REPORTS

OF

CASES

IN THE

HIGH COURT OF CHANCERY,

DURING THE TIME OF

Lord Chancellor Eldon.

VOL. III.

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ARGUED AND DETERMINED

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Lord Chancellor Eldon;

FROM THE

COMMENCEMENT OF THE SITTINGS BEFORE HILARY TERM, 1818,

TO THE

END OF THE SITTINGS AFTER MICHAELMAS TERM, 1819.

By CLEMENT TUDWAY SWANSTON, Esq.
OF LINCOLN'S INN, BARRISTER AT LAW.

VOL. III.

1818, 1819.—58, 59 GEO. III.

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LORD ELDON, *Lord High Chancellor.*
Sir THOMAS PLUMER, *Master of the Rolls.*
Sir JOHN LEACH, *Vice-Chancellor.*
Sir SAMUEL SHEPHERD, *Attorney-General.*
Sir ROBERT GIFFORD, *Solicitor-General.*

A

TABLE

OF

CASES REPORTED

IN THIS VOLUME.

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Edwards,

Porter,

REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

HIGH COURT OF CHANCERY.

Commencing in the Sittings before

HILARY TERM,

58 Geo. III. 1818.

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April 2. 8. 11. 16. 18. 21. 25, *May* 26. *June* 2. 10. 13. *July* 6.

The Rev. ADAM JOHN WALKER and LOVEDAY his Wife, late LOVEDAY WHITMORE, Spinster, WILLIAM ROBERTS, since deceased, and JOHN SANDERSON, PLAINTIFFS;

WILLIAM SYMONDS, since deceased, JOHN LILLY, ISAAC HARRIS, and JOHANNA WHITMORE, (by Original Bill,) DEFENDANTS.

The Rev. ADAM JOHN WALKER and LOVEDAY his Wife, and JOHN SANDERSON, PLAINTIFFS;

WILLIAM SYMONDS, THOMAS COOKE, and JOHN LILLY, (by Bill of Revivor,) DEFENDANTS.

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A deed of compromise executed by a *cestui que trust*, with the representatives and creditors of a deceased trustee guilty of a breach of trust, rescinded, and co-trustees declared responsible.

THE bill filed in *July*, 1802, and amended in *April*, 1804, stated, that by indenture, dated the 17th of *January*, 1780, made between *Isaac Donnithorne*, of the first part; *Nicholas Donnithorne*, *Thomas Griffith*, and *William Symonds*, one of the Defendants, of the second part; *John Whitmore*, and *Johanna* his wife, another of the Defendants, of the third part; reciting that *John Whitmore* by his bond, dated the 26th of *June*, 1772, became bound to *Isaac Donnithorne* in the penal sum of 12,000*l.*, conditioned for payment of 6000*l.* at a day then long past; and that there was then due for principal and interest thereon 7912*l.* 12*s.*; and that *Isaac Donnithorne* being desirous of making some provision for his daughter, *Johanna Whitmore*, had agreed to assign the bond, with the sum of 7900*l.*, principal and interest due thereon, to *Nicholas Donnithorne*, *Thomas Griffith*, and *William Symonds*, upon the trusts therein mentioned: It was witnessed, that *Isaac Donnithorne*, in consideration of natural love and affection towards his daughter, and in order to make some provision for her and her children, and for other considerations therein mentioned, assigned unto *Nicholas Donnithorne*, *Thomas Griffith*, and *William Symonds*, and the survivors, their executors, administrators, or assigns, the bond, and the sum of 7900*l.* thereon due, upon trust, with all convenient expedition to call in the sum due upon the bond, and as soon as it could be received, to lay out the same upon mortgage of freehold lands, or upon government or other securities, in the names of the trustees; and during the lives of *John Whitmore* and *Johanna* his wife, and the life of the survivor, upon trust, to pay the yearly interest, dividends, and produce thereof, or such part thereof as the trustees should in their discretion think fit, to or for the use of *John Whitmore*

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more and *Johanna* his wife, and the survivor, and to the use of their child or children, in such shares, and at such times, as they should think fit; and after the death of *John Whitmore* and *Johanna* his wife, to pay the said 7900*l.* to and among all and every the child or children of *John Whitmore* and *Johanna* his wife, share and share alike, if more than one, and if but one, to such only child, at his or her attaining the age of twenty-one years, or day of marriage.

The bill further stated, that *Isaac Donnithorne* died soon after the date of the indenture, and that the trustees accepted the trusts; and in execution thereof, in the year 1783, called in, and received from *John Whitmore*, the sum of 7900*l.*, which was secured, not only on the bond of *John Whitmore*, but also on some mortgage or other real security; and *John Whitmore*, in order to increase the trust monies to an even sum of 8000*l.*, when he paid the 7900*l.* to the trustees advanced to them a further sum of 100*l.* upon the same trusts as the 7900*l.*; that *John Whitmore* and *Johanna* his wife had but one child, the plaintiff, *Loveday Walker*, who, at the date of the indenture, was an infant of very tender years, and resided with *Johanna Whitmore*, her mother, who lived apart from her husband, and to whom the trustees paid three-fourths of the interest of the trust-sum, paying the other one-fourth to *John Whitmore*.

The bill further stated, that the Plaintiff *Loveday Walker* attained the age of twenty years in *December*, 1795; and having separated herself from her mother, and not having any separate provision, and having understood that she would become entitled, at the death of her father and mother, to a considerable sum of money, and that she was entitled to some provision for her maintenance in the mean time, but being ignorant of

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the amount and particulars thereof, she, on or about the 23d of *December*, 1795, wrote a separate letter to each of the trustees, to inform them of her situation, and to request that some provision should be made for her support, whereupon the trustees thought proper to allow her 100*l.* a-year out of the income of the trust property. That in *June*, 1799, the Plaintiffs *Adam John Walker* and *Loveday Walker* intermarried; and previous to their marriage, an indenture of settlement was executed, dated the 11th of *June*, 1799, between *Loveday* of the first part, and *Walker* of the second part, and the Plaintiffs *William Roberts* and *John Sanderson* (as trustees) of the third part; whereby, after reciting that *Loveday*, after her father and mother's decease, would become entitled to a legacy, or portion of 8000*l.*, given by the will of her late grandfather to *Nicholas Donnithorne*, *William Symonds*, and *Thomas Griffith*, in trust for her benefit, it was witnessed, that in consideration of the intended marriage, *Loveday*, with the consent of *Walker*, covenanted with *William Roberts* and *John Sanderson* that the sum of 2000*l.*, part of the sum of 8000*l.*, should, from and after the decease of her father and mother, be paid to *Walker*, and that the sum of 6000*l.*, the residue thereof, should be paid to *William Roberts* and *John Sanderson*, or otherwise settled upon the trusts therein mentioned.

The bill further stated, that *Nicholas Donnithorne* died on the 26th of *September*, 1796, and by his will appointed his son, *Isaac*, who had assumed the name of *Harris*, his executor, who proved the will, and possessed himself of the personal estate of his late father, and became his legal personal representative. That *John Whitmore* died in *December*, 1799, upon which event *Loveday Walker* applied to *William Symonds* and *Thomas Griffith*, as the sur-

surviving trustees, named in the indenture of *January*, 1780, and they consented to make an additional allowance of 50*l. per annum*, part of the interest of the trust-money, which had, in the life-time of *John Whitmore*, been paid to him. That *Thomas Griffith* died in *October*, 1800, having appointed the Defendant *John Lilly* his executor, who proved his will, and had possessed assets to pay the debts of the testator: and that *Walker*, and *Loveday* his wife, being desirous that the sum of 8000*l.* should be invested in the public funds, or on real security, or otherwise properly secured for their benefit, according to the trusts of the indenture of *January*, 1780, had called on the Plaintiffs *Roberts* and *Sanderson*, as trustees under their marriage settlement, to concur with them in having the same so invested or secured; and all the Plaintiffs had therefore applied to *William Symonds*, since deceased, as the surviving trustee in the indenture, to invest the sum of 8000*l.* on some public or real security, upon the trusts of the said several indentures.

The bill charged, that after the trust-money had been paid by *John Whitmore* to the trustees, it was by them invested in a mortgage security; but in 1790, the mortgagee, or the purchaser of the mortgaged estates, gave six months' notice to the trustees of his intention to pay off the mortgage-money, and it was accordingly, in or about that year, paid to them, or to one of them, by the direction, or with the consent and concurrence, of the rest, and they all joined in the receipt for the same; but although they had six months' notice that such trust-money was to be paid, they took no steps to procure any other real or effectual security on which to invest it. That after the money was so received by the trustees, they ought to have invested it in the public

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funds, or on some real security; but instead of doing so, they preferred the interest of *John Whitmore* and his wife, to that of the Plaintiff *Loveday Walker*; and for the sake of procuring some small addition of interest beyond what the public funds would have yielded, or for some other improper cause, took upon themselves to invest the money in bills or notes of the *East India* Company: And that the trust money was afterwards, by agreement between the trustees, called in and received by *Nicholas Donnithorne*, *Thomas Griffith*, and *William Symonds*, but they did not provide any security or mortgage, or endeavour to procure any such, on which to invest it; but received, or authorised *Nicholas Donnithorne* to receive it, and joined in the receipt or acquittance for it to *John Whitmore*; and after the trust-money was received, it never was laid out or invested, according to the directions of the trust-deed; but *Thomas Griffith* and *William Symonds*, instead of investing it on real or government security, as they ought to have done, consented and agreed to lend, or to permit *Nicholas Donnithorne* to retain it in his hands, by way of a loan or otherwise, until the time of his death: for the payment of which, with interest, he, several months after he had been so permitted to receive it, gave to *Thomas Griffith* and *William Symonds*, who consented to accept the same, a bond, or other personal security. And the bill charged, that *Thomas Griffith* and *William Symonds*, and *Nicholas Donnithorne*, by having so neglected to lay out and invest the trust-money, in a proper manner, and *William Symonds* and *Thomas Griffith*, by having so consented to lend, or permit *Nicholas Donnithorne* to hold and retain it, were all guilty of a breach of trust; by reason of which they, and their estates, ought to be severally charged with, or answerable for the trust-money,

money, or such part thereof as had been, or might be lost, by such breach of trust.

The bill also charged, that *Loveday Walker*, at the time she attained twenty-one, was, and long after remained, ignorant of the trust-deed, and of the contents thereof, and of the exact nature of her interest therein, and in what manner such interest was derived to her, and in what manner the money ought to have been invested: and that none of the trustees ever distinctly explained to her the same, as they ought to have done; but on the contrary, for a long time concealed the same from, or kept her in ignorance thereof; and it was not until many applications had been made to them, and until a considerable time had elapsed, that she was able, at last, at different times, to obtain some information of the trust-deed, by short and imperfect extracts therefrom: and that for a long time after she attained twenty-one, she supposed that her interest in the trust-money was devised to her by some will of her grandfather, *Isaac Dounithorne*, and was wholly ignorant of the existence of the trust-deed; and as evidence thereof, the bill charged, that in *January*, 1796, about six months after she attained twenty-one, being desirous to be correctly informed as to the state and amount of her fortune, she wrote to *William Symonds* as follows, "I am at present in a great degree ignorant, with regard to my grandfather's will. I apprehend you have a copy of it, and I cannot conceive any impropriety in my requesting to see it." But *William Symonds* never gave any answer to such application, although he then had in his possession the original trust-deed, or a full and correct copy thereof; and *Loveday Walker* having afterwards, through the medium of her friends, again applied to *William Symonds*, he furnished only some short extracts of the trust-deed, and declared that the trust-deed itself was

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in the possession of *Nicholas Donnithorne*, her uncle, to whom he accordingly referred her; and that sometime in the spring of the year 1796, having been advised by *Nicholas Donnithorne*, her uncle, to make a will, for the purpose of disposing of her fortune, in case of her death, and having some inclination so to do, but being still ignorant of the particulars of her fortune, she, in consequence thereof, and of *William Symonds* having so referred her to *Nicholas Donnithorne*, wrote a letter to *Nicholas Donnithorne*, dated the 8th of *May*, 1796, to the following effect: — "The will you recommend, and which I have thus long delayed making, I would wish to be done before I leave this neighbourhood, where I have a friend able and disposed to assist. The paper in your possession which gives me this right, and of which I had extracts sent, while I was with Mr. *Symonds*, I would therefore be obliged to you to enclose me as early as you can. A professional gentleman, who saw those extracts, says, that the complete paper would be more satisfactory, and that this original is the proper authority to proceed upon." To which *Nicholas Donnithorne* wrote an answer to the following effect: — "Since I received your letter this morning, I have been ransacking my shattered memory, to bring to mind the paper you mentioned, as being in my possession. It is all in vain; I have not the most distant recollection of it. If there is such a paper, and Mr. *Symonds* furnished you with extracts, it must still rest with him; but what it can be, I cannot conjecture. Your right is derived from my father's will, the probate of which (I believe) is in *Cornwall*; and this, I apprehend, must be the complete paper, the original, the proper authority, as you call it. As the will was proved at *Hereford*, your friend may easily procure a copy, or such extracts as may answer the purpose. If I can recollect any other paper, or matter, I will write again. Let me know what your friend

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friend says, as nothing on my part shall be wanted." That *Nicholas Donnithorne* never gave *Loveday Walker* any further information, or shewed her the original deed, or gave her any copy thereof; but after various applications had been made by means of her friends, she at length procured from *William Symonds* a copy of the trust-deed, but without any information of the state of the trust-property, or how it had been applied, or on what security it was standing: and that having afterwards understood that the trust-monies were in the hands of *Nicholas Donnithorne*, and that at his death he had left his affairs much involved, and that *Isaac Harris* had, by entering into various money engagements for his father, become also much embarrassed, she, on the 19th of *December*, 1796, wrote the following letter to *William Symonds* and *Thomas Griffith*: "The present state of the funds is so advantageous for purchasing, that I think (if you have no objection) no time should be lost in investing the money you have in trust in government security. An addition to our income is an object by no means inconsiderable; and though I have no opportunity of consulting my mother, yet I think it must be what she wishes. I hope, sir, you and Mr. *Griffith* will converse on this subject, and soon favour me with your opinions. I trust you will see no objection to comply with this request, unless it be the reluctance you may feel to call on my cousin, (meaning *Isaac Harris*) at a time when I greatly fear, from report, that his affairs are very much deranged. I should greatly lament putting him to any inconvenience; yet I cannot think it a sufficient reason for neglecting to dispose of the money to such advantage as the presen time offers; nor do I think I can, with justice to ourselves, neglect taking any step for an addition, which I understand a different disposal of the money would produce." In answer to which, she received from *William Symonds*

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Symonds and *Thomas Griffith* the following letter, dated *December* 24th, 1796: "In reply, madam, to your favour of the 19th instant, we can have no objection of investing the money in the funds, agreeable to your wishes; but we apprehend it will not be convenient to Mr. *Isaac Donnithorne* (meaning *Isaac Harris*) to advance the sum at this juncture. Mr. and Mrs. *Whitmore* met us last *Saturday* respecting the business; and our joint sentiments thereon were transmitted to Mr. *Hardy*, the solicitor, who was informed of your intention of being in town; therefore we referred him to you on the same occasion, and presume by this time you have either seen or heard from him."

The bill charged, that no farther notice was taken to *Loveday Walker* of her application to have the trust-monies called in and invested; nor did she see Mr. *Hardy*, who was an attorney employed by the creditors of *Nicholas Donnithorne* to act for their interest; nor did she see the paper, nor hear any thing of the joint sentiments of *William Symonds* and *Thomas Griffith*, and of her father and mother, in the letter mentioned to have been transmitted to Mr. *Hardy*, until the 11th of *February*, 1797, when she was on a visit at *Fetcham* in *Surry*, at the house of Mr. *Skerson*, whose wife was the daughter of *Nicholas Donnithorne*, and sister of *Isaac Harris*, and cousin of *Loveday Walker*; but on the morning of that day, she was informed that a Mr. *Hardy*, accompanied by another person, would be at *Fetcham* that day to dinner, at the house of Mr. *Skerson*; and she was wholly ignorant of the purpose of their coming, save only as she understood they were bringing some papers with them from *Hereford*. That, in the afternoon of the 11th of *February*, 1797, Mr. *Hardy*, accompanied by another person, whom *Loveday Walker* since understood to be a considerable cre-

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creditor of *Nicholas Donnithorne* and *Isaac Harris*, and who was one of the trustees under some trust-deed relating to their affairs, arrived at the house of Mr. *Sherson* at *Fetchqm*; and at a late hour in the evening, after dinner was over, Mr. *Hardy*, and such other person, made some statements or representations to her of the embarrassed state of the affairs of her uncle *Nicholas Donnithorne*, and of her cousin *Isaac Harris*, and the distress of the family, and of some arrangement for adjusting their affairs; and represented and assured her, that all the creditors would be ultimately paid; that the property was perfectly safe; and that the purpose of arrangement was to enable *Isaac Harris* provide the money for satisfying the claims of the creditors, by means the best adapted to effect that end, with least inconvenience and loss to him and the family of *Nicholas Donnithorne*: and they then, for the first time, produced to her some written paper, which they represented to contain the joint concurrence of *William Symonds* and *Thomas Griffith*, and of *John Whitmore* and *Johanna* his wife (her father and mother), in the arrangement (which was the same referred to by *William Symonds* in his letter), and their entire approbation thereof; but of the expediency and propriety of the measure thereby recommended, she was not then sufficiently informed to have a proper judgment: and she, having been then called on for her consent and approbation, and having no proper person to consult with and advise her what to do, in circumstances so new and embarrassing, gave credit to the representations made to her, respecting the ultimate security of the property; and under the influence of the advice and opinion of her friends *William Symonds* and *Thomas Griffith*, who, as it appeared to her by the said writing, recommended a compliance with the proposed arrangement,

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ment, was induced to express her willingness to concur in what was so approved; and thereupon Mr. *Hardy* produced a voluminous draft of a deed, and read over a part only, which occupied about three hours in the reading, and which she did not understand; after which, being asked if she approved of it, she answered, that she did not understand matters of that nature, but took it for granted that what was so proposed for her approbation was right; and, as the night was then far advanced, she was desired to consider of what she had heard until the next morning; and, being again, the next morning, asked for her consent, expressed her willingness to concur in what she understood could be no prejudice to her own interest, and would be a great accommodation and relief to the family, to which she was so nearly related, and under whose roof she then was. That she was then desired to sign some paper or instrument, which she accordingly did; and was told, it would be a satisfactory thing for *William Symonds* and *Thomas Griffith* to be informed by herself of her having consented to the arrangement; in compliance with which request she accordingly wrote to them a letter to some such effect.

The bill further charged, that *Hardy*, having thus effected the object of his journey to *Fetcham*, namely, to obtain the consent and signature of *Loveday Walker*, for which purpose he was desired by *William Symonds* to apply to her, returned to *London*, and took with him all the deeds, papers, and writings he had brought, without leaving with her any copy or abstract thereof, or any memorandum of what the same consisted, and of what she had been so induced to do. That *Loveday Walker* never signed or executed any other paper, authority, or consent as to the trust-monies, and that she

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she was ignorant of matters of business, and of the nature and effect of the deed of arrangement or compromise, and of the act she was called upon to perform, when she signed the authority and gave her consent or approbation. That such authority and consent were obtained by surprize, circumvention, and contrivance; and that the procuring such consent and signature was designed by *William Symonds* and *Thomas Griffith* as a means of protecting themselves, who were also creditors on their separate account of *Nicholas Donnithorne*, from the consequences of the breach of trust which they had incurred, or apprehended, by their having lent, or permitted *Nicholas Donnithorne*, their co-trustee, to retain, the trust-monies without sufficient security, and was a fraud on her; that on the 12th of *April*, 1797, Mr. *Hardy* sent to her the engrossment of a deed, accompanied with a letter containing (among other things) as follows: — "Mr. *Hardy* is very sorry he is so circumstanced he cannot wait on Miss *Whitmore* with the deed for her signature. The instrument which Miss *Whitmore* signed at *Fetcham* was an authority from Mr. and Mrs. *Whitmore* to the trustees (Messrs. *Symonds* and *Griffith*) to execute the deed of trust; and, had not Mr. and Mrs. *Whitmore* executed in the country, he (Mr. *Hardy*) would not have deemed Miss *Whitmore*'s signature necessary; but, as they have executed, her executing will make it, for form's sake, more regular. The deed is the same as the draft which Miss *Whitmore* has already perused at *Fetcham*, except the alterations which he mentioned. The bearer shall wait till Miss *Whitmore* or her friends have perused the draft and deed; and Mr. *Hardy* regrets that he cannot leave either, as he takes them into the county of *Cornwall* to-morrow morning. Mr. *Hardy*'s clerk will deliver to Miss *Whitmore* a check for 50*l.* on account of the interest money, the like

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like sum having been paid to her father and mother; and the arrears of interest will very soon be paid." That *Loveday Walker* having informed her friends of what had passed at *Fetcham*, as well as she could recollect or explain the same, and they having cautioned her against signing any deeds or papers respecting her property, without being properly advised as to the nature and effect of such papers, she did not sign and execute the indenture; but by three letters requested Mr. *Hardy* to leave a draft or copy of the deed with her, so as to afford her an opportunity of reading and considering it, and taking the advice of her friends thereon, and also a copy of the paper she signed at *Fetcham*, and a copy of the "Reasons," (as they were called) which *William Symonds* and *Thomas Griffith* had caused to be written and prepared by Mr. *Fallowes* (an attorney employed by them at *Hereford*), to which they, by the letter of the 24th of *December*, 1796, referred her, as containing their joint sentiments on the arrangement; and Mr. *Hardy*, after a separate application to him on her part for a copy of each of such respective papers, furnished her with them, one by one, as they were respectively called for; and she, after having read and considered them, and consulted her friends thereon, discovered, and was advised, that the deed was such as she ought not to execute or accede to, as being greatly injurious to her, and such as no person having any regard for her interest could advise, and she therefore declined to execute it. The bill therefore insisted that her consent, or concurrence and authority, were fraudulently obtained, and not binding, or at least that they ought not to have the effect of discharging the trustees, and their respective estates, from liability in respect of the trust-monies; but that the trustees, and particularly *Symonds* and *Griffith*, having been guilty in the first instance of a breach of trust, ought to be held answerable for

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for the consequences, and bound to make good the trust-monies.

The bill prayed, that the consent of *Loveday Walker* to the deed, and her signature to the writing expressive of such consent, might be declared to have been improperly obtained, and to be fraudulent and void; and that it might be declared that *William Symonds* (deceased) and *Thomas Griffith*, and *Nicholas Donnithorne*, ought, upon receipt of the said sum of 8000*l.* trust-money, to have invested the same on real or government security; and by lending the trust-money to *Nicholas Donnithorne*, one of the trustees thereof, upon his personal security, or permitting him to retain the same in his hands, were guilty of a breach of trust, and became personally liable to answer for, and make good, the same, and all loss that had arisen therefrom, or been occasioned thereby; and that *William Symonds* (deceased) and the respective estates of *Thomas Griffith* and *Nicholas Donnithorne*, might be charged with the amount of such trust-money accordingly; and that *William Symonds*, and *John Lilly*, and *Isaac Harris*, out of the estates of their respective testators, or some, or one of them, might be decreed to pay the said 8000*l.* into the Bank of *England*, in the name of the accountant-general; and that, when paid in, it might be laid out on real securities, or invested in capital stock, under the directions of the court, as to the interests and dividends thereof, during the life of *Johanna Whitmore*, upon the trusts of the indenture of the 17th of *January*, 1780, or such of the trusts as remained to be performed, and as to the capital of the trust-monies, and all other the interests and dividends thereof, after the death of *Johanna Whitmore*, upon the trusts of the settlement of the 11th of *June*, 1799, so that the trust-monies might be properly secured for the benefit of the Plaintiffs

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Adam John Walker and *Loveday Walker* his wife, and the issue of their marriage, according to their respective rights and interests; and that the interest and dividends might, during the life of *Johanna Whitmore*, be paid to *Loveday Walker*, or to *Adam John Walker* in her right, in such shares and proportions as the same had theretofore been paid, or as the court should direct; and, if *Lilly* and *Harris* should not respectively admit assets of their respective testators, that the usual accounts might be taken.

William Symonds and *John Lilly*, by their joint answer, filed on the 7th of *May*, 1803, stated that in or about *June*, 1772, *John Whitmore* (deceased) intermarried with *Johanna Whitmore* (then *Johanna Donnithorne*, daughter of *Isaac Donnithorne* deceased); and that upon the treaty for the marriage, *Isaac Donnithorne* agreed to advance the sum of 6000*l.* as the portion of his daughter, in consideration of an adequate settlement to be made upon her, and the issue of the marriage; and that he advanced 6000*l.* to *John Whitmore*, accordingly; and for securing the same with interest, *John Whitmore* gave his bond, but no settlement was then, nor until the time thereinafter mentioned, executed in pursuance of the agreement; and, denying that any real security was ever given by *John Whitmore* for the sum of 6000*l.*, or any other security except the bond, they stated that in or about the month of *January*, 1780, *John Whitmore* being greatly reduced in his concerns, and unable to make any settlement, according to the terms of the agreement, and there being an arrear of 1900*l.* interest, *Isaac Donnithorne* determined to make a settlement of the principal and interest due in respect of the bond, and accordingly the indenture of the 17th of *January*, 1780, was executed; in which was contained a declaration or proviso, that the trustees should

should be accountable for their own acts and defaults only, and not for any loss or miscarriage by any security of the trust-money, in case the same happened without their wilful default or neglect, nor for more than what should be actually received by them, or their order respectively; the answer admitted that *Nicholas Donnithorne*, *Thomas Griffith*, and *William Symonds*, accepted the trusts of the indenture; that *Isaac Donnithorne* died in *June*, 1782, having by his will devised freehold and leasehold estates in *Cornwall*, of considerable value, comprising lucrative tin mines, to *Nicholas Donnithorne* his son, for life, with remainder to his son *Isaac Harris*, (then *Isaac Donnithorne*) in fee simple; that *Nicholas Donnithorne*, upon the death of the testator, entered on the devised estates, and continued in possession till his death; being a merchant in *London* of very considerable credit and reputation: That in 1783, the principal and interest due on the bond were paid by *John Whitmore*, and the amount, 7900*l.*, was lent by him with the approbation of the trustees to one *Pritchard*, on the security of a mortgage of certain real estates, which, in 1790, were sold to *John Keysall*, who thereupon gave notice to the trustees of his intention to pay off the principal and interest due on the mortgage, at the end of six months; that in consequence of such notice, *William Symonds* made application to different solicitors of eminence in *Hereford*, and caused diligent inquiry to be made for some landed security whereon to invest the money; but no opportunity occurred of so investing it, and neither he, nor *Thomas Griffith*, were at that time able to find any such security; and the sum of 7900*l.* with the then arrear of interest, was afterwards paid in *London* by *Keysall* to *Nicholas Donnithorne*, pursuant to the notice; that, as the interest of that

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sum formed the principal part of the income of *John Whitmore* and *Johanna* his wife, and would have been much diminished by investing the money in the public funds, (which did not then produce an interest of 4 *per cent.*) it was agreed by the trustees, that it should be invested in bills or notes of the *East India* Company, payable in two years, which then produced an interest of 5 *per cent.*, and it was accordingly so invested by *Nicholas Donnithorne*, with the approbation of his co-trustees; and the interest of the bills from time to time paid to *John Whitmore* and *Johanna* his wife, (who then lived separate from each other) in the proportions in the bill mentioned.

The answer stated that in the month of 1795, the principal sum of 7900*l.* due on the bills was paid in pursuance of a public notice, and was received in *London* by *Nicholas Donnithorne*, who having informed *Johanna Whitmore* that he had received that sum, and that intelligence having been communicated by her to *William Symonds* and *Thomas Griffith*, *Symonds*, in or about the month of *May* 1795, wrote a letter to *Nicholas Donnithorne*, stating it to be the joint and earnest request of *Griffith* and himself, that the whole of the 7900*l.* should, as soon as convenient, be invested in the public funds, in the names of the three trustees; that *Nicholas Donnithorne* soon afterwards proposed to *Johanna Whitmore*, on behalf of himself and his son *Isaac Harris*, to join in securing the trust-money, by a mortgage of their estates in *Cornwall*, and requested her to consult *Symonds* and *Griffith* as to the propriety of acceding to such proposal; and *Johanna Whitmore* being desirous that the proposal should be accepted, and it appearing to *Symonds* and *Griffith*, that the estates in *Cornwall*, would be a very ample security, they expressed their consent

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consent to *Johanna Whitmore*, who thereupon wrote to *Nicholas Donnithorne*, informing him of such consent, and requiring that the mortgage should be executed with all possible despatch, and that, for the security of the money, until a mortgage could be completed, a joint bond should be given; that in *July* 1795, *Nicholas Donnithorne* transmitted to *Symonds* and *Griffith* the joint bond of himself and *Isaac Harris* for 8000*l.* (being the principal sum of 7900*l.* together with 100*l.*, part of the interest arising therefrom, added by the desire, or with the consent of *John Whitmore* and *Johanna* his wife); and he at the same time assured *Symonds* and *Griffith* that he would very shortly send them a joint mortgage of the *Cornish* estate, for securing the principal and interest of the trust money.

The answer admitted that *John Whitmore* and *Johanna* his wife had but one child, *Loveday*, who, at the time of executing the settlement, was an infant of tender years, and resided with *Johanna Whitmore* her mother, who then lived apart from her husband; that subsequent to such separation, the trustees allowed one-fourth part of the interest of the trust money to *John Whitmore*, and the remaining three-fourths to his wife; and that *Loveday* attained twenty-one in *December* 1795, and then separated herself from her mother, and soon after she attained that age, made an application to the trustees for an allowance for her support, in consequence of which they allowed her 100*l. per annum* out of the interest.

The answer further stated, that *Nicholas Donnithorne* not having, in pursuance of his engagement, sent to his co-trustees a mortgage for securing the trust-money, *William Symonds* made several applications to him on

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the subject, and wrote to him several letters, earnestly requesting him, in the name of himself and *Griffith*, either immediately to invest the money in the public funds, or to give them landed security for it; That *Nicholas Donnithorne* died on the 20th of *September*, 1796, during the course of such applications, without having executed a mortgage, leaving *Isaac Harris*, his eldest son and heir at law, who thereupon became entitled, under the will of his grandfather *Isaac Donnithorne*, to the estates in *Cornwall* at a yearly rent of 1500*l.*, and also to considerable copyhold and leasehold estates; and that *Nicholas Donnithorne* died intestate, and *Isaac Harris* took out administration to his personal estate: That in the beginning of *November*, 1796, *William Symonds* wrote to *Isaac Harris*, and requested him to invest the sum of 8000*l.* in the public funds, without further delay; but about the 19th of that month *Symonds* received a letter from Messrs. *Wadeson* and *Hardy* (the solicitors of *Harris*) informing him that the affairs of *Nicholas Donnithorne* appeared, on investigation, to be in a very embarrassed state, and that a meeting of his creditors was intended to be held in *London*, in order to determine what steps ought to be taken for obtaining payment of their debts, which meeting Messrs. *Wadeson* and *Hardy* requested *Symonds* and *Griffith*, (as bond creditors of *Nicholas Donnithorne*) to attend: That by reason of the distance from their place of residence to *London*, it was impossible for them to attend; but *William Symonds* shortly afterwards received a letter from Mr. *Hardy*, informing him that the meeting had taken place, and it appearing that the bond and simple contract debts of *Nicholas Donnithorne* amounted to 30,000*l.* and that the immediate sale of his real and personal estate would, from the nature of the property, be attended with considerable loss, whereas by continuing the

the same in the hands of trustees, an ample fund would be provided for the discharge of his debts by instalments, a proposal for creating a trust for the benefit of the creditors had been submitted to them on the part of *Isaac Harris*, to which the greater part of them were disposed to accede, and that a trust deed was accordingly prepared to carry the proposal into effect; to which Mr. *Hardy*, on the part of *Isaac Harris* and the creditors, requested the concurrence of *Symonds* and *Griffith*; that the proposal of *Isaac Harris* (to which the letter referred) was at the same time transmitted to *Symonds* and *Griffith* for their consideration, and was to the effect following:—

"That all the freehold, copyhold, and leasehold estates and other chattel interests of *Nicholas Donnithorne* deceased, and *Isaac Donnithorne*, situate in or near *Lad-lane*, *London*, in *Cornwall*, and at *Croydon*; and all outstanding debts owing to *Nicholas Donnithorne*, and also, all mining and farming stocks and utensils belonging to him, should be respectively conveyed and assigned to *Richard Walpole*, *William Curtis*, and *Thomas Wood*, of *London*, upon the following trusts; that the premises in or near *Lad-lane*, and the freehold estates of *Genown*, in *Cornwall*, and the leasehold premises, in that county, demised by letters patent of the 3d of *August*, 1762, should be sold at such time as the trustees should think fit, if they should think a sale necessary, and the monies arising yearly to be applied, first in payment of the principal money and interest due upon a certain mortgage of the Cornish estates, and other charges thereon, specified in the proposal; and the ultimate surplus (if any) to be applied in manner thereinafter directed, in respect to the general fund; but if the same should not be sufficient for the discharge of the mortgage debt, then the deficiency to

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be discharged out of such general fund; and until a sale, the rents and profits of the mortgaged estates should be applied first in payment of the interest of the mortgages, and the surplus of the rents and profits in reduction of the principal monies; and that the leasehold premises at *Croydon* should be immediately sold, with such part of the farming and mining stock and utensils in *Cornwall*, as the trustees should think fit, and the outstanding debts immediately got in, and the monies applied as part of the general fund, in manner thereinafter directed; and that the mines should be worked, and the stamping mills and other businesses in *Cornwall*, carried on by the trustees, except such part as they might judge it expedient to dispose of, and that the produce thereof, and the toll-tin, and the rents, and profits of the other parts of the Cornish estates, should be received by the trustees, who should thereout pay the expenses of the trust; and should also have power to raise by mortgage, such further sums as might be necessary for that purpose, or for insuring any life or lives upon which any of the leases might depend, and for renewing any of the leases; and that subject to the expenses aforesaid, the residue of the monies arising as aforesaid, should be applied, first in payment of the interest of a sum due on mortgage therein mentioned, and then of the interest of the specialty debts, and then in payment to the house of *Richard Walpole* and company, of certain sums, which they were under engagement to pay; and after the several payments aforesaid, to pay the yearly sum of 500*l.* to *Isaac Donnithorne*, during the continuance of the trusts, if he should so long live unmarried; but in case of his marrying during the pending of the trust, then the same annuity was to be continued to his executors, &c. until the trust should be determined; and also to pay 300*l.* a year to *Anna Donnithorne*, the widow of *Nicholas Donnithorne*, during the

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the continuance of the trust, if she should so long live, and in case of her death, then the 300*l.* a year to be continued to her three daughters, *Sophia*, *Catherine*, and *Loveday Donnithorne*, in equal shares, during the continuance of the trusts, subject to a proportionable reduction in case of the death of any of the daughters; and afterwards in payment of the interest of a sum of 1400*l.*, due to *James Donnithorne*, and then in payment of the other specialty debts, and that subject to the several payments aforesaid, the accruing interest of the specialty debts should be discharged, and that the clear surplus of such monies should be applied in discharge of the said sum of 1400*l.*, by certain yearly payments to *James Donnithorne*, his executors, &c., and in the next place, in discharge of the specialty debts, and also of the simple contract debts, by an equal pound-rate; and after full payment and discharge of the debts, that the trust estate should be conveyed to *Isaac Donnithorne*, and so much of the personal estate as should not have been disposed of for the purposes aforesaid, should be assigned to the widow and children of *Nicholas Donnithorne*, according to their respective interests therein, under the statute of distribution; and that in case all the debts should not be paid within the space of twelve years, the trustees should have power to raise by sale or mortgage, so much money as should be necessary for the full discharge of the debts remaining unpaid; That in consideration of the fund to be provided for payment of the debts, and the additional security for the discharge thereof, contributed by *Isaac Donnithorne*, the creditors executing the deeds of trust, should release all claims and demands on *Nicholas Donnithorne* and *Isaac Donnithorne*, and their respective estates."

The answer further stated, that *William Symonds* and

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Thomas Griffith having some objections to the proposal, which they afterwards stated to *Loveday*, and not chusing to execute the trust-deed, without the direction and authority of the persons interested in the debt, submitted the proposal and terms of trust, together with their objections, to *Whitmore* and his wife, then resident at *Hereford*, and they having considered of the same, an instrument, or power of attorney, was prepared and signed by *Whitmore* and his wife, whereby, after reciting the indenture of settlement, and that the trust-money, after it had been paid by *Keysall*, was invested in *East India* bills, payable in two years after date, and that the bills were received on account of himself, and his trustees, by *Nicholas Donnithorne*, who, in breach of his trust, converted the principal sum to his own use, and that *Thomas Griffith* and *William Symonds* had obtained a joint and several bond from *Nicholas Donnithorne* and *Isaac Donnithorne*, for securing the debt; and after reciting the intended deed of trust for the payment of the creditors of *Nicholas Donnithorne*, and that *John Whitmore* and *Johanna* his wife, and *Loveday*, their daughter, were the only persons beneficially interested in the trust-money, and that the mode provided by the deed of trust, appeared to them that which was most eligible, and would best conduce to the discharge of the debts of *Nicholas Donnithorne* and *Isaac Donnithorne*; It was witnessed that, for the reason and considerations aforesaid, *John Whitmore* and *Johanna* his wife, and *Loveday*, did authorize and direct *Thomas Griffith* and *William Symonds* to execute the indenture of release and assignment, as creditors in respect of the bond, and to receive the dividends, or share of the produce of the trust estates, according to the stipulations of the indenture, in satisfaction of the principal and interest due upon the bond, and they thereby confirmed all

all that *Griffith* and *Symonds* should lawfully do, or cause to be done, in pursuance of the said authority and direction. (*a*)

The answer then stated, that at the time of these transactions,

(*a*) The power of attorney recited the indenture of the 17th of *June*, 1780; and that the sum of 7900*l.* was, some time after the execution of the indenture, paid by *John Whitmore* to the trustees, and by them invested upon a mortgage of certain estates, and was paid off and discharged by *John Keysall*, purchaser of the said estates, to the trustees, who thereupon, or soon afterwards, invested the same upon certain promissory notes drawn by or on the behalf of the United Company of Merchants trading to the *East Indies*, payable two years after the date thereof or thereabouts, which were received by *Nicholas Donnithorne*, on account of himself and his co-trustees, but who in breach of his said trust converted the said principal sum of money to his own use; and *Thomas Griffith* and *William Symonds* have since obtained a joint and several bond from *Nicholas Donnithorne*, and *Isaac Donnithorne*, his son, for securing the same: and that there was then due from the estate of *Nicholas Donnithorne* to *Griffith* and *Symonds*, as such trustees as aforesaid, the said principal sum of 7900*l.* together with an arrear of interest for the same; and *Nicholas Donnithorne* was at the time of his decease indebted to several other persons by specialty and simple contract to a very large amount, to the payment of a part of which debts his son *Isaac Donnithorne* was also liable, in consequence of his having joined in the securities for the same: and that by certain indentures of lease and release, and assignment, bearing date respectively on or about the and days of *January* last past, made, &c. (describing the deed of trust afterwards executed) all the real and personal estate of *Nicholas Donnithorne*, and also *Isaac Donnithorne*, therein described, were conveyed to *Walpole*, *Curtis*, and *Wood*, their executors, &c. upon trust by the several ways and means therein

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actions, *Loveday* was on a visit at *Fetcham*, near *London*, and being fully informed of the state of the trust-property, wrote

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therein mentioned, to raise money for, and to apply the same in payment and discharge of the several specialty and simple contract debts of *Nicholas Donnithorne* and *Isaac Donnithorne*, jointly or separately, in the order and course therein mentioned: and that *Loveday Whitmore* had attained her age of twenty-one years, and thereby became intitled to a vested interest in the said sum of 7900*l.* subject to the life interest of her father and mother therein; wherefore *John Whitmore* and *Joanna* his wife, and *Loveday Whitmore* their daughter, were then the only persons beneficially interested in the trust money; and inasmuch as the mode provided by the last recited indenture appeared to them that which was most eligible and would best conduce to the discharge of the several debts of *Nicholas Donnithorne* and *Isaac Donnithorne*, *John Whitmore* and *Johanna* his wife, and *Loveday Whitmore*, had therefore agreed to empower *Griffith* and *Symonds*, as such trustees as aforesaid, to concur with the other creditors of *Nicholas Donnithorne* in acceding to the deed of trust, and accepting the terms therein proposed: and it was witnessed, that for the reasons and considerations aforesaid, and for divers other reasons and considerations them thereunto moving; *John Whitmore* and *Joanna* his wife, and *Loveday Whitmore*, authorized, empowered and directed *Griffith* and *Symonds*, or the survivor of them, or the executors, &c. to sign, seal, and execute the indenture of release and assignment of the day of *January* last past, as creditors for the said sum of 7900*l.* and all interest due for the same up to the date of the indenture, and thenceforth to accrue or become due in respect thereof, and from time to time to receive the proportionate dividend or share of the produce of the trust estates, when the same should, according to the stipulation and direction contained in the indenture, become due and payable, towards satisfaction of

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wrote a letter to *Symonds*, dated the 19th of *December*, 1796 (*a*), to which a joint answer was sent by *Symonds* and *Griffith*, dated the 24th of the same month (*b*); and that *Symonds* and *Griffith*, having drawn up certain observations to be submitted to *Loveday*, together with the necessary papers relating to the transactions, transmitted the same, with the power of attorney, executed by *Whitmore* and his wife, to Mr. *Hardy*, (the solicitor of *Isaac Harris*,) with a request that he would deliver them to *Loveday*, at the same time with the papers relating to the intended trust; the observations being to the effect following: "Mr. and Mrs. *Whitmore* being the persons interested in the seven thousand nine hundred pounds, it is obvious, that whatever proposal they concur in accepting, their trustees, Messrs. *Griffith* and *Symonds*, may safely adopt, but without their consent, (and particularly without Miss *Whitmore's*, to whom the money appears to belong, subject to her father and mother's life interest,) the trustees will incur a great risk, in acceding to any proposal, however equitable and advisable it may be in their own opinions. It has been intimated to the trustees, by a gentleman, who professes to act as the friend of Miss *Whitmore*, that they ought to use every possible means to get in the money, without regard to family considerations, and to place it in the funds, by which means it would produce more than five pounds *per cent.*: the trus-

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of the principal money and interest; and *Whitmore* and his wife, and *Loveday Whitmore*, ratified and confirmed, and promised and agreed to ratify and confirm whatsoever *Griffith* and *Symonds*, and the survivor of them, &c. should lawfully do or cause to be done in the premises by virtue or in pursuance of the power.

(*a*) *Vide ante*, p. 9. (*b*) *Vide ante*, p. 10.

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tees for their own part think such measures by no means advisable, in the present state of things, as being likely to produce great loss and inconvenience, and they would prefer the proposed trust, with some alterations, as more likely to secure the interest of the *Whitmore* family; but it seems doubtful, whether they have any right to think upon this subject. If they adopt such measures as that family (and Miss *Whitmore* in particular) may call for, however ruinous to the interests of all parties, they will stand acquitted as trustees, nor can they be blamed for the consequences, their advice to the contrary not being followed; but if they accept an arrangement, contrary to the wishes of the family, they may then be considered as the persons who gave credit, and become liable personally to pay the money and take the security upon themselves; no difficulty will arise with Mr. and Mrs. *Whitmore*, and Miss *Whitmore* will do well to consider that when the 7900*l.* was paid up by Mr. *Keysall*, (purchaser of the estates upon which it then stood as a mortgage,) the funds were at a very high price, and would not have paid near four *per cent.*; it was also then very difficult to get a good mortgage, and if such security could have been obtained, it would have been very unhandsome to call up the money, in a time of such difficulty to procure it; not to mention, that a mortgagor may have found it impossible to pay it in; many persons whose property is invested upon mortgages feel the difficulty of getting it in to place it in the funds, and are obliged to submit to let it remain upon the present securities. Having premised these reasons for obtaining Miss *Whitmore's* consent, Mr. *Hardy* will see the necessity of applying to her, and supposing it to be obtained, the trustees desire the following observations to be made upon the trust-deed, submitted to their consideration; they continue to think the allowance of 800*l.* a-year too considerable in this case, added to the other funds

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funds for the support of the *Donnithorne* family, and that 500*l.* a-year, divided as they think proper, would be enough to enable them, by living together, and acting with proper economy, to enjoy every comfort of life: perhaps it may be thought right to allow 300*l.* of this to Mr. *Isaac Donnithorne*, and the rest for Mrs. *Donnithorne*, and in addition to the portion of the young ladies; they think the continuance of 500*l.* a-year to the executors, administrators, and assigns of Mr. *Isaac Donnithorne*, still more inadmissible: his death, it is to be hoped, is an event not to be reckoned upon, in favour of the trust; but should it happen, where can be the good sense of empowering him to leave 500*l.* a-year to whom he pleases, which was intended only for his personal support? They think the discretionary increase of Mr. *I. Donnithorne's* allowance, improper and unnecessary, and that more particularly, if he is to have an allowance of 500*l.* a-year; it may be right to observe, that every increase of these allowances will not only retard the execution of a very complicated trust, but in the end be detrimental to himself, as every shilling his trustees pay off, will operate with the power of compound interest in his favour; they consider the specialty creditors in a worse situation than the simple contract creditors, the trustees having a discretionary power to pay off such of the latter as they think proper, and then they must pay all the creditors *pro rata*; the arrangement, it was expected, would have been to pay interest to the specialty creditors first, and then to the simple contract creditors; it seems to be inconvenient to compel the trustees to pay the debts *pro rata*; if the trust goes on well, some persons may have no objection to wait for their money, while others may be much distressed for want of it; perhaps there should be a power to the trustees to give a preference to the specialty creditors, with consent at least of a meeting of those creditors: the power of two

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of the trustees to act without the third, seems improper, unless it be restricted to the case of one of them being absent more than a certain time from *London:* in case of a difference of opinion between them, the one who dissents may be right, and a meeting of specialty creditors should be called to turn the scale. If Miss *Whitmore* should, however, approve of the deed in its present form, and should disapprove of the observations of her trustees, they will again consult Mr. and Mrs. *Whitmore*, and the family being unanimous, the trustees will be satisfied with having given their opinion, leaving it to the parties interested to determine for themselves."

The answer further stated, that Mr. *Hardy*, accompanied by *William Curtis*, (now Sir *William Curtis*, Bart.) one of the trustees named in the indenture of assignment, about the 11th of *February*, 1797, called upon *Loveday* at *Fetcham*, and fully explained to her the embarrassment of *Isaac Harris*'s affairs, and the arrangement which had been formed for vesting his property in trustees, to be applied in payment of his debts, together with the nature and particulars of the trust created for that purpose; and that they, at the same time, produced to her the writing containing the observations, together with a draft of the trust-deed, which they fully explained, and offered to give her any further information which she might desire; and they also produced to her the power of attorney signed by her father and mother; and she, having fully considered the several papers, and appearing perfectly to understand the nature of the trust, expressed herself to be entirely satisfied therewith, and on the following day executed the power of attorney in the presence of *Curtis* and *Hardy*, to whom she delivered the same; and, in the course of two or three days after, wrote to *William Symonds*

monds the following letter, dated the 14th of *February*, 1797.

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" In consequence of your last letter, I have long been expecting to hear from Mr. *Hardy*; on *Saturday* he and Mr. *Curtis* came to *Fetcham*, and brought with them the paper already signed by my father and mother: it has my entire approbation, and I have added my name to it. With regard to your observation on the proposed allowance of my cousin and aunt, I cannot quite agree with you: my cousin's case is certainly a very bad one, and I think, considering the great sacrifice he makes, of what he might have reserved entirely to himself, 500*l.* is not much more than what he might reasonably expect: — it is most probable the family may be separated in a very few years, and my aunt, I think, ought not to have less than 300*l.* which is mentioned by Mr. *Hardy*. I think the regular increase of *Isaac*'s income by no means necessary, unless he were to marry, and then it will be with the consent of his friends, as the debts decrease, to make an addition to his income, if he should wish it. Were he deprived of the power of disposing of the 500*l.* in case of his death, it would be an insuperable bar to his marrying. To a wife or children I think it should be continued, but if he should die unmarried, with him it should cease: I have said as much to Mr. *Hardy*; and I trust, upon further consideration, you will have the same opinion. I shall always be happy in assenting to what you and Mr. *Griffith* propose, to whom I beg my compliments and respects.

" P. S. I have taken the liberty of inclosing a few lines, which I shall be obliged to you to convey to him."

The answer further stated, that, in pursuance of the authority contained in the power of attorney, and after having

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having received the last-mentioned letter, *Symonds* and *Griffith*, as creditors by virtue of the bond, duly executed the trust-deed.

That deed, dated the 21st of *March*, one thousand seven hundred and ninety-seven, between *Isaac Donnithorne*, described as the eldest son and heir at law of *Nicholas Donnithorne*, and also a devisee and legatee named in the will of the Reverend *Isaac Donnithorne*, and administrator of the effects of *Nicholas Donnithorne*, of the first part; the Honourable *Richard Walpole*, *William Curtis*, and *Thomas Wood*, three of the principal creditors of *Nicholas Donnithorne*, *Richard Walpole*, and *William Curtis*, being also creditors of *Isaac Donnithorne*, as well as trustees nominated on the part of their other creditors for the purposes thereinafter mentioned, of the second part; and the several other persons who, by themselves or their respective partners, agents, or attornies lawfully authorised, had sealed and delivered the deed, or a duplicate thereof, also creditors either of *Nicholas Donnithorne* and *Isaac Donnithorne* jointly, or one of them separately, of the third part; after reciting various leases, and letters patent from the crown, by way of demise of divers stamping mills, tolls of tin, and other hereditaments in *Cornwall*, *London*, and elsewhere; and a devise of certain estates by *Isaac Donnithorne*, the grandfather, to *Nicholas Donnithorne* for life, subject to certain legacies, with remainder to *Isaac Donnithorne* in fee, and the descent of certain other estates on *Isaac Donnithorne*, as heir to his father *Nicholas Donnithorne*; and that *Nicholas Donnithorne* had been engaged in certain tin mines, and had become indebted to various persons; and that the immediate sale and disposition of the real and personal estate of *Nicholas Donnithorne* would, as to the greater part, from its nature, be attended

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tended with a considerable loss, whereas by working, and continuing it, an ample fund would be provided for the discharge of those debts by instalments, without occasioning such injury to the property as would result from an immediate sale, and therefore *Isaac Donnithorne* lately submitted a proposal to the creditors of himself and his late father, to the effect expressed in the proposals, and in the declaration of the trusts of the deed; witnessed, that *Isaac Donnithorne* conveyed freehold and leasehold estates specified, and certain tin-mines, farming stock, and chattels, and all his other chattels, as administrator of his father, to *Walpole*, *Curtis*, and *Wood*, and their heirs, &c. upon trust, to sell part of the premises, except certain tin-mines, which they were to carry on, and pay, first, certain mortgages, and the legatees of *Isaac Donnithorne* the grandfather, and such debts as from their nature required immediate payment; then 500*l. per annum* to *Isaac Donnithorne* during his life, and other annual sums to different members of the family; next, keep down the interest of the specialty debts; and afterwards satisfy all specialty and simple contract debts; and convey the surplus to *Isaac Donnithorne*, or his representatives.

The deed contained a clause, that in pursuance of the agreement of the parties of the second and third parts, and in consideration of the provision thereby made for the discharge of the several debts, and of the covenants and agreements on the part of *Isaac Donnithorne*, the trustees, and all other the creditors of *Nicholas Donnithorne* and *Isaac Donnithorne*, for themselves severally and respectively, and for their several and respective executors, accepted of the deed of conveyance and assignment in full satisfaction of all the debts, and sums

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of money set opposite to their respective signatures, and all other claims and demands whatsoever, on *Nicholas Donnithorne* and *Isaac Donnithorne*, jointly or separately, in respect of their joint trade, and all actions, &c.; and they severally and respectively released, and discharged *Isaac Donnithorne*, his heirs, &c. from all the debts, set opposite to their respective signatures, and from all other debts, sums of money, claims and demands whatsoever, then due to them, or any of them, &c. and from all actions and suits, which the creditors might have, &c. against *Nicholas Donnithorne*'s estate, or *Isaac Donnithorne*, or either of them, &c.; provided that the release, or any other clause therein contained, should not extend, or be deemed to extend, to release, discharge, or in any degree affect, any debt then due to any of the creditors separately from *Nicholas Donnithorne* or his estate, or *Isaac Donnithorne*, in conjunction with any other person or persons; but that every such debt should, as against such other persons, be and remain subsisting, and unreleased.

The answer then stated, that by that deed, executed by the direction and under the authority of *Loveday Walker*, *Symonds* and *Griffith* relinquished all claim in respect of the bond, as a separate debt of *Isaac Harris*, who was then perfectly solvent, and capable in time of paying the debt, and whose responsibility had since been greatly increased by a considerable real and personal property, acquired by him, in right of his wife, in consequence of which he assumed the name of *Harris;* that they believed the executing the deed was, under all the circumstances, the most adviseable measure for the creditors of *Nicholas Donnithorne* and *Isaac Harris*, and the best calculated for obtaining payment of their debts; and that the fund provided by that arrangement

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ment for the satisfaction of the debts was a solvent fund, and would ultimately be sufficient for that purpose; but they insisted that *Symonds*, and the estate of *Griffith*, ought not to be made responsible, in case of a deficiency of the fund; although they would be perfectly ready to submit to such responsibility, in case they could be put in possession of the personal security of *Isaac Harris*, relinquished by them under the authority of *Loveday Walker*. The Defendants submitted that the sum of 7900*l.* after it was received from the trustees, was duly invested on real security, by being lent on mortgage as aforesaid, and that the receipt for the sum paid by *Keysall* was signed by *Nicholas Donnithorne*, *Thomas Griffith*, and *William Symonds* (deceased), but the money was received by *Nicholas Donnithorne* only; and they denied that they and *Thomas Griffith* (deceased) ever consented, or agreed to lend the sum to *Nicholas Donnithorne*, (except on real security,) or that they (except as aforesaid,) permitted him to retain it by way of loan, upon personal security; and they stated, that *Nicholas Donnithorne* received it from Mr. *Keysall*, and also the produce of the *East India* bills, voluntarily and without direction or authority, from *William Symonds* (deceased,) or *Thomas Griffith*, who were, during the whole of the transactions, resident at *Hereford*; and after the trust-money was received by the payment of the *East India* bills, *Thomas Griffith* and *William Symonds* (deceased) used their utmost endeavours and made the most urgent application to *Nicholas Donnithorne*, during his life-time, and after his death to *Isaac Harris*, at first to procure the trust-money to be invested in government security, and afterwards to obtain a mortgage upon the *Cornish* estate; and they persevered in such endeavours until they were authorised by *Loveday Walker* and her father and mother, to execute the trust-

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deed; that if she was, at the time when she attained the age of 21 years, ignorant of the settlement made by her grandfather, or of the trust-money secured thereby, and her interest therein, and the various particulars relating thereto, which they did not admit, she did not long continue in ignorance thereof; and they denied that *Wm. Symonds* (deceased) or *Thomas Griffith*, did in any manner conceal or withhold the settlement from her knowledge, or keep her in ignorance thereof; or that she was under any difficulty in obtaining information respecting it; but they said that, on the contrary, they were at all times desirous of giving her every information in their power, and of answering, in the most unequivocal and satisfactory manner, every inquiry made by her relative to the same; and *William Symonds* (deceased) did in part answer all such inquiries, and explain to her the nature and valuation of the trust-property, when called upon by her, or on her behalf for that purpose; and neither he, nor *Thomas Griffith*, ever gave her any reason to believe, that her interest in the trust-money was derived under the will.

William Symonds, since deceased, admitted that *Loveday Walker*, some time in *January*, 1796, sent to him the letter, in the bill mentioned; but he not having the possession of the will of her grandfather, or any knowledge of the particulars thereof, and having no concern in the trusts thereby created, did not return any answer to such letter, and at the time of receiving it, he had no reason to believe, and did not believe that it had any reference to the property of which he was a trustee; he admitted that, after receiving the letter, he was applied to by *Adam John Walker*, who desired, on behalf of *Loveday*, to examine the settlement or trust-deed; and that the Defendant informed *Walker*, that he had not

not then the deed, or any copy in his possession, but that it was in the possession of *Thomas Griffith*, to whom he referred *Walker*; that, shortly afterwards, *Walker* repeated his application to the Defendant, who, having in the mean time procured the settlement from *Griffith*, produced it to *Walker*, who carefully examined it, and either took extracts, or the Defendant took extracts therefrom, as he desired, and delivered them to him, and he was at liberty to take a copy of the deed, or the Defendant would willingly have furnished him with a copy in case he had desired it; but he appeared to be perfectly satisfied with the extracts, and with the information which he then received.

The Defendant did not recollect, whether he then informed *Walker* of the situation of the trust-property, or in whose hands it then was, and under what circumstances, and upon what security, or whether or not any inquiry was then made on that subject; but he never declined, or refused, to give such information, and would have willingly furnished it in case any inquiry had been made on the subject; and he denied that any application was ever made to him, by, or on the behalf, of *Loveday Walker*, for a sight or perusal of the settlement, or for any information respecting it, except as aforesaid; and he denied that he ever informed her, or any person on her behalf, that the deed or settlement was in the custody or power of *Nicholas Donnithorne*; and he believed that he, in consequence of the first application made to him on her behalf, furnished *Adam John Walker* with a copy of the settlement; and that *Loveday* must have been perfectly acquainted with the situation of the trust-property, long before she wrote the letter of the 19th of *December*, 1796; that, in case *Loveday* had persisted in her intention of calling in the sum of 8000*l.*, and had requested

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quested the Defendant and *Thomas Griffith* so to do, they would by no means have executed the trust-deed, but would immediately have instituted some legal proceedings against *Isaac Harris*, to enforce the payment of the bond.

The Defendant, *W. Symonds*, since deceased, further said, that in case *Curtis* and *Hardy* made any representations or assurances, of the nature alluded to in the bill, which he did not admit, they must have been understood as making them, in their individual characters, and not as authorised by *Thomas Griffith*, and the Defendant, or as speaking their sentiments; and that, *Curtis* and *Hardy* were not authorised to act, and did not appear in the transactions as agents of the Defendant and *Thomas Griffith*, except in delivering to *Loveday* the writing, containing their joint observations on the intended trust.

The Defendants denied, that *Loveday Walker* was, at the time when she signed the instrument, incompetent to form a correct judgment of the nature and effect of the arrangement, or of the propriety of the act, or, that her consent or approbation and signature were obtained by surprise, circumvention, and contrivance, or under false, or improper representations, inasmuch as she was, at the time, well acquainted with the situation of the property, and appeared, by her letter of the 14th of *February*, 1797, to have been well acquainted with the nature of the intended arrangement, and to have fully considered, and deliberately approved it. The Defendants denied, that the Defendant, *William Symonds*, deceased, and *Thomas Griffiths* had any design in the transaction of obtaining her signature to the instrument as a means of protecting themselves from the consequence

consequence of any breach of trust, or that they considered themselves as having been guilty of any breach of trust, or in danger of being made responsible, in consequence of the trust-money having remained in the hands of *Nicholas Donnithorne*. They stated, that *Loveday Walker* did not communicate to *Thomas Griffith*, and *William Symonds*, deceased, her change of opinion as to the propriety of acceding to the proposed arrangement, nor had they any knowledge or suspicion thereof at the time when they executed the trust-deed, or until a considerable time afterwards.

By their answer to the amended bill, *William Symonds*, since deceased, and *John Lilly* stated, that they believed that the interest of all parties concerned in the trust-fund was best consulted, under the circumstances of the times, by investing the money in *East India* bills, until an eligible landed security could be procured for it; that, at the time when the trust-money was so invested by *Nicholas Donnithorne*, no landed security could be procured, and, by reason of the very high price of the public funds, there was a considerable danger, in case of a fall in the price (which in fact took place within a very few years afterwards,) that the capital of the trust-money might be greatly diminished.

The Defendant, *Isaac Harris*, by his answer insisted on the benefit of the trust-deed, and that, under the circumstances, *Loveday Walker* was not to be considered as a creditor on the personal estate of *Nicholas Donnithorne*, nor entitled to any account of it, and that *Harris* was not in any manner liable out of or in respect of the personal estate of *Nicholas Donnithorne* to make good the trust-monies.

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The cause having been heard before the Master of the Rolls, on the 4th, 5th, and 6th of *May*, 1807, the following judgment was given:

The MASTER OF THE ROLLS. (*a*)

The bill prays that the signature of the Plaintiff *Loveday* to the power of attorney, may be declared to have been fraudulently obtained and void: this is introductory to the rest of the relief prayed; the former must be made out to entitle the Plaintiffs to the latter. The foundation of the Plaintiff's case is, that her consent was improperly obtained. The objection is, that it would be impossible to replace the parties in the situation in which they were when the deed was executed; it would not, however, therefore follow, if the signature to the power of attorney had been fraudulently obtained, that it should not be declared void. It is true, that the parties would have had a very different judgment to exercise respecting Mr. *Nicholas Donnithorne* from that which they would have now to exercise; they might have assented to some deed; they probably would not have assented to such a deed as has been executed; and though this does not preclude the Plaintiffs from all relief, it throws the *onus* very strongly on them, to shew that the trustees were entirely blameable, and that there was an improper practice in obtaining the deed.

The questions are first, whether the trustees practised any imposition on her? second, whether they withheld from her any facts which it was essential she should have known?

It is hardly alleged that any imposition was actually

(*a*) From a note read on the argument of the exceptions to the Master's report.

practised

practised on her. The trustees were at a distance, the observations transmitted by them held out mere inducements, but not so as improperly to influence her judgment.

2dly, Information is said to have been withheld from her. Did they withhold any information she desired to have, or refuse to communicate what she required?

It is said that, in *January*, 1796, she desired to be informed of the contents of her grandfather's will, and that she did not receive that information. The trustee says he did not understand that she meant what respected the trust. If she had been ignorant of the contents of the deed of trust under which she was entitled when she executed the power of attorney, it might have been material; but the power of attorney recites the deed of trust. There is no other instance of her requiring information that she did not receive.

It comes therefore merely to a question, whether the trustees ought spontaneously to have put her in possession of information which she had not respecting the trust? — What are the transactions? The money had been properly laid out; it had been paid in without any act of the trustees; the trustees did no act to call in the money or change its situation; they were obliged to receive it; so far they were blameless. It came to *Donnithorne*'s hands, and the trustees were not to blame in letting it come to his hands; but they might have afterwards made themselves responsible, by merely not doing what was incumbent on them; by permitting the money to remain a considerable time in the hands of their cotrustee, they might, without any positive act on their part, have made themselves liable; that will depend on the degree and extent of their laches in suffering the money

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money to remain in the hands of the trustee. *Brice* v. *Stokes* (*a*) proceeds upon the doctrine that a trustee may become liable by knowing that his co-trustee had the money, and leaving it there. They being authorized to put the money out on mortgage, it would be rather hard to say that they were guilty of laches by giving *Donnithorne* a little time to find a mortgage, taking his bond in the mean time. What passed in the interval between to the death of *Donnithorne*, does not at all appear. If it were necessary to decide the point, an inquiry before the Master must be directed. In *December*, 1795, the money came again into *Donnithorne*'s hands, and the trustees being informed by Mrs. *Whitmore*, apply by letter to have it invested: it appears that Miss *Whitmore* then, and not before, knew what the trust-property was. It does not appear that she knew any thing of the proposed arrangement, but on the 19th *December*, she writes to say, that the money then in *Donnithorne*'s hands ought to be laid out in government security. She knew it was in his hands, that it was not properly there, and that she had a right to have it laid out on government security. When the proposal of Mr. *Donnithorne* was communicated to her, she proceeded to consider it, with this knowledge of the trustees having before left it where it ought not to be. The power of attorney recited, that *Donnithorne* had been guilty of a breach of trust. It recited too, that which was not true, namely, that all the trustees had received the money; they had no intention therefore to gloss over the transaction. It does not appear that she thought she had a claim against the surviving trustees, or that they were liable for a breach of trust. Without any direct communication from the trustees, she is left with this knowledge to exercise her own discretion. The persons who commu-

(*a*) 11 *Ves.* 319.

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nicated with her are fair and honourable men: she saw the observations of the trustees, and it appears that she fully understood the transactions: this appears clearly from her letter of 16th *February*, three days after he had executed the power of attorney.

If the trustees had known that they were personally answerable to the Plaintiff *Loveday*, I should have said that they ought to have communicated their knowledge to her, but it does not appear that they had the least suspicion that they could be personally answerable. Mr. *Hardy* in his letter to them, does not represent them to be in any danger; he considers them by Mr. *Donnithorne*'s bond, as being perfectly secure; but they declined acceding to the proposal without the approbation of the *Whitmores*, and thought they would be incurring a risk by not having that approbation. If the Plaintiff *Loveday* had been advised as to what her situation really was, she must have been told that it was very doubtful whether the trustees were personally answerable; and I have no reason to presume that, if she had been so advised, she would have resorted to the trustees, which would have made it necessary for them to enforce all the remedies they had against *Nicholas Donnithorne*.

I should have required a very strong case against the trustees, when I cannot place them again in the situation in which they would have been if she had refused her consent. It is not immaterial in such a case, that after the trust-deed she receives the interest under the deed from the trustees of *Donnithorne*. The acting under the deed, brings her assent to the deed, down to the time of her marriage. In *Brice* and *Stokes*, the party was held to have precluded himself from relief, because he

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he had received interest from one of the trustees. There is no difference between the receipt of interest from *Brice*, and the Plaintiff's receipt of her allowance out of the trust-fund. *Trafford* v. *Boehm.* (*a*)

The receiving interest under the arrangement which proceeded on the breach of trust, and was the only compensation to be received for it, is at least as strong as receiving interest from one of the trustees. *Smith* v. *French.* (*b*)

Can I say under all these circumstances that her consent was fraudulently obtained?

Bill dismissed without costs, as to all the Defendants, except *Johanna Whitmore*, whose costs were to be paid by the Plaintiffs.

The cause was heard before the Lord Chancellor on the 17th, 18th, 19th, and 25th of *June*, 1811, *Isaac Harris*, and *Johanna Whitmore*, not appearing; and on the 24th of *August*, 1812, his Lordship pronounced the following decree: —

That the order of dismission made on the hearing of the cause be reversed, and that it be referred to Mr. *Thomson*, one, &c. to inquire and report in whose hands the trust-money, mentioned in the pleadings, had been since the year 1782; and when the same should appear to have been placed out upon any security or securities, to report on what security or securities the same was

(*a*) 3 *Atk.* 444. (*b*) 2 *Atk.* 243.

placed

placed out; and it was ordered, that the Master should state specially and particularly the nature of such security or securities, when the same were not government or real securities, and also report in whose custody, possession, order, or disposal, the instruments of security were from time to time; and that the Master should also inquire and report what were the acts of each of the trustees respectively, as to the receipt and placing out of the trust-money from time to time, and the possession of the securities for the same; and it was ordered that such inquiry should be made, not only as to the acts of the trustees respectively, but as to the consent, permission, or privity, of each of the trustees respectively, to any act of the others, or other of them; and that the Master should inquire and report whether the trust-money was at any time, and for what time, in the hands of any of the trustees without security, and whether the same was so with the consent, privity, or permission of the others, or other of them; and in case, upon such inquiries, it should appear to the Master, that the Defendant, *William Symonds*, deceased, or *Thomas Griffith*, by any act, neglect, or default, committed any breach of trust, in respect of which they, or either of them, were or was answerable, personally, for the trust-money, or any part thereof, that the Master should state in what such breach of trust took place; and it was ordered that the Master should inquire and report whether the Plaintiff *Loveday*, previous to her executing the power of attorney in the pleadings mentioned, had any knowledge or notice, that, by reason of such breach of trust, they, or either of them, were or was so answerable; and it was ordered that the Master should state all special circumstances; and for the better discovery of the matters, the parties were to be examined upon interrogatories, &c. and his Lordship reserved the consideration of costs, and of all further

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further directions, until after the Master should have made his report; and any of the parties were to be at liberty to apply to the Court as they should be advised. Reg. Lib. *B.* 1811, fol. 1211.

The master's report certified, that in *June*, 1772, *John Whitmore*, the father of *Loveday Walker*, intermarried with *Johanna*, daughter of *Isaac Donnithorne*, upon which marriage *Isaac Donnithorne* paid to *John Whitmore* 6000*l.* as the marriage portion of *Johanna*, in consideration whereof, *John Whitmore* agreed to make an adequate settlement on her and her issue; and, as a security for effecting it, executed a bond to *Isaac Donnithorne* for re-payment of the sum of 6000*l.*, with interest; that, on the 17th of *January*, 1780, no settlement having been made pursuant to the agreement, *Isaac Donnithorne*, by indenture of that date, assigned the bond, and 7900*l.* (the principal and interest due thereon) to *Nicholas Donnithorne*, *Thomas Griffith*, and *William Symonds*, (all since deceased,) upon trust that they should call in the money due upon the bond, and place it out upon a mortgage or mortgages of freehold lands, or upon government or other securities, in the names of themselves, their executors, &c. and pay the interest and produce to or to the use of *John Whitmore* and *Johanna* his wife, and their children, for their maintenance and education, in such shares and proportions as the trustees should think fit, and after the death of *John Whitmore*, and *Johanna* his wife, upon further trust, to pay the 7900*l.* to and among their children, if more than one, and if but one, then to such only child, on his or her attaining the age of twenty-one years, or day of marriage; and in the indenture was contained a proviso, that the trustees should be answerable for their own acts and defaults only, and that they should not be accountable for any loss or miscarriage, by

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by any security or securities of the trust-money, in case the same happened without their wilful neglect or default, and that they should not be accountable for any more money than what should be actually received by them or their order respectively: that in 1783 the 7900*l.* were paid by *John Whitmore*, in discharge of the bond, and invested by, and in the joint names of *Nicholas Donnithorne*, *Thomas Griffith*, and *William Symonds*, deceased, as trustees under the indenture of settlement, on a mortgage of a real estate in the county of *Hereford*, and the trustees received the interest of such mortgage as it became due, and paid one-fourth part thereof to *John Whitmore*, and the remaining three-fourth parts to *Johanna Whitmore*, (who lived apart from her husband) for the separate use of herself and the Plaintiff, *Loveday*, who was the only child of the marriage; that in *January*, 1790, the mortgaged estate was purchased by, and conveyed (subject to the mortgage) to *John Keysall*, who thereupon gave to all the trustees six months' notice of intention to pay off the mortgage, which notice expired in *August*, 1790, and was enlarged to the 2d of *October* following, when a reconveyance of the mortgaged estate was executed by all the trustees to *Keysall*, but the mortgage money was not paid off till the 12th *January*, 1791, when *Keysall* paid it at his banking-house in *London*, to *Nicholas Donnithorne*, with the privity and consent of his co-trustees, and *Nicholas Donnithorne* signed a receipt which had been previously signed by his co-trustees, *Thomas Griffith* and *William Symonds*, deceased, and indorsed on the deed of reconveyance.

The Master found by the affidavit of *Benjamin Fallowes*, deceased, of the city of *Hereford*, sworn on the 11th day of *June*, 1813, that soon after notice was given by *Keysall* to pay off the mortgage, *William Symonds*

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Symonds informed the deponent of such notice, and on behalf of himself and *Thomas Griffith*, directed and requested the deponent to inquire for a good mortgage or real security, by the time it was to be paid off, pursuant to the notice; that a great deal of money was offered to the deponent about that time on landed securities, and that it was then, in the deponent's opinion, and as far as his experience extended, very difficult in that part of the country, and as he believed generally in other parts of *England*, to procure eligible real securities for money; and many persons in that part of the country were content to accept of more scanty securities than were desirable, or usually thought sufficient, under the circumstances, to prevent their money from lying dead, and to avoid placing it in the funds; and that money might easily have been procured, to the best of his recollection, to a very large amount at that time at 4*l. per cent.* interest, on such securities in that part of the country; that he did not recollect whether *Thomas Griffith* personally did or did not ever speak or apply to him, about procuring a security upon that occasion, but that he considered *William Symonds* to have acted therein with the concurrence of *Thomas Griffith*, and that the Deponent was not able himself to procure an eligible real security for the money, although he made all the inquiries, and used all the endeavours in his power so to do; and he had every reason to believe, that *Wm. Symonds* and *Thomas Griffith* endeavoured, and most sincerely wished to procure a proper real security for the money, and could not succeed therein.

The Master further found that *Nicholas Donnithorne* wrote the following letter to *William Symonds*, dated the 31st of *January*, 1791: "Dear Sir, I was every day

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day last week in expectation of receiving a line from you, but a letter from my daughter yesterday surprised me much; from my note-book the following is almost an exact copy of what I wrote you a fortnight ago. In consequence of the letter I received from you a long time since, I have waited with impatience for Mr. *Fallowes*, but all in vain. My friends and I have been constantly making inquiries for a mortgage for Mr. *Whitmore*'s money, but we have never had a prospect of more than 4*l. per cent.* and even that without any security for the punctual payment of the interest. As to the funds, there has not been a probability of late of obtaining more than 3¾ *per cent.* which would have been sad starving work. As I am now receiving in bills on the *East India* Company, dated at two years, to the amount of about 90,000*l.* I called on Mr. *Keysall*, and we were both of opinion that it would be best to lay out the money in those bills, especially as the interest is 4½ *per cent.* (paid down); and, in case of a proper mortgage offering, they may at any time be turned into cash at a week's notice. Mrs. *W.*'s money was 7900*l.*; but as I had not bills to the exact sum, we took 100*l.* from the interest, and discounted 8000*l.* bills. The interest for two years, less nine days, amounted to 711*l.*; but then you must deduct 100*l.* added to her capital, so that the interest received is 611*l.*; half of this sum I will lay out in the best manner I can for her, and for the other part she must draw on me from time to time, as she may have occasion. The 8000*l.* bills are to remain in Mr. *Keysall*'s hands till the mortgage is properly assigned; and (with your consent) they may afterwards be continued with him for Mrs. *Whitmore*'s use. Mr. *Keysall* told me, his notice ended [I think] the 2d of *October*, and that I must not expect him to pay interest after that day, to which time I suppose he has settled with you. Pray, are not the trustees of Mr. *Powell* liable to some

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part of the loss which Mrs. *Whitmore* has sustained? Mr. *Keysall* said he should write to you last week.—The above was the substance of what I wrote you on the 17th. As my mother expresses great anxiety, please to acquaint her with the accident which has happened. Mrs. *D.* and I sent three letters to the office the same day. Two miscarried, the other went safe; which makes the matter still more unaccountable. Please to tell me if you have heard from Mr. *Keysall*, as he was very desirous to have the assignment made with all expedition."

The Master found, from the several affidavits and letters aforesaid, and from the answer of *William Symonds*, that after the receipt of the trust-money from *Keysall*, it was not placed out upon any mortgage of freehold lands, or in the government funds, on account of the difficulty of procuring an eligible mortgage, and the low rate of interest from the government funds, and that the trust-money, amounting (with the addition of 100*l.* from the interest) to 8000*l.*, was possessed or retained by *Nicholas Donnithorne* for the purpose of being applied in the discounting of certain bills of exchange, drawn by him upon and accepted by the *East India* Company, payable at two years after date, agreeably to the proposals contained in his letter to *William Symonds*; and that *Nicholas Donnithorne* retained the sum of 8000*l.* accordingly, with the consent, permission, or privity of *Thomas Griffith* and *William Symonds*, his co-trustees; but the Master did not find, from any evidence laid before him, or otherwise (except as it might be inferred from the letter of *Nicholas Donnithorne*, dated the 31st *January*, 1791) that *Nicholas Donnithorne* ever actually laid out the trust-money, or any part thereof, in discounting the bills of exchange on the *East India* Company,

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Company, or upon any other security whatever; and therefore he was unable to state in whose custody, possession, order, or disposal the instruments of security for the trust-money were from time to time, or what were the acts of the trustees respectively, or the consent, permission, or privity of each of them to any act of the others or other of them, as to the possession of such securities. The Master also found, that *Nicholas Donnithorne* continued in the absolute possession, controul, or management of the trust-money, and the securities, if any, on which it was placed, without any interference of *Thomas Griffith* and *William Symonds*, his co-trustees, or either of them, except as to the receipt and payment of the interest by *Nicholas Donnithorne*, at the rate of $4\frac{1}{2}$ *per cent.*, to the parties entitled thereto under the settlement; and that no inquiry appeared to have been made by *Thomas Griffith* and *William Symonds*, or either of them, touching the bills of exchange on the *East India* Company, or the deposit thereof in any safe custody, or the receipt of the trust-money when the bills became payable, or the investment thereof in any security, from the month of *January*, 1791, (when it was paid by *Keysall* to *Nicholas Donnithorne*) until the 23d *May*, 1795, when *William Symonds*, on the behalf of himself and *Thomas Griffith*, wrote the following letter to *Nicholas Donnithorne*: — "Dear Sir, Mrs. *Whitmore* was so kind as to communicate the contents of your letter relating to our trust — I had yesterday the pleasure of dining with Mr. *Griffith*, when we had some conversation respecting our trust, and it was our joint opinion that the most beneficial step that could be taken is to invest the sum in the funds, which, from the present price, will produce nearly 5*l. per cent.*, with the prospect of an increase of the principal; therefore, Mr. *Griffith*

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hath requested me to signify our earnest wish and desire that you will, as soon as you can conveniently, invest the whole sum in the funds, in the names of the three trustees.

