A TREATISE OF Teſtaments and Laſt Wills.

Compiled out of the Laws Eccleſiaſtical, Civil and Canon, as alſo out of the Common Law, Cuſtoms and Statutes of this Realm.

The Whole digeſted into Seven Parts, viz.

I. What a Teſtament or Laſt Will is, and how many Kinds of Teſtaments there be.

II. What Perſons may make a Teſtament, and who may not.

III. Deſcribing what Things, and how much may be diſpoſed by Will.

IV. Decyphering the Forms, and in what Manner Teſtaments or Laſt Wills are to be made.

V. What Perſon may be Executor of a Teſtament, or is capable of a Legacy.

VI. Of the Office of an Executor, and of the ſeveral Kinds of Executors.

VII. Shewing by what Means Teſtaments or Laſt Wills become void.

By *HENRY SWINBURNE*, Sometime Judge of the Prerogative Court of YORK.

The Sixth Edition, corrected and very much enlarged with all the Statutes to 16 *Geo.* 2. incluſive; and alſo all Decrees in Chancery, and Reſolutions of Common Law Caſes relating to this Subject which have hitherto been publiſhed; with an exact Table to the Whole.

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2 KINGS xx. 1.

Put thine Houſe in Order; for thou ſhalt die, and not live.

In the SAVOY:

Printed by HENRY LINTOT, (Aſſignee of *Edw. Sayer*, Eſq;) and ſold by S. Birt, at the *Bible* and *Ball* in *Ave-Mary-Lane*; D. Browne, at the *Black Swan* without *Temple-Bar*; and J. Shuckburgh, at the *Sun* in *Fleetſtreet*. MDCCXLIII.

TO THE

READER.

GREAT is the Number of the Writers of the Civil and Eccleſiaſtical Laws: This appears by their ſeveral Books, as Lectures, Counſels, Tracts, Deciſions, Queſtions, Diſputations, Repetitions, Cautels, Clauſules, Common Opinions, Singulars, Contradictions, Concordances, Methods, Sums, Practicks, Tables, Repertories, and Books of other Kinds; that it is impoſſible for any one Man to read over the hundredth Part of their Works, though living an hundred Years, and did intend no other Work. Wherefore by the Publiſhing of this *Teſtamentary* Treatiſe, I may be thought to pour Water into the Sea, and to trouble the Reader with a Matter altogether needleſs and ſuperfluous. But yet if this Book may ſerve in ſtead of many great Volumes, then I hope, that in the Judgment of ſuch as be indifferently affected, the ſame is rather to be admitted as commodious, than rejected as ſuperfluous.

The Cauſes wherefore the Author of this Book undertook this Work.

By the Authority of the High Court of Parliament holden in the five and twentieth Year * of the Reign of King *Henry* the Eighth, it was enacted, (amongſt other Statutes then made, and ſince that Time revived in the firſt Year of Queen *Elizabeth* †) *That ſuch Laws Eccleſiaſtical being then already made, which be not hurtful or prejudicial to the Prerogative Royal, nor repugnant to the Laws, Statutes and Cuſtoms of this Realm, ſhall ſtill be uſed and executed as they were before the Making of that Act, until ſuch Time as they were viewed, ſearched, or otherwiſe ordered or determined, by Two and thirty Perſons, or the more Part of them, according to the Tenor, Form and Effect of the ſaid Act*: Which Laws ſo eſtabliſhed, revived and confirmed by divers Statutes made during the Reigns, as well of the ſaid moſt Noble King

* *Stat. H.* 8. *an.* 25. *cap.* 19.

† *Stat. Eliz. an.* 1. *c.* 1.

** Stat. H. 8. an. 27. c. 20. & an. 32. c. 7.
†† Stat. Ed. 6. an. 2. c. 13.

Henry the Eighth **, as of the moſt Godly Prince *Edward* the Sixth ††,) are termed or intitled *The King's Eccleſiaſtical Laws*; like as in thoſe Countries and Churches of *Germany* which have received the Goſpel, the Canon Law is admitted and obſerved ſo far forth as it is not repugnant to the *New Teſtament* *, and is at this Day the Eccleſiaſtical Law of their Conſiſtories.

* Schudiwinus Tract. de Nuptiis part. 4. tit. de Divortio, n. 13. fol. 48.

In like Manner the Civil Law (ever ſince the Eccleſiaſtical Law was made,) hath been deemed and judged for Part of the Eccleſiaſtical Law, in Caſes wherein it doth not differ from the ſame †: For whereas theſe two Laws are not contrary, the one is a Supplement of the other, and being mutually incorporated do both make one Body **; otherwiſe the Civil Law, being contradicted by the Eccleſiaſtical Law, ought to be ſilent in the Eccleſiaſtical Court ††.

† C. 1. de no. op. nunc. c. clerici. de jud. extra. c. ſi in and. diſt. 10. §. ſi vero Eccleſiaſticum. in Auth. ut clerici apud propr. Epiſcopos.
** Panor. in d. c. 1. de no. op. nun. Vaſquius de ſucceſſ. creat. l. 3. §. 26. n. 10. Benedict. Capra. Theſaur. com. op. verb. leges, f. (mihi) 403. n. 23. †† D. 1. de no. op. nunc. gloſſ. in c. 2. de arb. l. 6. Are. in d. c. clerici. de judic. extra. quæ ſententia communiter approbatur, teſte Benedict. Capra. ubi ſupra.

And foraſmuch as theſe foreſaid Laws have not as yet been viewed, or otherwiſe determined by Thirty-two Perſons, or the more Part of them, according to the Form and Effect of the foreſaid Act of Parliament; therefore thoſe Civil and Eccleſiaſtical Laws Teſtamentary, not repugnant to the Laws, Statutes and Cuſtoms of this Realm, are yet ſcattered and diſperſed here and there, in Corners of many Books of ſtrange Countries and foreign Language, incumbered with long Diſcourſes of far different Argument, and no leſs Number of Laws utterly impertinent to the Government of this Common-Wealth; ſo that the Knowledge thereof, howſoever admirable, and worthy to be learned of all, cannot (as the Caſe now ſtands) be ſo commodious to many, as the Expences to be conſumed in Books would be burthenſome, and the Study thereof would be tedious.

Videlicet, per Gualt. Haddon legum doctorem conſultiſſ. (omnium quas unquam tulit Anglia legislatorum diſertiſſimum) lib. de Reformatione legum Eccleſiaſt'.

In the Reign of *Hen.* 8. it was propoſed in Parliament to ſet aſide the Canons, and to make a new Eccleſiaſtical Law; the Care whereof was committed to Dr. *Walter Haddon* and Thirty-one other Perſons of the firſt Rank in Divinity, Civil and Common Law, who drew a Plan of a new Law, but it was rejected; thereupon the old Canon Law was confirmed by the Statute 25 *H.* 8. *cap.* 19. (*viz.*) ſuch Canons and Conſtitutions which were not contrary to the Prerogative, or to the Cuſtoms, Laws, or Statutes of this Realm.

Of the Thirty-two Perſons before-mentioned, and which the King was to nominate, Sixteen of them were to be Members of Parliament, and the other Sixteen Clergymen.

In Conſideration whereof, I thought it not ſuperfluous, but expedient, to make a Collection of the moſt principal Laws, Civil and Eccleſiaſtical, pertaining to Teſtaments, made before the five and twentieth Year of King *Henry* the Eighth. I mean, of thoſe Civil Laws which are not contrary to the Eccleſiaſtical Laws; and of thoſe *Eccleſiaſtical Laws which are not any way prejudicial or hurtful to the Prerogative Royal, nor repugnant to the Laws, Statutes or Cuſtoms of this Realm*; but agreeing amongſt themſelves, may now ſtill be executed, as they were before the Making the ſaid Act. Amongſt which Laws Civil and Eccleſiaſtical, I thought good likewiſe (as Occaſion ſhould offer, and as the Opportunity of the Place fitted) to inſert ſuch Statutes of this Realm, and to mention ſuch Cuſtoms, as well general as particular, as be not impertinent thereunto.

The End and Uſe of this Book.

To this End and Purpoſe eſpecially, that every Subject of this Realm, tho' he be but of mean Capacity, may with little Labour, and leſs Charge, take a ſenſible View of thoſe Civil and Eccleſiaſtical Laws Teſtamentary now in Force, and to be obſerved and executed in the Eccleſiaſtical Courts within this Realm of *England*, (the ſame being now reduced into a narrow Compaſs,) which before could not be done without great Charge and Difficulty.

Another Uſe of this Book.

And tho' the chief Scope of this Teſtamentary Treatiſe, is for the Benefit of thoſe Subjects which heretofore have been ignorant of the Civil and Eccleſiaſtical Laws; yet this Treatiſe being diligently peruſed, together with the Quotations and Marginal Notes thereunto adjoined, may in ſome Sort be profitable to thoſe *Juſtinianiſts*, or young Students of the Civil Law, who do intend to beſtow the Fruit of their Study in the Practice thereof. At leaſt, if no other Uſe can be made of it, it may ſerve them as a Directory, whereby they may underſtand what Laws Teſtamentary are now in Force here, and conſequently, what Titles of the antient Laws, Civil or Eccleſiaſtical, deſerve to be read with more Diligence; leſt otherwiſe, not knowing to make Choice of the more uſual Laws or Titles, they ſhould ſtudy Laws not equally neceſſary.

More-

The Cauſe of publiſhing this Book in our vulgar Tongue.

* *Juſtinian*'s Novels were written in *Greek*, becauſe the Seat of the Empire was then at *Conſtantinople*, where *Latin* was not underſtood.

Moreover, I conjecture that unto theſe *Juſtinianiſts* it would have been much more acceptable, to have ſet forth this Treatiſe in *Latin*, wherein the Laws * Civil and Eccleſiaſtical are originally written; and now, by the Tranſlation thereof into our vulgar Tongue, ſomething of their natural Beauty and Grace may be loſt; yet after I had conſidered, that by following this plauſible Courſe, I ſhould pleaſure but a few, in Compariſon of the reſt whom otherwiſe I might benefit; tho' I had once begun, and laid the Foundation of the whole Tract, in ſuch Terms as I found it delivered by others, yet preferring the Publick before any particular Benefit, I did eaſily alter my former Purpoſe.

That Laws transformed from their natural Shape, muſt needs in ſome Sort be either damnified or diſgraced, I do not think to be perpetually true: But if it be a Thing ſo neceſſarily incident to all Tranſlations, that it cannot be avoided, it ought therefore to be the rather tolerated.

Suffice it therefore theſe *Latin Juſtinianiſts*, that thoſe Marginal Notes eſpecially proper to their Studies are left in *Latin:* The reſt, becauſe it belongeth to all, meet it is that it be written in ſuch a Language as may be underſtood of all.

Inter cauſam finalem & impulſivam quid intereſt, præclare Tiraquellus in regulam, Ceſſante cauſa, &c. limitac. prima.

Thus (courteous Reader) I have diſcourſed unto thee the End wherefore I undertook this Labour, the Cauſe which moved me ſo to do, and wherefore I have publiſhed the ſame in the vulgar Tongue. Now it reſteth that I crave thy favourable Acceptance of my good Will and Endeavour; which if thou ſhalt vouchſafe to beſtow, I ſhall not only think my ſelf ſufficiently recompenced, but greatly inriched.

Thine moſt willingly to

His utmoſt Power,

Henry Swinburne.

Some Account of the

AUTHOR,

And of the

Several Editions of his Treatiſe of *Teſtaments* and *Laſt Wills.*

HENRY SWINBURNE, the Author of the following Treatiſe, was born in the *City of York*, and educated in *Grammar* Learning in the Free-ſchool there: His Father *Thomas Swinburne*, then living in that City, ſent this his Son about the Age of Sixteen Years to *Oxford*, and entered him a *Commoner of Hart-Hall* in that Univerſity, where he for ſome Time followed his Studies; and from thence removed to *Broadſgate-Hall* (now *Pembroke College*) where he took his Degree of *Bachelor of the Civil Law.*

Before he left the *Univerſity*, he married *Helena*, the Daughter of *Bartholomew Lant* of that City, which State of Life being inconſiſtent with the local Statutes of Colleges, he retired with his Wife to the Place of his Birth; and ſometime afterwards he practiſed in the Eccleſiaſtical Court there as a *Proctor.*

But having taken a Degree in the Univerſity, he might think it more expedient to practiſe in an higher Station, and for that Purpoſe he commenced *Doctor of the Civil Law*; and as his Cotemporary and Countryman *Gilpin* was called the Apoſtle of the *North*, ſo our *Swinburne* was called the *Northern Advocate*; the one being famous for his Learning in Divinity, and the other in the Civil Law; and having practiſed as an Advocate for ſome Years, he was advanced to be a Judge of the Prerogative Court of the Archbiſhop of *York*, in which Office he continued till his Death.

This was certainly a very generous Education, of which we have very few or no Inſtances ſince his Time;

for we ſeldom hear of a *Proctor* taking a Degree of Bachelor of Laws in any Univerſity, and afterwards pleading as an Advocate; or of being a Judge of the *Prerogative Court* in either Province; for all which Employments our Author was very well qualified.

There is no Record or Memorial extant giving any Account in what Year Mr. *Swinburne* was born, or when he died; but it is certain he was in great Reputation for Learning above One hundred and fifty Years laſt paſt, and it is as certain that he was buried in the *North Iſle of the Cathedral Church of York*; for this appears by a Marble Monument fixed to the Wall of that Church near his Grave, with his *Effigies* in the Gown of a Civil Lawyer, kneeling at a Desk, with a Book in his Hand; and becauſe he wrote a Book of *Spouſals* and *Matrimonial Contracts*, and likewiſe this Treatiſe of *Teſtaments and Laſt Wills*, it is probable that the following Epitaph engraved on his Monument might allude to both theſe Works.

ſſ. *Non Viduæ caruere viris, non patre pupillus,*
Dum ſtetit hic patriæ virque paterque ſuæ:
Aſt quod Swinburnus Viduarum ſcripſit in uſum,
Longius æterno marmore Vivet opus.
Scribere ſupremas hinc diſcat quiſque tabellas,
Et Cupiet qui ſic vixit ut ille mori.

As for his Treatiſe of *Teſtaments and Laſt Wills*, the firſt Edition thereof was publiſhed above * 150 Years ſince, and probably it was written by him a little before it was publiſhed; it could never be in that Year in which our † *Oxford Antiquary* hath placed him, (*viz. Anno* 1520.) becauſe that was 70 Years before the firſt Edition was printed; but rather about the latter End of the Reign of Queen *Elizabeth*; for the Stile in which it is written ſhews that it was the Language of that Age, which might eaſily be evinced by comparing it with other Books publiſhed about that Time.

* *Anno* 1590.

† *Athen. Oxon in verbo.*

In this Edition we find that the Author kept up to his Faculty; for in his Epiſtle to the Reader he tells us, that this Treatiſe is a Collection of the principal

Some Account of the AUTHOR.

Laws Civil and Eccleſiaſtical, relating to Teſtaments and Laſt Wills, reduced into a narrow Compaſs, not only for the Benefit of the Subjects in general who were ignorant of thoſe Laws, that they might know which were in Force, and to be obſerved in the *Eccleſiaſtical Courts in England*; but that it might ſerve as a Directory to the young * *Juſtinianiſts*, to ſhew them what Books of the antient Laws, both *Civil and Eccleſiaſtical*, they ought to read.

It is true, he likewiſe tells us, that he hath inſerted ſome *Statutes* in this Edition, and that he hath mentioned

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* *They are called* Juſtinianiſts *from the Emperor* Juſtinian, *who imployed Ten Lawyers (of whom* Tribonian *was one) to collect the beſt and moſt uſeful Conſtitutions of all the Emperors from* Adrian *to his Time; which Collection they made out of the* † Gregorian, Hermogenian, *and* Theodoſian Codes; *and this was called the* Juſtinian Code.

The ſame Emperor about two Years afterwards, viz. Anno 530. *gave Orders to the ſame* Tribonian, *to call to his Aſſiſtance what eminent Lawyers he thought fit, to collect the Deciſions of all the antient Lawyers in ſuch a Method, that there might be no Claſhing of Opinions, or Contrariety of Judgments.*

Thereupon all ſuch Deciſions, which were the moſt judicious and moſt agreeable to Equity, were by theſe Lawyers reduced into Fifty Books, *which before that Time laid diſperſed for many Years in almoſt* 2000 *Volumes, each of which Books contained ſeveral Titles divided into Laws, and ſubdivided into ſeveral Parts; and this was called the* Digeſts *or* Pandects.

The ſame Emperor likewiſe commanded Tribonian *and two other eminent Lawyers to make an Abridgment of the firſt Principles of the Law, for the Benefit of young Students, which was afterwards performed by thoſe Lawyers, and called* Juſtinian's Inſtitutes; *and this being a Collection of the firſt Elements of the Law, was for that Reaſon called the* Inſtitutes, *a Word which in Propriety of Speech ſignifies the firſt Principles of any Science.*

This Work is divided into Four Parts, *and each Part into ſeveral Titles, and it is ſuch a compleat Performance, that it is a common Saying amongſt the Profeſſors of the Civil Law, that he who is Maſter of the* Inſtitutes, *bids fair to be a good Lawyer.*

Within a few Years after the publiſhing Juſtinian's Code, *that Emperor found it very neceſſary to make* New Laws, *either to ſettle ſome Caſes which were not decided in the* Code, *or to confirm ſome Laws which were already made, or to correct or reform them; Part of which* New Laws *were after that Emperor's Death reduced into one Volume, and called* Juſtinian's Novels, *which were written in* Greek, *becauſe the Seat of the Empire was then at* Conſtantinople, *where* Latin *was little underſtood.*

But theſe Novels *have been tranſlated into* Latin *four Times, and the laſt and fourth Tranſlation is more valued than the other three; becauſe it was made after* Seringer's Greek *Copy printed at* Baſle *by* Hervagius, *which is a Copy from an Original, written with* Tribonian's *own Hand.*

So that the Body of the Civil Laws, conſiſting of the Code, the Digeſts or Pandects, *the* Inſtitutes, *and* Juſtinian's Novels, *the Students of this Law are from him called the* Juſtinianiſts.

But theſe Books were loſt for a long Time through the Incurſions made by the barbarous Goths *into* Greece *and* Italy, *till the Emperor* Lotharius *the Second, about the Year* 1130. *reſtored the* Code, *and the* Latin Tranſlation of the Novels, *as we now have them: And about* * *ſeven Years afterwards at the Siege of* Malphi, (*a Town in the Kingdom of* Naples) * 1137. *which was taken by him, the Soldiers amongſt the Plunder of that Place, found a Manuſcript Copy of the* Pandects, *compiled by* Juſtinian's *Order, which was afterwards carried to* Florence, *and is now called the* Florentine Pandect, *which is accounted the moſt authentick Copy at this Day.*

The Laws of Juſtinian *being thus reſtored to the World, became more famous in* Italy *than ever, and from thence ſpread all over* Europe, *and were received in every Kingdom and Principality, without the Sanction of any Secular or Eccleſiaſtical Power; and by way of Excellency it was uſual then, as it is at this Time, to call it* the Law of Laws.

† In the Reign of *Diocleſian,* about the Year 290. two eminent Lawyers, *Gregorius* and *Hermogenes,* collected the Conſtitutions of the firſt Emperors into two Codes; and afterwards *Theodoſius* the Younger, about the Year 435. made another Code.

tioned ſome *Cuſtoms* pertinent to the Subject-Matter; but not a Word of any *Common Law Caſes*, either in the Preface, or throughout the whole Treatiſe.

* *Anno* 1611. The *ſecond Edition* was publiſhed about * 21 Years after the firſt; which though a Maſter-piece in its Kind, yet it wanted ſome *Common Law Caſes* to quicken the Sale, which were ſupplied by thoſe who ſet forth this Edition after the Death of our Author; and probably for that Reaſon, that Impreſſion went off within half the Time of the former.

† *Anno* 1635. For there was a † *third Edition* of this Treatiſe about 24 Years after the *Second*, in which there was a Multitude of *Common Law Caſes* inſerted; and if we believe the ‡ *Oxford* Antiquary, that Impreſſion was ſold in a very little Time; for he tells us there was a *fourth Edition* in the Year 1640, which was about 5 Years after the Third.

‡ *Athen. Oxon. in verbo.*

** *Anno* 1677. The next *Edition* was publiſhed almoſt ** 66 Years ſince, and therein moſt of the Common Law Caſes relating to Teſtamentary Cauſes to that Time.

Anno 1728. The *laſt Edition* was publiſhed in the Year 1728, containing an additional Number of Common Law Caſes.

But there being a great Number of Caſes of that Nature judicially determined ſince the laſt Edition of the aforeſaid Treatiſe, there ſeems to be a Neceſſity of publiſhing it once more, with an Addition of all thoſe Caſes which have hitherto been decreed in any Court of Equity, or adjudged in any of the Courts of Common Law, relating to Teſtaments or Laſt Wills, to this very Time; and in this Edition the obſolete Stile of the laſt is corrected through the whole Treatiſe, that it may be read with Pleaſure, it being now the moſt complete Repertory extant of the *Civil*, *Canon*, and *Common Law*, concerning Teſtaments and Laſt Wills, Executors, Adminiſtrators, Deviſes, Legacies, and every Thing in general, pertinent to thoſe Matters.

THE

ABBREVIATIONS

IN THE

Marginal *Latin* Notes throughout the Treatiſe, alphabetically explained.

A *P. Juſtin.* (i. e.) *apud Juſtinianum*, in his Inſtitutes.
Arg. or *Ar.* (i. e.) *Argumento*, by one Argument drawn from ſuch a Law.
Auth. (i. e.) *Authentica*, in the Authenticks, (*i. e.*) the Summary of ſome of the Novels inſerted in the Code under ſuch a Title.
Cap. (i. e.) *Capite* or *Capitulo*, in the Chapter of ſuch a *Novel.*
C. Cod. (i. e.) *Codice*, *in Juſtinian's Code.*
C. Theod. (i. e.) *Codice Theodoſiano*, in the *Theodoſian Code.*
Col. (i. e.) *Columna*, in the Column of the Book cited.
Coll. with a double *LL.* (i. e.) *Collatione*, in the Collation of ſuch a Novel.
C. or *Cont.* (i. e.) *contra*; this denotes a contrary Argument.
D. (i. e.) *Dicto*, the aforeſaid, (*viz.*) the Law or Chapter before cited.
D. (i. e.) *Digeſtis*, or in the Digeſts.
E. (i. e.) *Eodem*, under the ſame Title.
F. (i. e.) *Finalis*, the laſt or latter Part.
ff. (i. e.) the *Digeſts* or *Pandects*; the *Grecians* uſed the Letter Π to ſignify *Pandects*; the *Romans* changed it into two *ff's*, thus joined.
Gl. (i. e.) *Gloſſa*, the Gloſs.
H. (i. e.) *hic*; this Capital Letter ſignifies *here*, in the ſame Law, Paragraph, or Title.
H. Tit. (i. e.) *Hoc Titulo*; the Capital Letter *H.* joined with *Tit.* ſignifies in this Title.
I. (i. e.) *Infra*, beneath or below.
J. Glo. (i. e.) *Juncta Gloſſa*, the Capital Letter *J.* joined to *Glo.* ſignifies the Gloſs joined to the Text cited.
In Auth. Col. 1. (i. e.) *in Authentica Collatione* 1. in *Juſtinian's* Novels, Section 1.
In F. (i. e.) *In fine*, at the End of the Title, Law, or Paragraph.
In Pr. (i. e.) *In principio*, in the Beginning, and before the firſt Paragraph of a Law.
In F. pr. (i. e.) *In fine principii*, towards the End of a Beginning of a Law.
In Sum. (i. e.) for the *Summary.*
L. (i. e.) *Lege*, in ſuch a Law.
Li. or *Lib.* (i. e.) *Libro*, in the firſt or ſecond Book.
Nov. (i. e.) *Novellâ*, in ſuch a Novel.
Par. (i. e.) *Paragrapho*, in ſuch a Paragraph, Article, Title of the Law, or the Inſtitutes.
Pr. or *Prin.* (i. e.) *Principium*, the Beginning of a Title or Law.
Π, the *Greek* Π ſignifies, *in the Pandects.*
Q. Qu. or *Ques.* (i. e.) *Queſtione*, in ſuch a Queſtion.
Ru. or *Rub.* (i. e.) in ſuch a *Rubrick* or Title.
S. C. or *Scil.* (i. e.) *Scilicet*, that is to ſay.
Sol. (i. e.) *Solutio*, the Anſwer to an Objection.
Sum. (i. e.) *Summa*, the Summary of a Law.
§. This Mark ſignifies a *Paragraph.*
T. or *Tit.* (i. e.) *Titulus*, a Title.
V. (i. e.) *Verſiculo*, in ſuch a Verſe, Part of a Paragraph.
Ult. (i. e.) *Ultimo*, the laſt Title, Paragraph, or Law.

A N

ANALYSIS of the First Part:

Wherein is shewed what a

TESTAMENT or LAST WILL is,

And how many Kinds of Testaments there be.

- A Testament being understood in a general Sense does not differ from a last Will, §. 1. Wherein if
  - An Executor be named, it is more properly called a Testament, §§. 1, 2. 10. which is either
    - 1. Solemn, §. 9. or Unsolemn, §. 10.
    - 2. Written, §. 11. or Nuncupative, §. 12.
    - 3. Privileged, §. 13. or Unprivileged, §. 17. Whereof some be
      - 1. Military Testaments, §. 14.
      - 2. Amongst the Testator's Children, §. 16.
      - 3. To charitable or godly Uses, §. 16.
  - No Executor be named, then it still retaineth the Name of a last Will, §. 4. And doth comprehend a
    - 1. Codicil, §. 3.
    - 2. Legacy or Devise, §. 6.
    - 3. Gift in Regard, or because of Death, §. 7.

A N

A N

ANALYSIS of the Second Part:

Wherein is declared who may make a

TESTAMENT,

And who may not.

Every Perſon may make a Teſtament or Laſt Will; certain Perſons excepted, §. 1. of whom ſome are prohibited by Reaſon

1. They want Diſcretion; as
- Children, §. 2.
- Mad Folks, §. 3.
- Idiots, §. 4.
- Old Men childiſh, §. 5.
- He that is drunk, §. 6.

2. They want Freedom; as
- Bondſlaves and Villains, §. 7.
- Captives and Priſoners, §. 8.
- Women Covert, §. 9.

3. They want ſome of their principal Senſes; as
- Dumb and Deaf, §. 10.
- Blind, §. 11.

4. They have committed ſome heinous Crime; as
- Traitors, §. 12.
- Felons, §. 13.
- Hereticks, §. 14.
- Apoſtates, §. 15.
- Manifeſt Uſurers, §. 16.
- Inceſtuous Perſons, §. 17.
- Sodomites, §. 18.
- Libellers, §. 19.
- Wilful Killers of themſelves, §. 20.
- Outlawed Perſons, §. 21.
- Excommunicate Perſons, §. 22.

5. Of certain legal Impediments; as
- Prodigal Perſons, §. 23.
- He that ſweareth not to make a Teſtament, §. 24.
- He that is at the very Point of Death, §. 25.
- Eccleſiaſtical Perſons, §. 26.

Of which Kind of Perſons the greater Part are not utterly inteſtable, but in ſome Caſes only.

In this ſecond Part this Queſtion alſo is briefly touched, *viz.*

Whether a King may bequeath his Kingdom to whom he will, §. 25.

A N

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ANALYSIS of the Third Part:

Deſcribing what

T H I N G S,

And how much may be diſpoſed by Will.

If we would know

- What things may be diſpoſed by Will; if we regard 19
  - 1. Lands, Tenements and Hereditaments; they are not deviſable but in certain Caſes, §. 2. — Whereof ſome are appointed by
    - 1. Cuſtom, *viz.* when the Lands are holden in
      - 1. Gavel-kind, §. 2.
      - 2. Burgage-tenure, §. 2.
    - 2. Statutes, *viz.* when the Lands are holden in
      - 1. Socage-tenure, §. 3.
      - 2. Knights-ſervice, §. 3.
  - 2. Goods and Chattels, they are deviſable, except in certain Caſes, §. 5. As when thoſe things bequeathed are ſuch as — §. 6.
    1. The Teſtator hath jointly with another,
    2. The Teſtator hath as Adminiſtrator,
    3. The Goods of the Realm, *viz.* of the antient Crown and Jewels,
    4. Belong to any of College, Hoſpital, City, Church,
    5. Deſcend to the Heir, and not to the Executor,
    6. Belong not to the Teſtator, but to another,
  - 3. Committing of the Tuition of Children, eſpecially within the Province of *York*; concerning which Thing divers Queſtions are examined, *viz.*
    1. Who may appoint a Tutor, §. 9.
    2. To whom a Tutor may be appointed, §. 10.
    3. Who may be appointed Tutor, §. 11.
    4. In what Manner a Tutor may be appointed, §. 12.
    5. What is the Office / Authority of a Tutor, §. 13.
    6. By what Means the Tutorſhip is ended, §. 14.
- How much may be diſpoſed by Will; if we reſpect
  - 1. Lands, Tenements and Hereditaments holden in
    - 1. Socage-tenure; all
    - 2. Knights-ſervice; two Parts of three

    are deviſable, §. 15.
  - 2. Goods; then in caſe the Debts due by the Teſtator do
    1. Exceed his Goods and Chattels, the Teſtator cannot bequeath any Thing in Prejudice of his Creditors, §. 16.
    2. Not exceed his Goods and Chattels, but that ſomewhat doth remain clear, the Debts and Funerals deducted; — of theſe clear Goods, if there be
       - 1. No Cuſtom, all is deviſable, §. 16.
       - 2. Any Cuſtom, (as there is within the Province of *York*, and in divers other Places,) if the Teſtator have
         1. Wife and Children, the 3d Part,
         2. Wife alone, or Children alone, the one Half,
         3. Neither Wife nor Children, all

         is deviſable, §. 16.

A N

AN
ANALYSIS of the Fourth Part:
Decyphering the
FORMS of TESTAMENTS.

- Of the Forms of Testaments; some be
  - 1. General to all Testaments, §. 1. And of these some do appertain to the
    - 1. Essence thereof; as the Naming of an Executor, §. 2. who may be appointed,
      - 1. Simply, §. 4. / or / Conditionally, §. 5.
      - 2. To a certain Time, / or (§. 17. / From a certain Time,
      - 3. Universally, / or (§. 18. / Particularly,
      - 4. In the first Degree, / or (§. 19. / In the 2, 3, &c.
      - 5. Alone, / or (§. 20. / With others,

      Concerning every which Kind or Form of making an Executor divers Things are considered; especially concerning the conditional Assignation of an Executor, these Things are examined, *viz.*
      1. *What it is, and what Words do make the Disposition to be conditional.*
      2. *How many Kinds of Conditions there be.*
      3. *What is the Effect of a Condition*, §. 6.
      4. *Whether every possible Condition ought to be observed precisely*, §. 7.
      5. *Whether the Condition be accounted for accomplished, when it doth not stand by the Executor or Legatary wherefore the same is not accomplished*, §. 8.
      6. *Whether he that is Executor, or to whom any Legacy is bequeathed conditionally, may in the mean Time, whiles the Condition dependeth, be admitted to the Executorship, or obtain the Legacy by entering into Bonds to perform the Condition, or else to make Restitution*, §. 9.
      7. *Whether it be sufficient that the Condition was once accomplished, tho' the same do not continue*, §. 10.
      8. *How far those Conditions, whereby the Liberty of making Testaments is hindered, be lawful or unlawful*, §. 11.
      9. *How far those Conditions are lawful or unlawful, whereby the Liberty of Marriage is hindered*, §. 12.
      10. *How far those Conditions are lawful, which do prohibit Alienation*, §. 13.
      11. *Within what Time the Condition may or ought to be performed, no certain Time being limited by the Will*, §. 14,
      12. *Of the Understanding of this Condition*, If he die without Issue, §. 15.
      13. *What Order is to be taken concerning the Administration of the Goods of the Deceased, whiles the Condition of the Executorship dependeth unaccomplished*, §. 16.
    - 2. Appearance thereof, that is to say, due Proof; which is to be made / by / Witnesses, / Writing, / §. 21.
  - 2. Particular or peculiar to some Kind of Testaments, *viz.* / Of a
    - 1. Solemn Testament, §. 23.
    - 1. Unsolemn Testament, §. 24.
    - 2. Written Testament, §. 25.
    - 2. Unwritten Testament, §. 26.

A N

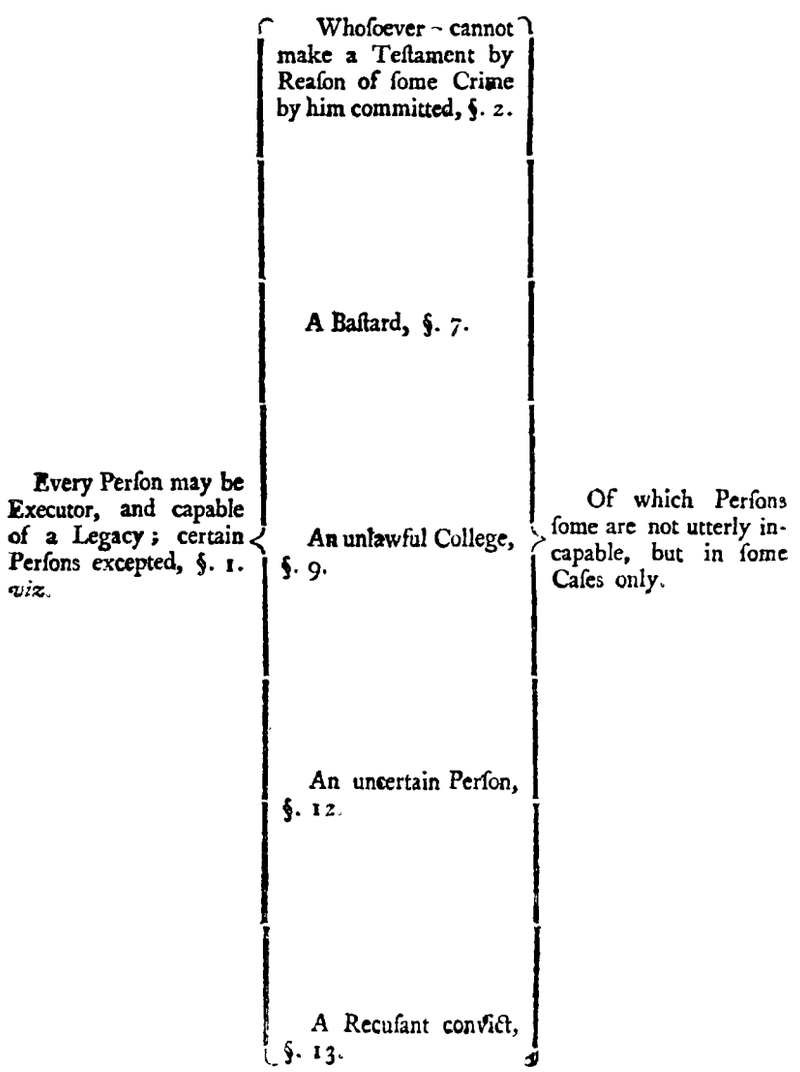
ANALYSIS of the Fifth Part:

Shewing who may be

EXECUTOR,

And is capable of a

LEGACY.



A N

AN
ANALYSIS of the Sixth Part; *viz.*
OF THE
OFFICE
OF AN
EXECUTOR.

- The Office of an Executor Testamentary is,
  - 1. Wherein for his better Instruction, amongst other things, (*ut in* §. 14.) he is to consider the Estate of
    - 1. The Testator; and therein especially what Goods and Chattels did belong unto him, and what Debts he did owe, and whether he were Executor and Administrator to another, §. 3.
    - 2. Himself; namely, whether for his Skill, Diligence and Fidelity, he be able and fit to undertake the Office, §. 3.
    - 3. Others with whom he is to deal, chiefly of his Co-Executor, if any be.
  - 2. Which Things considered, if he resolve to
    - 1. Undertake the Executorship, then it doth belong to his Office to
      - 1. Cause an Inventory to be made; wherein these Things are needful to be known; *viz.*
        1. *Whether it be of Necessity that an Inventory be made,* §. 6.
        2. *What Things are to be put into the Inventory,* §. 7.
        3. *Within what Time the Inventory is to be made,* §. 8.
        4. *What Form is to be observed in making of the Inventory,* §. 9.
        5. *What are the Benefits and Effects of an Inventory,* §. 10.
      - 2. Procure the Will to be proved; wherein it behoveth the Executor to know
        1. *Before whom the Testament is to be proved,* §. 11.
        2. *By whom,* §, 12.
        3. *When,* §. 13.
        4. *In what Form,* §. 14.
        5. *What Fees are due in this Behalf,* §. 15.
      - 3. Pay Debts, Legacies, and Mortuaries. And here he is to learn,
        1. *How far the Executor is bound to pay Debts and Legacies,* §. 16.
        2. *Which Debts are first to be discharged, in case there be not sufficient to pay all,* §. 16.
        3. *How much is due for Mortuaries.*
      - 4. Make an Account. And here he is to be advertized,
        1. *How needful it is,* §. 17.
        2. *To whom it ought to be made,* §. 18.
        3. *When,* §. 19.
        4. *In what Manner,* §. 20.
        5. *What is the End and Effect thereof,* §. 21.
    - 2. Refuse the Executorship, then he must beware that he do not administer as Executor: *viz.* He must not do any Act which is proper to an Executor; as to receive the Testator's Debts, or to give Acquittances for the same, &c. But other Acts of Charity or Humanity; as to dispose of the Testator's Goods about the Funerals, to feed his Cattle lest they perish, to keep his Goods lest they be stolen; these Things may be done without Danger.

AN

A N

ANALYSIS of the Laſt Part:

Shewing by what Means

TESTAMENTS or LAST WILLS

Become void.

- Sometimes the Teſtament
  - 1. Even from the Beginning is either void or voidable, wholly or in Part, by reaſon
    - 1. The Teſtator is ſuch a Perſon as cannot make a Teſtament,
    - 2. The Things bequeathed are not deviſable,
    - 3. The Form of the Diſpoſition is unlawful,
    - 4. The Executor or Legatary is incapable of the Executorſhip, or Legacy, } §. 1.
    - 5. Of Fear, §. 2.
    - 6. Of Fraud, §. 3.
    - 7. Of Immoderate Flattery, §. 4.
    - 8. Of Error; in which Caſe we are to diſtinguiſh whether the Error do reſpect the
      - Perſon, Name, Quality } of the Executor, or Legatary, §. 5.
      - Name, Subſtance, Quantity, Quality } of the Thing bequeathed, §. 5.
    - 9. Of Uncertainty; wherein it is material whether this Uncertainty have Relation to the
      - 1. Executor, or Legatary, §. 7, 8.
      - 2. The Thing bequeathed, §. 10.
      - 3. Date of the Teſtament, §. 11.
    - 10. Of Imperfection; which is either in reſpect of
      - 1. Solemnity. or 2. Will. } §. 12.
    - 11. The Teſtator hath no Meaning to make his laſt Will; as when he ſpeaketh
      - unadviſedly, jeſtingly, boaſtingly, } §. 13.
  - 2. Being good at the Beginning, is afterwards made void, either in reſpect of
    - 1. The whole Teſtament; as by
      - 1. A later Teſtament, §. 14.
      - 2. Revoking, 3. Cancelling } the Teſtament made, §. 15, 16.
      - 4. Alteration of the State of the Teſtator, §. 17.
      - 5. Forbidding or hindering the Teſtator to make another Teſtament, §. 18.
      - 6. Refuſal of the Executorſhip, §. 19.
    - 2. Particular Legacies only; which Thing doth happen by divers Means; whereof ſome have Relation to
      - 1. The Fact of the Teſtator; as by
        - 1. Ademption of Legacies, §. 20.
        - 2. Tranſlation §. 21.
      - 2. The Fact of the Legatary; as if the Legatary
        - 1. Become Enemy to the Teſtator,
        - 2. Accuſe the Teſtament of Falſity,
        - 3. Refuſe to perform the Charge impoſed in reſpect of the Legacy,
        - 4. Apprehend the Legacy of his own Authority,
        - 5. Die before the Legacy be due, §. 23.
        } §. 22.
      - 3. Other Occaſions; eſpecially if the Thing bequeathed be deſtroyed, §. 24.

A BRIEF

TREATISE

OF

Teſtaments and *Laſt Wills*, &c.

The Firſt Part.

§. I. Whether a Teſtament and Laſt Will be both one Thing, and of the manifold Acceptance of the Word *Teſtament.*

1. *No Uſe of ſolemn Teſtaments here in* England.
2. *A Teſtament and Laſt Will have divers Definitions.*
3. *Teſtament taken generally and ſpecially.*
4. *The general Signification of this Word Teſtament.*
5. *Teſtament, taken generally, doth not differ from a Laſt Will.*
6. *Laſt Will is a general Word, comprehending all Kinds, both of Laſt Wills and Teſtaments.*
7. *A Teſtament, according to the Definition thereof, is one Kind of Laſt Wills*, viz. *wherein an Executor is named.*

IT may ſeem that a Teſtament and a Laſt Will are both one Thing, and that there is no Difference betwixt the one and the other, at leaſt here in *England*; becauſe we (1) have no neceſſary Uſe [a] of thoſe ſolemn Teſtaments, in the Making whereof the Preſence of ſeven Witneſſes, together with the Obſervation of many more Ceremonies, is neceſſarily requiſite by the Civil Law [b].

[a] Tract de rep. Ang. l. 3. cap. 7. Lindwood in c. ſtatutum. ver. probatis. Tit. de Teſt. l. 3. provincial. conſtit. Cant. Bract. de legibus & conſuetud. Angliæ, lib. 2. c. 25. verb. fieri autem. Haddon l. de reforma. Legum Eccleſiaſt. Angl. Tit. de teſta. c. 2. Peckius in c. privilegium de reg. jur. 6. [b] L. Hac conſultiſſima. C. de Teſta. §. ſed cum paulatim Inſtit. de Teſt. ordin. & infr. ead. part. §. 9.

On the contrary, it ſeemeth that they are not both one, becauſe they have divers Names, which doth import Diverſity of Things [c]; and becauſe (2) they have different Definitions; for it is received for an infallible *Axiom*, that the Definitions being different, the Things defined are diverſe [d]. As for the former Reaſon, it may be thus anſwered: That though our Teſtaments be unſolemn; yet it doth not follow that therefore we have no Teſtaments, or that our Teſtaments are therefore mere Laſt Wills. For an [e] *unſolemn* Teſtament is a Teſtament, and that properly or in ſtrict Interpretation, as hereafter ſhall be confirmed, when we ſhall ſpeak of unſolemn Teſtaments [f].

[c] L. ſi idem C. de Codicil.

[d] Everar. & Olden. loco a definitione.

[e] (i. e.) *when it hath not thoſe Solemnities required by the Civil Law.*

[f] Infra. eadem part. §. 10.

And ſo the Concluſion ſeemeth rather neceſſary than probable, that a Teſtament and a Laſt Will are not both one, but different. Notwithſtanding, this Concluſion is not ſimply or perpetually true, for in ſome Reſpects they are both one, though in other Reſpects they differ.

Underſtand therefore, that (3) a Teſtament may be taken two Ways; largely and ſtrictly [g]. It is ſaid (4) to be taken largely or generally, when the Signification of the bare Name or Word Teſtament (which in *Latin* is *Teſtamentum*) is had in Conſideration [h], This Word *Teſtamentum* is as much as *Teſtatio mentis* [i], that is to ſay, a Teſtifying or Witneſſing of the Mind. So writeth the worthy Emperor [k] *Juſtinian*, after *Sulpitius* [l]. Which Definition others (without Cauſe) do ſharply reprehend [m], as though *Juſtinian* or *Sulpitius* had contended to deliver the very Etymology of the Word Teſtament, and not a certain Alluſion rather of the Voice only [n]. When this (5) Word Teſtament is uttered in this general Senſe, it differeth not from a Laſt Will [o]; and any Laſt Will, be it a Codicil, or other Kind, may be ſo termed a Teſtament, that is to ſay, a Teſtifying or Declaring of the Mind [p]. And hence it is, that not only in our Speech, but in our Writings alſo, we uſe the Terms of *Teſtament* and *Laſt Will* indifferently, or one for another.

[g] Bar. in l. 1. c. de ſacroſanct. Eccleſiaſt. col. pen. Gloſſ. in L. 1. ff. de Teſt.

[h] Gloſ. & DD. in d. 1. ff. de Teſta.

[i] Lib. 2. inſtit. Tit. de Teſta. ord. in princ.

[k] Juſtinian *firſt collected all the* Roman *Laws into one Body, by the Help of Ten of the moſt able Men of the Empire, and theſe were compil'd from the* Gregorian, Theodoſian *and* Hermogenian Codex's, *and called by him* Codex Juſtinianus; *and the Laws of the Judges and Magiſtrates, which were diſperſed in* 2000 *Volumes, he,* anno 533, *reduced to* 50, *and called them the* Digeſts *or* Pandects: *He compoſed Four Books of* Inſtitutes, *being an Abridgment of the Texts of all the Laws; and the new Laws which he made himſelf he compiled in one Volume, and called* The Novels.

[l] Covar. in Rub. de Teſt. ord. ex. j. par. n. 1.

[m] Nempe Aul. Gel. & Lau. Villa, acerrimus Latinæ linguæ aſſertor, qui hanc deductionem libero ore derident; ille l. 6. c. 12, hic lib. eleg. 6. cap. 3. Quod (ut aiunt) non magis dicatur teſtamentum, a mente, quam calceamentum, quam ſalſamentum, quam ornamentum, &c.

[n] Ita enim conantur hanc notam excuſare Alciatus in L. Tabernæ, ff. de verb. ſig. Covar. in Rub. de teſt. ex. j. part. n. 2. Inter Etymologiam vero & alluſionem hoc intereſt, quod illa in verbi veritate radicata rem ipſam potius quam vocem interpretatur; iſta nuda quadam vocabuli ſimilitudine contenta, vocem magis quam rem refert. Olden. & Everard. loco ab. Etymolog.

[o] Bar. in L. j. C. de ſa. ſan. eccl. col. pen. Bal. in L. omne verbum. C. Com. de leg. & Lindw. in c. ſtatutum. verb. ult. vol. de teſt. l. 3. Provincial. conſtit. Cant.

[p] Gloſ. in l. 2. de conſtit. Pecu. C. Bar. Bal. & Lindw. ubi ſupr.

It is taken ſtrictly, when it is accepted according to that Definition invented by *Ulpianus* [q], hereafter enſuing [r]: And being taken in that Senſe, it differeth from a Laſt Will [s], yet not as oppoſite thereunto, but as the *ſpecial* differeth from the *general* [t]; for every Teſtament is a Laſt Will, but every Laſt Will is not a Teſtament. To ſpeak more plainly, thus they differ. A (6) Laſt Will is a general Word, and agreeth to every ſeveral Kind of Laſt Will or Teſtament [u]: But a Teſtament (7) properly underſtood, is one Kind of Laſt Will, even that wherein *Executor* is named. For by the naming of an Executor it differeth from the reſt [x].

[q] L. j. ff. de Teſtam.

[r] §. Prox.

[s] DD. poſt. Gloſ. in d. L. j. ff. de Teſtam.

[t] DD. ubi ſupr.

[u] Man. tit. de conject. ult. vol. l. 1. tit. 5. ubi tradit quinque ſpecies ult. vol. quarum 1 eſt Teſtamentum. Simo de Præt. de interp. ult. vol. l. 2. dub. j. fol. 9. & Phil. Franc. in Rub. de teſt. lib. 6. qui locis prædictis alias inſuper ſpecies referunt.

[x] Infr. §. n. 19.

'Tis now become a common Conveyance of Eſtates, the Original whereof was ſoon after Property was ſettled *per jus naturale*, but the Solemnities were introduced *per jus Civile*; ſo that Wills as to their Subſtance are *de jure Gentium*; but as to their Forms and Solemnities, they are *de jure Civili*.

§. II. The

§. II. The Definition of a Teſtament.

1. *What a Teſtament is.*
2. *The Definition of a Teſtament unworthily reprehended.*

A Teſtament (1) is defined after this Manner: *Teſtamentum eſt voluntatis noſtræ juſta ſententia, de eo quod quis poſt mortem ſuam fieri voluit*[y]. A Teſtament is a juſt Sentence of our Will, touching that we would have done after our Death.

[y] L. j. de Teſt. ff.

Some (2) there be, who do cenſure this excellent Definition to be defective[z], though unworthily[a]; (but nothing can content a curious Head:) whoſe Error is detected, and the Definition ſuſtained, in the Expoſition following[b].

[z] Accurſ. & Paul. de caſt. in d. l. j.

[a] Quam viz. definitionem, utpote perfectiſſimam, nemini licere in controverſiam revocare, refert Michael Graſſ. Theſaur. com. op. §. Teſtam. q. j.

[b] In §. prox. n. 19.

'Tis by others defined to be an Appointment of an Executor or teſtamentary Heir, made according to the Formalities preſcribed by Law; and here 'tis to be obſerved, that the Heir in Blood may be a Teſtamentary Heir, if he is inſtituted by the Will of the Teſtator, and accepts the Succeſſion, for his Will is in the Place of a Law, both as to the Teſtamentary Heir and Executor, and Legatees, wherein his Intention is chiefly to be regarded.

§. III. A brief Expoſition of the former Definition.

1. *Definitions dangerous in Law.*
2. *The Cauſe of this Danger.*
3. *It is rare if the Definition be ſo juſt that it cannot be overthrown.*
4. *A juſt or perfect Definition profitable to many Purpoſes.*
5. *The Occaſion of this Expoſition.*
6. Juſt, *hath divers Significations.*
7. Juſt, *oppoſed to that which is wicked.*
8. *The Teſtator may not command any Thing againſt Juſtice or Equity*, &c.
9. Juſt, *taken for full or perfect.*
10. *The Teſtament muſt not be unperfect.*
11. *Imperfection teſtamentary twofold.*
12. *Teſtament unperfect in reſpect of Solemnity.*
13. *What Solemnities be requiſite in making of Teſtaments.*
14. *Teſtament unperfect in reſpect of Will.*
15. *Whether the Teſtament being unperfect in reſpect of Will be void.*
16. *A farther Meaning, by the Word* Juſt *being taken for perfect.*
17. *Every perfect Will is not a perfect Teſtament.*
18. *Their Error detected who reprehend this Definition.*
19. *What maketh a Teſtament to differ from other Kinds of Laſt Wills.*
20. *Of the manifold Significations of this Word* Sentence.
21. *Teſtaments ought to be made with Deliberation.*
22. *Such as have not the Uſe of Reaſon cannot make a Teſtament.*
23. *Unadviſed Speeches make not a Teſtament.*
24. *How it may be proved that the Teſtator had* animum teſtandi.
25. *Boaſting*

25. *Boaſting Words do not diſpoſe.*
26. *Two Kinds of judicial Sentences,* Interlocutory *and* Definitive.
27. *Contrary Effects of theſe Two Sentences.*
28. *Teſtaments compared ſometimes to an interlocutory Sentence; ſometimes to a Definitive.*
29. *The Will of the Teſtator, the Governor of the Teſtament.*
30. *The Meaning of the Teſtator is to be ſought diligently, and kept faithfully.*
31. *Meaning to be preferred before Words.*
32. *Fear and Fraud make void the Teſtament.*
33. *The Teſtator muſt be* ſui juris.
34. *The Teſtator not to be referred to another Man's Will.*
35. *How a Teſtament doth differ from other Sentences.*
36. *The Teſtament is of no Force until the Teſtator be dead.*

DEfinitions (1) are ſaid to be dangerous in Law [c]: The Cauſe (2) may be attributed to the Multitude of different Caſes [d], the Penury of apt Words [e], the Weakneſs of our Underſtanding [f], and the Contrariety of Opinions [g]. For amongſt ſuch Variety of Things, either we cannot diſcern the true Eſſence thereof [h], or we do not aptly deliver what we conceive [i]; or elſe theſe Perils being paſt, at leaſt in our own Opinions, yet are we ſtill ſubject to the rigorous Examination of all Sorts of Men, and muſt abide the Verdict and Sentence of the deepeſt Judgments [k]. And (3) it is rare [l], if one Man at leaſt, among ſo many, do not eſpy ſome Defect or Exceſs in the Definition, whereby the ſame may be ſubverted [m]. Which Thing, if it come to paſs, then the Definition being overthrown, all the Arguments drawn from thence, and whatſoever elſe dependeth thereupon, is in Peril to be overturned [n]. No Marvel then if Definitions be reported to be dangerous.

[c] L. Omnis definitio de reg. in ff. ubi Accur. cum ſuis ſequacibus, definitionem pro reg. ſumendam putavit. Sed probabilior mihi videtur Cagnoli & aliorum opinio, quod lex iſta loquitur de definitione proprie & dialectice ſumpta.
[d] L. neque. L. non poſſunt. ff. de Legibus.
[e] L. 4. d. præſ. ver. ff.
[f] L. 2. C. de ver. ju. Macagnan. de communi opin. in principio.
[g] C. quia diverſitatem. in prin. de conceſ. præben. extr.
[h] Id quod nemo non fatetur eſſe difficillimum. Dec. Cognol. & alii in d. L. omnis definitio.
[i] Quum plura ſint negotia quam vocabula. l. 4. de præſcrip. v. F.
[k] L. 1. §. j. ff. de dolo. DD. in Rub. Sol. matr. ff. Sane ut mirum ſit videre, & ibi, & paſſim alibi, quomodo pugnant inter ſe homines doctiſſimi in definiendis rebus.
[l] Quod autem ſic ſcribitur, (Parum eſt, &c.) in d. l. omnis definitio, ſic legitur a Budeo, (Rarum eſt:) quæ lectio facilius ſuaderi poteſt, quum alias maneat ſermo ſubobſcurus.
[m] Mantic. de conject. ult. vol. lib. 1. tit. 4. in fin.
[n] Quod ſi definitionem pro regula intelligendam ſentias cum Accurſio, unde quæſo illa magna periclitatio ſubverſionis? Eſto enim tot quaſi milites occidi quot patiatur except. regula. At horum dux interim (nempè ipſa regula) non ideo proſternitur, immo firmat exceptio regulam in non exceptis: ita ut probe contra ſeipſum hac ſimilitudine fretus diſputat Accuſius, dum admoneat ut quiſque ſtet firmus regulæ, velut Bononienſi Carotio, licet aliqui capiantur de ejus cuſtodibus: Et ſic licet aliqui caſus a regula ſubtrahantur, reſpondeatur (inquit) hoc eſſe ſpeciale, & ſic regula erit firma in non exceptis. Hæc ille in gloſſ. in d. l. omnis definitio. Quod nihil aliud eſt quam ſi dixiſſet, regula lædi quidem poteſt, ſubverti non poteſt. Quare cum definitio de qua hic agitur adeo ſit ſubjecta periculo, ut omnino ſubverti poſſit, certe non magis erit regula, quam illud neſcio quod Carotium Bononienſe eſt definitio.

But if, contrary to the common Courſe, the Definition be ſo juſt, that it cannot be iuſtly reproved [o], (4) then 'tis profitable, and ſo neceſſary, that from thence, as from the Root and Fountain, every Diſcourſe ought to take his Beginning [p]; the rather, for that thereby (amongſt many other Benefits iſſuing from the Definition [q]), the whole Nature or Subſtance of the Thing defined (which otherwiſe, for the Abundance of the Matter thereto belonging, may ſeem infinite) is plainly declared, and that in few Words [r].

[o] Nempe quod ſingulos complexa caſus convertatur cum definito. Id quod vel neceſſarium eſſe ad conſtituendam legitimam definitionem contendit acriter Cagnolus contra communem, immo negans contrariam eſſe communem. in d. L. omnis definitio.
[p] Cic. lib. 1. offic. quod tamen Cagnolus intelligit de definitione Nominis, non Rei. Cujus ſi vera ſit opinio, & nos id ipſum obſervavimus, dum quid & quotuplex ſit hæc vox Teſtamentum ſuperius tradidimus.
[q] Ut argumentationes, quæ ſæpiſſime a definitione deducuntur, quarum quanta ſit vis & utilitas, copioſe & eleganter Olden. Topic. legal. loco a definitione.
[r] Gloſſ. & DD. maxime Cagnol. in d. l. omnis definitio. Everard. loco a definitione.

Now therefore (5) leſt this Definition of a Teſtament, not being rightly underſtood, might ſeem either more dangerous or leſs commodious than it deſerveth; I thought it expedient to add this Expoſition following.

Firſt, Whereas a Teſtament is defined to be a *Juſt Sentence* [s], we are to conſider that this (6) Word *Juſt* hath divers Significations in the Law. Sometimes (7) it is oppoſed to that which is wicked, or repugnant to Juſtice, Equity, and to good Manners [t]. Being taken (8) in this Senſe, we are to underſtand, that the Teſtator cannot command any Thing that is wicked, or againſt Juſtice, Piety, Equity, Honeſty, *&c.* [u] For Things unlawful are alſo reputed impoſſible: And therefore if the Teſtator ſhould command any ſuch Thing in his Teſtament, the ſame is not to be obſerved [x]. As if he ſhould will any Man to be murdered; for this is againſt the Law of God [y]: Or if he ſhould command his Body to be caſt into the River; for this is againſt Humanity [z]: Or if he ſhould command his Goods to be burned; for this is againſt Policy [a]: Or if he ſhould command any ridiculous Act, or prejudicial only to his own Credit and Dignity; as if he ſhould will his Burial or Funeral to be ſolemnized with May-games, or Morrice-dances; for this were to manifeſt his Folly, or at leaſt to make Queſtion whether he were of ſound Mind and Memory [b]. In theſe and the like Caſes the Executor, in not performing the Commandments or Requeſts of the Teſtator, is not only holden excuſed, but is highly commended [c].

[s] Quam Alciatus ſubſtantialem appellat, l. 9. parergon, c. 2. perfectam Bartolus in L. j. de teſta. ff. immo perfectiſſimam, nec in controverſiam revocandam, dicit Graff. d. §. teſt. q. 1.

[t] Summa Hoſtien. tit. de teſta. §. quid ſit. Sichar. in Rub. de teſta. C. n. 2.

[u] L. Nemo de Leg. j. L. filius de cond. inſt. ff. Bar. in d. L. j. de teſt. n. 3. de Rebuff. in L. juſta. ff. de verb. ſig. fol. 888.

[x] L. conditiones. L. filius de cond. inſtit. ff. Summa Hoſtien. d. tit. de teſta. §. quid ſit. & Rebuff. in d. L. juſta.

[y] Exod. c. 25.

[z] Quidam ff. de cond. inſtit. Sichar. in Rub. de teſta. n. 2. C.

[a] Expedit enim Reip. ne quis re ſua male utatur. §. Sed & major. inſtit. De his qui ſui vel al. jur.

[b] D. L. quidam & L. condit. el. 1. & 2. ff. de cond. inſt. Sichard. in d. Rub. de teſta. C. Caſtrenſ. in L. Non oportet C. de his quibus ut indig.

[c] D. L. quidam, & ibi Ang. Paul. de caſtr. & alii, & videas etiam Mantic. de Conject. ult. vol. li. 2. tit. 5. n. 9.

Furthermore (9) this Word *Juſt* is ſometimes taken for *full* or *perfect* [d]. So we ſay, when a Woman hath gone her full Time with Child, (which is commonly Nine Months [e],) that ſhe hath gone her juſt Time. So we uſe to ſay juſt Age, for full and perfect Age; and ſo, juſt Weight, juſt Meaſure, juſt Number [f], for full and perfect Weight, Meaſure, Number [g]. The (10) Word *Juſt*, being thus underſtood, that is to ſay, for full and perfect, all teſtamentary Defects and Imperfections are thereby excluded. Wherefore the Teſtament ought to be full, complete and perfect; otherwiſe being an unperfect Teſtament, it is ſaid to be no Teſtament [h].

[d] Bar. in d. L. 1. ff. de teſta. Sichard. in Rub. de teſta. C. Covar. in Rub. de teſta.

[e] Tiraquel. in Rub. L. ſi unquam C. de revoc. donan. verb. ſuſceperit, ubi non minus eleganter quam diligenter docet quamdiu mulier uterum ferre valeat.

[f] L. Filius familias de leg. 3. ff. Rebuff. in L. juſta. de verb. ſig.

[g] Covar. in Rub. de teſt. ext. pri. part. n. 4. ejuſd. farinæ eſt quod ibi dicitur, Juſtus exercitus, juſta claſſis, juſta pugna, juſtæ ſtationes, juſtum volumen, juſtus error, &c. Adde quod ſcribit Minſing. in Rub. L. de teſta. lib. 2. inſtitut. jur. Civil.

[h] §. Ex eo inſtit. Quibus mod. teſt. infir.

The (11) Teſtament is ſaid to be imperfect in Two Reſpects, *viz.* in Reſpect of *Solemnity*, and in Reſpect of *Will* or Meaning [i]. The (12) Teſtament is imperfect in Reſpect of Solemnity, wherein ſome of the legal Requiſites, neceſſary in the Making of a Teſtament, be wanting [k]. Hereupon divers Writers have interpreted the Word *Juſt* in this Definition to ſignify *ſolemn* [l], that is to ſay, furniſhed with ſuch due Rites and Formalities as the Law requireth. Howbeit (13) all the ſuperfluous Solemnities of the Civil Law are vaniſhed out of the Kingdom of *England*. Only thoſe Solemnities remain which be *Juris Gentium* [m]. Which being the Common Law to all Nations through the World, ought to take Place, and is to be obſerved, unleſs

[i] Bar. & alii in L. hac conſultiſſima. §. Ex imperfecto. C. de teſta. Boer. dec. 240.

[k] Sichard. in d. §. ex imperfecto.

[l] Viglius in tit. de teſta. ordin. inſt. n. 29. Minſ. eod. n. 5. Sichard. in Rub. de teſta. C. n. 2.

[m] Infr. ead. part. §. 9.

leſs by the particular Laws of ſome Nations or Countries, written or cuſtomary, ſome other Proviſion be eſtabliſhed or practiſed [n]. So that with us it is ſufficient, to the Effect of Executing the Teſtament, that the Will and Mind of the Teſtator do appear by Two ſufficient Witneſſes [o]: Saving where Lands, Tenements and Hereditaments are deviſed; for then the Solemnity of Writing is alſo neceſſary, and that to be done in the Life-time of the Teſtator [p]. The (14) Teſtament is ſaid to be imperfect in Reſpect of Will, which the Teſtator hath begun, but cannot finiſh as he would [q]. If therefore (15) whiles the Teſtator is in making his Will, and whiles he yet intendeth to proceed farther at that preſent, either by adding or diminiſhing any Thing to or from his Teſtament, or by altering any Thing therein, (as commonly Men do uſe to put in, put out, and change many Things before they make an End [r],) he be ſuddenly ſtricken with Sickneſs, Inſanity of Mind, or other Impediment, whereby he cannot then finiſh or perfect the ſame as he would, and ſo die: This his Teſtament, being imperfect in reſpect of Will, is therefore void, even touching that which was done, which he did intend then to alter, before he had made an End [s]; by Reaſon of the Defect of the Teſtator's Conſent, without which the Teſtament is not of any Value [t]. Nevertheleſs, not every Teſtament which is termed imperfect in reſpect of Will, is by and by wholly of no Force: For in many Caſes, yea and for the moſt part, ſuch Teſtaments are effectual for ſo much as is already done, as elſewhere more abundantly is confirmed [u].

[n] Nam jus gentium omnibus eſt commune, & per totum terrarum orbem etiam hodie viget, niſi aliud ſpecialiter ſit proviſum vel jure ſcripto, vel ſtatuto, vel conſuetudine. Zaſ. in Q. Jus civile. ff. de inſt. & jure, n. 15.

[o] Lindw. in ſtatutum. verb. proba de teſta. l. 3. provincial. conſtit. Cant.

[p] Stat. H. 8. an. 32. c. prim.

[q] Bar. Sichard. & alii in L. hac. conſultiſſima. §. ex imperfecto. C. de teſta. L. ſi quis ita. ff. eod. tit. L. furioſ. C. qui teſta. fac. poſ.

[r] Jul. Clar. §. teſtam. q. 7. in fin.

[s] D. L. ſi is qui. & L. furioſ. Jaſ. & Sichard. in L. pen. de Inſtit. & ſub. C.

[t] Sichard. in d. L. hac conſultiſſima. §. Ex imperfecto. de teſta. C. n. 1.

[u] Infr. part. 7. §. xii.

[x] *Where Lands are deviſed.*

By our Law, tho' it is required, that Wills ſhould be in [x] Writing, yet formerly it was not neceſſary they ſhould be written *in the Life-time of the Teſtator*; for if Notes were taken by another, but by the Direction of the Teſtator, and afterwards put into Writing in the Form of a Will, and the Teſtator had died before it was ſhewed or read to him, this was a good Will, as appears by the Caſes following:

32 H. 8. cap. 1. 34 H. 8. c. 5. Sackvill *v.* Brown, *and* Brown's *Caſe.* Keilw. 209. 1 And. 34. S. C. 1 Brownl. 44. *See* Dyer 72. Hinton's *Caſe.* S. P. Weſt's *Caſe,* Moor 177.

ff. Soon after the Making the Statutes 32 *H.* 8. and 34 *H.* 8. The Teſtator on his Death-bed deſired another to *write his Will,* who took *ſhort Notes of it,* and went home to write it in Form, and ſoon returned with it written, but before he came the Teſtator was dead; this was adjudged a good Will within the Statute.

T. S. intending to go beyond Sea *wrote a Letter,* in which he appointed, that his Lands ſhould go after ſuch a Manner, and to ſuch Perſons; and this was held a good Will *in Writing.*

2 Leon. 35. 3 Leon. 79.

The Teſtator deviſed his Lands *by Parol,* but another Perſon, without his Knowledge *or Appointment,* put it into Writing; and this was adjudged a good Will, it being put into Writing in the Life-time of the Teſtator.

Naſh *v.* Edwards, Cro. Eliz. 200. 1 Leon. 113. S. C.

But in the next Year there ſeems to be a contrary Judgment, (*viz.*) the Teſtator deviſed his Lands by Parol, and *T. S.* being preſent, recited the Words to him, and asked, if that was his Will; he affirmed that it was, then *T. S.* put it into Writing, for his own Remembrance, in the Life-time of the Teſtator, but without his Appointment, and for that Reaſon this was held a void Deviſe; but if it

had been read to him, and he approved it, in ſuch Caſe it had been as good as if written by his Appointment.

The Teſtator gave Inſtructions 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 the Will of the Teſtator. Downhall *v.* Cateſby, Moor 356. Goldſ. 126. S. C.

There is yet (16) alſo a farther Meaning included in this Word *Juſt*, in that it doth ſignify full or perfect, which Meaning is this: That the Teſtament ought to be complete, not only in reſpect of Solemnity, and of Will, as is aforeſaid; but alſo that it ought to be perfect, in this Reſpect eſpecially, that there be no Want of any Thing which is neceſſary to the Conſtitution and Denomination of a Teſtament[y]. For if (17) it do contain only a perfect Declaration of the Teſtator's Will, and want that which is requiſite to make a Teſtament, it may well be termed a perfect Will; for a Codicil, a Legacy, a Gift in Reſpect of Death, *&c.* (they are all perfect in their Kind[z]:) But it cannot be termed a Teſtament, much leſs a perfect Teſtament. This (18) Senſe and Signification of the Word *Juſt*, becauſe ſome Interpreters did not perfectly apprehend, they did reprehend the Definition as not perfect, nor convertible with a Teſtament; that is to ſay, not agreeable to a Teſtament alone, but common to every Kind of Laſt Will[a]: for that they alſo were perfect every of them in their ſeveral Kinds[b]. Wherein nevertheleſs they were deceived; for the Perfection here meant, is an abſolute Perfection, ſuch as none other Laſt Will hath but only a Teſtament, even that Perfection that giveth both Name and Nature to a Teſtament[c]. So that the Defect was not in the Definition, but in their Underſtanding. To conclude therefore, this Perfection eſpecially being here underſtood by this Word *Juſt*, which is proper and peculiar to a Teſtament, the Definition remaineth irreprehenſible, and is agreeable to a Teſtament only; excluding both Codicil, Legacy, Gift in Regard of Death, and every other Kind of Laſt Will[d], having every Thing, and wanting nothing, which appertaineth to the Eſſence of a Teſtament[e].

[y] Bar. in L. j. de teſta. ff. Viglius & Minſing. in tit. de teſt. ordin. in princ. Alciatus in L. Tabernæ. de verb. ſig. ff. Covar. in Rub. de teſt. extr.

[z] Paul. de caſtr. in d. L. j. de teſt. ff. Nec ideo muſca dicitur imperfectum animal quod ſit minor Elephante, inquit Covar. in Rub. de teſt. extr. j. part. n. 3. Bar. in d. L. j. de teſt. ff. Minſing. in d. tit. de teſta. ord.

[a] Accurſ. & Paul. de caſtr. in d. L. j. de teſt. ff.

[b] Paul. de caſtr. in d. L. prim.

[c] Bar. (omnium Legiſtarum facillime princeps) Bald. Ange. Imol. Aretin. in d. L. j. d. teſt. ff. Porcus Viglius, Minſing. Juſt. de teſta. ordi. Vaſq; de ſucceſ. crea. L. j. in prin. n. 26.

[d] Bar. in d. L. prim. de teſta. ff. Viglius & Minſing. in d. tit. de teſta. ordin. Inſtit. Covar. in Rub. de teſta. ext. part. prim.

[e] Mantic. de conject. ult. vol. l. 1. tit. 4. n. 10. Graſſ. Theſaur. com. op. §. teſta. q. 1. Covar. in Rub. de teſta. extr. n. 14. 3 & 4. ſup. §. 1. in fin.

Now (19) if you will ask me what Kind of Perfection, or what ſpecial Thing this is, without which the Will, how perfect ſoever, is no Teſtament, I have told it before[f]. It is the Naming or Appointment of an Executor[g], (who in the Civil Law is called *Hæres*[h], Heir.) This is ſaid to be the Foundation, the Subſtance[i], and is indeed the true formal Cauſe of the Teſtament[k], without which a Will is no proper Teſtament[l], and by the which only the Will is made a Teſtament[m].

[f] Supr. §. 1. in fin.

[g] L. j. de hæred. inſt. L. pri. de vulg. & pup. ſub. L. Hæredes palam de teſt. L. quod per manus de Codicil. ff. §. ante inſtitut. de Lega. Bracton de leg. & conſuetud. Angl. lib. 2. c. 26. Brooke Abridge. tit. teſt. n. 20. Plowd. in caſu inter Greisbrook & Fox, & plenius infr. part. 4. §. 2.

[h] D. §. ante. inſt. de deleg. Haddon de refor. leg. eccleſiaſt. Angl. Doct. & Stud. lib. 2. c. 11. tract. de repub. Angl. l. 3. c. 9. ita ut Executor teſtamentarius, jure quo nos utimur, non tam re quam nomine differt ab eo quem jus civile nuncupat hæredem, infr. 6. part.

[i] D. §. ante inſt. de delega.

[k] Weſen. in part. tit. de teſt. ff.

[l] L. quod per manus. ff. de Codicil. Brooke Abridg. tit. teſta. n. 20. Plowden in caſu inter Greisbrook & Fox, fol. 276. Haddon ubi ſupr.

[m] Vide infr. part. 4. §. 1, 2.

Sentence. This Word (20) *Sentence* is a general Word, and hath many Significations. It is ſometimes taken for a ſhort pithy Saying

of

of a grave or wiſe Man [n]. It is ſometimes taken for a Decree pronounced by the Judge [o], and in other Places it is otherwiſe taken [p]. It is taken in this Place for an adviſed Purpoſe, or Deſtination of the Teſtator's Mind [q], which Purpoſe or Deſtination of Mind being reduced into Act (otherwiſe retained within the Compaſs of ſole Cogitation, it is no Teſtament, but an abortive Will [r],) is termed a *Sentence* by a certain Excellency [s]: Becauſe in (21) our Teſtaments, we ſhould ſhew our ſelves both wiſe and juſt; repreſenting as it were the Perſons of grave Men, and of juſt Judges. And certainly if all the Actions of this Life ought to be performed with Wiſdom and Conſtancy; if nothing ought to be attempted without Conſideration and Premeditation [t]: How much more ought the laſt Act of our Life, the Memorial of our Immortality [u], even our Teſtaments and Laſt Wills, to be framed with Deliberation, and built upon ſound and conſtant Determination [x]? Without which it hath neither Shape nor Savour of a Teſtament; nor is able to ſtand for a Teſtament, when it ſhall be tried or proved in the Form of Law [y]?

[n] Cujus generis ſunt ſententiæ Ciceronis, Proverbia Salomonis, & aliorum hominum, cum Philoſophorum, tum Theologorum, dicta memorabilia.

[o] Paul. de caſtr. Lancel. Doc. in L. j. de teſta.

[p] Veluti pro opinione, pro perſuaſione. Coratius de com. opin. in prin. Dictionar. Calepin. verbo Sententia. Quandoque ſumitur pro pœna a jure inflicta. Franc. in c. fin. de conſtit. 6. in fin.

[q] Juſta ſententia quid ſignificet, breviſſime & elegantiſſime (ut ſemper ſolet) æquiſſimus ille juris interpres Johannes Oldendorpius. Hoc eſt, (inquit) vera ac omnibus modis abſoluta animi deſtinatio, quam ſi ad alias in vita deliberationes conferas, longe excellit omnes. De action. claſſ. 5. in prin.

[r] Bald. in L. quidam cum filio fa. ff. de hæred. inſtit. Tract. de Conjecturat. mente. teſt. def. fol. 14. n. 6. ubi refert eam eſſe voluntatem abortivam quæ conſiſtit intentione, & non etiam in diſpoſitione. Quod fortaſſe fuit in cauſa, quod Anglus quidam vertendo dictam definitionem a latino idiomate in vulgare noſtrum ſic tranſtulit; Juſtam ſententiam, *A true Declaration.* Terms of Law, Verb. Teſtament.

[s] Covar. in Rub. de teſt. ext. j. part. n. 4.

[t] Cic. lib. 1. offic.

[u] Olden. de action. claſſ. 5. in prin.

[x] Adde quod quæ vivi facimus dicimuſve, ea aliquando non magni ſunt momenti, & ſi quid diſpliceat, obvia nobis ſuut emendandi remedia & formulæ: Verum quod in cauſam mortis deſtinamus, id ita proponimus, ut poſt hanc vitam nunquam mutari velimus. Old. ubi ſupra.

[y] Conſule Socin. Jun. conſ. 179. vol. 2. Hotto. conſ. 5. vol. j. Hyero. Franc. in L. quicquid de reg. jur. ff.

Seeing then every Teſtament is a *Sentence*, we may note divers Things. Firſt, that (22) ſuch Perſons as have not the Uſe of Reaſon or Underſtanding, [z] as mad Folks or Ideots, are juſtly excluded from making Teſtaments [a]: For their Devices being full of Folly, their Deeds muſt needs be void of Diſcretion; and their Words are utterly unworthy the Name of a Sentence: Howſoever ſometimes, more by Chance than by Cunning, they may ſeem to ſpeak wiſely [b].

[z] *See* Part 2. c. 3, 4.

[a] Vide infr. part. 2. §§. 2, 3, 4, 5 & 6.

[b] Jaſ. & Dec. in L. furioſi. C. de teſta. contra Jo. Andr. Panor. & alios in c. ad noſtram de conſuetud. ext. cum temperament. tamen, ut infra. 2 part. §. 4.

Secondly, (23) that tho' the Teſtator be of perfect Mind and Memory, nevertheleſs if he ſpeak any Thing unadviſedly; as if a Man, when he is in perfect Health, be demanded who ſhall be his Executor, or have his Goods after his Death, (which Queſtion is very common), he forthwith nameth ſome Perſon to whom he ſaith, he will leave his Goods after his Death; this is not to be taken for a Teſtament or Laſt Will, neither is that Perſon named to be admitted Executor, nor to have his Goods [c]; unleſs it be (24) proved, that the Teſtator, at the Time when the Words were ſpoken, had *Animum Teſtandi*, that is to ſay, a Mind or Purpoſe then and thereby to make his Teſtament or Laſt Will. Which Mind and Purpoſe muſt be proved by Circumſtances [d], (for Words alone are not ſufficient [e]:) As that he ſettled himſelf ſeriouſly to the Making of his Laſt Will, being then perhaps very ſick, or required them which were preſent to bear Witneſs of his Will [f], *&c.* Otherwiſe, even as the Opinion of a Judge, being delivered privately, or extrajudicially, touching the Event of any Suit, is but a Prediction of that which is likely to enſue, and not the Sentence itſelf, or final Judgment, whereby the Controverſy

[c] L. Lucius L. Divus. de mil. teſta. ff. §. plane. inſtit. de mil. teſta. Soc. Jun. conſil. 179. vol. 2. quod videas velim & perlegas diligenter.

[d] Menoc. de Arb. jud. caſu 496. ubi copioſe reſpondet, quæ & quot conjecturæ ſufficiant.

[e] Gloſſ. in §. plane. Inſtit. de teſta. mil. Hottoman conſ. 5. vol. 1.

[f] Gloſſ. & DD. in d. L. Divus. Menoch. in d. caſ. 496. & plenius infra part. 7. §. 13.

verſy is decided[g]: (Which Sentence ought to be pronounced judicially, after due Examination of the Cauſe†:) So when the Teſtator doth only foretel, whom at ſome other Time he doth intend to make his Executor, this is but a Signification of a future Act*, and ſo not the Teſtament it ſelf, wherein is required preſent and perfect Conſent[h]. (25) Much leſs is that to be taken for a Teſtament, when as any Man raſhly, or jeſtingly, affirmeth that he will make this or that Man his Executor, when he hath no Meaning at all, neither at that Time, nor any other Time, to make him Executor[i]. For without Meaning, or Conſent of Mind, the Teſtament is altogether without Life; and is no more a Teſtament, than a painted Lion is a Lion.

[g] Lex ſtipulatione. C. de ſenten. & interlocu. Spigel. Lexic. verb. ſentent.
† Bar. & alii in d. L. ex ſtipulatione. Vantius Nullit. viz. ex defect. proceſſ. n. 69.
* Pariſ. concil. 24. lib. 3. n. 10.
[h] Hottoman. lib. 1. conſil. 5. Corne. conſ. 149. vol. 2.
[i] Alciat. parerg. l. 2. c. 12. Pariſ. conſil. 127. vol. 1. n. 40, 41, Hyero. Franc. in L. quicquid de reg. jur. ff. n. 3.

Thirdly, By this, that a Teſtament is termed a *Sentence*, there is a farther Conſideration offered to our Underſtanding, in Reſpect of the Analogy betwixt a judicial Sentence and a Teſtament. Of judicial (26) Sentences there be Two Sorts; the one *Interlocutory*, the other *Definitive*[k]. An *interlocutory* Sentence is a Decree given by the Judge, betwixt the Beginning and Ending of the Cauſe, touching ſome incident or emergent Queſtion[l]. A *definitive* Sentence is a final Decree, whereby the principal Cauſe and Controverſy is decided, in condemning or abſolving the Party convented[m]. Theſe (27) Two Sentences have theſe Two contrary Effects. The one of them, that is to ſay, the Sentence *interlocutory*, may be revoked at any Time, ſo long as the principal Cauſe dependeth undecided[n]. But the *Sentence definitive* cannot be revoked[o]. The (28) Teſtament of any Man, ſo long as he liveth, may be compared to a *Sentence interlocutory*. For it may be revoked or altered at any Time, and as oft as the Teſtator will, whiles he liveth, even until the laſt Breath[p]: And of theſe the Laſt Will prevaileth[q]. But after his Death, it is compared to a *Sentence definitive*[r]: And as it cannot be revoked by the dead Man, ſo it ought not to be revoked by any other, but obſerved as a Law[s], and executed as the *Sentence* of a Judge[t]. And they are to be puniſhed that do hinder the Execution of the ſame[u].

[k] Tit. de ſent. & interl. om. Jud. C.
[l] Specul. de ſentent. §. ſpecies.
[m] Specul. ubi ſupra.
[n] L. quod inſtit. ff. de re jud. c. cum ceſſante, de app. extr. L. ſi quis jusjurand. §. fin. C. de reb. cred.
[o] L. Judex de re jud. l. 1. de queſtion. ff. L. 1. de reſcind. ſen. C. Rebuff. in d. L. quod juſſit, ubi multifariam limitat utramque concluſionem.
[p] L. 4. de Adimen. leg. ff. c. Matthæ. de celeb. miſſ. ext. [q] §. poſteriore. Inſtit. Quib. mod. teſt. infir. [r] D. c. Matthæ. [s] L. j. C. de ſacroſanct. Eccl. [t] Olden. de action. claſſ. 5. in prin. [u] c. Statut. de teſta. cant. c. ſtatuimus. eod. tit. l. provincial. conſtit. Ebor.

It followeth in the Definition (*of our Will*) concerning this Word *Will*. It (29) is written, that the Will or Meaning of the Teſtator is the Queen or Empreſs of the Teſtament[x]. Becauſe the *Will* doth rule and govern the Teſtament, enlarge and reſtrain it, and in every Reſpect moderate and direct the ſame[y], and is indeed the very efficient Cauſe thereof[z]. The (30) Will therefore and Meaning of the Teſtator ought before all Things to be ſought for diligently; and being found, ought to obſerved faithfully[a]. And (31) as to the ſacred Anchor ought the Judge to cleave unto it, pondering not the Words, but the Meaning of the Teſtator. For although no Man be preſumed to think otherwiſe than he ſpeaketh[c], for the Tongue is the Interpreter of the Heart[d]; yet cannot every Man utter all that he thinketh, and therefore are his Words ſubject to his Meaning. And as the Mind is before the Voice, (for we conceive before we ſpeak,) ſo is it of greater Power; for the Voice is to the Mind, as the Servant is to his Lord[e]. Here might ſeveral Authorities be produced to

[x] Sichard. in Rub. de teſta. C. n. 2. in fin.
[y] L. in conditionibus de cond. & de mon. L. ſi mihi. §. in legat. de leg. j. ff.
[z] Weſenb. in tit. de teſta. ff.
[a] Vide infr. part. 4. §. 4.
[c] §. noſtra. inſtit. de leg.
[d] Weſenb. in tit. de verb. ſig. ff.
[e] D. L. Labeo.

confirm this Point, but the following Inſtances ſhall ſuffice in this Place.

ff. The Intention of the Teſtator is called by my Lord *Coke*, the Pole Star, to guide the Judges in the Expoſition of Wills; and where the Intention is doubtful, it ought be interpreted by the Law of Nature, becauſe that Law is inherent in all Mankind, and therefore it muſt be preſumed, that the Intention of the Teſtator was governed by that Law rather than by any other Law whatſoever.

And tho' by our Law the Intention is more to be conſidered than the Words, yet ſuch [f] Intention muſt be collected out of the Words, and it muſt conſiſt with the Law; and as by the Intention of the Teſtator an *Eſtate in Fee* may be created without apt Words, ſo it ſhall be a good *Deſcription of the Perſon* who ſhall take by the Deviſe, though he is not particularly named in the Will: As for Inſtance, the Teſtator deviſed his Lands to *T. S.* to ſell and diſpoſe *at his Will and Pleaſure*; this is a *Fee-ſimple*, becauſe by theſe Words he muſt intend, that he ſhall have ſuch an Eſtate.

[f] 1 Roll. Rep. 318. 3 Leon. ca. 80. 4 Leon. ca. 101. Lutw. 763. S. P.

Dyer 333. A Woman had Two Husbands ſucceſſively, and had Iſſue a Son by each of them, then the laſt Husband deviſed his Lands to her for Life, Remainder *to her next of Kin*; now each of the Sons were equally of Kin to her, for they were both her Sons; but adjudged, that the youngeſt ſhall have the Lands, becauſe it ſhall be conſtrued, that the Intention of the Teſtator was, that his own Son ſhall have them before his Son in Law.

2 And. 17. Deviſe of a Term of Years to a Man and *his Heirs*; adjudged, that the Deviſee ſhall have the *whole Term*, for tho' 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.

But theſe Matters I hold more fit to be handled elſewhere, after the Reader is better inſtructed in other material Parts of this Diſcourſe of more eaſy Comprehenſion: Which Method if I ſhould not obſerve, I might fall into *Scylla* or *Charybdis*, leading the Reader into Difficulty, or into Deſpair of attaining that which is propounded. For which Cauſe it is excellently written by *Juſtinian*, *Si ſtatim rudem adhuc & infirmum animum ſtudioſi multitudine ac varietate rerum oneraverimus, horum alterum aut deſertorem ſtudiorum efficiemus, aut cum magno labore ejus, ſæpe etiam cum diffidentia, (quæ plerumque juvenes avertit,) ſerius ad id perducemus, ad quod leviore via ductus ſine magno labore, & ſine ulla diffidentia, maturius perduci potuiſſet* [g].

[g] Lib. 1. Inſtit. tit. de Juſt. & jure, §. 1.

Where it is ſaid in the Definition *of our Will*, the Interpreters do gather by this Word *Our*, that the Teſtator ought to enjoy all Liberty and Freedom in Making of his Will; that is to ſay, full Power and Ability to withſtand all Contradiction and Countermand [h]. And therefore (32) if the Teſtator be compelled by Violence, or urged by Threatnings, to make his Teſtament; it being made by juſt Fear, is uneffectual [i]. Likewiſe if he be circumvented by Fraud, the Teſtament loſeth his Force [k]. For though honeſt and modeſt Interceſſion, or Requeſt, is not prohibited; yet theſe fraudulent and malicious Means, whereby many are ſecretly induced to make their Teſtaments, are no leſs deteſtable than open Force [l]. For the Will of the Teſtator ought to be free, and therefore if it can be proved, that he was compelled by Violence, or any other unlawful Means, to make a Te-

[h] Mantic. de conject. ult. vol. lib. 1. tit. 3. n. 10.

[i] L. 1. Quod me cauſa L. fin. Si quis aliquem teſtari prohib. ff. & infr. part. 7. § 2.

[k] D. L. fin. Si quis aliq. teſtari prohib. ff. & infr. par. 7. §. 3.

[l] Olden de Action. claſſ. 5. in prin. & infr. part. 1. §. 3.

ſtament, it would not only be void, but by the Civil Law the Author of this Attempt would be puniſhed as for a Crime, according to the Quality and Circumſtances of the Fact.

Moreover by (33) Occaſion of the aforeſaid Words, *our Will*, the Writers do collect that the Teſtator muſt be *ſui juris*, that is to ſay, free Man; not in Subjection, as Bondmen and other like Perſons [m], of whom Mention is made hereafter [n], which have not Liberty to make a Teſtament.

[m] L. qui in poteſtate. ff. de teſta. & L. ſi quæramus eod.
[n] Infr. part. 2. §. 7, 8, &c.

Likewiſe (34) by theſe Words, *our Will*, are excluded thoſe Wills which depend of another Man's Will [o]. Wherefore if the Teſtator ſhould refer his Will to the Will of another; as if he ſhould ſay, I give thee Leave and Authority to make my Will, and to make Executor for me who thou wilt, *&c.* if hereupon thou didſt make a Will in his Name, and didſt name an Executor for him, yet this Will is void in Law [p]. For as thy Soul is not my Soul, ſo thy Will is not my Will, nor thy Teſtament my Teſtament [q].

[o] L. captatorias. C. de teſt. mil.
[p] Bar. in L. quidam ff. de reb. dub. n. 7. Bald. in L. Executorem. C. de excep. rei jud. n. 5. Jo. And. Gem. & Franc. in c. ſi part. de teſta 6. Pariſ. conſil. 38. vol. 3. n. 60. & infr. part. 4. §. 11.
[q] Bald. (qui nihil ignoravit) & Angel. in L. captator. C. de mil. teſt. Pariſ. con. 38. n. 40.

By the ſame Law, (*i. e.*) the Civil Law, if the Teſtator, inſtead of chuſing and naming an Executor, had in his Will directed, that ſuch a Perſon ſhould be his Executor *whom* T. S. *ſhould name*, this would have no Effect, becauſe it would want that which is eſſential to a Will, (*viz.*) that it ſhould be the proper Will of the Teſtator himſelf; and it would be contrary to Equity, that the Choice of an Executor ſhould depend on any other Perſon than he who hath Right to diſpoſe his Eſtate, becauſe the Teſtator might be deceived in the Perſon; and beſides, he who is thus choſen would be more obliged to him who choſe him than to the Teſtator himſelf, who had the Right to name him.

Furthermore, by Force of theſe Words, *of our Will*, the (35) Teſtament being termed a *Sentence*, differeth from thoſe other Sentences which are not of Will: That is to ſay, from that Sentence which is the Saying of ſome grave Man; for that is not a Sentence of Will, but of Reaſon [r]: And from the Sentence of a Judge; for that is not a Sentence of Will, but of Juſtice [s]. And howſoever the Teſtator may declare his Sentence, that is to ſay, his Teſtament, as he will [t]: Yet the Judge may not pronounce his Sentence as he will [u]; but he muſt judge according to that which is alledged and proved [x], (although peradventure as a private Man he know the ſame to be untrue,) ſaving in certain Caſes [y], which, becauſe they are impertinent to this Diſcourſe, are not here to be handled.

[r] Paul. de caſtr. in d. L. j. de teſta. ff.
[s] Paul. de caſtr. & Lancel. dec. in d. L. j. de teſta.
[t] In teſtamentis ſtat pro ratione voluntas. Mantic. de conject. ult. vol. l. 6. tit. 14. n 2.
[u] Inſtit. tit. de offic. Jud. in princ.
[x] L. Illicitus. §. veritas. ff. de offic. præſidis.
[y] Tu, ſi placeat, videas Jo. Olden. æquiſ. juriſ. interp. Coriſ. l. 3. Miſcel. 20. Covar. lib. 1. var. reſolut. c. 1. Gentil. Diſputat. vj. & generaliter Legiſtas in d. L. Illicitus. & Canoniſtas in c. j. de offic. ord. extr.

It followeth in the Definition, *touching that which we would have done after our Death.* By which Words a Teſtament differeth from all other Sentences proceeding from our Will, and from whatſoever Actions which take their Effect in the Life-time of the Teſtator [z]. For (36) a Teſtament reſpecteth that which is to be performed after the Death of the Teſtator: And therefore ſo long as he liveth, the Teſtament is of no Force; but doth take his Strength and is confirmed by the Teſtator's Death [a]. By theſe Words alſo we may collect the material and the final Cauſe of every Teſtament. Which Thing,

[z] Paul. de caſtr. in d. L. j. de teſta. ff. Minſing. in tit. de teſta. ordin. Inſtit. Covar. in Rub de teſta. extr. part. j.
[a] L. 4. de Adim. leg. ff. c. Matthæ. de celeb. miſſ. extr

Thing, becauſe I have more amply inlarged hereafter, let this ſuffice, which hath been ſpoken, for a Taſte only of ſuch Fruit as grow in this Garden.

§. IV. The Definition of a Laſt Will.

1. *What a Laſt Will is.*
2. *Wherein the Definition of a Laſt Will doth agree or differ, with or from the Definition of a Teſtament.*
3. *Of the Difference betwixt theſe Two Words,* Lawful *and* Juſt.
4. *Of the Difference betwixt theſe Two Words,* Diſpoſition *and* Sentence.

A Laſt Will is thus defined; (1) *Ultima voluntas eſt legitima diſpoſitio de eo quod quis poſt mortem fieri velit* [b]. A Laſt Will is a lawful Diſpoſing of that which any would have done after Death. This (2) Definition differeth not from the Definition of a Teſtament, ſaving in Two Words; that is to ſay, inſtead of *juſta ſententia*, a juſt Sentence, which is in the Definition of a Teſtament, here is *legitima diſpoſitio*, a lawful Diſpoſing [c]. Now if we ſhall conſider the Difference betwixt theſe Words, *juſta ſententia*, and *legitima diſpoſitio*, then ſhall we underſtand the full Difference betwixt a Laſt Will and a Teſtament, (either being underſtood according to this Definition:) For in the reſt both the Definitions do agree; and that which hath been or may be ſaid of the one, may alſo be verified of the other.

Lawful (3) and *juſt* do thus differ: This Word *Lawful* hath not all the Significations which be included in the Word *Juſt*. For albeit by this Word *Lawful* is excluded whatſoever is wicked, or whatſoever is contrary to Juſtice, Piety, or Equity, or contrary to good and wholſome Manners, as well as by the Word *Juſt* [d]: And although the Word *Lawful* may alſo ſignify ſolemn, or furniſhed with ſuch due Rites as Law requireth [e], as well as the Word *Juſt* doth: Albeit alſo that the Word *Lawful* in ſome Senſe do ſignify perfect [f], that is to ſay, not wanting any Thing which the Teſtator meant to utter [g]: Yet it doth not ſignify perfect in ſuch an excellent or ſpecial Senſe as doth the Word *Juſt* [h]; that is to ſay, having ſuch Perfection as is requiſite for the Form of a Teſtament, and is proper thereunto; namely, the Appointing of an Executor, by the which Form a Teſtament differeth from all other Laſt Wills, of what Kind ſoever they be [i].

This Word (4) *Diſpoſitio* is ſometimes taken for a Quality of the Mind, or unperfect Habit, that is to ſay, an Inclination or Affection [k]. In this Place it doth ſignify an Act proceeding from a firm Purpoſe or Reſolution [l], like as the Word Sentence in the former Definition [m]. And albeit this Word *Sentence* ſeems to inſinuate a greater Heed, or a more diſcreet Conſideration to be taken in the Diſpoſing that we would have done after our Death, than the Nature of this Word *Diſpoſition* doth inforce: Yet no Laſt Will is of any Force *ſine animo diſponendi*, no more than is the Teſtament *ſine animo teſtandi* [n].

[b] Francif. Mantica de conject. ult. vol. lib. 1. tit. 4. n. 18.

[c] Supr. §. 2. & §. 3.

[d] Spiegel. Lexic. verb. legitimum.

[e] Gloſſ. in c. conſanguinei, de ſen. & re jud. extr.

[f] L. Certo. §. ult. de ſerv. ruſt. præd. verb. legitima latitudo.

[g] Supra §. 3. n. 9.

[h] Mantic. de conject. ult. vol. l. 1. tit. 4. n. 10.

[i] Supra §. 3. n. 19.

[k] Jo. Caſus Oxon. tractat. dialect. ij. part. c. 20, 21.

[l] Mantic. de conject. ult. vol. lib. 1. tit. 4.

[m] Supra §. 3. n. 20.

[n] Vide infra part. 1. §. 13.

§. V. The

§. V. The Definition of a Codicil.

1. *This Word Codicil ſignifieth a little Book.*
2. *A Codicil rightly defined.*
3. *How the Definition of a Codicil doth agree with the Definition of a Teſtament, or differ from it.*
4. *The Signification of the Word* Juſt *in this Definition of a Codicil.*
5. *A Teſtament is called a great Will, and a Codicil a little Will.*
6. *Of the Invention of Codicils.*
7. *Codicils may be made in Writing, or without Writing.*
8. *Codicils may be made, either by him who hath made a Teſtament, or who dieth Inteſtate.*
9. *Who muſt pay the Legacies given in a Codicil by him who dieth Inteſtate.*
10. *Codicils be reputed Part of the Teſtament, whether they be made after, or before the Teſtament.*
11. *Codicils and Teſtaments do agree in the efficient Cauſe; but they have contrary Effects.*

Codicillus, a Codicil, is a Diminutive of *Codex* [a], a Book. And ſo this (1) Word *Codicil*, being rather *Latin* than *Engliſh*, doth ſignify a little Book or Writing [b]. The Reaſon wherefore it is ſo called, doth ſtraightways appear.

[a] Codicillus a Codice. Codex rurſus dicitur a caudice, ſiquidem codex ſignificat contextum tabularu' quæ priſcis temporibus aptabantur cera ad ſcribendum, tametſi loco tabularum pergameni & chartæ commodior ſucceſſerit uſus. Olden. de actio. claſſ. quint. in princ. Spiegel. Lexic. verb. codicil. [b] Gloſſ. in Rub. inſt. de codicil.

A Codicil is diverſly defined of divers. In my Opinion (2) is it rightly defined after this Manner [c]: *Codicillus eſt voluntatis noſtræ juſta ſententia de eo quod quis poſt mortem ſuam fieri velit, abſque Executoris conſtitutione* [d]. A Codicil is a juſt Sentence of our Will, touching that which any would have done after their Death, without the Appointing of an Executor. Which Definition (3) doth agree almoſt Word for Word with the Definition of a Teſtament: Saving that ſome Words are here expreſſed which are there omitted [e], *abſque Executoris conſtitutione*, without the Appointment of an Executor. By Force of which Words the Codicil is made to differ from a Teſtament: For a Teſtament can no more conſiſt or be without an Executor, than a Codicil can admit an Executor [f]. By the (4) ſame Words alſo is reſtrained that ſpecial Signification of the Word *Juſt*, which in the Definition of a Teſtament importeth that ſingular Perfection and proper Form whereby a Teſtament differeth from all other Kinds of Wills [g]. For here this Word *Juſt* is not only deſtitute of that peculiar Senſe; but it doth not ſo much as ſignify ſolemn, or furniſhed with teſtamentary Rites or Formalities [h]. For a Codicil is an unſolemn Laſt Will [i]. So that by the Word *Juſt* in this Definition is excluded that which is unlawful, and that Perfection only included which may ſtand with the Nature of a Codicil [k]. Whereupon (5) the Writers conferring a Teſtament and a Codicil together, and perceiving

[c] Sic enim a pleriſque definitur, ut ſit ultima voluntas minus ſolennis abſque hæredis inſtitutione. Quæ definitio vix arridet, ut qua vix intelligam qui differat codicillus a legato, quum & iſtud videatur voluntas ultima abſque hæredis inſtitutione, nec magis ſolennis, nec minus perfecta, qu'm eſt codicillus. Paulus de caſtr. in L. j. de teſt. ff. Covar. in Rub. de teſt. ext. par. j. n. 3. [d] Mantic. de conject. ult. vol. lib. 1. tit. 8. [e] Supra §. 2. [f] Intellige, directo, nam oblique ſeu per fidei commiſſum hæreditas codicillis jure relinquitur. §. Codicillus inſtit. de Codicil. Adde Vaſque de ſucceſſ. creat. lib. 3. §. 25. Ubi regula extat Ampliationibus octo, & ſex Limitat. ornata. [g] De qua ſupra §. 3. n. 19. [h] Minſing. Inſtit. de Codicil. [i] Graſſ. Theſaur. com. op. §. Codicil. in prin. [k] De cujus vocabuli ſignificatione, ſupra §. 4. n. 3.

ceiving the Odds betwixt the one and the other, they call a Teſtament a great Will, and a Codicil a little Will [l]. A Codicil by Intendment of Law, is either to alter, explain, add, or ſubſtract ſomething from the Will; and wherever it is added to a Teſtament, and the Teſtator declares that it ſhall be in Force; in ſuch Caſe, if the Will happens to be void for want of thoſe Solemnities required by Law, yet it ſhall be good as a Codicil, and be obſerved by the Adminiſtrator; it is true, *Executors* cannot regularly be appointed in a *Codicil*, but yet they may be ſubſtituted according to the Will of the Teſtator, and the Codicil is ſtill good.

[l] Accurſ. & alii in Rub. de codicil Inſtit. Sichard. in Rub. de Codicil. C.

That it alters a Will, appears in the following Caſe, (*viz.*) The Teſtator being ſeiſed in Fee, deviſed the Lands to his Wife *dum ſola, &c.* and after the Determination of that Eſtate, then to his and her Heirs, paying to his Wife 26*l. per Annum* during her Life, and charged other Lands of which he was ſeiſed in Fee to pay Annuities to younger Children, and with 1000*l.* to be paid to his Daughter; afterwards by a Codicil he deviſed all his Lands to Truſtees, and their Heirs, to the Uſe of his eldeſt Son and his Heirs, for ſo long Time as he or they ſhould ſuffer the Wife and Children quietly to enjoy the Annuities and Legacy; and if he ſhould interrupt them, then he deviſed all his Fee-ſimple Lands to his Wife, and to his Two younger Sons and their Heirs; adjudged, that this Deviſe to his eldeſt Son by this Codicil was good, and that he had it not by Deſcent but by Purchaſe, becauſe the firſt Part of his Will was corrected by the Codicil. *Moor* 726. *Digby*'s Caſe.

So where the Teſtator deviſed all his real and perſonal Eſtate to his Executors, and their Heirs, in Truſt, to pay his Debts and Legacies, (*viz.*) 1800*l.* Legacy to one *Winter*, the like Sum to one, *Bampfeild*, and 2500*l.* to one *Warr*, and ſeveral other Legacies; and having 7500*l.* in his Cloſet, he by a Codicil declared his Mind to be, that the Money in his Cloſet ſhould be diſpoſed by *Anne Rogers*, among ſuch poor People, and in ſuch Manner as he had directed her; and the Legatees having received their ſeveral Legacies out of the Money in the Cloſet, it was decreed they ſhould repay it, and that the ſame ſhould be applied according to the Direction and Intention in the Codicil. *Rep. of Caſes in Chancery, fol.* 460.

When (6) Codicils were firſt invented, they were uſed very ſparingly [m], that is to ſay, inſtead of a Teſtament, when the Teſtator had not Opportunity to make a Teſtament, by Reaſon of the manifold Solemnities thereof [n]; which were omitted in a Codicil [o]: Or elſe as Additions to the Teſtament made, when as any Thing was omitted in ſuch a Teſtament, which the Teſtator would add; or ſomething put in, which the Teſtator, upon better Advice, would detract. Which Emendation of the Teſtament was always done by Way of Codicil [p]. And this was that Reaſon (whereof I ſpoke before) wherefore this Kind of Laſt Will was termed a Codicil; that is to ſay, a little Book or a little Writing.

[m] Nempe ut condimenti, non ut cibi, fuit olim codicillorum uſus. Olden. ubi ſupra.

[n] L. Codicillorum. §. codicilli. ff. de codicil. Inſtit. eod. tit. in prin.

[o] §. Ult. inſtit. de cod.

[p] L. conficiuntur in prin. de jure codicil. Cujacius in tit. de codicil. C.

Concerning (7) the divers Kinds of Codicils, although it be denied by ſome, that there be ſuch Two Kinds of Codicils as there is of Teſtaments, *viz.* written and nuncupative [q]: Yet it is granted of the more Part, that a Codicil may be made either in Writing or without Writing [r].

[q] Vaſque de ſucceſ. crea. l. 3. §. 35. n. 27. Graſſ. Theſaur. com. op. §. codicil. n. 10.

[r] Gloſſ. in Rub. de codicil. C. Minſing. in Rub. de codicil. Inſtit. Weſenb. in tit. de jure codicill ff. quamvis abuſive dici codicillos oporteat conditos ſine ſcriptis, quum codicillus ſit parvula ſcriptura.

Moreover it is granted of all, that a (8) Codicil may be made either by him which dieth Inteſtate, or by him which dieth with a Teſtament [s].

[s] L. conficiuntur in prin. ff. de jure Codicil. §. non tantum. Inſtit. de codicil.

If the (9) Codicil be made by that Perſon which dieth Inteſtate, the Legacies therein given muſt be paid by him that ſhall have the Adminiſtration of the Goods of the Deceaſed, as if he were Executor [t]. Inſomuch that if the Codicil were made long before the Death of the Party now deceaſed, who after the Making of the Codicil did beget a Child, to whom the Adminiſtration of the Goods is committed, (whether he were born during his Father's Life, or after his Father's Death;) he ſhall be charged with the Payment of the Legacies, as if he had been born when the Codicil was made [u].

[t] L. ab inteſtat. ff. de codicil. §. non tantum. Inſtit. de codi. Brook Abrid. tit. Deviſe, n. 35.

[u] D.L. ab inteſtat. L. ſi quis. §. ſed etſi. L. gravi. L. is qu. ff. de jure codicil. Minſing. in D. §. non tantum Jaſ. Sichard. & alii in L. j. C. de codicillis.

If the (10) Codicil be made by him which hath a Teſtament; then whether the ſame were made before or after the Teſtament [x], it is reputed for Part and Parcel of the Teſtament [y], and is to be performed as well as the Teſtament: Unleſs being made before the Teſtament, it appears to be revoked in the Teſtament, or be contrary to that which is contained in the Teſtament [z].

[x] L. conficiuntur. ff. de codicil. de Cod.
[y] Vigel. Method. jur. civil. part. 4. lib. 9. c. 23. in prin.
[z] Minſing. poſt. gloſſ. in d. §. Non tantum. Inſtit. de codicil.

And where there is a Teſtament, the Executor is bound by the Civil Law to execute the Diſpoſitions of the Codicils; but where there is no Teſtament, then the Heir at Law or next of Kin is to do it in the ſame Manner as an Executor, who is inſtituted by a Teſtament. 2 *Dom.* 140.

Codicils (11) and Teſtaments do both agree in the efficient Cauſe, (as they do in divers other Things [a]:) Yet nevertheleſs they have many contrary Effects [b]. They agree in the efficient Cauſe, becauſe every Perſon which may make a Teſtament, may alſo make a Codicil; and whoſoever cannot make a Teſtament, the ſame Perſon cannot make a Codicil [c].

[a] Roland. B. non de arte Notari, ubi refert 4 caſus, in quibus convenit codicillus cum teſtamento, part 2. c. 8. fol. 561.
[b] In lib. quem appellant, Flores ultimarum voluntatum, octo numerantur differentiæ inter codicillos & teſtamenta, quarum tamen pars maxima jam eſt extincta.
[c] Bar. & alii in L. 2. de leg. 1. j. Graſſ. Theſaur. com. op. §. codicil. n. 2. qui affirmat hoc procedere non ſolum prohibente jure, ſed etiam prohibente ſtatuto teſtar.

They have divers contrary Effects. For firſt, whereas no Man can die with Two Teſtaments, (becauſe the latter doth always infringe the former [d]:) Yet a Man may die with divers Codicils, and the latter doth not hinder the former, ſo long as they be not contrary [e]. Another contrary Effect is this: If Two Teſtaments be found, and it doth not appear which was the former or latter, both Teſtaments are void [f]. But if Two Codicils be found, and it cannot be known which was firſt or laſt, and one and the ſame Thing is given to one Perſon in one Codicil, and to another Perſon in another Codicil; the Codicils are not void, but the Perſons therein named ought to divide that Thing betwixt them [g].

[d] §. poſterior. Inſtit. Quib. mod. teſta. infir.
[e] L. cum proponat. C. de codicil.
[f] L. ultim. & ibi DD. de Edict. divi Adria. toll. C.
[g] Gloſſ. & DD. in d. L. cum proponat. Graſſ. Theſaur. com. op. §. codicillus, ubi atteſtatur hanc op. eſſe com.

The Teſtator made his Will, and *T. S.* Executor; afterwards by a Codicil he declared, that his Will was, that *R. R.* ſhould have the Bond in which he was bound to pay 20 *l.* to the Teſtator, and died, *T. S.* proved the Will but not the Codicil; thereupon *R. R.* exhibited a Bill in Chancery againſt him to compel him to prove it; but adjudged, that no Relief could be had in Equity till the Codicil was proved,

proved, and that muſt be in the Spiritual Court; and that when it was proved and made Part of the Will, then it would be proper to be relieved againſt this Bond. *Hardes* 96. *Took* verſus *Fitz-John.*

The Husband made his Will and his Wife Executrix, and after ſome Legacies, he deviſed the reſiduary Part of his Eſtate to her, who afterwards died in his Life-time; then he made a nuncupative Codicil, and gave to *George Robinſon* all that he had given to his Wife, and died; adjudged, that this nuncupative Codicil was good notwithſtanding the Statute of Frauds; for the Wife dying before the Teſtator, the Deviſe of the *Reſiduum* to her was void, and by Conſequence there was no Will as to that Part, therefore the nuncupative Codicil was *quaſi* a Will for ſo much, and was no Alteration of the Will in reſpect to that, becauſe there was no ſuch Will, its Operation being deſtroyed. *Raym.* 334.

So where the Teſtator made his Will, and deviſed ſeveral Legacies, and then a Legacy of 50 *l.* to *D. B. by Fraud or Force*, this laſt Legacy is void, and therefore the Teſtator by his Codicil may deviſe it to another, for 'tis an original Will as to that 50 *l.* *Raym.* 335.

The Teſtator made a Will and his Brother Executor thereof, to whom he deviſed all his real and perſonal Eſtate; afterwards he married, and by a Codicil made his Wife Executrix; now, tho' the perſonal Eſtate was expreſly deviſed to the Brother, and not to him as Executor only, yet it was decreed for the Executrix. 1 *Vern.* 23.

The Teſtator by his Will deviſed 1000 *l.* to his Wife in full Satisfaction of her Dower, *&c.* and about Five Years afterwards by a *Codicil* written by himſelf in theſe Words, (*viz.*) *Whereas there is* 1000 l. *given to my Wife by my Will, I now give* 1600 l. *and what was in my former Will to my Wife, and that his former Will ſhould ſtand in Force notwithſtanding this Codicil*; decreed, that ſhe ſhould have the 1600 *l.* and not both theſe Sums. *Rep. of Caſes in Chancery, fol.* 290.

The Teſtatrix deviſed a Jewel to her God-daughter, wiſhing her all Happineſs, and 500 *l.* afterwards by a Codicil ſhe deviſed to the ſame Perſon 500 *l.* in Silver; in this Caſe it was decreed, that ſhe ſhould have both theſe Sums. *Ibid. fol.* 294.

The Teſtatrix by her Will *inter alia* gave to her Nieces *A. B.* and *C.* pecuniary Legacies, *viz.* to *A.* and *B.* 200 *l.* a-piece, and to her Niece *C.* 400 *l.* She afterwards by a Codicil bequeathed to her ſaid three Nieces *A. B.* and *C.* 50 *l.* a Year, for their Lives. Held, that the Annuities by the Codicil, though given to the ſame Perſons that were pecuniary Legatees by the Will, and though of greater Value, yet ſhould not be taken to be a Satisfaction for the pecuniary Legacies by the Will; becauſe the Annuities are not *einſdem generis*, and the Annuitants might die the next Day after the Death of the Teſtatrix, and conſequently the latter Gifts, inſtead of being a Bounty, might be a Prejudice, if taken to be in Satisfaction of the Legacies by the Will. *Maſters* v. *Maſters*, 1 *Williams* 421.

Finally it is to be noted, that there be divers Words which are common, or indifferent either to make a Codicil or a Teſtament. In which Caſe, whether the Judge is to pronounce for a Codicil or a Teſtament, is hereafter diſcuſſed [h].

[h] Inf. parte 4. §. 5.

§. VI. The

§. VI. The Definition of a Legacy.

1. *What is a Legacy.*
2. *Four Things to be conſidered in this Definition.*
3. *Every Legacy proceedeth of the Liberality of the Teſtator.*
4. *How a Legacy differeth from a Gift in regard of Death, or from other Gifts.*
5. *Not lawful for the Legatary to take his Legacy by his own ſole Authority.*
6. *Legacies payable, as well by the Adminiſtrator as by the Executor.*
7. *Divers Kinds of Legacies in Times paſt.*
8. *The Diſtinction of Legacies confounded.*
9. *Who may give and receive Legacies, and how Legacies may be diſpoſed, and of good Legacies.*

A *Legacy* (otherwiſe termed by our common Lawyers a *Deviſe* [a]) is (1) a Gift left by the Deceaſed, to be paid or performed by the Executor or Adminiſtrator [b]. There be other Definitions of a Legacy, which I omit, becauſe this one is ſufficient [c]. Wherein (2) Four Things eſpecially are to be noted.

[a] Terms of Law, verb. Deviſe.

[b] §. j. Inſtit. de lega.

[c] Conſtat plures eſſe Legati definitiones, aliam Florentini, aliam Modeſtini, aliam Juſtiniani, quarum nulla eſt quam unus aut alter non tentavit evertere: Sed fruſtra quidem ſudarunt omnes; quippe quorum fractis argumentis nullam harum non per ſe juſtam, legitimeque traditam, clariſſime oſtendit D. Gentilis Oxonienſ. hodie Legiſtarum decus, lib. 1. Lection. & Epiſtol. c. 14, 15, 16.

Firſt, In that it is called *a Gift*, it argueth that it (3) proceedeth of the mere Liberality and free Good Will of the dead Man; and conſequently, that he is not of Neceſſity tied thereunto [d].

[d] Minſing. in d. tit. de legat. inſtit. §. j.

Secondly, In that it is *left*, it (4) differeth from other Gifts; not only thoſe which are called Deeds of Gift, executed in the Life-time of the Donor; but alſo from thoſe *Gifts which be made in Conſideration of Death*, wherein the Things given are delivered by the Teſtator in his Life-time, to become their own to whom they are delivered, in caſe the Teſtator die [e]. For Legacies are not delivered by the Teſtator, but are to be paid by his Executor, or Adminiſtrator [f].

[e] §. j. Inſtit. de Donat.

[f] L. j. Quorum lega. ff. L. non dubium, de lega. C. & ibi DD. Perkins tit. teſta. c. 7. fol. 94. b.

And Thirdly, Becauſe the Legacy is to be *paid by the Executor or Adminiſtrator*, (as appeareth by the Definition) it is noted, (5) that it is not lawful for the Legatary to take his Legacy by his own ſole Authority [g]. (Only the Executor may of his own Authority enter to the Goods and Chattels of the Deceaſed [h].) Otherwiſe, if the Legatary preſume to be his own Carver, and do enter to the Poſſeſſion of the Thing bequeathed, without Delivery or Conſent of the Executor, he thereby loſeth his Legacy [i]: Except in certain Caſes, whereof hereafter [k].

[g] D. L. non dubium. & Sichar. ibid. n. 2. D. Coſens Apologie of Eccleſiaſtical Proceedings, c. 2. f. 23.

[h] Infra 6. §. j. & iij.

[i] D. L. non dubium. C. de lega.

[k] Infra part 7. §. 12. in fine.

Fourthly, In that here is Mention as well of the Adminiſtrator as of the Executor, the Meaning is, that (6) not only thoſe Legacies are due, which are left in a Teſtament wherein is appointed an Executor, and where the Party doth not die Inteſtate; but thoſe Legacies alſo which are left in a Codicil or Laſt Will, wherein no Executor is appointed, and where the Party dieth Inteſtate [l]: Which Legacies as they be due, ſo are they payable in both Caſes; in the

[l] §. non autem. Inſtit. de Codicil.

one by the Executor, and in the other Caſe by the Adminiſtrator [m]. Nay more than this; if any Legacy be left in a Teſtament, although the Executor therein named cannot be Executor, or do refuſe the Executorſhip, and ſo the Party die in a Manner inteſtate, and thereupon Adminiſtration of his Goods is granted, according to the Statutes of this Realm [n]: In this Caſe alſo, by the Laws and Cuſtoms of this Realm, the Legacies be due and payable by the Adminiſtrator [o], tho' it be otherwiſe by the Civil Law [p].

[m] Eod. §. non autem. & L. ab inteſtat. ff. de jure codicil.

[n] Stat. H. 8. an. 21. c. 5.

[o] Brook Abridg. tit. teſta. n. 20. inf. part. 7. §. 19.

[p] L. j. in fin. de Injuſt. teſtam. L. fidei commiſ. de Leg. j. Imperator. de Leg. 2. ff. Graff. Theſaur. com. op. §. legatum q. 8.

In antient Time (7) there were Four ſeveral Kinds of Legacies: *Per vindicationem* [q], *per damnationem* [r], *per ſinendi modum* [s], *per præceptionem* [t]. That is to ſay, by Challenge, by Condemnation, by Suffering, by Foretaking. Being ſo diſtinguiſhed, by Occaſion of a certain Solemnity or Formality of Words aſſigned to every Kind of Legacy [u]; with ſeveral Actions or Remedies aſcribed to every ſuch Legacy, for the Recovery thereof [x]. But afterwards the (8) Laws being more favourable to dead Men's Wills, this preciſe Solemnity of Words was taken away, and Liberty granted to make Bequeſts by any Manner of Words [y]. (As elſewhere more fully [z].) Whereby in the End all Legacies became of one and the ſame Nature, and are all at this preſent recoverable by like Actions [a]. Which by the Civil Law is threefold [b]. With us, if the Executor detain the Legacy, or do ſlack the Performance of the Teſtator's Will, the Legatary muſt ſue the Executor in the Eccleſiaſtical Court, for the ſame Legacy ſo detained or not ſatisfied [c]. For farther Confirmation hereof, I have ſet down *verbatim* that which I find written by that learned and no leſs religious Man, Doctor [d] *Coſen*, (as I take it,) in that worthy Work, intituled, *An Apology for ſundry Proceedings by Juriſdiction Eccleſiaſtical, Part* 1. *cap.* 3. whoſe Words are theſe: An Executor may ſue another in a Spiritual Court touching his Teſtator's Goods, in this Caſe; *viz.* If a Man deviſe or bequeath Corn growing, or Goods, unto one, and a Stranger will not ſuffer the Executor to perform the Teſtament; for this Legacy he ſhall ſue the Stranger for it in a *Spiritual Court* [e]. But if a Man take from the Executor Goods bequeathed, for this the Executor muſt uſe his *Action of Treſpaſs*, and not ſue in the Spiritual Court: For Executors cannot ſue for the Goods of their Teſtator in a Court Eccleſiaſtical, but at the Common Law [f]. Alſo Tenants may be ſued at the Common Law by Executors or Adminiſtrators for Rent behind, and due to the Teſtator in his Life-time, or at the Time of his Death; and they may for the ſame diſtrain the Land charged with the Rent [g]. If a Teſtament bear Date at *Caen* in *Normandy* [h], and be proved in *England*, the Executor may upon ſuch Teſtament have Action.

[q] §. ſed olim. inſtit. de lega.

[r] Alii legunt per vendicationem, ut Porcius, & Minſing. in d. §. ſed olim.

[s] i. e. obligationem, vel condemnationem.

[t] i. e. ante captionem. Minſing. in d. §. ſed olim.

[u] Accipe ſingulorum legatorum exempla. 1. Titius rem illam habeto. 2. Hæres meus damnas eſto dare. 3. Hæres meus ſinito Titium rem illam ſumere, ſibique habere. 4. Hæres prædium illud præcipito. gloſſ. in d. §. ſed olim.

[x] Legato videlicet per vindicationem relicto, actio realis; per damnationem vero, perſonalis naſcebatur. Sinendi modo relictum, ſola legatarii autoritate ſine vitio capitur: legatum per præceptionem actione famil. herciſcundæ exigebatur. Minſing. & alii in d. §. ſed olim.

[y] L. j. C. com. de lega. §. noſtra. Inſtit. de lega.

[z] Infra part 4. §. 4.

[a] D. §. noſtra. Inſtit. de lega.

[b] Jure civili tres actiones Legatariis competere dignoſcitur, perſonalem, realem, hypothecariam. Jure autem quo nos utimur, quin prima actio, qua executor ex quaſi contractu teneatur, etiamnum vigeat, nulla eſt dubitatio. Secunda etiam, qua rem Legatam perſequimur, competit quidem legatario primo adverſus executorem, ſeu adminiſtratorem, pro re tradenda; deinde, adepta poſſeſſione, adverſus quemlibet poſſeſſorem conceditur actio tranſgreſſionis. Tertiæ vero actioni, qua res teſtatoris legatariis pignorari dicitur, ſuſpicor nullum in hoc regno locum eſſe relictum.

[c] Tract. de repub. Ang. lib. 3. c. 9. Bract. de legib. & conſ. Angl. lib. 3. c. 26. in fin. Brook Abridg. tit. Deviſe, n. 27. 45. Fitzherb. Nat. Brev. fol. 42. & 50. in Br. de conſultac. in princ. Plowden in caſ. inter *Paramor & Yardley*. *Terms of Law*, verb. Deviſe.

[d] *D. Coſen's Apology of Eccleſiaſtical Proceedings* parte prima, c. 3. pag. 23.

[e] T. 4 H. 3. referente Fitzh. tit. prohib.

[f] Stat. 2 R. 3. c. 17.

[g] 32 H. 8. c. 37.

[h] T. 18 Ed. 1. teſta. 6.

But if an *Engliſhman* being in *Flanders* makes his Will there, and therein deviſe *omnia bona ſua, &c.* though by the Law there by the Name *de bonis* all his Lands are comprehended, yet by the Law of this Nation they ſhall not paſs [i].

[i] *M. 39 Eliz. Johnſon's* Caſe.

Of Legacies or Deviſes it will be ſufficient to touch a few Points. In the Books of the Common Law it is ſet down, that they ſhall be recovered in a Spiritual Court, and not in a Court Temporal [k]. Therefore if a Termor of certain Land bequeath his Crop, and die, the Spiritual Court ſhall hold Plea thereof [l]. Likewiſe where one ſued in Court Chriſtian for Goods deviſed by Teſtament, which another claimed by Deed of Gift, and thereupon brought a Prohibition, and ſhewed the Deed of Gift, and alledged withal, that the Defendant was neither Executor nor Adminiſtrator: Yet becauſe it was by Name of a Legacy, it was adjudged to belong to the Spiritual Court, by which it was to be determined, and the Circumſtances to be tried, whether the Deviſe were good, or not [m]. And in reſpect a Man hath ſuch Action againſt the Executor for a Legacy before the Eccleſiaſtical Judge, therefore the Legatary or Deviſee may not of his own Head take the Goods or Chattels, deviſed to himſelf, out of the Poſſeſſion of the Executor [n]. And for this alſo eſpecially, becauſe the Law doth not appoint that the Legacies ſhall be aſſigned, paid, or delivered, until the Debts of the Teſtator be ſatisfied and paid [o]. But becauſe an Inheritance deviſed is not demandable in an Eccleſiaſtical Court, but in the Temporal [p]; therefore the Legatary, (according to the Deviſe) without farther Aſſignment or Delivery, may enter into them after the Death of the Teſtator [q].

[k] 31 H. 6. p. 9.

[l] H. 8 H. 3. ex Fitzh. tit. prohib. 19.

[m] 46 Ed. 3. fol. 32.

[n] M. 20 E. 4. 9.

[o] T. 2 H. 6. 15.

[p] Bracton l. 5. c. 16.

[q] Perkins tit. Deviſes, §. 576, 577. Inſt. part. 1. fol. 3.

If a Man by his Teſtament bequeaths Goods to the Fabrick of a Church; for this Legacy the Executors may be ſued in Court Eccleſiaſtical. Alſo if Chattels real [r] (as a Leaſe) be bequeathed by Will, a Man may ſue for them in Court Eccleſiaſtical [s], but not ſo for Lands deviſed. If a Teſtator by his Teſtament doth charge his Executor to pay his Debts, the Creditors (in reſpect of ſuch Charge) may ſue for them in the Court Eccleſiaſtical [t]. When a Man, being Executor or Legatary, (and ſo injoined by Will,) doth refuſe to erect a Grammar-School, and is therefore ſued in a Court Eccleſiaſtical; if he purchaſe a Prohibition, the other Party ſhall have a Conſultation [u].

[r] Reg. in br. orig. p. 48. 6.

[s] *Liberties of the Clergy by the Laws of the Realm, by* John Gooddal, *printed by* Robert Wyer, tempore H. 8. Brownl. Rep. part. 1. fol. 34.

[t] Ibidem.

[u] Ibidem.

Where a Man deviſeth that his Executors ſhall ſell his Lands, and out of the Money which ſhall be raiſed by Sale, giveth a Portion to his Daughters; it was adjudged, that neither the Land nor Money was Teſtamentary, for it is not Aſſets to ſatisfy Debts, but a Sum ariſing of Land, and appointed to ſpecial Uſes in Way of Equity, and not as a Legacy, and therefore not to be ſued for in the Eccleſiaſtical Court, but in a Court of Equity: And the Eccleſiaſtical Court cannot hold Plea of a Legacy in Equity, but where it is a Legacy in Law indeed [x]. Yet if it be a Man's perſonal Legacy, though it be to be raiſed out of the Profits of Land, it being but a Leaſe for Years, and the Party hath raiſed it, and died before Payment, no Action being maintainable for it at Common Law by Account againſt the Executors; it is Reaſon there ſhould be Remedy in the Eccleſiaſtical Court: And ſo it was adjudged in *Love*'s Caſe, and a Conſultation awarded [y]. *Vide Cro. part* 1. *fol.* 395. *H.* 10 *Car. B. R. Hetter* verſus *Brett.*

[x] T. 17 Jac. C. B. Rot. 895. *Edwards* verſ. *Graves.* Hob. Rep. fol. 265. Dyer fol. 151, 152. M. 29 & 30 Eliz. C. B. 1 Leon. 87. 225. 4 Leon. 82. *Germie's* Caſe.

[y] P. 9 Jac. B. R. *Love* verſ. *Napleſden.* Cro. part. 2. fol. 279. 9 Eliz. Dyer 264. W. Jones 355. S. C.

But

But the Point in the laſt mentioned Caſe hath been otherwiſe adjudged, (*viz.*) The Deviſe was, that *T. S. ſhould ſell his Lands* and diſtribute the Money to *A. B.* and *C.* equally; the Land was ſold, and one of the Legatees ſued in the Spiritual Court for his Legacy; adjudged, that this was *not Teſtamentary*, it being a Sum ariſing *out of Lands*, and therefore not determinable in the Spiritual Court, but in a Court of Equity, for it is a Truſt in the Deviſee *T. S.* for the Benefit of the Legatees. *Hob.* 265. *Edwards* verſus *Graves.*

So where the Teſtator deviſed a Legacy to *T. S.* to be *paid out of the Profits of his Land*, and he deviſed thoſe very Lands to his Executor for a Term of Years, and died; adjudged, this was a Temporal Matter, and not Teſtamentary, becauſe the Legacy was to ariſe out of the *Profits of Lands. Bend.* 21. *Paſchal* verſus *Ketteridge*; but 2 *Cro.* 279. *Love* verſus *Napleſden contra.*

So that where a Thing is not Teſtamentary, it is not to be recovered in the Spiritual Court; but if it is Teſtamentary, and a Suit is brought in that Court, and the Defendant proves Payment by one Witneſs, which they refuſe, a Prohibition ſhall be granted. 1 *Vent.* 291. *Richardſon* verſus *Desborough*, and 2 *Salk.* 547. *Shotter* verſus *Freind.*

Nota; A Rent iſſuing out of Lands held for a *Term of Years*, and deviſed to *T. S.* for Life, ſhall be recovered in the Spiritual Court. *Roll. Abr.* 300. *Sid.* 279. *Ramſey* verſus *Roſſe*, *S. P.*

So where the Teſtator deviſed Leaſes to his eldeſt Son, and that out of the ſame he ſhould raiſe ſuch a Sum of Money for Portions for his Daughters, who libelled in the Spiritual Court for their Portions; adjudged, that this ſhould not be accounted as a Rent iſſuing out of the Lands, but as a Teſtamentary Legacy, and to be recovered in that Court. 1 *Bulſt.* 153. *Denn*'s Caſe. 2 *Cro.* 279. *Love* verſus *Napleſden*, *S. P.*

So where *T. S. covenanted* to pay to Three Perſons 20 *l.* a-piece, at the Age of Twenty-one Years, and being ſick, he deviſed to each of them 20 *l.* a-piece at their reſpective Ages of Twenty-one Years; and this was in *Performance of his Covenant*; one of the Legatees libelled againſt the Executor in the Spiritual Court for his Legacy; and upon a Motion for a Prohibition, ſuggeſting, that the Party was *bound in a Covenant* to pay theſe Legacies, the ſame was granted. *Moor* N° 368. *Margery Davis*'s Caſe.

So where the Teſtator gave Legacies to the Children of *T. S.* and appointed that his Executor ſhould *give Bond* to the ſaid *T. S.* to pay the Legacies, and accordingly the Executor gave ſuch Bond; and upon a Libel in the Spiritual Court, a Prohibition was granted. *Hetley* 87. *Warner*'s Caſe, and *ibid.* 161. *Champny*'s Caſe. See 2 *Brownl.* 11.

But in the Caſe of *Ramſey* and *Roſſe* before-mentioned, Juſtice *Twiſden* was of Opinion, that an *Action on the Caſe* would lie to recover a Legacy deviſed to be paid out of the *Profits of Lands*; it is true, if it had been of a Rent to be paid out of a Leaſe for Years, there the Suit muſt be in the Spiritual Court, becauſe a Rent iſſuing out of a Leaſe is Teſtamentary, for the Leaſe is a Chattel, and by Conſequence the Rent muſt be of the ſame Nature.

Glanville lib. 7. cap. 5, 6, 7.

'Tis likewiſe true, that the Common Law takes Notice of a *Legacy* not *in Specie*, but in collateral Matters; as for Inſtance, where

a Promiſe is made to pay Money, if the Plaintiff would forbear to ſue for a *Legacy*, this is a good Conſideration to ground an Action on the Caſe; but ſuch Action will not lie for a Legacy in Specie. *Raym.* 23. *Sid.* 45. *Nicholſon* verſus *Sherman.*

The Teſtator deviſed ſeveral Legacies, and amongſt the reſt 40 *l.* to a *Charity*; the Eſtate fell ſhort to pay all, and the Judge of the Spiritual Court being of Opinion, that the intire 40 *l.* ought to be paid, and not in Average with the other Legacies; the Plaintiff exhibited his Bill, ſetting forth this Matter, and prayed an Injunction to that Court; but it was denied, becauſe Legatory Matters are to be determined by the Civil Law; and the Spiritual Court hath the proper Juriſdiction in ſuch Caſes; and if by their Law a charitable Legacy hath the Preference, the Court of Chancery will not interpoſe. 1 *Vern.* 230. *Feilding* verſus *Bond.* *Sed vide* 1 *Williams* 264, 423, 674. 2 *Williams* 25.

The Siſter of the Teſtator, to whom he deviſed a Legacy, libelled againſt the Executor in the Spiritual Court, and obtained a Sentence for her Legacy and Coſts; afterwards the Executor exhibited a Bill in Equity againſt the Legatee to diſcover how much of the Teſtator's perſonal Eſtate came to her Hands; and it was held, that this Matter was proper for an Account in Chancery, tho' after Sentence for the Legacy; and decreed, that if it ſhould appear that the Executor had Aſſets to pay the Legacy, then he ſhould pay it with Intereſt and full Coſts, both in this Court and in the Spiritual Court. *Chancery Caſes* by the Lord *Nottingham* 434. *Bland* verſus *Elliot.*

Libel in the Prerogative Court for a Legacy, the Defendant moved for a Prohibition upon the Statute 23 *H.* 8. *c.* 9. for that the Parties lived in Two Dioceſes; and by that Statute it is enacted, that no Perſon ſhall be cited to appear out of his Dioceſe, *&c.* but becauſe the Will was proved in the Prerogative Court, and the Suit for the Legacy was there, and Sentence given, which was confirmed upon an Appeal to the Delegates, and Coſts taxed, and the Sentence executed; it is now too late for a Prohibition. *Cro. Car.* 97. *Smith* v. *Pendrell.*

The Teſtator deviſed in theſe Words, (*viz.*) *I give my Niece* R. L. 500 l. *which my Siſter the Lady* C. *hath now in her Hands, as by her Bond to me it appears*; and about Ten Years before his Death the 500 *l.* was paid to himſelf, who made no Alteration in his Will, but died; adjudged, that the Legacy was due, tho' the Security was altered, for this is a pure Legacy, and the Words (*Which my Siſter hath now in her Hands*) are only to ſhew, that it ſhould be as certain to her as he could expreſs, for a Legacy which is pecuniary ſhall remain, but a Specifick Legacy may be loſt, by being altered. *Raym.* 325. *Pawlett's* Caſe.

So where the Teſtator deviſed a Legacy to be paid out of ſuch Debts which were due to the Teſtator, or out of ſuch Money at Intereſt, and the Debts and Money are called in in the Life-time of the Teſtator, yet the Legacy remains due. *Ibid. fol.* 326.

The Teſtator deviſed a *pecuniary Legacy*, and then told his Executor, that he had made his Will and given ſuch a Legacy, *and I would have you increaſe it to ſuch a Sum*, this is called *Commiſſum fidei* in the Civil Law; and it is a good Legacy. 2 *Cro.* 345. *Benſon* verſus *Cartwright.* *Godb.* 146. *S. C.* 2 *Bulſt.* 207. *S. C.*

So where the Teſtator by his Will deſired his Executor to give *T. S.* 500 *l.* this is a good Legacy tho' he left it to the Executor,

how, when, and in what Manner to diſpoſe it, and gave no particular Directions himſelf. 1 *Chanc. Rep.* 246.

The Teſtator by his Will recited, that he owed *T. S.* 5 *l.* and would have his Executor to make it up 10 *l.* the Legatee libelled in the Spiritual Court for the 10 *l.* and upon a Motion for Prohibition, it was denied, becauſe the 10 *l.* was no Addition to the Debt of 5 *l.* but a new Sum given in Satisfaction of it, and ſo the whole 10 *l.* was a Legacy. 2 *Roll.* 284.

Deviſe of 1000 *l.* Legacy to be laid out in a Purchaſe for the Benefit of her Grandſon for Life, and the Intereſt thereof in the mean Time to him, for his better Maintenance; and if he died before the Money was laid out, then one half to the Wife of the Defendant, (to whom the Care of the Grandſon was committed) the other Moiety to the Plaintiff, who, together with the Defendant were Joint Executors; the Defendant alone received the Money, and the Legatee died before it was laid out, and then the Defendant refuſed to pay the Moiety to the Plaintiff, pretending it was all ſpent in Suits at Law, for the Benefit of the Legatee in his Life-time; but decreed, that the Defendant could not lay out the Money any otherwiſe than appointed by the Will, and therefore, that the Plaintiff ſhall have her Legacy, Intereſt, and Coſts. *Chanc. Caſes* 250. *Corbett* verſus *Franklyn.*

By the Civil Law, the Teſtator may deviſe what belongs to another, but then there muſt be ſome Circumſtance which may make ſuch a Diſpoſition appear to be reaſonable; and if he did know, that the Thing deviſed was not his own, then the Executor muſt give the Thing it ſelf, if he can purchaſe it; or if he cannot, then he muſt give the Value of it, becauſe it plainly appeared, that ſome Benefit was intended to the Legatee; but it will not be preſumed, that the Teſtator knew the Thing was not his Own, unleſs it is proved, and that muſt be by the Legatee, for he who demands is bound to eſtabliſh his Right; and if it is proved, that the Teſtator did not know that the Thing was not his Own, then the Legacy is void.

So if he knew that it was not his Own, and if afterwards he ſhould acquire it by a Lucrative Title (as by Gift); yet the Legacy would be void, unleſs it appears that the Teſtator intended the Legatee ſhould have the Thing it ſelf, or its Value.

§. VII. The Definition of a Gift in Conſideration, or becauſe of Death.

1. *What is a Gift in Conſideration of Death.*
2. *Three Sorts of Gifts in Conſideration of Death.*
3. *Which of theſe Three Gifts is compared to a Legacy.*

A *Gift in Conſideration of Death* is, (1) Where a Man, moved with the Conſideration of his Mortality, doth give and deliver ſomething to another, to be his, in Caſe the Giver die; or otherwiſe if he live, he to have it again [a]. Of (2) *Gifts* in Caſe of Death there be Three Sorts [b]. One, when the Giver, not terrified with Fear of any preſent Peril, but moved with a general Conſideration of Man's Mortality, giveth any Thing [c]. Another, when the Giver, being moved with imminent Danger, doth ſo give, that ſtraightways it is

[a] Inſtit. de donac. in princ.
[b] L. 2. ff. de donac. mor. cauſa.
[c] D. L. 2. L. Seni. L. ubi ita. ff. de mor. cau. don.

made his to whom it is given [d]. The Third is, when any being in Peril of Death, doth give ſomething, but not ſo that it ſhall preſently be his that received it, but in Caſe the Giver do die [e]. This (3) laſt Kind of Gift is that which is compared to a Legacy [f]. But the other Two are reputed ſimple Gifts, if the Giver do not make expreſs Mention of his Death; and ſo they cannot be revoked [g], but take full Effect from the Time of the Making of the Gift, if the ſame be not fraudulent [h]. Nevertheleſs, if a Man deliver unto thee certain Goods to be kept until he be dead, and then to be diſpoſed or diſtributed *in pios uſus*; in this Caſe thou art Executor of thoſe Goods ſo to be diſtributed [i].

[d] D. L. 2.

[e] Ibidem.

[f] Bar. in d. L. ſeni. Graſſ. Theſaur. com. op. §. donatio. q. 1.

[g] Jul. Clar. §. donatio. q. 4.

[h] Stat. Eliz. an. 13. c. 5. & an. 14. c. 11.

[i] Lib. qui inſcribitur Abridgment des caſes, Incerto Authore, Edit. 1599. f. 157. n. 7.

Precedents in Chancery, fo. 300.

One *Cowper*, after he had made his Will, and about three or four Days before his Death, gave Mrs. *Dawſon* ſome Bank Notes to her own Uſe, if he died, elſe to be returned; on his Death, *Aſhton* the Executor, on inquiring into the Affair, ſaid, he was very well pleaſed, that they were given her; ſhe deſired Mr. *Aſhton* to take the Notes and imploy them to the beſt Advantage for her, he took them and gave her a Note for them; but he afterwards refuſing to deliver up the Notes, an Action at Law was brought on his Note, and Judgment recovered againſt him; whereupon he brought a Bill in Chancery, but was denied Relief. *Curia*, You come here to be relieved againſt the Note, which cannot be but on the Foot of Fraud; at the Time of giving the Note, the whole Affair was examined into; it is not a Legacy, nor is there any Occaſion for the Executor's Aſſent to it, it is not a Gift at Common Law, but in View of Death: Here are expreſs Words; but if he had uſed no Words, and had been near Death, it had been looked on as *Donatio mortis cauſa*; it is a teſtamentary Legacy, of which the Common Law takes Notice, but is not provable in the Eccleſiaſtical Court, it is only queſtionable here, and the Executor's Aſſent is not neceſſary, becauſe he might die Inteſtate; this further differs from a Legacy, which depends ſolely on the diſpoſing Words, but in a *Donatio mortis cauſa* there muſt be a Delivery, which is ſomething more. So diſmiſſed the Bill with Coſts. *Aſhton* v. *Dawſon* and *Vincent*, *Select Caſes in Chancery*, *fol.* 14. This Cauſe was reheard before Lord Chancellor *King*, *6 Aug.* 1725. who affirmed the Decree in all but the Coſts, but inclined to have ordered a Trial at Law, had not Mr. *Aſhton* given a Note.

A Man being much in Debt, about ſix Hours before his Deceaſe, gives 600 *l.* for the Benefit of younger Children, this is not fraudulent as againſt Creditors, though it would have been ſo of a real Eſtate, or Chattel real, but the Court would not have it to be ſo *pro Confeſſo*, but would have directed an Iſſue to try it; and ſo it was done in Lord *Somers*'s Time, and on an Iſſue directed, found fraudulent before Lord Chief Juſt. *Holt*. *Duffin* v. *Furneſs*, *Select Caſes in Chancery*, *fol.* 77.

A. being about making his Will, directed the Scrivener to give 100 *l.* to his Nephew, but afterwards recollecting that his Nephew had 100 *l.* of his in his Hands, ordered the Scrivener not to put that Legacy into his Will, in regard his Nephew had already that 100 *l.* in his own Hand; the Teſtator made *B.* his Niece Executrix and Reſiduary Legatee. Afterwards the Nephew brought a ſpecie Bill for this 100 *l.* to the Teſtator, who in his laſt Sickneſs gave the ſaid 100 *l.* Bill to be delivered over to his Nephew in Caſe he the Teſtator

tor died of that Sickneſs, which did accordingly happen. The Nephew brought a Bill in Chancery for this 100 *l.* Bill; it was held to be *Donatio cauſa mortis*, and it was decreed the Plaintiff ſhould have his 100 *l.* Bill and Coſts. *Drury* v. *Smith*, 1 *Will. Rep.* 404.

Jewels were given by the Teſtator, by Way of *Donatio cauſa mortis*; the Maſter of the Rolls doubted, whether this was good againſt Debts; and it ſeems not, they being given in Caſe of the Donor's Death, and in Nature of a Legacy, which therefore would be fraudulent as againſt Creditors. *Smith* v. *Caſen*, 1 *Will. Rep.* 406.

The Teſtator being languiſhing upon his Death-bed delivered to his Wife a Purſe containing about 100 Guineas and bid her *apply it to no other Uſe but her own*; and likewiſe drew a Bill upon a Goldſmith to pay 100 *l.* to his Wife *to buy her Mourning*, and to maintain her until her Life-rent (meaning her Jointure) ſhould become due; and about ſeventeen Days after the Teſtator died. In Chancery it was held, that the Delivery of the Purſe of Gold was good, and muſt operate as a *Donatio cauſa mortis*, *ut res magis valeat*, *&c.* becauſe otherwiſe one could not give to his own Wife; and there being a Delivery by the Teſtator in his laſt Sickneſs, and when he was ſo near his End, and bidding the Wife apply it to no other Uſe than her own, made this Part of the Caſe plain, and that this was in the Nature of a Legacy to the Wife. As to the 100 *l.* Bill drawn upon the Goldſmith payable to the Wife, it was held good, and to operate as Appointment, and that it amounted to a Direction to his Executor, that the 100 *l.* ſhould be appropriated to his Wife's Uſe; it was obſerved, that a *Donatio cauſa mortis* need not be proved with the Teſtator's Will, neither need any Gift in Nature of a Legacy be proved, for they operate as a Declaration of Truſt upon the Executor. *Lawſon* v. *Lawſon*, 1 *Will. Rep.* 441.

Where Legacies are to be recovered.

ſſ. Legacies may be recovered in the Spiritual Court againſt an Adminiſtrator, with the Will annexed, or againſt an Executor of his own Wrong. *Roll. Abr.* 919.

The Teſtator made Two Executors, one of them made *T. S.* Executor, and died, and then the ſurviving Executor died Inteſtate; a Legatee ſued *T. S.* in the Spiritual Court for a Legacy, who pleaded this Matter; and the Plea being refuſed, he moved for a Prohibition; but it was denied, becauſe the Matter is Teſtamentary, and perhaps *T. S.* the Executor of the Executor might have the Poſſeſſion of all the Goods of the firſt Teſtator; and though by our Law where there are Two Executors, and one dies, the Survivor ſhall have all, yet by their Law it may not be ſo, and this purely belongs to their Law; and if they proceed wrongfully, the Party ought to appeal, but they ſhall not be prohibited by *B. R.* 1 *Lev.* 164. *Guillam* verſus *Gill.*

The Will was thus, (*viz.*) *I Will that my Executor ſhall ſell my Lands, and with the Money pay* 10 l. *to my Daughter* M. S. *and* 10 l. *to* E. S. Adjudged, that the Legatees may ſue for theſe Legacies in Chancery; and if the Executor dies, they may exhibit a Bill againſt his Executor or Adminiſtrator; and ſo likewiſe if the Money is to be raiſed out of the Profits of Lands; and in ſuch Caſe they cannot ſue in the Spiritual Court. *Brownl.* 32.

But where the Teſtator deviſed that his Feoffees ſhall ſell his Lands, and that the Money ariſing by ſuch Sale ſhall remain in their Hands to pay Legacies, there the Suit is properly in the Spiritual Court. 2 *Bulſt.* 257. *Sambern* verſus *Sambern.*

Where Lands were deviſed to be ſold by his Executors, and the Money to be diſtributed to certain Uſes, this is not a Legacy to be recovered in the Spiritual Court, but in Chancery. *Hob.* 265.

Legacies may be conſidered under the following Heads:

(1.) *Aſſent of an Executor to a Legacy.*
(2.) *Of Abatement of Legacies in Proportion.*
(3.) *Legacies deviſed to be paid out of Lands and out of perſonal Eſtates.*
(4.) *Legatee dying before Time of Payment, and where a Legacy ſhall ſurvive.*
(5.) *Where Executor muſt give Security for Payment of Legacies.*
(6.) *Of reſiduary Legatees and Surplus of the Eſtate.*
(7.) *Where Intereſt ſhall be paid for a Legacy, where not.*
(8.) *Other Caſes concerning Legacies.*

AND firſt of *Aſſent* to a Legacy, which ſeems to be like an Attornment to a Grant of a Reverſion, (*viz.*) 'Tis a perfecting Act, and where Goods or Chattels are deviſed, the Legatee cannot take them without the Aſſent of the Executor; if he doth, he is liable to an Action of Treſpaſs. *Keilway's Rep.* 128. *Dyer* 254. *b.*

But an Aſſent is not neceſſary to a *Deviſe of Lands*, for the Deviſee may enter without the Aſſent of the Executor; and if the Heir at Law ſhould enter before him, the Deviſee may enter and eject him. 1 *Inſt.* 111. 1 *Brownl.* 132.

His Aſſent is neceſſary to the Deviſe of a *Term for Years*; and in what Manner that ſhall be, ſee *Plowd. Com.* 510. *a.* 1 *Lev.* 25. And the Aſſent of an Executor to the firſt Deviſee of ſuch a Term, is an Aſſent to him in Remainder. *March* 136.

The Executor may aſſent to a Legacy before *Probate of the Will*, if he is above *Seventeen Years* old, and before he is Twenty-one; but if he is under Seventeen, then he is not able to take upon him the Office of Executor, and then alſo his Aſſent is of no Force; and ſo it was held in *Pigott* and *Gaſcoigne's* Caſe, 5 *Co. fo.* 29. *Cro. Eliz.* 602. *S. C.* 1 *Brownl.* 46. *S. C.*

Where there are *ſeveral Executors*, the Aſſent of *one of them* is ſufficient, and if there are not Aſſets to ſatisfy all the Debts, then he alone who aſſented ſhall anſwer it out of his own Eſtate; therefore 'tis not ſafe for an Executor to aſſent before all the Debts are paid.

An Aſſent need not always be *expreſs*, for an *implied Aſſent* in many Caſes is ſufficient; as for Inſtance, If the Teſtator appoints the Legatee to do ſome Act in reſpect of his Legacy, and the Executor accepts the Performance of ſuch Act, this is an Aſſent by *Implication*; ſo if a Sum of Money is deviſed to an Executor to educate the Children of the Teſtator, and he educates them accordingly, this ſhews that he aſſents to the Thing by Way of Legacy, and doth not take it as Executor. See *Paramour* verſus *Yardly*, *Plowd. Com.* 53.

So if an Horſe is deviſed to *T. S.* and one offering to buy the Horſe of the Executor, he directs him to the Legatee, or if the Executor himſelf offereth the Legatee Money for him, this implies his Aſſent, that he ſhould take it by the Will.

The Teſtator being poſſeſſed of a Plantation in *Barbadoes*, *deviſed the ſame to his Children* (*then Infants*) and made the Defendant, *Robinſon*, Executor, and directed that he ſhould receive the Profits, and account, *&c.* he afterwards *made a Leaſe thereof to W.* for a Term of Years, reſerving Rent in Truſt for the Children.

Afterwards the Executor ſold this Plantation to one *Faulconer*, for a valuable Conſideration, and applied the Money towards Payment of the Teſtator's Debts, (his other Eſtate falling ſhort), and now the Children exhibit their Bill to have an Account of the Profits, and a Reconveyance to them, and that they might enjoy it according to the Will, inſiſting, that the Executor by making this Leaſe to *W.* had *aſſented* to the Deviſe of the Plantation to them.

On the other Side it was argued, that this was no Aſſent, for that depends on the Intent of the Executor, to part with all his Intereſt; as where a Leaſe is deviſed *in Specie*, if the Executor aſſents, he hath no longer an Intereſt in the Eſtate; but in the principal Caſe, the Executor did apprehend, that he had ſtill an Eſtate remaining in himſelf, becauſe he ſold it to raiſe Money for Payment of Debts; ſo that 'tis plain he did not intend to exempt the Eſtate from paying of Debts, by veſting it in the Legatees by any Aſſent; but taking this Aſſent moſt ſtrongly againſt the Executor, the making this Leaſe amounts only to an Aſſent by Implication, and that in Equity it will not amount to ſo much: But it was decreed, that where an Executor hath aſſented to a Legacy, he ſhall never afterwards avoid it, tho' in ſuch Caſe a Creditor may enforce a Legatee to refund. 1 *Vern.* 90, 460. *Noell* v. *Robinſon.* 2 *Vent.* 358. *S. C.*

Where a Legacy is given abſolutely, the Executor may aſſent to it upon a *Condition precedent*; as thus: If you bring me ſuch a Bond wherein the Teſtator is bound to *T. S.* then you may take the Cattle to you bequeathed; or if you will pay the Arrears of Rent due to *T. S.* at the Teſtator's Death; and in ſuch Caſe, if the Condition is not performed, then there is no Aſſent given to the Legacy; but 'tis otherwiſe where the *Condition is ſubſequent*; as thus: *I do agree and Conſent that you ſhall have the Thing deviſed, if you pay ſo much to me every Year*, &c. now in ſuch Caſe, if the Legatee take the Thing, he ſhall not loſe it afterwards, though he doth not perform the Condition, becauſe the Executor by his Aſſent cannot make that conditional which the Teſtator hath given abſolutely.

Where an Executor once aſſents to a Legacy, he ſhall never afterwards revoke or countermand it; and if he ſhould refuſe to aſſent, he may be compelled by a Sentence in the Spiritual Court, or by a Decree in Equity, or he himſelf may afterwards aſſent, for a Diſ-aſſent is not ſo peremptory as an Aſſent; therefore *Anno* 14 *H.* 8. *fol.* 23. the Leſſee aſſigned a Term of Years ſo as the Aſſent of the Leſſor could be had by *ſuch a Time*; in that Caſe it was held, that tho' the Leſſor once denied to aſſent, yet he might do it afterwards before the Time appointed; but if no certain Time had been appointed, then one expreſs Refuſal to the Party himſelf had been peremptory.

Where a Leaſe, or the Profits thereof, is deviſed to *T. S.* for Life, or for Part of the Term, Remainder to *W. W.* and the Execu-

tor[k] aſſents, that *T. S.* ſhall enjoy it, this ſhall be as effectual to *W. W.* the Remainder-Man, as to *T. S.* who had the firſt Eſtate. See 8 *Rep. 96. a.*

[k] March 136. S. P.

But the Aſſent to one cannot enure to another in any Caſe, tho' of the ſame Thing, except by Way of Remainder, as aforeſaid, nor where the Thing is not the ſame, except in ſome ſpecial Caſes, (*viz.*) As where Leſſee for Years of Lands deviſeth a Rent to *T. S.* and the Land it ſelf to *W. W.* the Aſſent of the Executor, that *T. S.* ſhall have the Rent, is not an Aſſent that the other ſhall have the Land; but the Aſſent, that *W. W.* ſhall have the Land, implies the Aſſent that the other ſhall have the Rent. See in *Plowd. Com.* 521. *Brett* verſus *Rigden.*

The Reaſon why an Aſſent is neceſſary, is in reſpect to the Payment of the Teſtator's Debts, for if the Legatees might take their reſpective Legacies without ſuch Aſſent, then the Debts might ſtill be unpaid: And an Aſſent of an Executor to a Legacy, being a rightful Act, a ſmall Matter will amount to ſhew ſuch Aſſent; as where a Term for Years is deviſed to *S. S.* and the Executor permits the Deviſee to take the Profits for a little Time, or tells him that he *wiſhes him Joy with it*, or, *I am contented that you ſhall have it according to the Will*, or to the like Effect; this is a ſufficient Aſſent, and by Conſequence will be a good Execution of the Deviſe. 4 *Rep.* 18.

The Property therefore of a Legacy, (*viz.*) of a Chattel real or perſonal, being not transferred to the Legatee until the Aſſent of the Executor firſt had; it hath been a Queſtion, that if 'tis not had for ſome Time after the Teſtator's Death, whether it ſhall *relate* to that Time; and adjudged, that it ſhall; as for Inſtance: The Teſtator having a Leaſe for Years of Lands, made an Under-leaſe to *T. S.* rendring Rent, and then deviſed his Term to *W. W.* and died, in *May* the Rent became due and payable, and the Executor did not aſſent till *October* following; it was held, that ſuch Aſſent did *relate* to the Death of the Teſtator, otherwiſe the Legatee could not be intitled to the Rent. 5 *Rep.* 12. See *Plowd. Com.* 280. *b.* where Treſpaſs was brought againſt a Stranger for taking a Legacy before the Executor aſſented.

Two joint Executors, the Aſſent of one is ſufficient, (as hath been already mentioned) and ſo is the Aſſent of an Adminiſtrator of an Inteſtate, or the Executor of ſuch Adminiſtrator, or the Executor of an Executor; or if there is no ſuch, then the Legatee may take his Legacy and aſſent to it; and where the ſame Perſon is Executor and Legatary, he may aſſent to his Legacy, and yet waive the Executorſhip; therefore where a Term for Years is deviſed to *T. S.* who is likewiſe made Executor, and he afterwards dies before Probate, his Executor ſhall have this Term, ſo as 'tis not prejudicial to any Creditor.

The Goods of the Teſtator were waſted by *T. S.* who was Executor, and he deviſed his own Goods to *W. W.* and made his own Son Executor, and died; the Son being thus an Executor of an Executor, a Bill was exhibited againſt him to account for the Eſtate of the firſt Teſtator; and pending that Suit, another Bill was brought againſt him by *W. W.* the Legatee, and thereupon *he aſſented to the Legacy and delivered the Goods*; afterwards it appeared upon the *firſt Suit*, that the Executor had waſted the Goods, and thereupon the Complainant in the firſt Bill, and the Son, who was Executor of the waſting

waſting Father, join in a Bill againſt the Legatee *W. W.* to compel him to refund, but could not be relieved; becauſe the Son, who was Executor of an Executor, and who had aſſented to the Legacy, was one of the Plaintiffs, who ſhall never be admitted to undo his own *Aſſent.* 2 *Vent.* 360. *Hodges* verſus *Waddington.*

If an Executor refuſes to aſſent, he may be compelled by the Spiritual Court, and likewiſe by a Court of Equity. *March* 97. 1 *Williams* 287.

(2.) *Of Abatement of Legacies and refunding.*

Though the Teſtator made no Proviſion for refunding, yet the common Juſtice of a Court of Equity will compel a Legatee to refund; and 'tis certain that a Creditor ſhall compel a Legatee; and that one Legatee ſhall compel another to refund where there is a Defect of Aſſets. 1 *Vernon* 94.

But where the Teſtator deviſed a *Specific Legacy* to *T. S.* there tho' the Aſſets fall ſhort to ſatisfy the other Legacies, yet the *Specific Legacy* ſhall be intirely paid; 'tis otherwiſe where the Deviſe is of 100 *l.* to *A.* and 50 *l.* to *B.* and that the 100 *l.* ſhall be paid to *A. in the firſt Place*, for in ſuch Caſe, if Aſſets fall ſhort to ſatisfy the 50 *l.* there the Legatee muſt make a proportionable Abatement of his Legacy. 1 *Vern.* 31. *Brown* verſus *Allen.*

The Teſtatrix deviſed 400 *l.* to the Plaintiff *Smallbone*, to be paid to him out of 500 *l.* ſecured by a Statute, *&c.* by one *Crompton*, and this was in Part of her Acknowledgment, for the great Care and Pains of the ſaid *Smallbone* in her Concerns, and made the Defendant Executor, and died; and now a Bill was brought againſt him to have this Money paid, the Statute being in his Hands; but he refuſed to pay the Money, becauſe the Teſtatrix had deviſed to other Legatees above 1000 *l.* more than here Eſtate would ſatisfy; and that if the Plaintiff would ſubmit to an Abatement in Proportion, then the Defendant was willing to pay the Reſidue; but the whole was decreed to be paid to the Plaintiff, becauſe this was in Nature of a *Specific Legacy*, and ought not to be ſubject to any Abatement, though the Eſtate ſhould fall ſhort to anſwer the other Legacies. *Chanc. Caſes* 303. *Smallbone* verſus *Brace.*

One of the Legatees had a Statute and a Mortgage to ſecure the Payment of his Legacy; but his Legacy being not paid, he was decreed to abate in Proportion with the reſt, where there was a Defect of Aſſets to pay all the Debts. 21 *Car.* 2. *Grove* verſus *Benſon.*

The Teſtator deviſed 3400 *l.* to be laid out by his Executors in the Purchaſe of Annuities in the Exchequer for ninety-nine Years Term, to be enjoyed by his Wife for her Life, ſhe releaſing her Dower; and after her Deceaſe to go equally to his two Daughters; and bequeaths 1000 *l.* a-piece to his ſaid two Daughters, and dies, leaving little more Aſſets than would pay the 3400 *l.* *Lord Chancellor:* The 3400 *l.* ſhall have the Preference, and if there be not Aſſets enough to pay the other Legacies, they muſt be loſt; it is to be taken as a Deviſe of an Annuity, and therefore a ſpecific Legacy, and conſequently to be prefer'd before a pecuniary Legacy. *Burridge* v. *Bradyl*, 1 *Williams* 127.

The Teſtatrix *inter alia* gave 1500 *l.* to her eldeſt Son, in Truſt to lay it out in a Purchaſe of Lands in Fee, and to grant a Rent-charge

of 50*l.* *per annum* thereout to his Daughter, but if he ſhould refuſe or Neglect to lay out the 1500*l.* in a Purchaſe, and grant this Rent-charge, then he to have 500*l.* of the Money, and the remaining 1000*l.* to be laid out in the Purchaſe of an Annuity as far as it would go, for the Daughter.

There being in this Caſe a Deficiency of Aſſets, the Queſtion was, whether the 1500*l.* Legacy, or at leaſt the 50*l.* a Year Annuity, ſhould abate in Proportion. Objected, that it ſhould not, becauſe ordered to be laid out in Land, and conſequently a Deviſe of Land and thereby becomes a ſpecific Deviſe.

The Lord Chancellor held this no ſpecific Legacy, queſtioned the Authority of the laſt Caſe, ſaid he took the Daughter to be a Legatee for 1000*l.* which was to abate in Proportion, and as far as it would go to be laid out in an Annuity for the Daughter for Life. *Hinton* v. *Pinke*, 1 *Williams* 539.

As there is a Benefit to a ſpecific Legatee that he ſhall not contribute, ſo there is a Hazard the other Way; for Inſtance, If ſuch ſpecific Legacy, being a Leaſe, be evicted, or, being Goods, be loſt or burnt, or, being a Debt, be loſt by the Inſolvency of the Debtor; in all theſe Caſes the ſpecific Legatee ſhall have no Contribution from the other Legatees, and therefore ſhall pay no Contribution towards them. 1 *Williams* 540.

Charities tho' preferr'd by the Civil Law, yet they ought to abate in Proportion. 1 *Williams* 522, 523, 264. 2 *Williams* 25.

Specific Legacies, on a Deficiency of Aſſets, are not bound to abate in Proportion. *Maſters* v. *Maſters*, 1 *Williams* 422.

Deviſe of a Rent-charge out of a Term is as much a ſpecific Deviſe as a Deviſe of the Term it ſelf. *Long* v. *Short*, 1 *Williams* 403.

A ſpecific Legacy is not to be broken into in order to make good a pecuniary Legacy, much leſs ſhall pecuniary Legatees, on a Deficiency of Aſſets, have any Remedy for their Legacies againſt a Deviſee of Land; as where one ſeiſed in Fee owes Debts by Bond, and deviſes Land to his Heir in Tail, giving ſeveral Legacies, and the Heir, who was alſo Executor, with the perſonal Eſtate paid off the Bond-Debts, by which Means there was a Deficiency of Aſſets to pay the Legacies; the Legatees were held to be without Remedy; otherwiſe had the Land deſcended to ſuch Heir in Fee. *Herne* v. *Meyrick*, 1 *Williams* 201. *Clifton* v. *Burt*, 1 *Williams* 678.

One by Will gives ſeveral Legacies, and afterwards in the ſame Will, apprehending there would be a Surplus, therefore gave farther Legacies; the Legacies in the former Part of the Will ſhall have Preference, in Caſe there be a Deficiency of Aſſets. 2 *Williams* 23.

If the Teſtator's perſonal Eſtate is not ſufficient to pay all Legacies; the Executors having Legacies bequeathed them ſhall abate in Proportion with the other Legatees, even though the Legacies be given them for their Care and Trouble, and not generally. 2 *Vern.* 432. 2 *Peere Williams* 25. *Barn.* 434.

If an Executor pays a Legacy, on a Suppoſition that there are Aſſets to pay all other Legacies, and afterwards there is a Deficiency, the Legatee muſt refund. *Edwards* v. *Freeman*, 2 *Williams* 447.

(3.) *Of Legacies appointed to be paid out of Lands.*

A Debtor by Bond deviſed, that the Debt ſhould be paid out of his perſonal Eſtate; and if that fell ſhort, then his Executor ſhould ſell his real Eſtate, and with the Money ariſing by ſuch Sale diſcharge the Debt, and accordingly the Lands were ſold; which by ſeveral meſne Conveyances afterwards came to the Defendants, who were now ſued in *Chancery* for the Money as charged on the Lands; but it was decreed, that the Money ariſing by the Sale of the Lands ſhould go in Aid of the Purchaſer, who had bought the Lands for a valuable Conſideration, without Notice of any Incumbrance. *Chan. Caſes* 137. *Preſcott* verſus *Edwards & al'.*

The Husband being ſeiſed *in Fee of a Meſuage*, deviſed 10 *l. per Annum* to be paid yearly to his Wife for Life, and the *Inheritance to his Son and Heir*; upon Condition, that he ſhould pay to his Two Siſters 50 *l.* a-piece, *&c.* and ſoon after he died; then the Son entered and deviſed the ſaid Meſuage to his elder Brother *for Life*, and afterwards to the Defendant *Robert Colt, and his Heirs*; now theſe Legacies being to be paid out of the Lands, the Plaintiff by his Bill inſiſted, that he having only an Eſtate for Life therein, and the Defendant having the Reverſion in Fee, he ought to contribute Two Thirds, and the Defendant one Third; which was decreed accordingly; and becauſe the Plaintiff had the immediate Poſſeſſion, and ſo might be compelled to pay the whole, then he and his Executors ſhould hold the Premiſſes till they were ſatisfied. *Chanc. Caſes* 304. *Peachy* verſus *Colt.*

A Deviſe of Lands until 200 *l.* be raiſed out of them, ſhall be intended until that Sum *might be raiſed*; and in ſuch Caſe, if the Heir or he in Reverſion enter upon the Deviſee, he may either have an Action of Treſpaſs, or re-enter and hold the Land till all the Money is raiſed. 4 *Rep.* 42.

The Teſtator deviſed all his Lands to *T. S.* and the Heirs of his Body, Remainder over; and in another Part of his Will, reciting, that he owed the Defendant Money, he therefore deviſed to him all his *perſonal Eſtate*, and made him Executor, *willing him to pay his Debts:* Decreed, this was a Charge on the Lands as well as on the perſonal Eſtate to pay the Debts. 1 *Vern.* 411. *Clowdſley* verſus *Pelham.*

The Caſe was, (*viz.*) The Teſtator directed, that *his Debts ſhould be paid before any Legacies or Gifts*, and having deviſed ſeveral pecuniary Legacies, he afterwards *deviſed Lands* to *T. S.* on Condition to pay a Rent to *J. D.* and *other Lands* to *W. W.* on Condition to pay a Rent of 5 *l. per Annum* to *O. R.* Decreed, that theſe *Lands* are not ſubject to pay the Teſtator's Debts, becauſe the general Clauſe in the Beginning of the Will ſhall be intended only of the perſonal Eſtate, and the pecuniary Legacies therein deviſed. 1 *Vern.* 457. *Eyles* verſus *Cary.*

Where Lands are deviſed for Payment of Debts and Legacies, they ſhall be paid *pari paſſu*; ſo decreed by the Lord Chancellor *Nottingham*; but that Decree was reverſed by the Lord Keeper *North*, who gave Preference to the Debts; but the Lord Chancellor *Jefferies* was not ſatisfied with that Reverſal. 1 *Vern.* 482. *Goſling* verſus *Dorney.*

The Teſtator, when he was a Student in the Univerſity, and when he was juſt come of Age, entered into a Covenant for the Payment of his Siſter's Portion, to which he was not otherwiſe liable, and which he afterwards refuſed to pay; and by his Will deviſed his Lands for the Payment *of his juſt Debts*; it was inſiſted, that Clauſes of this Nature did not extend to all Sorts of Debts; as for Inſtance, Debts which ariſe by Misfeazance, as for an Eſcape or Breach of Truſt, which are contracted *Mala fide*; but it was decreed, that this was a juſt Debt and within this Clauſe, and the Lands charged therewith by this Covenant. 1 *Vern.* 431. Lord *Hollis* verſus *Carr.*

It was the Opinion of *Holt* Ch. Juſt. that where Money is deviſed to be paid out of Lands, that the Legatee may have an Action of Debt againſt the Owner of the Land, upon the Statute of Wills 32 *H.* 8. for where a Statute enacts any Thing for the Advantage of any Perſon, he ſhall have a Remedy to recover the Thing. *Mod. Caſes* 26.

One gives Legacies by his Will and other Legacies by his Codicil, charging the Land with the Legacies in the Will only; on the perſonal Eſtate's not being ſufficient to pay all the Legacies, the Land ſhall bear the Charge of the Legacies by the Will, and thoſe given by the Codicil ſhall be paid out of the perſonal Eſtate. *Maſters* v. *Maſters*, 1 *Williams* 422.

Where Lands are deviſed for Payment of Debts and Legacies, all the Bond-Debts, and likewiſe the Debts upon ſimple Contract, ſhall be paid in Proportion; but it is otherwiſe where there are Judgments or Debts which charge the Lands. *Chanc. Rep.* 32.

Lands were deviſed to Two Perſons for the Payment of the Legacies given by the Will, and the Debts of the Teſtator, Remainder to *T. S.* in Tail; it was held, that here was no Freehold in the Deviſees, but *quaſi* a Term for Years, for the Profits of the Lands and the Debts are incertain; but ſuch a Limitation in a Deed is a conditional Freehold. *Cro. Eliz.* 315, 330.

The Teſtator deviſes as follows:

"I give all my perſonal Eſtate whatſoever to my three loving "Siſters, equally to be divided amongſt them; and I give my real "Eſtate to my four Sons, *chargeable* with the Payment of my juſt "Debts." And after makes his three Siſters Executrixes; the Teſtator died indebted by ſimple Contract, Bond and Mortgages. Decreed in *Chancery*, that the perſonal Eſtate ſhould be firſt applied towards Payment of all the Debts, and that the real Eſtate ought to come in only to ſupply the Deficiency, in Caſe there ſhould be any. *Bromhall* and *Wilbraham*, *Mich.* 1734. *Forreſter's Rep.* 274.

Mr. *Nichol* makes his Will as follows: *As to my worldly Eſtate I give, deviſe and diſpoſe thereof as follows:* Imprimis, *I will that the Charges of my Funeral, and all Debts owing by me at my Death, be juſtly paid and ſatisfied, eſpecially that due to my poor Carriers, which I will ſhall be diſcharged with the firſt Money of mine that ſhall be received; and I will that all my Debts be paid within a Year after my Deceaſe, or ſo ſoon after as can poſſibly be performed.* Then he deviſes his real Eſtate to Truſtees, in Truſt for his Wife for 99 Years, if ſhe ſhould ſo long live; after her Death in Truſt for his Mother for 99 Years, Remainder to his firſt and other Sons in Tail Male, and gave away ſeveral ſpecific and pecuniary Legacies.

The

The Queſtion in *Chancery* was, Whether the real Eſtate was by theſe Words chargeable with the Payment of his Debts in the Caſe of a Deficiency of the perſonal Eſtate.

The Lord Chancellor held, that the real Eſtate was chargeable. *Hatton* v. *Nichol*, *Trin.* 1735. *Forreſter's Rep.* 110.

Colvile deviſed his Lands to his Wife for Life, chargeable with the Payment of two Annuities for Lives, and with a Legacy of 1000 *l.* and gave her a Power to raiſe by Mortgage, or Sale of any Part of the Inheritance ſuch a Sum as would be ſufficient to diſcharge the Debts he ſhould owe at the Time of his Death; and then expreſſing a Deſire he had of perpetuating his Name and Eſtate, he deviſed all his real Eſtate (after his Wife's Death) to his Nephew *Robert Lupkin* for Life, Remainder to his firſt and other Sons in Tail, *&c.* upon Condition of their taking and uſing the Name and Arms of *Colvile* for ever; and then in the Cloſe of his Will he gives all his Goods, Chattels and perſonal Eſtate to his Wife, and made her ſole Executrix.

In *Chancery* the Queſtion was, Whether the perſonal Eſtate ſhould or ſhould not be chargeable with the Payment of the Teſtator's Debts. Decreed, that the Charge ſhould be intirely on the real Eſtate, and the Wife to have the perſonal Eſtate to her own Uſe. *Stapleton* v. *Colvile*, *Trin.* 1726. *Forreſter's Rep.* 202.

One ſeiſed in Fee of Lands, and poſſeſſed of a perſonal Eſtate, having Children and owing Money, gives Legacies by his Will, and directs that they ſhall be paid out of his real Eſtate, and gives his perſonal Eſtate to his Children.

Maſter of the Rolls: If the Legacies had been only charged upon the real Eſtate, yet the perſonal Eſtate ſhould have been firſt applied to pay them, and ſo ſhould it have been againſt a reſiduary Legatee; but in this Caſe the real Eſtate being the Fund appointed, and the whole perſonal Eſtate given away by the Will, the Legacies muſt be paid out of the real Eſtate only, but the Debts ſhall be paid out of the perſonal Eſtate, the Will not ordering the Debts to be paid out of the real Eſtate. *Heath* v. *Heath*, 2 *Williams* 366.

(3.) *Of Legacies to be paid out of the perſonal Eſtate.*

The Father by his Will appointed, that his perſonal Eſtate ſhould be to the Uſe of his Daughter, to raiſe a Portion of 2000 *l.* for her, and that ſhe ſhould have the Intereſt thereof whilſt ſhe continued ſole, *&c.* in this Caſe it was held, that the Portion being to be paid out of the perſonal Eſtate, the Widow ſhould not retain her *Paraphernalia*. *Chanc. Caſes* 145. *Shipton & Ux'* verſus *Hamſon*.

A Legacy of 2000 *l.* was deviſed to the Plaintiff to be made up out of certain Debts due to the Teſtator, mentioned in a Schedule annexed to his Will; but upon Computation thoſe Debts amounted to no more than 1700 *l.* yet Aſſets being confeſſed, the Whole 2000 *l.* was decreed. *Chanc. Rep.* 152. *Pettiward* verſus *Pettiward*.

Deviſe of a Legacy of 2000 *l.* to his Daughter *Lettice*, and of 2500 *l.* to be paid to his Daughter *Jane*, to be raiſed out of his perſonal Eſtate; and if that fell ſhort, then the ſaid Portions to be made good out of the Rents and Profits of his real and *Leaſehold* Eſtates, *&c.* the Teſtator died, and a Bill being exhibited againſt the Truſtees to perform the Truſt, and that *Lettice* might have her Le-

gacy of 2000 *l.* and Intereſt; the Truſtees, by their Anſwer ſay, that they have not Aſſets, and that the Portions ſhould be *gradually paid*, as the Rents and Profits of the Lands ſhould ariſe, or intirely when the Whole ſhould be raiſed, and that they had not Power to ſell or mortgage the Lands to raiſe theſe Portions, and that the *Jewels* are the *Paraphernalia* of the Widow; but decreed, that the Leaſehold Lands ſhould be ſold to ſupply what was deficient of the perſonal Eſtate, or ſhould be mortgaged for that Purpoſe, and as to the *Paraphernalia*, no Order was made, but the Court inclined that the Widow ſhould retain them. *Chanc. Caſes* 165. *Carew* verſus *Carew*.

The Teſtator being ſeiſed of Lands in *Pimhow*, of the yearly Value of 34 *l. per Annum*, but leaſed to one for Life, reſerving 40 *s. per Annum* Rent, deviſed ſeveral Legacies amounting to 100 *l. to be paid out of his Lands at* Pimhow *within a Year after his Death*, and deviſed the Lands themſelves to *T. S.* without limiting what Eſtate he ſhould have therein. It was objected, that he had only an Eſtate for Life, becauſe the Charge for the Payment of the Legacies was not on his *Perſon*, but on the *Lands*; but adjudged he had a Fee-ſimple, becauſe the Profits of the Lands would not amount to 100 *l.* in the Time wherein the Legacies were payable, and therefore he might ſuſtain a Loſs by paying them. *Freak* verſus *Lee*, *T. Jones* 113. 2 *Lev.* 249. *S. C.*

The Teſtator had Goods to the Value of 100 *l.* and owed 20 *l.* and he deviſed a Moiety of all his Goods to his Wife and to his Executor, *equally to be divided*; the Executor paid the Debt of 20 *l.* but adjudged, that the Wife ſhould have the full Moiety of 100 *l.* becauſe, tho' the 20 *l.* was paid, the Executor had ſufficient Aſſets to pay that Moiety. *Gould.* 149.

So where the Teſtator deviſed a Moiety of his perſonal Eſtate to his Wife, and then he gave ſeveral Legacies to ſeveral Perſons, and afterwards deviſed the *Reſiduum* to *T. S.* it was decreed, that if there were ſufficienr to pay the Debts, the Wife ſhall have the full Moiety of the Whole, and the Debts ſhall be paid out of the reſiduary Part; and if he had Money, Bonds, and Leaſes for Years, the Moiety of them ſhall paſs. 1 *Chanc. Rep.* 16. *Lee* verſus *Hale*.

A. by Settlement had a Power to charge Lands with divers Sums of Money, but by joining in a new Settlement had deſtroyed that Power. *A.* by Will bequeathed 1000 *l.* to *J. S.* out of theſe Lands; it was inſiſted, that though this might be good as a Charge, it ſhould take effect as a Legacy, which was not hurt by taking an additional Security for it; like the Grant of an Annuity out of Land, to which the Grantor has no Title, though it cannot charge the Land, it ſhall charge the Perſon of the Grantor; the Teſtator's main Intent was to give this Legacy to *J. S.* he ſhall have it either one Way or another, either out of the Land or perſonal Eſtate.

Lord Chancellor: Here is a particular Proviſion for this Legacy. Now it is poſſible for a Legacy to be charged in ſuch a Manner upon a certain Fund, as that upon its failing the Legacy ſhall be loſt: It is material that this Bequeſt is grounded upon a Power, and may be thought no more than the Execution of that Power, which, if void, muſt of Courſe be a void Bequeſt alſo. It is likewiſe obſervable, that the Will gives the Reſidue to the Teſtator's eldeſt Son; ſo that to make this Legacy good, the Child who is the Legatee, and otherwiſe provided for, muſt take it away from another Child; and what

makes it ſtill harder in the principal Caſe is, that the Legacy would by this Means be taken away from an Heir in Order to be given to a younger Child. A Charge upon Land ſeems not to be ſo ſtrong as a Gift of a Legacy.

But at length it weighed with the Court, that the Value of the Land was ſo conſiderable as to amount to 1000 *l. per Annum*; and the Deſign appeared to be, to leave the younger Child two ſeveral Sums of 1000 *l.* one charged by expreſs Words upon the perſonal Eſtate, the other upon the Land; his Lordſhip ſaying, that if a Legacy be given to *J. S.* to be paid out of ſuch a particular Debt, and there ſhould not appear to be any ſuch Debt, or the Fund fail, ſtill the Legacy ought to be paid; and the failing of the *Modus* appointed for Payment ſhould not defeat the Legacy itſelf. *Savile* v. *Blacket*, 1 *Williams* 777.

(4.) *Legatee dying before Time of Payment of the Legacy, and where a Legacy ſhall ſurvive.*

By the Civil Law a Legacy is not due where the *Legatee dies before the Teſtator*; ſo alſo if the Legacy is conditional, and he die before the Condition is performed, or where by the Will it is to be paid, but *no certain Day or Time appointed for Payment*, and the Legatee dies before that Time comes; but if it is to be paid on a certain Day, and the Legatee dies, *&c.* it ſhall ſurvive to his Executor.

The Father bequeathed his Goods to be delivered to his Son *when* he ſhall be of the Age of 24 Years, and if he die before that, then his *Daughter* ſhall have them; the Son dies long before the Age of 24 Years: Adjudged, that the Daughter ſhall have them immediately. 1 *And.* 33.

But where a Sum of Money was deviſed, *Remainder over*, and the Legatee died before he had received his Legacy, the Lord Commiſſioner *Rawlinſon* was of Opinion, that it ſhould go to his Executor; but Commiſſioner *Hutchins* held, that it ſhould go to the Adminiſtrator *de Bonis non*. *Mich.* 3 *Will.* 3.

A Legacy of 50 *l.* was deviſed to *A. R. when ſhe ſhall be married*; ſhe died before ſhe was married; her Executor ſhall not have it; but if it had been given to her [1] *towards her Marriage*, in ſuch Caſe it ſhould ſurvive to her Executor. 1 *Brownl.* 32.

[1] 2 Bulſt. 123, 126, 129, *in* Roberts's *Caſe*.

Deviſe of a Legacy to *T. S.* and his Aſſigns, the Legatee died before it was paid: Adjudged, that his Adminiſtrator ſhall have it as Aſſignee in Law. *Roll. Abr.* 915.

Deviſe of a Legacy to *T. S. to be paid Four Years after the Death of the Teſtator*, and the Legatee died within that Time: Adjudged, that his Executor ſhall have it after the Four Years expired.

But if he had deviſed the Legacy *to be paid* to *T. S. when he comes to the Age of* 21 *Years*, his Executor ſhall have the Legacy; and ſo he ſhall, if the Deviſe had been of 20 *l. towards his Marriage*, and he dies afterwards unmarried. 2 *Bulſt.* 126, 129. In *Roberts*'s Caſe.

The Teſtator deviſed *Lands* to *H. B.* and *his Heirs*, and afterwards the Deviſee died in the Life-time of the Teſtator: Adjudged, that this Deviſe was void, becauſe the Deviſee was not in Being when the

Will ſhould take Effect; and the Word *Heirs* in this Caſe is not a Deſignation of the Perſon who ſhall take, but a Limitation of the Eſtate; for if it was a Deſcription of the Perſon, then his Widow would be endowed. *Plow. Com.* 345. *Brett* verſus *Rigden*; cited in 1 *Rep.* 105. in *Shelley*'s Caſe, and 155, in the Rector of *Cheddington*'s Caſe.

So where the Deviſe was to *R. B.* in Fee, to the Uſe of *H. B.* and the *Heirs Males* of his Body, and for Default of ſuch Iſſue to his Daughters; afterwards *R. B.* died in the Life-time of the Teſtator, leaving Iſſue a *Daughter*, and his Wife with Child, which was a Son, afterwards born: Adjudged, that neither the Son or Daughter ſhould have the *Lands*, for they could not veſt in the Son, becauſe they never veſted in *R. B.* his Father, he dying in the Life-time of his Father; and here the Word *Heirs* doth not give an immediate Eſtate by way of Purchaſe, but 'tis a Limitation of the Eſtate. *Cro. Eliz.* 249. *Hartopp*'s Caſe. 1 *Leon.* 253. *S. C.*

The Husband deviſed a Term for Years to his Wife, *until the Iſſue of his Body begotten on her ſhould be Eighteen Years old*; and if he die without Iſſue, then to his ſaid Wife for Life; he died, leaving Iſſue, but that Iſſue died afterwards, before Eighteen: Adjudged, that the Wife ſhall have the Land until the Iſſue would have been Eighteen if he had lived, becauſe the Time may be made certain by computing it from his Death, till he would have been Eighteen, if he had lived. *Lane* 56. *Sweet* verſus *Beale.*

But where a Legacy was deviſed to an Infant, *to be paid* when he comes of Age, and he died before; adjudged, that his Executor or Adminiſtrator ſhall have it preſently, and not expect till the Infant would have been of Age, if he had lived. 1 *Leon.* 278. Lady *Lodge*'s Caſe.

So where a Legacy was given to a Feme Covert, to be paid *within Eighteen Months after the Death of the* Teſtator, and ſhe died within that Time; adjudged, that her Husband ſhall have the Legacy, becauſe the Wife had an Intereſt in it before the Day of Payment, and ſuch an Intereſt which her Husband might have releaſed. 2 *Roll. Rep.* 134.

Deviſe of 800 *l.* in Truſt to pay *ſeveral Annuities, &c.* for Life, and the Surplus of his Eſtate to his *Two Nephews, equally to be divided*; and directed his Executors to lay it out *for their Benefit*; one of the Nephews and reſiduary Legatees died in the Life-time of the Teſtator, and the other died Two Years after the Teſtator's Death: Decreed, that the Nephews were Jointenants and not Tenants in Common, and by Conſequence he who ſurvived ſhall have the whole; for though the Words *equally to be divided* made a Severance, yet that Clauſe, by which the Executor is directed to lay out the Surplus for the Benefit of his Nephews, makes it *joint*; and the Annuitants being all dead, the 800 *l.* ſhall go to the reſiduary Legatee ſurviving, and not to the Executor. 1 *Vern.* 424. *Cock* verſus *Beriſh.*

One *Sands* made his Will, and gave his four Daughters particular Sums of Money, and then ſays, *I give all the Reſt of my perſonal Eſtate not bequeathed to my four Daughters*, Judith, Sarah, Elizabeth *and* Anne *equally, and I order the ſeveral Sums before given to my Daughters, and likewiſe their ſeveral Parts of my perſonal Eſtate*, ſhall be paid them reſpectively at their Age of twenty-one

one or Marriage, which ſhall firſt *happen*, ſo as *ſuch Marriage ſhall be with the Conſent of my Brother* Brown, *if he be then living, and if any of my ſaid three Daughters* (N. B. *one was then married*) *ſhall happen to die* before her or their reſpective Age *or Marriage as aforeſaid, in ſuch Caſe I give the Legacy of her or them ſo dying as aforeſaid to and between the Survivors of my four Daughters equally.*

One of the Daughters married in the Life of *Brown* without his Conſent, and died before the Age of twenty-one, leaving Iſſue.

Her Repreſentatives bring a Bill in Chancery for this Legacy.

Lord Chancellor: This is not to be conſidered under the Head *Forfeiture*, it is merely a Legacy, and two Days of Payment appointed, with a Deviſe over, and the Perſon dies before the Time the Legacy grew due; ſo decreed, that ſhe dying before Marriage *with Conſent*, or twenty-one, an Account to be taken of her Part, and that the Improvements of it be paid to the ſurviving Siſters. *Piggot* againſt *Morris*, *Select Caſes in Chancery*, *fol.* 26.

The Teſtator deviſed a Sum of Money to *T. S. to be paid* at the Age of Twenty-one, or Day of Marriage; the Legatee died before either of thoſe Contingencies happened: Adjudged, that his Adminiſtrator ſhall have the Money, becauſe the Inteſtate had a *preſent Intereſt*, though the Time of Payment was to come; 'tis likewiſe a Charge on the perſonal Eſtate, which was in Being at the Time the Teſtator died; and if the Legacy ſhould be diſcharged by this Accident, it would be for the Benefit of the Executor of the Teſtator, which he never intended. 2 *Vent.* 366. See *Smartle* verſus *Schollar*, *T. Jones* 98. *S. P.* 2 *Lev.* 207. *S. P.*

But if the Deviſe had been of Money to *T. S. at the Age* of Twenty-one, or Day of Marriage; and if he die before either of thoſe Times, 'tis then a lapſed Legacy. 2 *Vent.* 342. in *Cloberry*'s Caſe.

Charles Withers the Teſtator having a conſiderable real and perſonal Eſtate diſpoſed of it as follows: I give and bequeath to my Daughter *Mary*, at her Age of Twenty-one or Day of Marriage, which ſhall firſt happen, the Sum of 2500 *l.* and my Will is, that if my Son *Charles* ſhould die without Iſſue Male of his Body then living, or which may afterwards be born, that then my ſaid Daughter ſhall have at her Age of Twenty-one or Day of Marriage, which ſhall firſt happen, the farther Sum of 3500 *l.* over and above the ſaid Sum of 2500 *l.* but in Caſe the Contingency of my Son's dying do not happen before the ſaid Age of my Daughter, or Day of Marriage, then ſhe ſhall receive and be paid the ſaid Sum of 3500 *l.* whenever it ſhall after happen; then deviſes his real Eſtate to his Son in Tail, Remainder to his Brother in Fee, and goes on, And my Will is, that the Lands and Premiſſes hereby deviſed ſhall be liable to and chargeable with the Payment of the ſaid Sum of 3500 *l.* whenever it ſhall become due and payable; and directs, that in Caſe of Failure of Iſſue of his Son, his Daughter, her Heirs or Aſſigns, ſhould join in a Surrender of ſome Copyhold Lands to the Uſe of his Brother, otherwiſe the Legacy of 3500 *l.* to be void.

The Daughter marries, having attained her Age of Twenty-one, and dies in her Brother's Life-time, leaving the Plaintiff her Husband, who took out Adminiſtration to her, and then her Brother died without Iſſue Male.

The Queſtion in Chancery was, whether the Legacy of 3500*l.* ſhould be raiſed out of the Land, the perſonal Eſtate being deficient? And whether it was ſuch an Intereſt in her, as ſhould go to the Plaintiff her Adminiſtrator?

Lord Chancellor: Three Things were by the Will neceſſary to happen to intitle the Plaintiff's Wife to this Legacy; Death of her Brother without Iſſue Male, Marriage, or attaining her Age of Twenty-one: All three have happened; this Legacy muſt go to her Huſband, who is her Repreſentative, and who may well be thought to have married her in Conſideration of this additional Fortune of 3500*l.* though depending upon a Contingency. *King* v. *Withers*, *Trin.* 1735. *Forreſter's Reports* 117.

Lands were mortgaged to the Father, and the Mortgage being forfeited, the Father deviſed 500*l.* to his Daughter, to be paid out of the mortgaged Eſtate at her Age of Twenty-one, or Day of Marriage; the Teſtator and the Morgagor died, the Daughter married, and died before the Legacy was paid; and her Husband, upon a Bill exhibited againſt the Heir and Executor of the Mortgagor, had a Decree for the Money, tho' both of them inſiſted not to pay it, becauſe the Mortgage was forfeited in the Life-time of the Teſtator. *Chanc. Caſes* 91. *Clerke* verſus *Knight.*

Deviſe of a Legacy of 100*l.* charged on Lands, and to be paid on the 29th Day of *September* 1668; the Legatee died Inteſtate before that Day, and her Mother adminiſtered, and exhibited a Bill for the Money, which the Defendant would have avoided, becauſe the Inteſtate had it upon a Condition, (*viz.*) if ſhe had lived till the 29th Day of *September*, which Condition is now diſpenſed withal by the Act of God, (*viz.*) by the Death of the Legatee before the Time this Condition was to be performed; and which now is impoſſible to be performed; but the Court held, that an Intereſt was veſted in the Legatee, and by Conſequence it ſhall go to her Adminiſtratrix. *Chanc. Caſes* 112. *Innocent & Ux'* verſus *Taylour.*

And this agrees with the *Civil Law*, by which the Right of the Legatee is conſidered in Two Capacities; one which makes him Maſter of the Legacy immediately, ſo that he may demand the Delivery of it; the other is a Right which puts him in a Condition to demand it, though not immediately; now in the firſt Caſe, the Time is come in which the Right is veſted in the Legatee, and the Legacy is then due; and in ſuch Caſe, if the Legatee *dies* before he hath received the Legacy, 'tis tranſmitted to his Adminiſtrator, for in that Moment of Time when the Teſtator died, the Right is veſted in the Legatee; and though there is a *certain Time appointed for the Payment of the Legacy*, yet ſince the Legatee hath acquired a Right by ſurviving the Teſtator, he tranſmits that Right to his Adminiſtrator, though he die before that Time. 2 *Dom.* 180, 181.

A Legacy of 30*l.* was deviſed to *T. S.* an Infant, to put him out Apprentice, and he died before he was of a competent Age to be an Apprentice: It was decreed, that it ſhould go to the Executor of the Infant, who in this Caſe being Seventeen Years old, and having made a Will and named an Executor, it was allowed to be good. 1 *Vern.* 255. *Barlow* verſus *Grant.*

The Father charged his Lands *by Deed* for the Payment of 4000*l.* a-piece to his Daughters, for their Portions, to be paid to each of them, at ſuch Times and in ſuch Manner as he by his Laſt Will ſhould

direct; and in Default of ſuch Direction, then the Truſtees were to raiſe the ſaid Portions for each of his Daughters, payable at the Age of Twenty-one, or Day of Marriage, which ſhould firſt happen; afterwards by his Will he deviſed to his Two Daughters 4000 *l.* a-piece, to be paid to them in ſuch Manner as by the Deed was directed, and ſoon after died, leaving Two Daughters: one of them died before Twenty-one, and unmarried; her Mother adminiſtred, and brought a Bill againſt the Heir and the Truſtees, to have this Legacy of 4000 *l.* and Intereſt from the Death of her Daughter; and it was inſiſted for her, that this was *Debitum in præſenti* to the Daughter, and therefore it being an Intereſt veſted, it ought to go to the Adminiſtrator; beſides it is a Duty ariſing by the Will, and in Nature of a Legacy.

But on the contrary it was inſiſted, that this Caſe depends on the *Deed, and not on the Will*, which only confirms the Deed; and it being a Matter of Truſt, Equity ought to favour the Heir; 'tis true, if this had been a Legacy ariſing by the Will, then it muſt have gone in a Courſe of Adminiſtration; but 'tis a Duty ariſing upon the Deed, and was given as a Portion and not as a Legacy; and it was not intended, that the Daughter ſhould have any Intereſt in it till Twenty-one, or Marriage; 'tis true, where there is *Debitum in præſenti*, though not payable till a future Day, it ſhall go in a Courſe of Adminiſtration, becauſe it depends on the Will and affects the perſonal Eſtate; and ſo it is where *Money is deviſed payable out of Lands*, becauſe this is eſteemed a Legacy; but where it ſtands upon a Deed only, 'tis quite otherwiſe, and in the principal Caſe 'tis to come wholly out of the Lands, and the perſonal Eſtate is not made liable by the Will; and it was decreed accordingly for the Heir, and affirmed upon an Appeal. 1 *Vern.* 312. Lord *Pawlett*'s Caſe.

Deviſe of the Surplus of a perſonal Eſtate, being 30000 *l.* to the Lord *Craven, during the Minority* of the Teſtator's Son, to the Uſe of him and the Heirs of his Body; and if he died without Iſſue *during his Minority*, then to the Children of his Siſters, and made his Son Executor, and the Lord *Craven* Executor, during *the Minority* of his Son, who proved the Will; and then the Son being of the Age of Eighteen, died without Iſſue, having by Will deviſed to his Wife (the Plaintiff) all his perſonal Eſtate, and made her ſole Executrix; and it was inſiſted for her, that the Eſtate was abſolutely veſted in the Son, for the Deviſe to the Lord *Craven*, being *during the Minority of the Son*, (which muſt be intended to determine at Seventeen Years) and he being likewiſe made Executor during ſuch *Minority*; this ſhews that the Teſtator intended the Lord *Craven*'s Intereſt ſhould continue no longer than till the Son came to be Seventeen Years old, and then, and not till then, that the perſonal Eſtate ſhould be veſted in him; and though it was objected, that theſe Words *during the Minority* ſhall be intended until the Son is of the Age of Twenty-one Years; yet it was decreed, that the *Minority was determined when the Son was Seventeen Years old*; and that this was a Truſt veſted in him, and the Remainder over to the Children of his Siſters, void. *Chanc. Caſes* 326. *Whitmore* verſus *Weld.* 2 *Vent.* 367. *Chanc. Rep.* 2 *part*, 167.

The Father ſettled Lands to raiſe 100 *l. per Annum* for his eldeſt Son, and 100 *l.* a-piece for his younger Children, to be raiſed and paid according to their Seniority, and Maintenance in the mean Time;

ſome of the younger Children died living their Father: It was decreed, that the Adminiſtrators of the dead Children ſhould have no Benefit of their Portions, but that the ſame ſhould ceaſe; but that if any of the Daughters had married in the Life-time of their Father, and afterwards died, the Husbands, as Adminiſtrators to them, ſhould have their Portions; for *no certain Time* being appointed for Payment of theſe Portions, but that being left indefinitely, it doth not attach till the Death of the Father. 1 *Vern.* 334. *Braithwaite* v. *Braithwaite.*

Deviſe of a Portion to a Child, with Intereſt, but not payable till the Age of Twenty-one Years, or Marriage; the Child died before Twenty-one, and not married; it ſhall go to his Adminiſtrator. 1 *Vern.* 462. *Collins* verſus *Metcalfe.*

By the Civil Law there is no Survivorſhip amongſt Legatees; for if Goods are deviſed to Two jointly, and afterwards one of them dies, the Executor of the dead Legatee ſhall have his Share; but where the Teſtator deviſed Goods to Two jointly, and the Executor aſſented to the Legacy, and then one of them died; adjudged, that by this Aſſent an Intereſt is veſted, and 'tis become a Chattel, and governable by the Rules of Common Law. 2 *Lev.* 209. *Buſtard* verſus *Stukley.*

Thomas Cole by Will gave to his Grandaughters *Elizabeth* and *Anne*, and to his Grandſon *Thomas* 1000 *l.* a-piece of his *Eaſt-India* Stock, and the Intereſt thereof for their Uſe; and if any dies to the Survivors or Survivor, ſhare and ſhare alike, and Wills that the Intereſt be paid to their Father, his Son *Howard*, to be improved to their Uſe.

The Grandſon died an Infant, whereby his Share ſurvived amongſt his two Siſters, and then one of the Siſters died.

In Chancery the Queſtion was, whether the Share ſhe had taken by Survivorſhip upon her Brother's Death ſhould ſurvive to the other Siſter, as well as her original Legacy of 1000 *l.* or whether that Share taken by Survivorſhip ſhould go to the Father, who was her Adminiſtrator; held that it did not go to the ſurviving Siſter, but to the Father, who is Adminiſtrator of the deceaſed Siſter. *Rudge* againſt *Barker*, *Trin.* 1735. *Forreſter's Rep. fo.* 124.

(5.) *Of Executor giving Security for Payment of Legacies, and of Securities in general.*

An Executor may in ſome Caſes be compelled to give Security to pay a Legacy, as where 1000 *l.* was deviſed to *T. S.* to be paid at the Age of 21 Years; and upon a Bill exhibited againſt him, ſuggeſtgeſting a *Devaſtavit*, and praying, that he might give Security to pay the Legacy when due, it was decreed accordingly. Duncomb *v.* Stint, 1 Chanc. Rep. 121.

Where a Legacy is deviſed to a *City Orphan* in any Part of *England*, the Executor may be compelled to give Security for the Payment thereof to the Court of Orphans. 1 *Vent.* 180.

A Legacy was given to the Son *to be paid at ten Years old*, and at that Age it was paid to the Father, who afterwards died inſolvent; now it appearing, that the Executor, when he paid the Money, *took a Bond to ſave himſelf harmleſs*; it was held, that he took this Security at his own Peril; and therefore, tho' the Payment to the Father was

Holloway *v.* Collins, 1 Chanc. Rep. 245.

was good, it was decreed that the Executor ſhould pay it again to the Legatee. 26 *Car.* 2. *Holloway*'s Caſe.

The Teſtator deviſed 800 *l.* to *T. S.* to be paid by his Executor when the ſaid *T. S.* ſhall attain to the Age of 21 Years; the Legatee by his Guardian exhibited a Bill, that the Executor might give Security for the Payment of the Money; and it was decreed accordingly.

If the Spiritual Court go about to compel an Executor to pay a Legacy, without giving Security to refund, in caſe there ſhould be a Defect of Aſſets; a Prohibition ſhall go, as it was reſolved in the Caſe of *Knight* verſus *Clerke*.

(6.) *Of Reſiduary Legatees, and of the Surplus of the Eſtate.*

The Teſtator deviſed the reſiduary Part of his Eſtate to *Two Executors*, one of them died: It was decreed, that his Adminiſtrator ſhall have the Moiety as *Tenant in Common*, and that it ſhall not ſurvive to the other. *Chanc. Rep.* 238.

Fane *verſus* Fane, 1 Vern. 30.

Deviſe of ſeveral *Specific Legacies*, and that 1000 *l.* ſhall be raiſed out of her Plate and Jewels for her Funeral, and all the reſt of her *Goods and Chattels* to her Executors; then there follows this Clauſe, (*viz.*) *I give unto my Executors* 100 *l. for their Care and Trouble, and after my Debts and Legacies are paid*, I give *all the reſt of my perſonal Eſtate* unto the Children of Sir *Francis Fane*, the *Money* to be paid into the Hands of their Father: Decreed, that the Children ſhall have all the reſiduary Part, and that the Executors ſhould take nothing by the Deviſe of *all the reſt of the Goods and Chattels to them*, becauſe they had 100 *l.* a-piece deviſed to them.

Petit *verſus* Smith, 5 Mod. 247.

Two Executors, to whom the Teſtator deviſed 5 *l.* a-piece, and died without any Diſpoſition of the Reſidue of his perſonal Eſtate; the Will was proved in the Spiritual Court in common Form; and then one of the Daughters of the Teſtator ſued for her diſtributive Part of the *Reſiduum*; inſiſting, that the Executors had no Title to it, becauſe each of them had a pecuniary Legacy; and the Court gave Sentence againſt them to exhibit an Inventory, in order to make a Diſtribution; but a Prohibition was granted, upon a Suggeſtion, that the Court had not ſuch Power, but only when the Party died Inteſtate.

Grace Lawſon by Will, *inter alia*, gave a particular Legacy in Truſt for her Daughter *Elizabeth*, Wife of *Allen Johnſton*, for her own ſeparate Uſe, excluſive of her Husband's, during her Life, and after her Deceaſe to ſuch Perſons as ſhe ſhould give the ſame to by Will, or other Inſtrument in Writing; and of this Will, *Grace* made *Elizabeth* Executrix. In Chancery the Queſtion was, whether as there was a Legacy given in Truſt for the Benefit of *Elizabeth*, ſhe was intitled to the Surplus of the Eſtate of *Grace Lawſon*, as her Executrix, or became only a Truſtee for the Benefit of the next of Kin. *Lord Chancellor*, the Executrix is not excluded of the Surplus. The Ground of this Court's decreeing the Surplus in ſuch Caſe to be diſtributed, is founded on Conſiderations of Equity, and on ſome Fact from whence ariſes a violent Preſumption amounting to Evidence, that the Executor was only to be a Truſtee: The firſt Caſe on this Subject was, that of *Foſter* and *Monk* in the Time of Lord *Jefferies*, 1 *Vern.* 473. The Tradition of that Caſe he has heard to be, that Lord *Jefferies* thought there was ſomething of Fraud in the Party's getting

to be made Executor, and beſides thought it abſurd, that when the Executor had a Legacy of 5 *l.* given him *for his Trouble*, he ſhould claim the Reſidue of the Eſtate to his own Benefit; from that Time it has been taken, that where the Executor has a Legacy *for his Care and Trouble* he ſhall be a Truſtee for the Reſidue, it has been ſince carried farther, and held that where a Legacy is given to an Executor, he ſhall be a Truſtee for the *Reſiduum*. *Farrington* and *Knightley*, *Preced. Chan.* 566. *Caſes L. E.* 442. Diſtinctions have been endeavoured at, on Account of Nearneſs of Relation between the Executor and Teſtator, but over-ruled, *Granvil* and *Beauford*, 2 *Vern.* 648. but has prevailed in Favour of a Wife made Executrix. *Ball* and *Smith*, 2 *Vern.* 675. As to the principal Caſe, it is a Legacy of that Kind, no Inference can be drawn from thence, that ſhe was not to have the Reſidue, it is a Legacy in Truſt for her ſeparate Uſe excluſive of her Husband, for though the Teſtatrix intended that the Executrix ſhould have the Whole; yet as ſhe intended this Legacy for her ſeparate Uſe, excluſive of her Husband; there was a Neceſſity for Veſting it in the Manner it has been done. *Griffith* and *Rogers*, *Prec. Chan.* 231. Barely giving a Legacy in Truſt is not a ſufficient Foundation for ſuch a Diſtinction, but this is a Truſt of a particular Kind, and abſolutely neceſſary to anſwer the Purpoſe the Teſtatrix intended. *Barn. Rep. fo.* 94.

Where Lands are deviſed to be ſold for Payment of Debts and Legacies, and after thoſe are paid, then the *Reſidue of the perſonal Eſtate is deviſed to the Executor*; yet that very perſonal Eſtate ſhall be Aſſets, and ſhall be applied to the Payment of the Debts as far as it will go, and the Land ſhall be charged no farther than to make up what remains unpaid, and this in Favour of the Heir. 2 Vent. 349.

Two Executors, one of them is made reſiduary Legatee; in ſuch Caſe he may maintain an Action againſt his Companion, for Taking or Detaining the Goods of the Teſtator; and if both of them are made reſiduary Legatees, and then one of them dies Inteſtate, it hath been held, that his Adminiſtrator ſhall have a Moiety of the *Reſiduum* after Debts and Legacies paid; becauſe the Teſtator intended an equal Share to both, and his Intention ſhall prevent the Survivorſhip; but it hath been otherwiſe decreed; as for Inſtance, Cox *ver.* Quantock, 1 Chan. Rep. 238.

The Teſtator made Two Executors, and deviſed to them a Legacy of 20 *l.* a-piece, and likewiſe 800 *l.* in Truſt, to pay ſeveral Annuities to Three Perſons (naming them) for Life, and the Reſidue of his Eſtate to his Nephews, *Charles* and *John Cock*, *equally to be divided between* them, to be laid out by his ſaid Executors, for *the Benefit of his ſaid reſiduary Legatees*; one of them died in the Life-time of the Teſtator, and the other Two Years after the Teſtator's Death; the Queſtion was, whether the reſiduary Legatees were Tenants in Common, or Jointenants; if the later, then the Survivor ſhould have the whole Surplus; and it was decreed he ſhould have the Whole, for the Teſtator intended their Benefit, and none to the Executors; 'tis true, the Deviſe was ſevered by the Words *Equally to be divided*, but by the Appointment, that his Executors ſhould lay out the Money *for the Benefit* of the Legatees, it was *joint*. Cock *verſus* Berrith, 1 Vern. 425.

Two Executors, one of them was made reſiduary Legatee; he may retain the *Reſiduum* againſt the other; and if he take it, or any Part thereof, he may have an Action of Treſpaſs againſt his Co-executor; but where a Man makes one Executor, and gives him a Legacy, and

leaves the Reſidue of his perſonal Eſtate undiſpoſed, the Executor ſhall not have it, *quatenus* Executor; but the next of Kin of the Teſtator ſhall have the Adminiſtration, and it ſhall be diſtributed according to the [m] Statute.

[m] 22 & 23 Car. 2. cap. 10.

Shower's Rep. 26.

But where a Man is made reſiduary Legatee, and he dies before the Will is proved, his Executor ſhall have the Adminiſtration, and not the next of Kin of the firſt Teſtator, becauſe the reſiduary Legatee is [n] *in loco hæredis*; and in ſuch Caſe, if he die before Probate, or after, his Executor hath the Right of Adminiſtration.

[n] Dyer 372.

Philips *v.* Philips, 1 Chanc. Rep. 292.

The Teſtator deviſed ſeveral Legacies to particular Perſons (naming them) and the Reſidue of his perſonal Eſtate to *E. G.* and made *T. S.* Executor, and died, which ſaid *T. S.* the Executor, was Debtor to the Teſtator in the Sum of 400 *l.* It was inſiſted, that the Teſtator having made his Debtor Executor, the Debt was by that Means diſcharged; and if ſo, then the 400 *l.* was no Part of his perſonal Eſtate, and by Conſequence there was no *Reſiduum*; and it appeared, that there was ſufficient Aſſets beſides to pay all Debts and Legacies; yet it was decreed againſt the Executor, that he ſhould pay the *Reſiduum* of the Eſtate to *E. G.* to whom it was deviſed.

(7.) *Where Intereſt ſhall be paid for a Legacy.*

Where a Debt is due to the Teſtator, he may by his Will reſpite the Payment thereof to the Legatee, and in ſuch Caſe he cannot demand any Intereſt for the Forbearance, and much leſs he cannot pretend to Coſts and Damages, tho' the Debt was of ſuch a Nature as the Default of Payment might intitle him to ſuch a Demand. 2 *Dom.* 157.

Adjudged, That where *no certain Time* is appointed for the Payment of a Legacy (if the Legatee is an Infant) he ſhall have Intereſt after one Year from the Death of the Teſtator, becauſe a Year is always allowed to the Executor, that he may be informed whether there are any Debts owing by the Teſtator, and no Laches ſhall be imputed to an Infant; but if the Legatee was of full Age when the Teſtator died, he ſhall have no Intereſt but from the Time of the Demand of this Legacy, unleſs 'tis made payable at a [o] *certain Day*, and in ſuch Caſe he ſhall have Intereſt from that very Day. 2 *Salk.* 415. *Snell* verſus *Dee.*

[o] 1 Vern. 262. S. P. 2 Vent. 346. S. P. 1 Chanc. Rep. 277. S. P. Moor *v.* Blagrave.

Where Legacies were deviſed to *Infants payable at a certain Time*, which expired during their Infancy, and the Executor refuſed to pay the ſame, becauſe the Legatees could not give any Diſcharges, by Reaſon of their Infancy: It was decreed, that the Maſter ſhould put out the Money at Intereſt in the Name of the Guardian, or of ſuch other Perſon as he ſhould think fit, and that the Defendant ſhould be indemnified againſt the Infants. *Chanc. Caſes* 95. *Dyke* verſus *Dyke.*

An Infant exhibited a Bill by his Guardian for a Legacy of 100 *l.* deviſed to him; the Defendant by his Anſwer confeſſed the Legacy, and that he was always ready to pay it, ſo as he might be lawfully diſcharged, which the Plaintiff by Reaſon of his Infancy could not do; and therefore inſiſted, that it might be paid without Intereſt; which was decreed accordingly, and the Defendant to be indemnified. *Chanc. Caſes* 264. *Bullen* verſus *Allen.*

A Legacy was given to an Infant, the Teſtator having a great Deal of Money in Bank Stock, the Executor was reſiduary Legatee; a Bill was brought in the Exchequer for the Legacy; and the Queſtion was, whether it ſhould bear Intereſt, and from what Time. Chief Baron *Pengelley* and Baron *Hale:* It is a certain Rule, that where the Fund is certain, as when charged on Land, it ſhall bear Intereſt, becauſe it plainly appears the Rents are received. So the Fund on which it is charged produces a Profit here, it is equally certain, and therefore ſhould bear Intereſt, *Salk.* 415. *Small* verſus *Dee*, and ſhould be from the Teſtator's Death. But this was oppoſed by *Carter* and *Comyns*, 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 Time they are not payable, ſo not to bear Intereſt; which was agreed.

A Difference was offered to be made, that as this was a Legacy to an Infant, it could not be ſafely paid, and therefore could not bear Intereſt; to which it was anſwered by the Chief Baron, that it might be ſafely paid into the Hands of an Infant, having proper Evidence of the Payment, as is *Wentworth*'s *Executor* 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, he muſt depend on that taken at his Peril. *Bilſon* verſus *Saunders*, *Select Caſes in Chancery*, *fo.* 72.

Deviſe of 500 *l.* to his Grandaughter (then an Infant) *to be paid at ſuch Time and in ſuch Manner* as his Wife (who was Executrix, and the Grandmother) *ſhould think fit and beſt for his ſaid Grandaughter:* The Executrix lived Twenty Years after the Death of the Teſtator, in all which Time this Legacy was never demanded; and then ſhe having made the Defendant her Executrix, ſhe died without paying this Legacy; and upon a Bill exhibited againſt the Executrix of the Executrix for this Legacy, tho' no Demand was proved; and tho' the Time and Manner of paying it was left to the Wife; yet it was decreed to be paid with Intereſt from the Death of the Teſtator. *Churchill* verſus *Speake.* 1 Vernon 251.

(8.) *Other Caſes concerning Payment of Legacies.*

Deviſe of a Sum of Money to *T. S.* to be paid to him whom the Teſtator ſhall appoint; he died without making any Appointment, this is a good Deviſe to *T. S. Chan. Rep.* 198.

The Teſtator deviſed 500 *l.* to *T. S.* which *A. B.* now owed him upon Bond; afterwards the Money was paid to the Obligee: Adjudged, That the Legacy was due, though the Security was altered. *Raym.* 335.

Deviſe of 100 *l.* to a Feme Covert, *to be paid within Six Months after the Teſtator's Death*; and a Bill being brought for this Legacy by the Husband, the Executor anſwered, that he had paid it to his Wife, and had her Receipt: This was decreed to be no good Payment, but that it ſhould be paid to the Husband, with Intereſt, it being appointed by the Will to be paid at *a certain Time.* Palmer *v.* Trevor, 1 Vern. 261.

Where Lands are made ſubject either by Deed or Will, even thoſe which are barred by the Statute of [P] Limitations, ſhall be paid, becauſe they are ſtill Debts in Equity; and though the Statute hath taken 1 Salk. 154. [P] 1 Vern. 256.

taken away the proper Remedy to recover them, yet the Duty remains.

In 1707. Sir *Henry Johnſon* was indebted to *Blakeway* in 343 *l.*

In 1714. he received 50 *l.* in Part.

In 1719. Sir *Henry* died having made his Will, and deviſed his Lands to his Executors, *in Truſt to pay his Debts*; the Executors renouncing, the Earl of *Strafford* adminiſtered with the Will annexed.

Blakeway brought his Bill to be paid out of Aſſets.

The Earl of *Strafford* pleaded the Statute of Limitations, and that neither he nor (as he believed) Sir *Henry* made any Promiſe to pay the Debt within ſix Years before the Bill brought.

Lord Chancellor: I would be cautious of giving any Relief againſt an Act of Parliament; but it is plain the Debt is not extinguiſhed by the Statute of Limitations, ſince the Statute muſt be pleaded, which the Defendant is not bound to do; and if he afterwards will acknowledge the Debt, it takes it out of the Statute; his Lordſhip overruled the Plea.

Upon an Appeal brought in the Houſe of Lords this Decree was reverſed, and the Plea ordered to ſtand for an Anſwer. *Blakeway* againſt *The Earl of* Strafford. 2 *Williams* 373. *Vide* 2 *Vern.* 141. *Gofton* v. *Mill*, and *Staggers* v. *Welby*.

1 Salk. 153. Lands were ſettled on Truſtees to raiſe Money for the Payment of Debts and Legacies; all the Money was raiſed, but not paid, as directed by the Teſtator; and this being made an Objection why the Heir ſhould not have the Lands, that the Money was not paid by the Truſtees, but that they converted it to their own Uſe; but decreed, that the Heir at Law ſhall have the Lands diſcharged of the Debts and Legacies, becauſe the Lands were ſubject and Debtor to them, but not to the Default of the Truſtees, againſt whom both the Creditors and Legatees may have a proper Remedy.

Goſling *v.* Dorney, 1 Vern. 482. Lands were deviſed to be ſold for Payment of Debts and Legacies; the Lord Chancellor *Nottingham* decreed, that they ſhould be paid *pari paſſu* in equal Proportion; but the Lord Keeper *North* reverſed that Decree, and gave Preference *to the Debts*, and ſo he did in the Caſe of [q] *Hixon* and *Witham*; but the Lord Chancellor *Jefferies* was not ſatisfied with this Reverſal.

[q] 1 Chan. Rep. 248. Poſtea part. 7.

§. VIII. The Diviſion of Teſtaments.

1. *Of the antient Diviſion of Teſtaments.*
2. *Another Threefold Diviſion.*

FOraſmuch as that (1) antient Diviſion of Teſtaments, whereby they were firſt diſtributed into Two Sorts [r], the one Teſtament being termed *Calatis Comitiis* [s], the other *Præcinctum* [t], (whereunto afterwards a third Kind was added, called *Per æs & libram* [u],) hath been

[r] Inſtit. de teſta. ordin. §. 1.

[s] I. e. Vocatis comitiis, ſeu vocato populo, a Græco Verbo καλῶ, quod eſt voco. Tempore namque pacis, bis tantum in anno Teſtator, convocato per cornicinem populo, eoque præſente, ac quaſi teſte, ultimam ſuam voluntatem declarare ſolebat. Minſing. in d. §. j.

[t] Hoc teſtamentum fieri conſuevit ab exituris in prælium, ob dubiam belli aleam. Inde procinctum dicitur, non quod ſuccincte fieret, ſed quod procincti dicuntur milites, quaſi precincti & expediti. Viglius in d. §. j.

[u] i. e. Per imaginariam venditionem; præſentibus enim teſtibus una cum libripende ſeu æſtimatore patrimonii, is qui ſucceſſor defuncti futurus erat, morituri bona emebat, deinde percutiens libram, illud æris quaſi pretium dabat ei a quo hæreditatem expectabat. Minſing. poſt. Vigl. in d. §. j.

been long ſince aboliſhed [x], and worn not only out of Faſhion, but almoſt out of Memory; inſomuch that unto ſome their very Names may ſeem very ſtrange. Unwilling therefore, to offer any Thing more tedious than profitable, I thought good to make Report of ſome other Kinds of Teſtaments, whereof haply we may have ſome Uſe in *England.*

[x] Text. in d. §. 1.

Underſtand therefore, that (2) of Teſtaments ſome be *ſolemn*, ſome *unſolemn*; ſome *written*, ſome *unwritten*, or *nuncupative* [y]; ſome *privileged*, and ſome *not privileged* [z].

[y] Jure Civili Teſtament. ſcriptum non videtur alia ſpecies a Teſtamento ſolenni, plerumque enim hæc duo confunduntur, & indifferenter ſeu promiſcuè uſurpantur. (Bar. in L. Tabular. ff. Quemad. teſtament. app. & apertius Minſing. in §. ſed cum. Inſtit. de teſta. ord. & in §. fin. ibid. Graſſ. Theſaur. com. op. §. teſta. q. 10. n. 1.) At vero jure quo nos utimur inſpecto, plane diverſa ſunt. Sæpius etenim neceſſarium eſt, ut Teſtamenta noſtra ſint ſcripta, ſed ut ſint ſolennia nunquam. Quinimo vel eod. jure Civili teſtamentum inſolenne dividitur in ſcriptum & non ſcriptum. Graſſ. Theſau. com. op. §. teſta. q. 10, & q. 11. n. 3.

[z] Mantic. de conject. ult. vol. l. 1. tit. 7. Adde Jul. Clar. §. teſtam. q. 3. ubi tradit nobis aliam teſtamentorum diviſionem.

§. IX. Of ſolemn Teſtaments.

1. *What is a ſolemn Teſtament.*
2. *No Uſe of ſolemn Teſtaments here in* England.
3. *The Rigour of the Civil Law concerning Teſtaments.*
4. *This Rigour juſtly reformed.*
5. *What moved* Juſtinian *to exact the Number of ſeven Witneſſes in Teſtaments.*
6. *Two or Three Witneſſes ſufficient by the Law of God.*

Solemn Teſtaments are they, (1) wherein are all thoſe Solemnities of the Civil Law: As the Preſence of *Seven Witneſſes*, and required thereunto, their Subſcription, their Subſignation, the Expedition of the Act at one Time, *&c.* [a]. But (2) of this Kind of Teſtaments we have no Uſe in *England* [b]. Wherefore it ſhall ſuffice, that I have ſhewed that ſuch a Kind of Teſtament there is mentioned in the Civil Law; to the (3) Obſervation whereof the *Roman* People were ſtrictly tied in the Making of their Teſtaments, (much like as were the *Jews* to their Jewiſh Ceremonies:) So that if any one of theſe Solemnities were omitted, the Teſtament was void [c]. Which Thing was not only hard to be performed, but in ſome reſpects alſo ungodly. For that it was not ſufficient for any Man, to prove a Teſtament by Two or Three Witneſſes, (the Law of God requireth no more [d],) but it muſt be proved forſooth by Seven Witneſſes [e]. Wherefore with (4) good Reaſon was this Exceſs reformed, firſt by the *Eccleſiaſtical Law*, which did reduce the Number of *Seven Witneſſes to Three*, (the Parochial Miniſter being one [f],) and in ſome Caſes Two [g]; and then by the general Cuſtom of this Realm, which diſtinctly requireth no more Witneſſes than Two, ſo they be free from any juſt Cauſe of Exception [h]. The Reaſon (5) wherewith *Juſtinian* was moved to approve theſe Solemnities, and to add thereunto as he did, was, as he doth frankly acknowledge, (*Propter teſtamentorum ſinceritatem, ut nulla fraus adhibeatur* [i],) And I doubt not but before he did ſet down ſo preciſe a Law, he had ſufficient Trial of great Cunning and Craft practiſed in the making and proving of Teſtaments; (I would there were none in *England*;) which urged him to go from that Rule (6) and Law of *Ulpian* the famous Lawyer; the ſame alſo being moſt agreeable to the Law of God. *Ubi*

[a] §. Sed cum paulatim. Inſtit. de teſta. ordin. L. Hac conſultiſſima. C. de teſta.

[b] Supra §. 5. n. 1. Sir *Tho. Smith* de rep. Angl. lib. 3. c. 7. Bract. lib. 2. c. 25.

[c] L. 1. Injuſt. rupt. & irrit. teſt. ff. Minſing. in d. §. ſed cum n. 12.

[d] Deut. c. 19. Matth. c. 18. Mantic. de conject. ult. vol. l. 6. tit. 3. n. 18.

[e] D. §. ſed cum paulatim.

[f] C. cum eſſes. de teſta. extr.

[g] Teſta. videlicet ad pias cauſas condit. c. relatum. cl. j. de teſta. extr.

[h] Lindw. c. ſtatut. de teſta. l. 3. provincial. conſtitu. verb. probatis. Peckius in c. privilegium. de reg. jur. l. 6. n. 7.

[i] D. §. ſed cum paulatim. Inſt. de teſta. ord.

numerus teſtium non adjicitur, etiam duo ſufficiunt; pluralis enim elocutio duorum numero contenta eſt [k]. Where he ſaith, the *plural Speech is content with Two*, which is the Reaſon of the Law, it hath this Senſe: It was a Thing very well known, that *one Witneſs* alone was not ſufficient to decide a Controverſy, (the Teſtimony of one being as the Teſtimony of none [l];) and therefore there were required *Witneſſes:* But how many Witneſſes were ſufficient, was doubted of. Whereupon *Ulpian* anſwereth, that albeit Witneſſes are required, yet that plural Speech, *Witneſſes*, is ſatisfied with Two; and ſo Two Witneſſes are ſufficient, where a greater Number is not required [m]; but by our Law where Lands are deviſed, Three Witneſſes are required.

[k] L. ubi de teſtibus. ff.

[l] C. licet. c. venient. &c. Jusjurand. de teſtibus extr. admonere. 33. q. 2.

[m] DD. in d. L. ubi.

§. X. Of unſolemn Teſtaments, and whether the aforeſaid Definition of a Teſtament do agree to our Teſtaments in *England.*

1. *What is an unſolemn Teſtament.*
2. *Of the Freedom we enjoy in* England *in making our Teſtaments.*
3. *Writing required in the Deviſe of Lands.*
4. *Many Things permitted which be not neceſſary.*
5. *Whether it be needful that Witneſſes be required in a Teſtament.*
6. *Whether our Teſtaments in* England *do agree with the former Definition of a Teſtament.*
7. *Some Reaſons whereby it ſhould ſeem that the former Definition and our Teſtaments do not agree.*
8. *The former Definition of a Teſtament doth comprehend both ſolemn and unſolemn Teſtaments.*
9. *The Reaſons which prove that this foreſaid Definition doth comprehend both Teſtaments.*
10. Ulpian *did flouriſh before* Juſtinian.
11. *The Increaſe or Decreaſe of Solemnities do not make the Teſtament to ſwerve from the former Definition.*
12. *An unſolemn Marriage is a true Marriage in reſpect of the Knot or Eſſence of Matrimony.*
13. *A Military Teſtament, though unſolemn, is properly a Teſtament.*
14. *A Teſtament amongſt Children is properly a Teſtament, tho' unſolemn.*
15. *A great Inconvenience if an unſolemn Teſtament were not properly a Teſtament.*
16. *What is a Teſtament properly ſo called?*
17. *In* England *our Teſtaments, though unſolemn, have the Effect of Teſtaments properly ſo called.*
18. *An Anſwer to thoſe Reaſons which ſeem to prove our Teſtaments do not agree with the former Definition.*
19. *The former Definition is not of any ſpecial Teſtament.*
20. *The Concluſion.*

Unſolemn Teſtaments are (1) ſo termed, where the Solemnities of the Civil Law above-mentioned, or any of them, are omitted, at the Making of the Teſtament [a]: Without which, by the Civil Law, the Teſtaments are void [b], except in certain Caſes. But (2) with us in *England* they are not void: For that our Teſtaments are not ſubject to the Ceremonies of the Civil Law, but are made with all Liberty and Freedom, and (as one reporteth) *Jure militari* [c]. And ſo we are no farther tied than to the Obſervation of thoſe Requiſites that be neceſſary *Jure gentium* [d]. Which requireth but Two Witneſſes [e]: Saving that in (3) a Legacy or Deviſe of Land Three Witneſſes and Writing is alſo neceſſary, and that to be made in the Life of the Teſtator [f]. Howbeit, it is not to be doubted but that a Man may make his Teſtament in Writing, wherein he diſpoſeth of his Goods only, and ſo he may uſe the Teſtimony of more Witneſſes than Two. Alſo (4) if he will, he may procure the Witneſſes to ſubſcribe their Names to the Teſtament, yea, to every Page of the Teſtament, (if there be divers;) and it is a good and ſafe Courſe, whereby many Forgeries might be prevented, or more eaſily detected. But no (5) Man is tied to the Obſervation of theſe Cautels [g], (except as before) no not ſo much as to require the Witneſſes [h]: So beneficial are the Laws of this Realm to the Subjects of the ſame.

[a] L. j. de injuſt. rupt. & irrit. teſta. ff.

[b] D. L. j. L. Hac conſultiſſima. §. ex imperfect. C. de teſta. Minſing. in §. ſed cum paulatim. Inſtit. de teſta. ord. n. 12.

[c] D. *Smith* tract. de Repub. Ang. lib. 3. c. 7. Quod tamen indiſtincte non admitterem, quandoquidem multa privilegia teſtamentis militaribus competere videantur, qualia ſunt, cum duobus teſtamentis decedere, & id genus alia, (de quibus infra. §. 14.) quæ noſtratibus non licet vendicare, (ut eod. §. 14.) Et contra, Rogatio teſtium, quæ pro ſolennitate in militari teſt. requiritur,

(communi interpretum calculo,) ab Anglis teſtantibus non ita neceſſario obſervatur. [d] Milites ad ſolennitates tantum juris gentium aſtringi videre eſt apud Dec. in L. milites. C. de teſta. mil. poſt. Bar. in L. j. C. de ſacroſanct. Eccleſ. & DD. in L. j. ff. de mil. teſta. Quibus adde Tiraquel. de privileg. piæ cauſæ, c. 3. [e] Dec. in d. L. Milites. Mantic. de conject. ult. vol. lib. 6. tit. 3. n. 9. in fin. [f] Stat. H. 8. anno 32. c. 1. [g] Lindw. c. in ſtatutum de teſta. l. 3. provincial. conſtit. Cant. verb. probat. [h] Ratio eſt, quia rogatio teſtium non eſt juris gentium aut divini. Ab. Covar. & alii in c. relatum. el. j. de teſta. extr. Tiraquel. de privilegiis piæ cauſæ, c. 3. quo poſito, conſtat, Anglos pleniore libertate frui in condendis Teſtamentis, quam quæ vel ipſis militibus indulta fuit a jure civili: quo (ſi communi ſit credendum opinioni) rogatio teſtium eſt neceſſaria. Jul. Clar. §. teſtim. q. 58. Quamvis non deſint qui contendunt rogationem hujuſmodi non ad ſolennitatem exigi, ſed ut ex eo facilius dijudicari poſſit, Milites, proferendo verba quæ ſonant in teſtim. ea deliberate & ſerio, animoque teſtandi, non joco, non perfunctorie protuliſſe, ut ſæpe ſolent alias. Tiraquel. de privil. piæ cauſæ, c. 3. Weſenb. conſil. 38. n. 55. Adde quod in Teſtamento inter liberos, ubi attenditur ſolennitas juris gentium, non eſt neceſſarium ut teſtes ſint rogati. Graſſ. Theſaur. com. op. §. teſtam. q. 12. Clar. §. teſtim. q. 18. Dec. conſil. 610. Denique, nec in teſto. ad pias cauſas (in cujus confectionem adhibendæ ſunt juris gentium ſolennitates) requiritur ut teſtes ſint rogati, ut habet com. op. teſte Covar. in c. relatum. el. j. de teſta. infr. §. 16.

But (6) here methinks a Queſtion doth offer it ſelf to be reſolved. If all our Teſtaments in *England* be *unſolemn*, and (7) if by the Civil Law regularly all unſolemn Teſtaments be void, inſomuch that if but one Solemnity be omitted, the Teſtament is no Teſtament [i]; how doth the Definition of a Teſtament above-mentioned, borrowed out of the Civil Law, agree with our Teſtaments here in *England*, being all unſolemn Teſtaments? It ſhould ſeem we had need to ſeek a new Definition, and that I have erred, together with other our Common Lawyers of this Realm, in borrowing that Definition, which agreeth ſo juſt with their Teſtaments, with which our Teſtaments do not agree. For if the Definition did agree with both Teſtaments, they ſhould agree betwixt themſelves; but the Teſtaments do not agree betwixt themſelves; and therefore the Definition doth agree but with one alone. If it agree but with the one, and we confeſs it doth agree with their Teſtaments, how then can it agree with ours alſo?

[i] L. j. de injuſt. rup. & irrit. teſta. ff. L. ex imperfect. L. ſi unus. de teſta. C.

To this Queſtion briefly my Opinion is this, that the (8) Definition doth comprehend both *ſolemn* and *unſolemn Teſtaments*; and therefore is agreeable to our Teſtaments. The Antecedent I prove (9) thus. The Definition (as appeareth) was made by *Ulpian* [k]: This

[k] Ulp. in L. j. de teſta. ff.

Ulpianus

Ulpianus (10) is one of thoſe antient Lawyers, whoſe Anſwers, Definitions, Rules and Concluſions are contained in the Digeſts, and who flouriſhed no leſs than Two hundred Years before *Juſtinian*[1]: Which *Juſtinian* did add certain other Solemnities, without which he ordained that the Teſtament ſhould be void[m]. It muſt be granted therefore, that the Definition being perfect before thoſe new Solemnities were deviſed, and agreeable to thoſe Teſtaments which had not theſe Solemnities, becauſe as yet they were not: So now the ſame Solemnities being taken away, the Definition comprehendeth thoſe Teſtaments which have them not at this preſent, as it did thoſe other Teſtaments which had them not at the Beginning[n]. So that the (11) Increaſing or Decreaſing of the Number of Solemnities maketh not the Teſtament to come nearer, or depart farther from the Definition[o]. Indeed the Preſence or Abſence of Solemnities make the Teſtament ſolemn or unſolemn; but they do not make it a Teſtament or no Teſtament[p]. For (12) as an unſolemn Marriage is not therefore no Marriage becauſe it is unſolemn, (the Banes perhaps not being publiſhed, or the Marriage not being celebrated in the Face of the Church, but privately in a Chamber, or ſome other Rite or Ceremony thereof being omitted,) but is nevertheleſs reputed for a true Marriage[q], (ſo that the ſame were ſolemnized by a Miniſter in the Preſence of a ſufficient Number of Perſons thereunto required, by whoſe Teſtimony the ſame might be proved; in which Caſe the ſaid Marriage may be ſaid to be celebrated in the Face of the Church, though neither in Church nor Chapel, but in a Chamber, none being purpoſely excluded[r];) both in the Eccleſiaſtical Court, in reſpect of the Eſſence of Matrimonies[s], and in Temporal Courts, in reſpect of the Wife's Dower, and other legal Effects[t]; at leaſt if the Parties married be licenſed or diſpenſed with by the Ordinary in that Behalf[u]; ſo that there be no other lawful Impediment, as of Conſanguinity or Affinity within the Levitical Degrees prohibited, Precontract, or ſuch like, but the Defect of Solemnity only[x]: Even ſo an unſolemn Teſtament doth ſtill remain a Teſtament, when theſe Solemnities do rather appertain to the Proof or Appearance, than to the Subſtance or Teſtament[y]. For it is not ſaid in the Definition, there muſt be this or that Number of Solemnities in the Teſtament; only it is requiſite that there be a juſt Number[z], that is to ſay, ſo many as the Law requireth: And if the Law require none, the Definition requireth none, more than is ſufficient for a due Proof[a].

[1] Juſtinianus adeptus fuit Imperium an. Chriſti nati 527. Ulpianus autem floruit longe ante, nimirum tempore Alex Severi Imp. Ro. paulo plus CC. annis poſt Chriſtum natum. Cagnol. in L. unic. ſi quis jus dicenti ff.

[m] §. Sed cum paulatim. verb. ſed his. Inſtit. de teſta. ordin. L. jubem L. cum antiquitas. C. de teſta.

[n] Eadem enim ratio oppoſiti in oppoſito, ac propoſiti in propoſito. Socin concil. 16. lib. 3. n. 15. Everard. loc. a contrariis.

[o] Nam differentia quæ eſt tantum ſecundum majus & minus, non conſtituit diverſas ſpecies, & ſic nec diverſas definitiones. L. fin. de fund. Inſtruct. legat. ff Olden. de culpa.

[p] Si enim equus cæcus ſit equus; ita ut cæcitas non faciat equum non eſſe equum, ſed non eſſe oculatum: a fortiori, teſtamenti inſolennitas non facit teſtam. non eſſe teſtamentum, ſed non eſſe ſolenne: a fortiori, inquam, quum cæcitas ſit defectus in jure naturæ, inſolennitas autem defectus juris tantum civilis.

[q] Nam illa requiſita de quibus in c. cum inhibitio. de clan. deſponſ. ext. non eſſe de forma & ſubſtantia matrimonii vel legitimationis prolis, ſed de ſolennitate tantum, & ad ipſius decorem introducta, poſt Theolog. & Canoniſtas prodidit Graniſ. conſil. civil. 168. & hanc op. communi calculo receptam dicit Jo. Lub. & Maſcard. de probat. verb. filius, conclu. 798. n. 8. Et licet hodie per concil. Tridentin. hujuſmodi matrimonia fiant irrita; nos tamen ſequimur antiquum jus comm. tanquam non mutatum. Stat. H. 8. an. 25. c. 19. Nec illud, c. 30. q. 5. c. 1. de cland. deſponſ. extr.

[r] Maſcard. Tract. de probat. conclu. 1035. ubi locupleti teſtimonio conſtat matrimonium in facie Eccleſiæ poſſe contrahi dici, convocatis amicis, nemine videlicet ſerioſe excluſo, etiamſi non ſervetur forma. In ca. Cum inhibitio. de cland. deſpon. exam. præſcript. Et hanc opinionem & veram & moribus receptam eſſe ibid. liquido conſtat.

[s] Abb. in c. 1. de clan. deſponſ. extr. Dec. conſil. 163. Covar. de ſponſal. ſecunda part. c. 6. in principio, n. 7. Lindw. in c. Humana. de cland. deſp. lib. 4. provincial. conſtitut. Cant.

[t] Perk. tit. Dower, fol. ſexageſimo prim. quod verum eſt jure hodierno. Licet olim regnante H. 3. & longe ante eum contrarium jus obtinuit. Fitz. Nat. Brev. f. 150

[u] Fitz. Nat. Bre. fol. 150.

[x] Maſcard. ubi ſupra. Socin. jur. conſil. 87. n. 65. vol. 4. Palliot. de noth. & ſpur. cap. 5. n. 7. & cap. 10. n. 1.

[y] Minſing. in d. §. Sed cum paulatim. Old. de Act. claſſ. 5. in prin. Ripa in L. Nemo. de leg. j. & Jo. Crot. in eand. L. col. 6. Quorum opinione hæ ſolennitates teſtamentariæ non ad ſubſtantiam, ſed ad probat. teſtat. pertinent: Quæ quidem opinio ſine difficultate procedit hic in Anglia, ubi iſtiuſmodi ſolennitates omnino non ſunt neceſſariæ; licet fortaſſe alias contraria tanquam communis opinio locum ſibi vendicaret. Bar. in d. L. Nemo. Covar. in c. cum eſſes. de teſta. extr. n. 8.

[z] Juſta ſententia.

[a] Bon. in c. cum eſſes. de teſta. extr. in fin. Soarez l. rec. ſenten. verb. teſta. n. 72. Jaſ. in L. cunctos de ſumma tri. C. n. 39.

If an unſolemn Teſtament were no Teſtament, then *Teſtamentum militare* were no Teſtament; for it is an unſolemn Teſtament [b]: And yet *Teſtamentum* (13) *militare* is both in Name and Nature a Teſtament [c]. Likewiſe if an unſolemn Teſtament were no Teſtament, then *Teſtamentum inter liberos* were no Teſtament, being unſolemn and unperfect [d]: But *Teſtamentum* (14) *inter liberos*, though unſolemn, even properly, and by the Civil Law, is a Teſtament [e]. Beſides this, (15) if an unſolemn Teſtament were no Teſtament, then all the Teſtaments here in *England* being unſolemn, we ſhould all die Inteſtate [f]: And dying Inteſtate, then (mark what an Inconvenience would follow) by the Statutes of this Realm, the Adminiſtration of the Goods of every Man dying Inteſtate ought to be committed to the Widow or next of Kin to the Deceaſed. But the contrary hath been generally obſerved, that is to ſay, where an Executor hath been appointed, able and willing to undertake the Executorſhip, there the Maker of this Will hath been adjudged not to have died Inteſtate; and ſo the Adminiſtration of his Goods hath not been committed to the Widow, or next of Kin, according to the Statute, although the Teſtament were unſolemn: Which Adminiſtration otherwiſe ought to have been committed according to the ſaid Statute, as is aforeſaid [g]. And therefore by common Obſervation alſo an unſolemn Teſtament is not no Teſtament; but rather properly a Teſtament. For by the (16) Opinion of the moſt and beſt Writers, that is concluded to be properly a Teſtament, the Author whereof cannot be ſaid to be Inteſtate, and whoſe Executor therein named is to ſucceed *ex Teſtamento* [h]; though it be but in reſpect of the Laws or Cuſtoms of the Place where the Teſtament is made, being contented with fewer Solemnities than are requiſite in other Places [i]. Which (17) Effect our unſolemn Teſtaments have, wherein an able and willing Executor is named. For neither he is reputed to die Inteſtate, which appointeth ſuch an Executor [k], but is plainly, even in Laws of ſtrict Interpretation, (I mean the Statutes of this Realm,) termed a Teſtator [l]: Neither is the Adminiſtration of his Goods committed to the Widow or next of Kin, by the Authority of the Ordinary, according to the Statute, as in caſe of one dying Inteſtate [m]. But the Executor deriving his Authority from the Teſtator only, doth ſucceed in the Place of the dead Man by Force of the Teſtament, according to the Teſtator's Meaning and Diſpoſition [n]. Wherefore an unſolemn Teſtament is even properly a Teſtament. Which Concluſion being true, the Definition is not more proper to the one than to the other.

[b] Weſenb. in tit. de teſta. mil. ff. Bald. in L. filii. C. famil. herciſcun. n. 55.

[c] Tit. de teſta. mil. ff. Inſtit. &c. Vaſquius de ſucceſ. crea. §. 21. n. 47.

[d] L. Hac conſultiſſima. §. ex imperfecto. C. de teſta.

[e] Graſſ. Theſaur. com. op. §. teſtam. q. 11. n. 2. ubi refert hanc op. eſſe com. ex Alex. Dec. Curtio Nat. Emanuele Coſta, Vaſquio, & aliis, cont. gloſſ. in d. §. ex imperfecto.

[f] Inſtit. de hæred. quæ ab inteſtat. in princ.

[g] Id quod levi obſervat. fieri ubique conſpicitur.

[h] Bald. in L. cunctos de ſumma trinitate. C. n. 17. Sichard. in L. Hac conſultiſſima. §. ex imperfecto. C. de teſta. n. 5. in fin. Graſſ. Theſaur. com. op. §. teſta. q. 11. n. 2. Jul. Clar. §. teſtam. q. 13. Everard. conſil. 185. n. 8.

[i] Andr. Gail. lib. 2. practic. obſervat. 123. Soarez lib. recep. ſenten. verb. teſtam. n. 72. Baptiſt. Villabol. lib. com. op. verb. teſtam. n. 57. Gabr. Rom. lib. 4. tit. de teſta. conc. 4. Vaſq. de ſucceſſ. crea. §. 21. n. 47, 48. Pariſ. conſil. 12. n. 45. vol. 3. quorum opinio eſt proculdubio communis, licet aliter ſentiat gloſſ. in d. §. ex imperfecto.

[k] Hoc nemo neſcit qui vel mediocriter in alterutro foro verſatur.

[l] Stat. Ed. 3. n. 4. c. 7. & an. 25. c. 5. Stat. H. 8. an. 21. c. 5. & aliis pene infinitis locis.

[m] Id quod non ſemel dictum eſt, ſed & ſæpius eſt dicendum.

[n] Plowden in caſu inter Greisbrook & Fox, fol. 280. his verbis: Lez executores noſmes ſount executores maynetenant & devant probate del teſtament: Car le probate neſt que confirmation & allowance de ceo que le teſtator fiſt, &c. Et ils poyent executer devant probate, &c.

Now for the Anſwering of the Arguments objected. Firſt, where (18) it is objected, that all unſolemn Teſtaments are void, although Solemnity were omitted; that is true only by the Civil Law. But it doth not therefore follow, that an unſolemn Teſtament is no Teſtament in reſpect of this Definition [o], howſoever it hath not the ſame Effect to all Intents in Law. But if it be therefore a Teſtament, becauſe it takes Effect in Law, then are all our Teſtaments (though unſolemn) good and ſufficient Teſtaments; becauſe they have as much Force without thoſe Solemnities, as if they had them all

[o] Vaſq. de ſucceſſ. crea. §. 21. n. 48.

and an Hundred more[p]. Secondly, Where it is objected, that the Definition doth agree to their Teſtaments, and that their Teſtaments and ours do not agree betwixt themſelves; I Anſwer, that the (19) Definition is not of any ſpecial Teſtament, that is to ſay, it is not of a ſolemn Teſtament alone, nor of an unſolemn Teſtament, nor of a written Teſtament, nor of a nuncupative Teſtament alone, nor is convertible with any ſpecial Kind of Teſtament mentioned in any Part of the Civil Law, from which our Teſtaments made in *England* do differ. For indeed, if the Definition were made of any ſpecial Teſtament alone, mentioned in the Law, from which our Teſtaments do differ; then could not our Teſtaments, differing from the Teſtament defined, agree with the Definition[q]. But the Definition is of a Teſtament which is alſo common to all thoſe, or any other Kind of Teſtaments, as well ſolemn as unſolemn, as appeareth before: And therefore the Teſtament ſo defined, although it be ſpecial in reſpect of the Definition, yet is it general in reſpect of the ſeveral Kinds of Teſtaments above recited[r], and is verified of every of them, ſolemn or unſolemn; and ſo conſequently is common as well to our Teſtaments as to theirs, diſtributing both Name and Nature to every ſpecial Teſtament[s], howſoever they differ amongſt themſelves[t]. To (20) conclude therefore, we need not to ſeek any new Definition, but rather they themſelves by Reaſon of their new Solemnities, deviſed ſince the Making of the old Definition.

[p] Soarez, lib. recep. ſen. verb. teſta. n. 72. Graſſ. d. §. teſtam. q. 11. Clar. §. teſtam. q. 13. And. Gail. l. 1. practobſer. c. 123. Vaſq; de ſucceſſ. crea. §. 21. n. 47. Sichard. in L. Hac conſultiſſ. §. ex imperfecto. C. de teſta.

[q] Quod enim differt a definito, differt a definitione: ut, quod non eſt homo, non eſt animal rationale. Everard. & Olden. loco a definitione. Jo. Caſus Oxon. tract. de dialect. f. 225.

[r] Teſtam. ſuperius definitum genus eſt ſubalternum. Id quod poteſt eſſe & ſpecies & genus, diverſo tamen reſpectu: nimirum ſpecies reſpectu ſuperioris, id eſt, ſententiæ; genus reſpectu inferioris, id eſt, paganici, & militaris; ſcripti, & nuncupativi; ſolemnis, & inſolemnis teſtamenti. Hujuſmodi autem teſtamenta differunt non numero, ſed ſpecie; & ſic teſtamentum, cujus ſupra eſt definitio poſita, genus eſt, quia prædicatur de pluribus differentibus ſpecie.

[s] Id quod eſt generi proprium. Olden. Topic. Legal. Loco a genere.

[t] Species namque per formam diſcrepat a ſpecie. Conveniunt autem omnes ſpecies in ſuo genere. Olden & Everard. ubi ſupra.

Indeed we have not theſe ſolemn Teſtaments of the Civil Law; but in that reſpect we are the more happy, and our Law the more godly[u]; being not bound to any of the aforeſaid Solemnities, but only to that in Writing, where *Lands are deviſed,* and that the Teſtator ſhould ſubſcribe his Name, and publiſh his Will in the Preſence of Three Witneſſes, and they ſhould ſubſcribe their Names in his Preſence, as may be ſeen hereafter.

[u] Alciat. in L. j. C. de ſacroſanct. Eccleſ. n. 12.

§. XI. Of a written Teſtament

1. *What is a written Teſtament.*
2. *A Teſtament nuncupative is not made a written Teſtament by after Writing, except in certain Caſes.*
3. *Some Things common both to a written and to a nuncupative Teſtament.*
4. *Some Things peculiar to a written Teſtament.*
5. *Deviſe of Lands, Tenements, or Hereditaments, is not good without Writing.*
6. *In a written Teſtament it is not neceſſary that the Witneſſes be privy to the Contents.*
7. *Cauſes wherefore Teſtators many Times would have their Wills ſecret.*
8. *In what Manner the Teſtament is to be made when the Witneſſes know not the Contents.*

9. The Witneſſes muſt be learned, and muſt write their Names on the Teſtament, when they do not know the Contents thereof.

A *Written* [a] *Teſtament* is (1) that which at the Time of the Making thereof is committed to Writing [b]. By which Words, *at the Time of the Making thereof*, are excluded (2) ſuch Teſtaments as are afterwards put in Writing. For being made firſt by Word of Mouth, they do ſtill remain *nuncupative*, notwithſtanding the reducing thereof into Writing [c]. Unleſs the Teſtament being firſt made by Word, and afterwards (in the Life-time of the Teſtator) being written, it were brought to the Teſtator, and by him approved for his Teſtament: Or unleſs the Teſtator, when he declared his Teſtament, did will that the ſame ſhould be written, and that thereupon it was written accordingly during his Life: For then it is as effectual for the Deviſe of Lands, Tenements, and Hereditaments, as if it had been written at the firſt [d]. Inſomuch that if the Writer, being skilful in the Law, do only take Notes from the Mouth of the Deceaſed of his Laſt Will, for the Deviſe of Lands, Tenements, and Hereditaments, and afterwards write the ſame, but before it be ſhewed to the Teſtator, *he depart this Life*; yet this is ſufficient for a Will in Writing, for the Conveyance of Lands, Tenements and Hereditaments [e], whereof ſuch Notes were taken. And ſo it ſeems when Notes or Articles be made, and read to the Teſtator by the Notary, though the ſame be not written up at large, or in Form of Law, until the Teſtator be dead [f].

[a] Teſtamentum in ſcriptis an ſit alia ſpecies a teſta. ſolenni, examinavi ſupra, §. 8. in margine.

[b] Minſing. in §. ſed cum paulatim. Inſtit. de teſta. ordin.

[c] Minſing. in §. fin. Inſtit. de teſta. ord.

[d] Dyer fol. 72. & ita ſæpe audivi a nonnullis hujus regni Angliæ juriſperitis.

[e] Et hanc opinionem tenuiſſe Curiam de Banco refert Do. Dyer ſummus Juſticiarius in caſu inter Sackvill & Browne.

[f] Dyer ubi ſup. ſuper ultimam voluntatem cujuſdam Hanton civitatis London.

A written (3) Teſtament albeit it have ſome Things thereunto belonging which alſo belong to a nuncupative Teſtament, and ſo common to both, as the Appointing of an Executor, (without which there can be no Teſtament at all, neither written nor nuncupative,) and as the Deviſing or Diſpoſing of Goods or Chattels, (which may be done indifferently either by Word or by Writing;) yet (4) there be ſome Things which be proper and peculiar to a written Teſtament. One is the (5) Deviſe or Grant of Lands, Tenements, and Hereditaments; which cannot paſs by a nuncupative Teſtament, or Will without Writing [g]. Nevertheleſs it ſeemeth that in the Deviſe or Bequeath of Lands and Tenements holden in Burgage-tenure, and ſuch as were deviſable before the Statute of *Hen.* 8. *An.* 32. it is not neceſſary that the ſame ſhould be written, but that ſuch Lands, Tenements and Hereditaments may paſs ſufficiently by Will nuncupative, or Deviſe without Writing. And that the ſaid Statute of *H.* 8. *An.* 32. *cap.* 1. which doth require Writing in the Deviſe or Bequeſt of Lands, Tenements and Hereditaments, without which Writing the Deviſe is not good in Law, is to be underſtood to take Place in thoſe Caſes only, in the Deviſe of ſuch Lands as could not paſs by the Deceaſed's Will, before the making of the ſaid Statute; whereby Men were enabled to deviſe their Land, Tenements and Hereditaments, by their Laſt Wills, ſo that the ſame were written in their Life-time [h]. As doth afterwards more fully appear: Where is alſo ſhewed, what Lands and how much may be deviſed by Will [i]. Another Thing peculiar to a written Teſtament is this: In a written

[g] Stat. H. 8. an. 32. c. 1.

[h] Hanc opinionem crebriori calculo receptam eſſe, & in foris obſervatam ſæpiſſime accepi a nonnullis doctiſſ. Cauſidicis, quorum peritiam ſatis approbatam cognovi.

[i] Infra 3 part. §. 4.

ten Teſtament (6) the Teſtator hath this Benefit, he may conceal and keep ſecret the Tenor or Contents of his Will from the Witneſſes [k]; which he cannot do when he maketh a nuncupative Teſtament. And therefore, if the Teſtator be loth to have his Will known; which Thing hapneth very often, (7) either becauſe the Teſtator is afraid to offend ſuch Perſons as do gape for greater Bequeſts than either they have deſerved, or the Teſtator is willing to beſtow upon them; (leſt they, peradventure, underſtanding thereof, would not ſuffer him to live in quiet:) Or elſe becauſe he ſhould overmuch encourage others, to whom he meant to be more beneficial than they expected; (and ſo give them Occaſion to be more negligent Huſbands or Stewards about their own Affairs, than otherwiſe they would have been, if they had not expected ſuch a Benefit at the Teſtator's Hands:) Or for ſome other Conſiderations: In theſe and like Caſes, after the Teſtator hath written his Will with his own Hand, or procured ſome other to write the ſame, he may cloſe up the Writing, without making the Witneſſes privy to the Contents thereof; and ſhewing the ſame to them, he may ſay unto them, *This is my Laſt Will and Teſtament*, or, *Herein is contained my Laſt Will:* And this is ſufficient [l]. Neither is the Teſtament the leſs available, becauſe the Witneſſes do not know what is contained in the ſame [m], in caſe (8) the Witneſſes be able to prove the Identity of the Writing; that is to ſay, that the Writing now ſhewed, is the very ſame Writing which the Teſtator in his Life-time affirmed before them to be his Will, or to contain his Will [n]. Otherwiſe the Will can take no Effect, through the Defect of ſufficient Proof [o]. And therefore (9) leſt the Will ſhould periſh for Want of due Proof, when the Teſtator would not have the Contents known, it is expedient that they write their Names on the Back-ſide, or ſome Part of the Teſtament [p], that they may be able to depoſe and teſtify, that the ſame is the very Writing it ſelf which the Teſtator affirmed to be his Will, or to contain his Will [q]. If the Teſtator affirm that his Will is already written, and that it is in the Cuſtody of ſuch a One, naming ſome ſingular Perſon, which Perſon ſo named doth bring forth a Writing, and doth depoſe by Virtue of his Oath, that this is that Will or Writing which the Teſtator affirmed unto him to be his Laſt Will and Teſtament: This Man's Teſtimony, together with the other Witneſſes [r], depoſing that the Teſtator affirmed unto them, that his Will was in that Man's Keeping, is a ſufficient Proof of the Will of the Deceaſed, albeit none of them were privy to the Contents thereof, ſaving the Teſtator alone. But if the Teſtator did not ſimply affirm, that his Teſtament was in that Man's Keeping, but alſo that it was written with his own Hand; then it is not ſufficient for the Proof thereof, that this Man, who doth produce the Will, depoſe, that it be the ſame which the Teſtator did commit to his Cuſtody, unleſs alſo it appear that the ſame was written with the Teſtator's own Hand [s]. For the Teſtator, in affirming that the Teſtament was written with his own Hand, doth intimate thus much, that unleſs it appear to be written with his Hand, that other Man's Teſtimony ſhall not ſuffice [t], as in the former Caſe: Otherwiſe the Mention of his own Hand-writing had been idle [u].

[k] L. Hac conſultiſ. C. de teſta. & gloſſ. ibid.

[l] Auth. Et non obſervato. C. de teſta. & DD. ibidem.

[m] Minſing. in §. ſed cum paulatim. Inſtit. de teſta. ord. Cui accedit Kling. in eund. tit. n. 8. Vide Simo. de Prætis De interpret. ult. vol. l. 1. f. 31.

[n] DD. in d. L. Hac conſultiſſ. & in Auth. Et non obſervato. C. de teſta. Covar. in c. cum tibi de teſta. ext. n. 5. & inf. part. 4. §. 25.

[o] Bar. & alii in L. ſi ita ſcripſero. ff. de cond. & demon. Pariſ. conſ. 19. vol. 3. n. 25, 26.

[p] Specul. de Inſtr. edi. §. compendioſe. n. 40. Kling in tit. de teſta. ordin. Inſtit. n. 8. & 9. Clar. §. teſta. q. 4. n. 3.

[q] Sichard. in Auth. quod ſine. C. de teſta. Covar. in c. cum tibi de teſta. extr. Specul. ubi ſupra, & infr. part. 4. §. 25. Clar. de §. Teſtamentum, q. 4. & q. 36. in fin. Maſcard. Tract. de probac. concluſ. 1352. n. 173. Pariſ. de conſil. 19. vol. 3. n. 25, 26, &c.

[r] Ludo. Zunt. Reſponſ. pro uxore, n. 88. Alex. Concil. 176. l. 5.

[s] Caſtro. in leg. hæredes palam. ff. de Teſta. & in §. per nuncupationem. L. conſultiſſima. Cod. de teſta. Ludo. Zunt. ubi ſup. n. 89. Hiero. Pantſchman, q. 2. n. 53.

[t] Caſtrenſ. & in al' ubi ſup.

[u] Verba teſtatoris intelligi debent ut non ſint ſuperflua, imo improprie ſunt accipienda potius quam ſuperflue. Mantic. de conject. ult. vol. lib. 3. tit. 9. n. 1.

Whether a Teſtament may be written with Notes or Figures, and whether it may be proved without Witneſſes, by the Hand and Seal of the Teſtator, with other like Queſtions, is declared afterward [x]. [x] Infra part 4. §. 25.

What ſhall be ſaid to be a good Will to paſs Lands and Tenements within the Stat. 32 H. 8. cap. 1.

TWO Things are requiſite to the Perfection of a Will by which Lands paſs. 1. Writing, that's the *Initium:* 2. The Death of the Deviſor, that's the Conſummation. The *Initium* ought to be *plenum & perfectum*, otherwiſe it's not good: And therefore if one command another to make his Will, and by that to deviſe *White-acre* to *J. S.* and his Heirs, and *Black-acre* to *J. H.* and his Heirs, and he writ the Deviſe to *J. S.* in the Life-time of the Deviſor, and before the other is writ the Deviſor dieth; yet this is a good Will to *J. S.* But if he command one to make his Will, and to deviſe *White-acre* to *J. S.* and his Heirs, upon Condition, and he write the Deviſe to *J. S.* and his Heirs, and before that he hath writ the Condition the Deviſor dieth; the Deviſe is void: For in the one Caſe the Deviſes are ſeveral and diſtinct, and in that Caſe the Deviſe to *J. S.* is full and perfect; but in the laſt the Deviſe is not full, but imperfect; for the intire Deviſe as to *J. S.* was not fully put in Writing, ſo as the *Initium* in that Caſe *non fuit plenum* [y]. Therefore if a Man intend Land to *J. S.* for Life, the Remainder to *J. D.* and before the Remainder is written, the Deviſor dieth, it's a void Deviſe for the whole Land; becauſe the one did depend upon the other. *T.* 11 *Jac. C. B.* Sir *Tho. Lake*'s Caſe. *See the Statute* poſtea.

[y] 20 Eliz. *Calthorp*'s Caſe. Curia Ward. lib. 3. fol. 31. *Butler* and *Baker*'s Caſe. Brownl. Rep. part 1. fol. 44. S. C.

A Will in *Writing* is good to convey Lands, by the Statute 32 *H.* 8. *cap.* 1. tho' 'tis not *ſealed* by the Teſtator; for that Statute doth not mention *Sealing*, but only Writing; and 'tis by that, (*viz.*) by Writing, that Men are enabled to convey their Lands *in Fee-ſimple:* The Words of the Statute are, That every Perſon *having* Manors, Lands, *&c.* ſhall have Power to give, diſpoſe, will and deviſe, as well by his Laſt Will and Teſtament *in Writing*, as otherwiſe by Act executed in his Life-time, all ſuch Manors, Lands, *&c.* at his Pleaſure.

So likewiſe by the Statute of Frauds, *&c. Anno* 29 *Car.* 2. *cap.* 3. all Deviſes of Lands muſt be in *Writing*, and ſigned by the Teſtator; but Sealing is not required by that Statute.

Before the ſaid Statute 32 *H.* 8. it was held, that if a Man deviſed Lands of which he was not ſeiſed, and afterwards had purchaſed thoſe very Lands, that the Deviſe was good; but ſince the Statute, it hath been otherwiſe adjudged; for where the Teſtator deviſed Lands to which he had no Manner of Title, and afterwards purchaſed thoſe Lands, and died ſeiſed, this was held to be no good Deviſe within the Statute, becauſe the Word *Having* imports not only an Ownerſhip, but the *very Time* the Teſtator *had* the Lands, (*viz.*) at the Making the Will, and that is at the Time it was publiſhed. *Butler* verſus *Baker*, *Moor Rep.* 254. 3 *Rep.* 25. *S. C.* 1 *And.* 348. *S. C.* *Poph.* 87. *S. C.*

If a Man ſeiſed in Fee of Lands by his Will declared, that he intended to advance his Two Daughters equally, and deviſeth the one Moiety by ſpecial Name of the Land to his eldeſt Daughter, and dies

before he has deviſed the other Moiety to his younger Daughter; adjudged, that the Deviſe was void for the Whole; becauſe he did intend to advance them equally. *T.* 11 *Jac. in Curia Wardorum*, Sir *Tho. Lakes* and Madam *Cæſar.*

Any ſuch Inſtructions to have his Will made in Writing, thereby to give his Land to one of his Sons for Life, and the Clerk which put the Will in Writing, writes an Eſtate in Fee: *Per Curiam* the Will is void in the Whole; becauſe it was not the Will of the Deviſor [z]. If a Man by Parol deviſeth Land to *J. S.* and his Heirs, and afterwards it is put in Writing during his Life, without his Command or Agreement, it's no Will in Writing within the 32 *H.* 8. [a].

[z] T. 36 El. Rot. 817. M. 36 & 37. Rot. 817. *Downhall* verſ. *Cateſby.* Moore's Rep. fol. 356 & 483. 1 Roll. Abr. 834. S. C. Goldſ. 126. S. C.

[a] M. 3 Jac. *Moſeley* verſ. *Blaſhington.*

But if a Man write the Will of another without Directions, and bring it to the Deviſor, and he allow of it, it's a good Will [b].

[b] P. 3 Jac. Camera Stellat. *Comb*'s Caſe. Moore's Rep. fol. 759. n. 1051.

A. B. ſeiſed of Lands in Socage deviſed the ſame by Parol to his Three Siſters; a Stranger preſent recited the Teſtator's Words to him, who affirmed the ſame, afterwards the Stranger, for his own Remembrance, put the Words into Writing; but read them not to the Deviſor before his Death: This Deviſe ſo reduced into Writing *modo & forma* is void; becauſe it was written without the Direction of the Deviſor; and conſequently no Will within the Statute. But if after the Writing thereof, he had read it to the Deviſor, and thereupon he had affirmed the ſame, it had been a good Will [c].

[c] P. 30 Eliz. B. R. *Naſh* and *Edwards*'s Caſe, Leon. 113. Vide P. 24 Eliz. B. R. Leon. part 3. fol. 79. Leon. 113. 2 Leon. 35. S. C. Cro. Eliz. 100. S. C.

J. G. being an illiterate Man commanded one to write his Will, by which he would that his Houſe, 40 Acres of Land and 52 Acres of Paſture ſhould be ſold by his Executors: The Party writ his Will in theſe Words; I Will that my Houſe *with the Appurtenances* ſhall be ſold by my Executors, and the Money diſtributed for the Advancement of my young Children: The Deviſor dieth, the Executors ſell *Part of the Land:* Adjudged, by this Deviſe the *Lands* did paſs, for the Words *cum pertinentiis* are effectual to enforce the Deviſe.

It was ſo adjudged in the Caſe of [d] *Higham* verſus *Horwood*, but the later Authorities are otherwiſe, (*viz.*) that by the Word *Appurtenances* Lands will not paſs, but only ſuch Things which properly appertain to an Houſe; 'tis true, Lands may appertain to an Houſe, but not ſo properly as many other Things; therefore to make Lands paſs, they muſt be expreſſed, (*viz.*) with the Lands thereunto appertaining. See *Lex Teſtamentaria* 84.

[d] Moor 211, 221. 1 Leon. 34. S. C. Godbolt 40. S. C. Plowd. 210. Cro. Car. 57. Hearn *ver.* Allen. Hutt. 85. S. C. Litt. Rep. 8. S. C.

A. deviſeth Land to *R.* his Son, and the Heirs Male of his Body, with Remainder over to his other Children, *R.* died in the Lifetime of the Deviſor, having Iſſue Male, *A.* the Teſtator ſaith, that my Will and Intent is, that my Will ſhall ſtand good to the Children of *R.* as if he had ſurvived me. By *Popham* and *Fenner*, the Children ſhall take by this Deviſe. *Gawdy* and *Clench contra:* And their Reaſon was, becauſe the laſt Publication was not in Writing. The other Juſtices did think there was enough before in Writing to

make the Iſſues have the Land: But there they were to take by Diſcent, whereas here they are to take by Purchaſe [e]. *Quære.*

[e] H. 36 El. Rot. 546. *Fuller* verſus *Fuller.* Moore's Rep. fol. 353. n. 476. Croke part 3. 422.

A Man took Notes of one who lay ſick, to make his Will, and afterwards he drew up the Will in Writing, but the ſick Perſon died before it was ſhewed to him: *Per Curiam* it's a good Will within the Statute of 32 *H.* 8. to paſs Lands [f]. So it was adjudged in *Hinton's* Caſe, where Articles were read to the Deviſor concerning the Diſpoſition of his Lands, and the Articles were written and ingroſſed after his Death, and yet it was a good Will within the Statute [g].

[f] T. 6 E. 6. Dyer f. 72. 5 Eliz. *Sackvil's* Caſe.

[g] 5 Eliz. *Hinton's* Caſe. M. 4 & 5 Ph. & Mar. *Brown & Brown's* Caſe. Anderſ. Rep. c. 85.

A Man made his Will in Writing in this Manner, I will and bequeath my Lands to *A.* and the Name of the Deviſor was not in the whole Will; yet adjudged a good Deviſe by Averment of the Name of the Deviſor [h].

[h] P. 24 Eliz. B. R. Leon. part 3. fol. 79.

The Lord *Audley* made a Feoffment in Fee of his Lands, and afterwards by Indenture reciting the Feoffment to be to the Intent that the Feoffees ſhould perform his Will, he declared in theſe Words, Know ye, that my Will is, that they ſhall ſtand ſeiſed for the Payment of my Debts, and afterwards ſhall make an Eſtate to me and *E.* my Wife in Tail: *Per Curiam*, it's no Will, becauſe he limited the Eſtate to be executed in his Life-time. It was farther holden, that the Wife was a Stranger to the Land, and to the antient Uſe; wherefore, without an Eſtate re-made to the Feoffees, the antient Uſes did remain, and were not altered by the ſaid Declaration, but remained to the Husband and his Heirs as before [i].

[i] M. 1 Eliz. Dy. fol. 166. the Lord *Audley's* Caſe.

Nota; The uſual Way in former Days to diſpoſe Lands which Men had by Purchaſe, was by Feoffments in Truſt; and they directed *by their Laſt Wills*, how thoſe Feoffees ſhould diſpoſe the Eſtates; and becauſe a Truſt was properly under the Juriſdiction of a Court of Equity: That Court would compel the Feoffee to execute the Truſt, in Caſe he ſhould refuſe to do it at the Requeſt of the Perſons for whom he was intruſted.

This Method was very inconvenient, for the Feoffees having the legal Eſtate in the Lands, and the Parties themſelves the Uſe of it; if any other Perſon claimed a Title, he could not tell whom to ſue, becauſe he could not know the right Owner; 'tis true, the Feoffee was now become the Owner; but the Feoffor, tho' he was the old Owner, and the Perſon who took the Profits of the Eſtate, yet he could not properly be ſaid to be ſeiſed of the Lands; for his Wife could not be endowed, neither could thoſe Lands be extended for his Debt.

If a Man expreſs by a Letter his Will to diſpoſe of his Land, it ſhall go accordingly, and it's ſufficient to give the Lands, *per* 32 *H.* 8. It was the Caſe of one *Weſt*, who was beyond Seas, and writ ſuch a Letter, that he willed that his Lands ſhould go in ſuch a Manner; and adjudged a good Deviſe [k].

[k] M. 24 Eliz. *Weſt's* Caſe. Moore's Rep. fol. 177.

A Man deviſes ſuch Rents as are mentioned in ſuch a Writing under his Hand and Seal: Adjudged it was a good Deviſe in Writing of the Rents themſelves, and as good as if they had been ſpecially limited and expreſſed in the Will [l].

[l] H. 2 Jac. Rot. 360. *Molineux* verſ. *Molineux.* Crok. part 2. fol. 145.

A Man

A Man made a Deed of Feoffment to ſeveral Uſes, and maketh no Livery, and after by his Will deviſeth the Land to ſuch Perſons, and in ſuch Manner, as he appointed by his Deed of Feoffment: Adjudged a good Deviſe of the Land [m].

[m] *Fairfax*'s Caſe. Cu. Wardor.

A Will made at the Interrogation of another, is no Will within the Statute of 32 *H.* 8. and therefore if a Man be asked if he will give his Lands to *B.* and anſwereth, yes; though it be reduced into Writing, if it be not by the Direction or Agreement of the Deviſor, it's no Will within the Statute, becauſe it is but an Anſwer to a Queſtion [n].

[n] M. 10 Jac. *Shuter*'s Caſe.

H. B. being ſick in *London*, ſent for one *Tho. Atkins*, a Counſellor at Law, and deſired him to write his Laſt Will and Teſtament of his Lands, *&c.* the ſaid *Tho. Atkins* moved the ſaid *H. B.* to declare to him his Laſt Will, who did declare it to him; the ſaid *Tho. Atkins* took Paper and Ink, and writ Notes briefly of the ſaid Will, *ſcil.* every Legacy which the ſaid *H. B.* did declare to him, and alſo the Names of the Executors; after that the ſaid *Tho. Atkins* went to his Houſe with the ſaid Notes which he had written, and then immediately with his own Hand writ the ſaid Will and Teſtament of *H. B.* in Form; and when he had writ it before the Hour of Twelve in the Forenoon the ſame Day, the ſaid *Tho. Atkins* returned to the Houſe of the ſaid *H. B.* within Half an Hour after Twelve, with the ſaid Will and Teſtament, to read and deliver it to the ſaid *H. B.* but was told that he died at Twelve of the Clock before; whereupon *Tho. Atkins* delivered the ſame to the Executors which were therein named; the Wife enters upon the Lands deviſed to her, the Son enters upon her, the Wife re-enters, whereupon the Plaintiff brought his Writ: The Opinion of all the Juſtices was, that it was a good Will in Writing according to the Statute of 32 *H.* 8. [o].

[o] *Sackvill* v. *Brown*, Tr. 4 & 5 Phil. & Mar. *Henry Brown*'s Caſe. Kelw. fol. 209. a. Anderſ. Rep. c. 85.

From which Caſe it may be collected, that tho' 'tis required by Law, that a Will by which Lands are deviſed ſhould be in *Writing*, yet it was not neceſſary that it ſhould be written in the Life-time of the Teſtator; for if Notes were taken by his Direction, and afterwards written in the Form of a Will, and the Teſtator had died before it was read or ſhewed to him, this would be a good Will.

But now by the Statute 29 *Car.* 2. *cap.* 3. a conſiderable Alteration is made in the Law relating to Wills; for *they muſt be written in the Life-time of the Teſtator, and ſigned by him, or by ſome other Perſon in his Preſence, and by his Direction, and ſubſcribed in his Preſence by Three or Four Witneſſes.*

Tenant in Tail of the Manor of *W.* in *Berks* made a nuncupative Will, which was afterwards reduced into Writing, and deviſed, that his Executors ſhould purchaſe a Parcel of Land in *C.* in *Wilts*, for the erecting a Free-School there, and gave to the ſaid School 20 *l. per annum* Rent, to be paid out of his Manor of *W.*

The Will was made, and the Teſtator died before the Statute of Frauds and Perjuries, the Will was proved in the Spiritual Court as a nuncupative Will; the Executors bought the Ground and built the School, and the Commiſſioners for Charitable Uſes decreed the Iſſue in Tail to pay the Arrears of the Rent of 20 *l. per annum* to the School.

The Iſſue in Tail excepted to the Decree; and the Lord Chancellor allowed the Exception and reverſed the Decree; foraſmuch as at Common Law Lands or a real Eſtate were not deviſable; and by the Statute 32 *H.* 8. it is as much required that a Will of Lands ſhould be in Writing, as by the Statute of Frauds and Perjuries that ſuch a Will ſhould have three Witneſſes; and as in *Johnſon's* Caſe, (2 *Vernon* 597. *Precedents in Chancery* 270.) decreed by Lord Chancellor *Cowper*, a Deviſe of Land in Writing to a Charity, ſince the Statute of Frauds, but not atteſted by three Witneſſes, was held to be void; ſo a Deviſe of Land without Writing ſhould be void alſo; eſpecially, it being by Tenant in Tail, and of a Rent too, which cannot paſs but by Deed; and it would be very dangerous to allow of nuncupative Wills of Land.

Sed quære, & vide Duke's Charitable Uſes 81. *Stoddard's* Caſe, where one before the Statute of Frauds deviſed Rent of 10*l. per annum* out of Lands to a charitable Uſe, and willed, that one *Hugh* the Scrivener ſhould put it into Writing, which was accordingly done; and decreed, that this nuncupative Will was good; for though a Rent cannot be created without Deed, yet by the Words of 43 *Eliz.* it may be appointed without Deed, and though the nuncupative Will be void as a Will, it is good as an Appointment. And it ſeems, that the Statute of 43 *Eliz.* which made theſe Appointments to Charities good, being ſubſequent to the Statute of 32 *H.* 8. of Wills, ſuperſedes and repeals that Statute; but it is true, that the Statute of Frauds and Perjuries, being ſubſequent to the Statute of 43 *Eliz.* does repeal that Statute; and therefore ſince the Statute of Frauds, *&c.* an Appointment of Lands to a Charity by Will not atteſted by three Witneſſes is void. *Jenner* v. *Harper*, 1 *Williams* 247.

Lands were deviſed to Truſtees and their Heirs, in Truſt, that if within Three Years after the Teſtator's Death there ſhould *happen to be a Marriage between the Lord* Guilford and Mrs. *W.* (who was Heir at Law to the Teſtator, then the Lands ſhould be and remain to her for Life, Remainder in Tail to the firſt Son, *&c.* of that Marriage; and if the Marriage ſhould not happen, then the Remainder in Tail to the Lord *Faulkland:* She afterwards married Mr. *C.* and not the Lord *Guilford*, and the Husband exhibited a Bill to have the Lands, he being equal in Birth and Eſtate to the Lord *Guilford*, ſuggeſting that his Wife was an Infant, and in no Fault, and therefore ought not to loſe her Eſtate, the Lord *Guilford* differing with the Truſtees about the Settlement. Upon hearing the Cauſe, ſeveral *Papers and Writings* were offered in Evidence to prove, that the Teſtator intended it ſhould not be in the Power of the Lord *Guilford* to make the young *Lady* forfeit her Eſtate; but decreed, that thoſe *Papers and Writings* ſhould not influence the Conſtruction of a Will in Writing, for that would be to make them Part of the Will it ſelf, when 'tis expreſly required by the Statute of Frauds, that every Part of a Will ſhall be in Writing; and even before that Statute, no collateral Proofs, either by Papers or Words, were admitted, becauſe a Will is a conſummate Act of it ſelf. *Burtie* verſus *Lord Falkland*, 1 Salk. 231.

Touching Wills, my Advice is to all which have Lands, that by Advice of Counſel learned, by Act executed they make Aſſurances of their Lands according to their true Intent, in full Health and Memory; to which Aſſurances they may add ſuch Conditions or Proviſoes of Revocation as they pleaſe: For I have found great Contro-

verſies and Doubts daily to grow and ariſe by Reaſon of Deviſes and Laſt Wills, ſometimes in reſpect of the Tenures of the Land, at other Times under Pretence of Revocations, which may eaſily be made by Parol; alſo in reſpect of obſcure and inſenſible Words, and repugnant Sentences, the Will being made in haſte; and ſome do pretend that the Teſtator, in reſpect of Extremity of Sickneſs, was not of ſound Memory; and divers other Scruples and Queſtions are moved about Wills. But if you pleaſe to deviſe your Land by Will,

1. Make it by good Advice in your Health and ſound Memory, and inform your Counſel truly of the Eſtate and Tenure of your Lands, that it may be made according to the Rules of Law, and ſo all Queſtions and Controverſies may thereby be prevented.

2. If your Will concerns Land and Inheritance, it is good to make it indented, and to leave one Part with a Friend, leſt after your Death your Will be ſuppreſſed.

3. At the Time of the Publication of your Will, take credible Witneſſes which may ſubſcribe their Names to it.

4. If it may be, let the whole Will be written with one Hand in Parchment or Paper, for fear of Alteration, Addition, or Diminution.

5. Let the Hand and Seal of the Deviſor be put to it.

6. If it be in ſeveral Parts, let the Hand and Seal of the Deviſor, and the Names of the Witneſſes be ſubſcribed to every Part.

7. If there be any Interlining or Raſure in the Will, let there be a *Memorandum* of it.

8. If you make any Revocation of your Will, or of any Part of it, do it in Writing by good Advice; for upon Revocations by Parol Controverſies do ariſe, ſome of the Witneſſes affirming it in one Manner, and others in another Manner [p].

[p] Lib. 3. fol. 36. *Butler* and *Baker*'s Caſe.

§. XII. Of a nuncupative Teſtament. *See* Part II. c. 29.

1. *What is a nuncupative Teſtament.*
2. *Wherefore it is called Nuncupative.*
3. *Of the Force and Effect of a nuncupative Teſtament.*
4. *At what Time nuncupative Teſtaments are made, and what is the Reaſon.*
5. *Teſtaments favourably expounded.*
6. *A nuncupative Teſtament made divers Ways.*

A *Nuncupative* Teſtament (1) is, when the Teſtator without any Writing doth declare his Will before a ſufficient Number of Witneſſes [q]. and it is called nuncupative (2) *a nuncupando, i. e. nominando*, of naming [r]; becauſe when a Man maketh a nuncupative Teſtament, he muſt name his Executor, and declare his whole Mind before Witneſſes [s]. And (3) a nuncupative Teſtament is of as great Force and Efficacy (except for Lands, Tenements and Hereditaments) as is a written Teſtament [t]. This Kind (4) of Teſtament is commonly made when the Teſtator is very ſick, weak, and paſt all Hope of Recovery [u]. For it is received for an Opinion amongſt the ruder and more ignorant People, that if a Man ſhould be ſo wiſe as to make his Will in his Health, when he is ſtrong and of good Memory, having Time and Leiſure, and might ask Counſel (if any Doubt were)

[q] §. Fin. Inſtit. de teſta. ordin. L. Hæredes palam. ff. de teſta.
[r] Minſing. in d. §. fin. & Kling. in d. tit. de teſta. ordin. n. 11.
[s] Minſing. in d. §. fin.
[t] L. Hac conſultiſſima. §. per nuncupationem. C. de teſta. d. §. fin. Inſtit. de teſta. ordin.
[u] *Terms of Law*, verb. Deviſe.

were) of the learned, that then ſurely he ſhould not live long after. And therefore they defer it until ſuch Time, when it were more convenient to apply themſelves to the Diſpoſing of their Souls, than of their Lands and Goods[x]. (5) And in Conſideration hereof it is, that Teſtaments are ſo much favoured which be made in ſuch Times, namely, for that the Teſtator then cannot conveniently ſtay to ask Counſel of ſuch Points as be doubtful in Law[y].

[x] Ibidem.

[y] Infra, part 4. §. 4.

A (6) nuncupative Teſtament may be made not only by the proper Motion of the Teſtator, but alſo at the Interrogation of another, as is hereafter declared[z].

[z] Infra, part 4. §. 26.

Debt brought by Executors, the Defendant demanded *Oyer* of the Teſtament, and had it; which was thus; *Memorandum*, that *W. S.* of *London* made this nuncupative Will in this Manner, *viz.* he appointed *T. W.* and *R. C.* his Executors; and that was under the Seal of the Ordinary: *Per totam Curiam*, it is ſufficient to enable them to maintain an Action, notwithſtanding it was but under the Seal of the Ordinary, and not of the Party. 4 *H.* 6. *fol.* 1. 5 *H.* 5. 1. *Brook* Tit. *Teſtament.* *H.* 8. 3. 14 *H.* 6. 5. But *per Choke*, Executors cannot have an Action upon a nuncupative Teſtament, except it be after put in Writing; and therefore the Uſe is to prove it by Witneſſes before the Ordinary, and then to write it. 10 *E.* 4. 1.[a].

[a] 4H.6.1. 5 H.5.1. 14H.6.5. 10E.4.1. Brok. tit. Teſtament, pl. 8. 3.

Nuncupative Wills are more antient than Wills in Writing, becauſe they were in Uſe before Letters were known; and they are now of as great Force and Efficacy to diſpoſe of the perſonal Eſtate of the Teſtator, as Wills in Writing in the Teſtator's Life-time, having the [b] Court Seal affixed to them.

[b] *This was before the Statute of Frauds, but the Law is now altered.*

Tho' many Legacies are deviſed by a Will *in Writing*, and no Executor appointed, yet this will not amount to a Will in Writing; becauſe the Appointing an Executor, which is an eſſential Part of a Will, is wanting; however, it will be a good nuncupative Will. *Godolph.* 13.

One ſeiſed in Fee of Lands raiſes a Term for Years, which he ſettled on Truſtees, for ſuch Uſes as he *by Deed or Will* ſhould appoint, and for Want of ſuch Appointment, to attend *the Inheritance*; afterwards he made a *nuncupative Will* in theſe Words, (*viz.*) *I give All, All to* T. S. and then died without Iſſue; it was 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 expreſly ſettled by Deed for ſuch Uſes as he ſhould appoint; and for Want of ſuch Appointment, to attend the Inheritance, this reſtrains him from making any parol Diſpoſition, and the Words *All, All*, muſt be intended of *All* he could diſpoſe by Parol. 1 *Vern.* 341. *Thruxton* v. *Attorney General.*

By the Statute of Frauds, *&c.* 'tis enacted, that a *nuncupative Will ſhall not be good which exceeds* 30 l. *unleſs proved by Three Witneſſes, who were preſent at the Making thereof; nor unleſs it was made in the Time of the laſt Sickneſs of the Deceaſed, or in his Houſe, or where he hath been reſident for Ten Days before, unleſs ſurpriſed in Sickneſs from home*; and no *Evidence ſhall be given to prove ſuch Will after Six Months, unleſs it be committed to Writing within Six Days after the Making; neither ſhall the Probate of ſuch Will paſs the Seal of any Court till Fourteen Days after the Death of the Teſtator,* nor until Proceſs *hath iſſued to call in the Widow or next of Kin to conteſt it.*

After

After this Statute this Caſe happened, (*viz.*) The Teſtator made his Wife Executrix and reſiduary Legatee; but ſhe *dying in his Life-time*, he by a *Codicil nuncupative* deviſed to G. R. all which by Will he had given to his Wife, and died; the Queſtion was, whether this nuncupative Codicil was good, notwithſtanding the Statute before-mentioned; and adjudged that it was, and *quaſi* a new Will for ſo much as he had given to his Wife, and that it did not alter his written Will, for there was no ſuch Will, the Operation of it being determined by the Death of the Wife, living the Teſtator, who was her Husband. *Raym.* 334. *Stoniwell's* Caſe.

An Adminiſtrator brought a Bill to diſcover and have an Account of the Inteſtate's Eſtate; the Defendant pleaded, that the ſuppoſed Inteſtate made a nuncupative Will, and another Perſon Executor, to whom he was accountable, and not to the Plaintiff as Adminiſtrator; but decreed, that though there was ſuch a nuncupative Will, yet it was not pleadable againſt an Adminiſtrator before it was proved. 1 *Chan. Rep.* 192. *Verhorn* verſus *Brewin.*

Dr. *Shallmer* by Will in Writing gave 200 *l.* to the Pariſh of St. *Clement Danes*, and after *Prew* the Reader coming to pray with him, his Wife put him in Mind to give 200 *l.* more towards the Charges of building their Church, at which, though Dr. *Shallmer* was at firſt diſturbed, yet after ſaid he would give it, and bid *Prew* take Notice of it; and the next Day bid *Prew* remember of what he had ſaid to him the Day before, and dies that Day; within three or four Days after, the Doctor's Widow put down a *Memorandum* in Writing of the ſaid laſt Deviſe, 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 200 *l.* 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 *Memorandums* 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. *Shallmer* and her Maid, they decreed the 200 *l.* but on Exception taken by the Executors, the Decree was diſcharged of this 200 *l.* and the Lord Chancellor held it not good, becauſe it was not proved by the Oath of Three Witneſſes; for though Mrs. *Shallmer* and her Maid had made Proof, yet *Prew* was dead, and the Statute in that Branch requires not only Three to be preſent, but that the Proof ſhall be by the Oath of Three Witneſſes. *Trin.* 1704. Between *Phillips* and *The Pariſh of St. Clement Danes.*

A Daughter depoſits 180 *l.* in the Hands of her Mother, the Defendant, afterwards makes her Will in Writing, and thereby deviſes ſeveral Legacies, and makes her Mother Executrix, but takes no Notice of this 180 *l.* but afterwards by Word of Mouth ſhe deſires her Mother to give this 180 *l.* to the Plaintiff, if ſhe thought fit, and ſoon after died; the Mother proved the Will, and the Plaintiff brought a Bill for this 180 *l.* the Mother by her Anſwer admits ſhe had ſuch a Sum in her Hands, that her Daughter did make ſuch Requeſt to her, but that ſhe left it to her Election, whether ſhe would give it to the Plaintiff or not by the very Form of the Deviſe, and inſiſted that ſhe did not think fit to give it to the Plaintiff. In this Caſe it

was agreed, that this was not good in a nuncupative Will, being above 30*l.* and not reduced into Writing within ſix Days after the Speaking, as the Statute requires. 2*dly*, That if the Defendant had inſiſted on the Statute of Frauds and Perjuries, the Court could not have relieved the Plaintiff as upon a Truſt; but in this Caſe the Defendant having by her Anſwer confeſſed the Truſt, there was no Danger of Perjury from Variety of Proofs, which was the Miſchief the Statute intended to provide againſt; and therefore the Court took it to be in Nature of a Truſt, and decreed for the Plaintiff. *Paſ.* 1718. *Jones* and *Nabbs.*

§. XIII. Of privileged Teſtaments.

1. *What is a privileged Teſtament.*
2. *Wherefore they be called privileged.*
3. *Divers Sorts of privileged Teſtaments.*

Privileged Teſtaments are thoſe (1) which have ſome ſpecial Freedom or Benefit, contrary to the common Courſe of Law [c]. They are termed (2) privileged, *a privilegio, quaſi a privata lege* [d]. For a Privilege doth ſignify a private Law. Foraſmuch therefore as by a private or ſpecial Law ſome Teſtaments are diſcharged from the uſual Orders or Obſervations of common or general Law, in that reſpect they are called privileged.

Of (3) privileged Teſtaments there are Three Sorts; *Teſtamentum militare, Teſtamentum inter liberos, Teſtamentum ad pias cauſas:* A Teſtament made by a Soldier; a Teſtament made by a Father amongſt his Children; and a Teſtament made for good and godly Uſes. And although there be ſome other privileged Teſtaments, yet their Privileges are but ſmall in Compariſon of thoſe Three [e].

[c] Mantic. de conject. ult. vol. lib. 1. tit. 57. in fin.

[d] Summa Hoſtienſ. tit. de privileg. in prin.

[e] Videlicet, teſtamenta ruſticorum, teſtam. tempore peſtis condita, & hujuſmodi, de quibus Ripa in tract. de peſte, c. 2.

§. XIV. Of a Military Teſtament.

1. *The Cauſes wherefore Soldiers enjoy ſuch Privileges in making their Teſtaments.*
2. *Wherein Soldiers are privileged concerning the Making of their Teſtaments.*
3. *Soldiers privileged in reſpect of their own Perſons, and of others alſo.*
4. *Soldiers privileged in reſpect of Solemnities Teſtamentary.*
5. *Soldiers privileged in reſpect of the Subſtance and Form of a Teſtament.*
6. *Three Sorts of Men called Soldiers.*
7. *Whether all armed Soldiers enjoy theſe Privileges.*
8. *Whether Doctors of the Law and Clergymen enjoy theſe Privileges.*
9. *The Fruit which the Common-wealth reapeth by the Study and Practice of the Law.*
10. *What Benefit doth redound unto us by the Clergy.*
11. *Whether the Soldier or Lawyer are more honourable.*

12. *What Manner of teſtamentary Privileges Divines and Lawyers do enjoy.*
13. *All Doctors and Divines be not privileged.*

FOraſmuch as (1) Soldiers, being better acquainted with Weapons than Books, are preſumed to have ſo much the leſs Knowledge in the Laws of Peace, by how much the more expert they are in the Laws of Arms [f]: Foraſmuch alſo as Warriors, in the Defence of their Country, do oftentimes undertake perillous Enterprizes, wherein they loſe their Lives or their Limbs, and ſeldom eſcape without Wounds or bodily Hurt [g]: As well therefore in regard of their ſmall Skill in our peaceable Laws on the one Side [h], as in Recompence of their great Perils and Hurts in Battels on the other Side [i], they enjoy many Privileges and Benefits in the Making of their Teſtaments, (eſpecially by the Civil Law,) which are not allowed unto others [k].

[f] L. fin. §. C. de jure. d. lib in fin. Vigli. & Minſing. in tit. de teſta. mil. Inſtit.
[g] L. quanquam. C. de teſta. mil. & ibid. Dec.
[h] Inſtit. de mil. teſta. in princ. And. Gail. l. 2. practic. obſervat. c. 118.
[i] Dec. in d. L. quanquam. C. de mil. teſta. Atque harum cauſarum prior eſt impulſiva, poſterior finalis. Gail. ubi ſupra. [k] Vaſquius de ſucceſſ. reſoluc. li. 2. §. 20. ubi enumerat 70 privilegia militibus indulta.

Of theſe (2) Privileges, ſome do reſpect the Perſon of the Teſtator, ſome the Perſon of the Executor or Legatary; ſome the Solemnities about making the Teſtament, and ſome reſpect the Subſtance or Form of the Teſtament made [l]. Concerning the firſt Kind of Privilege: Whereas (3) there are many which be diſabled to make their Teſtaments, (as afterwards doth appear [m];) yet a Soldier is not diſabled by any of theſe Impediments, unleſs it be for Want of Reaſon, or for ſome other Cauſes, when he is diſabled *jure gentium* [n]. Concerning the Perſon of the Executor or Legatary: Whereas there are divers which are prohibited to be Executors or Legataries to other Perſons; yet they are not prohibited to be Executors or Legataries to a Soldier, (except in ſome few Caſes [o].) Concerning (4) the Solemnities of the Civil Law to be obſerved in the Making of Teſtaments: Soldiers are clearly acquitted from the Obſervation thereof [p]; ſaving that Soldiers when they make their Teſtaments ought to require the Witneſſes to be preſent [q]. But as no Subject of this Land is ſtrictly tied to this Obſervation, of requiring the Witneſſes in the Making of his Teſtament [r], (thoſe Solemnities only being neceſſary which are *Juris gentium* [s];) therefore that Opinion is not to take Place here in *England:* Otherwiſe this Abſurdity would follow, that Soldiers would be tied to more ſtrict Obſervation than Men of greater Skill, and enjoy leſs Liberty than they of leſs Deſert [t]. Concerning (5) Military Privileges which reſpect the Form and Subſtance of the Teſtament: Firſt, whereas no other Perſon can die with Two Teſtaments, yet a Soldier may; and both Teſtaments ſhall be deemed good, according to the Will and Meaning of the Teſtator [u]. And whereas another Perſon cannot die partly Teſtate and partly Inteſtate, (at leaſt by the Civil Law [x],) yet a Soldier may [y]. And therefore if he make his Teſtament, and therein appoint an Executor for Goods in one Place [z], the next of Kin ſhall have Adminiſtration of Goods in another Place [a]. But this Privilege doth alſo belong to every Subject of this Realm. Other Privileges there be, but it were too long to repeat them all [b].

[l] L. neque enim. ff. de mil. teſt. & ibi Bar. Sichard. in Rub. de teſta. mil. C. Mantic. de conject. ult. vol. lib. 6. tit. 1.
[m] Infra, 2 part.
[n] Bar. in d. L. Neque enim. Minſing. in tit. de mil. teſta. Inſt. in prin.
[o] Bar. in d. L. Neque enim. & infra, part. 5.
[p] L. Divus. ff. de teſta. mil. §. plane. Inſt. eod.
[q] Quorum opinio communis eſt, ut refert Jul. Clar. §. teſt. q. 58.
[r] Supra §. j. in prin. cum notat. ibidem.
[s] Supra §. x. in prin.
[t] Vide quæ ſuperius dicta ſunt §. x. n. 5. cum notis marg. Rogationem non requiri ex neceſſitate, Teſtatur Lindw. in c. ſtatutum. de teſtamentis. l. 3. provinc. conſtit. Cant. verb. probatis.
[u] L. Quærebatur. ff. de mil. teſta.
[x] L. jus noſtrum. de reg. jur. ff.
[y] L. Miles. C. de teſta. mil.
[z] D. L. Miles.
[a] Fitzherb. Abridg. tit. exec. n. 26. & infra, part. 4. §. 17. §. 18. [b] Vide (ſi placeat) Vaſqu' de ſucceſſ. reſoluc. l. 2. §. 20. ubi enumerat 70 privilegia quæ militibus competunt.

