case. Cro. E. 159. Mich. 31 & 32 Eliz. B R. Hawes v. Coney.

4. A devised that his Wife should have the Occupation of Black-Acre till Michaelmas next, paying 40s. to N. his Son, and after devised all his Lands, Tenements, and Hereditaments (except the Land before specified and given to his Wife) to N. my Son in tail. By the Exception of the Land before specified and given, Nothing but that pats to N. although the Estate of the Wife had been but for one Day, but it had been otherwise, if he had said, Except the Estate before specified and given; for then the Reversion should have paffed. Per Popham, if the Deviser had lived till after Michaelmas, yet Black-Acre should not have paffed to N. because Deviser's Intent appears to the contrary, though the Wife had not any Interest in Black-Acre. Noy 13. Trin. 1 Jac. B R. Stockwood v. Sare.

5. A devised of a Moiety of Lands in Possession, and of another Moiety in Reversion expectant on the Life of his Father and Mother, made a Will thus, my Wife shall have to her Use &c. all that my Living which I now occupy, so long as the keep my Name till my Son be 21. and that then she shall have the Thirds of all my Living. Item, I will, that my Son shall have all my Lands &c. The Wife married, and the Father and Mother died before the Sons Age of 21. Adjudged that the Words (The Thirds of all my Living) extend to the Reversion as well as Possession, and this Devise is not controlled by the Words subflequent of the Devise to his Son, and that though the determined her first Estate by Marriage, yet that destroys not the subflequent Devise. Cro. J. 649. pl. 18. Mich. 20 Jac. B R. Rowland v. Doughty.

8 Mod. 124
S. C. cited in
Cafe of
Goodright
v. Opp.
cited
3 Mod. 228. in Cafe of Hyly v.

S. C. cited per Holt Ch. J. 6 Mod 111 in the County of Bridgewater's Cafe. S. C. cited 2 Vent. 256. —— S. C. cited Fortescue's Rep. 227, by Nevill J. & Ibid 229, by Treby Ch. J. Hill. 7 W. 3. in the Cafe of Monnington v. Davis. —— S. C. cited by Ld. Ch. B. Affirm to the Ld Chancellor. 3 Wm's Rep. 64, and said he looked on that Cafe to have been the first Cafe of this Nature which had been adjudged, and is in All. 28. —— Ibid. at the Bottom of the Page is mentioned a Remark of the Reporter, that in the Cafe of Ivy v. Ivy, heard at the Rolls Trin. 1731. this Cafe of Wicker v. Walord being cited, his Honour lent for the Recorp, from whence it appeared that it was found by Special Verdict, that neither the Reversion in Fee paffed by the Will there would not be sufficient to pay the Testator's Debts; which Reason is not taken Notice of in the Book.

Said. 139. S. C. adjudged, and Judgment affirmed in the Exche-
12. A devisal of an Estate to B. his Harer at Law, for Life, and after Life to C. per cur. the Rev. of the Heritage, and
other Legacies devised all to D. his per cur. Lands, Tenements, Garrets, &c.

C. B. certified accordingly. --- Eqn. 132. and 262. 1754. S. C.

11. J. S. settled in B. Hill, W. & N. in C. S. B. Hill, and it was devisal accordingly. -- Vem. 42. 1751. Hill. 1763.

10. A devise to B. & H. of the Estate of D. in B.'s Black-Acre in the K. B. H. for Life, and after Life to C. per cur. the Rev. of the Heritage, and it was devisal accordingly. -- Vem. 42. 1751. Hill. 1763.

9. W. S. feild of B. the Rev. of the Heritage, and other Parties. and with the

8. A devise to B. in Tail Special, and to C. & D. the Estate in B.'s Black-Acre, to C. & D. and also all the rest and remainder Part of B.'s Black-Acre, and the Hereditaments the same.

7. A devise to B. in Tail Special, and to C. & D. the Estate in B.'s Black-Acre, to C. & D. and also all the rest and remainder Part of B.'s Black-Acre, and the Hereditaments the same.

6. A devise to B. in Tail Special, and to C. & D. the Estate in B.'s Black-Acre, to C. & D. and also all the rest and remainder Part of B.'s Black-Acre, and the Hereditaments the same.

5. A devise to B. in Tail Special, and to C. & D. the Estate in B.'s Black-Acre, to C. & D. and also all the rest and remainder Part of B.'s Black-Acre, and the Hereditaments the same.

4. A devise to B. in Tail Special, and to C. & D. the Estate in B.'s Black-Acre, to C. & D. and also all the rest and remainder Part of B.'s Black-Acre, and the Hereditaments the same.

3. A devise to B. in Tail Special, and to C. & D. the Estate in B.'s Black-Acre, to C. & D. and also all the rest and remainder Part of B.'s Black-Acre, and the Hereditaments the same.

2. A devise to B. in Tail Special, and to C. & D. the Estate in B.'s Black-Acre, to C. & D. and also all the rest and remainder Part of B.'s Black-Acre, and the Hereditaments the same.

1. A devise to B. in Tail Special, and to C. & D. the Estate in B.'s Black-Acre, to C. & D. and also all the rest and remainder Part of B.'s Black-Acre, and the Hereditaments the same.
Devise.

wife all the Estate devised to B. well passed. 2 Vern. R. 559, 560. pl. 507. Trin. 1706. at the End of the Cafe of Kingfman v. Kingfman, but seems not to belong to that Cafe.

If there had been any Lands or Skirts of Land lying out of the Places mentioned in the Will to satisfy the Word (elsewhere) it might make a Difference. Ibid. — 7 Wms's Rep 56. S. C. decreed by the unanimous Opinion of the Ld. Chancellor, Ld. Ch J. Ld Ch B. and Mr. Justice Price.

S C. Gibb. 288 Patch. 4 Geo. 2 reports, that Judgment was given for the Younger Children against the Heir at Law the last Trin. Term. Per tot. Cur. and Error brought in B. R.

13. A. having Land in D. and in S. conveys the Land in D. to B. in Tail, Remainder to his own right Heirs; then he devised all his Lands in S. and elsewhere not formerly settled, to C. and his Heirs for ever. De- creed that by this the Reversion passes of the Land in D. Gibb. 150. Mich. 4 Geo. 2. in Can. Chetver v. Chetver.

14. A. devised of the Reversion in Fee of Houfes of the Yearly Value of 264l. let out on Building Leaves at a Ground-Rent of 29l. a Year; A. had Ilfe B. his Eldest Son, and C. D. and E. Younger Children, and devised to C. so much a Year of 29l. a Year Ground-Rent in or near Red-Lion-Square to him and his Heirs and Assigns for ever; and devised to D. and to E. in the very same Words, which in all amounted to the 29l. and devised to B. whom he called his undutiful Son, 5l. a Year out of some Lottery Tickets. It was argued whether this should carry the Inheritance or not. The Court thought it a new and difficult Cafe, and so it flied over to the next Term. Gibb. 70. Trin. 2 and 3 Geo. 2. C. B. Mandy v. Mandy.

(K. b) What Lands and other Things pass by what Words.

Words wrongly or imperfectly describing the Thing or Place.


1. A Seised of 100 Acres of Land called Jacks, usually occupied with a House, let the said House and 40 Acres of the said 100 Acres to B. for Life, and made his Will and devised the said Houfe and all his Land called Jacks, then in the Occupation of B. to his Wife for Life, and after her Deceafe Remainder thence, and of all his other Lands belonging to Jacks, to his Second Son; the Wife shall have only the Houfe and 40 Acres, but the Devise to the Second Son extends to the other 60 Acres, by reafon of the Words (belonging to Jacks.) 2 Le. 226. pl. 287. Trin. 25 Eliz. C. B. Higham's Cafe.

2. If a Man has Land called the Manor of Dale, and he deviseth his Manor of Dale to J. S. the Land shall pass, though it be not a Manor, per Anderfon Ch. J. Godb. 17. in pl. 23. Patch. 25 Eliz. C. B.

3. The Devifor being Seised of a Free Farm Rent lying out of the Manor 5l. S. C. in of F. and of no other Land whatsoever, devised his Manor of F. to J. S. totdem Ver- And it was there held, that the Devife of the Manor of F. were Words in
Devise.

in a Will sufficient to pass the Fee Farm Rent issuing out of that Manor; for the Devisee being seised of that Rent, and nothing else in that Manor, it was plain that the Devisee meant the Rent, and could mean nothing else; so that otherwise the Will must have been entirely void. & C. the Reporter says that Wa'sley told him, That the Opinion of the Court was as here, and would have given Judgment accordingly, but it is not been discontinued.—— Ow. 38. Jelfey v. Robinson. S. C. the Court agreed that the Rent without doubt might be severed.

4. A purchased Land of B. but before any Conveyance made by B. to A. and then B. made a Conveyance to C. of the Land C. by Thorne. Will gave to D. all his Land in which he purchased of B. whereas C. and all he purchased of A. Arjudged that the Lands pass'd. And 188. pl. the Court held the Devise good.

5. By a Will Things of one Nature may pass by Words which are proper to pass Things of another Nature. Arg. Sty. 279. cites 35 Eliz. in B. R. Robinson's Case.

6. A. seised of Lands called Heselands, which extended into the Parishes of B. and C. made his Will thus: As concerning the Disposition of all my Lands &c. he devised all those his Lands lying in C. called Heselands, to his Wife for Life, and after her Decease that it should remain to John his Son and his Heirs. And after diverse other Clauses, he wills that if John die without Issue, Heselands shall remain to his Daughters in Fee. The Daughters should take only so much of Heselands as is in C. and no part of what lies in B. Though Fenner and Williams held S. C. only that the Daughters should take as well that in B. as in C. But it was adjudged afterwards, that the said B. did not pass to the Daughters, and so a Judgment in C. B. reversed. Cro. J. 21. pl. 2. Hill. 1 Jac. B. R. Tuttleham v. Roberts.

Son, and that the Devisee to John was precedent to that to the Wife, and that if John dies without Issue, the Wife should have Heselands; And resolved that the Wife should have only that which was in C. because there was no more devised to John. But Pooham held, if the Devisee had been to the Eldest son, and that if he died without Issue, that the Wife should have Heselands; there peradventure she should have all; because the eldest Son had all, viz. the one Part by Devisee, and the other Part by Devisee, and the should have all which he had; And Judgment accordingly. 224. Hill 39 Eliz. Thompson v. Thornton.


7. The Testator devised all the Profits of his Houses and Lands lying in the Parish of Biling, and in a Street there, called Brook's-Street, to his Wife for Life, when in Truth there was no such Parish as Biling, but the Land supposed to be devised laid in Biling-Street. The Will was held by all the Court to be good. Brownl. 131. Trin. 3 Jac. Pacy v. Knolls.

8. I give and bequeath to A. 100 Sheep and 10 Bullocks, and 101. payable Quarterly out of my Lands; This passes only 100 Sheep and 10 Bullocks in the whole and the second (and) diffjoins the Beasts from the Rent, and shall be taken generally, without any Reference to it. 8 Rep. 84. a. 85. b. Trin. 7 Jac. Sir Richard Pexhall's Cafe.

9. A. having two several Moieties of Lands by several Purchases in Kent and in Eflex, among other Things devised, says, and as to my Moieties, I devise all my Moieties in Kent unto B. and makes no Mention of the Moieties in Eflex. Adjudged that both Moieties passed. Bulfl. 117. Putesh. 9 Jac. Mirril v. Nichols.
10. If one by Will devise his Land in his own Possession, and he has Land in his own Possession solely, and also other Land in his Possession but in Common with another, the Whole shall pass by the Will; per two Justices. Built. 117. Patch. 9 Jac. in Cafe of Mifril v. Nichols.

11. A. has two Houses adjoining, viz. the Swan and the Red Lyon, and A. has the Swan in his own Possession, and occupies a Parlor, (which in Truth belongs to the Red Lyon) with the Swan-House, and then leteth the Red Lyon House, and then by Will devised his House called the Swan. The Room of the Red Lyon, which A. occupied with the Swan passeth by this Devise, though of Right it belonged to the Red Lyon House. Arg. Godb. 352. pl. 447. Trin. 21 Jac.

12. A. erected of a House called the White Swan in Old-street, London, and of a Garden thereunto belonging; made a Will thus, I devise the House or Tenement wherein W. N. dwells, called the White Swan in Old-street to J. D. for ever. It was found that W. N. at the Time of the Devisor's Death inhabited the Entry of the said House, and three upper Rooms therein, and that J. G. held the Garden, and other Places in the said House, and some others, other Rooms. Resolved, that all the House passed to the Devisee, for the Devisee being, that House or Tenement, and the Conclusion being called, the White Swan, both of them import the whole House, and the Words (wherein W. N. dwells) does not abridge or alter that Devisee, and the House being named by a particular Name, although W. N. never dwells'd in it passeth by the Devisee. By three Justices, contra Hide Ch. J. Cro. C. 129. pl. 4. Mich. 4 Car. B. K. Chamberlain v. Turner.

13. But if the House had not been named by the particular Name of the White Swan, and he had devised the House in the Occupation of W. N. there perhaps it might not extend to more than was in the Occupation of W. N. and not to that which was in the Occupation of others, according to the Cafe of Andrew Og nell, Coke Lib. 4. fol. 43. 30. Cro. C. 130. s. C.

14. A Man hath two Clofes called Spring-Clofes, but originally were but one Clof, and by his Will he devised a Clof called Spring-Clof, and it was held by the Judge that only one of these Clofes should pass, but the Jury found for both to pass against the Opinion of the Court, and the Judge did not rebuke them for it. Clayt. 104. pl. 175. Alifia Apr. 8 Car. Whitfield J. Leake's Cafe.

15. I devise all my Farms, and all my Lands in the Occupation of K. in the Manor of R. and N. to J. S. No Part of the Farm was in R. Per Car. this passeth Lands in the Possession of K. in the Parish of N. though they are not Parcel of the Manors of R. or N. 3 Keb. 637. pl. 40. Patch. 28 Car. 2. B R. Parker v. Ayres.

16. Devise of a Charity by A. to the Parish of B. in the County of C. There was no such Parish in the County of C. but in the County of D. adjoining there was; the Court thought that since there was such a Parish in the County of D. the Tefiator must mean the Parish in the County of D. because it appeared he was born there, and that both A. and his Parents lived and died in that Parish. Fin. Rep. 395. Mich. 30 Car. 2. Per Owen, Langenew Parish in Denbighshire v. Bean, & al.

17. The Tefiator having two House, one called the Upper House, and the other called the Lower House, devised all his Tenements for the Payment of his Debts, until his Grand-Son should come of Age, and afterwards he devised all his said Tenements, viz. two Parts of the Lower House for raising 200l. &c. the Remainder to his Grand-Son and his Heirs; The Question was, whether the viz. and the Clause which immediately followed it, did restrain this Devise to the Lower House only, or whether the Whole passed to the Grand-Son by those Words which
which went before, viz. All his said Tenements. The Court held that
the Adverb, viz. was distributive here, and shew'd what the Devisee
should have; and so the Plaintiff had Judgment Nifi. 4 Mod. 149.
Trin. 4 W. & M. Bagnall v. Abnett.
18. A Devisee was of a Rent Charge of 18. per Aum. to A. for Life, to be
assign'd out of the Rents and Profits of certain Lands, which were worth but
30l. a Year with Power of Distress, and devised the same Lands charg-
ed with the said Annuity in B. and his Heirs. A. the Devisee enters
into the Land, and by Will devises to C the Arrears of the said Rent-
Charge. C. the Devisee shall hold over, because the 18. a Year
was to be satisfied before B should have any Thing; and by the De-
vise the Lands are charged in B's Hands by the said Words; For it
Foster v. Foster.
19. One failed in Fee of five Missages, by his Will devised two of
them to his Wife for Life, Remainder to his two Daughters in Fee; and
devised the third to the Wife and her Heirs, the fourth he devised to the
Wife and her Heirs the paying his Legacies, in Case his Goods and Chatt
es did not answer them all. And if he did not make Provision for the
Payment of his Legacies in her Life-time, that it should be lawful for the
Legatee after her Death to sell the said Missages, to satisfy the Legacies
out of the Value thereof. And then follows this, on which the Doubt ariseth,
and all the Overplus of my Estate to be at my Wifes disposal,
and make her my Executrix, and per Trevor, Powell and Blinow
Judges, the second Houfe did not pass. 12 Mod. 592, 593. Mich.
20. A. by one Settlement is Tenant in Tail after Possibility &c. of
Black-Acre, Remainder in Fee to Trustees in Trust for A. and his
Heirs. And by another Settlement is Tenant for Life, Remainder to
his first &c. Sons. Remainder to Trustees in Fee in Trust for the right
Heirs of B. whose Heir A. is of White-Acre. And is Tenant in Tail,
Remainder to the right Heirs of his Father of Green-Acre. A. has no
liene, and by his Will devises to J. S. all his Lands, Tenements, and
Hereditaments out of Settlement. Decreed per Cowper C. alighted by
Trevor Ch. J. and Tracy J. that all the Lands so settled passed by
this Devise. And that the Words Out of Settlement, as this Case
stands, are of no Effect. 2 Vern. 623. pl. 557. Mich. 1708. Sir Lit-
ton Strode v. Lady Ruffell, Falkland &c.

affirmed in the House of Lords, and on which Case, the Court laid great Stress in the principal Case
there. Trin. 1730.

21. Properly Lanas under Settlement is where the whole Inheritance
is settled and disposed of, as if the Testament had been Tenant in Tail,
Remainder in Fee to another; There the Whole had been under Set-
tlement, though he might have barred the Remainder by a Common
Recovery; So if the whole Inheritance had been settled, but there
had been a Power of Revocation, though the Testament might have re-
voked, it should not have palled by the Words (out of Settlement,) be-
cause the Whole is properly under Settlement, though liable to be
revoked. Per Cowper C. 2 Vern. 623. in Case of Strode v. Lady
Ruffell, Falkland &c.

22. Lands settled with Power of Revocation will not pass by devise of
Lands not now in Settlement. 2 Vern. 623. pl 557. Mich. 1708. Lit-
ton, alias Strode v. Lady Ruffell and Falkland.

23. One devised all his Freehold Houses in A. to J. S. and his Heirs,
and in Fact the Testament had no Freehold Houses there, but Leaseholds be
had. Decreed per Justice Tracy in the Absence of Lord Chancellor,
that in such Case the Leasehold palls being by a Will; though they
would not in a Grant, and that the Word (Freehold) shall be reject-
Devife.

ed rather than the Will shou'd be void. And he said that the Bill was proper in Equity, since the Leafehold Houfes (being Chattels) could not pafs by the Will without the Affent of the Executor, which Affent he was compellable to give in Equity. Wms's Rep. 286. Mich. 1715. Day v. Trigg.

24. Devife of my Strong Box and all that is therein, and all my Crafts and Cabinets, and all that is therein to my Daughter E. There was a Frame fixed to the Strong Box, in which were Drawers that contained Bank Notes and other Things of Value, and the Frame was fo fixed with Screws to the Box, that it could not be seperated without opening the Box, yet decreted that what was in the Frame should not pafs, but the Frame with the Confect of the Executor was given to the said E. Upon appeal to the Houfe of Lords this Matter was compromised. March 15, MS. Tab 1744. Ld. Paget v. Duke of Bridgewater.

25. By a Devife of all my Houfhold Stuff, and Materials of Houfhold Goods that were in a Workhouse 70 Miles distance from the Tellator's Houfe, for employing sick and wounded Seamen, do not pafs. MS. Tab. Feb. 1, 1726. Pratt v. Jackson.

2 Wms's Rep. 282. pl. 85. Mich. 1755. S. C. but that is as to a Marriage Agreement, whereby the Wife was not to claim any Thing out of the Husband's Real or Personal Estate, provided that it should not extend to what he should or might have by Will, nor to all or any the Goods, Utensils or Houfhold Stuff &c. of him at his Death, all which he was to have and enjoy. Lord Chancellor said he would take the Meaning to be as large as the Words, and so decreed her the Beds, Sheets, and other Furniture used in the Workhouse, [which was a Hospital in Portmouth] But upon Appeal to the Houfe of Lords, this Decree was reversed Feb. 1726

(K. b. 2) Uncertain Description. What Things pafs by what Words. Also.

1. O N E devifes all his Freehold Lands in D. to his Wife during her Life; Item, I give to her for Life the Lands which I hold of G.T. Item, I give to her for Life all the Lands which I purchased of J. S. Item, I give, grant and bequeath my said Lands to E. my Son and his Heirs for ever; not only the Lands purchased of J. S. pafs to the Son, but all the other by this Devife. Adjudged upon a Special Verdict. Skin. 130. pl. 5. Mich. 35 Car. 2. B. R. Bartow v. Gameath.

(L. b) What pafs. Where Lands lie in two several Vills.


1. A Man feized of Land in a Town, and in two Hamlets of the Town, devifes all his Lands in the Town, and in one of the Hamlets, naming it. Diverse Justices held, that nothing of the Land in the other Hamlet pafs, becaufe of the Intent; But Brown e contra, becaufe the principal Vill comprehended all the Hamlets. D. 261. b. pl. 27. Pafch. 9 Eliz. Anon.

2. One
Devise.

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(M. b) What passes by Interfering Words.

1 Devise to three, provided that one shall have all the Profits; it was construed, that two should be seified to the Use of the third. For a Devise of the Profit is a Devise of the Land; and if a Man grant Land, referring the Profit, it is a void Reservation; per Doderidge J. Roll Rep. 320. cites 30 H. 6. Br. Estates 74. and F. Devise 22.

2. A. devised to his Son a Manor in Tail, and after by the same Will be devised a third Part of the same Lands to another of his Sons; They by this are Jointenants, per Brown and Dyer. 3 Le. 11. pl. 27. Mich. 8 Eliz. C. B. Anon.

3. If a Man in one Part of his Will devised his Lands to A. in Fee, and in another Part of his Will devised the same to B. in Fee, they are Jointenants, per Dyer and Brown J. 3 Le. 11. pl. 27. Mich. 8 Eliz. C. B. Anon.

By. Bulk 41. per Fenner J. this is a good Devise to B. Bat per Williams J. it is altogether void for the Uncertainty. — B. shall take, and not A. 2 Roll Rep. 423. the Serjeant's Cafe. — Jenk. 566 pl. 50. — Per Anderson it is good to B. but Periam J. contra. Ow. 84. — S P Arg 10 Mod. 521. — 3 Bulk. 105. — Cro. 49. — Per Tanfield Ch. B. Lane 118. — Roll Rep. 523. — Cro E 9. — (See Jointenant (K) S C.)

4. A. devised the Fee Simple of his Land to his Wife, and after her Cited a Roll Death to W. his Son, who was his Heir apparent; This is a Devise for Life, the Remainder to the Son for Life, and the Remainder to the Wife in Fee. D. 357. a. pl. 44. Patch. 19 Eliz. Chick's Cafe.

Bulk 127. — Cited Arg. Mo. 562. — In all which Books it is cited that the Wife had the Fee. — But And. 51. pl. 152. Baker v. Raymond S C cites it was adjudged that the Son had the Fee. — Bentl 350 pl. 292. Baker v. Raymond. S C adjudged that the Wife had only an Estate for Life, the Remainder in Fee to W. the Son.

5. Devise of Land to B. in Fee, and after there is a Devise of Rent to D. out of the same Land; This shall be construed first a Devise of the Rent, and then of the Land. 3 Bulk. 105. cites Pl. C. 541. Hill. 21 Eliz. Paramour v. Yardly.

6. A. seised in Fee of the Manor of M. extending into M and the Town of N. and also of other Lands in N. by his Will devises the Manor of M. to B. his Elder Son and Heir in Tail, and his Lands in N. to C. his Younger Son &c. Per three Justices C. shall have that Part of the Manor of M. which lies in the Town of N. 2 Le. 190. pl. 239. Mich. 32 Eliz. C B. Sir Ant. Dennis's Cafe.

7. A. devised Lands in Fee to his Son, and many other Lands in Tail, and after says, I will that if my Son die without Issue within Age, that the Lands in Fee shall go to H. Item, I will that the other Lands in Tail shall go to J. S. and says not in the second Item, if the Son dies without Issue within Age. Adjudged that the second Item should be without Condition. Godb. 146. pl. 183. 3 Jac. B. R. Finder's Cafe.
Devife.


v. Fiklin — A. seised of Black Acre and of a Messuage, devised all his Lands and Tenements to C. in Fee; and afterwards in the same Will he devised his House called the Swan, now in the Tenure of J. S. to D. for ever; Resolved that D. had a Fee in the House. D. 337. a. Marg. pl. 44. cites Patich. 4 Car. B. R. Chamberlain v. Tanner. — Cro. C. 139. pl. 4. Chamberlain v. Turner. S. C. 195. pl. 7. S. C. adjudged per tot. Cur. — A Man devises by his Testament to his Daughter 1. all his Land in D. tenant. his & bred. de corpore suo legitime proc. And by the same Testament he devises to his Daughter A. all his Land in the Tenure of J. S. in the County of Heresford. Whereas in Truth D. was in the County of Hereford, and Parcel of the Lands were in the Tenure of J. S. Whether J. shall have the Lands in D. in the Tenure of J. S. by the first Words; or A. shall have them by the last Words. Harvey said, the Tefator had given them by his first Words to I. Wherefore he cannot revoke his Gift, and give it afterwards to another Daughter. But all the Juf
tices were of the contrary Opinion. Het. 77. Hill. 3 Car. in C. B. Whiddon's Cafe. 

Adjudged accordingly that it is no Counter-
mand 1. For the Item shall be confirmed that if A. died without 
Iffue, the Land should remain as the Devife was to B. and the Limitation to A. is to be continued to A. and the Heirs of his Body, and not a Fee, and to all the Clauses of the Will stand togeth. Cro. J. 260. pl. 7. S. C. by the Name of Brown v. Jervis. — S. C. cited 4 Mod. 69. per Car. — And 
Tibd. 317 Arg. 

9. Devife of all his Lands in England to A. and his Heirs, and if he die without Heir of his Body, then his Lands in M. shall be to B. in Tail. Item, I give my Land in N. to C. in Fee. Devifor dies; C. dies; B. survives, and dies without Iffue. The Heir of C. shall have the Land; but by the better Opinion of the Court, C. does not take but by way of Remainder after the Death of B. without Iffue. Yelv. 259. Mich. 79. 

Jac. B. R. Wallop v. Darby. 

10. A. has Lands in M. or N. and no where else, and devife all his Lands in M. to B. and all his Lands in N. and elsewhere to C. The Word elsewhere is void. Hob. 65. pl. 68. Trin. 12 Jac. C. B. Green v. Armited. 

11. A. possiifed of a Term, devife it to B. if living at his Death, otherwise to C. whom A. made Executor, with a Provifio, that if B. be living at A.'s Death, then C. to account to B. for a Möity of the Profits of the Term at 21 or Marriage, and C. to retain the other Möity. A. died. Afterwards B. died before 21 or Marriage; the Term by the Affifiance of Judges was decreed to C. Chan. R. 80. to Car. 1. Revet v. Row. 

12. Sir S. B. devife all the Coppice and Wood-Grounds, and all and singular the Premises, and all Woods and Under-Woods (except Timber-
Trees) to his Wife for Life, and after her Death, limited the fame, with the Timber-Trees, to Trustees, that they for two Years should pay the Profits of the Premises to the Plaintiff, and they to build the fame in 
Building the College, and after limited the Reversion and Fee Simple of the Premises to the Plaintiff and their Successors for ever (the said Woods, Under-Woods and Timber-Trees excepted.) The Question is, as the Excep-
tion is made of the Woods, Under-Woods and Timber-Trees, Whether the Soil is not excepted ally from the Plaintiff? The Court is clear of Opinion, that the Intent of Sir S. B. was, that the Whole, as well 

13. Devife of Land to A. in Fee, and after by the same Will devife a third Part to B. for Life, or in Tail, this last Devife to B. don't make void all to A. But B. has Estate in Possifion and A. in Remain-

14. Devife
Devise.

14. Devise to A. in Tail, Remainder to B. Remainder to C. &c. and after the Devisor by express Words devises an Estate in Possession to B. This is a Revocation of all the Remainders, for the Remainder not determining by Devise, but by Star and Interposition of another Estate, upon which the Remainder did not depend, the Remainder could not stand; but in a Conveyance of Uses there may be Interposition of other Estates, and the Remainder stand good, because this Remainder depends and hangs on the first Root. But in a Will the Remainder settled must follow the Rule of Law, after the Devise of the Devisor, there is not Root nor Spring then. Per Bridgman Ch. J. Cart. 175. Hill. 18 & 19 Car. 2. C. B. in Cae of Rundall v. Ely.

15. A Man hath Issue Two Sons, T. his Eldrest and R. his Youngest Son. T. hath Issue J. and R. hath Issue M. a Daughter. The Father devises Lands to his Son T. for Life, and afterwards to his Grandson J. and the Heirs Males of his Body; and if he die without Issue-Male, then to his Grand-daughter M. in Tail, and charged it with some Payments, in which Will there was this Provifo; viz. If my Son R. should have a Son by his now Wife E. then all his Lands should go to such first Son and his Heirs, being paying as M. should have done. Afterwards a Son was born, and the Question was, whether the Estate limited to T. the Eldrest Son was thereby defeated; And the Court were all clear of Opinion, that this Provifo did only extend to the Cae of M’s being intituled, and had no Influence upon the first Cae limited to the Eldrest Son. 2 Mod. 293. Hill. 29 & 30 Car. 2. in C. B. Evered v. Hole.

16. Devise of a Term to A. and B. in the Will as Jointenams, and in the latter Part of the Will as Tenants in Common, there shall be no Survivor. 2 Chan. Cafes. 67. Trin. 33 Car. 2. Draper’s Cae.

17. A. by Will devised 1300l. to B. provided, if B. died before Twenty-one without Issue, then the 1300l. to go to C. and provided if B. marrie before Twenty-one without Consent of M. then to go to D. B. married without Consent of M. the Question was who should have this 1300l. if the should die without Issue before Twenty-one; Per Matter of the Rolls, the Provifo of Forfeiture by Marriage without Consent of M. cannot take Place, or have any Force till B. shall be Twenty-one, that they are sufficient Provioses and ought to be so continued; and decreed, that if B. die before Twenty-one without Issue, that C. should have the Benefit of the first Provifo. 2 Vern. 86. pl. 83. Mich. 1685. Pawlet & Ux v. Dogget.

18. If a Man devise an Annuity to a Child issuing out of certain Lands, and by the same Will he devises the same Lands for Payment of Debits and Legacies; the Devise of the Annuity is a Substituting Charge on the Lands and shall be good; Held so. N. Ch. R. 202. Patch. 1692. in Powell’s Cae.

19. A. feitied of Gavelkind Lands, and having two Brothers B. and C. (B. had Issue two Sons H. and B. and Issue two Daughters M. and N. and C. had Issue H. and H. had Issue S.) devised the Lands to H. the Son of B. if he lived till Twenty-one, and then his Wife to have the Houle &c. and if H. die before Twenty-one, then to the next Son of B. and if B. have no Son, then to H. the Son of C. and his Heirs, and if H. die before Twenty-one and my Wife be dead, then to the next Heir last named, as it shall fall out. H. Son of B. died before Twenty-one without Issue, but B. his Brother entred and died, leaving two Daughters M. and N. The Grand Question was, on the Words, If B. have no Son then to H. the Son of C. and his Heirs. It was admitted that by these Words H. the Son of C. took nothing, but whether the following Words, viz. If H. die before Twenty-one and his
his Wife be dead, then to my next Heir last named as it shall fall out, and Holt Ch. J. demanded of Levins of Counsel for the Heirs of C. that if the Words and if H. die before Twenty-one, should be applied to H. Son of B. and the Words then to the next Heir last named should be construed any other Son of B. if B. had another Son, otherwise as it shall fall out to H. Son of C. if he shall be next Heir, so that (as it shall cur) shall be applied to the Son of B. if he shall have another Son who shall be next Heir (for it is not found by the Verdict that their Fathers were living) otherwise to H. Son of C. if he shall be next Heir. For the Words (as it shall fall out) are considerable and if it be to that the Words next Heir should be applied to B. it will give him an Estate in Fee, and Holt Ch. J. said, that this seemed to be the Meaning and Intention of the Devilor, and if H. die before twenty-one to be but a Repetition of what he had said before. But Curia advisare vult. Skin. 385. 562. Mich. 6 W. & M. in B. R. Bevilton v. Hufley.

20. A. had a Son and two Daughters M. and N. and devised (in Case his Son should die without Issue) all his Lands except Black-Acre, Green-Acre, and White-Acre to M. in Fee, and he deviled Black-Acre, Green-Acre, and White-Acre to N. in Fee, and then he recites, that, whereas he was stilled of other Lands &c. and in the End of the Will he takes Notice of a Request of his Father's that Black-Acre should go for Want of Issue-Male of A. and B. his Brother, to D. his Cousin, and in Obedience to the Will of his Father, he is disposed that it be observed, and requests B. his Brother to act accordingly, and after dies, and John his Son and B. dies without Issue. And Holt Ch. J. who delivered the Resolution of the Court, said, that when it appears by the Special Words, that such General Words ought not to extend to all his Lands, Tenements, and Aerdiment, there an Exposition ought to be made according to the Special Words, according to the Rule in Altham's Case, 8 Rep. for otherwise the Special Words would be rejected; and therefore here, the Words forasmuch as there are other Lands &c. ought to qualify the Generality of these General Words and other ought to be referred, not to the Lands before, but ought to be understood of the Words not mentioned before; and therefore the Words (all his Lands) ought to be restrained, according to the Special Words, and not construed according to the Generality of them, when he said there are other Lands which could not be comprised before, for then they could not be others; and concluded that by these General Words Black-Acre did not pass but descended equally to M. and N. and gave Judgment accordingly for the Defendant. Skin. 631. Hill, 7 W. 3. B. R. Dalby v. Champernon.

21. I give all my Personal Estate to my Wife, and to A. and B. 1603 l. a piece, if they arrive at the Age of Twenty-one Years, or Marriage; A. was Heir at Law to the Testator. Per Cur. the Devise to the Wife must be so much thereof as was not dispossessed of by the Will. For otherwise this will be inconsistent by deviling 1603 l. to A. the Heir at Law, who would be intitulated to his whole Estate after the Death of his Wife, and therefore a Devise of 1603 l. to be paid to A. out of Testator's Estate would be impertinent when he was to have the whole Estate himself. 9 Mod. 93. Pach. to Geo. 1. in Canc. Burdett v. Young.

22. A. deviled several Specifick Legacies to several Persons and to each of his Grandchildren to be paid at their respective Ages of Twenty-one Years, or Days of Marriage, which should first happen. And by a subsequent Clause appoints that all the Legacies thereby deviled shall be paid within one Year after his Decease; per Cur. the subsequent Clause in the Will which seemingly contradicts the Payment of the Legacies
Legacies to the Grandchildren in Point of Time must be continued, so as it may not be repugnant to any former Clause in the same Will, and therefore that last Clause must only relate to the other Specific Legacies given to the other Legatees, and not to the Legacies devised to the Grandchildren. 9 Mod. 154. Trin. 11 Geo. Adams v. Clerk.

23. A having Lands of Inheritance in B. and C. and a Mortgage in D. and Lands extended in E. on a Statute, makes his Will and devised all his Credits and Mortgages to his Executors, and after devised all his Mefliges, Lands, Tenements &c. and all his Real Estate whatsoever in B. C. D. and E. to R. W. and F. S. for their Lives, and after their Decease to their Heirs &c. King C. decreed, the Mortgage and extended Lands in D. and E. to the Executors, and differs this Case from the Cafe in Cro. C. 292. Rose v. Bartlett, Where a Man was seised of a Term for Years in A. and having no other Land there, devised all his Lands in A. it was adjudged that the Term for Years palled, for in that Cafe Ld. Chancellor said, if the Term had not palled the Will had been entirely void, whereas here it stands well for Part, and so affirmed a Decree made at the Rolls. Gibb. 116, 117. Hill. 3 Geo. 2 in C edge. Davis v. Gibb.

24. If the latter Part is inconsistent with the former Part, it supercedes and revokes it; Per Reynolds Ch. B. and Comyns and Thompson. Gibb. 195. Hill. 4 Geo. 2. in the Exchequer, Obiter.

(N. b) What passes an Interest and what Authority. By the Word Until &c. and of what Continuance.

1. D E V I S E that his Executors should take the Profits of his Land S C. cited 9 till his Heir comes to Twenty-one, to the Intent that his Executors with the Profits of it shall pay his Debts, perform his Legacies, and for the Education of his Children, this passes an Interest. D. 210 a. pl. 17 Car. 2. C. B. in Cafe of Courthouse v. Heyman. S. P. — Ch. Rep. 265. Gore v. Blake.— So it is if the Words were, then if his Wife think fit to bring up his Children in Learning and to feed them meat, drink, and Apparel, then they shall have his Land till his Son comes to Twenty-four; it is an Interest. Cro. E. 252. pl. 21. Mich. 53 & 34 Eliz. B. R. Smith v. Havens.

2. Devise of his Lands to his Wife from Year to Year, till F. his Son shall come to the Age of Twenty Years. By the Death of J. the Wife's Estate is determined; But by Dyer if the Words had been till his Son should come or might come to the Age of Twenty Years, there notwithstanding his Death the Estate of the Pnee continues. Dal. 58. pl. 6. Anno 6 Eliz. Anon.

Mo. 48. pl. 153. Says if the Words had been, till the Son should or might come to Twenty &c. then the Wife's Estate had continued.

3. A Devise that his Wife should inhabit in one of his Houses which he had for Term of Years during her Life. Here the Wife takes no Interest in the Term but only an Occupation and Ufage, out of which the Executors cannot eject her during her Life. Per Cur. prater Wallis, Ow. 33. Trin. 7 Eliz. Anon.

4. A devised, that his Lands should descend to his Son, but he will, that his Wife should take the Profits thereof, until the full Age of his Son, for his Education and bringing up, and died; the Wife married another Husband. 4 D
Devise.

Anon. but S. C in totdem Verbi, but at the Con- clusion Wray Add, that the same amounted to a Devise of the Land, and to a Chattel in the Wife, which should accrue to the Husband. — S. C. cited by Bridgman Ch. J. Carr. 26. Trin. 17 Car. 2. C. B. accordingly.

5. A. having B. a Son nine Years old, devised his Lands to his Executors for Payment of his Debts, until B. shall be 21. Remainder over to B. Though B. dies the Term continues in the Executors till such Time as B. had lived, would have been 21. 3 Rep. 21. Hill. 29 Eliz. Boris ton's Cafe.

The Words To receive, let, and her for B. means only that Leafes shall be made in B.'s Name, and D. is only as Bailiff to account ; Per Fenner and Glech J. and Popham held that a Teftator cannot appoint that any shall make a Lease for Years in the Name of Devisee. Cro. E. 678. in S. C. — S. C. cited by Whitchin Lat. 39

6. A. devised Lands to B. his Son (an Infant) in Tail, Remainder to C. and made D. Overleer of his Will, and that D. should have the Education of B. till 21, and to receive, lost and let for B. the said Lands, and thereof to account to B. and D. to be allowed his Charges. D. has no Interest and is only Guardian for Nurture, and can make only Leafes at Will. Cro. E. 678. pl. to. adjournatur, but Ibid. 734. pl. 2. Hill. 42 Eliz. B. R. adjudged, absente Gawdy. Piggot v. Garnih.

7. Devise of Lands to his Wife for Life, so long as she shall be effectually ready to devise to his Heirs at 50. per Annum when the shall not dwell on it herself. The Wife goes and lives at another Place, yet the Condition is not broke unless there be a Tender and Refusal to demite. Mo. 626. pl. 860. Mich. 43 & 44 Eliz. in Cane. Sir Cha. Rawleigh v. Thynn.

8. Lands devised to Persons in Trust to let Leafes and distribute the Profits to twenty of the poorest Kindred of Devisee; the twenty &c. have but a Confidence. Mo. 753. pl. 1040. 2 Jac. in Exchequer, Griffith v. Smith.

9. Devise that A. shall have the Oversight and Duing of his Lands till his Son to whom he devised the Lands is 24. gives no Interest, and it shall be intended only in Right of the Son and to his Wife. Yelv. 73. Mich. 3 Jac. B. R. Carpenter v. Collins.

Mo. 714. pl. 1069. S. C. held accordingly, that the Estate remains by Decent in the Son, and yet if it were an Easace in the Son immediately and also for Years in the Executor, yet by the Death of the Son before 24. the Interest of the Executor is determined by the Son's Death, because it was not the Devisee's Intent to bar the Son's Heir till the Son should have come to 24 Years if he had lived. — Brown 88. S. C. & S. P. held accordingly. — S. C. cited Arg. 5. Mod. 102. as adjudged that the Executor had only a Stewardship for the Benefit of the Heir.

S C cited 10. A Copyholder in Fee surrendered to the Ufe of his Will, and devised to his Wife his Copyhold Land, and if she hath Issue by the Devisee, that the Issue shall have it at the Age of 21 Years, and if the Issue die before that Age or before his Wife, or if she has no Issue, that then she shall choose two Attorneys, and she to make a Bill of Sale of my Land.
Land to her best Advantage &c. Per Cur. she has those Lands for her Life, and the not having Issue, hath not any Interest to dispose, but has Authority by her Will to nominate two that shall fall, and they make Sale, and the Vendee shall be in by the Will without any new Surrender. Cro. J. 199. pl. 30. Mich. 5 Jac. B. R. Beale v. Shepherd.

11. A devisd a Term to his Wife until the Issue of the Body of the S. C. c. by Bridge.

Devisor acconplish the Age of 18 Years bringing up the said Child. Refolved (as the Reporter faith he heard) that the Estate of the Wife is not determined until the Issue should come to the Age of 18 Years, and Judgment was given accordingly. Lane 56. Trin 7 Jac. in the Ex.-

— 2 Ch. Rep. 136. Warwick v. Cutler, S. P. — 3 Le. 78 Ann. Per 2 J. that it is only a Confidence, but if he had devis’d the Profits it would have been a Charter in the Wife and have gone to her Husband who survived her.

12. Devise to A. and B. his Sons and the Heirs Male of their Body, and wills, that they shall not enter till their several Ages of 21 Years, and for his wills, that M. and N. his Executors shall have the Lands to perform his Will till his said Sons A. and B. come to their several Ages of 21 Years. The Executors have only a limited Estate determinable in their Time, when each Son Separtime comes to his full Age for his Part, and each of the Sons may enter when he is 21, and such Entry does not destroy the Jointure, but they shall be Joint-Tenants notwithstanding; for this Entry in the Intent of the Devise, was only as to the Per-


13. If one devise his Land to another until his Debts be paid, the Executors have a Term; Per Coke Ch. J. 3 Bull. 100. Mich. 13 Jac. in Cae of Blamford v. Blamford.

the Profit is satisfied; Per Lord Wright. 2 Vern. 424. Mich 1700. Hitchins v. Hitchins.

14. A. has a Leafe for Years, and devis’d, that after his Decease the Profits of this shall be put out to the Use and Benefit of B. This is a Devise of the Leafe itself. Per Doderidge J. and Coke Ch. J. agreed this to be fo, and said that fo is 45. 3. Tit. Feoffments and Faits; for this is tantamount to a Devise of the Leafe. 3 bull. 401. Mich.

13 Jac. in Cae of Blamford Blamford.

15. A. devis’d several Lands to B. his youngest Son, some in Fee, some for Life, and some in Tail, and then adds, I will that my Wife M. shall have the Use and Keeping of my Son B. and all the Premises to him bequested during his natural Life, paying him yearly for his Maintenance 9l. training him up in Learning and what more of her own Pleasures; Per Berkley J. she is only Guardian, but per 3 J. it is an Intercst becaus of the Limitation to her during her Life. Cro. C. 568. pl. 3. Trin 10 Car. B. R. Spirt v. Bence.

16. A Man devises Lands to his Wife for Life, and afterwards orders the same to be held by his Executors, and the Monies thereof coming to be divided amongst his Nephews, and makes A. and B. his Executors and died. It was referred to three Juftices, who certified that the Execu-
tors had not a good Intercst by the Devise, but an Authority only. Cro. C. 352. pl. 10. Mich. 10 Car. B. R. Howel v. Barnes.

17. A. feilt in Fee made his Will, and R. his Executor, and de-
vised that his Executor should receive the Issues and Profits of his Lands for and towards the Maintenance of his Children till they should attain the r
Devise.

their respective Ages of 21 Years, and devised the Residue of his Lands to his Son when he should be 21. R. the Executor made his Wife Executrix, and died before the Son came of Age, having first devised that she should dispose of the Huses and Profits according to the Words of the first Teftator, and gave her as full Power as was given to him, and died. The Question was, If R. had a Truant, or an Interest by the Will? Adjudged that an Interest was vested in R. the Executor, and so his Devise to his Wife good. Carter 25 Trin. 17 Car. 2. C. B. Courthope v. Hayman.

18. Devise of Profits till his Daughter come to Age of 21 Years towards Payment of his Debts and Legacies. The Daughter did't at five Years old. It is a good Devise of the Term till the Daughter would have been 21. Per Ld. Keeper, Chan. Cafes 113. Mich. 22 Car. 2. Carter v. Church.

And the Executors to whom the Devise was) shall continue in Possession till such Time as A would have been 21. had he lived; because the Testator might have computed how long it would be before his Debts could be paid. 2 Mod. 290. cites 3 Rep. 19. Sanlon's Cafes.


19. Devise of a Rent Charge to his Wife for Life, and after Sale, If he marries, my Executors shall pay her 100l, and the Rent still cease, and return to his Executors. The Rent continues till the 100l is paid, and the nor her Executors have present Interest in it. Mod. 273. pl. 25. Trin. 29 Car. 2. B. R. Osborn v. Wallenend.

20. The Testator devises Lands to be held by his Executors till the Testator's Son attained 22 Years of Age, for Maintenance of the Executrix and her Children, that the said Testator's Son died before 22 Years of Age. This Court decreed the Executrix to hold the Lands against the next Heir, until the said Son's Age of 22 Years, as if the said Son had lived to 22 Years. 2 Chan. Rep. 136. 30 Car. 2. Warwick v. Cuiter.

21. A. by Will made B. Executor, and gave the Residue of the Goods to the Dispofal of B. the Executor, and C. Before Probate of the Will B. died and made M. her Executor; Agreed, that the Bequest of the Residue by the Words aforesaid was a Bequest of the Interest, and not an Authority only. And that neither this Interest nor Moiety of the Residue should accrue by Survivorship to C. in this Cafe as a Legacy as it would be in a Gift of Goods at Common Law. 2 Jo. 161 July 5. 23 Car. 2. before Commissioners Delegates. Taylor v. Shore.

22. A. devised Land in Truant to pay one Third of the Rents in Satisfaction of Dower, until his Son, then two Years Old, attains 21. The Wife receives a Third of the Rent from the Trustees and dies, then the Son dies during his Infancy. The Administrator of the Wife shall have her Third of the Rents till such Time as the Son might have attained 21. 2 Vern. R. 65. pl. 59. Trin. 1638. Coates v. Needham.

Needham. S. C takes Notice of a former Hearing, and observes that it was adjudged that the Bequest to the Wife was determined by her Death, and should not go to her Administrators, and on that a Point arose to whom it should go, it was decreed by the Lords Commissioners in favour of the Heir.

2 Jo 161. Taylor v. Shore S. D.

23. Devise of Land to B. in Fee, paying 400l whereof 200l. to be at the Dispofal of his Wife by her Will, to whom she shall think fit. She dies Intestate; her Administrator shall have it, the whole Interest and Property being vested in her. Per Commissioners. 2 Vern. R. 181. pl. 163. Mich. 1690. Robinson v. Duffield.


24. Lands were devized to the Wife till his Son and Heir should be 21, and then to his Son and his Heirs, and the Son died at 13. Though she was Executrix, yet not being devised during that Time for Payment of Debts, nor any Creditors or want of Affeirs appearing; Har-
25. Ridge devises by his Will the Residue of his Estate to his Wife, and devises her to give all her Estate at her Death to his and her Relations, the Question was if this does amount to a Devise or Trust in the Wife, for all the Estate which her Husband gave her by his Will.

Harcourt C. said, I think these Words are too general to amount to a Devise over of his Estate after the Death of the Wife, nor can it be taken as a Trust, because the Words extend to all the Estate which she shall be possessor of at the Time of her Death, which the Husband has not any Power over, and therefore it must be taken over as a Recommendation and not as a Devise or Trust, but if the Testator had desired his Wife by his Will to give at her Death all the Estate which he had devised to her to his and her Relations, there the Estate devised to her ought to go after her Death to his and her Relations, according to the Statute of Distributions. There was a Cafe Tempore, Cowper C. where one Knight devised his Will 2000l. to be paid and distributed among his poor Relations, to the Executors at the Death of his Executors. A Bill was brought against the Executors and Residuary Legatee, by several of the Testator's poor Relations that were next a-kin, and might claim per Stat. of Distribution, and another Bill was brought by 20 of his poor Relations of a remoter Degree, and upon the Question who were entitled to this Legacy, Cowper C. decreed that this Legacy should be divided among all his poor Relations of what Degree soever, and for that Purpose ordered Notice to be given in the Gazette, that any Person who should go before the Matter and prove himself related to the Testator within six Months, should be entitled to a Share of his Legacy, but left it to the Executors to ascertain the Proportion according to the Power given them by the Will, but ordered if the Executors should refuse any such poor Relation, or shew any Partiality, that the Matter should report it specially, with the Reasons given for it, but he would not take away that Power from the Executors which the Testator had given them. Bill dismissed per Harcourt C. MS. Rep. Parch. 12 Ann. in Cunc. Palmer v. Schriibb.

26. A gave the Residue of his Estate to his Wife, with Power to dispose thereof with the Approbation of his Trustees. She made a Will and devised it to J. S. per Cowper C. The Devise is void, the not having the Consent of the Trustees, and so A. died Intestate as to the Residue of his Estate. 2 Vern. 723. pl. 640. Mich. 1716. Hutton v. Simpson.

27. A. feited of Land of 600 l. per Ann. devised 300 l. per Ann. to C. an Infant Son of B. which B. was Heir at Law to A., and devised 300 l. per Ann. to B. for his Care and Pains in looking after his Son's Estate till he should be 21. B. died, C. then being six Years old, but B. by Will devised the 300 l. to his Wife, and appointed her Guardian to C. his Son. Per Ld. Macclesfield, the Father B. being appointed Guardian, was the only Person that could extend his Care as a Guardian after his own Death; that the Father had by Law a Power to appoint a Guardian over his own Children, and that his Devise of the 300 l. per Ann. is good, and that it did not determine neither by the Wife's Death, unless for want of Care of the Son or his Estate, which if it happened the Son might complain of. Ch Prec. 597. Trin. 1722. Anon.
(N. b. 2) Continuance of a Devise. With or without the Word Until &c.

1. A Devised Lands to his four Younger Sons, and if they die without Issue, then to go to the Eldest Son; three of the four died. It was held that nothing should go to the Eldest till all four were dead without Issue. D. 303. b. 304. a. pl. 49. Mich. 13 & 14. Eliz. Anon.

2. A had three Sons B, C, and D. and devised that Black-Acre should remain after his Wife's Death to C. and his Heirs, and if it fortune that D. lives till the Land come to C. then I will that C. shall pay to D. 10l. per Ann. so long as D. lives. A died. C. came to the Land; Reolved that the Devise enures as a Rent-Seck for Life to D. with which the Land shall be charged in the Hands of the Heirs or Assigns of C. Mo. 721. pl. 1007. Mich. 32 & 33. Eliz. Andrew v. Sheffield.

3. A devised to J. S. until he shall or may raise 500l. out of the Profits of the Land. If a Stranger enters after the Death of the Devisee, though J. S. had no Notice of the Will, yet the Time shall run on as much as if he had had the Land in his own Possession. 4 Rep. Mich. 41 & 42. Eliz. in the Court of Wards. Sir Andrew Corbet's Case.

4. But When the Heir of the Devisee himself, or he in Reversion or Remainder enters upon such Devisee and expells him, he may re-enter and retain the Land further, until he has levied the intire Sum, and the Time in which he was expuls'd shall not be accounted Parcel; For he that did the Tort shall not take Advantage of it. 4 Rep. 82. a. b. Mich. 42 & 43 Eliz. the second Resolution in Sir And. Corbet's Case.

5. A devised a Term to M. his Wife, Remainder to his Son B. and L. his Wife if they have no Issue Male, and if they have Issue Male, then to be referred and put out for the Benefit of such Sons or one of them. A dies. M. the Wife of A. shall hold during her Life. But B. and L. his Wife shall hold only till a Son is born, and then the Son shall have the Term, and if a Son or Sons were born in the Life of M. then such Son or Sons should take immediately upon her Death, and B. and L. his Wife shall take nothing. Mo. 846. pl. 1146. Hill. 13 Jac. and if &c.

It is held to be limited after Tealator's Wife to Tealator's two Sons, and if those Sons have no Issue Male &c. and resolved by three Justices, that the Son born shall have it presently, and that this Intention in the Will, that his two Sons should not have it if they had a Son, and his Care was for his Grand-children, rather than for his Children. — Godb. 206. pl. 367. Blanford's Case. S. & C. flated and adjudged accordingly. — Roll Rep. 318. pl. 29. S. C. flated as in Cro. and Judgment accordingly. — 3 Bulst. 98. Blanford v. Blanford. S. & C. flated as in Cro. and largely argued, and Judgment accordingly, but with a Cefet Executio till Term. Pitch next ensuing.

6. Devise to a Feme Sole of 12l. per Ann. to be illusing out of Black-Acre, but if she marry, then the Executor to pay 100l. and 12l. Rent to cease and return to the Executor. Tealator dies, the Rent was paid to the Devisee. She marries. The Rent shall not cease till the 100l. paid. Adjudged by three Justices, but Twilden e contra. 2 Sand. 197. Mich. 22 Car. 2. Osborn v. Wickenden.

7. Devise
Devise.

7. Devise to B. Durante Exilie, and if pleasing God to restore him to his Country or be die, then to J. S. must be confirmed according to the Nature of the Exile, which being voluntary upon a Displeasure conceived against him, and the withdrawing a Pension from him, and is therefore to continue till he is reinstated and the Pension allowed him; and Judgment accordingly. See 2 Lev. 191. Patch. 29 Car. 2. B. R. Pager v. Volcius.

448. pl. 610. Dr. Volcius's Cafe. S. C. says, the Court perused the Parties to a Reference, and so it was referred to Sergeant Pemberton and the Recorder of London.—— 5 Kebr. 842. pl. 7. S. C.

8. Termor for Years determinable on Lives, devises 20l. per Annum to J. S. to be paid Half-Yearly out of this Estate if Cestus que Vies so long lives. J. S. dies, yet the Kent continues and shall go to his Executor so long as the Terms lasts 2 Vern. 35. pl. 27. Hill. 1689. Golley v. Gillford.

9. Devise of the Rents and Profits of Lands till his Son attain 21. towards Payment of Debts; and if my Son die before 21. my Debts being paid, then to A. The Son dies before 21; yet the Rents and Profits not only, till he would have attained 21. but also beyond, till the Debts be paid, shall be applied for that Purpofe. Rawlinson admitted, that if the Testator had only devis’d the Profits till his Son should be 21. towards Payment of Debts and had gone no farther, that it should have been carried no farther than till the Son would have attained to that Age; but Hutchins was of Opinion, that even in that Cafe the Profits should be applied to pay the Debts beyond the Age of 21. if tho’ to that Time were not sufficient to discharge them all. Chan. Prec. 34. pl. 36. Mich. 1691. Martin v. Woodgate.

10. Devise to A. and the Heirs Male of her Body, upon Condition that she intermarries with and have Issue by one Surnamed Searle, and in Default of both Conditions he devis’d it over to B. in the same manner, with Remainder over to C. Adjudged that this is a good Estate Tail, that the Words of Condition amount to a Limitation, and that the Estate of A. or B. does not cease though she marries one of another Name, for the Remainder is in Default of both Conditions, and in the mean Time it is limited to her and the Heirs Males of her Body, and the may survive such Husband and marry a Searle, and so there is a Possibility as long as she lives. 2 Salk. 570. pl. 6. Trin. 3 Ann. B. R. Page v. Hayward.

11. A. devises a College Leafe for 21 Years to his Wife for Life, Remainder to his Son, the paying 10l. per Annum to his Son during her Life; the Son dies in the Life of his Mother, the 10l. per Annum continues during the Life of the Wife and will go to the Son’s Executors, and decreed the Wife to renew the Leafe and the Matter to settle the Proportion of the Charge; Per Lord Keeper. 2 Vern. 666. Mich. 1710. Lock v. Lock.

12. A. devis’d to his Executors and their Heirs 50l. per Annum during B’s Life, to be to the separate Use of C. and to be paid to her own Hands and so as her Husband should not intermeddle, C. dies. Decreed the 50l. per Annum to be paid to C’s Executors during B’s Life. 2 Vern. 657. pl. Executors v. Dufches of Mountague. 595. Mich. 1710. Rawlinson v. Dufches of Mountague. Without referring to A’s devise of 10l. per Annum to C deducting the 50l. per Annum to be paid to C’s Executors during B’s Life. Per Administration (21. 191. 21. 191.) to be paid to him during B’s Life on Condition, C. behoves civility to B and made B. his Executor and died. Per Matter of the Rolls the 51. per Annum determines by the Death of C. It is a Personal Bequest, and the Condition is not performable after C’s Death. Ch. Prec. 175. pl. 143. Mich. 1701. Neale v. Hanbury.

13. A Man devises Lands to his Wife until his Son shall attain the Age of 21 Years, and then to his Son and his Heirs; the Son dies at the Age
Devise.

of 13. The Question was, If the ESTATE devised to his Wife did determine by the Death of his Son at 13 Years of Age, or should continue till the Son might have attained his Age of 21 Years by the E Fluent of Time? Harcourt C. of Opinion that the Wife's ESTATE determine by the Death of the Son, and differs from Scraton's Case. Co for there the Devise was to Executors for Payments of Debts otherwise unprovided for, but here the Wife comes in for her Thirds, and that is a sufficient Provision for her in the Eye of the Law. Decreed accordingly per Harcourt C. MS. Rep. Hill. 12 Ann. in Canc. Mansfield v. Mansfield.

14. A. had three Sons, B. C. and D. and by Will devised all his Lands to D. for his Life, he or his Heirs paying out of the Rents of the Premises 10l. a Year to his eldest Son B. for his Life, and 10l. a Year to his second Son C. for Life, and that after the Death of B. and M. His Wife, then the Son or Sons of D. should have all the Premises equally between them, or they or their Brothers paying the Legacies aforesaid, and if no such Son, then the Daughter or Daughters of the said D. to have the said Premises equally amongst them, Paying &c. Ed. C. Parker held that these Rents were not to link upon D's Death and during the Life of the Wife (who had an Estate for Life by Implication as his Lordship held) they being expressly given to the several Annuitants for their Lives, and were plainly intended as a certain Provision for them in all Events during their Lives. So that it is as if these Annuities were given in the first Place by the Will to the Annuitants, and the Lands afterwards given subject to the said Annuities; whence it seemed the Testator's Intent was that whoever took the Land should pay the Annuities, and that D's Wife should be liable. Wms's Rep. 472. Trin. 1718. Willis v. Lucas.

15. I give to my Wife all my Leafe at S. and all my Household Goods, for maintaining my Children, but if she should marry, then a Majority of it among my Children; the Children shall have no more than a Maintenance unless she marrieth. MS. Tab. Feb. 25th. 1725. Seagrave v. Euface.

16. Devise to my Daughters until my Son shall attain the Age of 40 Years, hoping by that Time my Son will have seen his Folly. The Son dies before 40. the Devise to the Daughters ceases. Devise to A. until B. shall attain 40 Years. B. dies before 40. A's Estate ceases; Sues if the Devise be made a Fund to pay Debts or Portions, which cannot be raised until B. shall have attained his Age of 40. in which Case the Word (shall) is taken for (should.) 3 Wms's Rep. 176. Hill. 1732. Lomax v. Holmeden.

(O. b) What passes by the Words, Residue of Estate.

1. DEVISOR made a DEBTOER Executor, and devised several Legacies, and the Residue of all his Personal Estate to another; Decreed that the Executor pay his Debts to the Residuary Legatee, notwithstanding there was no want of Affairs, though it was objected that this Case was different from former Precedents. Ch. Cafes 292. Mich. 28 Car. 2. Philips v. Philips.

and Household Goods &c. and all his Debts, Goods in Shop &c. and the Remainder of all his Personal Estate to divided equally between the Executor and another, and the Court held, that the Debts which the Executor owed the Testator were not discharged but ought to come into the Account.

2. Frem Rep. 11. pl. 10. S. C. Mich 1716. Ld. Chancellor held clearly that it should not be emploied but should be still in with the Residue of the Estate, especially in this Case where Debts are particularly mentioned, and this was a Debt at the Time of making the Will; and that if the Word (Debts) had not been in, he believed it would be all one, but that made it more strong

2. A.
Devise.

2. A seiz'd of Land in Fee and of Mortgages in Fee, devis'd all his Lands to B. and then bequeath'd 1500l. in Legacies, and then says, all the Residue of my Personal Estate I give to my Executor. The Lands in Mortgage will go to the Executor; but had A. only devis'd his Lands, and without giving any other Legacies, and had bequeathed the rest of his Personal Estate to his Executors, there perhaps the mortgaged Land should pass to B. for else there would be nothing to answer and make Sense of the Clause, "And the rest." &c. for that implies that he had already devis'd some Part of his Personal Estate, or at least it thows that he intended Part of it should have pass'd. 


3. Testator made a Stranger, and no Relation to him Executor, and gave him 50l. The Executor in such Case shall not have the Residue after Debts and Legacies paid by the next of Kin to the Testator, and so it was said had been decreed in the like Case between Cordall and Cordall. It is true if the Executor had been nearly related to the Testator, it might have been otherwise; but even in such Case, if there are other Relations in equal Degree with him and are poor and indigent, Equity in such doubtful Cases will give the Residue amongst them. 

6. It was admitted that in the Devise of the Residue of a Personal's Estate, if a Legatee was dead at the Time of making the Will the Residuary Legatees shall not have the Benefit of that Legacy, and it shall not fall into the Residue, nothing being intended to pass by that Devise but the Residue after that and other Legacies paid. Arg. 2 Vern. 395. pl. 566. Mich. 1700. in Case of Sprigg v. Sprigg. 

5. In Composition of Wills, generally the Words my Estate, the Residue of my Estate, or the Overplus of my Estate, may well pass an Inheritance, where the Intent is apparent to pass it; but such Intent to carry an Inheritance by such Words must be very apparent, and necessary to be drawn from the Words of the Will and Circumstances of the Case; for if the Words be indifferent to Real and Personal Estates or may be applied to Personal alone, there the Heir at Law is not to be disinherited by the Implication of such Words, or by any Implication at all, but what is a necessary one. 12 Mod. 596. Mich. 13. W. 3. Per Trevor Ch. J. in Case of Shaw v. Bull.

6. A Man having seiz'd all his Estate of Inheritance upon his Wife for Life, for her Jointure, makes his Will, and thereby devises several Precedent Legacies to several Persons, and then says, All the Rest and Residue of my Estate, Chattles Real and Personal, I give and devise to my Wife, whom I make sole Executrix; and the only Question was, Whether by this Devise the Reversion of the Jointure Lands pass'd to the Wife; and my Lord Keeper having taken Time to confider of it, delivered his Opinion, that it did not, because the precedent and subsequent Words explain his Intent to carry only his Personal Estate; for in the first Part of his Will, having given only Legacies, and no Land whatsoever, the Words, All the Rest and Residue of his Estate, are relative, and must be intended Estate of the same Nature with that he had before devis'd, which was only Personal; for having before given no Real Estate, there could be no Rest or Residue of that out of which he had given away none; then the Words, Chattles, Real and Personal, explain the Word Estate, and shew what Sort of Estate he meant; and make the Devise, as if he had said, All the rest of my Estate, whether Chattles Real or Personal &c. and so confine and restrain the extended Sense of the Word Estate. Equ. Abr. 211, 212. cites Hill. 1712. Markant v. Twidden.
7. A Man seised of Lands in Fee, made his Will, and thereby gave several Legacies, and then bequeathed in these Words (viz.) I give the rest of my Estate, Chattels Real and Personal to f. S. Per Harcourt Bd. Chancellor it was resolved, that nothing but his Chattels paid by the Word Estate. MS. Rep. Hill. 11 Ann. in Canc. Anon.

8. A seised of Lands in Fee, directed his Debts &c. to be paid, and gave his Wife Power to sell (if need be) his Lands, Goods &c. for Payment of the same, and then to pay such Legacies as are given by the Will, among which he gave his said Wife 1000l. to be by her detained out of the first Money that could be raised by the Profits or Sale of his Estate, after Payment of his Debts. And the Refidue of his Estate, after Debts and Legacies paid, he gave to his said Wife E. whom he made sole Executrix. Lt. C. Cowper was clear of Opinion, that a Fee paid by Devisee of all the Rest of his Estate to his Wife E. subject to the Payment of his Debts &c. But he held, that where a Man devises all his Estate, Goods and Chattels, and no Mention had been made before in the Will of Lands, of which the Testator was seised in Fee, a Fee Simple will not pass; but where a Real Estate is mentioned before in the Will, and then such Words follow, a Fee passes. 2 Ld. Raym. Rep. 1324. Mich. 1 Geo. in Canc. Cliffe v. Gibbons.

9. After a Devise of several Pecuniary Legacies, Testator added thefe Words, All the Rest of my Goods and Chattels and Estate, I devise to my Wife &c. Decreed that an Equity of Redemption of a Copyhold of Inheritance of the Testator's, did not pass, but it should go to the Heir at Law. 8 Mod. 222. Arg. cited in the Case of Wright v. Horne, as decreed Feb. 1724. in Chancery's Cafe. 

Ibid cites the Case of Wells v. Edwards — The Reason of the Case of Wells v. Edwards was because the Will began with Pecuniary Legacies, which showed that the Testator did not intend to pass the Equity of Redemption of a Mortgage. Arg. 8 Mod. 224 in Case of Wright v. Horne. — But the Words, and other Estate whatsoever, carried other Lands; per Finch C. Chan. Cafes 262. Trin. 27 Car. 2. Tirrel v. Page. — So where no Lands were devised after Pecuniary Legacies, the Words were All the Rest and Refidue of my Estate and Chattels Real and Personal, I give and devise to my Wife; This does not give the Reversion of Lands settled in Jaunture on the Wife. G. Equ. R. 29. Hill. 6 Ann. Marchant v. Twifden. — Abr. Equ. Cafes 211, 212 S. C. by the Name of Markant v. Twidten.

10. A by Will gives several Pecuniary Legacies, and after devises Lands to Trustees and their Heirs in Trust, that they do and shall, by Mortgage or Sale of the said Premisses, or any Part thereof, pay and satisfy his Debts, and the said Legacies and Funeral Expenses; then he devises all his Goods, Chattels and Household-Stuff in such a House to another, and then goes on in these Words, All the Rest and Refidue of my Personal ESTATE I give and devise to my Wife, whom I make sole Executrix; per Cur. the Refidue of the Personal Estate belongs to the Wife, in the Nature of a Specifick Legacy, exempt from Debts, Legacies and Funerals; for though the Personal Estate is the natural Fund for them, yet here he has expressly provided another for that Purpofe, by Words of an imperative Signification, that the Trustees do and shall &c. which is stronger than a bare Charge of them on his Real Estate, and might be intended only auxiliary to his Personal Estate, which without Words of Exemption, might be liable in the first Place; and though the Words Rest and Refidue of his Personal Estate are generally understood Reft and Refidue after Debts, Legacies and Funerals, yet here they are relative to the last Antecedent of the Devise of his Goods, Chattels and Household-Stuff at such a House, and pass to his Wife as a Specifick Devise, in the same Manner as the next preceding Devise did to the Devisee thereof, and are to be understood the Refidue of what he had not before particularly devised, not the Refidue after Debts paid. Abr. Equ. Cafes 271. pl. 13. Hill. 1724. at the Rolls. Adams v. Meyrick.
11. A. gave Specifick Legacies to his Daughters, and other Legacies to others; then he gave All the Residue of his Estate to W. R. &c. in Trust to increase his Daughters Portions. Decreed that this gave the Daughters a Fee 9 Mod. 92. Pach. 10 Geo. 1. in Canc. Anon.

12. A Devise of Lands to R. B. and his Heirs for ever, upon Condition he pay all my Debts and Legacies and Funerals, and if he do not pay them, then I devise the Premises to E. F. (the Defendant) and her Heirs for ever. And as to all the Rest and Residue of my Real and Personal Estate whatever not hereina before bequeathed, I give and bequeath to E. F. and her Heirs; the Devisee R. B. died before the Devisor, so it was a lapsed Legacy; The Court held that E. F. could not take by the said Words, "All the Rest and Residue of my Real and Personal Estate "not devised or unbequeathed," the Lands devised to R. B. for it must be expounded, the Rest and Residue of the Lands undevised at the Time of making the Will, and not at his Death. Fortescue's Rep. 184, 185. Pach. 2 Geo. 2. C. B. Roe v. Fludd.

13. Sir Brook Bridges by his Will gives several Legacies to his Daughter and other Relations, and then follows this Clause: I give the Remainder of my Estate, viz. my Bank-Stock, India-Stock, S. S. Stock, and S. S. Annuities to my Son B. Bridges, and I do hereby make him sole Executor of this my Will &c. Quere, If these Words, viz. All my Bank-Stock &c. do restrain the general precedent Words, the Remainder of my ESTATE? King C. was of Opinion that the latter Words which came under the viz. do not restrain the general Words precedent (the Remainder of my ESTATE) but were added by way of Enumeration or Description of the main Particulars whereof his Estate did consist, and not to restrain the Word (Estate) to those Particulars, and the rather because immediately after follow the Words, And I do hereby make him sole Executor of this my Will, and when he disposes of the Remainder of his Estate, it is plain he did not intend to die intestate as to any Part of it. Decree, that the Son was intituled to all the Residue of the Testator's Estate. MS. Rep. Hill. 2 Geo. 2. in Canc. Bridges v. Bridges.

14. The Words Residue of ESTATE do not always necessarily imply that any Thing was before thereout disposed of; for they are merely Words of Course, always inferred by the Penner of the Will, whether there be any precedent Request or not, and in Truth are never improper, because no Executor can be said to take more than the Residue, it being impossible for a Man to die without leaving some small Debts behind him, or if it could be so, the Funeral Expenses must always be born by the Executor; per the Matter of the Rolls. 4 Nov. 1753, in Case of Miles v. Leigh.

(P. b) What paffes as Incident or Appurtenant; or by the Words Cum Pertinentis.

A Man seised of a Messuage to which a Garden and Courtlage did belong, and there was no Way to the Garden but through the Messuage; devised the Messuage to his second Son in Fee; but mentioned not the Garden and Courtlage, nor said Cum Pertinentis; it was adjudged notwithstanding that they did pafs; For they agreed clearly, that the Courtlage is Parcel of the House, but they doubted of a Garden, because it is but a Place of Pleasure; but afterwards resolved that the Garden did pafs, because it is as well for Necessity as for Pleasure. Civ. E. 89. pl. 14. Hill. 30 Eliz. B. R. Garden v. Tuck.
2. A Man gave Instructions to another to make his Will in this Form; I will that B. shall have my Houfe, with all my Lands thereto appertaining; and the other made it in these Words, I devise to B. my Houfe with the Appurtenances; and it was adjudged that it should pass by this Word Appurtenances. For although that in late Books, Lands shall not pass by this Word Appurtenances, yet there is good Authority to prove that they shall pass, as 7 H. 5. and T. 21 E. 3. 18. And Wills shall be taken by the Meaning. Gouldsb. 99. 102. pl. 3. Mich. 30 and 31 Eliz. cites it as a Cambridgehire Case about a Year before.

3. J. S. Lord of the Manor of S. within which there is a Place called Ebley, in which is a Houfe, and six Acres of Land, to which divers other Lands throughout the whole Manor were appertaining, and had used to be let with it by the Space of 60 Years, and had always passed by one Grant, and under one Rent; J. S. devised that his Brother T. S. should have the Tenement with the Appurtenances in which H. B. dwelt in Ebley 69 Years, rendering 4l. per Ann. (the ancient Rent being 45s.) but the Houfe and six Acres was worth 5l. It was the Opinion of the Justices in this Case, that the Lands out of Ebley should pass. Cro. E. 113. pl. 11. Mich. 30 and 31 Eliz. B. R. Boocher v. Samford.

4. A. seized of a Messuage and two Acres of Land in N. and of two Acres of Meadow in K. used and occupied the said two Acres in K. with his Lands in N. and in his Will devised the Messuage, cum Domibus & Jngulis pertinentiis ad inde vel aliquo modo fructibus, to K. filio fug. & hereditibus suis in perpetuum, and for want of such filie to E. his Daughter for ever. Resolved, that by the Devise cum pertinentiis, the two Acres of Meadow did not pass; but otherwise it had been, if it had been cum terris pertinentiis, for then that which was used with it would have passed. Cro. C. 57. pl. r. Hill. 2 Car. in C. B. Hearn v. Allen.

5. Messuage in a Will carries a Garden and Curtelage, but Houfe will not, especially without cum pertinentiis, or like Words. 2 Ch. Cafes 27. Arg. Trin. 32 Car. 2.

6. By Devise of a Mill, a Stone taken out to be new cut shall pass as part of the Mill; per Holt Ch. J. 6 Mod. 187. Trin. 3 Ann. B. R.

(Q. b) What Words carry what Personal Estate and Chattles Real.

1. By his Will gave and bequeathed to his Wife, the third Part of all his Goods and Chattles. Quere, if the shall have only the third Part of the Goods and Chattles after the other Legacies paid, or the Debts paid, or if the shall have the third Part of the whole, the Debts &c. not deducted; and also whether the third Part of the Debts due shall pass by those Words (Bona & Catalla) D. 59. b. pl. 15. Pach. 36 & 37 H. 8. The Queen v. Ld. Latimer.

2. The Word Utenfils will not pass Plate or Jewels; all the Justices seemed to be of this Opinion. D. 59. b. pl. 15. Pach. 36 & 37 H. 8. in Case of the Queen v. Ld. Latimer.

2. If
Debts.

3. If one has Goods worth 100l. and is indebted in 20l. and bequeaths Money of all his Goods to his Wife the Moteity of all his Goods to be equally divided between her and his Executors, she shall have Goods to the Value of 50l. and Debts paid. 


5. Earl of Northumberland devised by his Will bis Jewels to his Wife.センター and Collar of S. S. do not pass, because they are not properly Jewels but Ensigns of Honour and State, and a Buckle in his Bonnet and Buttons annexed to his Robes do not pass because they were annexed to his Robes and were therefore no Jewels. But other Chains, Rings, Bracelets, and Jewels, pass by Virtue of the said Will. Resolved by Wray and Aberson Ch. J. to whom this Matter was referred. Owen. 124. 26 Eliz. Earl of Northumberland's Caise. 

6. A. made Lease for Years of Black-Acre and another Lease for S. cited Years of White-Acre and he devised all his Goods, Plate and Jewels D. 201 b. (except the Lease of Black-Acre) to J. S. The Lease of White-Acre passes by such Devise, because the Intent appeared by the Exception. Nov. 4. Jac. B R. — So a Devise of Lands and 

7. All his Moveables do not pass Devises, Corn, Fruit growing, Stone, nor Timber prepared for Buildings, as the Garnishments and Civilians hold. Wentw. Off. Executors 230. 

8. A bequeathed to his Wife all her Apparel, she shall not have, as some Civilians lay, her Garnishments of Gold and Silver, by which is meant, as he takes it, Chains, Jewels, Bracelets, Rings &c. But others are of contrary Opinion, except they are such Things as are lawful for her to wear. Wentw. Off. Executor 230. 


10. Bequest of a Coach he thinks does not pass the Horses, but perhaps the Harms or Furniture of the Coach-Horses may pass as appurtenant to the Coach; for so he thinks they shall do rather than by Bequest of the Coach-Horses without the Coach. Wentw. Off. Executors 230. 

11. A Man devised all his movable Goods and Chattles; Debts due to the Tettator did not pass by this Devise; because Debts are Jura, and cannot be devised by those Words. Jo. 225. pl. 1. Trin. 4 Car. B. R. Sparke v. Denn. 

12. By a Devise of all my Plate; New-Plate purchased after does not pass. But if devise all my Personal Estate, and acquire more and die, all pass. Because in the last the intention is plain by the Words, that all the Personal Estate should go to the Legatee. 

4 G
the first Case it could not be reasonably so intended. Arg. Holt's Rep. 241. cites God. Orp Leg 274.

13. Ruled that by the Bequest of a Moiety of the Personal Estate, where the Testator had Monies, Bonds, and a Lease for Years, a Moiety of the Lease passed, though it was objected that that was not usually reckoned Personal Estate. Chan. Cales 16. Mich. 14. Car. 2. Lee v. Hale.

14. A Testator having 1000l. due upon a Mortgage devised the Profits of it to the Defendant for her Lodging and Maintenance, and after her Death without Issue to the Plaintiff, and made the Defendant Executrix and died. The Plaintiff preferred his Bill in this Court to compel the Defendant to give him Security, that the Money should be preferred to him, in Case she should die without Issue. The Plaintiff's Bill was dismissed; and by Mr. Attorney a Mortgage cannot be entailed, being for Security of a Personal Duty and to go to the Executor. 2. Freem. Rep. 40. 41. pl. 44. Mich. 1678. Dingley v. Dingley.

15. A Man deviseth his Household Goods and Stuff to his Wife, and died, having made his Daughter Executrix. The Question was, whether or not by this Devise the Wife should have the Plate that was commonly used about the House, viz. A Silver Tankard, twelve Silver Spoons; and likewise whether she should have a Bracelet which she used to wear and some Pieces of Old Gold, viz. two Pieces that were given her to join in a Fine by her Husband and some other Pieces that were given her before Marriage by her Godfathers and other Friends, which she had kept all the Time of her Marriage. Resolved that the Tankard and Spoons commonly used about the House, will pass by the Devise of Household Goods; and for the Bracelet and Pieces of Old Gold which her Husband gave her, and permitted her to use and dispose of in his Life-time, it cannot be intended that he designed to take them away at his Death without express Words; and since the Wife might have disposed of them, and have sold or spent them, but the hath not, but hath been a good Housewife and saved them, they shall not now be taken from her, there being no Want of Affets for Payment of Debts. 2. Freem. Rep. 64. pl. 73. Hill. 1680. Flay v. Flay.

16. By the general Words in a Will (I devise all my Goods, Chattels, and Household Stuff in and about my House to &c.) 407l. ready Money in the House shall not pass to the Devisee, she having had a particular Legacy of 1000l. devised to her by the said Will. 2. Chan. Rep. 190. 32. Car. 2. Sanders v. Earle.

17. A Man having a Mortgage in Fee enters for a Forfeiture, and after seven Years Enjoyment absolutely sells the Land to A. and his Heirs. The Estate shall not be looked on to be a Mortgage in the Hands of A. so as to make it Part of the Personal Estate, but it shall be for the Benefit of the Heir. Vern. 271. pl. 267. Mich. 1684. Cotton v. Iles.


19. A.
Devise.

19. A. pollietled of a Term for Years gives All to J. S. Per Jefferies C. it is sufficient to pass the Term if it were a Term in gros. *Vern. 341. pl. 333 Mich. 1685. in the Case of Thruxton v. the Attorney General

all his Goods Cro E. 386. pl. 9 Cach. 37 Eliz. B. R. Portman v. Willis. *Mo. 352. pl 474. S. C. the Court inclined that the Term would pass by the Words (Omnia Bona) if there be no other Circumstance to guide the Intent of the Testator. *Goldsb. 129. pl. 25. S. C. but left a Quere.

20. Personal Estate is a fluctuating Thing, and therefore if a Man devises all his Personal Estate, all passes, though after the publishing the Will the Estate increases. *Vern. 137. in pl. 135. Cach. 1690. Arg. cites Northcot v. Northcot.

21. A. pollietled of a long Term for Years, devises it to B. for Life, and after his Decease to C. for Life, and faith nothing what shall become of the Remainder of the Term after the Decease of B. and C. The Question was, whether the Executors of C. or the Executors of A. should have it as a Reversionary Term? And it was argued by Levins, that the Executors of C. should have it; For that in Law, it being devised for Life, the whole Term passed, and C. being the last Devisee should have it. But it was held by the Court, that it should revert to the Executors of A. because, it being expressly limited to C. for Life, it doth not appear to be the Intent of the Testator, that his Executors should have it; and they said, that since it was now held, that a Devise of the Remainder of a Term after an Estate for Life is good, there could be no Reaion given why, if the Remainder were not devised, it should not remain in the Executors of the Devisee. But it was here admitted, that if, after the Death of B it had been limited to C. and his Assigns, or to C. generally, without paying for his Life; or if it had been said, if C. died without issue, then to a third Person; In all these Cases the Executors of C. should have it; But when the Testator gives it for his Life expressly, and is silent as to the Residuum, it shall remain with the Executors of the Devisee. *Frem. Rep. 272. pl. 299. Mich. 1697. C. R. Anon.

22. A Devise of Goods to A. for Life, with Remainder after the Decease of A. to B. it is now clearly settled, that it is a good Devise to B, and that B. may exhibit a Bill against A. to compel him to give Security that the Goods shall be forth coming at his Decease; and it is all one whether the Goods or the Use of the Goods be devised for Life. *Frem. Rep. 206. pl. 289. Mich. 1695. Anon.

23. A. devised that the Furniture and Pictures of his three *Houses at *The Ten B. C. and D. should go along with the three Houses, and that his Gilt Plate belonging to his Chappel shall be thely appropriated to that Use. Adjudged that the Plate then at three Houses passes. *Vern. 512. pl. 460. Mich. 1705. Franklin v. the Countess of Burlington.

*House to another. Per Lord Wright. Though Furniture in a large Sense takes in Plate, yet not here because he distinguishes the Chapel-Plate from the Furniture, and the Plate of ordinary Use that was carried about with him can no more be said the Furniture of one House than the other, and he meant only the particular Furniture of each House, so the Plate went to the Executors, and was asfet. *Ch. Prec. 351. S. C.

24. A. devised his House and all his Goods and Furniture therein to B. for Life, and after B's Decease to C. and his Heirs, except the Pictures which he thereby gave to D. A. had Pictures hung up in his House, and also Pictures in Boxes, and he frequently bought and sold Pictures. Per Ld. Keeper, the Pictures pass not by the Devise to B. but the Exception shall extend to those hung up, and those in Boxes, and as well to those in the House at the Time of the Will, as to those brought:
Devise.

brought in after the Will made. 2 Vern. 523. pl. 482. Hill. 1705.

Gayre v. Gayre and North, & al.

26. Plate shall pass by a Devise of Househol Goods. 2 Vern. 638. pl.


Mich. 1702.

in Case of lefion v. Effington. S. P. Ld. Keeper was of Opinion that by a Devise of all Rings and
Househol Goods, Plate used in the Houfe did not pass. It was formerly held that by the Devise
of all the Teftator's Furniture or Househol Goods, Plate in Common Ufe would not pass, in regard it
was but Curia Surescens; but as the Nation grew Richer, and Plate became a more Common Furni-
ture, it had been confidered to be included within those Words. Wms's Rep. 425. in a Note at
the Bottom of the Page, says it was fo laid by the Master of the Rolls. Pafch. 1754. Budgden v.
Ellion.—S P though Profl Proof was that Teftatrix declared her Intention, that it should not pass.

26. A Wife (having Authority to make a Will) devised to her Hub-
band her Gold watch and all the Goods which she brought into his Houfe,
and decreed that such Goods only passed as were then brought in, not any
brought in after; But that Books, Jewells, Pictures and Money did not pass.
Hill. Vic. 1711. Dormer v. Bishop of Sarum.

27. All my Personal Estate at D. Per Cur. whatever Personal Estate
Teftator had there at the Time of his Death will pass, as Coaches,
Horses, and whatsoever he had there. 2 Vern. 688. pl. 613. Mich.

28. Ld. C. Cowper held, that the Word Goods passed a Bond, and
that the Words seemed at Common Law to pass a Bond, and to extend
to all the Personal Ffeates; But this being in the Case of a Will, and a
Will relating to a Personal Ffeate too, it ought to be construed ac-
cording to the Rules of the Civil Law, and that the Civil Law makes
Bona Moibita, and Bona Immobita, the Membra Dividenda of all Ffeates.
The Bona Immobita are Land, Bona Mobilia are all Moveables,
which must extend to Bonds, and therefore by the Devise of all Te-

29. Devife was of the better Part or more Part of his Goods. Decreed
that he gave no more than half and nothing is intended but the first
Choife, and the better Half and more Part are Synonymous Terms. Hill.

30. A. devized to B. the Furniture of his Houfe at C. yet Goods in-
tended to be fent to that Houfe, though every Thing is prepared for their
fale thither, as buying the Goods, and Carriers agreed with, and
the Goods pack'd up, will not pass. Decreed at the Rolls, and af-
firmed by the Lord Chancellor. 2 Vern. 739. Hill. 1716. Duke of
Beaufort v. Ld. Dundonald and Dutches of Beaufort.

31. A. devized to B. his Wife, all his Plate, Pictures, Houfeholh
Goods and Furniture, that shall be at his Houfe at R. at the Time of
his Deceafe. A. goes beyond Sea, and being there, his Steward pre-
vaied on the Landlord of the Houfe at R. to take a Surrender of the
Leafe and the Goods are all removed to another Houfe; after this
an Account of it being wrote to A. A. approved of it. Thefe Goods
do not pass to the Wife. But had they been removed by Fraud to
defeat the Legacy, or by a tortious Act unknown to A. the might
have been relieved; Per Cowper C. 2 Vern. 747. pl. 654. Hill. 1716.
Earle of Shaftsbury v. Countes of Shaftsbury.

32. By a Devife of all a Man's Houfeholh Goods, all the Householh
Goods which Teftator hath at the Time of his Death will pass, and
because

Pafch. S.
Geo. I. before
the Lords Com-
missoners
S. C. is a D P.
such are always changing and perishing, therefore the Will as to the Peronal Estate shall relate to the Time of Testator's Death, or otherwise a Man must make a New Will every Day; and as to Plate it commonly made use of by the Family the same shall pass as Household Goods. It was so held by the Master of the Rolls. Wms's Rep. 421. Pach. 1711. Matters v. Sir H. Maffers.

33. I make my Wife sole and sole Executrix of all my Peronal Estate, Wms's Rep. and my Will is, that such Part of my Personal Estate, as she shall leave shall return to my Sister. The Intention of the Peronal Estate was not sufficient to maintain the Wife. Sir J. Jekyl Master of the Rolls, as agreeable to the Intention of the Testator and confirmed with the Rules of Law, construed and understood it thus, (viz.) I devise the Use of my Personal Estate to my Wife with a Power to dispose of as much of the Principal as shall be necessary for her Subsistence, if the Intention be not sufficient for that Purpose, and his Sister to have the Residue. And though the Law by Construction veils all the Personal Estate in the Executor absolutely, yet it may be qualified by the declared Intention of the Testator; And an Account was decreed accordingly. 10 Mod. 441. Trin. 5 Geo. Uphill and Halley.

34. If a Man devises his Silver Tea-kettle and Lamp, with the Appurtenances, roasting shall pass but the Kettle and Lamp, and the Box wherein the Lamp was placed, and not the Silver Tea-pot, Milk-pot, Tongs, Strainer, or Canisters; Resolved at the Rolls. Abr. Equ. Cafes 201. Mich. 1728. Hunt v. Berkly.

35. A Man devised to his Niece all his Goods, Chattles, Household Stuff, Furniture, and other Things, which then were, or should be in his House at the Time of his Death, and sometime after died, leaving about 205l. in Ready Money in the House; and it was decreed, that this Ready Money did not pass; for by the Words other Things shall be intended Things of like Nature and Species with those before mentioned. Abr. Equ. Caeis 201. Mich. 1729. Trailord v. Berridge.

36. One seized of Lands in Fee and possessed of a Term for Years in B. devises all his Lands, Tenements and Real Estate in A. and B. to J. S. and his Heirs; this will not pass the Term, especially if there be another Clause in the Will which disposes of the Personal Estate. 3 Wms's Rep. 26. Hill. Vac. 1729. Davis v. Gibbs.

37. I Devise all my Household Goods and other Goods, Plate Etc. to A. the Residue of my Personal Estate to B. the ready Money and Bonds do not pass by the Word Goods, for then the Bequest of the Residue would be void. 3 Wms's Rep. 112. Pach. 1731. Woolcomb v. Woolcomb.

38. One by Will gives all his Household Goods and Implements of Household, The Malt, Hops, Beer, Ale, and other Vintains in the House do not pass, but the Clock if not fixed to the House, shall pass; but not the Guns or Pijfolts, if used as Arms in riding, or shooting Game. 3 Wms's Rep. 334. pl. 97. Trin. 1734. Slanning v. Style & al.'

39. One devises the Sum of 6000l. South-Sea-Stock to J. S. and the Testator has but 5360l. no more than the 5360l. shall pass; and the reit of the Testator's Personal Estate not be obliged to make it up 6000l. but it might be otherwise if the Testator had no Stock at all. 3 Wms's Rep. 354. Mich. 1735. Atkion v. Atkion.

40. It is settled, that if there is a Limitation over of a Personal Estate, after that which would have been a plain vested Estate tall, if it had been a Real Estate, he that would have been intitled to have been Tenant in Tail, if it had been in Cafe of a Real Estate, shall be 411.
Devise.

intitled to the absolute Property in the Personal Estate; so that it shall go to his Representatives, and the Limitation over will be absolutely void. But in the Reasons of the Thing there seemed to him to be a great Difference between such Sorts of Limitations, that are vested over, and Limitations of this Sort, that are contingent. In those Cases where they are vested, the Party trusts to no Event, and nothing is put as doubtful. As if a Personal Estate be bequeathed to A. for Life, the Remainder to B. and the Heirs Male of his Body, and B. is a Person in Etitle, the Remainder to C. The whole Remainder in that Case is vested in B. and C. by no Possibility can ever take any Part of this Estate. But where the Limitation is in its Creation a Contingent one, the Party trusts to the falling out of the Contingency; and his Lordship’s present Opinion was, that according to the Event of that Contingency the Limitation over would be good or bad; namely, if that, which would have been a contingent Remainder in Tail, had it been in Case of a Real Estate, becomes a vested one during the Lives of any of the Tenants for Life, or if a Posthumous Child would have had the Benefit of the Remainder had it been within the Statute K. Will. 3. then the Remainder over would be bad; but if no such Contingency happens, the Remainder over will be good. Barnard, Chan. Rep. 58, 59. Patch. 1740. Per Ld. Chancellor in Case of Gower v. Grevynor.

(Q. b. 2) What passes by what Words, where there are Freeholds and Chattels, or Absolute Estates and Mortgages, though in Fee.


1. A Seised in Fee of divers Lands and having also Lands mort-
gaged to him, devised all his Lands to A. and his Heirs.

The mortgaged Lands do not pass but go to the Administrator.

Vern. 3. Patch. 33 Car. 2. Wynn v. Littleton.

2 Vent. 551. Sir Thomas Littleton’s Case, Patch. 55 Car. 2. in Conc. reports that Ld. Chancellor declared, that in such Case the Mortgage would pass.—Though forfeited do not pass. 2 Vern. 625. Litton v. Strode Russel &c. ——Nor though the Equity of Redemption is foreclosed or released afterwards, ut ante. Ld. Chancellor declared that if a Man had but the Trust of a Mortgage of Lands in D. and had other Lands in D. If he devised all his Lands in D. the Trust would pass. 2 Vent. 551. in Sir Thomas Littleton’s Case.

2. Vent. 551. Littleton’s Case.

S. C. decreted and says, that there were other Circumstances in the Will that seemed as if intend-
ed not to pass the mortgaged

Land [which is probably meant of the Rent Charge of 80L per Annum for Life]—2 Ch. Cates 51. S. C. decreted that the mortgaged Lands did not pass.

One
Devise.

3. One seised of a House in Fee rented a Barn and stable of Parker, which was in the Occupation of Parker, together with another House and this he was Tenant to for Eleven Years; and then he bought the Barn and Stable and occupied it with his ancient House and then he purchases Parker's House. After this he makes his Will and devises to his Wife the Mewsage where kitchen dwelt, and the Yards, Gardens, and Out-houses with all appurtenances thereunto belonging for Life, and after to his Son. And then he further gives to his Wife all that Mewsage or Premises which are purchased of Parker, with the Gardens and other Appurtenances, as they are situate in B. in the Tenure and Occupation of A. B. C. &c. for her Life, and after to his Daughter; and the Question upon a Special Verdict was, which of them should have the Barn and Stable. Holt argued that the Barn and Stable palled as Part of the House in Possession, because it is now become Part of the House, for it one hath an House and purchase Land to it and makes a Garden and lays it to his House, though it were not originally belonging to his House, it is now become Part of the Mewsage, being occupied together with it by one that had a permanent Estate in the Land 2 Cro. 121, 122. and the using it and enjoying it together, is a sufficient Reputation to make it pass for Part of the House, all People will take it as Part, and cited 6 Rep. 65. 1 Cro. 308. Sid. 190. His Intent was, that the Barn and Stable should pass with the House to his Son, for in this Part of his Will he faith, and all Out-houses, so that though Mewsage in strictness of Law will carry Yards, Backsides, Orchards, Barns, Stables &c. yet he added Out-houses to make his Intention plain, and when he devises the other House he omits to say Out-houses, but lays in the Tenure or Occupation of A. B. C. &c. and the Barn and Stable were not in the Tenure of A. B. C. wherefore he prayed Judgment for the Plaintiff; It was argued for the Defendant by Pellexen, but the Court were clearly of Opinion against him, and adjudged for the Plaintiff upon a Special Verdict. Skin. 187. pl 3. Trin. 36 Car. 2. C. B. Amon.

4. I devise to J. B. all my Right, Title, and Interest in those Terms of Years which I have in such a Place, and also my House called the Bell-Tavern, in which House the Taylors had a Remainder in Fee. Held in B. R. contra Holt Ch. J. that a Fee palled in the Bell Tavern. Trin. 11 W. 3. B. R. rot. 113. Moor v. Rawlefon. This Judgment was afterwards affirmed in the Exchequer Chamber.

5. I make my Wife Executrix, and give her the Oderplus of my Estate. Per Blandow J. this will only give Personal Estate or Chattels. 12 Mod. 393. Mich. 13 W. 3.

(R. b) What passes by the Limitation.

How much.

1. A. Seized in Fee of a Moity in Possession and a Moity in Reversion, made his Will in these Words: I will that my Wife shall have to her Use and Occupation, all that my Living which I do now occupy so long as she do keep my Name until such Times as my Son J. S. shall come to the Age of 21 Years, and that then she should have the Freehold of my Living. Item I will that my Son J. S. shall have all my Lands in C. and if he die without Issue, then I devise the same to my Daughter. The Lives, on which the Reversion was, die; M. enters and
Devise.

The Question was, Whether M. should have the Third Part of all, or but the Third Part of the Moiety which A. had in Possession, or no Part, because he married before the full Age of J. S. and determined her own Estate. It was resolved that she should have a Third Part of all; For the first Words give all which was in A's Possession (and that was a Moiety) during the Minority of the Son, and if he kept his Name (that is, if the lived for long a Widow) by the Words All this My Living which I now occupy, and alter Marriage or full Age that she should have the Thirds of all my Living, which extends to the Reversion as well as Possession; for it is not referred to that which he occupied, but it is to his Living, and in Common Parliament his Reversion is his Living, and as if he had paid, all this Farm; and this Devise to M. is not controlled by the Word Subsequent, he having no other Farm or Living; and though the determines her first Estate by Marriage, yet that does not destroy the subsequent Devise. Cro. J. 649. pl. 18. Mich. 20 Jac. B. R. Rowland v. Doughty.

2. I devise 100l per Annum to my Son A. and his Wife for their respective Lives; 60l. whereof to be paid to the Wife for the Support of herself and her Daughter, the remaining 40l. to my Son. The Son dies; his Wife shall have the whole 100l. per Annum. 3 Wms's Rep. 121. Cowper v. Scot, & al'.

(S. b) What shall pass by Intendment of Deviseor.

1. A has two Sons, B. and C. and devises Part to his Son B. in Tail and Part to C. and says, If any of my Sons die without Issue, then the whole Lands shall remain to a Stranger in Fee. B. and C. enter accordingly. C. died without Issue. He to whom to whom the Fee was devolved entered. Adjudged that this Entry was not lawful, and that the eldest Son B. should have the Land by Implicative Devise. 4 Le. 14. pl. 51. Mich. 32 Eliz. C. B. Anon.

S. C. by Pember on Ch. J. in delivering the Opinion of the Court in the Case of Holmes v. Meynell, and said it is a very strong Case. — S. C. cited in S. C. by Raymond J. in his Argument. Raym. 454.

See Remainder (r?) pl. 3 and the Note there.

2. Devise to his Son, and if he dies without Issue or before 21. that it shall remain to B. The Son has Issue but dies before 21. Adjudged his Issue shall have the Land and not the Remainder-Man, and (or) there was confirmed for (and.) Mo. 422. pl. 592. Mich. 37 & 38 Eliz. Sow-ell v. Garret.

3. Devise of a Term of Years to a Man and his Heirs; adjudged that the Devisee shall have the whole Term, for though he cannot take it by the Words of the Will, according to a legal Construction, yet since it appears, that the Testator intended that the Legatee should have what Estate he had in the Term, it shall go to him. 2 And. 17. pl. 12. in Case of Lowen v. Bedd.

4. Clauses Disaffordis is not sufficient in a Grant to create a Rent; otherwise in a Devise. Mo. 592. pl. 798. Trin. 49 Eliz. C. B. Kingl-well v. Cawdry.

Nov 71.
S. C. where the Words were, devise a Rent of 40s. per Annum out of all my Lands in H with a Clause of Disaffordis, payable Yearly at the usual Feasts. Per Cur. this is a good Devise of a Rent-Charge by these Words, With a Clause of Disaffordis; because of the Intent of the Deviseor in giving of a Remedy, and means to come to that Rent Charge.

6. Devise is of Rent-Charge for Life out of a Mortgage in Fe, the Mortgage is redeemed. It was said that in such Case every one should have Part of the Money pro Rata according to their several Interests. Vern. R. 4. Patch. 33 Car. 2. in Case of Winn v. Littleton.

7. Devise to A. and B. his Daughters and their Heirs, equally to be divided between them, and in Case they happen to die without Issue, then he devised to F. a Nephew. The two Daughters having several Estates by Moieties, one of the Daughters dies, her Part remains to her Sitter by way of Cross Remainder. Raym. 452. Mich. 33 Car. 2. B. R. Holmes v. Mayncl.

Ch. J. in delivering the Opinion of the Court, the Words (if they die without Issue) cannot be construed otherwise without Violence to the Intent of the Deviser; for then he gave all his Lands to F. which imports that both shall come at one Time, which cannot be till both the Daughters are dead without Issue, unless by the Death of one without Issue the other should lose her Moiety, which cannot be thought to be the Intention of the Deviser.——Pollexf. 425 to 435. Maynell v. Read. S. C. adjuged a Cross Remainder between the Daughters.

8. Devise to his Wife of 600 l. to be paid to A. in full for the Purchase of such Lands already settled on the Wife for Life for Jointure, the Lands were not settled. Adjudged no Devise of them. 3 Lev. 259.


9. A. devises 100 l. to B. and by Will releases to B. all Debts and Demands, and afterwards A. lends B. 100 l. Whether this 100 l. is released by the Will? Per Cur. If the Executor can recover it at Law he may; we will not take away his Remedy if any he hath, nor will give him any Aid in Equity; and therefore decreed Payment of the Legacy, and dismissed the Cross Bill. 2 Vern. 136, 137. in pl. 135. Patch. 1690. Roberts v. Bennet.

10. General Words in a Will may be qualified by special Words subsequent, and shall not be construed to subvert the Intention of Deviser explained by such subsequent Words. See Skinn. 632. pl. 1. Hill. 7 W. 3. B. R. Dalby v. Champmernoon.

11. One on Ship-board intituled to Part of a considerale Leasehold Estate by the Death of his Father, which he knew not that he had any Right to, made his Will at Sea, and devised to his Mother (if living) his Rings, and makes A. his Executor, and devises to A. his Red Box and all things else not before bequested. This passeth not the Leasehold Interest, or what the Tettator did not know he was intituled to, but shall not be restrained to such Things as were on board the Ship or Things ejusdem Generis with those abovementioned. And it is likewise considerable, that the Executor was a meer Stranger, whereas the Tettator had Brothers and Sitters, and the Master of the Rolls decreed him to be only as a Trustee for them as to the Surplus, but with Respect to the Rings &c. given to the Mother, that they were lapsed Legacies by her dying in Tettator’s Life-time, and should therefore fall to the Executor. Wms’s Rep. 302. Hill. 1715. Cook v. Oakley.

12. A. devised all his Personal Estate, and the Produce thereof to B. and if B. dies within Age and without Issue, then he gives the Personal Estate to J. S. It was held by the Master of the Rolls that the Interest Money of what shall be made of the Personal Estate does in all Events belong to B. and should be put out from Time to Time for his Benefit; and if he die within Age, and unmarried without Issue, J. S. shall only have the Principal Money or Capital. And upon Appeal to Ld. C. Parker,

13. A. by Will directs, that B. shall continue to live at his House at C. and that H. the Son of B. shall cohabit with B there in the same Manner as he then did with A, and that B. should be at the Charge of House-Keeping, Servants-Wages, and Coach-Horses to the Number that A. maintained; and to enable B. to do so, A. directed 1200 l. a Year by Quarterly Payments to be paid to B. for her Life, and that if H. marry and B. should think fit to live from him and to quit the House and Furniture, then B. was to have 250 l. a Year for Life. H. married Lord C. Parker first, he admitted that H. might live at the House at C. with B. as he had done with A. but if he would live there with a greater Number of Servants or Horses than were there in A's Life-time, his Lordship thought that B. was not bound to maintain them, but was only to maintain him in the same Plight and Manner as A. did, and that there should be no Abatement out of the 1200 l. in Case of A's Absence any more than in Case of his Death. Wms's Rep. 600. 604. Hill. 1719. Blackburn v. Edgley.

14. A. devolved that B. should continue to dwell in his House at C. and that H. her Son should dwell there with her, and gave B. 1200 l. a Year Annuity for the Charge of House-Keeping, and in Case H. should marry, and B. should think fit to live from him, and to quit the House and Furniture, then B. was to have 250 l. a Year for Life. Lt. C. Parker held, that the Furniture of the House at C. is not to be fold while B. stays there; For the Words above shew that she was to enjoy them until such time as the should quit the House and Goods. But he laid that the Words are not strong enough to carry the Goods as Heir-Looms with the House after B. should quit it or die, but then they shall be subject to the Trusts of the Will. Wms's Rep. 600. Hill. 1719. Blackburn v. Edgley.

15. A. having a Daughter his only Child married to N. by whom she had three Daughters, by Will, alter several Devises of Real and Personal Estate, gave the Residue of his Real and Personal Estate to Trustees, their Heirs, Executors and Administrators, in Trust to pay and apply the Produce and Interest thereof for the Maintenance and Benefit of such of his Grand-Children by his said Daughter as should be living at the Time of his Death, until they should be 21. without making any further Disposition, except that he directed, that if all his Trustees die, N. the Father should be a Trustee. The Quelion was, Whether the Grand-Daughters by these Words should have the Surplus itself by these Words, or that the same should be distributed among the next of Kin, as to the Personal Estate and the Real Estate to descend to the Heir at Law, and the rather because a Provision was made for them by the Marriage Settlement. Lt. C. Macclesfield held that the Intention was most plain that the Grand-Children should have the Surplus after they are 21. and laid, that by the veiling it in Trustees, All was given from the Heir at Law (the Daughter) which A. would not have done, had he intended any Thing to remain to her, and that to help this, the Word (Produce) shall be taken in the larger Sense, and then will dignity whatever the Estate will yield by Sale or otherwise, and that it cannot be intended that N. the Husband and Plaintiff, by being made Trustee, was to be fo for himself, or for what himself would be intituled to, should it come to his Wife. 2 Wms's Rep. 194. Mich. 1723. Newland v. Shephard.

16. A Person possessed of a Term of Years, and a Fortune in Money, made his Will, and left all of his Children Pecuniary Legacies payable at different times; and after the Death of his Wife, he devised one Mooney of the Term to his Son E. and the other Money to his Son F. and then came this
Devise.

this Clause, and if any of my Children die before their Portion becomes payable, then to fall equally between my Wife and the surviving Children.

B died in the Life of the Wife; so the Question was, Whether his Moiety of the Term should be divided among the Wife and surviving Children? It was resolved, that as in common Parlance Portion is not paid of a Term, and there being Pecuniary Legacies on which it may operate, the Word (payable) shall be applicable to and be confined to that; This Contingency of his Wife's dying might happen when the Sons were very old, and long after the Money became payable, and the Sons, by this Contingency hanging over them, could not dispose of their Interest for the Advantages, or perhaps the Necessities of their Families, which would therefore be to their Prejudice, which could not be suppos'd to be done by a Father. Sel. Cases in Case. in Ld. King's Time. 12, 13. Palch. 11 Geo. Richards v. Cock.

(S. b. 2) What shall pass by Intendment of Devise, where there are Words of Reference.

1. A Man after the Statute of 27 H. 8. devises that his Feevises should stand leased to the Use of A. in Fee, though there were no Feevises, nor could any to his Ufe, but the Testator's Intent was that A. should have the Land, and so it was adjudged; cited by Anderson. Hill. 29 B. R. the S. C. cited.

2. A Man makes a Grant of several Rent-Charges by several Deeds for Younger Sons, and never executes it by Livery &c. and afterwards devises by his Will that his Younger Children shall have the Inheritance according to the several Writings. Resolved that though the Deeds and Writings were not Parcel or Part of the Will, but another Matter, yet that Reference being to the Matter in the Deed, is a good Devise of the Rent-Charge within 32 H. 8. Noy. 117. Mollineaux's Case.

3. Devise of all his Lands to A. to his Wife for Life, and also his Lands which he purchased of B. to his Wife for Life, and after the Decease of his Wife, he gave the said Lands to one of his Sons and his Heirs. The Question was, Whether the Son should have all the Lands devised to the Wife, or only those that were last mentioned? And it was adjudged in the Grand Sessions that all should pass. And upon Error brought here it was agreed Arg. that if the Will had said, "All the said Lands to his Son and his Heirs," it would have extended to the Whole; and it was said that this is the same, because Indefinitum equipollot Universali. Er Adjornatur. Vent. 368. Mich. 35 Car. 2 B. R. Gamage's Case.

4. A feited in Fee of Lands in W. and Y. and other Lands, and having Issue two Sons B. and C. upon B's Marriage settles part of them to the Ufe of B. for Life, then to M. intended Wife of B. for Life,
Life, then to B. in Tail, Remainder to B. in Fee, and he settles Black, Green and White-Acre to himself for Life, then to B. for Life, with a Proviso to preserve contingent Remainders, and then to first &c. Sons of B. in Tail Male; and in like Manner to C. Remainder to the Right Heirs of B. A. dies; B. has Issue H. a Son, and J. and K. Daughters, and accordingly, he devized all his Lands, Tenements, Hereditaments to Trustees, to raise Portions and Maintenance for his Daughters, and after, in case H. was devised all his Lands &c., except L. L. and T. to J. his Daughter in Fee, and then he devised L. L. and T. to K. in Fee, and then recited that whereas he was seised of other Lands &c., and in the End of his Will takes Notice, that his Father had requested that Black, Green and White-Acre should go, for want of Issue Male of B. and C. to D. their Cousin, and that therefore he devised that it be observed, and requests C. his Brother to act accordingly, and dies, and H. and C. die without Issue, and Holt Ch. J. who declared the Resolution of the Court, held, that though B. had only a dry Remainder in Black, Green and White-Acre, yet it failed by the Generality of the Word (All his Land &c.) but in this Case the Exposition ought to be according to the Special Words, according to Altham's Case, 8 Rep. otherwise Special Words would be rejected, and that (All his Lands &c.) ought to be expounded by the Special Words of Recital (whereas he was seised of other Lands &c.) also that Black, Green and White-Acre could not be comprised within the Words, All his Lands &c. for all the Lands which he gave to his Trustees for raising Portions, he gave after the Portions raised to the same Trustees to the Uses (as to all but L. L. and T.) ut supra, now Black, Green and White-Acre cannot pass to the Trustees by this Devise; For B. was but Tenant for Life of Black, Green and White-Acre, and on his Death went to H. his Son, and so did not intend more to go to his Daughters than he could devise to his Trustees, and the Recital of his Father's Request at the End of the Will, declared fully his Intent, and that the Court ought not to adjudge such General Words contrary to such Intent. Skin. 631. Hill. 7 W. 3. B. R. Dalby v. Champerness.

(S. b. 3) What shall be said Accumulative Legacies or Devises.

1. A Rent Charge was devised to the Wife in Lieu of Jointure and Dower, and an Implicit Devise of the Lands to her by the same Will. Decreed she shall only have the Rent Charge. 2 Chan. Rep. 63, 23 Car. 2. Kemp v. Kemp.

2. C. by her Will gave the Plaintiffs 100 l. a-piece, and afterwards, by a Codicil annexed to her Will, gave the Plaintiffs 100 l. a-piece. This Court with the Judges, on reading the said Will and Codicil, were of Opinion and satisfied, that the said Legacies in the said Will and Codicil mentioned, are not one and the same, but distinct and several Legacies of 200 l. and decreed the Defendants to pay the same to the Plaintiffs. 2 Chan. Rep. 70. 24 Car. 2. Wallop v. Hewett.

3. A. bequeathed 1000 l. to every after-born Child; Afterwards a Son is born. A. adds a Clause with his own Hand, appointing his Executor to raise 4000 l. out of the Profits of such an Estate for the Portion and Benefit of his little Infant (as he called him) and afterwards declared he had left the Plaintiff (the after-born Son) 5000 l. and decreed accordingly, though it was objected the Construction would be very
A man has issue two Daughters, Amy and Agnes, and by Continuance Amy was called Agnes; The Father devised to his Daughter called Agnes, and adjudged that Amy shall have the Legacy, because Amy was called Agnes, and the other is Agnes in Truth, and is not capable by the Name of his Daughter called Agnes. Mo. 230. cites 5 El. 3.

2. A devised Land to the Wife of J. S. J. S. dies, the takes to Baron J. D. A. dies, the shall take the Land, and yet at the Death of A. the is not the Wife of J. S. but of J. D. Arg. Pl. C. 344. b. Trin. 10 Eliz. in Cafe of Brett v. Rigden.

3. A Devise was made to the Major Chamberlain, and Governors of the Hospital of St. Bartholomew; whereas they were Incorporated by another Name, yet the Devise held good by Dyer, Welton and Manwood, for it shall be taken according to the Intent of the Devisor. Ow. 35. Mich. 13 & 14 Eliz. Anon.

4. Devise to A. Eldest Son of B. where his Name is C. yet C. shall take, because there is sufficient Certainty; Per Welton. 3 Le. 18. pl. 44. Hill. 14 Eliz. C. B.

In totidem Verbis, and seems to be same Case.—Ow. 35. by Welton. S. C. and S. P. because the other Words do make a sufficient Certainty.—Fin. Rep. 403. Hill 31 Car. 2. Pitcairne.
6. If I have two Sons named J. and I devise my Lands or limit a Remainder to J. my Son: The Law will construe this Devise to extend to J. my younger Son, for without Devise or Limitation my Eldest Son should have it. But if a Stranger hath two Sons known by the Name of J. and I devise Lands to A. Son of the Stranger, there I ought to explain my Meaning openly. Per Southcote J. 2 Le. 217. P. S. Land 29

Eliz. B. R. in Humphreton's Case.

7. Grandfather, Father and Son, the Father dies, and the Son gives Lands to his Father and his Heirs, the Grandfather shall have it; because the Son so called him. Arg. 4 Le. 74. pl. 162. Hill 29

Eliz. C. B.

8. A. hath Issue two Sons, both named John, and conceiving his Eldest Son to be dead, he devieth his Lands by his Will to his Son John generally, when in Truth the Eldest Son is living; in this Case, the Younger Son may allege and give in Evidence the Devise to him, and may produce Witnesses to prove the Intent of the Father; and if no Proof can be made, the Devise shall be void for the Uncertainty. Per Anderson and Wray C. J. reffvd. 5 Rep. 68. b. Mich. 34.

Eliz. in the Court of Wards in Cheyney's Case.

9. Grandfather has a Daughter, the Daughter has a Son, the Grandfather devieth to his Son where it was his Daughter's Son, yet it was good. Per Newdigate J. 2 Sid. 149. cites 39 Eliz.

10. Three Brothers of one Father and Mother, the middle Brother seized of Land devifiable, giveth it by his Testament Propinquiori Patrui suo; it seems that none of them shall take. Dyer's Reading on the Statutes of Wills 5. cap. 3. S. 5.

11. If a Man seised of Land devifiable in Fee has two Sons and one Daughter, which Daughter has Issue two Daughters, and devieth his Land to a Stranger for Life, the Remainder unto his two Sons for Life, the Remainder unto the next of Blood of his Child, the Devisee dies, and the Mother of the two Daughters dies, the Stranger dies, the Eldest Son dies without Issue, the second does not issue into a Stranger with warranty, upon whom the two Daughters do enter, and the Feoffee puts them out, and they bring an Affise, the Affise will well lie. Perk. S. 508.

12. If a Man hath only two Sons which are both called Thomas, and he gives his Lands to Thomas it shall he intended his Youngest Son, because his Eldest Son should have it by Deferit, and this a good Will. Per Cur. 1 Brownl. 132. Trin. 6 Jac in the Case of Pacy v. Knolls.

13. A seised of Land in Fee has four Sisters, one has Issue and dies, he devieth his Land to all his Sisters or their Heirs equally to be divided. The Issue of the Sister that died in the Life of A. shall take nothing, and Or shall be construed And. Arg. 2 Sid. 54. cites Trin. 1 Cur. Rot. 159.

Taylor v. Hoskins.

14. If A. B. and C. being Aliens and Brothers A. has Issue a Son, and B. and C. are naturalized and B. preheds Lands, and devieth them to the Heir of his Brother A. and his Heirs; and B. dies, living A. and his Son, the Devise is void, for the Uncertainty who is intended there by; for A. being an Alien, can have no Heir; or however, being living, can have none during his Life; but per Glyw. Ch. 7. if it had been found that the he of A. was the reputed Heir of A. though A. was an Alien, yet his Son might have taken by this Devise. Eq. Ab. 213. pl. 9. cites 2 Sid. 23. 51. Trin. 1650. Potter and Ramley.

15. Devise
Devise.


16. W. C. by Will, devised to every one of his Servants living with him at the Time of his Death, 10 l. a-piece, and the Plaintiff was Servant to the Testator at his Death, to the Plaintiff's Suit is for the 10 l. Legacy. The Defendant intitiles, that the Plaintiff was not Servant to the said C. at his Death, or lived with him as a Servant, but the Plaintiff at the Testator's Death, and long before and after, was the Servant of M. B. the Testator's Mother. This Court was satisfied, that the Plaintiff was a Servant to the Testator, and intrusted in his House-keeping, and employed in washing his Linen, and tended him in his Sickness; and therefore decreed the Defendant the Executor to pay the Plaintiff her 10 l. Legacy. 2 Chan. Rep. 101. 26 Car 2. Feake v. Brandsby.

17. Linds devised to the Poor of the City of R. decreed that the Poor of the Precincts and Liberties shall have a Share. Fin. R. 193. Hill. 27 Car. 2. Attorney General on Behalf of St. Margaret and Servard Parishes in Rocheller v. Mayor and Citizens of Rochester.

18. A Devise was to Margaret the Daughter of W. K. The Daughter's Name was Margery. The Question was, whether Margery should take; And held that she should; quia Constat de Person. Frecm. Rep. 293. pl 344. Trin. 1677. Gynes v. Kemley.

19. Money was devised to be distributed annually among the Poor of the Parish of L. in the County of M. whereas there was no such Parish in the County, but in the County of D. there was. The Court held that since there was such a Parish in the County of D. the Testator meant that Parish, because it appeared that he was born there, and that both he and his Parents lived and died in that Parish. Fin. R. 393. 30 Car. 2. Owen v. Bean.

20. A. devised the Residue of his Estate among his Kindred, ac- Accoring to their most need, this shall be construed according to the Act for better settling Intestate Estates. 2 Chan. Rep. 140. 30 Car. 2. Carr v. Bedford.

what, the Counties of Winchelers being as near a Relation as any claimed a Share; and decreed that the is settled, in regard the Word Poor is frequently used as a Term of Instrument and Companion, rather than to signify an Indigent Person, as one speaking of his Father, My Poor Father, or of his Child, says, My Poor Child. Win's Rep. 327. Trin. 1716. at the Rolls Anon. — But the Reporter says that this seemed a strained Construction in favour of the Earl and Counsellors, who had not an Estate proportionable to their Quality.

21. Grandson may take by the Name of Son, if the Testator did use to call him by the Name of his Son. Per Raymond J. Raym. 412. Mich. 32. Car. 2. B. R. in Cafe of Stead v. Berrier.

22. A. by his Will gives 100 l. a piece to all his Servants; none but such as were Servants to A. before the making the said Will and did so continue to be Servants to him till the Time of his Death could have any Pretence to the said Legacy, and such as were his menial Servants and lived all along in the House with him, from before the making of the Will to the Time of his Death were intituled to the Legacies. 2 Chan. Rep. 362. 1 Jac. 2. Jones & al v. Henley.

23. A, pollied of a great Personal Estate bequeathes to B. his Brother 150 l. and to the Sons and Daughters of his Brother and Sister not mentioning them by Name 10000 l. to be equally divided between them
and the Surplus to be distributed among his Brothers and Sisters Children and Grandchildren, and the Rest of his poor Kindred according to his Executor's Directions; decreed, the Rest of the Poor Kindred to continue according to the Act for distributing Intestates Estates, and no further, and to be distributed in such Shares and Proportions as the Executors in their Discretion should think fit. 2 Chan. Rep. 395.