The Master further found, that, in consequence of the last-mentioned letter, *Nicholas Donnithorne*, either directly, or through *John Whitmore*, (his brother-in-law,) requested *William Symonds* and *Thomas Griffith* to permit the trust-money to remain in his hands, and proposed to give a mortgage for it upon some estates in *Cornwall*, of which he and his son, *Isaac Harris*, were seized, and, in the mean time, to give the joint bond of himself and his son for the money, until such mortgage could be effected; that *William Symonds*, on behalf of himself and *Thomas Griffith*, wrote the following letter to *Nicholas Donnithorne*: — "Dear Sir, this morning I had an opportunity of seeing Mr. *Griffith*, when we called on Mr. *Whitmore*, who communicated the contents of your last letter, from which we find it very much your wish for the trust-money to remain in your hands: therefore it is by no means our intention to subject you to any inconvenience; and, as you are prevented from going into *Cornwall* so soon as you proposed, he requested me to express our joint desire that a bond may be prepared immediately for the whole sum, including your brother and son in it, who, you mentioned, would readily comply in the business, which would afford you time for adjusting the proposed security. You may transmit the bond to Mr. *Griffith* or me, which is most agreeable." To which *Nicholas Donnithorne* wrote the following answer: — "London, 1st July, 1795. Dear Sir, my son being absent for a few days, it was not in my power to pay immediate attention to your letter. Enclosed you have the bond signed by myself and *Isaac*. How you came to name my brother I cannot imagine. We are very friendly when we

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meet; but I am sorry to say, ever since my father's death, we have not been upon such terms as would justify my making the request you mentioned. I shall now very shortly finish my account for the season at the *India* House, and then I shall prepare for my journey into *Cornwall*, &c." The Master found, that the bond alluded to in the last-mentioned letter was executed by *Nicholas Donnithorne* and *Isaac Harris*, dated the 19th of *June*, 1795, to *William Symonds* and *Thomas Griffith* therein described as two of the trustees under the will of *Isaac Donnithorne*, then deceased, in the penal sum of 16,000*l.*, conditioned for payment of 8000*l.* and interest, on the 29th *December*, 1795; and that *Nicholas Donnithorne* transmitted this bond in his letter of the first *July*, 1795, to *William Symonds*; which bond appeared to have been the first and only security ever given for the trust-money, since the same had been paid by *Keysall* in *January*, 1791.

The Master also found, that *Loveday Walker* attained the age of twenty-one years on the 21st of *July*, 1795, whereby she became entitled to a vested interest in the trust-money, to her own absolute use, after the death of her father and mother, who were entitled with her to the interest thereof, during their lives, under the trusts of the settlement; and that on the 21st of *June*, 1796, *William Symonds*, on behalf of himself and *Thomas Griffith*, wrote the following letter to *Nicholas Donnithorne*: — "Dear Sir, as you have not favoured Mr. *Griffith* or me with a line respecting the further security of Mrs. *Whitmore*'s money, makes me conclude you have some intention of seeing this quarter, and bringing it with you. From a late conversation with Mr. *Griffith*, he seems much dissatisfied relating to it, and hath requested me to signify his sentiments thereon; that it is his urgent wish, that it might be im-

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mediately invested in the funds. I hope and trust that you will comply with his wishes, or, if more agreeable to you, to transmit without delay landed security, &c." The Master found that it did not appear, from any evidence laid before him, that any other correspondence passed between the trustees respecting the trust-money, or the proposed mortgage, prior to the 26th of *September*, 1796, when *Nicholas Donnithorne* died, without having executed such mortgage, or repaid any part of the trust-money; and the Master was of opinion, that *William Symonds* and *Thomas Griffith* did commit a breach of trust, in respect of which they were answerable personally for the trust-money; and that such breach of trust consisted in their having permitted the trust-money to remain in the possession, or under the absolute controul and management of *Nicholas Donnithorne*, without any security, from *January*, 1791, to *July*, 1795, and in their having afterwards permitted the trust-money to remain in the hands of *Nicholas Donnithorne*, from *July*, 1795, to the 26th of *September*, 1796, the time of his death, upon the joint bond of himself and *Isaac Harris*. And the Master did not find that *Loveday Walker*, previous to her executing the power of attorney, had any knowledge or notice, that, by reason of such breach of trust, *William Symonds* and *Thomas Griffith*, or either of them, were or was so answerable.

To the report was annexed a monthly statement of the prices for sale of bank three *per cent.* consols, in the years 1790—1795.

William Symonds (deceased) and *John Lilly* took three exceptions to the report; the first, that the Master had certified that he was of opinion that *William Symonds* and *Thomas Griffith* did commit a breach of trust, in respect of which they were personally answerable for the trust-money, and that such breach of trust consisted

in their having permitted the trust-money to remain in the possession, or under the absolute controul and management of *Nicholas Donnithorne*, without any security, from *January*, 1791, to *July*, 1795, and in their having afterwards permitted the trust-money to remain in the hands of *Nicholas Donnithorne* from *July*, 1795, to the time of his death, upon the joint bond of himself and *Isaac Harris*; whereas the Master ought to have certified that *William Symonds* and *Thomas Griffith* did not commit such breach of trust, inasmuch as the trust-money at first came into the hands of *Nicholas Donnithorne*, and afterwards remained in his possession, or under his absolute controul or management, without the knowledge, consent, or privity of the Defendants, inasmuch as the bond was accepted by them only as a security in the mean time, and until some real or other sufficient security could be obtained: The second, that the Master had certified that he did not find that *Loveday Walker*, previous to her executing the power of attorney, had any knowledge or notice that by reason of such breach of trust, *William Symonds* and *Thomas Griffith*, or either of them, were or was answerable personally for the trust-money, or any part thereof; whereas the Master ought to have certified, that *Loveday Walker* had, previous to the time aforesaid, sufficient knowledge or notice of all the facts from which it was or might be inferred that *William Symonds* and *Thomas Griffith*, or either of them, were or was so answerable: The last, that the Master had not stated all the special circumstances of the case, from which it might be inferred either that *William Symonds* and *Thomas Griffith* were not so answerable, or that *Loveday Walker* had such knowledge or notice as aforesaid, and particularly had not set forth her letters of the 8th of *May*, 1796, and the 19th of *December*, 1796; and also that the

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Master did not state, that previously to her executing the power of attorney, she was attended by the solicitor for *Isaac Harris*, who, in the presence of Sir *William Curtis*, a personal friend of her and her family, read to her the trust-deed in the pleadings mentioned, and fully explained to her its provisions, so far as it affected her own interest, and that she was not called upon to sign, and did not in fact sign the power of attorney, until the day following that upon which the trust-deed was so read and explained to her; and also that the Master had not in like manner set forth her letter of the 14th *February*, 1797, and had not stated that *Nicholas Donnithorne* (the co-trustee of the Defendants) was brother to the Defendant *Johanna Whitmore*, and uncle to *Loveday*, and a merchant of great eminence, residing in *London*, and as such constantly applied to and corresponded with by *Johanna Whitmore*, and by *Loveday* after she came of age, on all matters of business, and especially on all matters connected with the trust property; and that *William Symonds* and *Thomas Griffith* (deceased) were then in advanced life, residing in the country, at a considerable distance from *London*, which they seldom or never visited, and wholly unacquainted with the general habits of business; and that it did not appear that they withheld from, or neglected to give to, *Loveday* any information in their power respecting the state of the trust property.

In *January*, 1816, the Defendant *William Symonds* died, and the suit was revived against his executors, *William Symonds* and *Thomas Cook*.

April 2. 8. 11. 16. 18.

The cause was now heard on exceptions, and for further directions.

Sir

Sir *Samuel Romilly*, Mr. *Bell*, Mr. *Treslove*, and Mr. *Merivale*, for the Defendant, in support of the exceptions. (*a*)

The object of the bill is to rescind a transaction to which the Plaintiff, Mrs. *Walker*, was a party, with full knowledge of all the circumstances, and, consequently, to charge the trustees with a breach of trust, when, by the effect of that transaction at this distant period, they can never be restored to the rights and remedies which they previously possessed. The facts were all known to the Plaintiff; the legal consequence, that the trustees were responsible to her for a breach of trust, could not be communicated to her by them; they knew it not themselves. Whatever loss occurs is the effect, not of taking the bond of *Nicholas Donnithorne*, which was confessedly a breach of trust, but of relinquishing it, as one term of that arrangement which the Plaintiff expressly sanctioned.

They cited *Brice* v. *Stokes* (*b*), *Joy* v. *Campbell* (*c*), *Doyle* v. *Blake* (*d*), *Bacon* v. *Bacon* (*e*), *Balchen* v. *Scott* (*f*), *Trafford* v. *Boehm* (*g*), *Smith* v. *French*. (*h*)

Mr. *Hart*, Mr. *Agar*, Mr. *Roupel*, and Mr. *Collinson*, for the Plaintiffs, supported the report for reasons stated in the judgment.

During the argument, the following remarks were made by

(*a*) The detailed statement of the case, which was thought necessary fully to explain the effect of the judgment and decree, may dispense with a more particular report of the argument.

(*b*) 11 *Ves.* 319.

(*c*) 1 *Sch. & Lef.* 328.

(*d*) 2 *Sch. & Lef.* 231.

(*e*) 5 *Ves.* 331.

(*f*) 5 *Ves.* 678.

(*g*) 3 *Atk.* 440.

(*h*) 2 *Atk.* 243.

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The investment of the trust-money in *East India* bills, as stated in the power of attorney, is no breach of trust; but as stated in the report, it is. The representation of the report is, that two of the trustees permitted their co-trustee to draw bills on the *East India* Company, payable not to them, but to him; and it is extremely difficult to maintain that that is not a breach of trust, if done with their consent, as in effect placing the amount under his controul. The money is then received by him, and converted to his own use; it might be, that neither the receipt nor the conversion by him was a breach of trust in him: but whether studiously, or from whatever motive, the power of attorney recites a breach of trust in him, making no mention of a breach of trust by them.

Duty of trustees to obtain information of the disposition of the trust fund.

It is the duty of trustees to afford to their *cestui que trust* accurate information of the disposition of the trust-fund; all the information of which they are, or ought to be, in possession: a trustee may involve himself in serious difficulty, by want of the information which it was his duty to obtain.

The questions are, first, whether the power of attorney accurately stated all the facts; next, supposing that it did so state them, and that there was no other instrument, whether the trustee and the *cestui que trust* were bound to know the law; but the latter question cannot arise unless the trustee and the *cestui que trust* were on equal terms. The representation contained in the power of attorney must be considered, recollecting the reference to *Fallowes*, the attorney of the trustees, to fill up the blanks, which he did, as the representation of those whose attorney he was. That instrument is studiously prepared to express that there had been no breach of trust

trust till the money came into the hands of *Nicholas Donnithorne*; but I never saw a case in which there was a plainer breach of trust by the act of the trustees, in placing the money under the controul of their co-trustee.

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Till her marriage, the Plaintiff, Mrs. *Walker*, had no property sufficient to enable her to institute a suit, depending entirely on the discretion of the trustees.

The LORD CHANCELLOR.

This case, which comes before me on exceptions to the Master's report, has been argued as if on farther directions; and it is extremely difficult, regard being had to the nature of the exceptions, to discuss the matter in any other way. The duty which I mean now to discharge is to state what occurs to me on the case, considered as a case heard on farther directions. I do not see how it is possible to support the exceptions. The comprehensive view which I have taken of the case, and a reference to my own notes, render it proper to say, that if the parties desire to address me, by one counsel on each side, I shall be ready to hear them.

April 21.

The bill is filed to charge the representatives of certain trustees with the consequences of a breach of trust, and to render them responsible for a sum of about 8000*l.* I take notice at the earliest moment, that whether the trust-money was 7900*l.* or 8000*l.*, a circumstance immaterial in many respects, may be material in this respect, that the person who was *cestui que trust* of the money seems not very accurately informed whether it

was

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was one sum or the other, or whether it was derived under a settlement or a will.

I have been furnished with a copy of the judgment of the Master of the Rolls (*a*), and I have also read the decree embodying that judgment in the form and language of the Court. I observe that the record states, that when the cause was heard before the Master of the Rolls, no documents were read except three letters; no part of a correspondence most material to be considered. I do not differ from the principles which the Master of the Rolls adopts in his judgment.

In proceeding to consider the facts, I am first bound to say, that if, when this cause was heard before me, I was wrong in directing a reference to the Master to make the inquiries which the decree specifies, still the cause is in such a state that I am bound to consider myself right; if wrong, the course of proceeding was by rehearing or appeal. I will add, however, that looking again at the record, and the evidence which was read to me on the hearing, (I see by the decree that all the correspondence and other documents were read,) looking at the pleadings, and recollecting the principles on which the Court must act, that it proceeds *secundum allegata et probata*, not permitting a new case, I think that the record not only justifies but requires the relief which I gave.

The Master of the Rolls observes, that the foundation of the Plaintiff's case is, that the consent of *Loveday Walker* was improperly obtained; that the objection is, that it would be impossible to replace the parties in the situation in which they were when the deed was executed; but that it would not therefore follow, if the

(*a*) *Ante*, p. 40.

deed

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deed had been improperly obtained, that the Plaintiffs were precluded from relief. This observation applies to the effect of the transaction of the trustees, in signing the deed of arrangement with the representatives of *Nicholas Donnithorne* under the authority, if they had the authority, of the Plaintiff *Loveday*. If there is any proof of the day on which the deed was executed, it has escaped me. (*a*) The day is extremely material, for supposing the power of attorney exposed to fewer objections than I think, still it was in its nature revocable; and the circumstances before the 11th of *February*, when *Hardy* attended *Loveday Walker*, must be recollected. The observation of the Master of the Rolls, that the objection that the Defendants are placed in a different situation, would not prevent relief, I understand thus, and I agree in it; that though the *cestui que trust* has done an act which places the trustee in a different situation with regard to relief against third persons, yet if the circumstances are such that the act may be considered as the trustees' own act, rather than the act of the *cestui que trust*, it will not bar relief.

The Master of the Rolls adds, the trustees "would probably not have assented to such a deed as has been executed." The accuracy of that proposition remains to be proved.

I agree with the Master of the Rolls, that there is no pretence for a charge of fraud; because whatever ground there may be in any case, I say not that in the present case there is any ground, to suspect imposition, it ought not to be imputed unless clearly proved. But whether there was communication from the trustees to the Plaintiff *Loveday;* whether any personal influence was at-

(*a*) It was stated from the bar that the deed appeared to have been executed on the *Wednesday* preceding the 9th of *April*, 1797.

tempted

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tempted to be used for inducing her to accede to the proposed arrangements, are questions that cannot be determined without adverting to the transactions in which *Hardy* was engaged; and I take the liberty of observing that it was impossible for the Master of the Rolls to attain a satisfactory conclusion on so little evidence as was before him.

The next proposition adopted by the Master of the Rolls is, that there was no concealment. Concealment is of different natures; an intentional concealment, and an actual concealment where there may be an obligation not to conceal, even if disclosure is not required. But the view in which it appears to me that this case must be examined is this; and the questions which it raises are, first, whether a trustee is not bound to communicate facts which he knows relative to the disposition of the trust-money; next, whether, supposing he is not bound, yet in the circumstances of this case, *Hardy* and *Fallowes* are not to be considered as agents of the trustees, and also, as their agents, taking on themselves to make representations and give information; whether they have not said to the *cestui que trust*, we state to you certain circumstances; you know nothing of many other circumstances which we might have communicated; you act on that information, and we are now entitled to say, you shall require no farther information from us.

The principles on which the liability of trustees must be decided cannot be mistaken; though it appears from a book for which the profession is this day indebted to Mr. *Eden*, that Lord *Northington* held doctrines different from those on which we have been accustomed to proceed. The judgment in *Harden* v. *Parsons* (*a*) is,

(*a*) 1 *Eden*, 145.

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in more respects than one, a curious document in the history of trusts as administered by this court. Lord *Northington* says, "the lending trust-money on a note is not a breach of trust, without other circumstances *crassæ negligentiæ*. That is plain from the case of *Ryder* v. *Bickerston*, where a sum of money was left to be placed out on security, with the best interest that could be got. The executor had lent it on a note without interest. Did the Court say that it was a clear breach of trust to lend it on a personal security? no." The fact is, that the Court said, yes; declaring that the trustee having placed out the money neither at interest nor on security, had committed a direct breach of trust in both respects. (*a*) Lord *Northington* proceeds to state a most material circumstance in the case; a "deliberate, uniform, and steady confirmation." The editor of this valuable work has taken the trouble to subjoin a great variety of cases, all of which contradict the doctrine that investing trust-money on personal security is not a breach of trust. (*b*)

The investment of trust money on personal security is a breach of trust.

Without going through all the cases, it is obvious, that *prima facie* there is this distinction between executors and trustees; that one executor can, and one trustee cannot, give a discharge: and it may frequently happen, as in *Brice* v. *Stokes* (*c*) it actually happened,

(*a*) 1 *Eden*, 149. n. See *Ryder* v. *Bickerton*, *post*. p. 80. n. *Adye* v. *Feuilleteau*, *post*. p. 84. n.

(*b*) The doctrine of Lord *Northington*, though now clearly over-ruled, seems to have been authorized by some early decisions. "If a man be trusted with money as executor or otherwise for children's portions, though no interest be reserved, yet interets in some measure shall be paid, while it is in his hands, and if he let it out to such men as are trusted and esteemed by others to be men of worth and ability, if any loss happen, he shall not bear the loss thereof. *Per* Lord Keeper in *Canc.* 25 *Jan.* 1637, in Sir *Edward Hale*'s and the Lady *Car*'s case. M.S.

(*c*) 11 *Ves.* 319.

not

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not only that one trustee cannot give a discharge, but that the instrument of trust provides that there shall be no discharge without an act in which all the trustees join. Executors seem formerly to have been charged on much stricter principles, if they joined unnecessarily, though without taking the controul of the money; that rule is now altered: whether the alteration is wholesome may be a question. It may be laid down now, as in *Brice* v. *Stokes*, that though one executor has joined in a receipt, yet whether he is liable shall depend on his acting. The former was a simple rule, that joining shall be considered as acting; but in the cases since the rule that joining alone does not impose responsibility, scarcely two Judges agree.

Liability of executors joining in a receipt.

Cestui que trust concurring or acquiescing in a breach of trust, not entitled to relief,

It is established by all the cases, that if the *cestui que trust* joins with the trustees in that which is a breach of trust, knowing the circumstances, such a *cestui que trust* can never complain of such a breach of trust. I go further, and agree that either concurrence in the act, or acquiescence without original concurrence, will release the trustees: but that is only a general rule, and the Court must inquire into the circumstances which induced concurrence or acquiescence; recollecting in the conduct of that inquiry, how important it is on the one hand, to secure the property of the *cestui que trust*; and on the other, not to deter men from undertaking trusts, from the performance of which they seldom obtain either satisfaction or gratitude.

subject to inquiry into the circumstances which induced concurrence or acquiescence.

In this case, the effect of the whole correspondence is very different from the effect of that part of it which was read to the Master of the Rolls; and it becomes necessary, therefore, minutely to consider the whole. In *December*, 1795, *Loveday* wrote a letter to the trustees, request-

requesting information and a provision; the trustees allowed her 100*l. per annum.* She afterwards wrote to inquire the effect of her grandfather's will. The materiality of that circumstance, though much affected by what passed afterwards, consists in this; that the bond executed by *Nicholas* and *Isaac Donnithorne*, is not executed to the trustees under the will: it is executed to *Griffith* and *Symonds* as trustees, but in fact they were not trustees under the will. It becomes material, recollecting *Hardy*'s letters, to know whether they had any claim under the will.

In *September*, 1790, *William Symonds* writes to *Keysall*, acknowledging the receipt of a sum on account of the interest of the mortgage, and stating that *Fallowes* had provided a security for the principal, which would be ready before *Keysall*'s notice expired. In examining the evidence to show the activity of the trustees, and of *Fallowes*, who was their agent, to provide a proper security for the trust-money, I have not found that *Fallowes* has given any explanation of this circumstance, or even mentioned it.

Between *January*, 1791, and *May*, 1795, I find no correspondence proved in the cause; no communication when the bills were paid in 1793; no inquiry what had become of the money, till the 23d of *May*, 1795.

When this cause was reheard, following what the Master of the Rolls intimated he should have thought right if he had given a different judgment, I directed an inquiry relative to the period between 1791 and 1795. The case comes back with a report stating a clear breach of trust in leaving the trust-fund in the situation represented, from 1791 to 1793, and

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from 1793 to 1795. The report states that the money was laid out, with the consent of the trustees, in *India* bills, payable to *Nicholas Donnithorne;* a palpable breach of trust, by placing the fund under his controul, secured by little more than a promissory note payable to himself. It was probable that in 1793 he would receive the money, and it would be lodged in his hands; and I repeat, that although the Court in directing an inquiry, will proceed as favourably as it can to trustees who have laid out the money on security from which they cannot with activity recover it, yet no judge can say that they are not guilty of a breach of trust, if they suffer it to lie out on such a security during so long a time. Here is a distinct breach of trust; and I lay the more stress on it because it has been represented in argument that the chief breach was the laying out the money on bond.

The Plaintiff *Loveday,* who appears to have had nothing beyond her expectations under this settlement, who was living separate from her father and mother, themselves separated, was so little informed of her rights, that she knew not whether she was entitled under a will or under a settlement.

Whether the letters which passed between *Nicholas Donnithorne* and his co-trustees relative to the investment of the fund were communicated to the *cestui que trust,* appears not; I therefore take it for granted that they were not communicated. Between *July,* 1795, and *June,* 1796, I do not find any transaction, though the bond was payable at *Christmas,* 1795, except three letters.

Receipt after receipt by the Plaintiff *Loveday* of her annual

annual allowance is in evidence: but will any one contend that this sort of receipt, while she yet knew nothing of the breach of trust, can amount to acquiescence?

It appears that in *November*, 1796, his co-trustees were pressing for security from *Nicholas Donnithorne*, and giving the strongest evidence, that from regard either to the situation of their *cestui que trust*, or to their own, they thought themselves bound to use exertions in obtaining this money from him.

Hardy, in his letters, assumed to represent to the Plaintiff *Loveday*, that it was of no consequence whether she executed the deed of composition; and while it has been gravely contended before me, that he supplied her with ample information concerning the trust-money, it appears that long after that time he was himself seeking information, as knowing nothing of it; and in every letter he holds out the expectation of punctual payment of interest.

In *November*, 1796, the matter stood thus: The trustees had been guilty of a breach of trust, in permitting the money to remain on bills payable to *Nicholas Donnithorne* alone, and in leaving the state of the funds unascertained for five years; they had the bond of *Nicholas Donnithorne*, who was dead, which affected his assets as a specialty debt; whether they had a judgment no one knows; they had also a claim on *Isaac Donnithorne*, in his own right and as his father's executor. I knew enough of Mr. *Hardy* to be satisfied that he must have been aware that without the signature of the Plaintiff *Loveday*, no deed executed by the trustees could have discharged *Isaac Donnithorne* from a demand on behalf of the *Whitmore* family; that her consent was necessary to discharge the trustees, and that without it, *Isaac*

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Donnithorne, as the representative of a deceased trustee, could never be discharged.

There is another observation, material towards ascertaining whether the Plaintiff *Loveday* understood her situation. The trust-deed relates to a person engaged in great commercial concerns in *London;* and I find in it a proviso usual in such deeds, that no one who has signed it shall thereby be taken to discharge any person but the parties to that deed; now, if the Plaintiff *Loveday* had been informed that *Griffith*, *Symonds*, and *Isaac Donnithorne* were liable, and asked whether she chose to release them by signing the deed, more especially when pressed by *Fallowes*, representing that all the creditors thought it for their satisfaction, is it to be supposed that she would have placed herself in the situation of releasing other persons, when no other creditor executed any such release?

It appears that in *December*, 1796, she knew that the money was in the hands of *Nicholas Donnithorne;* but whether she knew that it was there by breach of trust is a different question. The letter of the trustees, dated the 24th of *December*, in reply to her inquiries, merely refers her to *Hardy*, and then he is their agent for the purpose of making representations.

In a very material letter of the 20th of *January*, 1797, to *Symonds*, *Hardy*, whom they had made their agent for the purpose of communication to the Plaintiff *Loveday*, applies through them to *Fallowes* for information of the circumstances under which the money came into the hands of *Nicholas Donnithorne*, the most important subject of that communication.

I admit that if these transactions had been fairly recited

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cited in the power of attorney, there would be no question in this case; having regard that the protection of the Court to infants is continued after they have attained 21, until they have acquired all the information which might have been had in adult years.

Protection in respect of infancy continued after majority, until proper information has been obtained.

In a subsequent letter, *Symonds* directs *Hardy* to use his utmost endeavours to prevail on the Plaintiff *Loveday* to execute the deed.

We come now to the acts of *Hardy* in the performance of his mission. It appears that on the 11th of *February*, 1797, *Hardy* attended the Plaintiff *Loveday*, then Miss *Whitmore*, with the draft of the trust-deed, and a paper of observations, written, as I understand, by Mr. *Fallowes*; and it becomes material to attend to the whole of that paper, as supplying very strong observations in favour of the Plaintiff, and, it is but justice to add, as laying the foundation, so far as concerns the allowances to be made to the *Donnithorne* family, of the most effectual point of defence in the present case. This is the representation of the trustees, drawn by *Fallowes*, and delivered by *Hardy*, who must have known that it was the interest of the trustees to conclude this arrangement, otherwise they acted at the risk of making a communication which would not be complete, and where the Plaintiff would not have acceded to the arrangement if the communication had been complete. It is, I admit, very unfortunate that trustees acting without a supposition of liability, are afterwards made liable; but it would be impossible to maintain this proposition, that, because trustees are not aware that they have committed a breach of trust, they are not responsible. It is said, that Miss *Whitmore* did not apply to them to know what they had done; my answer is, that, without waiting for an application, they made to her an imperfect representation.

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They take on themselves by their agents to make a representation, not being required so to do; and that representation is not adequate to the circumstances of the case. There had been much correspondence with Mr. and Mrs. *Whitmore*, not one syllable of which was communicated to Miss *Whitmore*.

If there were a clear statement of a breach of trust on this power of attorney, I was wrong in directing an inquiry.

To a certain extent, *Donnithorne's* family have had the benefit of this arrangement; they have had the benefit of a trust-deed executed otherwise than it would have been executed, if Miss *Whitmore* had considered only her own interest. It is immaterial whether the instrument was written or engrossed in the country; but it was drawn by *Fallowes*, because *Hardy* had not sufficient information to know how to draw it.

The recitals in the power of attorney are such as, in all human probability, for I can carry it no farther, *Fallowes*, at the desire of *Hardy*, had thought proper to insert relative to the manner in which the money had been disposed of. It has been insisted here that Miss *Whitmore* must have known that which I am sure *Hardy* himself would say he knew not.

I stop not to inquire, whether the investment of the money in *East India* bills was a breach of trust; but it is clear, that this power of attorney states a different breach of trust; stating nothing of the bills being payable to *Nicholas Donnithorne* only, or, when the money was received, it proceeds to state that he, "in breach of his trust," applied the money to his own use.

I should

I should be glad to know whether this is information which would have communicated to the most experienced man in this court the circumstances of the case; or, whether any one could hesitate to conclude, that the statement purported that there was no breach of trust, until the receipt of the money by *Nicholas Donnithorne*, omitting the period from 1793 to 1795?

It was necessary to recite the bond; and I do not mean to say that the mention of the bond would not satisfy the ordinary notion of reciting it; but the materiality of the recital consists in this, that it refers the bond to the indenture of settlement, while the bond states the money to be due to the obligees as trustees under the grandfather's will. It is impossible not judicially to infer the purpose of *Fallowes* in drawing this instrument, and I will add, of *Hardy*, if he permitted himself to give instructions for preparing it, without farther information. I cannot doubt whether Miss *Whitmore* understood her claims; it is clear that *Curtis* did not understand the deed.

The Master of the Rolls seems to have thought, that the only breach of trust was taking the bond; that was a breach of trust; but he says, and I think rightly, that if he had not found other grounds for dismissing the bill, inquiry would have been necessary. I agree with the Master of the Rolls, that inquiry might, on the principles of this court, have discharged the trustees in given circumstances from breach of trust. If, without previous participation, they, in *June*, 1795, had found that they, being implicated in no breach of trust till that time, had a co-trustee who had been guilty of a shameful violation of his duty, and immediately exerted themselves to obtain from him a mortgage, which was their object at that time, and used their utmost efforts, instead of

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filing a bill in this court against him, which, perhaps, might have destroyed his means of giving security, I should have hesitated long before I charged them, if inquiry had satisfied me that for a simple contract debt due to them they had taken a bond and a mortgage, instead of instituting a suit, with the rational hope that by means of the bond and the mortgage they should obtain payment from their co-trustee; in such circumstances, I should readily agree with the Master of the Rolls. But when they take no steps on the arrival of the period at which the bond becomes payable, and choose to communicate to the *cestui que trust* that they have taken a bond, but not what is the effect of it, that is not a communication which can entitle them, in this stage of the cause, to insist on circumstances of which, if inquiry had been directed, they might possibly have availed themselves for their protection.

This young lady, who had sought information from her trustees, what were her interests under her grandfather's will, was so little acquainted with her rights as to suppose that she claimed as legatee under a will, while her real title was as a purchaser under a settlement. In the house of Mr. *Sherson*, nearly connected with *Isaac Donnithorne*, pressed both by her father and mother, with whom it appears that communications had been made; having no other property, for so the trustees state; with an offer of 50*l.* when she is solicited to execute this instrument, and a promise that the arrears of interest shall be punctually paid after the execution; compelled, on not executing, to leave the house of *Sherson*, and because she would not act under the suggestion of her father, become the object of his bitter reproach; in such circumstances, I desire to know whether, but for the allowances, any question could be made in this case?

Where

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Where the trustee and *cestui que trust* are equally informed, or the *cestui que trust* requires no information, desiring to speak most guardedly, I think that the doctrine of this court would not protect the trustee; but supposing that it would, as in *Brice* v. *Stokes*, that case is not applicable to this. I cannot allow to these trustees the benefit of the observation, that information was not required; they volunteered to give information, and gave it in a way which was calculated to induce the *cestui que trust* to believe that it was all that was to be given. The Master of the Rolls has recorded his opinion, that if any fraud or surprise was practised, the execution of the power of attorney would not have barred relief. He who, undertaking to give information, gives but half information, in the doctrine of this court, conceals. The authority being in its nature revocable, the mere signification of a purpose not to be bound by it was sufficient. The receipt of interest is not binding, unless it can be shown that she was previously apprised of all the circumstances. The trustees have had the opportunity of explaining the case before the Master, and have proved nothing; on the contrary, the report brings forward a case of breach of trust, such as was not thought before, and such as authorises me to say that she knew not how the money was disposed of after it was received in 1793. Payments were made to her at the time, for the purpose of procuring her to execute what would be useful to *Isaac Donnithorne*, under the pretence that it would be useful to her, placing before her eyes money which she was to receive in case she signed the instrument; she at that time having nothing for her support except what she could acquire through all the difficulties which encumber a *cestui que trust*, to whom the trustees have not done their duty.

Imperfect information equivalent to concealment.

This

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This is a case of great importance to trustees in general, and illustrates the necessity of attending to every word in transactions of this nature. It is one of the cases which convince me at a mature period of my judicial life, that it is impossible to comprehend such questions without minute examination of every fact, and reference to all the documents.

The Plaintiff *Loveday Walker* is entitled to relief, and the trustees must stand in her place under the deed.

April 25. Mr. *Hart* proposed, that the decree should declare the trustees personally liable for the trust-money; leaving them to proceed for their indemnity against the estate of *Nicholas Donnithorne*.

Sir *Samuel Romilly* objected, that it was unprecedented to allow a *cestui que trust* seeking compensation for a breach of trust to select two of the trustees, and prosecute no claim against the third; and that the Defendants could effectuate their equity only by means of the Plaintiff.

May 26. *The* LORD CHANCELLOR.

The result of the case is, that the Plaintiff *Loveday Walker* has a demand against both the Defendants for the amount due; and that they must take their remedy against those who made the composition, to recover it as their own debt. The question is, whether this is not to be considered as a case of concert between *Isaac Harris* and the two trustees: the consequence of which is, that they must arrange with each other as they can, making

making up to the Plaintiff the amount. The composition cannot be rescinded, unless the Plaintiff files a bill against all the parties to that deed; and the single question now is, whether in all the circumstances of this case, and having regard to general principles, the Plaintiff was at liberty to abandon her remedy under the trust-deed, and charge the surviving trustees personally?

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The LORD CHANCELLOR.

June 10.

When three trustees are involved in one common breach of trust, a *cestui que trust* suffering from that breach, and proving that the transaction was neither authorised nor adopted by him, may proceed against either or all of the trustees. The present case comprises this peculiarity, that *Isaac Harris*, being the son and representative of a deceased trustee, by deed dedicates all his own fortune and the assets of his father, to the payment of debts, including the trust-fund; and by the form of the arrangement, he becomes the debtor of the co-trustees, and they become his creditors; if with the approbation properly obtained of the Plaintiff *Loveday Walker*, she has no reason to complain. Her demand against the assets of the deceased, it appears to me, might be enforced under the trust-deed, but then all persons interested in it must be parties to the suit. The real question is, whether on this record in its present state, supposing the Court right in declaring the two surviving trustees guilty of a breach of trust with the deceased trustee, the Plaintiff is not entitled to abandon all benefit of the trust-deed, and charge the survivors with breach of trust, and also the representative of the deceased; to say that the assets have, without her concurrence, been placed in such a state that

Right of a *cestui que trust* to proceed separately against one trustee implicated in a joint breach of trust

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that she is not bound to pursue them, but may leave the survivors to indemnify themselves thence? If she abides by the trust-deed, she must abandon her claim against the survivors.

June 15. *The* LORD CHANCELLOR.

I have again read the papers, and the view which I take of the case is this.

The first question is, with reference to the exceptions, whether there was a breach of trust? It clearly appears to me that there was; and the result is, that *Nicholas Donnithorne* and the other two trustees were responsible for the consequences of that breach of trust. The defence of those who represent the co-trustees was founded in this, that the Plaintiff Mrs. *Walker* had given to them authority, by the power of attorney, to conclude the compromise with *Isaac Harris*, the representative of *Nicholas Donnithorne*, and that she must be considered in their persons as a creditor, not on the assets of *Nicholas Donnithorne*, but on the funds provided by the trust-deed, to which, as it was insisted, she was a party. On the former occasion I reviewed the whole evidence and correspondence for the purpose of stating the grounds of my opinion, that she could not be considered as a party to that instrument, so as to exclude her from a demand against the trustees; and I particularly adverted to the circumstance, that the other parties to that deed saved their rights against third persons. It is necessary for me to point out to those whose duty it may be to review my judgment, that I arrived at this conclusion after an examination of all the circumstances of the case.

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The principal difficulty was to do justice among the trustees and their representatives. *Nicholas Donnithorne*, if the trust-deed had not been executed, was first liable: but the consequence of that was no more than this, that Mrs. *Walker* would be bound to place the other trustees in her situation, that they might have every remedy which she might have had against him. The difficulty arises from this, that the trust-deed has made all the property of *Donnithorne* a trust-fund for the creditors executing that deed, and has therefore taken the property out of the situation in which it would otherwise have stood as his real or personal assets. But if Mrs. *Walker* is compelled, in consequence of the execution of that deed, to pursue his assets under all the difficulties which that deed has interposed, by which, in the circumstances of the case, she is not bound to abide, the question is, whether she is not entitled to an equity of this kind, to say to the surviving trustees that the bond of *Nicholas Donnithorne* is discharged as a bond, not by her act but by theirs, and to require them to replace the trust-fund, leaving them to seek justice through the means provided by this deed? The Court is justified in holding, that they would have no reason to complain, having constantly stated that, holding the bond for Mrs. *Walker*, they were consulting her interests, and doing the best that could be done for her in executing the trust-deed.

A declaration must be inserted in the decree, that all demands which the Plaintiff Mrs. *Walker* may possess under the trust-deed, or against the assets of *Nicholas Donnithorne*, as assets, the surviving trustees will be entitled to enforce for their own benefit.

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July 6.

The LORD CHANCELLOR.

Either the bill must be dismissed as against *Harris*, or some mode must be provided of proceeding between the Defendants.

The assets of *Nicholas Donnithorne* must be considered as assets, and as subjects of the trust-deed; in this suit, they cannot be treated as subjects of the trust-deed, because the trustees are not before the Court; nor as assets, because under the trust-deed, they are the subjects of that deed. It appears to me, that the remedy to which the Plaintiff Mrs. *Walker* is entitled, is to charge the two Defendants personally, leaving them to proceed over for their indemnity; but that they cannot do in this suit. (*a*)

The

(*a*) BRADWELL v. CATCHPOLE.

Liability of co-trustee.

In this case the Defendant was a co-executor with *James Maykew* in trust, and co-devisee with him of certain lands, in trust, by sale to raise money to discharge a mortgage, and the lands mortgaged descended to the Plaintiff as heir. The mortgage term was assigned after to *Maykew*. *Catchpole* joined with *Maykew* in a conveyance of the lands devised to them to sell, and in a receipt for the purchase money, but never received one penny for it. *Maykew* had enough in his hands to discharge the mortgage, but, however, assigned it over for the principal term, without notice of the trust for clearing it, and that assignee assigned to another with notice. *Maykew* had appeared to the bill, but never answered, nor could be found to be served with process, which was carried on against him to a commission of rebellion; and it was said he was broke. He not being served to hear judgment, there could be no decree against him, but the process of contempt having been carried on to the end of the line, (less would not have done,) the other Defendant could not object for want of parties, for otherwise there might

The decree ordered, that the exceptions be over-ruled as insufficient, and that the sum of 5*l.* deposited with the register, &c. be paid to the Plaintiffs; and his Lordship

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might be a failure of justice. And now upon hearing the cause,

LORD KEEPER decreed the Defendant *Catchpole* to make satisfaction for the breach of trust in his co-trustee, running away with the purchase money, though objected that he joined in the sale merely for conformity, and never intermeddled farther.

Sir *J. Jekyll* cited a late case at the Rolls, where one who was trustee for a woman and her children did, with the woman's consent, assign his trust to another who was guilty of a breach of trust, and the first trustee decreed to make satisfaction, because trustees cannot divest themselves of their trust at their pleasure. And another before Lord *Somers*, where one trustee received the whole trust-money, and both were charged.

Another part of the bill was against the assignee of the mortgage, to have the Plaintiff's inheritance discharged of it, *Maykew* having had sufficient in his hands to pay it off while the mortgage was in him, the mortgagor not having joined in an assignment from *Maykew* to *J. S.*, nor from *J. S.* to the Defendant; and it was insisted, and agreed to by *Vernon* of the other side, that if any person will take an assignment of a mortgage in which the mortgagor doth not join, he must at his peril inquire what is due upon it, and if all or part of the principal hath been before paid off by the mortgagor, or discharged by perception of profits, the assignee, though he comes in without notice, cannot set it up again against the mortgagor; and that for that reason, where the mortgagor doth not join in the assignment, it is the constant course to take a covenant from the mortgagee, who assigns, that the mortgage is in force, and unsatisfied, &c.; and that in this case *Maykew* having money enough in his hands to satisfy the mortgage, and which by the trust was to be applied to that purpose, it ought to be considered as applied, as against the mortgagee.

Right of assignee of mortgages against mortgagor.

But *Vernon* insisted that an

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Lordship declared, that the late Defendant *William Symonds*, and *Thomas Griffith*, were proved to have committed a breach of trust, in respect of which they were answerable

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an assignee was not obliged to take notice of such a collateral satisfaction; and there having been some length of time, and several assignments,

LORD KEEPER would not look upon the mortgage as satisfied; though it was objected that though the first under *Maykew* came in without notice, yet his assignee came in with notice.

But *Vernon* replied, that if you would affect a purchaser at third or fourth hand with notice, you must affect every one under whom he claims, and it is not sufficient to prove notice in him only, or in the second or third; for if it were, a purchaser without notice, might be brought into an impossibility of selling, by giving notice to those who intended to purchase of him. [From Mr. *Cox's* notes. — The date of this case is not stated; but the names of the counsel ascertain the period within which it must have occurred.]

In CHANCERY. 9th *Dec.* 1743.

ELIZABETH RYDER *v.* EDWARD BICKERTON. (*a*)

Trustee charged with breach of trust, for not putting out money at interest, nor on the best security, according to the trust in a deed. Money lent on a promissory note is not put out on a security.

The bill was brought to have a satisfaction for 800*l.* which had been deposited in the Defendant's hands, as a trustee, to be laid out on the best security that could be got, and which the Defendant had lent to one Mr. *Ryder*, the Plaintiff's uncle, who afterwards became bankrupt, on his promissory note.

LORD CHANCELLOR.— If this Defendant has acted fairly, it is a hard case, but the rules of this court must be observed; and it is better that one man should suffer an inconvenience, than that the general rule should be broken.

Two questions; first, whether Defendant has been guilty of a breach of trust?

(*a*) 2 *Eden*, 149. n. *ante*.

Second,

answerable personally for the trust-money in question; and that, under all the circumstances of the case, the Plaintiff *Loveday Walker* ought not to be considered as having

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Second, whether there is any thing on his part to excuse that breach of trust; or to indemnify him as to the plaintiff or her son?

As to the first, it is now plain, that he is guilty of a breach of trust; and a breach of trust may arise not only from a fraud in the trustee, but from his gross negligence; in both which cases he is liable to make satisfaction in this court.

Here has been the grossest negligence. 800*l.* out on a mortgage, which this trustee was to receive, and place out at interest on the best security that could be got for the same, with the approbation of the husband, wife, and survivor; afterwards there is a clause in the articles that defendant should not be liable to any bad debts, arising from any insufficient security that should be so taken, nor for more than should come to his hands.

It is plain that 800*l.* came to his hands; so that the next question is, whether he has pursued the trust? It is so far from that, that he has neither placed it out on security, nor at interest, but has laid it out on a bare promisory note, payable on demand, value received, without any interest. So there appears a direct breach of trust in two respects; first, it was to have produced interest during the life of the husband and wife; and in the next place, it was to have been on the best security that could be.

Trustee not protected by acquiescence of the *cestui que trust*, not duly informed.

A promissory note is evidence of a debt; but it cannot be considered as a security for money; for it should have been on some such security as binds land, or something, to be answerable for it.

Next as to the approbation of the husband or wife; but I shall lay no weight on this, as to the breach of trust, for their power of approbation or consent was only to collect what kind of security, and if this had been a security, their consent might have been sufficient to have indemnified him.

Another consideration is, as to part of the 800*l.* there is a clause in the articles, that if

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having relinquished or barred herself from the right to consider them as being so answerable for the said breach of trust, or as having bound herself to accept such

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if the husband should have a mind to make use of any of the money in trade, and should procure his wife's consent, the trustee should be indemnified for paying it to him.

There was a deed prepared, in pursuance of this power, for 300*l.*, but never executed, nor was any part of the money paid, so that is entirely out of the case, as to the breach of trust.

This trustee has taken upon him to act in the trust, and has received the money. It is said it will be a very hard case on trustees. As to that, there would be some weight in it, if trustees were forced to apply to this court in the case of small sums. But that can hold only where there are but small deviations in the act of the trustees from their powers; and that is not this case; so that, supposing a breach of trust,

The next consideration is, whether the trustee may be excused from making a satisfaction to the Plaintiffs or the infants?

As to the infants, there is no pretence to say that the defendant shall be excused; for after the marriage it was not in the power of the husband or wife to do any thing to prejudice them.

So all that remains is, whether the Plaintiff has done any thing to defend the trustee against being liable to make satisfaction to her during her life? And as to that, I am of opinion she has done nothing.

The power of the wife must arise out of the articles, for after the marriage she had no power to prejudice herself. The power is that she and her husband must give their consent to the placing out the money on security; Therefore she could not give her consent to the placing out the money on no security at all.

There is another point, where it is said that there may be a case in which a married woman may not have power to act within the terms of a trust created before marriage, and yet if she draw in a trustee to do any thing against her benefit, she being so concerned, shall not afterwards

such provision only, in respect of the trust-money, as she or *Wm. Symonds* and *Thomas Griffith* were or might be entitled to under the trusts of the indentures

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wards be admitted to take advantage of it against the trustee; which I believe is so: but in all these cases it must be where the persons so to be affected might have been fully informed of the state of the case. So that the question is, whether the Plaintiff appears to have been fully informed of the state of the case?

There is no evidence befor me of any transaction that she was privy to, antecedent to the lending of the money. I am speaking as to her being fully informed. All the evidence arises after the money was lent. The evidence arising out of the recital of the deed of March, 1737, amounts to nothing; for it is a false recital; reciting that the money had been paid by the mortgagees, and placed out on a security; and next *Crompton* swears that she said, as the money was placed out at interest in her uncle's hands, she would be content to lose it. This was a kind declaration; but the question is, whether it shews that she was acquainted with the transaction? It was further proved that she said the money would be getting something for her and her children; whence it appears she mistook the matter, as the note did not carry interest. Another declaration of hers was, that she was to have *5 per cent.* for it; but it was plain it would not bring her any thing, for no interest could be recovered but from the time of making the demand.

So that it appears she was imposed on, thinking it was placed out at interest on security.

When the Defendant's part of the case comes to be considered, I am far from charging him with a fraud; but it would be dangerous, in general, that a trustee should be excused for placing out money in the hands of persons with whom he has great dealings in trade, where that same money may possibly come round to his own

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tures of lease and release of the 24th and 25th days of *March*, 1797, but that, under such circumstances, either the Plaintiff *Loveday Walker*, under the true construction

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hands, to pay his own debt, in method of negociation. I do not impute this to the Defendant; but in general it might be a dangerous thing: therefore I cannot by any means allow his excuse.

Decree the Defendant to make satisfaction for the principal sum of 800*l.* and interest, after the rate of 4 *per cent.*, from the death of the Plaintiff's husband.

I cannot, for the sake of the precedent, make any other decree in this case.

There was evidence that Mr. *Ryder*, into whose hands the money was placed, was at that time in very good circumstances, to the appearance of the world; that the Defendant was but in slender circumstances, and that the Plaintiff and her husband were glad to have it in Mr. *Ryder*'s hands, thinking it a better security; and it further appeared that the Plaintiff and her husband were needy, and wanted it to be at interest, and that the Defendant had endeavoured to lay it out in a purchase of lands, but the Plaintiff's husband did not like the purchase.

Reg. Lib. *B.* 1743. *fol.* 154. *From Mr. Short.—Lord Colchester's MSS.*

IN CHANCERY. 1st *May*, 1788.

ADYE *v.* FEUILLETEAU. (*a*)

An executor lending money of his testator, upon bond, shall be personally answerable for the money, if the security for which had failed, had not been allowed him by the Master in his accounts.

Exception to the Master's report, that the sum of 1000*l.*, which had been lent by the executor, on bond, out of the assets in his hands, and the

Testator died in the island of *St. Christopher*, where he

(*a*) 2 *Cox*, 24.

left

struction of the said indentures, remained entitled to charge *William Symonds* and *Thomas Griffith* personally, or, if she was not so entitled under such construction,

left a very large personal estate, consisting of money lent on mortgages, and on bonds, leaving Plaintiffs, the infants, his residuary legatees.

It had been usual with the testator to lend very large sums of money on personal securities in the island, and the Defendant, the executor, who resided at *St. Christopher's*, continued the money upon the same securities, and as he received in the same, lent it again upon bonds, at 8*l. per cent.*, the lawful interest of the island; he by this means benefited the estate about 4 or 5000*l.* The 1000*l.* in question was lent by the executor to a person of whose solvency no doubt could be entertained at the time; afterwards, however, he failed.

The executor's conduct had been exceedingly honourable in every respect, and all the parties in the cause, who were adults, consented to his being discharged in his account of this 1000*l.*; and the children and residuary legatees of the testator, who were infants, did not oppose it.

Hardinge and *Graham* argued for the exception, that an executor might be considered in two capacities, 1st. merely as an executor paying debts and distributing the assets; and, 2dly, as having money standing in his name for a considerable time to satisfy legacies that do not immediately arise, in which capacity he may more properly be considered as a trustee than as an executor; that when acting in the former capacity, the executor was entitled, for his own use, to any temporary profits which might be made of the money in his hands, and therefore was accountable for any loss which might happen. This is the opinion of Lord *Hardwicke*, in *Adams* v. *Gale*, 2 *Atk.* 106., whose words are: "An executor may make use of money which is perpetually coming in by assets of the testator, and turn it to his own advantage; and it is not improper for an executor to do it upon his own account, where he is a respectable

swerable, if the security prove defective, though his testator was in the habit of lending money on such security; and shall not be indemnified from the profits made by other transactions of the same nature.

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struction, she was not bound to take the benefit of such provisions, and relinquish her demands against them personally on account of such breach of trust. And

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able man and ready to answer legacies and debts when called upon." And the same doctrine was laid down in *Bromfielf* v. *Wytherley, Prec. Chan. 505.*, where it is said that if the executor is solvent, he shall have the profits made of the money to his benefit, because he ran the risk; *secus* of an executor insolvent at the time, because he runs no risk. When acting in the second capacity, the executor is to be considered as a trustee, and as such is entitled to the favour of the court, where the strict rule of law would be against him; in this capacity he is entitled to no profits made of the assets, and therefore ought not to be personally liable for the loss. If a trustee (and the executor *quoad hoc* is a trustee) keeps the trust property as he would keep his own, or as the court has evidence the person for whom he is trustee would have kept it, he shall be indemnified. *Morley* v. *Morley*, 2 *Chan. Ca.* 2.; *Jones* v. *Lewis*, 2 *Ves.* 240. In the present case the executor not only employed the money as he would have employed it had it been his own, but he employed it in a manner the most beneficial that was possible for the residuary legatees, the infants, and by which he has gained for them a very considerable sum. He was obliged to lend the money upon personal security, or he must have transmitted it to England, where it would have produced much less, upon any securities, because the island afforded no other securities but personal ones; the executor, too, in this case, employed the money in the very same way in which the testator had himself employed it, and as he certainly would have employed it, had he been living. In *Prec. Chan.* 49., *Gibbs* v. *Herring*, testator employed a person to place out money for him at interest, and died, leaving a sum in his hands to be so laid out; the executor desires him to place it out at interest; he does, and the security fails; the executor was held to be liable. *Harden* v. *Parsons*, before Lord *Northington* (*a*), was a case

(*a*) Cited from a MS. note of Mr. *Stainsley*. 1 *Eden*, 145. *Vide ante*, p. 62, 63.

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And his Lordship declared, that *William Symonds* and *Thomas Griffith*, having made themselves, by having executed the said indenture of release, and other acts, creditors

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in point. There the executor lent money upon the note of of a man of whose solvency there was not at the time the least reason to doubt; afterwards he failed, and Lord *Northington* held that the executor should not be liable, and said it was sufficient if he dealt with the property as he did with his own; but that if there had been *crassa negligentia*, that indeed would have been different, and would have amounted to a breach of trust; and the other cases cited were *Churchill* v. *Hobson*, 1 *P. W.* 241., *Salk.* 218., and *Cox* v. *D'Aranda*, *Vin. Abr.*

Lord *Loughborough*.—It is quite a settled point that an infant's money cannot be laid out on personal security (*a*); and the Court will never give their sanction to that when done, which at the time they would not have suffered to have been done. In some of the reports a confused notion prevails that an executor or trustee is not answerable for the loss, where he would be answerable for the profits, but I take that to be quite erroneous, and that it has been long established in this court, that in these cases every thing shall be taken against the executor; if any profits are made, he must account for them; if any loss happens, he must bear it; and it does not alter the case that the executor has improved the estate by lending money on personal security; for the Court will not consider the whole account of his dealings together, but must consider every single transaction by itself. The executor has behaved very honourably; and I do not doubt that when the infants come of age, they will think themselves bound in honour to make up this loss to him, but the Court cannot do it. The distinction taken *Prec. Chan.* 505., is a very absurd one, and I thought had been long exploded. The exception must be over-ruled.

Hardinge. — Does your Lordship decide upon the ground of its being infants' money?

Lord *Loughborough*.—Upon the ground of its being trust money. The circum-

(*a*) *Terry* v. *Terry*, *Gilb. Eq. Rep.* 10.

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creditors of the Defendant *Isaac Harris*, as in the said indenture of release is mentioned, and the Plaintiff *Loveday Walker* not having been bound to accept the benefit of their demands, as such creditors, the Plaintiffs were entitled to have such payment made out of, and such account directed, as thereinafter was ordered and directed, as to, the assets of *William Symonds* and *Thomas Griffith* respectively, without compelling an account to be taken of the assets of *Nicholas Donnithorne*, deceased, which appear to be included in the trusts of the said indenture of release, or enforcing in the said suit any demand which by the Plaintiffs, or on their behalf, could be enforced under the trusts of that indenture; but with such liberty reserved to the respective representatives of *William Symonds* and *Thomas Griffith* as thereinafter provided. And it was ordered that it be referred to the Master to take an account of what remained due to the Plaintiffs for principal and interest of the trust-money in question; and that the Defendants *William Symonds* and *Thomas Cooke*, out of the assets of the late Defendant *William Symonds*, deceased, and the Defendant *John Lilly*, out of the assets of *Thomas Griffith*, pay what the Master should find to remain due for principal and interest on taking the said account, into the bank, with the privity of the accountant-general,

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stance of their being infants only affects the case, in as much as it is impossible there can be any circumstances of conduct in them which can authorize the executor, as there might have been had they been adults.

Hotham B.— Another reason why the Court always disapproves of lending money on personal security is, that it is a species of gaming, by which great interest is gained, and which the Court will not encourage.

The exception over-ruled.

From Mr. Romilly.—Lord Colchester's MSS.

to

1818.

WALKER v. SYMONDS.

to be there placed to the credit of the cause, "the Plaintiff's account;" subject to the further order of the Court; and the Plaintiffs were to be at liberty to make such application to the Court touching the same as they should be advised. And, in case the Defendants *William Symonds* and *Thomas Cooke* should not admit assets of *William Symonds*, deceased, sufficient for the purpose aforesaid, then they were to come to an account before the Master for his personal estate come to their or either of their hands, &c.; and unless the Defendant *John Lilly*, should admit assets of *Thomas Griffiths*, it was ordered, that the Master do take an account of his personal estate, come to the hands of *John Lilly*, his executor, &c.

And his Lordship declared, that, in case after having satisfied what they were liable to pay under the directions therein before contained, the Defendants *William Symonds* and *Thomas Cooke* and *John Lilly*, as such representatives respectively as aforesaid, or any representative of *Symonds* or *Griffith* respectively, should be advised to make any claim or demand against the assets of *Nicholas Donnithorne*, deceased, or against the trust-premises or the trustees, in the said indenture of release contained and named, or against the Defendant *Isaac Harris*, which it should be necessary, or they should be advised, to make in the names of the Plaintiffs, or any of them, they were to be at liberty to use the names of the Plaintiffs, or any of them, in any such proceedings, they giving to the Plaintiffs a proper and sufficient indemnity against the costs and expenses of all such proceedings. And it was ordered, that such indemnity be settled by the Master, if the parties differ about the same. And it was ordered that it be referred to the Master to tax the costs of the Plaintiffs, and that such costs, when taxed, be paid by the Defendants, the executors, out of the assets of their respective testators.

And

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And it was ordered that the Plaintiffs' bill, as against the Defendant *Harris*, be dismissed, without costs between the Plaintiffs and him; but such dismissal was to be without prejudice to any such proceedings as aforesaid for the benefit of the representatives of the other deceased trustees, either in their own names, or those of the Plaintiffs or any of them, thereafter to be taken, relative to the matters in question. And, for the better taking of the said accounts, the parties were to produce before the Master, upon oath, all books, &c. And the Master was to be at liberty to make a separate report or separate reports, of any of the matters aforesaid. And his Lordship reserved the consideration of all further directions, until after the Master should have made his report; and any of the parties were to be at liberty to apply to the Court as there should be occasion." Reg. Lib. *B.* 1817. *fol.* 1977.

CRAWSHAY *v.* COLLINS.

July 13. 16.

Arbitrators under an order of reference in a cause, having declined to proceed, the suit may be prosecuted as if no reference had been made.

BY an order of 1st of *March*, 1817, on consent, all matters in difference between the parties were referred to the award of three arbitrators, and it was ordered that no bill should be filed, nor any action commenced by either of the parties against the other touching any of the matters referred, except for the purpose of enforcing, if necessary, the award to be made; and any of the parties were to be at liberty to apply to the Court as they should be advised.

The arbitrators having declined proceeding, and the Court having refused to order them to proceed (*a*), the

(*a*) *Ante*, v. i. p. 40.

Plaintiff,

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Plaintiff on the 4th of *May*, 1818, obtained a reference to the Master to take certain accounts, and on the 30th of *June*, an order on the Defendant *Collins*, to produce before the Master all books, &c. in his possession relating to the accounts. *Collins* now moved to discharge the latter order with costs.

The *Solicitor General* and Mr. *Beames*, for the motion.

The order of reference is a virtual dismission of the bill; although the arbitrators decline to make an award, the cause is no longer in court. The terms of the reference are absolute, not in the usual form, conditional on the event of an award made. The concluding reservation of liberty to apply, is a clause of course, and may refer to applications for compelling the arbitrators to proceed, or for enforcing their award. *Woodbridge* v. *Hilton* (*a*), *Dick* v. *Milligan* (*b*), *Price* v. *Williams*. (*c*)

It is true, that after the first order of reference was suffered to expire, a second order of reference was made, with the consent of the Defendant *Collins*, but after the Court had transferred its jurisdiction to the arbitrators, no consent could restore it. *Pownall* v. *King*. (*d*) Had the reference not failed, it is not pretended that the parties could have proceeded here; the forum of the question was changed.

Sir *Samuel Romilly*, Mr. *Hart*, and Mr. *James Stephen*, against the motion.

(*a*) 1 *Bro. C. C.* 398. 2 *Dick.* 640.

(*b*) 4 *Bro. C. C.* 117. 536. 2 *Ves.* jun. 23.

(*c*) 3 *Bro. C. C.* 163. 1 *Ves.* jun. 365.

(*d*) 6 *Ves.* 10

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The dicta cited in support of this novel motion, from cases in which an award was actually made, have no application to a case in which the reference to arbitration has become ineffectual. The Court divests itself of jurisdiction only when the question can be decided by the arbitrators. The reservation of liberty to apply supposes a cause depending.

The LORD CHANCELLOR.

I take it to be undeniable, notwithstanding what was said in *Dick* v. *Milligan*, that according to all the old cases, an award was subject to exceptions; the new cases have restored the subject to a rule of common sense, that if on a reference of all matters in dispute the arbitrators proceed, there is an end of the matter: but the question is, whether, if the arbitrators do not proceed, if, for example, one dies, the cause is so out of court, that the parties cannot apply to prosecute it? I always understood that the reserved liberty to apply extended both ways; authorizing, if an award was made, proceedings on the award; and if the arbitrators did not proceed, an application as if the reference had not been made.

July 16

The LORD CHANCELLOR.

The motion must be refused, and the cause will proceed as if no reference had been made.

His Lordship doth not think fit to make any order upon the motion, but doth order, 'that the said Defendant do pay the costs of this application.' Reg. Lib. *A.* 1817, fol. 1464.

1818.

ROBERT MAYNE, - - Plaintiff.

July 14.
August 7.

WILLIAM HAWKEY, and JAMES WATT, Defendants.

A clerk in court and solicitor refusing to continue the conduct of a cause until his fees are paid, ordered to produce an office copy of the bill to be marked.

A MOTION was made on behalf of the Defendant *Watt*, that Mr. *J. Radcliffe*, one of the sworn clerks, might be ordered forthwith either to produce to the six-clerk the office-copy of the bill alleged by him to have been made in *Easter* term, 1816, in order that the same might be marked, or that he might be ordered forthwith to deliver up to the said six-clerk the original record of the amended bill filed in this cause; and that Mr. *J. G. S.* might be at liberty to act as the clerk in court for *Watt*, in the future conduct of the cause, and to file his further answer to the exceptions, and also to the amended bill.

The affidavit of *Watt* stated, that having no personal interest in the cause, and being a party merely as the agent or consignee of *Hawkey*, he had, at *Hawkey*'s request, allowed his answer to be prepared, and his defence to be conducted, by *J. R.*, the friend and solicitor of *Hawkey*, under an assurance that he should not be responsible for any expense incurred; that those terms were understood by *J. R.*, who admitted that he was employed by *Hawkey* alone, and that *Watt* was not responsible to him; that in *May*, *J. R.* informed *Watt*, that in consequence of the death of *Hawkey*, he could not continue so to conduct *Watt*'s defence, but that *Watt* must supply money for carrying on the suit; that *Watt* having then employed his own solicitor *R. G. B.*, *J. R.* refused to part with any papers, or give any information until his bill was paid; and in *June* delivered a bill amounting to 73*l.*

The

1818.

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The affidavit of *R. G. B.*, filed in support of the motion, stated, that having been employed by the Defendant *Watt* to put in his answer to the exceptions allowed to his former answer, and also his answer to the amended bill, the deponent applied to *J. R.* for the requisite information, who declined to give any information, or to part with any papers, unless he was paid his bill of costs for what he had before done; that an attachment having issued against *Watt* for not putting in his answer, the deponent prevailed upon the Plaintiff's solicitor to allow time for the answer to be prepared, and to furnish the deponent with a copy of the amended bill, and of the exceptions; that he afterwards prepared the further answer of *Watt*, which was sworn on the 22d of *May* last, and also paid the costs of the attachment and of the exceptions, to the Plaintiff's clerk in court; that some considerable time after the answer was sworn, he was informed by the agent for Mr. *J. G. S.*, the Deponent's clerk in court, that the six-clerk had refused to file the same, because the office-copy of the amended bill had not been marked or paid for, although in the bill of costs lately delivered to *Watt* by *J. R.* the sum of 7*l.* 19*s.* 10*d.* was charged for an office copy of the amended bill in *Easter* term, 1816; that he afterwards attended with the agent of Mr. *J. G. S.*, at *J. R.'s* seat in the Six-Clerks' office, and requested *J. R.* to get the office-copy (which he alleged had been made) marked by the six-clerk, in order that the answer might be filed; and the deponent subsequently offered to pay for the office-copy, if *J. R.* would produce and get the same marked, which he positively refused to do; that deponent had been informed by the agent of Mr. *J. G. S.*, which information he believed to be true, that *J. R.* detained the original record of the amended bill, alleging that he had a lien thereon for the amount of a bill of costs which he claimed to be due to him from *Watt*.

Sir *Samuel Romilly*, for the motion.

1818.

MAYNE v. WATTS.

Before a Defendant is allowed to file an answer, he must take an office-copy of the bill; and the six-clerk has no means of knowing whether the copy produced has been taken, except by the mark.

Mr. *Hart*, against the motion.

The LORD CHANCELLOR.

August 7

My opinion is, that Mr. *J. Radcliffe* must do what this motion requires. If a clerk in court, or solicitor, having engaged in the conduct of a cause, thinks proper afterwards to refuse to proceed without payment, he cannot stop the cause; he may reasonably decline to act without payment, and if the client omits to pay, he cannot be compelled to part with papers; but he must not delay the progress of the suit. The refusal of the solicitor or clerk in court to proceed authorises the client to employ another solicitor or clerk in court; and though the former solicitor or clerk in court cannot be compelled to part with papers, he must produce them for all purposes in the cause. (*a*)

"His Lordship doth order, That *J. R.*, one of the sworn clerks of this court, do forthwith produce to the six-clerk the office-copy of the bill alleged by him to have been made in this cause in *Easter* term, 1816, in order that the same may be marked; and it is ordered that *J. G. S.* be at liberty to act as the clerk in court for the Defendant *J. Watt*, in the future conduct of this

(*a*) See *Commerell* v. *Poynton*, *ante*, vol. i. p. 1.

cause,

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cause, and to file his farther answer to the exceptions allowed in this cause, and also to the said amended bill." *Reg. Lib. B.* 1817. fol. 1556. (*a*)

(*a*) On inquiry at the office of the Six Clerks, the editor has been favoured with the following information of the course of proceeding. An office-copy of the bill being taken by the Defendant's clerk in court, is produced to the Defendant's six-clerk, for the purpose of receiving his signature (*a*), and being then marked with the official stamp, becomes an authority for the clerk in court taking the copy, to file the answer of the Defendant for whom the copy was taken. A peer defendant being served with a copy of the bill, is allowed to file an answer without taking another copy.

The following note of a case (shortly reported, 2 *Anst.* 489.) on the jurisdiction of courts over their officers, is extracted from Lord *Colchester's* MSS.

EXCHEQUER *Trinity Term*, 1794.

Power of the Court of Exchequer to remove from the Remembrancer's office clerks who have not served a clerkship.

In the matter of *Windus* and *Rich*, side clerks in the King's Remembrancer's office, *Richards* moved, on behalf of Messrs. *Windus* and *Rich*, that the name of *John George Donne* might be erased from the roll kept in the office, whereby the seniority of the clerks in court is ascertained.

This motion was supported by affidavits, that *John George Donne* was articled to *David Burton Fowler*, Esq. prior to *May*, 1787, one of the sworn clerks in the said office, but had never attended there till 23d *May*, 1794, although his name had been entered upon the roll at the time of his being articled, and still remained there; that *Windus* was articled to another of the sworn clerks in *May*, 1787, and *Rich* to another in *November*, 1787, from which respective times they had regularly attended and served; that the said *J. G. Donne*

(*a*) Orders in Chancery, ed. *Beames*, 186. *Attorney General* v. *Milward*, 1 *Cox*, 437.

was,

was, during the whole, or the greatest part of the said time, at school, and at the time of his name being entered on the roll, was only of the age of nine years, being an age much earlier than usual for bringing clerks into the office.

Besides the impropriety of such clerkship being allowed to stand good, it was insisted also that such a priority in the roll, might and would probably prejudice *Windus* and *Rich* in the office at some future period.

Abbot, contrà, shewed for cause, that by other affidavits it appeared, that *Windus* and *Rich* knew, during the whole time, that the name of *Donne* stood before theirs, although they forbore for seven years to complain of it; that at any time, if required, *Donne* was ready and would have left school to give personal service in the office; that during the whole time he transcribed the king's process (which is part of the articled clerks' duty), by an avowed agent in the office, with the express knowledge and acquiescence of *Windus* and *Rich*, and that the said *David Burton Fowler* had dispensed with his service for the purpose of promoting his education; and that no rule or precedent to the contrary was known or ever intimated to *David Burton Fowler* or *Donne*.

Two precedents were cited in the course of the argument of names being erased from the roll; one of Mr. *Ord*, whose name had been postponed for non-attendance, by the authority of the Deputy Remembrancer, and without controversy; and another of Mr. *Wood*, whose name had been erased, he having left the office for many years, and returned to it at a great interval of time.

The Court was clearly of opinion, first, that it had jurisdiction to interfere in regulating the duties and conduct of all these clerks, although appointed by the King's Remembrancer, and promoted at his discretion; secondly, that no articled clerk should have his name on the roll who did not *bona fide* serve under his indentures.

And, accordingly, the Court ordered the name of *J. G. Donne* (not to be postponed, but) to be wholly erased from the rolls. See *Dorrington's* case, *Hardr.* 130. and the memorandum relative to the offices of chief prothonotary of the Common Pleas, and coroner and attorney of the King's Bench. *Dyer*, 150 b.

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July 25. *Ex parte* BIRCH in the Matter of ADDY, a Lunatic.

Sales of copyhold estates of a lunatic are not authorised by stat. 43 G. 3. c. 75.

THIS petition prayed a sale of some copyhold lands the property of the lunatic, under the statute 43 *Geo.* 3. c. 75.

Mr. *Barber*, in support of the petition, insisted, that though freehold and leasehold estates only are mentioned in the clause authorising a sale, yet the subsequent express authority to make surrender of the copyhold estates of lunatics, denotes the intention of the legislature to include them.

The LORD CHANCELLOR.

The power of sale is confined in terms to freehold and leasehold estates; copyholds are not mentioned as subjects of sale. I have no authority to make such an order.

Petition refused. (*a*)

(*a*) The stat. 59 *Geo.* 3. c. 80. s. 2. extends the power of sale to estates held by ancient demesne or copy of court roll.

July 29. HOPKINSON *v.* LEACH.

The Master's certificate in support of a motion for an absolute order for production of books, &c. or commitment, must bear date on the day of the motion.

A MOTION was made, that the Defendants might, within four days, deposit in the Master's office all books, &c. in their custody or power relative to the accounts directed to be taken; or in default, that the serjeant-at-arms might apprehend them.

Mr.

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HORNINSON v. LEACH.

Mr. *Heald*, in support of the motion, relied on the Master's certificate, that the Defendant had not produced the books at the time fixed by a former order.

The LORD CHANCELLOR inquired the date of the certificate; and being informed that it bore date on the 22d *July*, refused the order; observing that a certificate to support a motion for commitment must bear date on the day of the motion; otherwise *non constat*, that the party has not, since the certificate and before the motion, obeyed, and protected himself from the order, (*a*)

(*a*) So *Carleton* v. *Smith*, 14 *Ves.* 180.

July 20. 21. 25. 30.

NEWMARCH *v.* BRANDLING.

The lessees of a colliery having agreed to grant to the lessees of a neighbouring colliery licence to use a right of way enjoyed by the former, and the owner of the first colliery, having granted to the second lessees the same right of way during a term of years, and afterwards by assignment from the first lessees become possessed of the first colliery, and the right of way, an injunction was granted to restrain him from removing the materials, and destroying the way.

IN *September*, 1809, certain collieries at *Dunnington, East* and *West Brunton*, *Fawdon*, *Wideopen*, *Morley Hill*, and *Wheetslade*, in the county of *Northumberland*, were demised for twenty-one years to *Richard Carrington* and others, who, in *February*, 1810, assigned their interest therein to *John de Ponthieu*.

The premises called *Fawdon*, were situate about five miles and a half from the river *Tyne*; the intermediate grounds proceeding in a direction from *Fawdon* to the river, were respectively called *Coxlodge*, *Gosforth*, *Long Benton*, *Benton*, and *Wallsend*; and before the date of the assignment, *William Chapman* and his partners,

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carrying on the business of coal workers under the firm of the owners or lessees of *Kenton* and *Coxlodge* collieries, had sunk a coal pit, called the *Jubilee* pit, in the *Coxlodge* grounds, at the distance of about 350 yards from the *Fawdon* grounds, in a direction towards the *Tyne*, and by virtue of *way-leaves*, or leases, from the owners of the intermediate grounds before mentioned, had constructed a waggon-way from the *Jubilee* pit to the *Tyne*.

By an indenture of the 30th of *April*, 1811, between *J. Brandling*, owner of *Coxlodge*, *Gosforth*, and *Long Benton* grounds, and *de Ponthieu*, reciting that *Brandling* was seised and possessed of divers lands, situate at *Coxlodge*, *Gosforth*, and *Long Benton*, and that the lessees and owners of *Kenton* and *Coxlodge* colleries were then in the occupation of a certain waggon-way over part of the lands, as lessees under him, *Brandling* for himself, his heirs, executors, and administrators, covenanted with *de Ponthieu*, his executors, administrators, and assigns, that it should be lawful for *de Ponthieu*, his executors, &c. at any time within twenty-one years from the 22d of *November* then last, to make and place a waggon-way and side-way from the lands and grounds of *Fawdon* through the grounds of *Coxlodge*, to communicate with the waggon-way of the lessees and owners of *Kenton* and *Coxlodge* collieries at or near the *Jubilee* pit, according to a line laid down in a plan indorsed on the indenture, and by no other line, for the purpose of conveying the coals to be won and wrought out of the grounds of *Fawdon*, and out of a specified part of the grounds of *West Brunton*, and also of conveying timber, iron, &c. and all other things, to and from the colliery at *Fawdon*; and that it should be lawful for *de Ponthieu*, his executors, &c. during the term of twenty-one years, to have full and free liberty of ingress, egress, regress, way-

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way-leave, and passage, along the waggon-way of the lessees or owners of *Kenton* and *Coxlodge* collieries, through the grounds of *Brandling* at *Coxlodge*, *Gosforth*, and *Long Benton*, for the purpose of leading and conveying all coal to be wrought and won out of the grounds of *Fawdon* and out of the specified grounds of *West Brunton*, and all timber, iron, &c., and all other things necessary for carrying on the collieries; and also that it should be lawful for *de Ponthieu*, his executors, &c. during the term of twenty-one years, to make and lay a waggon-way and side-way from the grounds of *Fawdon* through the grounds of *Coxlodge*, and there to communicate with the first-mentioned waggon-way, according to the line also laid down upon a plan indorsed on the indenture, for the purpose of conveying the coal to be won and wrought out of the grounds of *East Brunton*, *Dunnington*, and *Morley Hill*, *West Wideopen*, and a specified part of *West Brunton*, and also for the purpose of conveying timber, iron, &c. to and from the last-mentioned collieries; and that it should be lawful for *de Ponthieu*, his executors, &c. during the term of twenty-one years, to have full and free liberty of ingress, &c. along the waggon-way intended to be laid as aforesaid, and also along the present waggon-way of the owners or lessees of *Kenton* and *Coxlodge* collieries, through the said grounds of *Brandling*, at *Coxlodge*, *Gosforth*, and *Long Benton*, for the purpose of leading and conveying the coal to be wrought and won out of the grounds at *East Brunton*, *Dunnington*, *Morley Hill*, *West Wideopen*, and the specified part of *West Brunton*, and also all timber, iron, &c. and all other things necessary for carrying on the collieries.

The indenture contained a covenant by *de Ponthieu* to pay a fixed rent for the several way-leaves, and a further contingent rent, proportioned to the quantity of

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coal conveyed. And it was agreed, that in case *de Ponthieu*, his executors, &c. should be desirous to quit the way-leaves at the end of any one year of the term of twenty-one years, and should give to *Brandling*, his heirs or assigns, twelve months previous notice in writing, he or they should be at liberty to quit the waggon-ways at the expiration of such notice; from which time the respective rents, and the term of twenty-one years should cease, on the ground over which the same passed being restored to a proper state of cultivation: and it was agreed, that a regular lease should be entered into of the way-leaves, in which should be inserted all covenants, clauses, and agreements in the indenture contained, and all other usual covenants and agreements contained in colliery way-leave leases, and thereby not provided for, which were consistent with the terms and stipulations therein contained.

By an indenture of the 10th of *July*, 1811, *Job Bulman* granted to *de Ponthieu*, his executors, &c. for twenty-one years from the 1st of *May* then last, right of passage and way-leave along the waggon-way and side-way laid by the owners or lessees of *Kenton* and *Coxlodge* collieries, upon the grounds of *Bulman*, within the townships and precincts of *Coxlodge*, for the purpose of conveying coal and other things to the *Tyne* from the premises comprised in the indenture of *September*, 1809; and also power, in case the owners and lessees of *Kenton* and *Coxlodge* collieries should determine their interest in the way, to lay another waggon and side-way on the same scite.

By an indenture of the 15th of *July*, 1811, *William Brown* made a like grant to *de Ponthieu* of a right of way-leave along the way enjoyed by the owners and lessees of *Kenton* and *Coxlodge* collieries, through his lands in

in the townships of *Long Benton* and *Little Benton*, for twenty-one years from the 12th of *May* last.

By two other indentures of the 22d of *June*, 1811, and the 28th of *September*, 1812, *C. W. Brigge* and the Dean and Chapter of *Durham* respectively granted to *de Ponthieu* a way-leave, and power to make and use a waggon-way, &c. from the premises comprised in the indenture of *September*, 1809, to the *Tyne*, through their respective grounds in *Long Benton* and *Wallsend*, for twenty-one years.

In *June*, 1811, Messrs. *Knowsley*, *Tindell*, and Co., who had become the owners or lessees of *Kenton* and *Coxlodge* collieries, agreed to grant to *de Ponthieu* way-leave over the waggon-way made by *W. Chapman* and his partners, from the *Jubilee* pit to the *Tyne*, at a rent ascertained by award; but no regular grant was executed.

De Ponthieu having opened a coal-pit, called the *New Winning* pit, in the *Fawdon* grounds, placed a new waggon-way over the *Fawdon* and *Coxlodge* grounds, to communicate with the *Kenton* and *Coxlodge* waggon-way near the *Jubilee* pit, and also over part of the *Wallsend* grounds to the *Tyne*, and thus became possessed of a waggon-way from the *New Winning* pit to the *Tyne*, and continued to work coal, and use the way, until his death in *April*, 1813.

In *May*, 1814, the personal representatives of *de Ponthieu* sold his interest in the collieries to *John Newmarch* for 45,000*l.*

In *March*, 1817, Messrs. *Knowsley*, *Tindell*, and Co. assigned their interest in the *Kenton* and *Coxlodge* collieries, including the materials of the waggon-way con-

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structed by *W. Chapman* and his partners, to *Brandling*; and on the 5th of *November*, 1817, *Brandling* sent a written notice to *Newmarch*, that the owners of the *Coxlodge* colliery had agreed for a new waggon-way, and as soon as the new line was prepared, intended removing the materials from the old waggon-road.

The bill, filed by *Newmarch* and his partners, and the personal representatives of *de Ponthieu*, against *Brandling* and his partners, insisted that *de Ponthieu* and the Plaintiff having paid the reserved rent, and performed the covenants contained in the indenture of the 30th of *April*, 1811, and *Brandling* having granted or agreed to grant to *de Ponthieu*, his executors, &c. way-leave and passage along the *Kenton* and *Coxlodge* waggon-way, through his grounds at *Coxlodge*, *Gosforth*, and *Long Benton*, for the term of twenty-one years, and having afterwards become the sole owner, and being then one of the owners, of the waggon-way, was not either by himself or in concert with the other Defendants, entitled during the continuance of the term to destroy or take away the materials of the waggon-way upon his grounds, and thereby deprive the Plaintiffs, as the executors and assigns of *de Ponthieu*, of the benefit of the agreements contained in the indenture of the 30th *April*, 1811.

The bill stated, that the Plaintiffs on receiving the notice, took measures for making a new waggon-way from the *Fawdon* grounds to the *Tyne*, in a direction different from that of the *Kenton* and *Coxlodge* waggon-way; and on the 22d of *November*, 1817, gave notice to *Brandling*, that they intended to quit on the 22d of *November*, 1818, the waggon-way and way-leave agreed to be granted to them over the grounds of *Brandling*; but insisted, that until the determination of the term of years by that notice, they were entitled to the benefit of the

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the agreement; the Plaintiffs not having any outlet for the coal obtained by them from the *Fawdon* colliery, except the way granted to them, until the new way was completed, which could not be effected before *November*, 1818.

