

within the Statute of Charitable Uses. And therefore, inasmuch as the £50 was the Personal Legacy, and no Devise of Lands, decreed, That the £50 be paid as far as the Defendants have Assets of their Testator, and directed it to an Account to see what Assets, and the Master to whom it was referred, to see the Money disposed for the Benefit of the Poor of the Parish.

The Lord Keeper ; Justice Windham ; Baron Turner.

NELTHROP and MARGARET his Wife, against HILL, BISCOE, and ANNE his Wife.
October 6 [1669].

Executor to take Security on Payment of Legacies in Case of a Defect of Assets.

This Cause was heard first before the Lord Keeper. *The Case.* The Plaintiff *Margaret* and the Defendant *Anne* were the two Daughters of *Smith*, who having made his Will eighteen Years since, and *Hill* Executor and Curator of the Children (both then in Infancy) by his Will gave several Legacies, and then gave the Residue of his Personal Estate to be equally divided between his two Daughters, *Anne* and *Margaret*; and if both die before Marriage or full Age, then he deviseth it over to another. *Biscoe* marrieth *Anne* the eldest Sister, and then one Moiety of the Estate, which was good, and in the Hands of the Executor, is paid to *Biscoe* and his Wife, and [136] *Biscoe* settles a Jointure for this on his Wife, and gives the Executor a Discharge.

Afterwards the Executor puts out the other Moiety (*Margaret* being still in Minority) on Security, and Part of it is lost. Then *Margaret* marries *Nelthrop*, and they bring this Bill against the Executor, and *Biscoe* and his Wife, to have a Contribution towards the Loss born by them, and to have *Biscoe* refund.

Upon the first Hearing it was so decreed, unless *Biscoe* shewed Precedents to the contrary.

Now upon farther hearing this Day (viz. 10 Jan. 1669), before the Lord Keeper, Mr. Justice *Wylde*, and Mr. Baron *Turner*, it was for *Biscoe* insisted, That by the Marriage of *Anne*, her Moiety became due, and the Devise over is defeated: So that if *Biscoe* and his Wife had brought their Bill for it, the Executor could not have denied Payment of it, and so *Biscoe* hath done no Default, who hath not his Money 'till due, and he is not concerned to look any farther; and in lieu of the Portion a Jointure is made, and a Release for the Legacy is given; and probably, if the Executor would not have paid, *Anne* might have lost her Preferment, and the Executor was by the Will the Curator of the Children. And it was said, That by *Anne's* Marriage first, she became first entitled. And it was insisted, That where Legacies are payable at several Times, and the Legacy that is first due is paid when due, and there is Money in the Executor's Hands to pay the other Legacies, that if a Loss fall on that afterwards, there is Equity in that Case to put the first paid Legatee to refund.

For the Plaintiff it was insisted, That there was in this Case no Time limited for Payment of either; and that by the Marriage of *Anne*, the Devise over being defeated, both became due and payable, the Devise being indefinite, without any express Time of Payment; and the Plaintiff *Margaret's* Infancy ought not to turn to her Prejudice; and that it was the Testator's Intention that they should have it equally, one as much as the other. And if *Biscoe* had sued, the Executor might have required Security to refund.

And it was said and admitted by the Court, That if Executors pay out the Assets in Legacies, and afterwards Debts appear, and they be forced to pay them, of which they had no Notice before the Legacies paid, That [137] the Executors by a Bill here might force the Legatees to refund.

But as to that it was answered, That Case was not like to this; for there was not enough to pay all when the Legacies were paid, but here was enough when the Legacies were paid to pay all, and the Loss since.

And for the Plaintiff it was farther insisted, That a Division could not be made without the Plaintiff *Margaret* called to it; and the Case of *Grove* and *Banson* insisted on, where *Banson* had a Conveyance and Statute for his Wife's Legacy, and yet put to refund.

