

Thirdly, the trust ; which the common law takes notice of, but which carries the beneficial interest and profits in this court ; and is still a creature of equity, as the use was before the statute.

[187] To apply this. By the will, the estate in the land, and the use, are devised to the three trustees and their heirs ; for a devise of land, by force of the statute enabling to devise, carries the estate in the lands, and the use too, without saying to the use of the devisee ; but the trust and beneficial interest is to the charity. By the codicil, the estate in the land and the use is given to the same trustees and two others : the trust for the charity is exactly the same : but there is some variation of the surplus profits. It is undoubtedly a new devise of the legal estate ; and therefore it was objected, that being subsequent to the *mortmain* act, it is void as well as the trust : but that was soon given up at the bar ; because the variation of the trusts of the surplus profits, being good, is sufficient to support it : as it was held in all those acts, which on a devise to unlawful trusts make the legal estate as well as the trust void : but with this distinction, that if part of the trust is good, it will support the legal estate : as upon the *Poperly act*, if part of a trust is for a protestant as well as for papists ; and then the only consideration of equity is, how far the trust is made void by the act ?

Next I am of opinion, that the beneficial interest and profits, that is the trust, to the charity is not revoked, but confirmed by the codicil ; which I ground first on the nature of the instrument ; secondly from the words. A codicil made after a will, and directed to be annexed thereto, is considered both in our law and in the civil law (from which we borrow ours, with regard to wills) as part of the will : although in notion of law there may be other codicils not part of the will : as in the *civil* law, a testamentary schedule, though no will at all : but this is part thereof, and therefore in its own nature is not intended to be a revocation of the instrument of the will (*Note* : A codicil revoking a legacy of £40,000, it being in fact only £30,000, and £10,000 an appointment, revokes the appointment. 2 Brown, 51) ; for there may be a revocation of the particular dispositions, and yet not of the instrument, but to be added and made part thereof ; as in several parts of *Swin.*, but particularly 15 (*the new edition*), this differs therefore from the case of a second will, which from the nature of the instrument has been held a revocation of the former, though no clause of revocation was inserted ; and is different from *Hitchins v. Basset*, 1 Sho. 537 ; *Cases in Parliament*, 146 ; in which case it was admitted throughout, that though a man could die with but one will, he might with several codicils, and no revocation : and a strong authority is there cited, *Coward v. Marshal*, Cr. E. 721, even on a second will ; the only doubt being that it arose on a second will ; for had it been a codicil, there would have been no question ; the instruments being part of one other, and to be taken together. Hence it follows, that as it stands clear of the doubt in *Shower*, it is so of revocations by act executed in life of the testator ; as of feoffment without livery, bargain and sale not inrolled ; the effect of all which is in the testator's life to defeat the act ; confirming nothing, but altering the estate in his life ; [188] which a codicil does not ; taking effect together with the will at the death of the testator. Then as the codicil is no revocation, farther than it is expressed ; so from the words there is no express revocation, but amounts to a confirmation of the trust to the charity, which must have arisen on the will, varying only the former part ; *other parts* meaning parts not varied ; which is the construction always put on the words. So that being made in 1734, it is not revoked nor contrary to the act ; and must be established.

(1) 2 Atk. 73 ; 1 Ves. sen. 32 ; 1 Ves. sen. 190 ; Prec. Chan. 459 ; 2 Vern. 741, S. G. ; 1 Eq. Ab. 407, S. C. ; 1 Wms. 343 ; 1 Wils. 313 ; 2 Atk. 268 ; 4 Burr. 2512 ; Cowp. p. 49, 87 ; Dougl. 30, 684. In these cases it is held that the mere act of cancelling a will is no revocation, unless done *animo revocandi*. Vide 1 Wms. 345, note 1, 4th edit., where the law is collected from the several cases on this subject.

HUGHES v. Trustees of MORDEN COLLEGE, Dec. 12, 1748.

Garden grounds used for trade as much protected by the Highway acts, &c., as private gardens. Plaintiff, therefore, quieted in possession by injunction against the commissioners. (Vide Supplement, p. 105.)