In reply to a pretence that *Brandling* only granted to *de Ponthieu* way-leave and passage along the *Kenton* and *Coxlodge* waggon-way for so long time as the owners or lessees of the *Kenton* and *Coxlodge* colliery should not be minded to remove the same, or the materials thereof, the bill charged, that by virtue of some agreement subsisting between *Brandling* and the owners or lessees of the *Kenton* and *Coxlodge* colliery, *Brandling* was empowered to sign the indenture of the 30th of *April*, 1811, and had sufficient authority to grant to *de Ponthieu*, his executors, &c. such way-leave and right of passage along the waggon-way, as by the indenture is agreed to be granted during the term of twenty-one years.

The bill, also charging, that under the circumstances, the Plaintiffs were entitled to way-leave and passage along the *Kenton* and *Coxlodge* waggon-way, as tenants from year to year, that is to say, from the 31st *December* in each year to the 31st *December* in the following year, and that the Defendants were not entitled to determine such tenancy, or to deprive the Plaintiffs of the use of the waggon-way any otherwise than as before mentioned; prayed, that the Plaintiffs might be declared entitled to the benefit of the several agreements contained in the indenture of the 30th *April*, 1811, and of the agreement between *Knowsley*, *Tindell*, and Co. and *de Ponthieu*, until the 22d of *November*, 1818, the Plaintiffs offering to perform the agreement on their parts until such time; and that in the mean time the Defendants might

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might be restrained by injunction from conveying away or removing the materials of the *Kenton* and *Coxlodge* waggon-way, and from destroying or injuring the same, so as to deprive the Plaintiffs of the use thereof.

The allegations of the bill being supported by affidavit, the Plaintiffs moved for an injunction. The affidavits filed in opposition to the motion, stated, that in cases where owners or lessees of collieries had made and laid, under a grant or license from the owners of the soil for that purpose, a waggon-way, for the purpose of leading the coal of their collieries, and the owners or lessees of any other colliery were desirous of using such way for the conveyance of coal, an application was made by the latter to the former for permission so to do; and it was the usage and practice to grant such permission, on the person to whom the same was granted paying a certain sum, or an awarded sum per ton per mile for the coal led over such waggon-way; and that such permission was always understood (unless it should be otherwise stipulated, of which stipulation the deponents recollected no instance) to be optional as to its duration on both sides; and that while the persons obtaining such permission were at liberty at any time to discontinue the use of the way, and in consequence to cease to pay or make any compensation, the persons granting the permission were also at liberty to withdraw such permission, and to prevent the leading coal over the way laid by and belonging to them at their pleasure, and without giving any notice of their intention. The affidavits farther stated, that the notice of *November*, 1817, was sent as matter of courtesy only, and not under a notion that the Defendants were bound to give notice of their intention to remove their waggon-way.

Sir

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Sir *Samuel Romilly* and Mr. *Bickersteth*, in support of the motion.

Mr. *Bell* against the motion.

The LORD CHANCELLOR.

An agreement by the lessees of the *Kenton* and *Coxlodge* collieries, to allow to the occupiers of the collieries of the Plaintiffs the use of the waggon-ways enjoyed by them, would be effectual so far only as their interest extended, but could not amount to an absolute grant without the concurrence of all the owners; for the right which they possessed was a licence to carry their own coal, not that of others. Such an agreement, I think, might be determined at any time, on the option of either party. But the Defendant *Brandling* then executes the deed of *April*, 1811, a most improvident deed, granting a licence to use this identical way. Suppose that *Brandling* had not come into possession of the *Kenton* and *Coxlodge* collieries, and that after that agreement the lessees of those collieries had removed the materials of the waggon-way, I think that they were at liberty so to act. But *Brandling* afterwards becomes owner in possession of the soil, and the question is, whether a court of equity will permit him to defeat his own covenant? The deed is improvident on the part of *de Ponthieu* also, who covenants absolutely for payment of rent, though the lessees were entitled to remove the materials. Had they exercised their power of removal, no complaint could have been made against *Brandling*; but the question is, whether, if he grants a right of way for a term of years, and afterwards acquires a power to render that grant effectual, he or those claiming under him can be permitted to defeat it?

The

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The LORD CHANCELLOR.

The claim of the Plaintiffs to the interposition of this Court is rested on two grounds. First, that the owners of the *Fawden* colliery are to be considered as tenants in common with the owners of the *Kenton* and *Coxlodge* collieries, of the way-leaves in question, subject to determination on six months' notice. On examination of the different instruments, it appears to me that they could not establish any equity on that ground.

But there is another ground on which they are entitled to say that the materials of this waggon-way shall not be removed before the 22d of *November*; an equity arising on the deed by which *Brandling* demised a right of passage along this identical way. By that instrument, *Brandling* having power to grant a right of passage to be exercised not only on any waggon-way which might be laid across that property, but on that identical waggon-way, covenanted that *de Ponthieu*, and those representing him, should have a right of passage over that identical way; and it appears to me, that neither he nor those claiming under him, can be competent to interrupt that way in contradiction to his own deed; as against him and others, the Plaintiffs have an equity to say, you shall not defeat this grant by the premature removal of the materials, and deprive us of that identical way to which this deed entitles us.

I am of opinion, that the Plaintiffs are entitled to an injunction against the removal of the materials before the 22d of *November*. (*a*)

(*a*) ——— *v.* WHITE.

Specific performance of an agreement become use-

The bill was for a specific performance of an agreement by which the Defendant was to take a lease of a way-leave over the Plaintiff's close, at the yearly rent of 10*l.*, for the

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the use of a colliery which the Defendant intended to take; and was likewise to employ the Plaintiff's son in the colliery during the term, and allow him 20*l. per annum* during the first seven years, and 30*l.* the second: at the close of the articles the Defendant obliged himself to the performance under a penalty. After the execution of them, some other colliers took a lease of other lands, which, as well as the Plaintiff's, lay between the colliery and the river, and so rendered the Plaintiff's way-leave useless to the Defendant; and the Defendant could not obtain a lease of the colliery, and the lease that he was to take being for the use of the colliery, though there was no fraud proved in the Plaintiff hindering the Defendant from taking the other way-leaves or the colliery,

Yet my Lord would not decree a specific performance, but directed only a *quantum damnificavit* by the Defendant's not taking the lease; and that part that related to the employing the son he totally rejected, there being no colliery to employ him in. — Lord *Colchester's* MSS. in a collection entitled as containing cases from *Easter* 1706 to *Michaelmas* 1713.

less to the Defendant, refused.

WHITE *v.* The Bishop of PETERBOROUGH.

July 20.
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A third incumbrancer on a rectory having obtained a sequestration, a receiver was appointed at the instance of the second incumbrancer.

THE bill stated, that the Defendant *John Ambrose*, being rector of the parish of *Blisworth*, in the diocese of *Peterborough*, in 1805, agreed with the Plaintiff for the sale to him of an annuity of 100*l.* during the life of *Ambrose*, secured on the rectory, at the price of 700*l.*; and by indenture of the 29th of *August*, 1805, *Ambrose* granted to the Plaintiff an annuity of 100*l.* charged upon the rectory, (*a*) parsonage-house, &c. during the life of *Ambrose*,

(*a*) The stat. 13 *Eliz. c.* 20., declaring void "all chargings of benefices with cure, with any pension or with any profit out of the same to be yielded or taken, other than rents reserved upon leases to be made according to the meaning of the act," together with the "explanations, additions, and alterations thereof, made by several

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Ambrose, with covenants for permitting entry and distress on the rectory, in case the annuity should be in arrear; and demised the rectory to *W. Ross* for ninety-nine years, if *Ambrose* should so long live, in trust, in case the annuity should be in arrear, out of the tithes and profits of the rectory, or by sale or mortgage, to raise such sums as should be sufficient to satisfy the arrears; and after reciting an indenture of the 27th of *May*, 1805, whereby *Ambrose* granted to *Joseph Jacob* an annuity of 110*l.* charged upon the rectory, and secured by a demise of the rectory for sixty years, and appointed *Matthias Deane* receiver of the tithes and profits of the rectory, in trust, to secure the annuity, *Ambrose* confirmed the appointment of *Deane* as receiver, and *Deane* agreed to apply the surplus of the tithes and profits of the rectory, after satisfaction of the annuity of 110*l.* and certain other deductions in payment of the Plaintiff's annuity.

The bill further stated, that a memorial of the annuity was enrolled, and that the annuity had remained unpaid since the 29th of *May*, 1810; that *Deane* died without having acted as receiver; that in *February*, 1814, *Ambrose* took the benefit of the stat. 54 *G.* 3. *c.* 28. for the relief of certain insolvent debtors, and the Plaintiff had been appointed assignee of his estate and

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ral statutes in the 14, 18, and 43," of *Elizabeth*, was repealed by stat. 43 *Geo.* 3. *c.* 84. *s.* 10.; but by stat. 57 *Geo.* 3. *c.* 99. *s.* 1., so much of the acts of *Elizabeth*, "as relates to spiritual persons holding of farms, and to leases of benefices and livings, and to buying and selling, and to residence of spiritual persons on their benefices," and also the statute of 43 *Geo.* 3. *c.* 84., are repealed. It seems therefore that so much of the stat. 13 *Eliz.* *c.* 20. as relates to the charging of benefices, and the provisions in stat. 14 *Eliz.* *c.* 11. *s.* 15. concerning bonds, contracts, promises, and covenants, for permitting any person to enjoy any benefice with cure, or to take the profits thereof, remain in force.

effects,

effects, of which an assignment had been made; that by reason of prior incumbrances affecting the rectory, and in particular of an outstanding term created by the indenture of the 27th of *May*, 1805, and then vested in the Defendant, *Robert Coddrington*, the Plaintiff was unable to proceed at law to enforce his remedies against the rectory; and that the Defendant, *Stephen Eaton*, was in possession of the rectory under a sequestration granted to him by the Bishop of *Peterborough*.

The bill proceeded to state an assignment of *Jacob*'s annuity to *Robert Coddrington* in *July*, 1807, and subsequent grants of annuities by *Ambrose*; and particularly a pretence of the Defendants, *Stephen Eaton* and *William Johnson*, that by an indenture of the 27th of *July*, 1809, *Ambrose*, in consideration of 3000*l*., granted an annuity of 417*l*., during his life, to *Eaton*, and demised the rectory for 99 years to *Johnson*, in trust, to secure the payment; and a pretence of the Defendant, *Augustus Manning*, that *Ambrose* was indebted to him in the sum of 4807*l*. upon a judgment; and charged that the sums of 3000*l*. and 4807*l*. were never paid to *Ambrose*, and that the grant of the annuity and the judgment were merely colourable transactions to enable *Ambrose* to retain possession of the rectory, and to exclude the Plaintiff and other creditors, and that with that view *Eaton* and *Manning*, on the 26th of *June*, and the 14th of *November*, 1811, respectively, procured sequestrations of the rectory to be granted to them by the Bishop of *Peterborough*; and by virtue of such sequestrations, they, or one of them, had entered into possession of the rectory, and had received the tithes and profits to a considerable amount; and though they had notice of the Plaintiff's annuity as a charge upon the rectory, had advanced various sums to *Ambrose* out of their receipts.

The bill prayed an account of the arrears of the Plaintiff's

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Plaintiff's annuity, and that the future payments might be secured out of the tithes and profits of the rectory; a reference to the Master to take an account of the incumbrances affecting the rectory, and to ascertain their priorities, and what was due upon them respectively; an account of all sums received by the Defendants, *Eaton* and *Manning*, or either of them, &c., from the tithes and profits of the rectory, and application of the amount, after deducting the sums expended by them in the salaries of curates and all other just allowances, in payment of what was due to the Plaintiff, and the other creditors of *Ambrose*, according to their priorities; and if it should appear that *Eaton* and *Manning*, or either of them, had advanced any sum to *Ambrose* out of the tithes, &c., after notice of the Plaintiff's annuity, that they might be charged therewith; and that the Plaintiff might be let into possession of the rectory, or that a receiver might be appointed with the usual powers; and an injunction to the Bishop of *Peterborough* from granting, and to the other Defendants from taking out or proceeding in, any sequestrations against the rectory, or collecting or receiving the tithes or profits thereof.

July 30. The allegations of the bill having been supported by affidavit, on this day a motion was made on behalf of the Plaintiff, for a receiver, and an injunction.

Mr. *Hart* and Mr. *Seton*, in support of the motion, referred to *Errington* v. *Howard* (*a*), and *Silver* v. the Bishop of *Norwich*. (*b*)

(*a*) *Amb.* 455.

Sir

Aug. 1816. (*b*) SILVER v. The BISHOP of NORWICH.

A receiver appointed of the profits of a rectory under

The bill stated, that previous to *December*, 1809, *Augustus Beevor*, one of the defendants, being possessed of certain rectories, and a vicarage in the diocese of *Nor-*

Sir *Samuel Romilly* and Mr. *Barber* against the motion.

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Norwich, contracted with the Plaintiff *Silver*, for an annuity for his life, to be charged on the rectories and vicarage; and accordingly, by indenture dated *December* 2, 1809, *Augustus Beevor* bargained and sold to *Silver* an annuity of 343*l.* during the life of *Augustus Beevor*, charged upon the rectories and vicarage; and the indenture contained a covenant on the part of *Beevor*, in case the annuity should be in arrear, to permit distress and entry by *Silver*; and *Beevor* demised to the Plaintiff *Sparkes*, the rectories and vicarage for 99 years, if *Augustus Beevor* should so long live, in trust, in case the annuity should be in arrear, by demise, sale, or mortgage, to raise the arrears.

The bill stated a similar indenture for securing an annuity of 300*l.* to the Plaintiff *Rolleston*. Both annuities were secured by warrant of attorney, and both were in arrear; and, on the 15th *May*, 1812, *Silver* and *Rolleston* (having severally entered up judgments, &c.) obtained sequestration against the rectories and vicarage.

On the 12th *November*, 1812, *James Beevor* procured sequestration to be actually granted to him by the Bishop of *Norwich*, and had ever since been, and then was, in the receipt of the profits under it.

In *October*, 1811, *Augustus Beevor* took the benefit of an insolvent debtors' act, under which *Silver* was appointed his assignee.

The bill charged, that the debt upon which *James Beevor* had obtained sequestration was collusive; that he was a trustee for *Augustus Beevor*, with notice; and fraud, &c.; and, after stating the claims of several other Defendants, who had sequestrations against the livings, and annuities charged on them, which they pretended were prior, and charging that they were not; the bill prayed an account of the arrears of the annuities; that the arrears and future payments might be paid out of the profits of the living; that the sequestrations of *James Beevor*,

sequestration, and an injunction granted against enforcing sequestrations.

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The LORD CHANCELLOR.

I remember, that in the case of *Silver* v. the Bishop of *Norwich*, I had occasion to consider the authorities relative

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Beevor, and those of the other Defendants, might be declared fraudulent, and an account be taken of what *James Beevor* and the Bishop had received under them, to be paid over for the benefit of the parties interested therein; a reference to ascertain the priorities of the annuities; that *Silver* might be let into possession; a receiver, and an injunction.

After the answers had been filed, the Plaintiffs moved for a receiver of the rents and profits of the rectories and vicarage; and an injunction to restrain the Bishop of *Norwich* and *James Beevor* from collecting the rents, &c., and to restrain other Defendants from putting in force the sequestrations which they had obtained.

Mr. *Hart* and Mr. *Seton* in support of the motion.

Sir *Samuel Romilly* and Mr. *Barber* opposed the motion, on the ground that the Court had no jurisdiction to interfere with a possession under a sequestration by appointing a receiver.

The LORD CHANCELLOR. The legal estate is not in the sequestrator. The trustee of the Plaintiff, under the demise of the term by which the annuity is secured, might bring ejectment, and in that recover the glebe and the tithes. It is said the legal estate is in one *Scott*, under a demise of a prior date, to secure a previous annuity, and that *Scott* will not consent to the receiver. But, I apprehend, the Court will not allow a prior incumbrancer to object to the Court's appointing a receiver by any thing short of a personal assertion of his legal right, and a taking possession himself.

In the course of the long vacation of 1816, the following written judgment was sent to the parties.

The LORD CHANCELLOR. I should have sent this case to town sooner, if, upon reading the pleadings attentively, I had not found more difficulty than what occurred to me upon the mention of the case in Court.

The objection to *Silver's* annuity, founded in what is stated (in the answer) as to the

lative to this question; but my present recollection is not sufficiently precise to enable me to pronounce judgment.

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the *memorial* (*a*), makes it necessary, on this motion for a receiver, to consider the case as founded only in the claim of *Rolleston* for his annuity. With respect to any claim which *Rolleston* can have under his sequestration of the 15th *May*, 1812, the pleadings deny that sequestration. (*b*)

I cannot, in the question about appointing a receiver, now enter into the consideration what may be fit to be done if he obtains a valid sequestration hereafter. If he has now no valid sequestration, I do not see what right he has to an account now under a sequestration, even if he should have that right when he has obtained a valid sequestration.

But perhaps this case will be found not to depend upon the rights connected with sequestration, or sequestrations, merely. *Rolleston*'s annuity is secured by a term of ninety-nine years, created in *December* 1809, and he seems, by the persons in whom that term is vested, to have a right to proceed by law to take possession against all subsequent judgment creditors, having obtained sequestration; and therefore against *James Beevor*'s judgment, unless there are prior outstanding legal estates, that would bar his title in ejectment. If he has such a right, and can proceed at law, he is not entitled to have a receiver in equity. The bill has indeed stated as pretences, that there are prior annuities of 1805 and 1807, without stating, whether the grants are of such a nature as would bar the Plaintiff's proceeding in ejectment under the demise, for it does not state these prior grants with much particularity as to the effect of them; but whatever they are, the bill, instead of admitting their existence, and stating that existence to be a bar to the Plaintiff's proceeding at

(*a*) That it had not been duly enrolled.

(*b*) It was said to be invalid as not having been duly published. *Legassicke* v. *The Bishop of Exeter*, 1 *Crompton*, 359.; see *Tidd's Practice*, 1004. n.

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The LORD CHANCELLOR.

Where a creditor of a clergyman seeks to obtain payment of his debt by judgment and sequestration, he is, in

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law, expressly charges that there are no such annuities, and that the suggestion that there are such is mere pretence. The answer indeed of *Augustus Beevor* or *James Beevor*, after asserting that *James*'s judgment is not colourable or in trust, represents his judgment for 10,000*l.* to be for securing 1388*l.* debt, and what he pays as surety for *Scott*'s annuity, which is prior to the Plaintiff's, and for various sums which *James* had paid for *Augustus*.

But this part of the answer does not so state the securities for *Scott*'s annuity, as to enable any judgment to be framed, whether there is an estate created for securing *Scott*'s annuity, such as would defeat the proceedings in ejectment, under the ninety-nine years' term, created by the demise in the deed of *December* 1809; and if that proceeding can be sustained, and it does not appear upon these pleadings that it cannot be sustained, I apprehend a receiver cannot be appointed. It is also true that it does not appear one way or the other by the answers, whether *James Beevor* has a right to make use of his judgment as against the Plaintiff *Rolleston* and his demise for ninety-nine years, with respect to the sums which he has paid for *Augustus Beevor* beyond his payment of *Scott*'s annuity. But *James* has sworn to a large sum of money being yet due to him, and I apprehend the Plaintiff cannot be entitled to a receiver, unless he can show by the record, that if he is entitled as a prior judgment creditor having a right to a subsequent valid sequestration, (the present sequestration of *Rolleston* being denied to be valid) the demand is satisfied in respect of which *James Beevor* is entitled to make use of his sequestration, or unless he can show from the record, that whatever be the claim of *James Beevor*, satisfied or unsatisfied, the Plaintiff has a right to the possession, by virtue of his demise for ninety-nine years prior to *James Beevor*'s title, but that by virtue of some prior legal estate, which would prevent his availing himself of the ninety-nine years' term, he

cannot

in the contemplation of this Court, in the same state as any other creditor who has taken out execution; and, a cre-

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cannot make use of it at law, and therefore is obliged to come into equity; and it seems to me that upon the present state of the record it cannot be shown that this is sufficiently manifest for the purpose of this motion. I am therefore upon the whole afraid that the case, as it stands upon the record, does not admit enough for the appointment of a receiver, and that more admissions must be obtained by compelling further answer. I have, however, stated the grounds upon which I think I cannot grant the motion, that either party may offer to me their observations upon what I have stated; being apprehensive that the justice of the case is more with the Plaintiff as to having a receiver appointed, than it perhaps can be shown to be upon the state of the present record. From Mr. *Merivale's* MSS.

A receiver was afterwards appointed.

His Lordship doth order, that it be referred to Sir *John Simeon*, baronet, one, &c., to appoint a proper person to be receiver of the rents, tithes, issues, and profits of the rectories and vicarage in the pleadings of this cause mentioned, and to allow him a reasonable salary for his care and pains therein, such person so to be appointed first giving security, &c.; and the tenants of the said estates are to attorn and pay their respective rents in arrear, and growing rents, to such receiver, who is to be at liberty to let and set the said estates from time to time, with the approbation of the said Master, as there shall be occasion; and it is ordered, that the said Master do inquire what annuities and incumbrances there are affecting the said estates, and he is to state their priorities; and it is ordered, that the person, so to be appointed receiver, do keep down the said annuities and the interest of the said incumbrances, according to their priorities; and it is ordered, that he do pay the balance that shall be reported due from him, from time to time, into the bank, &c.; and in the meantime it is ordered, that the Defendants, the Bishop of *Norwich* and *James Beevor*, be restrained,

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creditor, having taken out execution, cannot hold property against an estate created prior to his debt. If, by *elegit*, one creditor is in possession of one moiety, and another creditor of another moiety, that is good against the debtor; but if there is an antecedent estate, by virtue of which an ejectment may be brought, it does not appear that against that estate the creditors can hold. Here the Plaintiff could not succeed in an ejectment, because there is a prior estate which may be set up against him; but though a second incumbrancer, yet being prior to the creditor who has taken out sequestration, it appears to me that he is entitled to a receiver.

18th *August*, 1818. — " This Court doth order, that the Defendants be restrained from collecting or receiving the tithes, issues, and profits of the rectories, in the pleadings mentioned; and it is ordered, that it be referred to Mr. *Courtenay*, one, &c., to appoint a proper person to collect, get in, and receive the said tithes, issues, and profits, &c.; and it is ordered, that the said Master do take an account of the incumbrances affecting the said rectories, and ascertain their respective priorities; and it is ordered, that the receiver do, out of what he shall so receive, pay and keep down what is or may become due and payable for, or in respect of such incumbrances, according to their respective priorities; and he is to be allowed what he shall pay in respect thereof, in passing his accounts before the said Master, and for

by the injunction of this Court, from commencing or prosecuting any proceedings in respect of the matters in the bill mentioned; and it is ordered, that the Defendants *Miles Beevor*, *William Unthank*, and *Mary Beevor*, be restrained from putting in force the sequestration obtained by them in the pleadings of this cause mentioned, until the farther order of this Court. — Reg. Lib. B. 1815. fol. 1733 — 1735.

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the better taking the said accounts, &c." — Reg. Lib. B. 1817, fol. 1629. (*a*)

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(*a*) See concerning sequestration of ecclesiastical property, *Cuddington* v. *Withy*, *ante*, vol. ii. p. 174., with the references; to which may be added *Berwick* v. *Swanton*, *Bunb.* 192. n. 1 *Wood*, 295. 2 *Gwill.* 537. *The Bishop of Norwich* v. *Buckler*, 2 *Gwill.* 610. *The Bishop of London* v. *Nicholls*, *Bunb.* 141. 2 *Gwill.* 648. *and Hubbard* v. *Beckford*, 1 *Haggard*, 307.

"*Pasch.* 10 *Ann. B. R.* COVENTRY'S CASE. — The bishop grants a sequestration upon a *fieri facias*, against a clergyman; and returns that he had granted such sequestration, but that *A.* and *B.*, tenants of the land, refused to pay the rent according to it: upon a motion for an attachment against *A.* and *B.*, it was objected, that there was no affidavit that *A.* and *B.* refused to pay; but the Court held the return of the bishop, who, in this case, is in nature of the sheriff, sufficient." — From Sir *Clement Wearg's MSS.*

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March 17.

MUNYARD *v.* NEW.

Construction of an obscure will — executors not beneficially entitled.

THE will of *James Daniel*, dated in *April*, 1812, was in the following words: "Whereas my good and faithful servant, *Ann Glayshier*, has been kind, and done a mother's part towards my daughter from her cradle, and I putting great confidence in her future care and attention to and for my daughter's happiness, and for those reasons I do order and direct, that all the rents and profits arising from all and every part of my estates or effects shall be paid into the hands of my faithful friend *Ann Glayshier*, together with all the interest of any money in the public funds, and that her receipt shall be a full discharge for all monies received by her; and I order and direct, that she may recover and receive all money that may be owing to me, and that it may be paid into her hands; and after paying my just debts,

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and funeral expenses, the money to be applied as follows: First, I give and bequeath unto my faithful *Ann Glayshier* the sum of 200*l. per annum* for and during her natural life, together with the use of all my household furniture, for her use, not subject to the debts or controul of any future husband; and I do order and direct, that the interest of all the other monies arising from my estate and effects shall be applied as my executors shall direct, for the comfort of my daughter, as may be thought proper, subject to the direction and advice of my faithful friend *Ann Glayshier*, and that no part of the money shall be subject to the debts or controul of my daughter's present or any future husband; and I do order and direct, that, in case my son-in-law, *Joseph Munyard*, treats my daughter with kindness, and permits her, and that she does stay as long as she pleases with any of her friends or relations, and that in case my daughter shall, from any cause or infirmity of mind, or illness, be put under the care of her friends, and that it shall be the wish of my daughter to remain with her friends, that her husband shall not take her away, or compel her to live with him, in case she does not like it, and that her husband, *Joseph Munyard*, signs a deed drawn up for that purpose, and that my daughter is not compelled to live with his mother, or any other part of his family; and on my daughter's husband complying with these terms, then, and in that case, after the decease of my daughter and *Ann Glayshier*, the whole of all my houses and lands shall go to my daughter's husband, *Joseph Munyard*, his son, *Joseph Daniel Munyard*; and, after his son's decease, to be subject to the will of my son-in-law, *Joseph Munyard*, his heirs or assigns for ever; and in case my daughter's husband does not comply with these terms, then, and in that case, I leave it to the full power of my executors to dispose of all my property to and

amongst my own relations as they think proper, after the decease of my daughter; and should I leave any money in the public funds, then I order and direct, that one half shall go and be subject to the same conditions, to the use and benefit the same as the other property for the benefit of my daughter, and, after her decease, to go to *Joseph Munyard* and his son; the other half of the funded property to be disposed of by my executors as they may judge right; in case of the decease of my son-in-law, *Joseph Munyard*, then I do order and direct the whole of my property besides *Ann Glayshier's* part, shall go and be applied for the whole benefit and support of my daughter, *Sarah Ann Munyard*, and her son."

The testator appointed *Ann Glayshier*, *George New*, and *Charlotte Nash*, his executors and executrix.

On the 27th of *August*, 1812, the testator executed a codicil; which, after referring to his will, as in the possession of *F. J. Rowbotham*, proceeded thus: "Whereas, in and by my said will, I have given and devised my real and personal property, and to the persons, and in the manner therein expressed, the whole particulars of which I do not recollect, and I have therein nominated and appointed *George New*, with other persons, as trustees and executors; now, I do, by this codicil, which I direct to be added to and taken as part of my said will, nominate and appoint my said friend *Francis Jonathan Rowbotham* to be a trustee and executor of my said will, jointly with and in addition to the said *George New* and the other persons therein named; and in case of any inaccuracy or insufficiency as to the disposition of all or any part of my real or personal property, I do hereby give, devise, direct, limit, and appoint, all my real and personal, of every description, in *Great Britain*, or elsewhere belonging to me, or over which I have

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have any power of appointment or disposition, unto the said *F. J. Rowbotham*, jointly with the said *George New* and the other persons therein named as trustees or executors in my said will, and to their heirs, executors, administrators, and assigns, upon trust for the several persons, and to be disposed of in the manner expressed concerning the same, in and by my said will, which I do hereby ratify and confirm, in all respects not hereby varied or altered."

The testator died on the 29th of *August*, 1812, possessed of some leasehold and copyhold estates and money in the funds.

The bill filed by *Sarah Ann Munyard*, his only child, stated that *George New* and *Ann Glayshier* proved the will, and that the latter had retained to her use the testator's household furniture, without having signed an inventory.

The bill charged, that the general devise and bequest to all the executors in trust, contained in the codicil, revoked the special direction in the will, with regard to the receipt of *Ann Glayshier* alone; and, that by the true construction of the whole of the will and codicil together, the executors took the whole of the property not specifically bequeathed in trust for the Plaintiff for her life, or during her coverture, with a future contingent benefit to her, in case she should survive her husband; and that although the executors and trustees might be empowered to exercise a discretion as to the mode of applying the same for the Plaintiff's comfort, still the whole income of the testator's property, after paying *Ann Glayshier's* annuity, must be so applied, or if not, that whatever the executors should not think proper to be applied for the Plaintiff's comfort and benefit during her

her coverture, ought to be accounted for by them, and laid out as part of the testator's general estate, for the benefit of those entitled to the residue.

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The bill prayed, that the trusts of the will might be carried into execution for the benefit of the Plaintiff and all persons interested; the usual account of the testator's personal estate, and of his copyhold and leasehold estates; and that it might be ascertained of what particulars the clear residue might consist; and that the Plaintiff might be declared entitled to the whole interest or income of such residuary estate, to her separate use for her life, or during her coverture, with such future contingent interest absolutely as thereinbefore mentioned; or that the right and interest of the Plaintiff, and the several parties might be ascertained and declared; and that directions might be given for renewing any of the testator's copyhold and leasehold estates which might require renewal; and to that end, if *George New* and *Ann Glayshier* should not be held to have in them, as acting executors, sufficient estate and interest in the copyhold estates, without the joining of the executors and trustees named in the will, then that such other executors and trustees might join, or assign and convey their interest therein respectively, to the acting trustees and executors; and that, if necessary, a receiver might be appointed of the copyhold estates, with the usual directions.

Ann Glayshier, by her answer, claimed the annuity of 200*l.*, and submitted whether she and the other executors were entitled, for their own benefit, to a moiety of the testator's property in the public funds; and whether she was entitled to receive, during the life of the Plaintiff, the rents and profits of the testator's copyhold and leasehold estates, and the interest or annual produce of the clear residue of his personal estate other than his household furniture, and thereout to retain and pay

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pay to herself the annuity of 200*l.*, and to apply the remainder according to the directions of the will; or whether she was only entitled to be paid during her life the annuity of 200*l.*; and in that case, out of what fund.

The case, on farther directions, was argued by Mr. *Trower*, Mr. *G. Wilson*, Mr. *Hart*, and Mr. *Treslove*, for different Plaintiffs; Mr. *Bell* and Mr. *Shadwell*, for the Defendant *New*; Mr. *Wetherell* and Mr. *Roupel*, for *Rowbotham*; and Mr. *Heald* and Mr. *Cooper*, for *Ann Glayshier*.

The following authorities were cited: *Bro. Abr. Devise* pl. 39. *Anon. Moor*, 57. *Robinson* v. *Dusgate* (*a*), *Hales* v. *Margerum* (*b*), *Tomlinson* v. *Dighton* (*c*), *Nannock* v. *Horton* (*d*), *Maskelyne* v. *Maskelyne* (*e*), *Timewell* v. *Perkins* (*f*), *Goodtitle* v. *Otway* (*g*), *Gibbs* v. *Ramsey* (*h*), *Paice* v. *The Archbishop of Canterbury*. (*i*)

The MASTER OF THE ROLLS.

In the construction of a will so strangely framed, considerable difficulties are inevitable. The principal question is, whether the testator did not intend to give one moiety of his funded property to his executors? The subordinate question, who fill the character of executors — those only who have proved, or those also who have not proved, and in what proportions they take? — will not arise till the previous question is decided.

It is fair to contemplate the situation of the testator and his family, as some guide to his intention. Having copyhold, leasehold, funded, and other personal property,

(*a*) 2 *Vern.* 181.
(*b*) 3 *Ves.* 299.
(*c*) 1 *P. W.* 149.
(*d*) 7 *Ves.* 391.
(*e*) *Amb.* 750.
(*f*) 2 *Atk.* 102.
(*g*) 2 *Wils.* 6.
(*h*) 2 *Ves. & Bea.* 294.
(*i*) 14 *Ves.* 364.

and

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and only one child, a daughter, peculiarly requiring his protection, and marked out as the object of his care, and married to a husband with whom there had been disputes, and having one son of the marriage, without any misconduct on her part, and she still appearing to be the principal object of his bounty: to suppose that the testator meant to bestow one half of his property on strangers, not on any substituted object, having a prior claim, but merely to give it from his daughter and grandson, is a conclusion which the Court would not adopt, unless the words of the will peremptorily require it.

The will (which is written by his own hand) manifests an intention to embrace the whole of the testator's property, real and personal, expressly including interest arising from the funds, which is to be paid into the hands of *Ann Glayshier*, an object of his bounty, but principally with reference to the chief object of bounty, his daughter; and, as a means of conducting it to her, she is to retain to herself 200*l. per annum* for her life, not subject to the debts or controul of her husband; and a question has arisen, whether the household furniture was given absolutely to her, or only the use of it during life? I am of opinion, that it was the testator's intention to give to her the use for life only; that gift is expressly connected with the sentence that gives to her an annuity for life: both the subjects thus united are evidently intended to be given for the same period. Pursuing the general question, all the interest of money in the funds, and all the rents of the lands are given to *Ann Glayshier*, subject to this annuity of 200*l.*; and the testator then directs, that the interest of all his other monies should be applied as his executors direct for the comfort of his daughter. This is a disposition of interest only, not of capital. The interest of every part of his property, after satisfying the annuity of 200*l.*, is devoted to the

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the comfort of his daughter; but that clause, undoubtedly, extends to give to her the interest only, not the *corpus* of the estate. Then, leaving for a time the disposition in favour of his daughter, the testator proceeds to the case to which he had anxiously adverted, hoping to induce the husband to treat his daughter with kindness. The deed to which the will refers appears, by the Master's report, to have been prepared in 1810, though not executed till after the date of the will in 1812; but the testator by the will invites the husband to execute this deed, making the execution a condition of the benefits conferred on him, and thus imposing an obligation to treat his wife in the manner prescribed. In case of compliance with those terms, the real property, but no part of the personalty, is devised, after the decease of the wife, to the husband and grandson, to be at the absolute disposal of the former, after the death of the latter. That is the first alternative, compliance.

The testator then adverts to the alternative of non-compliance. (*a*) The first observation on this clause relates to the words, "all my property;" terms large enough to comprehend every thing of which he was possessed; but the question is, whether he did not mean all his *said* property, all that which he had just given in the event of compliance, namely, houses and lands; designing, in case of a compliance, a gift to his son-in-law; in case of non-compliance, an absolute power of disposal by his executors among his family, after the decease of the daughter, who was to enjoy the rents of the land, and the interest of the funded property. Then, assuming that the testator is pursuing the same alternative, the event of non-compliance of the husband, having declared what was to become of the lands in that event, that they were to be distributed by his executors among

(*a*) See the clause, *ante*, p. 120.

his

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his relations, was the son-in-law to be left destitute? What was to become of the funded property? To that he next proceeds. The clause is, indeed, subject to considerable difficulty and confusion; the testator is entangled by a multiplicity of words, but the question is, whether the Court cannot discern his intention? Whether it is not apparent, that he is now making a disposition with regard to the funded property, in the event in which he had previously disposed of the landed property?

Designing his will to operate *in terrorem* on his son-in-law, if he did not treat his daughter according to the terms of the deed, the testator directs that he shall forfeit all the landed property, and that his executors shall dispose of it; and as to the funded property, instead of having the whole, the son-in-law and grandson shall have only a moiety. It might be reasonable that his grandchild, the son of his only daughter, and the father of that son, should not be totally destitute, but that a reduced provision should be made for them; the other moiety is left to the disposal of his executors. The same power that the testator thought fit in the first instance to give to his executors over the landed property, as a punishment for the non-compliance of the son, he here extends to the funded property.

The difficulty of this part of the case arises from his having embarrassed his meaning with the words, "subject to the same conditions, to the use and benefit as the other property for the benefit of my daughter;" words which certainly create a considerable obscurity; but the main object of this clause seems to be, not to make a new disposition in favour of the daughter, but to provide that one moiety of the funded property should belong to the son and grandson, and the other moiety be at

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at the disposal of his executors. This construction appears best to reconcile the whole will, and executes the testator's natural intention of providing for his daughter, and securing protection to her, with an eventual power to the executors in case of non-compliance; regulating the disposition of both species of property, after the death of the daughter. It would be most unnatural that the ill usage or neglect of the husband, which rendered her a more just object of attention, should deprive her of a provision during her life. The misconduct of the husband ought not, and could not be intended, to operate in abrogating the bounty bestowed on the daughter. The words here introduced, "given for the benefit of my daughter," are evidently terms of reference, not of a new bequest; for they cannot be understood as a bequest of capital: after the death of the daughter this was to go to the son and grandson, but would operate to give to the daughter the interest. When on one construction the effect of the second part of the will, relative to the same subject and the same object, would be to reduce the gift in the former part, contrary to every probability of intent, to the prejudice of the principal object of the testator's bounty, the Court must incline to a different construction.

The concluding clause, "the whole of my property," &c. (*a*), may be fairly understood to express his intention, if the son-in-law was removed, to give the whole to the daughter. Supposing that the son had died during the daughter's life, notwithstanding the intermediate clauses, under the last clause the daughter would take the whole. What then would have become of that which is supposed to be a substantive independent gift of one moiety to the executors? In the event of the

(*a*) *Ante*, p. 121.

son's

son's death in her life, the whole devolves to the daughter. That manifests the testator's intention, that his daughter should take the whole, unless in certain events particularly mentioned.

The best construction, though not unattended with difficulties, is, that it was the testator's purpose to give the whole to his daughter for her life, to give the houses and lands to the husband, and to provide for an event not improbable, non-compliance with the terms of the deed. Nothing short of imperative words could compel the Court to declare that it was the intention of the testator to deprive his daughter of the funded property, for the benefit of his four executors, one of whom had been an object of his bounty to the extent of 200*l. per annum*. The general and loose form of the gift to the executors, denotes a gift to strangers, only in the event of the misconduct of a prior legatee.

This construction renders it unnecessary to consider the subordinate questions.

" His Honour doth declare, that the Defendant, *Ann Glayshier*, is entitled to the use of the testator's furniture for life, and doth order that an inventory be made thereof, signed by her and the other Defendants, the executors; and it is ordered, that two parts be made thereof, and it is ordered, that one part be deposited with the Master; and his Honour doth declare, that she is also entitled to a life-annuity of 200*l.* charged on the real and personal estate; and subject thereto, doth also declare, that the Plaintiff, *Sarah Ann Munyard*, is entitled for her separate use, to the interest and dividends of the testator's personal estate and funded property, and to the rents and profits of his real estate, for her life; and

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doth declare, that the said Defendant, *Joseph Munyard*, having executed the deed, and in other respects conformed to the directions contained in the testator's will, has entitled himself to such eventual benefit in and out of the testator's estate, as in the testator's will mentioned; and upon the death of the Plaintiff, he, or any other person interested in the estate of the testator, are to be at liberty to make such application to the Court in regard thereto, as they shall be advised; and his Honour doth declare, that the Defendants, the executors of the testator, take no beneficial interest, as such executors, under the said testator's will." Reg. Lib. B. 1818, fol. 1256.

July 25. *Exparte* PRICKETT, in the matter of the Duchess of NORFOLK, a lunatic.

Apportionment of the costs of granting a lease of a lunatic's estate, between the estate and the lessee.

THIS petition, presented by one of the receivers appointed in the lunacy, prayed the confirmation of the Master's report, that it would be for the benefit of the estate of the lunatic that a lease should be granted to *E. Stone*, of two farms described, on the terms specified, and a reference to approve a lease, and taxation of the costs of the petitioner, and the next of kin, and committees of the estate of the lunatic, relating to the proposal for and granting the lease, to be paid by the petitioner, and allowed in passing his accounts.

Mr. *Norton*, for the petition; Mr. *Bell*, for the committee of the estate; Mr. *Wetherel*, for the next of kin.

The LORD CHANCELLOR.

The usage in lunacy is, that the committee pays the expenses

expenses of the inquiry, and the lessee of the lease. — Take the order in those terms. (*a*)

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The order directed the Master to tax the petitioner, and the committees of the lunatic's estate, and the next of kin of the lunatic, their costs and expenses incurred about the proposal for granting the lease, and of the ap-

(*a*) In CHANCERY. 24th *May*, 1788.

Exparte JERMYN.

Petition in Lunacy.

A lease renewed for the benefit of the lunatic's estate ought to be taken in the name of the lunatic if it were so at the time of the lunacy, but if originally in trust for the lunatic, then to the committee.

Upon reference to the Master to inquire whether it would be for the benefit of the lunatic's estate to renew a lease holden under a college, and the Master having reported it to be beneficial to procure such renewal, the present petition prayed that the report might be confirmed, and that the committee might be at liberty to surrender the old lease, and that a new one might be granted by the college to the committee for the usual term.

The LORD CHANCELLOR had some doubt whether the new lease ought not to be in the name of the lunatic, and not of his committee; and asked whether this lease at the time of the lunacy was in the lunatic himself, or in any other person in trust for him? To which it was answered by the solicitor, that this was a very old lunacy, and that this lease had been from time to time renewed in the name of the committee, but whether the lease subsisting at the time of the lunacy was made to the lunatic himself, he was not able to inform the Court.

His Lordship said, if the lease was at the time of the lunacy made to some other person in trust for the lunatic, he should continue it so, as in that case he should not change the estate; but if the lease was in the lunatic himself, and only taken out of him by the act of the Court, the new lease ought to be made to the lunatic himself, and not to his committee. And his Lordship directed an inquiry as to this fact. — From Mr. *Cox*'s Notes.

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plication, and relating thereto; and those costs when taxed, were to be paid by the petitioner out of the rents and profits of the lunatic's estate, and allowed in passing his accounts; but the costs and expenses of the lease and counterpart were to be borne by the petitioner. (*a*)

(*a*) It was understood that those costs should be paid by the lessee.

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April 1. 2. 7. 11.
1823.
Feb. 11.
March 11. 13. 15.

A modus of one penny in lieu of the tithe of hay of every inhabitant or occupier of a house, and having any land at, or belonging to, or used or enjoyed with, any house, is invalid. The decree of the Master of the Rolls on the other moduses affirmed. A modus being clearly invalid as laid, the question of law is decided without directing an issue on the question of fact.

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THE decree pronounced at the hearing of this cause before the Master of the Rolls (*a*), on the 3d of *August* 1810, dismissed the bill, so far as it sought an account of the tithes of wheat, rye, barley, oats, peas, and beans; and directed a reference to the Master to take an account of all the other titheable matters and things demanded by the bill, which the Defendants *Thomas Jepson*, &c. had, since the 25th day of *December*, 1804, had or taken upon or from off the several farms or lands occupied by them respectively, in the several townships in the pleadings mentioned, (except gardens, orchards, eggs, geese, hay, colts, pigs, honey, wax, and wood burnt in their houses;) and an account of all Easter offerings, oblations, obventions, mortuaries, and other dues and payments which had become due from the Defendants respectively, to the Plaintiff *William Joule*, since the said 25th day of *December*, 1804; with the usual directions for taking the accounts.

The decree then ordered the Plaintiffs and the several

(*a*) 17 *Ves.* 473.

Defend-

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Defendants to proceed to a trial at law at the Spring assizes to be holden for the county of *Lancaster*, in the year 1812, upon the several following issues: 1. Whether by ancient custom, used and approved within the said parish of *Manchester*, from time whereof the memory of man is not to the contrary, hitherto there has been and now is due and payable at *Easter* in each year, or so soon after as lawfully demanded, by each and every inhabitant or occupier of a house situate in the several townships, precincts, and hamlets, in the parish of *Manchester* aforesaid, that is to say, *Beswick*, &c., and in all the other townships, precincts, or hamlets, in the said parish of *Manchester*, or any or either of them; and having any garden at or belonging to, or used and enjoyed with any house, and situate in the several townships, precincts, or hamlets aforesaid, or any or either of them, to or for the use of the rector or rectors for the time being of the said parish of *Manchester*, his or their lessee or lessees, farmer or farmers, for every such garden so occupied by every such person, the sum of one half-penny, for and in lieu and in full satisfaction of the tithes of all the titheable matters and things yearly arising, growing, renewing, and increasing, and had and taken in and from every such garden.

2. Whether by ancient custom, &c. hitherto there has been and now is due and payable at *Easter* in each year, or so soon after as lawfully demanded, by and each and every inhabitant and occupier of a house situate in the several townships, precincts, and hamlets, in the parish of *Manchester*, &c. having any orchard at or belonging to, or used or enjoyed with any house, and situate in the several townships, precincts, or hamlets aforesaid, or any or either of them, to or for the use of the rector, &c., for every such orchard so occupied by every such person, the sum of one penny, for and in

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lieu and in full satisfaction of the tithes of all the tithe-able matters and things yearly arising, growing, renewing, and increasing, and had and taken in and from every such orchard.

3. Whether by ancient custom, &c. hitherto there has been and now is due and payable at *Easter* in each year, or so soon after as lawfully demanded, by each and every inhabitant or occupier of a house situate in the several townships, precincts, and hamlets, in the parish of *Manchester*, &c., to or for the use of the rector, &c., for all hens kept by any such person on such land, the sum of one half-penny, in lieu and full satisfaction of the tithes of the eggs or young respectively, of all such hens.

4. Whether by ancient custom, &c. hitherto there has been and now is due and payable at *Easter* in each year, or as soon after as lawfully demanded, by each and every inhabitant or occupier of a house situate in the several townships, precincts, or hamlets, in the parish of *Manchester*, &c. and having any land at or belonging to, or used or enjoyed with any house, and situate in the several townships, precincts, or hamlets aforesaid, or any or either of them, to or for the use of the rector, &c., for all geese kept by every such person on such land, the sum of twopence, in lieu and full satisfaction of the tithes of the eggs and young respectively, of all such geese.

5. Whether by ancient custom, &c. hitherto there has been and now is due and payable at *Easter* in each year, or so soon after as lawfully demanded, by each and every inhabitant or occupier of a house situate in the several townships, precincts, and hamlets, in the parish of *Manchester*, &c. aforesaid, that is to say, *Beswick*, &c. and in all the other townships, precincts, or hamlets, in the

said parish of *Manchester*, &c. (save and except as to the tithe of hay of some parcels of land situate in the townships of *Manchester*, in the answer of the Defendants mentioned,) or any or either of them, and having any land at or belonging to, or used or enjoyed with any house, and situate in the several townships, precincts, or hamlets aforesaid, or any or either of them, and producing titheable matters and things to or for the use of the rector, &c., the sum of one penny, for and in lieu and in full satisfaction of the tithes of all hay of every such inhabitant or occupier having any such land as aforesaid, producing hay, whether such quantity be more or less.

6. Whether by ancient custom, &c. hitherto there has been and now is due and payable at *Easter* in each year, or so soon after as lawfully demanded, by each and every inhabitant or occupier of a house situate in the several townships, precincts, or hamlets in the parish of *Manchester*, &c. and having any land at or belonging to, or used or enjoyed with any house, and situate in the several townships, precincts, or hamlets aforesaid, or any or either of them, to or for the use of the rector, &c., for every colt fallen in such lands, the sum of four pence, in lieu and in full satisfaction of the tithes of every such colt.

7. Whether by ancient custom, &c. hitherto there has been and now is due and payable at *Easter* in each year, or so soon after as lawfully demanded, by each and every inhabitant or occupier of a house situate in the several townships, precincts, and hamlets in the parish of *Manchester* aforesaid, and having any land at or belonging to, or used or enjoyed with any house, and situate in the several townships, precincts, or hamlets aforesaid, or any or either of them, to or for the use of the rector, &c., for every farrow of pigs farrowed on such

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land, the sum of three-pence, for and in lieu and in full satisfaction of the tithes of every such farrow of pigs.

And it was directed that the Defendants in this cause be Plaintiffs at law, and the Plaintiffs in this cause be Defendants at law, who were forthwith to name an attorney, accept a declaration, appear, and plead to issue; and it was referred to the Master to settle the issues in case the parties differed about the same. And it was ordered, that all deeds, books, papers, and writings in the custody or power of any of the parties, be produced and left with the Master upon oath, as the Master should direct; and that the depositions of such of the witnesses examined in this cause as should be dead or unable to travel at the time of the trial, be produced, and read in evidence at the trial of the issues (saving just exceptions); and it was ordered that all the leases, tithe-books, and other documents which were produced, and given in evidence on the hearing of the cause, or before the commissioners named in the commission for the examination of witnesses, be also produced on the trial of the several issues at law. And his Honour reserved the consideration of the costs of the dismissal of the bill so far as it respects the demand of the tithes of corn and grain, and also of the rest of the costs of the suit, and of the trial of the issues, and of all further directions until after the Master should have made his report, and the trial of the issues should have been had; and any of the parties were to be at liberty to apply to the Court as as there shall be occasion. — Reg. Lib. A. 1809. fol. 1383 — 1387.

From this decree both the Plaintiffs and the Defendants appealed. (*a*) The Plaintiffs appealed from so

(*a*) 2 *Ves. & Beam.* 359.

much

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much of the decree as directed issues with respect to the tithe of hay, of gardens, of orchards, of hens, of geese, of colts, and of pigs; and as reserved the consideration of the costs of the dismissal of the bill, so far as it respected the demand of the tithes of corn and grain, and of the rest of the costs of the suit.

The Defendants appealed from so much of the decree as directed an account of the tithes of milk and calves, and agistment of cows not milked, and of the tithes of potatoes or other small prædial tithable matters; and insisted that issues ought to have been directed to try the moduses of 1½*d.* for each cow producing a calf within the year, in lieu of the tithes of the calf and milk of every such cow; and of 1*d.* for each cow called a farrow or barren cow, in lieu of the tithes of milk of such cow, if milked, and of the keep or feed of every such cow, if not milked; and of 1*d.* and 2*d.* for the small prædial tithes of lands cultivated by the plough, and called the plough and half plough.

The cause now coming to be heard on appeal, the Defendants objected a want of parties.

Sir *Samuel Romilly* for the Defendants.

The bill is filed by the warden and all the fellows of *Christ College, Manchester;* since the hearing, two fellows have died, and two new fellows have been elected in their place; for the same reason which rendered it necessary to have all the original fellows parties, the new fellows must be parties: at present no one sustains their interest; the fellows being Plaintiffs in their individual characters, not as members of the corporation, the deceased are not represented by the survivors. Among other

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other reasons, the new fellows are necessary parties in respect to costs, which the Court has reserved. The corporation is not a party to the suit; and if the Defendants are eventually entitled to costs, they must be recovered by attachment against the individuals, not by sequestration against the corporation. The cause is entitled not the *Corporation of Manchester*, but *Blackburn* and others, against *Jepson;* and the petition of appeal is presented under that title in the names of three living persons and two dead.

Mr. *Bell* and Mr. *Agar* for the Plaintiffs.

It is not necessary that all the members of the corporation should be parties. The decree declares that the Plaintiff *Joule*, not the corporation, is entitled to the tithes.

The LORD CHANCELLOR.

A suit by a corporation does not become defective on the death of some of the members; otherwise of a suit by the members in their individual character.

The question must be decided after an examination of the form of the decree:—if the Plaintiffs sue as a corporation, there is no defect of parties; if they sue as individuals, the objection must prevail. If it was originally necessary to make the warden and fellows parties to this suit, or if, though not from necessity, they have been parties from the beginning, and there is, by the decree, a reservation of costs, the Defendants are clearly entitled to the same security for costs, which was tendered to them in the institution of the suit; and that, notwithstanding that the Plaintiff *Joule* alone is declared entitled to the tithes.

Right of Defendants under a decree reserving costs, to a continued representation of all the original Plaintiffs, (though not necessary parties), as a security for costs.

The LORD CHANCELLOR.

A very material fact is, that the Defendants, subsequently

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quently to the appeal presented by the Plaintiffs, themselves presented an appeal (*a*), entitled in the same manner, and petitioned that their appeal might be heard at the same time with the Plaintiffs'. Is not that a waiver of the objection for want of parties? Proceed with the appeal.

Sir *Samuel Romilly.*

The Defendants' petition of appeal could not be otherwise entitled; they could not appeal in any other cause. If a suit has become defective by the death of parties, which renders necessary a bill of revivor or supplement, that objection cannot be waived.

The LORD CHANCELLOR.

Is not the fact of your petition evidence that you consider the information, however informal, as the information of the warden and fellows? (*b*)

Objections for want of parties removed by acts of Defendants.

(*a*) 2 *Ves. & Beam.* 359.

(*b*) The following cases on objections for want of parties, are extracted from MSS. in the possession of the editor.

Trin. 16 *Geo.* 2. 1742.

ANON. in CHANCERY.

Said per Lord *Hardwicke*, Chancellor, that where a bill is brought for a partition, a conveyance must be decreed, and therefore all parties necessary to make such conveyance must be made parties, and brought before the Court. Mr. *Cox*'s MSS.

Parties to a bill for a partition.

In CHANCERY. — *Trin.* 21 & 22 *Geo.* 2. 1748.

PIERSON *v.* ROBINSON, executor of *Foster*.

Upon an account made up between the Plaintiff, as captain of a ship, and *Foster* and *Barclay*, the two part-owners

One of two part-owners of a ship, hav-

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The counsel then proceeding to argue the case on appeal, a question arose which side should begin?

The

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ing assigned his share to the other, the former is a necessary party to a bill by a creditor of both against the representatives of the latter.

owners thereof, it was agreed that *Foster* and *Barclay* were indebted to the captain in 60*l*., and that the ship was liable thereto. *Foster* afterwards buys *Barclay*'s share in the ship, and dies.

And a bill was now brought against the executor of *Foster* only, for a discovery of assets, and for a satisfaction thereout of the said debt; and the bill suggested the death of *Barclay* before *Foster*, but it was not proved that *Barclay* was dead, and the Defendant answered that he did not know whether he was or not.

The question was, whether this debt is recoverable against the executor of *Foster* only, or whether *Barclay* or his representative ought not to have been made parties? And it was argued by the Attorney-General for the Plaintiff, and by the Solicitor-General for the Defendant.

The LORD CHANCELLOR.

Considering this as a personal debt, whether *Barclay* is now living, or whether he died before *Foster*, (though at law the demand survives,) I am of opinion, that *Barclay* or his representative ought to be made parties, because these are proper parties in account, especially as between the part-owners themselves, and they may perhaps shew in the account a satisfaction of part of the debt. As to the ship itself, no remedy lies here *in rem*, the admiralty only having jurisdiction as against that; and there is no reason for charging the executor of *Foster* in respect of the value, because *non constat* what is become of the ship? Besides, this bill is not adapted to such a demand, it being only for satisfaction out of the assets. The Court, therefore, can only decree for a moiety, or order the cause to stand over, with liberty to add parties, and the Plaintiff to pay the costs of the day.

And the cause was adjourned for him to make his declaration. MSS.

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The original appeal, and the cross-appeal together, bring the whole case before the Court; and it cannot be right that the appeals should be heard as if they were appeals

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In CHANCERY.—21 & 22 *Geo.* 2. 1748.

SAVILLE *v.* TANCRED. (*a*)

To a bill against a bailee, for re-delivery of jewels, persons entitled to a part of them are not necessary parties.

Bill for the delivery of a chest of plate and jewels, pawned originally in 1675, to Mr. *Saville* by one *Row*, and left by *Saville* in the custody of *Tancred*, with whom *Saville* lodged, and who always acted as his agent; and it appearing by the Defendant's answer, that in the chest there is a box of jewels, entitled, "a particular of jewels belonging to the Duke of *Devonshire*," and that this the Defendant informed the Plaintiff of before the bringing his bill, it was objected by Mr. *Brown* for the Defendant, that the representatives of the Duke (now deceased) ought to be made parties, that the Defendant may be safe in delivering up the jewels to the proper person.

But the Lord Chancellor clearly overruled the objection, because, as these goods appear to have been left with *Tancred* for safe custody only, he is obliged to restore them to the person depositing them, and the title of the Duke's representative (if any) will remain the same against the person to whom they are delivered. If *Tancred* was a pawnee only, he is compellable to deliver them up to the pawnor, not only here, but also in an action of trover or detinue.

Decreed, therefore, (*inter alia*), that the chest and every thing in it be delivered to the Plaintiff, but without costs on either side, because the paper written as above, though it be no defence, yet is some excuse to the Defendant for refusing to deliver the jewels. MSS.

(*a*) 1 *Ves.* 101.

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appeals in separate causes. Which side is entitled to begin, depends much on the question, Which has most to complain of in the decree from which they appeal? The

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Trin. 14 *Geo.* 2.

LAWLEY *v.* WALDEN.

When on a bill for an injunction in an ejectment at law against the Plaintiff's tenant, the tenant ought to be a party.

The bill was by the owner of lands, for an injunction to stay the Defendant's proceedings at law, upon an ejectment against the Plaintiff's tenant.

Demurrer, that the tenant was not made a party to the bill, and the demurrer allowed; but the Lord Chancellor said if the Plaintiff had been made a Defendant at law, as he might have been, he should not have thought it necessary to have made the tenant a party to his bill, notwithstanding his being a Co-defendant; but as he is the only Defendant at law, he must be a party here. Mr. *Cose's* M88.

EAST INDIA COMPANY *v.* COLES and Others.

Lincoln's-Inn-Hall, 15th January, 1783.

Whether a demurrer for want of parties should be to the whole bill.—*Quære.*

The bill was brought by the East India Company for an injunction to restrain the Defendant, *Coles*, (among others,) from proceeding at law on a bond given to him by the Defendants, *Herbert*, *Coles*, and *Palmer*, in the name of the said Company. The bill stated several transactions by the Defendant, *Herbert*, in conjunction with and *Kirkham*, both since dead, acting together as servants of the said Company, on a particular expedition, and afterwards transactions by the said Defendant, *Herbert*, acting with the Defendants, *Coles* and *Palmer*, in the same capacity, and required a discovery of all those transactions, and relief in respect of all of them, leaving a blank for the names of the representatives of and *Kirkham*; and prayed the injunction on the ground that the bond was given to *Coles* for a private debt of *Herbert* and *Palmer*, and that they were indebted on other accounts to the Company in a larger sum than

The rector complains that he has not received his tithe; that the Defendants have insisted on moduses which are not valid, and have attempted to prove the fact of modus,

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than the amount of the bond. The Defendant, *Coles*, demurred to the whole of the bill for want of parties, for that it appeared by the bill that the representatives of and *Kirkham* were necessary parties, and yet they were not before the Court.

When the demurrer came on to be argued, the counsel for the Defendant assigned *ore tenus*, as another cause of demurrer, that the bill was multifarious; and it was agreed to be regular in point of form, to assign such new cause without its being entered on the record (*a*), and that it was not necessary to specify the parts of the bill in which it was multifarious. It was agreed on both sides that there were some parts of the bill to which a demurrer would hold for want of parties; but it was insisted by the counsel for the Plaintiff, that a decree might be made as to part of the transactions against *Herbert*, *Coles*, and *Palmer*, without involving the representatives of and *Kirkham*; and that the demurrer would not hold as to those parts. It was insisted by the counsel for the Defendants, that the demurrer was good as to the whole, inasmuch as it sufficiently appeared by the bill, that the transactions involved and *Kirkham*, and that the Plaintiffs thought so by requiring discovery and relief against the representatives, and leaving a blank for their names; or if a separate decree could be made against *Herbert*, *Coles*, and *Palmer*, then that the bill was multifarious. They also contended that there could not be a partial demurrer for want of parties, but that a demurrer of that nature must extend to the whole bill.

January 16. The Lord Chancellor was inclined to think that there could not be a partial demurrer for want of parties, and that, therefore, a demurrer to the whole bill was proper, and had directed the register to allow the demurrer; but upon Mr. *Mitford*'s mentioning some cases wherein such partial

(*a*) *Ante*, vol. i. p. 288.

demurrers

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modus, when the pleadings raise no question on which the proof can be admitted: on the other hand, the Defendants

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demurrers had been allowed, *Finch*, 113., *Atwood* v. *Hawkins*; *Finch* 4., *Astley* v. *Fountaine*, 2 *Cha. Cas.* 197., *Pressendens* v. *Decrees*; the Lord Chancellor ordered it to stand over to the next day of demurrers; but the Plaintiff's counsel thought it would answer better their client's purposes to amend their bill, and pay the costs of the demurrer. Mr. *Coxe*'s MSS.

At the ROLLS, 22d *June*, 1786.

DELABERE v. NORWOOD.

Annuitants prior to a mortgage, need not be made parties to a suit by the mortgagee against the mortgagor for a sale, but the estate must be sold subject to the annuities.

This was a bill brought by a mortgagee against a mortgagor, praying a sale of the mortgaged estate. Two of the Defendants had annuities charged upon the estate, which were prior in point of date to the Plaintiff's mortgage.

The Master of the Rolls said, that it was quite unnecessary to bring the annuitants before the Court, and, therefore, notwithstanding they appeared at the hearing, and consented to a sale of the estate, he dismissed the bill as to them, with costs, and said that the estate must be sold subject to their annuities. If the annuities had been subsequent to the mortgage, in this case it might have been proper to have made the annuitants Defendants, because the Plaintiff then could have compelled them to join in a sale of the mortgaged estate; but even in that case they would not have been necessary parties.

Selwyn and *Mitford* for Plaintiff. *Brown* for Defendant. — From Mr. *Romilly*'s Notes. Lord *Colchester*'s MSS.

ROUTH v. KINDER and Others.

ROLLS, *February* 14th, 1789.

Parties to bill by creditors against trustees for sale.

Bill by *A.* on behalf of himself and other creditors, against *B.* and *C.*, trustees of estates conveyed in trust to pay debts, for account of produce of sales and payment

fendants have appealed on the question of agistment only. If the interest of the suitor, which must never be sacri-

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ment of their debts; *B.*'s representatives by their answer allege, that not only *C.* but also *D.* were trustees, and that *D.* acted in the trust, although they do not know whether he received any part of the produce. Defendant *B.* objected for want of parties.

Kenyon, M. R. held *D.* to be an unnecessary party; and *Arden*, M. R. in the same cause, held the same; and did not direct any inquiry before the Master upon this matter; *sed qu.* — for at the bar the general opinion was, that *D.*'s representatives ought to have been parties; nor could one creditor suing waive on behalf of absent parties, in joint interest with himself, the benefit or possible benefit of any part of the trust fund. — See *Cowslad* v. *Cely*, *Prec. in Cha.* 83. 1 *Eq. Ca. Ab.* 73. Lord *Colchester*'s MSS.

In the EXCHEQUER. *Nov.* 17th, 1790.

ROVERAY and Another v. GRAYSON and Another.

Injunction obtained by bail against a creditor after a verdict dissolved, the principal debtor, though a Defendant, not being within the jurisdiction.

This was a motion to dissolve an injunction on the coming in of the answer.

Burton and *Daniel* shewed cause.

The Plaintiffs were bail for one of the Defendants, sued at law by the Defendant *Grayson*, who, having got a verdict, was proceeding against them; and the bill set forth, that *Grayson* had pretended to have laid out various sums for the Defendant at law, *Kulnhaltz*, which in fact he had never paid; that goods had been remitted to him to be sold, which he had disposed of at an undervalue, collusively, and that most of them had been bought in on his own account; and it prayed an account of all the mercantile transactions between *Grayson* and the Defendant at law, *Kulnhaltz*, and that what appeared to be due from *Grayson*, might be set off against the verdict obtained at law, and that the Defendant *Grayson* might be restrained from proceeding until the account was taken; also, that the goods remitted by the Defendant at law to *Grayson*,

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sacrificed to the convenience of the Court, requires it, the appeals may be heard as appeals in distinct causes;

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son, and in his hands, might be sold, and the produce applied in discharge of the debt.

Eyre, Chief Baron, in the outset, asked *Burton* how he could make out any right in the Plaintiffs to come here, without having the principal actually before the Court? He was a Defendant, but charged to be out of the jurisdiction of the Court. What relief can bail be entitled to? They have undertaken specially to produce the Defendant, or pay the debt.

Burton mentioned the case of co-obligors who were only sureties.

But per *Eyre*, Chief Baron —Even they can not call on the obligee, if the principal obligor is not brought before the Court. The Defendant at law must be made an effective party, either as Co-plaintiff or as Defendant actually before the Court and appearing. For here must be a double account, you must at least have all the necessary parties here. If you had your account, it could not bind the Defendant at law. He might come in afterwards, and call upon the creditors to account upon the same grounds. If, indeed, you could fix collusion between the principal creditor, it might be otherwise; but standing as it does, nakedly, I do not see how you can proceed. And so the order must be absolute for dissolving the injunction.

This being mentioned again to-day, *No*

Burton and *Daniel* attempted to shew that there were facts to fix a strong suspicion of collusion on the Defendants. And the latter cited 1 *Vern.* 87. *Israel* v. *Narbourne*, to shew that the Court would give time to add parties, and grant an injunction in the mean time.

Eyre, Chief Baron, expressed his surprise at this being mentioned again; and said, he thought the Court had, when the matter came on last, expressed their opinion as to a total want of equity in the Plaintiffs, standing in the situation in which they stood

causes; otherwise, I think that the party whose appeal represents him to be most aggrieved by the decree should begin.

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stood at present. To grant an injunction in this case would be to put bail in a better situation than their principal could be in; for had the principal lain by and suffered judgment to go against him at law, the Court would never have granted him an injunction on his coming here in that stage of the business. And as to the present Plaintiffs, they are not at all damnified until they have paid the money — very different is the case in *Vernon*, for there the bail were principal, (it being a bond to the sheriff,) here they are only concerned collaterally. — Injunction dissolved. — Lord *Colchester*'s MSS.

ANGERSTEIN v. CLARKE. (1)

In CHANCERY. *Nov.* 13th, 1790.

To a bill against an obligor in a joint and several bond, an insolvent co-obligor need not be a party.

Objection for want of parties, because all the obligors in a bond were not before the Court.

It was stated in the bill, and admitted by the answer, that one obligor was out of the jurisdiction, and another was insolvent.

In *Madocks* v. *Jackson*, 3 *Atk.* 406., Lord *Hardwicke* says, that in equity all the obligors in a bond must be parties; but Lord *King* held otherwise in *Collins* v. *Griffith*, 2 *P. W.* 313.

LORD CHANCELLOR.

If you will sue in equity upon a joint and several bond, you must make all the obligors parties, to avoid circuity of suit; but if one of the persons living (which is a stronger case than that of a dead person) be admitted to be insolvent, surely it ought to be an answer to an objection for want of parties.

I almost incline to say, that even in the case of a living party upon an admission of his being insolvent, he need not be brought before the Court; because if that fact be agreed upon, there can be no danger of circuity of suit

(1) 2 *Dick.* 738.

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It was agreed that the appeals should be heard together, and that the counsel for the Plaintiffs should begin.

Mr.

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where there can be no objection to contribute to the demand.

The Chancellor recognized the case of *Madocks* v. *Jackson*, and seemed inclined to overrule the objection; but it appearing that a mortgage had been made as a collateral security, and that some of the parties to it, who had been in possession of the mortgaged estate, were not before the Court, it stood over on that account.

See Sir *Daniel O'Caroll's* case, *Amb.* 61.—Lord *Colchester's* MSS. (2)

(2) See *Cockburn* v. *Thompson*, 16 *Ves.* 326. *Haywood* v. *Ovey*, 6 *Madd.* 113.

IN CHANCERY. *Nov.* 26th, 1790.

ATTORNEY-GENERAL v. GAUNT.

The heir of a private founder, who has appointed no visitor, must be made a party to an information for regulating a charity; but the Court, in favour of charities, will direct an inquiry for the heir.

This was an information at the relation of the inhabitants of a parish in *Staffordshire*, to have a school-master dismissed for improper demeanour, and to have the charity regulated.

Richard Cross of *Baggington*, in the county of *Stafford*, by will in 1699, devised lands to *A.*, then minister of *Yoxall*, in the county of *Stafford*, and his successors for the time being, and to *B.*, then minister of *Harmstall Ridware*, in the same county, and his successors for the time being, in trust out of the rents and profits to erect a free school-house in *K. J. Bromley*, in the county of *Stafford*, provided the lord of the manor should grant a convenient piece of ground for that purpose; and that when the school-house was erected, they should apply the rents and profits for the maintenance of a school-master to teach poor children.

Lloyd, for the information, cited 1 *Ves.* 72., *Attorney-General* v. *Smart*, to show that in the case of a private charity

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Mr. *Agar* and Mr. *Bell*, for the Plaintiff,

Objected to the moduses as uncertain; and subject to abuse.

They

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rity the Court will not dismiss the information for want of form, but regulate the charity as well as it can. The heir of the founder was wanting in the case of *Newport* school, yet the Court directed an inquiry for the heir, and did not order the cause to stand over for making him a party.

So here the devise is to *A.* and *B.* and their successors, ministers of two parishes, to employ rents for maintenance of a school-master, but no power to appoint one; and the rule is, that when the king founds, his successors are visitors. 2 *P. W.* 325., *Eden* v. *Foster*. But if a private man founds, his heir is visitor, unless the founder makes another man and his heirs visitors. 3 *P. W.* 145., *Attorney-General* v. *Rigby*.

The heir of the grantor, therefore, shall nominate, and not the grantee's heir.

Therefore here these ministers had no authority, and the Court must find the heir who had authority to appoint a school-master; and the legal estate descended to the heir at law of this testator, the clergymen having no estate beyond their own lives by this will. 2 *P. W.* 125.. *Attorney-General* v. *Ruper*, The clergymen being only corporations for taking as parsons, and not generally for other purposes; the rents and profits, therefore, belong to the heir, in trust for the school.

Mitford, for the Defendant *Gaunt*, contended that the testator having devised to the rector of *Y.* and his successors for the time being, in trust to pay, the estate is vested in these successive rectors; and they are the persons to regulate the charity, though accountable to the Court. The rector is not only a corporation to take lands for the benefit of his church, but also for charitable purposes. *Duke's Char. Uses*, 139. So in other cases, as *Fulwood's* case, 4 *Co.* 64. The Chamberlain of *London* may take, &c.; and therefore this estate vested in the two rectors, as tenants in common; and they were to nominate, because they being to pay, and no other person having power to nominate, unless

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They cited *Took* v. *Ledgard* (*a*), *Travis* v. *Oxton* (*b*), *Franklyn* v. *The Master, &c. of St. Cross.* (*c*)

Sir

(*a*) 1 *Keb.* 612. cit. 2 *Gwill.* 588.

(*b*) 3 *Wood*, 523. 3 *Gwill.* 1066. 1 *Anstr.* 308. n., under the name of *Whitehead* v. *Travis*, 7 *Bro. P. C.* ed. *Toml.* 49.

(*c*) *Bunb.* 78.

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they nominate, there is no one to whom payment can be made. The heir of the donor ought not to have nomination; but if a necessary party, and not before the Court, yet the Court will not direct any inquiry *ex necessitate*. For in 1 *Ves.* 80., *Attorney-General* v. *Wycliffe*, Lord *Hardwicke* refused it, the information not appearing to him to be proper. 2 *Ves.* 327., *Attorney-General* v. *Middleton*.

The Solicitor-General, in reply, cited 3 *Atk.* 198., *Attorney-General* v. *Price*, to show that Latin and Greek are not the charity intended to be dispensed in these schools to poor children, and therefore this charity wanted regulation.

The LORD CHANCELLOR.

The heir at law should have been a party; but I will not dismiss this information if I can get the heir before the Master by inquiry.

Let the Master receive a scheme for the school, according to the nature and circumstances of the place where it is to be kept.—Lord *Colchester's* MSS.

At the ROLLS, 3d *December*, 1790.

STOKES *v.* CLENDON.

To a bill of foreclosure against the principal mortgagor, the mortgagor of another estate, as a collateral security, is a necessary party.

The case was of a principal mortgagor, and another mortgagor of an estate as a collateral security.

His Honor determined, that a bill of foreclosure against the principal only could not be sustained, without making the other mortgagor a party; because the other mortgagor has a right to redeem and be present at the account, to prevent the burthen ultimately falling on his own estate, or at least falling upon it to a larger amount

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Sir *Samuel Romilly*, Mr. *Hart*, and Mr. *Winthrop*, for the Defendants, cited *Bennett* v. *Read* (*a*), *Leyson* v. *Parsons* (*b*) (remarking that the statement of the modus

(*a*) 4 *Gwill.* 1272. 2 *Anstr.* 322. n.

(*b*) 18 *Ves.* 173.

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amount than the first estate might be sufficient to satisfy.

Ordered to stand over for want of parties. — Lord *Colchester*'s MSS.

In CHANCERY. *March* 12th, 1791.

SHEPHERD and Others on behalf of themselves and Others, creditors of JOHN ROBERTS, Sen., and JOHN ROBERTS, Jun. - - - Plaintiffs;

GWINNET, ROBERTS, Sen. and Jun., THOMAS RICHARDSON, and MATTHEW PAUL, - Defendants.

Judgment creditor prior to a mortgage, need not make the subsequent mortgagee party in order to postpone him

Bill filed by Plaintiffs, who were creditors of the two *Roberts*, who, in *November*, 1779, assigned certain premises to *Gwinnet*, in trust for all their creditors, and also entered into a joint bond and warrant of attorney to him, upon which judgment was immediately entered up.

Roberts had, prior to entering up the judgment, made a mortgage of his estate to *Richardson*, and at a date subsequent to the judgment, made a second mortgage to *Paul*.

The bill was filed praying, that *Gwinnet* might be decreed to account for what he had received under the deed of trust, and that Plaintiffs might be at liberty to redeem *Richardson*, and that *Paul*'s mortgage might be postponed to the judgment.

Lord Chancellor dismissed the bill with costs against *Paul*, as an unnecessary party, the judgment having a legal priority; and he decreed *Gwinnet* to account, and to put the judgment in force as far as it was available at law. — Lord *Colchester*'s MSS.

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is not correct, and no entry of the decree can be found in the Registrar's book), *Thomson* v. *Holt* (*c*), *Phillips* v. *Symes* (*d*), *Manchester College* v. *Andrew* (*e*), *Atkyns* v. *Lord Willoughby de Brooke* (*f*), *Williamson* v. *Lord Lonsdale* (*g*), *Gills* v. *Horrex* (*h*), *Boscawen* v. *Roberts* (*i*), *Scott* v. *Fenwick* (*k*), *Brincklow* v. *Edmunds* (*l*), *Gardiner* v. *Cox* (*m*), *Vernon* v. *Waller*. (*n*)

In the course of the argument, the following remarks were made by

The LORD CHANCELLOR.

In *Bennett* v. *Read* the modus was laid in persons resident and occupying, that is, inhabitants and occupiers; here it is in the disjunctive, inhabitants or occupiers; and for some purposes a person may be considered as occupier of a house which he does not inhabit. The doctrine of *Travis* v. *Oxton*, if different from that of *Bennett* v. *Read*, though the latter is the more recent decision, must prevail, since it has the authority of the House of Lords. I do not, however, consider the cases as contradictory. In the former case, I think that the intention of the House of Lords was to direct an issue on the question, not whether the modus was good, but whether that payment, whether good as a modus or bad, had been made in lieu of tithe of hay, in order to determine the first point in the case of a vicar — his title to satisfaction for tithe of hay; and they then seem to have dealt with the case as if it had been admitted that the

The cases of *Travis* v. *Oxton* and *Bennett* v. *Read* distinguished and reconciled.

(*c*) 2 *Gwill.* 671.
(*d*) *Bunb.* 171. 2 *Wood*, 228.
(*e*) 2 *Wood*, 438.
(*f*) 2 *Anstr.* 397. 4 *Gwill.* 1412.
(*g*) 5 *Price*, 25.
(*h*) 3 *Gwill.* 861.
(*i*) 3 *Gwill.* 946. 3 *Wood*, 174.
(*k*) 3 *Gwill.* 1250.
(*l*) *Bunb.* 307. 2 *Gwill.* 711.
(*m*) 2 *Wood*, 473.
(*n*) 1 *Wood*, 300.

payment

payment was made in lieu of tithe of hay: and that amounting to proof of the vicar's title to satisfaction for tithe of hay, and the modus being bad, it followed that he was entitled to tithe of hay in kind. The decision in *Bennett* v. *Read* seems to have proceeded on the ground, that every inhabitant was bound to pay a satisfaction for tithe of hay.

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It will be necessary to consider, also, the mode of combining the present fellows of the college; and I apprehend that that must be done by a consent to be bound by the proceedings in this cause — a consent under the college seal, and by the individual new fellows; and that agreement may be recited in the order now to be made.

The LORD CHANCELLOR. (*a*)

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Feb. 11.

This was a suit instituted by the warden and fellows of *Manchester* college; and the Defendants, after stating the particular premises which have been in their occupation and possession, insist that by ancient custom used and approved within the parish of *Manchester*, from time whereof the memory of man is not to the contrary, hitherto there hath been due and now is payable at *Easter* in each year, or as soon after as lawfully demanded, by each and every inhabitant or occupier of a house situate in the several townships, precincts, or hamlets in the parish of *Manchester*, — (I take it for granted, but I wish to be informed whether I am correct, that in the record itself the expression is "inhabitant or occupier," and not "inhabitant occupier;" because a man may be an inhabitant occupier, but he may also be an oc-

(*a*) *Ex relatione.*

cupier

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cupier without being an inhabitant: an occupier of land need not be an inhabitant, nor need an inhabitant of a house be an occupier of land (*a*),) — and having any garden, orchard, or land at or belonging to, or used or enjoyed with any house, and situate in the several townships, precincts, or hamlets aforesaid, or any or either of them, and producing the several titheable matters or things next after mentioned respectively, or any of them, to or for the use of the rector or rectors for the time being of the said parish, his or their lessee, farmer or farmers, the several sums following. So that the description of persons entitled, if any persons are entitled, to avail themselves of this modus, is an inhabitant or occupier of a house situated in some of these townships, having any garden, orchard, or land at or belonging to, or used or enjoyed with any house, and situate in these several townships, and producing the several titheable matters and things next after mentioned. The description is "inhabitant or occupier," in the alternative; but, whether he is inhabitant or occupier, he is to have a garden, orchard, or land: which word "land" will include any quantity of land; but it is to be at or belonging to, or used or enjoyed with the house, and situate in the several townships and precincts, &c. I do not find that in the subsequent part of the pleadings, the Defendants have inserted any averment that their land, gardens, or orchards were at or belonging to, or used or enjoyed with, their respective houses. I do not find any averment of the sort. Then they state, for every such garden so occupied by every such person, a sum of one halfpenny, to be payable for and in lieu and full satisfaction of the tithes; and they go

(*a*) On examination of the record the expression was found to be, "inhabitant or occupier."

through

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through all the several moduses, every one of them affected by the description, such as is stated, of the persons who claim the benefit of them. Having so done, they insist they are intitled to the benefit of all these moduses, and a vast deal of evidence has been gone into. The principal and most material question I apprehend to be with respect to the tithes of hay: and they say, that such persons so described are liable to pay one penny for and in lieu and in full satisfaction of the tithes of all hay of every such inhabitant or occupier having any such land as aforesaid producing hay, whether such quantity was more or less, save and except as to some closes which are particularly described as excepted closes. The way they allege their right to pay this penny in lieu of the tithes of hay is obviously this, that they are to pay only a penny, whether they have a thousand acres, or whether they have only one acre; but with this qualification, that the land upon which the hay is to be produced is to be land used and enjoyed with the house; not stating whether the land of which they themselves are in possession is land used and enjoyed with the house, and much less, stating that it had been anciently used and enjoyed with the house.

