

The *Lord Chancellor* said, that where such a devise is made to the heir, there indeed an estate shall arise to the wife by implication; but where it is devised to a stranger, as in this case, there in the mean time it shall descend to the heir.(1)

(1) Reg. Lib. 1681, A. fol. 335. [So 13 Hen. 7, pl. 17.] *Welcden v. Elkington*, Plow. 521; 1 Rol. 843, pl. 2. *Horton v. Horton*, Cro. Jac. 75. *Gardner v. Sheldon*, Vaugh. 263, 4; Bro. Abr. tit. Devise, 52. *City of London v. Garway*, post, 2 vol. 571. *Holmes v. Meynell*, Sir T. Raym. 453. *Smurle v. Scholler*, Jo. 98; 3 Keb. 816. *Ackroyd v. Smithson*, 1 Bro. Ch. Rep. 503. *Pickering v. Lord Stamford*, 3 Ves. 492. These cases all go upon the principle that the heir at law shall not be disinherited but by express words or necessary implication, and which is the established principle of the court, *Boutell v. Mohun*, Pre. Ch. 384. *Sympson v. Hornsby*, *ibid.* 440. [*Aspinall v. Petvin*, 1 S. & S. 544. See also *Nash v. Smith*, 17 Ves. 29. *Tregonwell v. Sydenham*, 3 Dow, 210. *Kellett v. Kellett*, 1 Ba. & Be. 533; 3 Dow, 248. *King v. Denison*, 1 V. & B. 260.] And this principle holds good as well where he is heir of customary lands as of freehold, *Gascoigne v. Barker*, 3 Atk. Rep. 9. *Byas v. Byas*, 2 Vez. 165. And the doctrine contained in the above cases is recognized *Upton v. Lord Ferrars*, 5 Ves. 801. And the next of kin as to the personal estate stand in parity of reason, with the heir at law, as to the real, *Pickering v. Stamford*, 3 Ves. 493. But a contrary notion seems to have prevailed formerly, vide *Rayman v. Gould*, Moor, 635, where said, "There cannot be an estate for life by implication in a term, as there may be an inheritance." But though the heir at law does not want an express intention in the case of a will, it is otherwise in the case of a deed, for there, since the statute of frauds and perjuries, the heir must shew an express trust for him, in order to entitle himself, *Lloyd v. Spillet*, 2 Atk. 151. And where there is no ambiguity the plea of heirship must not control a plain and express will, per *Holt*, Ch. J., *Lord Falkland v. Bertie*, post, 2 vol. 340. As to what shall be considered a necessary implication to disinherit the heir, vide *Boutell v. Mohun*, *ub. sup.*

Case 15.—How *versus* Tenants of BROMSGROVE. [1681.]

[1] Eq. Ca. Ab. 79, pl. 1, S. C.

Bills of peace to prevent multiplicity of suits are proper in equity.

There having been two issues directed, the one, whether *How* the lord of the manor of *Bromsgrove* had a grant of *free warren*; and the other, in case he had a grant of *free warren*, whether there were sufficient common left for the tenants. Upon motion for a new trial, the *Lord Chancellor* said, these matters were properly triable at common law; and he did not see, what jurisdiction the chancery had of this cause: but it was urged, the bill was brought to prevent multiplicity of suits, and was in its nature a bill of peace: and a new trial was granted, upon payment of full costs.(1)

(1) *Reasonable costs*. Reg. Lib. 1681, A. fol. 358. And though it is a general rule that a man shall not come into a court of equity to establish a legal right, unless he has tried his title at law if he can, yet this objection will not always prevail, for there have been a variety of cases both ways, vide *Evelme Hospital v. Andover*, post, 266, and cases there cited, *Mayor of York v. Pilkington*, 1 Atk. 282, and cases there cited, *Fitton v. Earl of Macclesfield*, post, 293.

[23] Case 16.—WILKINSON *versus* WILKINSON. [1681.]

[1] Eq. Ca. Ab. 413, pl. 14.

A man makes his brother executor, and gives him all his real and personal estate, and afterwards marrying, by a codicil makes his wife executrix.—She shall have the personal estate, and not the brother.