2 Jac. 2. Griffith v. Jones.


25. A's Wife being enfeated at the Time of making his Will, bequeaths 500l. to his Pothenous Child. Afterwards a Daughter is born and then A. dies; Per Lord Somers he is a Pothenous Child within the Meaning of the Will and well intituled to the 500l. Ch. Prec. 1177 1701. Jaggard v. Jaggard.

26. A Devise of Goods was made to A. for Life, and after his Decade to the Potheity of T. B. and the Question was, whether by the Virtue of Word (Pothevity) only Descendants from the Body of T. B. should take (viz.) Children and Grandchildren, or whether he having no Issue, it should go to the Collateral Relations? The Lord Keeper was of Opinion, that it went only to the Issue of the Body. 2 Fsec. Rep. 208. pl. 336. Mich. 1703. Attorney General v. Bamfield.

27. Devise to A. B. Father and Son are named A. B. Prima facie A. B. the Father shall be intended; But if Devisor did not know the Father it will go to the Son. Per Holt. Ch. J. 1 Salk. 7. Hill. 2 Ann. B. R. in Cafe of Lepiot v. Brown.

28. Stewards of Courts and such as are not obliged to spend their whole Time with their Mather are not within the Intention of the Will; but Ld. Keeper said, he would not narrow it to such Servants only as lived in Teller's or had Diet from him; this was on the Duke of Bolton's Will, which was to all his Servants living with him at his Decade. 2 Vern. 546. P. 1706. Townend v. Windham and Robinson.

29. A. by Will gave a Legacy of 200l. to Mrs. Sawyer when there was no such Person ever known to her, but it was alleged that she meant one Mrs. Swopper. The Master of the Rolls ordered the Master to examine who the Telleratrix meant thereby, and whether she meant Mrs. Swopper who contended for the fame, and if she should find that she was the Perfon intended, then she to receive her Legacy. Win's Rep. 421. 525. Pat. Ch. 1718. Masters v. Sir Harcourt Matters.

30. A. lived in Canterbury many Years and died there, and gave to the Poor of two Hospitals in Canterbury (naming them) 5l. a-piece, and afterwards by a Codicil gave 5l. a Year to All and Every the Hospitals, (without saying where the Hospitals were). It was held by the Master of the Rolls that A. having lived in Canterbury many Years, and died there, and taking Notice by her Will of two Canterbury Hospitals, this
Devise.

this Charity was not void for the Uncertainty, but to have been intended for All the Hospitals in Canterbury; but not to extend (as was prefixed) to the Hospital about a Male out of Canterbury, though founded by the same Arch-Bishop, and governed by the same Statutes. And the Court did the rather confine the general Words (all Hospitals) to those in Canterbury, because those Charities, if they prevailed, would be Perpetuities of 51. a Year, and by that Means create a Deficiency, and defeat the Rest of the Will as to plain Legacies, in favour of those that were doubtful. Wms's Rep. 421, 425. Patch. 1718. Maffets v. Maffets.

31. A Legacy of 500 l. was given to one by the Name of Catherine Earnley. This Legacy was claimed by Gertrude Yardley, and not by any Person of the Name of Catherine Earnley. It was proved that the Testator's Voice when he made his Will, was very low and hardly intelligible; that the Testator usually called the Legatee of this 500 l. Gatty, which the Scivener, who took Instructions for drawing the Will might easily mistake Katy, and that the said Scivener not well understanding who this Legatee of the 500 l. was, or what was her Name, the Testator directed him to J. S. and his Wife to inform him further, who afterwards declared that Gertrude Yardley was the Person intended. It was moreover proved, that the Testator in his Life-time had declared, that he would do well for her by his Will. At another Day, his Honour gave his Opinion, that the Legacy was a good Legacy to Gertrude Yardley, though the same was given by the Will to Katherine Earnley. It is true, if this had been a Grant, may, had it been a Devise of Land, it had been void, by Reason of the Mistake both of Christian and Surname. 2 Wms's Rep. 141, 142. Patch. 1723 in Cave of Beaumont v. Fell.

32. A. filed a Church Leafe for Life devised an Annuity out of it to B. for Life, and directed that if J. S. the Geoey que Vie should die, his Executor should purchase the Leafhold Premises in the Name of C. his Kinman, and that his Executor out of the Surplus of the Leafhold and Personal Eftate, should keep the Premifes in Repair; But if he could not make such Purchase, then he devilled the Surplus of the Eftate to W. R. the Plaintiff, and made D. his Executor in Trust, only giving him a small Legacy. The Executor purchased the Leafhold for the Life of C. Ld. C King held, that W. R. Refiduary Legatee could not have this Leaf, being on a Contingency which never happened, the Purchase having been made, and decreed it to C whom Testator in the Deviling Clause named his Kinman. But afterwards on a Re-hearing his Lordship overruled his former Decree, and held that the Plaintiff W. R. was intitled to the Leaf. Hill. 1725. and 6 July, 1726. 2 Wms's Rep. 323. Stephens v. Stephens.

33. John Brooke being posses'd of a considerable Personal Eftate, and having a Wife, and one Daughter who was married to the Defendant Thomas Taylor, made his Will, bearing Date the 4th Day of May 1720, in the Words following, viz. John Brooks, Citizen and Founder of London, doth revoke all other Wills, and acknowledge this to be my last Will. I do give to my dear Wife all my Worldly Goods, House at Ifington, Stock, Money, Bonds, Notes in the East India or elsewhere, and ninety nine Years Annuity in the Exchequer, with all the Profits which may come upon them or by them, with this Condition, to give to my wife's three Sisters 51. yearly for their Lives, or the longest Liver, prently after my Decease, if God permits you to continue in this Capacity, not else, and after my Wife's Decease, the same I give to my Sistars, and then after my Daughter's Decease to the Fruit of her Body. But for want of such Issue or Fruit, to my Brothers and Sisters then living, and after them to their Children, and the Children of my Brother Richard now deceased, 

4 L.
Dee\r

devised, except a Note of 50l. in Mr. Taylor's Hands, and Goods and Plate that I give to him. And I do nominate and appoint my Brother Phillip, Brother William, and Mr. Taylor to be my Executors to see my Will perform'd. Where I have set my Hand and Seal the 4th of May, 1720. In November 1721 the Teftator died, and the Defendant Thomas proved the Will, and posse'd the Perfonal Estate. 23d Jan. 1726 Mary Taylor the Daughter died without Issue, leaving her Husband Thomas Taylor. Upon the 30th Jan. 1726. the Widow died, having first made her Will, and Thomas Taylor Executor who has proved the Will, and has also taken out Letters of Administration to Mary his Wife. The Plaintiffs are all the Teftators Brothers and Sisters that were living at the Death of both the Widow and the Daughter. The Question was, Whether the subsequent Limitations after the Want of Issue of the said Daughter's Body, or any, and which of them (the Wife and Daughter of the said John Brooks being dead without Issue) are good, and to whom the said Estate does belong.

We are of Opinion that the Wife of John Brooke being dead, and Mary his Daughter being also dead, without Issue living at her Death, the subsequent Limitations are good, and that the Estate in Question belongs to the Plaintiffs.

R. Raymond.
F. Page.
Jam. Reynolds.
E. Probyn.


(U. b) Who shall take by Name of Heir; One who is, or is not, Really Heir.

1. L AND devised to his Executors till they have raised 1000l. and after Wills that his Heir Male shall have, and dies, having Issue a Daughter. Executors levy 1000l. the Brother cannot enter, because he ought to be Heir at Common Law, who shall take this, and not Heir Special. Palm. 50. cites 1 Rep. 103. b. [Pauch. 21 Eliz. in Shelley's Cafe.] Cited per Cowper C. 2 Vern 736. as adjudged Trin. 8 Anne in C. 5 Rot. 1884.

2. A taking Notice in his Will that B. his Brother (who was dead) had a Son, and that he himself had three Daughters, who were his right and immediate Heirs, he gave them 2000l. and gave his Land to the Son of his Brother by the Name of his Heir Male, provided if his Daughters troubled his Heir, then the Devise of the 2000l. to them should be void. Resolved, that the Deviseor taking Notice that the others were his Heirs, the Limitation to his Brother's Son, by the Name of Heir Male, was a good Name of Purchase, and this agrees with Couenden and Clerk's Cafe, in Hob. 30. Per Hale Ch. J. cites it as of 16 or 26 Eliz. Vent. 381. in Cafe of Pibus v. Mitford.

3. Where
3. A Man having Issue a Son and a Daughter, devises Lands to his The Daughter by the Words that after his Decease the Lands should come to the Son, but appointed that certain Friends should receive the Profits until his Lot, and Son came to 24. Provided that if the Son should happen to die without the Issue Male of his Body lawfully begotten, then he willed that the Lands right Heir should go to the right Heirs Males, and Possessor of me and my Name for ever; equally to be divided to, and amongst them; The Devisee dies, who is the the Son dies without Issue, the Daughter marries and has two Daughters of Males, or Female. No. 860. pl. 1181. Hill. 11 Jac. C. B. Cownden v. Clerk.

the Brother is Male, but he is not Heir; And this is a new Form of Inheritance, if the Brother should have this Land, and should have a Daughter, who has a Son in the Life of his Grandfather, or afterwards; The Fee upon the Death of the Grandfather should be an Abeyance, during the Life of the Daughter, if the Estate should be allowed. Judged and affirmed in Error. Jenk. 294. pl. 52 cites Hob. 29. 10 Jac. Cownden's Case.

4. A Man may be Heir Ex Vi Testamenti before he is Heir Ex Vi Doni, as if A. devised that B. shall be his Heir. C. devised Lands to A. and his Heirs, B. shall have those Lands as Heir to A. Arg. Mich. 1657. 2 Sid. 27. B. R.

5. And for Default of such Issue I gave the Remainder of my said Estate to the Heirs Male of the Body of J. L. lawfully begotten; E. L. happens to be living at the Time of the Remainder taking Place, yet the Heir Apparent shall take. MS. Tab. May 27, 1714. Darbion v. Beaumond.

6. A. devised Land in Trust after Debits paid, to convey to the Heir Male of the Body of B. A's Great Grand-Father; C. is Heir Male of the Body of B. and D. is Heir General, the being the Daughter of an Elder Brother. Per Cowper C. decreed the Trustees to convey to C. as C. would be well intituled to take as Heir Male by Descent, so he is sufficiently described to take by Purchafe. 2 Vern. 729. Hill. 1716. Newcomen v. Barkham.

7. If A. devises all his Lands to his Heirs in Borough-Englib, or to his Heirs in Gavelkind, such a Special Heir will take, though not Heir General at Common Law. Per Cowper C. 2 Vern. 732. Hill. 716. in Case of Newcomen v. Barkham.

8. Devise to the Heir Male of J. S. now living; Adjudged a good De-

vice, because the Person is well Described. Per Cowper C. 2 Vern. R. 734. Hill. 1716. in the Case of Newcomen v. Barkham, cites Pollexf. 457. and 2 Vent. 311. the Case of James v. Richardson. That Judg-

ment reversed in the Escocher Chamber for the Matter in Law, but in the House of Lords the Judgment in the Escocher was revers'd, and the Judgment in B. R. affirmed.

(W. b) Who shall take by the Words Heir, Issue, Heirs Male &c.

1. NOTE per Newton J. if a Man devises his Land to J. N. and his Heirs Females of his Body begotten, and dies, and after the Devisee had Issue a Son and a Daughter, and dies, the Daughter shall have the Land, and not the Son, though he be Heir at the Common Law.
Law; For this is a Tail to the Heirs Females. Br. Devife, pl. 37. cites 9 H. 6. 23,

2. Where a Man gives Land to s. S. and his Heirs Males of his Body &c. who has Issue a Daughter, who has Issue a Son, and dies, the Land shall revert to the Donor, and the Son of the Daughter shall not have it; but contra of such Devise, by reason of the Will of the Devisee; for there the Son of the Daughter shall have it. Br. Devise, pl. 29. cites 30 H. 8.

3. A devises his Land to his right Heirs Males, having only a Daughter; this Devise is void; for such Devisee is a Purchaser. But otherwise it is if A. devises to B. and his Heirs Males, and A. dies, and afterwards B. there is an Intail vested in B. Jenk. 294 pl. 42.

4. Issue includes all, and is Nomen Collectum, and an Eatee for Life of a Term devised to A. and after to the Issue of A., and for want of Issue of A. to B. was lately adjudged in B. R. to be a good Remainder to B. but reverted in Cam. Scacc. on Error brought, and a Difference taken between such Limitation to Children and to the Issue, and cited * Peirs and Reever's Cafe in Point; Per Ld. Keeper. 2 Chan. Cafes 210. Mich. 27 Car. 2.

5. A. devised Lands to B. during his Life if he be living at the Death of Devisee, but if he die before Devisee, then he gives them to C. the eldest Son of B. for Life if he be living. But if C. be dead then he devises them to the next Heir Male of C. (in the Singular Number) and for Default to the next Heir Male of the Body, and for Default, then to the next Heir Male of his Name then living &c. so the Land should continue in his Name. B. survived A. and after died, having Issue, C. the Defendant, M. and N. were Nieces and Heirs of A. It was argued that the Intent of the Will is plain that the Nieces should not take, and then intitled that the Clause (and for Default of such Issue, then to the Heir Male of B. begotten) is not under any Contingency, but stands absolutely, and is a good Limitation of the Remainder, and after B's Death take Effect in C. the Defendant, and the Words (Heir Male,) and for Default of such Issue &c. is of the same Sense as Heirs Male, and he thought if the Limitation had been in Feeblint to Uses the Contingent should not extend to the Heirs Male of the Body of B. though it should to C. and afterwards the Court was Opinion that C. had an Eatee by the Devisee, and Judgment was given quad Quer' nil capite per Billam. 2 Jo. 111. Trin. 30 Car. 2. B. R. Gold v. Goddard.

6. A. devised in this Manner; I give to my eldest Heir Male and his Heirs Males for ever, all my Lands in such a Place, and if there be a Female, she to have 12l. per Annum as long as she lives; the Testator had two Sons, the eldest of which died in his Life-time, leaving Issue a Daughter, and it was adjudged that the Lands should go to the second Son and not to the Daughter of the eldest, though she was Heir general. Abr. Equ. Cafes 214. Trin. 3 W. 3. C. B. Rot. 1494. Baker v. Hall.

7. Devise to E. A. for Life, and if she should have any Issue, then to such Issue and their Heirs. E. A. has Issue two Sons; Per Treby Ch. J. the eldest will take a Fee; but Powell J. held, that both will take, because Issue is Nomen Collectum, and it would not have been void for Uncertainty. Ld. Raym. Rep. 206. Patich 9 W. 3.

8 Devise to the Issue of B. R. had then a Daughter, and a Son born after Testator's Death. Per Ld. Keeper all the Children shall take, even Grand-Children, but they shall take only Eatee for Life; and though the Devise is to the Issue begotten that makes no Difference, the Words Begotten and To be Begotten are the same as well on the Construction of Wills as Settlements, and take in all the Issues begotten after, and if a Child is after a Child, then after Testator's Death, the Estate shall open and take
Devise.

take in such After-born Child; but if the Devise be of a Personal Estate Nothing
B. and his Children, there a Child born after Teltator's Death shall

Devise to the Issue of A. and for want of such Issue to B. A hav- 2 Le. 55. Lovelace’s Case. S. C.
ing a Son and a Daughter, they shall take as Perfions described and have a
only Estate for Life; Perld. Keeper. 2 Vern. 546. Paish. 1706. in Case
of Cook v. Cook.

and devised his Land to his Issue, and 10 l. a-piece to his Daughters, the Daughters take no Part of
the Land. Taylor v. Sawyer.——2 And. 134. pl. 81. S. P. and seems to be S. C.

10. A Devise was to A. with several Remainders, and a Remainder Silt. 376.
over to the Heirs Male of the Devisor. The Devisor had no Heir Male
of his Body at his Death. It was held a void Limitation and a
Collateral Male cannot take by this Devise. In the King's Case a
Grant to Heir Male is void, but in that of a common Perlon it is a
Fee, and the Word Male is idle, but Heirs Male &c. in a Will are al-
ways intended of the Body, and implies an estates Tail. Q. 11 Mod.

of his Body, and no Collateral Heirs Male shall take by such a Limitation by way of Remainder.

11. Devise to B. his Heir Male though B. is neither Heir of the Body
or Heir at Law to the Devisor, yet held good, because by other Words
in the Will it appears that Teltator did intend B. should not be hin-
dered from taking by his Heir Female; Cited per Cowper C. 2 Vern.
736' Trim. 8 Ann. C. B. Rot. 1834. in Case of Newcomen v. Bark-
ham.

12. A devises Lands in Trust after Debts paid, to convey the Pre-
mium the Heirs Male of the Body of B. the Teltator’s Great Grandfather,
C. is the Heir Male of the Body of B. but not Heir General, there being a
Daughter of an elder Brother who is Heir general; yet the Trustees shall
convey to C. as would be well intitled to take as Heir Male by De-
fect, so is he sufficiently described to take by Purchafe. Chan.

1722. in the Case of Dawes v. Ferrars, and a Diffinition taken by him between these two Cases, which
see at the Plea following.

13. One devises to his Wife for Life, Remainder to his Grand-daugh-
ter, who was Heir at Law for Life, Remainder to his own Heirs Male;
A Nephew although he be next Heir Male, cannot take by Virtue of
this last Limitation, not having both Parts of the Description verified

Brown b.

Barkham, which was cited in this Case, the Ld. Chancellor said, that that was merely of a Trust;
but the principal Case is that of a legal Estate where the Rule of Law that has so long prevailed and
been taken for granted must be observed, viz. that he who claims as Heir Male by Purchafe, must be
Heir as well as Heir Male. Besides this differed from the Case of Brown v. Barkham, the Remainder
being limited to the Heirs Male of the Body of Sir Robert Barkham the Grandfather; whereas here
the Devise was to the Heirs Male, without saying of any Body; wherefore allow the Demurrer. 2
Wms’s Rep. 3—— Ibid. at the End of Ed. 2 is a Note, That there is a now (Mich. 1759.) (the
Time of publishing this Volume) a Bill of Review pending to reverse this Decrees —— And accord-
ingly I find by a M. Rep. that this Case was upon the Will of Griffith Dawes, who devised, as in the
principal Case mentioned, to his Grand-daughter the Lady Eliza Bulkeley, Remainder to his own
Heirs Males. A Bill of Review was afterwards brought to reverse this Decrees, in which Devious
Gwyn, Priscilla Gwyn, and Elizabeth Williams Eliza, by their next Friend, were Plaintiffs, and
John Hooke, Esq. Defendant, where the Case appeared to be. That in 1759 the Lady Bulkeley
informed with the Defendant John Hooke, Esq. but before their Intermarriage, by Indentures of
Lease and Release, dated the 18th and 20th Days of November 1726, the the said Lady Bulkeley
grant and convey the said Premises to a Trustee to the Use of herself and the said John Hooke, and

and then to the Use of the Defendant and Lady Bulkeley for their Lives and the Life of the longer Liver of them, and after the Decease of the Survivor, then to the Use of the Defendant, his Heirs and Assigns for ever.

Lady Bulkeley died without Issue 8th May 1756, and thereupon the Defendant John Hooke entered on the said Capital Messuage called Banjelfton, and other the Real Estates of the said Griffith Dawes.

16th May 1738. The Plaintiffs, the three Great Grandchildren and Heirs at Law of Francis Dawes, the Brother of the said Griffith Dawes by their next Friend brought their Bill in the High Court of Chancery against the Defendant John Hooke, flaring the Will of the said Griffith Dawes and their Pedigree as above, and praying, among other Things, to be let into Possession of the said Premises.

The Defendant by this Answer made Title to the Premises by Virtue of and under the said Indentures of Lease and Release, dated the 18th and 19th of November 1729, made on his Marriage with Lady Bulkeley, whereby the Premises were conveyed as aforesaid to the Use of Lady Bulkeley till the Marriage, and then to the Use of the Defendant and Lady Bulkeley for their Lives and the Life of the longer Liver of them, and after the Decease of the Survivor of them, and then to the Use of him the said Defendant John Hooke, his Heirs and Assigns for ever.

18th November 1743. The Cause was heard before the Lord Chancellor, when his Lordship was pleased to Order, That a Case should be made for the Opinion of the Court of King's Bench, and that the following Question should be stated thereon, viz.

"Whether by Virtue of the Will of the said Griffith Dawes, dated 14th November 1693, the Plaintiffs are intitled to the Estate in Question?"

Copies of the Opinion of the Judges of the Court of King's Bench.

Upon hearing Counsel on both Sides, and Consideration of this Case, we are of Opinion, That the Plaintiffs are not intitled to the Estate in Question by Virtue of the Will of the said Griffith Dawes, dated 14th November 1693, for we conceive that Francis, the Brother of the Testator, under whom the Plaintiffs claim, could not take by the Devise of Right Heir Male of the Testator.

W. Lee.

Wm. Chapple.

M. Wright.

J. Denison.

Gwyn and Hooke, February 18th, 1745.

(X. b) Who shall take by the Word Children.

1. MOTHER devise her Goods to her Children; she has Issue a Bajfrard and other Children. The Baitard shall take with the others; or though in Case of others he is Nullius Filius, yet he is clearly known to be the Child of the Mother. Mo. 10. pl. 39. Hill.

2. Devise to his Daughters; Devise dies, leaving two Daughters, another Daughter is born. Adjudged that the Third shall take with the other two, otherwise if the two Daughters had been named by their proper Names. Mo. 220. pl. 358. Mich. 27 & 28 Eliz. B. R. Stanley v. Baker.

3. A. had Issue B. C. D. and E. and devised to his Wife for Life, and after her Death to C. his Son in Tail, and if he dies without Issue, then to his Children. B. had Issue a Son and died, and then C. died without Issue. Resolved that the Son of B. shall not take as one of the Children of A. Per Hale Ch. J. Vent. 229, 230. cites Mich. 34 Eliz. B. R. Tyler's Case.

4. Devise to Baron and Feme, and after their Death to their Children, or the Remainder to their Children; in this Case, though they have no Child at the Time, yet every Child which they shall have after may take by way Remainder according to the Rule of Law, for this Intent appears, that their Children shall not take immediately, but after the Death of Baron and Feme. 6 Rep. 17. b. Hill. 41 Eliz. B. R. Wild's Case, alias Richardson v. Yardley.

5. Grand-
Devise.

5. Grandmother devises Land to her Daughter J. S. whereas the is S. P. Venr her Grand-Daughter, yet this is good; because in common Speaking she is so called. Owen 88. per Walmley.

6. If Land be given to a Woman for Life, Remainder to her eldest Issue, a Buffard, though eldest, shall not take, for general Words shall be taken in digitiuni Senfe. Arg. Bridgm. 15.

7. A. made his Will, and having four Children living, devised his Land after the Death of his Wife to come among his Children equally, supposing his Wife to be with Child, devised a House for the Maintenance of such Child. A further will'd, that if all his Children dy'd before 21, then the Premises devised to his Children should go over. All the Children die before 21, except the Posthumous. Decreed that the Lands shall go to the Posthumous Child, and not to his or her in Remainder. Chan. Rep. 96. 10 Car. 1. Mat. v. Kirby.

8. J. S. having a Child born; A. devised to two of the Children of J. S. begotten, or to be begotten the Sum of 100 l. a-piece to be paid at their several Ages of Twenty-one, the that was born at the Time of the Will shall come in for 100 l. though there was two born after. Chan. Rep. 188. 12 Car. 2. Plumpton v. Plumpton.

9. Money given in Trust for the Children of J. S. shall be for the Benefit only of such Children as J. S. then had, and not of such as shall be born afterward. 2 Ch. R. 69. 24 Car. 2. Warren v. Johnston.

10. A. has two Sitters and bequeathed 300l. to each of my Sitters B. and C's Children, and if any of them die before the Money be paid, then the Money which should have been paid to such Child, shall be divided among the Grandchildren of my late Sitters, the said Legacy to be paid before any other; B. had Five Children, three of which died in the Life of A. and left Children; yet those Children's Children cannot take but the Money shall be divided between the surviving Children of B. Fin. R. 182. Mich 26 Car. 2. Judd v. Arnold.

11. A Devise to such of the Children of A. viz. B. C. and D. as shall be living at the Death of E. is but an Estate to Life to the Children, and adjudged that in that Case the Word Children extended to Grand Children. 3 Ch. R. 86. 19 June 1675. Edwards v. Allen.

12. A. devised Lands to be equally divided between B. C. and D. his three Nieces and Heirs at Law; and such of their Children as are, or should be living &c. B. had four Children. C. died, so that her Legacy was lapsed; D. had one Child, the two surviving Nieces and the Five Children shall take in equal Proportions during their Lives, and when any of the Children die, the Share of Shares of such dying shall remain to B. and D. as Co-parceners and their respective Heirs. Fin. R. 214. Trin. 27 Car. 2. Edwards v. Allen &c.

13. A. devised a Manor to the Eldest Son of B. in Fee and other

But the

Land to J. S. for Life, Remainder to such of B's Children, as shall be agreed that then alive and Owners of the Manor. Resolved if such Son be dead if a Man when J. dies, the Grand Child of B. shall not take, because it is not within the Words. Per Raymond J. Raym. 411. Mich. 32 Car. 2. B. S. n.b. a Grandson not a Son.

R. in Case of Stead v. Berrier cites Cro. E. 357.

Lands to his Son, the Grandson may take. But in the principal Case the Lands were devised to the Son, and a Legacy was left to the Grandson by the Name of Grandson; and the Son dying in the Life of the Devisor, he made a Codicil and devised away Part of the Lands devised before to the Son to a Stranger, and after declared by Parol, that his Intention was, that his Grandson should have his Lands which his Son should have had, to that the
14. A, devised the Residue of his Personal Estate to be divided among his four Children B, C, D, and E, and then devised his Real Estate to be sold for increase of his Children's Portions; after the Will another Child is born, that Child shall come in for a Share of the Money of the Real Estate, but not for any of the Residue of the Personal Estate, that being devised to the others by Name. 2 Chan. Rep. 210. 32 Car. 2. Coles v. Berries.

15. A being a Widower settles Land to raise 100 l per Annum for his eldest Son, and 100 l a-piece for his younger Children, such Children as he may afterwards have by another Wife will be equally intitled with those he had at the Time of the Settlement. Vern. 334. Mich. 1 Jac. 2. Braithwait v. Braithwait.

16. Devise of 1500 l in Trust for such of Children of A, as B should advise. B died not giving any Advice, and at B's Death there was only one Child living, but at the Testator's Death, there were five other Children living, who all died Intestate, but some of them left Children. Jefteries C. decreed, the 1500 l to be divided between the Child living at B's Death, and the Children's Children as were living at the Death of B. 2 Vern. 50. pl. 49. Pauch. 1688. Crook v. Brookings.

17. But on Appeal before the Commissioners they decreed that the only Child living at B's Death should have the whole 1500 l and thought the Grandchildren cannot take by the Name of Children where there are Children; But had there been no Children they might. 2 Vern. 105. pl. 105. Trin. 1689. Crook v. Brookings.

18. A, devised 200 l to purchase Lands to be fettle on B. and the Heirs of her Body, and if B. die without Issue then the Children of C. to have it (or Words to that Effect) so that it appears not by the Will, whether A. intended that the Children should have the Lands as Jointenants or Tenants in Common. B died without Issue. The Trustees afterwards purchase Land with the 200 l and settle it on D. and E. the two then living Children of C. and their Heirs; D. has Issue and dies; The Court would not help the Issue of D. against E. who claimed all by Survivorship; for the Chancellor 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 seem'd to be of Opinion that the Children of D. should have had a Moity; For where Money is given to two (being Personal Estate) it shall be several to them. 3 Ch. R. 214. Pauch. 1688. Sanders v. Ballard.

19. Devise of 201 l a-piece to all the Children of A. a Child born after the making the Will and before the Testator's Death shall take; Per Commissioner. 2 Vern. 105. pl. 103. Trin. 1689. Garbland v. Mayott.

20. A Man devised a Term for Years to his Daughter and her Children (she then having three Children) and also to such other Children as she should have, and the Children of those Children, the having other Children afterwards. But the Question was, whether they should have any Shares, and it was held that the Woman and her three Children took jointly each a fourth Part, and that the after-born Children took nothing; and that these Words were Words of Limitation, and not of Purchase, and it is as much for the Wife's Part, as though it had been

21. A Child born after Testator’s Death shall not take, where the Devise is of a Personal Estate, for it vested on the Death of Testator and shall not be devested. Per Ld. Keeper. 2 Vern. 545. Paish. 1706. in Case of Cook v. Cook.

22. Devise to B. and his Children, if B. has Children they take with him, but if he has none it is an Estate Tail. Per Ld. Keeper. 2 Vern. 545. Paish. 1706. in Case of Cook v. Cook.

-Jenk. 264 pl. 66.—So to the Men Children of his Body. Bend. 3d. cited per Richard-23. Devise of all the Rest of his Estate to and amongst his Grand-Children living at his Death; Per Couper C. they are restrictive Words, and can be of no other Use; otherwise if the Devise had been to his Grand Children; and decreed for the Grand-Children living at the Te-24. A Devise to all his Children and Grand-Children, extends only to those in Effe at the Time of the Will made, unless there were future Words, As all his Children and Grand-Children which should be born or living at his Death. Agreed per Council and Court. Ch. Prec. 470 Pach. 1717. Northey v. Burbage.25. A devised 3000 l. to all the Natural Children of B. his Son by J.S. Ld. C. Parker inclined that a Natural Child in Ventre fa mere could not take, for that a Bastard cannot take until he has got a Name of Re-26. A. has B. a Nephew, and C. a Niece; A. makes his Will, and devised Land to B. and C. for their Lives; Remainder to the Children of the said B. and to the Children of the said C. C. had then one Child, A. after made a Codicil, at which Time C. had two more Children. This Devise is as a future Devise, and takes in the Children after born, for the Word Children in the Will, extends to more than the Child born at the making the Will. 9 Mod. 104. Mich. 11 Geo. Bateman v. Roach.

(X. b. 2) Take by the Word Children &c. How.

1. A. Devised the Surplus of his Estate to B. C. and D. his Brothers, and the Children of his Brother E. equally to be divided. Whether the Children of E. shall severally take an equal Share with B. C. and D. or only a fourth Part among them? 2 Vern. 653. pl. 591. Paish. 1710. Bretton v. Lethullier.

2. A. by Deed in his Life-time settled Lands to such Uses as he should appoint, and in Default of such Appointment, to his five Daugh-2. by Will appointed an Estate for Life only to four of the five Daughters that were to take the Fee; for want of the Appointment it was objected by the Court, that it’s a Fee paffes not by the Will, but an Estate for Life only, yet the Reverlor passed by the Deed. But it was answered, that the Appointment by Will was
Devises.

This is not an Estate Executed, but Executory. Ibid.

3. A. devised an Estate to Trustees to settle on B. and the Heirs of his Body, taking special Care in such Settlement that it never be in B's Power to divest the Intail of the Estate given as aforesaid during his Life. Decreed B. should be only Tenant for Life without Impeachment of Wait. 2 Vern. 526. pl. 475. Mich. 1705 Leonard v. Ld. Suffex.

4. A. devised his Personal Estate to the Children of B. and C. Neither B. or C. had any Child at the making the Will, or at the Death of A. Per Cur. it shall be intended an Executory Devise, and to be such Children as they, or either of them, should at any time after have, and they to take per Capita, and not per Stirpes, they claiming in their own Right, and not as representing their Parents. 2 Vern. 705. pl. 627. Mich. 1715. Weld v. Bradbury.

5. A. had five Children, B. C. D. E. and F. of whom C. was dead, leaving Children, and A. by his Will bequeaths the Residue of his Personal Estate equally to B. and to C's Children, to D. and to E. and F's Children. — F. was living, and was married to J. S. who had been twice a Bankrupt, and therefore A. by his Will had made some Provision for her separate Use. It seems by what was mentioned by the Attorney General, and not denied by the other Side, that all the Sons and Daughters of A. had Portions given them before by A. in his Life-time, so that this was additional. Ld. C. King seem'd at first inclinat that the Children should take per Stirpes only; but at length decreed, that B. and the Children of C. and D. and E. and the Children of F. (being in all 14 of them) should each take per Capita, as if all the Grand-Children had been named by their respective Names; And that the Children of F. could not take according to the Statute of Distributions, or in Allusion thereto, forasmuch as F. the Daughter was living, and fo her Children could not represent her; and that to determine it otherwise, would be going too much out of the Will, and contrary to the Words, when Teflator's Meaning might be according to his Words, and that Meaning a reasonable and feasible one. 2 Wms's Rep. 383. Mich 1726. Blackler v. Webb.


7. H. by his Will gave 500 l. to the Relations of E. H. to be divided equally between them. E. H. had at the Teflator's Death two Brothers living, and several Nephews and Nieces by another Brother. Ld. King determined that as the Teflator had directed the 500 l. to be divided equally among them, he could not direct an unequal Distribution, and accordingly decreed them to take per Capita Cales in Equ. in Ld. Talbot's Time. 251. Mich. 1734. Thomas v. Hole.

(X. b. 3) What
(X. b. 3) Who shall take, and What, by the Word Survivor.

1. Make A. my Wife, and B. my Daughter, my Executrixes of all my Goods, moveable and immovable, equally to be divided between them; Provided, that either of them, to the whole Land shall remain to a Stranger in Fee; and B. enter accordingly; C. die without Issue; The Eldest Son shall take, and, if he die, the second Son shall take, that the Survivor be each others heir. The Eldest Son or Daughter, if any, to be the first in the Plural Number, and, if there are two, to be divided among the Survivors. The Eldest Son, if any, shall take in the Singular Number. Le. 166. pl. 230. 3. Le. 262. Mich. 30 and 31 Eliz. C. B. Hambleden v. Hambleden.

2. A. has three Sons, and devises to the Eldest Black-Acre, to the Survivor; the second White-Acre, to the third Green-Acre; and in case any of my heirs die without Issue, that the Survivor be each others heir. The Eldest Son shall take, and, if he die, the second Son shall take, that the Survivor be each others heir. The Eldest Son or Daughter, if any, to be the first in the Plural Number, viz. to be divided among the Survivors. Gouldsb. 100. pl. 2. S. C. Day was given over to argue it. Ow. 23. C. B. adjudged that the survivor should take all. And. 194. in pl. 229. cites S. C. to be devolved accordingly.

3. A. has two Sons B. and C. and devises part to his Son B. in Tail, and part to C. and says, If any of my Sons die without issue, then the whole land shall remain to a Stranger in Fee; and B. and C. enter accordingly; C. die without issue; He to whom the Fee was devized entered. Adjudged that his Entry was not lawful, and that the Eldest Son B. should have the Land by Implicitive Devise. 4. Le. 14. pl. 51. Mich. 32 Eliz. C. B. Anon.

4. A. hath three Daughters, and devieth to them 300l. a-piece, to be paid at the Age of 21 Years, or Day of Marriage, which should first happen, and if either of them should die before the said Times, then her Portion to be equally divided between the Survivors; and B. the eldest marries, and hath her Portion, and dies, leaving Issue; then the Youngest dies before she is married, or attains the said Age of 21; the second Survivors. Resolved per Ellis, Windham and Don't Cancellor, that the second Sister should have the whole; and if it was objected, that the Words (equally to be divided) did imply that they should be Shareers, yet that is to be understood reddendo singula singulis in Case two of them had survived. Freem. Rep. 301, 302. pl 365. Mich. 1673. Anon.

5. Devise of 1500l. to A. to be paid when he shall attain 21, to B. the same fo to C. and to D. and in case one or more of them die before, then his or their Legacy &c. to be divided among the Survivors. B. died in the Life of the Testator, yet B's Legacy shall go to the Survivors. 2 Vern. 207. pl. 192. Hill. 1690. Miller v. Warren.

6. A. devised a House to his Sons B. and C. in equal Moieties, and other Houses to his other Children in like Manner, and adds, but my Will is, that if any of my said Children shall die before 21, or unmarried, the Part or Share of the heir or her to dying shall go over to the Survivors; per Holt Ch. J. and decreed accordingly, if any of the Children die unmarried after their Age of 21, his Share shall go to the Survivor; but such Survivor shall have only an Estate for Life in such Share; And if B. die, by which C. has a Share of B's Part, and then C. dies, that which
Devise.


7. A. Copyholder for his own Life procured a Copy in Reversion to be granted to B. C. and D. for their Lives successive, but this was in Trust for A. and his Heirs; A. by Will devises the Copyhold after the Death of him and B. his Wife to the Heirs of his Body on B. if such Issue shall be living at the Death of him, his Wife or Survivor, Remainder to y. S. A. joint Issue living at his Death, but such Issue died living B. Per Wright K. the Word Survivor must not be rejected, and the Word (or) must be expounded (and) living at the Death of the Survivor; And to held the Remainder to J. S. good. But it that Point had been otherwise, yet J. S. had been well intitled as Heir at Law to A. and decreed it accordingly. 2 Vern. 388. pl. 357. Mich. 1700. Nichols v. Tolley, &c. al'.

(Y. b) Who shall take by the Words of the Limitation.

1. A. Had two Sons B. and C. and a Daughter D. and devised Lands to J. S. for Life, the Remainder proprinquoribns de Sanguine Puerorum of A. The Sons having no Children, but D. having two Daughters, neither the Sons nor the Daughters can take, for they are Pueri, and not de Sanguine Puerorum, but the two Daughters of D. shall take for their Lives; and if there were also Sons of Sons or Daughters, they should all take together, and Children born after the Remainder vested (which was after the Death of A.) take nothing, and the nearest of Degree in Blood shall take, and the worthief in order of Descent; For the Words import no Respect of Dignity, but of Proximity of Blood. Hob. 3. 5. in Case of Couden v. Clark, Hobart Ch. J. cit. 30 Aff. 47 and 30 E. 3. 27.

2. Per Babington if Land be devised to the College of D. and there is none such at the Time, but after such Corporation is made, the Devise is void, because there was no such in Record Notary at the Time &c. Br. Devise, pl. 5. cit. 9 H. 6. 23.

3. A Man deviseth to his Wife for 10 Years, Remainder to his Youngest Son (be having a Daughter) and to his Heirs for ever, and if either of his Sons shall die without Issue of his Body begotten, Remainder to the Daughter and her Heirs in Fee; the Younger Sons die without Issue in Vita Testamenti; Upon a Question whether the eldest Son should have the Lands in Tail or Fee by Intendment, or the Daughter it was held the Daughter should have them. D. 122. a. pl. 20. Mich. 2 & 3. Ph. and M. Anon.

4. A. has three Brothers B. C. and D. and devises his House in Pofsession of J. S. to his three Brothers among them, and his House in B's Possession to B. and be to pay R. W 5 l. to find him Schooling, or else to remain to the House, provided the House shall not be sold, but go to the next of the Name and Blood that are Males. A. dies; Afterwards B. dies without Issue; C. enters and dies, leaving Issue a Son; per three Justices the Son of C. shall have the Remainder, and this in Tail to him and the Heirs Males of his Body &c. Remainder to D. in like Manner; And also the first House devised to the three among them shall be also in Tail in every one of the Parts. And the Proviso against Alienation proves the Intention to make it a Tail. And the Words (or else to remain to the House) viz. Family, shall be intended to the Chief and
and most Worthy and Eldest Person of the Family &c. And the Words (that are Males) shall be construed in the Future Tenor. D. 333.

5. A. B. and C. three Brothers; A. has Issue and dies; B. purchases Land, and devises the same to his Son in Tail, and if he die without Issue, that it shall remain to the Lineage of the Father; the Son of A. the Eldest Brother shall have the Land, and not C. the Younger Brother.

6. A. feiled of Land in Fee, had Issue two Sons B. and C. and devised that if his Son B. die before Issue, to the Land descend to my Son C. then I will that my Executors shall have the Government of my Lands, and of my Son C. B. marry'd and died, leaving his Wife young with Child with a Daughter; Deviser died; the Daughter was born. Adjudged that by this Devise the Daughter was excluded from the Inheritance, and that C. should have the Land. 4 Le. 32. 26 Eliz. B. R. Anon.

7. Devise to second Son in Tail, and for Default &c. to the Heirs of the Body of his Eldest Son, and if he die without Issue, then to his two Daughters in Fee; Second Son dies without Issue living the Eldest, who has a Son. The Daughters shall have the Land, notwithstanding Witnesses swore that the Deviser declared his Meaning, that as long as his Eldest Son had Issue of his Body, the Daughters should not have the Land. 2 Le. 70. pl. 94. 29 Eliz. Challoner v. Bowyer.

8. Ejectton Firma. Upon Special Verdict the Cafe was J. S. had Issue three Sons, and devised his Lands to his second Son for 30 Years to perform his Will and pay his Debts, and made him his Executor, and if he dies within the 30 Years, that then his third Son shall have such Term as shall be Arrear of the 30 Years, and dies; the Eldest Son dies without Issue, and the Inheritance descends to the second Son, he dies within the 30 Years, having Issue; the Question was between the Uncle and the Nephew, it the third Son shall have the Land during the Reids of the 30 Years? And it was argued by Pigott for the Plaintiff, and Beaumont for the Defendant, and adjudged for the Uncle Plaintiff; for although the Term was Extinct in the second Son, yet this is a new Devise to the third Son, for the Words are, that he shall have such a Term &c. Cro. E. 128. pl. 1. Hill. 3 Eliz. in Scacc. Lowe v. Lowe.

9. Ufe limited to Executors; He makes but one Executor; There is Mo. 540. no one that can take. 2 And. 93. Mich. 32 and 33 Eliz. Sir Molie S. C. and P. Finch v. Bodyll.

10. Devise Manor de M. Seniofilio etjusdam Richardi Foster his Coifin, & Herediens sfit, and after devised his Manor de N. to Mary Walter for Life, and if she die, and then any of my Coifin Foster's Sons living, then I will my said Manor of N. to him that shall have my Manor of M. Foster had Issue George and John; George and Mary enter; George dies without Issue; John enters into M. and aliens it in Fee. Mary dies John living; John hasn't the Manor of N. because he had not the Manor of M. at the Death of Mary, and so was no such Person as might take by the Will. And. 306. pl. 315. Trin. 36 Eliz. Brown v. Peafe.

11. A. has a Nephew and a Niece, who are his next of kin, and he Pld. 116. devised his Lands to his Nephew in Tail; Remainder to the next of Kin of his Name. The Teller dies without Issue; if the Niece has left her Name, and says, that

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12. A devised Lands in N. in Tail, the Remainder to the next of Kin of his Name; at the Time of the Devise the next of Kin was his Brother's Daughter, who was then married to J. S. The Devisor died, the Tenant in Tail died without Issue. Adjudged the Daughter shall not have the Land, for she is not now of the Name of the Devisor, but of her Husband's Name. Cro. E. 576. pl. 23 Trin. 39 Eliz. in B. R. Jobson's Case.

13. A had Issue five Sons B. C. D. E. and F. C. had Issue Mary, A. devised to B. all his Lands in Tail, viz. To him and the Heirs Male of his Body, and if he die without Heirs Male of his Body, then he devised one Part of the said Land, (namning it) to C. and the Heirs Male of his Body, and to the other Son several Parts and severally to the Heirs Male of their Bodies, and then follows, so that my very Will is, that none shall have my Lands before mentioned but the Heirs Male of my Body, and their Heirs Male of their Body; And I further Will, that if all the Heirs Male of my aforesaid Son die and be spent, then, I will that John Sibb &c. shall have all my Lands to him, and to their Heirs Male &c. All the Sons die but D. Per the two Ch. J. the Land is entail'd to every Son, and Mary the Daughter of C. shall have nothing, but D. shall take. 2 And. 195. pl. 13. in the Court of Wards. Sibb's Case.

14. I give to A. and B. my Term for 60 Years for their Lives, and afterwards to such Persons as shall remain in my House at N. at the Time of their Decease; It was a Question whether one who was in Possession as Tenant at Sufferance at the Death of the Survivor of A. and B. shall be said to be in Possession to have Benefit of this Remainder? But little was spoken thereto, &c. Adjournatur. Cro. J. 198. pl. 26. Mich. 5 Jac. B. R. Mallet v. Sackford.

But all three Justices (Lea Ch. 1) being absent gave Judgment for the Issue of the eldest Daughter, though they differed in their Reasons. Palm. 204. Periman v. Pierce. ——Devise to A. Remainder to him that is next of Blood. A Person attainted may take by this Devise; Per Doderidge and Haughton J. 2 Roll. 256. in Case of Perin v. Pearce ——Bridg. 14. S. C. argued, but no Judgment.

15. A. having eight Daughters by three several Winters, devised his Land to his two Youngest Daughters by the last Winter for Life, the Remainder Present Contingent tis and Sanguinis of the Devisor; Youngest Daughter dies, leaving Issue. Per one J. the Eldest Daughter alone shall have the Remainder. Per two J. all the Daughters together shall take the Remainder. Palm. 11. Trin. 17 Jac. B. R. Periman v. Biford.

16. A. devised of Land in Fee makes Feoffment in Fee to his Use, and alter makes his Will, by which he devised that the Feoffees shall make Estate of the same Lands to all his Sons except H. and if all his Sons die without Issue, then the Remainder to a Stranger. Hurton said, that because H. was not excepted in the last Clause he had Estate Tail. Her. 57. Mich. 3 Car. C. B. Harris v. Marre.

Devise in Trust for his Daughter for Life, Remainder to the Second Son of her Body in Tail Male, and to every Younger Son with Remainder over, and says the Reason of his limiting it thus was because he thought the Eldest would be well provided for. She had a Son B. who died at a Year Old; After his Death, C. another Son was born; C. though now the Eldest, yet being the second by Birth, shall take
(Y. b. 2) Description. Who shall take. By Disjunctive Words.

1. A Having four Daughters B. C. D. and E. B. had Issue N. and died. A devises his Land to his Wife for Life, and after her Decease then equally to be divided amongst his Daughters or their Heirs; A. died; the Wife died; the Court was of Opinion that it was strongest for N. to have it by reason of the Word (Or) in the Disjunctive, for they laid if it was (and) it would give the Fee to C. D. and E. and not give B's Heir a fourth Part, but being (or) there is more Colour that the shall take a fourth Part by Force of the Devise. Ad- journatur. Godib. 363. pl. 455. Mich. 1 Car. B. R. Taylor v. Hodgskins.

shall take nothing, and that the Words Sistors (or) their Heirs, shall be construed Sistors (and) their Heirs. — If a Man devises his Lands to his Wife for Life, and after to his four Daughters and Heirs, equally to be divided between them, Share and Share alike, to hold to them and their Heirs for ever, and one of the Daughters die, having Issue a Son, and then the Devisee dies, the Will is void for a 4th Part 2 Sid. 53. Hill. 1657. B. R. Packman v. Cole.

2. A. devised Money in Trust for such of her Daughters, or Daughter's Children as should be living at her Son's Death. Some of the Daughters were living at the Son's Death, and had also Children, and others were dead, leaving Children. The Master of the Rolls decreed, that all the Children, as well of the living as of the dead Daughters, shall come in for their Shares. For the Word (Or) shall be taken for (And) otherwise the whole Devise will be void for the Uncertainty. And that it was the same as if the Devisee had been to such of my Daughters and their Children as shall be living at my Son's Death. Wms's Rep. 434. Patch. 1718. Richardson v. Sprag.
3. So if the Devisee had been to my Children and Grand-Children, my Children and Grand-Children would have taken. Per the Master of the Rolls. Ut sup.

(Z. b) Limitation.

Who shall take by it, being made to Things, and not to Persons.

1. A Devisees Ecclesa Sancti Andreae, it is a good Devise to the Parson of the Church, per Gauudy. Owen. 89. cites 21 R. 2. Devif 27.
2. A.
2. A. by Will gave 500l. to his Wife for Life, Remainder to the Parish Church of St. Helens, London, (which is an Impropriation). The Master of the Rolls decreed that this should not go to the Vicar or Stipendiary of the Church, but did belong to the Church-Wardens for the Reparations of the Church, and improving and adorning the same; and ordered that the same be applied accordingly. 2 Wins's Rep. 125. Hill. 1722. Attorney General v. Ruper.

(A. c) Who shall take.

By Relation to Testator's Death.

1. GOODS devis'd to A. for Life, and after the Death of A. to the Heir of B. B. dies in the Life of A. Decreed that the Goods should go to him that was the Heir of B. at his Death, and not to him who was the Heir at the Death of A. Vern. 35. pl. 34. Hill. 1681. Danvers v. the Earl of Clarendon.

2. 500l. to A. 500l. to B. 500l. to C. &c. and if any die, then his or her Legacy, and also the Residue of my Personal Estate shall go to such of them as shall be then living. Per Cur. these Words must refer to a certain Time, and that is when the Legacies become payable, which is at the Time of the Testator's Death, so that the Death of any of the Legatees afterwards, would not carry it to the Survivors. Ch. Prec. 78. pl. 68. Mich. 1687. Trotter v. Williams.

(B. c) Relation. Where the Bequest shall relate to the Time of making the Will, or to the Testator's Death.

1. If I devise all the Goods which I now have in such a Room, and after I put in other Goods they shall pass. Arg. But Holt Ch. J. ask'd how it would be if the Devisee put in other Goods? to which Broderick answered, that he would say nothing to that, but that it might be a Fraud. Holt's Rep. 244. admitted per Sir Edward Northey of the other Side, and cited Swinb. 418.

2. A Man devised all the Arrears now due, and unjustly detained from me the Dean and Chapter of York, to be employed in a certain Charity; and the Question was, Whether the Arrears incurred after the making of the Will, and a small Time before the Death of the Testator, and which were never demanded by the Testator, should pass; and per Lord Keeper not; for though a general Devise of all a Man's Goods will carry all he had at his Death, though purchased after the making his Will; yet here it is confined to the Arrears due at the making the Will. Decreed. Abr. Equ. Cases 201. Trin. 1701. Attorney General v. Bury.

3. A devised Lands to his Younger Sons at their respective Ages of 24, but that his Eldest Son should take the Rents and Profits till their said several Ages. A. died, and then the Eldest Son by Will gives all those Rents and Profits of the Lands to his Younger Brothers, but not to be paid them till 24, and died. The Master of the Rolls decreed that the Rents and
(C. c) Alterable or to be transferred and go over to another.

1. A Pollied of a Term devis'd it to his Wife for her Life and after Roll Rep. her Dec'ce to B. and C. his Sons, and if they have no Sons, equally and jointly together; But if it pleases God to leftow on them both Men Children, then my Will is, it shall be reserved and put out to the Life and Profit of both their Sons jointly together, or to one of them if to his baks been not Men Children. But if they no issue Male, then my Will is, after the Dec'ce of my Sons it shall be to f. S. A. made his Wife Executrix and died. The Wife allented to the Legacy. The Wife died. At which Time B. and C. had no Son, but afterwards a Son is born to C. Resolved that the Son of C. shall take previously. Cro. J. 394 pl. 7. Hill. 13 Jac. B. R. Blandford v. Blandford.

2. Devise of 12 l. per Annum for Life to A. and that if A. marry the Executor shall pay her 100 l. and the Rent shall cease; The Rent shall not cease till Payment of the 100 l. by two Justices, contra. Sand. 193. Osborn v. Wickenden. 29 Car. 2. B. R. Osborne v. Walleneden.

3. A has Four Sons B, C, D, and E. and being seised of Land in Fee devised to his Wife for Life, if she do not marry; But if she marry that
that B. presently after her death enter &c. and enjoy to him and the Heirs Male of his body, Remainder to C. and the Heirs Male of his body &c. The wife dies unmarried, yet her not marrying did not hinder but that the lands were entailed; for by the whole scope of the will it appears, that deviseor intended an entail with divers remainders, and rather then this intent shall be defeated, the words shall be construed thus viz. If she marry, B. to enter presently, and if she do not marry then B. shall have and enjoy to him and the Heirs Male of his body with the remainder over; and judgment accordingly. 3 Lev. 125. Mich. 34 Car. 2. C. B. Luxford v. Cheeke.

4. I give and devise my lands to my grandson R. the son of my son F. H. and to my granddaughter E. H. equally to be divided between them, and to the heirs of their respective bodies; and in default of such issue, I give the same to my granddaughter A. H. and her heirs for ever. The jury found that R. died without issue, and that A. H. married J. J. the executrix of the plaintiff. The ch. J. now delivered the resolution of the court upon this record; and said they were unanimously of opinion, that in this case no cross remainder ought to be allowed. He said the general rule in these cases is, that no estate shall arise, but where there is an express declaration of the party, or a strong implication to that purpose. But neither of these was in the present case; for the only words that give here any colour of doubt, are those, (and for default of such issue.) But those words may well refer to the word (respective,) as well as to the other words in the former sentence; and if so the executrix of the plaintiff is to take either of the two other grandsons dying without issue respectively; and as the plaintiff was of equal degree of kindred to the tenant with their brother and sister, this much confirms this construction. The only material case that seems of any weight against this opinion, was the case of *Ponies and Heynel, remainder (X) reported in sir Thomas Jones 172. and in other books. But this case materially differs from that in many respects; for there the words are, if they die without issue, which something implies, that both of them are co die first; likewise there was the word all, which intimates that the lands were to go all together; so there was not the word respective, and the first devisee was the tenant's daughter, the remainder-man only a nephew. He said likewise this circumstance of difference of kindred distinguishing the present case from that in 1 Dyer. 303. 326. and 4 levo. 14. Accordingly the court gave judgment for the plaintiff. Barnard. rep. in B. R. 367. Hill. 7 Geo. 2. and 443. Pach. 7 Geo. 2. Cumber v. Hill.

(D. c) Condition. By what words in a devise.

1. DEVISE that his lands (being fee simple) should remain in the hands of the wife his executrix for the term of thirty years for these intents and purposes ensuing, and if it wills, and his will and intent is, quare, if these words makes a condition? The matter was compromised at the request of the parties, but the opinion of the justices was bent that the entry of the heir was not lawful. D. 163. pl. 52. Trin. 4 & 5 P. & M.

2. The husband devised his lands to his wife for thirty years to the intents and purposes following (viz.) I will that she out of the profits,
Devise.

Profits pay Yearly to T. during the Term 30l. and appointed her to pay p. & M. some Legacies, and that she should be bound to the said T. S. to perform Anon S. P. the Will; she paid the Legacies, when she should have paid the 30l. and seems to T. S. to pay it over to the Legatees, and therefore the Heir entered for a Condition broken; but adjudged that this was not a Condition, but a Declaration of the Intention of the Testator; for to what Purpose should the Wife be bound to perform the Will, if this was a Condition; But Judgment was not given for the Parties agreed. And. 50 Pl. 126. Patch. 17 Eliz. Hub bard v. Spencer.

3. Devise of a Rent charge to his Younger Son towards the Edu- cation and bringing him up in Learning, it is not conditional, and he shall have the Rent though not brought up in Learning, and the Words (towards his Education) are only to shew the Intent and Consideration of the Payment of the Sum. 2 Le. 154 pl. 186. 19 Eliz. C. B. Anon.

4. G. devised his Lands to A. and devised also, that said A. should pay a Rent to B. and that B. might disfain for it; and if A. fail of the Payment of it, that the Heirs of the Deviseor might enter; the same is a good Diffreis and a good Condition. Le 269. in pl. 362. 20 Eliz. C. B. cites it as the Cafe of Shaw v. Norton.

Several of the Justices that the Plaintiff should recover, because the Will was upon Condition which was broke.—Dy; 348 a.b. pl. 13. Hill 15 Eliz. S. P. and seems to be S. C. and held accordingly by Dyer and Harper, contra Manwood and Moun ton and the Opinion of Wray and Saunders, the Ch J. and Ch B. in Pemian Manwood, ad Meniam was according to that of Dyer and Harper that both Penalities, viz. the Condition and Re-Entry and the Diffreis given to B. for Non-Payment are good Remedies for securing the Payment according to the Tellor's Intention; But Bought to make a Demand before the Diffreis taken.

5. M. made a Lease for Years rendering Rent, and for Default of Payment a Re-entry, with Covenants on the Part of the Leellite to repair the Mewages &c. and the Term continuing, the said M. by his Will in Writing, devised the same Land to the said Leallee for more Years than he had to come in it, rendering Yearly the like Rent, and under the same Covenants which he now holds it, and died, and afterwards the first Term expired, the Leellite does not repair the Houses, and the Question was, whether by this he has forfeited his Term, and adjudged that as to this it was not any Condition, and a Covenant it could not be, for a Covenant ought always to come on the Part of the Leellite himself, which cannot be in this Cafe, for he does not speak anything in the Will to bind him, but they are all the Words of the Deviseor himself, which are comprised in a Will, and it never was his Intent to have it to be a Condition, and therefore void as to the Leallee to bind him either by Way of Covenant or Condition. Poph. 8. cites it as as adjudged in C. B. 29 Eliz. Mitchell's Cafe.

6. A. Lellor devised to his Leallee for Years for the same Term he had Good. 74 4. before, and paying the same Rent and at the same Days and upon the pl. 1. Michel v. same Covenants, which were in the first Lease; Adjudged, that it is not like Covenant, and a Conditional Leafe, so that his Leallee should cease, it he did not perform the Covenants, for the first Covenants were only by Way of Covenant and not Conditional. Cited by Popham Cro. E. 283. in pl. as entred Mich. 39 & 30 Eliz. Rot. 649. and afterwards adjudged in Machin's Cafe.

(footnotes) and all the Court held that those Words do not make a Condition although they are in a Will; And Periam said, that those Words are void.—2 Show 49. cites Cro E. 258 Martindale v. Martin.
Devise.

v. Martin (but it should be Machin's Case cited in that Case) S. P. adjudged that it was not a Condition but only a Covenant or rather a Trust.

7. Devise to his Wife, proviso, and my Will is, that she shall keep my House in good Repair, is a good Condition. So Devise of Lands to B paying 10l to C, it is a good Condition, for C has no other Remedy. Le. 174. pl. 241. Trin. 30 Eliz. B. R. in Cafe of Creckmere v. Paterson.

8. Devise of 100l. to his Wife pro & Exemtion of her Dower it is a Condition that she shall not have the 100l. till she make a Discharge of her Dower. Cro. E. 274. pl. 3. Hill. 34 Eliz. C. B. Pett v. Baleden.

Land was devised for Years to J. N. Remainder by

9. If a Man devises Land to an Executor ad Vendendum, so if Lands are devised to one ad Sedendum 20l. to J. S. or paying 20l. to J. N. this amounts to a Condition. Co. Litt. 236. b.

10. If Lands are devised in Fee, upon Condition that the Devisee shall not alien, the Condition is void. Litt. S. 360.

11. A Man seld of certain Lands holden in Socage had Issue two Daughters, A. and B. and devised all her Lands to A. and his Heirs, to pay B. a certain Sum of Money at a certain Day and Place. The Money was not paid, and it was adjudged that thse Words, To pay &c. did amount in a Will to a Condition, and the Reason was, because the Land was devised to A. for that Purpofe, otherwise B. to whom the Money was appointed to be paid should be remediless, and the Lefsee of B. upon an actual Ejectment recovered the Moity of the Land against A. Co. Litt. 236. b. cites Crickmer's Case.

12. Devise to A. in Fee, on Condition if he does not pay to B. a certain Sum of Money, that B. shall have in Fee is a void Condition and Remainder; for it is contrary to Law. Finch 46. b.

13. Devise in Tail, on Condition to have Fee if the maray one of his true Sirname. The Tettator's Sirname was Mills, and the married one M. N. This was no Performance though the Husband was usually called as well Mills as Mill. Sti. 389. Mich. 1633. Olive v. Tong.

14. Mortgagee by Will remits Part of the Mortgage-Money and all the Interest of the reft be paid within three Years. If the Mortgagor does not pay within three Years, he loses the Benefit of the Bequest. Chan. Cales 51. Pach. 16 Car. 2. Glover v. Portington.

15. Devise to A. by proving himself to be the Son of B. and of M. his Wife. See Fin. R. 278. Hill. 29 Car. 2. Pigg v. Coldwell.

16. A has two Daughters, B. and C. A. devised to B. Lands in Fee Simple, and devised to C. Lands entailed on A. It B. will claim a Share of the entail'd Lands under the Settlement the must quit the Fee Simple Lands; for the Tettator having disposed of his whole Estate among his Children, what he gave them was on an implied Condition that each acquit and release the other; Per Cowper K. 2 Vern. 581. pl. 524. Hill. 1706. Noyes v. Mordant.

(E. c.)
(E. c) What a Condition, and what a Limitation.

1. THE Husband devised Part of his Lands to his Wife for Life, upon Condition that she should educate his Children in Learning; Remainder to his youngest Son in Tail, who died without Issue, and the Reversion in Fee came to the eldest Son; the Condition was broken. Adjudged this was not a Limitation, because there were express Words of Condition, but that the Devise over in Remainder to the youngest Son had destroyed that Condition, for if it had not, then the Heir at Law must have entered for the Condition broken, and so defeat the Estate of the Wife, which he could not do in this Case without destroying the Remainder. 10 Rep. 41 b. cites Hill, 3 & 4 P. & M. in C. B. Dr. Butts’s Case.

2. Words in a Will tending seemingly to a Condition shall not be taken in Law to be a Condition where it appears that the Intent of the Testator was, that all the Estate shall not be defeated. See Pl. C. 413. &c. Mich. 13 & 14 Eliz. Newys v. Larke.

3. If the Intent of Deviseor appears that another shall take Benefit of that and not the Heir, then it shall be a Limitation and not a Condition, and he in Remainder shall take Benefit of it; Per Doderidge Sergeant. Arg. 2 Brownl. 72. who says, this was the Reason of Judgment in Pl. C. [Vicb. 13 & 14 Eliz.] in Scholastica’s Case.

4. Devise that his Second Son B. shall have the Land for the Term of 31 Years, without Impeachment of Waite, to the Intent that he pay certain Debts and Legacies set down in the Will; Remainder after the said Term expired to the Heir Male of the Body of the said B. begotten, and further wills, that if B. die within the Term aforesaid, that then C. his Son shall have the said Term &c. and then shall also be Executor, but made B. his present Executor. B. entered, A. the eldest Son died without Issue; B. died within the Term leaving Issue; yet C. shall have the Residue of the Term; and per Manwcd it is Estate by Limitation in B. and he could not sell it, nor can it be extinct by Act in Law or of the Law, and it was a Lease determinable by the Death of B. and so shall be the Land of C. determinable on his own Death. 3 Le. 159. pl. 159. Trin. 26 Eliz. in Sacc. Vincent Lee’s Case.

5. Devise to A. but if she died or married, then to B in Tail, Remainder for want of Issue of B. to A to dispose at her Pleasure, and if B. survived A. then to C. B. died, living A. By two Juitices this is a Condition (but this Devise is good as a new Devise in Reversion on the precedent Condition, and not as a Remainder) but by one Juitice it is a Limitation. Le. 283. pl. 383. Hill. 29 Eliz. C. B. Jennor v. Hardy.

6. It was held that where one devises Land to his Wife for Life, Remainder to his Son and Heirs, and if he dies before the Age of 21 Years, then it shall remain to J. &. in Fee, and dies; the Son levies a Fine and dies before 21 Years. 7. S. all have the Land after the Death of the Wife, for it is a plain Limitation. Cro. E. 142. pl. 6. Trin. 31 Eliz. B. R. Mills v. Snowball.

7. A. devised to every one of his younger Sons, B. C. D. and E. to be paid when they severally come to the Age of 21 Years, and devised his Land to A. his eldest Son and his Heirs in Condition, that if he refused to pay, that then it shall remain to his younger Son &c. A. pays the Legacies to B. and C. but refused to pay to D. and E. D. enters into the Land in his own Right and the Right of E. upon the Heir of A. in 4 Q. Defect. 333
Devise.


8. The Testator being seised of Lands held in Borough-Englise, devised them to his second Son in Fee, upon Condition to pay to each of his Daughters 20l. a-piece at their respective Ages of 21 Years; the second Son was admitted, but did not pay the Legacies to his Sistres. Adjudged by all the Justices, prater Williams, that this was not a Limitation of his Estate so as to make it go to the next who was ineritable by the Cutoom, but it was a Condition, and the elder Brother shall enter for the Breach; it is true, if the Devise had been to the elder Brother upon the same Condition, it would have been a Limitation and not a Condition, it would have defended to the eldest Son, and he would not have been obliged to perform it. Cro. J. 56. pl. 2. Hill 2 Jac. B. R. Curtis v. Woolverton.

9. A devised certain Annuities to his younger Children, so as he had expressed in several Writings sign'd with his Hand, and that his Heirs shall have the Disposal of his Estate so long as he shall perform his Will, and if he fail be devised it to others. It was resolved that the Estate shall not cease though be way of Limitation without a Demand of the Rent, for it is payable in Nature of a Rent, and not as a Collateral Sum, and therefore Demand necessarry; Per Jones Serjeant. Arg. 2. Jo. 34. cites Cro. J. 144. pl. 4. Hill 4 Jac. B. R. Molineux's Cafe. 

10. A Devise was, that it S. shall pay to my Executors, then beshall have my Land to him and his Heirs. This is good by way of Devise, though not by Conveyance at Common Law. Per Coke Ch. J. 3 Bult. 109. Mich. 13 Jac.

11. A seised in Fee devised all his Lands to S. S. paying Debts and Legacies. On a Trial the Jury found as before, but did not find that S. S. had paid the Debts and Legacies, yet this was a good Verdict, because it was a Condition properly, and not a Limitation. See 2 Roll Trial, (A 2) pl. 5. cites Trin. 1651. adjudged between Johnson and Herman.


14. Though the Word Condition is used, yet the limiting of the Remainder ever makes it a Limitation. Per Hale Ch. J. Vent. 222. Patch. 24 Car. 2. B. R. in Lady Ann Fry's Cafe.

15. Devise
15. Devise of Lands to A. his Heir at Law, and other Lands to B. in Fee, and says if A. moleft B. by Suit or otherwife, he shall lose what is devise to him, and it shall go to B. Resolved upon the Entry and Claim of A. that B. is intitled to the Land of A. The Devise being to the Heir at Law. The Words if A. moleft B. &c. are Words of Limitation and not of Condition. 2 Mod. 7. Hill. 26 & 27 Car. 2. C. B. Anon.


Car. 171. by Bridgman Ch. J. that upon the Limitation it ceaseth without Entry or Claim.

17. If he misbehave himself, or neglect to pay my Debts and Legacies, then he to have 5 s. and left it in Direction of his Executor M. He was Heir at Law, and waving the Devise, neglected Payment. Decreed for M. and no Relief for the Plaintiff. 2 Chan. Rep. 391. 2 Jac. 2. Skinner v. Kilby.

18. A. having Lands in several Places, devised all to his Son B. in Geo. J. 292. Fee, and if he die without Issue, then he devised Part to H. his Nephew pl. 7. Mich. and died, B. entered and made a Devise of the Lands, and died without Issue, this is a Limitation by way of Remainder of the Part to H. his Nephew. 4 Mod. 69. Mich. 3 W. & M. in B.R. cited per Cur. to have been so adjudged.

19. A. feized in Fee devised to J. S. for 11 Years upon certain Trusts, and after he gave the said Lands to the first Issue Male of B. and the Heirs Male of his Body, and for Default to the 2d. &c. Provided they should respectively take upon themselves the Survant of Edge. And if they should not take the Survant &c. or should die without Issue Male as above, then to the first Issue of C. (who at the Time of the Devise had Issue a Son, which B. had nor) with Limitation to the 2d. &c. and the same Prov'd as above, and if they should not attain, then to D. for Life, and after to the Heirs Male of his Body, Remainder to the right Heirs of A. This Prov'd was held to be a Limitation and not a Condition, and therefore the Devise being void to the first Issue Male of B there being no such, the Devise to the Issue Male of C. shall take Place as a Remainder on the Expiration of the 11 Years, and it is like a Devise to a Monk, Remainder over. 12 Mod. 278. Pack. 11 W. 3. C. B. Scattergood v. Edge.

20. Lands are given to M. and the Heirs of her Body. But if she leave no Sons, and only two Daughters, the Elders to pay the Younger 300l and to have the whole Estate. There were only two Daughters, and the Money was not paid. On a Bill by the Younger for an Account of the Profits and Partition of half the Estate, Decreed at the Rolls to pay the 300l. with Interest from the Mother's Death in 6 Months, or account for the Profits of a Moiety, and the Moiety to be set out by Commissioners. Upon Appeal Wright K. order'd the Decree to stand as the Account of the Profits and Partition, but where the other Decree was, that Plaintiff should hold and enjoy, these Words were order'd to be struck out, the same amounting to a Foreclosure, but Defendents being an Infant must have a Day after the comne of Age to show Cause. 2 Vern. 479. Hill. 1704. Gundry v. Baynard.

21. A. by Will devised to M. his Niece, and the Heirs Male of her Body upon Condition, and provided that she intermarry with, and have Issue Male by one Survant Seats; and in Default of both Conditions, he devised to N. (at the same Manner) and in Default thereof he devised to B. for 60 Years if he so long live, Remainder to the Heirs of the Body of the said B. and their Issue Male for Ever. Adjudged that the Words of an Ex.
Devife.

Words (upon Condition &c.) though they are express Words of Condition, shall be taken to be a Limitation. 2 Salk. 370. Trin. 3 Ann. B. R. Page v. Hayward.

But where an Estate is to remain over for Breach of a Condition which is by Express Word of a Condition, yet it ought to be intended as a Limitation. Per Holt Ch. J. 11 Mod. 61. S. C. — 2 Roll. R. 425. the Serpant's Cafe, S. P. — They shall be according to the Common Law as Conditional, where it is not necessary to expound them contrary, as in Case of a Devife to an Eldest Son on Condition, it is necessary to take it as a Limitation, but otherwife in Case of such Devife to a Younger Child. Cro. J. 57. pl. 2. Hill. 2 Jan. B. R. Curtis v. Wolverton.

(F. c) What a Condition; And what a Trust.

Cro. E. 288. 1. A Devife certain Land to B. and C. his Wife, who was the Daughter of A. upon Condition that they within 10 Years should give so much of the Land as was of the Value of 100 l. per Ann. to F. F. and that he should find a Preacher in such a Place, and if they failed, their Estate to cease, and that then his Executors should have the Land to them and their Heirs, upon Trust and Confidence that they should stand feised to the same Uses. B. within the 10 Years made a Writing of Gift, Grant, and Confirmation, but no Livery nor Inrolment of it till after the 10 Years. The Executors refused to take upon them the Execution of the Will; yet it was adjudged, they should take the Land by the Devife, and that the Words upon Trust or Confidence, made not a Condition to their Estates. Mo. 594. pl. 806. Mich. 34 & 35 Eliz. Gibbons v. Marliward.

2. A. feised of Lands in Fee makes his Will and gives 20 l. to A. to be paid out of his Lands in one Year, and 20 l. to B. in two Years &c. and 50 l. to C. &c. and then gives all his Lands to J. S. generally. Per 3 J.; contra Jones J. This is a Trust and not a Condition. 2 Show. 36. pl. 28. Pach. 31 Car. 2. B. R. Frevk v. Lee.

J. that it is not Conditional but a Trust to pay. — 2 Jo. 113; S. C. and per Cur a Fee paifed, and Judgment for the Defendant; and afterwards affirm'd in the Exchequer-Chamber — 2 Show. 42. at the End of the Case obser.ves, that Pollexfen 599 mentions that Judgment was for the Plain- till (the Heir at Law) which he fays feems a Miftake.

3. A. makes J. S. and J. N. his Executors, and gives them 20 l. Legacy a-piece. He devifes likewise to his Executors 800 l. in Trust, for Payment of several Annuities to D. E. and A. for Life, far exceeding the Intereft of the 800 l. and makes B. Reditiary Legatee. The Annu- tants die, and a Surplus remain'd of the 800 l which was decreed to B. the Devife to the Executors not being Conditional, but the 800 l. was only deposited in their Hands in Trust for Payment thereof. Vern. 462. pl. 400. Hill. 1686. Cock v. Berilh.

4. Land was devifed to the Heir at Law, paying a Sum of Money to B. It was held in this Case, that paying did not make a Condition, because no one could enter for the Condition broken but the Devifee himself; but this would be a Trust upon the Land for raising the Money, and if a Purchafer had Notice of the Will, he should be affected with it; And in this Case it was faid, that in Case the Devife were to a Stranger paying 100 l. to A. that this makes a Condition, and that the Heir may enter for the Breach of it; but when he has entered he shall be a Trustee, so far as to secure the 100 l. 2 Freem. Rep. 278. pl. 349. Hill. 1704.

Anon. (G. c) Con-
(G. c.) Conditions. Whether broken or not, or how to be performed.

1. It a Man devise his Land to J. S. paying 100l. to W. N. this shall be intended Fee-Simple; and if he does not pay it in his Life, yet if his Heir or Executor pays it, this suffices; Quere of his Assignee. Br. Trench, pl. 18, cites 29 H. 8.

2. Devise of Land to B. upon Condition to pay 5l. out of the Land Quarterly to J. S. and if not paid that J. S. may devise, and adds further, that his Will is, that the Rent be paid accordingly; the Rent need not to be demanded, and if not paid the Condition is broke and the Heir may enter. D. 342. a. pl. 13. Hill. 18 Eliz. Anon.

3. A bequeathed a Term to his Wife, provided that if she marry from the House, Then &c. Popham Ch. held, that her marrying at all is a marrying from the House; for the was no longer Widow of that House, though he married with one of that Kindred and who had no other House, but would dwell in the House bequeathed. Wnt. Off. Executors 253, 255. cites 37 El. B. R. Low v. Carter.

4. Condition of a Devise of Lands was to permit the Executor to take the Goods then in the House or else the Estate to be void. A Verbal Dental is no Breach, but flushing the Door against them, or laying Hands upon them to keep them out, or any such like Act done, is a Breach. 8 Rep. 91. Mich. 7 Jac. Fracces's Cafe.

5. A Clause in a Will was, that if any Legatee should refuse to pay it appearing to his Executor what was justly due from them at his Death, either by Specialty, or otherwise, that such Person was to have no Beneficit from the said Will. A Legatee had been a Debtor for 1500l. but Effects of Legatee to his having afterwards come to Testator's Hands the Court referred it to a Matter to examine how much and to report the same specially. Fin. R. 25. Mich. 25 Car. 2. Blew v. Baker.

Court decreed against the Legatee, and dismissed his Bill. Fin. R. 567. Trin. 50 Car. 2. S. C. on a Bill of Revivor.

6. A Legacy is given on Condition not to interrupt the Will. Per Condition Matter of Rolls, where is Probabilit; Causa bitandit, the Legacy is not forfeited by contesting. 2 Vern. 91. pl. 86. Mich. 1685. Powell v. Morgan.

In Estate: Legatee brought a Bill against the Executor, for which there was very little Colour, among other Particulars demands the Legacy. Lord Chancellor thought the Suit very frivolous, and though be should not make the Legacy forfeited, yet declared if the Plaintiff did not pay the Costs the Executor was cut of Purse, he would dismiss the Bill. Select Cases in Canz. Lord King's Time 1. Pach. 1724. Nutt v. Burrell.

7. If a Man devises his Land to his Daughter, upon Condition, that after the Death of J. S. at or before her Age of Twenty-one Years, and if she refuse, then the Land shall be to another, and J. S. dies before her Daughter Age of Twenty-one. Yet the other may not enter till the Daughter having accomplished her Age of Twenty-one. Skin. 320. Trin. 4 W. & M. never relied on the Death of J. S. or relied on the Age of the Daughter. M. in B. R. Thomas and Howell.

W. R. at her Age of Seventeen; Adjudged that the Condition was not broken, it being becoming incapable by the Act of God. Adjudged in C. B. and Judgment affirmed in Error in B. R. 1 salt. 17o. Trin. 4 W. & M. Thomas v. Howell. —— 4 Mod. 66. S. C. 5 Judges were for affirming the Judgment but Gregory J. e contra.

4 R.

8. A.
8. A Devise was of Lands on Condition to pay 20 l. at a Day certain. The Money was not not paid at the Day. It was adjudged to be no Breach without a Demand and Refusal; cited per Ld. Wright, Ch. Prec. 161. Pach. 1701, as the Case of Robinson v. Holmes in C. B.

9. Legacies are given to A.B. and C. upon Condition, that as they came of Agethey should release all Claims to the Testator’s Estate. Per Ld. Keeper Wright, this Condition is to be construed distributively, that such only should forfeit their respective Legacies who should not release, and the others not be prejudiced. 2 Vern. 478. pl. 432. Hill. 1704. Hawes v. Warner.


10. The Father gave a Legacy of 40 l. to his Son upon Condition that he should not disturb the Trustees. They applied to the Court for an Execution of the Trust, and that he might either join with them in a Sale or lose the Legacy; and decreed accordingly, per Ld. Harcourt. Wms’s Rep. 136. Hill. 1710. Webb v. Webb.

(H. c) On Condition.

Notice in what Cases necessary, and what shall be said Notice.

1. THE Testator had a Wife and three Sons, G. W. and T. and he devised his Lands to his Wife for Life, and after her Death to G., his Eldest Son and his Heirs for ever, and if he die without Issue of his Body, then to W., the second Son and his Heirs for ever; and if both of them die before they have Issue of their Bodies, then to T., the Youngest Son and his Heirs for ever; and if G. shall enjoy the Lands, then be shall pay to each of the Younger Sons 20 l., and if he refuse, then the Lands shall remain to W. for ever, paying to the Eldest and Youngest Son such a Sum; and if W. enjoy the Lands, then he likewise to pay to T. 20 l. the Testator died, and then G. died without Issue, and afterwards the Wife died, then T. made his Will, and his Wife Executrix, and died, and W. the second Son entered and was seised in Tail, but did not pay the Money to the Executrix of T. now if this was a Conditional Estate to the second Son as it certainly was to the Eldest, then he ought to have given Notice to the Executrix, when he intended to make his Entry, that she might be there ready to demand the Money; because there can be no Refusal to pay, without a Demand, and the Executrix could not tell when to demand it, till she had Notice of the Entry. Poph. 10. Hill. 33 Eliz. Ward v. Downing.

2. A devised Annuities to his Younger Children out of Lands in N. and adds, If my Heir do not perform my Will herein, then I will, that my Executors and the Survivors of them shall have the Order and Disposition of my said Lands to perform my Will, and my Heir to have no meddling therewith, but so long as he shall perform my Will he shall have the Order and Disposition of them, and if by Default in my said Heir, and also in my said Executors my Will is not performed, then I will, that all my said Lands shall be to my Younger Children during their Lives, and made B. his Eldest Son and C. and D. two of his
his Younger Children, and J. N. and J. S. Executors. The Heir does not pay, nor the Executors; Resolved the Younger Children cannot enter, because there must be Default in the Heir and also in the Executors before such Entry, and Default cannot be in the Executors, till Notice to them of the Non-Payment by the Heir which they cannot be intended to know without express Notice, and without such Notice no Condition is broken to give the Younger Children or any of them Title to enter. Cro. J. 145. pl. 4. Hill. 4 Jac. B. R. Molineux v. Molineux.

3. A makes his Will in the Presence of B. some Years before his Death, and deviled Land to C. the Wife of B. on Condition to pay a great Sum of Money. A dies, the Will was suppressed several Years by the Wife of Devilor. B. sues in Chancery by which the Will is produced, the Condition is not performed. Neither B's being present at the making the Will, nor its being in Chancery, though at his own Suit, or being produced in any other Court in which himself is Party is any Notice to avoid the Estate for Non-payment while the Will is in Question. See Palm. 164. Pach. 19 Jac. B. R. Saunders v. Carwell.

4. A Devile was to fix Persons to pay certain Sums for Maintenance of They con-

an Amis-baise &c. and if two obligation's or other Cause the Trusts were not performed, then to J. S. upon the same Condition, and if J. S. failed then to the Mayor and Commonalty of London upon the same Trusts. The Six did not perform the Trusts. Whereupon J. S. entered and the Heir at Law of the Devilor entered upon him, and a Fine with Proclamations was levied and five Years paid. And the better Opinion was, that the Mayor and Commonalty of London were bound to pay the Money appointed by the Will, though they had no Notice that the Six Persons or J. S. had failed, though indeed the Cafe is adjudged against them as being barred by the Fine and Non-claim. Per Rainford J. Vent. 201. cites Cro. C. 505. (pl. 20. Hill. 15 Car. B. R.) The Mayor and Commonalty of London v. Alford.

Points the Court was not so unanimously resolved. Cro. C. 152. 7. 5. C.

In Alford's Cate the Debate was occasioned by the Special Penning; for it was thought, that if through Obligation the Trusts should happen not to be performed; now there could be no Obligation of that which they never knew, and therefore there is some Opinion there, that the Mayor and Citizens of London ought to have had precedent Notice; Yet the Judgment is contrary for they could not have been barred by the Fine and Non-claim if Notice had been necessary to the Commencement of their Title, and it is not found whether those to whom the Estate was deviled before had Notice; Per Hale Ch. J. Vent. 205. Pach. 24 Car. 2. B. R. in Case of Fry v. Porter.

5. A Devile of Lands paying several Sums of Money to several Persons Strangers; the Question was, Whether in this Case there being Notice whether he was not bound at his Peril to pay it, although the Land did depend upon it, yet it was held he ought to take Notice of it at his Peril where-ever they were. Cart. 94. Arg. cites Pach. 14 Car. 2. Newel v. Brown.

6. Where the Devilee, who is to perform the Condition, is Heir at Law, Notice of a Condition must be given to him; because he having a Title by Decesnt, need not take Notice of any Will, unless it be signified to him, and so is Fraunces's Cafe 8 Rep. But where the Devilee is a Stranger, and not Heir (as in the Principal Cafe) he must inform himself of the Estate deviled to him, and upon what Terms; per Rainford J. Vent. 200, 201. Pach. 24 Car. 2. B. R. in Cafe of Fry v. Porter.

7. Lands were deviled to the Heir for 60 Years, on Condition not to S Rep 52 a. disturb the Executor on removing the Goods. Resolved that he should not lose his Estate upon a Disturbance before he had Notice of the Will. Mach. 7. Jac. 3. The


8. The
8. The Husband devised his Lands to his Wife for Life, then to his Eldest Son and his Heirs, paying to his Youngest Son 40l. and leaving his said Eldest Son, then to come to the Youngest Son and his Heirs; the Money was not paid by the Eldest Son as directed by the Will, and the Question was, Whether his Estate was forfeited by Non-payment of the Money, without Notice of his Father's Will? It was inferred for him that it was not forfeited, because it shall be presumed, that being the Eldest Son he entered as Heir, which is a better Title than he had by the Will; it is true, if the Devise had been to a Stranger, in such Case, as he takes Notice what Estate he hath by the Will, he is bound to take Notice upon what Condition it is given; but the Heir at Law is not bound so to do; for which Reason it was adjudged, that Notice must be given to him of a Condition annexed to his Estate. Lutw. 804. 809. Trin. 8 W. 3. Whaley v. Read.

(I. c) Condition Broken.

Relieved, or not. In what Cases.


2. There was a Clause in a Will that if any Legatee should binder or oppose the Execution of his Will, such Person should lose the Legacy bequeath'd; yet the Court held that a Suit in Equity in Opposition was no Forfeiture. 2 Ch. R. 105. 27 Car. 2. Mofely v. Mofely.

3. J.W. having five Daughters, devises his Lands to W.W. his Son and the Heirs Male of his Body, Remainder to W.W. and his Heirs, upon Condition that he should pay 500l. to such of his Daughters as should be then living. And if Sir W.W. should refuse to pay the 500l. then he devis'd it to his Daughters and their Heirs. Sir W.W. dies living W.W., the Son who was Tenant in Tail, and devised this Reward to W. the Eldest Son of his Cousin J.W. of B. whereas his Eldest Son was named A. W.W. the Son dies without Issue; A. the last Devisee refused to pay the 500l. to the Daughters for three Years, but now professed to pay it, provided he might have the Land. The Ld. Chancellor held, that this Condition being for Payment of Money, although in Stric- tness of Law the Estate was forfeited by the Non-payment of the Money, and although there were an express Limitation to the Daughters, yet this was but as it were a Mortgage or Security of Money, and the Daughters being paid the said Money and Damages, they were at no Damage; and so decreed that A. paying the same should have the Land. 2 Freem. Rep. 9, 10, 11. pl. 9. Mich. 1675. Wheeler v. Whitehall, & al.

4. Where a Legacy was given on a Condition to be performed by a third Person, who refused, but afterwards complied, though the Money on Refusal was bequeath'd over to the Executors of Testatrix, yet the Forfeiture was relieved, because the deviling it over to the Executors was no
Devise.

no more than what the Law implied, and in the Principal Café the Condition might be performed afterwards, and so where any Compensation might be made for it. The Case was this, a Feme Covert having Power to devise Lands, devise them to her Executors to pay 500l. out of them to her Son at 21, provided if the Father of the Son did not give a sufficient Releafe to the Executors of the Goods and Chattles in such a House, then the Devise to be void and go to the Executors. 2 Vent. 352. Paleh. 33 Car. 2. in Canc. Cage v. Ruffiel.

5. A Devise of Lands was made to the Eldest Daughter paying 100l. to the second Daughter, and 100l. to the third Daughter &c. and if the Eldest Daughter did not pay the 100l. to the second Daughter by such a Day, then he devised the Land to the second Daughter, he paying her Sistera Portions by a certain Day; and if she did not pay, then he devised the Land to the third Daughter &c. It was resolved this was not in the Nature of a Mortgage to be redeemable after the Time of Payment was over; but that, the Eldest Daughter not paying the Time appointed, the second Daughter should have the Land, and the Eldest had no Relief. 2 Freem. Rep. 206. pl. (286. b.) Mich. 1695. cited by the Master of the Rolls as Man's Case.

(K. c) Condition broken.

Made good in Equity, tho' the Devise is void in Law.

1. A Devise made to a Daughter to pay her a Sum of Money if she will be divorced from her Husband; the Gift was made good, tho' the Condition was void. Toth. 141. cites 6 Jac. Tenant v. Bray.

2. A devise to his Wife for Life, and after to his Eldest Son, on Condition that it his Wife should be with Child, 80l. should be paid by the Heir at Law to the Child after the Mother's Death; She had a Child, and after the Mother and Eldest Son convey away the Lands to a Purchaser; upon Notice proved of the Will, the Money was decreeed to the Daughter, and declared it was a Trust devised to go with the Land, and yet this Will was void in Law as to the Legacy, seeing he who was to have the Benefit of the Breach of the Condition was Heir, and so the Party that should pay the Legacy. 3 Ch. R. 93. 24 Car. 1. Smith v. Attemby.

(L. c) On Condition.

Extent thereof.

1. A Seised in Tail of Lands in D. makes an Exchange with B. for Black-Acre; B. being also seised of Green-Acre and White-Acre, devises Green-Acre to his Heir at Law, and White-Acre to a Stranger, Provided that he does not re-enter or claim any other of his Lands, and if he do, then the Estate devised to cease. A. dies; the Heir enters into the eutailed Lands, and waves Black-Acre taken in Exchange, and before any other Entry, the Heir of B. enters upon Black-Acre, which
was given in Exchange by B. This was held no Breach of the Condition, because Black-Acre was not B's Estate at the Time of the Devise, and therefore out of the Condition. Godb. 99. pl. 115. Mich. 28 and 29 Eliz. C. B. Barber v. Topfield.

2. A. charged Lands with Payment of Annuities to Younger Children, and if my Heir do not pay them, then I will that my Executor shall have the Order &c. of my Lands to perform my Will, and my Son and Heir to have no meddling therewith. It was held by all the Judges against Popham, that Heir here is Nunnus Collectivum, and extends to the Heir of the Heir of the Devisor, and so to every Heir; though Popham thought that the Intent should not be stretched in a Condition. Cro. j. 135. pl. 4. Hill. 4 Jac. B. R. Molineux &c. Molineux.

3. A. devised to B. all his Lands in H. for his Life, Remainder to his first and other Sons in tail &c. and all the Rest and Residue of his Estate Real and Personal to B. and the Heirs of his Body, upon Condition that he pays his Debts and Legacies. Ld. Cowper held that the Condition extended to both Devises, as well to the Estate in H. as to what was paid by the General Devise of the Rest and Residue of Real and Personal. 2 Vern. 594. pl. 533. Mich. 1707. Griminton v. Ld. Bruce.

4. A. devised 1500l. to B. C. and D. to be paid at their respective Marriages, as well Principal as Interest, and if any of them die unmarried, her Legacy to go to the Survivor or Survivors. C. married and received her Share; D. died unmarried; per Cowper C. the Condition, though not again repeated, shall go to the Whole, as well as to what accrued by Survivorship as to the Original Devise. 2 Vern. 620. pl. 556. Mich. 1708. Moore v. Godfrey.

(M. c) Condition Precedent.

What is.

Though in Grants Estates shall not be till the Condition precedent be performed, yet it is otherwise in Wills, for Wills shall be guided by the Intent of the Party. Cro. E. 219. Jennings v. Gower.—Le. 229. S. C.

2. A. by Will in Writing devised his Leasehold Estate to J. D. and (being failed of other Land in Fee) after devised to his Executors all the Residue of his Estate, Mortgages. Goods &c. his Debts paid and Funeral Expenses discharged. In this Case the Payment of the Debts &c. is a Condition Precedent, so that the Executor cannot have it before the Debts paid and Funerals discharged. See Trial (A. g) pl. 15. cites Hill. 10 Car. B. R. Wilkinston v. Meream.

3. A. devised a Term for Years to his Wife for Life, and after her Death to the Child he was then enfrant with, and if such Child die before 21, then he devised it as to one third Part to the Wife, her Executors and the other two Thirds to J. S. The Wife was not enfrant at the Time of the Will, yet the Lord Harcourt held the Devise good to her of such third Part of the Term. Ch. Prec. 316. pl. 241. Mich. 1711. Jones v. Westcombe.

(N.c)
(N. c) What shall be a Determination of the Condition, Limitation, or Contingency.

1. Devise to A. and his Heirs, and if he die before 24 and without Heir of his Body, then to B. If A. attains 24 he has a Fee. D. 124. A. pl. 38. Mich. 2 & 3 P. & M. Anon. 2. A Man deviseth his Lands to his Wife de Annu in Annum till his Son shall come to the Age of 20, and dies; the Wife enters, the Son dies before he attains 20 Years. Resolved, the Interest of the Wife was determined; but by Dyer, it the Devise had been until the Son should or might come to the Age of 20 Years, there, notwithstanding his Death, the Estate of the Wife had continued. Mo. 48. pl. 143. Patch. 5 Eliz. Anon. 3. If any of his Sons shall alien or devise any of the Lands devised before 30 Years of Age, that then the other shall have the Estate; the Eldest, before his Age of 30 aliened the Land; the youngest Son before his Age of 30 Years enters for the Alienation, and after, before his Age of 30 Years aliened the same. Adjudged, that after the Entry for the Alienation, the Land is discharged of all Limitations. Owen 8. Hill 30 Eliz. C. B. Spittle v. Davis. 4. Termor for Years of a Clofe devised his Clofe to A. after he shall attain 22 Years of Age, and if he dies within the Term, the Remainder of the Term to B after he shall attain the Age of 22. A. attained 22, and entered and died within the Term, and after B. died within the Term under 22. The Executors of A. shall have the Term and not the Executors of B. nor of the Testator himself. The Devise to B is expressly limited upon a Contingency, and his dying before the Contingency happened, destroyed the Contingency and makes the Devise by Matter Ex post Facto void. 2 Sid. 130. 151. Hill 1659. & Patch. 1659. Fynimore v. Croftord. 5. A. devised Land to B. for 30 Years after the Death of C if C. die within Ten Years next. 2 Sid. 151. cites it at held per Popham, 1 Rep. 155 b. that if C. survives the 10 Years the Devise was utterly void, and that the entire Term palled to B. the first Devisee, and says that now the Court held this for good Law, in the Case of Fynimore v. Croftord. 6. A. poftfeft of a Term, devised it to his Wife, and after her Death to B. his Son (being beyond Sea) when he comes back, otherwise C. another Son to have the Term. The Wife died, C. in the Absence of B. entered, and adjudged that the entire Term was in C. cited per Glynn Ch. J. 2 Sid. 152. as Rotham’s Cafe. 7. Devise of 600 l. to B. to be paid within six Months after my Death. After, in another Part of the Will, my Will is, that if B. die before 21, I give the 600 l. to C. Testator died and after six Months, but before B. was 21, viz. at 19, the Executor gave 600 l. B. by Will bequeathed it to J. S. Ld. Shalshbury decreed the 600 l. to C. but upon Rehearing by Ld. Nottingham, allified by two Judges, it was decreed that the Security was a good Payment, and that the Will having taken Effect by Payment at the End of six Months, the Property was absolutely vested in B. and the Contingency at an End; for where a certain determinate Time is appointed for Payment of a Legacy, and afterwards a Contingent Clause is added touching the same Legacy, it will be inconsistent unless
unles the Contingency happen within the Time appointed for Payment.


8. Teller devized his Estate to his Executors for 15 Years after his Death, with a Power for them to nominate which of the Sons of N. M. should pass the said Lands. The Court directed the Executors to nominate one within a Fortnight, otherwise the Court would nominate one of them. Fin. Rep. 53. Hill. 25. Car. 2. Mofley v. Mofley.

9. A. devized 600L a-piece to B. and C. to be paid at 21, and gave the Residue of his Personal Estate to G. and also his Lands; but if either die in their Minority, the Survivors should be Heirs in equal Proportions.

G. died under Age, B. being of Age but not C. and decreed that a Majority of the Residue upon the Death of G. immediately vested in B. and C. and was no longer subject to any Contingency on the Death of C. should he die under Age. Fin. 436. Mich. 31 Car. 2. Burgage v. Whitwich.

10. Sir H. M. being Jesied in Fee of Thirty-five Share in the New-River, and having a Son by the first Venter and Five Children by the Second Venter, devized to his Five Children by the second Venter five Shares, fell to H. and his Heirs one Share, to A and her Heirs another Share, provided that it any of his said younger Children die before they shall have attained his or her Age of Twenty-one, or be married, that then the Share of such Child or dying shall go to the Right of thesaid Younger Children Share and Share alike. H. dies unmarried before Twenty-one; and after A. dies being married, and adjudged upon a Special Verdict, that the Part of H's Share which was in A. shall go to the Heirs, fell, her Brother of the same Venter and whole Blood, and not to the Son and Heirs of Sir H. M. by the first Venter. Skin. 339. pl. 5. Patch. 5 W. & M. in B. R. Middleton v. Swain.

11. A Man possessed of a Term, devized it to Infant in Venter so more if it should be a Son; and if it should be a Son and die during his Minority, then he devized it to his Grand-Son, after which he died, leaving his Wife Executrix, and the Child was after born, and proved a Daughter, and it was adjudged without Argument that the Executrix, and not the Grand-Son, should have the Term, because the Grand-Son was not to have it but upon a precedent Contingency, viz. the Birth of a Son and his Death in his Infancy, which Condition must be first performed, and it appears plainly that the Intent of the Teller was, that he should not have it otherwise. 12 Mod. 128. Trin. 9 W. 3. Grafton v. Warren.

12. A. has four Children B. C. D. and E. and devises a House to each of them, and the Heirs of their several Bodies; and then adds, but my Will is, that if any of my said Children die before 21 or unmarried, the Part or Share of him so dying shall go over to the Survivors. B. died after his Age of 21, but unmarried. Per Holt Ch. J. B's House shall go over to the Survivors; And if C. dies of Age and unmarried, his shall go too; But what goes over on either of their Deaths shall not go over a second time; And that by the Devise over only an Estate passed to the Survivors for their Lives in such Shares; and decreed accordingly. 2 Vern. 386. pl. 356. Mich. 1700. Woodward v. Glassbrook.

13. A. devized Portions to B. C. D. and E. to be paid at their respective Ages of Twenty-one or Marriage, and if any of them die before the time of Payment, or without Issue, then his or their Share to go the Survivors or Survivor of them and his Heirs. B. died without Issue under Age and unmarried. The Matter of the Rolls held that D's Share was liable to the Contingency of Surviving till it came to the lads, and that therefore B. the Plaintiff is not yet intitled to have his Share of D's Principal. But not Direction being given as to the Interdict in the Will, it was decreed that B. have a pro-portionable
portionable Part of the Interest during his Life, else the Interest must die till it come to the laft, which would be inconvenient, though in Cases not so circumstanced the Legatee has not been allowed the Arrears or growing Interest, but it has fallen into the Residuum of the Personal Estate. Ch. Prec. 528. pl. 325. Pash. 1719. Nicholls v. Skinner.

14. A being seised in Fee, and having three Sons, devised Black-Acre to Giles his Eldest Son and to his Heirs, and White-Acre to Edward his second Son and his Heirs, and a Rent Charge of 50 l. per Ann. issuing out of White-Acre to Roger his Youngest Son and his Heirs; Proviso, that if either of his Sons should die without Issue, living the other two, so as his Estate in Lands should come to the other two Sons, then the Rents should cease. Giles died leaving Issue John Peacock the Defendant; and Roger died without Issue; so that this Contingency could never happen, because Giles had Issue, and he being dead, and Roger like-wise without Issue, their Estate in Lands could never come to two, where Edward alone was surviving, therefore the Rent-Charge must descend to the Defendant as Heir at Law, being the Son of Giles, the Eldest Son of the Testator; for this is an Executory Devise to two on the Contingent of one dying in the Life-time of the other two, which Contingent must arise within the Compuls of one Life, otherwise it is void; for it is plain that the Testator intended this Benefit of Survivorship during his Sons Lives only; And the Court being of that Opinion, Judgment was given for the Defendant. 8 Mod. 347. Hill. 11 Geo. Parlia v. Peacock.

15. A seised in Fee devised his Lands to B. his Son and only Child in Tail General; and if B. should die without Issue and M his Wife survive him, then the Wife to have the Premises for Life; Remainder to C. his Sister for Life; and after her Death (B. being dead without Issue as aforesaid) then the Remainder to R. and his Assigns for ever. A died; M. died living B. afterwards B. died without Issue, and C. enter'd and enjoyed for her Life, and being Heir at Law on the Death of B. without Issue, the Question was between the Heir of C. and R. the Devisee of the Fee, Whether this Contingency of B's dying without Issue in the Life-time of B. was annexed as well to the Devise to R. as to the Devise to C. so as to prevent its taking Effect; And this Matter coming on at Chelmsford Affices, and being by Consent made a Case to be determined by Mr. Julius Reynolds who tried the Cause, he took Time to consider of it, and then delivered his Opinion, that the Contingency extended to all the Devises. 2 Wms's Rep. 390. Mich. 1726. Davis v. Norton.

16. A bequeath'd some South-Sea-Stock and Annuities to Trustees to apply the Dividend, for the Maintenance of E. his Grand-Daughter till 21 or Marriage, and at that Age or Marriage, with Consent of F. N. and J. S. they should transfer the Stock &c. to her; But if she marry without their Consent, then the Executors Trustees to pay her the Dividends during her Life, and after transfer the Stock and Annuities to her Children, and if she die without Issue, then to go over. E. lived to 21 and never married. Ld. C. King held that E. being 21, she had an absolute Interest vested in her, and that the Forfeiture must be intended only of Marriage without such Consent before 21, and decreed the Stock and Annuities to be transferred to her. 2 Wms's Rep. 547. Trin. 1729. Desbody v. Boyville.
(O. c) Entry by the Heir for the Condition broken. In what Cases.

1. A Man devises his Land to sell by his Executors, and to make Distribution for his Soul and dies, and A. and B. tender'd Money immediately for the Tenements, but not to the Value, and the Executors refused, and held the Land in their Hands by two Years, and sold more dear, and took the Profits to their own Use, without distributing any Thing for the Soul &c. And because they refused to sell upon the Tender, and converted the Money to their own Use, the Heir recovered against them in Alfise; Quod Nota. Br. Devise, pl. 19. cites 38 All. 3.

2. If Executors or other who are put in Trust by Devise to sell &c. will not perform the Trust, the Heir may enter; per Thorpe; quod non negatur. Br. Devise, pl. 46. cites 39 All. 17.

3. If a Man devised a Land deviseable in Fee, devises the same unto J. S. Clerk, upon Condition that he shall be a Chaplain, and shall sing for the Soul of the Devisor all his Life, and that after his Death the Land shall remain unto J. S. Mayor of S. and his Successors, to find a Chaplain perpetually for to sing for the Soul of the Devisor, and the Devisor dies, and J. S. being of the Age of 24 Years, enters and holds the Land for six Years, and is not a Chaplain, the Heir of the Devisor may enter for the Condition broken, for the Remainder shall not be defeat'd, but shall take Effect after the Death of the Deviser for Life, Tamen Quere. Perk. S. 563.

(P. c) To the Heir. How he shall take. What Estate; And where by Devise or Deficient.

Goldsb. SS. 1. THE Heir shall not take by Deficient where there is a Remainder over. Arg. Mo. 363. cites 2 Ma. Br. Devise 41.


2. Devise to the Heir and his Heirs for ever at his Age of 24, and if he die without Issue, Remainder in Tail; the Heir attains 24. He is in by Deficient, because the Fee Simple is given to him, and there is no Intail.
Devife.


3. Where the Devife is for the Benefit of a Stranger, there the Heir Where a shall take by the Devife, and not by Devise, Per Widdon J. 3 Le. 26. 47. Devile was to the Wife, and not to the Heirs. and is H. B. in Cafe of Cowper v. Burrough, alias Tower v. Burrow.

and if the Heirs, paying 124. when he shall come into Possession; A dies in the Life of the Wife. De- creed that the Heir at Law of A. is chargeable with the 100l. he taking only by Purchase, and not by Devise. 4 Nov 1738. Decreed at the Rolls. Miles v. Leigh.

Where a Devife is to the Heirs at Law in Tail, Remainder in Fee to a Stranger, the Heir cannot re- fute the Devife for the Prejudice of the Stranger. Br. Age, pl. 2. cites 3 H. 6. 46.

4. Devifor has Intail two Daughters by several Venter, A. the Eldest, This Liber- B. the Youngest, and devised one Moity of his Lands to his Wife for seventy years, and that A. enter into the other Moity the Day of the Marriage; and if to the Son, then the Son shall have the Land, and if with a Daughter, that then his not to be Daughter shall have her Port and Portion of his said Lands with his undivided other two Daughters. The Wife was not enfeint; the enters into the Moity within seven Years; A. marries and enters into the other any Estate to Moity; B. dies without Intail; the seven Years ended; A. had but a her, but only Moity of this Land devised to her, and not three Parts of it; or the Wife and Heir of the whole Blood shall have the other Moity by Devise alone, which B for the Tender- Now shall be adjudged, which is partly contrary to the Words of the Will. And 47. Trin 17 Eliz. Cooper v. Barrad.


If A. has Intail four Daughters, and he devised to one of them, it is good for the whole Land to devised to her, and no Part of the Land to devised shall devide to the other. Per Doderidge J. Gals. 412. pl. 449. Trin 21 Jac. B. R. in Summer’s Case. — S P. by Doderidge J. 2 Roll Rev. in S. C. A. has two Daughters B and C. — B. has a Son and dies. — A. devised the Land to the Son and his Heirs. — He takes the Whole by Devife, and not a Moity by the Devise or Gift of the Heirs. — For there can be no such Devise at the Devise of a Moity to one Coparcener the Heir, but the Devise is to all. 1谈 232. pl. 7. Hill 1 Ann B. R. Reading v. Roydon. — Cant. Pres. 222. Rawton v. Reading. S. C. adjudged on a Case stated, that the Son took the Whole by Purchase.

5. Devise to his Wife till his Eldest Son should be 24, and then the 5 Le 64. pl. Wife should have the Third Part for her Life, and the Son the Restful, 96. S. C. in Iollidm Ver- where is not any Estate Tail, for no Estate Tail was to arise before his 107. S. C. in of Age of 24, and therefore the Tail shall never take Ellet, and the Fee that no Entail is made by such Will, but the Fee Simple descends and remains in the Son, unless he die before 24, and then the Entail vests with the Remander over, but now having at- tained his full Age, he hath a Fee Simple, and that by Devise. 2 Le. 2 and 3 P. & 11. pl. 16. Hill. 20 Eliz. C. B. Hind v. Lyon. M. Anon

P. & S. P. that no Entail is made by such Will, but the Fee Simple descends to the Son. [This seems to be the S C notwithstanding the Distance of Time] —— So where it was to the Wife till the Son’s Age of 21, Remainder to the Son in Fee, per Gowy and Fenner. J. the Son shall be adjudged in by Devise, but Clerc J. contra. 4 Le. 55. Belpool’s Case.

6. A. seised of Lands in Fee has Intail two Daughters B. and C and devised the Lands to B. his Eldest Daughter; that the should pay toll to C. at such a Day; the Money was not paid; C. may enter into the Moity of the Land. Le. 174. pl. 242. Trin. 30 Eliz. B. R. Crick- mer v. Patterson.

7. A. seised of Lands in Gavelkind has Intail B. C. and D. and he 315. seised to them, being his Heirs by the Custom, and their Heirs, They shall, equally
Devise.

equally to be divided among them; they shall be in by the Devise; for now they are Jointenants, and the Survivor shall have the Whole; whereas if the Lands should be held to defend they should be Parteners, and so as it were Tenants in Common; and though the Words be plural, "equally to be divided among them," makes them Tenants in Common, yet that does not mend the Matter. Le. 112. pl. 254. Patch. 30 Eliz. C. B. Bear's Cafe.

8. A has two Daughters who are his Heirs, and devised his Land to his two Daughters and their Heirs, and dies; per Omnes J. they shall take as Jointenants, for the Devise gives it them, and for the Benefit of the Survivorship between them. Cro. E. 431. pl. 36. Mich. 37 and 38 Eliz. B. R. Anon.

9. If a Man has Lands in Borough English and Guildable Lands and has two Sons, and devised all his Lands to his two Sons and dies, both of them shall take jointly, and the Younger shall not have a distinct Moiety in the Borough-English, nor the Elder in a Guildable Land, but they are both Jointenants. Per Fenner. Ow. 65. Hill. 39 Eliz. Anon.

10. If one hath only two Daughters, and devises his Land to them in Fee; they shall be in by Devise as Jointenants, and not by Defcent as Parteners, but if he have but one Daughter it is void. Goldb. 141. pl. 53. Hill 43 Eliz.

11. A had three Sons, B. C. and D. and devised Black-Acre to B. Green-Acre to C. and White-Acre to D. And that if any of them died, the other surviving should be his Heir. A dies, B. dies. Fleming Ch. J. thought Black-Acre would vest in C. and D. by way of Remainder, and that they should take, though the Freehold by the Defcent of the Fee was drowned. But all the others held, that in regard nothing but a Freehold paffed by the Devise, the Recovery in Fee depending upon B. had drowned the Estate for Life, and that his Death after could not reverse and vest the Remainder in C. and D. and adjudged accordingly. Car. 2 R. Cro. J. 260. pl. 21. Mich. 8 Jac. B. R. Wood v. Ingerfole.

In Case of Perceveue v. Abbot observes that this Case of Wood v. Ingerfole is also reported in 1 Ballbrode 61. There it is put that a Man had two Sons, and Lands in three Counties, and devided the Lands in one County to one Son, in another to the second Son, and in the other to the third Son, and that if any of his Sons die, that then the one of them to be Heir unto the other; In Crook it is, That the other surviving shall be his Heir; so that as it is pen'd in Crook, it differs very much from Ballbrode; for if the Words were as in Ballbrode, it is only one of them that was to be Heir unto the other, therefore only one, and not both of the Survivors could take; but as it is in Crook, that the other surviving shall be his Heir, it may bear a Contraftion that both should be Heirs Jointly. Now that this Case in Crook is not very carefully reported, appears plainly for the End of the Case is plainly mistaken; for it is there faid to be adjudged for the Plaintiff, whereas it is plain that it should be fad for the Defendant; Next Crook's own Report afterwards repeats the Words differing from the Cafe as he had before put it, and more agreeable with Ballbrode; for he afterwards repeifs them thus in the different Character, whereby he intends them the very Words, That every one shall be Heir unto the other, and upon View of the Roll which is in Patch. 7 Jac. R. 145. the Words are, And if any of my Sons die, the one to be the other's Heir; then it will be very plain that these latter Words will be void.

Hub. 52. 12. If a Man devife to his Heir it is a void Devife, for the Defcent S. P. Shall be prefert'd. Per Dodridge J. Godb. 412. Trim. 21 Jac. B. R. in Sommner's Cafe.

2 Sid. 53: Per Glum Ch. J. S. P. — Unless it be of other Estates then would have defcended. Pl. C. 544. b.

And in such Cafes, they are Jointenants for the Benefit of the Stranger. Godb. 54. pl. 125. Mich.

18 & 29 Eliz. C. B. — If a Man may have any more Benefit by the Devise than by the Defcent, in such Cafe he shall take by the Devise. Per Periam. God. 35. 38. pl. 14. Patch. 35 Eliz. Anon.

23. A.
Devise.

A. has Issue a Son and a Daughter by the same Venter, and deceased his Land is to his Son and his Heirs for ever, and for want of Heirs of his Son, to his Daughter and her Heirs for ever, and died. Whether the Son had Estate in Fee or in Tail by this Will? For he could not die without Heir if his Sister outlived him, who was to take according to the latent of A. and per two Justices it is an Estate Tail in the Son. The Remainder to the Daughter, who might be his Heir, should the Devise to him and his Heirs, could be intended only to be to him and the Heirs of his Body. But per three Justices it is a Devise in Fee, but, agreed, If the Remainder had been to a Stranger it had been void, for then the Son had an absolute Estate in Fee, after which there could be no Remainder, which Vaughan says is undoubted Law. 

A Father being seised in Fee deviseth Lands to his Son and Heir, and to his Heirs, upon Condition that he should pay his Debts within a Year, and it failed, that his Executors should sell and pay his Debts. He entered but did not pay the Debts, and the Executors entered and sold. Held this was Affriss by Defect, for although the Son hath a Fee, yet he has it as a Purchaser, being tied with such Condition. 

A. to his Eldest Son and his Heirs, within four Years after the Death of the Testator, provided he pay 20l. to his Executors, towards the Satisfiotion of his Debts; he paid the Money; Adjudged, that he took by Purchase and not by Defect. 

14. A Father being seised in Fee deviseth Lands to his Son and Heir, and to his Heirs, upon Condition that he should pay his Debts within a Year, and it failed, that his Executors should sell and pay his Debts. He entered but did not pay the Debts, and the Executors entered and sold. Held this was Affriss by Defect, for although the Son hath a Fee, yet he has it as a Purchaser, being tied with such Condition. 

15. Devise to A. (being Heir at Law) for Life, and if he die without Ler. Issue living at his Death, Remainder to L his Younger Son in Fee, but if A. shall have Issue living at his Death, the Fee to remain to A. Re- solved, it is a Contingent Remainder, and until the Contingency happen the Fee descends to the Heir in some Sort, but not to confound the Estate for Life, but there shall be an Hiatus to let in the Contingency when it happen; So is Archer's Cate, and Judgment accordingly. 

16. A Devise to his Eldest Son and his Heirs, within four Years after the Death of the Testator, provided he pay 20l. to his Executors, towards the Satisfiotion of his Debts; he paid the Money; Adjudged, that he took by Purchase and not by Defect. 

13. A. has Issue a Son and a Daughter by the same Venter, and deceased his Land is to his Son and his Heirs for ever, and for want of Heirs of his Son, to his Daughter and her Heirs for ever, and died. Whether the Son had Estate in Fee or in Tail by this Will? For he could not die without Heir if his Sister outlived him, who was to take according to the latent of A. and per two Justices it is an Estate Tail in the Son. The Remainder to the Daughter, who might be his Heir, should the Devise to him and his Heirs, could be intended only to be to him and the Heirs of his Body. But per three Justices it is a Devise in Fee, but, agreed, If the Remainder had been to a Stranger it had been void, for then the Son had an absolute Estate in Fee, after which there could be no Remainder, which Vaughan says is undoubted Law. 

14. A Father being seised in Fee deviseth Lands to his Son and Heir, and to his Heirs, upon Condition that he should pay his Debts within a Year, and it failed, that his Executors should sell and pay his Debts. He entered but did not pay the Debts, and the Executors entered and sold. Held this was Affriss by Defect, for although the Son hath a Fee, yet he has it as a Purchaser, being tied with such Condition. 

15. Devise to A. (being Heir at Law) for Life, and if he die without Ler. Issue living at his Death, Remainder to L his Younger Son in Fee, but if A. shall have Issue living at his Death, the Fee to remain to A. Re- solved, it is a Contingent Remainder, and until the Contingency happen the Fee descends to the Heir in some Sort, but not to confound the Estate for Life, but there shall be an Hiatus to let in the Contingency when it happen; So is Archer's Cate, and Judgment accordingly. 

16. A Devise to his Eldest Son and his Heirs, within four Years after the Death of the Testator, provided he pay 20l. to his Executors, towards the Satisfiotion of his Debts; he paid the Money; Adjudged, that he took by Purchase and not by Defect. 

Years, it is a Defect in the Interim, and those Words are void.
Devise.

field said, it was only as if Testator had said, viz. So far I dispose
and let so much of it go from my Heir, who otherwise would have it,
but I will dispose of it no further from the Heirs of the Mother's Side
whence it came and where it must go, if I should not give it away.
Besides, the Words are not nugatory, because otherwise the Trustees
Bp of Lincoln.

(Q. c) To the Heir on Condition.

1. A Seised of Gavelkind Land has Issue two Sons, and devises to
one of them, viz. the Eldelst, upon Condition to pay 100 l.
at a certain Day; The Money was not paid at the Day; if the Young-
est Son may enter into a Moiety upon his Brother, by a Limitation
implied in the Estate on Non-performance of the Condition. Querers
2. A. devised Lands to his Wife for Life, and after to his Eldelst Son,
with Condition that if his Wife should be with Child 501. should
be paid by the Eldelst Son and Heir at Law to the Child, after his Mo-
ther's Death a Child was born, and after the Mother and Son convey
away the Land to a Purchaser, and upon Notice prov'd of the Will, a
Decree was made for the Daughter for the 501. and declared it was a
Trust devised to go with the Lands, and yet this Will was void in Law
as to this Legacy, since he that was to have the Benefit of the Breach
of the Condition was the Party, (as being Heir) which should pay the
Legacy. 3 Ch. R. 93. 24 Car. 1. Smith v. Atterby.
3. A Devise to an Heir on Condition is void in Law yet good in Equity,
as on Condition that he sells, is void in Law, but it is good by way
of Trust in Equity. 1 Chan. Cases 177. 179. Trin. 22 Car. 2. Pitt
v. Pelham.

Frem. Rep. 245. pl. 263.
S. C. the Court in-
clin'd ac-
cordingly.

4. Where the Heir takes by a Will with a Charge as paying 200 l.
&c. he doth not take by Defect, but by Purchase. Per North Ch. J.
and Atkins J. 2 Mod. 286. Hill. 29 & 30 Car. 2. C. B. Brittan v.
Charnock.

And he shall the Heir of the Heir, the Heir dying before the Time of Payment

5. Lands devised to J. S. on Condition to pay 20,000 l. to the Heir
at Law, viz. 1000 l. per Ann. till all be paid. The Heir enter'd for
Non-payment as for Forfeiture, and Devisee was relieved; but Interest
was allow'd from the Time of Failure. 1 Salk. 156. pl. 7. 1707.

(R. c) In what Cases the Heir or Wife shall take an
Interim Estate.

Perk. S. 143. 1. A Man devised his Land to be sold by his Executor and died, and
S. P. and cites S. C.
Devise.

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and took the Profits to his own Use; the Heir entered and well, per
Judicium, and held per Mombray, the Executor may fell as soon as
foon as he can, and in as short Time. Br. Ent. Cong. pl. 124. cites
38 Aff. 3.

2. If a Man devises his Land to his Executors to sell, there the Heir

cannot meddle. Br. Devise, pl. 5. cites 9 H. 6. 23.

3. But if he devises his Land to be sold by his Executors, there the

Heir may enter and take the Profits till the Executors have sold, and by
the Sale the Vendee may enter upon the Heir. Ibid.

of the Devise; and in this Case the Lessor for Years of the Devise shall have Aid of the Heir, and
not of the Executors. Br. Devise pl. 46. cites 15 E. 12. — In such Case the Inheritance shall
defend to the Heir and shall continue in him until they viz. the Executors fell &c. and then
the Executors may enter &c. and thereof insist the Vendee according to the Sale. Perk S. 534.
cites 38 Aff. 3.

4. A Devise shall be taken according to the Intent of the Devisor; S C. cited
as if a Man devise his Goods to his Feme, and that after the Devise
of his Feme his Son and Heir shall have the House where the Goods are
there, the Son shall not have the House during the Life of the Feme.
For now it appears that his Intent was that the Feme shall have the
House all during her Life, though it was not devised to her by
express Words, per Fineux; which all the Justices agreed. Br. De-
vise pl. 52. cites 13 H. 7. 17.

in a Will that is necessary, and an Implication that is not necessary, but possible only, that it was a Devise of the House to the Wife by necessary Implication; for it appears by the Will, that it must either be devised to the Wife for Life by necessary Implication, or no where to have it during the Wife's Life, which could not be. And that though the Goods were upon particular Devise given to the Wife and expressly, that was no Hindrance to the Wife's having the House devised to her also by her Husband by Implication necessary; which I the rather more, because Men of

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great Name have conceived, that where the Devise takes any thing by express Devise of the Testator, such Devise shall not have any other Thing by that Will devised only by Implication but the
Truth is, that is a vast Difference that hath been taken by many.—— S P. Bridgen. 105. and cites
S. C. —— S. P. per Raymond Ch. J. Raym. 453.

5. If a Will be that the Femees shall alien his Land, the Heir shall

S P. Br.

take the Profits till the Alienation be made and they be feised to his
Use, and if the Alienation be not made by them, the Heir shall have the
Land for ever. Per Fineux, Reede, and Tremaille. Br. Feoffe-
ments al Use, pl. 12. cites 14 H. 7. 3. & 15 H. 7. 11.

6. A devise that his Executors shall sell his Land; till the Sale the S P. Feme
Heir shall take the Profits and they are feised to his Use, and if they
do not alien the Heir shall have the Land for ever; Per Read J. &c.
Kelw. 45. a. Trin. 17 H. 7.

the Defent is taken away and the Executor may enter and take the Profit. Co. Litt. 256. 4.