His Lordship then read the judgment of the Master of the Rolls on the original hearing, and proceeded thus:

You observe that this direction, is, to try the fact before the law is ascertained; but if the modus is laid in such a way that it can have no validity in law, the question will be, whether the Court ought not in the first instance to decide against the modus, because it is not a legal modus, even if the fact would support a modus that was legal? The Master of the Rolls states

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states his opinion, that the modus for gardens and orchards is well laid, notwithstanding they are not represented to be ancient gardens and orchards; overruling the objection that the modus was laid to be in satisfaction of the tithes of all titheable matters and things yearly arising. There appears to me to be a stronger objection than that which he overrules, viz. that the Defendants claim this modus to be in satisfaction not only of the tithes that are mentioned, but of all other tithes, or some of them.

The Lord Chancellor then referred to *Leyson* v. *Parsons* (*a*); to the judgment of the present Master of the Rolls in *Buske* v. *Lewis* (*b*), (expressing doubt whether the Master of the Rolls had been correctly informed of the manner in which the modus in this case is laid, which differs materially from the modus in *Travis* v. *Oxton*); and to the judgment of the Chief Baron in *Williamson* v. Lord *Lonsdale*; and concluded by expressing his opinion, that the decision in the last case was ruled entirely by *Travis* v. *Oxton*; and that *Bennett* v. *Read*, if not distinguishable from *Travis* v. *Oxton*, though later, cannot prevail against it, in opposition to the authority of the House of Lords.

The LORD CHANCELLOR. (*a*)

1823 *March* 11.

I hold the hay modus bad, on principle, and on the authority of *Scott* v. *Fenwick*, *Travis* v. *Oxton*, *Williamson* v. Lord *Lonsdale*, and *Buske* v. *Lewis*; and I think the present case distinguishable from the case of *Bennett* v. *Read* in this respect, that if the owner there had parted with the land and retained the house, he was

(*a*) 18 *Ves.* 173. (*b*) 3 *Jac. & Walk.* (*c*) *Ex relatione.*

liable

liable to pay, which is not the case here. Whether that distinction is or is not solid and substantial, it is sufficient that the cases are distinguishable. This case must be decided upon different principles.

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The LORD CHANCELLOR. (*a*)

1825. *March* 15.

I have examined all the moduses in this case, and I see no ground for varying the decree of the Master of the Rolls, except as to the hay modus. That modus is bad; the remainder of the case has been properly disposed of.

Mr. *Agar* insisted, that the Plaintiff was intitled to both the deposits, and that the Defendants should be ordered to pay the costs of their appeal. He cited Lord *Loughborough*'s order of the 7th of *Feb.* 1794. (*b*)

March 15.

The LORD CHANCELLOR. (*c*)

The decree will direct an account of the tithes for the time past, and the representatives of the late warden will receive what accrued during his life. On the question of costs, it is a very material fact that the tithes now claimed were never before paid; all the predecessors of the Plaintiffs have been content with a sum now stated to be 15,000*l.* a year, less than they claim. The omission of demand in all times past, encourages the honest belief that tithes are not due. It happens, I believe very often, the law being that mere non-payment of tithes is no defence against payment, that non-pay-

(*a*) *Ex relatione.*
(*b*) *Orders in Chancery*, ed. *Beames*, 458.
(*c*) *Ex relatione.*

ment

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ment takes place from year to year and century to century, till the evidence of the legal right of non-payment is lost. It must be also recollected, that the Plaintiffs have failed in every point of their appeal, except the article of hay.

On the question of the modus of hay, though I have little or no doubt that I am right, yet I cannot forget that Sir *William Grant* was of opinion, that the fact of the modus ought to be tried before its validity was decided. With all deference to that great judge, (happy shall I be, if my memory is as much respected as his,) it appeared to me, that to try the fact of the modus was to begin at the wrong point, if the law is that the facts when found will not constitute a valid modus. Whether the modus would be valid, is a question depending much on the authorities of *Travis* v. *Oxton*, and *Bennett* v. *Read;* cases in which, though I have satisfied my own mind that they are substantially different, yet Sir *William Grant* expressed himself unable to discover a precise distinction. (*a*) On this modus, therefore, the Defendants had solid ground for resisting payment of the tithes.

I shall give no costs of the appeal; the general costs of the cause are reserved, and the Plaintiffs are entitled to both deposits. If, before the answer was filed, I had read all the cases which have been cited, I think that I could have laid a better modus. (*b*)

(*a*) 17 *Ves.* 476., and see 5 *Price*, 36.

(*b*) In the EXCHEQUER. *Pasch.* 5 *Geo.* 2.

The BISHOP of HEREFORD v. COWPER. (1)

Modus allowed.

The Plaintiff, as rector of *Whitechurch*, brought his bill for tithe hay and potatoes in kind, and for the agistment of

(1) Reported on another point, *Bunb.* 293.

barren

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March 1.

A purchaser was held entitled to an investigation of the vendor's title, notwithstanding possession taken, acts of ownership incident to possession, and preparation of a conveyance.

THE bill stated, that in 1812, the Plaintiff being seised in fee-simple of certain lands situate in the parish of *Offley*, and also under an act of parliament for en-

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barren cattle. Against the claim of tithe hay, a modus was pleaded in bar, (viz.) that within the parish of *Whitechurch* there were several townships, and that the occupiers of each township, time out of mind, had paid certain sums of money in lieu of tithe hay, which sums were collected by the respective constables, and then the whole, which amounted to 15*s.* 4½*d.*, was by some of them paid over to the rectors as a modus for the whole parish. *Eyre* Serjt. *pro quer.* objected to the modus, that as it was laid that the occupiers of each township have paid the certain sums, if any occupier of land in a township has not paid his share towards making up the sum belonging to that township, it will be a variance; and it appears that several of the lands have never been rated. Besides, to make any modus good, it is necessary to show how the rector may recover the satisfaction; for, he thought, the rector could have no remedy against a division or township.

Reynolds, Chief Baron, observed, that, according to this modus, the rector was only concerned with each ville in general, and in the same manner must have his remedy against each; which *Carter B.* said was no more than what was done every day in case of chief rents: but afterwards, it appeared by the proofs that it was usual for the rectors to deliver schedules to each constable to collect by; and by some of them it appeared how much each inhabitant ought, and was used to pay, towards the sum. On this the Chief Baron observed, that in such case the rector's remedy seemed to be against each particular landholder, for his share.—Ordered to stand over till next term, the Baron going to the House of Lords.

Note. None of the Plaintiff's proof was read, and but about half of the Defendant's.

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enclosing lands in the parish, and a deed of exchange made in pursuance of the directions of the act, seised in fee-simple of certain allotments or enclosures of common field in the

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Trin. 6 *Geo.* 2.

The proofs in the cause being read, and observations made thereon by the counsel, *Reynolds*, Chief Baron, said, wherever a fact is litigated, and the law resulting from it is dubious, we will always have the fact determined before we judge of the law arising from it. This modus seems to extend no further than the townships, and the rest to be an historical account how it is raised, and that the several proportions have been collected among the occupiers. There is no reason why this modus, as alleged, should not be good, for it has all the requisites of a good modus. This must be the case where there is a modus for a great quantity of land, which after is disposed of into different hands; though the remedy becomes more intricate, yet the rectors must have it against all those who have the land.

But several facts appearing doubtful to the Court, the principal of which was, whether all occupiers of the lands in each township had contributed to the sum to be raised by the respective townships, an issue at law was directed to try the modus. — *Per tot. Curiam.*

N. B. — Mr. *Bunbury* said, when this matter was before the Court several years ago, it was adjudged against the Defendants, because the modus was laid to be payable by the owners and occupiers, which was held to be uncertain, because an owner is very different from an occupier. — Sir *Clement Wearg's* MSS.

CART v. HODGKIN and Others.

In CHANCERY. *May* 20. 21 *Geo.* 2. 1748.

Modus of 5*s.* payable annually out of every yard

Bill by the administrator *de bonis non* of *William Cart*, late rector of *Stony Stanton*, in *com. Leicester*, for an account and satisfaction of tithe hay, and the small tithes of

the parish, offered the premises for sale by public auction, on the 12th of *June*, 1812, under conditions that the purchaser should pay a deposit of 20 per cent. and sign

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of the said rectory, due to him from 1722, when *Cart* first became rector, to 1735, when he died. The Defendants in their answer, as to the small tithes, set out, "that there is a modus or composition of *5s.*, which, from time out of mind, has been paid out of every yard land in the said parish of *S.*, in lieu of tithes, and that it ought to be received yearly and every year as a modus;" and further alleged, that *Cart*, the rector, received it for one year from the Defendants, "the occupiers of some of the yard lands, and the other occupiers and farmers of the said other yard lands;" and that Dr. *Geary*, his predecessor, received it "from the occupiers and farmers of the said yard lands."

It was objected by Mr. *Wilbraham* and others, to this modus, 1. That though it be not now necessary (as it was formerly) to lay a modus as payable on such a particular day, yet it must be laid to be paid annually, (in which case it will be understood to be payable on the first day of the year), and this is not alleged in the present case. 2. It is not stated by whom the modus ought to be paid, which should be shewn, that the person may be known against whom the action must be brought. A modus (generally) is payable by the occupier, but not always; for sometimes it is paid by the lord (*Cro. El.* 599.), and sometimes by the occupier only of part. 3. This is stated to be a modus or composition (in the disjunctive), which is very inaccurate, these being of a different nature; for a composition is fluctuating, but a modus not so. And in the late case of *Hardcastle and Slater*, where a modus was laid to be paid by the owners and occupiers, it was held ill, these being different. (*a*)

On the other side, it was argued by Mr. *Murray* (Solicitor-General,) that there is a great difference between

land, is valid. — Representatives of a rector not permitted to enforce payment of tithes which the rector never demanded.

(*a*) According to the printed reports of this case, *3 Atk.* 245., *Amb.* 41., *2 Gwill.* 784., the modus was allowed.

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sign an agreement for payment of the remainder of the purchase-money on or before the 31st day of *August*, 1812, on having a good title; and that if any delay should arise

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bringing bills for establishing a modus, and where a bill is brought for subtraction of tithes and a modus is set up by way of defence: in this last case, though it be set out informally, yet if it appears sufficiently in evidence, this will bar the Plaintiff; and it has been lately held, that in a bill for tithes, if it appears by the Plaintiff's own evidence that there is a modus, he cannot have a decree. Now here, it must be admitted, the modus is inaccurately stated; but yet it sufficiently appears, taking the whole together, that this is a modus, and that it is payable yearly by the occupiers and farmers. And Mr. Solicitor said, that where a modus was laid to be payable by "the owners and occupiers," it had been lately held sufficient; which the Court seemed to admit.

The LORD CHANCELLOR. There are cases (perhaps) in another court, where moduses have been overturned for niceties; but the question here is, whether it be laid sufficiently in substance? As to the difference mentioned at the bar, between bills brought for a modus, and the setting them up by way of defence, in both cases the modus must be laid with sufficient certainty, otherwise the Court will not enter into proof; and this is the rule both of this Court and the Exchequer. Indeed, where the Plaintiff sues for tithes, and shews, in his own proof, there has been a modus, this will bar him; though (perhaps) it would not be sufficient, if proved by the Defendant. There have been cases of this nature; and on the same foundation, it has been held by Lord Chief Justice *Holt*, that where in ejectment the Plaintiff proves a deed he shall be nonsuited, though such proof by the Defendant is not sufficient; and there are many other cases of this kind. Now, in the present case, I am of opinion, that the modus is stated to a common intent, and therefore to a sufficient certainty. There is no ground for the objection, that here is no time of payment alleged. It would be attended with great inconvenience to make it necessary to show a particular

arise in completing the purchase beyond that time, the purchaser should pay interest at *5 per cent.* on the remainder of the purchase money, from that day; that the

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cular day on which a modus is payable. If it was alleged to be payable yearly, this anciently was held sufficient, and so it is at this day. Here, after stating the modus, it is said that it ought to be received yearly, and every year, as a modus; which is all one in substance, as if it had been alleged in the beginning to be paid yearly. This is sufficient, though it be somewhat inaccurate, but the same exactness is not required in answers in this Court and in the Exchequer as in pleading. As to the 3d objection, it is shown in the subsequent parts of the answer, that *Cart* and *Geary* have accepted the modus from the occupiers and farmers, which must be admitted to be the same persons, and therefore this exception is not material. And as to the last, a modus, or composition payable from time immemorial, must mean the same thing.

The objections being all overruled, the Defendants proceeded to their proofs. And the deposition of one *Norton*, a parishioner of *Stoney Stanton*, was produced to prove the modus for the yard-land; and it was urged for the Defendants, that as it does not appear the whole parish is divided into yard-lands, a parishioner may well be admitted to prove it, unless it be shown, on the other side, that he has a yard-land.

But by Lord Chancellor; his deposition cannot be read, because this modus may possibly be in satisfaction of all the lesser tithes of the parish; and he said he had a note of a case where it was determined by all the Judges in *England*, in the time of Ld. Chief Just. *Parker*, that where a modus is in question, no inhabitant of the parish can be examined generally, unless he be a lodger, or one receiving alms of the parish, but he must not be a person who can claim any thing under the custom.

It appeared by the evidence produced, that as to the tithe hay, the parsons of the parish had for a long time enjoyed several pieces of land in lieu thereof, and it was not proved that Mr. *Cart* ever demanded

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the Defendant became the purchaser of lot 2, consisting of a wood called *Stubbock's Wood*, with an allotment of arable land, and an inclosure, at the price of 1800*l.*, and of lot 3, consisting of an allotment of arable land, and two small enclosures, at the price of 430*l.*; and paid a deposit, and signed an agreement to complete the purchase according to the conditions of sale; that shortly after the date of the agreement, an abstract of the Plaintiff's title was sent to the solicitor of the Defendant, who objected that the Plaintiff had no right to dispose of the allotments till an award had been executed by the com-

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demanded such tithe. It also appeared, that great part of the lands in the parish which was formerly grass, was now turned into clover. As to the modus of 5*s.* there was variety of proof.

The Lord Chancellor said, that there was no ground for the bill so far as it relates to the tithe hay, as it appears that the rectors have enjoyed land in lieu thereof. And it makes no difference that the lands in the parish are turned to clover, for it has been determined, that where there is a modus, or real composition, for the tithe of hay, and the ground is broke up and turned into a new culture (as clover, &c.), yet the modus or composition remains the same; each side being to take its chance, as it sometimes may be for the benefit of the parson and sometimes of the farmer; and the contrary would occasion much uncertainty. It is also very material that this bill is brought after a very great length of time, and after an acquiescence by the incumbent, during his whole life. It would be of great inconvenience to suffer personal representatives to bring bills for such tithes as the rector himself never demanded; I never remember such a case, and will not make a precedent. This is a circumstance of great weight. This part of the bill, therefore, ought to be dismissed with costs. The modus of 5*s.* must be sent to trial, on account of the variety of the proofs; and it is proper to reserve the consideration of costs, as to this part of the bill, till the issue be tried; and he decreed accordingly. — MSS.

commissioners, but no other objection was suggested, and the commissioners had long since executed their award, from which no appeal had been made.

The bill prayed specific performance of the agreement.

The Defendant, by his answer, insisted that he was not bound to pay the residue of the purchase money, inasmuch as divers objections existed to the Plaintiff's title to the premises, which, as the Defendant was advised, rendered the Plaintiff incompetent to make a good title, and to execute a proper conveyance; and among other things, that it did not appear that the award had been long since executed, no copy or extract thereof having ever been furnished to the Defendant or his solicitor, although applications had been made for that purpose; and that if the award had been in fact executed by the commissioners, yet it had not been inrolled in pursuance of the act 41 *Geo.* 3. *c.* 109.

The answer also stated other objections to the title, under certain deeds of exchange; and submitted to perform the agreement on having a good title.

The bill was afterwards amended by the insertion of allegations, that the Defendant took possession of the premises in *August*, 1812, and had since cut three falls of underwood; that after the receipt of the abstract by the Defendant's solicitor, a correspondence ensued between the solicitors of both parties, and in *November*, 1814, the Defendant's solicitor transmitted to the solicitors of the Plaintiff, a draft of a conveyance of the premises, approved on the part of the Defendant; and that the cutting underwood, and other acts of

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ownership, amounted to an acceptance of the Plaintiff's title.

At the hearing the counsel for the Defendant, objected to the production of the letters of his solicitor, offered on the part of the Plaintiff, as evidence that the Defendant had accepted the title. It was insisted that, in order to be distinctly put in issue, they should have been set forth at length in the bill, as in *The Margravine of Anspach* v. *Noel* (*a*); and it was said that in *Selby* v. *Selby* (*b*), Sir William *Grant* refused to receive in evidence letters not charged in the bill.

The Master of the Rolls over-ruled the objection.

Copies of letters written by the solicitors of the Plaintiff to the solicitor of the Defendant, were offered in evidence, but rejected by the court, notice not having been given to produce the originals.

Mr. *Trower*, Mr. *Shadwell*, and Mr. *Swanston*, for the Plaintiff.

By taking possession, and exercising acts of ownership, the Defendant has accepted the estate, and is no longer entitled to an inquiry whether the Plaintiff can make a good title. *Fleetwood* v. *Green* (*c*), *The Margravine of Anspach* v. *Noel* (*d*), *Fordyce* v. *Ford*. (*e*) The conclusion from the correspondence is, that the Defendant had waved that inquiry. The Lord Chancellor ordered the Defendant to pay the purchase money into court. (*f*)

(*a*) 1 *Madd.* 310.
(*b*) 3 *Mer.* 2.
(*c*) 15 *Ves.* 594.
(*d*) 1 *Madd.* 310.
(*e*) 4 *Bro. C. C.* 495.
(*f*) *Burroughs* v. *Oakley*, 1 *Mer.* 52. 376. n.

Mr.

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Mr. *Hart*, Mr. *Sugden*, and Mr. *Rose*, for the Defendant.

Possession was taken under the contract, with the assent of the Plaintiff: the acts of ownership alleged, consist only of three falls of underwood in a due course of husbandry. Nothing less than unequivocal acts of ownership, as in the cases cited, or want of good faith, will deprive a purchaser of his right to an investigation of the title. Payment of money into court was consequent on taking possession. *Jenkins* v. *Hiles* (*a*), *Fildes* v. *Hooker* (*b*), *Dixon* v. *Astley*. (*c*)

The MASTER *of the* ROLLS.

This case is attended by some circumstances, which distinguish it from any other that has ever come before the Court. The bill, as originally filed, was a common bill for specific performance. At that period, though recently after the correspondence on which the principal stress has now been laid, it did not occur to those who framed the pleadings to represent the Plaintiff's as one of the excepted cases, in which the vendor is released from the obligation of proving his title; an ordinary equity which the Court is particularly careful to enforce, on the plain principle that a plaintiff seeking to compel a purchaser to accept an estate, is bound to submit his title to such a scrutiny as satisfies the court, that the defendant may safely part with his money. The order of the Lord Chancellor in this case, for payment of the purchase money into court, was undoubtedly not intended to preclude the investigation of title; it was at that time stated, that the investigation was proceeding, and nothing was suggested to exempt this suit from the ordinary

(*a*) 6 *Ves.* 646. (*b*) 2 *Mer.* 424. (*c*) 1 *Mer.* 133.

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course. The Plaintiff then amended his bill, alleging circumstances now insisted on, possession taken, acts of ownership by felling underwood, and a correspondence, but not seeming to state that correspondence as proof that the title had been waived.

In proceeding to consider the effect of the evidence, a court of equity called on to enforce specific performance of an agreement for the conveyance of an estate to one party, and payment of the purchase money to the other, must feel anxiety to protect the purchaser, and give to him reasonable security for his title; not compelling him to take a title without knowing whether it is good or bad. The vendor, if his title is good, suffers only the temporary inconvenience of delay; but the vendee, if it is bad, may sustain a severe loss. The inclination of the Court therefore is in favour of the vendee; and a vendor claiming to be excepted from the general rule, is required clearly to establish a case of exception. What circumstances has this Plaintiff proved to warrant the Court in considering the present as an excepted case?

The decisions in *Fleetwood* v. *Green* (*a*), and the other cases cited, are founded not so much in a rule of equity, limiting a time within which objections must be taken, and visiting delay with punishment, as on a conclusion of fact, the Court being satisfied that the purchaser intended to waive, and has actually waived, his right of examining the title. When the Court is convinced that that is the just conclusion from the facts of the case, then, and then only, is it authorized in denying to the purchaser his ordinary equitable right. The question therefore is one of fact; what is sufficient to authorize that denial?

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Possession taken by the Defendant, has been properly insisted on as a very important fact: and, undoubtedly, it becomes a purchaser to be careful in what circumstances he takes possession; but whatever weight may belong to that fact in ordinary cases as evidence of waver of title, in this case certainly no such inference can be deduced.

Possession was taken of part of the lands at *Michaelmas*, 1812, and of the remainder at the end of that year under a contract which is silent on the subject of possession, and under which possession so taken is premature; the vendee being bound to pay interest on the purchase money from the 31st of *August*, 1812; a provision which seems to denote that the parties contemplated delay. Two lots of recently inclosed land are sold for considerable sums, and it being an express term of the contract that the purchase money should not be paid without a good title shown, and possible that delay might occur, in *August*, 1812, possession is taken; in what circumstances, the Court is not apprized; but it must be presumed to have been taken with the concurrence of the vendor; there is no proof that it was contrary to his wishes, or accompanied by an obligation on the vendee to wave any right. That the vendee did not, by taking possession wave the investigation of the title, is clear; more than a year after that event the parties were negotiating on the subject of title; what revived the investigation if then waved? In 1813 an abstract, and a farther abstract were delivered, for what purpose if the question of title had been abandoned? It must be concluded therefore, that possession was prematurely taken with the consent of both parties, but without an intention of waving the investigation of the title.

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The same principle applies to the acts of ownership; for what could be the purpose or advantage of taking possession, except to act as owner? The evidence on the part of the Defendant seems not to have carried the case farther than the evidence on the part of the Plaintiff; the act insisted on is cutting underwood. Had I known the nature of the evidence offered by the Defendant, namely, evidence of the judicious exercise of acts of ownership, I should have doubted whether it was admissible; but as an explanation of the acts insisted on by the plaintiff, I thought that I ought not to reject it. Whether included or excluded, the acts of the Defendant seem no more than the proper acts of a person entrusted with possession, bound to take care of the estate, and not to leave the crops uncut and waste; acts of preservation, not of destruction. The conclusion depends on that distinction. A fall of underwood which must be cut by the person in possession at the regular season, is no more than gathering a crop of corn or hay. In the absence of proof that the fall was improper or contrary to custom, it is only an annual crop which a tenant for life would enjoy as one of the ordinary fruits incident to the possession, and of which it could not be intended that the party in possession was not to have the benefit. The delivery of a farther abstract after a fall of underwood, is quite inconsistent with the supposition, that by that act the purchaser had made the estate his own, and precluded himself from an examination of the title.

The case finally resolves itself into the correspondence; the strongest of all the facts alleged, because it is open to the observation, that the parties are engaged in an act, which, in the ordinary course of business, is posterior to the investigation of title. It is not till after the title has been examined, that a draft of the convey-

ance

ance comes to be prepared. The preparation of the conveyance in this case is an important fact, as amounting to evidence that the parties had arrived at a stage of proceeding subsequent to the question of title, and must be supposed, therefore, to have removed or abandoned all objections. But I cannot satisfy myself that that fact alone, in the circumstances of this case, is sufficient to exclude the common equity. The Plaintiff had given no strong proof of desire of despatch; for entering into the contract in *June*, 1812, he has not delivered a farther abstract till *November*, 1813, and that imperfect and insufficient. If the difficulties attending the title had been removed, what occasioned the delay? The business proceeds slowly in 1814, without any urgency on the part of the vendor, to determine whether the purchaser meant to proceed with the examination of the title, or was satisfied.

The difficulty in this case, which distinguishes it from every other, is, that after possession taken, and acts of ownership, the investigation of title proceeds, and the question is, whether the delay in the investigation affords proof that it was abandoned? In the many instances that have occurred of culpable delay, perhaps for the purpose of retaining the purchase money, delay has not precluded an examination of the title. That conclusion requires not mere delay, but delay accompanied by acts which afford evidence of an intention to wave the examination. So much stress cannot be laid on a correspondence, in which we have only the letters on one side, letters of a country attorney, without knowing the answers, as to satisfy the Court that the Defendant intended to wave the question of title. They contain no express, nor am I convinced that they amount to an implied, waver. (*a*)

(*a*) The Master of the Rolls, here read and commented on the letters.

In

1819.

BURROUGHS v. OAKLEY.

In the *Margravine of Anspach* v. *Noel* (*a*), the acts of the Defendant amounted to evidence of waver, because they were such as without waver, would not have been performed. The solicitation of time for payment of the purchase money was an extremely strong act of that nature; the solicitation, as an indulgence, of delay, which if the question of title remained open, was matter of right. That application, together with acts of ownership, warranted the conclusion that the purchaser had waved the examination of title.

In *Fleetwood* v. *Green* (*b*), after a lapse of three or four years, no objection had been taken. Neither of those cases is parallel to the present. Here an objection had been taken, such as caused considerable delay in the delivery of the abstract; and the discussion of the title follows the acts, which are the strongest evidence of waver. The Court would not, under all the circumstances, be warranted in adopting so strong a measure as to deprive the Defendant of the common equity of an investigation of title. The money being in court, that investigation cannot be proposed for delay.

" His Honour doth order that it be referred to Mr. *Cox*, one, &c. to inquire whether the Plaintiff can make a good title to the said estate agreed to be sold to the Defendant; and in case the said Master shall be of opinion that the Plaintiff can make a good title, it is ordered that he do inquire when it appeared by the abstracts delivered by the plaintiff that he could make a good title, and at what time; and for the better discovery," &c. Reg. Lib. A. 1818. fol. 941.

(*a*) 1 *Madd.* 310 (*b*) 15 *Ves.* 594.

PALMER

PALMER *v.* VAUGHAN.

1818.

PALMER v. VAUGHAN.

1818. *July* 29.

The profits of the office of clerk of the peace being assigned for payment of creditors, a receiver was appointed, pending the question of the validity of the assignment.

VAUGHAN, clerk of the peace of the city of *Westminster*, assigned certain estates, and the profits of the office of clerk of the peace, to trustees upon trust to pay his debts. The bill having been filed to compel the execution of the trusts of the assignment; the Plaintiff now moved for the appointment of a receiver.

Mr. *Hart* and Mr. *Simpkinson* for the motion — stated, that *Vaughan* had forbidden the trustees to make farther payments.

Mr. *Shadwell* against the motion.

The Defendant will not oppose the appointment of a receiver of the rents of the estates, but submits the question, whether the profits of the office of clerk of the peace, (which do not exceed 160*l. per annum*,) are assignable? The assignment is void, by the statute of 5 and 6 *Ed.* 6. c. 16. prohibiting the sale of offices which "shall in anywise touch or concern the administration or execution of justice;" and by the principle of the decisions against the alienation of the half-pay of military officers. (*a*)

Mr. *Hart* in reply —

The cases cited are not applicable to an office which may be executed by deputy; but a doubt on the validity of the assignment is a sufficient reason for securing the property until a decision; as in Sir *Watkin Lewes* v. *Smith*. If the Defendant consents that the deputy shall pay the fees into court, verifying the amount by oath, the Plaintiff will not press for a receiver.

The LORD CHANCELLOR.

Take the order for a receiver, substituting, if the parties agree in the arrangement, payment into court of

(*a*) *Davis* v. *The Duke of Marlborough*, *ante*, v. i. p. 74.

the

1818.

PALMER v. VAUGHAN.

the fees by the deputy; without prejudice to the question whether the profits are assignable? (*a*)

(*a*) WHEELER *v.* TROTTER.

In *Cur. Canc. Trin.* 10 *Geo.* 2.

Bill for specific performance of an agreement to grant a deputation of the office of register of a consistory court. —What charge of misbehaviour is sufficient to introduce evidence of particular acts.

The defendant, *Trotter*, being entitled, by patent from the bishop of *Durham*, to the office of register of the Consistory Court of *Durham*, with all fees &c. for his life, to be exercised by himself or his sufficient deputy, did by deed-poll, dated 30th *August*, 1731, appoint the Plaintiff to be his deputy for three years, in case both the parties should so long live; but by articles of agreement, dated 6th *Sept.* 1731, the fees of office were ascertained, and the method and times of accounting prescribed; and it was also agreed that the Plaintiff should have one-third of the profits for the trouble of executing the office. The Plaintiff took possession of the office immediately, by virtue of the deputation, and afterwards the parties came to a new agreement in writing, dated 6th *December*, 1731, reciting the former deputation for three years, and thereby the Defendant granted, promised, and agreed, that the Plaintiff should have a further deputation for four years, so soon as the three years should be expired; and the Plaintiff likewise agreed to accept the deputation, and to execute the office upon the same terms that were expressed in the articles, dated 6th *September*, 1731. The three years being expired, this bill was brought to have a specified performance of the agreement with regard to the four years, to commence after the three years.

For the Plaintiff it was argued, that the consideration of this agreement was just, and not in the least affected by the 5 & 6 *Ed.* 6. *c.* 16., and that the deputation was not to be for such a time as that it could go to any one else besides the Plaintiff, for it was to end with the life of either of the parties. The difference was taken to be, where the deputy is to pay a sum in gross, and where out of the profits of the office; for in the former case it is in the nature of a sale, because in all events the deputy is bound

bound to pay it. *Godolphin* v. *Tudor*, 3 *Keb.* 717., 2 *Salk.* 468.; and there can be no inconvenience to the public by making a deputation for four years, for he must have it under the same terms with regard to any misbehaviour in the office, as if he was only a deputy at will. *Sutton*, Marshall of the King's Bench neglected to attend his office for two terms together, so the Court appointed another; and it was there held a lease of the office might be good. Then it was insisted, that as the principal might dispose of the profits of his office, or make a grant of them for the satisfaction of debts, so far as his right in the office itself extends, and as there could be no inconvenience to the public, in this case the Plaintiff was entitled to a specific performance of the agreement; and the case of Sir *Henry Slingsby* (*a*), warden of the Mint was cited, where it was argued, that he could not be turned out of his office without an inquisition found against him; but my Lord Chancellor *Finch* held, that the king was not obliged to accept of his service, but might direct the duty to be done by another, though he could not deprive him of the salary; whence it was inferred, that in this case, though the Defendant might in strictness of law refuse to make the Plaintiff his deputy, or might revoke it at any time, considering it as a bare power only, yet that he could not defeat the Plaintiff of the interest or profit he was to have from the place. *Co. Litt.* 233. a. b.

For the Defendant it was said, that every deputy is, from the nature of the thing, removeable, *Hob.* 13.; and the reason why the office of undersheriff is revocable, is for the public interest, and for the indemnity of the sheriff, which are both applicable to the present case, therefore the Court ought not to interpose, but leave the Plaintiff to his remedy at law if he had any. Then it was urged, that though the Court might in this case decree a specific performance of the agreement, yet that upon considering the whole together, the Plaintiff was not entitled to the aid and assistance of this Court, because the Plaintiff had not accounted for divers fees which he had received by virtue of the deputation, and that he had taken several fees which were not due or expressed in the list of fees

(*a*) *Post*, p. 176.

annexed

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annexed to the agreement, dated 6th *September*, 1731, and had concealed several instruments and writings belonging to the office, and so he had forfeited all the equity he might otherwise have had.

The Defendant being about to read his proofs as to those misbehaviours, &c. alleged in such general terms by his answer, it was objected on the part of the Plaintiff, that the charges were too general, and that the Plaintiff could not tell what proof to make against them, unless he must examine to every particular fee he had received during the time of his executing the office, and also as to every instrument that hath come to his hands, which would be unreasonable and expensive; therefore the Defendant should have pointed the particular facts in his answer, whereby the Plaintiff might be enabled to know how to clear himself by his proof. 2 *Danv.* 244. *A.* leases to *B.* for years, *B.* covenants to leave the premises in repair; Breach may be assigned that he did not leave in repair: but if the Defendant pleads he did leave them in repair, the Plaintiff by his replication must shew particularly what part was out of repair, that the Defendant may give a particular answer to it, *Hancock* v. *Field*, *Cro. Jac.* 171.; and it was said the reason would hold equally strong in equity as in law; and that though an indictment for barratry might be general, yet the prosecutor is always obliged to give a list upon oath to the Defendant of the particular matters that are intended to be proved against him, *Hawk. P. C.* 2 *B.* 227. For the Defendant it was said, if this exception should prevail, whenever a Defendant alleged fraud in his answer, or that any person was *non compos*, he could be admitted to prove no other facts but what were particularly set forth in the answer, because it may there with equal reason be objected, that the Plaintiff would not know what to controvert, or what proof to make. And the case of *Sidney* v. *Sidney*, 3 *P. W.* 269. was mentioned, where a bill was filed for a specific performance of marriage articles, and the Defendant in his answer, declared his wife had greatly misbehaved herself towards him; at the hearing of the cause, the Defendant would have proved, that the Plaintiff had been guilty of adultery, but he was not admitted to make that proof, there being a great variety of misbehaviour that a wife may be guilty of towards her husband, and so the charge was too general; but it was then agreed,

agreed, if it had been said generally, that she had been guilty of adultery, he might have been permitted to prove any particular acts of adultery, though not alleged in the answer.

Talbot, Lord Chancellor. The question is, whether these matters are sufficiently put in issue or not; for it is certain they might have been more precisely so, by enumerating the particular facts; yet as they are not intended to charge the Plaintiff with any particular sums received more than are accounted for, but to show a general misbehaviour of the Plaintiff in this office, so that a court of equity should not help him, I think for this purpose they are sufficiently put in issue. Here the Defendant does not rest in saying the Plaintiff has broken the articles generally, but says under such and such a head, which are general heads on which the Defendant intends to rest his case. In the case of *Sidney* v. *Sidney*, the words were so uncertain, that it was impossible to imagine what kind of misbehaviours they might be, and there the Court would not let him prove adultery, because it was not rightly put in issue; but if it had been said she had been guilty of adultery, then she would have had a sufficient opportunity of defending herself, even as to particular adulteries. In criminal matters, it is not only necessary that the nature should be set out, but generally that the single fact should be specified, by which the party may be enabled to defend himself in a matter which is final against him. But here, if the Plaintiff thinks he can give further light in the affair, or the Court has any doubts about it, there may be directions given for a further inquiry.

Then the Defendant began to read his proofs, but the Chancellor proposing that a Master should examine whether the Plaintiff had accounted for all the fees he had received, &c. the parties agreed to it. At last the whole dispute was referred to arbitrators.

This cause came before the Chancellor by way of appeal from the Rolls, where it was determined, that the allegations in the Defendant's answer were too general to put the particular misbehaviours in issue; and also, that this was in its own nature a case improper for the court to decree a specific performance, because the law has allowed every principal a power to revoke his deputation at any time. — Sir *Clement Wearg*'s MSS.

1818.

PALMER v. VAUGHAN.

July 18.
32 *Car.* 2.
1680.

Prerogative of the king by letters patent, to suspend a public officer, though the office is granted for life. After suspension the officer is entitled to receive the salary, but not to exercise the functions, of the office.

The following note of *Slingsby*'s case, cited in the preceding, is extracted from Lord *Nottingham*'s MSS.

SLINGSBY'S CASE.

Mr. *Slingsby*, the Master of the Mint, had been examined before the Lords Commissioners of the Treasury touching several misdemeanors, and upon their report, and hearing of him at council table, was ordered to be suspended from his place, and the patent of suspension coming to be sealed, he put in a caveat, and insisted by his counsel, that he had in no sort misdemeaned himself, nor could be removed from his freehold without an inquisition, finding a forfeiture, or a *scire facias*; nor could he be suspended, his salary arising by the profits, and he having also casual profits that arise by the exercise of his place, as 18*d.* for every pound weight of silver that is coined, and 7*s.* for every pound weight of gold, besides houses and other privileges; and cited 1 *Inst.* 233. *a*, *b*. 18. *E.* 4. 9. *Bro. Grants*, 103.

To which it was answered, that it was fit to distinguish in this case, between that which was truly and properly Mr. *Slingsby*'s office as Master of the Mint, and that which was a collateral contract by indenture between him and the king. To his office, strictly and properly, there belonged nothing but a mere salary, which must and ought to be continued to him notwithstanding his suspension, but his service in that office the king was not obliged to use unless he pleased; and *ergo*, might well enough discharge him the exercise of it, paying him his salary; for herein the king did no more than any common person might do. The profits and perquisites which he claims at 18*d.* and 7*s.* in the pound, arise only by the contract between him and the king, upon which contract he is found to be greatly indebted to the moneyers and others, and this contract is not for life; or if it were, the king is not obliged to continue in that contract, and trust with the further receipt of money, him who is already found so faulty; and whereof the consequence begins already to appear, so far that the mint is like to stand still; and as to the patent of his office, directions are given for a *scire facias*.

I said the first part of the debate, whether Mr. *Slingsby* have deserved to be suspended, is not at all before me; but the latter point, whether he may be suspended, though he

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he deserve it neversomuch, is that which I am to consider; and yet the very debate of the first point supposes and admits the latter: and I observed, that since his Majesty's happy restoration, there were several precedents of officers for life, who had been suspended. The earl of *Newport* was suspended from being Master of the Ordnance, and the exercise of that place granted to Sir *William Compton;* the Earl of *Anglesy* was suspended from being Treasurer of the Navy, and the exercise of that place granted unto Sir *Thomas Osborn*, and Sir *Thomas Littleton;* and to the first patent the Earl of *Clarendon* put the seal, to the second the Lord *Bridgman*. Since these, there was likewise a suspension of the Lord *Onger* from being Vice-treasurer of *Ireland*, and the exercise of that employment is now in the Lord *Ranelagh;* and this patent of suspension was sealed by the Earl of *Shaftsbury*. So that Mr. *Slingsby* must have more favour than these other lords have had, and I must be wiser than all my predecessors, if I refuse to seal this patent of suspension, which the council table have ordered to pass; nor do I do this because I am so required, but because I think the law allows it; for it is expressly within the difference of all the books, it being an office without any profits but the mere salary, which must be continued; and it were strange to deny the king that liberty which every subject hath, to refuse the service of any man whom he doth not like. For in a stronger case than this, viz. in the case of an office of inheritance, the case of the constable of *England*, it hath been resolved by all the judges of *England*, that the king may refuse the service of the officer; and yet there are profits incident to that office, as the books say, 6 *H.* 8. *Keilw.* 171. 11 *El. Dyer*, 285; and in *Mark Steward*'s case, who was serjeant-at-arms during life, and had a licence from the queen, by parole, to absent himself, the chief reason why that licence was held to be good was, as the book says, because it was in a manner a refusal of his services for the time, and it is in the pleasure of the queen, whether she will accept his service or no, *Co. l.* 9. 99. a. *quod nota*, for there are fees and profits which arise by the exercise of that office. And now if Mr. *Slingsby* be still resolved to dispute, and neither these precedents, nor yet a former precedent in King *James*'s time, where a pre-

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predecessor of his own, who was likewise master of the Mint, and was suspended by order of council, can satisfy him, I know no better way for the king to assert his power of suspending, and to try his right so to do, than by sealing this patent, and leaving Mr. *Slingsby* to his remedy at law. Lord *Nottingham*'s MSS.

Trinity, 1711.

YOUNGER *v.* WELHAM.

Where an office of justice or profit is in trust, the acts of a majority of the *cestui que trusts* may bind the rest.

There being four *cestui que trusts* of the office of the register of the Prerogative Court; the trustees covenanted not to appoint any under officer, &c. without the direction of the *cestui que trusts*; but afterwards the defendant *Norris* was made assistant without the privity of three of the *cestui que trusts*, but with the consent of the fourth.

Norris was enjoined not to act any longer; but as he came in without notice of the covenant, he was to have his costs against the Plaintiff, and the Plaintiff to have them over against *Welham* who put *Norris* in.

Peer Williams, said the four *cestui que trusts* made but one assignee of the office, and that therefore they ought all to agree in nominating, or else nobody could be nominated; and the rather because the place was within the statute, and therefore could not be sold, or the nomination any profit; but in cases of profit, he allowed a majority should bind.

Lord Keeper. Shall three lose their right because a fourth will not agree? A majority is sufficient. — From Mr. *Cox*'s notes. — Lord *Colchester*'s MSS.

END OF PART I.

REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

HIGH COURT OF CHANCERY.

Commencing in the Sittings before

HILARY TERM,

58 Geo. III. 1818.

In re the Coroner of SALOP.

1818.

April 25.

Order that a writ should be issued for the election of an additional coroner for the county of *Salop*.

Proceedings on the death of a coroner, for the election of a successor.

EDWARD SEAGER, one of the coroners for the county of *Salop*, having died, a petition was presented by some freeholders of that county, praying an order to the cursitor to issue a writ for the election of a coroner in his place, and also of an additional coroner for *Hales Owen*. The allegations of the petition appear in the orders annexed.

Sir *Samuel Romilly* in support of the petition.

The statute *Westm.* 1. *c.* 10., requires that "sufficient men" shall be chosen coroners, but no statute

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limits their number. In 1787 Lord *Thurlow*, on an application from the freeholders of *Staffordshire*, there being then only two coroners for that county, ordered writs for the election of two additional coroners.

The Lord Chancellor.

The usual course is (I know not that it is necessary) to issue the writ for election of a coroner, on a representation made by the magistrates at the quarter sessions.

The following orders were made.

Tuesday the 26th day of *May*, in the 58th year of the reign of His Majesty King *George* the Third, and in the year of our Lord 1818.

Upon reading the petition of several of the freeholders of the county of *Salop*, praying my order that the cursitor for the said county do make and issue forth His Majesty's writ *de Coronatore Eligendo*, for the election of a new coroner, in the room and stead of *Edmund Seager*, late of *Cleobury Mortimer*, in the said county of *Salop*, gentleman, deceased, one of the coroners for the said county; an affidavit of *Joseph Milnes Bloxham*, of the borough of *Hales Owen*, in the said county, surgeon, of the death of the said *Edmund Seager*, and an undertaking of *George Hinchcliffe*, of *Hales Owen* aforesaid, gentleman, one of the attornies of His Majesty's Courts of King's Bench and Common Pleas at *Westminster*, (filed with the receiver of the fines,) that six days' notice of the time and place to be appointed for the said election, shall be publicly given in all the market towns of the said county of *Salop*, before the day of the execution of the said writ; let the cursitor for the county of *Salop* make and issue forth His Majesty's writ

writ *de Coronatore Eligendo*, for the election of a new coroner in the room of the said *Edmund Seager*, deceased.

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In re the Coroner of Salop.

ELDON, C.

Tuesday, the 26th day of *May*, &c.

Whereas several of the freeholders of the county of *Salop*, on behalf of themselves and other freeholders of the said county, have presented their petition to me, stating, among other things, that within the said county there is a certain insulated part, situate within the parish of *Hales Owen*, which contains many thousands of inhabitants and considerable collieries and ironworks, in which are frequent accidents, which said parish of *Hales Owen* is about twenty miles distant from any other part of the said county, and that the attendance of a coroner who has usually resided in such other part of the said county, and at a place thirty-five miles distant from *Hales Owen*, has been attended with very great inconvenience, trouble, and expense; that there have hitherto been only four coroners acting in the said county, but that were a fifth appointed to act within such insulated part, it would be a considerable saving to the county in general, and to the parish of *Hales Owen* in particular, in the expenses attendant thereon, and that the business would be more speedily and effectually done; that in case the appointment of the fifth coroner should be approved of, and a writ should issue for such election, they were of opinion that the residence of such fifth coroner should be in the said parish of *Hales Owen*; and that the business of the county, independent of that part of it which lies within the parish of *Hales Owen*, is fully as much as four coroners can possibly attend to: Now therefore, on reading the said petition, the approbation of the justices signified at the general quarter sessions of the peace held for the

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said county, of such application for appointing a coroner for *Hales Owen*, and an undertaking of *John Philpot*, of the Inner Temple, gentleman, one of the attornies of His Majesty's Court of King's Bench at *Westminster*, (filed with the receiver of the fines,) that due notice shall be publicly given in all the market towns within the said county of *Salop*, of the time and place to be appointed for the execution of His Majesty's writ *de Coronatore Eligendo*, for the choosing a new coroner for *Hales Owen* in the said county, six days at least before the execution of the same; let the cursitor for the said county of *Salop* make and issue forth His Majesty's writ *de Coronatore Eligendo*, for choosing a coroner for the parish of *Hales Owen*, within the said county of *Salop*.

ELDON, C. (*a*)

(*a*) *Anon.* 5 *Alk.* 184. 58 *Geo.* 3. *c.* 95.

The ATTORNEY-GENERAL *v.* the MAYOR, &c. of FOWEY.

1818.
May 21. 23.

Defendants after two orders for time, having filed an answer which was found in part illegible, a motion that it might be taken off the file, resisted on an affidavit that it was legible when sworn, was refused.

IN this case, after two orders for time, an answer had been filed by the defendants, but on attempting to take a copy, it was found in various parts illegible. The plaintiff now moved that the answer might be taken off the file.

Sir *Samuel Romilly* for the motion.

An illegible answer, of which no copy can be taken, is in effect no answer. The only question is, whether the defendants are not under the necessity of obtaining a third order for time. They cannot be in a better situation than if no answer had been filed.

Mr. *Hart*

1818.

The Attorney General v. The Mayor of Fowey.

Mr. *Hart* against the motion.

The defendants are willing to pay the costs of filing a new answer; but they deprecate an order by the terms of which they consent that the serjeant at arms shall go against them. (*a*) The affidavit of their solicitor proves that the answer must have become illegible since it was sworn.

Sir *Samuel Romilly* in reply.

The solicitor states only that he examined the answer before it was sworn by one of the defendants in *London*, not after its return from *Cornwall*.

The Lord Chancellor.

If the answer was filed in a legible state, no blame attaches to the defendants. I find on inspection, that all the schedules, and nine-tenths of the body of the answer, are legible. An affidavit must be filed, describing the state of the parts now illegible, when last sworn.

May 25.

An affidavit having been filed, stating that the answer was legible when sworn, the Lord Chancellor refused the motion.

(*a*) *Orders in Chancery*, ed. *Beames*, 455.

1818.

ROBERT, Earl of *Buckinghamshire*, (since deceased,) ALBINIA, Countess Dowager of *Buckinghamshire*, JOHN SULLIVAN, ALBINIA JANE HOBART, HENRIETTA HOBART, CHARLES JOHN HOBART, AUGUSTUS EDWARD HOBART, and CATHARINE VERE LOUISA HOBART, Plaintiffs;

AND

GEORGE ROBERT HOBART, now Earl of *Buckinghamshire*, Defendant.

June 27. 29.
A charge not extinguished for the benefit of the estate, though satisfied by the tenant in tail, with the intention of extinguishing it, under the erroneous supposition that he was tenant in fee simple.

THE Master's report in this cause, dated the 1st of *April*, 1815, stated that Sir *Cecil Wray*, by his will dated the 21st of *January*, 1735, devised his seat at *Branston*, with all his fee-simple estate there, and all his messuages in *Heighington*, &c. in that county, to the heirs of his own body begotten or to be begotten, with remainder to Mrs. *Ann Casey*, his natural and reputed daughter, for life, without impeachment of waste, remainder to *John Selwyn* and *Thomas Farrington*, trustees, to support contingent remainders, remainder to *Selwyn* and *Farrington*, their executors, &c. for the term of 500 years, upon trust, to raise 6000*l.* for the younger child or children of *Ann Casey*, beside an eldest son, equally at the age of twenty-one years or day of marriage, remainder to the first and other sons of *Ann Casey*, in tail general, with remainder to her first and other daughters in tail general, with divers ulterior remainders; that Sir *Cecil Wray* died in 1736 without lawful issue, whereupon *Ann Casey* entered into possession of the devised estates, and afterwards intermarried with Lord *Vere Bertie*; that by an indenture dated the 14th of *May*, 1757, being the settlement, or articles providing for a settlement, on the marriage of *Albinia Bertie*

1818.

Earl of BUCKINGHAMSHIRE v. HOBART.

Bertie, the eldest daughter of *Ann Casey*, with the Honourable *George Hobart*, afterwards Earl of *Buckinghamshire*, between *George Hobart* of the 1st part; Lord *Vere Bertie* and *Ann* Lady *Bertie* his wife, and *Albinia Bertie*, then an infant of the age of eighteen years, of the 2d part; *Edward Woodcock* the elder and *Edward Woodcock* the younger of the 3d part; *Elizabeth*, then Countess Dowager of *Bucks*, of the 4th part; Lord *Robert Bertie* and *John Bristow*, of the 5th part; and *John*, Earl of *Buckinghamshire*, and *Robert Weston* of the 6th part; reciting that Lord *Vere Bertie* and Lady *Ann* his wife had issue *Albinia Bertie* and *Louisa Bertie*, and no other issue, Lord *Vere Bertie* and Lady *Ann* and *Albinia Bertie* covenanted with *Edward Woodcock* the elder and *Edward Woodcock* the younger, that in case the marriage should take effect, and *Albinia Bertie* should attain the age of twenty-one years, they would within six months after that time convey the mansion-house of *Branston*, and all other estates in the county of *Lincoln* devised by the will of Sir *Cecil Wray*, to the use of Lord *Vere Bertie* and *Ann* Lady *Bertie* and the survivor for life, remainder to the use of trustees to preserve contingent remainders, remainder to the use of the first and every other son and sons of *Ann* Lady *Bertie* in tail male, remainder to *George Hobart* for life without impeachment of waste, remainder to preserve contingent remainders, remainder to the use of *Albinia Bertie* for life, remainder to preserve contingent remainders, remainder to the use of two or more trustees to be named, their executors, &c. for 600 years, upon trust, in aid of a term of 500 years thereinbefore agreed to be limited in other estates devised by the will of Sir *Richard Ellys* in favor of *George Hobart*, for raising 10,000*l.* for the younger children of *George Hobart* and *Albinia Bertie*, remainder to the use of the second, third, and every the son of *George Hobart* on the body of the said

1818.

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Albinia Bertie lawfully to be begotten (other than such son as should be heir male of the body of *George Hobart* for the time being) in tail male, with divers remainders, and the ultimate remainder to the use of Lord *Robert Bertie* and his heirs.

The master also found that no settlement was made of the estates devised by Sir *Cecil Wray*, during the lives of Lord *Vere Bertie* and *Ann* Lady *Bertie*, but that after her death (she having survived her husband) in 1778, by indentures of lease and release, bearing date the 23rd and 24th days of *April*, 1779, and made between *George Hobart* and *Albinia* his wife of the first part, *Elborough Woodcock* of the second part, *Thomas Barnard* of the third part, Lord *Robert Bertie* and *Edward Woodcock* of the fourth part, and *Henry Hobart* of the fifth part, and by a recovery suffered in pursuance thereof, the estates devised by the will of Sir *Cecil Wray*, were settled to the use of *George Hobart* for life, remainder to the use of Lord *Robert Bertie* and *Edward Woodcock*, to preserve contingent remainders, remainder to the use of *Albinia* the wife of *George Hobart*, for life, with the like limitation to the same trustees to preserve contingent remainders, with remainder to the use of *Henry Hobart* and *Elborough Woodcock*, their executors, &c. for 600 years, as auxiliary to, and for raising such sum or sums as they should think proper towards payment of the said sum of 10,000*l.* intended to be provided by the trusts of the term of 500 years, limited in the estates of Sir *Cecil Wray*, by the articles of the 14th of *May*, 1757, for the portions of the younger children of *George Hobart* and *Albinia* his wife, remainder to the use of the second, third, and every other the son of *George Hobart*, on the body of *Albinia* his wife begotten, (except such as should be heir male of the body of *George Hobart* for the time being), with divers

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divers remainders over; the uses and trusts so limited and declared being conformable to the covenants in the indenture of the 14th of *May*, 1757, except as to the interests directed in favor of Lord *Vere Bertie* and *Ann* Lady *Bertie*, and her issue male; Lord *Vere Bertie* and Lady *Ann* being then dead without issue male.

The master also found that Lord *Vere Bertie* had, with the fortune of his wife Lady *Ann*, purchased other estates in *Branston*, which were known by the description of the purchased or partition estates, to which during his life it was conceived that he had, under the purchase, become entitled for an absolute and disposable interest; and that by the indenture of the 14th of *May*, 1757, the same had been demised by him to *John* then Earl of *Buckinghamshire*, and *Robert Weston* for 400 years, for securing additional portions to the younger children of *George Hobart* and *Albinia*, to the amount of 7000*l*., but that upon the death of Lord *Vere Bertie*, it was discovered that the purchased estates or the beneficial interest therein, according to the purport of a bond or agreement, which had been entered into by him upon his marriage with *Ann* Lady *Bertie*, respecting the investment of her fortune in land, would upon her death become vested in her two daughters *Albinia Hobart*, and *Ann Louisa*, as tenants in common in tail general; and accordingly upon the decease of *Ann* Lady *Bertie*, by indentures of lease and release, bearing date the 31st of *May*, and 1st of *June*, 1780, the release being made between *George Hobart* and *Albinia* his wife of the first part, *Augustine Greenland* of the second part, *Elborough Woodcock* of the third part, *John* Earl of *Buckinghamshire* and *Robert Weston* of the fourth part, and *Brownlow* Duke of *Ancaster* and *Kesteven* of the fifth part, and a recovery in pursuance thereof, the undivided moiety of *Albinia Hobart*, in the purchased estates,

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estates, was settled to the use of *John* Earl of *Buckinghamshire* and *Robert Weston*, their executors, &c. for 600 years, upon the same trusts for raising 7000*l.* for the additional portions of the younger children of *George Hobart* and *Albinia* his wife, as were declared by the indenture of the 14th of *May*, 1757, with respect to the term of 400 years; and it was agreed that the term of 600 years should not affect the term of 400 years, but should be considered to be only in aid thereof, and subject to the term, the moiety was limited to the use of the Duke of *Ancaster* and Lord *Robert Bertie*, (the executors of Lord *Vere Bertie*) their executors, &c. for 1000 years, upon trust by mortgage or sale to raise 4,200*l.*, and 4000*l.*, due from *George Hobart* to the estate of Lord *Vere Bertie* and *Ann* Lady *Bertie*, and subject thereto, to the use of *Elborough Woodcock*, in trust for *George Hobart* and his heirs.

The master farther found that in 1781 a partition of the purchased estates was effected by certain indentures bearing date the 13th and 14th of *September*, 1781, and certain fines levied in pursuance thereof, and *Albinia Hobart's* divided moiety thereof was settled to the uses declared of her undivided moiety, by the indenture of the 1st of *June*, 1780; that *George Hobart* and *Albinia* his wife had issue, *George Vere Hobart* their second son, who by virtue of the indenture of the 14th of *May*, 1757, and the settlement in pursuance thereof by the indentures of the 23rd and 24th days of *April*, 1779, and the recovery then suffered, became entitled to the estates devised by the will of Sir *Cecil Wray*, (called the *Wray* estates) as tenant in tail in remainder expectant upon the several deceases of *George Hobart* and *Albinia* his wife; that by virtue of an indenture of bargain and sale duly enrolled, bearing date the 13th of *June*, 1787, and made between *George Hobart* and *Albinia* his

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his wife of the first part, *George Vere Hobart* of the second part, *Elborough Woodcock* of the third part, and *Thomas Woodcock* of the fourth part, and of a recovery in pursuance thereof, the *Wray* estates were settled to the use of such person or persons and for such estate as *George Hobart* and *Albinia* his wife, and *George Vere Hobart*, should, by any deed executed in the presence of two witnesses and enrolled in Chancery, appoint, and in default, to the use of such person, &c. as the estates then stood conveyed by the indenture of the 24th of *April* 1779; that by an indenture of appointment bearing date the 9th of *February*, 1790, made between *George Hobart* and *Albinia* his wife, and *George Vere Hobart* of the one part, and *Elborough Woodcock* of the other part, duly executed by them in the presence of two witnesses, but not enrolled in Chancery, the *Wray* estates were appointed to the use of *Elborough Woodcock* his heirs and assigns, upon such trusts as *George Hobart* and *Albinia* his wife, and *George Vere Hobart*, should by any deeds executed in the presence of two witnesses appoint; that by indentures of lease and release and appointment, bearing date the 9th and 10th days of *February*, 1790, the release and appointment being made between *George Hobart* and *Albinia* his wife, and *Elborough Woodcock* of the first part, *George Vere Hobart* of the second part, *Charles Stuart* and *Ann Louisa* his wife, and *John* Earl of *Bute* and *Thomas Coutts*, (trustees named in the marriage settlement of *Stuart* and his wife,) of the third part, *Brownlow* Duke of *Ancaster* of the fourth part, *William Birch* and *Elborough Woodcock* of the fifth part, and *C. G. Hudson* of the sixth part, reciting that the indenture of the 9th of *February* had been enrolled in Chancery, and that in 1786, *George Hobart*, together with *Robert Hobart* his eldest son, executed mortgages of certain manors, &c. formerly the estate of Sir *Richard Ellys*, for securing several

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several sums, amounting in the whole to 50,000*l.*, the manors, &c. being also subject to an annuity of 500*l.*, granted by *George Hobart* and *Albinia* his wife, during their lives and the life of the survivor, and that at the time of making the mortgages, it was intended to repurchase the annuity, and 3,500*l.*, part of 50,000*l.*, were deposited in the hands of *Birch* for that purpose; and in the mean time to indemnify the mortgagees and *Albinia Hobart*, in case she should happen to survive her husband, against the annuity, and subject to such indemnity in trust for *George Hobart* his executors, &c.; and farther reciting that it having been found impracticable to repurchase the annuity, the 3,500*l.* had been laid out in India bonds, and that *George Hobart* being desirous of paying off 4,200*l.*, part of the 8,200*l.*, due to the Duke of *Ancaster*, as surviving executor of Lord *Vere Bertie* and *Ann* Lady *Bertie*, and to borrow 300*l.*, *Birch* had agreed to advance the 3,500*l.*, and *C. G. Hudson* had agreed to advance 1000*l.*, to make up the 4,500*l.*; and that *George Vere Hobart* had agreed to join with *George Hobart* and *Albinia* his wife, in appointing the *Wray* estates comprised in the indentures of 13th *June*, 1787, and 9th *February*, 1790, as a farther security for the 4,500*l.*, upon condition that the equity of redemption of the premises thereinafter granted, should be limited to *George Vere Hobart* in fee, subject to the estate for life of *George Hobart*; the several parts of the estates purchased by Lord *Vere Bertie*, and allotted in severalty to *George Hobart* and *Albinia* his wife, were released and assured to the use of *William Birch* and *Elborough Woodcock*, their heirs and assigns, subject to the terms of 400 years and 600 years, and to the sum of 7000*l.*, to be raised under the trusts of those terms, and subject to the term of 1000 years, and to the sum of 4000*l.* remaining to be raised under the trusts of that term, and subject to a proviso that

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that upon payment by *George Hobart* and *George Vere Hobart* or either of them, or the heirs or assigns of *George Vere Hobart*, to *Birch* and *Elborough Woodcock*, their executors, &c., upon the trusts thereinafter mentioned, of the 3,500*l.*, and to *Hudson* his executors, &c. of 1000*l.*, the premises should be reconveyed to *George Hobart* for life, and after his decease to the use of *George Vere Hobart* in fee; and for better securing the repayment of the 3,500*l.* and 1000*l.*, *Elborough Woodcock*, *George Hobart*, and *Albinia* his wife, and *George Vere Hobart*, conveyed the *Wray* estates to *Birch* and *Woodcock* in fee, subject to a proviso, that on payment of the 3,500*l.* and 1000*l.*, the last mentioned premises should be reconveyed to the use of such person, &c. as *George Hobart* and *Albinia* his wife, and *George Vere Hobart* should by deed attested by two witnesses appoint, and in default of appointment, to the use of *George Hobart* for life, remainder to the use of *Albinia Hobart* for life, remainder to the use of *George Vere Hobart* in fee; and the indenture contained covenants by *George Hobart* and *George Vere Hobart*, for payment of the 3,500*l.* and 1000*l.*

The Master farther found, that by a deed-poll, under the hands and seals of *George Hobart* and *Albinia* his wife, and *George Vere Hobart*, dated the 5th of *January*, 1791, and attested by two witnesses, reciting that the *Wray* estates, subject to the payment of 6000*l.* to *Ann Louisa* the wife of *Charles Stuart*, and to the last mortgage, were settled to the uses declared in the last indenture, and that *George Hobart* was about to borrow 14,463*l.* 3 *per cent.* bank annuities then standing in the names of *John* Earl of *Buckinghamshire* and *Robert Weston* as trustees, to pay the interest to *George Hobart* for his life, and after his decease in trust as to the capital, for the younger children of *George Hobart* by

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by *Albinia* his wife, except *George Vere Hobart*, the same having been purchased with the 10,000*l.* provided for the portions of the younger children; and the produce of the bank annuities, which was computed at 11,560*l.*, was to be applied in payment of 4,250*l.* remaining due from *George Hobart* to the trustees for Sir *Charles Stuart*, and then of 6000*l.* to *Ann Louisa Stuart*, and the residue to *George Hobart*; it was agreed between *George Hobart* and *Albinia* his wife, and *George Vere Hobart*, that the 11,560*l.*, or such sum as should arise by the sale of 14,463*l.* 3 *per cent.* bank annuities, should be secured, 6000*l.* primarily on the *Wray* estates, and collaterally upon that part of the estates purchased by Lord *Vere Bertie*, which had been limited in severalty to *George Hobart* and *Albinia* his wife, and the remaining 5,560*l.*, primarily upon the purchased, and collaterally upon the *Wray* estates.—That by another deed dated the 16th of *August*, 1791, under the hands of *George Hobart* and *Albinia* his wife, and attested by two witnesses, reciting that a security was prepared and would be speedily executed to *John* Earl of *Buckinghamshire* and *Robert Weston*, for the money to arise from the 14,463*l.* 7*s.* stock, in which to avoid objections on the part of the trustees, the whole was secured as well on the purchased as on the *Wray* estates, it was declared, that as between the parties to the deed and their son *George Vere Hobart*, the security was to be considered as given conformably to the agreement for charging 6000*l.* primarily on the *Wray* estates, and collaterally only on the purchased estates, and the residue primarily on the purchased, and collaterally on the *Wray* estates; that by indentures of lease and release and appointment bearing date the 16th and 17th of *August*, 1791, the release and appointment being made between *George Hobart* and *Albinia* his wife, of the first part; *George Vere Hobart* of the second part; *Charles Stuart* and *Ann Louisa* his wife,

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wife, and *John* Earl of *Bute* and *Thomas Coutts* of the third part; *Brownlow* Duke of *Ancaster* and *Kesteven* of the fourth part; *W. Birch* and *Elborough Woodcock* of the 5th part; *C. G. Hudson* of the sixth part; *John* Earl of *Buckinghamshire* and *R. Weston* of the seventh part; and *Conrade Coulthurst* of the eighth part; in consideration of 4000*l.*, part of 12,710*l.*, (the value of the 14,463*l.* 7*s.* stock,) paid to the Duke of *Ancaster*, in satisfaction of that sum remaining due to him under the trusts of the term of 1000 years, and in consideration of 6000*l.*, other part of the 12,710*l.*, to *John* Earl of *Bute* and *Thomas Coutts* paid in satisfaction of the 6000*l.* provided by the will of Sir *Cecil Wray* for the portion of *Ann Louisa Stuart*, as the only younger child of *Ann* Lady *Bertie*, and all interest thereon, and in consideration of the remaining 2,710*l.* paid to *George Hobart* and *George Vere Hobart*; *George Hobart* and *George Vere Hobart* conveyed to *John* Earl of *Buckinghamshire* and *R. Weston* in fee, the part of the purchased estates allotted in severalty to *George Hobart* and *Albinia* his wife, subject to the terms of 400 years and 600 years, to the 7000*l.* to be raised under the trusts thereof, and also subject to a proviso, upon payment of the 12,710*l.* and interest, for reconveyance to *George Hobart* for life, remainder to *George Vere Hobart* in fee, subject to the terms of 400 years and 600 years, and the sum of 7000*l.*: and for farther securing the repayment of the 12,710*l.*, *George Hobart* and *Albinia* his wife, and *George Vere Hobart*, appointed to the Earl of *Buckinghamshire* and *R. Weston*, in fee, all the *Wray* estates, subject to a proviso, upon repayment, for reconveyance to such persons as *George Hobart* and *Albinia* his wife, and *George Vere Hobart*, by any deeds attested by two witnesses, should appoint, and for want of appointment to *George Hobart* for life, remainder to *Albinia Hobart* for life, remainder to the use of *George Vere*

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Vere Hobart in fee; and the indenture contained covenants by *George Hobart* and *George Vere Hobart* for payment of the 12,710*l.*

The Master then found that *George Vere Hobart* being thus entitled in fee simple to the equity of redemption of the purchased estates, subject to the life estate of his father *George*, and also believing himself to be in like manner entitled in fee simple to the equity of redemption of the *Wray* estates, subject to the life estates of his father and mother, by his will dated the 12th of *June*, 1802, devised his reversionary interest in the *Branston* estate to his wife *Janet M'Leod Hobart* for her life, if she should so long continue unmarried, remainder to *Robert* Earl of *Buckinghamshire*, then *Robert* Lord *Hobart* and *John Sullivan* in fee, on trust to sell, (with an option of purchasing to his eldest son living at the death of his wife,) and stand possessed of the purchase-money upon trust for all his children living at his death, except an eldest or only son, equally, with benefit of survivorship in the event of the death of any sons under 21, or any daughters under that age and unmarried; that *George Vere Hobart* soon afterwards died, leaving his wife, (who shortly died) and *George Robert Hobart* his eldest son and heir, and five younger children.

The Master farther found that *George* late Earl of *Buckinghamshire* having died, leaving *Albinia* Countess Dowager of *Buckinghamshire*, and *George Robert Hobart* having attained 21, and having declined to purchase, *Robert* Earl of *Buckinghamshire* and *John Sullivan* contracted to sell the estates; and on investigating the title of the testator *George Vere Hobart*, it being discovered that the indenture of appointment of the 9th of *February*, 1790, had not been enrolled in the Court of Chancery,

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Chancery, the present suit was instituted in order to have that defect supplied; that in the mean time it was agreed between *Robert* Earl of *Buckinghamshire* and *John Sullivan*, and *George Robert Hobart*, upon whom, in case of failure of the appointment of the 9th of *February*, 1790, the remainder in tail in the *Wray* estates, after the life estate of *Albinia* Countess Dowager of *Buckinghamshire*, descended, that *George Robert Hobart* should concur with them and the Countess *Albinia* in making a good title to the purchasers, without prejudice to his rights as to the purchase-money of the *Wray* estates, in case the defect of enrolment should not be supplied; and accordingly by an indenture of the 19th of *November*, 1810, and certain recoveries suffered in pursuance thereof, the *Wray* estates were settled to the use of such persons as the Countess *Albinia* and *George Robert Hobart* should by deed appoint, and in default of appointment to the use of the Countess for life, by way of restoration and confirmation of her estate for life therein, remainder to the use of *George Robert Hobart* in fee; and the Countess and *George Robert Hobart* had concurred in executing the contracts for the sale of the *Wray* estates, and *Robert* Earl of *Buckinghamshire* and *John Sullivan* had executed the contracts for the sale of the purchased estates, and out of the purchase-money had paid the 12,710*l.* to the executor of the late *John* Earl of *Buckinghamshire*, the surviving trustee, and the sums of 3500*l.* and 1000*l.* to the parties entitled, and having kept separate accounts of the application of the purchase-monies, had charged the *Wray* estates with 6000*l.*, part of the 12,710*l.*

The Master also found that the 12,710*l.* arose from an investment in stock of the 10,000*l.* raised out of the estates of Sir *R. Ellys*, and received by *John* Earl of *Buckinghamshire* and *Robert Weston* as trustees for the

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younger children of *George Hobart* and *Albinia* his wife; and that the sum of 6000*l.* was paid out of the 12,710*l.* in satisfaction and discharge of the 6000*l.* provided by the will of Sir *Cecil Wray*, and a receipt for the same was endorsed on the release of the 17th of *August*, 1791, but he did not find that the same or any of the securities for the same were then any otherwise released, or that the said charge on the *Wray* estates, or the securities for the same, were extinguished, released, assigned, or otherwise dealt with, except as aforesaid, and except that after the contracts of sale, the term of 500 years was assigned, and that the Countess *Albinia*, after the decease of *George* last Earl of *Buckinghamshire*, paid the interest of the 12,710*l.* as tenant for life in possession of the *Wray* estates; and by an indenture dated the 16th of *January*, 1811, the trustee of the term of 500 years assigned it, subject to the mortgages of the 9th and 10th of *February*, 1790, and 16th and 17th of *August*, 1791, in trust for the Countess *Albinia*, *George Robert Hobart*, *Robert* Earl of *Buckinghamshire*, and *John Sullivan*, their heirs, &c. in trust to attend the inheritance.

The Plaintiffs insisted that the 6000*l.* having been originally charged on the *Wray* estates, they ought still to be considered as charged therewith, saving the effect of the sale and conveyance to the purchasers, and that sum ought to be paid out of the money arising from the sale of the *Wray* estates in exoneration of the purchased estates.

The cause now came on for further directions.

Mr. *Bell*, and Mr. *Wetherel*, for the Plaintiffs, cited *Jones* v. *Morgan*. (*a*)

(*a*) 1 *Bro. C. C.* 206.

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Sir *Samuel Romilly*, and Mr. *Benyon*, for the Defendants.

All the parties intended to extinguish the charge, and it is in fact extinguished. The transaction was certainly founded in mistake; *George Vere Hobart* acted on the erroneous supposition that he was tenant in fee, and had he known his title as tenant in tail, would probably have taken care to maintain the charge. — But the question is, Whether on such conjectural reasoning, the Court can interfere to do that which the parties omitted?

The reply was stopped by

The LORD CHANCELLOR.

On the hearing of this cause it appeared to me impossible to determine whether those who represent the persons by whom the 6000*l.* were paid were entitled to maintain that that sum should in equity be a charge on the *Wray* estates, without knowing accurately how the securities have been dealt with, and every particular of the transactions. The case now comes before the Court from the Master, on a long and complicated detail of facts, the effect of which, however, may be stated in few words.

The question does not depend much on the doctrine relative to tenants for life or in tail paying off incumbrances. The rules of the Court in those cases are well understood. If a tenant for life pays off a charge on the estate, *prima facie* he is entitled to that charge for his own benefit, with the qualification of having no interest during his life; if a tenant in tail, or in fee simple, pays off a charge, that payment is *prima facie* presumed to be made in favor of the estate; but the presumption may be rebutted by evidence as by call-

Effect of payment of a charge by tenant for life, and tenant in fee.

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ing for an assignment, or by a declaration. In *The Countess of Shrewsbury* v. *The Earl of Shrewsbury*, (*a*) it was held that if a tenant in tail without power of suffering a recovery, who was considered in this Court as a tenant for life, paid off a charge, his dealing did not raise the presumption which results from payment by a tenant of the inheritance.

Tenant in tail without power of suffering a recovery, considered in equity as tenant for life.

In this case, the original settlement charged on the *Wray* estates, which the Countess *Albinia* became entitled to, a sum of 6000*l.*, secured by a term of 500 years. In the course of dealing with these estates, a recovery was suffered by *Albinia* and her husband, and the estates were limited to certain uses to be declared by a deed enrolled in Chancery in execution of a power, and in default of appointment, to the old uses; the execution of the power being defective, in consequence of an omission to enrol the deed, the estates remained in *Albinia*, and eventually came to her second son as tenant in tail. Under the effect of this imperfect execution of the power, all parties conceived him to be tenant in fee, and there was a scheme for paying off the 6000*l.* and other sums, by borrowing an amount of stock which produced 12,710*l.*; and it being supposed that *George Vere Hobart* was tenant in fee of the estate of which he was only tenant in tail, a mortgage was made of this estate and of some other estates, of which he was tenant in fee, for 12,710*l.*, and of that sum 6000*l.* were applied in payment of the portion charged, and a receipt was given; but the term remained in no way dealt with, and has not yet been assigned to any one. The sales are without prejudice to the question.

(*a*) 5 *Bro. C. C.* 120. 1 *Ves. Jun.* 227. See *Ware* v. *Polhill*, 11 *Ves.* 257. *Redington* v. *Redington*, 1 *Ball & Beat.* 131.

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If we are to advert to cases on the intention of tenants in tail paying off charges, the answer to applying that doctrine to this case is, that the party never conceived himself to be tenant in tail; believing that he was tenant in fee, his meaning unquestionably was to pay off this sum of 6000*l.*, and so that it should no longer be a charge on the estate, but at the same time, by virtue of his interest as tenant in fee, to create a charge on the other estates for 12,710*l.*, part of which had been applied in payment of the 6000*l.*

George Vere Hobart died in ignorance that the mortgagees had a bad title, and with a conviction that the estates were discharged of the 6000*l.*; at least I think that it must be so taken: it now appears that the title of the mortgagees was bad. Suppose that the question had arisen with them. They dealt for a security for 12,710*l.*, not taking an assignment of the term, but omitting to take it on the ground that that term would be attendant on the inheritance in fee; it could not be so attendant on the fee in them, because they had not the fee; but that term being attendant on the estate tail which was in their mortgagor, and not barred by recovery, and it being the intent that the term should be attendant on the inheritance, and that the inheritance should be in them, it could not have been maintained in a court of equity that they should not have the benefit of the term, because it could not be actually attendant on the inheritance in them; as purchasers they would have a right to say otherwise.

Right of mortgagees to the benefit of a term attendant on the inheritance, though the term was not assigned, nor the inheritance conveyed to them

If *George Vere Hobart* had paid off the mortgage in his life-time, and taken an assignment, he would then have stood in the same situation as the mortgagees, and would have been entitled to object to his issue in tail that they should not have the benefit of this sum, unless

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they allowed the term to attend the inheritance. His assets paid the charge.

It appears to me that this case is not one in which the intention of the parties must be taken to have been to maintain the charge, but to destroy it; but it must finally be determined, that if the whole of the estate cannot be enjoyed according to the whole of the intention, the term, which has never yet been assigned, shall be considered as subsisting to secure the 6000*l.* I am of opinion that the parties are entitled to have the term so considered.

" His Lordship doth declare that the Plaintiff *Robert* Earl of *Buckinghamshire*, deceased, and *John Sullivan*, as devisees in trust under the will of *George Vere Hobart*, are entitled to have the 6000*l.*, remainder of the mortgage for 12,710*l.* in the pleadings mentioned, and interest, raised out of the *Wray* estates; and it is ordered, that it be referred to the said Master to take an account of what is due to the trustees for principal and interest in respect of the said 6000*l.*; and it appearing by the said Master's report, bearing date the 1st day of *June*, 1815, that the *Wray* estates have been sold, and the money arising therefrom has been paid to the Plaintiff *Robert* Earl of *Buckinghamshire*, since deceased, and *John Sullivan*, it is ordered, that what the Master shall find due in respect of the said 6000*l.* and interest, be paid to such of the Plaintiffs as are the younger children of the said *George Vere Hobart*; and for the better taking the accounts, &c. And his Lordship doth not think fit to give costs on either side." Reg. Lib. A. 1817, fol. 2221. (*a*)

JONES

(*a*) EARL of KINNOUL *v.* MONEY.

Hearing, *Michaelmas* Term, 30 *G.* 2. Rehearing, 18th and 21st *March*, 1767.

In 1740, *Constantia Earnle* was seized in fee of freehold estates in *Wilts* and *Hereford*, worth about 800*l. per annum*, in

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JONES v. the GUARDIANS of the POOR of the Parishes of *Montgomery* and *Pool*, and the Parishes, Chapelries, and Townships united therewith in the Counties of *Montgomery* and *Salop*.

June 30.

Creditors who had advanced money to a corporation established for the maintenance of the poor of a certain district, were held entitled to compel the assessment of rates sufficient, after maintenance of the poor, to pay the principal and interest of their debts.

BY statute 32 *Geo.* 3. *c.* 96. certain parishes, chapelries, and townships were united and incorporated into one district for the purposes of the act; and all persons inhabiting any of the parishes, &c. and being assessed to the relief of the poor, and seised or possessed of freehold or copyhold lands or tenements of the yearly value of 20*l.*, or of any lands or tenements within the parishes, &c. of the yearly value of 10*l.*, or possessed of a personal estate to the amount of 500*l.*, were incorporated by the name of the guardians of the poor of the parishes, &c. with power to sue, &c. and hold lands, tenements, and chattels, &c. and to convey or release, &c. such lands, &c.