John Wilkinson one of the six clerks made his will, and thereof made his brother executor, and devised unto his executor all his estate both real and personal: (1) and four years afterwards he marries, and then by a codicil makes his wife his executrix. The question was, whether the brother should have the personal estate as legatee. It was urged, that he should; for he does not take it as executor only, but by express

words of gift in the will; and it appears, that there was not only a benefit intended him as executor, for even the real estate was devised unto him: but it being in proof, that he had not any the least real estate in the world, it was said by the *Lord Chancellor*, that the personal estate was intended him only as executor; (2) and it was thereupon decreed for the widow the executrix. (There is merely an order of dismissal, Reg. Lib. 1681, B. fol. 67.)

(1) Where the devise was, "I make my niece *G.* executrix of all my goods, lands, and challets," and dies, not having any leasehold inheritance, here the lands of inheritance pass not by those words, *Piggot v. Penrice*, Pre. Chan. 471; Com. Rep. 250, S. C.

(2) But where testator gives and devises to *A.* whom he makes sole executrix, there, no doubt, but such executrix will take beneficially, vide *Ridout v. Paine*, 3 Atk. 486, where the only question was what estate executrix should take.

Case 17.—TRACY versus TRACY. [1681.]

[1] Eq. Ca. Ab. 399, pl. 1, 2.

*A.* tenant for life, remainder to *B.* for life, remainder over. *A.* though punishable of waste at law, by reason of the mesne remainder for life, yet shall be enjoined from committing waste in a court of equity.

In a bill for discovery of the defendant's estate, and to have the writings brought into court, and to prohibit waste in plowing, &c. The defendant, by way of plea, set forth, that in part of the land she had an estate for life, as a jointress, without impeachment of waste.

It was resolved by the *Lord Chancellor*, that although she was tenant for life, remainder for life, remainder in tail, so that she was punishable of waste at common law by reason of the mesne remainder for life, yet in such case this court does always grant an injunction to stay waste: (1) but if her jointure deed were made with an express clause of *without impeachment of waste*, as in truth the case was, then there could be no prohibition as to those lands. (2)

(1) *Anon.* Moor, 554; 1 Rol. Abr. 377. [*Farrant v. Lovel*, 3 Atk. 723. And an injunction will be granted at the suit of a mesne remainder-man for life, *Mollineux v. Powell*, 3 P. W. 268, n. F., without making the owners of the inheritance a party, *Dayrell v. Champness*, 1 Eq. Abr. 400 (cited in *Garth v. Cotton*, 1 Dick. 197). *Davies v. Leo*, 6 Ves. 787.] As to the effect of the words, "without impeachment of waste" at law, vide *Browning v. Beston*, Plow. 135.

(2) But this court will not permit tenant for life with express clause *without impeachment of waste*, to do acts that may destroy the inheritance. Case 5 Jac. 1, mentioned in *Aston v. Aston*, 1 Vez. 264. *Abraham v. Bubb*, 2 Show. Rep. 69. More fully reported 2 Free. 53. Not decided, but *Lord Chancellor* discovered his inclination *fortiter* for granting injunction, *ibid.* [S. C. from Lord *Nottingham's MS.*, 2 Swan. 172, n.] Nor tenant after possibility of issue extinct, *Williams v. Day*, 2 Ch. Ca. 32. *Abraham v. Bubb*, ub. sup. *Anon.* 2 Free. 278, et vide *Bishop of London v. Web*. 1 P. Wms. 527. *Aston v. Aston*, ub. sup. *Packington's Case*, 3 Atk. 215. Nor to cut ornamental trees nor saplings, *Packington's Case*, ub. sup. *O'Brien v. Obrien*, Amb. 107. *Strathmore v. Bowes*, 2 Bro. Ch. Rep. 89. *Chamberlain v. Dummer*, 1 Bro. Ch. Rep. 166. [3 Bro. Ch. Rep. 549] and cases there cited. The case, however, there was of tenant for life, who could not cut timber, but with special permission for her own use and benefit at seasonable times in the year. Where tenant for life, remainder for life, remainder in tail, and first tenant for life cut down timber trees, it seems the remainder-man in tail may seize the trees, though during the intermediate remainder he could not bring his action, *Udal v. Udal*, Aleyn. Rep. 81. Note, where an application to the court on the ground of waste, for injunction against converting ancient meadow land into tillage, an affidavit that the land is ancient meadow seems necessary—contra. it appears, where there is an express covenant not to convert any meadow land, Lord *Grey de Wilton v. Saxon*, 6 Ves. 106. [See further on the subject of restraining tenants for life, &c., unimpeachable for waste, from committing equitable waste, *Downshire v.*