7. A Man willed that J. S. shall have his Land after the Death of his

same Cases cited

Feme, and died, now the Feme of the Devise or the Feme shall
have the Land for Term of her Life, by Reason of the Intention of

cited by Popham, Pl. C. 521. a ad finem. — S. P. agreed by all. Br. Devise. pl 52. cites Term o e H; 8. —— S. C. cited Vaughan. 264, 265. by Vaughan Ch J. who said that by this Case and the Case in Br. Devise 52. there is no excluding of the Heir, and yet it is said the Wife shall have the Land during her Life by Implication, which is not necessary Implication, as in the Case of 15 H. 7. but only a possible Implication, and seems to croft that Differences I have taken. But this Case of Br. hath many Times been denied to be Law, and several Judgments have been given
against it. I shall give you some of them, to justify the Differences I have taken exactly as I shall
pref the Cases.

8. A
8. A Man seised of a Manor, Parcel in Demesne and Parcel in Services, devides to his Wife for all the Demesne Lands, and all the Services and chief Rents for Fifteen Years; and devides the whole Manor to another after the Death of the Wife; Resolved, that the Devise should not take Effect for any Part of the Manor, till after the Death of the Wife, and that the Heir of the Devisor after the Fifteen Years spent, and during the Life of the Wife, should have the Services and chief Rent. No. 7. pl. 24. Trin. 3 E. 6. Anon.

9. A seised of a Messuage and divers Lands in Fee, Time out of Mind occupied with the Messuage, leaves Parcel of the Land for Years, and after devises to his Wife, my Messuage with all the Lands thereto belonging in the Occupation of Lefsee, and after the Decease of my Wife I will, that it with all the Rest of my Lands shall remain to my Younger Son; Resolved the Heirt shall enjoy the Land not leased during the Life of the Wife. Mo. 123. pl. 265. Patch. 5 Eliz. Anon.

10. If Lands were devided to J. S. after the Death of his Wife, the shall have it for Life. But if a Man seised of two Acres devides one of them to his Wife, and that if. S. shall have the ather Acre after the Death of his Wife, the takes nothing in that Acre; because the Will took Effect by the first Words, cited per Anderson Ch. J. to have been so holden in the Time of Brown. Godb. 16. 17. in pl. 23. Patch. 25 Eliz.
Devise.

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to pass the other. Cited by Anderson Ch. J. to have been so held in Sir Ant. Brown's Time. 3 Le. 130. pl. 183. Mich. 28 Eliz. C. B.

12. If the Devise is void or the Devisee defers the Execution of the Devise, it is Reason that the Heir enter and take the Profits till the Devisee enters. But if a Stranger abates after the Death of the Devisee and dies feited, the fame shall take away the Defeant. 2 Le pl. 239. Mich. 32 Eliz. C. B. 190. Sir Anthony Denny's Café.

13. Though a Freehold will go to the Wife for Life by Words of Implication; yet it is otherwise of a Term for Years, because the Devisee could not in his Life make Estate for Life out of a Term. Mo. 635 pl. 871. Hill. 34 Eliz. Raymond v. Gold.

15. Devise to S. from Michaelmas next for five Years Remainder to A. Cro F. 852, and his Heirs, S. dies before Michaelmas; this is a good Remainder in Pay's Café. Contingency, because being in Café of a Will the Freehold shall be in the Heir of the Devisee till the Contingency happens. 4 Mod. 284, cites S. C. 259. cites Nov. 43. Payn v. Ferrall.


16. Wadham made a Lease for Years upon Condition that the Leffer should not alien to any besides his Children, the Leffer devesth the Term to H. his Son after the Death of his Wife, and made one Marshall and another his Executors and died; the Lessor entered as for a Condition broken, supposing this a Devise to the Wife of the Term by Implication. But it was held this was no Devise by Implication, but the Executors should have the Term until the Wife's Death, but if it had been devised to the Executors after the Wife's Death, the Executors should, when the Wife died, have had the Term as Legatees, but until her Death they should have it as Executors generally. Cro. E. 878. pl. 8. Patch. 45 Eliz. B. R. Pay's Café.

17. A. devised that J. S. shall have his Lands after the Death of J. N. being a Stranger, he shall not take by this Devise; otherwise it is, if A. devised that J. S. shall have his Lands after the Death of his Wife. Arg. 2 Sid. 53. Hill. 1657.

18. When the Devise is to an Infant when he shall be born, or to a Child of a Daughter when she shall be married, it shall descend to the Heir in the mean Time; Per Cur. Sid. 153. Mich. 15 Car. 2. B. R. Snow v. Tucker. Biddal.

19. A. Tenant for Life, Reverfion to B. B. devised the Reverfion to J. S. when he shall marry my Daughter. Tenant for Life dies, it shall descend till J. S. marry her. 1 Keb. 802. per Hale Ch. J. and Windham J. in pl. 70 Mich. 16 Car. 2. B. R.

20. Devise of Land to A. for Life, and of a House to the Wife for one Year, then devises all his Lands not settled or devised to W. R. He bend, to W. R. and his Heirs after a Year after Teftator's Death, and after the Death of A. Teftator dies and the Year expired. A. is yet living and Daughter and Heir of Teftator and brings Ejeftment for thereof brought in
Devise.

the Exchequer Chamber judgment was then affirmed. — 2 Keb. 266, pl. 44. S. C. adjournment. — Ibid. 224, pl. 76. S. C. and the Court agreed to the Words are to be taken distributively.

21. A. the Husband on Marriage covenanted to settle 200 l. a Year on M. his Intended Wife for Life, and if he should die before such Jointure settled, then she was to have so much out of Lands chargeable with Dower as would fully recompense the 200 l. a Year. A. by Will devised 200 l. Rent-Charge to M. for Life, to be issuing out of R. S. and F. in full Satisfaction of the said Articles and Dower, and devised the said Farmus to E. his Grandchild to have immediately after the Death of M. his Wife; and by a subsequent Clause he devised all the Lands (not therein before disposed of) to B. his Son for Life, Remainder over. M. claimed the 200 l. Rent-Charge, and also the Lands out of which it flowed, without Extinguishment of the Rent, by Reason of the Words (To have and to hold after the Death of M.) But the Court declared that they pay no Colour to decree both, but only the Rent-Charge. 2 Ch. Rep. 63, 23 Car. 2. Kemp v. Kemp.

22. Estate in Fee was devised to A. and his Heirs after the Death of Devise and Wife. Devise dies. A. who is a Stranger shall take nothing till the Wife is dead, but it shall descend to the Heir in the Interim. 2 Lev. 207. Mich. 22 Car. 2. B. R. Smartle v. Scholar.


23. Lands devised to A. his Sister and Heir till B. her Son is 22, and after B. attains that Age to B. and his Heirs, and if B. dies before 22 &c. The Fee is vested in B. immediately, and A. had only an Estate for Years till B. be 22. 2 Mod. 289. Hill. 29 & 30 Car. 2. C. B. Taylor v. Biddolph.

if the Devise had been to B. when he comes to 22 Years, and no Devise made to A the Mother, then in the mean time she had been in by Defect. — S. P. held that the Heir shall have the Fee in the Interim 1 Le. 101. Gates v. Holywell.

24. A. Devise to J. S. a Stranger during his Exilio &c. and afterwards to W. R. another Stranger in Fee. Though this was held a good Devise to J. S. yet upon a Supposition that during Exilio was a void Limitation to J. S. as being of an unknown Sene in our Law (which it is not) then W. R. cannot claim till the Death of J. S. and in the mean time the Land would descend to the Heir in Law. Vent. 326. Hill. 29 & 30 Car. 2. B. R. in Case of Paget v. Dr. Veilus.

25. Lands devised to a Stranger for 20 Years after the Death of his Wife, they shall descend to the Heir in the Interim, but had the Devise been to the Heir at Law for 20 Years after the Death of the Wife, there the Wife had Estate had had Estate for Life by Implication; Per Lord Nottingham. Vern. 22 pl. 14. Mich. 1691. Fawkener v. Fawlkner.


17. Br. Devise 52. — Cro J. 74. Horton alias Burton v. Horton. — But where such Confusions will make a Perpetuity it is otherwife. Arg. cited Roll R. 548. as Horton's Case; 1 bull. 195. S. C. cited in Case of Webb v. Haring — if the Devise was to the second Son after the Death of the Wife, she should have an Estate for Life by Implication; Per Croke J. 2 bull. 127; 2 Show. 177. cites
26. By Common Law one might devise that his Executor should sell his Lands, and in such Case the Vendee is in by the Will, and the Fee descend to the Heir in the mean Time; Per Powell J. 1 Salk. 230. Trin. 9 W. 3. C. in Case of Scatterwood v. Edge.

27. A Trust by Devise was, that the Profits should be equally divided between M. his Wife and B. his Daughter during the Life of M. and after B.'s C.—N. C. M's Death to the Use of B. in Tail, Remainder over. B. died without Wm's Rep. Issue, living M. This by the Opinion of the Judges of C. B. to whom it was referred, is a Tenancy in Common between M. and B. so that M. has no Title to B's Moiety either by Survivorship or Implication, nor does that Moiety either descend or fall to the Heir; But as to that Moiety during M's Life is was an Interest undisposed of, and in Nature of a Tenancy pur Anser Vie, and consequently belonged to the Administrator of B. and decreed accordingly. 2 Vern. 430. pl. 392. Hill.

1701. Philips v. Philips

The end of his Will devises all his Lands Tenements &c. in B. C. and D. to his Wife for Life; and towards the Heirs Male of her Body, and for want &c. then to his other Daughter N. &c. Ld. Cowper thought the Wife took no Estate for Life; for an Implication to disinter an Heir at Law must be necessary, which in this Case it was not, because it may be intended to extend only to the Lands expressly devised to the Wife for Life, that they should not have title after her Death. Ch. Prec. 459. Simpson v. Hornsby. S. C.—G. Equ R. 114 S. C.—Ch. Prec. 452. S. C. and there it is reported, That the Lands devised to the Wife for Life was expressed to be for her Jointure, and in full of all Claims and Demands whatsoever both in Law and Equity, and after that the Devise was that after the Death of the Wife all the Lands &c. Recoveries, &c. and Hereditaments whatsoever in before devised should be to M. Ld. Cowper held that the Words should be taken distributively, viz. All the Lands given to his Wife to go to M. after the Wife's Death, and all the rest immediately.

29. A having a Wife and two Daughters his Heirs at Law, A. devised Lands to one of his Daughters after the Death of his Wife, though the Daughter was but one of the Coheirs of A. Yet it palls a good Estate for Life to the Wife by Implication; Per Cowper C. 2 Vern. 723. Mich. 1716. in Case of Hutton v. Simpson. A. devised Lands in B. C. and D. to his Wife for Life for her Jointure, and towards the Heirs Male of her Body, and for want &c. then to his other Daughter N. &c. Ld. Cowper thought the Wife took no Estate for Life; for an Implication to disinter an Heir at Law must be necessary, which in this Case it was not, because it may be intended to extend only to the Lands expressly devised to the Wife for Life, that they should not have title after her Death. Ch. Prec. 459. Simpson v. Hornsby. S. C.—G. Equ R. 114 S. C.—Ch. Prec. 452. S. C. and there it is reported, That the Lands devised to the Wife for Life was expressed to be for her Jointure, and in full of all Claims and Demands whatsoever both in Law and Equity, and after that the Devise was that after the Death of the Wife all the Lands &c. Recoveries, &c. and Hereditaments whatsoever in before devised should be to M. Ld. Cowper held that the Words should be taken distributively, viz. All the Lands given to his Wife to go to M. after the Wife's Death, and all the rest immediately.

30. J. had three Sons, A. B. and C. and also two Daughters, and Wm's Rep. being held in Fee of Land, Part whereof is Gavekind, devised it to 472. Trin. 1718. S. C. & S. P. by Ld. C. Par, of J. his youngest Son, he or his Heir paying 10 l. a Year to A. and 10 l. a Year to B. and 5 l. a-piece to the Daughters for Term of his Life, after the Death of C. and his Wife, then it was to go to the Sons and Daughters her. of C. accordingly as he should have one or other, equally to be divided between them; C. dies, living his Wife. Parker C. was of Opinion that the Wife ought to have an Estate for Life by Implication, the Heir at Law being excluded by the Annuity, but directed an issue at L. 10. Mod. 416. Trin. 4 Geo. in Canc. Willis v. Lucas. (S. c)
(S. c) Of Devises by Implication; And what is a Devise by Implication.

1. One devised all his Goods, Jewels and Plate, excepting his Leafe in C. It was adjudged that all his other Leafees pafs'd. Arg. St. 262. cites 4 E. 3. Br. Grants, 51.

2. A Man made his Will in this Manner, I have made a Leafe to J. paying but 10s. Rent; this was held a good Leafe. Mo. 31. pl. 101. Trin. 3 Eliz. Anon.

3. A. made a Fœdiment in Fee to the Use of his left Will, and devised that his Fœdement should be seised to the Use of M. his Wife for Life, and after to the Use of B. his Son for Life, without Impeachment of Waste, and after the Death of M. and B. and D. Wife of B. then &c. It was held that a Use implied was limited to D. Le. 257. pl. 345. 16 Eliz. B. R. Manning v. Andrews.

4. A. devised that his Executors should assign his Lands to J. S. this by Implication is a Devise of the Lands themselves to the Executors, for otherwise they can't assign. Arg. 2 Le. 165. pl. 198. Pach. 26 Eliz. B. R. in the Case of Folter v. Walker, alias Walter.

5. A. wills and devises that B. shall pay yearly out of his Manor of D. to J. S. 101. It is a good Devise of Lands to B. Arg 2 Le. 165. in Case of Folter v. Walker, alias Walter.

6. A. having two Sons devised Part of the Lands to the Eldest in Tail, and the other Part to his Younger Son in Tail, and adding, that if any of his Sons died without Issue, then the whole Land should remain to a Stranger in Fee, and died; the Sons entered; the Youngest Son died without Issue, the Devisee in Fee entered, and his Entry was not lawful, for the Eldest Son shall have the Land by the Implicative Devise. Le. 14. pl. 51. Mich. 32 Eliz. C. B. Anon.

7. A. devised that his Executors shall have his Term until his Son John shall come to the Age of 21 Years; When his Son John comes to the Age of 21 Years, he shall have the Term by Implication. Per Coke J. 2 Bull. 127. Mich. 11 Jac. in Case of Roberts v. Roberts.

8. A Devise of an Estate with a perpetual Charge doth not make a Fee-Simple by Implication, As a Devise of eight Marks every Year out of such an Houfe to maintain a Chaplain, and the Reidue of the Profits of the Houfe to buy Ornaments and Books of the Church, yet this is not a Devise of the Houfe by Implication. Bridgm. 103. Mich. 14 Jac. in Scacc. Standish v. Short.


10. My Will and Meaning is, that if it happen that my Son George, Mary, and Katherine my Daughters do die without Issue of their Bodies lawfully begotten, then all my Free Lands, which I am now possessed of, shall come remain and be to my Nephew William Rose and his Heirs for ever; Geo. entered and died, leaving two Daughters, Judith and Margaret; who after George's Death entered. Mary dies, Katherine survives and makes a Leafe to the Plaintiff, but Judgment was given for the Defendant; for it was held that no Estate was devised to the Son or Daughters by express
expref and implicit Devife, neither is there any Estate by Implication given to them, for then it must be a Joint Estate to them for their Lives, with several Inheritances in Tail, and several Estates Tail to them in Succession, and such an Intail it cannot be, because it appears not by the Will who should take first and have such Estate, and who next, and therefore such an Estate Tail is meerly void for the Incertainty of the Perfons first taking. And it cannot be a Joint Estate for their Lives, with several Inheritances to them in Tail, for the Law doth not regularly admit Estates to pass by Implication, as being a Way of putting Estates not agreeable to the Plainness required by Law, and though an Estate by implication of a Will, if it be to the dilinheriting of the Heir at Law, is not good, if such Implication be not a necessary Implication, but only contractive and possible, as when it may be intended the Testator had a Mind to devile the Estate to A. or it may be reasonably intended otherwise. But when A. must have it and none else can have it, this is a necessary Implication, and the Testator’s Intent ought not to be confirr’d to disfigure the Heir where his Intention is not apparently

* The Oris-[but only] ambiguously to the contrary. Vaukh. 259, 260. Hill, final is [not]

11. A Man deviles his Lands in these Words, I devife all my Lands 16. pl. 11 S. C. adj. 

in Mynell Langly unto my two Daughters, Eliz. and Ann, and their Heirs, equally to be divided between them, and in Case they happen to die without Issue, then I give and devife all my said Lands to my Nephew S. M. Elded Son of my Brother W. M. and to the Heirs Male of his Body, with such Remainders over. Ann dies. Eliz. survives. And adjudged that Eliz. shall hold Ann’s Moiety to her and to the Heirs of her Body, by way of Remainder by Implication. 2 Jo. 172. Mich. 33

Car. 2. B. R. Holmes v. Mynell. 

12. A devised to his Wife 600 l. to be paid to J. S. in full for the Purchafe of Black-Acre already settled on my Wife for Part of her Inheritance; the Lands were not settled; per 3 J. against Powell J. this is not a Devife of them by Implication. 3 Lev. 259. Trin. W. & M. in C. B. Wright v. Wyvel.

13. In Cafe of Implicit Devises there must be no Reference to any Act that should have conveyed the Land to the Devifer before the Will, but the Will must pass the Land by Contraction and Implication. 2 Vent. 56. Trin. 1 W. 3. C. B. Wright v. Wyvel.


15. An Implication in a Devife to disfigure the Heir must, even or Law, be a necessary Implication. Arg. and agreed to by the Ld. Chancellor. Chan. Prec. 384. Patch. 1714. in Cafe of Boscet v. Mohun.

4 Y. (T. c) To
(T. c) To Creditor or Legatee, Where it is a Satisfaction.

1. * Seised of Lands of Inheritance of 360 l. per Ann. whereof. M. the Father's Wife of A. was Joint-Purchasor with her Baron of 60 l. per Ann. A. by his Will declared that M. should have during her Life the third Part of all his Lands, together with the Lands which she had in Jointure, the said Part to be alligned by his Executors, and dies. M. refutes the Jointure of 60 l. per Annunm, and demanded the third Part of all the said Land, viz. 120 l. as Legacy by the said Will, and also the third Part of the Residue, viz. 60 l. as her Dower. Decreed in the Court of Wards that she should have the Legacy of the whole 120l. viz. The third Part of 360l. and that she should have her Dower also. D. 61. b. pl. 14. Parch. 39 H. 9. Whorwood v. Little.

2. Baron made Jointure during Coverture to his Wife, and devised to the Wife for Life a Manor over and besides the Jointure and dies she refuses the Jointure. Adjudged that the shall * not have the Manor, for it was devised to her for the Inlargement of her Jointure, and fo was the Intent of the Baron. Cited to have beenfo adjudged 5 & 6 E. 6. D. 1 b. pl. 31. in Marg.

3. A. devised 20 l. to B. in Performance of a Covenant to pay the like Sum to B. Per Anderfon and Periam J. This is no Legacy, but the Will refers to the Covenant, and is in Discharge of the Covenant and it is but a Declaration that the Will of A. is that the Debt shall be paid. 2 Le. 119. p. 104. Mich. 29 & 30 Eliz. C. B. Davis v. Percie.


5. A. entered into a Statute to make his Wife a Jointure of 50 l. per Annum; he devised 52 l. per Annum to her and her Heirs. There being no Proof but only Conjecture that this was intended as a Gift, the Court declared it to be in lieu of her Jointure, and decreed the Statute to be delivered up and cancelled. Chan. R. 46. 6 Car. 1. Peacock v. Glafcock.

6. The Grandfather deviseath Lands to his Son to pay 10 l. per Annunm to the Son's three Daughters; the Father gives 200l. in Marriage with one. Whether the 10 l. per Annunm shall be included? Toth. 141. Mich. 13 Car. Kinnington v. Aftry.

7. The Earl of R. bequeathed 500 l. to the Plaintiff to be paid at the Age of 21 Years or Day of Marriage; but before either, the Defendant paid the said 500l. to her Father, upon Condition he would make it 1000l. which he covenanted to do; And afterwards, by his Will he devised unto his said Daughter 1000l. to be paid unto her at the respective Times as aforesaid, and died without mentioning that he devised the said 1000l. in Purfiance of the aforesaid Covenant; and now, after her Father's Death she exhibited her Bill against the Defendant for the 500l. but it was dismissed. Nelf. Chan. Rep. 51. 15 Car. 1. Willoughby v. Rutland.

8. If A. promise B. to give to C. as much as he shall give to any of his Kin, and afterwards A. makes C. his Executor and dies, this is no Performance of the Allimpt, inasmuch as C. has this as Executor. It was fo said. Sid. 25 pl. 6. Hill. 12 Car. 2. C. B. in the Cafe of Ship-Don v. Boyleer.

29. The
9. The Testator gives 3000l. a-piece to Daughters by Marriage Settlement, and afterwards out of the Intail of his Estate, and by his Will gives the same Daughters 3000l. a-piece. The Plaintiff, the Heir, insists that the Marriage Settlement and Will make but one Settlement, and the 3000l. in both is but one 3000l. This Court, with the Attendance of the Judges (it appearing by Proof that the Testator declared after the Marriage Settlement that he would add to his Daughters Portions) were of Opinion and declared he cut off the Intail on Purpose to add to the Portions, and that the said 3000l. in the Marriage Settlement and the said 3000l. in the Will made 6000l. a-piece, and they could not expound the Deeds and Will otherwise, and to dismist the Plaintiff's Bill. Chan. Rep. 199, 200. 13 Car. 2. Pile v. Pile.

10. The Husband enter'd into a Statute Staple to pay his Wife 500l. if he survived, and afterwards he devised several Lands to her for Life, and some in Fee, and made her sole Executrix &c. She pollitified herself of the Personal Estate, but procured the Statute to be extended after the Death of her Husband for the 500l. and this was against the Heir at Law, who was relieved if it should appear before a Master, that the Personal Estate of the Testator, and the Rents by her received of his Real Estate shall amount to more than 500l. but if there be any Deficiency it shall be supplied by the Statute. Fin. Rep. 42. Mich. 25 Car. 2. Malin v. Cheyne.

11. A. was Surety for B. B. being seized of Lands devises them to C. (his Wife) and her Heirs, provided if A. pay C. within 5 Years after B's Death 1000l. to enable C. to pay B's Debts, then C. was to convey the Premises to A in Tail to take Effect immediately after A's Devise. A. shall not out of the 1000l. retain for the Debt for which he was bound for B, and so have a Priority. Fin. R. 312. Trin. 29 Car. 2. Puleston v. Puleston.

12. A. enter'd into Bond to leave B. a third Part of his Personal Estate. A makes his Will and leaves three Executors, of which B. is one. The Court deemed to think that this was not a Performance, but that there an express Gift of a third Part was necessary to answer to the Condition. 2 Jo. 133. Hl. 3 & 32 Car. 2. R. Impey v. Pitt.

13. B. was Surety for A. to several Persons, and had supplied him with Money of his own. A. gave B. a Judgment for 3000l. and about five Years afterwards A. deposed that the said Judgment thus, viz. If A. should die without Issue, then his Heirs General, or his Executors or Administrators should within one Month after his Death pay to B. his Executors &c. 3000l. or settle Freehold Lands of that Value on B. and his Heirs. By Will made a Twelve-month before the Judgment was entered into, A. had devise a Farm of 60l. per Annu. to B. in Fee. On a Bill to set aside the Judgment, the Debts being paid, for which B. was Surety, an Issue at Law was tried and found that the Deleasance was the Act of A. only, and not of B. and decreed according to the Judgment, but the Farm devise to be quitted, or else to be reckoned as Part of the Satisfaction. Fin. R. 454. Trin. 32 Car. 2. Blois v. Man.

14. Speak was indebted to his Mother for Arrears of an Annuity of 500l. per Annum 3000l. and makes her he Executrix, and by Will devises as much Land as is worth 20000l. and devises his Jewels to his Wife. The Question before North Ld. Keeper was, Whether Mother, being Executrix, may retain the Jewels towards Payment of the Debt; or else, Whether the Debt shall be included in the 20000l. worth of Land, the Personal Estate not being sufficient to pay the Debt? And my Ld. Keeper held, that inasmuch as the Personal Estate was not sufficient, the Lands should go in Discharge of the Debt, and the Sufficient Legacy shall not be lost; but if there were not enough besides the Legacy
Devise.

gacy to pay the Debt, then she might retain. Skin. 158. pl. 5. Hill. 35 & 36 Car. 2. B. R. Speake v. Bedley in Chancery.

15. A on Marriage with M. jointures his Estate on M. Remainder to the Ifue of the Marriage. Afterwards A. sells to B. the same Estate, and by B's Direction conveys it to B. and C. in Trust for B. wo gives a Judgment to A. for 1200 l. the Purchase Money. B. and C. sell to D. and Covenant in Consideration of 1300 l. to convey or to pay back the 1300 l. to D. B. and C. convey to D. but afterwards D. is evicted by M. by Means of the Marriage Settlement. D. makes M. his Executrix and dies. B. shall pay back the 1300 l. to M. as Executrix of D. and the shall have that and her Jointure too. Vern. 284. Hill 36 Car. 2. Jefon v. Jervis.

16. A on Marriage settles a Rent Charge on his Wife for a Jointure, and afterwards devises to her Part of the Land which was charged with the Rent Charge; Per Jefferies C. the may differin all in all or any Part of the Lands for her Rent and denied to apportion the Rent Charge, but difmiffed the Bill. Vern. 347. pl. 342. Mich. 1685. Knight v. Calthope.

17. A. in Consideration of 50 l. Portion articles to settle a Jointure after Marriage, but before the 50 l. paid or Settlement made, died intestate.—The Widow administers and thereby becomes intitled to the 50 l and brings her Bill against the Heir of her Husband to have her Jointure according to the Marriage Articles. Per Jefferies C. she shall not have the Portion 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 difmiffed the Bill with Costs. Sed de hoc Quere. For the is intitled to these two Demands in distinct Capacities, and the Debts may appear hereafter to exhaust the Affairs; and if the Husband had actually received the 50 l. and it had been in his Possession the would have had it as his Administratrix. Vern. 463. pl. 443. Trin. 1687. Meredith v. Jones.

18. A. settles Lands to raise 5000 l. for Daughters, whereas 2000 l. to the Eldest; afterwards having no Ifue Male. A. made his Will, and devised that all his Lands (except the Lands charged with the 5000 l. which were partly jointured on his Wife, and which he devised her for Life, only charged with 100 l. Annuity to his Sitter, and then that those Lands also should descend to his Four Daughters equally, and that the Lands devised to my Wife, or jointured on her formerly shall not be charged with any Portions to my said Daughters by Virtue of any Marriage Settlement; Decreed per Ld. Commissioners, that the Eldest should have 1000 l. more than the other three. And if the other three Sitters did not agree to pay her the 1000 l. out of their Shares of the Land devised, then the Trustees were to raise the Money according to their Power, and in such Case the Mother to be re-imburse out of the Inheritance what her Estate for Life should be demantied. Ch. Prec. 5. pl. 4. Hill. 1689. Ld. Treviot v. Spencer.

19. In 1690, a Bill was brought to have 3000 l. provided for Daughters Portions on Failure of Ifue Male by an old Settlement in 1631. The Brother of the Plaintiffs who might have barred them by a Recovery giving them by Will above the Value of 3000 l. it shall be intended a Satisfaction. Per Commissioners. 2 Vern. 177. pl. 161. Mich. 1690. Smith v. Duffield.

S. C. cited 2 Vern. 354
20. By Marriage Settlement in Case of Failure of Ifue Male, a Remainder is limited to Daughters until Three Thousand Pounds paid. There is Ifue a Son and two Daughters; The Father by Will gives Seven hundred Pounds a-piece to the Daughters. The Son by his Will gives Seven hundred Pounds a-piece to his two Sitters and makes them Executors, and Residuary Legates by which they got about Seven thousand
Devise.

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... Pounds, and devises the Lands comprised in the Marriage Settlement of about two hundred Pounds per Annum to the Plaintiff, who was Coolin German and Heir Male of the Family, and dies without Issue. By two Commissioners, against one, the Provision by the Brother's Will is a Compensation for the Three thousand Pounds by the Marriage Settlement and they are not to be considered as Heirs, but as Mortgages, and cited the Cases of Blois v. Blois, Yeomen v. Brooks, Dekins v. Powell, Jeffon v. Jeffon, Osbiston v. Strickland &c. But this Decree was afterwards reversed on Appeal to the House of Lords. 2 Vern. 260. Paich. 1692. Duffield v. Smith.

21. A. on Marriage of B. with C. his Daughter gave Bond to B. for C's Portion, A. devised several Lands of such great Value to B. and C. and their Heirs, and makes B. Executor; Per Cur. Cases of this Nature depend on Circumstances and where a Legacy has been decreed to go in Satisfaction of a Debt, it must be grounded on some Evidence, or at least a strong Presumption, that the Testator did intend it, but it appeared here A. intended to give all he could to B. and C. and to debar his Creditors, so cannot preclude the Devise of the Lands intended in Satisfaction of the Bond Debt. 2 Vern. 295. pl. 288. Trin. 1693. Goodfellow v. Burchert.

22. A. by his Will devised some Legacies out of his Personal Estate to his Wife, and devised to her Part of his Real Estate during her Widowhood, and devised the Residue of his Estate to Trustees for Twenty one Years for Payment of Debts and Legacies; the Remainder of the whole in the Case Estate he devised to the Plaintiff (who was his Godson and of his Name but a remote Relation) and to his first and other Sons in Tail &c. Sommers C. was of Opinion, that although what was given to the Wife was not declared to be in Lieu and Satisfaction of Dower, and although no Estate for Life was devised to her but only during her Widowhood, yet that in Equity it ought to be taken that what was so devised was intended to be in Lieu and Satisfaction of Dower and that it might be plainly collected and intended from the Will that it was to intended, because he has thereby devised all other his Real Estate to other Utés; and a collateral Satisfaction may be a good Bar to Dower in Equity, though not pleadable at Law, and decreed that the suit either take her Dower, and wave the Devise, or accept and thereby devise to her personal Lands to his Widow, but it did not mention it to be in Satisfaction of her Dower, and devised to her as a Reversion of his Lands to his Executors till


23. Sir J. B. having Issue only Daughters settled his Estate upon Ch. Prex.: Trustees to sell, subject nevertheless to a Power of Revocation; afterwards upon the Marriage of his Daughter with the Plaintiff by Deed reciting that his Intent was, that the Manor of C. in Question should go to the Issue Male of the Plaintiff, he thereby agreed, that if the Plaintiff should wend to purchase the same to him and his Heirs, he would have it for 1500 l. cheaper than the best Purchaser would give for the same. Sir J. B. afterwards made his Will and gave the Complainant 1500 l. to be raised out of this Manor, but did not mention whether it should be in Satisfaction of the 1500 l. given by the Will, should be intended in Satisfaction of the 1500 l. mentioned in the Agreement, or whether Mr. B should have both? And it was clearly held, that he should not, inasmuch as the 1500 l.
is to be raised out of the same Lands, and the Lands are thereby otherwise disposed of, so that it could not be intended by Sir R. B. that he should have both. 2 Freem. Rep. 245, 246. pl. 315. Hill. 1709. Bromley v. Ferrisplace.

21. A Legacy of 150 l. given by a collateral Ancestor to the Daughter of A. which was paid A. and who after gave her a 1000 l. Portion, settled a Church Lease on her, and maintained her and her Husband fourteen Years; yet held no Satisfaction. Chan. Prec. 228. pl. 187. Hill. 1709. Chidlely and Ux. v. Lee.

25. A. gives Bond to B. her Servant to pay her 20l. per Annum quarterly for her Life, free from Taxes and by Will without taking Notice of the Bond, gives B. 20l. per Annum for Life, payable half Yearly; but not paid free from Taxes; Decreed the Annuity by the Will not to be a Satisfaction of the Bond, and that B. should have both the Annuities. 2 Vern. 478. pl. 433. Hill. 1704. Atkinson v. Webb.

A bequest-ed 500l. to M. the Daughter of J S. to be paid at Twenty-one or Marriage, but, before either, the Executor paid it in Contingency he would do it and make it 1000l. which J. S. covenanted to do. The Father, Decreed 1000l. to M. payable as aforesaid, without laying it was in pursuance of the Covenant. M. brought a Bill against the Executor for the 500l. but it was dismissed. N. Ch. R. 58. 11 Car. I. Willoughby v. Rutland (Earl.)

26. A. devised his Estate to B. his Son charged with five hundred Pounds to C. the Daughter of B. payable at Twenty-one or Marriage, on the Marriage of C. with D. B. gives One thousand five hundred Pounds Portion, but nothing said of the Legacy or any Release given. D. dies and C. marries E. C. and E. Twenty-one Years after sue for the Five hundred Pounds. For the Plaintiffs was cited the Cafe of Chudley v. Lee, where a greater Portion was given, yet afterwards a Legacy decreed to be paid, not being taken Notice of in the Marriage Agreement. But the Bill was dismissed it being thought that the One thousand five hundred Pounds was intended in Satisfaction of the Five hundred Pound Legacy, especially after this Length of Time. 2 Vern. 484. pl. 439. Hill. 1704. Macdowell and Ux. v. Halfpenny.

27. A. on his Wife's joining in Sale of Part of her Jointure gives her a Note to pay her 7l. 12s. per Annum for her Life; and afterwards on Sale of a farther Part, gives her a Bond to pay her 6l. 10s. per Annum for her Life, and by Will without taking Notice of the Note or Bond gives her 14l. a Year for her Life. The Devise shall be a Satisfaction of the Bond and Note. 2 Vern. 498. pl. 448. Patch. 1705. Brown v. Dawton.

28. A. on his Marriage, covenants to purchase and settle 20l. a Year on his Wife for her Life, and if he died before it was done to leave her 300l. out of his Personal Estate for her better Livelihood and Maintenance. He died without making any Settlement, and by Will gives his Wife the Interest of 330l. with a Power to dispose of 30l. at her Death. Decreed first that she was intitled to the 300l. by the Articles, and that the Executors were not at Liberty to settle 20l. a Year on her for her Life. Secondly, that the Legacy was not a Satisfaction of the Articles, but she should have the 300l. by the Articles and the Legacy too. 2 Vern. 595. pl. 434. Trin. 1705. Perry v. Perry.

29. A. by Marriage Articles agrees to lease his Wife Eight Hundred Pounds and her Jewels &c. and that notwithstanding anything in the
the Articles she should not be debarred of any thing. A. should give her by Will or Writing &c. A. devised one thousand Pounds to the Wife, and disposed of all his Estate. Per Ld. Chancellor, the Wife must wave the Articles or the Will, if she will take the Benefit of the Will the must suffer the Will to be performed throughout. 2.*

32. A Child intituled by his Father's Marriage Articles to an equal Share of one third of his Father's Personal Estate has a Legacy given him by his Father's Will; if he will have the Benefit of the Will he must renounce the Articles. Per Cowper C. 2 Vern. 556. Lady Herne & al. v. Herne & al.'

31. Devise to a Creditor of more or less than is due to him, is to be construed as a Gift or Gratuity, and not a Payment of the Debt only, 593. S. C. Decreed.

where there are Affets and Proof of Kindness. 1 Salk. 155. pl 5. upon Circumstances and Parl.

Proof.—S. C. cited by the Master of the Rolls. 5 Wm's Rep. 227.—B. was indebted 10 l. to C. and left him a Legacy of 100 l. and made him Executor, and after the making of his Will borrowed 100 l. more of him, and died. The Master of the Rolls decreed that this Legacy should be a Satisfaction of both the Debts, that contracted after the Will, as well as that contracted before; but Harcourt Ld. Ch. reversed the Decree, because a Court of Equity ought not to hinder a Man from disposing of his Own as he pleases. When he pays he gives it a Legacy, we cannot contradict him, and far be it for a Debt; and as to the Debt contracted afterwards, he said there was no Pretense to make this a Payment of that. If a Legacy be less than the Debt, it was never held to go in Satisfaction; so if the Tenant given was a different Nature, as Land, it should not go in Satisfaction of Money; so if the Legacy be upon Condition, nor by the breach he may be a Lien, whereas the Will intended it for his Benefit. Note. In all those Cases, the Intention of the Party ought to be the Rule. 2 Salk. 568. Cranmer's Case.—S. C. cited by the Master of the Rolls. 5 Wm's Rep. 227, as decreed by Ld. Harcourt, that a Legacy though it exceeded the Debt, could not be intended as a Satisfaction thereof; and that in fact it may be presum'd, that if the Tenant intended to pay or furnish a Debt, he would certainly have taken Notice of it.

* S. P. per Master of the Rolls. 2 Wm's Rep. (616) Trin. 1731. Eastwood v. Winkle or Styles. If the Sum given be as great or greater than the Debt, it is a Satisfaction of the Debt. But if given as a Contingency it is no Satisfaction Per Master of the Rolls Ch. Prec. 394. Mich. 1714. Sir John Talbot, t. alias Ivory, v. D. of Shrewsbury.—Arg. G. Equ. Rep. 64. 1 S. P. per Cowper Ch. G. Equa. R. 66. in Case of Davison v. Goddard.——40 l. bequest'd to a Creditor for 500 l. who was also made Executor, and submitted to account for the Surplus, was decreed per Parker C. not to go in Satisfaction of the 500 l. 10 Moit. 492. Pasha. 10 Go. in Case of v. Mortimer Powell. 40 l. Abr. Equ. Cases 205. Crompton v. Sale. S. P.

32. A. agreed with B. to give 2000 l. Portion to be laid out by A. he purchased Lands with 1000 l. and mortgages them, and then settles pursuant to the Articles, excepting only in one Limitation. A. devised these Lands to his Wife for Life, and also a Legacy in Money, and gave Legacies to B. and his Children, and dies without Issue of his Body, leaving the Children of B. his Heirs at Law. Per Cowper C. The Lands settled according to the Articles was a good Performance so far as the Value was over and above the Mortgage. Then it was urged that the Legacy to the Children was a Bounty, and not a Satisfaction of the Demand of the Heir; because at the Time of the Legacy it was not known whether he would be Heir, or take any Thing by the Settlement, and also it was a Legacy given to him in Company with others, and the Dispute is not between the Executor Defendant and a Creditor, but between the Executor and B. and his Son and Daughters; and there are Affets enough to anwer every Thing. Yet it was directed that the Master enquire what Affets by Default in Fee, and other Personal Liability came into his Hands, and that to be as Part of the Satisfaction of his Demand. G. Equa. Rep. 64. Pasha. 6 Ann. Letchmere v. Blaggrave.

33. A. received 1000 l. to the Ufe of B. and makes B. Executor and dies, that shall go in Satisfaction. Per Ld. Cowper. G. Equa. R. 64. Pasha. 6 Anon. in S. C.
34. A on his Marriage settled Lands by which he was Tenant in Tek, and covenanted not to suffer a Common Recovery, but that the Lands should be enjoyed according to the Limitations. But afterwards suffered a Recovery to the Life of himself and Hers. He had only one Child, a Daughter, to whom he gave a considerable Portion on her Marriage, and after devised the said Lands in Trust for his said Daughter for Life, with Remainder to her first &c. Son in Tail Male, and if she survived her Husband, then to her in Fee, but if she died first then the Remainder over, and died. The Husband and Daughter bring a Bill for a specific Performance of the Covenant. The Lord Chancellor being of Opinion that the Covenant did not bind the Land, the Plaintiffs pressed that they might be at Liberty to sue the Executor, and recover out of the Personal Accidents, and in order thereto that an Influe might be directed, upon which the Court directed that Influe to be, not what the Husband, but what the Wife, was dammified by the Breach of this Covenant. Though he said that arguably the Plaintiffs come too soon; For the Wife may survive, and the whole being limited to her, if she survives the may perhaps be no way dammified, and that the Testator having given her a Portion, the Defendant shall have Liberty to give in Evidence any Thing which may tend to a Satisfaction of this Breach of Covenant. Wms's Rep. 104. to 108. Hill. 1708. Collins v. Plummer.

35. A devises 10l. per Ann. to B. for Life charged on Houses held by a Lease for Years, and made M. his Wife Sole Executrix. M. by Will devised 10l. per Ann. to B. for Life, and made J. S. Executor, and J. S. settled Lands of his own, and charged them with Payment of 20l. per Ann. to B. for Life. Ld. Cowper thought the two 10l. Annuities given by the several Wills were several Devises of two several 10l. But whether the 20l. by the Settlement of J. S. should be additional or only in Satisfaction was not decreed, though it was sworn by two Persons to be intended in satisfaction. See G. Eqn. R. 66. Patch. 7 Ann. Davison v. Goddard.

36. A had two Daughters M. and N. A Legacy of 100l. was left to M. by J. S. and another of 50l. by W. R. and both Legacies were in the Father's Hands as Executor of J. S. and W. R. afterwards A. by Will by Virtue of a Power charges his Lands with 2000l. and also left M. and H. 250l. a-piece. This is not a Satisfaction of the two Legacies to M. Ch. Prec. 314. p. 1711. Meredith v. Wynn.

37. A Father gives Legacies to his Children by his Will, and makes his Wife Executrix. She not having paid the Legacies, gives them Legacies likewise. One of which was the same Sum, and the other a greater. Decreed they shall not both, and the latter is a Satisfaction of the former. And where there was a Devise of the Lands, with which one of the first Legacies was chargeable it was decreed that this was a Devise of the Money, which is payable out of the Lands. 1712. in Canc. Barkham & Ux. v. Dorwine.


39. A covenants to leave his Wife worth 650l. he dies Intestate, and her Share on the Statute of Distribution comes to 1000l. This is a Satisfaction. Per Maiter of the Rolls. 2 Vern. 709. pl. 631. Hill. 1715. Blandy v. Widmore.

40. By Marriage Articles the Wife's Portion of 700l. and 1000l. of the Husband's was to be laid out in Land, and settled to them and their Influe,
Devises.

Iliffe, Remainder to the Heirs of the Husband, who afterwards dies without Issue, and by his Will gave her all his Personal Estate, which was of greater Value than 1400l. and devise his Lands to J. S. Ltd. Harcourt, and now affirmed per Ltd. Cowper, deeded the 1400l. to J. S. as Land, and that the Bequest of the Personal Estate to the Wife was a Satisfaction. Ch. Prec. 400. Patch. 1715. Linguem v. Souray.

41. In Case of a Legacy to a Creditor the Nature and Circumstances of the Debt are material, as if it was upon an open and running Account between the Testator and his Executor, so that it might not be known to the latter whether he owed any Money or not to the Executor, then the Testator could not intend the Legacy to be in Satisfaction of a Debt which he knew not that he owed, any more than a Legacy can be a Satisfaction of a Debt contrived after the making the Will; Per Ld. Cowper. And referr'd it to a Matter to state how this Debt arose, with all the Circumstances of it. And in Easter Term 1718. the Case coming on upon the Master's Special Report, Ld. C. Parker said, that he was inclin'd to help the Defendant, who by Mistake or Misadvice only of his Counsel was in a Way of losing his Right, as to the Surplus of the Testator's Estate which by Mistake he had wad'd in his Answer, and so could not now be decreed for him) and therefore if the Plaintiffs would bind the Defendant by his Answer from raking the Surplus as Executor, they ought to take it upon the Terms in the Answer, viz. the Executor waves the Surplus, but satisfies upon his Debt and Legacy, and he decreed him in this Case, both Debt and Legacy, even though it appear'd by the Master's Report, that the Legacy was much greater than the Debt. Wms's Rep. 298 to 320. Mich. 1715. 1716. Rawlins v. Powel.

42. A devise 1200l. among the Children of B. viz. D. E. F. and G. to be distributed at the Discretion of B. but not to be compelled to pay till 12 Months after A's Death. D. died before A. and E. died within six Months after A. Several Years after A's Death B. paid 900l. to F. who gave B. a Receipt in full of his Share. B. by Will gave 900l. to G. in full of her Share of the 1200l. G. demanded the Residue of the 1200l. with Interest from the End of a Year after A's Death. Cowper Ch. held that the Remainder to F. and his Receipt for 900l. barr'd him and his Representative from any further Claim, and that the Remainder belong'd to G. and order'd that B. should allow Interest at 5l. per Cent. for the whole 1200l. from a Year after Tettator's Death, and that the 900l. paid to F. should be taken out of so much Principal, as with the Interest of it would make up 900l. at the Time it was paid to F. and then to carry Interest for the remaining Principal from the End of the Year after A's Death, and decreed such Principal with Interest to be paid to G. 2 Vern. 744. pl. 652. Hill.


43. A Servant having lived long in a Place without receiving any Wages, and being at length computed by the Master to amount to 100l. and he gave a Bond for 100l. due, and afterwards he beat and hit 500l. which was mention'd in the Will to be for his faithful Services. It was Hill. 117. said that this Bond being for Money due for Service, and this Legacy being for faithful Services, it was plain that the Testator intended this Legacy in Satisfaction of all that was due. Cited as Chancery's Cakes. See to Mod. 399. Patch. 4 Geo. in Canc. in the Cafe of v. Mortimer Powell.

reserved per Ld. Ch King, upon the particular Circumstances varying it from the Common Cafe, viz. that the Will by Express Words devis'd that all his Debts and Legacies should be paid, and that the 100l. Bond being a Debt, and the 500l. a Legacy, it was as strong as if he had directed both Bond and Legacy to be paid. And so the Servant had both Debt and Legacy. Wms's Rep. 410. Trim. 1725. Chancery's Case.
44. Pecuniary Legacies and Annuities given by a Codicil, though of greater Value than given by the Will to the same Persons, shall not be taken to be a Satisfaction for the Pecuniary Legacies given by the Will, because the Annuities are not easement Generis, and the Annuitants might die the next Day after the Testatrix, and so the latter Gifts, instead of a Bounty might be a Prejudice, if construed in Satisfaction of the Legacies by the Will, and shall not be so taken unless so expressed. And the Codicil is Part of the Will, and proved as Part thereof, and it is as if both the Legacies had been given by the same Will; and it seemed a Circumstance tending to prove that the Testatrix intended additional Bounties, for that between the making the Will and Codicil, an additional Estate came to her from her Mother; Per the Matter of the Roll. Wms's Rep. 421. 423. &c. Pach. 1718. Matters v. Harcourt Matters.

45. J. Lemon devised Lands to his Wife for her Life, and devised other Lands to the Plaintiff his Brother and his Heirs. The Defendant, Wife of the Testator, enters into the Lands devised to her, which were of more Value than her Dower, but not devised to her expressly in Lieu and Satisfaction of Dower, and afterwards brings Dower against the Devisee of the other Lands, and recovers Dower against him with Costs, who brings his Bill in this Court to be relieved against the Judgment, the Lands devised to her by her Husband being of greater Value, and she in Possession of them.

The Case of Lawrence and Lawrence in Dom. Proc. was cited for the Defendant as a Case in Point that the Wife shall have Dower, notwithstanding a Devise to her for Life of Lands by her Husband, unless declared to be in Lieu and Satisfaction of Dower.

Parker C. said, this Point is determined already by the House of Lords that there is no Relief in this Case in Equity, therefore the Bill must be dismist. MS. Rep. Trin. 5 Geo. Cancel. Lemon v. Lemon.

46. Mrs. Tryan having three Daughters A. B. and C. by her Will bequeathed to A. 1000l. to B. 800l. to C. 500l. at Age or Marriage. Afterwards on Treaty of Marriage of A. with the Plaintiff, the approximating the Match, gave P. a Note to pay him 500l. in six Months, if the Marriage took effect; the Mother fell sick on the Day of Marriage, and died six Days after. The Executors inful that the 500l. on Note was given in Satisfaction of the 1000l. Legacy, or at least of so much of it as the Note was given for. (N. B. These Daughters had Portions of 1500l. by the Father's Will.) The Defendants inful that the Mother after giving the Note declared, that the only intended to give her Daughter A. 1000l. and was uneasy during her Sicknees that her Will was not altered, and gave Directions for that Purpose, but died without altering the Will, and they made Proof thereof, and inful that the Words in Argumentation of her Portion was to be applied to the Portion left her by her Father. Also that the Mother's Affets would not satisfy all the Legacies in the Will, if this Note should be paid. Objection, That the Will gives a Legacy of 1000l. and the Evidence is to controil it, it is not to prove any Thing conform with the Will, or to explain it, as where two are of a Name where a Legacy is given, and afterwards the Testator becomes indebted to the Legatee, that can't be supported to be given in Satisfaction of the Debt, which was not then contracted. But in regard the proper Question was, Whether the Mother hath not, by giving a Note, advanced part of the 1000l. in her Life-time, with Intent to make the 500l. irrecoverable, so the Evidence was to explain, but bare Declarations of a Testator shall not be given in Evidence, for that would be to make a Will in Writing alterable by Parol. The Testator died before she had altered her Will or finished it, but no Witnesses go
ing to the Value, Ld. Chancellor sent it for a Matter to state the Value, and refer'd the farther Direction. The 500l. had been paid, and the Defendants agreed to let the Plaintiff have another 500l. admitting the 1000l. to be due in all Events. Hill. 6 Geo. Canc. Pepper v. Weyneve.

47. If a Man gives a Legacy to a Creditor to the Amount of his Debt, this has been continued a Payment or Satisfaction of the Debt, because a Man must be supposed to be Just before he is Bountiful. But there can be no Pretence to say that because a Teftator gave a Legacy of 500l. to his Debtor, therefore this was an Argument or Evidence that the Teftator intended to remit him the former Debt. Per the Matter of the Rolls. 2 Wms's Rep. 128. 132. Patch. 1723. Jeffs v. Wood, &c. all.

48. A made his Will and gave 100l. Legacy to his Executor, and afterwards contrived a Debt of 25l. with the Executor (who was an Attorney) for Fees and Business done. Ld. C. King refolved without Difficulty, that this Debt being contrived subsequent to the Will, the Legacy could be no Satisfaction for the same. 2 Wms's Rep. 343. Hill. 1725. Thomas v. Bennet.

49. A man indebted by Bond to his Servant, gives her 500l. for her long and faithful Service, though the Legacy is more than the Bond, yet the law have both Sel. Cafes in Chan. in Ld. King’s Time. 44. Trin. 11 Geo. Chancy v. Wotton. Court said they were not by this Resolution over turning the General Rule; but that this Case was attended with particular Circumstances varying it from the Common Cafe, viz. That the Teftator, by the express Words of the Will, had devis'd, “That all his Debts and Legacies should be paid,” and this 100l. Bond being then a Debt, and the 500l. being a Legacy, it was as strong as if he had directed that both the Bond and Legacy should be paid; that when the Teftator gave a Bond for the 100l. Arrear of Wages, it was the same Thing as paying it, and as if he had actually paid it, and had afterwards given the Legacy of 500l. the Executor could not have fetched back the 100l. and made the Defendant refund, so neither should the Bond in this Cafe be satisfied by the Bequest of the Legacy. His Lordship also observed, that the Executor (the Plaintiff Mr. Chancy) did not himself take this 500l. Legacy to be a Satisfaction for the Bond, as appeared by his having voluntarily paid the 100l. to the Defendant, and that his Lordship was of the same Opinion. So the Decree at the Rolls was revered, and the Defendant (the Maid Servant) had both her Debt and Legacy.

50. A had six Sisters B. C. D. E. F. and H. and devis'd to B. C. and D. Annuities for Lives of 10l. each, and to E. F. and H. Annuities of 5l. each, to be paid out of his Personal Estate, and gave all the Rest of his Real and Personal Estate to M. his Wife, whom he made sole Executive. Afterwards M. by Will gave two Annuities of 5l. each to F. and F. and their Heirs, in case they happen to over-live B; And also another Annuity of 10l. to H. and her Heirs; and another of 5l. to D. and her Heirs; but takes no Notice of A's Will, or that B. D. E. F. and H. had any Annuities given them thereby. It was urged that these Annuities being charg'd on the Personal Estate, and M. made Executive, she was as a Debtor for them, and so the Legacy by M. a Satisfaction of the Annuities given by A. to the same Perfons. But per Ld. Chancellor that Point has been carried too far, and he would carry it no farther, especially there being Assets to answer both, and there can be no Pretence to say that the two first Annuities of 5l. each can be a Satisfaction of the like Annuities given by the Husband, because they are given upon the Contingency of over-living such a one, which has not yet happened, and possibly never may; and then shall the Annuities for Life, which are certain, be extinguished, by giving the same Perfons Annuities in Fee on a Contingency which may never happen; and it that be so, as to these Annuities there is no Reason to imagine the Wife had a different Intention as to the others, or that the intended two of them should go in Satisfaction of the like Annuities given by her Husband, and the other two nor; and the Cafes where a Legacy has been held
held to be a Satisfaction of a Debt are, where the Debt was owing by the same who gave the Legacy; but if such Legacy be given upon a Contingency, or to take Place at a future Day, it is no Satisfaction of the Debt; and therefore it was decreed, that the Annuities given by the Wife were distinct additional Annuities, and not an Enlargement only of the Husband's Annuities, from an Interest for Life to an Interest in Fee, as it was urged to be, and therefore should go in Satisfaction of those Annuities; which the Court held they should not, but that the Annuitants should take both.  


51. The Matter of the Rolls said, he look'd upon it as a Stretch that where a Man has owed J. S. 100l, and after gave him a Legacy of 100l. this latter has been taken in Satisfaction of the former, since at that Rate Nothing is given. But though the Court has gone so far, it never construed a Devise of Land to be a Satisfaction for a Debt of Money, much less has it decreed that a Legacy of a less Sum than the Debt should be deemed a Satisfaction pro tanto. 2 Wms's Rep (616) (617) pl. 191. Trin. 1731. in Cafe of Eaftwood v. Vinke & Styles.

52. 30,000l. is covenanted to be laid out in Land, the Money need not be laid out all together upon one Purchase, but if laid out at several times it is sufficient; and if the Covenantor dies, having purchased some Lands which are left to defend, this will be a Satisfaction pro tanto. Per Ld. Talbot. 3 Wms's Rep. 228. Mich. 1733. Lechmere v. Carlile (Earl of).

53. Husband on Marriage settled 100l. per Annum Pin-Money in Trust for his Wife for her separate Life, which becomes in Arrears, and then the Husband by Will gives the Wife a Legacy of 500l. After which there is a further Arrear of the Pin-Money, and then the Husband dies; this Legacy being greater than the Debt, decreed even in the Cafe of the Wife to be a Satisfaction of the Arrears of Pin-Money due before the making of the Will. 3 Wms's Rep. 353. Pach. 1735. Fowler v. Fowler.

54. One having by his Will given his Wife 600l. in Money on his Death-Bed, ordered his Servant to deliver to his Wife then present two Bank Notes payable to Beater, amounting to 600l. saying, he bid not done enough for his Wife; this Gift is additional, and shall not be construed a Payment of the former Legacy in the Tenant's Life-time. 3 Wms's Rep. 356. Trin. 1735. Miller v. Miller.

(U. c) Immediate Devise What is.

In respect of the Incapacity of the first Devisee.

1. If a Man devises to one for Life, the Remainder to another in Fee, and dies, and the Tenant for Life waives the Devise, then he in Remainder may enter immediately. Br. Waiver de chotes, pl. t. cites 3 H. 6. 48. 4 I. 44.

2. Where a Devise is to a Monk, Remainder to B. In this Case B shall take immediately, because Devise to a Monk is void; But if it were that after the Death of the Monk it should remain, B should not take till after the Monk's Death; per Powell J. 12 Mod. 285. cites 9 H. 6. pl. 34. 39. F. 16.
3. The Father devised his Goods to his Son, when he should be of the Age of 21 Years; and if he die before that Time, then his Daughter should have them; the Son died under Age. Adjudged that the Daughter should have the Goods immediately, and not fly till the Time her Brother would have been of Age, if he had lived. And. 33. pl. 82. Mich. 4 E. 6. Anon.

4. Baron and Feme Jointenants for Life, Remainder in Fee to the Baron; the Baron devised a Rent of £1, out of the Manor to a Son, with Clause of Disses for his Child's Part to be paid Yearly. The Baron died; and 19 Years afterwards the Wife died. The Court agreed that in Case of a Grant by a Reverioner after a Lease for Life of a Rent-Charge after the Death of the Grantor, that the Grantee shall distress for all the Arrearages incurred after the Grant, even during the Life of the Grantor, and it was urged by Counsel this was stronger, for this Rent, as it appears by the Words, was devised to the Avouant for his (for his Livelihood) and (for his Children's Part) which Words imply a present Advancement; and these Words (Yearly to be paid) are strong to that Intent. It was adjudg'd. Le. 13 pl. 16. Mich. 25 and 26 Eliz.


5. Remainder-Man in Fee on an Estate for Life devised it to his Wife, yielding and paying during her natural Life 20s. and dies, living the Tenant for Life; the Rent shall not begin till the Remainder falls so as the general Words refer to the Beginning of the Estate, tho' the Words imply that the Rent shall be paid presently. Arg. Le. 243. pl. 330. Patch. 33 Eliz. B. R. in Case of Lord Mordant v. Vaux.


7. A Devise to his Wife till his Son shall be of the Age of 24 Years, then to the Son in Fee, and if he die before 24 Years without Issue, then to the Wife for Life, Remainder to A. &c. The Testator died. It was adjudg'd that the Son had a Fee Simple presently. For an Estate Tail he could not have till he was 24 Years old; and after the Death of his Father there was no particular Estate to support that Estate in the Remainder till he should come to the Age of 24 Years, so that he took by Decent immediately. Arg. 2 Mod. 291. cited as adjudg'd about 17 or 18 Car. 2. in Case of Taylor v. Wharton.

8. A poll'd of a Term purchases the Inheritance of the same Lands in the Names of others in Trust for himself and his Heirs, makes his Will in Writing, and devised to B. all his Estate in the said Term; and my Will is, that my Executors and Trustees shall convey my Estate to B that the same may remain to him and the Heirs Male of his Body. This is no present Devise of the Term, and fo not forfeited for a Felony done by B. Sid. 493. pl. 20 & 21. Car. 2. B. R. Sir G. Sands's Case.

9. If a Devise be of Land to A. and his Heirs within four Years, it is a present Devise, per Serjeant Pemberton; Arg. 2. Mod. 286. Hill. 29 & 30 Car. 2. C. B. in Case of Britain v. Charnock.

10. Devise to A (his Heir at Law) till B. be of Age, and then to B. Held that in Fee. Testator died. B. died within Age, yet a Fee vested in B. presently. 2 Mod. 289. Hill. 29 & 30 Car. 2. C. B. Taylor v. Biddal.


11. M. seised in Fee, gives his Lands after his Death without Issue to H. in Tail Male, until he or they make any Alls to alter or dif-continue
Devise.

The Truth of the Term was declared to be to pay A's Debts and Legacies (which were considerable) and 501 Annuity to B for Life, and to give Power to C to charge the Premisses with 1000.

A piece for his younger Children, payable at 21, and Maintenance in the mean Time, and the Trustees to raise the same out of the said Term, and then the Term to attend the Intestate's Debts, and upon his Death and Devise.

It was argued that the Charges were so great, and the Performance of same so distant in all Likelihood, that in a Court of Law it ought to be looked upon as an absolute Term for the whole 500 Years.

And the Judges agreed with this Opinion of the Judges, and said, that this being but a Trust Term and to be considered in Equity as a Security only for Money, it ought not to make the Devise void. Afterwards B. had a Son and died, and the Son of B. bringing this Matter again into Chancery in Lt King's Time, his Lordship sent it a second Time into B. R. when the Judges there being all new Judges gave their Opinion contrary to their Predecessors, viz. That it was a good Executory Devise, and not too remote; for that it must one way or other happen on the Death of B. whether he should have a Son or not, and that either upon the Birth of the Son, or upon his Death without Issue Male, the Premisses must vest. Trin. 1722. 2 Wms's Rep. 652. Gore v. Gore. —— And the Reporter says that Lord Raymond also was of the same Opinion. ibid.

And afterwards C. died without Issue, whereupon D. a next Remainder man bringing this Matter yet once more into Chancery in Ld. C. Taibo's Time, his Lordship referred this Matter again to the Judges of B. R. who certified that they thought the Remainder good, and that an Interim Estate till the Birth of the Son of B. (and who is since born) descended to B. and to the contingent Remainder supported. (U. and i.)
Devise.

(W. c) What is a Lapsed Devise.


It is not good as a Devise but as a new Devise; Per Clench. Ow. 112. Nothing pays to the Remainder-man till the Death of the Monk. Arg. 10 Mod. 120. cites Lc. 195. But that is, that the Devisee in Remainder shall take the Land presently.


3. The Teiftator had two Sons and one Daughter, and being feised in Fee he devised his Lands to his Wife for ten Years after his Decesest, Remainder to his youngest Son and his Heirs, and if any of his two Sons died without Life, Remainder to his Daughter and her Heirs. The youngest Son died without Life in the Life-time of his Father, and then the Father died without altering his Will. All the Court held that this was a good Remainder to the Daughter, notwithstanding the Death of the Devisee without Life in the Life of the Teflator, and would not argue the Case. Dyer 122. a. pl. 20. Mich. 2 & 3. P. & M. Rickman. v. Gardner.

4. A Devise to A. N. the Dean of Pauls, and the Chapter there and their Succesors, and A. N. dies, and J. S. is made Dean, and after the Devisee dies; the new Dean shall take, though not by the Words, yet according to the Intent; for the chief Intent was to convey it to the Dean and Chapter and their Succesors for ever, and the singular Person of A. N. was not the principal Caufe though perhaps it was one of the Caufes. Per Manwood. Pl. C. 344. b. ad Finem. Trin. 10 Eliz. in Case of Brett v. Rigden.

5. A devised Lands to his Wife for Life, and afterwards to B. his Son and heir, and if he die before the Son's Age of 24, then J. S. to have the Land till the Son is 24. A. died. J. S. died, living the Wife, the Son being under 24 Years. Per Anderfon and Periam J. the Executors of J. S. shall not have the Land till the Son's Age, but Rhodes and Windham doubted. 3 Lc. 195, pl. 244. Hill. 24. Eliz. C. B. Anon.

6. Devise may be to the Use of another; When Ceas que Ufe dies in the Life of Deviser Devisee shall take it, and when a Son is born it shall go to him (the Devisee being to Ceas que Use and the Heirs Male of his Body.) But if the Use be void, then Devisee shall have it to his own Ufe, Arg. But by Way and Anderfon the Devise is void, and it of the De- is all one with Brett and Rigden's Case; and by Anderfon, it a Man for shall devile Land to the Use of one, which Use by Possibility is good, and by luce. Possibility is not good, if afterwards, Ceas que Ufe cannot take, the Arg S. C. Devisee cited.

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Devise.

S. C. cited in Ch. Prec. 420. in Case of Sympton v. Hornsby.

Adjudged that the

Ilffe shall not take but the next in Re-

mainder.


Devise to A. in Tail, Remainder to B. and the Ilffe of her Body lawfully begotten, Remainder to the Right Heirs of A. for ever. A. died without Ilffe living the Tefator B. after making his Will had Ilffe C. who was also Heir at Law to A. and dies living; the Tefator; Refolved that the Heir at Law of the Tefator and not C. shall have the Lands. to Mod. 369. Woodright v. Wright.


But B. dying after the

Devise and

living the

Tefator it

shall go to

C. in Rem-

mainder. Adjudged Cro E. 453. in the Case above—S Mod. 224. Arg cites Cro. E. 445—4 Mod 255 in Case of Reeve v. Long cites S. C. Arg. says that it being in the Case of a Son it was not the Intention of the Father to disinherit him, but (it is said in Margin) that if the Devise had been to a Stranger, then to make the Ilffe of B. take, there must have been a new Publication of the Will. —B died in the Life of Tefator leaving Ilffe, yet C. shall take and not the Ilffe of B. and the Words Heirs or Heirs Males of his Body denote only the Quantity of the Effects, per Cowper C. but said that the Contra{uction of Law in those Cases was extremely rigid and severe, and that the Tefator’s Meaning was, that C. should not take while there was any Ilffe-Male, or Ilffe of B. but force it was not Res Integr. he was bound by the former Resolutions as it was a Point of Law, but since it was so and by that means an Heir at Law disinherited as to a Minority he would decide no Account of the Rents and Profits there being no Infant and left them to Law. Ch. Prec. 459 452 Pach. 1716. Simpfon v. Hornsby.—Gilb. Eq. Rep. 120. S. C. in toto dum Verbis.

Because Heirs here

is a Word of Limita

tion only.

Jo. 59.—Pl. Com. 245. a Brett v. Rigden. —Cited 2 Vern 468. —2 Vern 722. Hutton v. Simpfon. S. P.—Simpson v. Hornsby. Ch. Prec. 449 S. P. and cites Brett v. Rigden, and that the Words Heirs or Heirs of the Body &c. are only to express the Quality of the Effects, as to give a Fee by the Word (Heirs) or a Tail by the Words (Heirs Male of the Body &c.) but that they are not in either Case any Description or Designation of the Person, who was take by Purc[t]hase.

* For by the Will the Heir was intended to take by Defent, but if the Lands pass he must now take by Purchafe, Per Trevors Ch. J. 11 Mod. 156 in delivering the Judgment of the Court in the Case of Archer v. Bokenham.—In this Case there was no compleat Devise, because the Ancestor to whom the Devise was made dying in the Life-time of the Devisor, there was no Devise at the Time the Will was to take Effect; Per John Mallor of the Rolls. 19 Mod. 341. Mich. 5 Geo 1. in Case of Marks v. Marks.

Mo 81. 1 In Case of a Lease for Years devoted to A. and after the Death of A. to B. Adjudged that B. dying before A. the Executors of B. could not take, for that it was only a Contingency and no Interest. 1 Bult. 191. Pach. 10 Jac. Price v. Armory.

S. C. agreed accordingly.

—4 Le. 246. pl. 491. S. C. agreed that the Executor of the Son could not enter.

11 De-
15. Devise of Lands in Fee to A. for Life, then to B. the Son of A. and for Defeats of Heirs of B. to his own Right Heirs for ever; and the Testament devised a mortgaged Term in Possession to A. to do with it for the only Use of B. as he pleased, and that B. should enjoy the Same at his Age of Twenty-one Years, and not before; and if he died before, then he devised all that he had bequeathed to B. to C. D. and E. equally to be divided. D died after the Testament but in the Life-time of B. the first Devise, and before the Contingency happened; Decreed that the Executors of D. are wholly excluded of any Benefit of the Devise either of the mortgaged Term or the Lands in Fee. Fin Rep. 217.

Trin. 27 Car. 2. Edwards v. Allen.

16. Devise to his Sister, who was his Heir at Law, for Years, till her Son by a Second Husband comes to Twenty-one, then to him in Fee. He died within Age. Yet a Fee vested in him presently. 2 Mod. 289. Hill 29 & 30 Car. 2. C. B. Taylor v. Biddul.

17. If Lands be devised to A. and his Heirs, and A. dies before the Testament, it was agreed by all that his Heirs shall take nothing; for Heirs Car. 2. B. is a Law of Limitation and not of Purchase; Agreed per tot. Cur. the S. C. Freemen. Rep. 290. in pl. 343. in C. B. in Case of Steede v. But nor S. P. Herrier.


Davis v. Kemp.—1 Salk. 258. S. P. in Case of Butter v. coke.—S. P. by Holt Ch. J. Gibb. 243. cites it as held in Ld. Bridgman's Time in Davis's Case.—It is good without any New Publication; But it lab'd had the Heirs could not have taken.

19. A Man possessed of a Term devised it to an Infant in Venture for a mere, provided it be a Son; and if the Child be a Son, and die in its Minority, then to the Defendant; but the Executor assented, but the Child being a Daughter, it was adjudged upon a Special Verdict, that the Defendant cannot take, because here is a Condition precedent, which never happened, and that the Executor's Assent is not material, where there is no Devise. Comb. 437, 438. Trin. 9 W. 3. B. R. Eadcourt v. Warrv.

20. A. devised for Farms to his Father and Mother for Life, Remainder to Trustees till A. and B. respectively come to Age, then to convey one Farm to A. and the other to B. A. died, living the Father, before the Time came for the Conveyance to be made, yet per Cur. as he was to have had an Estate in Fee, he being dead, the Conveyance shall be to his Heir. 2 Vern. 561. pl. 510. Trin. 1706. Hook v. Taylor.

21. By the Civil Law it is a Rule laid down in Swinburne, that but decreed when a Legacy is payable at a Time uncertain, as at the Death of a Contra in Testament's Wife, that if Legatee be then dead, it is not to be transmitted by the S. C. to the Executor, but is a lapsed Legacy. Cited per Ld. Chanc. 2 Vern. 760. Trin. 1718. in Case of Pinbury v. Elkin. 347. Anon. I. Ed. C.

Parker said, that it was true in Swinburne, 414, 462 &c. some Cases were put which seemed to import that the Possibility would not go to the Executor of the Legatee; but those Cases were to darkly put, and with so many Inconveniences as to be all overbalanced by the Opinion of Ld. Nottingham in 2 Vern. 347. where A. devised to B. at his Age of Twenty-one and if B. died under Age, then to C. afterwards C. died living B and then B. died under Age. and Ld. Nottingham decreed that the Executors of C. should have the 100L. Trin. 51 Car. 2. Anon.


19. A.
Devise.

19. A devises to B. and C. and the Survivor and Survivors of them his Heirs and Assigns equally to be divided between them, Share and Share alike. B. died in the Life of A. Decreed per King C. the whole Estate to C. for Life as Jointenant, and after one Moiety to C., and his Heirs and the other Moiety to the Heir at Law of A. (after the Death of C.) and his Heirs; for that it was a Jointenant for Life, and a Tenancy in common of the Inheritance, and that the Word Survivors was Surplusage. 9 Mod. 159. Trin. 11 Geo. Baker v. Eyles and Smith.

(X. c) Lapsed Legacy.

1. If Executor Legatee refuses to prove the Will by the Common Law (though otherwise by the Civil Law) he hath no Remedy for his Legacy. For by the Refusal there is a dying Intestate and then nothing could be devised. Owen 44. 31 Eliz. Catlin's Cafe.

2. Lands devised to be sold for Payment of Portions; one of the Children dies after the Portion due and before the Land sold; the Administrator of the Child is intitled to the Money. Vern. 276. pl. 276. Mich. 1684. Bartholomew v. Meredith.

3. D. devises to his Sister M. 500l. she at the Death of the Testator was a Probationer at the Convent of Beneficiaries at Brulles, and became a profest Nun, and then she assigned 250l. of her Legacy being the Residue of what remained unpaid to the Plaintiff, who brings a Bill of Satisfaction &c. The Lady Abbess releases for herself and Family, all her Claims and Rights to the Legacy &c. Intituled for the Defendant that the Legacy was lapsed by her Profession she being become thereby Civiliter Mortua and not able to assign. Secondly, that the Legacy never vested per Statute 1 Ja. cap. 4 and 3 Car. 1. Harcourt Chancellor declared that the Assignment being without a Confidation was a Trust for M. and that he would as soon decree the Legacy to the Lady Abbess as to the Plaintiff. Bill dismissed. Mich. 15 Ann. Canc. Darrell v. Darel & al. (E. R.)

(Y. c) Lapsed Legacy; In Respect of the Death of Legatee in Testator's Life.

1. If a Man devises a Lease or Goods to J. S. who dies, and after the Devisee dies, the Executor of J. S. shall have nothing of this. Plowd. 345. b. Trin. 10 Eliz. Arg.

2. A. had two Sisters M. and N. and bequeathed 300l. to each of the Children of M. and N. and if any of them die before the Money is paid, then the Money, which should have been paid to such Child, shall be divided between the Grand-Children of M. and N. the said Legacy to be paid before any other; M. had Issue B. C. D. E. and F. whereof B. and C. died, leaving Issue, but all three, viz. B. C. and D. died in the Life of A. The Court was of Opinion, that B. C. and D. being dead
Devise.

* at the Time of the making A's Will, they could take nothing either by the Words or the Intent thereof, both which were fully satisfied, because E. and F. were living at A's Death to whom A's Executor paid 300l. a-piece, and nothing due to the Issue of D. Fin. R. 182. Mich. 26 Car. 2. Judd v. Arnold.

3. A devis'd to B. his Sister 350l. *on Condition that at or before her Death she give 200l. part thereof to her Children; the dies in Testator's Life time; per Lords Commisioners the whole Legacy is lapsed; for being a Devise of Money, the absolute Property vested in the first Legatee.


of Counsel admitted it to be against him.

4. A devis'd 300l. to B. his Sister, *willing her to give 200l. thereof to her Child; B. died in the Life of A. Bill by the Child for the 200l. dimiss'd. 2 Vern. 208. pl. 192. Hill. 1690. in Cafe of Miller v. Warren.

5. A devis'd 300l. to B. *whereof he owes me, which I intend to give to C. his Daughter. But my Will and Defire is that he give the 300l. to his Daughter C. at his Death, or sooner if there be Occasion for her better Advancement and Preference. A. at making the Will was in England, and B. died in Ireland eight Days before A. It was inferred that this was in Nature of a Remainder, and so go to C. and it was admitted that the Words I will, or I devise, amount to an express Devise. Decreed by the Master of the Rolls, that the 300l. Bond be assigned to the Administrator of C. (C. being dead) and the 200l. paid with Interest from the exhibiting the Bill. Wright K. confirmed the Decree on Appeal. 2 Vern. 456. pl. 427. Mich. 1704. Eacles v. England.

6. It was inferred that if a Legacy is given A. *in Trust for B. though A dies living the Testator, the Devise shall stand good for the Benefit of B. But Wright Keeper seem'd to doubt of the Point. 2 Vern. R. 468. Mich 1704. in Cafe of Eacles v. England.

7. If a Legacy is given to one of his Executors, Administrators and Assigns, and the Legatee dies in the Life of Testator, it was agreed by the Court and the Counsel on both Sides, that in such Cafe, though the Executors &c. are named, yet the Legacy is lost; for the Words (Executors, Administrators and Assigns) are void, being but Surplusage and Expresso omit. &c. and they are by Supposition of Law nam'd only to take in Succession, and by way of Representation as an Heir represents the Acestor in Cafe of an Inheritance. Wms's Rep. 84. Mich. 1705. Elliot v. Davenport.

8. But it was held that a Will may be so poud'd as that though the Legatee dies in Testator's Life, yet his Executors shall have the Legacy, but then it ought to appear in the Will plainly and by direct Words, that this was the Testator's Intention. Wms's Rep. 85. S. C.

9. A recit'd in her Will that B. ow'd her 400l. bequeathed the Debt Wms's Rep. of 400l. to B. provided be sheerout paid several Sums in the Will men. 85. 86. per tioned to his Wife and Children, and the Residue she freely and absoluately gave to B. and will'd the Executor immediately on her Death to deliver up the Security, and not claim any of the Debt, but the Executor to yield the whole as B. or his Executors &c. should require; B. died living A. Decreed the Legacies given out of the 400l. to be allowed the Plaintiff, and the Residue of the Debt to be paid to the Executors of A. 2 Vern. 521. Mich. 1705. Elliot v. Davenport.

be Auxiliar and Dependant upon it, viz. If the Legacy took Effect, then the Executor to release, and not to claim the Debt as a Consequence of it. The Court was rather induced to be of that Opinion, because it appears by the Devise over of part of the Debt to the Wife and Children, it was not the In-
Devise.

10. I forgive such a Debt, or my Executors shall not demand, or shall release it; it was admitted that such Words only in the Will would have been a good Discharge of the 400 l. in the Case above, though B. had died in the Life of A. 2 Vern. 522. Mich. 1705. Elliot v. Devonport.

11. And it was admitted if a Debt is mentioned to be devolved to the Debtor, without Words of Release or Discharge of the Debt, if the Debtor die before the Testator, that will be a lapsed Legacy, and the Debt will subsist. 2 Vern. 522. Mich. 1705. in Case of Elliot v. Devonport.

Where A. bequeathed the Surplus of his Estate to B. C. D. and E. who were his Brothers equally to be divided; and if any of them die before the Estate is got in and divided, his or their Share to go to his and their Children. D. died in the Life of A. but left Children. Whether they shall take their Father's Share? 2 Vern. 653. pl. 581. Hill. 1710. Breton v. Lethulier.

12. A. devised the Surplus of his Estate to B. C. D. and E. who were his Brothers equally to be divided; and if any of them die before the Estate is got in and divided, his or their Share to go to his and their Children. D. died in the Life of A. but left Children.Whether they shall take their Father's Share? 2 Vern. 653. pl. 581. Hill. 1710. Breton v. Lethulier.

13. A Man makes his Will and gives 600 l. to his Son John, to be paid with all convenient Speed; and gives 600 l. to his Son George, to be paid in convenient Time; and appoints his Real Estate to come in Aid of the Personal; and goes on and says, But in Case either of my said Sons happen to die before they have received all, or any Part of their Legacy, then the remaining Son or Sons shall go and be paid to the Survivor; One of the Legatees died in the Life of the Testator. Bill is brought by the Survivor for the Legacy left to the Deceased. In this Case there was no Defence. The Attorney General said, it had been frequently determined, that if a Legatee dies in the Life of the Testator, and there be a Survivor created, it shall not be considered as lapsed, because there was a Survivor created, but be looked on as an Immediate Devise, and the Survivor shall receive both, and so it was decreed. Sel. Cases in Canc. in Ld. King's Time 73, 74. Trin. 2 Geo. 2. Horneley v. Hornley.

(Z. c) Lapsed
(Z. c) Lapsed Legacy; In Respect of Legatee’s dying before Day of Payment; The Charge being on Land, or otherwise.

1. If a Man devises 20l. by his Testament to W. N. to be paid in four Years, and he dies in the first Year, yet his Executors shall have it; for this is no Condition, but a Limitation of Payment. Br. Conditions, pl. 187, cites 24 H. 8.

2. A. bequeath’d 500l. to B. for and towards her Marriage; B. died before Marriage. Quere, If the Executors of B. shall have the 500l. it seem’d to all as it that the Executors should have it. D. 59. b. pl. 15. Pauch 36 and 37 H. 8. The Queen v. Ld. Latimer, where a Legacy of Money was given towards Marriage, to be paid at the Day of Marriage, or at the Age of 21, and the died before both; But Dr. Read said that it is otherwise by the Civil Law. D. 59. b. pl. 15. Pauch 36 and 37 H. 8. The Queen v. Ld. Latimer. —— S. P. by Doderidge J. 2 Bulst. 126 Mich. 11 Jac.

3. If one devise that B. shall have 20l. at Marriage or 21 Years, if B. S. P. by die before, her Executor shall take. But otherwise if the Bequest had been to B. to be paid at her Marriage or 21 Years of Age, for that in the last Case it is a Duty presently. Per Williams and Yelverton J. Mich. 11 D. 59. b. pl. 15. Marg. Mich 3 Jac. B. R. cites Br. Devise 27. Jac.

4. A Devise of 100l. to his Daughter when she shall marry, or to his Son when he shall be of Age, and they die before; in such Cases their Executors shall not have the Money, but it is a lapsed Legacy, otherwise Car. 2. if the Devise were to them to be paid at their full Ages, and they die before that Time, and make Executors; there the Executors may recover the Legacy in the Spiritual Court. Godb. 182. pl. 259. Mich. Ceres 153. S. C. 9 Jac. C. B. Anon.

5. If a Man devise 100l. to the Eldest Son when his second Son shall come to the Age of seven Years, and he dies before he accomplishes this Age, yet it is clear the Eldest Son shall have this 100l. when the Time prefixed shall happen by Effluxion of Time. Per Croke J. 2 Bulst. 126. Mich. 11 Jac.

6. Devise to A and if he dies before be come to 21 Years, I make it to my Executors. A. dies before 21, yet it shall not go to the Administrator of A. 2 Bulst. 123 Mich. 11 Jac. Roberts v. Robert. Adjudged per three Justices against Doderidge.

7. A Legacy was given to a Femme Covert to be paid to her 18 Months after the Death of the Testator; She died within that Time; Adjudged that her Husband and not her Daughter was entitled to this Legacy, because the Wife had an Interest in it before the Time of Payment, and such Interest which he might have released. 2 Roll. Rep. 134. Mich. 17 Jac B. R. Anon.

8. If a Legacy is appointed to be paid after the Death of the Executor, and the Legatee dies before the Executor, it is left. Wentw. Off. Executors 240. quotes Swinbourn.
9. A devise of 100l. to B. thus, viz. 50l. in one Month after the Expiration of his Apprenticeship, and 50l. within one Year after the Expiration. B. died after the Month, but within the Year. Decreed the second 50l. to the Administrator of B. with Damages. 2 Ch. R. 25 2 Car. 2. Rowley v. Lancaster.

10. A Legacy was devised to a Daughter to be paid out of Lands mortgaged to the Teller. The Mortgage became forfeited in Teller's Lifetime, and it was therefore infilled that neither the Heir or Executor of the Mortgagor were bound to pay the Money; but Decreed the Money to be paid to the Husband and Administrator of the Daughter, (the being dead) or the Defendants to be foreclosed, and that the Husband was well intituled to the Legacy. Fin. R. 91. Hill. 25 Car. 2. Clarke v. Knight, Baker & al.'

11. Devise of 100l. to A. at 21, and if A. die under Age, B. and C. or the Survivors of them to have it. B. dies, then C. dies, living A. A. dies under 21. Decreed that C.'s Administrator shall have the 100l. though C. died before the Contingency happened. Vent. 347. Trin. 31 Car. 2. Anon.

12. A Devise of 100l. to J. S. at the Age of 21, and if he dies before, then J. N. and A. B. or the Survivor of them to have it; J. N. and A. B. died in the Life-time of J. S. and before he was of Age, and then J. S. died under Age. Decreed that the Administrator of J. N. who survived A. B. shall have it, though his Intestate died before the Contingency happened. 2 Vent. 347. Trin. 32 Car. 2. Anon.

13. Copyhold surrendered on Condition to pay 200l. to A. at 21, and if he die before 21 without Heirs of his Body, then to the Surrenderer. A. dies before 21, leaving a Son; Decreed the 200l. to be paid to the Son, and the Lands to stand charged therewith 2 Chan. Rep. 214. 33 Car. 2. Roe v. Tillier.

14. Term limited by a Settlement to raise Portions for Younger Children payable at 21 or Marriage. One of them dies under 21, and unmarried. Her Portion shall not be raised for the Benefit of the Administrator. Otherwise if the Portion was to be raised out of a Personal Estate. Vern. 204, 205. in pl. 201. Mich. 1083. Lady Poulet v. Lord Poulet.

15. Devise was to B. when she shall attain the Age of 21, or be married, which shall first happen, the Sum of 500l. to be paid her * with Interest. The Daughter dies under Age and unmarried, her Administrator had decree for Principal and Interest. North Ld. K. once pronounced a Reversal of the Decree, but being much pressed that Teller's Intention would be clear in the Proofs, he suspended it to hear the Proofs. 2 Chan. Cafes 155. Mich. 35 Car. 2. Lampen v. Clobery.


17. A
Devise.

17. A Difference allow'd by Ld. Keeper between a Devise of 500l. to One to be paid at her Age of 21 or Marriage, there it is due though
44 Anon. 
S. P. 2. To be the died before 21. and Where 500l. is devised, if, or when she comes paid at the to 21. 2 Chan. Cases 155. Mich. 35 Car. 2. Lampen v. Cobberry. Age of 21, it goes to the Executors. 2 Vent. 542. S. C.

But if in either of these Cases the Teftator had given Interest from his Death, this would be an Explanation of his Intent, to make the Legacy an Interest veiled, and consequently would not lapse, and this be construed in Cobbery's Case, 2 Vent. in Yates v. Ferrarsplace, and several other Cases. Ch. Prec. 517. Stapleton v. Cheales.

18. A Sum of Money is devised out of Lands to be paid at a future 2 Ch. Rep.
Day; the Teftator dies; Legatee dies. Administrator of Legatee shall have it, cited per Ld. Keeper. 2 Vent. 367. Patch. 1 Jac. in Lord Pawlet's Case.

So being charged upon Lands and being for a Portion though not by express Words mentioned to be for a Portion, yet if it appears to be so in Fact it shall sink in the Land. 2 Wms. Rep. 276 at 110.

But if a Legacy be chargeable as well upon the Personal as Real Estate then so much thereof as the Personal Estate shall extend to pay shall go to the Executors or Administrators of the Child; but where it is a Charge only upon the Land it is otherwise. 2 Wms. Rep. 276. S. C.—S. C. cited Arg. 2 Wms. Rep. (611) and afterwards per Lord Chancellor King (612) Trin. 1731, who said he had locked into this Case and the Case of Haste v. Ferrarsplace above, and that those Authorities shew that there is a Difference where the Real as well as the Personal Estate is charged; for in this Case as far as the Executor or Administrator claims out of the latter he shall act according to the Rule of that Court, where those Things are determinable, even though the Infant Legatee dies before the Time of Payment, but as far as the Legacy is charged upon the Land, so far it shall, upon the Legatees dying before the Legacy becomes payable, sink. And this being the Rule which has of late universally prevailed in the Legatees a Child or a Stranger, his Lordship said it would be of the most dangerous Consequence and disturb a great deal of Property for him to break into it, and decreed accordingly in the Principal Case with regard to the Legacy charged upon Land payable at 25, before which Age the Legatee died. 2 Wms. Rep. (612). (609) 612.) Trin. 1731. D. of Chandos v. Talbot.

A devised 100l. to B to be paid September 20, 1668 and charged it on Land devised to J. S. B. died before the Day, yet it shall go to B's Administrator. Fin. R. 112. Hill 25 Car. 2. 1 Thom. v. Taylor.

Ld. C. Talbot said, the Case of Smell b. D did weigh but little with him; for first he did not think it well reported; and secondly, the Reason seems idle. For why may not an Uncertainty be transmitted as well as a Certainty though perhaps not so beneficial. Cases in Eq. in Ld. Talbot's Case 124. Trin. 1735, in Case of King v. Withers.
Devise.

Cafe Pay
ment was
expressly to
be at
Twenty-
one or
Marriage. 2 Vern. 92. Ibid.

20. A charges Lands with 6000 l. for the Child his Wife was Primo-
ment, if a Daughter with Clause of Entry for Non-Payment; of the Rents and Profits of Lands, and dismissed the Bill as to so
a Daughter is born but died; Bill by Administrator of the Daughter
much as concerned the 2000 l. 2 Vern 92. pl. 58. Mich. 1688. Smith
was dismissed. 2 Vern. 208. Hill. 1690. Norfolk v. Gifford.

21. Legacy given to A. when she shall attain the Age of Twenty-one
Years. A dies before Twenty-one; this is a lapsed Legacy; This
Court has several Times made strained Constructions of Wills to help
Infants but never to help an Administrator. N. Ch. R. 193. Hill. Vac.
1691. Taylor v. Wood.

22. A devised Lands to B. on Condition to pay the several Legacies,
which he had bequeathed to the several Persons named in his Will,
by which he gave one Legacy to J. D. when she should attain and
come to the Age of Twenty-one provided if B. fail of Payment the
Legates or such of them whose Legacy should not be paid might en-
ter and detain till satisfied; J. D. before Twenty-one died; Decreed a
lapsed Legacy and not a present Devise. N. Ch. R. 193. Hill. Vac.
1691. Taylor v. Wood.

23. A Portion devised to a Child with Interest, but not to be paid
or payable until the Child attains Twenty-one Years or was married.
The Child dies under Twenty-one and unmarried. Decreed the Port-
ion to the Administrator. Per Jeferies C Vern. 462. pl. 449. Trin.

24. Where a Feme Covert has a Power referred to dispose by last
Will or Writing and the makes her Will and disposes and the Hus-
band subscribes his Approval, in such Cafe the Person, to whom the
gives, is not Legatee but Nominee, and if he dies before the Wife, it is
not like a Legacy which is thereby lapsed, but it is only the Execu-
tion of a Trust and the Executors or Administrators shall take. Abr.

25. A having entitled his Land on his Son subject to a Mortgage,
ywill devises his Leashold and Personal Estate to pay his Debts and
Legacies, and directs if his Personal Estate is applied to pay the Mortgage,
it should be kept on Foot to make good the Daughter's Portion, and gives her 3000 l. to be paid at Twenty-one or Marriage, it married with Con-
sent, if not but 1000 l. She died at Six Years of Age. The Portion
shall not be liable for the Benefit of her Administrator. 2 Vern. 416.

26. A devised 300 l. to B. but my Will is that B. give it to C. at
B's. Death or sooner, if Occasion be for her better Preteriment. B. died
before A. living C. then A. died; and at Sixteen Years of Age C died.
It is not a lapsed Legacy, but C's Administrator shall have it, B. being
only as a Trustee. Ch. Prec. 200. pl. 192. Trin 1702 Eales v. En-
gland.

27. A Legacy is bequeathed to a Mother for Maintenance of her Child;
though the Child dies the Mother shall have the Legacy. Per Ld.
Wright. Ch. Prec. 219. Pach. 1793. in Cafe of Buthnall v. Par-
fons.

And if B. died before Twenty-one then E's

28. A devised Lands to B. in Fee, and adds, but it is my Will nevertheless
that B. pay out my Lands so devised 600 l. 9 200 l. to C. at her Age of 21, to
D. 200 l. at his Age of 21, to E. 200 l. at his Age of 31, and 4 l.
per Annum for Maintenance, until they come to Twenty-one and their
Portions

died before Twenty-one. C. married and died before Twenty-one, leaving two Children; Ld. Cowper disaffirmed the Husband's Bill both as to the 200 l. and also as to the 100 l. because there were not Words that vested any Interest before Twenty-one, as to the 100 l. that was governed by the other Legacies. Ch. Prec. 267. S. C. —— G. Equ. R. 11. S. C.

29. H. bequeathed by his Will in these Words, viz. I give 100 l. a-piece to the Two Children of J. S. at the End of Ten Years after my A. devised Deeds; The Children died within the Ten Years; Per Cowper Lord 20 l. to B. Chancellor this is a lapsed Legacy, and shall not go to the Executors of her Children; for the Diversity is where the Bequest is to take Effect at Marriage a future Time, and where the Payment is to be made at a future to be paid Time. And though it was objected by Sir Thomas Powis that this differed from the Case where a Man devised 100 l. to J. S. at his Age of Twenty-one because it is a Contingency, whether he attain to that Age; but the Expiration of the Ten Years is inevitable; it is not a lapsed Legacy, per Boeckin 126 Roberts v. Roberts.

— Devise of a Legacy to A. at Twenty-one or to be paid at Twenty-one is the same, Per Wright Keeper. 2 Vern 417. —— Carlth. 32. —— Le. 277. + Lady Lodge's Case. —— + S. P. agreed and S. C cited Ch. Prec. 318 Stapleton v. Chivers. —— G. Equ. R. 76. S. C. —— Ld. V. King said that this seemed a very flight and superficial Diversity and though it had been establisht in the Spiritual Court as to Legacies out of a Personal Estate it deferred no Favour where charged on Land. Trin. 1711. 1 Wms. Rep. 612. D. of Chandes v. Talbot —— In the first Case it will lapse, but not in the last. Vent. 342. Trin. 29 Car. 2 Cloysbys Case —— Per Cowper C. S. P. 2 Ver. 610. —— 2 Chan Rep. 25. 21 Car. 2 Rowley v. Lancelott. S. P. —— But where in the Close of the Will was added, If any Legatee die before his Legacy is payable the same should go to the Brothers and Sisters of such Legates, it was held no lapsed Legacy but should go over. 2 Ver. 378. Darrel v. Meildworth. —— 2 Ver. 611. Ledfion v. Hickman. 3 P.

30. One being possified of a very considerable Personal Estate, Part in Jamaica and Part in England, and being himself residing in Jamaica, made his Will, and thereof several Executors, some for his Estate in Jamaica, and others residing in England for his Estate here, and amongst other Things devised in these Words, viz. I give and bequeath to J. S. now under the Capacity of R. D. the Sum of 2000 l. at the Age of Twenty-one Years, to be paid by my Executors in England, and devised all the Rest and Reversion of his Estate to the Plaintiff and died; J. S. having attained his Age of Eighteen made his Will, and thereby devised this Legacy, and all his Estate to the Defendant; And my Lord Chancellor held this a lapsed Legacy. Abr. Equ. Cafes 295. Trin. 1710. Onslow v. South.

31. A. wills all his Real and Personal Estate &c. to his Wife, and in this Case made her Executrix, provided she died without Issue by A. that Soll. should it not remain to C. after her Death, C. died in the Life of the Wife; Ad. 2 Vern judged according to the Case of 2 Vent. 374. and contra to Swinm. 462. 463. that the Legacy was good. 2 Vent. 758. 760. Trin. 1718. from Pinbury v. Elkin.

which being fulfilled by Death of the Wife without Issue the Devise over may take Place, as a new Original Devise and set as a Remainder, 1st Ld. Cowper Ch. Prec. 48 S. C. —— Wms. Rep. 365. p. 184. 8. C.

32. The principal Point debated in the Case was, That Ellis Ter. MS Rep. fell by his Will in 1715 inter all devised to his Brother Nicholas Ser. Dec. 7 cell and Christopher Haines one Annuity of 200 l. A Year issuing out of v. Vaughan. 5 E.
the Testator in Trust that they should pay the same from Time to Time into his Sister Rebecca Vaughan Wife of the Defendant Gwyn Vaughan for her Life, and after her Decease that they should assign the same unto and for the Use of all the Children of his said Sister equally to be divided amongst them, and if she should leave but one Child, then that they should assign all to that one Child. And declared the said Annuity for his separate Use. And Testator likewise devised another Exchequer Annuity of 50l. a Year to the same Trustees in Trust to apply the same to the Maintenance and Education of his Niece Rebecca Vaughan, until she should arrive at her Age of Twenty-one. And after she should arrive at her said Age, then in Trust to assign the said Annuity to his said Niece, her Executors and Administrators. Testator made his Brother Nicholas T. and Haines Executors and his Brother Nicholas and Sister Vaughan Residuary Legatees. Testator died, and Rebecca Vaughan the Niece died before twenty-one interstake, and Rebecca Vaughan the Sister likewise died without leaving any Child living at her Death, and having never had but one Child (viz.) Rebecca the Legatee of the 50l. a Year, and who died an Infant as before.

Two Questions were made, First, Whether the 50l a Year Annuity vested in Rebecca the Niece, vested in her to go to her Representative, or was lapsed by her Death and fell into the Residuum of Testator’s Estate. And, 2dly, as to the 200l. a Year Annuity given in Trust for the Mother, whether, the Reversionary Interest in that after the Mother’s Decease vested in the Daughter during the Mother’s Life, or was likewise lapsed into the Residuary Estate upon the Mother’s leaving no Child at her Death.

As to the first Question upon the 50l. a Year to the Niece it was very little debated and given up, that it was a vested Legacy in Respect of the Profits given for the Maintenance &c. of the Legatee during her Infancy &c. and compar’d it to the Cafe of a Legacy given at Twenty-one and Interest given in the mean Time.

But the other Question upon the 200l. was much debated, and his Honour after Argument held, that it was lapsed, and did not vest in the Daughter, but was merely contingent during the Mother’s Life, and that the Time of her Death was the Time when the Children were to take, for that the Will is clear that Testator intended his Sister’s Children, if more than one, should take as Tenants in Common, and if but one at her Death, then that one to have all, whereas if this were to vest in the Children that might be in the Mother’s Life-time, then it would follow that their Shares would go to their Representatives in Case they died before their Mother, when yet if there was but one living at the Death of the Mother, that Child was to have the whole, and therefore the Division must be at the Death of the Mother amongst the Children as they should then happen to be, and that is making the Words of the Will conform in every Part.

That the Expression of leaving Children &c. has always been understood leaving at the Death of the Party, and not to leaving generally.

That there is no possible Way to preserve a Tenancy in Common to all, and yet the whole to go to one only Child that should survive the Mother, and therefore holds that no Child was to take but such as was living at the Death of the Mother, and in this Case there being none, the remaining Interest in the Annuity is to be considered as undifposed and to fall into the Residuum of Testator’s Estate.

Holds the Annuity here, being given to Trustees makes no difference.

Nota,
Devise.

Notwithstanding that a Reversionary Interest may vest immediately and be transmissible to Representatives was cited Corbett v. Palmer 26 Feb. 1734, before Lord Talbot, where the Case was that John Corbett by his Will gave several Specific Legacies, and the residue of his Personal Estate to his Wife for her Life, and directed that after her Decease and the other Legatees paid, the residue should be divided amongst six Persons named in his Will, and two of them died after Testament in the Life of the Wife, and per Lord Talbot held, that the Shares of those two belonged to their Representatives, and declared that if a legacy is given at Twenty-one or Marriage and the Legatee dies before, in that Case the Legacy is gone, because the Condition cannot exist. Otherwise where upon a Condition that may exist after the Death of the Legatee, as in the Case in 2 Ventn. 347. Anon. Legacy to J. S. at Twenty-one and if he died before, then to A. B. and J. N. and they both die before J. S. and who likewise dies before Twenty-one; and decreed the Legacy to the Representative of the Survivor of A. B. and J. N.

Devise of Lands to Trustees in Fee in Trust within six Years after the Testator's Death, to arise and pay 1500 l. to his Daughter A. A. dies within the six Years; the 1500 l. shall go to her Administrator, here being no certain Time limited when, but only the ultimate Time within which, it shall be raised. 3 Wms's Rep. 119. Hill. 1731. Copper v. Scott, & al. 34.

One by his Will devises that all his Debts and Legacies shall be paid by his Executor out of his Personal Estate, if that shall be sufficient; but if not, then his Executors within Twelve-months after his Death shall sell or mortgage so much of his Real Estate as shall be sufficient for that Purpofe, and (inter al') gives a Legacy of 1500 l. to J. S. who dies within a Year, and the Personal Estate is not sufficient; This is a vested Legacy, and shall be paid to the Executor of the Legatee, tho' charged upon Land; for the Words, Within Twelve Months, denote the ultimate Time; but the Executors may pay the Legacy sooner. 3 Wms's Rep. 172. Hill. 1732. Wilfon v. Spencer.

If a Legacy be given out of Land to J. S. payable at 21, and J. S. dies before 21, the Legacy links; since where the Legacy is given out of the Personal Estate. 3 Wms's Rep. 138. Paifh. 1732. Gordon v. Rynes.

Michael Terry by Will gives to his Nephew Stephen Terry and his Heirs, all that Money of the Manor of Iffield in the County of Southampton, and the Adtrition and Right of Presentation, subject to the Settlement made on the Marriage of his Wife, so as the said Stephen Terry and his Heirs do and shall within the Space of one Year then next after the said Manor and Premises shall come into Possession, pay, or cause to be paid, divers Sums of Money to divers Persons hereafter named, and particularly his Executors and to Elizabeth Oads and others, 100 l. each, and directs that the said Manor and Premises shall be charged with the Payment of the same; and after giving divers pecuniary Legacies, gives the Rest and Residue of his Real and Personal Estate, his Debts and Legacies being first thereto allowed and discharged to Thomas Terry and the said Stephen, whom he makes his Executors. Eliz. Oads died in the Life of Testator's Wife the Jointress, who died in and Plaintiff as Representative of Eliz. Oads brings her Bill against Thomas and Stephen to have her Legacy or Sum of Money given to her by the Will, and they admit Affets, but say and insist that this was not to be paid out of the Personal Estate, and the Defendant Stephen Terry insists that this Sum of Money is not to be raised at all, the dying in the Life-time of the Jointress and before the Premises came into his Possession.

Fazacherly
Devise.

Furzachery for Plaintiff insisted that this Sum of Money was a vested Interest in Eliz. Oads, and transferrable to her Representative though the Time of Payment was postponed, which was merely for the Convenience and Benefit of the Devisee, who had only a Reversion in the Life of the Jointrejs ; and therefore Testator intended that he should not pay it during her Life, not that it should sink into the Inheritance if Eliz. Oads should not survive the Wife, or that it should be subject to any Contingency at all ; that this was such an Interest in her that the might have released it, which proves that it was transferrable, and that from the Nature of the Legacy it was so, and relied upon the Caces of Lord and Witheres determined by Lord Talbot, where all the Contingencies did not happen when the Parties died, yet he held that the Money given should go to the Representative though to be raised; and cited the Cace y. Spencer in 1732, where a Sum of Money was given to be paid within a Year after Testator's Death charged on Lands, and Legatee died within the Year, yet the Money was raised; He insisted that both Real and Personal were liable to the Payment of this Money, so that if it was not to be raised out of the Real they might resort to the Personal Eitate, which is the proper Fund for Payment of Legacies; and that if this is considered as a Legacy, there can be no Pretext for the Executors not to pay it.

Attorney General and Mr. Brown contra, That this is not a Legacy, but a Sum of Money charged on the Real Eitate; that this is a Fund particularly appropriated by the Testator for the Payment of this Money, and that the latter Words do not amount to charge the Personal Estate; for this is not a Legacy; and therefore if Plaintiff had sued Defendant in the Spiritual Court for this Money, the Temporal Courts would have granted a Prohibition; That though by the Rules of the Spiritual Court which are transmitted in this Court in Cases of Legacies, if a Legacy is made payable at a Future Day and Legatee dies before the Day, it shall survive to the Representative. It is otherwise where a Sum of Money is payable out of Land; The Rules of the Common Law and the Practice of this Court have put such Charges on Real Estates upon a different Foundation; for this Court considers them as Conditions at Common Law for the Benefit of the Real Estate, that it should not be encumbered with remote Sums of Money; and cited Night and Norton, determined by Lord Talbot, where Father and Son who was Tenant in Tail of Lands which had been settled on the Marriage of his Father joined in a Recovery to cut off the Entail on the Marriage of the Son, and declared the Uts thereof to the Father for Life, Remainder to the Son &c. and there was a Term raised to take Effect after the Death of the Father, in Truth to raise and pay the Sum of 1100L within the Space of six Years after the Death of the Father, with Interest at 5l. per Cent till the 1100L shall be raised. The second Son died in the Life of the Father, so that the Time for Payment of the Money was not come, and it was held that the Money should sink into the Inheritance. And cited also the Cace of Duke Chapel.

dois b. Talbot, where Sir J. D. gave 500L. 10s. to be paid out of his Real and Personal Estate at the Age of 25, and he died before ; and Lord King was of Opinion that it should not be raised.

Mr. Brown said, There was a Caufe before Lord Talbot concerning an Appointment of a Sum of Money to be paid out of Land after the Death of the Father, who left several Children unprovided for, there held the Money should not be raised. He cited [Catter v. Black- for.,] 2 Vern. 617. Bates v. Ferrisplace 2 Vern. 416, 417 where a Father having mortgaged his Real Estate afterwards entailed the same.
And per Lord Chancellor. On this Question hath been Variety of Determinations, many of which are not to be reconciled to one another, and this Court has laid of small Differences to reconcile one Case to another. The Question is, Whether this 1001. is to be raised out of the Real or Personal Estate?

It must be admitted that the general Rule of this Court is, That where a Sum of Money is given by Will to be paid out of the Real Estate, and Legatee dies before Time of Payment, it shall fall into the Inheritance, and that this is so whether the Money is given as a Portion or not; but it is said by the Plaintiff's Counsel that this Case falls not within that general Rule. 1st, That this Money is not only charged on the Real Estate but also on the Personal Estate; but this will not serve the Plaintiff in the present Case, and the Authorities are against this Distinction. It is plain it cannot take Place on this Will, for the Money is not made payable out of the Personal Estate for the Reasons before given, but was charged only on the Real Estate, but it had been payable out of the Personal Estate the Determinations are stronger; That where a Legacy is charged on Land and Personal Estate it shall so far partake of the Nature of a Sum of Money stilling out of Land, that if the Deeds before Time of Payment it shall not be raised, 2 Vern. 416. Tennings and Rock's, Duke of Chandos and Talbot, Proude and Abington.

2dly. That it is veiled, but only the Time of Payment postponed for the Convenience of the Reveriomer. As to that the Distinction between annexing the Time to the Substance of a Legacy and the Payment of it is not allowable on Legacies charged on Lands, but if there was any thing in that Distinction the Words of the Will will not warrant it, for here is no Gift of Money but only a Direction to the Devisee to pay this Money when he shall be in Possession of the Premises; so that this is not the like Case of an original Gift of a Sum of Money and where the Time of Money is postponed, which is Debitorum in Tuto in Hanci, and in those Cases it is the Executor should direct an Executor to pay a Legacy, as this is, out of the Personal Estate, and Legatee should die before, I should make no Doubt but that it would have been transmiformable; for the Direction of Payment is the Gift, and the Time of Payment is annexed to the Gift, and if the Party dies before, it is lapsus.

3dly. It is said that the Time of Payment here is not taken from the Nature of the Legacy or the Circumstances of the Legatee, as in the Case of a Portion; but there is no Difference at all between a Portion and any other Sum of Money given generally to a Stranger by Will; and in either Case, if the Party dies before the Time of Payment, it is not transmiformable.

Another Distinction has been aimed at between a Sum of Money to be raised by Will and by Deed, but that Distinction has been exploded, and the Case of King and Withers did not go on that Distinction; In that Case there were two Times mentioned, or rather two Things to create a Title to the Party.

There was a Time of veiling, and the Time of Payment was the Age of 21 or Marriage, both which the Party had attained; but there was another Contingency, which must happen before the Portion could be raised, which was the Failure of Issue Male by the Brother, and that did not happen till after Death; but the Foundation of that Case was, that the Time of Payment of it had happened in her Life-time, though the Contingency had not.

Here is no Contingency but the Time of Payment, and that is the Time of veiling, for nothing veils till that Time. As to the Case of Wilson and Spooner, that differs from this, for there the Legacy was veiled;
Devise.

(A. d) Legacy Extinct. In what Cases.


2. Where the Statute of Limitation was pleaded in Bar to a Legacy demanded due 20 Years since, Lord Chancellor held that a Legacy was not barred by the Statute, nor ever had been so held. 2 Freem. Rep. 22. pl. 20. Trin. 1677. Anon.

3. A Sum of Money devises to A. to dispose as the Testator shall appoint by a Note, who dies without Appointment; A good Bequest to A. Ch. Cafes 196. Pacli. 23 Car. 2. Martin v. Douch.


5. I give to B. 500l. which f. s. hath now in her Hands of mine, as her Bond appears; J. S. to Years before Testator's Death discharged the Bond; yet the Legacy was resolved to be payable; because it is a pure Legacy, neither Legatum Nominis nor Legatum Debiti, and the Words are only to liew that he meant the Legacy should be as certain to B. as he could make it. Raym. 335. Mich 31 Car. 2. in Cam. Scacc. Pawler's Cafe.

6. A Legacy was devises out of Debts due in several Counties, and they were all call'd in before the Testator's Death, and yet the Legacy remained good. Cited Raym. 335. Mich. 31 Car. 2. as adjudged in the Case of Theobald v. Wynn.

7. A Legacy is given to be paid out of such a Debt; if the Debt fails, the Legacy fails also. 2 Ch. Cafes 116. Trin. 34 Car. 2. Culpepper v. Atton.

8. J. S. devises Land to C. his Younger Son by a second Venter in Tail Male, Remainder to A. provided if the Land should come to A. (his Eldent Son by a first Venter) then A. or his Heirs should continue four Months after the Estate should come to him or them, pay roo0l. to his Daughter, or in Default the Trustees in the Will named to enter and raise it. J. S. dies; C. enters, leaves a Fine, and suffers a Recovery, but the Wile of J. S. having a Jointure, and the not surrendering, it was good only for a Moity. The Wife dies; A. dies; then C. dies. Decreed that though the Estate never came to A. but to his Heirs, and though a Moity only came to the Heir, yet the whole roo0l. was a legal

Subsisting.
Devise.

The Daughters did not claim under but Paramount C. and therefore there was no apportionment. 2 Vern. 359. Mich. 1698. Hooley v. Booth.

9. If a legacy be given to a young girl when she maries, and she marries before she is viri potens, she shall not have it; for it must be intended a compleat marriage; per Ld. K. Wright. 2 Freem. Rep. 244. Hill. 1700. in Cafe of Yate v. Pettiplace.

10. Devise of 1500L. to A. B. and C. to be paid at their respective Marriages, and if any die, her Legacy to go to the Survivors. A. dies unmarried; the Survivors are not intituled to A's Share till their respective Marriages. Per Cowper C. 2 Vern. 620. pl. 556. Mich. 1708. Moore v. Godfrey.

(B. d) Legacy Lapsed.

Where it shall survive to the other Legatees.

1. If a Lease of Land be made unto a Monk for Life, the Remainder unto a Stranger in Fee, this Remainder is void &c. If Land be devised unto J. S. for Life, the Remainder unto T. K. in Fee, and J. S. dies before the Devisee dies, and then the Devisee dies, it is a good Remainder to T. K. and shall presently take Effect &c. Perk S. 568.

2. The Tenantor had two Executors, and devises to them residuam bonorum &c. after the Debts and Legacies paid; One of them died, his Administrator finds the surviving Executor to have a Majority of the Surpluse. The Case came to a Hearing. The Defendant intituled that the Executors were Joint-Devisees, and took the Residue as Legatees, not as Joint-Executors. The Lord Keeper decreed for the Plaintiff, in Cafe of Executors the Tenantor intended an equal Share to his Executors; and by Ch. J. Roll's Advice it was decreed, that where a Devise was to two equally, notwithstanding which Word (equally) the Devises were Joint, yet the Intention prevents the Survivorship. The Case was dispued, but to the Dissatisfaction of the Bar decreed. For where the Intention is secret and not declared, the secret Intent must give way to the legal Intent. And if an Administrator, then an Administrator de bonis non must have it. Chan. Cafes 239. Mich. 26 Car. 2. Cox v. Quantock.

3. A devise Goods to B. and C. and after the Executor attains to the Legacy, and then dies; The Executor of B. plays in the Ecclesiastical Court for B's Part, for there is no Survivor by the Ecclesiastical Law in such Cafe, and plays a Prohibition and declares, and upon Demurrer and Argument adjudged, that the Prohibition shall stand; for by the Affent of the Executor the Interest is vested, and becomes a Chattel, and governable by the Common Law. 2 Lev. 209. Mich. 29 Car. 2. B. R. Ballard v. Stuckley.

4. A Devise of 100L. to J. S. at the Age of 21 Years; and if J. S. died under Age, then J. N. and A. B. to have the 100L. or else the Survivor of them. A. B. and J. N. are both in the Life of J. S. and before the Age of 21 Years. The Administrator of J. N. who survived A. B. sued and obtained a Decree for the 100L. for though he died before the Contingency happened, yet his Administrator should have it. 2 Vent. 347. Trin. 31 Car. 2. Anon.

5. Devise
Devise.

By the first
Claude it is
a Joint-De-
vise, and if
the Will had
ended there, Cley.
and one had
died, it would survive, and then the viz. is only a Severance in Case both live till Payment, and the left Claude is a new Substantive Devise of the Whole to the Survivor. Ch. Prec. 37. pl 39. Mich. 1691. Scoolding v. Green. — Abk. Eq. Cases 258. S. C.

6. A had three Daughters and devised to his three Daughters 50l. equally to be divided between them; that is to say 160l. a-piece, but if any
of them died without a Child, her Part to go to the Survivors, one of the
Daughters married J. S. and before the Portion paid, died without Hi-
fee J. S. exhibited his Bill against the Executor, and the two surviv-
ing Sisters, and had a Decree for the 160l. For a Sum of Money cannot
be entailed. 2 Vent. 349. Patch. 32 Car. 2. in Canc. Brookhurst v. Richard.

7. A makes B. and C. his Executors, and directs 2000l. to be laid
out in Land for the Benefit of his Wife for Life, and then to his Execu-
tors to be equally divided between them. The Wife and one of the Execu-
tors dies before any Disposition made of the Money. Finch C. de-
creed that this Money should not survive. Vern. 32. pl. 32. Hill.

8. A devis’d to his Executors, or makes several Men his Execu-
tors, the Survivor shall carry all; but where a Term is devised in
Common Share and Share alike, there shall be no Survivor. 2 Chan.
Cales. 65. Trin. 33 Car. 2. Draper’s Cafe.

9. A makes B. Executor and then gives the Residue of his Goods to
the Devise of B. and C. B. dies. This Interest or Moity of the Re-
idue does not survive to C. in this Case of a Legacy as it would in a
Gift of Goods at Common Law. 2 Jo. 161. July 5. 33 Car. 2. before

10. A devised the Surplus of his Estate to his two Nephews, equally
to be divided between them, and appoints his Executors to lay it out for
their Benefit. One of them died in Teitator’s Life-time. The whole
was decreed to the Survivor, and not to the Executors, the Teitator
not intending them any Benefit; For though by the first Words it is
several, yet by appointing the Executors to lay it out for their Benefit, it

11. A devised the Surplus of his Estate after Debts paid to B. and
C. B. dies. It was adjudged in the Delegates by the Lt. North, and
now confirmed by Jefferies C. that this was a joint Devise, and should
survive to C. and Jefferies C. was of Opinion that if A. had made B.
and C. Executors and B. had poss’d a Moity of the Goods and dies, it
would have been all one. Vern. 482. pl. 471. Mich. 1687. Lady
Shore v. Billingly.

12. Money devised to be laid out in Land and settled on the Chil-
dren of J. S. J. S. has two A. and B. Land is purchased and settled on
them and their Heirs. A. dies; decreed that it should not survive. 2 Vern.
46. pl. 44. Patch. 1688. Sanders v. Brown.

13. Two Devises of 500l. a-piece took a Joint Mortgage to both of
them for Payment of their Legacies with Interest; by the Death of one
nothing shall survive to the other, because the Mortgagees were Truis-
tees for each other, and the Mortgage which is only a Security makes

no
Devise.

14. Devise of 1700 l. to A. to be paid him at 21, to B. (the same) to
to C. and to D. in Cafe one or more of them die before, then his or their
Legacy &c. to be divided among the Survivors. B. died in the Life of
Teitament, yet B's Legacy shall go to the Survivors. 2 Vern. 207.
15. If a Legacy is devised to A. at 21, and if A. die before, to B.
Though A. dies in the Life of the Teitament, the Legacy shall go to B.
16. Several Legacies of 50 l. to A. B. and C. payable at 21 or Mar-
rriage, and adds if any Legatee die before his Legacy is payable, it shall go
to the Brothers and Sisters of such Legatee. A died in the Life of the
Teitament; Adjudged it was no Lapsed Legacy, but should go to the

17. A. devised an Estate to his Wife for Life, and after to the Plain-
tiff his niece, and her Heirs, upon Condition and to the Intent, that she
pay 400 l. to such Person, as his Wife by her Will in Writing, or any other
Writing, shall direct and appoint; and dies; the Wife after marries a se-
cond Husband, and then makes a Will in Writing, and thereupon reciting
the Power given her by her former Husband's Will, appoints the 400 l.
to be paid to her Husband, his Executors or Administrators, and that
when he shall have fully received the 400 l. he shall pay 100 l. out of it
to B. 50 l. to C. and 50 l. to D. and makes her Husband her Executor,
and then goes on and lays, that she has published this her last Will and
Testament in the Presence of three Witnesses, and the Husband sub-
scribed that he does approve of this Will; afterwards the Husband died
before her, and makes her Executors of his Will, and Refiduary Legatee;
then B. and C. die both Intestate, and afterwears the Wife die, and the
Defendants take out Administration to her, with the Will annexed, and
also Administration to B. and C. and the Question was, Whether
this Appointment being made by Will, and the Appointee dying before
the Appointor, this should be in the Nature of a Legacy, and to the
Appointment void, the Testatrix surviving the Nominee; and my Lt.
Keeper held, that if it was a Thing purely Testamentary, it would be
plainly a Lapsed Legacy; but in this Case the 400 l. was not in its own
Nature Testamentary, but they take as Nominee's, and it is but the Execu-
tion of a Trust, and decreed the Money to be paid. Eq. Ab. 1706, pl.
18. A. devised 300 l. a-piece to his three Daughters A. B. and C. at
21 or Marriage; If any die before, to go to the Survivor. B. died in the
Life of the Teitament. B's 300 l. shall go to the two Survivors. 2 Vern.
19. A Man devises all his Lands to his Executors for 10 Years, and
that after the 10 Years 100 l. should be paid out of them to H. and A.
provided that if neither of them were living, then nothing was to be raised. H.
dies before the 10 Years are expired, his Executor or Administrator
shall have nothing, for the Legacy is lapsed, but A. shall have her Por-
20. A. devised the Surplus to his four Brothers B. C. D. and E, and if
Cites the any of them die before his Estate is got in and divided his Share to go to his
Children. B. died in the Life of the Teitament, leaving Children. Per
Cowper C. though B. died before A. yet still B. died before the Estate
was gotten in and divided, and as to the Objection that his (Share) is a
dispersate

5 G
Devise.

is to be understood the Share intended him. 2 Vern. 653. Patch. 1710.

Crown to B. Brettou & A. v. Lethediuer.

Devise.

21. A. had two Sons B. and C. and two Daughters L. and M. and bequeathed 1500l. to C. and 1000l. a-piece to L. and M. and if any of his three Younger Children die before 21 or Marriage, then the portion of him or her so dying should go over to the Survivors; and gave his real Estate to B. his eldest Son, chargeable with those Portions. L. died within Age and before Marriage; and after C. died also within Age and before Marriage in the Life of A. After the Death of C. there was another Son born, whom A. named C. and afterwards A. by a Codicil at the Bottom of the Will, confirmed the Will thereby, taking Notice of the other Son, and gave 500l. to his son C. and his surviving Daughter, over and above what he had given them by his said Will. Lord C. Harcourc decreed, that the Share of L. vested in C. should not upon C.'s Death survive with C. 1500l. because the Portion of L. became vested in ditinct Shares in the Survivors, and there were no Words for creating a Jointtenancy of these Shares; But upon arguing upon other Points referred before Lord C. Cowper afterwards, it being objected that C. dying in the Life of A. the 1500l. became a Lapsed Legacy, and should sink into the Estate, his Lordship said it was improper to call this a Lapsed Legacy, that it was a Portion given over, and should take Effect, that the making the Codicil was a Reproduction of the Will, and amounted to a substituting the second C. in the Place of the first C. as if he had made his Will anew, and had wrote it over again, by which new Will the second must take, and that the said Intention of A. appeared that C. should have more than M. whereas if the 1500l. should be taken to be a Lapsed Legacy, M. should have twice as much as C. Wms's Rep. 274.