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in possession, and of other estates in reversion, (expectant on the death of her mother *Constantia Earnle*, who survived her,) of about 1200*l.* a-year; subject to and chargeable with sundry debts and legacies of her father. 12th *June*, 1741, Miss *Earnle*, in prospect of a marriage with the Earl of *Kinnoul*, then Lord *Duplin*, covenanted and agreed to settle all her estates both in possession and reversion, to the use of trustees for 99 years, for securing 200*l.* a-year pin-money, remainder to Lord and Lady *Duplin* for their joint lives; and in case the lady survived, then to her for life; remainder, as to the estates in reversion, to trustees for 500 years, which never took effect; remainder to the first and other sons of Lord and Lady *Duplin*, in tail male, remainder to such uses, and subject to such charges as Lady *Duplin* should, notwithstanding her coverture, by any deed direct

A woman, being entitled to some estates in possession, and to others in reversion on the decease of her mother, settled them previous to her marriage, to trustees for 99 years to secure pin-money, remainder to herself and her intended husband for their joint lives; and in case she

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The act prescribed a mode of election of directors, any five of whom were empowered to purchase lands or buildings for specified purposes, and to contract for and purchase provisions and materials for maintaining and employing

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should survive, remainder to her for life; with remainder as to the estates in reversion, to the first and other sons of the marriage in tail male, remainder to such uses as she, notwithstanding coverture, should appoint, and in default of appointment, remainder to her in fee; with remainder, as to the estates in possession, after her death, to such persons as she should appoint, with like remainder in default of appointment; and by the marriage articles it was agreed, that if the husband would have been entitled to be tenant by the curtesy, in case of no settlement, he should enjoy the lands

or appoint, and for want thereof, remainder to Lady *Duplin*, her heirs and assigns; and as to the lands in possession, after Lady *Duplin*'s death, to the use of such person or persons, and subject to such charges, as she should appoint; with the like remainder in fee to her own heirs in default of appointment. And it was by the marriage articles agreed, that in case Lord *Duplin* should be or would have been entitled to be tenant by the curtesy of all, or any part of the estates, in case of no settlement, then that he should enjoy such lands for his life, as if no articles or settlement had been made, and that the estates should after his death follow the uses limited as above.

The marriage was had, and Lord *Duplin* earned his curtesy estate; but the child died very young. Lady *Duplin* having, previous to her marriage, treated about the loan of 2500*l.* to pay her father's debts, and some of her own, completed the mortgage in *July*, 1741, (soon after the marriage,) wherein Lord *Duplin* joined, and covenanted to pay the mortgage money, which was secured on the estates, both in possession and reversion. In 1746, they raised the further sum of 4500*l.*, secured likewise on both estates. In 1752, an arrear of the interest having accrued on both sums, amounting to 1000*l.*, the mortgagees assigned, and Lord and Lady *Duplin* confirmed both estates to new mortgagees, for securing 8000*l.* and interest.

20th *June*, 1753, Lady *Duplin* made her will, and charged her estates in reversion with the payment of certain debts of her mother, and of sundry legacies given by her own will, and directed that they should be a lien and incumbrance on those estates, and be raised and paid by sale or mortgage, as soon as might be after her mother's death; and she devised the said estates in *Wilts* and *Herefordshire*, subjected by her as aforesaid, to her husband

employing the poor; and declared that it should be lawful for the directors, or any five of them, for and in the name of the corporation of guardians of the poor, from time to time to borrow and take up at interest any sums of

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band Lord *Kinnoul* for life, with power to make leases; and after his decease she devised the same estates, so subjected and charged by her as aforesaid, together with certain other estates in *Wilts* and *Herefordshire*, "subject to such incumbrances as the same are now subject to," to Mr. *Washbourn* and others, for their lives, and the survivor of them; then she devised all the said estates which were her late father's, as well those jointured as otherwise, "subject to such incumbrances as the same are now subject to," and all her estates, &c. unto the Defendant *James Money* and his heirs for ever.

Lady *Duplin* died 26th *June*, 1753, without issue, and without revoking her will. This bill was soon afterwards brought by Lord *Duplin*, in order to have the estate sold to satisfy the incumbrances, and that a value might be set on his life estate, and that he might have a contribution from the persons in remainder of the reversionary estates, for the interest paid in Lady *Duplin*'s lifetime, and since her decease, and before the death of Lady *Duplin*'s mother. The Defendants insisted that the mortgagees remaining satisfied with the security, the estate ought not to be sold, and that the sum of 8000*l.* being advanced during the coverture, ought to be considered as the debt of Lord *Duplin* himself, and that he ought to keep down the interest of the same.

At the hearing the Plaintiff's counsel relinquished the prayer of sale, and prayed that Lord *Duplin* might redeem the mortgagees, and that the Court should declare the estate to be liable to the debt of 8000*l.*, the money being advanced for the use of Lady *Duplin* herself, and that the Defendant might contribute towards the interest.

Mr. *Yorke*, Solicitor General.—The question is, whether this is not a debt to be charged upon the estate, and whether therefore the Plaintiff as tenant for life, is not intitled to redeem? and the ground

as if no settlement had been made. The husband became entitled to be tenant by the curtesy; after the marriage, a sum of 2500*l.* for paying debts of the wife due prior to the marriage, was raised by mortgage of the estates, the husband joining and covenanting for payment of the mortgage money; and a further sum of 4500*l.* was raised on a like security; and afterwards a sum of 1000*l.* for paying interest on the former sums: the wife died without issue surviving her, having by her will devised the estates to her husband for life, with a limitation of them after his decease, "subject to such incumbrances as

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of money not exceeding in the whole the sum of 12,000*l.*, in such shares or amounts of not less than 100*l.* each, as should be judged most convenient, and therewith to pay the expenses of obtaining and passing the act, and such

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they were then subject to:" on a bill by the husband, an inquiry was directed into the application of the money raised, and the husband was held discharged from so much as was applied to the wife's use, except that as tenant for life he ought to keep down the interest; but the will of the wife was construed not to charge the estates with the whole sum, in exoneration of the husband.

ground on which the Defendant must argue this, is much too large; for the Court has never yet said that a wife cannot make a gift to her husband. This Court has never yet broken in upon the rule of law, that wherever a feme covert levies a fine, and declares the uses thereof, she may give a benefit and interest in the estate to her husband. Lord *Huntingdon's* case. (*a*) A sum of money was borrowed on Lady *Huntingdon's* estate for my lord's use; Lord *Huntingdon* afterwards took an assignment of the mortgage in trust for himself, and devised the same to his second wife: upon an appeal the lords decreed that the mortgage should be assigned to the heirs of the first Lady *Huntingdon*. This appeared on the deed itself to be borrowed to buy Lord *Huntingdon* a place. So in the case of *Tate* v. *Austin*. (*b*) But in the present case, it is a gift from the wife to the husband; nothing appears on the face of the deed to shew the money was raised for the benefit of the husband. In the case of *Bagot* v. *Oughton* (*c*), it appears there was a covenant from the husband to pay the mortgage money, yet his personal estate was held not to be liable to pay the same, because it was not his debt. In the present case, this is the proper debt of the wife; the treaty for the mortgage was before the marriage, and the application of the money raised was in discharge of debts of Lady *Duplin's* father; and all that has been raised since the first mortgage, has been applied in discharging her debts. But in case this would not avail the Plaintiff in order to make this to be considered as Lady *Duplin's* debt, and for which the estate will be liable, yet it plainly appears to be the intention of Lady *Duplin*, to make her estate chargeable with this incumbrance in the hands of the remainder man, for she devises it to him subject to such incumbrances, as it was then charged with.

(*a*) 2 *Vern.* 437. (*b*) 1 *P. W.* 264. (*c*) 1 *P. W.* 347.

Mr. *Harley*,

such interest of the sums from time to time borrowed, as should become due during the three years next after the first court or meeting, and also the expenses which should be incurred in or be incident to the purchasing, conveying

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Mr. *Harley*, for the Plaintiff. The questions are, 1. Whether Lord *Duplin* is to be considered as principal debtor, and the land only as a collateral security? 2. Whether Lord *Duplin* is a creditor for the interest paid? As to the first, this case differs from *Pocock* v. *Lee* (*a*), for here the money was raised not for the use of the Plaintiff, but to pay the debts of Lady *Duplin*. And though the mortgage was executed after the marriage, yet it was in consequence of an agreement before; and though the Plaintiff covenanted to pay the money, that can be of no weight, for no person else could covenant; and in the case of *Bagot* v. *Oughton*, it was held that the land was liable, and the covenant only a collateral security. 2dly, Whether the Plaintiff is entitled to a contribution out of the estate in reversion towards payment of interest? The estate in reversion as well as that in possession, was in the contemplation of the parties at the time of lending the money. Nothing further was intended, only that the estate in possession should be the primary fund; and when the words of Lady *Duplin*'s will come to be considered, there can be little doubt; for when she devises the remainder of her estate, she makes use of the most general and comprehensive words. No intent appears in the will to throw the burthen upon the estate in possession only; and then the inquiry will be, whether the estate in reversion should not contribute to the payment of the interest? In the case of *Carter* v. *Barnardiston* (*b*), one seised in fee of the manors of *A.* and *B.*, mortgaged *A.* for 4000*l.*; and by will charged all his real estate for payment of his debts, and devised *A.* to *C.* and *B.* to *D.*, and died; the devisee of *A.* shall compel the devisee of *B.* to contribute to the payment of the mortgage on *A.*: *Heveningham* v. *Heveningham* (*c*), where two estates are subject to the raising a

(*a*) 2 *Vern.* 604. (*b*) 1 *P. W.* 505. (*c*) 2 *Vern.* 355.

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conveying or hiring the said lands, tenements, goods and chattels, the erecting and furnishing a house or houses of industry, and first setting the poor to work therein, and such other costs and expenses as ought, in the

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portion for a daughter, by a term of 100 years, after the decease of two several lives, and the life on one estate falls, and *J. S.*, to whom the estate comes, pays the portion, and afterwards the life on the other estate falls, *J. S.* shall have contribution. So that upon the reason of these cases, Lord *Duplin* the Plaintiff ought to have contribution out of the estate in reversion, now falling into possession by the decease of Lady *Duplin*'s mother.

Lord Chancellor *Hardwicke*. Some parts of this case are extremely clear. As to the prayer of a sale, that is certainly improper: the tenant for life of an estate subject to a mortgage is not entitled to pray such relief, though the mortgagee himself might be, if he thought it a scanty security; but the tenant for life is bound to keep down the interest. The clear equity is to have a redemption, and stand in the place of the mortgagee; and I think the plaintiff may pray any thing consistent with the nature of his case, under the prayer of general relief.

In what case a mortgagee is entitled to a sale.

What relief may be granted under the general prayer.

I differ entirely from the Plaintiff's counsel, who say it is incumbent on the Defendant to shew that the money was borrowed for the benefit of the husband; for the general rule is, that where a husband borrows money on the security of the wife's estate, as the money is under his power, it is supposed to come to his use; and this turns the proof on him to shew the contrary. This Court *prima facie* considers it as a pledge for the husband's debts; and his estate shall first be applied to exonerate it, unless a special case appears. A distinction is made, which appears in the case of *Bagot* v. *Oughton*, where a wife had joined with her husband by way of mortgage, to raise money on her estate, and there was a prior mortgage on such lands, and the husband has joined in the assignment, and covenanted to pay the money, the land there shall be liable, and not the husband. But though this is the general rule, that the husband

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the opinion of the directors, or any five of them, to be discharged and defrayed thereout; and also to convey and assign over by writing, under the common seal of the corporation, and the hands of some five of the directors,

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band shall be liable, yet it is but an equity, and therefore it may be rebutted by another equity, which may be set up by parol proof. It has been insisted that this money was paid and applied in discharge of Lady *Duplin*'s debts; but the proof goes only to 2500*l*., and therefore I think that it will be proper to send this to the Master to be further inquired into, and let it come back on his report.

Mr. Attorney General Sir *Robert Henley*, insisting to have his Lordship's opinion, whether Lady *Duplin*'s will had not made the estate liable to this mortgage, and discharged her husband; that point only was directed to be spoken to. The words of the will on which the doubt arose, were in the devise of the remainder to *W*. and *A*. for life, remainder in fee to the Defendant *Money*, subject to the incumbrances the estates are now charged with.

Lord Chancellor *Hardwicke* gave his opinion upon this part of the case. If Lady *Duplin* has by her will charged this estate with this incumbrance, then there will be no occasion to direct the inquiry before the Master; and though Lord *Duplin* did deserve all the bounty that could be shewn a very affectionate husband, yet I must make such a construction as is agreeable to law. The question is, whether Lady *Duplin*, by devising this estate to her heirs at law, with particular interests, subject to such incumbrances as they are now charged with, has thrown the burthen of these incumbrances upon the estate? And upon the best consideration I can give this matter, I do not think the words can have that operation; and if I was to be of that opinion, I think it would be of very dangerous consequence.

Lady *Duplin* had two estates, one in possession, the other in reversion. Both these estates were subject to the mortgage: her intention by her will was, first, a just one, to pay her own debts; next, a generous one, to discharge such debts as were due from her mother, at her own

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directors, to the respective persons advancing or lending the said monies, all and every the houses, lands, tenements, &c. of or belonging to the corporation, and also all or any part of the poor rates and assessments to be collected

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own death, and to give several legacies; and these she charges on the estate in reversion: then she devises the estate in reversion to Lord *Duplin* for life, subject as aforesaid; that is, to her own debts, to her mother's debts, and to her legacies; and after the decease of Lord *Duplin*, she gave the said estate to *W.* for life, then to the Defendant *Money* in fee. This was a devise of the remainder of the reversionary estate; and then she devises the remainder of the estates in possession to the same person, subject to such incumbrances as they are then charged with. The question is, therefore, whether these words are such as the law would have supplied, and therefore nugatory; or whether they are intended to discharge Lord *Duplin* of what he otherwise would have been liable to? I think the former is the right construction. Can any stronger words be made use of by a drawer of a will to express that the incumbrances should remain in the same state, and that no alteration was intended in the nature of them? And where the real estate is by will made liable to the debts, shall not an heir at law or an *hæres factus* have the benefit of the personal estate to exonerate the real? Suppose a mortgagee should take a bond of a third person, as a further security, and the mortgagor was to devise the land subject to the incumbrances, would this discharge the bond?

But I go further in this case, and I think the drawer of the will had a view to make a difference between the charge by will, and the charge of the mortgage. He was afraid it would have made both the estates subject to the same charge as the estate in possession was before; and the intention was to make the estate in reversion chargeable, with what was imposed by the will, and also the mortgage incumbrance, but to subject the estate in possession only to the mortgage: and therefore I am of opinion, that the Plaintiff Lord *Duplin* is still liable

collected within the parishes, &c. as a security for the repayment of the principal sums so borrowed with interest.

The act then directed that the conveyances and assignments should be in the form of a deed-poll, by which the

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to this debt, subject to such inquiry as is before mentioned.

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67. The Master reported that 2500*l.* were applied for Lady *Duplin*'s use, or in payment of her father's debts, and that the remaining 4500*l.*, except about 234*l.*, were received by Lord *Duplin*, and applied to his own use. Though the report was not confirmed, the Plaintiff declined to bring on the cause in that manner, because Lord *Hardwicke*'s directions seemed to bear towards charging him with part of the 8000*l.*, and therefore the cause came on by way of rehearing; but Lord *Camden*, C. objected to the method, and on saying he should not think himself bound by the former decree if he were of a contrary opinion, the parties consented that the report should be read as if confirmed, and that the cause might come on for further directions.

Mr. Attorney General *de Grey* for the Plaintiff. The dispute here is between the devisees and the heirs at law, whether these estates are not to be considered as estates of the wife charged with the husband's debts, and that consequently his assets ought to exonerate the mortgaged premises? The first point is to consider the incumbrance on the general principle, independent of the will: 2d. on the construction of the will, explanatory of the lady's intention.

The general rule is, that wherever the wife's estate is pledged for the husband's debts, his covenant shall bind his own assets, he becomes the principal debtor, and the wife's estate the security. The exceptions to the rule are, when it appears that the husband did not receive the money; so it is when the estate comes mortgaged to his hands, and he assigns, though he gives a bond, and covenants to pay the money: here the rule is reversed, he is only the surety, and the estate the real debtor; and this is

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the corporation of guardians for the poor of the parishes, &c. by virtue of the act, &c. conveyed and assigned to *A. B.* the houses and hereditaments belonging to the corporation; and the poor rates or assess-

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is settled in *Bagot* v. *Oughton* (*a*). Thus the leading principle governs in respect to an entire disposition of the mortgage money; but where the application is of a mixed nature, the Court will not weigh it minutely, nor split the consideration money; agreeable to *Lewis* v. *Nangle* (*b*), which was stated as follows, from Mr. Attorney General's note book; *Margaret Lloyd* being seised of an estate in fee previous to her intermarriage with *Nangle* the Defendant, by articles covenanted to settle the estate on the husband for life, and afterwards on the issue of the marriage, with remainder to herself and her heirs, and there was a clause by which the husband and wife jointly were empowered to revoke those uses, and to resettle the estate: they did afterwards accordingly revoke the uses, and mortgaged the estate for a sum of money, part of which was to enable the husband to carry on his trade, and to pay his debts, which he was unable to pay, he being very poor at the time of the marriage; and the other part to pay her debts, and he covenanted to repay the mortgage money: and subject to the mortgage, they resettled the estate on their children, with remainder to her and her heirs; and the bill was brought to have the estate discharged of the mortgage money, by the Defendant. In that case Lord *Hardwicke* would not determine the matter upon any general principle, but was of opinion that *Nangle* was obliged to keep down the interest of the money, and that the estate should pay the principal. But in that case the husband had given up a power of committing waste. It is material here, that the wife joined in mortgaging, and that part of the money was applied to her use, and in payment of her mother's debts; and there is no instance that in such case the husband shall disincumber.

2d. As to the point of

(*a*) 1 *P. W.* 347.

(*b*) *Amb.* 150. 1 *Cox*, 240.

intention,

assessments to be raised and collected within the parishes, &c. with all powers and authorities for entering into and upon the houses, &c. and for receiving the rents, &c. and also for collecting and raising the

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intention, she charges her estate in reversion with debts and legacies; the estates in possession are devised subject to such incumbrances as the same are now subject to: she would have said discharged, if she had meant to charge Lord *Kinnoul's* own estate or his assets.

Mr. *Yorke* on the same side. This is a question of construction on the will, whether Lady *Duplin* intended that the whole 8000*l.* should be satisfied out of her own estate? For the previous question as to the original intention at the time of the loans, will lead to the second of construction, and if Lady *Duplin* agreed that her estates should originally be liable, it will corroborate her will. The heir of the wife, he allowed, would be a creditor on the assets of the husband; and his real assets shall exonerate, where the wife has no part of the money paid to her use, or in discharge of her debts; but it is otherwise when applied for the benefit of both; as in *Lewis* v. *Nangle*, decreed by Lord *Hardwicke* in 1752, if the wife is entitled to a jointure, and levies a fine to let in a charge on that estate, the husband shall make a satisfaction. Equity will not suffer her tenderness for him to prejudice her. So, if she does any act to charge her own estate, whether settled or not, the husband shall exonerate. The first presumption is that she does it for his benefit; but this may be repelled by facts. *Tate* v. *Austin*, Lord *Huntingdon's* case, and *Pocock* v. *Lee*. Yet the law is otherwise, as in the present case, where the husband is a purchasor of the incumbrances, by giving up his rights; he departs with his estate of freehold so long as the mortgage subsists; he has given a consideration for the several loans, and they are to be considered as one entire transaction; and though in such case, he must pay the whole in law, yet he will be relieved in equity.

2d. How does it stand on the will? Lady *Duplin* has reserved no equity, there is no rule of this Court against the husband, and shall this

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the poor rates and assessments, to hold to A. B., his executors, administrators, and assigns, for his and their own use, until the sum of *l.* and interest should be repaid.

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Court interpret the words; "subject to such incumbrance as the same are now subject to," to be *expressio eorum quæ tacite insunt?* Do they not import that the devisees shall take without any equity or demand against the husband? That every devisee shall take *cum onere*, not only with regard to mortgages, but also the husband?

Mr. *Ord* on the same side. The Lady here is to be considered *sui juris*; she mortgages in pursuance of a power; the articles were never carried into execution; the legal estate remained in her all along; and, therefore, the personal covenant of the husband ought not to be called in aid of this estate. *Evelyn* v. *Evelyn* (*a*.)

Wedderburn for the Defendants, observed that the Plaintiff has brought this rehearing after an acquiescence of ten years under the spirit of Lord *Hardwicke*'s decree; that the established principle is, that whosoever receives the benefit shall be the principal debtor, and liable to discharge the incumbrance; Lord *Huntingdon*'s case: the reversal of that decree in the house of lords, laid the foundation of *Tate* v. *Austin*. With respect to the original security for 2500*l*., Lord *Duplin* did no more than the Court would have compelled him to do; that is, to mortgage or sell part of the estate for payment of debts, to which those estates were subjected. In regard to the will she has shown no favour to Lord *Duplin*. He took the same estate under the articles; and if she had intended to serve Lord *Duplin*, she would have said so, as she has done with respect to her mother's debts. There is nothing to show that she meant to subject the estates in possession, otherwise than the rules of law and equity subject them; she had no benefit from the loan, it did not increase their income, as in Lord *Huntingdon*'s case: and thus the general principle, the authorities of the Court,

(*a*) 2 *P. W.* 659.

and

The act then prescribed the form of transferring the securities; and directed copies or abstracts of the conveyances, assignments, and transfer, to be entered by the clerk of the corporation in a book kept for that purpose,

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and the circumstances of the case, support the decree.

Mr. *Maddox* on the same side. The presumption is when money is borrowed by husband and wife on the wife's estate, that it is for the husband's use till proof is made to the contrary. Where the wife has the estate settled to her separate use, the rule is stronger, that she only lends her estate to the husband, and it shall be his debt. To take the case out of this general rule, there must be evidence of an agreement between them. In the case of *Lewis* v. *Nangle*, there was the strongest implied contract, and evidence of agreement. The husband was necessitous, assigned over all for his benefit; he had a joint power of revocation of the uses, and had nothing of his own to pay, or wherewith to exonerate her estates. There is no shadow of such evidence of agreement in the present case, or that the lady's estate should be charged with second and third mortgages. But so far as they are liable, the two estates must be liable proportionably. The will only makes a difference as to the reversionary estates. It was necessary to give him a life estate therein, as he could not be tenant by the curtesy thereof. He cited *Serle* v. *St. Eloy* (*a*), which was the case of a devise of mortgaged and other lands subject to the incumbrances upon them, yet the devisees took them discharged; but this arose from a particular devise of lands for payment of debts, which shall mean all debts.

The Attorney General replied. The cases cited for the Plaintiff were designed to show that the Court will vary the general rule upon small alterations. The question of intention upon the will is the true one. By the will she means to give Lord *Duplin* a certain income for his life; she knows not the equity of this Court, that the wife and her estate are only a surety, and the husband's estate bound. The remain-

(*a*) 2 *P. W.* 386.

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pose, before any one claiming thereby should be entitled to receive the principal and interest.

The act then empowered the directors or any five of them, for paying the principal and interest of money bor-

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der men are volunteers, and it becomes a question whether they have any right to have the debt out of Lord *Duplin*'s estate? In case of pin-money, where many years are in arrear, the husband's estate shall be liable only to one year; the rest shall be supposed a gift to the husband. The rents of the estate in possession were not sufficient to pay the interest of the 8000*l.* after paying lady *Duplin*'s pin-money; the intention is express and equal as to the whole 8000*l.*, and if the estate is to be the primary fund as to legacies, it must be so as to debts. What construction shall we put upon the words, "subject to such incumbrances as the same are now subject to?" Do they mean subject as it was before in regard to the creditors, or as it now stands between my husband and me? The sense put upon them by the other side gives no meaning or operation to the words. There is not the least indication of intention to charge his estates, or that her own should be a security as to the 4500*l.*, and the principal debtor as to the 2500*l.* In *Serle* v. *St. Eloy*, there was not only a devise for payment of debts, but the rents were to accumulate for the infant; and it is a contradiction to say that part of it shall be taken away to pay the interest.

Lord *Camden*, C. This, in my opinion, is a clear case. The Earl of *Kinnoul* files the bill, and his principal view of relief, is to have the estates sold or mortgaged, and his part of the incumbrances discharged by such sale or mortgage; for the relief is of course as to the debts of the mother. The 2500*l.* were manifestly borrowed to pay the debts of Lady *Duplin*'s father. It is as manifest in point of fact, that the large sum of 4500*l.*, except about 200*l.*, was applied by Lord *Duplin* to his own use. This brings us to the 1000*l.* for interest of both sums, which requires a mixed consideration. Lady *Duplin* devises her estate in possession to Lord *Duplin* for life, and expressly charges it with her mother's

borrowed, and the expenses of maintaining the poor, and the other purposes of the act, to fix and charge upon the respective parishes, &c. such sums as should be needful from time to time, to be raised and paid by and

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mother's debts. The estate in reversion she likewise devised to him for life, subject to such incumbrances, as it was then subject to; and under these special circumstances it has been contended that equity will discharge him, as an exception out of the general rule.

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The principle is well known, and old as the Court itself; that when husband and wife raise money out of the wife's estates, with the reversion to one or to the other, this Court inquires into the uses, considers them as two persons, and, if I may use the expression, dissolves the marriage, *quoad* the transaction. Though the husband covenants to pay the money, and gives bond, yet the application determines who is the principal, who is the surety. This is the case of principal and surety at common law, the principal is first obliged to pay, and the surety only in default; in equity the surety comes in aid of the principal debtor. The cases of Lord *Huntingdon*, *Tate* v. *Austin*, *Pocock* v. *Lee*, are all in point.

It has been said, that where the husband has one part, and the wife another, the Court will not look too nicely into it, nor separate the debt. But no case has been cited to prove this point, except *Lewis* v. *Nangle*, which is so particular a case, that it cannot serve as a precedent; nor is it an authority to govern in any other case, unless the circumstances are very like it. There the estate was settled, with a joint power of revocation; the power was jointly executed, and the estate re-settled, subject to 1300*l.* incumbrance, which they took up, and applied partly in payment of the wife's debts, and partly to establish the husband in trade, who was in necessitous circumstances. Lord *Hardwicke* made two points, but declared that he meant not to lay down any general doctrine as a positive rule. The first was as to the mixed sum; but upon the second, he determined upon the particular circumstances of the case. The equity is very nice, but it seems to me to be just.

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and out of the places respectively, as their quotas, according to the proportion stated in the act, and to issue warrants to the churchwardens, &c. for payment of such sums to the treasurer; and provided means for levying the

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The money was not borrowed to pay the husband's debts, but to enable him to live, and he is besides a purchaser of that very loan from the joint power of revocation.

My opinion having gone so far, I can see no reason why the Master shall not inquire into the application of the money. It would destroy the fundamental rule of this Court, to say who shall be principal and who the surety. As to the 1000*l.* interest, I do not see any reason that Lord *Kinnoul* should pay off the interest of his lady's money, any more than the principal. He is bound indeed to pay the whole as to the mortgagees; the interest would have been decreed to them in this Court, yet the husband would have credit for it, in an account here between him and his lady.

Thus stands the matter upon the articles; and now the next question is, whether the will has made any alteration? There are no words in the will, but only those, "subject to such incumbrances as the same are now subject to," which can by any possibility make the estate liable to the whole 8000*l.* These words import no intention as to the equity between the husband and wife, but only as to the mortgagees; they must mean, subject to every incumbrance that the wife was liable to pay. But if I think with Lord *Kinnoul* and his counsel, I must say that Lady *Kinnoul* intended to pay the whole 8000*l.* upon the estate in possession, and that, subject to his life estate; and why should she intend to charge the estate in possession, and not that in reversion? It is *expressio eorum quæ tacite insunt*, for the same words, "subject, &c." are implied as to the estate in reversion. Mr. *Yorke* has laid great stress on the word, now, to charge the estate with the whole 8000*l.*; and so do I, in support of my decree. For if the estate is to be otherwise charged or affected, than it was at the time of making the will, it must totally alter it from its then situation.

I am therefore upon the whole

the money from the inhabitants of the parishes, &c. and declared that the parishioners and inhabitants of the townships should be answerable for the sums so to be raised on them, and not paid by their respective churchwardens,

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whole just as clear as Lord *Hardwicke* was, that the will makes no alteration; the prayer of the bill was to have the estate sold; but Lord *Hardwicke* said that was improper, inasmuch as a tenant for life of a mortgaged estate cannot ask to have the estate sold, but may redeem and put himself in the place of the mortgagee. I must therefore dismiss the rehearing, and confirm Lord *Hardwicke*'s decree, and as the Defendant, Colonel *Money*, is desirous to redeem, let it be referred to the Master to inquire how much of the 1000*l.* was applied to pay the interest of 2500*l.*, Lady *Duplin*'s part, and how much the interest of 4500*l.*, the Plaintiff's part. And let the Defendants, the mortgagees, convey, on having six months' notice, after the Master has made his report, and being paid off; and with respect to that part of the case relative to the estates in jointure to Lady *Duplin*'s mother, as directions have been already given in another cause, *Williamson* v. Earl of *Kinnoul*, the Court makes no order, but leaves the parties to apply; the mortgagees must have their costs decreed agreeably to the Master's report; as to the sums lent on mortgage, the estate of Lady *Duplin* is the principal debtor for the sum of 2733*l.* 19*s.* 8*d.*, and Lord *Kinnoul* discharged therefrom; and for the sum of 4266*l.* 0*s.* 4*d.*, Lord *Kinnoul* is the principal debtor, and the lady's estate discharged therefrom. Therefore let each party redeem his respective share of the 8000*l.*, and the Defendant having offered to raise his part of the principal, interest, and costs, in default of payment of the mortgage money, let the plaintiff's bill so far as it relates to this mortgage, be dismissed with costs; and reserve for future consideration how far these costs, or any, ought to be paid as between the parties; and Lord *Kinnoul* must in the mean time as to the mortgagees, keep down the

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wardens, &c. and should be compellable to pay the same upon re-assessment, and such rates, or assessments, or re-assessments, should be assessed, levied, and recovered, on and of such persons, and in such manner, as money assessed

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interest of the whole, but he shall be considered as a creditor for his wife's part of such interest, though he is tenant for life, subject to the incumbrances.

March 26. Lord *Camden* having doubted whether he had determined rightly as to the matter of interest, ordered the cause to be brought on again to day, when he said as Lady *Duplin* was the principal debtor for the sum of 2500*l.* raised by mortgage, he thought at first, that she ought likewise to be answerable for the interest, but as Lord *Kinnoul* was tenant for life of the estate, and as such had received the rents, which were to pay the interest, he ought to pay the whole interest himself, for then he became the principal debtor for it; and therefore decreed that Lord *Kinnoul* should pay the whole 1000*l.* raised for interest.—Mr. *Holliday*'s MSS. (*a*)

21st *March*, 1767.—"His Lordship upon the said Master's report, doth declare that the sum of 2738*l.* 19*s.* 8*d.*, part of the principal sum of 8000*l.* advanced on the mortgage of the estates in question, was applied to pay the debts and legacies which Lady *Duplin* was obliged to pay, and that therefore she ought to be considered as principal debtor for that sum; and the Plaintiff, the Earl of *Kinnoul*, discharged therefrom as against her heirs, save only that, as tenant for life, he ought to keep down the interest thereof; and that the sum of 5266*l.* 0*s.* 4*d.*, other part of the said principal sum of 8000*l.*, appears to have been received by the Plaintiff, the Earl of *Kinnoul*, only, and converted to his use; and that therefore he ought to be deemed the principal debtor for that sum, and also for the remaining sum of 1000*l.*, which was borrowed in order to pay the interest in arrear due for the said two former sums; and the Plaintiff the Earl of *Kinnoul*,

(*a*) See *Innes* v. *Jackson*, 16 *Ves.* 356. 1 *Bligh*, 104.

being

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assessed for the relief of the poor, was by the laws then in being to be assessed, &c.

It was also enacted (*a*), that as soon after the expiration of 10 years from the first court to be holden for putting the act into execution, as the expenses directed to be defrayed out of the rates or assessments (exclusive of any principal money borrowed) should be reduced to two parts in three of the average annual expenditure for seven years preceding *Easter*, 1791, the directors, with the consent of the guardians, should appropriate an annual sum, not less than 100*l.*, nor more than 300*l.*, out of the rates, at interest, or in the purchase of stock, and lay out the interest, as an accumulating fund, until a sum should be produced sufficient to discharge the whole money borrowed.

By stat. 36 *G.* 3. *c.* 38. the directors were empowered to raise a farther sum not exceeding 7000*l.* by annuity, and it was enacted, that all mortgages and grants of annuity, should be distinguished in the margin by a numerical progressive figure, and that when the directors should think proper to pay any part of the money borrowed, they should settle by lot, or in such other manner

(*a*) Section 19.

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being desirous that the estates in mortgage should be redeemed, and the Defendant, Mr. *Money*, consenting to raise and pay so much of the principal, interest, and costs of the mortgagee, as he ought to advance according to the directions of this decree; it is farther ordered, that it be referred to the said Master to take an account of the principal and interest due to the Defendants, the mortgagees, on their mortgage," &c. — Reg. Lib. A. 1766 fol. 368.

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manner as should be consented to in writing by the persons to whom the money should be due, which debt should be paid, and after notice of time and place of payment, no interest should accrue.

Under the first act, *David Pugh*, *J. Turner*, *John Pugh*, *and Robert Griffiths*, bankers at *Pool*, advanced 2,000*l.* to the corporation of guardians of the poor, who executed to them a mortgage, according to the provisions of the act.

The bill, filed on the 28th *November*, 1816, by the assignees of *Robert Griffiths*, the surviving partner in the banking-house, claiming to be entitled to the 2000*l.* and interest as a charge upon the estate of the corporation, alleged that the corporation purchased certain lands, and erected a house of industry thereon, and other buildings, and were seized and possessed of real and personal estate of great value, and had, by virtue of the act, been enabled to collect sums sufficient to pay the mortgage; and that *Griffiths* and his partners, previous to *Michaelmas* day 1815, gave the corporation notice to pay the mortgage; and prayed an account and payment of what was due on the mortgage, and that the defendants might, if necessary, be ordered to levy by proper rates, a sufficient sum to answer the mortgage debt, and all other mortgages and incumbrances affecting the premises, and that the whole, or a competent part, of the estate and effects of the corporation, might, if necessary, be sold for those purposes; and that a receiver might be appointed, to set, let, and manage, all the real estate belonging to the defendants, and to receive the rents and profits thereof, and to collect all sums due or to become due to the defendants by means of assessments or otherwise; and that all monies so re-

ceived and collected, might be applied towards payment of the demands of the plaintiffs, conformably to the acts of parliament.

The answer stated, that in consequence of the great expense incurred in the maintenance of the poor, the defendants had not been able to form any accumulation of money, but were in debt 880*l.* 11*s.*; that the only provision in the acts of parliament enabling the defendants to raise money for paying any sums borrowed, was the nineteenth section of the first act; (*a*) that the average annual expenditure of the seven years previous to *Easter* 1791, amounted to 3,039*l.* 16*s.* 0½*d.*; and the annual expenditure since the act considerably exceeded that sum, and in the year ending on the 30th of *June*, 1817, amounted to 8,178*l.* 14*s.* 4*d.*; that the defendants had been therefore unable to raise funds sufficient for the payment of the money borrowed on mortgage, which amounted to 11,900*l.*; the event in which alone they are authorised to raise money for that purpose, (namely the reduction of the annual expenditure to two-thirds of the average amount, previous to *Easter*, 1791,) never having taken place; but that they had directed 100*l.* *per annum* to be raised beyond their necessary expenditure, for the purpose of paying off the sums borrowed; and had applied 200*l.* in payment by lot; the acts having directed that there should be no priority among the creditors.

The defendants, alleging that the estate and effects of the corporation were not sufficient to satisfy all the mortgages, and that they had no power to sell for that purpose, submitted whether they were bound or autho-

(*a*) *Ante*, p. 205.

rised

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rised to make any rates or assessments under the acts, or by sale of their estate to raise money for paying the debts; and insisted that as the mortgage was granted, and the money secured thereby lent, under the first act of parliament, with full knowledge of the only means provided thereby for repayment, the plaintiffs were not entitled to the relief prayed by their bill.

The Plaintiffs having given notice of a motion for appointment of a receiver, to set, let, and manage all the real estate belonging to the defendants, and to receive the rents and profits thereof, and to collect all sums of money due or to become due to the defendants, by means of assessments or otherwise, it was arranged that the cause should be heard at the same time with the motion.

Sir *Samuel Romilly*, Mr. *Bell*, and Mr. *Owen*, for the Plaintiffs, insisted that the mortgagees were entitled to require the directors to levy sums sufficient for the payment of the principal and interest of the debts.

Mr. *Horne*, and Mr. *Temple*, for the Defendants, contended that the directors were not authorised to raise sums not necessary for the maintenance of the poor; and that the mortgagees must wait the gradual repayment provided by the acts.

The LORD CHANCELLOR.

The object of the two acts on which the question arises, was to incorporate into one district, certain parishes and townships, for purposes which could not be accomplished without considerable expenditure, and it was necessary therefore to provide a mode in which funds should be raised. The first material clause is

the 31st section of the former act (*a*); and on reading that clause the question cannot fail to occur, how the different subjects of property which it enumerates, the houses and lands of the corporation, and the rates and assessments to be collected, can consistently with their nature and destination, be made a security for the repayment of money borrowed. Recollecting that the purpose of the act was to construct buildings in which the poor were to reside, and levy rates by which they were to be supported, on a clause which contemplates the assignment of such subjects as a security for the repayment of principal and interest, the Court must put such a construction as is consistent both with the design of employing and maintaining the poor, and also with the security of those who have lent money, and who by the express terms of the clause, are to have security for the repayment of interest as well as of principal; and I agree that such must be the effect of the assignment whatever are its terms; it clearly intended by some mode of dealing with the subjects assigned, to work out payment of principal and interest.

The clause by which the trustees are empowered to levy money from the parishes according to certain proportions, is material, because it may be worth consideration, whether the word "empowered" does not give a construction to the words "all powers and authorities," in the instrument of assignment. Whether the payment of sums borrowed was not one of the purposes for which money was to be levied, is not left to conjecture; three purposes are specified; payment of interest, maintenance of the poor, and repayment of principal; the other purposes are left to be inferred from general words. The plan was to determine the quota of each

(*a*) *Ante*, p. 204.

parish

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parish by the proportion of its contribution in preceding years, but the aggregate to be raised was not limited to the amount raised in those years, but must be measured and ascertained by the purposes to which it was to be applied, including the repayment of the principal of money borrowed.

In giving an opinion on the construction of this act, I am dealing with a pure question of law. The 35th section (*a*) directs that the assessments shall be levied and recovered in the same manner as money assessed for the relief of the poor; if, therefore, I were now to order the directors to levy money for payment not only of sums required in the maintenance of the poor, but of the principal of debts which the mortgagees desire to have discharged, or to appoint a receiver, and declare that the money might be levied in the same manner as sums assessed for the relief of the poor, I should make that declaration at the hazard of what would be decided when the question was litigated in a court of law.

The 19th section of this ill-drawn act (*b*) rather supports than opposes the construction, that the directors have power to levy money for payment of principal. That clause was founded on the expectation of the corporation becoming rich; and speaks not only of a reduction of the rates within 10 years, but of payment of principal within that period. The question is, whether the payment of principal was one of the expenses directed to be defrayed out of the rates? I answer that question by reading the words in the parenthesis, "exclusive of the payment of any principal money borrowed."

There is great difficulty in the construction of the act, but that must be relieved by considering its policy

(*a*) *Ante*, p. 205. (*b*) *Ante*, p. 205.

and

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and all its purposes. It is necessary to consider its policy; because if it deprives the poor of the benefit of the statutes of *Elizabeth*, and the ordinary law, we must not put such a construction on it, as defeats all its purposes, and takes from the poor the bread which it meant to give. Then, the purpose of the act first in importance, being the maintenance of the poor, and next the securing to the creditor the principal as well as interest of his debt, and the act being probably founded on a supposition that principal would never be demanded except where it could be easily paid, and therefore framed in a way which presents great difficulties in discussion, the question is, whether the parishes have not placed themselves in this situation, that they undertake to raise from time to time such sums as are sufficient for the support of the poor, and the payment of interest, (in every clause mentioning interest, the act mentions also payment of principal), and having no fear that the principal will be demanded, they pledge themselves to raise money for that also, entertaining no doubt of being able to relieve themselves from any difficulty.

The policy of a statute a guide in its construction

My opinion is, that if a mortgagee calls for his money, and by consent of the other mortgagees, or by arrangement made under the second act for payment of principal, other creditors do not insist on equality, and all absence of priority, and if the corporation does not find other means of repayment, they must make assessments, which must be adequate, first to the maintenance of the poor, next to the payment of interest to all the creditors, and lastly, to the payment of principal to the particular creditor who demands it. They have involved themselves in this difficulty, from a confidence that the case would never arise.

I shall certainly not object to a case for taking the opinion of the Court of King's Bench, before whom all cases

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cases relative to the support of the poor must come, on the question whether the directors are authorised to levy rates for the payment of the principal of debts; but such is my opinion.

I will not say whether I shall appoint a receiver: this intimation of my opinion will probably produce an arrangement.

July 1. 7.

MORTIMER *v.* WEST. (*a*)

Exceptions to a report of impertinence cannot be taken after the impertinent matter has been expunged, nor without a special order, while the order to expunge remains in force. A report of impertinence having been obtained by surprise, the master was ordered to abstain from acting under the order to expunge, until the exceptions had been argued.

THE answer of the defendant, on a reference to the master having been reported impertinent, the Plaintiff on the 13th of *June*, obtained an order for the master to expunge the impertinence; the Defendant then filed exceptions to the master's report, and on the 20th of *June*, obtained an order for setting them down. The Plaintiff now moved that the order of the 20th of *June* might be discharged for irregularity, and that the master might be directed to expunge forthwith the impertinence in the Defendant's answer, pursuant to the order of the 13th of *June*.

Sir *Samuel Romilly*, and Mr. *Joseph Martin*, in support of the motion.

Admitting that under the authority of *Norway* v. *Rowe* (*b*), exceptions may be taken to a report of impertinence, after an order for expunging the impertinent matter, that order must first be discharged; to allow exceptions to the report, while an order to expunge

(*a*) Reported on another point, *ante*, v. i. p. 558. (*b*) 1 *Mer.* 135.

remains

remains in force, involves the existence of two inconsistent orders; one for reviewing the report, and another for carrying it into execution.

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Mr. *Belt*, against the motion.

It appears from the registrar's book, that in *Norway* v. *Rowe*, the exceptions were set down for argument, while the order to expunge remained in force.

The LORD CHANCELLOR.

In *Norway* v. *Rowe*, my opinion was, that notwithstanding the order to expunge, the Defendant might except; but there is this singularity, after expunction it is too late to except; and when an order to expunge has been obtained, the Plaintiff may expunge immediately.

The LORD CHANCELLOR.

July 4.

I have seen the registrar's book; and I think that the order in *Norway* v. *Rowe* was wrong in this respect, that it leaves the order for the Master to expunge the impertinent matter undischarged, and yet supports exceptions to his report. (*a*) I have consulted the Masters; and the notion which they entertain is, that the court ought in some way to dispose of the order to ex-

(*a*) *February* 3rd, 1816. The entry recites an order of the 21st of *April*, 1815, referring the answer for impertinence; the Master's report of the 7th of *December*, 1815, that the answer was impertinent; and an order of the 9th of *December*, 1815, for expunging the impertinence; and the order is as follows: "His Lordship doth order, that the Defendant *J. Rowe* be at liberty to file exceptions to the report of Mr. *Campbell*, one, &c.; and it is ordered, that the same be set down before his Lordship."—Reg. Lib. B. 1815, fol. 304.

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punge, either by directing the Master to act on it, or by discharging it before exceptions to the report can be filed. I rather think the better way will be to discharge the order.

July 7. *The* LORD CHANCELLOR.

For settling the practice of the Court I wish it to be understood, that after a report of impertinence, and an order to expunge the impertinent matter, exceptions may be taken to the report; but an application must be made to the Court for suspending or discharging the order to expunge. (*a*)

The

(*a*) In CHANCERY. *October* 30th, 1792.

WADMAN *v.* BIRCH.

Exceptions to a report of impertinence cannot be taken, nor be set down for argument, after an order to expunge, without special leave.

Order of 19th *May* to refer Defendant's answer for impertinence; report of impertinence dated 16th *July*; second order to expunge dated 17th *July*; impertinent matter in fact expunged on the 23d. Exceptions were afterwards taken to the report, and an order for setting down the exceptions to be argued was dated on the 27th *July*.

It was moved on the part of the Plaintiff to set aside this order for setting down the exceptions for irregularity; by reason that it was obtained after the matter reported impertinent was actually expunged.

And on the part of the Plaintiff it was insisted, that the Defendants had slipped their opportunity of excepting, which they ought to have done, if at all, before the order to expunge.

Mitford, for the Defendants. The practice in these cases is calculated to prevent delay. Therefore the Master delivers out his report to the party applying for the reference, and the second order to expunge is made on motion of course. This, though a wise practice

The Defendants afterwards moved, that the Master might be directed to abstain from acting under the order of the 19th of *June*, until after the exceptions taken by the

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practice in general, yet certainly goes far to prevent the other side from having an opportunity to except. Here it may be doubted whether the Plaintiff has proceeded properly to expunge, though he has obtained the order regularly; for there ought to be warrants on the adverse party to attend the expunging, to see that the record is altered according to the report. It is therefore certainly necessary to serve these warrants, for they are in fact the only notice to the other party of which he can avail himself in order to except to the report in time. Until the report is signed, no exceptions can be taken; and therefore it is very material that these warrants should be really served, for otherwise it would be almost impossible for the party to take the exceptions in the time which by the course of the Court he is allowed.

The Lord Commissioner *Eyre* thought the order for setting down the exceptions was clearly irregular, and that no notice was necessary to be given of the expunging; but the party who wishes to except must watch his opportunity, when the report is signed. If there is really any material injustice done to the Defendants by this report of the Master, the application must be to set aside the order for expunging upon the particular circumstances; but while the order for expunging stands, this order for setting down the exceptions must be irregular. Therefore it must be set aside with costs.—Mr. *Cox*'s notes. From Lord *Colchester*'s MSS.

"Their Lordships do order, that the said order of the 27th day of *July* last be discharged for irregularity, and that the exceptions be struck out of the paper; and it is further ordered, that the sum of 5*l*. deposited with the register on filing the said exceptions be returned to the Defendants."—Reg. Lib. B. 1791, fol. 543.

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the Defendants should be disposed of; and it appearing by affidavit that the Master's report had been obtained by surprise, on the 7th of *November*, 1818, an order to that effect was made.

WILLIS

In CHANCERY. *June* 21st, 1792.

BARNES *v.* SAXBY. (*a*)

A Plaintiff cannot refer an answer for impertinence after replication, or an undertaking to speed the cause. But he may refer for scandal at any time.

A motion was made to discharge, for irregularity, an order for referring an answer for scandal and impertinence. The irregularity complained of was, that the order had been obtained after an order to speed the cause, though the replication was not actually filed. The case of *Kenworthy* v. *Allen*, 1 Bro. Cha. Rep. 400., was cited to show that the Court would make such a reference in any stage of the cause.

But the Lords Commissioners said, that after replication they would not refer for impertinence, though they would at any time for scandal; and that the order to speed the cause was tantamount to a replication filed.

The order was therefore discharged, so far as it referred the answer for impertinence. — From Mr. *Cox's* notes, Lord *Colchester's* MSS.

In the EXCHEQUER. *March* 2d, 1793.

MARTYN *v.* BROUGHTON.

The Master's report on a reference for impertinence needs no confirmation; and a report that the bill is not impertinent,

The Plaintiff filed his bill praying an injunction; the Defendant referred the bill for impertinence, but the Plaintiff obtained the report of the Master in his favour.

Kidd moved in the first place, to have the report confirmed.

Per Cur. It wants no confirmation.

He then prayed for an injunction.

Per Cur. It ought to issue.

(*a*) 1 *Harrison, Chanc.* 190.

The

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WILLIS *v.* PARKINSON.

July 27, 28.

No substantial addition can be made to a decree on motion, without consent.

THE decree in this case having directed the issuing a commission for ascertaining the boundaries of the prebendal lands demised by the Plaintiff to the Defendant (*a*), a motion was now made on behalf of the Plaintiff, that the decree might be extended to copyhold as well as freehold lands.

Mr. *Bligh*, in support of the motion.

The LORD CHANCELLOR.

If the motion is not opposed, take the order. One proceeding is a consequence of the other. A direction to ascertain the boundaries of the freehold lands is useless without ascertaining the boundaries of the copyhold.

July 28.

Mr. *Heald*, for the Defendant, opposed the alteration of the decree.

(*a*) 2 *Mer.* 507. *ante*, vol. i. p. 9.

The motion to refer for impertinence is a dilatory of itself; and an injunction might have been granted upon that. (*a*)

Richards, for the Defendant, shewed for cause against this that the answer was actually in; and as no injunction had issued, none could now issue.

And of that opinion was the Court.

Eyre Chief Baron, and *Thomson* B. The injunction is, till answer or further order, which pre-supposes that the answer is not in. Being now in, you cannot have such an order:

Order refused.

From M. *Le Mesurier's* notes, Lord *Colchester's* MSS.

entitles the Plaintiff to an injunction, unless an answer has been filed.

(*a*) *Contra*, *Neale* v. *Wadeson*, 1 *Bro. C. C.* 574. 1 *Cox*, 104. *Macnamara* v. *Kinderley*, 1 *Fowl. Ex. Prac.* 276.

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The LORD CHANCELLOR.

The question is, whether the direction solicited is so strictly consequential on the direction already given, that the Court can make the alteration without consent? I am of opinion that it is not. It is a principle, that on motion no alteration can be made in a decree without consent, except in matter of mere clerical form; the Court cannot introduce a substantial addition.

Motion refused. (*a*)

1818.
January 20. 27.
March 17.
1819.
January 19, 20.
May 4.

JAMES *v.* BIOU.

An order dismissing a bill for want of prosecution, obtained after an injunction had been granted restraining the Defendant from proceeding in an action at law, on the Plaintiff's undertaking to give judgment to be dealt with as the Court should direct, and not to bring any writ of error; was discharged.

THE bill, filed on the 25th of *November*, 1817, stated indentures of mortgage dated the 20th and 21st of *December*, 1754, by which *William Browne* and *Sarah* his wife conveyed to *Joseph Biou* in fee, a moiety of the manor of *Netherhall*, and other estates in the county of *Suffolk*, for securing the repayment of 300*l.*; and that *Browne* and his wife executed to *Joseph Biou* a subsequent mortgage of the entirety of some part of the premises, for securing the farther sum of 400*l.*

The bill also stated, that before or in the year 1781, *Sewell Mansell* was seised of the equity of redemption of the premises, subject to the two mortgages to *Biou*, which were the first charges thereon, and to subsequent incumbrances; and being in possession of the rents and profits of the premises, by indentures dated the 30th and 31st of *July*, 1781, conveyed them to *Abel Jenkins*, in trust to pay the sums of 300*l.* and 400*l.* with interest at the rate of 5 *per centum per annum*, although interest was reserved on one of the mortgages at the rate of 4 *per cent.* only; that *Abel Jenkins* paid all interest in

(*a*) *Brackenbury* v. *Brackenbury*, 2 *Jac.* & *Walk.* 391.

17 arrear

arrear to the time of his death, the mortgagees not requiring payment of the principal; and by his will dated the 27th of *June*, 1802, devised all his real estates to the Plaintiffs *Charles James* and *David Owen*, his executors, and died leaving the Plaintiff *Abel Jenkins* his heir.

The bill farther stating that the mortgaged premises had become vested in *Susannah Biou*, who was entitled to the principal of the mortgage money, and had received interest from the Plaintiffs at the rate of 5 *per cent.* to *July*, 1816; prayed a reconveyance of the mortgaged premises, on payment of what was due for principal and interest, and an injunction against entering on the Plaintiffs' tenants, or giving notices to them, or otherwise preventing them from paying their rents to the Plaintiffs, and against bringing an ejectment.

On the 5th of *December*, 1817, the Plaintiffs moved, that upon payment into court by them of 300*l.* and 400*l.*, the principal due on the mortgages, and 50*l.* 12*s.* 9*d.* for interest to the 20th of that month, an injunction might be issued against the Defendant in the terms of the prayer of the bill. — The Lord Chancellor directed the motion to stand over until the time for answering had expired.

The Defendant, by her answer, claiming as heiress at law and administratrix of *Joseph Biou*, who died intestate in 1760, and admitting the first mortgage for 300*l.*, denied that *Browne* and his wife executed a second mortgage for 400*l.*; stated that in *July*, 1759, *George Keightley*, by the direction of *Mathews Sewell*, mortgaged the other moiety of the premises to *A. Maseres* for 400*l.*; and in *January*, 1775, that mortgage was purchased by the Defendant from *Keightley*, in whom it had become vested.

The answer further stated, that *Keightley* paid the interest on the mortgages as the solicitor of *Sewell* and

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steward of the estates, in which capacities he was succeeded by *Abel Jenkins*, deceased, who continued the payment of interest till his death in 1802; and from that time the Plaintiffs *Charles James* and *Abel Jenkins* acted as stewards of the estates, and paid the interest; that in 1816 the Defendant having applied to *Jenkins* for an account of the rents of the estates, *Jenkins* gave notice to the Plaintiffs that he intended to pay the principal of her mortgage, and a correspondence ensued, *Jenkins* claiming to be entitled to redeem by virtue of conveyances executed by *Sewel Mansel* to *Jenkins'* father in trust to sell. The conveyances, as he alleged, directed payment of the purchase money in discharge of incumbrances, and reserved the surplus to *Mansel*; upon the death of *Mansel* intestate, his father obtained letters of administration, and assigned his interest in his son's property to the father of *Jenkins*; and in 1783 the *Mansel* family claiming the property, Serjeant *Hill* gave an opinion that *Sewel Mansel* at his death had only an equitable interest in the surplus of the money to be raised by sale of the estate, which, as a chattel interest, passed to his administrator.

The answer stated, that the title of *Sewel Mansel* to the equity of redemption of the estates had never been made out; that the indentures of the year 1781 were studiously concealed, and had not been acted on; and submitted that the Plaintiffs ought to set out and establish their right to redeem the estate, and that the heirs or other representatives of the respective mortgagors ought to be parties to the suit; and insisted on the Defendant's right to the possession of the estate, until redeemed by some person entitled to redemption.

The Defendant having commenced actions of ejectment against the tenants of the premises, the Plaintiffs' motion for an injunction was renewed.

The

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January 20. Right of the mortgagee, against all except the parties entitled to the equity of redemption.

The LORD CHANCELLOR.

It is extremely clear that a mortgagee may retain possession of the estate until he is paid, and that no one has a right to make a tender of the money due, except the party entitled to the equity of redemption; against all other persons the estate is the property of the mortgagee. A party coming to redeem a mortgaged estate, must prove, at his own costs, that he is the individual entitled to the equity of redemption. The opinion of Serjeant *Hill*, whom I know to have been during many years the best lawyer in the kingdom, has little application to the question now before the Court.

January 27.

The LORD CHANCELLOR.

A mortgagee may retain the mortgaged estate against every one who cannot show a title to compel redemption. The mortgages which the bill seeks to redeem are not the mortgages held by the Defendant. It must be assumed that the parties making the conveyance in 1781, are the parties entitled to the equity of redemption, and I doubt whether in 1782 *Jenkins* could have compelled the mortgagees to permit him to redeem, and whether his trust is not much more special. The bill and the correspondence of the Plaintiffs represent the beneficial interest to be in different persons.

I perfectly agree with Serjeant *Hill*'s opinion; that the utmost interest in *Sewel Mansel* was a pecuniary, and not a real interest. By their correspondence the Plaintiffs erroneously represent the interest to be in him and another person. Were a decree now made, ought the reconveyance to be absolute, or subject to redemption?

On the 17th of *March*, 1818, the Lord Chancellor ordered, that upon the Plaintiffs' undertaking to give judgment

1818. JAMES v. BIOU. judgment in the actions against the tenants to be dealt with as the Court should think fit, and not to bring any writ of error, the Defendant should not proceed with them until the farther order of the Court.—Reg. Lib. A. 1817, fol. 634.

On the 11th of *November*, 1818, the Defendant, by motion of course, obtained an order for dismissing the bill for want of prosecution.—Reg. Lib. A. 1818, fol. 6.

1819. *January* 19. On this day the Plaintiffs moved to discharge the order for dismission.

Mr. *Hart*, and Mr. *Boteler*, in support of the motion.

After the order of *March*, 1818, for an injunction, the bill could not be dismissed by motion of course. That order was decretal, and necessarily retained the cause for the purpose of determining how the judgment given by the Plaintiffs under the direction of the Court should be dealt with. By means of that order, the Defendant obtained judgment at an earlier period than that at which it could have been obtained in the ordinary course of proceeding at law; and this Court will not allow itself to be deprived by a motion of course, of that jurisdiction to control the use to be made of a judgment, which was expressly reserved by the order under which it was given.

Sir *Arthur Piggott*, Mr. *Wetherell*, and Mr. *Wakefield*, against the motion.

No excuse has been offered for the Plaintiffs' delay, of which no advantage was taken, until five months after the

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the time when, by the course of the Court, the bill might be dismissed without notice.

By Lord *Bacon's* order, if the Plaintiff discontinue prosecution, after all the Defendants have answered, by the space of one whole term, the cause is to be dismissed of course, without any motion. (*a*) Since the statute of *Anne* (*b*), directed that, on dismission of a bill for want of prosecution, the Plaintiff should pay full costs, the Court has indulged the Plaintiff till the end of the third term, and that is now become the course of the Court in this matter. (*c*) If during three terms the Plaintiff has taken no proceeding in the cause, his bill is subject to be dismissed by motion of course without notice. The authority on which the order is obtained is the certificate of the six clerk that no proceeding has taken place. *The Attorney-General* v. *Finch.* (*d*) Nothing, therefore, which comes not within his cognizance is a proceeding; otherwise it would be necessary to produce, in addition to his certificate, an affidavit negativing the existence of interlocutory orders.

The LORD CHANCELLOR.

Supposing that by consent an order had been made that the bill should not be dismissed, the six clerk would have no knowledge of that order.

Argument against the motion resumed.

In such a case the Court would treat the application to the six clerk as a fraud.

The LORD CHANCELLOR.

The Court would dismiss the bill on production of the six clerk's certificate; but would the next day dis-

(*a*) *Orders in Chancery*, ed. *Beames*, 11.

(*b*) 4 *Anne*, c. 16. s. 23.

(*c*) *Pract. Reg.* 375.

(*d*) 1 *Ves. & Beames*, 368.

charge

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charge the order of dismission, when informed of the order by consent.

Argument against the motion resumed.

In *Degraves* v. *Lane* (*a*), your Lordship restored the old rule, which dispenses with notice of the motion to dismiss. In *Naylor* v. *Taylor* (*b*), and in *Day* v. *Snee* (*c*), it was expressly decided that an injunction constitutes no objection to the motion.

The only objection to a motion of this kind is some proceeding within the time limited; and no act is a proceeding which does not advance the cause to a hearing. Amendments and exceptions are proceedings, because they tend to prepare the record for the judgment of the Court. An order for an injunction before decree is interlocutory merely, and not decretal; the injunction preserves the property until the decree, but constitutes no part of the relief to be then given. The Plaintiffs might have dismissed their bill by consent; and an omission to proceed during a period which by the rules of the Court renders the bill subject to be dismissed, is an implied consent to its dismissal.

The Plaintiffs have suffered no prejudice by the terms of the order; the Defendant might before this time have obtained judgment; and the action being commenced by special original, no writ of error could be brought.

The LORD CHANCELLOR.

The merits of this case are not now in question; and on the present application I must assume that the order of *March*, 1818, was properly made, although I acknowledge my mind is not free from doubt on that point.

(*a*) 15 *Ves.* 291.
(*b*) 16 *Ves.* 127.
(*c*) 3 *Ves. & Beames*, 170.

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The Plaintiffs by their bill insist on a right to restrain the Defendant, who claims as mortgagee for two different sums, one of which passed to her by assignment, from taking possession of the mortgaged premises by means of her legal right. On the argument of the former order, I was of opinion that unless other parties were brought before the Court, the Plaintiffs had not a right to redeem. It appeared to me that the Defendant as mortgagee was in this situation, that she might refuse to convey the mortgaged premises to any one who was to become by that conveyance mortgagee or assignee of the mortgagee, (because no mortgagee can be compelled to place another person in his stead as mortgagee,) and might retain possession and refuse to reconvey, unless the persons entitled came to demand possession and reconveyance. It was never disputed that the Defendant is a mere mortgagee. The mortgage and costs are tendered to her; but she refuses to accept them, and insists on holding possession against all who cannot show a title to the equity of redemption. (*a*) Unless

Right of a mortgagee to retain possession of the mortgaged premises.

(*a*) *Lomax* v. *Bird*, 1 *Vern.* 182. *Bickley* v. *Dorrington*, and *Monk* v. *Pomfret*, cited and approved, *Barnard*, 32.

In CHANCERY. *December* 20th, 1793.

PYM v. BOWREMAN and Others;

AND

BOWREMAN v. PYM, STODDARD, and Others.

on a bill redeem, rimâ e title ffi- t; and ause l not irected

Upon a rehearing before Lord *Loughborough*, the case appeared to be, that *Bowreman* had filed his bill in 1778 to redeem a mortgage made by *Nicholas Stoddard*, *Bowreman*'s ancestor, to *Pym*; that the Defendant *Stoddard* had filed his bill in 1779, claiming to be heir at law of the first mortgagor, and intitled as such to the equity of redemption, but afterwards disclaimed; that the Defendant *Pym*

though the title is complicated, if uncontradicted.

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less all account against her was waved, she was entitled to hold possession till the account had been taken.

In

Pym claimed to hold the premises discharged of the equity of redemption, but that the Defendant *Pym*'s ancestor had, by an answer filed in the Court of *Exchequer* in 1772, admitted himself to be a mere mortgagee; that *Bowreman* filed a bill of revivor and supplement, and amended it in 1789; that *Pym* in 1790 filed his bill, as seised in fee of the premises, for delivery of the title-deeds.

These causes came on to be heard on the 27th *November*, 1792; and *Bowreman* insisted that he had, by very full and sufficient evidence, proved himself to be heir at law of *Nicholas Stoddard*, the mortgagor, unless some nearer heir appeared; and that it was not suggested in the causes, that any such nearer heir had appeared, or was in existence; and that he had also by very sufficient evidence proved negatively that there could be no such nearer heir; and no evidence was entered into by the Defendant to disprove *Bowreman*'s title as heir.

The Lords Commissioners had thereupon ordered the parties to proceed to a trial at law upon the following issue: whether *Bowreman* was the heir at law of the said *Nicholas Stoddard* deceased, reserving costs, and further directions.

Against this order, *Bowreman* presented a petition of rehearing, signed by his counsel, the Attorney-General *Scott*, Solicitor-General *Mitford*, Mr. *Mansfield*, and Mr. *Stanley*.

The reasons alleged in the petition for rehearing were:

That the petitioner did, at the hearing of these causes, produce good and sufficient evidence to prove that the petitioner was such heir, which was not opposed by any evidence given on the part of the said *John Pym*; that it appears by the answer of the said *John Pym* put in to the petitioner's bill, that he had no right or title whatsoever to the mortgaged premises, inasmuch as the only right or title pretended by him by his said answer thereto was derived from *George Pym* deceased, upon supposition that the said *George Pym* had obtained a release of the equity of redemption of the mortgaged premises, and

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In *March*, 1818, the Court made the order on which the Plaintiffs on this occasion have relied; and it is admitted that, although that order had not been made, the

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and had levied a fine thereof in *Hilary* Term 1770; whereas it appeared by the answer of the said *George Pym* put in to the petitioner's bill in the Court of *Exchequer*, and sworn by the said *George Pym* in *November*, 1772, that the said *George Pym* admitted that he had then no right, title, or interest, in the mortgaged premises, except by virtue of the said indenture of demise, and by way of mortgage for 100 years, and did not pretend to have obtained any release of the equity of redemption thereof, or to have gained in any manner any freehold interest therein; and submitted to be redeemed upon payment of principal, interest, and costs; so that the said Defendant *John Pym* had no right or title to contest the petitioner's title as heir at law of the said *Nicholas Stoddard* deceased, which title was not contested by the executors of the said *George Pym*:

That the evidence of the petitioner being the heir at law of the said *Nicholas Stoddard*, was such that the Court might have decided upon such evidence consistently with its rules and established practice, and none of the other parties in these causes had alleged himself to be the heir at law of the said *Nicholas Stoddard* in opposition to the petitioner:

And it not being even suggested that any other person, not a party, now sets up any title in such character to the mortgaged premises, or any right to redeem the mortgage, the said *John Pym* who is in possession merely in consequence of the possession obtained by the said *George Pym* as a mortgagee for such term of 100 years as aforesaid, had no right to call upon the Court to compel the petitioner to establish his title at law to the equity of redemption of the mortgaged premises, before the petitioner shall be at liberty to redeem the said mortgaged premises; such a redemption by the petitioner not being in the least prejudicial to the pretensions of any future claimant, should any ever appear to dispute the petitioner's title as such heir at law as aforesaid:

That

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the Defendant could not have moved to dismiss the bill for want of prosecution until *June*. The precedents which have been cited, and which were established by myself, I am anxious to follow to the utmost extent to which principle will authorise me; namely, that after an injunction has been obtained, if the Plaintiff takes no step during three terms, the Defendant may dismiss the bill for want of prosecution, by motion of course; although there is an order staying execution, or trial, or even sometimes the commencement of an action. In those cases,

Decisions, that a mere injunction will not prevent dismission of the bill for want of prosecution by motion of course, approved.

That considering the respective situations and interests of the petitioner and the said *J. Pym*, the evidence given by the petitioner to prove himself the heir at law of the said *Nicholas Stoddard* was amply sufficient; and that even upon much less proof than he has actually given, he ought to have been permitted to redeem the mortgaged premises, without the trouble and expense of a trial at law, and the delay consequential thereon, more especially as the said *John Pym* had not attempted by any evidence whatsoever to contradict the evidence adduced by the petitioner, or even pretended that any person was or claimed to be the heir of the said *Nicholas Stoddard*; so that the said *John Pym* by insisting upon an issue to try whether the petitioner was the heir as aforesaid, could only mean to put the petitioner to considerable expense, and to delay the petitioner in obtaining possession of the mortgaged premises, the rents already received from the mortgaged premises exceeding by 1000*l.* and upwards the principal and interest due on the said mortgage, and the said *John Pym* being, as the petitioner apprehended, utterly unable to pay the petitioner the costs of the trial of such issue, and the surplus rents due to the petitioner, and therefore meaning only to harass the petitioner, and to compel him to enter into some compromise to avoid the expense of such trial.

Lord *Loughborough* was of opinion with the petitioner, and accordingly reversed the decree of the commissioners, and proceeded to decree a redemption.—From Lord *Colchester*'s MSS.

" His

cases, on production of the six clerk's certificate, or on an assertion to which the Court gives credit that the certificate will be made, the bill is dismissed, and of course the injunction ends. The question is, whether the principle of those cases rules the present? I add only, that to what is called courtesy the Court can pay no attention; and that whatever may have been the practice of the clerks in court, notice of such a motion is not necessary. Forty years' experience authorises me to say, that these courtesies occasion more delay than any other transaction in the Court.

I agree that on the motion to dismiss the bill, the Court looks no farther than the certificate of the six clerk; but if any transaction between the parties renders that motion inconsistent with justice, the Court will advert to that transaction, on an application to discharge the order. The certificate, therefore, is not conclusive on the question whether the order shall remain; and the point to be decided here is, whether the principle of those excepted cases in which the Court looks

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" His Lordship doth order, that the order on hearing of these causes dated the 27th day of *November*, 1792, be reversed and be as follows, (that is to say); it is ordered that the Plaintiff's bill in the first-mentioned cause do stand dismissed out of this Court with costs to be taxed, &c.; and in the last-mentioned cause his Lordship doth order and decree, that it be referred to the said Master to take an account of what is due for principal and interest on the mortgage in the pleadings mentioned, and to tax the Defendants the executors of *George Pym* deceased, their costs of that suit; and his Lordship doth declare, that the Plaintiff *William Bowreman* is entitled to redeem the said mortgage, and to have a conveyance made to him of the mortgaged premises;" with directions for taking an account of the rents and profits. — Reg. Lib. B. 1793, fol. 213—215.

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looks beyond the certificate, comprehends the present case?

It has been said that the Defendant gained no advantage by the order of *March*, 1818; I think she gained much. Without this order she could not have obtained a judgment, on which the Plaintiffs could not have brought a writ of error, nor could she have moved to to dismiss the bill until *June*; whereas on the first day of the term ensuing the order, if judgment had not been given according to its terms, she might have moved to dissolve the injunction; and an injunction is the object of the bill. The order amounts to this, that the Plaintiffs, giving judgment, shall have the benefit of all equitable considerations; and the Defendant, obtaining judgment, shall not receive the fruits of it until this Court has decided whether she is entitled to them. This Court therefore assumes the right of controling the judgment at law.

Since *March*, 1818, this case has been placed in circumstances quite different from those in which the Court commonly acts; from that time it was competent to the Defendant, stating that judgment had not been given as ordered, to obtain the dissolution of the injunction. Call the order interlocutory or not, it is a rule of Court which alters the situation of the parties in respect to the right to dismiss the bill for want of prosecution. The principle of the cases cited in support of this motion, is not applicable here; that principle is, that a party who has obtained an injunction shall not delay the cause further than if he had not obtained it; but if the order for the injunction affords other advantages, as an undertaking not to bring a writ of error, or an early opportunity of applying to the Court, it seems

Principle of those decisions.

seems that to such a case the ordinary rule can not be extended. (*a*)

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May 4. The Lord Chancellor stated, that on reconsideration he retained the opinion which he had expressed, that the bill could not be dismissed on motion without notice; and intimated that he would consider the terms which should be imposed on discharging the order of *November*, 1818.

4 *May*, 1819. "His Lordship doth order, that the order made in this case, dated the 11th day of *November*, 1818, be discharged; and it is ordered, that the defendant *S. Biou* do restore the possession of the premises in the pleadings mentioned to the Plaintiff *Abel Jenkins*, undertaking to deal with such possession as the Court shall hereafter order; and it is ordered, that the said Defendant do retain the rents and profits she has received, without prejudice to either side." Reg. Lib. A. 1819, fol. 1800. (*b*)

(*a*) See in addition to the cases cited, *Earl of Warwick* v. *Duke of Bedford*, 1 *Cox*, 111. *Hannam* v. *The South London Waterworks Company*, 2 *Mer.* 61.

(*b*) In CHANCERY. *December* 17th, 1791.

RAILTON *v.* WOOLRICK.

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The Defendant having put in his answer to this bill, the Plaintiff in *May*, 1791, obtained an order to refer the answer for impertinence, but had never taken out any warrant before the Master, or proceeded under the order.

Shuter this day moved, that the order to refer the answer might be discharged, and that the bill might be dismissed for want of prosecution.

Cooke for the Plaintiff contended that the Defendant was not entitled either to

1819.

March 27.
April 6.
May 4.

KYNASTON *v.* The EAST INDIA COMPANY.

Owners and occupiers of houses in *London*, subject to tithe; Defendants in a suit by the tithe-owner, ordered to permit witnesses to inspect them preparatory to examination on interrogatories, for proving their value.

THE bill, filed in *Trinity term*, 1809, and amended under an order of *February*, 1811, stated, that the Plaintiff was, and ever since the month of *May*, 1804, had been seised of or entitled unto, and in the possession of, the rectory impropriate of *Saint Botolph without Aldgate*, part whereof is situate within the city of *London* or the liberties thereof, and other part in the suburbs of the city, and within the county of *Middlesex*: and was then, and ever since the year 1804, had been entitled to, and ought to have received, all the tithes, rates for tithes, sums and customary payments, or other duties, in lieu of tithes, which had become due and payable

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want of prosecution, and the Defendant needs not proceed to obtain the Master's report in his favor.

have the order discharged or the bill dismissed; that the regular way for the Defendant to have got rid of the order, would have been by taking out warrants himself, and procuring the Master's Report that the answer was not impertinent; as in the case of exceptions, where the Defendant might proceed upon the reference to get the answer reported sufficient; and that the Defendant was not intitled to have the bill dismissed, because an answer referred for impertinence was not considered as any answer, and a Defendant who had not answered would not be intitled to move to dismiss a bill for want of prosecution; and he offered to proceed immediately before the Master upon the reference.

But the Lord Chancellor said that the Plaintiff had abandoned the order by not proceeding under it, and he discharged the order, and would have dismissed the bill, but *Cooke* undertook to speed the cause.—From Mr. *Cooke*.—Lord *Colchester's* MSS.

17th *December*, 1791.—"Upon motion, &c. it was alleged that the Plaintiff having exhibited his bill in this Court against the Defendant, he put in his answer thereto on the 28th day of *June*, 1790, as

able from the citizens and inhabitants, for the time being, of that part of the parish which lies within the city of *London* or the liberties of the same, for their respective

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as by the six clerks certificate appears, after which the Plaintiff not having proceeded further in the cause, the Defendant gave notice that he should move to dismiss the Plaintiff's bill for want of prosecution, whereupon the Plaintiff applied for and obtained an order bearing date the 31st day of *May* last, whereby it was ordered that it should be referred to Mr. *Popham*, one, &c. to look into the Plaintiff's bill, and the Defendant's answer, and certify whether the Defendant's answer was impertinent or not, but the Plaintiff has not since proceeded under the said order of reference or in this cause; it was therefore prayed that the said order of the 31st day of *May* last may be discharged, and the Plaintiff's bill may stand dismissed out of this Court for want of prosecution, with costs to be taxed, &c. whereupon and upon hearing, &c. it is ordered that the said order bearing date the 31st day of *May* last be discharged, and that the Plaintiff do go to commission this vacation, give rules to pass publication in this term, and procure the cause to be set down for hearing in *Easter* Term next, or in default thereof it is ordered that the Plaintiff's bill do stand dismissed out of this Court with costs, for want of prosecution, without farther motion; and it is hereby referred to Mr. *Pepys*, one, &c. to tax the said costs."—Reg. Lib. B. 1791. fol. 32.

In CHANCERY. *January* 23d, 1792.

ATTORNEY GENERAL v. LORD STAMFORD.

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After the answer in this cause had come in, the Plaintiffs remained three terms without any proceeding, and then obtained an order to amend their information, and having remained some time without amending it, the Defendants moved that the order to amend might be discharged, and the bill dismissed for want of prosecution. The Plaintiffs then undertook to amend within a limited time,

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KYNASTON v. The EAST INDIA COMPANY.

respective houses, shops, warehouses, cellars, and stables, situate within that part of the parish which lies within the city or the liberties thereof: and the bill then stated the decree, bearing date the 23rd day of *February*, 1545, made by *Thomas*, then Archbishop of *Canterbury*, and others therein named, in pursuance of the act of the 37th year of *Henry* VIII. c. 12.

The bill further stated, that by virtue of that act and decree, the Plaintiff became entitled to receive all

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missed, it is sufficient to amend by expunging another Defendant, though immaterial to the Defendant at whose instance the order was made.

but not having done it, an order was made on the Defendant's application on the 6th *December* last, that the Plaintiffs should amend the information before the last seal after *Michaelmas* Term or the information be dismissed. The Plaintiffs then amended the information, merely by striking out the names of two Defendants, and obtained an order to dismiss the information as to them with costs.

Pemberton now moved, for the other Defendants, that the information might be dismissed; and he contended that the Plaintiffs had not complied with the last order; that they had made no material amendment, none that related to the present Defendants, and therefore that the information ought to be dismissed.

The Plaintiffs did not appear, but an affidavit of service of notice of the motion on them was read.

The LORD CHANCELLOR.

The conduct of the Plaintiffs is very vexatious, but yet they have literally complied with the order, and therefore the information cannot now be dismissed. Motion refused. — From Lord *Colchester*'s MSS.

In CHANCERY. *January* 16th, 1794.

SQUIRRELL v. SQUIRRELL.

After subpœna to rejoin, a bill may be dismissed for want of prosecution.

Abbott moved to dismiss for want of prosecution, after subpœna to rejoin. The registrar doubted, but 3 Atk. 558. being cited for the motion, it was ordered by the Lord Chancellor.—From Lord *Colchester*'s MSS. — Reg. Lib. B. 1793. fol. 114.

monies

monies due and payable for and in respect of the tithes, oblations, and dues, arising and payable by the inhabitants and occupiers of houses, warehouses, wharfs, and quays, within that part of the parish of *St. Botolph Aldgate*, which is situate in the city of *London* or the liberties thereof, at and after the rates expressed and directed to be paid in the decree, (that is to say) for every ten shillings rent by the year of all houses, shops, warehouses, cellars, and stables, within the rectory or parish, 1*s.* 4½*d.*, and for every 20*s.* rent by the year of all houses, shops, &c. within such parish, 2*s.* 9*d.*; subject to certain abatements in the decree specified.

The bill further stated, that the Defendants had, ever since the month of *May*, 1804, been, and then were, in the possession and occupation of several messuages or dwelling houses, warehouses, cellars, wharfs, quays, edifices, and buildings, situate within that part of the parish of *St. Botolph Aldgate*, which lies in the city of *London* or the liberties thereof, at and under certain yearly or other rents and reservations, or otherwise; and that certain yearly or other rents or reservations, in the nature of rents, had been or were formerly or theretofore, or at some times, paid or reserved, or made payable, for or in respect of the houses or warehouses, &c. or some or one of them, or of some other houses or buildings, which formerly or theretofore were erected and stood upon the scite, or upon the same pieces or parcels of land or ground, on which the houses, warehouses, &c., then in the possession, holding, or occupation of the Defendants, had been since erected and then stood, or had been made, and therefore the tithes, or yearly payments in the nature of tithes, were during the time they were in such occupation and possession, and then were, payable by them, for or in respect of the said messuages or dwelling houses, warehouses, &c. in man-

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ner and after the rate directed by the decree, according and in proportion to the rents respectively then paid by the Defendants or payments made by them, in the nature or in lieu of rent, during the time last mentioned, to the Plaintiff, as the rector or impropriator of the parish: and that the sums of money payable for or in respect of the tithes or dues, for or in respect of the houses, &c. in the occupation or possession of the Defendants, or any part thereof, had not, since the month of *May*, 1804, been paid to the Plaintiff, or to any other person, by his order or for his use, and that there was then a considerable sum of money owing to him on that account, from the Defendants.