After we have viewed what Privileges do belong to Soldiers, it ſhall be expedient to ſhew what Manner of Soldiers they be to whom theſe Privileges are granted. Wherefore we are to underſtand, that there (6) be Three Sorts of Men which be termed in Law by the Name of Soldiers. The firſt be *Milites armati*, armed Soldiers: (Such as are above deſcribed:) The Second be *Milites literarii*, lettered Soldiers, as Doctors of the Law: The Third Sort are *Milites cæleſtes*, celeſtial or heavenly Soldiers, as Clergymen and Divines: For ſo the Law doth term them [c]. Concerning the firſt Sort, (7) either they be ſuch as lie ſafely in ſome Caſtle or Place of Defence, or beſieged by the Enemy, only in Readineſs to be imployed in Caſe of Invaſion or Rebellion; and then they do not enjoy theſe Military Privileges [d]: Or elſe they be ſuch as are in Expedition or actual Service of Wars; and ſuch are privileged [e], at leaſt during the Time of their Expedition [f], whether they be imployed by Land or by Sea [g], and whether they be Horſemen or Footmen [h]. (8) Concerning the other Two Sorts of Soldiers, many are of this Opinion, that they do not enjoy the aforeſaid Privileges [i], becauſe they are not Soldiers properly ſo called, but metaphorically [k]. Others are of a contrary Opinion; affirming (9) that the great Pains and ſtudious Travel of learned Lawyers, (eſpecially Doctors of Law and ſuch like) are no leſs beneficial to their Country, than the hardy Adventures of thoſe armed Soldiers: For that without Laws no Common-wealth can be governed: And in that reſpect deſerve as great Privileges as they [l]. Much (10) more then (by all Probabilities) are thoſe Spiritual Soldiers worthy of all Privileges, by whoſe Prayers and Interceſſions the Wrath of God is appeaſed, and Victory many Times obtained, and without whoſe Miniſtry Chriſtianity would quickly be ruinated and ſubverted [m].

[c] Minſing. in Rub. de teſta. mil. inſtit.

[d] Intellige ſtationarios & limitaneos milites: de quibus Viglius, & poſt eum Minſing. in §. illis autem. Inſtit. de teſt. mil. & Jul. Clar. §. teſtam. q. 15. in fin. Adhibe duas alias micas ſalis, unam ex Zaſio, in L. Miles. ff. de re jud. n. 5. alteram e Decio, in Rub. de teſta. mil. C. n. 3.

[e] L. Pen. C. de teſta. mil. Mantic. de conject. ult. vol. l. 6. tit. 1. n. 32.

[f] §. Sed hacten. Inſt. de mil. teſta. Clar. §. Teſta. q. 15. n. 4. And. Gail. d. obſervat. 118.

[g] Michael. Graſ. Theſaur. com. op. §. teſtm. q. 3. n. 1. Zaſ. in L. miles. ff. de re jud. n. 5. in fin. [h] Dec. in Rub. de teſta. mil. C. n. 5. Ripa in L. centurio. ff. de vulg. ſub. n. 11. [i] Sichard. in Rub. de mil. teſt. c. 9. Jaſ. Ripa & alii in L. centurio. in de vulg. ſub. ff. quorum op. com. eſt, ut refert Vaſq. de ſucceſſ. crea. §. 24. n. 23. [k] Minſing. in Rub. de mil. teſta. Inſtit. n. 2. [l] Michael Graſ. Theſaur. com. op. §. teſtm. q. 4. Alex. in d. L. centurio. qui tamen aliis fundamentis nititur. [m] Alex. in d. L. centurio. n. 18.

And yet it is more doubtful in Law, whether theſe Military Privileges do appertain to Teſtaments made by Clergymen, than if they were made by Lawyers [n]. The Reaſon may be, becauſe howſoever Divines be worthy; yet they be otherwiſe rewarded, though not in this [o]: But this Reaſon doth not ſo fully ſatisfy. For if Doctors and Pleaders of the Law be therefore privileged, becauſe they be compared to Soldiers [p]; who like valiant Champions, by Force of Learning, Strength of Wit, and mighty Power of Eloquence, defend their Clients Cauſes againſt the Subtilties and Injuries of their Adverſaries: How much more ought our Divines, our Captains in the Spiritual Warfare of this Life, by Means of whoſe Miniſtry, and Virtue of whoſe godly Inſtruction, and Might of Preaching that powerful and invincible Word, not our Purſes, nor our Bodies, but even our Souls are defended and kept in Safety, againſt the cruel Aſſaults of that mortal Enemy of Mankind, and againſt his Hoſt of wicked Spirits, who never reſt Day nor Night, but ſtill ſtrive to overthrow us, and to bring us all to everlaſting Deſtruction? How much more, I ſay, are theſe our Captains in theſe ſo terrible Conflicts, to be gratified and dignified with all Manner of Military Privileges [q]? Wherefore if the Matter reſt upon the Iſſue of Deſert and Worthineſs, without Doubt,

[n] Ripa in d. L. centurio. ff. de vulg. ſub. n. 19. poſt Socin. Jaſon. Claud. & alios ibid. & Mathefilla, Not. 61. Graſſ. Theſaur. com. op. §. teſtam. q. 5.

[o] Vaſ. de ſucceſſ. crea. §. 24. n. 31. in fin.

[p] Gloſſ. & DD. in L. miles. ff. de re jud. Mentionem autem feci non ſolum de doctoribus, ſed de aliis etiam cauſidicis, propterea quod licentiati ratione exercitii privilegiis militaribus fruuntur. Teſte Ripa. d. L. centurio. n. 18.

[q] Arg. a min. ad maj.

Doubt, of theſe Three forenamed Soldiers, the Divine is not the laſt, but the foremoſt.

Concerning the (11) other Two, (the Lawyer I mean and the Soldier,) whether of them deſerveth better of the Common-wealth, and whether is to be preferred before the other, is a Queſtion ſo incident to this Controverſy, that there be few Writers which handle the one, but they alſo touch the other [r]. In the Determination whereof, if the Interpreters of the Law may be Judges in their own Cauſe, then the Sentence muſt needs be, *Cedant arma togæ* [s].

[r] Alex. Jaſ Ripa in d. L. centurio. Vaſq. de ſucceſ. crea. §. 14. n. 31.

[s] Vaſq. in d. §. 24. n. 31. Jaſ. in L. pen. Ripa ibidem, n. 15. col. 2. C. de pactis, n. 4. Angel. Are. in §. fin. Inſtit. de mil. teſta. Alex. in d. L. centurio. n. 14. & Panor. & Canoniſtæ in L. quando de magiſtr. extr. n. 3. Feli in Rub. de major. & ob. extr.

For my Part, if you will give me Leave, I will tell you a Tale out of *Zaſius* [t], writing upon this Queſtion, which is as true as any in *Æſop*'s Fables. A certain Painter (ſaith he) meaning by his Art to deſcribe the Strength of Man, did paint a little Man riding upon a huge Lion, as if a Man were ſtronger than a Lion. A Lion paſſing by, demanded of the Painter, wherefore he made ſuch a Picture. Becauſe (quoth the Painter) my Man is able to tame any Lion, as eaſily as an Horſe or an Aſs. Well, Sir, ſaid the Lion, if we could paint, thou ſhouldſt ſee a Lion devouring a Painter. Eloquent Men are as Painters, valiant Soldiers as Lions. It is not the golden Chain, nor the Plume of Feathers, nor the big Looks, nor the proud Brags, which make a right Soldier [u]. Neither is it the long Gown, nor the grave Beard, nor the ſtately Geſture, which make a good Lawyer [x]. The Counterfeit of either deſerveth no Honour; be he never ſo brave. If both be as they ſhould, the Pre-eminence in War is the Soldier's; in Peace the Lawyer's [y]. In other Matters, he is the more honourable which doth more honour than the other. To return to the former Queſtion, whether (12) theſe Soldier-like Lawyers may challenge theſe former teſtamentary Privileges: We are to diſtinguiſh betwixt Privileges granted to Soldiers (ſo properly called) in reſpect of their Want of Skill, and Ignorance in Matters of that Quality, (for ſuch do not belong to the Learned,) and Privileges of Prerogative or Deſert. For theſe Kinds of Privileges belong alſo to Doctors and Clergy-men [z]: But (13) with this Reſtriction, that as they belong not to every Soldier, but only to ſuch as are in Action; ſo they belong not to Doctors utterly *non-proficient*, or Clerks *non-reſident*, but ſuch as painfully attend their Profeſſion, and diligently labour in their Vocation [a].

[t] Zaſ. in L. miles. de re jud. ff. n. 8.

[u] Zaſ. in d. L. miles. n. 5.

[x] Cucullus non facit Monachum. Barba non facit Philoſophum.

[y] Zaſ. in d. L. centurio. n. 20. Alex. in eand. L. n. 14. Gail li. 2. pract. obſer. 118. n. 16.

[z] DD. in L. miles. & L. centurio. ff. de re jud. Michael Graff. Theſaur. com. op. §. teſtm. q. 5. n. 5.

[a] Graff. d. q. 5. Viglius in d. §. j. Inſtit. de teſta. mil. Sichard. in L. fin. ſi quis vero. C. de codicil. n. 5.

§. XV. Of the Teſtament of the Father amongſt his Children.

1. *What is a Teſtament amongſt Children.*
2. *That Teſtament is preſumed laſt, which is made in Favour of Children.*
3. *If Two Teſtaments be found, and it do not appear which is firſt or laſt, neither is good.*

4. *The Teſtament made in Favour of Children is not ſo eaſily revoked as another Teſtament.*
5. *What Manner of Mention is to be made in the latter Teſtament, to take away the former made in Favour of Children.*
6. *Certain Caſes wherein the Teſtament made in Favour of Children may be taken away by the Second, without any Mention of the former.*
7. *Whether a Teſtament may be proved which hath no Witneſſes of the Making thereof.*
8. *The Privilege of Proof without Witneſſes, whether it be peculiar to one Kind of Teſtament.*

THE ſecond Kind of privileged Teſtaments is, *Teſtamentum inter liberos* [b]: That is to ſay, (1) wherein the Father nameth his lawful and natural Children his Executors, giving to them the Reſidue of his Goods [c]. Unto which Kind of Teſtament divers Privileges do appertain [d]. The firſt Privilege is this, If (2) Two Teſtaments be found after the Death of the Teſtator, of divers Tenors, and it doth not appear which of them is the latter; in this Doubt that Teſtament is preſumed the latter, which is made in Favour of the Children [e]. Whereas if (3) neither be in Favour of the Children, nor otherwiſe privileged, neither Teſtament ſhall prevail, but both are void, the one deſtroying the other [f]. Unleſs the Teſtaments be made by a Soldier; for then it ſeemeth that both Teſtaments ſhall prevail, becauſe he may (if he will) die with Two Teſtaments [g].

[b] Mantic. de conject. ult. vol. lib. 1. tit. 7. in fin.
[c] L. ex hac conſultiſſima. §. ex imperfecto. C. de teſta. & ibi DD.
[d] d. §. ex imperfecto & L. fin. C. famil. herciſcun. Mantic. de conject. ult. vol. lib. 6. tit. 2.
[e] Bar. in L. j. §. j. de pon. poſſ. ſecundum tab. ff. Clar. §. teſtm. q. 100.
[f] L. fin. de hæred. Inſtit. L. jus noſtrum. de reg jur. & Cagnol. ibidem, n. 8. Bald. & Caſtr. in L. eum qui de acquir. her. ff. L. j. §. j. de bon. poſſ. ſecundum tab. ff.
[g] L. quærebatur. de teſta. mil. ff. bar. in d.

Another Privilege is this, The (4) Teſtament made in Favour of Children is not ſo eaſily revoked as other Teſtaments are [h]: For whereas in other Teſtaments, the former is revoked or infringed by the latter, and that *ipſo jure* [i], without any expreſs Revocation of the former, and without any Kind of Mention of the former Teſtament, either general or ſpecial [k], (certain Caſes excepted:) Yet (5) by the Civil Law, if the Father have once made a Teſtament, wherein he hath preferred his Children as before, the ſame is not revoked by a latter Teſtament, wherein Strangers are preferred, (whether the former be a written Teſtament or nuncupative,) unleſs in the latter Teſtament there be ſpecial Mention of the former [l]. So (6) that it is not ſufficient for the Teſtator to make general Mention, ſaying, I make this my Laſt Will, notwithſtanding any former Teſtament; but he muſt make ſpecial Mention, as, notwithſtanding any former Teſtament made amongſt my Children [m]. Or unleſs the ſecond Teſtament be made *ad pias cauſas* [n]. Or elſe ſome great Diſpleaſure or Enmity have happened betwixt the Father and the Children [o]; or ſome like Cauſe have come to paſs, whereby it may appear that the Father did repent him of the Making of his ſaid Will [p].

[h] Auth. hoc inter liberos. C. de teſta. & gloſſ. ibid.
[i] §. poſteriore. Inſtit. quibus mod. teſt. infir.
[k] Infra, part. 7. §. 14.
[l] d. Auth. hoc inter liberos. Alex. Jaſ. Sichar. ibidem. quorum opin. communis eſt, contra Angel. ut inquit Graff. Theſaur. com. op. §. teſtm. q. 86. n. 11.
[m] Mantic. de conject. ult. vol. lib. 6. tit. 2. n. 19. & Sichard. in d. Auth. Hoc inter.
[n] Jaſ. in d. Auth. Hoc inter.
[o] Graff. Theſaur. com. op. §. teſtm. q. 86. n. 11.
[p] Graff. ibid.

Another Privilege granted by the Civil Law to a Father's Teſtament amongſt his Children is this, That the (7) ſame take Effect, tho' there be no Witneſſes to prove the ſame: As when there is a

Teſtament found in ſome Cheſt, or like Place, written or ſubſcribed with the Teſtator's Hand, or by him procured to be written by ſome other [q]. Howbeit I do ſuppoſe that by (8) the general Cuſtom of this Realm of *England*, thoſe Two Privileges are not proper or peculiar to Fathers Teſtaments alone, but that the ſame are common to all other *Engliſhmens* Teſtaments; and namely the latter Privilege, when it doth appear undoubtedly to be written or ſubſcribed with the Teſtator's own Hand, or it is proved that the Teſtator cauſed the ſame to be written by another. How this Proof is to be made, that the Teſtament is written or ſubſcribed with the Teſtator's own Hand, is declared in another Place [r].

[q] Bald. Paul. de caſtr. & Jaſ. in Auth. quod ſine C. de teſt.

[r] Infra, part. 4. §. xxv.

Other Privileges there be, whereby theſe Kinds of Teſtaments are free from ſundry Obſervations and Solemnities wherewith other Teſtaments are charged. But becauſe they are alſo common to all our Teſtaments here in *England*, it were improper to repeat them in this Place under the Title of Privileges.

§. XVI. Of a Teſtament *ad pias cauſas.*

1. *A Teſtament* ad pias cauſas *may be ſo termed either in reſpect of Perſons or Places.*
2. *A Teſtament* ad pias cauſas *may be made by ſtrange and unaccuſtomed Notes.*
3. *A Teſtament* ad pias cauſas, *being found cancelled, is not preſumed to be adviſedly cancelled by the Teſtator.*
4. *In a Teſtament* ad pias cauſas, *whether the Condition ought to be obſerved preciſely.*
5. *A Teſtament* ad pias cauſas *is not void by Reaſon of Uncertainty.*
6. *Whether all Privileges which belong to a military Teſtament, or to a Teſtament amongſt the Teſtator's Children, do alſo belong to a Teſtament* ad pias cauſas.
7. *What if there appear Two privileged Teſtaments, and it doth not appear which is later? Whether ſhall be preferred?*

THE third Kind of privileged Teſtaments is that Teſtament *ad pias cauſas* [s]: Which is ſo termed (1) not only in reſpect of Perſons, (as when the Teſtator willeth his Goods to be diſtributed to young Orphans, Widows, Strangers, Priſoners, Lame and diſeaſed Perſons, ſo that they be poor and needy, ſuch as the Law termeth *miſerable Perſons*;) but alſo in reſpect of Places: As when the ſame is left to Hoſpitals, to Churches, to repairing of Bridges, Walls of a Town or City, when the ſame are decayed and ſtand in need to be repaired [t]. And ſuch a Teſtament hath very many Privileges [u].

[s] Mantic. de conject. ult. vol. lib. 1. tit. 7. in fin. & in l. 6. tit. 5.

[t] Lindw. in c. ita quorundam, verb. pias cauſas. de teſta. lib. 3. provincial. conſtitut. Cant. & latiſſime Tiraquel. tract. de privileg. piæ cauſæ in præf. ejuſd.

[u] Tiraquel. in d. tract. ubi enumerat 170 privilegia piæ cauſæ, quorum tamen longe maxima pars competit ſingulis Anglorum Teſtamentis, etiamſi non ſint condita ad pias cauſas.

One Privilege is, That (2) this Kind of Teſtament may be written with ſtrange and unaccuſtomed Characters or Notes; as inſtead of *A.* the firſt Figure 1. inſtead of *B.* the ſecond Figure 2. inſtead of *C.* the third Figure 3. or with ſome other more ſtrange deviſed Letters.

Yet

Yet nevertheleſs the ſame is as effectual, as if it had been written after the uſual and accuſtomed Manner [x].

[x] Mantic. de conject. ult. vol. lib. 6. tit. 3. n. 3. Tiraquel. de privileg. piæ cauſæ, c. 12. vide infr. part. 4. §. 25.

Another Privilege is this, That if the (3) Teſtament *ad pias cauſas* be found cancelled, and it is not known whether the Teſtator did willingly cancel the ſame, the Law doth preſume it to be cancelled unadviſedly [y]; and ſo it is in Effect as if it had not been cancelled at all: Whereas in other Teſtaments the contrary is preſumed; that is, that the Teſtator did willingly cancel the ſame [z]; whereby they are made void, as afterward is declared [a].

[y] Covar. in Rub. de teſta. 2. par. n. 19. Gravetra conſil. 128. Mantic. de conject. ult. vol. lib. 12. tit. 2. n. 32.

[z] Alex. conſil. 104. n. 6. vol. 7. Mantic. de conject. ult. vol. lib. 12. tit. 1. num. 30.

[a] Infra, part. 7. §. 16.

Another Privilege is, That for obtaining of any Thing left conditionally *ad pias cauſas*, it is (4) ſufficient the Condition be accompliſhed by other Means, than according to the preciſe Form of the Condition [b]. Whereas in other Teſtaments or Legacies it is not ſufficient, unleſs the Condition be preciſely obſerved [c].

[b] Tiraquel. de privileg. piæ cauſæ, c. 82.

[c] L. Mevius. L. qui hæredi. de cond. & demon. ff. vide infra, part. 4. §. 7.

Another Privilege is, That the (5) Teſtament *ad pias cauſas* is not void in Reſpect of Uncertainty, (as other Teſtaments are:) And therefore if the Teſtator ſay, I make the Poor my Executors, or, I Will that my Goods be diſtributed amongſt the Poor; ſuch Manner of appointing Executors or Legacies is not void [d].

[d] Bar. & Jaſ. in L. j. C. de ſacroſanct. Eccleſ. Graſſ. Theſaur. com. op. §. Inſtitut. q. 12.

Generally, I ſuppoſe, that (6) whatſoever Privilege doth belong either to a military Teſtament, or to a Teſtament made by the Father amongſt his Children, in reſpect of the Solemnities to be obſerved in the Making of Teſtaments [e], or the Subſtance of Teſtaments [f], that the ſame do alſo appertain to a Teſtament *ad pias cauſas*; ſaving in ſome Caſes, and namely, where the Privileges of both the former Kinds of Privileges be contrary; as where Two Teſtaments be extant, and it doth not appear which is former or latter. In which Caſe it ſeemeth, that if they be military Teſtaments, that then they are both good, otherwiſe they are both void [g]. But if the one of them be *ad pias cauſas*, then that is preſumed laſt, and ſo available, the other not being privileged [h].

[e] Jure civili non valet teſtm. ad pias cauſas abſque ſolennitatibus conditum; ſecus jure canon. modo adhibeatur ſolennitas juris gentium: Et hæc eſt communis opin. Graſſ. Theſaur. com. op. §. teſtm. q. 18. Boer. Deciſ. 93. n. 3. unde non requiritur, ut teſtes ſint rogati in confectione teſtm. ad pias cauſas, ut habet communis opinio. Teſtibus Covar. in c. relatum el. j. de teſt. ext. n. 4. Tiraquel. de privileg. piæ cauſæ, c. 3. & Graſſ. d. q. 18. n. 5.

[f] C. cum tibi. de teſta. extr. Quid autem reſpectu perſonæ teſtantis? Dic ut per Ju. Clar. §. teſtm. q. 5.

[g] Supra, §. 14.

[h] Jaſ. & Sichard. in L. fin. C. de Edict. D. Adrian. tollend.

But (7) what if both Teſtaments be privileged, the one being *inter liberos*, the other *ad pias cauſas*, and it doth not appear which is former or latter? Which ſhall prevail? I ſuppoſe that which is *inter liberos* [i]: For the Children are to ſucceed in Caſe both the Wills were void [k], and ſo have a double Help, the one of the Teſtament, the other of Proviſion of Law [l]. And it were hard to take the Teſtator's Goods from his Children, unleſs it did plainly appear

[i] Mantic. de conject ult. vol. l. 6. tit. 3. n. 43.

[k] Bar. in L. j. §. de bon. poſſeſ. ſecundum tab. ff. Stat. præſump. 43. n. 3.

[l] L. utrum. §. ult. ff. de minor. Alciat. de præſump. reg. 3.

that

that the other were the latter [m]. Howbeit, it ſeemeth that if the Teſtament were not in Favour of his Children, but of ſome other of his Kin, that then the Teſtament *ad pias cauſas* were to be preferred; unleſs they did prove the Teſtament made in their Favour to be the latter [n].

[m] Unde Aug. Quicunque (inquit) vult, exhæredato filio, hæredem facere Eccleſiam, alium patronum quærat quam Auguſtinum. c. ult. 17. q. 4.

[n] Mantic. de conject. ult. vol. I. 6. tit. 3. n. 43.

Damur's Caſe, Moor Rep. 822. Char. Uſes 72.

A Deviſe to a *Charity* is good, tho' the Will is void in Law; as for Inſtance, A Feme Covert, who was intitled to a Debt as Adminiſtratrix to her firſt Husband, deviſed it to a Charity; now, tho' her Will was void in Law, yet it was a Declaration of her Intention and within the Statute; ſo that if there were Aſſets, either of the Inteſtate's Eſtate, or her own, the Charity ſhall be ſupported.

Rolls's Caſe, Moor 888.

The Teſtator, before the Statute 32 *H.* 8. *of Wills*, deviſed his Lands to repair *Highways*; this Land was not deviſable *by Cuſtom*, and therefore it being before the Statute, was void; yet it was held to be a good Limitation and Appointment within the Statute of Charitable Uſes.

Hob. 136. in Dr. *Lloyd*'s Caſe.

So where the Deviſe was to the *Principal, Fellows and Scholars of* Jeſus *College in* Oxford, and their Succeſſors, to find a Scholar of his Blood; this is void in Law, becauſe it is not allowed by the Statute of Wills, to deviſe Lands to a Corporation in Mortmain; but yet it was held good by the Statute 42 *Eliz.* as a *Limitation and Appointment* of Lands to a Charity.

Moor Cha. Uſes 81. *Stoddard*'s Caſe.

Deviſe of a Rent iſſuing out of ſuch an Houſe, *&c.* to a *Charity*, and a Scrivener was directed to put it into *Writing*; but the Teſtator died before it was done, and afterwards the Scrivener wrote the Will: Now, tho' a *Rent* cannot be created or granted without ſome Deed or Will in *Writing*, yet this *nuncupative Will* was adjudged good, not as a Gift by the Deviſe, but as a Limitation or Appointment by the Statute.

The Poor of *Woodford* verſ. *Parkhurſt*, Moor Cha. Uſes 70.

The Father purchaſed *Copyhold Lands* in the Name of his Two Sons, and their Heirs, and afterwards deviſed to Sir *William Marten* a Rent-charge of 40*l. per Annum*, iſſuing out of the ſame, for the Relief of the Poor of *Woodford*; now, though the Father never [o] *ſurrendered* to the Uſe of his Will, and though the Eſtate in Law was in his Sons, yet ſince he enjoyed the Lands during his Life, he ſhall be accounted the lawful Owner, and his *Will*, though void in Law for Want of a Surrender, ſhall be a good *Limitation and Appointment* of the Charity.

[o] Chanc. Caſes 75. The Portreve of *Chard* ver. *Opie*, S. P.

Platt ver. *St. John*'s Coll. in *Cambridge*, Moor Cha. Uſes 77.

A Deviſe to a Charity is good, though there was a Defect in the Execution of the Eſtate; as where Tenant in Tail of a *Copyhold* ſuffered a Recovery in the Manor-Court, but no Judgment was given againſt the Vouchee; then he deviſed the ſaid Copyhold to a College: Adjudged, that the Recovery was void ſo as to bar the Intail, becauſe there was no Judgment againſt the Vouchee to have a Recompence in Value; but yet the Deviſe was good to the College as a Limitation or Gift of the Lands, and ſhall not be avoided for Want of a Circumſtance in Law to make it good.

So where in a Deviſe of a Charity, the Deviſee was miſnamed, this was held a good Appointment in Equity within the Statute. *Chanc. Caſes* 221. *Attorney General* verſus *Platt*.

Meek ver. *Maſter and Scholars of Magdalen-Hall*, Duke Cha. Uſes 47.

Where a Will was ſuppreſſed, yet the Charity was decreed; as for Inſtance, The Teſtator deviſed 100*l. per Annum* to Ten poor Scholars,

lars, to be choſen out of the *Free-School in* Worceſter, and to be educated in *Magdalen-Hall* in *Oxford*; this Will was never ſeen after the Death of the Teſtator; but it was proved, that he made ſuch a Will, and ſaid a little before his Death, that he would not alter it; the Heir at Law refuſed to convey according to the Will; but it was decreed by the Commiſſioners, that the Chancellor, Maſters and Scholars of the Univerſity, and their Succeſſors, ſhould ſtand ſeiſed of the Charity, and receive the Rents, and pay the ſame, as directed by the Will; which Decree was confirmed by the Court of Chancery.

Where a particular Sum of Money is deviſed to a *Charity*, and the Teſtator did not appoint out of what it ſhould iſſue, but died, leaving Lands and Aſſets, and his Wife Executrix, and ſhe refuſed to buy Lands or Rents of that Value: The Court of Chancery decreed, that ſhe ſhould buy to the Value of the Money, and ſettle it on the Charity. *Penſtred* ver. *Player*, Moor Cha. Uſes 82.

So where the Teſtator deviſed, that his Lands ſhould be ſold, and the Money applied to a *Charity*, but did not direct by whom they ſhould be ſold; the Commiſſioners may appoint a Perſon to ſell, and decree ſuch Sale to be good. Moor Cha. Uſes 79. *Steward* v. *Germin.*

Likewiſe where the Teſtator doth not direct what ſhall be done with the improved Value, it ſhall go towards the Increaſe of the Charity, as it was adjudged in the Caſe of *Thetford-School.* 8 Rep. 130.

And there is a Caſe wherein the *true Value* was conſidered, (*viz.*) The Teſtatrix deviſed a Portion of Tithes, *&c.* to Five Perſons and their Heirs, to the Intent they ſhould employ the yearly Profits to erect a *Grammar-School in* Newport *in* Eſſex, for a competent Number of Children, Inhabitants of that Place; which Tithes, at the Time of the Deviſe, were in Leaſe for ſeveral Years, at 7 *l. per Annum*; the Deviſees received the Rent and built the School, and then the former Leaſe being expired, they demiſed the ſaid Tithes for Thirty-ſix Years, at the ſame yearly Rent; afterwards, in Conſideration of a Surrender of this laſt Leaſe, the Truſtees demiſed the ſaid Tithes to the Surrenderor for Fifty Years, at the ſame Rent; the Leſſee died, and the Tithes from his Death to the Year 1650, were worth 43 *l. per Annum* more than the reſerved Rent; about Thirty Years afterwards the ſurviving Truſtees leaſed theſe Tithes for Twenty-one Years, at 10 *l. per Annum* Rent, which Leaſe was to commence after the Determination of the Leaſe for Fifty Years, at which Time the Tithes were worth 60 *l. per Annum* more than the reſerved Rent: Adjudged, that the concurrent Leaſe for Twenty-one Years was to defraud the Charity, and that the Truſtees ought to have let a Leaſe according to the true Value, and not exceeding Twenty-one Years. *Wright* and *The School of Newport.* Duke Cha. Uſes 46.

Lands were charged with 1000 *l.* to put out poor Apprentices, the Money was paid to the Executor of the Donor; it was decreed, that the Payment was made to a wrong Hand, and by Conſequence the Charity abuſed; for it is expreſly required by the Statute 7 *Jac.* that Money given to put out poor Apprentices, ſhall be imployed by the Parſon or Vicar for that Purpoſe, and therefore muſt be received by him, and diſpoſed for the Uſes intended by the Donor; and this is agreeable to the Civil Law, which is, that Biſhops of the reſpective Dioceſes ſhall ſee, that what is given to Charity be duly applied, according to the Intention of the Giver; and that ever ſince Chriſtianity Chanc. Caſes 187. *Attorney General* ver. *Lord Newport.* 7 Jac. 1. cap. 3.

came into the World, it hath been the peculiar Care of Biſhops, that what is given to Charitable Uſes ſhould be duly applied.

Chanc. Caſes 245. *Sir William Jones* v. *Peacock.* Where a Deviſe of Charity was to the *Poor* indefinitely, in ſuch Caſe Equity gives the Diſpoſal thereof to the King; becauſe the Word *Poor* extends to all the Poor in *Great Britain*, and conſequently it would not avail any Thing; but by the Civil Law ſuch a Deviſe would be to the *Poor of the Hoſpital in that Pariſh where the Teſtator lived*; and if there was no ſuch *Hoſpital*, then to the other Poor of that very Pariſh.

Chanc. Caſes 353. *Sir William Jones* v. *Sir Jeremy Whitchcott.* The Teſtator built an *Hoſpital* in the Pariſh of *Lambeth*, and placed Seven poor Women of that Pariſh in it, of Sixty Years old, and gave 4 *l. per Annum* to each of them, to be paid by quarterly Payments, and charged ſome Lands with the Payment thereof; and directed, that when one or more of them ſhould die, their Places ſhould be ſupplied *by other poor Women*, but did not ſay of what Pariſh: Decreed, that this Charity ſhould be paid in Succeſſion to poor Women to be choſen out of *Lambeth* Pariſh; otherwiſe it would be prejudicial to that Pariſh; for if they ſhould be taken out of any other Pariſh, then *Lambeth* muſt contribute to their Maintenance, becauſe the Charity of 4 *l. per Annum* is not ſufficient to maintain a poor Woman of Sixty Years old.

Chanc. Caſes 395. *Owens* ver. *Bean.* The Teſtator deviſed a Charity to be diſtributed every Year for ever on *Eaſter* and *Chriſtmas Eves*, amongſt the poor Inhabitants of the *Pariſh of* Langenew *in the County of* Montgomery, whereas there was no ſuch Pariſh in that County; but there was a Pariſh of that Name in the *County of* Denbigh, where the Teſtator was born, and his Parents lived and died there; therefore it was decreed, that he muſt intend that Pariſh in the *County of* Denbigh.

Man verſus *Ballett*, 1 Vern. 42. Several diſtinct Charities were deviſed to the Pariſh of *C.* (*viz.*) one Farm of the yearly Value of 12 *l.* for Repairing the Church; another of the yearly Rent of 6 *l.* for Repairing the Highways, and another towards the Relief of the Poor; and Complaint being made againſt the Truſtees, before the Commiſſioners for Charitable Uſes, that the Church was out of Repair, and the Rents of the Farm being 12 *l. per Annum*, were not applied to repair, but that it was done by a Rate raiſed and levied upon the Pariſhioners; the Truſtees replied, that the whole Charity, amounting to 40 *l. per Annum*, and no more, had been applied to the Repair of the Highways and Relief of the Poor; and though they had not preciſely purſued the original Direction of the Charity in the firſt Inſtitution thereof, yet they having done nothing for any private Advantage, but only what was neceſſary in parochial Concerns, in which they expended all the Money received by the Charity, they hoped to be excuſed for the Time paſt, and the rather, becauſe for above Twenty Years together this Money had been promiſcuouſly imployed, and great Part of it in finding a Lecturer, there being no Miniſter to officiate in the Pariſh, who otherwiſe muſt have found one, and that it was the ſame Thing to them, whether they paid their Money to find a Lecturer, or repair the Church; but decreed, that an Agreement amongſt the Pariſhioners ſhall not alter the Charities, or divert them to other Uſes; therefore it being miſimployed, there ſhould be no Allowance for what they paid the Lecturer.

The Teſtator deviſed 50*l. per Annum* for a Lecturer in Polemical or Caſuiſtical Divinity, *ſo as he was a Bachelor or Doctor in Divinity, and Fifty Years old*, and would read Five Lectures every Term, and at the End thereof would deliver fair Copies of the ſaid Lectures, to be kept in the Univerſity; and in Default of ſuch a Lecturer, then he deviſed the ſaid 50*l. per Annum* to a College in *Oxford*; but now the Univerſity of *Cambridge*, with the Conſent of the Heir at Law, would have a Man of Forty Years old, capable of this Salary, and that *Three Lectures* every Term, and the Delivery of fair Copies thereof once every Year, might be ſufficient; the Court would not intermeddle; but declared, that the Parties ſhould be held to the Letter of the Charity, and that the Heir could not alter the Diſpoſition of the Charity of his Anceſtor. 1 Vern. 55. Attorney General on the Behalf of *Peterhouſe* Coll. in *Cambridge*, &c. againſt *The Margaret* and *Regius Profeſſor* there.

The Teſtator deviſed 600*l.* to Mr. *Baxter*, to be diſtributed by him amongſt Sixty poor ejected Miniſters, adding, that he would not have his Charity miſtaken, it being given, not as they were Nonconformiſts, but that the Teſtator knew many of them to be pious Men, and in great Want; and upon an Information exhibited upon this Will, alledging this Charity to be againſt Law, and therefore the Right to apply the Money was veſted in the King, who had declared his Pleaſure, that it ſhould go towards the Building *Chelſea* College, &c. Mr. *Baxter* in his Anſwer, amongſt other Things ſaid, that the Doctrine and Diſpoſition of the Diſſenters, meerly as ejected Miniſters, was not ſo bad as to make them incapable of Charity, and that not only Religion but Humanity obliges us to pity thoſe who ſpent their Lives in ſtudying to know God's Will, and who by a Miſtake in ſome Opinions were reduced to great Want; and that he could not aſſent to a Reſignation of the Suſtenance of poor Men, and hoped the Court would not miſconſtrue this Act of Charity. On the other Side it was argued, that this was a Deviſe to Sixty ejected Miniſters, *eo nomine*, as they are Diſſenters, and to ſuffer them to take by ſuch a Deviſe, would be to encourage a perpetual Schiſm in the Church. *Attorney General* ver. *Baxter*, 1 Vern. 248.

To which it was anſwered, that it could not keep up a Schiſm, becauſe there was nothing given which was durable, no Land, Rent or Annuity given, but only a Sum of Ten Pounds to a Man, to keep himſelf and Family for a little while; that it could not be pretended that was a Deviſe to any ſuperſtitious Uſe; and that if it had been of Ten Pounds a-piece to Sixty ejected Miniſters *by Name*, there could not be any Pretence to make this Charity void: Now, the Teſtator had given Mr. *Baxter* the Power of naming them, and he is not diſabled by Law to execute that Power; but the Court decreed, that the *Uſe* was void, but not the Charity, and that the Money ſhould be applied towards the Building *Chelſea* College; then it was urged, that Charities ought to be applied *in eodem genere*; and this being intended for poor ejected Miniſters, ought to be diſtributed amongſt the Clergy; and thereupon it was decreed for the Maintenance of a Chaplain for *Chelſea* College; but this being an unreaſonable Decree, it was reverſed by the Lords Commiſſioners in *Trinity-Term* 1689, and the 600*l.* which had been brought into Court, was ordered to be paid out and diſtributed, as directed by the Will.

The Defendant's Brother having by his Will charged a Manor to raiſe 1000*l. out of the Profits, to be applied to ſuch charitable Uſes as he had by Writing under his Hand formerly directed*, and no ſuch Writing *Attorney General* ver. *Sydenham*, 1 Vernon 224.

Writing being found, the Attorney General, at the Relation of the Governors of *Chriſt's Hoſpital*, exhibited a Bill againſt the Defendant (who was Heir at Law,) ſetting forth the Will, and that the Writing therein mentioned was not to be found, therefore the Application of the Charity was in the King, who declared his Pleaſure was, that this Money ſhould be laid out for the Benefit of the *Mathematical Boys in Chriſt's Hoſpital*; and it was decreed, that the Charity being now become general and indefinite, it was veſted in the King as to the Application thereof; and though by the Will it was directed to be *raiſed out of the Profits*; yet it being a Sum in groſs, it ſhall carry *Intereſt* to the Time it ſhould be raiſed out of the Profits: [p] So a Deviſe *for the Good of the poor People for ever*, this being indefinite, the King directed, that it ſhould be applied for the Benefit of *Chriſt's Hoſpital*; and ſo it was decreed, though the Teſtator had ſeveral poor Relations, who inſiſted, that they were within the Equity of the general Deviſe of this Charity.

[p] *Frier* v. *Peacock.*

The Teſtator deviſed ſeveral Legacies to particular Perſons, and amongſt the reſt, he gave 40*l.* to a Charity; there happened to be a Defect of Aſſets to pay all the Legacies, but yet the Spiritual Court was of Opinion, that the whole 40*l.* ought to be applied to the Charity, and not in Proportion with the reſt of the Legacies; and for that Reaſon the Plaintiff exhibited his Bill, and prayed an Injunction; but it was denied, becauſe Legatory Matters were properly determinable by the Civil Law; and the Spiritual Court had a proper Juriſdiction in ſuch Caſes; and if by their Law Preference was given to a charitable Legacy, a Court of Equity will not alter it.

Fielding verſus *Bond*, 1 Vern. 230.

Charity Legacies that are pecuniary ſhall on a Deficiency of Aſſets come into Average, as well as other pecuniary Legacies. 1 *Williams* 423, 675.

A Deviſe by a Tenant in Tail of a Rent, iſſuing out of the intailed Eſtate, to a Charity good, though no Fine was levied, or Recovery ſuffered, by the Teſtator. 1 *Williams* 248.

One by Will deviſed an Annuity of 50*l.* *per Annum*, and alſo 100*l.* in Money to *A.* and his Heirs, and if *A.* died without Heirs then to a Charity. *A.* died without Iſſue in the Life of the Teſtator, and then the Teſtator died; it was held, that the Deviſe over was void, and that the Word *Heirs* ſhould not be conſtrued to ſignify Heirs of the Body, where the Deviſee over was not inheritable. *Attorney General* v. *Gill*, 2 *Williams* 369.

§. XVII. Of Teſtaments unprivileged.

UNprivileged Teſtaments are thoſe which have not any Freedom or Benefit contrary to the common Courſe of Law, but are tied to ſuch Obſervations and Solemnities as the Law requires regularly for all Teſtaments, of which Forms we ſhall diſcourſe herein after.

WHAT

PERSONS

May make a

TESTAMENT.

The Second Part.

SECT. I.

1. *Every Perſon may make a Teſtament which is not forbidden.*
2. *Divers Perſons forbidden to make their Teſtaments.*
3. *Some forbidden for Want of Diſcretion.*
4. *Some forbidden for Want of Freedom.*
5. *Some forbidden for Want of their principal Senſes.*
6. *Some forbidden by Reaſon of ſome heinous Crime.*

IN the ſecond Part of this teſtamentary Treatiſe ſhall be declared what Perſons may make a Teſtament, and who may not ſo do.

Wherein the Rule is, That (1) every Perſon, Chriſtian and Jew, ſound or ſick, (and generally of what State or Condition ſoever he or ſhe be) hath full Power and Liberty to make a Teſtament or Laſt Will[a], and may therein diſpoſe of his Goods and Chattels[b]; ſaving ſuch Perſons as be prohibited by Law or by Cuſtom[c].

[a] Inſtit. Quibus non eſt permiſſum teſtam. fac. in prin. & gloſſ. ibid. Simo de Prætis de inter. ult. vol. l. 2. inter. 1. fol. 4. Vaſquius de ſucceſſ. progreſſ. lib. 1. §. j. Michael Graſſ. Theſaur. com. op. §. teſtam. q. 20. [b] Quibus enim permiſſum eſt teſtari, eiſdem & codicillari, & legata relinquere. Roland. tract. de codicil. n. 6. Michael Graſſ. Theſaur. com. op. §. codicil. n. 1. [c] Eſt enim edictum de teſtamentis prohibitorium certarum perſonarum. Gloſſ. in §. j. Inſt. Quibus non eſt permiſſum teſta. fac. Graſſ. Theſaur. com. opin. teſt. queſt. 20. n. 1.

Therefore, if we examine what Perſons are forbidden by Law or by Cuſtom, it will appear who they are that can make a Teſtament, or diſpoſe of their Goods and Chattels. And though (2) many Perſons are forbidden by Law or Cuſtom to make Teſtaments, yet they are reduced by ſome unto Four or Five Sorts[d]. Amongſt the firſt (3) are comprehended ſuch as *want Diſcretion* or Judgment; as Children[e], Mad-folks[f], and Ideots[g]: To whom alſo I may join thoſe Perſons who be ſo very old that they become childiſh again[h]; and him that is drunk[i].

[d] Bar. & Bald. in l. Si quæramus. ff. de teſt. Lindw. in c. cum viris. de teſt. l. 3. provincial. conſtit. Cant.

[e] Infra. ead. part. §. 3. [f] Infra ead. part. §. 4. [g] Infra ead. part. §. 5. [h] Infra ead. part. §. 6. [i] Infra ead. part. §. 6.

Amongſt the ſecond (4) Sort are comprehended ſuch as *lack Freedom and full Liberty*; as Bond-ſlaves and Villeins[k]: Unto whom may be added Captives and Priſoners[l], and Women Covert[m].

In the third Sort (5) are contained ſuch as *lack ſome of their principal Senſes*; namely ſuch as be dumb and deaf[n], and blind[o].

Among the forth Sort (6) are placed ſuch as for *ſome hainous Crime* are deprived of Ability of making Teſtaments; as Traitors[p], Felons[q], Heretics[r], Apoſtates[s], and many others[t].

And laſt of all, others (7) for other Cauſes hereafter ſpecified[u].

[k] Infra ead. part. §. 7.
[l] Infra ead. part. §. 8.
[m] Infra ead. part. §. 9.
[n] Infra ead. part. §. 10.
[o] Infra ead. part. §. 11.
[p] Infra ead. part. §. 12.
[q] Infra ead. part. §. 13.
[r] Infra ead. part. §. 14.
[s] Infra ead. part. §. 15.
[t] De quibus infra ead. part. §§. 16, 17, 18, 19, 20, 21, 22.
[u] Infra ead. part. §§. 23, 24. cum ſequentibus. Vide Jo. ab Imol. in c. qua ingredientibus. de teſta. extr. ubi hæc ſunt carmina; *Teſtari nequeunt impubes, religioſus, Filius in ſacris, mortis damnatus, & obſes, Crimine damnatus, cum muto ſurdus, & ille, Qui majeſtatem læſit, ſit cæcus & ipſe.*

§. II. Of Children.

1. *At what Age a Teſtament may be made of Lands.*
2. *At what Age a Teſtament may be made of Goods.*
3. *What if the* Minor *be* doli capax, *or a Soldier, or the Teſtament be* ad pias cauſas?
4. *What if the Teſtament be made with the Authority of the Tutor.*
5. *What if the Teſtator do live until he come to lawful Age?*
6. *A Boy after Fourteen Years, a Woman after Twelve, may make a Teſtament of their Goods.* *See* Dom. fol. 9.
7. *What if the laſt Day of the Year be not finiſhed?*
8. *What if the Teſtament, made during Minority, be approved by the Teſtator after he be of full Years?*

IF we will underſtand when a Child may make his Teſtament, we muſt diſtinguiſh whether it be of *Lands* or of *Goods*.

If of Lands, (1) it is provided by the Statutes of this Realm, that Wills or Teſtaments made of any Manors, Lands, Tenements, or other Hereditaments, by any Perſon within the Age of Twenty-one Years, ſhall not be taken to be good or effectual in Law[x]; for until that Time, by the Common Laws of this Realm, they be accounted Infants[y].

If (2) of Goods, we muſt diſtinguiſh, whether the Child be Man or Woman. A Boy cannot make his Teſtament before he have accompliſhed the Age of Fourteen Years, nor a Girl before the Age of Twelve Years[z]. Inſomuch that (3) if before the foreſaid Years they were of that Ripeneſs of Wit, that they were *doli capaces*, capable of Deceit, or able to diſcern betwixt Good and Evil, and betwixt Truth and Falſhood; yet could they not make any Teſtament, nor diſpoſe of their Goods[a]. Or if the Boy were of that Strength, that he were a Soldier, notwithſtanding thoſe great Privileges which do belong to Soldiers in making their Teſtaments, yet could not he make his Teſtament, before he had accompliſhed his Age of Fourteen Years[b]. Neither can a Boy before he have accompliſhed Fourteen Years of Age, nor a Girl before ſhe is Twelve, make a Teſtament *ad pias cauſas*[c]. Neither (4) is the Teſtament good, made by the Boy or Girl before the ſaid Ages, although the ſame ſhould be made by the Authority or Conſent of the Tutor[d]. Neither (5) doth the Teſtament become good being made in their Minorities reſpectively aforeſaid,

[x] Stat. H. 8. an. 34. c. 5.
[y] Doct. & Stud. l. 1. c. 21. lib. 12. c. 28.
[z] L. qua ætate. ff. de teſta. §. præterea. Inſtit. quibus non eſt permiſſum teſta. fac. L. ſi frater. C. qui teſta. fac. poſ.
[a] DD. in d. L. qua ætate. quorum opinio communis eſt, ut aiunt Graſſ. Theſaur. comm. op. §. teſtam. q. 20. & Vivius eod. lib. verb. pupillus, n. 7.
[b] L. ult. C. de teſtam. mil. Graſſ. & Vivius ubi ſupra, referentes hanc op. eſſe com.
[c] Jaſ. in L. ſi frater. qui teſta. fac. poſſ. c. atque hæc opinio communi calculo comprobatur. Jul. Clar. §. teſtm. q. 5. & Graſſ. §. teſtm. q. 17.
[d] Jaſ. in d. L. ſi frater. C. qui teſta. fac. poſſ.

ſaid, albeit they ſhould afterwards attain to their ſeveral Ages, wherein they might make their Teſtaments[c].

[c] §. præterea. Inſtit. quibus non eſt permiſſ. teſta. fac. L. ſi filius-familias. ff. qui teſta. fac. poſſ.

Howbeit (6) a Boy after the Age of Fourteen Years, and a Girl after the Age of Twelve Years, may make a Teſtament and diſpoſe of their Goods and Chattels[f]; and that not only without the Authority or Conſent of their Curator or Guardian[g], but alſo without the Authority and Conſent of the Father, if he or ſhe have any Goods of his or her Own[h]. Or if (7) he or ſhe hath attained to the laſt Day of Fourteen or Twelve Years, the Teſtament by him or her, in the very laſt Day of their ſeveral Ages aforeſaid, is as good and lawful, as if the ſame Day were already then expired[i]. Likewiſe (8) if after they have accompliſhed theſe Years of Fourteen or Twelve, he or ſhe do expreſly approve the Teſtament made in their Minority, the ſame by this new Will and Declaration is made ſtrong and effectual[k].

[f] d. L. qua ætate. ff. de teſta. Perkins tit. deviſe, fol. 97. quamvis impreſſio ſit vitioſa: viz. litera (x) omiſſa; nam quod ſic ſcribitur, iiij. ans. ſcribi debuit, xiiij. ans.

[g] Jaſ. in L. ſi frater qui teſta. fac. poſſ. C.

[h] Verum quidem eſt, quod jure civili filius-familias teſtari nequeat ob illam patriam, cui ſubjicitur, poteſtatem. At vero in Anglia ceſſat perampla hæc poteſtas & prærogativa. trac. de repub. Angl. lib. 3. c. 7. & ſic ceſſante cauſa, ceſſat effectus.

[i] d. L. qua ætate. & ibi Bar.

[k] Paul. de caſt. & alia in L. ſi frater. qui teſta. fac. poſſ. C.

But by the Law of this Nation an Infant before the Age of Eighteen Years cannot make his Teſtament, and conſtitute Executors for his Goods and Chattels. *Inſt. part* 1. *fol.* 89. *b.* Adminiſtration granted *durante minore ætate* ſhall ceaſe at the Age of Seventeen Years, *H.* 43 *Eliz. C. B. Piggot's* Caſe, *Lib.* 5. *fol.* 29. Therefore before that Age he cannot make his Will.

In the Chancellor of *Litchfield's* Caſe, a Prohibition was prayed to the Conſiſtory Court, becauſe a Will of Goods was exhibited to that Court there, being made by the Teſtator, who was no more than *Sixteen Years old*, and Sentence given for that Will; but the Prohibition was denied, becauſe the Spiritual Court hath a proper Juriſdiction to determine at what Age a Will may be made of Goods; and if the Court gives Sentence againſt the Law, the Party grieved may have Remedy by Appeal, and not by a Prohibition. Tho. Jones 210. *Brown's* Caſe.

But in our Law 'tis ſettled, that an Infant of the Age of Eighteen Years may make a Will, and thereby deviſe his Goods, and appoint Executors, but cannot diſpoſe his Lands before Twenty-one Years. 1 *Inſt.* 89. *b.* Sid. 102.

And in Chancery it hath been decreed, that an Infant at the Age of Seventeen Years might make a Will and conſtitute an Executor, and that he might likewiſe adminiſter at that Age, but could not commit Waſte till of full Age. Vern. 255, 328.

In this Caſe no Diſpute was made, but that a Male Infant of the Age of fourteen Years, and a Female Infant of twelve Years of Age, might make a Will of a perſonal Eſtate: And Mr. *Gilbert* ſaid, it was ſo agreed by Lord Keeper *Wright* in the Caſe of *Sharp* and *Sharp*, wherein they followed the Rule of the Civil Law of *Juſtinian*, for their Conſent to Marriages at ſuch Ages. *Hyde* verſus *Hyde*, *Hil.* 8 *Annæ*, *Gilbert's Rep. fol.* 74.

§. III. Of Mad Folks and Lunatic Perſons.

1. *Mad and lunatic Perſons cannot make a Teſtament, and what is the Reaſon.*
2. *Whether the Teſtament made in the Time of* Furor *be good when the Teſtator is come to himſelf.*
3. *A Teſtament may be made by a lunatic Perſon betwixt the Fits.*
4. *Every one is preſumed to be of perfect Mind and Memory, until the contrary be proved.*
5. *He that objecteth Inſanity of Mind, muſt prove the ſame.*
6. *Whether it be ſufficient to prove that the Teſtator was mad before the Making of the Will.*
7. *Whether he that is once mad be preſumed ſo to continue.*
8. *Inſanity of Mind hard to be proved.*
9. *Witneſſes muſt yield a Reaſon, if they will prove a Man to be mad.*
10. *Arguments of Madneſs.*
11. *Whether a general Reaſon ſuffice to prove Inſanity of Mind.*
12. *Whether Madneſs may be proved by ſingular Witneſſes.*
13. *Thoſe Witneſſes are to be preferred, which depoſe that the Teſtator was of ſound Mind.*
14. *What if the Teſtament be made by a lunatic Perſon, and the Time of the Making unknown? Whether is the Teſtament good, or no?*
15. *What if it cannot be proved that the Teſtator had quiet Intermiſſions?*
16. *What if there be a Mixture of wiſe Things and fooliſh in the Teſtament?*

MAD Folks (1) and lunatic Perſons, during the Time of their *Furor* or Inſanity of Mind, cannot make a Teſtament, nor diſpoſe any Thing by Will [l], no not *ad pias cauſas* [m]. The Reaſon is, becauſe they know not what they do [n]. For in making of Teſtaments, the Integrity or Perfectneſs of Mind, and not Health of the Body, is requiſite [o]. And thereupon aroſe that common Clauſe, uſed in every Teſtament, *ſick in Body, but of perfect Mind and Memory* [p]. Therefore *P.* 3 *Jac.* in *Combe*'s Caſe, *in Camera ſtellata*, it was agreed by the Judges, that *ſane Memory* for the Making of a Will is not at all Times when the Party can ſpeak yea or no, or had Life in him, nor when he can anſwer to any Thing with Senſe; but he ought to have Judgment to diſcern and to be of perfect Memory, otherwiſe the Will is void [q]. And ſo (2) ſtrong is this Impediment of Inſanity of Mind, that if the Teſtator make his Teſtament after this *Furor* hath overtaken him, and whiles as yet it doth poſſeſs his Mind, albeit the *Furor* afterwards departing or ceaſing, the Teſtator recover his former Underſtanding, yet doth not the Teſtament made during his former Fit recover any Force or Strength thereby [r]. Howbeit (3) if theſe mad or lunatic Perſons have clear or calm Intermiſſions, then during the Time of ſuch their Quietneſs and Freedom of Mind, they may make their Teſtaments, appointing Executors, and diſpoſing of their Goods at their Pleaſures [s]. So that neither the *Furor* going before, nor following the Making of the Teſtament, doth hinder the

[l] §. Præterea. Inſtit. quibus non eſt permiſſum. L. furioſum. C. qui teſta fac. poſſ. L. nec codicillos. C. de codicillis.

[m] Bar. in L. j. C. de ſacroſanc. Eccleſ. n. 16. Dec. in d. L. furioſum. & hæc opinio communiter eſt recepta. Jul. Clar. §. teſtm. q. 5. Graſſ. d. §. teſt. q. 17.

[n] Graſſ. d. §. teſtm. q. 2. in prin.

[o] L. ſenium. C. qui teſta. fac. poſſ.

[p] Minſing. in de §. præterea. Inſtit. quibus non eſt permiſſ. quæ tamen clauſula non eſt adeo neceſſaria, ut ſemper obſervetur.

[q] P. 3 Jac. Camera Stellat. *Combes*'s Caſe, Moore's Rep. fol. 759. n. 1051.

[r] d. L. furioſum. C. qui teſta. fac. poſſ.

[s] §. præterea. Inſtit. quibus non eſt permiſſum, &c. [r] d. L. furioſum. & d. §. præterea. & DD. ibid.

ſame begun and finiſhed in the mean Time [t]. Much more is that Teſtament good and available in Law, not only for Goods and Chattels, but alſo for Lands, Tenements and Hereditaments, which was made by one of ſound Memory, never affected with any Lunacy or any Inſanity of Mind, until the ſame were fully accompliſhed and finiſhed: For then, albeit afterwards the Teſtator be overtaken and oppreſſed with Inſanity of Mind, (which is a Thing not rare a little before Men's Deaths,) yet that ſubſequent Diſability doth not diſannul the precedent Teſtament, or Laſt Will [u]; the rather, becauſe this Infirmity doth proceed from the Will and by the Viſitation of God, not by any voluntary Act of the Party [x].

[t] d. Locis.

[u] Vide Dom. Coke, lib. 4. in caſu inter *Forſe & Hemblings*.

[x] Dom. Coke ubi ſupra, lib. ult. ff. de injuſt. rupt. & irrit. teſt. Boer. niſ. dudum. el. j. de elect. extr.

And here Note, that (4) every Perſon is preſumed to be of perfect Mind and Memory, unleſs the contrary be proved [y]. And therefore (5) if any Perſon go about to overthrow the Teſtament by Reaſon of Inſanity of Mind, or Want of Memory, he muſt prove that Impediment [z]. Now Inſanity of Mind, or a not diſpoſing Memory, is not ſuch a Memory as to make proper Anſwers to common and familiar Queſtions, but to be able to diſpoſe the Eſtate with Intelligence and Reaſon; and this was [a] the Marqueſs of *Wincheſter*'s Eſtate, who being ſick and very old, was not of perfect Memory; and if the Queſtion ſhould ariſe, whether the Teſtator was of a diſpoſing Memory, or not, this ſhall be tried at Common Law. If it be asked, wherefore then is that uſual Clauſe (*of perfect Mind and Memory*) ſo duly obſerved in every Teſtament, if he that doth prefer the Will be not charged with the Proof thereof? It may be anſwered, That that which is notorious is to be alleged, not proved [b]. And ſo this being accounted notorious, (becauſe where the contrary appeareth not, the Law preſumeth it,) it need not be proved [c]. And therefore I ſuppoſe that Clauſe to be more uſual than neceſſary, and yet not hurtful [d].

[y] Bar. in L. nec codicillos. C. de codicil. Alciat. in Tract. de præſumpt. regula j. præſump. 7 8.

[z] Bar. in d. L. nec codicillos. Minſing. in d. §. præterea. Mantic. de conject. ult. vol. lib. 2. tit. 5.

[a] 6 Rep. 23. a.

[b] L. ſi adulterium. §. idem. ff. de adul.

[c] Vaſ. de ſucceſſ. progreſſ. li. 1. §. j. ubi contra Socin. & Boer ſentientes, quod allegans mentis inſanitatem tenetur eadem probare, non dubitat hanc opinionem indignam tantis viris affirmare. Ego vero ſententiæ Vaſquii ſubſcribo, niſi conſtet teſtatorem ante fuiſſe furioſum. Vide Maſcar. de probac. concl. 824. n. 10, 11, 12, 13.

[d] Immo prodeſt hujuſmodi clauſula, quoad probationis adminiculum, a Notario ſcripta. Mantic. de conject. ult. vol. lib. 2. tit. 5. in fin.

Seeing then he, whoſe Intent is grounded upon the Madneſs and Lunacy, muſt prove the ſame, it ſhall not be amiſs to ſet down ſome Obſervations concerning the Manner of Proof thereof.

Firſt therefore, it may be delivered for a Rule, That (6) it is ſufficient for the Party which pleadeth the Inſanity of the Teſtator's Mind, to prove that the Teſtator was beſide himſelf before the Making of the Teſtament, although he do not prove the Teſtator's Madneſs at the very Time of the Making of the Teſtament [e]. The Reaſon is; It (7) being proved that the Teſtator was once mad, the Law preſumeth him to continue ſtill in that Caſe, unleſs the contrary be proved [f]. For like as the Law preſumeth every Man to be an honeſt Man, unleſs the contrary be proved [g]; and being proved, then he which is evil, to be evil ſtill [h]: So concerning *Furor*; the Law preſumeth every Man to have the Uſe of Reaſon and Underſtanding, unleſs the contrary be proved; which being proved accordingly, then he is preſumed in Law to continue ſtill void of the Uſe of Reaſon and

[e] Gloſſ. in c. fin. de ſucceſſ. ab inteſtat. extr. Lanfranc. in c. quoniam contra. de probac. extr. verb. teſtium depoſ. & eſt communis opinio per præpoſ. in c. dilectus. deſponſ. extr.

[f] Mantic. de conject. ult. vol. lib. 2. tit. 5. Dec. in L. furioſum. C. Qui teſta. fac. poſ.

[g] Alciat. de præſump. reg. 2. præſump. 8.

[h] C. ſemel malus. de reg. jur. 6.

and Underſtanding [i]. Unleſs the Teſtator were beſides himſelf but for a ſhort Time, and in ſome peculiar Actions, and not continually for a long Space, as for a Month or more [k]; or unleſs the Teſtator fell into ſome Frenzy upon ſome accidental Cauſe, which Cauſe is afterwards taken away [l]; or unleſs it be a long Time ſince the Teſtator was aſſaulted with the Malady [m]. For in theſe Caſes the Teſtator is not preſumed to continue in his former *Furor* or Frenzy [n].

[i] Panor. Jo. And. & Butr. in c. cum dilectus. de ſucceſſ. ab inteſtat. ext. quorum op. com. eſſe multis teſtimoniis probat Maſcard. de probac. verb. furioſum. concl. 825. n. 5.

[k] Bar. in L. 2. de bon. poſſ. inſan. & furioſ. delat. Mantic. de conject. ult. vol. lib. 2. tit. 5. n. 7. verb. ſed tamen.

[l] Are. in L. 2. ff. de teſta. Covar. in tract. de ſponſ. & matrim. 2 part. c. 2. n. 6. Mantic. ubi ſupra verb. tertio.

[m] Bald. & alii in L. furioſum. C. qui teſta. fac. poſ. Covar. in d. c. 2. n. 6.

[n] Paul. de caſt. in d. L. Furioſum. & Maſcard. de probac. verb. furioſus, concl. 825.

Another Obſervation is this, (8) That it is a hard and difficult Point, to prove a Man not to have the Uſe or Underſtanding of Reaſon. And therefore (9) it is not ſufficient for the Witneſſes to depoſe that the Teſtator was mad, or beſides his Wits; unleſs they render or yield a ſufficient Reaſon [o], to prove this their Depoſition: As that they did ſee him to do ſuch Things, or heard him ſpeak ſuch Words, as a Man having Reaſon would not have done or ſpoken [p]; namely, (10) they did ſee him throw Stones againſt the Windows [q], or did ſee him uſually to ſpit in Mens Faces [r], or being asked a Queſtion, they did ſee him hiſs like a Gooſe, or bark like a Dog [s], or play ſuch other Parts as mad Folks uſe to do. This, or the like Reaſon (whereby the Judge may be induced to eſteem the Teſtator not to be ſound of Mind) ought the Witneſſes to yield, although they be not interrogated of the Cauſe of their Knowledge [t]. And ſome (11) there be which hold this for a ſufficient Reaſon, if the Witneſs do ſay, I know he was mad, for I did ſee him mad, although he do not expreſs any particular Act whereby ſuch Madneſs may be collected [u]. Furthermore, (12) this *Furor* or Madneſs may be proved by ſingular Witneſs [x]; ſo that the Witneſſes be not ſingular in Time. For if one Witneſs depoſe of the Madneſs of the Teſtator at one Time, and another Witneſs of his Madneſs at another Time, this doth not ſufficiently prove that the Teſtator was mad [y]: But when the Witneſſes agreeing in Time, one depoſeth of one mad Prank, another Witneſs of another mad Act at the ſame Time, theſe prove that the Teſtator was then mad, though they do not both depoſe of one and the ſame mad Act [z]. If ſome Witneſſes do (13) depoſe that the Teſtator was of perfect Mind and Memory, and others depoſe the contrary; their Teſtimony is to be preferred which depoſe that he was of ſound Memory [a], as well for that their Teſtimony tendeth to the Favour and Validity of the Teſtament [b], as for that the ſame is more agreeable to the Diſpoſition of Nature [c]; for every Man is a Creature reaſonable.

[o] Bald. in d. L. furioſum. Maſcard. tract. de probac. verb. furioſus. concl. 824, 827.

[p] Paul. de caſtr. in d. L. furioſum. Boer. Deciſ. 23. Mantic. de conject. ult. vol. lib. 1. tit. 5. & Maſcard. d. concl. 827. Minſing. in §. præterea. Inſtit. quibus non eſt permiſſum, &c.

[q] Bald. in L. Divus. ff. de offic. præfid. gloſſ. & DD. in L. ſi cum dotem. §. fin autem ſol. matr. Adhibe micam ſalis, ut per Mantic. d. tit. 5. n. 22. & per Dec. conſil. 448.

[r] Corn. conſil. 22. vol. 4. Mantic. d. tit. 5. n. 12. Maſcard. de probac. concl. 826. n. 29.

[s] Maſcard. de concl. 828. n. 28. Mantic. ubi ſupra, & Corn. conſ. 319.

[t] Paul. de caſtr. L. furioſum. C. qui teſta. fac. poſſ. Mantic. ubi ſupra. Boer. deciſ. 23. n. 4. Maſcard. de probac. concl. 827. n. 4.

[u] Are. in L. ult. §. ult. ff. de verb. ob. Boer. deciſ. 23. n. 44, 45. Mantic. d. tit. 5. lib. 2. n. 16.

[x] Gabr. lib. 1. com. concluſ. tit. de teſtibus, concl. n. 43. poſt. Alex. Pariſ. Pariſ. Dec. & alios ibi nominatos.

[y] Quod procedit, ſive agatur de probatione furoris in ſpecie, ſive in genere, ubi tempus eſt de ſubſtantia actus. Ruin. conſil. 67. vol. 1. Maſcard. de probac. concl. 827. n. 9.

[z] Maſcard. poſt Ruin. ubi ſupra.

[a] Gabriel lib. 1. com. concl. tit. de teſtibus, concl. 4. n. 19. ubi ad hunc finem citat Jaſ. Corne. Socin. Dec. Gravet. Boer. & alios: quibus adde Maſcard. d. concl. 827. n. 11.

[b] Simo de Prætis de Inter. ult. vol. lib. 2. ſolu. 1. n. 19.

[c] Idem ibid. n. 18.

The laſt Obſervation is this, (14) If a lunatick Perſon, or one that is beſides himſelf at ſome Times, but not continually, make his Teſtament, and it is not known whether the ſame were made while he

was of ſound Mind and Memory, or no; then, in caſe the Teſtament be ſo conceived, as thereby no Argument of Frenzy or Folly can be gathered, it is to be preſumed that the ſame was made during the Time of his calm and clear Intermiſſions: And ſo the Teſtament ſhall be adjudged good [d]. Yea (15) although it cannot be proved, that the Teſtator uſeth to have any clear and quiet Intermiſſions at all, yet nevertheleſs I ſuppoſe, that if the Teſtament be wiſely and orderly framed, the ſame ought to be accepted for a lawful Teſtament [e]. But (16) if in the Teſtament there be Mixture of Wiſdom and Folly, it is to be preſumed that the ſame was made during the Teſtator's Frenzy [f], inſomuch that if there be but one Word ſounding to Folly, it is preſumed that the Teſtator was not of ſound Mind and Memory when he made the ſame. And therefore in this Caſe is the Teſtament void [g], unleſs that it may be proved, that there was Intermiſſion of *Furor* the ſame Time.

[d] Michael Graſ. Theſaur. com. op. §. teſtam. q. 21. ubi atteſtatur hanc opin. eſſe com. Vaſq. de ſucceſſ. progreſſ. l. 1. §. j. n. 90. Vivius l. com. op. verb. teſtam.

[e] Hanc opinionem communiter receptam eſſe contra Abb. & alios, refert idem Graſſ. d. q. 21. n. 4. Item Boer. q. 23. n. 88. veriorem etiam & magis com. affirmat Joſeph. Ludo deciſ. 1. n. 13. Quinimo ne ab hac opinione recedas, monet Graſſ. ubi ſupra. Hippol. Marſil. ſing. 380. in fin.

[f] Bald. & Angel. in L. furioſum. C. qui teſta. fac. poſſ. Angel. in ead. L. furioſum.

[g] Idem An-

§. IV. Of Idiots.

1. *What Perſon is deemed an Idiot.*
2. *An Idiot cannot make a Teſtament.*
3. *He that is of a mean Capacity, or indifferent betwixt a wiſe Man and a Fool, may make a Teſtament.*
4. *Although a Man be not an Idiot, yet if he be ſo very ſimple, that there is but ſmall odds betwixt him and a natural Fool, ſuch a Perſon cannot make a Teſtament.*
5. *What if an Idiot ſhould make his Teſtament wiſely and reaſonably to the Shew? Whether were that Teſtament good, or not?*
6. *A pleaſant Jeſt of a very Fool, which gave a very wiſe Sentence.*
7. *Another Jeſt of a fooliſh Magiſtrate.*
8. *A natural Fool doth not underſtand what he ſaith, although he ſeem to ſpeak wiſely.*
9. *A Fool's Teſtament wiſely conceived is ſometimes good in Law.*

AN Idiot [h] or a natural Fool is (1) he, who, notwithſtanding he be of lawful Age, yet he is ſo witleſs, that he cannot number Twenty, nor can tell what Age he is of [i], nor knoweth who is his Father or Mother, nor is able to anſwer any ſuch eaſy Queſtion [k]. Whereby it may plainly appear, that he hath not Reaſon to diſcern what is to his Profit or Damage, though it be notorious; nor is apt to be informed or inſtructed by any other [l]. Such (2) an Idiot cannot make any Teſtament, nor may diſpoſe either of his Lands [m] or Goods [n]. And this appeareth by 3 *Eliz. Dy. fol.* 203, 204. where the Caſe was, that Executors recovered in an Action of Account, and the Defendant was taken in Execution for the Arrearages, and afterwards the Will was made void, becauſe the Teſtator was an Idiot; and

[h] Idiota apud Ciceronem & alios indoctum ſeu illiteratum plerunque ſignificat.

[i] Fitz. Nat. Bre. de idiota inquirendo.

[k] Quid? eſtne ſtatim fatuus, quiſquis non poteſt demonſtrare patrem? Abſit. Nam, ut concedam filium illum merito ſagacem dici, ſuum qui novit patrem: Certe ſi concluderem, reliquos omnes eſſes fatuos, vereor ne excluderem non paucos. Notum eſt, quod cecinit de Telemacho inſignis Homerus, *Ex illo natum mater me dicit: at ipſe Neſcio: nam certum quis poſſit ſcire parentem?* Quod igitur ſcriptum reliquit Fitzherb. Que tiel perſon ſerra dit ſot & idiote, que ne ſcier dire que fuit ſon pere ou mere, &c. ita exaudiendum eſt, ſi neſciat reſpondere quis appellatur ipſius pater.

[l] Fitzh. ubi ſupra.

[m] Stat. H. 8. an. 34. c. 5.

[n] Sichard. in Rub. qui teſta. fac. poſſ. C. n. 6. Simo de Præt. de interp. ult. vol. li. 2. dub. 1. fol. 4.

and thereupon the Party ſued an *Audita querela*, upon which the Executors demurred. *Vide C. lib. 9. fol.* 143. in Dr. *Drury*'s Caſe, where it is reſolved, that in ſuch Caſe an *Audita querela* doth lie. But a Lunatick having *lucida intervalla* may, in the Time of his right Mind, make a Will and Executors. 44 *E.* 3. *fol.* 33. The Difference between an Idiot and a Lunatick *vide lib.* 4. *Beverley*'s Caſe. And (3) if a Man be of mean Underſtanding, neither wiſe nor fooliſh, but indifferent, as it were, betwixt a wiſe Man and a Fool, yea, though he rather incline to the fooliſh Sort, ſo that for his dull Capacity he might be termed *Groſſum caput*, a Dunce; ſuch an one is not prohibited to make a Teſtament [o]: Unleſs he (4) be yet more fooliſh, and ſo very ſimple and ſottiſh, that he may eaſily be made to believe Things incredible or impoſſible; as that an Aſs can fly, or that Trees did walk, Beaſts and Birds could ſpeak, as it is in *Æſop*'s Fables. For he that is ſo fooliſh cannot make a Teſtament [p], becauſe he hath not ſo much Wit as a Child of Ten or Eleven Years old, who is therefore inteſtable, (as the Text witneſſeth,) namely, for Want of Judgment [q]. I do read, that if one have ſo much Underſtanding as he can meaſure a Yard of Cloth, or rightly name the Days in the Week, or beget a Child, Son, or Daughter, he ſhall not be accounted an Idiot or natural Fool by the Laws of the Realm [r]. Which Concluſion, if it be true, to avoid ſome Effects prejudicial to the Party [s]; yet nevertheleſs unleſs he have ſome more Underſtanding, namely to conceive what is the Nature of a Teſtament or Laſt Will, being well informed thereof, and the Matter plainly delivered, I do not hold him, being deſtitute of ſuch Underſtanding, fit to make a Will [t], although he could meaſure a Yard of Cloth, or rightly name the Days in the Week, or beget a Child. For the Making of a Will is an Act requiring a greater Meaſure of Underſtanding, than to be able to perform any of theſe Actions, and eſpecially the laſt of the Three [u], being an Act proceeding rather from Inſtinct of Nature, than from Capacity of Reaſon, and which brute Beaſts, not capable of Reaſon, can perform effectually [x].

[o] Simo de Prætis ubi ſupra. Minſing. in §. præterea. Inſtit. quibus non eſt permiſſ. &c.

[p] Simo de Prætis de interp. ult. vol. lib. 2. dub. 1. fol. 4. n. 21.

[q] Text. in d. §. præterea. Inſtit. quibus non eſt permiſſ. teſta. fac.

[r] *Terms of Law*, verb. *Idiot.* Stamford de prærogativ. Regis c. 9.

[s] Viz. Ne ſit ſub cuſtodia regis, &c.

[t] Supra ead. part. §. 3. in princ. & in prima part. §. 3. n. 4. D. Coke lib. 6. in caſu *Paulet* le Marques de *Winchester*.

[u] L. 2. & L. q. 1. teſtament. de teſta. ff. L. 2. qui teſtamentum fac. poſſ. Cod. DD. ibid.

[x] Commune autem animantium omnium eſt conjunctionis appetitus, &c. Cic. lib. 1. Offic.

But (5) what if an Idiot or natural Fool ſhould make his Teſtament ſo well and wiſely, (in Appearance) that the ſame may ſeem rather to be made by a reaſonable Man, than by one void of Diſcretion? Whether is this Teſtament good in Law, or no? Some have been of Opinion, that ſuch a Teſtament is good and available in Law [y]; becauſe God doth ſometimes ſo illuminate the Minds of the fooliſh, that for that preſent, they are not much inferior to the Wiſe [z]. And (6) to this Purpoſe divers credible Writers do remember a merry Accident, which (if they ſay truly) was no Fable, but an undoubted Fact [a]: And this is it.

[y] Ita fuiſſe deciſum in Senatu Romano commemorant Jo. And. & And. Barb. cum aliis in c. ad noſtram de conſuetud. extr.

[z] Gloſſ. in d. c. ad noſtram.

[a] Jo. And. Panor. Barba. & alii in d. c. ad noſtram. Hiero. Franc. in L. furioſi. de reg. jur. ff. Boer. deciſ. 23. n. 58. Mantic. de conject. ult. vol. l. 2. tit. 5. n. 8. Corſet. Sing. verb. Teſtamentum.

" At *Paris* one Morning a hungry poor Man, begging his Alms " from Door to Door, did at the laſt eſpy very good Chear at a " Cook's Houſe, whereat his Mouth began to water; and the Spur " of his Stomach pricking him forwards, he made as much Haſte to- " wards the Place as his feeble Feet would give him Leave: Where " he was no ſooner come, but the pleaſant Smell of the Meat and

" Sauce did catch ſuch hold of the poor Man's Noſe, that (as if he " had been holden with a Pair of Pinſers) he had no Power to paſs " from thence, until he had (to ſtay the Fury of his raging Appetite) " eaten a Piece of Bread which he had of Charity gotten in another " Place. In the Eating whereof his Senſe was ſo delighted with " the freſh Smell of the Cook's Meat, that tho' he did not lay his " Lips to any Morſel thereof, yet in the End his Stomach was ſo " well ſatisfied with the Smell thereof, that he plainly acknowledged " to have gotten as good a Breakfaſt, as if he had there eaten his " Belly full of the beſt Chear. Which when the Cook had heard, " (being an egregious Wrangler) he in haſte ſteps forth to the poor " Fellow, lays hold on him, and in a cholerick Mood bids him pay " for his Breakfaſt? The honeſt poor Man, amazed at this ſtrange " Demand, could not tell what to ſay: But the Cook was ſo much " the more earneſt, by how much he perceived the good Man to " be abaſhed at his Boldneſs; and did ſo cunningly cloak the Matter, " that in the End the poor Man was contented to refer the Deciding " of the Controverſy to whatſoever Perſon ſhould next paſs by that " Way, and abide his Judgment. Which Thing was no ſooner " concluded, but by and by cometh to the Place a very natural " Fool, and ſuch a notorious Ideot as in all *Paris* his like was not " to be found. All the better for me, thought the Cook; for more he " doubted the Sentence of a wiſe Man than of a Fool. Well, Sir, " to this foreſaid Judge they rehearſed the whole Fact; the Cook " complaining, and the other patiently confeſſing as before. A great " Multitude of People were gathered about them, no leſs deſirous " to know what would follow, than wondring at that which had gone " before. To conclude, this Natural perceiving what Money the " Cook exacted, cauſed the poor Man to put ſo much Money betwixt " Two Baſons, and to ſhake it up and down in the Cook's Hearing: " Which done, he did award, that as the poor Man was ſatisfied " with the Smell of the Cook's Meat, ſo the Cook ſhould be re- " compenſed with the Noiſe of the poor Man's Money. Which Judg- " ment was ſo commended, that whoſo heard the fame, thought, if " *Cato* or *Solomon* had been there to decide the Controverſy, they " could not have given a more indifferent or juſt Sentence.

The like (7) Caſe is reported to have happened at *Bononia*[b]. " There a certain covetous Man loſt his Purſe, with Twenty-one " Ducats in it; which when he could not recover with diligent " Search, he was like a Mad-man, and ready to have hanged himſelf " for Sorrow. Another honeſt Man having found ſuch a Purſe, " moved with Compaſſion, came and delivered the ſame to this co- " vetous Perſon; who never thanking the Bringer, fell forthwith to " telling of the Money, and finding but Twenty Ducats therein, with " great Greedineſs he exacted the odd Ducat: Which, becauſe the " Finder denied, he is brought before the Magiſtrate, a Man of very " great Wealth, but of very little Wit. (But ſuch Magiſtrates are " many Times elected, where the Matter lieth in the Mouths of the " Multitude.) The one Party ſweareth, that there were Twenty- " one Ducats in the Purſe which he loſt. The other Party ſweareth, " that there were but Twenty Ducats in the Purſe which he found. " The Magiſtrate, although a Fool, giveth no fooliſh Sentence: For " he pronounced, that the Purſe which was found, was not that

[b] And. Barba. in d. c. ad noſtram. de conſuetud. extr. n. 8.

" Purſe which was loſt; and therefore condemned the covetous Per-
" ſon to reſtore the Twenty Ducats to the other Party.

By theſe Reaſons and Examples therefore it may be reaſonably inferred, that if a Fool do make a wiſe and reaſonable Teſtament, the ſame ought to be allowed as lawful.

Nevertheleſs this is the truer Opinion, that ſuch a Teſtament is not good in Law[c]. The Reaſon is, becauſe a Teſtament is an Act to be performed with Diſcretion and Judgment[d]. But (8) a natural Fool, by the general Preſumption of Law, doth not underſtand what he ſpeaketh, though he ſeem to ſpeak reaſonably[e]; no more than did *Balaam*'s Aſs[f], when he reaſoned with his Maſter; or doth a Parrat, ſpeaking to the Paſſengers[g]. And although God do ſometimes ſo illuminate the Minds of very natural Fools and Idiots, that they do well perceive and underſtand what they ſpeak yet becauſe this Thing happeneth but very ſeldom, the Law doth not preſume the ſame by Occaſion of Words only[h]. And therefore, unleſs farther Proof be made thereof by other Circumſtances, the Law doth not approve ſuch Teſtaments.

[c] Jaſ. & Dec. in L. furioſi. C. qui teſta. fac. poſſ.
[d] Supra prim. part. §. 3. verb. Senten.
[e] Dec. in d. L. furioſum. C. qui teſta. fac. poſſ. lim. 3.
[f] Num. c. 22. verſ. 28. 2 Pet. c. 2. verſic. 16.
[g] Roman. ſing. 52. Cagnol. in L. Librarius. ff. de reg. jur. n. 2.
[h] Dec. in d. L. furioſi, & in L. in negotiis, de reg. jur. ff. Mantic. de conject. ult. vol. l. 2. c. 5. n. 11.

Indeed, (9) if it may appear by ſufficient Conjectures, that they had the Uſe of Reaſon or Underſtanding at ſuch Time as they did make their Teſtaments, then doth the former Opinion take Place, that ſuch Teſtaments are good in Law[i].

[i] Dec. in de L. In negotiis, & in Hiero. Franc. in. d. L. furioſi, de reg. jur. ff. Mantic. de conject. ult. vol. lib. 2. c. 15. Hyppol. d. Marſil. Sing. 380. in fin.

A Teſtator at the Making of his Will ought to be of a Memory, not only to anſwer to ordinary and familiar Queſtions, but alſo to have a diſpoſing Memory, ſo as to be able to make a Diſpoſition of his Lands with Reaſon and Underſtanding; and that is ſuch a Memory which the Law calls *Sana memoria. T. 31 Eliz. B. R. Co. lib. 6. fol. 23.* the Marqueſs of *Wincheſter*'s Caſe.

§. V. Of old Men. *Dom.* 10. *par.* 5.

1. *Age alone doth never deprive a Man of the Power of making a Teſtament.*
2. *He that by extream old Age is become a Child in his Underſtanding, cannot make a Teſtament.*
3. *He that hath loſt his Memory cannot make a Teſtament.*

THO' (1) old Age alone doth not deprive a Man of the Power of making a Teſtament[k]: (For a Man may freely make his Teſtament how old ſoever he be; for it is not the Integrity of the Body, but of the Mind, that is requiſite in Teſtaments[l]:) Yet (2) if a Man in his old Age do become a very Child again in his Underſtanding[m], (which Thing doth happen to divers Perſons, being as it were worn away with extreme Age, and deprived not only of the Uſe of Reaſon, but of Senſe alſo,) ſuch a Perſon can no more make a Teſtament than a Child[n].

[k] L. ſenium. C. qui teſta. fac. poſſ.
[l] d. L. Senium.
[m] Simo de Prætis de inter. ult. vol. l. 2. dub. 1. ſoluc. 4. n. 22.
[n] Ibidem.

So it is, (3) if a Man, either by Reaſon of Age, or ſome other Infirmity, become ſo forgetful, that he hath forgotten his own Name[o]: (Which Thing alſo hath happened to divers wiſe and learned Men:) Becauſe for any Act, which is to be performed with Diſcretion, he is no more fit than a Fool or an Ideot[p], of whom we have ſpoken already.

But the Infirmities of old Age, which do not take away the Uſe of Reaſon, do not hinder thoſe who are in that Condition to make a Will.

[o] L. fin. C. de hæred. Inſt.

[p] Bald. in d. L. fin. Mantic. de conj. ult. vol. l. 2. tit. 15. n. 16. 2 Dom. 22. par. 5.

§. VI. Of him that is drunk.

1. *Whether he that is drunk may make a Teſtament.*

HE (1) that is overcome with Drink, during the Time of his Drunkenneſs, is compared to a Mad-man; and therefore if he make his Teſtament at that Time, it is void in Law[q]. Which is to be underſtood, when he is ſo exceſſively drunk, that he is utterly deprived of the Uſe of Reaſon and Underſtanding. Otherwiſe, if his Underſtanding be obſcured, and his Memory troubled, yet may he make his Teſtament[r].

To this we will add the Words of Dr. *Godolphin*:

Such as are drunk, during the Time of being drunk, can make no Teſtament that ſhall be good in Law; yet this is only, when he is ſo exceſſive drunk, that he is altogether deprived for the Time of the Uſe of Reaſon and Underſtanding, being according to the Flaggon Phraſe, as it were, Dead drunk; for if he be but ſo drunk, that his Underſtanding is but ſomewhat clouded and obſcured, and his Memory troubled, he may in that Caſe make his Teſtament, and it may be good in Law. He therefore that is but exhilarated with Liquor, and thereby doth but ſomewhat deviate from the Rule of right Reaſon, is not the Perſon whom the Law renders at that Time inteſtable; but he who by a continual Cuſtom of Toping, or by ſuch an Exceſs of Drunkenneſs hath ſo exiled his Intellects, that he hath, as it were, totally loſt the rational, and reſerved nothing to himſelf but the animal. *Orphan's Legacy, part* 1. *c.* 8. *ſ.* 5. *p.* 26.

[q] Vaſqui. de ſucceſ. crea. lib. 2. §. 13. requiſ. 7. n. 8. Simo de Prætis de inter. ult. vol. lib. 2. dub. 1. ſoluc. 4. n. 22.

[r] Iidem Vaſq. & Simo de Prætis ubi ſupra.

§. VII. Of Slaves and Villains.

1. *Of all Men the Slave is in greateſt Subjection.*
2. *What is a Slave.*
3. *A Slave hath neither Lands nor Goods, for both are his Lord's.*
4. *Whether the Children of Bond-Parents be ſubject to Servitude.*
5. *By the Civil Law the Child is free, if the Mother be free, notwithſtanding the Bondage of the Father.*
6. *By the Laws of this Realm the Child is free-born whoſe Father is free, though the Mother be a Bond-woman.*
7. *No Baſtard is born a Slave, though the Father be a Bond-man.*
8. *A Bond-man cannot make a Teſtament.*
9. *Of the Difference betwixt a Bond-ſlave and a Villain.*
10. *A Villain like unto him which is called in the Civil Law* Aſcriptitius Glebæ.
11. *Whether a Villain may make a Teſtament.*

12. *The*

12. *The Lord may take from his Villain whatſoever he hath, Life excepted.*
13. *The Teſtament of the Villain is not void, but voidable.*
14. *Sometimes the Lord cannot make void the Teſtament of his Villain.*
15. *The Prince may at any Time make void the Alienation or Gift of his Villain, and conſequently his Teſtament.*
16. *What Manner of Villains be here meant?*
17. *A Villain Executor may make a Teſtament.*
18. *A Villain Executor may maintain an Action againſt his Lord.*
19. *The Reaſon of the former Concluſion.*

OF all (1) Men which are deſtitute of Liberty, the Slave is in the greateſt Subjection: For he is (2) that Perſon which is in Bondage to another, even againſt Nature[s]. Neither (3) hath he any Thing of his own, but whatſoever he poſſeſſeth is his Lord's[t]. Not only Lands, Goods and Chattels, and generally whatſoever he getteth, either by his own Induſtry, or by the Gift of others, or by any other Means[u]: But (4) even his Children alſo are infected with the Leproſy of their Father's Bondage[x].

[s] §. Servitus. Inſtit. de jure perſonarum. Et dicitur Latine ſervus, non a ſerviendo, ſed a ſervando; propterea quod ſervandi, non occidendi, ſunt a dominis. Nam cum antiquitus multi ſæviſſent in captivos, eoſq; necaſſant, prohibitum id fuit, conſtitutumq; ut potius venderentur quam occiderentur. Et inde a ſervando nomen mutuarunt ſervi. §. ſervi autem. Inſtit. de jure perſonarum. [t] §. in poteſtate. Inſtit. de his qui ſui vel alie. jur. [u] §. iterum. Inſtit. per quas perſonas. [x] Bracton de legib. & conſu. Ang. lib. 1. c. 6. Principal Grounds, fol. 44.

And although by (5) the Civil Law, the Wife being a Free-woman, the Children are likewiſe free, *Quia partus ſequitur ventrem*[y]; inſomuch that if the Mother be free either at the Conception or at the Birth of the Child, by the ſame Law that Child ſhall be free, notwithſtanding the Bondage of the Father[z]; yet (6) it is otherwiſe by the Laws of the Realm, for the Child doth follow the State and Condition of the Father: And therefore in *England* the Father being a Bond-man, the Child ſhall be in Bondage, without Diſtinction, whether the Mother be bond or free[a]; ſo that the Child is begotten or born in lawful Matrimony. But (7) a Baſtard ſhall not be bound, though the Father were a Bond-ſlave[b], becauſe the Law doth not acknowledge any Father in this Caſe: For by the Law a Baſtard is ſometimes called *filius nullius*, the Son of no Man; ſometimes *filius vulgi*, the Son of every Man[c]. But howſoever the Civil Law and the Laws of this Realm differ in this, whether the Bondage of the Father or of the Mother do make the Child bound: Yet in (8) this they do agree, that a Bond-man cannot make a Teſtament[d].

[y] §. Sed etſi. Inſtit. de ingenuis. [z] Eod. §. ſed etſi. [a] Bracton de leg. & conſ. Ang. lib. 1. c. 6. [b] Bracton ubi ſupra. Principal Grounds, fol. 44. [c] Cui pater eſt populus, pater eſt ſibi nullus & omnis. Cui pater eſt populus, non habet ipſe patrem. Gloſſ. in §. pen. Inſt. de nuptiis. §. j. ubi multis ampl. [d] L. Lib. de petic. hæred. L. ſervus. Comm. de ſucceſſ. C. Vaſq. de ſucceſſ. progreſſ. lib. 1. hanc propoſitionem ornat.

A *Villain* (9) howſoever he may ſeem like unto a *Slave*, yet his Bondage is not ſo great: For whatſoever a Bond-ſlave getteth, it is his Lord's, though ignorant and unwilling[e]; not only in reſpect of Property, but alſo in reſpect of Poſſeſſion: For whatſoever a Bond-ſlave doth poſſeſs, he doth alſo poſſeſs it for his Lord[f]. But it is not ſo with a Villain: For the Lord hath no Title to the Goods of his Villain before Seiſin; nor any Title to his Lands before Entry: Nor any Title to any Rent, Reverſion, Common, or the Advowſement of a Church belonging to the Villain, but by Claim[g]. And ſo the

[e] §. Item nobis. Inſt. per quas perſonas. [f] Eod. §. Item ibi, non ſolum. [g] Perkin. tit. Grant, fol. 6. Brook Abridg. tit. Villenage. Doct. & Stud. lib. 2. c. 43.

Villain in the mean Time hath perfect Property therein [h]. And therefore (10) a Villain is more like unto him which in the Civil Law is call'd *Aſcriptitius Glebæ* [i], (that is to ſay, one that is aſcribed or aſſigned to a Ground or Farm, for the perpetual Tilling or Manuring thereof [k],) than to a Slave.

[h] Doct. & Stud. c. 43. lib. 2.

[i] Aſcriptitius Glebæ, id eſt adſcriptus prædio. Spieg. Lexicon.

[k] Quemadmodum enim Aſcriptitius vere ſervus non eſt, ſed ſervili tantum macula aſperſus. Bald. in L. cum precum. C. de l. cauſa; & ſicut qui aſcribitur glebæ, ſeu prædio perpetuo colendo, nunquam inde recedere debet; vel ſi aufugiat, ad antiquos penates nempe ubi natus eſt, redire compellitur, L. omnes de Agricul. cenſit. l. 11. C. Eodem prorſus modo iſti quos *Villeins* appellat vulgus, licet non ſunt proprie ſervi; perpetuæ tamen prædii culturæ aſtringuntur, nunquam inde receſſuri invito vel ignorante domino. Quod ſi aufugiunt, conceditur ſtatim Breve, quod dicitur de Nativo habendo. Fitz. Nat. Bre.

If you will (11) underſtand whether a Villain may make his Teſtament or not: We muſt (12) Note, that whatſoever Villains have of their Own, be it Lands or Goods, the Lord may by Entry or Seiſing take and enjoy the ſame as his Own [l]; only he may not ſlay or maim his Villain [m]. And therefore (13) if the Villain make any Deviſe of Lands or Goods, the Lord may before the Probate of the Will, or Apprehenſion of the Goods by the Executor, enter to thoſe Lands and ſeiſe thoſe Goods, or ſome Parcel thereof in the Name of the Whole, and by that Means make void the Gift or Deviſe of the Villain [n]. The Will is alſo void though the Lord do not really ſeiſe any Goods of his Villain, in caſe he did claim the Villain in his Lifetime, and by Words only did ſeiſe his Goods; for then the Executor ſhall not have them, but the Lord of the Villain [o].

[l] Brook Abridg. tit. Villenage. Perkins tit. Grants, fol. 6. Littleton tit. Villenage. *Terms of Law*, verb. *Thene.*

[m] Old Tenures, tit. Villen.

[n] Doct. & Stud. lib. 2. c. 43.

[o] Brook tit. Villen. n. 30.

But if (14) the Will be proved before the Ordinary, and the Executors (by Virtue of the ſame Will or Deviſe) enjoy or poſſeſs the ſame Lands or Goods accordingly; then I ſuppoſe the Lord may not enter to ſuch Lands or ſeiſe thoſe Goods, no Entry, Seiſing or Claim being made before [p]. For if a Villain purchaſe Lands, and alieneth the ſame to another, before his Lord enter; then the Lord may not enter afterwards, but it ſhall be imputed to his own Folly, that he entered not when the Lands were in the Villain's Hands [q]. And ſo it is of other Goods, which if the Villain ſell or give to another before the Lord do ſeiſe them, the Sale or Gift is good, and the Lord cannot afterwards have the ſame [r].

[p] Brook eodem tit. n. 73. Doct. & Stud. lib. 2. c. 43. Adde quod Aſcriptitius poteſt teſtam facere. Spec. de Inſtr edi. ſect. compendioſe. Lindw. in c ſtatutum. verb Aſcriptitiorum. de teſta. lib. 1. provincial. conſtitut. Cant.

[q] Littleton tit. Villenage.

[r] Ibidem.

Nevertheleſs if the (15) Prince have any Villain which purchaſeth Lands, and alieneth the ſame before the Prince do enter; yet may the Prince at any Time after enter upon the Lands to whomſoever the ſame do come [s]. And likewiſe if the Prince's Villain ſell or give any Goods, yet may the Prince at any Time after ſeiſe thoſe Goods in whoſe Hands ſoever they do remain [t]; for the Prince is not prejudiced by any Courſe of Time. And therefore I do collect, that if the Prince's Villain ſhould by Teſtament diſpoſe either Lands or Goods, the Prince (notwithſtanding the Approbation of the ſame Teſtament, and Execution thereof,) might enter to the Lands, and ſeiſe the Goods ſo deviſed or diſpoſed, in whoſe Hands ſoever the ſame were [u].

[s] Littleton ubi ſupra.

[t] Ibidem.

[u] Arg. a contract. ad ult. vol. de quo Olden. Topic. Legal. loco a contract.

Note, that (16) what I have here ſpoken of Villains, is not to be underſtood of ſuch Perſons as only hold Lands in Villenage, being themſelves no Bondmen, but free, (for divers Perſons hold by Tenure

nure in Villenage, and yet be no Villains themſelves [x];) but of ſuch as both hold by Villenage and are Villains alſo. For theſe are they whoſe Teſtaments or Laſt Wills are voidable, ſaving, as before, where the Will is proved, and the Executor or Legatary poſſeſſed of the Things deviſed: And ſaving where (17) the Villain is Executor to another Perſon; for being Executor himſelf, he may appoint another Executor, who ſhall have thoſe Goods which the Villain had as Executor, and not the Lord of the Villain [y]. For if the (18) Villain himſelf were living, the Lord could not take from him ſuch Goods as he hath as Executor to another Man; and if he did, his Villain might bring an Action againſt him for the ſame, and recover both the Goods and Damages [z]. The (19) Reaſon is, becauſe that which the Villain hath as Executor, he hath it not to his own Uſe [a]; but is to be imployed in the Behalf of the Teſtator, as to the Payment of his Debts and Legacies, and to other godly Uſes: As appeareth more at large in the Office of an Executor [b].

[x] Brook, Littleton, Old Tenures, tit. Villenage.

[y] Brook tit. Villenage, n. 73.

[z] Brook tit. Villenage, n. 68.

[a] c. Statutum. §. nullus. de teſta. l. 3. provinc. conſtitut. Cant. & infra part. 6. §. j.

[b] Infra 6. part. §. j. §. iij. §. xvj. §. xxj.

As to the Interdiction of Villains to make a Will, it is not in Uſe in *England*, becauſe there are no ſuch Perſons which are in Bondage to others againſt Nature; it is true, there were Two Sorts of Villains formerly in this Kingdom, (*viz.*) a *Villain in groſs*, who was immediately in Bondage to the *Perſon of his Lord*, and his Heirs, and the other was a *Villain regardant to a Manor*, like him who was *Glebæ adſcriptitius* by the *Roman* Law, who was likewiſe bound to his Lord, but as a Member annexed to ſuch a Manor, whereof the Lord was the Proprietor; but the Tenure in Villenage is now aboliſhed, ſo that there is not any Thing in this Chapter which is now in Uſe amongſt us.

§. VIII. Of Captives and Priſoners.

1. *A Captive, during his Captivity, cannot make a Teſtament.*
2. *If the Captive eſcape, whether the Teſtament made during his Captivity be good.*
3. *What if the Teſtament were made before he were captive?*
4. *What if the Teſtator be taken captive by ſome Pirate, Turk, Infidel, or Chriſtian, when War is not proclaimed?*
5. *Whether he may make a Teſtament who is condemned to perpetual Priſon.*
6. *What if the Teſtator be impriſoned for Debt?*

HE (1) that is taken captive by the Enemy, during his Captivity cannot make a Teſtament [c]: Inſomuch that (2) if afterwards he do eſcape, yet the Teſtament made whiles he was with the Enemy, is void [d]. But if (3) his Teſtament were made before his Captivity; then, after his Eſcape, the Teſtament is of like Force as if he had not been captive [e]. Likewiſe if the Teſtament were made before he were apprehended, and the Teſtator die in Captivity; yet is the Teſtament allowed, and the Executor by Force thereof is to have all his Goods here within this Realm of *England*, as if he had died the Day before his Captivity [f]. Likewiſe (4) if any Perſon be taken as captive by any Pirate, Turk, Infidel, or Chriſtian, where War is not proclaimed; he that is ſo taken remaineth ſtill a Free-man: And therefore if he make his Teſtament whiles he is ſo detained, the Teſtament

[c] L. ejus qui apud hoſtes, ff. de teſta.

[d] Ead. L. ejus.

[e] L. ratio. ff. de captivis. Graff. Theſaur. com. op. §. teſtam. q. 25. ubi hanc opinionem communiter approbatam oſtendit.

[f] L. lege Cornelia. ff. de teſta.

ſtament is good and lawful [g]. If a (5) Lay-man be condemned to perpetual Priſon for ſome Offence, it ſeemeth that he cannot make a Teſtament [h]. But if (6) any Perſon be impriſoned for Debt, ſuch Impriſonment being ordained for Safety, not for Puniſhment, he is not thereby diſabled to make his Teſtament [i]; ſaving that the Teſtament is not good, when it is made in his Favour at whoſe Suit the Teſtator is impriſoned, of Intent to extort the ſame [k].

[g] L. qui a latronibus. ff. de teſta.

[h] Panor in Rub. de teſtam. ext. Graſſ. Theſaur. com. op. §. teſtam. q. 28. cui tamen opinioni, quamtumvis communi, non acquieſcit Clar. §. teſtam. q. 23.

[i] Bald. in L. 1. C. ſi quis aliq. teſtari prohib. n. 5. ult. vol. lib. 2. tit. 7. n. 2.

[k] L. Qui carcerem. ff. quod me cauſ. Mantic. de conject.

§. IX. Of a Woman covert.

1. *A married Woman cannot make her Teſtament of Lands.*
2. *Eſpecially not to her Husband, and wherefore.*
3. *What if ſhe be not conſtrained, but doth deviſe the ſame freely of her own Accord?*
4. *What if the Teſtament be made before Marriage?*
5. *What if the Teſtament being made during Marriage, ſhe overlive her Husband?*
6. *Certain Caſes wherein the Deviſe of Lands is good, notwithſtanding the Coverture of the Teſtatrix.*
7. *A Wife cannot make her Teſtament of Goods, without her Huſband's Licence or Conſent.*
8. *The Reaſon wherefore the Wife cannot make her Teſtament of Goods, without her Husband's Licence or Conſent.*
9. *Whether it be neceſſary that this Licence or Conſent ſhould go before the Making of the Will, or concur, or may follow.*
10. *Whether and when the Husband may revoke the Licence given to his Wife.*
11. *Certain Caſes wherein the Wife may make her Teſtament without the Husband's Conſent.*
12. *Whether an Empreſs or a Queen may make a Teſtament without the Conſent of the Emperor or King.*
13. *Of that which is due to the Wife, whereof the Husband was never poſſeſſed, ſhe may make her Teſtament without his Conſent.*
14. *A Woman contracted in Matrimony, if the Marriage be not ſolemnized, may make her Teſtament.*
15. *A Wife being Executrix, may make an Executor to the former Teſtator, without her Husband's Conſent.*
16. *The Reaſon of the former Poſition.*
17. *Whether a Wife being Executrix may make her Husband Executor in her Place.*
18. *A Wife Executrix may not give away the Teſtator's Goods by her Will.*
19. *A Wife both Executrix and Legatary cannot make a Teſtament of that which ſhe did accept, not as Executrix, but as Legatary.*
20. *The Reaſon wherefore an Executor cannot diſpoſe the Teſtator's Goods by Legacies.*
21. *The Reaſon wherefore a Wife Executrix and Legatary may not make her Teſtament of that which ſhe did accept as Legatary.*

22. *Whether*

22. *Whether ſhall the Wife, which is both Executrix and Legatary, be deemed to have accepted of the Teſtator's Goods as Executrix or Legatary.*
23. *Whether the Wife being licenſed to make her Teſtament, may make any more Wills than one.*

A Married (1) Woman, by the Laws and Statutes of this Realm, cannot make her Teſtament of any Manors, Lands, Tenements or Hereditaments [l]. And firſt, ſhe (2) cannot deviſe the ſame to her Husband [m]. The Equity of which Prohibition (if I may inſert the Reaſon and Conſideration of the Civil Law,) is not obſcure. For if this Gap were left open, few Children ſhould ſucceed in the Mother's Inheritance [n]. But by how much the Husband were more cruel, and the Wife more timorous; he crafty, ſhe credulous; by ſo much the more were the lawful Heir in Danger to be diſherited, and the cruel and deceitful Husband in hope to be unworthily inriched and advanced. Wherefore if the Wife ſhould deviſe any of her Manors, Lands, Tenements or Hereditaments, or any Part thereof, to her Husband; this Deviſe were void; becauſe the ſame is preſumed to have been made by the Conſtraint of the Husband, or other ſiniſter Means [o]. Secondly, though (3) it did appear by due Proof, that the Husband did not conſtrain his Wife thereunto; but that ſhe of her own Accord did make any ſuch Deviſe, either to her Husband, or to any other Perſon by his Conſent: Yet is not the Deviſe good [p], as well becauſe the Words of the Statutes are general, (and where the Law doth not diſtinguiſh, there may not we diſtinguiſh [q],) as for diverſ other Reaſons grounded on the Common Laws of this Realm. Thirdly, (4) though the Teſtament be made before the Marriage, yet ſhe being inteſtable at the Time of her Death, by Reaſon her Huſband is then living, the Teſtament is void [r]: For it is neceſſary to the Validity of a Teſtament, that the Teſtator have Ability to make it, not only at the Time of the Making thereof, when the Teſtament receiveth his Eſſence or Being; but alſo at the Time of the Teſtator's Death, when the Teſtament receiveth his Strength and Confirmation [s]. Fourthly, though (5) the Wife do over-live the Husband, yet the Teſtament made during the Marriage is not good [t]: The Reaſon is yielded before, becauſe ſhe was inteſtable at the Time of the Will making [u]. But (6) if the Teſtament being made during the Coverture, ſhe do approve and confirm the ſame after the Death of her Husband; in this Caſe the Deviſe is good, by Reaſon of her new Conſent, or new Declaration of her Will [x]. What if the Teſtament be made before the Marriage, and ſhe over-live her Husband? Whether in this Caſe is the Teſtament good, or not? By the Civil Law it is of as great Force as if ſhe had not been married at all [y]: And ſo I am informed that it is by the Laws of this Realm [z]. Thus much of the Deviſe of Lands.

[l] Stat. H. 8. an. 34. c. 5. 31 E. 3. deviſe 12. M. 30, 31 Eliz. Forſe & Hembling's Caſe, lib. 4. fo.
[m] Brook Abridg. tit. deviſe, n. 32, 34.
[n] L. 1, 2, 3. ff. de donac. inter vir. & ux.
[o] Brook ubi ſupra.
[p] Ita ſæpius accepi a nonnull. hujus regni juriſperitis non vulgaribus, quos ipſe velim conſulas.
[q] L. precio. ff. de public. in rem. action.
[r] Arg. §. alio Inſtitu. quib. mod. teſta. infir.
[s] d. §. alio. & §. non tamen. Inſtitut. quib. mod. teſta. infir. L. §. exigit. ff. de bon. poſſ. ſecundum tab. Porcus in §. in extraneis. Inſtit. de hæred qual. &c.
[t] c. Non firmatur. de reg. jur. 6. L. 1. §. j. de leg. 3.
[u] Arg. §. præterea. Inſtit quib. non eſt permiſſ. teſta. fac. verb. nec ad rem. Plowd. in caſ. inter Bret & Rigden, fol. 344.
[x] L. 1. §. j. de leg. 2. ff & ibi Panl. de caſtr. & alii.
[y] d. §. non tamen. & §. pen. verb. denique. Inſtit. de mil. teſta.
[z] Plowd. in caſ. inter Bret & Rigden, f. 343. M. 30 & 31 Eliz. C. B. Forſe & Hembling's Caſe. C. tit. 4. fol. 60. b.

Of (7) *Goods or Chattels* the Wife cannot make her Teſtament, without the Licence or Conſent of her Husband [a], (except in certain

[a] Bracton. de leg. & conſu. Ang. lib. 2. c. 26. Brook tit. deviſe, n 34. & in tit. teſtam. n. 21. Lindw. in c. Stat. verb. propriorum. de teſta. lib. 3. provincial. conſtitut. Cant. cui tamen hoc durum videtur. H. 29 Eliz. C. B. Ognel's Caſe, lib. 4. fol. 51. b. 3 E. 3. tit. deviſe 12. lib. 4. fol. 61. a

Caſes hereafter ſpecified [b];) (8) becauſe by the Laws and Cuſtoms of this Realm, ſo ſoon as a Man and a Woman are married, all the Goods and Chattels perſonal that the Wife had at the Time of the Celebration of the Marriage, or after [c], and alſo the Chattels real, if he over-live his Wife, belong to the Husband, by Reaſon of the ſaid Marriage [d]: And therefore with good Reaſon ſhe cannot give that away which was hers, without the Sufferance or Grant of the Owner [e]. Notwithſtanding upon Licence or Conſent of the Husband the Wife may make her Teſtament, even of his Goods [f]. And though (9) the Nature of a *Licence* is to go before the Act [g], and the authorizable Conſent is to concur with the Act [h]: Yet by the Laws of this Realm, if a Wife make a Teſtament of her Husband's Goods, the Husband not underſtanding thereof, and after her Death the Executors prove the ſame, if the Husband deliver the Goods deviſed in the Will to the Executors, thereby he hath made the Teſtament good, notwithſtanding he were not privy to the Making thereof [i]; becauſe in this Caſe the ſame Law preſumeth, that the Husband gave his Conſent in the Beginning at the Time of the Will making. And therefore the ſame being proved, and the Goods delivered accordingly, it is then too late for him to revoke the ſame [k]. Tho' otherwiſe, if (10) the Husband do give Licence to his Wife to make a Will of his Goods, yet he may revoke the ſame, not only at the Making of the Will, but after her Death, at the leaſt before the Will be proved [l].

[b] Hoc ipſo §. n. 11. cum ſequen.

[c] Tract. de Rep. Ang. l. 3. c. 6. Doct. & Stud. lib. 1. c. 7.

[d] Doct. & Stud. l. 1. c. 7.

[e] L. id quod noſtrum. de reg. jur. ff. c. filius. de teſta. extr.

[f] Lindw. in d. c. ſtatutum. ver. propriorum. de teſt. l. 3. provinc. conſtit. Cant. Bract. d. l. 2. c. 26. Brook tit. deviſe, n. 24.

[g] Phil. Franc. in c. Ratishibitio. de reg. jur. 6.

[h] Tiraquel. de legib. Connub. gloſ. 4. in prin. Imo licet jure Civili Conſenſus pro forma requiſitus debet præcedere; ſecus eſt jure Canonic. Beron. in Rub. de jure pa. n. 67.

[i] Perkin. tit. deviſe, c. 8. fol. 97. Tiraquel. ubi ſupra.

[k] Perkins ubi ſupra.

[l] Brook Abridg. tit. deviſe, n. 34.

The (11) Caſes wherein a Wife may make a Teſtament of Goods and Chattels, without her Husband's Licence or Conſent, are theſe. Firſt, I ſuppoſe that (12) an Empreſs or a Queen may make her Teſtament without the Licence of the Emperor or King her Husband; ſo that it be not in Prejudice of her ſaid Husband [m]. The ſecond Caſe is, when any Thing (13) is due unto the Wife, whereof ſhe was not poſſeſſed during the Marriage: For it ſeemeth ſhe may make her Teſtament thereof, and that ſhe may make her Husband Executor in that Caſe [n]. Neither can the Husband bequeath by Will, or make an Executor of an Obligation which he hath in Right of his Wife, nor of any other Thing in Action [o]. But if the Obligation be theirs both jointly, then he may deviſe the ſame by his Will, or make an Executor thereof [p]. Thirdly, if (14) a Man and a Woman be contracted together in Matrimony, and the Woman die before the Eſpouſals or Celebration of the Marriage; though the Law doth often call this Woman, thus betrothed and aſſured, by the Name of Wife, becauſe of the certain Hope of Marriage ſhortly to be ſolemnized, whereby ſhe ſhall become a Wife [q]; yet I take it for a clear Caſe, that the Woman ſo dying may make her Teſtament without his Agreement to whom ſhe was contracted in Matrimoney [r]. Fourthly, (15) if the Wife be Executrix to another Man, ſhe may make her Teſtament without the Licence of her Husband [s]. The Reaſon (16) is, becauſe

[m] De Auguſta & Regina, an & quando exemptæ ſunt a legibus vel ſtatutis, quibus cavetur, ne uxor teſtamentum condere valeat ſine mariti conſenſu, videre eſt apud Peckium, in præclaro ſuo tractat. de teſtam. conjug. l. 3. c. 26. Kitchen fo. 1. 3 H. 7. fo. 14. 49 E. 3. 4. 18 E. 1. 3.

[n] Brook Abridg. tit. teſtam. n. 11. Fitzher. Abridg. tit. executor, n. 109. Apologie for ſundry Proceedings Eccleſiaſtical, parte 1. c. 3. in fin. 12 H. 7. 22, 23, 24. 39 H. 6. 27. M. 32 & 33 Eliz. Rot. 428. Sir Moyle Finch verſ. Finch, Moor's Rep. fol. 339. c. 459. Abridgment, tit. Deviſe.

[o] Lib. qui inſcribitur Labridgment dez caſes, edit. 1599. Incerto autore. 7 H. 6. fol. 2.

[p] Ibid. 16 E. 4.

[q] Covar. de ſponſal. 2 part. c. 1. n. 4. Peckius de teſtam. conjug. l. 4. c. 5.

[r] Perkins tit. Feoffment, c. 3. fol. 40. quod verum eſt jure hujus regni. Cæterum attenta legiſtarum opinione communi, ſi ſtatuto caveatur, ne quid conjuges invicem relinquere poſſint, intelligitur etiam de ſponſis. Peckius tract. de teſta. conjug. lib. 4. c. 11.

[s] Fitzherb. Abridg. tit. exec. n. 10. Brook eod. tit. n. 11. Perkins tit Deviſe, c 8. fol. 97. M. 32 & 33 Eliz. Rot. 421. Sir Moyle Finch verſ. Finch, Moore's Rep. fol. 339. c. 459. 4 H. 6. 31. Brook tit. Teſtament, n. 9. M. 8 Jac. Graunt's caſe, Roll's Abridgment, tit. Deviſe.

2 E. 2. Fitz. Deviſe, 24. 3 E. 3. Deviſe, 12. 18 E. 4. fo. M. 8 Jac. Graunt's Caſe. Roll's

ſuch Goods as ſhe hath as Executrix are not her Husband's, but are to be diſtributed for the Dead; as for the Payment of his Debts, Performance of his Will, and for ſuch other good and godly Purpoſes[t]: And therefore if the Executrix ſhould make no Executor, but die Inteſtate, Adminiſtration might be obtained of the Goods not adminiſtred by the next of Kin of the Teſtator deceaſed[u], (for where an Executor dieth Inteſtate, the Teſtator from that Time is eſteemed to die Inteſtate[x]:) So far is it from the Husband to have any of thoſe Goods whereof his Wife is Executrix. Much like unto that Lord whoſe Villain is Executor; in which Caſe he cannot take from his Villain that which did belong to the Teſtator; but his Villain may have an Action againſt him for the ſame, and may recover both the Goods and the Damages, (as hath been ſaid before[y].) Although otherwiſe whatſoever doth appertain to the Villain, the Lord may take the ſame from him, and (as our Common Lawyers term it) may even rob his Villain[z]. Furthermore (17) it is not only lawful for the Wife being Executrix to make a Teſtament without her Husband's Licence, but ſhe may name and appoint him Executor[a]. Howbeit this Poſition, (18) that the Wife being Executrix, may make her Will of theſe Goods whereof ſhe is Executrix, without her Husband's Licence, is reſtrained in Two Caſes. The one is, when ſhe doth not make an Executor, but bequeatheth the Goods whereof ſhe is Executrix by Deviſe or Legacy[b]. The other is, when (19) ſhe is not only Executrix, but Legatary alſo, and hath accepted of the Thing bequeathed, not as Executrix, but as Legatary[c]. In theſe Two Caſes the Will is void. The (20) Reaſon of the former of theſe Two Limitations is, becauſe an Executor may not diſpoſe of the Goods of the Teſtator, otherwiſe than to the Uſe of the Teſtator, as to the Payment of his Debts, Performance of his Will, and to other charitable Uſes[d]; and therefore may not give or deviſe the ſame by Legacy; for that were to diſpoſe of the Teſtator's Goods as if they were the proper Goods of the Executor, and to convert the ſame to the private Uſe of the Legatary[e], and not to the Uſe of the Teſtator. But when an *Executor doth only make another Executor*, the ſecond Executor doth ſtand chargeable and accountable for the Diſtribution of the firſt Teſtator's Goods to the Uſe of the ſame Teſtator, as did the former Executor, and is by the Laws of this Realm reputed for the Executor, not of the Executor, but of the former Teſtator[f]; ſo is not a Legatary. The (21) Reaſon of the ſecond Limitation is this; for that which one hath as Legatary, he hath it to his own private Uſe[g], and not to the Uſe of the Teſtator: And the Wife being not only Executrix, but Legatary alſo, accepting of the Thing bequeathed, not as Executrix, but as Legatary, doth thereby make it her own proper Goods, and conſequently her Husband's: For that which is the Wife's, is by Reaſon of the Marriage her Husband's, and being inveſted in him[h], (as hath been ſaid before) cannot be given from him without his Licence or Conſent[i]. Great Difference there is therefore betwixt theſe Two Caſes, of accepting the Thing bequeathed as Executrix, or as a Legatary: For in the one Caſe it is not her Husband's, and ſo ſhe may make a Teſtament thereof, by appointing an Executor to diſtribute the ſame to the Uſe of the firſt Teſtator[k]; and in the other Caſe it is her Husband's, and ſo ſhe cannot make any Teſtament of the ſame without his Licence[l]. Howbeit though the Wife, being Executrix, may make her Teſtament,

[t] Latius inf. par. 6. §. j.

[u] Plowden in caſ. inter Greisbrook & Fox.

[x] Brook Abridg. tit. Adminiſtrator, n. 45.

[y] Supra ead. part. §. 8. num. 18.

[z] Old Tenures, tit. Villenage.

[a] Brook. Abridg. tit. exec. n. 11. Apology for ſundry Proceedings, par. 1. c. 3. pag. 22. in fin.

[b] Plowd. in caſu inter Bransby & Grantham, fol. 525. Imo nec cum conſenſu mariti poteſt legare teſtatoris bona.

[c] Infra hoc ipſo §. n. 21.

[d] C. ſtatutum. lib. 3. provincial. conſtitut. Cant. Plowd. caſ. inter Bransby & Grantham. & infra 6 part. §. j. & §. iij.

[e] Plowd. ubi ſupra. facit. c. filius de teſta. ext.

[f] Brook Abridg. tit. execut. n. 132. & infra par. 6. §. j. §. iij. tu vide Bar. in L. veluti. ff. de petic. hær.

[g] L. legatum de leg. 2. L. a Titio. de furtis. ff.

[h] Tract. de rep. Ang. lib. 3. c 6.

[i] L. id quod noſtrum de reg. jur. ff.

[k] Brook, tit. exec. n. 11.

[l] Supra eod. §. Roll's Abridgment, tit. Deviſe.

and appoint an Executor of thoſe Goods which ſhe had as Executrix, and not as Legatary, without her Husband's Licence: Yet nevertheleſs the Profit and Fruit which happen and ariſe out of thoſe Goods which ſhe had as Executrix during the Marriage, as Calves, Lambs, and ſuch like Profit of Kine, Sheep and Cattle, do belong and accrue to her Husband[m], and not to herſelf as Executrix: And therefore ſhe cannot make her Teſtament of ſuch Fruits and Profits without her Husband's Licence, Conſent or Approbation, to whom they do belong[n].

[m] Ita ſæpe nunciarunt mihi juris hujus regni periti quorum opinioni acquieſcendum duxi.

[n] Inf. part. 3. §. 6. n. 17.

But (22) here ariſeth another Queſtion: What if it do not appear whether the Wife did accept the Thing bequeathed as Executrix, or Legatary? In whether Name is ſhe preſumed in Law to have accepted the ſame, as Executrix, or as Legatary? Some are of this Opinion, that ſhe is eſteemed to have accepted the ſame as Executrix, not as Legatary[o]; becauſe it is not lawful for Legataries to carve for themſelves, taking their Legacies at their own Pleaſure[p], but muſt have them delivered by the Executor[q]. And therefore if any ſhould determine to accept ſuch a Legacy, it behoveth him by Proteſtations, or other Act anſwerable, to manifeſt the ſame[r]. Others are of a contrary Opinion, namely, that in this Caſe ſhe is reputed to have accepted the Thing bequeathed as Legatary, not as Executrix[s]: Becauſe where any Act may be done, or any Thing taken or poſſeſſed by a double Right, the Party is preſumed to do that Act, or to take or poſſeſs that Thing, by Force and Virtue of that Right which is more favourable and more beneficial to the Party[t]. Now it is more profitable for every one, which is both Executor and Legatary, to accept the Thing bequeathed as Legatary, than as Executor; becauſe the Legatary hath full Right in the Thing bequeathed, and may diſpoſe thereof at his Pleaſure[u]: Whereas an Executor hath not any ſuch Right, but muſt diſpoſe the Teſtator's Goods to the only Uſe and for the only Behoof of the Teſtator[x]. And therefore unleſs by ſolemn Proteſtations[y], or other Means, it may appear that the Executor did accept of the Thing bequeathed as Executor, the Party ſhall be deemed to have accepted the ſame an Legatary: Which Opinion (if I do not err) is more agreeable to the Rules of the Civil Law[z]. If a Leaſe for Years be deviſed to *A.* an Executor, and he enters generally, he ſhall take as Deviſee, and not as Executor; except it may turn to his Prejudice, as to charge him in *Devaſtavit*, if there be not ſufficient to pay Debts. *H.* 36 *Eliz. Rot.* 515. *Portman* verſ. *Willis.* 20 *E.* 3. *fol.* 9. *P.* 19 *Eliz. Rot.* 318. *C. B. Higs & Burgh. H.* 21 *Eliz. B. R. Rot.* 133. *Woodward* verſ. *Burgh. Moor's Rep. fol.* 352. *n.* 474. A Term for Years was granted upon Condition, that the Leſſee ſhould not alien without the Aſſent of the Leſſor; the Leſſee makes his Will, and deviſes the Term to his Executor, who enters generally: Adjudged a Forfeiture and Breach of the Condition, becauſe the general Entry ſhall be intended as Deviſee. 20 *Eliz.* enter Senior *Windſor* and Senior *Boroughs*. As for the Reaſon of the other Opinion, that a Legatary may not take his Legacy of his own Authority; that is true, when another Perſon is appointed Executor, otherwiſe not[a]. But yet although this Opinion ſeem more agreeable to the Rules of the Civil Law, that the Party ſhall be deemed to have accepted the Thing bequeathed as Legatary, rather than as Executor, whenas it doth not otherwiſe appear by

[o] Plowd. in caſ. inter Paramor & Yardley, lib. 8. fol. 543. Dyer d. fol. 277.

[p] L. 1. Quorum lega. ff. L. non dubium. de leg. C.

[q] Perkins, tit. Teſtam. c. 7. fol. 94. b.

[r] L. deteſtatio. de verb. ſig. L. pro hærede. de acquir. hæred. ff. Dyer fo. 277. An. Eliz. 10.

[s] Plowd. in caſ. inter Paramor & Yardley, ubi variis arg. ſatagit hoc ipſum confirmare. Dyer fol. 367. Anno Eliz. 22.

[t] Alciat. de præſump. reg. 3. præſump. 36. n. 4, 5. poſt. Alex. in L. Gallus. §. ult. de lib. & poſt. ff. n. 10. & Jo. And. in c. ſi ſuo de offic. del in 6. Maſcard. tract. de probac. concl. 42. n. 30. Plowd. ubi ſupra, fol. 543. b. in fin.

[u] L. legatum. de leg. 2. L. a Titio, de fur. ff.

[x] C. ſtatutum. de teſtam. §. nullus. lib. 3. provincial. conſtitut. Cant. Magna Char. c. 18. Perkin. tit. Deviſe, fol. 97.

[y] Nam declaranti parti credendum eſt, cum dubitatur an ex hac vel illa cauſa rem poſſidebat. DD. in d. L. Gerit. ff. de acquir. hæred. Maſcard. tract. de probac. concl. 47. n. 9.

[z] L. in toto jure. de reg. jur. ff. Maſcard. tract. de probac. concl. 45. num. 29, 37, 57. Gravet. conſil. 197. n. 4.

[a] Sichard. in L. non dubium. C. de lega. n. 13. & Jaſ. in eadem L. lin.

by what Title or Right the ſame was accepted: Nevertheleſs the contrary Opinion, (as I take it) is more agreeable to the Laws of this Realm; namely, that when a Thing is deviſed by the Teſtator to a Man, and the ſame Man made Executor he ſhall be deemed to have accepted the ſame rather as Executor, than as Legatary, whenas it is otherwiſe doubtful and cannot appear by what Title or Right the Thing bequeathed was accepted [b]. As for Example, The Teſtator poſſeſſed of a Term of Years, doth deviſe or bequeath a Leaſe to one for Term of his Life, the Remainder over to another, and doth make the Legatary his Executor, who after the Death of the Teſtator doth prove the Will, and enter, not declaring by what Title or Right, and afterwards makes his Executor, and dieth; after whoſe Death this laſt Executor doth prove the Will of the former Executor, and doth enter to the Leaſe, and take the Profits thereof. In this Caſe the Executor of the Executor, and not the Legatary in Remainder, ſhall enjoy the ſaid Leaſe, by the Opinion of the Temporal Laws [c]: For that it is to be intended, that the former Executor did enter to the ſaid Leaſe and accept thereof as Executor, and not as Legatary [d]. Which Thing nevertheleſs goeth hard with all Teſtators, ſeeing thereby their Teſtaments may eaſily be defeated by their Executors, whoſe Office is to perform the ſame according to the good Meaning of the Teſtator, and the Truſt repoſed in the Executors [e].

[b] Plowd. ubi ſupra. Dyer fol. 277. Anno Eliz. 10.

[c] Dyer ubi ſupra.

[d] Ibidem.

[e] Infra part 6. per totum.

A Man maketh his Will in Writing, and thereby giveth ſeveral Legacies, and deviſes the Reſidue of his Goods and Chattels to his Wife, whom he maketh Executrix, to pay his Debts, and to beſtow for the Health of his Soul: Adjudged the Wife ſhall take as Executrix, and not as Legatee, by Reaſon of the Words, (*viz*) to pay his Debts, and to beſtow for the Health of his Soul, are no more than what the Law ſaith [f].

[f] M. 15 & 16 Eliz. *Hunks* verſus *Alborough*, Moor's Rep. fol. 98. n. 242. Dyer 331. S. C. 1 And. 157. S. C.

If a Man ſeiſed of Lands, and poſſeſſed of a Term, deviſe all his Lands and Tenements to his Executors, until they have paid his Debts and Legacies, and levied all the Charges which they ſhall expend in Suits of Law againſt *J. S.* or others, about the Execution of his Will; he maketh Two Executors, and dieth; the Executors enter generally into the Land and the Leaſe: Adjudged that they take the Leaſe as Executors, becauſe the Words of the Will make no other Declaration than what the Law ſaith without ſuch a Declaration; and they ſhall take the Lands in Fee as Deviſees [g].

[g] H. 36 Eliz. Rot. 46. *Parnel* verſus *Fen*, Moor's Rep. fol. 350. n. 470. Cro. Eliz. 347. S. C. Goldſ. 185. S. C.

What (23) if the Caſe be ſuch, as the Wife cannot make her Teſtament without Licence, and that the Husband doth grant Licence to the Wife to make her Teſtament of a certain Portion of his Goods, (as many Times it hath happened, and may again fall out, by Reaſon of Bonds and Covenants at or before the Marriage,) and that the Wife, ſo licenſed to make a Teſtament, doth firſt make one Teſtament, and afterwards another, and peradventure the Third, or Fourth? Whether ſhall the Licence be extended to the laſt Teſtament, or ſhall it be underſtood of the firſt Teſtament only? For that Teſtament is to be approved by the Ordinary, for the Making whereof the Wife is licenſed. Divers, and thoſe of great Authority, are of Opinion, that the Licence is to be underſtood of the firſt Teſtament, and not

to be extended to any other Teſtament [h]. Others are of this Judgment, that the Licence is to be extended to the laſt Teſtament [i]: Otherwiſe the former Teſtament ſhould be void, becauſe it is revoked by the latter [k], and the latter Teſtament ſhould be void for Want of the Husband's Licence [l]; and ſo no Teſtament at all ſhould take Place: Or if the former Teſtament were not revoked by the latter, as being unlawful, then it muſt be granted that a Teſtament may take Place not only without the Will, but even againſt the Will of the Teſtator [m]; whereas it ought to be directed and ruled according to the Will of the Teſtator, from whence it hath his Life and Being [n]. And although it be ſo, that when Licence is granted to any to do an iterable Act, otherwiſe againſt Law, it ought to be reſtrained to the firſt Act only [o], whereof an hundred Inſtances might be brought [p]: Yet that Rule is to be underſtood, when the firſt Act doth or may take Effect in the Life-time of the Perſon to whom ſuch Licence is granted [q]. But in our Caſe, the Act, that is to ſay, the Teſtament, is of no Force before the Death of the Teſtator [r]; and therefore that ought not miniſter an Impediment, which is without Effect in Law [s].

[h] Socin. conſil. 89. vol. 1. Dec. conſil. 512.
[i] Sarmientus, tract. de redditibus Eccleſiaſt. c. 4.
[k] §. poſteriore. Inſtit. quib. mod. teſt. infir.
[l] Lindw. in c. ſtatut. verb. propriorum ux. de teſta. lib. 3. provincial. conſtit. Cant.
[m] Quod certe valde abſurdum eſt. Quum potius tolerandum ſit ut quis decedat inteſtatus, quam ut teſtamentum contra voluntatem teſtatoris ſuſtineatur. Mantic. de conject. ult. vol. l. 2. tit. 15.
[n] Supra prim. par. §. 3.
[o] L. Boves. §. hoc ſermone. de verb. ſig. ff.
[p] Tiraquel. in repet. d. §. hoc ſermone.
[q] Sarmientus ubi ſupra.
[r] C. Matthæ. de celebr. miſſ. extr.
[s] C. non præſtat. de reg. jur. 6.

Debt upon an Obligation, the Condition was, Whereas the Defendant had taken *A. S.* to Wife, who was a Widow, being poſſeſſed of divers Goods, if he would permit his ſaid Wife to make a Will, and to diſpoſe in Legacies ſo much as would not exceed 50 *l.* and perform what ſhe appointed, that then, *&c.* The Defendant pleaded that ſhe made no Will; whereupon Iſſue was joined. It was found, that ſhe made a Will, and thereby diſpoſed of ſeveral Legacies not exceeding 50 *l.* but that ſhe was a Feme Covert at the Time of the Making of the Will: It was adjudged for the Plaintiff. For although ſhe, being a Feme Covert, could not in Law be permitted to make a Will to diſpoſe of any Goods without the Husband's Aſſent; yet it is a Will within the Intent of the Condition: For the Intent of the Condition was, that ſhe ſhould make a Will to that Purpoſe, notwithſtanding the Coverture; and it is but her Appointment, which the Husband by the Obligation is bound to perform; and the finding that ſhe was a Feme Covert, was not in this Caſe material. *Mich.* 5 *Car. B. R. Marriot* and *Kingman*'s Caſe, *Croke, part* 1. *fol.* 159. Cro. Car. 219.

A Defendant covenanted with the Plaintiff by Indenture, that whereas he intended to marry *E. S.* a Widow, that he would pay all the Legacies which ſhe by her Laſt Will and Teſtament in Writing bearing Date the Firſt of *May* 20 *Eliz.* did give and bequeath, and was bound by Obligation to perform the Covenants in the Indenture. In Debt upon the Obligation the Defendant pleaded, that after the Making of the Will and the Obligation, he intermarried with the ſaid *E. S.* which Marriage continued till her Death, ſo the Will and Deviſe of *E. S.* was void: And demanded Judgment. And it was adjudged, that the Plaintiff ſhould recover: For notwithſtanding it was not a Will to all Intents and Purpoſes, yet the Indenture referreth to that which beareth the Name of a Will. *P.* 26 *Eliz. C. B. Eſton* verſus *Wood*, *Croke, part* 3. *pl.* 9. Cro. Eliz. 27.

A Man in Conſideration of 500 *l.* Portion he was to have in Money and Goods with his Wife, and in Conſideration of the Marriage,

ſettled Lands before Marriage, *inter alia*, to Truſtees for 200 Years, to raiſe 200 *l.* to be paid as the Wife by her Will, or any Writing ſhould direct; the Husband and Wife live together fifteen Years, ſhe made a Will appointing the Payment of the 200 *l.* and died before her Husband; the Appointee brought a Bill for raiſing this 200 *l.* The Husband inſiſted that he never received above 300 *l.* with his Wife, and that his having 500 *l.* was a Condition precedent, and the Conſideration of his diſpoſing of the 200 *l.* But the Court held, that the Conſideration of this Power was not only the Portion, but the Marriage, which alone had been a good Conſideration; moreover, at the Diſtance of fifteen Years, it would be hard to put the Legatee to prove that the Husband had received 500 *l.* with his Wife, wherefore on a Preſumption that he had received the 500 *l.* the 200 *l.* was decreed to be raiſed with Intereſt from the End of the Year after the Wife's Death, and with Coſts. *North* againſt *Anſel*, 2 *Will. Rep.* (618.)

4 Rep. 61. *Force* verſus *Hembling*. Gouldſ. 109. S. C.

A Feme ſole made a Will, and afterwards married, this is a Revocation of her Will, becauſe the Making it is but an Inception thereof, for it hath no Effect till the Death of the Teſtatrix; and therefore it being no perfect Will when ſhe married, and her Will after Marriage being the Will of her Husband, and ſubject to him, ſhe hath wholly revoked the Will ſhe made whilſt ſole.

By the Caſes before-mentioned it appears, that a Feme Covert cannot make a Will properly ſo called, becauſe ſhe is ſo intirely under the Power of the Husband, that ſhe cannot make what in Propriety of Speech is a Will, and therefore by the latter Reſolutions 'tis called an *Appointment*.

And in ſuch Caſes the uſual Way is for the intended Husband to enter into a Bond before Marriage in a Penal Sum, conditioned to permit his Wife to make a *Will*, and to diſpoſe of Money or Legacies to ſuch a Value, and to pay what ſhe ſhall appoint, not exceeding ſuch a Value; and in ſuch Caſe, if after the Marriage, and during the Coverture, ſhe makes any Writing purporting her Will, and diſpoſes Legacies to the Value agreed on, tho' in Strictneſs of Law ſhe cannot make a Will without her Husband's Conſent; yet this is a good Appointment, and the Husband is bound by his Bond to perform what is appointed.

Cro. Car. 376. *Tylly* verſus *Peirce*.

Debt on a Bond conditioned, that whereas the Defendant was about to marry a Widow, and if he ſhould ſurvive, then if within Three Months after her Deceaſe he ſhould pay the Obligee 300 *l.* to and for ſuch Uſes as the Wife by any Writing ſhould appoint under her Hand and Seal, the Obligation ſhould be void; the Defendant pleaded ſhe made no *Appointment*; the Plaintiff replied, ſhe made a Will, and thereby appointed the Payment of ſo much Money, and that the Defendant had not paid it; and upon a Demurrer this Replication was held good; for though, properly ſpeaking, a Feme Covert cannot make a Will without the Aſſent of her Husband after ſhe hath made it, yet this Declaration in a Form of a Will is a good Appointment.

Cro. Car. 597. 2 Roll. Abr. 247. *Sherman* ver. *Lylly*.

So where the Condition was to *permit* the Woman whom he was about to marry to make a Will to ſuch a Value, to be paid within a Year after her Deceaſe; and the Defendant pleaded, that *he did permit her*, &c. this upon a Demurrer was adjudged an ill Plea, becauſe he ought to have pleaded more, (*viz.*) that he had paid the Money, for otherwiſe the whole Condition was not anſwered.

Where the Husband conſents that his Wife ſhall make a Will, a little Matter will be ſufficient to prove it; as for Inſtance, if he tells the Executor, that he approves the Choice his Wife made in appointing him Executor: So likewiſe a little Matter will prove the Continuance of ſuch Aſſent; but it will be needful for the Husband to prove his Diſaſſent in a ſolemn Manner. 2 Mod. 170. *Brook* ver. *Sir Will. Turner.*

If a Woman has Pin-money or a ſeparate Maintenance ſettled on her, and ſhe by Management or good Houſe-wifry ſaves Money out of it, ſhe may diſpoſe of ſuch Money ſo ſaved by her, or of any Jewels bought with it, by Writing in Nature of a Will, if ſhe die before her Husband, and ſhall have it herſelf if ſhe ſurvive him, and ſuch Jewels, *&c.* ſhall not be liable to the Husband's Debts. *Paſ.* 1692. *Herbert* and *Herbert.* And the Precedent of Sir *Paul Neal*'s Caſe was cited to the ſame Purpoſe; the Wife was allowed what ſhe had ſaved out of her Pin-money againſt the Deviſee of the real Eſtate. *Mich.* 1694. *Milles* and *Wikes.*

§. X. Of thoſe who be Deaf and Dumb.

1. *Some Perſons are both deaf and dumb; others deaf, but not dumb; and others again dumb, but not deaf.*
2. *Whether he who is both deaf and dumb may make a Teſtament.*
3. *Whether he may make a Teſtament who is deaf, but not dumb.*
4. *Whether he may make a Teſtament who is dumb, but not deaf.*

WHere it is ſaid, that ſome Perſons cannot make a Teſtament by Reaſon of the Defect of ſome of their principal Senſes [t]; that we may the better underſtand who thoſe be, we are to note, (1) that ſome Perſons can neither hear nor ſpeak; others can ſpeak, but not hear; ſome again can hear, and not ſpeak [u]. Touching the firſt Sort, (2) that is to ſay, thoſe which are both deaf and dumb, if any be ſo by Nature, then can he not make any Kind of Teſtament or Laſt Will [x]; unleſs it do appear by ſufficient Arguments, that he underſtandeth what a Teſtament meaneth, and that he hath a Deſire to make a Teſtament: For if he have ſuch Underſtanding and Deſire, then he may by Signs and Tokens declare his Teſtament [y]. If he be not deaf and dumb by Nature, but being once able to hear and ſpeak, if by ſome Accident afterwards he loſeth both his Hearing and the Uſe of his Tongue; then in caſe he be able to write, he may with his own Hand write his Teſtament or Laſt Will, and ſo by Art ſupply the Defect of Nature [z]. But if he be not able to write, then is he in the ſame Caſe that they are which be both deaf and dumb by Nature; that is to ſay, if he have Underſtanding, he may make his Teſtament by Signs, otherwiſe not at all [a].

[t] Supra ead. part. §. j.

[u] Minſing. in §. Item ſurdus. Inſtit. quibus non eſt permiſſum teſta. fac.

[x] L. diſcretis. C. qui teſta. fac. poſſ. §. Item ſurdus. Inſtit. quibus non eſt permiſſ. teſta. fac.

[y] Dec. in d. L. diſcretis. Tiraquel. de privileg. piæ cauſæ, c. 9. Hoc ſcilicet ſubintellecto, ut in confectione teſtamentorum Anglicorum ſufficiat probatio juris gentium. Id quod non ſemel dixi, ſed & ſæpius eſt dicendum.

[z] d. §. Item ſurdus. Inſtit. quibus non eſt permiſſ. teſta. fac. d. c. 15. piæ cauſæ.

[a] Dec. in d. L. diſcretis. Tiraquel. de privileg.

Such (3) as can ſpeak, and cannot hear, may make their Teſtaments, as if they could both ſpeak and hear: And 'tis not material, whether that Defect came by Nature, or otherwiſe [b]. But there is none found ſo deaf, but that he is able to hear ſomewhat, if not the crying Voice of a Man, yet the loud Voice of ſome Inſtrument, as

[b] Minſing. in d. §. item ſurdus.

of

of a Horn, or a Trumpet, or a Gun [c]. And if he can ſpeak, it is certain that he could once hear, otherwiſe if he could never have heard, he could never have ſpoken: For how could he be inſtructed to ſpeak, if he could never hear [d]?

Such (4) as be ſpeechleſs only, and not void of Hearing, if they can write, may very well make their Teſtaments themſelves by Writing; or may alſo make their Teſtaments by Signs, ſo that the ſame Signs be well known to ſuch as then be preſent [e].

By the Civil Law, he who is deaf and dumb from his Birth, or otherwiſe, and who can neither write or read, being incapable of giving any Sign of his Will, is incapable of making one; but if one, who during the Time that he was neither deaf or dumb, had made a Will in due Form, and afterwards happens to fall under thoſe Infirmities, tho' this Accident renders him incapable of confirming his Will, or altering it, yet the Will ſtill ſubſiſts.

And by the antient Law, he who was deaf and not dumb, and he who was dumb and not deaf, could not make a Will, becauſe he who was deaf could not hear the Perſons, whoſe Preſence was neceſſary to the Making his Will; and he who was dumb could not explain his Intention to the Witneſſes: But with Leave from the Prince they might make a Will. 2 *Dom.* 13. *par.* 7.

[c] Paul. de caſtr. & Jaſ. in d. L. diſcretis.

[d] DD. in d. L. diſcretis, & in d. §. Item ſurdus.

[e] DD. in L. diſcretis.

§. XI. Of a blind Man.

1. *A blind Man may make a nuncupative Teſtament.*
2. *Whether a blind Man may make a written Teſtament.*

HE that (1) is blind may make a nuncupative Teſtament, by declaring his Will before a ſufficient Number of Witneſſes [f]. But (2) he cannot make his Teſtament in Writing, unleſs the ſame be read before Witneſſes, and in their Preſence acknowledged by the Teſtator for his Laſt Will. And therefore if a Writing were delivered to the Teſtator, and he, not hearing the ſame read, acknowledged the ſame for his Will, this were not ſufficient; for it may be that if he ſhould hear the ſame, he would not own it [g].

[f] Sed an requirantur omnes ſolennitates, de quibus in L. hac conſultiſſima. C. qui teſta. fac. poſſ. Et videtur eas adhiberi debere, quia, communi Doctorum opinione, ſolennitatis hujus L. adhibenda eſt vel in teſtamento ad pias cauſas a cæco condito; nec alias quicquam valet. Graſſ. Theſaur. com. op. §. teſtm. q. 31. Ego vero adhæreo Alex. Jaſ. Decio, Sichardo, & aliis in ead. L. hac conſultiſſima, & Tiraquel. qui putarunt hanc ſolennitatem non eſſe neceſſariam in hujuſmodi teſtamento, ſed ſufficere probationem juris gentium: & hanc opinionem recepit generalis regni noſtri conſuetudo.

[g] DD. in d. L. hac conſultiſſima. C. qui teſta. fac. poſſ.

By the Civil Law, Perſons who are blind, whether born ſo, or not, may make a Will, tho' they can neither write or read, for they may ſignify their Will, and have it ſet down in Writing; and declare in the Preſence of * Three Witneſſes, that what they have got reduced into Writing, and which was read in the Preſence of the Witneſſes, is their Laſt Will, which ſhall have its Effect, being ſigned by the Witneſſes. 2 *Dom.* 27. *par.* 20.

* *By the Civil Law 'tis Seven Witneſſes.*

§. XII. Of Traitors.

1. *Traitors loſe both their Lives, Lands and Goods, and conſequently are inteſtable.*

2. *Traitors are inteſtable not only from the Time of their Conviction, but from the Time of the Crime committed.*
3. *A Traitor pardoned and reſtored may make his Teſtament.*

OF thoſe who are prohibited to make their Teſtaments, as Malefactors, Traitors may be firſt mentioned, becauſe they are moſt pernicious to the Commonwealth, and are moſt worthy the firſt Place in Puniſhments.

Underſtand (1) therefore, that whoſoever is lawfully convicted of High Treaſon, by Verdict, Confeſſion, Outlawry or Preſentment, beſides the Loſs of his Life, ſhall forfeit to the Prince all his Goods and Chattels, and all ſuch Lands, Tenements and Hereditaments, as he ſhall have in his own Right, Uſe, or Poſſeſſion, of any Eſtate or Inheritance, at the Time of ſuch Treaſon committed, or at any Time after [h]; and ſo conſequently is inteſtable [i]. Inſomuch (2) that Traitors are not only deprived of making any Teſtament, or other Kind of Laſt Will, from the Time of their Conviction; but alſo the Teſtament before made doth by Reaſon of the ſame Conviction become void, both in reſpect of Goods, and alſo in reſpect of Lands, Tenements and Hereditaments [k].

[h] Stat. Ed. 6. an. 5. c. 11.
[i] L. quiſquis. §. j. C. ad L. Jul. majeſt. L. ſi quis. de injuſt. teſt. L. nemo. ff. de leg. 1. Vaſq. de ſucceſſ. progreſſ. lib. 1. §. j. n. 165. qui multis ampl. hanc concl. ornat.
[k] Stat. Ed. 6. an. 5. c. 11. DD. in d. L. nemo. de leg. 1. ff. & Vaſq. ubi ſupra.

It is very true, that one who is attainted or convicted of Treaſon, cannot make a Will of Lands or Goods for the Reaſon before-mentioned, (*viz.*) becauſe they are forfeited; but if he is only indicted, and die before Attainder, his Will ſhall be good for both.

So if (3) any Perſon being attainted of Treaſon obtain the Prince's Pardon, and be thereby reſtored to his former Eſtate; then may he make his Teſtament, as if he had not been convicted [l]: Or if he made any before his Conviction and Condemnation, the ſame by Reaſon of ſuch Pardon recovereth his former Force and Effect, as hereafter is more fully declared [m].

[l] L. ſi quis. §. quatenus. ff. de injuſt. rupt. & irrit. teſta.
[m] Infra 7 part. §. xvij.

But if a Traitor hath Goods as Executor to another, the ſame are not forfeited; whence it follows, that of ſuch Goods he may make his Will.

§. XIII. Of Felons.

1. *Felons loſe Life and Goods, and ſo be inteſtable.*
2. *Who ſhall have Felons Lands.*
3. *Whether he that is only indicted of Felony may make his Teſtament.*
4. *Whether he that ſtandeth mute may make his Teſtament of his Lands.*
5. *Whether a Man, after he is apprehended for Felony, may make his Teſtament.*
6. *Felons Goods not to be ſeiſed before Attainder.*
7. *The Teſtament of a Felon convicted is void, though he be never executed.*

IF any Perſon (1) be condemned of Felony, he ought to ſuffer Death, and the Prince ſhall have all his Goods, whereſoever they be found [n]. And if he (2) have any Freehold, it ſhall forthwith be ſeiſed into the Prince's Hands, and he ſhall have the Profit thereof by the Space of a Year and a Day, and alſo Waſte [o]: And after the Prince hath had it the Year and the Day and Waſte, the Land ſhall be reſtored to the chief Lord of the Fee; except in certain Places, as in the County of *Gloceſter*, where after a Year and a Day the Lands and Tenements of Felons ſhall revert to the next Heir to whom it ought to have deſcended, if the Felony had not been committed [p]: Or in *Kent* in *Gavelkind*, whereas it doth deſcend to all the Heir Males, equally to be divided, or to the Daughters, where there be no Sons, to be divided amongſt them. For there it is ſaid, *The Father to the Bough, and the Son to the Plough* [q]. Felons therefore lawfully convicted cannot make any Teſtaments, or other Diſpoſitions of any Goods or Lands, whereof (as we ſee) the Law hath diſpoſed already [r].

[n] Stat. Eliz. an. 5. c. 14. *Terms of Law*, verb. *Robbery*.

[o] Prærog. Reg. c. 16. Eliz. an. 5. c. 14.

[p] Prærog. Reg. c. 16.

[q] Eod. c. 16.

[r] Duplici ratione damnatus ad mortem fit inteſtabilis, nimirum, bonorum publicatione, & damnatione ad mortem. Damnatus autem ad mortem naturalem efficitur ſervus pœnæ, quod communi opinione nititur, adverſus eos qui exiſtimarunt ingenuum hodie non effici ſervum pœnæ hujuſmodi damnatione: ſed procedit prior opinio, ſive quis damnatus ſit ſecundum jus commune, ſive etiam ſecundum ſtatutum alicujus loci. Jul. Clar. §. teſtm. q. 21. Covar. in Rub. de teſta. extr. part. n. 7. Michael Graſſ. Theſaur. com. op. §. teſtm. q. 16.

But (3) if any Man be indicted only of Felony, and die before he be convicted or attainted, he may make his Teſtament of his Goods, and alſo of his Lands [s]. Or if (4) he be indicted at the Prince's Suit, and ſo being arraigned upon that Indictment, will not anſwer, but ſtandeth mute or dumb, whereupon he is to receive Pain (as it is termed) *Forte* and *Dure*, and be preſſed to Death [t]: In this Caſe his Goods only be confiſcate, but not his Lands [u]; and therefore in this Caſe I ſuppoſe he may make his Teſtament of his Lands [x].

[s] Quia non condemnatus non reperitur prohibitus. Vide Stat. R. 3. an. 1. c. 3.

[t] Doct. & Stud. l. 2. c. 41.

[u] Ibidem. Stanf. pl. Coron. fol. 139, 185. Inſt. part. 1. fol. 391.

[x] Quia viz. non prohibetur, quod non condemnatur.

If a Felon (5) be indicted, and afterwards be attainted by Verdict or Confeſſion, the Time of the Fact committed compriſed in the Indictment is to be regarded in reſpect of his Lands: But in reſpect of his Goods, the Time of his Judgment [y]. And therefore if before Judgment he do ſell, give, or otherwiſe alienate his Goods, ſuch Sale, Gift or Alienation is good [z]. Neither (6) may the Sheriff or other Perſon take or ſeiſe the Goods of any Perſon arreſted and impriſoned, before the ſame Perſon be convicted or attainted of Felony, according to the Law, or that the Goods be otherwiſe lawfully forfeited [a]. Howbeit, if he make his Teſtament before the Condemnation, foraſmuch as the Teſtament is not good before his Death [b], ſuch Diſpoſition being prevented by Judgment or Condemnation is made fruſtrate [c]; inſomuch, that if the (7) Teſtator being convicted of Felony be never executed, for that perhaps he dieth in Priſon, or eſcapeth out of Prſon and dieth naturally; yet is the Teſtament void by Force of the Condemnation, unleſs he do obtain his Pardon, and therewithal full Reſtitution to his former Eſtate [d].

[y] Perk. tit. Grants, fol. 6. Inſt. part. 1. fol. 391. Stat. de catallis felonum. vet. Mag. Chart. fol. 66. part. 2. 40 E. 3. 11. 3 E. 3. Coron. 65. Dame *Hale*'s Caſe. Pl. com. fol. 262.

[z] Perkins ubi ſupra. concordat jus Civile. L. poſt contractum. ff. de donac. cum diſtinctione tamen, ut per Bar. in d. L. Graſſ. §. teſtm. q. 26.

[a] Stat. R. 3. an. 1. c. 3. 8 E. 4. fol. 4. Brook tit. Forfeiture, pl. 58, 89. Stanf. pl. Coron. fol. 152. lib. 5. fol. 110. *Foxlie*'s Caſe. 7 H. 4. 11. 1 R. 3. c. 3.

[b] c. Matthæ. de celeb. miſſ. extr.

[c] Panor. in Rub. de teſta. extr. Jul. Clar. §. teſtm. q. 21. Graſſ. §. teſtm. q. 26. Vaſq. de ſucceſſ. reſol. lib. 1. §. 6. n. 18.

[d] L. ſi quis. §. quatenus. ff. de injuſt. teſta.

§. XIV. Of Hereticks.

1. *An Heretick cannot make a Teſtament.*
2. *Whether, and when doth an Heretick forfeit his Lands or Goods.*
3. *Whether is the Teſtament good, if the Heretick were never convicted,*
4. *An Heretick may be condemned after his Death.*
5. *Whether an Heretick, having reclaimed his Hereſy, may make a Teſtament.*

AN (1) Heretick cannot make a Teſtament [f]. And though by the Laws and Cuſtoms of this Realm, an (2) Heretick do not forfeit his Lands, unleſs, being delivered to Lay-mens Hands, he be executed for his Hereſy [g], nor his Goods, unleſs, being convicted of Hereſy, he be delivered to Lay-mens Hands [h]: Yet if he be convicted, and publickly excommunicated, though not as yet delivered, he cannot make a Teſtament of his Goods or Chattels [i].

[f] Auth. credentes. C. de hæret. Lindw. in c. 1. de hæret. Vaſq. de ſucceſſ. reſoluc. lib. 1. §. iiij. n. 23. Simo de Prætis de inter. ult. vol. l. 2. dub. 1. ſoluc. 4.

[g] Doct. & Stud. lib. 2. c. 29. 51. fol. 157. Brook tit. Forfeiture, n. 110.

[h] Ibidem.

[i] Bar in d. Auth. credentes. Graſſ. §. teſtm. q. 24. Clar. §. teſtm. q. 24. Gabr. com. conſ. lib. 4. tit. de teſta. c. 1. Quære tamen p. Stat. 2 H. 5. c. 7.

If he (3) were never convicted of Hereſy, and yet die an undoubted Heretick; in this Caſe it may ſeem that his Teſtament is void in reſpect of his Goods; the rather by Force of the Excommunication, into the which by Reaſon of his Hereſy he did fall *ipſo facto* [k]; eſpecially if in his Life-time he were ſo publickly denounced [l]: Yea tho' he were not ſo denounced, yet (4) ſo odious is the Crime of Hereſy, that he may be condemned of Hereſy after he be dead [m]; at leaſt the Exception of Inteſtability may be oppoſed againſt the Probate of the Teſtament [n]. If the (5) Teſtator reclaim his Hereſy, then he is not inteſtable, although he did not reclaim the ſame before Condemnation, ſo that he do it before he be delivered to the ſecular Power [o]. But howſoever he recover Ability to make a Teſtament, which reclaimeth his Hereſy; yet the Teſtament made by an Heretick, whiles he perſiſteth in his Hereſy, doth not recover any Force by ſuch Recantation [p]. And if he fall again into the Hereſy, by ſuch Relapſe he doth incur all the Puniſhments whereunto he was ſubject before; neither is his Recantation any more to be accepted [q].

[k] Abolend. de ſen. excom. ext. Lindw. in d. c. 1. de hæret. & infra ead. part. §. 18.

[l] At non ſufficit excommunicatio, etiam ob crimen quo efficitur quis inteſtabilis, niſi ſit publicata, ſi verum dicat Simo de Prætis de interp. ult. vol. lib. 2. fol. 148. n. 75.

[m] c. Sane profertur. q. 2. L. ex judiciorum. ff. de accu. L. Manichæos. C. de hæret. c. urgentis. de hær. extr. Jul. Clar. §. hæreſis, n. 21. Ægid. Boſſ. tract. var. tit. de hæret. Bellam. Dec. 677. cum ſeq.

[n] Per ea quæ habet Dec. in L. 1. de ſecundis nuptiis. C. num. 7. Cardinal. in clem. eos de ſepultur. q. 19. & infra ead. part. §. 18.

[o] Hoc tamen jure quo nos utimur, nam jure civili reclamans poſt hæreſin poſt ſententiam ſolum evitat pœnam mortis. Panor. in c. pen. de hæret. extr. Boer. deciſ. 343. Boſſ. tract. var. tit. de hæreticis.

[p] Simo de Prætis de interp. ult. vol. li. 2. dub. 1. ſoluc. 4. n. 56. cujus rei ratio eſt, quia teſtm. fuit ab initio nullum.

[q] Clar. Boſſ. Carerius, Grillandus, & alii de Hæreticis.

Nota; The Statute made 2 *H.* 5. *c.* 7. whereby the Forfeiture of Lands in Fee-ſimple and Goods and Chattels were given in Caſe of Hereſy, ſtandeth repealed by the Statute 1 *Fliz. c.* 1. The Books which ſpeak of Forfeiture are grounded upon the ſaid Statute 2 *H.* 5. which then ſtood in Force; ſaving 5 *R.* 2. which was before that Statute. For neither Lands nor Goods before the Making of that Statute of 2 *H.* 5. were forfeited by the Conviction of Hereſy, becauſe the Proceeding therein is merely ſpiritual, and *pro ſalute animæ*, and in

Libro 5. fol. 25. *Cawdry's* Caſe. Inſt. part. 3. fol. 43.

in a Court that is no Court of Record: And therefore the Conviction of Hereſy worketh no Forfeiture of any Thing that is temporal, *viz.* of Lands or Goods.

But now by the Statute 29 *Car.* 2. *cap.* 9. the Writ *de hæretico comburendo*, with all the Proceedings thereon, and all Puniſhments by Death, in Purſuance of any Eccleſiaſtical Cenſures, are from thenceforth utterly aboliſhed.

§. XV. Of an Apoſtata.

1. *An Apoſtata cannot make a Teſtament.*
2. *An Apoſtata worſe than an Heretick.*
3. *Who is an Apoſtata.*
4. *The State of the Heretick and of the Apoſtata damnable.*
5. *Three Kinds of Apoſtaſy.*
6. *Every Apoſtata is not inteſtable.*

THAT (1) which hath been ſpoken of an Heretick may alſo be verified of an Apoſtata [r]. For he is (2) as bad, or rather worſe and more execrable [s]. For (3) an Apoſtata is he which doth wholly ſtart back from the Chriſtian Faith, which once he did profeſs, and wherein he was once baptized; and becometh in Profeſſion a *Jew* or a *Turk*, or ſome other Infidel, approving their deteſtable Rites and Superſtitions [t]: Whereas an Heretick, albeit he do obſtinately perſevere in his Error, yet he erreth not wholly, but particularly in ſome Part of the Chriſtian Religion [u]. Both in Truth are abominable, and the (4) State of either miſerable and damnable. But of the Two the Apoſtata is more horrible; and better were it never to have known the Way of Truth, than, after the Knowledge thereof, to reject it, or ſtart away from it [x]. Worthily therefore is the Apoſtata to be as ſeverely puniſhed as an Heretick [y].

[r] L. 1, 2 & 3. C. de Apoſtat. Summa Hoſtienſ. tit. de Apoſtat. §. qualiter.
[s] Weſenb. in tit. de apoſt. C. L. ult. C. eod.
[t] Summa Hoſtienſ. tit. de Apoſtat. extr. c. non poteſt. 2. q. 7. c. quidam de apoſtat. &c. contra Chriſtianos. de hæret. 6.
[u] Summa Hoſtienſ. tit. de hæret. & de Apoſtata.
[x] 2 Epiſt. Petr. c. 2. v. 21. Epiſt. Paul. ad Hebræos c. 6. ver. 6.
[y] Panor. in c. 1. de apoſtat. extr.

There (5) be Three Kinds of Apoſtaſy; *Perfidiæ*, *Inobedientiæ*, *Irregularitatis*; one of Misbelief, another of Diſobedience, the Third of Irregularity [z]. Apoſtaſy of Misbelief is, when a Man doth utterly forſake the Chriſtian Belief, as Mention is made before: So did *Julian* the Apoſtata. Apoſtaſy of Diſobedience is, when the Subject refuſeth to obey the lawful Commandment of his Ordinary or Superior [a]: And ſo do many Anabaptiſts at this Day. Apoſtaſy of Irregularity is, when he that hath entered into the Miniſtry, and taken Holy Orders, forſaketh his Spiritual Profeſſion, and becometh not in Habit only, but in Actions, a Lay-man [b]. But (6) I ſuppoſe that an Apoſtata from Obedience, or from Spiritual Profeſſion, is not diſabled to make his Teſtament [c], though he be worthily ſubject to other grievous Puniſhments [d].

[z] Summa Hoſtienſ. tit. de apoſtat. §. quot ſpecies.
[a] Summa Hoſtienſ. tit. de apoſtat. Epiſt. ad Heb. c. 13. ver. 17.
[b] c. a nobis de apoſt. extr.
[c] Bar. in Rub. de apoſta. C.
[d] De quibus Ab. in c. 1. de apoſta. extr. & Hoſtienſ. ſumm. eod. tit. §. qualiter puniantur.

§. XVI. Of Uſurers.

1. *A manifeſt Uſurer cannot make a Teſtament.*
2. *Every Uſurer is not inteſtable.*
3. *Who is a manifeſt Uſurer.*
4. *Whether one Act may make an Uſurer to be manifeſt.*
5. *Whether he be an Uſurer which lendeth for Gain, but doth not receive any more than the Principal.*
6. *An Uſurer is not inteſtable in* England, *unleſs he take above Ten in the Hundred for a Year's Forbearance, or after that Rate.*
7. *The Puniſhment for Uſury in* England.
8. *A manifeſt Uſurer is not to be buried in any Church or Church-yard.*

A *Manifeſt* (1) *Uſurer* cannot make a Teſtament: And though he make one, it is void in Law concerning Goods and Chattels, unleſs he ſatisfy for the Uſury, or put in Caution for Satisfaction to be made[e].

[e] c. quanquam. de uſur. l. 6. Clar. §. teſtm. q. 26. Michael Graſſ. Theſaur. com. op. §. teſtm. q. 33.

Where it is (2) ſaid, a *manifeſt Uſurer*, we are to note, that not every Uſurer is excluded from making a Teſtament, but a *manifeſt Uſurer only*[f]; that is to ſay, (3) ſuch an One as hath been condemned for an Uſurer, or hath publickly confeſſed that he hath taken Uſury, or is publickly reputed and taken for an Uſurer amongſt his Neighbours, who are preſumed to know his Life and Converſation[g]. The Verity of the Fact, and Exerciſe of the Trade of Uſury, being the Foundation of the Fame and common Opinion that he was an Uſurer[h]. In which Caſe he being not only an Uſurer, but a manifeſt Uſurer, exerciſing that Trade, not privately only, but publickly, his Teſtament is void in Law[i]: Unleſs he made Reſtitution or Satisfaction for the ſame in his Life-time[k], or elſe Caution be entered for Reſtitution or Satisfaction to be made after his Death[l].

[f] d. c. quanquam. & ibi. Gloſſ. & DD.

[g] Gem. & Franc. in d. c. quanquam.

[h] Ubi conſtat de veritate exercitii uſurarum, & talis veritas fortificatur per famam populi ſe illi conſonantem vel confirmantem, per tales probationes ſimul junctas inducitur probatio manifeſt. quoad finem, de quo in c. quanquam. de uſur. 6. Jo. de An. in c. 3. n. 3. de uſur. ext. quem vide n. 4. Panor. conſil. 2. l. 2.

[i] Menoch. de Arbit. Jud. l. 2. caſ. 235. Maſcard. de probac. concluſ. 1418. Alphonſ. Villag. Tract. de uſur. q. 35. n. 2 & 3.

[k] Ed. ca. quanquam. de uſur. lib. 6.

[l] Beroius in cap. Quam omnibus. de uſur. ext. n. 52.

And (4) though ſome are of this Opinion, that a Man cannot be ſaid to be a *manifeſt Uſurer*, unleſs he have divers Times taken Uſury[m]; yet that Opinion is not held for ſound amongſt the Writers of the Eccleſiaſtical Laws; who think that a Man may be a *manifeſt Uſurer* by one only Act, the ſame being publick and manifeſt[n]. Again, our Uſurers here in *England* deal ſo cunningly, under the Cloak of other Contracts, avoiding the odious Name of an Uſurer, and Profeſſion of Uſury, that though they practice nothing more, yet (by Reaſon of the Colour wherewith their Actions are dyed, they eſcape the Puniſhment of Law) nothing can be more hardly proved, than that they be *manifeſt Uſurers*; ſo that a Man may truly ſay, *Non deficit jus, ſed probatio:* Wherein what Proof is ſufficient in this Caſe, over and above the Proofs formerly deſcribed, is left unto the Wiſdom of the Judge[o]. Nevertheleſs (5) it is not ſufficient in

[m] Bar. in. L. 3. de furt. ff.

[n] Card. in clem. eos. de ſepul. q. 19.

[o] Menoch. d. Caſ. 135. in prin. & fin.

Law, to deprive a Man of the Authority or Liberty of Making a Teſtament, becauſe he hath lent his Money or Goods to Uſury, unleſs he have taken Increaſe over and above the Principal [p]. Neither (6) is it ſufficient to have taken Uſury, and that *manifeſtly*, to the Effect of Making the Uſurer inteſtable, unleſs he have received above the Sum of * *Ten Pounds for the Loan or Forbearing of an Hundred Pounds for one Year, or after that Rate.* * The Sum of 10 *l.* Intereſt for the Forbearance of 100 *l.* for one Year, is by Virtue of the Statute 37 *H.* 8. and this was reduced to 8 *l. per Cent.* by the Statute 21 *Jac. cap.* 7. and afterwards to 6 *l. per Cent.* by the Statute 12 *Car.* 2. and now by the Statute 12 *Annæ*, 'tis enacted, that no Perſon ſhall upon any Contract take for Loan of Money, or any Commodity, above 5 *l.* for the Forbearance of 100 *l.* for one Year, and after that Rate for a greater or leſſer Sum, or for a longer or ſhorter Time; and all Bonds, Contracts, Aſſurances, *&c.* for Money lent at Uſury, where there ſhall be more taken, ſhall be void, and the Offender ſhall forfeit treble the Value of the Money, Wares, and other Things ſo lent, bargained or exchanged.

And no *Scriveners*, *Brokers*, *Solicitors*, or *Drivers of Bargains*, ſhall take more than 5 *s.* for 100 *l.* for one Year, for Brokage or procuring the Loan or Forbearance of any Sum of Money, and ſo rateably, *&c.* on Forfeiture of 20 *l.* with Coſts of Suit to the King and the Informer, who will ſue for it in the County where the Offence was committed.

But tho' all Uſury is condemned by the Laws and Statutes of this Realm, as unlawful [q]: Yet nevertheleſs every Kind of Uſury is not puniſhable with like Penalty. For if any do receive Uſury only after the Rate of Ten Pounds in the Hundred for a Year's Forbearance, or under that Rate, he ſhall only forfeit ſo much as ſhall be reſerved or received by Way of Uſury above the Principal [r]: But if any ſhall receive above that Rate, he doth not only loſe his Principal, together with the Intereſt, but is alſo to be puniſhed and corrected according to the Laws Eccleſiaſtical [s]. By (8) which Laws, if any be a *manifeſt Uſurer*, not only his Teſtament is void, as is aforeſaid, but his Body, after he is dead, is not to be buried amongſt the Bodies of other Chriſtian Men, in any Church or Church-yard, until there be Reſtitution or Caution tendered according to the Value of ſuch Goods [t].

Si quis de uſura convictus fuerit, omnes res ſuas amittat [u].

Uſurarii omnes res, ſive teſtatus ſive inteſtatus deceſſerit, regis ſunt [x].

Manifeſtus uſurarius eſt inteſtabilis [y].

By the old Laws of King *Alfred*, *&c.* it was ordained, that the Chattels of Uſurers ſhould be forfeited to the King, their Lands and Inheritances ſhould eſcheat to the Lords of the Fees, and they ſhould not be buried in the Sanctuary [z].

[p] Dom. & Franc. in d. c. quanquam. de uſur. l. 6. Ripa reſponſ. 116.

37 H. 8. cap. 9.
13 Eliz. cap. 8.
21 Jac. cap. 17.
12 Car. 2. cap. 13.
12 Annæ, cap. 16.

[q] d. Stat.

[r] Ibid.

[s] Eod. Stat. Eliz. an. 13. c. 8.

[t] d. c. quanquam. de uſur. 6.

[u] See the Cuſtome de Norm. c. 20. Inter leges S. Edw.

[x] Glanvil, lib. 7. c. 16.

[y] Fleta, lib. 2. c. 50.

[z] Major c. 1. §. 3. c. 5. §. 1. Parl. 50 E. 3. n. 58. Fleta, lib. 2. c. 1. Bract. l. 3. f. 116, 117.

§. XVII. Of inceſtuous Perſons.

1. *Whether inceſtuous Perſons may give any Thing by their Teſtament, and to whom.*
2. *What Marriages be inceſtuous.*

3. *What Degree of Conſanguinity doth hinder Marriage.*
4. *Certain Caſes wherein the Teſtators may bequeath ſomething to their inceſtuous Children.*

HE (1) who doth contract inceſtuous Marriage is prohibited to diſpoſe any Goods or Chattels by his Laſt Will either to his Children begotten in ſuch Marriage, or to any other Perſon [a]; ſaving to his Children begotten in lawful Marriage, (if he have any by a former Wife,) or to his Parents, or to his Brother, or Siſter, or to his Uncle, or Aunt [b]. By (2) inceſtuous Marriage, in this Place, I underſtand ſuch Marriages as are ſolemnized betwixt a Man and a Woman, being of Kindred or Alliance the one to the other within thoſe Degrees of Conſanguinity or Affinity within which it is not lawful to marry [c]; that is to ſay, within the *Levitical* Degrees, or the Degrees prohibited by God's Law. The Words of which Law are, [d] ff. *Thou ſhalt not uncover the Nakedneſs of a Woman and her Daughter, neither ſhalt thou take her Son's Daughter, or her Daughter's Daughter, to uncover her Nakedneſs, for they are her near Kinſwomen*; now in this Prohibition none of the Wife's Kindred are mentioned, but her Daughters, and yet her Mother and her Siſter are both comprehended within the Reaſon thereof, becauſe they are her near Kinſwomen.

[a] L. ſi quis. C. d. inceſt. nup.

[b] d. L. ſiquis. Per liberos autem intellige non ſolum filium & filiam, ſed nepotem & neptem, & deinceps alios utriuſque ſexus deſcendentes: & per parentes, non ſolum patrem & matrem, ſed etiam avum, aviam, & alios aſcendentes. Accurſ. Bald. & alii in d. L. ſi quis. Simo. de Prætis de in ult. vol. l. 2. dub. 1. ſoluc. 4. n. 92.

[c] Covar. de ſponſ. & matrim. 2 part. c. 6. §. 8. c. lex illa. §. inceſtus 36. q. 1.

[d] Leviticus 18, ver. 17.

But the *Wife's Siſter's Daughter* is not within the *Levitical* Degrees; and ſo it was adjudged upon Conſideration of the Statute 32 *H.* 8. *c.* 38. where a Man married his Wife's Siſter's Daughter; but it was otherwiſe adjudged in [e] *Man*'s Caſe, where after the Marriage the Parties were divorced, becauſe the Man married his Wife's Siſter's Daughter; 'tis true, Serjeant *Moor*, who reports the ſame Caſe, tells us, that ſuch Marriage is not prohibited, becauſe 'tis not within the *Levitical* Degrees; but the Lord Chief Juſtice [f] *Vaughan* held that to be no Manner of Reaſon, becauſe ſome Marriages muſt be prohibited which are not mentioned amongſt thoſe Degrees, as the Father from marrying his Daughter, the Grandſon from marrying his Grandmother, and the Uncle from marrying his Brother's or Siſter's Daughter.

Peirſon's Caſe, 1 Inſt. 235. 4 Leon. 16. S. C. See *Honour* verſus *Bradſhaw*, 3 Lev. 364. S. P.

[e] Cro. Eliz. 228. Moor 907.

[f] Vaugh. Rep. 321.

The Suit in the Conſiſtory Court of the Archbiſhop of *York* was to diſſolve a Marriage between the Husband and his *Wife's Siſter's Daughter*; Serjeant *Levinz* tells us, it was with his *Wife's Daughter*; and Juſtice *Raymond*, who reports the ſame Caſe, ſays, it was with his *Siſter's Daughter*; but be it as it will, the *Serjeant* reports, that a Prohibition was granted, becauſe it was not within the *Levitical Degrees*; 'tis true, 'tis not ſo expreſly in Words, but 'tis within the ſame Reaſon of the Prohibition in the xviii *Chap. ver.* 14. where the *Nephew* is expreſly forbid to marry his *Father's Brother's Wife*, becauſe ſhe is his Aunt; and for the ſame Reaſon in the principal Caſe, the Husband muſt be prohibited to marry his Wife's Siſter's Daughter, becauſe he is her Uncle; and in arguing this Matter, one of the Judges cited *Allington*'s Caſe, where it was held incongruous, for the *Nephew to marry the Aunt*, becauſe ſhe, who is ſuperior to her Husband in Parentage, muſt be inferior to him in Marriage; but the Reaſon is not the ſame where the *Uncle marries* the [g] *Niece*, becauſe he is ſuperior to her in both theſe Reſpects.

Wortley v. *Watkinſon*, Raym. 464. T. Jones 118. 2 Lev. 254.

[g] *Clement* v. *Beard*, 5 Mod. 448. S. P. otherwiſe adjudged.

The

Hill verſus *Good*, Vaughan 302.

The Queſtion in this Caſe was, whether a Man after the Death of his Wife might lawfully marry *her Siſter*; the Chief Juſtice *Vaughan*, and the whole Court of Common Pleas held, that ſuch Marriage was unlawful, becauſe 'tis expreſly prohibited in the[h] 18th Chapter of *Leviticus*, for to marry the *Wife's Siſter* is prohibited in ſame Degree of Affinity, by theſe Words, (*viz.*) *Thou ſhalt not take a Wife to her Siſter to vex her, to uncover her Nakedneſs, beſides the other during her Life*; but admitting 'tis not within the *Levitical* Degrees, if the Marriage is had after the Death of the Wife, yet 'tis prohibited by God's Law; now 'tis declared by[i] Act of Parliament to be againſt God's Law, (*viz.*) *That no Diſpenſation ſhall be made of a Marriage of a Man with his Wife's Siſter*, (and the Reaſon there given is) *becauſe 'tis againſt God's Law*; 'tis true, that Statute was repealed by 1 & 2 *Ph. & Mar. cap.* 8. but was revived by 1 *Eliz. cap.* 1. beſides this Marriage is declared to be againſt God's Law by the[k] Canons of King *James*, which were confirmed by the Parliament, (*viz.*) *No Perſon ſhall marry within the Degeees prohibited by God's Law, and expreſſed in a Table ſet forth by Authority in the Year* 1563, and all Marriages *otherwiſe made and contracted, ſhall be adjudged inceſtuous*; now a Marriage between a Man and his Wife's Siſter is expreſſed in that Table.

[h] Levit. 18. v. 18.

[i] 28 H. 8. cap. 7.

[k] 99th Canon, Anno 1603.

Harris ver. *Hicks*, 4 Mod. 182. 2 Salk. 548.

So where a Libel was exhibited againſt the Defendant for Inceſt in marrying his *Wife's Siſter*; he ſuggeſted for a Prohibition, that his firſt Wife was dead, and that he had a Son by his preſent Wife, to whom an Eſtate would deſcend as Heir to his Mother; and that tho' he pleaded this Matter in the Spiritual Court, yet they proceeded to make the Marriage void, and to baſtardiſe the Iſſue; but a Prohibition was granted as to that Matter, and that they might proceed to puniſh the Inceſt.

Collett's Caſe, T. Jones 213.

Prohibition, &c. the Husband ſuggeſted, that he had ſettled his Lands on his Children by his preſent Wife, and that he was proſecuted in the Arches to be divorced, for that ſhe was the *Siſter of his firſt Wife*; the Conſequence whereof was to make his Children Baſtards, and draw the Settlement of his Lands in Queſtion; but the Prohibition was denied; for if it ſhould be granted, then every inceſtuous Marriage might be ſheltered under the like Pretence; and the Matter being proper to the Juriſdiction of the Eccleſiaſtical Court, it ſhall be determined there, though a Temporal Inheritance may conſequentially come in Queſtion.

Hains ver. *Jeſcott*, 5 Mod. 168.

Libel, *&c.* againſt a Man for Marrying his *Wife's Siſter's Baſtard*; he ſuggeſted for a Prohibition, that a Baſtard Daughter was not within any of the *Levitical Degrees*, either of Conſanguinity or Affinity, that the prohibiting a Man to approach *to any near of Kin*, can never be intended of a Baſtard, becauſe ſhe is in Law accounted *filia populi*, and by Conſequence can have no Kin; to which it was anſwered, that at the Time when the *Levitical* Law was given to the *Iſraelites*, there was no Difference amongſt them between a Child born in Adultery and in lawful Marriage; that the *Levitical* Law was founded on the Law of Nature as well as on a politick Reaſon to enlarge their Kindred, and to unite their Families; and therefore 'tis naturally as unlawful to marry *his Wife's Siſter's Baſtard*, as it would be to marry *his Wife's Siſter's legitimate Daughter*; therefore ſuch a Marriage is prohibited by theſe Words, *Ad*

proximum Sanguinis non accedas: The Court inclined to grant a Prohibition in the principal Caſe.

By the (3) Statutes of this Realm it is declared and eſtabliſhed *to be lawful for all Perſons to marry, which be not prohibited by God's Law; and that no Prohibition (God's Law excepted) ſhall trouble or impeach any Marriage, without the* Levitical *Degrees*[l]. And therefore whoſoever doth marry, being prohibited by God's Law, or being within the *Levitical* Degrees, cannot diſpoſe any Thing by his Teſtament but to the Perſons above-named; and eſpecially not to his or her Children begotten in ſuch inceſtuous Marriages: Unleſs (4) the Parents were ignorant of the Impediment of ſuch Conſanguinity or Affinity[m]. In which Caſe, the Marriage being publickly ſolemnized, the Children which are born during ſuch their Ignorance, or the Ignorance of one of them, are by the Eccleſiaſtical Canons capable of all Legacies and all Manner of teſtamentary Benefits, as legitimate[n]; albeit the Parents afterwards ſhould be divorced[o]. Or unleſs ſo much only were left unto their ſaid Children, as would ſerve for their competent Suſtentation or Nouriſhment[p]: Or unleſs the Children were appointed bare Executors, without any other Benefit. In which Caſes the Teſtament is good[q], as hereafter more at large[r].

[l] Stat. H. 8. an. 32. c. 38.

[m] Simo de Prætis de interp. ult. vol. lib. 2. dub. 1. ſoluc. 4. n. 92.

[n] c. cum inhibitio. §. ſi quis. de cland. deſponſ. extr. & ibi Panor. Brook tit. Baſtardy, n. 23. Fitzherb. tit. Baſtardy, n. 2.

[o] Gov. epit. de ſponſal. 2. part. c. 8. §. j.

contrarium tenet Brook tit. Baſtardy, n. 23. & alibi per eundem inter ſuos caſus, an. 24 Hen. 8. quem locum diligenter obſerves cupio. [p] Iſtud ita jure Can. c. cum haberet. de eo qui dux. in ux. ext. quod c. locum habet non ſolum in ſpuriis, ſed etiam in inceſtuoſis, ut eſt com. op. teſte Decio in c. in præſentia. de prob. ext. n. 39. Gabr. lib. 6. de alimen. concl. 1. n. 5. [q] Infra 5. part. §. 7. Petr. Duen. reg. 366. Limit. 9. verb. filius. Simo de Prætis de interp. ult. vol. lib. 5. fol. 17. n. 27. [r] Infra 5. part. §. 7.

§. XVIII. Of a Sodomite.

1. *Who is a Sodomite.*
2. *A Sodomite cannot make a Teſtament.*
3. *What if he were never condemned of Sodomitry?*

A (1) Sodomite, (that is to ſay, he or ſhe that doth commit that wicked and horrible Sin againſt Nature[s], as did the *Sodomites*, whereof Mention is made in the Holy Scripture[t],) is (2) prohibited to make a Teſtament[u], and to bequeath his Goods and Chattels. And albeit he were not convicted, (3) or condemned thereof in his Life-time, yet I ſuppoſe this Exception may be objected againſt the Probate of the Teſtament[x]; for that he was inteſtable at the Time of the Fact committed[y].

[s] Sodomia autem dicitur, non ſolum illud nefandum peccatum inter maſculos, ſed etiam flagitium illud contra naturam cum fœmina; & hæc opinio communis eſt, contra Socin. contendentem iſtiuſmodi peccatum non Sodomiam, ſed extraordinariam quandam pollutionem dici debere, quem DD. communiter reprobant, ut refert Vivius, lib. com. op. verb. Sodomia. Dec. in L. j. de ſecundis nuptiis, n. 9. C. Card. in clem. 1. de conſang. & aff. q. 13. [t] Gen. c. 19. [u] Spec. de Inſt. edit. §. compendioſo, n. 5. [x] Dec. in L. 1. de ſecundis nup. D. Simo de Prætis de interp. ult. vol. li. 1. dub. 1. ſoluc. 4. n. 97. [y] Simo de Prætis & Dec. ubi ſupra. Adde Cardinal. in clem. eos de ſepul. q. 19.

Buggery or Sodomy is the carnal Knowledge of the Body of Man, Woman, or Beaſt, *againſt the Order of Nature*; it may be committed by a Man with a Man, or with a Woman, or by either Man or Woman with a *Beaſt*; 'tis Felony by the antient Common Law, both in the Agent and patient, unleſs it be in a Boy or Girl under the Age of Diſcretion; and not only he who doth the Act is a principal Felon, but all thoſe who are preſent aiding and aſſiſting the Criminal, are likewiſe Principals; and by the Statute[z] 25 *H.* 8. Cler-

See Exod. 22. v. 19. Levit. 18. v. 22, 23.

[z] 25 H. 8. cap. 6. See 5 Eliz. cap. 17.

gy is taken from the Offenders; the Words of which Statute are, *If any Perſon* ſhall commit, *&c.* which Word *Perſon* extends to a *Woman* as well as a *Man.*

§. XIX. Of a Libeller.

1. *What is a famous Libel.*
2. *A Libeller inteſtable.*

A (1) Famous [a] Libel is a Writing made to the Infamy of any Man, publiſhed abroad to that End [b]: And he that (2) is condemned for Deviſing, Writing, or Publiſhing the ſame, is thereby deprived of the Ability of Making a Teſtament, or diſpoſing of any his Goods or Chattels [c].

[a] Famoſum quandoque in malam partem ſumi multis exemplis oſtendit Petrus a Placa, epit. delict. c. 3.

[b] Summa Angel. Sum. Silveſt. verb. libellus.

[c] L. ſi cui. §. ſi quis. ff. de teſta. L. unic. de famoſ. libel. C. Petr. a Pla. epit. delict. lib. 1. c. 3.

§. XX. Of him that killeth himſelf.

IF any Man do willingly kill himſelf, his Teſtament, if he made any, is void [d], both concerning the Appointment of the Executor, and alſo concerning the Legacy or Bequeſt of any Goods; for they are confiſcate [e].

But by the Law of this Realm, the Goods and Chattels of a *Felo de ſe* are not forfeited, till it be found by the Oath of Twelve Men before the Coroner *ſuper viſum corporis*, or appear upon Record. So adjudged *H.* 27 *Eliz. B. R. Laughton's* Caſe, cited in *Foxly's* Caſe, *lib.* 5. 110. *b. Inſt. part* 3. *fol.* 55.

If the Teſtament be of Lands, it ſeems it is not void, becauſe a *Felo de ſe* doth not forfeit any Lands of Inheritance [f]: For no Man can forfeit his Lands without an Attainder by Courſe of Law.

The Forfeiture of the Goods and Chattels muſt relate to the Time of the Stroke given, and not to the Death of the Criminal; and there is a Difference between Killing ones ſelf and another, for the firſt is againſt the Law of Nature, the other is againſt the *Moſaical* Law, by which Vengeance is to be taken againſt the Manſlayer; but no Vengeance can be had againſt one who kills himſelf, therefore his Goods, *&c.* are forfeited to the King, who is by this Means deprived of the Benefit of a Subject.

[d] L. ſi quis filio. §. ejus. de teſta. ff. L. 2. qui teſt. fac. poſſ. C.

[e] Vaſq. de ſucceſſ. reſoluc. lib. 1. §. 3. n. 31.

[f] Britton, c. 7. Cuſt. de Norman. c. 21. Inſt. part 3. fol. 55. Fleta, cap. 36. 1 Lev. 8.

§. XXI. Of him that is outlawed.

1. *An outlawed Perſon loſeth his Goods, and Benefit of the Law.*
2. *What if the Action be perſonal?*
3. *What if the Action be unjuſt?*
4. *Whether an outlawed Perſon may make his Teſtament?*
5. *What if the Prince give the Goods to the Executor? Whether is he therefore chargeable with the Payment of Legacies?*
6. *He that is outlawed doth ſometime forfeit not Goods only, but Lands alſo.*
7. *An outlawed Perſon may make his Teſtament of Lands not forfeited.*

8. *An outlawed Perſon may aſſign Tutors teſtamentary to his Children.*
9. *Certain other Caſes wherein he that is outlawed may make his Teſtament.*

AN (1) outlawed Perſon is not only out of the Protection of the Prince, and out of the Aid of the Laws of this Realm [g], but alſo all his Goods and Chattels be forfeited to the Prince, by Means of the Outlawry [h]; although (2) he were outlawed but in an Action perſonal [i]: And although (3) alſo the Action were not juſt, nevertheleſs his Goods and Chattels are forfeited, by Reaſon of his Contempt in not appearing: For it is a *Maxim* in the Common Laws of this Realm, that he that is outlawed doth forfeit all his Goods and Chattels to the Prince, without Diſtinction, whether the Action be juſt or unjuſt [k]. And therefore (4) it followeth, that he that is outlawed cannot make his Teſtament of his Goods ſo forfeited [l]. Inſomuch that (5) if the Prince, having ſeiſed the forfeited Goods of the Teſtator, ſhould give the ſame again to the Executor; nevertheleſs the Teſtament is void in reſpect of ſuch Goods; neither can the Legataries recover the ſame at the Hands of the Executor [m]: For by the Forfeiture and Seiſin the Property thereof is altered, and ſo ceaſing to be the Goods of the Teſtator, do not charge the Executors as Aſſets [n].

[g] Fitzh. Nat. Br. fol. 161. *Terms of Law*, verb. *Utlegary*.
[h] Doct. & Stud. lib 2. c. 3.
[i] *Terms* ubi ſupra.
[k] Doct. & Stud. l. 2. c. 3.
[l] Jul. Clar. §. teſtm. q. 19. Doct. & Stud. lib. 1. c. 16.
[m] Doct. & Stud. lib. 1. c. 6.
[n] Doct. & Stud. lib. 2. c. 3. & lib. 1. c. 6.

If (6) the Teſtator be outlawed by an Outlawry for Felony, then he doth not only forfeit his Goods and Chattels, but alſo his Lands and Tenements, whether they be holden in Fee-ſimple or for Term of Life [o]. And he that is thus outlawed can neither make his Teſtament of thoſe Goods nor of thoſe Lands, for they are none of his.

[o] *Terms of Law*, verb. *Utlegary*.

But if an Exigent for Felony be awarded againſt a Man, whereby he loſeth all his Goods, yet he may make an Executor to reverſe it, for there he is not attainted. *Roll's Abridg.* Tit. *Execut. h.*

Howbeit (7) I ſuppoſe that he that is outlawed in an Action perſonal may make his Teſtament of his Lands, for they are not forfeited [p]. Or if (8) he do aſſign Tutors to his Children, (as within the Province of *York* and other Places, by Cuſtom there uſed, Parents may do [q],) the ſame Aſſignation is to be confirmed [r] by the Ordinary to whom the Probate of Teſtaments appertaineth. Or (9) if there be any Error or Diſcontinuance in the Suit or Proceſs, by Means whereof the Outlawry is reverſed or annulled. Or if the Party outlawed were beyond the Seas at the Time of the Outlawry pronounced [s]. Or if Three Proclamations were not made, according to the Statute lately made in that Behalf, *viz.* one in the open County-Court, another at the general Quarter-Seſſion, and the Third at the Church or Chapel where the Party Defendant dwelleth [t]; in reſpect whereof the Outlawry is reverſed and void. In theſe and like Caſes the Teſtament is good, notwithſtanding ſuch Outlawry. And ſo it is if Pardon be obtained, and he thereby fully reſtored [u].

[p] Vide quæ ſequuntur hoc §. litera L. quo etiam tendit qd' ſcripſerunt Brook, tit. Gard, 9. 6. & Perkins tit. Grant, fol. 6.
[q] Infra part. 3. §. vij.
[r] Is enim qui noſtratibus dicitur utlegatus, parum differt a relegato: Cum relegatio (ſicut utlegatio) nihil aliud eſt, quam exilium temporarium. L. relegati. ff. de pœn. Quinimo & relegati quandoque (prout etiam utlegati) bona confiſcata ſunt. Jul. Clar. §. teſtm. q. 22. Attamen non amittit teſtm. factionem relegatus quoad bona, ſi quæ ſint non confiſcata. Jul. Clar. d. q. 22. Quare ſicut relegatus, ita etiam utlegatus teſtandi facultatem retinet; ſi quid ſuperſit non proſcriptum, ſive publicatum. Porro bannitus non eſt inteſtabilis. Clar. q. 17. Denique nec deportatus ad pias cauſas. Graff. §. teſtm. q. 17. n. 9. Multo minus efficitur utlegatus inteſtabilis, quoad ea quæ non ſunt applicanda fiſco.
[s] *Terms of Law*, verb. *Utleg.*
[t] Stat. Eliz. an. 31. c. 3.
[u] L. ſi quis. §. quatenus. de injuſt. teſt. ff.

Where an Executor is outlawed, yet he may maintain an Action, but where the Teſtator is outlawed, and an Action of Debt is brought againſt

againſt his Executor, 'tis a good Plea for him to plead, that his Teſtator was outlawed; but it was otherwiſe adjudged in *Bullen* and *Jervis*'s Caſe, as followeth:

An Action of Debt was brought againſt *A.* as Executor of *B.* *A.* pleaded that *B.* was outlawed at the Suit of *H.* after Judgment, and ſo continued outlawed when he died, and that it is in full Force; and demanded Judgment *ſi actio, &c.* upon which Plea the Plaintiff demurr'd: And adjudged no Plea, becauſe the Plea doth not amount to more, but that he hath no Goods: And ſo he anſwereth *argumentative*, and by Implication. And it was holden that this Plea doth not prove a Nullity of the Will, for then he might have pleaded, that he was never Executor. 49 *E.* 3. 5. 29 *Aſſ.* 63. 33 *H.* 6. 27. And an Adminiſtrator or Executor may have divers Goods which are not forfeited to the King, as Arrearages of Rent upon an Eſtate for Life. *M.* 20 *Jac. Robert Bullen* verſus *Jervis*. *T.* 37 *Eliz. Rot.* 2954. [x] *Wolley* verſus *Bradwell*. *Hutton*'s *Rep. fol.* 53. 36 *H.* 6. 27. 21 *E.* 3. 5.

[x] Cro. Eliz. 575. S. C.

A Man outlawed in a perſonal Action may make Executors, for he may have Debts upon Contract which are not forfeited to the King; and thoſe Executors may have a Writ of Error to reverſe the Outlawry. *M.* 43, 44 *Eliz. B. R.* inter [y] *Shaw* and *Cuttreſs*. *Roll*'s *Abridgment*, tit. *Executor*. *H.* 16 *E.* 4. *fol.* 4. 9 *H.* 6. 20. *Brook*'s *Abridgment*, tit. *Outlawry*, *pl.* 49, 54, 59.

[y] Cro. Eliz. 850.

And if the Teſtator had mortgaged his Land upon Condition, that if the Mortgagee pay not at ſuch a Day to him or his Executors 100 *l.* that then it ſhall be lawful for him or his Heirs to re-enter, and after and before the Day the Teſtator is outlawed, and makes his Executors and dies, and at the Day the Mortgagee pays the Money to the Executors; that is Aſſets, and not forfeited to the King. *Hutton*'s *Rep. fol.* 53.

But if *A.* takes a Bond in another's Name, and is afterwards outlawed, the King ſhall have the Bond; and it ſhall not be Aſſets to his Executors if he dieth. Adjudged 24 *Eliz. Birket*'s Caſe. *Croke*, *part* 2. *fol.* 513. *The King* verſus Sir *Jo. Daccombe*'s Executors in the Exchequer.

So if Leſſee for Years aſſign his Term to another in Truſt for himſelf, and if Leſſee for Years be outlawed, this Truſt will be forfeited to the King. 24 *Eliz. Armſtrong*'s Caſe. *Crok. part* 2. *fol.* 513.

March's Caſe, 5 Rep. 111. Leon. 325. S. C. Cro. Eliz. 273.

The Teſtator was outlawed for Felony, and his Executor brought a Writ of Error to reverſe the Outlawry; it was objected, that one attainted in Felony could not make a Will, and conſequently an Executor; but if he could, he ſhould only have a Writ of Error to reverſe an Outlawry in a perſonal Action, and not in a criminal Caſe, as this was; but adjudged, that this Executor ſhall have a Writ of Error, becauſe his Teſtator might not be outlawed lawfully, for 'tis probable he might have only Goods and no Lands, and if ſo, then he was not duly outlawed; ſo that if this Writ of Error would not lie, then the Executor might loſe all the Goods; therefore *Leonard* reports, that it was adjudged to lie; and my Lord *Coke* in [z] *Foxley*'s Caſe cites it to be ſo adjudged.

[z] 5 Rep. 111.

The Plaintiff exhibited a Bill in Equity to be relieved, and to have a Debt due to him as Executor, *&c.* The Defendant pleaded in Bar, that the Plaintiff was outlawed; but it was over-ruled, becauſe

the Plaintiff ſued as Executor in the Right of another. *Vernon* 185. *Killigrew* verſus *Killigrew*.

So where Debt was brought againſt an Executor, who pleaded, that his Teſtator was outlawed, and died outlawed; it was adjudged, that this did not prove that the Will was void, becauſe the Plea amounts to no more, than that no Goods came to the Hands of the Defendant as Executor, to ſatisfy the Teſtator's Debts, they being forfeited by the Outlawry; for if he would have made the Will void, he ought to have pleaded, that he never was Executor.

A Perſon outlawed is not incapable of being a Legatary, but he cannot ſue for the Legacy, unleſs the Outlawry is reverſed by ſome Error or Diſcontinuance in the Suit, or unleſs he was beyond Sea at the Time of the Outlawry pronounced, or unleſs there was ſome Defect or Omiſſion in the Three Proclamations required by the [a] Statute, or unleſs he hath a [b] Pardon, in which the Words are to be conſidered, for by the Outlawry the Legacy is forfeited.

[a] 31 Eliz. cap. 3.
[b] 5 Rep. 49. in *Wirrall's* Caſe.

§. XXII. Of an excommunicate Perſon.

1. *An excommunicate Perſon may make a Teſtament.*
2. *Saving in certain Caſes.*

WHether (1) an excommunicate Perſon may make a Teſtament, or not, is a Queſtion which hath many Patrons, both of the affirmative and negative Part; howbeit the Affirmative hath more in Number, and thoſe alſo greater in Weight or Authority [c]. And this affirmative Concluſion proceedeth, although he be publickly excommunicated [d]; unleſs it is (2) for *Hereſy*, or *manifeſt Uſury*, or for ſome other Cauſe for the which he is prohibited to make any Teſtament [e]: Or unleſs he be excommunicate with that *great Curſe*, which is called *Anathema*, which is not to be inflicted but upon great Cauſe, with great Deliberation and Solemnity [f].

[c] Gabr. Rom. lib. 4. com. concl. tit. de teſta. concl. 1. Graff. Theſaur. com. op. §. teſtam. q. 24. Petr. Duen. tract. reg. & fall. ubi citantur & hujus & illius opinionis Authores pene infiniti.

[d] Graff. & Duen. ubi ſupra. [e] Sed an hic etiam opus ſit denunciatione, vide quæ ſuperius dicta ſunt ead. part. §. 14. & §. 18. [f] Socin. Tract. reg. & fall. verb. excommunicatus.

Excommunication is a Caſting any Perſon out of the Communion of the Church, and in the primitive Times of Chriſtianity, it was a Sentence decreed, by and with the Conſent of the Church in general upon a full Hearing of the Matter, and pronounced by the Biſhop; and by the Cuſtom of this Realm, the Perſon who remained Forty Days under this Sentence, was, at the Requeſt of his proper Dioceſan, to be arreſted and impriſoned by a Writ *De excommunicato capiendo*, but firſt there ought to be a *Significavit*, which is the Biſhop's Letter under the Epiſcopal Seal, ſignifying to the Court of Chancery the Contempt of the Party to Holy Church.

The Forty Days are to be accounted after the Miniſter hath publiſhed the Excommunication in the Church, which is done by Virtue of an Inſtrument he hath for that Purpoſe under the Seal of the Eccleſiaſtical Court; and then if the Perſon excommunicated doth not ſubmit within Forty Days after the ſaid Publication, then after the *Significavit* he may be arreſted upon the *Capias*; and whilſt he is under this Sentence, he is diſabled to do any judicial Act, as to ſue, to be a Witneſs, *&c.* ſo likewiſe if an Executor or Adminiſtra-

F. N. B. 62, 63. 2 Inſt. 189. 8 Rep. 68.

tor is excommunicated, he is diſabled to ſue as Executor, becauſe he who converſeth with a Perſon excommunicate, is himſelf excommunicated.

§. XXIII. Of prodigal Perſons.

1. *Divers Perſons inteſtable by the Civil Law, which are not prohibited by the Laws and Cuſtoms of this Realm.*

OTHERS (1) alſo for other Cauſes are forbidden to make their Teſtaments by the Civil Law [g]: Namely prodigal Perſons [h], and ſuch as are doubtful of their State of Freedom or Bondage [i]. The Son alſo, ſo long as his Father lived, (in whoſe Power he was,) could not make a Teſtament by the Civil Law [k]. But ſeeing the Laws of our Realm are contrary, I ſhall not need to enter into any Diſcourſe of that Law about theſe Perſons.

[g] De quibus Vigelius in ſua method. jur. civil. lib. 9. c. 5. & 6. cum ſequentibus.
[h] L. is cui. ff. de teſta. §. Item prodigus. inſt. quibus non eſt permiſſ.
[i] L. de ſtatu. de teſt. ff.
[k] L. qui in poteſtate. ff. de teſta.

§. XXIV. Of him that hath ſworn not to make a Teſtament.

1. *It is an old Queſtion, whether he that hath ſworn not to make a Teſtament, may notwithſtanding make a Teſtament.*
2. *The greater Part hold the Affirmative.*
3. *No Cautel under Heaven, whereby the Liberty of making a Teſtament may be taken away.*
4. *Whether it be needful that the Teſtator do expreſly revoke his Oath.*

IT is (1) an old Queſtion, whether he that hath taken an Oath not to make a Teſtament, may notwithſtanding make a Teſtament [l]. And (2) although there were many which did hold, that in this Caſe he could not make a Teſtament [m]; yet the greater Number are of the contrary Opinion [n], eſteeming the Oath not to be lawful, and conſequently not of Force to deprive a Man of the Liberty of making a Teſtament [o]. And therefore if a Man firſt make a Teſtament, and then ſweareth never to revoke the ſame, yet notwithſtanding he may make another Teſtament, and thereby revoke the former [p]. For (3) there is no *Cautel* under Heaven, whereby the Liberty of Making or Revoking his Teſtament can be utterly taken away [q]. Howbeit if (4) the Teſtator will make his Teſtament contrary to his Oath, then it is neceſſary that he revoke his Oath alſo; for the former Teſtament is not revoked, unleſs the Oath be alſo ſpecially or expreſly revoked [r]: Or at the leaſt, Mention muſt be eſpecially made of the former Teſtament, with the Oath: As for Example, *I do now make this Teſtament, notwithſtanding my former Teſtament, with the Oath therein contained not to revoke the ſame* [s]. For in this Caſe the former Teſtament is revoked. And ſo it is, if the ſecond Teſtament be confirmed

[l] De qua q. Bar. in L. ſi quis. ff. de leg. 3. Jo. And. in c. quod ſemel. de reg. jur. 1. n. 6. Bald. in Auth. hoc inter. C. de teſta. Spec. de Inſtr. edi. §. compendioſe. Verſ. quid ſi quis. Summa Hoſtienſ. tit. de ſepulturis. §. an licitum. Oldrad. conſ. 127.
[m] Specul. Hoſtienſ. Oldrad. & alii ubi ſupra.
[n] Bar. in d. L. ſi quis. Jul. Clar. §. teſtam. q. 94. Michael Graff. §. teſt. q. 87. Soarez lib. rec. ſenten. verb. teſtam. n. 67. & hæc opinio proculdubio communis eſt, teſtimonio eorundem Clar. Graf. Soarez. Covar. in Rub. de teſta. extr. 2 part. concl. 1. n. 8. cum infinitis aliis. rec. ſen. ver. teſtam. n. 67 Graff. §. teſtam. q. 87. ubi dicit hoc eſſe valde notandum lib. 4. præſump. 166.
[o] Bar. ubi ſupra. cui accedunt etiam Olden. de action. claſſ. 5. in prin.
[p] Bar. Clar. Graff ubi ſupra. Gabr. lib. 2. com. concl. tit. de jurejuran.
[q] Bar. & Olden. ubi ſupra.
[r] Jul. Clar. §. teſtam. q. 94. Soarez l. Menoch. de præſump.

firmed with an Oath: For then the former Teſtament, which the Teſtator did ſwear not to revoke, is nevertheleſs as effectually revoked, as if the Teſtator had not only made Mention of the Oath, but preciſely revoked the ſame [t].

[t] Jo. Dialect. Duran. de arte Teſtand. tit. 10. c n. 5.

§. XXV. Of him that is at the very Point of Death.

1. *He that is at the Point of Death cannot always make his Teſtament.*
2. *What if it appear that he is of perfect Mind and Memory?*
3. *What if his Words can ſcarcely be underſtood?*
4. *What if it be doubted whether he be of perfect Mind and Memory?*
5. *Whether the Teſtament made at the Point of Death by the Motion of another, be good, or not.*
6. *What if the Perſon be ſuſpected who doth ask the Queſtion?*
7. *They which be extremely ſick do eaſily anſwer (Yea) to any Queſtion.*
8. *The former Teſtament is not revoked by the Second, made by him that is ready to die, at the Interrogation of a ſuſpected Perſon.*
9. *Whether the Teſtament be good which is made at the Interrogation of a Perſon not ſuſpected.*
10. *What if the ſick Man's Meaning do not appear but by his bare Anſwer?*
11. *Whether that Teſtament be good, which is written by the Kinsfolks of the ſick Man, and afterwards read unto him, and he being demanded, whether he be content to have the ſame ſtand for his Will, anſwereth (Yea).*

WHether (1) he that is at the very Point of Death may make a Teſtament, or whether the Teſtament made by him when he is half dead be good, or no, may be known by theſe Caſes following.

The firſt Caſe is, when a Man is ſo extreamly Sick, that he is nigh dead, yet (2) if it appear by his Geſtures and ſenſible Speeches, that he is of good Underſtanding and ſound Memory: In this Caſe there is no Queſtion but he may make his Teſtament [u] for the Integrity of the Mind, and not of the Body, is required in the Teſtator [x]; and the Liberty of making a Teſtament doth continue even until the laſt Gaſp [y]. Inſomuch that (3) if the Teſtator be not able to pronounce his Words ſo plainly and diſtinctly as he had been accuſtomed, but ſcarcely and with great Difficulty can be underſtood of ſuch as be preſent, (his Tongue perhaps being ſwoln or become ſtiff; and he unruly, or otherwiſe diſturbed by Means of his Sickneſs;) yet doth not the Teſtament therefore loſe his Force or Virtue [z].

[u] L. quoniam indignum. C. de teſta. & DD. ibidem. Mantic. de conject. ult. vol. lib. 2. tit 6. Simo de Prætis de interp. ult. vol. lib. 2. dub. ult. ſoluc. 4.

[x] L. 2. ff. de teſta. L. ſenium. C. qui teſta. fac. poſſ.

[y] L. 4. de adimen. leg. ff.

[z] d. L. quoniam indignum. Simo de Prætis ubi ſupra. Phil. Franc. in Rub. de teſta. lib. 6. Alex. conſil. 33. vol. 3. n. 7.

The ſecond Caſe is, (4) when a Man is at the Point of Death, but it doth not appear plainly whether he be of perfect Mind and Memory. In which Caſe ſome are of Opinion, that nevertheleſs he is to be preſumed of perfect Mind and Memory [a]. Others are of the contrary

[a] Panor. in c. fin. de ſucceſſ. ab inteſtat. extr. n. 9.

contrary Opinion, comparing him that is in this Caſe to a dead Man, partly through the Extremity of the Sickneſs, and partly through the Cogitation of imminent Death [b]. Others, more indifferent, do reconcile theſe contrary Opinions, with this Diſtinction: Either the ſick Perſon doth ſpeak ſo diſtinctly as he may be underſtood, and then he is preſumed to be of perfect Mind and Memory, and ſo to be in that Caſe that he may make his Teſtament; or elſe he cannot ſpeak ſo diſtinctly as he may be underſtood, and then he is not in Caſe to make his Teſtament [c].

[b] Paul. de caſtr. conſil. 155. vol. 1.

[c] DD. in L. jubemus. C. de teſta. Mantic. de conject. ult. vol. lib. 2. tit. 6. n. 5. Viglius in §. ſed cum paulatim. Inſtit. de teſt. ord. ubi hoc diſtinctionum fœdere conciliat iſtas contrarias leges, nempe L. quoniam indignum, & L. jubemus, c. de teſta.

The third Caſe is, (5) when he that is at the Point of Death, and hardly able to ſpeak ſo as he may be underſtood, doth not of his own Accord make or declare his Teſtament; but at the Interrogation of ſome other, demanding of him whether he make this or that Perſon his Executor, and whether he give ſuch a Thing to ſuch a Perſon, anſwereth, yea, or, I do ſo. In which Caſe it is a Queſtion of ſome Difficulty, whether the Teſtament be good, or not: Neither can it be anſwered ſimply, either negatively or affirmatively, but diverſly in divers reſpects [d]. For (6) if he who doth ask the Queſtion of the Teſtator be a ſuſpected Perſon [e], or be importunate to have the Teſtator ſpeak [f], or make Requeſt to his own Commodity [g]; as if he ſay, *Do you make me your Executor? or, Do you give this or that? And thereupon the Teſtator anſwer, Yea:* In this Caſe, it is to be preſumed that the Teſtator did anſwer, Yea, rather to deliver himſelf of the Importunity of the Demandant, than upon Intent to make his Will [h]; becauſe it (7) is for the moſt part painful to thoſe that be in that Extremity, to ſpeak, or be demanded any Queſtion, and therefore they are ready to anſwer (Yea) to any Queſtion almoſt [i], that they may be quiet: Which Advantage crafty and covetous Perſons knowing very well, are then moſt buſy, and do labour to procure the ſick Perſon to yield to their Demands, when they perceive he cannot eaſily reſiſt them, neither hath Time to revoke the ſame afterwards, being then paſſing to another World [k]. And therefore with great Equity and Reaſon is that to be deemed for no Teſtament, when the ſick Perſon anſwereth Yea, the Interrogation being made by a ſuſpected Perſon; as well in reſpect of Preſumption of Deceit in the one, as of Defect of Meaning of making of a Teſtament in the other [l]. And (8) this is true eſpecially, when there is another former Teſtament; for that is not to be revoked by a ſecond Teſtament made at the Interrogation of another, in Manner aforeſaid [m].

[d] De hac q. conſulas velim Mantic. de conject. ult. vol. l. 2. tit. 6. & Gab. Rom. l. 4. com. concluſ. tit. de teſtam. concl. 2. ubi non paucis contentus eſt diſtinctionibus.

[e] Paul. de Caſtr. conſil. 155. col. pen. vol. 1. Zaſ. conſ. 3. vol. 1. n. 37. Socin. Jun. conſil. 183. n. 27. vol. 2. qui refert hanc opin. eſſe magis com.

[f] Zaſ. d. conſ. 3. n. 37. vol. 1. ubi atteſtatur hanc op. eſſe com.

[g] Socin. d. conſil. 183. vol. 2. n. 39. Sichard. in L. jubemus. C. de teſta. n. 7. in fin.

[h] Paul. de Caſtr. in L. hac conſultiſſima. §. at cum humana. c. qui teſta. fac. poſ. Mantic. de conject. ult. vol. lib. 2. tit. 6. n. 10. Socin. Jun. conſil. 144. vol. 2. n. 49. Sichard. in d. L. jubemus. C. de teſta. n. 7. Peckius tract. de teſta. conjug. lib. 1. c. 17.

[i] Hic cui moribundus (ait Alex.) reſponderet Ita, etiam ſi interrogares num interfeciſſet hominem. conſ. 33. vol. 3.

[k] d. L. jubemus. & DD. ibid.

[l] Mantic. de conject. ult. vol. lib. 2. tit. 6. n. 9. Covar. in c. cum tibi. de teſta. ext. n. 4. Peckius d. c. 17. n. 2.

[m] Socin. Jun. d. conſil. 183. n. 34. Zaſ. d. conſ. 3. n. 4. Molineus in addic. ad conſil. Decii 489. ubi non dubitat affirmare, Decium & alios contrarium conſil. peſſime conſuluiſſe Adde Menoch. de præſump. l. 4. fol. 67. verb. quartum. qui hoc dictum temperat, & Decium ſalvat diſtinctionis ope.

39 *H.* 8. a Monk came to a Gentleman (who was then *in extremis*) to make his Will. The Monk asked the Gentleman if he would give ſuch a Manor and Lordſhip to his Monaſtry. The Gentleman anſwered, Yea. Then, if he would give ſuch and ſuch Eſtates to ſuch and ſuch pious Uſes. The Gentleman anſwered, Yea, to them

all. The Heir at Law obſerving the Covetouſneſs of the Monk, and that all the Eſtate would be given from him, asked the Teſtator, if the Monk was not a very Knave: Who anſwered, Yea. Afterward the Will came in Queſtion, and at a Trial, for the Reaſons aboveſaid, it was adjudged no Will.

But (9) if the Perſon which maketh the Motion be not any Way ſuſpected, and it doth appear withal by ſome Conjectures, that the ſick Perſon had a Deſire to make his Will; as if he ſend for his Friend, who being come unto him, asketh him whether he make this or that Man his Executor, which otherwiſe were to have the Adminiſtration of his Goods, if he died Inteſtate; to whom the ſick Perſon anſwereth, Yea, or I do make him my Executor: In this Caſe the Teſtament is good[n], albeit it were in Prejudice of another Teſtament made before[o]. But (10) what if it do not appear by any Conjecture, that the Teſtator had a Meaning to make his Teſtament, and yet no Suſpicion can be conceived againſt the Perſon which demanded the Queſtion? Whether is the Teſtament good, if the Teſtator do only anſwer, Yea? I ſuppoſe, that without ſome Conjecture of the Teſtator's Meaning, it is not ſufficient[p]. And though ſome of good Authority do ſeem to hold the contrary, and that it is ſufficient[q]; yet I do take it, that this Opinion ought to take Place, whenas it doth appear ſufficiently that the Teſtator was of ſound Memory, notwithſtanding the Extremity of Sickneſs and Propinquity of Death[r].

[n] Zaſ. d. conſil. 5. n. 37. Socin. Jun. d. conſil. 183. n. 31. Covar. in d. c. cum tibi, n. 4. Peckius d. c. 17. n. 5.

[o] Dec. d. conſil. 489. Socin. Jun. conſil. 144. vol. 2. n. 44, 45.

[p] Mantic. de conject. ult. vol. lib. 2. tit. 6. n. 9. Socin. Jun. conſ. 183. vol. 2. n. 6, 37.

[q] Menoch. tract. de præſum. ibid. lib. 4. præſump. 8. n. 28.

[r] Menoch. d. præſump. 8. n. 24. verſic. ſecundus caſus ubi extat. 6. Quod cum teſtator vere ſanæ mentis eſt, etſi corpore æger atque infirmus jacet, valet ipſius teſtamentum ad alterius interrogationem conditum; cujus regulæ extenſio tertia eſt, etiamſi non conſtaret hanc teſtatorem, ante hanc interrogationem, habuiſſe animum teſtandi.

The fourth Caſe is, when the (11) ſick Man's Kinsfolks, or ſome other Perſons, do cauſe a Teſtament to be written after their Inditing, (the ſick Man as yet not knowing thereof,) and then afterwards the ſame being read unto him, and he being demanded, whether the ſame ſhall ſtand for his Teſtament, anſwereth, Yea, and ſhortly after dieth. In this Caſe the Teſtament is not good[s], unleſs the Teſtator had firſt uttered his Meaning to the Writer or Inditer thereof[t], or had requeſted them to write his Will[u]; or unleſs the Teſtator being of good Mind and Memory, had by plain and expreſs Words, or other apparent Conjectures, confirmed the ſame, and not only by anſwering Yea[x].

[s] Mantic. de conject. ult. vol. l. 2. tit. 6. n. 10. qui dicit hanc op. eſſe magis com. Covar. in d. c. cum tibi n. 4.

[t] Sichard. in L. jubemus. C. de teſta. n. 7. Gabr. lib. 4. com. concluſ. tit. de teſta. concl. 2. n. 13, 17.

[u] Gabriel ubi ſupra.

[x] Mantic. de conject. ult. vol. tit. 6. in fin.

But what if a Will be brought to the ſick Man, which being read over in his Hearing, and he demanded whether the ſame ſhall ſtand for his laſt Will and Teſtament, anſwereth, yea; and it doth not appear whether the ſame was written and prepared by the Direction of the ſick Man, or elſe of his Kinsfolks and Friends? Whether is it to be preſumed to have been prepared by his Direction, or by theirs? It ſeemeth, by the ſick Man, in Favour of the Teſtament[y]. But when it appeareth indeed to have been made ready by others; then, albeit the Teſtator being interrogated to anſwer as before, it is preſumed that the Queſtion was made by the Suggeſtion of the Executor[z]; and ſo the Teſtament is not good, as is aforeſaid.

[y] Alex. conſil. 33. vol. 3. Gabr. l. 4. tit. de teſta. concl. 2. n. 15. Menoch. d. l. 4. fol. 56. n. 6.

[z] Mantic. de conject. ult. vol. 2. tit. 6. n. 10.

§. XXVI. Of Eccleſiaſtical Perſons.

1. *Two Sorts of Eccleſiaſtical Perſons, Regular, and Secular.*
2. *Who are meant by Regular Perſons.*
3. *Religious Perſons compared to Bond-men.*
4. *Religious Perſons compared to dead Men.*
5. *Who be here meant by Secular Clerks.*
6. *Eccleſiaſtical Perſons are not ſimply prohibited to make their Teſtaments.*
7. *Eccleſiaſtical Perſons may make their Teſtaments of all Goods which they have not in Right of their Church.*
8. *Eccleſiaſtical Perſons cannot make their Teſtaments of Things immovable, which they poſſeſs in Right of their Church.*
9. *An Eccleſiaſtical Perſon may make his Teſtament of the Glebe by him ſown.*
10. *Whether an Eccleſiaſtical Perſon may make his Teſtament of the Fruits not received.*
11. *All Fruits which happen during the Vacation, are due to the next Incumbent.*
12. *Whether an Eccleſiaſtical Perſon may make his Teſtament of all moveable Goods which he hath in Right of his Church.*
13. *Some Caſes wherein Eccleſiaſtical Perſons cannot diſpoſe of their Goods.*

OF (1) Eccleſiaſtical Perſons there be two Sorts, the one *Regular*, the other *Secular*[a]. By *Regular* (2) I do underſtand Monks, Friers, and other religious Perſons[b]; whereof becauſe we have none this Day in the Church of *England*, I ſhall not need to enter into any Diſcourſe concerning them. Only this by the Way, that (3) theſe religious Perſons, in Reſpect of their canonical Obeiſance vowed unto their Abbots and Prelates, are in Law compared unto Bond-men[c], and (4) in Reſpect of their Vow of perpetual Poverty or renouncing the World, they are compared unto dead Men[d]: And in theſe Reſpects they could not make a Teſtament[e]. But if a religious Man had made a Teſtament before his Entrance into that Profeſſion, then was the ſame to have been proved and executed, as if he had been naturally dead[f]: And if he had made no Teſtament when he had entered into Religion, then the Ordinary might have commited the Adminiſtration of his Goods, as of one that had died inteſtate[g]. But it was and is otherwiſe with ſecular Clerks, who albeit they be ſometimes comprehended under the Name of religious Perſons[h]; yet the Law diſpoſeth otherwiſe concerning their Teſtaments than of the Teſtaments of religious Perſons[i].

[a] c. duo. 12. q. 1. gloſſ. in Rub. de regularibus extr.
[b] c.2. de teſta. extr.
[c] Specul. de ſtatu Monach.
[d] Littleton, tit. villenage, circa medium.
[e] Quod ſi quis ſcire cupiat, an & quatenus Monachus ſit teſtabilis, legat Jul. Clar. §. teſtm. 28, 29, 30. Michael Graſſ. §. teſtm. q. 34. & Ferdinan. Vaſq. de ſucceſſ. progreſſ. lib. 1. §. j.
[f] Littleton ubi ſupra.
[g] Ibidem. Adde Benedictum in rep. c. Ranutius de c. Teſta. & n. 1. fol. 67.
[h] Panor. in Rub. de regular. extr.
[i] Ut ſtatim ſequitur hoc §.

By (5) *Secular* Clerks I underſtand Archbiſhops, Biſhops, Deans, Archdeacons, Prebendaries, Parſons, Vicars, and other Eccleſiaſtical Miniſters or Clergymen[k]. Theſe Perſons (6) are in ſome Reſpects prohibited to make their Teſtaments; but they are not ſimply forbidden[l]. Wherefore that we may the better know when they may make a Teſtament, and when they may not, we are firſt to conſider whether the Things whereof they make their Teſtaments do belong unto them

[k] Michael Graf. Theſaur. com. op. §. teſtm. q. 34. Jul. Clar. teſtm. q. 27.
[l] c. 1. c. cum in Officiis. c. relatum. el. 2. c. requiſiſti. de teſta. extr. Covar. in d. c. 1.

in any other Reſpect than in Right of the Church, or of their Eccleſiaſtical Living[m].

For (7) of other Things than ſuch as are gotten by Right of the Church, whether the ſame be left unto them by their Parents, or given by ſome Friend; or whether they got the ſame by their own Induſtry, either by Preaching of the Goſpel, or by teaching of Scholars, or other Labour[n], of ſuch Things they may freely diſpoſe and make their Teſtaments, as well as Lay Perſons[o]; although the ſame be given or gotten after they be entered into the Miniſtry, and alſo after they have obtained ſuch ſpiritual Promotion[p].

[m] Ita diſtinguitur in d. c. relatum. el. 2.

[n] Panor. in d. c. relatum. el. 2. de teſta. extr. Flores ult. vol. part. 1. fol. 4.

[o] d. c. 1. de teſta. extr. & Covar. ibi licentiam C. de Epiſcopis & Cler. Graff. de §. teſtm. q. 34. n. 2.

dem. Graff. §. teſtm. q. 34. Perkins, tit. Deviſes, c. 8. in prin.

[p] Cyn. & alii in Authen.

If any Thing do appertain unto them in Right of their Church, then we are to conſider whether the ſame be *moveable* or not. For (8) of *immoveable* Things, as of Houſes, or of Demeans, or of Glebe, and ſuch like, Eccleſiaſtical Perſons cannot diſpoſe by their Teſtaments[q]; nor of the Trees or Fruits growing upon the ſame Demeans, or Glebe[r]; ſaving (9) where the Incumbent, before his Death, hath cauſed any of his Glebe-Lands to be manured and ſown at his proper Coſts and Charges with any Corn or Grain; for in this Caſe ſuch Incumbent may make and declare his Teſtament of all the Profits of the Corn growing upon the ſame Glebe-Lands ſo manured and ſown, by Force of the Statutes of this Realm[s]. Which Statute is agreeable to the Cuſtom of other Nations, namely of *France* and *Spain*: The general Cuſtom of which Countries is, that all ſecular Clerks may freely diſpoſe of the Fruits and Profits ariſing out of their Benefices, not only by alienating the ſame whilſt they be yet living, by Way of Bargain and Sale, or other Contracts; but alſo by deviſing or bequeathing the ſame in their laſt Wills and Teſtaments[t]. Inſomuch that if the ſaid ſecular Clerks ſhould not alienate the ſame in their Life-time, nor deviſe the ſame by their laſt Will, but die inteſtate; yet, by the ſaid Cuſtom, their Succeſſors in their Benefices ſhould not reap the ſame[u]. Which Thing is alſo obſerved here in *England*, where Clergymen dying inteſtate, the Adminiſtration of their Goods is uſually committed, as of other Lay Perſons; by Force of which Adminiſtration, the ſaid Adminiſtrators enter to all thoſe Goods and Chattels whereof the ſaid Clergymen dying might make their Wills[x]. And altho' (10) heretofore, as well by general Cuſtom of this Realm[y], as by ſpecial Conſtitution[z], it was lawful for Parſons and Vicars, after the Feaſt of the Annunciation of the bleſſed Virgin[a], and in ſome Places after the Feaſt of St. *Mark*[b], to make their Teſtaments of the Fruits of their Livings, albeit not as yet received, but payable that Year or the Harveſt following; nevertheleſs by the Statutes of this Realm, ſuch Cuſtom and Conſtitution is taken away; by which Statute[c], (11) *All Fruits, Tithes, Oblations, and other Emoluments whatſoever belonging to any Archdeaconry, Deanery, Prebend, Parſonage, Vicarage, Hoſpital, Wardenſhip, Provoſtſhip, or other ſpiritual Promotion, Benefice, Dignity or Office, (Chaunteries only excepted,) growing, riſing or coming, during the Time of the Vacation of the ſame ſpiritual Promotion, belong to the next Incumbent, and to his Executors, towards the Payment of the Firſt Fruits.*

[q] L. jubemus C. de ſacroſan. Eccleſ. c. cum in Officiis. c. relatum. el. 2. de teſtm. extr. Perkins, tit. deviſes, in prin.

[r] Perkins ubi ſupra. Epiſtola cujuſdam libri qui inſcribitur, *An Anſwer to an Abſtract.*

[s] Stat. H. 8. anno 28. c. 11.

[t] Sermient. Tract. de reddit. eccleſiaſt. c. 6. & c. 8. Veruntamen dicta conſuetudo non complectitur Epiſcopos; illi enim de fructibus Eccleſiaſticis per viam ultimæ voluntatis non diſponunt.

[u] Sermient. ubi ſupra. Excipiuntur tamen Epiſcopi; nam quoad hos ſervatur jus commune Eccleſiaſticum ſive Canonicum.

[x] Id quod nemo neſcit verſatus in negotiis forenſibus.

[y] Lindw. in. c. nullus rector. de conſuetud. lib. 1. provincial. conſtitut. Cant.

[z] c. cum inter rectores. tit. de conſuetud. lib. 1. provincial. conſtitut. Ebor.

[a] d. c. nullus.

[b] d. c. cum inter rectores. l. 1. provincial. conſtit. Eborac.

[c] d. Stat. H. 8. an. 28. c. 11.

Of

Of Goods (12) *moveable* which an Eccleſiaſtical Perſon poſſeſſeth, though the ſame were gotten in Right of the Church, or by Means of his Eccleſiaſtical Living, he may make his Teſtament, like as of any other his temporal Goods[d]; whether ſuch Eccleſiaſtical Perſon be Biſhop, Dean, Archdeacon, Prebendary, Parſon, or Vicar, certain Caſes only excepted[e], *Viz.* (13) of Goods which a Biſhop hath common with a Dean or Chapter[f], or which a Dean or Chapter have common to themſelves[g]; or which a Maſter or Brethren of an Hoſpital or College have alſo amongſt themſelves, in the Right of their Houſe[h]; or of Goods which are dedicated to the Service of God, as Ornaments of the Church[i]; or of the Eccleſiaſtical Rights not received, or not due nor payable in the Time of the Incumbency of the Teſtator, but reſerved to the next Incumbent[k]: In which Caſes it is not lawful for Eccleſiaſtical Perſons to make their Teſtaments of ſuch Goods; which Caſes excepted, it is lawful for an Eccleſiaſtical Perſon to declare his Will[l], either of the Goods themſelves, (if they remain and are extant,) or of the Money taken for the ſame being ſold or alienated[m].

[d] Lindw. in d. c. nullus, verb. legata. Doct. & Stud. lib. 2. c. 39, 40. Quod verum quidem eſt jure ſeu conſuetudine hujus regni Angliæ: ſed attento jure cano. non procedit indiſtincte. Abb. in d. c. relatum. el. 2. de teſt. extr.

[e] Jul. Clar. §. teſtm. q. 27. Graſſ. §. teſtm. q. 34.

[f] c. relatum. el. 2. de teſta. extr. Perkins, tit. deviſes, in prin. Doct. & Stud. lib. 2. c. 39.

[g] Fitzh. Abridg. tit. teſtm. n. 1.

[h] Perkins. Doct. & Stud. ubi ſupra.

[i] Etymologia eſt, quia hujuſmodi rerum nullum eſt commercium. §. nullius. Inſtit. de rerum à juſ.

[k] d. Stat. H. 8. an. 28. c. 11.

[l] Exceptio enim firmat regulam in non exceptis Dec. in L. 1. de reg. jur. ff.

[m] Iſtud verum jure quo nos utimur: artic. cler. c. 1. Doct. & Stud. lib. 2. c. 39. Secus jure can. Panor. in d. c. relatum. el. 2. n. 3. Graſſ. d. §. teſtm. q. 34. Jul. Clar. §. teſtm. q. 27.

It appeareth by many Records in the Reigns of *H.* 3. and *E.* 1. that by the Law and Cuſtom of *England* no Biſhop could make his Will of his Goods or Chattels coming of his Biſhoprick, *&c.* without the King's Licence[n]. The Biſhops, that they might freely make their Wills, yielded to give to the King after their Deceaſes reſpectively for ever ſix Things: 1. Their beſt Horſe or Palfry with Bridle and Saddle, 2. a Cloak with a Cape, 3. one Cup with a Cover, 4. one Baſon and Ewer, 5. one Ring of Gold, 6. his Kennel of Hounds. For theſe a Writ iſſueth out of the Exchequer after the Deceaſe of every Biſhop. This Duty is ſometimes called *Multura* or *Mulctura de Epiſcopis*, ſometimes *Monutier*, &c.

[n] Rot. clauſ. 30 H. 3. m. 4. Thomas de Stanford. Rot. pat. 13 E. 1. m. 21. Rex licentiam dedit Epiſc. Bangor. Inter Com. de H. 2 E. 2. in Scacc. proceſſ. verſ. Epiſcop. de Bath & Wells. 21 E. 3. fol. 60. Inſtitut. part. 4. fol. 338.

§. XXVII. Of Kings.

1. *Examples borrowed out of the Old Teſtament, whereby it may ſeem lawful for Kings to give away their Kingdoms.*
2. *Certain humane Reaſons tending to the ſame Purpoſe.*
3. *Other Examples, taken out of the prophane Hiſtories, of Kings which have diſpoſed of their Kingdoms by their Teſtaments.*
4. *By the Civil and Canon Laws, a King cannot give away his Kingdom.*
5. *Whether by the Laws of this Realm, a King may give away his Kingdom.*
6. *An uncertain Concluſion.*

IT may ſeem lawful for a King by his Teſtament to make his Heir whomſoever he ſhall think good, or to leave his Kingdom to whom he will, both by God's Law and Man's Law.

By God's Law, becauſe (1) *Moſes*, a Man to whom God did ſpeak as it were Face to Face, left the Principality or Government of the

Iſraelites to *Joſua* [o], being of the Tribe of *Ephraim* [p], and not to any of his own Tribe, which was the Tribe of *Levi* [q]. King *David* likewiſe, a Man after God's own Heart, did beſtow the Kingdom on *Solomon* [r], having the ſame Time an elder Son, namely *Adoniah* [s]. The ſame *Solomon*, the wiſeſt Man that ever was, or ſhall be [t], whilſt he reigned as King, did give unto *Hiram* King of *Tyrus* twenty Cities of the Kingdom of *Iſrael*, ſituate in the Land of *Galilee* [u]. The holy Patriarch *Jacob* alſo, even he that wreſtled with an Angel [x], deprived his eldeſt Son *Reuben* of his Birthright, and gave the ſame to the Sons of *Joſeph* [y].

[o] Deut. c. ult. ver. 9.
[p] Gloſſ. in c. Moſes 8. q. 1.
[q] Phil. Franc. in Rub. de teſtam. lib. 6. poſt. gloſſ. in d. c. Moſes.
[r] Lib. 1. Reg. c. 1. verſic. 28. cum ſequent.
[s] Eod. c. verſic. 41. cum ſequent.
[t] 1 Reg. c. 3. verſ. 12.
[u] 1 Reg. c. 9. verſ. 11. [x] Geneſ. c. 32. verſ. 24, &c. [y] Gen. c. 49. 1 Paralip. c. 5. in princ.

By Man's Law, becauſe (2) the Voice and Will of a Prince hath the Force of a Law [z]; becauſe alſo a King is ſaid to be a mortal God [a]; and therefore what he commandeth ought to be obeyed without Reſiſtence [b], if it doth not repugn the Law of God immortal [c]. To be a ſhort, if a King might not diſpoſe of his own Kingdom at his own Pleaſure, then his State were not ſo good as the State of his Subject [d]; for the meaneſt Subject may freely diſpoſe of his own [e]. Beſides which urgent Reaſons, whereby appeareth the Root and Life of this human Law, there be ſundry pregnant (3) Examples, which, as Branches, ſpringing from that lively Root, have in ſundry Ages and Countries brought both fair and good Fruit; whereby the Force and Efficacy of that Law hath been made manifeſt to all the World. Let theſe few ſuffice for a Taſte. It is recorded that *Attalus*, a King in *Aſia* the Leſs, did in his Teſtament inſtitute the *Roman* People his Heir, who by Virtue of that Teſtament did enjoy the Kingdom [f]. Likewiſe that *Alexander* King of *Ægypt* did bequeath unto the ſame *Roman* People the Kingdom of *Alexandria* and *Ægypt* [g]. *Ptolemæus* the King of *Ægypt* gave away the Kingdom of the *Cyrenes* [h]. *Unguinus* was King of the *Goths* by the Appointment of *Haldanus* [i]. To come nearer, (I mean in reſpect of Place, not of Time,) we may read how *Praſutagus*, one of the Kings of this Realm of *England*, a little after the Death of *Chriſt*, did make the Emperor *Nero* his Heir [k]. And divers other Kings have done the like [l]. So that it is neither new nor ſtrange, that Kings have by their Teſtaments given away their Kingdoms from thoſe who otherwiſe ſhould have enjoyed the ſame.

[z] §. ſed & quod. Inſtit. de jur. na. gen. & civil.
[a] Bald. in §. præterea. de prohib. alienac. feud. per fœder. n. 14. Pſal. 82. verſ. 6.
[b] Bald. in auth. hoc amplius. C. de fideicom. n. 10. quem velim videas.
[c] Act. Apoſt. c. 4. verſ. 19. c. 5. verſ. 29.
[d] Oldr. conſil. 94. in fin.
[e] Supra ead. part. in prin.
[f] Florus l. 2. Hottom. illuſtr. quæſt. c. 1.
[g] Cicero Orat. 1. pro lege agrar. alias lib. 2. c. 15.
[h] Hottoman d. c. 1.
[i] Eodem loci.
[k] Cornel. Tacitus l. 14. Camden. fol. 290. alias fol. 355.
[l] Quorum meminit Gentilis diſp. 2. fol. 45.

Notwithſtanding, (4) as well by the Civil Law [m] as by the Canon Law [n], (with which the (5) Laws of this our Realm of *England* do in this Point ſeem to join [o],) it is unlawful for a King to give away his Kingdom from his lawful Heirs; for the Confirmation whereof divers Writers uſe divers Reaſons [p].

[m] Bar. & Angel. in L. prohibere. §. plane. ff. quod vi aut clam. Jaſ. in L. debitorum. C. de pactis. Bald. in procem. de feudis, n. 32. Vaſq. de ſucceſ. crea. §. 26. lin. 3. [n] Innocen. Cardinal. Imol. Panor. Jo. de Anan. & alii in c. intellecto. de juretur. extr. Felin. in c. dilecti. de major. & ob. extr. [o] Fitzh. Abridg. tit. deviſe, n. 5. tit. execut. n. 108. hiſce verbis: L'opinion de pluis Juſtices & Doctors del Canon & Civil ley, aſſembles in le Eſchequer chambre, quant Roy Henry quart moruſt, fuit que il puit faier teſtam. & legacy des biens que il aver; mez dez biens de Royalme, ceſt aſſavoyer ancient Corone & Juels, il ne puit. Eodem tendunt quæ a Guliel. Lamberto, viro doctiſſimo, tranſcripta ſunt, ſub hac verborum ſerie: Debet vero de jure rex omnes terras & honores, omnes dignitates, & jura, & libertates Coronæ regni hujus, in integrum cum omni integritate & ſine diminutione ſervare & defendere, &c. lib. de priſcis Angl. legib. tit. de reg. offic. fol. 130. [p] De hac quæſtione conſulas Franc. Hotto. Juriſconſultorum omnium, quos iſta peperit ætas, celeberrimum, lib. 1. illuſtr. quæſt. c. 1.

The Biſhops, Lords and Commons aſſented in full Parliament, that the King, his Heirs and Succeſſors might lawfully make their Teſta-

ments, and that Execution ſhould be done of the ſame; whereof ſome Doubt was made before [q]. See *Rot. par.* 1 *H.* 5. *n.* 13. the Teſtament of King *Hen.* 4. and his Executors refuſed, the Archbiſhop of *Canterbury* was to grant Adminiſtration, with the Teſtament annexed to the ſame. See 1 *H.* 6. *n.* 18. the laſt Will and Teſtament of *H.* 5. 10 *H.* 6. *n.* 27.

[q] Rot. parl. 16 R. 2. n. 10. 1 H. 5. n. 13. 1 H. 6. n. 18. 10 H. 6. n. 27. Inſt. part. 4. fo. 335. a.

But (6) amongſt all their Reaſons, I ſee none to induce me to adventure any farther into the Examination of this deep and dangerous Queſtion; much leſs to proceed to the Concluſion; not only becauſe the ſame, being ſo high an Object, doth far exceed the ſlender Capacity of a mean Subject; but alſo for that this Princely Controverſy, as it hath ſeldom received ordinary Trial heretofore; ſo hereafter, if the Caſe were to be argued in very Deed, very likely it is to be urged with more violent Argumens and ſharp Syllogiſms, than by the unbloody Blows of bare Words, or the weak Weapons of Inſtruments made of Paper and Parchment; and on the other Side, to be anſwered with flat Denials of greater Force, and Diſtinctions of greater Efficacy, than can proceed from any legal or logical Engine; and in the End to be decided and ruled by the dead Stroke of uncivil and martial Canons, rather than by any Rule of the Civil or Canon Law.

Videant quorum intereſt.

WHAT THINGS May be deviſed by WILL.

The Third Part.

SECT. I.

1. *The Third principal Part divided into Two Numbers.*
2. *The firſt Member Threefold.*

IN the (1) Third Part of this Teſtamentary Treatiſe, there is to be ſhewed, firſt *what Things*, and then *how much*, the Teſtator may diſpoſe or deviſe by his Teſtament.

Concerning the (2) former of theſe, it ſhall not be amiſs to ſpeak firſt of the Bequeathing or Deviſing of *Lands, Tenements and Hereditaments* [a]; ſecondly, of the Bequeathing or Deviſing of *Goods and Chattels* [b]; and thirdly, of the *Committing of the Tuition of Children*, and Cuſtody of their Portions and Rights during their Minorities [c].

[a] Infra ead. part. §§. 2, 3, 4.
[b] Infra ead. part. §§. 5, 6.
[c] Infra ead. part. §§. 7, 8, &c.

§. II. Of the Deviſe of Lands.

1. *The Rule of the Deviſe of Lands is negative.*
2. *The Exceptions of this Rule are of Two Sorts.*

TRUE it is, that this Matter of the Deviſe of Lands, Tenements and Hereditaments, within this Realm of *England*, with all Queſtions incident thereunto, is to be determined according to the Laws temporal of this Realm, and is not ſubject to the Rules and Deciſions of the Laws Civil or Eccleſiaſtical.

Touching (1) the Bequeſt or Deviſe of Lands, Tenements and Hereditaments, this appeareth to be a true Poſition, and Ground agree-

able

able to the Civil Law [d], and alſo the Laws of this Realm [e], that Lands, Tenements or Hereditaments, cannot be diſpoſed or deviſed by Will, but in (2) certain Caſes: Of which ſome are approved by Force of certain *Cuſtoms* [f] within this Realm; and ſome by Force of certain *Statutes* [g].

[d] c. Imperialis. de prohib. feud. alien. l. 2. Feud. Bald. in c. 1. de ſucceſſ. feud.
[e] Stat. H. 8. an. 27. c. 10. in princ. Doct. & Stud. l. 1. c. 8. Perkins, tit. Deviſe 102.
[f] Infra §. prox.
[g] Infra ead. part. §. 4.

§. III. Certain Caſes approved by Cuſtom, wherein it is lawful to deviſe Lands, Tenements or Hereditaments.

1. *Gavelkind Lands may be deviſed by Will.*
2. *The Cauſe wherefore the Cuſtom of Gavelkind did continue.*
3. *Burgage Lands deviſable by Will.*
4. *To whom, and after what Manner Burgage Lands be deviſable.*
5. *Whether any other Perſon may deviſe Burgage Lands but a Citizen.*
6. *Burgage Tenure, a Kind of Tenure in Socage.*
7. *Whether Livery of Seiſin be needful, where Burgage Land is deviſed.*
8. *Whether the Jointenant may bequeath his Part of Burgage Land otherwiſe deviſable.*
9. *Of Lands deviſed to certain Uſes.*
10. *The Cuſtom of deviſing Lands to Feoffees reformed.*
11. *The Cauſe of this Reformation.*
12. *The Statute or Act of Reformation.*

THE (1) firſt Caſe, wherein by Cuſtom of this Realm of *England* it is lawful for a Man by his Laſt Will or Teſtament to deviſe or bequeath Lands, Tenements or Hereditaments, is this, namely, when Lands, Tenements or Hereditaments, are holden in *Gavelkind*: For ſuch, by antient Cuſtom, may be given or deviſed by Will [h]. For (2) after that *William* Duke of *Normandy* had invaded and conquered all *England*, *Kent* only excepted, at laſt alſo the *Kentiſhmen* yielded, but upon Condition, that they might enjoy their antient Cuſtoms of *Gavelkind*; which was granted unto them, and ſince hath continued [i]. Amongſt which Cuſtoms, being very large and beneficial, this is one; that they which hold Lands in *Gavelkind*, may give and ſell the ſame without Licence asked of their Lords; ſaving unto the Lords the Rents and Services due out of the ſame Tenements [k].

It became a Queſtion *Anno* 15 *Car.* 1. whether Lands in *Gavelkind* holden in Socage, could be deviſed by Will, (*i. e.*) whether there was any Cuſtom in *Kent* before the [l] Statute of Wills, to ſupport ſuch a Deviſe; and it was inſiſted, that there was ſuch a Cuſtom, for [m] *Fitzherbert* in his *Natura Brevium*, tells us, that the Writ *Ex gravi querela* lies where a Man is ſeiſed of Lands, *&c.* in *Gavelkind*, which *Time out of Mind hath been deviſable by Will*, and accordingly are deviſed; then this Writ will lie to compel the Execution of ſuch Deviſe; and Mr. *Lambert*, in his Perambulation of *Kent*, is of Opinion, that Lands held in *Gavelkind* may be *given*

[h] Dyer fol. 153. verb. Deviſe. *Terms of Law*, verb. *Gavelkind*, & ita ſæpiſſime accepi a nonnullis hujus regni juriſperitis. Tract. de repub. Angl. fol. 107.
[i] Lambert Perambulation of Kent, fol. 23.
[k] *Terms of Law*, ubi ſupra. Lambert ubi ſupra, fol. 416. Cro. Car. 561. *Launder* v. *Brooks*.
[l] 32 H. 8.
[m] F. N. B. 198. litera L.

or ſold, where by the Word *Given* it is meant by *Will*, and *Sold* is meant by Deed; and many Wills were produced out of the Regiſters of *Canterbury* and *Rocheſter*, where *Gavelkind* Lands were deviſed before the Statute of Wills, (*viz.*) in the Reigns of *H.* 6. *Edw.* 4. and *H.* 7. and ſome Verdicts by which ſuch Cuſtom was found of late Years; and there was a very old Precedent produced out of *Lambert*, which was a Will of *Gavelkind* Lands before the Conqueſt; and upon a full Evidence there was a Verdict for the Cuſtom in that Caſe, and ſo there was in the preſent Caſe.

The (3) ſecond Caſe is, When the Lands or Tenements be holden in *Burgage Tenure* [n]. For it is the Cuſtom of divers Cities and Boroughs of this Land, (as in *London*, *York*, *Oxford*, *&c.*) (4) that ſuch Perſons as are ſeiſed of Lands, Tenements or Hereditaments, lying and being in ſuch Cities or Boroughs, as hold the ſame in Burgage Tenure, may by their Teſtaments or Laſt Wills give or bequeath the ſame to whom they will [o], to hold in Fee-ſimple, or in Fee-tail, or for Life, or Years, or otherwiſe: And ſuch Bequeſt or Deviſe is good [p], the Will being lawfully made, and proved before the Ordinary, as touching the Goods and Chattels bequeathed in the ſame, and inrolled before the Mayor of the ſaid City or Borough [q]. Howbeit, it is not always neceſſary that the Teſtament be proved before the Ordinary, or inrolled, wherein Lands only, and no Goods and Chattels, are bequeathed [r]. For in ſome Places, by the Cuſtom there uſed, the Deviſee may enter to the Lands deviſed of his own Authority, without any Probate or Inrollment precedent: And in other Places he is to be put in Seiſin or Poſſeſſion by the Bailiff [s]. Neither is it neceſſary that the Will, wherein *Burgage Land* is deviſed, ſhould be written according to the Form preſcribed in the Statute of *Henry* the Eighth [t], the ſaid Land being deviſable before the Making of that Statute, preſcribing a Form of the Deviſe of Lands which could not paſs by Will before the Making of that Statute, as I have formerly declared [u]. And it (5) ſeemeth not to be needful to the Validity of the Deviſe in this Caſe, that the Teſtator ſhould be a Citizen or Burgeſs of that City or Borough where the Lands or Tenements deviſed do lie: But it is ſufficient, if the Lands and Tenements be holden in Burgage [x]. For that not he only is ſaid to hold in Burgage who is a Citizen or Burgeſs of the Place where the Lands or Tenements be, and holdeth of the King, or other Lord, Lands or Tenements lying in the City or Borough, yielding therefore to his ſaid Lord a certain yearly Rent: But he alſo that is no Citizen or Burgeſs, which holdeth of any Lord, Lands or Tenements in Burgage, yielding unto him a certain Rent by the Year [y]. Which (6) Tenure in Burgage is but a Kind of Tenure in Socage [z]. Howbeit there is this Difference betwixt Citizens, Burgeſſes and Freemen, and thoſe which be not; that is to ſay, Citizens, Burgeſſes and Freemen may bequeath their Burgage Lands to Mortmain, which others cannot do [a]. And (7) in ſome Borough, by the Cuſtom thereof, a Man may deviſe by his Teſtament, lawfully made, his Lands and Tenements which he hath in Fee-ſimple within the ſame Borough at the Time of his Death; and by Force thereof the Deviſee, after the Death of the Teſtator, may enter into the Tenements to him deviſed, to have and to hold to him after the Form and Effect of the Deviſe, without any Livery of Seiſin thereof to be made unto him [b]. But (8) if there be Two Jointenants in Fee-ſimple within one Borough, where

[n] Fitzherb. Na. Bre. ex gravi querela, in prin. Doct. & Stud. li. 1. c. 7. & 10.

[o] Brook Abridg. tit. Deviſe. n. 22, 51. Fitzh. in d. Br. ex gravi querela. Doct. & Stud. c. 7. & 10. Lindw. in c. ſtatut. de teſtam. lib. 3. provincial. conſtit. Cant. verb. de conſuetudine, & verb. laicalis feodi, eod. c.

[p] Fitzher. in d. Br. ex gravi querela.

[q] Fitzherb. in d. Br. ex gravi querela.

[r] Brook Abridg. tit. Deviſe, n. 43.

[s] Brook d. tit. Deviſe, n. 43. principal Grounds, tit. Burgage, fol. 43.

[t] H. 8. 32. cap. 1.

[u] Sup. part. 1. §. 11. n. 5.

[x] Brook tit. Deviſe, n. 22.

[y] Old Tenures, verb. Burgage.

[z] Littleton tit. Burgage, in prine.

[a] Brook Abridg. tit. Cuſtom, n. 7, 38, 41. tit. Deviſe, n. 22, 28. Doct. & Stud. lib. 1. c. 10.

[b] Littleton tit. Burgage.

the Lands and Tenements within the ſame be deviſable by Teſtament, if one of the ſaid Jointenants deviſe that which to him belongeth, and die, this Deviſe or Legacy is void [c]. The Reaſon is, for that no Deviſe can take Effect till after the Death of the Teſtator, who did bequeath and deviſe the ſame; but by his Death all the Land doth by the Law of this Realm come to the Survivor, who neither claimeth nor hath any Thing by Deviſe but of his own Right by the Survivor, according to the Courſe of the Law of this Land: And for this Cauſe ſuch Deviſe is void [d].

[c] Principal Grounds, fol. 20. b.

[d] Principal Grounds, fol. 20. b.

Another (9) Caſe there was alſo ſometimes uſed and practiſed, of deviſing Lands, Tenements and Hereditaments, by Wills to certain *Uſes, Intents and Truſts:* Which Wills or Teſtaments of Lands, Tenements and Hereditaments in Feoffees Hands were for the Time accounted and taken for good [e].

[e] Stat. H. 8. an. 27. c. 10.

But (10) this Cuſtom was reformed in many Things, for (11) divers good Conſiderations: Namely, becauſe by the Common Law of this Realm, Lands, Tenements and Hereditaments, be not deviſeable by Teſtament; and alſo for that ſuch Deviſes were not only hurtful to the Heir of the Teſtator, being many Times thereby diſinherited, but alſo for that divers other Inconveniences did by Reaſon thereof inſue; as that the Lords loſt their Wards, Marriages, Reliefs, Heriots, Eſcheats, Aids *pur faire fitz chivaler, & pur file marier.* Furthermore, by Occaſion of ſuch Wills, and other Conveyances to ſecret Intents, Uſes and Truſts, Men could not be certainly aſſured of any Lands by them purchaſed, nor knew they againſt whom they ſhould ſue their Actions and Executions for their Rights and Titles. Beſides this, Men married loſt their Tenancies by the Curteſy, Women their Dowries; finally, the Prince himſelf loſt the Profits of the Lands of Perſons attainted. For Reformation whereof a Statute was made in the Time of King *Henry* the Eighth, and enacted as followeth [f].

[f] 1. Stat. H. 8. 27. c. 10.

The Right and Poſſeſſion of Lands is to be in him to whoſe Uſe they are limited.

That is to ſay, (12) "That where any Perſon or Perſons ſtand or "be ſeiſed, or at any Time hereafter ſhall happen to be ſeiſed of "and in any Honours, Caſtles, Manors, Lands, Tenements, Rents, "Services, Reverſions, Remainders, or other Hereditaments, *to the* "*Uſe, Confidence or Truſt of any other Perſon or Perſons*, or of any "Body politick, by Reaſon of any Bargain, Sale, or Feoffment, Fine, "Recovery, Covenant, Contract, Agreement, Will, or otherwiſe by "any Manner of Means whatſoever it be, that in every ſuch Caſe, "all and every ſuch Perſon and Perſons, and Bodies politick, that "have or hereafter ſhall have any ſuch Uſe, Confidence, or Truſt, "in Fee-ſimple, Fee-tail, for Term of Life or of Years, or otherwiſe, or any Uſe, Confidence or Truſt in Remainder or Reverter, "ſhall from henceforth ſtand and be ſeiſed, deemed and adjudged "in lawful Seiſin, Eſtate and Poſſeſſion of and in the ſame Honours, "Caſtles, Manors, Lands, Tenements, Rents, Services, Reverſions, "Remainders and Hereditaments, with their Appurtenances, to all "Intents, Conſtructions and Purpoſes in the Law, of and in ſuch "like Eſtates as they had, or ſhall have, in Uſe, Truſt or Confidence, of, or in the ſame. And that the Eſtate, Title, Right and "Poſſeſſion, that was in ſuch Perſon or Perſons that were or hereafter ſhall be ſeiſed of any Lands, Tenements or Hereditaments, to "the Uſe, Confidence or Truſt of any ſuch Perſon or Perſons, or of "any Body politick, be from henceforth clearly deemed and adjudg-

" ed to be in him or them that have, or hereafter ſhall have, ſuch " Uſe, Confidence or Truſt, after ſuch Quality, Manner, Form and " Condition, as they had before, in or to the Uſe, Confidence or " Truſt, that was in them.

" And be it farther enacted by the Authority aforeſaid, That where " divers and many Perſons be or hereafter ſhall happen to be jointly " ſeiſed of and in any Lands, Tenements, Rents, Reverſions, Re- " mainders, or other Hereditaments, to the Uſe, Confidence or Truſt " of any of them that be ſo jointly ſeiſed, that in every ſuch Caſe, " he or thoſe Perſon or Perſons, which have, or hereafter ſhall have, " any ſuch Uſes, Confidence or Truſt, in any ſuch Lands, Tene- " ments, Rents, Reverſions, Remainders, or Hereditaments, ſhall " from henceforth have, and be deemed and adjudged to have, only " to him or them that have, or hereafter ſhall have, ſuch Uſe, Con- " fidence or Truſt, ſuch Eſtate, Poſſeſſion and Seiſin of and in the " ſame Lands, Tenements, Rents, Reverſions, Remainders, or o- " ther Hereditaments, in like Nature, Manner, Form, Condition " and Courſe, as he or they had before in the Uſe, Confidence or " Truſt of the ſame Lands, Tenements or Hereditaments: Saving " and reſerving to all and ſingular Perſons, and Bodies politick, their " Heirs and Succeſſors, other than him or thoſe Perſon or Perſons " which be ſeiſed, or hereafter ſhall be ſeiſed, of any Lands, Tene- " ments or Hereditaments, to any Uſe, Confidence or Truſt, all ſuch " Right, Title, Entry, Intereſt, Poſſeſſion, Rents and Actions, as " they or any of them had, or might have had, before the Making " of this Act.

" And alſo ſaving to all and ſingular thoſe Perſons, and to their " Heirs, which be or hereafter ſhall be ſeiſed to any Uſe, all ſuch " former Right, Title, Entry, Intereſt, Poſſeſſion, Rents, Cuſtoms, " Services, and Actions, as they or any of them might have had to " his or their own proper Uſe, in or to any Manors, Lands, Tene- " ments, Rents or Hereditaments, whereof they be, or hereafter " ſhall be ſeiſed to any other Uſe, as if this preſent Act had never " been had or made; any Thing contained in this Act to the contrary " notwithſtanding.

" And where alſo divers Perſons ſtand and be ſeiſed of and in any " Lands, Tenements or Hereditaments, in Fee-ſimple or otherwiſe, " to the Uſe or Intent that ſome other Perſon or Perſons ſhall have " and perceive yearly to them, and to his or their Heirs, one annual " Rent of Ten Pounds, or more or leſs, out of the ſame Lands and " Tenements; and ſome other Perſon, one other annual Rent to " him and his Aſſigns, for Term of Life or Years, or for ſome other " ſpecial Time, according to ſuch Intent and Uſe as hath been here- " tofore declared, limited and made thereof: Be it therefore enacted " by the Authority aforeſaid, That in every ſuch Caſe, the ſame Per- " ſons, their Heirs and Aſſigns, that have ſuch Uſe and Intereſt to " have and perceive any ſuch annual Rents out of any Lands, Te- " nements or Hereditaments, that they and every of them, their Heirs " and Aſſigns, be adjudged and deemed to be in Poſſeſſion and Seiſin " of the ſame Rent, of and in ſuch like Eſtate, as they had in the " Title, Intereſt, or Uſe of the ſaid Rent or Profit, and as if a ſuffi- " cient Grant or other lawful Conveyance had been made and exe- " cuted to them, by ſuch as were or ſhall be ſeiſed to the Uſe or In- " tent of any ſuch Rent, to be had, made, or payed, according to

" the

" the very Truſt and Intent thereof. And that all and every ſuch " Perſon or Perſons as have, or hereafter ſhall have, any Title, Uſe " and Intereſt, in or to any ſuch Rent or Profit, ſhall lawfully di- " ſtrain for Non-payment of the ſaid Rent, and in their own Names " make Advowries, or by their Bailiffs or Servants make Cognizances " and Juſtifications, and have all other Suits, Entries, and Remedies " for ſuch Rents, as if the ſame Rents had been actually and really " granted to them, with ſufficient Clauſes of Diſtreſs, Re-entry, or " otherwiſe, according to ſuch Conditions, Pains, or other Things " limited and appointed, upon the Truſt and Intent, for Payment or " Surety of ſuch Rent.

" And be it farther enacted by the Authority aforeſaid, That " whereas divers Perſons have purchaſed, or have Eſtate made and " conveyed of and in divers Lands, Tenements and Hereditaments, " unto them and to their Wives, and to the Heirs of the Husband, or " to the Husband and to the Wife, and to the Heirs of their Two Bo- " dies begotten, or to the Heirs of one of their Bodies begotten, or " to the Husband and to the Wife for Term of their Lives, or for " Term of Life of the ſaid Wife; or where any ſuch Eſtate or Pur- " chaſe of any Lands, Tenements or Hereditaments, hath been or " hereafter ſhall be made to any Husband and to his Wife, in Man- " ner and Form above expreſſed, or to any other Perſon or Perſons, " and to their Heirs and Aſſigns, to the Uſe and Behoof of the ſaid " Husband and Wife, or to the Uſe of the Wife, as is before rehearſed, " for the Jointure of the Wife: That then, in every ſuch Caſe, every " Woman married, having ſuch Jointure made, or hereafter to be " made, ſhall not claim, nor have Title to have any Dowry of the " Reſidue of the Lands, Tenements or Hereditaments, that at any " Time were her ſaid Husband's, by whom ſhe hath any ſuch Join- " ture, nor ſhall demand nor claim her Dowry of and againſt them " that have the Lands and Inheritances of her ſaid Husband. But if " ſhe have no ſuch Jointure, then ſhe ſhall be admitted and inabled " to purſue, have and demand her Dowry, by Writ of Dowry, af- " ter the due Courſe and Order of the Common Laws of this Realm; " this Act or any Law or Proviſion made to the contrary thereof not- " withſtanding.

" Provided alway, That if any ſuch Woman be lawfully expulſed " or evicted from her ſaid Jointure, or from any Part thereof, with- " out any Fraud or Covin, by lawful Entry, Action, or by Diſcon- " tinuance of her Husband; then every ſuch Woman ſhall be in- " dowed of as much of the Reſidue of her Husband's Tenements " or Hereditaments, whereof ſhe was before dowable, as the ſame " Lands and Tenements ſo evicted and expulſed ſhall amount or ex- " tend unto.

" Provided alſo, That this Act, nor any Thing therein contained " or expreſſed, extend, or be in any wiſe hurtful or prejudicial to " any Woman or Women heretofore being married, of, for or con- " cerning ſuch Right, Title, Uſe, Intereſt, or Poſſeſſion, as they or " any of them have, claim, or pretend to have, for her or their " Jointure or Dowry, of, in or to any Manors, Lands, Tenements, " or other Hereditaments, of any of their late Husbands, being now " dead or deceaſed; any Thing contained in this Act to the contrary " notwithſtanding.

" Provided alſo, That if any Wife have, or hereafter ſhall have, " any Manors, Lands, Tenements or Hereditaments, unto her given " or aſſured after Marriage for Term of her Life, or otherwiſe in " Jointure, except the ſame Aſſurance be to her made by Act of Par- " liament, and the ſaid Wife after that fortune to over-live the ſame " her Husband, in whoſe Time the ſaid Jointure was made or aſſured " unto her; that then the ſame Wife, ſo over-living, ſhall and may " at her Liberty, after the Death of her ſaid Husband, refuſe to have " and take the Lands and Tenements ſo to her given, appointed, or " aſſured, during the Coverture, for Term of her Life, or otherwiſe " in Jointure, except the ſame Aſſurance be to her made by Act of " Parliament, as is aforeſaid; and thereupon to have, ask, demand " and take, her Dowry by Writ of Dowry, or otherwiſe, according " to the Common Law, of and in all ſuch Lands, Tenements and He- " reditaments, as her Husband was and ſtood ſeiſed of in any State of " Inheritance, at any Time during the Coverture; any Thing con- " tained in this Act to the contrary in any wiſe notwithſtanding.

" Provided alſo, That this preſent Act, or any Thing therein con- " tained, do not extend, or be at any Time hereafter interpreted, ex- " pounded or taken, to extinct, releaſe, diſcharge or ſuſpend any Sta- " tute, Recognizance, or other Bond, by the Execution of any Eſtate " of or in any Lands, Tenements or Hereditaments, by the Authority " of this Act, to any Perſon or Perſons, or Bodies politick; any Thing " contained in this Act to the contrary thereof notwithſtanding.

" And foraſmuch as great Ambiguities and Doubts may ariſe of the " Validity and Invalidity of Wills heretofore made of any Lands, Te- " nements and Hereditaments, to the great Trouble of the King's Sub- " jects; the King's moſt Royal Majeſty, minding the Tranquility and " Reſt of his loving Subjects, of his moſt excellent and accuſtomed " Goodneſs is pleaſed and contented, that it be enacted by the Au- " thority of this preſent Parliament, That all Manner of true and juſt " Wills and Teſtaments heretofore made by any Perſon or Perſons de- " ceaſed, or that ſhall deceaſe before the firſt Day of *May*, that ſhall " be in the Year of our Lord God 1536. of any Lands, Tenements " or other Hereditaments, ſhall be taken and accepted as good and ef- " fectual in the Law, after ſuch Faſhion, Manner and Form, as they " were commonly taken and uſed at any Time within Forty Years " next afore the making of this Act; any Thing contained in this Act, " or in the Preamble thereof, or any Opinion of the Common Law, " to the contrary thereof notwithſtanding.

" Provided always, That the King's Highneſs ſhall not have, de- " mand, or take any Advantage or Profit, for or by Occaſion of the " executing of any Eſtate only by Authority of this Act, to any Per- " ſon or Perſons, or Bodies politick, which now have, or on this Side " the ſaid firſt Day of *May*, which ſhall be in the Year of our Lord " God 1536. ſhall have, any Uſe or Uſes, Truſts or Confidences, " in any Manors, Lands, Tenements or Hereditaments, holden of " the King's Highneſs, by Reaſon of primer Seiſin, Livery, *Ouſter* " *le maine*, fine for Alienation, Relief, or Heriot: But that Fines " for Alienations, Reliefs and Heriots, ſhall be payed to the King's " Highneſs. And alſo Liveries and *Ouſter le maines* ſhall be ſued " for Uſes, Truſts and Confidences to be made and executed in Poſ- " ſeſſion, by Authority of this Act, after and from the ſaid firſt Day " of *May*, of Lands and Tenements, and other Hereditaments holden

" of the King, in ſuch Manner and Form, to all Intents, Conſtruc-
" tions and Purpoſes, as hath heretofore been uſed or accuſtomed by
" the Order of the Laws of this Realm.

" Provided alſo, That no other Perſon or Perſons, or Bodies poli-
" tick, of whom any Lands, Tenements or Hereditaments, be or
" hereafter ſhall be holden, mediate or immediate, ſhall in any wiſe
" demand or take any Fine, Relief, or Heriot, for or by Occaſion of
" the executing of any Eſtate by the Authority of this Act, to any
" Perſon or Perſons, or Bodies politick, before the ſaid firſt Day of
" *May*, which ſhall be in the Year of our Lord God 1536.

" And be it enacted by the Authority aforeſaid, That all and ſin-
" gular Perſon and Perſons, and Bodies politick, which at any Time
" on this Side the ſaid firſt Day of *May*, which ſhall be in the Year
" of our Lord God 1536. ſhall have any Eſtate unto them executed
" of and in any Lands, Tenements or Hereditaments, by the Autho-
" rity of this Act, ſhall and may have and take the ſame or like Ad-
" vantage, Benefit, Voucher, Aid-prayer, Remedy, Commodity and
" Profit, by Action, Entry, Condition or otherwiſe, to all Intents,
" Conſtructions and Purpoſes, as the Perſon or Perſons ſeiſed to their
" Uſe, of or in any ſuch Lands, Tenements or Hereditaments ſo
" executed, had, ſhould, might or ought to have had, at the Time of
" the Execution of the Eſtate thereof, by the Authority of this Act,
" againſt any other Perſon or Perſons, of or for any Waſte, Diſſeiſin,
" Treſpaſs, Condition broken, or any other Offence, Cauſe or Thing,
" concerning or touching the ſaid Lands or Tenements ſo executed
" by the Authority of this Act.

" Provided alſo, and be it enacted by the Authority aforeſaid,
" That Actions now depending againſt any Perſon or Perſons, ſeiſed
" of or in any Lands, Tenements or Hereditaments, to any Uſe,
" Truſt or Confidence, ſhall not abate, ne be diſcharged, for or by
" Reaſon of executing of any Eſtate thereof by Authority of this
" Act, before the ſaid firſt Day of *May*, which ſhall be in the Year
" of our Lord God 1536. any Thing contained in this Act to the
" contrary notwithſtanding.

" Provided alſo, That this Act, or any Thing therein contained,
" ſhall not be prejudicial to the King's Highneſs for Wardſhips of
" Heirs now being within Age, nor for Liveries or for *Ouſter le*
" *mains*, to be ſued by any Perſon or Perſons now being within Age,
" or of full Age, of any Lands or Tenements unto the ſame Heir or
" Heirs now already deſcended; any Thing in this Act contained to
" the contrary notwithſtanding.

" Provided alſo, and be it enacted by the Authority aforeſaid, That
" all and ſingular Recognizances heretofore knowledged, taken or
" made to the King's Uſe, for or concerning any Recoveries of any
" Lands, Tenements or Hereditaments, heretofore uſed or had by
" Writ or Writs of Entry upon Diſſeiſin *in le poſt*, ſhall from hence-
" forth be utterly void and of none Effect, to all Intents, Conſtruc-
" tions and Purpoſes.

" Provided alſo, That this Act, nor any Thing therein contained,
" be in any wiſe prejudicial or hurtful to any Perſon or Perſons born
" in *Wales*, or the Marches of the ſame, which ſhall have any E-
" ſtate to them executed by Authority of this Act in any Lands, Te-
" nements, or other Hereditaments within this Realm, whereof any
" other Perſon or Perſons now ſtand or be ſeiſed to the Uſe of any

" ſuch Perſon or Perſons born in *Wales*, or the Marches of the " ſame: But that the ſame Perſon or Perſons born in *Wales*, or the " Marches of the ſame, ſhall or may lawfully have, retain and keep " the ſame Lands, Tenements or Hereditaments, whereof Eſtate " ſhall be ſo unto them executed by the Authority of this Act, ac- " cording to the Tenor of the ſame; any Thing in this Act contained, " or any other Act or Proviſion heretofore had or made, to the " contrary notwithſtanding.

Before this Statute was made, if Lands were limited to one and his Heirs to the Uſe of another, the *Ceſtui que Uſe* might take the Profits; and the Perſon in whom the Freehold was veſted was to make Eſtates according to the Direction of the *Ceſtui que Uſe*, who had only a bare Truſt, and had no Remedy againſt the other for a Breach of Truſt, but only in Chancery; but now by this Statute the Poſſeſſion is transferred to him who hath the Uſe, and what ever Eſtate a Man hath in the *Uſe*, the ſame he hath in *Poſſeſſion*.

But ſeveral Things are required to the *Execution* of an *Uſe* within this Statute: The firſt is, that ſome Perſon ſhould be ſeiſed: But the King, a Corporation, an Alien, one attainted, *&c.* cannot be ſeiſed to the Uſe of another; nor Tenant in Tail, Tenant by the Curteſy or in Dower; the *Ceſtui que Uſe* muſt be in * Being; there muſt be an Uſe likewiſe in Being, either in Poſſeſſion, Remainder, or Reverſion, *&c.* And where one conveys Lands to another by *Fine*, *Feoffment*, or *Common Recovery*, to the Uſe of his Laſt Will, and afterwards by his Will declares the Uſes, *&c.* this he may do without any Conſideration either of Kindred or Money.

1 Rep. 126, 136.

* See 11 & 12 Will. cap. 16.

It ſeems that Copyhold Lands are not within this Statute, becauſe the Transferring the Poſſeſſion to the Uſe by the Operation of Law, without the Allowance of the Lord and the Agreement of the Tenant, would be to the Prejudice of both.

Coke, Copyholder, Sect. 54.

SECT. IV.

Certain Caſes wherein by the Statutes of this Realm it is lawful to deviſe Lands, Tenements, or Hereditaments.

NOW follow certain other Caſes authoriſed by the Statutes of this Realm of *England*, wherein it is lawful to bequeath or deviſe Lands, Tenements and Hereditaments by Will, ſometimes wholly, and ſometimes in Part only, or ratably, according to the Nature of the Tenure of ſuch Lands, Tenements and Hereditaments, as in the ſame Statutes, which I have here ſet down at large, doth appear.

An

An Act declaring how, by the King's Grant, Lands, Tenements and Hereditaments may be by Will, Teſtament, or otherwiſe, diſpoſed; and concerning Wards and primer Seiſin, &c.

34, 35 H. 8. cap. 5. "WHERE the King's moſt Royal Majeſty, in all the Time "of his moſt gracious and noble Reign, hath ever been mer- "ciful, loving and benevolent, and a moſt gracious Sovereign Lord, "unto all and ſingular his loving and obedient Subjects, and at many "Times paſt hath not only ſhewed and imparted to them generally, "by his many and often, great and beneficial Pardons, heretofore by "Authority of his Parliaments granted, but alſo by divers other "Ways and Means, many great and ample Grants and Benignities, "in ſuch wiſe, as all his ſaid Subjects have been moſt bounden, to the "utmoſt of all their Power and Graces by them received of God, to "render and give unto his Majeſty their moſt humble Reverence and "obedient Thanks and Services, with their daily and continual "Prayer to Almighty God, for the continual Preſervation of his moſt "Royal Eſtate in moſt Kingly Honour and Proſperity: Yet always "his Majeſty being replete and endowed by God with Grace, Good- "neſs and Liberality, moſt tenderly conſidering that his ſaid obedient "and loving Subjects cannot uſe or exerciſe themſelves according to "their Eſtates, Degrees, Faculties and Qualities, or bear themſelves "in ſuch wiſe, as that they may conveniently keep and maintain their "Hoſpitalities and Families, nor the good Educations and bringing "up of their lawful Generations, which in this Realm, Laud be to "God, is in all Parts very great and abundant; but that in Manner "of Neceſſity, as by daily Experience is manifeſted and known, "they ſhall not be able of their proper Goods, Chattels, and other "moveable Subſtance, to diſcharge their Debts, and after their De- "grees ſet forth and advance their Children and Poſterities: Where- "fore our ſaid Sovereign Lord, moſt virtuouſly conſidering the Mor- "tality that is to every Perſon, at God's Will and Pleaſure, moſt "common and uncertain, of his moſt bleſſed Diſpoſition and Libe- "rality being willing to relieve and help his ſaid Subjects in their "ſaid Neceſſities and Debility, is contented and pleaſed, that it be or- "dained and enacted by the Authority of this preſent Parliament, in "Manner and Form as hereafter followeth: That is to ſay, That all "and every Perſon and Perſons, having, or which hereafter ſhall "have, any Manors, Lands, Tenements or Hereditaments, holden "in Socage, or of the Nature of Socage-Tenure, and not having any "Manors, Lands, Tenements or Hereditaments, holden of the King "our Sovereign Lord by Knight's Service, by Socage-Tenure in "chief, or of the Nature of Socage-Tenure in chief, nor of any "other Perſon or Perſons by Knight's Service, from the 20th Day "*July* in the Year of our Lord God 1540. ſhall have full and free "Liberty, Power and Authority, 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 Ma- "nors, Lands, Tenements or Hereditaments, or any of them, at

 "his

" his free Will and Pleaſure; any Law, Statute, or other Thing " heretofore had, made or uſed to the contrary notwithſtanding.

" And that all and every Perſon and Perſons having Manors, " Lands, Tenements or Hereditaments, holden of the King our So- " vereign Lord, his Heirs or Succeſſors, in Socage, or of the Na- " ture of Socage-Tenure in Chief, and having any other Manors, " Lands, Tenements or Hereditaments, holden of any other Perſon " or Perſons in Socage, or of the Nature of Socage-Tenure, and " not having any Manors, Lands Tenements or Hereditaments, hol- " den of the King our Sovereign Lord by Knight's Service, nor of " any other Lord or Perſon by like Service, from the Twentieth " Day of *July* in the Year of our Lord God 1540, ſhall have " full and free Liberty, Power and Authority, to give, will, diſpoſe " and deviſe, as well by his Laſt Will or Teſtament in Writing, " or otherwiſe by any Act or Acts lawfully executed in his Life, all " his ſaid Manors, Lands, Tenements and Hereditaments, or any of " them, at his free Will and Pleaſure; any Law, Statute, Cuſtom, " or other Thing heretofore had, made, or uſed, to the contrary " notwithſtanding. Saving alway, and reſerving to the King our So- " vereign Lord, his Heirs and Succeſſors, all his Right, Title and " Intereſt of primer Seiſin, Reliefs, and alſo all other Rights and " Duties for Tenures in Socage, or of the Nature of Socage-Tenure " in Chief, as heretofore hath been uſed and accuſtomed; the ſame " Manors, Lands, Tenements or Hereditaments, to be taken, had and " ſued out of and from the Hands of his Highneſs, his Heirs and " Succeſſors, by the Perſon or Perſons to whom any ſuch Manors, " Lands, Tenements or Hereditaments, ſhall be diſpoſed, willed or " deviſed, in ſuch and like Manner and Form as hath been uſed by " any Heir or Heirs before the making of this Statute. And ſaving " and reſerving alſo Fines for Alienations of ſuch Manors, Lands, " Tenements or Hereditaments, holden of the King our Sovereign " Lord, in Socage, or of the Nature of Socage-Tenure in Chief, " whereof there ſhall be any Alteration of Freehold or Inheritance " made by Will, or otherwiſe, as is aforeſaid.

" And it is farther enacted by the Authority aforeſaid, That all and " ſingular Perſon and Perſons, having any Manors, Lands, Tenements " or Hereditaments, of Eſtate of Inheritance, holden of the King's " Highneſs in Chief, by Knight's Service, or of the Nature of Knight's " Service in Chief, from the ſaid twentieth Day of *July*, ſhall have " full Power and Authority, by his laſt Will by Writing, or other- " wiſe by any Act or Acts lawfully executed in his Life, to give, " diſpoſe, will or aſſign two Parts of the ſame Manors, Lands, Te- " nements or Hereditaments, in three Parts to be divided, or elſe as " much of the ſaid Manors, Lands, Tenements or Hereditaments, " as ſhall extend or amount to the yearly Value of two Parts of the " ſame, in three Parts to be divided, in Certainty, and by ſpecial Di- " viſions, as it may be known in Severalty, to and for the Advance- " ment of his Wife, Preferment of his Children, and Payment of " his Debts, or othewiſe at his Will and Pleaſure; any Law, Sta- " tute, Cuſtom, or other Thing to the contrary thereof notwithſtand- " ing. Saving and reſerving to the King our Sovereign Lord the " Cuſtody, Wardſhip, and primer Seiſin, or any of them, as the " Caſe ſhall require, of as much of the ſame Manors, Lands, Te- " nements or Hereditaments, as ſhall amount and extend to the full

" and clear yearly Value of the third Part thereof, without any Di-
" minution, Dower, Fraud, Covin, Charge, or Abridgment of any
" of the ſame third Part, or of the full Profits thereof. Saving alſo
" and reſerving to the King our ſaid Sovereign Lord all Fines for
" Alienations of all ſuch Manors, Lands, Tenements and Hereditа-
" ments, holden of the King by Knight's Service in Chief, whereof
" there ſhall be any Alteration of Freehold or Inheritance, made by
" Will or otherwiſe, as is aboveſaid.

" And be it enacted by the Authority aforeſaid, That all and ſin-
" gular Perſon and Perſons having Manors, Lands, Tenements or
" Hereditaments of Eſtate of Inheritahce, holden of the King in
" Chief by Knight's Service; and having other Manors, Lands, Te-
" nements or Hereditaments, holden of the King, or of any other
" Perſon or Perſons, by Knight's Service or otherwiſe; every ſuch
" Perſon and Perſons, from the ſaid twentieth Day of *July*, ſhall
" have full Power and Authority to give, diſpoſe, will or aſſign by
" his laſt Will in Writing, or otherwiſe by any Act or Acts lawfully
" executed in his Life, two Parts of the ſame Manors, Lands, Te-
" nements or Hereditaments, in three Parts to be divided, or elſe
" as much of the ſame Manors, Lands, Tenements and Hereditaments,
" as ſhall extend or amount to the yearly Value of two Parts of the
" ſame, in three Parts to be divided, in Certainty, and by ſpecial Di-
" viſions, as it may be known in Severalty, to and for Advancement
" of his Wife, Preferment of his Children, and Payment of his
" Debts, or otherwiſe at his Will and Pleaſure; any Law, Statute,
" Cuſtom, or other Thing to the contrary thereof notwithſtanding.
" Saving alway and reſerving to the King our Sovereign Lord the
" Cuſtody, Wardſhip, and primer Seiſin, or any of them, as the Caſe
" ſhall require, of as much of the ſame Manors, Lands, Tenements
" or other Hereditaments, as ſhall amount and extend to the full and
" clear yearly Value of the third Part thereof, without any Manner
" of Diminution, Dower, Fraud, Covin, Charge, or Subtraction of
" the ſame third Part, or of the full Profits thereof.

" Saving alway and reſerving to our ſaid Sovereign Lord the King
" all Fines for Alienation of any ſuch Manors, Lands, Tenements
" or Hereditaments, holden of the King by Knights-Service in Chief,
" whereof there ſhall be any Alteration of Freehold or Inheritance,
" made by Will or otherwiſe, as is aboveſaid.

" Be it farther enacted by the Authority aboveſaid, That if any
" Perſon or Perſons hold any Manors, Lands, Tenements, or Here-
" ditaments, only of any other Lord or Perſon, than of the King
" our ſaid Sovereign Lord by Knights-Service, and other Lands and
" Tenements in Socage, or of the Nature of Socage-tenure; that
" then every ſuch Perſon ſhall or may give, diſpoſe, or aſſure, by
" his laſt Will, or otherwiſe by any Act or Acts lawfully executed
" in his Life, two Parts of the ſaid Manors, Lands and Tenements,
" holden by Knights-Service, or as much thereof as ſhall amount to
" the full yearly Value of two Parts, in Manner and Form as is a-
" bove declared; and alſo all the Lands and Tenements holden by
" Socage, or of the Nature of Socage-tenure, at his Will and Plea-
" ſure, as is above written. Saving and reſerving to the Lord of the
" Lands and Tenements holden by Knights-Service, for his Cuſtody
" and Wardſhip, as much of the ſame Lands and Tenements, as ſhall
" extend or amount to the full and clear yearly Value of the third

" Part of the ſame Lands and Tenements, holden by Knights-Ser-
" vice, without any Diminution, Dower, Fraud, Covin, Charge, or
" Subtraction of any Portion of that third Part, or of the clear
" yearly Value thereof, in Manner and Form aforeſaid.

" And be it farther enacted by the Authority aboveſaid, That if
" any Perſon or Perſons hold any Manors, Lands, Tenements or He-
" reditaments, only of the King our Sovereign Lord by Knights-Ser-
" vice, and not in Chief; or hold any Manors, Lands, Tenements
" or Hereditaments, of our ſaid Sovereign Lord by Knights-Ser-
" vice, and not in Chief; and alſo hold other Manors, Lands, Te-
" nements and other Hereditaments, of any other Perſon or Perſons
" by Knights-Service; and alſo hold other Manors, Lands, Tene-
" ments or Hereditaments, of any other Perſon or Perſons in Socage,
" or of the Nature of Socage-tenure; that then all and every ſuch
" Perſon and Perſons ſhall and may give, diſpoſe, will, deviſe and
" aſſure, by his laſt Will, or otherwiſe by any Act or Acts lawfully
" done and executed in his Life, two Parts of the ſame Manors,
" Lands, Tenements and Hereditaments, holden of our ſaid Sove-
" reign Lord the King by Knights-Service; and two Parts of the
" Manors, Lands, Tenements and Hereditaments, holden of any
" other Perſon or Perſons by Knights-Service, or as much of either
" of them, as ſhall amount to the full yearly Value of two Parts, in
" Manner and Form as is above declared; and alſo of all his Lands
" and Tenements ſo holden in Socage, or of the Nature of Socage-
" tenure, at his free Will and Pleaſure. Saving and reſerving to the
" King's Highneſs the Cuſtody and Wardſhip of as much of the
" ſame Manors, Lands, Tenements, or other Hereditaments, as ſhall
" extend and amount to the full and clear yearly Value of the third
" Part of the ſaid Manors, Lands, Tenements and Hereditaments, ſo
" holden of his Highneſs by Knights-Service, without any Diminu-
" tion, Dower, Fraud, Covin, Charge, and Subtraction of any Por-
" tion of that third Part, or of the full Profits thereof. And alſo
" ſaving and reſerving to the Lords of whom any of the ſaid Ma-
" nors, Lands, Tenements, or other Hereditaments, are holden by
" Knights-Service, for Cuſtody and Wardſhip, as much of the ſame
" Manors, Lands, Tenements or Hereditaments, holden of them or
" any of them by Knight-Service, as ſhall extend and amount to the
" full and clear yearly Value of the third Part of the ſame, without
" any Diminution, Charge, Fraud, Covin, or Subtraction of any
" Portion of that Third, or of the clear yearly Value of the third
" Part thereof, in Manner and Form above declared.

" Provided alway, and it is farther enacted by the Authority afore-
" ſaid, That if that third Part of the Manors, Lands, Tenements or
" Hereditaments, of any of the King's Subjects, which in any of the
" Caſes aboveſaid ſhall hereafter come to the King's Highneſs, his
" Heirs or Succeſſors, by Virtue of this Act, as is aboveſaid, be not
" or do not amount to the clear yearly Value of the third Part of
" all the ſaid Manors, Lands, Tenements, or other Hereditaments,
" whereof the King's Highneſs is or ſhall be intituled to have the
" Cuſtody or primer Seiſin, as is aboveſaid; that then our ſaid Sove-
" reign Lord and his Heirs ſhall and may, at his or their free Liber-
" ty and Pleaſure, take into his or their Hands and Poſſeſſions, as
" much of the other two Parts of the ſaid Manors, Lands, Tene-
" ments, and other Hereditaments, as with that of the ſame Manors.

" Lands,

" Lands, Tenements or Hereditaments, holden and remaining in the " King's Hands, ſhall make up the clear yearly Value of the full " third Part of the ſaid Manors and Tenements, ſo to be had to the " King's Highneſs, in Title of Wardſhip and primer Seiſin, or any of " them, as the Caſe ſhall require; and like Benefit and Advantage to " be given to every Lord and Lords, of whom any ſuch Manors, " Lands, Tenements or Hereditaments, be or ſhall be holden by " Knights-Service, as is aboveſaid, concerning only his third Part of " or for Title of Wardſhip.

" Provided alway, and be it farther enacted by the Authority a- " foreſaid, That every Perſon and Perſons ſhall ſue their Liveries " for Poſſeſſions, Reverſions, or Remainders; and alſo pay Reliefs " and Heriots, after ſuch Manner and Form, as they ſhould or ought " to have done before the Making of this Act, and as if this Act had " never been made; And that Fines for Alienations ſhall be paid in " the King's Chancery, for and upon Writs of Entry *in the Poſt*, to " be obtained in the ſame Court of Chancery, after the ſaid twen- " tieth Day of *July*, for common Recoveries to be had or ſuffered " of any Manors, Lands, Tenements or Hereditaments, holden of " the King in Chief, in like Manner and Form, as is uſed upon Alie- " nations of ſuch Manors, Lands, Tenements or Hereditaments, ſo " holden in Chief, by Fine or Feoffment.

" Provided alſo, and be it enacted by the Authority aforeſaid, " That in ſuch Caſes, where Fines for Alienations ſhall be payed in " the King's Chancery for Writs of Entry *in the Poſt*, as is afore- " ſaid, that then none other Fine ſhall be payed in the ſame Court " for any ſuch Writs; any Uſage or Cuſtom to the contrary thereof " notwithſtanding.

" And be it farther enacted by the Authority aforeſaid, That " where two or more Perſons now hold, or hereafter ſhall hold " any Manors, Lands, Tenements or Hereditaments, of the King " our Sovereign Lord by Knights-Service, jointly to them and to the " Heirs of one of them; and he that hath the Inheritance thereof " dieth, his Heir being within Age, that in every ſuch Caſe the " King ſhall have the Ward and Marriage of the Body of ſuch Heir " ſo being within Age; the Life of the Freeholder or Freeholders of " the ſaid Manors, Lands, Tenements or Hereditaments, ſo holden " by Knights-Service, notwithſtanding. Saving and reſerving to all " and every Woman and Women all and every ſuch Right, Title, " and Intereſt of Dower, as they or any of them ought to have, " or be or ſhall be juſtly intituled to have, claim, or demand, of " any Manors, Lands, Tenements or Hereditaments, by the Laws " of this Realm, to be taken or aſſigned unto them, or any of " them, out of the two Parts of the ſaid Manors, Lands, Tenements " or Hereditaments, ſevered and divided from the third Part, as is " aboveſaid, and not otherwiſe. And ſaving alſo to the King our " Sovereign Lord, his Heirs and Succeſſors, the Reverſions of all " ſuch Tenants in Jointenure and Dower, immediately after the " Death of ſuch Tenants, if they ſhall happen to die during the Mi- " nority of the King's Wards.

Another Act for the Explanation of the former, concerning Wills, and the Deviſe of Lands.

" WHereas in the laſt Parliament, begun and holden at *Weſtminſter* the 28th Day of *April* in the 31ſt Year of the " King's moſt gracious Reign, (*Cap. primo* Wills 2.) and there by " divers Prorogations holden and continued unto the four and twentieth Day of *July* in the two and thirtieth Year of his ſaid Reign, " it was by the King's moſt gracious and liberal Diſpoſition, ſhewed " toward his moſt humble and obedient Subjects, ordained and enacted how and in what Manner Lands, Tenements and Hereditaments, might by Will, or Teſtament in Writing, or otherwiſe by " any Act or Acts lawfully executed in the Life of every Perſon, be " given, diſpoſed, willed or deviſed, for the Advancement of the " Wife, Preferment of Children, Payment of Debts, of every ſuch " Perſon, or otherwiſe, at his Will or Pleaſure, as in the ſame Act " more plainly is declared: Sithen the Making of the Eſtatute, divers Doubts, Queſtions and Ambiguities have riſen, been moved " and grown, by Diverſity of Opinions taken in and upon the Expoſition of the Letter of the ſame Eſtatute.

" For a plain Declaration and Explanation whereof, and to the " Intent and Purpoſe that the King's obedient and loving Subjects " ſhall and may take the Commodity and Advantage of the King's " ſaid gracious and liberal Diſpoſition, the Lords Spiritual and Temporal, and the Commons in this preſent Parliament aſſembled moſt " humbly beſeech the King's Majeſty, that the Meaning of the Letter of the ſame Eſtatute, concerning ſuch Matters hereafter rehearſed, " may be by the Authority of this preſent Parliament enacted, taken, " expounded, judged, declared and explained, in Manner and Form " following.

" Firſt, Where it is contained in the ſame former Statute, within " divers Articles and Branches of the ſame, that all and ſingular " Perſon and Perſons having any Manors, Lands, Tenements or Hereditaments, of the Eſtate of Inheritance, ſhould have full and free " Liberty, Power and Authority, to give, will, diſpoſe, or aſſign, " as well by laſt Will and Teſtament in Writing, or otherwiſe by " any Act or Acts lawfully executed in his Life, his Manors, Lands, " Tenements or Hereditaments, or any of them, in ſuch Manner and " Form, as in the ſame former Act more at large it doth appear. " Which Words of Eſtate of Inheritance, by the Authority of this " preſent Parliament, is and ſhall be declared, expounded, taken and " judged of Eſtates in Fee-ſimple only. And alſo that all and ſingular Perſon and Perſons having a ſole Eſtate or Intereſt in Fee-" ſimple, or ſeiſed in Fee-ſimple in Copercenary, or in Common in " Fee-ſimple, of and in any Manors, Lands, Tenements, Rents, or " other Hereditaments, in Poſſeſſion, Reverſion or Remainder, or of " Rents or Services incident to any Reverſion or Remainder; and " having no Manors, Lands, Tenements or Hereditaments holden " of the King, his Heirs or Succeſſors, or of any other Perſon or " Perſons, by Knights-Service, ſhall have full and free Liberty, " Power and Authority, 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 otherwiſe by any Act or Acts

" lawfully executed in his Life, by himſelf ſolely, or by himſelf and " other jointly, ſeverally, or particularly, or by all thoſe Ways or " any of them, as much as in him of Right is or ſhall be, all his " ſaid Manors, Lands, Tenements, Rents and Hereditaments, or any " of them, or any Rents, Commons, or other Profits or Commodi- " ties, out of, or to be perceived of the ſame, or out of any Parcel " thereof, at his own free Will and Pleaſure; any Clauſe in the ſaid " former Act notwithſtanding.

" And farther be it declared and enacted by the Authority afore- " ſaid, That all and ſingular Perſon and Perſons having a ſole Eſtate " or Intereſt in Fee-ſimple, or ſeiſed in Fee-ſimple in Copercenary, " or in Common in Fee-ſimple, of or in any Manors, Lands, Tene- " ments, Rents, or other Hereditaments, in Poſſeſſion, Reverſion or " Remainder, or of and in any Rents or Services incident to any Re- " verſion or Remainder, holden of the King by Knights-Service in " Chief, or of the Nature of Knights-Service in Chief, hath, and by " the Authority of this preſent Parliament ſhall have, full and free " Liberty, Power and Authority, to give, diſpoſe, will or aſſign to " any Perſon or Perſons (except Bodies politick and corporate) by his " laſt Will and Teſtament in Writing; or otherwiſe by any Act or " Acts lawfully executed in his Life, by himſelf ſolely, or by himſelf " and other jointly, ſeverally, or particularly; or by all thoſe Ways " or any of them, as much as in him of Right is or ſhall be, two Parts, " as well of all the ſaid Manors, Lands, Tenements, Rents and He- " reditaments, as of all and ſingular his other Rents and Hereditа- " ments, or of any of them, or any Rents, Commons, or other Pro- " fits or Commodities, out of, or to be perceived of the ſame two " Parts, or out of any Parcel thereof, in three Parts to be divided, " or as much thereof as ſhall amount to the full and clear yearly Va- " lue of two Parts thereof, in three Parts to be divided, of what Per- " ſon or Perſons ſoever they be holden, at his free Will and Plea- " ſure. And that by the Authority aforeſaid, the ſaid Will ſo de- " clared ſhall be good and effectual for two Parts of the ſaid Manors, " Lands, Tenements and Hereditaments, although the Will ſo de- " clared be made of the Whole, or of more than of two Parts of " the ſame. The ſame Diviſion to be made and ſet forth by the " Deviſor or Owner of the ſame Manors, Lands, Tenements and He- " reditaments, by his laſt Will in Writing, or otherwiſe in Writing. " And in Default thereof, by a Commiſſion to be granted out of the " King's Court of the Wards and Liveries, upon the Enquiry of the " true Value thereof, by the Oaths of twelve Men, and Return and " Certificate thereof had in the ſame Court, of the ſaid Manors, " Lands, Tenements and Hereditaments, Diviſion to be made by the " Maſter of the Wards and Liveries, if the Maſter of the Wards and " Liveries for the Time being, and the Parties thereunto, cannot other- " wiſe agree upon the ſame Diviſion. And that the Iſſues and Pro- " fits of the two Parts of the ſame Manors, Lands, Tenements and " Hereditaments, upon every ſuch Diviſion, ſhall be reſtored to them " that ſhall have Right or Title to the ſame, from the Death of the " Owner or Deviſor thereof.

" And farther be it enacted and declared by the Authority afore- " ſaid, That all and ſingular Perſon and Perſons having a ſole E- " ſtate or Intereſt in Fee-ſimple, or ſeiſed in Fee-ſimple in Coperce- " nary, or in Common in Fee-ſimple, of and in any Manors, Lands,

" Tenements, Rents, or other Hereditaments, in Poſſeſſion, Reverſion, or Remainder, or of and in any Rents and Services incident to any Reverſion or Remainder, holden of the King, his Heirs or Succeſſors, by Knights-Service, and not in Chief, or holden of any other Perſon or Perſons by Knights-Service, ſhall have full and free Liberty, Power and Authority, 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 otherwiſe by any Act or Acts lawfully executed in his Life, by himſelf ſolely, or by himſelf and other jointly, ſeverally, or particularly; or by all thoſe Ways, or any of them, as much as in him of Right is or ſhall be, two Parts of all the ſaid Manors, Lands, Tenements and Hereditaments, or any of them, ſo holden by Knights-Service, or any Rents, Common, or other Profits or Commodities, out of, or to be perceived of the ſame two Parts, or out of any Parcel thereof, in three Parts to be divided, or as much thereof as ſhall amount to the full and clear yearly Value of two Parts thereof, in three Parts to be divided, at his free Will and Pleaſure. And that the ſaid Will, ſo declared by Authority aforeſaid, ſhall be good and effectual for two Parts of the ſaid Manors, Lands, Tenements or Hereditaments, although the Will ſo declared be or ſhall be made of the whole Lands and Tenements ſo holden by Knight's Service, or of more than of two Parts of the ſame; and alſo for the whole of all other ſuch Manors, Lands, Tenements and Hereditaments, or any of them, not holden of the King by Knight's Service in Chief, or otherwiſe by Knight-Service, nor of any other Perſon by Knight's Service, and of any Rents, Commons, or other Profits or Commodities, out of, or to be perceived of the ſame, or out of any Parcel thereof, at his free Will and Pleaſure. The ſame Diviſion to be made and ſet forth by the Owner of the ſaid Manors, Lands, Tenements and Hereditaments, by his laſt Will and Teſtament in Writing, or otherwiſe in Writing. And in Default thereof, for as much of the ſame Manors, Lands, Tenements and Hereditaments, as ſhall concern the King's Intereſt, by Commiſſion to be directed out of the King's Court of the Wards and Liveries, in Manner and Form as is aforeſaid, if the Maſter of the Wards and Liveries for the Time being, and the Parties thereunto, cannot otherwiſe agree upon the ſame Diviſion. And that Reſtitution of the Iſſues and Profits of the two Parts thereof ſhall be had and made in Manner and Form aforeſaid. And for ſuch of the ſame Manors, Lands, Tenements and Hereditaments, as ſhall concern the Intereſt of any other Lord or Lords, by Commiſſion to be granted out of the King's Court of Chancery, to enquire thereof by the Oaths of twelve Men, if the ſame Lord or Lords, and the Parties thereunto, cannot otherwiſe agree upon the ſame Diviſion.