22. A. devised 1200l. among the four Children of B. viz. C. D. E. and F. to be distributed at the Discretion of B. but not to be compelled to pay it within 12 Months after A's Decease. C. died in the Life of A. B. died within six Months after A. Adjudged the whole 1200l. was a subsisting Legacy, and till an Apportionment made no particular Interest vests in any one Child. 2 Vern. 744. pl. 652. Hill. 1716. Bird v. Leckey.

23. A. made his Wife Executrix, and bequeathed 900l. to be paid immediately after his Death to J. S. in Trust to place it at Interest, and pay the Produce to his Wife for Life, if she continued so long a Widow, and after to divide the same equally among his three Daughters B. C. and D. at their respective Ages of 21 or Marriage; Provided that if all his three Daughters die before their Legacies become payable, then the Mother to have the Whole. The Wife married B. and C. and died under Age, and unmarried. Ld. C. Macclesfield decreed the whole 900l. to D. For the Mother was excluded, unless the Contingencies had happened, and neither the Share of B. or C. was vested so as to be subject to the Statute of Distributions; For if all had died before 21 or Marriage, the Mother had had the Whole. 2 Wms's Rep. 69. Trin. 1722. Scott v. Bargeman.

24. One has two Sons A. and B. and three Daughters, and devises his Lands to be sold to pay his Debts, and as to the Monies arising by Sale, after Debts paid, he gives 200l. thence to his Eldest Son A. at 21, the Residue to his four Younger Children equally. A. the Eldest dies before 21.
Devise.


25. I give to A. B. and C. 1000l. a-piece of my Capital Stock in the East-India Company, and the Interest thereof to them for their Use, and if any dies, then to the Survivors or Survivor Share or Share alike; and my Meaning is, that the Interest shall be paid to their Father to be improved for their Use.—C. died an Infant, by which his Share survived to A. and B. Afterwards B. died. The Matter of the Rolls held, that the Share which B. took upon C's Death does not survive to A. but will go to B's Administrator, which in this Case was her Father; Had they not been distinct Legacies, it might have been another Question; But being intirely distinct, and not even so much as Tenants in Common, the Case is the same as that of Barnes v. Ballard before the Lord King June 1, 1727, where it was decreed for the Administrator, and agreed with Ld. Ch. J. Holt's Opinion cited in the Case of Woodward v. Glasbrook. 2 Vern. 388. and said that this Share goes to the Administrator by the Words Share and Share alike, which are tantamount to the Words equally to be divided, and decreed accordingly. Cases in Eeu. in Ld. Talbot's Time 124. Trin. 1735. Rudge v. Barker.

26. Francis Baffet, Grandfather of the now Plaintiff, had by his Will given 4000l. among his Younger Children, payable at 21, and had specified his Real and Personal Estate for the Payment of it; the Personal Estate was sufficient; And now the Question was, Whether the Legacy being to be raised out of a mix'd Fund, and one of the Children dying before she came of Age, whether her Part of the Legacy was to sink for the Benefit of the Real Estate, or was transmissible for the Benefit of the other Children?

It was said, as there has been no Case cited that where a Legacy has been payable out of both Personal and Real Estate, and the Personal sufficient, that the Legacy has been lost; I will not make such a Case, and indeed the Authorities are to the contrary; and cited 2 P. W. io. 276. 601. and if it were to determine otherwise, we must go into the Ecclesiastical Court for it.

(C. d) Devise Lapsed, or forfeited.

Where it shall vest in another to whom it is limited over.

1. In Allife where a Man devises to A. for Life, upon Condition to be Chaplain and pray for his Soul, the Remainder to the Com mandity of B. in Fee to pray ut Fupra, and A. held for six Years, and was no Chaplain, and was of such Age as he might have been Chaplain immediately at the Death of the Devisee, the Heir may enter, and therefore the Com mandity has left the Remainder. Br. Devise, pl. 16. cites 29 All' 17

But after the Justices ex- cised the Jury to say for the Devi- see in Allife; by which they said that the Plaintiff was seised and dispossessed, and this was for Conscience of the Remainder as it seems, Queere. Br. Conditions, pl. 111. cites S. C.

2. Note. It was agreed that where a Man devises his Land to A. for Life, the Remainder over to B. and dies, and A. will not take the Land nor Benefit by the Devise, yet after his Death B. shall have it, and he may well enter, and shall have the Land according to the Devise. For this
Devise.


3. Contra upon a Gift, if the first will refuse the Livery of Seisin, he in the Remainder has not any Remedy; For this can't take Effect but by the Livery. Ibid.

4. The Father bequeathed his Goods to his Son when he shall be of the Age of 21 Years, and if he die before, that then his Daughter shall have them; the Son dies long before the said Age of 21 Years. Adjutted that the Daughter shall have them immediately after the Son's Death, and not tarry till the Son would have been 21. And. 33. pl. 82. Mich. 4 E. 6. Anon.

5. Clause in a Will, that if any Legatee should hinder or oppose the Execution of the Will, then such Person should lose the Legacy bequeathed. The Plaintiffs claim'd the Benefit of the Perfection by Reason of the Defendant's contending and opposing the Execution of it; but the Court declared its Opinion to be, That no Advantage ought to be taken thereof, but that the Defendant ought to have her Specific Legacies bequeathed by the Will. 2 Can. Rep. 105. 27 Car. 2. Mofey v. Mofey.

6. One devises, after Debts and Legacies paid, the Surplus of his Effects to his Wife and Son John equally, who in he makes his Executors, but if she should marry, that then she should render the Right of being an Executive to the Testator's Son R. and he to be Partner with his Brother John in the Executorship. The Wife marries again; the thereby loses her Right to the Surplus, and to the Executorship. 2 Vern. 308. pl. 299. Hill. 1693. Barton all Stone v. Barton.

7. Legacy devised to A. to be paid at the Age of 21 or Marriage, which shall first happen, so as such Marriage be with the Consent of B. if not, Devise over; A. marries without Consent, and dies before 21, the Legacy is gone. Sel. Cafes in Chan. in Ld. King's Time 20. Trin. 11 Geo. Piggot v. Morris.

8. One gives a Legacy of 200l. a-piece to his Children, payable at 21, and if any of them die before 21, then the Legacy given to him dying to go over to the surviving Children. One of the Children dies in the Life of the Testator; though this Legacy lapses, as to the Legatee dying under 21, yet it is well given over to the surviving Children. 3 Will's Rep. 113. Trin. 1731. Willing v. Baine.

(D. d) Ademption of a Legacy. What is.

1. A By Will gave his Daughter M. 1000l. to be first paid after his Debts, besides a Share out of the Dividend of his Effects. Afterwards, on her Marriage, an Agreement was made for what she should have out of A's Effects; and that it should be only 1100l. and that was to be in full of what was intended her therein. Decreed by the Master of the Rolls, and confirmed by the Lord Chancellor, that the 1100l. was to be in full of what A. was to have out of the said Estate. 2 Chan. Rep. 35. 21 Car 2. Hale v. Aton.

2. P. devises to R. a Sum of 500l. which the Lady C. hath now in her Hands of mine, as by her Bond made to me and my Heirs appears, and makes no Executor. But the 500l. was paid in by the Lady C. ten Years before the Testator died. The Legacy is due though the Security was altered, it being a pure Legacy; not Legatum Nomini nor Legatum Debts; and the Words shew that he intended the Legacy should be as certain
Devise.

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certain as possible. Raym. 335. Mich. 31 Car. 2. in Cam. Scacc. Paw-

lett’s Cafe.

where a Devisë was of a Legacy out of several Debts due in several Counties, though they were called in before the Testator died, yet the Legacy remained good, and there is a Difference between a Legacy in Numerat and a Specifick Legacy; for in the first Case the Legacy remains though the Debt ex quo is paid in, but the Specifick Legacy may be lost by being altered.

3. I give to B. 500l. viz. the Bond and Judgment for 400l. due to me from A. and 100l. in Money. The Testator received almost the whole Debt, and took a new Bond for the Residue and died; Decreed to pay it. 2 Vern. 681. Hill. 1711. Omv v. Smith.

Money is paid in voluntary by the Debtor, and where the Testator recovers it by Suit. In the first Case the Legacy continues till good, because the Money only comes home to the Personal Estate; but in the other Case the Testator, suing for it, intended to make it his own, and so would not leave it to the Legatee to recover; Per Lord Harcourt’s Eq. R. 51. Omv v. Smith. —Same Diffcrence is, where the

principal Cases 550 l. in the Hands of E was bequeathed to S. though before the making the Will Testator had ordered some Payment out of the 550 l. this is no Ademption, and none of the Payments being made, but the whole 550 l. standing out, the Whole was decreed. 2 Wms’s Rep. 163. Trin. 1733. Crockett v. Crockett. —But if the Testator had, after the making the Will, drawn out Part of this Money, this had been an Ademption for

Tanto. Told.

4. B. and C were each indented to A. in 2000 l. by Bond; Afterwards A. by Will gave these two Sums to J. S. and devised away the Surplus of her Estate with a Proviso, that if all or any Part of these two Sums should be paid in before the Testatrix’s Death, then she gave to J. S. so much Money as the Principal Money so paid in, would amount unto as the

Cafe should fall out. Afterwards A. released in her Life-time the 2000 l. to B. without receiving any Part of the Money, and then died. J. S. died intestate, and B. who was her Brother administrated to her and demanded the 2000 l. released to himself, and also the 2000 l. due on the Bond of C. In this Case Lord C. Parker said, that he could not approve of the * Diversity, that if the Testator give a Debt by Will and afterwards calls it in, this must be a Revocation, Secus if it be paid in unmasked for

by the Testator; and as to the Release, he held it the same as if the Will had paid (if these Debts are paid and discharged;) and as to an Objection that B. (who is the Plaintiff) or Administrator to J. S. claims a double Advantage of this Debt as first being given him by the Release, and then he takes it over again by the Will as Administrator, his Lordship observed that this Claim as representing his Sitter is an Alter Derst, and as it J. S. was alive and made her Claim, and that it must be liable to her Debts if any were, and is the fame as if any other Person had been her Executor or Administrator. Wms’s Rep. 461. Trin. 1718. E. of Thomond v. E. of Suffolk.

* Same Diversity taken Arg and


5. A. by Settlement was Tenant for 90 Years if he so long lived, with Power to charge 2000 l. Remainder to B. in Tail; afterwards A. and the Trustees and B. joined in a Recovery and declared new Uses, viz. to A. for Life. Remainder over and so destroyed the Power of charging. A. bequeathed 1000 l. Legacy out of these Lands. It was infilled, that though this might not be good as a Charge, it might however take Effect as a Legacy, which was not hurt by making an additional Security. Ld. C. Mac-
clesfield said, that here is a particular Provision for this Legacy, and that it is possible a Legacy may be charged upon a certain Fund, which failing, the Legacy may be lost; that it is material that this Bequest is grounded upon a Power, and may be thought only an Execution thereof, which it void, must void the Bequest also; and it is also observable, that the Will gives the Residue to the Testator’s eldest Son; so that to make this Legacy good, the Legatee, who is otherwise provided

3 H. for,
Devise.

for, must take it away from another Child; and it is still harder, that the Legacy by this Means will be taken away from an Heir in order to be given to a younger Child, and that a Charge upon Land seems not so strong as a Gift of a Legacy; But at length it weighed with the Court that the Land amounted to 1000 l. a Year, and the Design appeared to be to leave the younger the two several Sums of 1000 l. one expressly charged upon the Personal Estate, and the other upon the Land; his Lordship saying, that if a Legacy was given to J. S. to be paid out of such a particular Debt, and it did not appear that there was any such Debt, or that the Fund should fail, yet still the Legacy ought to be paid, and the failing of the Modus appointed for the Payment should not defeat the Legacy itself. Wms's Rep. 778. Hill. 1721. Savile v. Blacket.

6. B. being indebted to A. in 1000 l. A devised 500 l. Part thereof to D. the second Son of B. and the Residue to the younger Children of B. and the same to remain in B's Hands till the younger Children should be capable of receiving it, and the Share of any dying before such Time to go to the Survivors or Survivor. The whole Debt was paid to A. and D. died, living A. then A. dies in the Life of the younger Children Ld. C. King held, that it could not be intended that the Survivors should take unless D. the Legatee should have survived the Testator so as the Right to the Legacy should have become vested in him, but that he dying in A's Life nothing could survive from him. 2 Wms's Rep. 328. Hill. 1725. Sir Barnham Rider v. Sir Cha. Wager & al.

Cafes seem to be within the plain Intention of the Testator, but that in the principal Cae it was quite a Strain to support a Legacy given out of a Fund which the Testator himself had by his own voluntary Act put an End to. Ibid 531.

So of a Devise to A and B. If A. dies in Testator's Life-time, and then Testator dies B. shall have the Whole; for these Cafes seem to be within the plain Intention of the Testator. Ibid

7. One by Will devised thus; Item, I give and bequeath to my Grand-daughter Mary Ford (the Plaintiff) the Sum of 40 l. being Part of a Debt due and owing to me for Rent from G. M. the allowing what Charges shall be expended in getting the same. Item I give unto my Grandfathers A. and B. the Rent and Residue of what is owing to me from the said G. M. which is about 40 l. more, to be equally divided between them, they allowing Charges as aforefaid. Afterwards the Testator received the whole Debt owing for Rent from J. M. For the Plaintiff it was infinced that there was a Difference between a Specifick and a Pecuniary Legacy; that though the dispoiling of a Specifick might be an Ademption of it, yet this being a Pecuniary Legacy the paying the Money to the Testator would be a Lofs of it. On the other Side it was infinced upon the Difference between a Voluntary and a Compulsory Payment; that though the first was no Ademption, yet the second was, and that the Testator obliged G. M. to pay in the Money; But my Lord Chancellor was of Opinion that there was no Foundation for the Difference taken in Books between a Voluntary and Compulsory Payment, for the latter might be with an Intent to secure the Legacy on all Events, and decreed the Plaintiff the 40 l. Legacy. Abr. Equ. Cafes 302. Trin. 1728. Ford v. Fleming.

8. Where the Testator devises a Debt, and afterwards receives it, or even calls it in, in neither Cae is this an Ademption of the Legacy; seeing this might be done from an Apprehension of such Debt being in Danger, and with a Design to secure it, and being Personal Estate and not diminished by remaining in Testator's Coffier, instead of the Hands
Devise.


9. A devises 1000l. Capital South Sea Stock to B. At the Time of making his Will he had 1800l. of such Stock, and after, by Sale, reduced it to 1000l. which he after increased to 1600l. and died. Between the making his Will and his Death the Act took Place, which changed Three Fourths of the Capital South Sea Stock into Annuities; This Legacy is not taken away or impaired by the Sale, nor by the Act of Parliament. Cases in Equ. in Ld. Talbor's Time, 226. Mich. 1736. Partridge v. Partridge.

(E. d) Legatees or Devisees-Joint.

Take How.

A Man devises to two and their Heirs and died, and after the one of the Devisees died, and the other survived, he shall not leave the Whole by Survivor, but only a moiety, and the other Joint-nant the other moiety, for this was the Intent of the Devisee; Per Audley Chancellor. Br. Devise, pl. 29. cites 30 H. 8. & Fizh. Devise, pl. 11 & 20 accordingly.

2. A seised of Lands devised the same to his Wife for Life, the Remainder to his three younger Sons, and to the Heirs of their Bodies gotten, equally to be divided amongst them by even Portions; and if one of them die, then the other two which survive shall be next Heirs. The Devisee dies, one of the Sons dies. And by Dyer and Welton J. the three Brothers were Tenants in Common in Remainder, and although the Words are, Equaly to be divided, the same is not intended of a Division in Fact and Possession, but of the Interest and Title. 3 Le. 19. pl. 45. Patich. 14 Eliz. C. B. Anon.

3. A Man devised two Parts of his Lands to his four youngest Sons in Tail, and if the Infant in Venere be Male, he shall have the fift Part as Cobre with the four younger Brothers, and if all four happen to die without issue Male of their Bodies, that the two Parts shall revert to the next Heirs of the Devisee for ever. The Father died, the Son is born, and after he and three other of the said Sons died without issue. All held that the Surviver shall have Estates Tail in the whole two Parts, and that none of the two Parts shall revert till the five Sons are dead without issue. Dy. 303. b. 304. a. pl. 49, 50. Mich. 14 Eliz. Anon.

4. H. devised a House to a Woman, and to the Brother of the Woman, and to the Heirs of every of their Bodies, and for Default of such Issue, of the Brother and of the Sister, the Remainder to the right Heirs of the Devisee, and died; the Brother died without issue, the Sister had issue and died; the issue shall have a moiety and no more, for it seems the Word (every) made several Estates. Quere if the right Heir shall have in Reversion or Remainder? Dy. 326. pl. 1. Mich. 15 & 16 Eliz. Huntley's Case.

And 27, 22. pl. 24 Huntley v. Hooper S. C. adjudged —— Bendl. 16. 259 S. C. and the Pleadings and Judgment accordingly. —— Ravn. 445. Mich. 35 Car. 2. B. R. the S. C. cited by Raymond J. and observes, that tho' the Question was, Whether the entire House should go to the issue or only the moiety, and the other moiety to the Heir of the Devisee, yet he says, he finds no Argument of it in the Book, and that they seem to intimate that the Pleading of the Case was more insisted upon than this Point; and that Anderson says, that the Stress of the Case was upon the Appportionment of Rents.
5 If one devise his Goods equally to two, there is no Jointenancy; for (equally) he sets his Intention to give to each an equal Proportion; Per Popham. Cro. E. 696. Mich. 41 & 42 Eliz. B. R. in Cafe of Lewen v. Cox.

6. A Man devises his Lands to his Wife for her Life, the Remainder to A. and B. and their Heirs respectively for ever. The Question was, Whether A. and B. were Jointenans or Tenants in Common? The Court held, that here is a Tenancy in Common, and that it shall go throughout, and is not to be divided, and the Intent of the Devisor appears in the Will, that every one shall have his Part, and their Heirs, so here is a Provision made for Children, and the Word (respectively) would be idle, if another Construction should be made, and would signify no more than what the Law said without it. So Judgment was given for the Plaintiff, Nifi. Sti. 434, 435. Hill 1654. B. R. Torret v. Frampton.

7. Where Money is given to two, (being Personal Estate) it shall be several to them. 3 Ch. R. 214. Patch. 1668. in Cafe of Sanders v. Ballard.

8. Tefator devised 50 l. per Annum to A. and B. her Son, payable out of such Lands Habilidade for their Lives and Life of Survivor, and adds, that after B. shall attain his Age of Thirteen Years (A. his Mother living) Then B. shall have 20 l. annually of the said 50 l. for his better Maintenance during the Life of A. and after to have all as afore devised. Per Cur. This is a several Rent and not a Joint Rent; for the entire 50 l. Rent is devised to A. till B. is thirteen Years old and then that B. shall have 20 l. of the 50 l. for his better Maintenance, which Clause would be absurd, if Tefator had intended it a Joint-Rent for if it was joint, then A. would have 25 l. and B. 25 l. and if the Rent be construed joint, then it will be pro Deteriori Manutenentia. Sand. 284. Trin. 21 Car. 2. Duppa Executors of Baskervil v. Mayo.

9. Where Goods are devised to two jointly and one of them dies before Affent of the Executor, the Executor of him dying shall have his Share, but if he dies after the Affent of Executor then the Survivor shall have the whole; because after Affent of the Executor an Interest is veiled and then the Goods are become Chattles governable by the Common Law, which makes them Jointenants. 2 Lev. 209. Mich. 29 Car. 2. Ballard v. Stukely.

10. Where a Devise was to two equally, it was decreed by Advice of Rolf Ch. J. that notwithstanding the Word equally, the Devisees were joint, yet the Intention prevents the Survivorship. See Vern. 32. pl. 30. Hill 1681. in Cafe of Thicknes v. Vernon.

Vide tamen
1 Chan. Cases 239 in Cafe of Cox v. Quaintock where it was decreed that the Administratrix of one should have an Account against the other, but it was much to the Difficultation of the Bar.

Legacies are bequeathed to A. B. and C. and the Wife of C. equally to be divided among them Share and Share alike. C. was no Kin to the Tefator, but C's Wife was; Per North Keeper, C. and his Wife shall have only one Third Part, and the rather for that he observed the two (ands) viz. to A. B. and C. and W. his Wife; and though a Devise may to ten Persons and add an (And) between every Person's Name, yet it is not natural or usual to add an (And) till you come to the last Person. Vern. 233. Patch. 1734. Bricker v. Whalley.
Devise.


of the Residuum by which it was intituled that a Property was vested in the Legatees by Law, yet it was anwered, that though that might be true with Respect to Specifiack Legacies, yet in this Case till it appeared that all the Debts &c. were paid, it would be impossible to know what the Residuum was, and consequentially no Property could velt. The Master of the Rolls after taking Time to confider of it, Decreed that the Survivor take the whole in the fame Manner as if it had been a Grant at Law. 2 Wms's Rep. 527. Paxf. 1726. Webber v. Webber —— Ibid 478 lays the same Decree was made 23 June 1729 by the Master of the Rolls in Case of Gray v. Willis.

13. A Man devised his Lands to his two Daughters, equally to be divided between them, and to the Heirs of the Body of the Survivor of them, and the Question was, whether they were Jointenants or Tenants in common? or (says the Book) though if a Devise be made to two equally to be divided between them, they shall be Tenants in common, because in a Will the Intent of the Deviser shall be interpreted to be so; yet it is not to in Case of a Grant or Feoffment; but in a Will it is a Tenancy in common by Construction and not by express Words, but only by Collection of the Intent of the Deviser; but if the other Words of the Will shew his Intent to be stronger, that he intended a Jointenancy, it shall be interpreted accordingly; and it was ruled accordingly, by Reason of the express Limitation made to the Survivor. Ld. Raym. Rep. 630. Hill 12 W. 3. Per Holt Ch J. cites Sty. 211. Furze v. Weekes.

14. A devised a Debt of 500 l. to B. and C. and if either died, to the Survivor; B. died before the Debt got in. Ld. Chancellor was of Opinion, that B. having survived the Testator, though he died before the Debt was got in, was intituled to his Share of the Debt; but it was reverted in Demo. 2 Vern. 654. Paxf. 1710. in Case of Berton v. Le-thullier, cites it as the Case of Davis v. Ld. Bindon.

15. One devises the Surplus of his Personal Estate to his Four Executors; this is a joint Bequest and on the Death of one shall go to the Survivors, as well in the Case of a Legacy as of a Grant. 3 Wms's Rep. 115. Trin. 1731. Willing v. Eaine.

(F. d) Legacies. In what Order to be paid.

LEGACY to A. of 200 l. to B. his second Daughter 200 l. Ibid. 57. to C. his Eldest Daughter 200 l. By the better Opinion of the Court, A. the youngest Daughter should be first paid, and then B. and then C. Cited by Barkham Serjeant. 2 Le. 55. in pl. 345. Mich. 15 Eliz. C. B. as Coniers's Case.

3 Le. 55. pl. 80. S. cited in totem Verbis as Conier's Cafe.

2. When several Legacies are given and one is due, but the Reit not till afterwards the Executor may not pay the first the whole Legacy, if there be not effects sufficient to pay the Reit. Chan. Rep. 133. S. C. cited in Chan. Cases 149. Mich. 21 Car. 2.


Banston, and Ld. Keeper declared, that where a Legacy was secured, but not paid, he conceived that every Legatee ought to lose in Proportion there not being enough to pay all —— In the Cafe of
Devise.

3. Where Legacies are to be made up out of growing Receipts of a Real Estate, which proves not sufficient, and the Executor has been over forward in paying any Legacies he must bear the Deficiencies out of his own Purse; but the Court saw no Caule to allow the Legatees Damages for the same. Chan. Rep. 134. 15 Car. 1. Vintner v. Pix.

4. Devifee of Lands in Trust to pay Mortgages in the first Place, and then Legacies, is made Executor; he mortgages to raise Money to pay other Debts of the Testator; such new Mortgage shall take Place of the Legacies. Vern. 69. Mich. 1691. Brent v. Beft.

5. Charitable Legacies by the Civil Law are to be preferred to other Legacies, and if the Spiritual Court gives such Preference in Cafe of Deficiency of Affaits, Chancery will not grant an Injunction. Vern. 230 pl. 226. Hill. 1683. Fielding v. Bond.

(G. d) Devife. When it veils, or is to be taken, or when Legacies are to be paid.

1. A Man devifes to his Wife the Demesnes of a Manor for Life and the Services and Chief Rents thereof for Fifteen Years, and all the Manor to another after the Death of the Wife; though the Fifteen Years expire, yet the Devifee shall take Nothing but after the Death of the Female. Agree by all the Justices. Mo. 7. pl. 24. Trin. 3 E. 6.

2. But if the Will had been that after the Fifteen Years expired and the Death of the Female the Devifee should have all the Manor after the Fifteen Years, then it should be construed distributively viz. that the second Devifee should have all the Demesnes upon the Wife’s Death, and the Rents and Services after the Fifteen Years expired. Arg. 1. Sand. 185, 186. Mich. 20 Car. 2. in Case of Cook v. Gerard, cites S. C.

3. Devise to his Son of Goods when he shall come to the Age of 21 Years, and if he die before the laid Age, then to one of his Daughters. The Son dies before 21, the Daughter shall have the Goods immediately after the Death of the Son. And. 33. pl. 82. Mich. 4 E. 6. Anon.

On mentioning the Matter again the next Day, and insisting that it had been determined as in the principal Cases here of And. 33. and 2 Vern. 255, and distinguishing between thoſe and the following Case of 2 Vern. 199, that where the Legacy is deviſed over in Cafe of the Legatee dying before 21, if he dies before it shall be paid presently, but if deviſed over, the Executors or Administrators of the Legatee shall not have it till such Time as the Legatee had he lived, would have been at the Age; his Lordſhip varied his Decree, at the Clause of the Will being, that if any of his Son and Daughters should die before his, her, or their respective Ages of 21, then the Legacy or Legacies of him, her or them fo dying should be paid to the Survivors or Survivors of such Children, and two of the Children having attained 21, and one dying at 11, and one other being no more than 12, his Lordſhip decreed two Thirds of the deceased Child’s Legacy to be paid to the two of Age, with Inteſt from the other’s Death. And though it was objected that this being a new Legacy the Executors ought to have a Year’s Time for Payment, yet the Court held that that must be intended to be from the Death of the Testator; Whereas in this Case the Testator had been dead several Years. 2 Wms. Rep. 478. Laud v. Williams. ——— The Reporter adds a Note, that the Rule in Equity seems by this Resolution to be settled accordingly. Ibid. 497.
4. In Replevin &c. the Defendant avowed, setting forth that G. D. was seised in Fee of the Manor of C. whereof the Lords in quo &c. was parcel, and being so seised, he gave the said Manor to Husband and Wife, and to the Heirs of the Husband, who by his Last Will devised a Rent to the Avowant of 41. out of the said Manor, with a Claim of Difficulties for his Livelihood and Child's Part, to be paid Yearly; the Husband died, and about 19 Years after his Death the Wife died, and the Avowant disclaimed for the Arrears of his Rent charge incurred between the Deaths of the Husband and Wife, and avowed for the same; thereupon the Plaintiff demurred, and it was infinited for him, that this Rent did not commence till after the Death of the Wife of the Testator, and therefore the Avowant could have no Title, but to what incurred after her Death; it was argued per Cur. that if it be in Reversion after the Determination of an Estate for Life, grant a Rent charge to another, in such Case the Grantee may disclaim for all the Arrears after the Grant, and which incurred in the Life-time of the Grantor, and it was said per Counsel for the Avowant that this was a stronger Case, because it appears by the Words of the Will, that the Rent was devised to the Avowant, for his Livelihood and Child's Part, which Words imply a present Advancement, and then the subsequent Words, viz. To be paid yearly, are a strong Proof that the Testator intended it as such.

5. If a Devise be of Land to A. and his Heirs after the Death of such a Monk, nothing passes to Devielle till the Death of the Monk, but it Land be devised to a Monk for Life, and afterwards to J. S. in Fee, the Devielle shall have the Land presently. Le. 196. pl. 279. Mich. 31 & 32 Eliz. in the Exchequer Chamber, in Ed. Paker's Case.

6. Devise of 100 l. to his Wife Pro Exoneration of her Dower; this makes a Condition that the Wife shall not have the 100 l. till she makes a Discharge of her Dower. Cro. E. 274. pl. 3. Hill. 34 Eliz. C. B. Pett v. Bailenden.

7. A Bond for Performance of Covenants which are not broken, shall interrupt the Payment of a Legacy, unless the Legatee will enter into a Bond to the Executor to make Restitution, if &c. otherwise nor. Ow. 72. Trin. 37 Eliz. B. R. Norton and Sharp v. Jennet.

8. If Land be devised in Fee-Simple, Fee-Jail, for Term of Life or Years, the Devielle may enter into the Land devised without any Leave of the Executor or Administrator; for the Freehold or State is in the Devielle before Entry. Co. Litt. 111. a.

9. Devise of Copyhold-Lands to A. and B. his two Sons, and to the Heirs of their two Bodies begotten, and wills that each of them shall enter at their several Ages of 21, and that his Executors shall take the Profits of the Land till they come to their several Ages of 21 Years. The Eldest cannot take till the Youngest comes of Age; Per three Justices B. C. but against Yelverton and Croke. 1 Bull. 42. Mich. 8 Jac. 3 Elyt. v. per 4 J. Gunning. the Eldest shall take.

So where a Term is devised to his two Sons when they come to the Age of 21 Years, and that his Executors shall take the Profits in the Interim; The Eldest shall not wait for the Age of the Youngest. Per Croke J. 2 Bull. 126. cites 15 H. 7. 17. b. or 15. b.

* The Entry of him that comes to full Age does not destroy the Interest, but they are Jointenants notwithstanding. Yelv. 183. S. C. S. C. cited Sinod. 184. in Case of Croke v. Gerason, 5 adjourn'd that the Eldest may well enter though the other had not attained his Age, because the Words of the Will shall be taken Distributively Redendo Singula Singulis.

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11. If
10. If a Man devises his Trees to his Executors to pay his Debts, the Executors must cut down the Wood in convenient Time. Brownl. 32.

11. A has three Sons, and devised several Leaves to his several Sons when they should come to the Age of 21 Years, and that his Executors should have the same in the interim. Each one of them when he comes to his Age of 21 Years shall have his Term by such Construction made, and Reddendo Singulr Singulis, and the Eldest shall not tarry for his Part till the Youngest shall come to his Age of 21 Years. For each of them shall have his Term in his Turn. Per Croke J. cites 13 H. 7. 17. b. by Fineux. 2 Bult. 126, 127. Mich. 11 Jac. Roberts v. Roberts.

12. A. devised Land to B. for Life, Remainder to C. and his Heirs, C. paying 100l. out of the Issue and Profits of the Lands. A. dies. C. dies, his Hear within Age. B. dies. and it being found by Office that the Land was held by Knight Service in Capite the King feised it, and afterwards for Non-payment during the Minority, the Heir of A. enters after Livery sued. But adjudged that the Entry was not lawful. For being to be paid out of the Rents and Profits, it is to be intended when he shall receive them, but the King having taken the Profits, he shall not pay them. Cro. J. 374. pl. 5. Mich. 12 Jac. B. R. Stade v. Thompson.

13. A. was possessed of a Term for 32 Years, and devised it to his Wife for Life, and after her Death to his Sons B. and C. jointly if they have no Sons, and if they shall have Sons, then that shall be reserved, and put out for the Benefit of such Child or Children. But if it shall please God to send them no Men Children, then after their Death he shall descend and come to D. and E. Children of a Son-in-Law. The Wife died. B. died leaving a Son; This Son shall enter upon C. for it is an Immediate Devise to the Children of B. and C. and Per 3 J. against Croke. 3 Bult. 98. Mich. 13 Jac. Blandford v. Blandford.

14. A. feised of three Meffuages has Issue three Daughters A. B. and Gilbert v. C. and he devised to each an House, and if his Daughters die without Issue, then to remain to J. S. One dies without Issue; Queare it J. S. shall take it presently, or expect till all are dead without Issue; Per Houghton. Cro. J. 448. pl. 28. Mich. 15 Jac. B. R. in Cafe of the Remainder to the Mother, and after divers Arguments it was resolved that the Mother should take immediately after the Death of each, as they died without Issue; but Lea Ch. J. doubted, because it was in a Will; and that it was not the Testator’s Intent to prefer the Remedies, as long as he had Issue of his Body; but for the Reasons of the other Justices they having long considered thereof, resolved that it could not be a Cross-Remainder. And so it was adjudged for the Defendant.——— S. C. cited Arg. 1 Sand. 184 in Cafe of Cook v. Gerard.

15. A Man being seised of Lands in Fee in Demesne, and also of a Reversion dependant on the Life of R. K. devises the Demesnes to his Wife for one Year after his Death, and then devises the said Demesnes and the Reversion together to W. K. Habend, immediately from and after the Expiration of that Year, and the Decease of the said R. K. to the said W. K. and his Heirs. The Devisee dies. The Year expires. W. K. shall have the Demesnes presently, and the Reversion after the Death of R. K. for it shall be taken Reddendo Singulr Singulis. 1 Sand. 186. Mich. 20 Car. 2. Coke v. Gerard.

16. A. bequeathed 100l. a-piece to his 4 Daughters, (his only Children) payable at 21 or Days of Marriage, and charged Lands with Payment of the same. Three died. The Survivor is intituled to the Whole,
Devise.

Whole, but not to compel Payment till she is 21 or married. Fin. R. 375. Trin. 30 Car. 2. Chapman (per Guardian) v. Crockley.

17. A. bequeath'd 1500 l. to B. and C. to be divided between them, and if one of them die, then the Survivor to have 1000 l. and if both die &c. The Time of Payment not being mentioned, the Legacies are payable in this Cafe at 21 or Day of Marriage. Fin. R. 432. Mich. 31 Car. 2. Dormer v. Dormer.

18. A. devised to his Two Daughters 600 l. a-piece to be paid at 75. ty-one, and the Residue of his Personal Estate to his Son, and declared that if either of his said Children should die in their Minority the Survivors should be Heirs in equal Proportion, and made J. S. Executor. The Son died Young. The Court thought the Residuary Part not subject to any Contingency of Survivorship, but that the Interests thereof immediately vested in the surviving Daughters, if of Age or not. Fin. R. 436. Mich. 31 Car. 2. Bargrave v. Whitewicke & al. 2

19. Legacy to be paid at Sixteen Years of Age, Legatee dies before; Administrator of Legatee shall not receive it till the Sixteen Years end. 2 Chan. Rep. 198. 32 Car. 2. Sanders v. Earle.

Cafe of Clobery v. Lampen. — A Personal Legacy shall be paid presently, though the Child dies before the appointed Time; Per Ld. Wright Ch. PreC. 198, in Cafe of Brewen v. Brewen.— Le 2 S. Hill. 26 Eliz. B. R. it was said by Dr. Aubrey, that the Civil Law is, that the Executor or Administrator shall receive it presently. In Lady Lodg's Cafe.

20. If a Legacy be given to an Infant to be paid at his Age of Twenty-one Years, and the Executors to pay Interest for it until it becomes payable, if the Infant dies before Twenty-one, it is due presently to the Executor or Administrator of the Infant; but if no Interest was to be paid for it, then it shall not be paid until such Time as the Infant would have come to Twenty-one in Cafe he had lived; because there it is a Benefit the Executor intended to the Executor by keeping it in his Hands;

in the other Cafe it would be none, when Interest was payable. 2 Frecm. Rep. 64. pl. 74. Hill. 1686. Anon.

A. bequeath'd to J. S. 1000 l. payable at Twenty-one and, in the mean Time J. S. to have the Yearly 2

Sam of 201. 3

not amounting to the Interest of the Legacy given him. J. S. died before Twenty-one; It was held by Raymond Ch. J. Jekyll Master of the Rolls, and Eyre Ch. J. (at the Council) it being a Cafe from Anegrea) after Time taken to consider of it, that the Executors of J. S. should wait for their Legacy till such Time as J. S. had lived would have been Twenty-one, it being unreasonable that the Executors of J. S. standing in his Place should be in a better Cafe than J. S. himself would have been, had he been living, and it was to be presumed that A. had made a Computation of his Estate, and confessed when the same would bear and allow of the Payment of this Legacy, and that no Reason could be given why an uncertain Accident should accelerate the Payment of this Legacy before the Time, which was at first intended for that Purpoise. 2 Wms's Rep. 355. 357. pl. 96. Hill. 1725. Cheffer v. Painter.

21. Though it be said that the Money shall be laid out after all Legacies paid, yet all besides what serves to pay the Legacies should be laid out presently. 2 Vent. 346. Trin. 32 Car. 2 Anon.

22. Lands devised to J. S. in Fee in Trust for A. and the Heirs of her Body and if A. die without Issue to B. for Life, and in another Clause in the Will he devised that if A. die without Issue and B. be then deceased, then and not otherwise he gave the Land to R. and his Heirs; A. died without Issue. B. survived her and died; R. brought a Bill against J. S. and the Heir at Law of the Tlesor to have this Trust executed; Decreed for R. though B. survived A. because the Words (If B. be then deceased) seemed put in to express his Meaning that B. should be sure to have it for her Life and that R. should not have it till the were dead, and also to shew when R. should have it in Possession. 2 Vent. 363. Hill. 2 & 3 W. & M. in C. B. Anon.
23. A Devise was in each Manner &c. because my Debts are many, amounting to 4600. a perfect Schedule whereof is hereto annexed, therefore I devise my Lands to be sold &c. And in another Clause says, as concerning such and such Lands, after my just Debts and Legacies paid, I devise them to A &c. Afterwards the Devisee mortgages part of these Lands for 4500l. The Debts (in the Schedule) and the Legacies are paid, and now the Estate shall velt; for the Debts to be paid precedent thereto are the Debts mentioned in the Schedule. 3 Lev. 432, 433. Mich. W. 3. C. B. Loddington v. Kime.

24. A Portion was devised to a Daughter to be raised out of a Real and Personal Estate and to be paid at Twenty-one, the marriage and dies before Twenty-one leaving a Child; (Note, it was not paid to be paid at Twenty-one or Marriage) Ld. Sommers directed an Account of the Estate and then he would give his Opinion, but inclined strongly that the Portion was payable; for all the Cases go upon this, there being no Marriage that did not happen, which was the Cause of the Portion. Ch. Prc. 109. Hill. 1699. Jackon v. Farrant.

25. J. S. having three Daughters and several Grandchildren and Great Grandchildren made his Will, and devised the Surplus of his Estate to be equally divided amongst his three Daughters, and all his Grandchildren and Great Grandchildren, that should be living within two Years after his Death, and died; and within two Years after his Death other Grandchildren were born; the Plaintiffs examined Witnesses to prove J. S.'s Intent, that none born after his Death should take; and the Question was, whether they could be admitted to read this Proof; and my Lord Keeper was of Opinion, that such Proof might be admitted; so the Witnesses were read; but Depositions were only, that J. S. said so or so, or to that Effect, which my Lord said, signified nothing for that makes the Witnesses the Judge; and he ought to set down the very Words for the Court to judge of; but without this Proof, my Lord held, that the Words in the Will (within two Years after my Death) were to be taken restrictively, and extended to none born after; and decreed accordingly, which Decree was affirmed in the House of Lords. Abr. Equ. Cases 231. Trin. 1700. Dayrell v. Moleworth.

26. Devise of 500 l. to A. to place him in Apprenticeship; it was objected that A. was not intitled till fit to be placed out, but the Objection was allowed and the Legacy decreed to be paid. 2 Vern. 431. pl. 393. Hill. 1701. Nevill v. Nevill.

27. A. by Marriage Settlement secures 2000 l. a-piece to Daughters, payable at Eighteen or Marriage, and afterwards by Will directs the Portions to be made up 3000 l. a-piece. Per Ld. Wright and the Matter of the Rolls, no Time being mentioned for the Payment of the Additional Portions they are payable at the same Time with the Portions provided by the Settlement which was at Eighteen or Marriage. Ch. Prc. 226. pl. 186. Trin. 1703. Alston v. Alston.

28. A. devised 300 l. to B, but declares his Will and Desire that B, give the 300 l. to M. the Daughter of B. at his Death or sooner, if there be Occasion for her better Advancement. It was intitled that if there was Occasion M. might call for the 300 l. even in B's Life-time. 2 Vern. 466. pl. 427. Mich. 1704. Eacles v. England.

29. John Jackon by his Will gives certain Lands to be sold for the Payment of his Debts, and the Rendue he gives to his Wife Mary for Life, and after her Death to Thomas his Son, his Heirs and Assigns for ever, provided nevertheless, that if the said Thomas Should depart this Life without Issue of his Body, then be gave to his two God-daughters the Plaintiffs 200 l. to be equally divided between them, and paid out of the Estate left mentioned within six Months after the Death of the Survivor of his said Wife and his Son Thomas by such Person as should inherit
Devise.

or enjoy the same, and for Non-Payment thereof he gave the Estate to his said God-daughters for Payment thereof. The Teftator dies and his Widow dies. Thomas enters upon the last mentioned Lands and levies a Fine, and settles the Land upon his Wife for a Jointure, and his Hiers by her, and for Want of such Issue to his own Right Heirs, and he having one Child a Daughter by that Marriage, he by his Will gives the Estate to his Wife Sarah and her Hiers after the Death of his said Daughter, and shortly after the making this Will he dies, leaving his Wife and one Daughter living, and in about three Months after the Daughter dies, and Sarah the Widow having the Land for her Life by the Settlement and the Inheritance thereof by the Will of Thomas, she afterwards marries the Defendant by whom she had Children, and then she dies, and the Defendant enjoys the Land by the Curtesy of England. The Plaintiff brought a Bill against the Defendant for a Satisfaction of the 2001, which Cause came to hearing and the Question was whether the Legacy was payable by Reason Thomas left Issue living at his Death, or whether it did not become payable at any Time upon the Failure of Issue of Thomas. My Lord Keeper Harcourt was of Opinion that the Legacy was not payable, taking the Meaning of the Words of the Will to be, that if Thomas should have no Issue living at his Death, then to be paid only; for that the Teftator having limited it to be paid in six Months after the Death of the Survivor, which if should be interpreted to be paid upon the Failure of Issue of Thomas that might be many Years after, but told the Plaintiff that as the Estate was devised for Payment of the Debts, they might and should have the Liberty to bring an Ejectment and try it and would retain the Bill in the mean Time. An Ejection was brought to try it at the Assizes, but the Plaintiff would not proceed. N. B. This Decree was afterwards reversed in the House of Lords. MS. Rep. Pauch. 11 Ann. in Canc. Nicholls & al v. Hooper.


to B. A. dies living the Teftator, but left Issue. The Devise to A. is void and B. shall take immediately, though Cowper C. said, it was against the Intent of Teftator and the Words of the Will, and against Horby, a Maxim in Law; that an Heir shall not be disinherited without express Words. 2 Vern. 722. pl 640. Mich. 1716. Hutton v. Simp. 115. S. C. in totidem Verbis.

31. A Devise was in Trust that the Devisees shall have the Profits of the Land when they come of Age; they have a Right to it in their Minority, at least to so much thereof as may be sufficient for their Support and Maintenance, and what is not then paid shall go to their Administrators. 9 Mod. 104. Mich. 11 Geo. Bateman v. Roach.

32. I give all my Personal Estate to my Wife, and to both my Grand Children 1000 l. a-piece, if they arrive at the Age of Twenty-one Years or Marriage. These Legacies are payable at Twenty-one or Marriage and is not to wait the Death of the Wife. 9 Mod. 93. Pauch. Confirmed on Appeal to the House of Lords. Ibd. 10 Geo. 1. Canc. Burdet v. Young.

33. A. by Will charges Lands with Payment of 1000l. a-piece to D. E. Cafes in and F. bis Daughters, payable at 22 or Marriage; and if any die before Chan. in His lordship's Will Portion becomes payable, the Share of her ft dying to go to the Surviving. E. died before 22 or Marriage; D. attained her Age of 22. It S C. and was held by Lords Commissioners Jekyl and Gilbert, that E's Share says, The shall not be paid to the surviving Daughters till such time as such de-
Deceafed Daughter, had she lived, would have come to 22. 2 Wms's Rep. 271. Pauch. 1725. Feltham v. Feltham.

34. And (the Reporter says that as he understood) the Court also declared that the surviving Daughters should not have their Shares of E's Part until they respectively should have attained 22 or be married, it not being the Testator's Intention to trust any of them with their Portion till 22 or Marriage. Ibid. 272.

35. A. by Will gives a Legacy to his Son B at 21, and if he died before, then to go over to C. and D. (two other Children) Testator dies; and B dies before 21. And Bill is now brought by C. and D. (who are likewife Infants) for this Legacy. And the Question was, Whether this Legacy should wait till B. would have been 21 (if he had lived) or should be paid immediately?

Lord Chancellor at the first Hearing declared, that if this had been a Substantive vested Legacy, and no Clause of Survivorship or Limitation over, it must, according to the late Authorities, have waited till B. the Legatee would have been 21, and would not have been recovered sooner by the Executors, because that would be to accelerate the Payment sooner than the Donor intended it, and it seems here C. and D. are Substituted only in the Place of the Executors &c. of the Legatee.

Lord Chancellor thought that though the Legacy here is given to B. at 21, yet it is a vested Legacy, and the same as if it had been given to be paid at 21; all the Legacies to the other Children being given in that Manner, and this small varying of the Expression does not sufficiently show that the Testator intended any Difference.

But Note, And it seems this Point is not material to the main Question as to the Time of Payment over; for whether vested or not, it was plainly to go over upon the Legatee's dying before 21, which happened.

Next Day this was stirred again, and Mr. Sollicitor General pro Quer. cited 2 Vent. 347. Leon. 278. and argued that the Difference was between an Executor and a Devisee over; for that in Case of such a Legacy vested, and the Legatee died before 21, there the Executor should wait, and not be paid the Legacy till the Legatee would have been 21, if he had lived; because the Executor claiming under the Legatee can be in no better a Condition than the Legatee himself would have been &c. And that the Executor should thus expect, and was lately revolved in a Plantation Case before the Lords of the Council upon a Reference to the two Chief Justices and Master of the Rolls; But it is otherwise in Case of a Devisee over, for the Devisee over does not claim or come in under the Legatee, but his Right accrues immediately upon the Contingency happening, viz. Death of the first Legatee before 21.

Note, At another Day Lord Chancellor declared, that though he could see no real Difference between the Devisee over and the Executor or Administrator, yet as there was a modern Precedent to the contrary, and that the Devisee over should be paid presently, and that the Executor should wait &c. he thought he was bound by that Precedent.

And
Devife.

And further said, that so long ago as the Time of E. 6. in And. Rep. such a Devifee over maintain'd an Action &c.

And 25 July his Lordship gave Judgment for the Plaintiffs that the Legacy should be paid immediately, without waiting till B. should have been 21. And cited Paynworth and Groot 2 Vern. 283. (which is in Point) and 1 And. 33. MS. Rep. 9 July, 1728. Landy v. Williams.

36. Lord Dover by his Will dated 14 January 1707. devised several Houfes, Ground-Rents &c. both in Possiffion and Reversion to Folkes & all. upon Trust, that they end the Survivor of them flould (as soon as conveniently they might or could) fell and dispose of all the faid Houfes and Premiffes to them devised both in Possiffion and Reversion for the best Price could be gotten for the fame; and out of the Money arising by such Sale or by the Reunts and Profits in the mean Time, should pay feveral Legacies thereby given to feveral Persons, which are directed to be paid within six Months after his Death, and after Payment of the faid Legacies and reimburying the faid Trustees their Charges, to put all the Remainder of the Money to be raised by the Sale of the Premiffes into five equal Parts or Shares, and out of the first fifth Part to pay unto the four youngest Daughters of his Niece Lady D'Avers 1000l. a-piece, at their refpective Ages of 21 or Days of Marriage, which fhould first happen, and to pay the Remainder of the faid fifth Part to the proper Hands of Lady D'Avers, or as the fhould direct, for her own proper Ufe, and her Receipt alone to be fufficient for the fame; and to pay another fifth Part to his Niece the Lady D'Ewes after Payment thereout of 1000l. a-piece to her younger Children, in like manner, and to pay the three other Fifths to his three other Nieces in like manner; and if any of his faid Nieces fhould happen to die before any Deviued could be made of the Sum or Sums of Money to be raised by the Sale or Sales of the Houfes and Premiffes directed to be fold, he appoints that all and every the Sum and Sums of Money which fhould or ought to have come and been paid to his faid Nieces in Cafe they had lived, fhould, in fuch Cafe of their dying be paid by his Trustees to and amongst all and every the younger Children of his faid Niece; Sir and Daughters, in equal Proportions which fhould be alive at the Time the Deviues are or ought to be made by the Intent of this his Will, the Sums fo to be deviued to be paid as soon as they are raised; in which Distribution of the Sums of Money intended for his faid Nieces, Care is to be taken that the younger Children of his faid Nieces do only claim and take the Share and Part intended for their own Mother in Cafe they had lived, and no more; and that after to much Money was raised as would pay the Legacies given by him which were precedent in Point of Payment to the Legacies intended for his Nieces and their Children, that then and so often as 1000l. was raised by Virtue of the Trust aforefaid, that the faid Money fhould from Time to Time be put out at Interfe upon Land Security by his Trustees or the Survivor of them, and the Monies which arife and come from the Interfe thereof should be added to the Principal to the Increafe of the Sums intended for his faid Nieces, and their Children repectively.

Lord Dover died 5th April 1708. Lady D'Ewes, one of his five Nieces died soon after in the Beginning of February 1708 before any Sale made or Bill brought for Execution of the Trust, leaving two Sons and four Daughters, fci. Sir Jermin D'Ewes, William D'Ewes, Deloriviere, Mary, Henrietta, and Merelina, all Infants.

Soon after the Death of Lady D'Ewes in Hill. Term 1708. Sir Robert D'Avers and Dame Mary Ux., one of the Nieces of Lord Dover, and all her younger Children then living, together with the younger Children of Lady D'Ewes and others, exhibited their Bill in this Court against the Trustees to have the Trust Estate fold, and that the

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Money ariling thereby might be divided according to the Directions of the Will. The Caufe was heard 28th July 1709, and it was decreed that the Estate devoted to be sold should be sold to the best Purchaser to be allowed of by the Matter, and that the Money ariling by such Sale should be divided and paid in such manner, and to such Persons, and subje& to such Contingencies as the Will directs. Pursuant to the said Decree several Parts of the Trust Estate were sold, and the several Legacies by the Will given and directed to be paid in six Months, as also the several Legacies of 1000L. a-piece given to the Daughters of the Testator's Nieces were likewise all paid.

Lady D'Avers died 18th October 1722. intestate, leaving eight Children, four Sons and five Daughters, a great Part of the Trust Estate still remaining unfold. The younger Children of Lady Davers in Easter Term 1726, exhibited their Bill against Folkes the surviving Trustee, and the younger Children of the other Nieces of the Testator, to revive the former Suit and Proceedings, and this came on to be heard 9th June 1727. and it was then decreed that it be referred to the Matter to take an Account of the several Contracts made for the Sale of the Trust Estate pursuant to the former Decree since the Death of Lady D'Avers, and of the Times when such Contracts were made, and for what Sums respectively, and what younger Children of Lady D'Avers and Lady D'Ewes respectively were alive at the Time of making the Contracts for such Sales, and that one fifth Part of the Money ariling by such Contracts respectively be paid to the younger Children of the said Lady D'Avers, who were living at the Time of making such Contracts, and if any of them are since dead, to their Representatives; and that one other fifth Part of the Monies ariling by such Contracts respectively be paid to the younger Children of the said Lady D'Avers who were then living, and if any of them are since dead, to their Representatives, and that the Trust Estate remaining unfold be forthwith sold according to the former Decree, and that one fifth Part of the Monies ariling thereby be paid equally to the younger Children of Lady D'Avers as shall be living at the Time of such Sale, and that one other fifth Part be paid to the Defendants Delariere Gage, Mary Lasbarg, and Henrietta Helmes, younger Children of the said Lady D'Ewes, or to such of them as shall be living at the Time of such Sale, the other Fifths ariling by such Sale be paid according to the Will of Lord Dover.

Mr. Helmes married Merelina D'Ewes, one of the Daughters of Lady D'Ewes; she attained her Age of 21 Years on 6th of July 1721, and died in April 1725, leaving three Sons, and Mr. Helmes took out Administration to her. Mr. Helmes thinking himself aggrieved by the said Decree, petitioned to have the Caufe reheard, and initiated that his Wife's Right was a vested Interest by the Death of her Mother Lady D'Ewes, and that he in Right and as Representative of his said Wife is intitled by Virtue of the Will and former Decree to his Wife's Proportion of her Mother's Share of the Monies ariling and to arife by Sale of the Trust Estate.

This Caufe was afterwards solemnly argued by Counsel on both Sides, before King C. assisted by Raymond Ch. J. and Mr. Baron Comyns.

The Question did arife on the Clause of Survivorship in the Will, feit. If any of my said Nieces shall happen to die before any Dividend can be made of the Sum or Sums of Money to be raised by the Sale or Sales of the Houfes and Premises directed to be sold, I appoint that all and every the Sum and Sums of Money which should of ought to have come and been paid to my said Nieces in Caufe they had lived, shall, in such Caufe of their dying, be paid by my said Trustees to and amongst
amongst all and every the younger Children of my said Nieces, Sons and Daughters, in equal Proportions, which shall be alive at the Time the Dividends are or ought to be made by the Intent of this my Will, and the Sums so to be divided to be paid as soon as they are raised.

Revoluiio Curiae. Mr. Baron Comyns, Though the Question ariseth upon the Clause of Survivorship, yet the whole Will ought to be taken into Consideration. Ld. Dover directs the Trust Estate both in Possession and Reversion to be sold so soon as conveniently it might or could; if it be plain it intended the Reversion should be sold, and not to defer the Sale till it came into Possession, which did not happen till the Death of Lady Dover, who died in 1726, and through it may be difficult to tie up the Sale to any precise and certain Time, no certain Time being fixed by the Testator, yet the Court must fix some reasonable Time or other for the Sale, or set some Bounds to the Trustees for Sale, which they ought not to exceed, and I think the utmost Period of the Time for the Sale cannot exceed to Time that the Daughters of his Nieces Lady D'Avers and Lady D'Ewes should marry or attain their Age of 21 Years; for then their several Legacies of 1000 l. a-piece grow due to be paid out of their Mothers Shares. If it were Differently in the Trustees not to sell till they thought fit, by delaying the Sale they might totally frustrate the Will and not fall at all. The Children are to take who shall be alive at the Time the Dividends are, or ought to be made; by the Intent of this Will there is certainly a Difference between the Words are and ought, and the Testator meant some Difference between them, and therefore not necessary that the younger Children should be alive at the Time the Dividends were actually made, it is enough if they be living at the Time they ought to be made; and I think the Estate ought to have been sold sooner, and consequently the Dividends ought to have been made sooner, for they are directed to be made as soon as the Money raised by Sale.

I think Mrs. Helmes being of Age before her Death, and a Party to the Bill in 1708 for an Execution of the Trusts in Lord Dover's Will, by that Bill she put in her Claim to her Share of her Mother's Share under the Will, and that an Interest was veiled in her, and consequently Mr. Helmes, as her Representative, is intituled to her Share.

Raymond Ch. J. said the Will was dark and obscure, but thought the Testator intended the Trust Estate both in Possession and Reversion should be sold in a reasonable Time, and such Time was long since lapsed and past, and did not think it necessary in the present Case to determine, or fix any precise or determinate Point of Time, he was sure a reasonable Time was already past. Whenceover the Sale ought to have been made, by the Intent of the Testator, that was the Time the Dividends ought to have been made, and from that Time became a vested Interest in the Younger Children of the Testator's Nieces.

King C. of the same Opinion, that the Interest attach'd in the Younger Children at the Time the Trust Estate ought to have been sold by the Intent of the Testator.

Decreed that the Monies raised, or to be raised by the Sale of the Trust Estate to be equally divided between the Younger Children of Lady D'Avers and Lady D'Ewes respectively, or their Representatives, pursuant to the Directions of the Will; per Cur. MS. Rep. pt. Trin. 3 Geo. 2. in Canc. Davers & al' v. Folkes & al' and Helmes v. D'Avers.

(§. d.) Devise
(H. d) Devise. When to be taken, where the Estate is limited upon a Dis-junctive.

1. **Devise.** was to N. his Grand-Child, with a *Proviso*, that if N. died before Payment of 500l., or before he come to the Age of 30 Years, that then O. another Grand-Son, shall have it. N. died before such Age. Adjudged that O. shall have it as a Purchasor. **2 Roll Rep. 220.** Per Chamberlaine J. cites 9 Eliz. Ocelie's Case.

2. A. devised Land to his Son, but if the Son die before 21 or without issue, he gave and devised the Premises to f, S. It was adjudged upon a Special Verdict, that if the Son die before 21, though he leaves Issue, yet the Issue shall not take, but the Remainder-Man. Cited 2 Vern. 377. pl. 340. Trin 1700, in the Case of the Bishop of Oxford v. Leighton, as adjudged on a Special Verdict in the Case of Jennings v. Helliar.

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(I. d) Legacies to Infants. When to be paid.

Defendant said he was always ready to pay, but the Legatees being Infants, Executor refused Payment, unless indemnified by this Court, the Infants being incapable of giving Discharges. Decreed that a Master place the Money out, or continue it where it now is, as he shall approve, and the renewed Securities to be in the Name of the Guardian, or such other as the Master shall think fit; and the Executor to be indemnified. Fin. R. 94 Hill. 25 Car. 2. Dyke v. Dyke.


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(K. d) In what Cases a Legacy must be demanded.

1. **Land** was devised to A. so that he pay &c. The Payment ought to be upon Request and subsequent. Arg. Mo. 363. cites 38 E. 3. fol. 11 and 12. and cites 4 E. 6. br. Estates 78.

was held that this Devise referring to a Deed, is a good Devise in Writing, as if the Rent-Charges were expressly mentioned in the Will, and that these being Rent-Charges by the Will, and the Condition being to pay them according to the Intent of the Deed, must be demanded, for by a payable in Nature of a Rent, and not as a Collateral Sum. Cro. J. 145. pl. 4. Hill. 4 Jac. B. R. Mol ineux v. Mol ineux.

3. Legacy is a Thing in its Nature not to be paid without Demand. Poph. 104. in Sirling's Cafe. 

And though a Bond be given for Performance of the Will, yet a Request is to be made. Le 17. pl. 10. Patch. 26 Eliz B. R. Fringe v. Lewes. — Arg. If a Man be bound to perform Covenants, and one Covenant is to pay Legacies, there he need not pay them without a Demand. But where one is expressly bound to pay such a Legacy, there he must pay it at his Peril. 2 Le, 114. pl. 142. Trin. 31 Eliz. B. R. in Cafe of Wellock v. Hammond. — Yet a Release of all Actions and Demands is no Discharge of a Legacy, but it must be released by particular Words. 3 Mod. 279. Patch. 2 W. and M. in B. R. Per Cur. in Cafe of Cole v. Knight. —— If the Will directs that on Non-payment the Legatee may enter and enjoy the Profits of such and such Land till satisfied, no Demand is necessary, for it is no fortification, but an Executory Devise, though Time and Place are appointed for Payment. Ruled per Pemberton Ch J. at the Athlete. 2 Show 185. pl. 190. Hill. 53 and 54 Car. 2. B. R. Petri son v. Sorrel.

A devi lent Land to D on Condition to pay his four Daughters at their full Age to every one of them 25l. The Condition is not broken without a Demand of those Sums after their full Age; for D. is not bound to take Notice of their full Age, but after Notice he ought to pay. Cro J. 57. Curtis v. Wolverton.

(L. d) Legacy to Infants &c.

Payment to Whom is good.

1. The Executor refusing to pay Infants Legacies to their Father, a Suit was brought by the Father in the Spiritual Court, and he had Sentence there. The Executor moved for a Prohibition, and alleged that he was Executor, and chargeable in an Account for the Money. But being after Sentence for the Father in the Spiritual Court, and also before the Delegates, a Prohibition was denied; and also because Executor refused to give Security for Payment of the Legacies to the Children. Godb. 243. Hill 11 Jac. C. B. Ayllif v. Brown.

2. A Legacy of 10l. was bequeathed to Feme covert to be paid 15 Months after the Death of Devilor; Feme dies within the 18 Months; Administration belongs to the Baron, and not to the Daughter of the Feme, for the Baron had an Interest in it before the Time of Payment accrued, which the Interest it is clear he might have released before the Time of Payment accrued. Per Mountague 2 Roll R. 134. Mich. 17 Jac. B. R. Anon.

3. Executor pays a Child's Legacy of 125l. to the Father, and takes a Purchasor from the Father to save him harms. The Father fail'd; the was ordered to pay Child from Legacies to their Parents on their Security, which was to be allowed by a Matter, and thereon the Purchasor to be discharged of it. 2 Chan. Cales 79 Mich. 53 Car. 2. North v. Champernowne.
4. A Personal Legacy given to an Infant is more properly cognizable in Chancery than in the Spiritual Court, and the Executor applying to the Chancery, that Court ordered the Money to be put out for the Children, and not to be paid to the Father, who refused to give the Executor Security, but fled for the Money. Vern. R. 26. Hill. 1681. Horrell v. Waldron.


6. A bequeathed 50l. a-piece to B. C. and D. the Children of E. the Money was paid during their Minority to E. the Father, on his giving Security to the Court; B. C. and D. out-lived their Age several Years, and made no Demand of their Money, yet they shall be paid with Interest and Costs, nor shall there be any Deduction for Maintenance of them in their Minority, the Father was bound to do it, and their Portions given by a Stranger are nothing to him more than if they had not any; and for the Interest of them, they having served their Father, their Service was more worth. Per Cwmp. C. 3 Chan. R. 165. Patch. 7 Ann. Strickland v. Hudson.

7. L. C. Cowper said, that the Master of the Rolls who had longer Experience than himself, would never allow a Child's Legacy to be paid to the Father or Mother upon any Security whatever, by reason of the Strife it might occasion in a Family. 3 Ch. R. 168. Patch. 7 Ann. in the Cafe of Strickland v. Hudson.

8. The Executor paid an Infant's Legacy to his Father, who at the Infant's full Age promised him Payment of a double Sum at a future Time, but said he could not pay him then. He and the Son became Co-partners in Trade, and 14 Years after the Son's full Age became Bankrupts. Declared that the Executor paid the Money to the Plaintiff the Assignee of the Communion, and though this was thought a hard Cafe by Lord Cowper himself, yet he said he did it to deter others from paying Infants Legacies to Parents. G. Equ. R. 103. Trim. 1 Geo. I. Dwy. v. Ballery.

Abr. Equ. Catef. 300. Doy ley v. Tol ler ey. S. G. This Cafe was thought hard, and the more so if it being proved that the Testator on his Death Bade one Direction that the Executor should pay the Legacy to the Father to improve the Money for his Infant's Benefit, and that this Circumstance appears like-wise in the Register Book. Wms. Rep. 253. Mich 1715. Dwy. v. Toller ey.


1. A Seised in Fee of Lands in Ireland by Will made in England de voted those Lands to a Trustee (who as also the Testator and his Wife lived in England) for Payment of 80l. a Year Annuity to his Wife for Life. No Place was appointed where the Money should be paid. It was intended that 80l. a Year payable in Ireland was not equal to 80l. a Year payable in England, and therefore the Charge of remitting should be deducted. But Ld. C. Macclesfield decreed otherwise, by reason of the Circumstances before mentioned, and also in regard it appeared in the Proofs that Testator had made Leaves of Part of his Irish Estate, reserving just so much Rent to be paid in London, free from Taxes, as would be sufficient to pay all the Annuity given by the Will. And Plaintiff was ordered her Costs. 2 Wms's Rep. 88. Hill. 1722. Wallis v. Brightwell.
2. So if one by will made in England gives a Legacy 80 l. it must be intended English Money, and it will be intended the same Thing, though charged in Land in Ireland, and the Reason is the same of both. Per Ed. C. Macclesfield. 2 Wms's Rep. 89. Hill. 1722. in Case of Wallis v. Brightwell.

3. A. by will in 1677, devised certain Lands of 62 l. per Annum to MS Rep. Trifles, to pay out of the Rents and Profits 30 l. per Annum to his Wife Much 1727; for her Life, without any Deductions in Satisfaction for her Dowry. And Marygold. Question was, Whether there was to be an Allowance for the Land-Tax or not?

For the Plaintiff who demanded the Annuity it was insisted by the Solicitor General &c that the Land-Tax was a Deduction, that there was an ample Fund, and that this was a Bounty intended by the Husband &c.

Contra for Defendant, it was insisted that this Devise was to be considered as a Rent-Charge to the Wife, and as all such Rents are charged by the Land Tax Act, to ought this &c. and the paying in the Sature of Covenants and Agreements between Landlords and Tenants does not extend to this Case.

And per Matter of the Rolls accordingly, and said he was sensible that the Act would be a Repeal of any Covenant to pay clear of Taxes, unless there had been such Savings; but here this is by way of Devise and not Covenant, and therefore the Saving does not extend to it, and the Act being a Repeal or Discharge of the Obligation to pay without Taxes, there is nothing to take it out of the general Purview of the Act; and that if a Devise be of a Rent-Charge clear of all Taxes by express Words, it will be subject nevertheless by the Act, because there is no saving as in Case of Covenants &c. But here the Words of Exemption are not so strong, it is not paid clear of Taxes or without Taxes, but without any Deductions, so that Testator seems not to have had the Case of Taxes under his Consideration, but Deductions of other Kinds, and there is no Reason why the Testator, if he had intended it to be clear of Taxes, should not have mentioned the Word Taxes, since if no Land-Tax was then actually in being, it was a Kind of Tax that had been before and was well known. That every Land-Tax is a new Grant to which all are Parties, and thereby is a Liberty to deduct out of all Rent-Charges and Annuitie, wherefore &c.

Note, In this Case as the Party had paid the Annuity without deducting the Tax, the Court would not go back to make the Party reland, nor was it so much as prayed.

(N. d) Interest. In what Cases payable, and from what Time.

1. If 100 l. be bequeathed to be paid divers Years after Testator's Death, this Difference is to be observed; if the Day were given in favour of the Legatee being an Infant, who could not safely receive it any sooner, then he shall have the Profit. But if the Refpite was in favour of the Executor, then the Legatee shall have the 100 l. only. Went: Off. Executors 252, 253. cited Sum. Silv. 284.


3. In
3. In Case of a Legacy, it was admitted it was not due till Demand, and the Executor or Administrator should pay Interest but from the Time of the Demand; Exemplify, that if no Demand be proved in the Cause, it will be from the Time of the Bill exhibited. 2 Freem. Rep. 1. Pauch. 1576. Anon.

4. J. S. made his Will (his Wife being then with Child) and ordered that all his Personal Estate after his Debts and Legacies paid, should be Laid out in Land (in Case he had no Son) and be settled on his Brother for preservation of his Name, and devised that if the Wife were delivered of a Daughter, that the Should have 300l paid her at her Day of Marriage, and also devised that the Mother should have 80l Part of the Interest of the 300l, for the Education of the Daughter. ∗ J. S. dies, the Wife has a Daughter. Per Cur. There is nothing to be laid out till the Debts and Legacies paid, the 80l is not to the Daughter but for the Mother; It is taken for granted that where a Sum of Money is devised to a Child at such an Age, it shall have the Interest in the mean Time, rather than the Executor shall Swallow it; But clear, where no Maintenance is otherwise provided for it, and decreed per Ld. Chancellor, that the Executor should account for what Interest he paid the Brother. Note, though it be said, That the Money to be laid out after all Legacies paid, yet all besides what serves to pay the Legacies should be laid out presently. 2 Vent. 346. Trin. 31 Car. 2. Anon.

* But if each Daughter die before 21 or Marriages, her Part in the Monies so devised to her were to be employed for the Benefit of such as were to enjoy his Lands. The Surplus of the Interest of the 300l, over and above the 80l was paid by the Executor to the Brother for several Years, and on the Executor's paying Payment, the Brother brought a Bill to recover the same, inferring that all the Rest of his Personal Estate being to be laid out in Land, this either expressly, or by a necessary Implication included all the Interest of the 300l, over and above the 80l a Year. But Ld. G. Finch who blamed the Plaintiff's Suit as undid &c. decreed the Plaintiff (the Brother) to re-pay what he had received, and that the Trustees should pay the Interest over and above the 80l a Year for the Benefit of the Daughter, till 21 or Marriage. Wm's Rep. 366. cites S. C. as there taken from the Register, and by the Name of Bourn v. Tynte. S. C. cited per the Matter of the Rolls. 2 Wm's Rep. 177. Tynte. 1722 by the Name of Brown v. Tynte.

If one gives a Legacy charged up on Land which yields Rents and Profits, and there is no Time for Payment mentioned in the Will, the Legacy shall carry Interest from the Testator's Death, because the Land yields Profit from the Time. Per Ld. C. Macclesfield. Trin. 17. 2 Vent. Ld. Maxwell v. Wernethall. But if given out of the Personal Estates, and no Time for Payment mentioned, it shall carry Interest only from the End of the Year after Testator's Death, and Lord Chancellor said, he took this to be the settled Difference. Us &c.

5. Money directed by Will to be raised out of the Profits of Lands, yet being a Groats Sum North Keeper thought it would carry Interest to the Time it should be paid and raised out of the Profits. Vern. 225. pl. 223. Hill. 1683. Attorney-General v. Siderin.

6. A bequeathed 500l. Mortgage to his Wife, willing her to give 200l. of it to M. his Grand-daughter, an Intam, to be paid at such Times and in such Manner as his Wife should think fit, and made his Wife Executrix, the Wife lived near 20 Years after A but never paid the Legacy. North Keeper decreed Payment of the 200l, with Interest from A's Death, though no Demand was ever made of it in the Life of the Wife. Vern. 251. pl. 244. Trin. 1694. Churchill v. Speke.

7. Devise of 3000l. Weight of Sugar to be paid in ten Years after Testator's Death. Executor lapsed the ten Years; Decreed Payment according to the Medium Rate of Sugars in the Place, where Testator had a Plantation, at the 10 Years End, and Interest from the Time it became due. 2 Vern. 553. pl. 502. Pauch. 1706. Symes v. Vernon.

8. Lands devized to J. S. paying the Heir 2000l. within 20 Years at 1000l. per Annuity. Per Cowper Lord Chancellor for every 1000l. from the Time it became payable, the Legatee or Heir shall have Interest, because both the Sum and Time of Payment were certain and paid, and there
Devise.

there is to be no Deduction of Taxes of any Kind, because it is not to ifue nor arise from the Lands, but is given as a Sum in Gros by Entry on the Lands for Non-payment. 1 Salk. 156. pl. 7. 1707. in Canc. Grimston v. Lord Bruce & Ux. Per Cowper Chancellor.

9. If a Legacy be devised generally, and no Time ascertained for the Payment, and the Legatee be an Infant, he shall be paid Interest being an In- fiant Interest was decreed from the Time the Legacy was made payable by the Will. Fin. R. 136. Mich. 26 Car. 2. Maplet v. Pocock.

10. Where a certain Legacy is made payable at a Day certain, it must be paid with Interest from that Day. 2 Salk. 415. Mich. 6 Ann. in Canc. Smell v. Dee,


12. A devised 1200 l. to be distributed by B. among B's Four Children at Twelve Months end after B's Death. Two of the Four Children died within the Twelve Months. At ten Years end after the twelve Months expired, B. paid 900 l. to one of the Survivors who gave a Receipt in full of his Share by which he was barred claiming any more; adjudged that B. ought to pay Interest for the 1200 l. from a Year after A's Death, and decreed accordingly, but the Matter in computing Interest was to take out of the Principal so much as with the Interest of it would make up 900 l. when it was paid to that Child, and then to carry Interest for the remaining Principal from the End of the Year after A's Decease, and decreed such Principal with single Interest to be paid the other Child the Plaintiff. 2 Vern. 744. pl. 652. Hill. 1716. Bird v. Lockey.

13. A. by his Will gave several Legacies, and amongst others 1000 l. to L. his Niece, who was the only Child of M. sitter and heir at Law of Tefator payable at Eighteen or Marriage, and the Residue of his Personal Estate to Trustees to be vested in Land and settled on B. for Ninety-nine Years, Remainder to his first &c. Son in Tail &c. After wards A. by Codicil appointed the 1000 l. given by the Will to be made up to 6000 l. and payable at Twenty-one or Marriage. ld. C. Macclesfield decreted, that L. was intituled to the Interest of the 6000 l. from A's Death, and paid, that it had weight with him, that by the Will the 1100 l. left to her was given her at Eighteen, but the coming to that Age in A's Life-time, the Codicil ordered it to be made up 6000 l. yet not to be paid till Twenty-one or Marriage, so that the Actual Payment was stopp till Twenty-one or Marriage, it was however veited preently and being severed from the rest of the Ettate (which Re- fited only the Defendant B. was concerned in) therefore the Interest of

In this Case was cited the Case of Sourn b. above, which was said to be the barnger than this, for that there was an express Provision of 80 l. a Year for the Education of the
Devise.


whether by implication be thought to exclude the Daughter from any farther Advantage of her Portion until the should come to twenty-one or Marry, at which Time the Portion was to become due. And also that in that Case the Legacy was not vested, but if the should die before twenty-one or Marriage it was to vanish, whereas here was a vested Legacy transferrable to Executors though she should die before twenty-one or Marriage. And that the Devile there was to a Brother, but here to a more remote Relation and out of a much larger Fund. Wms's Rep. 788. in S.C.

N.B. at the End of Page 788 is a Note that this Case is misplaced in Order of Time not being decreed till Trin. Term following.


15. If a Legacy be given out of a Personal Estate consisting of Mortgages carrying Interest, or of Stocks yielding Profits Half-Yearly, it seems in this Case the Legacy shall carry Interest from the Death of the Testator. 2 Wms's Rep. 26. Maxwell v. Wittenhall.

16. If a Legacy be brought into Court, and the Legatee has Notice of it, so that it is own Fault not to pray to have the Money, or that the Money should be put out, the Legatee in such Case shall lose the Interest from such Time as the Money was brought into Court; But if the Money was put out, the Legatee shall have the Interest, which the Money put out by the Court did yield. Per Ld. Macclesfield. 2 Wms's Rep. 27. Trin. 1722. Maxwell v. Wittenhall.

17. If a Man devises Lands for Payment of his Debts, the Lands become as a Security for Mortgage or all the Teflator's Debts, as well these by simple Contract as otherwise, and the Simple contract Debts shall carry Interest as the Land, which is the Fund, yields Annual Profts. Per Ld. C. Macclesfield who said it was the Daily Practice. 2 Wms's Rep. 27. Trin. 1722. Maxwell v. Wittenhal.

18. A by Will devised to E. her Nince an Infant of about Seventeen the Surplus of her Personal Estate which was about 3000 l. to be paid at twenty one, and if she should die before, then to J. S. and devised also to E. a small Estate in Lands. The Matter of the Rolls held clearly that E. was intitled to the Profits and Interest of the Surplus from the Death of A. in E's Life-time, though E. should happen to die before Twenty-one, and decreed accordingly. 2 Wms's Rep. 419. Trin. 1727. Nicholls v. Osborn.

In this Case it was argued and not denied that where the Devise is of a Surplus an Infant, and if he dies before Twenty-one, then to go over, the Surplus devised over is the same Surplus which was devised to the Infant; whereas it would be a different and greater Surplus, were it to carry the Interest accruing during the Life of the Infant added to what was the Surplus at the Time of the Teflator's Death, which seems not to have been intended. Ibid. 420.

In this Case Mr. Lutwidge took a Diversity between a Legacy to a Son and a Legacy to a Grandson, that in the last Case 19. So where 500 l. was bequeathed to an Infant Grandson without mentioning any Time of Payment, with Provifio to go over to another in Case of the Grandson's dying before Twenty-one. The Matter of the Rolls said, it was extremely clear, that this was a Condition subsequent, and therefore as the Infant's Death before Twenty-one would only defeat the Legacy from the Time it happens, it shall consequently carry Interest in the mean Time, at least from the End of the Year after Teflator's Death. 2 Wms's Rep. 504. Hill. 1728. Taylor v. Johnson.

where no Time is mentioned for the Payment, the Legacy would be payable presently and Equity of Course allows Interest from the End of the Year; But if the Legacy be to a Son, then from the Death of Teflator. Ibid 505.
20. A Legacy was left to an Infant, the Testator having a great deal of Money in Bank-Stock, the Executor was Residuary Legatee; the Bill was brought for the Legacy, and Question was, whether it should bear Interest, and from what Time. Pengelly Ch. B. and Hale B. it is a certain Rule, that where the Fund is certain, as when charged on Lands it shall bear Interest; so the Fund on which it is charged produces a Profit here; it is equally certain, and therefore should bear Interest. Salk. 415. Small v. Dee; and should be from the Testator's Death. But this was opposed by Carter and Comings Barons; that it should only bear Interest from a Year after the Testator's Death; for as Legacies are to be paid after Debts, the Executor has that Time to inquire; till which they are not payable, so not to bear Interest, to which it was agreed. A Difference was offered to be made, that as this was a Legacy to an Infant, it could not be safety paid, and therefore should not bear Interest. To which it was answered by the Ch. B. it might be safely paid into the Hands of an Infant, having proper Evidence of the Payment, as is Wentw. Exec. 313. And per Carter, it may be paid into the Hands of the Guardian, having Evidence; but if he takes Security from the Guardian, which should prove defective, there, as he does not rely on the Security, the Law gives, much depend on that taken at his Peril. Sel. Cases in Banc in Ld. King's Time, 72, 73. Mich. 13 Geo. Bilson v. Saunders.

21. A Legacy of 500 l. was given to be paid in convenient Time; it must bear Interest only from the usual Time of Payment of Legacies, though Land was charged with the Payment. Sel. Cases in Chan. in Ld. King's Time 73, 74. Trin. 2 Geo. 2. Hornfly v. Hornfly.

22. Interest was recovered for a Legacy, though after a Receipt given in full for the Legacy, and the Principal Legacy paid. 3 Wms's Rep. 126. Hill. 1731. Earl & Maria Ux' v. Thornbury.

23. A Legacy out of a Rent-Charge shall carry Interest but then it must be only in Proportion to what the Rent-Charge brings in, not more; and if there be a Surplus beyond the Interest, that must go to the Heir at Law. 3 Wms's Rep. 254. Pach. 1734. Stonehouse & Ux' v. Evelyn.

24. On a Bill brought by a Legatee against an Executor Interest shall not be given for the Legacy till a Year after the Testator's Death, unless where the Interest is expressly given from the Death of the Testator; Per Ld. Chancellor. Barnard. Chan. Rep. 46. Pach. 1740. in Cale of Neale v. Willis.

25. It is indeed true that where the Party prays his Satisfaction for a simple contract Debt merely out of Personal Assets, the Court will of Course direct the Debt to be paid with Interest to be computed from one Year after the Death of the Testator. But where a real Estate is charged with the Payment of Debts as well as the Personal, his Lordship said, he did not know, that it was absolutely fixed, that simple contract Debts should carry Interest from that Time. Barnard. Chan. Rep 229. Mich. 1740. Lloyd v. Williams.
(O. d) Maintenance. In what Cases to be allowed for, or out of Legacies.

1. WHERE there is no Provision by a Will for Maintenance, because the Legacies to be paid after the Debts, yet the Defendant was allowed Maintenance. Toth. 114. cites 2 Jac. Horton v. Long.

2. Children allowed seven or eight Pounds per Cent. for their Education, where there is no Allowance by the Will. Toth. 68. 5 Car. Bright v. Chappell.

3. Legacies were made payable at 21; the Legatee brought a Bill by their Guardians, suggesting that they had no Maintenance, and pray'd an Allowance. The Executor, who was the Defendant, demurred, because the Legatees were under Age, and their Legacies not to be paid till 21, and so had no Cause of Suit; but the Court over-ruled the Demurrer. Chan. Cafes 60. Mich. 16. Car. 2. Renney v. Parrot.

4. A. made his Will and left 1200l. in Trustees Hands to be paid to B. and C. or the Survivor of them, at 18 or Marriage, which should first happen, but nothing was mentioned as to Interest or Maintenance. It was decreed that the Trustees pay the Interest, Profits or Increase for the Childrens Maintenance until the 1200l. become due, and that they also pay all Arrears of Interest. Ch. Rep. 265. 18 Car. 2. Glide v. Wright.

5. Where there is a Devife over of a Portion, Chancery can allow no Maintenance out of it; otherwife if no Devife over. Chan. Cafes 249. 26 and 27 Car. 2. * Leech v. Leech.


7. In Cafes of a Personal Legacy payable at 21 or Marriage, the Court has always appointed Maintenance out of the Interest of it, if not expressly limited otherwise in the mean Time. And in the Principal Cafes the Legacy being 3000l. and the Child dead, 100 Marks per Ann. was allowed for it whilst the Child was living, which was only to the Age of five Years. And there being a Term raied by Marriage Settlement for raiing the like Sum, and now confirmed by the Will, the Land
Devise.

4 1 7

Land was deceeded charged with the 100 Marks per Ann. Maintenance.
8. Devise by Tefeator of all his Real and Personal Estate to his A where Eldest Son, charging the same with 1000l. a-piece to his Youngest Child, dren payable at their Ages of 21, but no Notice taken of Maintenance in 9 the mean Time. The Matter of the Rolls taking Notice that there were veiled Legacies, and no Devise of them over, decreed that the Infant, Equit was payable anew, in Cases of Maintenance. The Court doing but what the 10 Father if living ought to have done, viz. to provide for his Children, once to the 2 Wms's Rep. 21. Pfach. 1722. Harvey v. Harvey.


So likewise his Honour said it had been held, that though a Legacy were devised over in Case of the Legatee's dying before 21, yet the Infant Legatee ought to have Interest allowed him during his In- 11 feed for his Maintenance; but when the Estate is small, the Court has ordered the lower Interest.


19. Lands devised in Trust for B. for Life, Remainder for her Children in Trust, that they shall have and receive the Profits thereof when they come of Age. Per Cur. they have an Estate in Fee as Tenants in Common, and (the Mother being dead) they have Right to their Profits in the Minority, at least so much thereof as may be sufficient for their Support and Maintenance. 9 Mod. 104. Mich. 11 Geo. Bateman v. Roach.

10. A Father by his Will gave 2000l. a-piece to his two Daughters, payable at 21, charged on Land and Personal Estate, and the Personal Estate being exhausted in Debts, my Lord Chancellor held they should have a reasonable Maintenance out of the Real Estate, until their Legacies became payable, and allowed them 80l. per Ann. each. Abr. Equ. Cales 301. Trin. 1729. Conway v. Longeville.

(P. d) Security.

In what Cases to be given for Payment of Legacies.

1. Devise was of Goods and a Library to the Defendant for Life, and atter to the Defendant's Daughter and her Heirs for ever. The Plaintiff marry'd the Daughter, who is since dead, so as the Plaintiff, as Administrator, seeks to compel the Defendant to give Security to deliver the Goods to the Plaintiff after the Defendant's Death, or the Value thereof; Decreed accordingly, and a Commiion is awarded to the Matter to examine upon Oath such Witnesses as shall be produced before him. Chan. Rep. 110. 12 Car. 1. Bracken v. Bently.


3. A. devised his Real and Personal Estate to B. his Son, an Infant, and made C. Executor during his Minority, and that C. should account to B. at his Age of 21 Years. Decreed that the Executor give Security to a Master to give a just Account, and to pay what should appear due to B. at the Age of 21 Years. Fin. R. 317. Mich. 29 Car. 2. Edwards (by his Guardian) v. Jordan.

5 O

4. Lord
1. A bequeath'd 30 Twenty Shilling Pieces to B. 22 to C. and 10 to D. which were in such a Cheque or Place. When A died there were found no more than 30 in all, in that Place. If the Testator left sufficient to make good all those 60 Pieces bequeath'd, Quere, If that which is wanting in the Casket shall not be supply'd and made up? Wentw. Offices of Executors, 251.


3. An

4. A Man had a Conveyance and a Statue for his Wife's Legacy, and yet was made to refund. Arg. Chan. Cales 137. Mich. 21 Car. 2. cited as the Case of Grove v. Banfon.

Affets originally, but the Executor had wasted them and was Infolvent.

5. Executors must not pay their own Legacies first, if not enough to pay all; for all must be in Proportion. 3 Chan. Rep. 54. 22 Car. 2. Butler v. Coote.

6. A. the Father of B. and C. bequest'd 400l. to B. and 300l. to C. and died. Afterwards M. the Mother bequest'd 200l. to C. and made B. Executor. J. S. took Administration during the Minority of B. Afterwards W. R. as Guardian of C. iued J. S. for C's Legacy; and the Court decreed that in Case of want of Affets the Legacies of 400l. to B. and 300l. and 200l. to C. should be paid in Proportion out of the Personal Estate, and upon J. S. paying the same that W. R. gave Security that C. when of Age, should give a Release &c. Fin. R. 136. Mich. 26 Car. 2. Maplet v. Pocock.

7. An Executor shall not be forced to pay Legacies until the Legatees shall give Bond to refund in Proportion, or in the Whole, for the Satisfaction of Debts, if any do appear unsatisfied. Yet the Legatee upon his Bill in the Court shall refund, and this as well as were it is Legacy in Specie, as a Horie, or 1000l. actually paid, for the Legacies are not due till the Debts be paid, and a Legacy being paid, remains as a Legacy in the Hands of a Legatee after Payment. Per Ld. K. said, it was a Rule in this Court. Chan. Cales 257. Hill. 26 & 27 Car. 2. Chamberlain v. Chamberlain.

8. Administrator of an In-testate makes an Executor, and bequeaths a Legacy to J. S. and dies. Pending a Suit against the Executor for Recovery of the Goods in Right of the Intestate, the Executor pays the Legacy, and afterwards the Goods are ex'cuted. The Executor shall not make the Legacy refund, and Finch C. dismissed the Executor's Bill.


after by his Will devi'd his Freehold Lands to B. in Fee, and not charging them with Debts or Legacies, and gave his Copyhold Lands to C. in Fee in Trust to fall to pay his Debts and Legacies, and gave a Legacy of 300l. to D. and died, making E. Executor. The Copyhold was not surrendered, so that it was not liable. Ed. Harcourt decreed that as to so much of the Personal Estate as was exhausted by the Bond Debt, D. should stand in the Place of the Bond Creditor against the Land, and that the Freehold should be liable in default of Personal Affets to pay the Legacy. But upon Appeal Ld. C. Parker reversed that Part of the Decree; For every Device of Land is a Specifick Legacy, and shall not be broken in upon, or made to contribute towards a Pecuniary Legacy: And had the Land devi'd been only of a Tenme for Years, and not a Fee as in the Principal Case; Such Specifick Legatee of a Legacy should prevail against, and not contribute towards the Pecuniary Legacy. Mich. 1720. Wms. Rep. 678. Clifton v. Butl.

10. A. devi'd to B. lands of One Hundred Pounds per Annum in Fee, to be set out by his Executor, and Five Thousand Pounds to C. and Three Thousand Pounds to D. Executor lets out Lands of greater Value, so as there was not sufficient to pay the other Legacies. Per Ld. Chancellor, This is not a Specifick Legacy but Quantitatis, and therefore each should bare his Share of the Lods. But B. having sold Part of the Lands to he decreed that a Master examine the Value of the Lands &c.
And though
his Legacy was
created
by a Statute
and Mort-
gage, Chan.
Cales 138.
Mich. 21 Car.
2 Grove v. Banfton and Groze.——So shall Legacy to Executor for Care and Pain.
* As where the Legacy was of a Debt secured by the Statute. Fin. Rep. 325. Trin. 20 Car. 2.
Smallbone v. Blake. — Lt. Chancellor thought they ought to contribute, but directed to Prece-
dents 2 Chan. Cales 171. Hill. 1 Jac. 2. Comins v. Cominz.— But Lt. Harcourt Chancellor con-
trary. 2 Salk. 416. pl. in Can. Hcnr. v. Merick. — 2 Vern. 111. S. P. Per Lords Commit-
of Lingman v. Sonray.
may pay which he will, in Case of Paramour v. Yardley.

But in
Chancery though
there is no
Provision
made of
Refund, yet the Common Justice of this Court will compel a Legatee to refund, per Lord Chan-

2 Vern. 360.
Hodges v.
Wadding-
ton — Arg.
Vern. 92.
says it was settled in the Case of Chamberlain v. Chamberlain. — See Ch. Cales 135. Nelthorpe v.

Ch. Cales 156 admitted
that the
Court that
he shall
want of Af.
sers. Nel.
the Estate voluntarily paid a Legacy, the Estate is evicted he is without Remedy 2 Chan. Cales 9
Hodges v. Waddington — Decreed that neither the Executor or any other Legatees can compel a
Legacy to refund until where the Payment was compulsory. 2 Vern. 203. Hill. 1699. Newman v.
Barton. — Nor will the Court relieve the Executor upon Supposition of Fraud by misrepresenting
the Value of the Atits, they being beyond Sea, Lord Chancellor taking Notice, that no Fraud or Mifer-
representation appearing to have been used by the Legatees who had been paid, and there being more Rea-
son to think that the Executor was better informed of Teller's Estate than the Legatees, he would
not order any Refunding or Cest on either Side. 2 West's Rep. 291. 292. 296. Trin. 1725. Coppin
v. Coppin.

Where Legacies are given and the Estate falls short, each Lega-
tee shall proportionally abate; admitted the Law to be so. 2 Chan.

16 Chastenable Legates not to refund to other Legatees; per North

17. A Legacy to be paid to the Eldest in the first Place, denotes not
Preference in the Quantity. 2 Chan. Cales 132. Hill. 34 & 35 Car. 2.
Tillley v. Trockmorton.

18. A Legatee shall refund against a Creditor of the Teller that
can charge an Executor only in Equity, viz. upon a Writting by the first
Executor;
Devise.

Executor; But if an Executor pays a Debt on a Simple Contract there shall be no refunding to a Creditor of an higher Nature. 2 Vent. 360. Pach. 35 Car. 2. in Canc. Hodges v. Waddington.

19. Suit was for a Legacy; the Defendants demanded Allowance for their own Legacies first, but it was denied, an ordered that an Account be taken of the whole Estate, and the Defendants and Plaintiffs to abate equally and proportionably for what the Estate falls short; and so not like the Case where Executors pay their own Debts first at Common Law, or him that first pays his Debt in equal Degree before the other. 2 Freem. Rep. 134. pl. 163. Butler v. Wallis and Coole.

20. A Legacy was given to A, when he should be 24. The Executor pays Part before the Time to put him out into the World, and gives Bond for the Rish due to be paid at a Day certain, which was the very Day he would be 24. A died before 24. Bill was brought for Repayment of the Money and to deliver up the Bond, and charged an Agreement to that Purpose, which Defendant denied. Lord Ch. Jeffries declared it was fit to be heard on the Merits. 2 Vern. 31. pl. 22. Mich. 1687. Luke v. Alden.

21. A Man devised a Rent-Charge of 10l. per Annum to A, issuable out of Black-Acre, with a Clause, that if it should be behind, it should be lawful for him to enter, and hold till he was satisfied; and by the same Will devised a like Rent-Charge of 10l per Annum to B. issuable out of the same Land, with like Clause of Entry &c. The Land was not of sufficient Value to answer both the Rents, and they were both in Arrear, and both Devisees had brought several Ejectments and had recovered; and the Defendant being in Possession, the other Grantee brought his Bill to have an Account of the Profits, and that one Moniet might be applied to satisfy the Arrears of his 10l. per Annum, and it was decreed accordingly. Abr. Equ. Cases 115. Hill. 1697. Eure v. Eure.

22. A left of three Houses, on which there is a Mortgage of 1600l. which he had covenanted to pay. A devised them severally to B. and C. and bequeathed Legacies to E. F. G. and H. amounting to as much as he estimated his Personal Estate would arise to, and directed, that if his Estate fell short, the Legacies should abate in Proportion. The Personal Estate fell short above 1000l. Deceased the Pecuniary Legatees only to abate, and the Devisees of the Houses not to contribute or to take to themselves the Burthen of the Mortgage, but to be taken out of the Personal Estate. 3 Ch R. 306. Mich. 1703. Wavves v. Warner.

23. A intituled to 8000l. in the Chamber of London, makes a Will while the Stop was there, and declares, that when his Executors shall have received it, he gave 2000l. to the three Hospitals. It fell out that the 8000l. was worth but 6300l. after the Act of Parliament for settling a Fund for paying a perpetual Interest for the Orphans Debt; Yet Per Ld. Keeper the Devise is not of 2000l. Part of the 8000l. but a Charge on the Whole, and had the Debt increased to Value to 10000l. yet the Legacy was not to increase, and so now not to be reduced, and decreed the whole 8000l. 2 Vern. 547. pl. 497. Pach. 1706. Colwall v. Bonyncon, Longeyt & al.

24. Though Pecuniary Legatees shall be paid in Proportion, yet a Legacy of Money given to be laid out in Exchequer Annuities and to be enjoyed by Testator's Wife for her Life, the releasing her Deaver, and after her Decease to go equally to his two Daughters, shall have the Preference, and if there be not Ailes enough to pay other Legacies bequeathed by him, they must be loft; and the Money ordered to be laid out in Annuities, or if it was directed to be laid out in Land is to Equity be looked upon as an Annuity or Land, and consequently to be taken for a Special Devise and not a Pecuniary Legacy, and is therefore to be preferred;
25. If a Man by Will gives several Specifick Legacies and devises the Residue of his Estate to J. S. and his Cirumstances vary so that the Refiduary Part becomes very inconsiderable, yet the Refiduary Legatees must content himself with it, and shall have no Assistance from the Specifick Legatees; Per Cowper C. Ch. Prec. 401. Patch. 1715. in Case of Litig- wen v. Souray.

26. A had three Sons, and having a Personal Estate of 2000 l. bequeathed 3000 l. a-piece to his younger Sons and the Surplus to the eldest, and made his Wife Executrix and Guardian (the Sons being Infants). The Estate, confuting in Stocks, was afterwards much diminished by the Extravagance of the Mother's After-Husband. The younger Sons brought a Bill for their 3000 l. Legacies, but Ld. C. Cowper directed the Matter to take an Account of what was the clear Personal Estate of Teftator at his Death, and it confuting but of few Items, his Lordship thought the Teftator must know what would be the clear Amount, and that he meant the Surplus thereof as a Legacy to his eldest Son, and ordered all the three Sons to receive Part Paffiv in respect of the Value of the Surplus given to the eldest, which was to be taken as a Legacy, and in regard to the Legacies of 3000 l. each to the two younger Sons. Wms's Rep. 305. Hill. 1715. Dyole v. Dyole.

27. If the Executors of a Freeman of London prove insolvent so that a Loss happen to the Estate, it shall be born out of the Testamentary Part only; Per Cowper C. Ch. Prec. 409. Trin. 1715. Read v. Duck.

28. A Freeman of London having Inlue two Daughters devised to them 6000 l. a-piece, and made his Wife Executrix, and his Personal Estate was computed at 18000 l. Upon a Treaty of Marriage between the Widow and A. her Share was supposed to be 6000 l. and 600 l. per Ann. Jointure was settled as an Equivalent. But in Case a Deficiency should be, Collateral Security was given to make it up to 7000 l. as a small Matter would amount to; Afterwards the Wife died, and a Loss of 12000 l. let the Personal Estate. Decreed that the Loss should be born by all in Proportion, especially the Husband taking the 6000 l. Portion upon an open and unliquidated Account. Per Cowper C. Ch. Prec. 431. pl. 283. Hill. 1715. Paget v. Hoskins.


30. Legacies were given by Will, and other Legacies by Codicil. The Legacies by the Will were charged on Land, but not the Legacies by the Codicil, by reason of its not being witnessed. The Matter of the Rolls decreed the Legatees by the Will to be paid out of the Real Estate, and if that prove deficient, they must be to the Surplus, come in in Average with the Legates in the Codicil, to be paid out of the Personal Estate, and that the Specifick Legatees must be all paid and not abate in Proportion; But that Charities devised, though prefer'd by the Civil Law, ought to abate in Proportion; For they are but Legacies. And the Teftatrix having bequeathed 2000 l. for a Monument for her Mother, it was objected that that ought not to abate in Proportion; it being a Debt of Piety to her Mother's Memory, from whom Teftatrix had the greatest Part of her Estate. And to this the Court inclin'd, but however referred that Point, Wms's Rep. 421. Patch. 1718. Matlers v. Sir Harcourt Matlers.

31. As...
31. As by a Decree of Affets all Legatees are to be paid in Proportion; So it the Executor pays one Legatee, yet the Rest shall make him refund. Per the Matter of the Rolls. Wms's Rep. 495. Mich. 1718. Anon.

32. So it one gets a Decree for his Legacy and is paid, and afterwards a Deficiency happens, he shall refund. Ibid.

33. But if the Executor had Affets for all at first and after a Deficiency arises by his wasting them, the Legatee who recovered shall retain; For Vigilantium & non Dormientibus Jura subveniunt. Ibid.

34. As a Specific Legatee shall not contribute to the Loss of a Pecuniary Legatee; So on the other Hand, if such Specific Legacy (as supposed a Lease) be evicted, or (being Goods) are lost or burnt, or (being a Debet) be lost by the Insolvency of the Debtor, in all these Cases such Specific Legatee shall have no Contribution from the other Legatees, and therefore shall pay no Contribution towards them. Per Ld. C. Parker. Wms's Rep. 340. Trin. 1719. in Case of Hinton v. Pinke.

35. Bill by an Executor against a Legatee to refund a Legacy voluntarily paid him by the Executor, the Affets falling short to satisfy the Teztator's Debt. Decreed that the Defendant should refund to the Plaintiff, and that an Executor may bring a Bill against a Legatee to refund a Legacy voluntarily paid, as well as a Creditor; for the Executor, paying a Debt of the Teztator out of his own Pocket, stands in the Place of the Creditor, and has the same Equity against a Legatee to compel him to refund, contra to the Opinion in 2d Vent. 358. Robl v. Rovinton, and 2 Vent. 360. Dougs v. Maddington. Per Jekill M. R. MS. Rep. Patch 4 Geo. Canc. Davis v. Davis.

36. A having two Sons and a Daughter bequeathed to each of his Sons 2000l. and also to his Daughter 2000l. payable at 21 or Marriage, provided that if Affets fail short, yet the Daughter shall be paid her full Legacy, and that the Abatement shall be born proportionably out of the Son's Legacies only. The Affets left were sufficient, but the Executor wasted them, and for a Deficiency happen'd. It was decreed by the Matter of the Rolls that the Daughter's Legacy should in this Case abate in Proportion. But on Appeal Ed. C. Parker reversed the Decree, and said that as the Teztator had not restrained it to any particular Means by which the Affets should fail short, it must be taken Generally, viz. It by any Means there should be a Deficiency, as Loss by Fire, or by Badness of Title, on which the Money was lent, and decreed to the Daughther her full Portion, and the Abatement to be out of the Legacies of the Sons. Wms's Rep. 668. Mich. 1720. Math v. Evans.

37. If a Freeman of London dies without Issue, his Wife is entitled to the Custom to the Moity of her Husband's Personal Estate in Value, but not in Specie; If a Freeman of London makes his Will and disposits of his whole Estate without any Notice of the Custom, and gives several Specific Legacies, and several Pecuniary Legacies, and devises the Residuum to A. and the Widow waives her Legacy and claims a Moity of his Personal Estate by the Custom, if the Residuum be sufficient to answer her Moity or Share it shall be taken out of the Residuum, but if that fail short, then the Pecuniary Legatees shall abate in Proportion, and if the Residuum and Pecuniary Legacies be sufficient to answer her Moity, the Specific Legatees shall not be brought in to contribute, but enjoy their Legacies entire. Per Parker C. MS. Rep. Trin. 5 Geo. in Canc. Kitton v. Robins.

38. Teztator gives 60l. a-piece to his Executors, and 3l. a-piece to the Poor of several Parishes, and 5l. a-piece to his Servants, besides several other Charters, and in the same Will apprehending there would be a Surplus, gives further Legacies, and after all this makes a Codicil, and thereby gives more Legacies, and provides that if a Deficiency should happen, then 200l. given by his Will for re-building a Chapel should not be taken Effect.
Devise.  

...but only a convenient Part toward beautifying the Old Chapel. There happened a Deficiency, and thereupon it was decreed by the Master of the Rolls, that the Legacies in the former Part of the Will should be preserved, and those in the latter should be lost, and likewise the Legacies in the Codicil should abate in Proportion, had it not been specified that they should in Case of Deficiency be paid out of the 200l.


39. Where several Legacies are given out of Bonds, Securities &c. and these fall deficient there shall be an Abatement among them only, and not affect other Legatees; Where there are several Pecuniary Legatees they must abate in Proportion, but no Specifick Legatee, except in Case of his Legacy. Per Matter of the Rolls. Hill. Vac. 1723.

40. An Estate Pur Auter Vie was limited in Trust for A. his Executors and Administrators after the Death of J. S. in Poffeffion. A. devolved this Reversion to his Wife for Life, Remainder over; and dying indebted, a Bill was brought by a Creditor to charge this Estate with his Debt, and Ld. C. King after decreeing it to be Personal Estate, and that it could not be devised away from his Creditors, said, that nevertheless this being a Specifick Devise, all the Rest of A's Personal Estate not specifically devised, must be first applied to pay the Debts, and if there be any other Specifick Devise, the same ought to come in Average with this, and pay its Proportion, but if that will not serve, all must be sold to pay Tefator's Debts. 2 Wms's Rep. 381. Mich. 1726. Duke of Devon v. Atkins.

41. Where a Legacy is given to Executors for Care and Pains, it is wrong that that Cafe should receive a different Determination from the Cafe of a Legacy being given to Executors generally, in which it is admitted, that the Executors ought to abate in Proportion with the other Legatees; and where a Legacy is given to Executors generally, it is understood to be for their Care and Pains; and when these Words are expressed in the Will, declaring that the Legacy is given them for their Care and Pains, they are rather the Words of the Scrivener and Drawer of the Will, than the Maker of it; for which Reason the making a Difference between the one Cafe and the other, would be to make a Distinction on too slight a Foundation. And though the Bequest is expressed to be for Care and Pains, yet still it is but a Legacy which must proceed from the Bounty of the Tefator. It is not to be considered as a Debt or Contract, for the Care and Trouble of the Executor is only the Motive on which the Tefator exercises his Bounty by way of Legacy; and let the Motive of the Bounty be what it will, whether past and executed, or future and executory, it is all the same. An Executor when he proves the Will, may be supposed in some Measure to know the State of the Tefator's Affairs. And if he does prove the Will, he takes the Legacy subject to the Contingency of abating in Case the Estate proves deficient. Barnard. Chan. Rep. 435, 436. Pach. 1741. Herne v. Herne.
(R. d) Refunding.

Where Refunding is directed by Will to make an Equality. How much shall be refunded.

1. A On the Marriage of M. his Niece agreed to have &c. 301. a Year in Lands at his Death to the Children of M. (for to the Cafe in effect was as the same was decreed) and afterwards making his Will, and having therein given an Estate to S. a younger Niece, adds that if the Estate given to his younger Niece S. should prove of a greater Value than what he had before given to his Niece M. then so much should be taken from S. and be refunded to M. as would make them equal. It was objected that what the Children of M. were intitled to by the Marriage Articles, could not be taken as given to M. But Lt. C. King held clearly that the Provision by the Marriage Articles for the Children of M. ought to be looked upon as Part of the Provision for M. and as done for her, since it was doing that for her Children which otherwise the or her Husband would have been obliged to do themselves. 2 Wms's Rep. 343. Hill. 1725. Thomas v. Bennet. 

(S. d) Remedy for Legatees and Devisees.

1. A Man shall have Trespass of any thing certain which is devoted to him before he has the Possession of it; contra a Thing uncertain; Brook says, quod mirum, for it may be that there are Debts which are not paid. Br. Devise, pl. 30. cites 27 H. 6. 8.

2. A Term for Years is devoted to A. the Executors of the Devisee entered into the Land devoted to the Use of Devisee; Per Cur. it is a sufficient Possession for the Devisee. 3 Le. 6. pl. 15. 2 Eliz. C. B. Anon.

Delivery of the Executor, the Executor may bring an Action of Trespass against him Arg. Bridgm. 34 cites 20 E. 4. 9 2 H. 6. 16. 11 H. 4 84. 3. 5; H. 6. 50.

3. Devisee by a Devise has a Title of Entry, which shall not be a Lease, bound by any Defent as Entry for Mortmain, for Condition broken; pl. 229. Sir Anthony Denny's Fee was vested in the Devisee notwithstanding that the Heir had demised upon the Premises to J. S. and had received the Rent of J. S. and he died without having made any Special Entry, but only walking over the Land without any Special Claim; for by this the Heir did not gain any Seilin to found with him, and so could not die seised, and consequently there could be no out any mention of this Devise; and then the Entry of the Devisee was lawful. Le. 229. 210. pl. 293. Mich. 31 & 32 Eliz. C. B. Matthewson v. Trott.

feized and left all the Lands so devoted to a Stranger during the Minority of the Heir. The Heir comes of full Age and has Livery of the Whole, and without any express Entry leaves the Lands for Years, rendering Rent; The Leassee enters and pays the Rent to the Heir; the Heir dies; the Leassee assigns over his Term, and the Rent is yearly paid to the right Heir of the Devisee; and now the Heir enter'd, and per Curiam his Entry is lawful.
4. A deviled his Lands to B. and dies, and a Stranger enters and dies in error. 

The Device is settled before any Entry by the Devicee, now is the Devisee without Remedy. 

Arg. 2 Le. 147. cites 1 Cro. 92. Owen 96.

5. Lease for Years is devilled to A. Executor enters and takes a new Lease; the Court seems'd to incline that A. may have the Term as Legacy notwithstanding the Surrender by the Executor in accepting a new Lease. Mo. 358. pl. 487. Trin. 36 Eliz. Carter v. Love.

6. If the Heir of the Devillor enters and holds the Device out, he may either enter or have his Writ, called Ex gravi Querela, and this Writ (without particular Ufage) is incident to the Device. For otherwise if a Difcendent were cast before the Devicee did enter, the Devicee should have no Remedy after an actual Poiffeon. This Writ (Ex gravi Querela) lies nor, for then the Devicee may have his ordinary Remedy at the Common Law. Co. Litt. 111. a.


8. The Civilians said, that a Legatee that had got Administration, tho' it be afterward repealed upon a Citation, should yet retain his Legacy; But not fo upon an Appeal, for there the Administration is void ab Initio. Vent. 219. Trin. 24 Car. 2. B. R. in Cafe of Thomas v. Butler.

9. A seifed in Fee devilled to his Children 1000 l. payable at several Times, by 50 l. per Annum, with which Sums he charged his Lands to be thereout paid, and then died; one Payment of 50 l. incurred due, then the Lands were aliened by Fine and Proclamations and five Years passed. The Devicee sued for the Whole; but decreed, that what grew due after the Fine, was barred by the Fine, but not the 50 l. due before; for a Truit is barred by Fine. 2 Chan. Cases 247. Hill. 30 & 31 Car. 2. Wakelin v. Warner.

10. A Suit was begun for a Legacy and to discover Affets, no Affets sufficient being discovered. After other Affets came to the Executors Hands, and a second Bill for the Legacy and Affets thereon discovered. Ld. Chancellor gave Decree for the Legacy and Damages from the first Bill exhibited, for that was a good Demand for the Legacy though it was not prosecuted, and not only from Time of Affets. 2 Ch. Cases 2. Hill. 30 & 31 Car. 2. Anon.

11. If Legacies are given by Will, and that in Cafe of Non-Payment the Legatee may enter and enjoy the Profits of such and such Land till satisfied; no Demand is necessary, for it is no Forfeiture but an Executor Devile though there be a Place and Time appointed for Payment; Per Pemberton Ch. J. at the Affets. 2 Show. 185. Hill. 33 & 34 Car. 2. Pieriev. Sorrell.

12. If a Legacy be given to two, one cannot sue; or if Residuum Bonorum be given to several, they must all join; but when Legacies are given to severall Perfons, each may sue alone for his own Legacy; Per the Solicitor General. 2 Chan. Cases 124. Mich. 34 Car. 2. in Cafe of Haycock v. Haycock.

13. If
13. If Executor sells in Prejudice of a Specifick or Reliduary Legatee, they may have their Remedy against the Executor, but not follow the Estate into the Hands of a Purchaser; Per Car. 2 Vern. 445. pl. 409. Mich. 1753. Humble v. Bill.  
14. Devise may bring an Original Bill in Nature of a Bill of Revi-
vor, and shall have the same Advantage of a Decree as an Heir or Ex-
ecutor, and the Defendant is not at Liberty to make a new Defence; Per Cowper K. 2 Vern. 548. Pach. 1711. Clare v. Wordell.  
15. If a Creditor or Legatee, not Party to the Cause, comes in before the Master, he shall have his Costs, for it was in his Power to have brought a Bill for his Legacy or Debt, which would have put the Estate to further Charge; Per Ld. Macclesfield. 2 Wms's Rep. 27. Trin. 1722. Maxwell v. Whettenhall.

(T. d) Remedy for Legatese, where the Personal Assets are diminifhed &c. by Creditors.

1. A Seised in Fee and indebted by Bonds, by Will gives Legacy to Children (whom he had otherwise provided for before) and devised his Land to his Eldest Son in Tail. The Eldest Son being Exec-ecutor, pays the Bond with the Personal Estate. The Legatees by Bill pray'd to be let into the Place of the Bond Creditors, and to be paid out of the Land. The Court seemed to admit that if the Lands had descended, the Legatees might have been relieved out of the Real Estate, but since A. had devised the Lands, it was resolved they ought to be exempted; For it was as much A's Intention that the Device should have this Land, as the others should have the Legacies, and a Specifick Legacy is never broke in upon in order to make good a Pecu-nary one; and this Case is out of the Statue against Fraudulent De-
viles, because the Debts are paid, and the Children, being otherwise pro-
vided for, are not in the Nature of Creditors. Noc. This was an Ap-
peal from the Rolls, where the Master held that the Real and Personal Estate should be so charged that both the Debts and Legacies should be paid. Per Harcourt C. 2 Salk. 416. pl. 3. Hern v. Merrick.

in Tail of the Lands, the Legatees should have no Remedy to come upon the Real Estate in the Place of the Bond Creditors, but said he would reserve that Point, and ordered Precedents to be searched. Wms's Rep 201. to 204. Trin. 1712. S. C. — The Reporter adds, pag 204. That Mich. 1750 in the Cafe of Clifton v. Bir, this Decretal Order of Hern v Merrick was produc'd, and it appeared that this Case was not resolved by Ld. Harcourt, but adjourned for further Consideration.

2. Mr. Vernon said there had been Cases decreed in this Court, that where a Legatee has been forced to abate of his Personal Legacy to-wards Payment of Debts, he had been let in to stand in the Place of a Creditor to recover his proportionable Satisfaction out of the Real Estate devised to be sold for Payment of Debts. G. Equ. R. 73. Mich. 9 Ann. in Cafe of Hall v. Brooker.

3. If a Man by Will gives a Lease or Heads, or any Specifick Legacy, and leaves a Debt by Mortgage or Bond in which the Heir is bound; the Heir shall not compel the Specifick Legatee to part with his Legacy in
Devise.

Estate of the Real Estate; but though the Creditor may subject this
Specifick Legacy to his Debt, yet the Specifick or other Legatee shall
in Equity stand in the Place of the Bond Creditor or Mortgagor, and
take as much out of the Real Assets as such Creditor by Bond or Mort-
gage shall have taken from his Specifick or other Legacy. Per Lord C.
Tipping.

4. A. mortgaged his Lands and then makes his Will, and says, after
Payment of my Debts and Funeral Charges, which I will to be first paid,
I give my Freehold Estate in K. to my Wife for Life, chargeable with an
Annuity of 30l. for Life to E. K. and after my Wife's Death I give my
said Freehold Estate so charged to H. J. and K. and directs the Reprin
of his Personal Estate to be placed out at Interest, and to be paid to his Wife
for her Life, and after to be divided between H. J. and K. and gave 1500l.
to his Wife, provided she accepts the Devises and Bequests in Lieu of
Dower. The Personal Estate was not sufficient to pay the 1500l. if the
same should be apply'd in Estate of the Real. Lord C. Talbot decreed that
the Legatees be paid out of the Personal Estate, in Case the Mort-
gagee keeps to the Real; and if he falls upon the Peronal, they have
a Right to stand in his Room for so much out of the Real Estate as he
shall take out of the Personal; that being a proper Fund for their Pay-
v. Leigh.

5. If one owes Debts by Bond, and devises his Lands to J. S. in Fee,
and leaves a Specifick Legacy, and dies, and the Bond Creditors come upon
the Specifick Legacy for Payment of his Debt, the Specifick Legatee shall
not stand in the Place of the Bond Creditor to charge the Land, be-
cause the Devisee of the Land is as much a Specifick Devisee as the Le-
gatee of a Specifick Legacy. 3 Wms's Rep. 324. Trin. 1734. Hale-
wood v. Pepe.

(U. d) Remedy for Legatees &c. where the Charge is
on Lands, which prove deficient.

1. A Gave Legacies to his Daughters, charging his Real Estate with
Payment thereof, and other Legacies to his Brother, without
charging his Real Estate with Payment of them. If the Daughters re-
cover their Legacies out of the Personal Estate, then the Brother shall
stand in the Place of the Daughters, and take so much out of the Land
for their Legacies as the Daughters had exhausted out of the Personal
Assets, and if it was decreed by the Matter of the Rolls. 2 Wms's

(W. d) Le-
(W. d) Legacy.

Remedy in what Court.

1. In Trespasses it was said for Law that if a Man devises a Thing certain to another, and dies, as a Horse &c. and a Stranger takes it, the Devisee shall have Action of Trespasses; and contra if it be uncertain, as if it is of the Third Part of his Goods &c. there is no Remedy but to sue for it in the Spiritual Court. And this seems to be in the first Case between the Devisee and a Stranger; But Quære if he may take it out of the Possession of the Executor; for it may be that the Debts exceed the Goods; and then the Devise is void. Br. Devise, pl. 6. cites 27 H. 6. 8.

2. Goods are devised to B. the Son and Heir of A. B. sues in the Spiritual Court; Executors say that B. is not Son and Heir of A. This shall be try'd in the Spiritual Court. Kel. 110. pl. 33. Causi in certi Temporis.

3. A. devised a Term for Years to B. B. may sue the Executor in the Spiritual Court to execute the Legacy. Arg. Pl. C. 543. b. Hill. 21 Eliz. in Case of Paramour v. Yardley.

4. A Motion, that where the Plaintiffs had exhibited their Bill to be discharged of a Legacy, the Defendant since his Suit sued in the Spiritual Court; and therefore Day to shew Cause why an Injunction should not be granted. Cary's Rep. 104. cites 21 and 22 Eliz. Parre & Ux. v. Tiplady & Ux.

5. Lands were devised to be sold for Payment of Legacies; the Lands being sold, the suit for the Money to be distributed may be in the Land being sold, the Money is it be rising out of Land; per Barkley J. and agreed by Croke J. Cro. C. 396, 397. and cites 9 El. D. 254.

6. A Legacy was given upon Condition; the Legatee promised and agreed to perform the Condition, and then sued in the Spiritual Court, and the Executor pleaded this Matter there, which was relufed, and to a Prohibition was granted. Cro. E. 274. pl. 3. Hill. 34 Eliz. C. B. Pet v. Bafeden.

7. * Executor gives Bond to Legatee to pay the Legacy at a Day certain. * The Legatee before the Day sues in Spiritual Court. Prohibition was granted for the Legacy is extinguisht; but per Williams J. if the Bond had been made to a Stranger, the Legacy was not extinguisht. 2 Brownl. 11. 8 Mod. 528. Per Cur. in Cafe of Ca-

band v. Dewbury; and denied the Opinion of Dosteridge J. in Dosteridge's Case; where Dosteridge held that in such Case the Obligee may sue for the Legacy in the Court Chilifian and at Common Law upon the Obligation; for he said that the taking the Obligation for Payment had not totally destroyed the Nature of the Legacy. — See the Opinion by Anderdon as to a Covenant by the Executor for Payment, that if the Legatee afterwards sues the Executor in the Spiritual Court afterwards, he shall have a Prohibition. Quod Custodi Justiciarius nego-

vant. 2 Le. 119, 120. pl. 164. 29 and 30 Eliz. C. B. B.
Devise.

8. If a Legacy be granted out of Lands in Fee-Simple, this shall not be filed for in the Spiritual Court. But if one by Will devises Land to be sold for Payment of Legacies, this shall be filed for in the Spiritual Court, by the Opinion of the whole Court. Brownl. 32. Anon.

9. If a Legacy be granted out of Lands, the Suit may be in the Spiritual Court, and shall not be prohibited. Brownl. 34. Anon.

10. An Executor was sued in the Spiritual Court for a Legacy, who pleaded a Recovery in Debt against him at Common Law, whereunto to satisfy, he had no Assets; The Plaintiff there said the Recovery was by Coer, and that the Plaintiff who recovered the Debt offered to discharge the Judgment, and the Defendant would not. Reolved that the Covin was properly examinable in the Spiritual Court, because the Legatee could not sue for the Legacy at Common Law, and therefore Prohibition in this Case was denied. Mo. 917, 918. pl. 1307. Patch. 14 Jac. B. R. Lloyd v. Maddox.

11. If a Debt, Obligation, or such like Thing in Action be devis'd to another, the Devisee hath no power to recover it, but by Suit in the Spiritual Court, or in some Court of Equity to compel the Executor to sue for it himself, or to make to the Legatee a Letter of Attorney to sue for it in the Executor's Name unless he be made Executor as to the Debt, and yet if the Legatee have the Bond, or Specialty in his Hands he may deliver it up or cancel it. So it is to be understood that the bequeathing of Money payable upon a Mortgage. See Perk. S. 527. Wentw. Oil. Executors 18.