The bill, charging that the tithes were payable, and that the amount of the several sums to be paid by the Defendants for the tithes, or in the nature thereof, ought to be calculated and computed after the rate, and in the manner directed by the decree, according to the present or improved or last known rent or rents, or value of the houses, &c. and other buildings; prayed, that an account might be taken of the several sums of money due to the Plaintiff, for the tithes, rates for tithes, sums or customary payments, or other duties in lieu of tithes, on account of the messuages, &c. held and occupied by the Defendants, within such part of the rectory or parish, as aforesaid, or the titheable places thereof, in each year since the month of *May*, 1804; and that the Defendants might pay to the Plaintiff the money which should be found due from them on the taking such account, the Plaintiff waiving all penalties and forfeitures, &c.

By their answer, the Defendants admitted, that they had, ever since the year 1804, occupied, and did then occupy, and were the owners of several stacks of ware-

houses, and three dwelling-houses for their warehouse-keepers and servants, situate in and near *Gravel Lane*, *Petticoat Lane*, *Harrow Alley*, and *Cutler's Street*, and also certain warehouses then or formerly called *Parker's Gardens Warehouses*, situate in *Haydon Square*, near another alley or place also called *Harrow Alley*; and that they were then, and ever since the year 1804, had been the occupiers of certain warehouses called *Rumball's Warehouses*, situate also in *Haydon Square*. And they stated, that they believed that the whole of the warehouses and dwelling-houses, therein mentioned to be situate in or near *Gravel Lane*, *Petticoat Lane*, and the first mentioned *Harrow Alley* and *Cutler's Street*, and a small proportion of the warehouses called *Parker's Gardens Warehouses*, and a part of the warehouses called *Rumball's Warehouses*, respectively, are in that part of the parish of *St. Botolph* which is within the city, and that the residue of the warehouses, called *Parker's Gardens Warehouses* and *Rumball's Warehouses* respectively, are situate in the parish of *Trinity, Minories*, in the county of *Middlesex*. And they further stated, that all the warehouses and dwelling-houses, before mentioned to be situate in and near *Gravel Lane*, *Petticoat Lane*, the first-mentioned *Harrow Alley* and *Cutler's Street*, and the warehouses called *Parker's Gardens Warehouses*, were built by the Defendants, and that they having built, and being themselves the owners of the last-mentioned warehouses and dwelling-houses, they did not then, nor ever did hold the same, or any part thereof, under any yearly or other rent, or for any consideration in the nature or in lieu of rent, and that no yearly or other rent had, at any time, been paid for the said warehouses, dwelling-houses, or ground, though they apprehended and believed that certain dwelling-houses, or some edifices or buildings, did formerly stand upon the

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the scite, or upon the same pieces or parcels of land or ground, on which the said warehouses and dwelling-houses had been since erected, and then stood, and that some yearly or other rents or payments in the nature of rents, were reserved and made payable, for or in respect of such dwelling-houses, or other edifices and buildings, or the ground on which the same stood, but that the Defendants were unable to set forth what such rents or payments were, or whether they were paid or not: and that all such part of the warehouses, called *Rumball's Warehouses*, as are situate within that part of the rectory or parish of *St. Botolph*, which is within the city of *London*, or the liberties thereof, was then held by the Defendants, under a lease for a term of years then unexpired, at the yearly rent of six pounds, payable and regularly paid to the Honourable *John Olmius*.

The cause was heard at the Rolls, on the 2d of *March*, 1818, when his Honor declared that the Plaintiff was entitled to tithes, after the rate of 2*s.* 9*d.* in the pound, upon the annual value of all the messuages, warehouses, and other premises, held or occupied by the Defendants within the parish of *St. Botolph without Aldgate*, in the city of *London*, except the premises called *Rumball's Warehouses*; and ordered a reference to the Master to ascertain the value of the premises except as aforesaid, and to take an account of what was due to the Plaintiff for tithes, at the rate aforesaid: and it was ordered, that the Master should also take an account of what was due to the Plaintiff for tithes of the premises called *Rumball's Warehouses*, at the like rate of 2*s.* 9*d.* in the pound, upon the reserved rent of 6*l.* *per annum*, without prejudice to the question, whether the Plaintiff was entitled to 2*s.* 9*d.* in the pound, on the value of the last-mentioned premises.

In

In *November*, 1818, interrogatories, on the behalf of the Plaintiff, were carried into the office of the Master, for the examination of the Plaintiff's witnesses; and three surveyors, *James Burton*, *William Mountague*, and *Joseph Kay*, were examined on his behalf.

In *December* following, at the instance of the Defendants, publication was enlarged for three weeks from the 9th of that month, and within that period the Defendants examined four witnesses. The time for passing publication elapsed; but the depositions not having been published, publication was again enlarged, at the instance of the Plaintiff.

On the sixth of *February*, 1819, the Plaintiff having moved, before the Vice-Chancellor, that *Joseph Sills* and *William Smith* might be at liberty to inspect the several warehouses and premises, mentioned in the pleadings, in the occupation of the Defendants, situate in *Gravel Lane*, *Petticoat Lane*, *Harrow Alley*, *Cutler's Street*, and *Parker's Gardens*, respectively, preparatory to their being examined as witnesses on the part of the Plaintiff; the Vice-Chancellor ordered a reference to the Master to inquire and state to the Court, whether an inspection of the several warehouses and premises, mentioned in the pleadings to be in the occupation of the Defendants in *Gravel Lane*, *Petticoat Lane*, *Harrow Alley*, *Cutler's Street*, and *Parker's Gardens*, respectively, by the said *Joseph Sills* and *William Smith*, preparatory to their being examined as witnesses, upon interrogatories carried into the Master's office by the Plaintiff, in pursuance of the decree, was necessary for the Master to form his conclusion upon the matters referred to him.

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From this order the Defendants appealed to the Lord Chancellor.

Pending the appeal, by his report, dated the 24th day of *March*, 1819, the Master certified that he was of opinion, that an inspection of the several warehouses and premises, mentioned in the order of reference, by the said *Joseph Sills* and *Robert Smith*, preparatory to their being examined as witnesses, upon the interrogatories exhibited by the Plaintiff before him for the examination of witnesses, in respect of the matters referred to him by the decree, was necessary for him to form a satisfactory conclusion upon the matters so referred to him.

On the 7th of *April*, 1819, the Vice-Chancellor confirmed the Master's report, and ordered that the Defendants should permit *Joseph Sills* and *Robert Smith* to inspect the several warehouses and premises in the occupation of the Defendants, in *Gravel Lane*, *Petticoat Lane*, *Harrow Alley*, *Cutler's Street*, and *Parker's Gardens*, respectively, preparatory to their being examined as witnesses upon interrogatories carried into the Master's office by the Plaintiff. — Reg. Lib. A. 1818. fol. 822.

From this order also the Defendants appealed to the Lord Chancellor.

March 27. *The Solicitor General*, Sir *Arthur Piggott*, and Mr. *Wyatt*, in support of the appeal.

The order for inspection is unprecedented, unauthorized by practice or principle. The Court has no jurisdiction to compel the owners of houses to open them for the

the admission of adverse witnesses, undertaking to furnish evidence against them on the question of their value. Parties may be themselves examined on interrogatories; but their freehold is protected from the entry of strangers. The order can be supported only on the principle that the Court is competent to compel the *East India Company* to open their doors; every house subject to the same claim of tithe must be subject to the same inspection. If the parties acted on such an order, and the *East India Company* brought an action for a trespass, how could the Defendants protect themselves by an order of this Court? What precedent is there of such a defence? The instances in which the legislature has, for the purposes of revenue, compelled inspection of houses, afford no proof of a like power in this Court.

If the proprietor of a mine, in working underground, has worked into the mine of his neighbour, and taken ore not belonging to him, inspection may be ordered; but the Court then acts at the instance of the owner of the mine invaded and of the ore taken. A tithe-owner is undoubtedly entitled to enter on the land subject to tithe for the purpose of seeing the tithe set out, and carrying it away, but the analogy of that right cannot authorize the Plaintiff in deputing strangers to enter and inspect the Defendants' freehold. On the principle of this order every tithe-owner may file a bill, not according to the established practice for discovery, but for inspection.

The right of inspection cannot be consequent on the title created by the act of parliament; on such a supposition it would be needless to insert in any revenue law a clause authorising inspection; the right would follow the

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the imposition of a tax: but the legislature has never sanctioned that reasoning; or supposed that a right of entry into dwelling-houses could be assumed from mere constructive inference, without express enactment.

The practice of view in a trial at law is no authority for this order; the view is made by the jury, and under the authority of a statute. (*a*)

The order is unnecessary; the value of the buildings may be ascertained by external view. The *East India Company* resist the claim of compulsory inspection; but in fact their warehouses are frequently opened for public sales; and during the last long vacation inspection was admitted.

Mr. *Wetherell*, and Mr. *Palmer*, in support of the orders.

Upon principle, this Court possesses jurisdiction to pronounce an order which is necessary for administering the justice of the case. Every tithe-owner is entitled to enter on the grounds of the occupier, for ascertaining that the tithe is properly set out. Suppose that the agent of a merchant employed to purchase jewels, at a commission of 5 *per cent.*, consigns to his employer diamonds which he represents to be worth 150,000*l.*; while the merchant values them at 70,000*l.*, and refuses to pay commission on the larger sum; if the agent files a bill for an account of his commission, will not this Court compel production and inspection of the jewels, in order to enable the Master to ascertain their value? Upon the same principle pictures may be inspected. The

(*a*) See *post*, p. 262. n.

principle

principle is, that wherever in respect of the property of one individual, a right accrues to another which cannot be measured without inspection of the subject of property, the Court is competent to compel the proprietor to permit that inspection, as indispensable to the purposes of justice. Such inspection is no invasion of the *jus proprietatis*, but a legal consequence of the obligation affecting the property and the proprietor. Supposing an agent employed to value timber at a commission, and the timber felled, and a dispute arisen on what amount commission is to be computed; would the Court permit the owner of the timber to remove it, till he had afforded an opportunity of inspection for ascertaining its value?

The Court has assumed jurisdiction to direct the specific execution of a work in which the public are interested; as in the *Birmingham* canal case, the parties were directed to raise a bank to a given height. (*a*) If a doubt arose whether that order had been obeyed, would the Court be incompetent to compel inspection? On a dispute between landlord and tenant, whether waste had been committed, or repairs performed, questions on the fact or the extent of waste or repair, might render necessary inspection of the house in the possession of the tenant. Why is a house or a warehouse more privileged from inspection than jewels, paintings, or mines?

The statute of 4 *Ann.* c. 16. s. 8., for securing in all cases where it may be requisite, a view by a competent

(*a*) In the *Birmingham Canal Company* v. *Lloyd*, 18 *Ves.* 515. the injunction was refused; but instances of the injunctions alluded to, which though in form prohibitory, are in effect mandatory, may be found in *Robinson* v. *Lord Byron*, 1 *Bro. C. C.* 588. *Lane* v. *Newdigate*, 10 *Ves.* 192.

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part of the jurors, was rendered necessary by the want of that jurisdiction *in personam*, in courts of law, which is the characteristic of this Court; and by means of which its orders are enforced.

The LORD CHANCELLOR.

Whether before decree, the Court would direct a preliminary inquiry by the Master, on the necessity of inspection, *Quære.*

Has the Court in any other case directed a preliminary inquiry before the Master, whether inspection is necessary? It may be very difficult for the Master to dispose of such a reference. It is, indeed, a protection against needless inspection; but supposing several witnesses who had made inspection, to have been examined, how can the Master, if publication has not passed, know whether inspection by other witnesses is or is not necessary?

In a case not precisely the same *in specie* with others, the Court is cautious of introducing into its practice, what is an entire novelty, and may be productive of great expense, namely a reference to the Master to inquire whether inspection is necessary. On an application for a commission to examine witnesses in foreign countries, the Master receives testimony, and judges of the necessity of issuing a commission; but is there any precedent in the analogous cases of mines, &c. of directing a reference to the Master on the necessity of inspection? If the Master reported inspection unnecessary, the parties might except to his report, and the question would return to the Court.

Recollecting that the reference to the Master was, in this instance, directed after decree, I think it right.

Argument in support of the orders resumed.

The

The daily practice of the Court, its whole jurisdiction in issuing injunctions, and writs of *ne exeat regno*, imposes more important restraints on the civil rights of the subject, than an order of inspection. The authority of this Court, zealously disputed in the time of Lord *Ellesmere*, has been established more than a century and a half. (*a*)

Though novel in circumstances, the case is not novel in principle. The purpose of inspection is to inform the conscience of the Court, and witnesses appointed by it are entitled to be considered as its officers. In a former suit in the Exchequer between the same parties, the surveyors examined on opposite sides, in their estimate of value, differed, and to the amount of 2000*l.* *per annum.*

At the close of the argument, the following observations were made by

The LORD CHANCELLOR.

On the question what this Court will do, if it has jurisdiction, I entertain no doubt; the order must compel the *East India Company* to permit inspection; and if such an order were made, the Court, I apprehend, needs not trouble itself to consider the consequences of an action at law, because no action would be allowed.

For reasons which I may mention hereafter, I am of opinion that the statutes relative to revenue have not much application to this question; the real question is this; whether, when the legislature has declared, by this act of 37 *Henry* VIII. c. 12., that the owners or occupiers shall pay 2*s.* 9*d.* on the rent, if they receive rent,

(*a*) *Vide ante*, vol. ii. p. 22. n.

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and if not, on the value, and shall consider what would be the rent as the value, it has not as it were made a contract between the parties, that that act of parliament shall be carried into execution between them; and whether this Court has jurisdiction to see that it is carried into execution as a private contract? If there had been a private contract between the rector and the parishioners, that for avoiding litigation, the rector should take one-tenth of the rent, if the land were let, and if not let, one-tenth of the value, the question would have arisen, whether the Court would compel the land-owner to permit *witnesses* to enter on the lands for the purpose of informing the conscience of the Court, what was its value?

The right to view diamonds or trees in the cases suggested, is an implied right; and so is the right to enter the mine of another; the foundation is that necessity requires that entry; there is certainly fraud, but the ground is necessity.

The cases of view are not analogous; the view is made by the jury; and that practice existed, I believe, at common law (*a*), and was not introduced but regulated by statute; but is no authority for an order to permit inspection by third persons for the purpose of giving evidence against the proprietor. No precedent is produced of an order upon a party to permit inspection for the purpose of giving evidence; and the question is, whether the Court will make such an order in every case in which collateral evidence is less satisfactory than inspection?

(*a*) A view by the jury in certain actions, was a practice of the common law. The writ directing the sheriff to summon recognitors for trying an assize of *mort d'ancestor*, contained a clause, *et interim terram illam videant*. *Glanville*, l. xiii. c. 14. *Bracton*, l. iv. c. 19. *Fleta*, l. iv. c. 9., and many other passages. On the right of view, as at present exercised, see 1 Burr. 252. *et seq.*

The

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April 6.

The LORD CHANCELLOR.

The question is, whether the Vice Chancellor was right in taking a step which leads to giving liberty, if the Master should think it necessary, to the Plaintiff to appoint persons to examine the warehouses. On the Master's report the propriety of the order cannot be questioned. It may be right that the terms of the order should be altered, directing not that witnesses shall be at liberty, but that the *East India Company* shall give them liberty, to inspect; and then comes the question whether this Court has authority to make an order on the Defendant to give such liberty?

I have found no case in point, but on principle I think that the Court has authority. It has been admitted on all sides, that where houses and warehouses in *London* have never been let, tithes are to be paid according to the rent which they are worth to be let at; some of the old cases say that there is no authority in the statute for charging those houses at all, but it was admitted at the bar that the point is now decided; and I must take it that if a person has property of the various descriptions enumerated not let, the tithe-owner, whether lay or ecclesiastical, is entitled to 2*s.* 9*d.* in the pound, not on the rent, for there is none, but on the value; that is, the value at which it might be let.

Under that act this Court has undoubted jurisdiction to entertain the suit; that point, though formerly questioned (*a*), is now settled by many decisions. (*b*) Having

(*a*) The doubt was founded on a construction of the decree, (s. 19.) incorporated into the statute 37 *H.* 8. *c.* 12., as conferring exclusive jurisdiction on the Mayor of *London*.

(*b*) *Kynaston* v. *Miller*, 3 *Gwill.* 903. 2 *Dick.* 773. *Canons of St. Paul's* v. *Crickett*, 2 *Ves. jun.* 563. *Warden, &c. of St. Paul's* v. *Morris*, 9 *Ves.* 155. *Antrobus* v. *The East*

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jurisdiction, the Court must in course direct an account of tithes, by directing an account of what is the value of the premises to be let; and the question is, whether in such a case, the Court must not have the means of ascertaining, by the inspection of witnesses, the nature of the premises, in order to ascertain their value; and whether the law meant to leave it thus, that the Defendants were to state in their answer their opinion, and to send their own surveyor to give his opinion of the value, but on the other hand, the Plaintiff was to be in such circumstances that he could examine no witnesses who knew with precision the value of the premises? It is obvious that the capacity of warehouses of equal external dimensions, for holding goods, might be greater or less, and that the rent would be higher or lower, according to the capacity and accommodation of a warehouse. It is admitted that where a man has a right to receive a certain sum in the pound on the value of trees, the Court has ordered inspection of the trees; so in the case of a commission on diamonds, inspection would be ordered of the diamonds. I remember a case, where on a suggestion that a machine used by the Defendant was an infringement of a patent, the Court ordered the Defendant to allow an entry into his premises for the purpose of ascertaining by inspection whether the machine was an infringement. (*a*) So in the instance of partition of a house, the tenant having a right to the exclusive possession of it during a term, on a bill for partition the Court would order an entry, for the purpose of determining in what manner the house could be divided, or what must be paid for owelty of partition.

Instances of order to permit inspection,

and entry.

India Company, 13 *Ves.* 9., 1 *Dow*, 464. *Warden, &c. of St. Paul's* v. *Kettle*, 2 *Ves. & Beam.* 1.

(*a*) In *Brown* v. *Moore*, *Hilary* Term, 1816, such an order appears to have been made, (Mr. *Merivale's* MSS.) but no entry of it occurs in the Registrar's Book.

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But it is said that in these cases the parties had an interest in the property, or an interest under a contract; I say that this parliamentary contract is on the same ground, because every person claiming under it has an interest in the premises; and if without this proceeding the Court must miscarry, and cannot attain the justice of the case without inspection, my opinion is, that on principle, it has authority to order inspection, taking care to impose as little inconvenience as possible on those on whom the order is made.

Cases relative to the production of deeds and papers are not applicable, because there is a particular right to call for the production of those deeds; but on these general principles the Court must make the order. (*a*)

May 4.—"His Lordship doth order that the said orders dated respectively the 6th day of *February*, 1819, and the 7th day of *April*, 1819, be affirmed."—Reg. Lib. A. 1818. fol. 944. (*b*)

(*a*) See *Earl of Macclesfield* v. *Davis*, 3 *Ves. & Beam.* 16.

(*b*) *Mich.* 10 *Geo.*—In the EXCHEQUER.

CITY of LONDON v. THOMSON, *et è con.*

In a suit by the City of *London*, the Defendants obtained an order to inspect the city books and their bye-laws.

The original bill in this case was brought for some duties claimed by prescription on the exportation of corn. The Defendant denied the right; and now moved for an order to inspect the city books and their bye-laws concerning this duty, and particularly entries in the cocket office.

It was objected that the motion is irregular, for that though it is allowed between private persons and the *South Sea Company*, yet it ought not here, for that would be to make the city produce evidence against them-

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February 15. DUCKWORTH *v.* BOULCOTT.

The farther answer of a Defendant, being sworn at the house of a Master, and filed in the six clerk's office, on the evening of the day on which the Master had reported a former answer insufficient, an order obtained at the sitting of the Court on the next morning for an injunction, is irregular; *secus*, if the answer had not been filed on the day on which it was sworn.

THE Master having, on the 4th of *August*, 1817, reported the Defendant's answer insufficient, on that day, the Defendant at the house of the Master swore to his farther answer, which, on the evening of the same day, was taken by the agent of the six clerk, who attended at the Master's house for that purpose, and filed, by being deposited in the usual manner, in the study of the six clerk. At the sitting of the Court on the 5th of *August*, the Plaintiff obtained an order for the common injunction on the Master's report of the insufficiency of the first answer; and that order was drawn up and an injunction issued, although the Defendant's solicitor, on the 6th of *August* informed the solicitor of the Plaintiff, that the farther answer had been filed before the order was obtained.

A motion was made on behalf of the Plaintiff to discharge the order of the 5th of *August* for irregularity. The

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themselves; and the city here are in nature of a private person. Besides no particular bye-law, &c. is specified; so that the search would be infinite.

In the cases between lord and tenant of a manor, where the tenant says the land is not part of the manor, he shall not be intitled to inspect the Court Rolls, for he has barred himself by denying the land to be within the manor.

Chief Baron. There is nothing extraordinary in this motion. In the case of a lord of a manor and his tenants it is constantly allowed, and the corporation being concerned in interest makes no difference, any more than where the lord of a manor is concerned in interest, and the dispute is with a tenant. It is always allowed.

Cur. of the same opinion. Rule accordingly. — Mr. *Coxe*'s MSS.

In

The facts stated appeared by the six clerk's certificate, and the affidavits of the Defendant's solicitor, and one of the sworn clerks in the six clerk's office.

Mr. *Bell*,

In the EXCHEQUER. *May* 21st, 1791.

GABBETT *v.* Sir HENRY CAVENDISH.

Cooke moved that the Defendant should not be compelled to produce all the books of account and papers belonging to his late father, before the deputy remembrancer, pursuant to an order in this Court, he having offered and being ready to produce them to the Plaintiff's solicitor, or any agent of his in *Dublin*.

He had an affidavit of the Defendant, that he had produced all such books and papers as were here in his custody or power, and that as to those in *Dublin*, they were of consequence to the business carried on there.

Scott, Solicitor General *contra*, — objected that the order in this case was made upon consent, and so that the Defendant was not now at liberty to move for any alteration in it.

Eyre, Chief Baron, said that he remembered there was a great deal of discussion at the time, and he rather thought that he himself directed what the order should be; but that it was understood that when the decree came to be enforced, the parties should be heard as to any point that should arise.

He thought that what ought to be done was, that the Defendant should deliver a schedule upon oath of all the papers which are in *Dublin*, and that the Plaintiff should have copies of all such as he pleased. His only doubt was at whose expense this should be done, as it was for the Defendant's accommodation; but it was uncertain whether the Plaintiff would want any copies.

Cooke said there are large chests of papers, your Lordships would not expect that we should examine them all in order to schedule them.

Eyre, Chief Baron. It is no more than you must have done if the papers had been here. You must do it. Ordered accordingly. From *M. Le Mesurier's* notes.

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Mr. *Bell*, and Mr. *Wingfield*, in support of the motion.

Sir *Samuel Romilly*, and Mr. *Hart*, against the motion.

The

In the EXCHEQUER. *June* 12th, 1793.

POTTS v. ADAIR. (a)

A Plaintiff is intitled to the production of maps, rentals, &c. in the possession of and belonging to the Defendant, which elucidate the right of the Plaintiff.

Abbott moved that the Defendant might produce and leave in the hands of his clerk in court for the usual purposes, certain maps, terriers, rentals, plans, and particulars mentioned in the notice, and admitted by the Defendant by his answer to be in his custody. He waived so much of his notice of motion as respected copies of public instruments in the Defendant's custody.

The Plaintiff had filed his bill as vicar of *Hixton*, and intitled as such to glebe by endowment, stating that the Defendant was in possession of some of the glebe; and that by confusion of boundaries the Plaintiff was unable to distrain, &c. and praying a commission.

The Defendant admitted the title of the vicar to the glebe, and his own possession of certain parcels of the glebe, which he conceived to be situated in such and such places as appeared by a map, rental, or particular of his estate in *Hixton*, and also by a sketch or plan.

Abbott stated the principle, that equity will give any party a discovery from the adverse party of all matters useful to the prosecution of his suit, or to his defence, *Mitf.* 154. &c. And *Bowman* v. *Lygon*, MSS. *Exchequer*, 1792; *Attorney General* v. *Corporation of Pool*, 2d seal before *Michaelmas* Term, 1790, which was as follows: an information at the relation of persons claiming a right to elect a curate, and charging the Defendants to have papers in their hands respecting that right; Motion for Plaintiff was, that the Defendants might leave in the hands of

(a) 1 *Anstr.* 259.

their

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When an answer is sworn in town, the parties in the usual course swear to it at the public office of the Masters, and the confidential person in the office carries the answer to the six clerk's office; if the public office of the Masters is closed, the parties go to a Master's house, and swear to the answer there; and the Master keeps the answer, and delivers it himself to the six clerk. If the parties, not choosing to attend at the public office,

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their clerk in Court, the papers admitted by them in their answer to be in their possession; and ordered accordingly, though the papers were corporation deeds.

Burton and *Alexander*, *contra*, insisted that a Plaintiff could not look into a Defendant's title before hearing, and cited 2 *P. W.* 410. Sir *James Davers*'s case; and that the Plaintiff had no right at all events to look into the whole rental of the Defendant, and none to have copies of public instruments.

The Court said the case in *Peere Williams* was a motion to look into evidence in the cause before hearing, and was a different motion; that this was of course; That as to copies of public instruments, certainly the Plaintiff could not have a production of them from the Defendant; That as to the maps and rentals, the Plaintiff had a right to see the whole, according to the description given by the Defendant in his own answer, and perhaps the chief assistance might arise from seeing the rest of the plan besides what was pointed out by the answer.

Also *Thomson* B. added, that this discovery might be useful in two ways; 1st, if the Plaintiff on inspection was satisfied, he might come to the Court for delivery of possession, even without a commission; or 2dly, upon the commission this previous assistance would better enable the Plaintiff to supply and conduct his evidence before the commissioners.

The order was for an inspection of these maps, &c. in the hands of Defendant's solicitor, with liberty to take copies of the whole.—Lord *Colchester*'s MSS.

wait

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wait till that is closed, go to the Master's house, and the answer is brought to the six clerk's office the next morning, the answer cannot be considered as filed on the day on which it is sworn at the Master's house.

Here the agent of the six clerk attended with the parties at the Master's house, and the answer was filed on the same day on which it was sworn. The order for an injunction must be discharged.

The order of the 5th of *August*, 1817, was discharged, and the injunction set aside with costs. — Reg. Lib. A. 1817. fol. 1297.

ROLLS.
1818.
February 18.
July 14.

HACK *v.* TUCK.

A testator having bequeathed annuities issuing out of a leasehold estate, to some annuitants for life, to some during the continuance of the fund, and to others indefinitely, with a general provision for an increase or diminution of the annuities, in proportion to the increased or diminished income of the estate; and a particular provision that, on the death of

BY his will dated the 30th of *April*, 1769, *Thomas Betts* bequeathed a leasehold tenement in *Hoxton* Town, to his wife *Jane*, for so many years of the term which he had therein unexpired at the time of his decease as she should live, and after her decease, to his son *John Betts*, his executors, &c. for the remainder of the term unexpired at the death of his wife, provided he should leave any lawful issue at his death; but if his said son should die without issue, the testator bequeathed the same to his daughter *Jane*, her executors, &c. for the remainder of the term unexpired at the death of his son without issue, provided she should leave any lawful issue at her death; but in case she should die without issue, the testator bequeathed the same to his daughter *Elizabeth*, in like manner; and in case she should die without issue, then to *John Rogers* for all the residue of the term. The testator

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testator bequeathed all his leasehold estates in *Hoxton Market* and *Old Street Road*, to his two daughters, to be equally divided between them, share and share alike; but if either should die without issue, to the survivor; and if both died without issue, to his son *John*.

After the decease of the testator, and of his widow, *John Betts*, in *April*, 1782, assigned by way of mortgage all his interest in the premises in *Hoxton* Town, to *Francis Carter* the elder, who had married the testator's daughter *Jane*; he entered and continued in possession during the remainder of the life of *John Betts*, who died in 1785 intestate and without issue, and without having redeemed the premises. On his death, *Francis Carter* the elder and *Jane* his wife, entered into the possession or receipt of the rents of one moiety, and on the death of *Elizabeth Betts* unmarried, of the other moiety, of the premises in *Hoxton Market* and *Old Street Road*.

Jane Carter afterwards died, leaving *Francis Carter* the elder, her husband, and *Francis Carter* the younger, and *Jane Carter*, her only children. *Francis Carter* the elder obtained letters of administration of her personal estate, and continued in the receipt of the rents of all the premises until his decease. By his will dated the 28th of *April*, 1798, he gave to his son *Francis Carter*, and *B. Waters*, and *J. B. Tuck*, all his estate and effects of every kind, both leasehold and copyhold, in trust, after payment of his debts and funeral and testamentary expenses, to lay out the surplus at interest, and out of the interest and the rents and profits of his leasehold and copyhold estates, to pay to his son *Francis Carter*, his executors, &c. the yearly sum of 20*l*., so long as the rents and profits of his estate should produce annually the sum of 175*l*., and so in proportion with the other devisees,

some of the annuitants for life, their portions should be paid to the survivors; the annuities given indefinitely are payable during the continuance of the fund; and the amount of annuities ceasing by the death of annuitants for life, not named in the particular provision, belongs not to the survivors, but forms part of the residue.

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devisees, according to the annual amount of the estate; and he also directed his trustees, out of the rents and profits aforesaid, to pay to his daughter *Jane Carter* the yearly sum of 30*l.* quarterly during her life; and to pay into the hands of *Mary Hack* otherwise *Carter*, the yearly sum of 110*l.*, until her son *W. F. Hack*, otherwise *Carter*, should attain 21, in case he should so long live, and after he should have attained that age, to pay to *Mary Hack* the yearly sum of 90*l.* only, until her daughter *Louisa* should attain 21, if she should so long live, and immediately after that event, to pay to *Mary Hack* the yearly sum of 70*l.* only, until her daughter *Maria* should attain 21; and immediately after that event to pay to *Mary Hack* the yearly sum of 50*l.* during her life; and as soon as *W. F. Hack*, otherwise *Carter*, attained 21, the trustees were to pay to him 20*l.* yearly, with like directions for the payment of an annual sum of 20*l.* each to *Louisa* and *Maria Hack*, for their separate use; and the testator directed his trustees to pay to his sister *Ann Thompson*, the yearly sum of 15*l.* during her life; and he declared that if the interest, rents, &c. of his estate and effects should not be sufficient to pay the several yearly sums thereby given, every one of his devisees, except *Mary Hack*, should abate proportionately out of their several sums according to such deficiency; and if the same should produce more than sufficient to pay the annual sums, they should be increased proportionately; and that in case of the death of any of his children, *Francis Carter*, *Jane Carter*, *W. F. Hack*, *Louisa Hack*, and *Maria Hack*, under 21, the part of such child or children should be divided among the survivors; and he bequeathed his household furniture to his wife for life, and after her death, to his son and daughter *Francis* and *Jane*; and appointed *Waters* and *Tuck* executors.

Francis

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Francis Carter died in *December*, 1800, and his son *Francis Carter*, the younger, in 1809, having appointed *Mary Tuck* sole executrix of his will; after her death, in 1810, *J. B. Tuck* became administrator of *Francis Carter*, the younger, during the minority of the children of *Mary Hack*.

The bill filed by *W. F. Hack*, otherwise *Carter*, *David Tait* and *Louisa* his wife, late *Louisa Hack*, and *Maria Hack*, prayed that the rights and interests of the Plaintiffs under the will of *Francis Carter*, the elder, in respect of their several annuities, might be ascertained and declared.

The Defendants, *Jane Carter* in her own right, and *Tuck* as administrator of *Francis Carter*, the younger, insisted that the annuities given to the Plaintiffs were payable only during their lives, and claimed the residuary estate as next of kin of the testator.

Mr. *Bell*, and Mr. *Parker*, for the Plaintiffs.

Mr. *Heald*, Mr. *Shadwell*, and Mr. *Tead*, for the Defendants.

The MASTER *of the* ROLLS.

The express words of the will are decisive of this question. The testator has given some annuities expressly during the life of the annuitant, others expressly during the continuance of the fund; and a third class indefinitely; the Court cannot introduce into the latter gifts, terms of qualification which the testator has not inserted. The conclusion is, that when the testator meant that the annuity should be paid only during the life

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life of the annuitant, he has so declared; and that where he has not so declared, such was not his meaning.

July 14.

A motion was made, on behalf of the Defendant *Jane Carter*, that the minutes of the decree might be varied by the insertion of a declaration, that, the next of kin of the testator *Francis Carter*, the elder, were entitled to the proportion of his property applicable to the payment of annuities for life, as those annuities became extinct by the death of the annuitants.

Mr. *Bell*, and Mr. *Parker*, for the Plaintiffs.

Mr. *Hart*, Mr. *Heald*, and Mr. *Shadwell*, for the Defendants.

The MASTER *of the* ROLLS.

The provision in the will for the proportionate increase or diminution of the annuities, refers exclusively to the increase or diminution of interest and rents of his property, not to the reduction of the amount charged on that property, by the death of annuitants for life. The testator has expressly declared, that on the death of some of the annuitants, their proportions shall be paid to the survivors; the inference is, that his intention was different in the case of the annuitants for whose death no such provision is made. In the event that has occurred, the death of *Mary Hack*, a portion of the fund is undisposed of; and falls therefore into the residue. The variation proposed must be made.

" His Honor doth declare, that *Francis Carter*, the elder, in right of his wife, became absolutely entitled to the leasehold estate in *Hoxton* Town, *Hoxton Market Place*,

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Place, and *Old Street Road*; and doth declare that the said *Francis Carter*, the younger, *W. F. Hack*, otherwise *Carter*, *Louisa* the wife of the Plaintiff *David Tait*, and *Maria Hack*, otherwise *Carter*, are entitled to the several yearly sums of 20*l.* each, absolutely, so long as the interest of the testator *Francis Carter*, the elder, in the leasehold property continues; and that the Defendant *Jane Carter* is entitled to the yearly sum of 30*l.*, and the Defendant *Ann Thompson* to the yearly sum of 15*l.*, for and during the term of their natural lives; and that *Mary Hack*, widow, deceased, in the will of the said *Francis Carter*, the elder, and the pleadings of this cause mentioned, was also entitled under the will of the said testator, to the yearly sum of 50*l.* during the term of her natural life, and upon her decease, such last-mentioned annuity has fallen into and now forms part of the residuary estate of the said testator, and that the annuities so given to the said *Jane Carter* and *Ann Thompson*, as aforesaid, will also, upon their respective deceases, fall into and form part of such residuary estate; all which before mentioned yearly sums, amounting together to 175*l.*, being to be issuing out of the rents and profits of the said leasehold property, are to be increased or diminished rateably as such rents exceed or fall short of the said annual sum of 175*l.*; such several annuitants being entitled, under the will of the said *Francis Carter*, the elder, to have the whole of the rents and profits of the said leasehold premises distributed among them in such proportions as aforesaid: and that the said *Jane Carter*, as one of the next of kin of the said testator *Francis Carter*, the elder, and *J. B. Tuck*, as the personal representative of the said *Francis Carter*, the younger, who was the other next of kin of the said *Francis Carter*, the elder, are equally entitled to the residue of the estate of the said *Francis Carter*, the elder; and doth order that it be referred to Mr. *Campbell*, one, &c., to tax all parties their costs of this suit; and it is ordered

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ordered that such costs when taxed, be paid out of the personal estate of the said testator *Francis Carter*, the elder." — Reg. Lib. A. 1817. fol. 1548—1550.

1819.
May 1.

FRANCKLYN *v.* COLHOUN.
FRANCKLYN *v.* THORNHILL.
RUCKER *v.* PINNEY. (*a*)

A sequestration having issued for non-payment of money into court, an individual in possession of a sum claimed by the party against whom the sequestration issued, and by a stranger, was ordered to pay that sum into court.

ON the 2d of *May*, 1818, an order was made in the two former causes, directing the Defendant *William Colhoun*, on or before the 1st of *July* then next, to pay into court to the credit of those causes, "the account of monies belonging to the personal estate of the late Defendant *John Parson*, deceased," the sum of 9900*l.* 14*s.* 1*d.* being the balance reported due from him, by the Master's separate report dated the 5th of *August*, 1816, in respect of sums received or retained, and not accounted for by him as trustee for *John Parson*.

Colhoun

(*a*) The following cases on sequestration are extracted from MSS. in the possession of the editor.

WITHAM *v.* BLAND.

13th *November*. 25 *Car.* 2. 1675.

Sequestration not defeated by a voluntary conveyance, *pendente lite*. Sequestration against the heir for a personal duty decreed against the father.

I allowed a sequestration to proceed against the heir, for a personal duty decreed against the father, because he did not claim as heir, but by conveyance *pendente lite*. The first bill by his father in 1664, demanded deeds taken away by which he had conveyed an estate to *Bland*; on that bill the father was decreed to account, and on that account owed 5000*l.* The cross bill in 1665 demanded the land according to the settlement. The conveyance to the heir was voluntary, and in 1666; which I looked on as a practice to defeat the decree. — Lord *Nottingham's* MSS.

11th *Decem-*

Colhoun not having obeyed the order, and being beyond the jurisdiction of the Court, the solicitors of *Lucy Groome*, the widow and sole acting executrix of *John Parson*,

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WITHAM *v.* BLAND. (*a*)

11th *December*. 26 *Car.* 2. 1674.

tra- A sequestration of *Witham*'s
- estate had long been fenced
by off by a conveyance *pendente*
v *lite, viz.* a conveyance in 1666,
on whereas the bill was filed in
of 1664. When this would not
it- do, they resorted to former
ien settlements, upon which there
t was this case. *Anno* 1653, a
er ca- feoffment was made to the
use of *George Witham* for
life, remainder in tail unto
re- *Henry Witham*, (the now
sequestered person,) with
power of revocation, but no
new power of limitation reserved; afterwards, *anno* 1668, the
first settlement was revoked,
and new uses were limited
again to *Henry*. Mr. *Bland*'s
counsel urged that the first
settlement was well revoked
by the second, but the uses
of the second were not well
limited, for want of a new
power of limitation reserved,
and by consequence, the fees
descended from *George* to
Henry without any settlement, and might well be
sequestered in the hands of
the heir for a duty decreed
against the father, who had
been also sequestered, and
now the sequestration continued; and of this opinion
they had several great counsel upon advice.

I said, the opinions of counsel were great or less according to the reasons. I thought *Henry Witham* to be well in by the second settlement; for when the second settlement had executed the power of revocation in the first, a power of new limitation by the second settlement must need be incident, though it was not reserved; first, because the revocation of the first conveyance extended only to the uses limited in it, but could not extend to the common law estate, which passed by the first, for that is irrevocable, *ergo*, a power to limit new uses upon it

(*a*) *Rep. temp. Finch*, 126.

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Parson, caused an attachment, and all the intermediate processes of contempt to a sequestration, to be issued against him, and also commenced an action against him in

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must remain to the feoffor without reservation, or his estate is lost; secondly, though no man can have a power of revocation unless he reserves it, no man can want a power of limitation unless he excludes himself from it; thirdly, when a power of revocation is reserved to a stranger, he has no power of limitation unless reserved; *secus ubi* the feoffor himself has the power to revoke. — *Vide Winstanley's* case. (*a*) So I discharged the sequestration. — Lord *Nottingham's* MSS.

CROFTS *v.* OLDFIELD.

3d *June*. 28 *Car.* 2. 1676.

Lands, when bound from the institution of the suit; when not bound till sequestration.

A legacy was devised in 1627, and the profits of land during the minority of a daughter and heir, and until she came to 21, charged with it; these profits were received and applied till 13, and at 16, the daughter and heir married one *Crofts*, the Plaintiff's father, against whom a decree was had that the land should continue to be chargeable, which decree is vigorously prosecuted by *Oldfield* the Defendant, who is intitled to the unsatisfied legacy; but the persons truly grieved by this prosecution are *Brook* and *Foster*, two purchasers of part of the land, and another who was devisee of the other part of the land; and these make use of the Plaintiff's name to bring a bill of review to reverse this decree, from which they could not otherwise free themselves. When they appeared and were examined, the error assigned was, that the land was not liable after the daughter came to 21, yet the decree had continued the charge upon it. The Defendant, who demurred upon this bill, said that he had no intent to charge the land but only from the marriage till 21, and not after; and urged that he who broke the trust was liable in his person to make good all that might have been received until 21; it is true the land was not directly liable, but yet a decree against him or his heir, while the land was

(*a*) *Cit.* 2 *Keble*, 270. 3 *Keble*, 7.

in.

in the Court of the Lord Mayor of *London*, and according to the custom of the city, attached a debt due to him in the hands of *Daniel Henry Rucker*, esquire, of *Mincing*

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in his hands, binds the land; and a purchaser since the decree will be also bound. To which the Plaintiff said that *prima facie* every decree binds the person only, and the land itself whereof the profits were in demand is not bound till sequestration; whereof the consequence is that death before sequestration discharges the land, and if the Defendant devise before sequestration and die, the devisee will be freed.

I said, where the lands or the profits of the lands, which is all one, are directly in demand, the title is bound from the bill exhibited, and every purchaser *pendente lite* comes in at his peril; but where an account of profits is prayed by way of execution of a trust, there the person only is charged for breach of trust in not applying the profits, and the land is not charged but while in his hands, nor then neither till sequestration; so purchasers and devisees before sequestration are free: but overrule the demurrer, and after answer the Court may consider further. —Lord *Nottingham*'s MSS.

COULSTON *v.* GARDINER. (*a*)

10th *February*. 33 *Car.* 2. 1680–81.

After a decree against the father, and a report of 500*l.* due confirmed, and just before a sequestration awarded, the father conveys 7000*l.* of land to his son, which was his whole estate, without reserving any maintenance to himself, or any visible trust appearing. The considerations expressed were these: 1. To enable the son to make a jointure to a wife who brought 1700*l.* portion, and was married 10 months after; 2. To pay the father's debts, *viz.* 800*l.* on a mortgage, and 800*l.* more in other debts.

This conveyance the son pleaded in bar of the sequestration

able consideration, or *bonâ fide*.

(*a*) 2 *Ca. in Cha.* 43. See 1 *Ves.* 182.

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ing Lane. On the 12th of *December*, 1818, Mr. *Rucker*, having pleaded to the attachment *nil debet*, filed a bill of interpleader against *Frederick Pinney*, *Charles Pinney*, *Thomas*

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tration, and if the son be either a purchaser or come in voluntarily and *bonâ fide*, the plea is good. Against the considerations of this deed it was urged: 1. The marriage settlement is but a pretence, for the deed was only between father and son, the wife's friends no parties; also this conveyance not necessary to enable the son to make a jointure, for the father being seized in fee could have done it without this; and beside, the settlement is strange, and very suspicious, for the father strips himself of all, and gives the son the portion too. 2. The payment of debts is but a pretence neither, for the 800*l.* upon the mortgage needed no other provision, and the other 800*l.* were voluntary debts created for this purpose.

At last the defence is made barefaced, and the Defendant retreats to this point; that the sequestration binds not the land till laid on, at least not till the order made, and it is lawful to prevent a sequestration by a conveyance made for that purpose, before the date of the order; as at common law a man may make a conveyance to prevent an outlawry: and this point strikes home indeed; *ergo*, it is fit to settle this point once for all, without making use of any shifts or evasions, or straining the case to make a presumptive fraud or resulting trust, though there be ground enough for that too.

I will *ergo*, at this time, for learning's sake, and for use, enlarge myself a little upon the nature of sequestrations in chancery. The judges of the common law have been so very unwilling to support any proceedings in equity, that they have come to very strange resolutions. 41 *El. B. R. Brograve* v. *Watts*, *Cro.* 651. a sequestration of goods awarded by the Court of Requests, adjudged no bar in detinue; *M.* 5 *Car. B. R. Bill* v. *Heber*, adjudged on argument, no bar in trover. *Noy.* 20. *Jac. B. R. Elwayt*'s case, upon an indictment of murder for killing a sequestrator, the Court inclined that he was no such legal officer, that it should be malice

Thomas Groome, and *Lucy* his wife, and *William Colhoun*, praying that the Defendants might interplead and settle their claims in respect of the debt, and that the Plaintiff might

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malice implied to kill him; which was a bloody opinion, but the prisoner durst not trust to that opinion, but sued out his pardon. *Note* at that time Bishop *Lincoln* was *Custos*.

This is not the first time that the judges have endeavoured, by several resolutions, to depress the chancery, and yet, after judges have been ashamed of those resolutions. 11 *E.* 4. 8. He who has notice of a trust, and then procures a release from the trustee, cannot be questioned in equity; *cujus contrarium verum est.* 22 *E.* 4. 6. 1 *Roll.* 374. He that pays a statute or a bond without an acquittance, shall have no relief in equity if he be sued again. What can be more absurd? *Tr.* 11 *Jac. Shelley* v. *Shute*, Sir *F. Moor* (*a*), it was held that a suit in equity was no breach of a covenant not to sue, because the law takes no notice of a suit in equity; but 22 *Car.* 2. *Scac.* in Lord *Saint Alban*'s case, *Mich.* 1670. *Hale*, chief baron, justly denied this case. 12 *Jac. B. R. Glascock* v. *Rowly*, 1 *Roll.* 374. (*b*) there ought to be no relief in equity, against an entry for a condition broken; *risum teneatis?* 13 *Jac. B. R. Fynn* v. *Smith*, 1 *Roll.* 376. (*c*) If one joint tenant takes all the profits, there is no relief in equity. *Durus sermo.* 13 *Jac. B. R. Powell* v. *Harris*, 1 *Roll.* 376. (*d*) No account can be required of executors in equity; against all experience. 14 *Jac. B. R. Bromage* v. *Jenning*, 1 *Roll.* 380. (*e*) where damages may be recovered in an action upon the case, there shall be no relief in equity to compel the performance *in specie.* 3 *Car. B. R. Miller* and *Reames*'s case, there shall be no relief in equity, when the bond is lost, 1 *Roll.* 375. These extravagant opinions no man will own, no more than the exploded opinion that to sue in chancery after judgment is a *præmunire*.

(*a*) *Selby* v. *Chute*, *Moor*, 859.
(*b*) 1 *Roll. Rep.* 120. 2 *Bulstr.* 142.
(*c*) 1 *Roll. Rep.* 338.
(*d*) 1 *Roll. Rep.* 263.
(*e*) 1 *Roll. Rep.* 354. 368.

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might be at liberty to bring the sum of 1877*l.* 6*s.* 6*d.* the amount of the debt, into court, for the benefit of the parties entitled; and an injunction. On the 4th of *February*,

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As the judges did of themselves reform these opinions, when they saw the inconvenience of them, and how little they prevailed against the Chancery, so they have since begun to relent even in the matter of sequestration. *Tr.* 17 *Car.* 1. C. B. Serjeant *Bacon*, moved for a prohibition to the Court of Requests for granting a sequestration against the lands, and because the sequestration was of other lands than those which were in demand, the prohibition was granted, *March Rep.* 99. *pl.* 171. This admits that of the thing in demand a sequestration may be, and goes as far as ever my Lord *Bacon*'s rules went (*a*), *per Banks*, chief justice; and this is warranted by the reason of law; for every court baron may have a *levari facias*, only there it is renewed from time to time, whereas a sequestration is a continuing *levari*, and it were hard to deny the Chancery the power of a court baron. So that by this time, it is become a settled point, that sequestrations may be, and of the thing not in demand, *viz.* of land for a personal duty, nay of a copyhold too (*b*), and this without doubt is much ancienter than the precedents; for the records of the proceedings in equity have not been so carefully kept. The eldest precedent in chancery of a sequestration, is about 41 *Eliz.* (*c*) but in the county palatine of *Chester*, there are precedents as ancient as 1 *Mar.* And, indeed, no Court of Equity can subsist without this process, nor is it any great severity to find out a way to make men pay their debts effectually.

Copyho are subj to sequ tration.

In the next place, it must be observed that sequestration is not like any process at common law, nor is it awarded in imitation of any of those processes. 1. For first, it is not like a *levari facias*, which ceases by the death of the

Nature the proc of seque tration.

party.

(*a*) *Orders in Chancery*, ed. *Beames*, p. 15. *et seq.*

(*b*) See *The Marquess of Caermarthen* v. *Hawson*, *post*, p. 294.

(*c*) *Tothill* mentions a case of *Knightly* v. *Graunt*, 31 *Eliz. Transactions*, 175.

ary, 1819, the solicitors of Mrs. *Groome* received a notice from the solicitors of Mr. *Rucker*, that he intended to proceed no farther with the bill of interpleader, but to

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party. 2. It is not like the outlawry, where the profits are seized for the contempt, but do not necessarily go in satisfaction of the debt. 3. It is not like an execution upon the statute *Westminster* 2. or an extent; for though an injunction for the possession be like a *liberate*, yet it covers the whole, and reaches copyhold lands, which no extent does. So that it is a special remedy, warranted by the course of the Court, and stands only upon its own rules.

It remains *ergo*, to consider the bounds and limits of it; and first, we may be sure that this being the process of a Court of Equity, is never to issue out against the rules of good conscience. *Ergo*, a purchaser for a valuable consideration, before the sequestration, is free; for though a decree, as to some purposes, be equal with a judgment, yet it is never so till a sequestration awarded, for till then neither lands nor goods are bound. So is he free who comes in voluntarily and *bona fide*; for the very same reason, after a sequestration laid on against the father, if he dies and the lands descend to the issue in tail, the sequestration is discharged; so ruled, 6th *July*, 1673. Earl *Athol* v. *Comit. Derby*. (*a*) But whether it continues against the fee simple lands was not then debated. It has been said that there is as much reason to continue a sequestration against the heir in fee, as to put the party to a new sequestration after revivor; but I conceive that the sequestration does not continue until the suit revived, against the heir, and also against the executor, who may have assets; no, not though the son came in and was examined in his father's lifetime, and set out his title by conveyance; for after his father's death a new title accrues to him as heir; but after revivor the sequestration will bind him as much as it did in his father's lifetime. And this was one of the points in *Bland* and *Witham*'s case. (*b*)

Effect of sequestration against the heir.

(*a*) 1 *Ca. in Cha.* 223. 2 *Lev.* 71.

(*b*) *Ante*, p. 277. See *The Marquess of Caermarthen* v. *Hawson*, post, p. 294.

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to defend the action brought in the Lord Mayor's Court; and on the 12th of *February*, 1819, obtained a writ of sequestration, to sequester the goods and effects of *W. Colhoun*,

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The only difficulty is the point in question, how far a voluntary conveyance to the heir, on purpose to prevent and avoid a sequestration approaching, shall take place? And this ought to be no difficulty neither, for reason and authority are against it. 1. No such conveyance can be *bona fide*, which is made with an intent to avoid a just debt. 2. It tends to make all proceedings here illusory. 3. It teaches an art of cheating; for a man may borrow money to buy lands, and being sued in Chancery for the money, he may after a decree, make a voluntary conveyance to the heir, and defeat the remedy. *Bland* and *Witham's* case is an authority in point (*a*); for 4th *March*, 1672, it was debated before the Earl *Shaftsbury*, chancellor, whether the sequestration could be continued against the son after revivor? But 13th *November*, 1673, I did allow the sequestration to proceed. Afterwards *Witham* departed from the title he had made *pendente lite*, and set up a former settlement in 1653; upon which, 11th *December*, 1673, I delivered my opinion against him. He desired a case to be made, but never argued it. 17th *May*, 29 *Car.* 2. *Langley* v. *Bredon*, decree for 400*l.*, sequestration awarded; the Defendant pleaded a voluntary conveyance before the sequestration awarded; yet ordered to answer. — Lord *Nottingham's* MSS.

Lord PELHAM *v.* Duchess of NEWCASTLE. (*b*)

A Defendant ordered to deliver a copy of a deed, and refer to it in her answer as a true copy.

The Master reported the answer insufficient, for not setting forth the deed that declares the uses of the fines and recoveries that were levied and suffered by the Duke and Duchess of the *Newcastle* estate; and upon the general exception to the report,

(*a*) *Ante*, p. 277. *Bird* v. *Littlehales*, post, p. 297. *Hamblyn* v. *Lee*, post, p. 299.

(*b*) The circumstances of the case appear in the report, 3 *Bro. P. C.* 460.

Sir

W. Colhoun, for non-payment of the money ordered to be paid in by him, which, on the following day they served on *Rucker*, with a written notice that they, as two of

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Sir *Thomas Powis*, for the Duchess, insisted, as the Defendant did by her answer insist, on the very same matter in bar of the discovery of this deed that had been before pleaded and overruled; with this further, that the intention for the preserving the estate in the name of *Cavendish* was continued to the making the deed, and a clause in the deed that provided for it was set forth in the answer; that what was prayed by the bill to have the deeds set forth *in hæc verba*, was worse than delivering it over to the Plaintiff, for that would discover it to all the world; that the Duchess had an estate for life limited to her by that deed, and that the Duke having agreed, in consideration of her joining in that settlement, that her estate for life should be protected from the incumbrances which amounted to 80,000*l*., and affected that estate, she was a purchaser of the benefit of those incumbrances; and that those incumbrances being recited in the deed, the discovery might endanger her estate for life; that the Plaintiff was not intitled to that discovery, being an infant and not capable of confirming her estate for life, and not having proved the will and established the title at law. On the last head he cited the case of Dr. *Hamilton* and Mr. *Fleetwood*; that *Hamilton* claiming under the remainder man in fee, and the estate tail being spent to all but one person, who was under an incapacity, the doctor brought an ejectment, and after he had proceeded so far as that he got a special verdict, he brought his bill for discovery of deeds and writings, and to stay waste; that upon exceptions to a report of the insufficiency of *Fleetwood*'s answer, the Court would not oblige *Fleetwood* to answer, because the doctor had not affirmed his title at law. (*a*) He cited likewise *Whitcombe*'s case (*b*); which was, a man left two daughters by a first wife, and the second wife ensient with

(*a*) 8 *Vin. Ab.* 538 (*b*) *Whitcombe* v. *Whitcombe*, *Prec. in Cha.* 280.

a son,

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of the commissioners named in the writ, sequestered the sum of 1877*l.* 6*s.* 6*d.*, admitted to be due from him to *Colhoun*, and all arrears of interest, and required payment

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a son, who lived a year, and the uncle as heir to him, brought an ejectment, but was nonsuited by terms being set up by the daughters; he then brought his bill for a discovery of deeds, and particularly of the leases of the estate, to enable him to prove a possession in the infant; and upon exceptions to a report of the insufficiency of the answer for not setting them forth, the report was overruled: and at hearing, Lord *Cowper* would not compel the Defendant to discover, and declared that this Court would not in all cases help a person to deeds that he hath a right to at law; that it would not help a first purchaser against a second without notice, nor where there is a very hard bargain made between two, will it help the person that would take an advantage of it to enable him to do so at law; and that the present case was much stronger than coming here for a discovery before the hearing.

Note *Whitcombe*'s case was said to have been a case of great compassion, and to have been compounded at last. And Lord Keeper seemed to think that decree wrong.

Hooper insisted that the Duchess was a purchaser, and that the Duke was not entitled to production without confirmation; and that in the case of Sir *Coplestone Bunfield*, a jointress subsequent to a marriage was not compelled to discover; nor in the case of *Rook* v. *Rook*, where the deed comprised both the jointure and other lands.

Cheshire. A right to discovery is not substantive but dependent on a right at law, which the Plaintiffs ought to establish first, and they had room enough to try the validity of the will without discovery of the deed.

Williams put the case, that where conies are tithable by custom, and a bill is brought to discover the quantities and value; if the Defendant denies the custom, he will not be obliged to set forth the quantities, &c.

Lord Keeper. That is matter of account. In this case you say there are incumbrances; how shall the Plaintiff be able to try his right?

Cheshire.

ment of the same. The writ of sequestration, and a similar notice, were afterwards served on *Frederick Pinney* and *Charles Pinney*. On the 2d of *March*, 1819, the bill of interpleader was dismissed on the motion of the Plaintiff.

The

Cheshire. The Court may direct an issue, *devisavit vel non*.

Peat. We are a purchaser, though not of our estate for life, which is part of an old estate; yet of the incumbrances. Lord *Pelham* hath no right. We have denied the will and his title, and it must be taken now on our answer; and your lordship will not on a feigned suggestion oblige us to make any discovery. Our plea was overruled because the matter was not then fully discovered to the Court; it is now, having disclosed in our answer the clause in the deed that relates to that matter. If the words that direct the taking the name of *Cavendish* be not found enough to make either a condition or limitation, there is the greater reason that it should enure as a trust; continuing an estate in a name and family had been regarded in all ages; that was the reason of making the statute.

Dr. *Denis O'Williams*. If a plea is overruled for any mistake, the Plaintiff may insist on the same matter by way of answer.

Sir *J. Jekyll*, said (*inter alia*) that it could not be a trust, there being no obligation on the Duchess to take the name, and therefore no trustee made by the deed, nor *cestui que trust*.

Attorney General. The Duchess's fears of the incumbrances are groundless, she admitting by her answer that they were all assigned in trust for the Duke before the deed of settlement, and that there was a proviso in that deed that they should be assigned to protect the several limitations of that deed; which agreement, *Howe* said, was as effectual in equity as if they had been actually assigned pursuant to the proviso.

Vernon. Two dilatories were never to be allowed by the printed rules of the Court; and therefore a man cannot plead twice or demur twice, nor where a plea in bar is overruled, can he insist upon the

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The debt from *Rucker* to *Colhoun* arose on a bond dated the 14th of *February*, 1778, and executed by *James Campbell* and three other persons, resident at *Tobago*,

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the same thing by way of answer, unless it be overruled for informality only, and not for the matter, (which it was here.) It is true they have thrown in some additional circumstances; but if that contriv ance would avail they might do so *in infinitum*. What was said by the Court before on their plea, *viz.* if there were such a trust, &c. the discovery would not hurt them, and if there were not, the concealing the deed were a manifest injury to the Plaintiff, and that without a discovery of the deed, it could not be brought before the Court in judgment, whether there was or not, was unanswerable; and the Plaintiff did not claim paramount the Duchess; and sought only a discovery of her own act. He never heard it said that a purchaser was not compellable to disclose his own title, nor that advantage might not be taken of any clause in the purchase deed.

Cooper. It was not possible for the Plaintiff to go to law without a discovery of the deed, not even upon the issue *devisavit vel non*; for if it was not in the Duke, he could not devise it, and that was the only deed that brought the estate unto him.

Howe. The apprehension of danger of any strangers taking advantage of the discovery that was prayed, was expelled in Lord *Craven's* case; and if there was any real danger of letting in any incumbrances of other persons by it, it ought to be particularly insisted on by answer; there was no occasion here for confirming the Duchess' estate for life, she not being a purchaser of it, and it being created by the same deed under which the Plaintiffs claim, and the Duke having confirmed it by his will, which is much more effectual than a bare offer to confirm.

Lord Keeper. The Duchess is said to be a purchaser, and therefore not compellable to discover. She is no purchaser of any limitation in the deed; those limitations are rather the considerations of her purchase of the benefit of the incumbrances; there is

no

Tobago, for securing to *Colhoun* 2874*l.* 1*s.* 5*d.* sterling, with interest at 8 *per cent.* from the 2d of *April*, 1778; *Rucker* being the executor of *J. Campbell*, the surviving obligor,

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no reason of her being purchaser of them, for her not discovering the uses of the deed, which is another thing; the bill doth not seek a discovery of the incumbrances, but of a deed in which they are recited only: your fears of those are imaginary. Let her set it forth *in hæc verba*.

He afterwards proposed to both sides, and they consented, that instead of that, she should deliver a copy of it, and refer to it in her answer as a true copy.

Note. That nothing was insisted on by way of answer in bar of a discovery, but what had been before pleaded and overruled, or allegations taken out of the deed itself; if they had been pleaded, the plea would not have been proved without producing the deed, which, when produced, the Plaintiff might take advantage of. It seemed therefore vain to allege that, in bar of a discovery, which could not be proved without giving the discovery objected against.—From Mr. *Cox*'s notes, Lord *Colchester*'s MSS.

Lord PELHAM *v.* Duchess of NEWCASTLE.

Sequestrators forcibly dispossessed, restored by injunction.

The sequestrators having entered into *Powis* House, (to which Lady *Henrietta Holles* made title as heir,) and sequestered all the goods, &c. there belonging to the Duchess, they were forcibly turned out of possession; and upon affidavit of it, *Grandman*, the Duchess's solicitor, who directed it, was committed, and an injunction awarded to restore the sequestrators to the possession; but before they were actually restored, the Lady *Henrietta* moved the Court, that it might be referred to a Master to inquire what goods that were sequestered belonged to her, and what to the Duchess; and that money in Sir *Francis Child*'s hands, which had likewise been sequestered, might be discharged, upon a suggestion, that though Sir *Francis* had given notes payable to the Duchess or

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obligor, judgment had been obtained against him for payment from the assets of *Campbell*. The amount due for principal and interest on the 19th of *February*, 1819, was

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or order, it was really the money of the Lady *Henrietta*; but both parts of the motion were denied as irregular, the first being too early before the sequestrators were restored, and for the last, it was not proper for the Court to determine the property of the money upon affidavit.

No examination *pro interesse suo*, before the sequestrators have made a return.

It was then moved that Lady *Henrietta* might come in and be examined as to the money *pro interesse*; but that was denied too, because the sequestrators had not made any return; till they have, it cannot appear to the Court what is sequestered: after their return, any one who claims a title to the thing sequestered, may move to have the same, and be examined *pro interesse*.—From Mr. *Cox*'s notes, Lord *Colchester*'s MSS.

Lord PELHAM *v.* Duchess of NEWCASTLE.

A sum of money in the hands of the banker of a party against whom a sequestration had issued, sequestered. Proceeding for ascertaining the interest of a third person. Power of sequestrators to open boxes, &c.

Lady *Henrietta Holles* moving that she might be admitted by guardian, to be examined *pro interesse suo*, touching the money in Sir *Francis Child*'s hands, and other things sequestered, upon process against the Duchess, she was directed to put her suggestions into an order, and to specify what she claimed title to, and how, and that Sir *Francis Child* should give the Plaintiff a copy of the account on which the balance in his hands that was sequestered arose, to the end that the Plaintiff might the better know how to form proper interrogatories.

Serjeant *Hooper*, for the young lady, said, that if a sheriff executed an execution upon goods that did not belong to the Defendant, the party grieved might have his action; but in case of sequestration, all the recompence a person could have, whose goods were wrongfully sequestered, was barely a restitution on proof of his right.

Lord Chancellor, as against the Duchess, allowed the sequestrators to open boxes and rooms that were locked, if

was computed at 5494*l.* 5*s.* 3*d.* The Defendants *Frederick Pinney* and *Charles Pinney*, claimed to be entitled to the debt, under an assignment from *Colhoun* to their

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if the keys were denied them; to schedule the goods in them, but to remove nothing from *Powis* house without the special order of the Court.—From Mr. *Cox*'s notes, Lord *Colchester*'s MSS.

Lord PELHAM *v.* Lord HARLEY.

Injunction for sequestration.

Mr. *Aislaby*, one of the commissioners of sequestration, being likewise an attorney and agent for Lord *Pelham*, made use of the sequestration and injunction upon it, in many instances to compel the tenants of the Duchess's jointure, and the *Cavendish* estate, and of the other estates of the late Duke of *Newcastle*, to attorn and pay their rents to Lord *Pelham*'s use; and in several places did the same thing by threats, or remitting them the land tax, or allowing for repairs, where neither were allowed by their leases, and giving them notes to indemnify them, and receipts in full.

Lord Chancellor, upon the petition of Lord and Lady *Harley*, complaining (*inter alia*) of this exceeding great abuse of power in Mr. *Aislaby*, declared that the sequestration ought not to be laid on any estate but the Duchess's; and that though the Duchess had possessed herself of the rest, her possession must be taken to be in right of, and the possession of, her infant daughter; that Mr. *Aislaby* having gained possession for the Plaintiff by the methods before mentioned, was a great abuse of the process of the Court; for which reason he directed that he should shew cause the last *Thursday* in term why he should not stand committed, and pay Lord *Harley* his costs; that the sequestration should be discharged, as to all the lands except the Duchess's jointure, and the *Cavendish* estate, in which the tenants should attorn to the sequestrators, and in the other re-attorn to Lord *Harley*; that the profits received by the sequestrators or for Lord *Pelham*'s use, should be brought before a Master,

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their father *John Pinney*; the validity of which was disputed by Mr. and Mrs. *Groome*.

A motion was now made on behalf of Mr. and Mrs. *Groome*, that Mr. *Rucker* might be ordered to pay into

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Master, and those that arose from the other estates be paid over to Lord *Harley*, subject to the order of the Court. The possession of *Newcastle* house, which was never sequestered, he directed to be delivered to Lord *Harley*, and the goods to be removed, unless Lord *Pelham* agreed to their being delivered over to Lord *Harley* on his giving security; and by consent of both sides to save expense, directed the sequestrators to be discharged out of the three great houses of *Welbeck*, *Nottingham Castle*, and *Boscover*, and one person to be placed in each, by the appointment of the Master, to take care of the goods sequestered. The evidence-room in *Welbeck*, was by consent to be locked up without inspection, and a key delivered to each party.

Serjeant *Pratt*, and Sir *Peter King*, for Lord *Harley*, cited the case of one *Riddleston*, in *B. R.*, who, upon an erroneous judgment in ejectment, took out an *hab. fac. possessionem*, and extended it as to part, and for the rest only shewed it to the tenants, and by that means obliged them to attorn: the judgment being set aside, the Court awarded restitution of what he had got under the *hab. fac. possessionem*; he restored those lands where the writ had been executed only, pretending that the tenants attorned voluntarily in the rest; but the Court compelled him to make an entire restitution, and committed him for his contempt.

Serjeant *Pratt* said that in all cases where the process of the Court was misused to obtain another end than that for which it issued, though that end were otherwise in itself lawful, it was a contempt of the Court, and the course of the law always put things again *in statu quo*; and he instanced in the case where a man makes use of the process of the Court at *Westminster*, to bring a man within

into the bank on or before the 14th of *May*, the sum of *5494l. 5s. 3d.*

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within the process of an inferior Court or jurisdiction, that he may serve him with process of that inferior Court. — From Mr. *Cox*'s notes, Lord *Colchester*'s MSS.

Lord PELHAM *v.* Duchess of NEWCASTLE.

Sequestration for non-production of deeds, discharged on payment of costs, the party having been examined, and denied knowledge of them.

After a sequestration had issued against the Defendant by order of the House of Lords, for not complying with the order of the Court, by which she was directed to set forth the deed of 1693, *in hæc verba*, or deliver an attested copy of it, and refer to that in the answer. The sequestrators were forcibly turned out of possession of *Powis* House, and the day before they were to be restored to the possession of it, the Duchess left the two deeds of *January*, 1693, in a cupboard in her closet, of which she made an entry in her pocket book, and some time after applied by petition for leave to search the House, which was granted, but to be in the presence of the Master and the Plaintiff. The solicitor *Dummor*, (who with auditor *Harly* were the only persons privy to the Duchess's having left the deeds there,) was seen in the house and in that closet, after he was told by the Duchess where the deeds were left, and before the public search in the presence of the Master. At that search no deeds could be found, nor were they afterwards. The Duchess disclosed this matter by a further answer, and set forth three abstracts of them, which she insisted was all she could do. She afterwards submitted to be examined upon oath, which she was, and denied her being privy to their being removed, or knowing what was become of them.

Dummer, and several others, were examined in open court, but no light could be got from them. The Court, upon examination, was of opinion that they were

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The affidavit filed in support of the motion stated, in addition to the preceding facts, that the proceedings in attachment could not try the question of property in the debt, which being due from *Rucker* as executor only, he could

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taken away by somebody with a design to serve the Duchess; but however afterwards, upon the Duchess producing the abstracts, and submitting to be bound by them, and bringing before a Master a settlement made by her of the *Cavendish* estate to different uses, after the order for sequestration, she having done all now in her power to obey the order for setting forth the deed, though, when it was pronounced and for a long time, she had had the deeds in her custody, the Court discharged the sequestration upon her paying costs, and making a promissory affidavit to produce and discover the deeds, if ever she should discover any thing of them.

Lord Chancellor seemed to say that he could not have discharged the sequestration, if the counsel for Lord *Pelham* had not closed with the Duchess's offer to be examined upon oath, and so put the matter into a different method of inquiry. — Lord *Colchester*'s MSS.

In *Scacc. Mich.* 4 *Geo.* 2.

The Marquess of CAERMARTHEN, executor of the Duke of LEEDS, his grandfather, and WHITEHEAD, Plaintiffs, *v.* RICHARD HAWSON, Defendant.

Whether a sequestration after decree, is determined by the death of the Defendant; and Whether copyhold lands are subject to sequestration, *Quære.*

The Plaintiff's bill set forth a sequestration against the Defendant's father, *Rd. Hawson*, for 136*l.* 1*s.* 4½*d.*, on 23d *January*, 1702. The commissioners returned that they had sequestered, to the use of the Duke, a messuage, orchard, and garden, in *Kirby Moor*, of which *Whitehead* was then in possession, and of which *Rd. Hawson* was then seized in fee, or for a long term of years; and thereupon an order was made, 23d *April*, 1733, that the tenant should pay to the Duke, or to whom he should appoint, the growing

could not be arrested for it, and by the custom of *London* it could not be made the subject of attachment.

Mr. *Hart*, for the motion.

There

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ing rents. The tenant being served with the order attorned, and on the 20th *June*, 1703, the Duke assigned the premises to *Whitehead*, to hold till the decree performed, with a letter of attorney to act as the sequestrators might have done, and receive the rents. *Hawson* neither paid the Duke or the Plaintiff, *Whitehead*, nor had made any satisfaction, and died 1719, intestate and insolvent, the Defendant being his son and heir, who pretending the land to be copyhold, got admitted, and threatened to bring ejectments; so the Plaintiffs pray a revivor of the sequestration and proceeding, and an injunction to quiet *Whitehead*'s possession.

Philip Ward's argument.—The first question is, whether copyhold lands are sequestrable? It is laid down *per* Lord *Nottingham*, Chancellor, in *Coulston* v. *Gardiner*, *Hill*, 32 and 33 *Car.* 2. 2 *Chan. Cases*, 76. (*a*) that copyholds may be sequestered; it is true they are not extendible at common law, or by the stat. *West.* 2. *c.* 18.; but that is no reason why a Court of Equity may not do it, which has *potestatem extraordinariam et absolutam*. Courts of Equity have always had power over copyholds, as by the yearbooks appears; for they can compel lords to admit their tenants.

2d. It was long doubted whether a Court of Equity could sequester after a decree. The first that was granted was in Lord *Coventry*'s time, Sir *Thomas Read*'s case. (*b*) Since that time there have been innumerable instances in Chancery; *Hide* v. *Pett*, 1666, affirmed in parliament. (*c*)

In

(*a*) Ante, p. 279.

(*b*) *North*, life of Lord Keeper *Guilford*, v. ii. p. 73.

(*c*) 1 *Ca. in Cha.* 91. 185. 2 *Freem.* 125. 168. The first decree was reversed by the Lords,

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There is no other course of proceeding by which the justice of the case can be administered. The Court finding property belonging to the Defendant in the hands

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In *curia scacc.* in the case of *Guavas* v. *Fountain* (*a*), it was granted after a decree upon great consideration, 14th *June*, 1687, and has ever since been used without hesitation.

The

Lords, but the directions accompanying the reversal, in effect reserve the benefit of the sequestration to the Plaintiff, if he should eventually obtain a final decree.

25th *November*, 1667. "Upon hearing of counsel on both parts this day at the bar of this house, upon the petition of *Henry Petit*, administrator of *Thomas Freeman*, late of *London*, merchant, deceased, against *Laurence Hyde*, complaining of the hard measure he the said petitioner hath, by a decree made in the Court of Chancery, in the year 1661, for 893*l.* 7*s.* 8*d.*, alleged to be due to the said *Laurance Hyde*, upon an account for brimstone, which decree is grounded upon a certificate of three referees, *videlicet*, Mr. *Reames*, Mr. *Elcock*, and Mr. *Micoe*, all of the said *Laurance Hyde*'s own naming; it appearing to this Court upon the opening of the said cause, that whereas at the first, this matter in question being merchants' accounts, it was referred by the Court of Chancery, with the consent of both parties, to four persons, *videlicet*, Mr. *Rowland Elcock*, Mr. *William Reames*, Mr. *Nicholas Skynner*, and Mr. *Daniel Fairfax*, or any three of them, to hear and finally determine the matters in difference between the said parties; but if they the said referees could not determine the same, then to certify to the Court of Chancery how they found the same, who certifying two and two apart, the Court of Chancery could ground no order thereon; and, therefore, in appointing a fifth referee, named Mr. *Micoe*, a person formerly excepted against by the petitioner *Petit*; whereupon it being in the power of any three to certify, the two referees formerly named by the Defendant, *Laurance Hyde* and Mr. *Micoe*, certified, without any of the petitioner *Pettit*'s referees joining with them; upon which certificate the decree complained of was grounded; whereupon the estate of the petitioner *Pettit*, as well copyhold as freehold, was sequestered, and *Laurance Hyde* put into possession thereof, and he committed prisoner to the Fleet,

hands of a third person, is competent to order payment into the bank; parties claiming an interest in it, may, as in the instance of sequestration of property in possession, be examined before the Master *pro interesse suo*. The Court will not require that a bill should be filed; the question may be as well determined under this order,

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The doubt at the time with the Court was on a sequestration after a decree, for that they said was in the nature of an execution, and that at common law was not leviable

Fleet, for not obeying the said decree;

Upon due consideration had of the premises, it is ordered, declared, and adjudged by the lords spiritual and temporal, in parliament assembled, that the said decree be reversed and made void, and the same is hereby reversed and made void; and that the said *Henry Pettit* be released and discharged of his imprisonment; and the said sequestration for not obeying the said decree, be taken off and discharged, and *Henry Pettit* put into such possession thereof as he was in before the said sequestration; for that the cause of the said complaint and grievance of the petitioner did arise from nominating the said Mr. *Micoe* to be a referee: and it is hereby further ordered, declared, and adjudged, that the said cause and proceedings thereupon, and possession of the land of *Henry Pettit*, shall stand in *statu quo*, and as they were before the order of nomination of the said Mr. *Micoe* to be a referee; and the Lord Keeper of the Great Seal is hereby authorised and required to proceed in the said cause accordingly: and it is hereby further ordered and decreed, that in case, upon the determination of the said cause, a decree shall be made on the behalf of the said *Laurance Hyde*, that the lands and estate of the said petitioner which have been sequestered, shall be liable for satisfaction thereof, as they should have been in case the said decree hereby reversed had stood, and the sequestration had continued: and as to the rest of the petitioner's complaint, their lordships do not think fit to proceed thereupon, the petitioner having a remedy in an ordinary course of law, if there shall appear cause of relief."—(Lords' Journals, xiii. 147.)

(*a*) This suit appears to be connected with the great case of *Cook* v. *Fountain*, a note of which will be inserted in the appendix to the present volume.

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order. *Simmonds* v. *Lord Kinnard* (*a*), *Opie* v. *Maxwell.* (*b*)

(*a*) 4 *Ves.* 735. (*b*) Cit. 4 *Ves.* 742.

Sir

till *West.* 2. *c.* 18.; and, therefore, though frequent sequestrations had been before, yet none after a decree; but since then it has been the constant practice of both courts, for otherwise their proceedings would be illusory, if they could not execute them.

The second question is, whether the sequestration determined by the death of the Plaintiff or Defendant? No reason why it should in either case, but suppose it should, surely it may be revived. As to the first I can find no precedent one way or the other.

As to the second, in 1682, *per* Lord *Nottingham*, in the case of *Burdet* v. *Rockby*, a sequestration in pursuance of a decree, though for a personal duty, shall not determine by the death of the Defendant. 1 *Vern.* 58. Indeed, *North*, when he was keeper, on a demurrer denied to revive so as to affect the wife's dower. 1 *Vern.* 118., and would not declare his opinion whether he would revive against the heir; and in 1 *Vern.* 166. *Paschæ*, 1688, he seemed to be of opinion it was not revivable against the heir, and would see precedents; so the point was not determined. But it seems reasonable in this case, there should be an injunction, and the Court would do well to consider and settle the point, which may be as well done here as elsewhere, with less expense and as much authority.

This *Ward* moved the 22d *February*, and the Court granted an injunction as to the freehold lands, and gave the Defendants leave to proceed in ejectment as to the copyhold; saying they would reserve the determination of this point, whether a sequestration may be revived against the heir of copyhold lands to the hearing of the cause. The difficulties that the Court was under at this time were, 1st, they did not know how they could put the sequestrators in possession, *i. e.* oblige the lord to admit them; 2dly, if they could, yet they could not deprive the lord of his fine by descent, heriots, &c. on the death of the tenant.

N. B. It seems by the injunction

Sir *Arthur Piggott* and Mr. *Blake*, Mr. *Heald* and Mr. *Buck*, against the motion.

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If

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junction the sequestration as to the freehold land was not determined by the death of the Defendant.—MSS.

BIRD *v.* LITTLEHALES.

26th *February*, 1743. (*a*)

oceed- s under eques- tion for n-per- mance a de- e, after assign- ent by e De- ndant for luable nsider- tion.

In this case Lord Chancellor *Hardwicke* said, that although it was new to him and the register, whether a writ of injunction should follow a sequestration, and after that a writ of assistance, yet upon looking into his manuscripts he found a precedent of such a thing, and was now contented that a writ of assistance should go; that where the possession of land has been in the Defendant at the time of the decree, and afterwards has been changed, and possession delivered to a third person, in order to avoid or frustrate the decree, though for a personal demand, yet the Court will enforce its sequestration, and oblige the person in possession to come before the Court, and be examined *pro interesse suo;* such fraudulent conveyances have been made, and if the sequestration was to be checked by that, it would be an execution of no effect. His Lordship made a distinction, that if a bill was brought for land, and the party sells it before decree for a valuable consideration, and afterwards there is a decree for the Plaintiff for the same land, the sequestration will overreach the purchase, though for valuable consideration, because it was made upon a *lis pendens;* much more will such purchase be overturned if made after the decree pronounced: but if a bill is only for a personal demand, and the Defendant sells his land for valuable consideration during the suit, or even after the decree pronounced, it will be out of the reach of a sequestration; but if such pur-

(*a*) See *Coulston* v. *Gardiner*, *ante*, p. 279.