" And be it farther enacted and declared by the Authority aforeſaid, That the Savings, Reſervings and Proviſions, concerning ſaving of the Cuſtody, Wardſhip, Relief, and primer Seiſin to the King, of ſuch Manors, Lands, Tenements and Hereditaments, or as much thereof as ſhall appertain unto him by Virtue of the ſaid former Act, and by the Declaration and Expoſition thereof, declared by this preſent Act, during the King's Inteteſt therein; and alſo of the Cuſtody and Wardſhip to other Lords, of as much

" of

" of ſuch Manors, Lands, Tenements and Hereditaments holden of " them, as ſhall amount and extend to the clear yearly Value of the " third Part thereof, over and above all Charges, without any Di- " minution or Abridgment of the third Part, or of the full Profits " thereof, compriſed and mentioned in divers Articles in the ſaid for- " mer Act contained by the Authority aforeſaid, be, and ſhall be, in- " tended, expounded, and taken, as hereafter inſueth; that is to ſay, " That the King ſhall have and take for his full third Part of all " ſuch Manors, Lands, Tenements and Hereditaments, whereunto " he is or ſhall be intitled by the ſaid former Act, and by this pre- " ſent Act, ſuch Manors, Lands and Tenements, as ſhall by any " Means diſcend or come by Diſcent, as well of the Eſtate of In- " heritance in Fee-tail, as in Fee-ſimple, or in Fee-tail only, to the " Heir of any ſuch Perſon, or that ſhall make any Will, Gift, Diſ- " poſition or Deviſe by his laſt Will in Writing, or by any Act or " Acts lawfully executed in his Life, immediately after the Death of " the ſame Deviſor or Owner thereof. And that the Will, Gift and " Deviſe of every ſuch Deviſor or Owner, of and for the two Parts " of the ſaid Manors, Lands, Tenements and Hereditaments Reſidue, " ſhall, by the Authority aforeſaid, be and ſtand good and effectual " in the Law, albeit the ſame Will, Gift or Deviſe be had and made " of all his Fee-ſimple Lands, Tenements and Hereditaments. And " in Caſe the ſame Manors, Lands, Tenements and Hereditaments, " after the Death of any ſuch Owner or Deviſor, which ſhall make " any ſuch Gift, Diſpoſition or Deviſe, by his laſt Will in Writing, " or otherwiſe by any Act or Acts lawfully executed in his Life, to " his Wife, Children or otherwiſe, as is aforeſaid, which ſhall im- " mediately after his Death diſcend, revert, remain, or come to his " Heir or Heirs, as well of Eſtate of Inheritance in Fee-tail, as of " Eſtate in Fee-ſimple, or Fee-tail only, be not, or ſhall not amount " or extend to the full clear yearly Value of the full third Part, " with the full Profits thereof, of all the ſaid Manors, Lands, Tene- " ments, or other Hereditaments of the ſaid Deviſor or Owner, ac- " cording to the true Intent and Meaning of the ſaid former Act, " and of this preſent Act; that then the King ſhall and may have " and take into his Hands and Poſſeſſion, to make up his full third " Part, with the full Profits thereof, according to his Intereſt therein, " as much of the other Manors, Lands, Tenements or Heredita- " ments, willed, given, diſpoſed or aſſigned by any ſuch Perſon to " his Wife, Children or otherwiſe, as is aforeſaid, as with ſuch of " the ſaid Manors, Lands, Tenements and Hereditaments, deſcended, " or by any Means come unto the Heir, as Heir of any ſuch Devi- " ſor or Owner, ſhall make up the clear yearly Value of the ſaid full " third Part, with the full Profits thereof, of all the ſaid Manors, " Lands, Tenements and Hereditaments, of every ſuch Owner or " Deviſor, ſo to be had to the King, in the Title of Wardſhip or " primer Seiſin, as the Caſe ſhall require. And the Diviſion thereof " to be had and made, and with the Reſtitution of the Profits of " the two Parts of the ſaid Manors, Lands, Tenements and Heredi- " taments, in ſuch Manner and Form, as is above rehearſed. And " like Benefit and Advantage to be given, had, and taken, by the " ſaid Authority, to every Lord and Lords, of whom any ſuch " Manors, Lands, Tenements or Hereditaments, have been or ſhall " be holden by Knight's Service, in Manner and Form as is above-

" ſaid

" ſaid, concerning only his or their third Parts thereof, according to " their ſaid Intereſt therein.

" And be it farther enacted by the Authority aforeſaid, That if it " happen the ſame third Part, or any Part thereof, left, willed or " aſſigned, to the King or other Lord, at any Time during their " Intereſts therein, to be lawfully evicted or determined; that then " the King and the other Lord ſhall have as much of the two Parts " Reſidue, as ſhall accompliſh and make up a full third Part in " clear yearly Value, after the Rate and Portion of ſuch Manors, " Lands, Tenements and Hereditaments, as ſhall then happen to re- " main of the ſame third Part not evicted nor determined, and of the " other two Parts of ſuch Manors, Lands, Tenements and Hereditaments, as the King or other Lord ſhould or ought to have had, " by Virtue of the ſaid former Act, and this preſent Act; and the " ſame to be divided in Manner and Form above rehearſed, any " Clauſe in the ſaid former Act notwithſtanding.

" And be it farther enacted and declared by the Authority aforeſaid, That the Saving and Reſerving for Fines for Alienation by " any ſuch laſt Will and Teſtament, of ſuch Manors, Lands, Tenements or Heditaments, holden of the King by Knight's Service in " Chief, or of the Nature of Knight's Service in Chief, or by Socage in Chief, or of the Nature of Socage-Tenure in Chief, or " for Fines for Alienation of ſuch Manors, Lands, Tenements or " Hereditaments, whereof there ſhall be any Alteration of Freehold " or of Inheritance, made by any ſuch laſt Will, compriſed in divers " and ſundry Articles mentioned in the ſaid former Act, be and ſhall " be intended, expounded, taken, deemed and judged, by the Authority aforeſaid; that all ſuch Perſon or Perſons, to whom the ſaid " Manors, Lands, Tenements or Hereditaments, or any of them, be " or ſhall be given, diſpoſed, willed or deviſed, by any ſuch laſt " Will, ſhall be exonerated, acquitted and diſcharged for ever, " againſt the King, his Heirs and Succeſſors, for all ſuch Fines for " Alienations, by any ſuch laſt Will or Teſtament, without Licence, " by ſuing forth of the King's Pardon for Alienation out of the " King's Court of Chancery, paying to the King, his Heirs or Succeſſors, for the Fine of every ſuch Alienation, the third Part of the " yearly Value of the ſame Manors, Lands, Tenements, or other " Hereditaments, to him or them willed or deviſed. And this Act " from Time to Time ſhall be a ſufficient Warrant to the Lord " Chancellor of *England*, or Keeper of the Great Seal, for the " Time being, for the Granting out of the ſaid Pardon or Pardons " under the King's Great Seal, as heretofore hath been uſed for " Pardons for Alienations, without any farther Suit to be made to " the King for the ſame.

" And it is farther declared and enacted by the Authority aforeſaid, That Wills or Teſtaments made of any Manors, Lands, Tenements, or other Hereditaments, by any Woman covert, or Perſon within the Age of 21 Years, Idiot, or by any Perſon *de non ſane memorie*, ſhall not be taken to be good or effectual in the " Law.

" And farther be it enacted by the Authority aforeſaid, That if " any Perſon or Perſons, having an Eſtate of Inheritance of or in " Manors, Lands, Tenements or Hereditaments, holden of the King " by Knights-Service in Chief, or otherwiſe of the King by Knights-

" Service, or of any other Perſon or Perſons by Knights-Service, " hath given at any Time ſithence the Twentieth Day of the ſaid " Month of *July* 32 *Hen.* 8. *Anno Dom.* 1540, or hereafter ſhall " give, will, deviſe or aſſign, by Will or other Act executed in his " Life, his Manors, Lands, Tenements or Hereditaments, or any of " them, by Fraud or Covin, to any other Perſon or Perſons, for " Term of Years, Life, or Lives, with one Remainder over in Fee, " or with divers Remainders over for Term of Years, Life or in " Tail, with a Remainder over in Fee-ſimple, to any Perſon or Per- " ſons, or to his or their right Heirs, or at any Time ſithence the " ſaid 20th Day of *July* hath conveyed or made, or hereafter ſhall " convey or make, by Fraud or Covin, contrary to the true Intent " of this Act, any Eſtates, Conditions, Menalties, Tenures, or Con- " veyances, to the Intent to defraud or deceive the King of his Pre- " rogative, primer Seiſin, Livery, Relief, Wardſhip, Marriages, or " Rights, or any other Lord of their Wardſhips, Reliefs, Heriots, " or other Profits, which ſhould or ought to accrue, grow, or come " unto them, or any of them, by or after the Death of his or their " Tenant, by Force of and according to the former Statute, and of " this preſent Act and Declaration; the ſame Eſtates and other Con- " veyances being found by Office to be ſo made or contrived by Co- " vin, Fraud or Deceit, as is aboveſaid, contrary to the true Intent " and Meaning of the ſaid former Act, and of this Act; That then " the King ſhall have as well the Wardſhip of the Body, and Cu- " ſtody of the Lands, Tenements and Hereditaments, as Livery, " primer Seiſin, Relief, and other Profits, which ſhould or ought to " appertain to the King, according to the true Intent and Meaning " of the ſaid former Act, and of this preſent Act, as though no ſuch " Eſtates or Conveyances by Covin had ever been had or made, until " the ſaid Office be lawfully undone by Traverſe, or otherwiſe. And " that the other Lord and Lords, of whom any ſuch Manors, Lands, " Tenements or Hereditaments, ſhall be holden by Knights-Service, " as is aforeſaid, ſhall have their Remedy in ſuch Caſes, for his or " their Wardſhips of Bodies and Lands, by Writ of Right of Ward, " and ſhall diſtrain and make Avowry or Recognizance, by them- " ſelves or their Bailiffs, for their Reliefs, Heriots, and other Pro- " fits, which ſhould have been to them due by or after the Death of " their Tenant, as if no ſuch Eſtate or Conveyance had been had or " made, Saving and reſerving always, by the Authority aforeſaid, " the Right and Title of the Donees, Feoffees, Leſſees and Deviſees " thereof againſt the ſaid Deviſor and his Heirs, after the Intereſt " and Title of the King, or other Lord, therein ended and deter- " mined.

" Provided always, That this Act, Explanation and Declaration, " or any of them, or any Thing in this ſaid Act, Explanation or De- " claration contained, ſhall not extend to the Will or Deviſe of Sir " *John Gaynsford*, late of *Crowherſt* in the County of *Surry*, Knight, " deceaſed; nor to the Will or Deviſe of Sir *Peter Philpot*, Knight, " deceaſed; nor to the Will or Deviſe of *Richard Creſwell*, late of " *Mattingley* in the County of *South.* Gentleman, deceaſed; nor to " the Will or Deviſe of *Thomas Unton*, late of the County of *Berk.* " Gentleman deceaſed, Son of Sir *Thomas Unton*, Knight, alſo de- " ceaſed; nor ſhall be in any wiſe prejudicial or hurtful to any Per- " ſon or Perſons for or concerning any Manors and Lands, Tene-

" ments or Hereditaments, contained or ſpecified in the ſaid Wills or " Deviſes, or in any of them: But that the ſaid Laſt Wills and De- " viſes, and every of them, ſhall ſtand, abide, remain and be in the " ſame Caſe, Force and Effect in the Law, to all Intents, Purpoſes " and Conſtructions, as the ſaid Laſt Wills and Deviſes, and every of " them, were before the Making of this Act, Declaration and Expla- " nation, and of none other Effect or Force: This Act, Declaration " and Explanation, or any of them, or any Thing therein contained " to the contrary thereof, in any wiſe notwithſtanding.

" Provided always, and be it enacted by the Authority aforeſaid, " That all and every Perſon and Perſons, from whom the King, and " other Lord or Lords, ſhall take any Manors, Lands, Tenements, or " Hereditaments, for his or their full Third Part, or to make up his " or their Third Part, ſhall and may, by Authority of this preſent " Act, in any of the Caſes aforeſaid, upon his or their Bill exhibited " in the King's Court of Chancery, againſt all and every ſuch Perſon " and Perſons which ſhall be intitled, by or under any ſuch Will, " Gift, Diſpoſition or Deviſe, to the other Two Parts, have ſuch " Contribution or Recompence for the ſame, as by the Chancellor of " *England*, or by the Keeper of the Great Seal of *England*, for the " Time being, ſhall be thought good and convenient.

After 26 *March* 1693, Perſons inhabiting or having any Goods within the Province of *York*, may by their Laſt Wills diſpoſe of all their perſonal Eſtate as they ſhall think fit; and their Widows, Children, and Kindred ſhall be barred to claim any Part of ſuch perſonal Eſtate, in any other Manner than as by their Wills ſhall be appointed. 4 & 5 Will. cap. 2.

What ſhall be a good Deviſe of Lands and Tenements, what not: What Eſtate ſhall paſs by the Words of the Will, whether Fee-ſimple, Fee-tail, for Life, or other Eſtate; and of the Intention of the Teſtator.

THE Father being ſeiſed of Lands held *in Capite*, and of other Lands *in Socage*, made a Feoffment to the Uſe of his Wife and himſelf, and their Heirs: It was found, that this Manor amounted to Two Parts of the Lands that the Teſtator had at the Making the Feoffment, and that afterwards he deviſed the *Socage Lands* to his Wife for Life, Remainder over: Adjudged, that this Deviſe was void by the Statute of Wills. 3 *Leon.* 105. *Finch* verſus *Tracey*.

A Rent was granted to a Man and his Heirs, *during the* Life of another; the Grantee cannot deviſe this Rent, either at Common Law, or by the Statute of Wills; for that Statute requires, that the Teſtator be ſeiſed of an Eſtate in Fee to make the Deviſe good; 'tis true, in this Caſe he had a Fee deſcendible to his Heirs, during the Life of another, but it was not an abſolute Fee, and at moſt but an Eſtate *pur 'auter vie*, to which the Statute doth not extend.

The Teſtator having Lands in Fee, and other Lands which he held for Years, deviſed all his Lands and Tenements generally: Adjudged, that the Leaſe for Years did not paſs, becauſe there are other Lands to ſatisfy the Words of the Will. Cro. Car. 295. *Roſe* verſus *Bartlet*. Style 279.

A Man

A Man was ſeiſed in Fee of a *Portion of Tithes* in *Holford*, and having nothing more there, he deviſed *all his Fee-ſimple Lands whatſoever* to his Brother and his Heirs: Adjudged, that the *Tithes* paſſed by the Word *Lands*; for tho' they are diſtinct and ariſing out of the Land, yet the Aptneſs of Words is dot ſo much conſidered as the *Intention* of the Teſtator, who muſt intend that he had a Fee-ſimple Eſtate in *Holford*, for he had nothing there but this Portion of Tithes to ſatisfy that Word.

1 Chanc. Rep. 39. *Davis* v. *Beardſham.* The Teſtator having only an equitable Right, but never ſeiſed, *&c.* deviſed *all his Lands*; it was held, that they would paſs; as for Inſtance: He contracted for the Purchaſe of Copyhold-Lands, and accordingly they were ſurrendered out of Court to his Uſe, but he died before Admittance, having firſt made his Will, and deviſed all his Copyhold-Lands to *T. S.* after his Death; in this Caſe the Teſtator had an Equity to recover them, and the Vendor ſhall ſtand ſeiſed for him till a good Conveyance might be made.

Godb. 352. *Knight's* Caſe. The Teſtator had Two Houſes which were contiguous, one called the *Swan*, and the other the *Red-Lion*; the Firſt was in his own Poſſeſſion, and ſo was one Room belonging to the *Red-Lion*; then he made a Leaſe of the *Red-Lion*, and deviſed the *Swan* to *T. S.* Adjudged, that the *Room in the Red-Lion* did paſs.

A. deviſeth Lands to *B.* and the Heirs Male of his Body, and if he dieth without Heirs of his Body, the Remainder to *C.* and his Heirs: Adjudged that *B.* had not an *Eſtate-tail general*, but to the Heirs Male of his Body [g].

[g] P. 4 & 5 Philip. & Mar. Rot. 922. C. B. *Tuck* verſus *Frencham.* Moor's Rep. fol. 13. n. 50. fol. 124. n. 269. Dyer fol. 171. 115. S. C. 1 And. 8. S. C.

A. deviſeth his Lands to his Wife *de anno in annum* until his Son cometh to the Age of Twenty Years, and dieth; the Wife enters, and the Son dieth before he attains to his Age of Twenty Years: The Intereſt of the Wife is determined, by Reaſon of thoſe Words, *de anno in annum:* But if the Deviſe had been to the Wife until his Son cometh to the Age of Twenty Years, then notwithſtanding the Death of the Son the Intereſt of the Wife doth continue [h].

[h] P. 5 Eliz. Moor's Rep. fol. 48. n. 143.

A. maketh his Will in this Manner, Item, *I give my Manor of* Dale *to my ſecond Son*; Item, *I give my Manor of* Sale *to my ſaid Son and his Heirs: Per Dyer, Weſton,* and *Welſh,* the Son had but *an Eſtate for Life* in the Manor of *Dale*; and the Word (*Item*) ſeemeth to be a new Gift, and a greater Preferment in the ſecond Place, for the Amends of the other. But *Brown* was of the Opinion, that (*Item*) is as a Copulative, and the Heirs expreſſed in the laſt Clauſe extend to both *D.* and *S. Dyer* ſaid, that if in the firſt Clauſe there had not been any Perſon named, but the Words had been, *Item,* I give the Manor of *D. Item,* I give the Manor of *S.* to my ſaid Son and his Heirs, that it ſhould refer to both Manors [i].

[i] P. 5 Eliz. Moor's Rep. fol. 52. n. 153.

[k] Latch 9, 39, 134. A Man ſeiſed of Lands deviſeth them to his [k] Wife, *to diſpoſe and imploy them for her and her Son, at her Will and Pleaſure:* Adjudged that the Wife had a Fee-ſimple in the Lands; but the Eſtate in her is but conditional, becauſe theſe Words (*ea intentione*) make a Condition in every Deviſe, and the Words in the Deviſe do amount unto ſo much, ſo that ſhe cannot give or aſſign them over to a Stranger, but muſt hold them her ſelf, or give them to her Son [l].

[l] P. 6 Eliz. Moor's Rep. fol. 57. n. 162. Vide H. 22 Jac. Rot. 720. B. R. *Daniel* verſus *Ubley.* Jones Rep. fol. 137. Dy. 126. Coke, lib. 6. fol. 16.

B. deviſeth his Lands to *A.* and *if* A. *dieth before he hath any Iſſue of his Body*, then he deviſeth his Lands to *C.* and his Heirs: Adjudged that *A.* hath an Eſtate-tail by *Implication*, as well by the Words, *If he die before he hath Iſſue*, as by the Words, If he die without Iſſue [m].

[m] Moor 127 P. 25 Eliz. Rot. 851. C. B. *Newton* verſus *Barnardine.*

Deviſe to one for Life, and after his Deceaſe to *the Men-children of his Body*; it's an Entail in the Father to his Heirs Male. So a Deviſe to one and the Children of his Body, is an Entail [n].

[n] 4 Eliz. Bendloe's Rep. II. 37 Eliz. n. 519. 6 Rep. 16.

Rot. 1030. *Richardſon* verſus *Yardley.* Moor's Rep. fol. 397.

If a Man deviſe the *Uſe*, *Profits*, or *Occupation of his Land*, by this Deviſe the Land it ſelf is deviſed. *C. lib.* 8. 94. *Pl. C.* 525. *Brownl.* 80. *part* 1. For Lands will paſs by Words in a Will, which will not paſs by the ſame Words in a Deed. But whatſoever will paſs by any Words in a Deed, will paſs by the ſame Words in a Will: For Wills are always more favourably expounded than Deeds. *Pl. Com. fol.* 66 [o].

[o] C. li. 8 94. Pl. Com. f. 525. Brownl. f. 80. part 1. Pl. Com. f 66.

If a Man be ſeiſed of Land in Fee-ſimple in the Pariſh of *D.* and by his Will deviſeth all his Lands in the ſaid Pariſh to *A. B.* and after the Will made and publiſhed, he doth *purchaſe other Lands in the ſaid Pariſh*, and dieth; *A. B.* ſhall not have the new purchaſed Lands. *Pl. Com. fol.* 343, 344. *Old N. B.* 89. *Fitz. Deviſe* 17. Yet by a new Publication of the Will after the Purchaſing of ſuch Lands, they will paſs to *A. B* [p].

[p] Goldſ. 150. S. C. T. 37 Eliz. B. R.

Breckford verſus *Parnicote.* Cro. Eliz. 493. Moor 404. S. C.

Three Brothers of one Father and Mother, the middle Brother ſeiſed of Land deviſable, giveth it by his Teſtament *propinquiori fratri ſuo*; the Deviſe is void [q].

[q] Dyer's Reading upon this Stat.

If a Man in one Part of his Will deviſeth his Lands to *A.* in Fee, and afterwards by another Clauſe in the ſame Will deviſeth the ſame Lands to another in Fee, they are *Jointenants* [r].

[r] M. 8 Eliz. in C. B. Leonard 3. part, f. 11.

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 alledge and give in Evidence the Deviſe to him, and may produce Witneſs to prove the *Intent of the Father*; and if no Proof can be made, the Deviſe ſhall be void for the Incertainty [s].

[s] M. 34 Eliz. Sen'or *Chevney*'s Caſe, lib. 5. fo. 67.

One deviſed his Lands in *D.* in Tail, the Remainder to *the next of the Kin of his Name*; at the Time of the Deviſe, the next of his Kin was his Brother's Daughter, who was then married to *J. S.* the Deviſor died, the Tenant in Tail afterwards died without Iſſue: Adjudged that the Daughter ſhould not take; becauſe ſhe is not now of the Name of the Deviſor, but of the Husband's Name; but if ſhe had been unmarried at the Time of the Deviſe and Death of the Donor, although ſhe had been married at the Time of the Death of Tenant in Tail without Iſſue, yet ſhe ſhould have had the Land [t].

[t] T. 39 Eliz. C. B. *Jobſon*'s Caſe. Crok. part 3. fo. 64. Crok. part 3. fo. 532. M. 30 Eliz. B. R. *Bon* verſus *Smyth.* Cro. Eliz. 576.

A. deviſeth his Houſe *with the Appurtenances:* It was a Queſtion, whether the Land in the Field thereby paſſed. *Popham* doubted; but *Fenner* ſaid it might paſs, and that upon Demurrer in 28 *Eliz.* it was adjudged accordingly. But upon Evidence it did appear that

the Houſe 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 [u].

[u] M. 41 Eliz. B R. *Yates* verſ. *Clinkard*, Croke part 3. fo. 704.

A Man by his Will *releaſeth all his Lands, &c.* to *A.* and his Heirs: Adjudged it was a good Deviſe of the Lands to *A.* and his Heirs [x].

[x] M. 37 Eliz. *Anderſon*'s Caſe 83.

One deviſeth his Land to his Son and Heir *after the Death of his Wife*: It's a good Deviſe (*by Implication*) to the Wife for her Life; for it appeareth he intended his Heir ſhould not have it until the Death of his Wife; and none can have it beſides the Wife. But if ſuch a Deviſe had been made to a Stranger after the Death of his Wife, it would have deſcended unto the Heir [y].

[y] T. 2 Jac. *Horton* verſus *Horton*, B. R. Croke part 2. fo. 74.

A. ſeiſed of the Manor of *Cheſſam* extending into *Cheſſam* and the Town of *Hertford*, and alſo of Lands in *Hertford*, deviſed by Will the Manor of *Cheſſam* to *B.* his eldeſt Son in Tail, and the Lands in *Hertford* to *C.* his youngeſt Son: It was held by all the Juſtices, that the youngeſt Son ſhould have all that Part of the Manor of *Cheſſam* which lay in the Town of *Hertford* [z].

[z] M. 30 Eliz. C. B. Sir *Anthony Dennys*'s Caſe, Leon. part 2. fo. 190.

A. deviſed *that his Land ſhould deſcend to his Son, but willed that his Wife ſhould take the Profits thereof until the full Age of the Son*, for *his Education and bringing up*, and died; the Wife married another Husband, and died before the full Age of the Son: The Husband ſhall not have the Profits of the Lands till the full Age of the Son; for nothing is deviſed to the Wife but a *Confidence*, and ſhe is a Guardian or Bailiff for the Infant, which by her Death is determined, and the ſame Confidence cannot be transferred to the Huſband [a].

[a] P. 16 Eliz. in B.R. Leon. part 2. fo. 221.

A. deviſeth his Lands to *B. after the Deceaſe of his Wife*, and if he fail, then he willeth all his Part *to the Diſcretion of his Father*, and died; *B.* ſurvived, the Father being dead before without any Diſpoſition of the Land. In this Caſe the Father had a *Fee-ſimple*, there being no Difference where the Deviſe is, that *J. S.* ſhall do with the Land at his Pleaſure, and the Deviſe thereof to *J. S.* to do with it at his Diſcretion [b].

[b] T. 30 Eliz. Rot. 1160. *Whisker* and *Cleyton*'s Caſe, Leon. Rep. fo. 156.

A Man deviſeth his Lands to another and his Heirs, the *Deviſee died in the Life of the Deviſor*, and then the Deviſor died: In this Caſe the Heirs of the Deviſee ſhall not take by the Deviſe, for that the Heirs are not named as Words of *Purchaſe*, but only to expreſs and limit the Eſtate which the Deviſee ſhould have; for without the Word (*Heirs*) the Deviſee could not have the Fee-ſimple [c].

[c] Pl. Com. fo. 342. *Bret* and *Rigden*'s Caſe.

A Man ſeiſed of Lands made his Will in this Manner: Firſt, *I bequeath to my Wife* Black-acre, *for the Term of her Life, the Remainder to my Son* T. *in Tail*; Item, *I Will to my Son* T. *all my Lands in* D. *alſo my Lands in* S. *and alſo my Lands in* V. *Alſo I give to my Son* T. *all my Iſland of Land, or incloſed Land with Water, which I purchaſed of* J. S. *to have and to hold all the ſaid laſt before deviſed Premiſſes to the ſaid* T. *my Son and the Heirs of his Body.* The Queſtion was, if the *Habendum* ſhould extend to the *Iſland* only; if ſo, then *T.* ſhall have but for Life the Lands in *D. S.* and *V.* But it was reſolved by all the Juſtices, that the Thing laſt deviſed by the Will was an *Iſland in the ſingular Number*, which cannot ſatisfy the *Habendum*, which is in the plural Number; and therefore to verify the plural Number, the *Habendum* by fit

Conſtruction ſhall extend to all the Lands in *D. S. U.* and ſhould not ſtraiten the Deviſe only to the Iſland [d].

[d] T. 28 Eliz. C. B. Rot. 1458. *Wiſeman*, and *Wiſeman*'s Caſe, Leon. 57, 58. 1 And. 160. S. C Owen 40. S. C.

A Man ſeiſed of a Meſuage holden in Socage in Fee, deviſed the ſame in theſe Words; *I deviſe my Meſuage where I dwell to my Couſin* H. *and his Aſſigns for Eight Years, and my Couſin* H. *ſhall have all my Inheritances, if the Law will:* It was adjudged, that it was a good Deviſe in Fee of the Meſuage, and that by the general Words of the Will all his Inheritances did alſo paſs [e].

[e] Moor's Rep. fo. 873. n. 1218. M. 11 Jac. B.C. *Wedlock* verſ. *Harding*, Godbolt, fol. 208. Hob. Rep. fo. 7. Cro. Eliz. 204. S. C.

A. ſeiſed of Lands in Fee deviſed them *to his Wife for Life, and after to his Two Sons, (if they had not Iſſue Male,) for their Lives; and if they had Iſſue Male, then to their Iſſue Male;* and *if they had not Iſſue Male, then if any of them had Iſſue Male, to the ſaid Iſſue Male;* the Wife died, the Sons entered into the Lands, and then the *eldeſt Son had Iſſue Male*, who afterwards entered; the younger Son put out the Iſſue: It was adjudged, that by the Birth of the Iſſue Male, the Lands were deveſted out of the Two Sons, and veſted in the Iſſue Male of the eldeſt Son, and that he had an *Eſtate-tail* therein [f].

[f] H. 13 Jac. B. R. *Blandford*'s Caſe, Godbolt, fo. 266. Moor's Rep. fo. 846. n. 1146. 3 Bulſt. 98. S. C. 2 Cro. 394. S. C. 1 Rol. Rep. 318. S. C.

A *Copyholder* deviſeth his Lands unto his *Wife for Life*, and that after his Deceaſe the Wife or her Executors ſhould ſell the Land; and ſurrendered to the Uſe of his Will, which was entered thus, *viz.* to the Uſe of his Wife for Life, *ſecundum formam ultimæ voluntatis:* And whether ſhe had in the Lands an Eſtate for her Life, or an Eſtate in Fee to ſell, was the Queſtion. It was the Opinion of the Court, that ſhe had an Eſtate in it for her own Uſe *for her Life*, and alſo an Eſtate in *Fee to ſell*, otherwiſe the Clauſe *ſecundum formam ultimæ voluntatis* ſhould be void [g].

[g] M. 29 Eliz. in B.R. Godbolt, fo. 46.

A. ſeiſed of Land in Fee deviſed it unto B. *and* C. *equally, and to their Heirs:* Adjudged, that they are *Jointenants*, and not Tenants in Common. But if the Deviſe had been to *B.* and *C. equally to be divided*, they are Tenants in Common. If the Deviſe had been, equally to be divided between them by *J. S.* till ſuch Diviſion be made, they are *Jointenants*. *M.* 31 *Eliz. B. R. Dickons* and *Marſh*'s Caſe, *Goldsbr. fo.* 182, 183 [h].

[h] *Lowen* and *Beda*'s Caſe, Anderſ. Rep. part 2. Caſ. 10. M. 37 & 38 Eliz. C. B. *Lowen* verſ. *Cox*, Dyer 25.

A. deviſed his Lands *to his Wife for Life, and after her Death to* J. *his eldeſt Son and his Heirs, upon Condition, that he ſhould grant to* C. *his ſecond Son and his Heirs, a Rent of* 4 *l.* per Annum *out of the ſaid Tenements; and if* J. *died without Heirs of his Body, that the ſaid Lands ſhould remain to* C. *and the Heirs of his Body*, and died; the Wife entered and died; *J.* granted a Rent of 4 *l.* to *C.* and his Heirs out of the Lands with Clauſe of Diſtreſs; it was reſolved that *J.* had an *Eſtate-tail*; but by the Limitation of the Will, he is to make his Grant of this Rent; which being by the Appointment of the Donor, is not *contra formam doni*, but ſtands with the Gift, and ſhall bind the Iſſue in Tail [i].

[i] P. 15 Jac B.R. Rot 204. *Dutton* and *Engram*'s Caſe, Croke, part 2. fo. 427.

A Man

A Man let ſeveral Houſes and Lands by ſeveral Leaſes for Years, rendring ſeveral Rents amounting unto 10*l. per Annum*, and made his Will in this Manner; *ſcil. I bequeath the Rents of* D. *to my Wife for her Life, the Remainder over in Tail*; it was reſolved, That by this Deviſe the Land it ſelf ſhould paſs. For it appears *his Intent* was to make a Deviſe of his Lands and Tenements, and that he *intended* to paſs ſuch an Eſtate, as ſhould have Continuance for a longer Time than the Leaſes ſhould endure; and the Words are apt enough to convey the Lands, it being an uſual Manner of Speech for Men to name their Lands by their Rents[k].

[k] M. 45 El. in C. B. rot. 125. *Kerry* and *Dirrick*'s Caſe, Croke, part 2. fo. 104. Moor 771. S. C.

[l] *Kingſwell* v. *Cawdry*, Moor 592.

[l] Deviſe of his Rents with a Clauſe of Diſtreſs, is a good Rent-charge; but it is not ſo in a Deed.

If one by his Will deviſe his Land to *his Wife in the firſt Place*, and then ſaith, *My Will is, That my Son* A. *ſhall have it after my Wife's Death; and if my Wife die before my Son* B. *that then my Son* A. *ſhall pay to* B. 10 l. *by the Year during the Life of* B. *and alſo* 100 l. *to* J. S. in this Caſe *A.* ſhall have the *Fee-ſimple* of the Land[m].

[m] H. 17 Jac. B. R. *Spicer*'s Caſe, Godb. 280. 2 Cro. 527. S. C. 2 Rol. Rep. 80. S. C.

A Man having Lands in Fee-ſimple, and Goods to the Value of 5*l.* only, deviſed to his Wife *all his Eſtate, paying his Debts and Legacies*, his Debts and Legacies amounting unto 40*l.* It was adjudged that all his Lands did paſs by the Deviſe, and that the Deviſee had a Fee-ſimple in the Lands, by Reaſon of the Word *Paying*; for they are to be paid preſently, which cannot be if the Lands paſs not in Fee[n].

[n] T. 1651. B. R. *Kirman* and *Johnſon*'s Caſe, Stile'sRep. 293.

If a Man hath Lands *in Fee and Lands for Years*, and he *deviſeth all his Lands and Tenements*, the Fee-ſimple Lands only paſs, and not the Leaſe for Years; but if he hath only a Leaſe for Years, and no Freehold, and deviſeth all his Lands and Tenements, the Leaſe for Years ſhall paſs[o].

[o] T. - Car. in B. R. *Roſe* and *Bartlet*'s Caſe, Croke, part. 1. fo. 213, 292. Stile's 279. S. C.

A. deviſed his Land in *London* to his Son and his Heirs *after the Death of his Wife*; and *if his Daughters overlive his Wife and his Son, and his Heirs, then his Daughters ſhould have it for Life; and after their Deceaſe* J. *and* R. *ſhould have the ſame, and that they ſhould pay* 61. 16 s. *yearly to the Company of* Merchant-Taylors, *to be diſpoſed of to charitable Uſes.* In this Caſe three Points were argued. 1. Whether the Wife had an Eſtate *for Life by Implication* of the Will; and it was reſolved that ſhe had. 2. Whether the Son had a *Fee-ſimple or Fee-tail*; and it was reſolved that he had a *Fee-tail by Implication* of theſe Words, *viz.* (if his Daughters ſurvive his Wife and his Son, and his Heirs,) whereby it is implied that the Heirs there intended are the Heirs of his Body, and not his Heirs in Fee; for ſo long as the Daughters live, the Son could not die without a collateral Heir. 3. What Eſtate *J.* and *R.* have after the Death of the Daughters. It was reſolved they have a *Fee-ſimple by Reaſon of the annual Payment of the Money*; and it is not to be regarded what annual Value the Land is of over and above the Sums they pay; for *every Sum of Money paid or payable*

ble doth cauſe the Deviſee to have a Fee-ſimple. And *Coke* Chief Juſtice ſaid, that a Deviſe to a Man and *his Succeſſors*, is a Deviſe of a Fee-ſimple, without the Word (*Heirs*,) becauſe it implies a Fee-ſimple, though it wants the expreſs Words [p].

[p] T. 14 Jac. B. R. Moor's Rep. fo. 853. n. 1164.

F. ſeiſed of *Gavelkind* Lands had three Sons, and deviſed Part of his Land to one, Part to another, and another Part to the Third; and if any die without Iſſue, the other ſhall be his Heir: Adjudged, that it was an *Entail* in every one, and a Fee-ſimple by the Word (*Heir*) to the other [q].

[q] H. 32 Eliz. rot. 120. C. B. *Carter's* Caſe. M. 13 Jac. *Sparke* verſ. *Purnell*, Moor's Rep. fo. 864. n. 1190.

A Man hath Iſſue a Son, and Land is deviſed to the Father, *Habendum ſibi & hæredibus de corpore ſuo legitime procreandis*; and after the Deviſee hath Iſſue another Son; the ſecond Son ſhall have the Land [r].

[r] Dyer's Reading upon the Stat. of Wills, §. 18. Hob. 75. S. C.

A Man deviſeth Land to his Son, and *if he dieth without Iſſue, or before his Age of Twenty-one*, it ſhall remain to another; the *Son had Iſſue, but dies before the Age of Twenty-one.* Adjudged that his Iſſue ſhall have the Land, and not he in the Remainder; and (*or*) was conſtrued for (*and*) [s].

[s] M. 37, 38 Eliz. C. B. rot. 1249. *Sidwell* verſus *Garret*, Moor's Rep. fo. 422. n. 590.

If one deviſe his Lands to his *Wife for Years*, the Remainder to his youngeſt Son and his Heirs; and if either of his two Sons *die without Iſſue, &c.* that it ſhall remain to his Daughter and her Heirs; the youngeſt Son dieth in the Life-time of the Father, and after the Father dieth; by this Deviſe the elder Son ſhall have the Lands *in Tail* [t]. Or if one deviſe his Land to his *Wife for Life*, and after to his Son, and if his Son die *without Iſſue, having no Son*, (or having no Male,) that then it ſhall go to another; by this Deviſe the Son hath an Eſtate-tail to him and the Heirs of his Body [u]. Or if Lands be deviſed to a Man and Woman unmarried, and the Heirs of their two Bodies, or to the Husband of *A.* and Wife of *B.* and the Heirs of their two Bodies; by theſe Deviſes are created *Eſtates in Tail* [x].

[t] Dy. fo. 122.

[u] T. 7 Ja. C. B. *Robinſon's* Caſe.

[x] Coke 1 Inſt. 20, 26. Pl. Com. fo. 35.

A Man ſeiſed of Land holden *in Capite* deviſed it to his *Wife for Life, and after her Deceaſe his Son* John *to have it; and if his Son* John *marry, and have by his Wife any Iſſue Male of his Body lawfully begotten, then his Son to have it; if no Iſſue Male, then his Son* Thomas *to have the Houſe; and if* Thomas *marry, having Iſſue Male of his Body, his Son to have the Houſe after his Deceaſe; and if any of his Sons or Iſſue Males go about to alien or mortgage the Houſe, then the next Heir to enter*, &c. It was reſolved, firſt, That the Sons had an *Eſtate-tail in them ſeverally*, and to the Heirs Male of their Bodies; for theſe Words, [*if he hath no Iſſue Male, his Son* Thomas *to have it*] are ſufficient to create an Eſtate-tail to *John*, and ſo of the reſt. 2. Reſolved, That no Condition or Limitation, be it by Act executed, or by Limitation of Uſe, or by Deviſe by his laſt Will, can bar Tenant in Tail to alien by ſuffering a common Recovery [y].

[y] H. 8 Jac. *Sonday's* Caſe, Coke, lib. 9. fo. 128.

If Lands be deviſed to *A. B.* and *his Heirs Males, or his Heirs Females*, without ſaying [*of his Body*,] by this Deviſe *A. B.* hath an Entail; but if ſuch a Limitation be by Deed, it's a Fee-ſimple [z].

[z] Inſt. part 1. §. 25. 31 H. 6. 27. 9 H. 8. 27. Pl. Com. 414.

One deviſed all his Lands to another, and *the Heirs of his Body begotten*; and after in the ſame Will deviſed, That if the Deviſee die, the ſaid Lands ſhould remain to another *in Fee*; the Court held, that the Deviſee hath an Eſtate-tail by the firſt Words [a].

[a] H. 14 El. Anderſ. Rep. Caſ. 84, 88.

The Father Tenant for Life of certain Lands, the Remainder in Fee to the Son; the Son deviſed the ſame in theſe Words, *viz. I deviſe to* D. *my Wife the Lands which I have or may have in Reverſion, after the Death of my Father, paying therefore yearly during her Life to the right Heirs of my Father* 40 s. and died, his Father living; *per Curiam*, no Eſtate paſſed by this Deviſe but for *Term of the Life of the Wife*; and that ſhe ſhould not pay the 40 *s.* until the Reverſion did fall after the Death of the Father; for the Father had not right Heirs during his Life [b].

[b] Dyer 371.

R. D. ſeiſed in Fee of a Houſe, and poſſeſſed of Goods, made his Will in theſe Words, *viz. The reſt of my Goods, Lands and Moveables whatſoever, after my Debts, Legacies and Funerals paid, I give to my three Children,* J. T. *and* M. *equally to be divided amongſt them*: It was adjudged, that they have an Eſtate only for *Life* in the Houſe, and are *Tenants in common, and not Jointenants* [c].

[c] T. 35 Eliz. 10. 403. B. R. *Deacon* verſus *Marſh*, Moor's Rep. fol. 594. n. 108.

W. C. by his Will deviſed a Meſuage 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 [d].

[d] P. 17 Eliz. *Baker* and *Raymond*'s Caſe, Anderſ. Rep. c. 251. fo. 51.

A. Deviſed 8000 *l.* to be laid out in Land, and ſettled to the Uſe of *B.* in Tail, Remainder to the Uſe of *C.* in Fee; *B.* and *C.* agreed by Articles in Writing to divide the Money in the Manner therein mentioned; ſoon after, and before the Money was divided, *B.* died without Iſſue; in Chancery a ſpecific Performance of the Articles was decreed in Favour of the Executor of *B. Carter* v. *Carter*, *Paſ.* 1733. *Forreſter's Rep. fol.* 271.

If one deviſeth his Lands in this Manner, *viz. I give my Land in* D. *to* A. B. *to the Intent that with the Profits thereof he ſhall bring up my Child or my Children, or to the Intent that with the Profits thereof he ſhall pay yearly* 10 l. *or that out of the Profits thereof he ſhall pay to* J. M. 10 l. by theſe Deviſes *A. B.* hath only an *Eſtate for Life*, albeit the *Payments* to be made be greater than the Rents of the Land; otherwiſe it is in Caſe the Sum of Money is to be *paid preſently*, and not appointed *to be paid out of the Profits of the Land*; in which Caſe *A. B.* would have a Fee-ſimple [e].

[e] Coke, lib. 6. fo. 16. *Collier*'s Caſe. Lib. 3. fo. 20, 21. *Boraſton*'s Caſe. Brook, tit. Eſtates, pl. 38. Brook, tit. Teſtament, pl. 18. 32 & 33 Eliz. *Wellock* and *Hammond*'s Caſe.

A. ſeiſed of divers Lands in *A. B.* and *C.* the Lands in *C.* being in him by Mortgage forfeited, deviſed the Lands in *A.* and *B.* unto ſeveral Perſons, and then adds this Clauſe in his Will: *All the reſt of the Goods, Chattels, Leaſes, Eſtates, Mortgages, whereof he was poſſeſſed, he deviſed to his Wife after his Debts and Legacies paid*, made his Wife Executrix, and died: Adjudged, that in the *mortgaged Lands* only an Eſtate for Life paſſed to the Wife, and not a Fee [f].

[f] T. 10 Car. B. R. *Wilkinſon* and *Merriland*'s Caſe, Crook, part. 1. fo. 323.

One deviſeth his Lands *to his two Sons, and the Heirs of their Bodies, and that the Executors ſhall have them until they come to their ſeveral Ages of Twenty-one*; the one attains to the Age of Twenty-one; the Queſtion was, whether he might enter. It was ſaid, they were *Jointenants*, and their Executors ſhould hold them till they both came of the Age of twenty-one Years. But it was holden otherwiſe by the Court, for the Words [until they come to their ſeveral Ages] ſhall be conſtrued, *reddendo ſingula ſingulis*; that when either of them come to the Age of twenty-one Years, he ſhould then have his Part and Poſſeſſion [g].

[g] M. 8 Jac. in B. R. *Aylor* and *Chep*'s Caſe, Crook, part 2. fo. 259.

R. deviſeth his Land to his Brother *John*; and *if he die having no Son, the Land ſhould remain to* William *for his Life; and if he die without Iſſue, having no Son, it ſhall remain to the right Heirs of the Deviſor: John* his Brother had an *Eſtate-tail* to his Iſſue Males; but *William* had but an Eſtate *for Life*, or to his Heirs Females, becauſe having no Son is merely contingent [h].

[h] M. 42 & 43 Eliz. *Milliner* verſ. *Robinſon*, Moor's Rep. fo. 682. n. 939.

M. ſeiſed of Lands in Fee, deviſeth them to *R. his Daughter for Life; and if ſhe marry after my Death, and have Iſſue of her Body lawfully begotten, then I will that her Heir after my Daughter's Death ſhall have the Land, and to the Heirs of their Bodies begotten, the Remainder in Fee to a Stranger.* It was adjudged that *R.* had not an Eſtate in Tail, but only for Life, the Inheritance in her Heir by Purchaſe reſting in Abeyance all her Life, and ſettling in the Inſtant of her Death [i].

[i] H. 35 Eliz. Rot. 467. *Clerke* verſus *Day*, Moor's Rep. fol. 593. n. 803.

Deviſe of a Rent with a Clauſe of Diſtreſs is a good Rent-charge; but 'tis not ſo in a Grant. *Kingswell* ver. *Cawley*, Moor 592.

By a Deviſe of the Manor the Rents and Services paſs intirely, but ſometimes they are divided; as where the Teſtator deviſed his demeſne Lands to his Wife for her Life, and the *Services* to her for eighteen Years, and then he deviſed the *whole Manor* to *T. S.* after the Death of the Wife: Adjudged, that *T. S.* the Deviſee ſhall take nothing in the Manor, till after the Death of the Wife, though the Services were deviſed to her but for eighteen Years; for after the Expiration thereof, the Heir at Law ſhall have the Services during her Life, becauſe by the expreſs Words of the Will *T. S.* was to have nothing in the Manor whilſt the Wife was living; but if the *whole Manor* had been deviſed to him after the Expiration of *eighteen Years*, and after the *Death of the Wife*, in ſuch Caſe that Clauſe ſhould be taken diſtributively, (*viz.*) that he ſhould have the Demeſnes after the Death of the Wife, and the Services after eighteen Years. *Inchley* verſ. *Robinſon*, 2 Leon. 41. 3 Leon. 165. S. C. Moor 7. S. C.

The Teſtator was ſeiſed in Fee of ſome Lands in *Poſſeſſion*, and of others in *Reverſion*, expectant upon the Death of *T. S.* and deviſed that his Wife ſhould have the Uſe of his *demeſne Lands*, (which he had in Poſſeſſion) for one Year *after his Death*, and both his demeſne Lands and the Reverſion to *T. K.* for Life, after the Expiration of one Year next after the Deceaſe of the Teſtator, and the Deceaſe of *T. S.* who was the Tenant for Life; the Queſtion was, whether *T. K.* ſhould have the demeſne Lands a Year next after the Death of the Teſtator, or ſhould ſtay till a Year after the Death of *T. S.* *Cook* verſus *Gerrard*, Sand. 180. 1 Lev. 212. S. C.

T. S. the Tenant for Life; and it was adjudged, that he ſhould have the demeſne Lands a Year next after the Death of the Teſtator, and the Lands in Reverſion a Year after the Death of the Tenant for Life; for that Clauſe in the Will, (*viz.*) *a Year after my Deceaſe, and the Deceaſe of the Tenant* for Life, ſhall be taken diſtributively *reddendo ſingula ſingulis.*

In ſome Caſes the Sentences in Wills ſhall be joined, and not taken diſtributively.

Osborn verſ. *Wickens*, 2 Saund. 197. As where the Teſtator *deviſed* 12 l. per Annum *to be iſſuing out of the Lands to his Siſter for Life, and whilſt ſhe ſhould remain ſole; but if ſhe ſhould marry, then the* 12 l. *to ceaſe, and his Executor ſhould pay her* 100 l. ſhe married, the 100 *l.* was not paid, and ſhe diſtrained for the 12 *l.* Rent Arrears ſince her Marriage; and the Queſtion was, whether it ſhould immediately ceaſe on her *Marriage*, or not till the 100 *l.* was paid; and the better Opinion was, that it ſhould be joined and not ſeparated; for if it ſhould, then the Siſter might have nothing, becauſe if the Rent ſhould ceaſe upon *her Marriage*, it might happen that the Executor might not have Aſſets to pay the 100 *l.* It was objected, that if ſhe had married in the Life-time of the Teſtator, ſhe ſhould not have this Rent, tho' the 100 *l.* was not paid, which is very true; and the Reaſon is, becauſe the Rent was never veſted in her, for that would have been prevented by her Marriage, which was her own Act; but here the Rent was actually veſted in her, and 'tis not reaſonable it ſhould be deveſted without Payment of the Money.

Bates verſ. *Norton*, Raym. 82. One *Norton* the Teſtator deviſed his Lands to *a Daughter* of his Couſin *Amhurſt*, who ſhould marry a *Norton* within fifteen Years; the Plaintiff married the Heir at Law of the Teſtator, and one *Norton* married the eldeſt Daughter of Mr. *Amhurſt*, who had at that Time three Daughters; it was objected that the Will was void for the *Incertainty* which of the three Daughters ſhould take, for it was incertain which of them ſhould marry a *Norton*; but adjudged that the Will fixes it to one of the Daughters and no more; ſo that there is a Certainty in the Perſon, though not in the Event.

Milford verſ. *Smith*, 1 Salk. 225. The Father, in Conſideration of his Son's Marriage, covenanted to levy a Fine to certain Uſes mentioned *in his Deed*, but no Fine was levied; he by his Will (reciting the Deed) deviſed and confirmed all his Eſtate granted to his Son in Marriage according to the Deed: Adjudged, that ſince the Will referred to the Deed, it paſſed ſuch Lands as were intended to be conveyed by the Deed *and Fine*, becauſe the Word *Grant* in a Will ſhall comprehend any Manner of Agreement in the largeſt Senſe.

Sir *Thomas Littleton's* Caſe, 2 Vent. 351. As to *Grammatical Conſtructions* the Caſes are, *ff.* The Teſtator had Lands in Fee, and other Lands mortgaged to him in Fee, and deviſed *all his Lands* to *T. S.* Adjudged, that the *mortgaged Lands* did paſs; ſo if he had a *Truſt* of a Mortgage of Lands in *H.* and had other Lands in the ſame Pariſh; in ſuch Caſe by a Deviſe of *all his Lands in H.* the *Truſt* will paſs; but if he deviſe his Lands in *H. B. C. &c.* to *T. S.* and all other his Lands *elſewhere*, and he had at that Time a Mortgage of Lands of greater Value lying in another Pariſh; that Mortgage will not paſs, becauſe the Teſtator could never mean Lands of ſo great a Value by that Word *elſewhere*, which is uſually inſerted *Currente Calamo.*

The Teſtator recited in his Will thus, (*viz.*) I have made a Leaſe for Twenty-one Years of my Lands to *T. S.* paying 10 *s.* *&c.* this was held to be a good Leaſe for Twenty-one Years, though the Words (I have) are in the *Præter-Tenſe.* Moor 31.

But this Caſe was denied to be Law in *Wright*'s Caſe, which was thus: *As for my perſonal Eſtate I bequeath to my Wife* 600 l. *to be paid to* William Weddall, *and 'tis for the full Payment of the Lands I purchaſed of him; and is* * *already eſtated in Part of Jointure to her for Life*, when in Truth there was not any Part of it ſettled on his Wife for Jointure; and therefore it was held that the Heir at Law ſhould have theſe Lands, for it could not be an implicite Deviſe to the Wife, becauſe the Teſtator took Notice that ſhe was eſtated in them before the Making the Will. *Wright* verſ. *Wyvell*, 2 Vent. 56. 3 Lev. 259.

* *The Word* already *imports, that it was before the Making the Will.*

The Teſtator deviſed his Lands in *H.* to his Wife for Life, alſo his Lands in *B.* to her for Life, and alſo his Lands which he purchaſed of *W. M.* to her for Life; and after her Deceaſe, he deviſed *all the ſaid Lands* to his Son and his Heirs; the Queſtion was, whether the Lands in both the ſaid Pariſhes, or only the Lands which he purchaſed of *W. M.* ſhould paſs. *Gamage*'s Caſe, 1 Vent. 368.

Deviſes of Lands with Limitations, and upon Conditions; what Condition in a Deviſe ſhall be good, what not; what ſhall make a Condition, what not; and what Eſtate ſhall paſs to the Deviſee by Implication.

Conditions in Wills have ſo near a Reſemblance to *Limitations*, that they are commonly taken the one for the other; but the Difference is thus, (*viz.*) *Conditions are ſo many Reſtrictions* annexed to the Will of the Teſtator, which either qualify or ſuſpend his Intention, and make it incertain whether it ſhall take Effect or not, or rather a *Condition creates, enlarges, or defeats an Eſtate* upon an incertain Event; but a *Limitation* is the Bounds of an Eſtate, or the Time how long it ſhall continue, or rather a *Qualification* of a precedent Eſtate; and the proper Words to make a Limitation are *Quamdiu, Dum, Dummodo, Si, Quouſque*, and ſeveral other ſuch like Words.

A Deviſe of Lands upon Truſt to do ſuch an Act doth not make a Condition. *Gibbons* verſ. *Marlt-ward*, Moor 594.

The Teſtator having four Sons and a Daughter, deviſed 20 *l.* to every one of his younger Sons and to his Daughter, to be paid by his eldeſt Son, at their reſpective Ages of 21, and deviſed his Lands to his ſaid eldeſt Son and *his Heirs*, upon Condition that if he did not pay thoſe Legacies to his younger Children, that then the Lands ſhould be to them and *their Heirs*; now here was a Fee-ſimple limited upon a Fee, but it was upon a *Contingency*, (*viz.*) that *if the eldeſt Son failed in Payment of the Legacies*; and that he took by Deſcent; and that the Failure of Payment was a *Condition precedent* to the Deviſe of the Lands to the younger Children, and was no Limitation to the Eſtate of the Eldeſt. *Hainſworth* verſ. *Petty*, Moor 644.

But a Deviſe to his Wife for Life, Remainder to his eldeſt Son, *paying* 40 *s.* to every one of his Brothers and Siſters; this is a *Limitation* and not a *Condition*, ſo that upon Failure of Payment, *&c.* his *Willock* verſ. *Hammond*, Cro. El. 204. 3 Rep. 20, 21. S. C. 2 Leon. 114. S. C. *See* Dyer 317.

Eſtate ſhall ceaſe, and be transferred to the Heir at Law, though the Word *Paying* in a Will generally makes a *Condition.*

Warren's Caſe, Dy. 127. Deviſe to his Wife for Life *upon Condition that ſhe ſhould educate his Son at School at her own Charge*, until he came of Age, after her Death to his ſecond Son in Tail, Remainder in Fee to his own right Heirs; the Wife did not perform the Condition, the eldeſt Son entered; and adjudged good; for by the Breach of the Condition, the Eſtate of the Wife was determined, and the Heir at Law ſhall take Advantage of it during the Life of the Wife.

[a] P. 37 El. C.B. Rot. 527. *Fox* v. *Catlin*, Cro. Eliz. 454. *A.* deviſed Land to *B. reddendo & ſolvendo* 20 *s.* to *C.* yearly, and died; the 20 *s.* is not paid; adjudged that the Heir of *A.* may enter for Breach of the Condition [a].

A Man deviſeth Land to *B.* his eldeſt Daughter and her Heirs, that ſhe may pay to *C.* her younger Siſter yearly 30 *l.* and dies without other Iſſue; *B.* doth not pay the 30 *l.* *C.* enters; *Et per Curiam* her Entry was congeable, becauſe that [b] (*ſhe may pay*) maketh a Condition. 2. *C.* for the Condition broken may enter into one Moiety; but for the other Moiety the Condition is diſpenſed with *per act en ley*, *ſcil.* the Deſcent to *B.* and for that the Condition ſhall be apportioned [c].

[b] *If it had been* paying *to her younger Siſter* 30 l. *or* ea intentione, *that ſhe pay her ſo much; it had been a Condition, for generally the Word* Paying *makes a Condition in a Will.* 1 Inſt. 236. b.

[c] T. 30 Eliz. Rot. 568. *Crickmer* verſus *Patterſon*, Cro. Eliz. 146. 1 Leon. 174. S. C. 1 Roll. Abr. 410. S. C.

Stree verſus *Beal*, Lane 56. But where a Clauſe of *Diſtreſs* is added, it will take away the Force of a Condition, and make the Word *Paying* to be no Condition at all, (*viz.*) the Deviſe was to *T. S.* for Life, paying *E. G.* the yearly Rent of 6 *l.* half-yearly; and if 'tis behind, then that he may diſtrain for the ſame; this is no *Condition*, becauſe the Diſtreſs limited for Non-payment of the Rent qualifies the Word *Paying*, which otherwiſe would have made a Condition.

3 Mar. Dyer, Dr. *Butt's* Caſe. The Father deviſed Part of his Lands to his Wife *for Life*, *upon Condition* ſhe ſhould educate his Son in Learning and good Manners, Remainder to his youngeſt Son in Tail; the Condition was broken: Adjudged this was not a Limitation, but a Condition, but that the Deviſe over in Remainder had deſtroyed it; for if it had not, then the Heir muſt have entered to defeat the Eſtate of the Wife; which in this Caſe he could not do without defeating the Remainder.

Michael v. *Dunton*, 2 Leon. 33. Leaſe for Years with a Clauſe of Entry for Non-payment of Rent; afterwards the Leſſor by his Will appointed that the Leſſee ſhould have the Lands for Thirty-one Years, accounting the Years of the firſt Leaſe not expired as Parcel; and by the ſame Will deviſed the Inheritance to *T. S.* The Queſtion was, if the Deviſee ſhould hold over the Land, for the Term increaſed as he held it before; or if the Law will conſtrue the Words of the Will to be a *Condition:* Adjudged it could not be a *Condition*, becauſe Conditions are odious in Law, and never created but by apt Words.

Jennings ver. *Gover*, 1 Leon. 229. Cro. Eliz. 209. What would be a *precedent Condition* in a *Grant*, may not be ſo in a *Will*; as where the Teſtator deviſed a Term for Years to *T. S.* and *that if his Wife ſuffer him to enjoy it three Years*, then ſhe ſhall have all his Goods as Executrix; but if ſhe diſturb the ſaid *T. S.* then *E. G.* ſhall be his Executrix: Adjudged, that ſhe is Executrix preſently, and within the three Years, becauſe this *Condition* being in a Will ſhall not be *precedent*, ſo as no Eſtate would ariſe till it be

performed; but it is a Condition to abridge the Power of the Wife to be Executrix, if ſhe did not perform that Part of his Will.

Fr. B. ſeiſed of a Houſe in Fee, 4 *Eliz.* deviſeth it to *Agnes* his Wife for Life, and after to the Heirs of his Body begotten, and after to *Tho. B.* his Brother in Fee: *Proviſo, That if the ſaid* Agnes *ſhall clearly depart out of* London, *and inhabit in* M. *in* Suffolk, *then ſhe ſhall have* 10l. *yearly paid her out of the ſaid Houſe. F. B.* dieth without Iſſue; *Tho. B.* dieth, *R. B.* being his next Heir; 15 *Eliz. Agnes* totally departed out of *London*, and inhabited in *M.* in the ſaid County of *S. R.* releaſes to *Agnes.* It was adjudged, that this *Proviſo* doth determine the Eſtate of *Agnes* before Entry, inſomuch as ſhe is but Tenant at Sufferance, and the Releaſe of *R.* to her *nihil operatur*; for though there be no Words that her Eſtate ſhall ceaſe or be void, yet they are implied by the Will in theſe Words, *ſcilicet*, that then ſhe ſhall have ſuch a Rent out of the Houſe, which cannot be without a Determination of the Eſtate for Life [d].

[d] Cro. Eliz. 228. 3 Leon. 252. S. C. M. 31 Eliz. rot. 53. *Allen* verſus *Hill.*

A. maketh a Leaſe to *B.* of certain Land, upon Condition that he ſhould not alien to any but to his Children; the Leſſee deviſeth Part of the Land to *A.* after the Death of his Wife: Adjudged that the Wife ſhould take nothing, but it ſhould go to the Executors; and the Death of the Wife is a Demonſtration when the Children ſhould take [e].

[e] T. 2 Jac. rot. 710. *Horton* verſus *Horton*, 2 Cro. 74. 1 Roll. Abr. 844.

T. being ſeiſed of ſeveral Parcels of Land in Fee, deviſeth one Parcel of it to his *eldeſt Son in Tail*, and another Parcel to his *younger Son in Tail*; *Proviſo ſemper*, that if any of his Children alien or demiſe any of his Lands to them deviſed before they come to the Age of Thirty Years, then the next Brother ſhall enter: The eldeſt Brother entered into his Part, and demiſed that for Years before his Age of Thirty Years; whereupon the younger Brother entered by Force of the Limitation in the Will; and after the younger Brother, before he came to the Age of Thirty Years, demiſed the Land for Years, into which he had entered; whereupon the eldeſt Brother entered. Adjudged, 1. That this is a [u] *Limitation*, and the Eſtate ſhall be to them till they alien; and upon the Alienation it ſhall go to the other. 2. When one Brother had entered into the Land by Force of the Limitation, that Land is diſcharged of the Limitation in the Will for ever [x].

[u] *Which defeats the Eſtate.*

[x] Owen 155. S. C. H. 30 Eliz. Rot. 904. *Spittle* verſus *Davyes.* Moor 271. S. C. 2 Leon. 38.

A Man deviſeth 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 Deviſe to *B.* if *A.* dieth within Age; but that is not by Way of Remainder, but executory Deviſe [y].

[y] M. 33, 34 Eliz. B. R. rot. 1140. *Hoe* and *Gerrald*'s Caſe.

15 *Feb.* 1712. Sir *William Stephens* by Will gave to his Grandſon *William Stephens* ſeveral Meſuages, Lands, Tenements and Hereditaments, to hold to him, his Heirs and Aſſigns for ever; but in Caſe his ſaid Grandſon *William Stephens* ſhould happen to die before he attained his Age of Twenty-one Years, then he gave the ſame to his Grandſon *Thomas Stephens* to hold to him, his Heirs and Aſſigns for ever; *but in Caſe his ſaid Grandſon* Thomas Stephens *ſhould happen*

to

to die before he attained his Age of Twenty-one Years, then he gave the ſame to ſuch other Son of the Body of his Daughter Mary Stephens *by his Son-in-Law* Thomas Stephens, *as ſhould happen to attain the Age of Twenty-one Years, his Heirs and Aſſigns for ever*; the Elder of ſuch Sons to take Place before the Younger, one after another in Courſe of Seniority of Age, and Priority of Birth, and of the ſeveral and reſpective Heirs Male of the ſeveral and reſpective Body and Bodies of all and every ſuch Son and Sons, and the Heirs Male of his and their Body and Bodies iſſuing; and for Default of ſuch Iſſue he gave the ſame to all and every the Daughter and Daughters of his ſaid Son *Thomas Stephens*, on the Body of his ſaid Daughter to be begotten, and to the Heirs of the Body and Bodies of all and every ſuch Daughter and Daughters as Tenants in Common, and not as Jointenants; and for Want of ſuch Iſſue he gave the ſame to his Brother Sir *Richard Stephens*, to hold to the ſaid Sir *Richard*, his Heirs and Aſſigns for ever; all the reſt of his real and perſonal Eſtate he gave to his ſaid Son *Thomas Stephens*, and made him ſole Executor of his ſaid Will.

15 *March* 1712. The Teſtator died, leaving *Mary* his Daughter and Heir, two Grandſons *William* and *Thomas*, and one Grand-daughter, living at the Time of his Death.

18 *May* 1713. *Suſan*, the Daughter of *Thomas* and *Mary* the Daughter, was born, but died without Iſſue, and under Age, on the 14th of *April* 1734.

24 *Oct.* 1714. *Thomas* the Grandſon died without Iſſue, and under the Age of 21 Years.

14 *Sept.* 1718. *William* the other Grandſon died alſo without Iſſue, and under the Age of 21 Years.

14 *March* 1719. *Mary*, another Daughter of *Thomas* and *Mary* the Daughter, was born, but died 26 *Oct.* 1722.

13 *Nov.* 1721. *Sarah*, another Daughter of *Thomas* and *Mary* the Daughter, was born, and is yet living.

15 *Feb.* 1722. *Mary*, another Daughter of *Thomas* and *Mary* the Daughter, was born, but died 26 *April* 1723.

12 *Jan.* 1727. *Thomas*, Son of the ſaid *Thomas* and *Mary* the Daughter, was born, and is ſtill living.

Sir *Richard Stephens* the Teſtator's Brother, mentioned in the Will, is ſtill living.

Thomas Stephens the Son-in-Law claimed Title to the Premiſſes, as reſiduary Legatee, *Mary* as Heir at Law, and the other Parties under the Will.

The Queſtion was whether the Deviſe, *And in Caſe my Grandſon* Thomas Stephens *ſhall die before he attains his Age of Twenty-one Years, then I give all my ſaid Freehold Eſtates*, &c. *to ſuch other Sons of the Body of my ſaid Daughter* Mary Stephens, *by my Son-in-Law* Thomas Stephens, *as ſhall happen to attain his Age of Twenty-one Years, his Heirs and Aſſigns for ever*, be good by Way of executory Deviſe, it ſuſpending the Veſting of the Eſtate until a Son unborn ſhould attain the Age of 21 Years, on the Authority of the Caſe of *Taylor* and *Bydall*, 2 *Mod.* 289. It was held to be good by Way of Executory Deviſe, the Conſequence whereof is, that all the ſubſequent Limitations will be good, the Eſtate will reſt in *Thomas* the Teſtator's Grandſon now living, when he ſhall attain his Age of 21 Years in Tail Male; if *Thomas* the Grandſon ſhall happen to die be-

fore his Age of 21 Years, and the Teſtator's Daughter *Mary* ſhall have any other Son by her preſent Husband *Thomas Stephens*, then the Eſtate ſhall go over to him when he ſhall attain his Age of 21 Years; in like manner, if *Thomas* the Grandſon ſhall die before the Age of 21 Years, and the Teſtator's Daughter *Mary* ſhall have no other Son by her preſent Husband *Thomas Stephens*, who ſhall attain his Age of 21 Years, the Eſtate will go over to *Sarah* the Grand-daughter, and all the other Daughters of the Teſtator's Daughter *Mary* by her preſent Husband *Thomas Stephens*, as Tenants in Common in Tail, with Remainder over to Sir *Richard Stephens* the Teſtator's Brother in Fee; but if *Thomas* the Grandſon ſhall die before the Age of 21, and *Sarah* the Grand-daughter ſhall then be dead without Iſſue, and there ſhall be no other Son of the Teſtator's Daughter *Mary* by her preſent Husband *Thomas Stephens*, who ſhall attain the Age of 21 Years, or any other Daughter hereafter born of their two Bodies, then the Eſtate ſhall go over to Sir *Richard Stephens* by Virtue of the laſt Remainder to him in Fee: As to the Profits of the Eſtate received ſince the Death of *William* the Grandſon, or to be received until it ſhall veſt in any one Perſon, by Force of the ſaid Executory Deviſe, or ſhall go over to the Remainder Man, they belong to the Son-in-Law *Thomas Stephens*, by Virtue of the reſiduary Deviſe in the Will, as an Intereſt in the Teſtator's real Eſtate not before bequeathed or diſpoſed of by his Will.

Determined in Chancery purſuant to the Opinion of the Judges of the Court of King's Bench.

Stephens v. *Stephens*, *Mich.* 1736. *Forreſter's Rep.* 228.

A Man had Iſſue a Son and Two Daughters, and he deviſed his Land to his Son and his Heirs, and if he die without Iſſue within Three Years, then his Executor ſhall ſell his Land; the Son dieth within Three Years without Iſſue: Adjudged, that the Executor may enter and ſell the Land [z].

[z] M. 41, 42 Eliz. *Mollineux's* Caſe. T. 38 Eliz. Rot. 867. B. R. *Fulmerſton's* Caſe.

A *Condition* is void, where the Teſtator parts with all his Intereſt, and then deviſed it over; as where the Deviſe was, that the *Prior and Convent* of *B.* and their Succeſſors, ſhould have his Lands, *ſo as they pay yearly to the Dean and Chapter of St.* Paul's 15 *Marks, and if they fail, then their Eſtate ſhall ceaſe, and the Dean and Chapter, &c.* and their Succeſſors, ſhall have it; this was adjudged a void Condition, becauſe by the firſt Clauſe of the Will, the Teſtator had parted with all his Eſtate and Intereſt in the Lands to the *Prior and Convent, &c.* therefore there was none remaining for him to deviſe to another upon any Condition; for if it ſhould be a Condition, the Dean and Chapter could not enter if it ſhould be broken, but the *Heir at Law*, and that would defeat the whole Will. Dyer 33.

Conditions alſo which reſtrain the Authority given by a former Part of the Will, are void, as where a Man makes Two Executors, provided that one of them do not adminiſter his Goods, this is void. Dyer 74.

The Teſtator deviſed his Lands to *T. S. and the Heirs of his Body*, upon Condition, that he *ſhould not alien them*; and if he died without Iſſue, Remainder to *E. G.* in Fee; afterwards *T. S.* the Deviſee, *ſold the Lands*; yet the Perſon in Remainder could not enter, becauſe this was a *Condition* and not a *Limitation* of the Eſtate, and therefore the Heir at Law muſt enter for the Breach. *Skrine* verſus *Bond*, 1 Roll. Abr. 412.

A Man had Iſſue Three Sons, *John*, *Thomas*, and *William*, and deviſeth his Lands in this Manner; I deviſe my Land to my Son *John* after the Death of my Wife, to him and the Heirs of his Body lawfully begotten, in Fee-ſimple; and if he die in the Life of my Wife, that then my Son *William* be his Heir; the Deviſor dieth, *John* had Iſſue and dieth in the Life of the Wife: Adjudged, that the Iſſue ſhall have the Land after the Death of the Wife, and not *William*; for it amounteth to a Deviſe to the Wife for Life, the Remainder to *John* in Tail, the Reverſion to *William* in Fee upon a Contingency: For ſo it appeareth his Intent to be, and not to abridge the Eſtate-tail expreſly given to *John*, by his Death in the Life-time of the Wife, but only to limit the Remainder in Fee upon this Contingency [a].

[a] H. 5 Car. B. R.

J. S. ſeiſed of the Manor of *Warner*, and of the Manor of *Charcall*, deviſeth the Manor of *W.* to the eldeſt Son of his Couſin *R. F.* in Fee, and the Manor of *C.* he deviſeth to *M.* for Life, and if *M.* dies, any then of my Couſin *F.*'s Sons living, then I Will my ſaid Manor of *C.* unto him that ſhall have my Manor of *W.* the Teſtator dieth; the eldeſt Son of *R. F.* enters into the Manor, and conveys it to a Stranger; *M.* dieth. The Queſtion was, if the eldeſt Son of *R. F.* ſhall have the Manor of *C.* And adjudged that he ſhall not, becauſe he hath not the Manor of *W.* at the Time of the Death of *M.* for the Deviſe was, that the Son of *R. F.* which hath the Manor of *W.* ſhall have this Manor of *C.* for it's not ſufficient that he hath the Manor of *W.* at the Time of the Death of the Deviſor, for there are Two (*thens*,) therefore he that ſhall have this Manor, ought to have Two Notes, 1. That he be the Son of *R. F.* 2. That he hath the Manor of *W.* at the Time when the Deviſe of the Reverſion of the Manor of *C.* is to take Effect [b].

[b] T. 36 Eliz. C. B. *Brown* verſus *Peaſe*. Rot. 1145. 1 And. 306. Cro. Eliz. 357. S. C. Owen 24. S. C.

A. had Three Siſters living, one dieth, and hath Iſſue a Daughter, and deviſeth his Land to all his Siſters, between their Heirs, equally to be divided: Adjudged, that the Daughter of the Siſter which is dead ſhall take nothing by this Deviſe [c]. *This is miſtaken; ſee the Report.*

[c] M. 3 Car. B. R. inter *Taylor & Hoskyns*, Godb. 363.

H. M. was ſeiſed of Land and a Houſe called *The White Swan*, made his Will in Writing, and deviſed all his Fee-ſimple Lands and Tenements to *H. M.* his Son, and the Heirs Males of his Body, and for Default of ſuch Iſſue, to his right Heirs; and deviſeth his Houſe or Tenement wherein *William Nicholls* dwelleth, called *The White Swan in Old-ſtreet*, to *Henry Gallant*, his Daughter's Son, for ever; It was found by the Jury, that *William Nicholls*, at the Time of the Will making, and of the Deviſor's Death, inhabited the *Alley of the ſaid Houſe, and Three upper Rooms therein*, and that divers other Perſons at the ſame Time held the Garden and other Places in the ſaid Houſe. Adjudged, 1. That *H. Gallant* had an Eſtate in Fee-ſimple in the Houſe, by Reaſon of the Words [*for ever*;] and not like *Ludham*'s Caſe, 19 *Eliz. Dy.* 357. 2. Adjudged, that the whole Houſe paſſeth by this Deviſe, becauſe the Deviſe being, [*that Houſe or Tenement called The White Swan*,] both of them do neceſſarily import the whole Houſe: For the Sign of *The White Swan* cannot be intended to refer to Three Rooms; and the Words after, *viz.* [*wherein William Nicholls dwelleth*,] do not abridge or alter that Deviſe; and the Houſe being named by the particular Name of *The*

[d] Poſtea hic.

White Swan, although *William Nicholls* never inhabited therein, yet it paſſeth by the Deviſe. *Vide lib.* 4. *fo.* 48. *Ognell's* Caſe [e].

[e] M. 4 Car. *Chamberlain* verſ. *Turnor*, W. Jones 195. S. C. B. R. Crook, part 1. fo. 129.

Two Coparceners, one deviſeth *her Property* to a Stranger, without other Words: There the Deviſee had but an Eſtate for Life; for the Word [*Property*] doth ſignify but her Part in the Land [f].

[f] 28 Eliz. *Eraſmus Cooke's* Caſe.

B. deviſeth to *Agnes* his Wife my Houſe and all the Lands to it belonging, to diſpoſe of at her Will and Pleaſure, and to give it to which of my Sons ſhe will: Adjudged, that by the firſt Words, *viz.* [*I give*, &c. *to diſpoſe at her Will and Pleaſure*,] ſhe had but an Eſtate for Life; and the other Words, [*and to give it to which of my Sons ſhe will*,] do add an Authority to diſpoſe of the Reverſion to any of her Sons which ſhe pleaſes [g].

[g] P. 2 Car. B. R. *Daniel* verſ. *Upley*, W. Jones 137. S. C. Latch 9, 39, 134. S. C.

A Man was ſeiſed of a Farm, called by the Name of *Heſelands in Cuckfield*, and of other Lands in *Cleyton* therewith occupied; and being ſo ſeiſed made his Will in this Manner: As concerning the Diſpoſition of all my Lands and Rents, *&c.* he deviſeth all thoſe his Lands and Tenements lying in the Pariſh of *Cuckfield* called *Heſelands* to his Wife for Life, and after her Deceaſe, that it ſhall remain to *John* his Son, and his Heirs; and after divers Clauſes, he wills, that if *John* dieth without Iſſue, *Heſelands* ſhall remain to his three Daughters in Fee. Adjudged, that only ſo much of the Lands as are in the Pariſh of *Cuckfield* ſhall go to the Daughters, but none of the Lands in *Cleyton* [h].

[h] 11 1 Jac. B. R. *Tutteſham* verſ. *Roberts*, Crook, part 2. fol. 21. Dyer, fol. 261. T. 41 Eliz. B. R. *Wodden* v. *Oſborn*, Crook, part 3. 674. S. C

Some Caſes before-mentioned ſhew where the *Heir* at Law may enter for the Breach of a Condition, and where not; and as to that Matter 'tis generally true, where the Teſtator annexes a Condition to the Eſtate deviſed, which Condition is afterwards broken, the Heir at Law ſhall enter and take Advantage of it, becauſe by the Will he hath received an Injury in that which would have deſcended to him, if there had been none; but if the Deviſe had been to the Heir at Law himſelf, upon a Condition which was afterwards broken, in ſuch Caſe it had been idle, becauſe no Body could enter but the Heir, and he cannot enter upon himſelf.

But where the Deviſe was, that if *E. G. pay his* Executors 50 *l.* then ſhe ſhall have his Lands to her and her Heirs, this ſhall take Effect immediately after the Contingency happens, that is immediately after the 50 *l.* is paid, and the Heir at Law ſhall have it in the mean Time.

'Tis the ſame Law where a perſonal Eſtate is deviſed, (*viz.*) the Executor ſhall have it till the Condition is performed; and upon Breach thereof he ſhall take Advantage of it.

A. deviſeth the Fee-ſimple of his bigger Houſe in *Soper-lane* to his Couſin *Alice Ludham*, and after her Deceaſe to *W. L.* her Son, who was her Heir apparent, and dieth: Adjudged, that *Alice* hath an Eſtate for Life, the Remainder to *William* for his Life, the Fee-ſimple to *A.*

Anſley v. *Chapman*, Cro. Car. 112. Dyer 357. *Chick's* Caſe.

A. by his Will in Writing reciteth, that whereas he had joined his Son *Matthew* Purchaſer with him in Part of his Land in *T.* the Reſidue

Muſchamp v. *Bluett*, Bridgm. 132. W. Jones 211.

ſidue of his Lands in *T.* he giveth to his two Sons *Henry* and *Michael*, upon Condition, that if they ſell the ſaid Lands to any but to *Matthew* his Son, then *Matthew* to enter, and to hold it as of his Gift; and adds this Clauſe, *Item*, All the Houſes and Lands which I have given between my Sons is to this Purpoſe, that they all ſhall bear Part and Part alike, going out of all my ſaid Houſes and Lands, towards the Payment of my Wife 40 *l.* a Year during her Life, which I am bound to pay; and which of my Sons refuſe to bear their Part, I will that he or they ſhall enjoy no Part of my Bequeſt given unto them, but it ſhall go to the reſt of my well-willing Sons. Adjudged, that *Henry* and *Michael* had an Eſtate for *Life only*, and no Eſtate in Fee; becauſe the 40 *l. per Annum* is to be *paid out of the Land and Houſes*; and not like to *Collyer*'s Caſe, *lib.* 6. *fo.* 16. *Boraſton*'s Caſe, *lib.* 3. *fo.* 4 *E.* 6. *Broke, Eſtates*, 78. 26 *H.* 8. *Broke, Tenements, pl.* 18. 2. Adjudged, that although he doth recite that he and *Matthew* were joint Purchaſers; yet an Eſtate for Life only paſſeth, for no Intent appeareth that a Fee ſhould paſs, and it doth not appear by the Will of what Eſtate he was joint Purchaſer, and it may be it was but for Life; and the Reciting that he was joint Purchaſer, was not to ſhew what Eſtate ſhould paſs by the Will, but only what Land was to paſs, and in what Pariſh. 3. The Condition that he ſhould not alien to any but to *Matthew*, is a Condition void in Law.

B. hath Iſſue three Sons, *John*, *William* and *Richard*, and being ſeiſed of divers Lands lying in *A. B. C.* deviſeth all his Lands to *John* his Son, and his Heirs, and if he dieth without Iſſue, he deviſeth his Lands in *A.* to *William*, and his Heirs in Fee: *Item*, I deviſe my Land in *B.* to *Richard* in Fee. Whether this was a good Deviſe to *R.* after the Deceaſe of *John* without Iſſue, or an immediate Deviſe to *R.* and a Countermand of the Will to *John*, *quoad* thoſe Lands, was the Queſtion: And adjudged that it was a *Limitation* by Way of Remainder to *R.* and no Countermand; for the Words [*Item*, *I deviſe*, &c.] ſhall be conſtrued, that if *John* dieth without Iſſue, that then the Land ſhall remain, as the Deviſe is to *Will* and the firſt Deviſe to *John* is a Deviſe to him and the Heirs of his Body, and no Fee [i].

[i] T. 8 Jac. Rot. 1880. *Brown* verſ. *Jervis*, Croke, Jac. 290. Yelv. 209.

The moſt proper Words to make a *Limitation* are, *Quamdiu*, *Dummodo*, *Dum*, *Si*, *Quouſq*; *&c.* but it may be made by other Words, and in Wills there muſt be a *Deviſe over* to make it a Limitation, except the Deviſe is to the Heir at Law, *paying a Sum in groſs*; for if that ſhould be a Condition, it would deſcend to him, and be extinct in his Perſon, and then there could be no Remedy to compel the Payment of the Money. See *Wellock* verſus *Hammond*, *Cro. Eliz.* 204. 2 *Leon.* 114. 3 *Co.* 20. *b.* 2 *D. A.* 10. *p.* 7. 3 *D. A.* 177. *p.* 20. and *Dyer* 317.

Baldwin v. *Wiſeman*, Ow. 112. 2 D. A. 9. p. 5. Cro. Eliz. 376. 1 Roll. Abr. 411.

The Father deviſed his Lands to *T. S.* his youngeſt Son in Tail, upon Condition that he paid his two Siſters 20 *l. per Annum* at their full Age; and if he did not pay it, then he deviſed the Lands to them (the Siſters) and their Heirs; the better Opinion was, that this was a *Limitation* of the Eſtate of *T. S.* for if it ſhould be a *Condition*, it would not only defeat the Siſters of their Portions, but likewiſe the Deviſe to them over upon Non-payment of their Portions. See *Hainſworth* and *Petty*'s Caſe, *Cro. Eliz.* 919. *Moor* 644. *Noy* 51. 2 *D. A.* 9. *p.* 3. 558. *p.* 13.

Deviſe to his eldeſt Son in Tail, Remainder to his younger in Tail, Remainder to the Heirs of the Body of the Teſtator, Remainder to his own right Heirs; he had Iſſue *one Daughter*, and deviſed, *That if either of thoſe on whom he had intailed his Lands, ſhould moleſt the other for the ſame, or mortgage, ſell, or otherwiſe incumber it, that from thenceforth ſuch Perſon ſhould be excluded, and the Intail made to him ſhould be of no Force, but that it ſhall deſcend and come to the next in Tail, as if ſuch diſorderly Perſon had not been mentioned in the Will.* The eldeſt Soſt levied a Fine, and he and the youngeſt joined in a Recovery, and then their Siſter (the Daughter) entered for a Forfeiture: And adjudged that ſhe might, becauſe this was a *Limitation of the Eſtate*, and not a *Condition*; for if it had, then the eldeſt Son muſt have entered for the Breach thereof, and ſo defeat all the Remainders; but it being a *Limitation* of the Eſtate, it determines it, and caſts the Freehold on the next in Remainder, without any actual Entry.

Newis verſ. *Larke*, Plow. Com. 403. reported in Moor 543. by the Name of *Sharrington* verſ. *Minors*.

Deviſe to his Wife for Life, and that after her Deceaſe his Executors ſhould receive the Profits till 900*l.* ſhould be raiſed for the Preferment of his Daughters; and after that Sum was received, then the Lands ſhould remain to his right Heirs Male; and *if he* ſhould diſturb his Executors in receiving the Profits, than his Eſtate ſhall ceaſe, and the Lands ſhall be divided amongſt his Daughters: The Heir Male made a Leaſe to the Plaintiff, the Daughters entered, and the Leſſee brought an Ejectment; but Judgment was given againſt him.

Aſhenhurſt v. *Carter*, Hob. 34.

A. deviſeth Part of his Land to *B.* another Part to *C.* and another Part to *D.* and if any of them die without Iſſue, the Survivor ſhall have his Land ſo dying: Adjudged, that the Survivor ſhall have the Part but for Life, and the Words [*all his Land*] ſhall not be conſtrued to go to the Eſtate of Land, but to the Land it ſelf[k].

[k] H. 36 Eliz. *Detiland* verſ. *Eraſmus Cooke*.

A. being ſeiſed of Gavelkind Land, deviſed his Lands to Husband and Wife, the Remainder *proximo hæredi maſculo de eorum corporibus legitime procreato in perpetuum*: The eldeſt Son taketh only an Eſtate for Life. *Dy.* 133. *b.* But by *Popham*, if [*proximo*] were omitted, it would be an Eſtate-tail. *Vide Dy. f.* 337. *P.* 16 *Eliz. Humfryſon*'s Caſe[l].

[l] P. 16 Eliz. *Humfryſon*'s Caſe, Dyer, fo. 133, 337.

A Man had Iſſue three Sons, *John*, *Edward* and *William*, and had Lands in three Towns, *ſcilicet*, *A. B. C.* by his Will he deviſeth his Lands in *A.* to *John* his eldeſt Son, and the Lands in *B.* to *Edward* his Son, and the Lands in *C.* to *William* his Son; and if any of them die, the other ſurviving ſhall be his Heir; *John* dieth having Iſſue: If the Lands in *A.* ſhall go to the two Brothers, or to the Iſſue of *John*, was the Queſtion. Reſolved, becauſe nothing but the Freehold paſſed to *John*, the Reverſion deſcending to him, his Eſtate was merged, and therefore could not revive, and veſt the Remainder in *Edward* and *William*[m].

[m] P. 7 Jac. Rot. 155. *Wood* verſ. *Ingerſole*, Croke, part 2. 260. 1 Bulſt. 61. S. C.

J. G. ſeiſed of Lands in Fee deviſed them to his Wife for Life, the Remainder to *A.* and his Heirs, upon Condition, that after the Death of his Wife, he grant a Rent-charge to *B.* and his Heirs; and if *A.* dieth without Heirs of his Body, that then the ſaid Lands ſhall remain to *B.* in Tail; the Wife dieth, *A.* granteth the Rent accordingly, *B.* grants the Rent over; *A.* dieth without Heirs of his Body,

and the ſecond Grantee diſtrains for the Rent arrear. Adjudged, that *B.* the Grantee of the Rent was in by the Deviſor, and not by the Tenant in Tail; and therefore the Rent in Fee may continue, tho' the Intail be ſpent: And the Deviſor had Power to charge the Land as he pleaſed [n].

[n] M. 15 Jac. B. R. *Gouldwell's* Caſe, Poph. Rep. fo. 131.

A Man deviſeth Land to *A. habendum* to him and the Heirs of his Body, to the Uſe of him and his Heirs: Adjudged, that it is an Eſtate-tail, and the Words, [*to the Uſe of him and his Heirs*] are but declaratory, and it's all one as if he had ſaid *to his Heirs aforeſaid* [o].

[o] T. 14 Jac. *Cooper* verſ. *Franklin*, Croke, part 2. fo. 401.

A Man deviſeth Land to the eldeſt Son and his Heirs for his Part; *Item*, He doth deviſe to his ſecond Son ſuch Land for his Part, without limiting any Eſtate: Yet it ſhall be *a Fee* in the ſecond Son, for that he had Reference to the Part of the eldeſt Son [p].

[p] P. 14 Jac. *Goffe* verſ. *Haywood.*

A Man ſeiſed of Tenements in *London* deviſeth the ſame to Two, upon Condition, that they ſhould pay to his Wife 10 *l. per Annum* iſſuing out of the ſaid Tenements at Two Feaſts; and if the Rent be behind by the Space of forty Days being demanded, that it ſhould be lawful for the Wife to diſtrain: *Per Curiam*, it's a *good Condition*; and that if the Rent be behind, yet the Wife *cannot diſtrain before a Demand* of the *Rent*: But the Heir of the Husband might enter for the Condition broken, though the Wife did not demand the Rent [q].

[q] H. 18 Eliz. Dy. fo. 348.

A. deviſeth his Lands to his eldeſt Son and his Heirs, upon Condition that he ſhould pay 20 *l.* a-piece to his two Daughters, at their Ages of Twenty-one. *It's a Limitation, and no Condition.* But if the Deviſe had been to his ſecond Son, upon Condition that he ſhould pay 20 *l.* a-piece to his two Daughters, *ut ſupra*; adjudged that *it's a Condition*, and no Limitation. 2. The Daughters could not enter for *Condition broken without Demand*, and Notice given that they are of the Age of Twenty-one. 3. None could enter without their expreſs Order and Direction [r].

[r] H. 45 Eliz. Rot. 817. *Curties* verſ. *Wolverſtone*, Croke, part 2. fo. 57.

A. ſeiſed of certain Lands in Fee, having Iſſue three Sons, *viz. William* his eldeſt by one Venter, and *Fr.* and *John* by another Venter, deviſeth theſe Lands to his Wife for Life, and after to his two Sons *Fr.* and *John*, that they *ſhould pay* to his eldeſt Son *William* and his Heirs *annually* 3 *l.* and if either of them, or *their Heirs*, *do ſell the ſame*, then the Gift ſhall ſtand as void, and ſo to return to his Heirs again. Adjudged, that they have a Fee by the Words [*if they or their Heirs ſell*,] and by Reaſon of the 3 *l.* to be paid annually: And ſo the Condition, that they ſhould not ſell, is repugnant to an Eſtate in Fee, and by Conſequence void [s].

[s] P. 41 Eliz. C. B. Rot. 1043. *Shailand* verſ. *Baker*, Croke, part 3. fo. 745.

A Man ſeiſed of Land in Fee deviſeth the ſame to my Son *Francis* after the Death of my Wife, and if my Daughters fortune to overlive their Mother and *Fr.* and his Heirs, then I deviſe the Land to them for their Lives, and after their Deceaſe to *B.* and *C.* my two Nephews, and that they and their Succeſſors ſhall pay 3 *l.* yearly to ſuch a Company in *London* as I intend for ever. Reſolved that *Francis* hath an Eſtate-tail by Reaſon of the Limitation over, *viz.* [*if his Siſters ſurvive him and his Heirs*:] For *Heirs* in this Place

is intended Heirs of his Body; for the Limitation being to his Siſters, it's neceſſary to be intended, that if he ſhould die without Iſſue of his Body; for they are his Heirs collateral. And therefore if a Man hath Two Sons, and deviſe Land to his younger Son, and if he die without Heir, then it to remain to his eldeſt Son and his Heirs; this is an Eſtate-tail in the younger Son; otherwiſe the Remainder ſhould be void. 19 *H.* 8. *fol.* 9. *Vide Dy.* 333. *Chapman's* Caſe. *Coke, lib.* 6. *fo.* 16. *Wild's* Caſe. 2. The Nephews have a Fee, by Reaſon they have paid a Conſideration for it, *viz.* an annual Sum, and the Words [*if they or their Succeſſors deny the Payment*] ſhew the Intent that it ſhould go to the Heirs. 4 *E.* 6. *Brook* Tit. *Eſtate, pl.* 78. 3. It was adjudged, that it was no contingent Limitation to the Nephews, by Reaſon of the Words [*and if my Daughters*, &c. *over-live their Mother*, &c. *then they to have it*,] but expreſs, when it was to commence [t].

[t] H. 13 Jac. Rot. 606. *Webb* v. *Herring*, Crook, part 2. fo. 415. Moor 852. S. C. Bridg. 84. S. C. 3 Bulſt. 193. S. C.

Sir *Richard Fulmerſton* deviſed to Sir *Edward Chaſe* and *Fr.* his Wife, Daughter and Heir of Sir *R. F.* certain Lands in *E.* to them and the Heirs of Sir *E. C.* upon Condition they ſhould aſſure Lands in ſuch Places to his Executors and their Heirs to perform his Will; and if he failed, then he deviſed the ſaid Lands in *E.* to his Executors and their Heirs. It was adjudged to be a good Limitation, and no Condition; for if it ſhould be a Condition, it ſhould be deſtroyed by the Deſcent to the Heir; but it is a Limitation, and as an executory Deviſe to his Executors, who for Non-performance of the ſaid Acts entered and ſold; and adjudged good [u].

[u] T. 38 Eliz. Rot. 867. *Fulmerſton* and *Steward's* Caſe, Crook, part 2. fo. 592.

A. deviſeth Land to *B.* and his Heirs: It's a Fee-ſimple, for this Word [*Heir*] is *nomen collectivum* [x]. *Owen* 148.

[x] 35 Eliz. Rot. 467. *Lilly* verſus *Taylor*, P. 11 Jac. B. R. *Wilkyns* verſus *Whyting*, 39 Aſſ. pl. 20. 1 Bulſt. 219.

C. being ſeiſed of Land made his Will, and thereby he did give to his Two Sons Twenty Acres of Land, and if they or any of them do ſell, that then the Gift to ſtand void, and ſo it ſhall return again to the ſole Heir; and by another Clauſe he deviſeth to *J. S.* and his Heirs a Rent of 20 *l. per Annum* out of the ſame Land: *Per Curiam*, the Two Sons have an Eſtate in Fee-ſimple [y].

[y] P. 40 Eliz. C. B. Rot. 1403. *Shayland* verſ. *Baker*.

Fee-ſimple by Deviſe.

THE Law allows many Words and Expreſſions in Wills to paſs an Eſtate in Fee, which will not paſs by the ſame Words in Deeds, as a Deviſe *Sanguini ſuo*, or *propinquo ſanguini*, or *ſucceſſoribus ſuis in perpetuum.* Keilw. 43. b. Fitz. Deviſe 20. Co. Lit. 9.

'Tis true, the Word *Heirs* imports a Fee both in Wills and Deeds, and the Word *Heir* in the ſingular Number imports a Fee-ſimple in Wills, as a Deviſe to *T. S.* for Life; and after his Deceaſe to the *Heir of his Body* for ever; here the Word *Heir* is *nomen collectivum*, and is the ſame with *Heirs*, and *T. S.* hath a Fee-ſimple executed in him, and his Heirs ſhall take by Deſcent, and not by Purchaſe. 1 Roll. Abr. 253. Style's 249, 273. S. C.

The Reaſon why Wills are favoured more than Deeds, is, becauſe Wills are not Conveyances at Common Law, but by the Statute of *H.* 8.; 'tis true, there were Wills before, but thoſe were by Cuſtom in Boroughs;

Boroughs; now as Cuſtom enabled Men to deviſe their Lands contrary to the Common Law, ſo it exempted them from that Regularity required in other Conveyances.

Abraham ver. *Trigg*, Cro. Eliz. 479. Moor 424. S. C.

Thus, where the Deviſe was to *T. S.* and *his Heirs Males begotten*, this is an Eſtate in Fee for Want of the Word [z] *Body*, from whom theſe *Males* ſhould iſſue; but if it had been to the *Heirs Males of* T. S. it had been an *Eſtate-tail.*

[z] *My Lord* Coke *tells us, That in Wills the Law will ſupply the Word* Body, Litt. Sect. 31.

Cro. Eliz. 744. *Shailand* v. *Baker.*

The Father had Iſſue *William* by one Venter, and *James* and *Francis* by another, and deviſed his Lands to the Two laſt Sons, without limiting what Eſtate they ſhould have, and that if either of them, *or their Heirs, ſhould ſell the ſame*, then the Deviſe ſhould be void, and it ſhould return to the *whole Heirs*; then he appointed them to pay to the eldeſt Son and *his Heirs* 3 *l.* the ſaid Two youngeſt Sons both died without Iſſue: Adjudged they had a Fee-ſimple by theſe Words, (*viz.*) if they or *their Heirs* alien, and by reſerving a Rent of 3 *l.* to the eldeſt Son and *his Heirs.*

Deviſe of Lands to *T. S.* and his *Aſſigns*, without ſaying, *for ever*, this is a Fee-ſimple; and ſo 'tis if the Deviſe was to *T. S. for ever*, without ſaying to his Heirs. 1 *Rep.* 85. in *Corbett*'s Caſe.

The Teſtator deviſed his Lands to *T. S.* for 100 *l.* which he owed him, this is a Fee-ſimple. 1 *And.* 35.

1 Salk. 233. *Humble* verſus *Jones.*

Deviſe of his Lands to his Daughter for Life, Remainder to *T. S. and his Heirs*; and *for Want of ſuch Heirs*, Remainder to the right Heirs of *E. G.* Adjudged, that this Limitation to *T. S. and his Heirs* made a Fee-ſimple, and the Words *for Want of ſuch Heirs*, may be intended *Heirs general*, and not *Heirs of his Body*; and therefore the Remainder to the right Heirs of *E. G.* is void.

William Selwyn having three Daughters, *viz. Mary*, *Suſanna*, and *Anne*, and leaving no other Child, by Will deviſed his Lands and Tenements in *B.* in the County of *Gloceſter*, to his three Daughters, *Mary*, *Suſanna* and *Anne*, to be equally divided between them, to hold to them, their Heirs and Aſſigns for ever; he alſo deviſed his Lands and Tenements in *K.* in the County of *Glouceſter*, to his ſaid three Daughters, to hold to them, their Heirs and Aſſigns, immediately after the Deceaſe of his Wife *Suſanna* for ever; and then after ſome intervening Bequeſts, ſays, and if all my three Daughters ſhall die, and leave no Iſſue of their Bodies to inherit ſuch Eſtates as in this my Will is before deviſed to them, and not be of Age, or make no other Diſpoſal thereof, then my Will is, that all the ſaid Eſtates Lands and Tenements, both at *B.* and *K.* ſhall be veſted, and be the ſole and proper Eſtate of my Kinſman *S. B.* and I deviſe the ſame to him, his Heirs and Aſſigns for ever accordingly.

Anne the youngeſt Daughter died in her Infancy in the Life-time of the Teſtator her Father, the two other Daughters, *Mary* and *Suſanna* ſurvived their Father and Mother.

A Caſe in Chancery was made for the Opinion of the Court of King's Bench, whereupon one Queſtion was, whether the Daughters *Suſanna* and *Mary*, by Virtue of the Will, and by the Death of *Anne*, in the Life-time of the Teſtator, took an Eſtate in Fee-ſimple or Fee-tail in their reſpective Shares of the real Eſtate? The Judges certified that they took an Eſtate in Fee-ſimple. Whereupon it was decreed in Chancery accordingly. *Miller* and *Moor*, *Barnardiſton's Rep. fol.* 7.

Fee-ſimple by the Word Paying.

WHere the Deviſe of Lands is to *T. S.* his eldeſt Son, *paying* ſo much, *&c.* there the Word *Paying* doth not make a Condition, but a *Limitation* of the Eſtate, for if it ſhould be a Condition, then, if *T. S.* did not pay the Money, he himſelf would take Advantage of it; for the Land deſcends to him as Heir at Law, and ſo the Money would never be paid, therefore 'tis a *Limitation* of his Eſtate; and if the Money is not paid, it ſhall go to the next in Remainder. Plowd. Com. 412. 3 Rep. 20. *Nevis* verſus *Scholaſtica.* See *Wellock* verſus *Hammond* hic.

The Father deviſed his Lands to his Son after the Death of the Mother, and if his Daughter ſurvived the Son and his Heirs, then to her for Life, and after her Death, then to *Roger* and *John*, *paying every Year* 6 l. 16 s. *to the Company of* Merchant-Taylors *in* London; and if they (the ſaid *Roger* and *John*) or their *Succeſſors* ſhall deny the *Payment*, *&c.* then the Company may enter: Adjudged an Eſtate in Fee in *Roger* and *John*, by Reaſon of the Word [a] *Paying*; and 'tis not material of what yearly Value the Land is above the Money to be paid, becauſe that Word makes an Eſtate in Fee in the Deviſees; and in this Caſe the Word *Succeſſors* ſhall be taken for *Heirs*. *Webb* verſus *Herring*, 2 Cro. 415. Moor 852. S. C. Bridg. 84. S. C. 3 Bulſt. 193. S. C.

[a] *By Intendment of Law a Deviſe is always for the Benefit of the Deviſee, and not for his Prejudice; as where Lands of* 3 l. per Annum *are deviſed to* T. S. *paying out of it* 50 s. *to* E. G. *in this Caſe* T. S. *hath a Fee-ſimple; but if it had been to pay ſo much out of the* Profits of the Land, *'tis but an Eſtate for Life, becauſe he can have no Loſs.* 6 Rep. *Collier's* Caſe.

So where the Father deviſed Lands to his Son, *paying* 3 *l. per Annum* to his Brother; this was adjudged a Fee by the Word *Paying*, becauſe the Charge to the Brother might ſurvive, and continue after the Death of the Deviſee; and ſo 'tis in all Caſes in Wills where the Word *Paying*, or to *pay*, is collateral, and 'tis not ſaid *out of the Profits* of the Lands. *Spicer* verſus *Spicer*, Godb. 280.

The Caſe is almoſt the ſame where the Deviſe was to his *eldeſt Son for Life*, and after the Determination of that Eſtate, then to his youngeſt Son, *paying* to his Siſters 10 *l.* a-piece; this was adjudged a Fee-ſimple. *Green* verſus *Devet*, 2 Cro. 599.

In ſome Caſes where the Word *Paying* is not expreſſed, it ſhall be underſtood, as where the Husband deviſed his Lands to his Wife for Life, and that after her Deceaſe, *Robert*, his eldeſt Son, ſhould have it, for *Ten Pounds under the Price it coſt*; it was held, that the Clauſe ſignified he ſhould have it, *paying* Ten Pounds under that Price, which makes a Fee-ſimple determinable upon Non-payment of the Money. Moor 361. *Bullen's* Caſe. Gouldſ. 134. S. C.

Deviſe of Legacies to be paid out of Lands; in ſuch Caſe if the Profits will not do it at the Time limited to pay it, 'tis a Deviſe of the Lands in Fee.

So where the Deviſe was to his Son *Robert*, upon Condition, that he *pay* to his Siſters 5 *l. per Annum* during their Lives: Adjudged the Son had a Fee-ſimple. *Reed* verſus *Hatton*, 2 Mod 25.

Tho' the Word *Paying* generally makes a Fee-ſimple, yet 'tis not ſo where the Eſtate is limited over; as for Inſtance, The Father deviſed his Lands to his Two Sons ſeverally, *paying* to each of his Daughters 10 *l.* a-piece: Provided, that if either of his Sons marry and have Iſſue, *and die before he enters*, *then his Part ſhall remain to ſuch Iſſue*, and not to his other Brother: Now this Limitation, (*viz.*) *That after* *Bacon* verſus *Hill*, Cro. Eliz. 497. Moor 464. S. C.

ter the Death of one before he enters on his Part, it ſhall remain to the Iſſue of the other, ſhews, that their Father intended he ſhould have it only for Life, notwithſtanding the Word *Paying*.

Collinſon ver. *Wright*, 1 Sid. 148. See *Clatch*'s Caſe, and *Chaddock* and *Cowley*'s Caſe, poſtea.

So where the Deviſe was to his Son and Heir, and if *he die before Twenty-one, and without Iſſue of his Body then living*, the Remainder over, *&c.* the Twenty-one Years expired, and then he ſold the Lands, and died: Adjudged that he had a Fee-ſimple immediately, and by Conſequence the Sale was good, and that the Eſtate-tail (which was created by the Words, (*viz.*) *And without Iſſue of his Body*) was to ariſe upon a Contingency ſubſequent to the Eſtate in Fee, (*i. e.*) *upon his dying before Twenty-one, and without Iſſue then living*, which in this Caſe could never happen, becauſe he had ſurvived Twenty-one Years.

Chaddock v. *Cowley*, 2 Cro. 693.

Deviſe to *T. S.* and his Heirs, and *if he die without Iſſue, living* E. G. or if he die before Twenty-one, Remainder over: Adjudged this makes a conditional Fee-ſimple immediately, and the Words, *if he die without Iſſue, living* E. G. make an Eſtate-tail, but that is to ariſe upon a Contingency of his dying without Iſſue, *living* E. G. and not otherwiſe.

By the Word Purchaſe.

Green verſ. *Armſted*, Hob 65. 1 Roll. Abr. 833.

THE Teſtator had Iſſue *William*, who had Two Sons, *Robert* and *Thomas*, and he deviſed his Lands in *Clay* to *William for Life*, and afterwards to *Thomas*, except *William purchaſe* other Lands, and as good in Value (but did not ſay *yearly Value*) as his Lands in *Clay*, for his Son *Thomas*, and *then* William *ſhall ſell his Land in* Clay *as his own*, &c. Adjudged that *William* had a Fee-ſimple by this Deviſe; 'tis true, by the firſt Words of the Will he had expreſly *an Eſtate for Life*, but the Words which follow, (*viz.*) except *William purchaſe other Lands*, import an abſolute *Purchaſe in Fee*, (tho' it might be likewiſe *for Life*) and the Words *as good in Value* ſhall be intended *in the Price*, and not in the yearly Value, and it muſt be a Fee-ſimple, for otherwiſe he could not ſell *Clay*.

The Teſtator deviſed Lands to his Son, upon Condition that *he allow* to his Brother Meat, Drink and Apparel, and convenient Lodging: It was adjudged, that the Son had a Fee-ſimple immediately, becauſe the Brother was to have an immediate Maintenance, which might be a Charge to the Deviſee before he could receive any of the Profits of the Lands, tho' it was inſiſted that he had only an Eſtate for Life, becauſe the Word *Allow* imports it muſt be out of the Profits.

Lee verſus *Withers*, T. Jones 107.

By a Deviſe of All his Eſtate.

Wilſon ver. *Robinſon*, 2 Lev. 91. 3 Mod. 100. S. C.

THE Teſtator deviſed all his *Tenant-right Eſtate* in *B.* to his Couſin *T. S.* and all his Father took of the *Marqueſs his Fee*, with all his Lands in *Beckſide*: Adjudged, that the Word *Eſtate* did comprehend all his Intereſt in the Lands; tho' it was objected, that the Words were only a Deſcription of the Quality of the Land, and were not Words of Limitation of the Eſtate, and therefore made but an Eſtate for Life; but it was held to be a Fee-ſimple.

So where the Teſtator deviſed to ſeveral Perſons, Legacies in Money, and all the reſt of his Goods, Chattels, and *other Eſtate* whatſoever to *T. S.* whom he made Executor; it was decreed, that he having Lands, *T. S.* had an Eſtate in Fee in them, [b] for wherever a Man hath a real and perſonal Eſtate, and deviſes *All his Eſtate*, ſince it doth not appear what Eſtate he intended, it ſhall comprehend the Whole in which he hath any Manner of Intereſt.

1 Chanc. Rep 262. *Tirrill* verſus *Page*. See *Johnſon* verſus *Kerman* hic.

[b] 3 Mod. 45. *Reeves* v. *Winnington.*

So a Deviſe of all his real and perſonal Eſtate to diſpoſe for the *Payment* of his Debts, it was decreed this was an Eſtate in Fee, and no implied Truſt in the Deviſee for the Heir at Law to have the Surplus after the Debts paid. 1 *Chan. Rep.* 262. *Newton* verſus *Crompton.*

So where the Teſtator had both Freehold and Copyhold Lands, and deviſed all his Eſtate to his Wife and Children, equally to be divided; it was held, that the Word [c] *Eſtate* muſt in a legal Signification comprehend the *Intereſt* he had in thoſe Lands, and by Conſequence paſs an Eſtate in Fee.

Carter verſus *Horner*, Shore 348. 4 Mod. 89. S. C.

[c] *All my Eſtate includes the Whole, both real and perſonal, and it is a Deſcription of the Fee-ſimple.* 1 Salk. 236. Counteſs of *Bridgwater* v. Duke of *Bolton.*

Thomas Carter made his Will as follows: "As to my temporal "Eſtate, I bequeath to my Nephew *Tanner* (his Heir at Law) 50 *l.*" (Then he gives ſeveral Legacies:) "And all the Reſt and Reſidue of "my Eſtate, Goods and Chattels whatſoever, I give and bequeath to "my beloved Wife *Mary Carter*, whom I make full and ſole Ex-"ecutrix." In Chancery, decreed, that an Eſtate in Fee-ſimple paſſed to the Wife by the Words of the Will. *Tanner* againſt *Morſe*, *Trin.* 1734. *Forreſter's Rep.* 284.

By the Word Inheritance.

THE Teſtator deviſed an Annuity to *W. G.* in Fee: *Item*, I deviſe my Manor of *B.* to *T. S.* and his Heirs: *Item*, I deviſe *all my Lands, Tenements and Hereditaments* to the ſaid *T. S.* but did not ſay for what Eſtate: *Item*, I give all my Goods and Chattels, *and whatſoever elſe I have not diſpoſed*, to the ſaid *T. S.* he paying my Debts and Legacies: Adjudged, that *T. S.* had a Fee-ſimple by the laſt Words, (*viz. whatſoever elſe I have not diſpoſed*, for they could have no Effect on the perſonal Eſtate, becauſe all that was deviſed before; therefore they muſt extend to the Inheritance, becauſe that was not diſpoſed before, and the rather becauſe of the Words which follow, (*viz.*) he paying my Debts.

Hopewell v. *Ackland*, 1 Salk. 239. See Allen 29. S. P. and 2 Vent. 285. *Willow's* Caſe.

A Deviſe of his [d] *Inheritances* to *T. S.* after the Death of his Mother; and if he die within Age, then *to the right Heirs of the Teſtator*; it was held, this was an *Eſtate in Fee*, for if he had intended only an Eſtate for Life to *T. S.* it would have been in vain to have limited it *to his own right Heirs*, becauſe the Law would have done it without ſuch a Limitation.

2 Saund. 388. *Purefoy* v. *Rogers.*

[d] *A Deviſe of his Houſe to* T. S. *with all his Lands for* 21 *Years, and that he ſhall have my* Inheritance, *if it is not contrary to Law; this paſſes a Fee.* Hob. —. See *Whitlock* verſus *Harding*, S. P. Moor 873. Godb. 207. S. C. Hob 2.

By the Words to diſpoſe, give or ſell, at his Will and Pleaſure.

1 Leon. 156. *Jenour* verſus *Hardy.*

DEviſe to *E. G.* for Life, Remainder to *R. N.* in Tail, and if he die without Iſſue of his Body, living *E. G.* then the Lands to remain to her, *to diſpoſe at her Pleaſure:* Adjudged ſhe had a Fee-ſimple.

Deviſe to his Wife for Life, then to his Son; and if he fail, then all his Part to the *Diſcretion* of his Father: Adjudged, that the Father had a Fee-ſimple; and ſo it had been if the Deviſe was to be at his Diſpoſal. 1 *Leon.* 156. *Whisken* verſus *Cleyton.*

Moor 57. See poſtea *Lief* v. *Saltonſtall,* S. P.

So a Deviſe of Lands to his Wife to diſpoſe and employ them upon her ſelf and Sons *at her Will and Pleaſure:* Adjudged a Fee-ſimple in the Wife.

Daniel verſus *Upley,* Latch 9, 39, 134. W. Jones 137.

If it had been to diſpoſe at her *Will and Pleaſure, and to give it to which of her Sons ſhe pleaſeth,* probably this might have been an Eſtate for Life in the Wife, with a Power to diſpoſe the Reverſion; but the better Opinion was, that ſhe had a Fee-ſimple with a reſtrictive Power to alien to one of her Children, and no Body elſe.

Brian v. *Cawſen,* 2 Leon. 68. 3 Leon. 115.

A Deviſe of ſeveral Lands to his Three Sons, *John, Stephen,* and *Roger,* ſeverally, and if they live to the Age of Twenty-one, and *have Iſſue of their Bodies,* then to them and their Heirs, to *give and ſell at their Will and Pleaſure:* Adjudged a Fee-ſimple in them when they come of Age and have Iſſue; it is true, theſe Words, *Iſſue of their Bodies,* create an Eſtate-tail by Implication; but the Teſtator in this Caſe could never intend ſuch an Eſtate, becauſe he gave his Sons Power to *ſell and give at their Will and Pleaſure,* which Tenant in Tail cannot do.

Hall verſ. *Deering,* Hardres 148.

The Father deviſed his Lands to his Son *George and his Heirs;* and if he die before Twenty-one, and without *Heirs of his Body,* Remainder over: Adjudged, that by the firſt Clauſe *George* had an Eſtate in Fee, the Deviſe being to him and *his Heirs;* and the ſubſequent Words, (*viz.*) If he die before Twenty-one, *and without Heirs of his Body,* qualify the Eſtate, (*viz.*) that the Fee-ſimple ſhall not determine, unleſs he die before Twenty-one, and without Iſſue, and are not Words of *Limitation.*

Lief ver. *Saltonſtall,* 1 Mod. 189. 2 Lev. 104. S. C. *See Antea,* Moor 57. S. P.

Deviſe to the *Wife for Life,* with a *Power* given to her to *diſpoſe* it, *&c.* to ſuch of her Children as ſhe ſhall think fit, and accordingly ſhe did *diſpoſe* it to her Son *Philip and his Heirs:* Adjudged, that by the Word *Diſpoſe,* the Teſtator intended it ſhould be in Fee; and though the Wife had an expreſs Eſtate for Life, yet ſhe had a Power to diſpoſe the Fee-ſimple and Inheritance; but this is contrary to a Caſe in * *Leonard,* where the Deviſe was to his *Wife for Life, and ſhe to give it to whom ſhe will* after her Deceaſe; in which Caſe it was adjudged a Fee-ſimple, if there had not been an expreſs *Eſtate for Life* deviſed to the Wife; therefore ſhe had it only for Life, with a Power to diſpoſe the Reverſion in Fee; and when that is done, then the Grantee will be in by Virtue of the Will; but in the principal Caſe, Juſtice *Lecinz,* who reports it, tells us, the Court was divided.

* 3 Leon. 71. 4 Leon. 41.

William Rogers makes his Will in theſe Words: *I do conſtitute and make my well-beloved Wife* Anne Rogers *ſole and whole Heireſs and Executrix of all my Lands, Tenements, Goods and Chattels whatſoever, real and perſonal, the ſame to ſell and diſpoſe of as ſhe ſhall think fit, to pay my Debts and Legacies of this my laſt Will and Teſtament*, and gives the Heir at Law 5 *l.* Queſtion, whether there be not a reſulting Truſt to the Heir at Law? being ſaid to be for a particular Purpoſe. Decreed no reſulting Truſt. *Rogers* v. *Rogers*, *Select Caſes in Chancery*, *fo.* 81.

Where the Deviſee takes the Lands with a Charge, 'tis a Fee-ſimple.

ff. LANDS of the yearly Value of 34 *l.* were leaſed for Life, reſerving 40 *s. per Annum* Rent; and the Leſſor having by Will deviſed ſeveral Legacies, amounting in all to 100 *l.* to be paid out of his ſaid Lands by *T. S.* to whom he deviſed the ſame, (but did not ſay for what Eſtate) and to be paid by him within a Year after the Deceaſe of the Teſtator; it was inſiſted that *T. S.* had only an Eſtate *for Life*, becauſe the Charge of paying the Legacies was not on his *Perſon*, but on the *Lands*; but adjudged he had a Fee-ſimple; for he might have a Loſs by ſuch Payment, becauſe the Profits of the Lands would not amount to 100 *l.* within the Time the Legacies were appointed to be paid. *Freak* v. *Lee.* T. Jones 113. 2 Lev. 249. S. C.

So where the Deviſe was of ſeveral Legacies, and amongſt the reſt *four Coats to four poor Boys of the Pariſh of* C. *for ever*, and all his Lands (which were of the Value of 1000 *l.*) to his Wife *Margaret and her Aſſigns, &c.* ſhe married again, and then ſhe and her Huſband joined in a Fine, and declared the Uſes to themſelves, and to the Survivor for Life, Remainder to the Husband and his Heirs: Adjudged that *Margaret* had a Fee-ſimple by this Will, becauſe ſhe took the Lands with a Charge for ever, (*viz.*) *to find four Coats for four poor Boys.* 2 Salk. 685. *Smith* v. *Tindall.*

Laſtly, by a Deviſe of the *whole Remainder* a Fee-ſimple paſſeth, as where the 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 the 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. *Norton* verſus *Ladd*, 1 Lutw. 761.

Thomas Beckwith made his Will as follows: As touching my worldly Eſtate I diſpoſe of the ſame in Manner following; *Imprimis*, I give my Eſtate, which I purchaſed of *John Adamſon*, to diſcharge all my Debts; *Item*, I give to my Siſter *Mary* all my Eſtate at *Helmehouſe, &c.* paying and diſcharging all Legacies charged by my Father's Will; *Item*, I give to my Mother all my Eſtate at *Northwith, &c.* for her natural Life, *and to my Nephew* Thomas Dodſon *after her Death*, if he will change his Name to *Beckwith*; if he does not, I give him only 20 *l.* to be paid him for his Life out of *Northwith, &c.* which I give her upon my Nephew's refuſing to change his Name, to her and her Heirs for ever. In *Chancery* the

Queſtion was, Whether *Thomas Dodſon* took an Eſtate in Fee-ſimple by this Will, or an Eſtate for Life only? Held that he took an Eſtate in Fee-ſimple. *Ibbetſon* v. *Beckwith*, *Mich.* 1735. *Forreſter's Rep. fo.* 157.

Fee-tail by Deviſe by the Words Heirs, &c.

ESTates-tail are either general or ſpecial; an Eſtate-tail general is where Lands are deviſed to a Man and the Heirs *of his Body*, without mentioning *Males*, *or on what Woman* to be begotten; therefore if he hath ſeveral Wives one after another, and hath Iſſue by all of them, there is a Poſſibility that they may ſucceſſively inherit.

An Eſtate-tail *ſpecial* is where Lands are deviſed to Husband and Wife, and to the Heirs of their *two Bodies to be begotten*; and in ſuch Caſe none can inherit but the Iſſue between them, and therefore it is called an Eſtate-tail ſpecial; and theſe Eſtates-tail which are created by Wills, are always more favoured, than thoſe which are created by Deeds; and therefore a Deviſe to one and his *Heirs*, to one and *his Iſſue*, or to the Heirs of *his Body*, make an Eſtate-tail in Wills, which will not make ſuch an Eſtate in Deeds, as may be ſeen in the Caſes following.

Church verſ. *Wyatt*, Moor 637. *ſſ.* Deviſe to an Infant in the Mother's Womb, and to his *Heirs lawfully to be begotten*, and ſome other Part of his Lands to his *Daughter*, and to the *Fruit of her Body*; and if ſhe died without any *Fruit of her Body*, Remainder to the Infant in the Mother's Womb, and *that one ſhould be Heir to the other:* Adjudged an Eſtate-tail in the after-born Child, for the Words *to his Heirs lawfully to be begotten*, and that *one ſhall be Heir to the other*, make an Eſtate-tail without the Word *Body* being added.

Co. Litt. 25. a. So a Deviſe to a Man, and the *Heirs Males* of his Body, who hath Iſſue a Daughter, who had Iſſue a Son: Adjudged he ſhall inherit, but it is not ſo by Deed.

Chapman's Caſe, Dy. 333. The Teſtator having three Brothers deviſed an Houſe *amongſt them*, and another Houſe to his *Brother* Thomas *alone*, *paying* to *Chriſtopher* 3 *l.* 6 *s.* 8 *d.* to find him a School: *Provided that the Houſes be not ſold, but to go to the next of the Name and Blood that are Males: Thomas* died without Iſſue, the next Brother had Iſſue a *Son*, and died: Adjudged, that as to the Houſe deviſed to *Thomas*, it was an Eſtate-tail, and likewiſe an Eſtate-tail to each of the Brothers, as to the other Houſe, becauſe the Proviſo that the *Houſes be not ſold*, ſhews that he intended an *Eſtate-tail.*

Atkins verſus *Atkins*, Cro. Eliz. 248. Moor 593. S. C. Deviſe to *T.* and to the *Heirs of his Body*; this was held to be an Eſtate-tail.

Wiſeman verſ. *Rolfe*, 1 And. 160. Owen 140. S. C. 1 Leon. 57. So a Deviſe to his Wife for Life, Remainder to *Thomas* in Tail, Remainder to the right Heirs of *Thomas*; alſo I give to him my Lands in *Springfeild*, and in *Much Baddow*, (but did not ſay for what Eſtate) and my Lands in *Owſey*, to hold *all the laſt deviſed Premiſſes* to him in Tail: Adjudged, that he had an Eſtate-tail in all the Lands, as well as *Owſey*.

Whiting ver. *Wilſon*, 1 Bulſt. 219. Deviſe to *T. S.* for ever, and after his Deceaſe, to his *Heir Male:* Adjudged an Eſtate-tail, for the Word *Heir* (though in the ſingular Number) is *nomen Collectivum.*

Deviſe to his Wife for Life, Remainder to *Clement Frenſham*, and the *Heirs Males of his Body*; and if he die without Iſſue, (but did not ſay *Males*) then to his Couſin *T. S.* and his Heirs Males; *Clement* had Iſſue a Daughter and died: Adjudged this was an Eſtate-tail ſpecial by the Deviſe, to him *and the Heirs Males of his Body*, and not an Eſtate-tail by the Words, if he die *without Iſſue*; for theſe Words do not alter the Eſtate-tail precedent, becauſe theſe Words by which 'tis created ſhew the Intention of the Teſtator, that it ſhould go to the *Males*, and by Conſequence the *Daughter* can have no Title. *Frenſham*'s Caſe, 1 And. 8. Dyer 171. S. C. Moor 13. S. C.

The Teſtator deviſed Lands to *T. S.* and *the Heirs of his Body*, and after his Deceaſe to *R. S.* the eldeſt Son of the ſaid *T. S.* and the Heirs of his Body, Remainder over: Adjudged an Eſtate-tail, becauſe by the firſt Clauſe of the Will an expreſs Eſtate-tail is deviſed to him, and there is nothing afterwards to alter that Eſtate. *Atkins* verſ. *Atkins*, Cro. Eliz. 248. Mo. 593. S. C.

The Father deviſed an Houſe to his Son *Francis* after the Death of his Wife; and that if his *Daughter* ſurvived his Wife, and her *Brother* Francis *and his Heirs*, then ſhe to enjoy the Houſe for Life, Remainder over; *Francis* died without Iſſue, and then his Mother died: Adjudged, that *Francis* had an Eſtate-tail, becauſe the Word *Heirs* here muſt be intended *Heirs of his Body*, and the rather, becauſe the next Limitation was to the *Daughter*, who was his Siſter and *collateral Heir*; and 'tis impoſſible that he ſhould die without Heirs as long as ſhe lived. *Webb* verſ. *Herring*, Bridgm. 84. S. C. 2 Cro. 415. S. C. Moor 853. S. C. 3 Bulſt. 193. S. C. 1 Rol. Rep. 289. S. C. Cro. Car. 51. S. P. Litt. Rep. 346. S. P.

So where the Father had two Sons, and deviſed his Lands to the youngeſt; and if he died *without Heirs*, then to his eldeſt Son and his Heirs: Adjudged, that the youngeſt had an Eſtate-tail, becauſe the Word *Heirs* ſhall be taken to be *Heirs of his Body*; for otherwiſe the Remainder to the eldeſt would have been void, becauſe the youngeſt cannot die *without Heirs*, ſo long as the eldeſt is living. 1. Roll. Abr. 836.

George Tyte deviſed Lands, *&c.* to his Wife *Jane* for Life, Remainder to his Son *Henry* for Life, Remainder to his Son *George* and his Heirs for ever; and if he died without Heirs, then to his two Daughters *Catherine* and *Jane*. In Chancery held, that *George* had only an Eſtate-tail, and not a Fee-ſimple: Where a Deviſe is to one and his Heirs, and if he dies without Heirs, Remainder over to another, who is or may be the Deviſee's Heir at Law; the firſt Limitation ſhall be conſtrued an Intail, and not a Fee: But where the ſecond Limitation is to a Stranger it is merely void, and the firſt Limitation is a Fee-ſimple; for in the latter Caſe there is no Intent appearing to make the Words carry any other Senſe than what they do at Law; but in the former it is impoſſible that the Deviſee ſhould die without an Heir, while the Remainder-man or his Iſſue continue; and therefore the Word *Heirs* ſhall be conſtrued *Heirs of his Body*, ſince he could not but know, that the Deviſee could not die without an Heir while the Remainder-man or any of his Iſſue continued. *Tyte* verſus *Willis*, *Mich.* 1733. *Forreſter's Rep. fo.* 1. *Cro. Jac.* 415. 3 *Mod.* 123.

So a Deviſe to *John* his eldeſt Son and his Heirs, upon Condition that he ſhould grant to *T. S.* and his Heirs an Annuity of 4 *l.* and if *John died without Heirs of his Body*, Remainder to *T. S.* this is an Eſtate-tail to *John*, becauſe by the ſubſequent Clauſe, (*viz.*) if *John die without Heirs of his Body*, it appears what *Heirs* the Teſtator intended; but if his Meaning had not been explained by the Word *Body*, yet *John* would have an Eſtate-tail by the Deviſe to him and *his Heirs*, becauſe the Word *Heirs* ſhall be intended *Heirs of his* *Dutton* verſus *Ingram*, 2 Cro. 427.

Body

Body; for the Law will rather preſume that he may die without Iſſue than without Heirs.

Keen verſus *Allen*, and *Hearn* ver. *Allen*, Litt. Rep. 4. Cro. Car. 57. S. C.

But where the Deviſe was to his Wife for Life, Remainder to his Son *Thomas and his Heirs*, and for *Default of Heirs of Thomas*, Remainder to *his Daughter* and her Heirs; it was held by three Judges, that *Thomas* had not an Eſtate-tail, becauſe ſuch an Eſtate cannot be created without expreſs Words, (*viz.*) by the Words *Heirs of the Body*, or by Words which amount to it; as a Deviſe to *T. S.* and his Heirs *iſſuing*, where the laſt Word *Iſſuing* explains what Heirs were intended.

Now in the Caſe laſt mentioned it was held, that if the Remainder had been limited to a Stranger, and not to the Daughter, who was the next Heir, it had been a Fee-ſimple in *Thomas*; and then the Remainder had been void, becauſe one Fee-ſimple Eſtate cannot be limited after another.

Trilly verſ. *Collier*, 2 Lev. 162.

Agreeable to the Caſe of *Webb* and *Herring* before-mentioned, there is a later Judgment, which was thus; the Father having three Daughters, *Suſan*, *Anne* and *Elizabeth*, deviſed his Lands to his Wife till his *Heir* came of Age, *paying* to his *Heir* 10*l. per Ann.* then he deviſed to his two youngeſt Daughters *Anne* and *Elizabeth* 140*l.* a-piece; and that if *Suſan his Heir* die *without Heirs* before Twenty-one, ſo that the Lands ſhould come to *Anne*, then ſhe to pay the 140*l.* to *Elizabeth:* Adjudged, that *Suſan* ſhould have all the Lands excluſive from her Siſters by the Word *Heir*; and by the laſt Clauſe, (*viz.*) *If ſhe die without Heirs*, ſhe had an Eſtate-tail, becauſe by that Word *Heirs* it ſhall be intended that the Teſtator meant *Heirs of her Body*, for ſhe could not die without Heirs, ſo long as other Siſters were living.

Parker v. *Thacker*, 3 Lev. 70.

So where the Deviſe was to *W. T.* for Life, and *to his Heirs*; and for *want of Heirs of him*, then to *G. T.* in like Manner; and for *want of Heirs of him*, then to *William Flint and his Heirs for ever*; the two firſt Deviſees died without Iſſue: Adjudged they had an Eſtate-tail, becauſe theſe Words *for Want of Heirs* muſt be intended *Heirs of their Bodies*, eſpecially becauſe *William Flint* was next Heir at Law to them; and therefore they could not die without Heirs, ſo long as he or any of his Heirs were living.

Blaxton verſ. *Stone*, 3 Mod. 123.

So a Deviſe to his eldeſt Son, and if he die without *Heirs Males*, than to his next Son in like Manner: Adjudged an Eſtate-tail in the eldeſt Son; for the Teſtator muſt intend *Heirs Males of his Body*, becauſe of the Deviſe over to his ſecond Son; for it would have deſcended to him of Courſe without the Deviſe, if his eldeſt Brother had died without Iſſue.

Luxford verſ. *Cheek*, 3 Lev. 125.

Deviſe of his Lands to his Wife for Life, if ſhe doth not marry; but if *ſhe marry*, then *H.* his eldeſt Son ſhall enter immediately, and hold the Lands to him and the *Heirs Males of his Body*, Remainder to his ſecond Son in like Manner, Remainder over; the Teſtator died, and his Widow did not marry again; the Queſtion was, whether this was an Eſtate-tail in the eldeſt Son? And adjudged that it was, and that the Teſtator intended ſo by limiting ſeveral Remainders over; and rather than his Intention ſhould fail, the Words may be thus tranſpoſed.

Sſ. If my Wife marry, then H. *my eldeſt Son ſhall enter*, &c. *if ſhe doth not marry, then he ſhall have my Lands to him, and the Heirs Males of his Body, Remainder over.*

The Father having three Sons and a *Daughter*, and one Brother, deviſed his Lands to his Sons ſucceſſively in Tail Male, Remainder to his own *right Heirs Male for ever*; all the Sons died without Iſſue; the Queſtion was, if the Daughter as *Heir general*, or the Brother as *Heir Male*, ſhall take by this Deviſe: Adjudged that the Daughter ſhall take, becauſe no *collateral Heir Male* ſhall take by ſuch a Limitation by way of Remainder; but by a Deviſe to the *Heirs Males*, he only ſhall take who is *Heir Male of the Body of the Teſtator*, becauſe in Wills the Law will ſupply the Word *Body*. Lord *Oſſulſton*'s Caſe, 3 Salk. 336.

The Father having three Sons, deviſed his Lands to *T. S.* his ſecond Son, and his Heirs for ever; and *for Want of ſuch Heirs*, then to his own right Heirs, and died; the ſecond Son entered and died without Iſſue, in the Life-time of his elder Brother: Adjudged he he had an Eſtate-tail, and that the Words *for Want of ſuch Heirs* import no more than *Want of ſuch Iſſue*, becauſe the ſecond Son could never die *without Heirs*, ſo long as either of his Brothers, or any Heirs of his Father are living; ſo that the eldeſt Son in this Caſe takes by Deſcent, and not by the Will. *Nottingham* ver. *Jennings*, 1 Salk. 233.

Deviſe to *T. S.* and *his Heirs*, and if he die *without Heirs*, Remainder over; decreed to be an Eſtate-tail; for the Words *dying without Heirs* muſt be intended without Heirs of *his Body*. *Chanc. Rep.* 214. *Edwards* verſus *Allen*.

Deviſe to *T. S.* for Life, Remainder to his Heirs Males; this is an Eſtate-tail, but it would not be ſo if there had been a farther Limitation, (*viz.*) to his Heirs Males, and the Heirs of the Body of ſuch Heirs Males; for then *T. S.* would have only an Eſtate for Life, becauſe Words of Limitation being added to the Words *Heirs Males*, ſhall be taken only as *deſignatio perſonæ*. 1 *Vent.* 215, 232.

* The Word *Iſſue* amounts to the ſame Thing as the Words *Heirs of the Body*, ſo as to create an Eſtate-tail by Deviſe; as for Inſtance, the Father deviſed his Lands to his Son and *his Heirs*; and if he died *without Iſſue*, Remainder over; he had Iſſue, and died: And adjudged that he had an Eſtate-tail, becauſe the Word *Iſſue* ſhews what *Heirs* were intended, (*viz.*) Heirs of his Body. * *Saul* ver. *Gerrard*, Cro. Eliz. 525. Mo. 422. S. C.

The Husband deviſed an Houſe to his Wife for Life, and after her Deceaſe to *T. S.* and if he marry and have *Iſſue Male*, then he to have it; and if he hath *no Iſſue Male lawfully begotten of his Body*, then to *Samuel* in like Manner; and if *any of his Sons, or their Heirs Males, Iſſue of their Bodies*, go about to *alien* the Houſe, then the next Heir ſhall enjoy it; *T. S.* ſuffered a common Recovery, and declared the Uſes to himſelf and his Heirs; and adjudged good; for he had an Eſtate-tail by theſe Words, *if he hath no Iſſue Male*; and this is explained by the ſubſequent Words, (*viz.*) *if any of his Sons, or their Heirs Males, Iſſue of their Bodies*, go about to *alien*, *&c.* which they could not do, if they had only an Eſtate for Life. *Sonday*'s Caſe, 9 Rep. 127.

Deviſe to Husband and Wife for Life, and after their Deceaſe *to their Children*, they having *two then living*; this was adjudged an *Eſtate for Life*, becauſe they had *Children living at the Time of the Deviſe*; but if there had been none then living, it had been Eſtate-tail, becauſe it was certain that the Teſtator intended the Children ſhould take not as immediate Deviſees, becauſe they were not then born, and not by Way of Remainder, becauſe the Deviſe was to them immediately; ſo that the Word *Children*, if there had been none at that Time, is a Word of *Limitation*; and 'tis the ſame as if he *Wild*'s Caſe, 6 Rep. 16. 1 And. 43. S. C. Moor 397. S. C. *by the Name of Richardſon* v. *Yardly*.

had ſaid *to the Iſſue of their Bodies*, for every Child or Iſſue muſt be intended *Iſſue of the Body*.

Rickman ver. *Gardner*, Dyer 122. The Teſtator having two Sons and a Daughter, deviſed his Lands to his Wife for ten Years, Remainder *to his youngeſt Son and his Heirs; and if either of his Sons died without Iſſue of his Body*, then to his Daughter and her Heirs; the youngeſt Son died without Iſſue in the Life-time of his Father: Adjudged that the Eldeſt had an Eſtate-tail.

Coſen's Caſe, Owen 29. The Teſtator made his Will in theſe Words, (*viz.*) *If it ſhall pleaſe God to take my Son* Richard *before he ſhall have Iſſue of his Body*, ſo that my Lands deſcend to his Brother, then, *&c.* Adjudged this was an Eſtate-tail in *Richard* by Implication.

Spark verſ. *Purnell*, Hob. 75. Moor 864. S. C. So where the Father had three Sons, and being ſeiſed of *Gavelkind Lands*, deviſed Part thereof to one of them, Part to another, and the Reſidue to his third Son; and that *if any of them died without Iſſue*, the Survivor ſhall be his Heir: Adjudged an Eſtate-tail.

Lowice ver. *Goddard*, Moor 772. 2 Cro. 61. S. C. 10 Rep. 70. S. C. Deviſe to his Son *Thomas* and the Heirs Males of his Body for five hundred Years; provided if he or *any of his Iſſue Male* alien the Premiſſes, then to *T. S.* and his Heirs: Adjudged an Eſtate-tail, and the Deviſe for five hundred Years is void, becauſe the Teſtator intended it to be an Inheritance, for by the Proviſo he took Care to advance *the Iſſue of* Thomas; now if this ſhould be a Term for Years, then by the Deſcent of the Inheritance on *Thomas*, it would be merged, and his *Iſſue* would take nothing, becauſe he might alien the Eſtate from them.

Robinſon v. *Miller*, 1 Roll. Abr. 837. *Cited in* Lane Rep. 57. Deviſe to his Wife for Life, and afterwards to her Son; *and if he die without Iſſue having no Son*, Remainder over: Adjudged, that the Son had an Eſtate-tail Male.

Johnſon ver. *Smart*, 1 Rol. Abr. 836. Deviſe to two for their Lives, Remainder to their two Sons equally to be divided, and to their *Heirs*, and each to be *Heir* to the other; *and if they both die without Iſſue, Remainder over*; this was held to be an Eſtate-tail by Reaſon of the *Deviſe over, upon their dying without Iſſue*; but * *Anno* 33 *Car.* 2. this Caſe was denied to be Law; and yet 'tis hardly to be diſtinguiſhed from the following Caſe.

* T. Jones 174.

King ver. *Rumbull*, 2 Cro. 448. 1 Roll. Abr. 833, 836. S. C. *Ff.* The Father deviſed his Lands to his three Daughters, equally to be divided; and if any of them die before the other, then the other to be *her Heirs*, equally to be divided; *and if they all die without Iſſue, Remainder over, &c.* This was adjudged an Eſtate-tail, becauſe by theſe Words, *dying without Iſſue*, the Teſtator explained what he intended by the Word *Heirs* in the Beginning of the Will, (*viz.*) it muſt be the Iſſue of their Bodies.

Wilſon verſ. *Dyſon*, Raym. 425. Deviſe of his Lands to his third Son *Gerard and his Heirs*; provided he pay to *Elizabeth* 100 *l.* within ſix Months after the Death of the Teſtator, and after he ſhall be of Age, and for Default thereof, to *Elizabeth and her Heirs*; and if *Gerard die without Iſſue*, the 100*l.* being paid, then the Remainder of the Eſtate to be divided amongſt his Sons and Daughters: *Gerard* died before he was of Age, leaving Iſſue *Francis*, who died before *Gerard* could have been of Age if he had lived, and the 100*l.* was not paid: Adjudged this was an Eſtate-tail in *Gerard*, and not in Fee, by the Word *Heirs* in the Beginning of the Will; and he dying without Iſſue, the Remainder immediately veſted in the reſt of the Sons and Daughters of the Teſtator, and not in the Heir of *Gerard*.

An Eſtate was deviſed to *Bernard expreſly for Life*, and after his Deceaſe, to *the Iſſue of his Body* by a ſecond Wife, (he having a Wife then living;) It was held, that if an Eſtate had not been deviſed to *Bernard expreſly for Life*, theſe Words *to the Iſſue of his Body* would have made an Eſtate-tail; but now *Bernard* took only an Eſtate for Life, with a contingent Remainder to his *Iſſue* by a ſecond Wife; and of that Opinion was the *Lord Chief Juſtice Hale*, and the whole Court; but he afterwards upon great Conſideration altered his Opinion, and held it to be an Eſtate-tail; and thereupon a Writ of Error was brought in the Exchequer-Chamber, and there it was held to be an Eſtate-tail. *King* verſus *Melling*, 1 Vent. 214. 2 Lev. 58.

But there is a Caſe where the Words *Dying without Iſſue* will not make an Eſtate-tail by Implication; as where the Teſtator having two Sons, deviſed his Lands to his Son (not ſaying how long) and after his Deceaſe, then to his Daughters ſhare and ſhare alike, and *if all his Sons and Daughters die without Iſſue*, then to *Anne Warren* and her Heirs; the Sons died without Iſſue: Adjudged, this was not an Eſtate-tail in the Daughters by Implication, but that they were Tenants in Common of the Inheritance, and that it differed from the Caſe of *Gilbert* and *Witty*, becauſe there the Deviſe was to each of the Sons by diſtinct and ſeveral Limitations; but in the principal Caſe nothing is expreſly deviſed to the ſecond Son of the Teſtator; ſo that theſe Words, *If all his Sons and Daughters die without Iſſue*, are no more than a Deviſe to his Iſſue, which extends to them all, and gives only an Eſtate for Life. *Hanchett* v. *Thelwell*, 3 Mod. 104.

But there ſeems to be ſome Difference where the Teſtator limits his Eſtate upon a *Dying without Iſſue generally*, and upon a Dying without Iſſue *in the Life-time of another*, for in the laſt Caſe it is no Eſtate-tail.

Therefore where the Father deviſed his Lands to his Son and *his Heirs:* Proviſo, If he *die without Iſſue*, *living his Executors*, then the Lands ſhould be ſold by them, and afterwards the Executors died firſt; this was adjudged no Eſtate-tail. Dyer 354.

So a Deviſe to *T. S.* and his Heirs, and *if he die without Iſſue*, *living* E. G. then to remain to another, this makes a Fee-ſimple conditional immediately, by the Deviſe to *T. S.* and *his Heirs*; and the Words, *If he die without Iſſue*, create an Eſtate-tail not immediately, but to ariſe upon a Contingency which may happen. *Chaddock* v. *Cowley*, 2 Cro. 695.

The Teſtator deviſed his Lands to *T. S.* and the Heirs of his Body; but if he ſhould go about to alien, then his Eſtate ſhould ceaſe, and from and after the Determination thereof, then he deviſed his ſaid Lands to *Chriſt's Hoſpital:* The Queſtion was, whether this Limitation to the Hoſpital was good: It was admitted, that the reſtraining a Tenant in Tail to alien, was void, becauſe it tended to make a Perpetuity; and it was decreed, that the Limitation over to a Charity tended to the ſame Purpoſe, thinking that the Law would be ſo careful to preſerve a Charity, that it would allow ſuch a Limitation; but this being a late Invention to create a Perpetuity, therefore it was decreed, that this Limitation was void. *Company of Pewterers* verſus *Governor of Chriſt's Hoſpital*, 1 Vern. 161.

Implication

Implication by Deviſe.

Horton verſ. *Horton*, 2 Cro. 74.

WILLS muſt never be conſtrued by Implication to diſinherit an Heir, unleſs the *Implication is abſolutely neceſſary*; as a Deviſe of his Goods to his Wife, and after her Deceaſe, his Son ſhall have them and *the Houſe*; this is an Eſtate to her for Life in *the Houſe*, becauſe no other Perſon could take it in that Time; but if the Houſe had been deviſed to a Stranger, and not to the Son after the Death of the Wife, the Heir at Law would have it during her Life, becauſe ſhe could not take it by any [e] *neceſſary Implication.*

[e] *Smartle* v. *Schollar*, T. Jones 98. 2 Lev. 207. S. C.

Higham's Caſe, Cro. Eliz. 15. Moor 123. S. C. Godb. 16. S. C. 2 Leon. 226. S. C. 3 Leon. 130. S. C.

So in all Caſes of *poſſible Implications*, (*i. e.*) where it may be intended, that the Teſtator deviſed his Lands to *T. S.* and it may as reaſonably be intended, that he deviſed them to *E. G.* there the Intention ought not to be conſtrued to diſinherit the Heir; as where the Teſtator deviſed Part of his Lands to his Wife for Life, and that the ſame *and all the reſt of his Lands* ſhould remain to his youngeſt Son *after the Death of the Wife:* The Queſtion was, whether by theſe Words, *all the reſt of his Lands*, which were to come to the Son *after her Death*, ſhe ſhould have the Whole by Implication, or whether the *Heir at Law* ſhould have them during her Life, becauſe ſome Lands were expreſly deviſed to her before, which ſhews the Teſtator intended her no more: Serjeant *Moor* tells us, that the Heir ſhall have them during the Life of the Wife; but Juſtice *Croke* ſays the Wife had the Whole.

1 Vent. 223.

Deviſe of Lands to *T. S. after the Death of his Wife*, in ſuch Caſe, if *T. S. was not Heir at Law to the Teſtator*, it is no Deviſe to the Wife by Implication, becauſe it may be as reaſonably intended, that the Heir at Law ſhould have the Lands as the Wife, and therefore the Intention of the Teſtator muſt not be conſtrued to diſinherit him.

Newton v. *Bernardine*, Moor 127.

So likewiſe where Eſtates-tail are made by Implication, it muſt be a neceſſary and not a poſſible Implication, as where the Teſtator had Three Sons, the eldeſt whereof died leaving his Wife with Child, and the Teſtator deviſed to the Child in his Mother's Womb, an Annuity for Twenty Years; and if *Richard* (who was his ſecond Son) die before *he hath Iſſue of his Body*, Remainder over: Adjudged by theſe Words *Richard* had an Eſtate-tail *by Implication.*

The Father deviſed Part of his Lands to his eldeſt Son in Tail, and the other Part to his youngeſt Son in like Manner: *And if any of his Sons died without Iſſue, then the Whole* ſhould remain to *T. S.* in Fee; the youngeſt Son died without Iſſue: Adjudged, that theſe were croſs Remainders in the two Sons, and that the eldeſt ſhall have the Whole by Implication, becauſe there was no neceſſary Implication, that *T. S.* ſhould have the dead Man's Part. 4 *Leon.* 14.

Gardner v. *Sheldon*, Vaugh. 259.

The Teſtator deviſed the *Rents and Profits* of his Lands to raiſe Portions for his Daughters, and afterwards to be for his Son *George*, and if he and his Siſters *die without Iſſue of their Bodies*, then all his Freehold Lands ſhall remain to *William Roſe*, and his Heirs: Adjudged this was not a Deviſe to *George* and his Siſters, for their Lives, with reſpective Inheritances to them in Tail, by any neceſſary Implication, for the Words import only a Deſignation of the Time when the

Lands ſhall come to *William Roſe*, which is when *George* and his Siſters *die without Iſſue*, and not before; and it is as if he had deviſed in theſe Words, (*viz.*) *George* and his Heirs ſhall have my Land as long as any Heirs of his Body and his Siſters are living, and for Want of ſuch Heirs, then I deviſe my Lands to *William Roſe*, *&c.*

The Father deviſed his Lands to his Two Daughters, equally to be divided; and *if they die without Iſſue*, then *All his Lands* to *T. S.* in Tail, Remainder over; the youngeſt Daughter died without Iſſue: Adjudged, that *T. S.* ſhall not have her Part, but that the ſurviving Siſter ſhall have it as an Eſtate-tail in Remainder by Implication, becauſe both the Daughters had an Eſtate-tail by Moieties, and *T. S.* ſhall have nothing till both are dead without Iſſue, for he cannot take by the Death of one of them, becauſe the Will is, *If they die without Iſſue*, then *All his Lands* ſhall go to him. *Holmes* v. *Meynell*, Raym. 452.

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 Houſe* to maintain a Chaplain, and the Reſidue of the *Profits of the Houſe* to buy Ornaments and Books of the Church, yet this is not a Deviſe of the Houſe by Implication. *Standiſh* verſ. *Short*, Bridgm. 103.

The Teſtator having Three Daughters, deviſed his Lands to his *Two Youngeſt for Life*, *Remainder to the next of Kin of his Blood*: Adjudged, that this Remainder ſhall go to the eldeſt Daughter, and not to all Three, becauſe the expreſs Eſtate deviſed to the Two Youngeſt, ſhall exclude them and their Iſſue from taking any Eſtate by Implication.

Deviſe to *T. S. for Life*, Remainder to his firſt Son in Tail Male, *and if he die without Iſſue of his Body*, Remainder over: Adjudged that where a particular Eſtate is deviſed, as in this Caſe, to *T. S.* for Life, a contrary Intent ſhall never be implied by any ſubſequent Clauſe, and therefore theſe Words, if *T. S. die without Iſſue Male of his Body*, ſhall be conſtrued a Dying without ſuch Iſſue Male as are expreſſed in the Will; for there is a Difference between a Deviſe to *T. S.* and if he die without Iſſue, Remainder over, and a Deviſe to him *for Life*, and if he die without Iſſue, *&c.* 1 *Salk.* 236. *Popham* verſus *Bampfeild.*

The Teſtator deviſed an Houſe to his Wife, and that ſhe ſhall have the Occupation of Black-acre at *Michaelmas* next enſuing, *paying* 40*s.* to his Son *Nicholas*; and then he deviſed all his Lands, Tenements and Hereditaments, excepting what before ſpecified and given to his Wife, to *Nicholas* his Son in Tail: Adjudged, that by the Exception of the Land before given and ſpecified, nothing of that ſhall paſs to *Nicholas*, although the Eſtate to the Wife had been but for one Day; but otherwiſe, if it had been, [*except the Eſtate before ſpecified and given*,] for then the Reverſion would have paſſed to *Nicholas*. And by *Popham*, if the Deviſor had lived after *Michaelmas*, yet the Son *Nicholas* ſhall not have it, becauſe the Intent appears to the contrary [f].

[f] T. 1 Jac. Rot. 282. B. R. *Stockwood* verſus *Swan*, Noy's Rep. fo. 13.

A. deviſeth Land to *B.* and to his eldeſt Iſſue Male: Only an Eſtate for Life paſſeth: But if the Word [*Eldeſt*] had been omitted, it would have been an Eſtate-tail [g].

[g] T. 27 Eliz. *Lovelace* verſus *Lovelace*, Crook, part. 3. fo. 40. 1 And. 132. S. C. 2 Leon. 35. S. C. Moor 371. S. C.

F. C. ſeiſed of the Manor of *S.* made his Will in Writing, and deviſed the Manor to his Wife for the Term of Thirty Years in theſe Words, *viz.* for and to theſe Intents and Purpoſes following: *viz. I Will and my Mind and Intent is, that* B. *my Wife ſhall yearly content and pay out of the Iſſues and Profits of the ſaid Manor to Sir* J. S. *and others* 30 l. *and farther willed, that the other Legacies given in his Will ſhould be paid by her*, and therein deviſed divers Legacies; and farther willed, that his Wife ſhould be bound to Sir *J. S.* and others for the Performance of his Will. *F. C.* the Deviſor dies; the Wife enters on the Land, *&c.* takes the Profits, and thereof pays Legacies, but not to Sir *J. S.* and others, *&c.* whereupon the Heir enters as for Breach of Condition. It was held by the Juſtices, that it was *no Condition*, but a Declaration of the Teſtator's Intention; for to what Purpoſe ſhould the Wife be bound, if it were a Condition? But Judgment was not given in the Caſe, for the Parties agreed [h].

[h] P. 17 Eliz. *Hubbard* and *Spencer*'s Caſe, C. B. Anderſ. Rep. Caſe 126. Dyer 163. S. C.

Leſſee upon Condition, that he ſhould not aſſign his Term during his Life, without the Aſſent of the Leſſor; he deviſeth it without the Aſſent of the Leſſor: *Per Curiam eſt* Forfeiture, becauſe the Deviſee is in by the Deviſor: But otherwiſe, if he had it by Aſſignment in Law, as Executor [i]. See the Caſe in the Report.

[i] 31 H. 8. Dy. fo. 45. H. 36 Eliz. B. R. *Colt* and *Taunton*'s Caſe, Goldesb. fo. 184.

Deviſes of Reverſions, Remainders, and of Rents, when good, and when not, and to whom.

A Seigniory, Rent, or the like, is deviſable as Land is [k]: So that a Man may deviſe a Rent *de novo* iſſuing out of Land, or a Rent iſſuing out of Land that was *in eſſe* before.

[k] Perk. S. 538. Litt. S. 585, 586. Dy. fo. 253. F. N. B. 121.

If Rent be granted out of Land deviſable by Cuſtom, the Rent may be deviſed within the Cuſtom, for it is of the ſame Nature with the Land [l].

[l] 22 Aſſ. 78. Perk. 135. Roll. Abridgment tit. Deviſe, E.

If one deviſeth a Rent of any certain Sum out of his Land to be paid quarterly, and ſay not how long it ſhall continue; only an Eſtate for Life in the Rent paſſeth [m].

[m] Inſt. part. 1. 147.

R. B. being ſeiſed of Lands granted a Rent-charge to *R. S.* his Executors and Aſſigns of 16 *l. per Annum* during the Life of *F.* the Wife of *R. S.* who died Inteſtate, and *F.* his Wife was Adminiſtratrix to him: Adjudged, that the Rent was determined by the Death of the Grantee, and *F.* is not an Aſſignee by her taking of Adminiſtration; for none can make Title to the Rent, to have it againſt the Ter-tenant, unleſs he be Party to the Deed, or conveys a ſufficient Title under it: Yet the Grantee might have granted or aſſigned it in his Life. And *Popham*, *Dy. fol.* 253. ſaid, If a Rent be granted *pur auter vie*, with the Remainder over, and the Grantee dies, this Remainder ſhall commence preſently, becauſe the Rent for Life determined by the Death of the Grantee [n].

[n] P. 44 Eliz. Rot. 361. *Salter* verſus *Baker*, Croke, Eliz. fol. 901. Moore's Rep. fol. 664. Yel. 9. Noy 46.

A Rent was deviſed to *B.* with a Clauſe of Diſtreſs, to be paid at the Two moſt uſual Feaſts: Adjudged a good Rent-charge; but otherwiſe if it had been by Deed [o].

[o] T. 40 Eliz. Rot. 245. B. R. Moore's Rep. fo. 592. n. 798.

Rent is granted to *B.* and his Heirs during the Life of *C.* the Queſtion was, whether this Rent is deviſable by the Stat. 32 and 34 *H.* 8. By *Gaudy* and *Fenner* it may, though the Eſtate be but a Frank-tenement deſcendible. *Popham, econtra.* But all agreed, that no general Occupant can be of this Rent: And if it were deviſable by Cuſtom, that the Deviſe would prevent the Occupancy [p].

[p] M. 42 & 43 Eliz. Rot. 333. Moore's Rep. f. 625. n. 858.

A Man ſeiſed of Land and ſeveral Houſes, let them to ſeveral Perſons by ſeveral Leaſes for Years, rendring ſeveral Rents, amounting to 10 *l. per Annum*; and afterwards made his Will in this Manner: As concerning the Diſpoſition of all my Lands and Tenements, I bequeath the Rents of *D.* to my Wife for Life, the Remainder over in Tail. The Queſtion was, whether by this Deviſe the *Reverſions* did paſs with the Rents of thoſe Lands. For it was alledged, that the Rent divided from the Reverſion is not deviſable within the Statute, for he had no Inheritance therein. 26 *H.* 8. 5. *Dy.* 140. But it was adjudged, that the Land it ſelf ſhould paſs by this Deviſe: For it appeareth that his Intent was to make a Deviſe of all his Lands and Tenements, and that he intended to paſs ſuch an Eſtate as ſhould have Continuance for a longer Time than the Leaſes ſhould endure; and ſome Men name their Land by their Rents [q].

[q] M. 44 & 45 Eliz. Rot. 125. C. B. Croke, part 2. fol. 104. Moore's Rep. fol. 640. n. 880.

Grant of a *Rent* to the Husband during the Life of the Mother of his Wife, with a Clauſe for him and *his Heirs* to diſtrain, during her Life; the Husband deviſed this Rent to the Wife, and died in the Life of his Mother in Law: Adjudged that by the Word *Heirs* the Rent was continued during her Life, for the Husband had a Fee-ſimple determinable on her Death.

Vernon ver. *Gatacre*, Dyer 253.

The Teſtator made ſeveral Leaſes of his Lands in *Egham* and *Staines*, reſerving 10 *l. per Annum* on each Leaſe; then he deviſed *the Rent of* 10 *l. per Annum*, iſſuing out of his *Lands in Egham*, to his Wife for her Life, and he deviſed his Houſe in *Staines* to her for ever: Adjudged that by the Deviſe of the *Rent* the Lands did paſs.

Kerry ver. *Dethick*, 2 Cro. 104. Moor 640, 771. S.C.

The Father having Three Sons *Edward*, *Anthony*, and *Fabian*, deviſed his Lands to his Wife for Life, then to *Anthony* and his Heirs; and if *Fabian* lived till the Lands came to *Anthony*, then [r] he to pay *Fabian* 10 *l.* every Year during his Life; afterwards the Lands came to *Anthony*, who paid the Rent every Year to *Fabian:* Adjudged that the Iſſue of *Anthony* (tho' 'tis not expreſſed) ſhall pay this Rent, for 'tis a *Rent-ſeck*, and the Lands are charged with it in the Hands of the Heirs or Aſſigns of *Anthony*.

Andrews v. *Sheffeild.*

[r] But did not ſay his Heirs.

As to a Deviſe of a *Remainder*, they are many Times veſted; ſome are in *Contingency*, and there are often *croſs Remainders* by Wills, and generally a Remainder is an Eſtate limited by Will to commence after the Determination of a particular Eſtate on which it muſt depend; but there is a Caſe where 'tis good, tho' the particular Eſtate fails; as where the Father had Two Sons and a Daughter, and deviſed his Lands to his Wife for Ten Years, Remainder to his youngeſt Son and his Heirs; and if any of his Sons die without Iſſue, Remainder

Pickman's Caſe, Dyer 122.

der to his Daughter and her Heirs; the youngeſt Son died living his Father: Adjudged this was a good Remainder limited to the Daughter, being upon a Will, tho' the particular Eſtate failed.

Archer's Caſe, 1 Rep. 66.

The Father deviſed his Lands to *Robert, his Son and Heir, for Life*, Remainder to the next Heir Male of *Robert*, and *to the Heirs Males of the Bodies of ſuch Heir Male: Robert* made a *Feoffment in Fee, &c.* Adjudged that by the expreſs Words of the Will he had only an Eſtate for Life, which was determined by his Feoffment, and thereby the contingent Remainders were deſtroyed; for they muſt veſt at that inſtant of Time in which the particular Eſtate for Life determines; now *Robert* was Heir at Law to the Teſtator, and by Conſequence the Fee-ſimple deſcended on him; and having made a Feoffment, his Eſtate for Life was deſtroyed, ſo that there was nothing to ſupport the contingent Remainders.

Plunkett v. *Holmes*, Sid. 47. 1 Lev. 11. S.C. Raym. 29. S.C.

Deviſe of his Lands to his eldeſt Son *Thomas for Life, and if he die without Iſſue living at the Time of his Death*, then to *Leonard* and his Heirs; but if *Thomas hath Iſſue living at the Time of his Death, then to him and his Heirs: Thomas* ſuffered a Common Recovery, and died without Iſſue; it was inſiſted, that the Eſtate of *Leonard* was not barred by this Recovery, becauſe *Thomas* had a Fee-ſimple deſcended on him as *Heir at Law*, ſo that his Eſtate *for Life* was drowned, and then this muſt be an *executory Deviſe to Leonard*; but adjudged according to *Archer's* Caſe, that tho' the Reverſion in Fee deſcended on *Thomas* as Heir at Law, yet that did not deſtroy his Eſtate for Life againſt the Intent of the Teſtator, but that it was deſtroyed by the Common Recovery, and the Fee-ſimple thereby veſted in him, and ſo all the Remainders were deſtroyed.

Loddington v. *Kime*, 3 Lev. 431.

Deviſe of Lands to his Uncle *E. Armin, for Life, without Impeachment of Waſte*; and if he hath Iſſue Male, then *to ſuch Iſſue Male and his Heirs for ever*; and if he die without ſuch Iſſue Male, then to his ſaid Uncle *E. Armin*, and his Heirs: This was adjudged an Eſtate for Life in the Uncle, for if it had been an Eſtate-tail, theſe Words, *without Impeachment of Waſte*, had been impertinent; and the Inheritance being veſted in the *Iſſue Male* of the Uncle and *his Heirs*, theſe laſt Words make it certain what Heirs were intended, (*viz.*) the Iſſue Male of his Body; and then the Words which follow, (*viz.*) *If he die without Iſſue*, muſt not be taken abſolutely, but with Relation to what went before, (*viz.*) *if he die without ſuch Iſſue*, who might take the Inheritance as before was appointed by the Will; for otherwiſe thoſe Words would make an *Eſtate-tail by Implication* to deſtroy an expreſs Eſtate limited *to the Iſſue Male, and his Heirs, for ever*; but one Judge held, that this was a *contingent Remainder* to the Iſſue of the Uncle and his Heirs, according to *Plunkett's* Caſe; and that by the Common Recovery ſuffered before the Contingency happened, the Remainders were deſtroyed.

George Lord Viſcount *Lanesborough*, in Conſideration of an intended Marriage between his Son *James* and *Mary Compton*, and of the Marriage Portion by Indentures of Leaſe and Releaſe, conveyed certain Lands to Truſtees and their Heirs, in Truſt, that *James* ſhould, during the joint Lives of *George* and *James*, have thereout 300 *l. per Annum*; and if the Marriage took Effect, then after the Death of *James*, that *Mary* ſhould have an Annuity of 320 *l. per Annum* for her Jointure, then ſubject thereto, to the Uſe of *George*

for Life, *ſans* Waſte, then to the Uſe of *James* for ninety-nine Years, to commence from the Death of *George*, if *James* ſhould ſo long live, *ſans* Waſte, Remainder to Truſtees to ſupport contingent Remainders, Remainder to the firſt and every other Son of *James* and *Mary* in Tail Male, Remainder to the Heirs Male of the Body of *James*, Remainder to the right Heirs of *George*.

The Marriage took Effect.

The ſaid *George*, Lord Viſcount *Lanesborough* being ſeiſed in Fee of the Reverſion, by Will deviſed the aforeſaid Lands, *on Failure of Iſſue of the Body of the ſaid* James, *and for Want of Heirs Male of his own Body*, to his Daughter *Frances*, and the Heirs of her Body lawfully begotten, with divers Remainders over.

In the Houſe of Lords on a Writ of Error from *Ireland*, it was held, that *James* could not take an Eſtate-tail, no Alteration being made by the Will, and that no Eſtate is raiſed to *James* by Implication; and that *Frances* took no Eſtate whatſoever, but that the Deviſe to her was abſolutely void in its Creation, as being on too remote a Contingency. Lady *Lanesborough* and *Fox*, 25, 26 *April* 1733. *Forreſter's Rep.* 262.

Deviſe of his Lands after his Deceaſe to his Wife for Life, *if ſhe do not marry*; but if ſhe doth marry, then *Humphry* to enter and hold the ſame to him and his *Heirs Males of his Body*: *Humphry* was Heir at Law, the Widow did not marry again: Adjudged this was not a *contingent Remainder*, for the Widow had an Eſtate for Life determinable on her Marriage, and then the Words, *if ſhe marry*, are as if the Teſtator had ſaid, if her Eſtate ſhall be determined on her Marriage, then *Humphry* ſhall enter; for it being to determine either at her Death or Marriage, 'tis an Eſtate veſted in *Humphry*, to take Effect in Poſſeſſion upon either of theſe Contingencies. *Brown* verſus *Cutter*, Raym. 427.

A *contingent Remainder* muſt veſt, either before or at that Inſtant of Time, in which the particular Eſtate determines, or it ſhall never veſt: As for Inſtance, the Teſtator had Two Nephews, *Henry* and *Richard*, and deviſed his Lands to his Nephew *Henry* for Life, *Remainder to his firſt Son in Tail*, Remainder in like Manner to *Richard*; after the Death of the Teſtator, *Henry* entered and died without Iſſue, but left his Wife with Child; then *Richard* the Remainder-man entered, and within Six Months after a Son was born: Adjudged that this was a *contingent Remainder* to that Son, who not being born when the particular Eſtate for Life determined by the Death of *Henry*, therefore the Remainder became void; and *Richard* being next in Remainder, and entring before the Son was born, it veſted in him by *Purchaſe*; this Judgment was given in the Court of Common Pleas and affirm'd in *B. R.* but reverſed in the Houſe of Peers, where it was held, that it being in a Will, it ſhall be taken according to *Equity*, and according to the Intention of the Teſtator, which could never be to diſinherit the Heir of his Name and Blood (upon ſuch a Nicety) who was not then born. *Reeve* verſus *Long*, 3 Lev. 403. 4 Mod. 282. S. C.

And for this Reaſon the Statute 10 *Willi.* was made, (*viz.*) *That where any Eſtate is limited in Remainder to any Perſon who ſhall be born after the Deceaſe of his Father, ſuch Perſon ſhall take in the ſame Manner as if he had been born in the Life-time of his Father, altho' no Eſtate is limited to Truſtees after the Deceaſe of the* 10 & 11 Willi. cap. 16.

Father, to preſerve ſuch contingent Remainders to ſuch after-born Son, until he ſhall be born.

Goodright v. *Corniſh*, 1 Salk. 226. 4 Mod. 254. Deviſe to his eldeſt Son *for Fifty Years*, if he ſo long lived; and after the Determination of that Eſtate, then to the *Heirs Male of his Body*; and for Want of ſuch Iſſue, Remainder over; this is a *contingent Remainder*, and void, becauſe it cannot be ſupported by an Eſtate for Years.

Fitz. Deviſe 4. A Reverſion will paſs in a Will by the Words *Lands and Tenements*, as where the Teſtator deviſed his *Lands and Tenements*, Rents and Services; it was held, that the Reverſion paſſed by either of theſe Words.

Townſend v. *Wales*, 2 And. 59. Moor 341. S. C. Cro. Eliz. 524. Owen 155. Cro. Eliz. 159. The Teſtator having Lands both in Poſſeſſion and Reverſion, deviſed *all his Lands* to his Executors for Ten Years, for paying his Debts: Adjudged that the Lands in Reverſion paſſed.

Haws v. *Cony*, 1 Leon. 180. S. C.

Wheeler v. *Walrond*, Allen 28. Deviſe of a Manor to *T. S.* for *Six Years*, and Part of other Lands to *E. G.* and her Heirs, and the *Reſt of all his Lands* to his Brother, and the Heirs of his Body: Adjudged that by the Word *Reſt*, the Reverſion in Fee of the Manor after the Expiration of Six Years paſſed.

Hyley verſus *Hyley*, 3 Mod. 228. The Grandfather deviſed Lands to his Three Grandchildren ſeparately, and to the Heirs Males of their Bodies, *and all the reſt and remaining Part of his Eſtate* he deviſed likewiſe to his Grandchildren, equally to be divided (*except what he had given to them and to the Heirs of their Bodies*); the youngeſt Grandchild died without Iſſue: Adjudg'd that by theſe Words, the *Reſt and the remaining* Part, the Reverſion in Fee, after the Determination of the Eſtate-tail, would have paſſed to the Grandchildren, had it not been for the Exception.

A. ſeiſed of Land deviſed it to his Brother and his Heirs, and for Default of ſuch Heirs to *B.* his Siſter and her Heirs. *Per Richardſon*, *Hutton*, and *Harvey*, it is a Fee-ſimple, and ſo the Remainder void to *B.* But *Yelverton* and *Croke* were of Opinion, that it was an Intail, and the Remainder good to *B.* and his Heirs [y]. But it was agreed by all, that if the Remainder had been limited to a Stranger, the firſt Eſtate had been a Fee, and the Remainder void.

[y] H. 1 Car. Rot. 18. 1876. Crok. part 1. fol. 58. 19 H. 8. *and* 29 H. 8. Dyer 33.

By the Cuſtom of *London* a Man may deviſe his purchaſed Lands in Mortmain: A Man deviſeth the purchaſed Lands to the Prior and Convent *de St. Barth.* &c. *ita quod reddant* to the Dean and Chapter of *P.* 10 *l. per Annum*; and if they fail, their Eſtate ſhall ceaſe, and ſhall remain to the Dean. *Per Fitzh. & Baldwin*, the Remainder is void, for a Remainder cannot be limited after an Eſtate in Fee: And the Dean and Chapter ſhall not take Advantage of the Condition, but the Heir [z].

[z] 29 H. 8. Dy. fo. 33.

Leſſee for forty Years of divers Lands deviſeth his Term to his eldeſt Daughter and her Iſſues, the Remainder to the youngeſt Daughter, *&c.* the eldeſt Daughter took Husband, and died without Iſſue; her Husband ſold the Term: *Per Curiam* the Sale is good, and that the younger Daughter had no Remedy for it; becauſe the Remainder was void, it being of a Term [a].

[a] 28 H. 8. Dy. fo. 7.

A Leaſe was made for forty-one Years to *W. C.* if he ſhould ſo long live; and if he ſhould die within the ſaid Term, that then *E.*

his Wife ſhould have it for the Reſidue of the ſaid Years: *Per Curiam*, the Limitation to *E.* is void, for that the Term ended by the Death of *W. C.* and then there was no Reſidue to remain to the Wife [b].

[b] 9 El. Dy. fo. 253. Pl. Com. fo. 190.

A. having divers Daughters and Sons, granteth divers Rents or Annuities unto them, maketh his Will, and deviſeth his Land to his eldeſt Son, paying the ſeveral Annuities and Legacies to every one of his Children; and if his Heir doth not pay them, then his Executors to have the Land, *&c.* Adjudged, although it is ſaid [*Heir*] in the ſingular Number, yet the Heir of the Heir ought to pay it; for [*Heir*] is *nomen Collecticum* [c].

[c] H. 2 Jac. rot. 360. B. R. *Mollineux* verſus *Mollineux*, Croke, part 2. fol. 145.

Leſſee for thirty Years of a Parcel of Land lets it for twenty-eight Years, rendring 34*l.* Rent *per Ann.* and after deviſeth 28*l.* Parcel of that Rent to his three Sons ſeverally, to every of them a third Part; the one of them brings his Action of Debt for his Part of the Rent; and adjudged that the Action will not lie, and that the Rent was apportionable, and that the Tenant is chargeable, without Attornment, by the Deviſe to every one of the Deviſees for his Part, by Action of Debt; otherwiſe he is without Remedy, for no Diſtreſs lieth [d].

[d] T. 40 Eliz. *Ards* verſus *Watkin*, Crok. part 3. 637, 561. Moor's Rep. fol. 549. n. 737.

A Man poſſeſſed of a Leaſe for twenty Years of certain Lands deviſeth it to his Wife (whom he maketh Executrix) for ſix Years; and after the ſix Years to *John* his Son, who was beyond Sea; and if he doth not return within the ſix Years, then to *William* his Son, till *John* return; the Wife enters, and claims *Virtute legationis*: *William* within the ſix Years maketh his Executor, and dieth; the ſix Years expire, and *John* doth not return: Adjudged, that the Executor of *William* ſhall have the Term [e]. And it is not a Poſſibility, but the Intereſt of the Term after the ſix Years expired. And though it ſhould be accounted to be a Poſſibility in the Teſtator, yet foraſmuch as it is ſuch a Poſſibility, that the Term might have veſted in him, if he had lived until after the ſix Years expired, the Wife by her Entry having agreed to that Legacy, the Reſidue of the Term might have veſted in him, without any other Ceremony; therefore it might well go to his Executrix; and a Term certain being limited to one, and after that it ſhall go to another, is not a contingent Eſtate, but an Intereſt. *Vide lib.* 3. *fol.* 16. *Boraſton's* Caſe. *Plow. Com. fol.* 519. *Welden's* Caſe. *Lib.* 10. *fol.* 51. *Lampet's* Caſe [f].

[e] T. 15 Jac. rot. 615. B. R. *Sheriff* verſus *Wrotham*, Croke, part 2. fol. 509.

[f] Lib. 3. fol. 16. *Boraſton's* Caſe. Pl. Com. fol. 519. *Welden's* Caſe. Lib. 10. fol. 51. *Lampet's* Caſe.

A Man having two Sons and a Daughter, deviſeth his Land to his Wife for ten Years, the Remainder to the youngeſt Son and his Heirs; and if either of the two Sons die without Iſſue, *&c.* the Remainder to the Daughter, and her Heirs; the younger Son dieth in the Life-time of the Father, and after the Father dieth: *Per Curiam*, It is a good Remainder to the Daughter, being by Deviſe, though the particular Eſtate fail; but it ſeems the elder Son ſhall firſt have an Eſtate-tail, by the Intent of the Deviſor [g].

[g] Dyer 122.

A Man deviſes his Land to *A.* and *B.* and the Heirs of either of their two Bodies; and for Default of ſuch Iſſue, the Remainder to the

the right Heirs of the Deviſor; after the Deviſor's Death one of the ſaid Deviſees dieth without Iſſue, the other Deviſee hath Iſſue and dieth; the Iſſue ſhall have a Moiety and no more; for it ſeemeth that this Word [*either*] maketh ſeveral Eſtates[h].

[h] Dyer 326.

If an Eſtate be given to Husband and Wife, and the Heirs of their two Bodies, the Remainder to the right Heirs of the Husband; he may deviſe that Remainder to his Wife[i].

[i] 17 Aſſ. 50. Roll's Abridg. tit. Deviſe, F.

One deviſed his Land to *J. S.* from *Michaelmas* following for five Years, the Remainder to *B.* and his Heirs; *J. S.* died before *Michaelmas*; the Queſtion was, whether this was a good Remainder, becauſe it could not enure inſtantly by his Death; for it may not begin until the particular Eſtate, which was not to begin till after *Michaelmas*; and a Freehold cannot expect. But all the Court held, that it might expect; for in Caſe of a Deviſe, the Freehold in the mean Time ſhall deſcend to the Heir, and veſt in him; therefore it was adjudged accordingly, and that the Remainder was good[k].

[k] M. 43 & 44 Eliz. B. R. *Pay*'s Caſe, Crook. part 3. fol. 879. Noy 43. S. C.

Smith verſus *Havers*, Cro. Eliz. 96.

The Grandfather being ſeiſed in Fee deviſed his Lands to his Son for Life, Remainder to his Grandſon and the Heirs Male of his Body, Remainder to his own right Heirs Male, and to the Heirs Male of their Bodies; the Grandfather and Son died; the Grandſon had Iſſue a Daughter, and ſhe and her Husband ſold the Land; and adjudged good; for immediately upon the Death of the Grandfather, the Remainder veſted in his Son in Fee as right Heir, which cannot be turned into an Eſtate-tail by the ſubſequent Words.

Germin ver. *Arſcott*, 1 And. 186. 2 And. 7. S. C. 1 Rep. 85. Moor 364. S. C. 4 Leon. 83. S. C.

Deviſe to *Peter* in Tail, with ſeveral Remainders over; *provided that if any of the Remainder-Men alien the Land, his Eſtate ſhall ceaſe as if he was naturally dead: Peter* levied a Fine and ſold the Lands: Adjudged, that a Proviſo to determine an Eſtate-tail upon an *Alienation* of the Lands is void in Law; for as there cannot be a Deviſe of Lands in Fee-ſimple to one, and that if he doth not perform ſuch an Act his Eſtate ſhall ceaſe, and another ſhall have it; becauſe when the Teſtator had parted with the Fee, he had not Power in the ſame Will to deviſe it to another; ſo where once he had deviſed his Lands in Tail, he cannot determine that Eſtate, and deviſe it to another.

Foy verſ. *Hind*, W. Jones 56. 2 Cro. 696. 2 Roll. Rep. 467.

Deviſe to *Henry* and the Heirs Male of his Body, and for Default of ſuch Iſſue, to *Thomas* in like Manner, with divers Remainders over in Tail Male; and farther, that the Lands ſhould remain to *Henry* and the Heirs Male of his Body, till he or they ſhall do or go about to do any Act, to *alter or diſcontinue* the Eſtate-tail, and that then the Lands ſhould remain to *Thomas* in Tail; *Henry* entered, *Thomas* died leaving Iſſue *Richard*; then *Henry* levied a Fine, and declared the Uſes to himſelf and his Heirs: Adjudged, that *Thomas* had a Remainder veſted by the firſt Part of the Will, and that it was not a *contingent Remainder*, which depended upon the Alienation or Diſcontinuance of the Eſtate by *Henry*; and that the Teſtator could not determine a Remainder ſo veſted, and give another a Title to enter upon the Alienation of the Tenant in Tail in Poſſeſſion, becauſe that would be to make a Perpetuity; for if it could be done to one, it might be done to more; therefore the Remainder to *Thomas* being veſted, and not depending on any Contingency, 'tis barred by the Fine; and *Richard* his Son can have no Title, for his

Father was not to enter till *Henry* went about to alien with Effect; and 'tis not effectual till the Act is done; and when it is done, the Remainder is diſcontinued; and then 'tis too late to enter.

C. deviſeth his Houſe in *S.* to *A.* his Couſin in Fee-ſimple; and after her Death to *W.* her Son; which *W.* was Heir apparent to *A.* It was adjudged that *A.* is but Tenant for Life, the Remainder to *W.* for Life, the Remainder to *A.* in Fee [l]. [l] 19 El. *Chick*'s Caſe, Dy. fol. 357.

D. makes his Will in this Manner; I will and deviſe that *A.* and *B.* my Feoffees ſhall ſtand ſeiſed of my Land to the Uſe of *John Callis* during his Life, with Remainders over; and he had no Feoffees: And adjudged a good Deviſe to *John Callis*, with the Remainders over, by Reaſon of the Intention of the Teſtator [m]. [m] 2 Car. *Buffield* verſus *Byboro*, Popham's Rep. fol. 188. 1 Roll. Abr. 611.

L. maketh a Feoffment to his own Uſe, and after deviſeth, that his Feoffee ſhall be ſeiſed to the Uſe of his Daughter *A.* who in Truth was a Baſtard. It is a good Deviſe of the Lands by Reaſon of the Intention; for by no Poſſibility they can be ſeiſed to his Uſe; and if he deviſeth that his Feoffees ſhall make a Gift in Tail, it is a good Deviſe of the Land [n]. [n] P. 15 El. *Lingen*'s Caſe, Dy. fol. 323. 3 Leon. 48.

A Man having Iſſue three Sons, *A. B. C.* deviſed his Lands to *B.* his ſecond Heir, and his Heirs *in perpetuum*, paying to his Brother *C.* 20*l.* at his Age of twenty-one Years; and if *B.* died without Iſſue, living *A.* then *A.* his Brother ſhould have thoſe Lands, to him, his Heirs and Aſſigns for ever, paying the ſaid Sum as *B.* ſhould have paid. The Queſtion was, whether *B.* had an Eſtate in Fee or in Tail: It was adjudged, that it was not an Eſtate-tail in *B.* but a Fee; for it is deviſed to him and his Heirs *in perpetuum*, and alſo paying 20*l.* and the Clauſe [*if he died without Iſſue*] is not abſolute, whenſoever he died without Iſſue; but it is with a Contingency, if he died without Iſſue, living *A.* for he might ſurvive *A.* or have Iſſue at the Time of his Death, living *A.* 2. It was adjudged, it was a good Limitation of the Fee to *A.* by Way of Contingency, not by Way of immediate Remainder [o]. [o] M. 18 Jac. B. R. *Pell* and *Brown*'s Caſe, Crook, part 2. fol. 590. Bridgm. 1. Godb. 282. S. C. 2 Roll. Rep. 196. S. C. Palm. 131. S. C. 19 H. 6. 74. 12 E. 3. 8. Coke, lib. 7. fol. 41. *Berisford*'s Caſe. Lib. 10. fol. 50. *Lampet*'s Caſe.

Where a Deviſe is to two Perſons, and that each *ſhall be the other's Heir*; this makes *croſs Remainders*, but ſuch Remainders are ſeldom made by *Implication*.

The Teſtator having two Sons and two Houſes, deviſed one Houſe to his eldeſt Son and his Heirs, and the other Houſe to his other Son in like Manner; provided, that if both die *without Iſſue of their Bodies*, then *all my ſaid Houſes* ſhall be to *Margery and her Heirs*; the eldeſt Son died without Iſſue, the youngeſt had a *Daughter*: Adjudged that *Margery* ſhall have the Houſe of the eldeſt immediately; for this Proviſo doth not make *croſs Remainders to the Sons by Implication* from one to the other, becauſe the Houſes are deviſed to them reſpectively by expreſs Limitation. *Gilbert* verſus *Witty*, 2 Cro. 655. 2 Roll. Rep. 281. S. C.

But where the Father deviſed his Lands to his *two Daughters and their Heirs, equally to be divided between them; and if they died without Iſſue*, then all his Lands to *Francis* in Tail; the youngeſt Daughter died without Iſſue: Adjudged that the Survivor ſhall have the whole by way of croſs Remainder; for the *Holmes* verſ. *Meynell*, Raymond 452. T. Jones 172. S. C.

Daughters had ſeveral Eſtates-tail by Moieties, and that *Francis* ſhall have nothing by *Implication*, till both the Daughters are dead without Iſſue.

If Land be deviſed to *A.* for Life, the Remainder to *B.* for Life, the Remainder to *J. S.* in Fee; in this Caſe, if *B.* be a Perſon incapable of a Deviſe, then he in Remainder in Fee ſhall take preſently after the firſt Eſtate for Life ended; and if the Deviſe be to a Perſon for Life, who is uncapable to take, the Remainder to *J. S.* in Fee; then ſhall *J. S.* take preſently[p].

[p] Perk. S. 576, 567.

R. K. was ſeiſed in Fee of a Meſuage, and of two Acres of Land in *C. N.* and of two Acres of Land in *R.* and uſed and occupied the ſaid two Acres of Meadow, being four Miles diſtant from the ſaid Houſe, together with his Lands in *C. N.* made his Will in Writing, and deviſed his Houſe *cum omnibus & ſingulis pertinentiis adinde vel aliquo modo ſpectantibus* Tho. K. *filio ſuo, & hæredibus ſuis in perpetuum, & pro defectu hæredum prædicti* Tho. K. to *Anne Keene*, Daughter of the ſaid *R. K.* and to her Heirs for ever; and for Default of the Heirs of the ſaid *A. K. tunc prædictum meſuagium cum pertinentiis* Jo. K. *conſanguineo ſuo, & hæredibus ſuis in perpetuum*: Here *R. K.* and *T. K.* died without Iſſue. The Queſtion was, whether by the Deviſe of *R. K.* an Eſtate-tail in the Meſuage and Lands paſſed to *T. K.* or a Fee-ſimple; and ſo the Deviſe to *A. K.* void. It was agreed, that if the Remainder had been limited to a Stranger, the firſt Eſtate had been a Fee-ſimple, and the Remainder void; as *Dyer*, 19 *H.* 8. and 29 *H.* 8. 33. *fol.* 333. becauſe no Intent appears to make it an Eſtate-tail, but a Fee-ſimple; but here where it is limited to the Brother and his Heirs; and if he die without Heir, to his Siſter, who is his Heir, to whom he intended it ſhould go; theſe Words ſhew what Heirs he intended, *viz.* Heirs of his Body. But *Richardſon*, *Hutton* and *Harvey* conceived it to be a Fee-ſimple, and no Intail, and the Remainder to be void. But *Yelverton* and *Croke* held, that it was an Intail in *T. K.* and the Remainder to *A. K.* and her Heirs in Fee. 2. By the Deviſe of *R. K.* of the Meſuage *cum pertinentiis* the two Acres of Meadow did not paſs; becauſe by the Words *cum pertinentiis* Land paſſeth not, but only ſuch Things as may be properly pertaining; otherwiſe it is, if it had been *cum terris pertinentibus*, then that which was uſed to it would have paſſed[q].

[q] T. 22 Jac. & Hill. 1 Car. Rot. 1876. *Hearn* verſus *Allen*, Croke, part. 1. fol. 57. Hutt. 85. S. C. Litt. Rep. 8. S. C.

A. deviſeth Land to his Wife for Life, the Remainder to his three Sons, equally to be divided; this Land ſhall not be Aſſets, becauſe the eldeſt Son is in by Purchaſe, and not by Diſcent; and that for the Benefit of the Survivor. *H.* 29 *Eliz. Rot.* 33. *inter Bean* and *Eaton*[r].

[r] H. 29 El. Rot. 33. inter *Bean* and *Eaton*.

A Man deviſeth his Lands to his Daughter and Heir, being a Feme Covert, and to the Heirs of the Body of the Woman, the Reverſion over in Fee, and dieth; the Husband refuſeth to take by the Deviſe, he in Remainder entreth; he ſhall retain the Lands during the Lives of the Husband and Wife; but after their Deceaſe the Iſſue of the Wife may enter upon him[s].

[s] Dyer Reading fur 1 Stat. *de Voluat.* §. 22. S. 3

A Man ſeiſed of Land in Fee hath Iſſue two Sons and a Daughter; the Father deviſeth the Land to his Wife for Term of Life, the Remainder *propinquioribus de ſanguine ſuorum* of the Deviſor;

the Daughter hath Iſſue, and dieth; the Iſſue of the Daughter ſhall have this Remainder; and although the Sons have Iſſue after, yet their Iſſue ſhall not have it [t].

[t] Dyer Reading Sur 1. Stat. *de Volunt.* Sect. 3. § 23.

A Man having two Sons and a Daughter, who hath two Daughters, deviſeth his Land to a Stranger for Life, the Remainder to his ſecond Son for Life, the Remainder in Fee to the next of Blood to his Son; in this Caſe, if the eldeſt Son die without Iſſue, the Daughter and her Daughters ſhall have the Land [u].

[u] Fitz. tit. Deviſe, pl. 9. Perk. S. 508.

A Man ſeiſed of Lands in Fee-ſimple ſowed the ſame, and afterwards deviſed the Land to *J. D.* It was adjudged that the Deviſee ſhould have the Corn, and not the Executors of the Deviſor [x].

[x] M. 20 Jac. C. B *Spencer's* Caſ. Winc. Rep. fol. 51.

And it was then ſaid, that it was adjudged 18 *Eliz.* in *Allen's* Caſe, that where a Man deviſed Land (which was ſown) for Life, the Remainder in Fee, and the Deviſee for Life died before Severance; he in the Remainder ſhould have it. And it was ſaid by *Winch* Juſtice, that if a Man deviſeth Land, and afterwards ſows it, and after dies, that in that Caſe it was adjudged, that the Deviſee ſhould have the Crop, and not the Executor of the Deviſor [y].

[y] Ibidem.

Thomas Mallabar deviſed his Meſuages, Lands and Hereditaments to his Siſter *Eſther Mallabar*, her Heirs and Aſſigns for ever, upon Truſt, to ſell the ſame, and pay his Debts with the Money; out of the Remainder of the Money he gave ſeveral ſpecific Legacies, and made *Eſter Mallabar* reſiduary Legatee and Executrix.

The Executrix brought a Bill againſt *Nicholas Mallabar*, the Her at Law of the Teſtator, to have the Will proved, the Eſtate ſold, and the Debts and Legacies paid, and charging that the Teſtator had not ſurrendered all his Copyhold Lands to the Uſe of his Will, but ſome Part only, inſiſted that that Defect ſhould be ſupplied.

It appearing that the Teſtator's Eſtate, excluſive of the Copyhold Lands not ſurrendered, were ſufficient to pay all the Debts; The Chancellor refuſed to ſupply that Defect againſt the Heir. *Mallabar* againſt *Mallabar*, *Paſ.* 1735. *Forreſter's Rep.* 78.

Robert Cook ſeiſed in Fee of Copyhold Lands in *Lakenham* in the County of *Norfolk*, and of ſeveral Freehold Lands, by Will deviſed all his Meſuages and Lands (whether Freehold or Copyhold) to his Grandſon *Richard Cook* (who was his Heir at Law) for Life, Remainder to his firſt and other Sons in Tail, Remainder to his Daughters in Tail, Remainder to his younger Son (the preſent Plaintiff) in Fee, and died without making any Surrender to the Uſe of his Will.

Richard the Grandſon died without Iſſue, but before his Death ſurrendered the Copyhold Lands in *Lakenham* to the Uſe of his Will, whereby he deviſed them to his Mother and her Heirs.

In Chancery, the Queſtion was, 1ſt, Whether the Defect of the Surrender ſhould be ſupplied in Favour of the Plaintiff, not being a Child unprovided for, but already provided for another Way. 2dly, Whether Equity would ſupply the Defect in a Caſe of ſo remote a Deviſe as a Remainder upon an Eſtate-tail? And Defects being never ſupplied where the Heir is diſinherited, here the Heir at Law has only an Eſtate for Life, with a Remainder in Tail.

Per Cur': Creditors are intitled to have a Defect of a Surrender ſupplied, as are likewiſe younger Children unprovided for; the Father is the only Judge of the *Quantum* of the Proviſion; the Defect of Surrenders have been ſupplied even where the Copyhold Eſtate intended

intended to paſs has made but a Part of the Proviſion; the Objection that the Proviſion being a Remainder after ſeveral Eſtates-tail is too remote to be of any weight. If the Father had but a Remainder upon an Eſtate for Life, he might make a Proviſion out of it for his Children, it would not be ſo good a Proviſion as if in actual Poſſeſſion, but it would be a Proviſion ſtill; and if after one Life, why not after three or four? Here is no intermediate Diſpoſal of the Eſtate but to ſuch Perſons, as would all have been intitled to take as Heir at Law before the Plaintiff; when they fail there is no Heir to be diſinherited, but he becomes Heir at Law himſelf; it cannot be ſaid there is an Heir at Law unprovided for. *Cook* and *Arnham*, *Trin.* 1734. *Forreſter's Rep.* 35.

Said by Mr. *Pooley*, that it had been decreed in the Houſe of Lords, that they would not ſupply the Want of a Surrender in Caſe of a Deviſe of a Copyhold to Grandchildren.

To this the *Maſter of the Rolls* anſwered, that it was his Opinion ſuch a Deviſe of a Copyhold without a Surrender ought to be made good for Grandchildren as well as Children; and if the ſame Caſe were to come now into the Houſe of Lords, it would be ſo ruled *, and that he had and would decree it ſo.

* The like was alſo declared by Lord *Harcourt*, in the Caſe of *Freeſtone* v. *Rant* (*Trin.* 1712.) And it is obſervable, that the Caſe of *Kettle* and *Townſend* (here refer'd to by Mr. *Pooley*) being cited before Lord *Cowper*, in the Caſe of *Furſaker* v. *Robinſon*, (*Mich.* 1717.) his Lordſhip doubted thereof, in regard the Grandfather, by the Act 43 *Eliz.* for maintaining the Poor, is bound to maintain his Grandchild; which he ſaid he believed was not taken Notice of in that Caſe. *Watts* v. *Bullas*, 1 *Will.* 60, 61.

The Teſtator having ſettled a real Eſtate upon his Wife for her Jointure, deviſed *all his real Eſtate* not compriſed in the Settlement to Truſtees and their Heirs, for Payment of his Debts. He was ſeiſed of ſeveral Freehold and Copyhold Lands, but had not ſurrendered his Copyhold Lands to the Uſe of his Will, and died, leaving three Sons, and Part of his Copyhold Lands was of the Nature of Borough Engliſh.

Objected, The Copyhold does not paſs by this Deviſe, for tho' in the Caſe of Creditors, Equity will ſupply the Want of a Surrender, yet the Copyhold ought ever to be mentioned, eſpecially where there is a Freehold Eſtate to ſatisfy the Words of the Will.

Lord Chancellor, If the Copyhold paſſes, the youngeſt Son, who is intitled to ſuch Part thereof as is Borough Engliſh, muſt pay his Proportion of the Debts. As between the Sons it is a doubtful Caſe; but with regard to the Creditors, if there be not an Eſtate ſufficient for the Payment of the Debts without the Copyhold Lands; my Opinion is theſe ought to paſs. The Words are large enough, a Copyhold Eſtate is a real Eſtate. Let the Maſter ſee whether there be enough without the Copyhold for the Payment of the Debts. *Drake* ver. *Robinſon*, 1 *Will. Rep.* 443.

§ V. Of the Deviſe of Goods and Chattels.

1. *All Manner of Goods and Chattels may be deviſed by Will, certain Caſes excepted.*
2. *The Rule of the Deviſe of Lands, contrary to the Rule of diſpoſing of Goods.*

CONcerning the ſecond Kind of Things deviſable by Teſtament, namely Goods and Chattels; this may be delivered for a Rule: That (1) all Manner of Goods and Chattels may be deviſed by Will [a]; certain Caſes only excepted [b].

[a] L. cætera. ff. de leg. 1. § tam corporales. Inſtit. de legat. & ibid. DD. Lindw. in. c. ſtatutum de teſta. lib. 3. provincial. conſtitut. Cant. Perkins tit. deviſe, c. 8. fol. 99. [b] De quibus § prox.

Chattels are either real or perſonal, and the Teſtator may deviſe all of them, which he hath in his own Right; but not thoſe which he hath in the Right of another as Executor.

'Tis uſual in Wills to deviſe all the *Houſhold-Stuff*, by which Word Plate uſed about the Houſe, and not for Ornament, paſſeth; but Books, Cattle, Clothes, Coaches, Corn, Carts, Plows, Waggons, and any Thing fixed to the Freehold will not paſs by that Word.

By a Deviſe of Houſhold-Goods, Plate will paſs. 2 *Vern.* 638.

The Teſtatrix deviſed all her Houſhold-Goods to *J. S.* The Queſtion was, Whether by the Deviſe of the Houſhold-Goods the Plate ſhould paſs? Though it was reported on a Reference to a Maſter, that there were manifeſt Intentions and Declarations of the Teſtatrix, that ſhe did not intend the Plate ſhould paſs; yet the Maſter certifying that the Plate was commonly uſed in the Houſe, all the Evidence touching the Intention of the Party was rejected, there being a compleat and plain Will in Writing, which muſt not be altered or influenced by parol Proof. *Nichols* v. *Osborn*, 2 *Will. Rep.* 419.

If a Man deviſes 1200 *l.* to *J. S.* and by general Words deviſes all his Goods, Chattels and Houſhold-Goods in and about his Houſe, to the ſaid *J. S.* Money in the Houſe will not paſs, he having a particular Legacy deviſed to him. 2 *Chan. Rep.* 190.

Owen Roberts made his Will, and thereby gave to his Daughter *Eleanor Kyffyn* (*inter alia*) all the Goods and Things of what Kind ſoever, that be in her own Cloſet at *Beaumaurice*. *Eleanor* had in her Cloſet in the Teſtator's Houſe 41 *l.* 7 *d.* Money belonging to the Teſtator at his Death. Adjudged that this Money did not paſs by the Will. *Barn. Rep. fo.* 259.

'Tis uſual likewiſe to deviſe all the Goods moveable and immoveable: Now by the Civil Law, Actions and Right of Actions paſs by the Word Moveables, eſpecially when the Words of Univerſality are repeated in the Will; *as I give to* T. S. *all my moveable Goods and immoveable, of what Kind ſoever or whereſoever found.*

One deviſes all his Goods; and whether a Debt by Bond paſſed to the Deviſee, was the Queſtion.

Decreed by Lord Chancellor *Cowper*, that it did; that theſe Words ſeemed at Common Law to paſs a Bond, and to extend to all the perſonal Eſtate; but this being in the Caſe of a Will, and a Will

relating to a perſonal Eſtate too; it ought to be conſtrued according to the Rules of the Civil Law.

Now the Civil Law makes *Bona mobilia* and *Bona immobilia* the *Membra dividentia* of all Eſtates; *Bona immobilia* are Land, *Bona mobilia* are all moveables, which muſt extend to Bonds; and therefore by the Deviſe of all the Teſtator's Goods, a Bond muſt paſs. *Anonymus*, 1 *Will. Rep.* 267.

Moveables are alſo divided into animate and inanimate; by the firſt is comprehended all ſuch Moveables which are active in their Motion, as Cows, Horſes, *&c.* which all paſs by the Word Moveables; and ſo likewiſe Moveables inanimate, which are paſſive in Motion, ſuch as Books, Desks, Cabinets, and all Manner of Houſhold Goods.

The Rule before-mentioned is (2) contrary to the former of the Deviſe of Lands, Tenements and Hereditaments; for they cannot be deviſed, ſaving where ſome Cuſtom or Statute hath gained Liberty of bequeathing or deviſing the ſame [c]: But here, inſtead of the negative Rule, is ſet down the Affirmative; the Exceptions of which Rule are in the next Paragraph.

[c] Ut ſupra ead. part. §§ 2, 3, 4.

In the mean Time, before we proceed any farther, it ſhall not be amiſs to recite ſome Things, ſhewing how the [d] ſaid affirmative Rule is extended. The firſt is, That not only that Thing may be deviſed or bequeathed by the Teſtator which is truly extant, or hath an apparent Being, at the Time of the Making of the Will, or Death of the Teſtator; but that Thing alſo which is not *in rerum natura* whilſt the Teſtator liveth; therefore it is lawful for the Teſtator to bequeath the *Corn which ſhall be ſown, or grow in ſuch a Soil after his Death, or the Lambs which ſhall come of his Flock of Sheep the next Year, depaſturing in ſuch a Field.* But if there ſhall be no ſuch Corn growing in that Soil, nor any Lambs ariſing out of that Flock, then the Legacy is of no Effect, becauſe no ſuch Thing is extant at all as was bequeathed [e]. But if the Teſtator deviſe a *certain Quantity of Grain, or Number of Lambs*, as for the Purpoſe, *twenty Quarters of Corn, or twenty Lambs*, and doth will and deviſe, that the ſame ſhall be *paid out of the Corn which ſhall grow in ſuch a Field, or ariſe of his Sheep depaſturing in ſuch a Ground*; though not ſo much, or no Corn at all there grow, or not any, or not ſo many Lambs there ariſe; yet nevertheleſs the Executor is compellable by Law to pay the whole Legacies intirely [f]: Becauſe the Mention of the Soil, and of the Flock, was rather by Way of Demonſtration, than by Way of Condition; rather ſhewing how or by what Means the ſaid Legacy might be paid, than whether it ſhould be paid at all. Which Intention of the Teſtator is collected by this, that the Quantity is not joined to the Subſtance of the Legacy, but to the Payment thereof only; otherwiſe the Legacy were void, as hereafter more fully is declared. Howbeit in Contracts and Grants among the Living, it ſeemeth that the Laws of this Realm do not acknowledge any ſuch Diſtinction, whether the *Quantity of the Thing granted be joined to the Subſtance, or to the Payment thereof*; but that it is due in both Caſes: So that if a Man grant to *A. B.* an Annuity of ten Pounds, to receive out of his Coffers, though he have neither Coffers, nor Money in them; nevertheleſs his Perſon ſhall be charged with the Annuity, becauſe the Grant it ſelf induceth a Charge from the Grantor. So likewiſe if a Man grant an Annuity of ten Pounds out of his Lands in *Dale*, although he have no Land in *Dale*,

[d] L. quod in rerum. ff. de legat. 1. Inſtit. tit. de legat. § ea quoque res.

[e] L. Cum ita. § ſpecies. ff. de lega. 1. L. ſi. ſic. § 1. eod. tit.

[f] d. L. ſi. ſic. § 1. de leg. 1. L. qui teſtamento in prin. ff. de leg. 1. & 1. Paulo Callimacho. § Julianus Severus. § de leg. 3. & L. Lucius. ff. de alim. leg.

yet is not the Grant thereof void; but his Perſon ſhall be charged therewith [g].

[g] Fulbeck 2. part. parallel. tit. de conditionibus. fol. 64. poſt Fitz. & alios.

Robert Rowland 23 *Feb.* 1734. made his Will, and declared in the introductory Part, that he diſpoſed of his Eſtate in Manner following: Then gives ſome real and particular Legacies to his Nephew *Robert Snablin*, afterwards gives to his Niece *Anne Snablin* 5000*l.* in the old Annuities of the *South-Sea* Company, and then follows this Deviſe; *Item*, I give to my Couſin *Robert Purſe* 5000*l.* in the old Annuity Stock of the *South-Sea* Company; the Reſidue of his Eſtate he gives to *Robert Snablin*, and makes *Robert Purſe* ſole Executor.

The Teſtator, at the Time of making his Will and at the Time of his Death, was poſſeſſed only of one Sum of 5000*l.* old *South-Sea* Annuity Stock.

In Chancery *Nov.* 1737. It was determined by the Maſter of the Rolls, that but one 5000*l.* in old *South-Sea* Annuities paſſed by the Will, and decreed that it ſhould be divided between the Legatees *Anne Snablin* and *Robert Purſe*.

On Appeal to the Lord Chancellor this Decree was reverſed, and it was determined that the two 5000*l.* one to *Anne Snablin* and the other to *Robert Purſe*, were to be conſidered as Gifts of different Sums in that Fund, and that the Legatees *Anne Snablin* and *Robert Purſe* were each intitled by Virtue of the Will to have 5000*l.* old *South-Sea* Annuity Stock made good to them out of the Teſtator's perſonal Eſtate, (the Surplus of his Eſtate being ſufficient for that Purpoſe). In this Caſe the Chancellor cited for Authorities this Author *Swinburne*, *Part* 7. *Sect.* 24. *Part* 3. *Sect.* 6. *Part* 7. *Sect* 5. The Digeſt Book 33. *Domat*'s Civil Law, *fo.* 159. *Purſe* and *Snablin*.

Joſeph Aſhton by Will gave to Truſtees the Sum of 6000*l.* *South-Sea* Annuities, to be ſold and laid out in the Purchaſe of Lands to be ſettled on the Plaintiff for Life, Remainder to his Iſſue. The Teſtator died leaving a conſiderable perſonal Eſtate, but had only 5360*l.* in Annuities at the Time he made his Will. In Chancery, the Queſtion was, whether it ſhould be made up 6000*l.* or whether only the Teſtator's ſpecific Fund paſſed by the Will. Decreed, that it paſſed nothing but what the Teſtator had in the *South-Sea* Annuities. *Aſhton* and *Aſhton*, *Mich.* 1735. *Forreſter's Rep.* 152.

The ſecond Thing is, That though by Deed of Gift, made in the Life-time of any Perſon, of all his Goods and Chattels, the Debts or Things in Action do not paſs; yet if the Teſtator by his laſt Will do bequeath to another any Debt due unto him, or a Thing in Action belonging unto him, the Legacy is good, and effectual in the Law [h], and may be recovered in this Manner: That is to ſay, if the Teſtator do make the Legatary Executor of that particular Debt, or Thing in Action bequeathed, then the Legatary as Executor thereof may commence a Suit in his own Name, and recover the ſame to his own Uſe, againſt him by whom it was due. But if the Teſtator do not make the Legatary Executor of the Debt, or Thing in Action bequeathed, then his Remedy lieth in the Eccleſiaſtical Court, where he may convent the Executor, and compel him either to ſue for that Debt in a Court competent, and upon the Recovery and Payment thereof, to pay it over to the Legatary; or elſe to make a Letter of Attorney to the Legatary for the Recovery of the Debt, or Thing in

[h] Inſtit. tit. de lega. §. Tam autem. l. cætera, in prin. ff. de lega, 1. cum ſimil.

in Action, bequeathed in the Name of the Executor, to the Uſe of the Legatary [i]. Howbeit, if the Teſtator himſelf, after the Making of his Will, exact the Debt bequeathed, then is the Legacy void [k]. Or if the Husband make his Will of a Debt, or other Thing in Action, which he hath in Right of his Wife, the Legacy is void; and ſo it is if he diſpoſe of any Chattel real or Leaſe which he holdeth in Right of his Wife; for after the Husband's Death, they return to the Wife [l].

The third Thing is, That albeit the Teſtator have no ſuch Thing of his own as is bequeathed, yet nevertheleſs the Legacy is good in Law; therefore if the Teſtator do bequeath a Horſe or a Yoke of Oxen, the Legacy is good in Law, though the Teſtator have neither Horſe nor Ox of his own [m]: But who ſhall make Choice in this Caſe of the Thing ſo bequeathed, is a Queſtion not to be neglected. And the Solution is this; That if the Words of the Deviſe be directed to the Legatary; as if the Teſtator ſhall thus ſay, I will that *A. B.* ſhall have a Horſe, the Choice doth belong to the Legatary; but if the Words be directed to the Executor; as if the Teſtator ſhall thus ſay, I will that my Executor give to *A. B.* a Horſe, the Election doth belong to the Executor [n]. Provided nevertheleſs, that to whomſoever the Election doth belong, whether to the Legatary or to the Executor, they muſt not be unreaſonable in their Election, but frame themſelves to the Meaning of the Teſtator, (as elſewhere I have delivered [o];) otherwiſe the Legatary might make Choice of the beſt Horſe, and the Executor of the worſt in the Country, contrary to the Meaning of the Deceaſed. To this Purpoſe it is well ſaid, tho' he were no Lawyer that ſaid it,

Eſt modus in rebus, ſunt certi denique fines,
Quos ultra citraque nequit conſiſtere rectum.

A fourth Thing may be added out of the Civil Law, That it is lawful for the Teſtator to bequeath, not only his own Things or Goods, but alſo another Man's, which the Heir muſt buy, or elſe pay the Value thereof, if the Owner will not ſell them [p]. But becauſe the Civil Law in this Point is not only contrary to the Laws Eccleſiaſtical of this Realm [q], but alſo to the Laws temporal [r]; I have placed it as a Limitation or Exception to this affirmative Rule.

[i] d. §. Tam autem. Inſtit. de lega.
[k] d. §. Tam autem.
[l] *Abridgment of Caſes printed* Anno Dom. 1599. f. 179. n. 4. Doct & Stud. cap. 7.
[m] L. legato generaliter. ff. de lega. 1. ac Bar. Paul. de Caſtr. ac omnes DD. ibid.
[n] DD. in d. l. legato. Graſſ. li com. opinionum, §. legatum, q. 62. Covar. in c. Judicante de teſta. ex. n. 3.
[o] Inf. part 7. §. 10. n. 5, &c. uſque ad finem.
[p] §. non ſolum. Inſtit. de lega. l. alienum c. com. de legat.
[q] Cap. filius de teſta. ex. & ib. Covar. in fin. Panor. in rep. c. cum eſſes. eod. tit. and *Granthain.* Doct. & Stud. lib. 2. cap. ult. prope finem.
[r] Plowden in Caſ. inter *Bransby* n. 18. Bar. tract. de dif. inter Jus can. & civil. n. 86.

§. VI. Divers Kinds of Goods not deviſable by Will.

1. *Goods which a Man hath jointly with another, cannot be deviſed by Will.*
2. *What if the other Jointenant be made Executor? Whether is the Bequeſt good?*
3. *Goods which a Man hath as Adminiſtrator cannot be given by Will.*
4. *Every Adminiſtrator accountable to the Ordinary.*
5. *Difference betwixt the Executor of an Executor, and the Executor of an Adminiſtrator.*

6. *Goods of the Realm, that is to ſay, of the ancient Crown and Jewels, cannot be given by Will.*
7. *Goods belonging to a Church or Hoſpital cannot be deviſed.*
8. *Goods belonging to a City, Borough, or Commonalty, cannot be deviſed.*
9. *Church Goods cannot be deviſed.*
10. *Things which deſcend to the Heir, and not to the Executor, are not deviſable by Will.*
11. *Whether the Corn growing upon the Ground, whereof a Man is ſeiſed in Right of his Wife, be deviſable.*
12. *Whether Corn on the Ground be deviſable by the Leſſee, the Leſſor being ſeiſed in Right of his Wife.*
13. *Corn growing deviſable by the Tenant, by the Curteſy of* England.
14. *Corn growing deviſable by the Tenant in Dower.*
15. *Whether Corn growing on Land mortgaged be deviſable.*
16. *Whether Corn growing may be deviſed by the Teſtator's Daughter, where a Son and Heir is afterwards born, or wherein the Mother doth recover her Dower.*
17. *The Teſtator cannot bequeath that which is another Man's.*

FIRST, (1) A Man cannot bequeath by Will any of thoſe Goods or Chattels, which he hath *jointly with another*; for if he ſhould bequeath his Share thereof to a third Perſon, this Bequeſt is void by the Laws of this Realm [a]; and the Survivor which had thoſe Goods or Chattels jointly with another, ſhall have that Portion ſo bequeathed, notwithſtanding the ſaid Will [b]. Inſomuch that (2) if the Teſtator make the other Jointenant his Executor, againſt whom an Action is commenced in the Eccleſiaſtical Court in a Cauſe of Legacy; nevertheleſs the Executor is not to be adjudged to poſſeſs the ſaid Goods as Executor, or by Right of the Will, but by the Title and Right of the Survivor [c]; and ſo the Executor is to be diſmiſſed, and the Will in that Reſpect to be judged void [d].

[a] Perkins tit. deviſe, fo. 101. Doct. & Stud. l. 1. c. 6. licet jus civile contrarium dicat. L. cum alienum C. de legatis.

[b] Hoc verum jure regni noſtri Angliæ. Doct. & Stud. lib. 2. c. 25. Secus jure civili, ut late per Olden. de action. claſſ. 4. action. pro ſocio.

[c] Doct. & Stud. l. 2. c. 25.

[d] Vide ſupra eadem part. §. 3. n. 8.

Secondly, (3) An Adminiſtrator cannot make a Teſtament of thoſe Goods which he hath as Adminiſtrator [e]; becauſe he hath not any ſuch Goods to his own proper Uſe, but ought therewithal to pay the Debts and Legacies of the dead Perſon, and to diſtribute the reſt (if any Thing do remain) in charitable Uſes [f]. And for that Cauſe (4) every Adminiſtrator is accountable to the Ordinary for ſuch Diſtribution of the Goods of the Deceaſed, committed to his Adminiſtration [g]. And (5) though an Executor of an Executor may adminiſter the Goods of the former Teſtator [h]; yet the Executor of an Adminiſtrator cannot adminiſter the Goods of the former Deceaſed, but a new Adminiſtration is to be committed by the Ordinary of all the Goods unadminiſtered by the late Adminiſtrator, as if he had alſo died inteſtate, any Teſtament or Aſſignation of an Executor by him notwithſtanding [i]. By this then it appeareth, that the Authority of an Executor is greater than of an Adminiſtrator; for an Executor may appoint an Executor to the firſt Teſtator; ſo cannot an Adminiſtrator. Howbeit an Executor cannot give away the Goods of the Teſtator in his Will by Legacies, no more than an Adminiſtrator [k]; for thoſe Goods are not the proper Goods of the Executor, but are to be im-

[e] Brook tit. adminiſtrator, n. 7. Fitz. herb. eod. tit. n. 3.

[f] Plowd. in Caſ. inter *Bransby* and *Grantham*, fol. 525, 526.

[g] c. ita quorundam. de teſtam. lib. 3. provinc. al. conſt. Cant. Stat. Ed. 3. an. 31. c. 11.

[h] Stat. Ed. 3. an. 31. c. 25.

[i] Brook Abridg. tit. adminiſt. p. 7. Principal Grounds, fo. 61.

[k] Plowd. de Caſ. inter *Branby* and *Grantham*.

[l] c. ſtat. de teſta. l. 3. provincial. conſtit. Cant.
[m] Eod. c. ſtatutum.

ployed for the Behoof of the Teſtator [l]; and in that Reſpect alſo is the Executor accountable to the Ordinary, as well as the Adminiſtrator [m]. I mean of a bare and mere Executor, of whoſe Diligence the Teſtator made ſpecial Choice, to whom nothing is bequeathed in the ſaid Teſtament. But of the Profits and Fruits which happen and ariſe out of thoſe Goods which belong to any as Executor, he may make his Teſtament, though not of the Goods themſelves, as hath been aforeſaid [o].

[o] Sup. part 2. §. 9.

Thirdly, By the Opinion of divers Juſtices of this Realm, and Doctors of the Canon and Civil Law, (6) the Goods of this Realm, that is to ſay, of the *antient Crown, and Jewels*, cannot be diſpoſed by Will [p], as is aforeſaid [q].

[p] Fitzherb. Abridg. tit. Exec. n. 108.
[q] Sup. part 2. §. ult.

Fourthly, (7) Thoſe Things which belong to *any College or Hoſpital* cannot be deviſed by the Teſtament or Laſt Will of the Maſter of the ſaid College or Hoſpital [r]. (8) The ſame may be ſaid of a Mayor of any City or Borough; for he cannot by his Teſtament bequeath any Thing belonging to the City, Borough or Commonalty [s]; no more than a Maſter of a College or Hoſpital, ſuch Things as he hath in Right of the College or Hoſpital [t].

[r] Perkins tit. Deviſe, f. 96. Doct. & Stud. lib. 2. c. 39.
[s] Perkins tit. Deviſe, f. 96. §. non ſolum. Inſt. de lega. ver. ſed ſi.
[t] Perkins ubi ſupra.

Fifthly, (9) The Goods of the Church cannot be deviſed by Teſtament [u]: But the Corn growing upon the Glebe [x], and certain other Goods, may be bequeathed, as hath been before declared [y].

[u] c. 1. de teſtam. extr.
[x] Stat. H. 8. an. 28. c. 11.
[y] Supra part 2. §. penult.

Sixthly, (10) Thoſe Things which after the Death of the Teſtator deſcend to the Heir of the Deceaſed, and not to his Executor, cannot be deviſed by Teſtament [z]; except in ſuch Caſes where it is lawful to deviſe Lands, Tenements or Hereditaments. And therefore if a Man ſeiſed of Lands in Fee, or Fee-tail, bequeath his Trees growing upon the ſaid Land at the Time of his Death, this Deviſe is not good, except as before: But if he deviſe the Corn growing upon the ſame Land at the Time of his Death, from the Heir to ſome other Perſon, this Deviſe is good, albeit the Land whereupon it groweth be not deviſeable. The Reaſon of the Difference is, becauſe the Trees are Parcel of the Freehold, and deſcend together with the Land to the Heir, and not to the Executor: But it is not ſo of Corn, for the ſame ſhall go to the Executor as Parcel of the Teſtator's Goods. And therefore (11) if a Man be ſeiſed of Lands in the Right of his Wife, and ſow the Land, and deviſe the Corn growing upon the ſame Land, and die before the Corn be reaped; in this Caſe the Legatary ſhall have the Corn, and not the Wife: But it is otherwiſe of Graſs and Herbs not ſeparated from the Ground at the Time of the Death of the Teſtator. (12) If a Man ſeiſed in Fee, in Right of his Wife, do let the ſame Lands for Years to a Stranger, and the Leſſee ſoweth the Ground, and afterwards the Wife dieth, the Corn not being ripe: In this Caſe the Leſſee may deviſe the ſame Corn, notwithſtanding his Eſtate be determined. So is it, (13) if he that is Tenant by Curteſy of *England* of Lands, Tenements or Hereditaments for his Life, let the ſame Land to another for Years, and the Leſſor die within the Term of thoſe Years: In this Caſe the Leſſee may deviſe the Corn which ſhall be growing upon the ſame Land, not ripe at the Time of the Death of the Teſtator. Likewiſe (14) if the Tenant in Dower ſow thoſe Lands which he hath in Dower, and make his Executors, and after dieth, the Corn not ſeparated; there the Executors ſhall have the Corn, notwithſtanding the ſame be not ſeeded. And ſo the Tenant in Dower may deviſe the Corn growing upon that

[z] Perkins tit. Deviſe, a quo ſequentes caſus mutuatus ſum.

Land which ſhe holdeth in Dower, at the Time of her Death. But it is not always lawful for a Man or a Woman to deviſe the Corn by them ſown: For (15) if a Man ſeiſed of Land do infeoff a Stranger in Mortgage upon Payment, and not Payment made on the Part of the Feoffor at a certain Day, and the Feoffee ſow the Land, and the Feoffor pay the Money at the Day appointed, and enter: In this Caſe it is thought that the Feoffee cannot deviſe the Corn growing upon the ſaid Land. Likewiſe if he that is Tenant in Tail of certain Land do let the ſame Land for Term of Life, and the Leſſee do ſow the ſame Land, and the Tenant in Tail die, and the Iſſue do recover the ſame in Formedon in Deſcender before the Corn be ſeparated: It is thought in this Caſe that the Iſſue in Tail may bequeath the ſame by his Teſtament. Moreover (16) if a Man ſeiſed in Fee have iſſue a Daughter, and die, his Wife being great with Child, and the Daughter enter and ſow the Ground, and afterwards before the Corn is ſevered the Wife is delivered of a Son, and thereupon his next Friend do enter for him; yet the Daughter may deviſe the Corn growing upon the ſame Land: But if after the Sowing of the Corn, and before the Birth of the Son, the Mother hath recovered her Dower againſt her Daughter, and the ſame Land that is ſown is allotted or aſſigned unto her by the Sheriff for her Dower, in Allowance of other Lands; there the Mother may deviſe the Corn growing upon the ſaid Land, and not her Daughter.

A Man may deviſe the *Corn* growing on his Lands at the Time of his Death; but if the Teſtator is *Leſſee for Years*, and ſow the Land a ſhort Time before his Leaſe expires, and then dies before the Corn can poſſibly be ripe within the Term, in this Caſe a Deviſe thereof is void, becauſe he himſelf could not have reaped it after the Expiration of the Term, if he had lived; but where the Wife hath an Eſtate in Fee or in Tail, or for Life or Years, and the Huſband ſow, and dies before the Corn is ripe, his Executor, and not the Wife, ſhall have it. Perkins, Sect. 520

Seventhly, Foraſmuch as thoſe Things which after the Death of the Teſtator deſcend to the Heir, and not to his Executor, are not deviſable by his Will, except in ſuch Caſes where Lands, Tenements and Hereditaments are deviſable: Therefore thoſe Things which be *affixed unto the Freehold are no more deviſable than the Freehold it ſelf*; as the *Windows, with the Tables dormant, and Benches affixed thereunto, or mortiſed.* Inſomuch that if a Tenant for Years do upon his own proper Coſts and Charges, ſet *Glaſs in the Windows of the Houſe* which he holdeth of another, the ſame is thereby made Parcel of the Houſe or Tenement; and cannot be taken away, without Danger of Puniſhment for Waſte; and conſequently not deviſable by his Laſt Will and Teſtament. For without the Glaſs the Houſe is not perfect; for it lying open to Tempeſts and Rain, the Timber thereof is ſubject to Putrefaction and Waſte: And therefore the *Glaſs* annexed unto the Windows of the Houſe, either by Nails, or otherwiſe, together with the *Furnaces and Ovens*, ſet in Mortar or Stone, ſhall accrue to the Heir of the Landlord, and not to the Executors of the Tenant[a]. The like may be reſolved of the *Wainſcot* annexed unto the Houſe, either by the Leſſor or the Leſſee; for being affixed, it is Parcel of the Houſe, and ſo not otherwiſe deviſable than the Houſe it ſelf whereunto it is affixed. Neither is there any Difference, whether the ſame be affixed by Nails, great or little,

[a] D. Coke, lib. 4. in *Herlakenden's* Caſe. Kelway, Reſpon. fo. 88. n. 3.

or

or by Screws or Irons let in through the Poſts or Walls of the Houſe: For being affixed to the Freehold, by theſe or any other Ways or Means, the Wainſcot cannot be removed by the Tenant, which if he do, he is puniſhable in an Action of Waſte; and therefore he cannot make his Teſtament thereof[b].

[b] D. Coke in Caſe *Herlakenden*, ubi ſup.

The Law will not permit a Deviſe of a perſonal Thing, with a Remainder over; but the Uſe of it may be deviſed to one, and the Remainder over to another; and then the Property is veſted in the laſt Deviſee.

2 And. 185. The Father had a Leaſe for Years of a Farm, and he deviſed to his Son *John the whole Years*, and if *he die within the Term, then to his Daughters*; *John* died Inteſtate, and his Adminiſtrator ſold the Term; and adjudged good, becauſe a Deviſe of a Chattel, with Remainder over, is void. (But this is not Law now, as you'll ſee hereafter.)

March Rep. 106. 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 the 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.

Vachel verſ. *Lemon*, 1 Chanc. Rep. 129. Yet where the Husband deviſed *the Uſe* of ſeveral *Paintings* and *Jewels*, *Medals*, *&c.* to his Wife for Life, and after her Deceaſe, that the ſame ſhould *remain to his Son*, if ſhe was then with Child of a Son; but if not, or if the Son ſhould die without Iſſue Male of his Body, then the ſame to remain over to the Uſe of *Thomas Vachell*; it was decreed that this Limitation over was void.

Broadhurſt verſ. *Richarſon*, 2 Vent. 349. *Money* cannot be deviſed from one to another: As for Inſtance, the Teſtator had three Daughters to whom he deviſed 540*l.* equally to be divided; *and if any of them died without Iſſue, her Part to go to the Survivor*; one of them married and died without Iſſue; the Husband exhibited a Bill againſt the Executor and the ſurviving Siſters for his Wife's Part, being 180*l.* and had a Decree, becauſe a Sum of Money cannot be intailed.

Anne Catchmay by her Will made her Siſter *Catherine Catchmay* Executrix, and bequeathed her whole Eſtate (conſiſting of perſonal Things) to her for Life, and after her Deceaſe her Will was, that (*inter alia*) the Sum of 400*l.* ſhould be given to the Daughters of *Chriſtopher Catchmay*, being the Plaintiffs and Nieces to the Teſtatrix, by equal Portions; and if the ſaid *Catherine* ſhould die before the Children ſhould come of Age, then the ſaid 400*l.* to be paid into the Hands of the Defendant *Morgan*, whom ſhe appointed to ſee her Will performed; *Catherine* died before the Children came of Age, and left the Defendant *Judith Nichols* her Executrix; after which the Children of *Chriſtopher Catchmay* coming of Age brought their Bill for their reſpective Shares of the 400*l.* The Defendant's Counſel inſiſted, that this was a void Deviſe to the Plaintiffs, being the Remainder of a perſonal Thing after the Death of another, to whom the ſame was given before. But the Court decreed, that the Plaintiffs ſhould have their ſaid Legacy of 400*l.* *Catchmay* v. *Nichols*, 1 *Williams* 5.

John Ferrers, Eſq; the Plaintiff *Anne*'s late Grandfather, being ſeiſed in Fee of the ſeveral Manors and Lands in the Bill mentioned (*inter alia*) deviſed to the Defendant the Lady *Ferrers* for her Life, as an Addition to her Jointure, the Caſtle, Manor and Honour of

Tamworth, and alſo *his Goods and Furniture* in *Tamworth* Caſtle; and by his Will deſired, that the Goods and Furniture might be preſerved for the Heir, ſo that the Children which ſhe had by the Plaintiff's Father might enjoy the ſame, appointing the Lady *Ferrers* Executrix. The Bill (*inter alia*) was to have the Goods and Furniture at *Tamworth* Caſtle inventoried and preſerved for the Plaintiff *Anne*. Whereupon, as to the Goods and Furniture, it was ordered, that an Inventory thereof ſhould be taken and delivered to the Maſter by the Defendant, of which Goods, *&c.* ſhe to have the Uſe during her Life, and after they were to be delivered and remain to the Plaintiff's Uſe and Benefit. *Shirley* v. *Ferrers*, 1 *Williams* 6.

One *Hyde* deviſed all his Houſhold Goods in his Dwelling-Houſe at *H.* unto his Wife for her Life, and after her Death to his Son, and died, having made one *Parrat* his Executor.

The Son brought a Bill againſt the Wife and Executor, to have an Inventory of theſe Goods, and that the Wife ſhould give Security that they, at the Time of her Death, ſhould be forthcoming to the Plaintiff, and not be imbezilled.

And the Queſtion was, whether this Deviſe of the Goods to one for Life, with Remainder over, was not void as to the Remainder, it not being by way of *Uſe*.

The *Lord Keeper*, on the Strength and Authority of late Precedents, which had followed the Civil and Canon Laws, in conſtruing the *Uſe* of the Thing, and not the Thing it ſelf to paſs, where the firſt Deviſe is for a limited Time, in order the better to comply with the Intent of the Teſtator, allowed the Deviſe over to be good. *Hyde* v. *Parrat*, 1 *Williams* 1. See alſo the Caſe of *Tiſſen* v. *Tiſſen*, 1 *Williams* 500.

The Teſtator being poſſeſſed of a perſonal Eſtate of the Value of 333 *l.* and having a Wife and a Siſter, (the Plaintiff) but no Iſſue, by Will gave 10 *l.* to his Siſter, and directs, that ſuch Part of his Eſtate as his Wife ſhould leave of her Subſiſtence ſhould return to his Siſter, and the Heir of her Body.

The Wife married a ſecond Husband the Defendant, and died.

The Bill was brought for an Account of the perſonal Eſtate.

1*ſt*, It was objected, that formerly, even a Leaſe for Years could not be deviſed over after a Life, much leſs could a mere perſonal Chattel.

2*dly*, That the Widow had a Power to diſpoſe of the whole, that Equity would not have compelled her to give Security not to conſume the principal Money.

Sed per Curiam, It is now eſtabliſhed, that a perſonal Thing or Money may be deviſed to one for Life, Remainder over; and as to what is inſiſted on, that the Wife had a Power over the Capital, that is true, provided it had been neceſſary for her Subſiſtence, not otherwiſe. Let the Maſter ſee how much of this perſonal Eſtate has been applied for the Wife's Subſiſtence; and let the Defendant account for the Reſidue that has come to her Hands. *Upwell* and *Halſey*, 1 *Williams* 651.

Sir *Richard Groſvenor* by Will deviſed his real Eſtate to Sir *Thomas Groſvenor* for Life, Remainder to Truſtees, Remainder to his firſt and other Sons in Tail, Remainder to Sir *Robert Groſvenor* in the ſame Manner, and then wills, that his Plate, Jewels, Library of Books, and Furniture of his Manſion-Houſe in —— and *W.* ſhould

go as Heir-looms as far as they can by Law to the Heirs Male of his Family ſucceſſively, as his real Eſtate thereby ſettled; and made Sir *Thomas* reſiduary Legatee and Executor. Sir *Richard* died. Sir *Thomas* made a Will, and gave two Legacies, one of 8000 *l.* to *Catherine Lucy Gower*, payable at twenty-one, made Sir *Robert* his Executor, and died, having never had a Son.

Catherine Lucy Gower during her Infancy, by her next Friend, brought her Bill in Chancery to have her Legacy ſecured to her; and the principal Queſtion was, whether the Plate, Jewels, *&c.* directed by the Will of Sir *Richard* to go as Heir-looms, belong to Sir *Robert* on the Death of Sir *Thomas*, having never had a Son? Or, whether they are to be conſidered as Part of the perſonal Eſtate of Sir *Thomas*, ſo as his Executors ſhould have them? But it was determined, that they were not to be conſidered as Part of the Eſtate of Sir *Thomas*, out of which the Plaintiff would have a Satisfaction. *Barn. Rep.* 54 *to* 63.

Finally, (17) Whereas by the Civil Law it was lawful for the Teſtator to bequeath not only his own Things, but another Man's alſo[c]; inſomuch that the Executor was compellable to redeem the ſame Thing, and deliver it to the Legatary; or if the Owner would not ſell it, then to pay the juſt Value thereof to the ſame Legatary[d]; unleſs the Teſtator were ignorant that the ſame Thing did belong to another, and did ſuppoſe it to be his own; in which Caſe the Legacy is void, ſo that the Executor is neither bound to buy the Thing, nor to pay the Value thereof[e], becauſe if the Teſtator had known that it had been another Man's, he would not have bequeathed the ſame[f]: Yet nevertheleſs both by the Laws Eccleſiaſtical[g], and alſo by the Laws of this Realm[h], no Man can bequeath or deviſe any Thing by his Laſt Will, ſaving only that which is his own, and that which he hath to his proper Uſe[i]; and if he do bequeath any other Man's, the Bequeſt is void, ſo that the Executor is neither bound to redeem the Thing for the Legatary, nor to pay the Value thereof[k]; and that without Diſtinction, whether the Teſtator did know, or not know, whether the Thing bequeathed were his own, or another Man's[l]. But what if the Teſtator do bequeath ſomething which at the Time of the making the Teſtament is not his, but the Teſtator afterwards doth buy the ſame? Whether is this Thing due, or recoverable by the Legatary? By the Civil Law it is not due[m], but in ſome few Caſes[n]. By the Laws of this Realm it ſeemeth that we are to diſtinguiſh, whether ſome ſpecial Thing be deviſed or not. For if a ſpecial or certain Thing be deviſed, as if the Teſtator do bequeath the Manor of *Dale*, then though the Teſtator had no ſuch Manor when the Will was made, yet by the Purchaſe made afterwards, the Teſtator is preſumed to have had this Meaning from the Beginning, to purchaſe the ſame for the Benefit of the Legatary; and ſo the Deviſe is good[o]. But if the Legacy be not ſpecial, but general, as if the Teſtator do bequeath all his Lands; then the Teſtator having ſome Lands at the Time of making the Teſtament, and purchaſing other Lands afterwards, theſe Lands purchaſed after the Making of the Teſtament ſhall not paſs[p]. But howſoever the Laws of this Realm have determined concerning the Deviſe of Lands, Tenements and Hereditaments, purchaſed after the Making the Teſtament: Yet concerning Goods, if the Teſtator do bequeath any ſuch Thing in general Terms, as a Horſe or an Ox, altho' the Teſtator have

[c] §. Non ſolum. Inſtit. de lega. L cum alienum. C. de lega.
[d] Eod. §. non ſolum. L. non dubium. ff. de lega. 3.
[e] d. §. non ſolum. L. ſi unum. §. ſi rem. ff. de lega. 2.
[f] d. §. non ſolum. Inſtit. d. lega.
[g] c. filius. de teſta. extra. & ibi Covar. in fin. Panor. in repe. c. cum eſſes. eod. tit. n. 18. Bar. tract. de differentiis inter jus can. & civil. n. 86.
[h] Plowden in caſ. inter *Bransby & Grantham.* Huc etiam pertinent quæ ſuperius ſcribuntur in initio hujus §. de coemptore ſeu condomino diſponente.
[i] Plowd. ubi ſupra.
[k] Covar. Panor. Sichard. ubi ſupra.
[l] Si enim ignoraſſet rem eſſe alienam, tunc vel civili jure non valet legatum. §. non ſolum. Inſtit. de lega.
[m] L. 1. ff. de regul. Canon.
[n] Repertor. Bortach. verb. regula Caton.
[o] Plowd. in caſ. inter *Bret & Rygden*, fol. 344.
[p] Plowd. ubi ſupra.

neither Horſe nor Ox at the Time of his Teſtament made, neither yet at the Time of his Death, the Legacy is not therefore void [q]; but the Executor is bound to deliver an Horſe, or an Ox; as elſewhere is confirmed; where alſo is ſhewed to whom the Choice belongeth in this Caſe, and what Manner of Thing is to be delivered [r].

[q] Bar. Paul. de Caſt. & alii in L. legat. generaliter. de leg. 1. ff.

[r] Infra part 7. §. 1.

So a Deviſe of 300 *l.* to be paid to his Child which he ſhall have at his Death; and if none, then to his Siſter *R. S.* afterwards he had three Children, and then by a Codicil he deviſed 200 *l.* a-piece to his Children, but did not ſay *for their Portions*; decreed, that they ſhall have a Share of the 300 *l.* and likewiſe 200 *l.* a-piece by way of Accumulation.

Pitt verſus *Pidgeon*, 1 Chanc. Rep. 301

The Deviſe was of Money to a Woman *at* her Age of Twenty-one Years, or Marriage, *to be paid to her with Intereſt*, and ſhe died before Twenty-one, and unmarried: Adjudged that the Money ſhall go to her Executor; but if it had not been ſaid, *when to be paid*, and ſhe had died before Twenty-one, *&c.* it had been a lapſed Legacy.

Cloberry's Caſe, 2 Vent. 342. 2 Chanc. Rep. 155. S. C.

Deviſe of a Sum of Money to *T. S. to be diſpoſed by him for certain Purpoſes which he* (the Teſtator) *in a private Note* ſhould *acquaint him withal*, and he died without making any ſuch Note: It was decreed for *T. S.* becauſe it is a Deviſe to him and not to the Executors, for it doth not appear that they were to take any Thing by the Will.

Martin verſ. *Dunch*, 1 Chanc. Rep. 198. See *Attorney General* verſus *Siderfin*.

If a Man deviſes his Houſe, and all his Goods and Furniture therein to his Wife for Life, and after her Deceaſe to his Son *R.* and his Heirs, except his Pictures, which he gives to his Sons *A.* and *B.* And he has Pictures in Boxes, as well as thoſe hung up in the Houſe; and likewiſe Pictures at his Death, which he had not at the Time of making his Will; and it is proved in the Cauſe that he had Skill in Pictures, and frequently bought and ſold them again; the Exception of the Pictures ſhall extend, as well to the Pictures hung up as Furniture, as to thoſe in Boxes; and as well to thoſe in the Houſe at the Time of the Will, as to thoſe bought in after the Will made, ſo that they ſhall paſs to the Sons *A.* and *B.* *Gayre* and *Gayre*, 2 *Vern.* 538.

Cur. The Deviſe of all one's Houſhold Goods will paſs all Houſhold Goods that the Teſtator has at the Time of his Death; *contra* of a Deviſe of all one's Lands, for that will paſs only the Lands which the Teſtator then had: But Houſhold Goods are always periſhing and changing; and therefore the Will, as to the perſonal Eſtate, ſhall relate to the Time of the Teſtator's Death, otherwiſe it would be very inconvenient, for then a Man muſt make a new Will every Day. 1 *Williams* 424. *Salk.* 237.

Per Cur. A Deviſe of a Leaſe for Years differs from a Deviſe of a Freehold or Fee-ſimple; for Inſtance, one cannot deviſe Fee-ſimple Land, which he has not at the Time of making the Will; but Leaſes or perſonal Eſtate, though they were not the Teſtator's at the Time when he made his Will, yet if they be his at the Time of his Death, ſhall paſs by the Will; therefore if one deviſes all his real and perſonal Eſtate, and afterwards acquires more of each Kind, the real Eſtate purchaſed afterwards ſhall not paſs; *ſecus* as to the perſonal Eſtate, and yet the Intention of the Party muſt have been the ſame as to both; and the Reaſon of the Difference is this, with regard to the real Eſtate bought after the Making the Will, ſuppoſing that not to

paſs,

paſs, ſtill 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. 1 *Williams* 575.

Colonel *Coddrington* deviſed in theſe Words: I deviſe my Library of Books, *now* in the Cuſtody of Mr. *Carſwell*, to *All Souls College* in *Oxford*; and in the ſame Will he deviſed to the ſaid College 4000*l.* more to augment their Library; after which the Teſtator bought ſeveral Books of Value, which were placed in the ſaid Library.

It was decreed, that the Books bought afterwards by the Teſtator, and put into the Library, ſhould paſs to the College by the Will; the Court being of Opinion, that the Word *now* did not relate to the Books which were in the Library at the Time of making the Will; but on Conſtruction of the whole Sentence denoted where the ſaid Library was, and might be intended to diſtinguiſh it from any other Library of the Teſtator's. *All Souls College* verſus *Coddrington*, 1 *Williams* 597.

Deviſes of Leaſes and Chattels real, when good, when not, and to whom.

Child verſus *Baylie*, 2 Cro. 459. W. Jones 15. S. C. 2 Roll. Rep. 129. S. C. Palm. 48. 333. S. C. 1 Roll. Abr. 613. S. C. See *Sanders* v. *Corniſh*, Cro. Car. 230. See the Caſe of *Cotton* v. *Heath* poſtea.

W. *H.* poſſeſſed of a *long Term of Seventy-ſix Years*, deviſeth that *W. Heath* his Son, *and his Aſſigns*, ſhould have the ſaid Tenements and Reverſion of them, and all his Title and Intereſt in the ſaid Tenements, for all the other of the ſaid Seventy-ſix Years which ſhould be unexpired at the Time of his Wife's Death: Provided, that if the ſaid *W.* died without Iſſue living at the Time of his Death, that *Thomas* his Son ſhould have it for all the Reſidue of the Seventy-ſix Years unexpired, from the Death of his Wife and of *W.* without Iſſue; and if he died without Iſſue, then to his Daughters: *W.* aliens, and dies without Iſſue. The Queſtion was, whether this Alienation ſhall bind *T. H.* or that he may avoid it: Adjudged that this Alienation ſhall bind *T. H.* for when he limited it to *W. and his Aſſigns*, all the Eſtate was veſted in him, and he had an abſolute Power to diſpoſe thereof: And then the Proviſo thereto added is void to reſtrain the Alienation; and the Limitation to the Heirs of the Body and the Proviſo are all one.

L. deviſed a Term of Years to *A.* and the Heirs of his Body, and if he die without Iſſue, that it ſhall remain to another: It was adjudged a void Remainder, for he cannot limit a Remainder upon a Term after the Death of another without Iſſue; for ſuch an Entail of a Term is not allowable in Law, for the Miſchief which otherwiſe would enſue, if there ſhould be ſuch a Perpetuity of a Term [s].

[s] 13 Jac. in the Exchequer Chamber, *Lewknor*'s Caſe,

Dver 358. *b.*

The Teſtator deviſed, that his Wife ſhould have all the Land in his Leaſe which he had for Sixty Years, for ſo many Years of that Leaſe as ſhe ſhould live, and after her Deceaſe, *the Reſidue to her Son and his Aſſigns*, and made her Executrix, and died: Adjudged that this Remainder was good.

Dyer 7.

A Term for Years will not only bare a Remainder, as in the Caſe laſt mentioned, but a Remainder upon a Contingency, (*viz.*) the Father deviſed a Term of Years to his Daughter, and to *the*

Heirs of her Body, Remainder to his ſecond Daughter in Tail; this is void, becauſe the Teſtator had diſpoſed all the Term to his Daughter; beſides, the Law will not allow a Term for Years to be limited in Remainder, unleſs it is upon a Contingency: As for Inſtance, if the Teſtator had deviſed a Term for Years to *T. S.* and *if he die within the Term*, that *E. G.* ſhould have the Reſidue, ſuch a Remainder is good, becauſe he had not diſpoſed the whole Term to *T. S.*

W. C. poſſeſſed of a Term for Years deviſed it to his Wife for Life, and afterwards that *Jo.* his Son ſhould have the *Occupation thereof* as long as he had Iſſue, and if he died without Iſſue unmarried, that *J.* his younger Son ſhould have the *Occupation thereof* as long as he had Iſſue of his Body; and if he died without Iſſue unmarried, he deviſed one Moiety to *D.* his Daughter, the other Moiety to *R.* and *W.* his Sons, and made his Wife Executrix, and ſhe aſſented to the Legacy, and died; *Jo.* and *Jaſper* died without Iſſue, unmarried: Adjudged that *R.* and *W.* ſhould have a Moiety. And this Caſe differs from the Caſe of *Child* and *Baylie* aboveſaid: Becauſe the Limitation here is, [*if he die without Iſſue unmarried*,] which is upon the Matter, that if he dies within the Term, for if he be not married, he cannot have Iſſue; but in *Child*'s Caſe, he might have Iſſue, and yet if that Iſſue ſhould die without Iſſue in his Life-time, it ſhould remain, which the Law will neither expect nor ſuffer [t].

[1] Roll. Abr. 610. cited in W. Jones 15.

This Caſe is denied to be Law in *Lamb* and *Archer*'s Caſe, 1 Salk. 225. which ſee *hic poſtea.*

[t] H. 9 Jac. Rot. 889. *Rhetorick* and *Chappell*, 2 Bulſt. 28.

Leſſee for Years deviſeth his intire Term to *A. Proviſo*, if he dieth living *J. S.* then the Reſidue of the Term ſhall remain to *J. S. A.* doth alien, and dieth: *Per Hale and Mountague*, *J. S.* is without Remedy [u].

[u] 6 E. 6. Dy. fo. 74.

Leſſee for Forty Years of a Houſe deviſeth the Houſe to *J. S.* without limiting what Eſtate he ſhall have: The Deviſee ſhall have the intire Term; for he cannot have it for Life, at Will, nor for a leſs Term of Years [x].

[x] M. 14 Eliz. Dy. fo. 307. Anderſ. Rep. n. 105.

A Man made his Will in this Manner; *viz. I have made a Leaſe for Twenty-one Years to* J. S. *paying but Twenty Shillings Rent: Per Curiam*, it is a good Leaſe by the Will; for that Word [*I have*] ſhall be taken in the Preſent Tenſe, as is the Word [*Dedi*] in a Deed of Feoffment [y].

[y] T. 3 Eliz. Moor's Rep. fo. 31. n. 101.

Leſſee for Sixty Years deviſed it in this Manner: *I give my Wife and my Couſin my Term for their Lives, and after to ſuch Perſons as ſhall remain in my Houſe at* N. *at the Time of their Deceaſe*; the Wife ſurvives, and aſſigns the Term to another; the Heir of the Leſſor enters, and lets for Years, the Term expires, the Leſſee continues in Poſſeſſion until the Death of the Wife. The Queſtion was, if this Remainder of the Term were good. Two Juſtices held it was not, becauſe it was but a *Poſſibility*, and there cannot be any Remainder thereof; and no Counſel can adviſe how ſuch a Remainder by any Act can be executed, and therefore it cannot be good in a Will. But Two other Juſtices to the contrary, and they relied upon the Authorities of *Welden* and *Paramor*'s Caſe. *Pl. Com. Sed adjornatur* [z].

[z] M. 5 Jac. B. R. *Mallet* verſus *Sackford*, Croke, part 2. fo. 198. 1 Roll. Abr. 610.

Thoſe Caſes are as follow, (*viz.*) *Leſſee for Years* deviſed that his Wife ſhould have *the Occupation of his Lands for ſo many Years*

Welkden v. *Elkington*, Plow. Com. 519.

as ſhe ſhould live, and after her Deceaſe the Reſidue to her Son, and made her ſole Executrix, and died, the Widow 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 ſhe ſhould live ſo long*, and her Intereſt was to determine on 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 expounded to precede the Deviſe to the Wife, that both may ſtand, for there was *no expreſs Eſtate for Life* deviſed to her; if it had, ſhe would have been intitled to the whole Term, becauſe in Judgment of Law an Eſtate for Life is more valuable than for Years.

Paramour v. *Yardley*, Com. 53.

So where Leſſee for Years deviſed *all his Term* to his Son, and that his *Wife ſhould have the Occupation of the Lands during his Minority*; ſhe ſold the Term (being Executrix) and died: Adjudged that her Sale was void againſt her Son, for it ſhall be intended that the Deviſe to her ſhall precede the Deviſe to him, though it follow in Words, and that ſhe had not the whole Term, but only Part of it during the Nonage of her Son, and the Remainder was to veſt in him upon the Contingency of his living till he came of Age.

A Man poſſeſſed of a Term for Forty Years, by his Will deviſeth the ſame to *J. S.* after the Death of his Wife, and that the Wife ſhould enjoy it during her Life, and that *J. S.* ſhould neither deviſe it nor ſell it, but leave it to deſcend to his Son; and in the mean Time my Will is, that my Wife ſhall have the Uſe thereof during her Life, yielding 10*l.* yearly to *J. S.* during her Life, at two Feaſts; and made his Wife Executrix, and died: The Wife entered, and paid the 10*l.* yearly according to the Will. In this Caſe Three Points are reſolved. 1. That *J. S.* doth not take by Way of Remainder, but by Way of Executory Deviſe; and a Man may deviſe ſuch an Eſtate by his Will, which he cannot make by Act executed: And the Caſe is no more than this, that after the Death of his Wife, *J. S.* ſhould have the Reſidue of the Term. 2. The Deviſe is good, being a Chattel, which may veſt and deveſt at the Pleaſure of the Deviſor. 3. That there is no Difference, when one deviſeth his Land or his Leaſe, or the Uſe or Occupation, or the Profits of his Land [a].

[a] C. lib. 8. fo. 90. *Matthew Manning*'s Caſe.

Amner v. *Lodington*, Godb. 26. 3 Leon. 89. S. C. 2 Leon. 92. S. C. 1 And. 61. S. C. See the Caſe of *Rhetorick* verſ. *Chappell*, and *Matthew Manning*'s Caſe.

Deviſe of a Leaſe for Years to his Wife for Life, and afterwards to *his Children unprefer'd*; thoſe who argued that the Wife ſhould have the *whole Term*, diſtinguiſhed this Caſe from that of *Welkden*, where the Deviſe was, *That the Wife ſhould have the Lands in Leaſe, &c.* and from that of *Paramour, &c.* where the Deviſe was, that *the Wife ſhould have the Profits of the Lands* until her Son came of Age; but in the principal Caſe the Lands are not mentioned, but the *very Leaſe* was deviſed: But adjudged that the Wife had only an Eſtate for ſo many Years as ſhe ſhould live; and it being contingent whether any might remain at her Death; yet if any did remain, they were upon ſuch Contingency intended for his Children unprefer'd.

Price verſus *Almory*, Moor 831. See poſtea *Sheriff* and *Wroſham*'s Caſe.

Deviſe of a Term for Years to his Wife for Life, Remainder to *John, and the Heirs of his Body*, who died in her Life-time: Adjudged that the Executor of *John* had no Title to the Term, becauſe *John himſelf* had only a contingent Title to ſo much thereof as ſhould be to come after the Death of the Wife, for ſhe might happen

to ſurvive the whole Term; therefore if the Deviſee of ſuch a contingent Intereſt dies before the Contingency happens, it ſhall not go to his Executor.

But in *Blandford*'s Caſe there ſeems to be a contrary Reſolution, which was a Deviſe of a Term for Years to his Wife for Life, *Remainder to* Thomas *and* Lucy, *if they have no Iſſue Male, and if they have Iſſue Male*, then to be reſerved for their Benefit; they had ſuch Iſſue, and then *Thomas* died: Adjudged that the Remainder to the Iſſue Male was well limited, for *by the Deviſe of the Term for Years to the Wife for Life, ſhe had not the whole Term*, but upon the Contingency of her living ſo long, and the Poſſibility of what might remain at her Death was well limited to *Thomas* and *Lucy* by Way of executory Deviſe.

Blandford v. *Blandford*, Moor 846. Godb. 266. S. C. 3 Bulſt. 98. S. C. 2 Cro. 394. S. C. 1 Roll. Rep. 318. S. C.

The Caſe of *Price* and *Almory* before-mentioned is denied to be Law in *Sheriff*'s Caſe, but that Caſe is reported in a very incertain Manner, as followeth, (*viz.*) The Teſtator deviſed a Leaſe to his Wife for *Six Years*, Remainder to *John*, *if he comes home*; *and if he did not come within Six Years*, *then* William *ſhould have it till* John *came home*; *William* within the Six Years deviſed the Term to *Heſter*, and made her Executrix, and died: It was objected, that this was a meer *contingent Intereſt to* William, and that he could not have the Term unleſs he had outlived Six Years, and *John* had not come home within that Time, becauſe nothing veſted in him till then; and if ſo, 'tis certain he could not deviſe it: But adjudged, that there being an expreſs Deviſe for a *certain Number of Six Years*, and afterwards for the Reſidue of the Term; 'tis not a *Contingency*, but an *Intereſt veſted* after the Six Years in *William*; but if it ſhould be a Contingency, 'tis ſuch, that the Term might have veſted in him, if he had ſurvived the Six Years, and by Conſequence it ſhall go to his Executor; 'tis ſo reported by Juſtice *Croke*; and by *Rolls* in his 1 *Abr.* but in the ſecond Part of his Abridgment, he reports it otherwiſe, (*viz.*) that *William* could not deviſe this Contingency which he had, within the Six Years, for it was not an *Intereſt veſted* in him till after thoſe Years were expired.

Sheriff v. *Wrotham*. 2 Cro. 509. 1 Roll. Abr. 916. S. C. 2 Roll. Abr. 48. S. C.

If one be poſſeſſed of a Term for Years, and deviſe the ſame to another and his Heirs, or his Heirs Males; the Executors or Adminiſtrators, not the Heirs of the Deviſee, ſhall have it [b].

[b] C. lib. 10. fo. 46. *Lampet*'s Caſe, Perk. S. 556, 558.

C. deviſeth his Land to *A. B.* and the Heirs Males of his Body for the Term of Ninety-nine Years: By this Deviſe *A. B.* hath but a Leaſe for ſo many Years, if the Heirs Males of his Body ſhall ſo long continue, and for Want of Iſſue Male the Term of Years ſhall determine: And in this Caſe the Executor or Adminiſtrator, not the Heirs Males of *A. B.* ſhall have it after his Death [c].

[c] C. lib. 10. fo. 87. *Leonard Lovil*'s Caſe.

If one deviſeth his Land to his Executors for the Payment of his Debts, and until his Debts be paid; by this Deviſe the Executors have a Chattel and uncertain Intereſt, and they and their Executors ſhall hold it until their Debts be paid, and no longer [d].

[d] Coke Inſt. part 1. 42.

W. ſeiſed of Lands in Fee, deviſed to his Daughter and her Heirs, when ſhe comes to the Age of Eighteen Years, and that his Wife ſhould take the Profits of his Lands to her own Uſe until the Daughter comes to the Age of Eighteen Years, and made his Wife Executrix, and died; and it was provided, that the Wife ſhould pay the old Rent, and find the Daughter at School until ſhe could read and write *Engliſh*: The Wife enters, and proves the Will, takes Huſband,

band, and dies; the Husband aſſigns this Term; all the Conditions were performed. Adjudged, 1. that it was a Term for Years in the Wife, and after the Death of the Wife the Husband ſhall have it. 2. This Truſt of Education was not a Limitation perſonal, that the Leaſe ſhould not be to the Wife any longer than ſhe may educate her Daughter; but it was agreed that any one may educate her, and find her at School, and that there is no Fault in the Wife, for it's the Act of God [e].

[e] T. 17 Jac. C. B. *Blackburn's* Caſe, Hutton's Rep. fo. 36, 37.

If one deviſeth his Land unto his Executors until his Son ſhall come unto the Age of Twenty-one Years, the Profits to be imployed towards the Performance of his Will, and when he ſhall come to that Age, that then his Son and his Heirs ſhall have it; by this Deviſe the Executors ſhall have it until he be of Twenty-one Years of Age, and if he die before that Time, the Executors ſhall alſo have it, until the Time he ſhould have been Twenty-one Years of Age, if he had lived ſo long; and the Word [*ſhall*] in this Caſe is taken for [*ſhould*] [f].

[f] C. lib. 3. fo. 20. *Boraſton's* Caſe.

If a Man deviſe his Land for ſo many Years as his Executors ſhall name, it ſeemeth this Deviſe is not good; but if it be for ſo many Years as *A. B.* ſhall name, and he name a certain Number of Years in the Teſtator's Life-time, this is a good Deviſe [g].

[g] Pl. Com. fo. 524.

H. being ſeiſed in Fee of Lands and Houſes in *L.* in the County of *O.* and alſo of Houſes and Lands in *W.* in the County of *H.* let the Houſes and Lands in *W.* in the County of *H.* to *A.* and afterwards deviſed all his Meſuage and Lands in *L.* in the County of *O.* and all his other Lands, Meadows and Paſtures in *W.* in the County of *H.* The Queſtion was, whether the Houſes in *W.* in the County of *H.* paſſed by this Deviſe. It was adjudged that by a Deviſe of all his Lands, Houſes may paſs; yet if the Intent of the Deviſor is otherwiſe, as in this Caſe, they ſhall not paſs: For this particular Deviſing of his Lands, Meadows, and Paſtures, exclude the general Intendment of this Word [*terra,*] and reſtrain it only to arable Land, and exclude Houſes and Wood [h].

[h] T. 36 Eliz. Rot. 359. *Ewer* v. *Hayden,* Croke, part 3. fo. 476. Moor's Rep. T. 36 Eliz. n. 491. Owen 74.

By a Deviſe of *omnia bona,* a Leaſe for Years will paſs; if there be not ſome other Circumſtance to guide the Intent of the Deviſor [i].

[i] H. 36 Eliz. Rot. 515. *Portman* and *Willis.* Moor's Rep. fo. 352. n. 474. Cro. Eliz. 589. Gouldſ. 129. S. C.

A Perſon poſſeſſed of a Term for Years, and a Fortune in Money, made his Will, and left all his Children pecuniary Legacies, *payable at different Times,* and deviſed one Moiety of the Term, after the Deceaſe of his Wife, to his Son *Bennet,* and the other Moiety to his Son *John,* and then comes this Clauſe, *And if any Children die before their Portion becomes payable, then that to fall equally between my Wife and the ſurviving Children. Bennet* died in the Life-time of the Wife: So the Queſtion was, whether his Moiety of the Term ſhould be divided between the Wife and the ſurviving Children.

It was reſolved, that as in common Parlance *Portion* is not ſaid of a Term, and there being pecuniary Legacies on which that Word might operate, the Word *payable* ſhall be applied and confined to them; this Contingency of the Wife's Dying might happen when the Sons were very old, and long after the Money became payable, the

Sons, by this Contingency hanging over them, could not diſpoſe of their Intereſt for their Advantage, perhaps for the Neceſſities of their Families; which would be to their Prejudice, and this could not be ſuppoſed to be intended by their Father. *Richards* verſus *Cock*, *Select Caſes in Chancery*, *fo.* 12.

The Incumbent of a Church purchaſeth the Advowſon in Fee, and deviſeth that his Executor ſhall preſent after his Death, and deviſeth the Inheritance to another in Fee: Adjudged, that it was a good Deviſe of the next Avoidance, though by his Death the Church became void, and ſo a Thing in Action; yet it's good by Reaſon of the Intent of the Deviſor [k].

[k] P. 11 Jac. Sir *Edward Pynchin* verſ. Doct. *Harris*, Croke, part 2. fo. 371.

If a Man hath Lands in Fee and Lands for Years, and he deviſeth all his Lands and Tenements, the Fee-ſimple Lands only paſs, and not the Leaſe for Years. 2. If a Man hath a Leaſe for Years, and no Freehold, and deviſeth all his Lands and Tenements, the Leaſe for Years paſſeth. 3. If one deviſeth his Land which he hath by Leaſe to his Executor for Life, the Remainder over, there ought to be a ſpecial Aſſent thereunto by the Executor as to a Legacy, otherwiſe it is not executed [l].

[l] T. 7 Car. B. R. *Roſe* and *Bartlet*'s Caſe, Croke, part 1. fo. 292. Style 279.

A Man poſſeſſed of a *Term for divers Years* deviſed the *Profits thereof* to one for Life, and after his Deceaſe to another for the Reſidue of the Years, and died; the firſt Deviſee entred with the Aſſent of the Executors, and afterwards he in Remainder, during the Life of the firſt Deviſee, aſſigned it to another, and after the firſt Deviſee died: It was adjudged in this Caſe, that the Aſſignment was void; for he in Remainder had but a *Poſſibility* during the Life of the firſt Deviſee; for that is as much in Law, as if the *Land* had been deviſed to him for ſo many Years if he ſhould live, or for all the Term if he ſhould ſo long live; ſo as the Intereſt of the Term *ſub modo* was in him, and the other in Remainder had but a *Poſſibility*, which he could not grant over [m].

[m] C. lib. 4. *Fulwood*'s Caſe.

Deviſe that his Brother *Chriſtopher* ſhould have the *Uſe and Occupation* of his Leaſe *for Life*, afterwards to his Wife for Life, then to the eldeſt Son of *Chriſtopher* for Life; and after ſuch *Son dying without Heir Male*, to any other Son of *Chriſtopher*, one after another, in Manner as aforeſaid; and if *Chriſtopher die without Heir Male of his Body*, then the *Uſe*, *Occupation and Profits* of the Premiſſes ſhall remain to *Simon for Life*, then to his eldeſt Son for Life; and if ſuch Son *die without Heir Male*, then to any other Son of *Simon*, with other Remainders over in the ſame Words; and he made *Chriſtopher* and *Simon* Executors; *Chriſtopher* died without *Iſſue Male*, and *Simon* ſurvived, who had Iſſue *Edward* and *John*, and deviſed all his Goods and Chattels to *Edward*, and made him Executor and died; *Edward* made *Francis* his Executor and died without Iſſue Male, *Francis* made *George* his Executor and died: And adjudged that he had a good Title againſt *John*, *the ſecond Son of* Simon, becauſe the ſaid *John* could have no Title till *Chriſtopher died without Iſſue Male*, which by Intendment of Law is a Limitation in *Perpetuity*; and *Edward* who was the eldeſt Son of *Simon* (who was the ſurviving Executor of *Chriſtopher*) muſt likewiſe *die without Iſſue Male*, which is another Limitation of a Perpetuity, before the Remainder to *John* the ſecond Son of *Simon* could take Effect; and in the mean Time the Executor of the Teſtator ſhall have the Leaſe; for 'tis againſt Law to limit a Term for Years in Remainder, after a Dying

Sanders ver. *Corniſh*, Cro. Car. 230.

without Iſſue, and which was not to take Effect till after the Death of *Chriſtopher* and *Edward* both dying without Iſſue Male, which is a double Contingency; therefore the Remainder both in this Caſe, and in [n] *Child* and *Bailie*'s Caſe, being not to take Effect till after a Dying without Iſſue, was adjudged to be void.

[n] See the Caſe antea.

Leventhorp v. *Aſhby*, 1 Roll. Abr. 611.

Deviſe of a *Term* to his Executors for Seven Years, Remainder to *Thomas, and the Heirs Male of his Body*, and [o] *if he die without Heirs Male*, Remainder *to* T. S. *and the Heirs Male of his Body:* Adjudged that this laſt Remainder to *T. S.* was void, becauſe it was not to veſt in him till *Thomas* died without Iſſue Male, which is too remote an Expectancy where the Eſtate is but for Years, therefore *Thomas* had the abſolute Term, and might diſpoſe it as he pleaſes.

[o] *This doth not make an Eſtate tail, or a Remainder in Tail of a Term for Years, becauſe the firſt Limitation was to* Thomas, and the Heirs Male of his Body, *when in moſt of the other Caſes the firſt Limitation was for Life.*

Cotton verſus *Heath*, 1 Roll. Abr. 612.

The following ſeems to be a contrary Reſolution to the Caſe of *Child* and *Bailie:* The Husband being poſſeſſed of a Term, deviſed it to his Wife for Eighteen Years, then to *C.* his eldeſt Son for Life, and afterwards *to the eldeſt Iſſue Male of the ſaid* C. *for Life:* He had no ſuch Iſſue at that Time, nor at the Death of the Teſtator; but yet it was adjudged, that if he had left ſuch Iſſue Male, he ſhould have the Term by Way of executory Deviſe, tho' the *Remainder to the eldeſt Iſſue Male* of *C.* was a contingent Eſtate after a Contingency; and the Reaſon was, becauſe it was a *Contingency which might happen after a Life then in Being*; and this my Lord *Rolls* tells us was like *Matthew Manning*'s Caſe; and my Lord *Nottingham* was of Opinion, that 'tis like the Duke of *Norfolk*'s Caſe, which was thus: But that was upon a Settlement by Deed.

The Duke of *Norfolk*'s Caſe, 3 Chanc. Rep.

The Duke had Six Sons, *Thomas*, *Henry*, *Charles*, *Edward*, *Francis* and *Bernard*, and by Deed raiſed a Term of 200 Years upon ſuch Truſts as ſhould be declared of the ſame, *&c.* and by another Deed the Truſt of the Term was limited to *Henry* (the ſecond Son) and the *Heirs Male of his Body:* Provided, if *Thomas die without Iſſue, living* Henry, *ſo that the Earldom of* Arundel *deſcend on him, then the ſaid Term to remain to* Charles *and the Heirs Male of his Body*, with the like Remainder in Tail ſucceſſively to the other Sons; the Contingency did happen, (*viz.*) *Thomas* died without Iſſue Male, ſo that the Earldom deſcended on *Henry:* And the Queſtion being, whether this Term for Years was well limited to *Charles* in Tail, it was decreed, that it was well limited.

Burges verſ. *Burges*, 1 Mod. 114. 1 Chanc. Rep. 229.

This Caſe was alſo upon a Deed, (*viz.*) A Term for Years determinable on Three Lives, was ſettled by Deed, upon Truſt for himſelf for Life, then to his Wife for Life, then to the *firſt Son of their Two Bodies, and the Heirs of the Body of ſuch firſt Son*, and ſo to ſeveral other Sons in Tail Male; and for Want of *ſuch Iſſue*, Remainder to the Daughters in Tail; the Husband and Wife had Iſſue only a *Daughter*, the Wife died, the Husband married again and died Inteſtate, and his Wife adminiſtred; and it was decreed, that ſhe, and not the Daughter, ſhould have the Term, for the Limitation to the Daughter in Remainder was void, it tending to a Perpetuity; becauſe it did depend upon ſo many remote Contingencies; but a Remainder which might veſt in the firſt Son upon one Contingency, had been good.

William Clare being poſſeſſed of a Term for 1000 Years, 13 *April* 1706. by Will deviſed it to Truſtees, in Truſt for his Son *Thomas*,

for ſo many Years of the Term as he ſhould live, and after his Death, in Truſt for the Iſſue Male of his Son *Thomas* lawfully begotten, for ſo many Years of the ſaid unexpired Term as ſuch Iſſue Male ſhould live; and when the Iſſue Male of his ſaid Son *Thomas* ſhould happen to be extinct, then in Truſt for his ſecond Son *William* for Life, Remainder in Truſt for the Iſſue Male of his ſaid Son *William*, for ſo many Years as they ſhould happen to live, the eldeſt of ſuch Iſſue Male to be preferred before the youngeſt; and after the Death of *William*, and from the Time his Iſſue Male ſhould happen to be extinct, then that the Premiſſes ſhould come, deſcend and continue in the Iſſue Male of the Name and Family of the *Clares*, which ſhould be next of Kin for all the Reſidue of the Term, and made his Son *Thomas* ſole Executor and reſiduary Legatee. The Teſtator died, and in 1718 *Thomas* died without having any Iſſue Male. In Chancery, the Queſtion was, whether the whole Term did not veſt abſolutely in *Thomas?* And whether the Limitation over to *William* the ſecond Son after Failure of Iſſue Male of *Thomas*, was not void? Held firſt, that *Thomas* by this Will did not take an Eſtate-tail, but an Eſtate for Life only. 2dly, That the ſubſequent Accident of *Thomas*'s Dying without Iſſue Male, or rather never having had any Iſſue Male, would not let in the Limitation to *William* the ſecond Son. Here is a plain Affectation of a Perpetuity as ſtrongly declared by the Teſtator himſelf as can be, and a Succeſſion of Eſtates for Life to Perſons not *in Eſſe* is as much a Perpetuity, and as little to be indured as would be that of an Eſtate-tail, of which no Recovery could be ſuffered; and ſo the Term was decreed to *Thomas* as reſiduary Legatee of his Father, and from him to the Plaintiff, who was Executor of *Thomas*. *Clare* and *Clare*, *Paſch.* 1734. *Forreſter's Rep.* 21.

A long Term of Years was aſſigned in Truſt for the Father for Sixty Years, if he lived ſo long; the like to the Mother; then to *John* the Son, his Executors, *&c.* in caſe he ſurvived his Father and Mother; but if he died in their Life-time, and left Iſſue living at the Death of his Father and Mother, then to the eldeſt Son of *John*; but if *John* died without Iſſue, then to *Edward* and the Heirs of his Body, and in Default of ſuch Iſſue, to *Nicholas* and the Heirs of his Body, and in Default of ſuch Iſſue, to the Executors of *Nicholas*. *John* died without Iſſue, and Inteſtate, in the Life-time of his Father and Mother; then *Edward* died Inteſtate, and without Iſſue, and his Widow adminiſtred to him; and *Nicholas* adminiſtred to *John:* Adjudged, that ſince the Remainder limited to *John* was contingent, and *he dying before the Contingency happened*, for that Reaſon nothing veſted in him, and by Conſequence nothing could go to his Adminiſtrator; 'tis true, the Remainder over to *Edward* was likewiſe upon a Contingency of his ſurviving both the Father and Mother; but it was a ſhort Contingency which might happen after Two Lives then in Being, and therefore that Remainder was held good, for the Law might reaſonably expect its Happening in a little Time, and this we are told is expreſly contrary to the Reſolution in *Child* and *Bailie*'s Caſe; but in the principal Caſe it was agreed, that if the Limitation had been to *John*, and if *he die without Iſſue*, *then* to *Edward*, the Remainder had been void, becauſe 'tis a Limitation after an Eſtate-tail; and 'tis too remote to expect the Veſting of a Remainder after a Man's *Dying without Iſſue* generally; but upon a Dying without Iſſue, *living T. S.* the Limitation is good, becauſe it may veſt in a little Time. And

Wood verſ. *Saunders*, 1 Chanc. Rep. 131. 2 Chan. Rep. 239. Pol. 35. 3 Ch. Ca. 37,40,51. See poſtea *Maſſenburgh* verſus *Aſh.*

And as 'tis too remote to expect a Remainder of a Term for Years to veſt after a *Dying without Iſſue generally*, ſo 'tis too remote to expect a Veſting after a Limitation *to the Heirs Male of a Body*.

Grigg verſ. *Hopkins*, 1 Sid. 37. As where the Deviſe was of a Term for ninety Years to *E. G.* if ſhe lived ſo long, Remainder *to the Heirs Male of her Body begotten*, Remainder to *T. G.* for ninety Years, if he ſhould ſo long live, Remainder over: Adjudged, that theſe Remainders were void, and that *E. G.* had the whole Term; for in this Caſe the Word *Heirs* was not a Name of Purchaſe but of Limitation, it being of a Term for Years which doth not deſcend to the Heir at Law; beſides where a Term is limited to one and *the Heirs of his Body*, the farther Limitation in Remainder is void, becauſe the whole Term is veſted in the firſt Deviſee.

Garrett verſ. *Liſter*, 1 Lev. 25. Deviſe of a long Term of Years to his *Wife for Life*, Remainder to Truſtees for his Son *for Life*, Remainder in Truſt for the *Heirs of the Body of the Son*, Remainder to the right Heirs of the Son; the Wife was made Executrix, and the Husband died: Adjudged ſhe ſhall have the whole Term as Executrix, and that the Remainders were void.

Gibbons verſ. *Somers*, 3 Lev. 22. Deviſe of a Term to his Son *John*, and if he die unmarried and *without Iſſue*, *then to his Daughters* and their Executors; and if *John* be married and *have no Iſſue*, then to his Siſters, *&c. John died without Iſſue:* Adjudged that this *Remainder* to the *Daughters* was void, becauſe it was limited to them upon the Contingency of the *Death of their Brother without Iſſue*; it muſt be admitted, that ſuch a Remainder hath been held good in Caſe of an Inheritance; for ſo is *Pell* and *Brown*'s Caſe, but never upon a Term for Years.

Love v. *Windham*, Sid. 451. 1 Mod. 50. S. C. 1 Vent. 79. S. C. 1 Lev. 290. S. C. The Husband deviſed a Term to his *Wife for Life*, then to *Nicholas for Life*, and *if he die without Iſſue*, then to *Barnaby:* Now here the Limitation being to *Nicholas for Life*, *and if he die without Iſſue*, Remainder over; it was argued that this was an Eſtate expreſly to *Nicholas* for Life, and that the Remainder was good to *Barnaby* by way of executory Deviſe, (*i. e.*) *upon the Contingency of* Nicholas *dying without Iſſue*; but adjudged, that the Remainder was void, for the Limitation to *Nicholas for Life*, *and if he die without Iſſue*, is in Effect the ſame as if it had been, *if he die without Heirs of his Body*, Remainder over, which is certainly bad; becauſe the Law will not intend that *any Term for Years* can continue ſo long as a Man may have *Heirs of his Body*.

Dowſe verſus *Earle*, 3 Lev. 264. So likewiſe where a long Term for Years was deviſed to *T. S.* for Life, Remainder to his Son and the *Heirs Male of his Body*, Remainder over: Adjudged that the Remainder to the *Heirs Male* was void, becauſe 'tis 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 an Eſtate for Years.

Lamb verſ. *Archer*, 1 Salk. 225. Deviſe of a long Term for Years to *E. G.* and the *Heirs of his Body*; *and if he die without Iſſue*, *living* T. G. then to the ſaid *T. G.* and his Heirs: Adjudged, that this was a good Limitation to *T. G.* becauſe the Contingency was to ariſe within the Compaſs of one ſingle Life; and in this Caſe the Court denied *Child* and *Bayley*'s Caſe to be Law.

The following Caſe was upon a Deed, (*viz.*) A Term for Years was aſſigned to Truſtees, in Truſt for Husband and Wife during their Lives, and the Life of the Survivor; and if there ſhould be *Iſſue Male of their Bodies living at the Deceaſe of ſuch Survivor*, then in Truſt, that the eldeſt Son ſhould be *maintained* out of the Rents and Profits, until he attain his Age of twenty-one Years, and then the whole Term to be aſſigned to him; and if he die before twenty-one, then in like Manner for the Maintenance of the ſecond, third, fourth, and every other Son of that Marriage; but if no ſuch Son, or if all the Sons die before twenty-one, then the Remainder of the Term to Sir *William Maſſenburgh*; the Husband and Wife had Iſſue one Son, and died; and the Son likewiſe died an Infant; the Queſtion was, whether this Limitation of the Remainder of a Term was good; it was agreed, that the *Truſt of a Term*, as this was, is to be governed in a Court of Equity by the ſame Rules as a *Deviſe of a Term is at Law*; that the Rule which hath hitherto obtained is, that a Term might be limited to many Perſons one after another; but then they muſt all be in Being, but that there could be but *one contingent Remainder of a Term for Years*; that in this Caſe there was no Danger of a *Perpetuity*, becauſe the Contingency muſt happen within twenty-one Years after the Death of Husband and Wife; for when once the Iſſue attains to that Age, the whole Term is to be aſſigned to him, and he may either diſpoſe of it, or, if he die Inteſtate, it ſhall go in a Courſe of Adminiſtration; and ſo is the Caſe of *Wood* and *Saunders* in Point; and the Caſe of *Cotton* and *Heath* comes near it. *Maſſenburgh* v. *Aſh*, 1 Vernon 234. See *Warman* verſ. *Seaman*, poſtea.

On the other Side it was admitted, that *one contingent Remainder* of a Term for Years might be good; but a Contingency upon a Contingency is not to be ſuffered: And *Child* and *Bayley*'s Caſe was oppoſed to *Wood* and *Saunders*'s Caſe; and ſo was *Gibbons* and *Summers*'s Caſe; and if the Rule which allows one contingent Remainder, and no more, ſhould be ſet aſide, no Man can tell where it will end; for as the Contingency may be appointed to happen within twenty-one Years, it may be inlarged to forty Years, and from thence to one hundred Years, and ſo on; therefore ſome Bounds ought to be put to it.

The *Lord Keeper Finch*, being of Opinion that he could go no farther in Equity than the Law went in Caſes of executory Deviſes, ordered a Caſe to be made for the Opinion of the Judges, who were unanimous, that the contingent Limitation over to Sir *William Maſſenburgh* was good, becauſe it was circumſcribed, and muſt happen *within twenty-one Years*; and the Lord Keeper was of the ſame Opinion, and ſaid the Caſe of *Wood* and *Saunders* was in Point.

A Term for Years was ſettled in Truſt for *T. S.* for Life, Remainder to *E. G.* for Life; and from and after the Death of *E. G.* to permit *ſuch of her Children as ſhe the ſaid* E. G. ſhould have at her Death to take the Profits thereof; and for *Want of ſuch Child or Children, then in Truſt for* T. S. *E. G.* had Iſſue a Son, who died in her Life-time without Iſſue; it was objected, that the Remainder to *T. S.* was void, it being to take place after * two Lives then in Being, and after the Death of ſuch Child or Children as *E. G.* ſhould have, who were not then in Being; but the better Opinion was, that it was good. *Heyward* v. *Rogers*, 1 Vernon 461.

* *After the Death of* E. G. *and after the Death of her Son.*

Knight verſ. *Knight*, Chan. Caſes 181.

The Father by Deed ſettled a Term for eighty Years in Truſt on his Son *William for Life*, and afterwards to *Urſula* (his intended Wife) for ſo many Years of the ſaid Term as ſhe ſhould live, and then to *ſuch Child or Children as they ſhould have between them* for the Reſidue of the Term; and *for Default of ſuch Iſſue*, then to permit the *Heirs of the Father and their Executors*, &c. to injoy the Premiſſes during the Reſidue thereof: *William* married *Urſula*, and deviſed all his Eſtate to her, and made her Executrix, and died without Iſſue, then the ſurviving Truſtees aſſigned the Lands to her for ſo many Years of the ſaid Term as ſhe ſhould live: *Urſula* proved the Will, and by Virtue thereof, and of the Aſſignment, claimed the whole Benefit of the Leaſe againſt the Executors of the Father; and decreed that ſhe might, becauſe the Limitation to them was not to take place till after the intermediate Remainders to *William* and *Urſula*, and to their Child or Children, were ſpent; which tending to a *Perpetuity* is void in Law, and the whole Intereſt of the Term is veſted in *Urſula* and her Aſſigns.

Warman v. *Seaman*, Chan. Caſes 279.

A Term of one hundred Years was raiſed in Truſt for *N. B.* for Life, and afterwards for *Julian* and the Iſſues of their two Bodies; and for Default thereof, *to the Iſſue of the Body of* Julian; and for Want of ſuch Iſſue, to *Robert* and *George Warman*, &c. *Julian* had Iſſue *Eleanor*, who *ſurvived Julian*, and afterwards died Inteſtate; and *Mary Leeving* adminiſtred to her, who conveyed the Term to the Defendant *Seaman*; and it was inſiſted for him, that the Benefit of the whole Term did attach in *Eleanor*, as the Iſſue of *Julian* upon her Death; and that *Eleanor* dying Inteſtate, and without Iſſue, it ought to go to her Adminiſtratrix, and that the *Remainder* over to *George Warman*, in *Default of Iſſue of the Body of* Julian, was void.

Upon the firſt Arguing this Caſe the Court held, that the Remainder of the Truſt of this Term to *George Warman* was good, becauſe the Truſt was not to *Julian* and her Iſſue, by Way of immediate Gift; for the Word *Iſſue* is a Word of *Purchaſe*, and can carry no more than an Eſtate for Life; as it was adjudged in *Wild*'s Caſe, where theſe Words (*after their Deceaſe and their Children*) were adjudged by all the Judges of *England* to be Words of Purchaſe, becauſe they work by Way of Remainder, and carry but an Eſtate for Life; for in Law theſe Words *Iſſue or Children* import no more.

But upon a Rehearing of this Cauſe it was decreed, that ſo much of this Term, which was unexpired at the Death of *Julian*, did attach and veſt in *Eleanor as her Iſſue*, and not an Intereſt only or Eſtate for Life; that the Limitation over to *Robert* and *George Warman* is void in Law, becauſe it was not to take Effect but only in Default *of Iſſue of* Julian; and this in Suppoſition of Law is a Limitation in *Perpetuity*; for the Word *Iſſue* is *nomen collectivum*, and takes in all Iſſues to the utmoſt Extent of the Family, as the Word *Heirs of the Body* would do; and therefore the Law looks on it as too remote a Poſſibility, that *Julian* ſhould die without Iſſue during this Term, according to *Wild*'s Caſe; but yet ſuch a Conſtruction ought not to be made in this as it was in * *Wild*'s Caſe, (*viz.*) that the Iſſue of *Julian* ſhould have only an Eſtate for Life, becauſe the Truſt of the Remainder

6 Rep. 16. Moor 397. S. C. 1 And. 43. S. C.

* *In that Caſe the Limitation was to the* Children, *which is a Name of Purchaſe, and they had only an Eſtate for Life; if it had been to their* Iſſue, (*as 'tis in this Caſe*) *that would have been a Word of* Limitation.

Remainder of the whole Term was declared to her Iſſue; and ever ſince *Matthew Manning*'s Caſe the Judges have not favoured executory Eſtates of Terms for Years, but have kept them within Bounds, to prevent the Danger of Perpetuities.

Caſes in Law touching Deviſes of Chattels perſonal.
See antea, c. 6.

THE *Uſe of Chattels perſonal* may be bequeathed to one for Life, and after the *Property* to another; ſo that if one will that *A. B.* ſhall enjoy the *Uſe* of his Houſhold-Stuff during his Life, and after that it ſhall remain to *J. M.* this is a good Deviſe thereof to *J. M.* [a]. But if the *Property* of the Thing be bequeathed to the firſt of them, then it is otherwiſe; for the Gift of a Chattel perſonal, though but for an Hour, is a Gift thereof for ever; provided that the Teſtator make it abſolute, not conditional [b].

[a] 37 H. 6. fol. 30. Brook, Novel Caſ. §. 388. Brook, tit. deviſe, pl. 13.

[b] H. 9 Car. B. R. *The Lady* Davy's *Caſe*, and *Haſtings* verſus *Douglas*, Cro. Car. 343.

A Man poſſeſſed of certain Goods deviſed them by his Will to his Wife for Life, and after her Deceaſe to *J. S.* and died; *J. S.* in the Life-time of the Wife did commence Suit in a Court of Equity, to ſecure his Intereſt in the Remainder: Adjudged, that the Deviſe in Remainder of Goods was void, and therefore no Remedy in Equity. It was agreed, that a Deviſe of the *Uſe and Occupation of Lands* is a Deviſe of the Land it ſelf; but not ſo of *Goods*; for one may have the Occupation of them, and another the Intereſt in them [c].

[c] Tr. 17 Car. B. R. March 106.

Senior *Fitzjames*, Chief Juſtice of *England*, deviſed his Lands to *Nicholas Fitzjames* in Tail, with divers Remainders over; and deviſed the *Uſe and Occupation* of his Jewels and Plate to *Nicholas Fitz-james*, and the Heirs Males of his Body, according to the Eſtate in the Land: Adjudged, that *Nicholas* had no Property in the Goods, but only the Uſe and Occupation [d].

[d] T. 7 El. Sen' *Fitzjames*'s Caſe, Owen 33.

A. is poſſeſſed of ſix marble Statues, and a great Quantity of other Marble; he deviſeth two of his marble Statues, and all his other Marble to *B.* in this Caſe the other four Statues will not paſs to *B.* by Reaſon of the Intent of the Teſtator, who expreſly gave him two [e].

[e] L. 1. de aur. & argent. legat. & L. legat. de ſupellect. legat. & L. hæres meus. §. duæ & gloſſ. ibid. de legat. 3. Dict. L. legat. & Cujac. in dict. L.

If I deviſe my Houſe to *A.* with all the Things therein when I ſhall die, ſuch Things as are there only by Chance, and did not uſe to be there, ſhall not paſs by that Deviſe; yet ſuch Things ſhall paſs which uſed to be there, though by ſome Accident they were not then there; but Money found there, which not long before was received from Debtors, and intended to be again lent out, doth not paſs by ſuch Deviſe [f].

[f] L. ſi ita legat. & gloſ. ibid. de legat. 3.

If a Man doth deviſe all that he doth poſſeſs in *London*, his Books of Accounts, or Caſh in his Cheſts, which he hath in *London*, do not paſs by ſuch general Words [g].

[g] L. uxorem §. legaverat. & gloſſ. ibid. de legat. 3.

A Man having two Horſes, doth by his Will deviſe the two Horſes which he ſhall have at the Time of his Deceaſe; after the Teſtator ſells his two Horſes, and at his Death hath two Mares only; in this Caſe

[h] L. qui duos. & gloſſ. ibid. de legat. 3.

Caſe the Legatary ſhall have the two Mares, becauſe in Conſtruction of Law the Feminine in ſuch Caſes is compriſed in the Maſculine [h].

[i] L. mortuo bove. & gloſſ. ibid. de legat. 2.

A Teſtator bequeaths an Ox to one, the Ox dies before the Day comes for the Delivery of it to the Legatary, he ſhall have neither his Fleſh nor his Hide; otherwiſe if he had died after the Day for the Delivery thereof was come [i].

[k] 26 Eliz. le Counteſs de *Northumberland*'s Caſe, Owen 124.

The Earl of *Northumberland* deviſed by his Will his *Jewels* to his Wife, and died poſſeſſed of a Collar of SS, and of a Garter of Gold, and of a Button annexed to his Bonnet; and alſo of many other Buttons of Gold and precious Stones annexed to his Robes, and of many other Chains, Bracelets, and Rings of Gold, and precious Stones. Reſolved, that the Garter and Collar of SS did not paſs, becauſe they were not properly Jewels, but Enſigns of Honour and State; and that the Buckle of his Bonnet and the Button did not paſs, becauſe they are annexed to his Robes, and were no Jewels; but for the other Chains, Bracelets and Jewels, they did paſs [k].

[l] L. cum optionibus. de optionibus legat.

A. B. being poſſeſſed of ſeveral Houſes by Leaſe, doth deviſe two of them unto *C. D.* ſuch as he ſhall chuſe, or two of them to *C. D.* whether he will, the reſt to *J. G.* In this Caſe, if *C. D.* refuſe to take by this Deviſe, and will chuſe neither of the ſaid Houſes, *J. G.* ſhall have them all [l].

[m] Gloſſ. in L. a vobis. de annuis legat.

If a Teſtator appoint his Executors to pay unto *A. B.* the Sum of 10*l. per Annum*, and he live ſix Years and four Months, the Executors of *A. B.* ſhall receive 10*l.* for the whole ſeventh Year; becauſe ſuch an Annuity is due in the Beginning of every Year, when no certain Time is ſet by the Teſtator for the Payment of it [m].

[n] T. 6 Car. B. R. *Sparke* verſus *Denn*, Jones Rep. fo 225. *Danvers* verſus *Earl of Clarendon*, 1 Vernon 35.

A Man deviſed all his moveable Goods and Chattels: Debts due to the Teſtator did not paſs by this Deviſe; becauſe Debts are *jura*, and cannot be deviſed by thoſe Words [n].

Deviſe of all his Goods in *Cornbury-houſe* to the Lady *Gargrave for Life*, and after her Deceaſe to *the Heir* of Sir *John Danvers*; he who was Heir died in the Life-time of the Lady; the Queſtion was, whether he who was then Heir ſhall take theſe Goods as Deviſee, and being now dead, ſhall go to his Executor; or whether he who was Heir to Sir *John at the Time of his Death* ſhall have them; and adjudged that he who was Heir at his Death ſhall have them.

Catchmay verſus *Nicholas*, Chanc. Caſes 116.

The Teſtator being poſſeſſed of a good perſonal Eſtate, deviſed the ſame to his Siſter *Catharine for Life*, and after her Deceaſe, then 400*l.* a-piece to his four Nieces, (naming them) and made the ſaid *Catharine* Executrix, and died: It was inſiſted that this was a void Legacy as to the Nieces, it being the Deviſe of a Remainder of perſonal Things after the Death of another; but decreed that, becauſe *Catharine was by the Will to receive the Profits during her Life only*, ſhe was therefore in Nature of a Truſtee for the Legacies bequeathed to the Nieces.

Gibſon verſ. *Kinven*, 1 Vernon 66.

The Teſtator having two Sons and two Daughters, and being poſſeſſed of a perſonal Eſtate, deviſed it to his Wife *upon Truſt, that ſhe would not diſpoſe thereof, but for the Benefit of her Children*; ſhe afterwards deviſed 5*s.* to one of her Children, and all the reſt of her Eſtate to another: It was the Opinion of Sir *Francis Pemberton*, that notwithſtanding theſe Words *upon Truſt, &c.* yet ſhe being Executrix might diſpoſe it to which of her Children ſhe would, and that ſhe was not bound to divide it equally; but the Lord Chancellor *Finch* was of another Opinion, and decreed an equal Diſtribution.

§. VII. Of aſſigning Tutors, and diſpoſing of Childrens Portions during their Minorities, generally conſidered.

1. *Many Queſtions about the Tuition of Children.*
2. *The Matter of Tuitions both large and uncertain.*

IF I ſhould undertake to ſpeak fully of the Aſſignment or Appointing of Tutors to Children, and Cuſtody of their Portions or other Rights during their Nonage, (1) many Queſtions would offer themſelves to be handled, (namely, who may grant the Tuition, of whom, to whom, after what Manner, what is the Office and Authority of a Tutor, when the Tuition is finiſhed, what Action the Pupil hath againſt the Tutor for the Recovery of his Rights; or the Tutor againſt the Pupil for the Charge of his Education, and Conſervation of ſuch Things as are due to the Child; and finally, if the Tutor teſtamentary excuſe himſelf, or refuſe the Tutorſhip, what Order is to be taken in the Behalf of the Child;) which Queſtions are ſo ample, and miniſter Abundance of Matter, that it is not poſſible to apprehend the ſame within any Compaſs fit for this brief Treatiſe: But farther, the Cuſtoms of this Realm are ſo (2) contrary one to another, which do concern this Matter, that I might eaſily fall into divers Errors.

Wherefore, for that this Matter ſhould not exceed the Proportion of a juſt Member, I thought it better to refer the Reader to the Learned of every Place, of whom he may be more ſufficiently certified of their particular Cuſtoms, than to fill up this Volume with them and contrary Obſervations, of Countries and Places within this Realm, whereof I can obtain no ſounder Warrant, nor better Aſſurance of the Legality thereof, than the bare Reports and Relations of others.

Howbeit, foraſmuch as within the Province of *York*, I my ſelf have had ſome reaſonable Experience in theſe Affairs for many Years, I thought it not amiſs briefly to ſignify what is there obſerved.

§. VIII. Of the Committing of the Tuition of Children, and Cuſtody of their Portions, within the Province of *York*.

1. *No Parents in any Country have like Power over their Children as had the* Romans.
2. *Whence the Authority of aſſigning Children did deſcend.*
3. *The Cuſtoms of the* North *Parts of this Realm do very much reſemble the Civil Law.*

THough (1) neither within this Realm of *England*, nor within any Realm Chriſtian, any Parents have the like Power over their Children as had the *Romans* °, to whom alone that *patria poteſtas*

° §. Jus autem. Inſtit. de tutelis, & ibi gloſſ. in qua enumerantur ſeptem aut octo, in quibus jus patriæ poteſtatis conſiſtit.

teſtas was proper and peculiar [p]; which was (2) the chief Cauſe whereby they did and might by their Teſtaments commit the Bodies of their Children, and their Portions, at their Pleaſures, to the Cuſtody of others, according to the Civil Law [q]; yet (3) in divers Places within this Realm, and namely throughout the *Province of York*, there doth remain a certain Reſemblance of that Power and Determination of the Civil Law; as in many other Things, ſo alſo in the Aſſigning or Appointing of Tutors by their Teſtaments or laſt Wills [r]; whether we regard the Perſon of the Teſtator, or of him that is aſſigned Tutor, or of the Children, or the Manner of Aſſignation, or the Office and Authority of the Tutor, or the Means whereby the Tuition is ended, which I muſt only point at.

[p] Eod. §. nec non tract. de repub. Angl. lib. 3. c. 7. Intellige tamen ut in gloſſ. in d. §. Jus autem.

[q] L. 1. ff. de teſta. tutel. §. permiſſum. Inſtit. de tutel.

[r] Ut patet ex his quæ ſubſequuntur §§. 9, 10, 11, 12, 13, 14.

§. IX. Who may appoint a Tutor.

1. *The Father may appoint a Tutor by his Teſtament or laſt Will.*
2. *Whether the Mother may appoint a Tutor.*
3. *Whether a Stranger may appoint a Tutor.*
4. *Whether the Ordinary may aſſign a Tutor.*

UNderſtand therefore, that by general Cuſtom obſerved within the Province of *York* [*], (1) the Father, by his laſt Will or Teſtament, may for a Time commit the Tuition of his Child, and the Cuſtody of his Portion [s]; for within that Province Children have their filial Portions of their Fathers Goods, according to the Civil Law [t]; except he be Heir, or advanced in the Life-time of his Father [u]; which Teſtament and Aſſignation is to be confirmed by the Ordinary [x], who alſo is to provide for the Execution of the ſame Teſtament [y].

[*] De qua conſuetudine apertiſſime, per indubitatæ fidei acta & inſtrumenta antiqua in archivis Archiepiſcopi Ebor. repoſita, conſtat.

[s] Fateor quidem noſtratium liberos ab illa patria poteſtate fere ſolutos, & quaſi emancipatos eſſe, ut refert D. Smith in ſuo tract. de repub. Angliæ. Quin tamen hæc conſuetudo, quæ vel præcipue in partibus Borealibus viget, ſumma nitatur æquitate & ratione, negari non poteſt. Quis enim diligentius de pupilli rebus cogitat, quam parentes? aut cui majori curæ eſſe poterit? ut ex eo maxime, quamtumvis nulla alia ſubeſſet cauſa, iis liceret morientibus in Teſtamentis ſuis deſignare liberis vice parentis eos, quorum experta fide, norunt futuros eſſe liberis ſuis tutores, id eſt tuitores, ſive defenſores. [t] Et quidem debetur eadem prorſus quantitas: nam ut quandoque triens, quandoque ſemis competit, (auth. noviſſimo. C. de inoffic. teſtimon.) pro numero liberorum; ita jure quo nos utimur, media pars debetur liberis, nulla relicta uxore, qua ſuperſtite, tertia pars bonorum iis competere dignoſcitur. Infr. ead. part. §. 16. [u] Vid. infra ead. part. §. 16. [x] Id quod jure civili conſonat. ſc. ſi pater filio emancipato tutorem aſſignaverit, omnino Judicis ſententia confirmandus eſt. §. fin. Inſtit. de tutel. [y] Infra part. 6. §. 1.

If the Father die, no Tutor being by him aſſigned, and (2) the Mother do in her laſt Will and Teſtament appoint a Tutor, the ſame Will is to be proved, and the Aſſignation of the Tutor confirmed [z].

[z] Confirmatur quidem tutor a matre datus, ſed cum inquiſitione, propter fragile mulieris conſilium. Sufficit vero modica inquiſitio, filius ſi inſtituatur, alias requiritur magna. L. mater. C. de teſta. tutel. L. 2. ff. de confir. tut. Bar. in L. naturali. §. ſi quæratur eod.

And if no Tutor be aſſigned by either of the Parents, then (3) may a Stranger, if he make the Orphan his Executor, and give him his Goods, aſſign a Tutor unto him [a]; which Tutor is by the Ordinary to be confirmed [b].

[a] L. patronus. ff. de confir. tut. nam qui inſtituit impuberem, videtur eum eligere quaſi in filium: & ipſe habetur loco patris. Bald. in d. L. ſi patronus. [b] d. L. ſi patronus.

And

And if there be no Tutor teſtamentary at all, then (4) may the Ordinary commit the Tuition of the Child to his next Kinſman [c], demanding the ſame, according as in Adminiſtrations where any dieth Inteſtate [d]; ſo that the Child be not Ward, for then the Ordinary may not diſpoſe of the Cuſtody of his Perſon, as is hereafter declared [e].

[c] De hac poteſtate teſtimonium non obſcurum perhibent omnia fere acta & inſtrumenta, tum recentia tum antiqua, in Archivis publicis Archiepiſcopi Ebor. fideliter cuſtodita.

[d] Nam ubi ſucceſſionis emolumentum, ibi reſidet tutelæ onus. L. 1. ff. de tutel.

[e] Infra ead. part. §. 11.

§. X. Who may be appointed a Tutor.

1. *He that cannot be Executor, cannot be Tutor.*
2. *Whether he that is under Age, or Lunatick, may be appointed Tutor.*
3. *Whether a Woman may be Tutrix.*

ANY Perſon may be aſſigned Tutor which is not forbidden [f]. Who is forbidden, may appear by that which is hereafter ſpoken of an Executor [g]; for (1) he that cannot be an Executor, cannot be a Tutor [h].

[f] Quando excipiuntur aliqui, reliqui proculdubio admittuntur. Nam firmat exceptio regulam in non exceptis. Dec. & Cagnol. in L. 1. de reg. jur. ff.

[g] Infra part 5.

[h] Teſta. ff. de teſta. tutel.

He (2) that is not Twenty-one Years old, or is not of perfect Mind and Memory, may be aſſigned Tutor; but it is to be underſtood, that he ſhall be Tutor when he is of full Age, or when he doth return to Sanity of Mind [i].

[i] §. furioſus. Inſtit. qui tut. teſta. dari poſ.

By the Civil Law, (3) a Woman (the Mother and Grandmother excepted) cannot be aſſigned Tutrix [k]; but it is not obſerved as a Law within the Province of *York*, where not only the Mother and Grandmother are admitted, but other Women alſo; albeit they be married, and under the Government of their Husbands [l].

[k] L. jure noſtro. lib. 2. teſta. tuit. ff.