12. If a Legacy be of Twenty Oxen, and a Suit is commenced in the Ecclesiastical Court, and the other pleads Payment of 20 l. in Satisfaction, there the Proceeding must be at Common-Law, because the Legacy is altered. Per Velverton J. Het. 87. Patch 4 Car. C. B. Warner v. Barrett.

13. Where a Suit is in the Ecclesiastical Court for Lands and Goods, a Probation may be granted as to the Lands and they may proceed there not understanding as to the Goods. Styr. 10. Patch. 23 Car. Bethworth v. Bethworth.

14. The Estate of the Testator into whose Hands he leaves it being beside the Executors shall lie to Legacies, and such Perfon may be sued in Chancery as well as the Executor. Chan Cafes 57. Trin. 15 C. 2. Nichollon v. Sherman.

15. So may the Executor of an Executor, if it be charged that the first Executor's Estate had come to such an Executor's Hands. Chan. Cafes 57. S. C.

16. A Will by which a Legacy is given being under Probate Ecclesiastical is pretended by the Executor to have been revoked. Per Jeffries C. the Will is under Probate Ecclesiastical, and I will not try it here, but go to the Ecclesiastical Court and prove it there. 2 Chan. Cafes 178. Mich. 2 Jac. 2. Attorney General v. Ryder.

17. I conceive the Ordinary may enforce Payment of Debts or Contracts, as well as Legacies, or Marriage Money and no Prohibition lies.
Devise.


18. Bills to examine Witnesses in Order to prove a Codicil which he pretended was made by Defendant's Testator, whereby he bequeathed to the Plaintiff all his Goods then in the Plaintiff's Possession. But it appearing that this Matter was depending on an Appeal in the Archdeaconry, the Defendant demurred, for that it is a mere Ecclesiastical Cause and properly cognizable by the Spiritual Court, where the same is now litigated and where Plaintiff has a proper Remedy for the Recovery and Relief, and Demurrer allowed. Fin. R. 218. Trin. 27 Car. 2. Cavton v. Helwys.

19. Bill in Chancery was brought by a Residuary Legatee to have a Legacy of 25l. and an Account of Rents and Profits of a certain Farm assigned to Testator's Father to Testator for 900l. And this Bill was brought against an Executor of an Executor, and an Account was decreed accordingly. Fin. R. 39. Mich. 25 Car. 2. Shrimpton (by Bill of Revivor) v. Helman.

20. None can sue in the Ecclesiastical Court for a Legacy arising out of Land, because not within their Concourse. 2 Show. 50. pl. 36. Patch 31 Car. 2. B. R. Baffard v. Stockwell.

In Case of a Legacy's being granted out of a Legatee's Suit in Spiritual Court shall not be prohibited Brownl. 34. S. P. — Cro J. 279. pl. 9. Patch 9. le B. R. 

21. After Sentence against an Executor for a Legacy in the Spiritual Court, the Executor brought a Bill here against the Legatee for an Account of what Personal Estate of the Testator's had come to the Legatee's Hands in Order to enable him to pay Debts; Decreed an Account and the Plaintiff to be examined on Interrogatories as to the Value of the Estate, and what comes to his Hands, in which Defendant was not to be concluded but admitted to make what Proof he could to prove Allots in Plaintiff's Hands, and if he has Allots to pay the Legacy then he is to pay the same with Interest and full Costs both here and in the Spiritual Court. Fin. R. 434. Mich 31 Car. 2. Bland v. Elliot & al.

22. If the Spiritual Court would compel an Executor to pay a Legacy without Security to refund there shall go a Prohibition; Per Ld. Chancellor. Vern. 93. Mich. 1682. cites the Case of Knight v. Clarke.

23. Legatee Infant sues in Spiritual Court and pending Suit in the Spiritual Court sues in Chancery, the former Suit depending being pleaded the Plea was disallowed; for there is no such Security for the Infant's Advantage as here and possibly not for Interest, it placed out, and for bringing in Account here &c. 2 Chan. Cases 85. Hill. 33 & 34 Car. 2. Howell v. Waldron.

24. A Personal Legacy to an Infant is more properly cognizable in Chancery then in the Ecclesiastical Court, and if the Matter had proceeded to a Sentence in the Ecclesiastical Court it was proper to come here for the Executor's Indemnity, and that here Legatees were to give Security for the Money, but not there, and this Court would see the Money put out for the Children. Vern. 26. Hill. 33 & 34 Car. 2. Horrel v. Waldron.

25. The Civil Law is the Law by which Legatory Matters are to be determined, and the Spiritual Court has unquestionably the proper Juris-
Jurisdiction thereof, and if by their Law there is a Preference given to Charitable Legacies, Chancery has no Power to alter the Law in that Point; & Per North Keeper, and relapsed to grant any Injunction, or direct Security for refunding in Cafe of Deficiency of Affets. Varn. 230. pl. 226. Hill. 1683. Fielding v. Bond.

26 A Bill may be brought against an Executor for Discovery of the Personal Estate before the Will is proved, or during the Litigation thereof in the Spiritual Court. 2 Vern. 49. pl. 47. Pach. 1638. Dulwich College v. Johnston.

27. If Executor be to pay Legacies in another Diocese where there are no Bona Notabilia, the Way is to transfer the Will thither where the Legatee lives. Arg. 12 Mod. 252. Mich. 10 W. 3. cites Godb. 191. 2 Brownl. 12.

28. Executor being in a Diocese out of his own, but where Goods lay, was denied a Prohibition, because citable in Respect of the Locality. Arg. 12 Mod. 252. cited by Serjeant Genner as an Anonymous Cafe, about 5 W. & M. Ibid.

29. If a Will be proved in the Prerogative Court, let Executor be where he will, they of the Prerogative Court shall compel him to pay Legacies; & Per Holt Ch. J. Ibid. Mich. 10 W. 3.

30. If Money be devised out of Lands, such Devisee may have Debt against the Owner of the Land for the Money upon the Statute of 32 H. 8. of Wills, and the Action must be against the Tenant; & Per Holt Ch. J. 6 Mod. 26. Mich. 2 Ann. B. R. Anon.

31. Any Person intituled to Distribution within the 22 Car. 2. cap. 10. is by Consequence intituled to sue the Administrator in the Spiritual Court to make good his Account by Proofs and Examination upon Oath, as a Legatee was against an Executor before that Statute; & Per Cur. 1 Salk. 251. pl. 3. Hill. 6 Ann. B. R. The Archbishop of Canterbury v. Willis.

32. An Injunction must not be obtained in Chancery to stay a Suit in Spiritual Court for a Legacy upon a Suggestion of Payment, it being a Matter more determinable and triable; but contra on Suggestion of a Collateral Satisfaction, as a Gift of Land &c. Per Matter of the Rolls. Pach. 1718.

33. Where the Ecclesiastical Court and Chancery have a Concurrent Jurisdiction, which ever is first potlivered of the Cause has a Right to proceed, and the fame of all other Courts. But where the Husband sues in the Spiritual Court for a Legacy given to the Wife Chancery has granted an Injunction to stay Proceedings, because that Court cannot oblige him to make an adequate Settlement on her. Chan. Prec. 546. Mich. 1720. Nicholas v. Nicholas.

(X. d) Remedy for Devisee. Where and How.

In Respect of Lands charged &c.

Because it is 1. If one devises Rent out of his Land and charges the Land with a Distress, the Devisee may make Use of the Remedy, but unless Power be given him by the Will to distrain, he may not distrain for it. Dyer 348. a. b. pl. 13. Hill. 18. Eliz. Anon.

2. Devisee may maintain an Action at Common Law against a Tenant for a Legacy devised out of Land; for where a Statute, as the Statute

(Y. d) What shall be chargeable with Legacies.


3. If a Man gives a Legacy and chargeth it upon Black-Acre, although this be not sufficient to answer the full Value of the Legacy, yet it shall not be charged on the Personal Estate. 2 Freem. Rep. 22 pl. 21. Trin. 1677. Anon.

4. And it was said per Ld. Chanc. that if a Man deviseth 100l. out of a Lease for Years, and the Lease is determined, yet the Legatee shall never resort to the Personal Estate for this Legacy. 2 Freem. Rep. 22 pl. 21. Trin. 1677. Anon.

5. Mortgagor entered into a Statute to pay the Money and made his Will and devised 500l. to his Daughter and died. The Personal Estate was taken in Execution on the Statute so that there was not Sufficient to pay the 500l Legacy; decreed that now the Real Estate which was in Mortgage shall make good what was taken out of the Personal Estate and so the Legatee was relieved. 2 Chan. Cases 4. Mich. 32 Car. 2. Anon.

6. The Father having a Son and a Daughter, made a Will and devised 500l. to his Daughter and died. The Personal Estate was taken in Execution on the Statute so that there was not Sufficient to pay the 500l Legacy; decreed that now the Real Estate which was in Mortgage shall make good what was taken out of the Personal Estate and so the Legatee was relieved. 2 Chan. Cases 4. Mich. 32 Car. 2. Anon.

7. The Father by Will gave Land to his Younger Son and made him Executor, and gave an Annuity of 5l. per Annum to his Eldest Son, but does not expressly charge the Land. But decreed per Lds Commissioners that the Devise of the Land being also Executor the Land shall be liable and the rather because it is a Provision for a disinherited Heir. 2 Vern. 143. Trin. 1692. * Elliot v. Hanceck cites * Cloudsley v. Pelham.
Devise.

8 A. by Will devised his Lands to his Brother who is his Heir at Law in Fee, and gives several Legacies, and makes his Brother Executor, deferring him to see his Will performed. The Real Estate is charged with the Payment of the Legacies. Decreed per Commissioners and affirmed on Bill of Review. Confirmed in Domno Proc. 2 Vern. 228. pl. 263. Patch. 1691. Acock v. Sparhawk.

9. A Freeman of London devised 70 l. for Mourning. Per Cur. Mourning devised by the Will must come out of the Legatory Part, and not to leffen the Orphanage or Customary Part, but it was inferred that it there had been no Directions by the Will, or Will had only directed that the Expenses should not exceed such a Sum, there the Deduction must have been out of the whole Estate. 2 Vern. 240. pl. 224. Mich. 1691. Deacons v. Buckley.

10. A made his Brother B. Executor, and devised to him his Real Estate, and will'd that out of his Personal Estate and a Year's Rent of his Real he should pay his Legacies, and devises 40 l. per Annum to C. to maintain him at Cambridge to be paid by his Executor; it was proved by D. that the Executor promised A to pay the Annuity, otherwise A. would have charged his Real Estate with the Payment of it; it was admitted that the Will had made only the Year's Profits of the Real Estate liable, but on the Evidence of D. it was decreed, that the Real Estate stands charged with the Annuity; Affirmed on Appeal to the Lord Keeper. 2 Vern. 506. Trin. 1705. Oldham v. Litchford.

11. A devised Lands to B. in Tail, and 500 l. payable to C. on a Contingency, which happened within two Years, but might never have happened. In the mean Time the Affairs were all gone in discharging Bond Debts. C. shall not charge the Executor who did nothing but what he ought to do, nor shall he stand in the Place of the Bond Creditors to as to charge the Devisee of the Lands; Per Lord Macclesfield. Ch. Prec. 540. pl. 334. Mich. 1720. Chilton v. Birt.

(Z. d) How affected, or Chargeable with Debts or Legacies.

1. DEVISE to his Wife of the third Part of all his Goods. This does not take Place till after Debts and Legacies paid. D. 59. b. pl. 25. Patch. 36 & 37 H. 8 Quere.

Goldb. 159. pl. 34. S. P. and forms to be S. C. D. with the Moity of the Personal Estate to the Wife, and then of divers Legacies, and after of the Refidue to another, the Wife shall have a full Moity, if the other be sufficient to pay the Debts and the Debts shall go out of the other Moity. Chan. Cases 16. Mich. 14 Cur. 2. Lee v. Hale, and c. of D. 164.

2. Devise to his Wife of the Moity of all his Goods to be equally divided between her and his Executors. A. has Goods to the Value of 100 l. and owes by Bond 20 l. the Wife shall have 50 l. if the Executors have Affairs. D. 104. a. pl. 57. Trin. 4. & 5 P. & M. Anon.

3. A Man that had several Creditors makes his Will, and recites that for the Payment of his Legacies and Debts he devises such Lands to his Executors, then he gives 800 l. to his Wife, and 800 l. to his Daughter, &c. and says, That his Will is, that these several Sums of Money should be paid of Money raised upon the Sale of his Land; and the Value of the Land falling short of the Debts and Legacies, the Question was, whether the Debts and Legacies should equally be paid, or whether the Debts should be first paid? And it was held by Finch Ld. Keeper, that

4. And he took a Difference, where Lands were conveyed by Deed in Trust for the Payment of Debts and Legacies, there they should go Pari Passu, and should have proportionable Satisfaction and the Debts should have no Preference; but where Lands were devised to an Executor for the Payment of Debts and Legacies, this shall be intended that he shall have them as Afters; because the Teftator shall not be supposed, without express Words, to be fo unconcionable, as to give his Estate in Legacies and leave his Debts unpaid. Freem. Rep. 305. in pl. 374. Pafrh. 1675. in Cale of Hickfon v. Witham.

5. But if he devises Lands for the Payment of Legacies only, this shall not be liable to Debts, because it was in the Power of the Teftator to dispose of it under what Conditions and to what Purposes he pleased; and if he would make fo unconcionable a Will he said he would not make a better Will for him. Freem. 305. in pl. 374. Pafrh. 1675. in Cale of Hickfon v. Witham.

6. And he agreed farther, that if fo be he had deftiuf that his Legacies should be first satisfied, and that then the Remainder of the Profts should go to Satisfaction of his Debts, that then the Legates should be tired before the Creditors; but the naming of Legates first (as to pay Legates and Debts) gives no Preference; but here his Intention being apparently to provide for his Debts and Legacies, though the Legacies are specified, and his Defire that they should be satisfied, yet it shall be intended in Course of Law, and that way that was most concionable for the Teftator. But here he said, that where being a Provision for the Payment of his Debts, there should be no Difference between Bonds and Debts upon Contrata, but they should be equally satisfied, for being just Debts, there should not be that Difference between them upon a Nicety of Law, that some should have all, and others none. Freem. Rep. 305. 306. in pl. 374. Pafrh. 1675. in Cale of Hickfon v. Witham.

7. A feifed of Lands in Fee subject to a Mortgage devised them to B for Life, Remainder to C. in Fee and makes B. Executor. A leaves Afters sufficient to pay the Debts; yet C. being only Devisee and Not Huir, B. shall not be decribed to discharge the Mortgage in Favour of C. but decreed B. to pay one third, and C. two thirds to redeem, Per Finch Keeper. Chan. Cales 271. Hill. 27 & 28 Car. 2. Cornhill v. Mew.

8. A feifed of Prechold and Copyhold Lands, whereof the Copyhold was in Mortgage devised to B. all her Lands, together with all her Personal Estate for Seven Years on Condition with that Time to pay her Debts, and then devised the Fee to C. and if C. died without Issue, then the Fee to go over to B. Decreed that B. come to an Account and discharge the Mortgage and then the Mortgagee assign the fame to C. Fin. R. 275. Hill. 29 Car. 2. Pigg v. Coldwell & Edwards.

9. Devise of Lands to be held by Executors till B. his Son attain 22 Years. B. dies before he is 22. Decreed the Executors to hold the Land till B. would, if living, have been 22, and the Plaintiffs Debt on Bond to be paid by the next Heir, or the Reversion to lie liable and charged therewith. 2 Chan. Rep. 136. 30 Car. 2. Warwick v. Cotter.

10. There were Legates of Money in Nume, and Legates in Specie. The Estate fell short; Lord Chancellor was strongly of Opinion they ought to contribute; for he said the Intention of the Teftator was as much that one should have all the Money as the other, the whole Specifick Legacy. But it being objected that the Practice of the Civil Law, and this Court had been otherwise; He directed to search
Devise.


11. A wills all his Debits to be paid before any of his Legacies or Gifts after mentioned, and then devised several Pecuniary Legacies, and after in the same will devised Lands to B. on Condition to pay 5 l. per Ann. Rent to C. Per Jefferies C. the Lands are not subjected to the Payment of the Testators Debits. The general Clause in the Beginning of the Will shall be intended only of the Pecuniary and the Pecuniary Legacies thereout devis'd. Vern. 457. pl. 432. Patch. 1697.

12. A devised Land to B. for Payment of Debts, and devis'd to C. Lands which A. had mortgag'd, and gives C. his Personal Estate. Per Cur. C. must take the Lands mortgag'd cum Onere, and the personal Estate also, though devis'd to C. yet must be subject to the Debts, notwithstanding Lands were devis'd for Payment of the Debts.


Fin. Rea. 414. Hill.
41 Car. 2.
42 Lands devised to Trustees for Payment of Debts, and the personal Estate herebefore to the Wife. The personal Estate was not to be subject to Payment of Debts. 1 Chitty v. Jalfert & al. ——- Abr. Eq. Cases 271. Hill. 1742. Adams v. Byck. Where the Devise to the Trustees was in Trust, that they do and shall pay &c. his Debts, which is stronger than a bare Charge on his Real Estate, and might be intended only Auxiliary to his personal Estate, which without Hints of Exemption might be liable in the first Place. — A. bestow'd 20 l. to B. whom he makes Executor, and devis'd his Real Estate to C. on Condition to pay his Debts with-in two Month &c. Decedent per Lands Commissioners, that the Personal Estate shall be first applied to discharge the Debts. &c. Ch. Prec. 2. Hill. 1659. Cowler v. Brad.

† Devised the Surplus to his Sisters, and his Personal Estate to his Wife, whom he made Executor, the having the Personal Estate exempt from Debts, the Debts being more than the Personal Estate. Ch. Prec. 101. Mich. 1699. Bamfield v. Allinham. ——- S. C. cited by Ed. C. Talbot. Cases in Eq. 310. Trin. 1756. in Case of Sampson v. Culbre.

* Devise of particular Lands shall not have the Benefit of the Personal Estate, but Hins of the whole Estate shall be to Randal Commissioner. Ch. Prec. 3 Hill. 1689 in Case of Cowler v. Brad.


2 Vern. 732. S. C.

13. Land is devis'd to A. and his Wife for Life, and after their Decedence to such of their Children as should live at the Death of the Survivor of them, and their Heirs equally, he, the said A. paying 40 l. to B. &c. at a certain Time. This 40 l. is a Charge upon all the Estates. Ch. Prec. 27. pl. 29. Trin. 1691. Sadd v. Carter.

14. A. devis'd 3000 l. a-piece to his Daughters at their respective Aages of 18, and appointed Lands to be sold by Trustees for that Purpose; then he devis'd several Special Legacies to his Wife and others, which he appointed to be paid out of his Personal Estate, and bequested all the Rest and Remainder of his Goods and Chattels to his Wife, not disposed of by his Will, and which shall not be disposed of by any Codicil thereunto annex'd, to the End his Wife should pay all such Legacies &c. as he had appointed to be paid out of his Personal Estate, and made his Wife Executrix, and died. The Land fell short, but the Personal Estate was more than sufficient to pay all Debts and Legacies. Decreed that the Personal Estate shall be liable as far as the Lands fall Short. N. Ch. R. 223. Patch. 1691. Strode v. Ellis.

15. A Man by his Will devises his Lands to J. S. and desires that the said J. S. should pay his Debts, or if it be the said J. S. paying his Debts, or if immediately after the Devise of his Lands, he does appoint or desire that his Debts should be paid, or if he with any Expression in the Will whereby it appears that he had any Intent to charge his Lands with his Debts, in such Case his Lands will stand charged. But in the Case at Bar, where the Testator had in the Beginning of his Will said, that he desired that all his Jus Debts should be paid; and afterwards in the said
said Will he gave several Legacies, and devised Lands; It was held that this Devise was not charged with the Payment of the Debts; for if that should be so, the Debts of every Testator would be charged upon his Lands, for there are few Wills but have some such Expression, whereby the Testator disfrees his Debts to be paid. 2 Freem. Rep. 192. pl. (269. b.) Mich 1693. Anon.

16. Devise of Lands after Debts paid, (and then says, my Debts are only these contained in the Schedule.) Devisor afterwards contracts new Debts. The Payment of the first Debts is what is required by the Will. 3 Lev. 433. Mich. 7 W. 3. C. B. Lodgington v. Kine.

17. Where Lands were devised for Payment of Debts and Legacies, the Debts being such as had no lien upon the Land, as Debts by Simple Contract &.c. the Debts should have no Preference; but if there be not sufficient to pay all, they shall be paid in Proportion, although it was otherwise held in the Lord Nottingham’s Time, who used always to lay, that a Man ought to be Just before he was Bonnifal; and so the Course of Equity since that Time seems to be settled. 2 Freem. Rep. 270. pl. 339. Trin. 1703. cited by Dobbins as a Case now settled upon Consideration had of all the former Cases by the Ld. Keeper, in a Case of Herbert v. Herbert.

18. A. feified of Lands in Fee bequeaths 1000 l. to J. S. and devises the Lands to B. and C. for their Lives, Remainder to D. in Tail. Remainder over in Tail &c. Provided that my Executrices and Executors and Tenants in Tail shall pay the paid Sum of 1000 l. within 6 Months after my Death, and makes B. C. and D. Executors. The Personal Estate was not sufficient to pay the 1000 l. Ld. Cowper decreed that the Interest from the Time the 1000 l. became due be paid by B. and C. and they to pay the Third of the 1000 l. and D. the two other Thirds, and for that Purpose B. C. and D. were to join in Common Recovery to dock the Estate Tail and Remainders, and so make a Security for raising the 1000 l. Ch. Prec. 288. pl. 228. Hill. 1709. Jones v. Selby.

19. Bill by the Heir at Law against the Executors, to have an Account of the Personal Estate of the Testator, and that it might be applied in Exoneration of the Real Estate devised to Trustees to be sold for Payment of Debts and Legacies.

Wife, by his Will, devises several Lands to Trustees to be sold for Payment of his Debts and Legacies, and devises all the Residue of his Personal Estate to his Wife, and gives her also 600 l. out of the Money to be raised by Sale of the Trust Estate, and makes her Executrix.

Harcourt C. said, here is not only a Devise over of the Residue of his Personal Estate to his Executrix, but he gives her further the Sum of 600 l. out of the Real Estate, so that he did not think the Residue of his Personal Estate sufficient for her, but gave her 600 l. out of his Real Estate, which is the strongest Presumption imaginable of the Intent of the Testator, that his Wife should have Residue of his Personal Estate, and this makes it differ from the Case of Saroway and Christ’s Hospital, for there was no Devise unto his Executors out of his Real Estate.


20. A. devised his Real Estate to his Son for Life, Remainder to his In this Case first &c. Sons in Tail, with Remainder over, and by the same Will an Annuity was devised specifically a Leasehold ESTATE to his Daughter, and made his Son out of the Executor. Allots fell short to pay Debts. Per Ld. Chancellor the De- Leasehold Le- Leas

The Fee-Simple Estate devised to the Son being liable to Debts by Specialty by the Statute against Fraudulent Devices, and the Lea- hold, held, that
Devife.

that the Am-

mony was

as much a

Specifick De-

vise, as if it

had been of

the Term itfelf. 2dly, Tat a Specifick Devife of a Term is as much a Specifick Devife as a Devife of Lands in Fee. 3dly, that since the Statue of Fraudulent Devifes, Lands in Fee are equally sub-

But if the Devife had been of all the Rest of the Testator's Lands, this had been a Refiduary and not a Specifick Devife, and the Perfon taking thereby, fhou'd not have come in till after the Debts by Specialty, or otherwife, had been paid out of his Inheritance. Wms's Rep. 403. Hill. 1717. Long v. Short.

21. A by Will gave feveral Legacies, and then devified her Lands to Sir H. M. her Nephew and Heir at Law, but charged with Payment of her Legacies abovementioned, and made Sir H. M. Executor. Afterwards upon a conliderable Perfonal Eftate coming to A. by the Death of her Mother, the by a Codicil give feveral further Legacies to the fame and other Legatees, but the Codicil faid nothing as to charging the Land, and it was not attelled by any Witness, and fo, as was admitted, could charge no Land, and both Real and Perfonal Eftate were deficient to pay the Legacies charged by the Will and Codicil. Whereupon the Maker of the Rolls decreed, that the Perfonal Eftate being not fufficient to pay the Legacies both by the Will and Codicil, and the Real Eftate being liable to thofe by the Will, but not to the other, the Eftate fhould be fo Marhalled that as far as posfible the whole Will might take effect, and decreed that the Legacies by the Will to be a Charge on the Real Eftate, and if that fhould be deficient, they muff, as to the Surplus, come in Average with the Legatees in the Codicil, to be paid out of the Perfonal Eftate; And that the Land be forthwith fold to prevent a greater Deficiency, but that the Specifick Legates muft all be paid, and not abate in Proportion; but that fome Charities devifed by the Will, though prefer'ed by the Civil Law, yet ought to abate in Proportion; For they were but Legacies. Wms's Rep. 421. Pauch. 1718. Mat-

ters v. Sir Harcourt Mafers.

22. A. was feified in Fee of the Manors of D. and E. and by Will gave D. to B. and E. to C. and charged all his Real Eftate with Payment of his Debts. Afterwards A. mortgaged D. for 4000£. B. fhall compel C. to contribute to the Discharge of the Mortgage of D. But if the Will is avoided fo as the Co-heirs of A. become intitled to both Manors, fo that they come into one Hand, the Right of Contribution is at an End; For a Man cannot contribute to himfelf, and the Right of Contribution, as it was given by the Will, was in Force only while the Party claimed under the Will, and not where the Demand was fet up in Deifeance thereof. Wms's Rep. 505. &c. 521. Mich. 1718. Carter v. Bernardilton.


But the Lands had been left to defend to the Heir at Law if would be otherwife. Per Lord Macclesfield. Ch. Prec. 540. Mich. 1720. in Cafe of Clifton v. Birt.

24. A. bound himfelf and his Heirs, and after devifed his Lands to B. for Life, Remainder to the fift &c. Sons of B. in Tail Male, Remainder over; with a Power to B. to Leafe for one, two, or three Lives, at the old Rents, which were very small and conventionary Rents, the Lands lying in the Weft of England. B. took the Profits, and raffed consider-

able
able Sums by Fines on Leases. On a Bill by the Bond Creditors the Matter of the Rolls decreed the Personal Estate to be first accounted for, and then B. to account for the Rents and Profits of the Lands. Le. C. Macclesfield on Appeal held it sufficient that B. keep down the Interest, and that as A. died seised of some Lands let for Lives at Conventional-Rents and other at Rack-Rents, he directed, first, the Sale of the Lands let at Rack-Rents, and next, so much as is requisite out of the Life-Lands, and to account for the Fines of such of these Lands as shall be sold, to be taken as Part of the Purchase-Money; but if the Lands at Rack-Rent be sufficient, then B. not to account for the Fines.


25. As for concerning my Estate with which God hath blessed me, I give as followeth, Imprimis, I will that all my Debts and Funeral Charges be paid and satisfied, and then makes a particular Disposition of the Estate. This was decreed no Charge, as it would be, when Testament says, I will my Debts be paid in first Place, or where he gives away the Estate after Payment of Debts and Legacies; for here was a Clausé in the Will, that after Payment of Legacies and Funeral Charges, the Overplus was to go to such and such Uses, which declare the Intention to be that the same was to answer only Legacies and Funeral Charges, and not Debts. Per Matter of the Rolls. Trin. 9 Geo Parker v. Wilcox.

26. A. devised one third Part of all his ESTATE whatsoever to B. his Widow, and devised to C. and his Heirs two thirds of all his Real and Personal Estate, upon Condition to pay his Debts. The Judges and Matter of the Rolls (it being a Case in the Council-Chamber) after taking Time to consider of it, and having met together, all agreed that B. the Widow should have her Thirds not liable to the Debts, they being by the express Words of the Will fixed upon the other two thirds; and upon this Point were cited D. 59 b. 164. a. Goldsb. 149.


27. A. devised Lands in G. to J. S. at 21, subject to the Incumbrances thereon (they being then in Mortgage) and ordered the Rents and Profits during the Infancy of J. S. to be paid to her Father for her sole Use, and devised other Lands to Trustees for Payment of his Debts. The Matter of the Rolls held, that the Devise of other Lands for Payment of Debts must intend all his Debts, and consequently the Mortgage of G. is Part of those Debts, and the Profits being devised to the sole Use of J. S. during her Infancy, makes it so much the stronger. 2 Wms's Rep. 386. Mich. 1726. Serle v. St. Eloy.

28. A. seised of Lands in Fee, and possesseid of a Personal Estate, having Children, and being indebted, gave Legacies by his Will, and directs them to be paid out of his Real Estate, and gave his Personal Estate to his Children. The Matter of the Rolls held, that if the Legacies had been only charged upon the Real Estate, yet the Personal Estate should have been applied first to pay them, and so it should have been against a Refiduary Legatee; But in this Case the Real Estate being the Fund appointed, and the whole Personal Estate given away by the Will, therefore the Legacies must be paid out of the Real Estate only; but the Debt shall still be paid out of the Personal Estate, the Will not ordering the Debts to be paid out of the Real. 2 Wms's Rep. 366. Trin. 1726. Heath v. Heath.

29. A Will begins, As to all my worldly ESTATE, my Debts being first paid, I give &c. The Real Estate is liable to the Debts, nothing being devised till the Debts are paid. 3 Wms's Rep. 91. Hill. 1732. Harris v. Ingledew.

30. All my Personal Estate, of what Nature, Kind, or Quality soever, I give to my Sister A. whom I make my Executrix; and all my Real ESTATE, of what Kind, Nature, or Quality soever, I gave unto my Sons B. and C. by Le C. Talbot, who chargeable with my Debts. Arg. Cases in Eqw. in Le. Talbot's Time 204 and, that in

Cites
Devise.

that Cafe thed cites it as held at the Rolls about 1731 or 1732. and after by Lord C.
Real and
Li
cited
Kitch in the Cafe of Brownall v. Wilbraham, that the Personal
Estate should be first liable.

31. A Devise was as follows, viz. For the just and true Performance
of this my last Will, and for the Payment of all my Debts, I give and de-
vote all my Real Estate, and all my Personal Estate, which at the
Time of my Death I shall be possessed of and intituled unto, I give the same
unto my Executor and Executrix herein named, to defray my Funerat
Charges and Expenses, and if my Personal Estate shall fall short to dis-
charge the same, then the Remainder to be paid to my Executors out of the
first Rentals and Profits of my Real Estate as they shall become due after my
Decease, until Payment be made of all my Legacies, Debts, and Funerat
Expenses as aforesaid; and if there be any Surplus of my Personal Estate,
that then my Executors pay the same to my dear and loving Wife. Arg.
Cales in Eou. in Lord Talbot's Time 207. cites it as the Cafe of the
Attorney General v. Bartheam about the Year 1734, and that it was
held, that the Personal Estate should go to the Wife, discharged from the
Payment of Debts.

32. One devises all his Real Estate in Trust to pay all his Debts; the
Bond Creditors recover Part of their Debts out of the Personal Estate; the
Simple Contract Debts shall be equally paid out of the Real Estate with
the Bond Debts, and the Bond Creditors shall have nothing thereout un-
til the Simple Contract Creditors shall have received as much from the
same as shall make them equal in Payment with the Bond Creditors;
Per Ld. Chancellor. 3 Wms's Rep. 323. Trin. 1734. in Cafe of
Hicifwood v. Pope.

33. The Words of a Will was; I devise all my Manors to A and B.
and their Heirs in Trust, that they and their Heirs out of the Rents and
Profits, or by Leafe, or Mortgage, or Sale thereof, or of any Part thereof,
shall raise so much Money as I shall owe at my Death; and after Payment of
my Debts and reimbursing themselves, upon further Trust that they and
their Heirs shall stand feid of such Part of the Product, as shall remain
unpaid, to and for such Persons and Uses as the Manor of C. is already
settled; and if any Money remains after Payment of my Debts, it shall
be paid to my Daughter, and such as are intituled to the said Manor by the
Limitation aforesaid. Teftator, before the making of his Will had
given the Manor of C. to his Daughter in Tail, with Remainder to his
Nephew; and then gave all his Personal Estate of what Nature or Quality
soever to his Daughter, whom he made Executrix. Arg. Cales in Eou. in
Lord Talbot's Time 204. in Cafe of Stapleton v. Colive, says it was
held by Lord C. Talbot, August 13. 1734. in Cafe of
Dartwood v. Child, that notwithstanding this expres Devise to the Trustees, the
Personal Peronal Estate should be first applied in Discharge of the Real
Estate liable to the Payment of his Debts, the huyself being Desioe of the Whole; and that it would be absurd
to imagine the Teftator to have intended his Personal Estate to be exempted from Payment of his
Debts, when he had expressly provided that the Surplus of the Produce of what should be raised out of
the Real Estate should go to the very same Person who was Devisee in Tail of the Real Estate.
Devise.

34. A. devised his Lands to M. his Wife for Life, [charged and] chargeable with two Annuities for the Lives of W. R. and T. S. and with a Legacy of 1000 l. and gave M. a Power by Mortgage or Sale of any Part of the Inheritance to raise Money sufficient to discharge the Debts he should owe at his Death; and then resting the great Satisfaction he had of his Estate having continued so long in his Family, and the great Desire he had to perpetuate, as far as he could, his Name and Estate, he devised all his Real Estate after M's Death to B. his Nephew for Life, Remainder to his heirs Etc. Sons in Tail Etc. upon Condition of taking and using his Name and Arms for ever. And in the Close of his Will he gives all his Goods, Chattels, and Personal Estate to M. and makes her sole Executrix. Ld. C. Talbot observed, that after the Gift of the Annuity and Legacies wherewith he charged his Real Estate, he gives his Real Estate to his Wife for Life; and said, that tho' it does not necessarily follow that the coupling both together shews he intended both to be payable out of one and the same Fund, the Personal Estate being the proper Fund for Debts, though no Provision had been made by the Testator; but that the Annuities having none but what is particularly provided for them, yet that must have some Weight; that he did not think that the using the Words (charged or chargeable will make any Difference since they are us'd indifferently) and that then coming the Power given to the Wife, it seemed to him clearly to manifest his Intent of her taking what he gave her by his Will to her own Life; For his Intent being to perpetuate his Estate, he thought it not to be suppose'd, that after having given her the whole Power over his Personal Estate by making her Executrix, he would likewise empower her to dispose of to much of the Inheritance, and consequently of defeating the Devise (not so much as the Personal Estate should prove deficient, but) of what should be necessary for the Payment of his Debts; That his Intent seems clear to give her this Power of disposing of so much of the Inheritance as would satisfy his Debts, in order to secure her the full Enjoyment of her Estate for Life, and of the Personal Estate free from all Charges whatsoever; and so affirmed a Decree before made at the Rolls in Behalf of the Wife Cates in Equ. in Ld. Talbot's Time 202. Trin. 1736. Stapleton v. Colville.

(A. e) Specifick Legacy. What is. And liable to Contribution or Abatement, in what Cases.

1. Legacy devised to be paid out of a Debt of a greater Value, is in Nature of a Specifick Legacy, and not subject to Abatement to answer other Legacies, and in Default of Payment decreed the Executor to permit the Plaintiff to sue the Debt in the Executor's Name, and the Executor to be protected by this Court. Fin. 503. Trin. 29 Car. 2. Smallbone v. Brace and Crompton.

2. A. seised of Lands and Houses in Fee, by Will in Writing devised to B. Lands of 100 l. per Annum to be set out by his Executor, and 500 l. to C. and 300 l. to D. Per Finch C. this is not a Specifick Legacy but Quantitatis, and therefore if not sufficient each shall bear his Share of the Lofs. 2 Ch. Cafes 25. Pasch. 32 Car. 2. v. Wilkington.

3. S. was indebted to his Mother for Arrearages of an Annuity of 500 l. per Annum 300 l. and makes her his Executrix, and by Will deviles
as much *Land* to her as is worth 20000l. and devises his *Jewels* to his *Wife*; The Question before North Ld. 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 2000l. worth of *Land*, the *Personal Estate* not being sufficient to pay the Debt? And my Ld. Keeper 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 left; but if there were not enough besides the Legacy to pay the Debt, then that the might retain. *Skin.* 158. *Hill.* 35 & 36 Car. 2. Speak v. Pedley.

4. A *Man* having pawned a *Jewel* for a *Sum* of *Money*, devised the *Jewel* to *B.* and made *C.* his *Executor*, and gave him all his *Goods*, *Chattels*, and *Personal Estate* after his Debits and Legacies paid; and the Question was, Whether *B.* should pay the *Debt* for which the *Jewel* was pawned, or whether it should be paid out of the *Personal Estate* by the *Executor*? And decreed, that it should be paid out of the *Personal Estate*, and that the *Legatee* should have the *Jewel* discharged of it. This Decree was afterwards affirmed in the *House* of Lords, ut dieta, suit per Mr. Crawford, who was of Counsel in it, a Scotch Caufe. 2 *Frem.* Rep. 272. pl. 341. *Hill.* 1793. *Anon.*

5. An *Estate* being considerably mortgaged, was devised to *A.* and several *Specific Legacies* were left to others. *The Overplus* is not sufficient to discharge the *Debt*. Quere, Whether the Specific Legacies shall contribute towards discharging the Mortgage before the Mortgaged Premises shall be affected? For the Covenant to pay the Money makes it a *Personal Estate*, and the *Real Estate* shall never be put in Average with the *Personal*. *MS.* Tab. tit. *Heir* cites 1706. *Warner* v. *Hayes.*

6. A *seized* in *Fee*, and indebted by *Bonds*, by *Will* gives Legacies to *Children* (whom he otherwise provided for before) and devised his *Land* to the *Eldest* *Son* in *Tail*. The *Eldest* *Son* being *Executor*, pays the Bond with the *Personal Estate*; if the *Land* had defended the *Legates* might have been relieved out of the *Real Estate*; but since *A.* had devised the *Lands*, it was resolved they ought to be exempted; for it was as much *A*’s Intention that the Devisee should have this *Land*, as the others should have the *Legacies*; and a Specific Legacy is never broke in upon in order to make good a *Pecuniary One*; And this Case is out of the *Statute* against Fraudulent Devises, because the *Debts are paid*, and the *Children* being otherwise provided for, are *not in the Nature of Creditors*. This was on an Appeal from the *Rolls*, where the *Matter* held, that the *Real* and *Personal Estate* should be so charged that both the *Debts* and *Legacies* should be paid. 2 *Salk.* 416. pl. 3. per Lord *Harcourt* in *Canc.* *Hern* v. *Merick*.

7. A *bequeathed* several *Pecuniary Legacies*, and (int’ all) gave 1500l. to *B.* her *Eldest* *Son* in *Trust* to lay it out in a *Purchase* of *Lands* in *Fee*, and to *grant* a *Rent-Charge* of 50l. a *Year* thereout to *M.* her *Daughter*. But if *B.* should *refuse*, or neglect to lay out 1500l. in a *Purchase*, then be to have but 500l. of the 1500l. and the remaining 1000l. to be laid out in the *Purchase* of an *Annuity* as far as it would go, for the separate Use of *M*. There being a *Deficiency of Affeets*, the Question was, If the 1500l. *Legacy*, or at least the 50l. *Annuity*, should abate in Proportion? *Ld. Ch.* *Parker* agreed, that this 1500l. should be taken as *Land*, but said, that the *Legatee* cannot say he has a *Right* to the 1500l. in *Specie*, and that a *Specific Legacy* is *where* by the *Affect* of the *Executor* the *Property of the Legacy* would vest. And if upon a *Supposition* that 1500l. of *Testator’s Money* was lying on the *Table*, the *Legatee* cannot say that he had a *Right* to this very *Money* in *Specie*, it is then no *Specific Legacy*; And that by the *Will’s laying*, that if *the*
Devise.

the Son refuse or neglect to make this Purchase, then he is to have but
500l. and M. the remaining 1000l. he look’d upon M. as a Legatee for
1000l. which is to divide in Proportion, and as far as it will go to be
laid out in an Annuity for M. the Plaintiff for her Life, and for her
8. A settled of an Estate in Fee, and also of a Term for Years, mort-
gaged his Fee-Simple Lands for 500l. and after devised his Lands in Fee
to B. and his Lifehold Estate to C. leaving Debts which would exhaust
all his Personal Estate except the Lifehold given to C. The Question
was, Whether there being a Covenant for Payment of the Mortgage Money
as usual the Lifehold Premises devised to C. should be liable to dis-
charge the Mortgage? It was decreed by the Master of the Rolls, that
both these Estates being specifically devised, B. must take the Fee-
Simple Estate Contu in A, as probably was intended, and not disappoint
the Legacy to C by laying on it the Debt of 500l. and laid that by
this Construction each Devise would take Effect, and that this Resolu-
tion did not in the least interfere with that of Clifton v. Birt, because
in the later there was no Mortgage. Hill. 1720. Wms’s Rep. 693.
O’Neal v. Meade.
9. A bequeathed several Pecuniary Legacies, and then devises Lands
to Trustees and their Heirs in Trust, that they do end and sell by Mortgage or
Sale pay and satisfy his Debts, and the said Legacies and Funeral Ex-
penses. Then he bequeaths Goods &c. in such an House to another
and then says, All the Rest and Remainder of my Personal Estate I give and
devote to my Wife, whom I make sole Executor. Per Cur. this is in
Nature of a Specifick Legacy to the Wife, exempt from Debts and Leg-
acies and Funerals; and it is to be understood the Residue of what he
had not before particularly devised, and not the Residue after Debts
Adams v. Meyrick.

(B. c) Specifick Legacies.

Defect therein made good or Not.

1. If A. bequeath to J. S. that which is another Man’s, and whereto
the Testator had no Right, then A’s Executor ought to buy it and
give it to J. S. or else satisfy the Legatee to the full Value, and this
not only by the Civil, but also by the Canon Law, and in foro Con-
2. If A. bequeath to B. his Black Horse, and after sells him and dies,
the Executor is bound to answer the Value thereof to B. Wentw. Off.
of Executors 252. cites Sum. Silv. 286.
3. And if after such Sale A. buys another Black Horse; This later
Horse shall pass to B. (faith the same Book) except it can be proved that
A. sold the former on purposé to revoke his Will touching that Bequest.
4. If A. having a Moiety of Black-Acre, or of a Stack of Corn &c. gives
the Whole, fо as the Words plainly reach to more than his Moiety, the
Executor must buy out the other’s Part, or give him the Value.
5. But if the Words are only general, so as they may be reasonably sa-
tisfy’d with the Testator’s Part, no Supply shall be made. Ibid.
6. 38
6. So if Parsnne of Goods bequeath them, it shall be construed to extend them no further than his own Right. Ibid.

7. A Freeman of London devised a Lease for Years to A. and Books to B. A. Money is evicted by the Widow by the Custum of London. They shall not have Satisfaction for what is so evicted. For they can have no more than what the Testator devised, and the Widow by the Custum (there being no Child) was intitled to a Moiety; so that the Testator could devise but one Moiety, and nothing more passed by his Will, and they must be contented with a Moiety. 2 Vern. 110. pl. 107. Mich. 1689. Webb v. Webb.

8. Devise to his Wife of all his Personal Estate at D. This is a Specifick Legacy. 2 Vern. 638. Mich. 1714. Sayer v. Sayer.

9. The Case may so happen that a Specifick Legacy shall be chargeable with the Payment of a Pecuniary Legacy, as if a Man devises his Personal Estate at D. to B. and his Personal Estate at E. to C. and then gives 300l. out of his Personal Estate, and dies, leaving no other Personal Estate than at D. and E. the 300l. must come out of the Estate at large at both Places. Per Lt. Chancellor. Ch. Prec. 393. Mich. 1714. in the Case of Sayer v. Sayer.

10. But Pecuniary Legatees shall have no Aid of the Specifick Legatees, especially if the Pecuniary Legacies are devised generally and at large, withoutpaying out of his Personal Estate, or out of all his Personal Estate whatsoever, or Words to that Effect. Chan. Prec. 393. Mich. 1714. Sayer v. Sayer.

11. A. devised 6000l. S. S. Annuities to B. C. and D. to be laid out in Land and settled on B. for Life & C. And by Codicil three Days after, taking Notice of this Devise gives 1200l. to be laid out in Land to the late Uses and makes B. Executor. A. left a very considerable Personal Estate but had only 5369l. in Annuities at the Time of the Will made. The Question was if it should be made as to 6000l. It was decreed at the Rolls that nothing passed more than A. had in S. S. Annuities. And Lt. Chancellor affirmed the Decree. Cases in Equ. in Lt. Talbot's Time 152. Mich. 1735. Atkton v. Atkton.

12. Specifick Legacies, as in some Respect they have the Advantage, so in others they have the Disadvantage, of pecuniary ones, as suppose they shall have been left or deten in the Testament, how the Testamentary ones in his Lifetime, they must then fail in touto. 3 Wms's Rep. 395. pl. 106. Mich. 1735. Atkton v. Atkton.

(C. e) Residuatory Legatees who, and what shall go to them or where the Part of one shall survive to the others.

Cited Arg. S Mod. 223
—This Cafe in Leonard's Reports ought to be well considered; Per Cur. 8 Mod. 124.

2. A Seised of divers Lands devised Part called Gages to the erection of a School; another Part to B. in Fee, and all his other Lands to C. in Fee. The Devise of Gages was void, because too general no Person being named, and it was likewise held, that it passed by the General Devise to C. and yet that was not the Meaning of the Devise, but because such Devise stands not with the Law, it shall be rejected. Arg. Lc. 251. pl. 339. Trin. 32 Eliz. B. R. cited as the Cafe of Benner v. French.

Devise.

3. A has B. C & D. his Sons and M. his Daughter. A makes B. his Son and a Stranger his Executors; but on publishing the Will declares the Stranger to be only Executor in Trust for the Children and to take no Benefit by it, but the Estate to go to the Children and died; C. and D. died. B. died, and left the Stranger his Executor; M. fues the Stranger for 500 l. Legacy left to D. by A. the having taken Administration to D. and also claims the Reisduary Estate of A. But decreed that B. was well intituled to the Reisdium, and that the Trust in the Stranger should be construed as is most confident with the Will in Writing and dismissed M's Bill. 2 Ch. R. 99. 26 Car. 2. Bowyer v. Bird.

4. Lefflee for Years subject to a Trust devisd Reisdium Bonorum; the Estate would but pay the Debts if all sold. He pays the Debts and renewes the Leafe for a further Term, it being a Church Leafe and offered to account if any Profits would arise out of the Old Term. But by Ld. Keeper he shall account for the New Lease as well as the Old. 2 Ch. Cales 207. Mich. 27 Car. 2. Anon.

5. Devise of Lands to his Executors to be sold and thereout to retain their Costs and Charges and to pay 500 l. to A. if he returns from beyond Sea and the Reisdume to B. A. died before Tillator; Per Wright Keeper, it is a Contingent Devise, and on a Condition Precedent which not happening, is, as it never given; But if it had been an absolute Devise it would not paffed to the Reisdium Legatee by the Devise of the Reild and and Reisdume, and dismissed the Bill. 2 Vern. 394. Mich. 1700. Sprigg v. Sprigg.

6. It was admitted that on the Devise of the Reisdume of a Perusal Estate, if a Legatee was dead at the Time of making the Will, the Reisdium Legatees shall not have the Benefit of such Legacy, and that it shall not fall into the Reisdume, nothing being intended to pass by the Devise but the Reisdume after that and other Legacies paid. 2 Vern. 395. Mich. 1700. in Cafe of Sprigg v. Sprigg.

7. A had two Children B. and C. and then his Wife and be parted and she had two Children more, viz. D. and E. A. bequathed to B. and C. considerable Legacies, and to D. & E. his Wife's Children (as he called them, not owning them to be his) to s. a-piece and no more. Then A. devised Legacies to his Executors, but did not say that they were for Care and Pains. D. and E. shall come in for a Share of the undisposed Surplus. For the Words of Exclusion must be taken strictly. Ch. Prec. 169. Trin. 1701. Vachel v. Jeffries.

8. A gives 500 l. to his Executors on Trust to pay Annuities to B. and C for their Lives, which Annuities far exceeded the Interest of the 500 l. and gives the Surplus of his Estate to D. and E. the Annuants being dead, the unexhausted Remainder of the 500 l. shall go to Reisdium Legatees and not to the Executors. Vern. 426. pl. 400. Hill 1686. Cock v. Berrih.

9. Devise of 100 l. to A. whom he makes Executor, yet notwithstanding the Executor shall have the Reisdume if not being devised over. 2 Chan. Cales 187. Mich. 2 Jac. 2. Canning v. Hicks.

Legacy was devised to the Heir likewise.

11. Though Chancery will wash away Affairs for the sake of paying Debts, yet it will never do it in Favour of a Residuary Legatee and in Prejudice of the Heir at Law. Arg. 10. Mod. 477. Pash. 9 Geo. 1.

12. J. S. seised of several Lands in Fee devised all his said Lands to A. B. C. D. E. and to their Heirs in Common; D. died before J. S. who by another Clauses in the Will devised all other his Real and Personal Estate not already disposed to L. & M. and their Heirs, Executor &c. J. S. died without making any other Disposition of the Part of D. other than by his said Will as aforesaid, whether the same shall descend to the Heir at Law of J. S. as not disposed of by him by D's dying before him; or whether it shall pass to L. and M. who were made Residuary Legates by a latter Clause in the Will, viz. all the real, as an Estate nor before disposed by Testator, no Judgment was given. 8 Mod. 123 Pash. 9 Geo. 1724. Goodwright v. Opie.

13. The Testator devised all that his Messuages and Tenements in E. to F. C. and his Heirs, and all the Rest and Residue of his Messuages, Lands, Tenements, and Hereditaments in E. and elsewhere to J. L. his Heirs and Assigns for ever; after the making this Will, the aforesaid F. C. the Devisee, died in the Life-time of the Testator, so that this became a lapsed Devise by his Death; and then the sole Question in Ejection was, Whether this latter Clause of the Will would carry over the lapsed Devise to J. L. the Residuary Devisee, or whether it should descend to the Heir at Law of the Testator? The Court held, that the Devise of all the Rest and Residue of my Messuages, Lands &c. did not convey what was expressly devised before; for Wills must be construed from the Intent of the Testator at the Time of making the Will, which appears to be to give his whole Estate to F. C. and his Heirs, in that Messuage; and at the Time of the Will made, he had no Rest and Residue left in that House, and the Devise to C. being void, the House will go to the Heir at Law, and not to J. L. Fortescue's Rep. 182, 183. Pash. 11 Geo. C. B. Wright v. Hall.

14. Where a Man charged his Lands with the Payment of his Debts, and gave four Specifick Legacies, together with the Rest of his Personal Estate to his Brother; in which Case toasmuch as the Specifick Legacies would be exempt from the Debts, as betwixt the Devisee of the Land and the Specifick Legatee; so the Court declared, they could not fever the Specifick Legacies from the rest of the Personal Estate, and since the Testator equally intended that the Residuary Legatee should have the rest of his Personal Estate, as the Specifick Legacies, therefore all the Personal Estate was held to be exempt from the Debts. 3 Wms's Rep. 325. Trin. 1734. Hallevood v. Pope.

(D. e) Un-
(D. e) Uncertain.

In what Cases Legatee may make Election; and How.

1. If a Man bequeaths one of his Horses or Cows, not naming which, to J. S. he is to choose which he will, so it be not the best of all, faith the Civil Law. And perhaps the Mention of that Exception grows out of Respect to the Heriot which the Lord should have, or the Mortuary which the Parson should have. Wentw. Off. of Executors 251.

(E. e) Indirect.

And who shall take.

1. Will that A. shall have the Use of my Lease, if be shall so long live, during his Life, be paying certain Legacies &c. and after his Devise I devise the Profits thereof to B. the Remainder of the Term, together with the Lease in Manner and Form as B. should have it. Per Cur. this shall go to B. the said Devisee, and in Manner and Form shall go to the Payment of the Legacies, which is but Limitation; and per omnes it is a very strong Case, and together with the Lease, are very strong Words. Litt. R. 348. Mich. 6 Car. C. B. Pawling v. Pawling.

(F. c) In what Cases a Devise of Chattles with Remainder is Good or not.

1. In Trespasses. F. was possessed of a Garden, and made A. and B. his Executors, and devised the Garden to B. the one of the Executors to have and use for Term of his Life, the Remainder to the said A. the other Executor to have and use for Term of his Life, the Remainder to the next H. S, if the of Kin of B. forever, and died. The Devise with the Remainder supra is Devise for good, per Divers; for the Executors have no Property but an Occupation; and see in the End they pleaded the Devise to B. to have the Occupation for Term of his Life, and after his Decease to A. in the same Manner, and after his Decease to be disposed of by his Executors to the Use of the next of Kin of B. for ever; so note that the Property was not devised, but the Occupation, and it was agreed in the Time of H. 8. Be before Gift and E. 6. to be good Law that the Occupation may so remain; But if or S. le, he the Thing itself was devised to the Use, the Remainder is void; For a Gift or Devise of a Chattle for one Hour is for ever, and the Donee or Devisee may give, sell and dispose of it, and the Remainder depending upon it is void; Quod Nota for a very good Diversity. Br. Devise, pl. * 37 H. 6. 30. cites * 37 H. 6. 30.
2. And 2 E. 6. where a Man devise that W. N. shall have the Occupation of his Plate or Term during his Life, and if he dies within the Term, that it shall remain to J. S. This is good; for the first has only the Occupation, and the other after him shall have Property. Ibid.

3. F. devised his Land to N. F. in Tail with divers Remainders over, and in the same Devise he devised divers Jewels and Pieces of Plate, viz. The Use of them to the said N. F. and the Heirs Males of his Body. In this Case it was the Opinion of the Court, that the said N. had no Property in the said Plate, but only the Use and Occupation; per Dyer. Ow. 33. Trin. 7 Eliz. Fitz-James’s Case.

5. The Husband devised his Goods to his Wife for Life, and after her Decease to T. S. who sued in the Court of Equity of the Marchers in Wales, to secure his Interest in Remainder; but a Prohibition was granted, because a Devise of the Goods themselves, with a Remainder over, is void, but not where the Use and Occupation of them is first devised. March 166 Trin. 17 Car. C. B. Anon.


7. I give the Use of all my Paintings, Books, and other Rarities to my Wife for Life; and if she be with Child of a Son, then after her Decease the same Paintings &c. shall be left remaining and come to the same Son; but if my Wife be not with Child of a Son, or if the same Son shall die without Issue Male of his Body, then my Will is, that all the said Paintings &c. after the Decease of my said Wife, and the Death of such Son as my Wife is now with Child of, shall come and remain to the Use of T. V. the Father, of which my Will is, that the said T. V. shall have only the Use during his Life, and that he leave them to my Kinsman T. V. his Son, and that he shall as far as in him lies so dispose thereof to him that shall, by God’s Blessing, next succeed him in my Minors &c. that they remain as an Helv-Loos, and go and remain to such Person and Persons as shall inherit my said Minors &c. who I desire may prove Lovers of Learning, Ingenuity and Arts. Lord Chancellor declared that the Use of the aforesaid Rarities was well settled by the Will of the Testator upon T. V. the Son, after the Death of the Wife; and the Judges were of Opinion, that the Father dying in the Life-time of the Deviser, and the Wife being not with Child of a Son, to be the Contingency upon which the Limitation was made never happening, that the Devise to the Son was an absolute Devise, and good in Law, and the Wife ought to have the Use only during her Life, and stile to be examined on Interrogatories for a Discovery of the Rarities and Matters so devised, and an Inventory to be made &c. Chan. Cases 129. 131. Trin. 21 Car. 2. Vachel v. Vachel.

8. A Devise of Personal Estate to one for Life, and after to her Children, and if they have no Issue, the Remainder over is a void Devise as to the Remainder. 2 Ch. Rep. 65. 23 Car. 2. Boucher v. Antram.
Devise.


10. A. devised 3000 l. to a Daughter, and that the Trustees out of the Interest of the 3000 l. should pay for her Maintenance 80 l. per Ann. But if she died before 21 or Marriage, then to go to such Person as should enjoy his Lands of Inheritance according to his Will. If the Daughter dies within Age unmarried, he that has the Lands according to the Will shall have the Surplus of the Interest above the 80 l. as well as the 3000 l.

2 Ch. R. 148. 30 Car. 2. Bourn v. Ting.

11. Devise of Goods to J. S. for 11 Years, and after the 11 Years he gave the same to J. N. Decreed the Delivery of the Goods according to the Will, the 11 Years being expired. 2 Ch. Rep. 137. 30 Car. 2. Hide v. Parrot. S. P.

Jolly v. Wills.


A Charter in Graves cannot be devised for Life. But one may devise the Use of a Chattel in Goods for Life. Per Holt Ch. J. 12. Mo. 520. Patch 13 W. 5. Lord Peter v. Henage. — So where Teffador devised his Manor &c. and all his Goods and Furniture to his Wife, whom he made Executrix, and by his Will directed that his Goods and Furniture might be prelved for his Heirs, so that the Children which he had by the Plaintiff's Father might enjoy the same. An Inventory was ordered to be taken, and the Wife to have the Use for her Life, and then to be delivered to the Plaintiff's Use and Benefit. Wm's Rep. 6. In a Note there, cites 28 May. 2 W & M. Shirley v. Ferrers.

13. Goods devised to A. for Life, and after her Decease to the Heir of B. B. did, living A. The Goods were decreed to him that was the Reasoon Heir of B. at B's Death, and not to him that was his Heir at A's Death. a Devise Vern. 35. Hill. 1681. Danvers v. the Earl of Clarendon.

Mr. Vernon held that the Form of the Devise, and not the Intereft of the parties, held that it was a Trust vested in B. and the Remainder over to D was void. Vern. 326. 347. Patch. 1685. and Mich. 1685. Whitmore v. Weld.

14. A. devised his Personal Estate to C. in Trust for B. and the Heirs Avg. S. C. of his Body, and if B. die during his Minority, and without Issue, then to D. and makes B. (his Son) Executor, and C. Executor in Trust for B. during B's Minority; B. lives to 18 and then dies without Issue; this shall go to the Executor of B. and not to D. Per Jeffries C. who held void, said it was a Trust vested in B. and the Remainder over to D was void. Vern. 325. 347. Patch. 1685. and Mich. 1685. Whitmore v. Weld.

because the first Taker had the absolute Interest.

15. A. makes B. Executor, and gives the Surplus of his Personal Estate to B. but will'd if B. died without Issue it should go over to C. and that B. should give Security for its going over accordingly, the Devise over is void, but whether the directing a Bond to be given does not alter the Case. Vern. 478. Mich. 1687. Deering v. Hanbury.
Devife.

16. Goods were devized to one for Life, the Remainder over, and decreed good. Arg. 2 Vern. 246. cites the Case of Catesby v. Nicholls.

17. A Devise of Goods to A. for Life, with Remainder after the Decafe of A. to B: it is now clearly settled, that it is a good Devise to B: and that B. may exhibit a bill against A. to compel him to give Security that the Goods shall be forth-coming at his Deceafe; and is all one whether the Goods or the Use of the Goods be devized for Life. 2 Freem. Rep. 206. pl. 280. Mich. 1695. Anon.

18. A bequeathed all his House hold Goods to his Wife for Life, and after to his Son, it is a good Devise over, and the same as it the Devise had been only of the Use of them for her Life, and per ld. Some it is a Rule where Personal Chattles are devized for a limited Time, it shall be intended the Use of them only, and not the Thing itself.


19. A Man devizes all his Personal Estate to his Wife for Life, and what she has left at the Time of her Death, it is my Will, and I do desire that it may be equally distributed between my own Kindred and her's. Teftator died, and the Widow married the Defendant. This Bill was brought by the Relations to have an Inventory taken of the Teftator's Personal Estate, and that Security might be given that it should not be imbezzeled, for that by his Will the Wife had only the Use of the Personal Estate during Life; If the Words, What she has left, shall be construed to be by reason of Goods that are Bona Peritura, or may be quite worn out with using. On the Defendant's Part it was said, that the Estate left was so small, that she could not live upon it without spending the Stock. Matter of the Rolls said, If it be so, it may alter the Case; therefore let the Master state the Value of the Personal Estate, and then I will give further Directions. Chan. Prec. 71, 72. pl. 64. Pach. 1697. Cooper v. Williams.

20. A Farmer devises his Stock, (which consisting of Corn, Hay, Cattle &c.) to his Wife for Life, and after her Death to the Plaintiff. It was objected that no Remainder can be limited over of such Chattels as thefe, because the Use of them is to spend and consume them; but the Matter of the Rolls said, the Devise over was good; but said, if any of the Cattle were worn out in using, the Defendant was not to be answerable for them; and if any were sold as such, the Defendant was only to answer the Value of them at the Time of the Sale; and an Accompit was decreed to be taken accordingly. Abr. Equ. Cafes 361. Mich. 1702. Hayle v. Burrodale.

21. A Personal Estate was devized to A. and in Case he died without Issue, then to B. Resolved that the Devise over to B. is void, and the Whole decreed to A. 2 Freem. Rep. 237. pl. (357. b.) Pach. 1705. Anon.

22. A Devise of a Personal Estate to J. S. and his Issue, or to J. S. and if he died without Issue, Remainder over to another is void, and the whole Interest vested in J. S. Ch. Prec. 323. Hill. 1711. Gibbs v. Barnarditon.

23. A Remainder or Devise over on a Contingency to happen within the compass of a Life, is a good Devise or Limitation over, even of a Personal Estate or of a Sum of Money, or Chattel Personal. Arg. 2 Vern. 760. pl. 622. Trin. 1718. in Case of Pinbury v. Elkin.

24. A. devises to H. his Wife all his Debts, Goods &c. Provided that if H. died without Issue by him, he appointed that so l. should remain to his Brother J. D. A. dies, then J. D. dies in the Life time of H. and then H. dies without Issue by A. If. Question, Whether this was a good Devise to J. D. 2dly, Whether he dying before the Contingency
gence happened, it was so vested in him that his Executor should have it, or only intended as a Personal Benefit to J. D. Cowper Chancellor said, There is a Difference between this Devise here, which is upon a Condition Precedent, and where it is upon a Contingency over, as to one for Life, and if he die without Issue, or Heirs of his Body, then over to another. Here the Wife has nothing in this Money, but this is an Appointment of so much Money, when the Contingency happened. In the former Case the Estate Tail absorbs the whole Interest. The Word (Remain) is observabler it such an Accident happened, then so much was to remain to him. If this had been a Devise over, there had been no Question. May not this be construed, it H. died without Issue living by him? This Legacy was to arise upon a Condition precedent, which makes the Legacy the worse; but all the Caves put are of a Devise over, and the Fund here is devised to the Wife. As to the Point, if the Devise be good, it must go to the Executor of the Devisee. But he said he would consider it. 


25. Joseph Aunger by Will dated 28 April, 1703, gave several long Annuities for 99 Years in the Exchange, amounting to 322. per Ann. to Trustees for the Rehio of the Term, In Trust for Eliz. Dod for so many Years of the said Term as she should live, and afterwards for the Plaintiffs his God-Sons for so many Years of the said Term as they or the survivor of them should live, and after the Decesse of the Survivor, in Trust for the Heirs of their Bodies lawfully to be begotten for all the Remainder of the said Term of 99 Years, and for Default of such Issue, in Trust for his Neighbours (the Defendants) Joseph and Richard Dickenson. These Annuities were laboured into S.S. Company in the Year 1720. and the Bill was to have the South-Sea Stock and Annuities, the Produce thereof, sold, and the Money raised by Sale thereof to be paid to the Plaintiffs, who were the God-Sons and Devisees for Life, with Remainder to the Heirs of their Bodies &c. Caves cited for the Plaintiff 3 Lev. 22. Gibbons v. Sources. 1 Lev. 290. Locke v. Widdham & al. Cited contra Pinbery v. Ellis. Tempore Macclesfield C. Peacock v. Spooner, in Dom. Rec.

King C. said, Where a Term is devised to a Man and his Heirs, or the Heirs of his Body, the whole Term vests in the Devisee, and any Remainder over is void, and so it was held in the House of Lords the 1st Seions, in the Case of Sir John Ruthven, the Remainder in the present Case is void, being alter a Limitation in Tail. 


Stratton v. Pain.

25. A. bequeathed his Personal Estate to M. his Wife upon Condition to give his Three Sisters 5l. Yearly for their Lives, and after M's S C. cited Death he gave the same to D. his Daughter upon the same Condition, as to paying his Sisters, and after D's Death to the Fruit of D's Body, and for Want of such Fruit to his Brothers and Sisters and their Children then living. The Opinion of the Court was, that the Limitation to the Brothers and Sisters was good and yet had there been any Fruit of the Body they must have taken an Estate Tail; but they never coming in Elle, the second Limitation was allowed to take on the Place. Caves in Equ. in Ld. Talbot's Time 23. Arg. cites 2 Geo.


Decese to the Fruit of her Body (it had clearly been an Estate Tail); But the Reason was, that there were those other Words (to my Brothers and Sisters then living) which brought it.
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it within the Continuance of a Life, and these Words (then living) make the Caus to be the same as the Duke of Norfolk's Caus in 3 Chan Cases. And Ed. Talbot said, that the Caus of Brooke vs. Taylor (wherever Reason the Judges might go upon) was very different from the Principal Caus of * Clare v. Clare by Reason of the Words (then living) whereas in the Caus of Clare and Clare there is a plain Affection of a Perpetuity as strongly declared by the Tellator himself as can be. Caus in Eq in Ed. Talbot's Time 24, 25, 26. Pach. 1713. * See Remainder (X)

29. Where the Use of Goods is given to one for Life, the Causque Ufc for Life must sign an Inventory expressing that he is intituled to these Things for Life, and that afterwards they belong to the Person in Remainder. 5 Wins's Rep. 336. Mich. 1734. Slanning v. Style & al.'

(G. ε) Of Money with Remainder.

1. Money cannot be entailed. So 200 l. secured by an Annuity by Way of Mortgage, Mortgagor entails the Annuity, Remainder over by Will and dies. Mortgagor pays the 200 l. to the Executor. Executor shall pay the 200 l. to the Devisee and not keep it and pay the Interest as the Annuity was limited. Chan. Rep. 129. 15 Car. 1. Wyard v. Worfe.

2. J. devised 500 l. to his Daughter and if she die before Thirty Years of Age unmarried then to be divided between three; he does receive the Money, and dies before that Time. And resolved that the Money should be divided, and her Executor chargeable, as poiffessed in Trust for the Devisees in Remainder. 2 Freem. Rep. 137. pl. 172. Anon.

3. Money devised to A. for Life, and after to her Children, and if they have no Issue Remainder over, the Remainder tending to a Perpetuity is void. 2 Ch. R. 65. 23 Car. 2. Boucher v. Antram.

4. Portion and Interest devised on Contingency of Death or Marriage, decreed to be paid into Court for the Benefit of the Heires Fahtus in Caus of the Devisee's Death who was the Heir at Law, saving only that she was a Pofthumous born Child. 2 Ch. Rep. 148. 30 Car. 2. Bourn v. Tynt.

5. A Devise of 100 l. to J. S. at the Age of Twenty-one Years; and if J. died under Age, then J. N. and A. B. to have the 100 l. or else the Survivor of them. A. B. and J. N. die both in the Life of J. S. and before the Age of Twenty-one Years, and then J. S. died under the Age of Twenty-one Years. The Administrator of J. N. who survived A. B. sued, and obtained a Decree for 100 l. for though he died before the Contingency happened, yet his Administrator should have it. 2 Vent. 347. Trin. 32 Car. 2. Anon.

6. A. had Issue three Daughters and devised to his three Daughters 540 l. equally to be divided between them, that is to say, 180 l. a-piece; but if any of them die without a Child her Part to go to the Survivors; one of the Daughters married B. and before the Portion paid she died without Issue. B. had a Decree for the 180 l. For a Sum of Money cannot be entailed. 2 Vent. 349. Pach. 32 Car. 2. Broadhurst v. Richardson.

7. A. by Will in Writing after several Legacies thereby given gave all the Rest and Residue of her Estate unbequeathed, which confituted mostly in ready Money to be put forth to Interest by her Executors, and
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and one half of the Intestate to be paid to B, her Sister during her Life and the other Half to C, Daughter of B and C, after B's Decease to have all the Intestate during her Life, and if B died without Issue of her Body, then the Principal of the Residue should be equally divided between D. and E. decreed a good Will as to the Limitations, and the Executors to accord accordingly. 2 Chew. Rep. 410. 3 Jac. 2.

8. Interest of Money is devised to A for Life and if he die without Issue, then the Principal to go over to B. it is a good Remainder, and decreed the Money to go according to the Will; but with this, that in Case there should be Issue of A such Issue should have the absolute and intire Intrest in the Money. 2 Vern. 38. and 59. Hill. and Patch. 1688. Smith v. Fither.

9. A Remainder or Devise on Contingency to happen within the Compas of a Life is a good Devise, or Limitation over, even of a Personality or of a Sum of Money or Chattel personal. Arg. 2 Vern. 760.

10. A possessed of a Personal Estate of the Value of 333 l. having no Will, a Wife and a Sister, but no Issue, decreed that such Issue of his Estate, as his Wife should leave of her Subsistence, should return to his Sister and the Heirs of her Body and made his Wife Executrix; the Wife married and died, and left her Husband. the Matter of the Rolls said, that if the Matter could pick out the Meaning of this Will it ought to take Place, and that it is now established that Personal Things or Money may be devised for Life, Remainder over, and that though it be true that the Wife had a Power over the Principal Sum provided it had been necessary, yet not otherwise. So that her Money was not a Gift by Law for this was Trust Money, and directed that the Matter inquire how much had been applied for the Wife's Subsistence, and the Husband to account for the Residuo. Wms's Rep. 651. pl. 185. Trin. 1723. Upwell v. Halcy.

11. Money limited after a dying without Issue generally is void, but A. devised it if he be after a dying without Issue then living is good. Gibb. 68. Trin. 2 & 3 Geo. 2. Green v. Rod.

their respective Ages of Twenty one or Marriage, and if any of them die before the Time of Payment of such Issue, then his or their Portion to go to the Survivors or Survivor and his Heirs. The Matter of the Rolls held that this could not be intended a dying without Issue generally, but if to the Survivors might take, which must be during their Lives and so good. Ch. Prec. 528. Patch. 1719.


12. J. S. being seized of a Real Estate and possessed of Bank and Orphan's Stock, by Will reciting that a Marriage is proposed between his Niece A. and his Cousin B. devises to Trustees his Real Estate and Bank Stock, and Money in Orphan's Fund, and the Produce of the same, in Trust to pay the Rents and Profits to A during Life, or to such Person hearing we will be by Writing should appoint, with or without the Consent of any Husband, but if she should marry B. then, after the Decease of A. in Trust for B. during Life, and after his Decease in Trust for the first and Will a Remainder in the Order of Issue of A. and B. and their Heirs Male; and for Want of being with such Issue in Trust for the Daughters of A and B equally to be divided between them, and for Want of Issue of such Marriage, in Trust for the Issue of the Survivor of them; and if neither of them leave Issue, in Trust their Opt. for C. for Life, with Remainder for such Child and Children, as his Brother or sister, how D. should leave living at his Decease, or that D's Wife should be enjoin'd of, that should attain the Age of Twenty-one, and to the Heirs, Executors &c. of such Child or Children equally to be divided between them, as they in Lands should respectively attain the Age of Twenty-one Years; and if no such Child should attain that Age, then to his own right Heirs; But if A. should not marry and B. then

But Ibid. 249. says S. C. that upon 15 Nov.
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above to the Child and Children of D. would be considered. And they deliver their Opinion that as this Cafe has happened (by the others doing all of them without Issue) the Limitation of a Term for Years in the like Manner would have been good.

(H. e) Personal and Real Estate jointly with Remainder.

The Words 1. An Estate with the Furniture of the House is limited to A. and such Heirs of her Body as should be living at her Death, and for Default of such, Remainder over; Per Cur. this makes Estate Tail in the Land, and the Goods disposed of in the same Clause must go in the same Manner, and consequently the absolute Property is in the first Devisee, and no Remainder of Goods after an Estate Tail is good. 2 Vern. 325. pl 314. Mich. 1695. Richards v. Lady Bergavenny.

Wms's Rep. 295 C. S C. means no Land or Real Estate, but only Government Securities, was directed by the Will to be vested in a Purchase of Land to be settled in the same Manner, but 25 to the Residue of the Personal Estate no further Notice was taken of than in the Devise above mentioned of all the Rest and Residue of his Real and Personal Estate, which Residue amounted to 14 or 15000 l. It was agreed by the Counsel of both Sides, that all that Residue invested in B. could not bear any further Limitation. Ch. Prec. 421. Mich. 1715. Scale v. Scale.

2. A having by his Will given some Legacies, devised all the Rest and Residue of his Real and Personal Estate to B. and the Heirs Male of his Body, Remainder to B. and the Heirs Male of his Body, with like Remainders over, some Part of the Personal Estate being Government Securities, was directed by the Will to be vested in a Purchase of Land to be settled in the same Manner, but 25 to the Residue of the Personal Estate no further Notice was taken of than in the Devise above mentioned of all the Rest and Residue of his Real and Personal Estate, which Residue amounted to 14 or 15000 l. It was agreed by the Counsel of both Sides, that all that Residue invested in B. could not bear any further Limitation. Ch. Prec. 421. Mich. 1715. Scale v. Scale.

3. A devises and bequeaths all his Real and Personal Estate to his Wife, provided if the die without Issue by A. shall remain to B. after but
Devise.

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4. A devised his Real and Personal Estate to his four Daughters, S. C. Wms's and their Heirs, Executors, and Administrators; one of the Daugh-
ters died. Decreed that her Share shall go in the same Manner as a
Real Estate to the surviving Daughter. Ch. Prec. 567. Trin. 1721.
Per Ld. Chancellor cites it as the Case of Barkwell v. Dry.

thereat it is said, that this Report in Ch. Prec. 567. is not warranted by the Register-Book.

Bogwell v. Dry.

5. A gave the Interest of 400l. to B. for life, and then to his first Son,
payable to him until 21, and then be to receive the Principal Sum. But if
such eldest Son die before 21, then to the 2d &c. Son in like manner; and
if devised another 400l to C. and his first &c. Son in like Manner; and
but if either B. or C. die without issue, his Share to go to Testator's Right
Heirs; and A made his Wife Executer. The Matter of the Rolls de-
creed, That in Case of B. and C's Death without issue living at their
Death, that the Share of him or them for dying should belong to A's Rig e
Heirs, and not his Executrix; but that if they should die leaving issue, and
such issue die before 21, then those Shares should link into the Re-
sideum of Testator's Personal Estate. Upon Appeal to Ld. C. Maccfie-
field, he took a Difference between a Limitation of a Truant of a Term
as to that Power of Alienation might be restrained, and Perpetuity
introduced, and a Limitation of a Truant of Money which may be
subject to more remote Contingencies; For he thought a Bond to pay
Money on Death of A. without issue of his Body good, and the same,
of a Truant of Money to limited. However, that this Case must be under-
stood of a dying without issue then living; But whether in Case of the
Death of B. or C. without issue then living, it should go to the Present
or to the Then right Heir of A. his Lordship would then determine.

6. A having three Sistors, B. C. and D gave by his Will one Moity
of his Real and Personal Estate to B. and the Heirs of her Body, and for
want of such Heirs, then after her Death to the Children of C. and
for the other Moity to B for life, Remainder to the Heirs of her Body,
Remainder over. The first Limitation was held void, but the second
was held good, though there was no other Difference than that in the
second the Devise was to the Sifter expressly for Life. Arg. Gibb. 321.
cites it as a Case heard March 12th. 1726. in Dom. Proc. between
Stratton and Paine.

7. A settled in Fee, and also possessed of a Lease for 21 Years in the
Possession of B. and C. devised all his Lands &c. which he then sided
settied or possessed of, or any ways interested in, and which were in the Po-
session of B. and C. to M. his Wife for Life, Remainder to J. N. in Tail,
Remainder to W. R. for Life, Remainder to Trustees to preserve contingent
Remainders &c. Remainder over. The Freehold and Leashold lay fo intermix'd, and had been fo long enjoy'd together that it would be
very difficult to distinguish them; Ld. C. King thought the Words
(fee'd, possessed, or any ways interested in) very strong, and distin-
guished this Case from that of Role u. Batttle, and thought the Leas-
hold Premises ought to pafs by this Will. 2 Wms's Rep. 450. Patch.

8. Item, I give and bequeath all my Real and Personal Estate to
my Son Charles Hall, and to the Heirs of his Body to his and their Life,
to be paid to him in three Years after my Death, and during the Time I
make Sir J. N. my Executor of this my Will, and after the said three
Years
Devise.

Years expired, I do appoint that my Son F. shall be my Executor, and if my said Son F. shall die, leaving no Heirs of his Body living, then I give and bequeath so much of my said Real and Personal Estate as my said Son F. shall be possessed of at his Death to the Goldsmiths Company in London in Trust for several Charitable Uses mentioned in the Will; but my Will is, that the Company shall not give my said Son any Disturbance during his Life. The Testator dies, F., the Son, after three Years, takes the Execution of the said Will, suffers a Recovery of the Real Estate and dies without Issue, leaving his Wife Executrix. King Chancellor, the Master of the Rolls, and Reynolds Chief Baron were unanimous that the Limitation over was void, as the absolute Ownership had been given to F. the Son, for it is to him and the Heirs Male of his Body, and the Company are to have no more than he shall have left unspent, and therefore he had a Power to dispose of the Whole, which Power was not expressly given him, but it resulted from his Interest. The Words that give an Estate Tail in the Land must transfer the entire Property of the Personal Estate, and then nothing remains to be given over, and diminiished the Bill. Gibb. 314 to 321. Trin. 5 Geo. 2. Attorney General and Goldsmiths Company v. Hall.

9. Testator devilled a Term for Years, and all his Personal Estate to A. an Infant, and if A. dies during his Infancy, and his Mother should die without any other Child, then to B. A. died during his Infancy, though the Wife was living and might have a Child; yet the Court aided B. the Devisee over, by directing an Account and Discovery of the Estate in order to secure it in Case the Contingency should happen. 3 Wms's Rep. 300. Trin. 1734. Studholme v. Hodgson & al'.

(I. e.) Restrictions from Alienations.

And the Effect thereof.

1. DE V I S E to A. till B. should come to the Age of 22 Years, then the Remainder of the Part to C. and D. upon Condition, That if any of his said Sons, before B. shall come to the Age of 22 Years, shall go about to make Sale of any Part of the Lands, and the same shall remain over &c. C. leased for 60 Years, and so from 60 Years to 65, referring no Rent, such Lease is a Sale with the Intent of the Will. 2 Le. 32. pl. 110. M. 29 Eliz. B. R. Large's Cafe.

2. A. has two Sons, B. and C. A. devised Land to B. in Tail, and other Lands to C. in Fee, provided it any of his Sons or any of their FIles do alien or demy any of the Lands before any of them comes to the Age of 30 Years, then the other shall have the Estate, and does not limit what Estate. One of the Sons makes a Lease for Years before such Age, the other enters, and before he comes to 30 Years he aliens that Part into which he made Entry, and the other Brother, being the elder, enters, Per Cur, this is a Limitation, and upon such an Alienation the Lands is discharged of all Limitations. Owen 55. Hill. 30 Eliz. Spitile v. Davis.

3. Lands were devised to B. and C. and if either of them or their Heirs Heirs do sell the same, the Gift of it shall be void and it shall return to the Heir. This is a void Condition, being annexed to a Fee. Cro. E. 744. pl. 22. Hill. 42. Eliz. B. R. Shailard v. Baker.

4. Devise
Devise.

4. Devise to A. in Tail, Provided he shall attempt to alien, then immediately his Estate shall cease and another shall enter. A. made Executor, he in Remainder enter'd; Per Cur. the Condition is void, for a Man cannot be restrained from an Attempt to alien, for non Contra what shall be judged an Attempt, and how can it be tried? and when the express Words are so, there shall not be made another Sort of Construction than the Will imports; and so the Judgment given in the Grand Sessions for the Feoffee against him in Remainder was affirmed. Vent. 321. Mich. 29 Car. 2. B. R. Peirce v. Winn.

5. A. devised Land after his Death without Issue Male to B. in Tail. Jo. 59. Male, until be or they make any Acts to alter or discontinue this Estate S. C. of Fo Tail, and then to C. and the Heirs Male of his Body, with several Remainders over. Deviser dies without Issue. B. enters. C. dies, leaving Issue. D. B. levies a Fine. D. enters. Resolved the Remainder to C. was not contingent but an immediate Devise; because, should it be a D—See Contingent, the Deviser's Intent would be destroy'd, which was, that every one successively should enjoy the Land, and Judgment for D. Radclif's Raym. 429. Hall. 32 & 33 Car. 2. B. R. cites the Cafe of Foy v. Cafe. S. P. — Le 298. Raddal v. Millar. —— No. 212. S. C.

6. Devise to A. for Life, Remainder to her first Son, and the Heirs of Pollar. 657: the Body of such first Son &c. and for Default to B. &c. Before Seal- S. C.-S. C. ing and publishing, this Memorandum was made, viz. Memorandum, My 2 Show. Will and Meaning is, That A shall not alien the Lands given to her from the Heirs Male of her Body &c. but to remain upon Default of the Court such Issue to B. and the Heirs Male of his Body to be begotten, according to the true Intent and Meaning of this my Will. This Memorandum is rather like a Proviso than Habendum in a Deed, and makes no Alteration in the Limitation, and in that it is clear, it is a General Tail. 3 Med. 81. Patch. 1 Jac. 2 B. R. Friend v. Bouchier.

would not have thought that she had Power to alien ——The Words in the Memorandum are reported the same in Pollar as here, but in Skin 220. S. C. they are, That A shall not alien the Lands given to her, but that they shall be to her Heirs Male, and for want of such Issue, to B. &c. and adjusted for a Granddaughter of a Son against B. the Words (Heirs Male) in the Memorandum being to be construed Heirs Male according to the Intent and Meaning of his Will.

7. A. devised all the Rest of his Personal Estate by Letters in Trust, or otherwise, to his three Nephews A. B. and C. and makes them Executors, and wills, that they shall give Bond to each other, that in Case either die without Issue of his Body, to have at their Death all the said Chattles and Personal Estate to the Survivors and Survivor of them; and the Bill was to have the said Bonds given, but was dismissed, being an Attempt to entail a Personalty. Abr. Equ. Cases 207. Trin. 1703. Williams v. Williams.
(K. c) Sale of Lands good, where made by Executors.

1.  A Devise his Land to be sold by his Wife, whom he makes Executor. She afterwards marries, and sells it to her second Husband; and adjudged a good Sale. Pl. C. 414. cites 10 H. 7. 20. Br. Executors 175.

2.  The Authority of the Executors to sell can't be impaired or frustrated by any misfeas Act of the Heir or other Person, as by Feoffment by the Heir, or by his being distrest by a Stranger. Kelw. 40. b. pl. 4. Mich. 17 H. 7. says it was adjudged by all the Justices of England. 

3. By the Statute 21 H. 8. it is provided, that where Lands are will'd to be sold by Executors, that though part of them refused, the Rest may fall. See Co. Litt 265 b.

4. If all the Executors fell severally, the Lands to several Persons, such Sale which is most beneficial to the Tiltator shall stand and take Effect. Per Counsel. Le. 60. pl. 78. Patch. 29 Eliz. B. R. Bonefaint v. Greenvill.

5. Devise of Land to his four Executors; and further will'd, That his Executors should sell the same to A. for the Payment of his Debts, if the said A. would pay for it 300l. at such a Day. A. did not pay the Money at the Day; one of the Executors refused Administration; the other three entered and sold to B. Adjudged that the Condition for the Manner of it was good Le. 60. Bonefaint v. Greenvill.

6. A. feffed of Lands by his Will devised, that his Executors should sell his Lands, and died; the Executors kept a Fine thereof to one F. taking Money for the same of F. H. in Title made by the Conveyee to the Land by the Fine, it be a good Plea against the Fine to lay, Quod parties ad finem nihil habuerunt, was the Quelion. Anderson conceived that it was; But by Windham and Periam, upon Not Guilty, the Conveyee might help himself by giving the Special Matter in Evidence, in which Case the Conveyee should be adjudged in, not by the Fine, but by the Devise. Le. 51. pl. 38. Trim 33 Eliz. C. B. Anon.

7. A. devised that his Executors shall sell his Land; they may sell part at one Time, and part at another. 1 Rep. 173. b. (e) in Digges's Case.

8. If by the Custom a Man devisea that be Reversion, or any other Thing, that lies in Grant, shall be sold by the Executors, they may sell the Same without Deed; for the Vendee shall be in the Devilor, and not by his Executors. Co. Litt. 113. a.

9. On a Bill of Review an Error assigned was, that Lands were deeded to be sold pursuant to the Will for Payment of Debts, without giving the Heir a Day to show Cause after he came of Age. Lord Keeper confirmed.
confirmed the Decree; for the Lands being devised to be sold for Payment of Debts, there is nothing descends to the Heir, and an immediate Sale may be decreed without giving a Day to the Cuse, though an Infant; But if he had been decreed to have joined in the Conveyance, there he must have had a Day after he came of Age. 2 Vern. 429. pl. 391. Hill. 1701. Cooke v. Parfons.

(L. e) Sale.

By what Executors, Feoffees, Trustees &c. now, or at Common Law.

1. If a Man makes a Feme Covert, or a Monk prof't'd, his Executor, and devises the Remainder to be sold by them, they can't make a Deed, and yet their Sale is good without Deed, without any Attornment; nor can they levy a Fine; the Reason seems to be inasmuch as when the Sale is made, it passes by the Parliament, and not by the Sale; but he in whom it is vested by the Sale cannot grant it over without Deed and Attornment; so note a Diversity. Br. Devise, pl. 12. cites 19 H. 6. 23.

2. And Brook says the same Law seems to be of an Infant Executor as of a Feme Covert; and it seems that Newton delivered the Resolution of the Court; for this Matter was alleged in Arreit of Judgment, and yet the Plaintiff recovered. Ibid.

3. If a Man has Feoffes seised to his Use, and wills by his Last Will, that they shall fell his Land, and dies, the Feoffes eneoff others to the first Use, and per Kingmill the Second Feoffes may fell his Land; Quere; for 15 H. 7. 11. is contrary. Br. Feoffments al Ules, pl. 12. cites 14 H. 7. 33.

4. And per Tremal Justice, and Reede and Finaux Ch. Justices, if a Man declares by his Will, that his Feoffes shall alien to the S. and he dies, and they make a Feoffment over, the Second Feoffes may alien to J. S. for there is in Manner a Use in J. S. Br. Feoffments al Ules, pl. 12. cites 14 H. 7. 33. and 15 H. 7. 11.

5. If a Will be that his Land in Feoffment shall be sold, and does not say by whom, now the Executor shall sell it, and not the Feoffes; per Reede, Tremal and Frowick, which Finaux in Manner affirmed. Br. Feoffments al Ules, pl. 12. cites 14 H. 7. 33. and 15 H. 7. 11.

6. If a Man wills that his Executors shall sell his Lands, and distribute the Profits coming thereof for his Soul, and they prove the Will, and make their Executors, and die before they sell; the Executors shall sell the fame; but if they make no Executors, their Administrators shall not fall, for want of Privy, for the Sale is a Thing of Truth &c. Perk. S. 549.

7. If a Man wills that J. S. his now Executor, shall sell his Land, the Executors of J. S. shall not sell the same, because it appears by the Words of the Will, that another shall sell; and always be shall sell, in whom Confidence and Truth is repose. And therefore if a Man wills that J. S. Mayor of London shall sell &c. And J. S. is Mayor of London at the Time, and before the Sale another Man is chosen Mayor, in this Case J. S. shall sell and not the new Mayor, and so it is in the like Cases &c. Perk. S. 552.

(M. e) What
What Words give a Power to sell Lands.

1. A Devise'd Land to be sold by her Executors, and in their Default by the Executors of her Executors, [*and] by four Partitioners of the Parish of S. It seems that these Words (by four Partitioners) are void for the Uncertainty. Br. Devise, pl. 10. cites 49 E. 3. 16.

2. A Man may declare his Will that J.S. who is not Feoffee nor Executor to him shall alien his Land. Br. Testament, pl. 22. cites 15 H. 7. 11.

3. If a Man makes J. S. his Executor, and wills that a Monk shall sell his Land, and shall distribute the Profit thereof for his Soul, the Monk is Executor to this Purpofe. Perk. S. 549.

4. When a Man devises his Lands to be sold by his Executors, it is all one as if he had devised his Lands to his Executors to be sold; because by deviling the Lands he breaks the Decent. Co. Litt. 236. a.

5. A. has two Sons, and devised one Part of his Lands to the Eldeft and his Heirs, and the other Part to the Youngest and his Heirs, and if both die without Issue, that then it shall be sold by his Executors, and dies, the Eldeft dies without Issue. Per Hutton Executors cannot sell any Part before both are dead, for the Youngest hath Estate Tail in Remainder in the Part of his Eldest Brother. Her. 92. Pafch. 4 Car. C.B. Forefue v. Jobbou.

6. A. devised Lands to M. his Wife for Life, and will'd that if it should fully and sufficiently appear that M. should not find sufficient to pay his Debts, and to maintain the said M. and her Children, then she should sell the Land, or so much as with the Personal Estates would satisfy his Debts and maintain her and her Children. M. afterwards sold the Land to J.S. who being freed for the Land, pleaded that at such a Time it sufficiently appear'd to M. that the Personal Estates were not sufficient, and therefore by the Indenture enrolled, bargained and sold the Land to him and his Heirs, and so was forfeit in Fee by the Statue of Ules, and that the Heir at Law of A. relates to J. S. and his Heirs. Adjudged that the Value of the Personal Estate should have been shewn, and what was the amount of the Debts, and the Value of Land sold, so as it might appear to the Court that the said Cause to sell the whole Land, her Authority being only to sell so much as should be sufficient, and the Authority being by the Will, and he pleading a Sale by Indenture of Bargain and Sale enrolled, and that by Virtue thereof, and of the 27 H. 8. of Ules, he was seized of the Reversion, is not good. For if the Sale is good by the Will, he is not in by the Statue but by the Devise. Cro. C. 335. pl. 21. Mich. 9 Car. B. R. Dikey v. Ricks.

[This text discusses legal principles regarding the devision of lands, executorship, and wills, and provides examples from various legal cases and statutes. It includes references to specific statutes and cases, such as the Year-Book and the Statute of Ules.]
Devise.


8. If Lands be devised for Payment of Debts, the Executor may sell S. P. and if though Authority be not specially given them, but otherwise it such case dies, the Devise had been for * Legacies only, or for raising Portions &c. in such case the Cafe there had been no Remedy but in Chancery against the Heir. pl. 159. Patch. Kebr. 14. pl. 37. Patch. 13 Car. 2. B. R. Anon. 22 Eliz. Miller v.


* I ceded to be sold if it was devised to be sold for Payment of Legacies only.


9. Devise to raise Portions out of the Profits of his Leafe-Lands implies Ven. 104. a Sale. 1 Chan. Cafes 240. Mich. 26 Car. 2. Cary v. Appleton. Anon. S. P. — Secus if the Words are out of the Annual Profits, Per Counsel. Ch. Cafes 243. — And in this Cafe Finch K. took a Difference between a Devise of the Profits of a Glasse Leaf and of Freake Land. And it is decreed in Ld. Corbury's Cafe. Ib id — 3 Salk. 129. pl. 7. cites 6. C. — And in Cafe of a Trust where the Trustees is to pay Debts, Legacies, or Portions out of the Annual Rents, Profits, and Porions of the Estate, he cannot alien or sell to raise the Money, unless it is to be paid at a certain prefixed Time; And if the Annual Profits will not do it within that Time, then Trustee may sell; For it is within the Intention of the Trust 3 Salk. 267. pl. 2. Anon. — Ven. 104. pl. 90. Mich. 1682. S. P. as to Devise, but says such Words in a Deed executed in Life-time, will in neither Cafe empower Trustees to sell.

10. Devise of Lands to Trustees on Trust out of the Rents and Profits to pay Debts and Legacies, the Trustees may sell the Land itself. 2 Chan Cafes 255. Mich. 26 Car. 2. Lingon v. Foley.

11. Devise of Legacies to be paid out of the Personall Estate, and if that fall short, then out of the Rents and Profits of the Real Estate, the Trustees were decreed to sell &c. and to pay Interest from the Time the Legacies became due and payable. Fin. Rep. 163. Mich. 26 Car. 2. in Cafe of Carew v. Carew.

12. My Debts and Legacies being first detailed, I devise all my Estate both Real and Personal to J. S. This amounts to a Devise to sell for the Payment of Debts. Per Ld. Chanc. And it was laid in this Cafe by Mr. Solicitor General, that a Parole Declaration is sufficient to subject Lands to the Payment of Debts, where a Man has but an Equity only. Ven. 43. pl. 45. Patch. 1682. Newman v. Johnson.


14. A devizes Lands to B. in Tail, Remainder to C. and gives his Executor Power to raise out of his Estate 500/. for his next Heir, and directs him to join his Debts paid. This gives the Executor a Power to sell the Lands to pay the Debts. 2 Vent. 154. Trin. 1692. in Cafe of Wareham v. Brown.

15. Lands were devized to Trustees to let and set, and out of the 2 Vent. 425. Rents to pay; Per Lord Wright these Words are not sufficient to pl. 391. S. C. ground a Decree for Sale upon; but there being infraffuent Words that after his Debts and Legacies paid, it should be to the Trustees, he held that they were sufficient. Ch. Prec. 184. pl. 152. Hill. 1701. Cook v. Parions.

16. Devise that his Executors should receive the Rents, Issues and Profits until 500/. should be raised, and after Payment devised the Land to his Son. Decreed the Portion to be raised with Interest and set a Sale, and the * Heir forthwith to join, though the 6 B Estat v. Greer. S. P.
Devise.

Estate would little more than answer Debts and the 500l. 2 Vern. 424. Patch. 1701. Jackon v. Farrand.

A. having Term for 21 Years in the Printing-Office, by Will directs that 2000l. be raised out of the Profits for his Daughter and her Children, and made B. Executor. B. mortgaged the Term. Decreed that the Daughter and her Children should redeem, or be foreclosed; for per Cur. the Executor of a Testamentary Estate has Power over it as to alien or fell as he shall judge necessary; and if Executor sells in Prejudice of a Refundary or Specific Legatee, they may have their Remedy against the Executor, but not follow the Estate into the Hands of a Purchaser. Note, This Decree was afterwards reversed on Appeal to the House of Lords. 2 Vern. 444. Mich. 1703. Humble v. Bill.

(N. e) Sale.

Good in Respect of the Manner.

Suppl. to Co. 1. A Copyholder in Fee devised to his Wife for Life, and that the should fell the Reversion for Payment of his Debts, and afterwards he surrendered to the Use of his Wife for Life according to the Will and Deed. Adjudged that she might fell his Lands, because in his Surrender he referred to his Will, and afterwards the surrendered upon Condition to pay 12l. This was held to be a good Sale according to the Will. Cro. E. 68. pl. 18. Mich. 29 and 30 Eliz. B. R. Bright v. Hubbard.

2. If a Man wills that his Executors and Feoffees shall fell his Land; and the Executors fell without the Feoffees unto one Man, and the Feoffees without the Executors fell unto another Man, and afterwards the Executors and Feoffees fell unto a third Man; In this Case the first Sale is good, and the other two Sales are not good &c. Perk. S. 553.

(O. e) Sale of Lands good, where made by surviving Executor, Trustee &c.

1. It is admitted that where a Man wills that his Executors shall sell his Land, and the one dies, that the other may sell alone. Br. DeVilpe, pl. 50. cites 39 All. 17.

Note, Per Rede in the same Case that the second Feoffees cannot sell the Land, for it is contrary to the Law; But where the first Feoffees make a Deedment ut supra, yet the second Feoffees may sell the Land; quad titu concessum per Fineux and Tremaine Justices; but the second Feoffees may alien by Command of the first Feoffees; for this is their own Act, viz. of the first Feoffees. Br. Testament, pl. 7 cites 45 H. 7. 33. but cites 15 H. 7. 11. contra.

2. Note, Per Kingmull where a Man has Feoffees setted to his Use, and declares his Will that they shall sell the Land, and dies; and the Feoffees infall others to the first Use, the second Feoffees may sell the Land. Br. Testament, pl. 6. cites 14 H. 7. 33. but cites 15 H. 7. 11. contra.

3. Note,
Devise.

3. Note, Per Cur. that if a Man declares his Will that B. and C. his Executors shall fell his Land, and dies, and B. dies, and C. makes M. and P. Executors, and dies, and M. falls, this is void; For the Trust is strict; for Executors of Executors by the Common Law, cannot have Action as the first Testator. Br. Testament, pl. 5. cites 19 H. 8. 9.

4. But per Brandreth, if a Man wills that J. and N. his Executors shall fell his Land, and they refuse to be Executors, yet they may fall, because they are named by proper Names. Ibid.

5. Contrariwise if he wills that his Executors shall fell without other Name, and makes no Executors, or they refuse; Note a Diversity; for Land is not Testamentary. Ibid.

6. A Man will'd that his Land devisable should be fell by his Executors, and made four Executors, and died; All the Executors ought to fell, for the Trust is jointly put in them. But Quære if one or two dies, if the three or two who survive cannot fell, for there is the most Number of Executors; It seems that they may; for there Death is the Act of God; And see the Statute of 21 H. 8. that where such Will is made, and some of the Executors refuse, and the other prove the Testament, the one or he who proves the Testament may fell; Quod Nota; and see the Statute. Br. Devise, pl. 31. cites 30 H. 8.

7. And by some where a Man wills that the Land shall be fell after the Death of J. S. by his Executors, and makes four Executors, and dies, and after two of the Executors die, and after J. S. dies, there the two Executors who survive may fell; for the Time was not come till now. Ibid.

8. A Man devis'd his Land to his Wife for Life, the Remainder to another for his Life, and after their Deaths be devis'd that the same Lands should be fell by his Executors, or the Executors of his Executors, and the Money thence arising to be employ'd for the Use of his Soul. He died. Afterwards one of the Executors died; and then the other made his Executors, and died also; and then the Feme died, and he in Remainder died also. It was the Opinion of the Justices, that the Executors of one Executor should not make the Sale, for they had Authority jointly, and if one of them fail, the other cannot execute the Testament. Mo. 61. pl. 172. Trin. 6 Eliz. Anon.

9. And so it was said it was adjudged in Franklin's Case, where a Man devis'd that J. S. and J. D. by Advice of the Parson of D. should make Sale of his Lands after his Death, and before the Sale the Parson died, and the other two could not fell the Lands. Mo. 62. pl. 172. Trin. 6 Eliz. Anon.

10. A Man being seiz'd &c. devises all his Lands to his Sister and her Heirs (except out of this general Grant, my Manor of R. which I do appoint to pay my Debts) and makes two Executors by Name, and dies, and one of the Executors dies and the other Executor takes upon him the Charge of the Executorship, and sells the Manor to R. for 300£. And it was held that he might lawfully do this and so was the Intent of the Testator and not to leave this Reversion to his Heirs, but to trust the Executors with the Sale thereof for the speedy Payment of his Debts. 1 Dyer. 371. b. pl. 3. Mich. 22 & 23 Eliz. Anon.

11. A. devised that his Executors should have his Land for Ten Years for Payment of his Debts, and that afterwards his Executors or any of them should fell the Land for Payment; he made three Executors and died. One of the Executors died, yet a Sale by the other two was held good. Cro. E. 524. pl. 54. Mich. 31 & 39 Eliz. B. R. Townsend v. Wale.
Devise.

12. A Man devised that after the Death of his Wife his Land should be set by his Executors under Article A, and made his Wife and a Stranger Executors and died; the Wife died. A Sale by the Stranger Executor is not good; for the Authority is determined. Dy. 119. a. pl. 8.

13. If a Man Wills that his Executors shall sell his Land, if they all die but one, before any Sale made by them, he who survives may sell. Perk. S. 370.


15. If Coffy or Life willed that his Feoffees shall sell his Land, they ought to sell jointly by Reason of their joint Poftession &c. But if all the Feoffees but one die before Sale made by them, then he who survives may sell, because the Poftession of the whole is in him &c. Perk. S. 371.

16. The Executors having but a Power to sell, they must all join in the Sale, if one Executor dies, it is regularly true that being but a bare Authority the Survivors cannot sell. Co. Litt. 112 b. 131 a.

17. A Man devises his Land to A. for a Term of Life, and that after his Death his Land shall be sold by his Executors generally and makes three or four Executors, and during the Life of A. one of the Executors dies, and then A. dies; the other two or three Executors may sell because the Land could not be sold before and the plural Number of his Executors remain. But if the Executors had been named by their Names as by J. S. J. N. J. D. and J. G. his Executors, then in that Case the Survivors could not sell the same, because the Words of the Testator could not be satisfied. Co. Litt. 112 b. 179 a.

18. A was seised of certain Lands in Fee, and devised the same in Tail, and if the Donee should die without Issue, that his said Land should be sold by his Sons in Law, he in Truth having five Sons in Law; one of his Sons in Law died in the Life of the Donee; after the Donee died without Issue, and then the four Sons in Law sold the Land, and it was adjudged that the Sale was good, because they were named generally by his Sons in Law, and the Lands could not be sold by them all, and the Words of the Will in a benign Interpretation are satisfied in the Plural Number; albeit they had but a bare Authority, but it they had been particularly named it had been otherwise. Co. Litt. 113 a.

19. If
19. If a man devises lands to his executors to be sold and makes two executors, and one dies, yet the survivor may sell the land because as the estate, so the trustee, shall survive, so note the diversity between a bare trust and a trust coupled with an interest. Co. Litt. 113. a.

20. In both the above cases the executors may sell part of the land at one time, and part at another, as they may find purchasers. Co. Litt. 113. a.

21. If devise be that his executors shall sell and after names A. and B. to be executors in the end of the will; if one dies the other may sell at the common law for their naming them by their proper names in the first part of the will annexes to the sale a trust to A. and B. and appropriates the trust to them as private persons. Jenk. 44. pl. 53.

22. It seems that if devise be, that A. and B. his executors shall sell certain land, and in the end of the will also names them executors, if the one had refused at common law or died, the other might sell; for the interest is annexed to the executorship by this repetition. Jenk. 44. pl. 83.

23. A man devises lands to his wife for life, and afterwards orders the same to be sold by his executors and the moneys thereof coming to be divided among his nephews, and makes A. and B. his executors and died. It was referred to three judges, who certified, that the executors had not a good interest by the devise, but an authority only, that the surviving executor notwithstanding the death of his companion might sell. But if they might sell the reversion immediately, was not resolved. Cro. C. 382. pl. 10. Mich. 10 Car. in B. R. Howel v. Barnes.

24. It has been held, that if a man devise that his lands shall be sold by his executors for payment of his debts, that that will give the executors an interest, as well as if he had devised his land to his executors to be sold. Otherwise where he devises in general, that his lands shall be sold without paying by whom, though in that case the executors must sell, Per Hale Ch. B. Hardr. 419. in pl. 5. Trin. 17 Car. 2. in case of Barrington v. Attorney General & al. cites 15 H. 7.

(P. c) Sale of lands by whom good on refusal &c. of executors, or some of them.

1. A fema devises in tail land in London, and for default of issue to be sold by his executors, and in their default by the executors of his executors by four parishioners of the parish of S. and made three executors, and died; the one executor died, the other refused, and the third sold after the tail determined. Quære; For it seems that the sale of the one executor is not good; and it seems that these words, by four parishioners, are void for the uncertainty. Br. Devile, pl. 10. cites 49 E. 3. 16.

2. And it is held there, that if all the executors refuse, there the administrator admitted by the ordinary cannot sell. Br. Devile, pl. 10. cites 49 E. 3. 16.

3. A man devises that his land shall be sold by his executors; this Kelw. 127. shall extend to executors of executors. Arg. 2 Bulk. 291. cites 19 H. 6. pl. 25. Contra.


6 C

4. If
4. If a Man has Feoffees &c. and makes his Will that his Executors shall sell his Land, and dies, and they refuse the Administration, yet they may sell, because it is named in every Testament who shall be Executor, and Land is not Testamentary; therefore when they are named, they are the fame Perfon who were Truftees, but by this Name Executor the Ordinary nor no Administrator can sell. Br. Testament, pl. 7, cites 15 H. 7. 11. per Fineux Ch. J.

5. But where a Testament is made to the Intent that his Executors shall sell, and after he does not make Executors, there the Land cannot be sold. Ibid.

6. Contra if he makes Executors, notwithstanding the general Term of Executors before without naming their Names; for it suffices if they are named in the End of the Testament of the Goods, though they are not named in the Will of the Land by proper Names; And to note a Divinity between a Will and a Testament. Ibid.

7. Devise that his Executors shall sell his Land, and afterwards his Executors refuse to meddle with the Will, yet they may sell the Land, for it is a Thing limited for them to do over and besides the Testament. Per Frowick Serjeant. Kelw. 44. b. 45. a. 17 H. 7.

But the Executors may sell, tho' they refuse to prove the Will; for it is not given to them as Executors.

8. If a Man has Feoffees in his Land and wills that his Executors shall sell his Land, and he makes no Executors, the Ordinary shall not meddle with the Land nor Administrator, for the Ordinary can only meddle with Things Testamentary, as Goods, and the Administrator, who is his Deputy only, can do no more; And it was lately adjudged in Cam. Scacc. per omnes J. Angl, that if a Man makes a Will of his Land, that his Executors shall sell the Land and alien &c. if the Executors refuse the Administration and to be Executors, now the Administrator or Ordinary can't sell nor alien it. Quod suit Concellium. Per Rede and Tremail for good Law. 15 H. 7. 12. a. b.

9. If a Man wills that his Executors shall alien his Lands, without naming their proper Names, it they refuse the Administration and to be Executors, yet they may alien the Land. Per Fineux and Tremail, and not denied by Rede. 15 H. 7. 12. b.

10. If a Perfon be named by the Will to fell, and he refuses, he that shall have Advantage by the Sale shall compel him by Subpoena, Quod suit Concellium per Car. And if the Perfon named enfeof others, a Sale by those Second Feoffees is merely void. Kelw. 45. T. 17 H. 7.

11. Note, That if a Man wills by his Will, that his Executors shall sell his Land, and makes two Executors, and dies, and the one proves the Testament, and the other refuses, and he who proves sells the Land, this is good by the Statute 21 H. 8. 4. where it is expressed, that it was doubted at the Common Law whether the Sale by the Common Law was good or not; Quod Nota bene. Br. Devitie, pl. 26. cites 21 H. 8. 4.

12. Devise of Lands to his Wife for Life, and that after her Decease his Wife or his Executors should sell the Land; Sale by the Wife seems to be good. Per Suit J. Godb. 46. Mich. 28 and 29 Eliz. B. R.

13. A. seised of the Manor of D. devise'd it to three and their Heirs to sell it at the best Profit, and to convert the Money thereof coming to the Performance of his Will; and in the Conclusion of the Will he makes them
them his three Executors, and dies; one of the three refused to meddle with the Will or Sale, and the other two sells the Land in the Life of the third. Adjudged the Sale good by the two, either by the Common Law, or by the Statute of 21 H. 8. 4. For when he devised the Land to three to sell, this doth tantamount as if at the first he had devised that such his Executors should sell; and in such a Case the Sale by two, the third refusing, was good; for they two may perform the Will without the third; but the Statute makes it clear. Cro. E 80. pl. 43. Mich. 29 and 30 Eliz. in Scacc. Bonifiant v. Greenfield.

14. To be sold by his Executors, or one of them, and makes several Executors; Sale by two of them is good. No. 341. pl. 493. Hill. 35 Eliz. C. B. Townfend v. Walley.

15. Devise that his Executors shall sell Lands with the Affent of J. S. if J. S. dies before the Affent, the Executor shall not sell. 2 Brownl. 100. Trin. 9 Jac. C. B.


17. A devised Lands to be sold by the Heir of B. B. is Attaint for Felony in Life of A. A. dies; the Eldest Son of B. cannot sell the Land, for he is not Heir; the Blood is corrupt. He is Life, 8. Jenk. 203. pl. 27.

18. A Sale was directed to be made upon the happening of a Contingent Estate, which did not happen in the Executor's Time, who was decreed to make the Sale, but happening after his Death, the Executor's Executor, and those who claimed the Land after his Death, was decreed to sell. Chan. Cafes 150. cites 18 Jan. 1659. the Cafe of Tenant v. Brown.

19. Lands were devised to be sold by Executor who dies. The youngest Children for whole Benefit the Sale was ordered, render their Bills against the Heir; Heir demurrs because but an Authority in the Executor which is dead with him, but the Demurrer was over ruled. Ch. Cafes 35. Mich. 15 Car. 2. Garfoot v. Garfoot.

20. If a Devise be to an Heir on Condition to sell, it is a void Condition, but yet it is good by way of Truitt in Equity, and the Heir must sell. Arg. Chan. Cafes 177. Trin. 22 Car. 2. in Cafe of Pitt v. Pelham.

21. Lands were appointed to be sold, (but no Devise was made of them) and the Money to be divided between the Wife and Heir at Law, and three other Relations. Whether the Heir shall be forced to sell the Land after the Death of the Executor, there being no Party named to sell. Ld. K. took a Difference between a Devise of Money out of the Profits raised by Sale of Lands, that the first favours of a Truitt, the last amounts to a Differention, and is more than a Charge upon the Land in the Heir's Hands, and so dissimil'd the Bill in favour of the Heir; but with Directions that this should be no President. Chan. Cafes 176. 180. Trin. 22 Car. 2. Pitt v. Pelham.

Decreed in Dom. Proc., that the Vendees of Executor should have the Land. 2 Jo. 26. S. C.—And decreed the Heir to sell, and so reversed the Decree.

Dissimil'd upon Advice of the Judges. For when no Person is appointed to sell, it ought to be intended that he shall sell who has the Estate, which is the Heir. Lev. 354. S. C.

22. Lands were devised to be sold for Payment of Legacies, and none expressed to sell, the same decreed to be sold by the Executors, and the
23. Executors were directed to sell Land, and with the Money arising out of the Sale and Surplus of Testator's Personal Estate to purchase Annuity of 100l. a Year for J. S. for her Life &c. The Executors renounced. Administration with the Will annexed was granted to J. S. and a Bill was brought to compel a Sale, and the Heir to join. But the Executors not being made Parties, the same was objected; because notwithstanding they had renounced, yet the Power of Sale was said to continue in them, and that it was collateral to their Executorship. But there being a Power only, and no Estate devolved to the Executors, the Objection was over-rulled. 2 Wms's Rep. 308. Mich. 1725. Yates v. Compton.

(Q. e) Sale. By whom. No Person being appointed to sell.

S. P. Arg. 1. DEVISE of Lands to be sold for Payment of his Debts. It shall be sold by his * Executors, and the naming them Executors is sufficient. Per Gawdy J. 2 Le. 145. in Inchly and Robinson's Cafe.

2. Where Lands were devised to be sold, and the Monies to be distributed to several Persons, and no Person was named to sell, there by Content of Counsel it was decreed that the Executors should sell. Chan. Cases 179. cites 13 Nov. 13 Car. 1. Lockton v. Lockton.

3. As for my Lands, Tenements, Goods and Chattles, I gave and bequeath as follows: After my Debts paid, to my five Daughters 100l. a-piece, and to be paid at their Ages of 20 Years; also I gave to my Wife, whom I make my Executrix, all the Rest of my Lands and Tenements, Goods and Chattles. The Personal Estate was not sufficient to pay the Debts, nor could the Executrix out of the Profits of the Premises, being but 63l. per Annum, raise Money to pay the Debts and the Daughters Portions, being 500l. Therefore the Court conceived it was intended by the Will, that the Executrix should raise Money to pay the Debts and Legacies, and decreed the Executrix to sell accordingly, and by Sale to satisfy the Plaintiffs. Chan. Cases 179. cites 1 Feb. 16 Car. 1. Hughes & al v. Collis.

(R. e) At
Devise.

(R. c) At what Time the Sale may be made. And in what Cases, if not sold, the Heir may enter.

1. If a Man devises his Land to be sold by his Executors, and dies, and his Heir enters and dies seized, and his Heirs enters by Diminution, yet the Executors may sell the Land according to the Will of the Devisee; Per Newton J. Br. Devisee, pl. 32. cites 11 H. 6. 12.

2. If a Man devises his Land to be sold by his Executor, and dies, and the Heir enters and charges the Land, and after the Executor sells, the Vendee shall hold discharged. Per Brudnell Ch. J. Br. Charge, pl. 15.

3. So it the Heir suffers a Recovery or leases a Fine. Ibid.

4. So where a Man devises the Heir and dies seized and his Heir enters, and the Executors sell, the Vendee may enter; For he has no Right, nor is any Action given to him; For he has only a Title to enter by the Sale, and therefore he may enter; For otherwise he has not any Remedy; Per Hals J. Ibid.

5. When it happens that the Land cannot be sold, the Heir shall have the same. As if a Man seised of Land devisable, devises by his Will, that his Land shall be sold by his Executors, and dies, and all the Executors die Intestate before any Sale made by them or any of them; no such a Case the Heir shall keep the Land, and it Cally que Ufe of Land in Fee wills that J. S. now his Executor shall sell &c. and J. S. dies before any Sale made by him, then the Use is in the Heir to keep to him and his Heirs for ever &c. Perk. S. 554.

6. A Man devised his Land to be sold by his Executor after the Death of the Tellerator. One tenders to him a certain Sum of Money for the Lands, but not to the Value, and the Executor afterwards held the Land in his own Hands two Years, to the Intent to sell the same dearer to some other, and took the Profits all this while to his own Use. Here the Executor is to make the Sale as soon as he can, and if he does not, the Heir of the Devisee may enter, for he took the Profits here to his own Use, not as Assets. But if a Man devise that his Executor shall sell his Land, there he may sell it at any Time, for that he hath but a bare Power and no Profit. Litt. 383. and Co. Litt. 236. a.

7. Devise to J. S. for Life, and after that his Executor shall sell the Land; they may in the Life-time of J. S. The Word after is as much as to say, after the Determination of the Estate; Per Haughton J. 2 Bulit. 125. Mich. 11 Jac.

where the Devise was to J. S for Life, and that after his Death J. S. or his Executors should sell, J. S. may sell the Land; Per Clench J. Godb. 41. pl. 57. Mich. 2 S. & 29 Eliz. B. R. Anon.

8. The Case was; Zachary Thomas, seised in Fee of the Manors of D. S. and V. and having three Daughters, Jane, Mary, and Sarah, by his Will devises D. to Jane and her Heirs for ever, provided that she marry my Nephew Theophilus Thomas at or before she attain the Age of 21 Years, and this Estate was of the Value of 200l. per Annum or more, and if she refuse to marry my said Nephew Theophilus, or be married to any other before she attain the Age of 21, then he devises D. to his second Daughter Mary, and to her Heirs, and he devises S. to Mary and her Heirs with the like Limitations, and V. to Sarah and her Heirs; and then he said, Provided, and my Will is, that if neither of my said Daughters shall be married to my said Nephew before their respective Ages of
Devise.

n' 21, then I devise my said Estates to D. and S. to my Wife and five other Trustees, and they to sell and dispose of the same, and the Monies raised by such Sale to distribute among his said Daughters as they shall think them deserving; and it is further found by the Jury, that Theophrasus died being an Infant of 12 Years of Age, Jane the eldest Daughter being then 14 Years of Age, but that Theophrasus never demanded her Consent, or that the ever relented to give it. The Clause that says that it Jane or Mary do not marry Theophrasus before their Age of 21, that then the Trustees may sell, does not give an Interest to the Trustees till their Age of 21. Skinn. 301. Mich. 3 W. & M. in B. R. and 320. Trim. 4 W. & M. in B. R. Thomas and Howell.

9. A. devised that his Executors should sell Lands, and with the Money and Surplus of his Personal Estate pay an Annuity for 'J. S. for Life, out of which he should maintain her Children, and gave 301. to each Child, to be raised out of the said Annuity and his Personal Estate. J. S. died within three Months after the Testament. The Executors renounced. The Administrators of J. S. shall compel a Sale, and the Money arising thereof be paying the Children's Legacies. 2 Wms's Rep. 308. Mich. 1725. Yates v. Compton.

(S. e) Sale directed or compelled by Equity, None being appointed to Sell.

1. Where a Man declares by his Will that his Feoffees shall alien his Land for Payment of his Debts and dies, now the Creditors shall compel the Feoffees to alien; Per Fineux, which was agreed by Reed and Tremaile. Br. Feoffments al Utés, pl. 12. cites 14 H. 7. 33. and 15 H. 7. 11.

2. And if the Will be that a Stranger shall alien to J. S. now J. S. shall compel the Stranger by Subpœna to alien to him, and the Feoffees cannot alien. Br. Feoffments al Utés, pl. 12. cites 14 H. 7. 33. and 15 H. 7. 11. per Reed and Tremaile.

3. But if the Will be that the Feoffees shall alien the Lands for Distribution &c. now none could compel them to make Alienation; Per Reed and Tremaile, which was agreed. Br. Feoffments al Utés, pl. 12. cites 14 H. 7. 33. and 15 H. 7. 11.

4. Lands was devised to be sold, and the Money thereof coming he devised to Children, but the Lands could not be sold, because there was none appointed by the Will to sell the same, yet ordered to be sold. Toth. 116. cites 39 Eliz. Hire v. Ward.

5. By Keeling Ch. J. If Lands were devised to Executors to sell it is Aliens in them if they sell, and if they do not sell, they are compellable in Chancery; so by Twifden of the Here, if there be no other Aliens. 2 Keb. 524 Hill. 19 & 20 Car. 2. B. R. in Case of Martin v. Holmes.

6. The Words of the Will were these; My Will and Mind is, and I do hereby authorize, that my Executors hereafter named shall sell my Lands, and Woods thereupon growing, to any Person or Person or Persons, to and their Heirs, for the best Value, and with the Monies thereby raised pay all my Just Debts. 16 Feb. 1653. the Lords Commissioners affliet with Judges (the Executors being dead) upon View of Precedents
cedents decreed the Heirs to sell. Cited Chan. Cases 183. as the Cafe of Ashby v. Doyl.