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If a sequestration can be made effectual against a *chose in action*, a point much doubted, it must be by the course pursued in *Simmonds* v. *Lord Kinnard*, a bill of discovery.

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chase was with intent to avoid the decree for the personal demand, the sequestration shall defeat it. Here is an affidavit that this purchase, though after decree, was for money; and, therefore, let the writ of assistance go without charging the possession till the purchaser comes before the Court to be examined *pro interesse suo*; then it will be seen whether the purchase was for money and *bond fide*. MS.

The bill prayed the performance of an agreement by the Defendant, the mortgagor, to pay to the Plaintiff, the assignee of the mortgagee, a sum of 340*l.* for an assignment of the mortgage; the decree directed that the Defendant should pay 340*l.* and interest, and that the Plaintiff should execute a general release, and assign the mortgage to the Defendant. 10th *March*, 1742. — Reg. Lib. 1741. fol. 317.

A sequestration having been issued for non-performance of the decree, and the Defendant refusing to deliver possession of the house mortgaged to the sequestrators, on the 18th of *February*, 1743, it was ordered, "that an injunction do issue against the Defendant, *J. Littlehales*, to enjoin the said Defendant to cause possession of the said house and the premises thereunto belonging to be delivered to the said sequestrators." — Reg. Lib. A. 1742. fol. 177.

26th *February*, 1743. On motion for a writ of assistance, it being alleged by the counsel for the Defendant, that he had assigned the house and goods there for a valuable consideration by deed of the 8th of *December*, 1742, to Mr. *Hughes*, it was ordered that *Hughes* should come in to be examined *pro interesse suo*, unless he showed cause to the contrary on the next seal, and the Defendant was within two days to give to the Plaintiff notice of the place of abode of *Hughes*.— Reg. Lib. A. 1742. fol. 187.

19th *March*, 1743. On affidavit that *Hughes* could not be found to be served with the last order, a writ of assistance was ordered. — Reg. Lib. A. 1743. fol. 235.

discovery. The Court will not decide the conflicting claims of strangers on affidavits; and direct payment into court of the money which they claim, in suits to which they

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HAMBLYN v. LEY. (a)

18th *October*, 1743.

In this cause on the 6th *July*, 1738, the plaintiff obtained an order for the Defendant *Ley*, to pay the sum of 300*l.* into the bank: on the 13th of *July* following, *Ley* being seized of an estate in *Devonshire*, by lease and release dated the said 13th *July*, reciting that the premises were in mortgage for the term of 1000 years, in consideration of a bond given for 600*l.*, conveyed the equity of redemption to *Rosdue*, his nephew, in fee. No previous treaty appeared; and *Rosdue*, by virtue of this conveyance, entered, received rent, and paid the interest of the mortgage and land tax, but refused to pay the poor rates, under pretence that he was not yet in possession. On the bond no interest or principal appeared to have been paid; nor did it appear how the bond was conditioned, on what terms payable, or any thing in regard to it, save that it was proved that a bond was given.

On the 9th of *December* following, after the obtaining of the first order, and before the obtaining the second, the Defendant *Ley* being possessed of a mortgage term of 900 years, under an assignment of some other lands in the same county, at a place called *Swincomb*, in consideration that he stood indebted in 1728 to his two sisters, *Joan* and *Mary Ley*, in the sum of 220*l.*, and in consideration of their undertaking to discharge another debt of 180*l.* due on bond in 1729, and another of 40*l.* by bond in the same year, assigned the said mortgage term to his sisters; by virtue of which they entered, and took up the two bonds of 180*l.* and 40*l.*, the first of which they paid off, and for the other they gave a new bond of their own.

(a) 1 *Dick.* 94. cit. 4 *Ves.* 747. See *Coulston* v. *Gardiner*, *ante*, p. 279.

On

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they are not parties. The sequestration issues for payment of a personal debt of *Colhoun*; the sum sought to be sequestered, is claimed by him as executor to his father.

On the 6th of *April*, 1739, a sequestration issued, by virtue of which both the estates conveyed as above were sequestered. *Rosdue* and *Joan* and *Mary Ley* came in to be examined before the master *pro interesse suo*; and on the Master's report, exceptions were taken by the Plaintiff, and the first question was, whether this conveyance to *Rosdue* could be considered as made *bonâ fide*, and for a valuable consideration; secondly, whether the conveyance to the examinants, *Joan* and *Mary*, was to be considered as fraudulent?

And in respect to the first, the Lord Chancellor clearly held that it was not a *bonâ fide* sale, as there appeared no treaty in the case, no consideration but a bond, which it is odd a man in such distressed circumstances as the Defendant appears to have been in, should part with this estate for, as the mortgagee was not in possession. Had the money been advanced by *Rosdue* by way of mortgage, it would not have defeated the sequestration, if the collusion appeared so strong as to shew the fraudulent intent of *Ley*, as it is admitted it does. The present purchaser as his nephew, in point of evidence and conscience, is equally affected thereby, since in another law such an one is reckoned as conjunct and privy to all transactions.

As to his payment of interest of the mortgages and taxes, no weight can be laid on that, because, supposing him to be only a trustee, it was natural to do as much. A strong circumstance is, that he refused to pay the poor rates, under pretence of not being in possession, at a time when he had in fact the conveyance made to him, and had entered into possession. Upon the whole he is to be considered in no other light than that of a trustee; and as to the objection that he may be liable on account of his bond, he may be relieved as to that in this court; and what he may have paid for interest and taxes, he must be allowed again.

As to the second question, it is, whether the commissioners

father. A *chose in action* cannot be taken in execution at law, except under an extent at the suit of the crown; and there the sheriff is not authorised to levy the debt found

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sioners have a right to present possession under the sequestration against the examinants *Joan* and *Mary Ley*? It is not made part of the exception to the report, that the debt of 220*l.* is in anywise exceptionable; but I must inquire into this in the same manner on the report, as on a bill brought by a subsequent purchaser; and, therefore, as the parties were at liberty to proceed on the report without any exceptions, so they may offer any proof of this sort now if they please. But it is certain, that any person foreseeing a judgment at common law, or a sequestration in this court, may give a preference.

Note, the sequestrators had been in possession ever since *April*, 1739, and were so at this time; therefore the register was directed to search into former orders, given by the Court, on reports of the Master upon examination of the parties *pro interesse suo*, where the sequestrators have been in possession. On the morrow, the register produced two, but neither much to the purpose. The direction was in the present case as follows; therefore, upon the Master's report, let it be referred to the Master, to take an account of what has been paid by *Rosdue* for interest to the mortgagee, and also for taxes and repairs; and to inquire whether he received any rents and profits from the premises; and if it shall be found that he did, then let what he so paid for interest, taxes, and repairs, be allowed thereout, as far as the same will extend; but if the Master shall find that he received none, or not sufficient to answer what he so paid for interest, &c., then let the commissioners named in the commission of sequestration reimburse the said *Rosdue* the balance of what shall be found to be paid by *Rosdue*, out of the first profits which shall be received by them; and as to the premises mentioned in the second exception, comprised in the conveyance to *Mary* and *Joan Ley*, let the sequestrators deliver the possession of it to the two sisters, who claimed it before the Master, and

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found by the jury, but the inquisition is returned to the Court of Exchequer, and a *scire facias*, or an immediate extent is issued against the party indebted to the debtor of

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and let the commissioners come to an account for the rents, &c. of the said estate, since the time of their possession, and pay the balance over to the examinants *Joan* and *Mary Ley* (*a*); and let the Plaintiff be at liberty to apply to the Court touching the surplus over and above what is justly due on the deed of trust mentioned in the Master's report.— Reg. Lib. A. 1742, fol. 722.

Note, it appeared, from the case of *Fossett* v. *Fothergill* (*b*), 26th *December*, 1705, where Lord Cowper declared the commissioners of sequestration might redeem a mortgage, that this assignment by way of security to the two sisters, was redeemable by the sequestrators; but had it been directed that the exceptant should be at liberty to apply to the Court, touching the redemption of the premises conveyed by way of security to the two sisters, the sisters would not have been able to have disposed of the said term by way of sale or mortgage; which was agreed, and therefore directed as above. The Chancellor would not divide the deposit, but let the Plaintiff take it. — MS.

NEALE v. BEALING. (*c*)

19th *January*, 1744.

Under a sequestration for non-payment of money, the sequestrators may, on a motion with notice, (not on a motion of course,) be empowered to let real estate.

A motion of course was made for sequestrators to set and let.

The LORD CHANCELLOR. I cannot allow this without notice to the other side; for though it is a motion of course to obtain liberty for a receiver to set and let, and now most orders are drawn up with such express power in them, yet the reason of both of them is, that he is appointed by the Court for the management of the estate; but sequestrators have but

(*a*) *Walker* v. *Bell*, 2 *Madd.* 21. (*b*) Cit. 4 *Ves.* 747.

(*c*) See *Ray* v. ——— *post*, p. 506.

pre-

of the crown. (*a*) In like manner here a bill must be filed. The bill of interpleader is dismissed, and no order can be made in that suit.

(*a*) *West* on Extents, 171.

The

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precarious or temporary powers to levy a debt, and the sequestration may be taken off to-morrow, or so soon as the demand is discharged. — MSS.

" Upon opening, &c. it was alleged that a commission of sequestration having issued in this cause, against the Defendant *Ann Bealing*, who was the administrator of *Richard Bealing*, deceased, for non-payment of the sum of 235*l.* 1*s.* 11*d.* to the Plaintiff, directed to *H. B.* &c., empowering three or two of them to sequester the rents and profits of the real estate, and also the goods and chattels and personal estate of the said *Ann Bealing*, until she paid the said Plaintiff the said 235*l.* 1*s.* 11*d.*, cleared her contempt, and the Court made other order to the contrary; that by virtue of the said writ, the said sequestrators have entered upon and are in receipt of the rents and profits of the real estate of the said *Ann Bealing*, which consists of divers messuages or tenements in or near *New Street, Covent Garden;* that some of the tenants of the estate in question have quitted possession, and others have given notice of quitting upon the expiration of their leases, unless they can come to a new agreement; that in regard the sequestrators cannot let the said estate without an order for that purpose, it was therefore prayed that the said sequestrators, three or two of them, may be at liberty to set and let the said estate as there shall be occasion, with the approbation of Mr. *Kynaston*, one, &c., which, upon hearing of Mr. *Green* of counsel for Mr. *H. T.* the mortgagee, and upon reading an affidavit of notice of this motion, is ordered accordingly, 23d *March*, 1744." — Reg. Lib. B. 1744. fol. 214. (*a*)

(*a*) So *Harvey* v. *Harvey*, 3 *Rep. in Cha.* 49.

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The LORD CHANCELLOR.

I lay out of the question the bill of interpleader; and it is quite immaterial whether the proceeding by attachment

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RAY *v.* ——— (*a*)

7th *July*, 1784.

Sequestrators on *mesne process* will not be ordered to make leases.

Mr. *Selwyn* moved that the sequestrators upon mesne process might be ordered to make leases of the premises of which they were in possession.

But the Lord Chancellor refused it, and said there never was an order for sequestrators to let and set as receivers. — From Mr. *Romilly*'s notes, Lord *Colchester*'s MSS.

ROWLEY *v.* RIDLEY. (*b*)

13th *January*, 1784.

A sequestration to compel answer, may be executed, but no order will be made for the tenants to attorn till the commission is returned.

Bill for discovery. Defendant appeared, but did not put in any answer; Plaintiff went on with process of contempt till he obtained a sequestration. *Mitford* then (18th *November*, 1783,) moved, as a motion of course, that the tenants of the estate might attorn to the sequestrators, which the Court granted; but when the register was to draw up the order, he objected to it as irregular, under a notion that a sequestration to compel an answer could not be executed, but that the Plaintiff must go on with his process of contempt, and take the bill *pro confesso*.

Mitford moved it again this day. Lord Chancellor took till the next day to consider of it.

Lord Chancellor. — I do not see any foundation either in the reason of the thing, or in the history of the Court, for supposing that a sequestration to compel an appearance or answer should not be executed. If it were not, the

(*a*) See *Neale* v. *Bealing*, *ante*, p. 504.
(*b*) 2 *Dick*. 622. 4 *Ves*. 738—740.

justice

ment could, or could not, be enforced. As, during the suit of interpleader, if Mr. *Rucker* had paid the money into court, which he ought to have done, and had suggested

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justice of the Court would be in many cases disappointed. The bill, it is said, might be taken *pro confesso;* but where a bill is filed only for a discovery, as in the present case, it is no advantage to take the bill *pro confesso*. So in a bill for an account, where the decree to be obtained is a decree *ad computandum*, the Plaintiff having it in his power to take a bill *pro confesso*, is no reason why a sequestration should not be executed.

Neither does it appear to me, in the history of this court, or of the exchequer, it has ever been looked upon as impossible that a sequestration on mesne process should be carried into execution. In *Desbrow* v. *Commie*, which is reported *Bunb.* 272. and 1 *Barn.* 212., but best by *Bunbury*, who was counsel in it, it appears that sequestration on mesne process may be executed. Upon this first point, therefore, I am of opinion that a sequestration, though it issue upon mesne process, is capable of being executed.

This brings me to the second question, namely, how it shall be executed? It has been compared to the case of a receiver appointed by the Court; and upon that idea a motion has been made for the tenants to attorn, which is a special motion; and notice ought to have been given to the tenants. But there is great difference between a sequestration, which is a writ of process, and an order for a receiver, which is an order of the Court. *Tothill*, 13 *El.* Sequestration.

Upon the whole, I think the motion cannot be granted, as being premature; the commission should have been returned before the motion was made. The proper course, I should think, would be, after the commission was returned, to give the tenants notice to pay. However, the present motion cannot be granted till the return appears to the Court upon record.

Note, the other cases upon sequestrations which were cited, are *Maynard* v. *Pomfret*, 3 *Atk.* 468. *Hawkins* v. *Crook*, 3 *Atk.* 594. *Butler* v. *Rash-*

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gested that it was claimed by more than one party within the jurisdiction of the Court, and also by a person resident in a British colony, the Court would not have parted with

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Rashfield, 3 *Atk.* 740. *Davis* v. *Davis*, 2 *Atk.* 23.; see *Wilcocks* v. *Wilcocks*, *Ambl.* 421. — From Mr. *Romilly's* notes. Lord *Colchester's* MSS.

ROWLEY v. RIDLEY. (a)

9th *December*, 1785.

Order for leave to exhibit interrogatories to falsify examination, *pro interesse suo*, obtained by motion of course.

Before the LORD CHANCELLOR.

An order having been obtained for the examination of certain persons before the Master *pro interesse suo*, it was now moved for leave to exhibit interrogatories before the Master to falsify their examination; and it was so ordered without notice as of course. — Mr. *Cox's* MSS.

CADELL v. SMITH. (b)

6th *August*, 1791.

Sequestrators, upon a decretal order, have the same power to sell as on a final decree.

The case was, an order made upon the Defendant (on reading his answer) to replace stock; process of contempt to sequestration, and the sequestrators seized. A motion was made to empower them to sell.

The Chancellor at the third seal doubted whether this could be done, upon what he considered as an interlocutory order.

But at the fourth seal, *Richards* produced a precedent, and the Chancellor agreed the practice to be, that sequestrators on an interlocutory order had equal power to sell as upon a final decree. — Lord *Colchester's* MSS.

On the 19th of *November*, 1670, the House of Lords ordered a reference to the committee of privileges, "to

(a) See *Attorney General* v. *The Mayor of Coventry*, *post*, p. 511.
(b) 5 *Bro. C. C.* 362.

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with the fund until it had secured *Rucker* as well from the colonial claim, as from the claims here; so, if sequestrators, by bill or otherwise bring the money into court, it will be detained until the Court is satisfied that the party by whom it has been paid cannot be compelled to pay it elsewhere.

Fund in court detained, until the party by whom it has been paid is secured against all conflicting claims to it.

The true question is, whether this *chose in action*, considering it either as the whole sum due from *Colhoun*, or only so much as exceeds what is due to *Pinney*, can be taken

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consider of the proceedings in the Court of Chancery, upon sequestration of estates, and what law there is to warrant such proceedings, and to make report thereof unto the House." Lords' Journals, xii. 368. On the 18th of *March* following, the Earl of *Berks* reported that the committee had received some precedents of sequestrations of estates by the Court of Chancery since the 32d year of Queen *Elizabeth*, from the registers of that court: "that their lordships had heard the judges upon the said precedents, and received their opinion thereupon, which is as follows: The opinion of the judges after mentioned, *videlicet*, the lord chief justice of the Common Pleas, Justice *Tirrel*, Baron *Turner*, Justice *Archer*, Justice *Raynsford*, Justice *Moreton*, Justice *Wyld*, Baron *Littleton*, Baron *Wyndham*, in observance of the order of their lordships, delivered in writing by the said chief justice, with consent of the said other judges. They know no positive law by statute or otherwise, nor any judgment by any court of law, which doth warrant the proceeding by sequestration of real and personal estates for disobeying decrees made in Chancery upon process of subpœna; and they find, by the opinion of some judges in several times in the ancient law reports, that there was no other remedy for disobeying such decrees but imprisonment of the persons disobeying for the contempt; but they find no full resolution by any court of law of that point. They conceive the Court of Chancery, and proceedings therein upon

Opinion of the judges upon sequestrations by the Court of Chancery.

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taken by this sequestration; or whether there must not be some proceeding in aid of the sequestration? Speaking with the caution which befits one of a process so unusual, I have supposed it to be clear, that where there is tangible property, the Court will allow the sequestrators to lay their hands on it, whatever claims third persons may have, and will compel them to come in *pro interesse suo;* but a *chose in action* cannot be so taken; and the question arises, how are the rights of third persons to be decided? It is generally done by

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equitable matters, to be very ancient; and that it belongs not to the judges in the King's courts of law, to determine whether any decrees made in Chancery in matters of equity, or the proceeding in equity in execution of such decrees, be unjust, unless such decrees and proceedings be contrary to the statutes or common law. They know not, nor have time to examine, what precedents may be found concerning all the ancient course and custom of proceeding in the Chancery in matters of equity; but are of opinion, that the precedents since 32d of *Elizabeth*, delivered to them by their lordships to consider of, be of so late times, that, without other authority, they alone are not sufficient to prove a custom of sequestering real and personal estates for disobeying the decrees of that court." — Id. 463.

On the 23d of *March*, the House ordered that the farther debate of the report of the committee should be resumed on the 30th inst.; "at which time the judges are to be heard to explain the opinion delivered by them to the committee for privileges concerning this business." — Id. 468.

7th *April*. Upon consideration of the report, the committee were ordered to consider further of this business, and the debate had thereupon, and report their opinions what is fit to be done thereupon unto the house. — Id. 481.

No account has been found of any farther proceedings.

order;

order (*a*); whether it can be done in a case in which the third person does not appear, may be another question.

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Before I decide this case, I will refer to *Simmonds* v. *Lord Kinnard*; in the meantime *Rucker* must not part with the money.

An order was afterwards made for payment of the money into court.

(*a*) IN CHANCERY. *Anon. July* 2d, 1747.

By the LORD CHANCELLOR. Where a party's personal estate is taken in sequestration, and a third person claims property in part thereof, the Master cannot inquire into the matter of property, except by an order, (on motion) for examining parties and witnesses on interrogatories. — MSS.

The ATTORNEY GENERAL *v.* The MAYOR of COVENTRY. (*b*)

Mr. *Collings* had been examined before the Master *pro interesse*, and by his examination made a title to the thing in question; instead of replying, the Plaintiffs brought the matter before the Court, upon the exception to the report; and it was insisted for *Collings*, and ruled, that they were concluded by the examination, not having replied to it, (as they ought to have done, and put him upon the proof of it,) as much as if they had set down a cause upon bill and answer. The rule seems to be the same in all examinations before a Master. — From Mr. *Cox*'s MSS.

(*a*) 1 *P. W.* 306.

(*b*) See *Rowley* v. *Ridley*, *ante*, p. 308.

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BRANDON *v.* BRANDON.

June 17. 21.
July 14.

Under a marriage settlement, personal estate of the wife was vested in trustees, upon trust to assign 1000*l.* stock to the husband, and in case the wife should die during the life of the husband without issue, to transfer one moiety of the remainder to the husband, and the other to the nearest and next of kin of the wife in equal shares, and the husband covenanted that if the wife should die in her lifetime without leaving issue to survive her 30 days, he would within three months after her decease, transfer 500*l.* stock to the trustees, for the sole use and property of her nearest and next of kin; on the death

BY a settlement dated 23d *October*, 1787, made previously to the marriage of *Abraham Brandon* and *Abigail Brandon*, (both of the Jewish religion,) reciting among other things, that *Abigail Brandon* was, under the will of her late mother, entitled to a considerable part of her estate and effects, she assigned the same to *Jacob Israel Brandon*, *Gabriel Israel Brandon*, *Raphael Brandon*, and *Daniel Brandon*, upon trust after the solemnization of the marriage, to assign and transfer 1000*l.* 3 *per Cent consolidated Bank Annuities*, for her marriage portion to *Abraham Brandon*, and to invest the remainder in government securities in their names, and to permit *Abraham Brandon* to receive the dividends for the joint lives of him and *Abigail Brandon*, and after her decease, in case *Abraham Brandon* should survive her, and there should be issue of the marriage, in trust for the children of the marriage in manner therein mentioned; and in case there should be no issue of the marriage, in trust to transfer one moiety of the trust stock to *Abraham Brandon*, surviving her as aforesaid, and to transfer the other moiety unto the nearest and next of kin of *Abigail Brandon*, in equal shares among them. The settlement then provided that every other sum of money to which *Abigail Brandon* then was or should become entitled, should be paid to the trustees upon the same trusts as the other settled property; and it contained a covenant on the part of *Abraham Brandon*, that in case *Abigail Brandon* should die after the marriage, in his life time, without leaving issue to survive her 30 days, *Abraham Brandon* should within three months after her decease, transfer and pay over 500*l.* 3 *per Cent. consolidated Bank Annuities*, to the trustees, for the sole use

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use and property of the nearest and next of kin of *Abigail Brandon*.

The sum to which *Abigail Brandon* became entitled under her mother's will, amounted to 2000*l.* 3 *per Cent. consolidated Bank Annuities*, which was transferred by the executors to the trustees of the settlement, who after the marriage paid 1000*l.* Consols., part of it, to *Abraham Brandon*, and retained the remainder in their names upon the trusts of the settlement. In *July*, 1793, *Abraham Brandon* became bankrupt.

Sometime after the marriage, a legacy of 1000*l.* was bequeathed to *Abigail Brandon*, by an uncle, *Jacob Israel Brandon*, and paid by his executors to the trustees, and invested by them in the purchase of stock upon the trusts of the settlement.

Abigail Brandon died in *February*, 1805, without issue, leaving her husband, and *Jacob Da Fonseca Brandon*, the Plaintiff, her only brother, surviving her; she also left several nephews and nieces, the children of two deceased sisters.

The bill was filed by *Jacob Da Fonseca Brandon*, against these nephews and nieces, the trustees of the settlement, the executors of *Jacob Israel Brandon*, and the assignees of *Abraham*, stating that according to the Jewish law, he was the sole, next, and nearest of kin to *Abigail Brandon*, and claiming in that character to be intitled to one moiety of the funds included in the settlements, and also to the sum of 500*l.* covenanted to be paid by *Abraham Brandon* in the event of his wife dying without issue; the bill prayed that the latter sum might be retained out of *Abraham Brandon*'s moiety of the trust fund.

of the wife without issue during her husband's life, her brother was declared entitled to a moiety of the trust fund in exclusion of nephews and nieces; and the husband having become bankrupt before the death of the wife, his assignees are entitled to his moiety of the trust fund, without deduction of the sum due by virtue of his covenant, which did not create a debt proveable under his commission.

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All the parties to the settlement were Jews. The Plaintiff produced the evidence of some *Rabbi*, that by the Jewish law, on the death of a Jew without issue, leaving a brother and the children of deceased sisters, the whole of his personal property devolves upon the brother, as the next of kin. (*a*)

Sir *Arthur Piggott*, and Mr. *Sidebottom*, for the Plaintiff.

The phrase "next of kin" is a definite description, denoting the first degree of consanguinity; to comprehend within it unequal degrees, would be to confound propinquity and representation. The description, known to the law long before the statute of distributions, occurs in stat. 21 *H.* 8. *c.* 5. *s.* 3., and under the provision of that clause, directing the ordinary to grant probate to the widow or next of kin of the deceased, representation is not admitted, but the grandfather is entitled after brothers, and in preference to uncles or nephews, *Blackborough* v. *Davis*. (*b*) Before the statute of distribution (*c*) no doubt could have been entertained on the effect of a gift to the next of kin; that statute introduced the title by representation, but neither that nor the supplemental statute, 1 *Jac.* 2. *c.* 17., vary the import of those terms. The decision in *Worthington* v. *Statham* (*d*), is conclusive in the present case; the words in equal degree, neither extending nor restricting the description, next of kin.

(*a*) *Franks* v. *Martin*, 1 *Eden.* 309.

(*b*) 12 *Mod.* 615. 1 *P. W.* 41. *Rep. temp. Holt*, 45. 1 Lord *Raym.* 684. 1 *Salk.* 38. 251. *Com.* 96. 108.

(*c*) 22 & 23 *Car.* 2. *c.* 10.

(*d*) Reported as an anonymous case, 1 *Madd.* 56.

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The Court resorts to the statute of distribution for a construction of general terms of relationship, only where the terms are so indefinite, that without that construction the gift would be void; *Thomas* v. *Hole* (*a*), *Whithorne* v. *Harris* (*b*), *Edger* v. *Salisbury* (*c*), *Brunsden* v. *Woolredge* (*d*), *Isaac* v. *Defrier* (*e*), *Green* v. *Howard.* (*f*)

The single authority in support of the Defendant's claim, is *Phillips* v. *Garth.* (*g*) But the assertion of Justice *Buller*, that the stat. 1 *Jac.* 2. *c.* 17., has given a new sense to the terms next of kin, is manifestly erroneous; the design of the clause in which those terms occur (*h*), was merely to restrict the remedies provided by the former stat. 22 & 23 *Car.* 2. *c.* 10., to the persons entitled to distribution under that statute, and the terms are employed as descriptive of those persons, though not strictly next of kin; the widow of an intestate is, within the exception of that clause, entitled to distribution; and it is settled that she is not one of her husband's next of kin, *Garrick* v. *Lord Camden* (*i*), *Bailey* v. *Wright.* (*k*) The case of *Phillips* v. *Garth*, terminated by compromise; and the doctrine there expressed cannot be maintained. *Marsh* v. *Marsh* (*l*), the observations of Lord *Eldon*, in *Garrick* v. *Lord Camden* (*m*), and *Smith* v. *Campbell* (*n*); a strong authority for the present Plaintiff.

The express intention of the parties to the settlement, was distribution in equal shares; that intention will be

(*a*) *Ca. temp. Talb.* 251.
(*b*) 2 *Ves.* 524.
(*c*) *Amb.* 70.
(*d*) *Amb.* 507.
(*e*) *Amb.* 595. 17 *Ves.* 373. n.
(*f*) 1 *Bro. C. C.* 31.
(*g*) 5 *Bro. C. C.* 64.
(*h*) *s.* 6.
(*i*) 14 *Ves.* 372.
(*k*) 18 *Ves.* 49. *Ante*, v. i. p. 59.
(*l*) 1 *Bro. C. C.* 293.
(*m*) 14 *Ves.* 385.
(*n*) *Coop.* 275.

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frustrated by the application of the doctrine of representation, a doctrine not found in the Pentateuch.

On the second question, the sum of 500*l.* which the husband covenanted to transfer, ought to be retained out of his share: had he not become bankrupt, the Court would not have compelled the trustees to assign, nor suffered him to possess the fund, without performing his covenant. He is a purchaser, and one of the considerations is his covenant; the wife, therefore, as a vendor, is entitled to a lien for enforcing that covenant. His assignees take his interest, subject to all equities affecting him, and subject therefore to this equitable right to satisfaction for the non-performance of his obligation, whether in the form of lien, or set off, or mutual credit; a present debt payable *in futuro* may be the subject of set off, *Jeffs* v. *Wood* (*a*), *Atkinson* v. *Elliott* (*b*), *Ex parte Boyle.* (*c*)

Mr. *Shadwell*, for the trustees.

Mr. *Wetherell*, and Mr. *Wyatt*, for the nephews and nieces of *Abigail Brandon.*

The question must be decided by the law of this country, not by the Jewish law. The parties were domiciled in *England*, the contract was made, and the property is situated here. The case, therefore, presents no *conflictus legum*; the *lex domicilii*, the *lex loci contractus*, and the *lex loci rei sitæ*, are all the same. The law of *England* is the only law in question. *Brodie* v. *Barry* (*d*), and many other cases.

(*a*) 2 *P. W.* 128.
(*b*) 7 *T. R.* 378
(*c*) *Cooke, B. L.* 596.
(*d*) 2 *Ves. & Beames*, 127.

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In the law of *England*, the terms next of kin are a technical description of a class ascertained by the statutes of distribution; the class of civil, as distinguished from natural kindred, *Phillips* v. *Garth*. The decision in *Worthington* v. *Statham*, which is supported by *Wimbles* v. *Pitcher* (*a*), proceeded solely on the words, "in equal degree," which exclude the doctrine of representation.

Mr. *Heald*, and Mr. *Teed*, for the assignees of *Abraham Brandon*.

The assignees are entitled to a moiety of the trust fund, and no deduction or proof can be made in respect of the bankrupts' covenant. His right to a moiety vested immediately on the death of *Abigail Brandon*; his obligation was contingent, and could not become absolute until three months after that event.

The MASTER *of the* ROLLS.

On the first question, whether the Plaintiff, the only brother of *Abigail Brandon*, is entitled exclusively, or whether the nephews and nieces have a right to participate, I see no reason for suspending my opinion. The terms of the settlement on which the question arises, are, "nearest and next of kin." They occur twice, and in the first passage they are followed by the words, "in equal shares among them." Those words, however, afford no assistance in resolving the difficulty, since either mode of construction is consistent with a plurality of claimants. The question is, whether the property belongs to the persons who are next of kin, according to the rule and measure established by the statutes of

(*a*) 12 *Ves.* 435.

distri-

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distribution, or to those who are next of kin, according to a more strict and natural sense?

To consider the question without reference to authorities. In the construction of deeds, the first object is to ascertain the meaning of the parties; and if the words are explicit, they must prevail. The words "nearest and next of kin," are perfectly exempt from ambiguity, and in their general sense unquestionably denote the persons nearest in proximity of consanguinity. The present contest is between the brother who undoubtedly answers that description, and persons a degree more remote; and it is to be inquired whether the contest extends the import of the words next of kin? Were this a new case, the words are sufficiently explicit to decide it; the person who without ambiguity answers the description, ought not to be excluded by persons not within the terms.

The argument for the nephews and nieces is, that though not natural next f kin, they are admitted in that character under the statute of distribution. But no evidence exists that the parties intended to refer to the statute. The statute clearly adverts to two classes, next of kin in equal degree, and next of kin by right of representation; not confounding, but expressly distinguishing them. It is true that the phrase next of kin has long acquired a technical sense; and that on a reference to the Master to inquire who are the next of kin of an individual deceased, it is unnecessary to add a direction for including those who claim by representation; and if the import of words has been fixed by a technical rule, that rule should not be infringed. The question therefore is, have the authorities established a rule on this subject?

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The case of *Phillips* v. *Garth* (*a*), is directly in point; and if that case had been followed, I should have been unwilling to contradict it. But it appears that the doctrine of Justice *Buller* was not approved by Lord *Thurlow*, and the case ended in a compromise. In *Garrick* v. *Lord Camden* (*b*), the present Lord Chancellor declared that he had always entertained doubts on the doctrine there expressed; and in *Smith* v. *Campbell* (*c*), the late Master of the Rolls, putting the very case now before the Court, adds, that he should have decided in favour of the brother. That opinion was uttered after a review of all the authorities, and affords the third instance of a judicial disapprobation of the doctrine of Justice *Buller*.

The word "relations," construed by reference to the statute of distribution.

In many cases indeed, the Court has construed the word "relations," in a will by reference to the statute of distribution; as in *Thomas* v. *Hole* (*d*), *Green* v. *Howard* (*e*), *Widmore* v. *Woodroffe* (*f*), *Whithorne* v. *Harris* (*g*), *Isaac* v. *Defrier* (*h*); and in *Edge* v. *Salisbury* (*i*), the words "nearest relations," received the same construction. But it has been properly observed, that this rule of construction is founded in convenience

(*a*) 3 *Bro. C. C.* 64.
(*b*) 14 *Ves.* 385.
(*c*) *Coop.* 275.
(*d*) *Ca. Temp. Talb.* 251.
(*e*) 1 *Bro. C. C.* 31.
(*f*) *Amb.* 636.
(*g*) 2 *Ves.* 527.
(*h*) *Amb.* 595. 17 *Ves.* 373. n.
(*i*) *Amb.* 70. See in addition to the cases cited, *Carr* v. *Bedford*, 2 *Rep. in Cha.* 77. *Griffith* v. *Jones*, 2 *Rep. in Cha.* 179. 2 *Freem.* 96. *Jones* v. *Beale*, 2 *Vern.* 381. *Anon.* 1 *P. W.* 327. *Roach* v. *Hammond*, *Prec. in Cha.* 401. *Attorney General* v. *Bucklland*, cited *Amb.* 71. 1 *Ves.* 231. *Harding* v. *Glyn*, 1 *Atk.* 469. *Bennett* v. *Honeywood*, *Amb.* 708. *Supple* v. *Lowson*, *Amb.* 729. *Rayner* v. *Mowbray*, 3 *Bro. C. C.* 234. *Stamp* v. *Cooke*, 1 *Cox*, 234. *Masters* v. *Hooper*, 4 *Bro. C. C.* 207. *Hands* v. *Hands*, 1 *T. R.* 437. n. *Devisme* v. *Mellish*, 5 *Ves.* 529. *Mahon* v. *Savage*, 1 *Schoales & Lefr.* 111. *Pope* v. *Whitcombe*, 3 *Mer.* 689.

alone;

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alone; the Court being compelled to reduce words, in their natural sense indefinite, to some practical meaning.

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The following case is imperfectly reported, *Amb.* 397.

CROSLEY v. CLARE.

In CHANCERY. 8th—10th *April*, 1761.

Under a devise to the descendants of *F. I.*, in a certain district, grandchildren and great grandchildren take *per capita*.

Edward Ince, by his will dated in 1754, devised his estate at *Chilton Park*, in *Buckinghamshire*, worth about 250*l. per annum*, to *A.* for life, and then to *B.* for life, and after their several deceases, he gave and devised the said estate to the descendants of his uncle, *Francis Ince*, now living in or about *Seven Oaks*, in *Kent*, or hereafter living any where else, to be sold, and the money equally between them, share and share alike; and in another part of his will, among other pecuniary legacies, he bequeathed 4000*l.* to be equally divided among the descendants of his uncle, *Francis Ince*, &c., exactly as in the former bequest. It appeared by proof in the cause, that the testator had desired one Mr. *Burroughs*, a clergyman, to go into *Kent*, and inquire what relations the testator had there, the testator having kept up little or no correspondence with them; and that Mr. *B.* drew out a pedigree of all the descendants from the testator's uncle, *Francis Ince*, who were living at the time he made the inquiry, and that such pedigree was in the testator's custody at his death. It appeared, likewise, that at the time of making the will, there was one of the three daughters of the said *Francis Ince* living, who was the only person then living of the first line, but that she died before the testator; that there were several children of her, and of each of her sisters living at that time, who were grandchildren of *Francis Ince*, and formed the second line; that there were several of those children who at that time had children, which were the great grandchildren of the said *Francis Ince*, and formed the third line; as many of whom as were living, when Mr. *B.* made his inquiry and drew out the pedigree, were named in

The word "family" has for the same reason received the like construction (*a*), and with a like exception of the husband and wife, and therefore not precisely conformable to the provisions of the statute.

(*a*) *Cruwys* v. *Colman*, 9 *Ves.* 319.

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in it, but one of such great grandchildren happened to be born after drawing out the pedigree, but before the date of the will; that there was one great great grandchild who stood upon the fourth line, but that she was born after the date of the will, though before the death of the testator, and before his signing two codicils which were written in his own hand, and declared to be part of his will, and were made only to increase some legacies he had given by his will.

The bill was brought by the third line, the great grandchildren of *Francis Ince*, against the executors and trustees, and against the second line, the grandchildren, and the fourth line, the great great grandchild, insisting that the Plaintiffs were entitled as descendants of *Francis Ince*, living at the time of making the testator *Edward Ince's* will, equally with the grandchildren of the second line; and insisting that the great great grandchild was entitled to no share, as she was not born till after the date of the will.

The Defendants set up different claims in exclusion of each other, but all the grandchildren agreed in this, that neither the Plaintiffs, the great grandchildren, nor Defendant, the great great grandchild, were entitled to any part. The Defendant, the great great grandchild, insisted that she was entitled as descendant of *Francis Ince*, living at the death of the testator, though not born at the time of making the will; and it was urged that the codicil, which was executed after her birth, being declared to be a part of the will, this amounted to a republication of the will, and so she was at that time a descendant of *Francis Ince*, then living. It appeared that some of the Plaintiffs lived 15 miles from *Seven Oaks*, others 10, and that all the rest lived in the town of

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Notwithstanding this long line of decisions, the late Master of the Rolls, in *Smith* v. *Campbell*, thought that he was not prevented by authority from construing a gift

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Seven Oaks; and it was urged that the first lived at too remote a distance, but his honour paid no regard to that objection, the words being in or about *Seven Oaks*.

If the second line alone were to take, and to take *per capita*, it would be divided into four parts; if the second and third, then into 17ths, and if the great great grandchild was let in, then into 18ths.

A pedigree made by a testator's direction, and found among his papers, not admitted to explain a will, equivocal but not unintelligible.

There was a point of evidence debated, *viz.* Whether the pedigree taken by Mr. *Burroughs*, since dead, and found among the testator's papers, should be admitted to explain what was meant by the word descendants. His honour was of opinion it ought not; no, not even if it had been made out by the attorney, who was afterwards directed to prepare the will in consequence of it; for that would be in some measure to permit the attorney to make or vary the will by his evidence, which is never to be allowed; nor can parol evidence be received, except in cases where the devise would otherwise be void for uncertainty, or where it is merely to rebut an equity or resulting trust. (*a*)

After the claims of the several parties had been spoken to, his honour interrupted Mr. Attorney, who was going to reply, and proceeded to pronounce his opinion immediately. He observed that this was not a question merely upon the word descendants at large, but even if it had, that he should have been of opinion it extended to the Plaintiffs; but here not only the word descendants is made use of, but it is confined to such as resided within a certain district. Independent of this circumstance, it is true that the word descendants may be understood in a very different sense; and therefore, if it is said *A.* has such a manor, &c., to him and his descendants, there it is understood to mean heirs, but if to *A.* and his descendants equally to be divided be-

(*a*) *Goodinge* v. *Goodinge*, 2 *Ves.* 231.

gift to "nearest surviving relations," in favour of brothers and sisters, to the exclusion of nephews and nieces. The words of the present instrument are at least equally definite.

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tween them, *Simul et Semel*, and not separately, there it comprehends all. Consider it, first, if it had been descendants generally, second, as it is, in the present case, to descendants living in or about *Seven Oaks*.

1st, There is a wide difference between the word "relations," which is *genus generalissimum*, and comprehends ancestors; secondly, descendants; and thirdly, collaterals; and the word "descendants," which includes only the second and the third; and, therefore, in the cases cited, where the courts have restrained it to the next of kin, or those who would be entitled under the statute of distributions, it has been where it was to relations generally, which is a term of such unbounded latitude, that the courts have been obliged to introduce this rule in order to effectuate the bequest, which would otherwise be void, as it would be impossible to find out all a man's relations; and, therefore, the rule being introduced from necessity, *ut res magis valeat quam pereat*, it applies to none but like cases; therefore, where the word relations has been qualified by restraining it to particular objects, as my poor relations, it has extended to all that were poor, though they stood in different degrees.

The word descendants, is itself restrictive enough to prevent the inconvenience which the general term relations might occasion. The descendants of a man may in most cases be easily traced; but here it is descendants living at a particular place, which is still more restrained, and cannot leave the executor in any doubt, or put him under any difficulty to trace them. The cases cited, *Counden* v. *Clarke* (*a*), and *Chapman's* case (*b*), and the doctrine in *Co. Lit.* 10 b. are all governed by the same principle, that where the devise of land is to a man's heirs or family, &c. there it shall go to the heir, because otherwise void for uncertainty; but if it

(*a*) *Hob.* 29.

(*b*) *Dyer*, 333.

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definite. The same conclusion is supported by *Wimbles* v. *Pitcher* (*a*), and *Worthington* v. *Statham*. (*b*)

The case of *Phillips* v. *Garth*, overruled.

On the first question, I am therefore of opinion, that the words of the settlement are too explicit and definite to require or admit for their construction reference to the statute, and that the weight of authority is against the doctrine of *Phillips* v. *Garth*. The Plaintiff is therefore exclusively entitled to a moiety of the trust fund.

The second question I shall not decide without further consideration, and reference to authorities.

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The MASTER *of the* ROLLS.

On the first question in this case, I retain the opinion which I have expressed, that the Plaintiff is exclusively entitled under the words "nearest and next of kin." The question here arises not on an intestacy, but on the construction of a deed; even in a case of intestacy the statute of distribution would afford a rule, since it has been expressly enacted that that statute shall not extend to the

(*a*) 12 *Ves.* 435. (*b*) 1 *Madd.* 56.

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had been to the nearest relations equally to be divided, a brother and sister, I should think, they being in equal degree, would both take.

As to the objection that this construction will split the estate into so many shares, that they will be frittered to almost nothing, that can have no weight, as the testator does not appear to have had a predilection for any particular persons. Besides from what appears of the circumstances of the family, the shares will be very considerable to persons in their low situations.

As to the fourth line, the great great grandchild, she appears to have been born out of due time; therefore decree to the second and third line in equal 17th shares. — MSS.

estates

estates of femes covert (*a*); and in the division of this property of a feme covert, the Court therefore could not resort to the statute as a guide.

The next question which involves more difficulty, is, whether the trustees, or the Plaintiff as their *cestui que trust*, are entitled to deduct the sum of 500*l.* stock due from *Abraham Brandon* under his covenant, from his moiety of the trust fund?

In the event of *Abigail Brandon*'s death during the life of her husband without issue, which occurred in *February*, 1815, the settlement directs the trustees to transfer a moiety of the trust fund to *Abraham Brandon*; and he, having received 1000*l.* on the marriage, covenanted on the same event of the death of *Abigail Brandon* in the circumstances mentioned, to transfer to the same trustees 500*l.* stock, in trust for her next of kin. *Abraham Brandon* having become bankrupt in 1793, his assignees now claim his moiety of the trust fund; while on the other hand, the Plaintiff and the trustees insist that they are entitled to deduct from that moiety the sum of 500*l.* stock, either on the principle of mutual debt and credit, or of lien, or as having an equitable right to prevent his assignees receiving all that was due to him under the settlement, until they have paid all which, by the same deed, became due from him.

The interest of the bankrupt in the property was at the time of the bankruptcy contingent, and not reduced to certainty until 22 years after that event, by the death of his wife; but that contingent interest, such as it was, and all the bankrupts right and possibility, was on the bankruptcy transferred to his assignees; they became

(*a*) 29 *Car.* 2. *c.* 3. *s.* 25.

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eventually entitled to it as their absolute property, and the trustees became trustees for them. The fund thus acquired was derived, not from the next of kin of *Abigail Brandon*, but from herself, as a part of her estate purchased by the marriage. On the other hand, the debt claimed by the trustees is due solely on the personal covenant of *Abraham Brandon*, and in no other manner secured. It was, therefore, on his part, substantially a contract with his wife before marriage, in consideration of the marriage and the property derived under it, to pay the sum of 500*l*. stock in a specified event.

The first question is, whether the debt created by this covenant, was provable under the commission against *Abraham Brandon?* Clearly not. The debt had no existence at the date of the bankruptcy; it was then matter of contingency whether any debt would ever arise. Is it then a debt which can be set off under the statute (*a*)? I am of opinion, that it is not. In order to be within the operation of that statute, the debt must not be contingent; it must be a debt subsisting at the time of the bankruptcy. Here no debt existed until more than 20 years after that event. This is not a case of mutual debt and credit; here is no credit in any sense of that term, nor any mutual debt between the same parties. The trust fund, a moiety of which was given to the husband, moved from the wife; there is no mutual debt or credit with her; but her nominee or next of kin, who made no advance and entered into no contract, was eventually to become entitled to the sum in question.

Is there then any equity for charging this debt upon the fund? I think not. No one is liable to pay this debt but the bankrupt. It is his debt, arising since his

(*a*) 5 Geo. 2. c. 30. s. 28.

bankruptcy,

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bankruptcy, and not provable under his commission. There is no ground for charging his debt on a fund belonging to others. The trust fund is vested in his assignees, and they are not, by any statute or equity, subject to the payment of this sum.

If there is any injustice in the case, it arises from the omission in the settlement to create a lien on the fund for this contingent debt, but no lien can be here raised by implication, nor is there any equity for charging the property of others with the debt of the bankrupt. To set off one against the other, would be to confound distinct rights.

For these reasons I am of opinion that the claims cannot be blended. The sum due from *Abraham Brandon*, can neither be proved under his commission, nor deducted from the sum due to his assignees under the settlement.

" His honor doth declare that the Plaintiff, as the sole next of kin of *Abigail Brandon*, deceased, is, under the settlement and will above mentioned, entitled to one moiety of the said several funds, and the accumulations thereof, since the decease of the said *Abigail Brandon*, until the transfer; and that the Defendant, *Abraham Brandon*, having become entitled in like manner to the other moiety thereof, the Defendants his assignees are entitled to such moiety; and it is ordered that it be referred to Mr. *Stephen* one, &c. to tax, as between solicitor and client, all parties their costs of this suit," &c. — Reg. Lib. B. 1818. fol. 2052–2054.

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Under a will directing the transfer of stock among all the children of the testatrix's daughter, except an eldest son; a second son having become the eldest living by the death of his elder brother, who survived the testatrix, is not entitled to a share, although an estate limited to his elder brother, did not descend to him.

ANN MATTHEWS, by her will, dated the 31st *July*, 1801, among other things gave to trustees, all the bank stock of which she should be possessed at the time of her decease, in trust to pay the dividends to the separate use of her daughter *Mary*, the wife of *John Paul Paul*, for her life; and after her decease, to *John Paul Paul* for his life; and after his decease, "upon trust that they, the said trustees, do, and shall assign and transfer all such stock unto, and among all and every the children of my said daughter, if more than one (except an eldest son) equally, share and share alike; and if but one, then the whole to such one or only child; the same to be vested interests and transferrable at their, his, or her ages or age of twenty-one years; and in the mean time, and until such children or child shall attain such age, from time to time to invest and improve their respective share or shares of the dividends of such stock for such children or child's future benefit and advantage; and in case any such children or child shall die under the said age, leaving any children or child lawfully begotten, then the shares or share of every such child so dying to go unto or among such their, his, or her children in like manner as above mentioned; otherwise to go to the survivors or survivor of the children of my said daughter, and to be transferable in like manner as their original share thereof; and in case my said daughter shall leave no children or child at her decease, or leaving such, they shall all die under the said age of twenty-one years without children as aforesaid, then upon trust that they, the said trustees do, and shall assign and transfer all

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such stock unto such person and persons, and for such uses, &c. as she, my said daughter, (notwithstanding any coverture) by any deed, &c. shall give, direct, limit, or appoint the same; and in default of such gift, direction, &c. then in trust to assign and transfer the same unto my aforesaid nephew, *Walter Matthews*, his executors, &c. for his and their own use."

The testatrix then gave to the same trustees, all the share and interest she should have at the time of her decease in the *5 per cent.* bank annuities, 1797, (commonly called Loyalty,) and in the imperial terminable annuities; "In trust to stand possessed of all such annuities, and to receive the dividends or interest thereof from time to time as the same shall become due and payable; and thereupon to lay out and invest the same in the purchase of *5 per cent.* annuities, 1797, or such other stocks or funds as they shall think fit, being government security, in their names, and so in like manner from time to time, to lay out and invest all the dividends or interests to be received thereon; so as all such stocks or funds do thereby accumulate until the expiration of the term for payment of the imperial annuities; and thereupon to assign and transfer all such stocks or funds, as well original as accumulated, unto and among all and every the children of my said daughter, if more than one, (except an eldest son,) equally, share and share alike; and if but one, then the whole to such one or only child, the same to be vested interests and transferable, and the dividends or interest thereof applied at such time or times, and in such manner, and with the like power of appointment by my said daughter, as is hereinbefore mentioned and directed of and concerning the bank stock hereinbefore given in trust for the benefit of the children of my said daughter; and in default of my said daughter making any such gift, direction,

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rection, limitation, or appointment thereof, in trust to assign and transfer the same unto my said nephew, *Walter Matthews*, his executors, &c. to and for his, and their own use."

The testatrix made three codicils to her will, by the second of which, dated the 9th of *March*, 1802, she devised to the same trustees, the fee simple of certain estates upon trust, for the separate use of her daughter *Mary Paul*, for her life; and after her decease, "upon trust to stand possessed, as well of the said estate and premises, as also of the rents and profits thereof in the meantime, to and for the use, benefit, and behoof, of *Walter Matthews Paul*, second son of my said daughter *Mary Paul*, his heirs and assigns for ever, and to convey the same to him upon his attaining the age of twenty-one years; but if my said grandson, *Walter Matthews Paul*, should happen to die before he attains the said age, then my said trustees are also to stand possessed thereof, in trust to, and for all and every other the children of my said daughter who shall live to attain the age of twenty-one years, if more than one, (except an eldest son,) their heirs and assigns, share and share alike, as tenants in common, and not as joint-tenants; and if there should be but one child, then in trust for such one only child, his or her heirs and assigns for ever, and to convey the same to them, him, or her accordingly; and in case my said daughter should leave no children or child living at her decease, or leaving such, they should all die under the said age of twenty-one years, then upon this further trust, and it shall be lawful for my said daughter, notwithstanding her coverture, by any deed or writing, &c. or by her last will, &c. to give the same estate or any part thereof, unto such person, &c.; and in default of such gift, &c. to stand possessed

possessed thereof for the sole use and benefit of my said daughter, her heirs and assigns for ever.

By the third codicil, dated 30th *June*, 1804, reciting that, since the making of her will, she had become possessed of a share in the *5 per cent.* bank annuities, commonly called Navy annuities, the testatrix bequeathed to the same trustees the share which she then had in the said *5 per cent.* annuities, and such other share as she should have in them at the time of her decease, upon the same trusts as were declared in her will of the *5 per cent.* bank annuities, called Loyalty, and the Imperial terminable annuities.

The testatrix died in *December*, 1805, being possessed of 7000*l.* bank stock, 500*l.* imperial annuities, and 4300*l.* *5 per cent.* navy annuities, but not of any stock in the *5 per cent.* bank annuities, 1797.

John Paul Paul, and *Mary* his wife, survived the testatrix, and had at the time of her death two sons and three daughters living, *Mary Paul*, *John Paul*, *Walter Matthews Paul*, *Ann Paul*, and *Harriot Paul*. *John Paul* the eldest son died in *October* 1817, having attained the age of twenty-one years. *Walter Matthews Paul* attained that age in *February* 1818. *Mary Paul*, who was the eldest child, had also attained that age, and was married to *M. B. Napier*, and by a settlement made subsequent to her marriage, her interest in the funds bequeathed by the testatrix was assigned to trustees upon certain trusts for the benefit of herself and her husband, and their children.

The trustees, under the will, from time to time invested the dividends which became due upon the imperial annuities in the purchase of *5 per cent.* annuities, and

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the time for the payment of the imperial annuities having arrived in 1819, a bill was filed by them against *Walter Matthews Paul*, Mr. and Mrs. *Napier*, their children, and the trustees of their settlement, and *Ann Paul* and *Harriot Paul*, for the purpose of having the rights in the several funds ascertained.

. . . . . .

John Paul, the eldest son, was tenant in tail of a considerable estate, which, on his death, did not descend to his brother *Walter Matthews Paul*, but was devised by him, after suffering a recovery, to his father.

. . . . . .

Mr. *Agar* and Mr. *Rose* for the Defendant *W. M. Paul.*

The Defendant is not an eldest, but by the death of his elder brother has become an only son. In construing the words elder and younger, the Court has proceeded on the principle, that all are to be considered as younger children except the son who actually takes the family estate and becomes the head of the family. *Duke* v. *Doidge* (*a*), *Lord Teynham* v. *Webb.* (*b*) It is for this reason that an eldest daughter is permitted to take as a younger child, *Beale* v. *Beale* (*c*), *Heneage* v. *Hunloke.* (*d*) A younger son can incur no forfeiture of his rights in that character under a settlement, by the mere death of an elder brother, unless the estate, the title to which alone excluded the elder from the benefits conferred on the other children, descends to the younger son. Nor is even the rule so limited applicable to provisions made by any one not a parent, or in *loco parentis*, *Hall* v. *Hewer.* (*e*) The bequest here is by a grandmother in the life of the father.

(*a*) 2 *Ves.* 203.
(*b*) *Id.* 198.
(*c*) 1 *P. Wms.* 244.
(*d*) 2 *Atk.* 456.
(*e*) *Amb.* 203. 10 *Ves* 174.

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The shares to which the children were entitled have vested at the death of the testatrix, the time of payment not being annexed to the substance of the gift. *Monkhouse* v. *Holme.* (*a*) At least they must have vested when the eldest daughter attained twenty-one in the lifetime of *John Paul.* The share of *Walter Matthews Paul* was therefore vested in him prior to the death of his brother, and could not by that event be devested. *Graham* v. *Lord Londonderry* (*b*), *Driver* v. *Frank.* (*c*) In *Trafford* v. *Ashton* (*d*), a second son was allowed to take, although not born till after the death of the eldest.

Mr. *Wilbraham*, Mr. *Hart*, and Mr. *Williams*, for the other Defendants.

Most of the former cases have applied to persons who, at the time of executing the will, were not *in esse*, and who therefore could only be described generally. Here all the children were alive at the time the testatrix made her will, and if she had meant to exclude the eldest son *John* in particular, she would have named him as she has named *Walter* in the codicil, or have called him *the* eldest son. She has, on the contrary, used the expression, "an eldest son;" *i. e.* any eldest son, or the son who at the time of distribution shall be eldest. It is a description which, till that time, is uncertain and fluctuating.

When the elder brother died, the time of division was not arrived, and *Walter* was then under age; his share therefore could not have been vested, and when he attained twenty-one he was the eldest. But the time of vesting is not very material; for the principle is, that he who claims as younger son, must sustain that cha-

(*a*) 1 *Bro. C. C.* 298.
(*b*) Cited 2 *Ves.* 199.
(*c*) 3 *M. & S.* 25. 6 *Pri.* 41.
(*d*) 2 *Vern.* 660.

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racter when he applies for payment. In *Lord Teynham* v. *Webb*, Lord *Hardwicke*'s attention was called to the time of vesting; he would not say it did not vest, but took the middle course of considering a condition of continuing a younger son to be annexed to the gift. The same rule was acted on in *Chadwick* v. *Doleman* (*a*) and *Savage* v. *Carroll.* (*b*)

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The cases where this rule has been adopted have arisen on gifts by parents, or persons in *loco parentis*. In general, the estate passing to the eldest son has been in the power of the persons making the provision for the younger children, and the same instrument has comprised the estate and the provision. Has the rule ever been applied to portions given by a stranger, who merely contemplated the chance of property descending to the eldest son, as representative of the family?

Argument for the Defendants resumed.

It is difficult to define exactly what is meant by standing *in loco parentis*. In *Teynham* v. *Webb*, the appointment was made by a grandmother, and Lord *Hardwicke* said he should construe it as if it had been in a marriage settlement.

The cases of *Godfrey* v. *Davis* (*c*), *Lady Lincoln* v. *Pelham* (*d*), *Bowles* v. *Bowles* (*e*), *Radcliffe* v. *Buckley* (*f*), *Cook* v. *Arnham* (*g*), are authorities in favour of the younger children.

(*a*) 2 *Vern.* 528.
(*b*) 1 *Ball & Beat.* 265.
(*c*) 6 *Ves.* 43.
(*d*) 10 *Ves.* 166.
(*e*) 10 *Ves.* 177.
(*f*) *Id.* 195.
(*g*) 3 *P. W.* 285.

Mr.

Mr. *Whitmark* for the trustees.

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The questions in this case arise on the claim made by the Defendant *Walter Matthews Paul*, to a fourth-part of the funds, which pass by the will, insisting that though he is now become the only son, and may therefore be said to be the eldest, yet that as he was at the date of the will, and at the death of the testatrix, the second son, he is entitled to a share as a younger child. On the other side, it is contended that he is excluded, by the fact of having become, whatever he might once have been, the eldest son.

The fund which the Court is now required to distribute consists of the Imperial Annuities, and the *5 per cent.* Stock, belonging to the testatrix; the latter disposed of by the codicil; the former by the will. They are to be transferred at the expiration of the term for payment of the Imperial Annuities, which occurred in *May* last; and by the express declaration of the will, the fund was then to be transferred to all the children of *Mary Paul*, except an eldest son. There is therefore an express exclusion of any person sustaining the character of an eldest son; and the trustees are forbid to assign any part to him. It is observable that the distribution of the property is to be effected at a future time; part at the death of the survivor of the father and mother, and part at the termination of the annuities, about eighteen years from the date of the will. There is thus a prospective direction to divide the property among the children, with an express exclusion of an eldest son.

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The only fact then requisite to be ascertained for the true construction of the will, is the period at which the phrase "an eldest son" is to be applied to this family — a phrase capable of a change in its application by circumstances; and the individuals to take or to be excluded being identified, not by name, but by character. The persons to take are the children of the daughter; the person to be excluded, is he who bears the character of an eldest son. The single question, at what period is that character to be ascertained?

For that purpose three different times may be proposed; the date of the will, the death of the testatrix, and the time when the fund is directed to be distributed. Without adverting to the numerous cases that have been cited, all which I have read, a few clear principles deducible from them will enable the Court to resolve this case; the fact being indisputable that *Walter Matthews Paul*, though now the eldest son, was not always such.

First, on principle, is the phrase to be applied only to the person who was eldest son at the date of the will? If so, it was personal to that individual. The testatrix was conversant with the state of the family; in one codicil, she makes a gift to *Walter Matthews Paul nominatim*, as the second son, and must have known, therefore, that he had an elder brother living; if her intention was for any reason to exclude that elder brother *John* personally, there was no difficulty in identifying him by name; far from that, the testatrix has not even used the words "the eldest son," which might have been more descriptive of an individual then in her view, but purposely adopts an expression of indeterminate meaning, "an eldest son." The expression is several times repeated, and seems anxiously to mark an intention

intention to exclude, not a particular individual, but any individual who sustains a particular character. In the same manner, she describes the children of her daughter, not by name, but by character; their father and mother being then living, and the distribution of the fund being postponed till after their death in one case, and till the expiration of eighteen years in the other, it was impossible that she could fail to advert to a variety of events which might change the number of the children, and the relation of younger and elder among them. The anxious adoption of this indefinite expression, "an eldest son," shews that she referred, not to an individual, but to a character, and to any one who sustains it. It is impossible, therefore, to say that the words are not in their nature future, or that she meant to confine the terms of exclusion to the eldest son at the date of the will. In the same codicil, which describes *Walter Matthews Paul* as the second son, she disposes of the property in case of his dying before twenty-one, to the children of her daughter, except an eldest son; this disposition expressly refers to the event of his death; and it is evident therefore that the testatrix contemplated a future state of circumstances, and did not limit her expressions to the present state of the family. On no principle can the terms be confined to the date of the will. The fund being distributable at a future time, on general reasoning, every child coming into existence before the period of distribution would be entitled; to that period, and not to the date of the will, must be applied the words entitling those who take; to the same period must be applied the terms of exclusion. Both classes of expressions refer to future events.

The second period proposed is the death of the testatrix; and it is contended, on the part of the Defendant *Walter*

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Walter Matthews Paul, that at that time the property vested in interest, though not in enjoyment, in all the children except the eldest son; and that *Walter Matthews Paul*, not being then the eldest son, was not excluded, but his share vested, and was not subject to be devested. This question depends on the construction of the words in the latter clause, declaring that the interests given to the children shall be vested interests, and transferable at twenty-one. One construction proposed is to distinguish the clause which declares the interests vested, from that which directs that they shall be transferable. The other construction considers them as one sentence. It is necessary to examine the context, for determining whether the age of twenty-one years is to be applied to both the antecedent parts, or only to the transfer. It has been said, it was the intention of the testatrix that all the children should take vested interests at her death, and that the shares of any dying after that event were transmissible to their representatives; but such a construction is directly contradictory to that clause of the will which directs that the shares of children dying under twenty-one, shall go to their children, if they have any, if not, to the survivors. The shares then could not be vested in the children, since in the event of death before a certain period, they are expressly given to others. There is a farther direction, that if the daughter shall die leaving no child, or all the children shall die under twenty-one without children, the stock shall be transferred according to the appointment of the daughter. It is impossible to declare the shares vested, without negativing these clauses of the will which dispose of them as not vested, expressly providing for every possible case. It has been argued that the shares must be considered vested, because it would otherwise have been unnecessary to insert these clauses of ulterior disposition, which were designed to prevent a child from

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making a testamentary gift before twenty-one, which would have disappointed the intention of the testatrix; but such a disposition was equally necessary in the event of there being no gift. The evident object is to preserve the shares of any who might die entire to their children or to the survivors. The clauses are consistent with the supposition that the shares were not vested, but wholly inconsistent with the opposite construction. It is clear from the immediate words, and from the context, that the shares could not vest till one, at least, of the children, attained twenty-one.

These considerations dispose of the question as to the second period. What, indeed, should induce the testatrix to select the time of her death for determining who was to be excluded as an elder son? None were to take at that time. Her purpose was, for some reason, to exclude the person who sustained the character of eldest son, from participating in her bounty. The period of distribution, therefore, must be that to which the exclusion refers. The Court cannot indulge in conjectures what her reason might have been; the probability is, that the eldest son was otherwise provided for; but I think it unnecessary to consider that point. Whatever her reason was, it applied generally to exclude an eldest son from the division; and the period for ascertaining the individual who sustained that character, was the period of that distribution from the benefit of which it was a cause of exclusion. In all cases of legacies, payable to a class of persons at a future period, the constant rule has been, that all persons coming into *esse* and answering the description at the period of distribution, shall take; and the same rule must be applied to persons excluded. There cannot be one time for ascertaining the class of those who are to take, and another for ascertaining the character which excludes.

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excludes. This rule of referring to the future period of distribution being established by a long series of authorities, the Court must adopt that period, and not alter the state of the will, or the death of the testatrix, unless expressly appointed as the time of distribution. In the present case, the period is fixed beyond doubt, the trustees are directed to suffer the funds to accumulate until the termination of the imperial annuities; that time arrived in *May* 1819; and that is the period to be regarded for ascertaining the individuals excluded: there is no doubt that *Walter Matthews Paul* then sustained the character of an eldest son; and if the trustees were now to assign any part to him, they would act in direct contradiction to the terms of the will.

It is not necessary to refer to former cases; some of which have proceeded much further than this; as *Chadwick* v. *Doleman* (*a*), an excessively strong case; for there, though an appointment had been in favour of an individual by name, that individual having become an eldest son was excluded; the lord keeper declaring that the appointment was upon a tacit or implied condition of not becoming the eldest son. The same doctrine of a tacit condition has been recognized in *Savage* v. *Carroll* (*b*), *Lord Teynham* v. *Webb* (*c*), *Hall* v. *Hewer* (*d*), *Lady Lincoln* v. *Pelham* (*e*), and *Bowles* v. *Bowles*. (*f*) If, therefore, the shares had vested, the vesting would have been *sub modo* only, subject to be devested, and under the condition of not becoming an eldest son.

On both principles, then, I think that *Walter Matthews Paul* is excluded from a share; first, on the general

(*a*) 2 *Vern.* 528.
(*b*) 1 *Ball & Beat.* 265.
(*c*) 2 *Ves.* 198.
(*d*) *Amb.* 205.
(*e*) 10 *Ves.* 166.
(*f*) *Id.* 177.

ground,

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ground, first, that the testatrix looked forward, to a future period, for the classes of those who were to take or to be excluded, and that, at that period, this Defendant sustains the character which excludes, and could not be admitted without contradicting the will; secondly, because, even had the words been more favourable for the argument that he takes a vested interest, yet that a tacit condition was annexed to the gift devesting it, in the event of the character of exclusion devolving on one in whom it had vested.

Cases of hardship may be put both ways. Undoubtedly on this construction, a younger son becoming elder, may be excluded from the provision made for younger children without being otherwise provided for. On the other hand, he might, as elder son, take the principal estate, and as younger, share the portions of his sisters. But, without considering imaginary cases, the Court must proceed on general principles. The present is one of the strongest cases that has occurred against the claim of the second son; the use of the indefinite article necessarily refers the description to a future period.

Declare that the Defendant, *Walter Matthews Paul*, is not entitled to any part of the 7000*l.* bank stock, and 4300*l.* 5 *per cent.* navy annuities, and the 5 *per cent.* annuities purchased with the produce of the imperial annuities.

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New trial of an issue on the validity of a modus. Two new trials having been ordered for misdirection, and the verdict on the third trial, as in the two former, being in favour of the Defendant, the Plaintiff was ordered to pay the costs of the applications in equity, (except those of the first application to the Lord Chancellor,) and the costs of the last trial at law.

THE facts of this case appear in the report of the application to the Vice-Chancellor for a new trial. 4 *Madd.* 214. The motion having been refused by his honour, was renewed before the Lord Chancellor.

Mr. *Wetherell*, Mr. *A. Moore*, Mr. *Heald*, and Mr. *Dowdeswell*, in support of the motion.

Evidence of reputation of the boundaries of the farm ought not to have been rejected. — The question to be decided is, whether by approvement or annexation of part of the common, the boundaries of the farm have not been enlarged? and amounts to the question, what were the boundaries of the common? On that question reputation is evidence. *Webb* v. *Petts* (*a*), *Stransham* v. *Cullington* (*b*), *Congley* v. *Hall* (*c*), *Weeks* v. *Sparke* (*d*).

The lease of 1703 ought not to have been received in evidence. A modus cannot be proved by evidence of a real composition. *Ward* v. *Shepherd.* (*e*)

The Lord Chancellor.

The lease appears to prove nothing on the question of boundaries; the engagement is to pay what is due for the lands demised, or some part thereof, and affords no proof for what lands the sum paid is due. Nothing in that lease authorises the conclusion that any one acre is tithe free.

(*a*) *Noy.* 44. See 2 *Ro. Abr.* 186. *pl.* 5.
(*b*) *Cro. El.* 228.
(*c*) 2 *Rolle*, 1 25.
(*d*) 1 *M. & S.* 679.
(*e*) 3 *Pri.* 608.

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Argument for the motion resumed.

In the judge's charge the documentary evidence was not sufficiently insisted on. There is no case of a farm modus for part of a farm.

Mr. *Trower*, Mr. *Gaselee*, and Mr. *Tinney* against the motion.

The principle of this application is opposed by numerous authorities: *Buller's N. P.* 195. *Clarkson* v. *Woodhouse* (*a*), *Stanley* v. *White* (*b*), *Stockwell* v. *Terry* (*c*), *Reed* v. *Jackson* (*d*), *Richards* v. *Evans* (*e*), *O'Connor* v. *Cook* (*f*), *Manby* v. *Curtis* (*g*), *Bullen* v. *Michel* (*h*), *Hardcastle* v. *Slater* (*i*), *Chapman* v. *Smith* (*k*), *Atkins* v. *Lord Willoughby de Broke* (*l*), *Drake* v. *Smith* (*m*), *Clothier* v. *Chapman* (*n*).

The authority cited of *Webb* v. *Petts* has no analogy to the present case. The question there arose on an application for a prohibition to the Ecclesiastical Court under the statute 2&3 *Ed.*6. *c.*13. *s.*14; proceedings in which the Courts, considering the penalties imposed on failure of proof, found it necessary to be satisfied with slender evidence of the suggestion, that deprived the Ecclesiastical Court of jurisdiction. *Anon.* (*o*), *Austin* v. *Pigot* (*p*).

The LORD CHANCELLOR.

The point now to be decided is, whether the question

(*a*) 5 *T. R.* 412 *n.*
(*b*) 14 *East*, 332.
(*c*) 1 *Ves.* 118.
(*d*) 1 *East*, 355.
(*e*) 1 *Ves.* 39.
(*f*) 8 *Ves.* 535.
(*g*) 1 *Pri.* 225.
(*h*) 2 *Pri.* 399. 424.
(*i*) *Amb.* 41. 3 *Atk.* 245.
(*k*) 2 *Ves.* 506. 515.
(*l*) 2 *Anstr.* 397.
(*m*) 5 *Pri.* 369. *Dan.* 104.
(*n*) 14 *East*, 331 *n.*
(*o*) *Noy.* 28.
(*p*) *Cro. El.* 736.

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on the liability of this farm has been so satisfactorily investigated on the trial of the issue directed by this Court, that the bill should be dismissed on payment of the sum of 4*l.*, leaving the parties to a future contest, if the incumbent thinks fit to file a new bill, or whether, regard being had to the manner of the trial, the Court should require a farther discussion of the question?

The Plaintiff seeks to recover tithes in kind from a farm called *Wootton Farm*, containing 763 acres, and situate in the parishes of *Wootton*, *Whippingham*, and *Arreton:* the defence alleged is a farm modus of 4*l.* payable annually at *Michaelmas*, covering that part of the farm (consisting of 632 acres,) which is situate in the parish of *Wootton;* the rest of the farm pays tithes in kind: the subject in question is the validity of the modus.

A farm modus for part of a farm may be valid.

I recollect no case in which parties have succeeded in establishing a modus, in lieu of all tithes, for part of a farm; but on principle I think that no solid objection can be offered to such a modus. It was perfectly competent for those whose contract would sustain a modus to contract in that form, before the reign of *Richard* the First; this farm being situated in three parishes, the tithe-owner of one parish might contract for a payment in lieu of tithes, of so much of the farm as lies in that parish, although the tithe owner of the other parish might not concur. Though new in *specie*, therefore, the question is not so new in principle as to raise an objection to the issue directed.

This modus is stated as a farm modus.—Courts of equity undoubtedly have a right to decide in the first instance, if they think proper, the question of fact as well as the question of law; but a long course of decision

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sion has established it as matter of sound judicial discretion to send the question of a farm modus to a jury; and that is the constant course. Considering the difference between the question of a farm modus, and the simple question, what was the value of money, or any particular article, at the time when legal memory commences, there is evidently more discretion in sending to trial by jury the question of a farm modus than any other modus; but while is is clear, as I think, that though evidence is improperly received or rejected, the Court will not, for that reason alone, direct a new trial; yet I am of opinion that it abstains from directing a new trial of questions of this kind, only where it is satisfied that the question has been so dealt with, that if the evidence rejected had been received, or the evidence received had been rejected, and the verdict had been different, the court would have been dissatisfied with the trial: but the Court, when it establishes as a rule of sound judicial discretion, that these questions shall be sent to trial by jury, instead of being tried by its own authority, is bound to see that the jury has satisfactorily tried them.

Reason for directing a new trial.

It is the habit of this Court, in ordering an issue, to direct, that, if the substance of the issue is found, but with some special circumstances which may be material in measuring the extent of relief to be given on further directions, that matter should be indorsed on the *postea*. The Vice-Chancellor has, with great propriety, inserted such a direction, in this instance, and the judge on the trial seems to have comprehended the purpose of it.

In order to determine whether the past trial is, in this case, satisfactory, it becomes necessary to state, with some particularity, what evidence has been received and what rejected.

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The testimony of *Robert Knight* shows, that a farm of 400. acres paid 60*l.* a year for tithes, while 632 acres, part of *Wootton* farm, paid only 4*l.*; he states, that that sum was paid as a composition, meaning, without doubt, a real composition. The evidence thus far establishes the fact, that no one ever heard of payment of tithes in kind for these premises; and that in 1785, in 1801, and in 1806, the incumbent of the parish gave receipts for the sum of 4*l.* as a modus; and there is evidence, therefore, of payment of a modus, in round numbers, during forty years.

In this stage of the evidence is produced a counterpart of a lease dated in 1703; and the judge's report states, that notwithstanding an objection taken, he admitted it as evidence of reputation, but of reputation of what, he has not stated. That lease, an instrument executed between the owner of the land and his tenant, contains a covenant by the landlord to pay taxes, &c. "except the yearly composition, modus, or pension of 4*l. per annum* to the minister of *Wootton*." The question on this instrument, if properly admitted in evidence, is, whether its effect has been duly brought before the jury; and if improperly admitted, whether the jury gave more weight to it than they ought to have given?

In *Butler* v. *Michel* (*a*) the House of Lords clearly approved the opinion of the majority of the judges in the Court of Exchequer, that an occupier of lands sued for tithes, cannot insist upon a pecuniary payment as a modus, and at the same time a real composition, which are widely different:—a modus may, perhaps, originate in a real composition, but must be proved to have existed from the time of legal memory; a real composition

(*a*) 2 *Pri.* 599.

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may have been made within that time, by an agreement with the parson, under the sanction of the ordinary, before the restraining statute. (*a*) The Courts have held, that a Defendant insisting on a real composition, must produce evidence of the actual existence of the deed at some time, and that it is not sufficient to show non-payment merely as evidence of the loss of such a deed; allowing such evidence, every real composition might be turned into a modus. (*b*) Recollecting that doctrine, it remains to consider, in reference to this instrument, whether, consistently with it, the payment could be nothing but a modus, or whether it might not be a real composition or a pension.

Distinction between modus and composition real.

If this instrument was properly admitted in evidence, but proper observations were not made on it to the jury, or if it was improperly admitted in evidence, and must have had great weight with the jury, in either view there is reason for a new trial; and it may, therefore, not be necessary to express an opinion on the propriety or impropriety of its admission. I should have thought it my duty to state it to the jury, even if the weakest of all evidence; it was extremely material to know the opinion of the owner of the estate and the tenant, on this payment; and the lease acquires great force from the subsequent receipts of the rector. It ought, therefore, to have been particularly presented to the attention of the jury, in its strength or weakness, first, by itself, and afterwards in connection with the other instruments. It might have been properly observed, that the instrument determines nothing on the nature of the payment, whether a modus, a composition real, or pension; but leaves those points in total uncertainty.

(*a*) 13 *Eliz. c.* 10.

(*b*) *Knight* v. *Halsey*, 2 *Bos.* & *Pull.* 172. and the authorities there cited.

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In the view which I take of the case, it is not my duty to express an opinion on the effect of receiving the evidence of reputation: there are cases in which it is material to know the particular nature of the evidence;—for instance, when it is conceded that evidence of reputation would be admissible to prove the boundaries of a common, may not the boundaries of a farm be proved, not immediately by reputation, but by approximation; that is, proving by reputation the boundaries of the common, which coincide with the boundaries of the farm? Suppose a parochial modus extending over, not the whole of a parish, but the whole with the exception of farm A; then in order to ascertain what is covered by the modus, evidence by reputation is given of what constitutes A., not directly, but indirectly, by showing what constitutes B., to which such evidence is applicable. But I lay this out of consideration, and should not decide the general question without requesting the judge to state the particular evidence.

There are two grounds on which I think that the parties cannot complain, if the court, before it gives farther directions, requires a new investigation. I should wish that some communication may be made by the counsel engaged on both sides here, of the doctrines established in this court and the Exchequer relative to tithes and real compositions; and I have often endeavoured to impress the expediency, when issues are directed by this court, of employing in consultation some counsel who had been concerned in the case here.

The ground on which I proceed in directing a new trial is this, that I think that with respect to the question, whether this payment has been made as a modus, the case has not been satisfactorily tried, and that unless we are to say that all this documentary evidence

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is hereafter to be repudiated in all other courts, sufficient has not been said on it to lead the jury to a right conclusion.

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The directions given on the hearing of the case, for the trial of the issue, were, in my opinion, quite right, not merely considering this as a question of farm modus, but because, having regard to the pleadings, no other issue could, as I think, have been directed. Looking at the lease, I could not have refused to the occupier the benefit of a trial whether this was a modus; that instrument would have induced much doubt in my mind, whether the payment was a modus, a pension, or a composition; but I could not have granted an issue to try whether it was a composition; it would have been absurd to direct an issue whether this was a composition real, because, if the parties could not produce evidence to support a composition real they must have failed, though on other grounds entitled to succeed. Nothing appears to induce me to think that this was a pension, much less, that a pension and a composition are nearly synonymous, which the jury seems to have been told. A pension is widely different both from a composition real and from a modus: the parson of a parish may be entitled to a pension from lands, to the tithe of which he never had a claim. A pension, that is, a charge, may be due for lands tithe free, and cannot be treated as a payment in respect of tithes. In many cases, within my own experience, when parties have claimed exemption by composition real, the courts have, for the reason before-mentioned, rejected evidence of a modus.

Nature of a pension.

The trial has failed for this reason: it is impossible not to see that the judge considered the lease as conclusive

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conclusive evidence that the payment was a modus. The judge calls the attention of the jury to that instrument, as giving to this payment the character of pension, or modus, or real composition; but he tells them that a composition is a temporary agreement, and that a pension and composition are the same thing. The jury ought to have been told, that in the lease of 1703 the payment is called a modus, pension, or composition; a receipt in 1785 describes it as a modus, but in 1703 the parties have shown that they know not whether it is a modus, a composition, or a pension. Recollecting then this uncertainty, that a composition real requires peculiar evidence, and that although enough may not appear to sustain the payment as a composition, yet if the parties were dealing with each other as if it were a composition, it cannot be a modus, and if dealing as for a modus it cannot be a pension; the jury should have been instructed that they were to determine the character of this payment, which is subject to so much uncertainty.