[l] Ut per acta & inſtrumenta d. ſcaccar. Archiepiſcopi Ebor.

An Action of Treſpaſs was brought by the Mother, *Quare* N. *filiam & hæredem ſuam rapuit & abduxit. Per Catesby*: Such a Writ lieth not for the Mother, but it lieth for the Father; for he of common Right ſhall have the Wardſhip of his Son or Daughter [m].

[m] 9 E. 4. fol. 53. Brook tit. gard. pl. 55.

§. XI. To whom a Tutor may be appointed.

1. *A Tutor may be aſſigned to him that is not fourteen Years old, and to her that hath not accompliſhed Twelve.*
2. *After Fourteen and Twelve he and ſhe may chuſe their Curators.*
3. *When the Curator is to be confirmed.*
4. *A Tutor may be aſſigned to the Child unborn.*
5. *No Tutor can be aſſigned unto him that is Ward, by Reaſon of his Lands.*
6. *Neither to Infants or Idiots, Wards.*
7. *Who ſhall have the Wardſhip of a Child that hath Lands.*
8. *What the Guardian may do.*
9. *The hard Eſtate of Wards.*

10. *All*

10. *All Infants Wards are not ſubject to like Conditions.*
11. *Who ſhall be Guardian to the Infant which hath Lands in Socage.*
12. *Prochein Amy accountable to the Ward after his full Age.*
13. *Idiots in the Cuſtody of the Prince.*
14. *Whether the Cuſtody of an Infant or Idiot may be deviſed by the Teſtator.*

BY the ſaid Cuſtom generally obſerved within the Province of *York*, (1) a Tutor may be aſſigned to a Boy at any Time until he have accompliſhed the Age of fourteen Years, and to a Wench until ſhe have accompliſhed the Age of twelve Years[n]. But (2) after thoſe Years, he or ſhe reſpectively may chuſe their own Curators, notwithſtanding their Father's Will[o]. But if they do not elect any other Curator after their ſeveral Ages, (3) then he that is aſſigned in the Will is to be confirmed Curator to either of the ſaid Children, albeit he were above fourteen Years, and ſhe above twelve, when the Will was made[p].

[n] L. tutel. C. de teſta. tut. §. permiſſum. Inſtit. de tut. tit. quibus modis tut. finitur. Inſtit. in prin.
[o] §. Item inviti. Inſt. de curator L. divus. §. curatores. ff. qui petunt. L. matris. C. eod. in fin. quam op. longævus approbavit uſus.
[p] L. tutelæ C. de teſta. tut. §. dantur. Inſt. de cura.

A (4) Tutor may alſo be aſſigned to a Child that is not born[q]; likewiſe to an Idiot, or him that is lunatic[r].

[q] §. cum autem. Inſt. de tut.
[r] §. furioſi. Inſtit. de cur. & licet hujuſmodi perſonæ majores ſint 25 annis, erunt ſub curatione. d. §. furioſi. An hæc authoritas ſit penes teſtatorem, vel ordinarium, an ad regem ſpectet jure prærogat. Quære infra in d. §.

But all this which is here aforeſaid is to be reſtrained, ſo that it (5, 6) be not to the Prejudice of him that is a Guardian, or hath the Wardſhip of any Infant or Minor[s]; or of any Idiot, by Reaſon of any Lands, Tenements or Hereditaments, belonging to ſuch Infant or Idiot[t]. For by the Common Laws of this Realm of *England*, (7) the Lord of whom the Infant doth hold his Lands, ſo ſoon as the Father dieth, hath the Wardſhip and Keeping of the Heir; and thereby (8) may ſeiſe upon the Body of the Ward and his Lands[u], whereof he may alſo take the Profits without Account, ſo that he nouriſh and bring up the Ward[x]; and not that only, but alſo offering to his Ward convenable Marriage, without Diſparagement, before one and twenty Years, if it be a Man, or fourteen, if it be a Woman; if the Ward refuſe to take that Marriage, he or ſhe muſt pay the Value of the Marriage[y]; which is commonly rated according to the Profits of his Lands. Which (9) is a Thing utterly condemned of ſome, and greatly lamented of many, both grave and godly, becauſe of the unſatiable Covetouſneſs of divers in theſe Days[z]. For that thereby it cometh to paſs many Times, that a Freeman and a Gentleman, whilſt he is an Infant of ſlender Diſcretion, and leſs Experience, deſtitute of his beſt Friend, that is to ſay, his natural Father, and conſequently ſubject to the Subtilties and Importunities of his crafty and covetous Gaoler, is bought and ſold like a Beaſt to ſuch as ſeek to make moſt Advantage of him; and in the End, beſides many more Inconveniences, matched to my Maſter's Daughter, Siſter, Couſin, or ſome other Female, to whom, for her Virtues and gentle Conditions, if thine Enemy ſhould be preferred in Marriage, thou couldſt wiſh him no greater Torment, (if it were lawful for thee to wiſh him any Torment,) Hell excepted.

[s] Habenti tutorem tutor non eſt dandus. §. interdum. Inſt. de cura.
[t] Stat. prærogat. regis, c. 9. Fitz. Breve de idiota inquirendo.
[u] Tract. de rep. Ang. lib. 3. c. 5. per ſtat. de prærog. regis, an. 17 E. 2. c. 1 & 6.
[x] de tract. de rep. Ang.
[y] Stat. Weſt. c. 22.
[z] Vide d. tract. de repub. Ang. lib. 3. c. 5. *Terms of Law*, verb. Gardein.

To theſe Perils are theſe Infants ſubject which hold Lands of others by Knights-Service, called in *French Garde noble*[a]; for there (10) is another Kind of Service, called *Gard Returier, alias Gard in Socage*, or Tenure by the Plough[b]. This Wardſhip (11) falleth to him that is next of Kin, and cannot inherit the Land of the Ward[c]; as the Uncle on the Mother's Side, if the Land deſcend by the Father, or the Uncle on the Father's Side, if the Land deſcend by the Mother[d].

[a] d. tract. eod. c. 5.

[b] Eodem loco.

[c] Stat. Marleb. c. 17. an. 52 H. 3.

[d] Brook, tit. gardein & prochein amie, n. 11, 12, 13. *Terms of Law*, verb. prochein amie.

But now by the Statute 12 *Car.* 2. all Tenures by *Knights-Service in Capite* and *Socage in Capite* are taken away, and all Tenures are turned into *free and common Socage*; and by that Statute, a Father though under Age himſelf, or of full Age, having a Child under Age, and unmarried at the Time of his Death, whether then born or in the Mother's Womb, may by Deed in his Life-time, or by Will in the Preſence of two Witneſſes, diſpoſe the Cuſtody of ſuch Child or Children during Nonage, to any in Poſſeſſion or Remainder (excepting to Papiſts) which Perſon may maintain an Action of Raviſhment of Ward or Treſpaſs againſt wrongful Takers away or Detainers of ſuch Child, and recover Damages for the Uſe of the Child, and may take the Profits of the Lands and Tenements for the Uſe of ſuch Child, and the Cuſtody of his perſonal Eſtate according to ſuch Diſpoſition, and may bring Actions in Relation thereunto, as a Guardian in common Socage might do.

12 Car. 2. c. 23.

Before this Statute, if Tenant by Knight-Service had deviſed the Guardianſhip of his Heir, it had been void as to the Lord; for he was to have the Guardianſhip by Reaſon of the Tenure of the Land.

Keilw. 186.

And if *Tenant in Socage* had diſpoſed the Cuſtody of his Heir, it had been void; becauſe the Law gave that to the next of Kin to whom the Land could not deſcend; and if there had been a ſpecial Guardian, he could not transfer or aſſign the Cuſtody of his Ward, either by Deed or Will, becauſe the Truſt was perſonal, and therefore not aſſignable; neither ſhould it ſurvive to the Executors, but determine by the Death of the Guardian.

Bedell v. *Conſtable*, Vaugh. 180.

Since the Statute it hath been adjudged, that a *Copyholder* is not within the Act to diſpoſe the Cuſtody of his Child, for that belongs to the Lord of the Manor, not *de jure*, but according to the Cuſtom of the Manor; for if there is no ſuch Cuſtom, then the next of Kin, to whom the Land cannot deſcend, ſhall have the Cuſtody of the Infant and his Lands.

Clench v. *Cudmore*, 3 Lev. 395. 2 Lutw. 1181. S. C.

This (12) Guardian, otherwiſe called *prochein amie*, is accountable for the Profits and Revenues of the Land to the Ward, as the Tutor for the Goods and Chattels to the Pupil, when he is of full Age[e].

[e] d. ſtat. Marleb. c. 17. tract. de rep. Angl. lib. 3. c. 5.

Concerning Idiots, ſuch is the Prerogative of (13) the Princes of this Land, that they ſhall have the Cuſtody of all the Lands of natural Fools, and may take the Profit thereof without Waſte or Deſtruction, of whoſe Fee ſoever the ſame be holden, finding to them Neceſſaries[f]: And after the Death of ſuch Idiots, the Lands muſt be reſtored to the right Heirs[g]. But (14) in the mean Time, that is to ſay, during the Nonage of the Ward, or during the Life of the Idiot, the Tuition of the Body of the Ward or Idiot, or of his Lands, cannot

[f] Stat. Ed. 2. de prærog. reg. c. 9.

[g] Eod. ſtat.

not be deviſed by Teſtament to any other Perſon contrary to the Courſe of Common Law, in Prejudice of him to whom the Wardſhip doth belong[h]; ſaving the Teſtator may commit the Cuſtody of ſuch Goods and Chattels, as he doth bequeath to the ſaid Infant or Idiot, to whom he will, and during ſo long Time as he will[i]. If the Idiot have Copyhold Land, the Copyhold of this Idiot is not within the Survey of the Court of Wards, but ſhall be ordered in the Lord's Court, according to the Cuſtom of the Manor as touching this Point[k]. Alſo if a Copyholder die ſole ſeiſed of any Lands or Tenements ſo holden, his Heir being of the Age of fourteen Years, then he ſhall pay a Fine unto the Lord, and do Fealty, and be admitted Tenant. But if the Heir be within the Age of fourteen Years, then ſome Guardian ſhould be admitted to occupy his Copyhold, and to pay, and do his Service due for the ſame; that is to ſay, if the Lands deſcend from the Father, then the Mother, or ſome of her next Kin, ſhall have the Occupation of the ſame Lands until the Heir be of the Age of fourteen Years; and they ſhall pay a little Fine for the Guardianſhip, and the Heir at his Entry ſhall pay the whole Fine[l].

[h] Quia tutorem habenti tutor non datur.

[i] Siquidem unuſquiſque poteſt rebus ſuis quam velit legem imponere. Mantic. lib. 7. tit. n. 38. & teſtatoris voluntas habetur pro lege L. ſervus ff. de manumiſſ. licet aliàs videatur per Fitzh. Nat. Brev. de idiota inquirendo, quod bona quæ idiotæ obveniunt ſuo gardiano accreſcunt. Quære tamen per Stamford, ſup. d. prærog. reg. c. Idiot. vide Dyer, fo. 303. Anno 13 Eliz.

[k] Dyer, fol. 303. Anno 13 Eliz.

[l] Jonas Adams Court-Baron, fol. 14.

If a Copyholder be lunatic, and the Lord of the Manor commit the Cuſtody of his Land unto *J. S.* and Treſpaſs is done to the Land, the Action of Treſpaſs ought to be brought in the Name of the Lunatic, and not of the Committee; for the Committee is but as Bailiff, and hath no Intereſt, but for the Profit and Benefit of the Lunatic, and is as his Servant; and it is contrary to the Nature of his Authority, to have an Action in his own Name, for the Intereſt and the Eſtate, and all Power of Suits, is remaining in the Lunatic. And it hath been adjudged, that a Lunatic ſhall have a *Quare Impedit* in his own Name. *Vide Beverley*'s Caſe, *C. lib.* 4. the Difference between a Lunatic and an Idiot. *Per Curiam*, The Lord of a Manor hath not Power to commit or diſpoſe of the Copyhold of a Lunatic without ſpecial Cuſtom; neither can he commit during the Minority of an Infant Copyholder without Cuſtom[m]. When a Lunatic cometh to his ſane Memory, he ſhall have an Account of the Profits of his Land; but in Caſe of an Idiot it is otherwiſe; for the King or his Patentee ſhall have them to their own Benefit[n].

[m] P. 16 Jac. Hutton's Rep. fol. 16.

[n] 28 H. 8. Dyer, fol. 26.

Chan. Caſes 200. *Corcellis* v. *Corcellis.* A Guardian brought an Action of Treſpaſs againſt the Defendant for detaining the Infant to whom he was Guardian; and upon a Bill in Equity to be relieved againſt that Action, he pleaded, that *N. C.* did by his laſt Will *deciſe the Guardianſhip* of his Son to the Plaintiff in this Action, and the Management of his Eſtate, and made him Executor; and this was allowed to be a good Plea.

L^d. Shaftsbury verſus *Lady Hannam*, Chan. Caſes 323. The Guardianſhip of an Infant was given to *A. S.* by Deed, and to the Mother by the laſt Will of the Father; and it was decreed, that the Will was a Revocation of the Deed, and that the Mother had a good Title to the Guardianſhip.

2 Chan. Rep. 237. The Father deviſed the Guardianſhip of his Son (being ſeven Years old) to his Mother in Law, and died; the Widow married her Servant, and being poor, the Uncle got the Poſſeſſion of the Infant, and ſent him beyond Sea; but the *Lord Chancellor* ordered, that he ſhould be returned to the Mother; for where a Guardian is appointed by Virtue of the Statute, this Court cannot remove the Child or

Guardian, but can make her give Security not to marry the Infant without acquainting the Court; if the Guardianſhip had been at Common Law, then the Court might interpoſe.

The Father of the Plaintiff, the Infant, owed the Defendant Money, and by Deed granted him the Guardianſhip of his Children, with a Covenant in the Deed not to revoke it, and a Bond of 500*l.* Penalty to perform Covenants; and upon a Bill brought againſt the Guardian to have an Account, *&c.* and to remove him; yet becauſe there was a juſt Debt due to him, the Court would not reſtrain him from receiving the Rents and Profits of the Infant's Eſtate. 1 Vernon 442. *Lecone* verſ. *Shires.*

§. XII. Of the Manner of appointing Tutors.

1. *A Tutor may be appointed ſimply or conditionally, to a Day, or from a Day.*
2. *The Condition depending, what is to be done in the mean Time.*
3. *Lawful to appoint one or many Tutors.*
4. *Whether where one Tutor is appointed, another may be received.*
5. *Whether divers being aſſigned, one Tutor alone may be admitted.*
6. *By what Words a Tutor may be appointed.*
7. *What if the Teſtator ſay, I commit my Children to thy Power, or to thy Hands?*
8. *What if he ſay, I commit my Children unto thee quick and dead?*
9. *What if he ſay, I deſire thee to take Care of my Son?*
10. *The Teſtator may uſe any Language in the Aſſignation of a Tutor.*

BY the ſaid general Cuſtom, it is obſerved within the Province of *York* [a], that (1) a Tutor may be aſſigned either ſimply or conditionally [b], and until a certain Time, or from a certain Time [c]. But no Tutor may intermeddle as Tutor, until he be confirmed by the Ordinary, albeit he be aſſigned Tutor ſimply [d]; much leſs where he is aſſigned conditionally, or from a certain Time, may he intermeddle as Tutor, until the Condition be extant [e], or the Time limited be expired [f]. But the Ordinary (2) may in the mean Time commit the Tuition; and he that is ſo appointed by the Ordinary may for that Time adminiſter [g].

[a] De qua perplurima acta & teſta. in d. ſcaccario exiſt.
[b] §. ad certum. Inſtit. qui teſta. tutor dari poſſ.
[c] Eod. §. ad certum. L. tutor. §. tutorem. de teſtament. tut. ff.
[d] L. legitimus. & ibi Bar. ff. de legit. tutel.
[e] L. qui ſub conditione. ff. de teſta. tutel.
[f] d. L. qui ſub conditione.
[g] Bar. & alii in d. L. qui ſub conditione.

Moreover, (3) it is lawful to appoint either one Tutor alone, or many together [h]. Where (4) one alone is appointed Tutor by the Teſtator, the Ordinary ought not to join another Tutor [i]; unleſs he that is named Tutor be lunatic [k], or be abſent about the Affairs of the Commonwealth [l]; for in theſe and other like Caſes another Tutor may be joined [m], at leaſt during the Impediment. Where (5) divers are appointed, there one alone may adminiſter [n]. Which Concluſion doth proceed with leſs Difficulty, when the Co-tutors cannot or will not

[h] L. ſi plures. ff. de teſta. tut.
[i] §. Interdum. Inſtit. de cura.
[k] L. non. ſolum. §. ult. ff. de excuſ. tut. gloſſ. in d. §. interdum. Inſt. de curator.
[l] L. tutor. ſi quis abſuturus. ff. de ſuſpect. tut.
[m] Gloſſ. & Minſing. in d. §. interdum. Inſtit. de cur.
[n] L. 3. de adminiſt. tut. ff.

not meddle [o], or transfer their Authority to him that dealeth [p]; for they may do that, and ſo alſo be his Sureties [q].

[o] L. legitimos. § in legitimis. ff. de legit. tut. L. 47. de adminiſt. tut. ab his.

[p] Bald. in L. qui pupil. C. de negotiis geſt.

[q] L. Romanus. ff. de tutor. vel curator. dat.

It is not (6) material by what Words the Tutor is appointed, ſo that the Teſtator's Meaning do appear; for they are nevertheleſs to be confirmed Tutors [r].

[r] L. 1. de confir. tut. ff. & ibi. Bar. L. quoniam. C. de teſta. Socin. conſil. 83. vol. 1.

Wherefore (7) if the Teſtator ſay, I commit my Children to the Power of *A. B.* or, I leave them in his Hands, it is in Effect as if the Teſtator had ſaid, I make *A. B.* Tutor to my Children [s]. So it is, if he ſay, I leave them to his Government, Regiment, Adminiſtration, *&c* [t].

[s] Jaſ. in L. manumiſſionis. ff. de juſtit. & jure. Boer. deciſ. 124. ubi atteſtatur hanc opinionem & tutiorem & veriorem eſſe.

[t] Molin. in addic. ad Decium in c. ex part. de app. ext. Socin. conſil. 83. vol. 1.

If (8) the Teſtator ſay, I commit my Son to *A. B.* both quick and dead, with all his Legacies by me given; by theſe Words it is preſumed that the Teſtator meant, that *A. B.* ſhould be Tutor to his Child, if he lived; and if he died, then to have thoſe Legacies [u].

[u] Soc. in d. conſil. 83.

If (9) the Teſtator ſay, I deſire my Wife to take Care of my Children during their Minorities; albeit theſe Words do not neceſſarily infer or conclude a Tuition of their own Nature, but rather that ſhe ſhould chaſtiſe them, when they deſerved to be corrected [x]; (for, to have Tuition of Children is a greater Thing, and extendeth farther, than to have a Care of them only [y];) but foraſmuch as the ruder Sort of People do not know the Difference of Terms, nor the natural Force of Words [z]; therefore, if any be aſſigned Tutor by theſe foreſaid Words, he is to be confirmed [a].

[x] Dec. in d. c. ex part. de app. extr. Boer. deciſ. 124. in prin.

[y] Dec. in d. c. ex part.

[z] Socin. d. conſil. 83. vol. 1.

[a] L. 1. de confir. tut. ff. & ita limitatur. § quanquam in L. aliena. ff. de neg. geſt. ut per Jaſ. in L. manumiſſionis. ff. de juſtit. & jur.

The ſame alſo may be ſaid, where the Teſtator doth commit his Child to the Cuſtody of another. For albeit it be a greater Thing to have the Tuition of a Child, than to have the bare Cuſtody of a Child committed unto him [b]; yet in all Things the Will and Meaning of the Teſtator is to be obſerved [c], and preferred before the Property of the Words [d], whereof perhaps he is ignorant: Which Meaning is to be collected by that which went before or followeth in the Will, and by other Circumſtances, which the Judge ought to inquire [e].

[b] Rom. ſing. 164. Dec. in c. ex part. de app. extr.

[c] d. L. 1. de confir. tut. & DD. in eand. L. Molin. in addic. ad lect. Decii in d. c. ex part. M.

[d] L. quoniam indignum C. de teſtam.

[e] Boer deciſ. 124.

Finally, (10) It is not material in what Language the Tutor be aſſigned, whether in Engliſh, Latin, Greek, or any other Tongue [f].

[f] L. ult. C. de teſta. tut.

§ XIII. Of the Office and Authority of a Tutor.

1. *The Office of a Tutor doth principally reſpect the Perſon of the Pupil.*
2. *The Office of a Tutor doth ſecondarily reſpect the good Adminiſtration of the Pupil's Goods.*
3. *The Tutor ought to make an Inventory, and is chargeable with an Account.*

4. *Whether a Tutor ought to enter into Bonds for the Performance of his Office.*
5. *Of the Authority of a Tutor.*
6. *Whether the Tutor may alienate the Goods of the Pupil.*

THE Office and Authority of the Guardian, or him that hath the Wardſhip of an Infant, by Reaſon of any Lands, Tenements or Hereditaments, whether the ſame be holden by Knights-Service, or by Socage-Tenure, is already declared [a]; wherefore in this Place I ſhall only touch the Office and Authority of a Tutor, according to the Cuſtom obſerved within the Province of *York*, not greatly differing from the Diſpoſition of the Civil Law.

[a] Supra ead. part. §. 1. n. 8, 9.

This therefore is the Office of a Tutor. Firſt and (1) principally, to defend the Perſon of his Pupil [b]; that is to ſay, to provide that he be honeſtly and virtuouſly brought up, and to provide for him Meat, Drink, Clothes, Lodging, and other Neceſſaries, according to the Child's Eſtate or Condition, and Ability [c].

[b] Inde tutores quaſi tuitores, id eſt, defenſores, a tuendo & defendendo, appellantur; ſicut æditui dicuntur, qui ædes tuentur § tutores. Inſtit. de tutel. L. ff. eod.

[c] Nec tantum alimenta præſtari debent pupillo, ſed etiam in ſtudia impenſæ debent impendi pro facultate patrimonii, & dignitate natalium. Wigand. Happel. tract. de tut. tit. 138. n. 44. fol. 350.

Secondarily, (2) The Office of a Tutor conſiſteth in the good and faithful Adminiſtring or Diſpoſing of the Goods and Chattels of the ſaid Pupil [d]: That is to ſay, the Tutor may not commit any Thing that may be hurtful, nor omit any Thing that may be profitable to his Pupil [e]; and in the End muſt reſtore unto the Pupil all his Goods and Chattels, by him the ſaid Tutor before received [f]. And for that Purpoſe (3) every Tutor ought, even at the very Entry into his Office, to make a true Inventory of all the Goods and Chattels of his Pupil [g]; and to make a juſt and true Account of his Dealings in the Behalf of his Pupil [h]. And it is generally obſerved within the ſaid Province, that (4) every Tutor, as well Teſtamentary as other appointed by the Ordinary, doth enter into Bond with Sureties to the Effect aforeſaid, according to the Diſcretion of the Ordinary [i].

[d] § datus. Inſtit. de excuſ. tut. & Minſing. ibidem.

[e] Latius de offic. tutoris Happel tract. de tut. tit. 38. per totum.

[f] L. tutorem quendam. C. de arbitr. tut. Olden. de action. claſſ. 4. action. tut. direct.

[g] L. Tutor qui repertorium. ff. de adminiſtr. tut. L. tutores, vel curatores. C. de adminiſt. tut. Bar. in d. L. tutor.

[h] L. 1. § offic. de tut. & ration. diſtrahend. ff.

[i] Hoc uſitatiſſimum eſſe infr. provinc. Ebor. certo certius eſt; utcunque jure civili tutor teſtatorius, vel dativus, ſatiſdare non teneatur. L. teſtamento. de teſta. tutel. L. 2. de confir. tut. ff.

Concerning the (5) Authority of a Tutor, as ſoon as he is confirmed, he may ſeiſe upon the Body of the Pupil [k], and may likewiſe take Poſſeſſion of all his Goods [l]. And if any do convey away the Perſon of the ſaid Pupil, he may be convented, and in the End compelled to reſtore him [m]. Likewiſe if any Perſon do detain any Thing belonging to his ſaid Pupil, recoverable in the Eccleſiaſtical Court, he is uſually convented by the Tutor in Behalf of the Pupil [n].

[k] Aymo conſil. 18.

[l] L. 1. ff. de adminiſtr. tut.

[m] Gabr. lib. 5. com. concluſ. c. 1. n. 41. poſt Caſ. conſil. 120. Aymo conſ. 18. n. 6. forte etiam incidit in ſententiam excommunicationis, quia impedit executionem teſtamenti, per c. ſtatu. de teſta. lib. 3. provinci. conſtit. Cant. Fitzh. Nat. Bre. fol. 44.

[n] Sed an debet agere, vel conveniri nomine tutorio, Bar. in L. 1. § ſufficit. ff. de adminiſt. tutel. Brook Abridg. tit. Garthel. 2.

Furthermore, (6) The Tutor may ſell ſuch Goods belonging to the Pupil, as cannot be kept until he come to lawful Age [o]: But other Goods which may conveniently be kept until the Pupil attain to lawful Years, and eſpecially Goods immovable, the Tutor may not ſell [p]. Inſomuch that if the Father by his Laſt Will declare, that another Perſon ſhall have as well the Government and Education of his Chil-

[o] L. lex. C. de adminiſtr. tut.

[p] Eadem L. lex. & ibi Angel. & alii.

dren, as the Diſpoſing, Setting, Letting, and ordering of their Lands: Yet nevertheleſs, the Tutor in this Caſe cannot ſell the ſaid Lands by Force of the former Words; for that the Meaning of the Deviſor may be collected to be ſuch, that he would that his Land ſhould be diſpoſed and ordered after a good Manner and Order for the Profit of his Children; whereas if he ſhould ſell the Lands of the Children, that Kind of Diſpoſing thereof were after an evil Order, and contrary to the Meaning of the Teſtator [q].

[q] Dyer, fol. 26. An. 28 H. 8. n. 170.

§ XIV. By what Means the Tutorſhip is ended.

1. *The Tutorſhip is ended by divers Means.*
2. *In Reſpect of the Pupil, the Tutorſhip is ended when he cometh to lawful Age.*
3. *Sufficient Age in a Man at One and twenty, ſometimes at Fourteen.*
4. *Sufficient Age in a Woman at Twelve, Fourteen, and Sixteen Years, in divers Reſpects.*
5. *In Reſpect of the Tutor, his Office is ended, if he cannot be Executor, or do excuſe himſelf.*
6. *Likewiſe if he be removed as ſuſpected, or become Lunatick, or Deaf and Dumb, or be abſent, and die.*
7. *How the Tutorſhip is ended in Reſpect of the Form of the Tuition.*

THE Tutorſhip (1) is ended by divers Means, whereof ſome do reſpect the Perſon of the Pupil, ſome do reſpect the Perſon of the Tutor, and ſome do reſpect the Manor and Form of the Tuition it ſelf [r].

[r] Vigel. Method. jur. civil. part 2. lib. 5. c. 8. Wigand. Happel. tract. de tut. tit. 55, 56, &c.

In (2) Reſpect of the Perſon of the Pupil, the Tutorſhip is finiſhed when the Pupil hath accompliſhed ſufficient Age. Sufficient (3) Age in a Man is ſometimes at One and twenty Years, and not before; ſometimes at Fourteen [s]. In (4) a Woman ſometimes at Twelve, ſometimes at Fourteen, and ſometimes at Sixteen [t]. He that is Ward by Reaſon of Lands holden in *Knights-Service*, is not out of Wardſhip until he be of the Age of One and twenty Years [u]. He that is Ward by Reaſon of Lands holden *in Socage*, is then out of Wardſhip when he is of the Age of Fourteen Years [x], at which Years he may refuſe his Guardian, and call him to Account [y]. At the ſame Age alſo is the Tutorſhip ended, (if he have no Lands, but Goods,) and the Minor may then alſo call his late Tutor to Account [z]: And if he will, he may then chuſe a Curator, either the ſame Perſon that was Tutor, or ſome other [a].

Altered by the Statute.

[s] Minor quibus caſibus habetur pro majore, vide Repertor. Bertachni, verb. minor. gloſſ. & DD. in c. ex part. de reſtitut. ſpol. extr.

[t] Tract. de republ. Angl. lib. 3. c. 5. Principal Grounds, fol. 35. Brook, tit. Gard. l. 2.

[u] Mag. Char. c. 3. an. 9 H. 3. Bract. de leg. & conſ. Angl. lib. 2. c. 37. Brook, tit. Gard. n. 111.

[x] *Terms of Law*, verb. Prochein amie. [y] Marleb. c. 17. an. 52 H. 3. [z] L. indecorum. C. cum tut. eſſe deſin. Inſtit. quib. mod. tut. fin. in princ. [a] Supr. ead. part. § x.

A Woman as ſoon as ſhe is Twelve Years of Age, is out of the Government of her Tutor [b]; unleſs ſhe be Ward in Reſpect of Lands, for then ſhe ſhall continue Ward until ſhe be Sixteen Years old [c]; except ſhe be of the Age of Fourteen Years at the Death of her Anceſtors: For being of thoſe Years at her Anceſtor's Death, ſhe may have an Husband able to do Knights-Service, ſhe ſhall not be Ward [d].

[b] Inſtit. quib. mod. tut. fin. in princ.

[c] Brook, tit. Gard. l. 2. n. 7. Principal Grounds, fol. 35.

[d] Tract. de republic. Ang. lib. 3. c. 5. Fitzh. Nat. Bre. fol. 141. D.

In Reſpect (5) of the Perſon of the Tutor, the Tuition is ended, if he become ſuch a one as cannot be made Executor [e], of whom Mention is made hereafter [f]; or if he juſtly excuſe himſelf [g]. (But thoſe Laws concerning excuſing of Tutors and Curators are very ſeldom or not at all practiſed; for Tutors now-a-days are ſo far from excuſing themſelves, that on the contrary they ſtrive and labour mightily to be admitted, turning that to a Benefit which was wont to be a Burthen [h].) Or (6) if the Tutor be removed as ſuſpected, the Tuition is determined [i]: (And he is ſaid to be a ſuſpected Tutor, which dealeth not faithfully in his Office [k]:) Or if the Tutor become Lunatick; or Deaf and Dumb; or in that Caſe that he cannot govern or adminiſter his Goods [l], or if he die [m]; or is abſent, being taken of the Enemy [n].

[e] L. teſtament. de teſta. tut. ff.
[f] Infra 5. part.
[g] Inſt. tit. de excuſ. tut. lib. 2. § remittit. ff. eod.
[h] Olden. in L. 12. tab. tit. 3. fol. (mihi) 55. Tract. de repub. Ang. lib. 3. cap. 5.
[i] L. ſi adrogati. § pen. ff. de tut. § pen. inſtit. de ſuſpec. tut.
[k] § ſuſpectus. Inſtit. de ſuſp. tut. vel cur.
[l] L. complurima. ff. de tutel. L. poſt ſuſceptum de excuſ. tut.
[m] L. Cujus bonis. C. de curator. furioſ.
[n] L. ſi adrogati. ff. de tutel.

In Reſpect (7) of the Manner and Form of the Tuition, the Office and Authority of the Tutor is determined; as if the Tutor be appointed upon Condition, which Condition is broken; or if the Tutor be appointed during a certain Time, which Time is finiſhed [o]: In theſe and many other Reſpects (which for Brevity I omit) the Tutorſhip is determined [p].

[o] § præterea. Inſtit. quib. mod. tut. fin. L. ſi adrogati. § ſed etſi. & § fin. ff. de tut.
[p] Videant Juſtinianiſtæ Vigelii methodum juris civilis, ubi perplures traduntur cauſæ finiendi tutelam.

§ XV. Of the Quantity of Lands deviſable by Will.

1. *Of Lands, Tenements and Hereditaments, ſometimes all, ſometimes but Two Parts of Three are deviſeable.*

NOW that I have ſhewed what Kind of Things may be deviſed by Will, it remaineth to ſhew how much is deviſable of Lands or Goods.

And firſt (1) concerning Lands, Tenements and Hereditaments, ſometimes they may be deviſed wholly, as Lands, Tenements and Hereditaments holden in Socage, or of the Nature of Socage-Tenure [a]: Sometimes Two Parts of Three may be deviſed, namely, of Lands, Tenements and Hereditaments holden in chief by Knights-Service, or of the Nature of Knights-Service in chief [b]; as appeareth more fully heretofore, where I have ſet down the Statutes at large.

[a] Supra ead. part. § 4.
[b] Eod. § 4.

§. XVI. What Quantity of Goods or Chattels may be deviſed by Teſtament.

1. *Legacies to be paid out of the clear debtleſs Goods.*
2. *The Executor compellable to pay Debts out of his own Purſe, if he pay Legacies firſt.*
3. *Funeral Expences to be deducted out of the whole Goods.*
4. *The Teſtator may ſometimes bequeath all his debtleſs Goods, ſometimes half, and ſometimes but a third Part.*
5. *When half the Teſtator's Goods is due to the Wife or Children.*
6. *When*

6. *When the Wife and Children ought to have either of them a third Part.*
7. *Whether the Wife and Children ought to have any Part of the Debts due to the Teſtator.*
8. *Whether the Wife and Children may claim any reaſonable Part of Leaſes.*
9. *Whether the Wife and Children may claim a reaſonable Part of Goods, where there is no Cuſtom.*
10. *The Reaſon of the Law, which leaveth all to the Diſpoſing of the Teſtator.*
11. *The Reaſon of the Cuſtom, whereby the Power of the Teſtator is reſtrained.*

CONcerning the Quantity of Goods and Chattels to be diſpoſed, this is firſt to be noted, That the Teſtator cannot bequeath any Part of the Goods, but where (1) ſomething remaineth clear, the Funerals and the Debts due by the Teſtator firſt diſcharged[c]. And therefore, if the Teſtator do bequeath any Legacies, where his Goods and Chattels will not ſuffice to diſcharge his Funerals and Debts, and (2) the Executor pay any of thoſe Legacies, before he have diſcharged the Debts, by Means whereof there is not ſufficient Goods left wherewith to pay the Teſtator's Debts: In this Caſe the Executor ſhall be charged with the Payment thereof out of his own Purſe[d], as one that had waſted the Goods of the Teſtator[e].

[c] Bracton de legib. & conſ. Angl. lib. 2. cap. 26. n. 2. L. ſcimus. §. & ſi præfatam. C. de jure delib. In qua lege aſſignatur ratio quare legatariis præferuntur creditores: Nempe legatarii de lucro captando, creditores autem de damno vitando contendunt. d. L. ſcimus. Et licet hæres qui inventario legitime confecto legatariis ſatisfaciat, ſecurus ſit jure civili adverſus creditores, quibus eodem jure conceſſum eſt actionem intentare, non contra hærem, ſed contra legatarios: Longe tamen aliter jure noſtro cautum eſt; quo non legatarios, ſed ipſum executorem convenire permittitur, ut ſtatim ſubjicitur. [d] Fitz. Abridg. tit. Deviſe, n. 1. Brook, tit. Adminiſt. n. 37. Perkin. tit. Deviſe, fo. 109. [e] Doct. & Stud. lib. 2. c. 11. Quam concluſionem facile admitterem, conſcio executore æris alieni. Sichard. in d. §. & ſi præfatam. verb. 3. utilitas. & Minſing. in §. ſed noſtra. Inſtit. de hæred. qual. & diff. n. 12. Cæterum quod nonnulli ex noſtratibus eandem concluſionem extendunt, ut locum habeat vel ignorante executore alios eſſe creditores; an iſtud verum ſit dubito, durum eſſe non inficior. Et quidem ſummus Juſticiarius Brook oppoſitam ſententiam tenet, niſi ubi Principi quid ſit debitum, quia regia debita ſuo periculo ſcire debet, Brook, tit. Exec. n. 116.

This then being underſtood, that no Legacy is due, but where there clearly remains ſome Goods and Chattels, the Funerals and Debts firſt deducted, (for (3) funeral Expences are to be deducted forth of the whole Goods, both by the Civil Law[f], and by the Laws of this Realm[g];) that which (4) remaineth, ſometimes the Whole, ſometimes the Half, and ſometimes the third Part, may be bequeathed or deviſed by the Teſtator, according to the Diverſity of theſe Caſes following:

[f] L. ſcimus. §. in computatione. C. de jure delib.
[g] Fitzh. Nat. Brev. fol. 121. Doct. & Stud. lib. 2. cap. 10. Brook, Abridg. tit. Exec. n. 172.

The firſt Caſe is, when the Teſtator hath neither Wife nor Child at the Time of his Death. For then he may diſpoſe all the Reſidue of his clear Goods and Chattels at his Pleaſure[h].

[h] Lindwood in c. provincial. conſtit. Cant. verb. defunctum. Bracton de legib. & conſuetu. Angl. lib. 2. c. 26. Tract. de repub. Ang. l. 3. c. 6. Fitzh. Brev. de rationabil. part. bon. Stat. de teſtam. lib. 3.

The ſecond Caſe is, (5) when the Teſtator at the Time of his Death hath a Wife and no Child, or elſe ſome Child or Children, but no Wife. In which Caſe by a Cuſtom obſerved, not only throughout the Province of *York*, but in many other Places beſides within this Realm of *England*, the Goods are to be divided into two Parts; and the Teſtator cannot bequeath any more than his Part, that is to ſay, the one Half: For the other Half is due to the Wife, or elſe to the Children, by Virtue of the ſaid Cuſtom[i]. And if the

[i] Lindw. Bracton & Fitzherb. ubi ſupra.

Teſtator have a Wife and a Child or Children, which Child is Heir to the Teſtator, or which Children were advanced by the Father in his Life-time; in this Caſe likewiſe the Goods are to be divided into two Parts, whereof the Wife is to have one Part to her ſelf, and the other Half is at the Diſpoſing of the Teſtator[k].

[k] Lib. qui inſcribitur Labridgment dez caſes, edit. Anno Dom. 1599. f. 181. f. 15. n. 2.

The third Caſe is, (6) where the Teſtator leaveth behind him both a Wife, and alſo a Child or Children. In which Caſe by the Cuſtom obſerved in divers Places of this Realm of *England*, and namely within the Province of *York*, the Teſtator cannot bequeath any more of his Goods than the third Part of the clear Goods[l]. For in this Caſe the ſaid clear Goods are to be divided in three Parts, whereof the Wife ought to have one Part, the Child or Children another Part, and the third Part (which is called the *Death*'s Part) remaineth to the Teſtator, by him to be given or bequeathed to whom he thinketh good[m]. So that the Child or Children be not Heir to the Teſtator their Father, or advanced by him in his Life-time: For then the Goods of the Deceaſed are to be divided into two Parts, whereof the Teſtator's Wife is to have the one Half, and the other Half remaineth to be diſpoſed by the Teſtator[n]. And if the Teſtator have Wife and Children whereof one is Heir, another advanced, and ſome not advanced by their Father in his Life-time: In this Caſe the Goods of the Deceaſed ſhall be divided into three Parts, whereof the Wife ſhall have one, the Child or Children not advanced another, and the third ſhall be in the Power of the Teſtator, to be diſpoſed according to his Will[o]. And if the Teſtator by his Will bequeath a Sum of Money, or a Leaſe, or ſome other Thing, to ſome of his Children not advanced by him in his Life-time, in Lieu and Satisfaction of his filial Portion due unto him by the Curteſy of the Country: Yet the filial Portions due to the reſt of the Children not advanced ſhall not be augmented thereby; Neither ſhall the whole third Part of the Teſtator's Goods be divided amongſt them; but that filial Part or Share, otherwiſe due to the Child, in Lieu whereof he hath a Legacy bequeathed unto him, doth belong to the Executors, in caſe that Child accept of the Legacy in Lieu and Satisfaction of his filial Portion[p]. Which Thing is left to his Choice, ſo that he may either accept the Legacy, or refuſe the ſame, and challenge his filial Portion; as hereafter more fully is ſet down[q].

[l] Act. & computat. in Scaccario Archiepiſcopi Ebor. Lindw. Brac. & Fitzherb. ubi ſupra.

[m] Lindwood, Bract. & Fitzh. in locis præd.

[n] Fitzh. Nat. Brev. ubi ſupra.

[o] Fitzherb. Bracton, Lindw. D. Smith, & alii ubi ſupra.

[p] Ita non ſemel accepi, & ita ſæpius aliis conſului.

[q] Vide in ead. part. §. 18.

And here note, that (7) where the Wife or Children ought to have a ratable Part of the Goods of the Deceaſed, be it a third Part, or Half, as the Caſe yieldeth; there alſo they ought to have a like Part of the Debts due unto the Teſtator, after they be recovered by the Executor or Adminiſtrator; for then they are numbered or accounted amongſt the Goods of the Teſtator, but not before[r]. But (8) of Leaſes, the Wife and Children cannot have any ratable Part within the Province of *York*, or other Places where they have been accuſtomed to have their ratable Part of the movable Goods and Debts recovered, unleſs the ſaid Wife or Children, demanding their ratable Parts of Leaſes, do prove that by ſpecial Cuſtom of that Place (namely of that City, County, Deanery, or Pariſh where the Teſtator dwelled, and had ſuch Leaſes) the Wives and Children were accuſtomed to have their ratable Part, as well of the Leaſes, as of

[r] Brook Abrid. tit. Exec. n. 112. Siquidem ſi iſta ex conſuetudine tantum debentur, hac non probata, ſine difficultate illud procedet quod eſt juri recepto magis conſonum.

the movable Goods of the Teſtator; which ſpecial Cuſtom being proved, they may recover the ratable Part as before[s].

[s] Fitz. in Br. de rationab. part. in quo Brevi fit mentio non ſolum bonorum, ſed etiam catallorum. Atque huc facit quod habemus in Magna Chart. c. 28.

The fourth Caſe is, when (9) there is no ſuch Cuſtom of dividing the Goods of the Teſtator into two Parts, or into three Parts, as is before-mentioned. In which Caſe, albeit ſome were of this Opinion, that even by the Common Laws of this Realm, the clear movable Goods were to be divided into three Parts, or into two Parts, as before, whereof the Wife and Children were to have their Parts[t]; and conſequently, that the Teſtator could not diſpoſe any more than the Half or Third, being the Death's Part: Nevertheleſs others (whoſe Opinion hath prevailed) do hold the contrary, to wit, that there is no ſuch Diviſion to be made by Force of the Common Laws of this Land, but only by Force of Cuſtom[u]; and conſequently, that it is lawful for the Teſtator, by the Laws of this Realm, (except in thoſe Places where the Cuſtom aforeſaid is obſerved,) to diſpoſe all the whole Reſidue of his Goods (his Funerals and Debts deducted) at his Liking, and that the Wife or Child can claim no more thereof but according as the Teſtator ſhall deviſe by his Teſtament.

[t] Glanvil. lib. 7. c. 5. Fitz. Detinue, 56, 60. Mirror 313. M. 30 E. 3. 25. Fitz. reſponſ. 6. H. 17 E. 3. fo. 8. 17. a. Pet. Brook 36. M. 7 E. 4. fo. 20. In hac ſententia ſtetit Glandevile, antiquus hujus regni juriſconſultus, motus per ſtatut. de Magna Chart. c. 18. ut refert Fitz. de in d. Brevi rationab. part. bon. & Pet. Brook de ration. part. bon. ſic enim poſt multam diſputationem inquit: Et fuit dit pur ley M. 32 Hen. 8. que ceo ad eſtre miſe en ure come un commen ley, & nunquam demurr, & ideo videtur que ceo eſt le commen ley. [u] Fitzh. de Brev. de ration. part. bonorum. Brac. de legib. & conſuet. Angliæ, li. 2. 26. Tract. de repub. Angl. l. 3. c. 6.

The Writ *de rationabili parte bonorum* doth not lie by the Common Law, but there muſt be a particular Cuſtom for it: And the Writ in the Regiſter is grounded upon a Cuſtom[x].

[x] Regiſt. 142. F. N. B. 122. b.

And the Saving in the Statute of *Magna Charta, c.* 18. doth not create a new Right, but doth preſerve the antient: And therefore where ſuch a Cuſtom is, that the Wife and Children ſhall have the Writ *de rationabili parte bonorum*, that Statute ſaves it[y]. But it was never the Common Law, (though there be great Variety in the Books) as it doth appear by *Bract.* and other antient Authors and Authorities. *Bract. lib.* 2. *fo.* 60, 61. *Mirror, c.* 5. §. 2. *Glanvil, lib.* 12. *c.* 20. 31 *H.* 8. *rationabili parte bonorum*, 7, 6. *Inſtitut. part* 1. *fo.* 176. *b. Bract. lib.* 2. *c.* 26. *Fitz. Detinue, pl.* 58. *M.* 40 *E.* 3. *fo.* 38. *Fitz. Reſponſ.* 47. *H.* 39 *E.* 3. *fo.* 64. *Office of Executor, fo.* 150. That it is by Cuſtom in *Suſſex, vide P.* 39 *E.* 3. 9. *Raſtal's Entries*, tit. *Rationabili parte bonorum, fo.* 541. *a.* So in the County of *Nottingham, M.* 6 *Car. Sherwin* verſus *Cartwright, Hutton's Rep. fo.* 109. So alſo in *Yorkſhire, Cok. lib. Intrationum, fo.* 564.

[y] Inſtit. part 2. f. 33.

But the Adminiſtrator of a Man who dieth Inteſtate, or Executor of any that maketh no Diſpoſition of his whole perſonal Eſtate, Goods, Debts and Chattels, that Adminiſtrator or Executor, after the Debts paid and Will performed, ought not to take any Thing to his or their own Uſe; but ought, though there be no particular Cuſtom, to divide them, according to the Statute of *Magna Charta, c.* 18. and the ſaid antient and later Authorities may guide them therein. And this Right doth the Statute of *Magna Charta* ſave by theſe Words, *Salvis uxori & liberis ſuis rationabilibus partibus ſuis.* And the Executor or Adminiſtrator ſhall be allowed of this Diſtribution according to this Statute upon his Account before the Ordinary[z]. Yet Debts by ſimple Contract ſhall be allowed before the

[z] Inſtit. part 2. f. 33.

reaſonable Part. 2 *E.* 4. 13. 2 *H.* 6. *fo.* 16. *Lib.* 9. *fo.* 88. *Pinchon*'s Caſe.

It hath been much controverted, whether the Ordinary hath Power to compel the Adminiſtrator to give Portions to Children, or to allot and diſtribute filial Portions to the Deceaſed's Children out of his Eſtate. If the Ordinary attempt this either before or after the Granting of Letters of Adminiſtration, it hath been held, that the Adminiſtrator might have a Prohibition[a]. [a] C. lib. 8. fo. 135.

Neither hath he any Power to make any Diſtribution of the Surpluſage, nor to take any Bond for to anſwer the ſame[b]. [b] M. 15 Jac. in C. B. *Tooker* and *Loames*'s Caſe, Hob. Rep. fo. 191. *Slawney*' Caſe, Hob. Rep. fo. 83. Moor 864. S. C.

If the Ordinary might diſtribute, then the Adminiſtrator might be charged *de bonis propriis*; for there may be dormant Debts, and which are unknown[c]. [c] *Bruiſtyr*'s Caſe, Brownl. part 1. f. 31.

Yet notwithſtanding, it's uſual for the Ordinary to order and allot Diſtribution of filial Portions, and therein Prohibitions are not often granted at this Day[d]. [d] H. 13 Jac. *Henſlow*'s Caſe, C. lib. 9. T. 3 Jac. *Davys*'s Caſe.

It was reſolved in Sir *Jo. Bennet*'s Caſe, that when a Man dies Inteſtate, the Ordinary may diſpoſe Part of the Goods of the Inteſtate to pious Uſes, but with the Cautions following: 1. That it be after Adminiſtration granted, and the Inventory made: 2. The Adminiſtrator ought to be called to it: 3. The Uſe ought to be publick and pious: 4. It ought to be expreſſed in particular: 5. There ought to be a Decree made of it, and entered on Record[e]. [e] M. 20 Jac. in Camera Stell. Sir *Jo. Bennet*'s Caſe, Inſt. part 3. f. 150.

By the Statute 21 *H.* 8. it was enacted, that Adminiſtration ſhall be granted to the Widow or next of Kin of the Inteſtate, or to both, as the Ordinary ſhall think fit, *taking Security for the true Adminiſtration of the Goods*; but in theſe Securities this Clauſe was uſually inſerted, (*viz.*) *That after Debts paid, the Surplus ſhould be diſtributed as they* (the Ordinaries) *ſhould direct*; but in *Slawney*'s Caſe before-mentioned, my Lord *Hobart* was of Opinion, that they could not impoſe any other Condition in theſe Securities by Bond than truly *to adminiſter*; and in *Tooker*'s Caſe, that Clauſe was firſt conteſted: And in [f] *Fotherby*'s Caſe about four Years afterwards, the Queſtion was, whether the Ordinary had any Power to compel the Adminiſtrator to diſtribute the Surplus? And it was adjudged, that he had not, becauſe by the Statute 31 *Ed.* 3. he is obliged to grant Adminiſtration, and that being done, he hath executed that Authority which he hath by Law, and from that very Time the Property of the Goods is veſted in the Adminiſtrator: And ſo it was adjudged in [g] *Levaun*'s Caſe, that after Adminiſtration is granted, the Adminiſtrator had an abſolute Right to the Goods, and that the Ordinary had nothing farther to do; and ſo it was likewiſe adjudged in the Caſes cited in the [h] Margin. 21 H. 8. c. 5. [f] Cro. Car. 62. Litt. Rep. 21. [g] Cro. Car. 201. W. Jones 228. S. C. [h] *Matthews* v. *Davis*, Style 456 & 439. *Cook* v. *Chambers*.

Afterwards the Ordinaries made uſe of that Liberty which they had by the Statute 21 *H.* 8. which was to grant Adminiſtration, *either to the Wife, or to the next of Kin*, and they uſually computed to how much the Surplus would amount, and then to grant Adminiſtration either to the one or the other, who was willing to give Securities to make Diſtribution, as they ſhould appoint. *Hughes* v. *Hughes*, 1 Lev. 233. Carter 125.

But

But now all theſe Diſputes and Controverſies are fully determined, for by a late [i] Statute it is enacted, *That the Ordinaries ſhall call Adminiſtrators to account for and touching the Goods of any Perſon dying Inteſtate, and order and make juſt and equal Diſtribution of what remaineth clear (after all Debts, Funerals, and juſt Expences firſt allowed and deducted,) amongſt the Wife and Children, or Childrens Children, if any ſuch be; or otherwiſe to the next of Kindred to the dead Perſon, in equal Degrees, or thoſe that legally repreſent their Stocks* pro ſui cuique jure, *according to the Laws in ſuch Caſes, and in Manner and Form following: That is to ſay, one third Part of the ſaid Surpluſage to the Wife of the Inteſtate, and all the Reſidue by equal Portions to and amongſt the* [k] *Children of ſuch Perſons dying Inteſtate, and ſuch Perſons as legally repreſent ſuch Children, in Caſe any of the ſaid Children be then dead; other than ſuch Child or Children (not being Heir at Law) who ſhall have any Eſtate by the Settlement of the Inteſtate, or ſhall be advanced by the Inteſtate in his Life-time, by Portion or Portions equal to the Share which ſhall by ſuch Diſtribution be allotted to the other Children, to whom ſuch Diſtribution is to be made,* &c. *And the Heir at Law, notwithſtanding any Land that he ſhall have by Deſcent, or otherwiſe, from the Inteſtate, is to have an equal Part in the Diſtribution with the reſt of the Children,* &c. *And in Caſe there be no Children, nor any legal Repreſentatives of them, then one Moiety of the ſaid Eſtate to be allotted to the Wife of the Inteſtate; the Reſidue of the ſaid Eſtate to be diſtributed equally to every of the next of Kindred of the Inteſtate, who are in equal Degree, and thoſe who legally repreſent them.* [l] *Provided, that there be no Repreſentations admitted amongſt Collaterals after Brothers and Siſters Children. And in Caſe there be no Wife, then all the ſaid Eſtate to be diſtributed equally to and amongſt the Children,* &c. *And no ſuch Diſtribution to be made till after one Year after the Inteſtate's Death; or without ſufficient Security to be given by thoſe to whom ſuch Diſtribution ſhall be made, for refunding back to the Adminiſtrator, (according to each one's ratable Proportion,) in Caſe of the Inteſtate's Debts afterwards ſued for and recovered, or otherwiſe duly made to appear.* For other Proviſoes and Limitations the Reader may conſult the Statute.

[i] 22, 23 Car. 2. c. 10. Anno 1670.

[k] A Queſtion hath been, that where one dies Inteſtate leaving but *one Child*, whether ſuch *Child* can be comprehended under the Word *Children* in this Statute: And adjudged that it ſhall, and therefore where the Father died Inteſtate, leaving one Son, who likewiſe died Inteſtate, and Adminiſtration being granted to the next of Kin of the Son, an Appeal was brought by the next of Kin of the Father, but he did not prevail. 3 *Mod.* 58. *Palmer* verſus *Allicock*. For by this Statute a Right is veſted in the Child. *Brown* verſ. *Shore*, Shower 25.

[l] A Man died Inteſtate without Wife or Children; the Queſtion was, whether the Siſter of the Half-blood ſhall have an equal Diſtribution with the Siſter of the Whole-blood; now the Statute directs, that the Surplus ſhall be divided *amongſt the Kin in equal Degree:* Adjudged that the *Half-blood* may as prpperly be intended the *next of Kin* as the *Whole-blood*; for though it is only the *Half*, yet it is the ſame Blood with the Whole. *Smith* verſus *Tracy*, 1 Mod. 209. 2 Mod. 204. S. C. Jones 93. S. C. 1 Vent. 316. 1 Vern. 437. S. P. Lev. 173. S. C.

One of which is, (*viz.*) *That all Ordinaries having Power to grant Adminiſtrations, ſhall take Bonds with Sureties, in the Name of the Ordinary, with a Condition to exhibit a true Inventory of the Goods, and truly* to adminiſter the ſame according to Law; *and to make a true and juſt Account thereof, and to make Diſtribution of the Surplus, as before-mentioned,* (viz.) *one third Part to the Wife of the Inteſtate,* &c.

29 Car. 2. cap. 3. And by the Statute 29 *Car.* 2. it is declared, *That the aforeſaid Statute* 22 Car. *ſhall not extend to the Eſtates of married Women who die Inteſtate, but that their Husbands may have Adminiſtration of their perſonal Eſtates, as before the Making the ſaid Act.*

An Eſtate for the *Life of another* ſhall go to the Executors or Adminiſtrators of the Party that had the Eſtate, and be Aſſets in their Hands, if no Deviſe thereof is made, or no ſpecial Occupant.

The Inteſtate died ſeiſed of a Tenement which he held for *Three Lives*, and the Adminiſtrator was ſued in the Spiritual Court for a Diſtribution; he exhibited an Inventory, but left out the Eſtate *for Lives*, as not diſtributable by the ſaid Statutes: And adjudged that it was not, for it was a Freehold. 2 *Salk.* 464. *Oldham* verſus *Pickering.*

The ſaid Stat. 22 Car. *was made perpetual by the Stat.* 1 Jac. 2. cap. 17. *with this Addition, That an Adminiſtrator ſhall not be cited into any Court,* &c. *to render an Account of the perſonal Eſtate of the Inteſtate, otherwiſe than by an Inventory thereof, unleſs at the Inſtance of ſome Perſon, in Behalf of a Minor, or having a Demand of ſuch Eſtate as a Creditor or next of Kin; nor ſhall be compellable to account before any Ordinary,* &c. *otherwiſe than as aforeſaid.*

And if after the Death of a Father any of his Children die Inteſtate without Wife or Children, in the Life-time of the Mother, every Brother and Siſter, and their Repreſentatives, ſhall have an equal Share with her.

The Plaintiff brought his Bill as Adminiſtrator againſt the Defendant, who pleaded, that Adminiſtration had been granted to the Plaintiff, and to another, who died before the Bill brought; and upon that Plea the Queſtion was, whether when an Adminiſtration is granted to two, and one dies, the Adminiſtration ſhall ceaſe and be void, or whether it ſhall ſurvive to the other who is ſtill living?

It was held that the Adminiſtration would ſurvive, and the Plea was over-ruled. *Hudſon* verſus *Hudſon, Trin.* 1735. *Forreſter's Reports* 127.

A Bill in Chancery is proper to have a Diſtribution of the perſonal Eſtate, and therefore where ſuch Bill was brought, and the Defendant demurred, for that Diſtribution ought to be made in the Spiritual Court, the Demurrer was over-ruled; for there being no negative Words in the Statute, a Bill for Diſtribution is proper. *Howard* v. *Howard,* 1 Vern. 134.

The Teſtator deviſed particular Legacies to his Children and Grandchildren, and 10*l.* a-piece to his Executors; decreed that the Surplus ſhall not go to them, but be a Truſt for the Children. *Foſter* verſus *Munt,* 1 Vern. 473.

But in the Opinion of ſome, (10) the Law of this Land, which leaveth all the Reſidue to the Diſpoſition of the Teſtator, Funerals and Debts deducted, ſeemeth to have better Ground in Reaſon than any Cuſtom or Statute, whereby he is forced either to leave Two Parts of Three, or at leaſt the one Half to his Wife and Children [m]. For what if the Son be an Unthrift, or naughty Perſon? What if the Wife be not only a Shrew, but perhaps of worſe Conditions? Is it not hard, that the Teſtator muſt leave either one Half of his Goods to that Wife or Child, or more, for the which alſo peradventure he had laboured all his Life? Were it not more Reaſon that it ſhould be in the Liberty of the Father, or Husband, to diſpoſe thereof at his own Pleaſure? Which when the Wife and Children underſtood, it might be a Means whereby they might become more obedient, live more virtuouſly, and contend to win the Good-will and Favour of the Teſtator [n]. Theſe Reaſons make for the Teſtator, and for the

[m] Bract. d. l. 2. c. 26.

[n] Hiſce rationibus utitur Bracton in defenſionem juris hujus regni d. c. 26. cui adde Rebuff. in L. obvenire, de verb. ſignif. ff. fol. 68 z.

Equity of the Common Law, which leaveth the whole Reſidue to his Diſpoſition.

But (11) the Cuſtom, whereby the Liberty of the Teſtator is reſtrained, is not without Reaſon alſo. For where it is asked, What if the Child be an Unthrift, the Wife worſe than a Shrew? So it may be demanded, What if the Child be not an Unthrift, but frugal and virtuous? What if the Wife be an honeſt and modeſt Woman? Which Thing is rather to be preſumed [o]. But if it be not amiſs to fear the worſt, then on the contrary, What if the Teſtator be an unnatural Father, or unkind Husband? Perhaps alſo greatly inriched by his Wife, whereas before he was but Poor? Standeth it not with as great Reaſon that ſuch a Wife and Children ſhould be provided for, and that it ſhould not be in the Power of ſuch a Teſtator to give all from them, or to beſtow it upon ſuch as had not ſo well deſerved it, and by that Means ſet his Wife and Children a begging? Surely the Cuſtom hath as good Ground, in Reaſon, againſt leud Husbands and unkind Fathers, as hath the Law, in meeting with diſobedient Wives and unthrifty Children [p].

[o] c. dudum. &c. ultim. de præſump. extr. Maſcard. tract. de probac. concluſ. 222.

[p] Mediam viam elegit Juſtinianus, tam quoad uxorem, quam quoad liberos. Nam quod ad uxorem attinet, jubet Imperator, illa bona reſtitui, quæ marito vel ab ipſa uxore, vel ab alio nuptiarum cauſa, nempe ad ſuſtinenda matrimonii onera, donata fuere. l. 2. ſol. matr. ff. Bar. in Rub. ſol. matr. ff. n. 21. Quod autem attinet ad liberos jure civili, Aſſis nunc triens, id eſt, tertia pars totius patrimonii, nunc ſemis ſeu dimidium aſſis, pro legitima debetur. Auth. noviſſimo. C. de inoffic. teſta. Quæ quidem legitima gratis tantum liberis deberi intelligitur: Nam ingratis nihil habet parens pro legitima relinquere. Claud. Battandier, tract. de legitima, c. 13.

§. XVII. If the Teſtator do bequeath more than he may, which Legacy is to be prefer'd, or what other Courſe is to be followed.

1. *If the Teſtator bequeath more than the Death's Part, whether one Legacy is to be prefer'd before another.*
2. *Divers Opinions about this Queſtion.*
3. *Firſt, concerning this Queſtion, we are to conſider whether there be an Inventory, or not.*
4. *An Inventory being made, the Executor need not pay any one whole Legacy, where there is not ſufficient to pay the reſt.*
5. *Certain Caſes wherein an Inventory being made, the Executor is forced to diſcharge ſome Legacies wholly, though there be not ſufficient Goods wherewith to diſcharge the reſt.*
6. *If the Executor pay to ſome Legatary his whole Legacy, whether he thereby tie himſelf to pay the reſt wholly alſo.*
7. *Whether the Legacy, being unduly paid, may be recovered.*
8. *No Inventory being made, how far the Executor is bound to pay Legacies.*

NOW that we have ſeen when the Teſtator may diſpoſe all the Reſidue of his clear Goods, or Half, or but the third Part only; and what be the Reaſons of enlarging or reſtraining of the Liberty of the Teſtator in that Behalf: Foraſmuch as it doth often fall out in Fact, that (1) the Teſtator doth bequeath more by his Teſtament than he may by Law or Cuſtom; (that is to ſay, more than the whole Reſidue, where he may diſpoſe all; or more than the Half, where he can give but the Half; or more than the Third, where he

can give no more but the Third;) I ſhall examine which of the Legacies are firſt to be diſcharged, and whether that Legatary who is firſt named in the Will ought to have his Legacy firſt anſwered before the reſt, and he that is named in the ſecond Place, to have his Legacy next, and ſo the Third, and Fourth, until the Death's Part be wholly ſpent, and then the reſt of the Legataries to have nothing: Or whether the Executor may gratify which of the Legataries he will, without Difference, whether he be firſt or laſt named in the Will: Or elſe whether ought every Legatary to make a ratable Deduction from every Legacy, to wit, from the greater Legacy the greater Part, and from the leſſer Legacy the leſſer Part, proportionably, ſo that the Legacies do not exceed the Death's Part, and that the Death's Part may ſuffice to pay the Legacies.

It ſeemeth (2) by the Opinion of ſome, that a ratable Part is to be deducted and taken from every Legacy: And that it is not in the Power of the Executor to gratify any one Legatary to the Prejudice of another Legatary, whether he be firſt or laſt in the Teſtament [q]; but rather, if the Executor pay to one Legatary his whole Legacy, that then he bindeth himſelf to pay to the reſt of the Legataries their whole Legacies alſo [r].

[q] L. ſi quis teſtam. §. apud Julianum. ff. de leg. 1. & Jaſ. ibid. Paul. de Caſtr. in L. ſcimus. §. legitimam creditorib. C. de jure delib.

[r] In Auth. de hæred. & falcid. §. non autem. & ibi Bar.

An Executor made a Leaſe for Years of Lands which were deviſed to him, rendering Rent; and this was in Truſt for *T. S.* who exhibited a Bill in Equity for this Rent; the Executor confeſſed the Deviſe and Leaſe, but ſaid, that great Loſſes had happened to the Eſtate of the Teſtator, and that he had paid great Sums of Money to ſatisfy his Debts; and therefore prayed that he might retain the Rent to reimburſe himſelf: It was decreed, that though a *Legatee ſhould refund againſt Creditors*, if there was not ſufficient Aſſets to pay all the Debts, *and likewiſe againſt Legatees*, where all of them have not an equal Share, in regard of Aſſets falling ſhort; yet an Executor himſelf ſhall never bring a *Legacy back* when he hath once *aſſented to it*, unleſs he paid the Debts of the Teſtator by Compulſion; and if *the Spiritual Court give Sentence for a Legacy, without taking Security to refund, a Prohibition will be granted.*

Noel verſus *Robinſon*, 1 Vernon 90. 2 Vent. 358. S. C.

Where a *Specific Legacy* is deviſed, the Legatee muſt have it intire, tho' there are not ſufficient Aſſets to pay the reſt of the Legacies; but if 100*l.* is deviſed to *T. S.* and ſeveral Money Legacies to others, and the Teſtator directs, that the Legacy of 100*l.* ſhall be paid in the *firſt Place*; yet if the other Legacies fall ſhort, the Legatee of 100*l.* muſt make a proportionable Abatement of his Legacy.

Brown verſus *Allen*, 1 Vern. 31.

If the Executor do make an Inventory, then it is in his Power and Choice to pay to which of the Legataries he will his whole Legacy [s]: Like as it is in his Choice to pay to which Creditor he will his whole Debt [t], albeit he be not ignorant of other Debts of the ſame Nature [u]: And that Payment being made accordingly, and no Aſſets remaining in the Hand of the Executor, the Legatary hath no more Remedy againſt the Executor for his Legacy, than hath the Creditor for his Debt, who by the Laws of this Realm is utterly excluded; and by which Laws it is lawful for the Executor to gratify which

[s] L. ſcimus. §. & ſi præfatam. C. de jure delib. & ibi Jaſ. verb. tertia utilitas. Plowd. in caſ. inter Param. & Yard. his verb. Si home deviſe a A. 20 lib. a. B. 20 li. & a C. 20 li. & fait ſon exec. & moruſt, aiant biens forſque al value de 20. li. Ore il eſt in election de executor, a queux de eux trois il voyl payer lez 20. li. & ſil payer a lune, lauter ne poyer contradire ceo, ne ad aſcun remedy pur ſon legacy. fol. 545.

[t] d. §. & ſi præfatam.

[u] Et hoc ita jure hujus regni, ut infra part 6. §. 16. ſecus jure civil. ut eod. §. 16.

which of the Creditors he will [x], ſaving in certain Caſes elſewhere mentioned [y].

It is then (3) firſt to be conſidered; whether the Executor do make an Inventory, or not.

If (4) the Executor do make an Inventory, according to the Laws and Statutes of this Realm, then he need not pay any Legatary his whole Legacy [z], though he be firſt named in the Will [a]. (I mean, where there is not ſufficient to anſwer every Legatary his whole Legacy,) but may retain a ratable Part, according to the Proportion aforeſaid [b]; ſaving (5) in certain Caſes: Whereof one is, when ſome ſpecial Thing is bequeathed, as the Teſtator's Signet, or his white Horſe; which ſpecial Legacy (as ſome do deem) is to be ſatisfied and payed wholly, without Diminution, in reſpect of any other general Legacies; or of Legacies which do conſiſt in Quantity [c]. Another Caſe is, when the Legacy is to be diſtributed *in pios uſus* [d]; wherein though ſome be of Opinion, that this Legacy is to be wholly ſatisfied before other Legacies general, or conſiſting in Quantity; yet by the common Opinion, received and approved of by the beſt later Writers, this Legacy hath no ſuch Privilege warranted by Law, to be prefer'd before the reſt [e]. Another is, when the Father doth bequeath ſomething to his Daughter for her Dowry, or towards her Marriage [f]. Another is, when the Teſtator doth bequeath any Thing in Satisfaction or Recompence of ſome Injury by him done, or of Goods evil gotten [g]: For theſe Legacies alſo are not to be diminiſhed, by Reaſon of other general Legacies, or Legacies conſiſting in Quantity, the which ſhall remain wholly unſatisfied, rather than thoſe foreſaid Legacies ſhall be diminiſhed. And conſequently, in theſe Caſes it is not in the Power of the Executor to gratify any other Legatary at his Election [h].

[x] Doct. & Stud. lib. 2. c. 10.
[y] Infra part. 6. § 16.
[z] Paul. de Caſtr. in L. ſcimus. §. l'ma creditoribus. C. de jure delib. Alex. in d. L. §. & ſi præfatam.
[a] Jaſ. in L. ſi quis teſt. §. apud Jul. ff. d. leg. 1.
[b] Imo jure civili legatarius partem indebite ſolutam reſtituere tenetur. Caſtr. & Alex. ubi ſupr. unde fruſtra peteret, quod ſtatim reſtitueret. c. dolo de reg. jur. 6. non tamen poteſt executor falcidiam retinere. Spec. de Inſtr. edit. §. xij. n. 26.
[c] Jaſ. poſt Paul. de Caſtr. in d. L. ſiquis teſt. §. apud Jul. quamvis non negem propoſitionem hanc non ſine difficultate procedere.
[d] Caſtrenſ. in d. §. apud Jul.
[e] Licet enim de legatis piis non deducatur falcidia, tamen hoc procedit quoad commodum teſtatoris: Secus quoad damnum evitandum, ſi legata excedant ſummam vel vires patrimonii; ut ſi centum habeat tantum in patrimonio, & centum quinquaginta erogavit, partim ad pias cauſas, partim ad profanas; tunc enim legata utrinque minuuntur, & reducuntur ad modum & menſuram patrimonii teſtatoris: Deinde de profanis detrahitur falcidia, non de piis. Ita tenet Bart. d. Auth. ſimiliter cum pluribus per Tiraquel. allegatis, ex cujus relation. hanc quoque communem aſſerit Vaſqu. de ſucceſſ. progreſſ. tit. 3. §. 26.
[f] Caſtrenſ. ubi ſupra.
[g] Caſtrenſ. in d. §. Federic. de ſenis conſil. 243.
[h] Paul. de Caſtr. in d. §. apud Jul. cujus conſilio hæc ſunt mente tenenda, quia (inquit) ſunt ſingularia.

Furthermore, (6) If the Executor do make an Inventory, and afterwards pay to ſome Legatary his whole intire Legacy, yet is he not thereby tied to pay the reſt of the Legacies wholly, (the Death's Part not being ſufficient:) And this is undoubtedly true, if the Executor were ignorant of other Legacies given by the Teſtator [i], exceeding the Death's Part, when he did pay the whole Legacies [k]. But (7) neither the Executor nor any other Legatary can reclaim or recover that Overplus paid, and delivered to the Hands of the Legatary, as unduly paid unto him, in reſpect that there is not ſufficient to pay all the reſt of the Legacies out of the Death's Part [l].

[i] Plowd. in caſ. inter Paramor & Yardley. Quod vero Bar. ſcripſit, quod hæres ſubtiliter ſeu ſcienter uni legatario integraliter ſolvens, omnibus aliis in ſolidum ſolvere compellitur, omni penitus inconſtantia amota, intelligendum eſt ſine deductione falcidiæ, id eſt, quartæ hæredi debitæ. (Bar. in §. non autem. de hæred. & falcid. in Auth.) Nec enim dixit, neque profecto ſomniavit Bartolus, hæredem compellendum ſolvere reliqua legata ſine diminutione legatorum, quæ ſuperant vires hæreditatis, facto ſcilicet inventario. DD. in Auth. ſed cum teſtator. C. ad L. falcid.
[k] L. ſcimus. §. & ſi præfatam. C. de jure delib. & ibi gloſſ. ibidem.
[l] Hoc verum jure quo nos utimur, quo neque executori neque legatario competat indebiti condictio, vel aliqua actio quæ ſapiat ejus naturam. Imo vero vel ipſo jure civili, utcunque creditoribus vel legatariis per hujuſmodi actiones ſubveniatur; at certe executori legis Falcid. vel Trebel. beneficium prorſus denegatur. Spec. de Inſtr. edit. §. nunc vero aliqua, n. 26.

If the Executor enter to the Teſtator's Goods, and will make (8) no Inventory thereof, then may every Legatary recover his whole

Legacy at his Hands[m]: For in this Caſe the Law preſumeth that there is ſufficient Goods to pay all the Legacies, and the Executor doth ſecretly and fraudulently ſubſtract the ſame[n]: Whereas otherwiſe the Executor is preſumed not to have any more Goods, which were the Teſtator's, than are deſcribed in the Inventory, the ſame being lawfully made[o].

[m] L. ſcimus. C. de jure delib. huc facit c. in literis. de raptor. extr.

[n] Sichard. in d. L. ſcimus. §. & ſi præfatam. quod intellige, niſi executor doceat de bonorum inſufficientia; nam tunc licet non conficiat inventarium, non tenetur ultra vires hæreditatis. Jaſ. in d. §. & ſi præfatam. limitac. 4. Covar. in c. 1. de teſta. extr. n. 15. De jure vero regni noſtri, ſive fit inventarium confectum, ſive non, creditor, ſeu qualiſcunque petens, ſufficientiam probet bonorum, ut videtur per Dyer, M. 6 H. 8. c. 3. & alibi.

[o] Bald. & Sichard. in §. l'ma. d. L. ſcimus. & hæc opinio communis eſt, ut ait Franciſcus Herculan. tract. de probac. neg. n. 256.

§ XVIII. Of Childrens or filial Portions within the Province of *York*.

1. *By antient Caſtom throughout the Province of* York, *every Child to have a Child's Portion.*
2. *What if he be Heir, or advanced by his Father in his Lifetime?*
3. *Divers Queſtions about Childrens or filial Portions fit to be known.*
4. *Whether the Father by his Will may forbid his Child to have any filial Portion.*
5. *Whether the Father may leſſen his Child's Part or Portion by his Will.*
6. *Whether the Father may impoſe a Condition upon his Child's Portion.*
7. *Whether the Father may by his Will defer the Day of Payment of his Child's Portion.*
8. *Whether the Father may impoſe a Charge upon his Child's Portion, or beſtow it upon another after the Death of his Son.*
9. *Whether a Legacy bequeathed by the Father ſhall be underſtood to be left to the Child, in Recompence of his Portion.*
10. *Whether the Heir in Tail be barred of a filial Portion.*
11. *What if the Lands be of a very ſmall Revenue?*
12. *Whether the Heir in Reverſion may have a filial Portion.*
13. *Whether he which holdeth Lands by Deed in Mortgage may obtain a Child's Part of his Father's Goods.*
14. *Whether Copyhold Lands bar the Child from a filial Portion.*
15. *What Manner of Preferment doth exclude the Child from a filial Portion.*
16. *A rude Deſcription of Preferment excluſive of a Child's Part.*
17. *An Explanation of the former obſcure Deſcription.*
18. *What if another than the Father beſtow a Gift upon the Child?*
19. *What if a Father beſtow a Thing upon another for the Good of his Child, as for Learning and Knowledge?*
20. *What if the Father beſtow an Eccleſiaſtical Benefice upon his Son?*
21. *What if the Father diſcharge the Son's Debt?*
22. *What if the Father provide a Marriage for his Child?*
23. *What if the Father beſtow an Office upon his Child?*

24. *What if the Father bequeath ſomewhat in Lieu of his Child's Portion?*
25. *What if the Father beſtow a Leaſe or an Annuity, whereof the Child is to reap no Benefit whilſt the Father liveth?*
26. *What is meant by this Word* Competent.
27. *What if the Father's Subſtance greatly increaſe after the Preferment of his Child?*
28. *A ſmall Gift of the Father doth not bar the Child of a filial Portion.*
29. *What is underſtood by this Word* Portion.
30. *What if the Father beſtow much upon his Child to ſome other End than for his filial Portion?*
31. *What is ſignified by this Word* Patrimonium.
32. *What the Words* Matrimonium *and* Patrimonium *do import.*
33. *Whether the Child may caſt in that which he hath received of his Father, and ſo recover a filial Portion.*

WIthin the Province of *York* generally, (and in ſome particular Places within the Province of *Canterbury*,) there hath been an (1) antient Cuſtom; and divers famous Writers long ago, have made Mention of the ſaid Cuſtom in their Works, to have been obſerved long before their Days[p]; by which Cuſtom continuing unto this Day, there is due to the lawful Children of every Man, being an Inhabitant or an Houſholder within the ſaid Province of *York*, and dying there or elſewhere, being an Inhabitant or an Houſholder within that Province, a filial or Child's Part and Portion, which is ſometimes a Third Part, and ſometimes a Half Part, of his clear moveable Goods; as hath been afore ſhewed: Unleſs the Child (2) be Heir to his Father deceaſed, or were advanced by him whilſt he lived[q]. Whereby we may conceive a notable Rule, and Two famous Limitations thereof. The Rule is this; *There is due to every lawful Child a filial Portion of his Father's Goods dying within the Province of* York. The firſt Limitation of this Rule is, *Unleſs he be Heir to his deceaſed Father.* The other Limitation is, *Unleſs he were advanced by him in his Life-time.* And foraſmuch as many (3) Queſtions do ariſe daily about Childrens Portions, no leſs needful to be known, by Reaſon of the Frequency thereof, than hard to be attained, becauſe of the Scarcity of Writers upon this Subject: I have thought good to ſet down ſome Obſervations, as well touching the Rule, as touching the Limitations, whereby the ſaid Queſtions may be decided. Of every of theſe particularly. Concerning the Rule therefore, the ſame doth proceed, and taketh Place, Firſt, (4) albeit the Father by his Laſt Will and Teſtament ſhould forbid his Child to have any Part of his Goods. For a filial Portion being due unto him by Force of the ſaid Cuſtom, the Father's Will is not of Force to withſtand the Effect thereof[r]. Secondly, (5) the Father cannot by his Laſt Will diminiſh the Portion due to the Child by Virtue of the ſaid Cuſtom[s]. And therefore if the Father ſhould bequeath to his Child Twenty Pounds in Money, in full Satisfaction of his filial Portion, whereas peradventure by his Inventory the ſame would extend to Thirty or Forty Pounds; in this Caſe the Child may refuſe the Legacy, and recover his whole Portion, notwithſtanding

[p] Lindw. in c. Statutum. de Teſtam. lib. 3. Provinc. conſtit. Cant. Bracton de legib. & conſuetud. Angl. lib. 2. cap. 26. Fitzh. Nat. Br. de Rationabili parte bonorum. Doct. & Stud. lib. 1. c. 10. Brook, Abridg. Tit. Executor. Doct. Smith tract. de Repub. Angl. lib. 3. c. 6. Magna charta, c. 18. Quibus adde Acta, antiquiſſimaque indubitatæ fidei inſtrumenta, in Archivis Archiepiſcopi Eboracenſis fideliter cuſtodita.

[q] Supra ead. parte, §. 16.

[r] L. quoniam in erroribus. c. de inofficioſ. Teſtam. Accedit huc, quod legitima nonnunquam æs alienum nuncupatur, utpote quod jure naturali debetur a patre filio.

[s] d. L. quoniam. c. de inofficioſ. Teſtam. Quod tamen non eſt indiſtincte verum. Nam aliquando filius legitima privatur, ut per Claud. Battandier Tract. de legitima, c. 13.

ſtanding his Father's Will [t]. Thirdly, the Father cannot impoſe (6) any Condition upon the ſaid Portions, though the ſame were not only lawful, but eaſy to be performed. For the Child may recover the Portion without Performance of the Condition [u]. Fourthly, The Father cannot (7) defer the Day of Payment of the filial Portion due to the Child, as to be paid Seven Years after his Death: For it is due preſently upon the Father's Death, and is recoverable in the mean Time, notwithſtanding the Father's Will to the contrary [x]. Fifthly, As the filial Portion is due to the Child without Diminution, Condition, or Delay, ſo is it due (8) without all Manner of Burthen or Charge [y]. And therefore if the Father ſhould by his Will bequeath the ſame to any other Perſon, after the Death of the Child, (which Thing is very uſual within the Province of *York*,) the Father's Will is void in this Point. For he can no more diſpoſe of his Son's Portion by his Will, than of another Man's Goods [z]. Howbeit, if the Father ſhall deviſe any Thing to his Son by his Will over and beſides his filial Portion, there is no Queſtion but he may transfer the ſame to any other after his Son's Death; but the Portion due to the Son ſhall belong to his Executor or Adminiſtrator after his Death. What if the Father ſhall bequeath a Legacy to his Child, being neither Heir, nor advanced by him in his Life-time, without any Mention, whether the ſame ſhall be (9) in Lieu and Recompence of his filial or Child's Part? Whether ſhall this Legacy be underſtood to be in Conſideration of his Portion? In this Caſe, if the Legacy bequeathed be as much or more in Quantity than the filial Portion doth extend unto, by the Rate of his Father's Inventory, the Teſtator is preſumed to have bequeathed the ſame in Recompence of the filial Portion [a], though he did not expreſs ſo much. And ſo I think it to be, when the Legacy doth Want but a little of the filial Portion, though the Child be then at Liberty whether he will accept the ſame for his Portion, or not, as is aforeſaid. But if the Legacy be very ſmall, or if the Father will that it ſhould be paid out of his Part of his Goods; then (in my Opinion) the Legacy ſo bequeathed is not to be preſumed to have been left with a Mind or Intent of Compenſation or Recompence of the filial Portion [b]. So that in this latter Caſe the Child may recover as well the filial Portion as the Legacy, but not in the former. Thus much concerning the Rule.

[t] Hoc verum eſt jure quo utimur: Nam jure civili filius acceptans quod ſibi relinquitur pro legitima, per hoc non amittit jus agendi ad ſupplementum. Imo etiamſi pater in tali legato appoſuit clauſulam, qua jubet filium contentum eſſe, ita ut non poſſit plus petere nomine legitimæ, vel quacunque alia ratione; tamen filius ſimpliciter acceptans legatum, non expreſſe renuncians, poteſt petere ſupplementum legitimæ. Similiter ſimpliciter acceptans legatum a patre pro legitima relictum, non prohibetur ſupplementum petere, licet fecit quietantiam generalem. Jaſ. in c. ſi quando. §. general. C. de inoffic. teſt.

[u] d. L. quoniam prioribus. C. de inoffic. teſtam. in textu.

[x] d. L. quoniam, & L. omnimodo. C. de inoffi. teſtam. & Claud. Battandier ubi ſupr.

[y] d. L. quoniam. ubi apparet quod ipſa conditio vel dilatio, vel alia diſpoſitio, moram vel quodcunque onus introducens, tollitur: Id quod viridi etiam obſervantia habetur infra Provinciam Eboracenſem.

[z] Supra ead. part. §. 6. Nec in Anglia aliqua vis eſt pupillaris ſubſtitutionis, utpote quæ evaneſcente patria poteſtate conſiſtere nequit. Inſtit. de pupil. ſubſtitut. & Minſing. ibidem.

[a] Nam quando quantitas legati conven' cum quantitate debita, vel eam ſuperat, tunc præſumitur relictum fore animo compenſandi, etiamſi Teſtator ſit debitor ex cauſa voluntaria: Multo magis quando tenetur ex cauſa neceſſaria. Menoch. de præſump. lib. 4. præſ. 110. n. 26.

[b] Menoch. d. lib. 4. præſump. 109. n. 6.

Concerning the firſt Limitation of this Rule, which is, *That he which is Heir to his Father can have no filial Portion of his Goods*; This is diverſly extended [c]. Firſt, Not only the Heir of Lands holden in Fee-ſimple is thereby barred from the Recovery of a filial Portion, but he (10) alſo that is Heir in Fee-tail, either general or ſpecial [d]. Secondly, Albeit the Lands be (11) of very ſmall Revenue, peradventure not paſt a Noble yearly Rent, and the Goods very great in Compariſon of ſo ſmall Rent, (be it a Thouſand Pounds or more;) even in this Caſe the Heir is barred from the Hope of a filial Portion.

[c] Eorum quæ in hoc paragraph' traduntur notitiam, magis obſervat' quidem conſuetudine, quam inſpecta lege ſcripta, nactus ſum. Quam propterea mandari ſcriptis curavi, ne veritas deinceps lateat in tenebris, ſed lucis inſtar, amotis nubibus, omnibus quorum intereſt clarius ſplendeſcat.

[d] Hoc ipſum omnes uno ore fatentur.

tion [e]. And though this may ſeem hard to the Heir, if we conſider that ſame *Jus primogenituræ:* Yet if we ſhall conſider on the other Side, that if the Lands be worth a Thouſand Pounds by the Year, and the Goods little or nothing worth, (the Debts being paid,) and ſo little or nothing left to the reſt of the Children, (which Caſe is more frequent than the former;) the Cuſtom (we ſee) is not void of Equity, when both Caſes are equally balanced. Thirdly, not only that Heir is excluded from a filial Portion which doth enter upon the Lands immediately after his Father's Death, but he (12) alſo which is Heir in Reverſion is Heir, and being Heir, can have no filial Portion [f]. For in the Writ *de rationabili parte bonorum*, it is contained, that he which demandeth a filial Portion, *nec eſt hæres, nec in vita patris ſui promotus*, as by the ſaid Writ more at large appeareth [g]. Now he that is Heir in Reverſion cannot ſay ſo, and therefore can recover no filial Portion, according to the Cuſtom of the Country: Otherwiſe if he ſhould recover a Portion, and the Land afterwards, the final Intent of the Cuſtom ſhould ſuffer Prejudice, which would that the Lands and Goods ſhould not go both one Way, but the one to the Heir, and the other to the reſt of the Children. And yet the Caſe may fall out very hard with the Heir in Reverſion. For what if he ſhould die in the mean Time, before he could lawfully enter to thoſe Lands, which be his only Reverſion, and ſo reap no Benefit either of his Father's Lands or Goods? Howſoever it ſhall fall out, he muſt be content with his Lot: And though not he, yet his ſhall enjoy the Land at the Time appointed [h]. Fourthly, Albeit (13) the Heir hold Lands by Deed or Feoffment in Mortgage, or with Clauſe of Redemption, that is to ſay, upon Condition that if the Feoffor pay unto him a Sum of Money at a certain Day, that then the Feoffor may re-enter, and the Deed or Grant to be void, *&c.* yet nevertheleſs in the mean Time, until the Condition be performed, and the Land redeemed, if he ſhould demand any filial Portion, he is barred, becauſe as yet he is Heir to the Deceaſed [i]. But if the Lands ſhould be redeemed, and the Money ſatisfied, then it is thought that he may recover a filial Portion; becauſe then he is not Heir to the Deceaſed, nor the Advancement certain made by the Father in his Life-time [k]. Likewiſe if a Man purchaſe Lands in Fee, and by Will deviſe the ſame to his eldeſt Son, and to the Heirs of his Body; and for Default of ſuch Iſſue to his younger Son, and to the Heirs of his Body, *&c.* in this Caſe the eldeſt Son is not barred from the Recovery of a filial Portion, as Heir to the Deceaſed; becauſe he is not as Heir to his Father according to the Courſe of the Common Law, but according to his Father's Will [l]. But whether this Deviſe ſhall bar him as an Advancement, or as a Legacy intended to be given or bequeathed in Lieu and Satisfaction of his filial Portion, may be a Queſtion; whereof partly heretofore, and partly hereafter. Note alſo, that if the Child ſhould (14) have any Copyhold Land after his Father's Death, in this Caſe he is not reputed his Father's Heir to the Effect aforeſaid, and ſo not barred from the Recovery of a filial Portion, due by the general Cuſtom of the ſaid Province [m].

[e] Hanc ſententiam bonæ memoriæ D. Jo. Savil. unus Baronum Scaccarii Regii, pro tribunali ſedens apud Caſtrum Eborac. ſeptimana aſſiſarum, Anno Domini (niſi mea me memoria fallat) 1604. publice propalavit, memet, cum aliis quamplurimis, tum præſente, audiente, & diligenter animadvertente, tanti judicis & tam experti (maxime vero in conſuetudinibus hujus regni Borealibus) ſermonem.

[f] Huc facit quod traditur in Relationibus D. Dyer, fol. 124. plac. 38.

[g] Fitzh. Nat. Bre. fol. 122. Br. de Rationab. parte bonor.

[h] Vide Dyer ubi ſup.

[i] D. hac q. conſului D. Tho. Heſcoth militem, Juriſconſultum (dum vixit) diſertiſſimum, & a conſiliis Regiæ Majeſtati in hiſce partibus Borealibus inter alios unum, nec illo Honore indignum; cujus tandem, poſt maturam quidem deliberationem, opinio talis erat qualis hic a nobis citatur; ſane (ſi quid ego ſentiam) æquitate plena, & rationi conſona.

[k] Idem D. Th. Heſcoth.

[l] Perkins fol. 109. n. 569.

[m] Ita nonnunquam a non paucis, quorum non eſt obſcura fama, Juriſconſultis accepi.

Concerning the ſecond Limitation, which is, *That the Child advanced or preferred by his Father in his Life-time cannot challenge a filial Portion of his Goods:* For the better Underſtanding of this Limitation, it may be demanded, (15) what Manner of Preferment

or Advancement that is which doth debar the Child from a filial Portion. The Queſtion is much more eaſily propounded than anſwered; for that I do not find it defined or deſcribed by any Writer, either Civil or Temporal: And conſidering the Varieties of Opinions and Diverſities of Judgments in this Matter, it is impoſſible to make an abſolute Definition thereof, and very difficult to make a true Deſcription. Howbeit I have adventured to draw an obſcure Form and Shape thereof. This then may be termed an Advancement or Preferment, whereby the Child is excluded from a filial Portion, when as (16) the Father in his Life-time hath beſtowed upon his Child a competent Portion whereon to live. For (17) where a Preferment is ſaid to be that [*which the Father beſtoweth,*] it is to be noted, that if (18) another than the Father beſtow any Preferment or Advancement, though never ſo much, this Preferment by another is no Bar to the Child, from the Recovery of his filial Portion of his Father's Goods [e]; much leſs where the Child hath advanced his Eſtate by his own Induſtry. Secondly, where it is ſaid [*upon his Child,*] it is to be obſerved, that if the Father beſtow any Thing upon (19) another for his Child's Sake, or for the Good of his Child; nevertheleſs this is no ſuch Preferment as will hinder the Child of his filial Portion. And therefore if the Father beſtow any Thing upon a Man of Trade, to take his Son for an Apprentice, and to teach him his Myſtery, this is no Advancement to the Effect aforeſaid [f]. Or if he beſtow any Thing upon a Schoolmaſter or Tutor, in the Univerſities of *Oxford* or *Cambridge*, for the Increaſe of his Knowledge in Learning, or for any Degree there to be obtained; this is no Advancement to exclude the Child of a filial Portion [g]. No more is it, if the Father buy the Advowſon (20) of an Eccleſiaſtical Benefice or Dignity, and afterwards preſent his Son thereto: Or if the Son be (21) much indebted, and the Father diſcharge the Debt, yet I hold this not to be a Preferment [h]. But if the Father beſtow (22) a competent Portion with his Daughter in Marriage, upon him that ſhall marry her, this, without Queſtion, is ſuch an Advancement as will bar her from the Demand of a filial Portion [i]. What if the Father buy an Office, (23) and beſtow it upon his Son? Whether is this a Preferment to bar him of his Portion? It ſeemeth to be no Bar thereunto [k]. Thirdly, where it is ſaid [*in the Life-time of the Father,*] we are to underſtand, that though the Father by (24) his laſt Will and Teſtament do bequeath any Legacy to his Child in Lieu and Satisfaction of his filial Portion; yet becauſe this was no Advancement to the Child whilſt the Father lived, he is not ſo barred from the Recovery of a filial Portion hereby, but that he may refuſe or wave the Legacy bequeathed in his Father's Will, and recover a filial Portion, due according to the Cuſtom of the Country [l]. Howbeit if the Father in his Life-time beſtow (25) a Leaſe upon his Child, or grant unto him an Annuity for Life out of his Lands, yet in ſuch Manner as the Child ſhall not reap any Benefit thereby, ſo long as the Father liveth, but after his Death; this is holden for a Preferment for an Advancement [m], becauſe it was aſſured unto him in his Father's Life-time. Nor is this Caſe contrary to the former, for the Child had no Aſſurance of his Legacy until his Father was dead, becauſe he might have revoked the ſame at any Time whilſt he lived; which he could not do in the other Caſe. Fourthly, where it is ſaid [*a competent Portion,*] this Word (26) *Competent* ſignifieth equal, or not far inferior to that

[e] Claudius Battandier. Tract. de legitima, c. 12. n. 31. L. ſcimus. §. repletionem, & Authen. Noviſſim. C. de inoff. Teſtam.

[f] Arg. L. Omnimodo. §. imputari. C. de inoff. teſta. L. 3. §. ultim. ff. de muneribus. Iſtud enim non eſt tranſmiſſibile, & ideo non computatur in legitimam. Claud. ubi ſupra, n. 19, 20, 21, 22.

[g] d. L. 3. §. ultim. de Munerib. L. ultim. C. de Collat. Claud. Battand. d. c. 12. n. 19, &c.

[h] Claud. Battandier d. c. 12. n. 28. L. Liber. C. de poſtlim. reverſ. ubi tamen diſtinguitur.

[i] L. quoniam. Novel. C. de inoffic. teſtam. Claud. in d. Tract. c. xi n. 6.

[k] d. L. 3. §. ultim. ff. de Muneribus. Claud. ubi ſupra.

[l] Supra hoc ipſo §. in prin.

[m] Ita communiter traditur a Noſtratibus utriuſque fori cauſidicis, quibuſcum ſæpiſſ. de hac re ſermonem habui.

Quantity, which otherwiſe, according to the Cuſtom of that Province, ſhould fall to be due to the Child, after the Rate and Proportion of the Father's Eſtate, at that Time when he doth beſtow any ſuch Thing upon his Child; for the ſame being equal, or not much under the Rate which ſhould belong to the Child by the Cuſtom aforeſaid, if his Father had then died, ſhall ſtand for a ſufficient Preferment and Advancement, to exclude him from a filial Portion [o]. For conſidering the Equality, or ſmall Inequality, betwixt the one and the other, it is to be preſumed, that it was the Father's Purpoſe that the one ſhould ſtand inſtead of the other [p]. Inſomuch that if the Father after this Preferment ſhould live many Years, and (27) increaſe his Subſtance; yet I think that the Father's former Gift would bar the Child from Recovery of any farther filial Portion; and the Reaſon is, becauſe as the Father did grow richer, (in which Caſe the Son's Preferment ſhould be leſs,) ſo it might fall out that the Father might have grown poorer, and then the Son's Prefermeut ſhould have been more than otherwiſe it would by the Cuſtom of the Country. So that the Father's Gift being at the firſt Competent, in regard of his Eſtate at that Preſent, the ſame is not made effectual or ineffectual by the Increaſe or Decreaſe of his future Eſtate. But if the Father's Gift were (28) not competent, or far under the Rate of that which otherwiſe ſhould belong to the Child by the Cuſtom; as for the Purpoſe, if the Father ſhould give his Child five Pounds, to put in his Purſe, or beſtow at his Pleaſure, whereas otherwiſe his filial Portion would extend to divers Hundreds; I do not hold this Gift of the Father's to be ſuch an Advancement as will exclude the Child from his filial Portion [q], neither in the Conſtruction of Law, nor in the Intention of the Father; and that is rather to be termed a mere Benevolence, than a Preferment or Advancement excluſive of a filial Portion; and if the Son have deſerved a good Turn at his Father's Hands, this is no Advancement, but a Recompence of that which was formerly deſerved [r]. By the Word (29) [*Portion*] I underſtand not only a Sum of Money, or Part of the Father's Goods and Chattels, but alſo Lands and Annuities, beſtowed by the Father upon the Son. Finally, by theſe Words [*whereon to live,*] is to be collected, that if the Father beſtow any Thing upon his Child to (30) any other End, as Money in his Purſe to ſpend among his Equals, or to buy him Suits of Apparel, or Books, or Armour for the Service of his Country; yet this (as I take it) is not to be holden for an Advancement, though peradventure the Sums of Money given for theſe particular Ends, were not very much inferior to that which otherwiſe might belong to the Child for his filial Portion according to the Cuſtom, and otherwiſe would have been taken for an Advancement [s]. For that is properly (31) called *Patrimonium*, or *Patris munus*, which the Father is bound unto by the Law or Inſtinct of Nature towards his Son, which is, to provide ſome competent Thing for the Maintenance of his Child, whereby he may be the better enabled to live after his Father's Death [t].

[o] De modicis non eſt curandum. L. ſcio cum. gloſſ. ibidem de reſt. in integrum ff.

[p] Æqualitas ſervanda, & Oxonium petit æquales.

[q] Quod enim ex mera patris liberalitate proficiſcitur, non debet computari in legitimam, quia animo donandi id feciſſe præſumitur. L. Liber. C. de poſtlimin. reverſis. Clar. d. Tract. c. 11. n. 28.

[r] Quo caſu non computatur in legitimam ſive filialem portionem.

[s] Quod ſtudii cauſa, vel pro libris, aut armis, pater impendit, & jure Civili quicquid non eſt tranſmiſſibile, non imputatur in legitimam, quam nos filialem portionem appellare ſolemus.

[t] De ſignificatione iſtius vocabuli, late Rebuff. & alii in c. Rei ff. de verb. ſignif.

And as there is *Patrimonium*, ſo there is *Matrimonium*; the Definition whereof is, *viri & fœminæ conjunctio, individuam vitæ conſuetudinem continens*, the joining together of Man and Woman in an unſeparable Society of Life. But the true (32) Etymology of the Word

is, *Matris munus*, that is, the Mother's Duty, whereunto ſhe is bound by the Law of Nature, and is or ought to be exerciſed in the Nouriſhing of her Child, whilſt they be young and under her Government, like Chickens whilſt they be under the Hen's Wing [u]. Anſwerable to this *Matrimonium*, or *Matris munus*, is *Patrimonium*, or *Patris munus*, the Father's Duty, which is or ought to be exerciſed in providing of ſome competent Portion for his Children, whereby to live after they ceaſe to be kept any longer under their Mother's Wings, and do fly abroad into the World to ſhift for themſelves. And that Gift of the Father which is moſt proportionable hereunto, is moſt worthy (in my Opinion) to be adjudged a Preferment, ſuch as will exclude the Child from a filial Portion after his Death.

[u] Summa Hoſtienſ. §. Matrimonium. verſic. unde dicatur de ſponſal. Panor. in c. 2. de converſ. fidel. ex. n. 2. Præpoſ. in Rub. de ſponſal. extr. n. 7.

But now ariſeth a Queſtion: What if the Thing which the Father beſtoweth upon the Child be ſo indifferent betwixt Competent and Incompetent, that it may be juſtly doubted whether the ſame were *Patrimonium*, and ſo ſtand for an Advancement, or a mere Benevolence, over and beſides the which he might expect a filial Portion? Now whether (33) may the Child caſt in that Gift of the Father, and ſo recover an equal Portion with the reſt of his Brethren and Siſters? It ſeemeth at the firſt that he may. For if a Man ſeiſed of thirty Acres of Land in Fee-ſimple, have Iſſue two Daughters, and giveth with one of them in Marriage ten Acres of the ſame Land in Frank-marriage, and dieth ſeiſed of the other twenty Acres, ſhe that is thus married may (if ſhe will) have Part of the twenty Acres whereof her Father died ſeiſed; but then ſhe muſt put her Land given in Frank-marriage in *Hotchpot*, (as our temporal Lawyers term it) that is to ſay, ſhe muſt refuſe to take the ſole Profits of the Land given in Frank-marriage, and ſuffer the Land to be commixed and mingled together with the other Land, whereof her Father died ſeiſed, ſo that an equal Diviſion be made of the Whole, betwixt her and her Siſter; and thus, for her ten Acres, ſhe ſhall have Fifteen; whereas otherwiſe, her Siſter ſhall have the twenty Acres of which their Father died ſeiſed [x]. And as in Lands, ſo in Goods, which is alſo agreeable to the Civil Law [y]. And I have ſeen it ſometimes ſo obſerved by the Conſent of the Children not advanced, being then of lawful Years; but I have not known it at any Time ſo over-ruled by Law, without their Conſents. And therefore I do conclude, that, conſidering the Strictneſs of the Writ *De rationabili parte bonorum*, this Gift of the Father ſhall either be found to be a Preferment, or not; if ſo, then is the Child excluded from Recovery of a filial Portion; if otherwiſe, then he may recover the ſame according to the Cuſtom of this Province of *York*, as in the ſaid Writ is contained [z]. And thus much for this Diſcourſe of filial Portions due to Children within the Province of *York*; wherein nevertheleſs I do willingly ſubmit my Opinion to be cenſured by the Judgment of the better learned, and more experienced therein, as I do in all the reſt of this Book.

[x] *Terms of Law*, verb. *Hotchpot*.

[y] Ut per totum tit. de Collac. & per Vitalem Nemauſenſem, in Tract. inſigni de Collationibus, & Clau. Battandier Tract. de legitima, c. x.

[z] Hoc enim nominatim in d. Brevi exprimitur; viz. ſecundum conſuetudinem communiter obtentam, pueri poſt mortem patrum ſuorum, qui eorum hæredes non ſunt, nec in vita patrum ſuorum promoti fuerunt, &c. Fitz. Nat. Br. fol. 121.

An Inhabitant of *York*, having on his Marriage ſettled on himſelf his real Eſtate for Life, Remainder as to Part on his Wife for her Jointure, Remainder of the Whole to his firſt and other Sons in Tail, Remainder to his own right Heirs; the Queſtion was, Whether the Son was thereby excluded by the Cuſtom of the Province of *York* from

from having any Share of his Father's Perſonal Eſtate; which Point being directed to be tried on an Iſſue at Law; and it being found that he was thereby debarred, it was decreed accordingly. 2 *Vern.* 375.

The Inteſtate, being an Inhabitant within the Province of *York*, left Iſſue a Son and a Daughter only, and no Widow; the Daughter had a Portion given her in Marriage in Lieu and full Satisfaction of what ſhe might claim by the Cuſtom of the Province *York*; the Son was alſo advanced by a Settlement of Lands; and the Queſtion was, How the Eſtate was to be diſtributed; for the Heir it was inſiſted, that now the Cuſtom of the Province of *York* is to be quite laid out of the Caſe, and the ſame Diſtribution made of the Eſtate as of any other Inteſtate's Eſtate, and by Conſequence the Daughter to bring her Portion into Hotchpot, but the Heir to have a full Share without regard to what Lands had been ſettled upon him. But *per Cur'*, the Daughter muſt not bring her Portion into Hotchpot, for that came in Lieu of the Cuſtomary Part, and was the Price the Father thought fit to give her for the ſame. 2 *Vern.* 274.

A Man who lived in the Province of *York* died inteſtate, having advanced all his Children in his Life-time; it was held that the perſonal Eſtate, which he died poſſeſſed of, ſhould be ſettled according to the Act for ſettling Inteſtate's Eſtates. 1 *Vern.* 200.

If a Man within the Province of *York* dies inteſtate, leaving a Wife and no Child, the Wife ſhall have one Moiety of the perſonal Eſtate by the Cuſtom, and the other Moiety being without the Cuſtom ſhall be diſtributed according to the Statute of Diſtribution. 1 *Vern.* 465. 134. 305. 432.

So if a Freeman of *London* dies in *York*, his Heir ſhall come in for a Share of his perſonal Eſtate, tho' by the Cuſtom *York* he is debarred thereof, for the Cuſtom of *London* which follows the Perſon ſhall be preferred to that of *York*, which is only local. 2 *Vern.* 82.

If a Freeman of *London* dies in the Province of *York*, ſeiſed and poſſeſſed of a real and perſonal Eſtate, the Cuſtom of the City of *London*, for the Diſtribution of his perſonal Eſtate, ſhall prevail and controul the Cuſtom of the Province of *York*. 2 *Vern.* 48.

In

In what Manner

TESTAMENTS

OR

LAST WILLS

Are to be made.

The Fourth Part.

Sect. I. Of the Forms of Teſtaments.

1. *So many ſeveral Forms of Teſtaments, as there be Kinds.*
2. *Of Teſtamentary Forms, ſome be General, ſome Particular.*
3. *The General Form of Teſtaments is twofold, eſſential, and accidental.*

HERE followeth the Fourth principal Part of this Teſtamentary Treatiſe; wherein I undertook to ſhew how, or in what Manner Teſtaments or Laſt Wills, may or ought to be made. For Performance whereof, I thought it convenient, firſt to deliver certain Advertiſements, and then to proceed.

The (1) firſt Advertiſement is this, That as there be divers Kinds of Teſtaments or Laſt Wills, (whereof heretofore [a]) ſo there be divers Forms of Teſtaments or Laſt Wills; for every Kind hath his ſeveral Form, and every Kind differeth from another by his Form [b].

The (2) next Advertiſement is this, That albeit every particular Kind of Teſtament have his proper Form peculiar to it ſelf [c]; nevertheleſs they have alſo General Forms common to them all [d].

[a] Supra 1. part. §. 7, 8, 9, &c.

[b] L. Julianus § ſi quis ad exhibend. ff.

[c] Supra 1 part. § 7, 8, &c. & infra eadem part. § 22. cum reliq. uſque ad finem.

[d] Ut infra eod. § & § prox.

Wherefore, before I ſpeak of thoſe particular Forms, Order requireth that I ſpeak of the General.

Of (3) which General Forms, ſome do reſpect the *Subſtance or inward Eſſence of the Teſtament*, whereby that is made to be, which was not [e]; and ſome do reſpect the *outward Appearance or Proof of the Teſtament*, whereby that is made to appear, which otherwiſe, though it were, ſhould not ſeem to be [f]. For not ap-

[e] Bar. & Jaſ. in L. nemo ff. de leg. 1.

[f] Olden. de action. claſſ. 5. in prin. ubi tenet contra Bar. & alios, ſolennitatem teſtamentariam non eſſe de forma ſubſtantiali ſeu eſſentiali, ſed forma probatoria. Cujus opinio haud dubiè vera eſt, ubi ſolennitas non eſt de neceſſitate ejuſdem, ut hic in Anglia. Covar. in c. cùm eſſes, de teſta. extr. n. 8. Minſing. in § ſed cum paulatim. Inſtit. de teſta. ordin. n. 4.

pearing, it is (in Conſtruction of Law) as if it were not. *Idem eſt jure, non eſſe, & non apparere* [g].

[g] Vel non eſſe & non apparere, paria ſunt. Vel idem judicatur de eo quod non eſt, & quod non apparet. Rebuff. in L. Urbana. ff. de verb ſignif.

§ II. Of the general ſubſtantial Form of every Teſtament.

1. *The eſſential Form common to every Teſtament, is the Naming of an Executor.*
2. *What it is to appoint an Executor.*
3. *The Naming of an Executor is ſaid to be the Head of the Teſtament.*
4. *The Naming of an Executor is alſo ſaid to be the Foundation of the Teſtament.*
5. *No Will properly termed a Teſtament, wherein no Executor is named, albeit other Legacies be left therein.*
6. *The Effect of dying without, or with an Executor.*
7. *An Occaſion of further Conſideration concerning the Making of an Executor.*

THE general, (1) ſubſtantial, or eſſential Form, common to every Teſtament, is the Naming or Appointing of an Executor [h], the which alone doth make a Teſtament; and without which, no Will neither is, or can be rightly termed a Teſtament [i]. To (2) name, or to appoint an Executor, is to place one in the Stead of the Teſtator, who may enter to the Teſtator's Goods and Chattels, and who hath Action againſt the Teſtator's Debtors, and who may diſpoſe of the ſame Goods and Chattels, towards the Payment of the Teſtator's Debts, and Performance of his Will [k]; which if he neglect to do, he may be convented by the ſaid Creditors, and Legataries, ſo long as he hath Aſſets in his Hand [l].

[h] L. 1. de hæred. Inſtit. L. 1. de vulg. ſub. L. hæredes palam de teſta. ff. nec obſtat quod jus civile mentionem faciat de hærede, non de executore. Nam executores, quales paſſim conſtitutos videmus in Anglia, ex omni fere parte convenire cum iis, quos (nomen tantum ſi excipias) civile jus appellat hæredes, compertum eſt, ita, ut executor hujuſmodi meritò vice-hæres dici debeat. Quinimo & legiſtæ, & canoniſtæ omnes, illum pro hærede agnoſcunt executorem, qui nullo alio inſtituto hærede deputatus eſt ad diſtribuendum bona defuncti in pios uſus, Bar. in L. nulli. C. de Epiſcopis & Cler. Bald. in Authon. Licet. C. de Natu. lib. in princ. Zaſ. in L. precibus de vulg. ſub Ripa. in L. filioſa. de leg. 1. n. 21. ff. Panor. & Covar. in c. cùm tibi de teſta. extr. Lindw. in c. ſtatutum de teſta. lib. 1. provinc. conſt. Cant. verb. prius Mantic. de conject. ult. vol. lib. 4. tit. 1. n. 7. [i] L. quod per manus, de jure eod. Bar. & Jaſ. in d. L. nemo de leg. 1. ff. Id ipſum Jaſ. in Rub. de leg. 1. qua etiam in re conſpirant jura hujus regni, ut per Brook his verbis: Alias citatis, & nunc denuo citandis. Nota per lez doctors del civil ley, & ſerjeants del common ley, ſi home fait ſon teſtament, & noſme nuls executors, ceo neit teſtament, &c. Et alibi per Plowd. ſub hac verborum forma. Sans teſtament home ne ſerra executor. Brook tit. execut. 20. Plowd. in caſ. inter Greisbrook & Fox, fol. 276. b. [k] Sichard. in Rub. de hæred. Inſtit. C. *Terms of Law*, verb. execut. [l] *Terms of Law*, verb. execut. & latius infra part. 6. §. 3.

This (3) Naming or Appointing an Executor, is ſaid to be the Head of the Teſtament [m]. And as the Body is dead, which lacketh a Head, ſo the Teſtament is, as it were, dead, wherein no Executor is appointed [n]. It is alſo ſaid (4) to be the Foundation of the Teſtament [o]; wherefore as no Building can ſtand without a Foundation, ſo no Teſtament can ſtand without the Appointing of an Executor [p]; neither can it be properly named a *Teſtament*. And (5) although never ſo many Legacies, or Deviſes be given, all thoſe Legacies and Deviſes notwithſtanding, ſuch Diſpoſition may be called a Codicil, or a Will,

[m] §. ante Inſtit. de lega.

[n] §. Imprimis, Inſt. de fidei com. hæred.

[o] D. §. ante Inſtit. de lega.

[p] D. L. quod per manus de jure codicil. ff. & D. D. Ibidem. Jul. Clar. §. Teſtm. q. 5. n. 2. Adde quod Teſtator & Executor, ſunt Relativa.

or otherwiſe termed; but certainly a Teſtament it is not, neither can be properly ſo named [q]; and therefore (6) he that made any ſuch Diſpoſition, ſhall be deemed to have died without a Teſtament [r], and ſo the Adminiſtration of his Goods to be committed to the Widow, or next of Kin, as of one dying Inteſtate [s]: Whereas on the contrary, if an Executor be appointed, ſuppoſe no other Legacy be left, or Deviſe made, yet ſuch Diſpoſition both is, and may be lawfully and properly ſaid to be a Teſtament [t], whether the ſame *be ſolemn or unſolemn, written or nuncupative, privileged or unprivileged* [u]; and the Perſon ſo diſpoſing is called a *Teſtator* [x]. And in this Caſe the Ordinary cannot commit the Adminiſtration of the dead Man's Goods, as of one that died Inteſtate, the Executor being able and willing to undertake the Execution of the Teſtament [y].

[q] Quippe legata ſunt accidentia quæ adeſſe & abeſſe poſſunt, ſine ſubjecti (id eſt, teſtamenti) interitu. Jaſ. in Rub. de leg. 1. ff. Vaſq. de ſucceſſ. crea. §. 17.

[r] D. L. quod per manus jure codicil. ff. Inſtit. de hæred. quæ ad inteſtat.

[s] Stat. H. 8. an. 21. c. 5.

[t] L. 1. §. qui neque de hæred. Inſtit. ff.

[u] Supra, part 1. §. 10.

[x] Stat. Weſtm. 2. c. 23. an. 13 Ed. 1. ſtat. Ed. 3. an. 4. c. 1. & an. 25. c. 5. ſtat. 4. Brook & Fitzh. Abridg. tit. execut. & tit. teſtam. quibus in locis cum ſexcentis ſimilibus clarè conſtat, teſtatorem & executorem teſtamentarium relativorum naturam ſapere.

[y] Infra, part 7. §. 19.

Seeing (7) therefore the Force and Efficacy of making an Executor is ſuch, as without which no Will or Diſpoſition is, or deſerveth to be termed a *Teſtament*, and without which, the Party deceaſed ſhall be deemed to have died Inteſtate, notwithſtanding the Multitude of other Legacies or Deviſes; and ſo Adminiſtration of the Goods to be committed, as is aforeſaid: I ſhall therefore ſtep a little further into the Conſideration of this Matter of making an Executor, as the moſt excellent Part and Foundation of every Teſtament; and to ſhew after how many Sorts an Executor may be made [z], and what are the different Effects of every Sort or Manner of appointing an Executor [a].

[z] Infra, §. prox.

[a] Infra, ead. part. §. 4.

§ III. After how many Sorts an Executor may be made.

1. *An Executor may be appointed ſimply or conditionally, from or until a Time, directly or indirectly, univerſally or particularly, in the firſt Degree, ſecond, third,* &c. *And one alone may be appointed Executor or many.*
2. *After how many Sorts an Executor may be made, after ſo many may a Legacy or Deviſe be given.*

THE Word Executor taken in the largeſt Senſe, falls under a threefold Acceptation: For there is firſt, *Executor a lege conſtitutus*, and that is the Ordinary of the Dioceſe. Secondly, *Executor a Teſtatore conſtitutus*, and that is the *Executor Teſtamentarius*. And Thirdly, there is *Executor ab Epiſcopo conſtitutus*; and that is, the *Executor dativus*, who is called an *Adminiſtrator to an Inteſtate*. By the Civil Law, this *Executor Teſtamentarius*, or *Hæres*, doth ſucceed in *Univerſum jus quod defunctus habuit tempore mortis* [b].

[b] L. 1. Cot. de hæredibus.

An (1) Executor may be appointed after divers Manners, eſpecially after theſe following. Firſt, Either *ſimply* [c], *or conditionally* [d]. Secondly, Either *from a certain Time, or to a certain Time* [e]. And in the mean Time Adminiſtration may be committed to the next of Kin, or to the Widow; and the Acts done by ſuch an Adminiſtrator cannot be avoided by the lawful Executor. Thirdly, Either

[c] Infra, ead. part. §. 4.

[d] Infra, ead. part. §. 5.

[e] Infra ead. part. §. 17.

univerſally

[f] Infra ead. part. §. 18. [g] Infra ead. part § 19. [h] Infra ead. part. §. 20.

universally or particularly[f]. Fourthly, Either *in the first Degree, or in the second Degree, or in the third Degree, or in the fourth,* &c[g]. And last of all, Either *one* may be appointed sole Executor, or *divers* may be appointed Executors together[h], of which I mean to treat severally. But by the Way I would have the Reader to observe, that (2) as an Executor may be made diversly; so a Legacy may be given, or a Devise made accordingly, that is to say, simply or conditionally, from a Time or for a Time, universally or particularly, in the first, second, or third Degree, *&c.* and to one or many.

[i] Rot. Parl. 15 H. 6. n. 32.

3. When the King is made Executor, he doth appoint certain Persons to officiate the Execution of the Will; against whom such as have Cause of Action may bring their Suits, and appoint others to take their Accounts[i]. So *Catharine*, Queen Dowager of *England*, Mother of *Henry* the Sixth, who died 2 *Jan.* 1436. made her Will, and thereof appointed *Henry* the Sixth her sole Executor. Whereupon the King appointed [k] *Robert Rollestone*, and others, to execute the said Will, by the Oversight of the Cardinal, the Duke of *Glocester*, and the Bishop of *Lincoln*, or any two of them, unto whom they were to account[l].

[k] *Keeper of the Wardrobe.*

[l] Inst. part. 4. ut Prærogat.

4. And as the Assignation of an Executor may be various, so the Power of an Executor may be limited, qualified, and divided. First, Really, as if he makes *A.* his Executor for his Plate and Houshold-Stuff, *B.* his Executor for his Sheep and Cattle, *C.* his Executor for his Leases, Statutes, *D.* for his Debts due unto him. Secondly, Locally, as if he makes *A.* for his Goods in *London*, *B.* for his Goods in *Middlesex*, or in any other County. Thirdly, Temporally, as he may make his Wife Executrix during her Life, or during the Minority of his Son, or so long Time as she shall continue Widow[m].

[m] 19 H. 8. 3. Dyer. 32 H. 8. Brook. pl. 155. Plow. Com. Greisb. & Fox.

Pas. 31 Eliz. *Alice Francis*'s Case.

T. S. made his Wife Executrix, if she suffered *E. G.* to enjoy such a Parcel of Lands for three Years, otherwise *R. W.* should be his Executor: Adjudged, that she is Executrix immediately upon the Death of the Testator, and shall not stay till she hath suffered the other to enjoy the Lands for three Years.

Conditions in Wills. See Sect. 5, 6, 7.

A Condition is a Quality which as long as it dependeth unperformed, doth hinder the Effect of the Devise; so that the Thing which is devised conditionally cannot be lawfully demanded, because 'tis not done till the Condition is performed.

Or in other Words, a Condition is a *Restriction* annexed to Mens Acts, qualifying or suspending them, and by Consequence making them incertain, whether they shall take Effect or not; and it differs from a *Limitation*, for that is the Bounds or Compass of an Estate, or the Time how long it shall continue.

The Law allows *conditional Devises* as well of Lands as of Goods; and that if the Condition is not performed where the *Lands* are devised, then the Heir may enter; and where Goods are devised, then the Executor may take Advantage: As for Instance; the Testator devised his Lands to *T. S.* and his Heirs, *on Condition that he pay to* E. G. 20 *l.* in this Case if the Money is not paid, the Estate to *T. S.* is determined, and the Heir at Law may enter for the

Forfeiture; but if the Deviſe had been to *the Heir himſelf* upon that Condition, it had been impertinent, becauſe if it had been broken, no Body could enter but the Heir, and he cannot enter upon himſelf.

And becauſe theſe Conditions put Reſtraints upon Mens Actions, therefore they ought to be taken ſtrictly: As for Inſtance; a Leaſe for Years was made upon Condition that the Leſſee ſhould not alien it to *T. S.* and he ſold it to *E. G.* who ſold it to *T. S.* this was held to be no Breach of the Condition, becauſe it ought to be taken ſtrictly. Dyer 45.

(1.) 'Tis to be conſidered what Words make a Condition in Wills, and what not.
(2.) What ſhall be a *Condition precedent*, and what not.
(3.) What ſhall be a *void Condition.*
(4.) Of Conditions which *defeat an Eſtate.*
(5.) What ſhall be a *Condition*, and what a *Limitation*, and *e converſo.*
(6) Where the *Heir*, or he in Remainder, may enter for a Condition broken, and where he ſhall not enter.

(1.) There are ſeveral Words which make Conditions in Wills, as where the Teſtator was ſeiſed in Fee, and having two Daughters deviſed his Lands to his eldeſt Daughter, *that ſhe pay to her youngeſt Siſter yearly* 30*l.* this is a *Condition*, and for Nonpayment the youngeſt Siſter may enter into a Moiety, for otherwiſe ſhe hath no Remedy for her Annuity. *Crickmere* v. *Paterſin*, Cro. Eliz. 146. 1 Leon. 174. S. C. 1 Roll. Abr. 410. S. C. *Ward* v. *Browning*, Poph. 12.

So if the Deviſe had been *paying* to her youngeſt Siſter 30*l.* or *to the Intent* that ſhe pay her ſo much; this had been a Condition, for generally in Wills, the Word *Paying* makes a Condition.

But the Word *Paying* is in ſome Caſes qualified where a *Clauſe of Diſtreſs* is added for Non-payment. Dyer 348.

As where the Teſtator deviſed his Houſes in *London* to *T. S. upon Condition that he pay yearly a certain Rent iſſuing out of the Houſes*, &c. *to his Wife for Life*; and if in arrear for ſix Weeks, *then ſhe might diſtrain*; the Rent was in arrear, and the Heir of the Teſtator entered: And adjudged lawful, for that the Clauſe of Diſtreſs which was annexed to the Eſtate did not qualify the Condition, but that it was determined upon the Breach thereof: Now if in this Caſe the Condition had been by * *Implication*, and not expreſs, then this Clauſe of Diſtreſs would have taken away the Force of it, and have made the Word *Paying* to be no Condition; and of this the following Caſe is an Inſtance. * Lane 58.

ſſ. A Deviſe to *T. S.* for Life, *paying to* E. G. *the yearly Rent of* 6*l.* *half-yearly*, and if 'tis behind, that then *he may diſtrain*; this is no *Condition*, becauſe the Clauſe of Diſtreſs for Non-payment of the Rent qualifies the Force of the Word *Paying*, which otherwiſe would have made a Condition. *Strees* verſus *Beale*, Lane 56. 1 Roll. Abr. 411. S. C.

But the Words following *make no Condition:* As for Inſtance; 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 pay yearly to* T.S. *during the Term* 30*l.* and appointed her to pay ſome Legacies, and that ſhe ſhould be bound to the ſaid *T. S.* to perform the Will; ſhe paid the Legacies, when ſhe ſhould have paid the 30*l.* *Hobert* ver. *Spenſer*, 1 And. 50. Dyer 163. S. C.

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?

3 Leon. 63. So where the Deviſe was of an Annuity of 5 *l.* to his Son *towards his Education and bringing up in Learning*, this was held to be *no Condition*; for if he was not bred up in Learning, yet he ſhall have the Annuity, becauſe the Words *towards his Education* ſhew the Intent of the Teſtator; for he muſt neceſſarily intend that 5 *l. per Annum* was not ſufficient to educate a Youth in Learning.

Conditions are Things odious in Law, and therefore are never created without expreſs Words; for which Reaſon, where Lands are deviſed upon a *Truſt and Confidence*, theſe Words will not make a Condition: As for Inſtrnce; a Deviſe in Fee to Husband and Wife (who was the Daughter of the Teſtator) upon Condition, that *within ten Years* they ſhould give as much Land to *T. S.* as ſhould be worth 100 *l. per Annum*; and if they fail, then the Eſtate deviſed to them ſhall ceaſe, and ſhall go to his Executors *upon Truſt*, that they ſhould ſtand ſeiſed thereof to the ſame Uſes: The Husband made a defective Conveyance of Lands to *T. S.* within the Time, but it was perfected after the Time, (*viz.*) after ten Years: Adjudged, that the Executors might enter, and take the Lands by Virtue of this Deviſe, and that the Words *upon Truſt* did not make a Condition annexed to their Eſtate.

So where the Teſtator deviſed his Lands in Fee upon *Truſt and Confidence*, that *T. S.* the Deviſee ſhould out of the Profits build a Free-School, and pay ſo much Money yearly to the Maſter and Uſher; the Profits were diverted to another Uſe, and no School built: Adjudged this was *not a Condition* of which the Heir at Law might take the Advantage for the Breach thereof, for it was an *expreſs Truſt and Confidence.*

Longdale v. *Longdale*, 1 Vernon 456. The Father made a voluntary Settlement upon his eldeſt Son in Tail Male, Remainder to a ſecond Son; *Proviſo, that if his eldeſt Son did not pay his ſecond Son* 600 l. *at his Age of twenty-one Years, that then the Eſtate of the eldeſt Son both in Law and Equity ſhould ceaſe:* The Father afterwards married a ſecond Wife, and by Deed, in which the former Settlement was recited, took Notice that the Money was not paid; he conveyed the Lands to the Uſe of his Children by his laſt Wife; the Plaintiff exhibited his Bill to be relieved for Non-payment of the Money on the preciſe Day; but decreed, that the Conveyance being voluntary the Father might have put what Conditions in it he thought fit; and this Condition being ſpecial, the Court diſmiſſed the Bill.

(2.) *Conditions precedent and ſubſequent.*

A Condition which is *precedent* muſt be performed before the Eſtate can veſt; as where the Deviſe was, that if *T. S. pay* 50 l. *at* Michaelmas *next after the Death of the Teſtator, he ſhall have his Lands*; in this Caſe the Condition muſt be performed, (*i. e.*) *T. S.* muſt pay the Money before he can have the Lands; and

this and the like Conditions are called *Conditions executed and precedent*, becauſe they go before, and muſt be executed, otherwiſe the Eſtate can never veſt.

Deviſe of Lands to Truſtees and their Heirs, upon Truſt that *if within three Years there happened to be a Marriage between the Lord* Guilford *and Mrs.* W. (who was Heir at Law to the Teſtator) then to her for Life, Remaider to her firſt Son; and if that Marriage did not happen, then the Remainder to the Lord *Faulkland* in Tail; the Marriage did not happen with the Lord *Guilford:* It was held in this Caſe that Chancery would not relieve, becauſe the *Condition was precedent* to her taking the Lands, (*i. e.*) *if ſhe married the Lord* Guilford *within three Years*; and therefore for the Non-performance thereof * Equity cannot relieve, as it might where there is a Forfeiture for Non-performance of a Condition, becauſe in ſuch Caſe Equity may make an Eſtimate, and give Compenſation for it. *Bartie* verſus *Lord Faulkland*, 1 Salk. 231. * 1 Vern. 83. S.P.

The Father gave Portions to his Daughters, *upon Condition* they releaſed to his Son and Heir certain Lands, *&c.* one of them died without giving any Releaſe, and therefore the Heir refuſed to pay the Portions to the Survivors, who exhibited their Bill to be relieved; but they were not; for where the Matter lies in Compenſation, be the Condition precedent or ſubſequent, there ought to be Relief. 1 *Vernon* 222. *Hayward* verſ. *Angell.*

There is a Caſe which ſhews that a Condition is not precedent in a Will, which would be ſo in a Grant, (*viz.*) It was a Deviſe of a Term of Years to *T. S. and if his Wife ſuffer him to enjoy it three Years*, then ſhe ſhall have all his Goods as Executrix; but if ſhe diſturb him, then he made *E. G.* his Executrix: Adjudged that the Wife was Executrix immediately, and within the three Years; for this being in a Will ſhall not be a *Condition precedent*, as it would have been in a Grant; but 'tis a Condition to abridge the Power of the Wife, ſo that ſhe ſhould not be the Executrix of the Husband, if ſhe did not perform that Part of his Will. *Jennings* v. *Gover*, Cro. Eliz. 219. 1 Leon. 229. S. C.

Of Conditions ſubſequent.

A *Condition ſubſequent* is where the Eſtate is executed, but the Continuance of it depends upon the Performance of the Condition; and becauſe it followeth the Execution of the Eſtate, 'tis therefore called ſubſequent or executory, (*i. e.*) the Eſtate is veſted, but to be deveſted again upon the Non-performance of the Condition: As for Inſtance; the Teſtator deviſed a Term for Years to *T. S. upon Condition that he pay* 100*l. to* E. G. *at* Michaelmas *next after the Death of the Teſtator*; otherwiſe the Deviſe to him to be void, in this Caſe, by the Performance of the Condition *T. S.* will have the Term; otherwiſe not.

So when the Father deviſed his Lands to his Son, and his Heirs, *if he ſhall live to Twenty-one*, Remainder over; this is a *Condition ſubſequent*, and the Fee-ſimple veſted immediately in the Son, upon the Death of his Father, to be deveſted if he died before he was of Age. *Edwards* verſ. *Hammond*, 3 Lev. 132.

(3.) *In*

(3.) *In the following Caſes, Conditions in Wills have been adjudged void.*

AS where the Teſtator deviſed 100*l.* to *T. S. if he did what he* (the Teſtator) *appointed in a Codicil*, and he appointed nothing to be done, yet the Deviſe is good, and the Condition ſhall be taken to be void.

Dyer 33. And ſo it is where the Teſtator departed with all his Intereſt, and then deviſed it over; as where he deviſed to the *Prior of St. Bartholomew, &c.* all his Lands, *ſo as he pay yearly* 15 *Marks to the Dean and Chapter of* Paul's, *&c. and if he fail*, then his Eſtate ſhall ceaſe, and the *Dean and Chapter, and his Succeſſors*, ſhall have the Lands; theſe Words, *if he fail, &c.* are a void Condition, becauſe by the Deviſe to the *Prior, &c.* and *his Succeſſors*, he had parted with all his Intereſt, and therefore he could not deviſe it over upon a Condition; for if it ſhould be a Condition, the Heir at Law muſt enter for a Breach, but the Dean and Chapter could not.

(4.) *Of Conditions to defeat, qualify, or to ſuſpend an Eſtate.*

Spittle verſus *Davis*, Moor 271. Owen 155. S. C. 2 Leon. 38. See *Large*'s Caſe.

THE Father deviſed Part of his Lands to his eldeſt Son in Tail, and another Part to his youngeſt Son in Tail: *Provided, That if any of his Children alien or leaſe the ſame before they attain the Age of Thirty Years*, that then the other ſhall enter; the eldeſt Son made a Leaſe of his Part, before he attained the Age of Thirty Years, and then the youngeſt Son entered and ſold it before he was Thirty Years of Age, and thereupon the eldeſt Son entered again: And adjudged that he could not, becauſe the Proviſo extended to that Eſtate which was immediately deviſed, and not to any new Eſtate which might ariſe upon the Breach of that Proviſo; and therefore when once the younger Brother had entered for a Breach of the Condition, the Lands were diſcharged from it, otherwiſe the Eſtate might go from one to another for ever.

Skrine verſus *Bond*, 1 Roll. Abr. 412.

(5.) The Teſtator deviſed his Lands to *T. S.* in Tail, *upon Condition, that he ſhould not alien them*, and if he died without Iſſue, Remainder over to *E. G.* in Fee; afterwards *T. S.* ſold the Lands, yet *E. G.* could not enter, becauſe this was a *Condition*, and not a *Limitation* of the Eſtate, and therefore the Heir at Law muſt enter for the Breach.

Butt's Caſe, Dyer. See poſtea *Warren*'s Caſe.

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.

(6.) The Teſtator being ſeiſed of Lands held in *Borough Engliſh*, 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 Twenty-one Years*; the ſecond Son was admitted, but did not pay the Legacies to his Siſters: Adjudged that this was not a *Limitation* of his Eſtate, ſo as to make it to go to the next who was inheritable by the Cuſtom; 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, then it would have been a *Limitation* and not a *Condition*; for if it had been a Condition, it would have deſcended on the eldeſt Son, and he would not have been obliged to perform it. *Curtis* v. *Woolverſton*, 2 Cro. 56.

Deviſe of Lands to *T. S.* for ſo many Years, *yielding and paying to* E. G. 20s. *yearly at* Michaelmas; the Money was not paid: Adjudged this was a *Condition*, and that for the Breach the Heir at Law might enter. *Fox* v. *Catlin*, Cro. Eliz. 454.

Deviſe to his Wife for Life, *upon Condition that ſhe ſhould educate his Son at School at her own Charge, till he ſhould come of Age*; and after her Death he deviſed the Lands to his ſecond Son in Tail, and the Reverſion in Fee to his own right Heirs; the Wife did not perform the *Condition*; the eldeſt Son entered living his Mother, and adjudged lawful; for by the Breach of the Condition to which her Eſtate for Life was annexed, that Eſtate was determined, and the Heir at Law ſhall take Advantage of it, but ſhall have it only during the Life of the Wife, for the Remainder to the youngeſt Son was not deſtroyed by his Entry, becauſe it was created by a Will, which made it good, though the particular Eſtate for Life was not good, but upon a Condition to be performed. *Warren*'s Caſe, Dyer 127.

So where the Deviſe was of a Term for Years to *T. S. upon Condition ſhe ſhould ſo long live, and keep herſelf a Widow and live upon the Premiſſes*; theſe are Words which make it an expreſs *Condition*, and ſhew the Intent of the Teſtator. *Sayer* verſus *Hardy*, 1 Roll. Abr. 411.

The Teſtator having made a Leaſe of his Lands, reſerving Rent, deviſed the Reverſion to *T. S.* in Fee, and that his Executors ſhould have the Land during the Leaſe, *upon Condition, that they give Bond to pay* 34l. per Annum *to* T. S. *during the Term*; the ſaid Bond to be made to the ſaid *T. S.* and executed within Six Months after the Death of the Teſtator; there was no Bond given by the Executors: Adjudged that this was a *Condition*, and that upon Breach thereof *T. S.* who had the Reverſion in Fee ſhall have the Rent. *Trebern* v. *Cleybrook.*

The Father deviſed to his youngeſt Son his Lands called *S.* and that *if he ſhould be hindered in enjoying thoſe Lands*, then in Lieu thereof he gave him *all his Lands called* B. The Deviſee was evicted out of a Moiety of the Lands call'd *S.* It was decreed, that this being a Condition which lay in Compenſation, the Deviſee ſhall be relieved, and that he ſhould not have all the Lands called *B.* but only Satisfaction *pro tanto* as he was evicted out of the Lands called *S.* *Tyley* verſus *Tyley*, 1 Vern. 270.

§. IV. Of a pure or ſimple Aſſignation of an Executor.

1. *The chief Points conſiderable about the ſimple Aſſignation of an Executor.*
2. *What is a pure or ſimple Aſſignation of an Executor.*
3. *Divers Examples of a ſimple Appointment of an Executor.*
4. *Whether is he underſtood to be made Executor, to whom the Teſtator doth give* all, *or the* Reſidue *of his Goods.*
5. *It is not always needful to expreſs this Word* Executor, *in making of an Executor, namely, when the Teſtator's Meaning is known.*
6. *Other Examples of the former Concluſion.*
7. *The general Legatary is not always underſtood to be Executor.*
8. *What if the Words be indifferent, either to make a Teſtament or a Codicil.*
9. *An Executor may be made, either by the proper Motion of the Teſtator, or at the Interrogation of another.*
10. *The Teſtator muſt have a firm Purpoſe of making his Teſtament, otherwiſe Words are of no Force.*
11. *It skilleth not of Words, ſo that the Meaning appear, neither in what Part of the Teſtament the Executor be appointed.*
12. *Of the Effect of a pure or ſimple Nomination of an Executor.*
13. *Certain Caſes wherein the Mention of a Condition doth not make the Diſpoſition conditional.*
14. *Whether impoſſible or unhoneſt Conditions, do make the Diſpoſition conditional.*
15. *Whether neceſſary Conditions make the Diſpoſition conditional.*
16. *Conditions referred to that which is paſt, or preſent, are not properly Conditions.*
17. *Conditions neceſſarily underſtood, do not make the Diſpoſition conditional.*
18. *The Application of that which hath been ſpoken of the Aſſignation of an Executor to a Legacy or Deviſe.*
19. *Certain Caſes of the Deviſe of Lands, wherein the Meaning of the Deviſor is preferred before the Propriety of Words.*
20. *The different Effects of a ſimple Aſſignation of an Executor, and a ſimple Legacy.*
21. *A Legatary may not of his own Authority take his Legacy, and what is the Reaſon.*
22. *What Remedy a Legatary hath for the obtaining of his Legacy.*
23. *Certain Caſes wherein the Legatary may of his own Authority apprehend his Legacy.*

CONcerning (1) the pure and ſimple making of an Executor, I thought good to remember theſe Points, *viz. What it is, in what Form of Words it may be made, what is the Effect thereof*; and finally, *how a ſimple Nomination of an Executor, and a ſimple Legacy or Deviſe do agree or differ.*

A (2) ſimple Nomination or Appointing of an Executor is, when the Teſtator maketh his Executor *without any Condition*[a]; as if the (3) Teſtator ſay, I make *A. B.* my Executor; or thus, I inſtitute *A. B.* my

[a] §. Hæres. Inſtit. de hæred. Inſtit. & Minſing. ibid. Graſſ. Theſaur. com. op. §. legatum. q. 43. n. 2.

my Executor; or thus, I Will that *A. B.* be my Executor; or thus, I deſire *A. B.* to be my Executor; or thus, *A. B.* ſhall be my Executor; or thus, let *A. B.* be my Executor [b]: For the Law regardeth not ſo much the Words, as the Meaning of the Teſtator [c]. And therefore if the Teſtator ſay, I commit all my Goods to the Diſpoſition of *A. B.* it is in Effect, as if he ſay, I make him my Executor [d]; or, if the Teſtator ſay, I Will that *A. B.* ſhall diſpoſe my Goods which be in his Cuſtody, he is thereby made Executor of thoſe Parcels of Goods [e]. So it is if the Teſtator ſay, I commit all my Goods to the Hands or Diſpoſition of *A. B.* [f]. Or I make *A. B.* Lord [g] of all my Goods; or, I make my Wife Lady of all my Goods [h]; or, I leave all my Goods to *A. B.* [i]. Or, I make *A. B.* Legatary of all my Goods [k]; or, I leave (4) the Reſidue of all my Goods to *A. B.* [l]. For in theſe Caſes, he to whom all or the Reſidue is bequeathed, is thereby underſtood to be made Executor [m]. And this I ſuppoſe to be true, when it doth ſufficiently appear by other Means alſo, to be the Meaning of the Teſtator not to die Inteſtate, but that he to whom all or the Reſidue is bequeathed, ſhould immediately, by Virtue of the Will, enter to all the Teſtator's Goods, and (paying his Debts and Legacies) retain the Reſidue to himſelf [n]. For (5) it is not always neceſſary to expreſs this Word (*Executor*) in making of an Executor [o], neither hath every Teſtator Skill ſo to do [p]; wherefore it is ſufficient, if the Teſtator's Meaning do appear by other Words of like Senſe or Purpoſe [q]. And (6) hence it is, that if the Teſtator write after this Manner, *In all my Goods movable and immovable, I make* A. B. though the Teſtator do not add *Executor*, yet it is to be underſtood, and ſupplied; and ſo is in Effect, as if the Teſtator had ſaid, *In all my Goods movable and immovable, I make* A. B. *my Executor* [r]. Hence alſo is it, that if the Teſtator ſay, I Will that *A. B.* be my Executor, if *C. D.* will not: In this Caſe *C. D.* is preſumed to be appointed Executor; and may if he will be admitted to the Executorſhip, and exclude the other Executor [s]. Likewiſe, if the Executor ſuppoſing his Child, Brother, or Kinſman to be dead, do ſay in his Will: Foraſmuch as my Child, Brother, or Kinſman is dead, I make *A. B.* my Executor: In this Caſe, if the Child, or other Perſon whom the Teſtator ſuppoſed to be dead, be alive, he that is named Executor ſhall not be admitted to the Executorſhip, but the Child, Brother, or Kinſman, whom the Teſtator thought to have been dead [t]; for that it is preſumed to have been the Meaning of the Teſtator to have made that Child, Brother, or Kinſman his Executor, if he had thought him to have been living, and not the Party named [u]. Or if the Teſtator will, that *A. B.* ſhall have his Land in *Dale*, after the Death of his Wife, ſhe ſhall have it for her Life [x].

[b] L. quoniam indignum C. de teſta. & DD. ibidem.
[c] D. L. quoniam Matic. de conject. ult. vol. lib. 4. tit. 3. Graff. Theſaur. com. op. §. Inſtitut. qu. 14.
[d] Cum tibi de teſta. extr. ſumma Roſella. verb. teſtam. §. 1. verſ. quibus verb.
[e] L. Abridgment dez Caſes, edit. Anno Dom. 1599. fol. 115. n. 1.
[f] Lo. de An. Andr. Barba in d. c. cum tibi. Brook Abridg. tit. Executor. n. 98.
[g] L. his verbis ff. de hær. Inſtit.
[h] Bald. in d. L. his verb.
[i] Gloſſ. Bar. & Bald. in d. L. his verb. Graff. Theſaur. com. op. Inſtit. q. 14. quem velim videas.
[k] Mantic. de conject. ult. vol. lib. 4. tit. 3. n. 8. Bald. in L. id quod paupertribus. C. de Epiſcopis & cler. n. 1. verb. contrarium, Simo. de prætis. lib. 1. de interp. ult. vol. fol. 130. n. 3.
[l] Panor. in c. Ranutius de teſta. ext. n. 3.
[m] Rationem aſſignat Panor. in d. c. Ranutius. Quia (inquit juris imperiti neſciunt aptius loqui.
[n] Quo caſu, nihil reor intereſſe, ſitne teſtamentum ſolenne, vel non ſolenne. Nam quod quidam volunt verbum (relinquere) adjectum univerſitati bonorum in voluntate minus ſolenni importare fidei commiſſum, non

Inſtitutionem, actumque valere jure codicillorum, donationiſve cauſa mortis non teſtamenti (ut in apoſtil. ad Panor. in d. c. Ranutius.) Ita eſt intelligendum, quando teſtamentum alias non valeret. Bald. L. epiſt. C. de fidei com. n. 4. Sichard. in L. fin. C. de Codicil. n. 4. Covar. in d. c. Ranutius. §. 1. n. 3. [o] C. cum tibi de teſta extr. Brook, tit. Exec. n. 98. [p] Panor. in d. c. Ranutius. n. 3. [q] L. quoniam indignum. C. de teſta. Mantic. de conject. ult. vol. lib. 4. tit. 3. [r] Paul. Caſtrenſ. & alii in L. errore. C. de teſta. Mantic. de conject. ult. vol. lib. 4. tit. 3. n. 5. [s] Jul. Clar. §. teſtam. b. 35. n. 2. [t] Sichard. in Rub. de hæred. Inſtit. C. n. 3. [u] Sichard. ubi ſupra per. L. ſi m'r. C. de inof. Teſta. Alex. conſil. 185. lib. 2. [x] Brook Abridg. tit. Deviſe, n. 48, 52. ubi vide.

If *A. B.* is next Heir at Law to the Deviſor, the Wife by Implication ſhall have the Land for her Life; but if *A. B.* be a Stranger to the Deviſor, the Wife ſhall not have it for her Life, but it ſhall deſcend

deſcend to the next Heir at Law to the Deviſor, as it hath been adjudged.

But (7) if on the contrary it do appear to be the Teſtator's Meaning, not to make him Executor to whom he doth bequeath his Goods, as when the Teſtator having bequeathed his Goods to one Perſon, doth expreſly name another to be his Executor[y]; or if he to whom all is bequeathed, be unable[z] to execute the Teſtament; or if the Teſtator bequeath the Reſidue of his Goods, *the Debts diſcharged*[a]. In theſe Caſes the univerſal Legatary doth ſtill remain Legatary, and is to receive his Legacy at the Hands of the Executor or Adminiſtrator.

[y] Bar. in L. his verbis de hæred. Inſtit. ff. cujus opinio communiter approbatur, ait Graff. Theſaur. com. op. §. inſtitutio q. 14. Berous in c. Ranutius de teſta. extr. n. 20.

[z] Inſtit. de hæred. quæ ab inteſtat. in princ.

[a] Imol. in d. c. Ranutius, n. 8. Berous ibid. 37. Quæ opinio communis eſt teſte Graff. d. §. inſtit. q. 14. n. 6.

If the (8) Words be indifferent, either to make an Executor or an univerſal Legatary; a Teſtament or a Codicil[b], and no Circumſtances to maintain the one rather than the other, either elſe the Circumſtances being indifferent: Although in this Caſe the Judge ought rather to pronounce the Deceaſed to have made a Teſtament, than a Codicil, and to have left an Executor rather than to have died Inteſtate, in reſpect of the Civil and Eccleſiaſtical Laws[c]. Yet in regard of the Statute, it is more ſafe to commit the Adminiſtration to the Widow, or the next of Kin demanding the ſame, for fear of Forfeiture of Ten Pounds[d], leſt peradventure the Judge, before whom the Penalty is to be demanded, ſhall deem the Party to have died Inteſtate.

[b] Defunctus quando cenſendus eſt voluiſſe codicillari, vel teſtari, Pulchre Bald. in L. filii C. familiæ Herciſcund. ſed plenius Mantic. de conject. ult. vol. lib. 2. tit. 3.

[c] Legiſtæ. in L. verbis civilibus de vulg. ſub. ff. Canoniſtæ. in c. Cum tibi de teſta. extr. Mantic. de conject. ult. vol. lib. 2. tit. 3. n. 12.

[d] Stat. H. 8. an. 21. c. 5.

Furthermore, (9) the Teſtator may lawfully make his Executor, not only of his own Accord without Interrogation; but alſo at the Intreaty or Requeſt of another, (except in certain Caſes elſewhere declared[e],) and that not only by the Words aforeſaid, but by others of like Effect[f]. And therefore, if the Teſtator being demanded by another, whether he do make *A. B.* his Executor, do anſwer, yea, or I do, or what elſe, or why not, or whom elſe ſhould I make Executor, or I cannot deny. This is a pure and a ſimple Aſſignation of an Executor[g].

[e] Sup. part. 2. §. 26.

[f] Mantic. de conject. ult. vol. lib. 4. tit. 3.

[g] Ripa. Alcia. Zaſius, & alii Doctores in L. 1. §. ſi quis ita. de verbis ob. ff. Clar. §. teſtm. q. 37.

Provided (10) always in all the Caſes aforeſaid, and in every other like Caſe, that the Teſtator have a firm and conſtant Purpoſe and Meaning to make his Will, when he uttereth any ſuch Words[h]; for otherwiſe, if the Teſtator have no Meaning to make his Will, although he uſed the moſt plain Words that might be deviſed for the Making of an Executor, yet (as I ſaid before) it were no more a Teſtament or a Will, than a painted Lion is a Lion[i]; for the Purpoſe and Meaning of the Teſtator is the Life and Soul (as I may term it) of the Teſtament, without the which the Teſtator's Words are but Wind. If that do not appear, ſuch only Words ſhall not be admitted for a Will[k]. For what if the Teſtator ſay in Jeſt, I make thee my Executor? What if he ſaid ſo for Fear? What if he were overcome with Drink? Therefore it is not enough to prove the Teſtator's Words, unleſs it be proved that the Teſtator had *animum teſtandi* which how it is proved, is elſewhere declared[l].

[h] Mantic. de conject. ult. vol. lib. 4. tit. 4. in prin. ſupr. 1. part. §. 3. verb. ſententia.

[i] Supra part. 1. §. 3. n. 25.

[k] L. divus L. Lucius. ff d. mil. teſt. §. plane Inſtit. de. mil. teſtam. Mantic. de conject. ult. vol. lib. 2. tit. 4.

[l] Infra 1. part. §. 13.

Note alſo, that it is not material by what Words the Executor is appointed; ſo (11) it is not material in what Part of the Teſtament

he be appointed, whether in the Beginning, or in the Midſt, or Ending[m].

[m] §. ante Inſtit. de lega. Graſ. Theſaur. com.op. §. Inſtit. q. 1.

The (12) Effect of a pure and ſimple Aſſignation of an Executor is this, That the Executor may, immediately after the Death of the Teſtator, undertake the Executorſhip, and enter upon the Teſtator's Goods and Chattels[n]; whereas on the contrary, the Effect of a conditional Aſſignation doth ſuſpend his Admiſſion and Execution of the Teſtament, as afterwards more fully doth appear[o].

[n] Weſemb. in tit. de acquir. hæred. ff. & in tit. de hæred. Inſtit. Et hoc verum eſt etiam ante probationem teſtamenti. Plowd. lib. 1. in Caſ. int. Greisbrook & Fox. Cagnol. in L. precibus. C. de impub. & aliis, ſub. n. 276, 277, 278. [o] Infra ead. part. §. 6, 7.

And (13) here note, That if the Teſtator ſay, *I make* A. B. *my Executor according to the Conditions afterwards expreſſed*; if the Teſtator afterwards expreſs no Conditions, it is in Effect, as if the Teſtator had made him his Executor ſimply[p]. And ſo he may enter upon the Teſtator's Goods preſently after his Death; for the Teſtator, in not expreſſing any Conditions, is preſumed to have altered and revoked his Purpoſe concerning the Adding of Conditions[q]; and conſequently, that he would have the Appointment of the Executor to be pure and ſimple. Howbeit, if the Teſtator, making his Executor upon Conditions to be then expreſſed afterwards, in the mean Time, whiles he is in making his Will, be ſuddenly prevented by Death, or Inſanity of Mind, that he cannot expreſs thoſe Conditions according to his Purpoſe and Determination: In this Caſe the Aſſignation is void, and he which is ſo appointed Executor is not to be admitted to the Executorſhip[r]. Likewiſe, if the Teſtator do make his Executor after this Manner: *I make* A. B. *my Executor*, if I ſhall expreſs any Conditions, in this Caſe no Conditions being expreſſed, he that is ſo appointed ought not to be admitted[s].

[p] L. pen. c. de inſtitut. & ſub. [q] DD. in d. L. pen. [r] L. ſi quis deſtinaverat alias, ſi is qui ff. de teſtam. Paul. de Caſtr. in L. jubemus, C. de teſtam. & latius infra part. 7. §. 12. [s] Dec. & alii. in d. L. Pen. C. de Inſtit. & ſub.

It is (14) alſo to be noted, That that Aſſignation of an Executor is in Effect pure and ſimple, where the Condition is impoſſible or unhoneſt; for ſuch Conditions are reputed, as not written, but omitted[t], and ſo the Executor, without Accompliſhment of any ſuch Condition, is forthwith to be admitted to the Executorſhip, except in ſome Caſes, as hereafter is declared[u].

[t] §. Impoſſibilis Inſtit. de hæred inſtituend. L. obtinuit. de cond. & demon. L. conditiones de condit. Inſtit. ff. [u] Infra eadem part. §. 6, 7.

Furthermore, (15) when it is certain, That the Condition will neceſſarily follow, the Appointment of the Executor made under ſuch Condition is reputed pure and ſimple; as if the Teſtator make *A. B.* his Executor, if the Sun ſhall riſe the next Day[x]; unleſs the Time when the Condition will be extant be uncertain, as I make *A. B.* my Executor, if my Son ſhall die: For though it be moſt certain that he will die, yet nothing more uncertain than the Time when; and therefore the Aſſignation is in Effect conditional[y].

[x] L. ſi pupillus, §. ſub conditione, ff. de novac. Alex. conſil. 59. n. 14. vol. 4. [y] Sichard in Rub. de condic. Inſtit. C. & fuſius infra eadem §. 17. & part 7. §. 23.

And the like may be ſaid, (16) When the Condition is referred to that which is paſt, or preſent, as if the Teſtator ſay, I make *A. B.* my Executor, if he be Bachelor of the Civil Law, or if he have been Student in the Univerſity of *Oxford:* For this Kind of Condition is not properly a Condition[z], but rather a final Cauſe, where-

[z] L. ſi ita ſtipulatus ff. de verb. ob. Bar. in L. 1. de condic. & demon. ff.

fore the Teſtator made him Executor[a]. And although the Teſtator be uncertain, whether the Executor be Bachelor of Law, or have been Student; yet it is certain, in reſpect of the Fact it ſelf; and is either true or falſe at that Inſtant, when it is made: And ſo the Condition worketh no Delay or Suſpenſion, but is either a good or void Aſſignation at that Moment[b].

Finally, (17) That Aſſignation of an Executor is pure and ſimple, when that Condition is expreſſed which is neceſſarily underſtood[c], as if the Teſtator ſaid, I make *A. B.* my Executor, if the Law will[d], or if he will undertake the Executorſhip[e].

[a] Jaſ. in L. ſtichum. de leg. 1. ff.

[b] DD. in d. L. ſi ita ſtipulatus.

[c] L. hæc verba de leg. 1. ff. L. conditiones de cond. & demon. ff.

[d] Mantic. de conject. ult. vol.

[e] Graſſ. Theſaur. com. op. §. legatum. q. 47.

That (18) which hath been ſpoken of the Making of an Executor (according to my former Advertiſements) may eaſily be applied to a Legacy, *Mutatis mutandis:* Wherefore, as that Nomination or Aſſignation of an Executor is pure and ſimple, which is made without Condition; ſo that Legacy is pure which is given without Condition.

Secondly, By the like Application it may appear, that it is not material in what Form of Words a Legacy be bequeathed; ſo that the Teſtator's Meaning do appear. Which Meaning is to be preferred before the Propriety of Words[f], and that not only concerning Goods and Chattels, but alſo concerning Lands and Tenements: For further Declaration whereof I have added theſe Examples following, which I have borrowed out of a little Book, called *The Terms of Law*[g].

[f] §. noſtra Inſtit. de lega.

[g] Verbo Deviſe.

Firſt (19) therefore, *If a Man do by his Will deviſe to* A. B. *all his Lands and Tenements. In this Caſe not only all his Lands and Tenements, which the Teſtator hath in Poſſeſſion, do paſs, but thoſe alſo which he hath in Reverſion by Virtue of this Word* Tenements.

Item, *If Lands be deviſed to a Man to have to him for evermore, or to have to him, and his Aſſigns: In theſe two Caſes, the Deviſee ſhall have a Fee-ſimple; whereas if it be given by Feoffment in ſuch Terms, the Feoffee hath but an Eſtate for his Life, for a Deviſe made without expreſs Words of Heirs is good even in Fee-ſimple.*

Item, *If a Man deviſe his Land to another, to give or ſell, or do therewith at his Pleaſure and Will, this is Fee-ſimple.*

Item, *A Deviſe made to one, and to his Heirs Male, doth make an Eſtate in Tail; but if ſuch Words be put in a Deed of Feoffment, it ſhall be taken in Fee-ſimple, becauſe it doth not appear of what Body the Heirs Male ſhall be begotten.*

Item, *If Lands be given by Deed to* A. B. *and to the Heirs Male of his Body, who hath Iſſue a Daughter, which Daughter hath Iſſue a Son and dieth, there the Land ſhall return to the Donor, and the Son of the Daughter ſhall not have it; becauſe he cannot convey himſelf by Heirs Male, for his Mother is a Let thereunto. But otherwiſe it is of ſuch a Deviſe given by Will, for there the Son of the Daughter ſhall have it, rather than the Will ſhall be void.*

Item, *If one deviſe to an Infant in his* [h] *Mother's Womb, it is a good Deviſe, though ſuch a Feoffment, Grant, or Gift be void.*

[h] 21 H. 6. 12.

There is a contrary Judgment in *Dyer*, and the Reaſon there given is, becauſe a Child in the Womb is not capable of Taking any Thing: But the Lord Chief Juſtice *Hale*, doubting of this Matter in [i] a Caſe of the ſame Nature, cauſed the Roll of that Caſe in *Dyer* to be ſearched; and upon Peruſal thereof he found, that it did not warrant that Judgment. Dyer 303. b. [i] 1 Lev. 135.

However, there is a Caſe where ſuch a Deviſe was held good; it was thus, (*viz.*) The Teſtator deviſed his Lands to two Perſons, naming them, and to the Child then in the Womb of his Wife; and this was adjudged a good Deviſe. Moor 177.

'Tis true, *Coke* and *Doderidge* were of Opinion, where there is ſuch a Deviſe, and the Child is not born till after the Death of the Teſtator, 'tis void. *Simpſon* verſ. *South*, 1 Roll. Rep. 110.

And yet where the Father deviſed a Term for Years *to his Daughters, and after his Death another Daughter was born:* It was adjudged, that all Three of them had a Title. *Stanley* verſ. *Baker*, Moor 220.

Anno 19 *Car.* 2. The Court was divided, whether ſuch a Deviſe was good, or not; and thereupon it was adjourned into the Exchequer-Chamber, but the Parties agreed. *Snow* verſus *Cutler*, 1 Sid. 153. Raym. 162. S. C. 1 Lev. 135. S. C.

Item, *If one will that his Son ſhall have his Land after the Death of his Wife, here the Wife of the Deviſor ſhall have the Land firſt, for Term of her Life. So likewiſe, if a Man deviſe his Goods to his Wife, and that after the Deceaſe of his Wife, 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 Wife: For it is preſumed that his Intent was, that his Wife ſhould have the Houſe alſo for Term of her Life, notwithſtanding it were not deviſed unto her by expreſs Words.*

The Teſtator deviſed his Lands to *T. S. after the Death of his Wife:* Adjudged this was no Deviſe to her by *Implication*; *becauſe* T. S. *was not his Heir at Law*; and it might be as reaſonably intended, that he ſhall have the Lands as the Wife. 1 Vent. 223.

Item, *If a Deviſe of Land be made to* A. B. *and to his Heirs Female of his Body begotten. After the Deviſee hath Iſſue a Son and a Daughter, and dieth, here the Daughter ſhall have the Land, and not the Son; howſoever he be the more worthy Perſon, and Heir to his Father; but becauſe the Will of the dead Perſon is, that the Daughter ſhall have it; therefore Law and Equity would that it ſhould ſo be.*

Hereunto it may be added, That if the Teſtator by his laſt Will deviſe his Lands to *A. B.* charging him with a Payment of a Sum of Money (being as much, or not as much, as the Land is worth, for the Life of the Legatary or Deviſee): In this Caſe he, to whom the Land is deviſed, ſhall have an Eſtate of Inheritance by Virtue of the ſaid Will, though there be no Mention of Heirs, nor of Aſſigns, nor for ever, nor any other Words otherwiſe requiſite in a Deed, without the which an Eſtate of Inheritance could not paſs; whereby (as alſo by the former Caſes) we may diſcern the Difference, and the great Pre-eminence of Wills before Deeds; for in the one the Law doth reſpect the Meaning rather than the Words; in the other, the Words rather than the Meaning [k]. Howbeit, If a Man by his Will deviſe Land in Fee to one, and if he die without Heir, then

[k] L. quoniam Indignum C. de teſta. Mantic. de conject. ultim. volun. l. 4. tit. 3. Simo de præt. Tract. de interp. ult. volun. in locis infinitis.

then to remain to another in Fee; This is a void Remainder, becauſe one Fee-ſimple cannot depend upon another [l].

Thirdly, It may appear by that which hath been ſaid of an Executor, that the Legacy is void where the Teſtator hath not *Animum Teſtandi* [m].

Fourthly, That there be divers Conditions which do not make the Legacy conditional [n].

Laſtly, (20) Concerning the Effect of the one and the other, albeit otherwiſe the Appointing of an Executor, and the Bequeathing of a Legacy do agree in divers Things; yet in this they do differ greatly, that is to ſay, An Executor ſimply inſtituted, may as ſoon as the Teſtator is dead, enter to the Goods and Chattels of the Deceaſed [o]: But a (21) Legatary or Deviſee may not of his own Authority take the Legacy, and ſerve himſelf, but muſt receive the ſame at the Hands of the Executor [p]; the Reaſon is, for that the Executor is charged with the Payment of all the Teſtator's Debts, ſo far as the Goods and Chattels will extend, and the Legacies are not to be paid but of the Reſidue, if any Thing remain [q]. (22) And the Legatary hath no Remedy by the *Common Laws of this Land*, for any Legacy of Goods to him bequeathed, if the Executor will not deliver the ſame: But in this Caſe he muſt take a Citation againſt the Executor of the Teſtament, to appear before the Ordinary, or other Eccleſiaſtical Judge competent, to anſwer him in a Cauſe of Legacy [r]. Notwithſtanding (23) in ſome Caſes the Legatary may be lawfully poſſeſſed of his own Legacy, without Delivery thereof to be made by the Executor: For if there be ſufficient Goods and Chattels in the Hands of the Executor, to pay all the Teſtator's Debts and Legacies, and the Legatary is poſſeſſed of the Thing bequeathed, at the Time of the Death of the Teſtator: In this Caſe the Legatary, by the Civil Law, may ſtill retain the ſame in his own Hands [s]; neither is he to deliver the ſame to the Executor, and afterwards to receive the ſame again at his Hands [t]; likewiſe, if the Teſtator give Licence to the Legatary to enter to his Legacy: In this Caſe, the Legatary may, without the Privity or Conſent of the Executor, take his Legacy and keep the ſame; ſo that there be ſufficient beſides, to diſcharge the Teſtator's Debts [u]. Peradventure alſo, in Caſe of ſuch Sufficiency of Goods, a certain ſpecial Thing being bequeathed, (as the Teſtator's riding Horſe, his Books or his Signet) though another Perſon than the Executor detain the ſame; the Legatary may as well by the Laws of this Realm [x], as by the Civil Law [y], commence Suit againſt the Occupier thereof, and recover the ſame Legacy [z]; unleſs this Third Perſon were able to juſtify his Poſſeſſion, even againſt the Executor, or againſt the Teſtator himſelf, if he were living; for that is a lawful Bar or Exception againſt the Legatary alſo [a]. But if there be not ſufficient Goods to pay the Teſtator's Debts, or if the Legacy conſiſt in Quantity, or be general, (as if the Teſtator bequeath twenty Pounds or a Horſe) the Legatary cannot of his own Authority take ſo much of the Teſtator's Money, or any Horſe, which was the Teſtator's [x], without Licence given by the Teſtator, or Permiſſion of the Executor, nor may bring any Action againſt any third Perſon for the ſame Legacy, albeit he

[l] Fulb. paralele, f. 46. b. 19 H. 8. 8.

[m] Infra, part 7. §. 13.

[n] Infra, §. 5, 6.

[o] L. cum hæredes. ff. de acquirend. poſſ. Bar. in L. ex facto ff. de hæred. inſtituend. Cagnol. in L. precibus. C. de imp. & alio. ſubſt. n. 276.

[p] L. 1. quorum lega. ff. L. non dubium, C. de lega. Perkins, tit. Teſtament. c. 7. fol. 94. Brook, tit. Deviſe, n. 3.

[q] Perkins ubi ſupra & in tit. Deviſes, (ubi etiam tradit aliam cauſam ſed par. honeſtam fruſtrandi legata & fraudandi teſtatorem.) Aliam rationem aſſignat jus civile, nempe ob detractionem falcidiæ, quæ ratio quam ſit apud nos debilis facile eſt conjicere, quandoquidem nullus eſt falcidiæ locus infra regni noſtri limites.

[r] Tract. de rep. Angl. l. 3. c. 9. Fitz. N. B. brevi de conſultatione, Brook, tit. Deviſe, n. 3. 27. 14. Plowd. in caſ. inter Paramor & Yard. Terms of Law, verb. Deviſe.

[s] Socin. conſil. 11. vol. 1. Ripa in L. 1. ff. quorum lega. n. 15. Olden. de action. claſ. 2. act. 2. fol. 113.

[t] C. dolo, de reg. jur. 6.

[u] Jaſ. in L. non dubium, C. de lega.

[x] Brook. Abridg. tit. Deviſe, n. 630.

[y] Sichard. in L. 3. C. de lega, n. 16.

[z] Ratio eſt quia dominium rei legatæ ſtatim poſt mortem Teſtatoris tranſit in legatarium, etiam nondum facta traditione, gloſſ. & DD. in §. in noſtra. Inſtit. de lega. & in L. a. Titio, ff. de fur.

[a] L. ſi rem legatam ff. de excep. & præjudic.

[x] Brook, tit. Deviſe, §. 6. & n. 30.

poſſeſs all the Teſtator's Goods [y]. Finally, If the Legatary be alſo Executor, then may he, if he will, as Legatary, accept the ſame [z]. But, what if it do not appear whether he did accept the ſame as Legatary, or as Executor, whether it is preſumed that he did accept the ſame as Executor, or as Legatary? This Queſtion is elſewhere abſolved.

[y] Quod autem diximus jure civili triplicem concedi actionem legatario, pro conſequendo legato, procedit ſpecie relictâ, ſed ſi quantitas, vel genus relinquatur, non competit rei vendicatio, Bar. in L. 1. ff. de leg. 1. Sichard. in L. non dubium, C. de lega. niſi fortè quantitas, non ut quantitas, ſed ut corpus relinquatur, vel niſi genere relicto, facta ſit electio debita, tunc enim idem juris eſt, ipſoque jure tranſit rei dominium, ac ſi legata fuit ſpecies. Angel. Are. & alii in d. §. m'ra. Inſtit. de lega. Vide ſupra part. 1. §. 6. in fin. & quæ ibidem annotantur.

[z] Sichard. in L. non dubium, C. de lega numb. 13.

§. V. Of a conditional Aſſignation of an Executor.

1. *The chief Points conſiderable about the conditional Aſſignation of an Executor.*
2. *When the Aſſignation of the Executor is conditional.*
3. *By what Words the Diſpoſition is made conditional.*
4. *Of Conditions ſome be neceſſary, ſome impoſſible, ſome indifferent or poſſible.*
5. *What Conditions be neceſſary.*
6. *Two Sorts of neceſſary Conditions.*
7. *Of impoſſible Conditions there be divers Kinds.*
8. *Impoſſible by Nature.*
9. *Impoſſible by Law.*
10. *Impoſſible in reſpect of ſome Perſons.*
11. *Impoſſible, by reaſon of Contrariety or Perplexity.*
12. *Poſſible Conditions are thoſe which are indifferent betwixt neceſſary and impoſſible.*
13. *Of Poſſible Conditions, ſome be arbitrary, ſome caſual, ſome mixt.*
14. Item, *Of Poſſible Conditions, ſome conſiſt in chancing, ſome in doing, ſome in giving.*
15. *Of Conditions ſome are affirmative, and ſome negative.*

CONcerning a (1) conditional Aſſignation or Nomination of an Executor, I thought good to deliver firſt, *What it is* [a]? Secondly, *What Manner of Words do make the Diſpoſition to be conditional* [b]? Thirdly, *How many Kinds of Conditions there be* [c]? Fourthly, *What is the Effect of a conditional Aſſignation of an Executor* [d]? Fifthly, I have examined *certain Queſtions*, not impertinent hereunto [e].

[a] Eod. §. n. 2.

[b] Infra n. 3.

[c] Infra n. 4.

[d] Infra eadem part. §. 6.

[e] Infra ead. §. 7, 8, 9. cum ſequen. uſque ad §. 16.

The Aſſignation (2) of an Executor is conditional, when the Teſtator doth not make his Executor ſimply, but doth add ſome Quality to the Aſſignation, whereby the Effect of the Diſpoſition is ſuſpended or hindered, and dependeth upon ſome future Event [f]. As for Example, the Teſtator maketh *A. B.* his Executor, if his Ship ſhall return from *Venice*.

[f] Sichard. in Rub. de Inſtit. & ſub. C. n. 1. Graff. Theſaur. com. op. §. legatum, q. 46.

Divers (3) Words there be, whereby the Diſpoſition of the Teſtator is made conditional. Firſt and principally, by this Word (*If* [g]) as in the former Example. By this Word alſo (*when*) the Diſpoſition is ſometimes made conditional; namely, when it is joined to a Verb of the future Tenſe. As I make *A. B.* my Executor, or give him One hundred Pounds, when he ſhall be of the Age of Twen-

[g] Bar. in L. 1. de cond. & demon. ff. Mantic. de conject. ult. vol. lib. 10. tit. 5.

ty-one Years [h], or when he ſhall be married [i]. Sometimes by this Word (*whiles*;) as, I make my Wife Executrix, or give her a hundred Pounds, whiles ſhe ſhall abide with my Children; for it is in effect, as though the Teſtator had ſaid, *If ſhe abide* [k]. Alſo by theſe Words (*whenſoever*, *whereſoever*) the Diſpoſition is made conditional [l]; ſometimes alſo by theſe Words (*which*, *what Perſon*, *whoſoever*;) as, I make him my Executor, or give him a hundred Pounds, who ſhall marry my Daughter [m]; ſometimes the *ablative Caſe abſolute* doth infer a Condition, as (my Son being dead) I make *A. B.* my Executor [n]; in which Caſe, not only *A. B.* is aſſigned conditionally, that is to ſay, If the Teſtator's Son be dead, but alſo the Teſtator's Son, if he be living, is preſumed to be aſſigned during his Life [o]. Divers other Words there be, whereby the Diſpoſition is made conditional, wherein *Bartolus* [p] hath not only taken great Pains, but hath alſo been at ſome Coſt (as it ſhould ſeem) in making a great Feaſt, marſhalling together all ſuch Nouns, Pronouns, Verbs, *&c.* which make the Diſpoſition conditional, to whom I refer the Reader to be ſatisfied.

[h] Sichard. in Rub. de Inſtit. & ſub. C. n. 1.
[i] Bar. in d. L. 1. de cond. & demon. ff. n. 8, 9. & Paul. de Caſtr. in eodem L. Vaſq. de ſucceſſ. progreſſ. l. 3. §. 29. n. 3. in fin.
[k] Sichard. in d. Rub. Bar. in L. ſi Titio ff. quando dies legatus cedit.
[l] L. ſi ita ſcriptum §. fin. de leg. 2. ff. Sichard. ubi ſupra.
[m] Sichard. in d. Rub. n. 4.
[n] Ripa in L. centurio ff. de vulg. & pupil. ſub. n. 160, 161. Dyer, fol. 74. n. 16.
[o] Ripa. ubi ſupra Alex. conſil. 185. l. 2.
[p] Bar. in L. 1. de cond. & demon. ff.

Manifold (4) are the Diviſions of Conditions [q], but the plaineſt and fitteſt for this Treatiſe I ſuppoſe to be this, *viz.* Of Conditions, ſome be *neceſſary*, ſome *impoſſible*, ſome *poſſible* [r] or *indifferent*.

[q] Vide Sichard. in Rub. de Inſt. & ſub C. à quo multifariam dividitur conditio, 1. In tacitam & expreſſam, quarum deinde utraque ſpecies in tres ſpecies ſubdividitur. Tacita nimirum (ait) ex diſpoſitione vel naturæ, vel juris, vel teſtatoris ſuboritur; expreſſa autem, aut eſt neceſſaria, aut impoſſibilis, aut indefferens, ſeu poſſibilis. Et harum rurſus quælibet ſpecies multiplex quas ego ſpecies in hoc §. explicavi. [r] Sichard. in d. Rub.

Of neceſſary (5) Conditions, ſome may be ſo termed, in reſpect of *Fact*, ſome in reſpect of *Law* [s]. By neceſſary Conditions, in reſpect of Fact, I underſtand thoſe Conditions, whereof there is a certain and infallible natural Cauſe, by Force whereof the Condition muſt neceſſarily follow: As if the Teſtator make *A. B.* his Executor, or give him a hundred Pounds, if the Sun ſhall riſe the next Day [t]. Of (6) this kind of neceſſary Conditions there be two Sorts [u], ſome are certain in every natural Reſpect, that is to ſay, It is not only certain, that the Condition will follow, but alſo when; as in the former Example of the Riſing of the Sun. And ſome again are certain, but not in every Reſpect; as when the Teſtator maketh *A. B.* his Executor, if his Son ſhall die, or when his Son ſhall die; for albeit, it be certain, that every Man muſt die; yet when, where, or how, it is uncertain [x]. By neceſſary Conditions ſo termed in reſpect of *Law*, I underſtand all ſuch Conditions, which the Law requireth in every Act, albeit the ſame were not expreſſed. As for Example, the Teſtator ſaith, I make *A. B.* my Executor, if he will intermeddle therewith [y]; or I give *A. B.* a hundred Pounds, if he will [z]. This kind of neceſſary Condition is ſometimes expreſſed by the Teſtator, and ſometimes not expreſſed [a].

[s] Bar. in L. 1. de cond. & demon. ff. Mantic. de conject. ult. vol. lib. 10. tit. 5.
[t] Paul. de Caſtr. in L. ſi pupillus, §. ſub cond. ff. de Novac. Alex. conſil. 59. n. 14. vol. 4. Sichard ubi ſupra.
[u] Tu ſi placeat (Juſtinianiſta) videas Bald. in d. L. ſi. pupillos. §. qui ſub cond. ubi poſt gloſſ. ponit tria exempla neceſſariæ conditionis; unum neceſſitatis futuræ ſecundum naturam, veluti ſi moriar; aliud neceſſitatis futuræ ſecundum fidem catholicam, ut ſi Antichriſtus natus fuerit; tertium neceſſitatis præſentis, veluti ſi non tetigero cœlum digito. [x] Sichard. in d. Rub. de Inſtit. & ſub. C. §. illi ff. de leg. 1. [y] Graff. Theſaur. com. op. §. legatum. q. 47. L. hæc verba. de leg. 1. ff. [z] L. ſi ita [a] DD. in d. L. c. hæc verba.

Of (7) impoſſible Conditions, there be four Sorts [b]; in the firſt Sort (8) are contained thoſe whereunto *Nature is an Impediment*. For Example; the Teſtator maketh *A. B.* his Executor, or giveth him a hundred Pounds, if he touch the Skies with his Finger; or if

[b] Sichard. in d. Rub. de Inſtit. & ſub. C. cui adde Zaſium in L. impoſſibilis, de verb. ob. off.

he drink up all the Water in the Sea [c]. In (9) the ſecond Sort are contained thoſe Conditions which be *contrary to Law or good Manners:* As for Example; The Teſtator maketh *A. B.* his Executor, or giveth him a hundred Pounds, if he murder ſuch a Man, or deflower ſuch a Woman [d]; this Condition is unlawful and unhoneſt, and conſequently to be deemed unpoſſible: For the Law would have us to think every Thing impoſſible to be done, which is unlawful to be done [e]; hereupon it is ſaid, *Id poſſumus quod de jure poſſumus*, as if every Thing unlawful were alſo impoſſible [f]. In (10) the third Sort are contained theſe Conditions, which albeit they are not otherwiſe utterly impoſſible, in reſpect of *Nature*, or of *Law*, yet in reſpect of the *Perſon*, are *ſo hard, that they ſeem impoſſible*; as if the Teſtator make *A. B.* his Executor, if he ſhall marry the King's Daughter, he being but a baſe Subject [g]. In (11) the fourth Sort are contained thoſe Conditions, which by Reaſon of *Contrariety* or *repugnant Perplexity* be impoſſible, or incompatible [h]; as if the Teſtator ſay, If my Son be Executor, I make my Daughter my only Executrix; and if my Daughter be Executrix, I will that my Son be ſole Executor [i].

[c] §. Impoſſibilis, Inſtitut. de hæred. inſtituend. & Minſing. ibid. L. impoſſibilis, ff. de verb. ob. & Bar. ac alii ibid.
[d] Minſing in d. §. Impoſſibilis & DD. in d. L. impoſſibilis.
[e] L. ſi filius ff. de cond. Inſtitut.
[f] DD. in d. L. ſi filius.
[g] Sichard. in d. Rub. de Inſtit. & ſub. C. Minſing. in d. §. impoſſibilis, Zaſ. in d. L. impoſſibilis ff. de verb. ob.
[h] L. ſi Titius ff. de cond. Inſtit.
[i] D. L. ſi Titius. Minſing. in d. §. impoſſibilis.

Poſſible (12) Conditions are thoſe which are, as it were, in the midſt betwixt *neceſſary* and *impoſſible Conditions*, and which are *indifferent*, either to be, or not to be [k]. Of (13) poſſible Conditions, ſome are termed *caſual*, ſome *arbitrary*, and ſome are ſaid to be *mixt Conditions* [l]. Caſual Conditions are thoſe whereof the Event is uncertain, in reſpect of humane Knowledge [m]; As for Example; the Teſtator doth make *A. B.* his Executor, or give him a hundred Pounds, if the King of *Spain* die this Year [n]. *Arbitrary Conditions* are thoſe which the Law eſteemeth to be in his Power, on whom the Condition is impoſed [o]: As for Example; the Teſtator maketh *A. B.* his Executor, or giveth him a hundred Pounds, if he ſhall go to the Church [p]. *Mixt Conditions* are thoſe which are partly arbitrary, and partly caſual [q], or partly in his Power, on whom the Condition is impoſed, and partly in the Power of ſome other: As for Example; the Teſtator maketh *A. B.* his Executor, or giveth him a hundred Pounds, if he marry the Teſtator's Daughter. Furthermore (14) of poſſible Conditions, ſome conſiſt in *chancing*, ſome in *giving*, and ſome in *doing* [r]. Finally, (15) Of Conditions, ſome be *affirmative*, ſome *negative* [s], the Uſe of all which Diſtinctions doth hereafter inſue [t].

[k] Sichard. in Rub. de Inſtit. & ſub. C. n. 9.
[l] L. unic. §. ſin autem C. de ead. tol. Bar. in L. 1. de Inſtit. & ſub. C. Mantic. de conject. ult. vol. lib. 10. tit. 5. n. 3. Weſenb. in tit' de cond. Inſtit. ff.
[m] Spiegel. Lexic. verb. fortuitum.
[n] Minſing. in §. pen. Inſt. de hæred. Inſtit.
[o] Sichard. in d. Rub. Vigl. & Minſing. in §. pen. de hæred. Inſtit.
[p] Jaſ. in L. ſi filius à patre. ff. delib. & poſthu. n. 1.
[q] Bar. in L. 1. de Inſt. & ſub. C.
[r] L. in facto ff. de cond. & demon. [s] D. L. in facto. [t] Infra eadem part. §. prox. cum ſequen. uſque ad §. 16.

§. VI. Of the Effect of a conditional Diſpoſition.

1. *Divers and contrary Effects of Conditions.*
2. *Two Rules, where the Former is, that neceſſary and impoſſible Conditions do not ſuſpend the Effect of the Diſpoſition.*
3. *Examples of this former Rule.*
4. *The ſecond Rule is, That poſſible Conditions do ſuſpend the Effect of the Diſpoſition.*
5. *Example of the ſame Rule.*

6. *Con-*

6. *Conditions partly certain, and partly uncertain, do ſuſpend the Effect of the Diſpoſition.*
7. *Neceſſary Conditions being otherwiſe expreſſed than underſtood, ſuſpend the Effect of the Diſpoſition.*
8. *Impoſſible Conditions, which the Teſtator ſuppoſed to be poſſible, do ſuſpend the Effect of the Diſpoſition.*
9. *Divers Reſtraints of this laſt Poſition, being the fourth Limitation of the former Rule.*
10. *Very hard Conditions, or almoſt impoſſible, do ſuſpend the Effect of the Diſpoſition.*
11. *A Reſtraint of this laſt Poſition, being the fifth Limitation.*
12. *Impoſſible Conditions negatively conceived, are not void themſelves, but make void the Diſpoſition.*
13. *A Reſtraint of this laſt Concluſion, being the ſixth Limitation.*
14. *Conditions which become impoſſible, being at the firſt poſſible, do hinder the Effect of the Diſpoſition.*
15. *A Reſtraint of this Concluſion, being the ſeventh Limitation of the former Rule.*
16. *The Condition which is both impoſſible and unboneſt, maketh void the Diſpoſition.*
17. *Conditions which be impoſſible, by Reaſon of Repugnancy, make void the Diſpoſition.*
18. *A Reſtraint of this laſt Limitation.*
19. *Poſſible Conditions do ſuſpend the Effect of the Diſpoſition, until they be accompliſhed.*
20. *Divers Limitations of this Poſition being the ſecond Rule.*
21. *A further Conſideration of the former Concluſions, together with other Queſtions.*

THE (1) Diverſity of Conditions breedeth many and contrary Effects. For ſometimes, he that is appointed Executor conditionally, or to whom any Legacy is given conditionally, is not to be admitted to the Executorſhip, nor can effectually demand the Legacy, until the Condition be accompliſhed. And again, ſometimes he that is named Executor, or to whom any Thing is bequeathed upon Condition, may preſently be admitted to the Executorſhip, or demand the Legacy, though the Condition be not yet accompliſhed, or as though no Condition at all were expreſſed.

Wherefore, that we may know when the Condition is to be firſt accompliſhed, before the Executor can be admitted, or the Legatary demand his Legacy; and contrariwiſe, when the Executor may be admitted, or the Legatary make his Demand before the Accompliſhment of the Condition, I thought good to deliver two Rules, with their Limitations.

The (2) former Rule is this, *When the Condition is extream, that is to ſay, Either neceſſary or impoſſible, ſuch Condition hindereth not the Executor nor Legatary, but that he may be admitted to the Executorſhip, or recover the Legacy; as if ſuch had not been at all expreſſed* [u]. For Example, (3) the Teſtator doth make thee his Executor, or doth give thee a hundred Pounds, if the Sun ſhall ariſe upon *Eaſter-*

[u] L. ſi pupillus, §. qui ſub conditione de Novat. L. nam etſi. L. quod. ſi ea. de cond. indeb. L. Julianus de jure, de lib. L. hæres meus de cond. & demon. L. 1. L. conditiones L. filius, L. quandam L. mulier de condit. Inſtitut. ff. L. reprehendenda, de Inſtit. & ſub C. §. impoſſibilis, Inſt. de hæred. Inſtit.

Eaſter-day [x]; or the Teſtator doth make thee his Executor, or giveth thee a hundred Pounds, if thou ſhalt drink up all the Water in the Sea [y]: Both theſe Conditions are extream, the one neceſſary, the other impoſſible; and therefore in theſe two Caſes thou mayſt be admitted Executor, or obtain the Legacy; as if the Diſpoſition had been ſimple, or without any ſuch Condition [z].

The (4) ſecond Rule is this, *When the Condition is not extream, but indifferent or poſſible, then the ſame Condition muſt firſt be ſatisfied before the Executor can be admitted, or the Legatary recover his Legacy* [a]. For Example, (5) the Teſtator doth make thee his Executor, or doth give thee a hundred Pounds, if his Ship ſhall return from *Venice*. This Condition is indifferent, neither neceſſary nor impoſſible [b]. In the mean Time therefore, until the ſame Condition be extant, thou canſt neither be Executor, nor obtain the Legacy by Force of that Diſpoſition [c]. To return to the former Rule, the ſame is diverſly limited or reſtrained.

[x] Paul. de Caſtr. in d. L. ſi pupillus §. qui ſub condit. Sichard. in Rub. de Inſtit. & ſub. C. n. 7.

[y] Minſing. in §. impoſſibilis, Inſtit. de hæred. Inſtit.

[z] Per LL. ſupradictas.

[a] L. qui hæred. de condit. & demon. L. ſi quis ſub conditione, ſi quis omiſ. eam Teſta. L. cedere diem de verb. ſig. ff. Graſſ. com. op. §. legatum, q. 52. Simo de Prætis, de interp. ult. vol. lib. 5. interp. 2.

dub. 2. fol. 66. n. 109. Bar. & alii.

[b] Minſing. in §. hæres Inſt. de hæred. Inſtit.

[c] D. L. qui hæred. & ibi Gloſſ.

The firſt Limitation thereof may be this, that albeit (6) that Condition which by Courſe of Nature muſt needs follow, is accounted as it were already accompliſhed by Reaſon of the infallible Certainty; yet when the Condition is not in every Reſpect certain, but certain and uncertain in divers Reſpects: As for Example; the Teſtator maketh *A. B.* his Executor, or giveth him a hundred Pounds, if, or when his Son ſhall die [d]. Howſoever this Condition be certain in reſpect of Death, becauſe it is not certain in reſpect of the Time of his Death; therefore in the mean Time, the Executor or Legatary, where there is ſuch a Condition, cannot obtain the Executorſhip or Legacy, but muſt expect the Event of the Condition [e].

[d] Nihil intereſſe utrum teſtator dixerit ſi morietur, vel cum morietur, patet per Bar. Caſtr. & Alex. in L. extraneum, L. 1. C. de hæred. Inſtit. quor' opinio communis eſt, ait Alex. in d. L. extraneum, licet ſecus ſit in contractibus. Sichard. in d. Rub. de Inſtit. & ſub. C.

[e] Paul. de Caſtr. & Jaſ. in d. L. extraneum.

Another (7) Limitation to the former Rule is this; although the Diſpoſition be not made conditional by expreſſing of that Condition, which by the Law is neceſſarily underſtood [f]. Nevertheleſs, if the Condition be expreſſed in other Manner than is underſtood, the Diſpoſition is thereby made conditional [g]; ſo that in the mean Time, the Effect thereof is ſuſpended. As for Example; the Teſtator ſaith, I give to *A. B.* twenty Pounds if he will [h]. In which Caſe, except the Legatary do by ſome Means declare his Willingneſs, the Legacy is not due; and if he die in the mean Time, before he have declared his Willingneſs, the Legacy is not transferred to the Executor or Adminiſtrator of the Legatary [i]; whereas, if no ſuch Condition had been expreſſed, but that the Legacy had been left ſimply, then albeit the Legatary had died, not knowing of the ſaid Bequeſt, his Executors or Adminiſtrators might have obtained the ſame [k].

[f] L. hæc verba, ff. de leg. 1.

[g] L. ſi ita, §. illi ff. de leg. 1.

[h] D. §. illi, ibi, ſi volet, id eſt, ſi ſe velle declaraverit.

[i] Jaſ. & alii in d. §. illi. Quære tamen, iſto ſiquidem caſu diſtinguit, Practic. Papienſ. in forma libelli, pro legat. rei ſingular. fol. 455.

[k] Bar. Zaſ. & alii in d. L. hæc verba, ff. de lega. 1.

The third Limitation is, When it doth appear to be the Teſtator's Meaning, by the Expreſſing of the ſaid neceſſary Condition, to make the Diſpoſition conditional [l].

[l] Graſſ. Theſaur. com. op §. legatum, q. 47. ubi etiam oſtenditur quomodo appareat hujuſmodi teſtatoris voluntas.

The Fourth is, That (8) although the impoſſible Conditions, whether they be impoſſible by Nature or by Law, do not hinder the Effect of the Diſpoſition, being reputed as if they were not written nor uttered [m]. Nevertheleſs, if the Teſtator did ſuppoſe the ſame Condition to be poſſible or lawful, then is not the Condition void, but the Diſpoſition whereunto it is added [n]. As for Example; the Teſtator maketh *A. B.* his Executor, or giveth him a hundred Pounds, if he marry his, the Teſtator's Daughter, ſuppoſing her to be living, whereas ſhe is dead; in this Caſe the Condition is impoſſible, for the Legatary cannot marry a dead Woman: And yet nevertheleſs, becauſe the Teſtator did think her to be living, and ſo the Condition to be poſſible, *A. B.* cannot be Executor, nor obtain the Legacy; for it is not likely, that the Teſtator would have made him Executor, or have given him a hundred Pounds, if he had known or believed his Daughter to have been dead [o]. Howbeit (9) there be divers Caſes wherein the Diſpoſition is not void, by Reaſon of an impoſſible Condition, which the Teſtator did account poſſible and lawful; but the Condition it ſelf is void, howſoever it ſeemed poſſible in the Opinion of the Teſtator. One is, where the Condition may be accompliſhed by ſome equivalent Means, though not in the ſame Manner deſcribed in the Diſpoſition [p]: Another Caſe is, when the Teſtator after the Making of his Will, underſtanding the Condition to be impoſſible, did nevertheleſs confirm his Will by Codicils [q]. The like is, when the Teſtator was doubtful whether the Condition were poſſible or no [r], or the Bequeſt were in Favour of Liberty [s], or *in favorem piæ cauſæ*, when the Teſtator doth bequeath any Thing to be imployed to godly Uſes; for then the Condition, which he ſuppoſed poſſible, is rejected, and the Diſpoſition available, as pure and ſimple [t].

[m] L. 3. ff. de cond. & demon. §. impoſſibilis, Inſtit. de hæred. Inſtit. Groſſ. Theſaur. com. op. §. legatum, q. 50.

[n] L. ſervo manumiſſ. ff. Le cond. indebit.

[o] DD. in d. L. ſervo manumiſſo.

[p] L. hujuſmodi. §. ſi ita cui. ff. de leg. 1. Bar. in L. 1. de cond. & demon. ff. Jaſ. in d. L. ſi ita. §. ille, de leg. 1.

[q] Jaſ. in d. L. ſervo. manumiſſ. Are. in L. impoſſibil. de ver. ob. ff.

[r] Bar. in L. ab omnibus, §. in teſt. de leg. 1. Are. in L. impoſſibilis de verb. ob. Jaſ. in d. L. ſervo; manumiſſ. de cond. indeb. 5. [s] L. civitatem §. falſum juncta gloſſ. de condit. & demon. L. cum Stichus, de ſtat. lib. ff. & Jaſ. in de L. ſervo. [t] Bald. in L. 1. C. de com. ſervo. manumiſſ. Bar. in L. proxime, S. L. de his quæ in teſta. del. ff. & clarius per Jaſ. in d. L. ſervo manumiſſ.

The Fifth is, when the (10) Condition is not utterly impoſſible, but very hard, and as it were impoſſible to be performed by him, on whom it is impoſed. In which Caſe it ſeemeth to be the Purpoſe of the Teſtator, that the Party ſhall reap no Benefit by that Diſpoſition; otherwiſe the Teſtator would not have impoſed ſo hard and difficult a Condition [u]: And therefore in this Caſe, the Condition doth ſuſpend the Effect of the Diſpoſition, until the Condition perhaps be accompliſhed [x]. Notwithſtanding, (11) if the Condition be impoſſible only in Reſpect of the Shortneſs of the Time preſcribed by the Teſtator; as if he make *A. B.* his Executor, or give him an hundred Pounds, if he do erect a Monument within three Days after his Death; in this Caſe the Condition hurteth not [y], for that it reſpecteth the Execution, and not the Subſtance of the Will. And it is to be underſtood, that the Teſtator would have it performed with as great Expedition as is poſſible [z].

[u] Sichard. in Rub. de Inſt. & ſub. C. Minſing. in §. impoſſibilis Inſtit. de hæred. inſtituend.

[x] L. cum hæres §. 1. de ſtatu. lib. L. continuus §. Illud, de verb. off. ff.

[y] L. ſi mihi & tibi, §. 1. ff. de leg. 1.

[z] Jaſ. Lanc. Dec. & alii d. §. 1 Zaſ. in L. continuus, & illud. de ver. ob. ff.

The Sixth is, When (12) the impoſſible Condition is conceived negatively, for then it is not accounted as if it were void it ſelf, (as is the affirmative impoſſible Condition) but it maketh void the Diſpoſition whereunto it is adjoined. As for Example; the Teſtator chargeth

his Executor, to whom he hath alſo given the Reſidue of his Goods, that if he do not touch the Skies with his Finger, or do not kill his Father, then to pay to *A. B.* an hundred Pounds; in this Caſe the Legacy is void [a]. The Reaſon is, becauſe the Executor who otherwiſe ſhould have the ſame Thing bequeathed, is not to be puniſhed for not doing that Thing which is impoſſible or unhoneſt to be done [b]. But (13) if the negative impoſſible Condition be not ſet down in Way of Penalty, but ſimply, the Diſpoſition is not void, but taketh Effect preſently. As for Example; the Teſtator maketh *A. B.* his Executor, or giveth him a hundred Pounds, if he doth not drink up all the Water in the Sea: In this Caſe (if any were ſo fooliſh as to add any ſuch Condition) the Effect of the Diſpoſition is not hindered, and ſo *A. B.* is to be admitted Executor, or may obtain the Legacy, as if no Condition were expreſſed [c].

[a] §. L. ultim. Inſtit. de lega. in fin. L. ab eo. C. de fidei com. L. unic. C. de his quæ Pæn. nomine.

[b] Minſing. in d. §. ult. inſtit. lega. Caſtren. in d. L. unic. C. de his Pan.

[c] L. impoſſibilis, de verb. ob. ff. Bar. & alii in eand. L. Paul. de Caſtr. in d. L. unic. quem videas.

The ſeventh Limitation is, When (14) the Condition was not impoſſible at the firſt, but becometh impoſſible afterwards; for then it is not void, but maketh the Diſpoſition void. For Example; the Teſtator maketh *A. B.* his Executor, or giveth him a hundred Pounds, if he marry his, the Teſtator's Daughter; afterwards, and before Marriage, this Woman dieth, whereby the Condition is made impoſſible. In this Caſe the Condition, although now impoſſible, is not void, but maketh void the Diſpoſition; and ſo *A. B.* cannot be Executor, nor obtain the Legacy by Virtue of ſuch Diſpoſition [d]. But (15) if the Woman were not dead, but did refuſe to be married, and ſo the Condition became, as it were, impoſſible, for lack of her Conſent. In this Caſe the Diſpoſition was not void, and ſo he might be admitted to the Executorſhip, or obtain the Legacy, as if no Condition had been impoſed, or rather as if the ſame had been accompliſhed; as elſewhere [e] is more fully declared.

[d] Mantic. de conject. ult. vol. lib. 11. tit. 16. n. 23. Menoch. de præſump. lib. 4. fol. 706. Qui hanc concluſionem & extendit & reſtringit ibidem, n. 40. cum ſequen. Vide in eadem part. §. 8. in fin.

[e] Infra eadem part. §. 8.

The Eighth is, When (16) the Condition is both impoſſible and unhoneſt, for then the Diſpoſition is thereby void; and that in Diſfavour of the Teſtator, who added ſuch a Condition [f]: Whereas if the Condition had been only impoſſible or unlawful, the Diſpoſition had been good, and that in Favour of the Teſtament [g].

[f] Bald. in L. ſi pater. de Inſtit. & ſub. C. n. 5.

[g] Gloſſ. in §. impoſſibilis, Inſtit. de hæred. Inſt. aliud autem in contractibus obtinet.

The Ninth is, When the Condition is impoſſible by Reaſon of Perplexity, whereof there is Example before; for then the Diſpoſition is void [h].

[h] L. ubi repugnantia de reg. jur. ff. & ibi Cagnol. limitans eand. reg. gloſſ. in d. §. impoſſibilis, adde Petr. Duen. Tract. reg. & fal. verb. conditio. ubi tradidit tres limitationes.

The Tenth is, When (17) the Condition is repugnant to the Nature of the Diſpoſition, as in captious Diſpoſitions, whereof I have ſpoken hereafter more at large [i]. Notwithſtanding, (18) if the Repugnancy be not in ſuch Sort, but that it may be reconciled, it hurteth not the Diſpoſition [k]. And therefore, if the Executor do name two Executors, (for Example) his Son and his Daughter, with a Condition that his Daughter do not adminiſter: Albeit here ſeem a Repugnancy

[i] Infra eadem part. §. 11.

[k] Cagnol. in d. L. ubi repugnantia. de reg. ut. ff.

pugnancy in the Aſſignation of the Daughter, for that it is the Office of every Executor to adminiſter, yet becauſe the ſame may be reconciled, the Daughter is to be admitted to the Executorſhip, namely, to proſecute any Action, though not to adminiſter further of any Goods whereof they are in Poſſeſſion, or which ſhall after be by Action ſo recovered [l].

[l] Brook, Abridg. tit. executor, n. 2. 19 H. 8. Dyer, fol. 4.

The Eleventh Limitation is, When the unhoneſt Condition is referred to the Time paſt, for then it is not rejected, but doth either preſently confirm or infirm [m] the Effect of the Diſpoſition.

[m] Covar. Tract. de ſponſal. part. 2. c. 3. §. 1. n. 9.

Now, that we have ſeen the Limitations of the firſt Rule, let us take a View of the Limitations of the ſecond Rule, which is that, *When* (19) *the Condition is poſſible, the Effect of the Diſpoſition is ſuſpended, until the Condition be accompliſhed.* So that he which is made Executor, or to whom any Thing is bequeathed under ſuch Condition, cannot be admitted to the Executorſhip, nor obtain the Legacy in the mean Time [n]: Inſomuch, that it is not enough to perform the Condition by any other equivalent Means, but it muſt be accompliſhed in that preciſe Manner and Form of the Condition, without varying in any one Jot [o].

[n] L. qui hæred. de cond. & demon. L. ſi quis ſub condition. Siquis omiſſ. cauſa. teſta. L. cædere diem. de ver. ſig. ff. Graſſ. Theſaur. com. op. §. legatum, q. 52. Simo de Prætis, de interp. ult. vol. lib. 5. interp. 2. dub. 2. n. 109. [o] L. qui hæredi. L. Menius, de cond. & demon. ff.

The firſt Limitation of the ſecond Rule is this, (20) When it doth not ſtand by the Executor or Legatary, wherefore the Condition is not performed; for then it is accounted to be accompliſhed [p]. Another Limitation is this, When the Condition is negative; for there the Executor or Legatary, may, in the mean Time, be admitted to the Executorſhip, or recover the Legacy, entring firſt into Bond to make Reſtitution, if the Condition be not performed [q].

[p] C. Imputari de reg. jur. lib. 6.

[q] L. Mutianæ, ff. de cond. & demon.

The third Limitation is, When the Condition was once accompliſhed, though it do not continue [r].

[r] Bar. ſubſtitutione, ff. de vulg. ſub.

The fourth Limitation is, when the Condition is poſſible, in reſpect of Fact, but not lawful [s].

[s] L. filius, ff. de cond. inſtit. ſupra eadem part. §. 5.

But (21) foraſmuch as none of theſe Concluſions do proceed ſimply or indiſtinctly, I thought good to examine every of them ſeverally, and at large, namely.

Firſt, Whether every poſſible Condition ought to be obſerved preciſely, and *ad unguem* [t].

[t] Infra eadem part. §. prox.

Secondly, Whether it be ſufficient for the Executor or Legatary, that it ſtand not by them, wherefore the Condition is not accompliſhed [u].

[u] Infra ead. part. §. 8.

Thirdly, When, and in what Caſes the Executor or Legatary is to be admitted to the Executorſhip, or may obtain his Legacy before the Accompliſhment of the Condition by entring into Bond [x].

[x] Infra ead. part. §. 9.

Fourthly, Whether it be ſufficient that the Condition was once performed, though it do not ſo endure [y].

[y] Infra eadem part. §. 10.

Fifthly, Whereas it may be doubted of divers Conditions, whether they be lawful, or no; I have declared how far the ſame be lawful, or unlawful [z].

[z] Infra eadem part. §. 11, 12, 13.

Unto the which Queſtions, I have alſo added theſe following.

Within what Time the Condition may, or muſt be accompliſhed, when no certain Time is limited by the Teſtator [a].

[a] Infra eadem part. §. 14.

Then how that uſual Condition (*If he die without Iſſue*) is to be underſtood, or when it is ſaid to be accompliſhed [b].

[b] Infra eadem part. §. 15.

Finally, What Order is to be taken concerning the Adminiſtration or Poſſeſſion of the Goods of the Deceaſed, whilſt the Condition of the Inſtitution of the Executor dependeth unaccompliſhed[c]. [c] Infra eadem part §. 16.

§. VII. Whether every poſſible Condition ought to be obſerved preciſely.

1. *Conditions are of a ſtrict Interpretation.*
2. *Conditions inducing a Form, are to be obſerved preciſely.*
3. *Examples hereof.*
4. *When the Teſtator doth reſpect the End, it skilleth not of the Means.*
5. *Voluntary Conditions are to be obſerved preciſely, not neceſſary Conditions.*
6. *He in whoſe Favour the Condition is made, may conſent to other Means.*
7. *The Condition of Payment to be made to the Infant, is ſatisfied by Payment to the Tutor.*
8. *In Subſtitutions it ſufficeth, that the Condition be effected by other equivalent Means.*
9. *In Favour of Liberty, or of godly Uſes, the Condition need not to be preciſely obſerved.*
10. *Whether the Condition may be performed by another Perſon, than him that is named in the Condition.*
11. *Where the Law alloweth other Means, the preciſe Form need not to be obſerved.*

FOraſmuch (1) as Conditions are ſaid to be of a ſtrict Interpretation[d], and to induce a Form to every Diſpoſition, whereunto they are joined[e]; unto which Form nothing may be added, nothing detracted, nothing altered[f]. Therefore it is holden for a Rule, that (2) every poſſible Condition ought to be preciſely obſerved[g]: Neither is it ſufficient (but in ſome Caſes) to accompliſh the ſame by any other Means, or in any other Manner than is preſcribed. For Example; (3) the Teſtator maketh *T. S.* his Executor, or giveth him a hundred Pounds, if he ſhall give to *A. B.* ten Pounds; and *T. S.* not knowing of the Teſtator's Will, doth of Compaſſion or good Will, give ten Pounds to *A. B.* becauſe poor, and he is rich. In this Caſe *T. S.* ſhall not be reputed to have accompliſhed the Condition, becauſe he being ignorant of the Diſpoſition, did it not with a Mind or Purpoſe to ſatisfy the Condition[h]: Nevertheleſs, if *T. S.* did firſt know of the Condition, he will be preſumed to have given the ten Pounds with a Mind to perform the Condition, unleſs the contrary do appear[i]; ſo that it is not neceſſary to proteſt, or to affirm by Words, that *T. S.* did give the ten Pounds with a Mind or Intent to perform the Condition, ſeeing the ſame is preſumed, unleſs the contrary be proved[k]. Another Example to the ſame Effect is this; The Teſtator maketh *T. S.* his Executor, or giveth him a hundred Pounds, if he pay ten Pounds to *C. D.* before a certain Time, within which Time *C. D.* dieth, and *T. S.* payeth the ſame ten Pounds within the Time, to the Executor or Adminiſtrator of *C. D.* In this Caſe the Condition is not ſaid to be performed, and ſo *T. S.* cannot be Executor, nor obtain the Legacy of a hundred Pounds, becauſe he

[d] Michael. Graſſ. Theſaur. com. op. §. legatum, q. 52. n. 1.
[e] Bald. in Authen. ut liceat. C. quando Mul. Tut. Offic. Fung. Tiraquel. de retract. §. 1. gloſſ. 21. n. 13.
[f] Tiraquel. de retract. §. gloſſ. 11. n. 11. Peckius in c. cum nom. de reg. jur in 6. n. 6.
[g] Graſſ. Theſaur. com. op. §. legatum. q. 52. ubi atteſtatur de communi opinione.
[h] Gloſſ. & DD. in L. ſi quis hæredem C. de Inſtit. & ſub. & hæc eſt communis opinio, ut per Michael. Graſſ. d. §. legatum, q. 32. n. 3.
[i] Bar. & Paul. de Caſtr. in L. 2. de cond. & demon.
[k] Bar. & Paul. de Caſtr. in d. L. 2.

did not pay the ten Pounds to *C. D.* himſelf; for the Payment ought to have been made to *C. D.* himſelf [l], and not to his Executors or Adminiſtrators.

[l] L. ſub. diverſis, §. ult. & ibi Bar. de cond. & demon. ff. Mantic. de conject. ult. vol. lib. 11. tit. 17. n. 25. & hoc quidem ſine difficultate in hærede legatarii, quia hæredi legatarii ſolutio fieri non poteſt per d. §. ult. ſed an idem juris ſit in hærede hæredis, queſtio eſt magis dubia, de qua legendus eſt Mantic. ubi ſupra.

The firſt Limitation of the foreſaid Rule is, (4) When it doth appear that the Teſtator hath more Reſpect to the End, than to the Means; for then it is ſufficient that the Teſtament be accompliſhed, although in other Manner than it is expreſſed in the Condition [m].

[m] Mantic. de conject. ult. vol. lib. 11. tit. 16. n. 3.

The ſecond Limitation is, When (5) the Condition is not voluntary, but neceſſary; for in neceſſary Conditions 'tis not material, whether the ſame be accompliſhed in that Manner expreſſed by the Teſtator, or in any other good Manner [n].

[n] Bar. in L. Gallus, §. quid ſi tantum, n. 2. de lib. & poſthu. ff. Graſſ. Theſaur. com. op. §. legatum, q. 52. Simo de Pratis. de interp. ult. vol. lib. 1. in fin. ubi etiam reſpondit quænam conditio ſit dicenda neceſſaria, vel voluntaria.

The third Limitation is, When (6) the Perſon in whoſe Favour the Condition was made, doth conſent that the ſame be accompliſhed in other Manner [o]. For Example; the Teſtator maketh thee his Executor, or giveth thee a hundred Pounds, if thou give to *A. B.* ten Pounds: So it is, that *A. B.* did owe unto the ten Pounds, and is contented to be releaſed of that ten Pounds which he is to receive. In this Caſe the Condition ſhall be accounted for accompliſhed, as if the ten Pounds had been really paid [p]. Theſe three Limitations (eſpecially the firſt of them) are ſo general, that they may ſeem to comprehend the Reſidue of the Limitations; nevertheleſs, it ſhall not be amiſs, if I expreſs them for the better Underſtanding of thoſe former Limitations.

[o] Simo de Prætis. de interp. ult. vol. lib. 1. ſolut. ult. n. 34.

[p] Simo ubi ſupra licet fortaſſe contrarium obtineat in contractibus, attenta diſpoſitione hujus regni Angliæ. Perkins, tit. condit. fol. 146.

The fourth Limitation therefore (7) is this, When that is paid to the Tutor, which is limited to the Child [q]. For Example; thou art made Executor, or a hundred Pounds is bequeathed to thee, if thou pay unto the Teſtator's Son (being an Infant) ten Pounds: In this Caſe the Condition is ſufficiently performed, if Payment be made to the Tutor of the Child [r], eſpecially, if the Money be converted to the Benefit of the Child [s]. And albeit, this Condition may be ſaid to be a voluntary Condition, becauſe it doth conſiſt in giving, yet in this Caſe the Teſtator is preſumed to have more Regard to the End of the Condition, namely, the Benefit of the Child, than to the Form of the Condition; for if Payment ſhould be made to the Child, it might eaſily be conſumed, and do the Child little Benefit [t], and therefore better for the Child, and more agreeable to the Meaning of the Teſtator, and more ſafe for him that payeth the Money, to pay the ſame to the Tutor, rather than to the Infant [u].

[q] L. ſi fundus, ff. de cond. & demon.

[r] D. L. ſi fundus Craſſ. d. §. legatum. q. 52. Mantic. de conject. ult. vol. lib. 11. tit. 17. n. 29.

[s] Bar. in d. L. ſi fundus Mantic. d. tit. 17. n. 29.

[t] Mantic. ubi ſupra.

[u] Alciat. de verb. ſignif. lib. 3. col. 81. in fin.

The fifth Limitation is in (8) vulgar, or common Subſtitutions, for then it is ſufficient likewiſe, that the Condition be effected by other Means, than according to the ſtrict Form of the Condition [x]. For Example; the Teſtator maketh his Son Executor; and if he *will not*, he doth ſubſtitute the Executor in his Stead; if the Teſtator's Son *cannot* be Executor: In this Caſe thou ſhalt be Executor, as if he had refuſed to be Executor; although reſpecting the Form of the Condition, thou art Subſtitute only, in caſe the other *will not*, and not in caſe he *cannot*; the Reaſon is, becauſe in Subſtitutions the

[x] Paul. de Caſtr. in L. ſi magiſter. C. de Inſtit. & ſub. n. 1. in fin.

Law preſumeth, that the Teſtator doth more regard the Effect, than the Form of the Condition [y].

The ſixth Limitation is (9) in Favour of Liberty; that is to ſay, when the Lord or Sovereign, by his Teſtament, granteth unto his Villain or Bond-man Freedom upon ſome Condition [z].

The ſeventh Limitation is, When that which is left conditionally is to be diſtributed *in pios uſus*; for in theſe two Limitations, it is ſufficient that the Condition be effected by other equivalent Means, though not according to the preciſe literal Form of the Condition [a].

The eighth Limitation is, When the (10) Condition, which conſiſteth in giving, is performed by another, than by him (yet for him) who is named Executor, or to whom any Thing is given upon Condition, if he give to another. In which Caſe it is all one as if himſelf had given the ſame [b].

[y] Paul. de Caſtr. ubi ſupra Alciat. de verb. ſignif. lib. 3. reg. 4. q. 2.

[z] Bar. in L. Mævius de cond. & demon. ff.

[a] Bar. in d. L. Mævius cum addit. ibid.

[b] Bar. in L. Arethuſa de ſtat. hom. ff. & in L. fin. de cond. inſtit. ff. atque hoc eſt magis commune, teſte Mantic. de conject. ult. vol. lib. 11. tit. 17. n. 10

The ninth Limitation is, When the Condition cannot be performed in ſuch Manner as is preſcribed in the Condition: As for Example; the Teſtator giveth a Sum of Money, if ſo many Sermons be made in ſuch a Church, within ſuch a Time: During which Time the Church is interdicted; by Occaſion whereof the Condition cannot be accompliſhed. In this Caſe, the Diſpoſition is not abſolutely void [c], but the Money may be converted to ſome godly Uſe [d].

[c] L. legatum. de adminiſtr. rerum. ad civit. pertin. ff.

[d] Simo de Prætis, de interp. ult. vol. lib. 1. in fin.

The tenth Limitation is, (11) When the Law doth interpret it as if it were preciſely obſerved, as may appear in the next Queſtion [e].

[e] Infra §. proxim.

§. VIII. Whether the Condition be accounted for accompliſhed in Law, when it doth not ſtand by the Executor or Legatary, wherefore the ſame is not accompliſhed.

1. *No Man to be puniſhed, but ſuch as be Faulty.*
2. *He is not reputed Faulty in Law, who doth what he can.*
3. *Whether the Condition be reputed for accompliſhed, if it ſtand not by the Party.*
4. *Certain Diſtinctions about the former Queſtion.*
5. *Arbitrary Conditions are accounted for accompliſhed, if it do not ſtand by the Party.*
6. *The Reaſon of the former Concluſion.*
7. *Arbitrary Conditions are not accounted for accompliſhed, where the Party is in Fault.*
8. *Caſual Conditions are not reputed to be accompliſhed before the Event.*
9. *The Reaſon of the different Effect betwixt caſual and arbitrary Conditions.*
10. *Certain Caſes wherein caſual Conditions be reputed as accompliſhed, albeit the ſame be not ſo indeed.*
11. *In mixed Conditions, this Conſideration is firſt to be had, how the Impediment cometh.*

12. *The*

12. *The Impediment in mixed Conditions may happen divers Ways.*
13. *When it ſtandeth by him, by whom the Condition is to be performed, the ſame is not reputed for complete.*
14. *What if after the firſt Refuſal he conſent, and then the other Party is willing.*
15. *A Reſtraint of the laſt Poſition.*
16. *When it ſtandeth by the Party in whom the Condition is to be performed, the ſame is not reputed for complete.*
17. *A Limitation of the former Concluſion.*
18. *When the Teſtator doth hinder the Performance of the Condition, it hurteth not the Executor or Legatary.*
19. *When a Third Perſon doth hinder the Performance of the Condition, whether it hurt the Executor or Legatary.*
20. *The Accompliſhment of the Condition being hindred by caſual Means, whether it hurt the Executor or Legatary.*

IT agreeth (1) with Equity and Humanity, That no Man be puniſhed, or deprived of his Right, without his Fault [a]; and it ſeemeth, that (2) he is not in Fault, but ought to be excuſed, who doth whatſoever lieth in him for the Accompliſhing of that which is impoſed upon him [b]: Wherefore no Marvel if at the firſt View it ſeem true, that when it doth not ſtand by the Executor or Legatary, wherefore the Condition is not performed, (they doing whatſoever in them lieth, to accompliſh the ſame) that then it ſhould be accounted as if it had been fully performed [c]. And ſo it is (3) for the moſt part true, That when it doth not ſtand by him to whom it appertaineth, wherefore the Condition is not accompliſhed, it ought to be accounted as if it were performed [d]: But this Rule doth not take Place perpetually.

Wherefore, (4) if we will underſtand when this Rule doth hold or fail, we are to call to Mind ſome of the former Diſtinctions or Diviſions of Conditions [e], eſpecially this, That of Conditions, ſome be *arbitrary*, ſuch as the Law preſumeth to be in the Will and Power of the Man, to whom they are impoſed [f]: Some be *caſual*, ſuch as are not in the Power of that Man to whom they are impoſed, but even in the Power of ſome other Thing, or Perſon; ſo that the Event thereof is to us uncertain [g]: And ſome be *mixed* Conditions, ſuch as conſiſt partly in our own Power, and partly in the Power of ſome other Thing or Perſon [h]. For example of which ſeveral Conditions, I refer the Reader to thoſe former which I have there ſet down [i].

When (5) the Condition is meer *arbitrary*, then if it ſtand not by him, by whom the Condition is to be performed, the Law reputeth the ſame as if it were fully accompliſhed, though indeed it remain unperformed [k]. For example; the Teſtator doth make thee his Executor, or giveth thee a Hundred Pounds, if thou go to Church on *Eaſter-day* [l]. That Day being come, by Reaſon of Overflowing of Waters, or ſome other neceſſary Impediment, thou art not then able to go to the Church, being otherwiſe willing to go, if thou hadſt not been hindered. In this Caſe thou art to be admitted Executor, and mayeſt recover thy Legacy, as if thou hadſt gone to the

[a] C. ſine culpa de reg. jur. 6.

[b] Peckius in c. imputari. de reg. jur. 6.

[c] C. cum non ſtat. c. imputari, de reg. jur. lib. 6.

[d] D. cum non ſtat. d. c. imputari, de reg. jur. lib. 6.

[e] Supra eadem part. §. 5.

[f] L. unic. §. ſin autem C. de cad. tollend. Vigli. & Minſing. in §. Pen. Inſtit. de hæred. Inſtit.

[g] D. §. ſin autem.

[h] D. §. ſin. autem. Vigl. & Minſing. ubi ſupra.

[i] Supra eadem part. §. 1.

[k] L. quæ ſub conditione. §. 1. ff. de cond. Inſtit. Bar. in L. 1. C. de Inſtit. & ſub.

[l] Hoc eſſe exemplum poteſtativæ conditionis, patet ex Sichard. in Rub. de inſtit. & ſub. C. n. 9. & Minſingero, in §. Pen. Inſtit. de hæred. Inſtit. n. 2. quorum alter profert exemplum eundi Francfordium, alter eundi Biſcanum: Reliqui fere omnes inſtant in hoc exemplo, ſi aſcenderis capitolium. DD. in d. §. ſin autem, C. de cad. tol. & in d §. Pen. Inſtit. de hæred. inſtituend.

Church that Day [m]; the (6) Reaſon wherefore the Condition is accounted for accompliſhed in Law, albeit reſpecting the Fact it is not accompliſhed, I ſuppoſe to be this, Becauſe the Teſtator is preſumed to have more regard to the Good-will and Indeavour, in theſe Conditions which be within thy Power, than to the Event of the Condition [n]; ſo that by ſatisfying the Expectation of the Teſtator, thou haſt alſo ſatisfied the Exaction of Law [o].

[m] D. L. quæ ſub conditione, §. ... ff. de condit. Inſtit. &c. imputari de reg. jur. 6.

[n] Sichard. poſt Bar. & Bald. in d. L. 1. C. de Inſt. & ſub.

[o] D. D. in d. L. 1.

Howbeit, (7) even there alſo, where the Condition is arbitrary, and where the Teſtator doth, as it were, accept Good-will for a full Performance; if he, by whom the Condition is to be performed, were in Fault, by Occaſion of which Fault, the Condition cannot indeed be accompliſhed, though perhaps the Party would willingly perform the ſame, if then he could, there the ſame Condition is not reputed to be performed in Fiction of Law [p]. For Example; the Teſtator maketh *A. B.* his Executor, or giveth him a Hundred Pounds, if he go to the Church on ſuch a Day; upon the which Day *A. B.* intending to accompliſh the Condition, proceedeth towards the Church: As he is going, committeth ſome Crime or Offence, whereupon he is arreſted and ſtayed, ſo that he cannot go to the Church according to his Purpoſe. In this Caſe the Condition is not accounted for accompliſhed, for that he, by whom the Condition was to be accompliſhed [q], was himſelf in the Fault, and the Cauſe wherefore the ſame was not accompliſhed. So it is if the Condition cannot be performed, by the Negligence or Delay of the Perſon, by whom the ſame ought to have been performed [r]: And although an Impediment is ſaid to excuſe a Man from Delay [s], yet when the Impediment may be foreſeen and prevented, ſuch Impediment ſhall not excuſe him which doth not avoid the ſame [t]. For example; the Teſtator maketh thee his Executor, or giveth thee a Hundred Pounds, if thou go to the Church within Two Months; during the Firſt Month thou doeſt not go, during the Second thou knoweſt thou ſhalt not be able to go, by Reaſon of ſome Impediment, be it by Occaſion of Wars, or of the Weather, or of the Way, or of ſome Infirmity in thy own Body; and then being letted, thou makeſt an Offer to go, and doeſt proteſt that thou art not able, and that thou wouldeſt go if it were poſſible: Neither this Proteſtation, nor this Impediment will relieve thee, becauſe thou didſt willingly fall into theſe Difficulties, and wouldſt not go when thou mightſt ſafely have gone [u]. When (8) the Condition is meer *caſual*, the ſame is neither accounted for accompliſhed or extant, in Preſumption or Fiction of Law, neither yet for unaccompliſhed or deficient, until the actual Event of the ſame Condition do firſt come to paſs [x]. And therefore, if the Teſtator make thee his Executor, or give thee a Hundred Pounds, if the King of *Spain* die this Year [y]. In this Caſe, until the Event do indeed declare whether the King die this Year or no, the Condition is neither accounted for extant or deficient, but is ſuſpended [z]. And if he die, then is the Condition ſaid to be purified or extant, and ſo thou art to be admitted, otherwiſe not [a]. So there is a great Difference, whether the Condition be arbitrary or caſual; for the one is divers Times accounted for accompliſhed in Law, though not in Fact; but the other is not accounted for accompliſhed or extant in Law, unleſs the ſame be accompliſhed in Fact alſo [b]. The (9) Reaſon of the Difference is partly ſhewed before; for in *arbitrary Conditions*, the Teſtator is preſumed not to exact more than he may eaſily perform on whom

[p] Mantic. de conject. ult. vol. lib. 11. tit. 16. n. 24. poſt. Bar. & Bald. in d. L. 1. C. de Inſtit. & ſub.

[q] Bar. & Bald. ubi ſupra. gloſſ. in c. imputari de reg. jur. 6. Aymo Cravetta. conſil. 202. n. 8.

[r] Bar. in d. L. 1. Mantic. de conject. ult. vol. l. 11. tit. 16. n. 14.

[s] DD. omnes in L. quod te. ff. ſi cer. Pe.

[t] Gloſſ. & DD. in d. L. quod te. Zaſ. poſt alios in L. continuus, §. illud. ff. de verb. ob.

[u] C. Mona. de reg. jur. 6. Zaſ. in d. §. illud. n. 6. fall. 4. & Peckius in L. fin. ad L. Rhodiam. de jactu.

[x] L. unic. §. fin autem C. de cad. tol. & ibi Bar.

[y] Vigli. & Minſing. in §. pen. Inſtit. de hæred. inſtituend.

[z] Sichard. in Rub. de inſtit. & ſub. C.

[a] L. unic. §. fin autem C. de cad. tol.

[b] Eodem §. fin autem.

ſuch Condition is impoſed [c]; and ſo it is ſufficient that it ſtand not by him, that the ſame Condition is not performed: But here in *caſual Conditions*, foraſmuch as the Teſtator doth not refer it to that which is in his Power on whom the Condition is laid; therefore the Teſtator is thought to refer the Force or Effect of this Diſpoſition to the Determination of Fortune [d], (or rather to ſpeak more Chriſtianly, to the Will of God;) and therefore this Event of God's Will muſt decide the Doubt; I mean, whether he that is appointed under ſuch Condition, ſhall be Executor, or not, to obtain his Legacy, or not. Notwithſtanding (10) ſometimes even in caſual Conditions, it is ſufficient that it doth not ſtand by the Executor or Legatary, wherefore the ſame Condition is not accompliſhed, like as in arbitrary Conditions [e]. The firſt Caſe is, whether the Teſtator would have ſo diſpoſed, howſoever the Condition ſhould fall out [f]. The ſecond is, when by the Fact, his Accompliſhment of the Condition is hindered, to whom it is beneficial that the ſame ſhould never be performed [g]. The third Caſe is, in Favour of Freedom, or Liberty from Servitude [h].

If we (11) will know when a mixed Condition is reputed in Law to be accompliſhed, albeit in Fact the ſame be not performed, we muſt conſider by what Means the Impediment is miniſtred, namely, (12) Whether it proceed from the *Perſon by whom* the Condition is to be performed, or from that *Perſon to whom* the Condition is to be performed, or from *the Teſtator himſelf*, who deviſed the Condition, or from ſome *other Third Perſon*; or whether it happen by ſome *other Means*, according to the ſecret Purpoſe and Will of God, which we no leſs fooliſhly, than commonly, call *Chance* or *Fortune*.

When (13) he that is made Executor, or to whom a Legacy is given upon a *mixed Condition*, is himſelf the only Cauſe wherefore the Condition is not performed; then is the ſame Condition not to be accounted for accompliſhed [i]. For example; the Teſtator maketh thee his Executor, or giveth thee a Hundred Pounds if thou marry his Daughter; thou refuſeſt ſo to do, with great Reaſon is the Condition not reputed for performed, and ſo thou canſt not be Executor, nor obtain the Legacy [k]. Inſomuch, (14) that tho' afterwards thou become willing, and doſt offer to marry her, and ſhe then refuſe this thy Offer, and ſo it doth now ſtand by her, and not by thee, that the Condition is not performed: Nevertheleſs, thou canſt not reap any Benefit by her Refuſal, becauſe thou hadſt broken the Condition before, whereby thy Right paſſed away and was extinguiſhed, and ſo thy Repentance is now too late [l]; unleſs (15) at ſuch Time as thou didſt refuſe, thou then couldeſt not marry, for that perhaps at that Time thou wert not of ſufficient Age to marry, for thy Diſſent at that Time when thou couldſt not conſent, doth not hinder thee [m].

When (16) the Condition is not performed by his Means only, unto whom, or in whoſe Perſon the ſame is to be accompliſhed, then it is reputed in Law, as if it were fulfilled indeed [n]. For example; the Teſtator maketh thee his Executor, or giveth thee a Hundred Pounds, if thou marry his Daughter; thou art willing, and doeſt offer her Marriage, which ſhe refuſeth: In this Caſe the Con-

[c] Sichard. Bar. Bald. & fere omnes interp. in L. 1. de inſtit. & ſub. C.

[d] Paul. de Caſtr. in L. quæ ſub conditione, de condit. inſtit.

[e] Mantic. de conject. ult. vol. l. 11. tit. 16. n. 15.

[f] Gloſſ. in L. 1. C. de inſtit. & ſub.

[g] L. jure civili. ff. de cond. & demon.

[h] L. fin. C. de neceſſar. inſtituend.

[i] L. in teſtam. el. 2. ff. de condit. & demon. Mantic. de conject. ult. vol. lib. 11. tit. 18. n. 37.

[k] Bar. in d. L. in teſta. Sichard. in L. 1. C. de Inſtit. & ſub. Menoch. de præſump. lib. 4. fol. 1698. n. 22. Et in legato libertatis extenditur. ibid. n. 23.

[l] Jaſ. in d. L. 1. de Inſtit. & ſub. C. n. 7. & Sichard. in eand. L. n. 9. & eſt com. op. teſte Graff. Theſaur. com. op. §. legatum. q. 46. n. 16. poſt Dec. in d. L. 1. n. 13. Quam ſententiam intellige ut per Molin. in addit. ibid.

[m] L. ejus eſt nolle. de reg. jur. ff.

[n] L. Titio centum, §. Titio, ff. de cond. & demon.

dition is reputed for compleat, and ſo thou mayeſt recover the Executorſhip or Legacy [o]. Notwithſtanding, if (17) the Words of the Condition be directed unto her, not unto thy ſelf. As for example; the Teſtator maketh thee his Executor, or giveth thee a Hundred Pounds, if his Daughter marry thee. In this Caſe, if ſhe do refuſe, and it doth not ſtand by thee, the Condition is not reputed for accompliſhed [p], unleſs it were the Meaning of the Teſtator, that thou ſhouldeſt have the Benefit of the Diſpoſition, in Caſe of this her Refuſal [q]. And yet there is no great Difference betwixt the one Phraſe and the other: For the Teſtator in Saying, *If thou marry her*, doth neceſſarily underſtand thereby, if ſhe alſo be content to marry thee; for thou canſt not do the one, unleſs ſhe alſo do the other [r]: And therefore this Limitation is ſuſpected of ſome not to be found [s], notwithſtanding it is more generally approved, and rather admitted than the contrary Opinion [t]. What if the Teſtator make *A. B.* his Executor, or give him a Hundred Pounds if he marry his Daughter, and at the firſt *A. B.* is willing, and offereth to marry her, but ſhe refuſeth; afterwards ſhe is willing, but he refuſeth; whether in this Caſe is the Condition ſaid to be compleat? This Queſtion is ſatisfied afterwards [u].

When (18) the Impediment doth proceed from the Teſtator himſelf, when the Condition is reputed for compleat. As for example; the Teſtator doth make thee his Executor, or giveth the a Hundred Pounds, upon Condition, If thou bury his Body in the Cathedral Church of St. *Peter* at *York*. The Teſtator dieth excommunicate (becauſe he refuſeth to come to the Church, or becauſe he is an Heretick or Schiſmatick, a manifeſt Uſurer, or for ſome other like Cauſe) for which his Sepulture, in that Caſe is denied: Seeing in this Caſe it doth not ſtand by thee, but by him, wherefore the Condition is not compleat, it ſhall not prejudice thee, but that thou mayeſt be admitted to the Executorſhip or obtain the Legacy, as if thou hadſt indeed performed the Condition [x].

When (19) the Impediment doth proceed from a Third Perſon, then I ſuppoſe the Condition to be accounted in Law for accompliſhed [y]. For example; the Teſtator maketh thee his Executor, or giveth thee a Hundred Pounds, if thou marry his Daughter within a Month, during which Month a Third Perſon doth purpoſely hold her from thee, ſo that thou canſt not marry her within the Time preſcribed. In this Caſe the Condition is reputed to be accompliſhed, and ſo thou mayeſt obtain the Executorſhip or Legacy, as if thou hadſt married her within the ſaid Time [z]. But if the Third Perſon do not purpoſely detain her, being ignorant peradventure of the Teſtator's Will, then it ſeemeth that the Condition is not reputed for compleat [a].

When (20) the Impediment doth not ariſe by any of the Means aforeſaid, but by caſual Means (as we term it) when it proceedeth from the Will and Providence of Almighty God, the Law doth not account

[o] D. L. Titio, §. Titio.

[p] Mincat. de conject. ult. vol. lib. 11. tit. 18. n. 37.

[q] L. jure civili, ff. de cond. & demon.

[r] Socin. in d. L. in teſton. Mantic. de conject. ult. vol. lib. 11. tit. 8. n. 37.

[s] Michael. Graff. Theſaur. com. op. §. legatum, q. 16. n. 17.

[t] Alex. in L. 1. C. de Inſtit. & ſub.

[u] Infra eadem part. §. 10. in fin.

[x] DD. in L. milites §. ult. Ad. L. Jul de adul. ff. Sichard. in L. 1. de Inſtit. & ſub. C. n. 1.

[y] Bar. in L. 1. in teſton. el. ff. de cond. & demon.

[z] Bar. in d. L. in teſt. Bald. & Alex. in L. de Inſtit. & ſub. C. & hoc ego quidem procedere puto in hoc regno, etiamſi ille tertius injuſte detineat mulierem, cum apud nos Honoratos non habeat aliquam actionem contra injuſtum illum detentorem, pro damno, ſeu intereſſe. Videant autem Juſtinianiſtæ Manticam de conject. ult. vol. lib. 11. tit. 16. n. 22.

[a] Bald. Alex. & DD. in L. 1. C. de Inſtit. & ſub. Mantic. de conject. ult. vol. lib. 11. tit. 16. n. 21

account that Condition for complete [b]. And therefore, if the Teſtator make thee his Executor, or give thee a hundred Pounds, if thou marry his Daughter, and ſhe dieth before thou haſt married her. In this Caſe the Condition ſhall not be accounted for accompliſhed or extant, but contrariwiſe (as it is indeed) unperformed and deficient; ſo that thou canſt not receive any Benefit by that conditional Diſpoſition [c]; for where the Performance of the Condition is hindred by the Will and Providence of God, whereunto the Teſtator made Relation, there the Law doth not allow any feigned Performance [d], except it be in Favour of Liberty from Bondage [e], or Alimentation, or in a Diſpoſition [f], *Ad pias cauſas* [g], or except the Condition be not conditional, but modal [h]; for (*conditio*) and (*modus*) do greatly differ, as in the next Section is declared.

[b] Hen. Boic. in c. ſicut ex literis. De ſponſ. extr Bar. in. L. 1. C. de Inſtit. & ſub.

[c] Gloſſ. & Dyn. in c. imputari de reg. jur. 6. L. Legatum. C. de Condit. inſert. Menoch. de præſum. l. 4. f. 1706. n. 40. ubi hanc concluſionem extendit & limitat. præſump. 183. Sichard. & alii DD. in L. C. de Inſtit. & ſub.

[d] Mantic. de conject. ult. vol. lib. 11. tit. 16. n. 23.

[e] L. libertatem ff. de manumiſſ. teſtam. Covar. in cap. 3. de teſta. extr.

[f] Sichard. in L. 1. C. de Inſtit. & ſub. n. 6. in fin.

[g] Tiraquel. de Privileg. piæ cauſæ, c. 57.

[h] Graff. Theſaur. com. op. §. legatum, q. 58. n. 4. Et hæc opinio communiter approbatur, Alex. in L. 1. de Inſtit. & ſub. C.

§. IX. Whether he that is made Executor, or to whom any Legacy is given conditionally, may in the mean Time, whiles the Condition dependeth, be admitted to the Executorſhip, or obtain the Legacy, by entering into Bonds to perform the Condition, or elſe to make Reſtitution.

1. *Divers Kinds of Conditions to be remembered in this Queſtion.*
2. *When the Condition is Affirmative, it ſufficeth not to put in Bonds.*
3. *What if the Affirmative do alſo imply a Negative.*
4. *What if the Diſpoſition be made* Sub Modo, *and not* Sub Conditione.
5. *How* Modus *and* Conditio *do differ.*
6. *When the Teſtator's Will is not repugnant, then it ſufficeth to put in Bond.*
7. *If the Condition be Negative, then what Things are to be regarded.*
8. *If the Condition conſiſt in not doing, then it is material, whether the ſame may be accompliſhed during Life.*
9. *If the Condition cannot be accompliſhed during Life, then it ſufficeth to put in Bond, to the Effect aforeſaid.*
10. *Example of ſuch Condition as cannot be accompliſhed during Life.*
11. *The Reaſon of deviſing this Bond, and who was the Inventer thereof.*
12. *Certain Caſes wherein the Legacy may be obtained without Bond, being given upon Condition, which may ſeem not to be accompliſhed during Life.*
13. *If the Condition negative may be accompliſhed during his Life, to whom it is impoſed; this Caution hath no Place.*
14. *A Condition negative is ſaid to be accompliſhed when it cannot be infringed.*

15. *Great odds whether the Condition may be accompliſhed during his Life, to whom it is impoſed, or not.*
16. *What if the negative Condition cannot be infringed without Sorrow.*
17. *If the Condition conſiſt in not giving, then we muſt inquire and reſolve as in the Condition of Not doing.*
18. *When the Condition doth conſiſt in not hapning, then this Bond hath no Place.*
19. *The Form of the Bond, to whom it is to be made, and whether Sureties be neceſſary.*

IF any (1) be deſirous to know whether he that is made Executor, or to whom any Legacy is left by the Teſtator, under ſome poſſible Condition, may in the mean Time, whiles the Condition dependeth unperformed, be admitted to the Executorſhip, or obtain his Legacy ſo left, by entering Bond, or putting in ſufficient Caution, either to perform ſuch Condition, or elſe to make full Reſtitution of all Things by him received. It ſhall be behoveful to call to his Re-Remembrance how many Kinds of *poſſible Conditions* there be[i], eſpecially he muſt not forget, that of theſe Conditions, ſome be *Affirmative*, and ſome be *Negative*[k]. And again, that as well of the Affirmative as of the Negative, there be three Sorts, that is to ſay, Some conſiſt in Chancing, ſome in Giving, and ſome in Doing; and on the contrary, ſome conſiſt in Not chancing, ſome in Not giving, and ſome in not doing[l]. Now to apply theſe Diſtinctions to the Queſtion.

[i] De quibus ſupra eadem part. §. 5.
[k] L. in facto, ff. de cond. & demon.
[l] D. L. in facto.

When (2) the *Condition is Affirmative* (whether it do conſiſt in Chancing, Giving, or Doing.) He that is made Executor, or to whom any Legacy is given, under ſuch Condition, cannot be admitted to the Executorſhip, nor demand the Legacy by Virtue of the Laſt Will or Teſtament of the Deceaſed, ſo long as the ſame Condition dependeth unfulfilled, or is not extant[m], albeit the Executor or Legatary ſhould put in ſufficient Bond, to make Reſtitution, in Caſe the Condition ſhould be deficient. For the Event of ſuch affirmative Condition is to be expected, and muſt be extant before the Diſpoſition of the Teſtator can take Effect[n], except in theſe Caſes following. One (3) when the *affirmative Condition*, which doth conſiſt in Doing or Giving, doth withal ſecretly imply or contain a Negative[o]. As for Example; the Teſtator maketh his Wife Executrix, or giveth her a hundred Pounds, if ſhe abide with his Children; which affirmative Condition (if ſhe abide with his Children) conſiſteth in Doing, and doth withal ſecretly imply a Negative; that is to ſay, (if ſhe do not depart from his Children[p].) And therefore in this Caſe, the Executor or Legatary, by entring into ſufficient Bond to perform the Condition, or elſe to make Reſtitution, is to be admitted to the Executorſhip, or may obtain the Legacy, as if the Negative had been expreſſed[q]. Another Caſe is, When (4) the Diſpoſition is not made *ſub conditione, ſed ſub modo*[r]. For (5) thou ſhalt underſtand, that *conditio* and *modus* do differ: *Conditio* is a Quality which ſo long as it dependeth unperformed, doth hinder the Effect of the Diſpoſition, ſo that that Thing which is diſpoſed conditionally, can neither be demanded, neither is due in the mean Time[s]. *Modus* is a Mo-

[m] L. Mutian. in ff. de cond. & demon. & Gloſſ. ac DD. ibid.
[n] L. qui hæredi ff. de cond. & demon. DD. in d. L. Mutian.
[o] L. pater. §. ſocrus ff. de cond. & demon. Bar. & Paul. de Caſt. in d. Mutianæ, Ripa. in L. ita ſtipulatus ff. de verb. off. n. 46.
[p] Bar. & Paul. de Caſtr. in d. L. Mutianæ per d. §. Socrus.
[q] Bar. & Paul. Caſtr. ubi ſupr. Simo de Prætis. de interp. ult. vol. lib. 5. interp. 2. dub. 1. n. 24, 25. fol. 42.
[r] L. 1. C. de his quæ ſub modo, L. quibus diebus §. Termilius, ff. de cond. & demon. verum proprie loquendo, Cautio de modo implendo, non eſt cautio Mutiana, ſed alia ei ſimilis. Bald. in Auth. cui C. de indict. vid. n. 22. in fin.
[s] Bald. & Sichard. in Rub. de Inſtit. & ſub. C.

a Moderation, whereby a Charge or Burthen is impoſed, in Reſpect of a Commodity; which Moderation doth not ſo far hinder the Effect of the Diſpoſition, but that the Thing diſpoſed is due, and may be demanded in the mean Time[t]; and it is called *Modus a moderando.* The one of them is thus known from the other, that is to ſay, The Condition is commonly known by this Word (*If*) or by Words of like Nature[u], whereof I have given Examples before[x]; the Mean or Moderation is known by this Word (*That*,) as I make *A. B.* my Executor, or give him a hundred Pounds, that he may erect a Monument[y]. Now in this Caſe, when any Thing is left under a Moderation, or with the Exaction of a Remuneration, that Thing which is ſo bequeathed is preſently due, and may now alſo be demanded, ſo that he which maketh Demand do enter into Bond in Manner as hereafter is deſcribed, to perform that which is exacted by the Teſtator, or elſe to make full Reſtitution[z]. Another Caſe is, when (6) the Teſtator's Will is not repugnant thereunto; for then this Bond (as it is affirmed) hath Place even in affirmative Conditions[a].

[t] Bar. in d. L. quibus diebus, §. Termilius, de cond. & demon. ff. Sichar. in d. Rub. de Inſtit. & ſub. C. Graſſ. Theſaur. com. op. §. legatum, q. 58. Modus (inquit Cujacius) eſt finis propter quem legatur, vel cauſa legandi collata in futurum. Cujac. in tit de his quæ ſub mod. C.

[u] Bald. & Sichard. in Rub. de Inſtit. & ſub C.

[x] Supra eadem part. §. 5.

[y] Bar. in d. §. Termilius & Sichard. in d. Rub. de Inſtit. & ſub. C.

[z] L. quibus diebus, §. Termilius, ff. de cond. & demon L. 1, 2. C. de his quæ ſub modo.

[a] Bar. in d. L. Mutianæ, de cond. & demon. ff. n. 3.

When (7) the Condition is Negative, then we are to regard what Kind of negative Condition it is, that is to ſay, whether the ſame conſiſt in *Not doing*, or *Not giving*, or *Not chancing*.

If (8) the Condition conſiſt in *Not doing*, then it is material, whether the ſame may be accompliſhed ſo long as he liveth, on whom the ſame is impoſed.

If (9) the Condition conſiſting in Not doing, *cannot be performed ſo long as the Perſon on whom it was impoſed, liveth*, then may he obtain the Bequeſt, by putting in Bonds to accompliſh the Condition, or elſe in Defect thereof to make full Reſtitution[b]. As for (10) Example; the Teſtator maketh one his Executor, or giveth him a hundred Pounds, if he never play at Cards or Dice. This Condition we ſee is Negative, it conſiſteth in Not doing, and it is ſuch a Condition withal, as cannot be fully performed, ſo long as he liveth on whom it is impoſed, becauſe at any Time, during his Life, he may infringe the ſame, by playing at Cards or Dice[c]; for albeit he did abſtain this Day, yet might he play the next Day, or if not the next Day, yet ſome one Day or other ſo long as he had any Days to live[d]; and ſo in the mean Time, that is to ſay, all his Life long, he ſhould not reap any Commodity by the Teſtament, if the full Performance of the Condition were firſt exacted. Wherefore (11) leſt the Teſtator's Will ſhould be uneffectual, and leſt the Executor or Legatary ſhould reap no Benefit thereby, if the full Performance of the Condition ſhould be expected, ere the Bequeſt could be obtained; One *Mutius Scevola* did deviſe this Remedy, that he who is made Executor, or to whom any Legacy is bequeathed, upon a *Condition negative*, which could not be fully performed during his Life, ſhould enter into Bond to perform the Condition, (that is to ſay, never to do that which is prohibited, or elſe to make a full Reſtitution) and by that Means obtain the Executorſhip or Legacy[e]; which Bond or Caution is of *Mutius*, the Author thereof, called *Mutiana Cautio*[f], and after a Sort hath the Effect of the full Accompliſhment of the Condition[g]. Yea, in ſome Caſes (12) the Legacy which is given under

[b] D. L. Mutianæ & ibi Bar. Bald. & Paul. de Caſtr. Zaſ. in L. dedi tibi, ff. de cond. cauſ. dot.

[c] Simo de Prætis de interp. ult. vol. lib. 5. incorp. 2. ſub. 1. n. 23.

[d] Simo de Prætis ubi ſup. Paul. de Caſtr. in d. L. Mutianæ.

[e] D. L. Mutianæ, cum. gloſſ. ibid. Simo de Prætis ubi ſupra. Zaſ. in L. dedi tibi de cond. cauſ. dor. ff n. 7, 9.

[f] Gloſſ. in d. L. Mutianæ.

[g] Bar. & Caſtr. in d. L. Mutianæ.

der a *Condition negative* conſiſting in Not doing, may be obtained without any ſuch Bond, albeit the ſame Condition may be infringed during the Life of the Legatary, namely, in a Legacy of Liberty or Freedom from Bondage[h]; and in a Legacy *Ad pias cauſas*[i]. The Reaſon of the Difference is, becauſe in theſe favourable Legacies the Teſtator is preſumed to have meant only of the firſt Act, when the Legatary had Opportunity of doing the Thing prohibited[k]. So that if at that Seaſon or firſt Opportunity, the Legatary do not infringe the Condition by doing contrary to the Diſpoſition of the Teſtator; it is not hurtful, though after that firſt Opportunity paſt, the Legatary go againſt the Condition[l], unleſs the Meaning of the Teſtator do appear to be contrary, *viz.* That the Condition ſhould be extended to every Act during the Life of the Legatary[m].

[h] L. libertatem, L. libertas, §. 1. de Manumiſſ. teſta. ff.
[i] Tiraquel. de privileg. piæ cauſæ, c. 48.
[k] Tiraquel. ubi ſupra.
[l] Gloſſ. in L. Titio. §. fundus, ff. de cond. & demon. Tiraquel. d. c. 48.
[m] L. ult. de manumiſſ. teſta. ff. Tiraquel. ubi ſupra.

But (13) if the negative Condition be ſuch, *as may be performed during his Life, on whom it is impoſed.* This foreſaid Bond or Caution hath no Place[n], and conſequently the Executorſhip or Legacy diſpoſed under ſuch Condition, ſo long as the ſame dependeth not fully performed, cannot be obtained[o]. For Example; the Teſtator maketh thee his Executor, or giveth thee a hundred Pounds, if thou never play at Dice or Cards with *A. B.* or if thou do not at any Time give away thy Lands to *A. B.* this Condition, howſoever it be negative, and alſo conſiſteth in Not giving, or Not doing; yet it may be fully and perfectly complete, and performed in thy Life-time: For *A. B.* with whom thou art forbidden to play, or to whom thou art forbidden to give thy Lands, may die before thee, and then thou canſt not play with him, nor give him thy Lands when he is dead; and ſo it is evident, that this Condition may be fully performed and accompliſhed in thy Life-time, for a (14) negative Condition is then ſaid to be fully accompliſhed, when it is brought to an Impoſſibility[p]; and therefore in this Caſe thou canſt not be admitted Executor, no obtain the Legacy, until the Condition be brought into that State, that it cannot be infringed[q]. Great (15) odds therefore there is betwixt thoſe negative Conditions which cannot be performed in the Life-time of that Perſon on whom they are impoſed, and thoſe negative Conditions which may be performed during his Life. For there the Executor or Legatary may obtain the Executorſhip or Legacy, by putting in Bonds, but here he cannot, unleſs it be (16) ſuch a Caſe as the Event thereof doth bring Grief and Sorrow to the Party on whom the Condition is impoſed; for in ſuch Caſes, where the Condition cannot be infringed or become deficient, without Sorrow or Heavineſs, it is lawful for the Executor or Legatary to enter into Bonds for making Reſtitution, (if the Condition be not performed) and ſo to be admitted to the Executorſhip, and to obtain the Legacy in the mean Time[r]. As for Example; the Teſtator maketh his Wife Executrix, or giveth her a hundred Pounds, if ſhe depart not from her Children. This Condition may be extinct in the Life-time of the Mother, for it may happen the Children to die, and the Mother to over-live, and then the Condition muſt needs be extinct; for after their Death, ſhe cannot infringe the Condition, by departing from them that are not. Nevertheleſs, becauſe the Death of the Child is a hard and heavy Thing to the Mother; therefore the Law is not ſo hard, but that in this Caſe the Condition depending, the Mother is to be admitted to the

[n] L. cum tale, §. 1. ff. de cond. & demon. L. Pater. §. Socrus eod.
[o] L. cum tale, §. 1. & gloſſ. in d. L. Mutianæ.
[p] Gloſſ & DD. in d. L. Mutianæ, ff. de cond. & demon.
[q] DD. in d. L. Mutianæ, & d. cum tale. §. 1. Simo de Prætis. de interp. ult. vol. lib. 5. interp. 2. dub. 1. n. 23.
[r] D. L. cum tale, L. Peter. §. Socrus ff. de cond. & demon.

the Executorſhip, and may recover the Legacy upon Bonds, to accompliſh the Condition, or elſe to make Reſtitution [s].

When (17) the Condition doth conſiſt in *Not giving*, then as before, we are to inquire whether the Condition be ſuch, as the ſame cannot be accompliſhed during his Life, on whom it is impoſed: For if it be ſuch a Condition, that which is diſpoſed under ſuch a Condition, may be obtained by entering Bond, as before [t]. For Example; the Teſtator doth make thee his Executor, or doth bequeath unto thee a hundred Pounds, if thou do not give away thy Lands [u]; this Condition cannot be fully performed but by thy Death, becauſe ſo long as thou liveſt, thou mayeſt give away thy Lands, and ſo infringe the Condition [x]. Wherefore, leſt the Teſtator's Will ſhould be deluded, or thy ſelf defrauded, thou mayeſt be admitted to the Executorſhip, or obtain the Legacy in the mean Time; ſo that thou become bound, as before, to perform the Condition, or elſe to make full Reſtitution [y].

When (18) the Condition doth conſiſt in *Not chancing*, then this Bond or Caution cannot be admitted, neither can the Thing diſpoſed under ſuch Condition, be obtained before the Condition be performed [z]: And therefore (for Example) if the Teſtator make thee his Executor, or give thee a hundred Pounds, if thy Ship do not return from *Spain*; in this Caſe, the Event of the Condition is to be expected. And if it ſo come to paſs that thy Ship doth return, then is the Condition deficient, and ſo thou canſt not be admitted to the Executorſhip, nor obtain the Legacy by Virtue of the ſaid Diſpoſition [a]. But if the Ship cannot return (which Thing may happen by Shipwrack, or by ſome other Accident) and ſo all Hope or Poſſibility taken away, then the Condition is ſaid to be accompliſhed or extinct; and ſo thou art to be admitted to the Executorſhip, or mayeſt recover the Legacy, as if the Diſpoſition had been ſimple [b].

Now (19) that we have ſeen in what Caſes the aforeſaid Bond hath Place, and in what Caſe it hath no Place, it ſhall not be amiſs, in a Word, to ſhew the Manner and Form of the Bond, and to whom it muſt be made, and whether Sureties be required. The Form thereof is this, (*Not to do that Thing which is contained in the Condition; or elſe to reſtore the Things diſpoſed, together with all the mean Fruits and Profits thereof* [c].) The Bond is to be made by the Executor unto the Subſtitute [d], or him that is appointed Executor in Place of him that is bound, if the Condition be not obſerved [e]. And if there be no ſuch Subſtitute, then to the Co-executor [f]; and if there be be no Co-executor, then to the Ordinary, becauſe he doth, as it were, ſucceed where any dieth Inteſtate [g]. Likewiſe, the Legatary muſt enter Bond to him that is ſubſtituted unto him; if there be no Subſtitute, then to the Collegatary; if there be no ſuch, then to the Executor; if there be no Executor, then to the Ordinary [h]. There needs no Surety neither for any Thing immovable, nor for a Thing movable, unleſs the Party be not fit or ſufficient [i].

[s] D. L. cum tale, & gloſſ. in d. L. Mutianæ.

[t] D. L. Mutianæ ff. de cond. & demon.

[u] L. 4. §. idem, Julianus, ff. de cond. inſtit.

[x] DD. in d. §. idem, Julianus.

[y] D. L. Mutianæ, Simo de Prætis, de interp. ult. vol. lib. 5. interp. 2. dub. 1. n. 23.

[z] D. L. Mutianæ, & ibi Bar. & alii.

[a] Bar. & Paul. Caſtr. in d. L. Mutianæ, L. unic. §. ſin autem, C. de cad. tol.

[b] Idem Paul. de Caſtr. in d. L. Mutianæ, d. §. ſin autem.

[c] L. cum filius §. qui Mutianam ff. de leg. 2.

[d] Bald. in Auth. cui reliſtum, C. de indict. viduitat. n. 20.

[e] Bald. in d. Auth.

[f] Idem Bald. ibid.

[g] Stat. Ed. 3. an. 18. c. 19. vel forte præſtanda eſt hujuſmodi cautio Mutiana adminiſtratoribus caſu, quo adminiſtratio ſit conceſſa.

[h] Bald. ind. Auth. cui reliſtum, C. de Indict. vid.

[i] D. Auth. cui reliſtum.

§. X. Whether it be ſufficient, that the Condition was once accompliſhed, though the ſame do not continue.

1. *Many Caſes wherein it is ſufficient, that the Condition was once accompliſhed, though it do not ſo continue; and contrariwiſe, many Caſes wherein it is not ſufficient, that the Condition was once accompliſhed, unleſs it do continue.*
2. *The Order to be obſerved in this Diverſity of Caſes.*
3. *If the Condition be caſual, then it is ſufficient that the Condition was once accompliſhed.*
4. *Divers Examples of this Concluſion.*
5. *If the Condition be arbitrary, then it is not ſufficient, that the Condition was once accompliſhed.*
6. *Divers Examples of this Concluſion.*
7. *If the Condition be mixed, then it is ſufficient that the ſame was once accompliſhed.*
8. *Examples of this Concluſion.*
9. *What if the Condition indure not, by the Fault of the Party, by whom it is to be accompliſhed.*
10. *What if the Party be already married, to whom any Thing is bequeathed conditionally* (If he ſhall marry.)
11. *What if the Executor or Legatary were once willing, and afterwards unwilling; whether ſhall the Condition be reputed for accompliſhed?*
12. *In this laſt Q. either hath divers Authors.*
13. *The Opinion of the Author of this Book.*
14. *An Anſwer to an Objection.*
15. *Divers Limitations of the former Concluſion, whereunto the Author of this Book did ſubſcribe.*

MANY (1) Caſes there be, wherein it is ſufficient for the Performance of the Condition, that the ſame was once accompliſhed; though the ſame do not ſtill indure in the ſame Eſtate [k]. Other Caſes there be, wherein it is not ſufficient once to have performed the Condition, unleſs there be a Continuance of the Performance [l].

[k] Jaſ. in L. ſi quis hæredem C. de inſtit. & ſub. ubi tradita eſt regula non paucis ampliationibus & limitationibus illuſtrata. tradidit ſex fallentiis exornatam.

[l] Jaſ. in L. in ſubſtitutione ff. de vulg. & pupil. ſub ubi regulam

But becauſe it would grow to an infinite Matter, to recite every particular Caſe [m], it is meet to ſet down ſome general Concluſions or Diſtinctions, whereunto and whereby all thoſe particular Caſes may be reduced and decided.

[m] Qua in re nimium deſudaſſe videtur Jaſ. ut refert Ber. Diaz. Tract. reg. & fol. verb. conditio, reg. 110.

Firſt (2) of all therefore, we are to inquire the Nature of the Condition, whether it be *caſual*, *arbitrary*, or *mixt* [n].

[n] De quibus ſupra eadem part. §. 5. & Bar. in L. 1. de Inſtit. & ſub. C. Minſing. & Vigl. in §. Pen. Inſtit. de hæred. Inſtit.

If (3) the Condition *be meer caſual*, that is to ſay, ſuch a Condition, whereof the Event is to us uncertain [o], then it is ſufficient that the ſame was once accompliſhed, though it do not continue ſtill in

[o] Supra eadem part. §. 5. n. 14. Spiegel. Lexic. verb. fortuitum.

the ſame State [p]. As (4) for Example; the Teſtator maketh thee his Executor, or giveth thee a hundred Pounds, if *A. B.* ſhall be Proctor of the Univerſity of *Oxford* [q]. Now if at any Time after the Making of his Will, *A. B.* be Proctor, whether after the Teſtator's Death or before, or whether he continue ſtill Proctor, or not, it is not material [r]; yea, though he were depoſed from his Office, it is ſufficient that once he was Proctor, the Condition being caſual; and ſo thou art to be admitted to the Executorſhip, and mayeſt obtain the Legacy, as though *A. B.* were Proctor ſtill [s]. So it is if the Teſtator make thee his Executor, or give thee a hundred Pounds, if *A. B.* ſhall be Doctor of the Civil Law, though afterwards he be degraded [t]. Likewiſe, if the Teſtator doth make thee his Executor, or give thee a hundred Pounds, if his Daughter ſhall be Widow. In this Caſe, if his Daughter happen at any Time to be Widow, thou mayeſt be admitted to the Executorſhip, or obtain the Legacy, albeit ſhe do afterward take a new Husband [u].

[p] L. ſi quis hæredem C. de Inſtit. & ſub.

[q] D. L. ſi quis hæredem cujus exemplum eſt. Si Titius fuerit Conſul, vel Prætor, &c. cui noſtrum exemplum non eſt diſſimile.

[r] D. L. ſi quis hæredem.

[s] Sichard. & alii in d. L. ſi quis hæredem.

[t] Zaſ. in L. in ſubſtitutione, ff. de vulg. ſub. n. 11.

[u] Bald. in L. fin. de indict. vid. C. Graſſ. Theſaur. com. op. §. legatum, q. 53. referens ibi hanc op. eſſe veram, cui concinit Mantic. de conject. ult. vol. lib. 12. tit. 19.

If (5) the Condition be *arbitrary*, that is to ſay, ſuch a Condition as the Law eſteemeth to be in our Power [x]; then it is not ſufficient that it be once accompliſhed, unleſs it do continue [y]. As for (6) Example; the Teſtator maketh thee his Executor, or giveth thee a hundred Pounds, if thou pay to *A. B.* Ten Pounds; thou payeſt Ten Pounds to *A. B.* and when thou haſt ſo done, thou takeſt it from him again. This Payment is no Payment, becauſe thou didſt not ſuffer the Money to continue with him; and therefore, in this Caſe, thou art repelled from being Executor, or obtaining the Legacy [z]: So it is, if the Condition do include a Continuance of Time. As for Example; the Teſtator maketh thee his Executor, or giveth thee a hundred Ponnds, if thou permit *A. B.* to have a Way thorow thy Ground. In this Caſe, it is not ſufficient, that thou permit him to have a Way, or paſs thorow thy Ground for a Day or Two, but thou muſt ſuffer him ſo long Time as the Teſtator hath aſſigned, otherwiſe the Condition is not ſaid to be complete [a]. But what if the Teſtator make thee his Executor, or give thee a hundred Pounds, if thou give Ten Pounds to *A. B.* thou of Pity and Compaſſion giveſt him Ten Pounds, being ignorant of this Condition: Whether is it ſufficient that thou didſt once give him Ten Pounds? In this Caſe the Condition is not reputed for accompliſhed; and therefore if thou wilt be Executor, or obtain the Legacy, thou muſt once again give him Ten Pounds, as elſewhere I have declared [b]: For where the Condition is arbitrary, it muſt be obſerved preciſely [c], unleſs it be in ſuch a Caſe as it cannot be iterated [d]. For Example; thou art made Executor, or haſt a hundred Pounds bequeathed unto thee, if thou remit to *A. B.* Ten Pounds which he oweth thee: In which Caſe, if thou releaſe the ſaid Debt of Ten Pounds, before thou knoweſt of the conditional Diſpoſition, this Act ſhall be accounted for an Accompliſhment of the Condition, becauſe now thou canſt not do it again [e].

When (7) the Condition is a *mixed Condition*, then it is ſufficient that the ſame was once accompliſhed, though it do not ſo continue [f]. For Example; (8) the Teſtator maketh his Daughter Executrix, or giveth her an hundred Pounds, if ſhe marry; ſhe marrieth; afterwards her Husband dieth, or they are divorced by Occaſion of his Fault:

[x] Sichard. in Rub. de Inſtit. & ſub. C. Viglius & Minſing. §. Pen. Inſtit. de hæred. inſtituend.

[y] Bar. in L. 2. de cond. & demon. ff. Sichard. in L. ſi quis hæredem de Inſtit. & ſub. C. quorum opinio communis eſt, ex relatione Graſſ. Theſaur. com. op. §. legatum, q. 57. n. 3.

[z] L. ſi ſoluturis ff. de ſoluc. & Angel. ibid. Sichard. in d. L. ſi quis hæredem, n. 6.

[a] Dec. & Sichard. in d. L. ſi quis hæredem de Inſtit. & ſub. C.

[b] Supra eadem part. §. 7. in princ. per gloſſ. & DD. in d. L. ſi quis hæredem, & Graſſ. Theſaur. com. op. §. legatum, q. 52.

[c] Supra eadem part. §. 7.

[d] D. L. ſi quis hæredem, & per Sichard. ibid. n. 3.

[e] Sichard. & alii in d. L. ſi quis hæredem de Inſtit. & ſub. C.

[f] D. L. ſi quis hæredem. Adde Gabriel. lib. 4. com. concluſ. tit. de fidei commiſſ. concl. 8.

In this Caſe ſhe is to be admitted to the Executorſhip, or may obtain the Legacy, as if the Marriage had not been diſſolved, by Death or Divorce [g]. But if (9) her Fault were the Occaſion of the Divorce, it is more doubtful whether the Condition ſhall be accounted for complete to her Benefit [h]. In which Caſe nevertheleſs, their Opinion ſeemeth the truer and ſounder, who hold, that the Law doth exact no more at her Hands, by Reaſon of this former Condition, but that ſhe marry, not that ſhe ſhould commit no Fault, whereby the Marriage muſt be diſſolved [i]: And therefore, having performed the Condition by Marriage, the Divorce doth not repel her, the rather, becauſe ſhe did not offend of Purpoſe, to infringe the Condition [k]. Indeed, if ſhe did marry only to obtain the Executorſhip or Legacy, not with Purpoſe to continue a dutiful Wife, and afterwards commit Adultery, whereby ſhe is ſeparated: The Condition is not ſatisfied by that Marriage, and conſequently ſhe can neither be Executrix, nor obtain the Legacy [l]. But, how may it be known, whether ſhe did marry with Purpoſe only to obtain the Benefit of the Diſpoſition, or with Purpoſe to continue a dutiful Wife? The Shortneſs of Time betwixt the Marriage, and the Committing of the Fault, doth declare: For if ſhe marry on the one Day, and commit the Crime on the next; this is a Teſtimony that ſhe had not a Meaning to indure the Yoke of Marriage [m]. Furthermore, if the Marriage were not lawful from the Beginning, either by Reaſon of the Minority of the Perſon, or by Reaſon of Conſanguinity or Affinity, the Condition is not reputed accompliſhed [n].

[g] DD. in d. L. ſi quis hæredem.

[h] DD. in d. L. ſi quis hæred. quorum Bald. Sal. & Alex. in ea opinione ſunt, ut conditio non ſit completa: Sed Ang. Jaſ. Dec. & moderni fere omnes contrarium defendunt.

[i] Hoc tutius eſſe refert Jaſon, verius eſſe refert. Dec. in d. L. ſi quis hæredem. Quia viz. Lex illa loquatur indiſtincte.

[k] Dec. in d. L. ſi quis hæredem, cujus opinio facilius admitti debet, quandoquidem apud nos pro crimine ſolum ipſum matrimonii debite ritèque contracti vinculum non diſſolvatur, ſed ſeparatio tantum fit a menſa & a thoro.

[l] Dec. Sichard. & alii in d. L. ſi quis hæredem. [m] Sichard. ubi ſupra. Arg. L. ventri §. fin. ff. de privileg. cred. [n] L. Pen. quando dies leg. ced. L. hæc conditio de cond. & demon. ff. Mantic. de conject. ult. vol. lib. 11. tit. 18. n. 22.

What (10) if the Party whom the Teſtator maketh Executor, or doth bequeath any Legacy unto conditionally (*if ſhe ſhall marry*) be already married at the Time of the Will-making, whether by this Marriage is the Condition ſaid to be complete? If the Teſtator were ignorant of the Marriage, the Condition is ſaid to be accompliſhed, otherwiſe not [o]; as hereafter is more fully declared.

[o] L. ſi ita ſcriptum §. ſi pater. ff. de leg. 2. Mantic. de conject. ult. vol. lib. 11. tit. 18. n. 16.

What (11) ſhall we ſay to this Queſtion? The Teſtator maketh *A. B.* his Executor, or giveth him a hundred Pounds, if he marry his Daughter; *A. B.* offereth to marry her, ſhe refuſeth; afterwards ſhe being willing, conſenteth, and then he refuſeth; whether in this Caſe ought *A. B.* to be admitted Executor, and may recover the Legacy, as if he had married her, yea, or no [p]? Indeed, If ſhe had never been willing or conſenting to be married, it were a clear Caſe, that ſeeing it ſtood not by him, wherefore the Condition was not accompliſhed, but by her, then the Condition ſhould have been reputed in Law to have been accompliſhed [q], as hath been heretofore declared [r]. But the Caſe being altered, and ſhe who was unwilling before, being now at length become willing and conſenting, the Queſtion is more doubtful [s]: Wherein very (12) many do hold the Affirmative, eſteeming, that the Condition being once accompliſhed by her Refuſal, it is ſufficient, though it do not ſo indure; and in that Caſe we are to reſpect the Beginning, and not the Succeſs [t]. Others do hold the Negative, ſuppoſing the Condition ought not to be accounted for accompliſhed, unleſs he that is to reap the Benefit by the

[p] De hac q. vide Menach. de præſump. lib. 4. præſump. 183. per tot.

[q] C. cum non ſtat. c. imputari de reg. jur. 6.

[r] Supra eadem part. §. 8.

[s] Ut per DD. in L. 1. de Inſtit. & ſub. C. & per Mantic. de conject. ult. vol. lib. 11. tit. 18. n. 8.

[t] Bald. Sal. Alex. Sichard. in d. L. 1. C. de Inſtit. & ſub. & Molin. in Apoſtil. ad Dec. in eand. L.

the Performance thereof, do continue and perſevere in Readineſs and Willingneſs to perform the ſame, and that the leaſt Delay is ever hurtful [u].

[u] Petr. Cyp. Fulgol. & alii in d. L. 1.

Either Opinion hath many Authors of great Authority; and albeit it may ſeem, That this Condition being a mixt Condition, not conſiſting in his own Power alone, on whom it is impoſed, but in hers alſo; that therefore being once accompliſhed, it is ſufficient, though it do not ſo continue: As in the former Examples of being Proctor, Doctor, Wife, or Widow, where the Conditions be reputed for fully performed, howſoever afterwards the Proctor be depoſed, the Doctor degraded, the Wife divorced, or the Widow married.

Yet notwithſtanding (13) I do rather cleave to them which do hold the negative Opinion [x], and ſo that howſoever in this Caſe *A. B.* were at the firſt willing and ready to have accompliſhed the Condition, and that it did not then ſtand by him, wherefore the ſame was not performed; yet afterwards ſhe conſenting and he diſſenting, it is in Effect, as if he had heen unwilling at the Beginning, and conſequently, that he is not to be admitted Executor, nor to recover his hundred Pounds by Virtue of this Diſpoſition.

[x] Non tamen indiſtincte ut infra hoc ipſo §. in fin.

To (14) the former Objection, that it is ſufficient, that a mixt Condition be once accompliſhed, though it do not ſo indure; as appeareth by thoſe late recited Examples; it may be anſwered, that there the Condition was once actually complete, which was all that the Teſtator ſeemed to require [y] in thoſe Caſes: But here the Condition was never in Act, and ſo the Performance thereof came ſhort of the Teſtator's Deſire [z]. Wherefore, as I ſaid before, I do rather ſubſcribe to their Opinion, who do hold, that in this Caſe the Condition is no more reputed for complete in Law, than it is in Fact, and conſequently that he can reap no Benefit thereby, by whom it ought to have been performed [a].

[y] Jaſ. Dec. Sichard. & alii in d. L. 1. de Inſtit. & ſub. C.

[z] Id quod clare mihi conſtare videtur ex verbis teſtatoris dicentis (ſi duxerit filiam meam,) nec objicias per eum non ſtetiſſe, ex quo nunc ſtat. Sin adhuc urgeas conditionem tunc primum pro impleta haberi, quando per eum non ſtetit: Reſpondeo illud plus habere ſubtilitatis quam æquitatis, quippe qui non credam ſatisfactum eſſe voluntati teſtantis unica nuptiarum oblatione, muliere poſtea conſentiente, ita ut non ſubſecutis nuptiis legatum jure poſci non poſſit.

[a] Fateor tamen contrariam opinionem dici communem, teſte Sichardo in d. L. 1. de Inſtit. & ſub. & quidem attenta juris ſubtilitate, eandem opinionem magis ferendam eſſe non prorſus nego; ſed inſpecta teſtatoris voluntate, non ita.

And this Opinion I ſuppoſe to be more agreeable to the Meaning of the Teſtator, and therefore to be preferred [b], certain Caſes excepted. (15) One Caſe is, where the Executor or Legatary, upon the Refuſal of her Offer, doth marry another Woman, for then it is too late to repent, ſeeing from that Time he hath juſt Caſe to refuſe her Offer after he hath married another Woman [c]. Another Caſe is, when the Teſtator remitteth a Debt which is due unto him: As for Example; the Teſtator remitteth to *A. B.* a hundred Pounds which he oweth him, if he marry his Daughter, *A. B.* is willing and offereth to marry her; ſhe refuſeth, afterwards ſhe is willing. This new Willingneſs doth not hinder the Legatary, being before delivered, and the Action extinguiſhed by her Refuſal [d]. Another Caſe is like unto this, when after the Refuſal made by the Woman, and before her Repentance he, whoſe Offer was before refuſed, is admitted to the Executorſhip, and doth obtain his Legacy, and is poſſeſſed thereof: For notwithſtanding her Repentance and new Willingneſs, he may retain that whereof he was poſſeſſed [e]. Another Caſe ſeemeth to be this, namely, when ſome ſpecial Thing is bequeathed. As for Example; the Teſtator doth bequeath unto thee his white Horſe, or an hundred

[b] Mens autem teſtatoris quam diligentiſſime inveſtiganda, & tanquam regina colenda eſt, ut ait Sichard. in Rub. de teſta. C.

[c] Socin. in L. in teſto. el. 2. ff. de cond. & demon. Mantic. de conject. ult. vol. lib. 11. tit. 18. n. 38. Menoch. d. præſump. 183. n. 29. l. 4.

[d] Mantic. ubi ſupra.

[e] Mantic. ubi ſupra. poſt Socin. in d. L. in teſto. el. 2. de cond. & demon. ff. Menoch. ubi ſupra. n. 30.

Pounds lying in his Cheſt, if thou marry his Daughter; for ſtraightway by her Refuſal thou haſt gotten a certain Right in the Thing bequeathed [f]. If there be any other Caſes wherein the Affirmative hath Place, they are more ſtrange, nor eaſily like to happen, and therefore not ſo neceſſary to be known [g].

[f] Socin. ubi ſupra. huc pertinent quæ ſuperius dicta ſunt eadem part. §. 4. in Brook. Abridg. tit. Deviſe, nu. 6, 30. Bald. Sal. & Alex. in L. 1. de Inſtit. & ſub. C.

[g] Vide Menoch. de lib. 4. præſump. 183.

§. XI. Of divers Conditions which may ſeem doubtful, whether they be lawful or unlawful; and firſt of thoſe Conditions, whereby the Liberty of making Teſtaments is hindered; how far the ſame are lawful or unlawful.

1. *Certain Conditions, whereof it may be doubted of ſome, whether they be lawful or unlawful.*
2. *Captious Conditions deſtroy the Teſtament.*
3. *Captious Conditions, wherefore they be ſo termed.*
4. *Teſtaments are to be made with all Freedom, not only without Fear of Loſs, but alſo without Hope of Gain.*
5. *This Propoſition, that captious Diſpoſitions are void, diverſly extended.*
6. *The ſame Propoſition diverſly limited.*
7. *Another Kind of Condition againſt the Liberty of making a Teſtament.*
8. *The Teſtament improperly termed captious, which is referred to the Will of another.*
9. *The Teſtator's Will may not depend of another Man's Will, and what is the Reaſon thereof.*
10. *What if he, to whoſe Will the Teſtator did refer his own Will, ſhould make a Will in the Name of the Teſtator.*
11. *As another Man's Soul is not my Soul, ſo his Will and Teſtament is not my Will and Teſtament.*
12. *It is lawful for the Teſtator to refer his Will to the Will of another, being joined with a Fact.*
13. *So it is when the Teſtator doth refer his Will to the limited Will of another.*
14. *When is the Teſtator ſaid to refer his own Will to another's abſolute Will, and when to his limited Will.*
15. *The Declaration of the Teſtator's Will may be referred to another.*
16. *What if Relation be made to the Will of the Executor or Legatary.*
17. *In Favour of Liberty, the Diſpoſition may be referred to another's Will.*
18. *So may the Diſpoſition which is made* Ad pias cauſas.
19. *He that doth commit all his Goods to the Diſpoſition of another, doth not die Inteſtate.*

FOraſmuch (1) as there are divers Conditions, which are neither ſimply lawful, nor ſimply unlawful, but in divers Reſpects lawful and unlawful, eſpecially thoſe Conditions whereby the Liberty of

making a Teſtament[f], or the Liberty of *Marriage*[g], or the Liberty of *alienating the Thing diſpoſed*[h], may be hindred or reſtrained; I thought it convenient in this Place to ſhew how far, and in what Caſes theſe Conditions be lawful or unlawful, and what Effect they have.

[f] De qua conditione ſtatim ſubjic. cur hoc ipſo §.
[g] De qua infra §. prox.
[h] De qua infra ead. part. §. 13.

And firſt of all, (2) concerning thoſe Conditions which do hinder that Liberty which ought to be had in making of Teſtaments, and whereby the Diſpoſition of the Teſtator is ſaid to depend on the Will of ſome other Perſon: Such Conditions are unlawful, and do deſtroy the Force of the Diſpoſition[i]; and (3) therefore, if the Teſtator make thee his Executor, upon Condition if thou ſhalt make him thy Executor; or give thee a hundred Pounds by his Teſtament conditionally, if thou ſhalt give him a hundred Pounds in thy Teſtament: This Kind of Diſpoſition is ſaid to be captious[k], becauſe hereby the Teſtator goeth about to catch or intrap thee to make him thy Executor, or to give him a hundred Pounds, in caſe thou die firſt[l], and to hinder that Liberty which thou ſhouldſt enjoy in making of thy Teſtament. For when thou haſt made him thy Executor and dieſt, then hath he that which he looked for; he is now thy Executor, and thou on the contrary art fruſtrated of that which thou perhaps didſt look for; for being dead, thou canſt not be his Executor[m]. And therefore (4) as in Marriages the ſame ought to be free, not only from fear of ſuffering Loſs, but alſo from fear of not obtaining Gain[n]: So in Teſtaments, the ſame ought to be made with all Freedom, not only without Fear of Puniſhment or Loſs, but alſo without Hope of Gain or Reward.[o].

[i] L. Captatorias, de hæred. inſtituend. L. Captatoriæ, de leg. 1. ff. L. Captatorias, de mil. teſto. C. Covar. in c. cum tibi de teſta. exr.
[k] Illa enim voluntas propriè dicitur captatoria, quæ ſit ſub ſpe reciprocæ voluntatis. Covar. in c. cùm tibi de teſta. ext. Sichard. in L. captatorias, de mil. teſton. C.
[l] Alciat. Parergon. lib. 2. c. 31. Auguſt. lib. 4. Emendac. c. 15.
[m] Vide Minſing. lib. 1. obſerv. c. 8.
[n] C. Gemmæ de ſponſ. extr.
[o] Sichard. in L. captatorias. C. de mil. teſto. n. 5.

And in this Conſideration, (5) theſe captious Wills, whereby many under Pretence of making others their Executors, or gratifying them with Legacies, do ſubtilly procure themſelves to be made Executors, or otherwiſe to be benefited by the Diſpoſitions of others, are ſo odious, that they are utterly void[p], albeit they be military Teſtaments[q], or of the Father among his Children[r], or of a Stranger[s], or Teſtaments *Ad pias cauſas*[t], or Teſtaments made in Time of Wars[u], or in the Time of Peſtilence[x], or in the Priſon of a Tyrant[y], or in Place where is want of Witneſs[z], or before the Prince[a], or whether it be Teſtament or Codicil[b], for in all theſe Caſes, and divers others, ſuch captious Wills be void[c].

[p] L. illa L. captatorias, de hæred. inſtituend. L. captatorias, de leg. 1. ff.
[q] L. captatorias, de mil. teſton. C.
[r] Vaſque de ſucceſ. crea. lib. 2. §. 17. n. 28.
[s] Vaſque ibidem.
[t] Nam quod dicitur captatoriam diſpoſitionem valere quoad piam cauſam (ut in c. cum tibi de teſta, extr.) Id verum eſt in captatoria diſpoſitione impropriè ſic dicta, quæ, viz. pendet ex alieno arbitrio, prout in d. c. cum tibi. & Covar. ibid. n. 2. & ſtatim ſubjicitur, non autem quando diſpoſitio ſit ſub ſpe remunerationis. Sarmientus lib. 1. ſelect. op. c. 4. n. 8. c. 6. n. 33. Sichard. in d. L. captatorias. [u] Vaſquius de ſucceſ. crea. lib. 2. §. 17. n. 83. [x] Vaſq. ubi ſupra. [y], [z], [a], [b], [c], ibidem.

Notwithſtanding (6) if the Condition be not referred to the Time to come, but to the Time paſt, or preſent, the Condition is not unlawful, nor the Diſpoſition void: And therefore, if the Teſtator make thee Executor of his Teſtament, if thou haſt named him Executor in thy Teſtament, or giveth thee a hundred Pounds in his Will, if thou haſt given him a hundred Pounds in thy Will: This Condition is not unlawful[d]; for two Perſons may make either other Executors, or otherwiſe benefit one another by their Teſtaments,

[d] Sichard. in L. captatorias. d. mil. teſto. C.

ments, ſo it be done in Regard of good Will and Affection, and not in Hope of Gain or Remuneration [e].

[e] Alciat. Parergon. lib. 3. c. 21. Covaſ. in d. c. cum tibi de teſta extr. n. 1.

Beſides this former Kind of Diſpoſition, which by Reaſon of the Condition appeareth to be made in Hope of Gain, and is therefore properly termed captious; there (7) be other like Diſpoſitions which be repugnant to the Liberty of making of Teſtaments, which alſo are ſaid to be captious, that is to to ſay, when the Teſtator's Will doth depend on the Will of another [f]: As for Example; the Teſtator maketh thee his Executor, or giveth thee a hundred Pounds, if *A. B.* will; or thus: The Teſtator maketh that Perſon his Executor, or giveth him a hundred Pounds, whom thou wilt appoint. [g] In both theſe Caſes, (8) the Diſpoſition is ſaid to be captious [h]. Nevertheleſs, the Condition is unlawful, becauſe it is againſt the Liberty of making Teſtaments, wherein (9) the Teſtator's Will ought not to depend on the Will of another [i]. For the antient Law-makers conſidering, that if it ſhould be lawful for Teſtators to refer their Wills to the Wills of others, and to depend upon them, then he on whom the Teſtator did depend, either not doing any Thing at all, or elſe doing otherwiſe than the Teſtator would, by that Means the Teſtator would remain deceived, and they to whom the Teſtator did wiſh well, ſhould be diſappointed [k]. For the Avoiding of which Inconveniencies they did ordain, that every Teſtament ſhould perſonally depend of the Teſtator's own Will, and not of the Will of another, by whom the Teſtator might be deceived [l]. And (10) thence it is, that a Teſtament is defined to be a Sentence of our Will, not of another Man's Will [m]. Therefore, when thou art made Executor, or ſome Legacy is bequeathed unto thee (if *A. B.* will) as is ſet down in the former Inſtance, although *A. B.* ſhould will that thou ſhouldſt be Executor, or have the Legacy: Notwithſtanding, thou couldſt neither be Executor [n], nor obtain the Legacy [o]. And even ſo where the Teſtator maketh that Perſon his Executor, or giveth him an hundred Pounds, whom thou wilt appoint (as in the ſecond Inſtance) though thou ſhouldſt appoint one, yet this Appointment ſhould not benefit him [p]: For (11) as thy Soul is not the Soul of the Teſtator, no more is thy Will his Will, or thy Teſtament his Teſtament [q]; neither is it in the Power of the Teſtator to refer the Subſtance of his Will to the Will of another [r], being ſuch a Quality as cleaveth to his own Perſon, and cannot be committed to another [s], except in certain Caſes.

[f] Covar. in d. c. cum tibi de teſta. extr.

[g] Canoniſtæ. in d. c. cùm tibi de teſta. ext. Legiſtæ. in d. L. captatorias. de mil. teſto. C.

[h] DD. in d. L. captatorias, & in d. c. cum tibi Graſſ. Theſaur. com. op. §. Inſtit. q. 18.

[i] L. illa inſtitutio. ff. de hæred. inſtituend.

[k] Sichard. in L. captatorias C. d. mil. teſton. n. 4.

[l] Sichard. ubi ſupra. Peckius in Tract. de teſta. conjug. l. 1. c. 27.

[m] Supra 1. part. §. 2, 3.

[n] L. illa inſtitutio. ff. de hæred. inſtit. Pariſ. conſ. 38. lib. 3. n. 60, 71.

[o] L. nonnunquam. de cond. & demon. L. captatoriæ. de leg. 1. ff. & eſt communis opinio, quam etiam defendit Covar. in d. c. cum tibi de teſta. extr.

[p] Bar. in L. quidam de reb. dub. ff. n. 7, 8. Bald. in L. executorem. C. d. execu. rei jud. n. 5. Pariſ. conſ. 38. vol. 3. n. 9. Graſſ. §. inſtitutio. q. 18. n. 4.

[q] Bald. & Angel. in L. captatorias C. de mil. teſt. Vaſq. de ſucceſ. creat. lib. 2. §. 17. n. 81. Peckius, Tract. de teſta. conjug. c. 27. n. 3. Pariſ. de conſil. 38.

[r] D. L. illa inſtitutio. ff. de hæred. inſtit. Bar. in L. quidam de reb. dub. ff. Peckius, Tract. de teſta. conjug. lib. 1. c. 27. n. 3.

[s] Sermientus, lib. 2. ſelect. interp. c. 6. n. 2.

The firſt is, when (12) the Teſtator doth not refer his Diſpoſition to the ſole only Will of another Perſon, as in the former Example, *viz.* If *A. B.* will; but to the Will joined with a Fact [t]: As for Example; the Teſtator maketh thee his Executor, or giveth thee an hundred Pounds, if his Son ſhall go to the Church: This is a lawful Condition, and therefore the Condition being complete, thou art to be admitted Executor, or mayſt obtain the Legacy [u]. And yet there ſeemeth but a little Difference betwixt theſe Conditions (if *A. B.* will) or (if *A. B.* ſhall go to the Church) for that it is in his Will, whether he

[t] L. nonnunquam. ff de cond. & demon.

[u] D. L. nonnunquam. Sarmientus, lib. 2. ſelect. interp. c. 6. n. 28.

he will go to the Church, or not. But many Things do greatly hurt, being expreſſed; which not expreſſed, do no Harm [x].

[x] D. L. nonnunquam.

Another Caſe is this, When (13) the Teſtator doth not refer his Will to the mere abſolute Will of another, (as if *A. B.* will) but to his limited Will [y]: As for Example; the Teſtator doth make thee Executor, or giveth thee a hundred Pounds (if *A. B. ſhall eſteem it convenient.*) In which Caſe, if *A. B.* ſhall eſteem it meet or convenient that thou be Executor, or have the Legacy of an hundred Pounds, then thou art to be admitted to the one [z], or mayſt obtain the other [a]. The (14) Teſtator is ſaid to refer his Diſpoſition to *the mere abſolute Will* of another, when he committeth the ſame to his Will, to his Appetite [b]: *To his limited Will*, when he referreth the ſame to his Diſcretion, Judgment, Wiſdom, good Pleaſure, Diſpoſition and Conſcience [c].

[y] Sichard. in d. L. captatorias, c. de m. l. teſt.

[z] Sichard. ubi ſupra. quamvis quoad hæredis inſtitutionem iſtud non procedit ſine difficultate majori, jure civili. Sarmient. lib. 2. ſelect. interp. c. 6. n. 4.

[a] L. ſi ſic. de leg. 1. L. 1. de leg. 1. L. fidei commiſſa de leg. 3. ff. in L. ſi ſic. de leg. 1. ff. Menoch. d. lib. 1. q. 8.

[b] Menoch. de Arb. Jud. ſentent. lib. 1. q. 7.

[c] Jaſ.

Thirdly, When (15) the Subſtance of the Teſtator's Will is not referred, but only a Declaration or Election [d]: As for Example; the Teſtator maketh one of his Servants his Executor, or giveth him a hundred Pounds, whom thou ſhalt chuſe. In this Caſe, he whom thou ſhalt chuſe of the Teſtator's Servants, ſhall be Executor, or recover the Legacy [e].

[d] L. utrum. §. cum quidam ff. de reb. dub. Bar. in L. quidam eodem tit. n. 8. Peckius. de teſta. conjug. lib 1. c. 27.

[e] L. fidei commiſſ. de fidei com. lib. in fin. ff. Pariſ. conſ. 38. l. 3. Graff. §. Inſtit. q. 18. n. 6. ubi ait hanc opinionem eſſe com.

Another (16) Caſe is, when the Diſpoſition is referred to the Will of the Executor, touching the Executorſhip; or of the Legatary, touching the Legacy: As for Example; the Teſtator maketh thee his Executor, if thou wilt; or doth give thee a hundred Pounds, if thou wilt: For this Condition is not only permitted, but it is neceſſarily required [f].

[f] Supra eadem part. §. 6.

Another Caſe (17) is in Favour of Liberty or Freedom from Bondage; and therefore, if the Teſtator do manumit his Villain, if his Executor will, it is as effectual, as if he had referred the ſame to the Diſcretion, or Wiſdom, or Conſcience of his Executor [x].

[x] L. fidei commiſſa. de fidei commiſſ. l. ff. Sichard. in L. captatorias. C. de mil. teſton.

And further, when (18) the Diſpoſition is made *Ad pias cauſas*, then it is alſo lawful for the Teſtator to commit the very Subſtance of his Will, to the free and abſolute Will of another [g]; and therefore, if the Teſtator make the Poor of the Pariſh his Executor, or give them a hundred Pounds, if *A. B.* will; this is a good Diſpoſition [h].

[g] Paul. de Caſtr. & Alex. in d. L. captatorias. Abb. conſ. 32. lib. 2. Boir. & Covar. in c. cum tibi. Bald. in c. in cauſis de elect. extr. quorum opinio eſt com. Graff. §. Inſtitutio. q. 18.

[h] Et hoc procedit jure Can. non ſolum quoad legata, ſed etiam quoad Inſtitutionem. Covar. in d. c. cum tibi. n. 12. referens hanc op. eſſe veriorem. Tu adde Gabr. lib. 6. com. concluſ. Tit. pia cauſa. conc. 3. ubi pulcherrime hanc concluſionem ornat variis ampl. & limitat.

Finally, (19) If the Teſtator commit the Diſpoſition of all his Goods to another; this is lawful, and he to whom the Diſpoſition is committed, is underſtood to be made Executor, to diſtribute all the ſaid Goods *In pios uſus* [i]. So it is, if the Teſtator commit his Soul, and all his Goods, to the Hands of another, as hath been heretofore declared [k].

[i] C. cum tibi de teſta. extr. & ibi Covar. n. 10. Graff. d. §. Inſtitutio. q. 18. Peckius de teſta conjug. lib. 1. c. 27. Quorum teſtimonio hæc opinio eſt communis.

[k] Supra eadem part §. 4.

§. XII. Of thoſe Conditions whereby the Liberty of Marriage is reſtrained, &c. how far the ſame be lawful or unlawful.

1. *Of Conditions againſt the Liberty of Marriage, ſome are lawful, ſome unlawful.*
2. *Conditions againſt the Liberty of Marriage are all unlawful, except in certain Caſes.*
3. *The Reaſons wherefore the Conditions againſt the Liberty of Marriage, are unlawful.*
4. *The Prohibition of the firſt Marriage, more odious than of the Second.*
5. *The Condition of marrying with the Arbitrement, Will, or Conſent of another, is unlawful.*
6. *The Reaſon wherefore the former Condition is unlawful.*
7. *The Condition prohibiting Marriage for a ſhort Time, is not unlawful.*
8. *The Condition prohibiting Marriage with ſome Perſons, is not unlawful.*
9. *Whether the Condition prohibiting Marriage have Reſpect only to the firſt Marriage.*
10. *An Occaſion of Doubt, whether the former Concluſion be true.*
11. *An Anſwer to the ſame Doubt, diſtinguiſhing whether the Condition be affirmative or negative.*
12. *The Condition prohibiting Marriage in ſome Place, is not unlawful.*
13. *The Condition having Relation to the Marriage of a third Perſon, is not lawful, ſaving where that third Perſon is of Kin.*
14. *The Condition prohibiting Marriage, is not rejected where* Pia Cauſa *is ſubſtituted.*
15. *Affirmative Conditions about Marriage, are not rejected but in ſome Caſes.*
16. *Some affirmative Conditions of marrying, harder than the Negative of not marrying.*
17. *The Condition of marrying with the Advice or Counſel of another, is not unlawful.*
18. *The Condition of marrying with the Conſent of another, is to be obſerved in Part.*
19. *Difference betwixt theſe Phraſes,* If he do not marry, *and,* So long as he doth not marry.
20. *The Condition of not marrying, doth not hinder Reſtitution ſimply impoſed.*

ALbeit (1) all thoſe Conditions, whereby the Liberty of marrying is wholly taken away, are generally diſliked [l]: Nevertheleſs, where the Conditions be ſuch, whereby Marriage is not altogether prohibited, but in Part reſtrained, as in reſpect of Time, Place, or Perſon, they are not to be utterly rejected [m].

[l] L. quoties de cond. & demon. L. ſervo. §. ſi teſtator. Ad. Trebel. ff.

[m] L. cum ita L. hoc modo. L. ſed ſi. [illegible] vir. de cond. & demon. ff. & infra hoc §.

Wherefore, that we may the better know when theſe Kind of Conditions be admitted, or not, I thought it beſt, and the moſt eaſy Way to ſet down a Rule, with Ampliations and Limitations of the ſame, according to the Diverſity of Caſes incident to that Purpoſe.

The (2) Rule ſhall be this, *That all Conditions againſt the Liberty of Marriage, are unlawful* [n]; and that whenſoever the Teſtator doth appoint his Executor, or make any Bequeſt upon ſuch Condition, that then the Condition is void, as if it were not written; and that he who is made Executor, or to whom any Legacy is given upon ſuch Condition, may be admitted to the Executorſhip, or may obtain the Legacy, as if the Diſpoſition had been ſimple [o].

[n] Eand. reg. tradit Vigelius in ſuâ methodo exactiſſima juris civilis, part. 4. lib. 14. c. 13. cum decem exceptionibus. Et licet idem Vigelius poſtea exiſtimet contrarium jure novo conſtitui, & ita ſupervacaneas eſſe illius regulæ exceptiones, pace tamen tanti viri, nihil novi ſtatuitur in primis nuptiis, in quibus vel hodie jus antiquum obtinet, ut verè atteſtatur Mantica de conject. ult. vol. lib. 11. tit. 19. in prin. Cui concinit Graſſ. Theſaur. com. op. afferens conditionem, qua in totum prohibetur matrimonium, in virgine turpem, contra bonos mores, atque adeo de jure impoſſibilem eſſe, denique communi Doctorum calculo rejectam. §. legatum. q. 50.

[o] L. quoties, L. ſed ſi §. fin. L. cum tale. §. Meviæ. de cond. & demon. ff. L. 2. C. de indict. vid.

The (3) Reaſon which the Lawyers do yield, (I mean) of the Unlawfulneſs of this Condition, is, becauſe it is contrary to the Procreation of Children, and repugnant to the Law of Nature, and hurtful to the Commonwealth [p]: Whereunto it may be added, that howſoever Virginity is commended, yet Marriage is not thereby condemned; and therefore (as I ſaid before) if the Teſtator make one his Executor, or give him an hundred Pounds, if he do not marry; this Condition is unlawful, and as if it were not written [q]: Which (4) Things is rather true, if the Executor or Legatary were never married before, for the Prohibition of the firſt Marriage is much more odious in Law than the Second [r]: For albeit it be commonly and truly ſaid, that the Commonwealth hath an Intereſt, that Teſtaments ſhould be executed [s]; yet the Commonwealth hath a greater Intereſt, that it ſhould be throughly peopled, and therefore Marriage not to be prohibited [t].

[p] Mantic. de conject. ult. vol. lib. 11. tit. 19. in prin.

[q] L. quoties L. hoc modo. L. cùm ita legatum. de cond. & demon. ff.

[r] Iſtiuſmodi ſiquidem conditio, ſi permanſerit vidua, vel caſtè vixerit, in iis non rejicitur, in aliis ſecus. Auth. cui relictum. C. de indict. vid. Covar. Epitom. de ſponſal. c. 2. §. 9. n. 11. Graſſ. Theſaur. com. op. §. legatum, q. 50. quamvis eam non modo duram, ſed & iniquam exiſtimavit Peckius. Tract. de teſtam. conjug. l. 1. c. 24.

[s] L. Gallus §. quid ſi is. de lib. & poſthu. L. vel negare quemad. teſta. app. ff.

[t] L. 1. ſol. matr. L. cum ratio §. ſi plures. de bon. dam. ff. Mantic. de conject. ult. vol. lib. 11. tit. 19. in prin.

And in Conſideration hereof, this Rule is extended, that if (5) the Teſtator make ſome Perſon his Executor, or give him any Legacy, if he marry according to the Appointment or Conſent of ſome other; this Condition is rejected as unlawful [u]. And therefore in this Caſe, if he that is made Executor, or to whom any Legacy in ſuch Sort is given, do marry contrary to the ſaid Reſtraint, mentioned in the Teſtament, he is to be admitted to the Executorſhip, and may obtain the Legacy, as if no ſuch Condition had been expreſſed [x].

[u] L. cùm tale §. ſi arbitratu. d. §. ſi Meviæ. Gravetta. conſil. 1. n. 3. Mantic. de conject. ult. vol. lib. 11. tit. 18. n. 8.