7. Devise that his Executors should receive the Rents, Issues, and Profits of his Real and Personal Estate, and after Payment of his Debts to raise Portions, and then devises all his Lands, after Payment, to several Persons at future Times. The Matter of the Rolls declared, that if the Rent and Profits are not sufficient to pay the Debts in a reasonable Time, he would decree a Sale, and that the Sales should be out of all the Devisee's Lands. 2 Vern. 26. pl. 17. Trin. 1687. Berry v. Askham.

8. In a Devise of Lands to pay Debts, if the Creditors bring a Bill to compell a Sale, the Heir is generally to be made a Party. Secus in Case of a Trust created by Deeds to pay Debt. 3 Wms's Rep. 92. Hill. 1730. Harris v. Ingledeed.

(T. e) Waived or Disagreed to.

1. If Cofty que Use had will'd that his Feoffees should make Estate to A. for Life, Remainder to B. in Fee. In this Case, if A. refuse, yet the Feoffees were compellable to make Estate to some other for the Life of A. the Remainder in Fee to B. and this immediately; and if it be of Land devizable Remainder-man may enter in the Life of the Refuse. D. 310. cites Trin. 37 H. 6.

2. Note; Per Bromley Chr. J. and others, where a Man devises his Land to a Stranger for Life, the Remainder to his Son in Fee, and dies, the Son may waive the Devise and claim by Descent, and yet be shall not avoid the Term, no more than where a Man leaves for Years and dies, the Lease is good, and yet the dying Leid is good also to toll the Entry; For it is not like to the Case where the Father devises to the Son in Tail, the Remainder to a Stranger in Fee; there the Heir does not claim in Fee for the Loss of the Remainder in Fee. Br. Devise, pl 41. cites 2 M. 1.

3. A. devised his Land to M. his Wife, till P. his Daughter should Le. 156. be Nineteen then to P. in Tail Remainder over in Fee, and devised S. C. further that P. should alter her being being Nineteen pay M. 12l per Annum in Recompence of her Devise, and if P. failed of Payment that M. should have the Land for her Life. M. before P. was Nineteen brought Writ of Devise and recover'd a third Part; M. shall not have the 12l. per Annum, after P. is Nineteen; for it is against the Intention of the Will that he should have both and the Acceptance of the one is a Waiver of the other; Adjudged and affirmed in Error. Cro. E. 128. pl. 3. Hill. 31 Eliz. B. R. Gosling v. Warburton and Cripse.

(U. e) Waived.
(U. c) Waived.

Where, if not waved, it must be taken as the Will gives it.

**Decision.**

1. **Seised of Lands in Fee-Simple and Fee-Tail,** and having two Daughters B. and C. devises the Lands in Fee-Simple to B. and the Lands in Tail to C. If B. will claim Part of the intailed Lands she must quit the Fee Simple Lands. For the mutt acquiesce in the Will, or renounce any Benefit by it. And per Ld. Cowper, in such a Disposition it is upon an implied Condition, that each Party acquiesce and relieve the other, especially where the Teftator had plainly the Distribution of his whole Estate under his Consideration, as in the principal Case. 2 Vern. 581. Hill. 1706. Noys v. Morland.

2. A by Marriage Articles agrees to leave his Wife 800l. &c. but notwithstanding that, or any Thing in the Articles she should not be declared of any Thing which A. should give her by Will &c. He by Will gave her 1000l. Per Cowper Ch. the Will imports a Dispossession of the whole Estate, and she must renounce the Articles or the Will; she cannot take by both. And if she will take by the Will, she must suffer the Will to be performed throughout. 2 Vern. 555. Pach. 1706. Herne v. Herne.

3. So where the Eldest Son was intitled by the Marriage Articles to an equal Share of one Third of his Father's Personal Estate, and the Father left 7000l. by the Will, he must renounce either the Will, or the Articles and cannot take the Benefit of both; and the Will, if he takes by that, must be looked upon as a Satisfaction of what he might claim by the Articles. Ibid. 556. S. C.

4. The Wife of a Freeman of London must content herself to take either by her Husband's Will, or else by the Custom, but must not claim the Personal Estate by both, unless it be so expressly given by the Will. But her claiming her Customary Part will not bar her claiming Freehold Estate devised to her by the Will. Ch. Prec. 351. Mich. 1712. Kitchon v. Kitchon.

5. By Marriage Articles 1400l. was to be laid out in Land and settle on the Wife for Life &c. The Husband died without Issue before any Purchase, but made her Executrix and left her more than 1400l. Personal Estate. Decreed per Harcourt and affirmed per Cowper C. that the

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**Cham. Prec.** 263, pl. 216. S. C. but S. P. does not appear. — Gilb. E. Rep. 2. S. C. & S. P. accord as S. C. cited by Ld. C. Talbot and said, that when a Man takes upon him to devise what he had no Power to do upon a Supposition, that his Will be acquiesced under, this Court compels the Devisee, if he will take Advantage of the Will to take entirely, but not partially under it as was done in the Case of Rogers v. Morland, there being a Treat Condition annexed to all Devises of this Nature that the Devisee do not disturb the Disposition which the Testor hath made; And that is, that the Cales that have been decreed upon the Custum of London. Cases in Equity in Ld. Talbot's Time 132, 183. Hill. 1735. in Case of Streitheld v Streitheld.
may take by the Articles, if she infant upon it, but if she takes by the Will it must be deemed a Satisfaction of the Articles. Ch. Prec. 400. Pacli. 1715. Linguen v. Souray.

6. A. the Ancestor by Articles previous to his Marriage in 1677, agreed to settle certain Lands to the Use of himself and M. his intended Wife for Life, Remainder to the Heirs of the Body of A on M. to be begotten, Remainder over; A. made a Settlement in 1698. but not pursuant to the Articles, and had B. a Son and L. and M. two Daughters. A. in 1716. upon the Marriage of B. settles other Lands, in Consideration of B's Marriage, in the usual Manner; and in 1723. levies a Fine of the Lands in the Deed of 1698. to the Use of himself in Fee, and in 1725. makes his Will and devises Part of those Lands to L. and M. his two Daughters, and all the rest of his Real Estate to Trustees to educate the Grandson for Life, with Remainders to first &c. Son in Tail, Remainder to Daughters &c. and with Direction out of the Profits to educate the Grandson, and to place out the rest at Interest, to be paid to the Grandson at Twenty-one Years of Age; and if he do not attain that Age, to be paid to L. and M. his said Daughters, their Executors &c. Ld. C. Talbot held, that though the Grandson is not to be bound by the Deed, which did not pursue the Articles, yet he decreed him to make his Election in six Months after he comes of Age, either to stand to the Will or the Articles, and if he chuses to take the Lands which ought to have been settled, the Daughters (his Aunts) shall be reprised out of the Lands devised to him, which shall be conveyed to them in Fee. Cafes in Equ. in Ld. Talbot's Time 176. Hill. 1735. Streatham v. Streatham.

(W. c) Qualified or correct and made good.

1. A Devise void in Law by Reacon of a Mis-recital of a Grant, and by Reacon of an Attornment, yet was held good in Equity. Toth. 143. cites 38 Eliz. Bacon v. Bull.

2. Money devise by the Plaintiff's Father to the Plaintiff's out of certain Lands which were to be sold by the Defendant, the Lands were intailed and in the Deed there was a Provise, that it the Heir went about to sell the same, it should be void, being against the Statute of 32 H. 8. It was ordered to be sold. Toth. 184. cites 38 Eliz. Thyn v. Kinnsell.

3. A. makes his Niece Executrix, and after his Wife is Pricement En- 

4. A Legacy was devise to A. of 2000 l. to be made up of Debts due to Teflato, and a Schedule whereof was annexed to the Will, but those Debts were deficient by 300 l. yet Affets being confessed the whole 2000 l. was decreed. Fin. R. 152. Mich. 26 Car. 2. Pettward v. Pettward.

5. Lands devise to a Daughter in Sicknes, Teftator recover and 2 Vern

Car. 2. Vern. 216. and for the Son was relievable even by the Opinion of the Judges.

A being a Widow and having a Son and several Children, married M. who had B. a Daughter. A. made his Will and devised 1000 l. to B. his Wife's Daughter and to the Child En Eltz for
Devife.

Chap. Prec. 21 S. C.
but not fully
S. P.
2 Vent. 563.
Sir Robert
Reeve.
Cafe. S. C.
and S. P.

6. A. has four Daughters, E. F. G. and H. gives them Portions (nam- ing them) and appointed his Real Estate to be divided and added to his Personal Estate; A. has afterwards another Daughter named J. who is not provided for by the said Will. This Daughter J. shall have a Share of the Real Estate appointed to be divided, but not of the particular Portions. 2 Chan. Rep. 210. 32 Car. 2. Coles v. Hancock.

7. A. charges Lands with a Portion for a Daughter by a first Ven- ter, and then marries and fells Part of these Lands to the Jointure on a second Wife, to whom no Notice of the Charge is given. A. misconceiving and thinking the Portion would take Place of the Jointure, by Will gives other Lands in Lieu thereof. The Wife in Combination with the Heir refused to accept the Devife. North K. decreed the Daugh- ter to hold such Part of the Lands devised to the Wife as should be of equal Value of the Lands comprised in the Jointure till her Portion was raised. Vern. 219. Hill 168. Reeve v. Reeve.

8. A. by Will gives several Legacies and makes two strangers Ex- ecutors; he lived many Years after, improved his Estate much, and has several Children born since the Will, and dies. The Court would not make the Executors Trustees for the Children as to the Surplus of the Estate, but disinfused the Bill; Per Lds Commissioners. 2 Vern. 194. Trin. 1639. Hill v. Brewer.

9. One deviles to two of his Sisters 400l. a-piece, and to his third Sister what his Executors should think fit. The Court decreed the third Sister should have 400l. also, and be made equal to her two other Sisters, if the Estate would hold out. 2 Vern. 153. Trin. 1690. Warcham v. Brown.

10. A. made his Wife and J. S. Executors, his Wife being old and un- able to get in the Estate, and made his Wife Reiduary Legatee; the Wife died in the Life of A. who left four Children; They brought a Bill against the surviving Executor, and their Bill was disinfused. Cited per Hutchins Commissioner (but names neither time or Perfon.) 2 Vern. 149. Trin. 1690. in Cafe. of Cordell v. Noden.

11. A. devifes to T. and his Heirs, upon Trufk that he should convey it to such of the Relations of the Testator as he should think fit, and most reputable for his Family. A. dies without Issue, and the Heir at Law, who was the Testator's Brother, prefers a Bill against the Defendant to have him convey the Estate to him. It was in Fout against the Defendant's Part, that the Testator before the making of his Will did several times de- clare, that the Plaintiff was an ill husband, and would spend his Estate if he should leave it to him, and several other Expressions showing the Dislike of the Testator to the Plaintiff. But per Cur. there being nothing in Proof against the Plaintiff of any Misbehaviour since the Decease of the Testator, this Court will judge it most reputable for the Family, that the Heir at Law should have it; and for the Difcourtes which were before the making of the Will, those were all at an End by making the Will; and notwithstanding all these Difcourtes, it cannot be
be denied but if the Trustee would give it to him, he was not disabled to take it. 2 Freem. Rep. 198. pl. 273. Trin. 1694. Clarke v. Turner.

12. An Estate was devised to be disposed by two Trustees to such of his Relations as they should think fit, and they disagreed, and thereupon this Court decreed it to be conveyed to the Heir at Law. 2 Freem. Rep. 199. in pl. 273. Trin. 1694. cited as the Case of Mofely v. Mofely.

13. A being single made his Will, and devised all his Personal Estate to J. S. Afterwards A. married, and had several Children, and died without other Will or Disposition, and now Coram Delegatis, of whom Treby ch. J. was one, it was ruled that there being such a Alteration made. Per Commission of O. So. Trin. 1689. in * Presumptive Evidence to believe a Revocation, and that the Testator which Case continued not of the same Mind. 2 Salk. 592. pl. 2. Mich. 8 W. 3. the Executors were no Relations.

B. R. Lugg v. Lugg.

In Overbury's Case they were Relations — A. by Contrivance of B. his Nephew made a Will and B. Executor, and said nothing in his Will of his Personal Estate, which by this Means the Executor claimed, though the Testator left a Son; but it appearing by several Matters that A. intended it for his Son &c. Decreed for the Son (an Infant) and Defendant to be examined on Interrogatories, and to be restrained from confuding Judgments &c. to Creditors of Testator, and the Cobbly of the Infant taken from him. Fm R. 271. Pacht. 50 Car. 2. Curdill v. Corfellis.

* But that is only a Presumptive Revocation, and therefore if by any Expression or other Means it had appeared that the Intent of it was that it should continue in Force, the Marriage had not been a Revocation, and the Sentence given in the Spiritual Court was affirmed. 12 Mod. 256. Mich. 10 W. 5. Lugg v. Lugg.

14. A. was sei'd of Black-Acre in Fee, and White-Acre in Tail, and having two Sons, devised the Tail-Acre to his Youngest Son, and the Fee-Acre to his Eldest Son. The Eldest enter'd upon the Tail-Acre; whereupon the Youngest brought his Bill, either to enjoy the Tail-Acre, or to have an Equivalent out of the Fee-Acre; and per Cowper C. this Devise being defined as a Provision for the Youngest Son, the Devise of Black-Acre to the Eldest Son must be understood to be with a tacit Condition to suffer the Youngest Son to enjoy quietly, or else that the Youngest Son should have an Equivalent out of the Fee-Acre, and de-creted accordingly. G. Equ. R. 15. Hill. 7 Ann. Anon.


15. A. devised Lands to his Eldest Son, and other Lands to his Youngest Son in Tail, and if both his said Sons die with (instead of without) Issue, then the Whole to Burr and his Heirs. Both the Sons died without Issue. The Jury (taking the Will in such Sente as was consistent with Reazon and good Sente) found for Burr the Plaintiff. 8 Mod. 59. Mich. 8 Geo. 1. Burr v. Davall.

16. A Man devised to the now Defendant by the Name of his Youngest Coram Lord Son John and his Heirs, all his Estates in W. and in Case his Son should not live to attain the Age of 21, having no Issue lawfully begotten, he devised the Estates to the Plaintiff Elizabeth his Eldest Daughter and the Heirs Males of her Body, with like limitations over to his other Daughters; and in Case his Son should attain the Age of 21 Years, then he devised the Estates to be sold, and the Money arising from such Sale he devised amongst all his Daughters as an Augmentation to their Fortunes. There was a great deal of Timber upon the Estate, which John the Son was cutting down, and now they moved for an Injunction to stay him.

Sollicitor-General for the Injunction said, there were many Cases where this Court would grant such Injunctions in Favour of Persons not intituled to an Action at Law at, as where there is Tenant for Life, Remainder for Life, Reversion in Fee, so for an Infant in Venere
Devise.

fa Mere, and cited Freeman's Reports Trin. Term 1680. And Lord Chancellor was of Opinion, that he ought to grant an Injunction; he said he thought he was to be considered as a Trustee of the Inheritance for the Benefit of the Daughters, and that it was the Intention of the Teitator, he thought, to give him the beneficial Interest, but that it would be strange if he was to take away under such a Devise the greater Part perhaps of the Estate.

He said, though there had been no Case determined where this Court had granted an Injunction to stay Wally for an Infant in Ventre fa Mere, yet he should not scruple to do it if such a Case should happen, and he should be inclined to restrain an Heir at Law in Case of an Executory Devise.

Injunction granted, and made perpetual.

Note, The particular Reason upon which he founded his Judgment he declared to be, because he looked upon the Devisee John as a Trustee by the Intention of the Teitator.

(X. e) Money devized to be invested in Land, and Vice Versa. How construed in Equity.

1. I give Martha my Youngest Daughter the Sum of 400l. to be paid unto her by my Executors within one Year next after my Decease. But I will and my Desire is, that Cornelius Collet (the Husband of Martha) upon the Payment of the said 400l. shall give such Security as my Executors shall approve of, that the said 400l. shall be laid out within 18 Months next after my Decease, and purchase an Estate of that Value to be settled and adjusted upon her the said Martha and the Heirs of her Body lawfully begotten. Martha died within four Months after the Teitator, leaving Ifiae a Daughter, who died within four Months after her Mother. The 400l. was decreed to the Husband, who had taken out Letters of Administration to his Wife and Daughter. 2 Vent. 355. Trin. 34 Car. 2. Collot v. Collet.

2. A. had two Daughters B. and C. A. made her Will, and devised 200l. to her Daughters to be laid out (by Trustees in the Will named) in Lands and settled to the Use of C. and her Heirs of her Body, and if the said Without Ilfiae, then to the Use of the Children of B. Before the 200l. laid out C. died without Ilfiae; B. having Ilfiae D. and E. The Trustees, purchased Land, and settled it on D. and E. and D. died, leaving F. a Daughter. Decreed the Whole to survive to E. If the Money had not been actually laid out in a Purchase F. would be intitled to a Moiety, for then there would have been no Survivorship. Carth. 15. Mich. 3 Jac. 2. in Canc. Anon.

3. Where Money is devised to be laid out in Land, and settled to the Use of A. in Tail, Remainder to B. Chancery ought not to decree the Money to be paid to A. though he will have Power over the Land when purchased and settled by suffering a Recovery, but the Trust ought to have been strictly pursued, and the Money invested in Land, and settled according to the Will, and then the Remainder-Man has a Contingency of A's dying before he can suffer a Recovery; per Cowper K. 2 Vern. 551. pl. 501. Pach. 1706. Legatt v. Shewell & Ux. and Weller.

Wm's Rep 90, 91. Pach. 1726. S.C. But where the Lands purchased are to be settled on A and his Heirs he may pray to have the Money, and that it be not laid out in a Purchase, because none have an Interest in it but himself. But if he dies before a Purchase made, the Executor shall have no Benefit of the Money, but the Heirs. Per Lord Macclesfield. Ch. Prac. 548. Mich. 1720. Scudamour v. Scudamour.

4. 800l.
(Y. e) Nuncupative Wills and Codicils.

1. A Codicil is defined in the Civil Law, to be an Act which contains Dispositions in Prospect of Death, and made without the Intituation of an Executor. And whether a Codicil is made at the same Time, or before or after the Will, or whether the one mentions the other or not, yet the Codicil is considered as part of the Will. Fin. Rep. 460. Mich. 32 Car. 2. Rogers v. Bamfield, & al'. And in Marg. cites Donat 2 Vol. 140.

2. A Codicil is part of the Will, and the most material Part of it, Comyn's because last made. The very Meaning of the Name Codicil is a little Rep. 381. pl. Will; and this was determined in the House of Lords, the Judges too. S. C. decreed, and Opinion, then attending, being asked on an Appeal from Lord Macclesfield's Decree, on this Question, If this Codicil be in a separate Writing, and not annexed to the Will, but only said to be annexed, whether it was a Re-publication of the Will? And they held, it was, and that the Codicils and Will made but one compleat Will, and the Decree was affirmed. Arg. Fortescue's Rep. 192, 193. Trin. 8 and 9 Geo. 2. C. B. in Cafe of Acherley v. Vernon.

3. A Testament Nuncupative is, when as the Testator makes his Will by Words before Witnesses. But more properly it is said, a Testament Nuncupative, when the Testator lies lingering for Tear of sudden Death, dares not to stay the writing of his Testament; and therefore he prays his Curate, and others his Neighbours, to bear Witnesses of his Last Will, and declares by Word what his Last Will is. And such Will is as strong as a Testament or Will in Writing, and sealed with the Seal of the Testator, if not that it be in Special Cate &c. Perm. 576.

4. The Testator being feised in Fee, devised the Lands to his Wife in Recompence of her Dower, to hold so long as she should live Sole, and after the Determination of that Estate, then to his Heirs, paying to his Wife 26l. per Ann. during her Life, and charged other Lands, of which he was feised in Fee, to pay Annuities to younger Children, and 1000l. Portion to his Daughter; Afterwards by a Codicil be deviced all his Lands to Trustees, and their Heirs, to the Use of the Eldest Son and his Heirs, for so long Time as be or they should honor the Wife and Children quietly to enjoy the Annuities and Legacies; and if he should interrupt them, then he deviced all his Fee Simple Lands to his Wite, and to his two younger Sons and their Heirs. On a Referance to the two Ch. Justices Pepham and Anderfon, they held clearly, that this Devise to his Eldest Son by this Codicil was good, and that he had it not by Divide, but by Purchase, and they thought that the first Part of his Will was corrected by the Codicil.
Devise.

Codicil. And deed accordingly. Moor 726 Hill. 38 Eliz. in the Court of Wards. Digby's Cafe.

5. A was bound in a Bond of 800l. to B. and B. made his Will, and C. Executor thereof; and after declared his further Will that A. should have the Bond, and died. C. proved the Will, but omitted this Codicil; and to compel him to prove it A. sued C. before the Commissioners for Probate of Wills &c. Pending which the Bond was sued at Law; A. having filed this Bill for Relief, it was resolved that there should be no Relief for the Legacy before the Codicil proved, and that then he should be relieved against the Bond, by reason of the Legacy; but the Court supported the Injunction till the Hearing before the Commissioners. Hard. 96 Patch. 1657. in the Exchequer. Took v. Fitz- John.

6. Nuncupative Will is to be proved only in the Spiritual Court, and before Probate it is not pleadable in any Court against an Administrator. Chan. Cafes 192. Hill. 22 & 23 Car. 2 Verhorn v. Brewin.

7. I bequeath to K. N. my God-Daughter a Jewel set with Diamonds, weighing for all Happiness, and 500l. to my God-Daughter, Mrs. K. S. I give and bequeath a Diamond Bedkin, and an Enamed Border; and afterwards by a Codicil the Testatrix bequeathed to her God-Daughter K. N. 500l. in Silver, and to her God-Daughter K. S. 100l. more than she had given in her Will. The Court decreed the 500l. in the Will as well as the 500l. in the Codicil to Mrs. K. N. 2 Ch. R. 110. 27 Car. 2. Newport v. Kinaton.

9 s. 20. After six Months passed after speaking the pretended Testamentary Words, no Testimony shall be received of such Nuncupative Will, unless the said Testimony were committed to Writing within six Days after making the said Will.

10. s. 21. No Letters Testamentary or Probate of any Nuncupative Will shall pass the Seal of any Court till 14 Days after the Testator's Death. nor shall any Nuncupative Will be proved, unless Proofs have issued to call in the Widow or next of Kindred to the Deceased, to contest it if they will.

11. A. makes his Will in Writing and B. Executor, and give some Legacies, the residuum to B. B. dies in Life of A. viz. Sept. 5, 1679. Testator knowing of the Death of Executor, makes a Nuncupative Codicil on the 6th Sept. 1679. and gives to C. all that he had given to B. and dies 11th Sept. 1679. This is a good Disposition. The Nuncupative Will being quash a new Will for the Residuum, (which Devise became totally void by Death of B.) and makes no alteration of the Will as to so much. There being now no such Will, its Operation being determined. Raym. 334. Mich. 31 Car. 2. Stonywell's Cafe.

12. If Part of a Will in Writing be made by Force or Fraud, such Part may be disposed of by a Nuncupative Will, which will be an Original Will for so much. For such Part obtained is void, and no Part of the Will, (to that it is as a Part of Estate undispersed of) Per Commissioners Delegates. Raym. 334, 335. Mich. 31 Car. 2. in Stonywell's Cafe.

13. If A. poissed of an Estate of 1000l. and by Will in Writing gives 500l. of it to B. A. may give the Residue by a Nuncupative Will,
Devise.

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Will, so as he do not alter the Executor. Raym. 334. Mich. 31 Car. 2. in Stonywell's Cafe. By Commissioners Delegates.

14. A. makes his Brother Executor, and devised to his Executor all his Real and Personal Estate, and afterwards A. marries, and by a Codicil makes his Wife Executrix; it was urged that the Brother does not take as Executor only, but by express Words of Gift in the Will. But by Finch C. the Wife shall have the Personal Estate, and not the Brother, for it was intended him only as Executor. Vern. 23. pl. 16. Mich. 1691. Wilkinson v.

15. The Testator devised all his Real Estate to his Executors and their Heirs, in Trust that they out of the Reets and Profits &c. should pay his Debts and Legacies, and gave 1800 l. Legacy to one Winter, the like Sum to one Bamfield, and 2500 l. to one Warre his Sister, the Lady Drax, and leaving 7500 l. in his Closet, &c. by a Codicil declared his Mind to be, that all the Money in his Closet should be disposed by Ann Rogers the Plaintiff, amongst such poor People, and in such Manner as he had directed; and gave the Keys of his Closet where the Money was to the said Ann, and soon after died. The Executors took the Money out of the Closet, and paid the greatest Part of the Money to the Legatees; And the Legatees having received their several Legacies out of the Money in the Closet, it was decreed they should re-pay it, and that the same should be applied according to the Direction and Intention in the Codicil, the Plaintiff giving Security for that Purpose. Fin. Chan. Rep. 460. Mich. 32 Car. 2. Rogers v. Bamfield.

16. A Citizen and Freeman of London feis'd of Lands &c. and a Personal Estate by Will nuncupative, on his Death-Bed, declar'd, viz. I heard that J. R. (who was Heir at Law) is inquiring after my Death, and therefore I am resolv'd to leave him nothing but what my Father gave him by his Will; I give all my Estate to my Wife. Pollexfen said, that a Nuncupative Will being enrolled by Virtue of the Custom of London, is all one as a written Will; The Court inclined accordingly. And the Reporter says, that in the Case of Carter v. Donner, Pech. 4 W. & M. Northey affirm'd this Case to be adjudg'd, that all paffed to the Wife in Fee, and that it was so enjoy'd accordingly, Ex una certa Scientia. Skinn. 193. Trin. 36 Car. 2. C. B. Anon.

17. A seized in Fee of Lands limits a Term for 100 Years to Trustees, for such Uses as be by Deed or Will should appoint, and for want of such Appointment, to attend the Inheritance; A. being a Battard made a Nuncupative Will in these Words, viz. I give All, All to J. S. and then died without Issue; Ld. Chancellor agreed, that before the Statute of Frauds &c. a Man might dispose of a Trust by Parol, and that the Words All, All, are sufficient to pass a Term for Years; but in this Case the Term being expressly settled by Deed for such Uses as he should appoint, and for want of such Appointment, to attend the Inheritance, this refrains him from making any Parol Disposition, and the Words All, All, must be intended of All he could dispose by Parol. Vern. 340. pl. 333. Mich. 1685. Thruxton v. Attorney-General.

18. A. being very ill, desired B. to make her Will, who wrote down only Names and initial Letters to this Effect, viz. To the Wife 200 l. to the Daughter 100 l. to Reb. 50 l. to Self 10 l. and to several other Persons in like Manner, to above 400 l. which being more than her Estate B. made an Alteration in a second Column, by subtracting Part of the Sums from some of the Legatees, as set down in the second Column, and then told A. the Sense of the proposed Devises; there were two Persons in the Room that did not hear any Thing that was said between A. and B. but only heard the Testatrix at last pronounce, 1837.
that all was well; B. went to a Scrivener to have the Devises drawn out at Length and in Form, and before the returned the Testatrix died; the Judge below pronounced for this Will, but upon an Appeal to the Delegates it was reversed; and in this Case it was agreed, that if the Will had been written in Words at Length, so as they had carried a Sense and Meaning in themselves, it had been a good Will; for that there was one Witness that wrote it, and two that heard the Testatrix pronounce that it was well, which would have been intended to have amounted to a second Witness, in regard it appeared on all Hands by several Witnesses, that the Testatrix did then seriously disapprove herself to the making her Will; And distinguishing this Case from the Case of one PEPPER, where a Person disapproved herself to make her Will, and dictated it to a Person, who wrote it down; and another, not called in as a Witness lay behind the Hanging out of Curiosity, and yet such Will was allowed to be good, being proved by these two Witnesses. But because this Will was not Substantive, but was to take its Sense from the Interpretation of the Witnesses, and so there would be Inuendo upon Inuendo, which made it purely a Nuncupative Will; and such not being attested by the Number of Witnesses appointed by the Statue of Frauds and Perjuries, the Will and Legacies were void. Abr. Equ. Cafes 404, 26 Feb. 1710. Davis v. Glocester.

19. Dr. Shalmer by Will in Writing gave 200l. to the Parish of St. Clement's Danes, and after Prew the Reader coming to pray with him, his Wife put him in Mind to give 200l. more towards the Charges of Building their Church, at which tho' Dr. Shalmer was at first disturb'd, yet after said he would give the other 200l. and bid Prew take Notice of it, and the next Day bid Prew remember what he had said to him the Day before, and dies that Day. Within three or four Days after the Doctor's Wife puts down a Memorandum in Writing of the said last Devey, and so did her Maid; Prew died about a Month after, and amongst his Papers was found a Memorandum of his own Writing, dated three Weeks after the Doctor's Death of what the Doctor said to him about the 200l. and purporting that he had put it in Writing the same Day it was spoken, but that Writing which was mentioned to be made the same Day it was spoken did not appear, and these three Memorandum did not expressly agree. About a Year after, on Application by the Parish to the Commissioners of Charitable Uses, and producing these Memorandums, and Proof by Mrs. Shalmer and her Maid, they decreed the 200l. but on Exception taken by the Executors the Decree was discharged of this 200l. and my Ld. Chancellor held it not good, because it was not proved by the Oath of three Witnesses; for though Mrs. Shalmer and her Maid had made Proof, yet Prew was dead, and the Statue in that Branch requires not only three to be present, but that the Proof shall be by the Oath of three Witnesses. Abr. Equ. Cafes 404. Trim. 1704. Philips v. the Parish of St. Clement's Danes.

20. Feme before Marriage gave 350l. out of her Maintenance Money, which was in her Brother's Hands. The Brother gave a Bond for it to the Baron, but the Steward proving that the Baron said his Wife should have the 350l. and that it should be placed out for her Benefit; and having also a little before his Death said, he gave it to his Wife, and three Perfons present wrote it down and attested it as Witnesses, though not by Baron's Direction or with his Knowledge, and though the Baron after made two Codicils, and in one of them devised several Things to the Wife, but took no Notice of the 350l. or the Bond for it, yet Cowper C. decreed it for the Wife not as a Gift from the Baron, but as declared and intended originally for her separate Use. 2 Vern. 748. Hill. 1716. Earl of Shaftesbury v. Councils of Shaltsbury.

For more of Devise in General, See Executor, and other proper Titles.
Dilapidations.

(A) Cases relating to Dilapidations.

1. If a Bishop, Archdeacon, Parson, or the like, abates all the Wood upon the Land, he shall be Dilapidator; Per Thirlw, but per Thirning there is no Remedy for this by the Common Law. Br. Depofition, pl. 1. cites 2 H. 4. 3.

2. 13 El. cap. 10. If any Ecclesiastical Persons, who are bound to repair the Buildings whereof they are seized in Right of their Place or Function suffer them to fall into Decay for want of Repair, and make fraudulent Gifts of their Personal Estate with Purpose to hinder their Successors from recovering Dilapidations against their Executors or Administrators, in such Cases the Successors shall have like Remedy in the Ecclesiastical Court against the Grantor of such Personal Estate as he might have against the Executor or Administrator of the Predecessor.

3. 14 El. cap. 11. All Monies recovered for Dilapidations shall within two Years be employed upon the Buildings for which they were paid, in Pain to perfect to the Queen Ecc. double so much as shall not be so employed.


6. A Bishop is only to sell Timber for Building, for Fuel, and other necessary Occasions. The Woods are called the Dower of the Church; Per Coke Ch. J. 2 Bullt. 279. Mich. 12 Jac. Anon.

7. Coke Ch. J. said he had seen a Record 25 E. 1, where Complaint was made in Parliament of the Bishop of Durham for cutting down Timber Trees for his Coal Mines; and there it was agreed, that in such a Case a Prohibition did lye, and a Prohibition was granted in B. R. 2 Bullt. 279. Mich. 12 Jac. Anon.

8. Vicar had cut several great Timber Trees and did not repair the Church with them, and on Suggestion of this to the Court, and that S. C. he would cut more Trees in like manner, a Prohibition was granted.
Dilapidations.


9. Any Person may sue out a Prohibition against a Parson that is cutting down Trees and not repairing the Church with them. Roll R. 335. pl. 44. Hill. 13 Jac. Knowle v. Harvey.


11. In Cafe of Dilapidations the Whole ought not to be sequestr'd, but to leave a Proportion to the Parson for his Livelihood. 2 Vent. 35 Pach. 32 Car. 2. Per Cur. in Cafe of Walwin v. Auberry.

12. Dr. Sands, a Relidiciary Prebendary of the Church of Wells, brought a Suit in the Spiritual Court for Dilapidations against the Executors of Dr. Pierce his Predecessor; and they on the other Side came and shewed, that in that Church there are eight Relidiciary Prebendaries, to which, to encourage them to Relidience, there are eight Houfes belonging, that to each Prebend there is an Houfe belonging, but not any Houfe in certain, the Bishop having the Privilege of appointing what Houfe he thinks fit to each Prebendary, but he must appoint one. They hence inferred that this Houfe goes not in Succession, nor is it Part of the Corps of the Prebend, for that he is Prebendary, and hath one Houfe allotted him, and so was Dr. Sands; and afterwards, upon the Death of another Prebendary, another Houfe. But Jones J. answered, It is true, here are eight Houfes, belonging to eight Relidiciary Prebendaries, whereof each Prebendary de ftre is to have one; that no one Houfe is aftertained to any particular Prebend, or is Parcel of any particular Prebend, but ought to be affigned to some particular Prebend, and when the Bifhop doth so affign by Virtue of his Power and not by Virtue of any Estate he had in him, then it is Part of the Prebend, and shall be liable to a Suit for Dilapidations; wherefore they ought to be no Prohibition. Skin. 121. pl. 18. Trin. 35 Car. 2. B. R. Dr. Sands Cafe.

13. Dr. W. Bifhop of L. and C. was suspended by Archbishop San-croct for Dilapidations, and the Profits of the Bifhoprick were sequestr'd, and the Episcopal Palace built out of them. Cited 12 Mod. 237. as the Cafe of Dr. Wood Bifhop of Litchfield and Coventry, 1687.

14. In a General Pardon Dilapidations were excepted, unless Suit be commenced and depending before such a Day. Upon a Suit commenced after the Day, the whole Court conceived that the Parliament never intended to take away the Successor's Remedy for Dilapidations; But they would intend this Exception of such Suits, as might be in the Eccleialiical Court ex Offico, against the Dilapidator himself to punish it as a Crime against the Eccleialiical Law, and to pardon it unless there were Procuration before the Day aforesaid. 2 Vent. 216. Mich. 2 W. & M. in C. B. Anon.

15. In Action on the Cafe for Dilapidations by Successor, the Declaration was upon the Clifford of the Realm and held good. 3 Lev. 268. Pach. 2 W. & M. in C. B. Jones v. Hill.

16. An Action on the Cafe was brought by a View Successor against his Predecessor for Dilapidations, who by taking a second Benefice with Cure &c. had lost this Vicaridge. It was objected that this Action lay not, but that the proper Remedy was in the Spiritual Court. But after long Debate the Plaintiff had Judgment, and the Cales in the Margin * were cited. Carth. 224. Pach. 4 W. & M. in B. R. Jones v. Hill.

* Godolph.
175. 249. 5
Buls. 91. 92.
175. 2 Buls.
213. 11 Rep.
49. 71. Tr.
12. H. 7.
Rot. 69.
P. 15. H.
S. C. 3 Lev. 268. lays that Pollevken Ch. J. who tried the Cause, then was, and con-t

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Dilatories.

17. A Prohibition was moved to the Ecclesiastical Court for Dilapidations, upon Suggestion that the Plaintiff in the Ecclesiastical Court had brought a Suit at Common Law, for the same Dilapidations, in which Action the Defendant pleaded Tender of 10 l. which was sufficient to repair the said Dilapidations, and the Plaintiff took Issue that the 10 l. was not sufficient, and the Verdict found it sufficient; upon which Judgment was given for the Defendant and he pleaded this Judgment in Bar, to the Suit in the Ecclesiastical Court, which they refused to receive and the Court granted a Prohibition; but afterwards, Treby J. hesitated, adjournatur to the next Term. 3 Lev. 413. Hill: 6 W. 3 C. B. Okes v. Ange.

See Tit. Prerogative (R. c) pl. 1. and the Notes there, and other Proper Titles.

(A) What Plea shall be said Dilatory.

1. A Man shall not falsify in Dilatorie; as in Outclaw, Excomunication in the Demaundant &c. nor by Entry of the Demaundant into the Land pending the Writ; nor because the Land was in Ancient Demesne &c. for these do not disprove the Title of the Demaundant; Perc Fertelce Ch. J. Br. Fauxil. de recov. pl. 15. cites 36 H. 6. 32.

2. Formation in Remainder &c. Disclaimer is not Dilatory, but rather pretermptory; for by this the Demaundant cannot enter. Br. Dilatories, pl. 13. cites 5 E. 4. 46.

3. Precipe quod reddat against Four; three confessed the Action, and the fourth pleaded Joint tenancy with two aboue here that the third any thing bad; and per Fitzh. the Demaundant shall not recover against the three till the Issue be tried; for this is several Tenancy which goes in Abatement of all the Writ, and so he shall have the Plea clearly; quod nemo dedixit; for this is not properly dilatory, as it seems. Br. Dilatories pl. 2. cites 27 H. 8. 30.

(B) Several
(B) Several Defendants. In what Cases they must agree in Dilatories.

1. Præcipe quod reddat of Land in B. against two, the one demanded the View, and the other said that there are two B's and none without Addition; Judgment of the Writ, and could not have the Plea, for they ought to agree in Dilatories, and the other has affirmed the Writ by Demand of the View. Br. Dilatories pl. 18, cites 21 E. 3. 52. and Fitzh. Brief 307.


3. And see there 223. Débit against Baron and Fene and J. S. the Fene pleaded to the Action, the Baron and J. S. shall not plead to the Writ. Ibid.

4. Affizæ against the Baron and Fene, the Baron pleaded Villenage to J. S. by which the Plaintiff took a new Writ against the Baron and Fene and J. S. and the Baron pleaded Villenage to W. P. & non allocatur; For the Plaintiff shall not be twice delayed by Villenage; For so it may be infinite. Br. Dilatories, pl. 15, cites 22 Att. 12.

5. Præcipe quod reddat against two, the one cannot plead to the Count, and the other to the Writ. Br. Dilatories pl. 16. cites 42 E. 3. 17.

6. Nor can the one pay the View if the other pleads in Bar. Ibid.

7. Nor if they take the Teneacy jointly can the one vouch another of his Part, and the other vouch another of his Part; for they ought to agree in Dilatories. Ibid.

8. But in the last Case of Voucher they may vouch severally by 12 H. 7. 1. if they shew Causes. Ibid.

9. Formedon against five as jointtenants, the one disclaimed, another took the entire Teneacy, abique hoc, that the others any Thing had, and vouched &c. The third said, that he was Tenant of the Whole, and traversed the Gift; The fourth made Default, and nothing of their Pleas was entered, but their Presence recorded, and Petit Cause against him who made Default, and Idem Dies given to those who appeared; For no issue shall be taken, till he who made Default, has lost his Answer; For it may be that he is Tenant of the Whole, and shall have his Default, and then it is no Reason to forejudge him of his Teneacy; and though he cannot take the Teneacy and save his Default, yet the Demundant shall not have Seisin of the 5th Part before the Issue taken, which is tender'd by the others; For then he shall recover the 5th Part per mie & per tour, or perhaps one of them who has pleaded to Issue may be found Tenant of the Whole. Br. Dilatories, pl. 17. cites 46 E. 3. 15.

10. In Formedon, the Tenant said, that A. and B. leased to him for Life, and prayed Aid of them and had it, the Sheriff returned the one dead, and the other did not come, by which he was awarded to answer alone, wherefore he vouched the other Prayer, and was ousted by Award; For he had one Delay by him before. Br. Dilatories, pl. 14. cites 7 H. 4. 15.

11. Where Action is brought against two, the one only may disclaim though the other will not. Br. Dilatories, pl. 13. cites 5 E. 4. 46.

12. Vide
Dilatories.

12. In Scire Facias three recover'd Damages in Affise, whereof two brought Scire Facias against two, and supposed the third who recovered to be dead, and one of the Defendants said, that he who is supposed to be dead is alive, and the other said, that the one of the two Plaintiffs is dead, and each concluded to the Writ, and therefore ill; For he cannot recover in Dilatories; Contra of Pleas in Bar, which goes in Discharge of the Action, be the Action Real or Personal. Br. Dilatores, pl. 11. cites 7 H. 7. 5.

13. In Formedon by the best Opinion, the Tenants may vouch severally, or the one, and the other shall vouch and the other plead in Bar. Per Vavilfor. Br. Dilatores, pl. 12. cites 12 H. 7. 3.

14. And by him, the one may plead in Bar, and the other may vouch or pray in Aid. Ibid.

15. But the one cannot plead to the Writ, and the other demand the View. Ibid.

16. Nor can the one pray in Aid of one, and the other of another. Ibid.

17. Formedon against two Feoffees, the one would not do otherwise than confesse the Action, or plead in Bar, and the other would vouch as Cast ye Use informed him, and it was moved whether the one may vouch, and the other plead in Bar. And per Fitzherbert J. they cannot vouch unless both vouch; and the other shall have his Warrantia Chartae. Per Brook J. it is not so; For if the one confesses or renders the Action, yet the other shall have his Voucher. But 42 E. 3. 17. & 15. and 15 H. 7. 1. is that they cannot vouch severally Nisi olenderint causam. But this does not prove but that the one may vouch and the other plead in Bar. But where Warranty is made to two, the one alone cannot derivant it, 48 E. 3. 17. the Reason seems to be inasmuch as the Voucher is in lieu of Action, and the one shall not have Action which belongs to two. Br. Dilatores, pl. 8. cites 14 H. 8. 24.

18. Precipe quod reddat against two, the one prayed the View, and the other impared, and per Fitzh. he shall have the View; Quod Natura; For it appears elsewhere that they ought to agree in Dilatories. Br. Dilatores, pl. 1. cites 25 H. 8. 2.

(C) In what Actions allowed or not.

1. In Quare Impediment a Man shall not have Age nor other Delay, for the Lapse of Time; as Protection, nor does Eftoign de Servitio Regis lie &c. Br. Dilatores, pl. 10. cites 43 Alb. 21. Per Thorp.

2. 4 & 5. Ann. cap. 16. 3. 11. Enacts that no Dilatory Plea shall be received in any Court of Record, unless the Party offering such Plea do by Affidavit prove the Truth thereof, or shew some probable Matter to the Court, to induce them to believe that the Fact is true.

For more of Dilatories in General See other Proper Titles.
Disabilities.

(A) What are, and the Effect thereof.

And Pleadings.

1. Debt upon an Obligation the Defendant pleads, that at the Time of the Obligation made he was non sane Memorie, and it was thereupon demurred, and adjudged to be no Plea; For he cannot save himself by such a Plea, and the Opinion of Fitzherbert held to be no Law. Wherefore it was adjudged for the Plaintiff. Cro. E. 398. pl. 4. Trin. 37 Eliz. B. R. Stroud v. Marthall.

2. If I am bound to enfeoff A. and before the Day I marry her, the Bond is forfeited. Brownl. 62. by Ld. Coke. Trin. 7 Jac. cites 18 E. 4. 18. 20.

3. If a Man be bound by his Bond to sell a House to J. S. and after he sells to a Stranger the same House; by this Sale, the Bond is forfeited notwithstanding that afterwards he doth re-purchase the same House again. Per tot. Cor. 1 Built. 117. Pach. 9 Jac. Anon.

4. There is a Difference where a Man is bound to deliver a Thing which is in his own Possession, or in the Possession of another, or which is not in his own Possession; As in the first Case to deliver a Horse or a Dog, for he may secure such in his Stable from Casualties; But Seats in a Church, and which were the Property of the Plaintiff himself, so that Defendant could not possibly secure them in his own House without subjefting himself to an Action if they are pull'd down, so that Defendant can't deliver them according to an Award, it is a good Plea for him that they were pull'd down without his Knowledge. Arg. Curia Advisare vult. 2 Mod. 27. Pach. 27 Car. 2. C. B. Bridges v. Bedingfield.

5. No Man can take Advantage of his own Disability; as no Man can plead that he is a Fool, or Non Compos mentis; But if a Non Compos is indicted, the Judges must acquit him Ex Officio; for the King takes Care of all such Persons. But if a Man is disabled by Judgment to bear an Office, he is excused; For Judicium redditur in Invitum. But where he can remove the Disability, as in Case of Excommunication, he shall take no Advantage of his Disability. 1 Salk. 168. Hill. 6 W. & M. in B. R. Per Holt Ch. J. and Eyre J. in Case of the King v. Larwood.

6. Matter of Disability which might have been pleaded to the Action, is not pleadable to the Sc. Fa. on Judgment. 1 Salk. 2. pl. 5. Pach. 1 Ann. B. R. Welt v. Sutton.

7. A Re-
7. A Remainder was limited in Trust for a Papift for 99 Years, Remainder to his Issue Male, who is disabled to take by the Statute 11 and 12 W. 3, §. and an after Remainder was limited to a Protestant. Two several Bills were brought in Chancery, one by the Protestant Remainder-Man, and the other by the Heir at Law, after the Death of the Donor, against the Papift to be let into Possession of the Premises. The Protestant Remainder-Man infinfed that the Limitations to the Papift being void, he was therefore to take presently. The Heir infinbed that the said Remainder-Man was not to take until the Papift should be dead without Issue; and that an Interim Estate should descend to the Heir as undisposed of by the Person that made the Settlement. See Wms's Rep. 352, 353. Trin. 1717; Vane v. Fletcher.

8. After a Lease granted, Leffor disables himself (by a Settlement by which he makes himself only Tenant for Life) to perform the Covenants in the Lease, as to grant a New Lease with certain Advantages to Leffee, yet this After-Settlement shall not prejudice Leffee, nor fore-judge him of the Benefit of any Covenant in his Life. 9 Mod. 59. Mich. 10 Geo. in Canc. Alston v. Bretland.

9. If a Testator be under a Disability at the Time of making his Will, As if made though that Disability be actually removed before his Death, yet the Will will be absolutely void, because he had no Ability at that Time. Per Holt Ch. J. Gibb. 226. in the Case of Bunker v. Coke.

of Age, or the Feme buries her Husband. 11 Mod. 123. S. C. —— But a New Publication would make it good. Ibid.

For more of Disability in General, See Alien, Condition, Enfant, Recluant, Utallow, and other Proper Titles.

Disagreement.

(A.) Disagreement as to Lands and Chattles, Good and Necessary, in what Cases, and the Effect thereof.

1. The Defendant was bound that if T. N. be not well content at his coming from beyond Sea with the Wholement of J. to the Church of P. that then he should resign &c. and said that T. N. such a Day and Year agreed &c. and the Plaintiff said that such a Day and Year before he disagreed &c. Br. Conditions, pl. 30. cites 46 E. 3, 5. But Brooke says Quare; for 1. H. 8. 2. it is said, that the first Act, be it Agreement or Disagreement, makes an End of all, if no Day be limited; but where Day is limited, and he agrees before the Day, this is sufficient, though he disagrees before also.

2. If
Difagreement.

2. If a Lease is made to A., for Life, Remainder to B. and after A. dies, the Law adjudges the Frank-Tenant in B. till be difagrees or declaims, and by the waving thereof it veils in the Donor or his Heir. Br. Done &c. pl. 7. cites 55 E. 3. 21.

3. So in the Case of Defeint or Eftbeat. Br. Done &c. pl. 7. ut sup.

4. If a Fine is levied to two, and one does not enter nor pay any Thing, and the other enters and is impleaded, there per Hank he may plead Jointenancy with the other, notwithstanding that he alone counts of the Possifion, and that the other never enter'd ; For the Possifion by the Fine and the Entry of the one shall be adjudged in Law to be both till the other disfagrees by Matter of Record, and to fee that Disagreement to relinquish a Thing shall not be but by Matter of Record, but Agreement to take a Thing may be by Paroll or Matter in Deed. Br. Jointenancy, pl. 57. cites 8 H 4. 13.

5. If a Man makes a Gift of his Goods to me by Deed in my Absence, this is good without Livery made to me of the Deed, till I difagree to the Gift, which must be in a Court of Record. Br. Done &c. pl. 29. cites 7 E. 4. 20. per the Juftices.

6. Where a Feffe Cover is enfeoffd, and after the Baron difagrees, yet all Things executed Mefne between the Livery and Disagreement remain good. Br. Relation, pl. 17. cites 1 H. 7. 16.

7. Contre of Things Executory, which are not fully executed. Ibid.

8. Lease for Life to B. Remainder to C. and D. in Tail; C. and D. can't difagree to the Remainder without Matter of Record ; for they are Tenants in Common: But if the Remainder had been limited to them in Fee, fo as they took jointly, it had been otherwise; for then by the Disagreement of the one, the other shall take the whole Land. 4 Le. 207. pl. 332. Mich. 21 Eliz. C. B. Ancen.

9. Disagreement en Pais to Dower may be good; for if the Says in the Country that the will not have such Annuity granted to her first Husband and herfelf in Recompence of Dower, this is a good Refufal, and if the once difagrees, she can never agree afterwards. Goldsb. 4. pl 8. Patch. 28 Eliz.

10. When one has Elefion to have a Thing or or refufe it, if he refues it then it was never in him, but if he agrees, then it has a Relation to the firft Act done. And. 221. pl. 239. Patch. 28 Eliz. Thetford v. Thetford.

11. If Lands are given to a Baron and Feffe in Tail or in Fee and the Baron dies, the Wife cannot devell the Freehold out of her by any verbal Waiver or Disagreement in Pais, as if the before Entry says that the utterly waives and difagrees to the Eftate, yet the Freehold continues in her, and she may enter whenever the pleases. 3 Rep. 36 a. Per Cur. Mich. 33 & 34 Eliz. B. R. in Cafe of Butler v. Baker.

12. So if the affents and agrees to the Eftate by Words in Pais, yet afterwards he may waive this in a Court of Record, for a verbal Assent and Agreement is not of any Effect in Law, for the Law respects Acts without Words more than any Words without an Act, and therefore, if the enters into the Land and takes the Profits, though the says nothing, yet this is a good Agreement in Law. Ibid.

13. A Baron assigns his Land and retakes an Eftate to him and his Wife in Tail. The Baron dies. The Lord of whom the Land is holden by Knights Service suppling that the Baron dy'd sole fole fatisfied, by Paroll assigns Dower to the Wife, which the accepts, yet this Refufal of the Eftate of Inheritance and Acceptance of Dower in Pais shall not devell the Freehold out of her. 3 Rep. 26 a. Per Cur. Mich. 33 & 34 Eliz. B. R. in Cafe of Butler v. Baker.

14. So where four were enfeoffed and Seifin delivered to three only in the Name of all, the fourth comes and views the Deed, and by Parol
Disagreement.

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vol disgree to the Deed, yet this doth not devest the Freehold out of him, but the Tenancy remains in all until Disagreement in a Court of Record. For a Freehold ought not to be easily devest, to the Intent that the Tenant to the Praecipe might be the better known. 3 Rep. 26. b. Per Cur in S. C.

15. And as an Act in Pais may amount to an Agreement, so may an may an Act in Pais amount to a Disagreement, but this is always of the same Thing, as if a Tenant by Deed enters his Lord and a Stranger, and makes Delivery to the Name of both, here if the Lord by Parol disagrees to the Estate, this signifies nothing; and on the other Hand, if he enters into the Land generally and takes the Profits this shall amount to an Agreement; but if he enters into the Land and disfrains for the Signory, this shall amount to a Disagreement, and shall devest the Feoffment out of him. 3 Rep. 26. b. Per Cur in S. C.

6. An Agreement to a second Estate and Entry into it may be a good Disagreement to an Estate before given. 3 Rep. 26. b. in Butler and Baker. Cafe cites D. 351.

17. An Use before 27 H. 8. might have been waiked by Parol en Pais, but not since, because the Statute incorporates the Use and the Possession of the Land. 3 Rep. 27. Mich. 33 & 34 Eliz. B. R. in Cafe of Butler v. Baker.

18. Disagreement by Covenant to an Indenture of Covenant to stand seized to Uses, which was delivered to a Stranger to the Use of Covenantee deteats all the Uses and Estates, for there can be no Covenant for want of a Covenantor; Decreed per Egerton K. Mo. 300. cites Mich. 38 & 39 Eliz. waterer v. Roe.

19. Agreement to a Grant by a third Person concerned (as Attornment to the Grant by the Tenant) may be made in the Absence of Grantor, but a Disagreement ought to be to the Party himselt, as appears in WIngr's Cafe 14 H. 8. 23. a. b. Per Coke. 2 Rep. 69. a. Hill. 43 Eliz. in Tooker's Cafe.

20. Disagreement to a Marriage had under Age of Consent ought to be published in Court at the Age, otherwise the Issue may be Rattard; for a Disagreement in Writing is not a sufficient Disagreement, nor a good Proof; Per Coke Ch. J. and the Civilians. Noy 153. Anon.

21. It was adjudged upon a Demurrer, that where A. makes an Obligation to Baron and Feme, the Baron dies, the Wife takes Letters of Administration, and brings Debt upon that Obligation as Administrator, and declares accordingly, but the dies before Judgment, and her Executor brought Debt upon that Obligation, and adjudged that it does not lie. 18. That Personal Duty being Goods en action shall well lie in Jointure between Baron and Feme, but otherwise of other Personal Things see 4 H. 6. 6. a. 2dly, That is a sufficient Election and Waiver though the had Judgment to have it as Administrator, and not in her own Right. Noy 149. Norton v. Glover.

22. If the Husband discontinue the Wife's Estate, and then the Discontinue conveys the Estate back to the Wife in the Abience of the Husband, who, as soon as he knows of it disagrees to it, this shall not take away the Remitter which the Law wrought on her first taking the Estate from the Discontinue. Arg. cites 1 Init. 356. Jo. 78. Because she is in of a Title Paramount to the Conveyance to which the Disagreement relates, and the same Rule holds for Agreements. Show. 357. Mich. 3 W. & M. in Cafe of Thomson v. leech, says, of this Opinion was all the Court of C. B.

23. A. makes a Bond to B. and delivers to C. to the Use of B. It is the Deed of A. immediately, but B. may refuse it, and by that the Bond will lose his Force. So of a Gift of Goods and Chattles, if A. delivers a Deed to the Use of B. the Goods and Chattles are in B.立即
Difceit.

medately before Notice or Agreement, but B. may refuse, and by that the Property and Interest shall be devested; Per Gould J. 1 Salk 301. Hill. 1 Ann. in Case of Wankford. v. Wankford.

For more of Disagreement in General See Disclaimer, and other proper Titles.

Difceit.

(A) In what Cases it lies [on Real Actions.]

Cor. E 171. 1. In a Precipe quod reddat, if the Tenant be summoned upon the Land according to the Common Law, and the Summons returned, and the Tenant makes a Default, upon which a Grand Jury issues, and thereupon Judgment is given, the Tenant may have a Writ of Difceit by the Equity of the Statute of the 31 El. Cap. 3. for that he was not summoned at the Parochial Church according to the said Statute, for this is not Error, and to he is without Remedy for the Land, which was the Difceit before the Statute, and he can only have an Action upon the Case against the Sheriff, if he cannot have this Writ. 37 Eliz, B. R. between Collet and Marshall held; For the Statute intends to put it in a Writ of Dis-equal Degree with a Non-Summons at Common Law.

Proclamation of Summons was not according to the Statute; for now he is not summoned according to Law; but Clerch and Gawde a contra, because it is a good Summons by the Summoners on the Land.—Mo 349, pl. 167; Corbet v. Marsh. S. C and because the Sheriff had returned him Summoned and Proclaimed, the Court gave judgment accordingly, and put the Party to his Remedy against the Sheriff.

2. If a Man sees a Protection and does not go, this Writ lies; contrary, it he goes, though he presently returns. F. N. B. 97. (B) in the Marray, cit. s. 44 H. 3. 4.

3. In Affize, if a Man finds Pledges in my Name in Affize brought against me by which I lose the Land, I shall have Action of Difceit. Br. Difceit pl. 36. cites 9 H. 4. 7.

4. If a Man sees Execution against the Confor upon a Statute Staple, as Executor of the Conufe where he is not Executor, or where the Conufe is alive, the Conufe may have Writ of Difceit. Br. Difceit, pl. 34 cites 2 R. 5. 8.

And Note; Such Writ lies notwithstanding the Record on which it is founded be cancelled or avoided before. F. N. B. 95. (E) in the new Notes there (a) lays sec 17 E. 3. 12. S. 1.

6. If
6. If I present one unto a Church whereof I am the Patron, to the Ordinary, and one T. does disturb, for which Disturbance another does purchase a Surety Impedist in my Name returnable in C. B. against the said T. not knowing thereof, and afterwards causes the Writ to abate, or me to be Non-juit in that Writ, I shall have this Writ of Disturbance against him who purchased that Writ &c. F. N. B. 96. (A).

7. If one forgie a Statute-Merchant in my Name and files a Copye thereupon, for which I am arrested, I shall have this Writ of Disturbance against him that forged it, and against him who sued forth the Writ of Capias &c. F. N. B. 96. (B).

in my Name, I shall not have Disturbance, because I may plead Non est factum.

8. If a Man procures another to sue an Action against me to trouble me, I shall have a Writ of Disturbance. F. N. B. 98. (N).

9. In a Praecipe quod reddat against the Husband and the Wife, at the Grand Cape the Husband appears in Person, and the Wife appears by Attorney, who has a Warrant which is sufficient, by which Judgment is given, upon the Default of the Wife, against the Husband and Wife &c. Yet they shall have a Writ of Disturbance it they were not summoned &c. F. N. B. 99. (B).

10. A Tenant lojes by Default, where he was not summoned he may have a Writ of Disturbance on this Judgment, and a Writ of Error at the same Time. Jenk. 69. at the End of pl. 31.

11. A Writ of Disturbance will lie where a Sheriff falsely returns a Summons. Jenk. 121. pl. 45.

(B) Upon what Recovery it lies.

1. I a Writ of Wffe, if at the Grand Distress the Sheriff inquires of the Wffe by Inquest, according to the Statute, the Defendant shall have a Writ of Disturbance, if he was not summoned though the Recovery was by Inquest, because the Default is the Cause of the Loss. 17 C. 3. 58. b.

2. But otherwise it is in an Action. 17 E. 3. 58. b.

3. If A. be Lessee for Life, the Remainder in Tail to B. and a Precipice in Capitae is brought against A. and B. as Jointenants by Covin between the Demandant and A. and procure one to answer for B. as Jointenant, and join the Mife, and after they make Default, by which a final Judgment is given against them; in this Case B. shall have a Writ of Disturbance, by which he shall be restored to the Land. 17 E. 3. 60. b.

4. In a Plea of Land, if the Demandant recovers by the Default of P. N. B. the Attorney of the Tenant, if the Demandant be Party to this Disturbance, a Writ of Disturbance lies, and he shall recover the Land. 21 E. 3. 45. b.

5. If a Man recover an Annuity, and afterwards sies a Seize Facias and recovers by Default, the Defendant shall have a Writ of Disturbance if he were not summoned. F. N. B. 98. (S.)

6. A Recovery by Default against the Father, in a Real Action, leaves the Father, and his Son after his Death, to their Writ of Right. But
Difceit.

if the Recovery was by Default, and the Father was not Summoned; the Father, and after his Death, his Heir shall avoid this Judgment by a Writ of Difceit; by all the Judges of England. Jenk. 113. pl. 20.

(C) Upon what Recovery, and in what Action it lies.

[And what shall be recover'd back.]

1. If a Man brings a Writ of Difceit against him who recover'd in the first Action, and the Sheriff returns him summoun'd, upon which for the Non-Summoun in the first Action, the Recovery is rever'd upon the finding of a Non-Summoun in the first Action, the Defendant in this Writ of Difceit shall not have a Writ of Difceit upon this Recovery to recover the Land again, if he was not summoun'd, but he is put to his Remedy against the Sheriff. 8 H. 6. 2.

2. If a Man recoveres by Default in a Re-Summons, where the Tenant was not Re-Summon'd, he Hall have a Writ of Difceit. 13 H. 4. 8 b.

3. If in a Scire Facias upon a Recognizance a Man recoveres by Default, and has the Lands deliv'red to him, a Writ of Difceit lies to recover the Lands. 17 C. 3. 12 b. adjudged. 18 C. 3. 28 b. adjudged; i E. 3. 25 b. had to be adjudged.

4. If a Man recoveres by Default in Writ of Wafe, though he recoveres in a Bundle by Action tried, inasmuch as the Sheriff inquires by Tithe, yet a Writ of Difceit lies. 29 E. 3. 42 b.

5. If a Man recoveres by Default in a Scire Facias to execute a Fine, though this Scire Facias be given by the Statute, yet a Writ of Difceit lies upon it, for he was not summoun'd, the Statute is not duly publish'd. i E. 3. 25 b. adjudged 26.

6. If a brings Debt against B. upon a Bill, and the Defendant pleads in Abatement, and the Plea is over-ruled against the Defendant, and the Attorneys, by Difceit between them [let Judgment be entred] that the Plaintiff recover his Debt, whereas the Judgment ought to be a Reipondas Outler, yet no Writ of Difceit lies to reverse the Record, but only to recover Damages; Nux. 13 Lex. B. R. between Waller and Durrington, per Curiam.


8. And in Wafe quas tenuit, the Defendant shall have Action of Difceit, and shall be restor'd to his Treble Damages lost; but to no Land. For he does not lose any Land. Ibid.

(D) At
(D) At what Time it lies.

1. He that loses the Land shall have the Writ without Doubt. Br. Difceit, pl. 16. cites S. C. per

Rolf.—Fitzh. Difceit, pl. 9. cites S. H. 6. 1. S. C.


Griffen v. Sheer, cites S. C. & F. N. B. 97. (C)—If a Man lose Land, by Default in a Precipe quod reddat, and dies, his Heir shall have a Writ of Difceit as well as the Father, and shall have Restitution. F. N. B. 98. (Q)

3. Note per Belk. that the Vouchee who comes by the Grand Cape, ad F. N. B. volentiam need not save his Default at the Summons, nor shall any take Advantage thereof; For no Land is in Demand against him in certain, and yet by Non-Summons at the Writ of Summons and Grand Cape the Vouchee shall have Writ of Difceit, and yet the Summons cannot be delivered by Ley Giger of Non-Summons, nor by any other Illue; Quod nemo negavit &c. in Action of Difceit. Br. Sauer Default, pl. 42. cites 50 E. 3. 17.

4. If in Precipe quod reddat against Baron and Feme, the Feme is received for Default of the Baron and Vouchee, and the Vouchee enters and dies, and Re Summons is filed against the Feme, and she is not re-summon'd, the Feme shall have Action of Difceit, and the same Law where one is return'd Summon'd upon Scire Facias; and it not warned. Br. Difceit, pl. 13. cites 6 H. 5. 4. Per Marten and Askain.

5. If a Man have Execution by Default upon a Recognizance in a Scire Facias filed against another, and the Defendant dies, his Executors shall have a Writ of Difceit, and shall be restored &c. If the Difceit be found that their Testator was not warned, there the Garnishers shall be examined &c. F. N. B. 98. (R.)

6. If the Tenant for Life loses by Default where he was not summoned, and dies, he in the Reversion shall have a Writ of Difceit, because he shall not have a Writ of Error, it not by the Statute &c. So 8 E. 3. 6. per Parning, clearly. F. N. B. 99. (E.)
(F.) Against Whom.

S. P. Br. 1. The Writ lies against him that recovers without Doubt. Difceit, pl. 8 H. 6. 2.


S. P. Br. 2. So it lies against the Heir of him that recovers. 8 H. 6. 2.

Difceit, pl. 16. cites 8 H. 6. 1. Or against a Stranger; Per Rolf, which Newton and others denied. — Fitzh. Difceit, pl. 9. cites S. C. — It lies against the Demandant’s Heir, if the Summoners, Vejors and Perons are living. F. N. B. 97. (C.)

3. If one answers for another as Attorney without any Warrant, the Defendant may move this pending the Plea; but if Judgment be given, he is put to his Writ of Difceit against the Attorney, and he shall recover Damages; and if the Defendant (Plaintiff) was Party to the Difceit he shall have the Writ against both, and recover. F. N. B. 95. (E) in the new Notes there (a) cites 21 E. 3. 45. by Thirning.

4. Note, That where the King recovers in Quare Impedit by Default in his own Right, or in another’s Right, where the Party was not summoned, attach’d or deprived, yet he shall not have Writ in B. R. to make the Summoners, Mainpernors, and Pledges come to be examined, and the Reason seems to be inasmuch as Action of Difceit ought to be against the Party, and no Action lies against the King. Br. Difceit, pl. 32. cites 10 H. 4.


6. And it lies against the Master of the Effion else, and the Effioner shall be in proper Person. Ibid.

7. It was said that Writ of Difceit lies against the Sheriff to recover Damages; Quare of this Matter, for the Justices were in diverse Opinions. Br. Difceit, pl. 26. cites 6 E. 4. 3.

8. If a Guardian pleads an ill Plea where he might have pleaded a good one, by which the Infant loses, the Infant shall have Writ of Difceit at his full Age; and recover all in Damages against the Guardian. Br. Droit de recto, pl. 15. cites 9 E. 4. 36.

9. Brian, Chocke and Pigo were in diverse Opinions whether Writ of Difceit lies against the Heir of him who recovered by Default, and dies, or not. Br. Difceit, pl. 30. cites 18 E. 4. 11.

10. If an Action of Trespays be brought against many, and the Plaintiff and one j. by Coven between them cause certain Persons to come into Court and say, that they are the same Defendants, and that they make the said j. their Attorney, and afterwards the said j. as Attorney for the Defendants pleads into Effe, and afterwards suffers the Inquit to pass by Default, by which the Plaintiff doth recover against the Defendants; Now those who are the true Defendants shall have Writ of Difceit against j. who appeared as Attorney for them &c. F. N. B. 96. (E.)

11. If a Man dies a Precept quod reddat against divers Tenants, and they purchase a Protechee for one of them, furnishing that he is beyond the Seas upon the King’s Service, whereas he is and always has been remaining in England, by which the Demandant is delayed, the Demandant shall
shall have a Writ of Diseit against the Tenants for that Delay. F. N. B. 97. (B.)

12. If the Demendant in Praecipe quod reddat, who recovered by false Return of the Sheriff, makes a Petition of the Land, then the Writ of Diseit lies against the Demendant who recovered and his Feoffee and the Sheriff, and if the Demendant be dead, and the Sheriff also, yet the Writ lies against the Demendant's Heir, and against him who is Tenant of the Land, if any of the Summoners, Veiors and Persons are living, for it they say that they did not summon him, then the Plaintiff in the Writ of Diseit shall recover his Land and be restored &c. But if they are all dead, then the Writ of Diseit is lost. F. N. B. 97. (C.)

13. If an Action of Debt be brought against two as Executors whose one of them is not Executor, if he who is not Executor confesses the Action, he who is Executor shall have a Writ of Diseit against him, and recover as much in Damages. F. N. B. 98. (H.)

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(G) Examination.

1. In a Writ of Diseit, if the first Summoners come, and none of the other Veiors or Personis, and the Summoners are examined, and it is found by them that the Summoners was not made, the Judgment shall be reversed. 29. C. 3. 34.

2. Diseit against one as Tenant and another as Sheriff, upon a Recovery by Default and Scire Facias against the Summoners, Veiors, and Persons, returnable immediately, and the Sheriff returned the Writ serverd against the Tenant, who appeared; and as to the Sheriff, the new Sheriff returned Nihil &c. and the Sheriff return'd, that three of the Summoners were dead, and that the fourth was warned who appeared, and one of the Veiors was warned who appeared, and that the others were dead, and the Plaintiff pray'd that the Summoners and Veiors should be examined, and upon good Argument they were examined de bene esse, for if all the Summoners and Veiors were dead, the Action of Diseit is gone; and though it may be that two of the one Sort and two of the other served the Writ, yet those who appeared die, the serving shall be intended that it was done by all as the Return purports, and it was false either in Part or in toto by the bell Opinion, by which the Defendant said that the Summon and Veior was by others of the same Name of those who appeared, and not by them, for those two who appeared said upon their Examination, that they knew nothing of the Summons nor of the Pernancy in the Hands of the King upon the Grand Cape, quod Nota, and Procases was made against the old Sheriff, who was returned Nihil. Br. Diseit, pl. 7. citers 35 H. 6. 46.

3. Diseit by Proceeds against him who first recovered, and against the Summoners and Veiors, and the Defendant by one of the Summoners appeared; and the Defendant pleaded a Release of the Plaintiff made to him, and the Plaintiff prayed that the Summoner should be examined; and by some Justices they shall not be examined, for the Plea is peremptory, for both Parties. Br. Diseit, pl. 26. cites 6 E. 4. 3.

4. But upon Plea to the Writ or Aid prayed of the King &c. which are not peremptory, they shall be examined for Danger of Death. Ibid.

5. In a Writ of Diseit the Sheriff returned, that he had warned one of the Summoners but that the other was not found in his County, and likewise that he had warned the Defendant; at the Day of the Return one of the Summoners
Difficult.

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that the Summoners and the Pledges upon the Attachment and the Manufactures upon the Ditrefses shall be examined, when the Writte of Difficult is brought therefore. F. N. B. 99. (C).

(H) [Examination.]

At what Time, [and Proceedings thereupon.]

1. In a Writ of Difficult, if one of the Summoners comes at the Day, he shall be examined presently for the Danger of Death, and what he lays shall be entered, and Proceeds shall be awarded against the others. 26 E. 3. 61.

2. If a Writ be filed against the Party that recovers and the Sheriff, and they are returned Nihil, but the Garnishers are returned Summoned, and appear at the Day, they shall be examined immediately though the Party be absent, for Danger of their Death, by which the Plaintiff shall be without Remedy. 1 E. 3. 26. ad judged. 2 E. 3. 48. b. adjudged.

3. But though it be found that there was not any Summon, yet it shall not be reversed presently, but a Distrajus shall issue against the Party, because he may at the Return thereof plead a Release. 2 E. 3. 48. b.

4. If all the Summoners and Veios are dead, the Action of Difficult is gone. Br. Difficut, pl. 7. cites 35 H. 6. 46.

5. Difficult upon a Recovery by Default in Formedon; the Sheriff returned 120 Summoned, W. P. and O. S. and the Defendant said that there are two W. P.'s and O. S.'s in the same Vill, viz. elder and younger, and the Sheriff appeared, and the Summons was made by the youngest, and yet the Court examined him who appeared for Doubt of Death, and he said he knew nothing of the Summons. Br. Difficut, pl. 25 cites 5 E. 4. 42.

6. Difficult by four against him who recovered by Default where they were not summoned; three appeared, and the Summoners also, and the fourth not; and per Cur., the Summoners shall be examined de bene esse for Fear of Death before the Summoners ad sequendam causam shall be awarded. Br. Difficut, pl. 27 cites 8 E. 4. 8.

7. So upon Protest call, or if the Release of the Plaintiff be pleaded of all Actions, or of the Right. Ibid.

8. So if the Defendant says that the Summoner who appeared is another Person of the same Name. Ibid.

9. A Judgment being had against S. in a Civil Suit, the Tenant before Execution brought a Writ of Difficult, and because that would not stay Execution, he brought also a Writ of Error; and though both these Writs tended to avoid the Judgment, yet because they were upon several Reasons and Respects, they were both allow'd. Hob. 218. pl. 283. Hill. 15 Jac. Howard v. Salkeld.

Cro J. 47
pl. 2; Mich.
17 Jac.
R. R. Sal-
keld v. Howard.
S. C. Curtis
adviser

vall, and afterwards the Parties compounded.——2 Roll Rep 127. S. C. the Writ of Error was discontinued by Consent.——Palm. 56. The Earl of Northumberland v. Salkill and Howard, S. C. and Judgment affirmed.

(H. 2) Pro-
(H. 2) Proceedings and Pleadings.

1. If a Husband and Wife lose the Land of the Wife by Default, they may sue a Writ of Difceit, and if the Husband dies, it seems the Wife may sue a Writ of Difceit to be restored to her Land &c. or have a Cui in Vita upon the Statute at her Election; and the Writ of Difceit shall be directed unto the same Sheriff who did the Difceit and file Return, and not unto the Coroners, as appears, Trin. 20 E. 3. yet it seems it is not Error, if it be directed unto the Coroners &c. F. N. B. 98. (C) cites 20 E. 3. Difceit 4.

2. The Nature of a Writ of Difceit is not to recover the Land by Default, and it may be that the Tenant who made Default has a Release of the Plaintiff to plead, therefore it is good to award Scire Facias against him per Marten; but per Babbs, this is not the Præcis in this Writ, but Venire Facias, which is returned served against him, the which is in this Action in Nature of a Scire Facias in another Case; Per Rolle, he who loses by Default, or his Heir, shall have a Writ of Difceit against the Recoveror or his Heir, or against a Stranger if he has aliened, which Newton denied and others likewize. Per Strange, If the Tenant was not warned they shall not have Writ of Difceit, against the Sheriff to re-have the Land, but Action upon the Case, for he did not lose the Land here by Default, but upon Examination of the Summoners, Vejors and Pernors, which is the Natural Trial in this Action. Br. Difceit pl. 16 cites 3 H. 6. 1.

3. Difceit in Præcipit quod reddat, the Tenant was esjoined, and after made Default, and left the Land upon the Grand Cafe, and brought Writ of Difceit, and it was found by Examination that the Tenant was not summoned in the Præcipit, and the Tenant demanded Judgment of the Writ because the Tenant in the Præcipit was esjoined, of which the Plaintiff ought to make mention in this Action, and that the Esjoin was not cast by him; for if the Esjoin was cast by him, he shall not have Action of Difceit, &c. and no allocatur, for if it shall be so, he may allege it for Plea, by which the Defendant was answered to, quod nona. Br. Difceit pl. 19. cites 36 H. 6. 23.

4. Difceit upon a Recovery by Default in Formdon, the Defendant shall not have the Averment that those who appeared by the Return of the Sheriff are other Persons of the same Name, for then when others appear, they may say also, that the other is not the Summoner, but another Person of the same Name, and so in infinitum, which would be a great Inconvenience. Br. Difceit pl. 25. cites 5 E. 4. 40.

5. It is a good Plea in Writ of Difceit, that be who recovered indeed him; Per Catesby, Quod non fuit negatum 18 E. 4. 9. 2.

6. If a Man recovers in a Quære Impedit by Default &c. if the Defendant be not summoned, he shall have this Writ, and the Summoners and Pledges upon Attachment shall be examined thereupon. And if the Difceit be found, he shall have Writ unto the Bishop &c. for him. F. N. B. 98. (G.)

7. If an Attorney be not truly informed by his Client to plead in any Action, and he pleads, Quod ipse non est Veraciter innotimus, & ideo nullum reponsum &c. the same shall be entred to have him of Damages.
Difceit.

mages in a Writ of Difceit brought against him by his Mafter &c. F. N. B. 98. (1).

8. A. recovers against B. in a Precipe quod reddat by Default the Writ of Difceit in this Cafe is Judicial and illus out of the Common-Plea, and the Proces is Attachment and Diffrefs infinite, and is mentioned in the Writ; and in this Cafe A. and the Sheriff and the Summoners and Veiors are made Parties by this Writ, that is, he who was Sheriff and made the Return of the Summons which by the Writ of Difceit is alleged to be fälle. If the prefent Sheriff did this Difceit, the Writ of Difceit aforesaid fhall be directed to the Cororons. Jenk. 122. pl. 46.

9. Writ of Difceit by the King and Queen upon a Fine leved by C. to D. of Lands in Ancient Demefne, who rendered to C. for Lite, Remainder to K. D. died pending the Writ. Resolved, the Writ fhall not abate, because it is in Nature of a Trefpafs, which doth not demand the Land, but is to punish the Difceit. Mo. 13. pl. 49. Hill. 4 & 5 P. & M. The Queen v. Dewe.

10. In a Writ of Difceit, upon Recovery in Dower for Default of Summons it was Resolved by the Court clearly, although that the Words of the Writ of Difceit are, Interim Terram illam in Manus notiras capias, ita quod neuter eorum manum apponat &c. yet the Sheriff cannot remove the Party out of Possefion, but he ought only to make a general Seifire; and cites Bracton 365. b. That the Summoners, that appear to be examined, shall not have any Charges by the Course of the Court. But the Plaintiff at his Peril ought to procure them, and to bear their Charges. Noy. 152. Atkins v. Gage.

(1) Judgment, and at what Time it fhall be given.

S. P. Br. Difceit pl. 16 cites $H. 6. 1. Fizth. Difceit pl. 9 cites S. C. Br. Rempts. pl. 12. cites S. C. and favs the Reason seems to be chiefly on the Party ought to have sued Refummons in this Cafe; but adds a Quere, for he fays it is not adjudged in that Point.

1. N Difceit against the Party that recovers if the Party be returned summoned, and makes Default, yet if upon Examination it appears there was not a good Summons, Judgment fhall be given prefently without awarding more Proces against the Party that makes Default, because if Judgment fhall be had till he comes, there may be a Difceits infinite, and to the Plaintiff fhall be disinherited. 8 D. 6. 1. b. 5. b. adjudged.

2. In Difceit the fift Summoners came, and the Summoners and Veiors in the Grand Cape, but the Tenant who recovered came not, and the Court not perceiving it examined the Summoners and the Permons in the Grand Cape, and found by Examination that he had not made Summons by the frft Writ, nor in the Grand Cape, nor the Land taken into the Hands of the King, by which it was awarded that he who loft should re-have his Land which he loft, and he who recovered and the Sheriff should be taken, without saying any thing of the Illus, and when the Court perceived the Default of the Tenant, they faid that they would fay till he comes, and made Proces againft him, for it may be that he has a Release from the Party, and by 8th [Edw. 3.] after the Examination, and
and the Disceit thereupon found Process shall be by *Difceit ad autien-
dum Judicium, and not ad respondeundum*, whereas the Process before the
Examination is Difceit infinite. Burgh, the Process is returned served as well against the Tenant as against the Sheriff, by which he prayed
Judgment, and Fulthorp awarded ut supra, that the Plaintiff recover
his Land lost by the first Writ, and the others were taken. Br. Dis-
ceit, pl. 12. cites 50 E. 3. 18.

3. Note, that the Statute of *Wesminster 1 cap. 30. is, that if a Plea-

der or other make Disceit to the Court, he shall have an Imprisonment by a Year,

and this is understood as well of Apprentices and Serjeants as of

others; Per Jenny. Br. Disceit pl. 28. cites 11 E. 4. 3.

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(K) **[Judgment]** How. For the Land.

1. **The Judgment shall be, That the Plaintiff shall be restored**


   *Fitzh. Difceit, pl. 36. cites 17 E. 3. 12. S. C. & S. P.*

   *Ibid. pl. 16. cites 8 H 6. 1.*

2. If a Man recovers in a Writ of Wafle where the Tenant was not sum-

moned &c. the Defendant shall have a Writ of Difceit, and shall be re-


   *42. 29 E. 3. Difceit 63. and 56.*

3. In a *Scire Facias to execute a Fine, if the Sheriff returns the Tenant Contra per

summoned by two Summoners, if it be not true, yet the Tenant by the Return

shall lose the Land; for Execution shall be awarded upon the

Return if the Tenant do not appear, and then the Tenant shall have a

Writ of Difceit against the Sheriff, and him who had Execution, and

him who is Tenant, and shall be restored to the Land. *F. N. B. 97. (D.)*

   *Ibid. in the new Notes there (A) cites 1 H 6. 5.*

4. So if a Man sies a *Scire Facias upon a Recognizance of Debt,* and the Sheriff returns the Defendant summoned where he is not summoned, for which the Plaintiff has Execution awarded, the Defendant shall have a Writ of Difceit against him who had Execution, and the Sheriff
shall be punished by this Writ for his Faulty, and the Party who re-

covered shall make Restitution of that he recovered &c. *F. N. B.

97. (D.)*

5. In a Writ of Difceit, if the Sheriff returns one Summoner dead, yet

the other Summoner shall be examined &c. and if it be found that he did not summon &c. the Party shall be restored unto the Land. *F. N.

B. 98. (D.)*

6. And so if the Writer or Peron did not do that which he ought to
do, the Party shall be restored, because it ought to be done by both &c.

*F. N. B. 98. (D.)*

7. If a *Notary or other Peron of Covin counterfeits the Seal of any

Parfon or Vicar, and forges Letters of Resignation of his Parsonage or

Vicarg in the Name of the Parson or Vicar of his Benefice, he shall thereupon have a Writ of Difceit. But whether by that he shall be restored unto his Benefice, Quære; It seems nor, because the removing of him is a Spiritual Act. *F. N. B. 99. (K.)*

(L.) **[Judg-**
(L.) [Judgment; How for the] Profits.

1. He shall be restored to the Issues from the Day that the Defendant had Execution till the Day of this Writ purchased.

2. He shall also be restored to the Issues from the Day of the Writ purchased till the Judgment, and the King shall not have them.

3. Note, Per Brian, Choke and Pigot, in an Action of Difceit upon a Recovery by Default, a Man shall be restored to the Land and Issues and Profits in the mean time incurred as in Writ of Error or Attaint, and no Diversify. But others contra. Br. Difceit, pl. 30. cites 18 E. 4. 11.

(M.) Judgment in what Cases; and How.

1. If the one Summoner denies the Summon, the Plaintiff shall be restored, for false in part false in all. Br. Difceit, pl. 25. cites 5 E. 4. 40. Per several of the Justices.

2. And in the same Case fol. 54. it was said by divers of the Justices, that if it shall be proved for the Plaintiff that they were not summoned, the Plaintiff shall be restored to the Land with the Issues and Profits in the mean time, and be shall have Damages against the Sheriff for his false Return, and by some the Sheriff shall only make Fine to the King; for the Party shall have his Judgment and the Mede Issues against the Tenant, and the Plaintiff shall be restored. Per Ibid.

For more of Difceit in General, See Actions, and other Proper Titles.
* Disclaimer.

(A.) Of what Things and Estates a Disclaimer may be, and of what not.

1. A Man cannot disclaim in the Principal, and not in the Incidents; as he that is vouched because of a Robertson cannot disclaim in the Robertson, saving the Seigniory. 40 Eliz. 3. 27.

2. In Writ of Mefne by the Donee in Tail against the Heir of the Donor, founded upon the Tenure, and the Reverion regardant to the Demandant without the Deed of the Gift, the Tenant disclaimed in the Seigniory and in the Reverion, and held good. Thel. Dig. 147. Lib. 11. cap. 34. S. 9. cites Pach. 8 Eliz. 3. 394. Quere. Contra per Finchden Trin. 40 Eliz. 3. 27.

3. In Writ of Mefne the Defendant said, that he had not Fee nor Seigniory in the Land, but a Rent Seek, and held good. And the Demandant was received to maintain that he held of the Defendant; Prift &c. Thel. Dig. 147. Lib. 11. cap. 34. S. 10. cites Pach. 20 Eliz. 3. Mefne 13.


5. There be divers Kinds of Disclaimers; that is to say a Disclaimer in the Tenancy a Disclaimer in the Blood; and a Disclaimer in the Seigniory. Co. Litt. 102. a.

(B) In what Actions.

1. A Man cannot disclaim in a Writ of Mefne. Ditto, 44. * In Writ of Mefne the Defendant may disclaim in his Seigniory against the Plaintiff, per Finch. But Quere for non respondent. Br. Disclaimer, pl. 9. cites S. C.

2. The Plaintiff in a Recaption may disclaim 47 Eliz. 3. 22.
Disclaimer.

3. In a Per quæ servitutis the Tenant shall not disclaim, but shall claim, pl. 15b that he did not hold of him the Day of the More levied. * 11 S. C. per D. 472 b. Hill. And it shall be tried by the Jury.—Ibid. pl. 26. cites 5 E. 4. 2. that Defendant cannot disclaim; because the Plaintiff shall not recover the Land if it be found against him; for he demands nothing but Attornment.—Fitzh. Disclaimer, pl. 8 cites 11 H. 4. 72.—Br. Per quæ servitutis; pl. 3 cites S. C. & S. P. by Hill.

In Per quæ servitutis the Tenant disclaimed to hold of the Plaintiff, and that he did not hold of the Confiner the Day of the Writ purchased &c. Upon which the Tenant was fined die, notwithstanding that the Plaintiff tender'd to aver, that if &c. Thel. Dig. 147 Lib. 11. cap. 34. S. 4. cites Hill. 33 E. i. Disclaimer 51.—Ibid. cites Mich. 12 E 5. 13. 11 H. 4. 72. and 5 E 4. 2. according.

Ibid. pl. 54. 4. In Affise of Rent by the Lord against his Tenant the Tenant disclaims to hold of him, and was oust'd by Award. Quod Nata. Br. Disclaimer, pl. 32. cites 8 E. 1. and Fitzh. All. 416.


7. Entry in the Quibus against two, the one would have disclaimed, and was not suffer'd; For he is in de jure sort demises, which see in the Old Nat. Bre. in the Additions of the Writ of Right upon the Disclaimer. Br. Disclaimer, pl. 36. cites 4 H. 5. * S. P Ibid. pl. 54 cites 15 H. 7. 27.

8. And see there that the * Tenant shall not disclaim in Writ of Cestavit, but may say that he does not hold of the Demandant. Ibid. In all Affises in which a Man shall not recover Damages a Man may disclaim; but where Damages are to be recovered, the Demandant may aver his Writ, and set him of the Disclaimer in Submission of his Damages; Agreed per Omnes. Br. Disclaimer, pl. 54. cites 16 H. 7. 1.

9. In Action in which a Man may recover Damages, and the Tenant disclaims the Demandant may aver him Tenant. Br. Disclaimer, pl. 17. cites 36 H. 6. 23. Per Danby. * Contra where he cannot recover Damages; For he is at no Mischief; For he may enter. Ibid. S. P. Ibid. pl. 54 cites 16 H. 7. 1.

10. In Formadon in Remainder it was said that in Action against two, the one alone may disclaim, as well as one may in Action against one alone, and the Demandant shall not put him to his Disclaimer, unless in Action in which it is to recover Damages; Quod Nata. Br. Disclaimer, pl. 54. cites 16 H. 7. 1.

11. In Formadon in Remainder it was said that in Action against two, the one alone may disclaim, ibid. pl. 54. cites 5 E. 4. 46.

12. Fortescue made Assurity in Replesin, and after he perceived that the Plaintiff would have disclaimed, by which he relinquished the Assurity, and
Disclaimer.

and made justification, and then the Plaintiff cannot disclaim. Note—In Reple-

on the Diversity, that a Man cannot disclaim in justification; Contra-

in Avowry, and upon Justification the Defendant shall not have Re-

turn. Br. Disclaimer, pl. 15. cites 9 E. 4. 28.


13. In Writ of Entry in nature of Affise of Rent. The Tenant pleaded a

Bar at large as to a Rent Charge, and the Demandant made Title to a

Rent Service leaving out of Land, which the Tenant held of him, and the

Tenant disclaimed to hold of him, and thereupon it was demurred in Law.


13 H. 7. 27. and 16 H. 7. 1.

14. In Case in Vita a Man may disclaim. Br. Disclaimer, pl. 54. cites

16 H. 7. 1.

15. A Man may disclaim in Writ of Customs and Services. Br. Dis-

claimer pl. 45.

16. Br. Conscience pl. 18. makes a Quære, whether a Man may dis-

claim in Chancery.

17. Lease for Years is Plaintiff in Replevin, the Defendant avows up-

on A. a Stranger as his Tenant, who comes and says, that he is A. the

Tenant, and that the Plaintiff is his Lease for Years; Resolved by all the

Justices of England, that A. may join in Aid Gratis without Pro-

cess, and that both may disclaim, and that the Plaintiff shall recover his

Damages, and the Defendant shall be in Mifericordia. In the Case of Ten-

ant at Will, where there is a Joiner in Aid to him in Replevin, no Disclaimer lies for

him in this Case; for he loses nothing. Jenk. 56 pl. 3.

18. Lord, Mesne, and Tenant in Replevin, the Mesne cannot disclaim; for a

Writ of Right, upon a Disclaimer, demands the Land and he

has it not; and the Lord has no Benefit by this Disclaimer; for the

Tenant cannot lose his Tenancy by the Disclaimer of the Mesne and the

Lord has not more or better, or other Services than before the Dis-

claimer. A Writ of Right of Disclaimer lies, where both Mesne and

Tenant disclaim; it the Disclaimer be in a Court of Record, a Writ of

Right lies upon the Disclaimer. Jenk. 142. pl. 95.

19. A. grants an Annuity to B. pro Confiteo impendo. Upon a Writ of

Annuity against A. A. may disclaim to have Counsel, and so ex-

tinguish the Annuity; but it is otherwise if the Annuity was granted


20. 21 Jac. 1. cap. 16. S. 5. In all Actions of Trespasses Quaere clamam

frigid, wherein the Defendant shall disclaim any Title to the Land, and the

Trespass be by Negligence or involuntary, the Defendant shall be admitted to

plead a Disclaimer, and that the Trespass was by Negligence or Involuntary,

and a Tender of sufficient Amends before the Action brought; and if the

Issue be found for the Defendant, or the Plaintiff be not justified, the Plain-

tiff shall be barred from the said Action, and all other Suits concerning the

same.


(C) What
(C) What Persons may.

1. **SUCH Person as cannot lose the Thing perpetually in which he disclaims, shall not be differed to disclaim.**

Br. Difclaimer. 

S. C.—S. P. Br. Difclaimer pl. 17, cites 56 H. 6. 28.—S. P. Ibid. pl. 27, cites 1 E. 4. 2.—**Affes of 101 by a Prior against an Abbot, the Abbot came and said, that his Predecessor without Affes of the Covent preudfed the Land of the Prior, and Covent rending the 101. Rent, where the Land was not worth the Money of the Rent, by which his Predecessor, next before him, waived the Land and this Abbot Defendant after him also, and to disclaimed, and to fee that he who has Fee, as here, may waive his Land; and he said also on Court, that he relinquished and renounced the Land to the Plaintiff, and to the Frankenement by him shall be adjudged in the Plaintiff, and demanded Judgment, if this Writ against him shall go, and shewed Deed of the Prior and Covent, sealed to his Predecessor, and the Dred and Seal of the Abbot only without the Covent made to the Predecessor of this Writ; and upon this the Affes was awarded.** Br. Difclaimer. pl. 19, cites 45 Aff. 25.—Thel. Dig. 147. Lib. 11. cap. 34. S. 17 cites S. C.—Abbot shall not disclaim. Ibid. 148. S. 20, cites 56 H. 6. 56. per Prior.

In Preceps a Bishop cannot disclaim, for he cannot ousted the Right out good reddat of the Church. 40 E. 3. 27. B.

Br. Difclaimer. pl. 7, cites 40 E. 5. 27.

3. **A Bishop cannot disclaim, for he cannot ousted the Right out good reddat of the Church.**

Br. Difclaimer. pl. 17, cites 56 H. 6. 28.—S. P. Ibid. pl. 27, cites 1 E. 4. 2.—**Affes of 101 by a Prior against an Abbot, the Abbot came and said, that his Predecessor without Affes of the Covent preudfed the Land of the Prior, and Covent rending the 101. Rent, where the Land was not worth the Money of the Rent, by which his Predecessor, next before him, waived the Land and this Abbot Defendant after him also, and to disclaimed, and to fee that he who has Fee, as here, may waive his Land; and he said also on Court, that he relinquished and renounced the Land to the Plaintiff, and to the Frankenement by him shall be adjudged in the Plaintiff, and demanded Judgment, if this Writ against him shall go, and shewed Deed of the Prior and Covent, sealed to his Predecessor, and the Dred and Seal of the Abbot only without the Covent made to the Predecessor of this Writ; and upon this the Affes was awarded.** Br. Difclaimer. pl. 19, cites 45 Aff. 25.—Thel. Dig. 147. Lib. 11. cap. 34. S. 17 cites S. C.—Abbot shall not disclaim. Ibid. 148. S. 20, cites 56 H. 6. 56. per Prior.

Br. Difclaimer pl. 7, cites 40 E. 5. 27.

4. Baron and Feme may disclaim for the Feme. 5 H. 6. 29.

Br. Difclaimer. pl. 17, cites 56 H. 6. 28.—S. P. Ibid. pl. 27, cites 1 E. 4. 2.—**Affes of 101 by a Prior against an Abbot, the Abbot came and said, that his Predecessor without Affes of the Covent preudfed the Land of the Prior, and Covent rending the 101. Rent, where the Land was not worth the Money of the Rent, by which his Predecessor, next before him, waived the Land and this Abbot Defendant after him also, and to disclaimed, and to fee that he who has Fee, as here, may waive his Land; and he said also on Court, that he relinquished and renounced the Land to the Plaintiff, and to the Frankenement by him shall be adjudged in the Plaintiff, and demanded Judgment, if this Writ against him shall go, and shewed Deed of the Prior and Covent, sealed to his Predecessor, and the Dred and Seal of the Abbot only without the Covent made to the Predecessor of this Writ; and upon this the Affes was awarded.** Br. Difclaimer. pl. 19, cites 45 Aff. 25.—Thel. Dig. 147. Lib. 11. cap. 34. S. 17 cites S. C.—Abbot shall not disclaim. Ibid. 148. S. 20, cites 56 H. 6. 56. per Prior.

5. **[But] if the Baron hath nothing but in the Right of his Feme, he cannot disclaim. Contr. * 9 H. 6. 52.**
Disclaimer.

8. An Infant Vouchee, because of a Reversion descended to him, cannot disclaim in the Reversion. 5 El. 3. 25 b. 

10. In Writ against two Jointenants, if the one disclaims the Whole shall vest in the other, inasmuch as this is a Disagreement to the Purchase of Record; but it is not so in Writ against Partecners, where the one disclaims, nor where they are Jointenants by Feme. Per Shard. Quare Thel. Dig. 147. Lib. 11. cap. 34. S. 25. cites 36. per Prifon. 

11. Entry for Difference against the Baron and Feme and their Son; the Son disclaimed, and the Baron disclaimed for his Feme, and pleaded Venenage for himself. Br. Disclaimer, pl. 8. cites 43. E. 3. 5. 

12. Note. It is said per Atchough. J. that where an Abbot in Person or by Bailiff avows or makes Companionship, the Plaintiff cannot disclaim by Reason of the Mortmain; Quod non contradicetur. Br. Disclaimer, pl. cites 28. H. 6. 10. 

13. Pernor of the Profits shall not disclaim, for none shall disclaim in Prejudice of another; and this is in Prejudice of Feoffees that the Pernor of the Profits, who is Cutly que Ufe, disclaims. Br. Disclaimer, pl. 17. cites 36. H. 34. Per Prifon. 

14. Trespafs of a House broken, Assault and Battery, and Goods taken, the Defendant said, that the Plaintiff, at the Time of the Taking, held the House by Fealty and 10. s. Rent, of which Services he was safe, &c. and so much of Rent Arrer he at the Time of the Trespafs &c. found the House open and took the Goods as Distresses, and the Plaintiff would have retaken them, and the Defendant put his Hands peaceably upon him and said, that if he took them he would have Write of Receuse, which is the same Assault, Battery, Breaking of House, and Taking of Goods, of which the Plaintiff brings his Write &c. and the Plaintiff said that he did not hold the House of him Prifon, and the others contra, and a good Illie per Cur; for in Replevin and Receuse Hors de Fon Fee is a good Plea, contra in Trespafs, for he e he cannot disclaim or answer to the Fee; for the Defendant does not suppose that he has Fee there but that he holds of him, and therefore that he does hold of him is a good Plea, quod nota. Br. Illies joines, pl. 26. cites 38. H. 6. 26. 


5 N. 

16. II
Disclaimer.

16. If the Tenant in Frankalmoina bring a Writ of Mesne against his Lord, the Lord cannot disclaim in the Seignory, because he cannot hold of any Man in Frankalmoina, but of his Donor and his Heirs. And to note, a Diversity between a Tenure in Frankalmoina, whereby Divine Service is maintained, and Homage Ancesfrel, which respects Temporal Service; But it the Lord will not disclaim in the Seignory in Case of Homage Ancesfrel, then albeit he has received Homage he shall warrant the Land. Co. Litt. 102. a.

17. An Abbot, Prior, Bishop, Archdeacon, Prebend, Parson, Vicar, or any other sole Corporation that is seated in Anter Drott cannot disclaim, because, as Littleton says, they alone cannot devest any Fee which is vested in their House or Church; For the Wisdom of the Law would never trust one sole Person with the Disposition of the Inheritance of his House or Church; But an Abbot and Prior and their Covent, the Bishop his Chapter, the Parson and Vicar their Patron and Ordinary [may], and the like of sole Corporations, without whole Aflent they could pass away no Inheritance. Co. Litt. 103. a.

(D) Who in Respect of their Estates may Disclaim.

The Disclaimer and the Joiner therein is good. For the Termor by his Disclaimer shall lose his Term, as the Leifor Tenant of the Frank Tenement shall his Frank Tenement; But the Tenant at Will and the Leifor shall not join in Disclaimer; for the Tenant at Will cannot put any thing in Jeopardy. Br. Disclaimer, pl. 10. cites 8. C. — Termor for Years and he in Reseifion may disclaim. Br. Disclaimer, pl. 10. cites 4. H. 5.

1. If Leifor for Years bring a Replevin, and an Avowry is made upon the Leifor, who joins to the Leifor, they both may disclaim. 45. C. 3. 8.

2. So if the Mesne joins to the Tenant they may disclaim. 45. C. 3. 7. b.

3. In an Avowry upon Leifor for Life for Rent, he cannot disclaim for the Prejudice of him in Reseifion. 20. P. 6. 46. 28. C. 3. 96. For the Lord cannot have a Writ of Right upon the Disclaimer of such Leifor; ergo.


5. But the Heir may disclaim, being vouched upon a Lease made by his Ancestor. 20. P. 6. 24. 18. C. 3. 42. b. adjudged. 38. C. 3. 32. b.


7. A Leifor may disclaim. 45. C. 3. 8.

8. If a Man be vouched because of a Reversion upon a Lease made by himself, he cannot disclaim. 17. 8. 39. b. Curia.

9. If a Man be vouched for Homage taken by his Ancestors, he may disclaim. Contra if he be vouched for Homage taken by himself. Br. Disclaimer, pl. 15. cites 47. H. 3. and Fitzh. Voucher 270.

10. Praecipe
Disadvisor.

10. Precipe quod reddat was brought against two, where the one of them had laid to the other for eight years upon Condition that if he did not pay 10l. within one year, that then the Leifee shall have Fee; and the Feoffee durst not disclaim the Land for fear of losing the Advantage of the Condition in futurum. Br. Disadvisor, pl. 34. cites 12 E. 2. and Fitz. Voucher 265.

11. If the Lord Paramount disclaims the Tenant paravishe, and he brought Replevin, and the Lord avowed upon him, he can't disclaim, because he holds of him by a Mesne; Agreed per Cur. Br. Disadvisor, pl. 1. cites 9 H. 6. 25.

12. But per Marten he may say that he holds of the Mesne by such Services, and he holds over of the Defendant by such Services, abique hoc, that he holds of the Defendant immediately modo & forma. Ibid.

13. In Replevin, the Defendant as Bailiff to the Prior of S. made Compancy for Rent and Fealty &c. upon one f. N. the Plaintiff said that f. N. leaped to him for three years, and prayed Aid, and had it, and they joined, and Day given to the next Term, at which Term they joined and disclaimed, to which the Defendant said that Mesne between the two Terms, the Lease and Term of the Plaintiff is determined; and yet because he remains Party, and the joining is good, therefore the Disclaimer was awarded good; Quod Nota. Br. Disadvisor, pl. 4. cites 28 H. 6. 12.

14. Where the Tenant leaves his Land for Years, the Lord disclaims, the former brings Replevin, the Lord avows, the Tenant prays Aid of the Leifor, and had it; they two upon the Founder may disclaim; Quod Nota. Br. Disadvisor, pl. 16. cites 9 E. 4. 32.

15. In Replevin, Per Jemey, in Avowry if the Donor joins to the Tenant in Tail, they can't disclaim. Br. Disadvisor, pl. 30. cites 12 E. 4. 16.

16. So it is where an Abbot is Mesne and joins to the Tenant in Avowry &c. which Littleton and Neele agreed. Ibid.

17. And the Serjeants held, that if there be Lord Mesne and Tenant, the Mesne can't disclaim in Avowry; * For he can't lose the Tenant's Land; * S. P. Ibid. But if he joins to the Tenant, they two may well disclaim; for this is the Act of the Tenant himself to do so. Quere; for the Avowry is made upon the Mesne, and not upon the Tenant, and therefore as it seems that the Lord where there is Mesne shall not have Writ of Right upon Disadvisor against the Tenant by Disadvisor of the Tenant. Br. Disadvisor, pl. 30. cites 12 E. 4. 16.

18. In Avowry it appears by the Argument that if a Man disclaims for two Seignories one and the same Man who is Tenant of both, where of the one Seignory there is Lord Mesne and Tenant, and of the other Seignory is Lord and Tenant only, and the Mesne joins to the Tenant, and be and the Mesne disclaims for all, they may join by the Manner, and that for the one Part lies one Writ of Right upon Disadvisor, and another Writ of Right upon Disadvisor for the other Part, insomuch as it was of two Seignories, of which there was Lord Mesne and Tenant for the one, and Lord and Tenant for the other, and that they may well disclaim; Quere bene. Br. Disadvisor, pl. 42. cites 13 E. 4. 6.

19. In Quod et deforcet, it is said that he who was the Leesee shall not disclaim; otherwise it is of his Grantee. Br. Disadvisor, pl. 51. cites 10 H. 7. 10.

20. And if Tenant for Life prays Aid of him in Reversion, he shall not disclaim. Ibid.

21. Precipe quod reddat of Rent, the Defendant pleaded in Bar, and the He who is Demanunt said that the Defendant held the Land of him &e. by which not Tenant the Defendant disclaimed, and may well; per Wood and Divers; for he Pernor can't disclaim; Contra of Ter tenant; and now it appears that he shall not life.
Disclaimer.

22. In Replevin the Defendant asserted as Lord in Tail &c. upon the Tenant, there the Tenant shall not be permitted to disclaim; for the Lord cannot have Writ of Right upon Disclaimer; for he has not Fei-Sequence. Br. Disclaimer, pl. 53. cites 13 H. 7. 14.

(E.) The Place.

1. THE Disclaimer refers to the Place where the Awaiting is made. 40 E. 3. 33.

(F) How it may be.

1. In an Awaiting the Plaintiff cannot disclaim by Attorney, because the Awaiting cannot have a Writ of Right for disclaimer thereof. 22 E. 3. 6. 6.

2. In a Mortdeamer the Tenant may disclaim for his Matter. 22 Ass. 25.


4. Pray that good redlet against two, the one said that the other was his Villain, which the other agreed; which was taken a Disclaimer, and the Writ good; and the Villain went quit by Award. Br. Disclaimer, pl. 29. cites 21 E. 3. 14.

5. It was held by Hals in Writ against two, if the one disclaims, that the other cannot disclaim also, because it cannot vest in any, but by plea specially, and say that he never agreed to the Feoffment, and if he be in by Deed to say that he waived the Possession. Thel. Dig. 147. Lib. 11. cap. 34. S. 15. cites Hill. 4 H. 5. Disclaimer 27. Where in Writ of Entry the Quibus against two, the one was not received to disclaim, because he was in De fon tort Demenece.

6. In Formont against two, if the one disclaims the other cannot plead to the Whole without taking the entire Tenancy; for he may choose to plead to the Whole or to the Moiety. Thel. Dig. 148. Lib. 11. cap. 34. S. 16. cites Parch. 27 H. 6. Disclaimer 28. And that so agrees 33 H. 6. 53. Where in Writ against two the one made Default after Default, and the other disclaim'd for all, upon which the Demandant recover'd all against him, who made Default, by Judgment, notwithstanding that the Grand Cape did not issue but of the Moiety. And note that
that this Disclaimer was Sole in the Tenancy, with Protestation that the Demandant held the Land of him who disclaimed by such Service. Thel. Dig. 148. Lib. 11. cap. 34. S. 16.

7. Writ of Entry of Rent in Nature of Affete where the Demandant supposed the Land to be held of him, the Defendant disclaimed to hold the Land of him; and per Brian, he shall not disclaim in the Land; For Rent is in demand and not the Land. Per Townfend he disclaims in the Tenure and not in the Land; but in Avowry he may disclaim to hold of him. Br. Disclaimer, pl. 54. cites 13 H. 7. 27.

(F. 2) Bar to Disclaimer. What is. And Pleadings.

1. CESSAVIT by a Bishop, the Tenant appeared and confessed the Tenure, and tender'd the Arrears as the Demandant counted, this is a Conclusion to disclaim in another Cessavit, or in Writ of Custom and Services. Br. Disclaimer, pl. 11. cites 50 E. 3. 23.

2. In Trepass, if a Man avows and the Plaintiff confesses the Avowry, yet in another Avowry be may disclaim; Per Needham, which Moile denied, therefore quære. Br. Disclaimer, pl 23. cites 2 E. 4. 16.

3. In Formedon the Tenant disclaimed, the Demandant maintained his * S. P. But Writ that the Defendant was Pernor of the Profits the Day of the Writ, J. by Dis-claimer of Littleton, * he shall not maintain his Action to; For he is not to re-cover Damages in this Action; and therefore he may enter. But Need-ham J. contra, and that he may so maintain his Writ; For he cannot enter; For the Judgment upon Disclaimer is no more than that the Tenant must take nothing by his Writ, which is in Effect that the Tenant, Writ shall abate; and then the Demandant cannot enter; For if he or any who enters the Tenant may have + Affete; Quod quære inde; For it seems the Law is contra; For the Disclaimer eiptos the Tenant to have Affete. Br. Disclaimer, pl. 24. cites 4 E. 4. 38.

4. In Replevin the Defendant said, that N was sised of 20 Acres of * S. P by Land, of which &c. and held of him by Service &c. and alleged Sisvn by his Hands, whose Estate the Bailiff had the Day of the Taking, and * For it may avow'd upon the Plaintiff, and the Plaintiff disclaimed, and the * Defense to that he disclaimed, that the Plaintiff was not Tenant of the Frank-tenement at the time made a Time of the Disclaimer; Per Littleton, this is a good Plea; For the Que Proemptn in Elate made him Tenant to the Avowry, and not Tenant of the Frank-tenement; and in Writ of Right upon Disclaimer brought against it ibid. pl. 41. Strangers, be may say that he who disclaims had nothing in the Land at the time S. C. Time of the Disclaimer; For he who has not the Land cannot forfeit it. Br. Disclaimer, pl. 28. cites 12 E. 4. 13.

5. If the Lord, who is wont'd, has received Homage of the Tenant or of any of his Ancestors, then he shall not disclaim, but is bound by the Law to warrant the Tenant; Therefore it is good for the Tenant, to the Intent to oult the Lord of his Disclaimer, in his Voucher to allege, that the Lord has received Homage of him; and if he allege it not, and the Lord offers to disclaim, the Tenant may counter-plead the same by

O Acceptance
Acceptance of Homage; and the Reason that the Lord cannot disclaim in that Case, is, for that he has accepted his humble and reverent Acknowledgement to become his Man of Life, and Member and terrene Honour, and to be Faithful and Loyal to him for the Tenements which holds of him, and against the Acceptance hereof the Lord cannot disclaim. Co. Litt. 102. a.

6. In Quo Warranto against the Citizens of Canterbury who claim'd divers Liberties &c. within the Arch-bishop's Palace; As to Part in such a Place they justified in the City Præterquam in Staple-Gate and Well-Gate, and quoad Residuum Locorum disclaim'd; Resolv'd that the Disclaimer extends to Staple-Gate and Well-Gate, notwithstanding the Præterquam. 2 Roll. Rep. 482. Trin. 21 Jac. B. R.

(G) Writ thereupon.
Against whom the Writ of Right for Disclaimer lies.

Fitch. Dis-claimer, pl. 12. cites S. C.

1. **It is not necessary that the Writ should be brought against him that disclaims, for it shall be but only against him that is found Tenant of the Land, and against no other, [and though] he be a Stranger, it is not material.** 45 E. 3. 7. b.

2. If the Mifie joins to the Tenant, and both disclaim, the Writ shall be brought only against the Tenant. 45 E. 3. 7. b.

3. In Replevin the Defendant made Confiance as Bailiff of one A. and the Plaintiff disclaimed; Per Brian, Writ of Right upon Disclaimer lies for the Matter upon this Disclaimer against the Bailiff; for there is sufficient Privity between the Bailiff and the Lord; Quod non negatur. Br. Disclaimer, pl. 16. cites 9 E. 4. 32.

4. But where the Lord leaves his Manor for Years, the Tenants attach, and the Termor disclaims and avows, the Tenant cannot disclaim; for the Termor cannot have Writ of Right upon Disclaimer; and if the Leffor will not bring Writ of Right upon Disclaimer, the Termor of the Leffor may have Writ of Right upon Disclaimer. Ibid.

5. Lord or his Mifie shall not have Writ of Right upon Disclaimer against the Tenant by Disclaimer of the Tenant. Br. Disclaimer, pl. 30. cites 12 E. 4. 16.

(H) Writ of Disclaimer.
For Whom it lies.

S. P. Br.
Droit de
Reçu, pl. 50.

1. **The Heir shall not have Writ of Right upon Disclaimer made in the Time of his Father for &c. and to the Disclaimer no Object but only against him who made the Avowry in whom the Disclaimer was, and not against his Heir.** Br. Disclaimer, pl. 2. cites 27 H. 6. 2.

2. A Man can not disclaim against a Termor of a Seigniory in Replevin, viz. against Tenant for Years of a Seigniory who avows in Replevin; for Termor
Disclaimer.

Terme cannot have Writ of Right upon Disclaimer. Br. Disclaimer, pl. 36. cites 29 H. 6.

3. And see M. 9 E. 4. there that a Man can not disclaim against Tenant in Tail of a Seigniory; the Reason seems to be inasmuch as none can have Writ of Right upon Disclaimer but he who has Fee-Simple in the Seigniory. Ibid.

4. Note, The Bailiff made Conuance for his Master by Tenant from him, and the Tenant disclaimed to hold of him, the Lord brought Right upon Disclaimer, and well though he be a Stranger to the Record of Replevin, for the Conuance was made in his Right and concordat 22 E. 3. And in this Action the Tenant shall not have the View, nor shall he vouch; for he is the same Person who did the wrong, viz. disclaimed. Quod Nota, by the Justices of C. B. Br. Disclaimer, pl. 29. cites 12 E. 4. 14.

5. In Replevin in Avowry between the Bailiff or Servant of the Lord and the Tenant, it the Tenant disclaims to hold of the Lord, the Lord may have Writ of Right upon Disclaimer, though the Lord be Party to the Avowry by Aid-Prayer or otherwise. Br. Disclaimer, pl. 20. cites 9 H. 7. 23. per Brian.

6. In Replevin the Defendant avow'd as Lord in Tail &c. upon the Tenant, there the Tenant shall not be permitted to disclaim; for the Lord can't have Writ of Right upon Disclaimer; for he has not Fee-Simple. Br. Disclaimer, pl. 53. cites 13 H. 7. 14.

(I) The Effect of Disclaimer.

1. Dower against R. and J. Per Fulthorp, if R. disclaims, this veils the frank-Tenement and Right in J. But contra if he pleads Nontenure; for in withstanding this the Right remains in his Person. Br. Disclaimer, pl. 13. cites 22 H. 6. 44.

2. In Avowry the Defendant made Avowry as Hie to bis Father; late Lord, upon the Tenant, as upon his very Tenant; the Tenant said, that at another Time bis Father, whose Hie the Defendant is, made Avowry upon him, and he disclaims for the same Rent, and demanded Judgment if he shall be received to avow upon him contrary to the Disclaimer, which is of Record; and notwithstanding the Avowry was held good; by which he disclaimed again. Br. Disclaimer, pl. 2. cites 27 H. 6. 2.

3. Where Tenant disclaims against his Lord, and after the same Lord disclaims him, and he makes Rejeours, and the Lord brings Affire, the Disclaimer is no Plea. Quere. Br. Disclaimer, pl. 3. cites 28 H. 6. 10.

4. And it seems there that Writ of Right upon Disclaimer lies as well where the Tenant disclaims against a Bailiff of the Lord who makes Conuance, as where the Lord himself had been Party, and had made Avowry. Br. Disclaimer, pl. 3. cites 28 H. 6. 10.

5. Precipe quod reddat against two, the one made Default after Default, and his Default recorded, and the other said, that the Demandant held the Land in Demand of him, and saving to him bis Seigniory (and placed what) he disclaimed to have any Thing in the Land, by which the Demandant had Judgment to recover the Whole against him who made Default; for by the Disclaimer all veils in him who made Default; Quod Nota; as well as if both had appear'd, and the one had disclaimed. Br. Disclaimer, pl. 5. cites 33 H. 6. 53.

6. If Tenant for Life disclaims, the Demandant enters, and the Tenant dies, he in Reversion may re-enter, and therefore it is best for the Demandant
Disclaimer.

mandant to *over his Writ*; per Moile. Br. Disclaimer, pl. 17. cites 36 H. 6. 28.

7. Disclaimer stops the Tenant to have *Assise*. Br. Disclaimer, pl. 24. cites 4 E. 4. 38.

8. *Formedon in Remainder &c*. Disclaimer is not Dilatory but may be Dilatory; for the Demandant by this may enter. Br. Diliatories. pl. 13. cites 5. E. 4. 46.

9. *By Disclaimer in Avowry the Lord is cut of Possession of his Services, and nothing remains but the Right of the Seigniory to have Writ of Eviction &c*. Br. Disclaimer, pl. 54. cites 16 H. 7. 1. Per Brian, Townshend and Keble.

10. *And Assise, Coffewrit, and all Writs of Possession are gone*. Ibid.

11. *By Entry upon Disclaimer in Formedon, the Heir in Tail is remitted*; Per Townshend, quod futi Concellum. Br. Disclaimer. pl. 54. cites 16 H. 7. 1.

12. *By the Disclaimer in the Seigniory in a Court of Record the Seigniory is extinct in the Land*. 2dly, That after the Disclaimer the Tenant shall hold of the next Lord Paramount by the same Services as the Menfe to disclaiming held before. Litt. S. 146. and Co. Litt. 102 b.

13. If a Man be disfelled and a Diffeiior dies, his Heir being in by Defeit, now the Entry of the Diffeiie is taken away; and if the Diffeiie bring his *Writ of Entry Sur Diffeiien in the Per against the Heir, and the Heir disclaims in the Tenancy &c*. the Demandant may aver his Writ that he is Tenant as the Writ supposes, and thereby to recover his Damages; but if he will relinquish the Averment &c. he must lawfully enter into the Land because of the Disclaimer, notwithstanding that his Entry before was taken away; and this was adjudged before Sir R. Danby Ch. J. of C. B. and his Companions &c. Litt. S 692.

14. *In a Formedon in Reverter, if the Tenant pleads Non-Tenure generally, the Demandant may maintain his Writ that he is Tenant, though he can recover no Damages*. Adjudged by all the Court, and that Litt. and Co. were not to be intended of a Simple Plea of Non-Tenure, supposing the Tenant has no Freehold, but a Reversion in Fee, the Demandant shall not be re tired to the Fee, for nothing is shown in the Simple Plea of Non-Tenure but only the Freehold, which may be true, and yet he may have the Reversion in Fee; but when the Tenant disclaims, or pleads Non-Tenure, and disclaims, the Demandant shall be re tired to the Whole, because he has disclaimed the Whole. 3 Lev. 330. Trin. 4. W. & M. Hunlock v. Peter.

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(K) Judgment in Disclaimer.

1. *In Writ of Customs and Services, if the Tenant disclaims to hold of the Demandant, the Writ shall abate, by which Action is accrued to the Demandant by Writ of Right upon Disclaimer*. Thel. Dig. 147. Lib. 11. cap. 34. S. 2. cites Trin. 31 E. 1. Droit 72. &c Hill. 2 E. 2. Droit 28. &c 13 H. 7. 27.

2. *In Writ of Right of Advowson, if the Tenant disclaims the Demandant shall not have Writ to the Sheriff to deliver Seisin*; but in Quare Impedit the Plaintiff shall have Writ to the Bishop. Thel. Dig. 148. Lib. 11. cap. 34. S. 21. cites Hill. 6 E. 3. 249.
Discontinuance.

3. In Nuper Obit, if the Tenant disclaims in the Blood the Writ shall abate, and the Demandant shall not maintain his Writ; but where the Tenant says that he does not claim any thing by Descent of Heritage but by Purchafe, there the Demandant may maintain his Writ. Thel. Dig. 147. Lib. 11. cap. 34. S. 7. cites Parch. 7. E. 311. & 11 H. 7. 14.

4. In Formedon against two, if the one disclaims and the other pleads Non-Tenure, they may well do so, but the Demandant shall not have Judgment to recover thereupon, but he may well enter &c. Thel. Dig. 148. Lib. 11. cap. 34. S. 17. cites 36 H. 6. 31. 36. & 13 H. 7. 28. And that so agrees Parch. 5 E. 4. Brief fol. 1. & Long Fol. 45. For upon Disclaimer in Writ where a Man shall not recover Damages, the Judgment shall be that the Demandant shall take nothing by his Writ, but the Judges were in a contrary Opinion there if the Demandant might enter upon him to whom the Tenant disclaiming made Alienation pending the Writ, Quære.

5. Upon the Disclaimer the Judgment is, that the Writ shall abate, and no Judgment is given for the Demandant. Br. Disclaimer, pl 17. cites 36 H. 6. 28.

6. If Tenant in Tail discontinues and die, and the Issue brings a Formedon against the Discontinue, who pleads Non-Tenure and utterly disclaims the Tenancy, Judgment shall be that the Tenant be fine, Die, and the Demandant may enter notwithstanding the Discontinuance. Litt. S. 691.

For more of Disclaimer in General, See Disagreement, and other proper Titles.

* Discontinuance.

(A) What Act or Thing will make a Discontinuance.

1. If a Tenant in Tail of a Copyhold (admitting there may be an Estate Tail thereof) surrenders the Copyhold to certain Utes or Seniority, &c. this is no Discontinuance. Rich. 15 Jac. 2. R. between Lee & Bucque, upon Evidence at the Bar the Court leaned to insist thereon, and admitted it in their Charge to the Jury; but they said it had been a great Question.