But as to that Case it was answered, There was not any Payment, but a Security, and

by that he would have had a Redemption ; so this Payment was not paid, but executory. And the Plaintiff cited the Case of *Picks and Vincner* upon Sir *Henry Martin's* Certificate, which was 29 *Octob.* 1639, and was in Substance thus : *That an Executor may not pay one, if he hath not enough to pay all ; and an Executor is not bound to pay a Legacy without Security to refund if there be want of Assets to pay either Debts or Legacies.* Which was not, as is said, to this Purpose, there being at the Time when this Legacy was paid, enough to pay all.

Ordered the Cause be set down to be re-heard originally, as well against the Executor, as the Legatee *Biscoe* and his Wife.

Quære, If there be not a Difference between Debts and Legacies thus : Debts may appear to the Executors, but Legacies appear in the Will ? And quære, If therefore Executors be not bound more strictly to take Security against Legacies that do appear, than Debts that do not ?

And note the Case 1 *Vern.* 482, viz. Lands being devised for Payment of Debts and Legacies, 'twas at first decreed, That both should be paid in equal Degree. But that Decree was revers'd by Lord Keeper *North* ; and *Jeffries* declared, he was dissatisfied with that Reversal—But after all, I take it there is a great Difference between Debts and Legacies, the former being *ex debito Justitiæ*, and the latter only *ex opere Charitatis* ; and we must allow *Justice* to be preferable to *Charity*.

[138] *The Master of the Rolls. First Hearing.*

CHARLES FRY *Gent.* and the Lady ANNE his Wife, and MOUNTJOY FRY an Infant, by their Guardian, against GEORGE PORTER, an Infant, by GEORGE PORTER his Uncle and Guardian. *Octob.* 13 [1669].

A Legacy given on Condition the Legatee marries with Consent, where recoverable in Equity, or not.

Mountjoy Earl of *Newport* had two Daughters, *Isabella*, who by his Consent married *Nicholas* Earl of *Banbury* (whose Daughter the Plaintiff the Lady *Anne* is), and *Anne*, who without her Father's Consent married *Thomas Porter, Esq.*, by whom she had *George* the Defendant the Infant.

The Earl of *Newport* being seized of *Newport-House* in Fee, by his Will in Writing, deviseth in these Words :

Item, I give and bequeath unto the Lady Anne Countess of Newport, my dear Wife, all that my House called Newport-House, and all other my Tenements in the County of Middlesex, for her Life ; and from and after the Death of my said Wife, I do give my said House, and all other my Tenements in Middlesex, unto my Grandchild the Lady Anne Knowles, the Daughter of Nicholas Earl of Banbury by the Lady Isabella, my late Daughter, and the Heirs of her Body to be begotten. Provided always, and upon Condition, That my said Grandchild the Lady Anne Knowls do marry with the Consent of my said Wife, and of Charles Earl of Warwick, and of Edward Earl of Manchester, or the major Part of them. And in Case the Lady Anne Knowls do and shall marry without the Consent of my said Wife, or the major Part of my Trustees aforesaid, or shall happen to depart this Life without any Issue of her Body, then I will and bequeath all my said Premises unto my Grandchild George Porter, Son of my deceased Daughter the Lady Anne, late Wife of Thomas Porter, Esq., and to his Heirs for ever.

The Plaintiff *Fry*, after the Death of the Lord *Newport*, stole away the Plaintiff, the Lady *Anne*, in the Night, from *Newport-House* (where she lived with her Grandmother), over the Garden Wall ; and so soon as she was [139] missed by her Grandmother, and she was informed of this Fact, she sent to the Earls of *Warwick* and *Manchester*, to inform them of it, who both protested against the Marriage as unfitting for the young Lady, who was at that Time about fourteen Years of Age, and declared their utter Dislike of it. Afterwards these two Earls being examined for the Plaintiffs as Witnesses in the Cause, say, *That they do assent to the Marriage ; and that they do not know but that if their Consents had been asked for before the Marriage, such Reason might have been given as they might have consented to it.* And they and other Witnesses speak as to the Earl of *Newport's* Intent, and frequent Declarations, that the Plaintiff the Lady