[x] D. §. ſi arbitratu. l. turpia. §. ſi Titiæ. de leg. 1. ff. Gravetta. & Mantic. ubi ſupra Peckius de teſta. conjug. lib. 1. c. 24. n. 6. ubi dicit hoc procedere in virginibus, non in viduis, ob novellam Juſtiniani conſtitutionem, qua permittitur conditio viduitatis: Quod etiam aliis placet, ut Graſſ. d. §. legatum. q. 50. n. 10.

The (6) Reaſon of the Unlawfulneſs of this Condition is, leſt he, whoſe good Will were to be procured, might make an hard Choice for the Executor or Legatary, either by Reaſon of the Diſlike of the Parties [y], Inequality of Age, Diſparity of Kindred,

[y] Quam rationem communiter eſſe receptam refert Graſſ. Theſaur. com. op. §. legatum q. 50 n 9. poſt DD in d. L. turpia §. ſi Titiæ.

Diſagreeing in Matters, or ſuch like; which, if it were ſuffered, would breed greater Miſchief, than may be in a Caſe of that Quality tolerated or indured.

Moreover, if the Teſtator do bequeath any Legacy to a Woman conditionally, if ſhe do not marry, willing her to reſtore the ſame to ſome other, if ſhe do marry: Albeit in this Caſe the Woman do marry, ſhe may obtain the Legacy, neither is ſhe bound to reſtore the ſame [b], unleſs it were the Meaning of the Teſtator, not to forbid Marriage, but to grant the Uſe of the Thing bequeathed, until the Legatary did marry [c]. Other Extenſions there be alſo of this Rule, but let us return to the Limitations.

[b] L. quoties de cond. & demon. ff. Mantic. de conject. ult. vol. lib. 11. tit. 19. n. 4. Graff. Theſaur. com. op. §. legatum. q. 50. n. 7, 8.

[c] Peckius de teſta. conjug. lib. 1. c. 24. L. ſed ſi §. cùm vir. de cond. & demon. ff. vide Saſin. in d. cent. c. ſumit. §. fin. de verb. ob. ff.

The firſt Limitation therefore is, when (7) the *Condition is not perpetual, but temporal* [d]; as if the Teſtator make his Daughter Executrix, or bequeath her a hundred Pounds, if ſhe do not marry before the Age of twenty Years; this Condition is to be performed [e]. Howbeit, if the Time of the Prohibition be ſuch, that it is very like, if ſhe ſhould continue a Maid, during that Space, that her Marriage ſhould be greatly hindered, the Condition is rejected, as being made in Fraud of Marriage [f].

[d] L. ſed ſi §. cùm vir. ff. de cond. & demon.

[e] Jaſ. in Auth. cui relictum. de indict. vid. C. Mantic. de conject. ult. vol. lib. 11. tit. 18. n. 8.

[f] Jaſ. in d. Auth. cui. n. 3. per L. cum tale. ff. de cond. & demon. Fran. de Are. conſil. 67. Mantic. de conject. ult. vol. lib. 11. tit. 19. n. 8

The ſecond Limitation is, when (8) the Prohibition doth only exclude ſome Perſons: As for Example; the Teſtator doth make thee his Executor, or giveth thee an hundred Pounds, if thou do not marry a Widow; this Condition is not unlawful [g]. And therefore, if at any Time after thou do marry a Widow, thou canſt not be Executor, nor obtain thy Legacy: Inſomuch, that (9) if thou ſhouldeſt marry a Maid, and after her Death ſhouldeſt marry a Widow, all thy Hope of being Executor, or obtaining thy Legacy, is extinguiſhed by this thy ſecond Marriage [h]; much more is the Condition lawful, if the Teſtator make thee his Executor, or give thee any Legacy, if thou do not marry this or that particular Woman [i], for here thou haſt greater Liberty, and more Choice than in the former. Where (10) I ſaid that the Hope and Intereſt of the Executor or Legatary is extinguiſhed, if at any Time he marry contrary to the Prohibition of the Teſtator, whether it be the firſt or the ſecond Marriage; this may ſeem doubtful: For that when Mention is made of Marriage, it is to be underſtood of the firſt Marriage only [k]. And therefore, if the Teſtator make thee his Executor, or giveth thee an hundred Pounds, if thou marry his Daughter; if thou after the Making of this Will, ſhouldeſt firſt marry ſome other Woman, and after her Death ſhould marry the Teſtator's Daughter [l]; yet couldſt thou not be Executor, nor obtain the Legacy: For in this Caſe, the Teſtator is preſumed to mean of the firſt Marriage, not of the ſecond Marriage [m]. How then cometh it to paſs, that thou being made Executor, or having any Thing bequeathed unto thee, if thou do not marry the Teſtator's Daughter, loſeſt all thy Hope and Intereſt, whenſoever thou doſt marry her, ſuppoſing thou hadſt married one, two, or three before? The (11) Anſwer is this, when the Condition is affirmative, then it is to be underſtood of the firſt Act only; but when the Condition

[g] L. cum ita legatum ff. de cond. & demon. Peckius de teſta. conjug. lib. 1. c. 24. n. 4.

[h] Oldrad. conſil. 16. Alciat. in L. boves. §. hoc ſermone de verb. ſig. ff. & Tiraquel. n. §. limitat. 7.

[i] D. L. tum ita legatum Mint. c. de conject. ult. vol. lib. 11. tit. 19. n. 9. Peckius de teſtam. conjug. lib. 1. c. 24.

[k] D. L. boves §. hoc ſermone.

[l] Paul. de Caſtr. in L. hoc genus ff. de cond. & demon.

[m] Tiraquel. in d. §. hoc ſermone n. 3, 4. facit L. matrimonii. ff. qui à quibus ma.

is

is negative, then not only the firſt Act, but the ſecond, third, and every other Act is perpetually forbidden [n]: The Reaſon of the Difference is, becauſe there is greater Force in the Negative, than in the Affirmative [o].

[n] Oldrad. d. conſil. 16. Alciat. & Tiraquel. in d. §. hoc ſerimone Bar. & Paul. de Caſtr. in d. L. hoc genus. ff. de cond. & demon.

[o] Plus negat negatio quam affirmat affirmatio, inquit Paul. de Caſtr. in d. L. hoc genus.

The third Limitation is, when (12) the Condition [p] is limited, only in Reſpect of ſome Place, as if thou doſt not marry in the City of *York*.

[p] L. hoc modo. ff. de cond. & demon. Graſſ. Theſaur. com. op. §. legatum. q. 50. Peckius de teſta. conjug. l. 1. c. 14. n. 10.

The fourth Limitation is, when (13) the Condition of not marrying, is not referred to the Executor or Legatary, but to ſome other Perſon: As for Example; the Teſtator maketh thee his Executor, or giveth thee an hundred Pounds, if his Daughter do not marry. In this Caſe the Condition is not rejected, wherefore thou art to expect the Event thereof [q]: For if ſhe marry, thou art excluded; if ſhe die unmarried, thou art to be admitted [r]. But if the Teſtator make thee his Executor, or give thee an hundred Pounds, if thy Daughter do not marry: This Condition is unlawful [s]; for where the Perſon whoſe Marriage is prohibited, is of thy near Kindred, who art made Executor or Legatary, it is likely that ſuch Perſon will by thy Perſwaſions abſtain from Marriage, to inrich thee by the Teſtament [t]; and therefore the Law, to prevent ſuch Fraud, hath rejected that Condition [u].

[q] L. 1. C. d. indict. vid. Mantic. de conject. ult. vol. lib. 1. tit. 19. n. 5.

[r] DD. in d. L. 1. C. de indict. vid.

[s] L. hæres meus §. ult. de cond. & demon. ff.

[t] D. §. ult. & ib. Bar. & Paul. de Caſtr.

[u] Mantic. de conject. ult. vol. lib. 11. tit. 19. Ubi tradit alias limitationes.

The fifth Limitation is, when (14) that which is given with Condition of not marrying, is to be diſtributed *In pios uſus*, in Caſe the Condition be not obſerved: As for Example; the Teſtator doth bequeath unto thee an hundred Pounds, if thou doſt not marry; and if thou doſt marry, then he doth will that the ſame be diſtributed amongſt the poor Scholars of *Oxford*. In this Caſe the Condition is not rejected as unlawful, and ſo if thou ſhalt marry, thou loſeſt thy hundred Pounds, and the ſame is to be diſtributed amongſt the ſaid poor Scholars [x]; the Reaſon is, for that the Law doth more favour Piety, than the Liberty to marry [y].

[x] Paul. de Caſtr. in L. Titio. §. ult. de cond. & demon. ff. Mantic. de conject. ult. vol. lib. 11. tit. 18. n. 9. Raquel. de privileg. piæ cauſæ priv. 8.

[y] Mantic. ubi ſupra Imol. in d. L. Titio. §. ult. Tira-

The ſixth Limitation is, when (15) the Condition is conceived affirmatively, not negatively. For Example; the Teſtator maketh thee his Executor, or giveth thee an hundred Pounds if thou marry his Daughter [z], or if thou marry a Maid [a], or if thou marry within a Month [b], or if thou marry at *London* [c]: For albeit in theſe affirmative Conditions, is alſo included a Negative; that is to ſay, If thou do not marry another Woman, nor at any other Time, nor in any other Place. Nevertheleſs, theſe Conditions are not unlawful, ſeeing the included Negative is not univerſal, but particular [d].

[z] L. uter. de cond. & demon. ff. Mantic. de conject. ult. vol. lib. 11. tit. 18. n. 2.

[a] Peckius Tract. de teſta. conjug. lib. 1. n. 24.

[b] Mantic. d. tit. 18.

[c] Peckius d. c. 24. n. 5. in fin.

[d] L. cum ita. L. hoc modo. ff. de cond. & demon.

But (16) if the Woman appointed by the Teſtator be ſuch, as thou canſt not with Honeſty marry her [e], then howſoever the Condition be affirmative, yet in very Truth it is a harder Condition, and more againſt the Liberty of Marriage, than this Negative (*If thou do not marry:*) For by this Affirmative, thou art not only excluded from marrying any other, but thou art, as far as is in his Power, inforced to accept her, whom thou canſt not with thy Credit marry [f]. And the like may be ſaid, if the Time or Place be not convenient; for then alſo the Condition is rejected [g].

[e] D. L. cum ita legatum.

[f] D. L. cum ita in fin. Mantic. de conject. ult. vol. lib. 11. tit. 18. n. 5. & Bar. in d. L. cum ita, ubi reſpondet, quæ perſona ſit indigna tuis nuptiis, nempe illa, cui non potes ſine dedecore nubere, inſpecta natalium qualitate: Ne dum ſi jure vel civitatis moribus prohibeantur hujuſmodi nuptiæ, indigna erit perſona, & inutilis conditio

[g] Mantic. & Peckius, ubi ſupra.

The ſeventh Limitation is, when (17) by the Condition the Executor or Legatary is not to marry without the Counſel or Advice of another Perſon [h]. As for Example; the Teſtator doth make thee his Executor, or give thee an hundred Pounds, if thou do marry with the Counſel or Advice of his Brother; for if thou do marry without his Counſel or Advice, thou art excluded [i]. Nevertheleſs, in this Caſe, thou art not bound to follow his Counſel or Advice, but to requeſt the ſame [k]. So it was adjudged in *Pigot*'s Caſe, when the Father deviſed an hundred Pounds to his Daughter *H.* upon Condition, that ſhe marry with the Aſſent of her Mother; ſhe marries and ſues for the Legacy; and it was pleaded in Bar, that ſhe did not marry with the Aſſent of the Mother; notwithſtanding that, ſhe had a Sentence for the Legacy. Cited in *Greſley* and *Luther*'s Caſe. *H.* 11 *Jac. Rot.* 1866. *Moor's Rep. fol.* 857. *n.* 1176.

[h] Caſtrenſ. & Alex. in L. turpia. §. ſi Titiæ. de leg. 1. ff. Bar. in L. 1. §. ſi plures de exercit. action. ff. Mantic. de conject. ult. vol. lib. 11. tit. 18. n. 10.

[i] Mantic. ubi ſupra. Aym. Gravet. conſil. 1. Covar. de ſponſal. 2. part. c. 3. §. 8. n. 3.

[k] Paul. de Caſtr. conſil. 300. vol. 1. Felin. in c. ex part. de conſtit. extr. col. 2. Graff. Theſaur. com. op. §. legatum. q. 50. n. 11. Licet impreſſio in illo loco ſit corrupta.

The eighth Limitation is this, where (18) it is ſaid before, that the Condition of marrying with the Conſent, good Will, and Arbitrement of another, is void; (ſo that the Executor or Legatary, to whom the Condition is impoſed, is neither bound to obtain, nor yet to crave the Conſent, good Will, or Arbitrement of the other) yet the Perſon on whom the Condition is impoſed, cannot be Executor, nor get the Legacy, unleſs he do marry [l]: For though he need not ſo much as to crave the Conſent of any third Perſon in this Caſe, ſeeing that Part of the Condition is unlawful; yet muſt he marry ere he can pretend any Title to the Executorſhip or Legacy, ſeeing that Part of the Condition is not unlawful [m].

[l] Alex. & Paul. Caſtrenſ. in d. L. Turpia. §. 1. ff. de leg. 1.

[m] Mantic. de conject. ult. vol. lib. 11. tit. 18. n. 8. poſt Alex. & Caſtrenſ. in d. §. 1.

The ninth Limitation is, when (19) the Prohibition of Marriage, is not made conditionally by this Word *If*, (*as I make thee my Executor, if thou doſt not marry,*) but by other Words or Adverbs of Time: As when the Teſtator willeth, that his Daughter or Wife ſhall be Executrix, or have the Uſe of his Goods *ſo long*, as ſhe ſhall remain unmarried [n]. Agreeable hereunto are the Laws of this Realm of *England*, wherein there is a Caſe, that one of the Kings of this Realm did grant to his Siſter the Manor of *D.* ſo long as ſhe ſhould continue unmarried. And this was admitted to be a good Limitation in the Law, but not a Condition [u].

[n] L. Legatum ita eſt. de an. leg ff. Peckius, de teſta. conjug. l. 1. c. 24. Zaſ. in d. L. centeſimis §. fin. de verb. ob. ff.

[u] Fulb. paralætæ lib. 1. ubi plures authoritates citat. 7. Dialogo, fol. 47. a.

The tenth Limitation is, when (20) the Perſon on whom the Condition is impoſed, is ſimply charged to reſtore the Thing bequeathed [x]. As for Example; the Teſtator doth bequeath to thee an hundred Pounds, if thou do not marry, and he doth Will thee to reſtore the ſame to his Son, when he ſhall come to lawful Years. In which Caſe thou art by Law to reſtore the ſame accordingly [y]: Neither is this Limitation contrary to the former Ampliation of the Rule; for here thou art charged with Reſtitution ſimply, there conditionally [z].

[x] L. non dubium ff. de leg. 3.

[y] D. L. non dubium, Mantic. de conject. ult. vol. lib. 11. tit. 19. n. 4. Graſſ. Theſaur. com. op. §. legatum. q. 50.

[z] Mantic. d. tit. 19. n. 4.

Conditions concerning Marriage.

WHERE a Legacy was deviſed to a Feme Sole, *if ſhe doth not marry* T. S. Adjudged that if ſhe afterwards did marry him, the Legacy was void.

Godbolt 51.

The Father deviſed 500*l.* to his Daughter, upon Condition, that *if ſhe would not marry* T. S. then it ſhould be taken from her and given to him; the Daughter died before ſhe was capable of Marriage, or of the Age to give her Conſent: Adjudged that this Condition was only * *in Terrorem*, and that *T. S.* ſhould not have the 500*l.* though it was deviſed over to him; becauſe the Daughter was not in any Fault, and therefore ought not to be puniſhed.

* *A Legacy given to a Woman on Condition not to marry without the Conſent of* T. S. *is only* in Terrorem, *if* it is not deviſed over.

Jarvis v. *Duke*, 1 Vern. 19.

If there be a Portion of 8000*l.* given to a Woman, provided ſhe marries not without the Conſent of *A.* and that if ſhe marries without his Conſent ſhe ſhall have but 100*l. per Annum*; yet if ſhe marries without his Conſent ſhe ſhall be relieved, for the Proviſion is *in Terrorem* only. *Trin.* 15 *Car.* 2. between Sir *Henry Bellaſis* and his Wife and Sir *William Ermin*, 1 *Chan. Caſes* 22. 2 *Chan. Rep.* 23. 1 *Vern.* 20. *Nelſon's Chan. Rep.* 145. 2 *Vern.* 293. But it was ſaid, that if the Portion upon ſuch Marriage had been limited over to another, it had been otherwiſe. 1 *Chan. Caſes* 22. 2 *Chan. Rep.* 95. 2 *Vern.* 357.

A Man by his Will leaves his Grand-daughter an Annuity of 10*l. per Annum* for Life, and afterwards by a Codicil to his Will declares, that "If his Grand-daughter ſhall marry with the Good-liking "of his Truſtees, then ſhe ſhall have 150*l.* in Lieu of the Annuity, "and her Annuity to ceaſe."

The Grand-daughter afterwards marries one worth nothing, and without the Conſent of any of the Truſtees.

It was objected, that the Reſtraint of Marriage was only *in Terrorem.*

But Lord *Cowper* held the contrary, ſaying here was a Proviſion either Way, and therefore the Proviſion for the Child is in the Alternative, and there is a Condition precedent to the Gift of the Portion, (*viz.*) If ſhe marries with Conſent, *&c.* and that is not performed, and the Child is ſtill provided for, though not with the greater Portion, Equity in that Caſe does not relieve. *Gillet* verſus *Wray*, 1 *Williams* 284.

A. deviſed to his Daughter *M.* the Plaintiff 100*l.* to be paid by his Executors upon her Day of Marriage or Age of 25 Years, which

ſhould firſt happen, upon Condition that ſhe ſhould marry with the Conſent of ſuch and ſuch Perſons; and if ſhe married without their Conſent, then to have 50*l.* only, and no more, and gave the Reſidue of his perſonal Eſtate to the Defendants. *M.* married the Plaintiff without ſuch Conſent, before ſhe was 21; and it was held by the Maſter of the Rolls, that this was more than a Clauſe *in Terrorem*, and that the Deviſe of the Surplus of the perſonal Eſtate was a Deviſe over of the 50*l.* on *M.*'s Diſobedience. *Amos* v. *Horner*, *Mich.* 1699.

The Earl of *Newport* deviſed *Newport-Houſe*, *&c.* to his Wife the Lady *Anne* for Life, and after her Deceaſe to his Grand-daughter the Lady *Anne Knowles*, and the Heirs of her Body to be begotten; provided and upon Condition that his ſaid Grand-daughter do marry with the Conſent of his ſaid Wife, and of the Earls of *Warwick* and *Mancheſter*, or the major Part of them; and in Caſe his ſaid Grand-daughter ſhould marry without the Conſent of his ſaid Wife, or the major Part of his Truſtees aforeſaid, or ſhould die without Iſſue of her Body, then he gave the ſaid Premiſſes to his Grandſon *George Porter*, and his Heirs for ever.

After the Death of Lord *Newport*, the Plaintiff *Charles Fry* ſtole away the Grand-daughter the Lady *Anne*, who was then about 14 Years of Age, and married her; the Earls of *Warwick* and *Mancheſter* being acquainted with this proteſted againſt the Marriage, and declared their utter Diſlike of it; but being afterwards examined as Witneſſes ſay they do aſſent to the Marriage, and that they do not know, but that if their Conſent had been asked for before the Marriage, ſuch Reaſon might have been given as they might have conſented to it. It was held, that the Plaintiffs ſhould not be relieved; for the ſubſequent Conſent of the Earls ſhould not deveſt the Eſtate which was before veſted in *George Porter*, and that there ſhould be no collateral Averment, that it was intended only *in Terrorem*. *Fry* v. *Porter*, 1 *Chan. Caſes* 138. 2 *Chan. Rep.* 26. 1 *Mod.* 300.

A. deviſed 500*l.* to *B.* her Daughter, and that if ſhe married under 21, without the Conſent of the Executors, or major Part of them, the Legacy to go to the Children of her Siſter the Wife of *C.* and made *C.* and two others Executors, *B.* being at the Houſe of *C.* there marries his Son by a former Wife without his Privity, being under 21. *B.* and her Husband bring a Bill for the Legacy; *C.* in Favour of his other Children, inſiſts that the Legacy is forfeited; the other Executors confeſſed they had Notice of the Courtſhip, and did not contradict or diſapprove of it; the Plaintiffs had a Decree for the 300*l.* there being at leaſt a tacit Conſent. *Meſgret* verſus *Meſgret*, 2 *Vern.* 580.

One by Will bequeathed the Reſidue of his perſonal Eſtate to *Jane Styles*, provided ſhe married with the Conſent of *A.* and *B.* his Executors, (who were but Executors in Truſt) and if *Jane Styles* ſhould marry otherwiſe, then the Teſtator deviſed over the ſaid *Reſiduum* to *J. N. One of the Executors died*, after which *Jane Styles*, without the Conſent of the ſurviving Executor, intermarried with a common Mariner; whereupon *J. N.* brought his Bill for the *Reſiduum*.

But the Bill was diſmiſſed with Coſts; it was held to be a Condition ſubſequent: If there be a ſubſequent Condition, which becomes impoſſible by the Act of God, the Party is excuſed and diſcharged from the Condition; this Conſtruction ought the rather to prevail, with

with Regard to a Condition ſo odious as this, which reſtrains the Freedom of Marriage, and is void by the Civil Law when annexed to a perſonal Legacy. The Plaintiff would have the Court add Words to the Will, *viz.* that *Jane Styles* ſhould not marry without the Conſent of the Executors, *or the ſurvivor of them.* A Caſe was, where the Conſent of both Executors being required by a Will, one, on a proper Match being propoſed, did conſent, but the other was obſtinate and would not; which being laid before the Court, and the Diſſent of the Executor appearing to be without juſt Cauſe, the want of ſuch Conſent was ſupplied. *Peyton* v. *Bury*, 2 *Williams* (626)

The Defendant's Father by Will deviſed to the Defendant (who was his Heir at Law) and to his Heirs, all his Lands, *&c.* in the County of *B.* except ſuch and ſuch Part thereof, charged with the Sum of 2500 *l.* to his Daughter (ſince married to the Plaintiff) at her Age of twenty-one or Marriage, which ſhould firſt happen, and deviſed the excepted Premiſſes in Truſt to be ſold for Payment of his Debts, provided, that if his ſaid Daughter ſhould marry in the Life of her Mother, without her Conſent firſt had in Writing, 500 *l.* of the ſaid 2500 *l.* ſhould ceaſe and be applied towards Payment of his Debts charged upon the excepted Lands; he appoints his Wife Guardian of his Daughter, and makes her Executrix and dies.

The Daughter attains the Age of twenty-one, and without the Privity of her Mother intermarries with the Plaintiff.

Lord Keeper: The Diſtinction, that where there is no Deviſe over, the Condition ſhall be only *in terrorem*, is a great deal too wide, for here in Effect is no Deviſe over; for though it be to go towards Payment of Debts, yet here appear no Creditors to be concerned, none that are in Danger of loſing their Debts. I think the Plaintiff muſt have her whole Portion; the Teſtator has appointed two Times of Payment, Marriage or 21; ſhe attains her Age of 21; and that ſingly gives her a Right to it; if ſhe had married before that Age, ſhe muſt have had her Mother's Conſent, otherwiſe ſhe was to loſe 500 *l.* but when ſhe attains her Age, and marries after, her Title to the whole is accrued, which was complete by her attaining that Age, and could not be impeached after by her Marriage without her Mother's Conſent; for as her Marriage by her Mother's Conſent was one Title, ſo her attaining the Age of twenty-one was another Title. *King* v. *Withers*, *Gilbert's Rep.* 26. See the Caſe of *Lord Saliſbury* and *Bennet*, 2 *Vent.* 365. 2 *Vern.* 223. *Skinner* 285.

The Teſtator deviſed 20 *l. per Annum* to *E. G.* his Wife, *if ſhe ſhould remain a Widow*; now in this Caſe by the Civil Law ſhe is obliged to give Security to repay what ſhe ſhall receive, in Caſe ſhe marry again; but 'tis otherwiſe if the Deviſe had been *until* ſhe ſhall be married, or *ſo long* as ſhe ſhall be unmarried.

Force ver. *Hembling*, 4 Rep. 61. Gouldſ. 109. S. C.

E. G. a Feme Sole deviſed 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 voluntary Act, it amounts in Law to a Countermand of her Will.

Furſon ver. *Penton*, 1 Vern. 408.

A Man before Marriage covenanted with his intended Wife, *that ſhe ſhould have Power to diſpoſe of* 500 l. *of her Portion*, notwithſtanding the Intermarriage; afterwards the Husband exhibited a Bill againſt the Perſon in whoſe Poſſeſſion this 500 *l.* was, ſetting

forth his Right to it; and that if there was any ſuch Covenant as before-mentioned, it was diſcharged by the Intermarriage. The Court was of Opinion, that though this Covenant was taken unskilfully in the Name of the Wife, when it ought to be taken in the Name of Truſtees, and for that Reaſon, tho' in Strictneſs of Law it might be diſcharged by the Intermarriage; yet a Court of Equity would never ſuffer a Truſt to be ſo defeated; 'tis true, a † Promiſe by the Husband to the Wife before their Marriage, *to leave her* 500 l. *at his Death*, was diſcharged by the Intermarriage, as reported by *Hobart*, which is expreſly contrary to the Judgment in ** *Clark* and *Thompſon*'s Caſe, wherein *Stafford*'s Caſe was cited, and there three Judges were of a different Opinion, that the Promiſe was not diſcharged by the Marriage, becauſe it was not a Duty during the Coverture.

† *Smith* v. *Stafford*, Hob. 216.

** *Clark* v. *Thompſon*, 2 Cro. 571.

§. XIII. Whether the Condition forbidding Alienation of Goods bequeathed is lawful, or not.

1. *Prohibition of Alienation is ſometimes to be obſerved as lawful, and ſometimes not.*
2. *Prohibition, ſetting forth the Cauſe, is lawful.*
3. *Naked Prohibitions do not bind the Executor or Legatary.*
4. *Whether a Feoffee may be prohibited to alien.*
5. *Whether the Donor of Lands in Tail may prohibit an Alienation.*
6. *As it is lawful to prohibit Alienation in Favour of ſome Perſons, ſo in Diſfavour of others.*
7. *Of thoſe Cauſes wherewith the Prohibition is ſaid to be apparelled.*
8. *In what Caſes the Executor or Legatary may alienate the Thing deviſed, notwithſtanding the apparelled Prohibition.*
9. *Bond ought to be put in where there is a Condition prohibiting Alienation.*

THE (1) Prohibition of the Teſtator forbidding the Executor or Legatary to alienate the Goods bequeathed, is ſometimes to be obſerved as lawful, ſometimes not.

The Prohibition is then (2) lawful, and to be obſerved, when it is made in Favour of ſome other Perſon, who is to injoy the Thing diſpoſed, after the Executor or Legatary, or when there is ſome ſpecial [a] Cauſe, whereupon this Reſtraint is grounded.

[a] L. filius familias. §. divi. de leg. 1. ff.

The (3) Condition is not of any Force, when it is without Cauſe, or not made in Favour of any other Perſon, ſave only of the Executor or Legatary [b]. In which Caſe, they may renounce this Favour, and alienate the Thing deviſed, notwithſtanding ſuch ſingle Prohibition, which is rather ſaid to be a Counſel than a Commandment [c]: For the Law doth deem it an abſurd Matter, that a Man ſhould be Lord and Owner of a Thing, and yet ſhould not at Pleaſure alienate the ſame [d]. In which Point alſo I ſuppoſe, that (4) the Temporal Laws of this Realm have the ſame Effect in Lands, which the Laws Eccleſiaſtical and Civil have in Goods. And therefore, if a Feoffment be made of Lands in Fee-ſimple, upon the Condition that the Feoffee ſhall not alienate or put away the ſame; this Condition is

[b] D. §. divi.

[c] Jaſ. in d. §. divi. n. 1.

[d] Jaſ. in d. §. divi. n. 9. Doct. & Stud. lib. 1. c. 24.

void, becauſe the Feoffee is reſtrained of that Power which the Law yieldeth unto him in ſuch a Caſe[c].

[c] Brook, Abridg. tit. Condition, n. 135. Fitzh. tit. Condition, n. 4. Principal Grounds, fol. 28. Doct. & Stud. lib. 1. c. 4. Littleton, tit. Eſtates upon Conditions.

But when the Prohibition hath a Cauſe annexed, or the ſame is made in Favour of ſome other Perſon, who is afterwards to enjoy the Lands; then this Condition of not alienating the ſame is good and effectual in the Law, as may appear by the Gifts of Land in Tail. For if (5) Lands be given to a Man, and to the Heirs of his Body lawfully begotten, upon Condition, that neither he nor his Heirs ſhall alienate the Lands to any other Perſon: This Condition is good and effectual. In which Caſe, if he or his Heirs, to whom the Lands are given, alienate the ſame, then the Giver or his Heirs may lawfully enter and retain the Lands for ever[f]. And (6) as it is not lawful to alienate from particular Perſons, in whoſe Favour the Prohibition is made; no more is it lawful to alienate to thoſe particular Perſons, in whoſe Disfavour the Prohibition is made[g]. In which Caſe alſo concerning Lands, the Laws of this Realm do not differ from the Civil and Eccleſiaſtical Laws concerning Goods: For howſoever it is not lawful for the Feoffor to cut off the whole Power of the Feoffee; yet he may abridge or reſtrain ſome Part thereof, by Condition that he ſhall not alienate his Lands to ſuch or ſuch Perſons[h].

[f] Fitzh. Abridg. tit. Condition, n. 4. Littleton, tit. Eſtates upon Conditions, f. 77.

[g] Alex. in d. filius familias, §. divi. ff. de leg. 1. n. 1.

[h] Brook, Abridg. tit. Condition, n. 135. Littleton, tit. Eſtates upon Condition. fol. libri mei 77.

The (7) Cauſe wherewith the Prohibition is ſaid to be apparelled, beſides theſe former Reſpects of the Favour and Disfavour of Perſons, ariſeth for the moſt part of the Teſtator's Affection towards the Thing bequeathed. As when the Teſtator doth bequeath ſome Cup of Gold which was his Anceſtors, forbidding the Executor or Legatary to alienate the ſame, but to keep it for a Memorial[i]; or when he doth bequeath ſome Jewel, or other Ornament, being the Gift of the Prince[k]. And for that Cauſe doth prohibit the Alienation thereof; or when he doth bequeath ſome Prize by him gotten in the Wars, as a Sword or an Helmet; and therefore doth forbid the Alienation thereof[l].

[i] L ſi in emptione. de Minor. ff. Paul. de Caſtrenſ. in d. §. divi.

[k] Alex. & Ripa. in d. §. divi.

[l] Alex. & Ripa. ubi ſupra.

Which Prohibition in this Sort is to be obſerved, as well as if it were in regard of ſome other Perſon[m], except it be in certain Caſes: For it is not perpetually true, that the Prohibition upon a Cauſe, or made in reſpect of ſome Perſon, is to be obſerved.

[m] D. L. filius famil. §. divi.

The firſt Exception therefore of this Rule is, when the Alienation is neceſſary, not voluntary, that is to ſay, when the reſt of the Teſtator's Goods will not ſuffice to pay his Debts; for then it is lawful for the Executor to ſell the ſame Goods prohibited to be ſold[n].

[n] D. §. divi. in fin. L. peto. §. prædium ff. de leg. 2. Jaſ. & Ripa. in d. §. divi.

The ſecond is, when the Alienation is momentary, or of a ſhort Time, not perpetual, with a Covenant to reſtore the Thing alienated again[o].

[o] Angel. in L. voluntas. C. de fidei Commiſſ. Ripa. in d. §. divi. n. 10. ubi limitat hanc exceptionem duobus modis.

The third Exception is, when the Thing bequeathed is in Place far diſtant from him to whom it is bequeathed, and who by Reaſon

thereof cannot have any Benefit thereby, if he ſhould not alienate the ſame; for then the Prohibition of Alienation, being made in his Favour, it ſeemeth that he may alienate the ſame [p].

The fourth is, when the Alienation is made by him who is the laſt of the Family, in whoſe Favour the Teſtator did prohibit the Thing bequeathed to be alienated [q].

The Fifth is, when the Executor, being prohibited to alienate the Thing bequeathed, except to certain Perſons, and he offering to ſell the ſame unto them, they refuſe to buy it: In which Caſe he may ſell the ſame to others, notwithſtanding the Prohibition [r].

[p] Bald. in L. voluntas C. de fidei commiſſ.

[q] Jaſ. & Ripa. in d. §. divi.

[r] Jaſ. in Rep. d. §. divi. n. 8. per L. qui Romæ §. cohæredes. ff. de verb. ob.

The Sixth is, when the Thing bequeathed was firſt ſold to the Perſon permitted by the Teſtator, for afterwards it may be ſimply ſold to any other [s]. For Example; the Teſtator doth bequeath a Thing to *A.* upon Condition, that he ſhall not alienate the ſame to *B.* the Legatary doth alienate the ſame to *C.* which *C.* doth alienate the ſame to *B.* In this Caſe the Condition is not broken, becauſe not the Legatary, but another did alienate the ſame to *B.* and ſo did not violate the ſame Condition expreſſed in the Deceaſed's Will [t].

The Seventh is, when the Executor or Legatary doth ſell the Fruits and Commodities of the Things bequeathed, during his Life [u].

[s] Jaſ. in Rep. de §. divi. n. 76. per L. pater §. quindecim, ff. de leg. 3.

[t] Fulb. paralel. lib. 2. part. tit. Conditions, fol. 69.

[u] Jaſ. in Rep. d. §. divi n. 84. poſt. Bar. in L. Codicil. §. Inſtitutio. ff. de leg. 2.

Divers other Exceptions there be [x] concerning this preſent Purpoſe, but becauſe I do not ſee how there can be any great Uſe thereof in the Eccleſiaſtical Court, I have omitted the ſame, aiming eſpecially at theſe Caſes, whereof there is like to be moſt Uſe, and moſt Benefit to the Reader: Only this Thing I thought good to add in this Place, that where the (9) Teſtator doth make an Executor, and give him the Reſidue of his Goods conditionally, if he do not alienate the ſaid Reſidue of Goods, the Executor cannot be admitted to the Executorſhip, unleſs he firſt enter into Bonds not to alienate the ſame [y].

[x] De quibus. Jaſ. & Ripa in d. §. divi. & Vigl. in ſua methodo jur. civil. part. 4. l. 14. c. 11. in prin.

[y] L. 4. §. idem Julianus ff. de cond. Inſtit. & ibi Bald. Jaſ. & Ripa. in d. §. divi. quæ ſententia firmior erit exiſtente cohærede, ſeu coexecutore. Cui Mutiana præſtari poſſit cautio.

Prohibitions not to alienate.

THE Father made his Son Executor, and prohibited him from mortgaging or alienating the Eſtate, *or any Part thereof*, and commanding him to preſerve the ſame for his Children; the Father having mortgaged Part of the Eſtate to *C. D.* for 100 *l.* the *Son ſold the ſame*, and diſcharged the Mortgage: Adjudged that this Alienation was good, becauſe it was of Neceſſity to pay off the Mortgage; and in Prohibitions of this Nature the Law extends to voluntary Alienations, and not to thoſe which are of Neceſſity. Godolph. 403.

Deviſe to his five Sons by Name, upon Condition that if either of them alienated his Part to a Stranger, that the ſame ſhould enure to the Crown for ever; afterwards two of the Sons ſold their Parts to one of the three Brothers, and died; and then the Brother who had bought

bought the ſaid two Parts, made *T. S.* his Executor, and deviſed to him the ſaid two Parts, and died: Adjudged that the Deviſe was good. *Ibid.*

Pewterers Company verſus *Governor of Chriſt's Hoſpital*, 1 Vern. 161.

Lands were deviſed to *T. S.* and the Heirs of his Body; but if he ſhould go about to alien, then his Eſtate ſhould ceaſe, and then he deviſed the ſaid Lands to *Chriſt's Hoſpital:* The Queſtion was, if this *Limitation* to the Hoſpital was good; it was admitted, that the Reſtraint of an Alienation tended to a Perpetuity, but that the Charity ought to take Place, eſpecially ſince the Donee was dead without Iſſue; but decreed this Limitation to a Charity was an Invention to create a Perpetuity, and therefore void.

§. XIV. Within what Time the Condition may, or ought to be performed, no certain Time being limited by the Teſtator.

1. *In this Queſtion, Three Times, and Three Conditions are to be conſidered.*
2. *Whether the Condition may be performed before the Making of the Will.*
3. *When the Condition is arbitrary, the ſame muſt be performed after the Death of the Teſtator.*
4. *What if the arbitrary Condition be ſuch, as the ſame cannot be iterated.*
5. *What if the arbitrary Condition have Relation to the Time paſt.*
6. *Caſual and mixed Conditions may be performed before the Making of the Teſtament, if the Teſtator were ignorant of the Performance.*
7. *If the Teſtator did know of the former Performance, it muſt be performed again if it be poſſible.*
8. *Whether the Condition may be performed, during the Time betwixt the Making of the Teſtament and the Death of the Teſtator.*
9. *Within what Compaſs of Time, may, or ought the Condition to be performed after the Death of the Teſtator.*
10. *The Condition being Arbitrary, it is not material whether the Condition be impoſed on the Executor or Legatary.*
11. *The Executor may at any Time accompliſh the arbitrary Condition after the Teſtator's Death.*
12. *Whether the Ordinary may limit a certain Time for Performance of the Condition.*
13. *The Legatary muſt perform the arbitrary Condition, ſo ſoon as he can.*
14. *The Reaſon wherefore the Executor hath longer Time of performing an arbitrary Condition, than the Legatary.*
15. *No Time doth prejudice the Legatary, whiles he is ignorant of the Conditions.*
16. *If the Condition be caſual, it may be accompliſhed at any Time.*
17. *What if the Condition be extant after the Death of the Legatary.*

18. *If the Condition be mixed, it may be performed at any Time.*
19. *What if the Condition do concern Marriage, whether ought it to be performed within three Years.*

IF (1) we will underſtand within what Compaſs of Time, the Condition, whereupon the Executor is made, or any Legacy bequeathed, may, or ought to be performed, where there is not any certain Time limited by the Teſtator, we are to conſider three ſeveral Times, and three ſeveral Sorts of Conditions.

Of the three Times, the firſt is the Time *before the Making of the Teſtament*; the ſecond is *the Time betwixt the Making of the Teſtament and the Death of the Teſtator*; the third is *the Time after the Death of the Teſtator* [a].

Touching the Conditions we are to conſider, whether the ſame be *arbitrary*, *caſual*, or *mixed* [b]. For the (2) Time before the Making of the Teſtament, if any do inquire, whether within that Time, the Condition may be performed? It is to be anſwered, That (3) if the Condition be Arbitrary, that is to ſay, ſuch as doth conſiſt in his Power on whom it is impoſed, the ſame cannot be performed, but after the Death of the Teſtator [c]. For Example; the Teſtator maketh thee Executor, or giveth thee an hundred Pounds, if thou wilt go to the Church, or if thou wilt give Ten Pounds to the Poor: In this Caſe it is not ſufficient that thou didſt go to the Church; or that thou didſt give Ten Pounds to the Poor at any Time before the Making of the Teſtament; or yet after the Making of the Teſtament, before the Death of the Teſtator: For an arbitrary Condition muſt be performed after the Teſtator's Death [d], ſaving in ſome Caſes. One (4) is when the Condition cannot be iterated; for then it is ſufficient, that the ſame was performed in the Life-time of the Teſtator, even before the Making of the Teſtament [e]. For Example; the Teſtator maketh thee Executor, or giveth thee an hundred Pounds, if thou ſhalt remit unto *A. B.* the Debt which he oweth thee, and burn the Obligation; which Thing is by thee already done. In this Caſe it is ſufficient that thou haſt done it, ſeeing it cannot be iterated [f]. And this I ſuppoſe to be true, not only if the Teſtator be ignorant of the Performance of the Condition [g] (for it is not likely that he would have impoſed any Condition to have been performed, if he had known the ſame to have been performed before, and that it could not be performed again) but alſo, if he did know the Condition to have been performed before; in which Caſe, the Condition not being iterable, is impoſſible, and ſo rejected, the Diſpoſition remaining pure and ſimple [h]. Another Exception is, when (5) the Condition is referred to the Time paſt. For Example; the Teſtator maketh thee his Executor, or giveth thee ſome Legacy, if thou haſt done this or that Thing [i]. In which Caſe it is not only ſufficient, that the Condition was performed before the Making of the Teſtament, but it is neceſſary that it ſhould ſo be, for obtaining the Executorſhip or Legacy [k].

[a] L. ſi jam facta. ff. de cond. & demon.

[b] L. unic. §. fin autem C. de cad. toll. & ſupra eadem part. §. 5.

[c] L. 2. de condit. & demon. ff. L. ſi quis hæred. de Inſtit. & ſub. C.

[d] Gloſſ. & DD. in d. L. ſi quis hæredem, & hoc etiam fieri debet non fato aut caſu, ſed animo & ſtudio implendi conditionem, ut habet communis omnium interpretum ſententia, teſte Graſſo. Theſaur. com. op. §. legatum, q. 57. & huc faciunt quæ ſuperius dicta ſunt eadem part. §. 7. in princ.

[e] L. ſi jam facta. L. hæc condit. ff. de cond. & demon. Paul. de Caſtr. in d. L. ſi quis hæredem, n. 4.

[f] L. hæc conditio el. 1. ff. de cond. & demon. Bar. in L. 2. de cond. & demon. Paul. de Caſtr. & Sichard. in L. ſi quis hæredem, de inſtit. & ſub. C.

[g] D. L. ſi jam & facta & L. hæc conditio, el. 1. ff. de cond. & demon. & eo loci Interpretes. in fin. per L. quæ ſub. conditione §. quoties ff. de cond. inſtit. ad præſens ſi cer. pe. ff.

[h] Graſſ. Theſaur. com. op. §. legatum, q. 57.

[i] L. talis inſtitutio. de cond. inſtit. L. cum

[k] D. L. inſtitutio talis.

But if (6) the Condition be not *Arbitrary*, but either *Caſual* or *Mixed*, that is to ſay, either wholly without the Power of the Perſon,

ſon, on whom it is impoſed, or partly in his Power, and partly in the Power of ſome other [l]; then it is material, whether the Teſtator were ignorant of the Accompliſhment of the Condition, when he made his Teſtament, or not: For if the Teſtator, when he made his Teſtament, were ignorant that the Condition was performed before, the ſame is deemed to be ſufficiently complete [m]. *Example of the caſual Condition*; the Teſtator maketh thee his Executor, or giveth thee an hundred Pounds, if his Ship ſhall return from *Venice*. This Ship is returned already, but the Teſtator is ignorant thereof, at the Time of making his Teſtament. In this Caſe the Condition is ſufficiently extant, as if the ſame had returned after his Death [n]. Example of the *mixed Condition*; the Teſtator doth make thee his Executor, or giveth thee an hundred Pounds, if thou take a Wife; thou haſt a Wife already, but the Teſtator did not then know ſo much, when he made this Condition. In this Caſe alſo thou art reputed to have ſufficiently accompliſhed the Condition [o].

[l] Bar. in L. 1. C. de Inſtit. & ſub. ſupra eadem part. §. 5. in fin.

[m] D. L. ſi jam facta. ff. de cond. & demon. d. L. ſi quis hæredem C. de inſtit. & ſub.

[n] L. hæc conditio, §. ſi ſic. ff. de cond. & demon. & d. L. ſi quis hæredem.

[o] Mantic. de conject. ult. vol. lib. 11. tit. 18. n. 16. per d. L. ſi quis hæredem & d. L. ſi jam facta.

But if (7) the Teſtator were not ignorant thereof, but did know of the Return of his Ship, and of thy Marriage, at the Time when he did impoſe the Condition; then the Condition is not reputed to be extant or accompliſhed: But it is to be underſtood of the next Return, and of thy next Marriage [p]. Howbeit, if the Condition were ſuch, that the ſame could not be iterated, then it ſhall be reputed for extant and accompliſhed; albeit, the Teſtator at the Time when he did impoſe the Condition, were not ignorant of the Accompliſhment thereof. For Example; the Teſtator maketh thee his Executor, or giveth thee an hundred Pounds, if thou ſhalt be baptized, or if thou ſhalt take his Daughter to Wife: For it is ſufficient, albeit the Teſtator did know thee to be baptiſed before, or that thou haſt taken his Daughter to thy Wife before, ſeeing the Condition cannot be iterated [q].

[p] L. ſi ita ſcriptum ff. de leg. 2. Mantic. de conject. ult. vol. tit. 18. lib. 11. n. 16.

[q] L. quæ ſub conditione §. quoties. de condit. inſtit. L. hæc conditio. el. 1. & L. ſi jam facta de cond. & demon. ff. L. ſi quis hæredem. de inſtit. & ſub. C. & DD. in dictas LL.

Concerning (8) the ſecond Time, that is to ſay, the Time betwixt the Making of the Teſtament and the Death of the Teſtator; if any be deſirous to know, whether the Condition may be performed, during this Time, I refer him to that which hath been ſaid immediately before; that is to ſay, either the Condition is Arbitrary; and then it is not ſufficient to perform the ſame, ſo long as the Teſtator liveth, unleſs it be ſuch a Caſe as cannot be iterated, or that the Condition doth reſpect the Time paſt, or elſe the Condition is caſual or mixed; and then it is ſufficient that it is completed whiles the Teſtator liveth. For ſeeing it is ſufficient, if it be performed before the Making of the Teſtament, much more if it be performed after the Making of the Teſtament.

Concerning (9) the third Time, which is the Time after the Teſtator's Death, if we would now alſo know within what Space or Compaſs of Time immediately from his Death, the Condition may or muſt be performed, no certain Time being preſcribed by the Teſtator, we muſt firſt inquire the Nature of the Condition, obſerving diligently, as before, whether the ſame be *Arbitrary*, *Caſual*, or *Mixed*; for according to the Diverſity of the Conditions, the Law hath determined diverſly.

In the firſt Caſe, (*viz.*) When (10) the *Condition is Arbitrary*, we are to conſider, whether the ſame be impoſed on the Executor, or on the Legatary. If the (11) Condition be impoſed on the Executor, the ſame may be performed at any Time, ſo long as the Executor liveth [r]. For Example; the Teſtator maketh thee his Executor, if thou ſhalt give to the Poor Ten Pounds. In this Caſe thou mayeſt at any Time, during thy Life, accompliſh the Condition; and it is of the ſame Effect, as if thou hadſt performed the ſame immediately after the Teſtator's Death [s], unleſs the (12) Ordinary do appoint a certain competent Time for the Performance thereof: For ſo he may do in this Caſe (as hereafter is more fully declared [t]) within which Time, if thou do not accompliſh the Condition, he then may commit the Adminiſtration of the Goods of the Deceaſed, as of one dying Inteſtate [u]. If the (13) Condition *do appertain to the Legatary*, then the ſame muſt be performed ſo ſoon as the Legatary conveniently may perform the ſame, or elſe the Legacy is loſt [x]. For Example; the Teſtator doth bequeath unto thee an hundred Pounds if thou wilt go unto the Church, or give Ten Pounds to the Poor. In this Caſe, ſo ſoon as thou art well able to go the Church, or to give the Ten Pounds after the Death of the Teſtator, thou muſt perform the Condition, otherwiſe thou haſt loſt thy Legacy [y]. The (14) Reaſon of the Difference betwixt the *Executor and Legatary* in this reſpect, is, becauſe greater Prejudice may grow to the Executor, by undertaking the Executorſhip, than to the Legatary by accepting the Legacy. And therefore, in Equity the Executor ought to have longer Time to deliberate of the Performance of the Condition, and Undertaking of the Burden of the Executorſhip, than the Legatary, to whom no Prejudice at all may happen, or not ſo much as to the Executor [z]. Notwithſtanding (15) if the Legatary were ignorant of the Teſtament or Condition, ſo long as he is ignorant, no Negligence is to be imputed unto him, nor any Prejudice doth grow unto him, by not performing the Condition, as otherwiſe it might, if he had known thereof [a].

In the ſecond Caſe, that is to ſay, When the *Condition* (16) *is caſual*, then the Event thereof is to be expected; and whenſoever the ſame ſhall be extant, then may he that is made Executor, or to whom any Legacy is left upon ſuch caſual Condition, be admitted to the Executorſhip, or obtain the Legacy, and not before [b]. As for Example; the Teſtator maketh thee his Executor, or giveth thee a hundred Pounds, if his Ship return from *Venice*. In this Caſe, whenſoever the Ship ſhall return from *Venice*, during the Life of the Executor or Legatary, then is he to be admitted to the Executorſhip, and may obtain the Legacy, and not before [c]. So that (17) if he die in the mean Time, the Executorſhip or Legacy ſhall not be tranſmitted to his Executors or Adminiſtrators, although the Condition be extant afterwards [d]; unleſs ſome Legacy be left unto the Prince, who, if he die before the Condition be extant, yet is the ſame due to his Succeſſors, in whoſe Time the Condition is extant [e]; or unleſs it be the Will and Meaning of the Teſtator, that the ſame be tranſmitted: For the Teſtator, if he will, may make the ſame tranſmiſſible, which otherwiſe is not tranſmiſſible [f].

[r] L. ſi quis inſtituatur §. 1. de hæred. inſtit. ff.

[s] Gloſſ. Bar. & Bald. in d. §. 1. Graff. Theſaur. com. op. §. legatum, q. 57. n. 2.

[t] Infra eadem part. §. 16.

[u] Bar. Bald. Paul. de Caſtr. in d. L. ſi quis §. 1. & infra eadem part. §. 16.

[x] L. hæc conditio ff. de cond. & demon. Dec. in L. 1. de inſtit. & ſub. C.

[y] Bar. in d. L. hæc conditio. Alex. in L. ſi inſulam. n. 24. Ripa. n. 103. de verb. ob. ff. quæ opinio communiter eſt recepta, ait Graff. Theſaur. com. op. §. legatum, q. 57. n. 2.

[z] Graff. ubi ſupra Bar. Bald. Caſtr. & alii in L. ſi quis §. 1. ff. de hæred. inſtit.

[a] Bald. in L. 1. C. de Inſtit. & ſub. n. 20.

[b] L. intercidit. de cond. & demon. L. fidei commiſſa, §. ſic fidei commiſſ. in fin. de leg. 3. ff.

[c] D. L. intercidit. L. unic. §. fin autem. C. de cad. tol. Tiraquel de retract. §. 1. gloſſ. 2. n. 25.

[d] L. liber §. ſi ita de hæred. inſtituend. L. in teſtam. de cond. & demon. ff. L. unic. §. fin autem C. de cad. tol. Zaſ. in L. ſi decem. ff. de verb. oblig.

[e] L. quod principi. ff. de leg. 2. vol. lib. 11. tit. 20.

[f] L. in conditionibus §. 1. ff. de cond. & demon. Mantic. de conject. ult.

A Bill

A Bill in Chancery was exhibited againſt the Defendants, to have Satisfaction of 1000 *l.* which was to be paid by the Obligor within Seven Years after the Marriage of his Daughter, and Jointure made; the Marriage was had, but the *Jointure was not made*, and the 1000 *l.* was deviſed to the Plaintiffs; but the Defendants inſiſted, that it was not payable, but upon a Condition which was never performed, for that the Obligor died within Four Years after the Date of the Bond, and no Jointure was made; and this Matter was pleaded to the Bill, but the Plea was not allowed. *Caſes in Canc.* 178. *Glaſcock* verſus *Brownwell.*

In the third Caſe, that is to ſay, when the (18) Condition *is mixed*, then the ſame may be accompliſhed at any Time, as in caſual Conditions, except the Condition be of Marriage [g]. But if the Teſtator (19) make thee his Executor, or give thee an Hundred Pounds, if thou marry: In this Caſe, very many be of this Opinion, that thou oughteſt to marry within Three Years [h]. Others are of a contrary Opinion, and that it is ſufficient to marry at any Time, either within Three Years, or after [i]. In which Contrariety of Opinions, I ſuppoſe, That if the Executor be appointed upon Condition, if he marry, that then he may at any Time accompliſh the ſame, not only within Three Years, but after [k]. But if a Legacy be given upon Condition, if the Legatary marry, then it is the common Opinion of the Writers, that the Legatary muſt be married within Three Years, or elſe the Condition is ſaid to be deficient, and ſo the Legacy is loſt [l]. And albeit the other Opinion is ſaid to be truer, that the Condition is ſufficiently accompliſhed by marrying after Three Years [m], yet the Judge may not eaſily depart from the common Opinion: For whatſoever is affirmed for the Truth of the ſingular Opinion; yet that is preſumed to be the truer Opinion, which is more commonly received [n]. The Reaſon of the Difference wherefore the Legatary is excluded rather than the Executor, if he do not marry within Three Years (as is before ſhewed) is, namely, for that the Executor otherwiſe is ſubject to more Peril than the Legatary [o].

[g] Jaſ. in L. 1. de Inſtit. & ſub. C.

[h] Bar. in L. 2. §. ad filiorum, C. quando & quibus quarta pars. Jaſ. Sichard. & alii in L. 1. C. de Inſtit. & ſub.

[i] Paul. de Caſtr. in d. L. 2. Mantic. de conject. ult. vol. lib. 11. tit. 18. n. 23.

[k] Paul. de Caſtr. in d. d. 2. Graſſ. Theſaur. com. op. §. legatum, q. 46. n. 18.

[l] Bar. Jaſ. Dec. Sichard. & alii in d. L. 2. quorum opinio communis eſt, inquit Graſſ. Theſaur. com. op. §. legatum, q. 46. n. 18.

[m] Mantic. de conject. ult. vol. lib. 11. tit. 18. n. 23. Graſſ. ubi ſupra.

[n] Coraſius, Tract. com. op. lib. 2. caſ. 14.

[o] Ut ſupra in pluribus.

§. XV. Of the Underſtanding of this Condition, *viz.* If he die without Iſſue.

1. *Manifold Queſtions by Occaſion of this Condition*, If he die without Iſſue.
2. *Whether he be ſaid to die without Iſſue, whoſe Iſſue is natural, but not lawful?*
3. *What if the Father and Mother do afterwards marry together?*
4. *When the Iſſue is lawful, not natural, whether he be ſaid to die without Iſſue?*
5. *What if the Child were got by another Man before Marriage?*
6. *If another have to do with the Wife beſides her Husband, yet the Child ſhall be deemed the Husband's.*
7. *Divers Extenſions of this Concluſion.*
8. *What if the Child be like the Adulterer?*
9. *How comes it to paſs that the Child is ſometimes liker unto another, than him who did beget it?*

10. *In ſome Caſes the Husband ſhall not be judged the Father of the Child begotten, during Marriage.*
11. *Whether ſhall the Child be the former, or the ſecond Husband's, when it is uncertain whether of them did beget him?*
12. *Whether he be ſaid to die without Iſſue, who had Children, but not at his Death?*
13. *Difference betwixt this Condition,* If he die without Iſſue, *and this,* If he have no Iſſue.
14. *Whether that Father is to be deemed to die without Iſſue, whoſe Child is unborn when he dieth?*
15. *Whether he be deemed to have died without Iſſue, whoſe Child dieth ſo ſoon as it is born?*
16. *If the Child be heard to cry, the Father ſhall be Tenant by the Curteſy.*
17. *What if the Child were not heard to cry?*
18. *What if the Iſſue be born dead, or dieth as it is born?*
19. *What if a Monſter be born; whether ſhall the Parents be judged to have died without Iſſue?*
20. *What if the Child in the Mother's Womb, being made Executor, ſhe be delivered of divers Children at one Birth, whether ſhall every of them be Executors?*
21. *What is to be obſerved in Legacies, where more are born at one Birth?*

AS there (1) is no Condition more uſual than this, (*If he die without Iſſue*) ſo there is none that doth miniſter more Queſtions although ſome of them be not altogether ſo difficult:) Which Thing that it may the better appear, let us firſt ſuppoſe that the Teſtator doth make thee his Executor, or doth bequeath unto thee an Hundred Pounds if he die without Iſſue. This Caſe doth miniſter all theſe Queſtions; What if the Teſtator have *Iſſue natural, but not lawful?* Or, what if he have *Iſſue lawful, but not natural?* What if he have *Iſſue both natural and lawful, but the ſame dieth before the Father?* Or, what if he beget his Wife with Child, and *then die before the Child be born?* Or, what if the *Child die before it be born?* Whether ſhall the Teſtator be judged to die without Iſſue? All theſe and many more like Queſtions, may be demanded by Reaſon of that Condition (*if he die without Iſſue,*) whereunto I ſhall anſwer in order as they be propounded; preſuppoſing, that to have Iſſue, is to have a Child or Children; and to die without Iſſue, is to die without any Child.

When (2) the Iſſue is *natural, but not lawful,* if the Will and Meaning of the Teſtator do not appear, the Teſtator is deemed to have died without Iſſue [a]. For it is not likely that an honeſt Perſon, ſpeaking of Children, did mean Baſtards, but lawful Children [b]; inſomuch, (3) that if the Teſtator do beget a Child, and after the Birth of the Child marry the Mother; yet in this Caſe I am of Opinion, that by the Laws of this Realm he ſhall be judged to have died without Iſſue. For in the Time of King *Henry* the Third [c], this Queſtion being propounded in the Parliament, *Whether one born before Matrimony might inherit, as one born after Matrimony?* All the

[a] L. in conditionibus de cond. & demon. L. ex facto. §. ſi quis rogatus, ad Trebel. L. vulgo de ſtatu hom. ff. Mantic. de conject. ult. vol. lib. 11. tit. 9. in prin. Sichard. in L. generaliter. §. cum autem C. de inſtit. & ſub. Bract. de leg. & conſue. Angl. lib. 5. c. 30. n. 10. in fin. Fleta, lib. 6. cap. 38. Forteſc. c. 39. 11 Aſſ. pl. 20. Inſt. part. 2. fol. 97. Inſt. part. 1. fol. 123. 14 Chr. Dy. fol. 313. 14 Chr. Dy. fol. 345. n. 6. Graff. Theſaur. com. op. §. fidei commiſ. q. 37. n. 6.

[b] Ripa. in d. L. ex facto. §. ſi rogatus ad Trebel. ff.

[c] Merton. c. 9. anno 20 H. 3.

the Biſhops anſwered and ſaid, That it was againſt the common Order of the Church, that ſuch ſhould not inherit [d]; and they all deſired the Lords Temporal and Barons then aſſembled in Parliament, that they would conſent, that all they that were born before Matrimony, ſhould be legitimate, as well as they that were born within Matrimony, concerning the Succeſſion of Inheritance, foraſmuch as the Church accepted ſuch as legitimate. But they all with one Voice anſwered, that they would not change the Laws of this Realm, which hitherto had been uſed and obſerved [e].

When (4) the Iſſue is *lawful, not natural:* By lawful Iſſue in this Place, I underſtand that Child which is begotten of a married Woman, by another than her Husband [f]; (for of Adoption, Arrogation, or any other Means to make Children lawful, except Marriage, we have no Uſe here in *England* [g]:) In this Caſe, firſt of all the Meaning of the Teſtator is to be regarded [h], the which if it do not appear, then it ſeemeth by the Laws of this Realm, that he is reputed not to have died without Iſſue, but as if he had got it himſelf; becauſe by the ſame Laws [i] it is provided; (5) That if a Man take to Wife a Woman which is great with Child by another that was not her Husband, and after the Child is born within Eſpouſals of Marriage: He who married the Woman, ſhall be ſaid to be the Father of the Child, and not he who did beget the ſame, although the Child were born the next Day after the Marriage ſolemnized [k]: For whoſe the Cow is, as it is commonly ſaid, his is the Calf alſo [l]. 18 *Edw.* 4. *fol.* 28. *Inſt. part.* 1. *fol.* 244. *a.*

[d] Per c. 1. & c. tanta, qui filii ſunt legit. extr. §. ult. Inſtit. de nuptiis c. nullum. 3. q. 5.

[e] Merton. c. 9. anno 20 H. 3.

[f] Bracton de conſuet. Angl. lib. 2. c. 29. n. 4. verb. & licet.

[g] Tract. de Republica Angl. lib. 3. c. 7.

[h] D. §. ſi quis rogatus L. ult. C. de his qui væn. ætat. imp. L. Sancimus. de nuptiis. C. Mantic. de conject. ult. vol. lib. 11. tit. 8. in prin.

[i] Bract. ubi ſupra Fitz. Abridg. tit. Baſtardy, n. 1, 4. Brook eod. tit. n. 43. in fin. Tract. de repub. Angl. lib. 3. c. 6.

[k] Juxta illud pater eſt quem nuptiæ demonſtrant. Baſtardy, & infra d. §.

[l] Quod tamen non eſt ſimpliciter verum in viduis, ut per *Terms of Law*, verb.

Much more (6) if, after the Marriage, another Man have carnal Conjunction with his Wife, ſhall the Husband be deemed the Father of that Child, which is not only born, but begotten during Marriage: For then, by all Laws, the Husband is preſumed to have gotten the Child himſelf, and not the Adulterer [m], albeit another had to do with her beſides her Husband. Which (7) Concluſion, becauſe it is in Favour of Matrimony, and tendeth to the Benefit of Children, is diverſly extended.

[m] L. filiam. de his qui ſunt ſui vel alien. jur. L. miles, §. defunct. de adul. ff. & ibi Legiſtæ. c. Michael. de fil. Preſbyt. c. per tuas de probat. extr. & ibi Canoniſtæ. Bract. de leg. & conſuetud. Angl. lib. 2. c. 29.

Firſt therefore, although the Mother do cohabit with the Adulterer, yet if the Husband have free Acceſs unto her, he is preſumed to be the Father, and not the Adulterer [n]. For tho' it be likely that the Adulterer did beget the Child, yet ſeeing it is poſſible that the Huſband did beget it; honeſt Poſſibility is preferred before that other Poſſibility which is linked with Diſhoneſty [o].

[n] Bald. in L. ſi a matre C. de ſuis & legit. Ab. in c. accedens de purg. canno. ext. Maſcard. de probat. verb. filius concl. 788.

[o] Bald. in d. L. filium, de his qui ſui, vel alien. jur. ff. Palæotus de Noth. & Spur. c. 24.

Secondly, Albeit the Wife were as common as the Cartway, making an open Profeſſion of her Filthineſs; yet the Husband, if ſhe be not altogether out of his Guard, ſhall be judged the only Father [p].

[p] Cyn. poſt Jac. de Butr. in L. ſi minus, C. de nup. Gab. lib. 1. tit. de præſump. concl. 14. n. 9. Maſcard. de probat. d. concl. 788. n. 39.

Thirdly, Albeit the Mother had been barren a long Time before, yet the Child is preſumed to have been begotten by the Husband, and not by the Adulterer [q].

[q] Ab. in c. per tuas de probat. ext. Alciat. de præſumpt. reg. 3. præſumpt. 37. Gab. d. concluſ. 14. n. 8.

Fourthly, Albeit the Mother do confeſs that the Adulterer did beget the Child, yet her ſole Confeſſion doth not hurt the Child [r].

[r] Ab. in c. officiis de pœniten. extr. quod procedit etiamſi matris confeſſio accederet, Palæot. de Noth. & Spur. c. 24. n. 2. Alciat. de præſumpt. reg. 3. præſumpt. 37. n. 6. Petr. Duen. Tract. reg. & ſal. verb. filius, reg. 344. cont. Bald. Arch. & Alex. de quibus Gabr. d. concluſ. 14. n. 13.

Fifthly, albeit the Child be born blind, or lame, yet is the Huſband preſumed to have begotten the ſame, and not the Adulterer [s]. In which Caſe, nevertheleſs ſome have been of this Opinion, that this Child was gotten in Adultery [t], being ſo born (as they imagined) by God's Providence and Juſtice, becauſe of the Sin of the Parents; whoſe raſh Opinion is by others refelled as erroneous and blind [u], having no better Ground than had their Conceit, who asked of our Saviour Chriſt (as he paſſed by a blind Man) who had ſinned, he or his Parents, that he was blind [x]. To which Demand our Saviour anſwered, neither he nor his Parents, but that the Power of God might be made manifeſt [y].

[s] Covar. Epitom. de ſponſal. 2. part. c. 8. §. 3. n. 8. Maſcard. d. concluſ. 788. n. 81. Petr. Duen. d. reg. 334. limit. 2.
[t] Barba in c. præſentia de probat. extra. & in conſ. 68. in prin. vol. 4. Alex. conſ. 117. vol. 5. Dec. conſ. 188. Hyppol. Sing. 530. ubi alios citat hujus opinionis Autores quamplures. Quibus ſi placeat, adde Ed. Fenton Anglum, Tract. de mirabil. ſecret. naturæ, cap. 5.
[u] Covar. de ſponſal. c. 8. §. 3. n. 8. part 2. Duen. d. reg. 344. in fin.
[x] Evangel. S. Johan. c. 9. in prin.
[y] Exod. c. 9. verſ. 3.

Sixthly, albeit (8) the Child be very like the Adulterer, yet ſhall the Husband be deemed the Father [z]. Wherein divers (I confeſs) of no ſmall Authority have contended mightily, that this Child is to be adjudged the Adulterer's [a], fortifying their Aſſertion with this Reaſon eſpecially, becauſe in other Creatures, Nature hath ſo provided, that each Thing do beget that which is like unto it ſelf [b]; yet contrariwiſe their Opinion hath prevailed (as being armed with Arguments of the invincible Truth,) who defend that the Husband ought to be judged the Father of that Child, which is ſo like the Adulterer, and ſo unlike himſelf [c]. Neither is that other Reaſon of ſuch Force as is pretended, becauſe (9) this Form or Similitude may happen to the Infant, by the Mother's ſerious Cogitation or firm Imagination at the Time of the Conception [d]. For Proof whereof, we may read in the holy Scriptures, how by *Jacob*'s Device of the ſpotted Sticks being laid before *Laban*'s Sheep at the Ramming Time, the Lambs became ſpotted [e]. Famous alſo is that Accident (regiſtred in the Books of ſundry Writers [f]) of a beautiful Lady, who having a Husband of a fair and white Complexion, was delivered of a Child, like a *Moor* or *Ethiopian*: And hereupon being accuſed of Adultery, ſhe was acquitted and abſolved, for that by the Opinion of the beſt learned in Phyſick and Philoſophy; the ſame did ſo come to paſs by Reaſon of the Picture of a Black Boy, or little Negro, which did hang in the Bed-chamber, at the Time of the Conception. Like unto this, is that credible Hiſtory of another Woman in the Time of *Charles* the Fourth, Emperor and King of *Bohemia*; who, becauſe ſhe had too much Regard

[z] Bald. in L. Gallus, de lib. & poſth. ff. n. 13. Paul. de Caſtr. conſil. 257. vol. 3. Alciat. de præſump. 17. n. 3.
[a] Alberic. in L. 7. ff. de ſtat. hom. Pariſ. conſil. 10. vol. 2. n. 59. Bald. conſ. 390. vol. 2. Fulgoſ. conſi. 212. col. 3. Coraſ. L. 2. Miſcel. cap. 22. num. 5.
[b] Pariſ. Coraſ. & alii ubi ſupra Tiraquel. de legibus, Connub. leg. 7. Maſcard. de probat. concluſ. 792. n. 2.
[c] Bar. Jaſ. & communiter DD. in L. Gallus, ff. de lib. & poſth. quam ſententiam propiùs ad veritatem accedere refert Maſcard. de probat. d. concluſ. 792. n. 7.
[d] Alciat. de præſumpt. 37. poſt Bald. in d. L. Gallus unde mulieres ſimulacra ſæpiſſimè ſtatuaſque in delitiis habuiſſe legitur, ſimileſque iis partus enixas. Coral. d. c. 22. n. 2.
[e] Gen. c. 30.
[f] Jaſ. L. Gallus, d. de lib. & poſth. n. 69. Coraſ. lib. 2. Miſcel. c. 22. Fenton de ſecretis Naturæ, cap. 5.

gard to the Picture of St. *John*, cloathed in a Camel's Skin, which did hang at the Beds-feet, during the Conception, ſhe brought forth a Child all rough, covered with Hair like unto a Bear [g]. The Hiſtories are full of theſe Kind of Accidents, I ſhall content my ſelf with one more, which did befal in the Time of the Emperor *Maximilian*, in a Town in *Brabant* [h]: There in a publick Play, a certain Man whoſe Part was to play a Dancing Devil, aſſoon as the Play was ended, ran home to his Wife in the Devil's Attire; and being moved in Spirit [i], catched his Wife haſtily in his Arms, and muſt needs, *&c.* in that Habit; ſaying, *He would beget a Devil*; and ſo it came to paſs, that at her Child's Birth ſhe was delivered of a deviliſh Monſter, which, as ſoon as it was born, began to leap and dance like to the Father. Which Examples (with divers other like Experiments) being made notorious, many Women (that they might bring forth beautiful Children) have gotten beautiful Pictures, and fixed the ſame nigh to their Beds, and have indeed oft-times brought forth Children like unto thoſe Pictures, in the Sight whereof they were formerly moſt delighted [k]. Seeing then the Conceit or Imagination of the Woman is of ſuch Force in the Act of Generation, that whoſe Form or Similitude is then in their Mind, the ſame is not ſeldom repreſented in the Child [l]; What Marvel then if the Child which is begotten by the Adulterer be like unto the Husband, when the Adultereſs fearing to be interrupted by his Return, cannot but ſtill have an Eye to that Door, until the Peril be paſt [m]? And wherefore then alſo ſhould we wonder, that the Child which is begotten by the Husband, ſhould be like to the Adulterer [n], upon whoſe Face and Favour her Mind is fully fixed, who in the Midſt of her Delights, imagineth the ſtoln Water to be the ſweeter [o]. Nay rather, it is to be marvelled that it ſhould be otherwiſe, but that the Almighty doth ſtill reſerve his Prerogative, beſides, and contrary to the Courſe of Nature, beſtowing what Forms it beſt liketh him, upon every Creature. Other Extenſions there be of this Rule [p], but let us return to the Limitations.

[g] Coral. in annotat. ſuper quodam Arreſto. Tholoſſ. fol. 31. Fenton ubi ſupra.

[h] Coral. in d. annotat. eod. fol. 31. Ludovic. Vives in 12. lib. Aug. de Civit. Dei.

[i] Viz. in concupiſcentia. Vide Tranſlationem verſic. 16. c. 12. lib. Judith in vulgare noſtrum Idioma.

[k] Plutarch. de placitis Philoſ. lib. 5. c. 12. Coraſ. in d. c. 22. n. 2. lib. 2. Miſcel.

[l] Gloſſ. in L. quæret aliquis, de verb. ſig. & in L. non ſunt. de ſtat. hom. ff.

[m] Alciat. de præſump. Reg. 3. præſump. 37. Jaſ. & alii in d. L. Gallus ff. de lib. & poſthu.

[n] Bald. in d. L. Gallus Maſcard. de probat. verb. filius concluſ. 792.

[o] Prov. Salo. cap. 9. v. 17.

[p] De quibus Maſcar. de probat. d. concl. 788. Petr. Duen. tract. reg. & fal. reg. 344. Alciat. de præſumpt. 37. Menoch. de Arb. Jud. ſent. 89. Gabriel de præſumpt. concluſ. 14.

The firſt Limitation is this, when (10) the Husband was not within the four Seas at ſuch Time as the Child was conceived [q], or at the leaſt was ſo far abſent from his Wife, or impriſoned at the ſame Time, that thereby it was impoſſible for him to have begotten the ſame Child [r]. Which Time of Conception when it was, may beſt be known by Relation to the Birth of the Child: For a Woman cannot bring forth a perfect Child before the Beginning of the ſeventh Month [s]; neither can ſhe bear a Child in her Womb, after the End of the tenth Month, from the Time of the Conception, at leaſt by Preſumption of Law [t], except it be (9) for one, two, or three Days more at the very fartheſt [u].

[q] Bract. de legat. & conſ. Angl. lib. 1. cap. 9. in fin. & lib. 2. cap. 29. num. 3 & 4. Kitchin tit. diſcent. fol. 108. Brook, tit. Baſtardy, n. 4.

[r] Cap. ex tenore, de teſtib. extr. & Panor. ibid. Pariſ. conſil. 64. vol. 3. n. 6, 7. & conſil. 10. vol. 2. n. 36, 78. Maſcard. de probat. concluſ. 788. n. 40. Petr. Duen. d. reg. 344. limit. 3. Brook. Abridg. tit. Baſtardy, n. 4.

[s] L. ſeptimo de ſtat. hom. ff. ex ſententia Hippocratis. lib. de partu ſeptimeſtri, a quo non diſſentiunt Ariſtotel. l. 2. De natura animal. Plutarch. l. 5. de placit. Philoſ. c. 18. Plin. l. 11. Natural. Hiſt. cap. 31.

[t] L. inteſt. 20. §. ult. ff. de ſuis, & legit. & §. ult. Tiraquel. in rep. L. ſi unquam C. de revoc. don. verb. ſuſceperit, ubi multa ſcitu non indigna de partu ſeptimeſtri & decimeſtri, ex Hippocrate, Ariſtoteli, & aliis, tum Medicis, tum Philoſophis deprompta, videre licet. Sed præ cæteris Legiſtis, præclariſſime & copioſiſſime de naſcendi tempore, ſcripſit Gentilis noſter.

[u] Accurſ. in d. §. ult. Auth. dor. ſtir. & ea quæ parit, &c. Salmo in L. Gallus, de lib. & poſth. ff. Menoch. de Arb. Jud. quæſt. lib. 2. caſ. 89. n. 41.

It

It was found by Verdict, that *Henry*, the Son of *Beatrice*, which was the Wife of *Robert Radwill* deceaſed, was born *Per undecim dies poſt ultimum tempus legitimum mulieribus conſtitutum:* And thereupon it was adjudged, *Quod dictus* Henricus *dici non debet filius prædicti* Roberti *ſecundum legem & conſuetudinem* Angliæ *conſtitutam:* Now *tempus legitimum* in that Caſe appointed by the Law, at the furtheſt, is nine Months or forty Weeks; but ſhe may be delivered before that Time. *Trin.* 18 *Edw.* 1. *Rot.* 61. *Bedford, coram Rege:* And this agreeth with that in *Eſdras*, *Vade & interroga prægnantem, ſi quando implevcrit novem menſes ſuos, adhuc poterit matrix ejus retinere partum in ſemet ipſa? & dixi, non poteſt Domine. Eſd.* 4. 41.

Edmund Andrews died the three and twentieth of *March*, *Anno* 1610. *A.* his Wife being *privatment enſeint*, but not delivered until 5 *Jan.* 1611. which was forty Weeks and nine Days, and then delivered of a Daughter, named *Elizabeth:* Adjudged the Iſſue legitimate, and no Baſtard. *Mich.* 17 *Jac. B. R. Alſop* verſus *Bowhet, Croke, part.* 2. *fol.* 541. Though the uſual Time for a Woman to go with Child, be nine Months and ten Days, *viz. Menſes Solares*, that is, thirty Days to the Month, and not *Menſes Lunares;* yet by Reaſon of want of Strength in the Woman or Child, or by Reaſon of ill Uſage, ſhe may be a longer Time, *viz.* to the End of ten Months, or more: And ſo both antient and modern Authors, and Experience, prove. And as a perfect Birth may be at ſeven Months according to the Strength of the Mother, or of the Child it ſelf, which is as long before the Time of the publick Birth; ſo by the ſame Reaſon it may be deferred by Accident, which is commonly occaſioned by Infirmities of the Body, or Paſſions of the Mind. The Record *Trin.* 18 *Edw.* 1. was produced, but not much regarded, becauſe it ſaith, That Child was born *undecim dies poſt tempus conſtitutum*, but doth not ſay *poſt quadraginta ſeptimanas.* What ſhall be ſaid to be the Time *mulieribus pariendo conſtitutum*, ſee Sir *Thomas Ridlie*'s View of the Civil Law, *fol.* 55. where he relates of a Widow in *Paris* that was delivered of a Child the fourteenth Month after her Husband's Death; yet the Judges adjudged the Child to be legitimate. The like Judgment was given in the *Conſiſtory* at *Witenburgh*, in Caſe of a Woman who was brought to Bed in the eleventh Month after her Husband's Death. *Vid. Cornad. Manſeri partem ſecundam de Matrimoniis, c.* 36. *fol.* 150. *Selden de Succeſſionibus, fol.* 22. *Croke's Anatomy, lib.* 6. *fol.* 336.

By the Laws of this Realm, if the Husband be within the four Seas, that is, within the Juriſdiction of the King of *England*, if the Wife hath Iſſue, no Proof is to be admitted to prove the Child a Baſtard (for in that Caſe, *Filiatio non poteſt probari*) unleſs the Husband hath an apparent Impoſſibility of Procreation; as if the Husband be but eight Years old, or under the Age of Procreation. Such Iſſue is Baſtard, albeit he be born within Marriage. *Bract. lib.* 4. *fol.* 278, 279. 7 *H.* 4. 9. 43 *Edw.* 3. 19. 41 *Edw.* 3. 7. 44 *Edw.* 3. 10. 29 *Aſſ.* 54. 8 *Aſſ.* 14. 1 *Hen.* 6. 7. 19 *Hen.* 6. 17. 39 *Edw.* 3. 12.

But if a Child is born within a Day after Marriage between a Man and a Woman of full Age, and where the Parents are under no apparent Inability, ſuch Child is legitimate, and ſhall be intended the Child of the Husband. 1 *Inſt.* 244. 1 Roll. Abr. 353.

Salk. 123. A Child begotten after a Divorce *a menſa & thoro*, ſhall be accounted a Baſtard, unleſs it can be proved that the Husband had Acceſs to the Wife; but where the Separation was voluntary, a Child afterwards born ſhall be accounted legitimate.

Ibid. The Iſſue which are born before a Divorce *cauſa præcontractus* are accounted *Baſtards*; but if it is for *Conſanguinity* or *Affinity*, the Children before ſuch a Divorce are accounted legitimate; but where a Divorce is for any Cauſe ſubſequent to the Marriage, as *Adultery*, *&c.* there the Children born before the Divorce are legitimate; but thoſe born afterwards are Baſtards, unleſs it can be proved that the Huſband had Acceſs to his Wife after the Divorce.

Secondly, If the Husband were not able to beget a Child, at ſuch Time as the Wife did conceive, he is not to be deemed the Father of that Child [x]; in the Conſtruction of the Deceaſed's Right [y]. For ſeeing Law is but an Art of Right and Good [z], by Imitation of Nature [a], it were againſt all Right and Reaſon that he ſhould be judged the Father of that Child, by Fiction of Law, which he could not beget by Poſſibility of Nature [b]. Whether he were diſabled by grievous Sickneſs [c], (eſpecially ſuch whereby thoſe Parts of the Generation are affected [d]) or it were by Reaſon of old Age [e]. For howſoever it may ſeem a Paradox to ſome, yet it is commonly received for a true Concluſion amongſt the Learned, that as a Woman in Proceſs of Time becometh barren, namely, after fifty Years: So a Man alſo is at the Length deprived of the Ability of begetting a Child [f], that is to ſay, at fourſcore Years, if not before [g]; neither is that contrary, where I ſaid before, that by the Laws of this Realm, if a Man take to Wife a ſingle Woman great with Child by another Man, then he which married her, ſhall be the Father of the Child, albeit ſhe were delivered the next Day after the Marriage ſolemnized: For there it is poſſible for the Husband to have begotten the Child; here impoſſible [h]. Now the Law doth often preſuppoſe or allow that for true, which is falſe, becauſe it may be true [i]; but the Law doth never preſuppoſe or feign that Thing to be, which is impoſſible ſo to be, for that were unreaſonable, and againſt Nature which directeth Art.

[x] L. filium. ff. de his qui ſunt ſui, vel al. jur. & DD. ibidem. Gabr. lib. 1. com. concluſ. tit. de præſump. concl. 14. n. 19. Pract. Andr. Gail. lib. 2. obſerv. 37. n. 15.

[y] Quamvis quoad alios effectus alii aliter ſentiunt, qua de re vide D. Coke, lib. 5. *In* Burie's *Caſe*.

[z] L. 1. ff. de Inſtit. & jur.

[a] §. minorem Inſtit. de adop. Pariſ. conſil. 10. vol. 2.

[b] Pariſ. de conſil. 20. & conſil. 29. vol. 2. Bor. in L. ſi is qui ff. de uſu cap. num. 22.

[c] L. filium ff. de his qui ſunt ſui vel alien. jur. Maſcard. de probat. concluſ. 788. n. 40, 41, 42. Abb. & Felin. in c. per tuas de probat. extr. Bracton. de leg. & conſuetud. Ang. lib. 2. c. 29. n. 5. & lib. 1. c. 9. in fin.

[d] Menoch. de Arb. jud. quæſt. caſ. 89. n. 53. Pariſ. d. conſil. 29. n. 80.

[e] Maſcard. de probat. concluſ. 718. n. 43, 44. Palæot. d. Noth. & Spur. c. 24. n. 3. ante eos ſcripſerunt Bald. & Cyn. in d. L. filium.

[f] De hac re, ut de re qualibet præclare Tiraquel. de leg. connub. Lege 5. ſub finem verb. Nec erit intempeſtivum.

[g] Socin. conſil. 65. vol. 3. Pariſ. conſil. 29. vol. 2. Menoch. d. caſ. 89. n. 57. Attamen in hoc regno Angliæ vulgo creditur, ſenes etiam plus quam octogenarios, hac poteſtate non eſſe penitus orbatos, eorumque liberi communiter reputantur legitimi, & proinde ſuccedunt iis ac reliqui, hoc impedimento non obſtante.

[h] D. L. filium, quo etiam tendit quod Bractonus Juriſconſultus Anglus, non minus peritus, quam antiquus ſcriptum reliquit. Legitimus (inquit) & hæres judicabitur, naſcitur ab uxore, dum tamen præſumi poſſit, quod maritus potuit ipſum genuiſſe.

[i] Bar. Angl. & alii in L. ſi is qui pro emptore, ff. de uſu. cap. Menoch. de præſump. lib. 1. q. 8.

[k] Bar. in d. L. ſi is qui, n. 22. Alciat. de præſump. in prin. Again [k], In that Caſe he is worthily the Father of another's Baſtard, becauſe he when he is free, yet willingly taketh her with all Faults, whom he knoweth to be another's Whore: But here an honeſt Man is greatly beguiled by her to whom he is already tied, and therefore leſs worthy to be further afflicted [l]. But it is not manifeſt, that many have ſucceeded in the Inheritance, as lawful and natural Children of thoſe Perſons, who neither were principal, neither acceſſary, nor any way privy to the begetting either of a Leg or an Arm, no not ſo much as of the little Finger of that Iſſue? Indeed no Marvel, when there is not due Proof of Impoſſi-

[l] Affictio afflicto non eſt infligenda. Bar. in L. 9. ff. de nop. op. nun. Bald. in L. precibus, C. de impub. & al. ſub.

bility [m], the Defect is not in Law, but in Proof [n], which Proof is ſaid to be the Chariot, wherein the Judge doth ride towards his Sentence [o]; or however, ſuch Iſſue is admitted to the Succeſſion by Interpretation of the Laws of this Realm [p]: Yet when the Teſtator ſpeaketh of Iſſue, it is not likely that he did mean of ſuch Iſſue, which is not as well natural as lawful [q]; which Meaning of the Teſtator, as in other Caſes, ſo in this alſo, ought to be obſerved [r].

[m] Nam cum par militet in utroque caſu ratio, cur non idem jus? Cur quæſo magis favendum eſt abſenti, ne habeatur pro patre illius quem genuit alter, quam qui morbo, vel ſenio confectus generare nequeat? Quod ſi dixeris difficilius probari impotentiam, quam abſentiam: Attamen probata hac impotentia, eadem tunc prorſus manet hinc, ac inde ratio. [n] L. duo ſunt Titii, ff. de teſta. tutel. [o] Mantic. de conject. ult. vol. lib. 4. tit. 11. n. 43. [p] Immo non admittitur probata gignendi impotentia, ſi Bractono fidem adhibeamus, lib. 2. c. 29. n. 4. in fin. ubi non aliter ab alio genitum, pro mariti filio judicandum fore cenſet, quam ſi præſumi poſſit, eum a marito gigni potuiſſe. [q] Mantic. de conject. ult. vol. lib. 11. tit. 8. n. 2. per L. ult. de his qui væn. ætatis. [r] L. in conditionibus ff. de cond. & demon. L. cum quæſtio. C. de lega. §. diſponat. in Auth. de nup. Dec. conſ. 399.

Divers other Limitations [s] there be of this former Rule, ſhewing, that the Child is not to be aſcribed to the Husband, but to the Adulterer; namely, when the Wife doth make an Elopement from her Husband [t], and doth altogether cohabit with the Adulterer, and eſpecially if then alſo the Child be born blind, or lame, or be like unto the Adulterer; for then it doth ſeem, that the Adulterer ſhall be judged to be the Child's Father, unleſs it be proved that the Husband had free and often Acceſs unto the Mother; but becauſe, I doubt of the Truth of theſe Limitations, I dare not deliver them for current. Nevertheleſs in Teſtaments, the Will and Meaning of the Teſtator is to be regarded, and ſo the Husband is to be judged to have had Iſſue, or not to have had Iſſue accordingly [u]. What if the Wife be married to another Husband very ſhortly after the Death of her former Huſband, and after her ſecond Marriage be delivered of a Child, whoſe Iſſue ſhall this be, the former or the ſecond Husband's? If the Wife were great, or apparently with Child at the Death of her former Husband, then there is no Queſtion, but that the Iſſue is to be aſcribed to the former Husband [x]. But if ſhe were not apparently with Child, ſo that by Poſſibility of Nature, it might be the Child, either of the former or the ſecond Husband, for that perhaps ſhe is delivered within eight or nine Months after the Death of her former Huſband; yet not before the ſeventh Month next after her ſecond Marriage; then the Queſtion is much more doubtful [y]: Wherein how many Heads, ſo many Wits; how many Men, ſo many Minds; and no Man which hath not ſomewhat to ſay, as well for the Defence of his own Opinion, as for the Confutation of the contrary. But I will not trouble you with their tedious Diſputations [z], I will briefly repeat their Opinions touching this Queſtion.

[s] Quas videre eſt apud Gabr. l. 1. com. concluſ. 14. Maſcard. de probat. concluſ. 788. [t] Brook tit. Baſtardy, n. 4. Alciat. de præſump. reg. 3. præſump. 37. num. 11. Pariſ. conſil. 10. num. 34. vol. 2. Maſcard. de probat. concluſ. 788. n. 11. [u] Mantic. ubi ſupra. Paul. de Caſtr. conſil. 30. vol. 1. [x] DD. in L. Gallus, ff. de lib. & poſthu. *Terms of Law*, verb. Baſtardy. Kitchin, in tit. Deſcent, fol. 108. [y] De qua Bar. Bald. Alex. Jaſ. & alii in L. Gallus, ff. de lib. & poſthu. Alciat. de præſump. reg. 3. præſump. 37. in fin. [z] Si quis horum altercationes & pugnas videre cupiat, legat. Jaſ. in d. L. Gallus, & Jacob. de Beluiſ. in quadam diſputatione quam habet in L. 1. de bon. poſſ. ſecundum Tabul.

Some therefore do hold, that the former Husband ought to be adjudged the Father [a]; ſome that the ſecond Husband [b]; others that both [c]; and others again, that neither [d] is to be deemed the Father of the Iſſue. Some ſay that the Mother is to be credited [e], which of them is the Father; and ſome ſay, that it is in the Child to elect and chuſe [f], whether of them he will for his Father: Others are of this Mind, that he ſhall be deemed the Father, by whom the Child may receive

[a] Multos in hac ſententia ſtetiſſe refert Coraſ. in annotat. ad Arreſtum quoddam Tholoſ. fol. 33. [b] Anto. Vecca. in L. 7. ff. de ſtat. hom. poſt. Imol. in d. L. Gallus. [c] Angel. in L. duo. de hæred. Inſtituend. ff. [d] Jac. de Beluiſ. in d. diſputat. [e] Alciat. d. præſump. 37. n. 15. per L. etiam ff. de probat. [f] Alex. in d. L. Gallus, n. 14. verſ. hoc tamen dictum, & cum eo contentit Berry Juſticiarius Angliæ, de quo Brook tit Baſtardy, n. 18. in fin.

receive the greater Benefit [g]; and others, that he ſhall be the Father, unto whom the Child is more like in Favour, Complexion, and Proportion of Body [h]. Many do leave it to the Diſcretion of the circumſpect Judge, who is not tied to any one Opinion alone, but according to the Variety and Probability of Circumſtances (together with the Advice of Phyſicians, Midwives, and eſpecially ſuch as be skilful in Aſtrology [i]) is to decide the Controverſy [k]. Finally, by the Laws of this Realm, at leaſt in Caſes of Succeſſion of Land, it ſeemeth, that the ſecond Husband ſhall be the Father of this Child [l], becauſe it being certain, that the Child is born during the Marrying and Cohabitation betwixt ſecond Husband and the Mother, and uncertain whether he were begotten before, it were very hard and dangerous to adjudge him to be another Man's Child, rather then the ſecond Husband's, who by Poſſibility of Nature, may be his Father [m], and to whom it is to be imputed, that he adventured ſo ſoon upon another Man's Widow [n].

[g] Dec. in c. per tuas, de probat. extra. n. 2. verſ. 4.
[h] Coraſ. lib. 1. Miſcel. c. 22.
[i] Apoſtil. ad Alex. in d. L. Gallus, ubi Aſtrologi longè præponuntur medicis.
[k] Bar. in d. L. Gallus, cujus opinio & verior & crebrior, & tutior eſſe dicitur, attento jure civili. Jaſ. in d. L. Gallus. n. 72. & Alex. in fin.
[l] Tract. de Republic. Angl. l. 3. c. 6. *Terms of Law*, verb. Baſtardy. Kitchen, tit. Diſcent, fol. 108.
[m] Apoſtil. ad Bar. in d. L. Gallus.
[n] Anto. Vac. in L 7. de ſtat. hom. ff.

When the Iſſue is *both natural and lawful, but* (12) *dieth before the Father:* In this Caſe the Father is ſaid to die without Iſſue [o]; and therefore he that is made Executor, or to whom any Thing is bequeathed upon Condition, if the Teſtator die without Iſſue, may in this Caſe be admitted to the Executorſhip, or obtain the Legacy [p]: For albeit the Teſtator may be ſaid to have had Iſſue, yet can it not be denied, but that he died without Iſſue, becauſe at the Time of his Death he had no Iſſue [q]. Indeed, (13) if the Teſtator make thee his Executor, or bequeath unto thee a hundred Pounds, upon Condition, if he ſhall have no Iſſue: Then if the Teſtator after the making of the Will had Iſſue, although the ſame were not extant, nor living at the Time of the Teſtator's Death, it is ſufficient to exclude thee from the Executorſhip and Legacy [r], unleſs it do appear that the Teſtator did mean of having Children at the Time of the Death [s]. Which Meaning is ſaid to appear ſometimes by this Word (*then* [t]) as when Teſtator ſaith, *If I have no Iſſue, then I will that* A. B. *be my Executor*; for this Word (*then*) is ſaid to ſignify Extremity of Time, ſo that it is not ſufficient that the Teſtator had Iſſue in the mean Time [u], unleſs even then he had Iſſue when his Teſtament ſhould take Effect, which it cannot do ſo long as the Teſtator liveth [x].

[o] L. ex facto, §. ſi quis autem, ff. ad Trebel. Bar. in L. hæred. eodem. tit. Zaſ. in L. in ſubſtitutione de vulg. & pupil. ſub. Mantic. de conject. ult. vol. lib. 11. tit. 6. n. 3.
[p] D. ſi quis autem.
[q] Bar. in d. L. hæredibus, Zaſ. in d. L. ſubſtitutione Mantic. in d. tit. 6. Graſſ. Theſaur. com. op. §. fidei commiſſ. q. 35.
[r] Jac. de Are. Alberic. de Roſa. in d. L. ex facto, §. pen. Mantic. de conject. ult. vol. lib. 11. tit. 6. n. 5.
[s] Mantic. ubi ſupra, Zaſ. in d. L. in ſubſtitutione, n. 15.
[t] L. ſi his, §. ſi ita, de cond. & demon. ff. Zaſ. in d. L. in ſubſtitutione, n. 15. fol. 30.
[u] D. §. ſi ita.
[x] Mantic. poſt Bar. & Alex. d. lib. 11. de conject. ult. vol. tit. 6. n. 5.

When (14) the Child is in *the Mother's Womb at ſuch Time as the Teſtator dieth.* If we would in this Caſe know, whether that Man is to be judged to have died without Iſſue, we muſt conſider, whether it be for the Benefit of the Child, that the Father ſhould be accounted to have died without Iſſue, or not: For howſoever the Rule be, that he is not ſaid to die without Iſſue, whoſe Wife is with Child at his Death [y]; yet that Rule ought to take Place when it tendeth to the Benefit of the Child [z], not when it tendeth to the Prejudice of the Child, or only Benefit of another [a]. Wherefore, if the Teſtator make thee his Executor, or give thee an hundred Pounds, if he die without Iſſue, after which Will made, he dieth, leaving his Wife with Child: In this Caſe he is reputed to die without Iſſue; and

[y] L. ſi quis prægnantem de reg. jur. ff. L. jubemus, §. ſi quis autem, C. ad Trebel.
[z] L. qui in utero, ff. de ſtat. hom.
[a] D. L. qui in utero, Mantic. de conject. ult. vol. lib. 11. tit. 6. n. 9.

and ſo thou art to be admitted to the Executorſhip, and mayſt recover thy Legacy [b], unleſs it be more beneficial to the Child, that his Father ſhould have been reputed to have died without Iſſue; for then thou art excluded [c].

[b] Mantic. d. tit. 6. n. 9. poſth. Bald. in d. L. qui in utero. el. 2.

[c] L. jubemus §. pen. C. ad Trebel. & ibi Paul. de Caſtr.

When (15) the Child *dieth ſo ſoon as it is born*, we muſt conſider, whether it were born in due Time or no, if it were born in due Time, ſo that by Poſſibility of Nature it might have lived longer, (as in the Seventh, Ninth, or Tenth Month [d]) the Father is judged to have Iſſue, eſpecially (16) if the Child were once heard to cry [e]: For then alſo by the Laws of this Realm, that Man whoſe Wife was ſeiſed in Fee-ſimple, or in Fee-tail general, or as Heir in Fee-tail ſpecial, ſhall be ſaid to have had Iſſue; and by Reaſon thereof, after the Deceaſe of his Wife, ſhall hold the ſame Land during his Life; and ſhall be called *Tenant by the Curteſy of England*, for that it is thought that the ſame Law is not uſed in any other Country, ſaving only in *England* [f]. But (17) if the Child which he had by his Wife were not heard to cry, it is thought that he cannot be Tenant by the Curteſy [g]. Which Opinion, tho' antient, hath been ſtrongly incountered of late, and ſhrewdly ſhaken by Men of deep Judgment, and reverend Authority [h]; and ſo the ſame not being free from Contradiction, cannot be utterly void of Doubt [i]; and therefore (as it becometh me) I do very willingly refer the Determination thereof to the Learned and Expert in the Study and Practice of the Laws Temporal of this Land. Nevertheleſs, to other Purpoſes and teſtamentary Effects, determinable in the Eccleſiaſtical Courts, I ſuppoſe he ſhall not be reputed to have died without Iſſue, although his Child did never cry, ſo that it did ſenſibly breathe or move [k]; for what if the Child were born dumb [l]. Therefore I ſay, by the Civil and Eccleſiaſtical Laws concerning teſtamentary Effects, the Father ſhall not be accounted to have died without Iſſue, if the Child did but breathe, and though it did not, nor could not cry, but died in the Hands of the Midwife [m]; for Crying is not an only Proof of Life [n], ſince it may be proved by other Means, as by Motion, Breathing, and ſuch like [o]. Indeed (18) if the Child be born dead [p], or being half born alive, yet dieth before it be wholly born [q], he ſhall not be reputed to have Iſſue [r]. Likewiſe in the other Caſe, that is to ſay, when the Child is not brought forth in due Time, (as perhaps before the ſeventh Month, or in the eighth Month [s]) ſo that it is impoſſible for the ſame to live: The Parents for and concerning teſtamentary Effects, ſhall not be accounted thereby to have had Iſſue, howſoever the Child, for a while after the Birth, did ſenſibly breathe and move [t].

[d] L. ſeptimo menſe. de ſtat. hom. L. Gallus in prin. de lib. & poſthu. L. inteſtat. §. ult. de ſuis & legit. ff.

[e] Mantic. de conject. ult. vol. lib. 11. tit. 6. n. 10. Maſcard. Tract. de probat. verb. Natus, concl. 1088. n. 6, 10. per L. quod certatum C. de poſth. hæred. inſtituend. & Sichard. in d. L. n. 4.

[f] Littleton, tit. Curteſie d'Angleterre.

[g] Bract. de leg. & conſuet. Angl. lib. 5. tit. de except. c. 30. n. 7, 8.

[h] Dyer, fol. 25. n. 159. poſt. Fitz. tit. 8. fol. 34. Pain's *Caſe*, Inſtit. part. 1. fol. 29. b.

[i] Partum immaturum naſci, quibus ſignis probetur. Vide Menoch. de præſump. lib. 6. præſu. 52.

[k] L. quod. dicitur ff. de lib. & poſthu. L. 2. 3. & C. de poſthu. Felin. in c. ſicut de homicid. extra. Maſcard. Tract. de probate. verb. Natus, concluſ. 1088. ſub fin.

[l] D. L. quod dicitur & d. L. 23. & DD. ibid.

[m] D. L. 3. C. de poſthu.

[n] L. quod certatum C. de poſthu. & ibi Sichard. n. 4. Maſchar. de probat. concluſ. 1088. n. 10. & ſub. Maſchard. d. concluſ. 1088. ſub finem. Sichard. in d. L. quod certatum.

[o] L. ſi Magiſter. C. de Inſtit. & ſubſt. Alciat. in d. L. qui mortui. Cui adde Tiraquel. in Rep. L. ſi unquam, C. de revoc. donac. verb. ſuſceperit. n. 132. ubi etiam diſputat an talis Baptizari poſſit, cujus tantum caput in partu apparet.

[p] L. qui mortui, ff. de verb. ſignif.

[q] De Natо in 8. menſe, Vide Joſeph. Ludovic. concluſ. 37. & Gentil. De naſcendi tempore, fol. 11. n. 13.

[r] D. L. 3. in fin. d. L. qui mortui, & DD. in LL.

[s] L. 2. C. de poſthu. Socin. ſen. conſil. 275. n. 20. vol. 2. Mantic. de conject. ult. vol. lib. 11. tit. 6. n. 10. Graſſ. Theſaur. com. op. §. fidei commiſſ. q. 33. in fin.

[t]

If (19) the Teſtator make thee his Executor, or do bequeath unto thee any Legacy conditionally, if he ſhall have no Iſſue, and afterwards his Wife do bring forth a Monſter, or miſ-ſhapen Creature, having peradventure a Head like unto a Dog's Head, or to the Head

of an Aſs, or a Raven, or Duck, or of ſome other Beaſt or Bird: Such monſtrous Creature, though it ſhould live (as commonly none do) yet it is not accounted amongſt the Teſtator's Children[u]: For the Law doth not preſume that Creature to have the Soul of a Man, which hath a Form and Shape ſo ſtrange and different from the Shape of a Man[x]. For by the Law of this Realm, if the Wife be delivered of a Monſter, which hath not the Shape of Mankind; this is no Iſſue in Law. But although the Iſſue hath ſome Deformity in any Part of his Body; yet if he hath human Shape, this ſufficeth. (*Bract. tit.* 5. *fol.* 437, 438. *Brit. cap.* 66. *fol.* 83. *Fleta, lib.* 1. *cap.* 5. *lib.* 6. *cap.* 54. *Inſtit. part.* 1. *fol.* 29. *b.*) As having ſix Fingers on either Hand[y]; or on the contrary, wanting ſome of the ordinary Members, as having but one Hand, or one Foot[z]: Such Creature is not excluded, but is to be accounted for the Teſtator's Child. What if there be Duplication of notable Members, as to have four Arms, or two Heads, or Diſorder in the principal Members, as the Face ſtanding backwards, or in the Breaſt? In this Caſe I ſuppoſe much to be attributed to the Diſcretion of the Judge[a]. And albeit the Writers ſeem rather to incline to this Opinion, that they be Monſters, and ſo not to be accounted as Children[b]; notwithſtanding, if any Legacy be left, not by the Parents to another, but to the Parents by another, upon Condition, if they ſhall have Iſſue: In this Caſe it ſeemeth, that it doth not hinder the Parents, though the Father did beget, and the Mother bring forth a Monſter, when it cannot be imputed to their Fault, wherefore the Iſſue was monſtrous[c].

If (20) the Teſtator make the Child in the Mother's Womb his Executor, and the Mother bring forth two or three Children at that Birth, whether are they all to be admitted Executors? Likewiſe (21) the Teſtator bequeathing to the Child in the Mother's Womb, if it be a Man Child a greater Sum; if a Woman Child, then a leſſer Sum: The Mother bringing forth a Son and a Daughter at one Burthen; how much is to either? Theſe Queſtions are elſewhere reſolved[d].

[u] L. non ſunt. ff. de ſtat. hom. Olden. in eand. L. & Sichard. in d. L. 3. C. de poſthu.
[x] Bald. in d. L. non ſunt. Sichard. in d. L. 3. n. 5.
[y] DD. in d. L. 3. C. de poſthu. & in d. L. non ſunt & in L. oſtentum, & in L. quæret. ff. de verb. ſig. Idem quoque juris eſt, ſi quis habeat tres teſtes, Alciat. in d. L. quæret. n. 9.
[z] Bald. & Aug. in L. quod dicitur, ff. de lib. & poſthu.
[a] Sichard. in d. L. 3. C. de poſthu. n. 5. verb. cum autem.
[b] L. oſtentum. ff. de verb. ſignif. DD. in d. L. quod dicitur.
[c] D. L. quæret. de verb. ſignif. & Alciat. ac Rebuff. ibidem.
[d] Infra eadem part. §. 10. ſub finem.

Deviſe to a Baſtard.

THE Parents of a Baſtard may by Deed executed in their Lifetime, or by laſt Will, give or deviſe their Lands to their Baſtards; and where a Baſtard is commonly known or reputed to be the Son of *T. S.* there a Remainder limited to him by the Name of the Son of *T. S.* is good; for ſo is the Year-Book 39 *Ed.* 3. *fol.* 11. cited in Sir * *Moyle Finch*'s Caſe.

Perkins, tit. Grants, 11. Title Deviſe, 94, S. P. Bracton, lib. 2. c. 7. * 6 Rep. 67.

Where a Man had ſeveral Children, and one of them a Baſtard, and he granted all his Goods to his *Children*; it hath been held, that the Baſtard ſhall take nothing by this Grant, but probably he might if it had been by Will; but 'tis clear that he might take by that Name by his Mother's Will, becauſe he is known to be her Child. Moor 10.

A Deviſe to the Uſe of *Jane his Daughter*, and to the Heirs of her Body, which *Jane was a Baſtard*; this was held to be a good Deviſe of the Lands by the Intention of the Teſtator. Dyer 323.

So where the Deviſe was to *T. S. his Son*, which *T. S.* was a Baſtard; this was held good for a Baſtard as a reputed Son. Sid. 194. *Collingwood* v. *Pace.*

§. XVI. What Order is to be taken concerning the Adminiſtration of the Goods of the Deceaſed, whiles the Condition of the Executorſhip dependeth unaccompliſhed.

1. *Of the Remedy which Creditors and Legataries have during the Suſpence of the Condition of the Executorſhip.*
2. *The firſt Remedy is to commit the Adminiſtration to him that is conditionally aſſigned Executor.*
3. *The Effect of this Adminiſtration.*
4. *What if the Executor will not meddle with the Adminiſtration or Poſſeſſion of the Goods in the mean Time.*

FOraſmuch (1) as the Nature of every honeſt and poſſible Condition is ſuch, as it doth ſuſpend the Execution and Effect of the Diſpoſition [a]; ſo that in the mean Time the Party deceaſed cannot be judged to have died either Teſtate or Inteſtate; and conſequently he that is made Executor is neither to be received nor repelled, in the mean Time, to or from the Executorſhip [b]. It ſhall not be amiſs to ſhew what Order is to be taken, for and concerning the Poſſeſſion and Adminiſtration of the Goods of the Deceaſed, and what Remedy the Creditors and Legataries have, for the Obtaining of their Debts and Legacies, which are due preſently after the Death of the Teſtator, whiles the Condition of the Executorſhip dependeth [c]: For it ſeemeth not only inconvenient but unjuſt alſo, that they, eſpecially the Creditors [d] ſhould be remedileſs all that while, during the Suſpence or Expectation of the Performance of the Condition, until that be performed by the Executor, which perhaps would not, nor could not be effected in ſeven Years.

[a] L. qui hæredi. de cond. & demon. L. ſi quis ſub conditione. Si quis omiſſa cauſa teſta L. cedere diem. de verb. ſig. ff. Graff. Theſaur. com. op. §. legatum, q. 52. & ſupra eadem part. §. 6.

[b] L. quamdiu. ff de acquir. hæred. Minſin. in §. hæres Inſtit. de hæred. Inſtituend.

[c] Quod autem jure civili non poſſunt legata peti pendente conditione inſtitutionis, ut in qua tota vis teſtamenti collocata ſit, non obſervatur in Anglia, prout alias plenius diximus, infra part. 6.

[d] Creditores enim de damno vitando: Legatarii autem de lucro captando certare dignoſcuntur. L. ſcimus, §. & ſi præfatum, C. de jure delib.

The firſt (2) Remedy thereof is this, conſidering that he which maketh an Executor conditionally, cannot be judged to have died Inteſtate, the Condition depending, or ſo long as the Teſtament may take Effect [e]; and ſo the Adminiſtration of the Goods cannot be committed according to the Statutes of this Realm, which provide only in that Caſe, where a Man dieth Inteſtate, or where the Executor doth refuſe to prove the Teſtament [f]. It is provided by the Civil and Eccleſiaſtical Laws, that it ſhall be lawful for the Ordinary to commit the Adminiſtration and Poſſeſſion of the Goods of the Deceaſed, to him that is made Executor, only for and during ſo long Time as the Condition dependeth, and is not extant, or elſe deficient [g]. By (3) Virtue of which Adminiſtration, or Decree of Poſſeſſion, the ſaid Executor may enter to the ſaid Goods, and may adminiſter and ſell the ſame for the Satisfying of the Debts due by the Teſtator, and Payment of his Legacies ſimply bequeathed, and may be convented by them, if he make Delays during the Time aforeſaid [h]: And if afterwards

[e] D. L. quam. divi. ff. de acquir. hæred.

[f] Stat. H. 8. an. 21. c. 5. & ſtat. Ed. 3. an. 31. c. 11.

[g] L. ſi quis inſtituatur, §. 1, 2. ff. de hæred. inſtituend.

[h] D. L. ſi quis. Quæ lex etſi creditoribus tantum præbeat remedium, tamen jure inſtitutionis conditio, quo utimur, legatariis quoque ſuccurritur, utpote quibus legata omnino debeantur, etiamſi deficiat nec aliquis exiſtat hæres, ſeu executor (infra part. 7. §. 19.) nedum ubi pendeat adhuc conditio.

terwards the Condition be performed or extant, then may he ſtill retain the Goods of the Deceaſed, as Executor to the Will [i]: But if the Condition be infringed, or deficient, then ought he to make Reſtitution to the next of Kin to the Deceaſed, or to thoſe that ſhall have Adminiſtration of his Goods [k]: For by Breach or Defect of the Condition, the Deceaſed is reputed to have died Inteſtate, or as he had never made Executor [l]; and the former Adminiſtration is finiſhed, and a new may be committed [m].

[i] Dum tamen probatum ſit teſtamentum, & ab Ordinario approbatum.
[k] L. 2. §. ſi ſub conditione ff. de bon. poſſeſſ. ſecundum Tabul. Graſſ. Theſaur. com. op. §. bon. poſſeſſ. q. 5. n. 7.
[l] L. hæres. de acquir. hæred. L. quod dicitur de mil. teſta. ff.
[m] D. L. ſi quis inſtituatur. ff. de hæred. inſtit.

If he (4) that is made Executor conditionally, will not meddle with the Adminiſtration of the Goods of the Deceaſed, nor yet perform the Condition, the next Remedy is this; you muſt conſider of the Nature of the Condition, that is to ſay, whether the Performance of the ſame do conſiſt in the Power of the Executor, or not [n]. If it be ſuch a Condition as he may eaſily perform, then may the Ordinary aſſign unto him a competent Term, for the Accompliſhment thereof [o], within which Time, if the Executor do not perform the ſame, it is reputed for infringed or deficient [p]; and ſo the Adminiſtration may be committed according to the Statute, in this Caſe, as of one dying Inteſtate [q]: And the Executor ſhall be excluded, if he do not purge his Delay, before the Adminiſtrators do meddle with the Goods [r]. But if the Ordinary knowing of this Will, ſhall commit Adminiſtration to ſome other without the Executor's Knowledge; or without appointing to him a competent Time for the Accompliſhment of the Condition mentioned in the Will, upon the which he is made Executor; which Condition he was willing to have performed at the Firſt, and afterwards doth perform the ſame, and then proveth the Will. In this Caſe the Adminiſtrator is in Danger to be ſued by the Executor in an Action of Treſpaſs [s], unleſs the Executor did refuſe before [t]; or unleſs the Teſtament were ſo ſecretly kept, that the Ordinary was ignorant thereof; which Ignorance is rather to be intended in the Ordinary, not only becauſe it is a Matter in Fact [u], but alſo of another Man's, the Knowledge whereof is not preſumed [x]. Moreover, it ſeemeth that where there is a Teſtament, there the Action againſt the Adminiſtrator ſhall be abated, where there be Executors able and willing to undergo the Executorſhip, albeit as yet they have not proved the Teſtament [y]. If the Condition conſiſt not in the Power of the Executor, then may the Ordinary at the Petition of the Creditors, appoint a Time to the Executor to undertake the Adminiſtration and Poſſeſſion of the Goods; during which Time, if he refuſe or neglect to undertake the ſame Adminiſtration; then may the Ordinary commit the ſame to ſuch as have Intereſt, until ſuch Time as the Condition be either extant or deficient [z]. Or elſe the Ordinary may make a Letter *Ad colligendum bona defuncti*, to ſome other Perſon than the Executor. But here the Ordinary had Need to take good Heed: For this is a dangerous Courſe to himſelf, becauſe that Perſon which hath a Letter *ad colligendum*, not being Adminiſtrator, the Actions which otherwiſe might be brought againſt the Adminiſtrator, do now lie againſt the Ordinary, as well as if he took the Goods into his own Hands, or by the Hands of any of his Servants by his Appointment or Commandment [a]. But what if he which hath

[n] D. L. ſi quis. §. 1, 2.
[o] Fortaſſe 100. dies extraneis, & annum defuncti liberis, ſecundum Bar. & Bald. in d. §. 1.
[p] Bar. & Paul. de Caſtr. in d. §. 1.
[q] Stat. H. 8. an. 1. c. 5.
[r] Bald. & alii in d. §. 1.
[s] Abridgement dez Caſes edit. Ann. Dom. 1599. tit. Adminiſtr. fo. 183. n. 1.
[t] Ibidem.
[u] Præſumendum eſſe, quempiam ab inteſtato deceſſiſſe, quam condito Teſtamento communis & uſu recepta eſt opinio (maxime alius factum non præſumitur,) pulchre Docet Franciſ. Mantic. de conject. ult. vol. lib. 2. tit. 1. n. 3, 4.
[x] L. Verius ff. de probat.
[y] L. Abridgment dez Caſes, ubi 5. fol. 185. n. 3.
[z] D. §. 1. & DD. ibidem.
[a] *Terms of Law*, verb. Adminiſtrator. Brook's Abridgment, tit. Ordinarii, n. 13. Abridg. dez Caſes, tit. Executor. fol. 176. n. 11.

Letters *ad colligendum*, hath alſo Authority from the Ordinary to ſell ſuch Goods of the Deceaſed, as otherwiſe would periſh, *& quæ ſervando ſervari non poſſunt*; and thereupon doth ſell ſuch as could not be preſerved: Whether is he ſubject to be ſued by the Creditors of the Deceaſed, as Executor of his own Wrong? In this Caſe, I take the Law to be, that he cannot plead that he did never adminiſter as Executor, or what he did, was by Virtue of the Letter *Ad colligendum & ad vendendum bona peritura, &c.* For it is holden, that albeit the Ordinary may grant Authority *Ad colligendum*, as before; yet he cannot grant Authority *Ad vendendum bona defuncti, etiam peritura* [b]. And ſo the Authority not being good in Law, he may be ſued as Executor of his own Wrong, howſoever thoſe Goods by him ſold would otherwiſe have periſhed [c].

[b] Dyer, fol. 256. Cui adde Abridgement dez Caſes, tit. Executors, fol. 176. n. 12.

[c] Et ita poſt maturam deliberationem fuit Judicatum, Teſt. D. Dyer ubi ſupra.

§. XVII. Of the making of an Executor, to, or from a certain Time.

1. *An Executor may be ordained, either for a Time, or from a Time.*
2. *The Ordinary may commit Adminiſtration until there be an Executor, or after the Executorſhip is ended.*
3. *Whether a Man may die partly Teſtate, and partly Inteſtate.*
4. *Whether he is ſaid to die partly Teſtate, and partly Inteſtate, which appointeth an Executor, to, or from an uncertain Time.*
5. *A Legacy may be given to, or from a certain Time, or to, or from an uncertain Time.*
6. *That Legacy is not tranſmiſſible, which is given from an uncertain Time.*
7. *What if the Uncertainty be not about the Queſtion* Whether, *but about the Queſtion* When?
8. *What if the Uncertainty be not joined to Subſtance of the Legacy, but to the Execution.*
9. *The Legacy is not tranſmiſſible, when the Queſtion is only* When, *not* Whether?
10. *The Teſtator may make that tranſmiſſible, which otherwiſe is not tranſmiſſible.*
11. *Whether that Legacy be tranſmiſſible, which is given after a certain Age.*
12. *Difference whether the Legacy be joined to the Subſtance, or to the Execution of the Diſpoſition.*
13. *Certain Caſes wherein a Legacy is tranſmiſſible, albeit the Age be joined to the Subſtance of the Legacy.*

ALbeit (1) by the Civil Law, *Hæres* the Heir cannot be inſtituted, either from a certain Time, or until a certain Time [a], leſt the Deceaſed might ſeem to die partly Teſtate, and partly Inteſtate [b]; yet where an Executor is ordained, howſoever the Executor be *quaſi Hæres*; at leaſt by the [c] Laws of this Realm, he may be

[a] L. hæreditas ff. de hæred. inſtituend. §. hæres inſtit. eodem, tit.

[b] L. Jus noſtrum de reg. jur. ff. cujus regulæ rationem aſſignat Porcius in §. & unum Inſtit. de hæred. inſtituend.

[c] Supra 1. part. §. 3. n. 19. Haddon. de reform. leg. Eccleſiaſt. Angliæ Doct. & Stud. lib. 2. cap. 11. Tract. de Repub. Ang. lib. 1. c. 9.

be appointed either from a certain Time, or until a certain Time [d]. For Example; the Teſtator maketh thee his Executor after the Expiration of Five Years next after his Death, or he doth make thee his Executor, for and during Five Years next after his Death: This Aſſignation is lawful by the Laws of this Realm [e]. And the (2) Ordinary may commit the Adminiſtration of the Goods of the Deceaſed to the next of Kin in the mean Time, during which Time, the Act of the Adminiſtrator is Good, and cannot be avoided by the Executor afterwards [f]; for in the mean Time he dieth Inteſtate. And likewiſe, he may commit the Adminiſtration of the Goods of the Deceaſed unadminiſtred by thee, after the Expiration of the Time of thy Executorſhip, where thou art appointed Executor but for a Time. For after the Term be expired, he is ſaid to be Inteſtate [g].

Where (3) it is ſaid, that a Man cannot die partly Teſtate, and partly Inteſtate, that is true where the Strictneſs of the Civil Law is obſerved [h]: But where the Teſtator is not tied to ſuch ſtrict Obſervance, whether it be by Reaſon of legal Privilege, as in *Military Teſtaments* [i], and in Teſtaments *Ad pias cauſas* [k]; or whether it be by Cuſtom of the Place, where the Teſtator abideth [l], as in *England*, where we enjoy all Immunity, nor be tied to any other Obſervance in making of Teſtaments, than that which is *Juris gentium* [m]; in theſe Caſes and Places, a Man may die partly Teſtate, and partly Inteſtate [n].

If the (4) Teſtator do ordain, or make an Executor, from or until an uncertain Time, as from or until the Death or Marriage of his Son: This Aſſignation is good and ſufficient, even by the Civil Law [o]; neither is the Teſtator in this Caſe ſaid to die partly Teſtate, and partly Inteſtate [p]: For an *uncertain Time* is compared to a *Condition* [q], which if it come to paſs, and be extant, the Teſtator is reputed to have died wholly Teſtate [r]: For a Condition purified had Reference backward, and is underſtood as if it had been accompliſhed immediately upon the Death of the Teſtator [s]; neither can the Teſtator be ſaid to die Inteſtate, in the mean Time before the Event, or whiles the Condition dependeth in Expectation [t]. Yet in a Legacy, the Condition purified hath no Relation backward, to the Death of the Teſtator, as though it had been then accompliſhed but only to the Time of the Exiſtence or Performance of the Condition [u]. And therefore the Fruits and Profits which ariſe out of the Legacy in the mean Time, are not due to the Legatary [x]; eſpecially when as the Condition is arbitrary, or ſuch as is in the Power of the Legatary to perform the ſame at his Pleaſure [y]. But if the Condition be infringed, or become deficient, then is the Teſtator to be adjudged to have died always Inteſtate, and not from the Time of the Breach, or Defect of the Condition [z]; which is the Cauſe wherefore in conditional Aſſignations the Adminiſtration cannot be committed to the next of Kin: As in Caſe of one dying Inteſtate, ſo long as the Condition is in Suſpence; as hath been before declared.

[d] Brook Abridg. tit. Exec. n. 155. tit. Admin. n. 45. Plowd. in caſ. inter Greisbr. & Fox.

[e] Brook ubi ſupra.

[f] Plowd. in caſu inter Greisbr. & Fox.

[g] Brook Abridg. tit. Adminiſtr. n. 1. & n. 45.

[h] Dec. Cagnol. & Hiero. Franc. in d. L. jus noſtrum de reg. jur. ff.

[i] L. miles, ff. de mil. teſton. Cagnol. & Dec. in d. L. jus noſtrum.

[k] Bar. in L. 1. C. de ſacroſan. Eccleſiaſt. Hiero. Franc. in d. L. jus noſtrum in fin.

[l] Hiero. Franc. in d. L. jus noſtrum. lib. 3. cap. 7.

[m] Supra 1. part. §. 10. in prin. tract. de Repub. Angl.

[n] Brook & Plowd. ubi ſupra, adde Socin. Tract. reg. & ſal. reg. 400. ubi tradidit 20 caſus, in quibus poteſt quis decedere pro parte teſtatus, pro parte inteſtatus.

[o] L. in tempus ff. de hæred. inſtit. L. extraneum eod. tit. C. gloſſ. in §. hæres, Inſtit. de hæred. inſtituend. Graff. Theſaur. com. op. §. Inſtit. q. 24. n. 4.

[p] Hiero. Franc. in d. L. jus noſtrum.

[q] L. dies incertus ff. de cond. & demon. Jaſ. in L. ſi cui legetur de leg. 1. n. 6. Cujac. obſervat. lib. 18. c. 1.

[r] L. hæres quandocunque de acquir. hæred. Hiero. Franc. in d. L. jus noſtrum de reg. jur. ff.

[s] L. quod dicitur. de mil. teſtam. L. hæres, quandocunque de acquir. hæred. ff. Minſing. in §. hæres. Inſtit. de hæred. inſtituend. Tiraquel. de retract. §. 1. gloſſ. 2.

[t] Minſing. in d. §. hæres. n. 4. 14. de reg. jur. & ibid. Dec. & Hiero. Franc. in L. ii is qui pro tempore ff. de uſu cap.

[u] Bar. Jaſ. & alii in L. ſi filius fam. de verb. oblig. ff. L. quæ legata ff.

[x] Vide Bald. in L. fin. §. ſed quia. C. com. de Lege.

[y] Bar.

[z] Hiero. Franc. in d. L. jus noſtrum de reg. jur. ff.

And here (5) Note, That as an Executor may be appointed from a certain Time, or until a certain Time: So a Legacy may be bequeathed either from a certain Time, or until a certain Time [a]. And albeit, where (6) a Legacy is given from or after a certain Time, the Legatary dying in the mean while, before the Time be come, the Executors or Adminiſtrators of that Legatary, may demand and recover the Legacy, after the Day is paſt, as might the Legatary himſelf if he had lived [b]; unleſs the Meaning of the Teſtator be contrary [c], or unleſs it be ſuch a Thing as cannot be tranſmitted to the Executor, as perſonal Service [d]. Yet (7) if the Legacy be given after an uncertain Time, (for ſo alſo it is lawful for the Teſtator to do [e]) the Legatary dying in the mean while, the Executors or Adminiſtrators of the Legatary deceaſed, cannot demand the ſame, but are utterly excluded [f], and that (8) not only when it is uncertain *whether* it ſhall happen [g], but alſo when it is uncertain *when* it ſhall happen [h]. For example; the Teſtator giveth thee an Hundred Pounds when his Daughter ſhall be married. This is uncertain whether [i] it ſhall happen at all, or no; or the Teſtator giveth thee an Hundred Pounds when his Son ſhall die. This is uncertain when [k] it ſhall happen, not whether it ſhall happen; for it is certain we muſt all die. In both which Caſes, if thou die before the Day be come, that is to ſay, before the Marriage of the Teſtator's Daughter, or Death of his Son, the Legacy is utterly extinguiſhed, or as if it had been conditional [l]. Neither (9) is it material whether the Uncertainty be joined to the *Subſtance* of the Diſpoſition, or to the *Execution* thereof: For in both Caſes the Legacy or Diſpoſition is reputed conditional [m]; and ſo it is not material, whether the Teſtator ſay, I give to *A. B.* an Hundred Pounds when my Daughter ſhall marry, or when my Son ſhall die. In which Caſe the Uncertainty is ſaid to be joined to the very Subſtance of the Diſpoſition; or whether the Teſtator ſay, I give to *A. B.* an Hundred Pounds, and I Will that the ſame ſhall be paid *when my Daughter is married*, or my Son dieth [n]. In which Caſe, it is ſaid to be joined to the Execution of the Diſpoſition [o]. For as well in the one Caſe as in the other, if the Legatary die before the Marriage of the Teſtator's Daughter, or Death of the Teſtator's Son, his Executors or Adminiſtrators cannot demand the Legacy [p].

[a] Graſſ. Theſaur. com. op. §. legatum, q. 53.

[b] L. 5. ff. quando dies leg. ced. Graſſ. d. q. 43. Vaſq. de ſucceſſ. progreſſ. lib. 3. §. 29. n. 2.

[c] L. in conditionibus de cond. & demon. ff. Mantic. de conject. ult. vol. lib. 11. tit. 20. n. 8.

[d] L. ſi poſt. in prin. ff. Quando dies leg. ced. & ibi Bar.

[e] Graſſ. d. q. 43.

[f] D. L. ſi poſt diem L. ſi Titio. ff. Quando dies, leg. ced. Graſſ. d. q. 43.

[g] L. cum Teſtator, C. de manumiſſ. teſt.

[h] L. ſi Titio, ff. quando dies leg. ced. L. ſi cui §. 1. de leg. Graſſ. d. q. 43.

[i] Alex. conſil. 55. vol. 2.

[k] Cujac. obſerva. l. 18. c. Vaſq. de ſucceſ. progreſſ. lib. 3. §. 27. n. 3. & §. 29. n. 3. in fin.

[l] L. ſi Titio quando dies, leg. ced. l. quibus diebus, §. 2. de cond. & demon. ff. Bar. in L. ſi cui legetur §. 1. de leg. l. Vaſquius ubi ſupra.

[m] Alex. in L. ſenis ad Trebel. ff. Jaſ. poſt Bald. & Paul. de Caſt. in d. L. ſi cui, §. 1. de leg. l. Graſſ. Theſaur. com. op. §. legatum q. 43. Vaſqui. de ſucceſſ. progreſſ. lib. 3. §. 29. n. 4. quæ opinio ſcilicet quod legatum hujuſmodi non ſit in diem, ſed conditionale, ubi dies eſt incertus, quando (veluti poſt mortem alterius) ut communior, ita & eſt verior, ex relatione Graſſ. §. legatum q. 43. n. 8. cui ſubſcribit Mant. de conject. ult. vol. l. n. 3.

[n] DD. in L. ſi cui, §. 1. de leg. ff.

[o] L. Bar. Paul. de Caſtr. Lancel. Dec. in d. §. 1.

[p] Vaſqui. de ſucceſſ. progreſſ. lib. 3. §. 29. n. 4. Mantic. de conject. ult. vol. l. 11. tit. 20. n. 3.

Dying in the Life-time of the Teſtator.

DEviſe of his Lands to his Son *when* he ſhall be of the Age of Twenty-four Years, and that his Executor ſhall have the Overſight and Dealing thereof in the mean Time; the Son died before Twenty-four: Adjudged that the Intereſt of the Executor was determined by the Death of the Son, becauſe the Teſtator did not intend to bar the next and right Heir of his Son, until he would have been Twenty-four Years old if he had lived. *Carpenter* v. *Collins*, Moor 774. Yel. 73. S. C. 1 Brownl. 85. S. C.

The Husband deviſed his Lands to his Wife *from Year to Year*, until his Son ſhould come to the Age of Twenty Years; 'tis true, if Moor 48.

he

he die before that Time, her Intereſt is determined, becauſe the Words from *Year to Year* ſhew, that the Teſtator intended that the Eſtate ſhould determine upon the Death of the Son; but if the Deviſe had been to the Wife until the Son ſhould come to that Age (and theſe Words *from Year to Year* had been omitted) in ſuch Caſe if he had died before, yet the Eſtate of the Wife ſhould continue.

Tayler verſ. *Biddall*, 1 Mod. 189. See *Boraſton*'s Caſe poſtea.

Deviſe of his Lands to his Siſter and Heir, until his Son *Benjamin* ſhould attain his full Age of Twenty-one Years, and afterwards to him and his Heirs; and *if he die before* Twenty-one Years, then to the Heirs of the Body of *Robert*; afterwards *Benjamin* died before he was Twenty-one: Adjudged that the Siſter had an Eſtate for ſo many Years, as from the Death of *Benjamin* would have made up Twenty-one Years, if he had lived.

But in very Truth (if we look a little nearer unto the Cauſe) the Time of another's Death is not only uncertain, in reſpect of the Queſtion *When*, but alſo in reſpect of the Queſtion *Whether* [q]; for who is certain, whether the other ſhall die before the Legatary? And this I ſuppoſe to be the principal Cauſe, wherefore the Legacy which is given, or is to be performed after the Death of another, is reputed to be conditional: Namely, becauſe it is uncertain whether that Time ſhall happen during the Life of the Legatary [r]. For (10) if the Queſtion be only *when the Time ſhall happen*, and not *Whether* it may happen during the Life of the Legatary, then the Legacy, in reſpect of Tranſmiſſion, is ſaid to be pure, and not conditional [s]. As for Example; the Teſtator giveth thee an hundred Pounds, to be paid the Day before thy Death; here the Uncertainty is only when the Time ſhall happen, not whether it ſhall happen during thy Life: Wherefore in this Caſe, after thy Death, thy Executors or Adminiſtrators may recover the Legacy [t], and that without Diſtinction, whether the Uncertainty be joined to the Subſtance of the Legacy; as, I give thee an hundred Pounds the Day before thy Death; or, whether it be joined to the Execution of the Legacy; as, I give thee an hundred Pounds to be paid the Day before thy Death [u].

[q] L. hæres meus ff. de cond. & demon. & Bald. in d. L.

[r] Bal. in d. L. hæres. Cui ac lib. 18. obſervat. c. 1. Mantic. de conject. ult. vol. lib. 11. tit. 20. n. 4.

[s] De L. hæres meus & ibi Bald. cum Paul. de Caſtr.

[t] D. L. hæres meus L. 4. ff. quando dies leg. ced.

[u] D. L. hæres. Et licet in illius legis exemplo incertitudo videri poſſit adjungi præſtationi legati & non ſubſtantiæ: Tamen cum ratio illius legis ſit generalis, & in utroque caſu militet, nempe quia dies non poteſt non cedere vivente legatario, vis legis non eſt per unicum exemplum anguſtanda.

Wherefore, where it is ſaid that when a Legacy is given *after an uncertain Time*, if the Legatary *die in the mean while*, his Executors or Adminiſtrators are excluded from demanding the ſame Legacy, albeit the Uncertainty be about this Queſtion *When*; that Concluſion hath divers Limitations. The firſt Limitation or Reſtraint is, in caſe alſo it be uncertain, whether the ſame ſhall happen, during [x] the Life-time of the Legatary; otherwiſe, if it muſt needs happen, during the Life of the Legatary, then the Executors or Adminiſtrators of the Legatary are not excluded, although it be uncertain when it ſhall happen [y]. Another Limitation is, when (11) it is the Meaning of the Teſtator, that the Executors or Adminiſtrators of the Legatary ſhall have the Legacy, notwithſtanding the Death of the Legatary, in the mean Time; for then the Uncertainty of the Time doth not make the Diſpoſition conditional, becauſe the Teſtator may, if he will, make that tranſmiſſible, which otherwiſe is untranſmiſſible [z].

[x] Bald. in d. L. hæres. Mantic. de conject. ult vol. lib. 11. tit. 20. num. 4. Cujac. lib. 18. obſervat. c. 1. Jaſ. in L. ſi cui §. hoc autem de leg. 1. num. 7.

[y] D. L. hæres meus ff. de cond. & demon.

[z] L. in conditionibus ff. de cond. & demon. Mantic. de conject. ult. vol. lib. 1. tit. 20. num. 8. Vaſqui. de ſucceſſ. progreſſ. lib. 3. cap. 29. num. 15, 16.

What (12) if the Teſtator doth bequeath ſome Legacy, when the Legatary or ſome other Perſon hath accompliſhed *a certain Age*, whether (if the Legatary, or that other Perſon die before that Age) may the Executors, or Adminiſtrators of the Legatary obtain the Legacy [a]? This Queſtion I ſuppoſe is thus to be anſwered.

[a] De hac q. uberrime ſcripſit Vaſqui. de ſucceſſ. progreſſ. lib. 3. c. 29. & generaliter D. D. in L. ſi cui. §. hoc autem ff. de leg. 1.

If (13) the Time be joined to the *Subſtance* of the Legacy, then the Executors or Adminiſtrators of the Legatary deceaſed, before the Accompliſhment of that Age, are without Hope of obtaining the Legacy [b]. For Example; the Teſtator doth give thee an hundred Pounds, when thou ſhalt be of the Age of One and twenty Years; thou dieſt before that Time; thy Executors or Adminiſtrators cannot obtain the hundred Pounds [c], except in certain Caſes, whereof the firſt (14) Caſe is, when Relation is made to the Age of the Executor, who is charged with the Payment of the Legacy, and not to the Age of the Legatary, or of any third Perſon [d]. For Example; the Teſtator doth will or charge his Executor to pay unto thee an hundred Pounds, when he ſhall be of the Age of One and twenty Years, before which Time the Executor dieth. In this Caſe (by the Opinion of divers [e]) thou mayeſt recover thy Legacy againſt the Executor of that Executor dying, at ſuch Time as the former Executor, if he had lived, ſhould have accompliſhed the Age preſcribed in the Teſtament. The Reaſon is, becauſe the Teſtator is preſumed to bear greater Love to his own Executor, on whom he hath beſtowed the Reſidue of his Goods, than to the Executor's Executor, whom peradventure he did not know [f]. Wherefore ſeeing the Teſtator charged his own Executor whom he more loved, the rather then is he preſumed to charge his Executor's Executor whom he leſs loved [g]. Howbeit, if the Teſtator charge his Executor with the Payment of the Legacy by this Word *If*, as if the Teſtator command his Executor to pay unto thee an hundred Pounds, if he ſhall accompliſh the Age of One and twenty Years. Here the Legacy is conditional, and therefore if the Executor die in the mean while, the Legacy dieth together with the Executor [h]. And ſo it is if the Executor be charged with Payment of the Legacy after he be of ſuch Age [i]: Nay more (contrary to that which is ſaid before) although the Teſtator do charge his Executor with the Payment of the Legacy by this Word *When*, as in the firſt Example, even there alſo by the received Opinion of the more Part, the Legacy is concluded to be conditional [k]: And therefore, if the Executor die before that Age, the Legacy cannot be recovered againſt the Executor of the Executor deceaſed [l], no more than where it is given *after* his Executor hath accompliſhed ſuch an Age: For albeit this Word (*after*) doth import a more full Perfection of Time than doth this Word *When* [m], yet they differ not in making the Diſpoſition conditional: For that is done as well by the Word *When*, as by the Word *After* [n]. What if the Executor being charged with the Payment of the Legacy, when, or after he hath accompliſhed a certain Age, the Legatary himſelf do die, the Executor ſtill living, whether may the Executors or Adminiſtrators of the Legatary deceaſed recover the Thing bequeathed of the Executor then living, after he hath accompliſhed the Age limited

[b] L. ſi Titio f. Quando dies leg. ced. d. l. ſi cui, §. hoc autem, de Jaſ. l.

[c] DD. in d. §. hoc autem.

[d] Bar. in d. §. hoc autem.

[e] Bar. Angel. Paul. de Caſtr. & Lancel. Dec. in d. §. hoc autem per L. libertis quos §. ab hæredibus ff. de Alimen. & cibar. leg.

[f] Bar. & Lancel. Dec. in d. §. hoc autem.

[g] Arg. a major. ad min.

[h] Bar. in d. §. hoc autem, per. ſi L. ſervus ff. de ſtat. lib.

[i] L. fidei commiſſaria cl. 1. §. etiam, ff. de fide commiſſ. lib. & Bar. cum Paul. de Caſtr. & Lancel. Dec. in d. §. hoc autem ff. de leg. 1.

[k] Dyn. Sal. Imol. Raph. Cuma. Alex. Aret. & Jaſ. in d. §. hoc autem, quorum opinio communis eſt contra Bar. & ejus ſequaces, ait Jaſ. ubi ſupra.

[l] L. intercidit ff. de cond. & demon. ff. L. unic. §. fin. autem, C. de cad. tol.

[m] Jaſ. Alex. & alii in d. §. hoc autem.

[n] Ita contra Bar. ſentiunt Salis. Imol. Alex. & Jaſ. ac Moder. in d. §. hoc autem.

in the Teſtament? It ſeemeth that he may [o], becauſe the Condition is here extant; notwithſtanding, becauſe it is concluded that the Legacy in this Legacy is conditional; therefore howſoever the Condition do afterwards come to paſs, yet was the Legacy extinguiſhed by the Death of the Legatary, the Condition then depending [p], and ſo cannot be recovered by his Executors or Adminiſtrators, unleſs it be proved (for it is not preſumed [q] that the Teſtator did mean the contrary [r].)

[o] Paul. de Caſtr. in d. §. hoc autem in leſt. p. adverſ. & multo fortius.

[p] L. unic. §. fin. autem C. de ead. tol. L. intercidit. ff. de cond. & demon.

[q] Nam cum præſumitur teſtator magis diligere ipſum legatarium quam ejus executorem, licet velit dare primo, non ſequitur quod dabit ſecundo. Bar. in d. §. hoc autem.

[r] L. in conditionibus ff. de cond. & demon. Mantic. de conjeſt. ult. vol. lib. 11. tit. 20. num. 8. Bar. in d. §. hoc autem in fin.

Dying before Legacy payable.

Sweet verſus *Beal*, Lane 56.

DEviſe to his Wife until his Iſſue of her Body be of the Age of 18 *Years*, provided if he die without Iſſue, then the Lands ſhall be to his *Wife for Life*; he left a Child, but it died before it was 18 *Years old:* Adjudged that ſhe ſhould have the Lands until the Child ſhould have come to 18 Years of Age, if he had lived, becauſe the Time may be made certain, by computing it from the Death of the Child, till he would have been 18, if he had lived.

Boraſton's Caſe, 3 Rep. 19.

Deviſe of his Lands for 8 Years, and then to remain *to his Executors till* Hugh *ſhall be of the full Age of* 21 *Years*; and *when* he ſhall be of that Age, *then* to him and his Heirs; he died at 9 Years: Adjudged that the Executors ſhall have the Lands till *Hugh* would have been 21, if he had lived; it was admitted, that *When* and *Then* are Adverbs of Time, but when they refer to a Thing which muſt neceſſarily happen, they are then contingent; now here the Term may be made certain by Computation from the Death of *Hugh* until he would have been 21, if he had lived; and the Adverbs *Then* and *When* are Demonſtrations of the Time when the Remainder to *Hugh* ſhall take Effect in Poſſeſſion.

1 And. 33.

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 ſtay till the Time her Brother would have been of Age, if he had lived.

The ſecond Caſe is in Favour of Liberty or Freedom from Bondage [s]. For Example; the Teſtator doth manumit his Villain, *when his Son ſhall attain the Age of One and twenty Years.* In which Caſe albeit his Son do not attain to that Age, yet ſhall the Villain be free, at ſuch Time as he ſhould have attained unto that Age, if he had lived [t]; but the Tenure of Villenage is now aboliſhed.

[s] L. ſi ita ſcriptum ff. de manumiſſ. teſta.

[t] D. L. ſi ita ſcriptum & DD. in d. §. hoc autem.

The third Caſe is, when any Legacy is left to ſome godly Uſe; for then alſo the Legacy may be recovered, notwithſtanding the Death of that Perſon, to whoſe Age the Teſtator made Relation [u].

[u] Vaſqui. de ſucceſſ. progreſſ. lib. 3. §. 29. c. 5. in fin. ubi concluſionem hanc variis confirmat mediis.

The fourth Caſe is, when the Time tendeth to the Diſſolution of the Legacy. For Example; the Teſtator doth give thee Ten Pounds yearly, *until his Son do attain the Age of One and twenty Years.* In which Caſe, if his Son *die in the mean Time*, thou mayeſt obtain the Legacy of Ten Pounds yearly, until ſuch Time as the Teſtator's

Son ſhould have attained to that Age, if he had lived [x]: So likewiſe, if a Man bequeath Twenty Pounds to *A. B.* to be paid in four Years after the Teſtator's Death, who dieth, and after him the Legatary dieth alſo, before the four Years be expired; yet in this Caſe the Executors or Adminiſtrators of the Legatary, may recover the Money bequeathed, or ſo much thereof as is behind or unpaid [y].

[x] L. Ambiguitatem C. de uſu fruct. Bald. in d. L. ſi cui, ff. de leg. 1. Vaſq. de ſucceſſ. progreſſ. l. 3. §. 29. n. 3.

[y] Brook's Caſe, n. 50. Fulbeck. paralet. 1. part, fol. 42. b. quamvis iſta limitatio proprie non eſt ſub regula prædicta, quia hic tempus adjicitur executioni legati, non ſubſtantiæ. Vide addit. ad Specul. tit. de fructib. & intereſſe §. 1. n. 9. tit. q.

The fifth Caſe is, when it is the Will and Meaning of the Teſtator, that the Legacy ſhould be tranſmittted [z].

[z] Bar. in d. L. ſi ce §. hoc autem in fin. Bald. in eand. L. & in L. Sejus ad Trebel. ff. Paul. de Caſtrenſ. in d. L. ambiguitatem, n. 2.

But if the Time of the Age be not joined to the *Subſtance* of the Legacy, but to the *Execution or Performance* of the ſame; then the Legatary dying in the mean Time, his Executors or Adminiſtrators may recover the ſame when the Time is expired, wherein the Legatary, if he had lived, ſhould have accompliſhed that Age [a]. For Example; the Teſtator doth bequeath to *A. B.* a hundred Pounds, to be paid when he ſhall accompliſh the Age of *One and twenty Years.* After the Death of the Teſtator, the Legatary alſo dieth, before he have accompliſhed the Age of One and twenty Years. In this Caſe the Executors or Adminiſtrators of the deceaſed Legatary may recover the ſame, when the Time is accompliſhed, wherein the ſaid *A. B.* if he had been then living, might have recovered the ſame [b]. What if the Teſtator bequeath to a young Maid an hundred Pounds, for and towards her Marriage, and ſhe dieth before ſhe be married, whether in this Caſe may the Executors or Adminiſtrators of the Legatary, recover the Legacy againſt the Executors of the Teſtator deceaſed? The Deciding of this Doubt doth chiefly depend upon the Teſtator's Meaning, which is the predominant Rule to be obſerved, as in many other, ſo alſo in this Caſe. But if his Meaning do not otherwiſe appear than by the bare Words formerly recited; for mine own Part I do ſubſcribe to their Opinion, who do hold the Legacy to be pure and ſimple, not conditional; and conſequently, that it is transferred to the Executors or Adminiſtrators [c] of the deceaſed Legatary, and recoverable by them; eſpecially, if ſhe live until ſhe were marriageable, though never married [d]. But if the Legacy had been given unto her, in regard of ſpecial Marriage with ſome particular Man; as, I give and bequeath unto *A. B.* for and toward her Marriage with *C. D.* In this Caſe the Legacy is deemed to be conditional, or, at leaſt, upon Conſideration of her Marriage with *C. D.* as the final Cauſe of the Legacy, which otherwiſe he meant not to have bequeathed; and therefore ſhe dying before that Marriage with *C. D.* the Legacy is extinct, and cannot be recovered by her Executors or Adminiſtrators [e]; yet if ſhe were contracted with the ſaid *C. D.* by Words inducing Matrimony, albeit ſhe died before they were ſolemnly married in the Face of the Church, it is holden, That the Legacy of an hundred Pounds is recoverable by her Executors or Adminiſtrators [f]; much more if ſhe were married to *C. D.* but died before they did lie together [g]. Moreover, if the Maid be very poor, or much

[a] Bar. & alii in d. §. hoc autem per L. ex his C. quando dies leg. ced.

[b] L. ex his verbis C. quando dies leg. ced. & D. D. ibid. Vaſq. de ſucceſſ. progreſſ. lib. 3. §. 29.

[c] Bald. conſil. 249. vol. 4. Gravet. conſil. 101. Covar. in c. 3. de teſta. extr. n. 11. verſic. ſecundo apparet. Dyer fol. 1. 59. Fulb. paralet. lib. 1. fol. 42. Munoch. de præſump. lib. 4. præſ. 146. n. 26.

[d] Bald. in L. generaliter cl. 2. C. de Epiſcop. & Cler. 10. & d. conſil. 249. Graſ. legatum c. 48. n. 1. imo ante adventum nubilis ætatis legatum peti non poſſe videtur. Covar. in d. cap. 3. verſic. ſeptimo.

[e] Menoch. de præſump. lib. 4. præſ. 146. n. 6. ubi latiſſime de hac q. diſput. Bart. & alios in L. Titio centum §. genero. ff de adminiſt. lega.

[f] Menoch. de præſump. 146. lib. 4. n. 20. part. Bald. in l. ſi plures, c. de cond. incert.

[g] Menoch. d. lib. 4. præſ 147.

much affected by the Teſtator, whereby it is probable that the Teſtator did bequeath that Sum, in regard of her Poverty, or of his own Affection, rather than of the Marriage with that Man. In this Caſe, though ſhe die before the ſaid Marriage, the Legacy is tranſmitted to her Executor or Adminiſtrator, as a pure and ſimple Legacy [h]. But if the Teſtator do bequeath unto her an hundred Pounds, which he willeth to be paid at the Day of her Marriage: If ſhe die in the mean Time, the Legacy dieth alſo, and therefore is not recoverable, by her Executors or Adminiſtrators, as hath been already declared [i].

[h] Covar. in d. c. 3. verſ. quinto Menoch. ſi præſ. 146. n. 22. Gravet. d. conſil. tot. ubi ſequuntur. Bar. dicit, quod quando apparere poteſt aliqua conjectura qua teſtator alias fuiſſet relicturus, non dicitur tale legatum conditionale. Fulb. lib. 1. paral. fol. 42. Dyer, fol. 59. Vaſqui. de ſucceſſ. progreſſ. lib. 3. §. 29.

[i] In eodem §. num. 8.

Dying before Legacy paid.

Latimer's Caſe, Dyer 59. b.

THE Teſtator deviſed 500 *l.* to his Daughter, *for and towards her Marriage*; ſhe made her Executors, and died before ſhe was married: Adjudged that they ſhall have the Money; but if it had been * *to be paid at the Day of Marriage, or at the Age of* 21, and ſhe had died before Marriage, or before 21, in ſuch Caſe her Executors ſhould not have it, becauſe the Teſtator did not intend a preſent, but a future Intereſt for the Daughter, and that it ſhould reſt in Contingency.

* 1 Vern. 462. *Collins* v. *Metcalfe* S. P.

Smartle v. *Schollar*, 2 Vent. 366. T. Jones 98. S. P. 2 Lev. 207. S. P. † 1 Vern. 324. S. P.

So a Deviſe of a Sum of Money *to be paid* at the Age of 21, or Day of Marriage, and the Legatee died before; in ſuch Caſe his † Adminiſtrator ſhall have it, becauſe the Legatee had a preſent Intereſt, tho' the Payment was to be made at a Time to come; and this is a Charge on the perſonal Eſtate, which was in Being at the Teſtator's Death; and if it ſhould be diſcharged by this Accident of Death, it would be for the Benefit of the Executor, which was never intended by the Teſtator.

Godb. 182.

But if the Words *To be paid* had been left out, it had been otherwiſe; as for Inſtance; a Deviſe of 100 *l.* 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 'tis ** a lapſed Legacy.

** *Cloberry*'s Caſe, 2 Vent. 342. 2 Chanc. Rep. 155. S. C.

2 Vent. 347.

A Deviſe of 100 *l.* to *T. S. at the Age of* 21; and if he die before, then *E. G.* to have it, who died in the Life-time of *T. S.* and before he was of Age, and then *T. S.* died under Age: Adjudged that the Adminiſtrator of *E. G.* ſhall have it, tho' his Inteſtate died before the Contingency happened.

2 Leon. 222.

Deviſe of his Lands to his Son, *but that his Wife ſhall take the Profits till he came of full Age*; ſhe married again, and died before her Son was of Age: Adjudged that her Husband ſhall not take the Profits till that Time, becauſe his Wife had only an *Authority* to receive them, for the Profits were not deviſed to her.

Carter verſ. *Church*, 1 Chanc. Rep. 113.

Deviſe to his Daughter and her Heirs, who was then a Year old, and that his Executor ſhould *receive the Profits until ſhe come to the Age of* 21 *Years, towards Payment of his Debts and Legacies*; the Daughter died at 5 Years old: It was decreed, that this Appointment of *the Profits to be received, &c.* amounted to a Leaſe till ſhe ſhould have been 21, if ſhe had lived, and ſo like *Boraſton*'s Caſe; but it is

not like the Caſe in *Leonard* laſt mentioned, for there the Appointment was to receive the Profits *generally*; but here it was to receive them *towards the Payment of his Debts and Legacies.* [z] Leon. 222.

§. XVIII. Of making an Executor univerſally or particularly.

1. *It is lawful to appoint an Executor, either univerſally or particularly.*
2. *The univerſal Executor may enter to all the Teſtator's Goods and Chattels; and therefore chargeable with Payment of all his Debts.*
3. *The particular Executor may meddle with no more than is allotted unto him; and therefore not charged, but according to his Portion.*
4. *A Man may die both Teſtate and Inteſtate, in reſpect of his Goods.*
5. *Of a particular and univerſal Legatary.*

THirdly, (1) An Executor may be ordained either univerſally or particularly [k]: Univerſally, that is to ſay, when the Teſtator maketh an Executor of his whole Will, or doth commit unto him the Diſtribution of all his Goods; or when the Teſtator doth appoint an Executor indefinitely, that is to ſay, without any Sign univerſal, of *Whole* or *All.* As, I make *A. B.* my Executor [l]. Particularly, that is to ſay, when the Teſtator doth commit the Execution of ſome Part of his Will, or the Diſpoſing of ſome Part of his Goods only: As if the Teſtator ſhould make thee his Executor of his Plate, or of his Goods within the County of *York*, or of his Debts only [m].

He (2) that is made Executor univerſally or ſimply, may enter to all and ſingular the Goods and Chattels of the Teſtator [n], and in that reſpect is univerſally and ſimply chargeable with the Payment of all and ſingular the Debts and Legacies of the Teſtator, ſo far as the ſame Goods and Chattels do extend [o].

He (3) that is made Executor particularly, cannot meddle with any other of the Teſtator's Goods and Chattels, than ſuch whereof he is made Executor, and is only ſo far chargeable with the Payment of the Debts and Legacies of the Teſtator, as the Portion of the Goods to him allotted doth extend unto [p]. And if there be no other Executor appointed, the particular Executor cannot meddle with the Reſidue as Executor: For touching (4) the other Goods, the Teſtator by the Laws of this Realm, is ſaid to die Inteſtate [q], and ſo may die partly Teſtate, and partly Inteſtate, not only in reſpect of Time (as hath been before declared [r]) but alſo in reſpect of Place, and of Goods [s], contrary to the Civil Law. And therefore if a Man have Goods in divers Dioceſes, he may make Executors of his Goods in the one, and die Inteſtate, as touching his Goods in the other: And if he make Executors indefinitely, they may adminiſter as Executors, in the one Dioceſe, and refuſe in the other, and take Adminiſtration of

[k] §. Hæreditas Inſtit. de hæred. inſtit. Graſſ. Theſaur. com. op. §. Inſtitutio, q. 21. n. 1. Fitzh. Abridg. tit. Executor. n. 26. Brook, tit. Execut. n. 2. & n. 155.

[l] L. 3. C. de mil. teſtam.

[m] Fitzh. Abridg. tit. Execu. n. 26. Brook, eodem tit. n. 2. & n. 155.

[n] L. hæreditas de reg. jur. ff. & ibi Cagnol. Plowd. in Caſ. inter Greiſbrook & Fox, & infra, part. 6. §. 3.

[o] *Terms of Law*, verb. Executor.

[p] Fitzh. & Brook, ubi ſupra. L. ſi hæredes de leg. 1. L. legatorum de leg. 2. ff. Sichard. in L. 1. C. de impub. & al. ſub. n. 4. Eſt enim eadem ratio partis ad partem, atque totius ad totum.

[q] Fitzh. & Brook in locis ſupra ſcriptis.

[r] Supra eadem part. §. 17. in prin. Brook, tit. Adminiſtrator. n. 45. Plowd. in Caſ. inter Greiſbrook & Fox.

[s] Fitzh. tit. Executor. n. 26. Brook, eod. tit. n. 155.

of thoſe Goods, as of one dying Inteſtate [t]. And ſo it is, if he have Goods in divers Provinces [u]. And if the Teſtator by his Will declare that *A. B.* ſhall diſpoſe his Goods which be extant, in the Hand and Poſſeſſion of the ſaid *A. B.* Hereby he is made Executor of that Parcel of Goods remaining in his Cuſtody [x].

And here note (5) that as an Executor may be made univerſally or particularly; even ſo one may be made particular or univerſal Legatary, in reſpect of ſome univerſal or particular Legacy left by the Teſtator [y].

Howbeit, where the Teſtator doth leave all his Goods, or the Reſidue of his Goods to ſome Perſon, none elſe being appointed Executor, he to whom ſuch general Legacy is made, ſeemeth to be appointed Executor [z], at leaſt, he hath been admitted to the Adminiſtration of the Goods of the Deceaſed [a], as heretofore more largely [b]. But if the Teſtator give his Goods to one Perſon, and make another Executor; this Executor is called *Nude* Executor, for that he reapeth no Commodity by the Teſtament [c]. And here note, that if a Man by his Teſtament deviſe all his Lands and Tenements in *D.* yet Leaſes for Years do not paſs by theſe Words, *Lands and Tenements*; for thereby is intended Frank-Tenements or Freehold, and not Chattels [d].

[t] L. Abridgment des Caſes edit. anno Dom. 1599. tit. Execut. §. 16. fol. 181.
[u] Ibidem.
[x] D'Abridgment, f. 175. n. §. 7.
[y] Vide ſupra 3. part. §. 17. & hac part. §. 4.
[z] L. his verbis, ff. de hæredibus inſtit. & gloſſ. ac D. D. ib. Graſſ. Theſaur. com. op. §. inſtitutio. q. 14. Mantic. de conject. ult. vol. lib. 4. tit. 3. n. 8.
[a] Et ita ſæpiſſ. practicari obſervavi in foro Archiepiſcopi Ebor.
[b] Supra eadem part. §. 4.
[c] Jo. de Athon. in legat. libertatem de Executor. Teſtam. Lindw. in c. ſtatutum, de teſta. lib. 3. Provinc. conſtit. Cant. & in c. religioſa eodem tit. verb. de damnis.
[d] Brook's Abridgment, tit. Done, n. 41.

§. XIX. Of making Executors by Degrees.

1. *How Executors are made by Degrees.*
2. *He that is made Executor in the firſt Degree, is ſaid to be inſtituted, the reſt ſubſtituted.*
3. *Divers Kinds of Subſtitutions, whereof certain have but little Uſe in* England.
4. *Of the divers Forms of a vulgar Subſtitution.*
5. *Of the Effects of Subſtitutions.*
6. *So long as the Executor inſtituted in the firſt Degree, may be Executor, the Subſtitute is not to be admitted.*
7. *If any one Executor in the firſt Degree may be admitted, the Subſtitute is excluded?*
8. *What if every Executor have a ſeveral Subſtitute?*
9. *The firſt Subſtitute being repelled, whether the reſt be repelled likewiſe?*
10. *What if the Executor in the firſt Degree, die Inteſtate?*
11. *The Admiſſion of the Executor inſtituted in the firſt Degree, doth not always exclude the Subſtitute.*
12. *The Subſtitute ought to ſucceed in that Part and Quantity, which was aſſigned to the former Executor.*
13. *Where divers be ſubſtituted to one, whether they ſhall ſucceed equally or unequally.*
14. *Divers Caſes, wherein the Executors being unequally inſtituted, and the ſame alſo ſubſtituted, do ſucceed equally.*
15. *Of the great Difference betwixt ſubſtituting by proper Names, and ſubſtituting by Names appellative.*
16. *What if the Subſtitution be made by both Names?*
17. *What if ſome be inſtituted by their proper Names, others not?*
18. *What if it be doubtful, by what Names they be ſubſtituted?*

FOurthly, An Executor may be made either in the firſt Degree, or in the ſecond Degree, or in the Third, Fourth [a], *&c.*

[a] L. poteſt quis ff. de vulg. pub. ſub. Inſtit. de vulg. ſub. in princ. Franc. poſt gloſſ. in c. ult. de teſta. 6. Brook, tit. Execut. n. 9.

The (1) Teſtator is ſaid to make Degrees of Executors, when he doth ſubſtitute one in Place of another. For Example; the Teſtator maketh his Wife Executrix, and if ſhe will not, or cannot be Executrix, he maketh his Son Executor; and if his Son be not Executor, he maketh his Brother Executor [b]. In which Example there be Three Degrees, whereof the Wife is in the firſt Degree, the Son in the ſecond Degree, and the Brother in the third Degree. For look how many Subſtitutions there be ſucceeding one another; ſo many Degrees there be beſides the principal Inſtitution, which maketh the firſt Degree [c]: And who (2) ſo is Executor in the firſt Degree, he is ſaid to be inſtituted; and they which are Executors in the ſecond, third, and fourth Degrees, are ſaid to be ſubſtituted [d].

[b] D. L. poteſt. & ibi DD. Graſſ. Theſaur. com. op. §. Subſtitutio. q. 1.

[c] L. 1. L. poteſt. ff. de vulg. & pupil. ſub.

[d] Zaſ. Tract. de ſubſtit. in princ.

There (3) be divers Kinds of Subſtitutions, or Sorts of placing of Executors one after another [e]; whereof, either becauſe we have no Uſe at all [f] here in *England*, or very little [g], I ſhall only ſpeak of that vulgar or common Kind of Subſtitution, whereof there is more Uſe. Concerning the which, this is to be noted, That it (4) is lawful for the Teſtator to make ſo many Degrees of Executors as he liſts [h], and he may ſubſtitute into the Place of one Executor, either one or more; and into the Place of many Executors, he may ſubſtitute one alone [i]. Likewiſe he may ſubſtitute or ordain many Executors, and appoint to every of them a ſeveral Subſtitute; or he may ſubſtitute one of the ſame Executors to another [k]; or the Teſtator having inſtituted divers Executors, may ſubſtitute Executors to ſome of them, but not to others [l].

[e] Ut ſubſtitutio vulgaris, pupillaris, exemplaris, breviloqua, compendioſa; de quibus ſigillatim & copioſe Zaſ. in ſuo præclaro tractatu de ſubſtitutionibus.

[f] Ut de pupillari ſubſtit. & de exemplari, quæ pupillaris ſubſtitutio idcirco corruit; nempe ob defectum patriæ poteſtatis, ſine qua conſiſtere non poteſt (Inſtit. de pub. ſub. in princ.) & conſequenter cadit exemplaris ſubſtitutio, quum hæc ad pupillaris imitationem fieri dignoſcatur.

[g] Ut de breviloqua & compendioſa; quarum diſceptatione mirum in modum involvunt ſe DD. a quibus nihil fere aliud quam quod ad fatigationem ſtudioſorum, & ad obſcuritatem rei, quæ vel ultro perdifficilis eſt, capere valeas.

[h] Inſtit. de vulg. ſub. in princ. L. poteſt. eodem tit. ff.

[i] §. plures, Inſtit. de vulg. ſub.

[k] D. §. plures.

[l] D. L. poteſt. & DD. in eand. L.

It is alſo lawful for the Teſtator to inſtitute an Executor ſimply, and to ſubſtitute another in his Place conditionally [m]; or contrariwiſe, to inſtitute conditionally, and to ſubſtitute ſimply [n]. Simply, I ſay, not becauſe I deny any Subſtitution to be conditional; for indeed every Subſtitution is in this Reſpect conditional, becauſe every ſubſtitute is appointed with this Condition, *viz.* If the Perſon to whom he is ſubſtituted, will not or cannot be Executor [o]. But I ſay ſimply, when no other Condition is expreſſed or underſtood in the Subſtitution, than is expreſſed or underſtood in the Inſtitution [p].

[m] L. qui liberis de vulg. ſub. ff.

[n] L. ſub conditione ff. de hæred. inſtituend.

[o] Jaſ. in L. quamdiu ff. de acquir. hæred. in prin. Sichard. in Rub. de impub. & al. ſub. C.

[p] L. qui liberis de vulg. ſub. ff.

Very (5) many, and infinite almoſt, are the divers Effects iſſuing from the divers Kinds of Subſtitutions [q], the Diſcourſe whereof would be much more laborious than commodious. Wherefore leſt I ſhould make long Harveſt about little Corn, I ſhall content my ſelf with a Declaration of Two Concluſions, whereby we may underſtand, *when* and *how* the vulgar Subſtitute is to be received or repelled, to or from the Executorſhip.

[q] De quibus Zaſius, Politus Fumeus, & alii in ſuis Tract. de ſubſtitut.

The firſt and principal Concluſion is this. So long (6) as he which is inſtituted Executor in the firſt Degree, may be Executor, the Subſtitute, or he which is appointed Executor in the ſecond Degree, cannot

not be admitted to the Executorſhip[r]; and likewiſe ſo long as he may be Executor, which is aſſigned in the ſecond Degree, he that is appointed in the third Degree, is excluded: So by the Firſt, the Second is repelled, by the Second the Third, by the Third the Fourth, *&c.*[s]

[r] L. quamdiu, de acquir. hæred. L. cum in teſtamento de hæred. Inſtit. ff. L. poſt aditam. C. de impub. & al. ſub. Graff. Theſaur. com. op. §. ſub. q. 9.

[s] D. L. quamdiu. Zaſ. in d. Tract. de ſub. c. 1. n. 5.

And if the (7) Teſtator do inſtitute divers Executors, ſubſtituting one or more, ſo long as any one of them which was firſt inſtituted may be Executor, the Subſtitute is not to be admitted[t]; unleſs (8) the Teſtator do appoint to every Executor firſt inſtituted his ſeveral Subſtitute; for then any one of thoſe firſt inſtituted Executors, not being able or refuſing to be Executor, his Subſtitute is to be admitted with the other Executors firſt inſtituted[u]: Whereas (9) otherwiſe any one of the Executors in the firſt Degree lawfully undertaking the Executorſhip, all the Subſtitutes are excluded; not only thoſe which be placed in the ſecond Degree, but alſo thoſe which be placed in the Third and Fourth[x]. Inſomuch, that (10) if the Executor undertaking the Office, do afterwards die Inteſtate, yet the Executors inſtituted do ſtill remain excluded[y], and ſo by the Laws of this Realm, the Adminiſtration is to be committed of the reſt of the Goods of the Teſtator deceaſed, not adminiſtred by the Executor[z]: The Reaſon is, for that they which are ſubſtituted, are made Executors conditionally; that is to ſay, If he which is inſtituted Executor in the firſt Degree will not, or cannot be Executor[a]. Wherefore he that was firſt inſtituted lawfully, undertaking the Executorſhip, cannot be ſaid to be unwilling or unable; and ſo the Condition expireth, and is become deficient: Without the Accompliſhment whereof, that is to ſay, unleſs the Executor in the firſt Degree will not, or cannot be Executor, the Subſtitute cannot claim any Thing[b]. Howbeit, if (11) the Executor inſtituted in the firſt Degree, be deprived of the Executorſhip, by Reaſon of his Negligence in not performing the Will, then is the Subſtitute to be admitted[c]; likewiſe, if the Executor firſt inſtituted, notwithſtanding his Intermeddling, be admitted to renounce the Executorſhip, then alſo the Subſtitute is to be received[d]: Likewiſe, if he that is firſt inſtituted, do delay to take upon him the Executorſhip, by the Space of thirty Years, he is to be excluded, and the Subſtitute to be received[e]; But I ſuppoſe he is not to be excluded by Lapſe of leſſer Time, unleſs the Ordinary do aſſign a certain Time to take or refuſe the Executorſhip[f]: Likewiſe, if he that is firſt inſtituted, cannot be Executor, the Subſtitute being appointed upon this Condition, if the former *will not* be Executor, nevertheleſs the Subſtitute is to be admitted, as if the former Executor had refuſed[g]. And finally, whereſoever it is likely that the Teſtator would have ſubſtituted in the Caſe not expreſſed, if he had remembered the ſame, as well as in the Caſe expreſſed, there the Subſtitute is to be admitted, as if the ſame Caſe had been expreſſed[h].

[t] L. quidam de impub. & al. ſub. C. Zaſ. ind. Tract. de ſubſtit. c. 6. verſ. quinta concluſio. Sed conſulas Ripam in L. 1. ff. vulg. ſub. n. 187, &c. qui de hac q. pluribus diſputat.

[u] Zaſ. in d. Tract. de ſubſtit. c. 1. membro 5. concluſ. 1. limit. 3.

[x] Bar. in L. 1. de vulg. & pub. ſub. ff. d. 47. & Ripa. ibid. n. 185. Dec. in L. poſt aditam. C. de impub. & al. ſub. n. 2.

[y] L. poſt aditam. C. de impub. & al. ſub. & Sichard. in eand. L. in 1. verſ. ita deinde.

[z] Brook Abridg. tit. Adminiſt. in 45. & tit. Executor. num. 149.

[a] Odofred. & Fulgo. in d. poſt. aditam.

[b] Conſtat alias a Jaſone, Sichardo, & aliis in d. L. poſt aditam. aſſignari rationes, quæ tamen non tanti ſunt apud nos momenti; non tamen erit inutile illos in hac re conſulere.

[c] Zaſ. in d. Tract. de ſubſtit. c 1. mem. 5. concluſ. limit. 1.

[d] Bar. in d. L. 1. de vulg. ſub. n. 49. cujus opinio communis eſt, teſtimonio Graff. Theſaur. com. op. §. ſubſtitutio, q. 15

[e] Jaſ. in L. quamdiu. de acquir. hæred. ff. quam opinionem dicit eſſe communem, n. 9.

[f] Vide infra 6. part. c. 13.

[g] Bar. in d. D. L. 1. ff. de vulg. ſub. & poſt eum Zaſ. in d. Tract. de ſubſt. c. 1. verb. primus effectus.

[h] Bar. & Jaſ. ubi ſupra.

The ſecond Concluſion is, That (12) the Subſtitute ſhall ſucceed in ſuch Part and Quantity of the Teſtator's Goods, as was aſſigned to him that was inſtituted Executor in the former Degree, be it more

or leſs[i]: So that if the inſtituted Perſon were made Executor of the one Half of the Teſtator's Goods, the Subſtitute ſhall be admitted Executor of the other Half; or, if the inſtituted Perſon were made Executor of a third Part, or of Goods in a certain Place, the Subſtitute ſhall ſucceed and be admitted accordingly[k]. And (13) if divers be ſubſtituted to one, they ſhall ſucceed equally; but if the ſame Subſtitutes were alſo inſtituted Executors, and that unequally (for that perhaps to ſome more, to ſome leſs is allotted:) In this Caſe, if any of the inſtituted Executors will not, or cannot be Executor, the Portion of that Executor ſhall not be equally diſtributed amongſt the ſubſtituted Executors, but according to the Portion of the firſt Aſſignation; that is to ſay, he that is an inſtituted Executor of a greater Part, ſhall be Subſtitute of a greater Part; and he that was inſtituted of a leſs, ſhall be Subſtitute of a leſs[l]; (a ratable and juſt Proportion obſerved.) The Reaſon is, becauſe the ſame Affection is preſumed in the Subſtitution, which was in the Inſtitution[m].

[i] L. 1. C. d. impub. & al. ſub. §. & ſi Inſtit. de vulg. ſub. L. ſi plures. ff. de vulg. & pup. ſub.

[k] DD. in d. L. 1. Minſing. in d. §. & ſi plures de vulg. ſub.

[l] Bald. Paul. de Caſtr. & Sichard. in d. L. 1. d. impub. & aliis, ſub. C. Mantic. de conject. ult. vol. lib. 5. tit. 1. n. 20.

[m] Minſing. in d. §. & ſi Inſtit. de vulg. ſub. per L. licet imperator ff. de leg. 1. & L. Publius. §. Titio. de cond. & demom. & Mantic. ubi ſupra.

Notwithſtanding, if (14) the Executors unequally inſtituted, be ſubſtituted to a Legatary; then in Caſe the Legatary will not, or cannot have the Legacy, the ſame ſhall be equally divided amongſt the Subſtitutes[n].

[n] L. Unic. §. ſed ut manifeſtetur. C. de eadem tol. & ibi Paul. de Caſtr. Sichard. in d. L. 1. de impub. & al. ſub. col. 5. ver. nec movet.

Or if the Subſtitutes be equally charged by the Teſtator, then alſo they ſhall ſucceed equally, notwithſtanding they were unequally inſtituted[o].

[o] L. quoties ad Trebel. L. utrum §. fin. de rebus dub. ff. Dec. in d. L. 1. n. 10.

Or if the Perſons inſtituted Executors in the firſt Degree, be aſſigned conditionally, the Subſtitutes aſſigned ſimply ſhall not be charged with the Performance of that Condition[p], unleſs they be ſubſtituted to a conditional Legatary; for then the Condition expreſſed in the former Diſpoſition is underſtood to be repeated in the Subſtitution; and therefore the Subſtitute cannot obtain the Legacy, without the Performance of the Condition[q]. Or unleſs the Condition, expreſſed in the Conſtitution, conſiſt in giving; for then it is repeated in the Subſtitution. As for Example; the Teſtator doth make thee his Executor, if thou ſhalt give ten Pounds to *A. B.* And if thou do not, then he doth appoint another to be his Executor. Though thou refuſe to give ten Pounds to *A. B.* yet cannot that other be Executor, unleſs he give ten Pounds to *C. D.* [r] becauſe this Condition of giving, expreſſed in the Inſtitution, is underſtood to be repeated in the Subſtitution[s].

[p] L. ſi ſub. conditione de hæred. inſtit. & ibi Bar. Bald. Imol. & alii, ff. Et hæc eſt communis ſententia, ut per Mantic. de conject. ult. vol. lib. 10. tit. 6. n. 2.

[q] Dec. in d. L. 1. de impub. & al. ſub C. in fin. L. 1. §. pro ſecundo, C. de cad. tol. quod tamen intellige ut per Mantic. de conject. ult. vol. lib. 10. tit. 6, n. 9. cum ſeq.

[r] Menoch. de præſump. lib. 4. præſ. 177. n. 28. Jaſ. in L. licet imperator. de leg. 1. ff. n. 43.

[s] Ratio eſt duplex. 1. quia talis conditio habet vim relicti: Altera, quia ſi teſtator gravavit hæredem primo loco quem magis dilexit, multo magis hæredem ſecundo loco, quem minus dilexit. Jaſ. ubi ſub.

Or (15) if in the Subſtitution, the Perſons ſubſtituted be not all named by one Name appellative, but every one ſeverally by his own proper Name, then notwithſtanding they were firſt inſtituted Executors of unequal Parts, the Diſtribution amongſt them as Subſtitutes ought to be equal[t].

[t] L. nonnunquam ff. ad Trebel. & ibi DD. Viglius, & Minſing. in §. & ſi Inſtit. de vulg. ſub.

By Names *appellative* in this Place, I underſtand every Name which is common, or may comprehend divers Perſons, or all Names except the Chriſtian-name or Surname of any Perſon: As when the Teſtator doth inſtitute his *Executors*, his *Children*, his *Brethren*, his *Kinsfolks*, all which I do account Names appellative in this preſent Caſe [u]. The Cauſe of the Difference (as moſt do think) is the Force of this Word *And*, which Word being moſt commonly uſed, and almoſt neceſſary, whereſoever the Teſtator doth ſubſtitute divers Perſons by their ſeveral proper Names, the Nature and Force thereof is ſuch, as it doth make equal Diſtribution [x]; without the which, the Subſtitution ſhall be proportionable to the Inſtitution; inſomuch, that if the Teſtator do ſubſtitute divers by their proper Names, without that Word *And*; as if the Teſtator ſay, I ſubſtitute the two *Johns* at *Noke*. In this Caſe the Executors being inſtituted unequally in the firſt Degree, the Subſtitutes are to ſucceed unequally likewiſe [y].

[u] Sichard. poſt Paul. de Caſtr. & alios. in d. L. 1. deimpub. & al. ſub. c. n. 5. in fin. Minſing. & Vigl. in d. §. ſi ex diſparibus.

[x] Paul. de Caſtro Jaſ. & Sichard. in d. L. 1. de impub. & aliis ſub. C.

[y] Idem Caſtrenſ. Jaſ. Sichard. in d. L. 1.

But what (16) if the Teſtators do ſubſtitute by both Kinds of Names, as well by the Appellative, as by the proper Names; or what if ſome be ſubſtituted by the proper Names, others by ſome Name appellative: What if it be doubtful by whether Kind of Name they were ſubſtituted. Whether in theſe Caſes, ought the Subſtitutes to ſucceed equally, or unequally, according to the Proportion of the Subſtitution [z]?

[z] Has quæſtion. cum multis aliis expeditas habet Jaſ. in d. L. 1.

When the Subſtitution is made by both Names jointly, we are to conſider, whether the Names appellative, or the proper Names have the firſt Place in the Depoſition: For if the Appellative go before, then the Subſtitutes are to be admitted, as if their proper Names were not at all expreſſed, that is to ſay, according to the Proportion of the Inſtitution: But if the proper Names enjoy the firſt Place, then the Subſtitutes are admitted equally, notwithſtanding their unequal Inſtitution [a].

[a] Jaſ. & Sichard. in d. L. 1. quæ opinio communis eſt, quam etiam adverſus Curtium defendit Viglius, in d. §. & ſi ex diſparibus. Inſtitut. de vulg. & pupil. ſub. n. 7.

When (17) ſome be ſubſtituted by their proper Names, others by Names appellative; they which be ſubſtituted by their proper Names do ſucceed equally: The others according to the Proportion of their Inſtitution [b].

[b] Jaſ. poſt. Silicet. in d. L. 1.

When it is doubtful, by whether Names they be ſubſtituted (for that perhaps the Witneſſes do not remember what Manner of Words the Teſtator did uſe:) In this Caſe, they ſhall ſucceed according to the Proportion of their Inſtitution [c].

[c] Bar. in L. 1. ff. de vulg. & pupul. ſub. Jaſ. & Sichard. in d. L. 1. c. de impub. & al. ſub.

§. XX. How many may be appointed Executors.

1. *Either one alone, or more Perſons may be appointed Executors.*
2. *What if the Teſtator make all the World his Executor.*
3. *What if he ſay, I make the Poor my Executor, or the Church, or my Kin.*
4. *Where divers be named Executors, all are to be admitted, and not one without the reſt.*

5. *The Extenſions of this former Concluſion.*
6. *The Limitations of the ſame Concluſion.*
7. *Whether the Executor of the Executor is to be joined with the Executor ſurviving.*
8. *What if the Executor ſurviving die Inteſtate.*
9. *The Executor of the Executor may ſometimes be ſued as Executor in his own Wrong.*
10. *If the Impediment be not long, the Executor is to be expected.*
11. *One of the Executors may execute when the reſt refuſe.*
12. *Whether the Co-Executor be excluded by his Refuſal before the Ordinary.*
13. *Other Caſes wherein one Executor alone may ſue, or be ſued, without his Fellows.*
14. *Whether one Executor may ſue another.*
15. *Certain Caſes wherein one Executor may ſue another.*
16. *How the Goods are to be diſtributed amongſt the Executors, to whom the Teſtator giveth the Reſidue.*
17. *If the Teſtator make the Child in the Mother's Womb Executor, and the Mother bring forth two or three Children at one Birth, they are all to be admitted Executors.*
18. *If the Teſtator do bequeath an hundred Pounds to the Child in the Mother's Womb, and the Mother is delivered of two or three, whether are each of them to have an hundred Pounds, or but one hundred amongſt them?*
19. *What if the Teſtator make his Wife and the Child in her Womb Executors, willing, that if it be a Man-Child, he to have two Parts of the Reſidue of his Goods, and his Wife but one? And if it be a Woman-child, then his Wife to have two Parts, and his Daughter but one. Admit now the Mother have both a Son and a Daughter at one Birth; how are the Goods to be diſtributed?*
20. *Caſes in Law concerning Co-Executors.*

Fifthly, Either one Perſon (1) may be appointed Executor alone, or divers Perſons together [a], even as many as the Teſtator liſts to appoint; ſo that (2) the Number be not infinite, as to ſay, I do make all the Men of the World my Executors [b]: For to appoint Executors in that Sort, were an Argument that the Teſtator were not of perfect Mind and Memory [c]. Beſides that, it is impoſſible [d] for all to execute, and therefore a void Aſſignation, at leaſt in Effect [e]. But (3) if the Teſtator make the *Poor* his Executors, or the *Church*, or his *Kin*, giving to them the Reſidue of his Goods, albeit he do not declare which Poor, what Church, or which Kinſfolks, nevertheleſs the Depoſition is not void, as elſewhere is declared [f].

[a] §. & unum. Inſtit. de hæred. inſtituend.

[b] Porcius in d. §. & unum qui refert hanc opinionem eſſe communem, licet Graſſ. Theſaur. com. op. §. Inſtitut. q. 13. exiſtimet contrariam eſſe magis communem, nempe hujuſmodi inſtitutionem mero jure ſubſiſtere, ſed re & effectu irritam, & inanem reddi. [c] Porcius in §. & unum. [d] Idem Porcius ibid. [e] Gloſſ. in d. §. & unum Graſſ. d. q. 13. [f] Infra 7 part. §. 8. vide Dyer, fol. 160.

When (4) the Teſtator doth make divers Perſons Executors, they are all to be admitted to the Executorſhip, and not one alone without the reſt [g]; which Concluſion is diverſly both extended and limited.

[g] C. religioſa, §. fane. de teſta. lib. 6.

The (5) firſt Extenſion is, that albeit the Teſtator do appoint his own Son and a Stranger his Executors; the Stranger, if he can and will,

will, is to be admitted with the Teſtator's Son: For howſoever in this Caſe, by the Civil Law, the Teſtator's Son is underſtood to be inſtituted in the firſt Degree, and the Stranger no more but ſubſtituted, or appointed in the ſecond Degree; and ſo to be admitted, in caſe the Son cannot or will not be Executor [h]; yet by the Laws and Cuſtoms of this Realm, it is otherwiſe, and both are to be admitted alike [i].

[h] Gloſſ. & Bar. in L. Gallus §. quidam recte ff. de lib. & poſthu. Graſſ. Theſaur. com. op. §. Inſtitutio, q. 20. n. 6.

[i] Quippe ceſſante cauſa, & ratione juris civilis, nimirum inſtituendi neceſſitate, ceſſat & ipſius legis effectus, c. cum ceſſante de app. extra.

The ſecond Extenſion is, That although the Executors be appointed alternatively, or disjunctively: As for Example; the Teſtator maketh *A. B.* or *C. D.* his Executors. In this Caſe both the Perſons are to be admitted Executors [k]; and this Word *or*, in Favour of Teſtaments, is taken for *and*, and ſo it is in Effect [l]; as if the Teſtator had ſaid, I make *A. B.* and *C. D.* my Executors, ſaving in certain Caſes elſewhere expreſſed [m].

[k] L. quidam, C. de verb. ſig. Mantic. c. de conject. ult. vol. lib. 4. tit. 3. n. 19.

[l] D. L. quidam, & ibid. Bar. & Jaſ.

[m] Infra 7. part. §. 9. & ibi tres extant limitationes.

The third Extenſion is, That where there be divers Executors, the Action commenced by them, or againſt them, ought to be commenced in all their Names, and not in the Name of ſome of them only [n].

[n] Jo. de Athon. in legatin. libertatem de execut. teſta. Brook Abridg. tit. execut. n. 117. Intellige in executoribus hæreditatem adeuntibus, alias indiſtincte in utroque caſu non eſt verum.

3 H. 6. fol. 6.

The Reaſon is, becauſe they all repreſent the Perſon of the Teſtator, therefore they muſt join in all Suits brought to recover his Eſtate, and as well thoſe who refuſed, as thoſe who proved the Will muſt be named; but where they are Defendants, thoſe only are to be named who proved the Will.

Smith verſus *Smith*, Yel. 130. 1 Brownl. 101. S. C.

The Mother and her Son *an Infant* were made Executors, and Adminiſtration was granted to her, during the Minority of her Son; ſhe married again, and then her Husband and ſhe (as Executrix) brought an Action of Debt againſt the Defendant, who pleaded in Abatement, that the Infant was not named; and upon a Demurrer to that Plea, it was held that the Plea was good; but if it had been ſet forth ſpecially in the Declaration that there was another Executor under Age, though not joined in the Action, it might have been otherwiſe.

The (6) Limitations of the former Concluſion are many, but they may almoſt be reduced to two, whereof the firſt is, when the other Co-Executor *cannot be* Executor [o]; the ſecond is, when he *will not* undertake the Executorſhip [p]. For the better Underſtanding of the which two Limitations; Firſt, concerning the former of them, we are to note, whether the Impediment be *perpetual or temporal.*

[o] C. religioſa §. ſane. de teſta. lib. 6.

[p] D. §. ſane & ibi Domini, & Phil. Franc.

If the Impediment be *perpetual*, becauſe perhaps the Co-Executor is dead, or perhaps ſuch a Perſon as is utterly incapable of an Executorſhip, then he that is living and able to execute, may be admitted to the Executorſhip, notwithſtanding the Impediment of the Co-Executor [q], unleſs the Teſtator did will expreſly, that the one ſhould not execute without the other [r]; otherwiſe, if (7) two be appointed Executors, and the one maketh his Teſtament, wherein he nameth

[q] D. §. ſane & ibidem Franc. & alii.

[r] Eodem §. ſane in fin.

his Executor, and dieth, his Executor ſurviving. In this Caſe the Executor of the Executor is not to be joined with the Executor ſurviving; neither in the Execution of the Will [s], nor in Suits or Actions [t]. And if the Executor of the Executor have any Goods or Chattels in his Hand, which did belong to the firſt Teſtator, the Executor of the ſame Teſtator ſurviving, may have an Action againſt the Executor of the Executor for the ſame [u]. Inſomuch, that if the (8) Executor ſurviving, do afterwards die Inteſtate, yet may not the Executor of the Executor meddle with the Goods of the former Teſtator; for the Power of the Executor who died firſt, was determined by his Death, the other then ſurviving [x]; and the Ordinary in this Caſe may commit the Adminiſtration of the Goods of the ſurviving Executor, who died afterwards Inteſtate, to the Widow, or to the next of his Kin: And may alſo commit the Adminiſtration of the Goods of the former Teſtator not before adminiſtered, to the Widow, or next of Kin to the ſame Teſtator [y]. And (9) if the Executor of the Executor who died firſt, meddle with the Goods of the firſt Teſtator, he may be ſued by Creditors of the firſt Teſtator, as Executor in his own Wrong [z].

If the (10) Impediment be not *perpetual, but temporal*; then we are to conſider, whether the ſame be like to indure for a long or for a ſhort Time: If the Impediment be like to continue long, for that perhaps the Co-Executor is beyond the Seas, or in ſome By-place far diſtant [a], or for that peradventure the Co-Executor is yet unborn, or but a Babe (for ſuch Perſons may be named Executors [b];) then the other Executor is to be admitted in the mean Time [c]; for the Law would not that Mens Teſtaments or laſt Wills ſhould be deferred, but with all convenient Speed executed and performed [d]. But if the Impediment be but of a ſhort Time, then the one Executor is to expect his Fellow, and is not in the mean Time to be admitted alone to the Executorſhip [e].

[s] D. §. ſane & ibi gloſſ.
[t] Brook Abridg. tit. Execut. n. 52, 160.
[u] Brook, tit. Executor, n. 95.
[x] Brook, tit. Executor, n. 149.
[y] Eodem n. 149.
[z] Brook Abridg. tit. Executor, n. 29, 99.
[a] Jo. And. & Phil. Franc. in d. §. ſanc.
[b] Ut infra part. 5. §. 1.
[c] D. §. ſanc. & DD. ibid.
[d] Franc. in d. §. ſanc.
[e] Idem Franchus poſt. Jo. And. in d. §. ſanc. quod tamen vérum eſt in Executoribus nudis non in mixtis. Simo. d. Prætis. De interp. ult. vol. fol. 19. vol. 5.

When (11) one Executor may undertake the Executorſhip, but doth *refuſe* ſo to do; then is the other Executor to be admitted alone, and may execute the Will, or commence any Suit, or be ſued alone, as if none other had been named Executor [f]. Which Concluſion is true, if the Executor refuſing do ſtill perſevere in his Unwillingneſs; but (12) if he alter his Mind, and afterwards become willing, then ſo long as the Executor who proved the Will, is living, (his former Refuſal before the Ordinary notwithſtanding) he may by the Laws and Cuſtoms of this Realm, join with the other Executor, who proved the Will [g]. And if he releaſe any Debt due to the Teſtator, the Releaſe is as ſufficient, as if he had never refuſed [h]. Which is to be underſtood, if he releaſed before Judgment; but after Judgment, being no Party in the Suit, he cannot acknowledge Satisfaction, becauſe he was not privy to the Judgment [i]: Or if one releaſe, and afterwards take Adminiſtration of a Man's Goods dying Inteſtate, this ſhall not bar him, but that he may recover the Debt, as Adminiſtrator unto him to whom the Debt was due [k]; the Reaſon is evident, becauſe the Right of the Action was not in him at the Time of the Releaſe [l].

[f] D. c. religioſa, §. ſanc. de teſta. lib. 6.
[g] Brook Abridg. tit. Executor, n. 33. & n. 117.
[h] Brook d. tit. n. 117. & n. 117. Do. Coke, lib. 5. *In* Middleton's *Caſe*.
[i] Dyer, fol. 319. n. 15.
[k] Dom. Coke, lib. 5. Relationum, fo. 28. Middleton's *Caſe*.
[l] Ibid.

Henſlow's *Caſe*, 9 Rep. 30.

Where there are ſeveral Executors, and one of them *refuſeth before the Ordinary*, and the reſt prove the Will; he who *refuſed* may adminiſter when he will, and therefore they who proved it, ought to name him in every Action; but if they all refuſe, and the Ordinary grants Adminiſtration to another, then it is too late, for in ſuch Caſe they cannot afterwards prove the Will.

Pawlett verſ. *Freak*, Hardres 111.

Co-Executors, &c. One of them proved the Will, and the reſt *refuſed*; he who proved it died Inteſtate, and *T. S.* took out Adminiſtration, which he could not lawfully do; becauſe one of them proving the Will, made all of them Executors; and that no other Perſon can adminiſter during their Lives.

Houſe verſ. *Lord Peter*, 1 Salk. 311.

R. made his Brother *W.* Executor, who made his Wife *Lucy and one* Todd *joint Executors*, and died; *Lucy* alone proved the Will, and made *two Executors*, and died; then *Todd renounced* the Executorſhip to *W.* and thereupon the Adminiſtration of the Goods of the firſt Teſtator was granted to *T. S.* but the *Co-Executors* of *Lucy* inſiſted that it ought to have been granted to them; and it was decreed by the Delegates, that *Todd being joint Executor with Lucy*, and ſurviving her, the Right of Executorſhip to *W.* did ſurvive to him; which Right could not be deveſted but by his actual Refuſal, and then and not before both their Teſtator *W.* and *R.* the firſt Teſtator are dead inteſtate; and if ſo, then the Ordinary might grant Adminiſtration to *T. S.* In this Caſe, the Common Lawyers held, that if one Executor refuſes before the Ordinary, and the reſt prove the Will, yet at Common Law, he who refuſed may at any Time come in and adminiſter; and though he never acted whilſt his Companions were living, yet after their Death he ſhall be preferred before any other Executor made by a Co-Executor; but the Doctors of the Civil Law held, that a Refuſal is peremptory by their Law.

To the two Limitations as aforeſaid may a third be added, whereby one Executor may ſue or be ſued, without the other Co-Executor; namely, (13) when no Exception is made againſt the Proceedings by the Party [m]. Hereunto alſo may be added a fourth Limitation, that is to ſay, when any one of the Executors doth ſell ſome of the Teſtator's Goods for a Sum of Money; for then that Executor which ſold the Goods, may himſelf alone ſue for the Money due for the ſame Goods [n]. What if the Teſtator make two Executors, whereof the one refuſeth, and the other proveth the Will, who afterwards maketh others as Executors, and dieth. Whether may theſe Executors of the Executor ſue for the Debt due to the firſt Teſtator, or the ſurviving Executor who refuſed? It is holden, that he which did refuſe the Executorſhip, cannot aſſume that Office after the Death of his Fellow Executor. And therefore the Executors of the deceaſed Executor may ſue or be ſued for the Debt of the firſt Teſtator, and not the ſurviving Executor, who did refuſe the Executorſhip whilſt his Co-Executor lived [o]. And this may ſtand for a firſt Limitation, wherein one Executor may ſue or be ſued without the other.

[m] Jo. de Athon. in legat. libertatem, de execut. teſtam.

[n] Brook Abridg. tit. Execut. n. 65.

[o] Dyer, fol. 160. n. 42.

Furthermore it is to be noted, That when the Teſtator doth make divers Executors, if (14) any of them do get the Poſſeſſion of the Goods of the Teſtator, the other Executor hath no Action for Recovery of the ſame Goods, or any Part thereof [p]; for one Executor cannot for another. Howbeit, (15) if the Teſtator make divers Executors, and do bequeath to the one of them the Reſidue of his Goods;

[p] Brook tit. Execut. n. 98. part. 6. §. 3.

it is not only lawful for him, to whom they are bequeathed, to retain the ſame; but alſo, if the other Executor enter thereunto, he is ſubject to an Action of Treſpaſs [q]. Likewiſe, if the Teſtator do bequeath unto all his Executors the Reſidue of his Goods, the ſame ought to be equally diſtributed amongſt them. In which Caſe, I ſuppoſe the Office of the Ordinary, to whom they are accountable, is of great Authority, if one of them ſeek to defraud another [r]. Which is to be underſtood whilſt the ſaid Executors be yet living; for if any of them happen to die, his Part ſhall accrue to the Executor ſurviving: Unleſs the Teſtator by his Will did declare, That the Reſidue of his Goods ſhould be equally divided amongſt them. For theſe Words, *Equally to be divided*, in a Will, do make a Tenancy in Common. In which Caſe, if any of them die, the others ſurviving, yet nevertheleſs the Executors or Adminiſtrators of the Party dying may recover ſuch Part of the Deceaſed's Goods undivided, as he himſelf ſhould have had, if he had lived [s]. Or if the Teſtator, making divers Executors, do bequeath to every of them a hundred Pounds, though one of them die, the others ſurviving; yet that hundred Pounds ſhall not accrue unto the Survivors, but ſhall belong unto the Executors or Adminiſtrators of the Deceaſed, as a diſtinct Legacy [t].

[q] Brook d. tit. Execut. n. 104.

[r] C. tua nos de teſtam. extr. Brook Abridg. tit. Accomp. n. 8.

[s] Dom. Coke, lib. 3. Relationum in Ratcliff's *Caſe*, fol. 39. n. 5. ubi refert ita ſæpius Judicatum fuiſſe, etiamſi nulla in facto intervenit bonorum partitio.

[t] Ratio eſt quia non ſunt conjuncti nec re nec verbis, & ideo non eſt locus rei accreſcendæ. Jaſ. poſt. Bar. in L. hujuſmodi, ff. de lega. 1. n. 2.

But (16) what if the Teſtator make many Executors, giving them the Reſidue of his Goods, of which Executors he nameth one by his proper Name, the reſt by a Name collective: As for Example; the Teſtator ſaith, I make my Brother and his Children my Executors, to whom I bequeath the reſt of my clear Goods: Whether in this Caſe ought the Father to have as much as all his Children, or whether ought every Child to have as much as the Father? I ſuppoſe, that in this Caſe the Reſidue of the Death's Part ought to be divided into two Parts, and that the Father ought to have as much as all the Children [u]; for it is delivered for a Rule, That where divers Perſons be comprehended under one Name collective, with another third Perſon, then all they which be included under that one Name, do repreſent one only Perſon [x]. Of which Rule nevertheleſs there be divers Exceptions; one is, when the Teſtator willeth the ſaid Goods to be equally divided amongſt them [y]. Another is, when the Children were not born at the Time of the Making of the Teſtament [z]. The Third, and that is general, is when the Teſtator meaneth, that every Perſon ſhall have a like Portion [a]: For in thoſe Caſes the Rule doth not hold, but Diſtribution is to be made according to the Number of the Perſons; that is to ſay, if there be three Perſons, then the Reſidue of the Death's Part is to be divided into three Parts; and if there be four Perſons, then into four Parts; and if there be more, then into more Parts; every Part equal for every Perſon.

[u] Jaſ. in L. fin. de impub. & al. ſub. C. Dec. conſil. 236. & conſ. 25. 4.

[x] Jaſ. in d. L. fin. Mantic. de conject. ult. vol. lib. 4. tit. 9. quem operæ pretium erit videre.

[y] L. interdum & ibi. Paul. de Caſtr. ff. de hæred. inſtit. Dec. conſil. 597.

[z] Jaſ. in d. n. fin. per L. quidem §. ſi tibi de reb. dub. ff.

[a] Jaſ. in eand. L. fin. quem velim videas, nam ibi tradidit regulam ſeptem limitationibus dotatam.

If (17) the Teſtator do appoint the Child in the Mother's Womb his Executor, and it falleth out, that the Mother doth bring forth two or three Children at that one Birth, they are all to be admitted Executors [b]. And as they are all to be admitted to the Executorſhip, ſo are they all to enjoy the Legacy. And therefore, if the Teſtator ſay, I do bequeath a hundred Pounds to the Child in the Mother's

[b] Jaſ. in L. placet ff. de lib. & poſth. Mantic. de conject. ult. vol. lib. 4. tit. 8. n. 4.

ther's Womb; and if ſhe doth bear two or three Children, the Legacy is to be divided amongſt them[c]. But (18) if the Teſtator ſay, if my Wife ſhall bring forth any Child, I give to the ſame an hundred Pounds; and ſhe bring forth two or three Children. In this Caſe every Child may obtain an hundred Pounds, if the Teſtator's Goods do ſuffice to ſatisfy the ſame[d], unleſs it be proved, that it was the Teſtator's Meaning, that they ſhould have no more but an hundred Pounds amongſt them[e].

[c] Paul. de Caſtr. in L. qui filiabus, §. 1. ff. de leg. 1.

[d] D. L. qui filiabus, §. 1. & DD. ibid.

[e] Text. in d. §. 1.

What ſhall we ſay to this Queſtion? The (19) Teſtator maketh the Child in the Mother's Womb Executor, and willeth, That if it be a Man-Child, he ſhall have two Parts of the Reſidue of his Goods, and the Mother but one; and if it be a Woman-Child, that then the Mother ſhall have two Parts of the ſaid Reſidue, and the Daughter but one. The Will being thus framed, the Mother bringeth forth a Son and a Daughter; how much of the Teſtator's Goods is due to each Perſon? In this Caſe, every Perſon is to have a Portion anſwerable to the Rate or Proportion of the Teſtator[f]; that is to ſay, the Son ſhall have twice ſo much as the Mother, and the Mother twice ſo much as the Daughter: For Example; the Reſidue of the Teſtator's Goods ariſing to ſevenſcore Pounds, the Son ought to have fourſcore Pounds, the Mother forty, and the Daughter twenty: So the Mother hath double as much as the Daughter, and the Son hath double as much as the Mother.

[f] L. Inſtit. ff de lib. & poſth. Mantic. de conject. ult. vol. lib. 4. tit. 9. n. 12.

But what if the Will be as before, that the Iſſue Male ſhall have two Parts, and the Mother one Part; and ſhe bringeth forth an Hermaphrodite, ſhall ſuch Child have as much as both Male and Female Children? he ſhall not, but only the Portion due to the Sex that doth moſt prevail.

Co-Executors being in (20) Law but as one Perſon, therefore the Act of one is the Act of them all, and the Poſſeſſion of one is accounted the Poſſeſſion of all, and the Payment of Debts by or to one of them is the Payment of or to all of them; and the Sale or Gift of the Teſtator's Goods by one, is the Sale or Gift of all; and likewiſe a Releaſe before Judgment of one of them, is a Releaſe of all.

Pannell verſ. *Ferne*, Cro. Eliz. 347. Moor 350.

Co-Executors had a Leaſe for Years, one of them ſold the Term, and the Sale was adjudged good; becauſe each of them had an entire Power to diſpoſe it, both of them being poſſeſſed in the Right of one, (*viz.*) in the Right of the Teſtator; and for this Reaſon one of them cannot aſſign the Term to another of them, becauſe he was poſſeſſed of the whole before.

See Further's *Caſe*, Cro. Eliz. 471. *Lawry* verſ. *Aldred*, 2 Brownlow 183. Keilw. 23. S. P.

One Executor ſhall be barred by the Acquittance of his Co-Executor, becauſe each is intitled to the whole, they being but as one Executor to repreſent the Teſtator; the Law is the ſame where one confeſſes the Action, for that ſhall bind the other for ſo much of the Teſtator's Eſtate as he hath in his Hands.

Kelſeck v. *Nicholſon*, Cro. Eliz. 478.

T. S. was bound in a Bond to the Teſtator, who made two Executors, and died; the Executor who had the Bond gave it up in Satisfaction of his own Debt, and died: The ſurviving Executor brought an Action of *Detinue* againſt him who had the Bond; and adjudged not good, for he might have releaſed the Debt; and therefore might diſpoſe the very Deed by which the Debt was created.

§. XXI. The Executor of an Executor, and where he ſhall be charged, and what Actions are maintainable, by, or againſt him.

THE Executor of an Executor (where there is no joint Executor) is Executor to the firſt Teſtator, and hath Right to all the Profit, and is liable to all the Charge that the firſt Executor had, or was ſubject unto. But the one Teſtator's Goods ſhall not ſtand charged for the other Teſtator's Debts, but each for his own [a]. [a] 25 Ed. 3. c. 4. Pl. Com. f. 86. 34 H. 6. fol. 14. C. l. 5. f. 9.

If an Executor of an Executor aſſume the Adminiſtration of the firſt Teſtator's Goods, he cannot afterwards refuſe the Adminiſtration of the Goods of the latter Teſtator, but he may accept the latter, yet refuſe the former, but not *econtra* [b]. [b] T. 17 Jac. C. B. *Wolfe* and *Heyden's* Caſe, Hutt. 30.

An Executor's Executor ſhall not be admitted to adminiſter the Goods of the firſt Teſtator, where the firſt Executor refuſed to adminiſter, or died before *Probate*, unleſs the *Reſiduum bonorum*, after the Debts paid, be given by the Will to the firſt Executor [c]. [c] Dyer, fol. 372. Tr. 4 Car. C. B. *Denn's* Caſe, Croke, part. 1. fol. 113.

Error; the Error aſſigned was, That the ſaid *W. E.* had brought an Action of Debt upon an Obligation by the Name of *W. E.* Adminiſtrator *Bonorum & catallorum* A. E. *durante minori ætate* of *I. E.* Executor of the ſaid *A. E.* Executor of *R. Emry*, and demands Judgment upon an Obligation of 29 *l.* made to the ſaid *R. E.* the firſt Teſtator: Whereas he could not bring an Action by this Name, but as Adminiſtrator of *R. E.* For by this Adminiſtration committed, he hath no Authority to meddle with the Goods of the firſt Teſtator. And for this Cauſe Judgment was reverſed [d]. [d] H. 33 Eliz B. R. *Rob. Limmer* verſ. *Will. Emry*, Croke, part. 3. fol. 211. n. 2. 27 H. 8. 7.

Executor of an Executor cannot ſell the Land of the firſt Teſtator [y]. [y] Brook Abridg. tit. Executor, p. 3. & tit. Teſtam. p. 1. 19 H. 8. fol. 4.

There are two Executors, one of them maketh his Executor and dieth. Debt lieth againſt the Executor which ſurviveth, and not againſt the Executor of him which is dead [z]. [z] 10 H. 6. 26. Brook, tit. Execut. p. 160. Dyer 160.

Two Executors, one of them proved the Will, the other refuſed before the Ordinary, who thereupon granted Adminiſtration to the other, who made his Executor, *and died*; and that *Executor alone* brought an Action of Debt for a Debt due to the firſt Teſtator; and adjudged that the Action did lie; for though he who refuſed might adminiſter at any Time, yet it muſt be in the Life-time of his Companion, and he being dead, that Election is gone; but where an Adminiſtrator got Judgment, and then died Inteſtate, his Adminiſtrator cannot have Execution on that Judgment, becauſe he is not privy to it.

And ſo is * *Brudnell's* Caſe, (*viz.*) an Adminiſtrator *durante minore ætate* got Judgment and died, having firſt made *T. S.* his Executor, who brought a *Scire facias* on that Judgment, and thereupon the Defendant brought a Writ of Error; and adjudged, that an *Execu-* * *Brudnell's* Caſe, 5 Rep. 9.

tor of an Adminiſtrator cannot have Execution upon a Judgment obtained by the Adminiſtrator, becauſe he is not obliged by Law to pay the Debts of the Inteſtate.

Wade v. *Marſh*, Latch 211. But an *Executor of an Executor* may *avow for Rent* due to the firſt Teſtator; and this he may do *proprio jure*, (*viz.*) Leſſee for Years rendring Rent, made *E. G.* his Executor, and died; and *E. G.* made *T. S.* her Executor and died. *T. S.* diſtrained for Rent, and in Replevin he avowed *jure ſuo proprio*; and adjudged that this Avowry was good; and though it was inſiſted, that an Action of Debt was the proper Remedy due in the Life-time of the Teſtator, yet it was held, that a Diſtreſs was proper by Reaſon of the Reverſion which made the Privity.

Nicholſon ver. *Sherman*, 1 Chanc. Rep. 57. Raym. 23. S.C. Sid. 45. S. C. Deviſe of a Legacy to *T. S.* and the Teſtator appointed *R. S.* and *D.* his *Wife* to be Executors, and died; the Husband made *D.* his Wife and *W. S. his Son* Executors, and died; and *T. S.* the Legatee exhibited a Bill againſt *D. the Widow* and her Son, wherein he charged, that the Eſtate of the firſt Teſtator liable to this Legacy was come to their Hands, the one being the ſurviving Executor of the ſaid Teſtator, and the other being the Executor of the dead Executor; and upon a Demurrer to the Bill *by the Son*, it was inſiſted, that the ſurviving Executrix of the firſt Teſtator was only liable, and that he (the Son) who was Executor of an Executor, was not accountable for the Eſtate of the firſt Teſtator; but decreed, that his Eſtate is liable into whoſeſoever Hands it came.

Chamberlain verſus *Chamberlain*, 1 Chan. Rep. 257. 1 Vent. 291. S. C. Two Executors, one of them make *T. S.* his Executor, and died; yet an Action of Debt lies againſt the Survivor; but it will not lie againſt an Executor of an Executor, upon a Suggeſtion of a *Devaſtavit made by the firſt Teſtator*, becauſe 'tis a perſonal Wrong; and my Lord *Hale* was of Opinion, that it was obtained with ſome Difficulty to allow an Action of Debt to be good againſt the Executor himſelf upon a Suggeſtion of Waſte by his Teſtator: However, Chancery thought it equitable to make an *Executor of an Executor* liable to anſwer the *Quantum* of the *Devaſtavit* to the Creditors, ſo far as the Executor had Aſſets from his Executor; and about three Years afterwards the Parliament enacted, that an Executor of an Executor ſhall be liable as his Teſtator would have been, where the Goods are waſted or converted. 30 *Car.* 2. *cap.* 7.

A Man makes two Executors and dies; one of the Executors maketh an Executor and dies; the other ſurvives, and dies Inteſtate. The Executor of the Executor ſhall not meddle; for the Power of the Teſtator was determined by his Death, and the Survivor of the other; and the Ordinary may commit Adminiſtration of the Goods of the Executor which ſurvived, and of the Goods not adminiſtred of the firſt Teſtator[e]. And if the Executor of the Executor, who died firſt, meddle with the Goods of the firſt Teſtator, he may be ſued by the Creditors of the firſt Teſtator, as Executor of his own Wrong[f]. But where there is no joint Executor, there moſt Things which concern the immediate Executors, extend alſo to the mediate, or more remote Executors; and the mediate Executor in the fourth and fifth, or farther Degree, ſtands in like Manner Executor to the firſt Teſtator, as the firſt and immediate Executor, and may ſue and be ſued as the former.

[e] 32 H. 8. Brook ibid. part. 149.

[f] 39 H. 6. fol. 45. Brook ibid. part. 99, 29. 21 Ed. 4. 22. 10 H. 6. 26. 41 Ed. 3. 30, 31.

Deviſe that his Executors ſhall take the Profit of his Land, until the Heir ſhall be of full Age to pay Part; one of the Executors dies,

after the Survivor maketh his Executor and dies; the Executor of the Executor, who died laſt, ſhall have the Profit, becauſe 'tis an Intereſt which ſurvives [g].

[g] Dyer, fol. 210.

In Debt againſt the Executor of an Executor; the Defendant pleaded, That the Executor's Teſtator had fully adminiſtred, and that he had nothing in his Hands at the Time of his Death; and it was found, that he had Aſſets; whereupon a *Fieri facias* iſſued to the Sheriff, and he returned, that the Defendant had nothing: And it was held, That the Sheriff ſhould be amerced, for he ſhall be eſtopped to make ſuch a Return; and that it ſhould be no Prejudice to the Plaintiff, for that the Debt ſhall be charged ſo long as the Record remains in Force, not reverſed by Error nor Attaint. And if he hath no Goods of the Teſtator's, he ſhall be charged of his own proper Goods; for that when he pleaded, that the firſt Executor had fully adminiſtred, he did not deny, but that Aſſets came to him after the Death of his Teſtator [h].

[h] Paſch. 3 Eliz. Moor's Rep. fol. 23. n. 81.

§. XXII. Of an Infant Executor; an Executor or Adminiſtrator *durante minori ætate*; where Adminiſtration *durante minori ætate* ſhall be good; what Acts done by ſuch an Adminiſtrator ſhall be good; and where ſuch Adminiſtration ſhall ceaſe and determine. *Et econtra.*

AN Infant, how young ſoever he be, may be Executor [a], yet the Execution of the Will ſhall not be committed unto him, until he attain the Age of ſeventeen Years: For Adminiſtration granted *durante minori ætate* ceaſes, when the Infant Executor attains to that Age of ſeventeen Years [b]. And if it be a Female Infant, and married to a Man of ſeventeeen Years of Age, or more; it is then, as if her ſelf were of that Age, and her Husband ſhall have the Execution of the Will, and Adminiſtration thereof [c]. This Limitation of ſeventeen Years comes in by the Canon, not by the Common Law [d].

[a] Brook Abridg. tit. Execut. n. 11. tit. Covertan. num. 56. 21 Ed. 4. 13.

[b] C. lib. 5. *Prince's* Caſe.

[c] Brook, tit. Exec. n. 114. 20 Ed. 4. fol. 17. lib. 5. fol. 29. 6. *Prince's* Caſe.

Prince verſus *Simpſon*, Cro. Eliz. 718. 2 And. 132.

[d] Office of Execut. c. 18.

An Infant was made Executor, and Adminiſtration was granted to another *durante minori ætate* of the Infant, who brought Debt for Money due to the Inteſtate, and had the Defendant in Execution, and then the Executor came of full Age. It was moved, that the Defendant might be diſcharged out of Execution, becauſe the Authority of the Adminiſtrator is determined, and he cannot acknowledge Satisfaction; and it was ſaid, That he was rather a Bailiff to the Infant, than an Adminiſtrator. But the Judgment of the Court was, That though the Authority of the Adminiſtrator was determined, yet the Recovery and Judgment did remain [e].

[e] M. 29 Eliz. C. B. Goldsb. fol. 104.

A. brought an Action againſt *B.* as Adminiſtrator of *I. S.* during the Minority of *C.* Iſſue being joined, it was found for the Plaintiff: It was moved in Arreſt of Judgment, that the Declaration was not good, becauſe *non conſtat*, whether *C.* were ſeventeen Years of Age at the Time of the Action commenced, at which Time the Adminiſtrator's Authority is determined: But it was adjudged, that the Plaintiff

Plaintiff need not ſet forth that Matter; firſt, becauſe the Plaintiff is a Stranger to the Defendant's Power. Secondly, the Defendant, by joining Iſſue, hath admitted that his Power doth continue [f].

[f] T. 6 Jac. B. R. *Croft* and *Walbank*'s Caſe, Yelv. Rep. 128.

An Account brought by an Adminiſtrator *durante minori ætate*, againſt the Defendant, as Bailiff of ſuch a Manor; it was found for the Plaintiff. It was moved in Stay of Judgment, that it is not ſhewed that the Executor (the Infant) was within the Age of ſeventeen Years; and it might be, that he was above the Age of Seventeen, and yet under Age. *Per Curiam*, It ſhall not be intended, unleſs it be ſhewed, that he was above ſeventeen Years; eſpecially, when the Defendant hath admitted him to bring the Action, and had pleaded to Iſſue [g].

[g] M. 7 Car. *Wells* verſ. *Some*. Croke, part 1. fol. 240.

Moſt of the Reſolutions before the Statute for ſettling Inteſtates Eſtates are, that if it appear on the Pleadings, that the Adminiſtrator was more than * ſeventeen Years old; in ſuch Caſe the Adminiſtration is determined.

* 1 Vernon 326.

Major verſus *Peck*, 1 Lutw. 338.

The Adminiſtrator *de Bonis non, &c. durante minori ætate* of *Rebecca Wood*, brought an Action of Covenant againſt Husband and *Wife, who was Executrix of her firſt Husband*; and the Plaintiff averred that *ſhe was under Age*; the Defendant pleaded in Bar, that after the laſt Continuance the ſaid *Rebecca* came of Age, (*viz.* Twenty-one;) the Plaintiff demurred; but it was never argued, becauſe he could not maintain his Demurrer; for as ſoon as *Rebecca* came of Age the Action was determined.

Coke verſus *Hodges*, 1 Vern. 25.

An Adminiſtrator *durante minori ætate* of a young Woman exhibited a Bill in Equity, and an Account was decreed; afterwards ſhe married, and thereupon the Adminiſtration, during her Minority, was committed to her *Husband*, who exhibited a new Bill, to have the Benefit of the former Proceedings; to which the Defendant demurred; and the Queſtion was, whether this ſecond Adminiſtrator could carry on the Account; it was objected he could not, becauſe ſuch an Adminiſtrator could not at Law take out an Execution upon a Judgment obtained by the firſt Adminiſtrator; but decreed that the Defendant ſhould put in his Anſwer, and that Matter ſhould be ſaved at the Hearing the Cauſe.

An Infant Executor cannot *releaſe* or diſcharge a Bond, without receiving the Money due thereupon. Firſt, Becauſe it will be a *Devaſtavit*, and charge the Infant Executor *de bonis propriis*. Secondly, It would be a Wrong, which an Infant by his Releaſe cannot do: And thirdly, Becauſe it is not purſuant to the Office of an Executor; but all Acts and Things which he legally doth according to his Office and Duty of an Executor, ſhall bind him [h]. But if upon a ſingle Bond or Obligation, the Infant receive the Money, and make an Acquittance or Releaſe, *per Curiam*, it is good, and the Infant ſhould be bound thereby.

[h] H. 21 Eliz. B. R. *Ruſſel*'s Caſ. Anderſ. Rep. 117. Moor's Rep. fol. 146. 5 Rep. 27. See *Kniveton* v. *Latham* hic.

A Guardian recovered in Debt upon an Obligation made to an Infant; the Defendant paid the Principal and Coſts, and prays, that the Guardian be ordered to acknowledge Satisfaction: The Court ſaid, that a Guardian, or Infant, or Executor, may not acknowledge Satisfaction for more than they receive; and for ſo much they ordered the Guardian to acknowledge Satisfaction, and made an Order that no Execution ſhould iſſue out for the Reſidue [i].

[i] T. 14 Jac. B. R. *White* verſus *Hall*, Moor's Rep. fol. 852. n. 1163.

Infant Executor, the Adminiſtration was committed *durante minori ætate*, Debt was brought againſt the Adminiſtrator, the Infant cometh of full Age, and the Juſtices doubted much, if the Action did not abate [k].

[k] H. 39 Eliz. B. R. *Ford* verſus *Glanvil*, Moor's Rep. fol. 462. n. 648. Godb. 104.

But where ſuch an Adminiſtrator *is Plaintiff*, and had got Judgment againſt the Defendant, and had him in Execution; and afterwards the Infant Executor came of full Age; it was moved that the Defendant might be diſcharged, becauſe the Authority of the Adminiſtrator (at whoſe Suit he was in Execution) was now determined; and he could neither give Defendant a Diſcharge, nor acknowledge Satisfaction upon paying the Money; but the Court held that the Judgment and Execution were in Force, and that if the Defendant would be relieved, he muſt bring an *Audita Querela*; but my † Lord *Hale* was of Opinion, that if Execution had been taken out after the Infant Executor came of Age, it had been wrong.

Godb. 104.

† 2 Lev. 37.

If an Action be brought by an Adminiſtrator *durante minori ætate*, he muſt aver, that the Executor was ſtill within the Age of ſeventeen Years, otherwiſe it is an Error: But if an Action be brought againſt ſuch an Adminiſtrator, there need no ſuch Averment [l].

[l] H. 13 Jac. Rot. 678. *Carver* verſ. *Haſtlig*. Hob. Rep. fol. 251. Croke, part. 2. 12. C. lib. 5. fol. 59. *Piggot*'s Caſe.

Adminiſtration *durante minori ætate* of an Executor, is not within the Statute of 21 *Hen.* 8. to be granted of Neceſſity to the Widow of the Teſtator, becauſe there is an Executor all the while, otherwiſe, if the Executor were made from a Time to come [m].

[m] M. 15 Jac. *Briers* ver. *Goddard*, Hob. Rep. fol. 250. 1 Roll. Abr. 923. S. C.

Adminiſtratrix *durante minori ætate* of the Daughter Executrix, made divers Obligations unto the Creditors of the Teſtator, and after took Husband; the Court was of Opinion, that ſo much of the Goods of the Teſtator, as amounted unto the Value of the Debts paid, and undertaken by the Wife, the Husband might retain as his own. *Qu.* How the Caſe ſhall be, if the Wife die, for there the Husband is no longer chargeable [n].

[n] M. 15 Jac. *Brier's* Caſe. Hob. Rep ibid.

A. made his Will, and thereby ordered, that none ſhould have any Dealing with his Goods, until his Son came to the Age of eighteen Years except *I. S. Per Curiam*, *I. S.* was Executor during the Minority of the Son by this Will [o].

[o] M. 27 & 28 El. *Brightman* v. *Keighly*, Croke, part. 3. fol. 43. n. 3.

One makes an Infant his Executor, and dies, the Ordinary grants Adminiſtration to a Stranger, during the Infant's Minority; after, when the Infant came of full Age, he proved the Will: The Queſtion was, what Remedy the Infant ſhould have againſt the Adminiſtrator for the Goods, *viz.* Whether a Writ of Account, or Detinue, or have his Remedy againſt the Ordinary himſelf, to deliver him the Goods. *Per Curiam*, He cannot have Account, but a Detinue, or he may ſue in the *Eccleſiaſtical Court* for the Goods [p].

[p] 36 H. 8. Anderſ. Rep. c. 86.

Adminiſtrator *durante minori ætate* cannot be charged as *Executor de ſon tort*, where he waſtes the Goods, becauſe he had a lawful Authority to poſſeſs them; but when the Infant comes of Age, he may bring an Action of *Detinue* for the Goods in the Poſſeſſion of ſuch an Adminiſtrator; but the ſafeſt Way is to charge him upon the ſpecial Matter.

Palmer v. *Litherland*, Latch 160, 267. See *Brooking* v. *Jennings*, 1 Mod. 174. *Watſon* verſ. *Crofts*, Sid. 57.

Error of a Judgment in Debt upon an Obligation. The Error aſſigned was, becauſe the Plaintiff ſues *by Attorney*, where he was an *Infant*, and ought to ſue by *Guardian*; but becauſe the Action was brought by him, as Adminiſtrator; ſo that he ſued *in auter droit*; *Infancy* is no Impediment unto him, no more *Outlawry*; and therefore he might well ſue by Attorney, and the firſt Judgment was af-

firmed [q]; but if he is ſued, he muſt appear by *Guardian*. *Preſcot* verſus *Cotton*, *Poph.* 130.

[q] T. 38 Eliz. Rot. 145. *Bade* v. *Starkey*, Croke, part 3. fol. 541. H. 37 Eliz. Rot. 251. *Bartholomew* verſus *Dighton*, Croke, part. 3. fol. 424. *denied to be Law.*

Foxniſt v. *Tremain*, 1 Mod. 47. 2 Saund. 112. S.C. 1 Lev. 229. S.C. 1 Sid. 449. S.C. 1 Vent. 102. S. C.

There were two Executors, and one of them was an Infant, and whether he muſt be joined in the Action with the other as Plaintiff, was the Queſtion; it was objected that he muſt not, becauſe an Infant cannot make a Warrant of Attorney; and if he could, he cannot inſtruct him: Adjudged they may both ſue *per Attornatum*, becauſe they both repreſent the Perſon of the Teſtator, and ſue in the Right of another, and therefore the Infant muſt be joined with the other.

[r] Mod. 297. Raym. 198. 1 Lev. 181. S. C.

But where a Judgment was obtained by the Teſtator, the *Scire facias* may be brought by that Executor alone who was of full Age; as where the Wife and an Infant were made Executors, and the Wife proved the Will, with a *Reſervata poteſtate* to the Infant when of Age, and brought a *Scire facias* upon the Judgment, ſetting forth the whole Matter, and that another who was an Infant was likewiſe Executor; this was held good, becauſe the Infant could not prove the Will; and it would be inconvenient that the Judgment ſhould be ſuſpended till he came of Age.

Debt as Adminiſtrator to *A. L. durante minori ætate* of *W. L.* the Executor, upon an Obligation, and avers that *W. L.* was within the Age of Twenty-one Years; the Defendant pleaded an ill Bar; and it was thereupon demurred: But becauſe the Court was reſolved upon Conference with divers Civilians openly in Court, That the Power of an Adminiſtrator *durante minori ætate*, doth ceaſe at the Executor's Age of *Seventeen Years*; and that Adminiſtration committed after that Age of the Executor, is meerly void. And notwithſtanding this Averment here, the Executor might be above the Age of Seventeen Years; and within the Age of Twenty-one. It was adjudged, *quod querens nil caperet, &c* [r].

[r] H. 40 Eliz. *Piggot* ver. *Gaſcoyn*, Croke, part. 3. fol. 602. C. lib. 5. fol. 29. 1 Brownl. 46. S. C.

An Adminiſtrator *durante minori ætate* of an Executor, cannot grant a Term of Years, during the Minority of the Executor: For ſuch an Adminiſtrator hath but a ſpecial Property *ad commodum executoris*, and not a general Property, as another Executor or Adminiſtrator hath, and therefore his Sale of Goods, except they be *bona peritura*, or it be for Neceſſity of Payment of Debts, which he is chargeable to pay, ſhall not bind: But he may ſue and be ſued, and yet his Authority is but a limited Authority. And therefore like as if Letters *ad colligendum bona defuncti* were granted to one, then he may ſell *bona peritura*, as Fruit, or the like. It was doubted, whether ſuch an Adminiſtrator *durante minori ætate* might aſſent to a Legacy, or the Executor during his Minority. *Per Anderſon*, An Executor of the Age of Eighteen Years may aſſent; but whether the Aſſent of an Adminiſtrator *durante minori ætate* be good, he doubted [s].

He cannot aſſent to any Legacy, except there be Aſſets to pay Debts.

[s] H. 41 Eliz. Rot. 1097. *Price* verſus *Simpſon*, Croke, part. 3. fol. 718. vid. lib. 5. fol. 29. b. 2 And. 132. S. C.

Debt upon an Obligation made to the Teſtator, the Defendant pleaded a Releaſe made by one of the Plaintiffs, the Plaintiff replies, That this Releaſe was made without any Conſideration; and he who releaſed, was within Age at the Time of the Releaſe made. It was there-

thereupon demurred; and adjudged for the Plaintiff, That it was a void Releaſe, being by an Infant without Conſideration [t].

[t] P. 40 Eliz. Rot. 1945. *Knot & Knot* Executors verſus *Barlow*, Croke, part. 3. fol. 671. lib. 5. fol. 27. *Ruſſel*'s Caſe.

And yet it hath been held that an Infant may be made Executor, and may give Releaſes and Acquittances concerning his Executorſhip, and may ſell the Goods of the Teſtator, but then ſuch Releaſe muſt be for a true and real Satisfaction made, otherwiſe 'tis void; but the Sale is good, becauſe he is bound to pay the Debts of the Teſtator; and tho' ſold under Value, yet it ſhall bind him notwithſtanding his Nonage.

Manning's Caſe, 1 Leon. 143. 4 Leon. 210.

B. makes *Katherine* his Wife, and *John* his Son (aged one Year) his Executors, *K.* proves the Will alone, and marries the Plaintiff, and they (without the Son) bring Action of Debt, as Executors, againſt the Defendant, who pleaded in Abatement of the Writ, That *John* was made Executor with *Katherine*, and that he was yet alive, and not named, *&c.* The Plaintiff replied, That *John* was not above one Year of Age, that *Katherine* had proved the Will, and had Adminiſtration committed to her, during his Minority, *&c.* Whereupon *Yelverton* demurred; and adjudged for the Defendant, *Quod billa caſſetur.* For that they are both Executors, and ought to be named in the Action [u].

[u] T. 6 Jac. B. R. *Smith* and *Smith*'s Caſe, Yelv. Rep. f. 60, 130. 1 Brownl. 101. S. C.

Debt by Executors upon an Obligation made to their Teſtator for Payment of Fifty-two Pounds; the Defendant pleaded, That he paid the Fifty-two Pounds to one of the Executors in Satisfaction of the ſaid Debt, and all Intereſt and Damages upon it; who thereupon *releaſed* to him the ſaid Obligation. The Plaintiff replied, That the Executor who releaſed was within Age: *Per Curiam*, this Releaſe by an Infant ſhall not bar, becauſe the Infant being Executor, by Courſe of Law is to have the Benefit of the Forfeiture of the Bond, and the intire Sum in the Bond is a Debt due to the Executor; and the Infant being but one of the Executors, takes Part of the Money only (although it be all which was due in Conſcience) yet this Releaſe ſhall not bar him; but if he will take all the Money, and make a Releaſe, this is good: And if he will have Remedy, he muſt have it in a Court of Equity, and cannot plead this Releaſe in Bar at Common Law. Judgment for the Plaintiff accordingly [x].

[x] M. 13 Car. B. R. *Kniveton* v. *Latham*, Croke, part. 1. fol. 490.

Debt againſt an Executor upon an Obligation of the Teſtator, the Defendant pleaded, that the Teſtator made him Executor until *I. S.* ſhould come to the Age of Twenty-one Years, and in the mean Time keep all his Goods for him, and then deliver them unto him; and the ſaid *I. S.* then to be Executor, and ſhewed, that before the Action, *I. S.* attained the Age of Twenty-one Years, and he delivered the Goods to him, which he accepted; it was debated by the Court, that if the firſt Executor waſted the Goods, how the Creditor ſhould relieve himſelf for thoſe Goods, the new Executor taking upon him the Executorſhip. It was argued, that the old Executor did remain Executor, as to have an Action againſt them, for againſt the Vendees they can have no Remedy [y].

[y] T. 17 Jac. C. B. *Chandler* v. *Thompſon*, Hob. Rep. fol. 265. 1 Roll. Abr. 265. S. C.

If an *Infant* be made Executor, Adminiſtration *durante minori ætate* may be committed to the Mother; but ſuch an Adminiſtrator cannot ſell the Goods of the Teſtator, except it be for Neceſſity of Payment of Debts, becauſe he hath the Office *pro commodo Infantis*, and not to his Prejudice [z].

[z] M. 1655. *Ingram* ver. *Fawſcot*, Style's Rep. fol. 463.

And

Seth verſus *Seth*, 1 Rol. Abr. 910.

And yet he may bring an Action of Trover for the Goods of the Teſtator, for he hath not only the bare Cuſtody, but likewiſe the Property of ſuch Goods.

Prince verſ. *Simpſon*, antea.

But this muſt not be intended an abſolute, but only a ſpecial Property; for it hath been held, that he cannot ſell Leaſes which were deviſed to an Infant Executor, without ſome reaſonable Cauſe; as where there were no other Goods to pay the Teſtator's Debts; and the Reaſon is, becauſe he hath only a ſpecial Property *pro proficuo Executoris*, but he may ſell fat Cattle, becauſe thoſe are *Bona peritura.*

Miller verſus *Gore*, Godb. 104.

He cannot be ſued upon a Bond entered into by the Teſtator, becauſe he hath no Intereſt in his Eſtate.

There are three Kinds of temporary Adminiſtrations. *Gibſon's Codex Juris Eccleſiaſtici Anglicani, page* 574.

1. An Adminiſtration *durante minori ætate.*
2. ——— ——— *durante abſentiâ* of the next of Kin beyond Sea.
3. ——— ——— *pendente lite.*

An Adminiſtrator *durante minori ætate* may maintain an Action for a Debt due to the Deceaſed, making a proper Averment, that the Executor is under ſeventeen. 5 *Rep.* 29. *Pigot's* Caſe. *Hob.* 251. *Carver* v. *Haſlerig.* 1 *Roll. Abr.* 888. *Wright's* Caſe; and 2 *Brownl.* 83. *Skin. Rep.* 156.

As to granting Adminiſtration *durante abſentiâ* of the next of Kin beyond Sea, *vide* 1 *Lutw.* 342. & 4 *Mod.* 14. *Clare* v. *Hodge.* 1 *Lutw.* 242. Such Adminiſtrator may bring an Action. 1 *Salk.* 42. *Slaughter* v. *May.* But he ought to aver the Abſence. *Ibid.*

An Adminiſtrator *pendente lite* in the Spiritual Court touching the Executorſhip may bring an Action. 1 *Salk.* 42. *Slaughter* v. *May. Sed vide Moor* 636. *Robins* Caſe, and 2 *Williams* 585.

Adminiſtration *quoad* a Bond *pendente lite* concerning a Will, and Adminiſtration *pendente lite* concerning a Right of Adminiſtration. *Carthew's Rep.* 153. 2 *Williams* 585, 586.

If an Executor afterwards becomes Lunatic, and thereby diſabled from acting, there, for Neceſſity's Sake, the Ordinary may grant a temporary Adminiſtration, with the Will annexed; but not if the Executor become Bankrupt. 1 *Williams* 581.

All theſe temporary Adminiſtrations are equally out of the Statute 31 *Ed.* 3. *c.* 11. And in ſuch Adminiſtrations the Ordinary is not bound to grant to the next of Kin. *Hob.* 250. *Bryers* v. *Goddard*, and 1 *Vent.* 219. *Thomas* v. *Butler.*

Iſrael Woollaſton as Adminiſtrator *de bonis Nathaniel Clerk non adminiſtrat'* by *Frances* his late Wife and Executrix, *pendente lite* in the Spiritual Court, touching the Will of the ſaid *Frances*, recovered Judgment in *C. B.* for 52 *l.* Damages *ſur aſſumpſit.*

Error brought in *B. R.*

Raymond C. J. *Page* and *Probyn* Juſtices, were of Opinion for affirming the Judgment; and that the Ordinary had a Power to grant Adminiſtration *pendente lite*, tho' touching an Executorſhip; that the Reaſon of the Ordinary's having a Power to grant Adminiſtration *durante minori ætate* of an Executor, was, becauſe during the Infancy of the Executor there was a Perſon capable of ſuing or recovering the Debts of the Deceaſed; that *pendente lite* there being no Executor that can ſue, ſuch Caſe is within the ſame Miſchief, which would be attended with great Inconveniencies; that the Caſe of an Adminiſtrator du-

ring the Abſence of the Executor is ſtronger, there being an Executor capable of acting, who might by Commiſſion prove the Will, and ſue by Attorney; that all theſe temporary Adminiſtrations, though out of the Statutes of *Ed.* 3. and *H.* 8. were yet allowed to be within the Equity of thoſe Statutes, for the Eaſe and Convenience of the Subject, which ought to be conſidered; that in the Caſes cited from *Moor* and *Carthew* [*ſupra*] there was no Judgment, and the Reaſon given in the latter of theſe Books did not maintain the Opinion.

But *Lee* J. doubted; for he ſaid, an Adminiſtration *pendente lite* touching the Executorſhip ſeemed to differ from Adminiſtrations *durante minori ætate*, or *durante abſentia* of an Executor; becauſe in the two laſt Caſes the Adminiſtrations were granted *cum teſtamento annexo*, which cannot be done when the Will is in Controverſy; & *adjourn'*. But Judgment was afterwards affirmed with the Concurrence of Mr. Juſtice *Lee*. *Walker* v. *Woolaſton*, 2 *Williams* 576 *to* 590.

§. XXIII. Who ſhall be ſaid to be an Executor of his own Wrong; and what Act ſhall make him ſo.

AN Executor of his own Wrong, is he that takes upon him the Office of an Executor by Intruſion, not being ſo conſtituted by the Deceaſed, nor for Want of ſuch Conſtitution, ſubſtituted by the Court to adminiſter. And therefore, if a Man dieth Inteſtate, and a ſtrange Perſon takes the Goods of the Inteſtate, and uſe or ſell them; this makes him an Executor of his own Wrong[a]. And thoſe to whom the Inteſtate was indebted, have no other Remedy for the Recovery of their Debts, but to charge him as Executor *de ſon tort*. But when an Executor is made, and he proves the Teſtament, and aſſumes the Charge of the Will, and adminiſters: In this Caſe, if a Stranger takes any of the Goods, and claims them as his proper Goods, and uſes and diſpoſes of them as his proper Goods; this doth not make him an Executor of his own Wrong, becauſe there is a rightful Executor, againſt whom an Action lieth: And thoſe Goods which are ſo taken out of his Poſſeſſion, after that he hath adminiſtred, ſhall be Aſſets in his Hands. And though there be an Executor which doth adminiſter, yet if a Stranger taketh the Goods, and claims to be Executor, pays, and receives Debts, or pays Legacies, and intermeddles as Executor; in this Caſe, by ſuch expreſs Adminiſtration as Executor, he may be charged as Executor of his own Wrong, although there be another Executor *de droit*[b]. And by this Means he makes himſelf chargeable to all Suits by the rightful Executor, and to the Creditors and Legatees of the Teſtator, ſo far as the Goods which he wrongfully poſſeſſed did amount unto.

[a] T. 2 Jac. C. B. *Read*'s Caſe, Co. lib. 5. fol. 33. Coke, lib. intr. 144. S. C.

[b] C. lib. 5. fol. 34. 9 Ed. 4. 13.

When a Stranger takes the Goods before the rightful Executor had aſſumed upon him, or proved the Teſtament; in this Caſe he may be charged as Executor *de ſon tort*: For the rightful Executor ſhall not be charged, but with the Goods which come into his Hands, after that he aſſumed the Charge of the Will[c].

[c] Lib. 5. ibidem.

The Wife, who was Executrix to her Husband, made a fraudulent Gift of his Goods, but kept them ſtill in her own Poſſeſſion; afterwards ſhe married a ſecond Husband and died; and an Action being brought againſt him, upon *Plene adminiſtravit* pleaded, it was adjudged

Wilcox verſ. *Watſon*, Cro. Eliz. 405. Moor 396.

judged againſt him; becauſe the Gift being fraudulent, the Property of the Goods ſtill remained in his Wife, and he having *paid Legacies* ſince her Death, made himſelf *Executor de ſon tort*, and ſo is liable to the Action.

[d] M. 40, 41 Eliz. B. R. *Coulter*'s Caſe, tit. 5. fol. 30. b. Cro. Eliz. 530. S. C. Moor 527. S. C.

He that takes the Goods of the Deceaſed, to ſatisfy his own Debt or Legacy, is chargeable as Executor of his own Wrong [d]; an Executor *de ſon tort* cannot retain, to ſatisfy his own Debt [e]; for great Inconvenience would inſue thereupon: For every Creditor, (and eſpecially when the Goods of the Deceaſed are not ſufficient to ſatisfy all the Creditors) would contend to make himſelf Executor of his own Wrong, to the Intent to ſatisfy himſelf by Retainer; by which Means others would be barred; and it is not reaſonable that any ſhould take Advantage of their own *Tort*: But all legal Acts which an Executor of his own Wrong doth, are good.

[e] M. 6 Jac. *Alexander* verſus *Lamb*, Brownl. p. 1. fol. 103. Yelv. 137. S. C. M. 11 Jac. C. B. *Bond* and *Green*'s Caſe, Godbolt, fol. 217. Moor's Rep. n. 696. *Ireland*'s Caſe.

Atkinſon v. *Rawſon*, 1 Mod. 208.

In an Action againſt the Defendant *T. S.* as Executor, he pleaded that *E. G.* made a Will, and that he (the Defendant), *ſuſcepto ſuper ſe onere teſtamenti*, did pay ſeveral Sums due on Specialties, and that the Teſtator owed ſo much to this Defendant's Wife, and that he retained ſo much of his (the Teſtator's Goods) to ſatisfy that Debt, and had not Aſſets *ultra*; and upon a Demurrer to this Plea, it was adjudged ill, becauſe for any Thing appearing to the contrary, the Defendant might be *Executor de ſon tort*, and if ſo, he cannot *retain*.

If a Wife named Executrix, or not Executrix, take more Apparel of her own than is neceſſary, and convenient for her Degree; this is an Adminiſtration: But if by the Aſſent or Delivery of the Executor, it is not [f].

[f] 33 H. 6. fol. 31. Office of Executor, c. 3. 1 Eliz. Dyer 167. *Porter*'s Caſe, Brook, tit. Adminiſtr. p. 6.

If one do either pay Debts of the Teſtator's, or receive Debts, or make Acquittances for them, or demand the Teſtator's Debts as Executor, or give away Goods which were the Teſtator's, or deliver Money of the Teſtator's for Fees about proving the Will, or being ſued as Executor, do take it upon him, and plead in Bar as an Executor. All theſe are Adminiſtrations, and will make him Executor of his own Wrong; although there be an Executor or Adminiſtrator of Right: But if he pays Fees or Debts only with his own Money, he he is not.

But obſerve, That if one hath Poſſeſſion of Goods as Overſeer, or by Letters *ad colligendum*, or by Will, which is revoked, or by Reaſon of Expences *circa funeralia*; or if a *Feme Covert* refuſe after the Death of her Husband: All theſe, where an Action is brought againſt them, ought to plead the Special Matter, without that, that they adminiſtred in any other Manner; but he which claimeh an Intereſt, ought to conclude *abſque hoc, quia ut Executor* [g].

[g] 33 H. 6. 31. Dyer, fol. 167. 21 Ed. 4. fol. 5.

If the Biſhop grant to *B. literas ad colligendum, & ad vendendum ea quæ peritura eſſent & compotum inde, &c.* He to whom the Letters are granted, ſells the Goods of the Inteſtate *quæ eſſent peritura*. He is Executor of his own Wrong [h].

[h] 9 Eliz. Dyer, fol. 256.

If a Man make a Deed of Gift of all his Goods and Chattels to another, and dieth Inteſtate; and this Deed is fraudulent, or but in Truſt, and the Donee after the Death of the Donor doth diſpoſe of theſe Goods and Chattels. By theſe Means he ſhall be an Executor of his own Wrong [i].

[i] Goldsb. fol. 116. n. 12. Brownl. p. 1. fol. 384, 385. M. 36, 37 Eliz. Rot. 1028. *Kitchin* verſ. *Dixon*. Noy 69. S. C.

Where a Man is Executor of his own Wrong, though Adminiſtration be committed to him afterwards, or to a Stranger; yet the *Tort* is not purged, but he may be charged as Executor of his own Wrong, becauſe he hath once ſubjected himſelf to an Action; and therefore ſhall not diſcharge himſelf by Matter *Ex poſt facto* [k].

[k] P. 39 Eliz. C. B. *Bradbury* v. *Reynel*, Croke, part. 3. fol. 565. 21 Hen. 6. 8. 9 Ed. 4. 47. 2 R. 3. fol. 20. Kelw. 59.

An Executor of his own Wrong may be ſued for Legacies, as well as a rightful Executor; *per Popham* and *Yelverton*; but *Williams* doubted of it [l].

[l] Noy's Rep. fol. 13.

A Woman Executor took a Husband; afterwards they are divorced *cauſa præcontractus*; the Woman appealed to the Court of *Delegates*, pending which Appeal, the Husband did intermeddle with the Goods, and afterwards the Wife died. It is a *Quære*, 2 *Mar. Dy. fol.* 105. If this Intermeddling ſhall make him an Executor of his own Wrong. See *Lib.* 5. *Coulter*'s Caſe. That it is an Adminiſtration; for the very Intermeddling with the Goods, is that which gives Notice to the Creditors, againſt whom to bring their Action [m].

[m] 2 Mar. Dyer, lib. 5. *Coulter*'s Caſe.

Executor de ſon tort cannot bring an Action, becauſe he cannot produce any Will to ſupport it, but he will be ſeverely puniſhed for a falſe Plea; as for Inſtance; if he plead *Ne unques Executor*, and 'tis found againſt him, the Execution ſhall be awarded for the whole Debt, though he meddle with a Thing of a ſmall Value.

Debt brought againſt *B.* as Executor of his own Wrong; he pleaded *Ne unques Executor*, and it was found againſt him, and Execution was awarded againſt him for the whole Debt, *viz.* Sixty Pounds for his falſe Plea, although, in Truth, he had not intermeddled, but with one Bedſtead of ſmall Value; and it was ſaid ſo to be adjudged 40 *Eliz. C. B.* in *Kitchin* and *Dixon*'s Caſe [n].

[n] Noy's Rep. fol. 69. Gouldſ. 116. S. C.

The Executor of his own Wrong renders himſelf liable to the Action, not only of the right Executor, but alſo to the Suits of the Teſtator's Creditors; yet but only ſo far as the Goods which he ſo wrongfully adminiſtred amount unto [o].

[o] 6 H. 8. Dyer, fol. 2. T. 20 H. 7. Kelw. f. 63. M. 3 Car. B. R. *Whitmore* v. *Porter*, Croke, part. 1. 89.

If a Man perform only Acts of Charity or Humanity, as to bury the Body of the Teſtator, or feed his Cattle, or preſerve them by Taking them into his Cuſtody, or diſpoſe of them only about the Funerals, or make an Inventory thereof; he doth not hereby make himſelf an Executor of his own Wrong, when there is an Executor or Adminiſtrator of Right [p].

[p] T. 20 H. 7. Kelw. fol. 63. Brook, tit. Adminiſtr. n. 6. 28.

If a Man lodge in my Houſe, and die there, leaving Goods therein behind him, I may keep them till I be lawfully diſcharged of them, without making my ſelf chargeable as Executor of my own Wrong; for it will no more charge me, than if I took an Inventory of the Deceaſed's Goods [q].

[q] Kelw. fol. 63.

E. P. is charged as Executrix *de ſon tort* Demeſne ſhe having taken divers Goods into her Hands to the Value of 400 *l.* and ſold them by the Aſſent and Direction of *I. P.* her Son, who afterwards taking out Letters of Adminiſtration, paid the juſt Debts upon Specialties, as far as the Goods of the Inteſtate amounted unto, as well to the Value of the ſaid 400 *l.* ſold by his Mother, as of all the Goods, whereof the Inteſtate died poſſeſſed; the Defendant pleads *Plene adminiſtravit.*

Whitmore v. *Porter*, Cro. Car. 88.

vit. The Queſtion was, whether *E. P.* ſhould be charged as Executor of her own Wrong; and adjudged that ſhe ſhould not be charged, but that the Plaintiff ſhall be barred: For the Action being brought after the Adminiſtration committed, and when ſhe was chargeable for thoſe Goods to the Adminiſtrator, and when the Adminiſtrator hath fully ſatisfied in paying the Debts of the Inteſtate, as far as the Goods of the Inteſtate amounted unto; it is not Reaſon ſhe ſhould be charged by the Plaintiff, for then ſhe ſhould be double charged, *viz.* To the Adminiſtrator, and to the Creditors; neither is it Reaſon, That more ſhould be ſatisfied out of the Goods of the Inteſtate to the Creditors, than ſuch Goods amounted unto, and ſo much being paid, they ought not to have more; but if the Action had been brought againſt her before the Adminiſtrator had fully adminiſtered, it might have been otherwiſe.

1 Vent. 349. In the Caſe laſt mentioned, the Court would not allow that an Executor *de ſon tort* ſhould be doubly charged, once at the Suit of a Creditor, and again at the Suit of the rightful Adminiſtrator; but this was againſt the Opinion of the Chief Juſtice *North: ff.* An Executor *de ſon tort* poſſeſſed himſelf of the Goods, *&c.* a Creditor of the Inteſtate got Judgment againſt him, and took the Goods in Execution, againſt whom the rightful Adminiſtrator brought an Action of Trover for the ſame Goods: And adjudged that the ſaid Execution did not diſcharge him of the Action of Trover: It might be a good Diſcharge againſt any other Creditor of the Inteſtate, and he might plead *Riens inter manes*, but not againſt *the rightful Adminiſtrator*; for Men muſt not meddle with the perſonal Eſtate of others, without any Right.

Baker verſ. *Beriſford*, 1 Sid. 76. 1 Lev. 154. S. C. Raym. 58. S. C. But where an Executor *de ſon tort* poſſeſſed himſelf of a *Term for Years*, and afterwards died Inteſtate, and his Mother who was a Widow married again, and took out Adminiſtration to her Son the Inteſtate, and her Husband paid the Debts of the firſt Inteſtate to the Value of the Term: It was adjudged, that by her Adminiſtration the *Tort* was purged, and that if Actions ſhould be brought againſt the Husband, he might plead *Plene adminiſtravit*, becauſe even an *Executor de ſon tort* may lawfully pay the Creditors of the Inteſtate.

Williamſon v. *Norwich*, Style 337. 1 Roll. Abr. 923. S. C. *Debt* was brought againſt an *Executor de ſon tort* upon a Contract of the Inteſtate, and pending the Action he took out [r] Adminiſtration, and then pleaded the ſaid Inteſtate was indebted to him in 50*l.* upon a Bond, and that he adminiſtered, and by Virtue thereof did *retain Goods* to that Value, *ultra quod* he had *nulla Bona* of the Inteſtate; and upon a Demurrer this was adjudged a good Plea, becauſe the Adminiſtration granted, though *pendente lite*, had purged the Wrong, and he ſhall retain Goods to ſatisfy a Bond-debt, becauſe he is obliged to pay a Debt upon a Contract.

[r] *The Law is clear, that an* Executor de ſon tort *cannot* retain *without ſuch a ſubſequent Adminiſtration, becauſe he did not come to the Poſſeſſion by due Courſe of Law, or by the Act of any Court, but meerly by his own wrongful Act.* See *Alexander* v. *Lamb.*

Pyne verſ. *Woolland*, 2 Vent. 179. But though an Adminiſtration granted *pendente lite* will enable an *Executor de ſon tort* to *retain* for a Debt due to himſelf; yet it will not *abate* an Action brought againſt him, for if he converts the Goods, and then takes out Adminiſtration, though before the Writ, yet the Plaintiff may charge him in an Action as *Executor de ſon tort*; and in ſuch Caſe he may be ſued, either as *Executor de ſon tort*, or as Adminiſtrator.

See *Bond* v. *Green*, and *Stubbs* v. *Rightwiſe*, Cro. Eliz. 102. and *Bethel* v. *Stanhope*, Cro. Eliz. 810.

Debt againſt an Executrix, who pleaded that her Husband died Inteſtate, and that Adminiſtration was granted to her, *cujus prætextu* ſhe adminiſtered the Goods of her Husband; and upon a Demurrer to this Plea it was inſiſted, that ſhe ought to have *traverſed* that ſhe was Executrix, or that ſhe ever adminiſtered as Executrix; but adjudged that the Plea was good *without ſuch Traverſe*; it is true, if the Plaintiff had replied that ſhe had adminiſtered *de ſon tort*, and then the Defendant had demurred to the Replication, ſhe had confeſſed it to be true by the Demurrer; and then the Action might have been brought againſt her, either as *Executrix de ſon tort*, or as *Adminiſtratrix*, though ſhe was neither at that Time, but had obtained Adminiſtration afterwards; but by her Plea ſhe admitted that ſhe was chargeable as to the *Right*, but ought to be charged in another Manner, and ſhews how, (*viz.*) as Adminiſtratrix, which is a full Anſwer to the Declaration, though he cannot bring an Action as is before-mentioned, yet there are ſeveral Acts which he may lawfully do; as he may pay any of the Debts of the Inteſtate, but not himſelf, and he ſhall be allowed all ſuch Payments which the rightful Executor ought to pay.

Bowers verſus *Cook*, 5 Mod. 136. 1 Salk. 298. S. C. By the Name of *Powers* v. *Clerke*.

Ayres verſus *Ayres*, 2 Chanc. Rep. 33.

There may be an *Executor de ſon tort* of a *Term for Years*, and he is puniſhable in an Action of *Waſte*, for there being a lawful Term in Being, the Reverſioner cannot maintain an Action of Treſpaſs ſo long as the Term continues; and therefore it is reaſonable that he ſhould have a Remedy upon the *Contract* againſt any one who claims upon ſuch Contract.

Mayor of Norwich v. *Johnſon*, 3 Lev. 35. 3 Mod. 90. S. C. Shower 242. S. C.

An Executor *waſted* the Goods of his Teſtator, and died, leaving Aſſets, having made *T. S.* his Executor, againſt whom an Action was brought upon ſuggeſting of a *Devaſtavit*; but the Lord Chief Juſtice *Hale* was clear of Opinion, that he was not chargeable, becauſe it was a *perſonal Tort* in the firſt Executor, which died with him.

Brown verſ. *Collins*, 2 Lev. 110.

But where the firſt Executor poſſeſſes Goods wrongfully as *Executor de ſon tort*, and then *waſtes* them and dies, leaving Aſſets; the Chief Baron *Turner* held, that his Executor was liable, becauſe his Teſtator came wrongfully by the Goods; and therefore the *Tort* in waſting ſhall not die with his Perſon.

Aſtry verſus *Nevitt*, 2 Lev. 133.

And ſo it was decreed in Chancery, (*viz.*) An Executor committed *Waſte*, and died, leaving Aſſets; it was decreed that his Executor ſhould be liable to make good the *Quantum* of the *Devaſtavit* to the Creditors, ſo far as he had Aſſets of the firſt Executor, who waſted.

Chamberlaine verſus *Chamberlaine*, 1 Ch. Rep. 257.

But now by the Statute 30 *Car.* 2. it is enacted, that if an *Executor de ſon tort waſtes the Goods, and dies, his Executor ſhall be liable in the ſame Manner as the Teſtator would have been if he had been living.*

30 Car. 2. cap. 7. made perpetual by the Statute 4 & 5 Will. cap. 24.

In a Special Verdict in Trover for a Gelding, the Caſe was, *T. S.* was poſſeſſed, *&c.* which he put to the Defendant to paſture, and afterwards died Inteſtate, and *before Adminiſtration was granted* to any one, the Plaintiff, at the Deſire of the Defendant, buried him, and laid out above 20 *l.* in the Funeral; whereupon the Plaintiff agreed that the Defendant ſhould have the Horſe at 10 *l.* and that the Plaintiff would give him a Note under his Hand to pay what was due more; afterwards the Plaintiff adminiſtered, and then brought an Action of Trover for this Gelding; and the Chief Juſtice *Holt* held, that

Whitehall v *Squire*, 1 Salk. 295.

it would not lie, becauſe by meddling with the Gelding, the Defendant had made himſelf *Executor de ſon tort*; and though the Plaintiff conſented, that he (the Defendant) ſhould have the Horſe, yet it was before he adminiſtered, and by Conſequence before he could lawfully conſent; but Three Judges againſt him.

Debt againſt *A.* as Executor of *I. S.* he pleads, That he had taken Letters of Adminiſtration, Judgment of the Writ; the Plaintiff replied, That the Defendant adminiſtered *de ſon tort*, and after took Letters of Adminiſtration, *&c.* And upon this it was demurred. *Per Curiam*, After the Defendant by his *tortious* Adminiſtration hath given Advantage to be ſued as Executor, he cannot by his own Act purge himſelf of this *Tort*, and the Plaintiff hath Election to ſue him one Way or other; for he ſhall not take Advantage of his own *Tort* [s].

[s] T. 28 Eliz. Rot. 407. *Stubbs* v. *Rightwiſe*, Croke, part. 3. fol. 102.

If Judgment be given againſt an Executor upon Demurrer, and Execution be awarded, the Sheriff cannot return, *Nulla habet bona Teſtatoris*, but is to return a *Devaſtavit*; as if it had been found againſt the Executor by Verdict: For he hath charged himſelf by his own Plea [t].

[t] Ibid. Croke, part. 3.

Debt *verſus A.* as Executor; he pleaded *Ne unques Executor*, *&c.* And a Special Verdict found, that Adminiſtration of the Goods of the Teſtator was committed to the Wife of the Defendant, who is dead; and that he kept *bonam partem bonorum* in his Hands, and ſold them: *Williams* moved, That this Verdict was void for the Incertainty, for *bonam partem* is altogether uncertain; but it was held well enough. For if he detain any Part, it makes him Executor *de ſon tort*, *&c.* Wherefore it was adjudged for the Plaintiff [u].

[u] Anonymus, Croke, part. 3. fol. 472.

Leſſee for Years of a Reverſion, who dieth Inteſtate, his Wife aſſigned it by Parol to *A.* after the Wife took Letters of Adminiſtration, and made Aſſignment thereof to *K. Per Curiam*, The Sale before Adminiſtration was not good, becauſe it was a Reverſion, and no Entry could be made therein, nor can any Man therein be Executor of his own Wrong. But the laſt Aſſignment was good [x].

[x] P. 25 Eliz. B. R. inter *Kenruke & Burgeſs*, Moore's Rep. n. 273.

The Executor of *A.* brought Action of Debt againſt *B.* as Executor of *D.* upon a Bond; the Defendant pleaded that *D.* died Inteſtate, and that before the Writ brought, Adminiſtration of his Goods was committed to *N.* who adminiſtered, and yet doth; the Plaintiff replied, That *D.* died Inteſtate, and before the Adminiſtration granted, divers Goods of his came to the Defendant's Hands, which the Defendant, as Executor of the ſaid *D.* adminiſtered, *ſeu aliter ad ſuum proprium uſum diſpoſuit*; it was found for the Plaintiff: For ſince there was an Executor of his own Wrong before the Adminiſtration granted, the Plaintiff had Cauſe of Action veſted in him, which ſhall not be taken away by ſuch an Adminiſtration after granted; though it be before the Action brought: And the rather, becauſe the Goods taken *by Wrong* before the Adminiſtration, ſhall not be Aſſets in the Hands of the Adminiſtrator, till they be recovered, or Damages for them [y].

[y] T. 12 Jac. C. B. *Keble* verſ. *Osbaſton*, Hob. Rep. fol. 49.

If the Ordinary take Goods of the Inteſtate, being out of his Dioceſe. He is not to be charged as Ordinary, within the Statute of *W.* 2. *c.* 19. becauſe he took them of his own Wrong [z].

[z] 12 Rich. 2. Adminiſtr. 21. Inſtit. part. 2. fol. 398.

§. XXIV. Of thoſe Things which do appertain to the Appearance of the Teſtament.

1. *Every Teſtament is to be proved by Witneſſes, or by Writing.*
2. *Two Witneſſes needful, and Two ſufficient.*
3. *What if the Witneſſes be not free from all Exception, whether doth the Number ſupply the Defect?*
4. *Sometimes one Witneſs is ſufficient.*
5. *Every one may be a Witneſs, which is not forbidden.*
6. *Three eſpecial Cauſes, which do miniſter Exceptions againſt Witneſſes.*
7. *Who are excluded for their Diſhoneſty.*
8. *All Malefactors are not repelled from Witneſſing.*
9. *Who are excluded for Want of Judgment, and how long.*
10. *Who are excluded for Affection, and how far.*
11. *Whether a Legatary may be a Witneſs.*
12. *Whether a Woman may be a Witneſs.*
13. *Whether a poor Man may be a Witneſs.*

HAving ſpoken of the *general internal Form*, common to every *Teſtament*, that is to ſay, of the Making an Executor: Now let us return to the *general external Form*, that is to ſay, the Form whereby every *Teſtament* may lawfully appear.

Wherefore (1) that Wills and Teſtaments may lawfully appear, it is requiſite that there be ſufficient Proof, either by *Witneſs*, or by *Writing* [a].

[a] Maſcard. Tract. de probat. verb. Teſtamentum, alioquin præſumi quemlibet ab inteſtato deceſſiſſe confirmat. Mantic. de conject. ult. vol. lib. 2. tit. 1.

Of Proof by Writing, it followeth afterwards in the Handling of the particular Form of written Teſtaments [b].

[b] Infra eadem part. §. 25.

Concerning Proof to be made by Witneſſes, Two Things are eſpecially to be examined. Firſt, *How many Witneſſes* are required for the full Proof of a Teſtament or Laſt Will: Secondly, *What Manner of Perſons* may be received for Witneſſes.

For the *Number*, By (2) the Laws and Cuſtoms of this Realm, Two Witneſſes are needful [c]; and again, Two are ſufficient [d]. So that as it is not neceſſary to have any more than Two, ſo it is vain to have no more but one [e]. For the better Underſtanding of the which two-fold Concluſion:

[c] Jus autem civile exigit ſeptem. §. ſed cum paulatim. & §. fin. Inſtit. de teſta. ordin.

[d] Lindw. in c. ſtatutum verb. probatis de teſta. lib. 2. provinc. conſtitu. Cant. Peckius in c. privilegium de reg. jur. 6. n. 7. [e] Jaſ. in L. cunct. C. de ſumma Trinitate, Hyppol. Singul. 102.

Firſt, Where it is affirmed that Two Witneſſes be ſufficient; that is to be underſtood, in caſe the ſame Two Witneſſes be without Cauſe of Exception [f]; but if they be not lawful Witneſſes, Two alone are not ſufficient for the Proof of a Laſt Will [g]; at the leaſt where the ſame is to be proved in Form of Law.

[f] C. relatum el. 1. de teſta. extr. Lindw. in d. c. ſtatutum. verb. probatis Mantic. de conject. ult. vol. lib. 6. tit. 3. n. 5, 6. [g] D. c. relatum. & c. cum eſſes de teſta. extr. & ibi DD.

By the Statute 29 *Car.* 2. it is enacted, *That all Deviſes of Lands or Tenements ſhall be in Writing, and ſigned by the Teſtator, or by ſome* 29 Car. 2. c. 3.

ſome other in his Preſence, and by his Direction, and ſubſcribed in his Preſence by three or four Witneſſes, or elſe ſhall be void.

Chadron ver. *Harris*, Noy 12.

Before this Statute a Will was written in an old Piece of Paper, not ſigned or ſealed by the Teſtator, but there were three Witneſſes to prove it; two of them depoſed upon Hearſay, but the third had ſubſcribed his Name; and upon this Evidence the Plaintiff had a Verdict; and it was adjudged, that a Will of Lands deviſable at Common Law was good without Witneſſes, if it was put in Writing, and proved to be the Teſtator's Hand: And ſo it was adjudged in the Caſe of *Gage* and the Company of *Fiſhmongers*, *Michaelmas* 12 *Jac.* upon Mr. *Goddard*'s Will, who by a Paper which he had written, gave Lands in *Bray* to the Corporation of *Fiſhmongers*, and their Succeſſors, to build an Hoſpital, *&c.*

But what if (3) the Witneſſes be not free from all Exception, but yet are more in Number than two, ſuppoſe three or four: Whether be they ſufficient for Proof of the Will? It may be anſwered, That if the Exceptions whereunto the Witneſſes are ſubject be light or ſlender, ſuch as do in Part diminiſh the Credit of their Teſtimony, as the Exception of Friendſhip, or Suſpicion of ſome ſmall Fault, there the Number doth ſupply the Defect; and ſo the Teſtimony of three Witneſſes, not altogether clear from thoſe Exceptions, is as the Teſtimony of two Witneſſes, without all Exception [h]: But when the Exceptions whereunto the Witneſſes be ſubject, are great and heinous; as the Exception of Perjury, which doth utterly extinguiſh all the Credit of the Depoſition [i]; or, when the Witneſſes are ſubject to double Exception [k]; or when the Law doth reſiſt the Examination [l] of the Witneſſes; as of thoſe that be perpetually mad, or have no Underſtanding; or when the Defect is not in the Perſon, but in the Depoſition [m]. In theſe and like Caſes, the Number doth not ſupply the Defect, but the Teſtimony of them all is as the Teſtimony of none [n].

[h] Mantic. de conject. ult. vol. lib. 6. tit. 3. n. 8.

[i] Maſcard. de probat. verb. perjurus. Ampl. 1. Alciat. de præſump. reg. 2. præſump. 10.

[k] Suarez. lib. recep. ſeu. verb. teſtis n. 215. Gabr. lib. 1. com. concluſ. tit. teſtib. concluſ. 7. n. 13. Hyp. de Marſil. Sing. 385. Menoch. de arbr. jur. lib. 2. cauſ. 99. Gravetta. conſ. 249. [l] Felin in c. dilecti de accuſ. extra. Pariſ. conſil. 58. n. 52. vol. 4. [m] Ruin. conſ. 149, 150. vol. 5. Gabr. lib. 1. com. concluſ. tit. de teſtib. concl. 6. n. 3. [n] Vide eund. Gabr. de concl. 6.

Secondly, Where (4) it is affirmed that one Witneſs is as none, yet ſuch is the Power and Authority of the Teſtator, that he may ordain that one Witneſs ſhall make a full Proof; as if the Teſtator commit ſomewhat in ſecret unto him (being loth perhaps that any other ſhould know thereof) and willeth in his Life, that that Perſon alone ſhall be credited for the Declaration of his Will. In this Caſe, that one Perſon alone is ſufficient to prove the Contents of the laſt Will and Teſtament of the Perſon deceaſed [o]. Altered by the Statute.

[o] D. Theopom. ff. de dote præleg. Olden. de probat. fol. 286. b.

For the ſecond Queſtion, that is to ſay, *What Manner of Perſons* are to be received for Witneſſes. This may be delivered for a Rule, That (5) whatſoever Perſon is not by Law forbidden to be a Witneſs, the ſame Perſon is to be admitted [p]. This Rule is ſhort; but if we ſhould deſcend to the Exceptions, and ſhew in particular, what Perſons are in this Caſe forbidden to bear Teſtimony by the Civil and Eccleſiaſtical Laws, we ſhould find it a Matter of ſuch Diſcourſe, as the ſame ſhould far exceed the Quantity of this ſmall Volume, for there be many Volumes of this Argument only [q]. Beſides, it is a Matter wherein very much is left to the Conſideration

[p] L. §. 1. ff. 1. de teſtib.

[q] Id quod pluſquam manifeſtum eſt per illum lib. qui inſcribitur Tractatus de teſtibus probandis, vel reprobandis. Var. authorum, &c.

of the Judge[r]; ſo that it is very hard alſo to preſcribe any Certainty in this Behalf[s]; only I will remember three (6) ſpecial Cauſes whereby the Witneſſes are not *omni exceptione majores.* The firſt is Diſhoneſty in Manners; the ſecond is Want of Judgment or Underſtanding; the third is Affection more to the one Party than to the other[t].

[r] L. 3. §. 1. de teſtibus, ff.
[s] Bat. Bald. & alii in d. L. 3. §. 1.
[t] Has cauſas veluti præcipuas proſequitur Albericus in tract. de teſtib. part. 1.

The firſt (7) Cauſe doth miniſter Exception, not only againſt perjured or forſworn Perſons convicted of a *Præmunire* of Forgery, upon the Statute of 5 *Eliz. cap.* 14. Or convict of Felony, or by Judgment loſt his Ears, or ſtood upon the Pillory or Tumbrel, or been *Stigmaticus*, branded, or the like, whereby they become infamous for ſome Offences. *Quæ ſunt minoris culpæ, ſunt majoris infamiæ.* 43 *Ed.* 3. *Conſp.* 11. 27 *Aſſump.* 59. 33 *H.* 6. 55. 21 *H.* 6. 30. *Forteſc. c.* 26. *Staundf. Pl. Coron. fol.* 174[u]. But alſo againſt all other Malefactors, or Law-breakers[x]; which by any Crime by them committed become infamous[y]; for it is ſaid to be a Dignity to be a Witneſs[z]. But all ſuch Perſons as are infamous by their evil Life, the Law eſteemeth unworthy of any Dignity[a], which alſo pondereth the Credit of each Man's Saying, with the Gravity of his Life[b]; and therefore light Life, light Credit alſo. Howbeit (8) amongſt many Limitations of this Exception, drawn from the evil Life of the Witneſs[c], this is one, That if any Man having committed any Crime, (Perjury excepted[d]) hath reformed his Manners, clear from his former Fault, and hath lived honeſtly, and laudably by the Space of three Years before his ſaid Production, ſuch a Perſon is not repelled from being a Witneſs[e]. So if a Perſon hath committed Felony, and a General Pardon cometh, and pardons the Felony, he is a good Witneſs. See *Paſch.* 21 *Jac. in Caner. Stell.* Sir *Henry Fine*'s Caſe, *Godbolt Rep.* 288. For the Pardon doth not only take away *pœnam*, but *notam*; and when it is pardoned, the Perſon is cleared of the Crime and Infamy; and ſtands *notus in curia. Vide Trin.* 13 *Jac. Rot.* 933. *Hob. Rep. fol.* 81. *Cuddington*'s Caſe.

[u] De perjuri teſtimonio late Maſcard. de probat. verb. perjurus concluſ. 1168.
[x] De teſte criminoſo idem Maſcard. de probat. verb. criminoſus, concluſ. 469.
[y] De infamibus ſive juris, ſive facti, optime Jaſ. in L. cunctos C. de ſumma Trinitate.
[z] Auſrer. Tract. de teſtibus verb. dignitas.
[a] Ac infamibus de reg. jur. 6.
[b] L. 2 & 3. ff. de teſtibus.
[c] De quibus Maſcard. & Jaſ. ille concluſ. 464. concluſ. 1161. hic in L. cunctos. C. de ſumma Trinitate.
[d] Maſcard. de probat. concluſ. 1168. n. 16.
[e] C. teſtimonium de teſtibus extr.

One *Hawkins* having a great perſonal Eſtate, and being in *Newgate*, and diſturbed in his Mind, made a Will, which was well atteſted, and being controverted in the Prerogative Court, Sentence was given againſt the Will; and upon an *Appeal to the Delegates*, two Records were produced to invalidate the Evidence of two of the Witneſſes; one was a Record of the *Conviction of one of the Witneſſes for a Libel*; and the Record of the Conviction of the other was for *Singing a Ballad againſt the Government*, and both of them ſentenced to the Pillory, but no Proof was made that they were put into it: After theſe Witneſſes were examined in the Spiritual Court, and before Sentence was given againſt the Will, they were pardoned: The Queſtion before the Delegates was, whether the Depoſitions taken in the Prerogative Court ſhould be Evidence; if it was not good when taken, the ſubſequent Pardon would not make it ſo, and that the * Judgment to the Pillory made them infamous, tho' it was never executed; but that 'tis not from the Judgment, but from the Nature of the Crimes that the Infamy ariſes; and theſe Crimes not being infamous, either by the Canon or Civil Law, by which Law

Charter v. *Hawkins*, 3 Lev. 426.

* *But this muſt be at Common Law, 'tis not ſo either by the Civil or Canon Law, unleſs the Cauſe was infamous.*

this Caſe muſt be determined, therefore the Sentence in the Prerogative Court was reverſed.

The ſecond (9) Cauſe doth comprehend Children[f], Idiots[g], Lunatic Perſons[h], and ſuch like, of whom it may be ſaid as of the former; that as they which reform their evil Manners, and afterwards live an honeſt and commendable Life, are not to be repelled; ſo theſe Perſons being altered in their Knowledge, that is to ſay, the Child being grown to Years of Diſcretion, the Idiot made wiſe, or the lunatic Perſon not diſtracted by his Fit, or Frenzy, then their Teſtimony is to be received, even of thoſe Things which were done during the Time of their Minority[i], or Madneſs[k]; ſo that they were not utterly void of Underſtanding in thoſe former Eſtates[l].

[f] §. Teſtes Inſtit. de teſta. ord.
[g] Rebuff de reprobat. & ſalvat. teſt. verb. furioſus. Campag. tract. de teſtibus, reg. 114. Bar. tract. de teſtibus, n. 98. ubi conſtituit differentiam inter ſtultos & fatuos.
[h] D. §. teſtes & Minſing. in §. furioſi. Inſtit. de Curator. ubi diſtinguit inter furioſum & mente captum.
[i] Angel. Are. in d. §. teſtes. Alberic. tract. de teſtib. c. 5. n. 18.
[k] Maſcard. tract. de probat. verb. furioſus concluſ. 828.
[l] Jul. Clar. pract. cral. q. 24. Alberic. l. tract. c. 5. num. 24.

The third (10) Cauſe, which is Affection, doth reach unto thoſe Witneſſes which be of Kindred or Alliance[m], or which be Tenants, Servants, or of the Houſhold of the Party producting them[n]; and to the Enemies of the Party againſt whom they are producted[o]. *Item*, To all thoſe which are to reap any Benefit by their Depoſition[p]; wherein (as in many Things elſe) very much is attributed to the Diſcretion of the Judge, who, as the Kindred or Affinity betwixt the Witneſſes and the Party, is near or far off; the Fear of the Tenant, or Servant, or the Diſpleaſure of his Lord and Maſter, great or little; the Enmity betwixt the Witneſs and the adverſe Party, hot or cold; or the Commodity the Witneſs is to reap, more or leſs: So the wiſe Judge ought to give more or leſs Credit to their Sayings and Depoſitions[q].

[m] De quibus Alberic. d. tract. cap. 1. & Hector Æmilius tract. de teſtibus verb. affinis.
[n] De his teſtibus, idem Alberic. de tract. c. 2.
[o] Inimicus quatenus repellendus, docet Maſcard. in d. tract. de probat. concluſ. 899. quatenus vero recipiendus, Campegius. tract. de teſtit. reg. 23.
[p] Albericus, tract. de teſtibus, c. 4.
[q] De hujuſmodi teſtibus, Hector Æmilius, i. tract. de teſtib. verb. affectionem habens, Gabr. lib. 1. com. concluſ. tit. de teſtib. concl. 9, 10, 11, 12, 13, 14, 15, 16. Panor. in c. ſuper eodem de teſtib. extr. n. 8. Rebuff. de reprobat. & ſalvat. teſtium verb. inimicus, verb. domeſticus, & verb. conſanguineus.

On an Appeal before the Delegates, from a Sentence touching the Validity and Probate of a Will of a perſonal Eſtate, there were three Witneſſes to the Will, but two of theſe happened to be Children of the reſiduary Legatee.

By the Civil Law the Child is not allowed to be a Witneſs for his Parent.

The Common Law Judges agreed with the Civilians, that theſe two Children were not to be allowed to be Witneſſes; therefore the Will failed for Want of Proof, one Witneſs being by the Civil Law as no Witneſs. *Twaites* and *Smith*, 1 *Williams* 10.

Quære, If the Will in Queſtion appeared to be written, or ſo much as ſubſcribed, by the Teſtator's own Hand, ſince in either of theſe Caſes it would have been good without any Witneſſes at all. See hereafter §. 28. this Part.

What ſhall we ſay of the Teſtimony, of theſe Perſons, namely, of a Legatary, of a Woman, and of a poor Man?

I ſuppoſe the (11) Teſtimony of the Legatary to be good for the reſt of the Will[r], but not for his own Legacy[s]; and therefore where there be but two Witneſſes of a Will, wherein either of them hath ſomewhat bequeathed unto him, this Will is not ſufficiently proved

[r] §. Legatariis, Inſtit. de teſtam. ord.
[s] Porcius, in d. §. legatariis.

for thoſe Legacies[t]: But for the reſt of the Will it ſeemeth to be ſufficiently proved[u].

[t] Bar. in omnibus C. de teſtibus, & Porcius in d. §. Legatariis.

[u] Albericus, tract. de teſtib. c. 4. n. 57. n. hoc. ar. Vivius, com. opin. verb. teſtis.

But by the Law of this Realm, the Legatee is no good Witneſs, becauſe he ſhould be *Teſtis in re propria*, which the Law will not admit: For if his Teſtimony be good, as to the Will, by Conſequence, and *ſecundario*, he doth thereby make good his own Legacy. And therefore in the Caſes of Tenant's Right, Common, *Modus decimandi*, and the like, the Courts of Juſtice will not ſuffer them to be Witneſs one for another; but if the Legatee doth releaſe his Right to the Legacy, his Teſtimony is to be received. *P.* 14 *Jac. C. B.* The Lord *William Howard's* Caſe, *Hob. Rep. fol.* 91, 92.

And ſo it is where a Legatee or a Deviſee of an Annuity had received his Legacy, though after the Action was brought; and ſo likewiſe if he had been in Poſſeſſion of any the Lands deviſed. *Stephens* v. *Gerrard*, Sid. 315.

An Eſtate in Remainder being limited after the Determination of an Eſtate for Life, and this by the Laſt Will of the Teſtator to the Miniſter and Church-wardens of *C.* for the Maintenance of the Poor for ever; it was agreed at a Trial at Bar, that any of the Pariſhioners of that Pariſh might be a Witneſs to prove the Will. Sid. 109. *Townſend* v. *Row.*

A Woman (12) is alſo a good Witneſs in this Caſe by the Laws Eccleſiaſtical[x]: And whatſoever divers do write, that a Woman is not without all Exception[y], becauſe of the Inconſtancy and Frailty of the Feminine Sex, whereby they may the ſooner be corrupted[z]; yet I take it that their Teſtimony is ſo good, that a Teſtament may be proved by two Women alone, being otherwiſe without Exception[a].

[x] Panor. & Covar. in c. cum eſſes de teſta. extr.

[y] Dec. in L. fœmina. de reg. jur. ff. Gravetta. conſil. 99. n. 5.

[z] C. forus, de verb. ſignif. extr.

[a] Sichard. in L. hac conſultiſſima §. ex imperfecto. C. de teſta. Ripa, tract. de peſte. c. 2. n. 24. quæ ſententia communis eſt. Covar. in d. c. cum eſſes n. 14.

A poor Man (13) likewiſe, being an honeſt Man, is not forbidden to be a Witneſs[b].

[b] Vivius Theſaur. com. op. verb. teſtis.

Tu vero Juſtinianiſta, vide Gabr. lib. 1. com. concluſ. tit. de teſtib. concluſ. 18. ubi tradita eſt regula de paupere teſte, varie tum ampliata, tum limitata.

An Alien may be a good Witneſs, as it was adjudged *P.* 14 *Eliz. Duke de Norfolk's* Caſe; but an Infidel cannot. *Forteſc. c.* 25. *Inſtit. part.* 1. *fol.* 6. *b.*

Since the making the Statute 29 *Car.* 2. before-mentioned, there have been ſome Caſes concerning the *Manner and Number* of the ſubſcribing Witneſſes.

ff. The Teſtator deſired the Witneſſes to go into another Room about ſeven Yards diſtant from the Room where he lay, in which Room there was a Window broken, thro' which the Teſtator might ſee the Witneſſes ſubſcribe their Names: Adjudged that ſuch Subſcription was in his Preſence if he might ſee them, and that it was not neceſſary he ſhould be in the ſame Room where they were. *Shires* v. *Glaſcock*, 2 Salk. 688.

A Will was ſubſcribed by three Witneſſes, but *not at the ſame Time*, but at ſeveral Times, at the Requeſt of the Teſtator, the Witneſſes being never together at the ſame Time; and this was adjudged a good Will within the Statute. 2 Chanc. Rep. 109.

Two

Lea verſus *Libb*, 1 Shower 68. 3 Mod. 262. S. C.

Two Witneſſes ſubſcribed a Will of Lands, and about a Year afterwards the Teſtator made a *Codicil*, which was ſubſcribed by Two Witneſſes, *of which one of them was a Witneſs to the Will*, and the other was a *New Witneſs*, and in this Codicil the Will was recited and confirmed, and ſome new Legacies given: The Queſtion was, whether this *New Witneſs* to the *Codicil*, who never ſaw the Teſtator ſubſcribe his Will, ſhould be a Third Witneſs to make the Will good, becauſe (as it was inſiſted) the Will and Codicil, tho' written in diſtinct Papers, made but one Will; and if but one Will, then there were Three diſtinct Witneſſes to it; but adjudged that the Subſcribing the Codicil was not a Subſcribing the Will; therefore it was void for Want of Three Witneſſes, as required by the Statute.

There were four Witneſſes to a Will of Lands, One of them was gone beyond Sea, Two ſwore they ſaw the Will executed by the Teſtatrix, and that they ſubſcribed the ſame in her Preſence, the Third ſwore that he ſubſcribed the Will as a Witneſs in the ſame Room, and at the Requeſt of the Teſtatrix.

Lord Chancellor, The proper Way of examining a Witneſs to prove a Will as to Lands is, that the Witneſs ſhould not only prove the executing the Will by the Teſtator, and his own ſubſcribing it in the Teſtator's Preſence, but likewiſe that the Reſt of the Witneſſes ſubſcribed their Names in the Preſence of the Teſtator, and then one Witneſs proves the full Execution of a Will. The bare ſubſcribing the Will by the Witneſs in the ſame Room, does not neceſſarily imply it to be in the Teſtator's Preſence: For it might be in a Corner of the Room in a clandeſtine fraudulent Way; and then it would not be a Subſcribing by the Witneſs in the Teſtator's Preſence, merely becauſe in the ſame Room; but here it being ſworn by the Witneſs, that he ſubſcribed the Will at the Requeſt of the Teſtatrix, and in the ſame Room; this could not be fraudulent, and was therefore well enough. And the Will was declared to be good. *Longford* v. *Eyre*, 1 *Will. Rep.* 740.

Anthony Springet being intitled to two Thirds of certain Copyhold Lands, and *William Springet* his Brother being intitled to the other Third: It was agreed that *Anthony* ſhould be admitted to the Whole, in Truſt to account to *William* for his Share; ſoon after *William* purchaſed of *Anthony* his whole Intereſt in the Premiſſes; but to avoid the Charge of a Surrender, *Anthony* by Deed executed declared that all the ſaid Copyhold Lands belonged to his Brother *William*, and that he would at any Time ſurrender the ſame to him and his Heirs, as he or they ſhould appoint.

William made his Will in Writing ſigned by himſelf, but *without any Witneſſes atteſting it*, wherein was this Clauſe, " What Eſtate I " have I intend to ſettle in this Manner: My Eſtate in *K.* which is " 135 *l. per Annum*, 128 *l.* at the Exchequer, *&c.* All which I give " to my Brother Mr. *Anthony Springet.* After his Deceaſe my Deſire " is, that it ſhould be diſpoſed of after this Manner: To Mr. *William* " *Tufnel*, Son of *S. T.* Eſq; my Eſtate at *K.*"

No Surrender was made to the Uſe of this Will. *William* died without Iſſue, *Anthony* entered and deviſed the Premiſſes with other Lands to *Page*, *Campton* and *Pen*, one of whom was his Heir at Law; no Surrender was made to the Uſe of this Will, nor were they ever admitted, but on the Death of *Anthony* they entered; whereupon

William Tufnel brought a Bill for an Account of the Rents and Profits of the Eſtate called *K.* and to have the ſame decreed to him.

For the Plaintiff was cited 2 *Vern.* 498, 597. 2 *Lev.* 91. *Ibbotſon* and *Beckwith. Mich.* 9 *Geo.* 2. *Abr. of Ca. in Eq.* 178.

For the Defendants was cited *Miller* and *Mohun*, 21 *June* 1732. and 1 *Cro.* 447.

It was determined, that tho' there was no Surrender at all, this Will not atteſted by any Witneſſes was ſufficient to give the Truſt of the Copyhold to the Plaintiff, and that the Plaintiff was intitled to an Eſtate in Fee. *Barnardiſton's Rep. fo.* 9. *Vide* 2 *Will. Rep.* 259, 261.

J. W. conveyed Lands to Truſtees and their Heirs to the Uſe of them and their Heirs, in Truſt that (after ſuch Money raiſed as therein mentioned) they ſhould convey the Premiſſes to *J. S.* his Heirs and Aſſigns, or to ſuch Perſon or Perſons as he or they ſhould direct.

The Monies were raiſed, and *J. S.* by Will atteſted only by two Witneſſes, deviſed the Premiſſes to *J. N.*

Obj. The Truſt being, that the Truſtees ſhould convey to ſuch Perſons as *J. S.* his Heirs or Aſſigns ſhould direct; this Will, tho' not good by Way of Deviſe, ſhould however be effectual as an Appointment.

Lord Chancellor, This is no more than a common Truſt of Lands in Fee-ſimple, (*viz.*) in Truſt for *J. S.* his Heirs or Aſſigns, or ſuch Perſon or Perſons as he or they ſhould appoint; theſe laſt Words are no more than what was implied before. A Truſt of an Inheritance cannot be deviſed otherwiſe than by a Will atteſted by three Witneſſes in the ſame Manner as a legal Eſtate.

Adjudged that the Will was void, and that the Truſtee ſhould convey the Premiſſes to the Heir at Law of the Teſtator. *Wagſtaff* verſus *Wagſtaff*, 2 *Will. Rep.* 258.

An *Engliſhman* made a Will beyond Sea of Lands in *England*, atteſted but by two Witneſſes, the Will is void. *Coppin* verſus *Coppin*, 2 *Will. Rep.* 291.

In 1721 *Iſaac Wells* made his Will, thereby deviſing his real Eſtate; in 1725 he intermarried, and thereupon made a Settlement of his real Eſtate; afterwards his Wife dying without Iſſue, he declared in the Preſence of one Witneſs, that his Will made in 1721 ſhould ſtand; it was held that the Will being revoked by the Settlement in 1725, the Republication of it being only in the Preſence of one Witneſs, could ſignify nothing. *Barn. Rep. fo.* 189.

By the Statute 4 & 5 *Annæ*, 'tis enacted, that all ſuch Witneſſes who are allowed to be good on Trials at Law, ſhall be good Witneſſes to prove any *nuncupative Will*, or any Thing relating to it. 4 & 5 Annæ, c. 14.

§. XXV. Of the particular Forms of Teſtaments.

1. *So many particular Forms, as Kinds of Teſtaments.*

THE (1) particular Forms of Teſtaments be no fewer in Number, than are the ſeveral Kinds of Teſtaments: For every Kind hath his particular Form, by the which it differeth from the reſt [c]. [c] L. Julianus §. ſi quis ff. ad exhibendum.

The ſeveral Kinds of Teſtaments are theſe; that is to ſay, ſome be ſolemn Teſtaments, and ſome be unſolemn; ſome written, and ſome nuncupative; ſome privileged, and ſome unprivileged [d]. Of the particular Forms of every of which Kind, albeit I have already ſaid ſomething in their ſeveral Definitions; yet now alſo it ſhall not be in vain to add thereunto theſe Things following.

[d] Supra prima parte §. 8, 9, 10, 11, 12, 13, &c.

§. XXVI. Of the Form of a ſolemn Teſtament.

1. *Divers Things ought to concur to the Form of a ſolemn Teſtament.*
2. *No Man tied to the Obſervation of this ſolemn Form.*

IN the making of ſolemn Teſtaments, many Things are requiſite, whereof if any one be wanting, it is not reputed a ſolemn Teſtament [e].

[e] §. ſed cum paulatim Inſtit. de teſta. ordin. & ibi Minſing.

Firſt, (1) It is requiſite that there be Seven Witneſſes preſent at the Making thereof [f]. This is altered by the Statute 29 *Car.* 2.

[f] D. §. ſed cum paulatim.

Secondly, They muſt all be required, neither is it ſufficient, that they be preſent by Chance or unrequired [g].

[g] Auth. rogati C. de teſta. L. hæredes palam ff. de teſtam.

Thirdly, It is required, that every Witneſs do ſubſcribe his Name with his own Hand, if he can write, or elſe Two or Three others for him [h].

[h] L. ſingulos de teſta. ff. & Minſing. in d. §. ſed cum paulatim.

Fourthly, It is requiſite that the Teſtator do with his own Hand write his Name, whom he will ſhall ſucceed, and have all his Goods; and if he cannot write, that then he name him before thoſe Witneſſes [i].

[i] L. jubemus L. cum antiquitas C. de teſta.

Non tamen ita neceſſaria eſt nominatio hæredis, ut proprio teſtatoris ore fiat, quin ſufficit ſi teſtator, alio interroganté, an velit talem fore hæredem? reſpondeat ita. D. D. in d. l. jubemus Graff. Theſaur. com. op. §. Inſtitutio q. 17.

Fifthly, It is requiſite that the Witneſſes be ſuch as are not forbidden to bear Teſtimony in that Behalf [k].

[k] §. Teſtes. Inſtitut. de teſta. ordin.

Sixthly, It is neceſſary that the Witneſſes do ſee and behold the Teſtator, and not hear him only [l]. It is alſo neceſſary, that the Witneſſes do ſeal the Teſtament either with their own Seals, or with the Seal of another [m].

[l] Menoch. de arbitr. Jud. q. lib. 2. cent. 5. caſ. 475. n. 23. Minſing. in d. §. ſed cum paulatim.

[m] D. §. ſed cum paulatim.

Finally, It is neceſſary that the Teſtament be made at one Time, without any Intermiſſion, except natural, ſuch as cannot be avoided [n].

[n] Eodem §. & ibi Minſing.

A Will thus (2) made, is called a ſolemn Teſtament, which Form, if Men would obſerve, (but no Man is neceſſarily tied thereunto here in *England* [o]) it were a more ſafe Way, as well againſt the Forging of Falſe Wills, as Suppreſſing of true Wills.

[o] Supra part. 1. §. 9.

§. XXVII. Of the Form of an unſolemn Teſtament.

1. *What is requiſite in the Making of an unſolemn Teſtament.*

IN the (1) making of an unſolemn Teſtament, it is not preciſely neceſſary to uſe any of the aforeſaid Ceremonies. This only is needful here with us in *England*, that the Teſtator do appoint his Executor, and declare his Will before Two or Three Witneſſes, whoſe Teſtimony, partly by the Laws Eccleſiaſtical [o], and eſpecially by the general Cuſtom of this Realm [p], is ſufficient for the Probation and Approbation of the ſame Will, concerning the Appointing of an Executor, or the Diſpoſing of Goods and Chattels [q].

[o] C. cum eſſes c. relatum, el. 1. de teſta. ext.

[p] Lindw. in c. ſtatutum, verb. probatis lib. 3. Provincial.

conſtitu. Cant. tract. de repub. Angl. lib. 3. c. 7. Peck. 9. in c. privileg. de reg. jur. 6.

[q] Atque huc tendit quod ſcriptum reliquit Minſing. in Rub. de mil. teſta. num. 6. Videlicet, apud eas gentes quæ juris civilis obſervatione non tenentur (quarum Anglia eſt præcipua) jus militaris teſtamenti obtinere, ſi qua nulla propria lex extet.

§. XXVIII. Of the Form of a written Teſtament.

1. *Divers Things conſiderable in a written Teſtament.*
2. *In what Matter or Stuff the Teſtament is to be written.*
3. *In what Language the Teſtament is to be written.*
4. *In what Hand the Teſtament is to be written.*
5. *With what Notes or Characters a Teſtament is to be written.*
6. *Limitations of the former Concluſion.*
7. *Of the Words and Sentences of a written Will.*
8. *Whether Witneſſes be neceſſary in a written Will.*
9. *How the Witneſſes are to depoſe in proving the Will to be written by the Teſtator.*
10. *What if the Teſtament be found in the Teſtator's Cheſt.*

WE have heard elſewhere, in what Caſes it is needful that the Teſtament be written [a], namely, where the Teſtator doth deviſe any Lands, Tenements, or Hereditaments [b]; and alſo when the ſame ought to be written, that is to ſay, in the Life-time of the Teſtator [c]; with divers other Queſtions there abſolved. Now (1) let us hear of ſome other Things which may ſeem to appertain to the Form of a written Teſtament; namely, *In what Matter or Stuff* the Teſtament is to be written, *in what Language*, with *what Hand, Letters, Notes, or Characters*, with *what Words or Sentences*; and whether it be always neceſſary that there be *Witneſſes* of a written Teſtament.

[a] Supra 1. part. §. 11.

[b] Stat. H. 8. an. 32. c. 1.

[c] Eodem Stat.

For the (2) *Matter* wherein the Teſtament is written, the Law regardeth not whether it be Paper or Parchment, or other like Stuff apt for Writing [d].

[d] §. Nihil Inſtit. de teda. ordi. Spec. de

Inſtr. edit. §. 8. n. 21. Sed quid ſi quis ſcripſerit voluntatem ſuam in pulvere? numquid valebit teſtamentum ut ſcriptum? Et videtur quod ſic per L. milites. C. de teſta. Hoc uno ſubaudito, nimirum noſtratium teſtamenta, omni immunitate, atque adeo jure militari gaudere, ut ſcriptum reliquit D. Smitheus tract. de repub. Angl. lib. 3. cap. 7. Contrarium tamen, ſcilicet non valere hujuſmodi teſt. tanquam in ſcriptis conditum, exiſtimo: ſaltem ad effectum illum, de quo fit mentio in d. ſtat. H. 8. an. 32. cap. 1. id quod ex mente illius ſtatuti facile colligere licet. Et huc pertinet quod ſcriptum reliquit. Molun. in L. 1. §. eodem. ff. de verb. ob. n. 9.

Neither

Neither is it material in what (3) *Language* [c] the ſame be written, either *Latin*, *French*, or any other Tongue.

Bovey verſus *Smith*, 1 Vernon 144.

The *Teſtatrix* lived in *Holland*, and made her Will in *Dutch*, by which ſhe deviſed her Houſes in *Chelſea*, *which ſhe purchaſed with her Capital*, to *W. B.* and to other Truſtees and their Heirs, in Truſt for her four Daughters *and their Children:* If it had been *Iſſue inſtead of Children*, it would have carried the Inheritance; and it may be the Cuſtom in *Holland*, that by thoſe Words the Inheritance will paſs there: To which it was anſwered, that though the Will was in *Dutch*, and admitting thoſe Words would paſs an Inheritance in *Holland*, yet a Will whereſoever 'tis made muſt be ſuch as would paſs an Inheritance by the Laws of this Realm; and ſo it hath been reſolved in the Caſe of *Latin* Wills.

For the (4) *Hand or Letters* wherewith the Teſtament is written, the Law is indifferent whether it be Secretary Hand, *Roman* Hand, Court-Hand, or any other Hand, either fair, or otherwiſe; ſo the ſame may be read and underſtood [f].

For the (5) *Notes or Characters*, 'tis not material whether the ſame be *uſual or unaccuſtomed* [g]. Uſual or accuſtomed Notes be theſe, xx *s.* for twenty Shillings, Cl *l.* for a hundred and fifty Pounds, 1590. for a Thouſand five hundred fourſcore and ten, with ſuch like, whereof I might bring infinite Examples. Unaccuſtomed Notes and Characters be, as when the Teſtator doth uſe the Figure (1) inſtead of the Letter (A,) the Figure (2) inſtead of the Letter (B,) the Figure (3) inſtead of (C,) *&c.* or perhaps ſome other more ſtrange Characters than theſe in place of Letters. Howbeit, (6) if the Characters be ſuch as the ſame cannot be read or underſtood, the Teſtament is as if it were not written [h]; or if they may be read or underſtood, either by the ſame, or by ſome other Writing, or by any other Means, yet if that Writing were but a Draught, or Preparation to the Teſtament, and not the Teſtament it ſelf, it is without any Force [i].

M. M. by a Codicil to her laſt Will gave ſeveral Legacies, ſome of which were wrote ſo blindly, (ſeeming to have been altered) that it was difficult if not impoſſible to read them, or to diſtinguiſh what the Legacies were; particularly in one Place, whether 100 *l.* or 300 *l.* was meant. In Chancery, it was referred to a Maſter to examine and ſee what thoſe Legacies were, and he to be aſſiſted by ſuch as were skilled in the Art of Writing. *Maſters* v. *Maſters*, 1 *Williams* 421.

Words (7) *and Sentences* are not required for the Form of a Teſtament, but for the expreſſing the Will and Meaning of the Teſtator [k]; and therefore, if the Writer by Error omit ſome Words, whereby the Senſe is unperfect; as for Example; the Notary doth write thus, (I make my Wife my of this my laſt Will and Teſtament (leaving out this Word Executor). In this Caſe the Error of the Writer ought not to prevail againſt the Truth of the Teſtament [l]: For the Law preſumeth that more was ſpoken, though leſs was written [m]; much leſs ought it to be prejudicial to the Teſtament, where inſtead of the Words omitted, other Words of the ſame Senſe to ſuch Purpoſe are uſed and expreſſed [n]. For Example; Suppoſe that in

[c] Minſing. in d. §. nihil.

[f] DD. in L. quoniam, C. de teſta.

[g] Hoc intelligant Juſtinianiſtæ procedere jure gentium quo nos utimur. Nam jure civili teſtam. in ſcriptis fieri non poteſt per notas aut Zypheras inuſitatas, ut tenent Bar. Bald. Angel. & alii in L. quoties §. 1. ff. de hæred. inſtituend. præterquam in caſibus exceptis, veluti in teſtamento militis, ad pias cauſas, &c. de quibus Vaſq. de ſucceſſ. creat. lib 2. §. 15. requiſit. 16. Tiraquel. de privileg. piæ cauſæ, c. 13. Graff. Theſaur. com. op. §. teſta. q. 10. Vaſq. d. requiſit. 16.