* A Discontinuance of Estates in Lands or Tenements is (properly in legal Understanding) an Alienation made or suffered by Tenant in Tail, or of the Issue in Tail, or the Heirs or Successors, or those in Reversion or Remainder, are driven to their Action and cannot enter. Co. Litt. 513. a.

It is an Alienation of the Possession, where the Right of Action is left in another; and it began in the Case of the Husband's Alienations of their Wives Lands. By the Civil Law the Father gave the Dos, which was the Estate of the Wife given on the Marriage; and if it consisted of Matters moveable the Husband had the Possession, but was bound to Reinstatement at his Death, and even an Action was allowed to the Wife in Case the Husband fell to Decay, to recover during his Life. If it
2. But by the Custom such Surrender may be a Discontinuance. 

3. If a Baron seised of a Copyhold in the Right of his Wife, surrenders it to the Use of another in Fee, who is admitted accordingly, this is not any Discontinuance to the Feene. Co. 4. Bulock b. Dalley 23. adjudged.

4. A Livery in Law will not make a Discontinuance.

5. An Exchange will not make a Discontinuance.

6. As if Tenant in Tail exchanges with another, that is not any Discontinuance, for his Issue may enter. 9 C. 4. 22. 13 C. 4. 3. Perkins 2. 294. 295.

7. Grant of Reversion or Advowson by Tenant for Term of Life is no Discontinuance, but only a Grant which expires by his Death, and the other who has Right may enter or prevent without being put to their Action. Quod Nota. Br. Grants. pt. 72. cites 23 All 8.

8. Confirmation with Warranty made by the Heir in Tail to a Tenant for Life, Hubendam to him in Tail shall take away the Entry of his Issue, and the Reason seems to be because the Warranty makes a Discontinuance. Br. Discontinuance de Poffeuffling, pl. 1. cites 3 H. 4. 9.

9. If Tenant in Tail inoff the Donor in Fee, this is no Discontinuance, but the Issue in Tail may enter, for he is not discontinued but where the Reversion is discontinued, but here the Reversion is not discontinued, for the Alienation is made to him who had the Fee, and by this Alienation the Donor gains no Fee, for if he shall have two Fee-Simples in one Land, which cannot be, for the Fee-Simple which he had before remain'd always in him, by which he cannot have a New Fee-Simple, and so this Estate is not in Law but for Life of the Tenant in Tail. Br. Discontinuance de Poffeuffling, pl. 24. cites 9 E. 4. 24.

10. Tenant for Life and Remainder in Fee of Copyhold Land within Age surrender to the Ule of B. B. is admitted Tenant for Life and Remainder-Man dies. The Heir of Remainder-Man is admitted, and enters into the Land, and good. Le. 95. pl. 124. Hill. 39 Eliz. B. R. Knight v. Footman.

11. Discontinuance is when by that has an Estate Tail or Fee-Simple in another's Right, as the Husband in Right of his Wife, a Dein sole seised in the Right of his Deanry, Dean and Chapter, Guardian
and Chaplains, as also Mayor and Commonalty of Lands in the Right of their Corporation, makes a larger Estate of the Land than he may; as by Fine or Feoffment for the Life of the Lefsee in Tail or in Fee, which is called a Discontinuance. Fin. Law. 8vo. 190.

12. Grant of a Rent, Release or Confirmation to a Tenant for Years in Fee makes no Discontinuance, for they pass no greater Estate without Livery than the Grantor had. Finch's Law. 8vo. 190.

13. Warranty of an Estate of Inheritance or for Life descending upon him which ought to take such Estate, makes a Discontinuance *; as if Tenant in Tail of an Advowson in Gros suffer an Usurpation by six Months, the Release of a Collateral Ancestor with Warranty is a Discontinuance. Finch's Law. 8vo. 193.

14. So it seems of a Collateral Ancestor's Release with Warranty to the Gransee in Fee of a Rent or an Advowson in Gros by Tenant in Tail. Ibid.

15. But if Tenant in Tail of an Advowson in Gros grants it in Fee, with Warranty, this is no Discontinuance, but at the Pleasure of the Illue. Finch's Law. 193.

16. An Act may be a Discontinuance now, and not a Discontinuance by Matter ex Post Facta. As if Tenant in Tail infeof him in Reversion and a Stranger, and Reversioner survives, it is no Discontinuance. So if Baron and Feme make a Lease for Life by Deed of Lands of the Feme, if the Feme after the Death of the Husband agrees, it is no Discontinuance; but if it disagrees, it is a Discontinuance. Per Croke J. Cro. C. 406. pl. 4. Pach. 11 Car. B. R. in Case of Baker v. Hacking.

(A. 2) What Act or Thing is. In Respect of the Persons making it. And what Persons may make it.

1. VIGAR of a Church may make a Discontinuance by Lease for Term of Life. Quere inde, for a Person cannot make a Discontinuance, for the Fee-Simple is in Abeyance. Br. Discontinuance de Posseffion pl. 31. cites 9 E. 3. 8. & Fitzh. Juris utrum. pl. 18.

2. Tenant in Tail of the Gift of the King, the Reversion to the King, made Feoffment in Fee and re-took him and his Feme, and died, and the Illue was within Aged, and the King seised him and ousted the Feme and made her to answer the Illues and Profits of two Parts and endowed her of the third Part, because the Feoffment is now void; for where the Reversion is in the King and the Tenant in Tail cannot discontinue, Br. Taile & Dones. pl. 41. cites 40 Aff. 36.

3. Land is given to two, and to the Heirs of one who join in a Lease for Term for Life to J. N. it is no Discontinuance, nor Forfeiture by him who had not but for Term of Life, because the other who had the Fee joined in the Lease with him, and there is no new Reversion gained. Br. Discomm de Posseffion. pl. 33. cites 2 H. 5. 7. & Fitzh. Want. 54.

4. If Exchange be of Lands-tailed or by Baron and Feme of the Land of his Feme, this is no Discontinuance. Br. Exchange. pl. 5. Per Choke, Danby, and Needham, cites 9 E. 4. 19. 20.
5. If Tenant for Life, and be in Remainder in Tail join in a Feoffment, this is no Discontinuance, for it is the Livery of the Tenant for Life and the Grant of him in Reversion, and Grant without Warranty is no Discontinuance. Br. Misc. Discon. p. 38. cites 13 H. 7. 14.

6. If Land is given in Tail to the King, and after the King by his Patent leaves it for Years, or for Life, and has Issue and devise, the Patent is void, for it is no Discontinuance; for Grant without Livery does not make any Discontinuance; so if he had granted it in Fee, this is no Discontinuance; and so fee that the King may be Tenant in Tail; for when a Man gives to the King in Tail, the King cannot have greater Estate than the Donor will depart with to him. Br. Tail & Dones Ecc. pl. 39. cites 9 H. 8.

7. A Sole Body Politick that has the absolute Right in them, as an Abbot, Bishop, and the like, may make a Discontinuance, but a Corporation aggregate of many as Dean and Chapter, Wardens and Chaplains, Master and Fellows, Mayor and Commonalty &c cannot make any Discontinuance; for if they join the Grant is good; and if the Dean, Wardens or Mayor make it alone, where the Body is aggregate of many, it is void, and works a Discontinuance Co. 325 b.

8. But by the Statue of 1 Eliz. and 13 Eliz. cap. 10. and 15 Jac. cap. 3. Bishops and all other Ecclesiastical Persons are disabled to alien or discontinue any of their Ecclesiastical Livings, as by the same Acts does appear. Co. Litt. 325 b.

(B) What Conveyance will make a Discontinuance.

1. If Tenant in Tail leaves a Fine Sur Conuance de droit tenuum, this is not any Discontinuance till Execution; for if he dies before Execution, the Issue may enter. 36 Ill. 8.

2. If a Gift be made to Baron and Feme, and the Heirs of the Body of the Baron, the Remainder to A. in Tail, the Remainder to B. in Tail, the Remainder to D. in Tail, the Remainder to the Right Heirs of the Baron, and the Baron and Feme and B. join in a Feoffment and after in a Fine or the Feevage, this is a Discontinuance of the Remainders, so that A. cannot enter upon the Death of the Baron without Issue, because the Baron was lapsed by Force of the Tail; and the joining of the Feme and him in the mediate Remainder in the Feoffment, and Feme does not alter the Issue at the Common Law, but it enters as their (*) Confirmation and so operates, that it is not any Discontinuance within the Statute of 32 H. 8. but a lawful Bar. Mich. 9 Car. 2. R. between King and Edwards, Unjudged upon a Special Perpetual per Curtail, prefer Jones, who doubted whether the Baron was lapsed by Force of the Tail, but agreed with the Court in the rest.

3. If there be Tenant in Tail, the Remainder to his Right Heirs, and he makes a Feoffment in Fee, this is a Discontinuance, though he that made the Feoffment had the Fee in null. * 13 P. 7. 22.

b. admitted. Patch. 11 Car. 2. R. in the Case between Baker and Hacking, agreed per totam Curtain.

4. If Donee in Tail and Donor join in a Leafe for Life by Deed, referring a small Rent, this a Discontinuance presently, so that the Donor cannot devise his Reversion during the Life of the Leafe, because it is a Rule of Law, that when Tenant in Tail makes a Feoffment
Discontinuance.

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Feoffment or Lease for Life, the lessor being seised by Force of the
Croke J.
Tail, that this shall be a discontinuance, and this is a Lease of
the Donee during his Life; P. 11 Car. B. R. between Baker and
Hacking, adjudged upon a special verdict by Brainston, Jones,
and Barley, against the opinion of Croke, who held it should
not be a discontinuance till the Death of the Donee, and conclud-
edly that he died during the Life of the Lessee, and so by Conse-
quence the Donee may in the mean Time dispole of his Revo-
ision, unless as the Intent of the Parties was so, but to
ta Curia against him, and that rather it shall be construed to be
present discontinuance, to be altered upon the Death of the Lessee
and Donee without Issue. Intratur Pull. 8 Car. B. R. Rot.
346.

during the Life of Tenant in Tail, and during the Time that he has Issue, but after his Death with-
out Issue it is the Lease of him in the Reversion and during the Life of Lessee it is a Discon-
nuance quoad the Tenant in Tail and his Issue; but not so as to the Reversion for that remains as it
was; and Richardson inclined to this Opinion, but Berkley doubted; But ibid. 204. pl. s. Patsh. 11 Car. B. R. S. C. Resolved by all the Justices contra Croke that the Lease for
Life is only the Lease of the Tenant in Tail during his Life and the Life of the Lessee, and that it is a
Discontinuance and the Reversion taken from him in the Reversion is displaced, and this being a Lease
for Life of the Lessee the Livery is only made by the Tenant in Tail, he only having Power of the
Prehold and the Immediate Possession and Inheritance; and so the Tenant in Tail has gained a
new Fee expectant upon the Estate for Life, and it is a present discontinuance, and it cannot be
a Lease for the Life of Tenant in Tail and after his Death without Issue, a Lease for Life of
him in the Reversion.———Hart 126. Baker v. Hacking. S. C. adjudged by all, pl. power Croke that it
was a Discontinuance and not the Lease of him in Reversion but his Confirmation.———Ib. 538.
85. Trin. 14 Car. 2 B. R.

5. If a Bishop seised in Fee of a Manor makes a Lease for Life of See tit.
Parcel of the Demesnes, not warranted by the Statute of 1 Eliz. of
Grants (Y)
Bishops, yet this is not any discontinuance, but the Reversion
thereof continues Parcel of the Manor. Patsh. 11 Car. B. R.
between Walter and Jackson, adjudged in a Bill of Error upon a
Judgment in Banco; And Justice Berkley said, that it was so
adjudged in B. in the same Term; And now the Judgment was
affirmed per Curiam, feliciter, that the Reversion of this Parcel
shall pass with the Attornment of the first Lessee by the Grant of the
Manor.

6. [But] if Tenant in Tail of a Manor makes a Lease for Life, not
warranted by 32 H. 8. of Part of the Demesnes, this is a Dis-
Grants (Y)
continuance of this Parcel, and makes it to be not Parcel of pl. 6 S. C.
the Manor, nor shall pass by the Grant of the Manor with the
Attornment of the Lessee; in the Case of Walter and Jackson, it was laid by Berkly, that it was so agreed in the said Case in
Banco.

7. Land was given to A. and E. his Wife and to the Heirs of the
Body of A. who had Issue J. and died, and J. granted the Reversion
over in Fee, E. attorned, and J. had Issue and died, and after E. died,
the Grantee entered, and the Issue ousted him, and the Entry of
the Issue is lawful, because the Grant did yet take Effect in the Life of
cites 34 Aff. 4.

8. Note for Law by Award, that where a Lease is made to Baron
and Feoff for Term of Life, the Remainder to A in Tail, A. released all
his Right to the Baron and Feoff by Deed without Warranty, and died;
the Baron alien'd, the Issue in Tail enter'd, and his Entry adjudg'd law-
ful; for where he releas'd as above without Warranty nothing pusses
but his Estate for Term of Life, and no Inheritance. Brooke says,
And from hence it seems, that if there had been any Warranty that this
6 Q

bad
Discontinuance.

had been a Discontinuance. Br. Discontinuance de Posseffion, pl. 17. cites 43 All. 17. and concordat with this Cafe the fame Year, fol. 45. 9. And where Tenant for Life is, the Remainder over in Tail, the Remainder over in Tail and the Tenant for Life aliens to another for Life, the Remainder in Tail, the second Tenant for Life dies, he in Remainder enters, the Entry of him in the first Remainder is lawful upon him. Br. Discontinuance de Posseffion, pl. 17. cites 43 All. 17.

10. A Fine levvd to one whois in Posseffion before, that it cannot otherwife be executed, is no Discontinuance, but some e contra; but it was agreed that a Feoffment or Fine fur Cognusfance de Droit come coo &c. are Discontinuances, for they are executed in themselves and are a Tranfmutation of the Posseffion; contrary of a Fine Cognusfance de Droit tranum or Fine de Grant and Render. Br. Discontinuance of Posseffion, pl. 2. cites 8 H. 4. 7. 11. Where Tenant in Tail leaves for Life and after releafes all his Right to the Tenant for Life and his Heirs, this is a Discontinuance in Fee. Br Discont. de Poff. pl. 3. cites 21 H. 6. 52. & 43. All. 48. 12 Contra where Tenant in Tail leaves for Years or for his own Life and makes fuch Releafe, this is no Discontinuance; for the Grant, Releafe, nor Confirmation of the Tenant in Tail cannot be a Discontinuance but where the Tenant in Tail at the Time of the making it is feised of Fee Simple by some particular or other fuch Means. Ibid. per Littleton.

13. But where Tenant in Tail leaves for Life, Remainder over in Fee, this is a clear Discontinuance in Fee, for all goes by one and the fame Livery; Per Littleton & hoc concordatur pro Lege. Ibid. 14. And per Markham, Tenant in Tail has issue two Sons and dies, the eldest enters, and gives in Tail to Baron and Feme, the Baron dies, and Feme is Tenant in Tail after Possibility of Illue extinct; the eldest Son dies without Issue, and the Reverfion defends to the youngeft, who releafes to the Feme all his Right &c. and has issue and dies; the Feme dies, and the Brother of the Feme enters; the Entry of the Illue of the youngeft Son is tolled. Quere; For be who releafed was never feised by Force of the Tail. Ibid.

Where the Thing does lie in Live-ry, as Lands and Tenements, yet if to the Conveyance of the Freehold or Inheritance no Livery of Seisin is requisite, it works no Discontinuance; as if Tenant in Tail exchange Lands &c. or if the King, being Tenant in Tail, grant by his Letters Patent the Lands in Fee, there is no Discontinuance wrought. Co. Litt. 332 b.

15. Exchange is no Discontinuance, for there is no Livery; Per Danby, Needham, and Chocke, and the Heir or Feme may enter. Br. Discont de Poff. pl. 5. cites 9 E. 4. 22.

A Devise is no Discontinuance. Br. Exchange, pl 5 Per Choke, Danby, and Needham. If a Man be feised in Tail of Lands devisable by Testament &c. and he devises this to another in Fee and dies, and the other enters &c. this is no Discontinuance; for that no Discontinuance was made in the Life of the Tenant in Tail &c. Litt. S. 624 —— No Discontinuance can be made by Tenant in Tail, but such as is made and takes Effect in his Life-time. Co. Litt. 334. b.

17. If Tenant for Life and be in Remainder in Tail join in a Feoffment, this is no Discontinuance, for it is the Livery of the Tenant for Life, and

18. Grant without Levery will not make a Discontinuance, nor shall it bind, but during the Life of the Grantor; and the same Law of such Grant in Fee. Br. Diiscont. de Poff. pl. 35. cites 38 H. 8.

19. A has Issue a Son and a Daughter, and conveys Land in Trut for his Son and his Wife and the Heirs of their Bodies lawfully be gotten, and for Default of Issue to the Use of the Daughter and her Husband, and to the Heirs of the Body of the Daughter lawfully be gotten, and after to the Use of A. and his Heirs for ever. The Son died without Issue. A died. The Daughter had Issue B. by her then Husband; the Husband died; the Daughter marry'd a second Husband and they levy a Fine, by which they grant and render a Rent of of 20l. per Annum to C. and D. for their Lives. This Grant and Render is out of the Statute of 32 H. 8. 36. of Fines, and binds not the Issue in Tail. Kelw. 219. a. b. Mich. 3 & 4 Eliz.

20. A Tenant in Tail, Remainder in Fee to his Sisters, being his Heirs at the Common Law, by Deed indented, the Words were in the Form of a Deed-Poll, did give, grant, and confirm for a certain Piece of Money &c. to W. R. and his Heirs, without the Words Bargain and Sell, Habendum to the said W. R. with Warranty &c. against A. and his Heirs, and a Letter of Attorney to make 'Livery and Seisin; This Deed was enrolled within a Month after it was executed, and about four Months afterwards the Attorney made 'Livery and Sellin; A. died without Issue; the Sisters enter'd, and W. R. the Leesee re-enter'd, and thereupon they brought Trepals, and the whole Court held for the Plaintiff; for here is not any Discontinuance, because the Conveyance was by Bargain and Sale, and not by Feoffment, and the Levery comes too late after the Inrollment, and then the Warranty shall not hurt them; and though in the Deed there are not any Words of Indenture, and though the Words are in the first Person, yet the Parchment being indented and both the Parties having put their Seals to it, it is sufficient, and the Words, Give, Grant, Agree, and Confirm for Money, if the Deed should be duly inrolled, the Lands shall pass both by the Statute of Uses and by the Statute of Inrollments as well as upon the Words Bargain and Sell. 3 Le. 16. pl. 59. Mich. 14 Eliz. B. R. Anon.

21. Tenant in Tail made a Leafe for the Life of Leesee, according to the Statute of 32 H. 8. The same was held not to be a Discontinuance. 4 Le. 191. pl. 301. Hill. 19 Eliz. B. R. Vernon v. Staveley.

22. Tenant in Tail makes a Bargain and Sale and makes 'Livery, and within six Months inrolls it; this is adjudged a Discontinuance, and yet the Bargain and Sale is not any Discontinuance ; Per Anderson Ch. J. Goldsby. 25. pl. 6. Trin. 28 Eliz. cites Plowd. C. Bracey's Cafe.

Brown J. Mo. 28. pl. 90.

23. A Tenant for Life, Remainder in Tail to B. Remainder to A. in Fee, A. and B. makes a Leafe for three Lives by Indenture. A dies. B. grants the Reversion to C. in Fee to the Use of his Laft Will, and after devis'd the Reversion for Years and dies; the three Lives die; Device for Years enters; the Heir of the Body of B. out's him; adjudged that the Lease for three Lives was no Discontinuance. Cro. E. 36. pl. 4. Pasch. 29 Eliz. B. R. Trevilian v. Lane.

24. In Trepals, the Defendant pleaded, that A. N. his Ancestor The Reversioner was fefted, and died fefted, and that the Lands descended to him as Son and Heir; the Plaintiff replied, that long before A. N. any Thing served, that the Court had no
Discontinuance.

27. If Tenant in Tail makes a Lease for Years, and after makes a Grant; it is no Discontinuance, although that Afters defend; but a Disfrels may be taken for the Rent. But if a Formetou in the Defeuder be brought, he shall be barred. 3 Rep. 85. a. Pach. 44 Eliz. in the Case of Fines.

28. A Formetou for the Life of the Lefsee in Tail or in Fee is a Discontinuance; But a Grant (of a Rent) Release or Confirmation (to a Fine for Years in Fee) is no Discontinuance; for they pass without Livery, and therefore pafs no greater Eftate than the Grantor had. Finch. Law 8vo. 190.

29. To every Discontinuance there is necessary a dreading or displacing of the Eftate, and turning the fame to a Right; for if it be not turned to a Right, they that have the Eftate cannot be driven to an Action. And that is the Reason that fuch Inheritance as he in Grant cannot by Grant be discontinued, because fuch a Grant devells no Eftate, but paffes only that which he may lawfully grant; and to the Eftate itfelf does defend, revert or remain. Co Litt. 327. b.

30. If Tenant in Tail makes a Lease for Years of Lands, and after leaves a Fine; this is a Discontinuance, for a Fine is a Footment of Record, and a Freehold paffes. Co Litt. 332. b.

31. But if Tenant in Tail makes a Lease for his own Life, and after leaves a Fine, this is no Discontinuance, because the Reverion expeft upon an Eftate of Freehold, which lies only in Grant, paffes thereby. Co Litt. 332. b.

32. If Tenant in Tail makes a Lease for three Lives according to the Statute 32 H. 8. that is no Discontinuance of the Eftate Tail, or of the Reverion, because it is authorized by Act of Parliament, whereunto every Man in Judgment of Law is Party. Co Litt. 333. a.

33. And yet in fome Cafes the Freehold may be discontinued, and not the Reverion. As if the Husband and Wife makes a Lease for Life by Deed of the Wife’s Land, referencing a Rent, the Husband dies; this was a Discontinuance at the Common Law for Life, and yet the Reverion was not discontinued, but remained in the Wife. Otherwise it is if the Husband had made the Lease alone. Co Litt. 333. a.

34. B. Tenant in Tail makes a Gift in Tail to A. and after B. releases to A. and his Heirs, and after A. dies without issue, the Life of the first Donee may enter upon the Collateral Heir, because A. had no Saffian and Execution of the Reverion of the Land in his Demise as of Fee. Co Litt. 333. b.

35. But
Discontinuance.

35. But if Tenant in Tail makes a Lease for Life of the Lessor, and after releaseth to him and his Heirs; this is an absolute Discontinuance, because the Fee Simple is executed in the Life of Tenant in Tail. Co. Litt. 333. b.

36. Note, that the Cafes in Littleton, tit. Discontinuance, where Tenant in Tail shall not discontinue by his Release, are no otherwise but where he leaves for Years or for his own Life, and after releaseth to the Tenant in Fee, this is no Discontinuance; for he was Tenant in Tail at the Time of the making the Release. But contrary where he leaves for Life of the Tenant, and after releaseth to him in Fee, this is a Discontinuance in Fee; For he had the Fee at the Time of the Release, and this Fee was executed in the other in the Life of the Tenant in Tail.

Br. Diccon de Pofl. pl. 3.

37. If I give Land to another in Tail, and he lets the same Land to Co. Litt. another for Term of Years, and after the Lessor grants the Reversion to another in Fee, and the Tenant for Years attorns to the Grantee, and the Term expires during the Life of Tenant in Tail; by which the Grantee enters, this is no Discontinuance. Litt. S. 619.

38. But if Tenant in Tail makes a Lease for Life of the Lessor, and the S.P. for Tenant for Life dies, dying the Tenant in Tail, and the Grantee of the Reversion enters, this is a Discontinuance in Fee, for the Reversion being executed in the Life of Tenant in Tail, it is equivalent in Judgment of Law to a Feoffment. Litt. S. 620. and Co. Litt. 333. b.

plainly manifest a Discontinuance of the entire Fee Simple. But it may be asked why such Grant operates by the Subsequent Entry, to pass more than it lawfully may pass; for if the Grant and Attornment only operate to pass a rightful Estate, why does the Subsequent Entry in pursuance of such Grant make it pass a wrongful one? The Answer is plain; the Grant and Attornment of Tenant for Life passes the new Reversion depending upon that Estate for Life, but since Grants in their own Nature are secret, and therefore pass no more than they lawfully may pass; it follows that this Grant and Attornment alone cannot pass the Reversion, so as to disinherit the Tenant in Tail; but if it be owned by Entry, then it will; For the Entry is a Notariety, that the Grantor intended to perpetuate the Discontinuance, and to continue a Right of Feoffment distinct from the Propriety, and must be equal to a second Feoffment, which he might make when Tenant for Life dies, during his Life; but if he had died before Tenant for Life, he had not been capable of such Feoffment, and consequently of no Discontinuance that is tantamount; for the Grant and Attornment of Tenant for Life pass by an Endeavour to pass the new Reversion, and the Entry in pursuance thereof must be to all manner of Pursuits tantamount to a new Feoffment, and therefore continues the Right of Feoffment distinct from the Propriety, and by the Law continued not to operate as a Grant merely, but taking the Acts most strongly against the Parties, it is interpreted to operate as a Feoffment.

Gibb, Treat. of Ten. 115, 114, 115.

39. If Tenant in Tail make a Lease for Life, and grants the Reversion in Fee, and the Lessor attorns, and that Grantee grants it over, and the Tenant for Life grants a Lease to the Tenant in Tail. Yet this is no Discontinuance, but Life, this death of Tenant in Tail the Issue may enter, because (as Littleton here says) he is not in of the Grant of the Tenant in Tail, but of his Grantor. Co. Litt. 333. b.

b cause he parts with the Freehold out of him, gains a new Reversion to the Tenant in Tail. Now if he grants this new Reversion in Fee, and Tenant for Life attorns, and Tenant in Tail dies during the Life of Tenant for Life, and then Tenant for Life dies, the Issue in Tail may enter, because by this the Discontinuance is at an End by the Death of Tenant for Life; and the Grant of the Reversion being secret, must be intended to pass no more than it lawfully might pass, unless it were executed by Entry into the Possessor; For since it operates only as a Grant, it must be only intended to pass the Reversion, during the Life of Tenant in Tail, which he had a lawful Power to Grant, and not establish a Right of Property distinct from the Right of Possession. But if a Man had thus created the Reversion, and Tenant for Life had died, and then the Grantee had entered by Force of the Grant, and the Tenant in Tail had died, this had worked a Discontinuance. Gibb, Treat. of Ten. 115.
40. If Tenant in Tail makes a Lease for Life, and after disposes the
Lease for Life, and makes a Fee Simple in Fee, the Lessee dies, and then
Tenant in Tail dies, although the Fee be executed, yet for that the Fee
was not executed by lawful Means, it is no Discontinuance. Co. Litt.
333. b

41. If Tenant in Tail makes a Lease for Life of the Lessee, he discon-
tinues the Entail during the Life of the Lessee, and gains a new Reversion
in Fee, and if he after grant this Reversion in Fee, and Lessee dies, or
furrenders or forfeits in the Life of Tenant in Tail, this is a Discon-
tinuance in Fee, because the Grantee was seised in Demise as of Fee in the
Life of Tenant in Tail by force of this Grant; But if Tenant in Tail dies
before the Grant in Fee be executed by Death &c. of Tenant for Life,
the Discontinuance determines upon the Death of Tenant for Life,
though the Grant were with Warranty, * which being annexed to an
Estate palling by Grant, cannot bar the Entry of the Issue because the
Estate to which it is annexed is void at his Election. Hawk. Co. Litt.
422, 423.

42. W. inchof Husband and Wife, habendum to them and to the
Heirs of their Bodies between them to be begotten, and they being fo
seised of the whole Land in Fee-Tail, the Husband inchof the Young-
off Son in Fee of the Lands, and died, and then the Wife died before she
made any Entry; The Eldest Son entred into the Land. The Question
was upon the Statute of 32 H. 8. as to Feoffments &c. made by the
Husband during Coverture, and Sir Edward Coke held, that the Heir
is not barr'd of his Entry by the Statute. Brownl. 131. Hill. 5 Jac.
Greenly v. Palley.

43. Tenant in Tail bargains and sells to another, with Warranty to him,
his Heirs, and Assigns; This is no Discontinuance to him in Remain-
der or Reversion, neither can the Bargainee re-butt in a Formedon in
the Reverter, because the Estate to which the Warranty is annex'd
is determined. 10 Rep. 95. b. 96. b. Mich. 10 Jac. Seymour's Cafe.
44. Tenant after a Bargain and Sale leaves a Fine to the Bargainer and
his Heirs with Warranty, this is no Discontinuance, for the Fine
operates upon the Estate Precedent, and pusses nothing, but if the Fine
had been levied before the Bargain and Sale enrolled, this had been a Discon-

45. Land was given to the Ufe of B. and his Wife, and the Heirs of
the Body of B. and for default of such Issue the Remainder to the right
Heirs of B. B. makes a Feoffment in Fee with Warranty, and
takes back an Estate to him and his Wife for their Lives, the Remain-
der to L. and M. two of his Daughters and their Heirs, and dies,
leaving four Daughters, The Wife enters and dies. It was infir'd,
that it was no Discontinuance, because the Husband and Wife were
Jointtenants for Life with an Estate Tail expectant in the Husband,
and none can discontinue the Tail, if he was not seised of it; and in
this Case it is plain, that the Husband was not seised of it at the Time
when he made the Feoffment, because he and his Wife were Joint-
tenants in Tail, but adjudg'd this is a Discontinuance, and by the
Livery and Seisin B. was out of Possession, and no Remitter can be
before an Entry, and the Warranty is here attach'd before Entry.

46. If Feoffor of Estate Tail makes a Bargain and Sale by Deed
enrolled, and Issue in Tail releases with Warranty, it is a Discon-
tinuance,
Discontinuance.

ance, though neither Bargainee had entered and had Poffefion, nor the Issue in Tail had once been feifed by force of the Tail. Refolv'd. 

(B. 2.) What Conveyance is a Discontinuance.

In Respeft of the Warranty.

1. In Dower Baron and Feme Tenants in Tail had Issue two Sons, and the Baron died, the Feme lefled to the Eldest Son for Years, and after released to him and his Heirs with Warranty, he took Feme, and died without Issue, and after the Mother died, and the Youngest Son enter'd, and the Feme of the Eldest Son brought Writ of Dower and recover'd by Judgment, and therefore it feem that a Releafe with Warranty is a Discontinuance, nevertheless this Judgment was contrary to the Opinion of severals. Br. Difcont' de Pofi. pl. 7. cites 24 E. 3. 28.

2. If a Man leaves for Life and after grants the Reversion to A. in Tail, which A. granted it to B. in Fee with Warranty, the Tenant attorn'd, the Downe had Issue and died, and after the Tenant for Life died, and the Issue enter'd, and B. oufled him, and he brought Affife, and B. pleaded for the Tenant in Tail with Warranty, and yet the Affife was awarded, Quod Nota, his Entry lawful. And to see that Grant of Reversion by Tenant in Tail with Warranty makes no Discontinuance of the Tail, if the Reversion does not fall to the Poffefion in the Life of the Granter, ficut non ficit hic. Quod Nota, Warranty makes no Discontinuance. Br. Difcont' de Pofi. pl. 14. cites 36 Aff. 8.

3. In Affife; Tenant in Tail after Possibility of Issue extinct alius with Warranty, he in Remainder or in Reversion may enter notwithstanding the Favour of the Warranty, Quod Nota. Br. Enr. Cong. pl. 84. cites 43 Aff. 24.

4. If Tenant in Tail of an Advowfon in Gros' aliens the Advowfon with Warranty, this is no Discontinuance, but the Issue in Tail may have Quare impedit, but it he has Affife in Fee by Defcent, he shall be barred. Per Nомнray quod non fuæ dedicatum, nevertheless Quare inde. Br. Difcont' de Pofi. pl. 30. cites 43 E. 3. 26.

5. In Affife, a Man gave to N. in Tail, who had Issue O. by K. his Wife, and died, and O. endowed K. and K. lefled to D. and F. his Feme for Term of their Lives and died, and O. confirmed the Estate of the Baron and Feme in Tail with Warranty, and the Baron and Feme died and after O. died, the Heir of the Baron and Feme in Tail entered, and the Issue of O. oufled him, and the Issue of the Baron and Feme brought Affife, and by the belt Opinion the Entry of the Tenant was not lawful, by Reason of the Confirmation of his Father with Warranty, for it seems that by the Confirmation and Warranty, it fthal ensue to a Discontinuance in Effef. Br. Enr. Cong. pl. 19. cites 3 H. 4. 9.

6. If Tenant in Tail of Rent grants it in Fee, this is no Discontinuance; For it is by grant without Livery, which is only his Interest which he may lawfully grant. Contra if he grants it in Fee with Warranty, this is a Discontinuance in Fee, Note the Difference. Br. Difcont' de Pofi. pl. 5. cites 21 H. 6. 52. & 43. Aff. 48.

7. And yet it was agreed, that where Tenant in Tail leaves for Life and grants the Reversion over in Fee with Warranty and dies before the Tenant for Life and after the Tenant for Life dies this is no Discontinuance in Fee notwithstanding the Warranty. Ibid.

8. Where
Discontinuance.

8. Where a Man infeoffs another with Warranty, there an Entry lawful or a Recovery made or had by a Stranger by Elder Title before the Tenant has vouched in Precipe quod reddat, or before Request of Warranty made in Affisa shall defeat the Warranty. Br. Garranties pl. 32. cites 21 H. 6. 45.

9. Contra after Voucher or Request made. Ibid.

10. Contra of Release made by him who has Entry lawful; there it shall not determine the Warranty; for the Possession continues as to this Regard. Ibid.

11. If a Man gives Land to the Father and Son and to the Heirs of the Body of the Father begotten, the Father makes a Feoffment in Fee, of the whole with Warranty and dies, there by all the Justices the Son may enter into the Moiety for the Diffciliation, and have his Action for the other Moiety, and so a Discontinuance of a Moiety, Nota. Br. Difcont. de Possession, pl. 4. cites 22 H. 6. 51.

12. It was admitted, that where the Duke of Norfolk had the Office of the Marshal in Tail and granted it with Warranty to B for Life and the Grantor died, and it was found that the Duke died feized of the Office in Tail and the Heir within Age, by this B. is out of Possession, but it is admitted that he may travel, and then it seems that the Grant is not void by the Death of the Tenant in Tail, but that the Grant and the Warranty is a Discontinuance and the Grantee out of Possession, because his Grant is not found in the Office, and may Ad himself by Traverfe. Br. Difcont. de Possession, pl. 20 cites 5 E. 4. 3.

13. Tenant for Life, the Remainder over in Tail, the Tenant for Life dies, and f. N. intrudes, in whose Possession he in Remainder releases with warranty in Fee, and has issue and dies, the Issue cannot enter, for by the Opinion of all the Justices this Release with Warranty is a Discontinuance; for this Release counteracts the Entry and Feoffment in this Case and the Warranty shall enure upon the Posseffor in Fee, by which warranty the Entry of the Issue is taken away. As it Tenant in Tail be dissiffed, and after releases, this is a Discontinuance. But Caresebi contrary, and that it is not a Discontinuance, for he who released never had Possession, and therefore demurred in Law. And fee Littleton’s Tenures tit. Discontinuance and tit. Garantie, that Warranty makes a Discontinuance as here; though he who released with Warranty was not feized by Force of the Tail. Br. Difcont. de Possession, pl. 21. cites 12 E. 4. 11.

14. Tenant in Tail of a Rent grants the Rent, this is no Discontinuance, and notwithstanding that he be with Warranty, yet by the best Opinion it is not a Discontinuance; if Warranty shall not enure but upon the Effeate, and the Rent was granted in Tail, and had not Effe before, so that there never was Fee-Simple of it, therefore it is doubted it the Grantee may have thereof Fee-Simple, nevertheless Quere, if he may not have Fee-Simple determinable upon the Effeate Tail. Br. Difcont. de Possession, pl. 6. cites 15 E. 4. 6.

15. If Collateral Warranty descents upon an Infant within Age, he may enter within Age, or at full Age, at his Pleasure to defeat the Warranty. Br. Ent. Congress. pl. 102. cites 18 E. 4. 13.

S. P. Br. Ent. Congress pl. 65. cites 28 Ass. 28.

where his Entry was lawful before, per Shard, Stanton and Birton, so that it seems contrary if his Entry be not lawful before.
Discontinuance.

16. If Tenant in Tail of Rent discharges the Tor-tenant, and makes a Fee-Co. Litt. 332. b (r) offce in Fee with Warranty, this is no Discontinuance of the Rent, per S. P. and Hamb. Davers and Brian, because the Warranty is of the Land. But S. C. in the Townehead contrary, and that the Warranty of the Land extends to all Margin, that may issue out of the Land, and the Rent is not extinct but suspend- ed. Br. Discon't de Poffession, pl. 18. cites 3 H. 7. 12.

17. And if Tenant in Tail of Rent releases with Warranty to the Te- nant of the Land, this is no Discontinuance, per Townehead. Br. Di- socont' de Poffession, pl. 18. cites 3 H. 7. 12.

18. Rent does not lie in Discontinuance; for though Tenant in Tail grants it in Fee with Warranty and dies, yet the Heir may distrain, and pl. 25, cites it is no Discontinuance. But if he will bring a Formedon he shall be barred if he has Affets, for this is his Folly, but contrary if he will distrain, Per Kingmiff Justice and Marfo. Br. Dioccont' de Poffession, pl. 9. cites 21 H. 7. 9.

S. P. and yet if Collateral Warranty descends upon each Grant of Rent or Adrowfon, it shall be a Bane to the Heir in Tail by the bell Opinion of the Justices because the Grantor has Fee in it till the Heir has distrain'd or presented to the Advocate, ibid. pl. 34, cites 21 H. 7. 40.


20. Never releases by Kingmiff, if Tenant in Tail of a Rent purchases the Land in Fee, and makes a Feoffment of the Land with Warranty, this is a Discontinuance of the Rent; for Land lies in Discontinuance. And the same Law by Frowicke Ch. J. and that it should have been a good bar if it had been well pleaded as it was not. Br. Dioccont' de Poffession, pl. 9. cites 21 H. 7. 9.

21. Or if Tenant in Tail is discharges and releases with Warranty and such Re- leases there are not Discontinuances, per Marro. Br. Discon't de Poffession, pl. 9. cites 21 H. 7. 9.

be Heir to the Warrantor, 2 Rep. 58. b. Patch 44 Eliz. in the Case of Fies. — Litt. 8. 601. for this is a Discontinuance by Reason of the Warranty. —— Because if the Issue in Tail should enter, the Warranty should be destroyed, and therefore to the End that if Affets descends in Fee-Simple, the Release may pleas the same and to bar the Demannant, and so all Rights and Advan- tages are voided. Co. Litt. 328. a. b.

such Release with Warranty is a Discontinuance; because it amounts to Entry and Feoffment, Per Petition. Mo. 256, in Case of Brifce v. Chamberlain. —— So if Issue in Tail before Entry re- leases with Warranty to the Demannor of his Father, this is a Discontinuance and takes away the En- try of his Issue without Warranty and he is put to his Action. Jo. 397. pl. 7. agreed per Cor. Cur. Mich. 15 Car. 8. R. Fitzherbert v. Lech.

22. If the Baron discon'tes the Right of his Feme, and Ancestor Col- lateral of the Feme releases with Warranty and dies, to whom the Feme is Heir, and after the Baron dies, the Feme shall be barr'd in Cui in Vita by this Warranty notwithstanding the Coverture, because she is put to her Action by the Discontinuance; for Coverture cannot avoid Warranty but where the Entry of the Feme is lawful, which is not upon a Discontinuance. Br. Guaranties, pl. 84. cites M. 33. H. 8.

23. Where a Man may avoid the Poffession upon which the Warranty is defended, as it a Stranger has Entry lawful by Reason of Discon't, or by a Condition &c. which is Misuse between the Tail and the Poff- sion, and Warranty of the Purchafor, there, when the Poffession upon which the Collateral Warranty was made is defeated, the Collateral Warrant- y is also defeated. Br. Guaranties, pl. 31. cites Litt. tit. Garr.

24. So where it cannot defend by Reason that he who made it is attainted of Felony, or the like. Ibid.
Difcontinuance.

When the warranty did not descend when a warranty was made or the right of re-

in the time of the warranty, the warranty is construed to the favor of the

Co. J. v. J. (continuing)

This is a case of a Clear and Definite Receipt, but it is not a Difcontinuance.

either the warranty or the warranty was

Difcontinuance, in the time of the warranty, to be construed.

the warranty is construed to the favor of the

be construed to the favor of the parties.
Discontinuance.

32. A Tenant in Tail levies a Fine to the Use of J. S. for the Life of J. S. with Warranty, and after that levies a Fine to the Use of himself, and his Heirs with Warranty, and after that bargains and sells to another and his Heirs. By and Holt Ch. J. and Powell, it was held, 1st, That the first Fine made a Discontinuance, but it was only a Discontinuance for the Life of J. S. because the wrongful Estate that causes the Discontinuance was only an Estate for Life, and the Discontinuance could remain no longer than that Estate.

2dly, The second Fine could not enlarge the Discontinuance, because the Estate raised by the Fine returned back to the Conusor, and consequently the Warranty which was annexed to it was extinguished; and it would be a vain Thing to make a Discontinuance for the sake of that Warranty, which was destroyed in its Creation.

3dly, Suppose the second Fine had been levied to R. S. a Stranger, yet during the Life of the first Conusor this second Fine makes no Discontinuance, because the Estate was turning to Right by the first Fine, and the second Fine could not turn it more to a Right; so as it is not a present or an immediate Discontinuance; but if the first Conusor die in the Life of Tenant in Tail, then it becomes a Discontinuance; for the new Reversion, which Tenant in Tail gained, and to which the Warranty was annexed, is executed in Possession of R. S. and there was no Right of Entry or Action in any Body when the Estate was executed; for the Tenant in Tail could not enter, and the Issue had no Right; and they compared it to Litt. S. 620. 622. 1 Salk. 244, 245. Hill. 1 Ann. B. R. Hunt v. Burn.

(B. 3) In Respect of the Time of the Grant’s taking Place or Effect.

1. N Affife Land was given to the Baron and Feme, and to the Heirs of the Body of the Baron, who had Issue J. The Baron died, and J. granted the Reversion to W. N. in Foe, and the Feme attorned, and after J. had Issue T. and died, and after the Feme died, and this Gift of the Reversion entered, and T. oued him, and the Entry of T. lawful, because the Grant did not take Effect in the Life of J. who died before the Feme, and therefore no Discontinuance. Br. Discont. de Pot. pl. 12. cites 34 Aff. 4. & 36 Aff. 8.

2. Affise was adjourn’d out of the County of Devon into C. R. A. Tenant in Tail leaped to B. for Life, and after granted the Reversion in Foe to J. S. and B. attorned, and after B. granted his Estate to J. S. A. had Issue and died, and after B. died, and the Issue in Tail entered upon J. S. in Reversion, and J. S. brought Affise, but the Issue in Tail travers’d the Grant of the Estate of B. to be in the Life of the Tenant in Tail, and the Court
Discontinuance.

Court doubted of the Discontinuance in Fee. Markham laid this is a Discontinuance in Fee, because it was executed in J. S. in Reversion by the Grant of the ESTATE of B. the Tenant for Life in the Life of A. the Tenant in Tail; for this Grant of B. was a Surrender, and then J. S. was in in Fee by the Tenant in Tail, and is not in by the Tenant for Life; for this is a Surrender. But in this Case if B. had survived A. and B. in Life of A. had not made such Grant to J. S. then it had not been a Discontinuance in Fee but for Term of Life only, and there the Issue in Tail after the Death of B. might have lawfully entered upon J. S. because the Fee was not executed in the Life of B. Br. Discont. de Poll. pl. 3 cites 21 H. 6. 52. & 43 Aff. 48.

3. And where a Tenant in Tail leases for Term of his own Life to B. the Remainder to J. S. in Fee, and A. has Issue and dies, the Entry of the Issue in Tail is lawful upon J.S. for this is no Discontinuance in Fee, quod nota, good Café. Ibid.

4. Where Tenant in Tail leases for Life, and after grants the Reversion to another in Fee, and the Tenant attorns and does Waife, and he in Reversion brings Writ of Waife and recovers the Place waifed in the Life of the Tenant in Tail, there this is a Discontinuance in Fee. Br. Discont. de Poll. pl. 3. cites 21 H. 6. 52. & 43 Aff. 48.

5. So it seems if the Tenant for Life abides in Fee, or prey is in Aid of a Stranger in Practice quod reddat, so that he in Reversion enters in the Life of the Tenant in Tail, this is a Discontinuance in Fee. Ibid.

6. So if Tenant in Tail leases for Life, and after confirms the ESTATE of the Tenant for Life in Fee, this is a Discontinuance in Fee. Ibid.

7. And where the Fee is not executed in the Grantee of the Reversion nor his Heirs in the Life of the Tenant in Tail who granted, there the Entry of the Issue in Tail is lawful after the Death of the Tenant for Life, because the Fee was not discontinued, but only the Frank-Tenement for Term of Life; quod nota; per judicium. Ibid. cites 43 El. 3. 48.

(B. 4) Bound thereby. Who.

1. A Discontinuance made by the Husband did take away the Entry only of the Wife and her Heirs by the Common Law, and not of any other which claimed by Title Paramount above the Discontinuance. Co. Litt. 327. b.

2. As if Lands had been given to the Husband and Wife, and to a third Person and to their Heirs, and the Husband had made a Feoffment in Fee, this had been a Discontinuance of the one Moiety, and a Discontinuance of the other Moiety; if the Husband had died, and then the Wife had died, the Survivor should have entered into the Whole, for he claims not under the Discontinuance, but by Title Paramount from the first Feoffor; and seeing the Right by Law doth survive, the Law does give him a Remedy to take Advantage thereof by Entry, for other Remedy for that Moiety he could not have. Co. Litt. 327. b.

6. If the Reversion or Remainder be in the King, the Tenant in Tail cannot discontinue the ESTATE Tail. Co. Litt. 335. a.

4. But Tenant in Tail the Reversion in the King might have barred the ESTATE Tail by a Common Recovery until the Statute, 34 H. 8. cap. 20. which
Discontinuance.

which refrains such a Tenant in Tail, but that Common Recovery neither barred nor discontinued the King's Reversion. Co. Litt. 335. a.

(B. 5) Removed, or Purged.

1. A Man seised in Feue Uxoris infeff'd A. upon Condition to lease to Br. Condition
   him and his Feme for Life, the Remainder to B. in Tail, the Remain-
   der to the Right Heirs of the Baron; the Baron died, and A. leased to
   the Feme for Life, the Remainder to B. in Tail, the Remainder to the Right
   Heirs of the Feme, by which the Heir of the Baron entered for the Condi-
   tion broken, and the Feme entered upon him, and well, per tot. Cur. ex-
   cept Cheaney, for by the Entry of the Heir of the Baron the Discon-
   tinuance is purged and defeated, and so the Entry of the Feme is lawful.
   Br. Discontinuance de Potfition, pl. 8. cites 4 H. 6. 2.

   Tenant enters for the Condition broken, this revests the Reversion in the Leifor.

2. The Baron and Feme and a third Person purchase jointly; the Baron
   aliened the Whole, and died, and after the Feme died, and then the third
   Person entered, the Alienee ousted him, and be brought Affinse, and re-
   covered the Whole, because by the Death of the Baron the third Person
   and the Feme were intituled to have Writ of Right and revive the Joint-
   tenancy, and of the Alienation of the Baron the third Person cannot
   have Cui in Vita. And therefore he shall recover by Affinse and by En-
   try. Quod Nota Alienation, which was a Discontinuance, is now purged
   by the Death of the Feme, and the Entry of the third Person revived for
   the Whole. Br. Discontinuance de Potfition, pl. 13. cites 35
   Aff. 15.

3. Discontinuance takes away the Entry of those that come to have
   Title after his Death. If he (whose Entry is barred by a Descent or Discon-
   tinuance) have the Freehold cast upon him by a new Title, he shall be in
   of his ancient Title; which is termed a Remitter. Finch's
   Law 8vo. 193, 194.

4. As if the Heir of the Disfeife (in by Descent) makes a Leafe for
   Life to the Remainder for Life or in Fee to the Disfeife, if Tenant in
   Tail discontinuance, and then disfeifes the Discontinuance, and dies feifed,
   whereby the Lands descend to his Issue; or if the Husband make a Feoff-
   ment in Fee of Land in Right of his Wife, and takes back an Estate in Fee
   to him and his Wife. In these Cases the Disfeife after the Death of
   the Issue in Tail, and the Wife surviving, her Husband is remitted
   ; but if the Husband survives, her Heir is not; for there is another
   Tenant of the Freehold, against whom he may bring his Action. And
   in the Case of Tenant in Tail before, though the Heir of the Discon-
   tinuance were within Age at the Time of the Descent to the Issue in Tail,
   yet his Entry is gone for ever, by reason the Issue is remitted. Finch's
   Law 8vo. 194.

5. The Reversion may be revested, and yet the Discontinuance remain.
   Co. Litt. 335. a.

6. As if a Feme Covert be Tenant for Life, and the Husband makes
   Hawk Co. a Feoffment in Fee, and the Leifor enters for the Forleiture; here is
   the Reversion revested, and yet the Discontinuance remained at the

   remain since the Estate which passed by Livery, and was the only Cause of the Discontinuance is
defeated by the Entry of the Leifor.

6 T

7. A Te-
Discontinuance.

7. A Tenant in Tail, Remainder to B. in Tail, Remainder over &c. A makes a Lease to J. S. for the Life of J. S. not warranted by the Statute, and dies without Issue, leaving B. in Remainder his Heir, to whom the Reversion in Fee descends. B. leaves to W. R. (living J. S.) for 99 Years to commence after the Death of J. S. referring Rent. J. S. surrenders to B. (and C) upon Condition, and dies. Then a Præcipe is brought against B. (and C. a Stranger) and a Recovery with single Voucher had (to the Use of B. and her Heirs, and after the Condition is broken) for Years enters (B. grants the Reversion, then J. S. dies.) The Defendant the Heir of B. distrains for the Rent. W. R. brings a Replevin (and the Defendant avows for the Rent referred upon the 99 Years Leases as claiming under the Grantee of the Reversion.) It was agreed that this was a Discontinuance and a tortious Reversion in Fee, out of which the Lease was made; But whether by the Surrender this tortuous Reversion being gone the Lease should be too was the Doubt of the Case. See Vent. 357. Mich. 33 Car. 2. B. R. Anon. and Skill 2. S. C. by the Name of Paulin v. Hardy.

(C) What Act or Thing shall make a Discontinuance in Respect of the Person to whom it is made.

Lit. S 625 r. If Tenant in Tail enfeoffs the Donor, this is not any Discontinuance, because the Donor has the immediate Estate. Co. 1. Chadleigh 140.

But this must be understood where the Reversion of the Donor is immediately expellant upon the Estate of the Donor; for if a Man makes a Gift in Tail, the Remainder in Tail, referring the Reversion to himself; In this Case if the Donor enfeoffs the Donor, this is a Discontinuance, because this is a mean Estate, and so does Littleton here put his Case of a Reversion immediately expellant upon the Gift in Tail. Also it is to be intended as a Fragment made to the Donor slyly or only; for if the Donor enfeoffs the Donor and a Stranger, that is a Discontinuance of the whole Land. Co. Lit. 534. b 535 a.

But if Tenant for Life makes a Lease for his own Life to the Lesser, the Remainder to the Lesser and an Stranger in Fee, in this Case forasmuch as the Limitation of the Fee should work the wrong, it ensues to the Lesser as a Surrender for the one Money, and a Forfeiture as to the Remainder of the Stranger; for he cannot give to the Lesser that which he had before, and as to the Remainder to the Stranger, it is a Forfeiture for this Money, and when the Lesser enters he shall take the benefit of it. Co. Lit. 535 a.

If Tenant in Tail enfeoffs him in the immediate Reversion or Remainder, this operates as a Surrender, and therefore passes no more than it lawfully may pass, and consequently works no Discontinuance; but if the Fœcility were to the more remote Reversioner, or to the immediate Reversioner with any other, it is a Discontinuance, because it cannot be interpreted to operate as a surrender. Gilb. Treat of Ten. n. 115.

2. If a Copyholder in Tail (admitting it may be intailed) surrenders to the Lord to make his Will and he regrants it to the Copyholder, this is not any Discontinuance, though a Surrender to the Use of a Stranger should be admitted to make a Discontinuance; for the Surrender to the Lord cannot make a Discontinuance, inasmuch as he hath the Reversion. Mich. 15 Jac. B. R. between Lee and Brown, upon Evidence at the Var agreed and resolved per totum Curiam. 3. If
Discontinuance.

3. If there be Tenant in Tail, the Remainder in Tail, and the Tenant in Tail informs him in Reversion in Fee, this is a Discontinuance. Co. 1. Chudleigh 140.

4. Tenant in Tail informs the Donor and a Stranger, this is a Discontinuance Conditional (i. e.) if the Stranger survives. Dy. 12. a. pl. 53. Trin. 28 H. 8.

(Who may make a Discontinuance. Not he that is not seised by Force of the Intail.

1. If there be Baron and Feme Tenants in Tail, and the Baron and Feme Tenants in Special Tail, and the Baron alien in Fee, this is a Discontinuance of the Tail, for he is seised of the whole entirety. Co. 8. Greenly 71. b. resolved.

2. But if the Baron be seised of Land in the Right of his Wife in Tail, and alien in Fee, this is not any Discontinuance of the Tail, for he is not seised by Force of the Tail; (But Fitz. Nat. 193. is, That the Issue shall not have a Stir Cui in Vita, because this Prer is for Estates at Common Law, but he shall have a Forencdon;) But it seems this is no Proof that it is a Discontinuance of the Tail; for if he should not have a Forencdon, he should be without Necessity. Co. Lit. 326.

3. If Land be given to Baron and Feme, and the Heirs of the Body of the Baron, and the Baron makes a Feoffment in Fee, this is a Discontinuance, for the Baron is seised by Force of the Tail, and so it shall be pleaded. Mich. 9. Car. B. R. between King and Edwards, per Curiam, prter Justice Jones, who doubted thereof; Adjudged upon a Special Verdict. Infrattr Curtr. 7 Car. 8. Rot. 992.

4. So it is in the said Case Baron and Feme join in a Feoffment and after also levy a Fine to the Foe fee, yet this is a Discontinuance of the Tail, for this will be the Feoffment of the Baron; in the said Call of Mich. 9 Car. between King and Edwards, B. R. adjudged, though the Feme survived the Baron, as it was found by the 50. C. adjudged.

5. If there be Tenant for Life, the Remainder in Tail, and he in Remainder enters upon the Leissee, and disfrees him, and makes a Feoffment over, this is not any Discontinuance, because he was not seised by Force of the Entail. Tr. 2. Ja. B. between Aborridge and Ellis C. B. White, adjudged. Definitum, the sixth Point was, that if Tenant in Tail enters upon his Leissee for Life and makes Feoffment, and the Leissee re-enters; the Court held that this is a Discontinuance.

6. If there be Leissee for Years, the Remainder in Tail to J. S. S P. 880 and J. S. enters upon the Leissee, and makes a Leafe for Life or Fee a Feoffment in Fee, this is a Discontinuance, for he was seised by Force of the Entail at the Time of the Feoffment. Pashy. 11. in Tail, and the Leissee re-entered, the Court took this to be a Discontinuance. Mo. 281. the sixth Point in the Case of Barty v. Definitum.

8. Tenant in Tail makes a Lease for twenty-one Years, and afterwards makes a Feoffment in Fee, with a Letter of Attorney to make Livery. The Attorney enters and quits the Leesse and makes Livery. Dyer and Walth held, that it was a Discontinuance; and they said, that it was adjudged in the Earl of Warwich's Case, that where a Man made a Lease for Life, and afterwards made a Feeoffment in Fee, and a Letter of Attorney to make Livery, who ousted the Leesse and made Livery, that it was a good Feeoffment, and if the Leesse for Life re-entred, the Reversion remains in the Feoffee. Mo. 91. pl. 226. Patch. 10. Eliz.

9. B. Tenant for Life joined with C. the Remainder-Man in Tail in a Fine for conceffit only which was to the said B. for Life &c. The Court held the taking of the Fine by B. to be a Surrender of her Estate, and the taking a new Estate of the Grant of C. in Remainder to be no Discontinuance, because he was not seised of the Tail at the Time. Mo. 747. pl. 1026. Trin. 26 Eliz. in the Court of Wards. Ld. Rolle v. the Earl of Rutland.

In many Cases a Warranty added to a Conveyance, is said to make a Discontinuance ab Effecl, although be that made the Conveyance was never seised by Force of the Estate Tail, because it takes away the Entry of him, that Right has, as a Discontinuance does. As if Tenant in Tail be seised and dies, and the Issue in Tail relates to the Devisee with Warranty, in this Case the Issue was never seised by Force of the Tail, and yet this has the Effect of a Discontinuance by Reason of the Warranty. Co. Litt. 339. a.

11. If Tenant in Tail makes a Lease to another for Term of Life, and the Tenant in Tail has Issue and dies, and the Reversion descends to his Issue, and after the Issue grants the Reversion, to him defended, to another in Fee, and the Tenant in Life attorns and dies, and the Grantor of the Reversion enters &c. and is seised in Fee in the Life of the Issue and after the Issue in Tail has Issue a Son and dies, it seems that this is no Discontinuance to the Son, but that the Son may enter &c. for that his Father, to whom the Reversion of the Fee-Simple defended, had never any Thing in the Land by Force of the Entail &c. Litt. S. 635.

Where after such Grant the Issue died, Living Tenant, or, fo that the Grant did not take Effect in the Life of the Grantor, Remainder-man in Tail, the Entry of his Issue was Congeasble. Br. Entre Cong. pl. 71. cites 34. Aff. 4.

The Issue in Tail had no inheritable Possession, insuch as the Right of Entail only depended on him, and not the Possession; and therefore he could not have any Power to alien a Right of Possession that was never in him; and consequently his Grant when he never had any Original Right of Possession by Virtue of such Entail does not discontinue the Right of Possession, so as to bar the Son from his Entry. Gibl. Treat of Ten. 117.

So if Tenant in Tail makes a Lease for Life, and then grants over the Reversion, and the Tenant for Life attorns, and then the Grantor grants over, and the Tenant attorns to the said Grantor, and dies, and the second Grantor enters in the Life Tenant in Tail, and then the Tenant in Tail dies, this is no Discontinuance to bar the Issue, but that he may enter; because, though the Tenant in Tail had an Original Right to discontinue during his Life, because he had the Right of Possession in him, yet the first Grantee had no Right of Possession in him, nor ever was seised of the Land by Virtue of the Entail, or otherwise; and since he never had the Right of Possession in him, he cannot alien the Right of Possession, so as to work a Discontinuance. Gibl. Treat of Ten. 117.

12. None can discontinue an Estate Tail &c. unless he once were seised by Force of the Tail &c. unless it be in Respect of a Warranty; which being made to a Feoffee, or Devisee and depending to the Heir, had the Effect of a Discontinuance in taking away the Entry of the Heir before
Discontinuance.

4 & 5 Ann. cap. 16. by which all Warranties made by them who have no Estate of Inheritance in the Land &c. shall be void against the Heir. And where no greater Estate pails than for Life of Tenant in Tail, as in Grants of Reversions &c. a Warranty added, whether by Tenant in Tail or any other Ancestor, never caused any Discontinuance. Hawk. Co. Litt. 430.

13. But such Feoffments and Grants made by them, who never were feigned by Force of such Estates, are good against the Grantors during their Lives Hawk. Co. Litt. 430.

14. None may discontinue the Remainder or Reversion of an Estate if Tenant in Tail, but he only to whom the Land is entailed, and therefore if Tenant in Tail grants tamen Statum iium to another, and he makes a Feoffment in Fee; this shall not take away the Entry of him in Remainder or Reversion, 10 Rep. 97. Mich. 10 Jac. in Seymour’s Case.

Discontinuance, because he has an Estate for the Purpoze of Alienation but for Term of his Life. Gibb. Treat of Ten. 112.

15. But if the Tenant in Tail were but once feigned of the Tail, though it is sufficient to create a Discontinuance; but though the Tenant was never feigned, yet there may be a Discontinuance by reason of a Warranty, as poled by the Father disposes the Grandfather, being Tenant in Tail, and the Father makes a Feoffment with Warranty, and then the Grandfather and Father die, this is a Discontinuance to the Son, Litt. S. 637, 638. Otherwise not because the Father was never feigned of the Estate Tail.

16. Tenant for Life, the Remainder to the Wife for Life, the Remainder to the Heirs of their Bodies; they levy a Fine with Warranty to B. the Baron and Feme die without Issue, the next Perfon in Remainder (being a Daughter by a former Venter) brings an Ejectment. The Baron here has but an Estate for Life; and there is no displacing and divelving of any Remainder but the Fine operates only as a Grant of Cestuy pur vie, and the Remainder in Tail which they may lawfully grant, and does not disturb any Estate in Remainder; and if there were any displacing of the Estate, yet it is but at the Election of him in Remainder as it is Bredon’s he will bring his Formedon, and admit himself out of Poiffion. But if there be no Discontinuance, the Warranty will be no Bar, as in Seymour’s Case. 1 Lev. 36, 37. Trin. 13 Car. 2. B. R. Stephens v. Brittridge.

is no Bar; And that the Estate Tail in the Baron and Feme was not executed because there was an interposing Remainder limited to the Wife, which is an Impediment, the which Estate is not drownd’d, but remains divined, inasmuch as they take by undivided Moieties. But it was agreed by all, that if the Estate Tail had been executed, the Fine had been a Discontinuance of the Remainder in Tail, and the Warranty had barred.

17. Tenant in Tail has the Right of Poiffion inheritable, and therefore he may discontinue the same in Fee by his Feoffment, because since he has an inheritable Poiffion, it follows of Consequence, that he may alien it without any Diffelin to any Person; but if he only makes a
Discontinuance.

Lease for Life, he executes but part of his Power; for since he had a Possession inchoatable, he from that Possession has Privilege to alien in Fee without Discontinue to any one; and therefore it after such Lease for Life, he grants the Reversion in Fee, and Tenant for Life attorns, and after Tenant for Life dies, and the Grantee of the Reversion enters in the Life of Tenant in Tail, this is a Discontinuance of the Fee; for since he had originally an inheritable Possession, this is an Execution of the former remaining Part of his Power, and amounts to an Alienation of the Fee by a second Feoffment; for having originally an inheritable Possession, he might discontinue the same in Fee; and when he executes but part of his Power, the rest remains in him; and therefore if he have afterwards Opportunity in his Life he may execute it by a second Alienation. Gilb. Treat. of Ten. 116.

18. If Tenant in Tail makes a Lease for Life, and dies, and the Reversion descends to the Issue, and the Issue grants the Reversion with Warranty, and Tenant for Life attorns, and dies, and the Grantee enters, and the Issue dies leaving a son; this is no Discontinuance, but the Son may enter; for he is not barred by this Warranty; for the Issue in this Case only transfers the Reversion, and not the Possession, or Right of Possession; and therefore Issue in this Case is not repelled from claiming the Possession, which was never transferred to the Grantee, and to which the Warranty was never annexed; for it were absurd to confer the Warranty to extend to the Possession of that which never was in Possession at the Time when the Contract was made. Gilb. Treat. of Ten. 118, 119.

(D. 2) What is an Impediment to it.

1. In Affinse. If a Man seised in jus Usoris leases the Land to B. for Life, and after grants the Reversion to S. in Fee, and dies, and after B. dies, the Entry of the Feme is lawful, for there was no Discontinuance but for the Life of B. for the Reversion in Fee is not discontinued, because the Baron died before the Tenant for Life, do that the Reversion was not executed in his Life. Br. Dict. of Feoffations, pl. 15. cites 38.


Coke Ch. 1. that where Tenant was for Life on Condition on such Act done to have for Years, and Leafe did the Act by which he became Tenant for Years, and after he in Remainder levy'd a Fine, he thought this was Discontinuance, being levy'd after he was Leafe for Years, but it had been otherwise had it been during the Time of his being Leafe for Life. Roll R. 188, pl. 21. Patch. 15. Jac. B. R. Sir George Reynell.

3. Reversioner in Tail expelling an Estate for Life made a Feoffment by Consent of Tenant for Life; This is no Discontinuance of the Remainder over; for it is a Maxim in Law, that he that has no Freehold in the Land, cannot discontinue any Estates therein; and a naked Assign of Tenant for Life to the making the Feoffment did not amount to a Surrender of the Estate to the Reversioner. Carth. 110. Hill. 2 W. & M. in B. R. Swift v. Heath.

(E) Of
Discontinuance.

(E) Of what Things it may be.

A Discontinuance may be of a Copyhold in Tail (admitting this to be a Tail) as by a Recovery in a Real Action in the Court of the Lord. Co. 4. Deale 23. (But Note, That this is more properly a Bar for the Time than a Discontinuance, as it seems to me.) Rich. 43. 44. Eliz. B. R. per Curtiam. Morris's Cases, Vill. 8 Jac. 25.

2. If Baron and Feme are Seised of Lands in the Right of the Feme, and lease it to another for Life, this is not an Discontinuance, for this is the Lease of the Feme till Disagreement. Contra 18 Eliz. 3. 39. 54. 15 All. pl. 2.


4. In Entry fur Diffeifein they were at Issue, and after came the Tenant, and pleaded Confirmation of the Demandant made to him after the last Continuance, Not the Deed after the last Continuance is no Plea; for it was his Deed before it is a Bar; for it is so confec'd in Effect, nor he shall not lay that it was deliver'd before and not after, but may say that it was made before the last Continuance by Duress, Abjure hee that it was made after the last Continuance. Br. Fuita. pl. 90. cites 21 H. 6. 9.

5. If Tenant in Tail of a Rent grants it in Fee, this is not Discontinuance, for it is by Grant without Livery, which is only his Interest which he may lawfully grant. Br. Discont. de Possession, pl. 3. cites 21 H. 6. 32 and 41 All. 49.

6. Rent in Gress lies not in Discontinuance, but Rent Parcel of a Manor may be discontinued by Feoffment of the Manor. Br. Discont. de Possession, pl. 36. cites 21 H. 7. 34.

7. If A. is Tenant in Tail, Remainder to B. for Years, Remainder in Fee to A. Afterwards B. conveys his Eftate to the King, and A. makes a feoffment, this is a Discontinuance, notwithstanding the Term which is in the King; For he by this Term has not any Possession in the Land. 2 And. 210. pl. 29. in the Court of Wards in Clyve's Cafe.

8. Tenant in Tail Remainder to the King leaves a Fine, with Proclamations. It was holden it shall bind the Issue, notwithstanding the saving in the Statute 32 H. 8. for that here is not any Reverlion in the King, but a Remainder, of which the Statute speaks nothing; but yet this Fine does not devest the Remainder out of the King, but the Comite shall have a Fee determinable upon the Tail. No. 115. pl. 258. Pach. 20 Eliz. Jackfon v. Darcey.

9. A. makes a Gift in Tail to B. who makes a Gift in Tail to C. C. makes a Feoffment in Fee, and dies without Issue. B. has Issue and dies. The Issue of B. shall enter; for although the Feoffment of C. did discontinue the Reverlion of the Fee Simple, which B. had gained upon the Eftate Tail made to C. yet it could not discontinue the Right of the Entail which B. had, which was discontinued before; and therefore when C. died without Issue, then did the Discontinuance of the Eftate Tail of B. which passed by his Livery, cease, and consequently the Entry of the Issue of B. lawful; which Cafe may open the Reason of many other Cases. Co. Lit. 327. b.

10. A Grant by Deed of such Things as do lie in Grant and not in Livery of Selin, works no Discontinuance. But the particular Reason is, for that of such Things the Grant of Tenant in Tail works no Wrong, either
Discontinuance.

either to the Issue in Tail, or to him in Reversion or Remainder; for nothing does pass but only during the Life of Tenant in Tail, which is lawful, and every Discontinuance works a Wrong. Co. Litt. 332. a.

11. If Tenant in Tail of a Rent Service &c. or of a Reversion, or Remainder in Tail &c. Grants the same in Fee with Warranty, and leaves Aftets in Fee simple, and dies; this is neither Bar nor Discontinuance to the Issue in Tail, but he may divest for the Rent or Service, or enter into the Land after the Decease of Tenant for Life. But if the Issue brings a Forfeiture in the Defender; and admits himself out of Possession, then he shall be barred by the Warranty and Aftets. Co. Litt. 332. b.

(F) Discontinuance.

Of what Estate or Interest.

1. If a Man be seised of a Manor with an Advowson appendant in Tail and dies, his Heir enters and endows his Mother of the third Part of the Manor, and of the third Part of the Advowson to present by two, and after takes Feme, and convey'd two Parts of the Manor, and the Reversion of the third Part, and of the Advowson in Demesne, and in Reversion in Fee, and re-takes an Estate to him and his Feme for their Lives, the Heir cannot discontinue the third Part of the Manor, nor the third Part of the Advowson in the Life of the Tenant in Dower, because it remains in Reversion, and therefore his Grant of it shall not serve but for his Life. And if he grants two Acres of the Manor, and the Advowson to W. N. in Fee after that he has presented twice, and after he and the Tenant in Dower die, and the Church is void, his Feme shall have the Presentation, and not the Alieence, because it is but a Grant of it, and not a Discontinuance, and the Grant is not good, for the Baron is dead. Quod Noto, by Award. Br. Discon't de Poff. pl. 19. cites 23 Aff. 8.

2. If Tenant in Tail endows his Maker and after grants the Reversion, and the Tenant attorns, this is no Discontinuance, Per Hutley, Brian, and Fairfax. And if Tenant in Tail of a Rent in Possession makes Alienation with Warranty, and the Tenant attorns, it is a Discontinuance. Br. Discon't de Poff. pl. 19. cites 4 H. 7. 17.


Discovery.

1. DEFENDANT enforced to set down upon his Oath whether his Lease was expired or not. 25 Eliz. Toth. 69.
2. Where the Complainant will rest upon the Oath of the Defendant, and be contented to be judged thereby, there the Oath of bewraying is hardly granted. Cary's Rep. 15.
3. A Bill was brought for Tithes of Conies due to him by Custom, to pay the Tenth Cony or the Value of it, and to discover how many he had kill'd. The Defendant, by Anwer denied the Custom, but made no Discovery as to the Number kil'd, or the Value of them. Exception being taken thereto, the Court held, that he need not discover, there being a full Anwer given to the Thing in Demand, by denying the Custom; which should be tried before he be bound to discover, but the Court thought fit that if this Matter should be found against the Defendant, he should be examin'd upon Interrogatories to discover his Knowledge, and an Issue was directed to try the Custom. And the Court conceived the Cafe stronger for the Defendant, the Demand of Tithes of Conies being against Common Right. Hard. 188. Palch. 13 Car. 2. in the Exchequer. Randall v. Head.
4. And the Court held that it would be the same if the Plaintiff upon a leign'd Suggestion should pray that a Defendant discover what Writings he has, or what Goods or other Things upon a Pretense that he is joignant with him, and so as to what he has got by his Trade, which would be strangely inconvenient; But where that is no such great Inconvenience, as upon a Bill against an Executor to discover Affets upon a Bond or Debt, there he must answer though he denies the Debt; because it concerns the Act of another Person, and Affets are premum'd, and in such Case there is no Inconvenience. Hard. 188. Palch. 13 Car. 2. in the Cafe of Randall v. Head.
5. A feis'd of Lands in Fee covenants by Deed in consideration of 1500l, to settle all his Lands of which he was then feis'd, so that on A's Death they should come to B. and his Heirs, and also to leave B. all his Personal Estate (except &c.) and also that all the Lands which he should purchase after per Date of the said Deed, should be so purchas'd that after A's Death they should come to B. A. by a former Decree was order'd to convey the Lands he was feis'd of at the Time of the Deed executed. And having purchas'd Lands since B. brought a new Bill for Discovery of the same. B. demurr'd, for that the Plaintiff hath not entitled himself thereto, and the Demurrer allow'd. Fin. R. 230. Trin. 27 Car. 2. Coke v. Ethop and Verdon.
6. Where the Entail was discontinued by Effect of the Court would Vern. 212. not oblige the Defendant to discover where the Freehold was to enable the Plaintiff to find out a Tenant to the Precipe, against whom to bring his Petition. 2 Vern. 345. pl. 318. Hill. 1697. in Cafe of Bowater v. Ely, cites it as the Cafe of Sharrard v. Stapleton.
7. Plaintiff
(B) Bill of Discovery allowable in what Cases.

Where it will subject a Man to Penalty or Forfeiture.

1. The Plaintiffs exhibited a frivolous Bill without a Counselor's Hand, and got an Injunction for Stay of any Suit to be commenced in any of her Majesty's Courts but in this; which Subpoena and Injunction being served, seemed to be Counterfeit; therefore ordered a Subpoena be awarded against the Plaintiffs, as well to show of whom they had the said Writ, and to answer their Misdemeanors, as also to pay the Defendant Costs for his unjust Vexation. Cary's Rep. 152, 153. cites 21 Eliz. Ap. Edward ap Hugh, and David ap Jenkin. Ralph Jenkin.

2. M. was not enforced by Answer to discover a Forfeiture to his own Hurt. Toth. 69. 32 & 33 Eliz.

3. The Plaintiff prefers his Bill to have the Defendant's Answer, Whether the Controversy was to receive more Monies for Interest than was warranted; Demurrer unto, but overruled, and it found that the Defendant lent it without Consideration, then to take the Forfeiture. Toth. 87. 25 Eliz. Cotton v. Foller.

4. One who had a Covenant to deliver Evidence, exhibited his Bill, supposing certain Deeds to remain in the Covenantor's Hands; the Opinion of the Court was, the Defendant needed not to answer, because he should thereby difclose Cause of Forfeiture of the Bond. Toth. 8c. Mich. 38. Eliz. Wolgrove v. Coe.

5. A Bill upon a Penal Statute, claiming one Half to the Queen and another to the Party disallow'd by my Lord's Opinion, though not mentioned in the Order. Toth. 80. Trin. 39 Eliz. Coward v. Weit.

6. The Counts of Mountague claimed the Wardship of the Body of the Heir of a Tenant of hers, which was elloyed from her; he, suspecting some of the Heir's Friends, exhibited her Bill in Chancery; and it seemed they should not answer to charge themselves criminally, especially in this Case, where so great a Punishment as Abjuration may follow &c. Cary's Rep. 12. 13.


8. Although Criminal Causes are not here to be tried directly for the punishing of them, yet incidently for so much as concerneth the Equity of the Cause they are to be answered. Toth. 74. Wakeman v. Smith.

Discovery.

10. On a Lemurrer to discover what Waffe he had done, the Demurrer was allowed. Arg. Comins's Rep. 664. cites 11 Car. Attorney General v. Vincent. This seems to be misprinted for 11 Geo. and was a Bill brought against a Copyholder for a Discovery of Timber cut down more than he could justify. The Defendant demurred, because it would subject him to a Forfeiture, as being Waffe, and the Demurrer was allowed. MS. Rep.

11. Bill by the Attorney General against a Person outlaw'd to discover his Real and Personal Estate, and what secret and fraudulent Gifts and Conveyances he had made, for that he was Outlaw'd, whereby his Goods and Profits of his Lands were forfeited. Defendant demurred, Quia nemo tenetur prodere seipsum, and to discover his Estate upon a Forfeiture, but held that he must answer, because the Protector is intitled to his Estate by Course of Law, and the Outlawry is in Nature of a Gift to the King or a Judgment, and a common Person may have a Bill of Discovery in the like Case to enable him to take out Execution, and he was ruled to answer; Quod Noto. Hard. 22. pl. 6. Mich. 1655. in Scacc. The Protector v. Lord Lumley.

12. A Bill was to discover, Whether the Defendant did not conceal the Casks and Excise upon 260 Casks of Currants imported, and had endeavoured to corrupt the Custom-House Officers by promising 40 l. Reward to conceal it. On Demurrer by the Defendant the Court inclined to think he should not be compelled to make a Discovery, unless the Attorney General waived the Proceeding for all Forfeitures. Arg. Comyns's Rep 664. cites Hard. 137, 138. [Hill. 1658. in Scacc.] The Attorney General v. Lord Mico.

13. The Difference is between Caufes Criminal and Civil; If an Offender be once legally convicted of an Offence, whereby he ought to forfeit his Estate, then it is lawful and proper to prefer a Bill to discover what Estate in Lands and Goods he then had, as in Case of an Outlawry or Attainder &c, for that the Effect of such a Bill is only to discover what is forfeited already, and not to discover a Cause of Forfeiture. Arg. Hard. 145. in the S.C.


15. The Husband devolved to his Wife an Estate and Interest in several Goods and Things to be held and enjoy'd by her during her Widowhood. On a Bill brought against her to discover, Whether married or not, in order to prove a Forfeiture of her Estate, the demurred, and Geo. 2. the Bill was dismissed. 2 Chan. Rep. 68. 24 Car. 2. Monnings v. Monnings.


17. Bill for Tithes; Defendant demurred because he had not offered by his Bill to accept of the single Value, and yet alleged in his Bill that the Defendant had carry'd away the Corn &c without setting forth.

Firey's Cafe. — But where it is by his own Agreement, though it is a Penalty, he must discover 2 Vern. 244. pl. 229. Mich. 1691. African Company v. Paris. — Or where the Person requiring it has the Power, and offers to remit such Penalty. And this is the constant Rule in Cases of Tenant for Life committing Waffe, or levying a Fine &c. or any other Forfeiture, unless the Forfeiture is remitted he is not bound to discover. See G. Equ. R. 187. Arg. Hill. 12 Geo 1. in Case of Gaffeign v. Sidwell.

† As whether he agreed to give a Concellor a Sum in Grofs for Care and Pains. For it is within the Statute of Maintenance. Fin. R. 75. 1 H. ill. 25 Car. 2. Penrice v. Parker.
Discover

forth the Tithes according to the Statute; it was urged for the Defendant, that should he answer, the Plaintiff would presently go to Law, and give his Answer in Evidence, and recover the treble Value of the Tithes, and a Court of Equity ought not to allow in recovering a Penalty, nor compel a Discovery of a Forfaiture; but overruled, the Tithes in this Case being only Executor of a Parson, and not the Parson himself, and so not intitled to a Forfaiture on the Statute. Vern. 60. pl. 57. Mich. 1682. Anon.

15. Bill was brought to discover Simony; Defendants demurred, and the Demurrer was allowed. Ch. Prec. 214. pl. 176. Hill. 1702. Attorney-General for Hindley v. Sudell, Hesketh, & al.

18. A Bill was brought at the Relation of several Freemen of the Weavers Company against the Defendants, Wardens &c. of the said Company, setting forth their Charters of Incorporation and Rules, but that the Defendants had been guilty of many Breaches thereof, and had oppressed the Freemen &c. and mentioned some Particulars, and for a Discovery of the Rール, and that they might be decreed for the future to observe the Charters, and to have an Account of the Revenue of the Corporation, which the Defendants had mis-spent &c. was the End of the Bill; to which the Defendants demurred, because as to part of the Bill it was to subject them to Prosecutions at Law, and to a Quo Warranto, and as to the other Parts, the Plaintiffs had Remedy by Mandamus, Information, or otherwise, and not here; and of the same Opinion was my Lord Keeper, who said it would surpass too much on the King's Bench, and that he never heard of any Precedent for such a Case as this, and so allowed the Demurrer. Abr. Equ. Cases 131. Mich. 1705. Attorney-General v. Reynolds, & al.

19. If A. deals Goods from B and sells them to C. and A. takes them from C. the Plaintiff, may sue A. in Equity to discover his Title to the Goods, and A. shall be intitled to anwer. Holt's Rep. 50. pl. 6. Mich. 5 Ann. in Case of Gawne v. Grandec.

20. Where several are Partners in an unlawful or clandestine Trade, and one of them brings a Bill of Discovery against the others, it is no good Plea that their Answer may subject them to the Penalty of an Act of Parliament; for by their going on in such Trade they seem'd to have intenely waivable that Unlawfulness as between themselves; so the Plea was disallowed, and they were ordered to answer. G. Equ. R. 183. Hill. 12 Geo. 1. Gaffeine v. Sidwell.

21. Upon the Marriage of Mr. Payne with one Mrs Gage, Lands in the County of Surry were settled and conveyed to the Use of the Husband and Wife for their Lives, and the Life of the Survivor of them, then to the Use of the first and every other Son in Tail Male, Remainder to the Right Heirs of the Husband. The Marriage took Effect, but Mr. Payne, the Husband, died in the Life-time of his Wife without leaving any Issue, having devised all his Lands to his Wife and her Heirs.

In 1730 Mrs. Payne, the Wife, devised all her Real Estates to the Defendant, subject to a few Legacies mentioned in her Will, but lived and dy'd a Papist; But that being difficult to prove at Law, the Plaintiff Mr. Smith, who had married Eliz. Payne, Heir at Law to Mr. Payne and his Wife, filed their Bill against the Defendant to set aside the Marriage-Settlement and Will of Mr. Payne, the Husband, under which Mrs. Paine claimed, and in particular prayed that the Defendant might discover whether Mrs. Payne, the Wife, under whom the Defendant claim'd, was a Papist or not.

As to so much of the said Bill as sought a Discovery from the Defendant whether Mrs. Payne was at any Time, and how long before her Marriage with her Husband, a Papist, and profess'd the Papist Religion, and continued so till her Death, and whether as such she was incapable
incapable and disobedible by the Laws of the Realm, to purchase either in her own Name, or in the Name of any to her Use, or in Trust for her, any Manors, Lands, Tenements, Hereditaments, Estates, Terms, or any Interest or Profits whatsoever out of Lands; the Defendant and his Wife, as also the Will of Mrs. Payne, the Husband, which, was made incapable to purchase in his or her own Name, or in the Name of any other Person or Persons to his or her Use, or in Trust for him or her, any Manors &c. And that all and singular Estates, Terms, and any other Interest or Profits whatsoever out of Lands to be made, fuller'd and done to and for the Use or Benefit of any such Person or Persons, should be utterly void to all Intents and Purposes.

Upon this Plea it was insisted upon for the Defendant, that it was a Standing Rule in this Court, that no Person was bound to discover what might be subject to the Penalty of an Act of Parliament. That the Statute 11 and 12 Wm. 3. was a Penal Law, and that the Party who would take Advantage of such a Law, ought not to be afflicted in a Court of Equity, which never helps a Forfeiture. He that would claim any Thing forfeited, must make out the Forfeiture himself; for no Person is obliged to discover a Fact, which Fact would be subject to a Forfeiture of his own Estate. If a Copyholder commits Waste, it is a Forfeiture of his own Estate to the Lord of the Manor; But if the Lord of a Manor comes into this Court for a Discovery whether the Copyholder has been guilty of Waste or not, the Copyholder is not bound to answer; for no Law in the World obliges a Man to accuse himself. If an Estate is given to a Woman durante Visitation fea, she is not bound to discover whether she is married or not, because the Discovery of that Fact might be the Los's of her Estate. 2 Chan. Rep. 68 which Cafe they affirmed to be Law.

That Disabilities and Forfeitures were of the same Nature; that a total Incapacity or Disability to hold at all (which is the Cafe of Papists) was certainly as much a Penalty as a Forfeiture of an Estate which the Party was before capable of holding. That as Mrs. Payne would not have been obliged in her Life-time to discover whether she was a Papist or not, so the Defendant who claims under her will not be obliged to discover it, because hestands in her Place. To all which might be added, that this and other Acts of Parliament made against Papists creating Disabilities and Penalties were hard Laws made to restrain People in the Exercise of their Religion according to their Conscience, and therefore would never be help'd in a Court of Conscience as this Court was.

On the other Hand it was insisted for the Plaintiff, that it was not their Business to examine whether the Acts of Parliament made against Papists were hard Laws or not; they were Laws, and that was sufficient for their Purposse; that this was not the Cafe of a Forfeiture, but it was to discover a Fact which, if true, the Estate was never in Mrs. Payne, because the Act of Parliament makes all Papists absolutely incapable of being Purchasers; if she was a Papist, the Estate never vested in her, and as she was not capable of holding it, she could not give it away to the Defendant, the Defendant therefore could never forfeit the Estate; for no Person could be said to forfeit an Estate he never had. An Alien is incapable of holding Lands at the Common Law, but it is clear that he would be obliged to discover whether he is an Alien or not.
not, and his Discovery of that Fact whether he is so or not, can never be a Forfeiture of his Estate, because he never had a Right to it. So in Case of a Bastard who is Nullius Filius, and incapable of claiming Lands by Decent, he shall discover whether he be so or not for the same Reason. So a Person claiming under a Bankrupt whose Goods are vested in the Assignees for the Benefit of the Creditors, must discover whether the Person under whom he claims was a Bankrupt or not at the Time of the Conveyance. That all these Cases depend on the same Reason, and were no Forfeitures, because the Estates were never in them. So if Mrs. Payne was a Papist, she was incapable of having the Estate herself, so could not give it away, and therefore the Defendant could never forfeit it, because the Estate was never in him.

But my Lord Hardwicke was of Opinion, that the Defendant was not obliged to discover whether Mrs. Payne was a Papist or not; that there was no Rule better established in this Court, than that a Man shall not be obliged to answer to what may subject him to the Penalty of an Act of Parliament. No Person can doubt whether this be a Penal Law, and whether the Clauses relating to Papists are not Penalties imposed on all Persons exercising that Religion. It is objected that this is not the Case of a Forfeiture, because the Estate was never vested, and therefore can never be devestted; yet it all falls under the same Reason, and an Incapacity or Disability to hold at all created by Act of Parliament is certainly as much a Penalty as the Forfeiture of an Estate by a Person who had a Right to enjoy it before that Forfeiture. That this is not like the Case of an Alien or Bastard, who are incapable by the general Laws of the Realm to inherit; for this is a Disability created by an Act of Parliament. That what sway'd with him much was the great Inconvenience that would follow, should this Plea be disallow'd, for that there would be nothing in this Court but Bills of Discovery whether such and such Persons were Papists or not, and no Body knows what Contumacy would follow.

His Lordship held, that as Mrs. Payne was not obliged to discover whether she was a Papist or not, so likewise the Defendant who claimed under her was not, and that in that Respect there was no Difference between the Party herself and the Person who derived his Title from her. The Plea was allow'd.

22. Giles Meredith being seised of the Lands in Question in Fee, died leaving three Sisters, all of them above the Age of Eighteen Years and Six Months and professing the Papist Religion viz. the Defendants Catherine Cecily and Mary who was married to the Defendant Watkins who was a Protestant.

And now the Plaintiffs brought their Bill in Right of the Plaintiff Mary who was the next Protestant kin (letting forth their Case as above) against the said Defendants Catherine Cecily and Watkins and his Wife in Order to compel them to discover whether at the Death of the said Giles Meredith they were not severally of the Age of Eighteen Years, and six Months and upwards, and were not educated in and professed the Papist Religion and whether they had not refused to take the Oaths prescribed by the Act of the 11 & 12 W. 3, and thereby incapacitated from holding any Lands &c. by Decent or otherwise, and whether Plaintiff Mary is not next of Kin to the late Father of the said Giles Meredith, and to the said Giles Meredith, as also to the said Defendants Catherine, Cecily, and Mary, and thereby, and by the said Act intituled to the Premisses during such Incapacity.

To such Parts of the said Bill as sought a Discovery, whether the said Defendants were not educated in, and did not then, and at the filing the Bill profess the Papist Religion, and whether they were not at the Death of Giles Meredith of the Age of Eighteen Years Six Months
Discovery.

Months and upwards, or what other Ages, and whether they had not incurred the Penalties of the said Act, and were incapable of holding and enjoying Lands &c. by Descent or otherwife, and whether the Plaintiff Mary was not next Protestant of Kin to the Father of the said Giles Meredith and of the said Giles Meredith and also to thefe Defendants, and thereby intituled to enjoy all the said Lands during the supposed Incapacity of those Defendants. The Defendants pleaded the said Statute of the 11 & 12 W. 3. intituled An Act for the further preventing the Growth of Popery, in Regard that such Discovery might subject them to the Penalties, Forfeitutes, or Disabilities of the said Act.


(C) Bill of Discovery after Verdict or Judgment.

1. In an Action on the Case a Verdict paffes against the Plaintiff for want of being able to prove a Letter wrote to him by the Defendant, the Plaintiff brings a Bill to clear up this Matter; Defendant pleads the Verdict, and that the EfEcts of the Letter was given in Evidence at the Trial, and demurred for want of Equity, and Plea and Demurrer allowed. Chan. Cases 65. Hill. 16 and 17 Car. 2. Sewell v. Freeborne.

2. Money was paid in Part of an Account for Goods, but the Receipts were left, and the Whole was recovered at Law. Per Norch K. you come too late for a Discovery after a Veredit. Vern. 176. pl. 169. Trin. 1683. Barebone v. Brent.

3. A. having recover'd Judgment at Law for 1400l. against J. S. brings a Bill charging that J. S. had convey'd his Estate to Trustees, and had lent 1000l to B. in C's Name, and praying that this might be liable to A's Debt; Defendant demurred, for that he in his Life-time is not bound to discover his Personal Estate; and Demurrer over-ruled. Vern. 398. pl. 370. Pach. 1686 Smithier v. Lewis.

4. A. obtains a Judgment against B. and brings a Bill against C. for an Account and Discovery of Goods of B. which C. had got into his Hands; Defendant demurred, because the Plaintiff had not alleged that he had taken out Execution, and Demurrer allow'd. Vern. 399. pl. 371. Pach. 1686. Angl v. Draper.

5. The Plaintiff having recovered Judgment against J. S. (but no Writ of Execution sued out) supposing some particular Effects of J. S's to be in the Defendant's Hands, brought a Bill to discover them, in order to subject them to his Judgment; the Defendant demurs, because there is no Equity to compel a Discovery, and no such Bill would lie against the Debtor himself, much les against a third Perfom. My Lord Keeper seemed to agree it would not lie against the Debtor himself, nor to have a General Discovery from a third Person, but only for particular Things, as this Bill was, and over-ruled the Demurrer. Abr. Equ. Cases 132. Mich. 1705. Taylor v. Hill.

6. Bill for the Discovery of the Confideration of a Promiffory Note This should for 275l. f fugging out, that it was given ex turpi Causa, to smoother and have been make up a Felony &c. Demurrer to that Part of the Bill which seeks (A) Discovery if the Note were not given to make up a Felony which is of a criminal Nature &c. and the Demurrer allowed. MS. Rep. Mich. 4 Geo. in Canc. Guiborn v. Fellows & al.

7. Bill
Bill of Discovery against Purchasers.

1. The Plaintiff bought Land of one who had no Power to sell, and moved, that if the Defendant should be compelled to bring in the Deeds which might incumber the Plaintiff's Purchase, then the Plaintiff might bring in the ancient Evidence which might discover, that he which sold to the Plaintiff had no Power to sell; The Court answered, that no Aid should be given to overthrow Purchases made Bona fide. Toth. 223. cites Vavasor or Waverer v. Row, in 33 & 34 Eliz.

So of a De-
scrip. 3 Ch. 332.
Borington v
Borington.
——— 3 Ch.
Cafes + 1679 Anon. con

2. A Purchaser of Lands from A. which B. makes Title to, getting the Deeds which makes out B's Title, is not bound to discover them. Ch. 69. Parch. 17 Car. 2. Shirly v. Fagg.

N. Ch R.
155 S. C.
per Bridg-
man K
Fin R. 102.
per Finch
K. the S. C. but D. P.

3. Pleading a Man's self a Purchaser for a valuable Consideration is not good unless he pleads it from some of the Plaintiff's Ancesters; for a Purchaser from a Stranger without Title was held no good Plea; for the Defendant was ordered to answer. 3 Ch. R. 40. Hill & Mich. 1669 & 1670. Seymour v. Nofworthy.

4. A Bill of Discovery was brought against a Purchaser on a valuable Consideration, and the Court would not compel him to answer, though it was proved there was a Deed and a Real Settlement; cited per Serjeant Maynard. Vent. 198. Parch. 24 Car. 2. B. R. in the Cafes of Jones v. the Countees of Mancheater.

5. Bill for the Discovery of a Title by a Coheir in Gavelkind; Defendant pleaded that he is a Purchaser for a valuable Consideration without Notice, and that he had obtained a Verdict and Judgment in Ejectment; The Court allowed the Plea. Fin. R. 34. Mich. 25 Car. 2. Hayman v. Gomeldon.

6. Bill brought to set aside a Purchase, and to have a Discovery of the Site and Profits of the Estate. Defendant by Answer inflicts that he is a Purchaser, and that he is not obliged to make a Discovery; to which Exception was taken for not answering, and that Exception allowed. Sel. Cafes in Canc. in Lord King's Time 51. Mich. 11 Geo. 1. Richard-
son v. Mitchell.

In Support of the Exception was cited the Cafe of Ste-
phens v. Stephens before Lord Macleesfield; Bill was brought for a Discovery of the Rents and Profits of an Estate, which he claimed by Will from a Common Ancestor; Defendant says he is intituled to the Estate, and therefore till the Right is determined, he was not obliged to give Account of Rents and Profits. Lord Macleesfield said, this might have been good by way of Plea, but having answered, he must answer the Charge of the Bill. Ibid.

So lately the Cafe of Edmunds v. Freeman; Bill brought for Account, the Defendant contro-
verted the Right, and said he was not obliged to give an Account before that was settled; and your Lordship was of Opinion, that he having answered, the Charge of the Bill must be answered. Ibid.

7. Bill to discover how much Money Defendant paid for the Purchafe of &c. and to whom, and what remains unpaid, and that the Plaintiff might be satisfied a Debt of 1800 L. due from the Vendor; Defendant pleads that he is a Purchaser for a valuable Consideration, and that he has paid and secur'd the Purchafe-Money; but because he did not set forth how much the Purchafe-Money was, nor to whom he paid the same the Plea was over-ruled, and Defendant ordered to answer those Particulars without
Discovery.

without Coils, but the Purchas© not to be impeached. Fin. R. 219.
Trin. 27 Car. 2. Caurell v. Mannington.
8. A Bill was preferred for Discovery of Title and Writings. The
Defendant pleaded he was a Purchas© for a valuable Consideration without
Notice of the Plaintiff's Claim, and so demurs. The Plea was ruled to
be ill per Cancellar® because he does not set forth the particular Con-
sideration, but if that had been expressed it had been good, and so it
was held in one Snag's Case. 2 Freem. Rep. 43. pl. 47. Mich. 1678.
Millard's Cafe.
9. Motion was made that the Defendant might discover the Names of
the Witnesses to a Deed by which the Defendant claimed by his Answer,
which the Plaintiff by Bill charged to be antededated, but the anteda-
ting denied by Answer. Per Ld. Chancellor. That may tend to pre-
pare, or otherwise to tamper with the Witnesses, and therefore denied
the Motion, but if there were apparent Suspicion it may be. 2 Ch. Cales
84. Hill. 32 & 33 Car. 2. Anon.
10. A Purchas© of Lands jud}® to a Judgment without Notice thereof
But if the Com-
plaint will not be obliged to discover. 2 Ch. Cales 47. Hill. 32 & 33 Car. 2.
Snelling v. Squibb.

But he must set forth that he had no Notice of the Judgment, 2 Vent.
561. Anon.

11. By Lord Chancellor it is an infallible Rule, that a Purchas© for a
valuable Consideration shall never, without Notice, discover any thing

ought of one that after was Bankrupt.

12. Purchas© of Goods of a Bankrupt without Notice of the Bank-
ruptcy, and for which Goods he paid the Money without Notice, is not
bound to discover. 2 Ch. Cales 135. Hill. 34 & 35 Car. 2. Brown v.
Portman v.

Purchas© of

3 Ch. R. 41. Gladwyn v. Savil. 22 Car. 2. S. P.—— N. Ch. R. 141. S. C. Defendant pleaded his
Purchas© Deed, and that the Bankrupt was really indebted to him when it was executed, and the
Court would not compel him to answer as to Notice. 2 Ch. Cales 136. Wagboil v. Read. S. P. as to
Goods, and there Ld. Keeper diluglied, that if the Sale were at an extreme Under-Value the Plea
should not bard, and at length ordered Defendant to answer, What the Goods were, and what be paid
for them, but Plaintiff not to take Advantage thereof al Common Law, and the Plaintiff to sub
scribe his Consent with the Register. But would not compel him to shew the Time when, for Fear
should over-reach, and be within the Time after an Act of Bankruptcy committed. Skin. 149 pl.
21. Mich. 35 Car. 2. Anon seems to be S. C.

13. The Want of Notice must not be pleaded by a Purchas© for a va-

luable Consideration, but must be put in by Answer; Per North K. 2

14. It is not the Practice of Chancery to compel a Purchas© to an-
swer Matters to impeach his Grant. Arg. Vern. 291. Mich. 1684. in
Cafe of the King v. Vernon.

15. Bill of Discovery lies in Equity, though for Matters founding in

Evans & al'.

Mine under his Neighbour's Ground, and where a Man run away with a Casket of Jewels, he was
ordered to answer, and the injured Party's Oath allowed as Evidence in Olibum Spolitores. Ibid.
This should have been entered at (A)
(E) Bill of Discovery by Purchasers.

1. **Bill by Assignee of an Extent against the Tenant of the Lands**
to enforce him to deliver to him a true Note in Writing of the
Date of the Deed, and for what Term of Years he had it in Lease, and
under what Rent reserved, but not any of the Covenants or Condition,
2. Defendant ordered to shew Evidences to direct what Tenants ought
to attend, and to discover who is Tenant. 11 Car. Toch. 78. Pie v. Bevill.
3. Bill by a Purchaser to discover a Charge and to preserve Testimo-
3. The Defendant discovered a Lease for 1000 Years. It being
called a severe Case on the Plaintiff, there is no Reason for the Plaintiff
to pay Costs at Law, or in this Court. 2 Ch. R. 172. 26 Car. 2. Tre-
therby v. Hoblin.

(F) Bill of Discovery.

By Creditors.

1. In a Bill to discover upon what Consideration a Bond was given,
that had been assign'd to the King as a Debt in Aid; the Court
held, that a Man was not bound to discover the Consideration of a
Bond, which implies in itself a Consideration; and to Baron Atkins
said, it had been ruled in Chancery. Hardr. 202, 201. pl. 4. Trin. 13
Car. 2. Turner v. Binion.
2. A contends a Statue to B. B. extends the Lands. J. S. a Credit-
by Judgment full and final to the Statute, takes A in execution on the Judge-
ment, and then brings a Bill against B the Conveyer, to discover Incumben-
ties, which he imputed he could not have after A's Death, and therefore
ought to have it now. B. pleaded the Matter above, and therefore that
the Plaintiff could not extend his Lands, nor were they liable to his
Debt during the Life of the Cognizer, and though it was urged that
it had been ruled that such a Bill will lie, notwithstanding the Debit
is in Execution at the Suit of the Plaintiff, yet the Court inclined that
this Part of the Plea was * likewise good. N. Ch. R. 89. 15 Car. 2.
Churchill v. Grove.
3. If you sue the Executor of one Obliger to discover Assets, you must
make all the Obliger Parties, that the Charge may be equal; but it a
Judgment be against one Obliger, his Executor may be sued alone for a
Discovery of Assets, because the Bond is drown'd in the Judgment. 2
Vent. 348. Trin. 32 Car. 2. in Canc.
(G) Bill of Discovery relating to Wills and Personal Estate.

1. **BLIGEE** may sue in Chancery to discover **Assets** before a **Bill** is brought for a Title to the said Will, and demand for what the Plaintiff has set forth no Title to the said Will, to as to demand a Discovery, and the Court allowed both Plea and Demurrer. Fin. R. 36. Mich. 25 Car. 2. Ramere v. Rawlins.

2. Bill to discover a Will, Defendant pleaded in Bar a Title by the said Will to his own, and demanded for what the Plaintiff sets forth no Title to the said Will, to as to demand a Discovery, and the Court allowed both Plea and Demurrer. Fin. R. 36. Mich. 25 Car. 2. Ramere v. Rawlins.

3. Bill to discover a Personal Estate and Will, Defendants demurred, for that they have not proved the said Will, and it be not a Title to the Personal Estate, nor does not charge that any came to his Hands, is ill. Chan. Cases. 326. Patch. 26 Car. 2. Davis v. Curtis.

4. Discovery decreed though against the express Words of the Will, which was, that the Declaration of the Executor should be taken and without being compelled the same to be brought before the Court. Law. 22 Chan. Cases 198. Trin. 26 Car. 2. Gibbons v. Dawley.

5. Bill was to set aside a Will made by J. L. who was the Husband of the Defendant, now deceased, for that the said Will was irregularly obtained; and amongst other Things, to discover what Portion the said M. brought to her late Husband J. L. who made this pretended Will. The Defendants by their Answer deny that the Will was irregularly obtained, and plead the same in Bar, and as to the other Part of the Bill they demur; it appearing by the Plaintiff's own showing, that he has no Title to have such a Discovery as prayed. The Court allowed the Demurrer with Costs, but ordered the Plaintiff to reply to the Plea. Fin. Rep. 397. Mich. 30 Car. 2. Lloyd v. Williams.

6. Bill for a Discovery of the Personal Estate was brought before the Will was proved, the same being controverted in the Spiritual Court. The same was pleaded to the Bill, but over-ruled; a Discovery being for the Benefit of all Persons interested, and necessary for the Preservation thereof, and such Discoveries have been often ordered Peniteente in
Discovery.

the Spiritual Court. 2 Vern. 49. pl. 47. Pauch. 1688. Dulwich Coll. v. Johnston.

8. It is usual to prefer Bills to discover Acts before they begin at Law, that if any discovered, the Plaintiff might produce the Answer in Evidence at the Trial at Law. N. Ch. R. 158. Hill. 1 W. & M. Wright v. Carew.

9. Will concerning Personal Estate proved in the Spiritual Court, Defendant having a former Will in his favour brings his Bill to discover by what Means the latter Bill was obtained, and to have an Account of the Personal Estate, and whether the Testator was not incapable and imposed upon. Defendant demurred, because it belonged to the Spiritual Court only to prove the Validity of Wills, and the former Will was not proved in the Spiritual Court, as the Will in his Favour was. Demurrer overruled. MS. Tab. Feb. 6, 1723. Andrews v. Powers, or Powis.

10. By the ancient Course of the Court, a Person was allowed to bring his Action at Law against the Representative of the Deceased, and at the same Time to bring his Bill here, in Order to have a Discovery of Affairs; Though now it is establisht that if the Party proceeds in Equity against such Representave, his Bill must be both for a Discovery of Affairs and a Satisfaction for his Debt. Barnard. Chan. Rep. 278. per Ld. Chancellor. Hill. 1740. in Cafe of Barker v. Dumeres.

(H) Bill to discover a Trust.

1. If a Trustee does by Fraud and Combination with the Ceufay que Trust endeavour to evade any Penal Law as the Statue of Simony &c. under Pretence, that a Trust is only cognizable in Equity, and that Equity should not affit a Penalty or Forfeiture, yet Chancrey will Aid remedial Law and not suffer its own Notions to be made Use of to evade any beneficial Law. Abr. Equ. Cafes 131. Pauch. 1706. Attorney General v. Hindley.

(I) Bill of Discovery against Counsellors, Attorneys &c.

1. Bill was to discover several Matters relating to the Estate and Affairs of B. Defendant pleads that he was Attorney in several Causes and faithfully managed the same for B. and ought not to discover them; and the Plea was allowed. Fin. R. 82. Hill. 25 Car. 2. Le- gard v. Foot.

2. Bill was for the Discovery of a Deed and the Contents of it in the Defendant's Custody. The Defendant demurred, for that he is an Attorney at Law, and was intrusted by his Client with the said Deed, and with other Deeds and Writings, and therefore ought not to discover the same, or the Contents thereof, or any other Matters which came to his Knowledge, as he is an Attorney, and employed in the Affairs of his Clients. The Court was of Opinion, that there ought to be a Discovery, and ordered the same accordingly, viz. whether there was such Deed or Deeds, and where the same is or are, and to whom delivered, and when he first saw the same, and in whose Custody; but not to produce or discover
K) Between Landlord and Tenant.

1. WHETHER a Licence to assign a Lease were granted or not, being but three Years past, the Defendant was ordered by my Lord to answer directly, and not to his Remembrance. 38 & 39 Eliz. Tech. 71. Ofwald v. Pennant.

2. Grandson and Heir of the Lessee brings a Bill against the Son of the Lessee to discover Boundaries, the Lands leafed, and the Leases own proper Lands lying contiguous and the Fences thrown down, and an Account of Rent Arrear, and of Heriots &c. there being a Heriot referred upon the Death of every Life. Defendant demurred, because Plaintiff had not made Oath of the Loss of the Counterpart of the Lease it appearing by the Bill that the Lease was not determined and for that he did not offer to confirm the Lease for the Residue of the Term. Ordered to answer as to the Boundaries and what he knows of the Payment of any Rent and after that is done there shall be no farther Proceedings in this Court. Fin. R. 239. Mich. 27 Car. 2. Glyn v. Seawen.

3. Bill was to discover whether the Defendant had not assigned over a Lease; the Defendant pleads that there was a Proviso in the Lease, that the Case be assigned over, the Lease should be void; and that this being in the Nature of a Penalty, or Forfeiture he ought not to be compelled in a Court of Equity to discover; but for the Plaintiff it was said, that this was not a Penalty, but Part of the Contract, yet the Plea was allowed. Abr. Equ. Cafes 77. Hill. 1700. Fane v. Atlee.

L) Bill of Discovery by or against a Jointures.

1. BILL brought by a Jointure to discover * Incumbrances on the Jointure Lands which were greatly deficient; Defendant pleaded that she is Purchaser for a Valuable Consideration, having paid to much Money to the Husband, and that the had a Verdict and Judgment at Law for 1000l. which was affirmed on a Writ of Error. But the Question being whether any more than the Principal Sum of 1000l. was secured on the Lands claimed by Plaintiff for her Jointure, and what is due to Defendant for Principal and Interest, the Court ordered her to answer that particularly. Fin. R. 143. Mich. 26 Car. 2. Osborn & al' v. Brown & al'.

2. By Sergeant Maynard. It is the Course of Chancery, when a Bill is exhibited against a Jointure to discover Writings, not to compel her to do it till such Time as the Plaintiff agrees to confirm her Jointure. Vent. 198. Patch. 24 Car. 2. B. R. in the Case of Jones v. the Countres of Manchester.

3. A Jointure is not bound to answer, whether her Baron had any other Title than as Assignee of a Mortgage the by Anwser denying that she had any Notice of the Mortgage, and insinft that her Baron told her, he was in by Defcent, was allowed an Answer sufficient. Per Ld. Chancellor. 2 Vern. 701. Mich. 1715. Stephens v. Gaule.

7 A (M) Of
Discovery.

(M) Of Deeds.


2. It is most usual in Chancery to demand Evidence concerning the Complainant’s Lands, to which he makes Title, which are not in Chells, Bags, or Boxes, and whereas he knows not the Date &c. Cary’s Rep. 21, 22.

3. Where a Bill is barely for Discovery of a Deed and prays not Relief upon it; Oath need not be made of the not having it. N. Ch. R. 78.

4. A Purchaser shall not be obliged to produce Deeds containing the Title of others, and thereby to impeach his own Title. 3 Chan. Rep. 32, 14 Nov. 21 Car. 2. Borrington v. Borrington.

5. Bill to discover Deeds and Writings, which Plaintiff claims as belonging to several Manors and Lands &c. Defendant pleads a Deed of the said Lands to him by Will duly proved, and that the Plaintiff has an Answer to it at Law. Plea allowed. Fin. R. 82. Hill. 25 Car. 2. Legard v. Foot.

6. Bill by an Heir against Levee, to discover a Lease not determined and made by his Ancestor. Defendant demurred, because the Plaintiff had not made Oath that the Counterpart was lost, and that he did not offer to confirm the Lease for the Held of the Term. Demurrer allowed. Fin. R. 239. Mich. 27 Car. 2. Glynn v. Seaun.

7. Bill against an Attorney, to discover a Deed and the Contents of it in the Defendant’s Custody. Defendant demurred, for that he is an Attorney at Law, and intrusted by his Client with the Deed, and ought not to discover what came to his Knowledge as he is an Attorney and employ’d in the Affairs of his Clients; but ordered to answer if there was such Deed, and where the same now is, and to whom delivered, and when he last saw the same, and in whole Custody, but not to produce or discover the Date or Contents. Fin. R. 259. Trin. 28 Car. 2. Kingston v. Gale.

8. Bill to discover and have the Use of a Deed to lead the Use of a Fine levied by Defendant’s Mother, and conceal’d and suppress’d by her. The Case was, Defendant’s Mother was feized 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 infils that the Fine was gained unduly, and denies the having the Deed, which was voluntary without Consideration, and the Conveyance by Fine &c. was voluntary and without Consideration, no Money being paid &c. The Court would give no Relief, but left the Plaintiff wholly at Law to help himself there if he could. 2 Chan. Cases 133. Hill. 34 & 35 Car. 2. Anon.

9. Where an Estate Tail is discontinued, though by a voluntary Conveyance, such Grantee is not to be compelled by the Issue to discover the Deed of Intail. 2 Vern. 50. pl. 48. Pach. 1698. Bunce v. Phillips.

10. Bill by a Bishop against an Assignee of a Lease, charging that he knew the Lease was expired, and that it appears so by Deeds in his Hands. Defendant pleaded the Lease, and that he was a Purchaser, and was told that at his Purchase in 1677 there were 37 Years to come, and therefore gave 19 Years Purchase for it, and so ought not to discover any thing to impeach his Title. Plea allowed and Demurrer also. 2 Vern. 225. Hill. 1691. the Bishop of Worcester v. Parker.


11. A sues, that in a Mortgage by B. to C. which had since been S. P. Per assigned to D. there was a Trust declared for the Benefit of A. and Wright K. prays that D. may produce the Deed. D. denies by Answ. any such Trust in the Mortgage-Deed, saying that by this all Purchasers might be blown up. Q. tamen. 2 Vern. 493. Mich. 1704. Hall v. Atkinson

and Daniel.

12. Persons who claim Lands by a Will or any other voluntary Dispension, having the Law on their Side, are intituled as against an Heir at Law to a Discovery of Equity in Deeds relating to the Estate, and to have them delivered up, otherwise the Heir might defend himself at Law by setting up prior Incumbrances, and by that Means hinder the trying the Validity of the Will. MS. Tab. May 19th, 1713. Dutches New-

castle v. Lord Pelham.

13. A Coheiress disinterested by the Will of his Ancestor may enforce S. C. & P. the other Coheir, in whose Favour the Will is, to produce the settle- ment of the Estate, that he may see if his Ancestor had Power to make such Will and given the Lands from him, and that before he contends the Will. 9 Mod. 99. Mich. 11 Geo. Floire v. Sydney.

a Will before the making it shall be inquired; and it was decreed that all Deeds should be produced, and the Counsel’s Opinion is; nor as they will be a Guidance to the Court, but for the Case on which they might be founded; for in those Cases Papers may be mentioned which might otherwise be suppressed and not come to Light. Sel. Ch. Cases in Ld. Knt. Time. 2 Mich 11 Geo. 1. 1724.
(N) Bill of Discovery. To bring Actions.

1. Where Certainty wanteth the Common Law faileth, but yet Help is to be found in Chancery for it; for if the Queen grant to me the Goods of A. who is attainted for Felony, and I know not the Certainty of them, yet shall I compel any Man to whose Possession any of them are come, to make Inventory of them here. Cary's Rep. 21 cites 36 H. 6. 26.

2. The Defendant being Tenant for Life was ordered to be examined for making known to whom the Reversion of the Lands in Question were to pass, which, if she refuse, then the Parties to proceed in Suit, notwithstanding her present Estate. Toth. 235. cites 11 & 12 Eliz. Mayor &c. of Feverham v. Lady Amcoats.

3. The Court compels Tenants for Years to set down in certain the Time of the Making, Commencement, Determination, and what Rents are reserved, and the Times the same are payable, to the end the same may be liable to an Extent upon a Statute. Toth. 281. cites 30 Eliz. ii. A. tol. 311. Buck v. Lupton.

4. The Defendant was forced to set down to whom he assigned his Leave, because otherwise the Leffor would have no Action of Waifs, and to set down the Names of the Persons whom he bad caused to sell Trees, whereby the Leffor might have his Action against them. Toth. 71. cites 38 & 39 Eliz. Standon v. Bullock.

5. A Bill to find a Tenant to an Estate whereby to ground an Action of Dwerr; Toth. 84. cites Mich. 2 Car. Lord Kemp v. Risbie.

6. A Bill to discover a Patron, whereby to impower one to bring a Quare Impediet. Toth. 262. 2 Car. Comes Pembroke v. Boffcock.

7. If a Man has Caufe to demand Land by Action, and knows not the Tenant of the Land, by Reafon of the making of secret Estates it hath been lately used to draw them in by Oath to confess the Tenant, but it is now doubted. Cary's Rep. 22.

8. A Man shall have a Discovery in this Court in order to bring an Action of Trover; Arg. and saith it is a Common Cafe, and cited the Printers Cafe in this Court, Vern. 307. pl. 300. Hill. 1684. in Cale of the East-India Company and Evans.


10. A Clothier sends Goods to his Factor to sell; the Factor pawns the Clothes; Clothier brings a Bill to discover if the Clothes came to the Hands of the Defendant, who answers that some Clothes were pawned to him, but did not admit they were the Plaintiff's. Ld. Jeffries ordered that the Plaintiff and others with him might have a Sight of them, and this was to enable him to bring an Action. Vern. 427. pl. 381. Mich. 1686. Marthden v. Panhall.

11. There is no Reafon to compel a Man to discover the Boundaries in his Deed, for that would be to help a Man to Evidence to evict my Possession. 2 Vern. 39. pl. 34. Mich. 1688. Hungerford v. Goring.

12. Bill
Bill to discover who was Owner of a Wharf and Lighter, to enable Plaintiff to bring an Action for the Damages he sustained by the Lighters being overtaken by Negligence of a Lighter-man; Defendant demurred; Demurrer over-ruled. 2 Vern. 442. pl. 406. Mich. 1702. Heathcott v. Fleet.

A Ship taking Fire by the Neglect of the Master or Ship's Crew, the Plaintiff who was one of the Freighters, and had his Goods burnt, brought his Bill to discover who were Part-owners of the Ship, to enable him to bring his Action. The Defendant demurred. In the Case of Heathcott v. Fleet, and also in this Case it was intimated on for the Defendant, that it was a hard Demand in its Nature. The Plaintiff might recover at Law, as he could, but was not to be assailed in Equity; and compared it to the Case where a Fire happens in a Man's House, and burns his Neighbours also; although he is liable to Damages at Law, yet the Plaintiff in such Case shall not be assailed in Equity. Per Cur. The Cases are not alike. In the Case put it is true, the Law gives an Action; but it does not arise out of any Contract or Undertaking of the Party; but in the Cases before the Court, the Lighter-man receives a Premium, or Wages for undertaking to conduct the Goods to the Wharf; and so the Matters or Owners are by Agreement to have Freight for carrying and transporting of the Goods; and it is within the Reaton of the Case of any common Carrier; and therefore over-ruled the Demurrer, and ordered the Defendants to answer. 2 Vern. 443, 444. pl. 407. Mich. 1704. Morfe v. Buckworth.

Where a Bill will not lie in Equity to discover the Concealment of Goods, when the Concealment was to prevent their being taken in Execution, See Barnard. Chan. Rep. 39. Patch. 1749. Lowthill v. Jenkins.

(O) Bill of Discovery.

Relating to Marriage and Marriage Settlements.

1. Bill supposes a Settlement on the Plaintiff in Remainder after the Death of D. the Defendants former Wife, and on certain Condition depending on that Estate of D. and to examine Witnesses, to those Points. Defendant sets forth a Settlement subsisting to the Time pretended for the first Settlement on a second Marriage, and Issue of that Marriage had 15 Years since, and the Plea allowed, for it was alluded at Bar, that in Truth this Bill was but an Artifice to examine a second Marriage, which whether it was not in the Life of D. his first Wife, and so to bastardize the Children by the second Wife. Ld. Keeper allowed the Plea. 2 Ch. Cafes, 209. Mich. 27. Car. 2. Duke v. Duke.

2. A. the Eldest Son of B. brings a Bill against B. and J. S. to be relieved touching of B's Marriage Articles, B. having received 9000l. S.C. of A's Wifes Fortune, and yet refused to make any Settlement, but took Advantage of a Defect in the Marriage Articles, and in order to be relieved pray'd a Discovery of the Incumbrances on B's Estate agreed to be settled on the Marriage; It was intimated that the Plaintiff by the Marriage Articles had no Title to the Estate in Quetfon, and therefore they were not bound to discover Incumbrances. Finch C. ordered Defendants to answer to the Incumbrances. Vern. 74. pl. 69. Mich. 1682. Weft v. Ld. Delaware and Cutler.

7 B 3. Bill
3. Bill to establish a separate Maintenance for Defendant's Wife, & inter al' prayed a Discovery of several Unkindnesses and Hardships which Defendant had used, as was pretended to her to make her recede from this Agreement. Demurrer allowed, as a Matter not properly examinable or relievable in this Court; Per North K. Vern. 294. pl. 200. Mich. 1683. Hinks v. Nelthorp.

(F) Bill of Discovery.

Of what Estate a Man has.

1. Whether a Jointenant shall be forced by Law to disclose a Partition in the Life of his Fellow. See Toth. 72.
2. Lessee for Years of Confor of a Statute was compelled to discover what Estate he had from the Confor to the End that it might be liable to the Statute. See Toth. 226. cites 25 Eliz. Titchburn v. Dodgington.
3. Tenant for Life sought a Discovery on what Account a Fine levied, and to what Uses, and for what Consideration. Defendant demurred for want of sufficient Title in the Plaintiff. 3 Ch. R. 27. Trin. 21 Car. 2. Hilliard v. Licefter.
4. Bill to discover who is Tenant of the Freehold in order to bring a Formedon, will not lie, Per North K. for there are other Ways to know it. Though the Case of Bickerton v. Bickerton was cited, where such a Demurrer was disallowed, yet per North K. the Demurrer was good. Vern. 212. pl. 210. Hill. 1683. Stapleton v. Sherard.