The trustees had agreed with the commissioners of the turnpike, to let them dig gravel in land, which they had leased to the plaintiff for twenty-one years ; and

which he had turned into a garden. The commissioners entered, took possession, dug up the *legumens* planted, set a value on them, and made a satisfaction, which the plaintiff accepted.

The plaintiff moved for an injunction, to restrain further digging; which was refused; because he had not made the commissioners parties: which having amended, he now moved it again.

*Lord Chancellor.* What the fruit of this injunction will be, or whether it will be too late to stop the mischief done, I know not: but the question is, whether there is not a case made by the plaintiff sufficient for an injunction; and there clearly is. This court, as well as other courts of justice, will certainly give great allowance to the acts of the commissioners of the turnpike; and will not interpose to censure them, unless in a plain case; but not where there is any ground of doubt, whether they had authority or no; for then the court will not interpose, till that doubt is removed, and the matter finally determined at law. But no such doubt is here; the plaintiff's right, and his remedy here being plain to me, though not to the defendants.

The turnpike act, and all these relating to highways, *except* messuages, houses, gardens, orchards, yards, planted walk; without limiting it to any particular kind of garden; which are as much taken out of their jurisdiction, as if they had none: and if they act contrary, they are as much trespassers as private persons. The only thing creating a doubt, was the plaintiff's acceptance of that sum in satisfaction: but that appears to be for a distinct matter; for the damage to his crop; not relating to the present question of his possession, and the commissioners became purchasers of that [189] gross crop. They acted therefore without authority, and are in the case of private persons entering by force into the ground, of which another had possession for twenty-one years; for which indeed there is a remedy at law: but that would be only for a particular wrong done, and not equal to the remedy in this court; in seeking which the plaintiff was right, and had a proper head of relief, being in possession at the time of filing the bill, and three years before; the reason of which is, that the statutes of *forcible entry* require it. (Vide Stat. 8 H. 6, c. 9, s. 7; 37 Eliz. c. 11, s. 3, and 3 Gwill. Bac. Ab. 249, &c.) To extend which statutes, the bill is brought for an injunction, for which he has made a proper case; the bill now before me being the amended bill, which is above three years after making the lease. There is no imputation upon the trustees; but however this should not have been done; being something like the case of *Naboth's* vineyard: and its being in a country, where it is difficult to get gravel, is not a circumstance, that will extend the authority of the commissioners; and the plaintiff has been in possession all along: for repeated trespasses from time to time did not gain them the possession. (Reg. Lib. 1748, A. fol. 78, entered as "*Hughes v. Brand*.")

HAWKINS v. DAY, Dec. 21, 1748.

Confirmation of master's report opened, and the report allowed to be excepted to, or reviewed, under particular circumstances; although previous exceptions had been disallowed after argument. (Vide Supplement, p. 106.)

On petition that the master should review his report after exceptions thereto taken, argued, and the report confirmed by judgment of the court.

*Lord Chancellor* said, he never knew an order to that purpose; and it would be of mischievous consequence: but errors in computation merely, might be set right at any time. (Reg. Lib. 1748, A. fol. 115.) (Notwithstanding this first impression of the court, it nevertheless acceded to the petition. See Supplement, p. 106.)

PARSONS v. LANOE, Jan. 28, 1748.

[S. C. 1 Wils. 243. See *In the Goods of Dobson*, 1866, L. R. 1 P. & D. 89; *In the Goods of Smith*, 1869, L. R. 1 P. & D. 719.]

Will on a contingency. Devise in case of testator dying before his return from *Ireland*. Having returned, &c., the whole disposition ineffectual (vide *Sinclair v. Hone*, 6 Ves. 607). Revocation by marriage, and birth of children (vide Supplement, p. 107, 108).—S. C. Amb. 557.

Colonel *Charles Lanoe*, intending to go to *Ireland*, made a paper-writing in 1732, declaring it to be his last will in manner following: "If I die before my return from my