[h] L. 1. ff. 1. ſi Tabul. teſta.

[i] L. ex ea ſcriptura, ff. de teſta. L. fidei commiſſ. §. 1. de leg. 3.

[k] L. quoniam indignum, C. de teſta. Molin. in L. 1. §. eodem ff. de verb. ob. n. 8. in fin.

[l] L. Errore, C. de teſta.

[m] D. L. Errore. Ita ut in hoc exemplo non ſit neceſſaria aliqua probatio quod Scriba erraverat, vel quod teſtator omnia nuncupaverat, cum lex ipſa ſit loco probationis. Sich. in d. L. Errore. Attamen neceſſe eſt probare mulierem iſtam eſſe teſtatoris uxorem, quam vult eſſe ſuam executricem. Jaſ. in d. L. in fin.

[n] L. quoniam. C. d. teſtam.

the Teſtament it is written, that the Teſtator doth bequeath ſuch Lands to ſuch Perſon, to have and to hold, to him and to his Aſſigns, for evermore. Howſoever, in this Device there is not any Mention of Heirs, without which Word an Eſtate of Inheritance cannot paſs, by any Deed or Gift made whiles a Man yet liveth; yet becauſe in Teſtaments, the Will and the Intent of the Teſtator is preferred before formal or preſcript Words, an Eſtate of Inheritance doth thereby paſs, as if he had made expreſs Mention of his Heirs [o]. Other Examples to the ſame Effect are extant in other Places of this Book, which to repeat were ſuperfluous.

[o] Supra eadem part. §. 4.

Concerning the laſt Queſtion, *viz.* Whether (8) it be neceſſary that there be Witneſſes of a written Will? This is the Anſwer, That if it be *certain and undoubted*, that the Teſtament is written or ſubſcribed with the Teſtator's own Hand; in this Caſe the Teſtimony of Witneſſes is not neceſſary [p]. But if it be *doubtful*, whether the Teſtament were written or ſubſcribed by the Teſtator; in this Caſe the Teſtimony of Witneſſes is neceſſary, to confirm the ſame to be the Teſtator's own Hand [q]. This is altered by the Statute *29 Car. 2. cap. 3.* by which 'tis enacted, *That all Deviſes of Lands*, &c. *ſhall be in Writing, and ſigned by the Teſtator, or by ſome other by his Direction, and in his Preſence*, and ſubſcribed in his Preſence by *three or four Witneſſes*, or elſe ſhall be void; therefore (9) 'tis not ſufficient for the Witneſſes to ſay this is the Teſtator's own Hand, for we know his Hand [r]; neither is it ſufficient to bring forth other Writings of the known Hand of the Teſtator, and ſo prove the Will to be written or ſubſcribed by the Teſtator, by comparing ſuch Writings with the Teſtament [s]. For the Witneſſes may be deceived (the Teſtator's Hand being eaſy to be counterfeited,) and therefore Proof by Similitude of Hands is not a full Proof [t], ſaving in thoſe Courts where the Cuſtom doth approve ſuch Teſtimony for a full Proof [u], or when the Teſtament is to be proved in vulgar Form: Nevertheleſs in this Caſe where it is doubtful, whether the Teſtator did write or ſubſcribe the Teſtament, if the Witneſſes do depoſe that they did ſee the Teſtator write or ſubſcribe the Teſtament, and know the ſame to be his Hand [x], or elſe that they did hear the Teſtator confeſs, that he had made his Teſtament, or that the ſame was in the Hands of ſuch a Perſon [y]; or if the Teſtament were found in the Teſtator's Cheſt amongſt his other Writings. In theſe Caſes the Proof made by comparing of Hands, albeit the Teſtament be to be proved in Form of Law, is a full and ſufficient Proof [z]. Or if there be none of theſe Helps by likely Circumſtances, yet if on the contrary there be no Suſpicion of Fraud, or Fear of Subornation, I am of their Opinion who do hold, that the circumſpect Judge may allow the Proof, made by comparing of Hands, for a full Proof [a]. But then alſo the Writings ſo found in the Teſtator's Cheſt, muſt be ſo written, as it may appear not to he a Draught or Preparation of a Will, but the Teſtament it ſelf [b]. What if the Teſtator ſhall acknowledge, that his Teſtament

[p] Auth. quod ſine C. de teſta. & DD. ibi. Jo. dilect. de arte teſtandi. tit. 2. c. 2. in fin. Maſcard. de probat. verb. teſtam. concl. 1352. n. 60, &c.

[q] Bar. in L. ſi ita ſcripſero ff. de cond. & demon. Alex. conſil. 76. vol. 3. n. 2, 3. Pariſ. conſil. 19. vol. 3. n. 26. Covar. in c. cum tibi de teſta. extr. n. 5.

[r] Sichard. in d. Auth. quod ſine. Alex. de conſil. 76. n. 314. Menoch. de arbitr. Jud. q. lib. 2. caſ. 114. n. 22. Afflict. deciſ. 181. n. 7.

[s] Sichar. in d. Auth. quod ſine. Alex. d. conſil. 76. vol. 3. Molin. in addit. ad. Alex. conſil. 114. vol. 7.

[t] Bar. & alii in L. admonendi, ff. de jure jur. Afflict. deciſ. 181. Maſcard. tract. de probat. verb. comparatio.

[u] Veſtrius pract. cur. Rom. lib. 6. c. 1.

[x] Sichard. in d. Auth. Alex. de conſil. 67. & conſil. 123. vol. 1. n. 5.

[y] Bar. Imol. & alii in L. ſi ita ſcripſero ff. de cond. & demon. quorum opinio magis eſt communis, teſte Graſſ. Theſaura. com. op. §. Inſtitutio, q. 16. n. 1. & §. teſtim. q. 16. in fin.

[z] Natta. in Auth. quod ſine. Graſſ. Theſaur. com. op. §. teſtim. q. 16. in fin. Maſcard. de probat. ver. teſtim. concluſ. 1352. n. 66.

[a] Alex. conſil. 114. vol. 7. n. 4, 5. Natta in d. Auth. quod ſine. & Graſſ. Theſaur. com. op. §. Inſtitutio q. 16. n. 6. Dec. conſil. 219. in fin. Sotin. conſil. 162. n. 4. & hanc opinionem non ego falſam cum Molineo, imo communem cum Alex. periculoſam tamen cum Maſcardo, ideoque in arbitrio judicis poſitam eſſe cum Decio ſentio.

[b] Bar. in d. L. quoties, §. 1. ff. de hæred. inſtituend. Maſcard. d. concl. 1352. n. 63. Non tamen opus eſſe puto, obſervari illa requiſita, de quibus in d. Auth. quod ſine; videlicet diei expreſſionem, extenſam ſcriptionem, liberorum nominationem, &c. Quorum ſine obſervatione, nec inter liberos, nec ad pias cauſas teſtamentum valet, etiamſi conſtet de manu teſtatoris: Nam iſta requiſita

 inducta

Teſtament is contained in a Schedule or Writing, which he left in the Cuſtody of ſuch a Man. Now if that Man bring forth a Schedule, and upon his Oath depoſe that to be the ſame Writing which the Teſtator left in his Cuſtody, Whether is this a ſufficient Proof of the Deceaſed's Will; without any further comparing of Hands? As the Caſe is propounded, the Proof is ſufficient without comparing of Hands [c]. But if the Teſtator had ſaid, that the Schedule or Will was written with his own Hand, then the aforeſaid Proof is not ſufficient without Comparation, whereby it [d] may appear to have been written by the Teſtator; for in ſaying, that the Schedule which he left with ſuch a Perſon, containing his Will, is of his own Hand-writing, it ſeemeth, that the Teſtator did not repoſe ſuch Truſt in that Man, as that his Teſtimony alone ſhould ſuffice, unleſs alſo it did appear, that the Schedule which ſhould be brought forth was written by the Teſtator; which in the former Caſe is not neceſſary, where it is referred to the ſole Credit of the Witneſs, with whom the Writing was left [e].

inducta ſunt à jure civili, nec ſunt ſublata jure canonico, ut author eſt Everard. Verum autem, inſpecto jure gentium, quo jure nos Angl. haud. aliter ac Romani milites, libere fruimur, non eſt neceſſaria vel diei expreſſio, vel extenſa ſcriptio, &c. Illud ſolum exigitur, ut conſtet ſcripturam manu teſtatoris exaratam fuiſſe, vel ſubſcriptam ſine alia quavis ſolennitate, dum tamen hujuſmodi ſcriptura non ſit præparatio ad teſtandum, ſed ipſa depoſitio, ut alias ſupradictum eſt, & infra dicendum part. 7. §. 13. in fin.

[c] Alex. conſil. 176. vol. 5. n. 3. Lud. Zunt. pro uxore, fol. 24. n. 88. Hyero. Pantiſhmant. lib. 2. q. 2. n. 53. [d] Aſtrenſ. in L. hæredes palam. ff. de teſta. n. 2. Zunt. & Pantiſh. ubi ſupra. [e] L. Theopompus F. de dote pra. leg. probatur, quod dicto unius ſtat ex voluntate teſtatoris.

But what if (10) the Teſtament be found in the Teſtator's Cheſt, or ſafely kept amongſt other Writings; which Teſtament is neither written by the Teſtator, nor by him ſubſcribed, but altogether of another Man's Hand, Whether ſhall this Writing prevail as the laſt Will and Teſtament of the Deceaſed, or not? It ſhall not [f], unleſs it be proved, that the ſame was written by the Commandment of the Teſtator [g], or unleſs it be ſealed with the Seal of the Teſtator [h]?

[f] Jaſ. in d. Auth. quod ſine, C. de teſta. Jul. Clar. §. teſtim. p. 41. n. 5. ubi dicunt hanc opinionem eſſe communem Menoch. lib. 4. præſ. 17. n. 1.

[g] Jaſ. in d. Auth. Maſcard. de probat. d. concluſ. 1353. n. 67. [h] C. 2. de fide Inſtr. extr. Et licet Decius ibidem teneat contrarium, niſi Sigillatione accedat etiam ſubſcriptio: Quia tamen hæc opinio fundata eſt in ſolennitate juris civilis, nobis jus gentium attendentibus, opinor hanc Decii ſententiam non audiendam fore in foro noſtro.

§. XXIX. Of the Form of a nuncupative Teſtament. See 1 *Part, Chap.* 12.

1. *Of the Form of Words in a nuncupative Teſtament.*
2. *Obſcurity and Ambiguity to be avoided.*
3. *Obſcurity, what it is, and how it may be avoided?*
4. *Ambiguity, what, and how it may be avoided?*
5. *The Difference betwixt Obſcurity and Ambiguity.*
6. *Wills favourably interpreted.*
7. *In Contracts, Interpretation is to be made againſt the Party.*

IN the Making of a nuncupative Will or Teſtament, this is chiefly to be obſerved, That the Teſtator do name his Executor, and declare his Mind by Words of Mouth, without Writing, before Witneſſes [h]. As (1) for any preciſe Form of Words, none is required [i], neither is it material whether the Teſtator do ſpeak properly, or unproperly [k]; ſo that his Meaning do appear, as hath been heretofore confirmed by divers Examples [l]. But it is not ſufficient for the Teſtator to leave a Sound in the Ears of the Witneſſes, unleſs he do leave ſome Underſtanding alſo of his Will and Meaning [m].

[h] §. fin inſtit. de teſta. ordin. Auth. hoc inter §. per nuncupationem. C. eodem tit. numerum tamen ſeptenarium teſtium de quo in d. §. non eſſe neceſſarium ſupra diximus.

[i] Molineus, in L. 1. part. §. [k] L. eodem ff. de verb. ob. n. 8. in fin. [l] L. quoniam indignum de teſta. [m] Supra eadem & ſi § proſcribere. de Inſtit. action. L. ætate, nihil de inter. action. ff.

And although in written Teſtaments, it be alſo required that the Words and Sentences be ſuch as thereby the Teſtator's Meaning may appear[n]; yet more ſpecially it is required in a nuncupative Teſtament, for more Supply may be made in written Teſtaments than can be made in nuncupative Teſtaments, concerning the Teſtator's Meaning [o].

[n] Supra §. prox. præceden'.

[o] Auth. quod ſine C. de teſta.

Wherefore (2) that the Teſtator may the better perform this Thing, and that his Meaning may be better underſtood, he muſt as much as he can avoid *Obſcurity* and *Ambiguity* [p].

[p] De obſcuro & ambiguo vide Spiegel. Lexic. verb. ambig. & verb. obſcurum.

Obſcurity (3) is avoided by ſpeaking plainly; for an obſcure Speech is that which either cannot be underſtood at all, or very hardly, by Reaſon of the Darkneſs thereof, or want of the Light of plain Utterance [q].

[q] Spiegel. Lexic. verb. obſcurum Cagnol. in L. ſemper de reg. jur. ff.

Ambiguity (4) is avoided by ſpeaking ſimply and certainly; for an ambiguous Speech is that which yieldeth divers Senſes to the Hearer, who remaineth doubtful in whether Senſe the Speaker is to be underſtood [r].

[r] Spiegel. & Cagnol. ubi ſupra.

The (5) Difference betwixt Obſcurity and Ambiguity is this. *By Obſcurity*, the Hearer is made like to him which walketh in a dark Place, not knowing where the Way lieth; whether on the right Hand, or on the left, before him, or behind him; or whether he be in the Way, or out of the Way. *By Ambiguity*, the Hearer is made like unto him, who walketh in the Light, meeteth with two or three Ways, and knoweth not which Way to take, nor which of thoſe Ways leadeth to that Place where he ought to go; both of them are to be avoided [s].

[s] Zaſius in L. veteribus ff. de pactis.

Spiegel. & Cagnol. ubi ſupra. Fateor tamen alias ab aliis differentias excogitari, & quandoque etiam confundi.

Before the Stat. 29 *Car.* 2. it was neceſſary to put a nuncupative Will in Writing, and to prove it; for the Executor could bring no Action unleſs the Will was written and proved by a Witneſs, and under the Seal of the Ordinary; but the Seal of the Teſtator was not neceſſary. Fitz. Exor. 2.

An Adminiſtrator exhibited a Bill to have a Diſcovery and an Account of the Inteſtate's Eſtate; the Defendant pleaded, that the ſuppoſed Inteſtate made a *nuncupative Will*, and *T. S.* Executor, and inſiſted that he was not accountable to any other Perſon; but decreed that a nuncupative Will *before Probate* was not pleadable to an Adminiſtrator. *Verborn* v. *Brewin*, 1 Chan. Rep. 192.

By the Statute 29 *Car.* 2. 'tis enacted, *That a nuncupative Will ſhall not be good exceeding* 30 l. *unleſs proved by three Witneſſes, who were preſent at the Making thereof; nor unleſs it was made in the Time of the laſt Sickneſs of the Deceaſed, or in his Houſe, or where he had been reſident for ten Days before, unleſs it be committed to Writing within ſix Days after the Making; neither ſhall any Letters teſtamentary, or Probate of ſuch Will paſs the Seal of any Court, till fourteen Days after the Deceaſe of the Teſtator, nor until Proceſs hath iſſued to call in the Widow or next of Kin to conteſt it.* 29 Car. 2. c. 3.

By

By the ſame Statute it is enacted, *That no Will in Writing concerning any perſonal Eſtate ſhall be repealed, or any Clauſe therein altered by any Words or Will by Word of Mouth, except the ſame be put in Writing in the Life-time of the Teſtator, and read to and approved by him, and all that proved by three Witneſſes.*

Stonewell's Caſe, Raym. 354.

Since this Statute the Teſtator by his Will in Writing made his Wife Executrix and reſiduary Legatee; but ſhe dying in his Life-time, he made a *Codicil by Word of Mouth, by which he deviſed to* George Robinſon *all which he had given in his Will to his Wife*; this was adjudged by the Delegates to be a good nuncupative Codicil, and *quaſi* a new Will for ſo much as he had given to his Wife; and as to that Matter it was no Manner of Alteration of the Will in Writing, becauſe in Law there was no ſuch Will, for the Operation of it was determined by the Death of the Wife, in the Life of the Teſtator her Husband; ſo that as to the *Reſiduum* deviſed to her, it was utterly void.

Though (6) the Law hath provided favourable Interpretations, to ſuſtain the Teſtament where the Depoſition is obſcure, ambiguous, or uncertain [t], contrary to the (7) Nature of Contracts, where he that ſpeaketh obſcurely or ambiguouſly, is ſaid to ſpeak at his own Peril, and that ſuch his Speeches are to be taken ſtrongly againſt himſelf [u]: Nevertheleſs how favourable ſoever the Law be towards dead Men's Wills, the Lawyers are not ſo favourable to their Clients; and therefore if it were but to avoid long and coſtly Suits, it is meet that the Teſtator utter his Mind, as plainly and certainly as he can.

[t] L. in teſtamentis de reg. jur. ff. & DD. ibid.

[u] L. veteribus ff. de pactis.

§. XXX. Of the particular Forms of other Teſtaments or Laſt Wills.

CONcerning the Forms of Teſtaments privileged, or not privileged, or of other Kinds of Wills, as of Codicils, or of Gifts in Caſe of Death, I refer the Reader to thoſe Places where ſpecial Mention is made of every of them, and of their Differences of Forms [x].

[x] Supra 1 part. §. 5, 6, 7, &c.

And chiefly concerning the Forms of Legacies, I wiſh the Reader to peruſe the manifold Forms of making an Executor: For as I have often ſaid [y], by underſtanding after how many Sorts an Executor may be appointed, it is an eaſy Matter to collect how diverſly a Legacy may be left alſo.

[y] Supra eadem part. §. 3, 4. n. 18. cum ſeq.

WHAT PERSON May be EXECUTOR OF A TESTAMENT, Or is capable of a LEGACY.

The Fifth Part.

SECT. I.

1. *Every one may be Executor which is not forbidden.*
2. *The Teſtator may omit or exclude his own Child, and make others Executors.*
3. *The Teſtator may make Executors either Bondmen or Free.*
4. *Not only Laymen, but Clerks alſo may be made Executors.*
5. *Women as well as Men may be Executors.*
6. *Infants as well as thoſe of full Age may be made Executors.*
7. *The Teſtator may make his Executors either known or unknown Perſons.*
8. *The Teſtator may appoint Executor either his Creditor or his Debtor.*
9. *The Teſtator may appoint Executors either one Perſon, or many.*

IN the fifth principal Part of this teſtamentary Treatiſe is declared, what Perſons may be appointed Executors, and are capable of a Legacy; and what Perſons are incapable of an Executorſhip or Legacy.

Wherein, forasmuch as the Law doth give Liberty to the Testator to appoint whom he will to be his Executor [a], and likewise to give Legacies to whom he will, certain Persons excepted [b]; this may be delivered for a Rule, That (1) every Person may be an Executor, and is capable of a Legacy, saving such as are forbidden [c]. Now what Persons those be which are forbidden, shall straightway be shewed, after the View of the Greatness of the Testator's Liberty in appointing his Executors.

[a] Tit. de hær. instit. l. 2. Institut. in princ. Benedict. de Capra. Tract. regul. & fal. verb. executor.
[b] §. legati. Instit. de lega.
[c] Minsing. in d. tit. de hær. instit. in prin. pract. Petr. de Ferrar. in forma libelli ad redden. ration. tutel. §. ad executores, n. 1.

First, it is to be understood (2) that this Liberty of the Testator is so large and ample, that albeit the Testator have Children of his own naturally and lawfully begotten; yet by the Laws and Customs of this Realm he may appoint others to be his Executors, secretly omitting, or openly excluding, his own Children [d].

[d] Bract. de consuet. & leg. Ang. l. 2. c. 26. Tract. de repub. Angl. l. 3. c. 7. Unde perspicuum est, nullum fere usum apud nos manere hujusmodi titulorum juris civilis, viz. de exhæredac. liberorum, l. 2. Institut. de lib. & posthu. hær. instituend. vel exhæred. ff. & de inoffic. test. ff. Instit. &c. una cum pluribus aliis ejusd. farinæ cum titulis, cum legibus.

Secondly, (3) The Testator hath Liberty to appoint Executors, not only those which be free, but also Bondmen or Villains [e], either his own Villain, or the Villain of another [f]. And if the Testator do make his own Villain Executor, he doth manumit, or deliver his Villain from Bondage [g]. And if another's Villain be made Executor, such Villain may as Executor have Action against his own Lord, in case he were indebted to the Testator [h]; because he shall not recover the Debt to his own Use, but to the Use of the Testator [i].

[e] Libr. Instit. tit. de hæred. instituend. in prin. Littleton tit. Villenage, fol. 40. Brook Abridg. tit. Villein, n. 68. Et licet jure civili servus institui quidem non potest executor, ut per Bald. in L. id quod C. de Episcopis & cler. n. 3. tamen jure quo nos utimur, institui possunt servi nostrates executores, ut per Littleton & Brook ubi supra. Quinimo eodem jure civili servus constitui potest nudus executor. Jo. de Can. Tract. de exec. ult. volunt. part. 1. q. 3. n. 47. [f] D. tit. de hæred. instit. in prin. [g] Jo. de Platea in d. tit. in prin. [h] Littl. tit. Villenage, fol. 40. Brook tit. Villein, n. 68. [i] Littl. ubi supra, & nota, quod non obtinet jus civile, quo servus alienus instit. acquirat domino. §. alien. Instit. de hæred. instit.

Thirdly, (4) The Testator hath Liberty to appoint his Executors not only Laymen, but Clerks also [k].

[k] Imo etiam religiosos, obtenta licentia, Fitz. tit. execut. n. 47. Brook eod. tit. n. 68, 77.

Fourthly, (5) The Testator may make Executors not only Men, but also Women [l], either single, or married [m]. But when a Woman is made sole Executrix, and she taketh a Husband, whether the Husband alone may release any Debt due to the Deceased, hath been a great Question in former Ages amongst the Learned in the Laws of this Land, by whom it hath been strongly argued *pro & contra* [n]; but now at last it seemeth to be without Question, that the Release of the Husband in such a Case is good [o].

[l] Covar. in c. tua de testa. extr. Et est communis opinio. Peckius de testa. conjug. l. 1. c. 20.
[m] Peckius de t. c. Fitz. & Brook d. tit. Executor.
[n] Vide relationes Roberti Keilwey inter casus incert. temporis, fol. 122.
[o] D. Coke, l. 5. Relat. in Russel's *Case*, paulo ante finem. Fitz. Abridg. tit. Executor, n. 23, 30. Brook eod. tit. n. 147, 151, 152. Vide part 6. §. 3. n. 17.

Fifthly, (6) The Testator hath Power to appoint Executors not only Persons of full Age, but also Infants [p]; and the Act done by the Infant as Executor, as the Releasing of the Debt due to the Testator or the Selling or Distributing of the Testator's Goods, is said to be sufficient in Law [q]. Which is to be understood, upon true Payment and Satisfaction of the Due to the Deceased, made to the Executor in Minority;

[p] Brook Abridg. tit. exec. n. 115. tit. coverture, n. 56.
[q] Brook ubi supra & sic non recipit juris civilis disciplina, qua minor 17 annis non admittitur execut.

Minority; for then he may acquit and diſcharge the Debtor for ſo much as he doth receive; for therein he doth perform the Office and Duty of an Executor, which he is inabled to do; and ſo doing, his Act ſhall bind him [r]. But if he ſhall releaſe without Satisfaction, this Act is not according to the Office and Duty of an Executor; and therefore being without the Compaſs of his Office and Duty, ſhall not bind or bar him from Recovery thereof; for if it ſhould, then ſhould it be a *Devaſtavit* [s], and charge the Minor out of his own proper Goods, which cannot be by Law; for a Child may better his Eſtate, but not make it worſe [t], by contracting with, or acquitting of another Perſon.

[r] D. Coke, l. 5. Relationum, fol. 27. *Ruſſel*'s Caſe.

[s] D. Coke d. loco, ubi pluribus aliis non contemnendis nititur argumentis huc tendentibus.

[t] Namque placuit, meliorem quidem conditionem licere pupillis facere, deteriorem vero non. Inſt. tit. de auct. Tut. in princ.

'Tis lawful for an Infant Executor to ſell the Goods of the Teſtator, becauſe he is bound to pay his Debts; and as his Sale is good and ſhall bind him, ſo is the Sale of any other Perſon by his Appointment and Conſent, if 'tis not to his Prejudice; and he who aſſiſts him in ſuch Sale, ſhall not be accounted an Adminiſtrator, but as a Servant to the Infant.

Knott verſ. *Barlow*, Cro. Eliz. 671. *Clerke* verſ. *Hopkins*, Cro. Eliz. 254.

As to *Releaſes* made by an *Infant Executor*, if they amount to a *Devaſtavit* they are void, for he ſhall receive no Prejudice by his Folly whilſt under Age; and certainly 'tis an Act of Folly for an Infant to give a Releaſe without any Conſideration.

Manning's Caſe, 3 Leon. 143. Keilw. 52. 4 Leon. 210. *Ruſſel*'s Caſe, Moor 146. 5 Rep. 27. S. C.

Three Executors, one was an *Infant* who received 50 *l.* on a Bond and the Intereſt, and gave a Releaſe; this was held good, for though the Penalty of the Bond (which was 100 *l.*) was forfeited, yet his Releaſe could not amount to a *Devaſtavit*, becauſe he did what the Law would have compelled him to do.

1 And. 117. S. C. *Kniveton* v. *Latham*, Cro. Car. 490. W. Jones 400. S. C.

And here note, that by the Laws of this Realm every one is accounted Infant until he be twenty-one Years old [u]. And yet it ſeemeth that in ſome Caſes the Executor ſhall be adjudged to be of full Age before he be twenty-one Years old; for if the Teſtator make one his Executor that is in Minority, whereupon Adminiſtration is granted to ſome other, to the Uſe of the ſaid Executor *durante minori ætate*; in this Caſe the Adminiſtration doth ceaſe when the Executor is of the Age of ſeventeen Years [x]. Which is agreeable to the Opinion of ſome Civilians, and that Opinion confirmed by Cuſtom [y]; though others be of a contrary Opinion, eſteeming him unfit to manage another's Affairs, that is unable to govern his own [z]. Which Contrariety nevertheleſs may be reconciled, not only by the Diſtinction of Law and Cuſtom [a], or by the Difference between Acts judicial and extrajudicial [b]; but alſo and eſpecially by the Diſtinction of Acts conformable and not conformable to the Office of an Executor; whereof the former are holden lawful, notwithſtanding his Minority, and the other of no Validity in Law [c]. But if the Infant be ſo young that he hath no Diſcretion, (for it is not only lawful to make ſuch an one Executor, but alſo the Child in the Mother's Womb, and unborn at the Death of the Teſtator [q],) in that Caſe the Ordinary, or other to whom the Approbation of the Teſtament appertaineth, after the Birth of the Child, doth

[u] Doct. & Stud. l. 1. c. 21. l. 2. c. 28.

[x] D. Coke, l. 5. relat. fo. 29. in Princ. Caſe.

[y] Conſuet. (inquit Jo. de Canibus) illos admittit, ſicut etiam tolerat eos eſſe ad negotia procurator. Tract. de execut. ult. volun. prima partic. n. 44.

[z] Verior (inquit Oldendorpius) eſt eorum ſententia, qui dicunt minorem 21 annis, majorem tamen 17, ad executionem teſtamenti non admitti. Tract. de ex. ult. volunt. tit. 4.

[a] Jo. de Can ubi ſupra.

[b] Speculator. tit. de Inſt. edit. §. Nunc vero aliqua, n. 79.

[c] D. Coke, l. 5. relat. fol. 27. in Ruſ. Caſe.

[q] L. placet. ff. de lib. & poſthu. quæ lex etſi loquatur de hæred. inſtitut. idem tamen juris vel in executoris conſtitutione paſſim ab Anglis obſervari notorie conſtat, quicquid dixerit jus civile. Vide Dyer, fol. 303, 304.

doth commit the Execution of the Will to the Tutor of the Child for the Child's Behoof, until he be able to execute the ſame himſelf; the which Tutor hath Authority to deal as Executor until the Child be able to undertake the Executorſhip[r], that is to ſay, until he be of the Age of ſeventeen Years, as is aboveſaid. During which Minority, the Adminiſtrator to the Child's Uſe cannot ſell or alienate any of the Goods of the Deceaſed, unleſs it be upon Neceſſity; as for the Payment of the Deceaſed's Debts, or that the Goods would otherwiſe periſh[s]; nor let a Leaſe for a longer Term than whilſt the Executor ſhall be in Minority: Becauſe having that Office for the Good and Benefit of the Child only, he may not do any Thing to his Prejudice[t].

Sixthly, (7) It is lawful for the Teſtator not only to appoint his known Friends and Acquaintance his Executors, but alſo Strangers, and ſuch Perſons as he did never ſee[u].

Vide infra ead. part. §. ut & intell. ut ibi.

Seventhly, (8) It is lawful for the Teſtator to conſtitute and ordain to be his Executor, either that Perſon to whom the Teſtator is indebted, or that Perſon that is indebted to the Teſtator. If the Teſtator make him to whom he is indebted his Executor; as well by the Civil[x] and Eccleſiaſtical[y] Laws, as alſo by the Laws of this Realm, he is in as good Caſe as other Creditors of the Deceaſed, and may allow his own Debt before other like Creditors[z]; and may detain ſo much of the Goods of the Deceaſed in his Hands as his Debt doth amount unto[a], (in Caſe he make an Inventory of the Deceaſed's Goods[b] according to the Law.) So that albeit it may ſeem that the Action is extinguiſhed in regard of the Teſtator, yet the Debt is ſtill *in eſſe* in Reſpect of other Creditors[c]. Howbeit an Executor of his own Wrong cannot detain the Debt due unto him in Prejudice of other Creditors[d].

[b] D. L. ſcimus. C. de jure deliberand. §. in computatione. [c] D. §. In computat. & Fulb. ubi ſupra. [d] D. Coke l. 5. Relationum, fo. 30. in Coulter's Caſe.

Williamſon v. *Norwich*, 1 Roll. Abr. 923. Style 337.

An Action of Debt was brought againſt an *Executor de ſon tort* upon the Contract of the Inteſtate, and pending the Action the ſaid Executor took out Letters of Adminiſtration, and then pleaded that the Inteſtate owed him 50*l.* on Bond, and that he had adminiſtred; and by Virtue thereof did retain his Goods to the Value of the Debt, and that he had *nulla Bona* of the Inteſtate, other than to that Value; and upon a Demurrer this was adjudged a good Plea, becauſe the Adminiſtration granted (though *pendente lite*) had purged the wrongful Executorſhip, and therefore he ſhall retain the Goods to ſatisfy a juſt Debt due by Specialty, before he ſhall be obliged to pay a Debt on a Contract.

When the *Creditor maketh the Debtor his Executor*, in this Caſe the Debtor *proving the Will*, the Debt is utterly extinguiſhed by the Executorſhip; becauſe the Executor being one and the ſame Perſon in Law with the Teſtator, he cannot bring an Action againſt himſelf[e]. And if *Two be bound* to one in a certain Sum of Money, and the Creditor maketh the *one of them his Executor*, this is held for a Releaſe in Law of the Bond and Debt to them *both*[f]. Again, if the Teſtator make *his Debtor and another not indebted his Executors*, after whoſe Death they *both prove the Will*, then that Executor dieth that was indebted, the other who was not indebted ſurviving;

[r] Quod ſine ulla contradictione ſæpiſſime obſervatur, ſaltem infra provinciam Eborac.

[s] D. Coke in Prin. caſe, l. 5. relat. fol. 29.

[t] Ibidem.

[u] §. fin. inſtit. de hæred. inſtituend. L. extraneum. C. de teſt.

[x] L. ſcimus C. de jur. deliberand. §. in computatione.

[y] C. ſtat. §. ſtatuimus. l. 3. pr. conſtit. Cant.

[z] Plowd. in caſu inter Woodward & Parrie. L'abridg. dez Caſes, fol. 174. n. 3.

[a] Fulb. paral. lib. 1. fo. 44. 6. Inſt. part. 1. 264. 6. 8 Ed. 4. 3. 21 Ed. 4. fol. 2. 12 H. 4. fol. 21. Pl. Com. fo. 176, 545.

[e] L'abridg. dez caſes edit. An. Dom. 1599. tit. Executors, n. 3. Fulb. ubi ſupr. fo. 44. 21 E. 4. fol. 3. Pl. Com. fo. 36.

[f] Ibid. p. 1. Brook Abridg. tit. Executor, pl. 118. 21 E. 4. 81. 11 H. 4. pl. 31.

viving; the Survivor in this Caſe ſhall not have an Action of Debt againſt the Executor of his Co-Executor [g]. But what if the Party indebted did not adminiſter as Executor in his Life-time? In this Caſe likewiſe it ſeemeth the Executor ſurviving hath no Action for the Recovery of that Debt [h]: For that the Action was by conſtituting him Executor extinguiſhed and dea [i], and being once dead can never be revivived [i]. But if *one that is indebted make his Creditor and another his Executors*; the Creditor, if he do not prove the Will nor adminiſter, may have an Action againſt him which doth prove the Will [k]; for the Debt is not extinguiſhed *until he doth adminiſter as Executor* [l]. So that the Debt due by the Deceaſed is not extinguiſhed by appointing the Creditor an Executor, unleſs *he do adminiſter as Executor:* But the Debt due to the Deceaſed is extinguiſhed by *appointing the Debtor his Executor*, though he do not adminiſter; unleſs peradventure it be in Prejudice of others, to whom the Teſtator was indebted: For if there be not Aſſets or Goods ſufficient as well for Performance of the Deceaſed's Will as the Payment of his Debts; there the Will muſt reſt unperformed, until the Debts be firſt diſcharged, whether it be in reſpect of Goods bequeathed, or Debts either expreſly or ſecretly releaſed in the ſame Will [m]. For Legataries may not be preferred before Creditors, ſince theſe ſhould ſuffer Loſs if they were not ſatisfied; whereas the other ſhould ſuſtain no Damage, only they ſhould not gain [n].

de lucro captando, certare pluſquam manifeſtum eſt. Prætect.

[g] L'abridg. dez caſes, tit. Exec. f. 174. n. 3. 21 H. 4. fo. 31. contra.

[h] L'abridg. & Fulb. ubi ſupra.

[i] Actio ſemel extincta nunquam reviviſcit.

[k] Fulb. ubi ſupra.

[l] L'abridg. dez caſes edit. An. Dom. 1599. tit. Executors, fol. 174. n. 3.

[m] L. ſcimus. §. & ſi præfatam. C. de jure delib. Bract. de legib. Angl. l. 2. c. 26.

[n] Creditores de damno vitando, legatarias in d. §. ſi præfatam.

Where a Man dies Inteſtate, and afterwards Adminiſtration is granted to the Debtor, in ſuch Caſe the Debt is not extinct, but it ſhall be Aſſets in his Hands in reſpect to the Creditors of the Inteſtate, becauſe the Ordinary had no Power to diſcharge the Debt; and this is the third Reſolution in Sir * *John Needham's* Caſe.

* 8 Rep. 136.

So where the *Obligor* adminiſtred to the *Inteſtate Obligee*, and made *T. S. his Executor*, and died; and afterwards one of the Creditors of the Obligee brought an Action of Debt againſt this Executor; and adjudged that the Action was well brought.

Sid. 79. *Lockier* v. *Smith.*

The *Obligee* made the *Obligor Executor*, who adminiſtered ſeveral Goods, but made his Wife Executrix, and then died *before he had proved the Will of the Obligee*; ſhe (the Executrix) proved her Husband's Will, and *took out Adminiſtration to the Obligee, with his Will annexed*, and then brought Debt againſt the Heir of the Obligor (who was Executor to the Obligee as aforeſaid) upon the Bond of his Anceſtor: It was adjudged, that the Obligee having made the Obligor Executor, and he accepting the Executorſhip by adminiſtring Part of the Goods, the Debt was releaſed; for where the ſame Hand is to receive and pay, that amounts to a Diſcharge.

Wangford v. *Wangford*, 1 Salk. 299.

Finally, (9) the Teſtator may appoint one Perſon alone, or many [o]: I ſay, ſeveral, or many repreſenting one Body, as a College, a City, an Univerſity [p].

ſing. in d. §. & unum. Graſſ. Theſaur. com. op.

[o] §. unum. inſtit. de hæred. inſtituend.

[p] L. hæred. C. de hæred. inſtit. Minſ. §. Inſtitutio, q. 20.

After this View of the Greatneſs of the Power of the Teſtator in making Executors, let us return to the Reſtraint of the Teſtator's Liberty, and ſhew what Perſons are forbidden to be Executors, or to reap any Commodity by a Teſtament or Laſt Will.

Of Debtors and Creditors made Executors or Adminiſtrators.

IF an Infant of the Age of Seventeen Years releaſe a Debt, this is void; but if an Infant make the Debtor his Executor, this is a good Releaſe in Law of the Action [q].

[q] Inſt. part. 1. fo. 264. b.

If a Feme Executrix take the Debtor to Husband, this is no Releaſe in Law, for that would be a Wrong to the Deceaſed, and in Law work a *Devaſtavit*, which an Act in Law ſhall never do: And ſo adjudged [r]. But if the Teſtator make the Wife of one indebted to him his Executrix, it is a Releaſe in Law, as if ſhe her ſelf were the Debtor; but if after the Teſtator's Death ſhe do marry with ſuch a Debtor, then it's a *Devaſtavit* [s]. Alſo if *A.* and *B.* be made Executors, the Teſtator being indebted to *A.* 10 *l.* and *B.* being indebted to the Teſtator 10 *l.* in this Caſe the Debt of *B.* to the Teſtator is extinct [t].

[r] M. 30, 31 Eliz. Inſt. part. 1. fo. 264. b.

[s] Office of Executor, c. 17. §. 1.

[t] 21 H. 7. 31. Pl. Com. fo. 185. Contra *Danby & Choke*, 8 E. 4. fo. 3.

Where a Creditor to the Teſtator is made his Executor, he may detain ſo much of the Teſtator's Goods, as thereby to ſatisfy himſelf in the firſt Place before other Creditors [u]. Yet this is to be underſtood, where he makes an Inventory of the Deceaſed's Goods according to Law [x]; and that the Debt to him owing be of equal Degree with the Debts to others. For if his Teſtator were indebted to other Men by Statute, Judgment, or Recognizance, and to him whom he maketh Executor only by Bond or other Specialty; then he cannot firſt pay himſelf: But if there be Aſſets ſufficient to ſatisfy all Parties, he may. *Pl. Com. fo.* 185.

[u] Pl. Com. *Woodward's* Caſ. Abridgment dez Caſes, fo. 174. n. 3.

[x] Dict. L. Scimus. §. in comput.

If Adminiſtration be committed to the Obligor, the ſame doth not extinguiſh the Debt; but if the Obligee doth make the Obligor his Executor, the ſame is a Releaſe in Law of the Debt, becauſe it is the Act of the Obligee himſelf [y].

[y] C. lib. 8. fo. 135. Sir *Jo. Needham's* Caſe.

The Father and Son were jointly and ſeverally obliged to *A.* who made the Son's Wife his Executrix, and deviſeth to her all his Goods after his Debts and Legacies paid, and dies; the Wife adminiſters; the Son makes his Wife alſo Executrix, and dies; the Wife dies Inteſtate; Adminiſtration of the Goods not adminiſtred of the Obligee was committed to *F.* who ſues the Father, who was the ſurviving joint Obligor: *Per Curiam*, the making of the Wife of one of the Obligors Executrix, was a Suſpenſion of the Action during ſuch Time as the Executorſhip continued, as 8 *E.* 4. *fo.* 3. And *Nichols* ſaid, that a perſonal Action once ſuſpended by Act of the Party, as here by Act of the Obligee, in making the Wife of one of the Obligors his Executrix, ſhall be extinct for ever: Otherwiſe if by the Act of Law it was averred that the Debts and Legacies were paid [z]. Therefore when the Obligor made the Executrix of the Obligee his Executrix, and left Aſſets, the Debt was preſently ſatisfied by Way of Retainer; and conſequently no new Action could be had for that Debt; Judgment was given for the Defendant.

[z] T. 12 Jac. C. B. *Fryer* verſ. *Gildring*, Moore's Rep. fo. 855. n. 1174. Hob. Rep. fo. 10. H. 11 Jac. Rot. 1990. *Alſton* v. *Andrews*, Hutt. 128. S. P. *Tendgeon* v. *Heron*, Hutt. 121.

Where the Debtee adminiſters to the Debtor, he may retain the Goods of the Inteſtate in Satisfaction of his Debt; but where there are two Obligors, and one of them dieth Inteſtate, and the Obligee adminiſters, he cannot ſue the other.

And where there are no Goods which he can retain, he may have an Action of Treſpaſs or Trover againſt an Executor *de ſon tort*; he may likewiſe have an Action of Debt againſt ſuch an Executor, upon a Bond due from the Inteſtate, *&c.* *Aſhby* verſus *Child*, 1 Roll. Abr. 940. Style 348.

Two Obligors were jointly and ſeverally bound in a Bond to *T. S.* one of them made *E. G.* Executrix and died; and ſhe made *T. S.* the Obligee Executor, and died; who brought an Action of Debt againſt the ſurviving Obligor upon this Bond: The Defendant pleaded, that the dead Obligor made *E. G.* his Executrix, who made the Obligee his Executor, and that the Plaintiff had adminiſtered the Goods of the dead Obligor, *&c.* And upon a Demurrer the Plaintiff had Judgment; for though the Caſe was no more than this, (*viz.*) that two were bound in a Bond jointly and ſeverally to *T. S.* one of them made the ſaid *T. S.* his Executor; though the Action was diſcharged as to one, yet it lies againſt the other, becauſe the Bond was joint and ſeveral. *Cock* verſus *Croſſe*, 2 Lev. 73.

But where the Debtee made the *Executrix of the Debtor* his Executor, and died, this is no Extinguiſhment of the Debt; as for Inſtance; One *Webb* and *Dorceſter* became jointly bound to *Anne Row* in a Bond, conditioned for Payment of 260 *l.* *Dorceſter*, one of the Obligors, made his Wife and the ſaid *Anne Row* (the Obligee) Executrixes, and died; *Anne Row* the Obligee refuſed; but the other Co-executrix, the Widow of *Dorcheſter*, adminiſtred all the Goods of her Husband, and afterwards *Anne Row* the Obligee made her Executrix, and died, who brought an Action of Debt upon this Bond againſt *Webb* the ſurviving Obligor; and adjudged good, (*viz.*) that where the Obligee makes the Executrix of one of the Obligors her Executor, the Debt is not diſcharged, becauſe ſhe hath it in Right of another. *Dorcheſter* v. *Webb*, Cro. Car. 372. Jones 345.

The *Obligor* and another were made *Executors* by the *Obligee*, who by his Will appointed, that out of the Debt due from them to him they ſhould pay certain Legacies; adjudged that theſe Legacies were recoverable in the Spiritual Court; for by making the Obligor Co-executor with another, the Debt was not extinct as to the Legacies, but ſhall be Aſſets in their Hands to ſatisfy the ſame, as well as to pay Creditors; tho' 'tis true the Co-executor hath no Remedy againſt the other. *Flud* verſus *Ramſey*, Yelv. 160.

The Teſtator deviſed ſeveral Legacies, and the *Reſiduum of his perſonal Eſtate to T. S.* and made *E. G.* his Executor, and died, which *E. G.* was Debtor to the Teſtator in 400 *l.* and it was inſiſted, that the Teſtator, who was the Debtee, having made the Debtor his Executor, the Debt was diſcharged; and if ſo, then the 400 *l.* was no Part of his perſonal Eſtate, and by Conſequence there could be no *Reſiduum*; yet it was decreed againſt the Executor, that he ſhould pay the 400 *l.* to *T. S.* to whom the *Reſiduum* was deviſed. *Philips* verſ. *Philips*, 1 Chanc. Rep. 292.

From which Caſes it may be collected, that where the *Obligee or Debtee makes the Obligor or Debtor Executor*, and deviſes ſeveral Legacies to be paid; the Debts due from ſuch Executor to him ſhall not be extinct as to the Legatees, but are recoverable by them; and in the firſt Place ſhall be Aſſets in the Hands of that Executor to ſatisfy Creditors.

Neither ſhall a Debt be extinguiſhed by the *Granting an Adminiſtration* to the *Debtor*; as for Inſtance; an Executor brought an Action *Baxter* verſus *Bales*, 1 Leon. 90.

Action of Debt againſt *T. S.* who pleaded, that the ſaid Executor was cited to appear before the Ordinary to prove the Will, but made Default, and thereupon Adminiſtration was granted to *T. S.* (the Defendant) by Virtue whereof he adminiſtred, and ſo the Debt became extinct; but adjudged that it was not, becauſe the Will might be proved after this Adminiſtration granted, and then it would be defeated by ſuch Probate; and though the Executor had made Default, he might prove the Will at any Time.

If the Debtee dies Inteſtate, and the Ordinary commit Adminiſtration to the Debtor; yet it ſhall be Aſſets in his Hands as to ſatisfy Debts, becauſe the Ordinary hath Power to diſcharge the Debt [a],

[a] Roll's Abridgment, tit. Executor, lit. 9. T. 7 Jac. B. R.

If the Debtee makes the Debtor his Executor, it's not an abſolute Diſcharge of the Debt, for the Debt remains as Aſſets in the Hands of the Debtor Executor; and is *quaſi* a Releaſe in Law, becauſe he cannot be ſued, but it is a meer Suſpenſion of the Action [b].

[b] M. 9 Car. Rot. 373. *Dorcheſter* ver. *Webb*, Crook, part 1. fo. 373. 8 E. 4. 3. 20 E. 4. 17. 21 E. 4. 81. 21 H. 7. 31. 11 H. 7. 4. 11 H. 4. 83. C. lib. 8. fo. 136. Sir *Jo. Needham*'s Caſe.

Where the Feme Debtee takes the Debtor to Husband, or if a Man Debtee takes the Debtor to Wife, it's a Releaſe in Law, becauſe they may not be ſued: But where the Executor of the Debtor is made Executor to the Debtee, he hath nothing thereby in his own Right, but is only to uſe an Action in the Right of another [c].

[c] M. 9 Car. Rot. 373. *Dorcheſter* ver. *Webb*, Crook, part. 1. fo. 373.

John Brown the Teſtator, 23 *June* 1732, by Will, after ſeveral Bequeſts and Legacies to his Executors and others, gave all the Reſidue of his Eſtate, whether real or perſonal, whereof he was ſeiſed or poſſeſſed, or any Ways intitled to, and all his Right, Title and Intereſt therein, unto ſuch his Executor or Executors as ſhould take on them the Execution of his Will, their Heirs, Executors, Adminiſtrators and Aſſigns, as Tenants in Common, and not as Jointenants, and appointed Colonel *John Brown* and *William Selwin* his Executors, and died; *William Selwin* was indebted to the Teſtator at the Time of his Death in 3000 *l.* and Intereſt on a Bond dated 20 *June* 1732, in the Penalty of 6000 *l.* Colonel *Brown* brought a Bill againſt Mr. *Selwin*, for a Moiety of this 3000 *l.* and Intereſt. It appeared in Proof that the Teſtator deſigned this Money to Mr. *Selwin*, and gave his Attorney, concerned in drawing the Will, Inſtructions in Writing accordingly; but the Attorney refuſed to make Mention of it in the Will, inſiſting that the Bond would be extinguiſhed by Mr. *Selwin*'s being appointed Executor. The Teſtator being diſſatisfied, a Caſe was ſtated for Counſel, who confirmed what the Attorney ſaid; but the Parol Evidence not being allowed to be read againſt the expreſs Words of the Will: It was decreed that Mr. *Selwin* ſhould account with his Co-Executor Colonel *Brown*, and pay him a Moiety of the 3000 *l.* and Intereſt. This Decree was affirmed in the Houſe of Lords. *Brown* and *Selwin*, *Mich.* 1734. *Forreſter's Rep. fo.* 240.

§. II. Of an Heretick.

1. *An Heretick cannot be Executor.*
2. *Whether an Heretick may be Executor in a military Teſtament.*
3. *What if the Heretick do reclaim his Hereſy.*

AN (1) Heretick cannot be Executor, neither is he capable of a Legacy [d]. And ſo odious is the Crime of Hereſy, that albeit the Party be not yet condemned of Hereſy, nevertheleſs perſevering in his Hereſy, he is not to be admitted [e], no not (2) in a military Teſtament [f]: Howſoever a Soldier hath more Liberty in making an Executor than another [g].

[d] L. Ariani. C. de hæretic. Sichard. in Rub. de hæred. inſtit. C. n. 5. Minſing. in tit. de hær. inſtit. l. 2. Inſtitu. in prin.

[e] Vaſq. de ſucceſſ. progreſſ. l. 1. §. 2. n. 2.

[f] L. ult. C. de hæret.

[g] Supra 1. part. §. 14.

And tho' (3) he that is named Executor do repent, and reclaim his Hereſy; yet being an Heretick either at the Time of the Making of the Teſtament, or at the Time of the Death of the Teſtator, or at the Time when he undertakes the Executorſhip, he is excluded [h].

[h] §. Extraneis. Inſtit. de hæred. qual. & differentia.

For this is perpetual, that if any Perſon be incapable either when the Teſtament is made, or when the Teſtator dieth, or when he taketh upon him the Executorſhip, it is as if he were always incapable [i]: But it hindreth not if he be incapable at other Times [k]. Neither doth it hinder the Legatary, though he be incapable of the Legacy at the Making of the Teſtament, ſo that he be capable thereof at the Time of the Teſtator's Death [l], (as appeareth more at large hereafter [m].) The Reaſon of the Difference is, becauſe the Legacy dependeth on another Act; that is to ſay, on the Teſtament, from whence it receiveth its Power and Virtue: But the Teſtament or Appointment of the Executor doth not depend on another Act, whereby it may receive either Life or Strength [n].

[i] D. §. in extraneis. L. ſi alienum §. 1. ff. de hæred. inſtit. Sichar. in Rub. de teſta. C. in fin. Graſſ. Theſaur. com. op. §. Inſtit. q. 28.

[k] d. §. in extraneis. L. ſed etſi. §. ſolemus. ff. de hæred. inſtit.

[l] Bar. in L. non oport. ff. de leg. 2.

[m] Infra part. 7. §.

Peckius Tract. de teſta. conju. l. 4. c. 31. Graſſ. Theſaur. com. op. §. Inſtitutio, q. 18. 19. Fulb. fo. 36. l. 1. paral.

[n] Peckius d. c. 31.

And yet in ſome Caſes it ſeemeth, that tho' the Executor be uncapable at the Time of making the Will, it hindereth not, if the ſame Incapacity do ceaſe by the Death of the Teſtator; whereof we ſhall have Occaſion to ſpeak more at large hereafter [o].

[o] Vide infra part. 7. §. 19.

§. III. Of an Apoſtata.

AN Apoſtata alſo is incapable of an Executorſhip, or Legacy [p]. What an Apoſtata is, and how many Kinds of Apoſtacy there be, I have elſewhere declared [q].

[p] L. hi qui ſecundum. §. de Apoſtata.

[q] Supra, part. 2. §. 15.

That which is here ſpoken is meant of Apoſtacy properly ſo called, that is to ſay, of Back-ſtarting from the Chriſtian Faith [r]: To whom I might join alſo Anabaptiſts, for they are alſo incapable of Executorſhips and Legacies [s].

[r] Bar. in Rub. de Apoſtata. C.

[s] L. ult. de ſacr. baptiſ. reit. C. Minſing. in d. tit. de hæred. inſtit. l. 2. Inſtit. in prin.

§. IV. Of Traitors and Felons.

WHoſoever is convicted of Treaſon or Felony, as he cannot make a Teſtament or Laſt Will, as is before confirmed [t], no more is he capable of any Thing diſpoſed by Teſtament or Laſt Will [u]: But if a Man, being attainted of Felony, be admitted to his Clergy, I ſuppoſe that he may lawfully be an Executor [x].

[t] Supra §§. 12, 13. part. 3.

[u] Nam cum ſit damnatus ad mortem naturalem, mortuo æquiparatur, & ſic non poteſt inſtitui. Bar. in L. qui ultimo. ff. de pœnis. & eſt com. op. Graſſ. §. inſtitut. q. 5. Vaſq. de ſucceſſ. progreſſ. l. 1. §. 2. n. 13.

[x] L'abridg. dez caſes edit. An. Dom. 1599. tit. Exec. fol. 180. n. 13.

By the Law of *England*, a Perſon outlawed or attainted for Felony may be Executor, becauſe he hath the Goods not to his own Uſe, but in another's Right: As it was held *per Curiam*, *P.* 1 *Car. C. B.* in Sir *Upcell Carone*'s Caſe [y].

[y] Crook, part. 1. fo. 9.

And ſuch Executor may maintain a Writ of Error to reverſe a Judgment given againſt the Teſtator; as it was adjudged 33 *Eliz. B. R.* [z].

[z] Office of Executor, fo. 24. T. 30 Eliz. B. R. *Marſhe*'s Caſe, Leon. fo. 325.

§. V. Of him that is outlawed.

HE that is outlawed is out of the Protection of the Prince, and all his Goods are forfeited, and he is deſtitute of all the Aid of the Laws of this Realm [a]: And therefore ſo long as he ſtandeth in that Caſe, he is not to be admitted to the Executorſhip, nor can ſue for his Legacy [b]; except it be in ſuch Caſes as he may make his Teſtament, whereof Mention is made before [c].

[a] Supr. part. 2. §. 21.

[b] Fitzh. Abridg. tit. Adminiſtr. n. 3. Sed non exiſtimo utlegatum penitus incapacem reddi, utpote quem relegato verius quam deportato comparandum putem: (nam & relegati bona quandoque publicantur:) Sed quia non habet perſonam ſtandi in judicio, utlegatus non eſt audiendus in judicio durante utlegatione.

[c] Supr. d. part. 2. §. 21.

Howbeit though the Ordinary do not admit him, yet if he ſhall adminiſter as Executor, becauſe it is to the Uſe of another, it is holden for good, by the Opinion of thoſe who do alſo hold that a Perſon outlawed may be an Executor, as well as he may be an Attorney for another, or *Prochein amy* [d], *&c.* Which Opinion ſeemeth to be agreeable to Law: For an outlawed Perſon in an Action perſonal doth not much differ from a Villain, of whom there is no Doubt but that he may be Executor [e]. For though the Lord may lawfully enter into and ſeiſe upon all the Lands and Goods belonging to his Villain, and thereby take and enjoy them to his own Uſe [f]: Yet thoſe Goods which the Villain hath as Executor, his Lord may not take from him; and if he do, his Villain may bring an Action againſt him, and recover both Goods and Damages [g]. And the Reaſon is, becauſe that which the Villain hath, he hath it not to his own Uſe, but to the Uſe of the Teſtator, and it is to be imployed towards the Payment of his Debts and Legacies, and other godly Uſes [h]. Which Reaſon doth hold as well where a Perſon is outlawed, as where a Villain is made Executor, (*viz.* to the Uſe of another.) And therefore, the Reaſon being one in either Caſe, the Law muſt be one in both Caſes. Nevertheleſs if the Teſtator by his Will (as commonly Teſtators do) bequeath the Reſidue of his Goods, or at leaſt ſome Legacy, to his Executor, being an outlawed Perſon, the ſame is forfeited by Force of the Outlawry [i]. Unleſs the Outlawry happen to be pardoned; wherein notwithſtanding the Words of the Pardon ought very diligently to be conſidered [k].

[d] L'abridg. dez caſes, d. tit. Exec. fo. 179.

[e] V. ſupra 2. part. §. 7. Brook Abridg. tit. Villenage, n. 73.

[f] Littl. tit. Villenage.

[g] Supra, part. 2. §. 7. n. 18. Brook Abridg. tit. Villenage, n. 68.

[h] C. Statutum. §. nullus. de teſta. l. 3. provinc. conſtit. Cant.

[i] Doct. & Stud. L. 2. c. 3. & lib. 1. c. 6. D. Coke, lib. 3. relat. f. 3. & l. 4. f. 95.

[k] Dom. Coke, l. 5. relationum, fo. 49. in *Wirral*'s Caſe.

A Perſon outlawed may be an Executor to others, and may diſpoſe of the Goods which he hath as Executor to others, by Will, and make Executors of them: And ſo it is of Villains, Monks and Friars. And ſuch Executors may maintain a Writ of Error to reverſe a Judgment given againſt their Teſtator; as it was adjudged *M.* 33 *Eliz. in B. R.*

[l] If an Executor or Adminiſtrator ſueth any Action, Utlary in the Plaintiff ſhall not diſable him, becauſe the Suit is *en auter droit*, and not in his own. 12 *E.* 4. *fol.* 12. *Inſtitut. part.* 1. *fol.* 128.

[l] 1 Vern. 184. S. P. adjudged in the Caſe between *Killigrew* and *Killigrew*.

It's no Plea for the Adminiſtrator to ſay that the Inteſtate died outlawed; for the Executor or Adminiſtrator may have divers Things which are not forfeitable to the King. As if the Teſtator had mortgaged his Lands upon Condition, that if the Mortgagee pay not at ſuch a Day to him, his Heirs or Executors, 100 *l.* that then it ſhall be lawful for him to enter; and after, and before the Day, the Teſtator is outlawed, and makes his Executors, and dies; and at the Day the Mortgagee pays the Money to the Executors: That is Aſſets, and not forfeited to the King. So it is if Tenant for Life of a Rent be outlawed, and the Rent arrear, makes his Executors, and dies; this Arrearage is due to the Executors, and is Aſſets, and not forfeited. A Man outlawed may make an Executor, and this Executor may have a Writ of Error to reverſe the Utlary. *M.* 20 *Jac. Bullen* verſus *Gervis*, *Hutton's Rep. fo.* 53. 8 *E.* 4. 6. 21 *E.* 3. 5. 36 *H.* 6. 27. *T.* 37 *Eliz. Rot.* 2954. *Woolley* verſus *Bradwell. Cro. Eliz.* 375.

A Man outlawed in a perſonal Action may make Executors, for he may have Debts upon ſimple Contract which are not forfeited to the King; and for the ſame Reaſon Adminiſtration of ſuch a Man's Goods may be granted. *M.* 43, 44 *Eliz. B. R.* [m] *inter Shaw & Cattreſs, per Curiam. Roll. Abridg. tit. Executor, lit. N.*

[m] Cro. Eliz. 850.

If an Exigent for Felony be awarded againſt a Man, whereby he loſes all his Goods, yet he may make Executors to reverſe it, for there he is not attainted. So Adminiſtration of ſuch a Man's Goods may be granted. *C. lib.* 5. *fo.* 111. *a. M.* 33, 34 *Eliz. B. R.* [n] in *Marſhe's* Caſe. 18 *H.* 7. *B. R. Eaton's* Caſe.

[n] 1 Leon. 325. Cro. Eliz. 273. S. C.

The Creditors of *E. G.* exhibited a Bill in Chancery for their Debts, ſome of which were due on Mortgages, ſome on Judgments, and one was due upon a Bond; the ſaid *E. G.* was *outlawed*, and one of the Judgment-Creditors brought an Action of Debt againſt him; and the Queſtion being, which of the Debts ſhould be firſt paid; it was decreed, that this *Outlawry being upon meſne Proceſs*, and before Judgment, did not alter the Nature of the Debt, and create a Charge on the Land; but that where a Seiſure is upon an Outlawry, there the Debt attaches on the Land, and ſhall take Place of a Judgment, tho' Prior to the Outlawry; that the Plaintiff bringing an Action of Debt upon this Judgment, did not put it behind other Judgments; neither was it a Waiving the Charge on the Land, becauſe the Bringing the Action was the Act of the Attorney; and there was no other Remedy at Common Law after the Day and Year.

Erby verſus *Erby*, 1 Salk. 80.

§. VI. Of an excommunicate Perſon.

THO' an excommunicate Perſon may be appointed Executor, and is capable of a Legacy [o]; yet ſo long as he ſtandeth in the Sentence of Excommunication, he is not to be admitted by the Ordinary, nor can commence any Suit for his Legacy [p].

[o] Phil. Franc. in Rub. de teſta. l. 6. n. 32. quæ ſententia communiter approbatur, ait Graſſ. Theſaur. com. op. §. Inſtitutio. q. 4. Bald. in L. id quod pauperibus. C. de Epiſcopis & cler. n. 6.

[p] C. intelleximus. de judic. c. poſt ceſſionem. de probac. extr.

If Bailiffs and Commons, or any Corporation aggregate of many, bring an Action, Excommengement in the Bailiffs ſhall not diſable them, for that they ſue and anſwer by Attorney: Otherwiſe it is of a ſole Corporation [q]. But if Executors or Adminiſtrators be excommunicated

[q] Inſtit. part. 1. fo. 134. a.

[r] Bracton, lib. 5. fo. 426.

municated, they may be diſabled, becauſe they which converſe with a Perſon excommunicate are excommunicate alſo [r].

[s] 9 H. 7. 21. 3 H. 4. 3. 5 E. 3. 8. 28 E. 3. 97.

If a Biſhop be Defendant, an Excommunication by the ſame Biſhop againſt the Plaintiff ſhall not diſable him; and it ſhall be intended for the ſame Cauſe, if another be not ſhewed [s].

1 Inſt. 134.

We are told by my Lord *Coke*, that an *Excommunication is a greater Diſability to an Executor than an Outlawry*; his Reaſon is, becauſe where an Executor is Plaintiff and outlawed, that Outlawry cannot be pleaded in Abatement of his Action, becauſe he ſues in the Right of another; but 'tis otherwiſe if ſuch an Executor Plaintiff is *excommunicated*, becauſe every Man who [t] converſes with him is excommunicate himſelf.

[t] *But not till he is denounced, and the People are admoniſhed not to converſe with him.*

Three Executors, one was excommunicated, and in an Action of Debt brought by them, the Defendant pleaded in Abatement that one of them was excommunicated: Adjudged that this only ſuſpended, but did not abate the Action, becauſe he who was excommunicated might obtain Abſolution.

§. VII. Of Baſtards.

1. *Three Sorts of Baſtards.*
2. *Inceſtuous and adulterous Baſtards are incapable of all teſtamentary Benefit.*
3. *Divers Extenſions of this former Concluſion.*
4. *Divers Limitations of the ſame Concluſion.*
5. *Difference betwixt the Laws Eccleſiaſtical and the Civil Law, about the Alimentation and Nouriſhment of Children begotten in Adultery and Inceſt.*
6. *Of the Laws and Statutes of this Realm concerning Baſtards.*
7. *Of Baſtards begotten betwixt ſingle Perſons.*
8. *Whether the Legacy left unto the Baſtard be preſumed to be left for his Alimentation or Relief.*

OF Baſtards or Children begotten out of Matrimony (1) there be divers Sorts. Some are begotten and born in ſimple Fornication; that is to ſay, of carnal Copulation betwixt ſingle Perſons, ſuch as at the Time of the Conception or Birth of the Child may be married together [a]. Some are begotten in Adultery; that is to ſay, of ſuch Parents as being both, or the one of them, married to ſome other at the Time of the Birth and Conception of the Child, cannot then marry together themſelves [b]. Some again are begotten in Inceſt; that is to ſay, betwixt ſuch Perſons as are prohibited to marry by reaſon of Conſanguinity or Affinity [c].

[a] Covar. Tract. de matrimon. 2 part. c. 8. §. 4. Jul. Clar. l. 5. §. fornicatio.

[b] Covar. in d. c. 8. §. 5 & 6. Jul. Clar. §. adulter.

[c] Covar. in d. c. 8. §. 5 & 6. Jul. Clar. §. inceſt.

Baſtards (2) begotten and born in Adultery or Inceſt are not capable of any Benefit by the Teſtament or laſt Will of their inceſtuous or adulterous Parents [d]. Which Concluſion is accompanied with no ſmall Train of Ampliations and Limitations [e]; of which Company theſe are not the meaneſt.

[d] Auth. ex complex. C. de inceſt. nup. & DD. ibid. Covar. de ſponſal. 2 part. c. 8. §. 4. Graſſ. Theſaur. com. op. §. Inſtitutio, q. 7. limitat. illuſtratam.

[e] Petr. Duen. tract. reg. & fal. verb. filius ubi tradit regulam 14. ampliat. & 11

The firſt (3) Ampliation is, That albeit the inceſtuous or adulterous Father do name another Perſon to be his Executor, to whom he

giveth the Reſidue of his Goods, willing him to reſtore the ſame Goods to his inceſtuous and adulterous Child; this Diſpoſition is void in reſpect of the Baſtard[f]; neither is the Executor bound to reſtore the ſame, but may retain the ſame to himſelf[g]. For whereof any Perſon is not capable directly or by himſelf, he is not capable thereof indirectly or by another[h]. Yet I deny it not, but the Executor may of his own Liberality give any Goods to the Baſtard, though not as the Gift or Goods of the Father[i].

[f] Barth. & Cæpol. Cautela 38. verb. quinta.
[g] Covar. de ſpon. 2. part. §. 5. n. 7.
[h] Duen. verb. filius. reg. 366.
[i] Cæpol. ubi ſupra. Jo. Dilect. de arte teſtandi, tit. 1. cautela 14. n. 8. Covar. ubi ſupra

The ſecond Ampliation is, that albeit the Father ſhould appoint his inceſtuous or adulterous Child his Executor, willing him to beſtow his Goods on ſuch a Perſon, who of Likelihood would never demand the ſame; as if he ſhould will his Executor to give his Goods to the Emperor, or to the *Turk*, if he ſhould in Perſon come into *England* to receive the ſame; this is but a fraudulent Cautele, whereby the Executor might have ſome Colour ſtill to retain the ſame in his own Hands[k]. And therefore by reaſon of this Fraud the Diſpoſition is void, at leaſt ſo far as it doth reſpect the Benefit of the Executor[l].

[k] Alex. in L. cogi. §. hi qui ſolidi. ad Trebel. ff. Cæpol. cautela 38. Jo. Dilect. de arte teſtandi, de cautela 14. Alex. Dilect. & Cæpol. ubi ſupra.
[l] Bald. conſil. 399. vol. 2. Imol. in L. in tempus. de hæred. inſtit. ff.

The third Ampliation is, That even he which is begotten and born in Adultery, much more he that is begotten and born in Inceſt, is not only incapable in reſpect of his Father's Teſtament, but is alſo excluded from all teſtamentary Benefit by his Mother[m].

[m] Covar. epitom. de ſponſ. 2 part. c. 8. n. 15.

The fourth Ampliation is, That the Depoſition is void *ipſo jure* which is made in Favour of, or for the Benefit of inceſtuous and adulterous Baſtards[n].

[n] Duen. d. reg. 366. ampliat. 4.

The fifth Ampliation is, That although the inceſtuous or adulterous Baſtard be poſſeſſed of the Thing to him bequeathed; yet he cannot retain or preſcribe the ſame by that Title[o].

[o] Bald. in L. id quod pauperib. C. de epiſcopis & cler. per gloſ. in L. nem. ff. de uſu c. Duen. d. reg. 366. amp. 5.

The ſixth Ampliation is, That the adulterous, and eſpecially the inceſtuous Baſtard, is excluded, not only by the Civil and Eccleſiaſtical Laws, but alſo by the Law of God[p]. But whether this Ampliation be true or not, I leave to the Conſideration of the reverend Divines. Divers other Ampliations alſo there be of this Concluſion[q], which I omit, becauſe they ſeem to repugn the Laws of this Realm. Now to the Limitations.

[p] Aug. ut habet 35. q. 7. c. quid eſt. Duen. d. reg. ampliat. 2.
[q] De quibus Duen. d. reg. 366. Bart. Cæpol. cautela 38. & Jo. Dilect. cautela 14.

The (4) Limitations of the former Concluſions are theſe. Firſt, Theſe inceſtuous and adulterous Baſtards may be Executors unto any other Perſon ſaving unto their natural Parents; and are likewiſe capable of any Legacy or Deviſe bequeathed unto them by any other ſaving by their own Parents[r]. Even unto their inceſtuous or adulterous Brethren they may be Executors, or receive any other teſtamentary Benefit from them[s].

[r] Gloſſ. in Authen. quib. mod. na. effic. ſui. §. fin. Clar. §. teſta. q. 31. n. 4. Panor in c. cum haberet. De eo qui dux. in matrimo. quam. pol. extr. Afflict deciſ. 96.
[s] Duen. verb. filius. reg. 366. limit. 1.

The ſecond Limitation is, when they are appointed nude Executors [t], that is to ſay, when they do not reap any Commodity by the Teſtament [u]; for then they may be Executors even unto their own natural Parents.

[t] Simo de Prætis de Interp. ult. vol. l. 5. f. 17. n. 27. Nec obſtat quod dicitur, per incapacem nihil poſſe capi; quia attento jure Can. ſpurius etiam inceſtuoſus non eſt omnino incapax, utpote cui alimenta licitum eſt relinquere. Duen d. reg. 366. limitac. 9. verb. filius. [u] Jo. de Athon. in legatin. libert. de executor. teſt.

Thirdly, By the Laws Eccleſiaſtical they are alſo capable of ſo much of that which is bequeathed unto them by their inceſtuous and adulterous Parents, as will ſuffice for their competent Alimentation or Relief [x]; that is to ſay, for their Food, Cloathing, Lodging, and other meet and convenient Neceſſaries [y], according to the Wealth and Ability of the Parents [z]. And although (5) the Civil Law, in Deteſtation of this heinous Sin of Inceſt and Adultery, did deprive this inceſtuous and adulterous Iſſue of the Hope of all teſtamentary Benefit, though it were left for, and in the Name of Alimentation, or needful Relief [a]; the rather by this Means to reſtrain the unbridled Luſts of ſome, and to preſerve the Chaſtity of others [b]: Nevertheleſs, foraſmuch as Nature hath taught all Creatures to provide for their Young, ſo that the very Brute Beaſts have a natural Care to bring up whatſoever they bring forth [c]; ſeeing alſo in Equity the poor Infants ought not to be puniſhed (at leaſt not to periſh for want of Food) by Occaſion of their Father's Fault, whereof they are altogether faultleſs [d]; therefore the Eccleſiaſtical Law, whereby not only adulterous [e], but inceſtuous [f] Iſſue alſo, is made capable of ſo much as is ſufficient for needful and convenient Suſtentation, hath prevailed againſt the Rigour of the Civil Law, and is to be obſerved, eſpecially in the Eccleſiaſtical Court [g], as more agreeable to Nature, Equity, and Humanity.

[x] C. cum haberet. de eo qui dux. in ux. quam poll. per adult. [y] L. legatis. ff. de alimen. leg. Cætera quæ ad diſciplinam pertinent, legato alimentorum non continentur, niſi aliud ſenſiſſe teſtatorem probetur. L. niſi. eod. tit. [z] d. c. cum haberet, in fin. Sed neque pro neceſſitate tantum (ut volunt quidam) ſed etiam ad decentiam, conſtituenda, ſunt alimenta, ſi modo facultates ſuppetant. Gab. libro 6. com. concluſ. tit. de alimen. concluſ. 1. n. 31. Menoch. lib. 4. preſum. 157. n. 31. [a] D. Auth. ex complex. C. de inceſt. nup. [b] L. iſti quidem. ff. de eo quod met. cauſ. in fin & §. fin. Inſtit. noxal. action. [c] Cic. lib. 1. offic. L. 1. §. 1. ff. de Juſtic. & jur. [d] Deuteronom. cap. 24. verſ. 16. Ezech. cap. 18. verſ. 20. L. Sancimus. C. de pœnis. L. ſi pœna eod. tit. diſt. 56. [e] Text. in d. c. cum haberet. [f] Dec. in c. in præſentia. de probac. extr. n. 39. Gabr. ubi ſupra, n. 5. quæ opinio communis eſt, contra Bald. in d. Auth. ex complexu. [g] Idem juris eſt in terris Imperii. Glaſ. & Panor. in d. c. cum haberet. Bar. in d. Auth. ex complexu. Deciſ. Neap. 164. n. 2. Dec. ubi ſupra. Duen. filius. reg. 367.

Wherefore if the Teſtator ſhall bequeath a competent Portion to his baſe Daughter, for her Preferment in Marriage, the ſame is due and recoverable in the Eccleſiaſtical Court; but if the Sum bequeathed be exceſſive, then it is to be moderated *Arbitrio boni viri*, and to be reduced unto a convenient Portion [h].

[h] Simo de Prætis de interpr. ult. volun. l. 4. dub. 12. f. 204. & 198.

And in this reſpect (6) the Laws and Statutes of this Realm, in providing as well for the convenient Relief, and keeping of poor and miſerable Children, begotten and born out of lawful Matrimony, at the Charges of the reputed Father and Mother [i], without Diſtinction whether ſuch Infants were begotten in Inceſt and Adultery, or Fornication [k], as for the Puniſhment of the Mother and reputed Father of ſuch unlawful Iſſue, are worthily commended; although in reſpect of the next Limitation following, they may ſeem not altogether ſo worthy Commendation.

[i] Stat. Eliz. an. 18. c. 3.

[k] Ubi enim lex non diſtinguit, nec nos diſtinguere debemus. L. de precio. ff. de pub. in rem. action.

The fourth Limitation is grounded on the Laws of this Realm, which do permit every Man, both by Deed made and executed during their Lives [l], and alſo by their laſt Wills and Teſtaments to be executed after their Deaths [m], to give and to deviſe unto any their Baſtards, without Diſtinction, all their Lands, Tenements or Hereditaments,

[l] Perkins, tit. graunt, f. 11. Bract. l. 2. c. 7. [m] Perkins, tit. deviſe, fol. 98.

taments, without Reſtraint; at the leaſt more than will ſuffice for their Suſtentation, and much more than they are worthy of. Which Thing cannot but redound to the great Prejudice of right Heirs; conſidering the Danger whereunto lawful Children are ſubject, and which they do many Times ſuſtain, through the forcible Flatteries of vile diſſembling Harlots, no leſs void of all Modeſty, than full Fraught with all Kind of Subtilty, with whoſe ſweet Poiſon and pleaſant Sting many Men are ſo charmed and inchanted[n], that they have neither Power to hearken to the juſt Petitions of a virtuous Wife, praying and craving for her Children, nor Grace to deny the unjuſt Demands of a vicious and ſhameleſs Whore, prating for her Baſtards; never remembring, that when *Sarah* ſaid to *Abraham*, *Caſt out this Bondwoman and her Son, for the Son of this Bondwoman ſhall not be Heir with my Son* Iſaac; *Abraham*, by the Commandment of God, hearkened to the Voice of *Sarah*[o]; neither once regarding (that which divers have diligently noted) that the Brood of Baſtards are commonly infected with the Leproſy of the Sire's Diſeaſe[p]; and being encouraged with the Example and Pattern of their Father's Filthineſs, they are not only prone to follow their ſinful Steps[q] but do ſometimes exceed both them and others in all Kind of Wickedneſs.

[n] Videas c. 5. Prov. Solom.

[o] Gen. c. 21.

[p] C. ſi gens Anglorum, & ibi Præpoſ. diſtinct. 56. Hinc eſt (ait Peckius) quod Sodomitarum una cum parentibus parvulos etiam cæleſti igne conſumpſit Dominus, nempe quod proſpexerat parvulos hos idem flagitium admiſſuros. Pec. in c. non decet. de reg. jur. 6.

[q] Mali corvi malum ovum; & metuenda ſunt paterni criminis exempla. L. quiſquis C. ad L. Jul. majeſt. §. 1.

The fifth Limitation is, in the Baſtards of Kings and Princes; for a King may, *ex plenitudine poteſtatis*, make his unlawful Iſſue capable of whatſoever by Will deviſable he doth give or bequeath unto him[r].

[r] Boer Deciſ. 127. n. 17. Duen. d. reg. 366. lim. 7.

The ſixth Limitation is this, The adulterous Grandfather may bequeath any Thing to the lawful Children of his own unlawful Sons or Daughters, or make them his Executors[s]; but ſo cannot the inceſtuous Grandfather[t].

[s] Jaſ. in L. hæreditas. C. de his quibus ut indig. n. 7. & 8.

Cui opinioni locum concederem, etiamſi hic avus habeat legitimos filios; cum apud nos nulla ſit neceſſitas inſtituendi ſuos, ut ſupra ead. part. §. 1.

[t] Bal. in L. ſiquis inceſtus. C. de inceſt. nup. Covar. in d. c. 8. de ſponſ. 2 part. §. 5. n. 13.

The ſeventh Limitation is this, That the Teſtator may bequeath unto his inceſtuous or adulterous Daughter a competent Portion for her Dowry, or Preferment in Marriage; for this is accounted all one as if he did bequeath it unto her for her Alimentation[u].

[u] Panor. in d. c. cum haberet, n. 5. Bar. in d. Auth. ex complexu. quæ concluſio ampliatur per Petr. Duen. verb. filius, reg. 367. ampl. 3.

The eighth Limitation is this, that an Executor may make the Teſtator's Baſtard his Executor[x].

[x] Bar. in L. ſi his. ff. de vulg. ſub. Bald. in L. eam qua. C. de fidei commiſ. n. 4. Clar. §. teſtium, q. 31. Intellige tamen, niſi conjecturæ intervenerint ex quibus fraus præſumatur. Graſſ. §. Inſtitutio, q. 7. n. 13.

The ninth Limitation is, When the adulterous Parents do ſolemnize lawful Matrimony together before the Birth of the Child[y]. For Example; a married Man doth beget a ſingle Woman with Child, (for this is Adultery by the Laws Eccleſiaſtical of this Realm[z], although by the Civil Law it is but Fornication[a],) immediately after his Wife

[y] Præpoſ. in c. tanta vis. Qui filii ſunt legitimi extra. n. 10. Card. eod. c. n. 17. Melc. Klin. Tract. de cauſ. matrim. fol. 8. 86.

[z] Card. Præpoſ. & alii, in d. c. tanta vis. Kling. ubi ſupra, c. nemo, 32. q. 4. Panor. in c. tranſmiſſæ. de eo qui cog. conſan ux. extr. Clar. §. adulterium, n. 2.

[a] L. 1. C. de adul. L. inter liberos. ff. ead. Clar. ubi ſupra.

Wife dieth, after whoſe Death he marrieth the Woman, (for ſo he may [b]) after the Marriage the Child is born; in this Caſe the Child is not only capable of any teſtamentary Benefit, but is reputed a lawful Child, and not a Baſtard [c], as heretofore hath been diſputed more fully [d].

[b] Niſi præter copulam, mortis machinatio interveniſſet, vel fides data fuiſſet; quia tunc non valet inter eos matrimonium jure can. c. ſuper hoc. c. ſignificaſti, de eo qui dux. in matr. quam pol. per adul. extr. Sed an diſſolvi poſſint hodie nuptiæ hujuſmodi, multum dubito, occaſione ſtatuti H. 8. an. 32. c. 38. [c] D. c. tanta vis, & DD. ibidem. [d] Supra, part. 4. §. 15.

The tenth Limitation is, whenas the Teſtator doth bequeath to his baſe Child a greater Legacy than will ſuffice for his Alimentation, in Recompence of ſome Merit or Deſert at the Teſtator's Hand; for then the Depoſition is good in Law [e].

[e] Tiraquel. in repert. L. fi. unquam. C. de revoc. donac. verb. donatione largitur, n. 21.

Concerning (7) thoſe Baſtards which are begotten of ſingle Perſons, ſuch (I mean) as may lawfully marry together, then in caſe the Mother were a Maid, or an honeſt Widow, immediately before ſuch unlawful Copulation, and Conception of the Child, this kind of Fornication is termed *Stuprum* [f]; and this kind of Baſtard ſeemeth to be in the ſame Caſe as if he had been begotten in Adultery.

[f] L. inter liberos. L. ſtuprum. ff. de adul.

If the Mother were an Harlot before the Conception of the Child, howſoever, by the Civil Law, ſuch a Baſtard is not incapable of any teſtamentary Benefit [g]; yet for as much as by the Laws Eccleſiaſtical [h] and Statutes of this Realm [i] ſuch Copulation is condemned as unlawful, and to be puniſhed as ungodly; I ſuppoſe that this kind of Baſtard is no more capable of an Executorſhip or Legacy, than if the Mother had been honeſt before [k]; eſpecially if the Mother were a common Harlot, the Teſtator nevertheleſs eſteeming her to be clear from Pollution with any other, and himſelf only to be the undoubted Father of the Child, whom he doth make his Executor, or to whom he doth bequeath any Legacy by the Name of his Child; whenas indeed he is not the certain Father of the Child, the Mother having proſtituted herſelf to the Filthineſs of others alſo. For in this Caſe, even by the Civil Law, the Baſtard cannot be Executor, nor obtain the Legacy [l]; if not by Occaſion of the Father's Crime, yet by Reaſon of the Teſtator's Error and Folly, who of all likelihood would never have made that Child Executor, nor have ſhewed himſelf ſo good a Father, if he had known the bad Conditions of the Mother. Where it is ſaid, that the Parents may bequeath ſo much to their Baſtards, as will ſuffice for their Alimentation or Relief, what kind of Baſtards ſoever they be, without Diſtinction; it may be demanded, not impertinently nor unprofitably, what (8) if the Teſtator do ſimply bequeath a Sum of Money, or ſome other Thing, to his unlawful Child, not making any Mention that he doth bequeath the ſame for the Child's Relief or Alimentation? Whether in this Caſe is it to be preſumed that the Father did mean it for the Child's Alimentation or no? But if he did ſo mean, the Legacy is good; otherwiſe it is void. Briefly, howſoever in this Matter all Men are not of one Mind; I do rather ſubſcribe to their Opinion who do hold the Affirmative [m].

[g] Covar. de ſponſal. 2. part. c. 8. §. 5. n. 15, 16, 17.
[h] C. nemo. 32. q. 4. Panor in Rub. de adul. extra.
[i] Stat. Eliz. an. 18. c. 13.
[k] Videas Covar. in d. §. 5. adde Paleot. tract. de nothis & ſpur. c. 41. Item Caſ. in. L. ſi quæ illuſtris. Ad. S. C. orfri C. n. 13 Dec. conſ. 365. n. 5. in fin.
[l] Bald. in L. quiſquis. ad L. Jul. C. de adult. Graff. Theſaur. com. op. §. inſtitutio, q. 7. n. 10. & infr. part. 7. §. 5.
[m] Aymo. Gravetr. conſil. 219. n. 8. Menoch. de Arb. jud. lib. 2. caſ. 169. n. 8. Simo de Prætis de Interp. ultim. vol. lib. 3. fol. 10. n. 7. Tiraq. in rep. L. fi unquam. C. de revoc. don. verb. donatione largitur, n. 63. Caſtrenſ. conſ. 5. vol. 1. n. 5. Colerus, tract. de aliment. lib. 3. cap. 13. n. 3.

A Baſtard having gotten a Name by Reputation, may purchaſe by his reputed Name to him and his Heirs, although he can have no Heir but of his Body [n]; and a Remainder limited to him by the Name of the Son of *E. G.* is good.

[n] 39 E. 3. 11. 24. 17 E. 3. 42. 35 Aſſ. 13. 41 E. 3. 19. C. lib. 6. fol. 65. Sir *Moyle Finch*'s Caſe.

Where a Man has ſeveral Chil'ren, and one of them is a Baſtard, and he grants all his Goods to *his Children*, the Baſtard ſhall take nothing by ſuch Grant: But Serjeant *Moor* puts a *Quære* to it, whether he ſhould not take by the Will of his reputed Father; but 'tis clear he might take by his Mother's Will, becauſe he is known to be the *Child* of his Mother.

3 Leon. 48. Moor 10.

Deviſe to the Uſe of *Jane his Daughter*, and to the Heirs of her Body, which *Jane* was a *Baſtard*; it was held this was a good Deviſe of the Land by the Intention of the Teſtator.

Dyer 325.

The Teſtator deviſed his Lands to his Son *T. S.* who was a Baſtard, but reputed to be the Son of the Teſtator; this Deviſe was good.

Collingwood v. *Pace*, Sid. 194.

A Leaſe is made to *B.* for Life, the Remainder to the eldeſt Iſſue Male of *B.* and the Heirs Male of his Body; *B.* hath Iſſue a Baſtard Son; he ſhall not take the Remainder, becauſe he is not his Iſſue; for *qui ex damnato coitu naſcuntur inter liberos non computantur*; and he cannot have a Name by Reputation as ſoon as he is born [o].

[o] *So it was reſolved* M. 38 & 39 Eliz. Inſt. part. 1. fol. 3. b.

If Lands are given to a Baſtard and his Heirs, he takes a Fee-ſimple; a Limitation of a Remainder over upon ſuch Gift would be void. 1 *Will. Rep.* 78.

The late Earl of *Devonſhire* deviſed 3000 *l.* *to all the natural Children of his Son the late Duke of* Devonſhire, *by Mrs.* Heneage; and the Queſtion was, whether the natural Children by Mrs. *Heneage*, born after the Will, ſhould take a Share of the Three thouſand Pounds. *Lord Chancellor*, They ſhall not; the Earl of *Devonſhire* could never intend that his Son ſhould go on in this Courſe, that would be to encourage it, whereas it was enough to pardon what was paſſed; beſides, Baſtards cannot take until they have gained a Name by Reputation, for which Reaſon, though I give to the Iſſue of *J. S.* legitimate or illegitimate, yet a Baſtard ſhall not take. But then it was ſaid, the Directions of the Will were, for the Executors to pay this 3000 *l.* as the Earl the Teſtator ſhould by Deed appoint, and the Earl afterwards by Deed appointed the 3000 *l.* to all the Children of his Son (the Duke) by Mrs. *Heneage*, ſo that this depended upon the Deed, and therefore muſt refer to the Children born at the Time of the Execution thereof. *Tamen per Cur'*, The Deed referring to the Will is as to this Part to be taken as Part of it. Alſo it being a Queſtion, whether a natural Child *in ventre ſa mere*, of the Duke of *Devonſhire*, by Mrs. *Heneage* ſhould take? Lord *Parker* inclined, that ſuch Child could not take for the Reaſon above-mentioned, *viz.* for that a Baſtard could not take until he had got a Reputation of being ſuch a one's Child, and that Reputation could not be gained before the Child was born. *Metham* v. *Duke of Devon*, 1 *Will. Rep.* 530. 1 *Inſt.* 3. *b.* 6 *Co.* 68.

By the Stat. 31 *E.* 3. 21 *H.* 8. Adminiſtration ought to be granted to the next of Blood; the Ordinary cannot grant it to the Baſtard of the Inteſtate [p].

[p] H. 40 Eliz. *Portman*'s Caſe adjudged accordingly.

A Baſtard cannot be a Prieſt or Chaplain [q].

[q] 11 H. 4. 8.

The Lord *Powis* conveyed Lands holden *in Capite* to one *Gray* his Baſtard, in Remainder after his Death; the Lord *Powis* died: It was held by *Dyer* and *Saunders* Juſtices, that the Baſtard ſhould not ſue Livery for the third Part, becauſe the Statute of 32 & 34 *H.* 8. ſpeak of lawful Generation [r].

[r] 14 Eliz. Sen'or *Powis*'s Caſe, Dyer fol. 313. M. 18 Eliz. Dyer 345. *Thornton*'s Caſe, 13 Eliz. Dyer, fol. 296.

A. covenants to ſtand ſeiſed to the Uſe of himſelf for Life, the Remainder to *R. W.* his Baſtard Son in Tail; no Uſe is raiſed to the Baſtard, becauſe there is no valuable Conſideration; for natural Affection is not a ſufficient Conſideration, for that he is a Stranger in Law, although he be a Son in Nature [s].

[s] M. 23 Eliz. Dyer 374. *Worſley*'s Caſe.

If a Remainder be limited *Rich. filio Rich. M.* it's good, though he be a Baſtard in vulgar Reputation; for if a Grant be made to a Baſtard by the Surname of him who is ſuppoſed to beget him, it is good, if he be known by ſuch a Name [t].

[t] Lib. 6. fol. 65. Sir *Moyle Finch*'s Caſe.

R. Tompſon had Iſſue by one *Joan* before Marriage, and afterwards he married the ſaid *Joan*, and made a Feoffment in Fee, and took back an Eſtate to him for Life, the Remainder *Agnetæ filiæ prædict. Rich. & Joannæ: Per Curiam*, It's a good Remainder, without Averment that ſhe was known to be their Daughter. It was objected, that a Baſtard is not their Daughter in Law; but *Finchden* ſaid, that the Daughter was born before Marriage, ſo by their Marriage after ſhe was their Daughter; for *ſubſequens matrimonium tollit peccatum præcedens* [u]. So if the Husband and Wife be divorced *cauſa præcontractus*, the Iſſue hath loſt his Surname, and is now become a Baſtard, and *nullius filius*; yet becauſe he had once a lawful Surname, it is a good Ground of Reputation, to make him a reputed Son, which is a good Name of Purchaſe [x].

[u] 41 E. 3. 18, 19.

[x] Lib. 6. fo. 65. 2 H. 6. 11. 8 H. 4. 15. 36 Aſſ. 13. 11 Aſſ. 4. 39 E. 3. 24.

L. made a Feoffment to the Uſe of himſelf, and after deviſed that his Feoffees ſhould ſtand ſeiſed to the Uſe of his Daughter *A.* which in Truth was a Baſtard; this was a good Deviſe of the Land *per intentionem teſtatoris* [y].

[y] 15 Eliz. Dy. fol. 323. *Lingen*'s Caſe.

A Man had Iſſue a Baſtard, and after intermarried with the ſame Woman with whom he had that Baſtard, and had Iſſue two Sons by her, and then deviſed all his Goods to his Children; ſome conceive that the Baſtard ſhall take nothing, becauſe he is *nullius filius*. It's clear that the Baſtard in ſuch a Caſe ſhall not take by Grant; but *Quære* as to a Deviſe. And if the Mother of the Baſtard make ſuch a Deviſe, it's clear that the Baſtard ſhall take, becauſe he is certainly known to be the Child of his Mother [z].

[z] H. 4 E. 6. *Anonymus*, Moor's Rep. fol. 10. n. 39.

§. IX. Of an unlawful College.

1. *An unlawful College cannot be Executor.*
2. *What is underſtood by an unlawful College.*
3. *Whether the Church-wardens may ſue for a Legacy left unto the Church.*
4. *Particular Perſons of an unlawful College may be appointed Executors.*

AN (1) unlawful College cannot be Executor [s]. By (2) an unlawful College in this Place, I mean all Companies, Societies, Fraternities, and other Aſſemblies whatſoever, not confirmed nor allowed for a lawful Corporation by Authority of the Prince, or of ſome other by whom they ought to be confirmed or allowed [t]. Notwithſtanding, (3) if the Teſtator bequeath any Goods or Money to the Pariſhioners of any Pariſh, to the Uſe of the Church, ſuch a Bequeſt is good [u], and the Legacy may be recovered by the Church-wardens; who albeit in every Reſpect they be not a lawful Corporation, yet in this Reſpect they be accounted a lawful Corporation; I mean in Favour of the Church [x]. Or (4) if the ſeveral and particular Perſons of an unlawful College be appointed Executors, they are not to be repelled [y].

[s] 49 Aſſ. pl. 8. Brook Abridg. tit. corpor. pl. 45. L. Collegium. C. de hæred. inſtit.

[t] L. Collegium. Bar. in L. cum ſenatus. de reb. dub. ff. Abbas in c. dilecta. de exceſſ. prela. extr. Fulb. lib. 1. Paral. fol. 35, 36.

[u] Lambert. Tract. de offic. gardianorum, fol. 43. Brook, tit. Corporation, n. 55, 73, 84. tit. done, n. 17. 50. contra Fitz. tit. done, n. 1. 12 H. 7. 28. 37 H. 6. fol. 30. 10 H. 4. 3. b. Perkins 98. S. 510. 49 E. 3. fol. 3.

[x] Lambert, ubi ſupra. Fulb. lib. 1. Paral. fol. 42, 43.

[y] Paul. de Caſtro in L. cum ſenatus ff. de reb. dub.

§. X. Of a Libeller.

HE that is condemned for a famous Libel is inteſtable, both actively and paſſively, that is to ſay, he can neither make a Teſtament, nor receive any Benefit by a Teſtament [z]; but this is by the Civil Law; 'tis otherwiſe by the Common Law.

[z] L. is cui. §. ult. ff. de teſtam. Vaſq. de ſucceſ. progreſ. lib. 1. §. 2. n. 18.

And here it may be neceſſary to mention what is a Libel in our Law, (*viz.*) 'tis a malicious Defamation of any Perſon, either by Printing, Writing, or by Signs, or Pictures, to aſperſe the Reputation of the Living, or the Memory of the Dead; for 'tis puniſhable, tho' the Man or the Magiſtrate defamed is dead at the Time of the Making the Libel, becauſe thoſe of the ſame Family, or Friends of the dead Perſon who are living, may be provoked to break the Peace; and in Caſe of a Magiſtrate deceaſed, 'tis not only a Breach of the Peace, but the Government is abuſed; and if the Proſecution for a Libel is either by an Information or Indictment, 'tis not material whether 'tis true * or falſe; but if an Action on the Caſe is brought againſt a Libeller, he may juſtify that 'tis true.

* De libellis famoſis. 5 Rep. 125. Hob. 253. Hard. 470.

The Perſon convicted for publiſhing a Libel, muſt either contrive it himſelf, or be a Procurer of the Contriver, or he muſt be a malicious Publiſher of it, knowing it to be a Libel; but if one reads a Libel, or hears it read, 'tis no Publication, becauſe before he hears or reads

Lamb's Caſe. 8 Rep. 59.

reads it, he cannot tell whether 'tis a Libel or not; but if he write a Copy of it, and doth not deliver it to another, 'tis no Publication.

§. XI. Of Uſurers, Sodomites, and others.

1. *Manifeſt Uſurers and Sodomites can neither make a Teſtament, nor reap any Benefit by another's Teſtament.*
2. *Whoſoever is forbidden to make a Teſtament by reaſon of ſome Crime, the ſame Perſon is incapable of any Benefit by the Teſtament of another.*

AS manifeſt (1) Uſurers, Sodomites, and other criminous Perſons, are forbidden to make Teſtaments themſelves, or to diſpoſe their Goods by their Laſt Wills, (as is before at large declared [a];) ſo are they forbidden to reap any ſuch Benefit by the Teſtament of others; for this is a common received Concluſion, (2) that he that cannot make a Teſtament or Laſt Will, by reaſon of ſome Crime by him committed, the ſame Perſon is incapable of any Legacy of Goods diſpoſed by the Teſtament or Laſt Will of another [b].

[a] Supra, part. 2. §§. 15, 16, 17, 18.

[b] Gloſſ. in L. is cui. ff. de teſta. Soaraz. l. rec. ſen. verb. teſt. n. 82. referens hanc op. eſſe com. Idem Jul. Clar. §. teſt. q. 43. n. 2.

§. XII. Of an uncertain Perſon.

1. *If the Teſtator make* John at Stile *his Executor, and there be two Perſons of that Name, neither of them is to be admitted.*

AN uncertain Perſon (1) cannot be Executor nor Legatary [c]. For Example; the Teſtator doth make *Thomas Lante* his Executor, to whom alſo he giveth all his Goods; and there be two Perſons, either of them being called *Thomas Lante*; in this Caſe neither of them is to be admitted [d].

Divers other Examples of Uncertainty, with divers Declarations of every Example, do appear in the laſt Part of this Book, where the Reader may be more fully ſatisfied [e], in what Sort this former Concluſion is to be admitted.

[c] §. Incertis. Inſtit. de lega. Jo. An. Gem. & Franc. in c. ſi pater. de teſt. 6.

[d] Minſing. in d. §. incertis. Per. L. ſi quis. §. ſi inter. de lega. 2.

[e] Inf. part. 7. §. 6. cum ſeq.

§. XIII. Of a Recuſant convict.

1. *Whether a Recuſant convict may be Executor or Tutor.*

BY a Statute lately made againſt Popiſh Recuſants, *Becauſe* (1) *Recuſants are not thought meet to be Executors or Adminiſtrators to any Perſon whatſoever, nor to have the Education of their own Children, much leſs the Children of any other the King's Subjects within this Realm:* It is therefore enacted [u], *That ſuch Recuſant convicted, or which ſhall be convicted at the Time of the Death of any Teſtator, or at the Time of granting any Adminiſtration, ſhall be diſabled to be Executor or Adminiſtrator, by Force of any Teſtament after the ſaid Act of Parliament to be made, or Letters of Adminiſtration from that Time to be granted; nor ſhall he have the Cuſtody of any Child as Guardian in Chivalry, Guardian in Socage, or Guardian in Nurture; but that the next of Kin to ſuch Child or Children, to whom the Lands cannot lawfully deſcend, who nevertheleſs ſhall uſually reſort to ſome Church or Chapel, and there hear Divine Service, and receive the Holy Sacrament of the Lord's Supper thrice in the Year next before, according to the Laws of this Realm, ſhall have the Cuſtody of the ſame Child,* &c. *as by the ſaid Statute more at large it doth and may appear.* By which Statute it is alſo enacted, *That every married Woman, being, or which ſhall be, a Popiſh Recuſant convict, (her Husband not ſtanding convict of Popiſh Recuſancy,) which ſhall not conform herſelf, and remain conformed, but ſhall forbear to repair to ſome Church, or uſual Place of Common Prayer, there to hear Divine Service and Sermons, (if any then be,) and within the ſaid Year receive the Sacrament of the Lord's Supper according to the Laws of this Realm, by the Space of one whole Year next before the Death of her ſaid Huſband, ſhall (amongſt other Penalties expreſſed in the ſaid Act) be diſabled to be Executrix or Adminiſtratrix of her ſaid Husband, and to demand or have any Part or Portion of her ſaid Husband's Goods or Chattels by any Law, Cuſtom, or Uſage whatſoever.*

[u] Statut. Regis Jacobi An. 3. c. 5.

Whether an Alien may be an Executor or Adminiſtrator.

AN Alien born, and not made Denizon, may be an Adminiſtrator, and have Adminiſtration of Leaſes, as well as of perſonal Things, becauſe he hath them as Executor in another's Right, and not to his own Uſe: And adjudged accordingly [x].

Debt brought by an Adminiſtrator; the Defendant pleads the Plaintiff was an Alien *nee:* Adjudged, *Quod reſpondeat ouſter* [y].

An Alien born may make a Will and Executors, and be an Executor, and ſue as Executor, if he be an Alien Friend, and not an Alien Enemy; ſo adjudged [z].

An Alien is a Perſon born out of the Alligeance of the King, and under the Ligeance of another King or State: Denizons are thoſe who are made ſo by Letters Patent, and naturalized Aliens are made ſo by Act of Parliament; but the Heirs of Denizons are not inheritable to their Anceſtors, but thoſe who are naturalized are inheritable.

[x] P. 1 Car. C. B. Sir *Upwell Carone*'s Caſe. Crook part. 1. fol. 9.

[y] P. 41 El. rot. 1704. *Breck* verſus *Philips.* Crook part. 3. fol. 683. n. 16.

[z] 3 Eliz. *Paſcatius*'s Caſe.

Wells verſ. *Williams*, 1 Salk. 46. 1 Lutw. 11, 34, 35.

Debt upon Bond againſt the Defendant as *Executrix*, *&c.* ſhe pleaded that *T. S.* the Teſtator was an Alien born in *France*, and came hither without the King's Licence; the Plaintiff replied, that the ſaid *T. S.* from the Time of the making the Bond (upon which this Action was brought) to the Time of his Death, continued in *England* with the *Leave, and under the Protection of the King*; *& petit judicium*, and that the Defendant might anſwer, *&c.* and upon a Demurrer to this Replication the Plaintiff had Judgment that the Defendant ſhould anſwer.

Jevon v. *Levermere*, 1 Sand. 7. Sid. 308. S. C.

In an Action of Debt for Rent againſt an Adminiſtratrix, ſhe pleaded the Statute 32 *H.* 8. *cap.* 16. by which it is enacted, *That all Leaſes made of Dwelling-houſes or Shops in the King's Dominions to a Stranger Artificer, or Handicraft-man born out of the King's Obeyſance, ſhall be void, he not being a Denizon.* Then ſhe ſets forth that the Inteſtate *Levermere* at the Time of the Leaſe made (on which this Rent was reſerved, and for which the Action was brought) was a *Stranger Artificer* born out of the King's Obedience, (*viz.*) at *Paris*, in the Kingdom of *France*, and not made a Denizon, and therefore by Virtue of that Statute the Leaſe was void; and upon a Demurrer to this Plea the Plaintiff had Judgment, for there are three Points in this Statute, (*viz.*) that the Leaſe muſt be of a Dwelling-houſe, that the Party muſt be an *Alien*, and that he muſt be an *Artificer*; and the Defendant did not aver that this Leaſe was made of a *Dwelling-houſe*.

1 Lev. 59.

A Deviſe of Lands to an Alien is void.

OF THE OFFICE OF AN EXECUTOR.

The Sixth Part.

§. I. Of the ſeveral Kinds of Executors.

1. *Three Kinds of Executors.*
2. *Executor by the Law.*
3. *Executor by the Ordinary.*
4. *Executor by the Teſtament.*
5. *Divers Kinds of Executors Teſtamentary.*
6. *The Office of an Executor Teſtamentary.*

NOW followeth the Sixth principal Part of this Treatiſe, wherein I promiſed to ſet forth the Office or Duty of an Executor, I mean of an Executor Teſtamentary, that is to ſay, of him that is appointed by the Teſtator for the Performance of the Will.

For there be (1) Three Kinds of Executors, or Perſons which have to deal with the Execution of dead Mens Wills, and Diſpoſition of their Goods [a], every of which have their ſeveral Offices. The firſt hath his Authority *from the Law*, the Second *from the Ordinary*, the Third *from the Teſtator* [b].

[a] Specul. de Inſtit. edit. §. nunc vero aliqua. in prin.

[b] De hac trimembri executoris diviſione, tract. de executoribus in legitimam, dativum, & teſtamentarium. Specul. ubi ſupra: cui adjungas velim Jo. de Canibus ult. volunt. part. 2. q. 3. n. 22. f. (mihi) 120.

The (2) Executor which deriveth his Authority from the *Law*, is the Biſhop or Ordinary of every Dioceſe, unto whom the Execution of Teſtaments and Laſt Wills, eſpecially *ad pias cauſas*, (no Exe-

cutor being appointed by the Teſtator,) hath appertained [c]; and that not of late Time, (as ſome have lately dreamed,) but ever ſince Chriſtianity was firſt received, and eſtabliſhed by Imperial Authority, or very ſhortly after: Nor within this Realm of *England* only, where the Biſhops, to whom the Approbation of Teſtaments appertains [d], have continually, by the Royal Conſent of the Kings and Princes of this Realm [e], exerciſed this Office, and executed this Charge, for and during ſo long Time, and ſo many Ages, that (if I be not deceived) there is not any Memory or antient Record to the contrary [f]; I mean ſince Chriſtianity was embraced, and Paganiſm aboliſhed; but alſo throughout all the Kingdoms and Nations within the Chriſtian Empire. For not only by the Laws Eccleſiaſtical [g], uſed and obſerved for many Hundred of Years, but alſo by the Civil Law [h], compoſed above a Thouſand Years ſince [i], this Office and Charge of executing the aforeſaid Teſtaments and Laſt Wills hath been impoſed upon the Reverend Biſhops: In the Sincerity of whoſe Conſciences all Chriſtian Laws, and namely, the Law of this Land, hath repoſed greater Confidence than in other Lay-people, about the Performance of dead Mens Wills [k]. Hence it is, that every Biſhop is called *Ordinary*, as if other Judges were in this Behalf incompetent or extraordinary [l]. Hence alſo it is, that the Biſhop is called *Executor legitimus*, legal Executor, becauſe he only is appointed Executor by the Law, where no Executor is appointed by the Teſtator [m].

[c] L. nulli. L. ſi quis ad declinand. C. de Epiſcop. & cler. c. tum nobis. c. nos quidem. c. Io. de teſta. extr. c. ſtatut. de teſta. l. 3. provincial. conſtit. Cant. c. ſtatuimus. eod. tit. l. conſtit. provinc. Ebor.

[d] Lindw. in d. c. ſtatut. & in c. ita quorundam. de teſta. l. 3. provinc. conſt. Cant. Jo. de Athon. in legatin. libertatem, de execut. teſta. Doct. & Stud. l. 2. cap. 28.

[e] C. accidit. de immunitate Eccleſiaſt. libertatum. l. 3. provinc. conſtit. Cant. Lind. in d. c. ſtatut. eccleſiaſticarum libertatum.

[f] Lindw. in d. c. accidit. qui etſi antiquus ſit, non potuit tamen hujus antiquitat. initium inveſtig. aſſequi, nempe cujus regis temporibus illud primo fuerat conceſſum, ut ille ingenue fatetur.

[g] C. tua. c. nos. c. Io. de teſt. extr.

[h] L. nulli. L. ſi quis ad decl. C. de epiſc. & cler.

[i] Anno, viz. Chriſti 536. editus eſt ille Juſtiniani codex, in quo leges iſtæ inter alias inſeruntur.

[k] Perkins in tit. de teſtamentis, f. 94. D. Smith tract. de repub. Ang. f. 102.

[l] Ordinarius vero dicitur, qui lege, vel conſuetudine, vel principis beneficio, juriſdict. univerſaliter exercet. DD. in L. more. de jur. om. judic.

[m] Specul. in d. §. nunc vero aliqua, de Inſtr. edit. Jo. de Canib. de exec. ult. vol. part. 1. q. 3. Olden. de exec. ult. vol. tit. 2.

The Executor (3) which deriveth his Authority from the *Biſhop* or *Ordinary* is he whom we call *Adminiſtrator* [n]. For when the Executor named in the Teſtament doth refuſe to be, or cannot be Executor, and when no Executor is named in the Will; it is lawful for the Biſhop or Ordinary to commit Adminiſtration [o], and to annex the Will to the Letters of Adminiſtration [p]. And this Adminiſtrator, having his Authority from the Ordinary, is chargeable with the Performance of the Will, as if he had been appointed by the Teſtator [q], and is called in Law *Executor dativus* [r], becauſe he is given or aſſigned by the Ordinary, to whom originally and by Law this Execution doth appertain. But with us he is uſually called *Adminiſtrator* [s], becauſe he is the Ordinary's Deputy, or as it were his Steward or Bailiff, to deal and to adminiſter in ſtead of the Ordinary: And in that Reſpect the Ordinary may call this his Adminiſtrator to an Account [t]; and, if he will, may at any Time revoke his Office of Adminiſtration, like as any other Man may revoke his Attorney [u].

[n] Specul. ubi ſupra.

[o] Stat. Ed. 3. an. 31. c. 21. & Stat. H. 8. an. 21. c. 5.

[p] Brook Abridg. tit. Teſtament. n. 20.

[q] Brook Abridg. tit. Deviſe 35. Stat. Ed. 3. an. 31. c. 11.

[r] Specul. in d. §. nunc vero aliqua, de Inſtr. edi. Jo. de Can. & Olden. tract. de executor.

[s] Stat. Ed. 3. an. 31. c. 21. & Stat. H. 8. an. 21. cap. 5.

[t] Stat. Ed. 3. an. 31. c. 11.

[u] Brook tit. Adminiſt. n. 3. & n. 33. ſi Stat. 21 H. 8. non obſtat, quod quær. & tamen videtur quod ex juſta cauſa poterit revocari, ut in caſu Caroli Ducis Suffolciæ, 5 Ed 6 non tamen pro ſuo libitu.

And this the Ordinary may do, not only expreſly, but alſo ſecretly, by appointing another Adminiſtrator [x]. If a Man die Inteſtate, after whoſe Death the Ordinary doth firſt grant the Adminiſtration of his Goods to one Perſon, and afterwards upon Cauſe, or peradventure

[x] L'Abridg. dez caſes edit. an. Dom. 1599. tit. Exec. 11. 18. fo. 177. & tit. Adminiſtrator, fo. 184. in princ.

ture without Cauſe [y], doth grant Adminiſtration of the Goods of the ſaid Deceaſed to another Perſon; in this Caſe the ſecond Adminiſtration is a Secret, but as effectual a Revocation of the former Adminiſtration, as if the Revocation had been expreſſed [z]: Not much unlike a ſecond Teſtament, which is a Secret, but an effectual Revocation of the former [a]; or the Conſtitution of a ſecond Proctor or Attorney, whereby the former is as effectually revoked, as if it were expreſly done [b]. Yet the Acts done by the former Adminiſtrator, until his Authority were revoked, are good in Law [c].

[y] L'abridg. dez caſes ubi ſupra, fo. 177.

[z] Ubi ſupra.

[a] Minſing. & Viglius in §. poſteriore. Inſtit. quib. modis teſt. infir.

[b] L. ſi quis. §. final. ff. de procur.

[c] Brook Abridg. tit. Adminiſtrat. n. 33.

The Reaſon given in the old Books why the Ordinary might revoke an Adminiſtration is, becauſe by granting the Adminiſtration *no Intereſt paſſed to the Adminiſtrator*, but only an *Authority* to intermeddle with the perſonal Eſtate of the Inteſtate, which ſeems a very ſtrange Reaſon, becauſe it hath been often held, that all intermediate Acts done by the firſt Adminiſtrator ſhall ſtand, which could never be if an *Intereſt* did not paſs to him.

T. S. died Inteſtate, the Ordinary granted Adminiſtration to *E. G.* who was cited by the next of Kin of the Inteſtate to have it repealed; and pending the Suit the Adminiſtrator ſold the Goods, and afterwards the Adminiſtration granted to him was repealed; and in an Action of *Trover* brought by the new Adminiſtrator againſt the Vendee, it was adjudged that the Sale was good, which could never be if the firſt Adminiſtrator had no *Intereſt* or Property in the Goods, for a Man cannot convey a Property where he hath none; and ſuch a Property, that tho' the Adminiſtration had been fraudulent, it had been good againſt the ſecond Adminiſtrator, tho' by the [d] Statute it had not been good againſt Creditors.

Packman's Caſe, 6 Rep. 18. Cro. Eliz. 459. S. C. Moor 396. S. C.

[d] 13 Eliz. cap. 6.

Neither can the Ordinary repeal an Adminiſtration at his Pleaſure, as where an Adminiſtrator brought an Action of Debt, *&c.* the Defendant pleaded, that the Adminiſtration granted to the Plaintiff was repealed and granted to *T. S.* the Plaintiff replied that he had appealed from that Sentence; and upon a Demurrer it was adjudged, that the Ordinary having executed his Authority had nothing farther to do, for he could not revoke it, unleſs for a juſt Cauſe.

Price verſus *Parkes*, Sid. 280. 2 Lev. 157. S. C.

The Executor (4) which deriveth his Authority from the *Teſtator* is he that is named Executor in the Teſtament, or to whom the Execution of the Teſtament is committed by the dead Man. For it is lawful for every one having Authority to make a Will, to appoint an Executor for the Performance of the ſame Will [e]. This Executor is termed *Executor teſtamentarius*, a teſtamentary Executor [f], and hath his Authority immediately from the Teſtator [g], repreſenting the Perſon of the dead Man [h]; and may without the Authority of the Ordinary enter to the Teſtator's Goods and Chattels [i]; and may be convented by the Creditors and Legataries of the Deceaſed, as elſewhere is declared [k]; and after the Probation of the Teſtament may alſo commence Suit againſt the Teſtator's Debtors [l]. And he doth not much differ from him in Nature whoſe Name in the Civil Law is *hæres* [m]; ſaving that *Hæres* by the Civil Law is to have the Reſidue of the Teſtator's Goods, and may convert the ſame to his own Uſe, (the Funerals, Debts and Legacies diſcharged,) albeit the

[e] Supra, part. 5. §. 1.

[f] Specul. in d. §. nunc vero. & Jo. de Can. ac Jo. Old. de Executor. ult. vol.

[g] Plow. li. 1. in caſ. inter Greisb. & Fox.

[h] Sichard. in Rub. de jur. delib. C. n. 1. Minſing. in tit. de hæred. inſtituend. Inſtit. lib. 2. Zaſ. in L. ſi res. ff. de excep. & præjud. Doct. & Stud. lib. 2. cap. 7.

[i] Plowd. d. caſ. inter Greiſb. & Fox.

[k] Supra, part. 4. §. 2. & infra hac parte §. 3.

[l] Perkins tit. Teſtament, fol. 93. Brook tit. Executor, n. 49.

[m] Specul. de Inſtr. edit. §. nunc vero aliqua, n. 16. Lindw. in c. ſtatut. lib. 3. provincial. conſt. Cant. verb. prius. tract. de Repub. Angl. lib. 3. c. 9. Haddon lib. refor. leg. Eccleſi. Ang. tit. de teſta. c. 1. c. 18. Adde quæ ſuperius annotavi part. 4. §. 2. in princ.

Teſtator do not expreſly Will that he ſhould have the ſame [n]: Whereas an Executor may not convert the Reſidue to his own private Uſe [o], nor any Part of the Teſtator's Goods, more than that which is left unto him by the Teſtator, or which the Ordinary ſhall allow him for his Travel and Charges, or for ſome other Cauſes hereafter expreſſed [p]. Inſomuch that if the Executor die Inteſtate, the Teſtator alſo from that Time ſhall be deemed Inteſtate, and Adminiſtration may be committed in this Caſe of the Goods not adminiſtred [q].

[n] L. 3. C. de teſtam. mil. §. hæreditas. Inſtit. de hæred. inſtituend. L. interdum. ff. de hær. inſt. Lindw. in d. c. ſtatutum. verb. effectus, in fin.

[o] Mag. Charta c. 18. Plow. in c. inter Norwood & Rede, Perkins tit. Deviſe, c. 8. fol. 97. Littleton, fol. 40. Ripa in L. cum filius famil. ff. de leg. 1. n. 21.

[p] Text. in d. c. ſtatuimus. Dom. Gem. in c. religioſus, lib. de teſta. 6. n. 9. Doct. & Stud. lib. 2. c. 10. Dyer, fol. 2. & infra ead. part. §. 3. n. 14.

[q] Brook Abridg. tit. Adminiſtr. n. 141. tit. Execut. n. 149. Plowd. in caſ. inter Greiſb. & Fox.

Concerning the Office of him that is appointed Executor by Law, that is to ſay, of the Biſhop or Ordinary, and likewiſe concerning the Office of the Executor appointed by the Ordinary, that is to ſay, of the Adminiſtrator, I do not here purpoſe to entreat; but only of the Office of an Executor teſtamentary.

Of (5) Executors teſtamentary there be divers Kinds: That is to ſay, ſome be nude Executors, ſuch as do reap no Commodity by the Teſtament [r]; others not meer or naked Executors, but are to receive ſome Benefit thereby, and may commence judicial Action [s]: And again, of Executors ſome be univerſal, and ſome particular [t]. But becauſe I ſee no great Uſe of theſe Diſtinctions here in this Place, I ſhall ſpeak of an *Executor teſtamentary* generally, and as it is agreeable to every teſtamentary Executor, be he nude, or otherwiſe, univerſal, or particular [u].

[r] DD. in L. ſi quis. de leg. 2. ff. Jo. de Athon. in legatin. libertatem, de executor. teſtam.

[s] Conſule Bald. in d. L. ſi quis. ubi docet executor. dici poſſe nudum duplici reſpectu, vel ob defectum commodi, vel ob defectum actionis. ff. de alimen. leg. in ſpecie, vide poſt alios

[t] Olden. tract. de execut. ult. vol. tit. 3. & ſupr. part. 4. §. 18. Bar. in L. a filio.

[u] De officio executoris in genere, deinde de officio executoris teſtamentarii, legitimi, dativi, Jo. de Canib. de execut. ult. volunt. 2. part.

The (6) Office of every Executor teſtamentary conſiſteth in Two Things: The firſt is, in accepting or refuſing the Executorſhip [x]; the ſecond dependeth on the Reſolution of the Executor in accepting or refuſing the Executorſhip. For if he do accept the Executorſhip, then his Office is extended diverſly: But eſpecially it conſiſteth in making of an *Inventory* [y]; in procuring the Probate of the Teſtament [z]; in the Payment of Debts and Legacies [a]; and finally, in the Making of an Account [b]. But if he reſolve to refuſe the Executorſhip, his Office is ſo much the leſs, conſiſting only in the Avoiding of ſuch Things whereof Mention is made hereafter [c].

[x] Vide Sichar. in Rub. de jure delib. C. & infr. ead. part. §§. 2, 3, 4.

[y] Inf. ead. part. §. 6.

[z] Inf. ead. part. §. 11.

[a] Inf. ead. part. §. 16.

[b] Inf. ead. part. §. 17.

[c] Inf. ead. part. §. 22.

§. II. Of the Accepting or Refuſing the Executorſhip; and firſt, whether the Executor may be compelled to accept the ſame. See *poſtea Cap.* 22.

1. *Divers Queſtions about the Accepting or Refuſing of the Executorſhip.*
2. *The Executor may be cited to accept or to refuſe the Executorſhip.*
3. *If the Executor being cited will not appear, the Ordinary may commit the Adminiſtration of the Goods of the Deceaſed.*
4. *If the Executor named refuſe the Executorſhip, the Ordinary may commit the Adminiſtration.*
5. *The Executor cannot be preciſely compelled to undertake the Executorſhip.*
6. *What if he have already meddled with the Goods of the Teſtator?*
7. *Whether the Executor refuſing the Executorſhip, ſhall loſe his Legacy given unto him in the ſame Teſtament.*

CONcerning (1) the Accepting or Refuſing of the Executorſhip, three Queſtions may be demanded. Firſt, whether he that is named Executor in the Teſtament may be compelled to undertake the Executorſhip, or that it is in his Power to refuſe the ſame [a]. Secondly, What is to be conſidered of him that is named Executor, whereby he may be reſolved whether it were better to accept or refuſe the Executorſhip [b]. Thirdly, How long Time he that is named Executor hath to deliberate and determine of accepting or refuſing the Executorſhip [c].

To the firſt it may be anſwered, that he (2) that is named Executor may be cited to appear before the Ordinary, or other having Authority to prove the Will, and there either to accept the Executorſhip, or at leaſt to refuſe the ſame [d]. And in caſe (3) either he will not appear, or appearing (4) refuſe to prove the Teſtament, the Ordinary, or other Judge, may commit the Adminiſtration of the Goods of the Deceaſed, as if he had died Inteſtate [e]; and the Adminiſtrators have Action, and may adminiſter the Goods of the Deceaſed, as if he had died Inteſtate: And their Authority or Act done is good and effectual in the Law [f] in the mean Time, until the Executors undertake the Executorſhip [g]; for then the Ordinary may revoke the Adminiſtration before by him committed [h].

[a] De hac Q. conſulas Hen. Boi. in c. tua nos. de teſta. extr. Panor. in c. Johann. eo. tit. & Bar. in L. 1. de leg. 2. ff.

[b] Infra §. prox.

[c] Infr. ead. part. §. 4.

[d] Boi. Panor. & Bar. ubi ſupra. Plowd. in caſu inter Greiſb. & Fox.

[e] Brook Abridg. tit. adminiſt. n. 32. tit. exec. n. 49. 101. ſtat. H. 8. an. 31. c. 5.

[f] Brook ubi ſupra, & Plowd. ubi ſupr.

[g] Bald. in L. deberi. C. de fidei commiſ. liber. Plowd. in d. caſ. inter Greisb. & Fox.

[h] Brook Abridg. tit. admin. n. 33. quod facilius procedit, cum adminiſtratio commiſſa fuerit (ut ſemper ſolet) ſalvo jure cujuſcunque, &c.

Yet nevertheleſs, if the Ordinary, knowing that there is a Teſtament, and an Executor named therein, adventure to grant Adminiſtration of the Deceaſed's Goods, not having firſt called the Executor to prove the Will, and to accept or refuſe the Executorſhip; in this Caſe it ſeemeth, that when the Executor ſhall prove the Will, he may ſue the Adminiſtrator in an Action of Treſpaſs [i], notwithſtanding the Adminiſtration granted by the Ordinary; for that he hath no Power to grant Adminiſtration, but when the Perſon deceaſed

[i] L'abridg. dez caſes edit. Anno Dom. 1599. tit. adminiſtr. n. 2. fol. 183.

ceaſed did die Inteſtate, or that the Executor either will not or cannot perform the Office of an Executor [k].

[k] Statut. H. 8. an. 21. c. 5.

But he (5) that is named Executor cannot be preciſely compelled to ſtand to the Will, and undertake the Executorſhip [l], unleſs (6) he have already meddled with the Goods of the Teſtator as Executor; for then he is not only to be compelled to perform the Office of an Executor [m]; but alſo if he ſhould refuſe, and the Ordinary commit the Adminiſtration unto him, this Refuſal is void, and he ſhall be charged as Executor [n].

[l] Panor. in c. Io. de teſt. extr. n. 3. Olden. de exec. ult. volunt. tit. 7. in fin.

[m] Panor. & Olden. ubi ſup. Boi. in c. tua. de teſta. extr. Plowd. in caſ. inter Greisb. & Fox.

[n] Fitz. Abridg. tit. executor, n. 35.

Abraham v. *Cunningham*, 1 Vent. 303. 2 Lev. 182. S. C. T. Jones 72. S. C. 2 Mod. 146. S. C.

'Tis ſo by the Civil Law, with which our Law agrees: As for Inſtance; the Teſtator being poſſeſſed of a Term for Years, made *David* his Son Executor, and died, *who proved the Will* of his Father, and made *Hay* Executor, and then the Son died; but *Hay* not proving the Will of the Son, Adminiſtration *de bonis non* of the Father was granted to one *Bradburne*, (who knew nothing of the Will of the Son) and he ſold the Term for a valuable Conſideration: Then *Hay* the Executor of the Son refuſed to prove his Will, and the Adminiſtration to *Bradburne* was repealed, and a new Adminiſtration *de bonis non* was granted to the Defendant *Cunningham*; the Queſtion was, whether the firſt Adminiſtration *de bonis non* granted to *Bradburne* before *Hay* had refuſed, was good or not; and adjudged that it was not, becauſe *Hay* had the abſolute Property of the Eſtate in him before the Refuſal, and might have ſold the Term before Probate of the Will; and if ſo, then the Adminiſtration granted before he had refuſed was void, and his Refuſal after the Adminiſtration granted to *Bradburne* ſhall not relate to make that good, which was void for Defect of Power; and ſo the Sale by him was void.

Moreover, though (7) the Executor named, who hath not meddled with the Adminiſtration of the Goods of the Deceaſed, cannot be preciſely or abſolutely compelled; yet if any Legacy be left unto him in the Teſtament, he may be compelled to ſtand to the Executorſhip, or elſe to loſe the Legacy; ſo that he ſhall not reap the Benefit, if being duly admoniſhed, he refuſe the Burthen [o].

[o] Quæ poſitio locum vendicat, etiamſi executor ſit conjuncta perſona, ut habet communis opin. Gr. Theſaur. com. op. verb. tutor. Rom. conſil. 235. Add. Jo. de Canib. d. tract. de executor. ubi plures enumerat hujus regulæ limitationes, nempe quod non eſt compellendus; quarum firmitatem quia ſuſpectam habeo, eas ſilentio prætereo.

34 H. 6. 16.

The Perſon to whom Adminiſtration is granted may refuſe to take it upon him if he will, for the Ordinary hath not Power to compel him to accept it.

9 Ed. 4. 33. 1 Vent. 335.

But in ſome Caſes he cannot refuſe; as where an Executor (after a *Caveat* entred) took the uſual Oath, and afterwards refuſing, and another endeavouring to get Adminiſtration, the Executor who had refuſed, conteſted the Adminiſtration with him in the Spiritual Court; and it being decreed againſt him in that Court upon a Suppoſition that he was bound by the Refuſal; he appealed to the Delegates, and pending the Appeal he moved for a *Mandamus* to that Court, to be admitted to prove the Will, and had it; for having taken the Oath, that Court had no further Authority, and therefore ought not to have allowed his Refuſal, but to have granted the Probate to him.

Treſpaſs. It was found by Verdict, that Sir *Ralph Rowlet*, being poſſeſſed of a Term made his laſt Will, and thereof made the Lord Keeper *Bacon*, *Catlin* Chief Juſtice, and others, his Executors, and deviſed the Term to the Lord *Catlin*, and died; all the Executors wrote a Letter to Dr. *Dale*, Judge of the Prerogative Court, that they could not intend the Execution of the Will, and deſired him to commit the Adminiſtration to *Henry Goodyer*, the next of Kin to the Teſtator; the Adminiſtration was accordingly granted, but the Regiſter entered the Cauſe, *viz.* for that the Executors did defer *ſuſcipere onus teſtamenti*; after this, *Catlin* entred upon the Land deviſed to him, and granted it over: The Doubt was, whether this Grant was good. 1. Whether the Letter was a ſufficient Renunciation. 2. Whether (if they once refuſe) they may after Adminiſtration granted adminiſter at their Pleaſure. Dr. *Ford* declared to the Juſtices, that by the Civil Law a Renunciation may as well be by Matter in Fact, as by a judicial Act; and they may refuſe by Parol: And cited a Rule in the Civil Law, *Non cuit eſſe hæres, qui ad alium cuit transferre hæreditatem*; and *Hæreditas eſt totum jus quod defunctus habuit.* And to the ſecond he ſaid, *Qui ſemel repudiaverit hæreditatem amplius hæreditatem petere non poteſt*; and, *Qui ſemel repudiaverit*, ſhall not afterwards be Executor, *quia tranſit in contractum:* And that Executors cannot refuſe for one Time, but for ever; but they may pray Time to conſider of taking upon them the Executorſhip, and it ought to be granted; and in that Caſe the Ordinary is to grant in the mean Time *literas ad colligendum, &c.* but is not to grant Adminiſtration. And for theſe Reaſons, there being a Refuſal, the Grant made after Adminiſtration committed was void; and ſo was the Opinion of the Court [p].

[p] M. 29 & 30 Eliz. C. B. *Broker* verſus *Charter*, Crook, part 3. fol. 92. Owen 44. S. C. Moor 272. S. C. 1 Leon. 153. S. C.

Actions maintainable by Executors or Adminiſtrators.

EXecutors may charge Perſons for any Debt or Duty due to the Teſtator, as the Teſtator himſelf might have done; and the ſame Actions that the Teſtator himſelf might have had, the ſame for the moſt part may Executors have alſo. And therefore it was adjudged, that Executors may have and maintain a Trover and Converſion upon Trover and Converſion in the Time of the Teſtator [q].

[q] H. 37 Eliz. B. C. *Eliz.* Counteſs of *Rutland* verſus *Iſabel* Counteſs of *Rutland*, Crook, part 3. fol. 377. H. 21 Eliz. rot. 410. *Ruſſel* and *Prat*'s Caſ. Ibid. lib. 5. fol. 30. *Ruſſel*'s Caſe.

If three Executors bring a Trover and Converſion, and the one is an Infant, and they all ſue by Attorney, it is good, becauſe they are all but one Perſon, and ſue *en auter droit*, and not in their own Right; and it is not reaſonable that one or two ſhould ſue by Attorney, and a third by Guardian or *prochein amie* [r].

[r] Crook, part 3. fol. 378.

Quare Impedit lieth for an Executor upon a Diſturbance made in the Life-time of the Teſtator [s].

[s] P. 31 Eliz. C. B. *Sale* verſus *Eveſque de Lichfield.*

Treſpaſs by an Adminiſtrator, *de bonis aſportatis in vita inteſtati*: After Verdict it was moved in Arreſt of Judgment, that this Action is not given by the Statute of 4 *E.* 3. *cap.* 7. but ruled without Argument, that the Action lay by the Equity of the Statute; for it is in equal Miſchief [t].

[t] P. 37 Eliz. B. R. *Smith* v. *Vangar Codgay*, Crook, part 3. fo. 384. 14H. 7. 13.

An *Aſſumpſit* by the Executor upon a *Promiſe made to the Teſtator*, and did not ſhew forth the Teſtament in the Declaration: Adjudged, that it is Matter of Subſtance, not of Form; for otherwiſe the Excutor doth not intitle himſelf to the Action, without ſhewing the Teſtament [u].

[u] M. 38 & 39 Eliz. B. R. *Edwards* ver. *Stapleton*, Crook, part 3. fol. 551. Crook, part 2. pl. 1. P. 10 Jac. B. R. *Browning* v. *Fuller*, 1 Bulſt. 200. S. C. 1 Vent. 200.

But the Law is now altered as to that Point, for the *Profert hic in Curia literas, &c.* is held to be Matter of Form, and not of Subſtance; and my Lord *Hale* was always of that Opinion, but becauſe of different Judgments it was thought neceſſary, amongſt other Alterations made in the Law, to ſettle this Matter by * Act of Parliament, (*viz.*) *That after a Verdict Judgment ſhall not be ſtaid for not producing Letters of Adminiſtration.*

* 16 & 17 Car. 2. cap. 8.

Treſpaſs by the Plaintiff as Executor of *A.* againſt *B.* for that he took and eſloined Goods to Places unknown which were the Teſtator's *tempore mortis ſuæ, &c.* the Defendant thereupon demurred in Law: It was moved that this Declaration was not good, becauſe there ought to have been mentioned, that the Goods were taken *extra cuſtodiam ſuam*; as the *Regiſt. fol.* 49. 42 *E.* 3. 26. 48 *E.* 3. 10. 11 *H.* 4. 12. But adjudged, that becauſe the Plaintiff had Election to bring the Action either of his own Poſſeſſion, or as Executor, and foraſmuch as by the Teſtator's Death the Poſſeſſion is caſt upon the Executor; it is to be intended that the Goods were *in cuſtodia ſua*; and for that Cauſe the Declaration was adjudged good [x].

[x] H. 3 Jac. B. R. *Adams* v. *Cheverel*, Crook, part 2. fol. 113.

Scire facias in Chancery as Adminiſtrator to *G.* Earl of *S.* upon a Recognizance of 4000 *l.* conditioned for Performance of Covenants; the Parties being at Iſſue, it was given for the Plaintiff *C. B.* It was moved in Arreſt of Judgment, becauſe it is not mentioned in the Writ, *Quod profert literas Adminiſtrationis*; but becauſe it was in a Writ founded upon the Record, and the Courſe is not to mention it in Writs, and ſo be all the Precedents in Chancery; it was ruled to be well enough [y].

[y] 39 & 40 Eliz. The Earl of *Shrewſbury* verſus Sir *Walter Lewſon*, Crook, part 3. fol. 592.

The Stat. 4 *E.* 3. is taken by Equity, and Adminiſtrators who are in the ſame Miſchief ſhall have the ſame Remedy, albeit they be not named in the Statute [z].

[z] 14 H. 7. 17. Old N.B. 103. 7 H. 4. 6.

An Executor ſhall have a Replevin of Goods taken *in vita teſtatoris*, and likewiſe an *ejectione firmæ* of an Ouſter made to the Teſtator [a].

[a] Old N. B. 123. 17 E. 3. Exec. 106.

A Man condemned in Debt and impriſoned, if the Gaoler ſuffer him to eſcape, the Party or his Executors may have an Action of Debt againſt the Gaoler [b].

[b] F. N. B. 121. a. Fitz. Debt, pl. 36. 127.

An Action for Debt is brought againſt *B.* and Judgment againſt him for it, and he impriſoned; *A.* dies, the Gaoler ſuffers *B.* to eſcape; an Action of Debt will lie for the Executor or Adminiſtrator upon this Eſcape againſt the Gaoler; but if he be impriſoned upon a mean Proceſs, as a *Latitat* or Bill of *Middleſex*, *quære*: becauſe it is a perſonal Fact done to the Party, and ſo *moritur cum perſona* [c].

[c] T. 2 Car. rot. 1365. *Lemaſons* and *Dickſon's* Caſe. B. R. Poph. Rep. 189. Vid. T. 14 Jac. *Probe* and *Main's* Caſe, quod fur mean proces pur eſcape action ne gist. Poph. Rep. 192. W. Jones 173. S. C. Latch 167. S. C.

Anno 3 *Car.* 2. An Action was brought by an Executor againſt a *Gaoler, who ſuffered a Priſoner on meſne Proceſs to eſcape* in the Life-time of the Teſtator; and upon a Demurrer to the Declaration, two Judges were of Opinion that the Action did lie, if not at Common Law, yet by the Equity of the Statute 4 *Ed.* 3. *cap.* 19. *de bonis aſportatis in vita teſtatoris*, which Statute ought to have a favourable Conſtruction, in order to the Advancement of Juſtice, *&c.* Two Judges of a contrary Opinion, that the Action did not lie, not at Common Law, becauſe it was not grounded on a *Contract*, as *Debt, Covenant, &c.* that an Executor could have no Action which ariſed *ex maleficio*, as *Treſpaſs, Vi & Armis, Battery*, and ſuch like, though he might have an Action grounded on a Contract, which this is not; neither ſhall he maintain it upon the Equity of the Statute, for that only gives him an Action of *Treſpaſs for Goods of his Teſtator carried away in his Life-time*, which Action he could not have before this Statute; it gives no Remedy for any other Treſpaſs, as Aſſault, Battery, *&c.* Now in this Caſe the Treſpaſs did not concern the Goods of the Teſtator, but it was for ſuffering the Party to eſcape; 'tis true, this Statute hath been extended by Equity to other Actions, which concern the Goods of the Teſtator; therefore the Executor may bring Trover for Goods taken and converted in the Life-time of the Teſtator. W. Jones 173.

An Executor or Adminiſtrator may have a *Superſedeas* upon a Writ of Error brought by the Executor or Adminiſtrator, without ſpecial Sureties to pay the Condemnation, if the Judgment ſhould be affirmed; and the Stat. 3 *Jac. cap.* 8. that all *Actions of Debt*, &c. muſt be intended where it is *againſt the Party himſelf, upon his Obligation*, or where Judgment is general againſt the Executors; but where the Judgment is ſpecial, *that Execution ſhall be of the Goods of the Teſtator, and Damages only de bonis propriis*, it is not reaſonable that the Party ſhould be inforced to find Sureties to pay the intire Condemnation with his own Goods[d].

[d] M. 12 Jac. *Goldſmith* ver. The Lady Executrix, Crook, part 2. fol. 352. Crook, part 1. fol. 42. *Mildmay*'s Caſe.

A. as Adminiſtrator of *B.* brings an Action for Debt againſt *C.* and had Judgment to recover; *C.* being impriſoned for it, eſcapes; *A.* as Executor of *B.* brings an Action for this Eſcape: And adjudged the Action doth not lie, becauſe the firſt Recovery was as Adminiſtrator, and the Action upon the Eſcape is as Executor, which cannot be, that one ſhould die Inteſtate, and yet have an Executor; and this Action being brought as Executor, diſaffirms the firſt Suit, which ſuppoſes a dying Inteſtate; and the Action upon the Eſcape ought to purſue the firſt Action[e]. There was no Objection to the Action, but to the Form of the Declaration, (*viz.*) becauſe the Plaintiff declared againſt the Defendant as *Executor*, when he had recovered the Judgment as *Adminiſtrator* againſt the Perſon who eſcaped.

[e] H. 13 Jac. *Slingſbye* verſus *Lambert*, Crook, part 2. fol. 394. 3 Bulſt. 112.

If a Man recover as Adminiſtrator, where he is Executor, the Party againſt whom the Recovery is ſhall have an *Audita querela*, ſuppoſing that he had no Right to recover[f].

[f] Crook, part. 2. fol. 394. 2 R. 3. fol. 8.

If an Action be brought as Adminiſtrator, he ought to ſhew, *& profert hic in Curiam literas adminiſtratorias*; for it is Matter of Subſtance, and not aided by any Statute[g]; this is now altered. See *Antea.*

[g] M. 14 Jac. Sir *Jo. Cutt*'s Caſe, Crook, p. 2. fol. 409, 412. 28 H. 6. 31. 16 E. 4. 8. 21 H. 6. 23. Pl. Com. 52.

If

If an Executor brings an Action and recovers, and dies Inteſtate, the Adminiſtrator of the firſt Man may not ſue Execution by *Scire fac.* for there is not any Privity between them [h].

[h] 26 H. 8. 7. C. lib. 5. fol. 9. *Brudnel's* Caſe. C. lib. 1. fol. 31. *Shelley's* Caſe. Anderſ. Rep. part 1. c. 49. 2 R. 3. fol. 8. 10 E. 3. 26.

A Woman and another Perſon were made Executors, the Woman took Husband, who did not alter the Property of the Goods of the Teſtator; and then the Wife died: It was adjudged, that the other Executor might have an Action of Detinue againſt the Husband for the ſame Goods [i].

[i] P. 1 Eliz. Bendloe's Rep.

An Executor brings Debt upon an Obligation, the Defendant pleads *Non eſt factum*, and found for him: Adjudged that the Plaintiff ſhould pay no Coſts upon the Stat. 4 *Jac.* becauſe he ſues *en auter droit*, and of Matter which lay not in his Cognizance; therefore the Law never intended to give Coſts againſt him [k].

[k] M. 7 Jac. *Hayworth* verſ. *David*, Crook, part. 2. fol. 229. Yelv. 169. S. C.

If an Adminiſtrator recovers Damage on Treſpaſs *de bonis aſportatis in vita teſtatoris*, and then die Inteſtate, his Adminiſtrator may have Execution thereon; otherwiſe of a Debt recovered which was due to the Inteſtate [l].

[l] M. 44 & 45 Eliz. B. R. *Yate* v. *Goth*, Moor's Rep. n. 931. 2 Cro. 271. S. C.

If *A.* make a Promiſe to *B.* and after *B.* dies Inteſtate, and Adminiſtration of his Goods be committed to *C.* who after dies alſo Inteſtate, and after Adminiſtration is committed to *D.* of the Goods of *C.* in this Caſe *D.* cannot have an Action on the Promiſe made to *B.* as Adminiſtrator to *C.* for he is not Adminiſtrator to *B.* in that Adminiſtration was not granted to him of the Goods of *B.* unadminiſtred by *C* [m].

[m] M. 15 Car. B. R. inter *Goſlin* and *Oſborn*. Roll's Abridg. tit. execut. lit. E.

A Perſon made a Leaſe for Years, rendring Rent at *Michaelmas*, or within a Month after; the Leſſee enters; the Leſſor dies within ten Days after *Michaelmas*: Adjudged that the Executor had no Remedy for this Rent, for the Rent was not due in the Teſtator's Time, nor until the End of the Month; and in ſuch Caſe the Rent ſhall go to the Heir, and not to the Executor [n].

[n] T. 39 Eliz. C. B. *Pilkington* ver. *Dalton*, Crook, part 3. fol. 575. C. lib. 10. fol. 129. *Clun's* Caſe.

Where a Perſon died *ſeiſed of Rent*, either in *Fee or in Tail*, or *for Life*, his Executor or Adminiſtrator had no Remedy at Common Law to recover the *Arrears* due in his Life-time; but now by the Stat. 32 *H.* 8. *cap.* 37. an Action of Debt is given in ſuch Caſes, and likewiſe the Executor or Adminiſtrator may diſtrain.

This Statute extends only to *Inheritances* at Common Law, or to *a Freehold for Life*; and therefore where a Rent was granted for a certain *Term of Years*, if the Grantee lived ſo long, and it was arrear in his Life-time, his Executor could not diſtrain for the Rent after his Death, becauſe this Caſe is out of the Statute which provides a Remedy only where the Teſtator died *ſeiſed either in Fee, or in Tail, or for Life*; and 'tis not without the Equity of the Statute, though the Rent was determinable on Life.

Appleton v. *Doyley*, 1 Brownl. 102. Yelv. 135. S. C.

Neither doth this Statute extend to Rent arrear for a *Copyhold Eſtate*; for theſe are not Inheritances at Common Law, but by *Cuſtom*.

Gynnel's Caſe, 4 Rep. 48 a.

If the Teſtator after this Statute had granted his Intereſt, and the Grantee had attorned; and then the Teſtator died; his Executor could not recover the Rent in arrear by Virtue of this Statute,

becauſe it is loſt by granting over his Eſtate, and was not due to the Teſtator at the Time of his Death; and the Statute is expreſs, that the *Executor muſt recover in as large a Manner as the Teſtator might*, who as this Caſe is could not recover, and by Conſequence his Executor could not.

Detinue brought by an Executrix againſt her own Husband's Executor: The Caſe was this; one *Falconer*, who was the Plaintiff's firſt Husband, made his Will, gave divers Legacies, and towards the End of his ſaid Will ſaid, *The Reſidue of all my Goods I give and bequeath to* Frances *my Wife, whom I make my ſole Executrix of this my laſt Will, to diſpoſe for the Health of my Soul, and to pay my Debts*, and died indebted to divers Perſons, to whom the ſaid *Frances* paid the Debts and all the Legacies, having then Goods in her Hands, for which this Action was brought; ſhe having after married one *John Hunks*, who made the Defendant his Executor, to whoſe Hands the ſaid Goods came. Upon Demurrer Judgment was, that the Plaintiff ſhould recover; for notwithſtanding the Deviſe, *viz. of the Reſidue as aboveſaid*, ſhe hath them not as *Deviſee*, but as *Executrix*, becauſe the Words of the Will can have no other Intendment, than that ſhe ſhould enjoy them as Executrix [o].

[o] M. 15 & 16 El. C. B. *Hunks* verſus *Aldborough*, Anderſ. Rep. c. 45. Moor's Rep. fol. 99. n. 242. Dyer 331.

One Co-Executor cannot ſue another for Poſſeſſion of the Teſtator's Goods, for that all the Executors to the ſame Teſtator are but as one, and no Man can ſue himſelf [p]. Nevertheleſs, if the Teſtator makes divers Executors, and bequeaths to the one of them the Reſidue of his Goods, it is not only lawful for him to whom they are ſo bequeathed to retain the ſame; but alſo if the other Executor enter thereunto, he is ſubject to an Action of Treſpaſs [q]. Alſo if the Executor of a Co-Executor hath any Goods belonging to the firſt Teſtator, the other ſurviving, the Co-Executor of the firſt Teſtator may have an Action againſt the Executor of that deceaſed Co-Executor for the ſame [r].

[p] Brook tit. execut. pl. 98.

[q] Brook ibid. pl. 104.

[r] Brook tit. execut. n. 99.

If there be two Adminiſtrations granted together, he that is the rightful Adminiſtrator may ſue the Wrongful for the Goods in his Cuſtody [s].

[s] C. lib. 8. fol. 135.

If Leſſee for Years deviſeth his Term to another, and maketh his Executors, and dieth, and the Executors do waſte, and afterwards aſſent to the Legacy: Adjudged that although between the Executors and Deviſee it hath Relation, and the Deviſee is in by the Deviſor, yet an Action of Waſte is maintainable againſt the Executors in the *Tenuit* [t].

[t] T. 4 Eliz. C. B. lib. 5. fol. 12. *Saunders*'s Caſe.

Debt upon an Eſcape by Executors muſt be in the *Detinet* only, and not in the *Debet & detinet* [u]. Vide *Hiſcock*'s Caſe cited in *Hargrave*'s Caſe, *lib.* 5, 31.

[u] M. 17 Jac. *Lancaſtell* verſus *Sidley*, Hob. Rep. 272, 264. Lib. 5. fol. 31. *Hargrave*'s Caſe.

Executor to the Lady *P. port debt* upon an Obligation; the Condition was, for the Payment annually of 30 *l.* during the Life of the Lady at the Feaſts of St. *Michael* and the Annunciation, or within thirty Days after every of the Feaſts; the Lady dies within the thirty Days; the Queſtion was, Whether this ſhall diſcharge the Payment due at the Feaſt before her Death; and the Court held that it did [x].

[x] H. 37 Eliz. B. R. *Price* verſ. *Williams*, Crook part. 3. fol. 380.

Executor charged for Rent arrear after Aſſignment of the Term.

Marrow verſ. *Turpin*, Cro. Eliz. 715. Moor 600, and cited in *Walker*'s Caſe, 3 Rep. 24.

AS for *Rent arrear after the Aſſignment of the Term*, the Caſe was, An Action of Debt was brought againſt the Defendant (as *Adminiſtrator*) *for Rent arrear*, and reſerved on a Leaſe made to the Inteſtate, and incurred after *his Death*; the Defendant pleaded, that before the Rent was due *he aſſigned the Leaſe* to *T. S.* and that the Plaintiff knowing this Aſſignment, had *accepted the Rent* from the ſaid *T. S.* the Aſſignee; and upon a Demurrer to this Plea it was adjudged, that the Adminiſtrator was not chargeable *after the Aſſignment* of the Term.

Overton ver. *Syddall*, Popham 120. Gouldſ. 120. S. C. Co. Ent. 122. S. C. Cro. Eliz. 555. S. C.

A Prebendary made a Leaſe, rendering Rent, the Leſſee died, having made *T. S.* his *Executor*, *who aſſigned the Leaſe to* E. G. and the Prebendary brought an Action of Debt againſt *T. S. the Executor of the Leſſee*, for Rent arrear *after the Aſſignment*: And adjudged that it would not lie; for if the Executor could have been charged, it muſt not be upon any Privity of Contract, but upon a Privity in Law, as having the Eſtate, if he had not aſſigned the Term; but by his aſſigning the Leaſe the Privity of Eſtate was removed; and for that Reaſon the Action would not lie.

Walker verſ. *Harris*, Moor 351. 3 Rep. 24. S. C.

But if the *Leſſee himſelf* had aſſigned his Leaſe, though the Privity of Eſtate would have been removed by ſuch Aſſignment; yet the Privity of Contract would have ſtill ſubſiſted between the Leſſor and the Leſſee, who ſhall be always chargeable to the Leſſor for Rent, and incurred as well before as after the Aſſignment, during Life; but after his Death his Executor ſhall not be chargeable for any Rent due afterwards, becauſe by his Death the Privity of Contract, as to the Action of Debt, was determined.

Where an Executor ſhall be charged upon the Deed of the Teſtator, though he be not named in the Deed; and where he ſhall be charged de bonis propriis, *and where* de bonis Teſtatoris *only.*

IF a Man hath a Stock of Sheep or other perſonal Goods for a Time, and doth covenant for him and his Aſſigns at the End of the Term, to deliver the Stock, or ſuch a Sum for them; the Leſſee aſſigns them over; the Aſſignee ſhall not be charged with this Covenant, for it is a perſonal Covenant, and wants Privity: But the ſame ſhall bind his Executors and Adminiſtrators [a].

[a] C. lib. 5. fo. 17. *Spencer*'s Caſe.

Leſſee for Years by Indenture covenanted for himſelf, that within Three Years he would build a new Houſe upon the Lands; no Mention was made of the Executors; the Term expired, and the Leſſee died: *Per Curiam*, His Executors ſhall be charged, though not named in the Covenant [b].

[b] T. 28 H. 8. Dy. 14. 23.

If one makes a Leaſe of Land by Deed wherein he hath nothing, by the Word *Demiſi*, and dies before an Action of Covenant is brought againſt him; it will be maintainable againſt his Executor:

For the Word (*Demiſi*) implies a Power to let, as well as (*Dedi*) doth a Power of Giving [c].

[c] Lib. 4. *Nokes*'s Caſe, P. 11 Jac. Rot. 1358. *Holder* verſus *Taylor*, Hob. Rep. fol. 12.

If one be Leſſee for Years or Life without any Deed, and his Rent being behind dieth, his Executor ſhall be liable to the Payment of this Rent [d]. But if the Leſſee for Years ſell or grant away his Term or Leaſe, and die, his Executor ſhall not be charged for any Rent due after the Death of his Teſtator, though himſelf in his Life-time was ſtill liable for the Rent to grow due after, until the Leſſor accept the Aſſignee for his Tenant [e].

[d] 21 H. 6. 1. 44 E. 3. 43.

[e] 44 E. 3. 5. 7 E. 3. 11. 14 H. 7. 4. Dyer 247. Lib. 5. *Spencer*'s Caſe.

A. covenants with his Leſſee to pay all Quit-rents, and dieth. It is a *Quære* if his Executors be bound there. *Dy. fol.* 114. And the Books are, that it is a perſonal Covenant only, and dieth with the Perſon. 49 *E.* 3. 17. 18 *E.* 3. 2. *Finch, lib.* 1. *fol.* 17. But this *Quære* is reſolved in *Lib.* 5. *fol.* 16. *Spencer*'s Caſe [f].

[f] Dy. 114. 49 E. 3. 17. 18 E. 3. 2. Finch lib. 1. 17. lib. 5. *Spencer*'s Caſe.

Debt was brought againſt Two Executors, one appeared and confeſſed the Action, the other made Default; and Judgment was given to recover the Goods of the Teſtator in both their Hands; to which Purpoſe a *Fieri fa.* iſſued to the Sheriff; who returned *Nihil*; but he that made Default had Goods of the Teſtator, and had waſted them before the Receipt of the Writ; whereupon a *Scire fac.* iſſued out againſt him only who had waſted the Goods: And upon a *Scire fec.* returned, Execution was awarded againſt him only of *his proper Goods*, without any Execution ſued againſt his Companion [g].

[g] M. 4 Eliz. Dy. fol. 210.

If a Man condemned in Debt dieth before Execution, it was held by the Court, that his Adminiſtrators were bound to pay this Debt upon Record before Specialties: And if they be ſued upon an Obligation, they may plead a Recovery againſt them which is not executed; but if they do not plead it, but ſuffer a Judgment againſt them, and Execution before Execution ſued of the firſt Judgment, they ſhall be charged of their own Goods, for that by the firſt Judgment the Goods were charged [h].

[h] 5 E. 6. Dy. fol. 80. C. lib. 5. fol. 28. *Harriſon*'s Caſe.

Debt againſt an Executor, the Plaintiff had Judgment to recover *de bonis Teſtatoris*, and thereupon a *Scire facias* was awarded, and the Sheriff returned, *Quod nulla habuit bona teſtatoris*, and the Plaintiff ſurmiſeth, that he had waſted the Teſtator's Goods; whereupon he prayed a *Scire fac.* why he ſhould not have Execution *de bonis propriis*. *Per Curiam*, This Writ ſhall not be awarded upon the Surmiſe of the Party upon a *Devaſtavit*; nor in any Caſe, where the Judgment is *de bonis propriis*, unleſs it be upon Return of the Sheriff, when he returns a *Devaſtavit* [i].

[i] M. 38, 39 Eliz. C. B. *Aldworth* verſ. *Peel*, Crook part. 3. fol. 530. n. 61. 2 And. 55. S. C.

Debt, &c. againſt the Executor of *T. S.* who was Executor of *E. G.* upon a Bond of *T. S.* the firſt Teſtator; the Defendant pleaded, that the ſaid *E. G.* owed him 100 *l.* and that Goods to that Value came to him as Executor of the ſaid *E. G.* which he detained, *ultra quod* he had not Aſſets: The Plaintiff replied and averred Aſſets, upon which they were at Iſſue, and the Plaintiff had a Verdict: Adjudged that he ſhould recover *de bonis* of the firſt Teſtator in his Hands, and Damages *de bonis propriis*; and if the Sheriff ſhould return *nulla bona* of the firſt Teſtator in the Hands of the Defendant, he muſt likewiſe return a *Devaſtavit* in him, becauſe the Verdict found that he had Aſſets, and accordingly the Sheriff returned a *Devaſtavit*; and thereupon Execution was had *de bonis propriis*. Sir *John Chicheſter*'s Caſe, Dyer 185.

Scire

Merchant v. *Driver*, Sid. 412. 1 Saund. 306. S. C. 1 Vent. 20. S. C.

Scire facias againſt the Defendant, Adminiſtrator of *Anne Row*, to have Execution *de bonis propriis*; upon an Inquiſition returned, that he had Goods and Chattels of the Inteſtate to the Value of the Debt and Damages recovered by the Judgment, and that *Bona & Catalla illa* (to the Value of the Debt) *vendidit & elongavit & ad uſum ſuum proprium convertit*; whereupon they were at Iſſue, and the Plaintiff had a Verdict. It was objected that he could not have Execution *de Bonis propriis* of the Defendant, becauſe there was no *Devaſtavit* found, or in Iſſue, for the Iſſue which was tried might be true, and yet the Defendant not guilty of a *Devaſtavit*, becauſe he might convert the Goods to his own Uſe upon Payment of a Debt owing by the Inteſtate; but it was adjudged for the Plaintiff; for if he had paid a Debt to that Value, then the Property of the Goods had been altered and veſted in him, and if ſo, he could not convert them.

Debt againſt Two Executors; one pleads a Recovery in *B. R.* againſt him in Bar, the other that he had fully adminiſtered: Againſt the firſt the Plaintiff did aver Covin; and upon the ſecond Plea they were at Iſſue: The firſt Iſſue is found for the Plaintiff, and as to the other, it was found, that the Defendants had Goods in their Hands of their Teſtator not adminiſtered to 30 *l.* the Debt being 100 *l.* the Plaintiff had Judgment to recover *de bonis teſtatoris*; a *Scire fac.* is brought againſt the Executors, ſuppoſing many other Goods came to their Hands after the Judgment. *Per Curiam*, Where upon Nothing in their Hands pleaded, it is found, that ſome Part of the Sum in Demand is in the Hands of the Executors, there, upon a Surmiſe of Goods come to their Hands, the Plaintiff may have a *Scire fac.* contrary, where upon Iſſue it is found fully for the Defendants, that they have nothing in their Hands [k].

[k] M. 30 Eliz. C. B. *Bracebridge* and *Baſkervil*'s Caſe, Leon. fol. 67. 1 And. 150. S. C.

Morgan verſus *Sock*, 1 Bulſt. 187. Yelv. 219. S. C.

Debt againſt an Adminiſtrator, who pleaded that before the Action brought, the Adminiſtration was revoked and granted to another, he (the Defendant) having then Aſſets in his Hands to the Value of 200 *l.* which he had delivered over to the new Adminiſtrator: The Plaintiff replied that this was by Covin; and ſo it was found, and thereupon he had Judgment to recover the Debt *de bonis teſtatoris*; and upon a Writ of Error brought it was inſiſted, that the Recovery ſhould not be abſolute *de bonis teſtatoris*, but conditionally *Si tantum habuit in manibus*; but it was held that the Judgment was good.

Johns verſus *Adams*, 2 Cro. 191.

Debt upon Bond againſt Husband and Wife as *Adminiſtratrix*; he pleaded Payment by the Wife after the Death of the Inteſtate, upon which they were at Iſſue; and the Plaintiff had a Verdict, and Judgment *quod recuperet* againſt them *de bonis teſtatoris ſi tantum habent in manibus, & ſi non pro miſis de bonis propriis*; and adjudged good; for though the Plea is falſe, yet the Husband who pleaded it being a Stranger to the Inteſtate, he might not know whether his Wife had paid it to the Inteſtate, or not; and this is not like the Plea of *Plene adminiſtravit*, which, if found falſe, the Judgment ſhall be *de bonis propriis*, becauſe it is falſe upon the Defendant's own Knowledge.

Chapman verſus *Gall*, 2 Lev. 22.

Debt againſt an Executor, who pleaded *Plene adminiſtravit*, and it was found againſt him; and the Judgment was entered generally, when it ſhould be *de bonis teſtatoris, ſi, &c. & ſi non de bonis propriis.*

Debt againſt Co-executors, one of them confeſſed the Action, and the Plaintiff had Judgment to recover his Debt *de Bonis & Catallis* of the Teſtator in both their Hands; and thereupon a *Fi. fa.* iſſued againſt both, and the Sheriff returned, that at that Time they had *nulla Bona*, but that one of them had Goods of the Teſtator to the Value of the Debt, and that he had waſted them *ante receptionem brevis*; and upon this Return a *Scire facias* iſſued againſt him alone to have Execution *de bonis propriis*; and Judgment was given accordingly. *Williams* v. *Roberts*, Noy 7.

Judgment againſt an Executor to recover 60 *l. de bonis propriis*, and ſix Pounds Damages; and upon a *Fi. fa.* againſt him, the Sheriff returned *Nulla bona*; afterwards upon a Suggeſtion of a *Devaſtavit* in *London*, a ſpecial *Fi. fa.* was directed to the Sheriff, who upon an Inquiſition taken returned, *Quod bona teſtatoris devenerunt* to the Executor after the Death of the Teſtator, and that he converted them to his own Uſe, and then a *Scire facias* iſſued againſt him, to ſhew Cauſe why the Plaintiff ſhould not have Execution againſt him *de bonis propriis*: The Defendant pleaded, that as to the *Six Pounds* Damages, the Plaintiff ought to have Execution; but as to the 60 *l. Plene adminiſtravit*; and upon a Demurrer this was held a good Plea, for he ſhall not be concluded by the [l] Inquiſition and Return of the Sheriff, becauſe 'tis not directly in Purſuance of the Writ, but of a collateral Matter. *Gibſon* verſus *Brook*, Cro. Eliz. 856, 886. Owen 132. S. C.

[l] See the next Caſe.

Judgment againſt two Executors, to recover *de bonis teſtatoris*, and a *Fieri facias* to levy the Debt, who returned *Nulla bona*; whereupon the Plaintiff ſuggeſted on the Roll, that the Defendant had *waſted* the Goods; and a Writ being directed to the Sheriff, and an Inquiſition being taken, he returned, that they had *waſted*, *&c.* then a *Scire facias* iſſued againſt them, to ſhew Cauſe why the Plaintiff ſhould not have Execution *de bonis propriis*, to which the Defendant did not plead, as he did in *Gibſon*'s Caſe before-mentioned; thereupon the Plaintiff had Judgment upon the Return of *Nulla bona*; but upon a Writ of Error brought that Judgment was reverſed, becauſe when the Sheriff returned *Nulla bona*, the Plaintiff ought to have a ſpecial *Fieri facias* to the Sheriff to levy the Debt *de bonis teſtatoris*; and that if *ſibi conſtare poterit*, that the Executor had *waſted the Goods*, *&c.* then to levy it *de bonis propriis*; for if he make a falſe Return upon an [m] *Inquiſition*, the Party is without Remedy. *Pettifer*'s Caſe, 5 Rep. 32. Co. Entr. 270. b.

[m] See the Caſe before.

Husband and Wife, Executrix of her former Husband, were ſued in an Action of Debt in *London*, and the Plaintiff had Judgment; and upon a *Fi. fa.* the Sheriff returned *Nulla bona teſtatoris*; afterwards upon a *Teſtatum*, that the Goods were eſloined, the Plaintiff brought a new [n] *Scire facias*, reciting the Judgment and the former Writ and Return; and *Quod teſtatum exiſtit*, that the Defendants had Goods ſufficient, *&c.* and that they *eſloined* and ſold them, wherefore the Sheriffs of *London* were commanded, that by Inquiſition *vel alio modo*, *&c.* they ſhould inquire whether the Defendants had eſloined the Goods; and if it was ſo found, that then *Scire faciant* the Defendants to be in Court in *Octab. Michaelis*, to anſwer the Waſte done by them, and to ſhew Cauſe why Execution ſhould not be awarded *de bonis propriis*; the Sheriffs returned the Inquiſition, finding a Sale of Goods by the Defendants, and that *Scire fecerunt* the Defendants, who appeared and demurred to the Writ, *Mounſon* v. *Bourn*, Cro. Car. 518. Jones 417.

[n] This differs from *Pettifer*'s Caſe, for there the Judgment was given upon *Nulla bona* returned, but here upon a *Scire facias* returned.

which was adjudged good, and that the Defendants ſhould anſwer; afterwards they imparled, and Judgment was had againſt them by Default, and that the Plaintiff ſhould have Execution *de bonis propriis*, which Judgment was affirmed in Error.

Knight verſus *Hilton*, Cro. Car. 603. Debt againſt Husband and Wife as Adminiſtratrix of her former Husband, and Judgment againſt them; and upon a *Fieri facias* the Sheriff returned *Nulla bona* of the Inteſtate; and upon a Suggeſtion of a *Devaſtavit* another *Fieri facias* iſſued againſt them, with this Clauſe in the Writ, *Si ſibi conſtare poterit per inquiſitionem*, that they had waſted the Goods, then *Scire faceret* the Defendants to ſhew Cauſe why Execution ſhould not be done *de bonis propriis* (as the uſual Courſe is), and the Sheriff returned, that the Jury found the Wife had to the Value of 100 *l.* of the Inteſtate's Goods which ſhe had *waſted* whilſt ſhe was a Widow, and that the Husband had not waſted any; but Execution was awarded *de bonis propriis* of him and his Wife, for he is chargeable by Law for the *Waſte* done by his Wife.

Litt. Rep. 53. Where an Executor brings a Writ of Error, if the Judgment is not reverſed, he ſhall be anſwerable *de bonis propriis*.

Nelſon verſus *Powell*, 2 Rol. Rep. 400. An Executor acknowledged Satisfaction on a Judgment recovered by his Teſtator; afterwards this Judgment was reverſed, and Reſtitution awarded *de bonis teſtatoris*, *& ſi non de bonis propriis*; now if it had been *de bonis teſtatoris* only, then he who had paid his Money upon an erroneous Judgment might be in Danger of loſing it, if upon the Reverſal the Executor ſhould not have Aſſets to ſatisfy what was ſo paid; and it would be very hard upon the Executor, that Reſtitution ſhould be awarded *de bonis propriis*, when he had done no Wrong; for the Debt which the Teſtator recovered in his Lifetime by Virtue of the ſaid Judgment, was Aſſets in the Hands of the Executor ſo long as that Judgment was in Force, and not reverſed, and liable to his Debts, which his Executor is bound to pay.

An Executor is never charged to anſwer *de bonis propriis*, but where he hath done ſome Wrong, as may be obſerved in ſome of the Caſes before-mentioned, and in theſe which follow:

ff. Where he waſtes or conceals the Goods, and where he expreſly promiſes to pay Money, and neglects it.

As to the firſt of theſe Caſes, ſee *antea* in the Caſe of *Merchant* and *Driver*; and as to Concealing the Goods, this Caſe happened:

Blackmore v. *Mercer*, 1 Vent. 221. 2 Saund. 402. S. C. The Executor had not waſted the Goods, but had them in Specie, and kept the Poſſeſſion ſo privately, that the Sheriff could not find them to levy the Debt due to the Plaintiff: It was the Opinion of the Chief Juſtice *Hale*, that he ſhould be charged *de bonis propriis*.

And upon an Expreſs to pay the Money, and neglecting it, this Caſe happened.

Norden verſ. *Levett*, T. Jones 88. 1 Lev. 189. *ff.* One *Hope* poſſeſſed himſelf of the Inteſtate's Good's as *Executor de ſon tort*, which ſaid Inteſtate had given a Recognizance for the Payment of 800 *l.* to *Norden*: Afterwards Adminiſtration was granted to *Levett*, who brought an Action againſt *Hope* as *Executor de ſon tort*, and pending that Action they entered into Articles, that *Levett* ſhould diſcharge *Hope* as *Executor de ſon tort*, and that he ſhould pay *Levett* 650 *l.* which Sum *Hope* covenanted to pay, but had not paid, and thereupon *Levett* brought his Action to recover the Money; and upon a *Scire facias* brought by *Norden* the Cog-

niſee, againſt *Levett* the Adminiſtrator, *ſuggeſting that he had waſted the Goods, and had either ſold them or converted them to his Uſe*; Iſſue was taken, and all this Matter was found ſpecially; and it was inſiſted for *Levett the Adminiſtrator*, that he had done no Wrong, but had taken the moſt effectual Courſe to ſecure the Inteſtate's Eſtate; and the Security which he had taken from *Hope* being by Covenant to pay *Levett* 650 *l.* had made the Debt certain which was incertain before, becauſe the Suit againſt *Hope* was only to recover Damages, which were incertain till the Verdict, but by the Covenant the Debt was made certain, and the Money not being yet paid to the Adminiſtrator (*Levett*) the Matter reſted wholly upon this Agreement, and the Property of the Goods was not altered: But adjudged that the Property was altered, and that *Levett* the Adminiſtrator having accepted this Covenant to pay the Money, it operated as a Sale to him, and 'tis Aſſets in his Hands immediately, tho' by his Acceptance the Money was to be paid at a Time to come; and he ſhall be charged *de bonis propriis.*

So where an Action is brought againſt an Executor upon his own Promiſe to pay, and 'tis found againſt him, the Judgment ſhall be *de bonis propriis.* *Howell* v. *Trevanian*, Cro. Eliz. 91. 1 Leon. 93. S. C.

Likewiſe where the Inteſtate was indebted for Goods, and Adminiſtration was granted to his Widow, who promiſed, that if the Plaintiff would deliver to her more Goods, ſhe would pay the whole Debt; and in an Action brought againſt her for the whole, upon *Non aſſumpſit* pleaded, the Plaintiff had a Verdict and Judgment, and intire Damages; but this Judgment was ſet aſide, becauſe the whole could not be put together in one Action, for the Judgment for the Inteſtate's Debt ought to be *de bonis inteſtati*, and for her own Debt *be bonis propriis:* Juſtice *Croke* tells us this was only the Opinion of *Popham*, and that all the other Judges were againſt him, becauſe this Action was founded on her own Promiſe, and charged her upon her own Act, therefore the Judgment ſhall be *de bonis propriis tantum.* *Wheeler* verſ. *Colier*, Cro. Eliz. 406. Moor 409.

So where the Inteſtate was indebted to *T. S.* and the Adminiſtrator promiſed to pay, in Conſideration that at his (the Adminiſtrator's) Requeſt, *T. S.* would account with him, which he did, and being found in arrear, promiſed to pay: The Plaintiff *T. S.* had Judgment to recover *de bonis propriis*, and held good, for he was not obliged to account with the Adminiſtrator, and therefore the Accounting being at his Requeſt, and an expreſs Promiſe to pay, 'tis as much a Promiſe to pay in Conſideration of Forbearance, and that would be ſufficient to charge an Executor *de bonis propriis.* *Haws* verſ. *Smith*, 2 Lev. 122.

As where the Leſſee covenanted for himſelf, his Executors, *&c.* to repair the Houſe, which afterwards was burnt down through the Negligence of the Executor himſelf; and in an Action of Covenant brought againſt him, the Judgment was *de bonis teſtatoris tantum*, becauſe the Action was brought upon the Covenant of the Teſtator, which binds his Executor, as repreſenting him. Dyer 324. *Collins* v. *Thorogood*, Hob. 188. *Ball* verſus *Wheeler*, 2 Cro. 646. S. P. Palm. 314. S. C.

Debt againſt an Executor upon a Bond of his Teſtator, for *Performance of Covenants*, and the Breach aſſigned was, for plowing up Marſh-ground by the Executor himſelf, which his Teſtator was prohibited to do by the Leaſe, yet the Judgment was *de bonis teſtatoris tantum*, though the Breach of the Covenant was by the Act *Caſtilian* verſ. *Smith*, Hob. 283.

Act of the Executor, becauſe he is not chargeable *unleſs he hath Aſſets.*

Dean and Chapter of *Briſtol* v. *Guiſe*, 1 Saund. 112. Litt. Rep. 53.

Judgment againſt the Teſtator, who died, and a *Scire facias* being brought againſt his Executor, he pleaded that he never was Executor, nor adminiſtred as Executor; upon which they were at Iſſue; and it was found againſt him; yet the Judgment was *de bonis teſtatoris tantum*, becauſe the Execution muſt relate to the Judgment, the *Scire facias* being only brought againſt the Defendant to ſhew Cauſe why the Plaintiff ſhould not have Execution on the firſt Judgment.

Nevil v. *Delabar*, Cro. Car. 286.

Judgment againſt the Teſtator, who died, and upon a *Scire facias* brought againſt his four Executors, they all pleaded *Plene adminiſtraverunt*, upon which they were at Iſſue, and the Jury found 100*l.* Aſſets in the Hands of one, aud 40*l.* Aſſets in the Hands of another, and *none in the Hands of the other two Executors*, yet Judgment ſhall be *de bonis teſtatoris*, becauſe the Action was brought againſt them all as Executors, and by Pleading they had acknowledged themſelves to be ſo.

Bellew ver. *Incleden*, 1 Roll. Abr. 929.

But if two Executors are ſued, and each of them pleads ſeverally *Plene adminiſtravit*, and the Jury find that one hath Aſſets, and the other hath none, the Judgment ſhall be againſt him only who hath Aſſets.

Buckley verſ. *Pitt*, 1 Salk. 316.

Leſſee for Years made his Wife Executrix and died, ſhe aſſigned the Leaſe to *T. S.* who covenanted to repair, and then *T. S.* the Aſſignee made *Mary* his Wife Executrix and died; and in an Action of Covenant brought againſt her, the Breach aſſigned was for not repairing, *&c.* ſhe pleaded a Judgment had againſt her for ſo much, and that ſhe had not *Aſſets ultra*, *&c.* to ſatisfy the ſaid Judgment; and upon a Demurrer to this Plea it was held good, becauſe the Defendant was charged as *Executrix of an Aſſignee*, and not as *Aſſignee her ſelf*, and therefore was liable to anſwer *de bonis teſtatoris.*

Rouſe v. *Hetherington*, 1 Salk. 312.

Upon a *Capias* againſt two Executors, the Sheriff returned *Non eſt inventus* as to one, and the other appeared and pleaded; and Judgment was had againſt both; thereupon he who appeared brought a Writ of Error, and concluded *ad damnum ipſius*; and this was held wrong, for both muſt join in the Writ; and it was held that the Judgment ſhall be againſt both *de bonis teſtatoris.*

Tilney verſus *Norris*, 1 Salk. 309.

Covenant, *&c.* againſt the Adminiſtrator of Leſſee for Years, for not repairing; and the Plaintiff ſet forth, that *Status de & in præmiſſis* came to the Defendant, who entered, and that the Houſe was in Decay, and not repaired, and ſo it was found; it was inſiſted againſt the Defendant, that this Covenant runs with the Land, and that though the Defendant was ſued as *Adminiſtrator*, yet he ſhall be liable *proprio jure* to repair; but adjudged that he ſhall be charged *de bonis teſtatoris tantum.*

Error *ſur Judgment:* The Error aſſigned was, that in Debt upon an Obligation againſt an Executor for the Performance of Covenants in a Leaſe made unto the Teſtator, the Breach was aſſigned in the Time of the Executor, for not repairing of a Houſe; and Iſſue being found againſt the Defendant, Judgment was, *Quod recuperet* the Debt *de bonis teſtatoris ſi*, *&c.* *& ſi non*, *tunc de bonis propriis:* Where it was alledged, that inaſmuch as this Breach is declared to be by the Executor himſelf, and in his Default, the

Recovery ought to have been, as well for the Debt as for the Damages, *de bonis propriis*. *Per Curiam*, The Executor is chargeable in Debt by the Covenant made by the Teſtator, and therefore ſhall be charged only for the Principal with the Goods of the Teſtator: And by no Act or falſe Plea ſhall he be charged *de bonis propriis*, but when he pleads the falſe Plea of *Ne unques Executor*, which utterly ouſts him from the Benefit of the Teſtament [o].

[o] M. 20 Jac. B. R. *Bull* verſ. *Wheeler*, Crook, part 2. fo. 647. Dyer, fol. 324. M. 21 Jac. B. R. *Bridgman* verſ. *Lightfoot*, Crook, part. 2. fol. 671.

In Debt againſt Executors, who plead *Ne unques Executors*, *nec adminiſter come Executors*, the Judgment ſhall be *de bonis teſtatoris*, if they have Goods of the Teſtator's, if not, *de bonis propriis* [p]. And there it is ſaid, that if they plead *Non eſt factum*, or other Plea which ſhall bar the Plaintiff for ever, and it be found againſt them, the Judgment ſhall be *ut ſupra*. But *Quære* of the Plea *Non eſt factum*; for that doth not lie in their Notice, if it were the Teſtator's Deed, or not. But of ſuch Things of which they may have perfect Notice, and are perpetual Bars, or otherwiſe, as if they plead a Releaſe to themſelves or an Acquittance, and the ſame be found againſt them, there the Judgment ſhall be *de bonis teſtatoris*, *& ſi non*, *de bonis propriis*. But if they plead a Releaſe or Acquittance made to the Teſtator, of which they cannot have perfect Notice, there the Judgment ſhall be *de bonis teſtatoris* [q].

[p] 11 H. 4. 5. 33 H. 6. 23,24. 9 H. 7. 15.

[q] 46 E. 4. 2. 23 H. 8. Brook Exec. 22. 46 E. 3. 9, 10.

Debt againſt Executors, who pleaded *fully adminiſtred*, and it was found againſt them; the Judgment ſhall be *de bonis teſtatoris* [r]. For the Plea is no perpetual Bar, but is a Bar for the Time; for if Aſſets happen after, they ſhall be charged: And ſo it is where one Executor pleads Miſnomer, or that another is Executor not named in the Writ, and it is found againſt them [s].

[r] 2 H. 6. 12. 9 H. 6. 9. 34 H. 6. fol. 22.

[s] 18 H. 6. Br. Exec. pl. 18.

Debt againſt an Executor for 40 *l.* who pleaded *Plene adminiſtravit*; and it was found againſt him to the Value of 20 *l.* and Damages to 5 *l.* the Plaintiff ſhall have Judgment as to the 20 *l.* *de bonis teſtatoris*, and as to the Damages *de bonis propriis*.

Newman v. *Babington*, Godb. 178.

Actions maintainable againſt Executors or Adminiſtrators; and what Pleas they may ſafely plead.

ALthough the Executor hath not actually laid his Hands upon any of the Teſtator's Goods, yet ſhall he be ſaid to be in Poſſeſſion of them, ſo as to ſtand liable to the Creditors, ſo far as they extend in Value, though others do afterwards purloin them [t].

[t] *Office of Executor*, c. 10.

Debt brought in the *Detinet* againſt a Woman as Adminiſtratrix of her Husband, for Arrearages of Rent upon a Leaſe for Years, *viz.* for a Quarter's Rent due in the Life-time of the Inteſtate, and Two Quarters in her own Time; it was found for the Plaintiff. It was objected that the Action ought to have been in the *Debet* and *Detinet*, according to *Hargrave*'s Caſe, *lib.* 5. *fol.* 31. but it was reſolved, that the Action was well brought in the *Detinet*, ſhe having the Intereſt only as Adminiſtratrix: And *Hargrave*'s Caſe was denied to be Law, and the Judgment in that Caſe was reverſed [u].

[u] M. 7 Car. B. R. *Smith* and *Norfolk*'s Caſe, Crook, part 1 fol. 163

Debt againſt an Executor upon an Obligation, who pleaded, that the Teſtator at the Time of his Death was indebted to the King for

his Office of Sheriff-ſhip: But becauſe it was not averred, that it was *verum & juſtum debitum, & minime ſolutum*, it was adjudged for the Plaintiff [x].

[x] T. 5 Jac. B. R. *Woodal* and *Hugate's* Caſe, Crook, part 2. fol. 182.

Scire fac. againſt an Adminiſtratrix, to have Execution upon a Judgment againſt the Inteſtate: The Defendant pleaded, *Quod nulla habet bona quæ fuerunt inteſtati tempore mortis ſuæ in manibus ſuis adminiſtranda, nec habuit die impetrationis brevis, nec unquam poſtea, &c.* Adjudged no good Plea: For a Judgment cannot be anſwered without another Judgment; and it may be ſhe had adminiſtred all the Goods in paying Debts upon Specialties, which is not any Adminiſtration to bar the Plaintiff; or it may be he had Debts upon Statute or Recognizance, which are not allowable againſt a Judgment [y].

[y] T. 39 Eliz. C. B. *Ordwey* verſ. *Godfry*, Crook, part. 3. fo. 575.

Promiſe by the Teſtator, that if *J. S.* marry his Daughter, he would give him 100 *l.* and as much as to any other of his Children; the Marriage took Effect; an Action upon the Caſe is brought by *J. S.* againſt the Executors of the Teſtator: And adjudged, that the Executors are chargeable as well for this collateral Promiſe as for a Debt [z].

[z] T. 13 Jac. Rot. 932. *Sanders* verſus *Eſterly*, Crook, part. 2. fol. 417.

An Action of the Caſe lieth againſt an Executor upon a ſimple Contract of the Teſtator [a].

[a] Lib. 5. *Slade's* Caſe.

An Action lieth againſt Executors for Arrearages of Account found before Auditors [b].

[b] Lib. 9. fol. 86. Pl. fol. 182. F.N.B. 121. 3 H. 6. 35.

Where one hath a Tally of the Exchequer to receive Money of ſome Cuſtomer, Receiver, or other Officer of the King's, and delivereth it to him, he then having Money of the King's in his Hands, if he die without paying the ſame, his Executor ſhall ſtand chargeable with the Payment thereof [c].

[c] 27 H. 6. 4. 15 E. 4. 16. C. lib. 9. fol. 87.

Swan verſus *Scarles*, Moor 74.

The Teſtator being only Tenant for Life (Remainder to one *Scarles* in Fee) made a Leaſe for 15 Years to *Swan*, and afterwards made *Scarles* and another his Executors, and died; *Scarles* entered and avoided this Leaſe, and thereupon *Swan* the Leſſee brought an Action of Covenant againſt him and the other Executor; and adjudged that the Action would lie.

Covell verſus *Davall*, 2 Lutw. 1634.

Debt againſt an Executor, who pleaded that his Teſtator was indebted to one *Lamb* in 300 *l.* on Bond not ſatisfied, but ſtill in Force, and that he had fully adminiſtred and had not Aſſets *ultra* 10 *l.* to pay the ſaid Debt *die exhibitionis Billæ nec unquam poſtea*; and upon a Demurrer the Plea was adjudged ill, becauſe the Defendant pleaded *Plene adminiſtravit die exhibitionis Billæ*, when it ſhould be *ante impetrationem Brevis, &c.*

Powers verſus *Clock*, 2 Salk. 298.

Debt on a Bond againſt the Executor of *T. S.* who pleaded that the ſaid *T. S.* died *Inteſtate*, and that Adminiſtration was granted to the Defendant *unde petit judicium ſi ipſe ad Billam prædict' reſpondere debeat, &c.* and upon a Demurrer to this Plea it was inſiſted, that it was ill, becauſe the Defendant ſhould have traverſed, that he intermeddled before Adminiſtration was granted to him; for if he did, then he was *Executor de ſon tort*; but adjudged that ſuch a Traverſe would have made the Plea ill, becauſe there is no *Intermeddling* charged in the Declaration, and the Defendant ought not to traverſe what is not alledged.

Scire facias upon a Judgment againſt a Teſtator in Debt brought againſt his Executors, who pleaded, that before they had Knowledge of this Judgment, they had fully adminiſtred all the Teſtator's Goods in Payment of Debts upon Obligations. It was adjudged no Plea, for

at their Peril they ought to take Knowledge of Debts of Record, and ought firſt of all (unleſs Debts due to the Queen) to have ſatisfied them; it was adjudged accordingly [a].

[a] 43 Eliz. C. B. *Littleton* and *Hobbin's* Caſe, Crook, part 3. fol. 793.

Debt againſt an Executor upon an Arbitrement made in the Time of the Teſtator; it was demurr'd in Law, whether the Action lay becauſe the Teſtator might have waged his Law; and adjudged it lay not [b].

[b] P. 39 El. *Hampton* verſ. *Boyer*, fol. 557. Crook, part 3. fol. 600.

Error in *C. B.* againſt three Executors; the Error aſſigned was, that one of them died depending the Writ before Judgment: *Per Curiam*, It is no Error [c].

[c] H. 41 Eliz. *Anonymus*, Crook, part. 3. fol. 652. 3 H. 7. 1. 38 E. 3. 11.

Debt againſt Executor, who pleaded he had *Riens en ſes mains*, but certain Goods diſtrained and impounded; it was adjudged to be no Aſſets to charge him [d].

[d] M. 25 Eliz. C. B. Crook, part. 3. pl. 8.

Action ſur le caſe ſur trover & converſion of Goods; the Caſe was, a Recovery was had in the Exchequer againſt an Executor, of Debt and Damages, and a *Fieri facias* iſſued out *de bonis teſtatoris, ſi, &c. ſi nemy, damna de propriis*; the Executor dies, the Sheriff makes Execution of the Teſtator's Goods before the Return of the Writ; adjudged good, notwithſtanding his Death after the Teſte of his Writ [e].

[e] H. 31 Eliz. B. R. Rot. 31. *Moſſe* verſ. *Pack.* Moor's Rep. fol. 352. n. 473.

An Executor ſhall not be charged without Specialty wherein the Teſtator might wage his Law; for that an Executor cannot wage his Law of other Mens Contracts [f].

[f] 46 E. 3. 10. b. 11 H. 6.

Debt againſt an Executor upon an Obligation made by his Teſtator; the Plaintiff was nonſuited; the Defendant had Coſts by Order of Court; otherwiſe it is where an Executor is Plaintiff and is nonſuited; for it cannot be intended, that it was conceived upon Malice by him [g]. And the Stat. 4 *Jac.* ought to have a reaſonable Intendment, and no Default can be preſumed in the Executor, who complains, becauſe it concerns other Mens Facts, whereof he can have no perfect Knowledge; and ſo it was reſolved by the Courts of *C. B.* and *B. R.* [h].

[g] M. 38 & 39 El. *Fetherſton* verſ. *Allybon*, Crook; part. 3. n. 25. fol. 503.

[h] M. 7 Jac. B. R. Yelverton's Rep.

Action upon the Caſe *ſur Indebitatus aſſumpſit* of the Teſtator doth well lie againſt the Executors [i].

[i] T. 44 Eliz. B. R. *Slade's* Caſe, Coke, lib. 4. fol. 92. b.

The ſame Point had been adjudged before in * *Norwood's* Caſe; but a Diſtinction was made in † *Pine's* Caſe, between a Promiſe of the Teſtator to pay a certain Sum of Money, and his Promiſe to do a collateral Act; and that in the firſt Caſe an *Indebitatus aſſumpſit* would lie againſt his Executor, becauſe where the *Sum was certain, the Promiſe to pay it made a Duty.*

* Plowd. Com. 181. *Norwood* ver. *Read.*
† *Pine* verſus *Hide*, Gouldſ. 154.

But the former Opinions ſtill prevailed, (*viz.*) that an *Indebitatus aſſumpſit* would not lie againſt an Executor for a Debt created by the *ſimple Contract of the Teſtator*, becauſe he might have *waged his Law*; for where the Demand is certain, there the Defendant may *wage his Law*, which he cannot do in an Action where Damages are to be recovered upon a Breach of a Promiſe, which Damages are always incertain, till reduced to a Certainty by a Verdict; and therefore the Defendant in ſuch Caſe cannot wage his Law, becauſe 'tis impoſſible for him to *make Oath that he hath paid*, when he cannot tell how much was due.

Stubbings v. *Rotheram*, Cro. El. 454. *Serle* verſus *Rolfe*, Cro. El. 459, 557. 1 And. 182.

In *Slade's* Caſe it was held, *that an Action of Debt, or an Action on the Caſe would lie* againſt an Executor for a Debt due *upon the ſimple Contract of the Teſtator*, and this at the Election of the Plaintiff; the Reaſon given for the *Action on the Caſe* was, becauſe every Contract

Slade's Caſe, 4 Rep. 93. Yelv. 20. S. C.

Contract executory implies a Promiſe, for when a Man *agrees* to pay Money, or to deliver a Thing, he promiſes to do it; 'tis true, this is called a falſe Gloſs by the Chief Juſtice * *Vaughan*, invented only to turn Actions of Debt into Actions on the Caſe: But the Chief Juſtice *Coke* and ſix other Judges in † *Pinchion*'s Caſe were of another Opinion, for the Law was not clear that an *Action of Debt would lie againſt the Executor upon the ſimple Contract of the Teſtator*; becauſe in ſuch Action the Teſtator might have *waged his Law*; and 'tis a Rule that the Executor ſhall not be charged where the Teſtator might have waged his Law.

* Vaugh. 101.

† *Pinchion*'s Caſe, 9 Rep. 86. 2 Cro. 293. S. C.

Now if an Action on the Caſe ſhould not lie, then the Creditor would be without Remedy, and that would be a plain Defect in the Law; therefore the Judges held in *Pinchion*'s Caſe, that every Contract executory implied a Promiſe, upon which an Action on the Caſe might be founded.

Debt againſt the Defendant as Executrix of *J. S.* upon *Plene adminiſtravit* pleaded, it was found by Verdict, that the Teſtator at the Time of his Death had Goods to the Value of 100 *l.* and was bound to another by Obligation in 100 *l.* and that the Defendant had taken in this Obligation, and made another in her own Name with Sureties to the Obligor. *Per Curiam*, This was an Adminiſtration, and it is in the Nature of a Payment, and ſo much of the Teſtator's Debt is by this diſcharged [k].

[k] M. 30 & 31 El. *Martin* verſus *Alice Whipper*, Crook, part. 3. fol. 114. M. 28 & 29 Eliz. Rotul. 2625. inter *Stampe* and *Hutchins*, adjudged accordingly, 1 Leon. 111. Moor 260. S. P. Cro. Eliz. 120.

Debt againſt one as Adminiſtrator to *N.* upon an Obligation; the Defendant ſhews the Cuſtom of *London* to be, that if a Contract be made by a Citizen, to pay Money to another Citizen, and he who made the Contract dies, that his Executors or Adminiſtrators ſhall be chargeable therewith, as if it were upon an Obligation; and ſhews farther how the Inteſtate was indebted upon Contract to *A.* who had recovered againſt him, and that he had *riens ouſter en ſes maines*, &c. Adjudged that the Cuſtom is good, for the Executors or Adminiſtrators to pay Debts upon ſimple Contracts: Cuſtoms in *London* are confirmed by Act of Parliament, and are now as ſtrong as a Statute, and the Cuſtom is reaſonable, becauſe the Executor or Adminiſtrator is bound in Conſcience to pay Debts upon Contracts as well as Obligation, though the Law hath given Priority to Debts upon Obligation [l].

[l] T. 37 Eliz. C. B. *Snelling*'s Caſ. Coke, lib. 5. fol. 82. b. Croke, part 3. fol. 409. n. 21. S. C.

Hughes v. *Robotham*, Cro. Eliz. 302. Poph. 31. S. C.

Now as to Actions of Debt brought againſt Executors upon the ſimple Contract of the Teſtators, theſe Caſes happened, (*viz.*) it was held, that the Defendants in ſuch Caſes may be charged, or not according as they plead, for upon a Demurrer to a Declaration *in Debt* the Defendant muſt have Judgment; but if he plead, and 'tis found againſt him, then he hath loſt the Benefit of the Law.

Hughſon verſ. *Webb*, Cro. Eliz. 121. 1 And. 181. S. C. 1 Leon. 165. S. C. Gouldſ. 106. S. C.

But yet ſome are of Opinion, that even in ſuch Caſe the Judges *ex officio* ought to abate the Writ; as where *Debt* was brought againſt an Adminiſtrator upon a ſimple Contract of the Inteſtate; the Defendant pleaded *Plene adminiſtravit*, and it was found againſt him; yet the Plaintiff could never get Judgment, becauſe at Com-

mon Law *Debt* would not lie againſt an Executor or Adminiſtrator upon the ſimple Contract of the Teſtator or Inteſtate; and where the Action is improper, and not ſufficient to charge him, the Court ought *ex officio* to abate the Writ.

Soon after the Caſe laſt mentioned, an Action of Debt was brought againſt an Executor, *&c.* who pleaded that he never was Executor; and it was found againſt him; but in this Caſe the Plaintiff had Judgment, becauſe by the Plea the Contract was admitted. *Germin* verſus *Rolfe*, Cro. Eliz. 425 Moor 366.

But now the Law is ſettled as to this Point, (*viz.*) if the Defendant demurs to ſuch a Declaration in Debt, he muſt have Judgment for the Reaſon before-mentioned; but if he pleads, then he hath taken Notice of the Debt, and hath in a Manner confeſſed it, eſpecially if he plead *Plene adminiſtravit*; and if it is found againſt him, the Plaintiff muſt have Judgment. *Morgan* verſus *Green*, Cro. Car. 187. W. Jones 223. *Palmer* verſ. *Lawſon*, Sid. 332.

And by a Paragraph in the Statute of Frauds, it is enacted, *That no Action ſhall be brought to charge an Executor or Adminiſtrator upon a ſpecial Promiſe, to anſwer Damages out of his own Eſtate, or to charge the Defendant upon any Promiſe, to anſwer for the Debt or Miſcarriage of another, unleſs the Agreement upon which the Action is brought, is put into Writing, or ſome* Memorandum *or Note thereof, and ſigned by the Party, to be charged therewith, or by ſome other Perſons authoriſed by him.*

Since this Statute this Caſe happened, (*viz.*) *Leſſee for Years* died, leaving *Rent in arrear*; his Widow promiſed the Leſſor, that if he would permit her to enjoy the Lands till *Lady-day*, and to remove ſeveral Goods, ſhe would pay the Arrears due in the Life-time of her Husband, which was 160*l.* and 200*l.* more; the Queſtion was, ſince there was no *Memorandum* of this Matter in Writing, whether the Promiſe was good or not; and adjudged that it was not, for it was void as to the 160*l.* becauſe that was the Debt of the Husband, and not put into Writing; and being void in Part, it is ſo in the Whole, becauſe it is an intire Agreement. 2 *Vent.* 223. *Lord Lexington* verſus *Clerke.*

A. covenanted with *B.* to put his Son an Apprentice to *C.* or otherwiſe, that his Executors ſhall pay *B.* 20*l.* *A.* doth not put his Son an Apprentice to *C.* and dieth; *B.* brings Debt againſt the Executors of *A.* *Per Curiam*, It doth not lie, for it cannot be a Debt in the Executor, when it was no Debt in the Teſtator. If a Man covenant to pay 10*l.* Debt lieth againſt his Executor, but not when he covenanteth that his Executor ſhall pay 10*l.* [m] [m] P. 33 El. *Perrot* verſus *Auſtin*, Crook part. 3. 232.

If an Executor pleads *Plene adminiſtravit*, the Plaintiff may pray Judgment againſt him when Aſſets come unto him; but the Plaintiff is to be barred, if he acknowledge it; and if he denieth, that he hath not fully adminiſtered, which is found againſt him, he ſhall be barred alſo, and pay Coſts to the Defendant. When it is found that the Defendant hath ſome Aſſets, although of little Value, ſo as he hath not fully adminiſtered; the Plaintiff ſhall have Judgment for the intire Debt; but he ſhall not have Execution but of as much as is found, and ſhall not be barred for the Reſidue; and if more Aſſets come afterwards, he may have a *Sci. fac.* to have Execution thereof. But if it be found that he hath fully adminiſtered, or if it be ſo pleaded and confeſſed, the Judgment ſhall be againſt the Plaintiff. And therefore *Mary Shiplie*'s Caſe, *lib.* 8. *fol.* 134. that if an

Executor plead *Plene adminiſtravit*, the Plaintiff may take Judgment preſently, and expect when he hath Aſſets, was denied to be Law [n].

[n] M. 9 Cor. Rot. 373. *Dorcheſter* verſ. *Webb*, Crook part. 1. fol. 373. 8 E. 4. 3. Sir *John Needham*'s Caſe, lib. 8. fol. 136. 11 H. 7. 4. 21 H. 7. 31. 11 H. 4. 83. 20 E. 4. 17.

If an Executor of a Leſſee for Years doth aſſign over his Intereſt, an Action of Debt doth not lie againſt him for Rent due after the Aſſignment; and if a Leſſee for Years doth aſſign all his Intereſt and dies, the Executor ſhall not be charged for the Rent due after his Death, becauſe the perſonal Privity of Contract, as to the Action of Debt, is determined [o].

[o] C. lib. 3. fol. 24. *Walker*'s Caſe.

Information in the Exchequer in Nature of an Account was brought againſt *D.* Executor of *W. M.* who had received Money of the Queen's amounting to 1500 *l.* Upon ſpecial Verdict, the Caſe was, That *W. M.* had received annually out of the Exchequer 50 *l.* as a Fee for his Diet for thirty Years, which was paid him by the Command of the Lord Treaſurer, who had Authority by Privy Seal, to make Allowance and Payment of all Fees due; but in Truth theſe were not any due Fees. The Queſtion was, whether his Executors ſhould be charged. *Per Curiam*, They ſhall be charged; for this Payment by the Lord Treaſurer's Appointment was not allowable; for the Privy Seal is not ſufficient Authority to diſpoſe of the Queen's Treaſure, unleſs where it is due; and he diſpoſing of it otherwiſe, it is out of his Authority [p].

[p] H. 39 El. *Dodington*'s Caſe, Crook part. 3. fol. 545. C. lib. 11. fol. 90. b.

Scire facias was ſued by *H.* againſt *W.* Executor to his Father, for Execution of a Judgment obtained againſt the Teſtator; the Defendant pleaded *Plene adminiſtravit* at the Time of the Bringing of the Action; and thereupon they were at Iſſue. *Per Curiam*, It is no good Plea, but the Executor ſhould have pleaded, there was nothing in his Hands at the Time of the Teſtator's Death, becauſe the Judgment bound him to ſatisfy that Debt before others; but by joining of Iſſue the Advantage of that Exception to the Plea is waved [q].

[q] H. 11 Jac. Rot. 1963. Moor's Rep. fol. 858. n. 1178.

Scire facias againſt Executors, upon a Judgment againſt their Teſtator in Debt; they plead, that before they had any Conuſance of this Judgment, they had fully adminiſtered all their Teſtator's Goods in paying of Debts upon Obligation: *Sur demurrer* adjudged for the Plaintiff, and that it was no good Plea; for they at their Peril ought to take Conuſance of Debts upon Record, and ought firſt of all (unleſs for Debts due to the Queen, wherein ſhe hath a Prerogative) to ſatisfy them; and though the Recovery was in another County than where the Teſtator and Executors inhabited, it is not material. But if an Action be brought againſt them there where they inhabit, and before their knowing thereof they pay Debts upon Specialties; that is allowable [r].

[r] 4 H. 6. 8. 21 Ed. 4. 21. M. 42 & 43 Eliz. Rot. 627. *Littleton* verſus *Hibbins*, Crook part. 3. fol. 793.

Debt againſt *B.* as Executor; he pleads *Plene adminiſtravit*; and it was found by Verdict, that the Defendant's Wife was made Executrix, and ſhe by Fraud to deceive the Creditors, made a Gift of her Goods before Marriage with the Defendant, and yet ſhe retained them in her Poſſeſſion, and took to Husband the Defendant; the Wife

dies, and the Defendant had in his Hands ſo many of the Goods as would ſatisfy the Creditors their Debts. Judgment for the Plaintiff; for the Defendant had by his Plea confeſſed himſelf to be Executor; and for that he is chargeable, becauſe the Property of the Goods did not paſs out of the Wife by her Grant, the ſame being made by Fraud, and ſo void by the Stat. 13 *Eliz.* [s].

[s] H. 37 Eliz. Rot. 1011. *Watſon's* Caſe, Moor's Rep. fo. 396. n. 518.

Debt againſt an Adminiſtratrix upon a Bond of 600 *l.* made by the Inteſtate; the Defendant pleaded, that the Inteſtate and his Son acknowledged a Recognizance to the King of 100 *l.* and another of 800 *l.* to *B.* and another of 100 *l.* to *M.* and divers others, over and above which ſhe had not Aſſets; and after ſaid ſhe had not ſufficient Aſſets; the Plaintiff replied, that the Recognizance to *B.* was for 400 *l.* which is paid, and the other to *M.* was for Performance of Covenants, none whereof is broken, and that the Recognizance ſtands in Force by Covin of the Defendant. It was reſolved, 1. That the Bar was inſufficient, for that firſt ſhe confeſſed that ſhe had ſufficient Aſſets to pay the ſaid Recognizances, and afterwards denied it. 2. Her Plea is too general, but ſhe ought to have ſet forth how much Aſſets ſhe had, becauſe ſhe had Knowledge of them; alſo the Bar is inſufficient, becauſe the Inteſtate was bound in the Recognizance with another, and the Defendant hath not averred that the other had not ſufficient to have ſatisfied them [t].

[t] C. lib. 9. fol. 109, *Treſham's* Caſe. 1 Roll. Abr. 922. S. C. Winch. Ent. 177. S. C.

As to *Actions of Covenant* brought againſt the Executor upon a Covenant of the Teſtator; it is to be obſerved, that ſome Covenants are expreſs, in which the Executor is named, and ſome run with the Land, in which the Executor is not named; and theſe are Covenants in Law; but in both Caſes he is liable to an Action of Covenant.

As to thoſe Covenants which run with the Land, the Executor is always chargeable, even *after the Aſſignment of the Term, and after the Acceptance of the Rent by the Leſſor or his Aſſigns*, (*viz.*) Leſſee for Years covenanted *to repair*; the Leſſor aſſigned the Reverſion to *T. S.* and the Leſſee aſſigned the Term to *E. G.* then *T. S.* the Aſſignee of the Reverſion, brought an Action of Covenant againſt the Executor of the Leſſee *for not repairing*, &c. *after the Aſſignment of the Term*; and adjudged that it would lie, it being on an *expreſs Covenant which runs with the Land*, by which the Covenantor and his * Executors likewiſe are always liable ſo long as they have any Aſſets, not by Reaſon of any *Privity of Contract*, but by the expreſs Covenant it ſelf, and by Virtue of the Statute 32 *H.* 8. *cap.* 34. *which gives the Aſſignee of the Reverſion the ſame Benefit of Action againſt the Executors of the Leſſee for not performing the Covenants contained in the Leaſe, as the Leſſors themſelves might have had, if no ſuch Aſſignment had been made*; by which a Defect at Common Law was remedied; for before this Statute an Aſſignee of a Reverſion could not have that Benefit, becauſe he was neither Party or Privy to the Contract.

Brett v. *Cumberland*, 2 Cro. 521. 2 Roll. Rep. 63.

* *But not the Aſſignee of ſuch Executor after the Aſſignment of the Term; and ſo is the Caſe of* Pilcher *and* Tovey, 1 Salk. 81.

But an Executor is bound by the *expreſs Covenant of his Teſtator, though it is collateral*, and doth not *run with the Land*, as thoſe Covenants do which are *to pay Rent or to repair*, &c. As for Inſtance; the Leſſee covenanted for himſelf, *his Executors* and Aſſigns, *not to erect any Buildings on the Land, to the Prejudice of the Leſſor*; afterwards the *Leſſee aſſigned the Term, and died*; then the *Leſſor* accepted the Rent of the *Aſſignee*, and afterwards brought an Action

Batchelor verſ. *Gage*, W. Jones 223. Cro. Car. 188.

Action of Covenant againſt the Executor of the Leſſee, &c. It was objected that this Action would not lie, becauſe by the Aſſignment of the Term, and the Acceptance of the Rent from the Aſſignee, the Privity of Contract was determined; but adjudged that neither the one or the other ſhall bar the Leſſor from an Action againſt the Executor of the Leſſee upon an expreſs Covenant, which he made in his Life-time.

Morley verſ. *Polhill*, 2 Vent. 36. In *Morley*'s Caſe, *Anno* 1 *Will.* this Action was extended to the *Aſſignee of ſuch Executor*, which before extended only to the Executor himſelf upon an expreſs Covenant of the Teſtator, (*viz.*) The *Biſhop of Wincheſter* made a Leaſe to *T. S.* for Twenty-one Years, and died; the Leſſee aſſigned the Term to *W. N.* and made him Executor, and died; and the *Aſſignee made* E. G. *his Executor*, and died; then the Executor of the ſucceeding Biſhop brought an Action of Covenant againſt *E. G.* the Executor of the Aſſignee, who was Executor of the Leſſee, and laid the Breach for not repairing in the Life-time of the ſaid ſucceeding Biſhop; and adjudged that the Action would lie, tho' the Covenant was made with the preceding Biſhop, and though it was againſt the Executor of the Leſſee.

§. III. What is to be conſidered of the Executor, deſirous to be reſolved whether it were better to accept, or to refuſe the Executorſhip.

1. *Divers Things to be conſidered of him who would be reſolved, whether it were better to accept, or to refuſe the Executorſhip.*
2. *The firſt Thing to be inquired in this Caſe concerning the Teſtator.*
3. *Of the Authority and Charge of the Executor.*
4. *The Executor may not meddle with the Lands, Tenements or Hereditaments of the Teſtator, but the Heir.*
5. *The Heir hath not to deal with the Goods and Chattels of the Teſtator, but the Executor.*
6. *The Teſtator may give Power to his Executor to ſell his Lands for Payment of his Debts, or other Purpoſe.*
7. *What if ſome of the Executors named do refuſe? whether may the reſt ſell the Lands according to the Teſtament?*
8. *Whether the Executor of him that had Lands in Fee-ſimple, Fee-tail, or for Term of Life, may recover the Rents, Fee-farms, or other Arrearages againſt the Tenant, which ought to have paid the ſame in the Life of the Teſtator.*
9. *The ſecond Thing to be inquired concerning the Teſtator.*
10. *Of the Authority and Charge of the Executor of an Executor.*
11. *Whether divers being aſſigned Executors, whereof ſome be dead, the Executor of the Executor deceaſed may be joined in Action with the Executor ſurviving.*
12. *Of the Authority and Charge of the Executor of an Adminiſtrator.*
13. *What is to be conſidered about the laſt Will of the Teſtator.*

14. *Whether the Executor may convert the Reſidue to his own Uſe.*
15. *Whether he that is named Executor ſhall loſe his Legacy, if he do refuſe the Executorſhip.*
16. *What is to be conſidered in the Perſon of the Executor.*
17. *What is to be conſidered of a Wife Executrix.*
18. *What is to be conſidered in the Perſon of the Co-Executor.*
19. *Whether one Executor may prejudice another.*
20. *Whether one Executor may ſue another.*
21. *Whether one of the Executors may alone ſell the Goods of the Teſtator.*
22. *Whether the Co-Executor, after Refuſal, may meddle as Executor.*
23. *What is to be conſidered in other Perſons with whom the Executor is to deal.*

HE (1) that is deſirous to be reſolved whether it were better for him to undertake the Executorſhip, or to refuſe the ſame, muſt conſider divers Things; whereof ſome concern *the Teſtator*, and ſome concern *the Perſons of others*[a].

[a] Hæc & alia quæ ab executore deliberante conſideranda ſunt, traduntur à Jo. de Canib. in tract. de executor', ult. vol. 2. part. q. 1. cum ſeq. Cui, ſi placeat, adjungas Sichar. in Rub. de jure delib. C.

Of thoſe Things which concern *the Teſtator*, the firſt and principal Thing to be regarded is his Subſtance or Wealth.

Firſt of all therefore, (2) it behoveth him that is named Executor, to inquire diligently what Goods and Chattels did belong to the Teſtator at the Time of his Death[b], and what Debts were then due unto him; and on the contrary, what Debts he the ſaid Teſtator did owe unto other Men[c].

[b] Sichar. in d. Rub. de jure delib. C.

[c] Cujus rei utilitas ſtatim ſubjicitur.

For (3) as the Executor may enter to all the Goods and Chattels which did belong unto the Teſtator[d], and were in his Poſſeſſion at the Time of his Death[e], and hath Action againſt every Debtor of his Teſtator[f]; ſo ſhall every one to whom the Teſtator was indebted have Action againſt the Executor, (eſpecially having an Obligation or other Specialty,) ſo far as the Goods of the Teſtator will extend[g], and ſo long as the Executor hath Aſſets in his Hands[h]. Howbeit where any Debt is due to the Teſtator, this ſhall not charge the Executor as Aſſets, becauſe it is a Thing in Action, and not in Poſſeſſion[i]. Which Concluſion is very reaſonable, whenas the Executor hath uſed ſuch Diligence for the Recovery thereof, that he cannot be juſtly charged or blamed for not having the ſame in his own Hands[k].

[d] L. cum hæredes. de acquir. poſſ. L. hæreditas. de reg. jur. ff. Plowd. in caſ. inter Greisb. & Fox.

[e] Cagnol. in L. in precibus. C. de impub. & aliis ſub. n. 278.

[f] Inſtit. de perpet. & temp. action. Terms of Law, verb. Executor.

[g] L. fin. §. fin. de jure delib. C.

[h] Terms of the Law, verb. Executor.

[i] Brook Abridg. tit. executor, n. 112. [k] C. fine culpa. de reg. jur. 6. Quod ſi per eum ſtetit quo minus habeat, in eo caſu eſt, de jure civili & can. ac ſi in manibus retineret. L. jur. civili. ff. de cond. & demon. Peckius in c. cum. not. ſtat. de reg. lib. 3. c. 6. & 7.

As (4) for *Lands, Tenements and Hereditaments of the Teſtator*, they ſhall deſcend to his Heir, and ſhall not come to the Executor; for by the Laws of this Realm, as (5) the Heir hath not to deal with the Goods and Chattels of the Deceaſed[l]; no more hath the Executor to do with the Lands, Tenements and Hereditaments[m].

[l] Doct. & Stud. lib. 1. c. 7. & 24. Idem lib. 2. c. 10. & c. 12. Terms of Law, verb. Executor.

[m] Doct. & Stud. ubi ſupr. Tract. de repub. Angl. lib. 3. c. 6, 7.

3 Leon. 119. The Teſtator deviſed that his *Executors ſhould ſell his Lands*; they levied a Fine and ſold it, and the Cogniſee claiming by Virtue of this Title, it was pleaded, that *partes finis nihil habuerunt*; but adjudged, that upon giving the ſpecial Matter in Evidence, they ſhall be in by the Will, and not by the Fine.

Beal ver. *Sheppard*, 2 Cro. 199. The Husband deviſed a *Copyhold* to his Wife; and if ſhe had Iſſue by him, then to ſuch Iſſue at the Age of twenty-one; and if no ſuch Iſſue, then ſhe to chooſe two Attornies, and *make a Bill of Sale* of his Lands to the beſt Advantage: Adjudged this was an *Authority* to name the Attornies who ſhould ſell, and that accordingly they might lawfully ſell; and that the Vendee ſhall be *in by the Will*, without any new *Surrender*.

19 H. 8. 49. The Teſtator appointed that *T. S.* and *E. G. ſhould ſell his Lands*, and made them Executors, and died; in ſuch Caſe if they refuſe the Executorſhip, yet they may ſell the Lands, becauſe they are appointed by their proper Names ſo to do; but if they had not been named by their proper Names the Sale had been good; for it hath been * ruled, that a Deviſe to *his Sons in Law* to ſell the Lands without naming them, and afterwards one of them died, yet the Survivors may ſell.

* *Lee* ver. *Vincent*, Cro. Eliz. 26. Moor 147. S. C. 1 Leon. 286. S. C. 3 Leon. 106. S. C. 1 And. 145. S. C.

Bonifault v. *Greenfield*, Cro. El. 80. 1 Leon. 60. S. C. Gouldf. 4. S. C. Godb. 77. S. C. So where the Deviſe was to four Perſons (naming them) to the Intent that they ſell his Lands; and the Teſtator made them all joint Executors, and died; then one of them *refuſed*; it was adjudged that the reſt might ſell.

This was a Doubt at Common Law, becauſe it was a Truſt repoſed in all of them by the Teſtator himſelf; but if inſtead of *refuſing* one of them had *died*, there the Survivor might ſell, becauſe this was the Act of God, which ſhall not prejudice any Man.

Now where Lands be deviſable by Will, (whereof we have ſpoken before [n],) the (6) Teſtator may give Power and Authority to his Executor to ſell the ſame Lands, either for the Payment of his Debts, or for ſome other Purpoſe [o], and the Sale made thereof by the ſaid Executor is good and lawful [p]; and where divers Perſons are named Executors by the Teſtator, though (7) Part of them after the Death of any ſuch Teſtator, do refuſe to take upon him or them the Adminiſtration and Charge of the ſame Will, wherein they be ſo named Executors, and the Reſidue of them do accept and take upon them the Care and Charge of the ſame Teſtament and laſt Will; It is enacted by the Statutes of this Realm, "*That then all Bargains* "*and Sales of ſuch Lands, Tenements and Hereditaments, ſo willed to be ſold by the Executors of any ſuch Teſtator, as well before the Making of that Statute as after, made or to be made, by him or them only of the ſame Executors that ſo do accept or have accepted, or taken upon him or them, any ſuch Care or Adminiſtration of any ſuch Will and Teſtament, ſhall be as good and effectual in Law, as if all the Reſidue of the ſame Executors named in the ſaid Teſtament, ſo refuſing the Adminiſtration of the ſame Teſtament, had joined with him or them in making of the Bargain and Sale of ſuch Lands Tenements or other Hereditaments, ſo willed to be ſold by the Executors of any ſuch Teſtator, which before that Time had made or declared, or that after ſhould make or declare, any Will of any ſuch Lands, Tenements, or other Hereditaments, after his Deceaſe to be ſold by his Executors, as may appear by the Statute in that Behalf made.*

[n] Supr. part 3. §. 1. cum ſequentibus.

[o] Peckius, tit. deviſe, fol. 104, 105.

[p] Pecki. eod. loco.

2. H. 8. c. 4.

" *made. Howbeit it is provided, that the ſaid Statute ſhall not* " *extend to give Power and Authority to any Executor or Execu-* " *tors, at any Time after, to bargain or to put to Sale any Lands,* " *Tenements and Heditaments, by Virtue and Authority of any* " *Will or Teſtament made before the ſaid Statute, otherwiſe than* " *they might do by the Courſe of the Common Law, afore the Ma-* " *king of the ſame.*

Beſides that, ſuppoſing the Caſe were ſuch, as the Lands being deviſable, the Executors had Power to ſell the ſame, and to diſtribute the Profits *in pios uſus*; yet after the Death of the Teſtator, the Inheritance ſhall deſcend unto the Heir, and ſhall remain in him, until the Executor have ſold the ſame [q]. And if the Executors themſelves do enter into the Lands, after which Entry ſome Man offereth a Sum of Money or Price of the ſame Land, and the Executors refuſe to take the Money offered, becauſe the Money is under the Value of the Land, and the Executors intend to ſell the ſame dearer, and ſo keep the Land in their own Hands by the Space of one, two, or three Years, converting in the mean Time the Profits ariſing forth of the ſame Land to their proper Uſe; in this Caſe the Heir of the Teſtator deceaſed may enter to the Lands, and put out the Executors [r].

[q] Perkins, tit. deviſes, fol. 104, 105. Inſt. part 1. fol. 113. a.

[r] Perkins ubi ſupra, Brook Abridg. tit. deviſe, n. 19. 38 Ed. 3. Aſſ. pl. 3. Lit. §. 383.

Deviſe to his Wife for Life, then to his Son in Tail, and if he died without Iſſue, *then the Lands ſhould be ſold by his Executors*; the Wife died, then one of the Executors died, and then the Son of the Teſtator died without Iſſue, and the ſurviving Executor ſold the Land; adjudged that the Sale was not good, for the Executors had no Intereſt but only a bare Authority to ſell, for the Lands were *not deviſed to the Executors to ſell*; ſo that this being only an *Authority*, it ſhall not ſurvive.

Co. Litt. 112, 113.

But where the Teſtator *deviſed his Lands to two Executors to be ſold*, and died, then one of his Executors died; adjudged that the * Survivor may ſell, becauſe this was a *Truſt coupled with an Intereſt*; and 'tis not like a Deviſe that *his Executors ſhall ſell*, for that is an *Authority* and no *Intereſt*; and an *Authority* muſt be ſtrictly purſued, which cannot be done in this Caſe, becauſe the Teſtator appointed *two to ſell*; and there being but one living, that *Authority and Truſt* which was given *jointly* to both is determined.

Lock verſ. *Loggin*, 1 And. 145.

* *Townſend* verſus *Wales* S. P. 2 And. 59. Owen 155. S. C. Cro. El. 524. S. C. Moor 341. S. C. By the Name of *How* verſ. *Coney*.

But an Executor may ſell where he hath only an Authority and no Intereſt; as where the Teſtator deviſed his Lands to be ſold by his Executors for *Payment of his Debts*; there were two Executors, one of them died; it was adjudged that the Survivor might ſell, though he had only an Authority and no Intereſt.

Howell verſ. *Barnes*, W. Jones 352.

But certainly where Lands are deviſed to be ſold by Executors *for Payment of Debts*, this gives them an Intereſt, becauſe the *Payment of Debts* is a good Conſideration; and when they are ſold, the Money is * Aſſets in their Hands to charge them with an Action of Debt; and if they refuſe to ſell, they may be compelled by a Bill in Equity.

Barrington v. *Knight*, Hardres 419.

* *Dethick* v. *Curwen*, 1 Lev. 224.

The Teſtator deviſed, that his Lands ſhould be ſold by his Executor, and the Money ſhould be for his younger Childrens Portions; the Executor died before the Sale, but the Heir at Law was decreed to ſell.

Burnell v. *Currant*, Hardres 405. *Garſole* v. *Garſole*, 1 Chanc. Rep. 35.

If

If a Man deviſe by his Will, that *A. B.* and *C. D.* whom he makes his Executors, ſhall ſell his Land *for Payment of his Debts*, and they refuſe to be his Executors; yet nevertheleſs they may ſell his Land, becauſe *they are named by their proper Names*[s]; but if he had deviſed, that after the Death of his Wife his Land *ſhould be ſold by his Executors with the Aſſent of* A. B. and maketh his Wife and a Stranger his Executors, and dieth, and the Wife dieth, and the ſaid *A. B.* alſo; in this Caſe the Authority of ſelling the Land is determined and extinct by the Death of *A. B.* without whoſe Conſent it cannot be ſold[t]; and therefore if the ſurviving Executor ſhould ſell the Land ſo deviſed, the Sale is not good in Law, for want of ſufficient Authority[u]. But if the Teſtator ſeiſed of divers Manors, Lands and Tenements in Socage-tenure, by his laſt Will in Writing ſhall deviſe all his ſaid Manors, Lands and Tenements to his Siſter, and to her Heirs for ever, except his Manor of *R.* which he doth appoint to pay his Debts, and maketh two Executors by Name, and dieth, and afterwards one of the Executors dieth, and the other Executor taketh upon him the Executorſhip, and afterwards ſelleth the ſaid Manor of *R.* for a certain Sum of Money (for the Purpoſe above-mentioned) in Fee; the Sale in this Caſe is holden for good, according to the Intention of the Teſtator, for the ſpeedy *Payment of his Debts*[x]. And where it is ſaid, that if the Executors, having Power to ſell the Land of the Teſtator, defer the Sale thereof, after the Offer of a reaſonable Price, converting the Profits thereof to their own Uſe, there the Heir may lawfully enter to the Land, and put out the Executors; this is true, where the Executors have no farther Authority or Intereſt, but only to ſell the Land, and to diſtribute the Money taken for the ſame, according to the Will of the Deceaſed; for in this Caſe the Frank-tenement doth deſcend to the Heir. But if the Teſtator by his Will in Writing deviſe and give his Lands to his Executors, which he willeth to be ſold, and the Money to be diſtributed *in pios uſus*; in this Caſe the Frank-tenement is in the Executors after the Death of the Teſtator, and not in the Heir[y]. And ſo in this Caſe the Heir cannot enter, as he might in the former.

[s] Fulb. l. 1. paral. fol. 41.

[t] Fulb. ubi ſupra Dyer fol. 21. 9.

[u] In hanc ſententiam deſcendebat tota Curia, inquit D. Dyer loco ſupradicto; quam alii ſequuti ſunt, ut per Fulb. ubi ſupra.

[x] Dyer fol. 371. n. 3. Fulb. ubi ſupra, fol. 45.

[y] Kellway, lib. relat. fol. 107, 108. n. 25. ubi etiam refert quod in hac facti ſpecie executor executoris poteſt vendere terras ita relictas: de qua tamen quæſtione conſulas velim alios Juriſperitos; nam regulariter executor executoris non poteſt vendere terras, alias per primum executorem Teſtatoris vendibiles. Brook, tit. execut. n. 3. & inf. eod. §. n. 11. in fin. Cujus rei ratio eſt, quia mortuo executore, officium ſuum non tranſit in hæred. videtur enim ipſius induſtria & amicitia, electa. Gloſ. in c. religioſ. de teſta. lib. 6.

In all Caſes of Deviſes of Lands to Executors to ſell the ſame, it is moſt prudential to make it as clear and certain as may be, (that is) that the Executors, or the Survivor of them, or ſuch or ſo many of them as take upon them the Probate of the Will, (if his Intent be ſo) ſhall ſell[a]. And it is ſafer only to give an *Authority, than an Intereſt*; unleſs his Meaning be, that they ſhall take the Profits of the Land until the Sale; and if he do ſo, then it is requiſite that he appoint that the mean Profits, until the Sale, ſhall be Aſſets in their Hands; for otherwiſe it ſhall not be ſo[b].

Nota; Where a Man deviſeth his Land to be ſold by his Executors, it is all one as if he had deviſed his Land to his Executors to be ſold; and the Reaſon is, becauſe the Deviſe breaketh the Deſcent[c].

A Man ſeiſed in Fee of a Meſſuage, with which certain Lands have been occupied Time out of Mind, giveth Inſtructions for the Making of his Will, and, *inter alia*, declares, that his Meaning is,

[a] Inſt. part 1. fol. 113. a.

[b] Brownl. part 1. fol. 34. part 2. 47, 100.

[c] Inſtit. part 1. fol. 236. M. 10 Car. B. R. *Barne*'s Caſe, Jones's Rep. fo. 352.

that his ſaid Meſſuage and all his Lands in *W.* ſhall be ſold by his Executors; and the Party which writes the Will, pens it in this Manner, *viz.* I will that my Houſe *with all the Appurtenances* ſhall be ſold by my Executors; the Deviſor dieth, the Executors ſell Part of the Lands: This Sale is good, and the Lands do paſs; for the Words [*with all the Appurtenances*] are effectual to inforce the Deviſe, and extend to all the Lands, eſpecially becauſe the Deviſor gave Inſtructions accordingly [d].

[d] H. 28 Eliz. *Higham* and *Hanwood*'s Caſe, Leon. fol. 34. 3 Eliz. Pl. Com. 210. *Sanders* and *Freeman*'s Caſe.

But the later Authorities are otherwiſe: *ff.* The Teſtator being ſeiſed in Fee of an Houſe called *Brocks*, and of eighty Acres of Land thereunto *appertaining*; and of another Houſe called *Locks*, made a Feoffment in Fee of *Brocks* and the eighty Acres, and by another Feoffment took back the ſame Houſe and Acres, and *forty Acres more by another Name*; and about ten Years afterwards he deviſed his Houſe called *Brocks*, with all the *Lands thereunto appertaining*, to his youngeſt Son; now though he uſed thoſe forty Acres with his Houſe *for ten Years* together, yet it was adjudged that they did not paſs by the Deviſe, as *appertaining to his Houſe*, becauſe they were conveyed to him not by the Name of *Brocks*, but by another Name.

Loftus verſus *Barker*, Palm. 375. Godb. 352. By the Name of *Knight*'s Caſe.

It is true, *Lands may appertain to an Houſe*, but not ſo properly as many other Things; therefore to make them paſs, they muſt be expreſſed thus, (*viz.*) *with the Lands thereunto appertaining*; for nothing paſſes by the Word *Appurtenances*, but what properly may appertain; as a Deviſe of an Houſe with the Appurtenances; the Conduits and Waterpipes, though at a great Diſtance, will paſs.

Hearne verſus *Allen*, Cro. Car. 57. Hutt. 85. S. C. Litt. Rep. 8. S. C.

The Teſtator had a Cloſe, and an Houſe built on Part of it, and a *Kiln* upon another Part for drying Oats, and alſo *two Mills* to make Oatmeal adjoining to this Cloſe, *which were uſed together with the Kiln for ſeveral Years*; and he deviſed the Mills with the *Appurtenances* to *T. S.* Adjudged that the *Kiln* did not paſs, for by a Grant of an Houſe or Mill with the Appurtenances, nothing paſſes but what may properly *appertain* to it.

Archer verſus *Bennet*, 1 Lev. 131.

A. deviſeth that his Executors ſhall ſell his Land, and of the Money coming ſhall give ſuch a Portion to his Daughters; it is no Legacy, becauſe out of Land, and an Action of Account lieth, and no Suit in the Spiritual Court [e].

[e] 5 Mar. Dy. 152. Contra, Dyer fol. 264.

If a Man deviſeth that his Executors ſhall ſell his Land; by this Statute, if one refuſeth, the other may ſell; but the Sale cannot be made to him who refuſeth [f].

[f] 27 H. 8. Bendloe's Rep. Inſt. part. 1. fo. 113.

If a Man deviſe Lands to *A. B. C.* his Executors, to be ſold, *&c.* and one of them dieth, the Survivors cannot ſell, becauſe of the joint Truſt repoſed n them. *Inſt. part.* 1. *fol.* 113.

A. ſeiſed of Lands in Fee deviſed the ſame in Tail, and if the Donee died without Iſſue, that his ſaid Lands ſhould be ſold by his Sons in Law; one of his Sons in Law died in the Life of the Donee, and after the Donee died without Iſſue, and then the ſurviving Sons in Law ſold the Land: Adjudged that the Sale was good, becauſe they were named generally his Sons in Law, and it could not be ſold by them all; and the Words of the Will are ſatisfied [g].

[g] M. 32 Eliz. Rot. 1307. *Vincent*'s Caſe, Inſt. part. 1. fol. 113. a. M. 29 Eliz. B. R. *Bonifant* and Sir *Richard Greenfield*'s Caſe, Godbolt fo. 77.

One deviſed Houſes deviſable by Cuſtom (the Land was holden of the King in Tail, and if the Donee died without Iſſue, deviſed that the Land ſhould be ſold by his Executors, and died; the Deviſee died without Iſſue: It was holden in that Caſe, that although the Land eſcheated to the King, yet the Sale made by the Executors ſhould deveſt the Eſtate out of the King, without Petition or *Monſtrans de droit*, becauſe the Vendee was in by the Deviſor paramount the Eſcheat [h].

[h] 49 E. 3. *Iſabel Goodcheap*'s Caſe vouched in Sir *Hugh Cholmly*'s Caſe, C. lib. 2. fol. 53.

A. by Will deviſed, that his Executors ſhould ſell his Land, and died; the Executors levied a Fine thereof to *F.* for a certain Sum of Money; and it was pleaded in a Suit for the ſaid Lands, *Quod partes ad finem nihil habuerunt:* It was a Queſtion whether this was a good Plea. *Per Anderſon* it is a good Plea: But *Windham* and *Periam* Juſtices ſaid, that upon Not guilty pleaded, the Conuſee might help himſelf by giving the ſpecial Matter in Evidence, in which Caſe the Conuſee ſhall be in, not by the Fine, but by the Deviſe.

A. deviſeth that his Executors ſhall ſell a Reverſion of certain Lands of which he died ſeiſed; they ſell the ſame without Deed; yet the Sale is good, becauſe that the Vendee is in by the Deviſe, and not by the Conveyance of the Executors [i].

[i] 29 H. 6. Inſt. part. 1. fo. 113. a. Hugh's Abridg. tit. Deviſe, fo. 657.

As (8) for Rents due to the Teſtator, " By the Order of the Com-
" mon Law of this Realm [t], the Executors or Adminiſtrators of
" Tenants in Fee-ſimple, Fee-tail, and Tenants for Term of Life,
" of Rent-ſervices, Rent-charges, Rent-ſecks, and Fee-farms, have
" no Remedy to recover ſuch Arrearages of the ſaid Rents, or Fee-
" farms, as were due to thoſe Teſtators in their Lives; nor yet the
" Heirs of any ſuch Teſtator, nor any Perſon having the Reverſion
" of his Eſtate after his Deceaſe, may diſtrain or have any lawful
" Action to levy any ſuch Arrearages of Rents, or Fee-farms, due
" unto him in his Life; by Reaſon whereof the Tenants of
" the Demain of ſuch Lands, Tenements or Hereditaments, out of
" the which ſuch Rents were due and payable, who of Right
" ought to pay their Rents and Farms at ſuch Days and Terms as
" they were due, did many Times keep, hold and retain ſuch Ar-
" rearages in their own Hands, ſo that the Executors and Admi-
" niſtrators of the Perſons, to whom any ſuch Rents or Fee-farms
" were due, could not have or come by the Arrearages of the ſame,
" towards the Payment of the Debts, and Performrnce of the Will
" of the ſaid Teſtator. For Remedy whereof, it is enacted by the
" Statutes of this Realm as followeth; *viz. That the Executors*
" *and Adminiſtrators of every ſuch Perſon or Perſons, unto whom*
" *any ſuch Rents or Fee-farms are or ſhall be due, and not paid at*
" *the Time of his Death, ſhall and may have an* * *Action of Debt*
" *for all ſuch Arrearages againſt the Tenant, or Tenants, that*
" *ought to have paid the ſaid Rent or Fee-farm, ſo being behind in*
" *the Life-time of their Teſtator, or againſt the Executors and Ad-*
" *miniſtrators of the ſaid Tenants. And alſo furthermore, it ſhall*
" *be lawful to every ſuch Executor or Adminiſtrator of any ſuch Per-*
" *ſon or Perſons, to whom ſuch Rent or Fee-farm is or ſhall be due,*
" *and not paid at the Time of his Death, as is aforeſaid, to di-*
" *ſtrain for the Arrearages of all ſuch Rents and Fee-farms, upon*

[t] Vide Stat. H. 8. an. 32. c. 37.

* Which muſt be brought in the *Detinet*, and not in the *Debet*.

" *the Lands, Tenements, or other Hereditaments, which were* " *charged with the Payment of ſuch Rents or Fee-farms, and* " *chargeable to the Diſtreſs of the ſaid Teſtator, ſo long as the ſaid* " *Lands, Tenements or Hereditaments, continue, remain, and be* " *in Seiſin or Poſſeſſion of the ſaid Tenant in Demain, who ought im-* " *mediately to have paid the ſaid Rent or Fee-farm ſo being behind* " *to the ſaid Teſtator in his Life-time; or in the Seiſin or Poſſeſſion* " *of any other Perſon or Perſons claiming the ſaid Lands, Tene-* " *ments and Hereditaments, only by and from the ſaid Tenant, by* " *Purchaſe, Gift or Deſcent, in ſuch like Manner and Form as* " *their ſaid Teſtator might or ought to have done in his Life-time:* " *And the ſaid Executors and Adminiſtrators ſhall for the ſame Di-* " *ſtreſs lawfully make Avowry upon their Matter aforeſaid. Pro-* " *vided always, that this Act, nor any Thing therein contained,* " *ſhall not extend to any ſuch Manor, Lordſhip or Dominion in* " Wales, *or in the Marches of the ſame, whereof the Inhabitants* " *have uſed Time without Mind of Man, to pay unto every Lord or* " *Owner of ſuch Lordſhip, Manor or Dominion, at his or their firſt* " *Entry into the ſame, any Sum or Sums of Money, for the Redemp-* " *tion and Diſcharge of all Duties, Forfeitures and Penalties,* " *wherewith the ſame Inhabitants were chargeable unto any of the* " *ſaid Lord's Anceſtors or Predeceſſors, before his ſaid Entry.*

" *And farther be it,* &c. *That if any Man now hath, or hereafter* " *ſhall have, in the Right of his Wife, any Eſtate of Fee ſimple, or* " *Fee-tail, or Fee-farm, and the ſame Rents or Fee-farms now be or* " *hereafter ſhall be due, behind and unpay'd in the Wife's Life;* " *then the ſaid Husband, after the Death of his ſaid Wife, his Ex-* " *ecutors and Adminiſtrators, ſhall have an Action of Debt for the* " *ſaid Arrearages, againſt the Tenant of the Demain, that ought* " *to have payed the ſame, his Executors or Adminiſtrators: And* " *alſo the ſaid Husband, after the Death of his ſaid Wife, may di-* " *ſtrain for the ſaid Arrearages, in like Manner and Form as he* " *might have done if his ſaid Wife had been living, and make A-* " *vowry upon his Matter, as is aforeſaid. And likewiſe it is,* &c. " *That if any Perſon or Perſons now have, or hereafter ſhall have,* " *any Rents or Fee-farms for Term of Life or Lives, of any other* " *Perſon or Perſons, and the ſaid Rent or Fee-farm, now or here-* " *after, ſhall be due, behind or unpaid, in the Life of ſuch Perſon* " *or Perſons, for whoſe Life or Lives the State of the ſaid Rent or* " *Fee-farm did depend and continue, and if the ſaid Perſons do die,* " *then he unto whom the ſaid Rent or Fee-farm was due in Form a-* " *foreſaid, his Executors or Adminiſtrators, ſhall and may have an* " *Action of Debt againſt the Tenant in Demain, that ought to* " *have payed the ſame when it was firſt due, his Executors and Ad-* " *miniſtrators, and alſo diſtrain for the ſame Arrearages upon ſuch* " *Lands and Tenements, out of the which the ſaid Rents or Fee-* " *farms were iſſuing and payable, in ſuch like Manner and Form as* " *he ought, or might have done, if ſuch Perſon or Perſons, by whoſe* " *Death the foreſaid Eſtates in the ſaid Rents and Fee-farms were* " *determined and expired, had been in full Life, not dead; and the* " *Avowry for the Taking of the ſame Diſtreſs to be made in Manner* " *and Form aforeſaid.*"

If one grant a Rent out of his Land for Life, provided that it ſhall not charge his Perſon, and the Rent be behind, and the Grantee dieth;

dieth; in this Caſe, the Grantee's Executor may have an Action of Debt for theſe Arrearages of Rent [a].

[a] Inſt. part. 1. fol. 146. a.

If any Rent or Arrearages of Rent be due to one upon a Grant of Rent out of any Land to him, or Reſervation of Rent upon any Eſtate made by him; in theſe Caſes his Executor may have an Action of Debt for this Rent, or he may diſtrain for it, ſo long as the Land chargeable with the Rent, and out of which it doth iſſue, is in his Poſſeſſion that ought to pay it, or any claiming by or under him [b].

[b] Lib. 4. fo. 50. *Andrew Ognell's* Caſe. 9 H. 7. 17. 34 H. 6. fo. 20. 32 E. 3. tit. Debt 9. 14 H. 6. 26. 9 H. 6. 43. F. N. B. fo. 121. C. 19 H. 6. 43.

But in ſome Caſes after this Statute he could not *diſtrain*; for if the Teſtator had granted his Intereſt to another, and the Grantee had attorned, and then the Teſtator died, his Executor cannot recover the Arrears of Rent by Virtue of this Statute, becauſe they are loſt by the Granting over his Eſtate, and were not due to the Teſtator at the Time of his Death; and the Statute is expreſs, that *the Executor ſhall recover in as large and ample Manner as the Teſtator might*, who, as this Caſe is, could never recover ſuch Arrears; and this was one Point adjudged in *Andrew Ognell's* Caſe.

An Executor in ſome Caſes may have his Remedy by Action for the Arrearages of Rent, which the Teſtator himſelf in his Life-time could not. For if a Man grant a Rent-charge out of certain Lands to another for Life, with a Proviſo in the Deed, that the Grantee ſhall not in any Sort charge the Perſon of the Grantor, and the Rent be behind, the Grantee dieth, the Executors of the Grantee ſhall have an Action of Debt againſt the Grantor, and charge his Perſon for the Arrearages in the Life of the Grantee, notwithſtanding that Proviſo; becauſe the Executors have no other Remedy againſt the Grantor for the Arrearages; for diſtrain they cannot, becauſe the Eſtate in the Rent is determined, and the Proviſo cannot leave the Executors without Remedy [c].

[c] Dy. fo. 227. Inſt. part. 1. fol. 146. a. 9 H. 6. 53. a.

Tenant in Dower makes a Leaſe for Years, reſerving Rent, and takes a Husband; the Rent is in arrear; the Husband dies: Agreed by the whole Court, that his Executors ſhall have the Rent [d].

[d] M. 3 E. 6. Moor's Rep. n. 25. fo. 7.

A Rent-charge was granted to the Teſtator *for divers Years*, if *he ſo long lived*; in Replevin the Executors diſtrained, and avowed for the Arrears: Reſolved they could not *diſtrain*, for that the Statute 32 *H.* 8. provides Remedy only by Diſtreſs, *where the Teſtator was ſeiſed of a Rent to him and his Heirs, or for Life*; for there was no Remedy at Common Law? But where the Party hath Remedy at Common Law by *Action of Debt*, as the Executor hath in this Caſe, he cannot diſtrain and avow [e].

[e] P. 13 Car. B. R. *Turner* verſus *Lee*, Crook part. 1. fo. 471.

The ſaid Statute doth not extend to Rent arrear of [f] *Copyhold Lands*, but to Rent arrear out of all other Inheritances, or out of a Freehold for Life.

[f] 1 Brownlow 102. *Appleton* verſus *Doily*, Yel. 135. S. C.

Therefore where a Man grants a *Rent-charge for Life* out of his Lands, and the Rent is in arrear to the Grantee, and afterwards the ſame Grantor makes a Feoffment of the ſame Lands to *T. S.* and the Rent is likewiſe in arrear in his Time, and then the Feoffor makes another Feoffment to *E. G.* and the Rent is likewiſe arrear in his Time, and then the Grantee for Life of the Rent dieth, his Executor may have an Action of Debt againſt every one of them

Lillingſtone's Caſe, 7 Rep. 39. b.

for that Rent which was in arrear in their reſpective Times; the Reaſon is *Qui ſentit commodum ſentire debet & onus.*

Secondly, (9) Concerning the Teſtator, it ſhall be behoveful for thee that art deſirous to be reſolved, whether it were better to accept or refuſe the Executorſhip, to inquire and learn whether the ſame Teſtator were Executor or Adminiſtrator to any other Perſon.

If he were Executor, then, by the Statutes of this Realm, thou, (10) being Executor of an Executor, ſhalt have Actions of Debts, Accounts, and of Goods carried away of the firſt Teſtator, and Execution of Recognizances made in Court of Record to the firſt Teſtator, in the ſame Manner as the firſt Teſtator ſhould have, if he were in Life, as well of Actions of the Time paſt, as of the Time to come, in all Caſes where Judgment is not as yet given betwixt ſuch Executors [g]; but the Judgment given to the contrary in Times paſt ought to ſtand in its Force. And on the contrary, the Executor of the Executor ſhall anſwer to others to whom the firſt Teſtator was indebted, as much as he ſhall recover of the Goods of the firſt Teſtator, even as the firſt Executor ſhould do, if he were in full Life. But the Goods which did belong to the firſt Teſtator ſhall not be put in Execution for the Debt of the ſecond Teſtator [h]; which Goods the Executor of the Executor ſhall have by Relation of the firſt Teſtator, as immediately Executor unto him, and not by Relation to the ſecond Teſtator, Executor to the firſt Teſtator [i]: And ſo the Property which the ſecond Teſtator had by the ſaid Relation is taken away, and is in ſuch Caſe as if the ſecond Teſtator had never been Executor [k]. Howbeit, this is to be underſtood with this Limitation, *viz.* if there be no Executor of the firſt Teſtator ſurviving. For (11) if the Teſtator did make divers Executors, whereof ſome be yet living, that Executor of the firſt Teſtator ſurviving, and the Executor of his Co-executor, cannot be joined both together in one Action [l]: But the Executor of the firſt Teſtator ſurviving, he alone ſhall have Action againſt the Debtors of the firſt Teſtator, and he alone ſhall be convented by them to whom the firſt Teſtator was indebted, and not both jointly together [m]: For the Executor of an Executor hath not to deal with the Goods of the firſt Teſtator in this Caſe, that is to ſay, where there is another Executor of the firſt Teſtator ſurviving. Inſomuch that, where there be Two Executors, whereof one maketh an Executor and dieth, his Co-executor ſurviving, which Co-executor afterwards dieth Inteſtate; yet in this Caſe the Executor of the Executor may not meddle with the Goods of the firſt Teſtator [n]: For ſo ſoon as the Executor which made his Teſtament died, (the other ſurviving,) his Power was determined by his Death, and all the Power did remain in the Co-executor ſurviving, who afterwards dying Inteſtate, it is in the Power of the Ordinary to commit the Adminiſtration of the Goods of the firſt Teſtator not adminiſtred, to the next of Kin to the firſt Teſtator, and not to the Executor of that Executor which died firſt [o]. Much leſs may the Executor of Executor meddle with the Goods of the firſt Teſtator, when the Co-executor is yet living: And if he do, the Executor ſurviving may have an Action againſt him, for ſuch Goods as he hath of the firſt Teſtator [p]. And beſides that, the Creditors of the firſt Teſtator may

[g] Stat. 4 Ed. 3. an. 25. c. 5. Idem jure civili in hær. hæredis. L. 2. & 3. de petic. hær. ff. Contrarium in hærede execut. tam jure civili, quam Canonico. Bar. & alii in L. a filio. ff. de alimen. leg. gloſ. in c. fin. de teſta. 6. verb. mortuo. 34 H. 6. 14. Lib. 5. fo. 9. *Brudnell's* Caſe. Pl. Com. fo. 86.

[h] Legatarios præferendos eſſe creditoribus hæred. videre eſt apud Sichardum in L. ſi decreto. c. cui po. in pig. n. 8.

[i] Plow. in caſu inter Bransby & Grartham. Atque ita ſolvitur nodus de quo Bar. & alii in L. veluti. ff. de petic. hær. utrum, viz. hæres hæred. ſuccedat priori teſtat. ex teſtamento, vel ab inteſtato: nobis enim intelligitur ſuccedere ex teſtam. utcunque non fuit in primo teſtamento nominatus, id quod diſputandi rationem præbuit.

[k] Plowd. ubi ſupra.

[l] Brook Abridg. tit. Exec. n. 99. Contrar. in hæred. conſtituit jus civile, quo ſi aliquis ex hæred. deceſſerit, pluribus relectis hared. hi omnes accipere debent illam partem quæ ad hæred. defunct. pertinuit familiæ herciſcundæ actione. L. ſi familiæ herciſ. eod. tit.

[m] Brook Abridg. tit. Exec. n. 99.

[n] Brook Abridg. tit. Execut. n. 149.

[o] Brook d. n. 149. & in tit. Adminiſt. n. 45.

[p] Brook tit. Execut. n. 99.

have an Action againſt the Executor of the Executor in this Caſe, as Executor of his own Wrong [q].

[q] Brook eod. n. 99. 29. 21 E. 4. 22. 10 H. 6. 26. 41 E. 3. 30, 31.

And albeit the Executors, whilſt they lived, did divide the Goods of the Teſtator deceaſed amongſt them, (unleſs the Teſtator did by his Will deviſe that the ſame ſhould be ſo divided;) yet the Executor ſurviving may recover the ſame, notwithſtanding the Diviſion amongſt themſelves, beſides the Will of the Deceaſed [r]. But what if the Teſtator make Two Executors, whereof the one proveth the Will, and doth intermeddle as Executor, and the other *refuſeth*; afterwards he which did prove the Will maketh Executors, and dieth? Whether in this Caſe may the Executors of the Executor ſue for the Debts due to the firſt Teſtator? or whether may the other Executor of the firſt Teſtator prove the Will, and ſue for thoſe Debts? Wherein I am of their Opinion who hold that the Executors of the Executor may recover the Debts due to the firſt Teſtator [s]. For albeit the Executor of the firſt Teſtator might at his Pleaſure have adminiſtred as Executor, ſo long as his Co-executor lived; yet after his Death it is not in his Power ſo to do; for his Authority did die when his Co-executor died, by their Opinion upon whoſe Judgment I chiefly rely in the Deciding of this Queſtion [t]. Inſomuch that if the Executor who proved the Will had made no Executors, but had died Inteſtate, yet the Adminiſtration of the Goods of the firſt Teſtator, not adminiſtred by the ſaid Executor, is to be committed (as of one dying Inteſtate) to the Widow or next of his Kin, and not to the ſaid Executor who refuſed to prove the Will, and would not adminiſter as Executor whilſt his Co-executor lived [u]; notwithſtanding the Refuſal of one, yet they are all Executors; and this appears in [x] *Henſlo*'s Caſe, (*viz.*) Debt was brought againſt Co-executors; one of them refuſed before the Ordinary, and the reſt proved the Will; he who refuſed may adminiſter when he will, and therefore they who proved the Will ought to name him in every Action; but if they all refuſe, then the Ordinary may grant Adminiſtration to another.

[r] Id quod non ſemel accepi a juris regni noſtri peritis. 27 H. 8. 21, 22. Brook, tit. Executor, pl. 7.

[s] Dyer, f. 160. n. 42.

[t] Dyer ubi ſupra, (poſt D. Brook, ſummum tunc temporis Juſticiarium hujus regni Angliæ.)

[u] Brook Abridg. tit. Executor, n. 92, 99. & n. 149.

[x] 9 Rep. 39.

Houſe v. *Lord Petre*, 1 Salk. 311.

Robert made his Brother *William* Executor and died, then *William* made his Wife *Lucy* and one *Todd* Co-executors, and died; *Lucy* only proved the Will, and made *Two Executors*, and ſhe died; then *Todd*, one of the Executors of *William*, renounced the Executorſhip, and Adminiſtration of the Goods of *Robert* was granted to the Defendant; but the Executors of *Lucy* inſiſted, that it ought to be granted to them; and it was decreed by the Delegates, that *Todd* being *Co-executor* with *Lucy*, and ſurviving her, the Right of the Executorſhip to *William* did ſurvive to him (*Todd*), tho' he never acted as Executor, which Right could not be deveſted, but by an actual Renunciation, and then, and not before their Teſtator *William*, and alſo his Teſtator, are dead Inteſtate; and if ſo, then the Ordinary may grant Adminiſtration to the Defendant: The Common Lawyers held, that if one Executor refuſes before the Ordinary, and the other proves the Will, he who refuſed may at any Time come in and adminiſter; and tho' he never acted whilſt his Companion was living, yet after his Death he ſhall be preferred before any other.

The Executor of an Executor muſt anſwer to the Creditors of the firſt Teſtator, as much as he ſhall receive of the Goods of the firſt Teſtator [y]. But if that Executor did alienate or convert to his own

[y] Supr. eod. 6 n. 10.

Uſe all the Goods which did belong to the former Teſtator; in this Caſe no Action doth lie againſt the Executor of the Executor, for Recovery of any Debt due by the firſt Teſtator [z]. But where the Teſtator maketh one his Executor, and dieth, which Executor maketh another his Executor, and alſo dieth before he hath proved the Teſtament of the firſt Teſtator: In this Caſe the Adminiſtration of the Goods of the firſt Teſtator ſhall not be committed to the Executor of the Executor, (neither is he Executor to the firſt Teſtator,) but the Adminiſtration ſhall be committed, with the Teſtament annexed, to his next of Kin [a]; unleſs he did bequeath his Goods, after his Debts, Funerals and Legacies diſcharged, to the Executor named in his Teſtament: For in this Caſe the Adminiſtration of the firſt Teſtator's Goods, with the Teſtament thereunto annexed, is to be committed to the Executor of his Executor [b].

[z] L'abridg. dez caſes edit. an. Dom. 1596. tit. Exec. f. 177. n. 3. Cui convenit Ro. Kelleway, l. relationum, fol. 99. n. 7.

[a] Dyer, f. 372. n. 8.

[b] Et hoc ex relatione reverendi Do-

ctoris Drurie, Judicis Curiæ prærogativæ Cantuar. Cui reliqui Judices acquieverunt. Vide Dyer ubi ſupra.

Moreover, it is to be noted, that the Executor of an Executor cannot ſell the Land of the firſt Teſtator, who by his Teſtament gave Power to his Executor to ſell the ſame [c]: For after the Death of that Executor, the Power ceaſeth; unleſs divers being appointed Executors, ſome of them die, or refuſe to prove the Will, for then the others ſurviving, or accepting, may ſell the ſame, as is aforeſaid.

[c] Brook, tit. Exec. n. 3. 27 H. 8. Bendloe's Rep. adjudged accord. Inſt. part. 1. fo. 113. a.

If (12) the Party deceaſed, to whom thou art Executor, were not Executor unto another, but *Adminiſtrator only*; thou art not to ſucceed in his Place in the Adminiſtration of the Goods [d], but a new Adminiſtration is to be granted of the Goods not adminiſtred by the Adminiſtrator to the next of Kin, not of the Adminiſtrator, but of him that died firſt [e].

[d] Fitz. Abridg. tit. Adminiſtr. n. 3.

[e] Fitz. ubi ſupra, Principal Grounds, f. 61. pag. 2.

And ſo it is, if he to whom thou art Executor were Executor to another, but *died before he had proved the Will, or adminiſtred any of his Goods:* For in this Caſe Adminiſtration of his Goods is to be committed to the Widow, or next of his Kin, with the Will annexed; unleſs alſo he had bequeathed the Reſidue of his Goods unto his ſaid Executor; for then the Adminiſtration of his Goods is to be committed unto the Widow or next of Kin of the Executor, and not of the Teſtator, as is aforeſaid [f].

[f] Supr. eod. §. n. 33. *Iſted* verſus *Stanley*, Dyer 371.

The Teſtator deviſed all his Goods to *T. S.* whom he made Executor, who died before the Will was proved: Adjudged that Adminiſtration of the Teſtator's Goods *cum teſtamento annexato* ſhall be granted to the next of Kin of the ſaid *T. S.* becauſe he was the univerſal Succeſſor.

So where an Executor and reſiduary Legatee dies before Probate, his Executor ſhall have the Adminiſtration, and not the next of Kin of the Teſtator.

Shower 26. *Brown* verſus *Shore*.

Debt againſt the Executor of an Executor; the Defendant pleaded, that the Executor's Teſtator had fully adminiſtred, and that he had nothing in his Hands at the Time of his Death; and it was found that he had Aſſets; whereupon a *Fieri fac.* iſſued to the Sheriff, and he returned that the Defendant had nothing: And it was held, that the Sheriff ſhould be amerced, for he ſhould not have made ſuch a Return; and that it ſhould be no Prejudice to the Plaintiff, for that the Debt ſhould be charged ſo long as the Record remains in Force,

Force, not reverſed by Error or Attaint; and if he hath no Goods of the Teſtator's, he ſhall be charged of his own proper Goods; for that when he pleaded that the firſt Teſtator had fully adminiſtred, he did not ſay, that Aſſets did not come to his Hands after his Teſtator's Death [g].

[g] P. 3 Eliz. Moor's Rep. n. 8.

W. E. brought Debt upon an Obligation by the Name of *W. E. adminiſtrator bonorum & catallorum* A. E. *durante minori ætate* of *J. E.* Executor of the ſaid *A. E.* Executor of *R. E.* *Per Curiam*, *En brevi de error* he hath no Authority to meddle with the Goods of the firſt Teſtator [h].

[h] H. 33 Eliz. B.R. *Lemour* verſ. *Every*, Crook, part. 3. 10 E. 4. fo. 1. 27 H. 8. fo. 7.

There is yet (13) a farther Conſideration to be had of ſome Things which ſeem to concern the Teſtator, not to be neglected by the Executor, deſirous to be reſolved whether it were better to accept or refuſe the Executorſhip; namely, the Conſideration of the Laſt Will and Teſtament of the Deceaſed, and of the Legacies and Deviſes therein given. Wherein the Executor is not only to conſider, whether the Teſtator hath given more than the Death's Part doth extend unto, (in which Caſe, what Courſe is to be followed, is already elſewhere preſcribed [i]:) But alſo in (14) Caſe any Thing do remain, the Funeral, Debts and Legacies diſcharged, the Executor may not think to convert the ſame to his own proper Uſe [k], nor any more of the Teſtator's Goods than is given to him by the Teſtator in his Life-time, or by his Will, or which the Ordinary ſhall allow him for his Labour, or in Lieu of ſome Debts due unto him by the Teſtator, or due by the Teſtator to ſome other Perſon, and diſcharged by the Executor [l]. And (15) if after due Admonition to him given, he refuſe the Executorſhip, or to perform the Will, he ſhall loſe his Legacy bequeathed unto him by the ſame Teſtator, although he were of Kin, or allied unto him [m]. The Reaſon is, becauſe he is deemed unworthy the Benefit, that refuſeth the Burthen [n]. Moreover, here the Executor doth what in him lieth to make the Party deceaſed to die Inteſtate [o]. But if the Executor be not admoniſhed to undertake the Office, then being the Teſtator's Kinſman, or ſuch a Perſon to whom the Teſtator would have given the Legacy, though he did not perform the Will, he doth not loſe that Legacy in not undertaking the Executorſhip [p]: Neither ſhall the Wife loſe her Thirds, nor the Children their filial Portions, in refuſing the Executorſhip [q]: Much leſs ſhall the Creditor loſe his Debt due by the Teſtator.

[i] Supr. part. 3. §. 17.

[k] Magna Charta, c. 18. c. ſtatutum. §. ſtatuimus. de teſta. l. 3. provinc. conſt. Cant. Dominic. §. Gem. in c. religioſ. de teſt. 6. n. 9. & Doct. & Stud. l. 2. c. 10. circa medium. Inſt. part. 2. fo. 32. 17 E. 3. 73. 27 E. 3. 88. 29 E. 3. 13.

[l] Text. in d. §. ſtatuimus, Dyer, fol. 2. & fol 310.

[m] Rom. conſ. 207. & 235. cujus opinio communis eſt, ut per eand. conſ. 235. & per Gribald. Theſaur. com. op. verb. tutor.

[n] C. qui ſentit. de reg. jur. 6.

[o] Gribald. Theſaur. com. op. verb. tutor.

[p] Jaſ. Alex. & Sichard. in L. ſi legatarius. C. de leg. red. & falcid. §. ſiquis autem.

[q] Auth. hoc amplius. c. de fidei commiſ. Novel. de hæ-

No Man can be compelled to take upon him an Executorſhip, unleſs he hath intermeddled with the Teſtator's Eſtate, and then, tho' he afterwards refuſe before the Ordinary, and Adminiſtration is granted to another, 'tis wrong; as for Inſtance:

Abraham verſ. *Cunningham*, 1 Vent. 303. 2 Lev. 182. S. C. T. Jones 72. S. C. 2 Mod. 146.

The Father being poſſeſſed of a Term for Years, made his Son Executor, and died; the Son proved the Will and made *Hay* Executor, and died; but he not proving the Will of the Son, Adminiſtration *de bonis non* of the Father was granted to *Bradburn* (who knew nothing of the Son's Will), and who ſold the Term for a valuable Conſideration; then *Hay* (the Executor of the Son) renounced, and the Adminiſtration granted to *Bradburn* was repealed,

and a new *Adminiſtration de bonis non, &c.* was granted to *Cuningham*, which could never be, if the Adminiſtration granted to *Bradburn* had been good; but that was not good, becauſe it was granted whilſt *Hay* was Executor, and before he renounced, for till that Time *Hay* had the abſolute Property in the Eſtate, and might have ſold the Term before Probate; and if ſo, the Adminiſtration granted before the Refuſal was void.

After the Conſideration of the Eſtate of the Teſtator, he (16) that is named muſt alſo conſider his own Perſon, in whom many Things ought to concur; but chiefly it is requiſite that he be prudent, diligent, and faithful[r]: Wherein if there be any Defect, I mean, if either he be ignorant, negligent, or unfaithful, he is very like to find the Office very troubleſome, peradventure alſo diſcommodious[s]: Unleſs, that being ignorant, he will uſe the Advice of thoſe that be skilful; and that of a negligent Perſon he will become diligent, eaſing himſelf alſo of ſuch Buſineſs as might hinder the Expedition of this Office; and that, howſoever he hath behaved himſelf in other Affairs unfaithfully, yet in this Office he will have an honeſt Care, well and truly to diſcharge that Truſt committed unto him, always having before his Eyes, not only the Forfeiture of his Bond, by his unfaithful Dealing, together with the Ignominy by deceiving the dead Man's Expectation, but alſo the Danger of his Soul by the Breach of his Oath: For he muſt be ſworn to execute the Will, and to adminiſter the Goods well and faithfully[t].

[r] Jo. de Canib. Tract. de execut. ult. volunt. 2. particula, q. 1.

[s] Jo. de Canib. ubi ſupr.

[t] Hoc viridi obſervantia paſſim fit notorium, maxime infra provinciam Ebor.

It ſhall behove thee likewiſe in particular to conſider, whether thou be indebted to the Teſtator, or whether the Teſtator were indebted unto thee. In which Caſe how far thou ſhalt be tied or diſcharged, thou mayeſt eaſily and clearly perceive by that which I have formerly written of the Debtor or Creditor made Executor[u]: Whereunto I refer thee to be more fully inſtructed, whether it were better for thee to accept or to refuſe the Executorſhip.

[u] Supra part. 5. §. 1. prope finem.

If (17) a Wife during the Coverture be named Executrix, there is this farther to be conſidered in her Perſon, that ſhe alone cannot ſue for any Debt due to the Teſtator, nor be ſued for any Debt due by the Teſtator, without her Husband[x]: But ſhe alone may do any Act extrajudicial, as the paying of Debts or Legacies, or the receiving or releaſing of any Debts due to the Teſtotor[y]: (Yea, the Huſband without the Wife (though ſhe alone be Executrix) may do any extrajudicial Act, as well as the Wife Exectrix[z].) And therefore if the Husband releaſe or remit any Debt due to the Teſtator, the ſame is good and available, not only during the Marriage, but alſo after the Death of her Husband[a]. But if the Wife die, the Husband cannot convert any of the Goods and Chattels belonging to the firſt Teſtator to his own proper Uſe; for of ſuch Goods the Wife herſelf may make a Teſtament, appointing an Executor, without the Licence of her Husband, as is before more fully declared[b].

[x] Brook Abridg. execut. n. 178.

[y] Brook eod. n. 178. Kelleway's Reports, fo. 127. n. 74.

[z] Fitzh. Abridg. tit. Exec. n. 23, 40. Brook eod. tit. n. 147, 151, 152. D. Coke, lib. 5. Relat. in Ruſſel's Caſe.

[a] Fitz. & Brook ubi ſupr. quibus convenit D. Coke in Ruſſel's Caſe, quamvis contrarium teneat

[b] Supra 2 part. §. 9.

Rob. Kelleway, lib. Relat. fol. 122.

The Husband and Wife being but one Perſon in Law, ſhe cannot be Executrix without his Aſſent; for if ſhe might, then he would be Executor againſt his Will; therefore if ſhe is made Executrix, ſhe cannot bring an Action alone, but her Husband muſt join with her; and

19 H. 6. 25.

if he ſhould refuſe, he cannot be compelled, neither can ſhe be compelled to plead without her Husband.

But tho' ſhe cannot ſue or be ſued without him, yet ſhe may deliver any of the Teſtator's Goods to another to keep; ſhe may pay Legacies and receive Debts, and may give Acquittances without her Husband; and if any *Devaſtacit* is made by giving Acquittances, it ſhall bind them both, becauſe ſhe could not adminiſter without his Aſſent; and it ſhall be accounted his Folly to ſuffer ſuch a Perſon to adminiſter.

[1] Rol. Abr. 919. But where ſhe is Executrix and marries, and her Husband commits *Waſte*, and then ſhe dies, there is no Remedy at Common Law againſt the Husband, but only in the Spiritual Court, where he will be compelled to make Reſtitution.

Finally, Concerning the Perſons of others, with whom thou that art named Executor in the Teſtament haſt to deal, it behoveth (18) thee to have a ſpecial Conſideration of thy *Co-executor* [c], that is to ſay, whether he be of more Experience and greater Wealth than thou art, and namely, whether he be a covetuous and contentious Perſon [d]. If he be, take heed; for it is to be feared, that (19) he will keep all the Goods from thee [e]; that he alone will receive the Debts due to the Teſtator, and make them a Releaſe: For this alſo he may do [f], (except it be after Judgment.) Without Doubt, if he be ſuch a Perſon, he hath learned this Leſſon, that (20) *one Executor cannot ſue another* for Poſſeſſion of the Teſtator's Goods [g]; becauſe, how many Executors ſoever they be, they are all but as one Perſon, and no Man can ſue himſelf [h]; and ſo the Poſſeſſion of one is as the Poſſeſſion of another [i]: And hereby thou ſhalt remain without Remedy, unleſs it be for a Legacy left unto thee alone [k], or unleſs thou mayeſt have ſome ſlender Remedy before the Ordinary [l]. It is alſo very likely that he alone (21) will ſell the Teſtator's Goods; in which Caſe he alone will and may ſue for the Money due for the ſame [m]: But if there be any Debt due to be paid in the Behalf of the Teſtator, then look aſſuredly that thou ſhalt be ſued as well as he [n]; howſoever Execution may paſs againſt him alone which hath the Goods [o]. To conclude, if thy Co-executor be ſuch a Perſon as is aforeſaid, an Hundred to one he will not ſuffer thee to partake of the Commodity, but of the Trouble thou ſhalt not avoid but be Partaker.

[c] Jo. de Canibus Tract. de exec. ult. vol. particula 2. q. 1. n. 17.
[d] Jo. de Ca. d. 1. q. n. 18.
[e] Brook Abridg. tit. Exec. n. 98.
[f] Brook, tit. Exec. n. 37. Dyer, fol. 319.
[g] Brook eod. tit. n. 98.
[h] Arg. c. debitum. de baptiſ. extr. L. præter. ff. de tut. & cur. dat. ab his. Plowd. in caſu inter Par. & Yardley, fol. 343.
[i] Fitz. tit. Exec. n 32.
[k] Brook, tit. Exec. n. 104.
[l] Brook eod. tit. n. 37.
[m] Brook, tit. Exec. n. 66.
[n] Supr. part. 4. §. 20.
[o] Brook, tit. Exec. n. 16.

This alſo is not to be omitted, that (22) if thy Co-executor do refuſe the Executorſhip before the Ordinary, and thou alone doſt prove the Teſtament, yet may he afterwards (ſo long as thou liveſt) adminiſter the Goods, or remit the Debts due to the Teſtator [p], and thou canſt not hinder him; neither canſt thou recover againſt the Perſons by him ſo releaſed [q]. After (23) Conſideration of thy Co-executor, there is Regard alſo to be had to the reſt of thoſe Perſons with whom thou art to deal, *viz.* to the Creditors and Legataries, and to the Payment of Debts; for Debts are to be paid before Legacies [r]: And of Debts, ſome are to be preferred and ſatisfied before others, and likewiſe of Legacies, as elſewhere [s] hath been and [t] ſhall be ſhewed. Otherwiſe it may come to paſs, that the Executor ſhall be forced to pay out of his own Purſe, after he hath ſpent all the Teſtator's Goods and Chattels [u].

[p] Brook, tit. Exec. n. 38. Dyer, fol. 160.
[q] Brook, eod. tit. n. 37, & n. 117.
[r] L. ſcimus. C. de jure delib.
[s] Supr. part. 3. §. 17.
[t] Infr. ead. part. §. 16.
[u] D. ſcimus. Doct. & Stud. lib. 2. c. 10.

By the due Conſideration of thoſe Things, *viz.* firſt, of the Eſtate or Condition of the Teſtator, ſecondly, of his own Eſtate, and third-

ly, of the Co-executor or other Perſon with whom he is to have any Dealing, it is not hard, in my Opinion, for the Executor to collect whether it is likely to be beneficial or hurtful, to accept or refuſe the Executorſhip, and to reſolve accordingly; at the leaſt if hereunto he alſo take a View of thoſe Things which do appertain to the Office of an Executor, accepting the Executorſhip hereafter deſcribed [x].

[x] Infr. ead. part. §. 5. cum §§. ſequentibus.

§. IV. Of the Time which the Executor hath to conſult, whether he will undertake or refuſe the Executorſhip.

1. *The Time of Deliberation arbitrary.*

THE Time (1) wherein he that is named Executor in the Teſtament is to deliberate and determine, whether he will accept or refuſe the Executorſhip, is uncertain, and left to the Diſcretion of the Ordinary [y], who uſeth at his Pleaſure, and when he will, not only within the Year [z], but within a Month or two, to cite him that is named Executor to accept or refuſe the Executorſhip.

[y] Legatin. libertat. de exec. teſta. & ibi Jo. de Athon. verb. approbatam conſuetudinem.

[z] Quod vero annus deliberandi jure Civili conceditur, (L. cum in antiquioribus. C. de jure delib.) illud ita intelligendum, ubi hæres non confecto inventario tenetur ultra vires hæreditatis. Siquidem non tenetur hæres inventarium facere, ſi juri tantum civili attendamus, (L. ſcimus. §. fui de jure delib. C. & ibidem Sichard.) dummodo velit ſubire periculum ſolvendi univerſa defuncti debita. Sed jure Legatin. quo nos communiter utimur, executor tenetur præciſe ad confectionem Inventarii, nec tenetur ultra vires bonorum. Quare ſublata cauſa, id eſt, periculo ſolvendi debita ultra vires bonorum defuncti, per confectionem inventarii, quam non poteſt evitare, (ut infra eadem parte §. 6.) ſublata (inquam) cauſa, tollitur effectus, id eſt, annuale tempus deliberandi, num velit huic periculo ſeipſum ſubjicere. Nam executores, quoad confectionem inventarii, tutorum potius quam hæredum naturam ſapiunt. Lind. in c. ſtatutum. §. inhibemus de teſta. L. 3. provincial. conſtit. Cant. verb. prius.

§. V. Of the Office of an Executor teſtamentary undertaking the Executorſhip.

1. *Wherein the Office of an Executor doth principally conſiſt.*

IT (1) appertaineth to the Office of an Executor teſtamentary here in *England*, accepting the Executorſhip, (amongſt other Things [a]) to cauſe an Inventory to be made [b]; to procure the Will to be proved and approved [c]; to pay the Teſtator's Debts and Legacies [d]; and finally to make an Account [e].

[a] De quibus conſulas velim Jo. de Canib. Tract. de executor. ult. vol. part. 2. q. 1. n. 26. ubi decem enumerat executoris officio incumbentia.

[b] Ut infra ead. part. §§. 6, 7, 8, 9, 10.

[c] Ut infra ead. part. §§. 11, 12, 13, 14 & 15.

[d] Infra §. 16.

[e] De quo infra ead. part. §§. 17, 18, 19, 20, 21.

§. VI. Of

§. VI. Of divers Queſtions about the Making of an Inventory: And firſt, Whether it be of Neceſſity that an Inventory be made.

1. *By the Laws Eccleſiaſtical of this Realm, and Statutes of the ſame, an Inventory is neceſſary.*
2. *The Executor which preſumeth to adminiſter the Goods, and refuſeth to make an Inventory, may be puniſhed.*
3. *The Reaſon of this Neceſſity.*

CONcerning the Making of an Inventory, it is expedient to underſtand, whether it be ſimply neceſſary that an Inventory be made; what Things are to be put into the Inventory; within what Time the Inventory is to made; in what Manner; and what be the Effects of an Inventory.

That (1) an Inventory is neceſſary to be made by an Executor teſtamentary, is evident, as well by the Laws Eccleſiaſtical of this Realm[f], confirmed by continual Uſe; as alſo by the Statutes [g] of the ſame: Neither (2) ought the Executor to meddle with the Goods of the Deceaſed, before he make an Inventory [h]. And if any Executor refuſe to make an Inventory, and nevertheleſs preſume to adminiſter the Goods of the Deceaſed, he may be puniſhed at the Diſcretion of the Biſhop or Ordinary [i].

The (5) Reaſon is, leſt the Executor being diſpoſed to deal unfaithfully, ſhould defraud the Creditors or Legataries, by concealing the Goods of the Deceaſed [k].

[f] Legatin. libertat. tit. de executor. teſtam. c. ſtatutum. §. inhibemus. li. 3. provincial. conſt. Cant.
[g] Stat. H. 8. an. 21. c. 5.
[h] D. §. inhibemus.
[i] Legatin. libertat. de execut. teſta.
[k] Franciſ. Porcellin. tract. de inventario, q. 2. Per §. ſancimus. de hæred. & fal. in Auth.

[l] Othobon, tit. 14. By a provincial Conſtitution mentioned in [l] *Lindwood*, the Executor is required to exhibit an Inventory of all the Goods and Chattels which are found in the Poſſeſſion of the Deceaſed at the Time of his Death, before he intermeddles or poſſeſſes himſelf of ſuch Goods, *&c.* and this for his own Safety, that he be not chargeable *ultra vires bonorum*, which we call *Aſſets*; for if he doth not make ſuch Inventory, he ſhall be obliged to ſatisfy all the Teſtator's Debts and Legacies out of his own Eſtate, becauſe it ſhall be preſumed againſt him, that he had ſufficient Aſſets of the Teſtator's Eſtate to diſcharge the whole.

§. VII. What Things are to be put into the Inventory.

1. *All Goods, Chattels, Wares, Merchandizes, movable and immovable, are to be put into the Inventory.*
2. *Leaſes are to be put into the Inventory.*
3. *Corn on the Ground is to be put into the Inventory.*
4. *Graſs or Trees growing are not to be put into the Inventory.*
5. *Whether ſuch Things as are affixed to the Freehold ought to be inventoried.*

6. Whether Debts are to be put into the Inventory.
7. Whether Money due for Land is to be put into the Inventory.

THE (1) Things that are to be put into the Inventory, are all the Goods, and Chattels, and Rights, which were the Teſtator's, or did belong, or were due unto him, at the Time of his Death, whether they be movable or immovable, corporal or uncorporal [a]. Whereunto alſo agree the Statutes of this Realm, whereby it is enacted, *That a true and perfect Inventory be made of the Goods, Chattels, Wares, Merchandizes, as well movable as not movable, whatſoever, that were of the Perſon deceaſed* [b]; and therefore (2) Leaſes ought not to be omitted forth of the Inventory [c], how many ſoever they be.

[a] Franciſ. Porcellin. tract. de inventar. q. 3. Pract. Petr. de Ferrar. de forma libelli quo agitur ad reddendam rationem tutel. Sichard. in §. ſin autem. L. fin. C. de jure delib. n. 9.
[b] Stat. H. 8. an. 21. c. 5.
[c] Cattalla etenim ſunt realia. Terms of Law, verb. Chattels.

Likewiſe (3) *Emblements, or Corn growing upon the Ground*, ought to be put into the Inventory, ſeeing they belong to the Executor [d]; but (4) not the *Graſs or Trees ſo growing*, which belong to the Heir [e]; nor (5) Things that are affixed to the Tenement, and are made Parcel of the Freehold; ſuch I mean as belong likewiſe to the Heir, and not to the Executor [f].

[d] Perkins tit. Deviſe, fo. 99. & hanc opinionem longævus comprobravit uſus, quicquid dicat Sichard. poſt. Angel. in d. §. ſin autem.
[e] Perkins ubi ſupra.
[f] L. acceſſorium. de reg. jur. 6. huc facit L. cætera. de leg. 1. ff. in princ.

And therefore the *Glaſs annexed to the Windows of the Houſe*, becauſe it is Parcel of the Houſe, ſhall deſcend as Parcel of the Inheritance to the Heir, and the Executors ſhall not have it [g]. And although the Leſſee himſelf, at his own Coſt, do cauſe the Glaſs to be put into the Windows; yet the ſame being once Parcel of the Houſe, he cannot take the ſame away afterwards, without Danger of Puniſhment for Waſte [h]. Neither is there any material Difference in Law, whether the Glaſs were annexed to the Window with Nails, or in other Manner, either by the Lord, or by the Tenant; for being once affixed to the Freehold, the ſame cannot be removed by the Leſſee, but ſhall belong to the Heir, and not to the Executors, as is aforeſaid [i]; and therefore the ſame is not to be put into the Inventory, as Part of the Goods of the Deceaſed. The like may be concluded of Wainſcot, that it ought not to be put into the Inventory, as Parcel of the Goods of the Deceaſed; for being annexed unto the Houſe, either by the Leſſor or by the Leſſee, it is Parcel of the Houſe [k]. And there is no Difference whether it be affixed with great Nails, or little Nails, or by Screws, or Irons thruſt through the Poſts or Walls of the Houſe; for howſoever it be affixed, either in Manner aforeſaid, or in any other Manner, it is Parcel of the Freehold; and if the Executors ſhould remove it, they are puniſhable for the ſame [l]. And not only Glaſs and Wainſcot, but any other ſuch like Thing, affixed to the Freehold, or to the Ground, with Mortar and Stone, as Tables *dormant*, Leads, Bays, Mangers, *&c.* for theſe belong to the Heir, and not to the Executor [m]; and therefore they are not to be put into the Inventory of the Goods of the Deceaſed. Nevertheleſs the Box inſealed, or the Cheſt with Evidences of the Land, though the ſame be not affixed to the Freehold, yet becauſe they contain thoſe Things which belong to the Heir, they alſo belong to the Heir, and not to the Executors; and therefore they are not to be put into the

[g] D. Coke, lib. 4. relationum, in *Herlakenden*'s Caſe, in fin. fol. 63, 64.
[h] Ibidem.
[i] Ibidem.
[k] D. Coke ubi ſupra. Quamvis jure civili, quæ ornatus gratia magis quam perficiendi domum ponuntur, ædium partes non ſunt. De qua re vide Rebuff. & DD. in L. pen. de verb. ſig. ff.
[l] D. Coke ubi ſupra.
[m] Rob. Kelleway lib. relation. fol. 88. n. 2. L'abridg. dez Caſes, tit. Exec. fol. 181. n. 4.

Inventory of the Deceaſed's Goods [n]. And ſo it is of Fiſhes in the Ponds, and of Doves in the Dove-cote, ſituate within the Grounds belonging to the Heir; for in this Caſe the Fiſhes in thoſe Ponds and the Doves belong to the Heir, and not to the Executor; and therefore they are not to be put into the Inventory of the Goods of the Party deceaſed [o]. What ſhall we ſay to thoſe Goods which may ſeem to belong to the Wife, rather than to the Husband, as her Apparel, her Bed, her Jewels, or Ornaments for her Perſon? Whether are they to be put into the Inventory of the Husband's Goods? By the Civil Law thoſe Goods belonging to the Wife, which be called *Bona paraphernalia* [p], are not to be put into the Inventory of her Husband's Goods, neither are they ſubject unto the Payment of the Husband's Debts [q]. But whether the Wife's Apparel, with her Bed, Jewels, and Ornaments for her Perſon, be comprehended amongſt thoſe Goods which the Law calleth *Bona paraphernalia*, is the Matter in Queſtion. And it ſeemeth rather that they are not, (her convenient Apparel, agreeable to her Degree, only excepted [r]). Otherwiſe whatſoever Goods belong to the Wife, are preſently, by Virtue of the Marriage become the Husband's, the Property thereof being changed and transferred from the Wife to the Husband [s]. Inſomuch that without her Husband's Licence or Conſent, ſhe cannot diſpoſe thereof, neither by Act in her Life-time, nor at her Death by her laſt Will; which ſhe might do if they were *Bona paraphernalia* [t]. The *Goods to which the Husband is intitled in Right of his Wife, and as Adminiſtrator to her* are not to be put in the Inventory after her Death, but Things which are in Action muſt be put in.

An Adminiſtratrix exhibited an Inventory, in which ſhe put in ſome Goods, which the Inteſtate had given to a younger Child, and which were actually in his (the Child's) Poſſeſſion at the Time of the Death of the ſaid Inteſtate, by Virtue of a Deed of Gift by him made, which Deed ſhe pleaded in the Spiritual Court; and the Plea being rejected, a Prohibition was granted.

But thoſe Goods which the Husband hath by the Intermarriage, the Property being in him, and not in her after Marriage: And it being enacted by the Statutes of this Realm of *England*, *That the Executors ſhall make or cauſe to be made a true and perfect Inventory of all the Goods, Chattels, Wares, Merchandizes, as well movable as not movable, whatſoever, that were of the Perſon deceaſed, and the ſame ſhall cauſe to be indented*, &c. (as by the ſaid Statute more at large appeareth [u]:) It may be concluded, that in Conſtruction of Law, thoſe Goods above-mentioned, and namely the Wife's Jewels, and Chains, are to be put into the Inventory of the deceaſed Huſband's Goods [x]. And yet notwithſtanding, if we ſhall reſpect what hath been uſed and obſerved, ſuch hath ever been the general and ancient Cuſtom, or rather Courteſy of the Province of *York*, as thereby Widows have been tolerated to reſerve to their own Uſe, not only their Apparel, and a convenient Bed, but a Coffer, with divers Things therein neceſſary for their own Perſons; which Things uſually have been omitted out of the Inventory of their deceaſed Husband's Goods [y]. Unleſs peradventure the Husband were ſo far indebted, as the reſt of his Goods would not ſuffice to diſcharge the ſame. In which Caſe the Wife's Jewels, and Chains, and ſuch like, being Things of Decency or Ornament, and not of Neceſſity, have been uſually prized, and put into the Inventory amongſt other Goods of

[n] L'abridg. dez Caſes, edit. Ann. Dom. 1599. tit. Execut. fol. 181. n. 4. Non abſimile eſt quod jus civile ſtatuit in tabula, quippe qua cedit picturæ. Ridiculum enim eſt, picturam Apellis vel Parrhaſii in acceſſionem viliſſimæ tabulæ cedere. Inſt. de rer. deviſ. §. quis in aliena.

[o] R. Kelleway lib. relationum, fo. 118.

[p] L. hac lege. & L. fin. de pactis convent. ſup. dote. C.

[q] L. ob. maritorum. de ux. pro marit. C.

[r] Dyer fo. 166.

[s] Supra. eod. l. par. 2. §. 9. n. 11.

[t] Lindw. in C. ſtatut. de teſta. lib. 3. provinc. conſt. Cant. §. cæterum. verb. propr. uxorum. Per d. L. hac lege. & L. fin. C. de pact. convent. ſuper dote. 3 Bulſt. 315. *James* verſus *James*.

[u] Stat. H. 8. an. 21. c. 5.

[x] D. Stat. H. 8. an. 21. c. 5.

[y] Quemadmodum & in aliis quibuſdam regnis obſervatur, teſte Jo. Garſia, tract. de expenſis, fo. 182.

the Deceaſed, towards the Payment of his Debts. And ſo they ought to be [z].

[z] Per d. Stat. H. 8. an. 21. cap. 5. verſus quod ſuperveniens conſuet. parum v...

The (6) Debts due to the Teſtator are to be put into the Inventory [a]. But the Debts due by the Teſtator, they need not to be put into the Inventory [b]. And if any ſuch Debts be put into the Inventory, the Ordinary ſhall do well to make diligent Examination, whether the Teſtator did owe any ſuch; for many Times Debts are thruſt into the Inventory, which are not due by the Teſtator, and ſo the Legataries and Children of the Deceaſed are often defrauded, at leaſt of ſome Part of their Due, by the Unfaithfulneſs of the Executor, and Negligence of the Ordinary or his Officer.

[a] Gloſ. in L. chirographum. ff. de adminiſtr. tut. Quod verum quidem eſt, ubi exiſtant inſtrumenta; alias non requiritur ut inſcribantur, debent recuperentur, & manibus tractentur, ut quæ interim recte dicantur rep...ta. Lind. in d. c. ſtatut. §. inhibemus, verb. bonis. Pract. Ferrar. forma libelli ad reddendam rationem tut. §. in ſuo. n. 13. Æquum tamen eſt, ut aliqua fiat commemoratio hujuſmodi creditorum, utut incertorum, ne ſublata penitus eorum memoria, decepti maneant defuncti creditores, liberi, legatarii, vel alii intereſſe habentes in ea parte.

[b] Lind. in d. c. ſtatut.

Lands, Tenements and Hereditaments, with the Appurtenances, ſuch I mean as do not belong to the Executor, but deſcend to the Heir, are not to be put into the Inventory; inſomuch that (7) if the Teſtator appoint by his laſt Will, that the ſame Lands be ſold; in this Caſe, by the Statutes of this Realm, neither ſhall the Money thereof coming, nor the Profits of the ſaid Lands for any Time, be accounted as any of the Goods or Chattels of the Perſon deceaſed [c]; and conſequently are not to be put into the Inventory.

[c] Stat. H. 8. an. 21. c. 5. 5 Mar. Dyer 152, 264.

The Lady *C.* was poſſeſſed of divers Leaſes, and conveyed them in Truſt, and afterwards married with *A. B.* the Lady received the Money upon the Leaſes, and with Part of the Money bought Jewels, and other Part of the Money ſhe left, and died: *A. B.* takes Letters of Adminiſtration of the Goods of his Wife; and in a Suit in the Eccleſiaſtical Court, the Court would have compelled him to have given an Account of the Jewels, and for the Monies, to have put them into the Inventory. But the Opinion of the whole Court of *B. R.* was, that he ſhould not put them into the Inventory, becauſe the Property of the Jewels was abſolutely in him as Husband, and he had them not as Adminiſtrator; but of ſuch Things as be in Action, and as he ſhall have as Adminiſtrator, he ſhall be accountable for, and they ſhall be put into the Inventory. And for the Monies received upon Truſt, it was reſolved, that the ſame was the Monies of the Truſtees, and the Wife had no Remedy for it but in Equity; and therefore the Husband ſhall have it as Adminiſtrator. And in that Caſe it was reſolved, that if a Woman do convey a Leaſe in Truſt for her Uſe, and afterwards marrieth, that in ſuch Caſe it lieth not in the Power of the Husband to diſpoſe of it; and if the Wife die, the Husband ſhall not have it, but the Executor of the Wife [d].

[d] T. 15 Car. B. R. Sir *John St. John's* Caſe.

§. VIII. Within

§. VIII. Within what Time the Inventory is to be made.

1. *The Time for making and exhibiting the Inventory, is left to the Moderation of the Ordinary.*
2. *The Inventory ought to be made before the Executor meddle with the Teſtator's Goods, except in ſome Caſes.*

THE (1) Time appointed for the Making and Exhibiting of the Inventory, by the Laws Eccleſiaſtical of this Realm, is left to the Diſcretion of the Ordinary [e], who may appoint a ſhorter or longer Time, as the Diſtance of the Place where the Goods remain, being more or leſs, together with other Circumſtances, ſhall miniſter Occaſion [f].

[e] Text. in c. ſtatut. §. inventarium, tit. de teſta. l. 3. provincial. conſtit. Cant. unde palam eſt non obtinere jus civile, quo hæres ad perficiendum inventarium quandoque 66 dies, quandoque annum habeat; maxime ſi incipiat intra menſem a morte defuncti. Sichar. in L. fin. §. ſin autem. C. de jure de lib.

[f] Lind. in c. ſtatut. verb. arbitrio.

And (2) if the Ordinary do not appoint a Time, the Executor had need to beware, that he do not adminiſter the Goods of the Deceaſed, until he have cauſed an Inventory to be made; for howſoever the Act of him that is named Executor is ſaid to hold in Law before the Proving of the Will [g], and the Making of the Inventory [h]; nevertheleſs, he that ſo preſumeth to meddle and adminiſter as Executor, before he make an Inventory, is ſubject to Eccleſiaſtical Puniſhment [i]; unleſs it be for doing ſuch Things as cannot be deferred till the Inventory be made; as for Intermeddling about the Funerals, or Diſpoſing of ſuch Things as cannot be preſerved with keeping, and ſuch like [k].

[g] Plowd. in caſu inter Greiſb. & Fox.

[h] Lind. in d. c. ſtatut. verb. prius, in fin. illius gloſſ.

[i] Legatin. libertat. de exec. teſtam.

[k] Jo. de Athon. in d. legatin. libertat. verb. inventarium. d. c. ſtatut. §. inhibemus. in text. & in gloſſ.

As the Ordinary may diſpenſe with the Time of bringing in an Inventory, ſo he may diſpenſe with any Inventory at all upon a reaſonable Cauſe; as where it is not convenient to publiſh the intire Sum, or Extent of the Teſtator's Eſtate; for though the Statute requires the Executor to bring in a true and perfect Inventory, and upon proving the Will, the Executor is ſworn ſo to do, yet this may be diſpenſed withal: As for Inſtance; (*viz.*) *Thomas Boon* (being poſſeſſed of a great perſonal Eſtate, lying in ſeveral Places, and upon ſeveral Securities to the Value of 100000 *l.*) deviſed conſiderable Portions to his Daughters, but left his ſecond Son *Chriſtopher* 2000 *l.* and no more; and this to be paid at three Payments by *John* his eldeſt Son, whom he made Executor, and who proved the Will, and made Oath to bring in a true Inventory as uſual; which not being done, he was cited by *Chriſtopher* to bring it in; but the Judge did not think it neceſſary, becauſe two Payments were already made to *Chriſtopher*, and his Brother offered to pay the reſt of the 2000 *l.* Legacy; thereupon *Chriſtopher* appealed to the Delegates, who gave Sentence that there was no Occaſion for an Inventory; then he brought a Commiſſion of Review, and alledged that there might be another Will wherein he might be Executor, and therefore an Inventory muſt be neceſſary; beſides, there might be Specialties taken in his Name, and no Truſt

Boon's Caſe, Raym. 470.

declared, and that his Brother might die Inteſtate; and if ſo, *Adminiſtration de bonis non, &c.* belonged to him: And laſtly, that the Statute requires him to exhibit an Inventory; and upon proving the Will, he is ſworn to do it; but the Sentence was confirmed, for none of theſe Matters now objected ſhall be preſumed: And as for the Statute, it was purpoſely made for the Benefit of *Creditors and Legatees*; and in this Caſe they were all paid, or the Money was tendered to be paid, ſo that none of the Creditors complained; and ſince the Eſtate of the Teſtator conſiſted moſtly in Specialties, it might be prejudicial to the Debtors to have their Debts diſcovered, eſpecially where ſuch a Diſcovery was not neceſſary.

§. IX. Of the Form to be obſerved in the Making of an Inventory.

1. *What Perſons ought to be preſent at the Making of the Inventory.*
2. *Whereof the Inventory is to be made.*
3. *Inventory to be indented.*
4. *Of the Oath of the Executor about the Inventory.*
5. *The Goods and Chattels are to be valued.*
6. *Of the antient Form of praiſing the Goods.*

BY the Statutes of this Realm [1], it is thus enacted concerning the Form to be obſerved by the Executor teſtamentary in making of an Inventory, (*viz.*) "*That the* (1) *Executor or Executors name the Perſons, two at the leaſt, to whom the Perſon dying was indebted or made any Legacy, and upon their Refuſal or Abſence, two other honeſt Perſons, and in their Preſence, and by their Diſcretions, ſhall make, or cauſe to be made, a true and perfect Inventory* (2) *of all the Goods and Chattels, Wares and Merchandizes, as well movable as not movable, whatſoever they were, of the ſaid Perſon ſo deceaſed; and the* (3) *ſame ſhall cauſe to be indented; whereof one Part ſhall be by his ſaid Executor* (*upon* (4) *his Oath to be taken before the Biſhops, Ordinaries, their Officials and Ordinaries, or other Perſon having Power to take Probate of the Teſtament, upon the holy Evangeliſts*) *averred to be good and true; and the ſame one Part indented, he ſhall preſent and deliver to the Keeping of the ſaid Biſhop, Ordinary, or Ordinaries, or other Perſon whatſoever, having Power to take Probate of Teſtaments; and the other Part of the ſaid Inventory indented to remain with the Executor. And that no Biſhop, Ordinary, or Ordinaries, or other Perſon whatſoever, having Authority to take Probate of Teſtaments, upon Pain in the ſaid Statute contained,* (viz. *ten Pounds,*) *do refuſe to take any ſuch Inventory to him or them preſented or tendered, to be delivered as is aforeſaid.*

[1] Stat. H. 8. an. 21. cap. 5.

Thus far the Statute. Whereunto it may be added, that (5) it is not ſufficient to make an Inventory containing all and ſingular the Goods of the Deceaſed, unleſs the ſame be particularly valued and

praiſed [m] by ſome honeſt and skilful Perſons, to be the juſt Value thereof in their Judgments and Conſciences; that is to ſay, at ſuch Price as the ſame may be ſold for at that Time [n].

[m] Bar. in L. fin. C. de magiſt. conven. Hoc addito, quod quoad confectionem inventarii executores magis aſſimilantur tutoribus quam hæredibus, ut ſuperius adnotavi ex Lind. in c. ſtatu. §. inhibemus. de teſta. l. 3. Provincial. conſtitut. Cant. verb. prius. Laur. Va. tract. de Invent. fol. 101.

[n] De probatione rei mobilis vel immobilis, vid. Maſcard. tract. de probac. verb.

Raym. 470, 471.

But as to the Value upon the Appraiſement of theſe Goods it is not binding, nor very much regarded at Common Law; for if 'tis too high, it ſhall not be prejudicial to the Executor or Adminiſtrator; nor if 'tis too low, it ſhall be no Advantage to him; but the Value found by a Jury upon *Plene adminiſtravit* pleaded is binding.

In ancient (6) Time, amongſt many other Solemnities of Inventories [o], this Order was obſerved: Firſt of all, the *movable Goods were inventoried and praiſed, as Houſhold-ſtuff, Corn, and Cattel,* &c. then the Immovable, as Leaſes of Grounds or Tenements; after that, the Debts due to the Teſtator were ſet down [p]. Which Order is for the moſt part obſerved at this Time here in *England*, ſaving that ſome do *omit Leaſes*, wherein they do amiſs [q]; others praiſe them among the Movables; but it were better to praiſe them ſeverally.

[o] De quibus DD. in L. fin. §. fin autem. C. de jure delib.

[p] Franciſc. Porcel. tract. de invent.

[q] Supra ead. part. §. 7.

§. X. Of the Effect and Benefit of an Inventory.

1. *The Goods contained in the Inventory are preſumed to be in the Hands of the Executor.*
2. *The Teſtator is preſumed to have no more Goods than are deſcribed in the Inventory.*
3. *Whether Sufficiency of Goods be preſumed, when there is no Inventory.*

Divers are the Effects and Benefits of an Inventory [r]; this one I thought good to note, namely, that (1) all ſuch Goods and Chattels as are contained in the Inventory, are preſumed to have belonged to the Teſtator, and after his Death to belong and to be in the Power of the Executor [s]. And on the (2) contrary, that no more Goods and Chattels are preſumed to have belonged to the Teſtator than are contained in the Inventory [t].

[r] Quorum Caſtrenſis quinque, Minſingerus ſeptem oſtendit: ille in d. L. ſcimus, iſte in §. ſed noſtra. Inſtit. de hæred. qual. & differentia. Sed horum maxima pars noſtratibus parum prodeſt.

[s] L. ſcimus. §. legitima. C. de jure delib. & ibi Sichard.

[t] Bald. & Sichar. in d. §. legitima.

And therefore if any Creditor or Legatary do affirm, that the Teſtator had any more Goods than be compriſed in the Inventory, he muſt prove the ſame; otherwiſe the Judge is to give Credit to the Inventory, being made in Manner and Form aforeſaid [m]. Although indeed, when (3) the Executor entereth to the Goods of the Deceaſed, and maketh no Inventory thereof, nor will ſuffer the Quantity thereof to be known; in that Caſe our Law preſumeth that the Teſtator had ſufficient to diſcharge, not only all his Debts, but all his Legacies alſo [n].

[m] Alciat. tract. de præſump. reg. 3. præſ. 29. Maſcard. de probac. concl. 939.

[n] Bald. in L. filium. C. famil. herciſ. n. 37. Sichard. in L. fin. §. & ſi præfatam. C. de jure delib. n. 1.

Now the Uſe and Benefit of an Inventory is to give the teſtamentary Heir, or the Adminiſtrator (where there is no Will) the Liberty of Deliberating whether he will accept the Succeſſion, or not, which he may do with the greater Safety, becauſe then he may have a perfect Knowledge to what Value the Goods of the Deceaſed will amount; and by this Means they may ſecure their own Eſtates, becauſe they do not engage themſelves for more than the Value of the Goods; therefore all Executors and Adminiſtrators are allowed the Benefit of an Inventory of Courſe, it being inſtituted originally in their Behalf, and they are ſuppoſed to accept the Succeſſion always under that Benefit. 1 Dom. 619.

§. XI. Of the Probation and Approbation of Teſtaments, and namely before whom they are to be proved.

1. *Divers Queſtions about the Probation of Teſtaments.* See poſtea cap. 14.
2. *Teſtaments are to be proved before the Biſhop or Ordinary.*
3. *Certain Caſes wherein Teſtaments are to be proved before others than before the Biſhop.*
4. *Of the Prerogative of either Archbiſhop.*
5. *What is meant by* Notable Goods.

CONcerning (1) the Probate of Teſtaments, theſe Things are chiefly to be inquired: Before whom the Teſtament is to be proved; by whom; when; how; and what Fees be due in that Behalf.