(Q) Bill of Discovery.

Relating to Sea Affairs, and Companies trading into Foreign Parts.

Bill to discover what Title Defendants had to a Ship in Question from B. in which Plaintiff had an 8th Part by a Bill of Sale from the said A. dated in May, 1671, and that if Defendants had any Title it was subsequent to that of the Plaintiff's. Defendants plead a Bill of Sale from B. for a full and valuable Consideration, without Notice of Plaintiff's Bill of Sale; Plaintiff replied that Defendant might be a Purchaser, and yet it might be of some Mortgage, or upon some Tract or Agreement. Ordered that Defendant answer whether on any Mortgage, Tract or Agreement. Fin. R. 152. Mich. 26 Car. 2. Letton v. Penfax.

Discovery.

3. The Defendant and other Seamen libelled in the Admiralty Court for their Wages, and (as forth in their Libel, that) they went to fetch a Place or Craft in the East-Indies, and that the Plaintiff had not paid them their Wages &c. Sir James Montague moved for a Prohibition, for that Court will not, by their Way of Proceeding, receive our Answer but upon Oath; by which Means we will be forced to discover that we traded to the East-Indies, and so incur a Penalty inflicted by Act of Parliament, which is general, prohibiting all the Subjects of England to trade or traffic there, except they have a Licence, or are of the East-India Company. Besides, these Mariners have a Contract under Hand and Seal for their Wages, on which they may sue at Law. But the Prohibition was denied, for it is reasonable and just, whether their going thither was lawful or not, that you should pay them their Wages. There is no unlawful Act suggested, and if there be a Contract under Hand and Seal for their Wages, yet the Admiralty may have Jurisdiction thereof as incidental; but if they judge contrary to our Law, we will prohibit them. But they on the other Side deny the Contract to be as you have alleged. Holt's Rep. 49. pl. 6. Mich. 5 Ann. Gawne v. Grandee.

4. The Defendant was one of the Super-Cargoes of the Royal George belonging to the Plaintiffs; and on his being so appointed, entered into a Bond with Sureties of 5000l. Penalty not to trade to any of the Places prohibited by the Act of 9 of & Ann for erecting the South-Sea Company, or contrary to the Affiento Contract with the King of Spain, and several other Restrictions; and he on his Part covenanted not to trade to any of the said Places, or contrary to the said Contract, and covenanted not to plead or demur to any Bill which should be brought against him in Equity for a Discovery of his Trading or Dealings contrary to his Agreement, and this Bill was brought, charging him with several Breaches of Covenant to the Prejudice of the Plaintiffs, to the Amount of several 1000l. and for a Discovery thereof &c. and the Plaintiffs by their Bill set the said 5000l. Penalty of the Bond. To this Bill the Defendant pleaded the Statute 9 Ann, and several Articles of the Affiento Contract, whereby whoever traded contrary thereunto were liable to great Penalties, as Confiscation of Ship and Goods, and several other Forfeitures. And it was strongly urged, that by Law no one was bound to discover any Matters which tended to subject him to Penalties or Forfeitures; that it was the Business of Courts of Equity to relieve against, not to afford Forfeitures; and that this Covenant not to plead or demur, was illegal and void in itself, as it tended to deprive him of the Benefit of the Law, like a Covenant not to bring a Replevin, or such like; but the Plea was over-ruled, because he certainly might, if he thought fit, forego or waive the Benefit of the Law in those Particulars, which here he has expressly covenanted to do; and which were the more necessary to be required of him, as the Plaintiffs themselves were under like Penalties in Cave any of their Factors or Agents traded contrary to that Act, or the Affiento Contract. And this Covenant not to plead or demur, was purposely to obviate the Pretence, that he ought not to discover any Thing whereby to subject himself to any Penalties; which since he has expressly conformed to and covenanted for, he shall not now be at Liberty to object to the illegality of. And it was said to be so resolved in a like Case between the East-India Company and Atkins, in the Time of the Lord Macclefield, on a very solemn Debate. Abr. Eq. Cases 72, 78. Mich. 1725. South-Sea Company v. Bunilhead.

5. The
5. The Secretary and Book-Keeper of the East-India Company were made Defendants to a Bill for a Discovery of some Entries and Orders of the Company; the Defendants demurred, for that they might be examined as Witnesses; also because their Answer cannot be read against the Company; the Demurrer was over-ruled, left there should be a Failure of Justice, in regard the Company are not liable to a Prosecution for Perjury, though their Answer be never so false. 3 Wms's Rep. 310. Trin. 1734. Wych v. Meal.

For more of Discovery in General, See other Proper Titles.

Discount.

(A) Discount or Stoppage, or setting off mutual Debts one against another. Allowable in what Cases.

1. If a Man leases Land for Life rendering Rent, and disceives the Lessee, and he recovers by Affise, there the Arrearages due before the Disseisin shall not be recouped, but only the Rent incurred during the Disseisin, and after he shall have Affise of the Arrearages due before and after, and this was found, by which he recover'd, but the Damages were sevored. But Brook makes a Quere; for it seems he shall have only Diffires. Br. Damages, pl. 132. cites 9 E. 3. 8. and Fitzh. Affise 153.

2. In Affise it was found that the Baron entcoffed A. and died, and one entered without Covin of the Feome and endeav'd her, and A brought Affise against the Abator and the Feome, and therefore the Plaintiff recover'd two Parts and Damages, and the Feome retained the third Part in Dower, and the third Part of the Damages was recouped. Br. Damages, pl. 96. cites 12 All. 20.

3. Damages of 40s. and no more was found by the Affise, because the Land is fowen, and the House well amended, and so recoup'd the Damage. Br. Damages, pl. 82. cites 44 E. 3. 50.

So the Plaintiff recover'd the Land, and no Damages, because the Place was amended by Building quad Noto; for this was found by the Verdict. Br. Damages, pl. 99. cites 14 All. 13.

4. Disseisin is done ad Damnum 91. The Diseiser sows the Land which is worth 10l. The Affise gave the Damage to 91. They shall be attainted per Cur. because they did not recoup the fowing of 10l. And Attaint does not lie before the Execution of the Damages. Trinere Cane. But Brooke lays Quere inde, for after Judgment. Br. Damages, pl. 199. cites 24 E. 3. 59.

5. A Man
5. A Man granted a Rent-Charge of 10l. out of his Land, the Grantor
differs the Grantor of the Land out of which &c. and he brought Affr
and recovered to the Damage of 10l. above the 10l. the Defendant
ought to have during the Time of the Diffusion for his Rent; and per Cur
the 10l. of the Rent for the Time shall be recompened in Damages,
and the Plaintiff shall not recover the whole 20l. in Damages, but shall
make Recover of 10l. because during this Time if no Diffusion had been
the Diffisor ought to have had 10l. in Rent, and it is Circuity of Ac
tion that the Plaintiff in the Affire shall recover the 20l. and then the
that as to the Defendant to recover 10l. again; and the same Law it is said where
the Lord differs his Tenant, or if he who has Estates &c. diffises the
Tennent, but this is only where this Matter is found by the Verdict,
for otherwise it cannot be recouped. Br. Damages, pl. 7. cites 3 H. 6.
and as it seems Fitzh. Damages 18.

6. One Debt retained for another when each was indebted to the Br. Contindi
other in 10l. and a good Bar in Debt upon an Obligation with Condi-
7. Where the Lord diffises his Tenant, and the Tenant brings Affile
and recovers, the Rent due to the Lord shall be recouped in the Damages.
Per Rede. Br. Trefpas, pl. 270. cites 4 H. 7. 10.
8. A. has a Rent out of B's Manor; B. makes A. his Bailiff of his Cro. J. 178.
Manor. In Account A. shall have his Rent by Way of Retainer. Per
9. If a Difffisor sells Trees and repairs the Houses with them, and
Affile be brought against him, the fame shall be recouped in Damages,
because what was done was a Commodity. Arg. Goldb. 53. pl. 65.
10. If a Diffessor pays Rent, it shall be recouped in Damages. So if
one enters as Guardian, who is not Guardian, he shall have Allowance
for all reasonable Acts as a lawful Guardian would. Cro. E. 631. pl. 36.
11. By the Custom of Foreign Attachment in London, if it be refri
shed that the Plaintiff was indebted to the fame Petron whom he sues,
12. If a Trustee for Sale of Lands for Payment of Debts disburfes
Money of his own to the Value of Part, or of all the Estate, he be
comes a Purchaser pro tanto, or for all. Ch. Cafes 199. Patch. 23 Car.
13. A. conveyed Lands in Trust for Payment of Debts; A Rent of
15 l. per Annum was inciuf out of Part of the Lands and which were
in the Hands of B. a Creditor; A. and B. die. The Executors brought
a Bill against the Heir of A. and the Trustees (who had surrended the
Lands to the Heir as they intitled they had a Power by the Settle
ment to do to enable him to make a Jointure) the Trustees say, they
permitted B. to retain his Rent towards Satisfaction of his Debt. Decreed it
was not to go in Discharge of the Debt and if any Rent was due, there
was a Remedy at this Court to stop it, and ordered the Heir to pay the Debt with Damages for forbearing from

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7 C. cited
Arg. 5 Rep.
30. b Mich.
20 and 41.
Eliz. B. R.
in Coulter's
Cafe, and
there pag.
31. a. the
Court said,
the Cafe of
Recover in
Damages in
the Cafe of
Rent Ser-
vice, Charge,
or Seek, it
was resolved that the Reason of the Recover in such Cases is because otherwise when the Diffidio
re-enters the Arrears of the Rent Service, Charge or Seek, would be revived, and therefore to
avoid Circuity of Action and Circuitus ad extranum; Et bini Judices ex Lites dilimere ne Lites
ex Lato oritur, the Arrears during the Diffusion shall be recouped in Damages. But if the Diffisor
had Common in the Land, the Value of the Common should not be recouped; for by the Regress of
the Diffusion he shall not have any Arrears or Recompence for them, as appears in 26 H. 6. 13 a.
And with this Relation as to the Recover in Cases of Common agrees 35 H. 6. 32 a. in Rich's
Cafe, and to the Doubr in 16 H. 7. 11. a. it well explain'd.
the Time it was charged on the Lands, and with Cofts. Fin. R. 65.
Hill. 25 Car. 2. Lawrence v. Baskerville & al'.

14. It was held that if A. owes B. 100l. by Recognition, and B.
owes A. 50l. or 10l. upon any Security whatsoever, and A. sues B.
that cannot compel A. to pay himself by Way of Retainer out of what is
due to him, but they must take their mutual Remedies, unless there
were any Agreement to the Contrary. 2 Freem. Rep. 28. pl. 31. Hill.
1677. In Canc. Sir William Darcy's Café

15. Covenant upon a Charter-Party between the Merchant and a
Matter, the Merchant was to pay so much for Freight, and the Master to
deliver the Goods at such a Port; Breach is assigned in Non-payment
of the Freight; the Defendant pleads, that the Master has damaged,
wafted, and indeluted the Goods to the Value of the Freight; and that there
was a Custom to detain the Money which should be paid for the Freight in
Lien of the Goods; Plaintiff demurs; the Court thought that Plea good,
thought to a covenant, if there was such a Custom, whereof the Plaintiff
prayed leave to waive his Demurrer and to take Illue, which was
granted. Note, such a Custom there is between the Master and hired
Seamen to deduct out of their Wages what Goods are dammified, which
makes them the more careful, as several of the Bar said. 2 Show.

16. A. B. and C. were Partners in a Trade at Leghorn. Upon Ac-
count they dissolve their Partnership, and A. had his Share satisfied him
out of the Stock. Many Years afterwards A. had Occasion to receive
500 Dollars at Leghorn which was to be paid him for Merchandize by
D. another Stranger which no Way related to the Partner's Trade. The
500 Dollars were configned by Bill drawn on j. S. by C. payable to A. to be
received for his [C's] Use, and A. received them. C. sued at Law for
the Dollars, A. sues here to be relieved, and insists that he ought to
detain the same, because when the Partnership was dissolved, C. did cove-
nant to save him harmless from all Losses and Damages owing, or which
might be due, or brought on, or which might or should happen to him,
the said A. in Relation to his Part; and that long after the Dissolu-
sion of the Partnership he was sued by the Duke of Tuscany for Customs unpaid
at Leghorn, for the Goods which belonged to the Joint Trade, which amount-
ed to 60l. and Coifs, which he had paid, and therefore insisted to retain
to pay himself out of the Dollars. Mr. Attorney Jones said the Partner-
ship was long surrendered (I think he said fourteen Years) in all which
Time we have nothing to do with A. and the 500 Dollars is paid only
by our Use, and no Relation to the Partnership. And the Cov-
nant to save harmless is no Debt, but only releis in Damages. And to the Sentence in Law we are no Party, nor ever acquainted with it.
And by what Evidence or faint Detence made by A. the Sentence was
given, we know not. And it is more probable when A. had his Money
in our Hands he on Design to pay himself out of our Money in his
Hands made faint or no Defence. And it is improbable that the Duke's
Officers should be so long negligent of the Dues to the Duke, and the
Plaintiff should have given Notice to the Defendant. Ld. Chancellor
said, whether the Bill of Exchange was before or after the Sentence does
not appear. Mr. Attorney objected, that this is like a Foreign Attach-
ment to pay what is due on one Account, or Occasion out of another; and
the Money is not due from C. only, but also from B. till at last it was
answer'd, that C's Covenant extends to all which A's Part suffered, and
Gold v. Canham.

17. In Respect of a Company Stoppage is allowed to be as good as
Payment; For it is the Custum of Companies, that if they owe a Man
100l. they will give him Credit for so much; Per Ld. Keeper North.
Vern.
Discount.

Vern. 122. pl. 112. Hill. 1682. in Cafe of Cufon v. the African Company.


19. B. was indebted to A. A. dies leaving two Children C. and D. B. takes C. and D. to board with him; the Executors of A. shall discount the Debt due from B. with the Executor of B. though it was a Debt due by Simple Contralt, and the Payment of the Discount shall be no Deviatavit in B's Executor, if there should be any Debts or Bonds owing to B. and be afterwards put in Suit against him, because the Discount was made for the necessary Support of Infants, and this Court will protect him against any Judgment at Law on a Deviatavit. N. Ch. R. 159. Hill. 1 W. & M. Berritte v. Berritte.

20. Covenant to have the Leeflee harmless from a Rent Charge; if Leefee pays it without Compulsion, he pays it in his own Wrong and must pay it again to the Leefor; but if he is distrained for the Rent Charge and his Goods taken, this is a Breach of the Covenant and not before. 3 Salk. 109. pl. 9. Mich. 9. W. 3. B. Hannam v. Redman.

21. An Executor sells a Term to a Creditor, and agreed that the Creditor should discount his Debt out of the purchase Money. But on a Bill by the other Creditors, he was decreed to pay all the Money because he purchased with full Notice that it was a Testamentary Estate, and nothing came into the Executor's Hands as an Equivalent for it to make up the Quantum of the Teitator's Affairs. Cited Ch. Prec. 434. pl. 283. Hill. 1715. in Cafe of Paget v. Hoskins, as decreed in a Cafe when Ld. C. Cowper was Ld. Chancellor before.

22. A. & B. one a Clothier and the other a Dyer had carried on a Trade betwixt them several Years by setting off the Money due. B. died intestate and indebted to several Persons by Bond, who takes out Administration as Principal Creditors and sue A. at Law. On a Bill by A. Ld. Macclesfield thought that carrying on a mutual Trade several Years by setting off and not paying Money on either Side was a strong Presumption of an Agreement for that Purpofe: and on that Agrement they would not so long have continued their Dealings; that it was the constant Use between Merchants and Traders; and decreed that A. should be allowed on Discount what was due to him from B. Ch. Prec. 580. pl. 350. Hill. 1721. Downam v. Matthews.

23. If there be but the least bundle to direct an Account so as to let off the other's Debts it ought to be done; as if even in Cafe of Bond the Interest had not been paid, but called up and allowed in Goods this would intitle them to retain the whole against each as the Account should come out; Per Ld. Macclesfield, Ch. Prec. 580. Hill. 1721. in Cafe of Downam v. Matthews.


25. A. took a Nephew upon his Father's Death into his House and provided him with Cloaths and Schooling, and afterwards took him as Apprentice, and in his Books kept an Account of Expenses for that and board, but from the Time of the Apprenticeship omitted the Board, and afterwards left him 50l. by his Will, and made B. Executor; after A's Death B. supplied the Nephew with Wines who likewise received Money
Discount.

Monies due to B. and 50 became indented to B. considerably. The Nephew sued B. in the Spiritual Court for the 30l. Upon a Bill brought in Chancery by B. first against the Nephew and after against the Affiliates of a Commitment of Bankruptcy against the Nephew and Cross Bill by them against B. the Master of the Rolls said, that it was true that Stoppage was no Payment at Law, nor is it to itself in Equity; but then a very slender Agreement for discounting the one Debt out of the other will make it a Payment, because it prevents Multiplicity of Suits, and decreed an Account and the Plaintiff B. to pay only the Surplus after having deducted what is due from the Nephew as well to himself as to the Telfator, but no Costs on either Side. 2 Wms's Rep. 128. Patch 1723. Jeffs v. Wood.

26. The Plaintiffs were Sugar Bakers at Bristol, and Fry the Intestate was a Grocer there and bought Sugars of them, and they bought Blue Papers of him for their Sugars; Plaintiffs were indented to the Intestate 30l. for Paper, and the Intestate was indebted to them 100l. for Sugars. Intestate died insolvent not leaving Atlets to pay his Debts. Defendant Freeman takes out Admission as Principal Creditor, and brings an Action at Law, against Lane one of the Plaintiffs and Partners for Goods sold and delivered to him by the Intestate, and gets a Verdict at Law and Judgment thereon. Plaintiffs bring the Bill, suggesting that the Intestate was indebted to them as Partners in a far greater Sum for Goods sold and delivered, than they were indebted to him, and pray an Account and that deducting the Debt due by them to the Intestate they may have Satisfaction for the Balance of the Account out of Atlets.

Defendant insists upon the Verdict at Law against Lane for Goods sold and delivered to him upon his own separate Account, and that if those Goods were sold upon the Partnership Account Lane had a good Defence at Law in the Action brought against him alone, and since he did not take the Advantage of it at Law, he ought not to be aided in a Court of Equity; that there was not any Proof of an Agreement to set one Debt against another, and without such Agreement Stoppage is no Payment either in Law or Equity.

It was argued for the Plaintiffs that it is reasonable in mutual Dealings among Tradesmen, that one Debt should be set against another, both Debts being of an equal Nature, and that a very little Evidence will be sufficient to shew the Intent of the Parties, that it should be so, and cited the Case of Dowsn and Mathews in Cane. Hill. 8 Geo. to that Purpose, that here was Evidence that the Plaintiffs having sent to the Intestate for the Money he owed them, the Intestate sold them Blue Paper, and then said purely they would let him alone now for some Time longer, since he had sold them the Paper, which shews plainly that he understood the Value of the Paper was to go in Discount of Part of the Debt due to them; that there were no Witnesses examined for Lane in the Action brought against him for the Merits not tried, and this Verdict against Lane could not exclude the rest of the Partners from their Equity against the Defendant; if that Judgment should stand the Plaintiffs would be obliged to pay 30l. to the Intestate's Estate, when at the same Time his Estate was indebted to them 100l. and no Atlets to pay them, so the Plaintiffs would not only be stripped entirely of their Demands but pay 30l. towards satisfying other Creditors Demands.

Macclesfield C. In mutual Dealings between Tradesmen it is reasonable to suppose they intend one Debt should be set against the other, and the Ballance only to be paid as it is per Statute of Bankrupts, and therefore the least Evidence of such an Intent is sufficient. Here is insufficient Proof of such Intent between the Parties, and though I shall be
be tender of relieving in this Court after a Verdict at Law, yet in the present Cause, the Verdict is not material, for it appears in the Cause that the Sugars were Part of the Joint Stock and per contra the Paper was delivered to the Use of the Joint-Trade and not bought by Lane for his separate Use, and though Lane was the acting Partner, and agreed for the Paper, yet it was bought and employed in the Joint-Trade, and though the Verdict was against him singly yet he is but in Nature of a Trustee for the other Partners, and the Cafe is the same in Equity, as if all the Partners had actually bought the Paper, since it was bought for their Use and upon their Account.

Decreed that the Defendant acknowledge Satisfaction upon the Judgment, and that an Account be taken between the Parties and the Balance due to Plaintiffs be paid in a Court of Administration, but without Costs, because the Defendant is an Administrator.

N. B. This was an Appeal from the Rolls, where the Bill was dismissed, that Decree now reversed and Decreed ut supra.

27. 2 Geo. 2 cap. 22. Where there are Mutual Debts between the Plain-See pl. 34 tiff and Defendant, or if either Party sue or be sued, as Executor or Adminfrator, where there are mutual Debts between Teller or Interdict and either Party, one Debt may be set against the other, and such Matter may be given in Evidence upon the general Issue, or pleaded in Bar, as the Nature of the Cafe shall require, so as at the Time of pleading the General Issue, where such Debt is intended to be looked upon in Evidence, Notice shall be given of the particular Sum or Debt, as intended to be inquired upon and on what Account it became due, or otherwise such Matter shall not be allowed in Evidence on the General Issue.

28. Where a Person who had Stock in a Company was indebted to the Company, and there was an Express By-Law to subject the Stock of each there was Member to satisfy the Debts they should owe to the Company, in such Case the Company may stop to pay themselves. Abr. Equ. Cafes 9. cited as Member of a Decreed per Ld. Macclesfield affixed per Raymond Ch. J. and Price a Company, J. in the Cafe of Hudson's Bay Company.

The Directors thereof, borrowed Money of the Company, but not on the Security of the Stock, and afterwards became Bankrupt, and it was infcribed that by Statute of * 5 Geo 1. one Account was to be set off against another. But this was held not to be within the Statute which speaks only of mutual Debts and Accounts, which is not this Case, as the Bankrupt had a first Permanent Interest in the Stock, and the Money borrowed with Regard therein. And the Court held, that the Loan in the present Case to the Bankrupt was not in their Corporate Capacity wherein only he floated related to them, and held his Stock, but was a Loan by them as private Persons, for which they could not stop his Stock, which he had as a Member of the Company in their Corporate Capacity. Trin. 1728. Abr. Equ. Cafes 9. between Melioracchi v. Royal Exchange Assurance Company.

* This seems misprinted for 5 Geo 2, cap. 30. S. 28.

29. And it was resembled to the Cafe of the Lord of a Manor and his Copyholders, that the Lord could not refuse to admit a Person to whom one of the Copyholders had sold his Estate on Account of any Debt due to the Lord by that Copyholder, that as the Lord of the Manor in that Cafe, though he had the Freehold of all the Copyhold Estates in him, yet he had no Right to any of the Copyholders private Copyhold. Abr. Equ. Cafes 8. Trin. 1728. Melioracchi v. the Royal Exchange Company.

30. It was held, that where a Plaintiff is Executor, the Debt fell off S. C. cited against his Demand must be of an equal Nature; that is a Specialty against a Specialty; But not a Simple Contract against a Specialty; Be- cause a different Construction of the Statute might occasion a Devasta- tion. Trin. 6 Geo. 2. Kemyv v. Berfor.

the Court said, that this being before the Statute 8 Geo. 2. was a right Determination, but not for the Reason given. For how could any Contract make a Devastation? But if a Statute says or means, that a Simple Contract may be set off against a Specialty, surely that would be a good Justification for the Executor.
Discount.

Executor. But the true Reason arises from the Design of the Act, which was to prevent Creditor of Action, and the Necessity for Bills in Chancery. For before the Act, if a Man died, for a Safe Sum than he owed, I should have no Relief but in Chancery; therefore it was the Design of the Act to give the Plaintiff in such Case the same Advantage; as if he had brought another Cestui que for his Demand. Now in the Cafe of an Executor, if he sues a common Person upon a Bond given to the Tesator, he must recover; Whereas if the Defendant was too the Simple Contra& of the Tesator, he might possibly not recover, upon account of Superior Debts. Therefore as the Statute intended to give a Defendant the same, but not a greater Advantage, he ought not to be allowed to set it off, tho' it remains a Debt; because, if an Action had been brought for it, the Statute might have been pleaded in Bar.

S. C. cited Trin. 14 & 15 Geo. 2. in the Cafe of Hutchenson v. Sturges, Gurt & E. Hutchenson, SC. in the same Word as the Plaintiff was indebted to him by Simple Contract, more than the Sum mentioned in the Condition of the Bond. But upon Demurrer to the Plea there was Judgment for the Plaintiff; For that a Simple Contract could not be pleaded, or given in Evidence by way of Set off to an Action upon a Bond. Mich. 5 Geo. 2. C. B. Stephens v. Loytyn. The Court held that the Reason the Court went upon was, That the same Words of the same Act of Parliament ought to receive the same Construction, and therefore as it has been so determined in the Cafe of Executors, it ought to be so in the Cafe of common Persons. But surely where the same Words of an Act are referable to different Things, there ought to be different Constructions made according to the different Nature of the Things. Now the Cafe of a common Person Plaintiff does not stand upon the same Reason as that of a Plaintifl Executor. For if the Executor was to be tried upon a Simple Contract, there might possibly be no Recovery against him. But if the common Person Plaintiff was to be tried, there must always be a Recovery against him, whether the Debt be by Specialty or Simple Contract; and therefore in such Cafe it seems to be a good Set off against the Bond Debt. Accordingly when the Cafe went up into the King's Bench, the Court were of this Opinion, and would have reversed the Judgment of the Common Pleas, but for this Reason, that before the Act of the 8 Geo. 2. the Penalty at Law was the Debt; and in that Case the Debt pleaded as a Set off was not found to be in the Penalty of the Bond, though more than was due by the Condition of the Bond, and therefore they affirmed the Judgment.

This Action (Ut autdvi) was brought by an Administrator. 31. In an Action of Debt upon Bond the Defendant pleads that the Plaintiff was indebted to him by Simple Contract, more than the Sum mentioned in the Condition of the Bond. But upon Demurrer to the Plea there was Judgment for the Plaintiff; For that a Simple Contract could not be pleaded, or given in Evidence by way of Set off to an Action upon a Bond. Mich. 5 Geo. 2. C. B. Stephens v. Loytyn.

32. Debt for Rent upon a Parol Lease; Defendant had by his Plea set off a Debt by Simple Contract; to which Plaintiff demurred. Per Cur. a Debt of an inferior Nature cannot be set off against a superior Demand. Judgment for the Plaintiff, Debt for Rent is equal to an Action upon a Bond. Barres Notes in C. B. 199. Edw. 7 G. 2. Brown v Holyoak.


34. 8 Geo. 2. cap. 1. Makes the Act of 2 Geo. 2. for setting mutual Debts one against another, either by being pleaded in Bar or given in Evidence on the general Issue in the Manner therein mentioned, notwithstanding such Debts are deemed in Law to be of a different Nature, perpetual, unless in Cafes where either of the said Debts shall accrue by reason of a Penalty contained in any Bond or Specialty; and in all Cafes where either the Debt for which the Action hath been or shall be brought, or the Debt intended to be set against the same hath accrued or shall accrue by reason of any such Penalty, the Debt intended to be set off shall be pleaded in Bar, in which Plea shall be shown how much is truly and justly due on either Side, and in Case the Plaintiff shall recover in any such Action or Suit, Judgment shall be rendered for no more than shall appear to be truly and justly due after one Debt being set off against the other as aforesaid.

35. In Debt for Rent brought by an Administrator upon a Lease by Parol, the Defendant would have set off a Simple Contract Debt; But the Court held, that the Plaintiff's Demand being equal to a Bond or Specialty, a Debt by Simple Contract could not be set off against it. Patch. 8 Geo. 2. C. B. Brown v Holyoak.

Court held, the Court of King's Bench held it might, and the Ch. Justice said, there could be no Danger of a Detriment from such a Contra&ation, but the Act of Parliament would be a sufficient Jutification. And either at that Time the statute of the 8 Geo. 2. had passed, or immediately followed, which took away all Doubts.

36. Covenant
36. Covenant was brought upon Indenture for Non-payment of Rent. C. 200. S. C. the Court held, that the Evidence offered to be given by the late Act of Parliament. Mr. Justice Denton, who tried the Cause, at the last Alizes for Suffolk, being of opinion he could not upon this Htie. It was urged for Defendant, that his Debt is a certain De- mand, for which he might have brought an Action of Debt, and that the Debts are mutual of the same Nature and Degree, and both Debts arise upon the same Contract; that the Plea is a general Htie, and that thereupon a Bond might have been set off against a Bond; and therefore this is a Case within the Nature and Meaning of the Act. On the other Side, it was insisted, that Defendant’s Plea is entirely con- fident; he denies the Deed, and at the same Time makes a Demand under it; he might have pleaded a General Htie without denying the Deed, or might have pleaded the Matter specially; That the Court upon Motions to plead double, never give Leave to plead contradictory Matters. Cur. adv. Barnes’s Notes in C. B. 199. Mich. 8 Geo. 2. Gower & Ux. v. Hunt.

37. Plea delivered in the Country held to be bad, though with Notice to set off a mutual Debt, which Notice must necessarily be proved as the Affises by the Person that delivered it, with the Plea; but the Plea being delivered the first Day of last Term, and the Country Attorneys both living in the same Town, the Judgment was set aside, and Colts were ordered to attend the Event of the Trial. Barnes’s Notes in C. B. 177. Trin. 8 & 9 Geo. 2. Taylor v. Lawson.

38. The Plaintiff’s Husband to whom the was Executrix, had by Letter of Attorney appointed the Defendant his Steward; the Defendant received of the Tenants several Sums of Money for Rent after the Tis- tator’s Death. The Plaintiff brought this Action in her own Name, and not as Executrix, for the Money so received, as received by her Use; Notice was given to set off against the Plaintiff’s Demands certain Sums that were due from the Testator to the Defendant; but at the Trial the Defendant was not admitted to set off what was due from the Testator to him, because the Plaintiff had not declared as Executrix, but in her own Right. This was a Case referred at Lincoln Alizes for the Opinion of the Court on the Construction of the Statute 2 Geo. 2. cap. 22. S. 11. per Cur. the Plaintiff must have the Benefit of her Verdict. Cases of Præct in C. B. 151. Trin. 11 & 12 Geo. 2. Shipman v. Thompson.

39. A Bill against B. prayed Relief and a Discovery, and proceeded in an Action at Law upon the same Account, B. apply’d to the Court that Plaintiff would make his Election which Court to proceed in. A. elected to proceed at Law, but had Leave to proceed here likewise, as to 10 much of his Bill as sought a Discovery. A amended his Bill on Payment of Costs, by striking out that Part which tended to pray Relief. Thereupon the Bill was demiss’d of Course, because it pray’d only a Discovery, and the Costs to B. took’d at 38 l. But A. got Judgment at Law, and Damages and Costs to 440 l. for which B. was taken in Execution and lay in Custody, but at the same Time took out an Attachment against A. for the Costs in this Court. Upon a Petition by A. praying he might deduct the 38 l. Costs incurred here out of the 440 l. recover’d against the Defendant at Law, Ld. Chancellor said, the Petition seem’d very reasonable, and that he would grant it if the Precedents of the Court justify it, which yet he doubted, because the Bill of Discovery was demiss’d out of Court; and to would make no Order, but directed

40. In Debt on Bond the Declaration set forth that Defendant became bound to the Plaintiff, being one of the Bearers of the Verge of the King's Court of the Maryfailea, and an Officer of the King's Household, in the Sum of 81. Defendant pleads, that the Plaintiff is indebted to him several Sums, (by Simple Contracts) amounting in the Whole to 25l. which is due and unpaid, and is sufficient to satisfy and discharge the Plaintiff's Demand of 81. The Plaintiff prays, that the Condition of the Bond may be inrolled; which being done, it appear'd to be a Bond for Defendant's Appearance to an Action brought in the Maryfailea Court by a third Person. The Plaintiff demurs, and upon Joiner in Dis- murrer the Question was, Whether the Debts set forth in Defendant's Plea, would be set off against the Plaintiff's Demand. And the Court held they could not. For the Statute 8 Geo. 2. which allows the setting off Simple Contracts against Bond Debts, appears plainly to relate only to Bonds condition'd for Payment of Money; Whereas this is a Bond for the Parties Appearance at the Suit of a third Person; and though it was given to the Officer, and (being not Assignable), the Action brought upo- on it must be in his Name, yet he is only a Trustee for the real Plaintiff, and does not sue in his own Right. The Case is the same, as if one was to sue as Executor, and Defendant was to set off a Debt which the Execu- tor owed him in his own Right, which would certainly be ill. If it was otherwise, there would be an End of all such Bail Bonds, which are taken for the Furtherance of Justice; for then, wherever the Officer who takes the Bond, happens to owe Defendant Money, the Plaintiff's Suit must be render'd ineffectual. The Court therefore disallow'd the Plea, and the Plaintiff had Judgment. Trin. 14 & 15 Geo. 2. C. B. Hutchenson v. Sturges.

For more of Discount in General, See other Proper Titles.

- Dismes, [or Tithes].

(A) Predial.

[What shall be said to be Predial Tithes].


2. Pigs
Dismes, [or Tithes].

2. Pigs are priedial mix'd. [Ish. 8, Jer. 25.]
3. So Wool and Lamb are priedial mix'd. [Tish. 8, Jer. 25.]
4. Winn is a priedial Tithes. [Co. Magna Carta 649.]
5. Linum & Canânum is a priedial Tithes. [Co. Magna Carta
649.]
6. Canânum is a priedial Tithes. [Co. Magna Carta 649.]
7. Hops are properly priedial Tithes. [Tish. 8, Jer. 25.]
8. Those that come from the Fruits of the Earth, as Poma, Pira
Prama, Volcum, and Frutus Hortorum, and Mala of Oak and Beech
are priedial Tithes. [Co. Magna Carta 649.]

(B) Mixed.

1. Mixed Cylthes are those that come of Cheese, Milk &
    ex Paxibus Animalium quae sunt in pâcibus & gregation
killum, ut in Agnis, Vitulis, Hædis, Capreolis, Puliis &c. [Co.
    Magna Carta 649.]
2. Cylthes of Pigs are mired Tithes. [Tish. 8, Jer. 25.]
3. Wool and Lamb are priedal Cylthes. [Tish. 8, Jer. 25.]

Lamb are included within Small Tithes. [Poph. 44. Trin. 16. in Case of Nicholas v. Ward.]

4. Tithes of Cheese, Calves, and Lambs are mired Cylthes. [Co.
    Magna Carta 649. adjudged.

(6) Of what Things [Animals] they shall be paid
de Jure.

1. Tithes ought to be paid in Kind de Jure, of Wax [Cox. C. 359.]
    and Honey of Bees in an Due. [Tish. 1, Car. B. R. be-
    tween Barseoet and Norton, adjudged in a Prohibition upon a De
    murrer, and a Consultation granted.]

    to Tithes of Honey.—F. N. B. 51. [G] as to Honey and Wax.

2. Tithes shall be paid de Jure of young Pigeons. [Tish. 14. *See (S)
    Jer. B. between Wately and Hambury, resolved. Hill. 15. Jer.]
    B. R. resolved, and a Prohibition denied in one [Gaffreth’s Case
    of the Inner Temple.]

    Rep. 2. Jones v. Gaftrell. S. C. accordingly.—If they were spent by the Owner in his House no
    S. C & S P ——Litt. Rep. 42. Trin. 3 Car. B. S. P. ——Doves in a Dove-House may pay Tithes
    by Cullem. Vent. 5. Hill 20 & 21 Car. 2. B. R. Anon. ——Prohibition to the Spiritual Court for
    Pigeons on suggestion that they were spent in the House. [Holt doubted. 12. Mod. 47. Mich.
    5 W. & M. Badgerley v. Wood.]

3. No Tithes de Jure without a Custom ought to be paid for
No Tithes
Coneys, because they are Ferae Naturæ. [Trin. 8 Car. B. R. be-
    tween Woden and Benet, after a Prohibition granted, a Consulta-
    tion denied pe Curiam for the Cause aforesaid. P. 13 Car.
    by Cullem. Vent. 5. Hill 20 & 21 Car. 2. B. R. Anon. ——Prohibition to the Spiritual Court for
    Pigeons on suggestion that they were spent in the House. [Holt doubted. 12. Mod. 47. Mich.
    5 W. & M. Badgerley v. Wood.]

7 E
[Dimes, or Tithes.]

4. No Tithes de Jure are to be paid for Fish taken in a common River. Patch. 5 Car. B. R. a Prohibition granted to stay a Suit for Tithes of Fish taken in a common River within the Parish of Barton in Wealdenland; and Hill, 9 Car. a Prohibition was granted to stay a Suit for Tithes of Fish taken in the same River; but the Court seemed to be divided whether Tithes were due or not, but they granted a Prohibition, for that the Law should be decided thereof, and thus was between Davis and Hadgehouse.

5. If a Man hath Pheasants, and keeps them within an inclosed Wood, and clips the Wings of the Pheasants, and from the Eggs hatches and brings up young Pheasants, no Tithes shall be paid of these Eggs or young Pheasants, because they are not reclaimed, but continue terra natura, and would go out of the jurisdiction if their Wings were not clipped. Dibb. 11 Car. B. R. between Winderake and Evans, a Prohibition was granted; but it was affirmed that no Tithes was paid for them in a great Circuit called the Chiltern in the same County, elected of Bitches, and thus preserved in non commendaria; but the Court granted it because they were terra natura.

6. No Tithes shall be paid in kind, without a Custom, for Fish taken in the High Sea out of any Parish. Hill, 14 Car. B. R. between Long and Durell, per Curtiam, and a Prohibition granted accordingly; and Justice Jones said, that upon an Appeal to the Delegates out of Ireland in the Lord * Defeund's Case it was agreed, that for such Fish so taken, only Personal Tithes are due, deducibis Expenis.

An Owner of the Fisher-boat to have one Moiety of the Fish and the Fishermen the other Moiety and that the Owner used to pay the tenth of his Moneys to the Parson, in Discharge of all Tithes of Fish &c. The Court held it a good Suggestion, because at Common Law no Tithes are due for Fish taken in the Sea, it not being within any Parish; and therefore when the Parson by the Custom ought to have the Tithes of them, he ought to take them according to the Custom; and that the tenth of a Moiety may be a good Discharge of the whole. Nov. 10. Mich. 43 & 45 Eliz. Holland v. Hele.

Cro. C. 264 pl. 12. Trin. 8 Car. seems to be s. C. of Ld. Defend and the Suggestions were, because Fish in the Sea or great Rivers are terra natura, and not titheable. Secondly, because the Sea is not within any Parish, so no Spiritual Person can say it is within his Parish where the Fish is taken, but the Prohibition was denied; for Tithes of Fishes are usually paid in Ireland, as Jones affirmed.

In Prohibition the Court held, that Tithes of Fish caught in the Sea are not due without a Custom, and therefore a Custom to pay less than a tenth Part may be good. 1 Lev. 179. Patch. 18 Car.
Dismes, [or Tithes].

S. P. in S. C.——See (S) pl. 4.

7. No Tithes shall be paid in kind de Jure, without a Custom, as for Fish taken in a Common River which is not inclosed, as Tithes of Fish, and ill a Stream inclosed, because they are in Fam Natura though they are taken by one that hath a several Fishery there, and though the Parish Place where they are taken be within the Parish of that Parish that claims them, and for this is a Peronal Tithe, in which Tithes ought to be paid deductis Expensis. Patch. 15 Car. B. R. between Gold and Arthur, and others, a Prohibition granted, were the Suit was for the Fish of Salmon in the River of Erc. Mich. 15 Car. B. R. between Wiflacke and the said Arthur and others, a like Prohibition granted upon the same Matter between other Parties.

Nor Places Fish are titheable, as Salmons in the River of Exeter, and Herring in Yarmouth. Palm. 527. Hill. 5 Car. B. R. Anon.——S. P. cited Cro. C. 264. in pl. 12. Trin. 8 Car. B. R. Anon. And that they pay them to the Parish of the Parishes where there are, landed.——Cro C. 539. Hill. 9 Car. B. R. Richardson said, that in Yarmouth was a Suit for Tithes of Herring taken in the Sea, but they did not prevail. Jones said, that in his Country of Wales they used to pay Tithes for Herring; and in Ireland it is a Common Course to pay Tithes of Salmons taken in Rivers. Richardson said that that peradventure, may be by Custom; otherwise Tithe be not payable for Fishes taken in Rivers.


could not see but Turkeys are Birds as Tame as Hens or other Poultry and therefore must pay Tithes; that it is true, if Tithes are once paid of the Eggs, there can be no Demand made a Second Time in Respect of Chickens hatched afterwards. 2 Wms. Rep. 462. Trin. 1728. Carleton v. Brighwell.

9. Fish and Rabbits are Customary Tithes merely, of which no but by Tithes are due by the Law of the Land; Per Henden Serj. Arg. Het. 13. Patch. 3 Car. C. B.

and so of Doves in a Dove Houfe. Vent. 5. Hill. 20 & 21 Car. 2. B. R. Anon.


(D) For what Things they shall be paid de Jure. Of Freehold.

1. N O Tithes shall be paid for such Things as do not grow and renew from Year to Year by the Act of God. Co. 11. Dr. Grant 16.

2. No Tithes ought to be paid de Jure for Houses of Habitation. See (S) pl. 1. 2.

3. Nor for any Rent referred upon a Demise made of Houses of Habitation. Co. 11. Dr. Grant 16.

in London; the Defendant, suggedted, that the House &c. was formerly a Priory, which was discharged from Payment of Tithes by a Bull &c. and that it is enacted by the Statute 21 H. 8. that by which the Pollenites &c. were given to the Crown, that the King and his Patrons should hold the same discharged of Tithes in the same Manor as the Priors &c. but a Consultation was awarded, because the hear. Statute 37 H. 8. cap. 13. ordains that all Houses in London shall pay Tithes according to their Ordinances there, and so that Statute extends to all Houses, except...
4 5 D. 4. Rotulorum Parliamenti, Numero 66. The Commons pray, that whereas many of the Lieges of the King are often bred and troubled by Parliaments and Decrees of Holy Church by Creations and Confiscation of Holy Church; for Tithes of Stone and Slate worked and brought out of Quarries, of which no Tithes are paid, that he would please to grant, that if any Production be made in the Case, that no Consultation be granted to the contrary.

(E) Answer. The King will advise.

1. No Tithes shall be paid of Quarries, because they are Part of the Freehold. Hill. 14 Jac. B. R. per Curiam.


3. No Tithes shall be paid for Turf which is to burn. Hill. 14 Jac. B. R. per Houghton. Hill. 14 Jac. B. R. per Curiam.

See pl. 8.

4. 33 E. 1. Libro Parliamentorum 155. de Parliouis & Decreas pertinentius Decimation in Cornubia, uti Rex habet annuatim Episcopo Cornubiensi, de Decima praevia. Ita r e c o m m i s s i o n e, ut fuerit hie contributum Tempore Comitis & Regis: et habet hanc viam, S A C H E N C O R N U B I C E, ut seemed included Tithes de Stanno. Vide Rotulorum Parliamenti, 8 Ed. 2. Henricum 15.

5. No Tithes shall be paid of Lime, because it is Part of the Freehold. Hill. 15 Jac. B. between Thomas and Perris, per Curiam.

See pl. 8.

6. If a Man be sold of Lands within a Parish that are used to pay Tithes, and makes a Nursey therefor for Imps and Plants of several Lands of Fruit, as Apples, Peares, Plumbs &c. and of Arches and after sells several of them to Strangers, out of the Parish to be transplanted, he shall pay Tithes of this Nursey to the Parson, for though the Imps are Part of the Freehold as long as they continue.
From the same town that their constitution granted accordingly. Intratur, Mich. 16 Car. 2. in Seac. Grant v. Heding.

7. If a man cuts a Coppice of Wood, and thereof pays his Tithe and interest, before any new growth, he shall not pay Tithe of them, because they are Parcel of the Freehold, and not annually renewing. Mich. 16 Car. 2.

8. In Doderidge's History of the Duchy of Cornwall, fol. 121. it is said that there is paid yearly to the Bishop of Exeter for the Tenth of the Covenage of Fynne in Devon and Cornwall 161. 13s. 4d.

(F) Tithe of Wood.

1. Rotul. Parl. 17 Ed. 3. Numero 51. the Commons pray, That no man be drawn in Plen. in Court Christian for Tithes of Wood or Underwood, unless in such Places where such Tithes have been used to be given.


(G) Answer.

1. Let it be done of this as it hath used to be done before these Days.

2. 16 Ed. 3. Numero 12. the Commons pray, That as a Constitution is made by the Prelates to take Tithes of all manner of Wood, which thing was never used, and that Masters and decay make Testaments, which is against Reason, that it would please him and his good Council to order a Remedy, and that his People should remain in the same State as they had used to be in the Time of all his Predecessors, and that Prohibitions should be granted to all those who are implicated of the Tithes of Wood without having a Constitution.

Jac. in arguing the Case there it was said by Sergeant Hendon, that originally Tithe was not given to the Clergy of Wood before John Stratford Arch-Bishop of Canterbury 17 E. 7. made a Constitution that Tithes should be paid within his Jurisdiction of Sylva Caduceus, and that at the next Parliament 18 E. 5. and at every Parliament till 16 R. 2. the Commonalty complained thereof.

* This is misprinted for (3)
Dismes, [or Tithes].

(H) Answer, The King will that Law and Reason be done.

Prynne's Abr. 1. 21 Ed. 3. Numero 48. The Commons pray'd, That where as the Arch-Bishops and Bishops had lately ordained a Constitution to give Tithes of Under-Wood, told only, whereas before these Days no Tithes were given; now the People of Holy Church, by Force or the said Constitution, take and demand Tithes also of Gross-Wood, as well as of Under-Wood, told and not told, against what they have used Time out of Mind, to the great Damage of the Common Law, of which they pray a Remedy.

(I) Answer.

1. Tharch-Bishop of Canterbury, and other Bishops, have answered, That such Tithes is nor ordered by reason of the said Constitution, but of Under-Wood.

Prynne's Abr. of Cotton's Records. Part 2. Number 57. Same Petition and the Answer was, That the King will be advis'd.

(K) Answer. The King will advize.

Prynne's Abr. of Cotton's Records. Part 1. Number 17. The Petition was, that Silva cadua may effectively be declared; and the Answer was, That the Statute shall be observed.

(L) Answer.

1. 43 Ed. 3. Numero 17. The Commons pray'd, That it be declared in what Case Tithes of Wood or Under-Wood ought to be given of Right in Places where it has not been given before these Days; and also that it be put in certain what manner of Wood ought to be called Silva cadua; and that it may be imposed in Court Christian of Tithes of Wood or Under-Wood, that a Prohibition be granted thereupon, and an Attachment thereupon in Chancery, as well to the Judges as Parties, as is accustomed in other Cases, without having a Consultation.

Prynne's Abr. of Cotton's Records. Part 3. Number 23. Petition as to Wood, and for not observe such Petition there as to Wood in that Year.

LET the Statute in this Case ordained be kept and held.

2. 43 Ed. 3. Numero 23. Item, the Earls, Barons, Knights, and other of the Commons, complain, That where they sell their Gross-Wood of the Age of 20, 30, or 40 Years, or of greater Age, to Merchants, to the Profits of themselves, and in Aid of the King in his War, Parliaments and Decrees of Churches imply, and trouble the said Merchants in Court Christian for the Tithes of the said Wood, naming it by these Words Silva cadua, whereby they cannot sell their Wood at the true Price to the great Damage of them and of the Realm, of which they pray the King and his Council
Difmes, [or Tithes].

Council to apply a fit Remedy, and declare and interpret openly — The
these Words Silva cedus, as to the Intent of the Commonalty Under-
Wood is comprised in these Words, and not Trees of such Age.

a Man shall not have Tithes of Great Trees as of Silva Cedus. Br. Prohibition, pl. 1. cites 9 H. 6. by Elymion, and says that to it appears else here that the Statute 45 E. 3. which gives Prohibition in this Case gives it as it was used before, which proves that Prohibition was thereof at Common Law, and that this was intuitively upon the Common Law. — It is to be understood that this Act uses these Words, Gros-Bois, and that Haut-Bois, or Grand-Bois, which Word is also used in the Books of 50 E. 3. and 9 H. 6. And in an Act this Word (Gros-) signified specially such Wood as has been, or is, either by the Common Law or Custom of the Country, Timber, for this Act extends not to other Woods, that have not been, or will not serve for Timber, though they be of the Greatest or biggest of Timber. And it is to be observed that the Prohibition in 50 E. 3. for fishing for Tithes in Court Christin of Gros-Bois was grounded upon the Common Law, without mentioning of this Act. 2 Inst. 642, 643.

Here it is to be demanded, To what Kind of Wood Gros-Bois do extend? And the Answer is, That Oak, Ash, and Elm are to be included within these Words; and so is Beech, Horn-Beech, and Horn-beam, because they serve for Building or RepARATION of Houses, Mills, Cottages &c. against the Opinion in Plowden Com. fol. 452. in Molyn's Case, holden without Argument, which Opinion the whole Court, upon deliberate Advice, hold to be no Law. 2 Inst. 643.

(M) Answer.

1. Let there be a Prohibition granted, and an Attachment thereupon, as hath been used before these Days. Note, That upon this the Statute is unprinted. 45 E. 3. cap. 3. This Act is only Declaration of the Common Law. 2 Inst. 642.

2. 2 H. 4. Rotulus Parliamenti Numero 59. the Commons in a Petition retired the Statute of 45 E. 3. &c. and said, That notwithstanding this (§) Statute, Owners and Heirs claiming Tithes of all Manner of Wood, as before they were wont, because that Constitutions in this Case in Chancery have to early been granted by Colour of this Word Sylvia-Cedus, they pray, That he would require to ordain, that no Constitution be granted by these Words Sylvia Cedus, if it be to that the Wood of which he claims Tithes be of the Age of 20 Years or more at the Time of the Cutting, and a Pain thereupon ordained in present Parliament.

(N) Answer.

1. Let it be used as it hath been done before these Days. 2. 2 H. 3. 2. parte Numero 7. the Commons pray'd, That I do not observe, whereas they are often pleaded in Court Christian for Tithes of Gross Wood of the Age of 20 Years, and of 40 Years and more, by the Name of this Word, Sylvia-Cedus; and in the Statute made in 45 Ed. 3. it is contained, That a Prohibition be granted in this Case, and thereupon an Attachment, as it hath been used before these Days, by which Statute no null Declaration is made what Wood is titheable, and what not; whereas the Judges of the Land are of several Opinions concerning the said Matter; That it pleases the Lord our King to limit and ordain, by the Advice of the Lords of this present Parliament, that all Manner of Wood, which is of the Age of 20 Years or more, shall not be titheable in any Matter for the Time to come; and if it be within the Age of 20 Years, it shall be titheable if the Custom of the Country, where such Wood grows, demands it, and that in this Case a Prohibition be granted, and thereupon an Attachment, without granting a Constitution in this Case.

(O) Answer
Dismes, [or Tithes].

(O) Answer.

Because the matter of the petition requires great and mature deliberation, the king's declaration will, that the matter aforesaid be adjourned and removed to the next parliament, and that the clerk of the parliament cause this article to be brought before the king and his lords at the beginning of the next parliament to have it there declared.

2. 47 Eliz. 3 Midd. 21. All the commons of the realm pray, That as at the last parliament held at Winchester, the lords and commons of the land made their complaint, that parsons and vicars of the Holy Church trouble them in court Christian the tithes of great woods, wattle, of the age of 20 years and above, by colour of this word, Silva-caedus, at their request it was ordained, that no wood which was or should be of the age of 20 years and more, should be reichable; and the parsons and vicars of the Holy Church intending that this ordinance should not restrain them of their ancient incroachment, furnishing that this was not ordained for a statute, pursued in court Christian contrary to the ordinance aforesaid, to the great damage of the people, that it would please the king to affirm the said ordinance for a statute to subserve to the time to come, and that a special prohibition upon the same statute should be made thereof in Chancery forbidding those of court Christian to hold plea of tithes of wood of the age aforesaid.

(P) Answer.

1. Let there be such a prohibition granted as hath been of ancient time.

2. Register, fol. 44. A consultation granted to the court Christian to proceed there for tithes of Silva caedus, to that of Grosinis Arborebus in habe non agatur.


(Q) Of what things they shall be paid.

1. If a Dan tops oaks within the age of 20 years, and after leaves 14, 149. S. P. per Richardin. Patich. 4 Car. C. B. in the vicar of Wainsborough's case.

2. If oaks above the age of 20 years become putrid and rotten, they, on which they are not fit for timber, yet no tithes shall be paid of them; for this is become timber. Dic. 10. Fac. B. per Coke.
Difmes, [or Tithes].

3. If Oaks above the Age of 20 Years have used to be topped and Tithes shall topped within every 20 Years, yet no Tithes shall be paid of their Tops and Branches cut within their Age of 20 Years, because their Stetch is discharged. Tenn. 38 Eliz. B. R. between Parson Rans. and Patterson. Co. 11. between Sampson and Worthington. 48. b. accordingly. Br. Difmes, pl. 4. cites Dr. & Stud lib. 2. And a Man shall not pay Tithes for Loppes nor Stems of such Trees no more than of the Tree itself. Br. Difmes, pl. 4. cites Dr. & Stud lib. 2.*

4. If a Man cuts down Trees of Timber, no Tithes shall be paid for the Germs which grow ex Radicibus let Stipitibus, because the Root is privileged. Co. 11. 48. b. Lifting's to the Proportionary to be so adjudged. 95. p. 44. Stmp v. Clinton. S. C & Ibld. 100. S. P. by Coke Ch. J.

5. Tithes shall be paid of Beeches though they are above the Age 16. Mich. of 20 Years, for they are not Timber. Tenn. 38 Eliz. cited in one. S. C. & S. P. Eliz. S. P. held accordingly. Holliday v. Lee. — In a Country where Beech is reputed Timber, as in Buckinghamshire, Tithes shall not be paid for it, but in a plentiful Country of Wood it is otherwise; for there it is not Timber, and Tithes shall be paid for it. Brown. 94. Patch. 5. Jac. Man v. Somerton.—2 Roll. Rep. 84. Patch. 17 Jac. B. R. Anon. S. P. 2. Inf. 643. S. P. against the Opinion in Pl. Com. 473. in Molin's Cafe, which the whole Court upon deliberate Advice held to be no Law.


7. No Tithes shall be paid of Willows in such Countries where they are used for Timber. Hobart's Reports, Cafe 283. was shewn by Sergeant Moor as Patch. 12 Jac. Guffley v. Findar. S. P. — Nov. 50. Hill. 15 Jac. Findar v. Spencer cited Guffley's Cafe S. C. accordingly, and in the principal Cafe it was suggested that Hazel, Holly, Willow, White-Thorne, &c. were used for Timber to build and repair their Plows, and a Prohibition was awarded. And Hobart said, that in Cumberland Beech was used for Timber, and that the Uage of the Country for Scarcity of other Trees will alter the Cafe.


9. If a Man cuts Timber-Trees, no Tithes shall be paid for the 2 Inf. 643. Bark. Co. 11. Lifting's Cafe. 49. cites S. C & S. P. because
Difmes, [or Tithes].

10. Tithes shall be paid of Acorns of Oak, because this is an yearly cites S.C. & Increas’d. Co. 11. Lyford’s Catech, 49.
S. P. — Mo.
762. pl. 158. Trin. 2. Jac. B. R. in Reynold’s Case S. P. held accordingly. — Tithes shall be paid of
Acorns, but that is when they are gathered and sold. Litt. R. 40. Trin. 3 Car. B. Anon. —
Heli. 27. Anon. S. P. held accordingly.

Mo. 910. pl. 1280. Patch. 41 Eliz. B. R. Au-
berie’s Cafe.
S. P. —
8. P. Cro. 660. pl. 7. John-
A Preachment that jurisdiction shall lay their Grants and make it into Clocks, and set out the Tenth
Clock for the Parson, adjudged a good Preachment and Bar against the Parson, who sued for Tithes of the
cordingly.

Tithes are not payable of After-Math de Jure, and therefore it is but Form to lay a Custom to be
discharged thereof in consideration of making the former Showing into Hay; for Tithes are payable
only of Things ferre in A no repentansibus; Per Treby Ch. J. Ld. Busyl. Rep 242, 243. Trin. 9
W. 5. in Case of Norton v. Briggs.

12. If a Man pays Tithes of Hay no Tithes de Jure ought to
be paid for the Pature of the same Land for the same Year, for he
shall not pay Tithes twice in the same Year for the same Thing.
Patch. 16 Jac. B. between Nichols and Hosper, per Curiam.
3 Jac. B. R. and there laid per Cowte, that it
was so adjudged between Spencer v. John Joslin, and others why
adjudged between * Had and Fettish, because the After-pature is but
the Reーズ of the Hay, of which he had paid Tithes before. Patch.
17 Jac. B. Rammison.
13. 2 H. 4 Rotulo Parliamenti, Numero 93. not for Agit-
ments in Such After-grafs.

14. If a Man pays Tithes of Corn, he shall not after pay any
Tithes for (*) the Stubble that grows the same Year upon the same
Land. Hill. 6 Jac. B. Placito 13. Smith’s Cafe, per Curiam et
Patch. 7 Jac. per Curiam, same Cafe.

See 2
Brownl. 50.
Payment of Tithes Corn and Hay, to be discharged of paying any Thing for his young Cattle kept
and bred up for Agriculture, a Prohibition was granted; because Husbandry cannot be without
Cattle, and therefore ought not to have Tithes of them.

See pl. 15.
16. 2 H. 4 Rotulo Parliamenti, Numero 93. not for the
S. C. — 2 Agiments in Such After-grafs.
Inn. 611.
and 652. S. P.

Poph. 142.
S. C. &
S. P. But
if he has
taken all the
Benefit of
this Pature
17. If a man keeps pays Tithes of Hay of certain Land, and the
Rest of the Year after puts into the same Lands the Horses of his Guests
which come to Market there in the same Town, no Tithes shall be
paid for the Corvage of these Horses, for this is but the After-pa-
ture of the Land, of which he had before paid Tithes. Tr. 16 Ja.
B. R.
B. R. between Richardson and Cable, per Custom, and a Prohibition granted.

without having moved it before, then Tithe is payable for them, and a Prohibition was dened.

18. 2 H. 4. Rotulo Parliamenti, Numero 93. not for the Agiment in such Patter-nature.

19. No Tithes are due by the Law of a Fulling-Mill, for no Tithes in kind can be taken thereof, for only Money is paid for the Labour, and for it is but a Personal Tithe. D. b. 16. B. R. between Johnson and Doderidge, and a Prohibition granted. S. C. M. C. M. C.

This was a Berkshire Case; but Mich. 11. Case. B. R. between Johnon and Doderidge, per Custom; resolved, That Tithes by the Law are due thereof, and a Prohibition dened accordingly.

by the Law of the Land Tithes are not payable, a Prohibition was granted; For Doderidge said, that of such Things whereof the Gain comes only by Labour of Men, Tithes are not payable, but of Things rennovant e. — B. Roll Rep. 84. P. 1. 17. Jac. B. R. Anon. S. P. and terms to be S. C. and Calibre and said, that Warburton and Nichols were of Opinion 12. Jac. that Tithes shall be paid of a Fulling-Mill, viz. the tenth Penny of the Gain, but of a Tithe Mill the tenth Dint of the Corn; For this is in Nature of a Predial Tithe, and that so it was held 3. Jac. in Case of Bith b. and a. At another Dia Doderidge held, that unless an especial Custom be alleged for Payment of Tithes of a Fulling-Mill, no Tithes shall be paid; For that he had spoke with the Civilians, who held, that Tithes shall be paid of such Mill, but they cannot agree what Nanner of Tithes that is; For some say it is a Predial Tithe, and others say it is a Personal Tithe; but he said, that this cannot be a Predial Tithe, because it accrues only to the Labour of Men, so that if he shall have this Tithe as Predial Tithe, then another Tithe will be demanded of him, that sells the Cloth, and if the Deverall, and fo Tithes shall be paid several Times or one and the same Cloth; besides the Usage of the whole Country is to be respected; For, for Tym. Mills, or Lead-Mills, or Plate-Mills, or Razg. Mills no Tithes shall be paid, and therefore e. And to this Houghton and Croke J. agreed, and therefore as to the Gilt-Mill Convention was granted, but as to the Fulling-Mill the Prohibition road—No ancient Mill is titheable, but Mills newly erected shall pay Tithes by the statute of 9. E. 3. cap. 3. Mar 15. pl. 36. Parch. 15. Car. Anon. 1. 50 of a Calveres-Mill, Fulling-Mill, Skirring-Mill, they shall pay no Tithes. Litt Rep. 514. Mich. 5. Car. C. B. Anon. — Lt. Coke says, that the Case of the Tithe of Mills was never (that he knew of) judiciously determined. 2. Inst. 622.

For Tithes of Mills, See (E. a)

20. If a Man pays Tithes in Kind to the Parson for his Lambs, Calves, and other Things, going and eating upon his Pastures, Walls, Lands, Meadows &c. After the same Year he shall not pay Tithes of the Agimtents in the same Pastures, Walls &c. 2 H. 4. Rotulo Parliamenti, Numero 93. This is an express Pition of the Commons.

21. In Treipas it was said by the Justices, that of Hounds, Apses, Thretes, Popinjays and the like, which are tame, and are only Things of Pleasure, no Tithes shall be paid; For Replevin nor Appeal of Felony does not lie of them; For a Man has not properly a Property in them, and yet Treipas lies of taking them. Br. Difesms, pl. 20. cites 12. H. 8. 4.

22. Tithes shall not be paid but of Things that increase annually. Br. Dismes, pl. 16. cites the Regifter.


24. Tithes of the Loppings of Oak, Ash and Beech growing out of the Roots of Trees before cut down, shall not be paid unless the Loppings were cut within 20 Years before the last Cutting. Le. 79. pl. 105. Parch. 26. Eliz. B. R. Daws v Mollins.

25. Where
Difmes, [or Tithes].

If Timber Trees usu-
ally grow peer-
in a woodland, and are lop’d when the Wood is cut, this shall only be for Building or Reparation. 2 Inft. 643. cites it as resolved by the whole Court Plowd. Com. 470. Trin. 25 Eliz. in Molyns’s Cafe. Aft, as Trees serve for Arrows, which are used for the Defence of the Realm.— Gouldsb. 161. pl. 93. Hill. 45 Eliz. The Parson of Ramley’s Cafe. 8 P.


25. Where Hornbeams, Sallows, Maples, Hazels &c. grew sparimb amongst Oaks in a Wood, and the Owner failed the whole Wood, and caus’d them to be promiscuously cut into Faggots, and bound up in Faggots together, and the most Part of every Faggot was Oak, and the Reliance was of little Value, so as the Severance of the Sallows &c. from the Oak would not quit the Charge; in such Cafe Tithes shall not be paid. 2 Le. 80. pl. 105. Patch. 26 Eliz. B. R. Dawes v. Mollins. 26. But of the other Part, if the most Part of the Wood be Sallows &c. and here and there Sparimb grows on Oak &c. and the Owner cuts down all the Wood, and makes Faggots as before, Tithes in such Cafe shall be paid for them. Ibid.

27. Aft is comprehended within Grofs Wood, because it may serve to come shall not render Tithes. Mo. 908. pl. 1271. Patch. 29 Eliz. S C to Wray v. Clench. Trees apt for Timber in Time of Twenty Years growth apt for Timber in Time of Twenty Years old when cut, (as) if the Germens of Oak growing of a Root, the Germens of their own age, and the Germens of the same age of other Timber cut under that Age shall pay Tithes as other underwood; but if the Oak or other Timber Tree was seventy Years old when cut it was not titheable and for that the Germens of the Roots of such Trees cut at that age shall pay no Tithes. Per Car. 12 Mod. 524. Trin. 13 W. 3 Fox v. Thexton. cites 2 Inft. 495.

29. Not of Things Fere Nature unlefs by Custom. Mo. 599. pl. 822. Mich. 37 & 38 Eliz. Hugton v. Prince. If Timber Trees be often topped and lopped for Fuel; yet the Tops and Lops are not titheable; nor is the Wood of the Trees being by Law discharget of Tithes, so shall be the Branches; and therefore he that cuts them, may convert them to his own Use, if he please; said by Coke Ch. J. to have been of late twice adjudged. Gothb. 175. pl. 242. Patch. 8 Jac. B. Dr. Newman’s Cafe. If a Man fuffer Apples to hang so long by Negligence that they are stolen, he shall pay Tithes. Per Yelverton and Crook J. Het. 100. Trin. 4 Car. C. B. Anon. Tithes of Cabbages or Gillyflowers, or other Herbs shall be paid, if it be of a new Garden; per Richardson and Harvey; And per Richardson fo it shall be of an Old Garden, if there be not any Custom to discharge it. Litt. Rep. 148. Patch. 4 Car. 1. C. B. in Stiles’s Cafe. No Tithes are due of the Tenth Swarm of Bees, because they are Fere Nature, but only of the tenth of the Wax and Honey. Cro. C. 404. pl. 2. Patch. 11 Car. Anon. A Glass-House shall pay no Tithe. Litt. Rep. 314. Mich. 5 Car. C. B. Anon. If Furze sold Tithes shall be paid. Litt. R. 368. Patch. 7 Car. C. B. Rooket v. Gomersall.

Sd. 500. pl. 6 Cor-
uel v. Havens. C. B. men-
tions it to be let grow till Forty Years Old and held that one shall not avoid the Payment of Tithes by this Means, so long as the Thing cut is intended to be employed as Wood for Firing &c. See 2 Le. 80. pl. 105. Patch. 26 Eliz. B. R. Daw v. Molline contra. 

37. Pollards
Difmes, [or Tithes].

37. Pollards of Fifty Years Growth shall pay Tithes when felled. Per Woodham, Lev. 189. Trin. 18 Car. 2. in Cafe of Hawes v. Cornhill.

38. Plaintiff libelled for Tithes of Sheep. The Defendant to have a Prohibition, sugges[t]s that he took them in to feed after the was vaped pro Mejiorationes Agriculture infra Terras arabis & non aliter; it was held that the Parlon ought not to have Tithes of the Corn and Sheep too, which makes the Ground more profitable and to yield more. Mod. 216. Trin. 28 Car. 2. C. B. Anon.

39. Plaintiff libelled for Tithes of Faggots, the Defendant sugges[t]ed that no Tithe was payable for Oak-Faggots, the Plaintiff for a Consultation may shew that the Defendant had so foisted the Faggots that it was impossible to take the Tithe of one without the other. Arg. 3 Mod. 47. Trin. 7 Geo.

(R) Vide Postea, Title A. To what Thing the Modus shall extend.

1. If there have been two ancient Corn-Mills de Tempore & for which 6 s. 8 d. hath been paid for the Tithes de Tempore & and after by Continuance of Time the Mill-Stream changes its Coule, and runs into a Place a little Distance from the ancient Stream, and thereupon the Owner of the Mill pulls down one of the ancient Mills, and rebuilds it in the New Place where the Stream runs, this shall be discharged of any Tithes by Force of the ancient Modus, for this comes by the Act of God, and not by the Act of the Parly. Rich. 11 Car. 2. R. between Johnson and Dunridge, per Curiam rebuils, and a Prohibition granted accordingly. But the Court said, if the Stream be altered by the Act of the Owner himself, Tithes ought to be paid thereof as for a new mill. (Q) pl. 19. S. C. but D. P. — See (F. a) pl. 1. 2. S. C. And these two first Pleas seem (as Mr. Danvers observes) to be mistaken here. They should have come in at (F. a) and the other Pleas beginning pl. 3. 4. &c. here under the Letter (R) should have been continued under the Letter (Q) preceding.

2. Not of such Things which are not Yearly renewing.

3. If a Man pays Tithe for the Fruit of Trees, and after cuts down the same Trees, and makes them into Billets or Faggots, and tells them, he shall not pay Tithes for the Billets or Faggots, because this is not a new Increase. Co. Magna Charta 652. 621.

4. If a Man keeps an Horse within the Parish only for his Saddle to ride, no Tithes shall be paid for this Horse, because this is a barren Animal, not renewing, but only for his Labour. Cr. 15 J. B. R. between Landon Parker of Thimblethorpe and Hill, where the Cafe was, That a Man leased Land to another, referring the going of a Dog to ride, and after the Lease was tied in the Spiritual Court for the Tithes of the Dog, and a Prohibition granted by Sommague, Coke, and Dofridge, because this is a fent Annual, and used only for to ride; and, as it was urged at the Bar, the Lease paid him Tithes for all the Verbage, but the Court took no Advantage of this; But Woughton seemed e contra, for it seemed to him that no barren Cattle should be discharged of Tithes unless such as were used for Husbandry; but this was not used about Husbandry, ergo.

7 II. 5. If
3 If the Soil of an Orchard be sow'd with any Kind of Grain, the Parson shall have Tithes of the Fruit-Trees and of the Grain, because they are of several and distinct Kinds. Co. Digna Charta 652.


7. If a Man pays Tithes of Lamb at Bark-Cide, and at Midsummer he sells the Rehidae of the Lamb, Felicit, the nine Harts, [the other nine] he ought to pay Tithes of Wool of them, though there is but two Months between the Time of the Payment of the Tithes of Lambs which were not spun paid with their Fleeces, and the Sheering of the Rehida, for this is a new Increase. P. 16 Ja. B. between Nicholls and Hooper, per Curiam, and a Prohibition denied accordingly.

8. A Man shall not pay Tithes of the Herbage of Sheep, because he pays Tithes of the Wool, for otherwise he shall pay Tithes twice of one Increase. Tr. 12 Ja. B. between Marshall and Price, videtur.

9. If the Parson hath Tithes of Corn one Year, and the Land is left uncultivated the next Year, to the Intent it may be plow'd and made ready to be sow'd the third Year, no Tithes shall be paid for the second Year, for by the Lying thereof fresh the Land is bettered, and the Parson will have better Tithes the third Year. P. 7. Ja. B. Smith's Case, per Curiam.

1) For what Things Tithes shall be paid by Custom, where they ought not de Jure.

2. But otherwise is of new Houses, of which no Custom can be. P. 12 Ja. B. Dr. Leyfield's Case, per Curiam.

3. Whether
3. Whether a Parson can prescribe to have Tithes of Groves, against the Common Law, and the Statute de Silva curiosa, quoted 9 B. 6. 56.

4. By a Custome, Tithes may be paid of Fish taken in Island by Roll Rep. Merchants of a Town in England and brought into a Town here to the Parson of the Town. By Reports, 14 I. Gsllin and Harding, adjudged.

Fish is merely a Customary Tithe; Per Richardson. H. 13, Pauch. 3 Car. C. B. Anon.—Fishes in a River may pay Tithes by Custum. Vent. 5 Hill. 20 & 21 Car. 2. B. R. Anon.—See (C) pl. 6 and the Notes.

5. By a Custome, Tithes shall be paid of Pigeons that shall be spent in my House, though not of common Right. Rich. 4 Ia. B. Watty and Hanbury, agreed per Curtail.


7. So by Custome Tithes shall be paid of a Lime-Kil, though none are to be paid de Jure without a Custum. B. 13 Ia. between Thomas and Perry, per Curtail.

8. By a Custom Tithes shall be paid of white Salt. Tr. 16 Ia. B. R. between Jones and Gower, admitted; but a Prohibition granted upon a Modus.

9. Libel alleged a Custom to have 28. in the Pound for every House and Shop in the Town. The Defendant as to the Custom answered, that he did not believe there was any such, and suggested for a Prohibition, that he was a Butcher, and set up a Stall in the Market-place to sell Fie in the Market only, and that he had no other Shop nor House there. This was held to be no Denial of the Custom, but that if it had been expressly denied, they cannot proceed in the Spiritual Court. Lat. 210. Trin. 3 Car. Clerk v. Prowse.

10. In Derbyshire the 10th dye of Lead is now paid for Tithe by Custum; per Richardson. Litt. Rep. 147. Pauch. 4 Car. C. B. in Stiles’s Cafe.

11. Tarf, Gravel and Chalk, are Part of the Frehold, and not titheable; per Keeling. Mod. 35. pl. 84. Hill. 21 and 22 Car. 2.

12. Tithe-Oar is not due of Common Right but by particular Custum only; and the Court therefore directed a Trial to be had at Law, whether there was any, and what Custum within the said Township for the Payment of Tithe-Oar, with Direction to the Judge to endorse the Poleta, how the Custum was found upon the Trial. 2 Vern. 46. pl. 43. Pauch. 1689. Buxton v. Hutchinson.
Dimes, [or Tithes].

(T) Of what Things.

[Rent]

And a Modus to pay 2s in the Modus must be charged for the Tithes of the Rent, but he ought to have Tithes in kind of Land; and if they be but barren Cattle, yet he ought to sue for Tithes in kind of them if any be due, and so it was resolved, p. 14 Ja. in B. between Parson Ellis of Devon and Drake, though it was said, that by the Spiritual Law he had the election, for this crosses the Common Law.

(U) What shall be said Minute Decima [and who shall have them].


2. If a Vicar be endowed de Mittuis Decimis, and he hath used by force of this Endowment for a long time to have Wood [Wood] which is but of the Annual Value of 6s. 8d. by Reason of the small Value of the Wood and usage, the Wood shall pass by the Words Minute Decima. Dick. 10 Ja. B. R. between Reynolds and Green, per Curtail, adjudged upon Evidence at the Bar, though Wood in its Nature be not Minute Decima.

3. Tithes of Flax are Minute Decima. B. 14 Car. B. R. in North Webb's Case, per Curtail.

4. Weld, which is used for Dying, was sown with the Corn, and after the Corn is reaped, the next Year, without any other Manurance, the said Land brings forth and produces Weld. There was a Special Verdict, whether the Vicar shall have the Tithie of it, or the Parson, but one of the Parties died before any Judgment. Hurt. 78. Hill. 1 Jac. cites it a Kentish Case, and commonly sown therewith are not Minute Decima; Arg. Cro. C. 28. pl. 2. cites it as resolved 3 Jac. Hertman v. Bouvey

5. And
5. And if Tobacco be planted here, yet the Tithes thereof are Minute Decima. Arg. Hutt. 78. Hill. 1 Car.
6. As to all New Things, viz. Hops, Wood &c. if it doth not appear by material Circumstances to the contrary, shall be taken as Minute Decima. Hutt. 78. Hill. 1 Jac. cites it as a Kentish Cafe.
7. B. was Farmer to the Dean and Chapter of Norwich, who had the Parsonage Impropricate, and had used to have Tithes of Grain and Hay, and the Vicar had the small Tithes; and a Field was planted with Saffron which contained 40 Acres; and it was adjudged that the Tithes thereof belong to the Vicar. Hutt. 78. cites Patch. 3 Jac. B. R. Beddingfield's Cafe.

8. The Question was for Hops in Kent, and adjudged that they were great Tithes; but as for Hops in Orchards or Gardens, these were resolved to belong to the Vicar as Minute Decima. Hutt. 78. Hendon Sergeant cited it as 3 Jac. Potman's Cafe.
9. Lamb and Wood are included within small Tithes. Poph. 144. Trin. 16 Jac. says it was agreed in Cafe of Nicholas v. Ward.
10. In Trespass brought for taking away two Load of Wood, it was resolved by all the Justices, that the Tithe of Wood growing in the Nature of an Herb, is Minute Decima; and adjudged accordingly. Cro. C. 28. pl. 2. Hill. 1 Car. C. B. Udall v. Tindall.

11. If the Endowment of the Vicarage be lost, small Tithes must be paid according to Prescription; per Twifden. Mod. 50. pl. 105. Hill. 21 and 22 Car. 2. Tildell v. Walker.
12. Clover-Grafs is a small Tithe. 3 Keb. 479. pl. 13. Trin. 27
Car. 2. B. R. Darrel v. Withers.
13. Some of the Justices held that the Nature of small Tithes are Holt Ch. J. not altered by their Quantity, and thought they grew in Common Fields; thought the Tithes should be changed, according to the Quantity; yet Ow. 74. Dean they grew. Chapter of Norwich's Cafe, and Mo. 909. Beddingfield v. Peak, But 3 J. and Cro. E. 467. S. C. this is not admitted. 3 Lev. 365. Trin. 4 W. &c contra and said they should only confider the Nature of the Thing, if Corn be sown in a Garden, Parson shall have it; if Flax in a Field the Vicar; but if the greatest Part of the Parish be sown with small Tithes, the Parson; for otherwize the greatest Part will be transferred to the Vicar, as Dobson and Gregory said; But Erres said, in that case he should not have them unless by Usage. 12 Mod. 41. Trin. 5 W. & M. Wharton v. Lille.
* If a Man converts Arable into Pasture, though the Parson had the Tithe of Grain, yet the Vicar shall have the Tithe of Milk and Cheese, and though in some Places the Parson has the Tithes of Hops &c. which is a small Tithes, it was said, per Eyre. J. that this was established by Usage. Skin. 538. S. C.

14. Tithes are Minute with Respect only to the Quantity and not to As to this Quality of the Thing; Per Holt Ch. J. Carth. 264. but the Judgment given by the other 3 J. was contrary. Vide Ibid. Wharton v. Lille.

fown in small Parcels; and that if a great Quantity of Land be fown with a Thing which is a small Tithes, that then this shall become a great Tithes by Reason of its Quantity; the Court answered, that this is not the Case here, for here but Twenty-six Acres are found to be fown when the Parish contains 2500 and those twenty-six Acres may be fown by Forty Several Parsons, one Man may sow half an Acre and another a Leffer Part, as may be seen a little Part at End of a Land in the Common Fields frequently, but when the Greater Part of a Parish is fown with Flax, then they would confider, it shall be great or small Tithes here, or not. Skin. 537 Trin. 5 W. & M. in B. R. Wharton and Lille.
Incidents.

What Incidents belong de Jure to Tithes. As to the Setting out of Tithes.

By the Civil Law the Parishioner or Tenant to give the Parish Notice when the Tithes are due forth, per Curiam, but adding of this the Common Law does not oblige him to give Notice. N. y. 19 Trin. 15b; S. Anon. 2. 2d after 260 Motions the Court were all of Opinion that no Notice need be given, and cites so adjudged in Nov. 19, though the Ecclesiastical Law is otherwise and cites s. 6 the Principal Case hereof of Chase and Ware and Sry. 432 (Litchfield v. Maurice) where it is held, that if an action be brought against the Parson for not taking away his Tithes after it is set out, Notice must be given before such Action—Reloved in C. B. that it is not necessary for the Parson to give Notice to the Parson of his setting forth of Tithes. Vide Roll 642. 2 Roll 522.


Libel by a Parson in the Spiritual Court on the Statue of 2 E. 6. for the not setting forth of Tithes, consisting of various Articles. Defendant not appearing was excommunicated for it; and no Indemnity a Prohibition; because of one of the Articles was for not giving Notice of the setting out of Tithes. Per Curiam, let it go; because a Parishioner is bound either by Common Law or Statute to give the Parish Notice of the setting forth, and to set out Quoad extraeconus decimas. 12 Med. 174. 2d Bill S. W. 3. Gale v. Ever—Lentys's Rep. 22. 22. S. C. and a Prohibition was granted—Rule by Lee Ch. 1. an Evidence at a Trial that though by the Ecclesiastical Law Notice is necessary to be given, yet by our Law it is not; and accordingly the Defendant contended that the Jury should find a Verdict for the Plaintiff. 2 Bernard. Rep. in B. R. 174. Trin. 5 Geo. 2. Hewke v. Weight.

When the Tithes of Grass is severed from the Nine Parts, the Parson de Jure may make it into Hay upon the Land where it grows, as well as the Parishioner himself. Vill. 14 Ja. B. R. Newberry and Reynolds Parson of Calcotton in Devon per Curiam, and a Prohibition denied accordingly, where the Parson had alleged a Custom to do, and the Court held it idle.

The Parson was alleged that in that County the Parson should not make his Grass into Hay upon the Land but should carry it out, the Court paid no Regard to it, but Warburton said, that it was an unreasonable Custom.

So in this Case, the Parson may go over the Land of the Parishioner in the Way to come at the Place to make it into Hay, for this is incident to the Tithe. 9 14 Ja. B. R. by Reports, Newberry and Reynolds.

The Parson shall have reasonable Time to take the Tithes severed from the Nine Parts and to dry them, before that he shall carry them away. Br. Difmes pl. 12. cites 12 E. 4. 6.

5. 27H. 8. cap. 20. Tithes shall be paid according to the Custom of the Place.
Dissises, [or Tithes].

6. 2 & 3 E. 6. cap. 13. S. 1. Every of the King's Subjects, shall justly, without Fraud, set out and pay all Manner of their Predial Tithes in kind as they happen, as hath been of Right within Forty Years before this Act, or of Right or Custom ought to have been paid. And no Parson shall carry away any such or like Tithes which have been paid within the said Forty Years, or of Right ought to have been paid, in the Places titheable, before be hath justly set forth for the Tithes the Tenth Part of the same, or otherwise agree for the Tithes with the Parson, Vicars, or other, or Farmer of the Tithes, under the Pain of Treble Value of the Tithes.

7. S. 2. Whenever the said Predial Tithes shall be due, it shall be lawful to every Party to whom the Tithes ought to be paid, or his Servant, to see their Tithes truly set forth, and the same quietly to carry away.

8. If the Parthioner sets forth his Tithes and takes them again; he may; Rep. be sued for Tithes in the Spiritual Court, and the setting forth shall not excuse him Per Cur. 2 Le. 101. pl. 124. Trin. 30 Eliz. B. R. R. Spratt v. Heal. in Case of Bennett v. Shortwright.


9. If the Parthioner sets forth his Tithes and the Parson will not take them away, there is no Reason he should be charged again. Cro. E. S. C. and S. P. and if the Tithes is destroyed by Casel by the Laches of the Parson, he shall not have Tithes again.

10. Libel &c. for not setting out Tithes; the Defendant suggested that he set out the Tithes but that a Party unknown had taken them away. The Court agreed, that if the Tithes are divided from the Nine Parts and a Stranger takes them away, the Parson hath his Remedy at Common Law against such Person, and shall not sue the Parthioner in the Spiritual Court for the same. Pash. 43 Eliz. Noy. 44. Webb v. Pett.

11. Libel for Tithes upon the Statute &c. the Case was, that the Parthioner had set forth his Tithes according to the Statute but could not suffer the Parson to carry them away, and the Parson libelled &c. and the Defendant suggested for a Prohibition, that he did hinder him from taking and carrying them away one Way (which was the usual Way) but he might have come for them another Way; but the whole Court were clear of Opinion, that this was a fraudulent and not a good setting them forth, for he is to set them forth, and also to suffer the Parson to carry them away, and the Surmise as to the carrying them another Way is no Ways material. Bult. 108. Hill. 8 Jac. Anon.

12. If one who has some Colour of Title forues the Land and sets to 29. pl. out the Tithes, though this be by a Diffafr, it is good for the Parson; S. C. Otherwise it is where one without any Colour sets out Tithes, this is no setting out in Law; Per Jones J. 3 Bult. 337. Hill. 1 Car. B. R. in Case of Mountford v. Sidley.


13. Where Tithes are set forth the Parson hath a Liberty for a con. ibid. 536. current Time to come and carry them away, which Conveniency of Time S. C. per is triable by a Jury; If he exceed a convenient Time, then an Action of Trepass lies against him, because in such Case he shall be taken to be a Trepassor ab initio. Per Jones J. 3 Bult. 336. Hill. 1 Car. B. R. Mountford v. Sidley.

that an Action on the Cafes lies, and cites Pash. 20. Jac. B. R. that such an Action was brought by Wifman against the Recter of Laden in Elles, for not accepting &c. of the Tithes of Chele. Noy. 51. Dr. Bridgman's Cafe.
Tithes, [or Tithes].

14. If a more Stranger sets out Tithes this does not settle any Property in the Parson, fo as to intitle the Parson to bring Action for the Taking of them, Lat. 8. 1 Car. 1. B. R. Stillman v. Chanor.

15. If a Parishioner will not set out his Tithe in Cocks, when by Custom he ought to do it, the Parson may sue in the Court Christian, pro Modo Decimandi; but then the Suit ought to be Special for not setting it out in Cocks, and not Generally for not setting it out; Per Car. Lat. 125. Patch. 2 Car. in Layton's Cafe.

16. If a Parishioner fits forth his Tithes, and lets them stand two or three Days on his Land, and afterwards takes and carries them away; this is not a Setting forth within the Meaning of the Statute. Clayt. 20. pl. 34. August 1733. Per Davenport Ch. B. Judge of Allife, and said that it had been so reolv'd. Anderson's Cafe.

17. Libel was for Tithes of Corn in Stocks [or Shocks;] the Defendant pleaded that he was ready to pay Tithes according to Common Law, and that there is no such Custom, and upon a Refusal to allow this Plea, it was moved for a Prohibition, which was granted, because Tithe Corn shall be paid in the Sheaf, and if in Stocks, it is by Custom, Sid. 253. pl. 15. Patch. 18 Car. 2. B. R. Ledger v. Langley.

18. Parishioner sever'd the Tithes duly from the other nine Parts, and gave Notice to the Parson and required him to take them off the Land, but he suffered them to lie there a long Time. It was held that Cafe lies against the Parson for not carrying them away, but not Trespasses Vi & Armis. Ld. Raym. Rep. 187. Patch. 9 W. 3 Shapcott v. Mugford.


20. One is not bound to pay Tithe Lamb if he has any Number under ten, because they are entire Things; but if he has nine Pounds of Wool he shall pay Tithes for it, viz. by an inferior Weight, as by Ounces, for that is divisible. Per Holt Ch. J. 12 Mod. 458. Patch. 13 W. 3. Selby v. Bank.

(Y) Tithes in Kind.

How they ought to be paid.

11. A Man is not bound to make into Hay the Tithe of Grass, which he cuts, but he may set out the Tithes thereof when it is in Grass-Cocks, for then he may well enough sever the Tithes from the nine Parts. P. 17 Jac. B. between "Hide and El- lic, per Curiam. Roberts Reports, Case 328, the same Cafe.

Contra, Hill. 14 Jac. B. R. between Barham and Goose, per Curiam. P. 15 Jac. B. R. in the same Cafe per Curiam, and a Pro-
Dismes, [or Tithes].

hition denied. Tr. 15. B. R. between Poppering and Johnson, only the Tenth of the Revenue of the Plaintiff, and a prohibition denied. P. 13. B. R. per Curiam, and a prohibition denied. P. 2. Ia. B. R. cited Hadcot's
Reports, Cate 329, to be adjudged between Hall and Smeons.

Labour and Industry, where it may be divided, as in Grafs it may, though not in Corn. - Heit. 123. S. C in totem Verbis. — Roll Rep. 173. in pl. 3. Pack. 13 B. R. the Court held, that the Parsoner ought to make it into Hay. — All that the Parsoners are bound to do is to cut down the Grafs and divide it into ten Parts, after which the Parson is to make it into Hay. 2 Wms's Rep. 142, ed. L. C. King. Pack. 1729. Fox v. Ayde. And said it had been to resolved in one Reylold's Cafe.

2. A man is not bound to surrender the Tithe of Grafs before he puts it into Grafs-Cocks, and sets out the tenth Part, for he may put it into Grafs-Cocks out of the Swarth, and then set out the tenth * See (B, a) Part, Contra Bill, 14. B. R. * Barham and Googe, per Curiam, pl 1, 5, and a prohibition denied accordingly, and to P. 15. B. R. Per | See (B, a) Cur. in the same Cate Cate. 15. Ia. B. R. between 1 Poppering pl. 5. S. C. and fheep, per Curiam, and a prohibition denied accordingly.

3. A man may put out the tenth Part of the Hops for the Tithe be- Twifden J. fore they are dried, Bill. 14 Ia. B. R. in Barham and Googe's Cafe, put per Serjeant Hitcham, and agreed per Montaucc. know how the Tithes of Hops shall be set out, viz. whether by the tenth Pole or by Measure. Sid. 282. pl 15. Pack. 18 Car. 2 B. R.

Upon a Bill for Tithe of Hops the Cafe appear'd to be this; Plaintiff having given Notice to the Def- fendant that he would take his Tithes in Kind the first three Days, Defendant paid Plaintiff every tenth Dunjell when paid, but afterwards he left every tenth Pole four'd from the Grand, and said, the Reason of paying them by the Buffalo at first was because gather'd, but here and there a Pole of those that were left; Plaintiff objected that this was not an equal and fair Way of Tithing, because there was great Difference in the Value of the Poles, and that this was not a legal Separation, and two Cages were cited where this Manner of Tithing had been adjudged to be ill. See b. Ditch. 10 W. 17 Nov. Gisb v. — Mich. 5 Ann. Chitty v. Kebn, Trin. 1637. — Defendant infifted that he ought not to be at the Charge of picking, and that Plaintiff being omitted to Tith to both of the Hops and the Bines, he ought to take them together.

The Court unanimously agreed, that the Method of Tithing Hops ought to be by the Buffalo or Measure, not the Pole. MS. Rep. Bilh v. Chandler.

4. The Parsoner ought of Common Right to cut down the Corn, and prepare it for the Parson, and to set out the Tithe from the nine Parts. H. 3 Ia. B. R. between Perry and Chauncy. adjudged.

5. The Parsoner of Common Right ought to make the Corn into Sheafs. P. 13 B. R. per Curiam.

6. The Parsoner is not bound to gather and set up the Corn into Hillocks or Hayes; but it is a good Manner of Tithing to throw the Shocks out. P. 6 Ia. B. R. Placita 17. per Curiam.

7. Nov held clearly, that it two Person's base Portions of Tithe by Lat. 228. Halves in a Parish, that the Statute of E. 6. which commands the set- ting out Tithes, does not injoin the Parsoner in this Cate to divide the Tithes into Halves, and so to set out the Parts single, but he ought there are only to set out the Tenth, inasmuch as if the Tithe was of a Lamb, the Parsoner cannot divide it. Lat. 24 Mich. 3 Car. Sistinam Cremer.

ued to set out the Portions severally, but now they set them out generally. The Question was if this was within the Statute of E. 5. the Tithe not being set out severally. Adornatur. But the Reporter says that by another Report it was adjudged that the Parsoner is not bound to divide it into Moles- tics; but the Parson must divide it between themselves.

8. The Tenth Part of the Milk of his Cows every Meal must be paid Freem. Rep. entire every Tenth Meal; for otherwise the Parson must be forced to keep 349, pl. 469. S. C.
Dismes, [or Tithes]:

three Judges held, that there being no Custom in the Cafe, they ought to respect the Convenience of the Matter, and therefore it being the Usage of the Country to bring their Tithe-Milk and other small Tithes to the Church-Porch, they thought the Parishes ought to bring their small Tithes thither, it being an indifferent Place for that Pur- pose, but that for great Tithes the Parson ought to fetch the same. Raymond was of Opinion, that Tithes being due by the Ecclesiastical Law and by that Law small Tithes are to be carried Home to the Vicar's House, and therefore he was of Opinion, that this Court ought to adjudge it to too.


A Parishes-er is not obliged to do Common Right, but only let them out; and that therefore if this had been in the Modus it would have made it a good Cafe, and that the Cafe of Dodd and Engleton was a mere Equitable Decree, guided by the Custom of Neighbouring Parishes; per Holt. 12 Mod. 206. S. C.


12. A Suggestion for a Prohibition was, that there was a Modus Time out of Mind as to Tithe of Hops, that if the Parson send a Servant to pull part of them, he should have the Tithe of them. It was objected, that the Custom was void for Uncertainty of How much ought to be pull'd; and that by Law the Parson ought to have the Tithe in the same Manner without such Pains; and the Court were of this Opinion, and a Prohibition denied. Lord Raym. Rep. 504. Mich. 11 W. 3. Stedman v. Lye.


(Z) For what Thing for a Collateral Respect.

1. If a Man buys Woods Titheable, and burns them in his House, and shall not pay Tithes for them, as well resolved. P. 14 Ta. in Banco, between Parson Ellis and Drake.

2. No Tithes shall be paid of Wood cut and employed for Inclo- sure in his Husbandry. Tr. 38 El. 2. R. between Parson Ram and Patterson, admitted, Tr. 10 Car. 2. R. between Brown and Nixon, per Curtain.
Where one cut down \textit{Wod} to make Hedges, and \textit{usd} the greater \textit{Part} thereof in Hedging, yet for the Reit which was cut down for that \textit{Purpose} no Tithes shall be paid; cited by Fenner. 

\textit{Cro. E. 499. in pl. 10. Mich. 18 and 39 Eliz. to have been adjudged in B R.}

No Tithes shall be paid of \textit{Wood under 20 Years Growth} implied in \textit{Hedge-Poles for mellerating the Coppices}. Mo. 917. pl. 1204. Patch. 14 Jac. B. R. Lane's Case.

For Wood implied to hedge or fence Corn, where the Parson had \textit{Tith-Corn}, no Tithes shall be paid; and it was said to be a \textit{General Rule}, that no Tithes shall be paid for any \textit{Thing} for \textit{good descent} of time.


2. For Broom or other Fewel expended in the House of the \textit{Parl. Mo. 909. pl. 1405. and no Tithes are due.} P. 40 Cl. B. R. between :\textit{Austin} and Lucas, and S. P. adjudged per Curiam.


3. \textit{No Tithes shall be paid for Pigeons which are spent in my House, for this is for the \textit{Preservation of those which} labour in other Things of which the Parson hath Tithes.} B. 14 Ja. B. between \textit{Watley and Hunberry}, refouled, and a \textit{Prohibition} granted.

\textit{But he shall pay Tithes for such Pigeons as he sells, as it was agreed in the \textit{Cafe of Watley.}}

6. If a \textit{Bain keeps a Family, and hath Pigeon-Holes about his House, and there keeps any Pigeons, and the young Pigeons there encreas, and he kills and spends them in his House, he shall not pay any Tithes for them (*) Hill. 13 Car. B. a \textit{Prohibition} granted, and for a \textit{Consolation} pleaded by the Parson that he told them between \textit{Vincent and Tutt.}

7. If a \textit{Bain cuts down Gras, and before he makes it into Hay, being only put into Swathes, he carries it away and gives it to his Plow-Cattle for their necessary \textit{Suffenance}, not having sufficient for their \textit{Suffenance} otherwise, no Tithes shall be paid thereof.} Pich. 9 Car. B. R. between \textit{Crawley and Wells, per Curiam}, and a \textit{Prohibition} granted, this being an \textit{Hartfordshire Case.}

8. \textit{[So]} If a \textit{Bain cuts down \textit{Wood, and burns it to make Brick for the Reparation of his House within the Parish, for the Habitation of himself and his Family, no Tithes shall be paid thereof, it is as much as the Parson hath the Benefit of the Labour of his Family.} Cr. 10 Car. B. R. between \textit{Nixon and Brown}, per Curiam,

9. So if a \textit{Bain cuts \textit{Wood and burns it to make Brick for the Enlargement of his House within the Parish for the necessary Habitation of his Family, no Tithes shall be paid for it.} Cr. 10 Car. B. R. between \textit{Nixon and Brown}, per Curiam agreed.

10. But if a \textit{Bain cuts \textit{Wood and burns it to make Bricks for the Enlargement of his House within the Parish, more than is necessary for his Family, as for his Pleasure and Delight, he shall pay Tithes for it.} Cr. 10 Car. B. R. between \textit{Nixon and Brown}, per Curiam adjudged, and a \textit{Consolation} granted accordingly, where the \textit{Plauntis} in a \textit{Prohibition} had affirmed that he burnt it for the Reparation and the Enlargement of his House generally, without saying that it was for the necessary Habitation of his Family, for they laid, that by this Summe it might make a Cattle, and yet should pay no Tithes.

11. For the ordinary Raking not voluntarily scattered no Tithes \textit{shall be paid, because for those no Tithes were due} by the \textit{Levitical Law, and because they are but a Scattering of the Grain, of which he paid Tithes before.} Cr. 3 Ja. B. R. P. 14 Ja. B. R. between

\textit{f.12}
Tithes shall be paid of \textit{Rakings of Corn}, because the tenth Cock or Sheaf is no Satisfaction for more than the Grain whereof it is the Tenth, and therefore it is not the Tithes of the \textit{Rakings}.

1. If a Man sears his Sheep about their Necks to preserve them from Vermin, and not for the Benefit of the Wool, the Parish shall not have Tithe for this.

15. But otherwise if he shear them largely by \textit{Custum} for the Benefit of the Wool. \textit{Mich. 14 Ja. R. between Josie and Parker, per Curiam.}
16. So if he shear them about their Necks without Fraud but two Weeks before Mich. and two Weeks after Mich. to preserve them and their Fleeces from the Brambles, no Tithes shall be paid for them, for it appears that he does not shear them for the Benefit of the Wool, this being done at this Time before the Fleeces are increased after the Shearing of them whole Bodies. Mich. 14 In between Joyce and Parker, agreed per Curtian, prefer Moutague, who doubted.

17. If a Parishioner cuts his dirty Locks from his Sheep, for their better Preservation from the Vermin before the Time of Sheering and does this without Fraud, no Tithes shall be paid of these. P. 14 Car. B. R. between Dent and Salvin per Curtian, and a Prohibition granted accordingly. Mich. 14 Car. B. R. between Williams and White a Prohibition granted; but there was a Consideration furnished, slight, that he wound up the tenth Fleece for the Parson.

18. If a Man kills Sheep, yet he shall pay Tithe of the Wool that comes of them, but not for the Skins. P. 14 Car. B. R. between Dent and Salvin, per Curtian.

19. No Tithes shall be paid of the Hay that grows upon the Cro C 353 Headlands where the Horfs and Plough turn, when the Land is ploughed, if there be alleged a Custom not to pay it, and it be affirmed that the Head-Land is but sufficient to turn the Plough. Dills P. and 15 Car. B. R. between Head and Howland, per Curtian, a Prohibition granted. P. 15 Car. between Birds and White, a Prohibition granted per Curtian, with the said Averment, that the Head Land was not greater than what was sufficient to turn the Plough and Plough upon in ploughing the Land.

20. A Prohibition was prayed to a Suit for Tithes of Locks of Wool, suggesting that he paid the 10th Fleece of Wool in Satisfaction of all Locks and Tithes due for Wool. The Court held the Substance of the Prescription good enough, but the Suggestion not being (that they had usually paid &c) which is insusceptible it was not good; and therefore a Confitution awarded. Cro. C. 363. pl. 26. Mich. 36 & 37 Eliz. C. B. Jefop v. Payne.

21. Tithes shall be paid for Sheep depauperd on Turnips, though Tithe Wool was before paid of them. It was strongly in ligit, that it a double Tithing, but the Court agreed, that it was a new Incredite, Land from Siouing, Tone, it was decreed accordingly, and the Decree affirmed on a Rehearing. G. Equ. R. 23 tile W. & M. Dümmer v. Wingfield.
22. A Prohibition was granted to a Libel for Tithes of old rotten Trees cut for Fuel, and also for Tithes of Loppings of Trees, which Loppings were not of twenty Years growth. 2 Roll Rep. 495. Hill.
23. Of Wool of Rotten Sheep, no Prohibition, though alleged, that he shall have Tithe Wool for the same Thing again at Shearing Time. Lat. 254. Mich. 9 Car. Anon.
24. If a Parishioner sells Sheep, the Parish shall have Allowance of Tithes of them after the Shearing; Per Jones. Lat. 254. Mich. 3 Car. Anon.
25. Prohibition was granted to stay a Suit for Tithe of Wood upon Surmise that the Wood was spent in his House for Firing, and shews that the Custom in the same Parish is, that the Owners of any House and Land in the said Parish who pay Tithes to the Parson, ought not to pay Tithes of Wood spent in their Houses; and if he being upon this Custom; it was found for the Defendant and moved in Arreit of Judgment, that although it be found that there is no such Custom, yet he ought not to pay Tithes for Wood spent in his House, nor for feeding Stuff for Hedges, but per Legem Terra ought to be discharged of them; but the Court resolved that it is not de jure per Legem Terra that any be discharged of them; for it is usual in Prohibitions to allege Customs, as for Hearth-penny, or by Reason of other Lands whereof he pays Tithes, that he is discharged of that Tithe, but not to allege, that per Legem Terra he is discharged, and the Plaintiff here having alleged a Custom, and being found against him, it was adjudged for the Defendant, that Conasionally should be granted. Cro. C. 113. pl. 5. Trin. 4 Car. C. B. Norton v. Fermor.

there are divers Precedents where in that Case a Prohibition was granted without alleging a Custom. Litt. Rep. 152, 153. Norton's Case. S. C. adjournatur. — Whether Tithes shall be paid for Fuel spent in the House, where is no Custom, they said they should not determine, it being no Point in this Case, and there being Opinions both Ways. 1 Cro 113. was cited at the Bar that such Fuel shall not be discharged without a Custom. Freem Rep. 355. pl. 416 Mich. 1698 in Seco. Anon.

26. A Libel was was for feeding Cattle upon the Ground, to which the Defendant answered, that they were ancient Milch Beasts, and were growing old and dry, and that for a Month they depaupered with other Heifers, and that afterwards they put them into a Meadow out of which the Hay was carried, and after he fed them with Hay in the Houfe. The Court agreed, that Tithe should not be paid for the depauparity, or the Hay with which they were fed, but for the Thou went with the other Heifers, Crook and Hurton held that Tithes should be paid for them. Het. 100. Trin. 4 Car. C. B. Anon.
28. If a Man has Arable Land without a House, he is not intituled to be discharged of the Tithes of the Milk which maintains the Servants, who plow the Land, as he is if he has a House in the Parish where the Milk is spent. Ld. Raym. Rep. 129. Mich. 8 W. 3. in Cafe of Scoles v. Lowther.
29. Where a Man has Wood in one Parish and Arable Lands in another, if he makes use of this Wood in making Fences for his Arable Land, yet he shall pay Tithes to the Parish where the Wood grows. But it had been otherwise if it had been in the same Parish; Per Cur. Ld. Raym. Rep. 130. Mich. 8 W. 3. in Cafe of Scoles v. Lowther.

31. Bill for a Discovery of Tithe of Furze and Payment thereof. Defendant by answer infirmit that Furze spent upon the Premises is not Titheable, and likewise infirmit that Underwood and Furze generally is not Titheable in that Parish &c. Plaintiff admits that no Tiches is due for Underwood or Furze spent upon the Premises, but infirmit upon Tite of Furze made into Faggots and sold by Defendant, cites Moor 909. that Underwood or Furze spent for Firing or fencing of the Premises is not Titheable, but Underwood or Furze sold is Titheable. In the Proofs of the Cause there was some Evidence of 1d. per Ann. paid called Smoak-Money in lieu of Tites or Furze, but that not being infirmit on by the Answer, but a general Non Declimando for Underwood and Furze, decreed Defendant to account for Tites of Furze made into Faggots and sold, but not for Furze burnt or used upon the Premises. Defendant to pay Costs. Per Harcourt C. MS. Rep. Mich. 12 Ann in Canc. Roffi v. Harding.

(A. a) Wages. [Pl. 1.]

[And Feedings and Agistments of Cattle.]

1. SERVANTS of the Plough shall not pay any Tite of their Wages; as was resolved, 12d. 14 Jac. in Banco, between Patien Ellis and Drake in Devon, and a Prohibition granted accordingly, although the Libel was but for the Tite of a third Part of that Wages, leaving the rest free; for it was said, that by the same Reason that the Beasts of the Plough shall be free of Tites, the Serbans who follow the Plough shall be also.

2. No Tithes shall be paid for the Feeding which is eaten by the Brown. Oxen of the Plough, and the Cattle of the Pail. Mich. 9 Ja. 25. by 50. S. C. adjudged, that the Prescription was good. — S. C. cited Roll Rep. 38, that a Consultation was pray'd after a Prohibition, but not granted — Hetl. 100. Trin. 4 Car. C. B. Anon. S. P. — But if they are afterwards fatted for Sale Tites are payable for their Herbage. Parliament Cafe 193. Pfitsmon v. Sands, cited G. Eq. R. 251. in Cafe of Coleman v. Barker — Mar. 56. pl. 8. Mich. 15 Car. Anon. S. P. and Barkley J. only in Court granted a Prohibition — Of Common Right no Tites are due for Cattle bred for the Plough or Pail to be used in the same Parish, but if they belong to another Parish, Tites are due for them, and of that Opinion were the whole Court. Harde. 184. Patch. 15 Car. 2. in Seace.

3. No Tithes shall be paid for Horses of the Plough, for the Par. No Tite is to be paid for Saddle Horses or their Herbage; but for Cart Horses to till the Ground, allowance is to be made for their Herbage, because a Profit comes in by them, but not by Saddle-Horses; Per tot Car. Bullt. 171. Trin 9 Ja. Pothilv. May — S. P. as to Saddle-Horses, cited by Richardson, that a Prohibition was granted Har. 94. Patch. 4 Car. C. B.

4. Tithes are not due for young Cattle which a Man rears for his Cro. 171. Plough, for they are for the manuring of the Land, of which the Patron shall have the Tite. N. 14 Ja. 25. Waterley and Hunsbury Jusce v. reselected.
Difmes, [or Tithes].

Parker. resolved, and a Prohibition granted. 99. 14. B. R. between St. C. & S. P. accordin-
gly, per Car.—F. B. R. between Dr. Baytis and Williams; and Prohibition grant-
ed. 99. 14. B. R. between Kneeben and Woodreet, a Consulat-
on was denied, a Prohibition being granted before. Cr. 12. B. R. between Mason and Price, per Curiam.


on was denied, a Prohibition being granted before.

6. If a Man, according to the Custom of the Country, lays Down to feed his Horses for Tillage, and hath used to suffer his Horses to be fed upon the Land without any Iowing thereof, the Parson shall not have any Tithes thereof, for this is no more than Pasture for the Horses. 99. 3. B. R. per Tolby said, that it was one same's Cap of Essex, adjudged.

7. And in these Cases in the Prohibition, he need not preteribe to be dischargin of Tithes for them, because they are discharged by the Law. 99. 14. B. R. Kneeben and Woodreet, per Hountague and Woodderidge; but brought seems a curren, because their Labour (* ) is a Banner of a Smuggler for their Tithes; But Clarke and Clarke said, that of late Time they have not used to preteribe; but anciently the Utie was to preteribe.


8. If a Man buys Cattle, and feeds them, and sells them, he shall pay Tithes of them. Cr. 38. El. B. R. between Sherington and Fleetwood, per Curiam.


9. But if a Man buys Cattle and feeds them, and spends them in his House, he shall not pay any Tithes for them. Cr. 38. El. B. R. between Sherington and Fleetwood, per Curiam.

ition granted.

10. If a Man feeds Sheep in his Land, and after Kills and eats them in his House within the Parish, he shall not pay Tithes for them. Mich. 7. Car. B. R. between Facey and Lange, per Curiam upon a Denunciature.

11. If a Man gathers Green Pease to eat in his house, no Tithes shall be paid of them, and this by the Law of the Land. 99. 12. B. R. per Curiam.

12. But otherwise it is if he gathers them to sell or feed Hogs. 99. 12. B. R.
Dimes, [or Tithes].

13. If a Man buys barren Cattle, as Oxen or Steers, and after sells them, he shall pay Tithes for their Future, because they can render no other Tithe; but otherwise it is of barren Sheep, although Wethers, because they will render Tithe of their Wool. Rich. 7 Car. 5 R. between Facy and Lange, per Curiam.

14. If a Man keeps Horses that are barren Cattle to sell, and sells them accordingly, he shall pay Tithe for them. Tr. 15 Ja. 2 R. between Lampken and Wilde, per Curiam.

15. If a Man buys young Cattle, and rears and sells them, he shall pay Tithes for them. Tr. 38 El. 2 R. between Serington and Fleetwood, per Curiam.

16. So if a Man buys Cattle, and feeds and sells them, he shall pay Tithes for them. Tr. 38 El. 2 R. between Serington and Fleetwood, per Curiam.

17. Where Beasts are in one Parish for one Half Year, and in another Parish during the rest, every Parson shall have Tithes for the Time. Br. Dimes, pl. 16. cites the Register.

18. If the Parson has Tithe for the Corn of the same Land, he shall not pay Tithe for Agistment. Br. Dimes, pl. 18. cites the Register.

19. Libel for Tithes of Milch Cows, Steers, Oxen, and Horses &c. Cro E. 446. the Defendant suggested a Prohibition, a Modus to pay 1d. every Year for a Milch Cow, and an Half-penny for every other Cow, and the like for every Mare, in Satisfaction of all Cows, Steers, Horses and other Cattle, but a Consultation was granted De modo non tradurur de Decimis for Milch-Kine, Draught-Oxen or Beasts agist for Provision of his House — 2 Init. 231, 252. S. C. cited. S. C., cited to Cro E. pl. 3. — S. C. cited Mo. 454. in pl. 625.

20. Tithes are payable for Agistment, viz. for the Feeding of dry Beasts Cattle, which do not serve for the Plow or Pail, nor are fain to be set with the other Beasts of the Family. Jenk. 281. pl. 6. cites it as resolved by all the Judges of England in the Exchequer Chamber 3 Jac.

21. The Defendant suggested a Prescription to be discharged of Tithes of Barren Cattle reared or employed for the Plow; and upon a Demurrer to this Prohibition, it was objected that he had not alleged, that the Cattle for whose Herbage this Suit was brought, were reared for the Plow, or employed for that Purpose; He likewise pretended to be discharged of Tithes of the Herbage of Cattle attainted in the Parish, in consideration that all they who had Milch Cows there had paid Tithes of Milk, Butter, and Cheese, and nine Cheeses every Year on a certain Day, and did not allege that he had any Milch Cows, for which Reasons a Consultation was granted. Roll Rep. 62. pl. 7. Mich. 12. Jac. B. R. Mescall v. Price. 7 M 22. No

23. Prohibition to be discharged of Payment of Tithes for all Cattle agist generally, an not feeding for his own proper Cattle, is not good, nor reasonable, and stands nor with Law. Cro. J. 755, 756. pl. 3 Trin. 18 Jac. B. R. Joune v. Parker.

24. A Man agisted the Beasts of others in his Meadow-Ground, whereof he bad paid Tithes before; Resolved that he shall not pay Tithes for this feeding it with the Beasts of others after the Mowing, any more than it he had departnered the Land with his own Beasts. 2 Roll Rep. 191, 192. Trin. 18 Jac. B. R. cites Sheinton v. Fleetwood.

25. Libel was in the Spiritual Court for the Tenth Part of a Bargain of Sheep which had departnered from Michaelis to Lady-Day in the Parish; the Party fulfilled that he would pay the Tenth of the Wool of them according to the Custom of the Parish; Prohibition was denied, for as Doderidge J. said, by this way the Parson may be detrained of all if he shall not have his Recompence; for now the Sheep are gone to another Parish, and he cannot have any Wool now, because it is not Shearing-Time. Nota, per Whitlock J. De Animalibus Intuitibus the Parson shall have the Tenth Part of the Bargain for depotartnering, as Horses, Oxen &c. But De Animalibus Utilibus he shall have Tithes in Specie, as Cows, Sheep &c. Poph. 197. Mich. 2 Cur. B. R. Anon.

26. Though no Tithes shall be paid for Young Cattle which a Man rears for his Plough, yet if they are fold before they come to Perfection, the Parson will have Tithes. Het. 86. Arg. Patch. 4 Cur. C. B. Woolmerston's Café.

27. If I have 10 Milk Kine which I purpose to reserve for Calves, and they are dry, the Parson shall not have Tithes for their Pasture; But if I sell them, by which it appears I kept them for breeding, there Tithes shall be paid, per Harvey J. Het. 109. Trin. 4 Cur. C. B. Anon.

28. In a Suit by English Bill for the Tithes of the Herbage of barren Cattle, and others; The Chief Baron said, That Tithes for barren Cattle were due De communi Jure according to the Value of the Land after the Rate of 2s. per Pound, for that they cannot be otherwise valued or accounted for, because the Profits of the Lands for which they are paid, are perceived by the Mouths of the Beasts; but by Custom or Prescription such Tithes may be paid in other Manner, as by the Acre and for all manner of Cattle barren, and for the Plow and the Pail. Hardr. 184. pl. 9. Patch. 13 Cur. 2. in Scacc. Holbech v. Whadcocke.

29. If a Man agists Cattle such as are unprofitable, and yielding no Tithe in Kind, as Horses &c. there the Party that takes them in, viz. the Owner of the Ground, shall answer the Parson the Tithe according to the Rate he has for their departnering. But if a Man agists profitable Cattle, and such as yield a Tithe in Kind, as Sheep that yield Tithewooll, and Lambs, there the Owner of the Cattle shall answer the Tithes, because the Wooll and Lamb in Kind were due to the Parson, and it is impossible that the Owner of the Ground could pay that. This Difference was taken by Sir Robert Sawyer, and agreed per Cur. Freem. Rep. 329. pl. 408. Patch. 1679. in Scaccario. Anon.

30. If Cattle don't plow in the same Parish where they are fed, Tithes are due though they plow in another Parish; and if he had more Cattle than employed for the Plough in the same Parish, Tithes are due for them. 5 Mod. 97. Trin. 7 W. 3. Sweales v. Lowther.

S.P. by Holt Ch. J. because they are not Cattle of the Plow there. 7 Mod. 14. Mich. 1 Ann. B. R. in Harrow's Café.

32. A has a House in B in which he dwells and occupies a large Parcel of Arable Land there, and has likewise 40 Acres of Meadow and Pasture in the Parish of C. adjoining, and four Acres of Arable Land there. The plowing the Land in C. will excute only those Cattle which plow only the Land in C. and not those which plow any Land in B. For the Parson ought to have something in Lieu of the Lofs of those Tithes which can only be of the four Acres in C. Per Cur. Lord Raym. Rep. 130. Mich. 8 W. 3. Scoles v. Lowther.

33. Where the Parson has Tithe-Hops, no Tithes should be paid for the Poles which were used in the Hop-Yard; And the Question arose whether the Parson should have Tithes of the Bark of the Poles, the Bark being sold? And by Letchmere he should. But the Ch. Baron and the others e contra; for the Poles being privileged, the Bark shall be so too. Freem. Rep. 334. pl. 416. Mich. 1698. in Scacc. Anon.

34. But for Fuel spent in Fire to dry the Hops Tithes should be paid, because the Parson had no Benefit by that, the Tithes being paid before they were dried. Freem. Rep. 334. pl. 416. Mich. 1698. in Scacc. Anon.

35. By the Common Law Pasturage is as much Tithable as Hay, but the Difference is, Pasturage being taken by the Mouth of Cattle, but the Hay is Tithable before it is severed from the Ground; Pasturage shall pay no Tithe, but the Cattle, that feed it, shall; but Cattle of Pail and Plow shall pay no Tithe if you feed them upon Pasture all the Year long; and the Reason of that is, for they are as Tools of Husbandry, by which Tithes are meliorated. And no Tithe is originally due by Law in that Case, but Tithe is originally due upon mowing of the Grazs; and your subsequent Application of it, though to Cattle of Pail and Plow shall not discharge you of a Charge to which you were liable before upon the Mowing. And the Grazs is Tithable only in Respect of the Feeding, that is, the Use and Application makes it Tithable; and for that you cannot have any other Tithe than from the Profit of the Cattle that do feed it; Per Holt Ch. J. 12 Mod. 497, 498. Pach 13 W. 3. Selby v. Bank.

36. If a Man has a House in a Parish, and lives there, he must not pay Agistment for dry Cattle there; But if he be not a Houfekeeper there, he must pay Tithes for Agistment; Per Holt Ch. J. 7 Mod. 114. Mich. 1 Ann. B. R. in Harrow’s Cafe.

(A. a. 2) Tithes
Tithes of Mills: Payable in what Cases.

1. Tithes of Mills shall not be paid but where it used to be paid; per Coke C. J. Roll. Rep. 495. pl. 15. Trin. 14 Jac. B. R. in Jaques's Case.

2. De Molendino de Novo cretto non jacet Prohibition as to Tithes (though the Mill was erected upon Lands discharged of Tithes) by the Statute of Monasteries. Cro. J. 429. Trin. 15 Jac. B. R. Anon.

3. Libel for Tithes of a Grift-Mill a Fulling-Mill; the Defendant suggested for a Prohibition, that though by the Statute De Articulis Cleri 'tis enacted, that de Molendinis non fiat Prohibito, yet that must not be intended of Fulling-Mills, the Profits whereof arise by the Labour of Men, and therefore not within the Words of the Statute de Molendinis; and a Prohibition was granted as to the Fulling-Mill and a Consultation as to the Grift-Mill; but Tithes shall not be paid for Fulling-Mills, Lead-Mills, Plate-Mills, Rag-Mills, Edge-Paper-Mills, because the Profits arise by the Labour of Men. 2 Roll. Rep. 84. Patch. 17 Jac. B. R. Anon.

4. If two fulling Mills are under one Roof, and a Rate-Tithe paid for the Mills and then you alter the Mills and make one a Corn Mill, the rate is gone, and you must pay Tithes in kind. Brownl. 32. Anon.

5. Tithes are due and payable of all Mills unless they are ancient and before 9 E. 2. For Mills more ancient are discharged by the Statute Articulis Cleri. D. 170. b. Marg. pl. 5. cites Hill. 5. Car. C. B. that it was so resolved in Stonies Case.

6. Motion for a Prohibition to stay a Suit for Tithes of an old Mill, viz. every tenth Toll-Dith on Suggestion that it was an old Mill, but per Holt Ch. J. the Plaintiff urged in his Suggestion to prescribe in Non decimando, and also an Affidavit of the Truth of the Fact; and it was adjudged in Ld. Ch. J. Hale's Time in the like Case; for he said that Common Right Tithes are not due out of a Mill, yet before the Statute of Articulis Cleri some Mills did pay and some did not, and upon that it was enacted that De Molendino de novo cretto non jacet prohibito; and for such as paid before that Statute they shall still pay; and he said, Tithes were either Predial or Personal, for the Corn paid Tithe before; and it is necessary to prescribe in a Non decimando in an old Mill, and he quoted the Case of Hughes and Lord Villcoun Hertford. 12 Mod. 243. Mich. 10 W. 3. Hart v. Hall.