The Perſon (2) before whom the Teſtament is to be proved, is the Biſhop of the Dioceſe where the Teſtator dwelleth [a], or his Officer [b]; to whom by the ancient Cuſtom obſerved this many Hundred Years, together with the Royal Conſent of the Kings and Princes of this Land, the Probate of Teſtaments hath appertained [c]: Saving (3) in certain Seigniories or Lordſhips, where the Probate of Teſtaments of the Tenants there dwelling doth by Preſcription appertain to the principal Lord [d]: And ſaving in certain peculiar Juriſdictions, where by Preſcription or Compoſition, or other ſpecial Title, the Probate of the Teſtaments of ſuch as dwell and die within thoſe Places doth appertain to the Judge of the Peculiar [e]: And ſaving where no Goods are bequeathed in the Teſtament, but only Lands, Tenements and Hereditaments, or other lay Fees, are deviſed; and that in ſuch Places where neither Inſinuation nor Inrotulation is neceſſary [f]: And ſaving (4) where the Party deceaſed at the Time of his Death had *Notable Goods* extant in divers Dioceſes or Juriſdictions. For the Probate of the Laſt Wills and Teſtaments of ſuch Perſons doth appertain to the Archbiſhop or Metropolitan, within whoſe Province ſuch *Notable Goods* be diſperſed in divers Dioceſes, or

[a] Legatin. libertat. de exec. teſtam. c item quia c. ſtatut. de teſta. l. 3. provincial. conſt. Cant. c. ſtatuimus. lib. provincial. conſtit. Ebor. & Lind. in d. c. ſtat. Doct. & Stud. l. 2. c. 28. Perkins, tit. teſtament, fo. 94. Tract. de repub. Angl. lib. 3. cap. 7. Stat. Hen. 8. an. 21. cap. 5.

[b] Perkins ubi ſupra. Fitz. Abridg. tit. Teſtament, n. 3. Brook eod. tit. n. 12. c. fin. de fide inſtr. extr. Sich. in l. 2. n. 3. C. de teſt.

[c] Lindw. in d. c. ſtat. verb. eccleſiaſticarum libertatum, qui in d. c. item quia, verb. inſinuationem, ſeu publicationem, ait jure Civili non pertinere ad Epiſcopos, ſed jure tantum Authenticorum, (quo jus codicis corrigitur, & quod jus authenticum ſancitum fuit ab imperatore Juſtiniano ultra mille annos retro numerandos.) Non ſolum executio, ſed etiam ipſa inſinuatio & publicatio, coram Epiſcopis ordinariam juriſdictionem exercentibus fieri poteſt, ut firmat Sichardus in L. 2. C. de teſta. 3.

[d] Fitz. tit. Teſtament, n. 2. Doct. & Stud. lib. 2. cap. 28.

[e] Jo. de Athon. in legatin. libertat. de execut. teſta. verb. Ordinario.

[f] Supra, part. 3. §. 3.

[g] Lind. in d. c. ſtatut. verb. ad quos pertinet. Perk. tit. Teſtament, fol. 94. verb. Laicalis feodi. Cant.

or other inferior Juriſdictions [g], whether it be within the Province of *Canterbury* [h], or *York* [i].

[h] Fitz. Abridg. tit. Adminiſtr. n. 7. Brook eod. tit. n. 48. Lindw. in d. c. ſtatutum. Stat. H. 8. an. 23. c. 9. & plenius per Inſtrum. & Actorum libros curiæ prærogativæ Archiepiſc.

[i] Perkins tit. Teſtament, fol. 94. pag. 2. Stat. H. 8. an. 23. c. 9. & evidentius per Inſtrum. & Actorum libros in archivis Archiep. Ebor. fideliter per plurimorum ſeculorum curricula conſervata.

The Probate of Wills did originally belong to the Temporal Courts, and every Legatee had a proper Remedy to recover their Legacies in thoſe Courts; and *Glanvill* tells us, there is a Writ which lies at Common Law to demand a Legacy; *Linwood, who was Dean of the Arches*, and wrote about the Beginning of the Reign of *H. 6.* confeſſes, that the Probate of Wills did not belong to the Ordinaries *de jure*, but only by *Cuſtom*; and Archbiſhop *Parker* publiſhed a Book, *Anno* 1573, wherein he writes, that *Teſtamenta probandi authoritatem Epiſcopi non habebant, nec adminiſtrationis poteſtatem cuiq; delegare non potuerunt.*

Glanv. lib.6. c. 6, 7.

So that the Probate of Teſtaments did belong to Ordinaries but of late Times, *de conſuetudine Angliæ, & non de jure communi*; and the Power to grant Adminiſtration was granted to the Ordinary by the Statute of 31 *E.* 3. *c.* 11. And in antient Time, when a Man died Inteſtate, and had made no Diſpoſition of his Goods, the Truſt of them was committed to the King, who is *Parens patriæ*, to the Intent they might be diſpoſed for the Burial of the Dead, the Payment of the Inteſtate's Debts, and the Advancement of his Wife and Children; and the Ordinary was conſtituted by the King *in loco parentis*, and his Power given him by that Statute [k].

[k] Coke, lib.9. fol.37, 38. *Henſloe*'s Caſe.

But the Ordinary hath no Property in the Inteſtate's Goods, to diſpoſe of them to his own Uſe, or to the Uſe of any other [l].

[l] Coke, lib.9. fol.38.

In Order to diſcover by what Means the Eccleſiaſtical Court obtained Juriſdiction in teſtamentary Matters, it will be proper to conſider by whom that Juriſdiction was exerciſed by the Civil Law, and by whom by the Common Law, what was originally the Law of *England* upon that Head, and what Diſtinctions the Law of *England* has made touching that Juriſdiction.

As to the Juriſdiction in teſtamentary Matters by the Civil Law. The Way of authenticating Wills by the Civil Law was firſt before the *Prætor*; and afterwards before the *Magiſter Cenſus*; for they reckoned Wills to be in the Nature of Judgments in the Diviſions or Diſtributions that a Man himſelf made touching his Eſtate, and therefore they were ſhut up with the Magiſtrate, during the Life of the Perſon, for the Quiet and Repoſe of the Family, but were opened at his Deceaſe; they were ſigned by the Teſtator and ſealed by him, and by the Witneſſes upon a Thread, and carried in to the *Prætor*; and after the Death of the Party the Witneſſes were called, if living, to acknowledge their Seals; and if they were not living then the Seals were broke, and the Will opened in the Preſence of other ſufficient Witneſſes, and the Will was read and regiſtered, and a Copy of it delivered over to any Perſon that would ask for the ſame; for it was reckoned as a Matter of Record, and therefore any Perſon might have acceſs to it. Of this *vide Digeſt. lib. 9. tit.* 3. *De teſtamentis quemadmodum aperiantur, &c.* in the *Code*, *lib. 6. tit.* 32. And when any Legacy was diſpoſed of to pious Uſes, for the Uſe of the Church or for Monaſteries, or for the Poor, the Biſhops were to ſue for the ſame, and ſee

to the Adminiſtration thereof; this appears by the *Code*, *lib.* 1. *tit.* 3. *Law* 42. §. 6. *Vide Neceſſarium*, §. 7. *Amplius*, §. 8. *Si autem contigerit*, §. 9. *Præterea Sancimus.*

Upon this the Biſhops began to intermeddle with the Probate of Wills, which was a mere temporal Authority; but this Invaſion of the Prelates *Juſtinian* would not endure; and therefore in his *Code* he puts the Law againſt the Biſhops Probate of Wills before the Laws herein before-mentioned; and in his *Code*, *lib.* 1. *tit.* 3. *Repetita promulgatione, non ſolum Judices quorumlibet tribunalium, verum etiam defenſores Eccleſiarum hujus almæ urbis, quos turpiſſimum inſinuandi ultimas deficientium voluntates genus irrepſerat, prænonendos eſſe cenſemus ne rem attingant, quæ nemini prorſus omnium, ſecundum conſtitutionum præcepta, præterquam magiſtro cenſus, competit; abſurdum etenim clericis eſt, immo etiam opprobrioſum, ſi peritos ſe velint (oſtendere) deſceptationum eſſe forenſium: Temeratoribus hujus ſanctionis pœna quinquaginta librarum auri feriendis. Datum* XIII. *Kal' Dec' C. P. Juſtiniano* A. 11. *& Apiliano Conſſ.* 524. Thus Things ſtood by the Civil Law.

As to the Canon Law. The Popes, as their Power increaſed, endeavoured to get the Juriſdiction over Teſtaments, *&c.* This appears by the *Decret. lib.* 3. *tit.* 26. *c.* 26. *Si Hæredes juſſa teſtatoris non adimpleverant, ab Epiſcopo loci illius omnis res, quæ eis relicta eſt, Canonice interdicatur, cum fructibus & cæteris emolumentis, ut vota defuncti adimpleantur*; and likewiſe *Decret. lib.* 3. *tit.* 36. *De teſtamentis, c.* 17. *Tua nobis fraternitas intimavit quod nonnulli tam religioſi quam clerici ſeculares, & laici, pecuniam & alia bona, quæ per manus eorum ex teſtamentis decedentium debent in uſus pios expendi, non dubitant aliis uſibus applicare: Cum igitur in omnibus piis voluntatibus ſit per locorum Epiſcopos providendum, ut ſecundum defuncti voluntatem univerſa procedant, licet etiam a teſtatoribus id contigerit interdici, Mandamus quatenus executores teſtamenti hujuſmodi ut bona ipſa fideliter & plenarie in uſus prædictos expendant monitione præmiſſa compellas.* Pope *Innocent* IV. upon this Law, *fo.* 152. ſays, that the Biſhop may diſpenſe this Charity, if there be no Executor appointed by the Will; and if there be an Executor, and he do not fulfil the Will, then he may take it to himſelf. *Decret. lib.* 3. *De teſtamentis, tit.* 26. *c.* 19. *Johannes Clericus, & P. Laicus, executores ultimæ voluntatis O. Clerici Sanctæ Crucis, qui venerabilibus Epiſcopis locis de bonis ſuis in ultima voluntate legavit, mandans inde ſuper ſatisfieri creditoribus per eoſdem, poſt mandatum ſuſceptum per Dioceſanum cogi debent teſtatoris explere ultimam voluntatem.* See *Innocentius in Legem* 153. *Panormitan*, upon the Law of *Si Hæredes*, ſays, That this Matter of Wills, even where the Deviſe is to pious Uſes, is *mixti fori*, and that the Heir or Executor is to have a Year's Time to fulfil the Will before he can be compelled to do it by Eccleſiaſtical Cenſure. Panorm. tit. 4. fo. 157.

Upon the ſame Law *Tua nobis*, *Panormitan* ſays, that the Biſhop is to compel by Eccleſiaſtical Cenſure the Executor to the Performance of a Will to pious Uſes, although the Will it ſelf ſays, that the Biſhop ſhould not intermeddle; for they look upon that as an irrational Part of the Deviſe which is in it ſelf void. Ibid. fo. 176

The laſt Chapter *verbo Johannes*. The Caſe, as *Panormitan* ſtates it, was, where after Debts paid, the Reſidue was left to pious Uſes, and then the Biſhop was to compel the Payment of Debts,

and afterwards to ſee the Diſpoſition of the *Reſiduum.* I do not find that any of the Canoniſts pretend that Wills are of Eccleſiaſtical Conuſance *ſua natura*, but only ſuch Wills as were made for pious Uſes. And *Lyndwood*, *fo.* 174. *verbo Approbatis*, ſays, that the Juriſdiction of the Eccleſiaſtical Courts touching teſtamentary Matters is by the Cuſtom of *England*, and not by the Eccleſiaſtical Law.

Of the Eccleſiaſtical Juriſdiction of Teſtaments by the Law of *England.*

Wilkins 78. Lamb. Saxon Law 64. In *England* the Biſhop and Sheriff ſat together in the County-Court as appears by the Laws of King *Edgar*, *cap.* 5. *De Comitiis. Centuriæ Comitiis quisque (ut ante præſcribitur) intereſto; oppidana ter quotannis habentur Comitia; celeberrimus autem ex omni ſatrapia bis quotannis conventus agitur, cui quidem ill. Dioceſis Epiſcopus & Senator interſunto, quorum alter jura divina, alter humana populo edoceat.* Ibid. 136. Lamb. Saxon Laws 111. *Leges Canuti*, *c.* 17. *De Comitiis municipalibus: Ter in anno habeantur Comitia municipalia, & duo conventus (aut plures etiam) ex omni provincia, & illis interſint Epiſcopus & Senator, & ibi ubique doceatur tam jus divinum quam humanum.* From theſe Laws it plainly appears, that the Probate of Teſtaments was in the County-Courts.

William the Conqueror was the firſt that ſeparated the Eccleſiaſtical Court from the Civil. *Selden*, in his Notes upon *Eadmerus* 167. gives us the very Charter of ſuch Separation; *Propterea mando & regia authoritate præcipio, ut nullus Epiſcopus aut Archidiaconus de legibus Epiſcopalibus amplius in hundredo placita teneat, nec cauſam, quæ ad regimen animarum pertinet, ad judicium ſecularum hominum adducant.* This Charter, as Mr. *Selden* has told us, was recited in a Cloſe Roll of *Richard* II. and then confirmed; but the Charter of *William* I. does not mention teſtamentary Matters, or the Probate of Wills to be of Eccleſiaſtical Conuſance, but only ſays, that the Crimes, that were to be preſented *pro ſalute animæ*, were to be of that Conuſance.

That which ſeems firſt to have given Birth to the Eccleſiaſtical Juriſdiction was the Charter of *Henry* I. which ſays, *Si quis baronium vel hominum meorum infirmabitur, ſicut ipſe daret vel dari diſpoſuerit pecuniam ſuam, ita datum eſſe concedo, quod ſi ipſe confectus vel annis vel infirmitate pecuniam ſuam nec dederit nec dari diſpoſuerit, uxor ſua, ſive liberi, aut parentes & legitimi hæredes ſui, pro anima ejus eam decidant.* This let in the ſeveral Canons herein before-mentioned into *Englaud*; for ſince the perſonal Eſtate was to be diſpoſed of for the Good of the Soul, they looked upon every Will to be a Diſpoſition of the Teſtator's in a gratuitous or charitable Senſe; that whatever was left, was to be diſpoſed of by the Executor for the good of the Soul: So that all the Canons touching charitable Diſpoſitions were to take place in *England.*

In the Time of *Richard* I. when he was in Confinement, the Clergy got a Confirmation from him of the Eccleſiaſtical Immunities. This is mentioned by *Math. Paris* 161. *Item, Diſtributio rerum, quæ in teſtamento relinquuntur, authoritate Eccleſiæ fiet, nec decima pars, ut olim, ſubſtrahetur; ſi quis enim ſubitanea morte vel quolibet caſu præoccupatus fuit, ut de rebus ſuis diſponere non poſſit, diſtributio bonorum ejus Eccleſiaſtica authoritate fiet.* This Charter is likewiſe mentioned in the ſame Terms in *Radulphus de Diceto*, one of the *Decem Scriptores*, *fo.* 658. theſe Eccleſiaſtical Immunities

were confirmed by the Pope, and the Confirmation appears in *Vol.* 1. *Foedera* 104. though there is no expreſs Mention of a teſtamentary Juriſdiction.

Note; Alſo it appears by the Charter, that the King releaſes the Tenth that uſed to be taken on the Death of the Tenant; and thenceforward the King and his Lords only took Heriots, as an Acknowledgment, in lieu of ſuch Decimation.

From henceforth the Eccleſiaſtical Court began to conſider a proper Method for the Publication of Wills: Therefore, when any Perſon died, they ſummoned in the Executor, or next of Kin, to take Care of his Soul, and the Executor was obliged to bring in the Will, and both Executors and Adminiſtrators were obliged to bring in an Inventory of his Goods, and the Charges were lightened by the Canons in order to bring every Thing into the Eccleſiaſtical Court. *Lynwood* 176. *Canons of Simon Mepham.* And it appears by the Canons of *Stratford*, that the Reſidue in the Hands of the Executor was to be diſtributed for the Good of the Soul. *Lynw.* 178. And by the Canons of *Ottobon*, an Inventory was to be exhibited. *Lynw.* 167.

Notwithſtanding all this, the Juriſdiction of the County-Court ſtill continued, for this was acknowledged to be a Matter *mixti fori*; and therefore they could not hinder the County-Court from proceeding even according to their own Common Law.

But in order to get the whole Juriſdiction in the Time of *Richard* 2. as is mentioned by *Selden* in his Notes on *Eadmerus*, they got the King to publiſh the Law of *William* the Conqueror, and confirm the ſame, that no Matters of Eccleſiaſtical Conuſance ſhould be tranſacted in the County-Courts. This is the Charter of 2 *Rich.* 2. *membrano* 12. *n.* 5. and is mentioned in *Selden's Eadmerus* 168.

From henceforward the Clergy had the whole Juriſdiction of Wills, becauſe the County-Court could not receive the Probate, *&c.* and the King's Courts had never intermeddled with it, becauſe by the Charter of *Henry* 1. herein before-mentioned, and likewiſe by *Magna Charta*, *c.* 18. the King had granted the Liberty to his own Tenants to diſpoſe of their Goods, and therefore the Will touching the perſonal Eſtate never received any Sanction in the immediate Court of the King.

This reconciles that Caſe of *Fitzherbert Abr. tit. Teſtament*, *fo.* 148. where 'tis ſaid by *Fairfax*, that it was but of late that the Church had the Probate of Wills, which was by an Act (I ſuppoſe he muſt mean the Confirmation of *Richard* 2. herein before-mentioned, for there is no Act of Parliament that gives them that Probate). And he ſays, that in other Countries the Probate was of temporal Conuſance; which *Selden* notes to be true in all Countries except *France*; and *Tremale* in that Caſe aſſerts the Uſage of proving Wills in Courts-Baron, which certainly may be where the Cuſtom prevails.

In the 11th of *Henry* 7. *Fineux* aſſerts, that the Probate of Wills did not belong to the Spiritual Courts by the Eccleſiaſtical Law, but came to them by Cuſtom and Uſage: And theſe are the Foundations on which my Lord *Coke*, in *Henſloe*'s Caſe 9 *Rep.* 38. concludes, that when the Will is proved in the Eccleſiaſtical Court, the Court has executed its Authority; but the Executors are to ſue in the Temporal Courts to get in the Eſtate of the Deceaſed.

As to the ſeveral Diſtinctions that have been made by the Law of *England* touching this Juriſdiction, the Spiritual Court is the only Court now that has Authority to receive the Probate of Wills, and to give

give a Sanction to them, becauſe the Juriſdiction of the County-Court is loſt by Non-uſage; and ſince *Magna Charta*, *c.* 18. the King's Courts did not intermeddle with the Goods of a deceaſed Tenant. But here muſt be excepted all Courts-Baron, that have had the Probate of Wills Time out of Mind, and have always continued that Uſage.

The Seal of the Eccleſiaſtical Court does authenticate the Will, for there the Will is to be brought in and proved; and therefore the Caſe in *Raymond* 406, 407. is certainly good Law, that the Seal of the Ordinary cannot be contradicted, becauſe if there be no Way in the Temporal Court to prove the Will relating to Chattels, it muſt go on in the Spiritual Court, and the Determination there muſt be final; for the Temporal Courts cannot make a Judgment concerning the Will contrary to what was made in the Eccleſiaſtical Court; and therefore it is certainly good Law, that if they ſhew a Probate under the Hand of the Ordinary, they cannot prove in Evidence that the Will was forged, or that the Teſtator was *Non compos*, or that another Perſon was Executor; but they may give in Evidence that the Seal was forged, or the Will repealed, or that there were *Bona notabilia*, becauſe that is not in Contradiction to the real Seal of the Court, but admits the Seal and avoids it. *Lev.* 235. *Vaugh.* 207. 1 *Show.* 293. And therefore ſince the Eccleſiaſtical Court has the Probate of Wills now ſettled by Cuſtom, the Temporal Court cannot prohibit them in their Inquiries, whether the Teſtator was *Compos mentis* or not, or whether the Will be revoked or not, becauſe that is neceſſary for the authenticating the Will. *Hard.* 131, 313.

If a temporal Matter be pleaded in Bar of an Eccleſiaſtical Demand, they muſt proceed in the Eccleſiaſtical Court according to the Temporal Law, or elſe the Temporal Court will hinder them; as if Payment be pleaded in Bar of a Legacy, and there is but one Witneſs, which the Eccleſiaſtical Court will not admit, there the Temporal Court will prohibit them, becauſe it is a Matter temporal that hinders the Eccleſiaſtical Demand. *Shutter & Ux'* v. *Friend*, *Show.* 158, 173. 1 *Vent.* 291. 3 *Mod.* 283. But if, upon a Probate of a Will, they alledge on the other Side that the Will was revoked, and they would prove the Revocation by one Witneſs, according to the Reſolution in *Yelv.* 92. *Brown* and *Wentworth*, (which is but that of three Judges againſt two, and ſeems againſt the Opinion of 2 *Roll's Abr.* 299.) they might be prohibited; this ſeems to intrench upon their Juriſdiction; for if they cannot Judge by their Law, whether the Will is revoked or not, they cannot judge whether there is a Will or no Will. Indeed the Judges there ſay, that the Revocation is a temporal Matter, and therefore it is to be proved according to their Law by one Witneſs: But then we do not ſuffer them to determine touching the Validity of a Will of a perſonal Eſtate, which every Body allows to be of Eccleſiaſtical Conuſance. But if the Spiritual Court do admit a Will, but yet will not give the Probate to the Executor, becauſe he cannot give Security for a juſt Adminiſtration, it ſeems that a *Mandamus* will lie; and this was reſolved in the Caſe of *The King* and *Sir Richard Raines*, *Mich.* 10 *W.* in *B. R.* for tho' they are to determine whether there be a Will or not; yet if there be a Will the Executor has a temporal Right, and they cannot put any Terms upon him but what are mentioned in the Will; therefore if they will not grant the Probate, where they admit there is an Executor, the Court will grant a *Mandamus*.

If a Man gives Lands to be ſold for the Payment of Debts, and diſpoſes of the Money to ſeveral Perſons, that cannot be ſued for in the Eccleſiaſtical Court, but only in a Court of Equity; becauſe that is not a Legacy merely of Goods and Chattels, but it ariſes originally out of Lands and Tenements, and they have a teſtamentary Juriſdiction touching Chattels only. *Hob.* 365. 2 *Roll.* 285.

A Court of Equity may hold Plea concerning a Legacy, and likewiſe concerning the Deviſe of a *Reſiduum*, which is but a Legacy: They may in notorious Caſes declare a Legatee, that has obtained a Legacy by Fraud, to be Truſtee for another; as if the Drawer of a Will ſhould inſert his own Name inſtead of the Name of the Legatee, no doubt he would be a Truſtee for the real Legatee. As to a Deviſe of the *Reſiduum*, nothing can be more clear; for ſince the Caſe of *Foſter* and *Munt*, 1 *Vern.* 473. wherever an Executor hath had a ſpecific Legacy, he was looked on as a Truſtee of the *Reſiduum*, for the Relations, in a Courſe of Diſtribution; and no Body ever attacked theſe Decrees in Favour of the Relations, upon this of Argument, that they were contrary to the Eccleſiaſtical Juriſdiction. See 2 *Vern.* 648.

But in all Caſes a Court of Equity muſt conſider what was the real Intent of the Teſtator; and they cannot declare a Truſt according to their own Fancy, nor according to what the Teſtator ſhould have willed, for then they make the Will and not the Teſtator; but they may, according to the real Intention of the Teſtator, declare a Truſt upon ſuch Wills, although it be not contained in the Will it ſelf, and eſpecially in theſe three Caſes:

Firſt, In the Caſe of a Fraud upon a Legatee, as before is mentioned.

Secondly, Where the Words imply a Truſt for the Relations, as in the Caſe of a ſpecific Deviſe to the Executor, and no Diſpoſition of the *Reſiduum*.

Thirdly, In the Caſe of a Legatee's promiſing the Teſtator to ſtand as a Truſtee for another.

And no body has thought, that Declaring a Truſt in theſe Caſes is an Infringement upon the Eccleſiaſtical Juriſdiction.

The Commiſſary of the Biſhop of the Dioceſe granted Letters *ad colligendum & ad vendendum ea quæ peritura eſſent, & inde computum reddere*; the Grantee ſold Goods which would not keep, but periſhed; and an Action of Debt was brought againſt him as Executor of his own Wrong: And it was adjudged maintainable, becauſe the Ordinary himſelf had no ſuch Power, and therefore could not give it to another [m].

[m] 7 Eliz. Dy. 256.

If Leſſee for Years of Lands by his Laſt Will deviſe his Term to *A.* whom he maketh his Executor, and dieth; *A.* entered before any Probate of the Will, and held the ſame for a Year, and died. *Per Curiam*, The Property of the Term was lawfully veſted in the Executor by his Entry, and the Deviſe well executed without any Probate [n].

[n] M. 22 Eliz. Dyer 367.

The Probate of every Biſhop's Teſtament, or the granting Adminiſtration of his Goods, although he had no Goods but within his own Juriſdiction, doth belong to the Archbiſhop of the ſame Province [o].

[o] Coke 4 Inſtit. ch. 74.

5 Rep. *Ruſſel's* Caſe, 1 Inſt. 292. S. P.

An Executor may poſſeſs himſelf of the Teſtator's Goods; he may receive or pay Debts, and may diſcharge any Legacies; he may likewiſe pay any Debt due to the Teſtator, and all this *before he prove the Will*, becauſe the Right of Action is in him before *Probate*, for that gives him no Intereſt, but the Right he hath is by Virtue of the Will.

He is Executor *before Probate to pay Debts*, and to be ſued for Non-payment, but not to have an Action unleſs he prove the Will before he declares, for in ſuch Caſe the Impediment is removed *ab initio*; and therefore it hath been adjudged, that where an Executor brought an Action *before Probate*, if he concludes his Declaration with a *Profert hic in Curia literas teſtamentarias*, it is well enough; ſo if he hath the Reverſion of a Term for Years, in which a Rent was reſerved by the Teſtator, he may *diſtrain* and avow for the Rent *before Probate*.

Duncomb v. *Walter*, 1 Vent. 370. Raym. 479. 3 Lev. 57. S. C.

He may bring an Action of *Treſpaſs* for the Goods of the Teſtator taken unjuſtly from *himſelf*, or he may replevy ſuch Goods if impounded, and this *before Probate*, becauſe theſe are Actions which ariſe out of his *own Poſſeſſion*; and ſo it was adjudged in [p] *Greysbrook* and *Fox's* Caſe, (*viz.*) That an Executor *before Probate* may poſſeſs himſelf of the Teſtator's Goods; and if Adminiſtration ſhould be granted to another, and he ſhould take the Goods from the Executor before Probate, he might then prove the Will, and bring an Action of Treſpaſs againſt the Adminiſtrator, becauſe the Executor hath a Right to the Poſſeſſion of the Goods of his Teſtator, and the Adminiſtration is void as ſoon as the Will is proved.

[p] Plow. Com. 257. 2 And. 151.

Middleton's Caſe, 5 Rep. 28.

So if he *releaſe a Debt before Probate*, and afterwards proves the Will, the Releaſe is good in Law.

Parton verſ. *Baſeden*, 1 Mod. 215.

Judgment was had againſt the Teſtator; and upon a *Devaſtavit* returned, againſt his Executor, and he Pleading, a ſpecial Verdict was found, (*viz.*) That the Defendant was made Executor, and that he dwelt in the ſame Houſe with his Teſtator, who died; and that *before Probate* of his Will, he (the Executor) poſſeſſed himſelf of the Goods, which were appraiſed and put into an Inventory, and Part of them were ſold, and with the Money ariſing by ſuch Sale he paid a Debt due from the Teſtator to *T. S.* and converted the reſt to his own Uſe, and that afterwards he refuſed before the Ordinary to prove the Will, and thereupon Adminiſtration was granted to the Widow of the Teſtator: Adjudged that this was void, becauſe the other was rightful Executor, and had the Poſſeſſion of the Whole, tho' he adminiſtered but Part, yet he ſhall be charged with the Whole.

Partridge's Caſe, 2 Salk. 553.

Libel to prove a Will, the Defendant ſuggeſted for a Prohibition that the Will was of *Lands* and *Legacies*; but the Prohibition was denied, becauſe the Statute of *H.* 8. never intended to diminiſh the Juriſdiction of the Spiritual Court as to Probates of Wills; and in this Caſe it might be inconvenient to ſtay the Probate, becauſe whilſt it is ſtayed the Executor cannot ſue for Debts, and by that Means they may be loſt; and it would be to no Purpoſe to grant a Prohibition *as to the Lands*, becauſe as to them the Probate will be *coram non judice*.

Nota; In this Caſe the Marqueſs of *Winton's* Caſe denied to be Law.

1 Vern. 200.

Where an Executor dies before Probate, his Executor cannot take upon him to prove the Will of the firſt Teſtator, but Adminiſtration ought to be granted with the *Will annexed* to the Reſiduary Legatee,

if there is any ſuch, or to the next of Kin, according to the Reſolution in *Iſted*'s Caſe.

So where the firſt Executor dies Inteſtate, and before Probate of his Teſtator's Will, the Adminiſtration of the Teſtator's Goods ought to be granted to the next of Kin, becauſe in ſuch Caſe he is dead Inteſtate; but if the Executor had proved the Will, and then died Inteſtate, the Ordinary may grant Adminiſtration to whom of Right it belongs, and that Perſon might adminiſter the Goods of the firſt Teſtator.

A Bill in Chancery was exhibited by an Adminiſtrator, to have a Diſcovery of the perſonal Eſtate of the Inteſtate; the Defendant pleaded, that the ſuppoſed Inteſtate made a *nuncupative Will* in the Preſence of *Nine*, or more, credible Witneſſes, by which Will he made the Defendant Executor, and that he proved the Will according to the Cuſtom of the Country where the Teſtator died, and denied that he left any Eſtate but what was at *Naples*, where he died; and this Plea was allowed to be good; for where the dead Perſon left no Eſtate in *England*, it is not neceſſary that his Will ſhould be proved here, no more than if a Man died and left an Eſtate in *Scotland*. *Jauncy* verſus *Sealy*, 1 Vern. 307.

The Probate of a Will may be ſuſpended by an Appeal, but it is a Queſtion whether it may be revoked by the Ordinary after once it is granted.

ff. The Teſtator made *Adiel Mills* Executor, and deviſed (after ſeveral Legacies) the Reſidue of his Eſtate to *Gillam Hills*, and died; *Mills* (the Executor) proved the Will and became a *Bankrupt*, then *Hills the Reſiduary Legatee*, cited the ſaid Executor to ſhew Cauſe why the Adminiſtration granted to him ſhould not be revoked, and Adminiſtration *cum Teſtamento annex'* granted to the ſaid *Hills*, for that *Mills* being barely an Executor, and having no Intereſt in the Eſtate, but being now incapable to manage his own Affairs, either for Want of Honeſty or good Conduct, he was by Conſequence incapable of being an Executor, and the Probate for that Reaſon ought to be revoked; and it was ſo; but upon a Motion for a Prohibition it was inſiſted, that the Probate was not revocable, for if it ſhould, that would be to make a new Will for the Reſiduary Legatee; that Bankruptcy was no Diſability or Breach of Truſt *quoad* the Executorſhip, becauſe the Law protects every Thing which a Man hath as Executor, from all Forfeitures which might incur by his Acts or Omiſſions; that the Teſtator himſelf judged this *Mills* fitter to manage his (the Teſtator's) Eſtate than his own Sons, and that the *Mens teſtandi* was as ſtrong in him to make *Mills Executor*, as it was to make *Gillam Reſiduary Legatee*; that the Granting the Probate was only to enable the Executor to ſue, for he might releaſe or pay Debts before Probate; it is true, where *Adminiſtration* is granted, it may be afterwards revoked if the Adminiſtrator ſhould become a Bankrupt, becauſe he is made by the Court; but the Executor is conſtituted by the Party himſelf, and the Law intitles him to the Probate; and for theſe Reaſons a Prohibition was granted. *Hills* verſus *Mills*, 1 Shower 293. 1 Salk. 36.

Mandamus to the Judge of the Prerogative Court to grant a Probate of a Will, who returned, that the Executor abſconded and was incapable, *&c.* this was held an ill Return; for ſince the Teſtator thought him a proper Perſon to be Executor, the Ordinary ſhall not adjudge him otherwiſe, upon any Diſability ariſing by the Canon Law; neither can the Ordinary make him give Security to perform the *Rex* verſ. Sir *Richard Raines*, 1 Salk. 299.

the Will, becauſe the Teſtator thought him ſufficient, and he hath a Temporal Right by being made Executor, for which he cannot ſue before Probate.

North verſus *Wells*, 1 Lev. 235. Raym. 405.

The Plaintiff gave in Evidence the Probate of a Will to prove an Executrix, and the Defendant would have proved that the Will was forged, but he was not admitted to ſuch Proof, becauſe it was againſt the Seal of the Ordinary in a Matter proper for his Juriſdiction; but Evidence might be given that the Seal was forged, or that there were *Bona notabilia*, or the Party might be relieved on an Appeal.

A Feme Covert, purſuant to a Power given her by her Father's Will, made a Will of Lands only, touching which a Suit was depending in Chancery. A Suit was inſtituted in the Prerogative Court of *York* to compel the Plaintiff to bring in this latter Will, that it might be proved: Whereupon the Plaintiff moved in Chancery, that an Injunction before obtained might extend to ſtay Proceedings in the Eccleſiaſtical Court; but denied; the Eccleſiaſtical Court proceeding without Juriſdiction; the proper Remedy is by Prohibition in the Courts of Common Law. *Barn. Rep. fo.* 29.

On an Appeal from the Rolls it appeared, that *Phœbe Wallis*, being poſſeſſed of a perſonal Eſtate in 1723. made her Will, and left all to the Plaintiff; the Will was deſtroyed in her Life-time; the Plaintiff inſiſted it was done by the Defendant, and the Defendant inſiſted it was done by the Teſtatrix; this Matter was litigated in the Spiritual Court, and Adminiſtration granted to the Defendant as next of Kin. A Bill being brought in Chancery as being a Matter of Fraud, for which he could have no Remedy in the Spiritual Court, as having no Tranſcript of the Will; and it was inſiſted, that if it was deſtroyed in the Life-time of the Teſtatrix, he could have no Remedy there; *aliter* if after, ſo inſiſted to have an Iſſue to try whether it was deſtroyed by the Teſtatrix. But the Lord Chancellor was of Opinion, that the Eccleſiaſtical Court had Juriſdiction, and the Parties have no Occaſion to come here; for if the Will was deſtroyed by the Defendant, the Plaintiff is not without Remedy, he may bring his Action; ſo affirmed the Decree. *Eldred* verſus *Child*, *Select Caſes in Chancery*, *fol.* 49.

If a Teſtament be diſproved in the Eccleſiaſtical Court, and the Party appeals to the Metropolitan, and it is there diſproved, and afterwards there is an Appeal to the Court of Delegates, and it is there diſproved alſo, and at laſt the Party appeals to the Queen in Chancery, by the Stat. 25 *H.* 8. and there alſo it is diſproved before the Commiſſioners: If the Queen *ex regali authoritate* might grant Letters of Adminiſtration, was the Queſtion? The Opinion of the Juſtices of the Common Pleas was, that ſhe might, becauſe the ſaid Court of Chancery is the higheſt Court, and the Matter being once there, it cannot be determined in any inferior Court: And then the Party may ſhew in his Declaration generally the Matter; and that Adminiſtration was granted to him by the Queen *ex ſua regali authoritate* under the Seal of the Court of Delegates [q].

[q] M. 24 Eliz. C. B. 10 Jac. B. R. *Stephenſon's* Caſe. Contra, that the Court of Delegates cannot grant Letters of Adminiſtration.

And leſt Executors ſhould be cited to appear in divers Courts for the Probate of any Will; in this Caſe, by the late Conſtitutions and Canons Eccleſiaſtical of the Biſhops and Clergy of this Realm, con-

firmed by the King, and commanded to be obſerved in both the Provinces of *Canterbury* and *York*, it is ordained as followeth, *viz.* [r] "*For-* "*aſmuch as many heretofore have been by Apparitors, both of infe-* "*rior Courts and of the Courts of Archbiſhops Prerogatives, much* "*diſtracted, and diverſly called and ſummoned, for Probate of Wills,* "*or to take Adminiſtration of the Goods of Perſons dying Inteſtate,* "*and thereby vexed and grieved with many cauſeleſs and unneceſ-* "*ſary Troubles, Moleſtations and Expences; We conſtitute and ap-* "*point, that all Chancellors, Commiſſaries, or Officials, or any other* "*exerciſing Eccleſiaſtical Juriſdiction whatſoever, ſhall at the firſt* "*charge with an Oath all Perſons called, or voluntarily appear-* "*ing before them, for the Probate of any Wills, or the Adminiſtra-* "*tion of any Goods, whether they know, or (moved by any ſpecial* "*Inducement) do firmly believe, that the Party deceaſed (whoſe* "*Teſtament or Goods now depend in Queſtion) had at any Time of* "*his or her Death, any Goods, or good Debts, in any other Dioceſe,* "*or Dioceſes, or peculiar Juriſdiction within that Province, than* "*in that wherein the ſaid Party died, amounting unto the Value* "*of Five Pounds. And if the ſaid Perſon, cited, or voluntarily* "*appearing before him, ſhall upon his Oath affirm, that he knows-* "*eth, or (as is aforeſaid) firmly believeth, that the ſaid Party de-* "*ceaſed had Goods, or good Debts, in any other Dioceſe, Dio-* "*ceſes, or peculiar Juriſdiction within the ſaid Province, unto the* "*Value aforeſaid, and particularly ſpecify and declare the ſame;* "*then ſhall he preſently diſmiſs him, not preſuming to intermeddle* "*with the Probate of the ſaid Will, or to grant Adminiſtration of* "*the Goods of the Party ſo dying Inteſtate: Neither ſhall he re-* "*quire or exact any other Charges of the ſaid Parties, more than* "*ſuch only as are due for the Citation and other Proceſs had and* "*uſed againſt the ſaid Parties upon their farther Contumacy; but* "*ſhall openly and plainly declare and profeſs, that the ſaid Cauſe be-* "*longeth to the Prerogative of the Archbiſhop of that Province, wil-* "*ling and admoniſhing the Party to prove the ſaid Will, or require* "*Adminiſtration of the ſaid Goods, in the Court of the ſaid Prero-* "*gative, and to exhibit before him the ſaid Judge the Probate or* "*Adminiſtration under the Seal of the Prerogative, within Forty* "*Days next following. And if any Chancellor, Commiſſary, Official,* "*or other exerciſing Eccleſiaſtical Juriſdiction whatſoever, or any* "*their Regiſter, ſhall offend therein, let him be* ipſo facto *ſuſpended* "*from the Execution of his Office, not to be abſolved or releaſed, un-* "*til he have reſtored to the Party all Expences by him laid out con-* "*trary to the Tenor of the Premiſſes: And every ſuch Probate of* "*any Teſtament or Adminiſtration of Goods ſo granted, ſhall be held* "*void and fruſtrate to all Effects of the Law whatſoever.*

"*Furthermore, we charge and enjoin, that the Regiſter of every* "*inferior Judge do, without all Difficulty or Delay, certify and* "*inform the Apparitor of the Prerogative Court, repairing unto* "*him, once a Month, and no oftner, what Executors or Admini-* "*ſtrators have been by his ſaid Judge, for the Incompetency of his* "*own Juriſdiction, diſmiſſed to the ſaid Prerogative Court, with-* "*in a Month next before, under Pain of a Month's Suſpenſion from* "*the Exerciſe of his Office for every Default therein. Provided* "*that this Canon, or any Thing therein contained, be not prejudi-* "*cial to any Compoſition between the Archbiſhop and any Biſhop or*

[r] Lib. Canon. Eccleſ. edit. Ann. Dom. 1603. c. 92.

" *other Ordinary, nor to any inferior Judge, that ſhall grant any* " *Probate of Teſtament, or Adminiſtration of Goods, to any Party* " *that ſhall voluntary deſire it, both out of the ſaid inferior Court,* " *and alſo out of the Prerogative. Provided likewiſe, that if any* " *Man die* in itinere, *the Goods that he hath about him at that* " *preſent ſhall not cauſe his Teſtament or Adminiſtration to be liable* " *to the Prerogative Court*". *And concerning the Rate of* Bona no- " tabilia, *liable to the Prerogative Court, it is ordained in the very*

* D. lib. Can. 93. " *next* * *Canon as followeth*, viz.

" *Furthermore, we decree and ordain, that no Judge of the Arch-* " *biſhop's Prerogative ſhall henceforward cite, or cauſe to be cited* " ex officio, *any Perſon whatſoever, to any of the aforeſaid In-* " *tents, unleſs he have Knowledge, that the Party deceaſed was* " *at the Time of his Death poſſeſſed of Goods and Chattels in* " *ſome other Dioceſe, Dioceſes, or peculiar Juriſdiction within* " *that Province, than in that wherein he died, amounting to the* " *Value of Five Pounds at the leaſt; decreeing and declaring, that* " *whoſo hath not Goods in divers Dioceſes to the ſaid Sum or* " *Value, ſhall not be accounted to have* Bona notabilia. *Always* " *provided, that this Clauſe here, and in the former Conſtitutions* " *mentioned, ſhall not prejudice thoſe Dioceſes, where, by Compo-* " *ſition or Cuſtom,* Bona notabilia *are rated at a greater Sum. And* " *if any Judge of the Prerogative Court, or any his Surrogate, or* " *his Regiſter, or Apparitor, ſhall cite, or cauſe any Perſon to be* " *cited into his Court, contrary to the Tenor of the Premiſſes, he* " *ſhall reſtore to the Party ſo cited all his Coſts and Charges, and* " *the Acts and Proceedings in that Behalf ſhall be held void and* " *fruſtrate; which Expences, if the ſaid Judge, or Regiſter, or Ap-* " *paritor, ſhall refuſe accordingly to pay, he ſhall be ſuſpended from* " *the Exerciſe of his Office, until he yield unto the Performance* " *thereof.*

What (5) is meant by *Notable Goods* in this Place, or when they are ſo to be termed, divers Authors have been of divers Opinions. Some have been of this Opinion, that if the Teſtator died poſſeſſed of Goods or Chattels to the Value of Forty Shillings in two ſeveral Dioceſes, then he ought to be deemed to have *Notable Goods* [s]. Others have been of that Mind, that the Teſtator is to be deemed to have *Notable Goods*, though at the Time of his Death he had but one in another Dioceſe [t]. Others do not only vary from the former Opinions, but are alſo at Variance with themſelves, accounting thoſe for *Notable Goods*, ſometimes, when they extend clearly to an Hundred Shillings ſterling; ſometimes, when they extend to Ten Pounds, eleven Shillings Six-pence; ſometimes, when they extend to Twenty-three Pounds, Three Shillings Farthing, and not under [u]. Finally, others are of this Judgment, that he is ſaid to have *Notable Goods*, which hath Goods to the Value of Ten Pounds of currant Money of *England* diſperſed in divers Dioceſes or Juriſdictions. *And this Opinion ſeemeth to me to be moſt commonly received* [x].

[s] Perkins, tit. Teſtament, fol. 34.

[t] Fitz. tit. Adminiſt. n. 7.

[u] Lindw. in d. c. ſtatutum verb. Laicis.

[x] Plowd. in caſe inter Greisb. & Fox, fol. 281.

(But the Law at this Day is, that Five Pounds is the Sum or Value of *Bona notabilia*. But where by Compoſition or Cuſtom in any County, *Bona notabilia* are rated at a greater Sum, the ſame is to continue unaltered: As in the Dioceſe of *London* it is Ten Pounds by Compoſition [y]. And if any Man die *in itinere*, or in a Journey, the Goods that he hath then about him or with him, ſhall not be as

[y] Coke 4 Inſt. ch. 5. fol. 335.

Bona notabilia, to cauſe Adminiſtration to be committed, or the Will to be proved in the Prerogative [z].)

[z] Office of Exec. c. 4. §. 2.

For the better Underſtanding whereof, Three Things are to be noted. Firſt, that it is not neceſſary, that the Party deceaſed ſhould have Ten Pounds in every of thoſe ſeveral Dioceſes or Juriſdictions where his Goods be diſperſed; but that it is ſufficient, if the Party deceaſed were poſſeſſed of Goods and Chattels in ſome other Dioceſe, Dioceſes, or Juriſdictions peculiar within that Province wherein he died, of the Value of Five Pounds, beſides thoſe Goods extant where he died. Secondly, albeit the Deceaſed's Goods or Chattels, whereof he died poſſeſſed, did amount to Ten Pounds, or more; yet if the Goods and Chattels extant in ſome other Dioceſe, Dioceſes, or Juriſdiction peculiar, did not extend to Five Pounds at the leaſt, in this Caſe the Deceaſed is not to be accounted to have *Bona notabilia*. Thirdly, that good Debts amounting to Five Pounds, due by one or more, dwelling in ſome other Dioceſe, Dioceſes, or Juriſdiction peculiar, without that Dioceſe, yet within that Province wherein the Party died, to whom the ſame was due, do make *Bona notabilia*, (to the Effect aforeſaid) as well as Goods or Chattels, perſonal or real. Which Three Concluſions are eaſily collected out of thoſe Two formerly recited Canons, whereby all old Controverſies about the Rate of *Bona notabilia* are now decided.

As to the Juriſdiction of the Archbiſhop to grant Adminiſtration where there are *Bona notabilia* in ſeveral Dioceſes, it was not always ſo, for antiently the Ordinaries granted Adminiſtrations in Reſpect of the ſeveral Goods of which Perſons died poſſeſſed in their ſeveral Dioceſes; but this was found inconvenient, becauſe the Creditors of the Inteſtate were compelled to bring Actions ſeverally againſt the reſpective Adminiſtrators; and therefore by *Compoſition*, or by ſome other Agreement which is now run into a *Preſcription*, the Prerogative of granting Adminiſtration in ſuch Caſes is veſted in the Archbiſhop.

Where a Man hath *Bona notabilia* in *England* and *Ireland*, and dieth Inteſtate, in ſuch Caſe two Adminiſtrations ought to be granted, one by the Archbiſhop of *Canterbury*, and the other by the Archbiſhop of *Dublin*, but then there muſt be *Bona notabilia* in ſeveral Dioceſes in each of their Provinces; for otherwiſe it ought to be granted by that Ordinary where the Goods are at the Time of the Death of the Inteſtate.

1 Rol. Abr. 908.

So where a Man dies Inteſtate in the Dioceſe of *B.* without any Goods there, but hath *Bona notabilia* in another Dioceſe, the Right of Adminiſtration is in the *Metropolitan*, becauſe the Ordinary of that Dioceſe where he died is equally bound by Law to take Care of the Goods with the Ordinary where they actually were at the Time of the Death of the Inteſtate, or rather, becauſe he dying in the Province of the Archbiſhop, he hath a general Juriſdiction there.

If the penal Sum of a Bond be but Five Pounds for the Payment of a leſs Sum, altho' the Bond be forfeited, yet that is not underſtood as *Bona notabilia*, altho' in Law the whole Penal Sum be a Duty [a]. And thoſe Debts are ſaid to be *Bona notabilia where the Bonds or other Specialties are, and not where the Debtors inhabit:* So that if the Bonds be in the County where the Teſtator died, and the Debtors in another County, in this Caſe the Will is not to be proved in the Prerogative Court. But in Caſe the Debts are only by Contract

[a] Office of Executor, c. 4. §. 2.

without

without Specialty, they are then to be eſteemed *Bona notabilia* in that Place where the Debtor is. But in caſe *Lands be by Will given to be ſold for Payment of Debts and Legacies*, this is not to be accounted as *Bona notabilia*, though it be Aſſets: For where Land is bequeathed to be ſold for ſuch Uſes, there neither the Money raiſed thereby, nor the Profits thereof, ſhall be accounted as any of the Teſtator's Goods[b].

[b] Ibidem.

An Action of Debt is brought by an Adminiſtratrix upon an Adminiſtration granted by the Biſhop of *R.* the Defendant pleaded an Adminiſtration committed to him by the Dean and Chapter of *Canterbury ſede vacante*, becauſe the Inteſtate had *Bona notabilia*; the Plaintiff replied, that the ſaid Adminiſtration was repealed: And it was adjudged for the Plaintiff. 1. Becauſe the Defendant did not ſhew *what* Bona notabilia *the Inteſtate had in certain*; and it ſhall be intended that he had not *Bona notabilia*, and ſuch Adminiſtration is but voidable. 2. Becauſe before the Repeal of the Adminiſtration committed by the Metropolitan, the inferior Ordinary may commit Adminiſtration; and when the Defendant's Adminiſtration is repealed, it is void *ab initio*. And in the principal Caſe it was alſo reſolved, that whereas the Adminiſtration was committed to the Obligor, that the Debt was not extinct, becauſe it is in another's Right: Otherwiſe it is if the Obligee himſelf made the Obligor his Executor[c].

[c] 8 Jac. lib. 8. fol. 135. Sir *Jo. Needham*'s Caſe.

Debt as Adminiſtrator upon an Obligation: The Caſe was; that the Inteſtate died in *L.* but the Obligation was in *London* at the Time of his Death; the Biſhop of *Cheſter*, (in whoſe Dioceſe the Inteſtate died,) committed Adminiſtration to *J. S.* who releaſed to the Defendant; and the Archbiſhop of *Canterbury* committed the Adminiſtration to the Plaintiff. This Releaſe was pleaded in Bar: And it was thereupon demurred. *Warburton:* Every Debt follows the Perſon of the Debtee, and *Cheſter* is within the Province of *York*, wherein the Archbiſhop of *Canterbury* hath nothing to do. *Anderſon:* When one dies who hath Goods in divers Dioceſes in both Provinces, there *Canterbury* ſhall have the Prerogative; otherwiſe there would be two Adminiſtrations committed, which is *res inaudita:* The *Debt is where the Bond is, being upon a Specialty; but Debt upon a Contract follows the Perſon of the Debtor:* And this Difference hath been often agreed. *Dyer* 305. And if the Archbiſhop of *Canterbury* hath not any Prerogative in *York*, but that ſeveral Adminiſtrations ought to be granted; yet Adminiſtration for this Bond ought to be committed by the Archbiſhop of *Canterbury*. Wherefore this Releaſe is not any Bar[d].

[d] H. 38 Eliz. B. R. *Byron* verſus *Byron*, Crook, part. 3. fo. 472.

Where a Man dies leaving *Bona notabilia in both the Provinces of* Canterbury *and* York, there muſt be ſeveral Adminiſtrations; for an Adminiſtration granted in one Province, is void as to the Goods in the other Province, becauſe each Archbiſhop hath a diſtinct ſupreme Juriſdiction; and ſo it is in * *England* and *Ireland*.

Allenſon v. *Dickenſon*, 1 Salk. 39. Hardres 216. S. P.

* *Shaw* v. *Stoughton*, 2 Lev. 86.

But where he dieth poſſeſſed of Goods in *ſeveral Peculiars*, the Archbiſhop of the Province (and not the Biſhop of the Dioceſe) hath the Right to grant Adminiſtration.

Noy 54. S. C. *Byn* verſus *Byn*, poſtea.

If a Man hath Goods in divers Dioceſes or Provinces, and makes his Executor of his Goods in one of the Provinces, and dies Inteſtate as to his other Goods; if the Ordinary do commit Adminiſtration of the Goods which are in the other Province unto the ſaid Executor,

then is he both Executor and Adminiſtrator, and the Party died both Teſtate and Inteſtate [c].

[c] 35 H. 6. fol. 36.

In Treſpaſs the Caſe was, A Leſſee for Years, by ſeveral Leaſes, of divers Lands, ſome of them in the Dioceſe of *York*, ſome in another Peculiar within the ſame Dioceſe, deviſed all theſe Leaſes to his Son, and made his Daughter within Age his Executrix; the Mother takes Adminiſtration *durante minori ætate* of the Executrix (in *F.* the Peculiar where the Teſtator died) *ad commodum Executricis*; the Adminiſtratrix *durante minori ætate* granted this Term to the Plaintiff: It was adjudged this was no good Grant; becauſe he hath but a ſpecial Property *ad commodum Executricis*, and no general Property, as other Executors or Adminiſtrators. 2. It was moved, whether Adminiſtration ſhould in this Caſe be granted in Two Places, *viz.* the one within the *Peculiar*, the other by the Biſhop of *York*, Ordinary of the Dioceſe: Or whether he ſhould have the Prerogative of both; as he had where *Bona notabilia* are in divers Dioceſes. It was reſolved, that there ſhould be Two Letters of Adminiſtration granted: For the Archbiſhop ſhall not have any Prerogative here, becauſe this *Peculiar* was firſt derived out of his Juriſdiction [f].

[f] H. 41 Eliz. Rot. 1097. *Price* verſus *Simpſon*, Crook, part 3. fol. 719.

Adminiſtration is granted in the Dioceſe of *Canterbury*, and the Adminiſtrator recovers in Debt, and hath Judgment, and a *Scire facias* upon it after the Year; the Defendant pleaded, that the Inteſtate died in *London*, and had not *Bona notabilia* in divers Dioceſes; and that Adminiſtration in *London* was committed to the Wife. *Per Curiam*, The Defendant came too late to plead this Plea; for that it is an Annulling of the Record, which is not ſufferable. But if the Adminiſtration had been repealed, he might well have avoided the Judgment by this Plea [g].

[g] H. 34 Eliz. Rot. 720. *Allen* verſ. *Andrewes*, Crook, part 3. fol. 283, 315, 457. *Scarpe* verſus *Young*, 2 Lutw.

The moſt certain Way of Pleading where there are *Bona notabilia*, is thus, (*viz.*) That the Inteſtate, at the Time of his Death, had *Bona notabilia* in ſeveral Dioceſes within the Province of *Canterbury*, (*viz.*) at *H.* in the County of *Middleſex*, and Dioceſe of *London*, and at *St. Edmundsbury* in the County of *Suffolk* and Dioceſe of *Norwich*, and that Adminiſtration was granted, *&c.* by the Archdeacon of *Sudbury*.

Adjudged that where there are *Bona notabilia* in Two Dioceſes in the ſame Province, there muſt be a Prerogative Adminiſtration; but where there are *Bona notabilia* in one Dioceſe in one Province, and in another Dioceſe in another Province, there muſt be Two *Prerogative Adminiſtrations*.

Burſtow verſ. *Rydley*, 1 Salk. 39.

Luker a Merchant of *Ireland* was obliged in 80 *l.* to one *D.* of *London*; the *Obligation was made in* Ireland, *but always remained in* London; *D.* dies Inteſtate in the County of *Bedford* in *England*; the Biſhop in *Ireland* commits Adminiſtration to the Son of *D.* and he releaſes; the Archbiſhop of *Canterbury* commits Adminiſtration in *England* to the Wife of *D.* which had the ſaid Obligation, and recovered: For the Adminiſtration ſhall be committed by the Ordinary of the Place *where the Obligation is at the Death of the Inteſtate, and not where the Debt commenceth*, for it it not local [h].

[h] 14 Eliz. *Luker's* Caſe, Dy. fo. 305.

To make *Bona notabilia*, a Debt without a Specialty ſhall be accounted Goods where the Debtor lives, and not where the Teſtator lived. Likewiſe if a Man dies Inteſtate, having divers Debts or Oligations in ſeveral Dioceſes, the Debts are ſaid to be *Bona notabilia* where the Bonds or Obligations are, not where the Debtor or Debtees are [i].

[i] T. 17 Jac. *Trowbridge* verſus *Taylor*, Roll's Abridg. tit Execut.

Bynn verſus *Bynn*, Cro. Eliz. 472. Noy 54. S. C.

T. S. died Inteſtate in *Lancaſhire*, leaving at that Time a Bond in *London*, the Biſhop of *Cheſter* granted Adminiſtration to *E. G.* who releaſed the Debt due on that Bond, and the Archbiſhop granted Adminiſtration to the Plaintiff, who brought an Action of Debt againſt the Defendant upon this Bond; and he pleaded this Releaſe in Bar to the Action: But adjudged againſt him, becauſe the Debt is where the Bond was at the Time of the Death of the Obligee, and therefore the Prerogative Adminiſtration is good.

If a Man dies Inteſtate having Goods in divers Dioceſes, the Metropolitan ſhall grant the Adminiſtration. 14 *H.* 6. 21. 10 *H.* 7. 18. 35 *H.* 6. 43. If he hath *Bona notabilia* to the Value of one hundred Shillings in divers Dioceſes, the Metropolitan ſhall grant the Adminiſtration. 10 *H.* 7. *fol.* 16. Or if a Man dies beyond the Seas Inteſtate, the Archbiſhop ſhall grant the Adminiſtration [k].

[k] Roll's Abridg. ibid. 14 H. 6. 21. 10 H. 7. 18. 35 H. 6. 43. 10 H. 7. 16. b.

If a Man hath Goods to the Value of 5 *l.* in one Dioceſe, *and a Leaſe for Years of the ſame Value in another Dioceſe*; they are *Bona notabilia*, whereby the Archbiſhop ſhall grant the Adminiſtration, although the Leaſe for Years be not a Thing movable, nor properly *bonum*, but it is a Chattel [l].

[l] Roll's Abridg. ibid.

If a Man becomes bound in an Obligation at *London*, *and dies Inteſtate in* Devon, and there hath the Obligation at the Time of his Death with him; the Adminiſtration ought to be granted by the Biſhop of *Exon*, where the *Obligation was at the Time of his Death*, and not by the Biſhop of *London*, where the Obligation was made: For the Debt ſhall be accounted Goods, as to the Granting of Letters of Adminiſtration, where the *Bond was at his Death*, and not where it was made [m].

[m] T. 14 Car. inter *Lunn* and *Dodſon*, Roll's Abridg. ibid.

Debts due to the Teſtator will make *Bona notabilia*, *as well as Goods in Poſſeſſion*; but there is a Difference between *Debts on Bonds and Specialties*, and Debts due on *ſimple Contracts*; for Bond-debts make *Bona notabilia* where the Bonds or other Specialties are *at the Time of the Death* of him whoſe they are, and not where he dwelt or died, but Debts on ſimple Contract make *Bona notabilia* in that County where the Debtor dwells: For theſe Debts follow the Perſon to whom they are due.

In Debt brought by an Adminiſtratrix upon an Adminiſtration committed by the Biſhop of *R.* the Defendant pleaded an Adminiſtration committed to him by the Dean and Chapter of *C. ſede vacante*, becauſe the Inteſtate had *Bona notabilia* in divers Dioceſes; the Plaintiff replied, that before the Writ brought, the ſaid Adminiſtration granted in the Prerogative Court was revoked and annulled. It was adjudged, that becauſe the Defendant had not ſhewed in his Bar, that the Inteſtate had *Bona notabilia* in certain, it ſhall be intended that the Adminiſtration was granted where the Inteſtate had not *Bona notabilia* in divers Dioceſes [n].

[n] C. lib. 8. fol. 135. 136. Sir *Jo. Needham*'s Caſe.

Furthermore, this is not to be omitted, that if a Man die, and have Goods in one inferior Dioceſe or Juriſdiction only, and yet the Metropolitan within whoſe Province that Dioceſe or *Juriſdiction peculiar* is ſituated, pretending that he hath *Bona notabilia* in divers Dioceſes or Juriſdictions within his Province, doth commit the Adminiſtration of his Goods; this Adminiſtration is not void, but voidable by Sentence, for that the Metropolitan hath Juriſdiction over all the Dioceſes within his Province, and for that Cauſe it cannot be void, but only voidable by Sentence. But if any Ordinary of a Dioceſe,

or Commiſſary of a peculiar Juriſdiction, commit the Adminiſtration of his Goods that hath *Bona notabilia* in divers Dioceſes; in this Caſe the Adminiſtration is meerly void, as well concerning the Goods within his own Dioceſe, as the other Goods without his Dioceſe, becauſe by no Means he can have Juriſdiction of that Cauſe which belongeth to his Superior [o].

[o] D. Coke, lib. 5. Relation. *Prince's* Caſe, fo. 30. 22 Eliz. *Vere* and *Jefferies's* Caſe, Moor 145.

By a late Statute, it is enacted, that the Salary and Wages for Work done in her Majeſty's Docks and Yards, ſhall not be deemed *Bona notabilia* of the dead Perſon to intitle the Prerogative Court to any Juriſdiction. 4 & 5 Annæ, cap. 16.

§. XII. By whom the Teſtament is to be proved.

1. *The Teſtament is to be proved by the Executor.*
2. *Any Perſon having the Teſtament may be compelled to exhibit the ſame.*

THE (1) Perſon by whom the Teſtament is to be proved, is the Executor named in the Teſtament [a], whom the Ordinary, or other Perſon having Authority for the Probate of the Teſtament, may convene to the Intent to prove the Teſtament, and to take upon him the Execution thereof, or elſe to refuſe the ſame [b].

[a] Perkins tit. Teſtament, fol. 93.

[b] Stat. H. 8. an. 21. c. 5.

If on Proceſs or Summons from the Judge, the Executors appear not to prove the Will, they are puniſhable for Contempt; if they appear, but refuſe to prove the Will, the Judge may grant Adminiſtration to the Widow, or next of Kin [c]. *Refuſal cannot be by Word only*, but it muſt be entered and recorded in Court, and therefore done before a competent Judge. When an Executor hath once adminiſtered, he cannot afterwards refuſe to prove the Will, and take on him the Executorſhip, and in that Caſe the Ordinary ought not to accept ſuch a Refuſal, but to compel him to prove the Will, and take upon him the Executorſhip [d]. Yet if the Judge doth admit one to adminiſter, notwithſtanding his having formerly refuſed, it ſhall ſtand good [e].

[c] 9 E. 4. 33. Pl. Com. fol. 184. a. C. lib. 9. fol. 37, 38. *Henſloe's* Caſe.

[d] 9 E. 4. 47. Pl. Com. fol. 280. b. *Greisbroke's* Caſe.

[e] 26 H. 8. fol. 78.

But after Refuſal, and Adminiſtration committed to another, the Executor cannot recede from it, and go back to prove the Will, and aſſume the Executorſhip; yet if after Refuſal it ſhall appear to the Judge, that the Executor had adminiſtered before ſuch Refuſal, he may revoke the Adminiſtration, and compel the Executor to prove the Will.

In Debt brought againſt an Executor, it is a good Plea, that the Teſtator made him and another Executor, who is alive, not named, without ſaying the Teſtament is proved [f].

[f] Lib. 9. fol. 37, 38. *Henſloe's* Caſe.

This the Ordinary or other competent Judge may do, not only *ex officio* [g], but at the Inſtance of any Party having Intereſt [h]; which Intereſt is proved by the Oath of the Party [i].

[g] L. 1. ff. quemadmodum teſta. app. & ibi Bar. n. 1.

[h] Bald. & Angel. in d. L. 1. Opinor etiam quod ad ejus inſtantiam cui nihil eſt relictum, exhibendum teſta. ſcilicet, ut inde certior fiat, numquid legatum aliquod ſibi relictum ſit a defuncto. Gloſſ. & Bald. in L. 2. ff. quemadmodum teſta. app. in princ.

[i] Bar. & Bald. in d. L. 1.

If

If the Executor have not the Teſtament in his Cuſtody, but (2) ſome other Perſon, then may ſuch Perſon be compelled to exhibit the ſame [k]: And it is ſufficient to prove that once he had it; for he is preſumed ſtill to have the ſame, unleſs he affirm upon his Oath, that it is not in his Poſſeſſion [l].

[k] L. 1. in prin. & §. hoc interdict. ff. de Tab. exhibend.
[l] Alex. in L. 2. C. de teſta. n. 3. verb. teſtamen.

No Man can be compelled to take upon him the Executorſhip, unleſs he hath intermeddled with the Teſtator's Eſtate, and in ſuch Caſe he may be compelled; and if he refuſe in Court, and Adminiſtration is granted to another, it is wrong.

9 Ed. 4. 33.
1 Vent. 335.

But in ſome Caſes he cannot *refuſe*, as where an Executor (after a *Caveat* entered) took the *uſual Oath*, and afterwards *refuſed*; then *T. S.* endeavouring to get the Adminiſtration, the Executor (who refuſed) would prove the Will, and conteſted the Matter in the Spiritual Court; but it being adjudged againſt him in that Court, ſuppoſing he was bound by his *Refuſal*, he appealed to the *Delegates*; and pending the Appeal, he moved for a *Mandamus* to the Spiritual Court to admit him to prove the Will, and had it; for having *taken the Oath*, that Court had no farther Authority; and therefore he could not be admitted afterwards to *refuſe*.

It ſeems by the Caſe laſt mentioned, that *taking the uſual Oath* amounts to an Adminiſtration, and therefore he cannot afterwards refuſe; but if once he refuſeth, he cannot afterwards adminiſter. As for Inſtance:

Broker verſus *Chater*, Owen 44.
Cro. Eliz. 92. S. C.
Moor 272. S. C.
1 Leon. 153. S. C.

The Teſtator deviſed a Term for Years to the *Lord Chief Juſtice Catlin*, and made him Executor, and died; the *Chief Juſtice wrote a Letter* to the Judge of the Prerogative Court, that he could not attend the Execution of the Will, and therefore deſired him to grant Adminiſtration to the next of Kin of the Teſtator, which was done accordingly; afterwards the *Chief Juſtice* entered and granted the Term to *T. S.* But it was adjudged a void Grant, becauſe the *Letter was a ſufficient Refuſal*, and an Executor cannot refuſe, and afterwards take upon him the Executorſhip.

Middleton's Caſe, 5 Rep. 28.

But where there are *Co-Executors*, and ſome refuſe, yet they ſtill continue Executors; for at any Time during the Lives of their Companions, they may prove the Will, they may pay Debts, make Releaſes, and they muſt be joined in all Suits where the *Co-Executors are Plaintiffs*, becauſe they are all privy to the Will; but not where they are Defendants, becauſe the Plaintiff in the Action is not bound by Law to take Notice of any but thoſe who have proved the Will.

49 Ed. 3. 17.
Moor 373.

By the Caſe before-mentioned it appears, that if ſome Executors refuſe before the Ordinary, and others prove the Will, yet the refuſing Executors may adminiſter when they will; but if they all refuſe, none of them ſhall adminiſter afterwards.

Abraham verſ. *Cunningham*, 2 Lev. 182.
T. Jones 72. S. C.
1 Vent. 303. S. C.
2 Mod. 146. S. C.

The Teſtator being poſſeſſed of a Term for Years, made his Son Executor, and died; the Son proved the Will, and made *Hay* and two others Executors, and died; thoſe Executors not proving the Will of the Son, Adminiſtration *de bonis non* of the Father was granted to one *Bradburn*, who knew nothing of the Will of the Son; and *Bradburn* ſold the Term for a valuable Conſideration; then two of the Executors of the Son died, and *Hay* the ſurviving Executor *renounced*; afterwards *Bradburn*'s Adminiſtration was repealed, and a new Adminiſtration *de bonis non* of the Father was granted to the Defendant; the Queſtion was, whether the Adminiſtration

ſtration granted to *Bradburn* before *Hay refuſed*, was good or not; and adjudged it was not good, for before his *Refuſal* he had the abſolute Property of the Eſtate in him, and might have ſold the Term before he had proved the Will; and if ſo, then the Adminiſtration granted to *Bradburn* before *Hay had refuſed* was abſolutely void; and the *Refuſal* afterwards cannot relate to make that good, which was void in it ſelf for Defect of Power.

§. XIII. When the Teſtament is to be exhibited and proved.

1. *The Teſtament is not to be proved whilſt the Teſtator liveth, but after his Death.*
2. *If it be unknown whether the Teſtator be dead or alive, whether may his Teſtament be proved?*

IF (1) the Teſtator be living, the Judge may not proceed to the Proving and Publiſhing of his Teſtament [m], at the Petition either of the Executor, or any other, ſaving at the Requeſt of the Teſtator himſelf [n]. For at his Petition the Teſtament may be recorded and regiſtred amongſt other Wills; but it is not to be delivered forth under the Seal of the Ordinary with a Probate, becauſe it is of no Force ſo long as the Teſtator liveth; who alſo may revoke or alter the ſame at any Time before his Death, as hereafter is declared [o].

But if the Teſtator be dead, the Judge may proceed to the Proving the * Will; and the Time of exhibiting and proving the ſame is left to his Diſcretion, and he may appoint a longer or a ſhorter Time, according as the Place is farther diſtant or nearer, or as other due Circumſtances ſhall induce him [p].

If (2) it be unknown whether the Teſtator be living or dead; foraſmuch as ſome are of Opinion, that every Man is preſumed to live till he be an hundred Years old [q]; it ſeemeth by this Opinion, that the Judge may not in the mean Time proceed to the Publication of the Teſtament, unleſs there be lawful Proof, or ſufficient Preſumption, for the Teſtator's Death [r]. On the contrary, others are of Opinion, that a Man is not preſumed to live ſo long [s], for that Men commonly die betwixt ſixty and ſeventy Years of their Age [t]; and ſo by their Opinion it ſeemeth that the Will may be proved after the Age of ſeventy Years of him that is abſent, for that he is not then preſumed to be living.

[m] L. 2. §. ſi dubitetur, in fin. ff. quemadmodum teſta. app.
[n] Bar. in d. §. ſi dubitetur. Sichar. in L. 2. C. de teſta.
[o] Vide infra eod. lib. part. 7. §. 14 & 15.
* L. 2. C. de teſtam. & DD. ibidem.
[p] L. 2. §. utrum. ff. quemadmodum teſta. app.
[q] Quam opinionem (tanquam communem) acriter defendit Vivius, Theſaur. com. op. verb. vivere. Molinæum hæreticum appellans, qui contrariam crebriorem dixit.
[r] Pract. Papienſ. in form. libel. 1. pet. hæred. ex teſt.
[s] Quorum opinionem magis communem refert Molinæus in Apoſt. ad Alex. conſil. 1. vol. 5. n. 24. Menoch. de præſump. lib. 6. fol. 545. q. 49.
[t] Franc. Herculan. de probac. negativ. n. 290. pro quo facit Pſalmus 90.

I ſuppoſe if a Man be abſent, and no certain Proof of his Death or Life, that the Will may be proved, and that the Teſtament it ſelf is a Preſumption of his Death [u].

[u] Jaſ. & Sichard. in d. L. 2. C. de teſta. alter n. 7. alter n. 8. Temperanda eſt hæc concluſio, ut per Menoch. Tract. de adipiſcend. poſſ. remed. 4. n. 669. fol. (mihi) 218.

It is a great Queſtion, whether the Death of one that is abſent may be proved by common Voice and Fame [x]; that is to ſay, by the conſtant Report and Opinion of the more Part of the diſcreet and honeſt

[x] Maſcard. Tract. de probat. concluſ. 1074

Inhabitants of the Pariſh, Town, or Place of his former Dwelling that is now abſent [y]; wherein ſome hold the Affirmative, others the Negative; a third Sort diſtinguiſhing whether the Matter in Queſtion be of ſmall or great Moment; if ſmall, then the fame is a ſufficient Proof; if great, then inſufficient [z]. Which Diſtinction without Queſtion is very reaſonable. Whereupon we are to conſider, whether the Proving of the Will of him that is abſent be a Matter of great or ſmall Moment. Wherein, for my own Part, I hold it to be a Matter of great Importance, becauſe it concerneth a Man's whole Eſtate [r]. And yet nevertheleſs, I hold it to be a more ſafe Courſe to prove the Will, at leaſt when the Executor is an honeſt ſubſtantial Man, than to ſuffer the Goods to periſh, or to be ſubject to be purloined by Men and Means unknown. But to return to the Queſtion formerly propounded, whether the Death of him that is abſent may be proved by a common Voice and Fame; it may be determined by theſe Caſes following. Whereof the Firſt is, when the Party hath been abſent long, and the Fame of his Death ancient; this Fame alone is a ſufficient Proof of his Death [s]. The ſecond Caſe is, when the Fame is that he died in a Place far diſtant, as (peradventure beyond the Seas;) in which Caſe the Fame of his Death is ſufficient; but if he died in a Place not far off, then it may be known by Witneſſes whether he be dead or alive; in which Caſe the Fame alone is not a ſufficient Proof [t]. The Third is, when the Fame did firſt ſpring from credible Perſons; for then it ſufficeth, otherwiſe not [u]. The fourth Caſe is, when the Fame is deſtitute of other Probabilities, for then it is not enough; but being ſtrengthened with other Conjectures, as that the Party abſent was a very old Man, or very ſickly; then the Fame, thus fortified with Preſumptions of Nature, doth make a full Proof of his Death [x]. The fifth Caſe is, when the Fame is aſſiſted with other Likelihoods derived from ſuch Accidents as we do attribute unto Fortune; as when the Party taketh Ship to travel beyond the Seas, and being upon the Main, a Tempeſt doth ariſe; and the expected Time of his Return being paſt, he returneth not, neither can the Ship after diligent Inquiry be heard of; for in this Caſe, the Fame, accompanied with theſe Circumſtances, doth ſufficiently prove his Death [y]. And ſo it is when a Man is preſſed to the Wars, which being ended, and the reſt of the Army returned; yet he doth not return with them, nor can it be known by Enquiry what is become of him; for then the Fame, being thus furniſhed, is a ſufficient Proof of his Death [z], until the contrary doth appear, as ſometimes it doth. For it is moſt true that one in *Yorkſhire* took Shipping (amongſt others) for a *Portugal* Voyage; and after ſome Exploits, his fellow Soldiers returning, he came not, nor could be heard of; and thereupon a Fame did ariſe that he was dead; whereupon Adminiſtration of his Goods was committed; and whilſt his Kinsfolk were in Suit about the fame, after ſome three Years Abſence, he, not expected, returned, and took up the Controverſy. Wherefore it ſhall behove the Ordinary in theſe and the like Caſes, at the Proving of the Will, or the Granting of Adminiſtration, to take Bond of the Executor or Adminiſtrator, with good Surety, to make full Reſtitution or ſufficient Recompence to the Abſent, in caſe of his Life or Return.

19 Car. 2. cap. 6. But now 'tis provided by a Statute, *That if any Perſon for whoſe Life a Copyhold Eſtate hath been granted, or an Eſtate by Leaſe for one or more Lives, or for Years determinable upon one or more Life or Lives, ſhall remain beyond Sea, or abſent themſelves here*

[y] Tho. de Piperat. & Marquard. Tract. de fama, princ. Dec. Tholoſ. q. 379.

[z] Deciſ. Tholoſ. q. 312. cum addic. Aufre.

[r] Panor. in cap. querela. de procur. ex. n. 9. & DD. ibidem.

[s] Maſcard. de probat. concluſ. 1074. n. 4. Bald. conſil. 398. Menoch. de adipiſcend. poſt. remed. 4. n. 672. Gravetr. conſ. 127. in fin.

[t] Maſcard. de prob. concl. 1074. n. 5. poſt. Alex. Bar. Ang. Spec. & alios ibi citatos.

[u] Maſcard. ubi ſupra, n. 6.

[x] Bar. in tract. de Teſtib. n. 38. Menoch. & Maſcard. ubi ſupra.

[y] Maſcard. poſt. alios ubi ſupr. n. 7.

[z] Bar. tract. de teſtibus, n. 38. & poſt. cum Alex. Aufre. & alii quos memorat Maſcard. ubi ſupra, n. 8.

for ſeven Years together, and no ſufficient Proof be made of their Lives in any Action, to be brought for the Recovery of ſuch Eſtate by the Reverſioner or Leſſor; then the Perſon upon whoſe Life ſuch Eſtate depended, ſhall be accounted as naturally dead.

And if any Perſon (the greateſt Part of whoſe real Eſtate is held by Leaſe or by Copy of Court-Roll for Lives) *ſhall be returned of the Jury, he may be challenged; Proviſo, that any Perſon evicted may re-enter upon Proof, that the Perſon for whoſe Life the Eſtate was held be living.*

And by another Act 'tis enacted, *That where any Perſon hath a Demand to an Eſtate, after the Death of another within Age, married Woman, or other whatſoever, and ſhall make Affidavit of his Title in Chancery, and that he hath Cauſe to believe that the Party is dead, and his Death concealed. Upon moving that Court, he ſhall have an Order, that the ſuſpected Concealer on the Service thereof, ſhall produce to the Perſon or Perſons not exceeding two, who ſhall be named by him who proſecutes the Order, ſuch Perſon ſuſpected to be concealed; and upon his Refuſal or Neglect to produce the Perſon, the Court may order the Perſon concealed to be brought into Court, or before two Commiſſioners appointed for that Purpoſe, and to be nominated by him who proſecutes the Order, and at his Coſts and Charges; and on Refuſal to produce him, ſuch Party ſhall be taken to be dead, and the Perſon claiming the Eſtate may enter,* &c. *as if the Party concealed were actually dead.* 6 Annæ, cap. 18.

And if it ſhall appear to the ſaid Court by Affidavit, that the concealed Perſon is or lately was beyond Sea, at a certain Place there; then the Party who proſecutes the Order, may at his own Charges ſend over one or more Perſons appointed by the Order to view the Perſon concealed; and in Caſe of any Refuſal or Neglect to produce him, and a Return made thereof, the Perſon concealed ſhall be taken to be dead.

Provided, If it appear upon any Action brought, that the Perſon for whoſe Life ſuch Eſtate was held, was alive when the Order was made, then he who holds the Eſtate determinable upon ſuch Life, his Executors or Adminiſtrators may maintain an Action againſt thoſe who have received the Profits ſince the Order, and recover full Damages from the Time of the Eviction.

Provided that if ſuch Perſon, who hath an Eſtate determinable upon the Life of another, ſhall make it appear to the Chancery, that he hath done his utmoſt Endeavour to procure the Perſon on whoſe Life the Eſtate doth depend, and that he cannot procure or compel him to appear; and that he was living at the Time the Order was returned and filed; then the Perſon holding ſuch Eſtate ſhall continue in Poſſeſſion, &c. *as if this Act had not been made.*

And every Perſon holding over after the Death of him, for whoſe Life the Eſtate was held, ſhall be a Treſpaſſer, and the Perſon injured ſhall recover the full Value of the Profits received during wrongful Poſſeſſion.

Other Means and other Preſumptions there be to prove the Death of him that is abſent [u]; which nevertheleſs are left to the Diſcretion of the Ordinary, to whom alſo I refer the ſame.

[u] Bar. tract. de teſtibus, n. 38. & poſt eum Alex. Aufre. & alii quos memorat Maſcard. ubi ſupra, n. 8.

Regularly Teſtaments ought to be inſinuated to the Official or Commiſſary of the Biſhop of the Dioceſe *within four Months next after the Teſtator's Death* [x]. The Ordinary may ſequeſter the Goods

[x] Fulb. par. part. 3. Dial. 3. fol. 33.

Goods of the Deceaſed, until the Executors have proved the Teſtament; ſo may the Metropolitan, if the Goods be in divers Dioceſes [y]. Alſo the Ordinary *may compel the Executor to prove the Will, and to accept or refuſe the Adminiſtration.* If the Executor refuſe, or if there be a Will made, and no Executor appointed, the Ordinary muſt commit Adminiſtration *cum teſtamento annexo*, to whom he ſhall think fit, and take Bond of the Adminiſtrator to perform the Will. If no Will be made, he muſt grant Adminiſtration to the next of Kin; if they refuſe it, then to whom ſhall deſire it. And if no Body take the Adminiſtration, the Ordinary may grant Letters *ad colligendum bona defuncti*, and thereby take the Goods of the Deceaſed into his own Hands, wherewith he is to pay Debts and Legacies ſo far as the Goods will reach [z]; for which himſelf becomes liable in Law, as other Executors or Adminiſtrators.

[y] 9 E. 4. fol. 33.

[z] 31 E. 3. cap. 11. 13 E. 1. c. 19. 21 H. 8. c. 5.

§. XIV. Of the Manner of proving Teſtaments.

See antea, c. 11.

1. *The Form of proving Teſtaments is two-fold.*
2. *Of the vulgar Form.*
3. *Of the Form of Law.*
4. *Of the Difference betwixt the Vulgar and the legal Form.*
5. *Of a third Form of Probation of Teſtaments.*
6. *Of the Oath and Bond of the Executor.*

THAT it is neceſſary for the Proof of Teſtaments that there be either Witneſs or Writing, is already declared [a]; alſo what Number of Witneſſes, and what Manner of Writing, is ſufficient, is likewiſe declared [b]; wherefore in this Place I ſhall not need to ſpeak, ſaving only of the Manner of Proceeding in the Probate of Teſtaments.

This (1) Manner and Form therefore here in *England* is of two Sorts; the one is called the *Vulgar* or *Common Form*, the other is termed the *ſolemn Form*, or *Form of Law* [c].

[a] Supra, part 4. §. 1.

[b] Supra d. part 4. §. 25, 26.

[c] Ad imitationem confirmationis, quæ nunc fit in forma communi, nunc in forma ſolenni & ſpecifica. Molin. in conſuet. Pariſ. §. 5. Alex. conſil. 123. vol. 4. n. 18. &c. Dec. in Rub. de confir. utili vel inutili.

The (2) *Vulgar* or *common Form* is more compendious or brief than the other; for after the Death of the Teſtator, the Executor preſenteth the Teſtament to the Judge, and in the Abſence, and *without citing or calling of ſuch as have Intereſt*, produceth Witneſſes to prove the ſame, who teſtifying upon their Oaths (*viva voce*) that the Teſtament exhibited is the true, whole and laſt Teſtament of the Party deceaſed [d], the Judge doth thereupon, and ſometimes upon * the leſſer Proof, annex his Probate and Seal to the Teſtament, whereby the ſame is confirmed [e].

[d] Stat. H. 8. an. 21. c. 5.

* *Ff. Upon the Oath of the Executor only.*

[e] Quæ omnia frequentiſſima paſſim obſervatione fieri pluſquam eſt manifeſtum.

When (3) the Teſtament is to be proved *in Form of Law*, it is requiſite that ſuch *Perſons as have Intereſt* [f], that is to ſay, the Widow and next of Kin to the Deceaſed, to whom the Adminiſtration of his Goods ought to be committed, if he had died Inteſtate [g], are

[f] Bald. in L. 2. C. de teſta. n. 2. Sichard. in eand. L.

[g] Stat. H. 8. an. 21. c. 5. Et hi quidem, ut videtur, citandi ſunt nominatim; licet, ſi incertum ſit quis ſuccedere debeat ab inteſtato, ſufficit citatio generalis, omnium, ſcilicet quorum intereſt. Sichard. poſt Bald. in d. L. 2. Kling. de teſta. ordin. Inſtit. n. 10. & n. 14.

are to be cited to be preſent at the Probate of the Teſtament[h], in whoſe Preſence the Will is to be exhibited to the Judge, and Petition to be made[i] by the Party which preferreth the Will[k], and enacted[l] for the Receiving, Swearing, and Examining of the Witneſſes upon the ſame, and for the Publiſhing and Confirming thereof[m]. Whereupon Witneſſes are received and ſworn accordingly, and are examined every one of them ſecretly and ſeverally, not only upon the Allegation or Articles made by the Party producing them, but alſo upon Interrogations miniſtred by the adverſe Party[n], and their Depoſitions committed to Writing[o]; afterwards the ſame to be publiſhed; and in Caſe the Proof be ſufficient, the Judge doth by his Sentence or Decree pronounce for the Validity of the Teſtament[p]; and this is called a Probate *per Teſtes:* But ſuch Probate doth not corroborate the Will; for if there ſhould be a Queſtion in Law, whether Will or no Will, 'tis no Evidence to a Jury to prove it a Will, that it was proved by Witneſſes in the Spiritual Court.

[h] Alias quoad non citatos, nullum facit prejudicium. Paul. de Caſtro conſil. 96. vol. 1. Sichard. in d. L. 2. n. 4. Graſſ. Theſaur. com. op. §. teſtamen. q. 6. 61. Kling. ubi ſupra.

[i] Non tamen requiritur libellus, vel litis conteſtatio. Sichard. in d. l. 2. n. 7. in fin. Simo de Prætis de interp. ult. vol. l. 2. dub. 2. fol. 3. l. 4.

[k] Nec refert an ſit Executor, vel fidei commiſſarius, vel legatarius; vel an futurus ſit reus, an actor: quamvis contrarium quoad lagatarium reſpondeat Pariſ. conſ. 24. vol. 3. ſed male, ut per Simo. de Prætis ubi ſup.

[l] Bald. in d. L. 2. C. de teſta. n. 3. ubi aſſignat rationem.

[m] Formam petic. vide apud Sichard. in d. l. 2. n. 2.

[n] Bald. Alex. & Sichard. in d. L. 2.

[o] Bald. Alex. & Sichard. in d. L. 2.

[p] Non tamen opus eſt ſententia definitiva in ſcriptis, ſed interlocutoria. Bald. Alex. Caſtrenſ. & alii in L. 2.

The (4) two Forms before-mentioned being compared together, we may eaſily perceive the Differences betwixt the one and the other; of which Differences I ſuppoſe this to be of the greateſt Moment, that in the vulgar Form, ſuch as have Intereſt are not cited to be preſent at the Probate of the Will; whereas obſerving the Form of Law, they are to be cited to that End. Which Difference of Form worketh this Diverſity of Effect; namely, that the Executor of the Will proved in the Abſence of them which have Intereſt, may be compelled to prove the ſame again in due Form of Law[q]. And if the Witneſſes be dead in the mean Time, it may endanger the whole Teſtament[r]; eſpecially if ten Years be not paſt ſince the Probate, whereby neceſſary Solemnities are preſumed to have been obſerved[s]. Whereas the Teſtament being proved in Form of Law, the Executor is not to be compelled to prove the ſame any more; and although all the Witneſſes afterwards be dead, the Teſtament doth ſtill retain his Force[t].

[q] Paul. de Caſtr. conſil. 96. vol. 1. Simo de Prætis de interp. ult. vol. l. 2. dub. 2. ſoluc. 3. fol. 207. n. 4, 5.

[r] Paul. de Caſtr. d. conſil. 96. DD. in l. 2. C. de teſta.

[s] L. filius famil. C. de petic. hæred. niſi forte contrarium probetur ex inſpectione actor.

[t] L. 2. C. de teſtam. Socin. Jun. conſil. 89. vol. 1. Kling. in tit. de teſta. ordin. l. 2. Inſt. n. 10.

The Probate of a Will, or Letters of Adminiſtration granted under the Seal of the Ordinary, may be given in Evidence to a Jury at a Trial; but it ſeems not to be concluſive Evidence to bind them to give their Verdict; and therefore where in Ejectment the Defendant made Title under *T. S.* Executor of *E. G.* appointed by his Will *Anno* 1673. the Probate whereof was ſhewed in Evidence to the Jury, under the Seal of the Ordinary; and the Judge who tried the Cauſe, being deſired to direct the Jury, that this was concluſive Evidence for them to find for the Defendant; the Leſſor of the Plaintiff making Title under the ſaid *E. G.* by Virtue of an Adminiſtration granted to him of the Goods of the ſaid *E. G.* which he (the Plaintiff) ſhewed in Evidence likewiſe, under the Seal of the Ordinary, bearing Date *Anno* 1677. whereby he (*E. G.*) was ſuppoſed to die Inteſtate; and the Judge directing the Jury to find only whether there

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was any Will or not, the Defendant put in a *Bill of Exceptions*, becauſe the Judge did nor direct the Jury that the Probate ſhewed to them under Seal was concluſive Evidence for the Defendant; and the Jury finding there was no Will, Judgment was given for the Plaintiff, which was affirmed in Error; for the Court held, that the proper Way had been to demur upon the Plaintiff's Evidence, it having been held of later Times, that nothing can be given in Evidence againſt the Probate of a Will ſhewed under Seal, but that it was forged, revoked, or obtained by Surpriſe; 'tis true, the Probate is not traverſable, but the Effect of it may be traverſed, that the Teſtator did not make him Executor who claims by the Probate.

Here a Queſtion not to be neglected may be demanded; What if a Teſtament being made in Writing, and afterwards loſt by ſome Caſualty, they, to whom the Adminiſtration of the Goods of the Deceaſed ſhould belong, if the Party deceaſed made no Executors, but died Inteſtate, ſhall call the Executors either to prove the Will of the Deceaſed in ſolemn Form of Law, (in caſe he made any ſuch Will,) or elſe to ſhew Cauſe, wherefore the Adminiſtration of the Deceaſed's Goods ſhould not be committed unto them? whether may this Will written and loſt be proved by Witneſſes? Whereunto my Anſwer is, that albeit the very original Teſtament be loſt, yet if there be two Witneſſes which did ſee and read the Teſtament written, and do remember the Contents thereof, theſe two Witneſſes, ſo depoſing the Tenor of the Will, are ſufficient [u] for the Proof thereof in Form of Law, ſo that they be otherwiſe, as well in Reſpect of their Skill as of their Integrity, greater than all Exceptions; and ſpecially ſome other Likelihoods concurring therewithal to make their Teſtimony more credible [x].

[u] Vide Bar. in d. tract. de teſtib. n. 38. & Maſcar. de probac. conc. 1074, 1075, 1076, 1077. ubi copioſe de mortis probation. ſcriptum invenies.

[x] Simo de Prætis de interp. ult. vol. I. 2. fol. 204. n. 82. per doctrinam Bart. communiter approbat. in Auth. ſi quis in aliquo. C. de edendo.

Beſides (5) theſe Forms of proving Teſtaments above recited, which are referred to that Kind of Probate which is called *Publicatio Teſtamenti* [y]; there is yet another Form, which is called *Apertura Teſtamenti* [z], which Form doth reſpect written or cloſed Teſtaments [a]; in the Making whereof, amongſt many other Solemnities, the Civil Law did require that the Witneſſes ſhould put to their Seals; and after the Death of the Teſtator, at the Opening of the written or cloſed Teſtaments, the ſame Law did alſo require, that the ſame Witneſſes ſhould be called by the Magiſtrate to acknowledge their Seals [b], or to deny the Sealing [c]. But as we do not obſerve that Solemnity of the Civil Law in the Sealing of the Teſtaments by the Witneſſes, no more do we obſerve that Solemnity which the Civil Law requireth in opening of Teſtaments ſealed; unleſs this may ſeem to have ſome Reſemblance with this third Form, *de apertura Teſtamenti*, which is enacted in the Statutes of this Realm, *viz. That the Biſhop or Ordinary, or other Perſon, having Authority to take Probate of Teſtaments, upon the Delivery of the Seal and Sign of the Teſtator, do cauſe the ſame Seal to be defaced, and thereupon incontinent redeliver the ſame ſealed unto the Executor or Executors, without Claim or Challenge thereunto to be made*, &c. [d].

[y] De qua in d. L. 2. C. de teſta.

[z] De qua in L. 1. ff. quemadmodum teſt. app.

[a] L. 1. & 2. quemadmodum teſt. app. ff. & DD. in L. 2. de teſta. C.

[b] L. 4. ff. quemadmodum teſta. app.

[c] L. 5. eod. tit. quemadmodum.

[d] Stat. H. 8. an. 21. c. 5. Crederem tamen hujuſmodi verba ſtat. non referre veterem illam formam de apertura teſtamenti; ſed potius, quoniam multa ſolent aſſute fieri quando ſigill. mortui interceptum eſt, eapropter ſtat. caveri, ut ſigil. ad Judicem deducatur, ut ipſius forma ab eodem pervertatur; materia autem Executori ſtatim reſtituatur. Haddon de reformatione legum Eccl. tit. de teſta. c. 19.

Furthermore (6) it is to be noted, that in what Manner ſoever the Teſtament be proved, the Executor, before he be admitted by the Ordinary to execute, and before he have the Will under the Seal of the Ordinary, is to promiſe by Virtue of his Oath, and, if it be behoveful, alſo to enter into Bond, to make a true Account, when he ſhall be thereunto lawfully called by the Ordinary [e].

[e] Stat. §. & poſtquam. de teſt. l. 3. provin. conſt. Cant.

§. XV. What Fees are due for and about the Probation and Approbation of Teſtaments.

1. *Where the clear Goods do not exceed the Value of five Pounds, only Six-pence is due to the Regiſter.*
2. *Where the clear Goods, being above five Pounds, do not amount to forty Pounds, only three Shillings and Six-pence is due,* viz. *two Shillings and Six-pence to the Ordinary, and Twelve-pence the Regiſter.*
3. *Where the clear Goods exceed forty Pounds, there five Shillings is due,* viz. *two Shillings and Six-pence to the Ordinary, and two Shillings and Six-pence to the Regiſter.*
4. *What Fees are due for the Copies of Teſtaments or Inventories.*
5. *The Penalty whereinto they fall which offend by extorting greater Fees than are here limited.*

IT is enacted and eſtabliſhed by the Statutes of this Realm [f], "That the firſt Day of *April Anno Domini* 1530 (1) nothing "ſhall be demanded, received or taken, by any Biſhop, Ordinary, "Archdeacon, Chancellor, Commiſſary, Official, or any other Man- "ner of Perſon or Perſons whatſoever they be, which now have, "or at any Time hereafter ſhall have, Authority or Power to take "or receive Probation, Inſinuation or Approbation of Teſtament or "Teſtaments, by himſelf or themſelves, nor by his or their Re- "giſters, Scribes, Preiſers, Summoners, Apparitors, or by any other "of their Miniſters, for the Probation, Inſinuation and Approbation "of any Teſtament or Teſtaments, or for any Writing, Sealing, "Preiſing, Regiſtring, Fires, making of Inventories, and giving in "of Acquittances, or for any other Manner of Cauſe concerning "the ſame, where the Goods of the Teſtator of the ſaid Teſta- "ment or Perſon ſo dying, do not amount clearly over and above "the Value of an hundred Shillings *Sterling*; except only to the "Scribe, to have for writing the Probate of the Teſtament of him "deceaſed, whoſe Goods ſhall not be above the ſame clear Value "of an hundred Shillings, Six-pence; and for the Commiſſion for "the Miniſtration of the Goods of any Man deceaſing Inteſtate, "not being above like Value of an hundred Shillings clear, Six- "pence. And that nevertheleſs the Biſhop, Ordinary, or other Per- "ſon or Perſons, having Power and Authority to take or receive "the Probation or Approbation of Teſtaments, refuſe not to approve "any ſuch Teſtament, being lawfully tendred or offered to them "to be proved or approved, where the Goods of the Perſon ſo dy- "ing amount not to above the Value of an hundred Shillings *Ster-* "*ling*;

[f] Stat. 8. an. 21. cap. 5.

" *ling*; ſo that the ſame Teſtament be exhibited by him or them in " Writing, with Wax thereunto affixed ready to be ſealed, and that " the ſame Teſtament be lawfully proved before the ſame Ordinary " (before the Sealing) to be the true, whole, and laſt Teſtament of " the ſame Teſtator in ſuch Form as hath been commonly accuſtomed " in that Behalf.

" And when (2) the Goods of the Teſtator do amount over and " above the clear Value of an hundred Shillings, and do not exceed " the Sum of forty Pounds *Sterling*, that then no Biſhop, Ordinary, " or other kind of Perſon or Perſons, whatſoever he or they be, " now having, or which hereafter ſhall have, Authority to take Pro- " bation or Approbation of any Teſtament or Teſtaments, as is afore- " ſaid, by themſelves, or any of their ſaid Regiſters, Scribes, Prei- " ſers, Summoners, Apparitors, nor any other their Miniſters, for the " Probation, Inſinuation or Approbation of any Teſtament or Teſta- " ments, or for the Regiſtring, Sealing, Writing, Preiſing, making " of Inventories, giving of Acquittances, Fines, or any other Thing " concerning the ſame, ſhall take, or cauſe to be taken, of any " Perſon or Perſons, but only three Shillings Six-pence, and not a- " bove; whereof to be to the Biſhop, Ordinary, or to any other " Perſon or Perſons having Power and Authority to take Probation " and Approbation of any Teſtament or Teſtaments, for him or his " Miniſters, two Shillings Six-pence, and not above; and Twelve- " pence, Reſidue of the ſame three Shillings Six-pence, to the Scribe, " for the Regiſtring of the ſame.

" And where the Goods of the Teſtator, or Perſon or Perſons " ſo dying, do amount over and above the clear Value of forty " Pounds *Sterling*, that then the Biſhop nor Ordinary, nor other " Perſon or Perſons now having, or which hereafter ſhall have " Power or Authority to take Probate of Teſtaments, as is afore- " ſaid, by him or themſelves, or any of his or their Regiſters, " Scribes, Preiſers, Summoners, Apparitors, or any other their Mi- " niſters, for the Probation, Inſinuation and Approbation of any " Teſtament or Teſtaments, or for the Regiſtring, Sealing, Writing, " Preiſing, making of Inventories, Fines, giving of Acquittances, " or any Thing concerning the ſame Probate of Teſtaments, ſhall " from the ſaid firſt Day of *April* take or cauſe to be taken, of any " Perſon or Perſons, but only five Shillings, and not above; " whereof to be to the ſaid Biſhop, Ordinary or other Perſon ha- " ving Power to take the Probation of ſuch Teſtament or Teſta- " ments, for him and his Miniſters, two Shillings Six-pence, and " not above; and two Shillings Six-pence, Reſidue of the ſame " five Shillings, to be to the Scribe for regiſtring of the ſame; or " elſe the ſame Scribe to be at his Liberty to refuſe two Shillings " Six-pence, and to demand and have for writing of every ten " Lines of the ſame Teſtament, whereof every Line to contain ten " Inches in Length, one Penny.

" And in (4) caſe any Perſon or Perſons, at any Time hereafter, " require a Copy or Copies of the ſaid Teſtaments ſo proved, or of " the ſaid Inventory ſo made, that then the ſaid Ordinary or Ordi- " naries and the other Perſons having Authority to take Probate of " Teſtaments, or their Miniſters, ſhall from Time to Time, with " convenient Speed, without any fruſtratary Delay, deliver, or cauſe " to be delivered, a true Copy or Copies of the ſame to the ſaid

" Perſons ſo demanding them, or any of them; taking for the " Search, and for the Making of the Copy, either of the ſaid Teſta- " ment or Inventory, but only ſuch Fee as is before rehearſed, for " the Regiſtring of the ſaid Teſtament; or elſe the ſaid Scribe or " Regiſter to be at his Election, to demand, have and take, for eve- " ry ten Lines thereof, being full in Proportion before rehearſed, one " Penny.

" Provided always, that where any Perſon or Perſons, having " Power or Authority, have uſed to take leſs Sums of Money than " is aboveſaid for the Probate of Teſtaments, Commiſſions, or Ad- " miniſtrators, or other Cauſe concerning the ſame, they ſhall take " or receive ſuch Sum or Sums of Money, for the Probate of Teſta- " ments and Commiſſions, or the Adminiſtrations, and other Cauſes " concerning the ſame, as they before the Making of this Act have " uſed to take, and not above.

" And it is enacted, (5) That every Biſhop, Ordinary, Archdea- " con, Chancellor, Commiſſary, Official, and other Perſon or Per- " ſons having, or they which hereafter ſhall have, Authority to take " Probate of Teſtaments, their Regiſters, Scribes, Preiſers, Appari- " tors, and all other Miniſters whatſoever they be, that ſhall do, or " attempt to be done and attempted againſt this Act or Ordinance " in any Thing, ſhall forfeit for every Time ſo offending to the Par- " ty grieved in that Behalf, ſo much Money as any ſuch Perſon a- " boveſaid ſhall take contrary to this preſent Act; and over that, " ſhall loſe and forfeit *Ten Pounds Sterling*, whereof the one Moiety " ſhall be to the King, and the other Moiety to the Party grieved in " that Behalf, that will ſue in any of the King's Courts for the Re- " covery of the ſame; in which Action no Eſſoin ſhall be admitted " or allowed.

Reſolutions upon the aforeſaid Stat. 21 H. 8. c. 5. *about Fees for proving Wills*, &c.

IF a Man makes his Teſtament in Paper, and dieth poſſeſſed of Goods and Chattels *above the Value of forty Pounds*, and the Executor cauſeth the Teſtament to be *tranſcribed in Parchment*, and bringeth both to the Ordinary, *&c.* to be proved; it is at the Election of the Ordinary, whether he will put the Seal and Probate to the *Original in Paper, or to the Tranſcript in Parchment*; but whether he put them to the one or the other, there can be taken of the Executor, *&c.* in the whole but *five Shillings, and not above, viz.* Two Shillings Sixpence to the Ordinary, *&c.* and his Miniſters, and Two Shillings Sixpence to the Scribe for regiſtering the ſame; or elſe the ſaid Scribe to be at his Liberty to refuſe thoſe two Shillings and Sixpence, and to have for writing every ten Lines of the ſame Teſtament, whereof every Line to contain ten Inches, one Penny.

If the Executor deſire that the Teſtament in Paper may be tranſcribed in Parchment, he muſt agree with the Party for the Tranſcribing; but the Ordinary, *&c.* can take nothing for it; nor for the Examination of the Tranſcript with the Original; but only two Shillings Sixpence for the whole Duty belonging to him.

When the Goods of the Dead do not exceed *an hundred Shillings*, the Ordinary, *&c.* ſhall take nothing, and the Scribe ſhall have only for writing of the Probate, Six-pence; ſo that the ſaid Teſtament be exhibited in Writing, with Wax thereunto affixed, ready to be ſealed.

Where the Goods of the Dead do amount unto *above the Value of a hundred Shillings, and do not exceed the Sum of forty Pounds*; then ſhall be taken for the Whole but Three Shillings Six-pence, whereof to the Ordinary, *&c.* two Shillings Six-pence, and Twelve-pence to the Scribe for regiſtering the ſame.

Where by Cuſtom leſs hath been taken in any of the Caſes aforeſaid, there leſs is to be taken; and where any Perſons require a Copy or Copies of the Teſtament ſo proved, or Inventory ſo made, the Ordinary, *&c.* ſhall take for the Search, and making of the Copy of the Teſtament or Inventory, if the Goods exceed not a hundred Shillings, Six-pence; and if the Goods exceed a hundred Shillings, and exceed not forty Pounds, Twelve-pence; and if the Goods exceed forty Pounds, two Shillings Six-pence; or to take for every ten Lines thereof, of the Proportion aforeſaid, One penny [g].

[g] M. 6 Jac. Rot. 1301. C. B. inter *Edward Neale* Informer, *&c.* and *Jacobum Rouſſe* Officialem infra Archidiaconatum de Huntington def. per l'chiefe Juſtice *Walmeſly*, *Warburton*, *Daniel* and *Foſter*. Inſt. part. 3. fol. 149. Inſt. part. 4. fo. 336. Co. Ent. 166. S. C.

Officialis indictatus de citando & affligendo plurimos, non poteſt dedicere; & petit quod admittatur ad finem [h].

[h] M. 22 E. 3. coram rege, Rot. 181. Eborum.

If a Biſhop, or other Eccleſiaſtical Judge or Miniſter, doth exact a Bond or Oath of any Perſon in any Eccleſiaſtical Caſe, not warrantable by Law; the Bond is void, and this Exaction is puniſhable by Fine. The Record is long, but worthy to be read [i].

[i] Rot. Parl. 8 H. 4. n. 15, 16, 17, 18, 19, 20.

Contra Sequeſtratores, Commiſſarios, & alios Officiales Epiſcoporum, pro captione feodorum pluſquam debent pro teſtamentis probandis [k].

[k] H. 13 E. 3. coram Rege.

If the Executor requeſt any to ingroſs the Teſtament, he muſt agree with him he doth ſo requeſt, or bring one ready ingroſſed with him; which for preventing of more Fees than by the Statute, is adviſed as a ſafe and ready Way [l]. *Nota*, That by the ſaid Statute, neither the Monies raiſed of Lands appointed by the Will to be ſold, nor the Profits thereof, are to be accounted as any of the Teſtator's Goods or Chattels.

[l] Inſt. part. 4. fol. 336.

4 & 5 Annæ, c. 16. By a late Statute it is enacted, that *the Power of granting* Probates, and Adminiſtration of Goods of Perſons dying, for Wages or Work in her Majeſty's Docks or Yards, ſhall be in the Ordinary of the Dioceſe where the Party dieth, or in him to whom ſuch Power is granted by the Ordinary.

§. XVI. Of the Payment of Debts, Legacies, and Mortuaries.

1. *Many Queſtions about the Payment of Debts and Legacies.*
2. *What Debts are firſt to be diſcharged.*
3. *Of Debts due to the King.*
4. *Of Judgments and Condemnations.*
5. *Of Debts due by Recognizance and Statute-Merchant.*
6. *Of Obligations.*

7. *Of Bills and Books.*
8. *Of Debts without Specialty.*
9. *Whether the Executor may allow his own Debt.*
10. *Of paying Part, and receiving an Acquittance for the whole Debt.*
11. *Of paying the Teſtator's Debts with the Executor's own Money.*
12. *Of Mortuaries.*
13. *No Mortuary to be taken but in certain Caſes, and that under a certain Pain.*
14. *No Mortuary due where the movable Goods do not extend to Ten Marks.*
15. *No Mortuary due but in thoſe Places where they have been uſed to be paid.*
16. *One only Mortuary due, and that in the Place of the moſt Abiding of the Deceaſed.*
17. *Three Shillings Four-pence due for a Mortuary, where the movable clear Goods do exceed Ten Marks, but do not amount to Thirty Pounds.*
18. *Six Shillings Eight-pence due for a Mortuary, where the clear movable Goods extend to Thirty Pounds, or above, and be under Forty Pounds.*
19. *Ten Shillings due for a Mortuary, the clear movable Goods extending unto Forty Pounds, or above.*
20. *Divers Perſons diſcharged of Mortuaries.*
21. *Other Interpretations extending and limiting this Statute concerning Mortuaries.*

HOW (1) far the Executor is bound to pay Debts and Legacies [a]; how the Payment of Debts is to be preferred before Legacies [b]; how Legacies are to be paid out of the Dead's Part [c]; how the Dead's Part is ſometimes the Whole clear Goods, ſometimes half, and ſometimes but a third Part [d]; alſo whether in caſe the Legacies do exceed the Dead's Part, it be in the Election of the Executor to prefer one Legacy before another, or what other Order is to be taken [e]: All theſe Things are more fully heretofore declared, and need not here to be iterated. It (2) remaineth therefore that in this Place be ſhewed, which Debts are firſt to be diſcharged, in Caſe there be not ſufficient Goods and Chattels to pay all the Teſtator's Debts; or whether it be in the Power of the Executor to pay which Debts he will; and if any remain clear, then whether Mortuaries are to be paid, and how much is to be paid for Mortuaries.

[a] Supra ead. par. §. 3.
[b] Supra part. 3. §. 16.
[c] Eod. §. 16.
[d] Eod. §. 16.
[e] Supra part. 3. §. 17.

Firſt of all therefore, (3) I ſuppoſe that the Debt due by the Teſtator *to the King* is to be diſcharged, and that it is not in the Choice of the Executor, to prefer any other Debt due to any Subject [f]:

[f] Magna charta, c. 18. Quod verum eſt, utcunque jure Civili, non ſolum in actionibus perſonalibus, ſed etiam in hypothecariis, ſaltem jure quo nos utimur; ex hypothecariis creditoribus prior tempore, potior jure.

Which muſt be underſtood of ſuch Debts as are due to the King only by Matter of Record, and not of Sums of Money due to the King upon Wood-ſales or Sales of his Minerals, for which no Obligation is given; or of Amercements in his Courts-Baron or Courts of his Honours, which be not Courts of Record; or of Fines for Copyhold

hold Eſtates there; or of Forfeitures to the Crown of Debts by Contract due to any Subject by Utlary or Attainder, until Office thereupon found [g]. If the Executor be ſued by any Subject for a Debt, he may plead in Bar, that his Teſtator died ſo much indebted unto the King, ſhewing how, *&c.* and that he hath not *ultra* to ſatisfy the Debt [h]. If he hath no Day in Court to plead this, then the Executor is put to his *Audita querela*, wherein he muſt ſet forth the Special Matter.

[g] Office of Executor, fo. 206.

[h] M. 33, 34 Eliz. the Lady *Walſingham*'s Caſe in C. B.

Secondly, (4) (if yet there remain ſufficient Goods and Chattels,) before other perſonal Debts, whether they be due by Obligation, Bill, or otherwiſe, *Judgments* and *Condemnations* are to be diſcharged [i].

[i] Brook Abridg. tit. Exec. n. 172. Doct. & Stud. l. 2. c. 10. D. Coke l. 4. fo. 60.

It is no Plea for a *Creditor by Statute*, to ſay that his Statute was acknowledged *before the Judgment*, and ſo more antient: For a Judgment, though later, is to be preferred before a Statute in Time precedent [k]. But if this Judgment be ſatisfied, and is only kept on Foot to wrong other Creditors, or if there be any Defeaſance of the Judgment yet in Force; then the Judgment will not avail to keep off other Creditors from their Debts [l]. If there be Two Judgments againſt the Teſtator, Precedency or Priority of Time is not material, but he that firſt ſueth out Execution ſhall be preferred, and before Execution the Executor may ſatisfy which he pleaſeth firſt. And it is not neceſſary that the Judgment be limited to the Courts at *Weſtminſter*; but if it be obtained in any Court of Record, which hath Power to hold Plea by Charter on Preſcription of Debt above Forty Shillings, it is ſufficient. For though upon ſuch a Judgment Execution cannot be there had, but of ſuch Goods as are within the Juriſdiction of that Court; yet if the Record be removed into Chancery by a *Certiorari*, and there by *Mittimus* into one of the Benches, then Execution may be had upon any Goods in any County of *England*.

[k] Dy. 32. M. 32 Eliz. *Pemberton*'s Caſe, lib. 4. fo. 60. Dyer 32. the Sadler's Caſe.

[l] Lib. 5. fo. 28. lib. 8. fo. 132.

It is certainly true, that *Judgments obtained in the Courts at* Weſtminſter, ſhall be paid before *Statutes*, becauſe thoſe Judgments are Debts of a ſuperior Nature, and above any private Records, and likewiſe above any *Recogniſances*; they are *judicia reddita in invitos*, and recovered upon judicial Proceedings in thoſe Courts; it is true, *Statutes and Recogniſances* are likewiſe Debts on Record, but of a more private Nature, as being acknowledged by the Agreement of Parties, therefore Judgments (where there are no Defeaſances) muſt firſt be ſatisfied.

Littleton v. *Hibbins*, Cro. Eliz. 793.

And if ſuch *Judgments* are to be ſatisfied before *Recognizances*, it is plain they are to be paid before *Bonds*, for thoſe are ſtill of an inferior Nature; therefore where Judgment in Debt was had againſt the Teſtator, and upon a *Scire facias* brought againſt his Executor, he pleaded that before *he had Notice of the Judgment*, he had fully adminiſtered by paying Debts due on Bonds (naming them); this upon a Demurrer was adjudged an ill Plea, becauſe the Executor ought at his Peril to take Notice of Debts on Record, and to pay them in the firſt Place.

Judgments are likewiſe to be paid before *Rent*, eſpecially if it became due after the Death of the Teſtator; but if it was due and in arrear in his Life-time, then it ſtands on the ſame Equality with Debts on Specialties.

An Executor paid the *Arrears of Rent incurred in the Life-time of the Teſtator*, which Rent was reſerved on a *Parol-Leaſe*; and the Queſtion was, whether this Money was ſo well applied as to bar a Creditor on *Bond*; and decreed, that it ſavouring of the Realty, it was to be preferred before a *Bond*. 1 *Vern.* 490. *Willet* verſus *Earl.*

But the Forfeitures for not burying in Woollen, and all Money due for Letters to the Poſt-Office, ſhall be paid before any Debt due to a private Perſon; and this by particular Statutes made for that Purpoſe. 30 Car. 2. cap. 3. 9 Annæ, cap. 10.

Thirdly, (5) The Debt due on *Statute-Merchant and Recognizance* is to be diſcharged (if there be Aſſets) before any perſonal Debt [m]: For that by Force of the Recognizance, not only the Perſon of the Debtor is bound, but alſo after the Day of Payment is expired, the Moveables of the Debtor may be apprehended and ſold for the Payment of the Debt [n].

[m] Quibus enim res obligatæ ſunt, ſunt illi potiores quam creditores qui perſonali tantum actioni incumbunt. L. eos. C. qui potiores in pig.

[n] Anno 13 Ed. 1.

Judgments in a Court of Record ſhall be paid before Statutes, which are but private Records, and alſo before Recognizances acknowledged by Aſſent of Parties. A Debt due upon a Judgment, though it be a later Debt, ſhall be paid before a precedent Debt due by Recognizance or Statute: For though they be both Records, yet the Judgment in the King's Court upon judicial Proceedings is more eminent in Degree [o].

[o] M. 32 Eliz. C. B. *Pemberton* and *Barham*'s Caſe. C. lib. 4. the Caſe of the Wardens and Commonalty of Sadlers. Lib. 5. fo. 28. *Harriſon*'s Caſe.

But a *Judgment not docqueted*, as required by [p] Statute, ſhall not affect any Lands as to Purchaſers or Mortgagees, or have any Preference againſt Heirs, Executors, or Adminiſtrators in the Adminiſtration of the Eſtates of their Anceſtors, Teſtators, or Inteſtates.

[p] 4 & 5 Will. & Mar. cap. 20.

A *Statute and Recognizance* ſtanding in equal Degree, it is at the Executor's Election to give Precedency to which he will: Neither between one Statute and another doth the Time or Antiquity give any Advantage as touching the Goods, though touching the Lands of the Conuſor it doth: But as for the Goods in the Hands of the Executor, he who firſt ſeiſeth them by Execution is preferred; and before Suing of Execution, the Executor may give Precedency to which he will.

But amongſt *Statutes and Recognizances*, thoſe which are *forfeited* ſhall be preferred before thoſe which are for Performance of Covenants, not broken. Lib. 5. fo. 28. Hill. 40 Eliz. C. B. Rot. 119.

In the next Place *Debts due for Arrears of Rent reſerved upon Leaſes in Writing*, and likewiſe upon Parol-Leaſes, are to be paid, becauſe it ſavours of the Realty by Reaſon of the Profits received.

Then Debts due on *Specialties* are to be paid in the next Place, as *Bonds*, *Penal Bills*, or *Bills ſealed*, and without any Pain. But a Duty decreed in a Court of Equity ſhall take Place of *Bonds* and Debts on ſimple Contracts, and ſhall be paid next to *Judgments*. 1 *Vern.* 143. *Harding* verſus *Edge.*

T. S. was Debtor by *Bond and by Recognizance*, and Judgment was had againſt him in the *Bond*, and before Execution *T. S.* made his Wife Executrix, and died, then his *Goods were taken in Execution* 2 And. 157. Cro. Eliz. 734, 822. 4 Rep. 59. b. *Fuller* v. *Gilmore.*

tion upon the Recognizance, and afterwards the *Bond-Creditor* brought a *Scire facias* on the Judgment againſt the Executrix, to ſhew Cauſe why he ſhould not have Execution, to which ſhe pleaded *Execution on the Recognizance*; and it was held a good Plea, becauſe the Executrix is liable to the juſt Debts of the Teſtator: Now the Debt on the *Recognizance* was a juſt Debt, and the Execution was an actual Recovery by due Courſe of Law, which ſhe could not prevent, eſpecially having no Notice of the Judgment on the Bond.

If there be ſeveral Obligations for the Payment of Money, the Time in one was come at the Time of the Teſtator's Death, and not ſo upon the other, if when the Money is payable, he forbear to ſue for his Debt, until the other Obligation become payable; it is in the Election of the Executor to pay which he pleaſes firſt: For it is the Commencement of the Suit only which entitles to Priority of Payment; or at leaſt reſtrains the Executor's Election. Therefore an Executor may not pay a Debt of equal Degree to a Creditor that brings no Action for the ſame, after another Creditor hath brought his Action [q].

[q] Dr. and Stud. lib. 2. c. 10. 29 H. 8. Dy. fo. 32.

Fourthly, (6) (if the Goods and Chattels will ſuffice); and if there be divers Obligations, then it ſeemeth to be in the Power of the Executor, to diſcharge which Obligation, and to gratify which of the Creditors he will [r]; which being done, the other Creditors be without Remedy, if there be no Aſſets. Unleſs the Day of Payment in the one Obligation be expired, and the Day of Payment of the other Obligation is not yet come; in which Caſe the former Obligation is to be firſt ſatisfied [s]: Or unleſs there be Suit commenced for ſome Obligation; for then it is not in the Power of the Executor to diſcharge another Obligation, for the which no Action is brought, in Prejudice of the former Suit [t]. But if there be Two Obligations, and the Two ſeveral Creditors bring ſeveral Actions againſt the Executor, he that firſt obtaineth Judgment muſt be firſt ſatisfied [u]. Yet a Debt due upon Record may be paid pending the Action [x].

[r] Brook ubi ſupr. Doct. & Stud. l. 2. c. 10.

[s] Brook d. tit. Exec. n. 172. L'abridg. dez caſes edit. An. Dom. 1599. fo. 174. pag. 2. n. 4. 28 H. 8. Dy. fo. 32.

[t] Brook d. n. 172.

[u] D. L'abridg. dez caſes, fo. 174. p. 2. n. 6.

[x] Brook eod. n. 172.

Fifthly, (7) Concerning theſe laſt recited Specialties, Bills are of the Nature of an Obligation. For when a Man maketh ſuch an Obligation, namely, *This Bill witneſſeth, that I* A. B. *have borrowed ſo much Money of* C. D. without ſaying more, this ſhall charge the Executor as well as an Obligation; ſo that the Teſtator, if he had been alive, could not have waged his Law againſt this Bill. For theſe Words, *recepiſſe*, or *debere*, or *teneri ad ſolvendum* Ten Pounds, do make a good Obligation, and ſhall bind the Executor; for every Word which proveth a Man to be Debtor, or to have another's Money in his Hand, though it be by Bill, yet ſhall it charge the Executor [y].

[y] Fulb. l. 2. paral. fol. 30.

Finally, (8) If the Creditor have no *Specialty*, or Writing, it ſeemeth that the Executor is not bound by the Laws of this Realm to pay the ſame, albeit he had Aſſets in his Hands, (ſaving Servants Wages [z];) becauſe in every Caſe where the Teſtator might wage his Law, no Action lieth againſt the Executor [a]. Howbeit an Action of the Caſe may be brought againſt the Executor, upon the Promiſe or Aſſumption made by the Teſtator in his Life-time by [b] *Word only*, without Writing, if there are Aſſets.

[z] Brook tit. Exec. n. 87, 163.

[a] *Terms of Law*, verb. Exec.

[b] Brook tit. Exec. n. 71. Lib. 4. *Slade's* Caſe 93. Yel. 20. S. C.

[c] But this is now altered by Statute, (*viz.*) that no Executor or Adminiſtrator ſhall be charged on a ſpecial Promiſe to anſwer Damages out of his own Eſtate, unleſs ſome Note thereof be in Writing,

[c] 29 Car. 2. cap. 3.

and ſigned by the Party to be charged, or by ſome other authoriſed by him.

Now if there are Aſſets to ſatisfy all the Creditors, then obſerving the Order aforeſaid, Beginning with the Payment of the Debt due to the King, and ſo forward, I ſuppoſe it is a Diſcharge againſt the reſt [d]. Otherwiſe it is dangerous to the Executor, if he pay Debts without Specialty before thoſe Debts which are due upon Specialty, or if he diſcharge Obligations before Judgments, *&c* [e].

[d] Quod facto inventario ſine impedimento procedit, alias ſecus, ſi reſpiciamus jus civile. L. ſcimus. §. & ſi præfatam, idque ob præſumptam fraudem.

[e] Brook, Doct. & Stud. locis ſupradictis.

But here it may be demanded, what if the Teſtator were indebted to the Executor, whether may (9) the Executor allow his own Debt, in Prejudice of other Creditors? By the Civil [f] and our Eccleſiaſtical [g] Laws, he is in the ſame Caſe as other like Creditors. And I ſuppoſe alſo that, by the Laws of this Realm, he may allow his own Debt in Prejudice of other like Creditors [h], in caſe he have made an Inventory, and in caſe he be not Executor of his own Wrong [i].

[f] L. ſcimus. §. in computatione. C. de jure delib.

[g] C. Stat. §. ſtatuimus. de teſta. l. 3. provinc. conſt. Cant.

[h] Plowd. in caſ. inter *Woodward & Darcy:* Licet contrarium teneat Brook tit. Exec. n. 57, 59, 112, 114, 118. cujus opinio communiter hodie reprobatur, ut non ſemel mihi nunciarunt juriſperiti hujus Regni Angliæ non pauci, nec mediocriter docti.

[i] D. Coke, l. 13. Relat. fol. 30.

But he muſt obſerve that the Debts be of an equal Degree. For if the Teſtator be indebted to other Men by Judgment or Statute, and to the Executor only by Bond, then he may not firſt pay himſelf, unleſs there be Goods ſufficient to pay both him and them. *Pl. Com. fo.* 184. *Woodward* and *Darcy's* Caſe. *Lib.* 5. *fol.* 30. *Dyer* 185.

Furthermore, it is to be noted in this Place, (10) if the Executor pay to ſome of the Creditors Part of the Debt due to the Teſtator, and receive an Acquittance for the Whole; as if the Teſtator be indebted to one in Forty Pounds, whereof the Executor payeth but Ten Pounds, and nevertheleſs taketh an Acquittance of the whole Forty Pounds; this Acquittance ſhall not prejudice any other Creditor, but for Ten Pounds only [k].

[k] Brook tit. Aſſets, n. 1. & tit. Exec. n. 6.

If there be Two Creditors in equal Degree, and both ſue, if the Executor doth by Covin help that Creditor which began his Suit laſt to his Judgment or Execution firſt, and there be no Aſſets left to pay the other Creditor; he muſt be ſatisfied out of the Executor's own Eſtate, if this Covin be proved againſt him. But the Confeſſion of an Action by the Executor, where there is a real Debt, is no Covin: And ſuch Recovery by Confeſſion is a good Plea for the Executor againſt another Creditor. 5 *H.* 7. 27. *P.* 39 *Eliz. C. lib. Intrat. fo.* 269. 41 *E.* 3. *Fitz. Executor, pl.* 68. 7 *Eliz. Dy. fo.* 232. 21 *H.* 7. *Kelw. fo.* 74.

Therefore where ſeveral Actions are brought againſt him of equal Nature, he may confeſs Judgment to which he will, and ſatisfy him firſt, unleſs 'tis in the Caſe of the King, where he is intitled to a Debt on Record, as upon Office found, or to *Fines* and *Amerciaments* in his Courts of Record.

Edgcomb verſus *Dee* Vaugh. 89.

So where there are ſeveral juſt Debts due on Bonds, the Executor may pay which he will, except a Suit is commenced; but even in ſuch Caſe, if pending that Suit another Bond-Creditor brings an Action

tion of Debt againſt him, he may prefer which he will, by confeſſing Judgment to one of them, (for he is not bound to ſtand out the Suit) and he ſhall be firſt ſatisfied.

Blundevill v. *Lovedale*, 1 Sid. 21.

An Executor procured another to ſue him for a juſt Debt, and thereupon Judgment was obtained, which he pleaded to a former Action brought againſt him; and this was adjudged a good Plea; for an Executor hath Liberty to pay one before another, tho' he hath Notice of the Action; for tho' in Conſcience all juſt Debts ought to be paid, yet there may be ſome Circumſtances which may make it reaſonable, that one Creditor ſhould be preferred before another, as if he is Poor, *&c.*

1 Vern. 369. *Bright* v. *Woodward.*

After a Bill is exhibited in Chancery againſt an Executor, and pending that Suit, he ſhall not be allowed any voluntary Payments he made afterwards to any of the Creditors, without Suit.

1 Vern. 457. *Surrey* verſ. *Smalley.*

Neither ſhall a *Judgment confeſſed* by an Executor *pending a Bill in Equity*, be preferred in any Payment, nor allowed in Account.

If an Executor or Adminiſtrator compound for 40 *l.* with one who hath a Judgment for 100 *l.* this underhand Compoſition ſhall not prejudice any other Creditor who is a Stranger to it: For every Executor or Adminiſtrator ought to execute his Office lawfully in paying Debts, Duties and Legacies, in ſuch Precedency as the Law requires; and an Agreement made between them and others ſhall not be to the Prejudice of a third Perſon. *Lib.* 8. *fo.* 132. *Turner*'s Caſe.

A Man is condemned in Debt, and dies before Execution had; *per Curiam*, the Adminiſtrator or Executor is bound to pay this Debt upon Record before Specialties. *Dy. fo.* 80.

Moreover it is to be noted, that this hath been delivered and received for Law, *viz.* that if (11) the Executor did pay with his own Money ſo much of the Teſtator's Debts as the Value of the Teſtator's Goods or Chattels did ariſe unto, and retain in his Hands the Teſtator's Goods or Chattels; then ſuch Payment ſhould not prejudice the other Creditors to whom the Teſtator was indebted, but ſhould charge the Executor as Aſſets [l]: And therefore that it behoveth the Executor to alienate the Goods of the Teſtator for Payment of his Debts, if he would be ſafe from paying any more Debts than the Goods of the Teſtator did extend unto [m]. Howbeit at this preſent the contrary Opinion ſeemeth to prevail in this our Realm; namely, that the Executor paying the juſt Value of the Teſtator's Goods to the Creditors, may retain the ſame Goods in his Hands, which nevertheleſs ſhall not charge the Executor as Aſſets [n].

[l] Brook Abridg. tit. Aſſets, n. 8. tit. Exec. n. 116, 150. tit. Admin. n. 37, 38, 51. Lind. in c. ita quorundam. ver. ſibi de teſta. l. 3. provinc. conſt. Cant.

[m] Brook & Lind. ubi ſupra. Quibus adjungas Sichar. in L. ult. §. & ſi præfatam. n. 11, 12. C. de jure delib.

[n] Dyer, fol. 2. & fol. 187.

In an Action of Debt brought againſt an Adminiſtrator, it was the Opinion of the Court, that he might retain Monies in his own Hands of the Inteſtate, to ſatisfy a Debt due to himſelf. *M.* 11 *Jac. C. B. Bond* and *Green*'s Caſe. *Godb. Rep. fo.* 216. *Lib.* 5. *fo.* 59. [o] *Coulter*'s Caſe.

[o] Cro. Eliz. 630. S.C. 1 Roll. Abr. 922. Moor 527. S. C.

And ſo may an Executor. *Pl.* 184. 20 *H.* 7. *Kelw. fo.* 58. *M.* 2 *Eliz. Dy.* 187.

If the Teſtator be indebted to *A.* by Bond in 20 *l.* if his Executors make a ſufficient Obligation to the Teſtator's Creditor, and ſufficiently diſcharge the Teſtator without Covin, they may retain the Goods for ſo much, and the Goods retained ſhall not be Aſſets in

their Hands; yea though they have appointed *ulteriorem diem* for the Payment of the Money [p].

[p] P. 3 Eliz. C. B. *Stampe* and *Hutchins's* Caſe, Leon. fo. 111, 112. Moor 260. S. P. Cro. Eliz. 120.

S. brought Debt againſt *J. S.* as Executor to *B.* who pleaded Fully adminiſtered, *&c.* to which the Plaintiff replied, that he had Goods of the Teſtator's to the Value of 200 Marks; which the other confeſſed, and gave in Evidence, that he had paid as much of his own proper Money for the Teſtator's Debts, and ſhewed how. Reſolved, that it might well be given in Evidence, and that the Property of the Deceaſed's Goods by Payment of the Teſtator's Debts to the Value of the ſaid Goods is altered; and the Property being altered to the Uſe of the Deceaſed, it is a juſt Adminiſtration [q].

[q] *Shelly* verſ. *Sackville*, Anderſ. Rep. 24. 20 H. 7. fo. 2, 4, 5.

If a Teſtator mortgages a Leaſe for Years, and dies, his Executors may redeem it with their own Money, and the Leaſe ſhall be Aſſets in their Hands, for ſo much as the Leaſe is worth above the Sum which they paid for Redemption of it [r].

[r] T. 32 Eliz. C. B. *Hawkins* and *Laws's* Caſe, Leon. 155.

Now as concerning (12) *Mortuaries*, they are ſo called, becauſe before the Reformation, they being left to the Church, were brought thither with the *Corps* at the Time when it was to be buried, and preſented to the Prieſt at the Funeral.

This Word in thoſe Days was uſed in a *Civil* as well as in an *Eccleſiaſtical* Senſe, for the *Mortuary* was paid to the Lord of the Fee, as well as to the Prieſt; for if the Deceaſed had Three or more Animals of any Kind whatſoever, the beſt was reſerved for the *Lord of the Fee as an Heriot*, and the next beſt was *for the Prieſt as a Mortuary*, which was certainly to be paid to him of whom the Deceaſed uſually received the Sacrament whilſt living; and this was in Recompence of a ſuppoſed *Subſtraction of perſonal Tithes and Oblations*.

Lindw. Lib. 3. tit. 15. cap. 2.

It was a Payment originally founded upon the Superſtition of Perſons apprehending themſelves in a State of Damnation for *ſubſtracting Tithes*, but it was due to the Clergy only from their *own Pariſhioners*, tho' now by an unwarrantable Manner they are demanded by Parſons of other Pariſhes, as the Corps paſſes through their reſpective Pariſhes, and this by the Name of [s] *Obventions*, (*i. e.*) from their *Meeting the Corps*, whereas that Word is applicable to all Church-Duties whatſoever.

[s] Hob. 175. 11 Rep. 15.

But becauſe many Queſtions and Doubts had been made, not only of the Manner and Form of demanding *Mortuaries*, but alſo of the Quantity and Values thereof, it is enacted by Authority of Parliament as followeth [t]. "*No* (13) *Parſon, Vicar, Curate, Pariſh-*
"*Prieſt, ne any other Spiritual Perſon, nor the Farmers, Bailiffs,*
"*ne Leſſees, ſhall take, demand, or receive, of any Perſon or Per-*
"*ſons within this Realm, or any Perſon or Perſons dying within*
"*this Realm, for any Mortuary or Corſe-preſent, ne any Sum or*
"*Sums of Money, ne any other Thing for the ſame, more than is*
"*hereafter mentioned; ne alſo ſhall convent or call any Perſon or*
"*Perſons before the Judge ſpiritual, for the Recovery of any ſuch*
"*Mortuaries or Corſe-preſent, or any other Thing for the ſame, more*
"*than is hereafter mentioned; upon Pain to forfeit for every Time*
"*ſo demanding, receiving, taking, or conventing or calling any ſuch*
"*Perſon or Perſons before any Spiritual Judge, ſo much Value as*
"*they ſhall take above the ſame limited by this Act; and over that,*

[t] Stat. H. 8. an. 21. cap. 6.

" *Forty Shillings to the Party grieved contrary to this Act: For the*
" *which Forfeiture, the Party ſo grieved contrary to this Act ſhall*
" *have an Action of Debt by Writ, Bill, Plaint, or Information, in*
" *any of the King's Courts, wherein no Wager of Law, &c. ſhall*
" *be allowed.*

" Firſt, (14) *It is enacted; That no Manner of Mortuary ſhall be*
" *taken or demanded of any ſuch Perſon, whatſoever he be, which*
" *at the Time of his Death hath no movable Goods but under the*
" *Value of Ten Marks.*

" *Alſo* (15) *that no Mortuary ſhall be given or demanded from*
" *henceforth of any Manner of Perſon, but only in ſuch Place as a*
" *Mortuary heretofore hath been uſed to be payed and given; and in*
" *thoſe Places none otherwiſe but after the Rate and Form hereafter*
" *mentioned.*

" *Ne* (16) *that any Perſon pay Mortuaries in more Places than*
" *one, that is to ſay, in the Place of their moſt Dwelling and Ha-*
" *bitation; and there but one Mortuary.*

" *Nor* (17) *no Parſon, Vicar, Curate, Pariſh-Prieſt, or other,*
" *ſhall for any Perſon dying, or dead, being at the Time of his*
" *Death of the Value of movable Goods of Ten Marks or more,*
" *clearly above his Debts payed, and under the Sum of Thirty*
" *Pounds, take for any Mortuary more than Three Shillings Four-*
" *pence in the Whole.*

" *And* (18) *for a Perſon dying, or dead, being at the Time of his*
" *Death of the Value of Thirty Pound or above, clearly above his*
" *Debts payed, in movable Goods, and under the Value of Forty*
" *Pound, there ſhall be no more taken and demanded for a Mortua-*
" *ry than Six Shillings Eight-pence in the Whole.*

" *And* (19) *for any Perſon dying, or dead, having at the Time of*
" *his Death of the Value in movable Goods of Forty Pound or a-*
" *bove, to any Sum whatſoever it be, clearly above his Debts payed,*
" *there ſhall be no more taken, payed or demanded for a Mortua-*
" *ry, than Ten Shillings in the Whole.*

" *Provided,* (20) *That for no Woman being Covert Baron, ne*
" *Child, nor for any Perſon not keeping Houſe, any Mortuary be*
" *payed, ne that any Parſon, Vicar, Curate, Pariſh-Prieſt, or o-*
" *ther, ask, demand, or take for any ſuch Woman, Child, or for a-*
" *ny Perſon not keeping Houſe, dying, or dead, any Manner of*
" *Thing or Money by Way of Mortuary.*

" *Ne alſo for any way-faring Man, or other that dwelleth not ne*
" *maketh Reſidence in the Place where they ſhall happen to die; but*
" *that the Mortuary of ſuch way-faring Perſons be anſwerable in*
" *Places where Mortuaries be accuſtomed to be paid, and in Man-*
" *ner and Form, and after the Rate before-mentioned, and no other-*
" *wiſe, in Place or Places where ſuch way-faring Perſons at the*
" *Time of their Death had the moſt Habitation, Houſe and Dwel-*
" *ling-places, and not elſewhere.*

" *Provided* (21) *always, That it ſhall be lawful to all Manner*
" *of Parſons, Vicars, Curates, Pariſh-Prieſts, and other Spiritual*
" *Perſons, to take and receive all Manner Sums of Money, or o-*
" *ther Thing, which by any Manner of Perſon dying ſhall fortune to*
" *be diſpoſed, given or bequeathed unto them, or any of them, or to*
" *the high Altar of the Church, this Act or any Thing therein men-*
" *tioned notwithſtanding.*

" *And be it*, &c. *That no Mortuaries or Corſe-preſents, or any* " *Sum or Sums of Money, or other Thing, for any Mortuary or* " *Corſe-preſent, ſhall be demanded, taken, received or had in the* " *Parts of* Wales, *nor in the Marches of the ſame, nor in the Towns* " *of* Calice *or* Berwick, *or the Marches of the ſame, but only in ſuch* " *Parts and Places of* Wales, *Marches and Towns aforeſaid, where* " *Mortuaries have been accuſtomed to be taken and payed: And* " *in thoſe Parts and Places no Mortuaries or Corſe-preſents, ne a-* " *ny other Thing for Mortuary or Corſe-preſent, from henceforth ſhall* " *be demanded, taken, received, or had, but only after the Form,* " *Order and Manner above ſpecified in this preſent Act, and none* " *otherwiſe, ne of any other Perſon or Perſons, than is limited in* " *this preſent Act, and none otherwiſe, upon Pain above contained* " *in this preſent Act.*

" *Provided alſo, That it ſhall be lawful to the Biſhops* [u] *of* Ban- " gor, Landaff, Saint Davids, *and* Saint Aſaph, *and likewiſe to the* " *Archdeacon of* Cheſter, *to take ſuch Mortuaries of the Prieſts* " *within their Dioceſes and Juriſdictions as heretofore hath been* " *accuſtomed.*

[u] Mortuaries are taken away within thoſe Dioceſes, and a Recompence is given to the reſpective Biſhops thereof by the Statute 12 Annæ, cap. 6.

" *Provided always, That in ſuch Places where Mortuaries have* " *been accuſtomed to be taken of leſs Value than is aforeſaid, that* " *no Perſon ſhall be compelled to pay in any ſuch Place any other* " *Mortuary than hath been accuſtomed; ne that any Mortuary in* " *ſuch Place ſhall be demanded, taken, received or had, of any ſuch* " *Perſon or Perſons exempt by this Act, nor in any wiſe contrary to* " *this Act, upon Pain afore limited.*"

This Statute is now the ſtanding Law concerning Mortuaries; but before it was made, the common Opinion was, that they were only recoverable in the *Spiritual Court*, and where Prohibitions were brought, it was uſual to grant Conſultations; for as *Fitzherbert* tells us, where a *Cuſtom* is alledged for the Payment of a Mortuary it ſhall be tried in the Spiritual Court, becauſe that Court had the original Juriſdiction in ſuch Caſes; but others are of Opinion, that where the Cuſtom is denied, and that is ſuggeſted to the Court in order to obtain a Prohibition, that it hath been granted; therefore Prohibitions having been denied, and granted upon ſuch a Suggeſtion; it was ruled by the Court of King's Bench, that where the Suit was in the Spiritual Court for a Mortuary, the Defendant ſhould take a Declaration upon a Prohibition, and try the Cuſtom at Law. 3 *Mod.* 268. *Proud* verſus *Piper.* F. N. B.

And yet where a Vicar ſued in the Spiritual Court for a Mortuary, the Defendant ſuggeſted for a Prohibition, that it was not by Cuſtom due to him, but to the Impropriator, and that he had paid it to him, and that the Statute had not taken away all Mortuaries, but only ſuch as were not due by Cuſtom, which Cuſtom is to be tried at Common Law; but the Prohibition was denied, for that the Spiritual Court may hold Plea of Mortuaries notwithſtanding this Statute, for that takes away thoſe Mortuaries only which were not payable by Cuſtom; now here it was admitted, that a Mortuary was due by Cuſtom, but they differed in the Perſon to whom it was to be paid, and the Statute enacts no new Thing, but leaves Mortuaries to be paid as before. *Mark* verſus *Gilbert*, Sid. 263.

A Mor-

A Mortuary was formerly uſed to be paid by the Executor next to the Heriot, and before the Debts. *Veta, lib.* 2. *c.* 50. *Bracton, lib.* 2. *fo.* 60. *Britton, fol.* 178. *Inſt. part.* 1. *fo.* 185. *b.*

If a Man be ſued in the Spiritual Court for a Mortuary, a Prohibition will lie. *Doct. & Stud. lib.* 2. *c.* 55. Though it appeareth by the Statute 13 *E.* 1. commonly called *Circumſpecte agatis,* that Mortuaries are ſuable in the Court Chriſtian. In antient Times, if a Man died poſſeſſed of Three or more Cattel of any Kind, the beſt being kept for the Lord of the Fee as a Heriot, the ſecond was wont to be given to the Parſon in the Right of the Church. *Inſt. part.* 1. *fo.* 185. *b.*

But here it may be demanded, whether the *Mortuary* ought to be paid before the Goods be divided amongſt the Wife and the Children, (where ſhe hath a Widow's Part, and they filial Portions, by the Cuſtom of the Country;) or it ought to be taken out of the Dead's Part only. To which Queſtion anſwering, I hold it more agreeable to the Civil and Eccleſiaſtical Law, that it ought to be ſatisfied out of the Dead's Part, after the Diviſion of the Deceaſed's Goods, according to the Cuſtom of the Country: And my Reaſon is, becauſe a Mortuary is of the Nature of a Legacy, and termed in Law the principal Legacy. Now ſeeing it is clear that Legacies are to be paid out of the Dead's Part, therefore the Mortuary is to be paid out of the ſame Part [x]; yet before any other Legacies, and without any Defalcation, as well for that it is a principal Legacy, as by Force of the foreſaid Statute.

[x] Mortuarium eſſe legatum, nempe pro anima defuncti relictum, conſtat ex gloſ. in c. conquerente, de offic. ordin. ex & Hoſtienſ. ibidem, verb. mortuar. ideoque non ex aſſe, ſed ex illa parte quæ dicitur pars defuncti ſolvendum; nec patitur defalcationem, maxime propter Stat. inde edit.

Upon the whole Matter, Mortuaries are ſuable in the Spiritual Court, tho' ſome have been of Opinion, that ſince by the Statute the Sum is made certain, where by Cuſtom a Mortuary is to be paid, that an Action of Debt may be brought for that Sum, becauſe the Statute hath made it a Duty, and therefore the Law will give a proper Remedy to recover it; but ſuch Action was never yet brought.

But an Action of Debt hath been brought againſt a Vicar for taking more for a Mortuary than is allowed by the Statute, by which he forfeits ſo much in Value as he took more than is limited by that Statute, and Forty Shillings to the Party grieved. See the Precedents in *Co. Entr.* 164.

§. XVII. Of making an Account; and firſt, of the Neceſſity thereof.

1. *Divers Reaſons wherefore Executors are to account.*
2. *Whether the Executor be ſubject to account, being releaſed by the Teſtator.*

HERE it may be conſidered [m], how needful it is that Executors ſhould be accountable; to whom the Account is to be made, within what Time, in what Manner, and what Effects the ſame hath.

How (1) requiſite and needful a Thing it is, that Executors ſhould be charged with the rendering an Account; the unfaithful Dealing of

[m] Super hac materia vid. Jo. de Can. de Tract. de exec. ult. vol. §. noviſſimum, n. 4. & Jo. Olden. conſ. Tract. tit. 8.

Executors, to the utter undoing of many fatherleſs and friendleſs Children, is a Proof over-well known[n]. Surely, if it ſtand with Reaſon, that Stewards, Receivers, Bailiffs, Tutors, Factors, and ſuch as have to deal for other Perſons, ſhould be accountable of their Stewardſhip and Offices[o]; with great Reaſon may it be maintained, that an Executor ſhould be ſubject to account rather than they; for they for the moſt part have to deal for ſuch as be living, who may have an Eye to their Doings; but an Executor hath to deal for a dead Perſon, who neither can ſee nor hear if his Executor deal unjuſtly. Again, if the Executor have well and faithfully executed his Office, and fully diſcharged the Truſt repoſed in him, what ſhould move him that he ſhould not willingly make a due Account thereof, and thereby obtain an Acquittance, and be delivered from the Burthen laid upon him[p]? On the contrary, if he have played the unjuſt Steward, in that Caſe ought he to be urged and compelled to make his Account, that his Fraud and Deceit being detected, he may be juſtly puniſhed, and others by his puniſhment premoniſhed[q]. By this alſo, that as well the Civil Laws as the Eccleſiaſtical Laws be ſo preciſe in making Inventories, we may learn the Neceſſity in making an Account; for if Executors were not accountable, the Uſe of Inventories were to little Purpoſe[r].

[n] Argument. a §. quoniam in Authent. ut hi qui oblig.

[o] Jo. de Canib. in d. §. noviſſimum, n. 1. Menoch. de arb. jud. l. 2. Caſe 209.

[p] Jo. Olden. tract. de executor. ult. vol. tit. 8.

[q] Olden. ubi ſupra.

[r] Jo. de Canib. in d. §. noviſſimum.

To conclude, all equal Laws of every well-governed Commonwealth have favoured the Execution of Teſtaments and laſt Wills of Men deceaſed, and have had ſpecial Care that they ſhould not be fruſtrated; and therefore no Man can with ſafe Conſcience ſpeak againſt the rendring an Account[s]. Inſomuch that if (2) the Teſtator ſhould diſcharge his Executor from making an Account; yet if the Executor deal fraudulently, the Ordinary may in his Diſcretion exact an Account at his Hands, for the Reformation of ſuch Fraud[t]. For it is not to be preſumed that the Teſtator, in granting to the Executor Immunity from making an Account, did think that the Executor would deal unjuſtly and fraudulently[u], and ſo did not pardon any ſuch Injuſtice and Fraud, whereof he had no Conceit[x]; but rather hoped that the Executor would diſcharge his Office with all Fidelity, ſo that there ſhould not need any Account, and in that Reſpect only (I mean in the Caſe of his Fidelity) did acquit him from rendring an Account[y].

[s] Old. d. tract. tit. 8.

[t] Lind. in c. religioſa. verb. rationem. de teſtam. l. 3. provinc. conſt. Cant. Jo. de Athon. in magna gloſſ. in Legatin. libertat. de exec. teſtam. Jo. de Canib. & Jo. Olden. locis ſuperius citatis.

[u] Lin. Jo. de Canib. & Jo. Olden. ubi ſupra.

[x] L. ſi quis ff. de leg.

[y] Lind. ubi ſupra.

By a Statute made *Anno* 1 *Jac.* 2. 'tis enacted, *That an Adminiſtrator ſhall not be cited to give an Account of the perſonal Eſtate of the Inteſtate, otherwiſe than by an Inventory, unleſs it be at the Inſtance of ſome Perſon in Behalf of a Minor, or of one having a Demand out of ſuch perſonal Eſtate, as Creditor or next of Kin.*

1 Jac. 2. c. 17.

Now ſince the *Inventory* ſhews with what he is charged, ſo the Account to be given by him muſt be his Diſcharge, and that is what he can prove to be laid out in *Funeral Expences*; the Charges in making the *Inventory*; and where there is an Executor, the Charges of proving the Will, the Payment made of all *juſt Debts* and Legacies; ſuch an Account will diſcharge him of all Suits in the Spiritual Court, but not of Suits at Common Law, for there every Particular muſt be again proved.

My Lord *Coke* tells us, that in his Time it was attempted in Parliament to give an Action of *Account againſt the Executors of Guardians*;

1 Inſt. 90. b.

dians; but it could never be effected; this is now done by the Statute 4 *Annæ*, by which 'tis enacted, *That an Account ſhall lie againſt an Executor or Adminiſtrator of a Guardian, Bailiff, or Receiver,* &c. *and the Auditors ſhall examine the Parties on Oath, and ſhall be allowed as thought reaſonable by the Court, by the Party on whoſe Side the Balance ſhall be.*

4 & 5 Annæ, c. 16. part. 45.

§. XVIII. To whom the Account ought to be made.

1. *The Account is to be made to the Ordinary.*
2. *Whether the Account is to be made to the Creditors or Legataries.*
3. *Whether the Account is to be made to the Co-Executor.*

THE (1) Account is to be made by the Executor to the Biſhop or Ordinary, to whom the Probate of the Teſtament appertaineth [s]; who therefore not unaptly may be termed the Executor of Executors, becauſe he examineth the Account of every Executor; and the Father of the Fatherleſs, for that to poor Orphans he is inſtead of a Father [t], in providing how they may maintain that which is left unto them by the Teſtament of their Father or other Perſon deceaſed.

And though (2) it ſeemeth that the Executor is not bound to make an Account to the Legataries or Creditors extrajudicially [u]; yet I ſuppoſe that, at the Inſtance of ſuch Legataries and Creditors, he may be compelled to render an Account to the Ordinary judicially [x].

To (3) this Queſtion, whether an Executor be bound to make an Account to his Co-executor, it is anſwered, That extrajudicially an Executor may exact an Account of his Co-executor, but not in Judgment [y]; but the Ordinary may call them both, or either of them, to a judicial Account [z].

[s] Clem. Unic de teſt. c. Stat. §. & poſtq. de teſtam. l. 3. provinc. conſtit. Cant. Jo. de Canib. de Exec. ult. vol. 2. partic. §. noviſſimum. Per. L. nulli. C. de Epiſ. & Cleric.

[t] Jo. de Canib. in d. §. noviſſimum. n. 9.

[u] Jo. de Canib. in d. §. noviſſimum.

[x] Per ea quæ inferius ſcribuntur, ead part. §. 20.

[y] Lind. in d. c. ſtat. §. & poſtq. verb. rationem, in fin. gloſſ. ibidem.

[z] L. 2. de adminiſt. tut. C. Lind. ubi ſupr.

§. XIX. Of the Time of the Account.

1. *The Time is left to the Diſcretion of the Ordinary.*
2. *Of the general and particular Account.*

THE (1) Time appointed for making the Account ſeemeth to be arbitrary, that is to ſay, left to the Diſcretion of the Ordinary [a]. And (2) altho' it may ſeem that the Executor ought not to be called to a general Account of his whole Executorſhip, before he have had ſufficient Time for the Performance of the Will [b], (which is a Twelve-month [c];) nevertheleſs in the mean Time, if the Executor do not adminiſter faithfully, or if the Ordinary think it convenient, the Executor may be compelled to make a particular Account [d]; and ſo in divers Reſpects the Law hath appointed the Time diverſely.

[a] Text. in c. Stat. §. & poſtquam. de teſta. l. 3. provincial. conſt. Cant.

[b] Lind. in d. c. §. & poſtquam. verb. congrue, & verb. rationem reddere.

[c] L. nulli. C. de Epiſ. & cler. Boi. in c. tua. nobis. de teſta. extra. Covar. in c. 3. eod. tit. Jo. de Canib de exec. ult. vol. §. noviſſimum, q. 10.

[d] Lind. in d. c. Stat. verb. congrue, & verb. rationem reddere.

But whatſoever the Law hath determined herein, it is for the moſt part every where within this Realm obſerved, that the Executors promiſe to the Ordinary by Virtue of their Oath, to make a true and perfect Account whenſoever they ſhall be thereunto called by

the ſaid Ordinary [e]; and therefore may be called to a general Account within the Year [f]; yet I refer the Reader to the ſeveral Stiles of ſeveral Courts, for his farther Information in this Behalf.

[e] Text. in d. §. poſtquam.
[f] Jo. de Athon. gloſſ. in Legatin. libertat. verb. approb.

§. XX. Of the Manner of making an Account.

1. *What Proof is requiſite in the Account.*
2. *Of the Diſtribution of the Reſidue.*
3. *Of the Office of the Ordinary in the Account.*
4. *What Manner of Expences are to be allowed to the Executor.*
5. *Of the Citation in the Account.*

IF we reſpect what is to be performed by the Executor who maketh the Account [g]; he is not only to declare what Goods and Chattels belonging to the Teſtator he hath received [h], and what Debts and Legacies he hath paid for the Teſtator [i], and to (1) make due Proof of every Payment, that is to ſay, of leſſer Sums by his Oath, and of greater Sums by other Proofs [k], ſuch as the Ordinary ſhall allow [l]; but alſo if (2) any Thing do remain of the ſaid Goods and Chattels [m], the Funerals together with the Debts and Legacies ſatisfied and diſcharged [n], the ſame ought to be diſtributed, and converted *in pios uſus* [o]. Neither ought the Executor to apply any Part thereof to his own private Uſe, more than is given him by the Teſtator, or which the Ordinary ſhall allow him for his Labour, or for the like Conſideration [p]. But of this Diſtribution of the Reſidue (*in pios uſus*) there is but ſmall Uſe in theſe Days, as well for that the Reſidue is commonly left to the Executors; as alſo for that Executors are afraid that ſome unknown Debts due by the Teſtator ſhould afterward ariſe, and ſo may be compelled to pay the ſame out of their own Purſe.

[g] De forma reddendi rationem præclare Olden. in Tract. de execut. ult. vol. tit. 8. & Menoch. de arb. jud. l. 2. ca. 209.
[h] Molineus in conſuetud. Pariſ. §. 6. gloſſ. 6. n. 18.
[i] Molin. ibid.
[k] Jo. And. in addic. ad Specul. de Inſtr. edit. §. nunc vero. verſ. quid ſi executor. Lind. in c. ſtatutum. verb. reddere rationem. lib. 3. provin. conſtit. Cant. Jo. de Athon. in Legatin. libertat. de executor. teſtam. Maſcard. Tract. de probac. verb. expenſæ, concluſ. 722.
[l] Menoch. de caſe 209. Old. de exec. ult. vol. tit. 8. Maſcard. de probac. concluſ. 720.
[m] L. cum ſervus. ff. de cond. & demon.
[n] Magna char. c. 18.
[o] In c. ſtatutum. §. ſtatuimus. de teſta. lib. 3. provincial. conſtit. Cant. c. cum. tibi. de teſta. extr. Plowd. in caſ. inter Norwood & Read. Doct. & Stud. lib. 2. cap. 10. circa medium.
[p] Text. in d. §. ſtatuimus. Quod tamen intellige prout ſupra ſcripſi ead. part. §. 1. in fin.

If we reſpect (3) what is to be performed by the Ordinary in the Making of this Account, I ſuppoſe that it doth appertain unto his Office, not only to examine the Account, and ſee whether the ſame be rightly calculated, and whether the Accountant do charge himſelf with the Receipt of the whole Goods and Chattels of the Teſtator, and how much he hath diſburſed, either for Funerals, Debts, or Legacies [q]; but alſo to have Regard what Manner of Expences the Accountant requireth to be allowed unto him; for (4) delicate Expences are not to be allowed, but honeſt and moderate, according to the Condition of the Perſons [r]. And after due Examination of the ſaid Account, the Ordinary finding the ſame to be true and perfect, may pronounce for the Validity thereof, and ſo acquit the Executor ſo far forth as appertaineth to the Eccleſiaſtical Court [s]. But if, upon the Examination of the ſaid Account, it do appear that the Executor hath not dealt faithfully, the Account is to be rejected [t].

[q] Menoch. d. caſe 209. Old. d. tit. 8.
[r] d. c. ſtatutum. §. ſtatuimus. Old. d. tit. 8. n. 5.
[s] De qua re attendendus eſt cujuſque fori ſtylus.
[t] Vide infr. §. prox. *Levann's* Caſe.

The Ordinary may call an Adminiſtrator to Account, but he cannot compel him to diſtribute the Surplus of the Inteſtate's Goods; 'tis true, he was to account when required, but was not bound to do it before he was lawfully cited, and by Conſequence could not be cited *ex officio*; all which appears by the Condition of the Adminiſtrator's

trator's Bond to the Ordinary before the Statute 22 *Car.* 2. but by that Statute 'tis enacted, *That all Ordinaries having Power to grant Adminiſtration, ſhall take Bonds with Sureties in the Name of the Ordinary, with a Condition to exhibit a true Inventory of the Goods*, &c. *and truly to* * *adminiſter the ſame according to Law, and to pay the Reſidue as the Ordinary ſhall direct, who hath Power to call the Adminiſtrator to account, and to order a Diſtribution of the Surplus, after Debts, Funerals, and juſt Expences allowed, and to compel the Adminiſtrator to pay the ſame by the Eccleſiaſtical Laws.*

22 & 23 Car. 2. c. 10. Anno 1620.

* (i. e.) *Theſe Words ſhall be conſtrued in bringing in his Account.*

Lutw. 882. 1 Salk. 315. S. C.

After this Statute Debt was brought on a Bond, conditioned for the Payment of 300 *l.* wherein one *Brown was bound to the Archbiſhop*, that the Adminiſtrator of *T. S.* ſhould truly adminiſter and exhibit a true Inventory of the Inteſtate's Eſtate, and to give a *juſt Account* of his Adminiſtration, *&c.* the Defendant pleaded that he had exhibited a true Inventory, and given a juſt Account; the Plaintiff replied, that the Inteſtate owed 200 *l.* to *E. G.* by Bond, and that his Goods to that Value came to his (the Adminiſtrator's) Hands, and aſſigns the Breach *in not paying that Debt*; and upon a Demurrer to this Replication the Plaintiff had Judgment; but it was reverſed in the Exchequer-Chamber, becauſe the Breach was not within the Meaning of the Condition of that Bond.

Salkeld, who reports the ſame Caſe, tells us, the Queſtion was, whether an Adminiſtrator was obliged by the Bond to *account before he was cited*; and that it was adjudged, that any Perſon who by Law is intitled to a diſtributive Part, may in Conſequence ſue *for an Account*, as a Legatee might before the Statute, for the next of Kin is a Legatee by the Statute; now before the Statute, the Adminiſtrator was to account when required; but ſince the Statute, the Condition of the Bond is to account at a certain Day, which he muſt do at his Peril, and without being cited; but then his Account is not examinable, unleſs controverted by ſome Perſon who hath an Intereſt; ſo that the Condition of the Bond is *to account*, and not to pay the Debts of the Inteſtate; therefore the Bond ſhall not be aſſigned or put in Execution, and a Breach alledged for Non-payment of a Debt, for that was never intended by the Condition.

Now whether (5) we reſpect the Office of the Accountant or of the Ordinary, this is perpetually to be obſerved, that the Creditors to whom the Teſtator did owe any Thing, and the Legataries to whom the Teſtator did bequeath any Thing, and all others having Intereſt, are to be cited to be preſent at the Making of the ſaid Account [u], otherwiſe the Account made in their Abſence (and they never called) is not prejudicial unto them [x].

[u] Specul. de Inſtr. edit. §. nunc vero aliqua, n. 45. Lind. in d. c. ſtatutum. §. & poſtquam. verb. ordinarius.

[x] L. d. unoquoque. ff. de re jud. & DD. ibid. & ſupr. ead. part. §. 14.

§. XXI. Of the End and Effect of an Account.

1. *The Making of an Account ordained in favourable Regard of Teſtaments.*
2. *The Effect of a perfect and juſt Account.*
3. *The Effect of an unperfect Account.*

THE (1) End for which it is ordained, that every Executor ſhould be ſubject to make an Account, is this, that the lawful Teſtaments of them which depart this Life ſhould be fully accompliſhed,

pliſhed, according to their true and honeſt Intents; and that the Occaſion of defrauding the dead Man, and miſpending his Goods by unhoneſt Executors, might be prevented [y].

[y] Jo. de Canib. Tract. de exec. ult. vol. §. noviſſimum. Jo. Olden. eod. Tract. tit. 8. & ſupr. ead. part. §. 17.

The (2) Effect which ariſeth of a true and juſt Account is this; the Executor having well and faithfully performed his Office, and made his Account accordingly, ought to be acquitted and diſcharged from farther Moleſtation and Suits, as one that hath fully adminiſtered and finiſhed his Office [z]; neither is he to be called by the Ordinary to any farther Account [a].

[z] Menoch. d. caſe. 209. in fin. Brook Abridg. tit. Adminiſt. n. 14. [a] L. Semel. C. de Apoch. Olden. de exec. ult. vol. tit. 8. n. 17.

But this final (3) Diſcharge and Acquittance cannot be obtained, until the Executor have fully adminiſtered and accounted. And if any inferior Judge (I mean under the Degree or Dignity of a Biſhop) do grant unto any Executor Letters of Acquittance or final Diſcharge, before a lawful Account of full Adminiſtration and faithful Execution be made, that Judge is *ipſo facto* ſuſpended *ab ingreſſu Eccleſiæ* by the Space of ſix Months [b]. Beſides that, the Acquittance it ſelf doth not benefit the Executor, when it appeareth that he hath not fully and faithfully adminiſtered [c].

[b] c. fin. de teſtam. li. 3. provinc. conſtit. Cant. *in fin.* [c] Lind. in d. c. fin. verb. acquietanciarum.

§. XXII. Of the Executor refuſing the Executorſhip, and what he is to take Heed of. See *antea*, *Cap.* 2.

1. *The Executor reſolved to refuſe, muſt not meddle as Executor.*
2. *Who is ſaid to meddle as Executor, or not.*

IF the (1) Executor named in the Teſtament reſolve not to ſtand to the Executorſhip, but to refuſe the ſame; then muſt he beware that he do not adminiſter the Goods of the Deceaſed as Executor; for having once adminiſtered as Executor, he may at any Time after be compelled to undergo the Burthen of an Executor [d], and alſo may be ſued as Executor by the Creditors of the Teſtator; though he cannot ſue others as Executor, for that he hath not the Will under the Ordinary's Seal [e].

A (2) Man is then ſaid to adminiſter as Executor, for that thereby he may be compelled to ſtand to the Executorſhip, when he doth perform thoſe Acts which be proper to an Executor [f]; as to pay the Debts due by the Teſtator, or to receive any Debts due unto the Teſtator, or to give Acquittances for the ſame [g], with other ſuch like Acts [h].

[d] Panor. in c. Johannes Boi. in c. tua nobis. de teſta. extr. [e] Perkins tit. Teſtament, fol. 93. Plowd. in Caſe, inter Greiſb. & Fox. Brook tit. Exec. cap. 49. [f] L. pro hæred. ff. de acquir. hæred. Mantic. de conject. ult. vol. lib. 12. tit. 9. n. 18.

[g] Maſcard. de probac. concl. 44. n. 5, 29, 45. Fitz. Abridg. tit. Executor, n. 38. [h] Aditio hæreditatis quomodo probatur copioſe Maſca. Tract. de probac. qui per multas concluſiones hanc materiam proſequitur in verb. aditio.

By the Statute 43 *Eliz.* it is enacted, *That if any Perſon ſhall obtain Goods or Debts of the Inteſtate, or by Fraud releaſe or diſcharge Debts due to him, as by procuring a Stranger who is poor to have the Adminiſtration granted to him, and with an Intent to obtain the Inteſtate's Eſtate, and not upon any valuable Conſideration, or in Satisfaction of juſt Debts, anſwerable to the Value of the Goods or Debts ſo obtained, he ſhall be charged as Executor* de ſon tort, *to the Value of theſe Debts or Goods; howbeit, he ſhall be allowed* 43 Eliz. cap. 8.

lowed ſuch reaſonable Deductions, as other Executors or Adminiſtrators ought to have.

There are ſeveral Acts which amount to an *Executorſhip de ſon tort*, as may be ſeen in many Inſtances following, and generally by all Acts of *Acquiſition, Transferring, or Getting the Poſſeſſion of any Goods or Eſtate of the Deceaſed*; but not by Acts of *Piety or Charity*, ſuch as providing Neceſſaries for his Children, or by feeding and preſerving his Cattle, by repairing any of his Buildings in Decay, or by taking an Account of his Eſtate, or making an Inventory of his Goods, as may be ſeen hereafter.

Floyer verſ. *Southcote*, Dyer 105. b. 1 Roll. Abr. 918. S. C.

Now as to the *Poſſeſſion of his Goods* this Caſe happened; one had the Poſſeſſion thereof, without doing any Act as an Executor, either by paying or receiving Debts or Legacies, or in any wiſe diſpoſing the ſaid Goods: It was the Opinion of *Dyer*, that the bare Poſſeſſion of the Goods made the Perſon *Executor de ſon tort*, becauſe by that Means the Creditors had Notice whom they might ſue; but my Lord *Rolle* in abridging that Caſe, tells us, that it did not, for if an Action ſhould be brought againſt him as *Executor de ſon tort*, he might diſcharge himſelf by ſpecial Pleading, ſhewing how and in what Manner he intermeddled.

It muſt be admitted that if a Stranger (one I mean who is neither Executor nor Adminiſtrator) ſhall aſſume upon him the Office of an Executor or Adminiſtrator, by uſing the Goods of the Deceaſed, or by taking them into his Poſſeſſion; this is a ſufficient Adminiſtration to charge him as Executor of his own Wrong, whereby they, to whom the Teſtator was indebted, may recover their Debts againſt him; if there be no other Executor or Adminiſtrator, who hath proved the Will, or adminiſtered the Goods of the Deceaſed, againſt whom the Creditors may have Action for the Recovery of their Debts [i]. But when the Will is proved, or Adminiſtration granted, and they intermeddled; in this Caſe, albeit a Stranger take the Deceaſed's Goods into his own Hands, challenging them for his own, and do uſe and diſpoſe them as his own, yet this doth not make him *Executor of his own Wrong* by Conſtruction of Law; becauſe there is another *Executor of Right*, whom the Creditor may charge, and againſt whom he may bring his Action [k]. And thoſe Goods which the right Executor taketh forth of the other's Poſſeſſion, after he hath adminiſtered, are Aſſets in his Hands [l]. And yet for all this, albeit there be an Executor which doth adminiſter, yet if the Stranger take thoſe Goods, and claiming to be Executor, pay Debts and receive Debts, or pay Legacies, and intermeddle as Executor; there, becauſe of ſuch expreſs Adminiſtring as Executor, he may be charged as Executor of his own Wrong, although there be another Executor of Right [m]; as in the former Caſe, where he doth take the Goods of the Deceaſed, before the right Executor hath taken upon him the Executorſhip, or proved the Will; in which Caſe he is chargeable as Executor of his own Wrong, whereas the right Executor ſhall not be charged but with thoſe Goods which come to his Hands after he hath aſſumed upon him the Charge of executing the Teſtator's laſt Will [n]. And here alſo it is to be noted, that a Man ſhall be charged as *Executor of his own Wrong*, which taketh into his Hands any of the Goods of the Deceaſed, although the Teſtator were indebted unto him, and he only intending to ſatisfy his own Debt, doth take and retain ſo much of the Deceaſed's Goods as doth countervail his Debt,

[i] Do. Coke, lib. 5. relationum, fol. 33, 34. in *Read*'s Caſe.

[k] Remedium ordinarium facit ceſſare extraordinarium, nec concurrit auxilium ordinarium cum auxilio in ſubſidium introducto. L. in cauſ. el. 2. de minor. ff.

[l] Do. Coke ubi ſupra.

[m] Ibidem. unde ſibi imputet, quia os ſuum contra ſe aperuit. Nam expreſſa nocent, quæ tacita non nocent. L. de reg. jur. ff.

[n] Do. Coke ubi ſupra.

and no more [o]; for he may not be his own Carver in this Caſe [p], becauſe of the great Inconvenience and Confuſion which otherwiſe would inſue; for then, whenſoever any died indebted more than his Goods would extend to diſcharge, every of the Creditors would ſtrive to ſatisfy himſelf firſt, and by Force or other Means bar the reſt from their Right, contrary to Right [q].

[o] Do. Coke, lib. 5. relationum, fol. 30. in Coult. Caſe.

[p] Nemini licet ſibi jus dicere. L. uni. C. Nequis in cauſ. ſan.

[q] Nemo ex dolo ſuo debet reportare commodum. L. 1. ff. Imo fraudibus & dolis omnibus modis occurr. C. ſedes. de refer. ex.

But in ſome Caſes, though there is an *Executor de ſon tort*, yet he ſhall not be charged as ſuch, becauſe that Wrong may be purged by a ſubſequent and lawful Adminiſtration; as where the Mother poſſeſſed her ſelf of the Inteſtate's Goods as *Executrix de ſon tort*, and the Son afterwards took out Adminiſtration, and paid the Debts as far as the perſonal Debts amounted, being to the Value of what his Mother had received, as well as to the Value of what he had poſſeſſed, being the Whole of the Eſtate; then one of the Creditors brought an Action againſt the Mother as *Executrix de ſon tort*, ſhe pleaded *Plene adminiſtravit*; and all this Matter being found ſpecially, it was adjudged that ſhe was not liable to the Suit of the Creditor, becauſe it was brought after Adminiſtration was granted to the Son; for in ſuch Caſe ſhe is liable only to him; and if ſhe ſhould likewiſe be liable to a Creditor, ſhe might be doubly charged.

Whitmore verſus *Porter*, Cro. Car. 88.

But many Years afterwards the Chief Juſtice *North* held it reaſonable, that an *Executor de ſon tort* might be *doubly charged*, both at the Suit of the *rightful Adminiſtrator*, *and of the Creditor*; as where ſuch an Executor had poſſeſſed himſelf of the Goods, and a Creditor of the Inteſtate brought an Action againſt him, and had a Verdict and Judgment, and took the Goods in Execution; then the rightful Adminiſtrator brought an Action of Trover againſt him for the ſame Goods; and it was held, that the Execution thus executed would not diſcharge him againſt this Action; it is true, it might diſcharge him againſt any other Creditor of the Inteſtate, and he might plead *Riens inter manes*, but not againſt the rightful Adminiſtration, for no Man ſhould intermeddle with another's Eſtate, without any Manner of Right.

1 Vent. 349.

But if a Man do thoſe Acts which are not proper to an Executor, he is not ſaid to have adminiſtered as Executor to the Effect aforeſaid [r]; as, to feed the Cattle of the Deceaſed, leſt they ſhould periſh [s], or to take into his Cuſtody the Goods of the Deceaſed, to the End they may be ſafe from being ſtolen or purloined [t]; or to diſpoſe of the Teſtator's Goods about the Funerals [u]; for theſe be Deeds of Charity common to every Chriſtian, and not peculiar to an Executor [x]. Likewiſe to make an Inventory of the Goods of the Deceaſed, is not to adminiſter as Executor [y]; or to deliver to the Wife her convenient Apparel [z]; or to take the Teſtator's Horſe and ride him, or to uſe him as his own, ſuppoſing him not to be the Teſtator's, but his own [a]; or to take of the Goods of the Teſtator by his lawful Gift [b]. And generally, whoſoever as a mere Treſpaſſer entereth on the Goods of the Teſtator, whether it be to Things living, as Horſe, Kine, Sheep, or dead Things, as Pots, Pans, Diſhes, converting the ſame to his proper

[r] Mantic. de conject. ult. vol. lib. 12. tit. 9. n. 18.

[s] d. L. pro hær. Fitzherb. tit. exec. n. 45.

[t] d. L. pro hærede.

[u] Ead. L. pro hær. & ibi DD. Lind. in d. c. ſtatutum. Fitz. tit. execut. n. 38. Brook tit. adminiſtr. n. 6. 28.

[x] L. non hoc. C. unde legit. d. L. pro hær. Fitz. tit. exec. n. 38.

[y] Mantic. de conject. ult. vol. lib. 12. tit. 9. n. 15. Jaſ. & Alex. in L. ult. §. ſin autem. C. de jure deli. quæ opinio communis eſt, adverſus Bar. & ejus ſequaces, ut refert Maſcard. de probac. concl. 48. ſed cum diſtinctione, ut ibi per eundem.

[z] Brook tit. admin. n. 6. Tu autem vide Maſcard. de probac. concl. 44. n. 46, &c. Dyer fol. 166.

[a] Brook tit. admin. n. 28. Huc pertinet quod ſcriptum reliquit Maſcard. de probac. concl. 45. n. 46, &c.

[b] Brook tit. execut. n. 162. Maſcard. d. concl. 45. n. 29, &c.

proper Uſe, and not to the Uſe of the Teſtator, as to the Payment of the Teſtator's Debts or Legacies, doth not adminiſter as Executor [c].

[c] Brook tit. execut. n. 165. tit. adminiſt. n. 42.

Which former Concluſions are generally true, whenas *another is named Executor*, and as Executor hath intermeddled with the Goods of the Deceaſed; for then he which did without Authority take the Goods of the Deceaſed into his own Poſſeſſion, or diſpoſeth thereof to his own private Uſe, ſhall not be ſubject to be ſued *as Executor of his own Wrong* by the Creditors of the Deceaſed, ſeeing they have Action againſt the right Executor, and he again hath Action againſt the Occupiers of the ſaid Goods without Authority, as is aforeſaid [d]. What if the Executor named in the Teſtament prove the ſame? Whether is he thereby tied to ſatisfy the Creditors of the Deceaſed, as one that hath adminiſtered? It ſeemeth that he is not [e], unleſs alſo he pay the Fees due out of the Goods of the Deceaſed. What if the Executor named in the Teſtament do take the Goods to him deviſed by the Will? Whether is he hereby adjudged to have adminiſtered as Executor, and conſequently tied to anſwer the Creditor as Executor? It ſeemeth that he is [f], unleſs they had been delivered unto him by another; in which Caſe it ſeemeth that he hath not adminiſtered to the Effect aforeſaid.

[d] Supra eod. §. n. 62. 2 cum ſequen.

[e] L'abridg. dez caſes edit. An. Dom. 1597. fol. 175. ubi rationem reddit, quia probatio teſtamenti eſt opus ſpirituale, ſine adminiſtratione.

[f] d. L'abridg. dez Caſes, §. 19. n. 1. fol. 182.

Howbeit, in theſe Caſes and ſuch like, whoſoever feareth to be adjudged Executor adminiſtering of his own Wrong, the moſt ſafe Courſe is not to meddle at all, but utterly to abſtain from all Manner of Uſe of the Teſtator's Goods; and namely, let him beware that he do not ſell any Goods, or kill any Cattle of the Deceaſed [g].

[g] Brook tit. admin. n. 16. Quamvis jure civili certo certius eſt, eum qui res perituras, quæ videlicet ſervando ſervari non poſſunt, diſtraxit, in ea cauſa eſſe, ut pro hærede non geſſerit, quia hoc non adeundi animo factum eſſe præſumitur. d. L. pro hærede.

Mayor of Norwich, verſus *Johnſon*. Shore 242. 3 Lev. 35. S. C. 3 Mod. 90. S. C.

It hath been a Queſtion whether there can be an *Executor de ſon tort of a Term for Years*, becauſe where a Man enters wrongfully he is a *Diſſeiſor*, and not a *Termor*; but it is now adjudged, that there may be an *Executor de ſon tort of a Term*, and that he is puniſhable in an Action of Waſte.

For there being a lawful Term in Being, he in Reverſion cannot maintain an Action of Treſpaſs during that Time; and therefore it is reaſonable he ſhould have a Remedy upon the Contract againſt him who claims a Title by that Contract.

And as to an Executor of an *Executor de ſon tort*, he was not liable, for the Waſting or Converting any of the Goods of the Teſtator, at Common Law; but this is now remedied by the Statute 30 *Car.* 2. by which he is made liable as their Teſtator or Inteſtate would have been, if he had been living.

30 Car. 2. c. 7.

By what Means

TESTAMENTS

OR

LAST WILLS

become void.

The Seventh Part.

SECT. I.

1. *Teſtaments loſe their Force two Ways.*
2. *By what Means Teſtaments are void from the Beginning.*
3. *By what Means the Teſtament, once good, is made void afterwards.*
4. *How we may know when the Teſtament is void from the Beginning.*

HItherto of thoſe Things which appertain to the *Making* and *Accompliſhing* of Teſtaments: Now of ſuch Things as tend to the *Diſſolution* thereof.

Tho' (1) the Means whereby Teſtaments and Laſt Wills do loſe their Force be many [a]: Yet they may be reduced to Two [b].

[a] De quibus Vigel. in ſua method. jur. civil. l. 9. c. 5. cum ſeq.

[b] Vigl. in tit. quib. mod. teſt. infir. Inſtit.

The firſt is, when (2) there is ſome original Defect in the Teſtament [c]; which may happen divers Ways: Either becauſe the Teſtator is ſuch a Perſon as cannot make a Laſt Will [d]; or becauſe the Things bequeathed are not deviſable by Will [e]; or becauſe the Manner of the Diſpoſition is unlawful [f]; or for that the Perſon named Executor is incapable thereof; or for ſome other Cauſe hereafter expreſſed [g]. And ſuch a Teſtament or Laſt Will being void originally, or from the Beginning, is called *nullum*, ſometimes *injuſtum*, or *non jure factum* [h].

[c] L. ſi quæramus. ff. de teſta.
[d] Supra, part 2.
[e] Supra, part. 3.
[f] Supra, part. 5.
[g] Infra §. prox. cum §§. ſeq. uſque ad § 14.
[h] Minſing. & Vigl. in d. tit. quib. mod. teſt. infir. Inſtit.

The other Means is, when (3) the Teſtament or Laſt Will, being free from original Fault, doth afterwards become void [i]. And this alſo

[i] Vigl. in d. tit. quibus mod. teſta. infir.

alſo may happen divers Ways: As by the Making of a later Teſtament [k]; or by revoking or cancelling of that which is made [l]; or by Alteration of the State of the Teſtator [m]; or by forbidding or hindering the Teſtator to make another Teſtament [n]; or if he that is named Executor will not, or doth become unable to be Executor [o]; and by many other Means more particularly ſhewed hereafter [p]. And this Kind of Teſtament which, once being good, becometh void *ex poſt facto*, is ſometimes called *ruptum*, ſometimes *irritum* [q].

[k] L. §. poſteriore. Inſt. quibus mod. teſta. infir. & infr. §. 14.
[l] L. 1. de his quæ teſta. del. ff. & inf. §§. 15, 16.
[m] §. alio. Inſt. quibus mod. teſta. infir. & infra.
[n] Tit. ſi quis aliquem teſtari prohib. ff. & C. & infra §. 18.
[o] L. 1. ff. de injuſt. rupt. & irrit. teſtam. & infr.
[p] Infr. §. 20. cum reliquis §§. uſque ad finem.
[q] Tit. de injuſt. rup. & irrit. teſtam. ff. d. §. §. 19. alio. Inſt. quib. mod. teſta. infir.

Touching the former of theſe void Teſtaments, foraſmuch as we have already declared who may make a Teſtament, what Thing may be diſpoſed, what Form is lawful, and who may be Executor or Legatary; and on the contrary, what Perſon cannot make a Teſtament, what Thing cannot be deviſed, what Form is not lawful, and what Perſon is not capable of an Executorſhip or Legacy; it is a Matter of little Labour, and leſs Difficulty, by Examination of the Premiſſes, to collect and diſcern (4) when the Teſtament is originally void, either in Reſpect of the Teſtator, or of the Thing bequeathed, or of the Form of the Diſpoſition, or of the Perſon of the Executor or Legatary. Whereunto it may be added, that the Teſtament is originally void, or at the leaſt voidable by Exception, when the Teſtator is compelled by Fear [r], or circumvented by Fraud [s], or overcome by immoderate Flattery [t], to make the ſame. It is alſo void from the Beginning, ſometimes by Reaſon of Error [u], ſometimes by Reaſon of Uncertainty [x], and ſometimes by Reaſon of Imperfection [y], and ſometimes becauſe the Teſtator hath not *animum teſtandi* [z], a Meaning to make his Teſtament or Laſt Will.

[r] Infra §. prox.
[s] Infra §. 3.
[t] Infra §. 4.
[u] Infra §. 5.
[x] Infra §. 6. cum ſeq.
[y] Infra §. 12.
[z] Infra §. 13.

Touching the other Kind of theſe Teſtaments, ſuch, I mean, as were good at the firſt, but do become void afterwards, we ſhall ſpeak more particularly hereafter.

§. II. Of the Teſtament made by Fear.

1. *Exception of Fear deſtroyeth the Teſtament.*
2. *Whether this Exception be prejudicial to any other than to the Author thereof.*
3. *What if the Teſtament be confirmed with an Oath?*
4. *What if the Force be not of preſent Hurt?*
5. *What if the Teſtament be made after the Time of the Violence offered, and not at that inſtant?*
6. *Whether the Teſtament made by Fear be void* ipſo jure.
7. *Vain Fear hindereth not the Validity of the Teſtament.*
8. *The Teſtament confirmed after Fear paſt, is good.*
9. *The Teſtament is good, ſaving in Favour of the Author of this Fear, and his Complices.*
10. *What if the Teſtator proteſt that he made his Teſtament, being compelled by Fear? Whether doth this Proteſtation make void the Teſtament?*

NOthing is more contrary to free Conſent than Fear [a]. (1) Therefore that Teſtament is to be repelled which is made upon juſt Fear [b]. Which Concluſion is diverſly both extended and limited.

[a] Nihil conſenſui, de reg. jur. ff.
[b] Bar. in L. fin. ſi quis aliquem teſtari prohib. ff. Jaſ. & Sich. in Rub. ſi quis aliquem. C. quamvis communi Doctorum opinione, hujuſmodi teſtament. non fit ipſo jure nullum, ut per Graſſ. Theſaur. com. op. §. teſt. q. 23. Soarez. l. rec. ſenten. verb. teſtam. n. 56, 57.

The firſt Extenſion is, that the Teſtament made by Fear is uneffectual, not (2) only in Reſpect of that Perſon who put the Teſtator in Fear, but in Reſpect of other Perſons alſo [c]; tho' ignorant of that Fear wherewith the Teſtator was conſtrained in their Behalf [d].

[c] Glo. in Rub. ſi quis aliqu. prohib. ff. Bar. in d. L. fin. Boſſ. tract. var. tit. de his qui prohib. aliquem teſtari, n. 4.
[d] Bar. & Boſſ. ubi ſupr. Contrar. tamen opinionem tenent Jaſ. & Sichar. in Rub. ſi quis aliquem. C. Sed diſtingue, ut infra in limitac. 4.

Secondly, The (3) Teſtament is overthrown by the Exception of Fear, tho' the Teſtator did with an Oath confirm the ſame during the Fear [e]. For where a Man being overcome with Fear, to the End he may eſcape that Danger, doth ſwear to perform that Thing which he intendeth not with his Heart; this Oath doth not give any Strength to that Act [f]: But contrariwiſe, the Act is ſo much the weaker, by how much the Suſpicion of Fear by this extorted Oath is made the ſtronger.

[e] Quamvis de pactis, l. 6.
[f] DD. in d. c. quamvis. Felin. in c. ſi vero. de jure jur. extra. n. 8. declar. 4.

Thirdly, (4) Not only that Teſtament is deprived of its Validity which the Teſtator is conſtrained to make by preſent Force and Violence, but that alſo where the Teſtator is but only threatned with future Evils, being ſuch as may move juſt Fear [g]. Although by the Civil Law in other Reſpects, that is to ſay, of greater or leſſer Puniſhment of the Author of this Fear, there is great Difference, whether he exerciſe Violence againſt the Teſtator, or Threatnings only; as alſo whether the Violence be open or ſecret [h]: Of which Puniſhment we have no great Uſe in *England*, except it be Forgery of Wills [i].

[g] Sichar. in d. Rub. ſi quis aliquem. C. n. 1. Jaſ. in §. quadrup. inſtit. de action. ubi tradit quinque genera metus.
[h] Sichar. in d. Rub. Jul. Clar. §. falſum. & pract. criminal. q. 3.
[i] Stat. Eliz. 2. an. 5. c. 14.

Fourthly, Albeit (5) the Teſtament were not made at the Time of the Violence or Threatnings executed, but afterwards; yet the Cauſe of the Fear ſtill enduring, it is of no more Force than if it had been made at the Time of the former Beating or Threatnings [k].

[k] Zaſ. in L. ſi ob turpe. ff. de cond. indeb. Peck. tract. de teſta. conjug. l. 1. tit. 9. n. 3.

The Limitations of this former Concluſion are theſe. Firſt, The Teſtament (6) made by Fear is not void *ipſo jure*, but voidable by the Help of Exception [l]. The Reaſon is, becauſe he that doeth an Act through Fear, doth after a Sort conſent [m], that is to ſay, of Two Evils he chuſeth the leſs [n], and is willing rather to make a Teſtament, than to incur the Peril threatned [o]. And albeit ſome be of this Opinion, that the Teſtament made by Fear is void *ipſo jure*; and that in this Caſe a conſtrained Will is no Will, being rather *noluntas*, than *voluntas* [p]: Yet the common Opinion is againſt them [q], unleſs the Coaction be not conditional, but preciſe, neceſſary, and inevitable [r].

[l] Bar. in L. fin. ſi quis aliq. teſtari prohib. ff. Are. in L. 1. ff. de teſt.
[m] L. ſi mulier. §. pen. ff. quod met. cauſa.
[n] Weſenb. in tit. quod met. cauſa. ff.
[o] Weſenb. ibid.
[p] Vaſq. de ſucceſ. crea. §. 17. requiſit. 22. Jaſ. in Rub. ſi quis aliquem teſt. prohib. C.
[q] Vaſq. d. §. 17. n. 5. Graſſ. Theſaur. com. op. §. teſt. q. 83. Soarez. eod. l. verb. teſt. n. 56, 57. Mantic. de conject. ult. vol. l. 1. tit. 3. l. 2. tit. 7.
[r] Quia tunc omnino deeſt voluntas. Weſen. in tit. quod met. cauſa.

The ſecond Limitation is, when (7) the Fear is but a vain Fear [s]: (For a juſt Fear only, that is, ſuch a Fear as may move a conſtant

[s] L. ſi quis ab al. off. de re. itid. L. vani, de reg. jur. ff.

Man

Man or Woman, maketh void the Teſtament [t]; as the Fear of Death, or of bodily Hurt, or of Impriſonment, or of the Loſs of all or moſt Part of one's Goods, and ſuch like Fear:) Whereof no certain Rule can be delivered, but it is left to the Diſcretion of the Judge, who ought not only to conſider the Quality of the Threatnings, but alſo the Perſons, as well threatned, as threatning; and in the threatned, the Sex, the Age, the Courage, or Puſillanimity; and in the Perſon threatning, the Power, the Diſpoſition, and whether he be a meer Boaſter, or Performer of his Threats [u].

[t] c. ad audientiam. c. cum dilectus. de his quæ metum extra. Mantic. de conject. ult. vol. lib. 2. tit. 7. n. 6.

[u] Menoch. de Arb. Jud. caſ. 135. Maſcar. tract. de prob. conc. 1054. Idem Menoch. tract. de præſum. l. 3. preſ. 126.

Thirdly, If the (8) Teſtator afterward, when there is no Cauſe of Fear, do ratify and confirm the Teſtament, I ſuppoſe the Teſtament to be good in Law [x].

[x] L. 2. C. de his quæ vi, &c. L. ſi ob turpem. ff. de cond. indeb. Sichar. in L. ſi per vim. C. de his quæ vi, &c. n. 3.

Fourthly, Where (9) it is ſaid that the Teſtament is uneffectual, as well in Reſpect of the Author of the Fear, as of others for whom he extorteth any Benefit in the Teſtament: Yet if the Teſtator of his own Accord do in the ſame Teſtament bequeath any Legacy to any other Perſons beſides theſe afore-named, the Teſtament in that Reſpect is not unlawful [y].

[y] Bar. in d. L. fin. §. ſi quis aliq. ff. Bal. in L. 1. eod. tit. C. n. 7.

Fifthly, If the (10) Teſtator, after the Making of the Teſtament, do affirm or proteſt generally, that the Teſtament by him made was done through Fear, not expreſſing particularly by whom he was compelled thereunto; ſuch bare Proteſtation doth not make void the Teſtament [z]: But if the Teſtator doth expreſs by whom he was conſtrained, proteſting that he would gladly alter the Teſtament, but for Fear of the Perſons by him named; by ſuch Aſſertion the Teſtament is void, at the leaſt in the Prejudice of thoſe Perſons [*].

[z] Bald. in d. L. 1. Mantic. de conject. ult. vol. l. 2. tit. 7. n. 5.

[*] Mantic. ubi ſupra, Sichar. in Rub. ſi quis aliquem teſtari prohib. c. n. 5.

§. III. Of Teſtaments made by Fraud.

1. *Fraud as deteſtable as Force.*
2. *Whether all Manner of Deceit be evil.*
3. *What if the Deceit be very ſmall.*

FRaud (1) is no leſs deteſtable in Law than open Force [a]. Wherefore when the Teſtator is circumvented by Fraud, the Teſtament is of no more Force than if he were conſtrained by Fear [b].

Nevertheleſs (2) when the Deceit is not evil, but good, (for all Deceit is not evil [c],) ſuch Deceit doth not hinder the Teſtament [d]. For Example; the Teſtator intending to beſtow all his Goods upon ſome vile and naughty Perſon, omitting his honeſt Wife and dutiful Children; if the Wife or Children beguile the Teſtator, perſwading him that that lewd Perſon is dead; or by ſome other Means deceive the Teſtator, and ſo procure themſelves to be made Executors, or univerſal Legataries: This Deceit is not reproved as evil, and therefore the Teſtament is not to be repelled as unlawful [e].

It ſeemeth (3) alſo that the Teſtament is not void, when the Deceit is very light and ſmall, ſuch as cannot beguile a prudent Man or Woman [f]. For as that Fear only is termed juſt, and is able to overthrow

[a] Olden. de Action. claſſ. 5. fo. 518. in action. ex teſtam.

[b] L. non enim de inoffic. teſta. L. 1. de excep. dol. ff.

[c] Zaſ. in tit. de dolo malo. ff.

[d] Bald. in L. ſi quis aliquem teſtari prohib. C. & Sich. in Rub. ibid.

[e] Bald. in d. L. 1. n. 17.

[f] C. cum dilectus. de his quæ vi vel metus causa facta.

throw the Teſtament, which may overcome a conſtant Man: So that Deceit only ſeemeth ſufficient to repel the Approbation of a Teſtament, which may deceive a prudent Perſon [g]. Howbeit, (if this Limitation be true,) yet as in that Caſe it is left to the Diſcretion of the Judge, to determine what Fear is juſt, reſpecting the Quality of the Threats, together with the Diſpoſition of the Parties; ſo in this Caſe, the Judge comparing the Deceit with the Capacity or Underſtanding of the Perſon deceived, may beſt diſcern whether it be ſuch a Deceit as may overthrow the Teſtament, or not [h].

[g] Panor in d. c. cum dilectus. n. 4. Marſil. ſing. 207. Alex. in apoſtil. ad lect. Bar. in L. eleganter. ff. de dolo, in prin. d. L.

[h] Arg. d. c. dilect.

How the Teſtator may be induced by Fraud to make or revoke his Teſtament, were it not that the Crafty would put the ſame in Practice, is a Thing not altogether unworthy the Underſtanding. But leſt by Inſtructing the better to avoid the ſame, I might alſo teach the Evil-affected to follow the ſame; ſufficeth it to refer the Reader to that which hath been ſpoken of captious Wills [i], and to that which hereafter ſhall be uttered of forbidding or hindring the Teſtator to make or alter his Will [k].

[i] Supr. part. 4. §. 11.

[k] Infra §. 20.

The Father having made his Will in Form, and his Wife ſole Executrix, and his Son (being informed that ſuch Will was made) came to his Mother whilſt his Father was living, and perſwaded her to uſe her Intereſt with his Father, that he (the Son) might be made Executor, becauſe there being Debts to be paid, the Executorſhip would be troubleſome to her, and that he being a Member of Parliament, could better deal with the Creditors, and declared that he would be only an Executor in Truſt for her; accordingly the Mother prevailed with the Father to alter his Will and make the Son Executor, and by his new Will ſhe had only a Legacy of 50*l.* given her, and ſoon afterwards the Father died, then the Son ſet up for himſelf, and denied the Truſt for his Mother, or that the Will was drawn by his Directions; but afterwards in his Anſwer to a Bill exhibited againſt him the whole Matter was confeſſed; and thereupon, though no Truſt was declared in Writing according to the Statute; yet it appearing to be a Fraud the Plaintiff had a Decree. 1 Vern. 296. *Thynn* verſus *Thynn.*

A Will, tho' good at Law, may in Equity be ſet aſide for Fraud; as if *A.* ſhould agree to give *B.* Bank Notes to the Amount of 1000*l.* in Conſideration that *B.* would make his Will, and thereby deviſe his Lands to *A.* and accordingly *B.* does make a Will, and *A.* gives *B.* the Bank Notes, but theſe Bank Notes proved to be forged; this, though a good Will at Law, ſhall nevertheleſs be avoided in Equity. If *A.* had deviſed his Land to his Mother in Fee, and afterwards *J. S.* had told *A.* that the Will was void for want of its being *well guarded*, and that he would make another for *A.* that ſhould be effectually *guarded*, and accordingly did make another Will for *A.* whereby the Eſtate had been deviſed to the Mother for Life only, the Remainder to *J. S.* in Fee; this would be a good Will at Law, if atteſted purſuant to the Act of Parliament, but would be ſet aſide in Equity for the Fraud. *Goſs* v. *Tracey*, 1 *Williams* 287. *& vide* 1 *Chan. Rep.* 12, 66.

Said by Lord Commiſſioner *Jekyll*, that there was a Difference betwixt a *Deed* and a *Will* gained from a weak Man, and upon Miſrepreſentation or Fraud; for if a Will be gained from a weak Man, and by falſe Repreſentation, this is not a ſufficient Reaſon to ſet it aſide in Equity; as was determined in the Caſe of the late Duke of

Newcaſtle's Will, between Lord *Thanet* and Lord *Clare*, and in the Caſe of *Bodvil* and *Roberts*; but where a Deed (which is not revocable as a Will) is gained from a weak Man upon Miſrepreſentation, and without any valuable Conſideration, the ſame ought to be ſet aſide in Equity. *James* v. *Greaves*, 2 *Williams* 270.

It was decreed in the Houſe of Lords, that a Will of a real Eſtate could not be ſet aſide in a Court of Equity for Fraud or Impoſition, but muſt firſt be tried at Law on *Devaſtavit vel non*, being Matter proper for a Jury to inquire into. 21 *July* 1728. *Bransby* and *Kerridge*.

The Spiritual Court had Juriſdiction of Fraud in obtaining a Will of a perſonal Eſtate, and can examine the Parties by Way of Allegation touching the Fraud. 1 *Williams* 388. 2 *Williams* 286. 2 *Vern.* 8, 9. Though ſuch Wills are not to be controverted in Equity, yet if the Party claiming under ſuch Will comes for any Aid in Equity, he ſhall not have it. 2 *Vern.* 76.

§. IV. Of Teſtaments made by Flattery.

1. *Flattering Perſwaſions not always unlawful.*
2. *What if Fear go before?*
3. *What if Fraud be intermingled with Flattery?*
4. *What if the Teſtator be of weak Judgment, and the Legacy great?*
5. *What if the Teſtator be under the Government of the Flatterer?*
6. *What if the Flatteries be immoderate?*
7. *What if the Teſtator have made a former Teſtament?*

IT is not (1) unlawful for a Man by honeſt Interceſſions, and Perſwaſions, to procure either another Perſon or [1] himſelf to be made Executor [m]: Neither is it altogether unlawful for a Man, even with fair and flattering Speeches, to move the Teſtator to make him his Executor, or to give him his Goods [n], except in theſe Caſes following:

[1] See in the laſt Chapter.

[m] Olden. de action. claſſ. 5. fol. 518. in action. ex teſtamento.

[n] L. ult. ſi quis aliquem teſtari prohib. ff. & C. ac DD. ibidem.

The firſt Caſe is, when (2) he that is made Executor did firſt threaten the Teſtator, and thereby did put him in Fear: For then it is juſtly ſuſpected and preſumed, that the Teſtator is moved to make his Teſtament rather by Fear than by fair Speeches [o].

[o] Peck. de teſt. conjug. l. 1. c. 9. n. 23. Jaſ. & Sich. in L. ult. C. ſi quis aliquem teſtari prohib. Menoch. de arb. Jud. c. 395. n. 41. verb. hoc fortius.

The ſecond Caſe is, (3) when unto Flattery is joined Fraud or Deceit [p].

[p] Sich. in d. L. ult. n. 13. Olden. de action. claſſ. 5. f. 518. Menoch. d. caſ. 395. n. 41. Afflict. deciſ. 69.

The third Caſe is, (4) when the Teſtator is a Perſon of weak Judgment, and eaſy to be perſwaded, and the Legacy great [q].

[q] Molin. in Apoſtil. ad Dec. conſil. 489.

The fourth (5) Caſe like unto this is, when the Teſtator is under the Government of the Perſwader, or in his Danger [r]. And therefore, if the Phyſician, during the Time of Sickneſs, be inſtant with the Teſtator to make him his Executor, or to give him his Goods, this Teſtament is not good [s]; for the Law preſumeth, that the Teſtator did it leſt the Phyſician ſhould forſake him, or negligently cure

[r] Molin. in Apoſtil.

[s] Peck. de teſtam. conjug. l. 1 c. 9. n. 6. Bar. in L. Archiatr. de profeſ. & med. l. 10. C.

cure him[t]. So it is if the Teſtator being ſick, his Wife neglect to help him, or to provide Remedy for the Recovery of his Health, and nevertheleſs in the mean Time buſily apply him with ſweet flattering Speeches, to make her his Executrix, or to beſtow his Goods upon her: For in this Caſe the Diſpoſition is uneffectual[u].

[t] Peckius ubi ſupra & in c. 17. eod. L. Lucas de Penna in d. L. Archiatr. juxta illud Poetæ, *Garrulus ægroto medicus ſi forte medetur, Alter adeſt morbus continuſque dolor.* [u] Peckius, lib. 1. de teſta. conjug. c. 9. n. 5. Math. de Afflict. deciſ. 69.

The fifth Caſe is, (6) when the Perſwader is very importunate[x]: For an importunate Beggar is compared to an Extortor[y]; and it is an impudent Part ſtill to gape and cry upon the Teſtator, and not to be content with the firſt or ſecond Denial[z].

[x] C. fin. 20. q. 3. Abb. in c. præterea. de offic. delega. extr. Menoch. de Arbit. Jud. caſ. 395. n. 41. & latius Peckius d. c. 9. n. 9. [y] Imol. in c. petitio de jure. Peckius in d. c. 9. n. 9. L. 1. §. perſuadere. ff. de ſer. cor. [z] Peckius ubi ſupr. Rebuff. Tract. de reſcript. 2. gloſſ. 3.

The ſixth Caſe is, (7) when the Teſtator hath made another Teſtament before; for then the later Teſtament, made at the Inſtigation or Requeſt of another Perſon, is not good in Prejudice of the former[*], as elſewhere is and ſhall be declared †.

[*] Socin. Jun. conſil. 14. vol. 2. Peckius in d. c. 9. verſic. tertio. † Supra part. 2. §. 27. infra §. 14. limitac. 4.

§. V. Of Error.

1. *Error may happen in divers Reſpects.*
2. *Of Error in the Perſon of the Executor or Legatary.*
3. *Of Error in the Name of the Executor or Legatary.*
4. *Of Error in the Quality of the Executor or Legatary.*
5. *Whether a falſe Cauſe makes void the Diſpoſition.*
6. *Error in the Thing bequeathed, manifold.*
7. *Of Error in the proper Name of the Thing bequeathed.*
8. *Of Error in the Name appellative of the Thing bequeathed.*
9. *Of the Difference betwixt a proper Name, and a Name appellative.*
10. *An Objection, with the Anſwer.*
11. *Certain Caſes wherein Error in the Name appellative is not hurtful.*
12. *Error in the Subſtance of the Legacy doth deſtroy the Legacy.*
13. *Error in the Quantity of the Thing bequeathed is not hurtful.*
14. *Certain Caſes wherein Error in Quantity doth deſtroy the Legacy.*
15. *Certain Caſes wherein Error in the Quantity of the Thing bequeathed as a certain Body is not hurtful.*
16. *Error in the Quality of the Thing bequeathed doth not deſtroy the Legacy.*
17. *Error in the Form of the Diſpoſition doth deſtroy the Force thereof.*

ERROR doth ſometimes overthrow the Diſpoſition of the Teſtator, ſometimes not. Therefore, that we may underſtand whether this Error hurt, or not, we are to conſider, (1) whether the Error doth reſpect the Executor or Legatary, or the Thing bequeathed, or the Form of the Diſpoſition. And if it do reſpect the Executor or Legatary, then whether the Teſtator do err in the Perſon, or in the Name, or in the Quality of the Executor or Legatary.

When

When (2) the Teſtator doth err in the Perſon of the Executor or Legatary, ſuppoſing him whom he maketh Executor, or to whom he doth bequeath any Legacy, to be another Perſon than he is, the Diſpoſition is void[a]. For Example; the Teſtator intending to make *John at Stile* his Executor, or to give to *John at Stile* an Hundred Pounds, he ſaith, I make *John at Noke* my Executor, or, I give to *John at Noke* an Hundred Pounds. In this Caſe neither can *John at Stile* nor *John at Noke* be Executors, or obtain the Legacy[b]. The Reaſon is this: *John at Noke* is excluded, becauſe the Teſtator never thought it; *John at Stile* is excluded, becauſe the Teſtator never ſpoke it: For Meaning without Speaking is nothing, and Speech without Meaning is leſs[c].

[a] L. quoties. ff. hæred. inſtit.

[b] DD. in d. L. quoties.

[c] d. L. quoties. & L. in ambiguo, ff. de reb. dub.

A wrong Deſcription of the Legatee or Deviſee doth not make the Will void, ſo as there may be a Certainty what Perſon the Teſtator intended.

3 Leon. 18, 19. Owen 35. S. C.

Thus a Deviſe to *T. S. the eldeſt* Son of *R. S.* altho' his Name was not *T. S.* but *W. S.* yet the Will is good, becauſe there was a Certainty of the Perſon, for the Father can have but one *eldeſt Son.*

Brown verſus *Peas*, 1 And. 306. Cro. Eliz. 357. S. C. Owen 24. S. C.

Where there are ſeveral Deſcriptions of the ſame Perſon, they muſt concur at the Time of the Will executed, or 'tis void; as for Inſtance; the Teſtator having two Manors, (*viz.*) *Warners* and *Churchall*, he deviſed *Warners* to the eldeſt Son of *Richard Foſter* in Fee, and the Manor of *Churchall* to *Margery Waters* for Life, and if ſhe die, any of *Foſter*'s Children being then living, then to him who ſhall have the Manor or *Warners:* This *Richard Foſter* had two Children *George* and *John*; the ſaid *George* died without Iſſue, then *John* entered and ſold *Warners*, and afterwards *Margery* died; adjudged that *John* ſhould not have *Warners*, for there were two Deſcriptions of his Perſon in this Will, (*viz.*) the Deviſe was to *Foſter*'s *Child*, and if this had ſtood ſingly, then *John* would have been intitled to the Manor of *Churchall*, becauſe he was *Richard Foſter*'s *Child*, and living at the Death of *Margery*; but it muſt be ſuch Child who ſhould have Manor of *Warners* at that Time, and that could not be *John Foſter*, for he had ſold it.

Bon verſus *Smith*, Cro. Eliz. 532.

The Teſtator having *a Son and a Daughter*, deviſed his Lands to his Son in Tail; and if he ſhould die without Iſſue, then to remain to the *next Heir of his Name*; the Son died without Iſſue, the *Daughter was married*; and it was adjudged that the *next Heir Male* ſhould take it; for tho' the Daughter was the next Heir, yet ſhe was not of the Name of the Teſtator, that being loſt by her Marriage. So where the Deviſe was to *T. S.* in Tail, Remainder to *the next of Kin of his Name*; and it happened that the next of Kin was his Brother's *Daughter*, who at that Time was *married:* Adjudged ſhe had no Title, for the Reaſon in the Caſe laſt mentioned; but if ſhe had been unmarried, then ſhe had been the Perſon deſcribed in the Will, (*viz.*) *The next of Kin to the Teſtator, and likewiſe of his Name.*

Jobſon's Caſe, Cro. Eliz. 576.

Cowden verſ. *Clerke*, Hob. 29. Moor 860. S. C. 1 Rol. Abr. 839. S. C. 2 Roll. Abr. 416. S. C.

The Teſtator having a Son and a Daughter, deviſed that his Lands ſhould deſcend to his Son, and if he died without Iſſue, then to the *right Heirs of his Name*, equally to be devided, Part and Part alike; the Son died without Iſſue, the Daughter had Iſſue a Daughter and died; *George Cowden* the Brother of the Teſtator was *of his Name*, but not the *right Heir*, the Daughter of the Daughter was his *right Heir*, but not *of his Name*: Adjudged that *George*

Cowden had no Title, for the Teſtator never intended he ſhould have any, becauſe it was to go to the *next Heirs of his Name.*

There is another Caſe to this Purpoſe reported in ſeveral Books: *ff.* The Teſtator had a *Son* and *Grandſon* both named *Robert*, and he deviſed his Lands to his Son *Robert* in Fee, and gave a Legacy to his Grandſon *Robert*; but *Robert* the Son dying in the Life-time of the Teſtator, he new publiſhed his Will, and declared that his Intention was, that *Robert* his Grandſon ſhould take by the Will inſtead of *Robert* his Father: It was objected that this new Publication of the Will by Parol could not alter the Words of the *written Will*, ſo as to put a new Senſe on them, for *Son* and *Grandſon* are different Names of Appellation, and ſignify diſtinct Perſons; but Three Judges were of Opinion, that the Word *Son* in the Will is applicable to the *Grandſon*, for he is a Son, and more; but this Judgment was reverſed on a Writ of Error in *B. R.* for that no parol Declaration can carry the Lands to one Perſon, where by the Words of the Will in Writing, they are expreſly deviſed to another, as in this Caſe they were to *the Son*; and the Teſtator himſelf had in this very Will diſtinguiſhed between the *Son* and *Grandſon*; for he gave his Lands to one and a Legacy to the other, ſo that this new Publication and parol Declaration can never make the Word *Grandſon* ſignify *Son* in the written Will.

Stead verſ. *Berrien*, Raym. 408. 1 Mod. 267. S. C. T. Jones 135. S. C. 1 Vent. 341. S. C. 2 Lev. 243. S. C. 2 Mod. 313. S. C.

The Husband deviſed his Lands in *Wiskow*, which were *eſtated on his Wife*, and declared that they ſhould be in full for her Jointure, when in Truth they were not before *eſtated on her:* Adjudged that the Heir at Law, and not the Wife, ſhall have the Lands, becauſe they are not deviſed at all to the Wife, for he only declared, that they were *already ſettled on her*, which muſt be before the Making the Will, in which he was miſtaken.

Wright v. *Wyvell*, 3 Lev. 259. 2 Vent. 56. S. C.

When (3) the Teſtator doth err in the Name of the Executor or Legatary, and not in the Perſon, ſuch Error doth not hurt [d], but in certain Caſes. One is, when the Teſtator is blind; for then it is ſuſpected that the Teſtator doth miſtake the Perſon, together with the Name [e]. Another is, when the Teſtator doth err in the Name of his own Son [f], or of his Father [g]. The Reaſon is, for that this groſs Error doth note the Teſtator of Folly [h]: But a Fool, or he that is not of ſound Memory, cannot make a Teſtament [i]. Much more is the Diſpoſition void, if the Teſtator do err in his own Name [k]: As if the Teſtator ſay, I *Peter* make my Teſtament, where his Name is *John:* For this is a plain and evident Proof of his Folly, or lack of ſufficient Memory [l].

[d] L. ſi in nomine. C. de teſta.

[e] Jaſ. & Sichard. in d. L. ſi in nomine. Ripa in L. ſi quis in fund. ff. de leg. 1. n. 9. quem vide.

[f] Sichar. in d. L. ſi in nomine. n. 14.

Ripa in L. ſi quis fund. ff. de leg. 1. ubi ſublimitat hanc limitac. quando viz. natus & educatus eſſet filius in loco remoto.

[g] Ripa in d. L. ſi quamvis. n. 8.

[h] Sichard. & alii in d. L. ſi in nomine.

[i] Supra 2. part. §. 4.

[k] Jaſ. in d. L. ſi in nomine.

[l] Bar. in L. cum in liberis. C. de hæred. inſtit. & eſt communis opinio, ut per Graſſ. Theſaur. com. op. §. Inſtit. q. 29. n. 2.

When (4) the Teſtator doth err in the Quality of the Executor or Legatary, this Error is not hurtful [m], unleſs that Quality were the final Cauſe wherefore the Teſtator made him Executor or Legatary: For the Error in ſuch a Quality doth make void the Diſpoſition [n]. For Example; the Teſtator ſaith, I make my Couſin *John at Stile* my Executor, or, I give to my Couſin *John at Stile* an Hundred Pounds: In this Caſe, if *John at Stile* be not Couſin to the Teſtator, he cannot obtain the Executorſhip, or Legacy [o]. Here-

[m] L. falſa demonſtratio. ff. de cond. & demon. c. 1. 29. q. 1. Mantic. de conject. ult. vol. lib. 4. tit. 5. n. 16. Paul. de Caſtro in L. quoties. ff. de hæred. inſtit.

[n] L. neque profeſſio. C. de teſta.

[o] d. L. neque. & ibi DD. & Graſſ. Theſaur. com. op. §. Inſtit. q. 29. n. 4. ubi refert hanc op. eſſe receptam ab omnibus, niſi fortaſſe teſtator ſolet appellare illum conſanguineum ſuum.

unto it may be added, that if the Teſtator do erroneouſly expreſs a falſe Cauſe, the Diſpoſition is void [p]. For Example; the Teſtator ſaith, becauſe thou didſt lend me an Hundred Pounds, I bequeath unto thee an Hundred Pounds [q]; or, becauſe my Son is dead, thou ſhalt be my Executor [r]: In which Caſes, the Cauſe being falſe, the Diſpoſition is of no Force. And although it be written, that a falſe Demonſtration or falſe Cauſe doth not hurt the Diſpoſition [s]: Yet that is to be underſtood, where the Teſtator doth not ignorantly, but wittingly [t] expreſs the ſame.

[p] Bar. in L. demonſtratio. §. quod autem. ff. de cond. & demon. n. 13.
[q] Bar. ubi ſupra. verb. quædam cauſa proxima.
[r] L. ſui. ff. de hæræd. inſtit. Sichard. in Rub. de hæred. inſtit. C. n. 3.
[s] L. cum tale. §. falſam. de cond. & demon. ff. §. longe. Inſtit. de lega.
[t] Gloſſ. in L. 1. C. de falſa cauſa adject. & ibi Doctores.

But (5) when the Teſtator doth ignorantly expreſs a Cauſe, which is ſo annexed unto the Legacy [u], as without the which Cauſe he would not have given that Legacy [x]: In this Caſe, the Cauſe being falſe, the Legacy is void [y].

[u] Bar. in d. L. demonſtratio. §. quod autem. de cond. & demon. ff. n. 13. & Paul. de Caſtr. in d. L. n. 5.
[x] Secus ſi cauſa ſit impulſiva tantum, quæ ab ignorante adjicitur: Nam illa, quantumcunque falſa, non viciat diſpoſitionem, niſi forte non cauſative, ſed conditionaliter ſit adjecta; quia tunc viciatur diſpoſitio, ſive intellexerit, ſive ignoraverit teſtator cauſam illam non exiſtere. Sichard. in Rub. Paul. de Caſtr. in d. L. demonſtratio. Minſing. & alii in d. §. longe. Inſtit. de lega. Vigel. Method. jur. civil. lib. 12. c. 10. excep. 71.
[y] Porcius in §. longe. inſtit. de lega. & ibi Minſing. n. 2. Sich. in Rub. de hæred. inſtit. C. & Paul. in d. L. demonſtratio.

If the (6) Error touch the Thing bequeathed, then we are to enquire whether the Teſtator do err in the Name, or in the Subſtance, or in the Quality, or in the Quantity of the Thing bequeathed.

The (7) Error of the Teſtator in the proper Name of the Thing bequeathed doth not hurt the Validity of the Legacy, ſo that the Body or Subſtance of the Thing bequeathed is certain [z]: As for Inſtance; the Teſtator bequeathed his Horſe *Criple*, when the Name of the Horſe was *Tulip*; this Miſtake ſhall not make the Legacy void, for the Legatary may have the Horſe by the laſt Denomination; for the Teſtator's Meaning was certain [a], that he ſhould have the Horſe; if therefore he hath the Thing deviſed, 'tis not material if he hath it by the right or wrong Name [b].

[z] §. ſi quidem in nomine. Inſtit. de lega. quæ ſententia communis eſt. Graff. Theſaur. com. op. §. Legatum. q. 65.
[a] Bar. Zaſ. & alii in L. ſi quis in fund. ff. de leg. 1.
[b] d. §. ſi quidem in nomine. Inſtit. de lega.

Pacy verſus *Knollis*, 1 Brownl. 131. Deviſe of all the Profits of his Houſes and Lands lying in the *Pariſh of Billing*, in a Street there called *Brook-ſtreet*, and there was no ſuch Pariſh as *Billing*, but the Lands intended to be deviſed were in *Birling-ſtreet*; adjudged that the Profits of thoſe Lands did paſs.

Thorp v. *Thompſon*, Cro. Eliz. 121. *T. S.* being ſeiſed in Fee of certain Lands, contracted with *T. T.* to ſell the ſame to him; but before any Conveyance thereof was executed to him, the ſaid *T. T.* ſold the Lands to *W. G.* who deviſed them to *R. R.* in theſe Words, (*viz.*) I bequeath to *R. R.* my Son in Law, *all my Lands which I purchaſed of* T. T. when in Truth they were not purchaſed of him, becauſe *T. T.* had no Conveyance thereof; but adjudged that the Deviſe was good.

Chamberlain v. *Turner*, W. Jones 195. Cro. Car. 129. S. C. Deviſe of an *Houſe* wherein *H. N. dwelleth*, called the *White Swan*; now this *H. N.* had only the Uſe of the *Entry and Three Garrets*; yet it was adjudged that the whole Houſe paſſed, for the Word *Houſe* in the Beginning of this Sentence, and ending it with the Name of the *White Swan*, muſt extend to the whole Houſe; but if it had not been deviſed by that particular Name, (*viz.*) The

White Swan, it would not have paſſed the *whole Houſe*, for it cannot be intended that the *White Swan* ſhould relate only to the *Entry and Garrets*.

The Teſtator being ſeiſed of an Houſe, deviſed the ſame to *T. S.* by the Name of his *Corner-Houſe in* Andover, *in the Tenure of one* Hitchcock, which it was not, but in the Tenure of one *Benſon*; but this *Hitchcock* was the Teſtator's Tenant of an Houſe next adjoining to the *Corner-Houſe*; adjudged that that Houſe did not paſs, but only the *Corner-Houſe*, becauſe it was ſufficiently deſcribed by that Name, and the Addition, (*viz.*) *In the Tenure of one* Hitchcock, is an apparent Miſtake, and tho' falſe, 'tis only Surpluſage, and ſhall not make that void which was certain before. *Blake* verſus *Gold*, W. Jones 379. Cro. Car. 447. S. C. 1 Roll. Abr. 613. S. C.

So where the Teſtator had Two Tenements called the *Upper Houſe and Lower Houſe*, and deviſed *all his Tenements*, *&c.* for the Payment of his Debts, till his Grandſon came of Age; and afterwards he deviſed *all his Tenements*, (*viz.*) *Two Parts of the Nether Houſe*, for raiſing 200 *l. &c.* Remainder to his Grandſon in Fee; adjudged that by theſe general Words *All his Tenements*, all the Houſes paſſed, and that the (*viz.*) was directive only how Part ſhould go. *Bagnall* ver. *Abdet*, 4 Mod. 140.

The Teſtator being ſeiſed in Fee of Lands in *Two Hamlets*, but *in one Town*, deviſed all his Lands *in the Town*, and in one of the *Hamlets* by Name; adjudged that nothing in the other Hamlet paſſed. Dyer 261.

The (8) Error in the Name appellative of the Thing bequeathed doth deſtroy the Legacy [d]. For Example; the Teſtator intending to bequeath an Horſe, doth bequeath an Ox; or Meaning to bequeath Gold, doth bequeath Apparel: In both theſe Caſes the Legacy is void [e]. The Reaſon of the Difference (I mean, of the divers Effects betwixt the Error in proper Names and the Error in Names appellative) is, becauſe (9) a proper Name is an Accident attributed to ſome ſingular or individual Thing, to diſtinguiſh the ſame from other ſingular Things of the ſame Kind: Whereas Names appellative do reſpect the Subſtance of Things, and being common to every ſingular of the ſame Kind, make them to differ from Things of other Kind or Subſtance [f]. Againſt (10) this Reaſon it is commonly objected, that Words or Names are but invented to ſignify Things [g]; and that the Words of the Teſtator are to be drawn even into an improper Senſe to maintain the Will and Diſpoſition of the Teſtator [h]. To the which Objection it is anſwered, that thoſe Words which have a manifold Senſe may be ſtretched to that Senſe which is contained therein, albeit improperly; but to comprehend that Senſe which is not at all within Compaſs of the Words, neither properly nor improperly, they may not be ſtretched ſo far [i]: For then this Concluſion hath Place, *That which I would, I ſpake not; that which I ſpake, I would not:* And ſo neither is good [k].

[d] Si quis in fund. ff. de leg. 1.

[e] d. L. ſi quis in fund.

[f] Minſing. in d. §. ſi quidem in nomine. n. 8. DD. in d. L. ſi quis. & in L. ſi in nomine. C. de teſtam.

[g] Text. in d. §. ſi quidem in nomine.

[h] L. non aliter. de leg. 3. ff. Mantic. de conject. ult. vol. lib. 3. tit. 5. n. 2.

[i] Ripa & Zaſ. in L. ſi quis in fund. ff. de leg. 1. ille, n. 26. iſte, n. 20.

[k] L. in ambiguo. de reb. dub. ff.

Nevertheleſs, (11) It is not perpetually true, that the Error in the Name appellative of the Thing bequeathed doth make void the Diſpoſition: For if the Thing bequeathed be preſent, and the Teſtator doth with his Hand demonſtrate the ſame, albeit he do err in the Name appellative, it doth nothing hinder the Validity of the Legacy [l]. Likewiſe if there be ſome Conformity or Similitude betwixt the Name appellative, and the Name wherein the Teſtator doth err, the Legacy is not void: As if the Teſtator, Meaning to bequeath his Books,

[l] Gloſſ. in L. quæ extrinſecus. ff. de verb. ob. Jaſ. in d. L. ſi quis in fund. qui ibi refert hanc opinionem eſſe veram.

Books, doth bequeath his Papers [m]. Or if the Teſtator proteſt, that the Legacy ſhall paſs by thoſe Terms: For then the Error in the Name appellative is not hurtful [n]. Or if by common Uſe of Speech the Name appellative be altered: For then it is in the Election of the Teſtator to uſe whether Name he will, even that which is leſs proper [o]. Or if the Names be artificial, not natural, as to uſe *Procuratorſhip* for *Curatorſhip* [p].

[m] Gloſſ. in d. L. ſi quis in fund. Bar. in L. quæſitum. §. ſi mihi de leg. 1. & eſt com. op. ait Graſſ. Theſ. com. op. §. legatum, q. 65.

[n] Gloſſ. in d. L. ſi quis in fund. & quod hæc communis ſit, numerat Ripa in d. L. ſi quis. n. 27. & Graſſ. §. legatum, q. 65.

[o] Jaſ. & Zaſ. & Ripa in d. L. ſi quis in fund.

[p] Minſing. in §. ſi quidem in nomine. Inſtit. de lega. n. 2.

The (12) Error in the Body or Subſtance of the Thing bequeathed doth deſtroy the Legacy [q], like as in the Perſon of the Executor or Legatary [r].

When (13) the Error is in the Quantity of the Thing bequeathed, it doth not hurt the Legacy [s]. For Example; the Teſtator meaning to bequeath the fourth Part of his Goods, doth by Words bequeath the one Half; or meaning to give but fifty Pounds, doth bequeath an Hundred Pounds: Or contrariwiſe, the Teſtator meaning to bequeath a great Quantity or Sum, doth expreſs a leſſer Rate or Sum [t]. In theſe Caſes the Legacy is good, and the Legatary may obtain ſo much as the Teſtator did mean, be it more or leſs than the Portion or Sum uttered [u].

[q] Si quis in fund. de leg. 1. ff.

[r] L. quoties. de hæred. inſt. ff.

[s] L. qui quartam. de leg. 1. ff.

[t] Et ſic valet legatum, ſive quantitas ſit continua, ſive diſcreta; vel, ut alii loquuntur, ſive pars ſit quotitativa, ſive numeralis, Jaſ. & Zaſ. in d. L. qui quartam.

[u] Bald. Paul. de Caſtr. Alex. Jaſ. & Zaſ. in d. L. qui quartam, quamvis Bar. contrariam partem teneat, caſu quo minor ſumma ſit expreſſa; cujus opinio communiter reprobatur. Et ſic valet legatum utroque caſu.

Howbeit (14) if the Quantity be bequeathed as a certain Body; as if the Teſtator bequeath an Hundred Pounds *lying in ſuch a Cheſt*, whenas there is no Money in the Cheſt; in this Caſe the Legacy is void [x]. Likewiſe if the Teſtator do generally bequeath unto another whatſoever *he himſelf doth owe unto that other*, the Teſtator not being indebted; the Legacy is void [y]. So it is, if the Teſtator do ſay, I do bequeath unto ſuch a Man *Ten Pounds* which he oweth me; in this Caſe alſo the Legacy is void, if the Legatary be not at all indebted to the Teſtator [z]. So it is, if the Teſtator do bequeath a certain Sum to one, which either he (the Legatary I mean) or ſome other doth owe unto the Teſtator, when no ſuch Sum is due by either of them to the Teſtator [a]: For whether the Teſtator did know, or not know, that nothing was due unto him, in both theſe Caſes the Legacy is void [b]. So it is, if the Teſtator, ſuppoſing himſelf to be indebted to anotner, doth bequeath that Debt to the Perſon to whom he erroneouſly ſuppoſeth himſelf to be indebted, not expreſſing any Quantity; for the Legacy is in this Caſe void [c]. But if the Teſtator, knowing himſelf not to be indebted, doth ſay, I bequeath to ſuch a Perſon Ten Pounds which I do owe unto him; in this Caſe the Legacy is good, notwithſtanding the falſe Demonſtration [d]: Neither is the Teſtator preſumed to err in this Caſe; and therefore unleſs the Executor make Proof of the Error, the Legatary may recover the Legacy [e].

Where (15) I ſaid a little before, that the Legacy of Quantity being bequeathed as a certain Body, as when the Teſtator doth bequeath an Hundred Pounds *lying in ſuch a Cheſt*, or which ſuch a Perſon doth owe unto him, that then no Money being found in the Cheſt, or nothing being due by that Perſon, the Legacy is void [f];

[x] L. ſi ſervus. §. ſi quinque. L. ſed & ſi certos nummos. ff. de leg. 1. Minſing. in §. huic proxima. Inſtit. de lega. n. 8. Graſſ. §. legatum. q. 59. n. 3.

[y] L. ſi ſic. §. ſi mihi. ff. de leg. 1.

[z] Minſing. in d. §. huic proxima. Inſtit. de lega.

[a] L. ſi ſic. §. ſi mihi. & Jaſ. in d. §.

[b] Paul. de caſtr. in d. §. ſi mihi. & Minſing. in d. §. huic proxima.

[c] d. §. ſi mihi.

[d] Ex. d. §. ſi mihi. & Minſing. in §. huic proxima. Inſtit. de lega. n. 6.

[e] Caſtr. in L. 2. C. de falſa cauſa adject.

[f] L. ſi ſervus, §. ſi quinque. L. ſed & ſi certos nummos. ff. de leg. 1.

this Concluſion doth admit theſe Limitations. One is, when the Miſreport or falſe Demonſtration is not joined to the Subſtance of the Legacy, (as before [g],) but to the Execution thereof: As thus, *viz.* I give to *A. B.* an Hundred Pounds, and I will that the ſame be paid of the Money which I have in ſuch a Cheſt, or of the Money which ſuch a Man doth owe unto me. For albeit there be not any Money in that Cheſt, nor any due by that Perſon named by the Teſtator; nevertheleſs the whole Legacy is due, and is to be paid of the Teſtator's Goods [h]. For the Legacy being once pure and ſimple, and perfect in it ſelf, it is not made conditional by that which followeth in another Sentence, reſpecting the Performance, and not the Subſtance of the Legacy: For by ſuch Demonſtration the Teſtator is preſumed to have had a Care only how the Legacy might be paid the more eaſily, or with leſs Diſcommodity to the Executor; not whether it ſhould be paid at all unto the Legatary [i].

Another Limitation is this, when ſome Part of the Legacy conſiſting in Quantity is extant, though not all, according to the Demonſtration of the Teſtator [k]. For Example; the Teſtator doth bequeath Ten Pounds remaining in ſuch a Cheſt, at whoſe Death Five Pounds only is found in that Cheſt: In this Caſe, howſoever this Legacy be as of a certain Body, yet Five Pounds is due and recoverable by the Legacy [l]; but no more than Five Pounds. Inſomuch that if at the Death of the Teſtator there were Ten Pounds found in that Cheſt, whereas at the Time of the Making of the Teſtament there was no more but Five Pounds in the Cheſt; in this Caſe Five Pounds only is due [m]: Unleſs the Teſtator at the Will-making did think that there had been Ten Pounds in the Cheſt, and ſo did add other Five Pounds thereunto, to make the Sum anſwerable to his Opinion; for then the Legatary may recover the whole Ten Pounds, as if the ſame had been all there, as well at the Making of the Teſtament, as at the Teſtator's Death [n].

And here note, that the Teſtator is preſumed to have thought that there had been Ten Pounds in the Cheſt, like as it is ſet down in his Teſtament, unleſs the Executor do prove the contrary, *viz.* that the Teſtator did know that there was but Five Pounds in the Cheſt when he made his Teſtament [o].

Error (16) in the Quality of the Thing bequeathed doth not hurt the Legacy, when the Body or Subſtance is certain [p], no more than the Error in the proper Name: And therefore if the Teſtator bequeath his white Horſe, having but a black Horſe, the Legacy is good [q].

Error (17) in the Form of the Diſpoſition maketh the ſame to be of no Force [r]. For Example; the Teſtator intending to make an Executor, or to bequeath any Legacy, conditionally, and not otherwiſe, doth by Error omit the Condition: In this Caſe the Diſpoſition concerning the Executorſhip or Legacy is void [s]. Howbeit, if the Teſtator do appoint an Executor, or bequeath any Legacy, according to certain Conditions afterwards to be written, no Conditions being afterwards written, the Diſpoſition is good, and as it were ſimply made [t]; unleſs it do appear that the Teſtator did mean, that the Diſpoſition ſhould not take Place without thoſe Conditions following [u], as in the former Example [x].

[g] Hoc ipſo §. pleniùs ſupr. part. 4. §. 17. n. 8, &c.

[h] L. quidam. de teſtament. ff. de leg. 1.

[i] d. L. quidam & L. paulo. de leg. 3. Bar. Caſtr. & alii in d. L. quidam.

[k] L. ſi ſervus. §. ſi quinque. ff. de leg. 1.

[l] d. §. ſi quinque.

[m] Paul. de Caſtr. in d. §. quinque. n. 9.

[n] Idem Caſtr. in d. §. quinque. n. 9.

[o] Idem Caſtr. in d. §.

[p] Angel. in d. L. ſi quis in fund. ff. de leg. 1.

[q] Et eſt com. op. Ripa in d. L. ſi quis in fund. Graſſ. §. legat. q. 56.

[r] L. quoties hæres. §. tantundem. ff. de hær. inſtit.

[s] d. §. tantundem. & DD. ibidem.

[t] L. pe[illegible] C. de Inſtit. & [illegible]

[u] Molin. in apoſtil. ad Dec. in d. L. pen.

[x] d. §. tantundem.

§. VI. Of Uncertainty.

1. *Divers are the Means whereby Uncertainty doth grow.*

THAT we may the better underſtand when the Uncertainty is ſuch as it doth overthrow the Diſpoſition, (for ſometimes it doth deſtroy the ſame, and ſometimes not,) we are to be advertiſed, (1) that the Uncertainty doth ſometimes reſpect the Perſon of the Executor or Legatary [y]; ſometimes it doth reſpect the Thing bequeathed [z]; and ſometimes it doth reſpect the Time or Date of the Teſtament [a].

[y] Infra §§. 7, 8.
[z] Infra §. 10.
[a] Infra §. 11.

The Teſtament is uncertain in Reſpect of the Perſon of the Executor or Legatary by divers Means, but eſpecially by theſe Means following.

Firſt, When it cannot be underſtood whom the Teſtator meaneth, either for that there is no Perſon certainly named; or elſe, ſome being named, yet no Perſon of that Name to be found [b].

[b] Infra §. prox.

Secondly, When there be divers Perſons of one and the ſame Name, whereby the Teſtator maketh his Executor or doth bequeath any Legacy [c].

[c] Infra §. 8.

Thirdly, When the Teſtator doth appoint Executors or give Legacies alternatively, or disjunctively, as, I make *A.* or *B.* my Executor [d].

[d] Infra §. 9.

Of the other Uncertainties, *viz.* in Reſpect of the Thing bequeathed, or Date of the Teſtament, it followeth afterwards [e]. In the mean Time therefore of the Uncertainty concerning the Perſon of the Executor or Legatary.

[e] Infra §§. 10, 11.

§. VII. Of Uncertainty, either becauſe no certain Perſon is named; or, ſome being named, none of that Name is to be found.

1. *The Uncertainty of the Perſon maketh void the Diſpoſition.*
2. *If the Perſon, at the firſt uncertain, be afterwards made certain, whether is the Diſpoſition good, or no?*
3. *What if ſome Perſon be named, but no Perſon found of that Name?*

WHERE (1) no certain Perſon is named Executor or Legatary, the Will in that Point is void [f]: And therefore if the Teſtator ſay, I make one Man of the World my Executor, or, I give to one of the World an Hundred Pounds, no Man can be Executor, nor recover the Hundred Pounds by this Diſpoſition [g]; unleſs he be able to prove, that the Teſtator's Meaning was that he ſhould be Executor, or have the Legacy [h]. Likewiſe where the Teſtator ſaith, I make that Perſon my Executor, or, I give him an Hundred Pounds, whoſe Name is written in a Schedule in the Cuſtody of ſuch a Man, whenas indeed there is no ſuch Schedule to be found, or being

[f] Bar. in L. quidam. ff. de reb. dub. Clar. §. teſt. q. 36. Graſ. Theſ. com. op. §. Legatum. q. 64.

[g] Ætiologia eſt, quia iſta perſona eſt incerta ex incertis. Bar. Graſſ. & Clar. ubi ſupra. Are. in §. ex incertis. Inſtit. de lega. & Mant. de conject. ult. vol. lib. 8. tit. 4.

[h] Minſing. in d. §. ex incert. Saltem valet legat. jure can. Felin. in c. 1. de pact. extra.

ing found, yet no Name therein; this Diſpoſition is void [i]. Neither is it ſufficient that a Paper or Schedule be extant, and that the Name be therein plainly contained; unleſs alſo it appear by ſufficient Proof or lawful Conjectures, that this Schedule is the very ſame whereunto the Teſtator made Relation [k].

[i] Bar. in L. ſi ita. ff. de cond. & demon. Cov. in c. cum tibi. de teſt. extra. Simo. de Præt. de interp. ult. vol. l. 3. ſoluc. vol. 1. n. 12. de conject. ult. vol.

[k] Bar. in d. L. ſi ita. Cov. in d. c. cum tibi. Graff. Theſ. com. op. §. inſt. q. 16. Mantic. l. 1. tit. 7. n. 7. Clar. §. teſt. q. 36. in fin.

The Teſtator deviſed his Lands to *T. S.* for Life, Remainder to *the beſt Man of the Company of* Skinners: Adjudged that this Deviſe was void. Fitz. Deviſe 7.

So where the Deviſe was to his *beſt Friend*, or that his Goods ſhall be diſtributed, and doth not ſay *amongſt whom*; in this laſt Caſe it hath been held, that they ſhall be diſtributed amongſt the Poor; but this is by the Civil Law, and where the Teſtator died without Iſſue.

Deviſe of half his Lands to his Wife for Life, and afterwards all his Lands to the Heirs Male of *any of his Sons, or next of Kin*; this being in the Disjunctive, the Court inclined that the Will was void. *Beal* verſus *Ujman*, Style 240. See poſtea cap. 9. contra.

If (2) no certain Perſon be named at the firſt, but afterwards be made certain by Event; the Teſtament or Diſpoſition is of no leſs Force, than if the Perſon had been eſpecially and certainly named at the firſt [l]. For Example; the Teſtator maketh that Man Executor, or giveth him an Hundred Pounds, which ſhall marry the Teſtator's Daughter: In this Caſe, whoſoever ſhall marry the Teſtator's Daughter, he is to be admitted to the Executorſhip, and may obtain the Legacy, as if he had been named at the firſt [m]. And this Concluſion proceedeth whether the Marriage be made in the Life-time of the Teſtator, or afterwards [n]. Saving where the Marriage is made after the Death of the Teſtator, if it be likely that the Teſtator would not have made that Perſon Executor, or have given him the Legacy, if he had thought that it would fall out that he ſhould have married his Daughter, (for that perhaps that Perſon was Enemy to the Teſtator, or otherwiſe unworthy of any Benefit by the Teſtator:) In this Caſe the Perſon marrying the Teſtator's Daughter after his Death cannot be Executor, or recover the Legacy [o].

[l] L. quidam. & ibi Bar. de reb. dub. ff. Angel. Are. in d. §. incert. Inſt. de legat.

[m] d. L. quidam. de reb. dub. ff Nec obſtat, quod tutor non poteſt dare ei qui venit alicuo eventu certificandus quia contrar. procedit jure cano. Apoſt. ad Bar. in L. duo. ff. de teſt. tut. Adde quod licet exec. nonnunquam aſſimiletur tutori, (ut per Bar. in d. L. quidam. & per DD. in L. ſi quis a filio. §. ſi quis pluries. de leg. 1.) tamen in Anglia aptius comparatur hæredi, qui incertus ex incertis, eventu certificandus, poteſt inſtitui. Are. in d. §. ex incertis. Inſtit. de legat.

[n] L. uter, cum ſeq. ff. de cond. inſt. Donellus in L. quidam. de reb. dub. Bald. conſil. 188. vol. 5.

[o] Donel. in d. L. quidam. de reb. dub. Simo de Præt. l. ult. vol. 128. n. 9.

If (3) a certain Perſon be named, but no ſuch Perſon be to be found, and the Meaning of the Teſtator utterly unknown; it is as if the Teſtator had made no Mention of any [p].

[p] L. 2. ff. de his quæ pro non ſcript.

The Teſtator deviſed his Lands to *William, the eldeſt Son of* Charles, who in Truth was the *eldeſt Son*, but his Name was *Andrew*, and not *William*; decreed that the Deviſe was good, for tho' it was to the Deviſee by a wrong and miſtaken Name, yet there was another Circumſtance, by which the Intention of the Teſtator did plainly appear to give his Lands to this Perſon, (*viz.*) *to the eldeſt Son of* Charles. *Pitcairn* verſ. *Braſe*, Rep. in Chancery, fo. 405.

§. VIII. Of

§. VIII. Of Uncertainty ariſing, becauſe there be divers Perſons of one Name.

1. *Where divers Perſons be of one Name, the Diſpoſition is void.*
2. *What if the Teſtator's Meaning be known?*
3. *What if the one of them be a familiar Friend, the other not?*
4. *What if the one be of Kin to the Teſtator, the other not?*
5. *The Diſpoſition* ad pias cauſas *is not void by Reaſon of Uncertainty.*
6. *What if the Teſtator give ſomewhat to the Church? What Church is underſtood?*
7. *What if there be divers Churches of one Name?*
8. *If the Teſtator give any Thing to the Poor, which Poor are to have the ſame?*
9. *The Authority of the Executor Teſtamentary in diſtributing to the Poor.*
10. *What if the Executor make his Kin his Executor? Who is to be admitted?*
11. *What if the Teſtator make another's Kin his Executor?*

WHERE (1) the Teſtator nameth ſome one Man his Executor, or doth bequeath ſome Legacy unto him, and there be divers Men of that Name; this Uncertainty maketh void the Diſpoſition [a]: For Example; the Teſtator maketh *Titius* his Executor, whereas there be divers Perſons ſo called; or, to ſpeak after the Manner of our temporal Lawyers, the Teſtator maketh *John at Stile* his Executor, or giveth to him an Hundred Pounds, and there be two Perſons called *John at Stile*, and the Teſtator maketh no Difference, but leaveth it uncertain of whom he did mean; in this Caſe neither of them can obtain the Executorſhip or Legacy [b].

But (2) if the one of them do prove that the Teſtator did mean that he ſhould be Executor, or have the Legacy, it is ſufficient for the Obtaining of the Executorſhip or Legacy.

[a] L. ſi quis. §. ſi inter. ff. de leg. 2. Bald. in L. hac conſultiſſima. C. qui teſt. fac. poſſ. n. 4.

[b] DD. in d. §. ſi inter.

[c] Bar. in L. quidam. ff. de reb. dub. Simo de Præt. de interp. ult. vol. l. 1. fol. 97. n. 1.

Or if (3) one of them appointed be one of the Teſtator's familiar Acquaintance, and his Friend, the other a Stranger; in this Caſe the Stranger is excluded, and the other admitted [d]. Or both of them being Friends, yet if one of them be joined in greater Friendſhip with the Teſtator than the other, he is to be preferred to the Executorſhip or Legacy before the other [e].

[d] L. quem hær. ff. de cond. & demon. Mantic. de conject. ult. vol. l. 8. tit. 4. n. 5.

[e] Simo de Prætis de interp. ult. vol. l. 1. fol. 100. n. 3. Mantic. de conject. ult. vol. l. 8. tit. 4. n. 5.

Or if the one of them (4) be of Kin to the Teſtator, and the other not of Kin, the Kinſman is to be preferred [f]; and if they be both Couſins, then I ſuppoſe that whether of them were to be admitted to the Adminiſtratorſhip, in Caſe the Teſtator had died Inteſtate, that he is to be admitted to the Executorſhip [g].

[f] L. cohæred. §. qui diſcretas. ff. de vulg. ſub. Mantic. de conject. ult. vol. lib. 8. tit. 4. n. 5.

[g] Jaſ. in L. 1. §. hoc autem. ad Trebel. lect. 3. ff. Simo de Prætis de interp. ult. vol. 1. fol. 98. n. 9. Mantic. de conject. ult. vol. l. 4. tit. 6. n. 3, 4.

Or if (5) the Diſpoſition be made *ad pias cauſas*, it is not void, by Reaſon that the Name is common or agreeable to divers. And therefore (6) if the Teſtator doth bequeath any Thing to the Church, not expreſſing what Church he doth mean, the Diſpoſition is not void, but is to be underſtood of his Pariſh-Church[h]. And if the Teſtator name a Church, and (7) there be divers Churches of that Name, it is to be underſtood of his Pariſh-Church[i]. For Example; the Teſtator doth bequeath to St. *Peter*'s Church in *Oxford* an hundred Pounds, where there be two Churches of that Name; this Diſpoſition is not void, but the Bequeſt is due to the Teſtator's Pariſh-Church, or where he did more uſually reſort to pray to God, or to hear his Word[k]. And if neither of them be his Pariſh-Church, neither can it appear that the Teſtator did more frequent the one than the other; or, on the contrary, if both of them were his Pariſh-Churches, for that perhaps he kept a Family in either Pariſh, and did equally frequent either Church; in theſe Caſes, by the Opinion of ſome Writers, the Legacy is to be divided betwixt the Churches[l]. But by the Opinion of the more Part, it is in the Power of the Executor, or if the Executor do refuſe to prove the Will, or that there be no Executor appointed by the Teſtator, then it is in the Power of the Ordinary to beſtow the ſame Legacy on whether Church he thinketh good[m], as the Conſideration of divers Circumſtances ſhall induce him; wherein (amongſt other Things to be remembred by the Ordinary) this is not to be forgotten, *videlicet*, whether Pariſh is the poorer[n].

[h] Gloſſ. in L. quidam ff. de reb. dub. Abb. in c. judicante. de teſta. extr. Bar. & Jaſ. in L. 1. de ſacroſan. eccleſ. C. Graſ. Theſaur. com. op. §. Inſtit. q. 11. & §. Legatum, q. 64. Mant. de conject. ult. vol. l. 8. tit. 6.

[i] Bar. in L. conditione. §. cum ita ff. de cond. 8 demon. Pan. in c. judicante. de teſt. extra.

[k] Et hæc eſt com. op. ait Jaſ. in L. qui inſulam. ff. de verb. ob. Graſſ. Theſaur. com. op. §. legatum. q. 64. Covar. in d. c judicante. de teſta. extra.

[l] Bar. in d. c. jud. & ibi Covar. aſſerens hanc opin. eſſe veriorem.

[m] Hoſtienſ. & al. in c. jud. quorum op. eſſe com. fatetur. Covar. in d. c. jud. Idem quoque dic. Graſ. Theſ. com. op. & leg. q. 64. Ben. Cap. regul. & ſal. reg. 113.

[n] Gloſ. in d. c. judicante. Mant. de conject. ult. vol. l. 8. tit. 5. n. 5.

In like Manner if the Teſtator (8) make the Poor his Executors, giving them the Reſidue of his Goods; this Diſpoſition is not void by Reaſon of Uncertainty; for that is a Teſtament *ad pias cauſas*[o]. By the Poor therefore in this Place is underſtood the Poor of the Pariſh where the Teſtator did dwell and keep Houſe[p]; for it is likely that he did bear a great Affection to the Poor where he dwelled[q]; eſpecially alſo if the Teſtator were buried in the ſame Place[r]; and therefore the Ordinary in this Caſe ought to provide that the Poor have their Due, according to the Meaning of the Teſtator[s]. But if the (9) Teſtator do bequeath a certain Sum to be diſtributed amongſt the Poor, and do appoint an Executor; then it is the Office of that Executor to diſtribute the ſame[t]; who in the Diſtribution thereof is not neceſſarily tied to beſtow it wholly upon the Poor of that City, Pariſh, or Place, where the Teſtator did dwell[u]; (unleſs the Teſtator did mean that the ſame ſhould be beſtowed on them alone[x];) neither is he preciſely tied to make Choice of the pooreſt Perſons[y]; but may uſe a farther Liberty, ſo that he do not abuſe the ſame[z]. For he may not ſo make Choice of any Perſon, as it may ſeem to oppoſe the Teſtator's Liking and Meaning[a]; neither may he beſtow the whole Legacy upon one Perſon alone[b], nor upon himſelf nor his Children, unleſs they be very poor[c], nor upon ſuch Perſons as will unthriftily ſpend it; but upon ſuch Poor to whom it may do good; and

[o] Tiraquel. tract. de privileg. piæ cauſ. privil. 56.

[p] L. quis ad declin. §. ubi c. de epiſc. & cler. gloſ. in c. ſi pater. verb. pauper. de teſta. l. 6. Covar. in c. cum. tibi. de teſt. extr. Mantic. de conject. ult. vol. l. 8. tit. 5. n. 2.

[q] Mant. de tit. 5. n. 2.

[r] Panor. conſil. 99. l. 2. n. 4.

[s] L. nulli C. d. epiſc. & cler. d. c. judicante. de teſta. extra. & gloſ. ibid.

[t] Mant. de conject. ult. vol. l. 8. tit. 5. n. 2.

[u] Gem. & Franc. in c. ſi pater. de teſta. l. 6.

[x] Mant. d. tit. 5. n. 2.

[y] Bar. in L. unum ex famil. §. 1. ff. de leg. 2. Bald. in rep. L. 1. de ſacroſan. eccleſ. C. Mantic. d. tit. 5. n. 6.

[z] Par. conſil. 45. vol. & Mant. d. tit. 5. n. 8.

[a] Angel. in L. ſed & ſi. §. ſi libertis. ff. de jud. Pariſ. conſil. 26. vol. 4. n. 29.

[b] Bar. in L. 1. ff. de op. leg. Bald. in rep. L. 1. C. de ſacroſa. eccleſ. Mant. de conject. ult. vol. l. 8. tit. 5. n. 18, 19.

[c] Brook, tit. exec. n. 116. c. tua nos. de teſt. extr. Imol. in Cl. 1. de teſt. Mant. d. tit. n. 9.

and eſpecially if the Kinsfolks of the Teſtator be poor, and of the ſame Pariſh where the Teſtator did dwell, they are to be preferred[d].

[d] Bald. in L. illa. Inſt. ff. de hær. inſt. Pariſ. conſil. 26. vol 4. Mantic. de conject. ult. vol. tit. 5. n. 17.

Hereunto it may be added, that if the (10) Teſtator make his Kin his Executor, or give his Goods to his Kin, that this Diſpoſition is not void; but that they which be in the next Degree of Kindred to the Teſtator, to whom the Adminiſtration of his Goods was to be committed, if he had died Inteſtate, are to be firſt admitted to the Executorſhip[e], or to enjoy the Legacy during their Lives[f]; and after their Deaths, the other next of Kin to the Teſtator are to be admitted one after another, ſucceſſively by Degrees, and not all together[g]; ſaving where the Teſtator doth make (11) another's Kindred his Executor, or do bequeath ſome Legacy to any other's Kin; for then they are all to be admitted together, without Reſpect or Degree[h]. The Reaſon of the Difference is, becauſe the Teſtator is not preſumed to carry an equal Affection towards every of his own Kin, but to him that is nearer of Kin greater Love, and to him that is farther off leſſer; and therefore of his own Kindred the beſt beloved is firſt preferred; which Inequality of good Will is not preſumed towards another's Kindred,[i] and therefore they are admitted without Difference[i].

[e] Jaſ. in L. Gallus, §. quidam recte. ff. de. l. & poſthu. Tiraquel. de retract. Lignagier. §. 11. gloſſ. 12. Graſ. Theſ. com. op. §. Inſt. c. 20. n. 12. Bar. in L. ſi contingat. ff. de reb. dub. q. pen.

[f] Bar. in L. cum ita §. fin. ff. de leg. 2. Pariſ. conſil. 49. vol. 2. Graſ. Theſ. com. op. §. legat. q. 41. & §. fidei commiſſum, q. 16.

[g] Paul. de Caſtro in d. L. cum ita §. fidei commiſſ. Cujus op. com. eſt, ut refert Par. conſil. 11. n. 28. vol. 3. Covar. in c. Ranutius. §. 2. de teſt. extra. Graſ. Theſ. com. op. §. fidei commiſſum, q. 16.

[h] Bar. in L. ſi cognatis. ff. de reb. dub. Simo de Prætis de interp. ult. vol. l. 3. fol. 91. n. 28. Graſ. Theſ. com. op. §. Inſtitutio. q.20. n. 10. Jaſ. in L. Gallus. §. quidam recte. ff. de l. & poſthu. n. 28.

[i] Bar. & Simo de Prætis ubi ſupra.

One *Hole* by Will gave 500 *l.* to the Relations of *Elizabeth Hole*, to be equally divided between them. *Eliz. Hole* had at the Teſtator's Death two Brothers living, and ſeveral Nephews and Nieces by another Brother. In Chancery there were two Queſtions, 1. Who ſhould take by the Deſcription of the Relations of *Eliz. Hole*. 2. In what Proportions ſuch Relations ſhould take, whether as they would have taken by the Statute of Diſtributions, or in a different Manner. As to the firſt, it was determined, that no Relation ſhould take by this Deſcription that could not take by the Statute of Diſtribution. As to the ſecond, as the Teſtator had directed the 500 *l.* to be equally divided amongſt them, they ſhould take *per Capita*. *Thomas* v. *Hole*, 11 *April* 1728. *Forreſter's Rep.* 251.

It hath not only been a Queſtion amongſt the beſt Lawyers in this Land, whether the Mother be of Kin to her Child[k]; but after much Diſputation, it hath been alſo adjudged for the Negative, *viz.* That the Mother is not of Kin to her Child. As appeareth in the Caſe commonly known by the Name of the Duke of *Suffolk*'s Caſe, very famous in many Books[l], (though more famous for the Rareneſs than for Soundneſs,) which Caſe was this: In the Reign of King *Edward* the Sixth, *Charles*, Duke of *Suffolk*, having Iſſue a Son by one Venter, and a Daughter by another Venter, made his laſt Will, wherein he deviſed Goods to his Son, and ſo died. After whoſe Death the Son died alſo Inteſtate, without Wife, and without Iſſue, his Mother and his Siſter by the Father's Side (for ſhe was born of the former Venter) then living. The Mother took the Adminiſtration of the Son's Goods, according to the Statute[m], whereby it is enacted, *That in caſe any Perſon die Inteſtate, the Adminiſtra-*

[k] Brook, Abridg. tit. adminiſtr. n. 47.

[l] Brook, ubi ſupra. Dom. Coke, l. 3. in *Ratcliff*'s Caſe, cum ſimilib. 5 E. 6.

[m] Stat. H. 8. an. 21. c. 5.

tion of his Goods ſhall be committed to the next of Kin, &c. The Adminiſtration being thus granted to the Mother, the Siſter by the Father's Side doth commence Suit before the Eccleſiaſtical Judge, pretending herſelf to be next of Kin, and the Mother not of Kin at all to the Party deceaſed, and therefore deſired the Adminiſtration formerly granted to the Mother to be revoked, and to be committed unto her, as next of Kin to the Deceaſed, by Force of the ſaid Statute [n].

[n] Vide ſupr. eod. l. part. 6. §. 1. n. 3. Brook ubi ſupra.

Hereupon the moſt Learned, as well in the Laws of this Realm as in the Civil Law were conſulted. Firſt, whether an Adminiſtration once granted might afterwards be revoked; whereunto they all agreed that it might. Secondly, whether the Mother were next of Kin to her Son; whereunto not only the Temporal Lawyers, but alſo the Civilians, (as it is reported) were of this Opinion, that ſhe was not of Kin to her own Son. Whereupon by definitive Judgment of the Court, the former Adminiſtration granted to the Mother was revoked, and a new Adminiſtration granted to the Siſter, albeit ſhe were of the Half Blood to the Deceaſed. According to this Judgment divers other Adminiſtrations were granted from the Mothers, to the Brethren and Siſters, as next of Kin to them dying Inteſtate, for divers Years after [o]. The Reaſons which moved the Temporal Lawyers to be of this Mind, that the Mother ſhould not be of Kin to her own Child, were eſpecially theſe. Firſt, becauſe there is a Ground or Principle in their Law, that Lands cannot lineally aſcend, but deſcend [p]; whereupon they concluded, that Goods and Chattels might lineally deſcend, but not aſcend [q]. Secondly, becauſe howſoever Children be of the Blood of their Parents, yet are not Parents of the Blood of their Children; for ſo they write, *Liberi ſunt de ſanguine patris & matris, ſed pater & mater non ſunt de ſanguine liberorum* [r]. Thirdly, becauſe the Father, the Mother, and the Child, though they be three Perſons, yet are they but *una caro* [s], one Fleſh, and conſequently no Degree of Kindred betwixt them.

[o] Veluti in caſu inter *Brown* and *Shelton*, cum aliis.

[p] Littlet. Tenures, l. 1. fol. 1.

[q] Brook Abridg. tit. adminiſt. n. 47.

[r] Ibidem.

[s] Brook ubi ſupra, poſt Iſidor.

What might be the Reaſons whereby the Civilians were moved to be of the ſame Opinion, that the Mother was not of Kin to her Child, I cannot eaſily conceive; unleſs it were this, *viz. Mater non numeratur inter conſanguineos* [t]; or unleſs it were the antient Law of the Twelve Tables, whereby the Mother was excluded from ſucceeding in the Inheritance of her Son or Daughter [u]. Thus was the Judgment in this Caſe, and theſe were the chief Reaſons thereof; which Reaſons not being very ſtrong, the Judgment could not be very ſound. For firſt, though it be a Maxim in the Laws of this Realm, that Lands cannot lineally aſcend from the Child to the Parents [x], (which Maxim ſeemeth alſo to favour of the Law of the Twelve Tables [y], being the moſt antient Part of the Civil Law written [z], whereby (as I have ſaid) the Mother was forbidden to ſucceed in the Inheritance of her Child [a]; yet nevertheleſs it doth not thereby follow, that Parents be not of Kin to their Children, becauſe they cannot ſucceed them in the Inheritance, no more than the Child ceaſeth to be of Kin to his Parents, when he is diſherited or barred to ſucceed in the Inheritance. And touching the Law of thoſe Twelve Tables, it was not only thereby ordained that the Mother ſhould not ſucceed in the Inheritance of her Children; but likewiſe, that the Children ſhould not ſucceed in the Inheritance of their

[t] Bald. in L. ult. C. de verb. ſignif.

[u] Inſtit. l. 3. tit. de S. C. Tertil. in prin.

[x] Littleton, fol. 1:

[y] Inſtit. l. 3. d. tit. de S. C. Tertil. in princ.

[z] Initio civitatis, cum omnia manu regia gubernarentur, nullæ ſcriptæ fuerunt leges, ſed arbitria principum pro legibus erant. Anno autem ab urbe condita 303. conſcriptæ latæque ſunt leges 12 tabularum. L. 2. ff. de origin. jur. & Weſen. eod. tit.

[a] Inſtit. de S.C. Tertil. in princ.

their Mother[b]; which Prohibition notwithſtanding, the Kindred ſtill remained intire betwixt the Parents and their Children *hinc & inde*[c].

And ſo much doth Mr. *Littleton* (no leſs honourable for his profound Knowledge in the Laws of this Realm, than authentical for his Antiquity) plainly acknowledge, that the Parent is more nigh of Blood unto the Child than the Uncle[d], notwithſtanding that Ground in their Law, namely, that Inheritance cannot lineally aſcend. Which Concluſion is alſo agreeable to the Civil Law, being much more antient than old *Littleton*; whereby it is manifeſt, that as the Son and the Daughter be in the firſt Degree of Kindred in the Line deſcendant, ſo the Father and Mother be in the firſt Degree of Kindred in the Line aſcendant[e].

[b] Ibidem.

[c] Inſtit. de gradibus cognat. §. 1. lib. 3. L. ult. ff. de grad. aff.

[d] Littlet. Tenures, fol. 1.

[e] Inſtit. tit. de gra. cognat. §. 1. Adde & perluſtr. arborem conſanguinitatis in fine lib. 4. decret. dep. & Jo. And. lectur. cum commentar. ſuper arbore conſang.

Touching the ſecond Reaſon, although it be true, that Children be of the Blood or Seed of their Parents, but that the Parents are not of the Blood of their Children[f]; yet doth it not follow, that Parents are not therefore of Kin to their Children, becauſe they ſpring not out of their Blood, nor deſcend from their Loins; for the Brother doth not ſpring from the Blood, nor deſcend from the Loins of his Brother, but both of them ſpring from the Blood and Seed of their Fatheir[g], as two Branches from one Root or Stock; and yet who can deny them to be of Kin the one to the other? So then it is ſufficient for Kindred to agree *in tertio*[h], or to flow from one Fountain, or grow from one Root; though one of them do neither flow nor grow out of the other. If you inquire, how then doth the Father and his Son, or the Mother and her Daughter, grow from one and the ſame Stock or Root? you muſt underſtand, that the common Stock or Root, from whence not only the Father and Mother, but alſo their Sons and Daughters do grow, is the Grandfather. So did *Iſaac* and *Jacob* alſo ſpring from the Loins of *Abraham*, viz. *Iſaac* the Son immediately, and *Jacob* the Grandchild mediately, the one in the firſt Degree, and the other in the ſecond Degree, to *Abraham*, being the common Stock to them both, and to their Poſterity[i]. Hence it is, that *Cognati* or *Agnati* be ſo called, *quaſi ab una nati*[k]; and *Conſanguinitas, quaſi ſanguinis unitas*[l]. And hence it is, that Conſanguinity or Kindred is defined to be *vinculum perſonarum ab eodem ſtipite deſcendentium, carnali propagatione contractum*[m]. A Bond of Perſons knit together by Blood or carnal Propagation, deſcending from one Stock.

[f] Brook Abridg. tit. adminiſtr. n. 47. Covar. de ſponſal. par. 2. c. 6. §. 6. n. 3.

[g] L. 1. ff. de grad. aff. in prin. Melch. Kling. tract. de cauſ. matrimon. fol. 46. Lectur. Jo. And. cum commentar. ad arborem conſang. Covar. ubi ſupra, n. 2.

[h] Vide ſupra in commun. ſtipit. lectur. Jo. And. ad arborem conſang. cum commentar. Philipp. Melanc. de arb. conſ. Kling. ubi ſupra.

[i] Jo. And. Melchior Kling. Philipp. Melanch. & Georg. Major de arbor. conſang. tam civili quam can.

[k] L. 1. ff. unde cognat. Rebuff. in L. in vulgari. ff. de verb. ſignif.

[l] Jo. And. & Georg Major ubi ſupra.

[m] Jo. And. Philip. Melan. & Georg. Major in ſuis tractatibus de conſang. & ff. Alias definitiones videre licet apud alios authores, veluti apud Hoſtienſ. in ſumm. eod. tit. Covar. tract. de ſponſal. 2. part. c. 6. §. 6. Præpoſ. in tit. de conſang. & aff. & de arbore conſang. de quorum controverſiis magnopere non laboro.

Whereby it may be concluded, that Parents be of Kin to their Children, like as *Iſaac* was to *Jacob*, for that they both came of the Seed of *Abraham*; and conſequently that the Mother is of Kin to her Child, notwithſtanding ſhe ſpring not from his Blood, becauſe they both ſprang out of the common Stock, being her Father, and her Child's Grandfather. And therefore by the Laws of this Realm, if a Man die ſeiſed of Lands holden in Socage, his Heir

being within the Age of fourteen Years, in this Caſe the Mother ſhall have the Wardſhip of her Son, as being next of Kin, to whom the Lands cannot deſcend [n].

[n] Stat. de Marlebridge edit. anno 52 H. 3.

Touching the third Reaſon, it is more feeble than either of the former. For although it may not be denied, but that the Father and Mother, being Man and Wife, are *una caro* [o], one Fleſh; yet it is not to be granted that the Parents and their Children are one Fleſh, otherwiſe than as they agree in a Third, by proceeding from one Root, as is aforeſaid. Or if it were granted that they were *una caro*, and conſequently no Degree of Kindred betwixt them; by this Argument, as Parents ſhould not be of Kin to their Children, becauſe they are both one Fleſh; ſo Children ſhould not be of Kin to their Parents by the ſame Reaſon, being *commune argumentum* [p].

[o] Gen. ii. 23. Matth. xix. 5.

[p] Argument. commune facile retorquetur, quo ſi quis utatur, ſtatim ſuo ipſius gladio jugulatur. Everard. de locis arg. legal. in præamb.

Now as touching the Reaſons which peradventure did induce the Civilians to be of Opinion, that the Mother was not of Kin to her Child; true it is, that the Mother is not properly comprehended *inter conſanguineos* [q], becauſe properly and ſtrictly, *conſanguinei* doth only comprehend them which be of Kin by the Father's Side [r]. Whereby we may underſtand, that this *Engliſh* Word *Kin* is more large than the *Latin* Word *Conſanguinei*; which Thing is ſo well known to the Learned in that Law, as I doubt whether this were any of their Reaſons of denying the Mother to be of Kin to her Child [s]. And albeit the moſt antient Law of the Twelve Tables was very ſevere againſt the Mother and her Children, and did mutually expel them both, *ut ne quidem inter matrem, filium, filiamve, ultro citroque hæreditatis capiendæ jus daret* [t], ſo that neither ſhe ſhould ſucceed them, nor they her, in the Inheritance; yet upon better Conſideration, by the Clemency of the honourable *Prætor*, and Piety of ſucceeding Emperors, was this rigorous Law of the Twelve Tables altered [u], and the Mother admitted to ſucceed her Children, *ad ſolatium liberorum amiſſorum*, for Comfort and in Recompence of the Loſs of her Children [x].

[q] Bald. in L. ult. C. de verb. ſignif.

[r] Fran. in c. ſciant. de elect. 6. 2. Alex. conſil. 229. n. 10. vol. 6.

[s] Dictio conſanguinitas, proprie ſumpta, non Cognatos, ſed Agnatos comprehendit. At communi loquendi uſu complectitur etiam ex fœmineo ſexu conſ. Alex. & Franc. ubi ſupr.

[t] Inſtit. de S.C. Tertil. in princ.

[u] De variatione juris civilis in deferenda Matri ſucceſſione filii inteſtati, & econtra, videas velim Minſing. de S. C. Tertill. l. 3. Inſtit.

[x] Jure Novellarum in univerſum ſtatutum eſt, patri matrique pariter deferri ſucceſſion. filiorum ſine liberis decedentium, ſimulque cum iis admitti fratres ſororeſque ex utroque parent. & conſeq. de hæred. ab inteſtat. Authen.

The Reaſons of this Judgment being thus removed, it is now Time to conſider what became of the Judgment it ſelf. True it is, that in thoſe Days this Example did ſo much prevail, that many Judgments paſſed accordingly upon the like Caſe [y]; but yet in Proceſs of Time the Truth prevailed, (for what is ſtronger than Truth?) and the Mother was every where adjudged to be of Kin to her Child [z]; who dying Inteſtate, and without Iſſue, the Adminiſtration of his Goods may be committed unto her (if the Ordinary in Diſcretion ſo think good) as next of Kin, according to the Statute [a]. Or if he do not die Inteſtate, but maketh his Kin his Executor, or doth bequeath the Reſidue of his Goods to his Kin; the Mother in this Caſe (where there are no Children) is to be admitted Executor, and to enjoy the Legacy as next of Kin to her Child [b] during her Life; and after her Death the other next of Kin [c]. But if the Teſtator do not bequeath his Goods to his Kin, but to the next of his Kin, nor make his Kin Executor, but the next of his Kin, the Mother being next of Kin (where the Teſtator dieth without Iſſue,)

[y] Brook tit. adminiſtr. n. 47 Ca. inter *Brown* and *Shelton*.

[z] Juxta dict. Novel. de hæred. ab inteſtat. §. ſi igitur.

[a] Stat. H. 8. an. 21. c. 5.

[b] Per d. §. ſi igitur. de hæred. ab inteſtat. Novell.

[c] DD. in L. cum ita. §. fin. ff. de leg. 2. Graff. Theſaur. com. opin. §. fidei commiſſ. q. 16.

Iſſue,) ſhall be his Executor ſimply, and enjoy all his Goods, not only for her Life, but diſpoſe thereof at her Death to whom ſhe will.

§. IX. Uncertainty ariſing by Reaſon of alternative or disjunctive Speech.

1. *The Executor ſaying*, I make *A.* or *B.* Executor, *it is as if he had ſaid*, I make *A.* and *B.* Executor.
2. *What if the Teſtator be more affected to the one than to the other?*
3. *What if the Election be referred?*
4. *What if the one be capable, the other not?*

See antea, cap. 7. contra.

THE alternative (1) or disjunctive Speech of the Teſtator in making Executors, or diſpoſing of any Legacy, doth not hurt the Teſtament [o]. And therefore if the Teſtator ſay, *I make* A. *or* B. *my Executors*, or, *I bequeath to ſuch or ſuch a Perſon a hundred Pounds*; this Diſpoſition is not void, but both of them ſhall be admitted Executor, and both of them obtain the Legacy, to be divided betwixt them [p].

[o] L. cum quidam, C. de verb. ſignif.

[p] d. L. cum quidam, & DD. ibidem.

And albeit at the firſt there was great Diſſenſion and Conflicts in Opinions about this Queſtion; at laſt it was eſtabliſhed for Law, that this Word [*or*,] in Favour of Teſtaments, ſhould be taken for [*and* [q],] when it is ſo placed betwixt two Perſons, as it may ſeem to miniſter Doubt, whether Perſon the Teſtator did mean [r]. And therefore the Teſtator ſaying, *I make* A. *or* B. *my Executors*, it is in Effect as if he had ſaid, *I make* A. *and* B. *Executors* [s], &c. Which Concluſion notwithſtanding is ſometimes limited, and one only of the Perſons is to be admitted.

[q] Text. in d. L. cum quidam.

[r] §. melius. in d. L. cum quidam.

[s] d. §. melius.

The firſt Limitation is, when (2) the Teſtator doth bear more Affection to the one than to the other; for then he to whom the Teſtator beareth more Affection is to be preferred before the other [t]. For Example; the Teſtator ſaith, *I make my Brother, or his Children, my Executors*, or, *I bequeath to my Brother, or his Children, ſuch a Thing:* In this Caſe, foraſmuch as the Teſtator is preſumed to carry a greater Love to his Brother than to his Brother's Children, he ſhall firſt be admitted to the Executorſhip, and obtain the Legacy, and enjoy the ſame during his Life; and after his Deceaſe, his Children then ſhall be admitted [u]. But this unequal Order of Affection hath not ſuch unequal Effect when the Teſtator doth make his Brother and his Children Executors, by this Word [*and*,] or [*with*,] as before hath been declared; for then they be all admitted equally, and not ſucceſſively [x].

[t] Ripa in c. inter cæteras. de reſcrip. extra. n. 54. Pariſ. conſil. 21. vol. 3. Jul. Clar. §. teſtam. q. 80. n. 5.

[u] L. cum pater. §. a te. ff. de leg. 2. Bald. in c. 1. de eo qui fibi & hæred. ſuis. lib. feud. Jul. Clar. d. q. 80. n. 5.

[x] Jaſ. in L. Gallus. §. quidam recte. ff. de lib. & poſthu. Clar. §. teſtm. q. 80. n. 6. quæ opinio ab omnibus juris interp. eſt recepta, ait Clar. eod. n. 6.

Another Limitation is, when (3) Authority is granted to another of making Election: For Example; the Teſtator maketh his Executor *A.* or *B.* whom the Ordinary ſhall chuſe; or giveth an hundred Pounds to *A.* or *B.* whom the Executor ſhall chuſe; in this Caſe, this Disjunctive [*or*] ſtandeth properly, and is not changed into a Conjunctive; and ſo Election being made of the one, the other is excluded [y].

[y] L. ſi Titio aut Servio. de leg. 2. L. utrum. §. cum quidam. de reb. dub. ff.

Another Limitation is, when (4) the one of the Perſons is not capable of the Executorſhip or Legacy; for then alſo the Disjunctive ſtandeth properly, and the other Perſon alone ſhall obtain the Executorſhip or Legacy [z].

[z] Jaſ. in L. cum quidam. C. de verb. ſignif. limit. 5. quippe qui alias habet in eo loco iſtius regulæ limitationes.

§. X. Of Uncertainty reſpecting the Thing bequeathed.

1. *Whether Uncertainty by Reaſon of Generality in the Thing bequeathed doth make void the Diſpoſition.*
2. *Whether the Diſpoſition be void, when that is bequeathed which of the Logicians is called* Species.
3. *Whether the Legacy of Wine or Corn, no Quantity being expreſſed, be void.*
4. *By the Equity of the Eccleſiaſtical Laws, uncertain Teſtaments are ſaved from Deſtruction.*
5. *Who ought to chuſe, where a Legacy is given generally, the Executor, or the Legatary.*
6. *The Manner of Election.*
7. *Of Legataries, who muſt chuſe firſt.*
8. *If Collegataries diſſent among themſelves, what Means is to be uſed.*

THAT the Diſpoſition or Bequeſt is ſometimes overthrown or deſtitute of Effect, by Reaſon of the Uncertainty of the Thing bequeathed, may appear by that which hath been already ſpoken of Error in the Thing bequeathed [a]; for by what Means the Teſtator doth err, by the ſame Means is his Diſpoſition made uncertain; concerning which Kind of Uncertainty, whether it deſtroy the Legacy or no, doth there appear. Now therefore of ſome other Kind of Uncertainty reſpecting the Thing bequeathed, and namely whether the Uncertainty growing by Occaſion of Generality make void the Bequeſt or not.

[a] Supra ead. parte, §. 5.

Firſt, when (1) any Thing is bequeathed under ſuch general Words, that the Meaning of the Teſtator is unknown, the Diſpoſition remaineth without Effect; as when the Teſtator ſaith, *I do bequeath ſome Thing*, or, *I bequeath a Subſtance*, or, *I bequeath a Body*, or, *a living Creature* [b]. For that which the Logicians call *Genus*, either *generaliſſimum* or *ſubalternum*, being bequeathed, the Executor is ſaid to be delivered, if he give but a Piece of Bread, or a Fly [c].

[b] Gloſſ. & DD. in L. legato generaliter & L. ſi domus. ff. de leg. 1.

[c] Accurſ. Bar. & communiter DD. in d. L. legato, quamvis Zaſius in d. L. & Jo. Rub. lib. 2. ſententiarum, c. 14. dicunt, inutile quidem eſſe legatum; non tamen quia hæres dando quid minimum liberetur, ſed quia effuſum adeo & incertum eſt legatum, ut inutilem, potius quam utilem, actum concipere voluiſſe teſtator intelligatur.

If the (2) Teſtator bequeath ſuch a Thing which in Logick is called *Species* [d], and in Law *Genus*; then we are to conſider whether the ſame Thing do receive his Limits of Nature, as an Horſe, a Tree, *&c.* or of a Man, as a Ship, a gold Chain; or of Weight, Number, or Meaſure, as Lead, Money, Wheat [e], *&c.*

[d] Quod enim Dialecticis eſt ſpecies, Juriſtæ genus appellant; quemadmodum & ſpecies dicitur à Juris conſultis id quod Dialectici appellant individuum. Minſing. in §. ſi generaliter. Inſtit. de legat.

[e] Zaſ. lib 1. Sing. reſponſ. in princ. n. 33. Minſing. in d. §. ſi generaliter.

In

In the firſt Caſe, *viz.* If the Teſtator bequeath an Horſe, the Bequeſt is good, whether the Teſtator have any or none [f].

In the ſecond Caſe, *viz.* If the Teſtator bequeath a Ship, or a gold Chain, by the common Opinion of Writers, the Legacy is void [g], unleſs the Teſtator have a Ship, or a Chain. But others are of Opinion, that the Legacy is good, although the Teſtator have no Ship or Chain [h]. And this Opinion ſeemeth more reaſonable, and more agreeable to the Equity of the Eccleſiaſtical Laws [i]; eſpecially if the Teſtator knew that he had no Ship or Chain of his own, when he made his Will.

[f] Bar. Paul. de Caſt. & omnes Doctores in d. L. legato.

[g] Angel. & Alex. in L. ſi domus. ff. de leg. 1. Jaſ. in eand. L. n. 16. ampl. 2. & 3. Bar. & Dec. in L. quod in rerum. §. & ſi Navem eod.

[h] Zaſ. Sing. lib. 1. c. 1. n. 42, 43, &c. Peckius de teſt. conjug. lib. 5. c. 26. Minſing. in §. ſed ſi generalit. Inſtit. de lega. n. 9, 10. Claud. cautiuncula, & alii, de quibus Peckius in d. c. 26. Quia hanc ſententiam ut veriorem defendunt in re magis dubia, nempe in domo ſimpliciter legata. Graff. §. legatum, q. 61. n. 4. in fin.

[i] Zaſ. in L. Triticum. & in L. ita ſtipulatus. de verb. ob. ff.

In the third Caſe, *viz.* If the Teſtator do bequeath Lead, or Money, or Wheat, not expreſſing the Quantity, the Bequeſt is unprofitable, becauſe of the great Uncertainty; at leaſt it ſeemeth the Executor is delivered by delivering a very little [k]. Howbeit if the Legacy conſiſting in Weight, Number or Meaſure, be diſpoſed for the Performance of ſome Act, or other certain Conſideration, as for the Building of ſome Bridge, or mending of Highways, or for the Education or Alimentation of ſome Perſon, or maintaining him at Study, or for the Relief of the Poor, or for the Repairing of the Church, or for other like Uſes; in theſe Caſes the Legacy is not void, albeit no Quantity be expreſſed; for ſo much is underſtood to be diſpoſed, as may ſatisfy or anſwer that Purpoſe whereunto it is appointed, and as the Ordinary, conſidering the Neceſſity of the Thing, and the Ability of the Teſtator, and the Continuance of the Gift, ſhall deem convenient [l].

[k] L. nummis. ff. de leg. 3. Gloſſ. in d. L. legato.

[l] Zaſ. in L. ita ſtipulatus. de verb. ob. ff. n. 14, 15. & Ripa in eand. L. n. 19, 20, 21, &c.

Moreover, by the (3) Equity of the Laws Eccleſiaſtical, not only the Legacy general of Things conſiſting in Weight, Number or Meaſure, as of Wine, of Oil, of Corn, of Iron, of Braſs, of Money, *&c.* is good and available, without any Quantity expreſſed by the Teſtator, which Quantity is underſtood to be left to the Diſcretion of the Ordinary, to be limited by him as due Circumſtances ſhall induce him [m]; but alſo by the ſame (4) Equity, it ſeemeth that the general Legacy even of that which the Logicians call *Genus* (which may be verified of Things different in Kind) is not void [n]. But 'tis to be certified and declared by the Ordinary, according to the Eſtate of Perſons, the common Cauſe, and whatſoever may be collected by other Circumſtances [o]. Much leſs is the Legacy void, where the Teſtator doth bequeath a certain Quantity of Corn, or Wine, or other Things, conſiſting in Number, Weight, or Meaſure, not expreſſing the Kind of Corn, *viz.* Wheat, Rie, or Barley, or of Wine, *viz.* White, Sack, or Claret [p].

[m] Archid. in c. ſunt nonnulli. 1. q. Abb. in c. 1. de dec. extr. gloſſ. & DD. in c. nos quidem. de teſta. extra.

[n] Verum, ſi animal legatum fuerit. Zaſ. in L. Triticum. ff. de verb. ob. n. 11. Archid. in c. ſunt nonnulli. 1. q.

[o] Zaſ. ubi ſupr. & in L. ſi ita ſtipulatus. ff. de verb. ob. & ibi Alex. & Ripa.

[p] Zaſ. & Ripa in d. L. ſi ita ſtipulatus

Here it may be demanded, Who ſhall (5) chuſe, where the Legacy is general, the Executor or Legatary? To this Queſtion thus:

If the Teſtator do expreſly grant the Election, the Doubt is eaſily anſwered; he to whom the Election is granted [q].

[q] Graff. Theſaur. com. op. §. legatum. q. 61. in princ. Lanc. Dec. & Jaſ. in L. legato. ff. de leg. 1.

If there be no expreſs Grant made by the Teſtator, then if the Words of the Diſpoſition be directed to the Legatary, as if the Teſtator ſhall ſay, I will that *A. B.* ſhall have a Horſe; the Election belongs to the Legatary [r]. But if the Words of the Diſpoſition be directed to the Executor, as if the Teſtator ſay, I will that my Executor give to *A. B.* a Horſe; then the Election appertains to the Executor [s]. If the Words be not directed to the Executor nor to the Legatary, it is anſwered, that if the Thing bequeathed have his Limits aſſigned of Nature, then the Election is in the Legatary, in caſe ſuch Things be extant among the Teſtator's Goods; and in caſe there be no ſuch extant, the Election is in the Executor [t]. But if ſo be that the Thing bequeathed be limited by Man, the Election doth appertain to the Executor [u]. And ſo it is of Things conſiſting of Number, Weight, or Meaſure [x], albeit there be of thoſe Things extant amongſt the Goods of the Deceaſed [y]; much more if there be none extant [z].

[r] Gloſſ. in L. lucio. ff. de leg. 2. & hæc opinio communis eſt, teſte Graff. d. §. legatum. q. 62. n. 2.
[s] Covar. in c. judicante. de teſta. ext. n. 3. Zaſ. & alii in d. L. legato. quorum opinio communis eſt, ut per Graff. ubi ſupra.
[t] Gloſ. Alex. Jaſ. Zaſ. in d. L. legato generaliter, & horum ſententia communis eſt, ait Graf. d. q. 62. n. 3.
[u] Jaſ. in d. legato. n. 20. Graff. d. q. 62. n. 3. verb. aut vero. Contrarium Minſing. in d. §. ſi generaliter. n. 9. ſed prior opinio eſt communis, ut per eundem Graff. [x] L. leg. 4. ff. de Tritic. vin. & oleo leg. Zaſ. in d. L. legato. n. 18. [y] Atque hæc opinio communiter approbatur, ſive teſt. de certo ſenſerit, ſive non; ut per Graff. ubi ſupr. qui tamen diſtinguit. [z] Minſ. in d. §. ſi generaliter. n. 7. Zaſ. in d. L. legato, in fin.

Provided (6) always, that of thoſe Things which be extant, the Legatary, having the Benefit of Election, muſt not chuſe the very beſt [a]; unleſs there be no more but two of the Things extant, (for then he may chuſe the better [b];) or unleſs the Teſtator do grant Election, for then he may chuſe the beſt [c]. And likewiſe on the contrary Part, where the Election belongeth to the Executor, he may not obtrude to the Legatary the very worſt of thoſe Things which be extant in the Patrimony [d]; and whereas there be not any ſuch Things amongſt the Teſtator's Goods, the Executor muſt provide ſome competent Thing [e].

[a] Gloſſ. in L. ſi quis a filio. §. ſi quis plures. ff. de leg. 1. Zaſ. in d. L. legat. general. n. 13, 14. Minſing. in d. §. ſi generaliter. n. 6.
[b] L. ſi ſervus. §. cum homo. ff. de leg. 1. Zaſ. in d. L. leg. n. 14.
[c] L. 2. ff. de option. leg. & Weſenb. in eund. tit. n. 1. Per L. in teſt. de reg. jur. ff. E regione ſtat Zaſ. ſcribens, quod etiamſi legatario datur optio, non tamen optima, ſed mediocria, ſunt eligenda. in d. L. leg. n. 13. [d] DD. in d. L. legato. Covar. in c. jud. de teſt. extr. n. 3. & hoc indubitat. in Spec. Sed in quantitatibus & in ſummis, quod minimum eſt deberi intelligitur, ſi Caſtrenſi credamus, in d. L. legat. n. 4. Verum in hujuſmodi legat. ſervandum eſt boni viri arbitrium. Archid. in c. nonnulli ſunt. 1. q. Abb. in c. 1. de dec. extr. 6. [e] Zaſ. in d. L. legato. n. 22. poſt gloſſ. ibidem.

Furthermore, it is to be remembered, that (7) if the Teſtator having two Things, whereof the one is much better than the other, (be it for Example two Horſes,) do bequeath to two Perſons either of them a Horſe; he that is firſt named in the Teſtament may firſt chuſe [f].

[f] Bar. in L. qui duos. ff. de leg. 1. quæ ſententia communiter approbatur, ut refert Graff. d. §. legatum. q. 62. in fin.

Finally, this is not to be omitted, That if the (8) Legataries diſſent about the Election of the Thing bequeathed, this Controverſy is to be decided by Lot, if it be not otherwiſe reſolved, who in that Choice is to be preferred [g].

[g] Optionis. Inſtit. de lega.

Having declared by the Caſes formerly propounded, whether Uncertainty in Reſpect of Generality make void the Diſpoſition or Be-

queſt of the Teſtator, or not: Foraſmuch as there be other general Words uſual in Teſtaments, as Goods and Chattels, movable and immovable, the Generality whereof is apt to breed Queſtion and Contention; therefore, for the Clearing of Doubts and avoiding of Suits, which otherwiſe might inſue about the Meaning of the Teſtator by thoſe general Words, I have thought good to deliver the ſeveral Significations of every of the ſaid Words particularly, whereby it may appear what is, or is not, due to the Legatary by Force of the ſaid Words, or any of them.

Touching the Word [*Bona*, Goods,] albeit in the Explication thereof the Civilians do make Mention of the Philoſophers Threefold Diviſion, *viz. Bona ſunt vel animi, vel corporis, vel fortunæ* [h]; that good Things be either of the Mind, or of the Body, or of Fortune; as Virtue, Health, and Wealth; wherefore the firſt is Moral, the ſecond Natural, and the third Caſual [i]: Yet nevertheleſs, foraſmuch as this our preſent Diſcourſe is not philoſophical, but legal, the Subject which we intend to proſecute is Goods of the laſt Kind, which uſually Men call the Goods of Fortune, but improperly, being in Truth his good Gifts who is the Giver of all Goodneſs, and whoſe is the Earth and all that therein is [k]; and who alone ſetteth up one and pulleth down another [l], making rich or poor at his good Will and Pleaſure [m]. But before we come to ſhew what is ſignified by *Goods* in a Man's Laſt Will and Teſtament, it is fit to conſider how it is taken both in the Civil Law, and in the Laws of this Realm.

[h] Jo. Bræchæus & Jo. Goddæus in L. bonor. de verb. ſig. ff.

[i] Bræchæus & Godd. in d. L. bonor.

[k] Pſal. 24. verſe 1.

[l] Pſal. 75. verſe 7.

[m] Pſal. 112. verſe 3.

By *Goods* therefore the Civil Law doth oftentimes underſtand, not only thoſe Things whereof a Man is Owner, or whereof he is juſtly poſſeſſed, as Lands, Leaſes, and other perſonal or corporal Goods; but alſo thoſe Things which belong unto him, either corporal or incorporal, for the which he may have a lawful Action, as Debts due unto him [n] by Contract or Obligation.

[n] L. Bonor. 40. ff. de verb. ſig. & DD. ibid.

Secondly, By Goods the Law Civil doth ſometimes underſtand a Man's whole Eſtate, both actively and paſſively; ſo as his Succeſſor univerſal, called *Hæres*, ſhall not only injoy all his Goods, but ſhall be likewiſe chargeable to pay all his Debts [o].

[o] L. Bonor. 208. ff. de verb. ſig. & DD. ibid.

Thirdly, By the Word *Goods* the ſame Law doth underſtand no more but only a Man's clear Goods, his Debts deducted [p].

[p] L. ſubſignat. §. bon. ff. de verb. ſign.

By the Laws of this Realm, in Deeds and Contracts among the Living, the Word *Goods* is otherwiſe underſtood, comprehending ſuch Things as be either with or without Life, as a Horſe, or a Bed [q], *&c.* But neither ſuch Things as be of the Nature of Freehold [r], nor Leaſes for Years [s], much leſs for Lives, nor Things in Action, as a Debt upon a Promiſe or Obligation [t].

[q] Kitch. verb. Cattal. fol. 34.

[r] D. Cowell tract. de verb. interpr. verb. Cattal. alias Chatt.

[s] Kitch. ubi ſupra.

[t] *Terms of Law*, ver. Choſe in Action. Niſi ultra donationem bonor. accedat amplior auctoritas pro debitis recuperandis. Weſt. Symb. §. 424.

The next Word to be conſidered is this Word [*Chattels*,] which is more obvious in the Laws of this Realm than in the Civil Law. Whereby is ſignified all Goods, movable and unmovable, except ſuch as be of the Nature of Freehold or Parcel thereof [u].

[u] D. Cowell tract. de verb. interpr. verb. Cattal.

Of Chattels ſome be real, and ſome be perſonal. *Real* are Leaſes for Years and at Will, Guardianſhips [x], the Intereſt of an Advowſon for one Turn; all Intereſts by *Statutes Merchant*, *Staple*, *Elegit*, *&c.* and the Word *Bona* comprehends both real and perſonal Chattels. *Perſonal* are movable Goods, as Money, Plate, Houſhold-ſtuff, Horſes,

[x] *Terms of Law*, verb. Chattels.

Kine, Corn, and ſuch like [*]. Howbeit ſome do hold that Ready Money is neither Goods nor Chattels [y]; neither Hawks nor Hounds, becauſe they be *feræ naturæ* [z]. The Reaſon why Money is not to be accounted Goods or Chattels, the Author of that Opinion doth not expreſs; but ſome other on his Behalf hath invented this witty Reaſon; becauſe, ſaith he, Money of it ſelf is not a Thing of worth, but by the Conſent of Men, and for their eaſier Traffick, or Permutation of Things neceſſary for common Life, it hath been reckoned amongſt other worldly Goods by Force of Conceit, rather than conſiſting ſo indeed [a].

[*] Ibidem.
[y] Kitch. f. 32. verb. Cattalla.
[z] Kitch. ubi ſupra.
[a] D. Cowel de interpret. verb. verbo Cattal.

The Teſtator deviſed in theſe Words, (*viz.*) *my Debts* and Legacies being firſt deducted, *I deviſe all my Eſtate both real and perſonal to T. S.* Decreed that this amounts to a Deviſe to ſell for the Payment of his Debts.

The next Thing to be conſidered is, what is ſignified by [*Movables* or *Immovables*.] Concerning *Movables*; albeit the Civil Law ſometimes puts a Difference betwixt *Moventia* and *Mobilia* [b], underſtanding by *Moventia*, ſuch Goods as actively and by their own Accord do move themſelves, as Horſes, Oxen, Sheep, and Cattle [c]; and by *Mobilia*, ſuch Goods as paſſively are movable, or removable, from one Place to another, as Apparel, Pots, and Pans, and ſuch like [d]: Yet nevertheleſs, regularly, by Movables are indifferently underſtood Goods both actively and paſſively movable [e]. As Cattle of all Sorts, *Corn ſowed*, becauſe it doth not come without Induſtry, (and it may be given by Will, or forfeited by Outlawry) ſome Deeds, Apprentices for Years, *&c.* becauſe theſe Things belong to the Perſon of the Owner; and becauſe when they are taken away and wrongfully detained, the Party injured hath no Remedy to recover, but by a perſonal Action.

[b] Alciat. & DD. in L. Moven. de ver. ſig. ff. & DD. ibid.
[c] Alciat. ubi ſupra. L. 2. ff. de ſupell. leg.
[d] Alciat. Goddæus & alii, in d. L. Movent.
[e] *Text. apert. in d.* L. Movent. de verb. ſign. ff.

But *Writings and Evidences* concerning Freeholds or Bonds, *&c.* being Things in Action, are not in Propriety of Speech comprehended under the Word *Chattels*, yet *Writings pawned for Money lent*, are ſaid to be *Chattels*.

Concerning *Immovables*; they are thoſe Goods which otherwiſe be termed Chattels real; for that they do not immediately belong to the Perſon, but to ſome other Thing by Way of Dependency: As Trees growing on the Ground, or Fruit growing on the Trees, or a Leaſe, or Rent for Term of Years [f]; but not Lands, Tenements, or Frank-tenement [g].

[f] D. Cowel de verb. interp. verb. Cattal. Kitchin, fo. 32.
[g] Kitchin, ubi ſupra. verb. Cattal.

Having examined the legal Signification of theſe Words, Goods and Chattels, movable and immovable; it may be material to know of what Force and Efficacy they be in a Man's Laſt Will and Teſtament.

For the better Comprehenſion whereof, ſuppoſe that four Men made Four ſeveral Wills, wherein the firſt did bequeath to *A. B.* all his Goods, the ſecond did bequeath to *A. B.* all his Chattels, the third all his movable Goods, the fourth all his immovable Goods. What is due to *A. B.* in every of theſe Caſes? For Anſwer to every particular Queſtion: Firſt, where the Teſtator did give to *A. B. all his Goods*; in this Caſe *A. B.* is to have the Teſtator's whole Eſtate, actively and paſſively, (his Lands, Tenements and Freehold excepted,) being in Effect his Executor, or *Hæres*, or univerſal Succeſſor [h]: Who as he is to enjoy all the Deceaſed's Goods and Chattels, of what Kind ſoever, together with the Debts due to the Deceaſed; ſo

[h] Gloſſ. in L. his verbis. ff. de hær. inſt. ac Bar. & Bald. ibid.

is he chargeable to pay all Debts due by the Teſtator, ſo far as his Goods and Chattels will extend [i]. Neither is it to be doubted but that *A. B.* hath Right to all the Gold and Money [k] of the Deceaſed by Virtue of the ſaid Legacy, as hereafter more at large.

[i] L. bonorum. 200. ff. de verb. ſignif. L. ſub ſignat. §. bon. eod. tit. & DD. ibidem.

[k] Rebuff. in L. Movent. de verb. ſign. ff. D. conſil. 472. & 381.

In the ſecond Caſe, where the Teſtator did bequeath to *A. B. all his Chattels*; he the ſaid *A. B.* is to have and enjoy all the Deceaſed's Goods movable and immovable, together with the whole Eſtate of the Teſtator deceaſed, both actively and paſſively [l], as in the former Caſe.

[l] Diction. Cattalla non minus late patere quam dictionem Bona, imo latius patere, oſtendunt Stanf. De prærogat. c. 16. & Kitch. fol. 32. verb. Cattalla.

In both which Caſes, if *A. B.* ſhould die before he proved the Deceaſed's Will, yet ſhould the Adminiſtration of his Goods be committed to the next of Kin of the ſaid *A. B.* and not to the next of Kin to the Teſtator [m].

[m] Dyer fol. 371. n. 8.

[n] Chanc. Rep. 190. The Teſtator deviſed to *T. S. all his Goods, Chattels, and Houſhold-ſtuff*, and there was at that Time 400 *l. in Ready Money in the Houſe*, and in the ſame Will he deviſed 1200 *l.* to another; it was decreed that by the Deviſe of all his *Goods and Chattels*, the 400 *l. in Money* was comprehended, and therefore it ſhall come into the Account of the perſonal Eſtate. See *poſtea hic.*

Howbeit, if the Teſtator, after he hath bequeathed all his Goods, or all his Chattels, or all his Goods and Chattels, to one Man, do make another Man his Executor: In this Caſe the Legatary ſhall not enter into the whole Eſtate of the Deceaſed [n]; but the Executor proving the Will, is to enter unto all the Goods of the Deceaſed, and hath Right to receive, or by Suit to recover, all the Debts due to the Deceaſed [o], and as Executor, ſtandeth charged with Payment of all Debts due by the Deceaſed [p]: And if any Thing remain clear after Payment of the Deceaſed his Debts, that only is due to the univerſal Legatary in this Caſe [q]. But if the Teſtator do bequeath the one Half of his Goods to one Perſon, and make another Perſon his Executor, willing and appointing that all his Goods ſhall be equally divided betwixt them: I do find that the Two Chief Juſtices of *England*, and others, did at that Time when this Queſtion was propounded, agree and conclude the Law in this Caſe to be, that the Legatary ſhould have the one Half of all the Teſtator's Goods, before Deduction of any Debts. As for Example; the Teſtator having Goods to the Value of an Hundred Pounds, and being indebted Twenty Pounds, doth bequeath the one Half of all his Goods, by his Teſtament, to his Wife, to be equally divided betwixt her and *A. B.* his Executor. In this Caſe the Wife is to have Fifty Pounds for her Moiety, without any Defalcation in reſpect of the ſaid Debt of Twenty Pounds, which is to be paid by the Executor out of the other Half, having Aſſets [r].

[n] Bar. in L. his ver. ff. de hær. inſtit.

[o] Sup. eod. l. part. 4. §. 4. n. 6. Graſ. Theſ. com. op. verb. Inſt. q. 14. n. 3.

[p] Lind. in c. ſtat. & c. Religioſa. de Teſt. l. 3. provinc. conſt. Cant.

[q] Lind. in d. c. ſtat. & in c. Religioſa.

[r] Dyer fol. 164. De hac qu. conſ. velim Graſſ. Theſ. com. op. §. Inſt. q. 14. n. 5. & 6.

In the third Caſe, where the Teſtator did bequeath to *A. B. all his Movables*, the Legatary may recover all his perſonal Goods, both quick and dead [s], which either move themſelves, as Horſes, Sheep, and Oxen, *&c.* or can be moved by another, as Plate, Houſhold-ſtuff, Corn in the Garners and Barns, or in the Sheaf, *&c.* [t]. But whether the Legatary, to whom the Teſtator hath bequeathed his

[s] L. Moventium. de verb. ſignif. ff. & DD. ibidem.

[t] Ead. L. Movent. & vide paulo infra hoc ipſo §.

Movables, may recover *Corn growing on the Ground* at the Time of the Making of the Will, and Death of the Teſtator, hath been a Queſtion [u]: Wherein it ſeemeth at the firſt View that he cannot, as well becauſe the Fruits of the Ground are eſteemed as acceſſory thereunto [x]; which Acceſſory muſt follow the Nature of the Principal [y]; and therefore the Ground, which is the Principal, being unmovable, the Fruit muſt be deemed likewiſe unmovable [z]: As alſo becauſe the Time of Making the Will (or at leaſt of the Death of the Teſtator) is to be reſpected [a]; at which Time the *Corn, not being cut down*, or peradventure not then ripe, nor fit to be cut down, ought not to be reputed among the Movables [b]. Nevertheleſs, the contrary Opinion hath prevailed among very many Writers [c]; yet not ſimply, but with a Diſtinction [d], which is this: That of Fruits ſome be induſtrial, and ſome natural [e]. By *induſtrial* I mean ſuch as be *ſown in the Ground by Man's Induſtry*, in hope not to continue there ſtill, but to be ſeparated and reaped with Increaſe e'er long. And theſe Kind of Fruits the Writers do reckon among the *movable Goods* [f], for that they be *movable Habitu*, or in the Intention and Purpoſe of the Sower [g]: And therefore the Legatary in this Caſe, to whom the Teſtator hath bequeathed his Movables, may recover the *Corn ſtanding on the Ground* at the Death of the Teſtator [h].

[u] De hac q. vide Hicion. L. aut. in Deciſ. Rotæ Avenion. Deciſ. 16. n. 39. 40. Tiraquel. de Retract. Lignag. §. 1. & alios.
[x] D. Deciſ. Avenion. n. 2. Tiraq. d. §. n. 42.
[y] c. Acceſſorium. de reg. jur. 6.
[z] Tiraq. ubi ſupra.
[a] d. deciſ. 16. n. 2. L. ſi ita. ff. de au. & argen. legat. L. uxorem. §. teſt. ff. de leg. 3.
[b] L. Fruct. pendentes. ff. de rei vend. Tir. ubi ſupra.
[c] Paul. Caſtrenſ. conſil. 132. vol. 1. Socin. conſil. 60. vol. 1. Dec. conſil. 473. n. 5. Tiraquel. d. §. 1. gloſſ. 7. n. 44.
[d] d. 16. Rot. Aven. n. 4. [e] De hac diſtinct. fructuum vide Molin. in conſuet. Pariſ. §. 1. gloſſ. n. 50. cum ſequen.
[f] D. deciſ. Aven. 16. n. 4. poſt Paul. Caſtrenſ. d. conſil. 132. quem Decius & alii ſequuntur. [g] D. deciſ. 6. & Caſtrenſ. d. conſil. 132. Tiraquell. de §. 1. gloſſ. 7. n. 45. [h] Decius poſt. Caſt. ubi ſupra. alt. conſ. 473. alter conſil. 132. vol. 1. quamvis Molineus in addit. ad conſil. Decii illud Pauli conſil. falſiſſimum eſſe affirmat; cujus ſententia, cum ſine probat. lata ſit, non magni ponderis eſſe poteſt.

If Leſſee for Years *ſoweth the Land* ſo ſhort a Time before the Expiration of his Leaſe, that the Corn cannot poſſibly be ripe before the End of his Term, in ſuch Caſe the *Deviſe of the Corn* is void, becauſe he himſelf, if he had lived, could not have reaped it after his Leaſe expired, without being a Treſpaſſer; but if it was *ſuch Corn as he might have reaped if he had lived till Harveſt*, the Deviſe had been good; but he who hath an Eſtate in Fee or in Tail, or for Life, and who ſoweth his Land with Corn, may deviſe it to whom he will; and if he die before 'tis ripe, the Legatee ſhall have it. So if the Husband ſow the Lands which he holds in the Right of his Wife, and dieth before Harveſt, his Executor or Deviſee ſhall have it, and not the Wife: The Caſe is the ſame where a Tenant ſows the Lands, and dies before the Corn is ripe. Perk. §. 520.

By *natural* Fruits, I mean ſuch as grow of their own Accord, without any great Labour or Coſt, as Graſs, or Apples [i], *&c.* And theſe the Legatary cannot recover as movable, unleſs they were ſeparated at the Time of the Teſtator's Death [k]. For till they be ſeparated, they are *Fructus pendentes*, and accounted not only as acceſſory to the Ground or Trees whereupon they grow; but alſo they are reputed for Part and Parcel of that Body whereon they grow, and whence they are nouriſhed, and conſequently of the ſame Nature and Condition, to wit, immovable [l].

[i] Decius d. conſil. 472. n. 5. Molin. in d. conſuet. Pariſ. §. 1. gloſſ. 1. n. 50, 51.
[k] Dec. d. conſ. 472. n. 5. Molin. ubi ſupra.
[l] Fruct. naturales antequam ſeparentur, non proprie fructus, ſed pars rei vere & proprie dicuntur. Ita Molin. in conſuet Pariſ. §. 1. gloſſ. 1. n. 5.

Moreover, that Corn ſown and unſeparated is not to be accounted Parcel of the Ground of the Deceaſed, but to be reckoned as Parcel of his Goods, is apparent by the Laws of this Realm, whereby the

Land together with the Trees and Graſs growing thereon, ſhall deſcend to the Heir, as Parcel of the Freehold; but the Corn growing upon the ſame Ground ſhall belong to the Executor, (as Parcel of his Goods,) as elſewhere is more fully demonſtrated [m].

[m] Supra eodem lib. parte 3. §. 6. ubi plures enumerantur caſus ex quibus liquide conſtat, quod de jure hujus regni Angliæ, frument. nondum a ſolo ſeparatum, ſed adhuc virens & creſcens, inter bona etiam mobil. computatur. Adde Perkins, tit. Deviſes, & Fulbecke eodem titul. fol. 37, 38.

And hence it is that Emblements, or Corn growing on the Ground, ought to be praiſed and put into the Inventory of the Goods of the Deceaſed; but not Graſs or Trees, ſince they are Parcel of the Freehold, and fall to the Heir but not to the Executor of the Deceaſed [n].

[n] Vide ſupra eod. lib. parte 6. §. 7. n. 3. & Perkins ubi ſupra.

Now as touching their Reaſons, who do hold that Fruits of the Earth are to be eſteemed immovable, firſt, Becauſe the Acceſſory doth follow the Nature of the Principal; the Anſwer to this Reaſon is, that this is true in Fruits natural, but not in Fruits induſtrial [o].

[o] Caſtrenſ. conſil. 132. vol. 1. Rot. Aven. dec. 16. Decius conſil. 472. n. 5.

And as touching the other Reaſon, that the Time of the Teſtament ought to be reſpected, and therefore the Corn being inherent to the Ground at the Time when the Will was made, ought to be adjudged immovable; the Anſwer is, That theſe induſtrial Fruits were in the Purpoſe and Intention of the Deceaſed ſeparable and movable, even then when the Will was firſt made [p], albeit they were not actually ſeparated or removed from the Ground. Which Purpoſe and Intention or Deſtination is ſufficient in a Teſtament to make them movable [q].

[p] Caſtr. Decius, Tiraquel. & Laurent. ubi ſupra.

[q] Quemadmodum enim fructus naturales adhuc pendentes judicantur ut fundus, vel ut ejus pars, & quid immobile; (Molin. in conſuet. Pariſ. tit. 1. §. 1. & gloſſ. 1. n. 51.) ita fructus ſtatim colligendi (ſaltem induſtriales) pro collectis habentur. Tiraquel. ubi ſup. n. 44, 45. cui accedit quod deſtinatum pro perfecto, & cingendus pro cincto habetur.

Moreover, that the Time of the Making of the Deceaſed's Will is not always to be reſpected, doth afterwards more at large appear. And ſo the former Concluſion remaineth firm, that the Legatary, to whom the Teſtator doth deviſe his movable Goods, may recover the Corn ſtanding on the Ground, as Parcel of his movable Goods [r].

[r] Per ea quæ ſuperius dicta ſunt hoc ipſo §.

To demand whether the Legatary, to whom the Teſtator did bequeath his movable Goods [s], might recover the Deceaſed's Ready Money, might ſeem an idle Queſtion, becauſe no Goods are more movable than Money, which is therefore termed current, (and that rightly) becauſe of the continual ſwift Motion, and running thereof from one Hand to another. Yet foraſmuch as ſome do hold, that Ready Money is neither Goods nor Chattels [t]; (which Opinion howſoever it may ſeem a Paradox, yet it is not utterly untrue, for that there be particular Caſes in the Law, wherein Money is not reputed as any Part of the Goods of the Deceaſed, either movable or unmovable;) therefore the Queſtion is not ſimply idle, or unworthy to be anſwered.

[s] Rebuff. in L. Moventium ff. de ver. ſignif. Decius conſil. 472.

[t] Kitchin, verb. Cattall. fol. 32. See antea hic.

But before we come to theſe particular Caſes, it may be delivered for a Rule, That Ready Money is juſtly and worthily reputed amongſt the movable Goods of the Deceaſed [u], and recoverable by the Legatary, to whom the Movables are bequeathed [x]. The Exceptions of which Rule, or Caſes wherein Money is not accounted as Goods or Chattels, are theſe.

[u] §. Et quia parum. Authen. de Nupt. Rebuff. in d. L. Moventium. Mant. de Conject. ult. vol. lib. 9. tit. 3. n. 2. Dec. conſil. 381. & conſ. 472. Tiraquel. de Retract. Lignagier. §. 1. gloſſ. 7. n. 103. [x] Tiraquel. Retract. Lignagier. §. 1. gloſſ. 7. n. 103. Dec. conſil. 381. Mantic. ubi ſup. Spec. de fruct. & intereſſe. n. 8 & 9.

The firſt Caſe is, when the Perſon deceaſed, by his Laſt Will or Teſtament willeth any his Lands, Tenements or Hereditaments to be ſold: For in this Caſe, by the Statutes of this Realm, the Money thereof coming, or the Profits of the ſaid Land for any Time to be taken, ſhall not be accounted as any of the Goods or Chattels of the Perſon ſo deceaſed [y].

[y] Stat. H. 8. an. 21. c. 5. Vide Bald. in L. ea demum. C. de Collac.

The ſecond Caſe is, when the Teſtator hath purchaſed Lands in Fee, and for Payment of Lands ſo purchaſed, hath laid up certain Money [z]. For there is no Likelihood that the Teſtator, by that general Legacy of his movable Goods, did intend to paſs that Money alſo, to the Prejudice of his Heir; according to that Rule of Law, that nothing doth paſs by general Words, where it is likely that the Giver would not grant them by ſpecial Words [a].

[z] An autem pecunia ad emptionem prædiorum deſtinata, inter mobilia vel immobilia numeranda ſit, magnus eſt inter Doctores conflictus; ſed com. opinio eſt, quod numeratur inter mobil. Bar. deciſ. 219. poſt Jaſ. in L. cætera. §. ſed ſi. de lega. 1. ff. Nec ego diverſum ſentio, ſed in caſu diverſo, viz. in pecunia parata pro ſolutione prædiorum emptorum, non autem emendorum. [a] C. in general. de reg. jur. 6.

Again, ſeeing by the Statutes of this Realm the Money taken for Land ſold ought not to be accounted as his Goods [b]; wherefore ſhould that Money, which is purpoſely laid up for Payment of the Lands bought, be accounted amongſt the Deceaſed's Goods [c], otherwiſe than for Payment of the Land purchaſed; eſpecially when the Day of Payment is nigh at hand, and Money otherwiſe hardly to be raiſed out of the Teſtator's other Goods [d]? And therefore in this Caſe I do think, that the Legatary to whom the Movables are bequeathed cannot recover that Money, as Parcel of the movable Goods, in Prejudice of the Heir; in whoſe Favour alſo many Things, which of their own Nature be movable, by Conſtruction or Fiction of Law are nevertheleſs accounted unmovable, as Hawks, and Hounds, and Deer in the Park [e], *&c.* There be not many other Caſes wherein Money is not accounted Part of the movable Goods [f]: Which Caſes excepted, in Regard of the reſtleſs Motion thereof, it is not only to be accounted movable [g], but alſo to be reckoned as Parcel of a Man's Goods, becauſe it is a good Surety in every Neceſſity [h].

[b] Stat. H. 8. an. 21. c. 5.

[c] Arg. a contrario ſenſu, ſumpto ex ſtat. prædict.

[d] Quo caſu, inſtante nimirum neceſſitate, res deſtinata perfectioni proxima pro perfecta habetur. Zaſ. in d. L. cætera. §. ſed ſi ff. de leg. 1. n. 16. Graſſ. §. legat. q. 19. n. 8. in fin.

[e] Vide Rob. Kelleway 1. relationum, fol. 118. & Graſſ. Theſaur. com. op. §. legatum. q. 19. n. 8. in fin.

[f] De quibus vide Rebuff. & Goddæum in d. L. Moven. ff. de verb. ſignif. Adde L. ſi chorus. §. 1. ff. de Lega. 3. & DD. ibidem.

[g] Tiraquel. de Retract. Lignagier. §. 1. gloſſ. 7. n. 103. Dec. conſ. 381. [h] Memorabilia Cottæ, verb. peculium.

In the fourth Caſe, where the Teſtator doth bequeath to *A. B.* all his Goods immovable, the Legatary hath Right to the *Leaſes* which did belong to the Deceaſed [i], and alſo to all the natural Fruits thereof, as Graſs growing on the Ground, and Fruit on the Trees [k], and likewiſe to the Fiſhes in the Pond [l], and Pigeons in the Dove-cote [m], as appurtenant to the Grounds demiſed, or as Parcel of the Fruits of the Tenement, which (if it were out of Leaſe) ſhould belong to the Heir, and not to the Executor [n]. But to the Corn growing on the Ground, or other Fruits induſtrial, the Legatary in this Caſe hath not any Right, for that they are accounted among the Movables, as hath been proved heretofore.

[i] D. Cowell de verb. interp. verb. Cattels. Stanford. de prærogat. regis. c. 16. fol. 45. L. lex. C. de adminiſt. tut. §. ergo. & DD. ibidem.

[k] Molin. in conſuetud. Pariſ. §. 1. gloſſ. 1. n. 51, 52.

[l] Rebuff. in d. L. Moventium. Kelleway's Rep. fol. 118.

[m] Kelleway ubi ſup. Goddæus in d. L. Moventium.

[n] Kelleway ubi ſup.

Thoſe Leaſes are *Chattels real*, and as to that Matter it hath been a Queſtion, whether a Deviſe of a Chattel real with a Remainder over, is good or not; 'tis agreed, that ſuch a Deviſe of a perſonal Chattel is not good, but that the Deviſe of *the Uſe of a perſonal Thing*

Thing to one, and after his Death to another, is good, but that the *Thing it ſelf* cannot be ſo deviſed, becauſe a Deviſe of a perſonal Thing for an Hour, is a Deviſe of it for ever.

Whitmore v. *Craven*, 2 Ch. Rep. 167.

The Teſtator deviſed the Reſidue of his perſonal Eſtate, conſiſting in Chattels, Houſhold-Goods, Plate, Jewels, Arrears of Rent, and Debts due to him on Bonds to the Earl of *Craven*, for the Uſe of *William Whitmore*, his only Son, and the Heirs of his Body; and if he died without Iſſue, and a *Minor*, then *to the Iſſue of the Siſters of the Teſtator*, and made his ſaid Son Executor, and the Lord *Craven* Executor, *durante minori ætate*, *&c.* the Son died without Iſſue, being *more than Seventeen Years of Age*, and under Twenty-one, having firſt deviſed all his perſonal Eſtate to his Wife, *&c.* It was decreed that this Limitation to *the Iſſue of his Siſters*, *was void*, becauſe it was of Money and perſonal Chattels; 'tis true, it hath been allowed in Chattels real, but never in perſonal, for the Uſe of Money is Money itſelf; and the Deviſe of a perſonal Thing to *T. S.* for an Hour, is a Deviſe to him of that Thing for ever.

Here now another Queſtion doth offer it ſelf, *viz.* whether *Debts due to the Deceaſed* do paſs under the Legacy of the *Movables or Immovables*. Whereunto the Anſwer is, that Debts are neither movable nor immovable [o]: And conſequently, they are neither due to the Legatary to whom the Movables are deviſed; nor to the Legatary to whom the Teſtator hath bequeathed his Unmovables [p]. And this is true, not only when the Teſtator hath bequeathed all his Goods movable and immovable in ſuch a Place [q]; but alſo where the Legacy was deviſed without Deſignation of Place [r].

[o] Alciat. & Reb. in d. L. Moventium. de verb. ſignif. ff.

[p] Si legantur mobilia uni, alteri immobilia, neutri debentur nomina, inquit Rebuff. in d. L. Moventium, poſt Corn. conſil. 104.

[q] Mantic. de conject. ult. vol. lib. 9. tit. 3. n. 13.

[r] Rebuff. in d. L. Moventium.

The Reaſon is, becauſe Debts are a ſeveral Kind from Movables and Immovables [s], ſeparated by a Threefold Difference; *viz. in Subſtance*, *in Nature*, and alſo *in Effect* [t]. In Subſtance, becauſe Debts being a Thing incorporal, they admit no Diviſion; whereas Goods, as well movable as unmovable, being corporal are ſubject to Diviſion [u]. *In Nature*, becauſe Goods movable and immovable may be actually poſſeſſed; whereas Debts, or Things in Action, cannot be actually poſſeſſed [x]. *In Effect*, becauſe the one, being corporal, may be preſcribed in ſhorter Time than the other, being incorporal [y]. What if the Teſtator did bequeath all his Goods movable and immovable whatſoever? In this Caſe it ſeemeth that, by Reaſon of the Generality of the Deviſe, the Debts due to the Deceaſed are thereby diſpoſed [z]. For the Force and Efficacy of theſe univerſal Signs of [*All*] and [*Whatſoever*] is ſuch, as it ſtretcheth the Word whereunto they are joined to the Comprehenſion of whatſoever is thereby ſignified, not only properly but alſo improperly [a].

[s] Bar. Alciat. & Reb. in L. Moventium. ff. de verb. ſignif.

[t] Rebuff. in d. L. Moventium.

[u] Inſtit. de reb. corporal. & incorporal. L. Servus. §. incorporales. ff. de acquir. rerum dom.

[x] d. §. incorporales.

[y] Nempe res mobiles triennio, immobiles decennio; jura incorporalia, 30 annorum ſpacio. Rebuff. in d. L. Moventium.

[z] Rebuff. ubi ſupra. L. ſi legatus §. 1. ff. ad Trebel. Mantic. de conject. ult. volun. l. 9. tit. 3. n. 10.

[a] Unde quicunque hæres etiam improprie hæredem comprehendit. Et cum de quibuſcunque contractibus loquimur, etiam de abuſivis dicimus, inquit Alciatus in d. L. Moventium, n. 5.

Winn verſ. *Littleton*, 1 Vern. 3.

The Teſtator being ſeiſed in Fee of Lands lying in ſeveral Counties in *Wales*, and having other *Lands in* Wales *mortgaged to him*, deviſed all his Lands in *Merioneth*, *Montgomery*, and *Denbighſhire*, or *elſewhere within the Dominion of* Wales, to Sir *John Winn*, and his Heirs: And having bequeathed ſeveral Legacies to particular Perſons, he deviſed *the Reſidue of his perſonal Eſtate* to his Executor, *&c.*

and died; the Queſtion was, whether the *Lands he had in Mortgage* ſhould paſs to Sir *John Winn*, by the Deviſe *of all his Lands within the Dominion of* Wales, or whether they ſhould go to the *Reſiduary Legatee*, as Part of the perſonal Eſtate of the Teſtator: And it was decreed that the mortgaged Lands ſhould paſs to the Executor as the perſonal Eſtate; and if the Teſtator, having deſcended into Particulars by mentioning in what Counties his Freehold Lands did lie, had circumſcribed his Intention, that no more ſhould paſs but what were in thoſe Counties, and that the Clauſe, *elſewhere in the Dominion of* Wales, ſhall not reach the mortgaged Lands, being of a different Nature from his Lands of Inheritance, that the Word *elſewhere, &c.* may ſerve to fetch in ſmall Parcels of Land of his own Inheritance, which lay out of thoſe Three Counties, and in *Wales*, but ſhall never affect the mortgaged Lands, it being only a fortuitous Clauſe, and inſerted *Currente calamo.*

Again, if theſe univerſal Signs ſhould not extend the Word to Things improperly thereby ſignified, they ſhould be idle and ſuperfluous; which Superfluity is to be avoided, eſpecially in a Teſtament [b], wherein commonly leſs is written than ſpoken [c], and leſs ſpoken than was meant; partly through Want of Skill, and partly through Want of Time. Nevertheleſs, others (and, as it ſeemeth, the greater Number of Writers) do hold the contrary Opinion, namely, that Debts are not comprehended under the Name of Goods movable or immovable [d]; and that this Word [*All*] or [*Whatſoever*] is not of Force to draw Debts within the Compaſs of Goods movable or immovable, no not in a Teſtament [e], becauſe it is a third Kind diſtinct from either of the former [f]. Inſomuch that if there were Bonds or Specialties of thoſe Debts, (which Specialties be movable;) yet, for all this, the Teſtator's Debts are not underſtood to paſs by the Generality of that Legacy, of all or whatſoever the Teſtator's Goods, movable or immovable [g]. As for the Reaſons of the former Opinion, they may be thus anſwered.

[b] Mantic. de conject. ult. vol. l. 3. tit. 6. per tot.

[c] Minus ſcriptum, plus nuncupatum, multis exemplis docet Mantic. de conject. ult. vol. l. 4. tit. 3.

[d] Graff. Theſaur. com. op. §. legatum. q. 19. n. 6. poſt Bar. in L. centurio. ff. de vulg. ſubſtit. n 27. & alios quorum ſententia communiter eſt recepta.

[e] Graff. d. §. legatum. q. 19. n. 6.

[f] Bar. Alc. & Rebuff. in d. L. Movent. ff. de verb. ſignif.

[g] Graf. d. §. legatum. q. 19. n. 6. in fin.

Firſt, albeit this Word [*All*] or [*Whatſoever*] draw in that which is improperly ſignified; yet Debts being a diſtinct Species from Movables and Immovables, differing (as I ſaid before) in Subſtance, Nature and Effect, *tanquam oppoſita membra*, they cannot by any good Conſtruction be contained under, or ſo much as improperly ſignified, by either the one or the other [h].

[h] Oppoſitorum ea eſt conditio, ut uno poſito, removetur alterum, & poſita una ſpecie, removentur omnes ſpecies non expreſſæ. Olden. Topic. leg. loco a ſpecie, fol. 144. & loco a differentibus, fol. 128. Neque dictio *Omnia*, adjuncta mobilibus & immobilibus, efficere poteſt ut veniant jura & actiones etiam in teſtamenta, inquit Graf. ubi ſupra.

Secondly, this Word [*All*] or [*Whatſoever*] is not therefore idle, becauſe it doth not extend to Debts, ſeeing it hath Relation to the Quantity of the Legacy, ſhewing how much the Teſtator hath bequeathed, even all his Goods movable or immovable, whereof there might be Queſtion, if the Legacy were indefinite [g].

[g] De oratione indefinita, & an ea vim univerſalis habeat, inſignis eſt quæſtio; de qua Covar. lib. 1. var. reſol. c. 13.

Thirdly, although it be true, that oftentimes leſs is written than ſpoken, and leſs ſpoken than intended, for want of Time, or of Skill, or through Fear of Death, or Extremity of Sickneſs; yet, for

all this, no Man is preſumed to think that which he doth not ſpeak [h], or where is that *Delius* that can dive into the Depth of another's Man's Thought, when his Words do not expreſs the ſame [i]? For ſuppoſe he thought, (that under Immovables or Movables he meant to bequeath his Debts;) if he do not utter it, it is as if it had never been thought: According as it is written in the Civil Law, *In ambiguo ſermone, non utrumque dicimus, ſed id duntaxat quod volumus. Itaque qui aliud dicit quam vult, neque id dicit quod vox ſignificat, quia non vult, neque id quod vult, quia non loquitur* [k]. In a doubtful Speech we utter not a double Senſe, but only that which we mean. Therefore he which ſpeaketh one Thing, and meaneth another, neither doth he utter that which the Word ſignifieth, becauſe he meaneth not ſo; neither that which he meaneth, becauſe he ſpeaketh it not. To draw to an End; What ſhall be the Concluſion of this vexed Queſtion? Are Debts comprehended under the Legacy of all the Teſtator's Goods movable and immovable, or are they not? Indeed, if we ſhall conſider the common Uſe of Speech within this Land, whereby (if I do not err) Debts are underſtood to be comprehended under that general Legacy of all Goods movable and unmovable [l]; then I rather ſubſcribe to their Opinion who do hold, that the Debts due to the Deceaſed are thereby deviſed [m]; eſpecially if the Teſtator bequeath as well his Chattels as his Goods movable and immovable, for that Chattels comprehends Debts, as hath been aforeſaid [n]. Now then ſince Debts paſs under Movables and Immovables, here ariſeth another Queſtion; What if the Teſtator, intending, under the Name of Goods movable and immovable, to bequeath his Debts alſo due unto him, make his Will, and thereby deviſeth his movable Goods to one Perſon, and his immovable Goods to another Perſon? Which of theſe two Legataries hath Right to the Debts of the Deceaſed?

[h] Nemo (inquit Baldus) præſumitur habere plus in corde quam in ore. in L. ſi is qui. ff. de teſta.

[i] De Delio Natatore, vide Eraſmum in Adagiis.

[k] Paulus in L. ambiguo. ff. de reb. dub.

[l] Lib. Canon. edit. An. Dom. 1603. Ca. 39 & 29. Nam ibi nomina faciunt bona notabilia. Adde Stanford. prærog. c. 16.

[m] Nec in Anglia tantum, ſed in aliis etiam regionibus, ex com. loquendi uſu actiones contineri ſub mobilibus vel immobilibus, oſtendunt Tiraq. de retract. Lignag. §. 1. gloſſ. 7. n. 18. & Old. Conſil. 209. & Jo. And. ejus diſcipulus, & Felin. in procem. decretal. col. 3. Quibus adde Peckium Tract. de Teſtam. conjugum, lib. 5. c. 30. fol. 512.

[n] Supra eod. §. n. 28. Stanford. prærog. c. 16.

The Anſwer briefly is, That thoſe Debts which did ariſe by Occaſion of Things movable, and for the Recovery whereof there lieth an Action perſonal, belong to that Perſon to whom the Teſtator did bequeath his movable Goods [o]. But thoſe Debts which did grow by Occaſion of ſome Thing immovable, for the Recovery whereof there lieth an Action real, as for Rents due out of Leaſes, or Arrearages of Rents due out of Lands, Tenements or Hereditaments, they belong to that Perſon to whom the Teſtator did bequeath his immovable Goods [p]. Howbeit neither of theſe two Legataries can in their own Names proſecute any Action againſt the Parties indebted, unleſs they were Executors to the Deceaſed, or his Adminiſtrators. For when the Teſtator doth appoint a third Perſon to be his Executor, he only may ſue for the Debts due to the Deceaſed, as repreſenting his Perſon [q]; and having recovered and received the ſame, then may the Legataries commence Suit againſt him in the Eccleſiaſtical Court, and there recover their ſeveral Legacies, by Virtue of the Will of the Deceaſed, which the Executor is bound to perform [r]. And in caſe the Executor do not commence Suit againſt the Parties indebted, but delay or refuſe ſo to do; then may the Legataries convent the Executor in the Eccleſiaſtical Court, where he ſhall be adjudged by Sentence of the Ordinary, and compelled by the Cenſures of the Church,

[o] Bar. in L. poteſt. de author tut. ff. Tiraq. de Retra. Lignagier. §. 1. gloſſ. 7. n. 15. Graſſ. Theſ. com. op. verb. legatum, q. 19. n. 5. ubi teſtatur hanc opinionem eſſe communem.

[p] Bar. Tiraq. Graſſ. ubi ſupra. Aufrer. in addic. ad deciſ. Tholoſ. q. 315. in fin. cum multis aliis, quos enumerat. Tiraq. in d. §. 1. gloſſ. 7. n. 15.

[q] Supra eod. lib. part. 6. §. 1. n. 4. Perkins tit. Teſtament, fol. 93. Brook Abridg. tit. Executor, n. 49. Doct. & Stud. l. 2. c. 7.

[r] Tract. de Repub. Angl. l. 3. c. 9. ſupra eod. lib. part. 4. §. 4. n. 22. in fin. c. ſtat. de teſtam. l. 3. provin. conſt. Cant.

Church, to make a Letter of Attorney to either of the Legataries, for the Recovery of their ſeveral Debts to them bequeathed, in the Name of the Executor, to their own ſeveral Uſes [s].

[s] §. Tum autem. Inſtit. de Legatis, ſupra eod. lib. part. 3. §. 5.

I have thought good alſo in this Place to deliver what is comprehended in the general Legacy of [*Houſhold-ſtuff*] and what not; the rather, for that this Bequeſt of Houſhold-ſtuff is more frequent, than well underſtood what Kind of Goods are comprehended therein. But before we come to the Unfolding of the chief Doubt, and namely, whether Plate be comprehended under Houſhold-ſtuff, it is to be obſerved, that as there be divers Words which ſignify Houſhold-ſtuff, as *Supellex* [t], *Utenſilia* [u], *Maſſariciæ* [x], *Arneſia* [y], and ſuch like [z]; ſo there be divers Definitions thereof extant in the Body and Text of the Civil Law [a]. For *Pomponius* defineth it after one Sort [b], *Alphenus* after another [c], *Tubero* after a third [d], and *Florentinus* after a fourth Sort [e]. I will firſt ſhew divers Particulars, whereof there is no great Doubt but that they are to be reckoned amongſt Houſhold-ſtuff; then, other Particulars, which are not to be accounted amongſt Houſhold-ſtuff. Firſt therefore, there is no Doubt but that theſe Particulars following are to be reckoned as Part and Parcel of Houſhold-ſtuff, *viz. Tables* [f], *Stools* [g], *Forms* [h], *Chairs* [i], *Carpets* [k], *Hangings* [l], *Beds* [m], *Bedding* [n], *Baſons* with *Ewers* [o], *Candleſticks* [p], all Sorts of Veſſels ſerving for Meat and Drink, being of Earth, Wood, Glaſs, Braſs, or Pewter [q], Pots, Pans, Spits, and ſuch like [r].

[t] L. 1. de ſupell. leg. ff.

[u] Menoch. Tract. de præſump. l. 4. præſ. 160. n. 4. Weſenb. in tit. de ſupell. leg. ff.

[x] Menoch. ubi ſupra. Bar. in L. 1. ff. de ſupell. leg. Panor. conſil. 88. vol. 2. Quorum teſtimon. conſtat, hoc dictum eſſe vulgare Italorum.

[y] Simo de Prætis Tract. de Interpret. ult. vol. l. 4. dub. 8. n. 28.

[z] De quibus Weſenb. & Menoch. ubi ſupra; veluti Gerarda, & Mobilia domus.

[a] Ut in L. 1. L. 2. L. 6. & 7. eod. tit. de ſupel. leg. ff.

[b] Supellex (inquit Pomponius) eſt domeſticum patrisfamilias inſtrumentum, quod neque argento aurove facto, vel veſti, annumeratur. L. 1. de ſup. leg. ff.

[c] Alphenus ſupellectilia eas res eſſe putat, quæ ad uſum comm. patrisfamilias paratæ ſunt, quæ nomen ſui generis non habent ſeparatum. L. 6. eod. tit.

[d] Tubero hoc modo demonſtrare ſupellectilem tentat, nempe, Inſtrument' quoddam patrisfamilias, rerum ad quotidianum uſum paratarum, quod in aliquam ſpeciem non cadit. L. Labeo. de ſup. leg. ff.

[e] i. e. Res mobiles, non animalia. L. 2. de ſupel. leg. ff.

[f] L. ſupellectil. ff. de ſup. leg. verb. Menſæ, & verb. Trapezophoræ, i. e. Menſæ magno ornatu, quæ effictis imaginibus ſuſtinebantur; quales hodie in vetuſtis marmoribus viſuntur. Alex. ab Alex. lib. 1. dierum genial. c. 19. Menoch. de præſump. 160. lib. 4. n. 8.

[g] d. L. ſupellectil. verb. ſcamna, ſubſel. &c.

[h] L. Inſtrument. ff. de ſupel. leg. verb. Sedular.

[i] L. de Tapetis, eod. tit. verb. Cathedralia. Menoch. ubi ſupra. n. 19.

[k] d. L. de Tapetis, in princ.

[l] d. L. de Tapetis. Menoch. de præſump. 160. n. 17. 19. verb. Aulæa.

[m] d. L. ſupel. verb. Lect. etiam argentat. aurat. vel. gemmat. Idem, ſi tota argentea vel aurea ſint.

[n] d. L. de Tapetis, verb. Toralia. Adde quod lecto leg. debentur culcitræ, & alia lecti ornamenta. Rebuff. in L. inſtratum. de verb. ſignif. ff. Teſtatur enim, inſtructum apparatumque lectum legar. videtur. Alciat. in eand. L.

[o] d. L. ſupel. verb. pelves, aquiminaria, &c.

[p] L. leg. de ſupel. leg. ff. verb. Argentea candelabra.

[q] d. L. ſupellectil.

[r] Univerſa namque vaſa ad coquendum deputata, cum in penu non continentur, (ut in L. Inſtrumentum. ff. de penu legat.) inter ſupellectilia domus numerare crederem Panor. conſ. 88. vol. 2. n. 3. Menoch. lib. 4. Præſ. 162. n. 21. Quod ſi objiciatur, hujuſmodi vaſa eſſe inſtrumenta fundi, (L. cum de lanionis ff. de fundo inſtruct. legat. verb. cacabos,) & ideo non eſſe de ſupellectilium genere; (L. Labeo. ff. de ſupel. leg. in princ.) Reſpondeo, non propriam verborum ſignificationem, ſed quid Teſtator voluerit, ſcrutand. d. L. cum. de lanionis. Quinimo ſupellex tanquam pars inſtructi fundi eo legato continebitur. L. quæſitum. ff. de fund. inſtruct. §. ſed ſi fundus.

Secondly, *Apparel* [s], *Books* [t], *Weapons* [u], *Tools* for Artificers [x], *Cattle* [y], *Victuals* [z], *Corn* in the Barn or Granary [a], *Wains* [b], *Carts*, *Plough-gear*, *Veſſels* [c] affixed to the Freehold, are no Part of Houſhold-ſtuff. But whether *Plate* and *Coaches* are to be accounted as Part of Houſhold-ſtuff, is a Queſtion wherein all Writers are not of one Mind. For the Deciding of which Controverſy, let us ſuppoſe the Caſe to be this:

[s] L. 1. de ſupel. leg. ff. & L. Labeo. eod. tit.

[t] L. ſupellectil. eod. tit.

[u] d. L. ſupellectil.

[x] Menoch. de præſump. 160. lib. 4. n. 33.

[y] L. 2. de ſupell. leg. ff.

[z] L. Labeo. d. tit. & gloſſ. ibidem.

[a] d. L. Labeo. & gloſſ. ibidem.

[b] L. vaſa ænea. de ſup. leg. ff. Menoch. de præſump. 160. n. 29.

[c] d. L. vaſa ænea. & Menoch. de præſ. 160. n. 29. d. L. Labeo. verb. Inſtrumenta agri aut domus.

The Teſtator by his laſt Will and Teſtament doth bequeath to *A. B. all his Houſhold-ſtuff*. Now in this Caſe, whether may the Legatary recover the Teſtator's *Plate and Coaches*, as Part and Parcel of his

his Houſhold-ſtuff? For the Plate, the Writers are at Variance; ſome ſetting it down for Law, that nothing which is made of Silver or Gold is to be accounted Houſhold-ſtuff [d]; and ſome the contrary [e]. For Reconciliation of which Contrariety, we muſt uſe divers Diſtinctions; whereof the firſt is of the Time, according to the ancient Admonition, *Diſtingue tempora, concordabunt Scripturæ* [f]; that is, betwixt the ancient and later Times. For ſuch was the Severity and Frugality of old Times, that *in diebus illis*, Veſſels of Gold or Silver, being then very rare, were not comprehended under the Name of Houſhold-ſtuff [g]. But afterwards in latter Times, when Men began not to be contented with the Simplicity of their Grandſires, but digging for more precious Metal, did furniſh their Houſes with Veſſels of Gold and Silver and precious Stones, and, as it is written in the Civil Law, *Nunc ex ebore, teſtudine, atque argento, jam ex auro etiam atque gemmis ſupellectili utimur* [h]; upon this Change of Mens Manners did the Law alſo begin to change, and to reckon theſe Veſſels of Silver, Gold and precious Stones, as Baſon and Ewer, Bowls, Cups, Candleſticks, *&c.* for Part and Parcel of Houſhold-ſtuff [i]; yet not indiſtinctly or abſolutely, but with this Moderation, ſo that it were agreeable to the Teſtator's Meaning, otherwiſe not [k]. That is, if the Teſtator in his Life-time did uſe to reckon them amongſt his Houſhold-ſtuff; in which Caſe they are due to the Legatary by the Name of Houſhold-ſtuff [l]: But if the Teſtator did eſteem them as Ornaments rather than Utenſils, and did uſe them for Pomp or Delicacy, rather than for daily or ordinary Service of his Houſe; in this Caſe they do not paſs under the Legacy of Houſhold-ſtuff [m]. Or if the Teſtator did uſe to number Things of another Kind amongſt his Houſhold-ſtuff, which without Doubt are not ſo to be eſteemed; as for Example, his Apparel, Books, and ſuch like [n]; then, albeit the Teſtator did intend that his Apparel, or thoſe other Things, ſhould paſs under the Name of Houſhold-ſtuff; yet nevertheleſs the Legatary cannot recover them [p]. And albeit there be no Defect in the Teſtator's Meaning [q]; yet becauſe the ſame is no way uttered by Words which by their own Nature, or by common Uſe of Speech, might teſtify his Meaning, therefore is the Legacy void, as if it had not been written or ſpoken [r]. Unleſs it were the expreſs Will of the Teſtator, that the Legacy ſhould ſtand good, notwithſtanding his Miſnaming thereof [s].

[d] L. 1. de ſupel. leg. & L. 3. eod. tit.
[e] L. Labeo. eod. tit. verſ. Nunc ex ebore, &c.
[f] Glo. in d. L. ſupel. litera O.
[g] d. L. ſupellect. Vide Goddæum in L. Movent. de verb. ſignif. ubi de hac quæſt. copioſe ſcripſit.
[h] d. L. Labeo. poſt Tuberonem. & L. legat. ff de ſupel. leg.
[i] d. L. Labeo. & L. legat.
[k] Hoc autem diſtinctionis fœdere diverſas illas Tuberonis & Servii ſententias conciliari vult Celſus, in d. L. Labeo. de ſupel. leg. ff.
[l] Celſus in d. L. Labeo.
[m] d. L. Labeo. & Goddæus. in L. Moventium. ff. de verb. ſignif.
[n] Veluti Eſcar. argentum. Servius in d. L. Labeo. Menoch. de præſump. 160. n. 26, 27.
[p] d. L. Labeo. §. verum ſi ea de quibus non dub. Goddæus in d. L. Movent. Men. ubi ſupra. Weſenb. in tit. de ſup. leg. ff. n. 3.
[q] Non enim ex opin. ſingulorum, ſed ex communi uſu, verba exaudiri debent, inquit Servius in d. L. Lab. Cujus ſententia adverſ. Tuber. obtinuit, Celſo judice.
[r] Goddæus, Menoch. & Weſenb. ubi ſupra.
[s] Goddæus ubi ſupra. & vide quæ a nobis ſcripta ſunt paulo ante. ead. part. §. 5. n. 11.

As for the Teſtator's *Coaches* [t], whether the Legatary to whom the Houſhold-ſtuff is bequeathed may recover the ſame, doth admit ſome Doubt. But howſoever all Men are not of one Mind in this Point [u]; yet I do rather ſubſcribe to their Judgment, who do hold that Coaches are uſually numbered amongſt Houſhold-ſtuff [x].

[t] Rhæda dicitur genus leviculi currus in quo geſtabantur Nobiliores in villas ſuas. Spiegel. Lexic. Juris civilis, verb. Rhæda.
[u] Negat enim Alex. ab Alex. vehicula in ſupellectili contineri, ſed illa inſtrument. viator. eſſe fatetur. Cui convenit gloſſ. quædam manuſcripta in L. inſtr. de ſup. leg. ff.
[x] L. inſtr. de ſupell. leg. ff. Menoch. de præſ. l. 4. præſ. 160. n. 16. Anto. Aug. l. primo emendationem, c. 4.

An Analyſis of the Chapter foregoing.

Advowſons, *Commons*, *Fairs*, *Houſes*, *Lands*, *Markets*, &c. } Theſe and ſuch like are Chattels real.

What Things paſs in a Will by a Deviſe of all his Goods, *and what not, and by other Words.*

Advowſon: Which the Teſtator had for a Term of Years; and if an Incumbent purchaſe the Inheritance of an Advowſon, and deviſeth that his Executor ſhall preſent to the firſt Turn after his Deceaſe, and giveth a Fee to another, this is good. *Pinchin* v. *Harris*, 2 Cro. 371.

Apprentices.

Avoidance: The next Avoidance which a Man hath in the Right of his Wife will not paſs.

Bedding.

Bills.

Bonds: By the Civil Law the Debt therein mentioned will paſs by the *Deviſe of Goods*, but Bonds made to the Wife *dum ſola* will not.

Boxes.

Braſs.

Cabinets.

Carts.

Cattle.

Chattels, Real and Perſonal, which he hath in his own Right, and not in the Right of his Wife, or as Executor or Adminiſtrator.

Coppers, not faſtened to the Freehold.

Corn, in the Barn, Field or Ground, which the Teſtator might have cut if he had lived; ſo if the Husband deviſe Corn growing on his Wife's Land, and dies before 'tis ſevered, the Deviſe is good, whether it was ſown before or after Marriage.

Debts.

Desks.

Fairs.

Ferrets.

Fruits gathered, but not growing on Trees.

Glaſs.

Grayhounds will not paſs.

Goods: By a Deviſe of all his Goods, Leaſes for Years paſs. *Moor* 352.

Guns.

Hay.

Hemp.

Hops.

Hounds.

Houſhold-ſtuff: Books, Cattle, Cloaths, Coaches, Corn, Carts, Plows, Waggons; but any Thing fixed to the Freehold will not paſs by

the Name of *Houſhold-ſtuff*; but Plate uſed about the Houſe, and not for Ornament, will paſs.

Jewels.

Leaſes: For Life or Years.

Leets: Profits thereof.

Linen.

Locks will not paſs.

Market.

Maſtiffs.

Money.

Mortgages.

Movables: By the Civil Law, Actions and Right of Actions paſs by the Word *Movables*, eſpecially when the Words are reiterated; as I give to *T. S.* all my movable Goods and immovable of *what Kind ſoever or whereſoever* found. Thoſe Things which are inanimate and paſſive in their Motion, as Books, Beds, *&c.* Thoſe which are animate and active in their Motion, as Cows, Horſes, *&c.*

Immovables: Leaſes, Rents, Graſs, Corn growing, *&c.*

Pewter.

Plate.

Ploughs.

Preſentation to a Church, which a Biſhop hath in Right of his Biſhoprick, and void in his Life-time, cannot be deviſed by him. 1 *Inſt.* 185, 308.

Saffron.

Ships.

Spaniels.

Statues.

Tithes.

Trees fell'd, but not growing.

Utenſils: By this Word Plate and Jewels will not paſs. *Dyer* 59. *b.*

Waggons.

Wainſcot will not paſs.

§. XI. Of Uncertainty in reſpect of the Time or Date of the Teſtament.

1. *When it is uncertain whether of the two Teſtaments is later, both are void.*
2. *The Teſtament in Favour of Children is preſumed laſt.*
3. *The Teſtament* ad pias cauſas *is preſumed laſt.*
4. *The Will once proved, is not to be reproved by another of the ſame Date.*
5. *A Soldier may die with two Teſtaments.*
6. *Which of theſe two Teſtaments is preſumed later, the Teſtament* ad pias cauſas, *or the Teſtament* inter Liberos.

WHERE (1) two Teſtaments be found, but uncertain whether of them is the later, in this Caſe neither Teſtament is good[a]; for no Man can die with two Teſtaments[b], for the one doth deſtroy the other[c].

[a] Gloſſ. in L. ult. C. de ed. Di. Adrian. tol. Clar. §. teſt. q. 10.

[b] L. quærebatur. ff. de teſt. mil.

[c] Bar. in L. 1. §. 1. ff. bon. poſſ. ſecundum Tabul.

Nevertheleſs,

Nevertheleſs, if (2) one Teſtament be made in Favour of the Teſtator's Children, or of thoſe who are to have the Adminiſtration of his Goods, in caſe he had died Inteſtate, and the other Teſtament in Favour of others; then that ſhall prevail which is made in Favour of the Teſtator's Children, or of them which otherwiſe are to have the Adminiſtration of his Goods [d].

[d] Bar. in d. §. 1. Sich. in L. ult. C. de edicto D. Adr. tol. Mantic. de conject. ult. vol. l. 2. tit. 15. n. 17.

Or if (3) the one Teſtament be made *ad pias cauſas*, the other not; then that Teſtament *ad pias cauſas* is preſumed laſt, and ſo to take Place [e].

[e] Jaſ. & Sich. in L. d. ult.

Or if (4) the one Teſtament be proved, (the other perhaps not as yet appearing,) and the Executors in Poſſeſſion of the Teſtator's Goods by Virtue of the Teſtament already proved; it is not afterwards to be reproved, nor the Executors diſpoſſeſſed, by Means of the other Teſtament of the ſame Date [f].

[f] Bar. in. d. §. 1. Jaſ. & Sich. in d. L. ult.

Or if (5) the Teſtaments be military Teſtaments; for then perhaps they are both good, becauſe a Soldier may die with two Teſtaments [g].

[g] L. quærebatur. ff. de mil. teſt.

Where it is ſaid, that that Teſtament is preſumed later which is made in Favour of them that are to have the Benefit of the Adminiſtration of the Teſtator's Goods; or *ad pias cauſas*, rather than thoſe Teſtaments which are not made *ad pias cauſas*, nor in Favour of them which are to have the Adminiſtration; what if (6) two Teſtaments be found, the one in Favour of the Teſtator's Children, or ſuch as are to have the Adminiſtration of the Goods of the Deceaſed, the other made *ad pias cauſas*, and it doth not appear whether of them is former or later? Whether is to be preſumed laſt, and ſo of Force? I ſuppoſe, that if they which are to have the Adminiſtration of the Teſtator's Goods, in whoſe Favour the Teſtament is made, be the Teſtator's Children, then that Teſtament made in their Favour is to be preſumed later, rather than that Teſtament *ad pias cauſas* [h]: Otherwiſe the Teſtament *ad pias cauſas* is to be preſumed later, rather than that Teſtament made in Favour of collateral Kinſmen [i].

[h] Mantic. de conject. ult. vol. l. 6. tit. 3. n. 43. Vide ſupr. 1. part. §. pen. in fin. & quod ibi adnotavi ex Auguſt.

[i] Mantic. ubi ſupr. Per. L. ſancimus. C. de ſacroſan. eccleſia.

The Teſtator having deviſed ſeveral Legacies to ſeveral Perſons by Name, and amongſt the reſt 40 *l.* to a Charity; and there being a Defect of Aſſets, the Spiritual Court gave Sentence for the Charity of 40 *l.* in the firſt Place, and would not allow it to come in Proportion with the other Legacies; and a Bill in Chancery being exhibited for that Purpoſe; and it being moved for an Injunction to the Spiritual Court, it was denied, becauſe legatory Matters are properly determinable in that Court; and ſince by their Law Preference is given to a charitable Legacy, the Court of Chancery will not alter it.

Feilding verſ. *Bond*, 1 Vernon 230.

It is a famous Queſtion amongſt the Civilians [k], whether the Time of the Making of the Teſtament, or of the Death of the Teſtator, is to be reſpected; and conſequently, whether the Teſtator be preſumed to bequeath thoſe Things only which he had at the Time of the Making of his Will, or of his Death [l]. For the Determining of which Queſtion divers do uſe ſundry Diſtinctions, whereof ſome ſeem

[k] Egreg. admodum hanc eſſe diſputationem refert Men. de præſump. l. 4. præſ. 127. in princ.

[l] De hac q. vide Bar. in L. ſi ita legat. ff. de aur. & arg. leg Mantic. de conject. ult. vol. l. 3. tit. 11. Sim. de Præt. de interp ult. vol. l. 4. dub. 9. fol. 178. & Menoch. d. præſump. 127. l. 4.

ſeem to make the Matter more intricate. Wherefore pretermitting thoſe Diſtinctions, I have choſen a plain and eaſy Courſe of deciding the Controverſy, by propounding a Rule with Extenſions and Limitations. The Rule is this, *That the Time of the Teſtament, and not of the Teſtator's Death, is to be regarded* [m]. And ſo thoſe Goods which the Teſtator had at the Time when he made his Will are bequeathed unto, and recoverable by the Legatary; but not thoſe Goods which he got afterwards [n].

[m] Eandem regulam propon. Mant. & Simo de Prætis ubi ſupra. Per. d. L. ſi ita. §. de aur. & argen. leg.

[n] Mantic. & Simo de Prætis ubi ſupra.

The firſt Extenſion of the Rule is, That the ſame doth proceed not only in reſpect of Things bequeathed, but alſo in reſpect of Perſons to whom any Thing is deviſed [o]. As for Example; the Teſtator doth bequeath an hundred Pounds to the Children of *A. B.* who at the Time of the Making of the Will hath four Children, and afterwards begetteth other four Children, and ſo hath eight Children at the Time of the Death of the Teſtator. In this Caſe the hundred Pounds is to thoſe four Children which were alive at the Time when the Will was made, but not to thoſe who were born afterwards [p].

[o] Simo de Præt. ubi ſupr. n. 35. poſt. Bar. in L. ſi cognat. de reb. dub. ff. n. 4. Menoc. de præſ. l. 4. præſump. 127. n. 18.

[p] Bar. in d. L. ſi cognatis. ff. de reb. dub. n. 4. Alex. conſil. 170. vol. 5. n. 3.

The Reaſon is, becauſe he had no Thought of them which were not *in rerum natura* when he made his Will [q]. So likewiſe if the Teſtator do bequeath an hundred Pounds to his Pariſh-Church, and after the Will made, he doth change his Dwelling to another Pariſh, and there dieth; in this Caſe the Legacy is due to the Church where the Teſtator dwelled at the Time when the Will was made [r].

[q] Cagnol. in L. ult. C. de pact. n. 233. Caſtr. conſil. 132. vol. 1. n. 3.

[r] Rom. in Authen. ſimil. ad L. falcid.

cujus ſententiam ego quidem veram eſſe arbitror, non tamen vigore d. L. ſi cognatis; quæ lex magis adverſ. quam adſtipulatur huic opin. (ut recte monet Mantic. de conject. ult. vol. l. 3. tit. 11. n. 3.) Sed virtute d. l. ſi ita §. de aur. & argen. leg. ff.

Secondly, This Rule proceedeth and hath Place, not only in Things bequeathed whereof the Teſtator hath actual Poſſeſſion, but alſo in Things bequeathed which are incorporal, or Things in Action; and therefore if the Teſtator bequeath to *A. B.* all his Debts, there is no more due to the Legatary by this Deviſe, but only ſuch Debts as were due to the Deceaſed at the Time of the Making of the Will, and not any Debts which did ariſe to be due afterwards [s]. So likewiſe if the Teſtator do remit unto *A. B.* all ſuch Debts as he doth owe unto the Teſtator; by this Deviſe only thoſe Debts are remitted which were due to the Deceaſed at the Making of the Will [t]. Thirdly, this aforeſaid Rule is of Force not only in an indefinite or general Legacy, (as when the Teſtator deviſeth his Books, Apparel, or Houſhold-ſtuff,) but even then alſo when to theſe Legacies he doth add the Word *All*; inſomuch that if the Teſtator ſhould bequeath to *A. B.* all his Books, all his Apparel, all his Houſhold-ſtuff, yet there is no more due to the Legatary, but only thoſe Books, that Apparel, or that Houſhold-ſtuff [u], which were the Teſtator's at the Time when the Will was made. Fourthly, the Rule aforeſaid doth ſo ſtrongly tie the Legacy to the Time of the Making of the Teſtament, that the Legatary to whom the Teſtator hath bequeathed any Thing, muſt prove that the Thing bequeathed was the Teſtator's when he made his Teſtament [x], and not the Executor, who hath the ſame in Poſſeſſion [y]. Fifthly, the foreſaid Rule proceedeth yet one Degree farther, in Conſideration of the Time of the Making of the Teſtament. For if the Teſtator, having Store of young Cattle, willeth

[s] Cagnol. in L. ult. C. de pact. n. 231. ubi non pauc. author. ampliationem hanc optime firmat.

[t] Mant. de conject. ult. vol. l. 3. c. 11. n. 5. Simo de Prætis. ubi ſupr. n. 36.

[u] Mantic. ubi ſupr. n. 4. Socin. Jun. conſil. 99. vol. 3. per tot. Par. conſil. 21. vol. 2. n. 34. Et hoc procedit etiamſi per nomen meum, quod præſens tempus denotat, non fuit adjectum, inquit Mant. ubi ſupr. poſt Socin. ubi ſupra.

[x] Simo de Præt. de interp. ult. vol. l. 4. dub. 9. fol. 179. n. 36. Mantic. de conject. ult. vol. (poſt Bald. Rom. Alex. & Jaſ. d. l. 3. tit. 11. n. 4. in fin.)

[y] Simo de Præt. de interp. ult. vol. ubi ſupra. & Mant. de conject. ult. vol. d. l. 3. tit. 11. n. 4. in fin.

willeth his Executor to give to *A. B.* two Colts of the Age of two Years, and after the Making of his Will, liveth many Years, and then dieth, having other Colts at the Time of his Death of the Age of two Years; in this Caſe there is due to the Legatary two of the firſt Colts which were extant at the Time of Making the Will, and not of the laſt Colts at the Time of his Death [z]. Sixthly, If the Teſtator bequeath to *A. B.* a Share, (*viz.* a third Part, or the one Half) of his Goods being in ſuch a Place, although the Teſtator have more Goods in that Place at the Time of his Death, than were there at the Time when the Will was made [a]; yet the Legatary hath no Right to thoſe later Goods, but only to thoſe which were there when the Will was made. And ſo I take it to be, if the Teſtator doth bequeath to *A. B.* all his Goods which are in ſuch a Place; in which Legacy only thoſe Goods are contained which were there extant when the Will was made, and not thoſe Goods which were brought thither afterwards [b].

[z] L. uxori. §. teſt. ff. de leg. 3. Menoch. de præſump. l. 4. præſump. 127. n. 6. Ejuſdem farinæ eſt quod ſcriptum reliquit Old. conſil. 31. nempe quod pecuniâ certi generis legata, ſi poſtea variatur, debetur æſtimatio quæ fuit tempore conditi teſt. Mant. de conject. ult. vol. l. 3. tit. 11.

[a] Menoch. de præſump. l. 4. præſ. 127. n. 12. poſt Alex. conſil. 171. n. 1. vol. 6. præſ. 127. n. 29.

[b] Menoch. de præſ. l. 4.

The firſt Limitation or Reſtraint of this Rule is, when the Legacy or Thing bequeathed is univerſal; for then the Time of the Death of the Teſtator is conſidered, and not the Time when the Will was made [c]. As for Example; the Teſtator doth bequeath to *A. B.* all his Subſtance, or all his Goods and Chattels: In this Caſe the Legatary hath Right to thoſe Things which the Teſtator left at the Time of his Death [d], whether they be more or leſs than they were before. Neither is this Limitation contrary to the third Ampliation before rehearſed, where it is ſaid, that if the Teſtator do univerſally bequeath all his Books, all his Apparel, or all his Houſhold-ſtuff, yet notwithſtanding that univerſal Bequeſt [*All*] there is no more due to the Legatary, but only thoſe Books, that Apparel or Houſhold-ſtuff, which were the Teſtator's when the Will was made [e]. For howſoever theſe two Legacies may ſeem to be without Difference in reſpect of the Form or Manner of the Deviſe, both of them being univerſally framed; yet there is a great Difference in reſpect of the Matter or Thing bequeathed [f].

[c] Mantic. de conject. ult. vol. l. 13. tit. 11. n. 13. Simo de Præt. de interp. ult. vol. l. 4. dub. 9. fol. 179. n. 41. Menoch. de præſump. l. 4. præſump. 127. n. 26, 27. Bar. in L. ſi ita. ff. de aur. & argent. leg. 3. n. 4.

[d] Menoch. de præſump. l. 4. præſump. 127. n. 26, 27.

[e] Supra eod. §. n. 11. poſt Mant. l. 3. c. 11. Socin. Jun. conſil. 99. vol. 3.

[f] Mantic. poſt Bar. ubi ſupra.

For a Man's Subſtance, or Goods, or Eſtate, and ſuch like [g], they be Names collective, comprehending Things of divers Natures in one Univerſe, which doth receive Increaſe and Diminution [h]. But ſo are not a Man's Books, or Apparel, or Houſhold-ſtuff, for they be but *Species quædam bonorum* [i]; and conſequently no Contrariety betwixt this Limitation and that Ampliation of the Rule.

[g] Veluti peculium, reddit. Mantic. de conject. ult. vol. l. 3. tit. 11. n. 13.

[h] Totum univerſ. eſt quod ex multis corporibus conſt. quæ ſive diminuantur, ſive augeantur, ſemper dicitur idem corpus. Zaſ. in L. grege. ff. de leg. n. 3.

[i] Zaſ. in d. L. grege. ff. de leg. 1. n. 3.

Secondly, the Rule is limited, when a Thing univerſal is bequeathed, albeit the Teſtator doth not add any Sign univerſal. As for Example; the Teſtator doth bequeath to *A. B.* his Flock of Sheep, or Herd of Cattle [k]; for it is in Effect as if he had bequeathed his whole Flock of Sheep, or his whole Herd of Cattle [l]. In which Caſe the Time of the Death of the Teſtator is to be reſpected, and the Legatary is to have the ſame as then they be, either increaſed or diminiſhed; inſomuch that if one only Sheep do remain of the Flock at the Death of the Teſtator, yet that one is due [m], albeit one cannot make a Flock [n].

[k] L. grege legat. ff. de leg. 1. cum LL. ſequen. Simo de Præt. de interp. ult. vol. l. 4. dub. 9. n. 45. fol. 179.

[l] d. L. greg. cum LL. ſeq. L. peculium. ff. de leg. 2. & DD. in d. L. grege.

[m] L. ſi grege. ff. de Leg. 1. ead. Bar. ib.

[n] Ibid.

Thirdly, the Rule is reſtrained, when ſuch a Thing is bequeathed as is conſumed with Uſe; for then the Time of the Teſtator's Death is to be conſidered [o]. As for Example; the Teſtator doth bequeath to *A. B.* his Corn; this is to be underſtood of that Corn which the Teſtator left at the Time of his Death [p]. So likewiſe if the Teſtator do bequeath his Apparel to *A. B.* and afterwards liveth until that Apparel be worn out, and other Apparel provided in ſtead thereof; in this Caſe the Legatary ſhall have the Teſtator's Apparel which he left at the Time of his Death [q]. Neither is this Limitation contrary to the former Ampliation, where it is ſaid, that if the Teſtator do bequeath all his Apparel to *A. B.* the Legatary ſhall have ſuch Apparel as the Teſtator had at the Time when the Will was made, and not the other Apparel which was made afterwards; for that Ampliation is true, when the Teſtator hath divers Suits of Apparel, whereof ſome remain which were made when the Will was made [r]; and in this Caſe the Legatary can have no more but the old Suit [s]. But this Limitation taketh Place, when the Apparel is worn out and conſumed which was firſt bequeathed; in which Caſe the Legatary ſhall have the new Suit, in Lieu of the former [t]; leſt otherwiſe the Deceaſed's Will ſhould be utterly defeated and without Effect. So likewiſe if the Teſtator having made his Will, and therein bequeathed to *A. B.* the Corn in his Barn, and afterward layeth up more Corn in the ſame Barn, before the other be threſhed; in this Caſe the Legatary cannot recover both the old and the new Corn, but muſt be contented [u] with the Corn in the Barn at the Time when the Will was made. Or if the old Corn were utterly conſumed and ſpent, yet the Legatary cannot recover a greater Quantity of the new Corn, than the old Corn did extend unto when the Will was made [x].

The fourth Limitation of the Rule is, when the Teſtator doth bequeath any Thing by Words of the future Time; as I give to *A. B.* the Books, Apparel, or Houſhold-ſtuff, which ſhall be in my Houſe, or in ſuch a Place. For in this Caſe, the Time of the Death of the Teſtator is to be reſpected [y]; and ſo the Legatary hath Right not only to ſuch Books, Apparel, or Houſhold-ſtuff, as the Teſtator had in his Houſe, or Place aforeſaid, at the Time of making his Will; but alſo to thoſe other Books, Apparel, or Houſhold-ſtuff, extant at the Time of his Death, albeit they were brought thither after the Will was made. And ſo it is if the Teſtator uſe this Word [*May*] or [*Can*] [z]. As if the Teſtator give to *A. B.* all his Books, Apparel and Houſhold-ſtuff, which are or can be found in ſuch a Place; for in this Caſe the Legatary hath Right alſo to thoſe Books, Apparel, and Houſhold-ſtuff, which be found there at the Time of the Teſtator's Death [a].

The fifth Limitation is, when the Legacy is conditional. In which Caſe the Time when the Will was made is not to be reſpected [b]; but of the Accompliſhment of the Condition, or Death of the Teſtator, as already hath been confirmed [c].

[c] Supra eod. lib. parte 4. §. 6.

The ſixth Limitation is, when it is to be collected by Circumſtances and Conjectures, that the Teſtator did mean of the Time of his Death, rather than of the Time when the Will was made [d]; or if it be likely that the Teſtator, if he had been asked the Queſtion, whether he meant of the Time of making his Will, or of his Death, would

[o] Bar. in L. quidam. ff. de tritic. leg. Mant. de conject. ult. vol. l. 3. tit. 11. n. 16.

[p] Mant. d. l. 3. tit. 11. n. 15.

[q] Bar. in L. ſi ita. ff. de aur. & argent. leg. n. 8. Mant. de conject. ult. vol. l. 12. tit. 2. n. 9.

[r] Menoch. de præſ. l. 4. præſ. 227. n. 29, 30. Berons q. 130. n. 5.

[s] Bar. in d. L. ſi ita. ff. de aur. & arg. leg. n. 8.

[t] Bar. ubi ſupra.

[u] Maſcard. de probac. concluſ. 1280. n. 33. poſt Caſtr. & Bald.

[x] Maſc. de probac. concluſ. 1280. n. 32, 33. Caſtr. in L. ſiſer.

[y] Mant. de conject. ult. volun. l. 3. tit. 11. n. 12. poſt Bar. in d. L. ſi ita. de aur. & arg. leg. ff. Menoch. de præſ. l. 4. præſ. 127. n. 87.

[z] Mantic. ubi ſupra. Menoch. de præſ. l. 4. præſump. 117. n. 21.

[a] Menoch. ubi ſupra. poſt Decium & alios in eo loco citatos.

[b] Mantic. d. tit. 11. l. 3. n. 27, 28. licet Socin. Jun. conſil. 142. vol. 2. aliud ſentire videatur.

[d] Mantic. de conject. ult. vol. l. 3. tit. 11. n. 22, 23, 24.

have anſwered, that he meant of the Time of his Death: In this Caſe, albeit the Legacy were given by Words of the preſent Time, yet the future Time, namely, the Time of the Teſtator's Death, is to be regarded [e]. As for Example; the Teſtator ſaith, I bequeath to *A. B. all my Plate*, (for this Word or Pronoun poſſeſſive [*My*] hath the Force of the preſent Time [f];) now ſuppoſe the Teſtator at the Time when the Will was made, over and beſides the Plate which he did then poſſeſs, (which he might juſtly call *Mine*, not only in reſpect of his Title thereunto, but alſo of his Poſſeſſion thereof,) had bought certain *other Plate*, which was not then delivered unto him when the Will was made: In this Caſe, foraſmuch as it is likely, that if the Teſtator had been asked, whether he meant that *A. B.* (to whom he had bequeathed his Plate) ſhould have that Plate alſo which he had bought, but was not poſſeſſed of, he would have anſwered that he meant of that Plate alſo; which is very probable, the rather for that he could not but know that ſuch Plate he had bought; therefore in this Caſe the Legatary hath Right *to this bought Plate undelivered, as well as to the other* [g]; and that by Force of the conjectured Meaning of the Teſtator, though his Words did not extend thereunto [h]. Which Meaning doth rule eſpecially in Wills and Teſtaments, enlarging, reſtraining, interpreting and directing the ſame in every Reſpect [i]. Whereunto this may be added for a Rule, than which there is not any other more apt or neceſſary for the Interpretation of Wills and Teſtaments, namely, That where it is likely that the Teſtator, whiles he is making of his Will, if he had been asked, whether he would have thus or thus diſpoſed, would have anſwered affirmatively; there the Caſe is not to be deemed omitted, nor the Thing undiſpoſed [k]. Howbeit this Rule of collecting the true Meaning of the Teſtator by ſuch ſuppoſed Queſtions and Anſwers, as it is very ready and profitable, if it be diſcreetly handled by a Judge with leaden Feet; ſo on the contrary, there is not a more dangerous Doctrine to be obſerved, or a more erroneous Guide to be followed, by him eſpecially who is ſo ſwift of Apprehenſion, that he needeth a Bridle rather than a Spur [l].

If there be any other Limitations of this Rule, (as ſome Writers do ſet down more in Number [m], yet they are ſuch as (I think) may eaſily be reduced to one of theſe Six before recited; or ſuch as I ſuſpect the Soundneſs thereof, the Laws of this Realm conſidered, and therefore not ſo neceſſary to be known.

The Teſtator being ſeiſed of Ten Acres of Land, deviſed *all his Lands* to *Henry Brett*, and his Heirs, and afterwards purchaſed *Twelve Acres more*; the Deviſee died, and then the Teſtator told his Son *Henry*, that *he ſhould be his Heir, and have all his Lands*, as his Father ſhould, if he had lived: Adjudged that he ſhould not have the *new purchaſed Lands*, for thoſe did not paſs either by the Words, or the Intention of the Teſtator, to be collected out of his Words; they did not paſs by his *Words*, becauſe he having Ten Acres when he made his Will, and having deviſed *all his Lands*, thoſe Words were ſatisfied by paſſing the *Ten Acres*; and there were no Words in the Will by which his Intention might appear to paſs the *new purchaſed Lands*; he could not intend it when he made his Will, becauſe he had not the Lands at that Time.

And ſo it was held in *Butler* and *Baker*'s Caſe, that the new purchaſed Lands would not paſs by the [n] Statute of Wills, by which it is enacted, that all Perſons *having a ſole Eſtate, &c.* where the Word *Having*

[e] Mant. ubi ſupra.

[f] Menoch. de præſump. l. 4. præſ. 127. n. 35.

[g] Caſtr. conſ. 132. vol. 1. n. 3. Mant. de conject. ult. vol. l. 3. tit. 11. n. 22, 23, 24. Socin. Jun. conſil. 98. vol. 3.

[h] Caſtr. & Mantic. ubi ſupra.

[i] Vide quæ ſupra a nobis ſcripta ſunt parte prima, §. 3. n. 29.

[k] Caſum omiſſum pro expreſſo haberi, quando verisimiliter teſtator ita diſpoſuiſſet, ſi interrogatus fuiſſet, magna authoritate probat Mantic. de conject. ult. volun. l. 3. tit. 19. n. 1, 2, 3, 4.

[l] Mantic. ibidem, n. 5, 6, 7. &c.

[m] Mant. d. l. 3. tit. 11. ubi videre licet duodecim limitationes regulæ ſuperius traditæ.

Brett verſus *Rigden*, Plowd. 342.

3 Rep. 25. Moor 254. S. C. 1 And. 348. S. C. Poph. 87. S. C.

[n] 32 H. 8.

Having imports the very *Time* of the Ownerſhip, and that the Teſtator muſt *have the Lands* at the Time of the Publication of his Will.

Thompſon v. *Thornton*, 2 Leon. 120. 1 And. 188. S. C.

T. S. ſold Lands to one *Thornton*, who, before he had any Conveyance executed, ſold the ſame Lands to *Thompſon*, who paid Part of the Purchaſe-Money to *T. S.* and other Part to *Thornton*, and then *T. S.* alone, without *Thornton*'s Joining with him, conveyed the Lands to *Thompſon*, who not along afterwards deviſed all his Lands which he had purchaſed of *Thornton*, to *E. G.* and his Heirs; now, tho' in Strictneſs, theſe Lands were not purchaſed of *Thornton*, but of another: yet having agreed with him for the Purchaſe, and paid Part of the Purchaſe-Money, this may be properly called a Purchaſe, and a *Having* the Lands, and ſo they ſhall paſs.

Beckford v. *Parncott*, Moor 404. Cro. Eliz. 493. S. C. Gouldſ. 150. S. C.

The Teſtator having Four Daughters, and being ſeiſed in Fee of Lands in *Aldworth* in *Berks*, deviſed all his Lands in *Aldworth* to his Two eldeſt Daughters in Tail, and made them joint Executrixes; afterwards he purchaſed more Lands there; and one of his Relations deſiring he might have the new purchaſed Lands, he replied, that he ſhould not, but that they ſhould go with his other Lands to his Executrixes; it was inſiſted after the Death of the Teſtator, that the new purchaſed Lands did not paſs by this Will, becauſe the Statute of Wills enables a Man to deviſe what he *hath*; but it is plain he had not theſe Lands when he made the Will; but in this Caſe the Will being read to him, and he approving it, that amounted *to a* ° *new Publication*, and ſo the new purchaſed Lands paſſed.

° *If it had not been for this new Publication, the Lands would not paſs*, 4 Jac. 2. B. R. *Earle*'s Caſe.

Prideaux v. *Gibbon*, 2 Chan. Rep. 144.

Articles were drawn for a Purchaſe of Lands, and before the Conveyances were executed, the intended Purchaſer deviſed *all his Lands*, &c. *for the Payment of his Debts*, and afterwards the Conveyances were ſealed and delivered; it was decreed that the Deviſe was good, tho' he *had not the Lands* at the Time he made his Will, nor made any new Publication after they were conveyed to him, ſince the Deviſe was for *Payment of Debts*; and the Court declared, where a Man deviſeth *All his Lands for Payment of his Debts*, and afterwards purchaſes more Lands, a Sale ſhall be decreed of the Whole, tho' there were no precedent Articles.

Bunter verſus *Cook*, 3 Salk. 237.

Adjudged that a Deviſe of perſonal Things is good, tho' the Teſtator had them not at the Time of making his Will, becauſe they go to his Executor, and Legacies do not paſs by the Will, but by the Aſſent of the Executor; but a Chattel real, if purchaſed after the Making the Will doth not paſs; and that a Deviſe of Lands is not good, if the Teſtator had them not at the Time he made his Will, for a Man cannot give that which he hath not.

§. XII. Of an unperfect Teſtament.

1. *Two Sorts of unperfect Teſtaments.*
2. *Whether a Teſtament which is unperfect in Reſpect of Solemnity be void.*
3. *When a Teſtament unperfect in Reſpect of Will is void.*
4. *Two Means whereby Teſtaments are ſaid to be unperfect in Reſpect of Will.*
5. *Whether the Teſtament be void which is unperfect by the former of theſe Two Means.*

6. *By the Civil Law, the Teſtament unperfect in Reſpect of Will is void.*
7. *Whether a Teſtament* ad pias cauſas, *being unperfect in Reſpect of Will, be void.*
8. *That which hath Place in Teſtaments* ad pias cauſas, *hath Place alſo in our Teſtaments.*
9. *Whether a Teſtament being unperfect in Reſpect of Will, by the ſecond Means, be void or not.*
10. *What if the Teſtator, after he have declared his whole Will, reſerve ſomewhat to be done at another Time?*
11. *What if the Teſtator, having declared his Teſtament, do ſend for a Notary to write, and die in the mean Time?*

OF imperfect (1) Teſtaments there be Two Sorts: The one imperfect in Reſpect of Solemnity; the other in Reſpect of Will [a]. [a] L. hac conſultiſſima. §. ex imperfecto. C. de teſta. & ibi Paul. de Caſtro, Jaſ. & alii. Boer. deciſ. 240. n. 4. & 5.

That Teſtament is ſaid to be unperfect in Reſpect of Solemnity, which wanteth ſome of the legal Requiſites neceſſary to the Conſtitution and Denomination of a ſolemn Teſtament [b]; of which we have already ſpoken [c]. [b] Sichar. & alii in d. §. ex imperfecto. [c] Supra 1. part. §. 7. & part. 4. §. 23.

That Teſtament is ſaid to be imperfect in Reſpect of Will, which the Teſtator hath begun, but cannot finiſh as he would, being prevented by Death, Infanity of Mind, or other Impediments [d]. [d] Jaſ. Sichar. & alii id d. §. ex imperfecto. L. ſi is qui. de teſta. ff. L. furioſus. qui teſta. fac. poſſ. C.

The (2) Teſtament which is imperfect in Reſpect of Solemnity is utterly void by the Civil Law [e]: But by the Laws Eccleſiaſtical [f], and eſpecially by the general Cuſtom of this Realm [g]; the Teſtament is good without any ſuch Solemnities; ſaving that where Lands, Tenements and Hereditaments be deviſed by Will, the Solemnity of a Writing in the Life-time of the Teſtator is preciſely neceſſary, without the which the Deviſe of Lands, Tenements and Hereditaments is merely void [h]. [e] L. 1. de injuſto teſtam. ff. L. hac conſultiſſima. §. ex imperfecto. C. de teſta. & DD. ibid. Minſing in §. ſed cum paulatim. Inſt. de teſta. ord. n. 12. Jul. Clar. §. teſta. q. 89. [f] c. relatum. el. 1. c. cum. eſſes. de teſt. extr. [g] Tract. de Republ. Ang. lib. 3. c. 7. Lind. in c. ſtatutum. de teſt. lib. 3 provinc. conſtit. Cant. [h] Per Stat. H. 8. an. 32. c. 1. ut refert D. Smith. Tract. ut ſupr. Quod tamen quære.

The (3) Teſtament which is imperfect in Reſpect of Will is ſometimes utterly void; and ſometimes it is good, ſo far forth as it is done: Which Diverſity of Effects doth ariſe by the Diverſity of the Means whereby the Teſtament is imperfect.

If we would therefore know particularly when the Teſtament is utterly void or not, which is imperfect in Reſpect of Will, it behoveth us to take particular View of the ſeveral Means whereby the Will of the Teſtator is made imperfect.

The (4) Means whereby the Teſtament is imperfect in Reſpect of Will ſeem to be Two [i]. The firſt is, when the Teſtator, after he hath begun to make his Teſtament, and intending to proceed farther at that preſent, is then ſuddenly, even whiles he is making his Teſtament, prevented by Death, or Infanity of Mind, or by ſome other Impediment, ſo that he cannot finiſh the ſame according to his Purpoſe [k]. [i] Maſc. Tract. de probac. verb. teſtam. concluſ. 1352. n. 70. ib. ſecundus caſus. Graſſ. Theſaur. com. opin. §. teſtam. q. 19. ubi proponit tres caſus. [k] L. ſi is quis de teſt. ff. L. furioſum. qui teſta. fac. poſſ. C. Jaſ. & Sichard. in L. pen. de inſt. & ſub. C.

The other Means is, when the Teſtator is not hindred at that preſent Time of making his Teſtament, but after he hath begun to make it, deferreth the Finiſhing or Perfecting thereof till another Time, and in the mean Time dieth, or otherwiſe becometh inteſtable [l].

[l] Old. ad conſil. 119. Paul. de Caſtr. conſ. 75. vol. 1. & conſ. 450. vol. 2. Peckius Tract. de teſtam. conjug. l. 1. c. 18.

When (5) the Teſtament is imperfect after the firſt Manner, it may ſeem that the ſame is utterly void, even touching that which is already done; yea, although the Teſtator had appointed an Executor, which is the Subſtance of the Teſtament. And there (6) is no Queſtion but that by the Civil Law it is void, though it were the Teſtament of the Father amongſt his Children [m]. But whether it be void *jure gentium*, and conſequently by that Law which we uſe here in *England*, is a Queſtion: And the Reſolution ſeemeth to depend upon the Verity of another Queſtion; namely, whether a Teſtament *ad pias cauſas* being imperfect with that Imperfection of Will, be good or not. For if a Teſtament *ad pias cauſas* be good, notwithſtanding ſuch Imperfection; then our Teſtaments are alſo good: And if that Teſtament be not good; then ours are likewiſe naught: For theſe Teſtaments *ad pias cauſas* are ruled *ſecundum jus gentium* [n]; and ſo are ours [o].

[m] Bar. Bald. Caſtr. & alii in L. hac conſultiſſima. §. ex imperfecto. C. de teſta. quorum op. com. eſt, ut referunt Jul. Clar. §. teſta. q. 9. & Michael Graſſ. Theſau. com. op. §. teſtam. q. 12.

[n] Panor. in Rub. de teſta. extr. n. 9. Tiraquel. de privileg. piæ cauſæ, c. 3. & c. 5. Corn. conſ. 307. Covar. in c. relatum. el. 1. n. 6. Paul. de Caſtr. conſil. 75. circa medium vol. 1. & conſil. 450. vol. 2. Graſſ. Theſaur. com. op. §. teſt. q. 18. ubi dicit hanc op. com. eſſe jure can.

[o] Dixi ſupra part. 1. §. 9.

Now (7) That a Teſtament *ad pias cauſas*, being imperfect in Reſpect of Will, is utterly void, even touching that which is already done, is holden by a great many Writers, and thoſe of great Authority [p]; whoſe Opinion is [q] highly extolled [r]: Their Reaſon is, becauſe in this Caſe here is Defect of Conſent, without which Conſent no Teſtament is good [s]. There is Defect (ſay they) of Conſent in this Caſe, becauſe Teſtators, whiles they are making their Teſtaments, until they have finiſhed the ſame, do put in and put out, they add, they revoke, and they alter many Things already by them diſpoſed [t]. Other Reaſons alſo they have, which in my Opinion are not altogether ſo forcible [u].

[p] Bald. in rep. L. 1. de ſacroſan. eccle. C. q. 6. Angel. in L. ſi is qui. de teſt. ff. Fulgoſ. conſil. 117. Auth. in c 2. de teſta. extr. Are. in d. L. Si is qui. Boer. deciſ. 240. Vaſq. de ſucceſſ. crea. §. 22. n. 6. Pariſ. conſil. 24. vol. 3. Tho. Gram. deciſ. 62. Sichard. & Curtius Jun. in d. L. hac conſultiſſima. §. ex imperfecto. [q] Jul. Clar. §. teſt. q. 7. Imo magis eſt com. ait Graſſ. [r] Ab hac opinione in prax. non licere recedere, ſcripſit Ruinus conſil. 7. n. 8. vol. 3. fand. op. eſſe non modo com. ſed canonicam & veriſſimam. Laudat Vivius, Theſaur. com. op. verb. teſtam. Tandem magis communem eſſe, aſſerit Graſſ. §. teſtam. q. 19. [s] Sichard. in d. §. ex imperfecto. [t] Clar. §. teſtam. q. 7. [u] Nempe, quod teſt. ratione voluntatis imperfectum non valet inter liberos, ergo nec favore piæ cauſæ. Sed negatur argumentum per ea quæ ſuperius dicta ſunt, prima parte, de privileg. utriuſque teſtamenti.

On the contrary, others, whoſe not only Number is more exceeding, but Authority more excellent, are of this Opinion, that where the Teſtator hath begun his Teſtament, and hath bequeathed certain Legacies *ad pias cauſas*, and intending at that preſent to proceed farther, is then ſuddenly by Death or other Impediment prevented or hindered, that he cannot finiſh his Teſtament; nevertheleſs, thoſe Legacies already made *ad pias cauſas* are not thereby infringed, but do continue ſtill firm and effectual, as if the Teſtator had finiſhed his Teſtament, according to his former Purpoſe [x]: And this their

[x] Bar. & Imola. in. L. is qui. ff. de teſt. Caſtr. conſi. 456. vol. 1. Panor. in c. 1. de ſucceſſ. ab inteſtat. extr. Alex. in L. hac conſultiſſima. §. ex imperfecto. C. de teſt. Are. in § fin. Inſtit. quib. mod. teſta. infir. Jaſ. conſil. 15. vol. 4. Socin. Tract. reg. & ſal. reg. 300. Joh. de An. conſil. 7. Barba. conſil. 42. vol. 4. Calca. conſil. 13. Dec. in c. 1. de fide inſtr. Tiraq. de privileg. piæ cauſæ, c. 7. Mal. de probac. ver. teſt. Covar. in c. relatum. el. 1. de teſta. extr. Surdus, deciſ. 292. n. 15, 16.

their Opinion is teſtified to be more commonly received [y]. The Reaſon of their Opinion is, becauſe touching thoſe Legacies already given, there is no Defect of natural Conſent [z]. For although there be Imperfection of Will in Reſpect of his whole Teſtament, becauſe the Teſtator cannot abſolutely finiſh the ſame according to his Purpoſe; yet in Reſpect of that which is done there is no Imperfection of Will [a], (the perfect is not to be hurt by the imperfect [b].) And albeit Teſtators, whiles their Wills and Teſtaments are in making, do many Times add and diminiſh, and alter divers Things; yet who is able to ſay, that, concerning this or that particular Legacy already given, the Teſtator would have made any Addition, Diminution, or Alteration? The Preſumption is rather to the contrary; for Perſeverance, and not Mutation of Will, is preſumed [c]. Indeed, if it can be proved that the Teſtator did mean at that preſent to alter thoſe Legacies before given, e're he had finiſhed his Teſtament, and could not, being then ſuddenly prevented by Death, or otherwiſe; then the former Opinion hath Place [d], that the Diſpoſition is void; otherwiſe not [e].

[y] Tiraq. tract. de privil. piæ cauſæ, privil. 7. Maſc. de prob. verb. teſt.
[z] Panor. in d. c. 1. de ſucceſſ. ab inteſtat. extra.
[a] Tiraq. de privil. piæ cauſæ, privileg. 7. Dec. in c. 1. de fide inſtr. extr. Surdus, d. deciſ. 292.
[b] c. utile. de reg. jur. extra. Nec obſtat ſi dicatur quod teſtamentum ſit individuum. Hoc verum jure civili, non gentium. Imol. in c. 1. de teſt. ext. n. 22.
[c] L. cum qui voluntatem. ff. de probac.
[d] Palu. de Caſt. in L. jubemus de teſta. & DD. in L. pen. de inſt. & ſub. C. L. ſi is qui. ff. de teſt.
[e] Quia nemo præſumitur habere plus in corde quam in ore. Bald. in

By (8) this now which hath been ſpoken of Teſtaments *ad pias cauſas*, we may judge whether our Teſtaments here in *England* be good or not, when they be imperfect by the firſt Means, *viz.* where the Teſtator, whiles he is in making his Teſtament, after he hath appointed an Executor, or given ſome Legacies, and intending to proceed farther, is even then ſuddenly interrupted and hindred, that he cannot finiſh the ſame accordingly.

When (9) the Teſtament is imperfect by the ſecond Means of Imperfection of Will, that is to ſay, when the Teſtator, after he hath begun to make his Teſtament, doth put off or defer the Finiſhing thereof until another Time, and in the mean Time dieth, or is otherwiſe letted, that he cannot make an End thereof, as he meant; howſoever by the Rigour of the Civil Law the Teſtament in this Caſe may ſeem to be void, even touching that which is already done [f]; yet by that Law which this Realm of *England* doth admit in this Caſe, (I mean *jus gentium* [g],) concerning thoſe Things already diſpoſed, the Teſtament is not void, by the Reaſons before alledged. For as in the former Caſe the Legacies already given are not void, where the Teſtator cannot finiſh his Teſtament as he would at that Time: So in this Caſe, the Legacies before diſpoſed, or the Conſtitution of the Executor before made, doth not become void, where the Teſtator cannot finiſh his Teſtament, as he purpoſed at another Time [h].

[f] Paul. de Caſtr. conſil. 450. vol. 2.
[g] Jus Gentium etiam hodie ubiq; gentium vigere, niſi ubi vel jure ſcripto vel conſuetudine contrarium obtinent, probatur per Zaſ. in L. Jus civile. ff. de juſtic.
[h] Cum igitur eadem ratio in utroque caſu militet, idem etiam jus conſtitui oportet. Gravetr. conſil. 150.

Nec caſus diverſitas, ſed rationis identitas, inſpici debet. Aymo,

Much leſs (10) is that Teſtament void, where the Teſtator having declared his whole Will, and intending to do no more at that preſent, reſerveth ſomewhat to be done at another Time, and in the mean Time dieth: For even by the Civil Law in this Caſe the Teſtament is perfect, notwithſtanding ſuch Reſervations [i]. Wherefore if the Teſtator, after he hath made his Will, doth ſay that he will add, diminiſh or alter any Thing in his Will the next Day, and die in the mean Time,

[i] Aret. Jaſ. & Sichar. in L. pen. C. de inſtit. & ſub. Graff. Theſaur. com. op. §. teſt. q 12. n. 4. quam

ſententiam communiter receptam monſtrat poſt Lud. Zant. Reſponſ. pro ux. n 302.

Time, before any ſuch Additions or Alterations be made; the Teſtament is not to be noted of Imperfection by any ſuch Reſervation of adding, diminiſhing, or altering his Teſtament[k]; becauſe theſe Things may be done by Way of Codicil, without which the Teſtament is ſufficiently perfect[l]. And eſpecially the Teſtament remaineth firm and effectual, where the Teſtator doth over-live the Time by him preſcribed for ſuch Additions, Diminutions, or Alterations; for then he is preſumed to have repented him of ſuch Additions, by not doing the ſame when he might[m].

[k] Simo de Prætis de Interp. ult. vol. l. 1. fol. 195. Jo. de Ana. conſ. 44.
[l] Sich. in L. pen. de inſtit. & ſub. C. in fin.
[m] Alex. conſ. 74. vol. 1. Old. de action. claſſ. 5. fol. 498. Paul. de Caſt. in L. jubemus. C. de Teſta. Menoch. Tract. de præſump. l. 4. præſump. 15. n. 5.

Hereunto (11) it may be added, that where the Teſtator, having declared his whole Will before Witneſſes, cauſeth the Notary or Scribe to be called unto him, intending to have the ſame committed to Writing, for a more ſufficient Proof of his Teſtament, and before the Coming of the Notary, dieth; in this Caſe the Teſtament is good, and ought to prevail as a nuncupative Teſtament[n]. Nevertheleſs, if it may be proved, that the Teſtator did reſtrain himſelf to the written Teſtament, and that it was his Will and Meaning, that it ſhould not be of Force, unleſs it were written; then, the Teſtator dying in the mean Time before it be written, the Teſtament ſhall not be allowed as a nuncupative Teſtament, and ſo not at all[o]. But it is not preſumed, by ſending for a Notary, that otherwiſe the Teſtator would that his Teſtament ſhould take no Place, unleſs it were written[p]; but rather for a more ready Proof of his Will[q].

[n] Alex. in L. hac conſultiſſima. §. ex imperfecto. C. de teſt. Graſſ. Theſaur. com. op. q. 12. n. 6. Mantic. de conject. ult. vol. l. 1. tit. 7. n. 6. ubi oſtendit hanc. op. eſſe comm.
[o] Bar. poſt Dyn. in L. ult. ff. de jur. codic. Old. conſil. 119. Caſtr. conſil. 75. vol. 1. & conſ. 450. vol. 1. Peckius de teſta. conjug. l. 1. c. 18. ibi tertia concluſio.
[p] Covar. in c. relatum. el. 1. de teſta. ext. n. 17. Graſſ. Theſaur. com. op. §. teſt. q. 11. n. 1.
[q] Graſſ. d. §. teſt. q. 1, 2. in fin. Mantic. d. c. 7. n. 6.

Rider's Caſe, Moor 874. *Brook* verſus *Ward*, Dyer 310.

A Will was made in Writing, but before it was publiſhed, the Teſtator ſaid he would alter or add ſomething to it; in ſuch Caſe, if he die before any Alteration made, 'tis not his Will; but if he die after the Publication, and without any Alteration, then 'tis his Will.

§. XIII. Of the Defect in the Teſtator's Meaning.

1. *No Teſtament good without a firm Reſolution of the Mind to make a Teſtament.*
2. *Words uttered raſhly or unadviſedly do not import a firm Purpoſe in the Teſtator.*
3. *It is the Mind, and not the Words, which giveth Life to the Teſtament.*
4. *What is to be conſidered to prove a firm Intent of making a Teſtament.*
5. *Of the Draught of a Will in Writing.*
6. *If a Writing be found in Manner of a Will, whether is it preſumed the very Will, or but a Draught thereof?*

[r] L. Divus. ff. de mil. teſt. §. plane. *Inſt. de mil. teſt.*

IF the (1) Teſtator have not *animum teſtandi*, that is, *a firm Reſolution or adviſed Determination of making his Teſtament*, his Teſtament is void, or rather no Teſtament[r]. And therefore (2) if

any Man raſhly, unadviſedly, incidently, jeſtingly, or boaſtingly, and not ſeriouſly, nor with a firm Purpoſe to make his Will, do ſay and affirm (as oftentimes it happeneth) that he will make ſuch a Man his Executor, or will leave unto him all his Goods, this is no Teſtament [s]: For (3) it is the Mind, and not the Words of the Teſtator, that giveth Life to the Teſtament [t]. Which (4) Mind or earneſt Purpoſe ought to be proved by Circumſtances [u]: As, that the Teſtator was very ſick when he ſpake theſe Words [x]; or that he did require the Witneſſes to bear Witneſs thereof [y]; or that he framed and ſettled himſelf earneſtly to the Making of his Teſtament [z]; or by other Circumſtances of like Effect [a]: Wherein the Judge is to conſider the Condition of the Perſon. ſpeaking the Words, the Time, the Place, the Occaſion, the Manner of Speech, and in whoſe Preſence [b]; and namely, whether the Words were of the preſent or future Time [c]. And if the Words be of future Time, then whether they be ſuch as do import the Accompliſhment of the Act, or but the Beginning only: For thoſe of the former Sort being executory, are equivalent to Words of the preſent Time [d]. By which Circumſtances the Judge may the better collect, whether he who uttered the Words had a Mind or Purpoſe to make his Teſtament or not [e].

[s] L. ult. ff. de teſt. & DD. ibi, & in L Divus. & §. plane. Hottom. conſ. 5. vol. 1. Socin. Jun. conſil. 179. vol. 2. Par. conſil. 89. vol. 3. Hiero. Fran. in d. L. quicq. de reg. jur. ff.

[t] Mant. de conject. ult. vol. l. 2. tit. 15. in fin. L ex feod. ff. de hær. inſt. Atque huc pertinent quæ ſuperius a me ſcripta ſunt in explic. definitionis teſt. verb. ſent. 1. par. §. 3.

[u] Gloſſ. in §. plane. Inſt. de teſt. mil.

[x] Gloſſ. in L. Divus. ff. de mil. teſt.

[y] Ead. gloſ. in d. L. Divus. [z] Gloſ. in d. L. plane. [a] L. Pamphilio. §. propoſitum eſt, de leg. 3. & DD. ibid. [b] Menoch. de arbitr. Jud. l. 2. centur. 5. caſ. 496. [c] Paul. de Caſtr. in L. fin. ff. de teſt. Hottom. d. conſil. 5. [d] Alciat. Ripa, & alii in L. ſervi elect. ff. de leg. 1. [e] Menoch. d. caſ. 496. ex quo abunde haurire poteris, unde ſitim tuam extinguas.

As Words (5) only, withouta conſtant Purpoſe of making a Teſtament, do not make one; ſo the Writing which is prepared for a Draught of the Teſtator's Will only, or for a more ready Direction of the Teſtator whereby to make his Teſtament afterwards, is no more to be accounted a Teſtament, before it be acknowledged by the Teſtator for his Teſtament [f], than is the Draught of a Sentence to be taken for a Sentence, until it be pronounced by the Judge [g]; or the Draught of an Obligation is to be accounted for an Obligation, before it be ſealed and delivered by the Obligee as his Act and Deed [h].

[f] L. ex ea ſcriptura. de teſt. L. fidei commiſſa. §. 1. de leg. 3. ff.

[g] L. 2. & 3. de ſent. ex breviloqua recit. C. c. fin. de re jud. 6.

Vantius de nullitat. viz. de null. ex defectu proceſ. &c. n. 69, 70. Bald. in d. L. fidei commiſ. §. 1. Everard. conſ. 155. n. 8. [h] L. contract. C. de fide inſtr.

Notwithſtanding I do not hereby mean, that it is always neceſſary the Teſtator ſhould acknowledge before Witneſs the Teſtament by him written to be his Laſt Will and Teſtament, or that it is always neceſſary that he ſhould ſubſcribe his Name, or put his Seal thereunto; for the Teſtament written with the Hand of the Teſtator may be good without any of theſe Things, as heretofore I have confirmed [i].

[i] Supr. par. 4. §. 25.

T. S. by *Indenture* made between him of the one Part, and *Orbell* and *Skin* of the other Part, declared his Intention to raiſe Portions for his Children, and to pay his Debts, and ſettled his Lands accordingly, and made Two Executors in Truſt to ſell his Lands for the Purpoſes aforeſaid, and publiſhed and declared this Indenture to be his Laſt Will, and died; and this was decreed to be a good Will; which Decree is agreeable to the Civil Law: It is true, [k] Formalities which are made eſſential by the Law to the very being of a Will, cannot be diſpenſed withal in Equity; and ſuch are, that

Hickſon v. *Witham*, Chanc. Caſes 195. Hill. 27 Car. 2. 1 Chanc. Caſes 248. 1 Mod. 117.

[k] 29 Car. 2. cap. 3.

the Will *muſt be written in the Life-time of the Teſtator, that it muſt be ſigned by him, or by ſome Perſon in his Preſence, and by his Direction, in the Preſence of Three Witneſſes, and that they muſt ſubſcribe their Names in his Preſence:* But the Law hath not directed in *what Form of Words* the Writing purporting a Will ſhall be made; ſo that any written Inſtrument by which the Intention of the Party appears to give or diſpoſe any Thing, and having all the Formalities required by Law, as *Signing*, *Sealing*, *Witneſſes*, *&c.* ſhall amount to a Will.

Dom. 2. Vol. 18.

Smith verſus *Aſhton*, Chanc. Caſes 273. Mich. 28 Car. 2.

The Husband by a Marriage-Settlement had *Power to charge his Lands with any Sum not exceeding* 500 *l.* and this was for Portions for his Daughters; and he having prepared *Notes in Writing*, purporting his Will, and having declared that thoſe Notes were the Effect of his Will, died before it was drawn up in the Form of a Will, and before it was executed; yet this was decreed to be a good *Execution of his Power.*

But now this Doubt may ariſe: What (6) if a Writing be found written indeed with the Hand of the Teſtator in Manner of a Will, wherein he hath diſpoſed his Goods, and appointed an Executor, but the Writing is neither ſealed with the Teſtator's Seal, nor ſubſcribed with his Name, nor by him acknowledged before Witneſſes to be his Laſt Will? Whether ſhall this Writing be accounted to be a Draught of the Teſtator's Will, or the Teſtament it ſelf? I ſuppoſe that the Solution of this Queſtion reſteth in the Variety of Circumſtances. For if the Writing be unperfect [l], for that perhaps the Teſtator doth leave off in the Midſt of a Sentence [m], and without any Date [n]; or if the ſame be written with ſtrange Characters [o], or if the ſame be written in Paper, and great Diſtance betwixt every Line, divers Emendations and Corrections made betwixt the Lines [p]; if alſo the ſame be found amongſt other Papers of ſmall Value or Account [q]; by theſe Circumſtances it ſeemeth rather a Draught or Preparation to a Teſtament, than the Teſtament it ſelf [r]. But on the contrary, if the Writing be perfect or fully finiſhed, having a certain Date of the Day, Month, and Year, and be written with uſual and accuſtomed Letters in Parchment, without Corrections, and with ſmall Diſtance betwixt the Lines, and alſo found in ſome Cheſt of the Teſtator, among other Writings of the Teſtator of great Value and Moment; by theſe Circumſtances it ſeemeth rather to be the very Teſtament it ſelf than a Draught only [s].

[l] L. ex ea ſcriptura. de teſt. L. fidei commiſ. de leg. 3. ff.

[m] Bald. & Angel. in d. L. ex ea ſcriptura. Everard. conſ. 155. n. 9.

[n] Auth. quod ſine. C. de teſta. Everard. d. conſil. 155. Non tamen affirmo, neceſſarium eſſe ut tempus inſcribatur, prout jus civile in omni teſtim. etiam inter liberos exegit; ſed quia communiter apponi ſolet tempus a noſtrat. in ſuis teſt. ſcriptis, omiſſio igitur temporis (argumento a communiter accidentibus) denotat præparat. rei potius quam ipſam rem.

[o] L. quoties. [q] 1. ff. de hær. inſt. Bar. Bald. Ang. & alii ibidem. Non quod idcirco vitioſum ſit teſt. quia ſcriptum notis vel Zypheris inuſit. maxime jure gentium attento: Sed quod deducto argumento a communiter accident. præparatio magis quam res ipſa videatur, quia perpauci vera ſua teſt. literis vel charact. inuſ. conſcrib.

[p] Paul. de Caſtr. Sich. & alii in L. contract. C. de fide inſtr. Lupus Aneg. 30.

[q] DD. in D. Auth. quod ſin. Men. præſ. 7.

[r] Ever. d. conſ. 155.

[s] DD. in D. Auth. quod ſine. Ever. de conſ. 155. Add: q. ſup. ſc. par. 4. §. 25.

§. XIV. Of a later Teſtament.

1. *Divers Means whereby the Teſtament, being good at the firſt, is afterwards infringed.*
2. *A Man may make as many Teſtaments as he liſts.*
3. *Only the laſt Teſtament is of Force.*
4. *This Concluſion, that the later Teſtament doth infringe the former, diverſely extended.*
5. *The ſame Concluſion diverſely reſtrained.*

6. *Of*

6. *Of the Clauſe derogatory of future Teſtaments.*
7. *Queſtions about Clauſes derogatory.*
8. *Of Clauſes derogatory, ſome are derogatory of the Power of making Teſtaments, ſome of the Will.*
9. *When the Clauſe is derogatory of the Power of making Teſtaments, Mention or Revocation thereof is not neceſſary.*
10. *When the Clauſe is derogatory of the Will of making Teſtaments, then it is needful to make Mention thereof.*
11. *Certain Caſes wherein Mention or Revocation of the Teſtament derogatory is not neceſſary.*
12. *Three Manner of Revocations, general, ſpecial, and ſingular.*
13. *The Force of the general Revocation.*
14. *The Effect of the ſpecial Revocation.*
15. *The Effect of the ſingular Revocation.*
16. *The Effect of the general Mention.*
17. *The Effect of particular Mention.*
18. *How a Teſtament may be revoked, wherein is a ſpecial Clauſe derogatory circumſcribed with certain Limits.*
19. *What is chiefly to be obſerved about thoſe Teſtaments wherein be Clauſes derogatory.*
20. *Clauſes derogatory of ſmall Force in the Teſtaments of ſimple Perſons.*
21. *What if Two Teſtaments appear, but it doth not appear whether of them is later?*

IT hath been ſignified already, That (1) a Teſtament which is good and lawful at the Beginning, may afterwards become void by divers Means [a]: As by the Making of a later Teſtament [b]; and by revoking [c], and cancelling [d] the Teſtament made; by Alteration of the Teſtator's State [e]; by forbidding or hindering the Teſtator to make another Teſtament, or to correct the former [f]; and by divers Means hereafter enſuing [g].

Concerning the firſt of theſe Means, that is to ſay, the Making of a later Teſtament, ſo large and ample is the Liberty of making Teſtaments, that (2) a Man may as oft as he will make a new Teſtament, even until his laſt Breath [h]; neither is there any Caution under the Sun to prevent this Liberty [i]. But no Man can die with Two Teſtaments [k]; and therefore (3) the laſt and neweſt is of Force [l]: So that if there were a Thouſand Teſtaments, the laſt of all is the beſt of all, and maketh void the former [m].

[a] Supr. ead. par. §. 1.
[b] In hoc ipſo §.
[c] Infra §. 15.
[d] Infra §. 16.
[e] Infra §. 17.
[f] Infra §. 18.
[g] Infra §§. 19, 20. cum ſequen. uſque ad finem libri.
[h] L. ff. de adim. leg. Mant. de conject. ult. vol. l. 12. tit. 1. n. 1.
[i] Bar. in L. ſi mihi. §. in leg. ff. de leg. 1. Old. de action. claſſ. 5. in princ. fo. 494.
[k] L. jus noſtrum. de reg. jur. ff. L. ſane. C. de teſta.
[l] §. poſteriore, inſt. quib. mod. teſta. infir.
[m] Pariſ. conſil. 10. l. 3. n. 4.

This (4) Concluſion, that the latter doth infringe the former, is diverſely inlarged. Firſt, the later Teſtament doth infringe the former, though the Executor of the later do refuſe the Executorſhip or die, either during the Life of the Teſtator, or after his Death [n]: For it is ſufficient that once he might have been made Executor [o]. Secondly, the later Teſtament doth infringe the former, albeit the Prince or Emperor himſelf were appointed Executor of the former [p]. Thirdly, the later Teſtament doth make fruſtrate the former, albeit the former were a written Teſtament, and the latter but a nuncupative Teſtament [q]. Fourthly, the later doth infringe the former, albeit there be no Mention in the ſecond Teſtament of revoking the former [r].

[n] d. §. poſteriore. inſtit. quib. mod. teſta. infir. Maſc. tract. de prob. concl. 1282. n. 2.
[o] Eod. §. poſteriore.
[p] L. ſi quis. C. qui teſta. fac. poſſ.
[q] Vaſq. de ſucceſſ. reſoluc. l. 1. §. 1. n. 26, 27. Perk. tit. teſt. fo. 92. Dyer fo. 310.
[r] Minſing. & Vigl. in d. §. poſteriore.

Fifthly, the later Teſtament doth revoke the former, albeit in the former there be a Clauſe derogatory of Wills and Teſtaments afterwards to be made [s]. But then, whether it be neceſſary that in the later Teſtament there be Mention or Revocation of that former Teſtament, or of the Clauſe derogatory, is hereafter declared [t]. Sixthly, the later Teſtament doth make void the former, albeit there be Twenty Witneſſes of the former; and but Two of the later [u]. Seventhly, the later Teſtament doth take away the former, albeit in the former Teſtament the Executor is appointed ſimply or without Condition, and in the later conditionally, and the ſame Condition alſo violated [x]; ſo that the Condition be of ſomething then to come at the Time when the Condition was made. But if the Executor of the later Teſtament be made upon ſome Condition then preſent, or paſt, the Condition not exiſting, the former Teſtament is not revoked [y]. Eighthly, the later Teſtament doth make void the former, albeit the Teſtator have ſworn not to revoke the ſame [z], the Oath being alſo revoked together with the Teſtament [a].

[s] Bar. in L. ſi mihi & tibi. §. in legatis. ff. de leg.

[t] Infra eod. §. n. 7, 8, 9, &c.

[u] Covar. in Rub. de teſt. extra. part. 2. in prin. Vaſ. de ſucc. reſol. l. 1. §. 1.

[x] d. §. poſteriore. Inſt. quib. mod. teſt. inf.

[y] Minſing. in d. §. poſt. n. 6. adde Hier. Pant. l. 2. quæſt. controv. q. 10.

[z] Covar. in Rub. de teſt. extr. par. 2. n. 19.

[a] Jul. Clar. §. teſt. q. 87. & hoc, inquit, eſt valde notandum.

2 Salk. 592. Caſes adjudged 143. S. C. Hardr. 374. S. C. 3 Mod. 203. S. C. by the Name of *Hitchins* and *Baſſet*.

Anno 1644. Sir *Henry Killigrew* made a written Will, by which he deviſed his Lands as therein mentioned; and upon a Trial in Ejectment, the Jury found a Special Verdict, (*viz.*) *That in the Year* 1645, *the ſaid Sir* Henry Killigrew *made another Will in Writing, but that he did not deviſe any Lands by this Laſt Will*, &c. Upon arguing this Verdict, it was objected, that it muſt be intended the Teſtator deviſed his Lands by this Will, becauſe it was in *Writing*, and that this Verdict was void, becauſe it was in the *Negative and ſuperfluous*; now if the Teſtator deviſed his Lands by this laſt Will, it muſt neceſſarily be a Revocation of the firſt: But adjudged that it was not a Revocation of the firſt Will, becauſe both may be conſiſtent and ſtand together, for a Revocation muſt always be taken according to the Subject-Matter; as for Inſtance; where the laſt Will cannot ſtand with the firſt, and the Teſtator muſt have *Animum revocandi* to make the Revocation effectual, as well as *Animum teſtandi* to make a good Will; and ſince he may have ſeveral Lands in ſeveral Counties, he may by one Will diſpoſe his Lands in one County, and by a ſecond Will deviſe his Lands in another County, and by this laſt Will confirm the firſt; therefore where the Matter ſtands indifferent, it can never be intended that a Will in Writing, and made with all the Solemnities requiſite, and appearing ſo to be made now in Court, ſhall be revoked by a ſubſequent Will which doth not appear at all.

Colt verſus *Dutton*, Sid. 2.

The Teſtator deviſed his Lands to *W. D.* in Tail, and afterwards by a ſubſequent Will he deviſed the ſame Lands to *Elizabeth* his eldeſt Daughter for Life, Remainder to her firſt, ſecond, and third Sons in Tail Male, and gave a Rent-charge of 1000 *l. 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; adjudged that this *Republication* of the firſt Will was a Revocation of the laſt.

The Reſtrictions (5) of this former Concluſion are theſe. Firſt, the later Teſtament doth not make void the former, when the later is unperfect in Reſpect of the Teſtator's Will [b], and not in Reſpect of Solemnity [c]. Secondly, when it is vehemently ſuſpected that the

[b] §. ex eo. inſt. quib. mod. teſt. infr. L. ſancimus. c. de teſta.

[c] Supra hoc ipſo §. Ampliac. 3. & 6.

Teſtator was compelled to make the later Teſtament by Fear or Violence[d]. Thirdly, when it is ſuſpected that the Teſtator was induced to make the later by Fraud or Deceit[e]. Fourthly, the later Teſtament doth not take away the former, the later being made at the Interrogation or Suggeſtion of ſome other Perſon[f]; eſpecially when the Teſtator is very ſick, and in Peril of Death[g]: For then it doth not take away the former made by the proper Motion of the Teſtator[h], unleſs it appear plainly of the expreſs Will of the Teſtator to revoke the former[i]; or unleſs the Teſtator himſelf did dictate the Teſtament[k]; or unleſs the later Teſtament be in Favour of the Teſtator's Children, or others who were to have the Adminiſtration of his Goods if he died Inteſtate[l]. Fifthly, where the Teſtator hath made two Teſtaments, a former and a later, both being written, and the ſame Teſtator afterwards lying ſick upon his Death-bed, ſome Neighbours of his preſenting to the Teſtator both the Teſtaments, willing him to deliver them which of theſe Teſtaments he will ſhall ſtand for his Laſt Will, if the Teſtator, being of perfect Mind and Memory, ſhall deliver to them the former Teſtament; in this Caſe the Teſtament ſo delivered ſhall be the Teſtator's Laſt Will, albeit it were firſt made[m]. Sixthly, the ſecond Teſtament doth not revoke the former, when the ſecond Teſtament doth not in any wiſe diſſent from the former, but agreeth with the ſame in all Points; eſpecially if the later were made very ſhortly after the former, for then they both ſeem but one Teſtament in divers Writings[n]. Seventhly, the former Teſtament is not revoked, when in the later Will there be no Executors named; for then the later is but a Codicil or Addition to the former Teſtament, wherein Executors be named[o]. Eighthly, the former Teſtament is not revoked by the later, where the Teſtator doth take an Oath not to revoke the former, unleſs there be expreſs Mention of the ſame Teſtament with the Oath[p]. Ninthly, the later Teſtament doth not take away the former, when it is made in Heat of Anger and Diſpleaſure conceived by the Teſtator againſt the Executor of the firſt Teſtament, whereas afterwards they be reconciled and joined in Amity as before[q]. Tenthly, the (6) former Teſtament, wherein is a Clauſe derogatory of Wills and Teſtaments afterwards to be made, (as if the Teſtator ſay, *Whatſoever Teſtament I ſhall hereafter make, I will that the ſame be of no Force*, &c.) is not always infringed by the later Teſtament, unleſs there be ſufficient Mention or Revocation of the former Teſtament or Clauſe derogatory[r].

[d] Simo de Præt. de interp. ult. vol. l. 4. fo. 226. n. 49. Sed an ſufficiat prob. per unic. teſtem, vide ibidem.
[e] Sim. de Præt. ubi ſup. & ſup. ead. part. §. 3.
[f] Zaſ. conſ. 3. vol. 1. n. 41. Aymo conſ. 10. n. 13. Apoſtil. ad Ripam in L. 1. §. ſi quis ita ff. de ver. ob. n. 9. ubi dic. hanc. op. eſſe com. & ſupr. ead. part. §. 4.
[g] Soc. Jun. conſ. 148. vol. 2. n. 15.
[h] Vide quæ ſcripſi ſup. part. 2. §. 26.
[i] Gabriel, l. 4. com. concluſ. 2. n. 9. poſt. Ruin. conſ. 12. n. 11. vol. 2. Menoc. l. 4. præſump. 8.
[k] Gabriel. ib. n. 21. in fin. Menoc. ubi ſupr.
[l] Soc. Jun. conſ. 144. n. 5. vol. 2. Dec. conſ. 489. Reuſuerus tra. de teſt. par. 6. c. 20. n. 25.
[m] Perk. tit. teſt. fo. 99.
[n] Vigl. in d. §. poſt. Inſt. quibus modis teſt. infir.
[o] Inſt. de codic. vide ſupra part 1. §. 5.
[p] Vaſq. de ſucceſſ. reſoluc. l. 1. §. 1. n. 32. Graſſ. Theſaur. com. op. §. teſt. q. 86. Jul. Clar. §. teſt. q. 64. n. 5. Vide Menoc. de præſ. l. 4. præſ. 166. n. 63.
[q] L. quicquid. de reg. jur. ff. Mant. de conject. ult. vol. l. 12. tit. 1. n. 25.
[r] Gloſ. in L. ſi mihi & tibi §. in lega. ff. d. leg. 1. quam commun. receptam dicit Jaſ. in L. Horatius ff. de lib. & poſthu.

If you demand in what (7) Caſes Revocation is to be made of the former Teſtament having a Clauſe derogatory, and in what Manner this Revocation ought to be made, and is ſufficient for the Revoking of the former Teſtament with the Clauſe derogatory: Surely this Queſtion, eſpecially concerning the Manner of Revocation to be made in the ſecond Teſtament, is very difficult, and ſuch as in the Anſwering whereof the Writers do contradict one another very ſtrongly[s]; ſo that the Victory is very doubtful, and very hard it is to know whether Opinion is truer, or more commonly received. Others, labouring to reconcile theſe Contradictions, and to pacify theſe Contentions, have waded ſo for fine and dainty Diſtinctions, that they ſeem to ſwim up and down, and to float hither and thither, I know not whither, in a deep and bottomleſs Sea of intricate and confuſed Divi-

[s] Ut patet per Cov. in Rub. de teſt. extra. part. 2. & per Jul Clar. §. teſt. q. 99. & per Graſſ. Theſaur. com. op. §. teſt. q. 89. & per Mant. de conject. ult. vol. l. 12. tit. 8.

[t] Bar. in L. ſi quis, in prin. de leg. 3. Mich. Graſſ. §. de teſt. q. 89. DD. in L. ſi mihi & tibi. §. in leg. ff. de leg. 1.

Diviſions[t]: So that if a Man would adventure to follow them to the End of their Voyage, he might well doubt whether ever he ſhould obtain any Haven or ſafe Landing. Wherefore for mine own Part, I thought to wade no farther from the Shore than I ſhould find faſt Footing, and where I might be within the Reader's Reach.

Concerning the Queſtion therefore, firſt of all, we are to underſtand, (8) that of Clauſes derogatory there be two Sorts; the one derogatory of the Power of making Teſtaments, the other derogatory of the Will of making Teſtaments[u]. Example of the firſt is, when the Teſtator uſeth theſe or the like Words, *I do from henceforth renounce the Power of making any other Teſtament:* Or thus, *I Will that hereafter I have no more Liberty or Authority to make more Wills or Teſtaments*, &c. Example of the ſecond, when the Teſtator uſeth theſe or the like Words, *If I make any Teſtament hereafter, I Will that the ſame be of no Force:* Or thus, *If I make any Teſtament hereafter, except therein I write the Lord's Prayer, my Mind and Will is that the ſame be void and of none Effect*[x]. The Uſe of this Diſtinction or Difference betwixt Clauſes derogatory of Power and of Will is this.

[u] Clar. Graſ. Covar. ubi ſupra. DD. in d. §. in legatis.

[x] DD. in d. §. in leg. Covar. in d. Rub. Clar. & Graſ. ubi ſupr.

If (9) the Clauſe be derogatory of the Power or Liberty of making of Teſtaments, and afterwards the Teſtator makes another Teſtament, it is not needful therein to make any Mention or Revocation of the former Teſtament, or Clauſe derogatory therein contained[y]; for the former is taken away by the ſecond, as if there had not been any ſuch Clauſe derogatory therein at all. The Reaſon is, becauſe the Clauſe derogatory of Power of making Teſtaments is utterly void in Law, nor can a Man renounce the Power or Liberty of making Teſtaments[z]; neither is there any Caution under Heaven to prevent this Liberty[a], which alſo endureth whiles any Life endureth[b], as hath been aforeſaid.

[y] Bar. in L. ſi quis, in prin. de leg. 3. Jaſ. in d. §. in leg. Clar. §. teſt. q. 99. n. 2. Graſ. §. teſt. q. 89. n. 3.

[z] Bar. d. L. ſi quis. n. 4. Clar. & Graſ. ubi ſupr.

[a] Bar. in d. §. in leg. Old. de action. claſſ. 5. in prin. fo. 497. Mant. de conject. ult. vol. l. 12. tit. 1. n. 1.

[b] L. 4. ff. de adimen. legatis.

If (10) the Clauſe be derogatory of the Teſtator's Will, then it is neceſſary that in the later Teſtament there be Mention or Revocation of the Teſtament with the Clauſe derogatory, otherwiſe the former Teſtament is ſtill in Force[c]. The Reaſon is, becauſe there is preſumed a Defect of the Teſtator's Will in the ſecond Teſtament, and that his Meaning is not to have the former revoked, without making Mention of the former derogatory Teſtament[d].

[c] Bar. in L. ſi quis. de leg. 3. Clar. §. teſta. q. 99. Graſſ. §. teſta. q. 89.

[d] Covar. in d. Rub. de teſt. extra. part. 2. Clar. & Graſſ. ubi ſupr. Mantic. de conject. ult. vol. l. 12. tit. 8. Pariſ. conſil. 10. vol. 3. n. 9, 24, &c.

Nevertheleſs (11) it is not perpetually true, that the Teſtament wherein is a Clauſe derogatory of the Teſtator's Will is not infringed by the later Teſtament, wherein is no Mention or Revocation of the former Teſtament derogatory; for it faileth in divers Caſes.

The firſt Caſe is, when it may be proved by other Conjectures that it was the Teſtator's Meaning, that the former Teſtament ſhould be revoked[k].

[k] Covar. in d. Rub. 2. part. n. 19. verſ. quar. concluſ. Pariſ. conſil. 10. vol. 3. n. 21. Graſſ. d. q. 89. n. 6. Clar. d. q. 99. n. 8. Mantic. de conject. ult. vol. l. 12. tit. 8. n. 13. Maſcard. de probac. concluſ. 1282. n. 43.

Another Caſe is, when there be ten Years expired from the Time of the firſt Teſtament[l].

[l] Bald. in L. ſancimus. C. de teſt. n. 6. Graſſ. d. q. 89. n. 10. Clar. d. q. 99. n. 19.

The third Caſe is, when the Teſtator doth with an Oath confirm the later Teſtament [m].

The fourth Caſe is, when the ſecond Teſtament is made in Favour of the Teſtator's Children [n], or ſome other Perſon entirely beloved of the Teſtator [o].

[m] Bald. in d. L. ſancimus, in fin. Graſſ. d. q. 89. n. 8. Clar. d. q. 99. n. 10.

[n] L. ult. C. de Curator. furioſ. Graſ. d. q. 89. n. 9. Mantic. C. de teſta. lim. 6.

d. tit. 8. n. 27. [o] Jaſ. in d. L. ſancimus.

The fifth Caſe is, when the Executor named in the former Teſtament, after the Making thereof, doth grievouſly offend the Teſtator [p]. For in this Caſe there is great Likelihood of the Alteration of the Teſtator's Mind [q].

[p] Jaſ. in d. L. ſancimus. lim. 2.

[q] Menoch. de præſ. l. 4. præſ. 166. n. 37.

The ſixth Caſe (grounded upon the ſame Reaſon of Likelihood of Alteration of the Teſtator's Mind) is, when the Child being made Executor in the firſt Will, whereby alſo the Teſtator doth bequeath unto him all his Goods, dieth before his Father [r].

[r] Menoch. ibid. Soc. Jun. conſil. 124. n. 52. vol. 1.

The ſeventh Caſe is, when the ſecond Teſtament is made to godly and charitable Uſes [s].

[s] Menoch. de præſ. 166. n. 40. Oldrad. conſil. 129.

For the other Queſtion, (*viz.* What Manner of Revocation is to be made in the ſecond Teſtament, that it may ſuffice to revoke the former Teſtament, wherein is a Clauſe derogatory of the Will of the Teſtator,) we muſt note (12) that there be three Sorts of Revocations; one general, another ſpecial, the third ſingular or individual [t]. *General*, when the Teſtator in his later Teſtament uſeth theſe or the like Words, *I will that this Teſtament ſhall ſtand, notwithſtanding any other Will or Teſtament by me heretofore made*; or thus, *I revoke and make void all former Wills and Teſtaments*, &c. *Special*, when the Teſtator hath theſe or the like Terms, *I do hereby revoke all former Teſtaments, notwithſtanding any Clauſe derogatory in the ſame. Singular*, wherein the Teſtator ſaith, *I make my laſt Will and Teſtament, notwithſtanding that Clauſe derogatory of my former Will, that I would not have that Teſtament revoked, unleſs I ſhould inſert in this Teſtament the Lord's Prayer*; or thus, *Notwithſtanding that Clauſe derogatory in my former Will, whereby I would that no Will or Teſtament afterward to be made ſhould prevail, albeit it ſhould ſpecially derogate from the former*; or thus, *Notwithſtanding that Will where I made ſuch a Perſon my Executor*; or thus, *Notwithſtanding that Will which I made in ſuch a Place, at ſuch a Time, and before ſuch Witneſſes*, &c [u]. Theſe Diſtinctions obſerved, I make theſe Concluſions.

[t] Graſſ. Theſ. com. op. §. teſta. q. 89. n. 4. Clar. §. teſt. q. 99. n 7. Mant. de conject. ult. vol. l. 12. tit. 8. n. 6.

[u] Bar. in L. ſi quis, in prin. ff. de leg. 3. Covar. in Rub. de teſt. extra. part. 2. n. 19. Clar. §. teſta. q. 99. Graſſ. §. teſtam. q. 89. Mantic. de conject. ult. vol. l. 12. tit. 8.

The firſt Concluſion is, That (13) if in the later Teſtament there be a general Revocation; as, *Notwithſtanding all former Teſtaments*, &c. the former Teſtament, wherein is a Clauſe derogatory of the Teſtator's Will, is not thereby taken away [x], albeit there be but one former Teſtament [y].

[x] Bar. in d. L. ſi quis. Socin. Jun. in eand. L. n. 24. Graſſ. Theſaur. com. op. §. teſt. & hæc opinio (inquit ille) eſt vera. q. 89. n. 4.

[y] Jaſ. in L. ſancimus. C. de teſt. quæ ſententia communis eſt, teſte Graſ. d. q. 89. n. 5. cantrarium Bar. in d. L. ſi quis. Cujus opinio communiter reprehenditur, ut aſſerit Tobias Nonius conſil. 26. col. 2. & ſecundum communem opinionem eſſe pronunciandum à Judice, monet Tiraq. de leg. connub. gloſ. 7. n. 131. Clar. d. q. 99. n. 3. affirmans quod in lib. ſuo aut Bar. verba ſunt corrupta, aut non fideliter à Doctoribus recitata. Tu igitur conſulas librum proprium.

The ſecond Concluſion is, That (14) if in the ſecond Teſtament there be a ſpecial Revocation; as, *Notwithſtanding any Teſtaments with*

with their Clauſes derogatory, &c. the former Teſtament with the Clauſes derogatory of the Teſtator's Will is thereby taken away [z].

[z] Dyer in c. quod. ſemel. de reg. jur. 6. Alex. d. L. ſancimus. Clar. §. teſta. q. 99. n. 4. & per eum cenſetur communis opinio.

The third Concluſion is, That (15) if in the ſecond Teſtament there be a ſingular Revocation of the former Teſtament; as, *Notwithſtanding ſuch a Teſtament made before ſuch a Notary*, &c. the ſame former Teſtament having therein a general Clauſe derogatory is ſufficiently revoked, although in the ſecond Teſtament there be no Mention of the Clauſe derogatory in the former Teſtament [a].

[a] Bar. in d. L. ſi quis. n. 8. Covar. in d. Rub. de teſtam. extr. n. 19. verſic. cert. concluſ. qui ibi atteſtatur hanc op. eſſe & com. & veriorem.

The fourth Concluſion is this, That (16) if in the former Teſtament there be a ſpecial Clauſe derogatory, the ſame is taken away by the Second, wherein is general Mention made of the former Teſtament, and of the Clauſe derogatory [b].

[b] Bar. in d. L. ſi quis. col. 3. DD. in d. L. ſancimus. Covar. in d. Rub. de teſt. n. 19. verſic. cert. concluſio. ubi dicit hanc op. eſſe. comm.

The fifth Concluſion is, That (17) if in the former Teſtament there be a ſpecial derogatory Clauſe, the ſame is not taken away by the ſecond Teſtament, wherein is particular Mention of the ſame Teſtament without Mention of the Clauſe derogatory [c].

[c] Paul. de Caſt. conſil. 206. vol. 1. Covar. in d. Rub. n. 19. verb. primum queſtione.

The ſixth Concluſion ſhall be, That (18) if in the former Teſtament there be a ſpecial Clauſe derogatory, circumſcribed with certain Limits: For Example; *I will that this Teſtament ſhall ſtand, notwithſtanding any other to be made hereafter, unleſs in the ſame I ſhall write, or cauſe to be written, the Lord's Prayer*, &c. the ſame former Teſtament may be taken away by a Second, albeit the Lord's Prayer be not written in the ſame [d]; but then it is behoveful that in the ſecond Teſtament there be Mention not only of the Teſtament, but alſo of the Clauſe derogatory; as, *I will that this later Teſtament ſhall ſtand, notwithſtanding any former Teſtament by me made, containing whatſoever Words or Clauſe derogatory*; which done, the former Teſtament is taken away [e].

[d] Bar. in d. ſi quis. Covar. in d. Rub. n. 19. verb. ſecundum. Apoſtil. ad Bar. in d. L. ſancimus. C. de teſta. Bald. conſil. 178. vol. 4.

[e] Bar. in d. L. ſi quis. Paul. de Caſt. conſil. 284. vol. 1. Covar. in Rub. de teſt. extr. part. 2. n. 19. Mant. de conject. ult. vol. lib. 12. tit. 8. n. 10. Atque hanc opinionem communem laudat Covar. Sal. Dy. & aliis refragantibus.

Other Concluſions [f] I might add, but I thought (19) good to deliver this one for all, the ſame in my Opinion being more worthy to be remembered; which Concluſion is this, That it behoveth the Judge, where he findeth ſuch Clauſes derogatory in any Teſtament, to conſider the Perſons of the Teſtators, namely, whether they be ſuch Perſons as do underſtand the Force and Effect of theſe Clauſes derogatory and revocatory, and to examine the Occaſions of inſerting the ſame Clauſes; eſpecially this is to be conſidered, whether theſe Clauſes be added by the proper Motion of the Teſtator himſelf, or at the Inſtigation and Perſwaſion of ſome other, as the Executor, the Legatary, the Notary [g], *&c.* For if the Teſtator do underſtand the Effect of ſuch Clauſes derogatory, and did inſert the ſame willingly of his own Accord, it is preſumed that he did ſo, leſt peradventure afterwards he might be ſolicited and induced, by the Inſtigation and Importunity of his Kinsfolks, or the Moleſtation

[f] Videant Juſtinianiſtæ Mant. de conject. ult. vol. lib. 12. tit. 8. & Covar. in d. Rub. de teſta. part. 2. n. 19.

[g] Simo de Præt. de interp. ult. vol. l. 4. fol. 227. n. 60, &c.

of ſome other, receiving ſmall Benefit by the Teſtament, and hoping to gain more by the Alteration or Revocation thereof, to change or revoke the ſame, contrary to his former ſettled Purpoſe and firm Reſolution. In which Caſe, if at any Time after the Teſtator make a new Teſtament, the former is not eaſily revoked [h]; unleſs in the Second he do make Mention of Revocation of the former Teſtament, with the Clauſe derogatory [i], in Caſes where Revocation is neceſſary, as in the former Concluſions is preſcribed; otherwiſe, the ſaid Form not obſerved, it is to be preſumed, that it is not the Teſtator's Meaning to infringe and fruſtrate his former Teſtament, made with ſuch conſtant Reſolution, and preciſe Caution [k]. But on the contrary, if (20) the Teſtator were but a ſimple Perſon, not underſtanding the Effect of ſuch derogatory or revocatory Clauſes, and the rather, if the ſame Clauſes were inſerted in the former Teſtament by the Notary, at the Petition or by the Direction of ſuch as were benefited by the ſame Teſtament, or ſome of their Friends, being loth to have the ſame altered or revoked; then, howſoever the former Teſtament be corroborated with preciſe Clauſes, of inſerting the Lord's Prayer in the ſecond Teſtament, or of not revoking the former Teſtament, although in the Second he ſhould ſpecially revoke the ſame; all theſe Clauſes and Cautions notwithſtanding, the former Teſtament may be the more eaſily revoked, without any ſuch preciſe Obſervation of any ſpecial Revocation above deſcribed [l].

[h] Pariſ. conſil. 10. l. 3. n. 10, 11, &c.

[i] Simo de Præt. de interp. ult. vol. l. 4. fol. 227. n. 61, &c.

[k] Simo de Prætis ubi ſupra.

[l] Idem Simo de Prætis loco ſuperius allegato, ubi locupletiſſime de hac re. Cui adjicias Didac. Covar. in Rub. de teſta. extr. n. 19. verb. decimo tertio. Mantic. de conject. ult. vol. l. 12. tit. 8. n. 15. Barb. conſil. 72. vol. 3. Pariſ. conſil. 10. vol. 3. n. 21, &c.

Thus we have ſeen in what Caſes the former Teſtament is infringed or not infringed by the laſt Teſtament. If any do here demand of me, What (21) if two ſeveral Teſtaments do appear to be made by one Perſon, but it doth not appear which is former or later? Which of theſe ſhall prevail? The Queſtion is ſatisfied a little before [m]; thither I refer the Reader.

[m] Supra ead. part. §. 11. & ſupr. 1. par. §. 16. n. 7.

§. XV. Of revoking the Teſtament made.

1. *Lawful for every Man to revoke his Teſtament, and to die Inteſtate.*
2. *Revocation of a Man's Teſtament is not preſumed.*
3. *Divers Extenſions of the former Concluſion.*
4. *Divers Limitations of the ſame Concluſion.*
5. *Whether a bare Revocation do overthrow the Teſtament.*

ANother of thoſe Means whereby the Teſtament, which was good at the Beginning, is afterwards made void, is Revocation of the ſame Teſtament. For (1) as it is lawful for every Teſtator to add and diminiſh to and from his Teſtament, and to alter the ſame; ſo is it likewiſe lawful for every Perſon having made his Teſtament, to revoke the ſame, and to die Inteſtate [n].

But (2) no Man is preſumed to have revoked his Teſtament once made, unleſs it be proved [o]. Inſomuch (3) that if a Man do live forty Years after he has made his Teſtament, yet is not the Teſtament preſumed

[n] Bald. in L. ſancimus. C. de teſt. Mantic. de conject. ult. vol. l. 2. tit. 15.

[o] L. eum qui voluntatem. ff. de probac. Maſc. Tract. de prob. concluſ. 1280. qui variis & ampliac. & limitac. hanc concluſ. ornavit.

preſumed to be revoked by the Courſe of ſo long Time [p]; though his Wealth and Subſtance do greatly increaſe, yet is not the Teſtament preſumed to be revoked [q]. And though the Teſtament be in Prejudice of ſuch as otherwiſe were to have the Adminiſtration of the Goods of the Deceaſed; yet all thoſe Things concurring, *viz.* the long Time, the Increaſe of the Teſtator's Wealth, and the Prejudice of ſuch as are to have the Adminiſtration of the Teſtator's Goods, the Teſtament is not preſumed to be revoked [r]. And though the Teſtament be made in Time of Sickneſs and Peril of Death, when the Teſtator doth not hope for Life, and afterwards he recover his Health; yet is not the Teſtament revoked by ſuch Recovery [s]. Or albeit the Teſtator make his Teſtament by Reaſon of ſome great Journey, yet it is not revoked by his Return [t]. And though the Teſtator, after the Making of the Teſtament, have a Child born, I ſuppoſe that the Teſtament is not preſumed thereby to be revoked [u]; eſpecially if the Teſtator did live a long Time after the Birth of the Child, and might have revoked the Teſtament, and did not [x].

[p] Paul. de Caſtr. Alex. & Jaſ. in d. ſancimus. C. de teſt. Quære tamen Bart. Sing. 183. & Mantic. l. 6. tit. 3. n. 46. etiamſi prius fuerit teſtamentum ad pias cauſas.

[q] Alex. & Jaſ. in d. L. ſancimus.

[r] Paul. de Caſtr. Jaſ. & Alex. ubi ſupra.

[s] Alex. & Jaſ. in d. L. ſancimus. Maſc. Tract. de prob. concl. 1280. n. 17, 18.

[t] Dyn. in L. poteſt. de hæred. inſtit. ff. repertorium Bertach. verb. teſta. revocatur, n. 48.

[u] Hoc ita ob defectum patriæ poteſtatis. quamvis inſpecta juris civilis diſpoſitione, contraria opinio approbatur. Graff. §. legat. q. 67. Ripa in L. ſi unquam. C. de don. 42. Maſcar. de probac. concluſ. 1280. n. 153. quæ concluſio ampliatur & limitatur per Prat. Tract. reg. & fal. l. 2. reg. 466. fol. (mihi) 16. verb. legato.

[x] Mantic. de conject. ult. vol. lib. 12. tit. 2. in fin. L. quod dicitur. ff. de l. & poſthu.

On the (4) contrary, the Teſtament is ſometimes preſumed to be revoked, and the Will of the Teſtator altered. One Caſe is, when he who is appointed Executor or Legatary, after the Making of the Teſtament, doth become Enemy to the Teſtator, or doth him ſome great Injury [y]. Another Caſe is, when the Teſtator, in Heat of Anger or Diſpleaſure conceived without juſt Cauſe againſt his Son, or other Perſons to whom the Adminiſtration of his Goods were to be committed, if he had died Inteſtate, maketh his Teſtament in Favour of others, and afterwards (the Heat of his Diſpleaſure being extinguiſhed) they be reconciled; for by this Reconciliation the Teſtament is preſumed to be revoked [z]. The third Caſe is, when the Teſtator hath begun to make his Teſtament, but is hindered by the Executor, that he cannot proceed as he would to the finiſhing the Teſtament, or farther diſpoſing of other Legacies; for in this Caſe the Will of the Teſtator is preſumed to be revoked [a], concerning any Benefit which the Perſon ſo hindering the Teſtator otherwiſe ought to have reaped [b]. The fourth Caſe is, when the Teſtator being extremely ſick, and afraid to die, doth bequeath ſome Legacy *ad pias pauſas*, and after doth recover his Health; for there the Legacy is alſo preſumed to be revoked [c]. It may ſeem ſtrange, that Legacies left to good and godly Uſes ſhould be revoked, rather than other prophane Legacies; but I take the Reaſon to be, for that it is preſumed that the Teſtator did not intend to give Legacies to ſo good an Uſe in that Extremity, but in caſe he ſhould die of that Sickneſs; and ſo not dying, the Legacy is revoked [d].

[y] Auth. ſi capt. C. de epiſ. & cler. Mantic. de conject. ult. vol. l. 12. tit. 1. n. 34. quod quidem in legatis & fidei com. quæ nuda voluntare adimi poſſunt, multo facilius admittitur, quam in hær. inſtit. ut in L. 3. §. ult. & L. ex parte. ff. de adimen. lega. & Maſc. de prob. concl. 1280. n. 150. Verum tum dic. (ut per Bar. in d. L. ex parte.) Inſtitutum propter graviſſ. inimicitias a ſe ortas hæreditatem amittere.

[z] L. filium de inoff. teſtim. Hier. Franc. in L. quicquid. de reg. jur. ff. Mantic. de conject. ult. vol. lib. 12. tit. 1. n. 25.

[a] L. ſi ſcriptis. ff. de his quibus ut indig. Mantic. de conject. ult. vol. l. 12. tit. 1. n. 24.

[b] L. 2. ff. ſi quis aliq. teſtari prohib. vide quæ inferius ſcripta ſunt. §. 18.

[c] Bar. in rep. L. C. de ſacroſanct. Eccleſ. n. 41. Repertor. Bertach. verb. teſta. revocatur. n. 47.

[d] Bar. & Bertach. ubi ſupra.

It is (5) a Queſtion appertaining to the Revocation of a Teſtament not altogether free from Doubt, whether a Teſtament may be

revoked by a bare and naked Revocation, that is to ſay, whether the Teſtament be ſufficiently revoked, when the Teſtator ſaith, *I revoke my former Teſtament*, or, *I will that my former Teſtament be of no Force.*

Many Writers are of this Opinion, that the Teſtament is not revoked by a bare Revocation before Witneſſes, unleſs the Teſtator had added unto his former Words, and ſaid, *becauſe I will die Inteſtate* [e].

[e] Bar. in L. ſi jure ff. de leg. 3. Alex. & alii in L. ſancimus. C. de teſta. quorum opinio multorum teſtimonio communis eſt. Dec. conſil. 582. Clar. §. teſt. q. 91. Graſſ. §. teſt. q. 84. Simo de Prætis de Interp. ult. vol. l. 4. fol. 226. Vaſqu. de ſucceſſ. crea. l. 2. §. 15. requiſit. 17. n. 62. ubi ſic, Sicut (inquit) ſi vas aureum, vel argenteum, vel luteum feceris, deinde juſſeris illud infectum fieri, non per hoc infectum fiet, niſi manus adhibeas, illudque fregeris; ita quoque teſt. &c. Sed Bar. alia ratione nititur, quia viz. ex hac voluntate non poteſt adiri hæreditas.

Others are of a contrary Opinion, eſteeming that it is ſufficient to make a bare Revocation without any expreſs Mention of dying Inteſtate [f]. And this Opinion, in my Underſtanding, is more ſound and more reaſonable. For whiles the Teſtator will not have his Teſtament to ſtand, it followeth that it is his Will and Meaning to die Inteſtate [g], and ſo the next of Kin to be called to the Adminiſtration of his Goods. Beſides, it ſeemeth abſurd and unreaſonable to maintain a Teſtament, not only without a Man's Will, but even againſt his Will [h]; at leaſt within this Realm of *England*, where we do not obſerve the Solemnities of the Civil Law, this Opinion is to be preferred; for even by the Civil Law Legacies are taken away by a ſimple and naked Revocation [i]; and ſo be divers Teſtaments; thoſe, I mean, wherein thoſe Solemnities are not neceſſary; as Teſtaments *ad pias cauſas* [k], or amongſt the Teſtator's Children [l], or Military Teſtaments [m]. Wherefore as thoſe Teſtaments are reclaimed and made void by a bare Revocation; ſo ought our Teſtaments to be meaſured with the ſame Line, and to enjoy like Liberty, as well in the Diſſolution, as in the Conſtitution [n].

[f] Bald. in L. ſancimus. C. de teſta. Socin. Jun. conſil. 145. aſſerens hanc ſententiam pluribus & majoris ponderis authoritatibus confirmatam. Quinimo narrat eandem cuilibet ſenſato & rationabili intellectui quadrare, & quemlibet Judicem poſſe ab opinione Bar. recedere. Cum quo etiam convenit Mantic. de conject. ult. vol. lib. 12. tit. 15. Idem vid. Pap. q. 200. & Barb. conſil. 60. vol. 2. & Raph. Cuma in d. L. ſi jure, non dubitans pronunciare conſiderationem Bartoli eſſe Truſſam. [g] Alex. conſil. 104. vol. 2. [h] Mant. d. lib. 2. tit. 15. n. 22. [i] L. 3. ff. de alimen. leg. [k] Alex. poſt Bald. d. conſil. 104. [l] Alex. eod. conſil. 104. [m] Vaſq. de ſucceſ. reſoluc. lib. 1. §. 9. n. 7. [n] Conſulas Vaſq. d. n. 7. ubi teſta. militar. eam ob. cauſam nuda voluntate poſſe diſſolvi contendit, quia nuda voluntate poteſt conſtitui, per L. nihil tam naturale. de reg. jur. ff. Conſulas etiam de hac re Maſc. de probac. concl. 1282. n. 36. qui has diſſidentes op. diſtinctionis fœdere conciliare conatus eſt.

* A Revocation may be by Word only, without being expreſſed in the Will or any other Writing; likewiſe Revocations may be by Act and Operation of Law, as well as by Fact or any expreſs Terms.

* *This is altered by the Stat.* 29 Car. 2.

A. ſeiſed of *Black-acre* and of *White-acre* in Fee expectant upon a Leaſe for Years of *White-acre*, maketh his Will in Writing, and after his Will made covenanteth with *D.* to make a Feoffment of *Black* and *White Acre* to the Uſe of himſelf for Life, and of *C.* his intended Wife for Life; the Feoffment is executed in *Black-acre*, but not *White-acre*, nor was there any Attornment of the Tenants; the Marriage taketh Effect, and *A.* after dieth. Adjudged, that the Feoffment without any Execution, or Livery, or Attornment in *White-acre* was a Countermand of the Will for *White-acre* [o].

[o] H. 38 Eliz. Rot. 1044. *Mountague* v. *Jefferies*, Moor's Rep. fol. 429. n. 599.

If a Man ſaith that he will revoke his Will which he hath made, that is not any Revocation, without the Doing of ſome other Act [p].

[p] M. 38 & 39 El. B. R. per Popham. Roll. Abridg. tit. Deviſe, P.

If one ſaith that he will make a Feoffment thereof to another, that is no Revocation before it be done; but if a Man deviſe Land to another by his Will in Writing, and after deviſeth it to another by Parol,

Parol, albeit that is void as a Will, yet it is a Revocation of the former [q].

[q] 44 E. 3. 33. 2 R. 3. 3. Roll. tit. Deviſe, R.

If a Teſtator alien the Land deviſed, and after repurchaſe the ſame, yet the Will is revoked as to the Land.

One made his Will in Writing, and deviſed his Land to *A.* and her Heirs; afterwards being ſick and lying upon his Death-bed, (becauſe *A.* did not come to viſit him,) he affirmed that *A.* ſhould not have any Part of his Lands or Goods; it was held by all the Court, that it was not any Revocation of his Will, being but by way of Diſcourſe, and not mentioning his Will; but the Revocation ought to be by expreſs Words, that he did revoke his Will, and that ſhe ſhould not have his Lands given unto her by his Will, or ſuch like Words, which might ſhew his Intent to make an expreſs Revocation thereof [r].

[r] P. 4 Jac. B. R. *Sympſon* verſus *Kirton*, Crook part. 2. pl. 2. 115.

If one make his Will in Writing of Land, and afterwards upon Communication ſaith, that he hath made his Will, but it ſhall not ſtand; or, I will alter my Will; theſe Words are not any Revocation of the Will, for they are Words but *in futuro*, and a Declaration what he intends to do; but if he ſaith, I do revoke it, and bear Witneſs thereof, he doth hereby declare his Purpoſe to revoke it *in præſenti*, and it is then a Revocation [s].

[s] M. 16 Jac. B. R. *Fitzhugh Cranuel* v. *Saunders*, Crook part. 2. pl. 3. 487.

A Woman ſeiſed of Lands made her Will, and deviſed the ſame to *B.* and his Heirs; they after intermarry, and the Woman by Words after Marriage revoketh the Will, and ſaith that her Husband ſhall not have the Land by her Will, and dies: Adjudged that the Huſband ſhould take nothing thereby [t].

[t] M. 30 & 31 Eliz. C. B. *Anderſon's* Caſe, 117. Coke tit. 4. fol. 61. *Forſe* and *Houbling's* Caſe. Gouldſ. 109. S. C.

One deviſed his Lands to his Siſter in Fee, and after made a Leaſe to her for ſix Years of the Lands, to commence after his Deceaſe, and delivered it to a Stranger to the Uſe of his Siſter; which Stranger did not deliver it to her in the Teſtator's Life-time; ſhe refuſed, and claimed the Inheritance: Adjudged, becauſe the Deviſe and the Leaſe made to one and the ſame Perſon, beginning at the ſame Time, cannot ſtand together in one and the ſame Perſon, that it was a Countermand of the Deviſe; but if the Leaſe had been made to any other than the Deviſee, they might ſtand together, and the Leaſe ſhould not have been a Revocation of the Will as to the Inheritance, but only during the Term [u].

[u] M. 2 Jac. C. B. *Coke* and *Bullock's* Caſe, Crook part. 2. fol. 49.

If a Man poſſeſſed of a Term for forty Years deviſe the ſame to his Wife, and after leaſe the ſame to another for twenty Years, and die; that Leaſe is not a Revocation of the whole Eſtate, but only during twenty Years, and the Wife ſhall have the Reſidue by the Deviſe [x].

[x] T. 19 Jac. B. R. Rot. 596. *Hodgkins* verſus *Whood*, Crook part. 2. fol. 690. Cro. Car. 23. S. C.

If a Man ſeiſed in Fee deviſe the ſame to *I. S.* in Fee, and afterwards make a Leaſe thereof to *I. D.* for Years; this is no Revocation of the Fee, but only during Years [y].

[y] M. 38 Eliz. B. R. int. *Mountague* and *Jefferies*, Roll. Abridg. tit. Deviſe, tit. V. fol. 616.

If a Man hath a Leaſe for Years, and diſpoſes of it by his Will, and afterwards ſurrenders it up; and takes a new Leaſe, and dieth; the Deviſee ſhall not have this laſt Leaſe, becauſe it was a Revocation of his Will [z].

[z] T. 30 Eliz. C. B. *Aſhbie* and *Livers's* Caſe, Gouldſ. fol. 92.

All theſe Caſes before-mentioned were adjudged long before the Statute 29 *Car.* 2. but by that Statute a conſiderable Alteration is made in the Law as to this Matter; for now a *Deviſe in Writing ſhall not be revoked otherwiſe than by ſome other Will or Writing declaring the ſame, or by burning, tearing, or cancelling the ſame by the Teſtator, or in his Preſence, and by his Direction; but all Deviſes ſhall remain good till altered or revoked by ſome other Will or Writing of the Teſtator, ſigned in the Preſence of three Witneſſes declaring the ſame.* *

* *Note*; The Statute does not ſay, that theſe Witneſſes ſhall ſubſcribe their Names in his Preſence.

The Teſtator made another Will before the Statute, and another after, by which *he revoked all former Wills*; and this laſt Will was atteſted by three Witneſſes in his Preſence; but it was not *ſigned by the Teſtator in their Preſence*, which is an eſſential Circumſtance required by the Statute to make a good Will, and likewiſe to make a good Revocation, which muſt be by a Will or Writing ſigned by the Teſtator *in the Preſence of three Witneſſes* declaring the ſame; it is true the laſt Part of that Clauſe which relates to Revocations is ſo; but the firſt Part of it is, that a *Deviſe in Writing ſhall not be revoked otherwiſe than by ſome other Will or Writing declaring the ſame*; which implies, that if there is ſuch a Writing, then it may be revoked, and here is ſuch a Writing; therefore it is a Revocation.

Hoile verſus *Clerke*, 3 Mod. 218.

The Teſtatrix deviſed her Lands by one Will, and afterwards by another Will ſhe deviſed the ſame Lands to the ſame Perſon, but this laſt Will was not *ſubſcribed by the Witneſſes in her Preſence*; now though it was a *void Will* becauſe not ſubſcribed by the three Witneſſes in her Preſence, yet it was inſiſted that it was a good *Revocation* of the firſt Will; but adjudged that it was not; it is true it was *another Writing*, but not within the Meaning of the Statute, for it muſt be a *Writing operating as a Will*, or *a Writing declaring her Intention to revoke or make void the firſt Will*; now though in this and in *Speke's* Caſe laſt mentioned both the laſt Wills were void; in the one Caſe becauſe the Teſtator did not ſubſcribe his Name in the Preſence of the Witneſſes, and in the other Caſe becauſe the Witneſſes did not ſubſcribe their Names in her Preſence; yet in this they differ, (*viz.*) in *Speke's* Caſe the Teſtratrix did not declare any Intention to make the firſt Will void; but in *Hoile's* Caſe there was a plain Revocation of all former Wills, *&c.*

Eccleſton verſ. *Speke*; Shore 89. 3 Mod. 259. S. C.

The Teſtator, by Will duly executed and atteſted, deviſed Lands to Truſtees to ſeveral Uſes.

He afterwards made another Will of the ſame Lands to other Truſtees, but to the ſame Uſes; and in the laſt Will was a Clauſe revoking all former Wills; but to this laſt Will the Witneſſes did not ſubſcribe their Names in the Teſtator's Preſence.

The Queſtion was, Whether this laſt Will, which was admitted to be a void Will *quoad* the Lands, ſhould yet be a good Revocation of the former Will.

It was held to be no Revocation; and tho' the firſt Will was ordered by the Teſtator to be, and in Fact was, cancelled accordingly; yet

all this being upon a Preſumption that the latter Will was good, and duly executed, it was properly relievable under the Head of Accident; wherefore the Heir was injoined, and the firſt Deviſee held and injoyed.

It was ſaid by Sir *Thomas Powis*, and not denied by any, That if a Man, having two Duplicates of his Will, cancels one of theſe Duplicates with an Intention to deſtroy his Will; that this is a good Revocation of the whole Will, and of both the Duplicates; and that this was Sir *Edward Seymour*'s Caſe. *Onyons* verſus *Tyrer*, 1 *Williams* 343.

Hilton verſus *King*, 3 Lev. 86. The Teſtator intending to revoke Part of his Will, directed theſe Words to be ſubſcribed therein: *ff. We whoſe Names are ſubſcribed do teſtify that* Edward King *did on the Day of the Date hereof publiſh and declare, that the ſeveral Clauſes and Deviſes in his Will in Writing relating to his Daughter* Diana *ſhould ceaſe and be void:* The Teſtator did not ſign it with his Name, but the Witneſſes did on the *ſame Will and Paper*, when the Statute requires it ſhould be by ſome *other Will or Writing*; yet this was inſiſted to be a good Revocation, becauſe the Teſtator's Intent appeared in Writing to revoke, *&c.* and his ſubſcribing *his Name to the Will it ſelf* ſhall ſerve for the Whole; for it is not material whether it is put at the Top or Bottom of the Will, for the Word is not *ſubſcribed* but *ſigned*; ſo that if it is *ſigned* in any Place by the Teſtator it is ſufficient; but adjudged to the contrary, for the *Revocation as well as the Will muſt be ſigned by the Teſtator.*

Sayle verſus *Freeland*, 2 Vent. 350. A Settlement was made with a Power of Revocation by any Writing publiſhed, *&c.* in the Preſence of *three Witneſſes*; afterwards the Teſtator by his Will reciting this Power, and publiſhed in the Preſence of *two Witneſſes* and no more, did revoke this Settlement; and this was decreed a good Execution of his Power, for Equity ſhall relieve in this Circumſtance, becauſe the Owner of the Eſtate had fully declared his Intention; and wherever a *Power* is reſerved for a Man to diſpoſe his own Eſtate, it ſhall have a favourable Conſtruction; but it ſhall be taken ſtrictly where it is to charge the Eſtate of another.

Guy verſus *Dormer*, Raym. 295. The Teſtator ſettled his Lands upon *Robert Dormer* and his Heirs, but with a Power of Revocation *by any Writing in expreſs Words declaring his Intention to revoke it*; and afterwards he deviſed the ſame Lands to his Nephew *William Dormer* and his Heirs; it was inſiſted that this Will did not revoke the Deed, becauſe it was only an *implicit Revocation*, when by the *Power* reſerved it ought to be in *expreſs Words*; but adjudged that where two Things cannot conſiſt together, (as they cannot in this Caſe) becauſe by the Deed the Lands were given to *Robert*, and by the Will to *William Dormer*; therefore the laſt muſt revoke the firſt, and by Conſequence the Power is well executed.

Lugg verſus *Lugg*, 2 Salk. 592. The Teſtator being a ſingle Man deviſed all his perſonal Eſtate to *T. S.* afterwards he married and had ſeveral Children, and died without making any other Will; it was decreed by the *Delegates*, that there being ſo great an Alteration both of his Circumſtances and likewiſe of his Eſtate, from the Making the Will to his Death, that a Revocation might be preſumed, and that he did not continue all that while in the ſame Mind.

A Man made a Will, and appointed *J. S.* (who was no Relation) his Executor; afterwards he went beyond Sea, where he became Governor of one of the Plantations, and ſent 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 it was determined, that this total Alteration of the Teſtator's Circumſtances was an implied Revocation of the Will. 1 *Williams* 304. *Pater credens filium ſuum eſſe mortuum alterum inſtituit hæredem; filio domi redeunte, hujus Inſtitutionis vis eſt nulla. Vide* Cic. de Oratore, Cantab. Ed. pag. 69, 102. & Dig. L. ult. de hæred. inſt.

J. S. being a Bachelor made his Will, and deviſed a Legacy of 500*l.* to his Brother, and other Legacies to other Perſons, and deviſed his real Eſtate to *Elizabeth Cloſe* and her Heirs, and afterwards intermarried with *Elizabeth Cloſe* and died, leaving her *privement enſient* of a Son, without making any Alteration in his Will. The Lord Keeper held, that Alteration of Circumſtances might be a Revocation of a Will of Lands as well as of a perſonal Eſtate, and that notwithſtanding the Statute of Frauds and Perjuries, which does not extend to an implied Revocation; but no ſuch Alteration appears here, for no Injury is done any Perſon, and theſe are provided for whom the Teſtator was moſt bound to provide for; and thereupon the Decree of the Maſter of the Rolls, who held it a Revocation, was reverſed. *Trin.* 1702. *Brown* and *Thomſon.*

The Teſtator made his Will, and his Brother Executor, and deviſed to his ſaid Executor all his real and perſonal Eſtate, and four Years afterwards he married, and then by a *Codicil made his Wife Executrix*; decreed that the perſonal Eſtate was intended to him as Executor, and not otherwiſe; but by the Codicil the Executorſhip was revoked and given to another as Executrix; and thereupon it was decreed for her. *Wilkinſon's* Caſe, 1 Vern. 23. Anno 1681.

A voluntary Settlement was made by Deed with a Power of Revocation, and by a Will the ſaid Deed was confirmed; afterwards the Party who made both the Settlement and the Will, borrowed Money of *W. H.* and mortgaged his Lands to ſecure the Repayment thereof with Intereſt; the Queſtion was, whether this Mortgage was a Revocation of the Will; and decreed that it was not, only *pro tanto*, (*viz.*) as to the Money borrowed on the Mortgage; it is true in * Law a Mortgage in Fee is an implicit Revocation of the whole Will; but Equity will conſider the Intent of the Party which was only to borrow Money to ſupply his preſent Occaſions, and not with any Deſign to revoke his Will abſolutely; if this had been a Mortgage for Years, then certainly the Reverſion would have paſſed, which would have carried with it the Equity of Redemption, and ſo the Revocation would have been *pro tanto* only, and it is the ſame Thing in Equity where the *Mortgage is in Fee.* The like Decree was made in the Caſe of † *Thorn* verſus *Thorn.* *Perkins* verſus *Walker*, 1 Vern. 97. * *Hall* verſus *Dunch*, 1 Vern. 329. † 1 Vern. 88, 141.

Admiral *Littleton* by Will deviſed to his Wife ſix Houſes in Bar of Dower, to his eldeſt Daughter one Moiety of his real and perſonal Eſtate, and to his youngeſt Daughter the other Moiety.

Afterwards, on the Marriage of his eldeſt Daughter with Sir *Barnham Rider*, he gave her 5000*l.* in Money, and by Articles previous to the Marriage covenanted to ſettle one Moiety of his real Eſtate to the Uſe of himſelf for Life, Remainder to Sir *Barnham* and his intended Wife for their Lives, with Remainder to their younger Children

dren in Tail, Remainder to Sir *Barnham* in Fee; and alſo that he would ſtand poſſeſſed of one Moiety of ſuch perſonal Eſtate as he ſhould leave at his Death, (ſubject to his Debts, and ſuch Legacies as ſhould amount to 5000 *l.*) in Truſt for Sir *Barnham* and his intended Wife for their Lives, and afterwards to be paid to their younger Children.

He afterwards made a Codicil to his Will, reciting that he had by Deed dated the ſame Day, purſuant to a Power, limited a Jointure of 400 *l. per Annum* to his Wife for Life in Bar of Dower, and then gave his *South-Sea* Stock, being about 3000 *l.* to his youngeſt Daughter, and confirmed his former Will, ſubject to the aforeſaid Articles.

It was held, that the Marriage-Articles, though but a Covenant, and no Revocation of the Will at Law, yet being for a valuable Conſideration was in Equity tantamount to a Conveyance, and conſequently in Equity a Revocation as to a Moiety of the ſix Houſes deviſed to the Wife. That Sir *Barnham* was intitled to one clear Moiety of the real Eſtate; as to the other Moiety, that the Wife ſhould have ſix Houſes, Part thereof for her Life (in Lieu of thoſe deviſed to her) and the ſame Moiety ſubject to the Wife's Eſtate for Life in the ſix Houſes, ſhould be divided into two Moieties, one Moiety thereof to go to the elder Daughter, the other to the younger.

It was urged, that the Admiral and his Wife had joined in a Mortgage of the Eſtate by Leaſe, and Releaſe, and Fine, and that this was a Revocation of the Will.

Lord Chancellor: It can only be a Revocation *pro tanto*. *Rider* verſus *Wager*, 2 *Williams* 328.

Though a Covenant, or Articles alone do not at Law revoke a Will, yet if entered into for a valuable Conſideration, amounting in this Court to a Conveyance, they muſt conſequently be an equitable Revocation of a Will, or of any Writing in Nature thereof. A Woman's Marriage is a Revocation of her Will. *Cotter* verſus *Layer*, 2 *Williams* 623.

Smartle v. *Scholler*, 2 Vent. 366. T. Jones 98. S. P. 2 Lev. 207. S. P.

So where the Teſtator deviſed a Sum of Money to *T. S. to be paid at the Age of Twenty-one, or Day of Marriage*, and the Legatee died before that Time, and unmarried; in ſuch Caſe his Adminiſtrator ſhall have it, for the Reaſon before-mentioned, (*viz.*) becauſe *T. S.* had a preſent Intereſt veſted, though the Payment was appointed at a Day to come; beſides this is a Charge on the perſonal Eſtate; and if it ſhould be diſcharged by this Accident, it would be for the Benefit of the Adminiſtrator, which was never intended by the Teſtator.

Chbery's Caſe, 2 Vent. 342. 2 Chanc. Rep. 155. S. C. * Godb. 181. S. P.

But if the Teſtator had deviſed the Money to *T. S. at the Age of Twenty-one Years*, or Day of Marriage, and the Legatee had *died before Twenty-one and unmarried*; in ſuch Caſe it is a lapſed Legacy, and ſo it would have been if the Deviſe had been to her * *when* ſhe comes to the Age of Twenty-one, and ſhe dies before.

2 Vent. 347.

So where the Teſtator deviſed 100 *l.* to *T. S. at the Age of Twenty-one Years*; and if he die before he ſhall attain that Age, then to *W. N.* and *E. G.* and the Survivor of them, who both died in the Life-time of *T. S.* and before he was of Age; and then *T. S.* died under Age: Adjudged, that the Adminiſtrator of *E. G.* who ſurvived *W. N.* ſhould have this Legacy, though his Inteſtate died before the Contingency happened.

A Legacy was deviſed to *T. S.* and *his Aſſigns*, and the Legatee died before Payment: Adjudged, that his Adminiſtrator ſhall have it, becauſe the Duty remains, it not being limited to the Perſon of the Legatee alone.

A Portion was deviſed to an Infant with Intereſt, but not to be paid till the Child come to the Age of twenty-one Years, or was married; the *Infant dies under twenty-one* and unmarried; the Portion was decreed to the Adminiſtrator of the Infant. *Collins* v. *Metcalfe*, 1 Vern. 462.

§. XVI. Of cancelling the Teſtament.

1. *A Man's Mind is known as well by Deeds as by Words.*
2. *Of the Effect of cancelling Teſtaments.*
3. *Whether a nuncupative Teſtament loſe his Force by cancelling the Writing.*
4. *Divers Caſes wherein the Teſtament is not hurt by Cancellation.*
5. *If it be unknown who did cancel the ſame, to whom is the ſame to be attributed.*

ANother of the Means whereby the Teſtament, which was good at the Beginning, is afterwards made void, is the Cancelling or Cutting of the Teſtament[a]. For the (1) Will and Meaning of a Man is no leſs ſhewed by his Deeds than by his Words[b]; and therefore (2) he that cancelleth or defaceth his Teſtament, is thereby thought to have this Will and Meaning, to take away the Force and Virtue thereof[c]. Which Will in this reſpect ought to be obſerved for a Law, and ſo the Teſtament cancelled and defaced is to be adjudged void[d].

[a] Cancel. eſt in modum crucis expungere vel illinire. Bar. in L. 1. §. ſed conſ. ff. de his quæ teſt. de J. Spieg. Lexic. vet. cancellare.
[b] Minſing. in §. ex eo. Inſt. quib. mod. teſta. infir. Vaſq. de ſucceſſ. crea. l. 2. req. 17. n. 62.
[c] L. 1. & L. proxime. ff. de his quæ teſt. del. & DD. ibi Vaſ. de ſucceſ. crea. §. 15. requiſ. 17. n. 60, 61, &c.
[d] Intellige ope exceptionis, non ipſo jur. gloſſ. in L. ff. de his quæ teſt. del. quæ op. eſt com. Graſſ. Theſaur. com. op. q. 85. n. 1.

And that this Cancelling or Defacing of the Teſtament being objected[e] doth deſtroy the Force thereof, is ſuppoſed to be extended to thoſe Teſtaments nuncupative which afterwards be reduced to Writing[f]; ſo that (3) if a Man firſt make his Teſtament by Word of Mouth, then cauſeth the ſame to be written, and afterwards doth willingly cancel or cut the ſame Writing, or otherwiſe deface it, that then ſuch Teſtament is void, as if it had been written at the Beginning[g]. Neither doth it profit to prove the ſame by Witneſs[h]; for although the Inſtrument or Writing do not appertain to the Subſtance of the Teſtament; yet by the Cancelling thereof the Teſtator is preſumed to have repented of the making thereof, and to have reclaimed or revoked the ſame[i]. Furthermore, albeit there appear no Cauſe of Unworthineſs either in the Executor, or any other Legatary, whereby the Teſtator might be moved to diſappoint them of their Hope; yet by cancelling the Teſtament the Whole ſhall be void[k], and the Teſtator is preſumed to have done it in their Favour who are to have the Adminiſtration of his Goods after he dieth Inteſtate[l].

[e] Alias ipſo jur. non viciat. d. gloſ. communiter recepta.
[f] Paul. de Caſtr. in L. fin. ff. de his q. teſt. del.
[g] Zaſ. conſ. 2. vol. 1. n. 29. Graſ. Theſ. com. op. §. teſt. q. 85. ubi hanc ſententiam & veriorem & humaniorem refert: & huic etiam ſententiæ ſubſcripſit Vaſq. de ſucc. crea. l. 2. §. 15. requiſ. 17. n. 61, 62. quicquid in contrarium ſtat. Jul. Clar. §. teſt. q. 93. vel. Minſing. in §. pen. inſt. quib. mod. teſt. infir. vel ante eos Bald. in d. L. fin. vel poſt eos Maſc. de prob. concluſ. 1282. n. 31.
[h] Vaſq. d. requiſit. 17. n. 63.
[i] Vaſq. & Graſſ. ubi ſupra.
[k] Vaſq. de ſucceſſ. reſoluc. l. 1. §. 4. in prin. Doct. in L. cancel. & in L. proxime. ff. de his quæ teſt. del.
[l] Dyn. & DD. communiter, in L. noſtram. ff. de his quæ teſt. del. Mantic. de conject. ult. vol. l. 12. tit. 1. n. 31. Clar. §. teſt. q. 93. Graſſ. §. teſt. q. 85.

The Caſes (4) wherein this former Concluſion, *viz.* that by cancelling or defacing the Teſtament, the ſame is void, doth fail, are theſe.

The firſt is, where the Teſtament was cancelled by the Teſtator himſelf unadviſedly, or by ſome other Perſon without the Teſtator's Conſent, or by ſome other Caſualty [m].

[m] L. 1. §. ſed conſ. ff. de his quæ teſt. del. Bar. in L. ſi jur. de leg. 3. Angel. Are. & Minſing. in §. ex eo. Inſt. quibus mod. teſt. infir.

The ſecond Caſe, when the Teſtator, after he hath wittingly and willingly pulled away the Seals, doth ſeal the ſame again [n].

[n] L. ſi teſt. ff. qui teſt. fac. poſſ.

The third Caſe is, when the whole Teſtament is not cancelled or defaced, but ſome Part thereof only raſed, blotted or put out; for the other Parts of the Teſtament do remain firm and ſafe [o] as they were before, although the Deletion were in the chief Part of the Teſtament, namely the Aſſignation of the Executor [p].

[o] L. prox. §. ſent. ff. de his quæ teſt. del. Mant. de conject. ult. vol. l. 12. tit. 1. n. 31. in fin.

[p] Weſ. in d. tit. de his quæ in teſt. del. ff. Mantic. ubi ſupra.

The fourth Caſe is, when there be ſeveral Papers or Writings of one Tenour, each of them containing the whole Teſtament; the Defacing or Cancelling of ſome of them doth not hurt the Teſtament [q]; unleſs it be proved that the Teſtator's Mind was contrary [r].

[q] L. plurib. ff. de his quæ in teſt. del.

[r] d. L. plurib. & ibi Doctores.

The fifth Caſe is, when the Teſtament is loſt, either in the Lifetime of the Teſtator, or after; for ſo much as may be proved by Witneſſes is ſtill in Force [s].

[s] L. 1. §. ſed conſul. ff. de his quæ in teſt. del. cum gloſſ. ibid. De prob. teſt. originali amiſſo. vid. Simo de Prætis de interp. ult. vol. l. 1. fol. 204. n. 82.

What if (5) the Teſtament be found cancelled and defaced, but it is not known who did it? To whom is this Act of Cancelling or Defacing the Teſtament to be attributed? To the Teſtator which made it; or to ſome other, which otherwiſe peradventure might be hindered by it?

It ſeemeth not to be reputed the Act of the Teſtator [t]; for Mutation or Change of the Mind is not be preſumed [u]; eſpecially after a Man hath done a Thing with ſuch Deliberation and Reſolution wherewith Teſtaments commonly are made and finiſhed [x].

On the contrary, it ſeemeth that it ought not to be accounted the Act of any other [y]; for that were to preſume Fraud and Deceit in Men; which ought not to be preſumed, unleſs it be proved [z].

[t] Zaſ. conſil. 2. l. 2.

[u] L. cum qui. ff. de probac.

[x] Supr. 1. par. §. 3. verb. ſent. & hac ipſa parte ſuperius paulo, viz. §. 13.

[y] Jo. Faber in §. ex eo. Juſt. quib. mod. teſt. infir. Peckius de teſt. conjug. l. 1. c. 46. n. 1.

[z] L. dolum. C. de dolo.

In this Controverſy therefore I ſuppoſe, that the Perſon in whoſe Cuſtody the Teſtament is found ſo cancelled or defaced is to be adjudged to have done the Act, whether it be the Teſtator or another [a].

[a] DD. in L. ſi unus. C. de teſt. Mantic. de conject. ult. vol. l. 12. tit. 1. n. 30. Hyer. Pantiſh. q. n. 17. fol. 486.

And if it be ſo that the Teſtament were kept in ſuch a Place, as not only the Teſtator but others might have Acceſs unto it; in this Caſe the Arguments and Circumſtances of the Fact being equal and indifferent, the Cancelling or Defacing of the Teſtament is rather to be aſcribed to the Teſtator than to others [b]; who is alſo preſumed to have done the ſame wittingly and willingly [c]; ſaving in Legacies

[b] Zaſ. de conſil. 2. vol. 1. n. 1. & n. 15. Fab. in. §. ex eo. inſtit. quib. mod. teſt. infir. Menoch. de præſump. l. 4. Præſ. 165. n. 24.

[c] Paul. de Caſtr. in L. 1. §. ſed conſ. ff. de his quæ in teſt. del.

cies of Freedom, or *ad pias cauſas*; which being blotted or put forth by the Teſtator, it is not preſumed to have been done willingly [d]. But when the Argument and Circumſtances be unequal, and the greater Preſumptions that it ſhould be the Act of another rather than of the Teſtator, it is to be adjudged accordingly [e]; for the fewer and weaker Preſumptions give Place to the more and ſtronger [f].

[d] Paul. de Caſtr. in d. §. Tiraquel. de pia cauſa, privileg. 16. Mantic. de conject. ult. vol. l. 12. tit. 2. n. 25.

[e] Zaſ. conſ. 1. n. 15, 16, 17, 18, &c. Zaſ. ubi ſupr.

[f] C. afferte mihi glad. de præſump. extr. Mant. de conject. ult. vol. l. 12. tit. 17 &

§. XVII. Of the Alteration of the State of the Teſtator.

1. *What Manner of Alteration of the State of the Teſtator doth make void his Teſtament.*
2. *Two Times wherein the Teſtator muſt have Power to make a Teſtament.*

THE Alteration (1) of the State of the Teſtator is alſo a Mean whereby the Teſtament which was good at the Beginning doth after become void [g]. The which Alteration may happen divers Ways [h]; but eſpecially when the Teſtator is convicted or condemned of ſuch a Crime, after the Making of his Teſtament, for the which the Law depriveth him of this Power and Ability of making a Teſtament [i].

[g] §. *Alio.* Inſt. quibus modis teſt. infir.

[h] Viz. maxima & media capitis dimin. gloſſ. in d. §. alio. Item voluntarie, & invite. Minſing. in §. non tamen. Inſtit. eod. tit.

[i] d. §. alio, & ibi gloſſ. & DD.

What Manner of Crimes they be whereby the State of the Teſtator is ſo altered, that thereby he is made inteſtable, is above expreſſed [l]; to wit, Hereſy, Apoſtacy, Treaſon, Felony, Sodomy, Inceſt, manifeſt Uſury, and ſuch like; whereunto I might alſo add Captivity [m]; not for that Captivity is a Crime, but for that it hath the ſame Effect with thoſe Crimes to overthrow the Teſtament. But if the Captive recover his former Liberty, then the Teſtament made before the Captivity recovers his former Force [n]. And if he that is convicted or attainted of Treaſon or Felony obtain the Prince's Pardon, with Reſtitution to his former State, then the Teſtament made before ſuch his Conviction is likewiſe revived and reſtored [o]; and in both Caſes the Teſtament is good, without any new Confirmation or Declaration [p]. Howbeit in this they differ; for the Teſtament of the Perſon which recovereth his former Liberty is good even from the Beginning, as if he had never been in Captivity [q]; but his Teſtament whoſe Crime is pardoned, and himſelf reſtored, is of Force only from the Time of Reſtitution [r]. Again, if the Pardon do only import a Remiſſion of the Penalty, without Reſtitution of his former Eſtate, then the Teſtament before made doth ſtill remain void [s].

[l] De quibus ſigillat. ſupra part. 2. & part. 5.

[m] L. ejus qui apud hoſtes. ff. de teſt. ſupra part. 2. §. 8.

[n] §. Non tamen inſt. quib. mod. teſt. infir.

[o] L. ſi quis, §. quaten. ff. de injuſt. teſtam.

[p] Quod verum quidem eſſe in capitis diminutione neceſſaria, ſecus in voluntaria. Minſ. & Platea in d. §. non tamen.

[q] Graſſ. Theſ. com. op. §. teſt. q. 25.

[r] Jo. Platea in d. §. non tamen.

[s] Minſing. in d. §. non tamen.

And here note, (2) That there be two Times wherein it is neceſſary that there be in the Perſon of the Teſtator Ability to make a Will. The one is, the Time of the Making of the Teſtament, when it receiveth his Subſtance or Being; the other is, the Time of the Death

Death of the Teſtator[x], when it receiveth his Strength and Efficacy. (As for the Time betwixt the making of the Teſtament and the Death of the Teſtator, it skilleth not whether the Teſtator have any ſuch Power or not[y].) And therefore if any Perſon being attainted of ſome Crime, do whilſt he is inteſtable make his Teſtament, and afterwards obtain a full Pardon, with full Reſtitution, the Teſtament nevertheleſs is void, becauſe of the original Defect[z].

[x] d. §. non tamen. L. 1. §. exig. de bon. poſſ. ſecundum Tab. infr. §. 19. Porc. in §. in extraneis. Inſt. de hær. qual. & differ.

[y] d. §. non tamen. & Minſing. ac alii ibid.

[z] Aretin. in d. §. non tamen. Sim. de Præt. de interp. ult. vol. l. 1. fol. 146. n. 56.

§. XVIII. Of forbidding or hindring the Teſtator to make another Teſtament.

1. *The former Teſtament is void, where the Teſtator is forbidden to alter the ſame, or to make a new Teſtament.*
2. *Divers Extenſions of this foreſaid Concluſion.*
3. *Of hindring the Notary or Witneſſes to have Acceſs to the Teſtator.*
4. *Of diſturbing the Teſtator by making a Noiſe.*
5. *Of immodeſt Perſwaſions.*
6. *Whether this Prohibition be proved by the Aſſertion of the Teſtator.*
7. *Divers Limitations of the firſt Concluſion,* viz. *that the Teſtament is overthrown, where the Teſtator is hindred in altering the ſame.*
8. *Of diſturbing the Teſtator with Noiſe and Weeping.*
9. *Whether the Prohibition of one be prejudicial to others.*

AMongſt many other Means whereby the Teſtament, which was good at the Beginning, is afterwards made void, this is one not to be omitted, (ſeeing it is ſo often practiſed,) namely, when (1) the Teſtator, intending to alter the Teſtament before made, or to make a new Teſtament, is forbidden or croſſed, ſo that he cannot or dare not do as he intended[a]. By this Prohibition and Manner of crooked Dealing, the Teſtament which ſhould have been altered is made void[b].

[a] Tit. ſi quis aliquem teſt. prohib. ff. & C.

[b] L. 1. & 2. ff. ſi quis aliquem teſt. prohib. Boſſ. Tract. de var. crim. tit. de his qui aliq. teſtar. prohib. Menoc. de arb. Jud. quæſt. caſ. 395. Soc. Jun. conſil. 148. vol. 2. qui omnes locupletiſſime ſcripſerunt de hac re. Eos igitur vid. velim.

The Reaſon is, becauſe as thoſe Teſtaments are not ſound at the Beginning which are made by Fear or Fraud[c]: So that Teſtament which for Fear or by Fraud the Teſtator dare not or cannot alter, is from henceforth infected with the ſame Diſeaſe, and ſo from henceforth to be eſteemed of no more Force or Efficacy than theſe other[d].

This Concluſion, (2) that the Teſtament doth become void when the Teſtator is prohibited to alter the ſame, doth proceed not only when the Teſtator himſelf is prohibited or put in Fear; but alſo (3) when the Notary or Witneſſes be letted or ſtopped, that they cannot have Acceſs unto the Teſtator[e]: For he that doth not permit, is ſaid to prohibit[f]. And therefore if the Wife being made Executrix, or any other Perſon benefitted by the Teſtament, underſtanding that the

[c] Supr. ead. par. §§. 2. & 3.

[d] Weſ. in tit. ſi quis aliq. &c. ff. n. 1.

[e] Bar. in L. fin. ff. ſi quis aliq. teſt. prohib. Boſſ. in d. tit. de his qui prohib. &c. n. 2. Par. conſ. 67. l. 3.

[f] Par. conſ. n. 13.

the Teſtator is about to alter his Will, will not ſuffer his Friends to come unto him, pretending peradventure that he is faſt aſleep, or in a Slumber, or the Phyſician gave in Charge that none ſhould come to him [g], or pretending ſome other Excuſe, or elſe (all Excuſes ſet apart) do for Charity's Sake ſhut them forth of the Doors [h]: In theſe Caſes the Teſtament is void, in Deteſtation of ſuch odious Shifts and Practices [i].

[g] Peck. tract. de teſt. conjug. c. 13.
[h] Ut eſt apud Ter. præ amore excluſit eum foras.
[i] Peckius ubi ſupra.

Secondly, this Concluſion hath Place, if (4) after the Coming of the Notary or Witneſſes, and Preparation of all Things neceſſary for the Alteration of the former Teſtament, ſome Perſon, of Intent and Purpoſe to hinder the Altering of the ſame Will, doth make a Noiſe, and keeping ſuch a Stir, exclaiming and quarrelling with ſuch as ſeek to have the Teſtament altered, that the Teſtator being therewith diſturbed and offended, did not then alter his Will, and ſhortly after died [k].

[k] Anch. conſil. 337. Menoch. de Arbitr. jud. caſ. 395. n. 38, 39.

Thirdly, (5) this Concluſion hath Place not only where the Teſtator is prohibited by Threatnings, or hindered by Fraud, but alſo when he is overcome with importunate Requeſts, and fraudulent Perſwaſions, not to alter his former Teſtament [l].

[l] Afflict. deciſ. 69. n. 7. Menoc. d. caſ. 395. n. 41. huc pertinet quod ſcripſerunt Inno. in c. petitio. de jurejur. ext. & Rebuff. tract. de reſcript. tom. 2. are. 2. gloſ. 3.

Fourthly, (6) this Concluſion doth proceed, albeit there be no ſtronger Proof of Violence or Impediment offered to the Teſtator in this Caſe, than the Aſſertion of the Teſtator himſelf [m].

[m] Par. conſil. 66. n. 119. vol. 3. Soc. Jun. conſil. 148. n. 14. Men. d. caſ. 395. n. 40.

In theſe Caſes following (7) the former Concluſion doth not proceed. The firſt Caſe is, when the Teſtator had no Purpoſe to alter his Teſtament: For if any do forbid the Teſtator to alter his Teſtament, when the Teſtator hath not any Purpoſe to alter the ſame; this Prohibition doth not hurt the Force of the Teſtament already made [n]. The ſecond Caſe is, when the Fear which is uſed in the Prohibition is vain, or but light, ſuch (I mean) as cannot move a conſtant Perſon [o]. The third Caſe is, when the Teſtator is prohibited, but not at that preſent Time when he intended to alter his former Teſtament; for ſuch Prohibition is not hurtful [p]. The fourth Caſe, being like to the former, is, when the Teſtator, after the Prohibition, might very well at ſundry Times have altered his Teſtament, and did not [q]: For in not altering the Teſtament when he might, he ſeemeth to allow it and confirm it [r]. The fifth Caſe is, when the Teſtator is not compelled by Fear, nor circumvented by Fraud, but induced with flattering Speeches void of Deceit, ſuch as may become an honeſt Wife or faithful Friend,) not to alter his Teſtament [s]. The ſixth Caſe is, when (8) all Things neceſſary for the Alteration of a Teſtament being prepared, the Executor or Legatary, or other Perſon, with his Noiſe or Weeping, doth ſo diſturb the Teſtator, that he cannot alter his Teſtament: Not of Purpoſe to hinder ſuch Alteration; but being moved with Compaſſion, to ſee the Teſtator grievouſly afflicted with Sickneſs, or being ſtricken with an unfeigned Sorrow, through Fear of the Teſtator's Death, or otherwiſe overcome with an

[n] L. 1. ff. ſi quis aliq. Bar. in L. ult. eod. tit. n. 13. Menoc. d. caſ. 395. n. 32. & eſt ejus op. quod duo ſunt proband. viz. voluntas mutandi teſt. & prohibitio. Soc. Jun. conſil. 148. vol. 2.
[o] Par. conſil. 67. n. 41. vol. 3. Menoc. d. caſ. 395. n. 32. & quæ nos dixim. ſup. ead. par. §. 2.
[p] Soc. ſen. conſ. 105. vol. 3. Soc. Jun. conſil. 148. n. 3. vol. 2. Par. conſ. 67. n. 33. vol. 3. Menoch. d. caſ. 395. n. 32. Boſſ. d. tit. de his qui prohib. & n. 2. in fin.
[q] Mar. Soc. Jun. conſil. 148. n. 48. vol. 2. Par. conſ. 67. n. 62. vol. 3. Men. d. caſ. 395. n. 25.

[r] Maſc. de probac. concl. 1280. n. 54. Mant. de conject. ult. vol. l. 12. tit. 1. n. 12. Pet. tract. L. ff. de teſt. mil. quod tamen ſerio conſiderandum eſt, ut per Mant. ubi ſupr. & Peck. tract. de teſt. conjug. l. 1. c. 11. [s] Menoc. d. caſ. 395. n. 42. Per L. ult. ff. ſi quis aliq. teſt. prohib.

an honeſt or kind Care or Grief, and not able to ſuppreſs the Force of this vehement Paſſion, doth burſt into Tears, and ſo with Noiſe of his Lamentations doth diſturb the Teſtator, that he cannot proceed in the Alteration of his Will. In this Caſe the former Teſtament is not made fruſtrate by ſuch Diſturbance, albeit after that the Teſtator never had the like Opportunity of altering his Teſtament [t]. Howbeit the Judge muſt be very wary, and learn by the Circumſtances of the Fact, whether this Noiſe and Exclamation be of Policy, or of Simplicity [u]. The ſeventh Caſe is, when (2) the Executor or Legatary doth forbid or hinder the Teſtator to alter his Teſtament. In which Caſe the former Teſtament is void only in Prejudice of that Perſon which doth prohibit or hinder the Teſtator to alter the ſame, but not in Prejudice of another not conſenting thereunto [x]: Much leſs doth the Prohibition of that Purpoſe by him who is to reap no Benefit by the Teſtament, hurt thoſe Executors which otherwiſe ſhould be Adminiſtrators in Caſe the Party died Inteſtate [y]; unleſs it doth appear that the Teſtator would have changed his whole Teſtament, and have appointed new Executors; for then this Prohibition maketh void his whole Teſtament, like as if the Teſtator had been compelled to make the ſame at the firſt [z].

[t] Par. conſil. 67. vol. 3. n. 47, 48. Soc. Jun. conſil. 148. vol. 2. n. 33. verb. nam dum primo, &c.

[u] Menoch. d. caſ. 395. n. 39.

[x] L. 2. ſi quis aliq. teſt. prohib. ff.

[y] Menoc. d. caſ. 395. 20. poſt. Bar. in L. ult. ſi quis aliquem teſt. prohib. ff. n. 11.

[z] Bar. in d. L. ult. Menoc. d. caſ. 395. n. 17. Par. conſ. 67. vol. 3.

There is much ado in the Civil Law about this Queſtion, who ought to have the Teſtator's Goods, when he is compelled to make his Teſtament, or hindered that he cannot revoke his Teſtament, the Prince, or the Heirs of the dead Perſon. But with us, if any die Inteſtate, the Adminiſtration of his Goods is to be committed to the Widow, or next of Kin, and doth not go to the Prince, though the Executor or Legatary be unworthy.

§. XIX. When he that is made Executor cannot or will not be Executor.

1. *Though the Executor be incapable, the Legacies are ſtill due.*
2. *The Executor ought to be capable of the Executorſhip at three ſeveral Times.*
3. *It is ſufficient for the Legatary, if he be capable of the Legacy at the Teſtator's Death.*
4. *What if the Diſpoſition be conditional.*

ALbeit (1) where he that is named Executor in the Teſtament either cannot or will not be Executor, by the Laws of this Realm the Legacies bequeathed in the ſame Will are ſtill due, and to be paid by ſuch as ſhall have the Adminiſtration of the Goods of the Deceaſed [a]: In which Caſe the Will is to be annexed to the Letters of Adminiſtration (as heretofore I have declared [b]:) Yet by Reaſon of the Incapacity or Refuſal of the Executor, ſuch Diſpoſition is thereby deprived both of the Name and Nature of a Teſtament [c]; and ſo the Party is ſaid to die Inteſtate.

[a] Brook Abridg. tit. Execut. n. 20. dixi, jure hujus regni; nam ſecus eſt jure civili, hæreditate non adita. L. 1. in fin. de injuſto teſtim. L. fidei commiſſum. de leg. 1. L. imperator. de leg. 2. ff. licet hoc non ſit indiſtincte verum, ut per Vigelii method. juris civil. a quo tradita eſt regula cum plurimis limitationibus & ſublimitac. l. 12. c. 9.

[b] Supra, part. 1. §. 6. n. 6.

[c] Inſtit. tit. de hær. quæ ab inteſtat. def. in princ. Brook ubi ſupra.

I ſhall not need to repeat here particularly, by what Means the Executor may become incapable of the Executorſhip.

This one Thing I thought good to note in this Place, that by the Civil Law, (2) he which is named Executor muſt be capable of the Executorſhip at three ſeveral Times [d]. Firſt, at the Making of the Teſtament; for then it taketh his Subſtance or Being [e]. Secondly, at the Time of the Death of the Teſtator; for then the Teſtament receiveth his Strength and Confirmation [f]. Thirdly, at the Time of the Probation of the Will, and undertaking the Executorſhip; for then the Teſtament entereth to his Effect and Execution [g]. Howbeit it is (3) ſufficient in a Legatary, if he be capable of the Legacy or Deviſe at the Time of the Death of the Teſtator [h]; unleſs the Deviſe be not pure and ſimple, but conditional: For in conditional Diſpoſitions both the Executor and alſo the Legatary muſt be capable at the Time of the Performance or Exiſtence of the Condition [i]. As for any other Time, whether it be betwixt the Making of the Will and the Teſtator's Death, or betwixt his Death and the Probation of the Will, it skilleth not: For though the Executor be then incapable, it hurteth not [k]; eſpecially if (4) the Diſpoſition be conditional: For then it is not required in the Executor (much leſs in the Legatary) that he be capable at another Time, ſaving only at the Time of Exiſtence or Performance of the Condition, no not at the Making of the Will, or Death of the Teſtator [l].

[d] §. in extraneis. Inſtit. de hær. qual. & differentia. vide ſupra part. 5. §. 2. & quæ in illo §. adnotavi.

[e] Chriſt. Porcus in d. §. in extraneis.

[f] Idem Porcus in eod. §.

[g] Idem ibid. quamvis Jaſ. hiſce rationibus totus non acquieſcat, quippe qui alias meliores atque (ut ille inquit) fundamentaliores aſſignat; in ſuis addic. ad Chriſt. Porcum in d. §.

[h] Bar. in L. ſi alienum. §. 1. ff. de hære. inſtit. in fin. Peckius Tract. de teſtam. conjug. l. 4. c. 31. n. 5. Graſ. Theſ. com. ep. §. Inſtitutio. q. 28. n. 4. [i] Bar. Graſſ. & Peckius ubi ſupra. [k] §. in extraneis. Inſtit. de hæred. qual. & differentia. [l] Alex. in L. 2. ff. de vulg. & pub. ſup. n. 11. Graſſ. d. §. Inſtitutio. q. 28. n. 3. quæ op. com. eſt, licet non deſint qui contrariam teneant.

If the Executor do refuſe to undergo the Burthen or Office of an Executor, then he loſeth whatſoever Legacy is left unto him in the Teſtament [m]; ſaving as elſewhere is recited [n].

[m] Bar. & Sichard. in L. ſi legatarius. C. de legatis.

[n] Supra part. 6. §. 3.

§. XX. Of Ademption of Legacies.

1. *By what Means Legacies become void.*
2. *Ademption of Legacies, what it is.*
3. *Ademption of Legacies twofold.*
4. *The Teſtator may at any Time alter his Will, either wholly, or in Part.*
5. *Ademption of Legacies not to be preſumed.*
6. *Corn in the Barn being bequeathed, whether the ſame being ſpent, and other Corn there at the Death of the Teſtator, the Legacy be extinguiſhed.*
7. *Whether the Ship bequeathed being altered and renewed, the Legacy be extinguiſhed.*
8. *Whether the Houſe bequeathed, being by Piece-meal re-edified and renewed, may be recovered.*
9. *What if the Teſtator do voluntarily pull down the Houſe, and erect another in Place thereof?*
10. *What if the Houſe be burned, or blown down, and another erected? Whether may this new Houſe be recovered?*
11. *An Anſwer to an Objection.*
12. *Whether by neceſſary Alienation of the Thing bequeathed, the Legacy be adempted.*
13. *What if the Alienation be voluntary? is the Legacy extinguiſhed?*

14. *What*

14. *What if the voluntary Alienation be void in Law?*
15. *What if the Teſtator ſhould redeem the Thing alienated?*
16. *Whether Lands deviſed, alienated, and redeemed, may be recovered.*
17. *The Reaſons of either Law being contrary in this Point.*
18. *If the Thing bequeathed be pledged, it is not thereby adempted.*
19. *Whether the Receiving of the Debt bequeathed by the Teſtator be an Ademption of the Legacy.*
20. *A Flock of Sheep being bequeathed, whereof one alone is left, whether that one be due.*

MANY other (1) Means there be whereby the Teſtament, which was good at the Beginning, becomes void afterwards [a]: But it were too long to rehearſe them all: Let it ſuffice therefore, that I have ſpoken of ſuch as haply may the ofter fall out in Fact. Now it remaineth that I ſpeak of ſuch Means, whereby Legacies given and bequeathed by the Teſtator become void. Of which Means ſome do proceed from the Fact of the Teſtator [b]: Some have Relation to the Fact or Perſon of the Legatary [c]: Some to the Thing bequeathed [d]:

Demiſe of Lands for twenty-one Years, under the Rent of a Pepper-Corn, with a Re-demiſe for twenty Years and eleven Months paying 600 *l. per Annum* for the firſt ſeven Years, and a Pepper-Corn for the Reſidue of the Term; this was for ſecuring the Payment of 3000 *l.* which was paid accordingly; but before it was paid the Teſtator deviſed all *his Eſtate whatſoever* to his Executors, in Truſt to pay his Legacies, and that they ſhould diſpoſe *One thouſand Marks* to ſuch Perſon as the Defendant *Elizabeth* ſhould appoint, *&c.* The Demiſe and Re-demiſe were expired, and by Conſequence the Legacy of one thouſand Marks is extinct; becauſe it was to iſſue out of the Re-demiſe, there being no other Eſtate to ſatisfy the ſame; for the perſonal Eſtate of the Teſtator ſhall not ſtand charged with it. *Chanc. Caſes* 464. *Morgan* verſus *Morgan.*

In Reſpect of the Fact of the Teſtator are Legacies made void, eſpecially by Ademption, and by Tranſlation of the Thing bequeathed [e].

Ademption (2) is a Taking away of the Legacy before bequeathed [f]: *Tranſlation* is a Beſtowing of the Legacy bequeathed upon ſome other Perſon [g]. Ademption may be without Tranſlation, but Tranſlation of a Legacy cannot be without Ademption [h].

Ademption (3) of Legacies is two-fold, expreſſed, and ſecret [i]. *Expreſſed*, when the Teſtator doth by Words take away the Legacy before given [k]: *Secret*, when the Teſtator doth by Deeds without Words take away the Legacy; as when he doth give away the Thing bequeathed, or doth voluntarily alienate the ſame before his Death [l].

It is (4) lawful for every Teſtator [m], ſo long as he liveth, to revoke or alter his Will [n], either wholly or in Part [o], either in the ſame Will, or in another [p], ſimply or conditionally.

[a] Centum pene caſus quibus reſolvitur teſtim. commemorat Vaſ. de ſucceſ. reſoluc. lib. 1.

[b] Hoc ipſo §. & §. ſeq.
[c] Infra §§. 22. & 23.
[d] Infra §. ult.

[e] Inſtit. tit. de ademp. & tranſla. legator. & tit. de adimen. vel transferend. leg. ff.

[f] DD. in d. Rub. de ademp. & tranſlac. leg. Inſtit.

[g] Minſin. in d. Rub. [h] Minſin. ubi ſupra. Weſen. in tit. de adimen. vel transferend. leg. ff.

[i] Weſen. in d. tit. de adimen. leg. ff.

[k] L. 2. & 3. de adimen. leg. ff.

[l] L. rem legatam. de adimen. leg. ff.

[m] L. 3. de re jud. L. 3. de reg. jur. ff.

[n] L. 4. de adimen. leg. ff.

[o] L. ult. de adimen. leg. ff. [p] Quod ſi alio teſtamento inſolenni fiat ademptio, tunc non ipſo jure, ſed ope exceptionis, tollitur leg. Graſ. Theſaur. com. op. §. legat. q. 78.

When the Teſtator doth expreſly revoke the Legacy, it is not material whether he do uſe Words direct contrary; as, *I do not give, I do not bequeath*, or any other Words whatſoever, ſo that his Meaning may appear [q].

Ademption (5) of Legacies is no more to be preſumed than the Revocation of the Teſtaments [r], unleſs it be proved [s]. And therefore (6) if the Teſtator do bequeath all the Corn in his Barn, and after the Making of his Will, the Teſtator ſurviveth until all the Corn be ſpent, and other Corn put in the Place thereof [t]: This Spending of the Corn is no Ademption of the Legacy; and therefore the Legatary ſhall have ſuch Corn as is found in the Barn when the Teſtator dieth [u], unleſs the Corn found in the Barn at the Death of the Teſtator be greater in Quantity than was the Corn at the Time of the Will making; for ſo much is due, but not a greater Quantity than was the firſt [x].

[q] L. 2. & 3. ff. de adimen. leg. Inſtit. tit. de ademp. legat.
[r] Bald. in L. ſi pluribus. ff. de leg. 1. Mant. de conject. ult. vol. l. 12. tit. 2. n. 2.
[s] L. eum qui voluntatem. ff. de probac.
[t] Secus ſi non ſit repoſitum per modum ſurrogationis, ait Angel. in L. ſi ſervus. §. qui quinque. ff. de leg. 1. Maſc. de probac. concluſ. 1283.
[x] Paul. de Caſtr.

n. 33. [u] Bar. in d. §. qui quinque. Mantic. de conject. ult. vol. lib. 12. tit. 2. n. 9. in d. §. qui quinque. Maſc. de probac. d. concl. 1283. n. 33, 34.

Likewiſe if (7) the Teſtator do bequeath a Ship, and afterwards doth by Piece-meal repair and renew the ſame, ſo there remaineth nothing of the old Ship but only the bottom Tree: Here is no Ademption of the Legacy, and therefore the Legatary may recover the whole Ship [y].

[y] L. quod in rerum. §. & ſi navem. ff. de leg. 1. Spiegel. Lexic. verb. carina. Mantic. de conject. ult. vol. l. 12. tit. 2. n. 7.

Or if (8) the Teſtator do bequeath an Houſe, and afterwards by Piece-meal repair the ſame, ſo that there is no Part of the old Matter or Stuff remaining; the Will of the Teſtator is not hereby preſumed to be changed, and therefore the Legatary may recover the Houſe ſo repaired [a]. For it is deemed to be the ſame Houſe ſtill in Law, as in the former Caſe it is deemed to be the ſame Ship [b].

[a] L. ſi ita legatum. §. ſi domus. ff. de leg. 1.
[b] Jaſ. in §. ſi domus. n. 1. Maſcard. de prob. conclu. 1280. n. 21. Zaſ. in d. §. & ſi navem.

But if (9) the Teſtator did at once voluntarily pull down all the whole Houſe bequeathed, and did afterwards erect a new Houſe in the ſame Place; then, by the Civil Law, the Will of the Teſtator is preſumed to be changed, and the Legacy extinguiſhed [c]. And although by the Laws of this Realm it may be otherwiſe in Contracts and Covenants amongſt ſuch as be living [d]: Admit it were ſo, (as in ſome Sort it is anſwerable to the Civil Law [e],) yet the Reaſon of the Difference is not obſcure, which is this: In Contracts, Covenants, and Grants made amongſt ſuch as be living, he to whom this or that is lawfully granted, hath a certain Right and Intereſt therein [f], which without his Conſent ought not to be impaired [g]; and whatſoever is builded upon another's Ground yieldeth thereunto, and thereby becometh his which is the Owner of the Ground [h]. But in a Teſtament or Laſt Will there is no ſuch Right derived to the Legatary in or to the Thing bequeathed, until the Teſtator be dead [i]: And therefore if in the mean Time the Teſtator do alter his Mind, (which Alteration is manifeſt as well by Deeds as by Words [k],) in this Caſe the Legatary, which hath no Right, cannot make ſuch Claim to the Thing

[c] Paul. de Caſtr. in d. §. ſi domus. Mantic. de conject. ult. vol. l. 12. tit. 2. n. 6.
[d] Id quod non ſemel mihi nunciatum fuit.
[e] Intellige quoad jura realia, quorum intuitu ædificium deſtruct. & reſtitutum cenſetur idem. L. ſervitutes. §. ſublatum. ff. de ſervit. verb. præd.
[f] Bar. & alii in d. §. ult.
[g] L. Id quod noſtrum. de reg. jur. ff.
[h] §. Cum in ſuo ſolo. Inſt. de rerum diviſ.
[i] Bar. in d. L. ſi ita legat. §. ult. de leg. 1. verb. dic. ergo.
[k] L. Paulus. ff. rem rat. haberi. Weſenb. in tit. de adimen. leg. ff. n. 2. & 4.

Thing bequeathed as another may do, to whom a Thing is covenanted or granted, and ſo hath a Right and Intereſt therein [l]. Indeed if the Teſtator were dead, and ſo a Right in the Legatary, and then the Heir or Executor ſhall pull down the Houſe deviſed, and erect a new Houſe in the ſame Place, the Legatary might recover the new builded Houſe [m]: But being pulled down by the Teſtator whiles as yet there was no Right or Intereſt in the Legatary, the Legacy is extinguiſhed [n]; as is aforeſaid: Unleſs a contrary Meaning be proved in the Teſtator, *viz.* that he did not intend to revoke the Deviſe, by deſtroying the ſame deviſed [o]; becauſe peradventure he did proteſt [p], before he cauſed the Houſe to be pulled down, that he did not thereby mean to make void the Deviſe; or after the Re-edifying thereof, did ratify and confirm his former Will [q]; or did manifeſt his Meaning by other equivalent Conjectures. Without which Proof of ſuch the Teſtator's Meaning, the Legacy is ſo ſurely extinguiſhed, that albeit the Teſtator did pull down the Houſe with Intent to re-edify the ſame, or to make it bigger [r], and albeit it were re-edified of the ſame Matter or Stuff [s], yet it cannot be recovered as due to the Legatary: For now, having a new Form, it is not the ſame, but another Houſe [t]; and ſo being another Thing than that which was bequeathed, how can it be rightly challenged by the Legatary [u]?

[l] Bar. in d. §. ult. & Jaſ. ibid. n. 6.

[m] L. domos. de leg. 1. ff. & ibi DD.

[n] Text. in d. L. ſi ita legat. §. ſi domus. Maſcard. de probac. concl. 1280. n. 27.

[o] Eod. §. ſi domus.

[p] L. at ſi clerici. §. plerique. ff. de relig. & ibi Bald.

[q] Arg. L. 1. §. 1. de leg. 3. ff. Brook Abridg. tit. Deviſ. n. 8.

[r] Jaſ. in d. L. ſi ita §. ult. de lega. 1. ff. n. 13. in fin.

[s] Paul. de Caſtr. & Jaſ. in d. §. ſi domus. Maſc. de probac. concl. 1280. n. 25.

[t] Iidem Caſtr. Jaſ. & Maſcard. ubi ſupra. Maſcard. de probac. concl. 1180. n. 25.

[u] Vide DD. in L. inter ſtipulantem. ff. de verb. oblig.

What if (10) the Houſe bequeathed be blown down with Violence of the Wind, or be conſumed with Fire, or otherwiſe by caſual Means deſtroyed againſt the Will of the Teſtator, and a new Houſe erected by the Teſtator in the Place where the former ſtood? whether may the Legatary recover the Houſe newly erected? By the Opinion of ſome he may [x]. For if the Teſtator had not erected a new Houſe, by the Civil Law the Ground whereon the Houſe did ſtand ſhould belong to the Legatary [y]. Seeing then the Ground is the Legatary's, it followeth that the Houſe is the Legatary's alſo [z]. Howbeit the Author of this Opinion in another Place is of another Opinion [a]: Which Opinion is alſo commended of other Writers as more agreeable to Law [b], becauſe this Houſe is another Houſe than that which was bequeathed. And again the Text of the Civil Law is plain, that *the Houſe bequeathed being deſtroyed, if the Teſtator build another in the ſame Place, the Legacy is extinguiſhed, unleſs the Meaning of the Teſtator were otherwiſe* [c]. Seeing then the Text doth not diſtinguiſh of the Means whereby the Houſe is deſtroyed, neither may we [d].

[x] Jaſ. in L. domus. ff. de leg. 1. n. 1. & in L. ſi ita legat. §. ſi domus. eod. tit. n. 13.

[y] L. ſi grege. legato. ff. de leg. 1. in fin. Paul. de Caſtr. in d. §. ſi domus. verb. ſed pone. & ibi Jaſ. n. 2. & 7.

[z] L. ſi ſervum filii. §. ſi areæ. ff. de leg. 1. Jaſ. & Paul. de Caſtr. ubi ſupr.

[a] Jaſ. in L. domus. ff. de leg. 1. n. 13.

[b] Maſcar. Tract. de probac. concl. 1280. n. 27. & Mantic. de conject. ult. vol. lib. 12. tit. 2. n. 6.

[c] Text. in d. §. ſi domus.

[d] Maſc. & Mantic. ubi ſupra.

To the (11) former Reaſon, that the Ground had belonged to the Legatary, if the Teſtator had not builded a new Houſe, *ergo* the Houſe alſo; it is anſwered, that if it were granted (which of divers is denied) that the Ground ſhould belong to the Legatary [e]; yet ſhould it not belong unto him as Principal, but as Acceſſary, or Part of the Houſe bequeathed [f]: And therefore being but Acceſſary, it doth not receive any other Acceſs or Augmentation [g]. Howbeit, forasmuch as theſe Queſtions about Houſes deviſed by Will, afterwards deſtroyed, and then re-edified, are rather to be determined by the

[e] Raph. Cu. Petr. de Bexu. in d. §. ſi domus. & ibi Jaſ. n. 13.

[f] Bar. Paul. de Caſtr. Jaſ. in d. §. ſi domus.

[g] Iidem Bar. Jaſ. & Paul. de Caſtr. ubi ſupra.

Laws of this Realm than by the Civil Law; I do willingly yield the Matter into their Hands to whom it principally appertaineth.

The Teſtator having laid the Foundation of his Houſe, and intending to build it, did by his Laſt Will, (which was made before the *Statute of Frauds, &c.*) deviſe his Lands for raiſing Portions for his younger Children, and for paying his Debts, and appointed that 400 *l.* ſhould be laid out in building and finiſhing his Houſe; but he lived ſeveral Years after he made this Will, and laid out above 400 *l.* upon this Houſe, and died, leaving it unfiniſhed: This Will was defective in Form, for not being ſubſcribed by the Witneſſes according to the Statute, *&c.* ſo that it was void as to paſſing any Lands; but the Heir at Law would have this 400 *l.* raiſed out of the perſonal Eſtate, and laid out upon the Houſe; but it was decreed that it ſhould not, for by the Teſtator's laying out the 400 *l.* in his Life-time, for the ſame Purpoſe as directed by his Will, he had taken away the Deviſe thereof, as he had before appointed. *Huſbands* verſus *Huſbands*, 1 Vern. 95.

Furthermore, if (12) the Teſtator being conſtrained by Need [h], as to pay his Debts, or to provide him Food, or other like Neceſſaries [i], do as it were unwillingly alienate the Thing by him before bequeathed, this is no Ademption of the Legacy [k]; and therefore is the Executor bound to redeem the ſame, or to pay the juſt Value thereof to the Legatary: Unleſs he prove that the Teſtator did purpoſe by the ſame Alienation to take away the Legacy [l]; or unleſs the Legacy were conditional, and the Alienation made before the Condition were extant or accompliſhed [m]. But (13) if the Teſtator not conſtrained by Neceſſity do of his own Accord alienate the Thing bequeathed, (as if he giveth the ſame freely [n], or do ſell the ſame of Intent to gain thereby [o];) this is an Ademption of the Legacy [p]. Which Concluſion (14) hath Place, although the Gift or Alienation be void in Law [q]. For it is ſufficient in Laſt Wills, for the Revoking of a Legacy, that the Teſtator's Meaning do appear even by an Act otherwiſe inſufficient [r].

[h] L. fidei commiſſ. §. ſi rem. ff. de leg. 3. L. rem legatam. ff. de adimen. leg.

[i] Minſing. in §. ſi rem. Inſtit. de lega. Berous q. 9. Adde quod ſive neceſſitas ſit ex re familiari, ſive ex lege, utraque impedit præſumptionem revocationis legat. Maſcard. de probac. concl. 1280. n. 126.

[k] d. L. fidei commiſſ. §. ſi rem.

[l] d. §. ſi rem. Inſtit. de lega. Maſc. de prob. d. concl. 1280. n. 127.

[m] L. Stichum. ff. de lega. 1. Bald. in L. 3. C. de lega. n. 6.

[n] L. rem legatam. ff. de adimen. lega.

[o] Berous d. q. 9.

[p] Bar. & alii in L. rem legatam. ff. de adimen. leg. & in L. 3. C. de lega.

[q] L. legatum. §. pater. ff. de adimen. lega. Bar. in L. cum domin. §. fin. de pecul. leg. 1. Socin. ſen. conſil. 104. n. 11. vol. 3. Covar. in Rub. de teſta. extra. 2. part. n. 21. Mant. de conject. ult. vol. lib. 12. tit. 6. n. 2. quod locum habet tametſi legatum fuerit expreſſum legatum. Et hæc ſententia verior eſt & receptior, teſtibus Mant. ubi ſupra, Maſcardo de probatione concl. 1280. n. 98. Gabriel. conſ. 103. Idem juris eſt, ſi facta alienatione dominum non ſit tranſlatum. Mant. d. tit. 6 n. 3. Maſc. d. concl. 1280. n. 100. Et licet non deſint magni nominis Interpretes qui in contraria ſtant ſententia; Per L. prædia. §. libert. de Inſt. leg. Falſiſſima tamen eſt horum ſententia, ſi verum dicat Gabr. d. conſil. 103. Tu vero dic ut per D. Gentilem, acutiſſime de hac re diſſer. l. 1. epiſt. c. 10.

[r] Covar. in d. Rub. part. 2. n. 21. verb. adver. Graſſ. Theſ. com. op. §. legat. q. 78. in fin.

Secondly, this Concluſion (15) hath Place, although the Teſtator ſhould redeem the Thing alienated, the Alienation being lawful [s]: And therefore if the Legatary ſhould after the Death of the Teſtator demand the Legacy alienated and redeemed, his Petition were to be repelled, unleſs he did prove a new Will of the Teſtator, or ſome Approbation or Ratification of the former Will, after the Redemption of the Thing alienated [t]; or unleſs the Legacy be of Freedom from Bondage [u], or given to ſome godly or charitable Uſe [x]; or unleſs the Alienation were neceſſary, not voluntary [y]; or unleſs the Legatary be near of Kin or allied unto the Teſtator [z]. In theſe and in ſome other Caſes the Legacy redeemed may be recovered, as if the ſame had never been alienated [a]. Peradventure alſo by the Laws of this

[s] L. cum ſervus. ff. de adimen. leg.

[t] d. L. cum ſervus.

[u] L. verum. ff. de teſt. manumiſſ.

[x] Minſing. in d. §. ſi rem. Inſt. de leg. Mant. d. tit. 6. n. 6. Maſcard. d. concluſ. 1280. n. 112.

[y] Bar. in d. L. cum ſervus.

[z] L. filia. §. Titio. ff. de cond. & demon. Maſc. d. concl. 1280. n. 111.

[a] Maſc. d. concluſ. 1280. n. 108, 109, &c. ubi alias videre licet hujus regulæ exceptiones.

this Realm, (16) Lands, Tenements and Hereditaments, being firſt deviſed, and after the Alienation redeemed may be recovered, as if the ſame had not been alienated [b]. The (17) Reaſon of this Law may be, becauſe the Alienation doth not defeat the Will, which is not as yet of any Force until the Teſtator be dead [c]. But the Reaſon of the Civil Law is, becauſe by this voluntary or unconſtrained Alienation, or Gift of the Thing bequeathed, being an Act contrary to the former Act of the Teſtator, his Will and Meaning (which is the Life and Soul of the Teſtament) is ſtraightways preſumed to be changed [d], and conſequently the Legacy not to be aſleep, (as ſome do dream,) but to be quite dead and extinguiſhed [e]: And being once dead, cannot eaſily be awaked, but ſtandeth in Need of a new Conſent or other lively Act before it can be revived [f].

If (18) the Thing bequeathed be not fully alienated, as if it be pledged or pawned, the Legacy is not thereby extinguiſhed [g]: And therefore the Executor in this Caſe is bound to redeem the ſame, and to reſtore it to the Legatary, or to pay the Price thereof, if he ſuffer it to be forfeited [h]. Likewiſe, if ſome Part only of the Legacy be alienated, the other Part not alienated is due, and may be recovered [i]: Unleſs it be proved that the Teſtator did mean by alienating Part, to take away the whole Legacy [k]. Or if the Legacy be alternative, as if the Teſtator bequeath ſomething, or the Value thereof; the Thing being alienated, yet may the Value be recovered [l].

If (19) the Teſtator doth bequeath an Obligation, or a Sum of Money due unto him, and afterwards the Debtor unprovoked doth voluntarily pay the Debt due unto the Teſtator; the Receipt of the ſame is no Ademption of the Legacy [q]; but if the Teſtator do provoke the Debtor to make Payment, then by Receipt thereof the Legacy is extinguiſhed [r]; unleſs the Legatary be able to prove that the Teſtator did not thereby mean to revoke the Legacy [s]; for that peradventure the Teſtator exacting and receiving the Money did lay it up, and ſafely keep it for the Legatary [t]; or did utter in Words that he did not intend thereby to revoke the Legacy [u]; in theſe Caſes the Legacy is not revoked [x].

[b] Brook Abridg. tit. Deviſe, n. 8.
[c] Brook eodem loc.
[d] Aretin. in §. ſi rem. Inſt. de leg. Socin. ſen. conſil. 103. in fin. Maſc. de probac. concluſ. 1280. n. 190. Sich. in L. 3. c. de leg. n. 5.
[e] Sich. in d. L. 3. c. de leg. n. 5, 8.
[f] L. cum. ſerv. ff. de adim. lega.
[g] L. qui poſt. C. de leg. n.
[h] Iſtam concl. limitat & ſublimitat Maſc. de probatione concl. 1280. n. 56, &c. quem velim videas.
[i] Si rem. Inſt. de leg.
[k] Eod. §. in fin.
[l] Bald. & Paul. de Caſtr. in l. 3. C. de leg.
[q] L. fidei commiſ. §. ſed ſi rem. ff. de leg. 3. Mant. de conject. ult. vol. l. 11. tit. 2. n. 19.
[r] d. §. ſed ſi rem. & ibi Bar. & alii. L. pater. ff. de adim. leg. Maſcard. de probac. concl. 1280. n. 130.
[s] d. §. ſed ſi rem.
[t] Eod. §. ſed ſi rem. d. concluſ. 1280. n. 132, 133.
& ibi Bar. in fin. & Bald. circa med.
[u] Bar. in d. §. ſed ſi rem.
[x] Vide Maſcard.

A. deviſed to his Daughter 200 *l.* *Item*, I give to her my Houſehold Goods, if ſhe ſhall not be married in my Life-time; his Daughter married in his Life-time, and he gave her above 200 *l.* and dies, not having revoked or altered his Will: And the Court held, that the Legacy was extinguiſhed by the Portion. *Jenkins* and *Powell*, 2 *Vern.* 214.

The Teſtator *inter alia* deviſed as follows: *Item*, I give to *A.* my Uncle the Sum of 500 *l.* that is to ſay, the Bond and Judgment he gave me for 400 *l.* and 100 *l.* in Money, and made his Wife Executrix, and deſires her to be kind to his Uncle: After this the Uncle paid 320 *l.* off the Bond, took it up, had the Judgment vacated, and gave a new Bond for the remaining 80 *l.* After this the Teſtator died. The Uncle brought a Bill for the Legacy of 500 *l.* The Defendant inſiſted that this was a ſpecific Legacy of that particular Bond and Judgment, and they being cancelled and altered before the Teſtator's Death, it was an Ademption of the Legacy as to ſo much; and

beſides, that this Payment of 320*l.* amounted to a Releaſe of ſo much of the Legacy, and therefore the Plaintiff could have no Right but to the remaining 100*l.* On the other Side it was inſiſted, that the Diverſity is where the Money is voluntarily paid in, and where the Teſtator ſues for it and recovers it; in the firſt Caſe the Legacy continues ſtill good, becauſe the Money only comes home to the perſonal Eſtate; but in the latter Caſe, the Teſtator by ſuing for it ſhews he intended to make it his own, and the Juſtice of the Uncle ought not to prevent the Affection of the Nephew, and no Alteration of his Intention appeared: The Lord Keeper was clear of the ſame Opinion, and decreed the 80*l.* Bond to be delivered up, and the Reſidue of the Legacy to be paid. *Orme* and *Smith*, 2 *Vern.* 681.

The Counteſs Dowager of *Thomond* having two ſeveral Sums of 2000*l.* each, due to her on two ſeveral Bonds, the one from her Grandſon the Earl of *Thomond*, and the other from her Grandaughter the Lady *Henrietta Obrian*, by Will gave theſe two Sums of 2000*l.* each, and all Intereſt due for the ſame to her Grandaughter the Lady *Mary Obrian*, and deviſes away the Surplus of her Eſtate with a Proviſo, "That in Caſe all, or any Part of theſe two Sums, ſhould "be paid in before the Teſtatrix's Death, then the ſaid Teſtatrix "gives to the ſaid Lady *Mary Obrian* 4000*l.* or ſo much Money "as the principal Money ſo paid in ſhould amount unto, as the Caſe "ſhould fall out."

Afterwards the Teſtatrix releaſed to the Lord *Thomond* the 2000*l.* due on his Bond, without having received any Part of the Money, and died. The Lady *Mary Obrian* died Inteſtate, and the Lord *Thomond* adminiſtered to her, and, as her Adminiſtrator, demanded out of the Aſſets of the Teſtatrix the Counteſs Dowager of *Thomond* the 2000*l.* which was releaſed to himſelf on his Bond. It was objected for the Defendants, that the Releaſing the 2000*l.* was an Ademption *pro tanto* of the 4000*l.* Legacy. But the Objection was over-ruled, and the 2000*l.* decreed to the Plaintiff the Lord *Thomond*. *The Earl of Thomond* againſt *The Earl of Suffolk and others*, 1 *Williams* 461.

One by Will gives his Daughter a Portion of 500*l.* the Daughter afterwards married, and he then gave her 300*l.* for her Portion, and lived four Years after the Marriage without revoking his Will.

Lord Chancellor: If a Father gives a Daughter a Portion by Will, and afterwards gives to the ſame Daughter a Portion in Marriage; it is a Revocation, for it will not be intended unleſs proved that the Father deſigned two Portions for one Child. *Harleſs* v. *Whitmore*, 1 *Williams* 681.

A. by her Will gave to her Grandaughter *Mary Ford* 40*l.* out of a Debt due to the Teſtatrix from *J. S.* for Rent, ſhe the ſaid *Mary* allowing her Part of the Charge for recovering the ſame, and gave the Reſidue of the ſaid Rent to her Grandſon *William Ford*, he alſo allowing his Part of what ſhould be expended in the Recovery thereof.

After the Making the Will *A.* the Teſtatrix ſued for theſe Arrears of Rent, and received them in her Life-time.

On a Bill by the Grandaughter for this 40*l.* it was held, that the Calling in the Debt by the Teſtatrix was no Ademption of the Legacy, (*Poulet*'s Caſe, *Raymond* 335.) And the Reaſon why the Teſtatrix's Calling in the Legacy ſhall be no Ademption is, becauſe it

muſt be preſumed to have proceeded from the Teſtatrix's Apprehenſion that the Debt was in Danger, and therefore to have been done in Favour of the Legatee, to the Intent ſhe might not loſe her Legacy; and what was done out of Kindneſs to the Legatee ought not to be interpreted to her Prejudice. *Ford* verſus *Fleming*, 2 *Williams* 469.

The Teſtator by Will gave 1000*l.* Capital *South-Sea* Stock to his Wife; at the Time of making his Will he had 1800*l.* *South-Sea* Stock, he afterwards reduced ſuch Stock to 200*l.* but after that purchaſed as much as made the 200*l.* to be 1600*l.* and died in *July* 1733. In *June* next before his Death the Act took Place for changing three Fourths of the Capital *South-Sea* Stock into Annuities.

In *Chancery* the Queſtion was, 1. Whether the Teſtator ſelling Part of the *South-Sea* Stock after the Making his Will ſhould not be conſidered as an Ademption of the Legacy? 2. If the Act turning the *South-Sea* Stock into Annuities ſhould not be ſo conſidered? Adjudged, that neither of them was an Ademption. *Partridge* againſt *Partridge*, *Mich.* 1736. *Forreſter's Rep.* 226.

The Teſtator had Iſſue two Sons, *William* and *Peter*, and four Daughters, and in his Life-time gave his two Sons, in order to ſettle them in the World, 1500*l.* a-piece, and took Receipts from them reſpectively in the following Words: *Received of my Father* William Prince *the Sum of* 1500*l. which I do hereby acknowledge to be on Account and in Part of what he has given, or ſhall by his laſt Will give to me.* Sometime after the Teſtator made his Will in the following Words: *And whereas I have heretofore given or advanced with my Children* William, Elizabeth *and* Sarah *the Sum of* 1500*l. a-piece: Now I hereby in like Manner give unto my three other Children* Peter, Mary *and* Anne 1500*l. a-piece*, the Reſidue among all his Children.

The Queſtion in *Chancery* was, whether *Peter* ſhould have a new Sum of 1500*l.* upon the latter Words of the Will, or whether he ſhould not be in the ſame Caſe with *William*, they both being equally advanced by the Father, and this ſeeming only a Miſtake in the Teſtator. Decreed the 1500*l.* received by *Peter* in his Father's Life-time, to be a Satisfaction for what the Father gave him by his Will, and that he ſhould not have another 1500*l.* upon the latter Words. *Upton* v. *Prince*, *Paſ.* 1735. *Forreſter's Rep.* 71.

Where a certain Quantity is twice bequeathed it is twice due, if in two diſtinct Writings, as in a Will and in a Codicil; but if in one Writing it doth not make the Legacy double.

Finally, (20) if the Teſtator do bequeath a Flock of Sheep, and afterwards the Number decreaſing, they become fewer than a Flock (a Flock conſiſting of ten at the leaſt [y],) be it that of all the Flock there be left but one; in this Caſe the Will of the Teſtator is not preſumed to be altered, nor the Legacy adempted; and therefore that one Sheep is due [z].

[y] L. ſi grege. ff. de leg. 1. & DD. ibid.

[z] §. ſi grex. inſt. de leg.

§. XXI.

§. XXI. Of Tranſlation of Legacies.

1. *Tranſlation of a Legacy what it is.*
2. *Every Tranſlation includeth an Ademption.*
3. *What if the Perſon to whom the Legacy is transferred be incapable thereof.*
4. *Certain Caſes wherein Tranſlation of the Legacy doth not include an Ademption.*
5. *The Legacy is preſumed to be transferred with the Charge impoſed on the firſt Legatary.*
6. *Certain Exceptions of this Concluſion.*
7. *One and the ſame Thing bequeathed, firſt to one, and after to another, whether it be wholly taken from the former Legatary.*
8. *If in the ſecond Diſpoſition there be no Mention of the former, it is not wholly taken from the former Legatary.*
9. *If there be Mention of the former Bequeſt, yet the Thing bequeathed is not wholly taken away.*
10. *Certain Limitations of this laſt Poſition.*
11. *Difference between theſe Words,* I give, *and,* I bequeath.
12. *What if the Legacy conſiſt in Quantity?*
13. *What if one Sum be twice bequeathed to one Perſon, whether is it twice due?*

TRanſlation (1) of a Legacy is a Beſtowing of the ſame upon another [a]. As Ademption may be made either in the ſame Teſtament or in Codicils, ſimply or conditionally; ſo may Tranſlation of Legacies likewiſe [b].

A Legacy (2) being transferred from one to another, the Legacy is taken away from the former Legatary, albeit (3) the ſecond Legatary be incapable of the Legacy [c]. For howſoever that Act is ſaid not to miniſter Impediment, which is altogether without Effect [d]; yet foraſmuch as by this Tranſlation it doth appear to be the Teſtator's Will and Meaning, firſt to have the Legacy taken away from the former Legatary; this Will and Meaning ought to be obſerved, ſo far as it may [e], and ought not therefore to be hindered in one Thing, becauſe it cannot be performed in another [f]. For, as I ſaid before, (4) every Tranſlation doth preſuppoſe and include an Ademption [g], except in certain Caſes following. The firſt Caſe is, when the Teſtator in the Time of great and extreme Sickneſs transferring a Legacy, or beſtowing the ſame upon another, doth afterwards recover his Health; for by this Recovery the Tranſlation is void, and the former Legacy confirmed [h]. Another Caſe is, when the Teſtator having bequeathed a Legacy to one, provideth, that if the Legatary will not do ſuch a Thing to another Perſon, that then that other Perſon ſhall have the Legacy; in this Caſe if the former Legatary be prevented by Death, that he cannot perform the Condition though he would, the ſecond Legatary cannot obtain the Legacy [i]. The third Caſe is, when the Legacy doth conſiſt in Quantity, as when the Teſtator doth bequeath to one Man an hundred Pounds, and immediately after to another Man an hundred Pounds; here is neither Tranſlation or Ademption of the former Legacy, but two ſeveral Legacies

[a] Minſing. in tit. de ademp. leg. inſtit. n. 4.
[b] Tit. de ademp. leg. Inſt. L. Tranſlat. eod. tit. ff. & DD. ibid.
[c] L. plane. §. 1. de leg. 1. L. & ſi tranſ. de adimen. leg. ff.
[d] C. non præſt. de reg. jur. 6.
[e] Minſi. in d. tit. de ademp. leg. n. 6.
[f] Bar. Jaſ. & alii in d. L. plane.
[g] Cæteru' an tranſlatio ſit expreſſa vel tacita primileg. revocat. quæſtio eſt, cui non eod. modo reſpond. omnes; tu autem videas Covar. in Rub. de teſt. extr. 2. part. n. 21.
[h] L. Titia. §. ult. de adim. leg. ff. Mantic. de conject. ult. vol. l. 12. tit. 3. n. 2.
[i] L. ſanc. C. de pœnis, Jaſ. in L. cum proponas. C. de hær. inſt. & Mant. de conject. ult. vol. l. 12. tit. 3. n. 2.

gacies [k]. But yet if the Teſtator do limit this Sum to ſome certain Body, as if the Teſtator bequeath to one Man a hundred Pounds which lieth in his Cheſt; then it is all one as if he ſaid, he did bequeath his Signet, his Books, or his Armour; whereof we ſhall have Occaſion to ſpeak ſhortly after [l].

Furthermore, it is to be (5) noted in this Place, that where any Legacy is transferred from one to another, it is preſumed to be transferred to the ſecond Legatary with ſuch Charge, or upon ſuch Condition, as it was left to the former Legatary, albeit in the former Tranſlation there be no expreſs Mention of any ſuch Charge or Condition [m]. For Example; the Teſtator giveth to one Perſon an hundred Pounds, charging him to diſtribute ten Shillings yearly amongſt the Poor during ten Years; afterwards the Teſtator doth beſtow that hundred Pounds upon another Perſon, without Mention of any ſuch yearly Diſtribution: In this Caſe the ſecond Legatary is charged with the yearly Payment and Diſtribution of ten Shillings, even as the former Legatary [n], neither can he accept the one Part of the Legacy without the other [o], ſaving (6) in certain Caſes. One Caſe is, if he be able to prove the Teſtator's Meaning to the contrary, *viz.* that it was to transfer and beſtow the Legacy ſimply, without any ſuch Charge or Condition [p]. Another Caſe is, when the Condition is ſuch, as the ſame doth cleave to the Perſon of the former Legatary [q]. For Example; the Teſtator doth bequeath to a Woman with Child an hundred Pounds, if ſhe be delivered of a Boy; this Condition doth cleave to the Perſon of the former Legatary, and ſo it is not transferred with the Legacy [r]. The third Caſe is, when the Tranſlation is made of the ſame Perſon without Mention of any farther Charge or Condition; for then, leſt the ſecond Bequeſt ſhould ſeem ſuperfluous, it is thought to be the Meaning of the Teſtator, by the ſecond Bequeſt to give the ſame ſimply [s]. The fourth Caſe is, when in the Tranſlation of the Legacy there is a new ſpecial Charge impoſed upon the ſecond Legatary; for then the old Charge impoſed to the former Legatary is preſumed to be remitted, leſt otherwiſe the latter Legatary is preſſed with a double Charge [t].

[k] L. paulo. in prin. de leg. 3. ff.

[l] Infra hoc ipſo §. n. 7, 11.

[m] L. Gaio. ff. de alimen. & cib. leg. L. legatum. de adim. leg. Paul. de Caſtr. conſil. 337. vol. 1.

[n] Bar. in d. L. Gaio. Mant. de conject. ult. vol. l. 12. tit. 3. n. 3.

[o] L. legat. §. ſi legat. de leg. 1.

[p] d. L. Gaio.

[q] L. legat. ſub conditione. de adimen. leg. L. legatum ſub conditione de cond. & demon. ff.

[r] d. L. legat. ſub conditio. de adim. leg. & ibi DD.

[s] Si tibi. de adim. leg. ff.

[t] L. Alumne. de ad. Paul. de Caſtr. conſil. 427. vol. 1. Mantic. de conject. ult. vol. l. 12. tit. 3.

What (7) if the Teſtator, after he have given a Legacy to one Perſon, do afterwards bequeath the ſame to another Perſon? Whether is this an Ademption of the former Legacy? Or whether ought both the Legataries to concur, and to have the Legacy between them?

For Anſwer, we are to conſider, whether ſome ſpecial and certain Thing is bequeathed, or a Thing conſiſting in Quantity.

In the former Caſe, namely, when ſome ſpecial or certain Thing is bequeathed, it is material, whether the Legacy be of Lands, Tenements or Hereditaments; and ſo the Queſtion determinable in the Temporal Court, according to the Laws temporal of this Land; or of Goods, and ſo the Controverſy to be decided in the Eccleſiaſtical Court, according to the Laws Eccleſiaſtical of this Realm. If of Lands, Tenements and Hereditaments, as when the Teſtator (for Example) doth in the former Part of his Will deviſe his Lands in ſuch a Place to one in Fee, and afterwards in the latter Part of the ſame Will to another Perſon in Fee; it ſeemeth by the Laws of this Realm, that the latter Part doth overthrow the former [u]; and that as the

[u] Plow. in Ca. inter *Paramor* and *Yardley*, fol. 541.

latter Teſtament doth deſtroy the former Teſtament, ſo the latter Part of a Teſtament doth infringe the former Part of the ſame Teſtament, when it is contrary thereunto [x]. Nevertheleſs, I will not preſume to affirm that this Concluſion is undoubtedly certain, but with due Submiſſion ſurrender the ſame to be diſcuſſed by the learned in the Laws temporal, unto whom it rightly appertaineth.

[x] Eadem enim eſt ratio partis ad partem, atque totius ad totum. Everard. loc. top. à toto ad partem.

It was my Lord *Coke*'s Opinion, that the latter Clauſe revoked the firſt: But ſince it hath been decreed in Equity to the contrary, (*viz.*) where Lands in the ſame Will are firſt deviſed to one, and afterwards to another, the laſt Clauſe ſhall not revoke the firſt, but they ſhall be joint Deviſees.

Fane verſus *Fane*, 1 Vern. 30.

If the Deviſe be of Goods, as when the Teſtator doth bequeath his Signet, his Books, or his Horſe, *&c.* firſt to one Perſon, and afterwards to another Perſon; then (8) in caſe the ſecond Legacy be ſimple, (I mean without Mention of the former,) the former Legacy is not taken away, but the two Legataries concurring ought to divide the Legacy betwixt them [y]. The Reaſon and Foundation whereupon this Concluſion is builded is the Teſtator's Conſtancy; wherein the Civil Law doth repoſe ſuch Confidence, that when he hath once bequeathed a Thing, he is not preſumed to take the ſame away [z], without evident Preſumption [a] of the Alteration of his former Reſolution. Inſomuch that if one and the ſame Thing be left to one Perſon in the Teſtament, and to another in the Codicil, yet is not the Teſtator preſumed ſo variable, as utterly to take away the former Legacy, but rather that both the Legataries are to concur, and ſo to divide the Legacy betwixt them [b]. Where it is ſaid, that as the latter Teſtament doth deſtroy the former Teſtament, ſo likewiſe the latter Part of the Teſtament doth overthrow the former Part thereof; that is true, when it is evident that the Teſtator did mean it ſhould be ſo [c]. But if it be doubtful, then we ought to labour diligently to ſave the Teſtament from Contradiction [d], and not ſuffer one Part to fight and brawl with another; much leſs to permit one Part to deſtroy another, in caſe there be any Place for Peace or Hope of Reconciliation to be had betwixt them. Again, the Argument is not of equal Force *à parte ad partem* with the Argument *à toto ad totum*, in caſe there be Inequality or Diverſity of Reaſon betwixt the one and the other [e], as in this Caſe. For, ſay that ſuch is the Force of Poſteriority in Teſtaments, that the latter doth ſtill deſtroy the former [f], without any other Revocation [g]; ſay and think that the Life of the latter Teſtament is evermore the Death of the former Teſtament, even becauſe it is the latter [h]; yet how can it be thereby juſtified, that the latter Part of a Teſtament doth deſtroy the former Part, whereas neither Part doth receive any Life before the other [i]? for until the whole Teſtament be completed, the Parts thereof are as the ſenſeleſs Parts of an unperfect Creature, or confuſed *Embryo* [k], and do receive their Life too all together at one Inſtant; namely, when the Teſtator having finiſhed his Teſtament, doth approve the ſame for his laſt Will, and not before [l]; like as they do receive their Strength all at one Moment, namely, at the Death of the Teſtator, and not before; at which Time the foreſaid *Embryo* being now grown to a perfect Child,

[y] Paul. de Caſtr. Jaſ. & Zaſ. in L. ſi plurib. ff. de leg. 1. Ripa in L. re conjuncti. n. 21. de leg. 3.

[z] d. L. ſi pluribus. verb. ſi quidem evidentiſſime.

[a] Raph. Cum in d. L. ſi plurib. & ibi Jaſ. n. 12. & 13. & Zaſ. n. 14. Qui omnes tenent, ſufficere conjecturalem probationem, non obſtante quod Textus exigat evidentiſſimam. Quinimo, probatio vel ex conjecturis emergens, dicitur evidentiſſima in tranſlatione legator. Jaſ. ubi ſupr. poſt Bar. in L. ſi conſt. ff. ſol. ma. n. 12.

[b] Bald. in L. cohær. §. cohæres, in fin. de vulg. & pud. ſub. ff. Alex. conſ. 169. vol. 5. Mant. de conject. ult. vol. 1. 12. tit. 2. n. 3.

[c] d. L. ſi. plurib. & ibi DD. Mant. de conject. ult. vol. 1. 2. tit. 2. n. 3. in. fin.

[d] Mant. de conject. ult. vol. 3. tit. 5. Soc. Jun. conſ. 125. vol. 1. n. 5.

[e] Everard. d. loco à toto ad partem, n 5. poſt. Cyn. & alios leg. interpretes in L. cum notiſſimi. §. in his. C. de præſcrip. 30. an.

[f] §. poſterior Inſt. quibus mod. teſt. infir.

[g] Vigl. & Minſing. in d. §. poſterior.

[h] Graff. Theſ. com. op. §. teſt. q. 860. in prin. & ſupra eadem part. §. 14.

[i] Bar. in L. ſi quis. ff. de teſta. L. ex ea ſcriptura eodem tit.

[k] d. L. ex ea ſcriptura. Imo (inquit Text.) teſt. imperfectum eſt ſine dubio nullum. §. pen. Inſt. quib. modis teſta. infir.

[l] Jul. Clar. § teſt. q. 7. in fin.

Child, is brought into the World when the Teſtator did depart out of the World [m].

[m] Chr. Porcus. §. in extraneis. Inſt. de hær. qual. & different. Matth. de celebr. miſſ. extra.

If (9) the ſecond Bequeſt be qualified with Mention of the former: For Example; the Teſtator ſaith, *My Signet which I bequeathed to* A. B. *I bequeath to* C. D. whether in this Caſe the former Legacy be quite taken away, or in Part, is a Queſtion wherein the Writers do greatly vary [n]; but the greater Number incline to this Opinion, that the former Legacy is not wholly taken away, but that they are both joint Legataries [o]; (10) except in certain Caſes. One is, when it may appear (at leaſt by Conjectures) that it was the Teſtator's Meaning to take away the former Legacy from the former Legatary wholly [p]. Another is, when the ſecond Bequeſt is not made in the ſame Teſtament, but after in ſome Codicil [q]. Another Caſe is, when the Teſtator in the ſecond Diſpoſition ſaith, (11) that which I did bequeath to *A. B.* I give to *C. D.* for this Word [*Give*] is of ſuch Force, that it ſeemeth wholly to take away the former Legacy [r].

[n] Id quod patet per Mant. de conject. ult. vol. l. 12. tit. 4. per Covar. in Rub. de teſt. extra. part. 2. per Graſſ. Theſ. com. op. §. legatum. q. 8. per Vaſq. de ſucceſſ. progreſſ. l. 3. §. 23. n. 96, &c. & per Doctores in L. plane. & L. ſi pluribus. ff. de leg. 1.

[o] Bar. in L. re conjunct. ff. de leg. 3. Cujus opinionem frequetiori calculo receptam monſtrat nobis Mantic. de conject. ult. vol. l. 12. tit. 4. n. 1. & refert Graſſ. Theſaur. com. op. §. legatum. q. 180.

[p] Bar. in d. L. re conjunct. Mantic. d. tit. 4. n. 8. Graſſ. de §. legatum. q. 80. n. 2.

[q] Ripa in d. L. re conjunct. n. 23. de leg. 3. ff. Mantic. d. tit. 4. n. 10.

[r] Covar. in Rub. de teſt. extr. part. 2. n. 21. Alc. in L. triplici. de ver. ſig. ff. n. 13. Maſcard. tract. de prob. concl. 1280. n. 47.

In the ſecond Caſe, that is to ſay, (12) when the Legacy doth conſiſt in Quantity, if the Teſtator do bequeath to one Man an hundred Pounds, and immediately to another Man an hundred Pounds; here is neither Tranſlation nor Ademption, but two ſeveral Legacies; and either Legatary in this Caſe ſhall recover an hundred Pounds [s], as I have ſhewed before. Where alſo I ſignified, that if the Teſtator do reſtrain this Quantity to a certain Body, as to the hundred Pounds ſealed up in ſuch a Bag, then it is reduced to that Caſe of bequeathing a certain ſpecial Thing, as the Teſtator's Signet, firſt to one, and then to another [t].

[s] Atque hæc concl. ſine contradict. vera eſt. Minſi. in §. tranſferri. Inſt. de ademp. leg. n. 8.

[t] L. plane. §. ſi ead. de leg. 1. ff. ver. ſed hoc. ita & Zaſ. eod. §. n. 3. verb. ſed finge.

If the Teſtator (13) do bequeath to one Man an hundred Pounds, and afterwards in the ſame Teſtament bequeath to the ſame Man an hundred Pounds; the ſecond Diſpoſition is underſtood to be but a Repetition of the former, and all but one Legacy [u]; wherefore the Legatary in this Caſe can recover but one hundred Pounds; unleſs he make Proof that it was the Teſtator's Meaning, that he ſhould have two hundred Pounds [x]. Or unleſs an unequal Quantity be given to the ſame Legatary; as if the Teſtator do bequeath in one Part of his Teſtament an hundred Pounds, and in another Part fifty Pounds; for in this Caſe the Legatary may recover an hundred and fifty Pounds [y]. Or unleſs where two equal Sums be left to one Perſon, the one Quantity were left in one Writing, and another Quantity in another Writing, ſuppoſe one hundred Pounds in the Teſtament, another hundred Pounds in the Codicil; for here the Legatary may recover two hundred Pounds [z], as two ſeveral Legacies;

[u] Gloſſ. in d. L. plane. §. 1. & ibi Jaſ. n. 11. & Zaſ. n. 14. Michael Graſſ. Theſ. com. op. §. legat. q. 60. Contra quam opinionem, quamtumvis communem, emanavit diſputatio à D. Gentil. condita, non inelegans, nec injucunda. Hanc ipſe legit. l. diſput. fo. 51.

[x] Tunc enim ſæpius præſtanda eſt ſumma, ſi modo evident. probationibus oſtendatur teſt. mult. leg. voluiſſe. d. §. 1.

[y] L. cum centum. de adimen. leg. ff. Jaſ. in d. §. 1. Graſſ. d. q. 60. ubi ſcribit hanc op. eſſe com. Adde Vaſq. de ſucceſſ. progreſſ. §, 11. n. 10. Menoch. de præſ. l. 4. præſ. 128. fol. 1297. n. 9.

[z] Jaſ. & Zaſ. in d. L. plane. §. ſi eadem. de leg. 1. & hæc op. com. eſt, ut per eoſdem Doctores, & per Graſſ. de §. legatum. q. 60. & per Ripam. d. L. conjunct. de leg. 3. ff.

Legacies; except the Executor prove the Teſtator's Meaning to be contrary [a].

[a] Minſing. in tit. de adem. legat. Inſt. n. 8.

Si ob eandem cauſam quantitas ſit uni in diverſis ſcripturis relicta, (puta alimentorum cauſa centum relicta ſunt,) illa centum tantum ſemel præſtari debent. Menoch. præſump. lib. 4. præſ. 128. n. 14.

The Teſtator having three Nieces *A. B.* and *C.* and being indebted to his Niece *A.* in 100 *l.* on a Bond, he deviſed 300 *l.* to her, and to his other two Nieces 200 *l.* a-piece; and afterwards he borrowed 100 *l.* more of his Niece *A.* and died; it was inſiſted that ſo much of this 300 *l.* deviſed to her as amounted to 200 *l.* ſhould go in Satisfaction of both the Debts owing to her by the Teſtator, and that ſhe ſhould not have the intire Legacy of 300 *l.* and be paid thoſe Debts out of the Teſtator's Eſtate; for a Man ſhall be intended to be juſt in paying his Debts before he ſhall be charitable in giving Legacies; but it was decreed that the Legatee ſhould have the 300 *l.* over and above the Debt of 200 *l.* which was due to her from the Teſtator; and the Reaſon was given in * *Cranmer*'s Caſe, (*viz.*) becauſe a Court of Equity cannot ſay that the Teſtator paid a Debt when he deviſed a Legacy. *Cuthbert* v. *Peacock*, 1 Salk. 155. * 2 Salk. 508.

T. B. by Will gave ſeveral Annuities to be paid by his Executrix out of his perſonal Eſtate, *viz.* to his Niece *E. P.* an Annuity of 5 *l.* payable quarterly during her Life; to his Niece *E. N.* an Annuity of 5 *l.* payable quarterly during her Life; to his Niece *M. D.* an Annuity of 10 *l.* to her Daughter *E. D.* an Annuity of 5 *l.* to be paid quarterly during their reſpective Lives; made his Wife *E. B.* ſole Executrix and reſiduary Legatee, and died. *E. B.* the Widow by Will gave to the ſaid *E. P.* an Annuity of 5 *l.* to be paid quarterly, to her and her Heirs for ever, *in caſe ſhe ſhould ſurvive her Mother* M. P. *and not otherwiſe*; and to the ſaid *E. N.* an Annuity of 5 *l.* to be paid quarterly, to hold to her and her Heirs for ever, *in caſe the ſaid* E. N. *ſhould ſurvive the Teſtatrix's Siſter* M. P. to the ſaid *M. D.* an Annuity of 10 *l.* to hold to her and her Heirs for ever; and to the ſaid *E. D.* an Annuity of 5 *l.* to her and her Heirs for ever; and directed a Purchaſe of Lands to be made for ſecuring the Payment of theſe Annuities. It was inſiſted, that the Annuities given by the Will of the Wife ſhould be taken as a Satisfaction of the Annuities given by the Will of the Husband, (the Wife having her Husband's perſonal Eſtate was become a Debtor in Reſpect thereof, and conſequently might intend the Legacies in Satisfaction of ſuch Debt). *Sed per Cur'*: As to the Annuities given by the Will of the Wife to *E. P.* and *E. N.* they are given upon Contingencies, and therefore cannot be a Satisfaction for Annuities given abſolutely by the Will of the Husband: As to the Annuities given by the Wife's Will to *M. D.* and *E. D.* though they are of the ſame yearly Value, and greater in Point of Duration, than thoſe given by the Husband's Will; yet, as ſhe has not declared that the one ſhall be a Satisfaction for the other, it may be ſuppoſed that the Wife intended to be kind as well as juſt to her Husband's Relations; and it was decreed accordingly. *Crompton* v. *Sale*, 2 *Williams* 553.

§. XXII. Of

§. XXII. Of divers Means whereby Legacies are loſt conſiderable in the Legatary.

1. *By what Means he that is named Executor is made incapable of the Executorſhip, by the ſame Means doth the Legatary loſe his Legacy.*
2. *The Legacy is loſt by Reaſon of Enmity betwixt the Teſtator and the Legatary.*
3. *Divers Extenſions of this Concluſion.*
4. *What if the Teſtator were the Cauſe of the Enmity, and the Legatary in no Fault?*
5. *Certain Caſes wherein the Legacy is not loſt by Reaſon of Enmity.*
6. *The Legatary, being appointed Tutor, loſeth his Legacy if he refuſe the Tutorſhip.*
7. *The Legatary, if he accuſe the Teſtament of Falſity, loſeth his Legacy.*
8. *The Legatary which doth cancel the Teſtament doth loſe his Legacy.*
9. *The Legatary doth loſe his Legacy, who of his own Authority doth take and poſſeſs the Thing bequeathed.*
10. *Certain Caſes wherein the former Concluſion is limited.*

IN Reſpect of the Fact and Perſon of the Legatary, the Legacy may become void divers Ways. And firſt generally, (1) by all the Means above recited, whereby the Executor is made incapable of the Executorſhip [a]. As if the Legatary do become an Heretick, an Apoſtata, or do forbid the Teſtator to alter his Will, *&c.* of all which Means we have ſpoken already [b]; wherefore we ſhall let them paſs, and deſcend to ſome particular Cauſes not yet mentioned.

[a] Gloſſ. in L. 3. §. fin. de adimen. leg. ff. L. ex part. eod. tit. Mantic. de conject. ult. vol. l. 12. tit. 4. n. 2.

[b] Supra part. 5. §§. 2, 3, 4. cum ſeq. & ſup. ead. part. §. 18.

Firſt therefore, if the (2) Legatary become Enemy to the Teſtator, he loſeth his Legacy [c]. For beſides that he ſeemeth unworthy of a Benefit at his Hands, whom he doth offend and injure; it is not likely that the Teſtator would that that Perſon, which proſetutes him with Hatred and Enmity whilſt he liveth, ſhould reap any Commodity by his Teſtament when he is dead [d]. And therefore if the Teſtator's Enemy ſhould demand any Legacy, he might juſtly be repelled, by reaſon of the Defect of the Teſtator's Will and Conſent [e]; which Conſent is the Life and Soul of the Teſtament.

[c] L. 3. §. fin. de adimen. leg. ff. Tiraq. in reg. ceſſante cauſa. n. 127. Mantic. de conject. ult. vol. l. 12. tit. 5. in princ.

[d] L. ſi inimicitiæ. ff. de his quib. ut indig. L. nec. adjecit. ff. pro ſocio Maſcard. de prob. concl. q. 1289. n. 137.

[e] DD. in L. ſi inimicitiæ. & in d. §. fin.

The (3) Extenſions of this Concluſion are theſe. Firſt, albeit the Teſtator do afterwards make ſome Codicil, or Additions to his Teſtament, and do not therein expreſly revoke the Legacy before bequeathed in his laſt Teſtament; yet it is ſtill preſumed to be revoked ſecretly, and in the Intent of the Teſtator, by reaſon of the aforeſaid Hatred or Enmity [f].

[f] L filio. §. ſcia. & ibi Bar. de adimen. leg. ff. Rip. in L. ult. de revoc. don. C. Mant. de conject. ult. vol. l. 12. tit. 5. n. 2. Maſc. de probac. concl. 1280. n. 138.

Secondly, the former Concluſion hath Place, albeit the Teſtator were ignorant of the Injury done unto him by the Legatary, when it is ſuch an Injury, for the which it is very likely that the Teſtator would have revoked his Legacy, if he had known thereof; as if the Legatary have committed Adultery with the Teſtator's Wife, or have deflowed his Daughter [g].

[g] Gloſſ. in L. fidei commiſſ. C. de fidei commiſſ. Mant. de conject. ult. vol. l. 12. tit. 5. n. 6. Et quidem ipſo jure tollitur legatum, ſi vivente teſtatore ſtupravit ejus uxor. eo vero defuncto, ope exceptionis. Apoſt. ad gloſſ. in d. L. fidei com.

Thirdly, if the Wife depart from her Husband without his good Favour, ſhe loſeth her Legacy [h].

[h] L. uxori. de aur. & argent. leg. ff. & ibi gloſſ. cum Bar. Maſc. de prob. concl. 1280. n. 140. Mant. de tit. 5. n. 3.

Fourthly, he which doth accuſe the Teſtator of any capital Crime loſeth his Legacy [i].

[i] L. filio. §. ſe. ff. de adimen. leg.

Fifthly, he which becometh capital Enemy to the Teſtator's Brother loſeth his Legacy [k].

[k] Mant. de conject. ult. vol. lib. 12. tit. 5. n. 8.

Sixthly, (4) albeit the Teſtator himſelf were the Cauſe of the Enmity, and the Legatary in no Fault, yet ſhall the Legatary loſe his Legacy [l]. Which Concluſion may ſeem hard, but the Reaſon is eaſy; namely, becauſe where the Teſtator hath conceived Enmity, there is he preſumed to have altered and revoked his Will [m]; which Alteration and Revocation is ſo much the rather preſumed, when the Teſtator himſelf is the Cauſe of the Enmity; for he that will be Enemy without a Cauſe, is leſs a Friend then he that is unwillingly made an Enemy. And therefore I do the rather incline to their Opinion which hold, that the Legacy is taken away by Enmity ariſing from the Teſtator, without any juſt Cauſe given by the Legatary. If any think that this Opinion doth favour more of Law than of Equity; let him yet conſider, that even in Equity the Legatary, although innocent, ought not to receive any Favour againſt the Will of the Teſtator [n]. At leaſt, howſoever the Legatary were in no Fault at the firſt, if at the laſt being provoked by the Teſtator he become his Enemy, ſeeking to be revenged for the Injury done him; in this Caſe he loſeth his Legacy, even as well as if he himſelf had firſt broken the Bond of Amity [o].

[l] Mant. de tit. 5. n. 9. Jaſ. in L. ſi filiam. C. de inoffic. teſt. Ripa. in L. ult. C. de revoc. don. n. 151. Covar. in Rub. de teſt. extr. part. 2. n. 19. verſic. 5. in fin. contra opinionem Lar. à multis olim quidem recept. (quorum diligenter meminit Cotta in cauſa fororis ſuæ, aſſeverans eam eſſe communem, in memorabilibus verb. inimicitiæ) ſed hodie magis communiter reprobatam, ut refert Maſcard. de probac. concl. 1280. n. 144.

[m] Mant. d. tit. 5. n. 9. L. 3. §. ult. de adimen. leg. ff.

[n] Dec. conſil. 426. Mant. de conject. ult. vol. l. 3. tit. 19. n. 11.

[o] Maſc. de prob. concl. 1280. n. 145. qui hoc diſtictionis fœdere contrarias opiniones conciliat.

Seventhly, if the Legatary did neglect to miniſter neceſſary Help to the Teſtator in Time of his Sickneſs, whenas he might eaſily have done the ſame, through the Want whereof the Teſtator died; the Legacy is loſt [p]. For whoſo looketh to be benefited by a Man's Death, he ought to beware that he be not the Occaſion thereof, either in committing or in omitting any Thing, contrary to the Rule of Piety and Charity [q].

[p] L. indignum. ff. de his quibus ut indignis.

[q] Mant. de tit. 5. n. 10. Maſcard. concl. 1280. n. 134, 135.

Eighthly, if the Legatary by injurious and contumelious Words do grievouſly defame and ſlander the Teſtator, or curſe him with wicked Speeches; in theſe and ſuch like Caſes the Legacy is loſt [r].

[r] L. ſi inimicitiæ. ff. de his quibus ut indignis. Mant. d. tit. 5. n. 11. quem velim te videre.

The (5) Limitations of the former Concluſion are theſe. Firſt, when the Enmity is not great and grievous, but ſmall and light [s]. For the Teſtator is not preſumed to have altered or revoked any Part of his Will and Teſtament made with Deliberation and Conſtancy, by

[s] L. 3. §. ult. de adimen leg. 1. ſi inimicitiæ. de his quibus ut indig. ff.

reaſon of any light Offence or ſmall Diſpleaſure; but then whenas the Teſtator is moved and ſtirred as it were with Violence of great Diſpleaſure, and thereby driven to ſuch Bitterneſs of Mind againſt the Legatary, that it may ſeem that it repented the Teſtator that he had bequeathed any Thing in his Teſtament to ſuch a Legatary [t].

[t] Mantic. d. tit. 5. n. 14. Zaſ. tract. de ſub. c. 2. col. pen. Jaſ. in L. ſi filiam. C. de inoffic. teſta.

Secondly, when the Legacy is left in reſpect of the good Deſert of the Legatary [u]. For where Deſert went before, the Legacy is not preſumed to be taken away by the Offence following [x]; at the leaſt if the Offence be not very great and hainous, ſuch as may be thought to alter a Man's Purpoſe, even againſt him that had well deſerved [y].

[u] Maſca. de prob. concl. 1280. n. 147. Ripa in §. ult. C. de revoc. don. n. 150.
[x] L. ſi pater. §. pen. ff. de donac. Bald. in. L. ſi cum. tibi. ff. de dolo. Mant. d. tit. 5. n. 17.
[y] Mant. ubi ſupr. vide Maſcard. d. concl. 1280. n. 148.

Thirdly, when the Teſtator and Legatary be reconciled and reduced into Friendſhip again; for then the former Enmities do not Prejudice the Legatary [z]. Not only by Reaſon of Enmity betwixt the Teſtator and Legatary during the Teſtator's Life; but alſo by other Occaſions after the Teſtator's Death, conſiderable likewiſe in the Perſon of the Legatary, the Legacy may be loſt.

[z] L. 4. d. adim. leg. ff. Graſſ. Theſ. com. op. §. legat. q. 78. Maſc. d. concl. 1280. n. 149.

If (6) the Legatary being appointed Tutor in the Teſtament, or charged by the Teſtator with the Bringing up of ſome Child, do refuſe to undergo the Charge, he loſeth his Legacy [a]. Which Concluſion proceedeth, whether he were appointed Tutor either in the ſame Teſtament wherein the Legacy is contained, or in ſome Codicil, the Legacy being contained in the Teſtament [b]; or whether he were appointed by the Father of the Child, or by any other having Authority to appoint a Tutor [c], (of whom we have ſpoken before [d]) or whether the Legacy were left conditionally, (*viz.* If he did undertake the Tutorſhip,) or ſimply [e]; or whether the Tutor appointed be of Kin or allied to the Teſtator, or no [f]. But the ſaid Concluſion faileth, when the Legatary would be Tutor, but cannot [g]; or when it doth not ſtand by the Legatary that he is not admitted Tutor [h]; or if by other Circumſtances it may appear that the Teſtator would that he ſhould have the Legacy, albeit he did not undertake the Tutorſhip: In which Caſe the Tutor not being moniſhed to undertake the Tutorſhip, doth not loſe his Legacy [i].

[a] L. poſt legat. ver. amittere. ff. de his quibus ut indignis.
[b] L. Ne ſenſ. juncta. L. ſeq. de excuſ. tut. ff.
[c] d. L. ne ſenſ. L. natur. de confir. tut. ff. & ibi Bar. L. ſi patronus. eod. tut. & ibi. Bal.
[d] Supra 3. part. §. 9. cum ſequen.
[e] L. ſed hæc. ff. de excuſ. tut. Gribald. Theſaur. com. op. verb. tutor.
[f] Grib. de verb. tutor. Bar. Jaſ. Sichar. & alii in L. ſi legatar. 3. de lega. Et iſta opinio communis eſt jure Authen. pr. §. his omnibus. de hær. & falcid. refragante Covar. in C. Johann. de teſta. extra. Sed diſtingue, ut per Alex. & alios in d. L. ſi legatarius.
[g] DD. in d. L. ſi legat. C. d. lega.
[h] L. cum filius. §. non jure de leg. 2. ff.
[i] Alex. & Sich. in d. L. ſi legatarius. C. de lega.

Item, if (7) the Legatary after the Death of the Teſtator do accuſe the Teſtament as a falſe Teſtament, he loſeth his Legacy therein bequeathed [k]: Unleſs he being Tutor to the Teſtator's Children, or to ſome other having Intereſt, that the Teſtament ſhould not take Place, doth proſecute the Cauſe againſt the Teſtament, not in his own Name, but as Tutor, or for the Behoof of the Pupil [l]; or unleſs he accuſe the Teſtament, not as a falſe Teſtament, but as unlawfully made [m]; or unleſs he deſiſt from the Suit before Sentence be given [n]; In theſe and divers like Caſes he doth not prejudice himſelf [o].

[k] L. poſt legatum. de his quibus ut indig. ff.
[l] L. tutorem. ff. de his quib. ut indig.
[m] L. pen. eod. tit. Ætiologia eſt, quia non tam judicium defuncti impugnat, quam de jure diſputat.
[n] Sich. in Rub. de his quib. ut indignis C. n. 7. per L. 2. & per L. aliam cauſam eod. tit.
[o] Doctores in c. ex eo de reg. jur. 6. Gabr. l. com. concl. l. 6. tit. de reg. jur. concl. 1. Vig. method. jur. civil. lib. 12. c. 8. cauſ. 17.

Item, if (8) the Legatary cancel or deſtroy the Teſtament, he loſeth his Legacy [p]. And ſo it is, though he do not deface the Teſtament, but maliciouſly and fraudulently conceal the ſame [q].

Item, if (9) the Legatary of his own Authority, without the Conſent of the Executor, do apprehend and occupy the Legacy to him bequeathed, he loſeth his Right and Intereſt thereunto [r]. For he may not be his own Carver in this Caſe, but ought to receive his Legacy at the Hands of the Executor [s]: Which Executor ought firſt to have all the Teſtator's Goods and Chattels in his Hands, for the Payment and Diſcharge of the Teſtator's Debts [t]; which Debts ought to be paid before Legacies [u].

[p] L. ſi quis cum falſo. §. divus. L. ſi quis patris. Ad 1. L. Cornel. de falſis. ff.

[q] L. ſi legatarius. C. de lega.

[r] L. 1. quorum legatorum. ff. L. non dubium. C. de lega.

[s] Sich. in d. L. non dubium. Peckius, tit. teſtam. fol. 94.

[t] Old. de action. claſſ. 2. action. 2. fol. 112. Peckius ubi ſupra.

Caſtr. & Sichar. in d. L. non dubium, aſſignantes aliam rationem, nempe ob detractionem falcidiæ. [u] L. ſcimus. C. de jure delib. Paul. de Caſtro in d. L. non dubium. Brook Abridg. tit. Deviſ. n. 6. Fulbeck, fol. 47.

The (10) Limitations of this former Concluſion are theſe. Firſt, when the Teſtator doth in his Teſtament give Licence to the Legatary to take and occupy the ſame without Delivery of the Executor [x]. Which Licence may be granted either expreſly or ſecretly [y]. Expreſly, when the Teſtator ſaith, I bequeath my Horſe to *A. B.* giving him Licence to take him, and to poſſeſs him of his own Authority, without any Delivery to be made by my Executor [z]. Secretly, when the Teſtator ſaith, I bequeath unto him my Horſe, which I will that he quietly enjoy withont Trouble or Moleſtation [a]; or by Words of like Importance [b].

[x] Bar. in L. Titia. §. Lucius de leg. 1. Rip. in L. 1. quorum lega. ff. Sich. in d. L. non dubium. C. de lega.

[y] Sich. in d. L. non dubium. Rip. in d. L. 1.

[z] Sichard. in d. L. non dubium. n. 11.

[a] Sichar. in d. L. non dubium. n. 12. [b] Ripa in d. L. 1. ff. quorum lega. n. 10, 11, 12, 13, 14.

The ſecond Limitation is, when the Legatary was in quiet Poſſeſſion of the Thing bequeathed at the Time of the Death of the Teſtator; in which Caſe, if there be ſufficient Goods to pay the Teſtator's Debts, he may ſtill retain the Legacy [c].

The third Limitation is, when the Executor doth willingly permit the Legatary to take and occupy the Legacy without Contradiction [d].

The fourth Limitation is, when the Legatary doth apprehend his Legacy before the Executor have proved the Will, and undertaken the Executorſhip [e], or before Adminiſtration be granted [f].

[c] Socin. conſil. 111. lib. 1. Ripa. in d. L. 1. n. 15. Olden. de action. Claſſ. 2. action. 2. fol. 113.

[d] L. 1. §. prodeſt. ff. quorum leg.

[e] Paul. de Caſtro in d. L. non dubium.

Ratio eſt, quia vacante hæreditate, legatarius non dicitur vitioſe occupare. [f] Forte tamen cenſuris eccle. puniendus eſt, per Leg. unic. de bonis inteſtatorum.

The fifth Limitation is, when the Executor is negligent, and the Legacy like to periſh; as when certain Fruits or Corn on the Ground are given, and the ſame ready for reaping [g].

The ſixth Limitation is, when the Legatary is ignorant that the Thing by him apprehended and poſſeſſed was bequeathed unto him [h].

The ſeventh Limitation is, when the Legatary is alſo Executor [i].

The eighth Caſe is, when any Legacy is bequeathed to good and godly Uſes [k].

The ninth Caſe (by the Laws of this Realm) is where a Thing certain is deviſed, which cannot but be known to the Legatary. For in this Caſe, he may enter to the Legacy without Livery of the Executor [l], whereas if the Legacy were not certain, he could not enter thereunto without Danger of Loſs of the Legacy [m]. But in theſe and other Caſes the Legatary doth not loſe his Legacy [n]: Albeit (if need be) he may be compelled to reſtore the ſame [o].

[g] Jaſ. in d. L. non dubium. in fin.

[h] Sichard. in eand. L. non dubium. n. 1.

[i] Sichard. ibid. n. 13.

[k] Tiraq. de privileg. piæ cauſæ, c. 45.

[l] Kelleway's Reports, fol. 118. n. 93.

[m] Kelleway ubi ſupr.

[n] Old. de action. claſ. 2. action. interdict. quod legator. fo. 109.

[o] d. L. 1. quorum legatorum. & ibi Zaſ. & Ripa d L. non dubium. & ibi Jaſ. & Sich.

A. gives

A. gives *B.* a Legacy on Pain of Forfeiture of it, in caſe he ſhould give his Wife (whom he made Executrix) any Trouble in Relation to his Eſtate; *B.* brings a Bill againſt the Wife, for which there was very little Colour, and *inter alia* demands his Legacy. The Chancellor was of Opinion that the Suit was very frivolous, but would not declare the Legacy forfeited. *Nutt* verſus *Burrel, Select Caſes in Chancery, fo.* 1.

§. XXIII. Of the Death of the Legatary before the Legacy be due.

1. *If the Legatary die before the Legacy be due, the Legacy is extinguiſhed.*
2. *A ſimple Legacy beginneth to be due at the Death of the Teſtator.*
3. *What if the Legatary die at the ſame Inſtant when the Teſtator dieth.*
4. *If the Prince die before the Teſtator, his Succeſſors may obtain the Legacy.*
5. *A conditional Legacy is not due before the Condition be extant.*
6. *If the Legatary die before the Condition be extant, the Legacy is not transferred to his Executors.*
7. *Extenſions of this former Concluſion.*
8. *Limitations of the ſame Concluſion.*
9. *If the Legacy be referred to a certain Day, whether it begin to be due at the Death of the Teſtator.*
10. *When the Day is utterly uncertain, the Legacy is as if it were conditional.*
11. *What if the Day be certain in ſome Reſpects, and uncertain in other Reſpects?*

IF (1) the Legatary die before the Legacy *be due*, the Legacy is extinguiſhed [a]. That we may know when the Legacy is due, we are to conſider, whether the ſame be pure and ſimple, or conditional, or referred to a Day [b].

[a] L. ſi poſt. ff. quando dies. leg. ced.

[b] Gloſſ. in Rub. de cond. & demon. ff. Graff. Theſ. com. op. §. legat. q. 43. in prin.

When (2) the Legacy is pure and ſimple, the Day wherein the Legacy beginneth to be due is the Day of the Death of the Teſtator [c]: And therefore if the Legatary die before that Day, the Legacy is void; neither can the Executors or Adminiſtrators of the Legatary demand the ſame [d]. Inſomuch that if the Teſtator by his Laſt Will do bequeath his Lands and Tenements to *J. S.* and to his Heirs; yet if *J. S.* die before the Teſtator, the Deviſe is meerly void; and ſo the Heirs of the ſaid *J. S.* cannot recover the Land by Force of the Will [e]. And (3) ſo it is although the Legatary live as long as the Teſtator. For if he do not over-live the Teſtator, but that they die both at one Inſtant, (both peradventure being drowned together, or both being ſtruck to Death with the Fall of an Houſe [f];) in this Caſe alſo the Legacy is not due [g], and conſequently not tranſmiſſible to the Executors or Adminiſtrators of the Legatary. But if the Legatary do over-live the Teſtator, though it be but a very little, even a Mo-

[c] L. unic. §. cum igitur. & §. in noviſſim. C. de ead. tollend.

[d] d. L. unic. §. cum triplici.

[e] Plowd. in caſu inter Brett. & Rig. Do. Coke l. 1. in Rector de Cheddington's Caſe.

[f] Duobus ſimul mortuis, bello, ruina, naufrag. uter præſumitur prius mortuus. Menoc. de præſump. l. 6. præſ. 50.

[g] L. quod. ff. de reb.

a Moment, then the Legacy is due [h], and ſo may be recovered by the Executors or Adminiſtrators of the Legatary [i]. Neither is it material whether the Legatary did know, or were ignorant [k] of the Legacy; or whether the Will were proved, or the Adminiſtration of the Goods committed, whiles the Legatary lived [l]: For in this Caſe alſo the ſame is due to his Executors or Adminiſtrators. Howbeit (4) the former Concluſion, that if the Legatary die before the Teſtator, the Legacy is extinguiſhed, doth not hold where any Thing is bequeathed to the Prince: For though the Prince die before the Teſtator, yet the Legacy is due to his Succeſſor [m].

[h] Caſtr. in d. L. quod Tiraq. de jud. in reb. exig. lim. 3. nec longe abeſt. Jaſ. L. ſi quis. C. de inſtit. & ſub. n. 5.
[i] L. ſi poſt diem. ff. quand. dies leg. ced.
[k] L. ult. quando dies leg. ced. ff.
[l] L. unic. §. Sin autem. C. de ead. tollen. Dyer fol. 367, 372.
[m] L. quod princ. ff. de leg. 2.

When (5) the *Legacy is conditional*, the Day wherein the Legacy beginneth to be due is the Day wherein the Condition is performed [n]: And therefore (6) the Rule is, that the Legatary dying in the mean while, before the Condition be performed, the Legacy is extinguiſhed [o]. Which Rule (7) is extended, although the Legatary were one of the Teſtator's Children [p].

[n] L. unic. §. ſin autem. C. de ead. tol. Bar. in L. ſi poſt. ff. quando dies leg. ced.
[o] L. intercidit. ff. de cond. & dæmon. & Bar. in d. L. ſi poſt diem.
[p] Gloſſ. in L. unic. de his qui ante aper. tab. C. Vaſq. de ſucceſſ progreſſ. l. 3. §. 19. n. 19. quæ opinio communis eſt, ut latius per Mantic. de conject. ult. vol. l. 11. tit. 20. n. 1.

Item, Although the Condition were referred to the Will of the Legatary. For Example; the Teſtator giveth to *A. B.* an hundred Pounds *if he will:* For in this Caſe alſo, if the Legatary die before he have declared himſelf *willing*, the Legacy is extinguiſhed [q], and ſo nothing is due to his Executors or Adminiſtrators. Likewiſe, if the *Condition be alternative*, whereof one Part is ſimple, and the other conditional, if the Legatary die before the Condition be performed, the Legacy is utterly void [r]. For Example; the Teſtator doth bequeath to *A. B.* all his Plate, and if his Wife have a Child, an hundred Pounds: Albeit *A. B.* do over-live the Teſtator, but die before his Wife have a Child, the Executors or Adminiſtrators of the Legatary can neither obtain the hundred Pounds, nor the Plate [s].

[q] L. ſi ita. §. ſi illi. de leg. 1. ff.
[r] L. cum illud. ff. quand. dies leg. ced.
[s] DD. in d. L. cum illud. Ætiologia eſt, quia in alternativis non ſunt duo legata, ſed unum.

Limitations (8) of this former Rule are many [t]. Firſt, when it is the Teſtator's Will and Meaning, that the conditional Legacy be tranſmitted [u].

[t] Vigel. method. jur. civil. part. 4. l. 13. c. 7. except. 2. Vide Mant. l. 20. tit. 11.
[u] Vaſq. de ſucceſſ. progreſſ. l. 2. §. 18. n. 94. lib. 3. §. 29. n. 16. Bar. in L. ſi is cui. §. hoc autem. de leg. 1. in fin.

Secondly, when it doth not ſtand by the Legatary wherefore the Condition is not performed, and in that Reſpect the Condition is reputed for accompliſhed [x].

Thirdly, when the Legacy is not conditional, but modal [y]. (Of which Difference we have ſpoken before [z].)

Fourthly, when the Legacy, which was firſt conditional, is afterwards repeated without any Condition [a].

Fifthly, when the Teſtator doth give the Legacy upon Condition afterwards to be expreſſed, but expreſſeth none [b].

Finally, whereſoever the Condition doth not make the Legacy conditional, (either becauſe it is ſecretly included [c] in the Diſpoſition, or rejected

[x] C. cum non ſtat de reg. jur. 6. plenius ſupra part. 4. §. 8.
[y] L. cum tale ff. de cond. & demon.
[z] Supra patr. 4. §. 9.
[a] L. non ad ea. ff. de cond. & demon. & Caſtr. ibid.
[b] L. plen. C. de inſtit. & ſub.
[c] L. ſi dies. §. ult. ff. quand. dies leg. ced. Mant. de conject. ult. vol. l. 12. tit. 20. n. 5.

rejected [d],) it doth not hinder the Tranſmiſſion of the Legacy to the Executors or Adminiſtrators of the Legatary deceaſed, no more than if it were a ſimple and pure Legacy.

[d] L. conditiones. de condic. Inſt. ff. §. impoſſibilis. Inſtit. de hæred. inſt. & ſupra. §§. 4. & 5. part. 4.

When (9) the Legacy is referred *to a Day*, then it is material whether the Day be certain, or uncertain, or in ſome Reſpect certain, and in other Reſpect uncertain.

In the firſt Caſe, that is to ſay, when *the Day is certain*, the Legacy beginneth to be due at the Time of the Death of the Teſtator, although it cannot be demanded effectually before the Day do come [e]. And therefore if after the Death of the Teſtator, the Legatary die alſo before the Day of Payment, the Legacy is tranſmitted to the Executors or Adminiſtrators of the Legatary, as if it had been a pure and ſimple Legacy [f]. For Example; the Teſtator doth bequeath to *A. B.* an hundred Pounds at *Eaſter Anno Domini* 1600. and afterwards dieth, and after him the Legatary dieth alſo before *Eaſter Anno* 1600. in this Caſe the Executors or Adminiſtrators of the Legatary at *Eaſter* 1600. may demand and recover the Legacy; becauſe the Time is certain (in the Reputation of Law) as well in Reſpect of the Queſtion *when*, as in Reſpect of the Queſtion *whether* [g], as may be ſeen in the following Paragraph.

[e] L. cedere diem. de verb. ſig. ff. & ibi Alciat. & Rebuff.

[f] L. ſi dies. ff. quando dies leg. ced. Si home deviſe 20 l. al W. S. deb. pay in 4 annes puis ſon mort, & devie, uncore lez Executors le deviſee avera le mony, ou le reſt de ceo devant l'Ordinary. Brook Abridg. tit. Deviſe, n. 17, 45.

[g] DD. in d. L. ſi dies & in L. ſi poſt diem. ff. quando dies leg. ced. Graſ. Theſ. com. op. §. legat. q. 43. n. 3, 4, 5.

In the ſecond Caſe, that is to ſay, when (10) *the Day is utterly uncertain*, the Legacy is compared to a conditional Legacy [h]: And therefore if the Legatary die in the mean Time, the Legacy is loſt, without Devolution thereof to the Executors or Adminiſtrators of the Legatary deceaſed [i]. For Example; the Teſtator ſaith, I do bequeath to *A. B.* an hundred Pounds *when he ſhall be married*; or thus, I bequeath to *A. B.* an hundred Pounds, *to be paid when he ſhall be married*: Here the Day is utterly *uncertain*; for neither is it certain *when*, neither yet *whether* the Legatary ſhall marry before the Event. And therefore if the Legatary die before he be married, his Executors or Adminiſtrators have no Action or Right to demand the Legacy [k]. Neither is it material, whether the Day be joined to the Subſtance of the Legacy, as in the former Example, or to the Execution thereof, as in the ſecond Example: For it is not devolved either in the one Caſe or in the other [l]. But if the Teſtator bequeath to *A. B.* an hundred Pounds for and towards her Marriage, and ſhe die before Marriage, yet is the Legacy due to her Executors or Adminiſtrators [m].

[h] L. dies incertus. ff. de cond. & demon.

[i] L. unic. §. ſin autem. C. de ead. toll.

[k] DD. in d. §. ſin autem.

[l] Bar. in L. ſi cui. §. hoc autem. de leg. 1. poſt. gloſſ. in L. Sejus. ad Trebel. ff. & Alex. ibid. Mant. de conject. ult. vol. l. 11. tit. 20. n. 3. & eſt communis opinio, teſte Graſ. Theſ. com. op. §. legatum. q. 43. n. 7. Legato Titio relict. ita ut Meviam duc. in uxorem, an ſit modale vel condicional. Vide Men. tract. de præſump. lib. 4. præſ. 146. n. 17. Graſ. Theſaur. com. op. §. legatum. q. 48. n. 2.

[m] Dyer fol. 59. Fulb. tit. Deviſe, fol. 46.

In the third Caſe, that is to ſay, when (11) the Day is partly certain, and partly uncertain, we are to diſtinguiſh, whether the Uncertainty be in Reſpect of the Queſtion *Whether*, or of the Queſtion *When*.

If the Uncertainty be in Reſpect of the Queſtion *whether*, not of the Queſtion *when*, as if the Teſtator do bequeath an hundred Pounds *when his Son ſhall come to the Age of* 21 *Years*; (for here it is certain when he ſhall be of that Age, but uncertain whether he ſhall live till he come to that Age;) in this Caſe we muſt yet again diſtinguiſh.

For either the Time is joined to the Subſtance of the Diſpoſition; as when the Teſtator ſaith, I give to *A. B.* an hundred Pounds *when he cometh to the Age of* 21 *Years*; and then the Legacy is not devolved to his Executors or Adminiſtrators, if he die in the mean Time [n], (except in certain Caſes elſewhere before ſpecified [o]:) Or elſe the Day is joined to the Execution or Performance of the Legacy; as when the Teſtator doth bequeath to *A. B.* an hundred Pounds, which he willeth *to be paid when the Legatary ſhall be of the Age of* 21 *Years*; and then the Legatary dying in the mean Time, his Executors or Adminiſtrators may recover the Legacy, when the Time is expired the Legatary ſhould have been of the Age of 21 Years, if he had lived [p].

[n] Bar. in d. L. ſi cui. §. hoc autem. de leg. 1. L. ſi Titio. in prin. quando. dies leg. ced. ff. Vaſq. de ſucceſſ. progreſſ. l. 3. §. 29. n. 3.

[o] Supra part. 4. 17. ſub fin.

[p] L. ex his verbis. C. quando dies leg. ced. Bar. & Paul. de Caſtr. in L. ſi cui.

§. hoc autem. ff. de leg. 1. Alex. in L. Se jus ad Trebel. in fin. ff. Vaſq. de ſucceſſ. progreſſ. l. 3. §. 29. n. 3. verb. quandoque, &c.

If the Uncertainty be not in reſpect of the Queſtion *whether*, but of the Queſtion *when*; as if the Teſtator do bequeath to *A. B.* an hundred Pounds, when the Executor of the Teſtator ſhall die, or to be paid when the ſaid Executor ſhall die; (for here it is certain whether the Executor muſt die, (we muſt all die,) but when he muſt die it is uncertain:) In this Caſe the Legacy is not tranſmitted, the Legatary dying before the Executor of the Teſtator [x]. Howbeit this Legacy after another's Death, if it be duly conſidered, is not only uncertain in reſpect of the Queſtion *when*, but alſo in reſpect of the Queſtion *whether*; becauſe it is uncertain alſo whether the Legatary ſhall over-live the Executor, not only when the Executor ſhall die [y], as elſewhere hath been declared [z].

[x] L. hujuſmodi. ff. quando dies legat. ced. DD. in L. hæres meus. de con. & demon. Ceval. de uſufruct. mulier. n. 70, 71. quorum opinio eſt magis recepta, ut per Graſ.

[y] d. L. hæres meus. de

Theſ. com. op. §. legatum. q. 43. n. 8. Vaſq. de ſucceſſ. progreſſ. l. 3. §. 27. n. 11. cond. & demon. ff.

[z] Supra. part. 4. §. 17.

By the Civil Law it is neceſſary in all Legacies to conſider two Effects of the Right of the Legatee, (*viz.*) one which renders him Maſter of the Thing deviſed, ſo that he may demand the Delivery thereof immediately; or where it is not demandable till a certain Time to come; the firſt of theſe Effects is, that then the Time is come in which the Right of the Legacy veſts in the Legatee, for then the Legacy is due; and in ſuch Caſe if the Legatee *dies* before he hath received the Legacy, it is tranſmiſſible to the Adminiſtrator; and tho' a certain Time is fixed for the Payment thereof, yet ſince the Legatee hath acquired a Right by ſurviving the Teſtator, he tranſmits that Right to his Adminiſtrator whether he die before or after the Payment; and this agrees with our Law as in the Caſes following.

ff. The Father deviſed to his Daughter *Mary* 500 *l.* to be paid out of Lands mortgaged to him, which Mortgage was forfeited in his Life-time; the Daughter married the Plaintiff, and both ſhe and her Father *died* before this Legacy was paid; but the ſame was decreed for the Husband.

Clerk verſus *Knight*, Rep. in Chan. 91.

Deviſe of 100 *l.* to *Mary Frith to be paid to her on the 29th Day of* September 1668. ſhe died before that Day, and *Margaret* the Wife of the Plaintiff adminiſtered; and then the Husband and Wife exhibited a Bill in Chancery for this Legacy, which the Defendant refuſed to pay, pretending that it was not demandable by the Adminiſtratrix, becauſe her Inteſtate *Mary Frith* the Legatee had it upon *a Condition*, which was, if *ſhe lived till the 29th of* September, *&c.* which being

Innocent & ux' verſus *Taylor* & ux', Rep. in Chan. 112.

being now diſpenſed withal by the Act of God, *viz.* by her *Death before that Time*, the Performance of that Condition is become impoſſible; but the Court was of Opinion that an Intereſt was veſted in the Legatee, which was tranſmiſſible to her Adminiſtratrix; and decreed the Legacy with Intereſt from the Time of the exhibiting the Bill.

Barlow verſus *Grant*, 1 Vern. 215.

A Legacy of 30*l.* was deviſed to *an Infant* to put him out *Apprentice* to ſome Trade, and before he was of a competent Age to be placed out as an Apprentice, he *died*; it was decreed that this Legacy ſhall go to his Adminiſtrator.

Lord *Pawlet's* Caſe, 1 Vern. 204. 2 Vent. 366. S. C.

The Father made a Settlement of his Lands, and amongſt other Things to Truſtees to raiſe 4000*l.* a-piece for each of his Daughters, *payable at Twenty-one or Day of Marriage*, and competent Maintenance in the mean Time, in caſe he ſhould not otherwiſe direct by his Will; and afterwards by his Will he deviſed 4000*l.* a-piece to his two Daughters to be paid to them reſpectively, in ſuch Manner as by the ſaid Deed of Settlement was declared; and 100*l. per Ann.* for their Maintenance, as by the ſaid Deed was appointed; but one of the Daughters *died unmarried and under Age* before her Portion could be raiſed; and the Father being dead ſoon after this Settlement was made, the Mother adminiſtred to her Daughter, and exhibited her Bill againſt the Heir at Law, and the Truſtees named in this Settlement, to have this Legacy of 4000*l.* and Intereſt thereof from the Death of her Daughter, to be raiſed out of the Truſt Eſtate, inſiſting that it was *debitum in præſenti* to her Daughter, *ſolvendum in futuro*; and therefore being an Intereſt veſted, it ought to go to her Adminiſtratrix; and that it being a Duty ariſing by the Will, 'tis in Nature of a Legacy; for the Deed was only to take Place if the Father made no Appointment by his Will; but decreed that this Sum of Money ſtands upon the Deed only, and that the Will is a Confirmation thereof; and that it was to come wholly out of the Lands, and the perſonal Eſtate was not made ſubject by the Will to the Payment thereof.

Snell verſus *Dee*, 2 Salk. 415.

The Father by his laſt Will deviſed 200*l.* a-piece to the two Children of *T. S. at the End of ten Years* after his Deceaſe, but both the Children died within that Time; this was adjudged a lapſed Legacy; for where-ever the *Time is annexed to the Legacy it ſelf*, in ſuch Caſe if the Legatee dies before that Time happens, 'tis a lapſed Legacy; but where the *Payment of a Legacy* is to be made at a Time to come, there, if the Legatee dies before that Time, the Legacy is tranſmiſſible to his Adminiſtrator, becauſe an Intereſt in the Sum was veſted in the Legatee immediately upon the Death of the Teſtator, though the Payment was to be made *in futuro*.

2 Roll. Rep. 134.

A Legacy was given to a Feme Covert *to be paid to her eighteen Months after the Death of the Teſtator*; ſhe died within that Time; adjudged that her Husband was intitled to this Legacy, becauſe the Wife had an Intereſt in it before the Day of Payment, and ſuch an Intereſt which he might have releaſed.

One makes his Wife Executrix, and gives her all his Goods and Chattels, provided, that *if ſhe ſhall die without Iſſue by the ſaid Teſtator, then after her Deceaſe* 80*l.* ſhall remain to the Teſtator's Brother *J. S.* The Teſtator dies.

J. S. the Brother died in the Life-time of the Wife, and then the Wife dies without Iſſue.

The 80 *l.* with Intereſt from the Wife's Death, and Coſts, were decreed to the Executors of *J. S.* the Teſtator's Brother. *Pinbury* v. *Elkin*, 1 *Williams* 563. 2 *Vern.* 347.

One deviſed the Reſidue of his perſonal Eſtate to ſix Perſons, *to each of them a ſixth Part*, and made them Executors, but one of theſe ſix Executors and reſiduary Legatees died in the Life-time of the Teſtator.

This is a lapſed Legacy as to one ſixth Part, the reſiduary Legatees being Tenants in Common, and not Jointenants, and therefore the Legacy ſhall not ſurvive, but go to the Teſtator's next of Kin, according to the Statute of Diſtributions. But if any Legatee, where there is a joint Deviſe, dies in the Life-time of the Teſtator, it ſhall go to the ſurviving Legatees. *Page* v. *Page*, 2 *Williams* 489.

Sir *Thomas Doleman* by his Will gave ſeveral Legacies and (*inter alia*) 500 *l.* to his Nephew *Lewis Doleman*, payable at his Age of twenty-five, and charged his Land with the Payment of his Debts, Legacies, *&c.* and ſoon after died. *Lewis Doleman* died an Infant about ſixteen Years old, having left his Mother Executrix.

Where there is a Bequeſt of any Sum of Money out of a perſonal Eſtate to one, to be paid at his Age of twenty-one or twenty-five; if the Legatee dies before the Time of Payment, it becomes notwithſtanding a veſted Legacy tranſmiſſible to Executors or Adminiſtrators; but where ſuch Legacy is deviſed out of a real Eſtate, and the Legatee dies before the Time appointed for Payment, there the Legacy ſhall ſink into the Land; becauſe Equity will not load an Heir for the Benefit of Executors or Adminiſtrators.

And ſo it was decreed *Chandos* and *Talbot*, 2 *Williams* (601). *Paulet* and *Paulet*, 1 *Vern.* 204, 321. *Yates* and *Fettiplace*, 2 *Vern.* 416. *Jennings* v. *Lookes*, 2 *Williams* 276.

§. XXIV. Of the Deſtruction of the Thing bequeathed.

1. *The Legacy is extinguiſhed, if the Thing bequeathed do periſh.*
2. *What if it periſh by the Fact or Negligence of the Executor?*
3. *What if the Legacy be general, or do conſiſt in Quantity?*
4. *What if one Thing of two Things be bequeathed, whereof the one doth periſh?*
5. *What if the Thing bequeathed be not deſtroyed, but the Form thereof altered?*

IF the (1) Thing bequeathed do periſh or be deſtroyed, the Legacy is extinguiſhed [a], and the Legatary deſtitute of Remedy. For Example; the Teſtator doth bequeath unto thee his beſt Ox, which Ox is afterwards killed; in this Caſe the Legacy is extinguiſhed [b]; inſomuch that neither the Skin, nor the Fleſh, nor the Price is due unto thee [c]. Which Rule notwithſtanding is limited in certain Caſes.

[a] §. ſi res legata. Inſt. de lega. De hac. q. vide Fulbeck, tit. deviſe, fol. 41, 42, 43.
[b] L. mortuo bove. ff. de leg. 2.
[c] d. §. res legata. & ibi Minſing.

Firſt, when (2) the Thing bequeathed doth periſh by the Fact or Negligence of the Executor; as when the Executor after the Death of the Teſtator converteth the Thing bequeathed to his own proper Uſe [d]; or when he maketh Delay, in not paying or delivering the Thing bequeathed ſo ſoon as he may, after he hath undertaken the Executorſhip [e]; or doth unjuſtly defer the Proving of the Will, and

[d] Gloſſ. in d. L. bove. & in L. lana. de leg. 3. ff
[e] L. omnia, de leg. ff. Intellige, ſi modo præcedat interpellatio, vel hominis, vel certæ diei. L. ſi ex legat. cauſa. ff. de verb. ob. ſed non ſufficit mora irregularis, nempe quæ ex juramento oritur. Cagnol. in L. quod te. ff. ſi cer. pe. n. 97.

Undertaking the Executorſhip [f]; and the Thing bequeathed periſh in the mean Time; for then the Legacy is not ſo extinguiſhed, but that the Legatary may recover the Value thereof, albeit the Thing it ſelf be not extant [g]; and albeit it would have periſhed likewiſe [h], if it had been delivered to the Legatary in due Time [i].

[f] L. equis. ff. de uſ. & fruct.

[g] Paul. de Caſtr. in L. ſervum filii. §. ſi pocula. de leg. 1. L. ſenatus eod. tit. Mant. de conject. ult. vol. l. 9. tit. 12. n. 3. [h] Quomodo conſtabit rem etiam legatario traditam perire voluiſſe, vide Ripam in L. quod te ff. ſi cer. pe. & Cagnol. in eand. L. n. 82. [i] Alex. Jaſ. & alii in L. nemo de verb. ob. ff. quorum opinio eſt communis, ut refert Jaſ. ubi ſupra, & Soarez. l. recept. ſententiarum, litera M. ant. 222. de qua ſententia tanto minus dubitatur, quanto magis dubitatur an res apud legatarium peritura fuiſſet. Quod ſi manifeſte conſtat rem eodem modo fuiſſe perituram apud legatarium, hic multi recedunt ab illo communi dogmate, exiſtimantes æquiorem opinionem eſſe, ut non teneatur executor. Soarez. ubi ſupra. Ripa in L. ſi inſulam. de verb. ob. n. 79.

Secondly, when (3) the Legacy is general, or conſiſteth in Quantity; as when the Teſtator doth bequeath an Horſe, or an Ox, (not this Horſe, or that Ox;) or when the Teſtator doth bequeath certain Quarters of Wheat, or other Grain, not this or that Grain lying in ſuch a Barn or Garner; this Kind of Legacy cannot periſh, though all the Teſtator's Cattle do periſh, and all his Corn be conſumed [k]; and therefore the Legatary may recover his Legacy. Unleſs ſome certain Thing were offered to the Legatary, which he without juſt Cauſe refuſed to take; for then, if the ſame Thing do periſh afterwards, the Legacy is extinguiſhed [l].

[k] L. incendium. C. ſi cer. pe. L. non amplius. §. 1. de leg. 1. ff. Minſing. in §. ſi res legata. Inſtit. de leg. [l] L. hujuſmodi. §. ſtichum. & §. ſi cui. de leg. 1.

Thirdly, when (4) one of two Things is bequeathed alternatively; as if the Teſtator do bequeath his Apparel, or his Books, the one of theſe being conſumed, the other of them may be recovered [m]; unleſs the Election appertaining to the Executor, he offered the one of them to the Legatary, which afterwards periſhed [n].

[m] L. cum res. §. ſed ſi de leg. 1.
[n] L. hujuſmodi. §. ſtichum. & §. ſi cui de leg. 1. L. ſtatu. liberum. §. ult. de leg. 2. ff.

Fourthly, (5) when the Thing bequeathed, whereof the Form is altered, may be reduced to his firſt Matter; as when the Teſtator doth bequeath ſome Maſs of Metal, be it Gold or Silver, Tin, or ſuch like, whereof the Teſtator afterwards doth make ſome Veſſel, or other Inſtrument; or, on the contrary, the Teſtator having bequeathed a Cup of Gold, or other Veſſel, or Inſtrument of Metal, doth afterwards diſſolve the ſame to his firſt Matter; or the Teſtator having bequeathed a Cup of Gold, doth make a Chain thereof; the Will of the Teſtator by ſuch Alterations is not preſumed to be altered, and therefore the Legacy is not thereby extinguiſhed [o].

[o] Bar. Lancel. Dec. & alii in L. ſervum filii. §. ſi pocula. ff. de leg. 1. quorum opinio communiter approbatur, ut refert Jaſ. eod. §. n. 5.

But if the Thing bequeathed, after the Form thereof be altered, cannot be reduced to that which it was before; as Wool when it is made Cloth, or Timber when it is hewen or made a Parcel of a Ship; the Teſtator having bequeathed certain Wool or Timber, and afterwards tranſlating the ſame to other Forms, from whence they cannot be reduced to the former, the Legacy is extinguiſhed [p]; unleſs it do appear that the Will of the Teſtator therein is not changed [q].

[p] L. lana. ff. de leg. 3. Bar. Paul. de Caſtr. & alii communiter in d. L. ſervum filii. §. ſi pocula. de leg. 1. [q] d. §. ſi pocula.

Other Limitations there be of this Rule, as alſo divers [r] other Cauſes whereby Legacies may be loſt: But neither have I convenient Leiſure to proceed in the Diſcourſe thereof; neither do I think the ſame either ſo needful or profitable to be known, as theſe whereof I have made Choice, and which I have already delivered. And therefore I thought good only to refer ſuch as are farther ſtudious in that Point, to their own more plentiful Libraries, and more ſerious Labours, and here cut off the Thread of this *Teſtamentary Treatiſe.*

[r] De quibus plene Vigelius in ſua methodo exactiſſima juris civilis, l. 12. c. 10. cauſ. 51. ubi enumerat 70. cauſas amittendi legata.

APPENDIX.

By the Statute 3 *Geo.* 1. No Manors, Lands, Tenements, Hereditaments or any Intereſt therein, or Rent or Profit thereout, ſhall paſs, alter or change, from any Papiſt or Perſon profeſſing the Popiſh Religion, by any Will, except ſuch Will within ſix Months after the Death of the Teſtator ſhall be inrolled in one of the King's Courts of Record at *Weſtminſter*, or elſe within the ſame County or Counties wherein the Manors, Lands and Tenements lie.

Lands, &c. not to paſs by the Will of any Papiſt unleſs inrolled, &c.

The Statutes 10 *Geo.* 1. 3 *Geo.* 2. 6 *Geo.* 2. 9 *Geo.* 2. 11 *Geo.* 2. 12 *Geo.* 2. have reſpectively inlarged the Time for inrolling ſuch Wills made ſince the 29 *Sept.* 1717. And by the Statute 16 *Geo.* 2. every ſuch Will made ſince the 29 *Sept.* 1717. ſhall be effectual, provided it be inrolled on or before the 28 *Nov.* 1743. but the ſaid Act ſhall not extend to any ſuch Will already made and not inrolled, of the Want of Inrolment whereof Advantage ſhall have been taken on or before the ſecond Day of *February* 1742.

Time for Inrolment inlarged.

And by the ſaid Statute 16 *Geo.* 2. it is enacted, That no Purchaſe made for valuable Conſiderations of any Manors, Meſuages, Lands, Tenements or Hereditaments, or of any Intereſt therein, by any Proteſtant, ſhall be impeached or avoided by Reaſon that any Will, through which the Title thereto is derived, hath not been inrolled as is required by the ſaid Acts, ſo as no Advantage was taken of the Want of Inrolment thereof before ſuch Purchaſe was made; and ſo as ſuch Purchaſer had not Notice before ſuch Purchaſe was made, that the Perſon who made ſuch Will was a Papiſt; and ſo as no Decree or Judgment hath been obtained for Want of the Inrolment of ſuch Will.

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