The documentary evidence is certainly inconsistent, and admits many reasonable objections to the credit of each instrument; but the practice of our courts, for many centuries, has been absurd, if, by reason of such inconsistency, these documents are not to obtain much more credit than was allowed to them on this trial.

This case has not been tried, and I think it better to exclude the possibility of filing another bill, by directing a new trial, reserving the costs of the former.

For the following note of the further proceedings in this cause the editor is indebted to Mr. *Walker*.

Upon

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Upon the second trial which took place at the *Winchester* summer assizes, before *Wood* B., a verdict was again found for the Defendant, (the Plaintiff at law). In addition to the evidence on the former trial, a receipt was produced, dated in 1783, in which the rector, Mr. *Walton*, acknowledged the payment of the 4*l.* without calling it a modus.

Mr. *Wetherell* and Mr. *A. Moore*, now moved for a new trial (*a*), on the ground of misdirection of the judge as to the nature and weight of the evidence. The objections were, first, that he had stated to the jury, that the ancient documentary evidence was entitled to little or no weight, and that more stress had been laid on the modern evidence than was fairly due to it; that the attention of the jury ought to have been directed, not only more particularly to the general character of the ancient evidence, but also to the combined effect of it, which in this case, from its uniformity for a period unusually long, was almost decisive in favour of the rector. Secondly, that he had treated the words, yearly composition, in the lease of 1703, as meaning real composition, and that the possibility of their meaning a temporary one, and the doubts which that construction must necessarily raise, as to the nature of the payment, were never presented to the mind of the jury. Thirdly, that no observation had been made on the omission of the word modus in the receipt of 1783; and, fourthly, that the

(*a*) The Plaintiff was also desirous that the form of the issue should be changed, but the Lord Chancellor was of opinion that no order to that effect could be made on a motion for a new trial; and that the propriety of the form of the issue could be questioned only on an appeal from the decree by which it was directed. A petition of appeal was accordingly presented, and heard at the same time with the motion.

Romney

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WHITE v. LISLE.

Romney March cases (*a*), which were mentioned by the judge to the jury, ought not to have been alluded to.

Mr. *Trower*, Mr. *Gaselee*, and Mr. *Tinney* opposed the motion; and contended that the judge, in substance, had stated that the ancient documents (to which he had adverted in detail, although it must be admitted by every one that little reliance could be placed on them) were clearly evidence; but, secondly, that they were not conclusive evidence, and that the jury were to give such weight to them as they might think proper. The only thing, it was argued, strictly to be inferred from the lease was, that the payment was a permanent one, and as it could not be a pension, the question, whether it was a real composition or a modus, being uncertain, was properly left to the jury: the names in the lease were inserted as words of course, and, as evidence, were therefore not of much importance, and the observations which were made by this court on the motion for the second trial were brought before the jury by the Defendant's counsel.

The LORD CHANCELLOR.

I shall not again enter into a statement of the reasons which induced me to grant a new trial in this cause, after the issue was tried before Mr. Justice *Park*, particularly as other points were then raised, which were not entered into upon the second trial. The only question now, as I understand, is, whether this payment of 4*l.* is a modus? The evidence represents that word to have been occasionally used, when the payment was made; but the first receipt produced for the sum in question is dated in 1783; that receipt ascertains 4*l.* to be the amount paid, but there is no expression in it which ascertains

(*a*) 2 *Ves.* 506.

the

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July 15.

the nature of the payment. In 1785 there is a receipt which not only mentions the sum of 4*l.*, but mentions it as being a modus. It has been argued, that the learned judge who tried this issue ought to have remarked to the jury, that the receipt of 1783 did not contain the word modus. It does appear to me that if I had tried the cause, I should have mentioned that fact, but I should have accompanied it with this observation, that if there was any hesitation in giving the name of modus to this payment in 1783, it had been overcome in 1785, as that name is given to it in the receipts of that and subsequent years. But the circumstance which it appears to me ought to have been particularly called to the attention of the jury is, the names by which this payment is designated in 1703. It appears that the patronage of the living and the ownership of the estate had long continued in the same family; and a lease dated in 1703 is produced, by which the land-owner lets the farm to a farmer, who undertakes to pay all out-goings, except the yearly composition, modus, or pension of 4*l.* per annum to the minister of *Wootton*. The learned judge, in his summing up, speaks not only of real, but also of yearly compositions; the former subject he treats as it should be treated. This issue being to ascertain whether it was a modus or not, the fact of its being a real composition would be fatal to the Plaintiff's case; but the judge seems to say, that it is incumbent on the Defendant to have proved that; this could hardly be expected from him, as, if it were afterwards set up as a real composition he would endeavour to establish the contrary; perhaps, however, no observation of much importance in favour of the Plaintiff could have been made on this point, except that it might have been a real composition, regard being had to the uncertainty whether it was a modus or not. The judge, on the other hand, speaks of a temporary composition;

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composition; but then he treats it, as it seems to me, without sufficiently distinguishing between that which is a composition, in the exclusive sense of the word, and a modus: the fair way of putting it would have been to have given an opinion as to the meaning of the words in the deed; the jury should have been told whether the judge thought yearly composition and modus meant the same or different things; if in legal construction they meant the same, that would be favourable to the Plaintiff's case; but if yearly composition meant, as it generally does, a temporary composition, as contra-distinguished from a modus, that would be strong evidence that this payment was not a modus, or, at least, that the land-owner, in 1703, could not undertake to say which it was. If such were the meaning of the word, it ought also to have been observed to the jury, that before 1703 there was no receipt in the possession of the landowner describing it as a modus, and from that time to 1785 there is no such receipt in the possession of the family; and the fair way then of putting it to the jury would have been to have said, if you should have been of opinion, if this had been tried in 1785, that this payment was not a modus, the question you will now have to determine is, whether the transactions subsequent to 1785 so bear down all the observations that can be made on the antecedent evidence, that you can take upon yourselves to say, that that which has been denominated a modus since 1785, was and ought to have been so denominated before.

With respect to the written documents which were produced, I am ready to admit, that that species of evidence is open to very strong observations on the other side, but I cannot agree that no observation is to be made for it. The value of such documents is to be estimated by the particular circumstances of each case in

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WHITE v. LISLE.

in which they are produced. With respect to the taxation, the inquisition, and so on, the parties were interested in representing the property to be taxed at as low a rate as could be believed; but the question is, whether they could venture, and that for a series of years, to put it at a rate so far remote from what was the real value, as they have done, if this 4*d.* is a valid modus. And I cannot help thinking, I speak with deference, that it is not right to state to a jury some very remarkable instances in which former juries have found a modus valid, without stating those in which other juries have not ventured to go the same length as those who have pronounced the verdict in the one or two cases referred to. Upon these grounds, provided the Plaintiff, in this suit, will undertake to give the occupier no further trouble should this verdict be against him, I think that a new trial ought to be granted.

The Plaintiff, *Richard Walton White*, by his counsel, undertaking that if, upon a new trial of the said issue, the jury should find a verdict against him, he should be finally concluded by such verdict, as to the matters in question in these causes, it was ordered that the parties should proceed to a new trial of the said issue, at the next *Winchester* assizes; and it was ordered, that the Defendant, *S. M. Phillips*, should be the Plaintiff at law, and the Plaintiff *R. W. White*, should be the Defendant at law; and if any of the witnesses, examined upon the former trials, should be proved to the satisfaction of the Court, at the time of such new trial, to be dead, or in such a state of health as not to be capable of attending, then the judge's notes of the testimony of such witnesses were to be read at the said new trial; and the costs of the former trial were reserved, until after the new trial; and either of the parties was to be at liberty

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liberty to read the depositions taken in the cause, at the trial of the issue, in case it should appear to the satisfaction of the court, that such witnesses, or either of them, were dead, or in such a state of health as not to be capable of attending.

A new trial accordingly took place before *Graham* B., at the following *Winchester* Summer assizes, when a verdict was returned, for the third time, in favour of the Defendant, *Susan March Phillips*, the Plaintiff at law.

16th *August*, 1821. "His lordship doth order, that the Plaintiff's bill do stand dismissed out of this court; and it is ordered that the Plaintiff do pay unto the Defendant, *Susan March Phillips*, the costs of these suits, including the costs of a motion for a new trial, before the Vice-Chancellor, and also the several applications made by the Plaintiff to the Lord Chancellor, except the costs of the first application for a new trial before the Lord Chancellor; and also the costs of the last trial at law: such costs to be taxed by the said master, Sir *John Simeon*, bart., to whom these causes stand referred. And it ordered that the petition of appeal lodged by the Plaintiff against the decree, do stand dismissed, and that the sum of ten pounds, deposited with the register, on setting down the cause to be heard on the said petition of appeal, be paid to the Defendants." *Reg. Lib. B.* 1821. fol. 277.

THE END OF THE SECOND PART.

REPORTS

OF

CASES

ARGUED AND DETERMINED 1818.

IN THE

HIGH COURT OF CHANCERY.

Commencing in the Sittings before

HILARY TERM,

58 GEO. III. 1818.

CURRE *v.* BOWYER.

July 31.

WILLIAM GILES, a Defendant in this cause, having been erroneously named *Edward Giles* in the title of the interrogatories exhibited for the examination of witnesses on behalf of the Defendant *Edward Bowyer*, the Vice-Chancellor, on the 13th of *July* 1818, ordered that the Defendant *Bowyer* might be at liberty to alter the christian name of the Defendant *Giles*, in the title of the interrogatories, from *Edward* to *William*. Reg. Lib. A. 1817. fol. 1392.

The christian name of one of the Defendants having been mistaken in the title to interrogatories and depositions, an order was made for correcting that error, and reswearing the witnesses.

It afterwards appearing that the error extended to the title of the depositions which had been taken under a com-

1818.

CURRE v. BOWYER.

a commission then in execution for the examination of witnesses, a motion was made on behalf of the Defendant *Bowyer*, that he might be permitted to alter the christian name of the Defendant *Giles* in the titles of the different sets of original and cross interrogatories exhibited for the examination of witnesses on the part of the Defendant *Bowyer*, and also in the title or titles of the depositions, if any, taken thereon.

Mr. *Mascall* for the motion.

Mr. *Agar*, against the motion, objected, that after the alteration, perjury could not be assigned on the depositions; and cited *White* v. *Taylor*. (*a*)

The LORD CHANCELLOR.

The witnessess must be all re-sworn after the title of the interrogatories has been rectified, and the Defendant *Bowyer* must pay all the costs. It is a point of nicety; but I will go the utmost length, consistent with the safety of the proceedings, to relieve a mere mistake.

The following order was made: "His Lordship doth order that the commissioners named in the commission for the examination of witnesses issued in this cause, be at liberty to alter the christian name of the said Defendant *Giles* from *Edward* to *William*, in the titles of the several sets of original and cross interrogatories exhibited under the said commission; and also that the examiner be at liberty to make the same alteration in the title or titles to the interrogatories filed in this cause in his office, in which the said Defendant is named *Edward Giles*; and it is ordered that the said commis-

(*a*) 2 *Vern.* 435. 1 *Eq. Ca, Ab.* 80. pl. 7.

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CURRE v. BOWYER

sioners, and the said examiner respectively, be also at liberty, in the depositions already taken upon such respective interrogatories, to alter the name of *Edward Giles* to that of *William Giles*, and afterwards to re-swear such of the respective witnesses who have been examined on the present interrogatories, as are willing to be re-sworn to the truth of the depositions so altered; and it is ordered that the said commissioners and examiner do certify to this court, which of the several witnesses have been so re-sworn to the truth of the respective depositions so altered; and it is ordered, that the said Defendant *Edward Bowyer* do, previous to such alteration being made as aforesaid, pay unto the said Plaintiff the costs and reasonable charges which have been incurred by him with respect to the examination of witnesses on the said interrogatories, and also the expenses of making such alteration as aforesaid, together with the costs of this application; such costs and charges to be taxed, &c.; and it is ordered, that the order obtained in this cause, dated the 13th day of *July* instant, be discharged." Reg. Lib. A. 1817, fol. 1608.

HARCOURT *v.* RAMSBOTTOM.

Aug. 12.

ON the 13th of *May* 1817, the Plaintiff obtained the common injunction for want of answer. Reg. Lib. A. 1816. fol. 956.

An order obtained, after exceptions to the answer allowed, for entering *nunc pro tunc*, an order to dissolve an injunction absolutely for want of cause shewn to the contrary, is not irregular; nor is the Plaintiff entitled to continue or revive the injunction.

On the 5th of *August* 1817, the following order was made for dissolving the injunction: "Whereas by an order dated the 19th day of *July* 1817, it was ordered

1818.

HARCOURT v. RAMSBOTTOM.

that the injunction granted in this cause, until answer and other order to the contrary, should be dissolved, unless the plaintiff, his clerk in court having notice thereof, should on the 28th day of *July* 1817, shew unto the Court good cause to the contrary, which time for shewing cause stood enlarged to this day; now upon motion this day made unto this Court, by Sir *Samuel Romilly* and Mr. *Roupel* of counsel for the Defendant, it was alleged that due notice had been given of the said order, as by affidavit appears, and no cause having been shewn to the contrary thereof, during the sitting of the Court, it is, at the rising thereof, ordered that the injunction do stand absolutely dissolved." Reg. Lib. A. 1817. fol. 2127.

On the 24th of *November* 1817, it was ordered, that the Defendant's clerk in Court do accept the exceptions to the sufficiency of the Defendant's answer, as if the same had come in in time. Reg. Lib. A. 1817. fol. 31.

On the 20th of *December* 1817, the usual reference of the answer and exceptions was made to the Master, to certify whether the answer was sufficient. Reg. Lib. A. 1817. fol. 320.

On the 22d of *July* 1818, on the motion of Mr. *Roupel*, of counsel for the Defendants, it was ordered, that the order made in this cause, on the 5th day of *August* 1817, which has been drawn up, but omitted to be entered within the time limited by the rules of this Court, be entered *nunc pro tunc*, and thereof notice is to be given forthwith. Reg. Lib. A. 1817. fol. 1639.

After the 5th of *August* 1817, fifty-six exceptions were taken to the answer of the Defendants; on the 30th of *June* 1818, the Master certified that he had allowed thirty

thirty of the exceptions; and on the 11th of *July*, an order was obtained for leave to amend the bill, and that the Defendants might answer the amendments and the exceptions at the same time.

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A motion was now made, on behalf of the Plaintiff, to discharge the order of the 22d of *July* 1818, and to continue or revive the injunction.

Aug. 12.

Mr. *Bell*, Mr. *Montagu*, and Mr. *Phillimore* in support of the motion.

Exceptions to the answer having been filed and allowed, if the order dissolving the injunction were now entered, it would contain a false allegation; namely, that no cause is shewn against dissolving the injunction, while exceptions to the answer are pending. The Plaintiff may shew exceptions for cause after failing on the merits, as he may shew cause on the merits after exceptions over-ruled. *Gilb. For. Rom.* 97. An order not entered and served is a nullity.

Sir *Samuel Romilly* against the motion.

At the time appointed for shewing cause against dissolving the injunction, cause was shewn, but not sufficient, and insufficient cause being considered as no cause, the order according to the usual form contains a recital to that effect. By the established practice, the Plaintiff is put to his election to show exceptions or merits against dissolving the injunction; and failing on the merits, he cannot afterwards shew exceptions. In this instance, the time for shewing cause is enlarged, which amounts to a waiver of shewing exceptions. The mere omission to enter the order when it was made, is no ground for discharging it; after the time within which the registrar enters an order without the direction of

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HARCOURT v. RAMSBOTTOM.

the Court is elapsed, an order may be obtained for that purpose by motion of course, and is clearly not irregular.

The LORD CHANCELLOR.

This is a case of great consequence to the practice of the Court.

An answer having been filed, the Defendant moves to dissolve the injunction which had been obtained for want of answer, on the allegation that he has put in a sufficient answer: when the time comes for shewing cause against dissolving the injunction, it is for the Plaintiff to decide whether he will give credit to that allegation. If not, he must shew exceptions for cause; and he has no other course, except an undertaking to shew cause on the merits at the next seal. If he makes that undertaking, I apprehend that he has no right afterwards to shew exceptions for cause (*a*); and, if he fails on the merits, the injunction is dissolved.

After undertaking to shew cause on the merits against dissolving an injunction, exceptions cannot be shewn for cause.

I will

(*a*) PINHEIRO *v.* PORTER.

The First Seal after *Michaelmas*, 12 *Geo.* 2. 1738.

After enlargement of the time for shewing cause against dissolving an injunction, the Plaintiff cannot shew exceptions for cause.

It was moved in this case to enlarge the day for shewing cause why the injunction should not be dissolved upon the coming in of the Defendant's answer; to which Lord *Hardwicke* (Chancellor) said, "You must then take the answer as it is, and you cannot come after and shew exceptions for cause;" upon which the Plaintiff's counsel urged, that the Defendants were in contempt for not answering in time, and had not cleared their contempt by paying the costs, and therefore produced the attachment, and moved upon that; but it was held that the Defendants might clear their contempt in court, by paying the costs there, which they offering to do by their solicitor,

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HARCOURT v. RAMSBOTTOM.

Whether an injunction dissolved on merits can be revived on merits disclosed in the answer to subsequent exceptions. *Quære.*

I will not say, that where a plaintiff has failed on merits, there may not, on the answer to exceptions, afterwards appear a case in which he may be entitled to an injunction on the merits; but then he must come to revive the injunction, shewing that the answer to the exceptions has established a case, which, if he had had it before, would have entitled him to an injunction.

I will,

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tor, this was overruled. It was then said for the Plaintiffs, that they had the whole day to shew cause, and they would prepare exceptions, which it was agreed they might do, but they agreeing afterwards to take the answer as it is, the day for shewing cause was enlarged to the third seal.—Mr. *Coxe's* MSS. 7th *Nov.* 1738, common injunction for want of answer. —Reg. Lib. B. 1738, fol. 56. The register has been examined without success for a subsequent entry in this cause.

PEYTO *v.* HUDSON. (*a*)

12th *March*, 27 *Geo.* 2.

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The bill in this case was for an injunction, &c., and the Defendant not having answered in time, the common injunction went upon an attachment, and the answer being come in, the usual order was made to dissolve the injunction, unless cause, and thereupon the Plaintiff having taken exceptions to the answer, the exceptions were shewn as cause against dissolving the injunction, but according to the course of the court, the order was for the Plaintiff to procure a report of the answer, being insufficient in four days, or otherwise the injunction to be dissolved without further motion (*b*); and the Master being attended upon the answer, he reported it to be

(*a*) 2 *Madd.* 555. n. (*b*) Reg. Lib. B. 1753, fol. 179.

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HARCOURT v. RAMSBOTTOM.

I will, therefore, not undertake to pronounce an opinion that the answer to exceptions may not supply a case of merits; but the Court is extremely anxious to oblige the Plaintiff to rest at once on exceptions or merits; if he were permitted to vacillate, such hardship would ensue, as this Court cannot allow.

Unless I mention the case again the injunction may be considered as dissolved.

Aug. 14. The Lord Chancellor intimated that he retained the opinion which he had expressed, and that the order pronounced on the 28th of *July* might be given out.

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sufficient, and thereupon the Defendant took out execution upon his judgment at law, and the Plaintiff, to prevent its being executed upon his goods, paid the money into the hands of the sheriff, and moved the Court of Chancery at the next seal after upon the merits of the case, that the injunction might be revived and continued to the hearing, and that the money paid into the hands of the sheriff might be returned to the Plaintiff. But the Lord Chancellor said, he never knew the Court revive such an injunction after execution executed; and that as the Plaintiff had relied upon the answers being insufficient, which were found otherwise, he was too late now to move upon the merits; and therefore refused to make any order; but said, the Plaintiff might, if he thought proper, proceed in his cause to get a decree.—Mr. *Coxe's* MSS.

1818.

ABEL WHITEHOUSE, ABRAHAM WHITEHOUSE, and WILLIAM WHITEHOUSE, Plaintiffs; JOSEPH PARTRIDGE, THOMAS PRICE, and EDWARD FISHER, Defendants. (a)

Aug. 15. 17.

An injunction to restrain an extent having been granted by the Vice-Chancellor upon terms of paying the money in question into a banking-house within a month, the Lord Chancellor, on the motion of the Defendant, and evidence of threats of the Plaintiff to leave the kingdom, refused a writ of *ne exeat regno*, but ordered that the injunction should be dissolved, unless the money was paid within three days; and intimated a doubt of the jurisdiction of the Court to enjoin against an extent.

ON the 2d of *July* 1818, an application for an injunction was made to the Vice-Chancellor, supported by an affidavit of the plaintiff, *William Whitehouse*, in substance as follows.

In

(a) MACKINTOSH *v.* OGILVIE. (a)

10th *March* 1747.

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This was a motion to discharge a writ of *ne exeat regno*. The Plaintiffs were assignees of a bankrupt, the Defendant a creditor, who, before bankruptcy, had made arrestments in *Scotland* on debts due to the bankrupt from persons there, and on affidavit of his getting the money into his hands, the writ was ordered. He now moved to discharge the order, upon a supposition that he had a right to proceed by arrestment.

The LORD CHANCELLOR. The Defendant had not obtained sentence before the bankruptcy; it is then like a subsequent foreign attachment by the custom of *London*. Would this Court suffer a creditor to obtain pri-

due to the bankrupt's estate there, to an amount much beyond his own , was, upon evidence of his intention to quit the kingdom, restrained by of *ne exeat regno*.

(a) *Dick.* 119. 4 *T. R.* 193. n.

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1818.

WHITEHOUSE v. PARTRIDGE.

In *May* 1811, the Plaintiffs, who carried on the business of nail and ironmongers at *West Bromwich*, in the county of *Stafford*, in co-partnership, obtained from the commissioners

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ority by such an attachment only, if no sentence was pronounced before the bankruptcy? Certainly not. The true way is for the Defendant to give security, if the Court of Session will not regard the right of the assignees. I cannot grant an injunction or prohibition to the Court of Session, but I will certainly restrain the party. I will not permit a creditor here to gain such a priority, to pass by the commission of bankruptcy, go into *Scotland* or *Holland*, where arrestments are suffered, and arrest debts there, &c. to obtain a preference, and evade the laws of bankruptcy here. That is the nature of the present case. The Defendant endeavours to procure an entire satisfaction by another law over effects there. If I discharged the writ, he might go out of the kingdom, and evade all account here. If the Defendant were not going abroad I would do nothing; but as he is, I shall not discharge this writ without security to abide the event of the cause. — MS.

The facts of the case on which the writ was issued, appear from the entry of the order for that purpose in the Register, 24th *February* 1747. "Upon consideration this day had by the right honourable the Lord High Chancellor, &c. of the humble petition of the Plaintiffs, shewing that a commission of bankrupt issued against *John Aberdeen*, late of *London*, merchant, bearing date the 29th day of *September* 1746, and he was thereupon found a bankrupt, and the Plaintiffs (together with one *Jeremiah Cape*, since deceased,) were chosen assignees of his estate and effects; that the said bankrupt, before his bankruptcy, having dealt considerably into *Scotland*, there was due to him in that country at the time of issuing the said commission, upwards of 700*l*., for the better recovering and getting in the same, the Plaintiffs, together with the said *J. C.*, granted their power of attorney to a merchant in *Scotland*; that on their agent's applying to the several debtors in that country for payment of the debts due from them to the bankrupt's estate, they severally informed

missioners appointed by statute 51 *G.* 3. *c.* 15., a loan of exchequer bills to the amount of 5000*l.*, of which sum they, in pursuance of a previous agreement, advanced

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WHITEHOUSE v. PARTRIDGE.

informed him that they would readily pay, but that the Defendant, *Thomas Ogilvie*, a merchant, residing in *London*, pretending to be a large creditor of the said bankrupt, had sent down orders to his agent in *Scotland*, to arrest in the hands of the debtors all the debts due to the said *J. Aberdeen* the bankrupt, in *Scotland*, which he had accordingly done, and that they could not pay till those arrestments were removed; that the Plaintiffs have lately received information from their said agent in *Scotland*, that the said Defendant, *T. Ogilvie*, had proceeded on the said arrestments in the courts of justice in that country, and although the Plaintiffs by their agent had made a defence, and insisted on the said commission of bankruptcy and assignment, yet the said Defendant, *T. Ogilvie*, so far prevailed as to obtain decreets or sentences for the payment to him of the money so arrested, and some of them had already been obliged to pay their debts to the said Defendant, *Ogilvie's* agent, and the others of them would soon be obliged to do the same, although there appears to the Plaintiffs to be due to the said Defendant, *T. Ogilvie*, only 31*l.* 2*s.* 9*d.* from the bankrupt; that the said Defendant, *Ogilvie*, who has resided some years in *London*, and traded as a merchant there, is now fitting out a ship to go on a voyage to *Guinea* and the *West Indies*, and intends very soon to proceed in her himself, whereby the Plaintiffs will be prevented from recovering the monies the said Defendant's agent has already received on the said arrestments in *Scotland*, and the other monies which the said Defendant's said agent will receive on that account, as by affidavit appeared; that the said *Aberdeen's* creditors will, by such contrivances, be defeated of a very great part of the said bankrupt's estate, which, they hope, ought to go and be divided proportionably among the creditors who have or shall come in, in due time, and prove their debts under the said commission; that the Plaintiffs have filed their bill against

1818.

WHITEHOUSE v. PARTRIDGE.

vanced 1400*l.* to the Defendant, *Partridge*, and conformably to the provisions of the act, the Plaintiffs executed their joint and several bond to his majesty, his

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against the said Defendant, *T. Ogilvie*, as by the six clerks' certificate appears; it is ordered that a writ of *ne exeat regno* do issue against the said Defendant, *T. Ogilvie*, until he shall fully answer the Plaintiff's bill, or this Court make further order to the contrary; and the same is to be marked for the sum of 300*l.*, and to that end the said writ is to be indorsed in words at length, and not in figures."—Reg. Lib. B. 1747. fol. 167.

SEALY *v.* LAIRD.

At the ROLLS, 10th *January* 1792.

A writ of *ne exeat regno* was granted in respect of a debt for which the Plaintiff had made himself liable, on the Defendant's account, but which he had not yet paid.

The Defendant was an *English* merchant established at *Malaga;* the Plaintiff acted as his agent and correspondent in *England* for several years, and was, by agreement, allowed a commission on all the orders he procured to be sent to the Defendant from *England*. In the course of these dealings between the Plaintiff and Defendant, the Plaintiff, by the Defendant's direction, chartered a ship for the Defendant, on a voyage from *London* to *Malaga*, and thence to *Bremen*. In the charter-party which the Plaintiff executed, he was stated to be the agent of the Defendant. After the voyage had been performed, the owner of the ship brought an action of covenant against the Plaintiff, upon the charter-party, and recovered a verdict for 800*l.*, which was 200*l.* less than he had at first demanded, and the Plaintiff being unable immediately to pay the 800*l.*, an agreement was entered into between the owner of the ship and the Plaintiff, that he should pay the 800*l.* by instalments of 50*l.* a year, without interest, and that the judgment should stand as a security for payment of the instalment. The Plaintiff had not yet paid any of the instalments, but the Defendant coming to *England*, and being about shortly to return to *Malaga*, the Plaintiff filed his bill for an account of all dealings and transactions between them, and prayed, that in taking the

1818.

WHITEHOUSE v. PARTRIDGE.

his heirs, and successors, in the sum of 10,000*l.*, conditioned for the payment of 5000*l.* by instalments, and *Partridge*, together with *J. Round*, *W. H. Easturell*, and *J. Hatchly*, as the sureties of the Plaintiffs, in like manner became jointly and severally bound to his majesty, his heirs, and successors, as sureties for the Plaintiffs, for the due payment of the loan of 5000*l.*; *Partridge* becoming bound in the penal sum of 4000*l.* as surety for 2000*l.*, and the other parties respectively, in the sum of 2000*l.*, as sureties for the three several sums of 1000*l.* each.

The Plaintiffs paid the first two instalments on the bond, amounting to 2500*l.* with interest to the 12th of *July* 1812, and under the statute 52 *G.* 3. *c.* 137. the time for the repayment of the remaining instalments

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the account he might be allowed 791*l.* 5*s.* 6*d.*, in respect of the said bond so entered into by him; and that the Defendant might be restrained by a writ of *ne exeat regno* from going out of the kingdom.

Upon an *ex parte* petition to Sir *R. P. Arden*, Master of the Rolls, supported by an affidavit, stating all the above facts, and that the Defendant was indebted to the Plaintiff in 30*l.*, upon the balance of accounts, independently of what was due in respect of the bond entered into by him, and in 791*l.* 5*s.* 6*d.*, in respect of the bond, in manner before mentioned; His Honor, after much consideration, made an order for a writ of *ne exeat regno*, and directed it to be indorsed with the sum of 791*l.* 5*s.* 6*d.*

After his Honor had made the order, he stopped it in the hands of the register, and after some days directed him to deliver it out. — From Mr. *Romilly's* notes. Lord *Colchester's* MSS.

10th *January* 1792. "His Honor doth order, that a writ of *ne exeat regno* do issue against the said Defendant, until he shall fully answer the Plaintiff's bill, and this Court make other order to the contrary; and it is further ordered that such writ be marked in the sum of 791*l.* 5*s.* 6*d.* in words at length, and not in figures." Reg. Lib. B. 1792, fol. 35.

was,

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was, with the consent of the sureties, enlarged, one-third, amounting to 833*l.* 6*s.* 8*d.*, being made payable on the 1st of *February*, and the other two-thirds respectively, on the 1st of *April*, and the 1st of *August*, 1813; and on the 29th of *July* 1812, the Plaintiffs and their sureties entered into bonds for the payment of the last mentioned several sums and interest.

On the 4th of *February* 1813, a commission of bankruptcy was issued against the Plaintiffs, under which they were declared bankrupts, and the Defendants, *Price* and *Fisher*, were chosen assignees; and in *October* 1815, the Plaintiffs obtained their certificate.

At the time of the bankruptcy the whole of the last mentioned instalments was due, and *Partridge* had not paid to the Plaintiffs the sum of 1400*l.*, his proportion of the loan, but was then indebted to them in the sum of 1844*l.* 8*s.* 2*d.*, on account thereof, and under the provision in the first act (*a*), entitling the commissioners in the event of any person who should have given bond in respect of an advance of exchequer bills becoming bankrupt, to payment in preference to every other creditor, the commissioners by *Wm. Holden*, their secretary, obtained on the 23d of *March* 1813, an order from the Lord Chancellor, that the assignees should, out of the estate of the plaintiffs, in preference to the other creditors, pay to the cashier of the bank of *England* the sum of 2500*l.* remaining due on the said bond with interest. Under that order 1108*l.* 11*s.* 10*d.*, being all the assets in the hands of the assignees, were paid by them in part of the 2500*l.*; 1000*l.* were paid by *Round*, 621*l.* 17*s.* 8*d.*, being the balance for principal and interest, the commissioners under a process of or nature of an extent issued by them for that p

(*a*) 51 *Geo.* 3. *c.* 15 *s.* 48.

levied from the estate and effects of *Partridge*, together with the costs of the levy, and other costs amounting in the whole, with the sum of 621*l.* 17*s.* 8*d.* to 749*l.* 13*s.* 10*d.*, and the whole of the debt due to the commissioners in respect of the said loan was thus satisfied and paid. The Plaintiffs insisted that, in such payments *Partridge* had paid and satisfied only that portion of the loan which it was incumbent on him to pay, or as in the nature of a principal, and in exoneration of the Plaintiffs, inasmuch as the sum of 1400*l.*, part of the said loan, had been actually advanced to *Partridge* immediately after it was obtained, and he was, at the date of the bankruptcy, indebted to the estate of the Plaintiffs in the sum of 1844*l.* 8*s.* 2*d.*, being an amount considerably exceeding the sum obtained from him by the commissioners under the levy; and that the debt from *Partridge* to the Plaintiffs was part of their estate and effects, within the meaning and operation of the order obtained by *Holden*.

The Plaintiffs having obtained their certificate, and recommenced business on their separate accounts, *Partridge* demanded from them the repayment of the sum of 749*l.* 3*s.* 10*d.*, and threatened to obtain from the commissioners their warrant or process of extent for the recovery thereof, under the provision in the act (*a*), giving to sureties the benefit of the process of extent against the principal debtor or obligor for recovering the sums paid by them; the Plaintiffs insisting that *Partridge* was not a surety within the meaning of the act, but that on the contrary, that portion of the loan which he received and had not accounted for, would have been assets applicable to the payment of the order obtained by *Holden*.

(*a*) 51 *Geo.* 3. *c.* 15. *s.* 43.

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The assignees were willing, if necessary, that the monies received by *Partridge* and remaining in his hands, should be applied in payment of the order, and had given notice to him, that in his account with them as their agent, they were ready to allow to him the sums paid under the extent against the debt due to the Plaintiffs' estate.

The affidavit further stated, that *Partridge* was on other accounts indebted to the estate of the Plaintiffs, and had, since the bankruptcy, received various sums as the agent of the assignees, to an amount exceeding the sum of 749*l.* 3*s.* 10*d.*; that the Plaintiffs were established in business, and rising in credit, and any proceedings under the suit or process of extent, or in the nature of that process on the part of *Partridge*, would produce their immediate and irreparable ruin.

Mr. *Rose* in support of the motion.

The Vice-Chancellor made the following order: "It was therefore prayed that the said Defendant, *J. Partridge*, might be restrained by injunction from applying for, or obtaining, any extent, or writ, warrant, or process of, or in the nature of, an extent, in respect of his said alleged debt or demand against the said Plaintiffs, and from enforcing or executing any extent, or any writ, warrant, or process of, or in the nature of, an extent, or other legal proceedings against the said Plaintiffs, or from in any manner molesting them, either as to their persons or property in respect of his said alleged demand; which, upon hearing the said affidavit, and the six clerks' certificate, is ordered accordingly, until answer or further order." Reg. Lib. B. 1817. fol. 1217.

On the 7th of *August* 1818, a motion was made before the Vice-Chancellor, to dissolve the injunction. The motion

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motion was supported by an affidavit of the Defendant *Partridge*, stating, that he executed the bonds at the request, and solely for the accommodation of the Plaintiffs; that in *January* 1813, 749*l.* 13*s.* 10*d.* being due to the commissioners, an extent was issued against *Partridge*, under which 1156*l.* 12*s.* 4½*d.* were levied by the sheriff from his goods; and 120*l.* 19*s.* being paid by the sheriff for rent and taxes due from *Partridge*, the remaining 1035*l.* 13*s.* 4½*d.* were retained by him; and after deducting his costs and charges attending the execution of the writ, he paid 749*l.* 13*s.* 10*d.* to the account of the commissioners; and *Partridge* denied, that it was ever agreed that he should have, or that he ever in effect had, one-fourth, or any part of the loan.

The Vice-Chancellor refused to dissolve the injunction until *Partridge* had answered the bill, but ordered that the plaintiffs should be at liberty to pay the sum of 621*l.* 17*s.* 8*d.* into the banking-house of Messrs. *Childs* and Co., in the joint names of *J. B.* and *J. A.*, solicitors for the Plaintiffs, and the Defendant *Partridge*; and thereupon it was ordered that the injunction should be continued until hearing or farther order; and in case the 621*l.* 17*s.* 8*d.* should not be so paid in, within a month, that the injunction should be dissolved; and in case it should be paid in, the Defendant *Partridge*, on putting in his answer, should be at liberty to apply to dissolve the injunction.

Aug. 15.

The Vice-Chancellor's Court being closed for the vacation, a motion was now made before the Lord Chancellor, on behalf of the Defendant *Partridge*, for a writ of *ne exeat regno* against the Plaintiff *William Whitehouse*, or that the order of the 2d of *July* might be discharged, and the injunction dissolved.

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In support of the motion, was read an affidavit of the Defendant *Partridge*, stating, that the sum of 621*l.* 17*s.* 8*d.* had not yet been paid in, and that *William Whitehouse*, whom the affidavit represented as the only one of the Plaintiffs of ability to pay that sum, or any part of it, had formed a fraudulent scheme for evading the payment, and intended to dispose of his property and quit the kingdom; and some declarations and acts indicating that intention were specified.

Sir *Samuel Romilly* and Mr. *Phillimore* for the motion.

The injunction having restrained the Defendant's proceedings at law, the solvent Plaintiff intends to take advantage of that delay to go abroad with the money of the Defendant in his hands. The facts detailed in the affidavit evince that intention. A Defendant in such circumstances, may obtain a writ of *ne exeat regno* without filing a bill. The Plaintiffs are not entitled to the injunction. An extent is certainly a summary proceeding, but it is not the practice of the Court of Chancery to grant an injunction in every case of extent.

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The Defendant represents himself to have paid 700*l.* as surety for the amount of exchequer bills advanced to the plaintiffs, and to be therefore entitled to the crown process for compelling repayment; and the bill seeks to restrain those proceedings. Assuming that an injunction might be granted, still, according to the rules and practice of the Court, its interposition must be governed by the circumstances of the case. The Vice-Chancellor thinking that the money ought to be paid into court, allowed for that purpose a month, which, if there is no apprehension of the party going abroad, is a reasonable time; but if there is an affidavit of declarations and threats

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threats that he will go abroad, I should pay no regard to an affidavit denying that intention. Evidence of a threat is that on which the Court acts, notwithstanding denial (*a*); and reasonably; because one who designs to leave the kingdom for the purpose of defrauding his creditors, will not scruple to deny that design.

The Court acts on evidence of intention to go abroad, without regard to denial.

If the Court, having granted time for payment of money, is satisfied before the time arrives that the party is going abroad to prevent payment of the money, it will undoubtedly interpose; whether by issuing a writ of *ne exeat regno*, or by dissolving the injunction, unless immediate payment is made, may be a question.

An objection to the motion for dissolving the injunction is, that it asks a reversal of the Vice-Chancellor's order; and an objection to the application for a writ of *ne exeat regno* is, that the sum of money which it seeks to secure, though due, is not yet payable; but if between the date of an order for an injunction, and payment of money into court at a future time, and the arrival of that time, there is a substantial threat that the party who ought to pay will go abroad, the practice of the Court is to order him to pay the money *instanter*, or to dissolve the injunction.

After an injunction and order for payment of money into court at a future time, on a threat of going abroad, the Court orders instant payment of the money, or dissolves the injunction.

In this case there certainly should be no injunction without securing the money.

Let notice of motion be given.

Aug. 17.

Notice having been given, the motion was now renewed.

Mr. *Phillimore* for the motion.

(*a*) *Amsinck* v. *Barklay*, 8 *Ves.* 594. *Jones* v. *Alephsin*, 16 *Ves.* 470.

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Mr. *Wetherel* and Mr. *Rose*, against the motion, cited *Etches* v. *Lance* (*a*) and *Jones* v. *Alephsin.* (*b*)

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The question is, whether, an order having been made for an injunction and payment of money into court within a month, there is reason to believe that the party intends to take advantage of that order for the purpose of defeating it?

Whether an injunction can be issued against proceeding under an extent. *Quære.*

I recollect no instance of injunction against an extent; but without entering into that general question, I should have felt a great difficulty in issuing this injunction, unless the money had been secured. The crown has the process of extent against all debtors, and happens not to be bound by that equity which binds every other creditor to make use of his securities for those who are secondarily liable to pay, against those who are liable primarily. (*c*)

The crown is not subject to the equity of using its securities for those secondarily liable to pay, against those primarily liable.

The present case discovers the inconvenience which must ensue if one department of the Court before which motions are heard rises, while the other continues to sit. I cannot re-hear the case.

I must take this to be a decision of the Vice-Chancellor, that an injunction may be issued against an extent, and that it was fit that the money should in this instance be brought into court; it must be understood,

(*a*) 7 *Ves.* 417.

(*b*) 16 *Ves.* 470.

(*c*) *The Attorney-General* v. *Resby*, *Hardr.* 378., the eighth chapter of *Magna Charta* having received a restrictive construction; but the surety, after satisfaction of the debt of the crown, becomes entitled to the crown process against the principal. *Anon. Savile*, 50. pl. 72. *The King* v. *Bennett*, 1 *Wightw.* 1.

therefore,

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therefore, that in his opinion there was at least so much doubt on the question of principal and surety that the money ought to be secured, and that the undertaking of the assignees to allow a set-off if any thing should be eventually found due, was not sufficient to dispense with that security. An order is therefore made for payment of the money; and the single question now is, whether I shall interfere, when the party at whose instance the order was made is so dealing with it as to defeat it?

I have no hesitation in saying that if I had granted this injunction, I should have ordered payment of the money into court. I apprehend that it was part of the system under which these loans were obtained, that persons becoming sureties, if the crown did not choose to employ the prompt remedies provided by the acts of parliament, should themselves be entitled to resort to them.

When the application was made for a writ of *ne exeat regno*, I was much struck by the difficulties which presented themselves. The writ can be issued only on an equitable debt, with the single exception, I think, of a balance of account, on which an action may be maintained (*a*); and it can be issued only on an equitable debt then due and payable. I recollect a scandalous instance of advantage taken of that rule; a creditor having given time to his debtor from the 1st of *January* to the 1st of *July*, in the last week in *June* the debtor thought proper to attempt to leave the kingdom; and on great consideration this court decided that it could not grant the writ. (*b*) If, therefore, the Vice-Chancellor

In general, the writ of *ne exeat regno* can be issued only for an equitable debt actually payable.

(*a*) And of arrears of alimony decreed, *Dawson* v. *Dawson*, 7 *Ves.* 173., and many other cases.

(*b*) See 6 *Ves.* 284., 7 *Ves.* 174., 14 *Ves.* 261.

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has thought proper to render the debt no longer demandable at law until there should be disobedience to his order, and that order renders it not demandable in equity before the end of a month, there would be great difficulty in extending this high prerogative writ, which has been already extended far enough, to embrace this case.

I shall, therefore, consider the application as made not for a writ of *ne exeat regno*, but for an order that the money which was to have been paid within a month, may be secured by earlier payment, or that the injunction may be dissolved. On the present occasion I must take the order of the Vice-Chancellor to be right, for I am not now called on to re-hear it.

It is obvious that there is a degree of inconvenience very unintentionally introduced by the circumstance of both courts not continuing their sittings. The business of these departments of the court cannot be carried on, unless an opportunity is afforded to the suitors of conveniently stating to each the difficulties that occur in the execution of its orders; and there ought therefore to be some reasonable interval between the last day of the sittings, and the departure of the person holding them. I cannot attempt to set right the order of the Vice-Chancellor, but must consider it to be correct; recollecting, however, that it is an order which assumes that this court may grant an injunction against an individual whom the legislature has authorised to sue out an extent, by giving to him that remedy which the crown itself would have had, and, in the first instance, would have taken, against persons who as among themselves should be considered as primarily liable; and so far I may venture to say it is a very delicate question whether an injunction should be issued. Assuming the propriety

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propriety of the Vice-Chancellor's order for an injunction and payment of the money into court at the time specified, the question is, whether the subsequent affidavit satisfies me that the Plaintiffs should not now be allowed for that payment a time so long as that granted, and, as I must take it, properly granted, in the first instance?

Application of the writ of *ne exeat regno* not to be extended.

The Court ought to feel no inclination to extend the application of the high prerogative writ of *ne exeat regno;* I think that it has been granted on grounds which ought not to be enlarged by subsequent decisions. If men will not take from their debtors security enabling them to proceed at law, they must abide by the consequences.

I am clearly of opinion that the present circumstances of this case require more prompt payment. Let the injunction be dissolved, unless the money is paid into the banking-house on the 20th of this month; and if not being then paid, it is afterwards raised by virtue of the extent, I think that it becomes me to show so much respect for the order of the Vice-Chancellor as to direct that it shall in that case also be secured.

" His Lordship doth order that the Plaintiffs, on or before the 20th day of *August* instant, pay the sum of 621*l.* 17*s.* 8*d.* into the banking-house of Messrs. *Childs* and Co., *Temple Bar*, *London*, to the joint account of *J. B.* and *J. A.*, &c.; and in default of the plaintiffs paying the said sum of 621*l.* 17*s.* 8*d.* into the said banking-house as aforesaid by the time aforesaid, it is ordered that the injunction granted in this cause to restrain the Defendant *J. Partridge* from applying for or obtaining any extent, &c., be dissolved without farther motion; and the Defendant *J. Partridge* is in that case to be at

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liberty to proceed under the extent for the said sum of 621*l.* 17*s.* 8*d.*, or for so much thereof as shall not have previously been so paid into the said banking-house; and it is ordered that the Defendant *J. Partridge* forthwith pay what he shall recover under such extent into the said banking-house, to the said joint account of *J. B.* and *J. A.*" Reg. Lib. B. 1817. fol. 1620.

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A testator having directed his trustees and executors, after sale of his estates, to stand possessed of the money arising from the sales, upon trust, in the first place, to invest 400*l.* in trust for his wife for life in bar of dower, and after her death for *W. C.*; and upon farther trust, out of the residue of the money, to invest 400*l.* in trust for *J. R.* for life, and after his death for his children; and upon farther trust to pay other sums to persons named; and having bequeathed the residue of his estate to *W. C.*; and the only acting executor having made no investment on the trusts of the will, but having paid interest on the two sums of 400*l.* to the respective legatees, and applied the assets to his own use, and afterwards become bankrupt; it was held, that by that dealing the two legatees had waived whatever priority the will might have given to them; and the dividends payable on the whole sum proved under the commission against the executor in respect of the testator's estate, was divided among the pecuniary legatees and the residuary legatee, in the proportion of the amount of their legacies, and of the residue, as it was computed at the death of the testator, with interest on each.

WILLIAM ROE, by his will dated the 11th of *January* 1804, and duly executed to pass real estates, after directing that all his just debts, and funeral and testamentary expenses, should be paid out of his real and personal estate, devised and bequeathed to *George Chadwin*, his brother-in-law, and *Thomas Dakin*, all his real and personal estate to them, their heirs, &c., upon trust to sell, with a direction that their receipts should be sufficient discharges; and upon farther trust, and he directed his trustees in the first place, to place out at interest the sum of 400*l.*, on mortgage or government security, the interest to be paid to the testator's widow half-yearly during her life, in bar of dower; and immediately after her decease he bequeathed the said sum to his nephew *William Chadwin*; and upon farther trust, out

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of the residue of the money to arise from the sale of his estate and effects, to discharge all his debts, funeral and testamentary expenses, and the expenses of the trust, and subject thereto, on trust to place out at interest the farther sum of 400*l.* upon mortgage or government security; the annual interest to be paid to his brother *John Roe* during his life, and immediately after his decease, the said sum to be called in and divided among the children of *John Roe* equally; and on farther trust out of the residue of the money to arise from the sale, to pay to each of the testator's nephews 100*l.*, and to each of his nieces 50*l.*, when they should attain twenty-one; and the residue of his estate he gave to his nephew *William Chadwin*, and appointed *George Chadwin* and *Thomas Dakin* executors.

Dakin having renounced probate, the will was proved in *March* 1804, by *George Chadwin*, who sold the testator's estates, and paid his debts and funeral and testamentary expenses; and instead of investing the residue according to the trusts of the will, employed it in trade, and in the purchase of a real estate for his own benefit. Interest on the sum of 400*l.* was paid to the testator's widow to the 25th of *March* 1812, and interest on the like sum was paid to the testator's brother *John Roe* to the same time; and two of the testator's nieces received the legacies bequeathed to them.

In *July* 1811, a commission of bankrupt was issued against *George Chadwin* the executor.

Soon after the bankruptcy, *William Chadwin*, the nephew and residuary legatee of the testator, presented a petition, on which an order, dated the 15th of *April* 1813, was made, directing a reference to the commissioners to take an account of the assets of the testator possessed

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possessed by the bankrupt, and how he had applied and disposed thereof, and what remained due from him on account thereof at the time of the bankruptcy, and the petitioner was to be at liberty to prove such sum as should be found due upon the account directed; and it was ordered that the assignees should pay the respective dividends which should be declared upon the amount of such proof, (the amount of such respective dividends so to be paid from time to time, to be verified by affidavit,) into the Bank, with the privity of the Accountant-General of the Court of Chancery, in trust in this matter, to be placed to the account of the personal estate of the testator, subject to farther order; with liberty for the petitioner and all other parties interested under the said testator's will, to apply as they should be advised; and it was ordered that the costs of the application should be paid to the petitioner.

By virtue of this order the petitioner proved a debt of 3185*l.* 5*s.* 11*d.* under the commission; and two dividends thereon, amounting to 1313*l.* 18*s.* 7*d.*, were paid into the Bank.

William Chadwin then presented another petition, stating that the testator's widow and her second husband had assigned to him her interest in the sum of 400*l.*; that the testator's brother *John Roe* was still living, having four children, three of whom were infants; that *Thomas Roe*, another brother of the testator, was also living, having one child, an infant; that the petitioner was the eldest son of *Elizabeth Chadwin*, the sister of the testator, who had five other children, the testator having no other brother or sister; and that the petitioner had thus become entitled to the present interest in the whole of the legacy of 400*l.*, and also to the legacy of 100*l.* as one of the testator's nephews, and

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to all the residue of the testator's estate after payment of his debts and legacies; and submitting that the legacy of 400*l.* was by the will a primary charge on the produce of the sale of the testator's estates, and that the petitioner was entitled to be paid the same in full, out of the sum of 1313*l.* 18*s.* 7*d.*

The petition prayed, a declaration that the petitioner was entitled to be paid the legacy of 400*l.*, with interest, from the 25th of *March* 1812, in full, and payment thereof, out of the sum of 1313*l.* 18*s.* 7*d.*, and an account of what was due to him for principal and interest, and payment of the residue of that sum among the petitioner and the other legatees, according to their several priorities, in part satisfaction of their legacies; or, if the Lord Chancellor should be of opinion that the petitioner was not entitled to be paid the sum of 400*l.* in full, then that an account might be taken of the clear amount of the testator's estate at the time of his death, and of the amount of the clear residue that would have remained of that estate, after paying all his debts, funeral and testamentary expenses and legacies, if the same had in fact been paid, and that the several legacies given by the will, and the amount of the said residue, might be ordered to abate proportionally; and that the sum of 1313*l.* 18*s.* 7*d.* might be apportioned among the petitioner and the several other legatees, in proportion to the amount of their several legacies, and of the said residue.

The Master, on another petition by the same petitioner, having reported that all the debts of the testator were paid, in *March* 1817 *William Chadwin* presented a farther petition, praying the confirmation of that report, and that the original petition might be farther heard.

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The case was argued by Sir *Samuel Romilly* and Mr. *Stephen*, Mr. *Horne*, and Mr. *Rose*.

The cases cited were, *Dyose* v. *Dyose* (*a*), *Fonnereau* v. *Poyntz* (*b*), and *Humphreys* v. *Humphreys*. (*c*)

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This petition prays payment, not out of the testator's estate, but out of dividends declared on the amount due to the testator's estate from the party who has become bankrupt, and claims a proportionate abatement among the pecuniary legatees and the residuary legatee.

The first part of this petition, which prays that the legacy of 400*l.*, the entire interest in which the petitioner has acquired by assignment from the testator's widow, may be paid in full, preferably to all the other legacies, is founded on the passage in the will, directing the trustees, "in the first place," to invest that sum; and on the expressions which precede the subsequent bequests, "upon further trust, out of the residue of the money," to pay debts and funeral and testamentary expenses, and "subject thereto and on trust," to invest other sums; and it was insisted in the argument, that these expressions manifest an anxiety in the testator, that the sum to be invested for the benefit of his wife should have priority even over the payment of his debts. Each legacy in succession is given out of the residue; which, it has been properly contended, means what remains after the prior application of the fund.

Under the ulterior bequests infants are interested,

(*a*) 1 *P. W.* 505. (*b*) 1 *Bro. C. C.* 472. (*c*) 2 *Cox*, 184.

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and a considerable question arises how far their rights can be bound by an order on a petition in the bankruptcy of the executor; such an arrangement may be beneficial to them, but it appears to me that it can hardly be said that the Court can so bind them. The question, whether by reason of the deficiency of the estate, not only the pecuniary legatees should abate among themselves, but a computation should be made of what would be coming to the residuary legatee, and he should be considered on the footing of a pecuniary legatee to that amount, and an abatement be made among them all, is extremely difficult, and ought to be made the subject of a bill, did not the small amount of the fund render it adviseable to obtain a decision in this way, rather than to institute a suit, which would absorb the estate.

If there had been assets for payment of all the legacies no question could have arisen; the residuary legatee could not in that character have objected to the payment of the antecedent legacies, but must have been content with whatever might happen to be the residue, and while there was sufficient to satisfy the pecuniary legacies, there would have been no reason for discussing their priorities.

A question might have arisen involving no consideration of the consequences of the *devastavit* which has been committed. Supposing the testator's estate insufficient to satisfy all the legacies, the question would then have been, the funds left by the testator not being adequate to pay all that he intended to be paid, did he intend that the first mentioned sum of 400*l.* should be paid in priority to all the rest, and each of the successive legacies in priority to those which follow it? But the case which I have supposed differs entirely from the

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the present, assuming an estate unaffected by *devastavit*, and to be distributed according to the effect of the testator's will; whereas, in the events that have occurred, the executor instead of applying himself to the due administration of the testator's estate, paying the legacies according to their priorities, if there were priorities, and making proper investments, paid interest to the testator's widow, and to one of his brothers: and that sort of transaction introduces another question not touched by any prior decision, whether the legatees have not so dealt with this executor in regard to their respective legacies, as to have made him their debtor for each respectively; and whether the proper proof under the commission would not have been, not one entire proof, but subdivided proof for the respective legacies?

Assuming that in this case the latter ingredient is not to be regarded, the Court is to consider what the law is where, there being both pecuniary legatees without priorities among themselves, and a residuary legatee, and by reason of the *devastavit* of the executor, the estate having become insufficient to pay all the pecuniary legacies, the residuary legatee insists that the estate at the death of the testator being sufficient, and there then being a residue of 2000*l.* or 3000*l.*, he is entitled to rank as a legatee of that sum, and to represent that the executor being a debtor to the aggregate body of legatees, he is to be considered a creditor for the residue?

In the first case cited, *Dyose* v. *Dyose* (*a*), Lord *Cowper* in the instance of deficiency by a *devastavit*, held that he was bound to consider the residuary legatee as entitled to something, if the state of the assets at the

(*a*) 1 *P. W.* 505.

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death of the testator left a residue; and that the wreck of the estate which could be recovered after the *devastavit*, was divisible not among the pecuniary legatees alone, but among all the legatees according to the proportion of their legacies, and allowing the residuary legatee to claim as a legatee of the amount of the residue as it stood at the death of the testator.

That case came under the consideration of Lord *Thurlow* in *Fonnereau* v. *Poyntz* (*a*), where the principal question related to the admissibility of parol evidence; and adverting to the argument which had been deduced from Lord *Cowper's* decision, Lord *Thurlow* declared that he could not agree to the law of that case, and deprecated the doctrine, that whenever a testator gives a residue he is to be understood as intending to leave a residue.

In *Humphreys* v. *Humphreys* (*b*) Lord *Thurlow* did not content himself with expressing disapprobation of the doctrine in *Dyose* v. *Dyose*, but seems to me to have decided against it; for in that case the residue had been diminished, not by the act of the executor after the death of the testator, but by the act of the testator alone; and Lord *Thurlow* remarks, that if the inference there attempted to be drawn from Lord *Cowper's* decree were correct, the inquiry into the state of the assets should have referred to the date of the will, and not to the death of the testator.

Lord *Thurlow* may, therefore, be considered as having condemned the decision in *Dyose* v. *Dyose* (*c*); and

(*a*) 1 *Bro. C. C.* 472., see p. 478.
(*b*) 2 *Cox*, 184.
(*c*) Lord *Thurlow's* condemnation of that case has been approved by Sir *William Grant*, *Page* v. *Leapingwell*, 18. *Ves.* 466.

if

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if there were no question in the present case but this, whether the residuary legatee can come in competition with the pecuniary legatees, Lord *Thurlow*'s authority would be opposed to the claim of the residuary legatee.

A case in which after the death of the testator, the executor deals with the property as he thinks fit, there being no accession to that dealing on the part of those for whom he is trustee, is widely different from the present case, in which those who might every day have made demands on the executor, have dealt with him as a person having in his hands so much of their money, and have from time to time received from him interest on various sums to which they are respectively entitled. Such transactions give rise to a question which requires much consideration, whether the legatees have not thereby made the executor severally their debtor. If the testator's widow, whom the petitioner by her assignment represents, had required the executor in the first place to separate the 400*l.* from the bulk of the assets, and invest it in a mortgage, and that course had been adopted, no question could have arisen between the first legatee and the rest, on the effect of the *devastavit*. Instead of that, the executor is permitted by the widow and the other legatees, to retain the legacies, paying interest for them; and the question then arises, whether, supposing Lord *Thurlow* right, these supervening circumstances in the conduct of the respective legatees vary the case, and lay a ground for the doctrine of *Dyose* v. *Dyose*, not on the reasoning there suggested, but on the principle that the widow and the adult legatee having received interest on their legacies, and the residuary legatee having been entitled to receive the fruits of his legacy, if there were any, a mixed case exists, which renders it reasonable to declare that this sum of 1300*l.* shall be divided among the legatees, as the 3000*l.* would have been

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been divisible if the executor were solvent? Whether it is not most just to hold that there is an end of the will as to priorities, and that arrangements having been made by all the legatees, the fund in the hands of the executors is applicable for the benefit of all according to those arrangements, as they may be considered to have rendered the executor the debtor of each of the legatees separately?

After anxious and frequent consideration, I know no better view of this case. If the parties are content with it, I venture to say that it is for the benefit of the infants that it should be so considered; but if the parties are not content, I ought not to be satisfied, feeling that this is as difficult a case as I ever had to deal with; and I must put them to file a bill.

Mr. *Cullen* (*Amicus Curiæ*) observed, that the proof represented the testator's estate, and that the total was augmented by the amount to which the residuary legatee was entitled.

The LORD CHANCELLOR.

I am of opinion that the residuary legatee ought to be considered a creditor for the amount of residue at the death of the testator. This view of the case admits him on a principle different from that adopted in *Dyose* v. *Dyose*, and excludes him from priority in respect of the 400*l*.

The following order was made:

I do order that it be referred to Master *Stephen*, the master to whom this matter has already been referred, to ascertain the amount of the clear residue that would have remained of the testator's real and personal estate,

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after paying all his debts, funeral and testamentary expenses, and legacies, if the same had in fact been paid; and I do declare that the several legacies given in and by the said testator's will, or such of them as have not been paid, and the amount of the said residue, ought to abate proportionally; and I do order, that the said Master do apportion the residue of the sum of 1313*l.* 18*s.* 7*d.* now standing in the books of the Governor and Company of the Bank of *England*, in the name of the Accountant-General of the Court of Chancery, to the credit of this matter, the account of the personal estate of the testator *Wm. Roe*, after payment of the costs hereinafter directed to be taxed, among the petitioners *Wm. Chadwin*, *Thos. Roe*, *John Roe* an infant, *George Roe* an infant, and *Ann Roe* an infant, children of the testator's brother, *John Roe*; and between *Elizabeth Roe* an infant, daughter of the testator's brother, *Thos. Roe*; and between *George Chadwin*, *Elias Chadwin*, and *Betty Chadwin*, three of the children of the testator's sister, *Elizabeth Chadwin*, according and in proportion to the amount of their said several legacies and interest, including the aforesaid legacy of 400*l.*, the interest whereof is given for the said testator's widow, and afterwards assigned to the petitioner *Wm. Chadwin* as aforesaid, and of the residue and interest of the testator's estate and effects; and that what the said Master shall certify to be the proportion of the petitioner, *Wm. Chadwin*, be paid to him; and let what the Master shall certify to be the proportion in respect of the interest of the legacy of 400*l.*, given to the testator's brother, *John Roe*, for life, be paid to him; and let the proportion of the principal thereof be carried over to an account, to be called the account of the said *John Roe* and his children, and be laid out in the purchase of Bank 3 *per cent.* annuities, and the dividends paid to the said *John Roe* during his life, with liberty to apply upon

upon the death of the said *John Roe*; and let the proportion of each of them, the said *Wm. Chadwin*, *Thos. Roe*, *Elias Chadwin*, and *Betty Chadwin*, be paid to them respectively by the said Accountant-General, out of the residue of the said sum of 1313*l.* 18*s.* 7*d.*, after payment of the costs hereinafter directed to be taxed: and I do order that what the said Master shall certify to be the proportion of each of them, the said *John Roe*, *George Roe*, *Ann Roe*, and *Elizabeth Roe*, the infants, of the residue of the said sum of 1313*l.* 18*s.* 7*d.* as aforesaid, be carried over by the said Accountant-General to their respective accounts; and let the same, when so carried over, be laid out in the purchase of Bank 3 *per cent.* annuities; and I do order that it be referred to the said Master to tax, as between solicitor and client, the petitioner's costs which were directed to be paid to him by the order of the 15th day of *April* 1813, in his said petition mentioned, and also the petitioner's costs of and relating to this matter, and incident thereto; and let the said Master, in like manner, tax the costs of the other legatees, of and relating to this matter, and incident thereto; and let such costs, when so taxed and ascertained, be paid by the Accountant-General, out of the said sum of 1313*l.* 18*s.* 7*d.* to the solicitors for the respective parties, that is to say, &c.; and for the purposes aforesaid, the said Accountant-General is to draw upon the Bank, &c. with liberty for the several parties to apply to me in this matter as they shall be advised; and this, my order, is to be drawn up and entered with the register of the Court of Chancery.—Orders in Bankruptcy, 147. fol. 236—242.

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Aug. 17. *Ex parte* SOUTH, in the matter of ROW.

A trader having given to a creditor an order on the executor of her debtor to pay the debt to the creditor, and the executor having received the order, and retained it until the assets of the testator should enable him to pay simple contract debts, and the trader having become bankrupt before payment, the creditor was declared entitled to receive the amount of the order from the executor, notwithstanding a subsequent arrest of the trader.

GEORGE ALDERSON and *Thomas Alderson*, being creditors of *Jane Row* for goods sold and delivered to the amount of 528*l.*, and *Jane Row* being a creditor of the estate of *John Fish*, deceased, for work done principally with the materials sold to her by *G.* and *T. Alderson*, she, in order to satisfy part of her debt, gave to them her draft on *F. Klein*, Esq., the acting executor of *Fish*, in the form following: "417*l.* 6*s.* *Sunbury*, 5th *August* 1813. Please pay Messrs. *G.* and *T. Alderson*, or order, 417*l.* 6*s.* as part of the amount due to me for plumber's work done for the late *John Fish*, Esq. — To *F. Klein*, Esq., *Lower Tooting*, *Surry*."

The draft was immediately presented to *Klein* by the solicitors of *G.* and *T. Alderson*, but *Klein* not being prepared with assets to discharge the simple contract debts of the testator, could not accept it payable at any certain period, but retained it to be paid when there should be funds of the testator applicable to the payment of debts of that class.

In consequence of the delay in the payment of the draft, *G.* and *T. Alderson* afterwards arrested *Jane Row* for the amount of their debt.

On the 17th of *November* 1814, a commission of bankrupt was issued against *Jane Row*, and on the 17th of *December* 1814, *Thomas Alderson* proved a debt of 530*l.* 13*s.* 6*d.* under the commission; stating in his deposition that he held the draft as a security; and *Thos. Alderson* and *James South* were elected assignees.

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Klein having declined to pay the draft without the Chancellor's order, the Vice-Chancellor, on the petition of *G.* and *T. Alderson*, ordered that the sum of 417*l.* 6*s.*, the money due from *Klein* on account of the estate of *Fish*, might be paid to or on account of *G.* and *T. Alderson*, their proof of debt being reduced *pro tanto*. (*a*)

James South, the other assignee, being dissatisfied with this order, presented a petition of rehearing, insisting that the 417*l.* 6*s.* ought to be paid to the assignees as part of the general estate of *Jane Row*.

The case having been argued before the commencement of the present year, the Lord Chancellor now gave judgment.

The LORD CHANCELLOR.

It has been decided in bankruptcy, that if a creditor gives an order on his debtor to pay a sum in discharge of his debt, and that order is shown to the debtor, it binds him; on the other hand this doctrine has been brought into doubt, by some decisions in the courts of law, who require that the party receiving the order should in some way enter into a contract. (*b*) That has been the course of their decisions, but is certainly not the doctrine of this Court.

An assignment of a debt requires not, for its validity in equity, a contract with the debtor.

In this case the executor of the debtor, instead of returning the draft to the persons who presented it, retains it, with a declaration that he cannot then accept it payable at any particular time, but that it shall be paid whenever the state of the testator's assets enables

(*a*) *Ex parte Alderson*, 1 *H. Bl.* 239. *Legh* v. *Legh*, 1 *Madd.* 53. 1 *B. & P.* 447. *Tatlock* v. *Harris*, 3 *T. R.* 180.

(*b*) See *Israel* v. *Douglas*,

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him to pay simple contract debts, and that in the mean time he will hold it as a charge. I am of opinion that the Vice-Chancellor was right in considering this not as an absolute, but as a conditional acceptance of the order; for this document, though not in the form of a bill of exchange, is rather an order for payment of money than any thing else; and I think that the act of the executor in holding the order until the assets should enable him to make payment, is such an acknowledgment as takes this case out of the decisions in the Court of King's Bench, supposing them such as I have represented.

Then it is said that the *Aldersons* waived the benefit of their security. After full consideration, I think that the Vice-Chancellor was right also on this point. This draft was given as a security; the executor retained it in his hands as a charge on the assets, but could not apply the assets in payment until they were in a state to be properly so applicable; whether they would ever be so applicable was a question; in all events the time was not yet arrived; and the debt, therefore, could not be considered as in any way discharged, nor the other remedies of the creditors affected, except that if they resorted to those remedies, the executor would be liable to pay to them so much only as remained unsatisfied. The arrest itself was no waiver: had it been accompanied by an agreement to make no farther demand on the assets, the effect might be different; but if it proceeded no farther than arrest, and there was no other consideration, I think that would not be sufficient.

The order of the Vice-Chancellor is therefore right.

Petition dismissed. — Orders in Bankruptcy, 147. fol. 227. 228.

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BARRITT *v.* BARRITT.

Nov. 6, 7.

Attachments issued for want of answer, after intimation that they would be sealed at the next private seal, and notice of a petition presented for an order for farther time, set aside for irregularity, due diligence having been used to obtain the order, but without costs, no communication having been made of circumstances which occasioned delay.

THE first order for time to answer obtained by the Defendants having expired on the 23d of *August*, on the 27th of that month the Plaintiff's clerk in court sent to the Defendant's clerk in court a note intimating that he had peremptory orders to attach at the first private seal. On the following day the Defendant's solicitor left a note with the clerk in court of the Plaintiff, purporting that they would obtain an order for farther time; and on the 29th of *August*, a petition for three weeks farther time was presented to the Master of the Rolls, and notice of its presentment given to the Plaintiff's solicitors. The petition was answered and returned on the 3d of *September*, and an order was bespoken from the registrar's office, and after applications on the 7th and 8th, which were not successful by reason of the absence from town of one of the officers, was obtained on the 15th of *September*, and having been entered on the next day, was served on the Plaintiff's solicitors.

On the 5th of *September*, attachments for want of answer were issued against the Defendants, and executed on the 12th.

A motion was now made that the attachments might be set aside for irregularity, and that the Plaintiff's solicitor might be ordered to pay the costs.

Mr. *Hart* for the motion.

Sir *Arthur Piggott* and Mr. *Spence* against the motion.

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The LORD CHANCELLOR.

The first order for time having expired, the Defendant became subject to an attachment; but it is clear, that, according to the established practice, if an attachment is not issued before a second order for time has been obtained, it is too late to complain of that contempt, which may be said to have existed between the expiration of the first order and the date of the second. I go farther, and say, that if the Plaintiff, from courtesy, declines to issue an attachment, intimates to the Defendant that an attachment will be issued unless he obtains another order, he puts it on the Defendant to take measures for obtaining the order, and cannot complain unless he fails to obtain it in due time.

These remarks dispose of the question of irregularity. On the question of costs, much will depend on the *bona fides* with which the parties acted, in insisting that due diligence had not been used for obtaining a farther order.

Nov. 7.

The LORD CHANCELLOR.

The Plaintiff having filed a bill for relief, the Defendant obtained an order for time, which expired on the 23d of *August*, and on that day, according to my understanding of the practice, it was competent for the Plaintiff to obtain an attachment against him for want of an answer. Without in all respects condemning what is called the courtesy of the Court, I cannot help thinking, that it sometimes occasions more expense than it saves. According to this courtesy a paper was handed to the Defendant, intimating that an attachment would be sealed against him at the next private seal: on the opening of this case it was represented that the notice contained the words "unless

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"unless an order is obtained for farther time;" that representation is found to be erroneous; but I consider the error immaterial, because a notice of this kind is neither more nor less than an intimation that an attachment will be issued if the parties can issue it, which means, unless in the interval an order is obtained; for after an order the attachment cannot be issued. The consequence is, that the person giving this notice must be understood as intimating his intention not to issue an attachment if an order is obtained for time; and, therefore, that he will not apply for it if due diligence is used to obtain the order.

On the 28th of *August* notice was given to the Plaintiff's clerk in court that the Defendant would obtain an order for farther time; on the following day a petition for three weeks farther time was presented to the Master of the Rolls, and there can be no doubt that, on that petition, the order, which was matter of right, would be obtained; on the same day, the Plaintiff's clerk in court was informed that the petition had been presented; on the 5th of *September* attachments were issued. The Plaintiff, therefore, obtained the attachments after he had received notice of a petition on which, of course, an order would be obtained that would prevent their being issued; and if they had been executed forthwith, without doubt the Court would have set them aside as issued against good faith.

I think that the question of costs depends almost entirely on this view of the case; whether, after the answer of the Master of the Rolls to the petition had been obtained, on the 3d of *September*, it was incumbent on the person who obtained it to give intimation to the Plaintiff's clerk in court, that he had done what on the 29th of *August* he had promised to do; or whether, on the other

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other hand, it was the duty of the Plaintiff's agent to make inquiry. Before the attachments were executed the Plaintiff waited from the 29th of *August* to the 16th of *September*, without a word of intimation what had been done. If one party, therefore, was too hasty in issuing the attachments, the other failed in not informing him of the circumstances which occasioned delay in obtaining an order, without a due application for which the attachments might be properly issued. The attachments must be set aside for irregularity, but without costs.

" His Lordship doth order that the said attachments be set aside for irregularity." Reg. Lib. A. 1818. fol. 306.

Nov. 7.

Ex parte PARTRIDGE and Others.

Order directing taxation of a solicitor's bill for business done in the court of great sessions discharged, the Court not assuming jurisdiction for that purpose alone.

ON the 21st of *March* 1817, the Master of the Rolls ordered (in the ordinary form of a reference for taxation), " that it should be referred to Mr. *Campbell*, one, &c., to tax the bill of *Charles Brown*, of *Cardiff*, in the county of *Glamorgan*, gentleman, attorney at law, and one of the solicitors of this court; and in order thereto the said parties were to produce before the said Master, upon oath, all books, papers, writings, and vouchers in their custody or power, relating thereto, or any of the items or charges therein, and were to be examined upon interrogatories, as the said Master should direct, who was to make unto both sides all just allowances; and the said parties were, according to their submission, to pay to *Charles Brown* what should be reported due to them on such taxation; and thereupon, or in case it should appear that the said *Charles Brown* was

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was overpaid, he was to deliver up to the said parties, upon oath, all books, papers, writings, and vouchers in his custody or power, belonging to the said parties, and was to refund such overplus; and it was ordered, that all proceedings at law against the said parties, touching the said bill of fees and disbursements, should be staid, until after the said Master should have made his report."

On the 7th of *June* 1817, a motion was made before the Lord Chancellor, to discharge the order of the Master of the Rolls. The facts of the case, and the argument on the application, appear in Mr. *Merivale's* report. (*a*)

On this day the case was again mentioned by Mr. *Blake* for the solicitor.

The LORD CHANCELLOR.

This Court does not tax the bill of a solicitor for business done in the court of great sessions; but if the solicitor, having possession of papers which this Court orders him to deliver up, is entitled to a lien on those papers for business done in the court of great sessions, taxation is then directed, as incidental to the jurisdiction for compelling delivery of the papers. That distinction reconciles the cases.

The order must be discharged.

Order discharged. Reg. Lib. B. 1818. fol. 266.

(*a*) 2 *Mer.* 500.

1816.
Dec. 17.
1817, *Dec.* 11.
1818, *June* 23. *July* 1. 8. *Nov.* 9, 10. 15.
1819, *Jan.* 18. *Feb.* 27. *June* 29. *July* 27. *Aug.* 16.
1821, *June* 26.

GORDON *v.* GORDON. (*a*)

An agreement between two brothers, the younger of whom disputed the legitimacy of the elder, for a division of the family estates, rescinded after a lapse of nineteen years; the legitimacy of the elder being established on the trial of an issue directed, and the younger brother having been apprized at the time of the agreement of a private ceremony of marriage which had passed between their parents, and not having communicated that fact to the elder, and not possessing a legal power, on the supposition of the elder brother's illegitimacy, to secure to him the benefits stipulated in the agreement.

THE bill, filed on the 28th of *April* 1809, stated, that Colonel *Harry Gordon*, late of the island of *Grenada*, being seised of some plantations in that island, and in *America*, some of which were charged with a mortgage for 5550*l.* and interest, by his will, dated the 1st of *April* 1776, devised all his said plantations to his son *Peter Gordon*, since deceased, and his heirs male, and gave to each of his three sons, namely, the Plaintiff *Harry Gordon*, his second son *Adam Gordon*, the Defendant *James Gordon*, and his daughter *Hannah*, certain pecuniary legacies; and if *Peter Gordon* should die

(*a*) Cited 2 *Bligh*. 348. The following cases, on the construction and performance of agreements, are extracted from MSS. in the possession of the Editor.

ANONYMOUS.

Pasch. 1634.

A gift of a moiety of the donor's goods, to be enjoyed after his death, affects those only of which he was then possessed.

Mr. *Andrew Gray*, a bencher of the Inner Temple, having two daughters, and having concluded a marriage for the eldest, gave unto her a moiety of all his goods and household stuff; and the other moiety to his other daughter, to have them after his death. Those only pass which are in specie at the time of the gift; and if any of them be lost, decayed, or changed, and others bought, and brought in their place, they do not pass in law or equity. — MS.

COKE

die without heirs male, he gave his estates, so charged, to his younger sons and their heirs male successively, the elder claiming before the younger, with ulterior remainders;

COKE v. BISHOP. (a)

23d *November.* 29 *Car.* 2. 1677.

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The Defendant having been long since arrested for 1000*l.* at the suit of *J. S.*, the Plaintiff was so kind to him as to lay down the money for him; whereupon, in requital of this kindness, the Defendant entered into articles with the Plaintiff to settle upon him all his real and personal estate, which he had or should have, except 3000*l.* (b) Upon these articles a suit was commenced in Chancery in the year 1664, and a decree made for the Defendant to settle all he then had, which was performed; since that an attempt was made before me to have a new decree against the Defendant to settle new acquisitions made by him; but I did not think a court of conscience obliged to execute such a strange agreement any farther than it had been carried already, since it tended to the discouragement of all honest industry; so the suit failed. Now this bill was exhibited in aid of the former decree in 1664; for it did not demand any estate accrued since, but to have a farther conveyance of that estate which was then in being, but undiscovered, and is now proved, and insisted upon some old forfeited mortgages then unknown, and for this the Plaintiff prevailed; but because forfeited mortgages in fee simple are, when redeemed, part of the personal estate, *ergo* the decree was with a proviso, that if the Defendant's personal estate was not worth 3000*l.* at the time of his death, according to the exception in the articles, then these forfeited mortgages, now to be conveyed, should be subject to make it up. — Lord *Nottingham's* MSS. — Reg. Lib. A. 1677, fol. 105.

(a) See *Prebble* v. *Boghurst*, *ante*, v. i. p. 309.

(b) The settlement was to take effect from the death of the Defendant. — Reg. Lib. A. 1677, fol. 105.

COLLET

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remainders; and charged his estates with an annuity of 300*l.* to his wife *Hannah*, and appointed her, and his nephew *James Gordon*, since deceased, executrix and executor.

COLLET *v.* BUTLER.

Whether letters referring to other letters which have been suppressed, but not containing in themselves certain terms of agreement, can be made the foundation of a specific performance, *quære.*

On a marriage between a son of the Defendant and a granddaughter of the Plaintiff, the Plaintiff settles lands to the use of the son of the Defendant, the intended husband, for life, remainder to the wife for life, remainder to the issue of their two bodies in tail, remainder to the husband in fee. Immediately after marriage, the husband dies without issue, and devises all his reversionary interest to his father the Defendant.

The Plaintiff exhibited his bill to compel the Defendant to make a settlement on his son's widow, pursuant to an agreement on his part, or else to reconvey the reversionary interest devised to him by his son.

The evidence of the agreement was a letter written by the father, in which were words to this effect:

"All that I have promised I will make good;" and after, "all that I have is for him and his," *i. e.* the son. This letter was written in answer to one from the son to the father, which was suppressed.

The contents and occasion of the son's letter were to acquaint his father that his proposals would not be accepted till they could hear from him.

It was insisted that the words of the father's letter referred to proposals which he had given the son authority to make, and which the son's letter would probably have disclosed, and that being suppressed by the Defendant, ought to be taken most strongly against him; and that the words "all that I have," included both real and personal, "to him and his," his wife and children.

It was said by *How*, that if the Court should be against the Plaintiff as to making a settlement, the Defendant ought to reconvey the estate devised to him, the consideration, *viz.* the settlement on the husband's side, not being executed; as in case lands are sold and conveyed, and the purchase money never paid, Chancery will

executor. By a codicil dated the 7th of *December* 1782, reciting that he had two children by *Margaret O'Hara*, and that she was then pregnant, and expressing his desire

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will compel the vendee to reconvey.

To this it was answered, that the settlement made by the Plaintiff mentioned no consideration of any other settlement to be made by the Defendant, nor any other consideration at all but marriage, which was executed, and, therefore, no reason for a reconveyance.

The LORD KEEPER told the Defendant's counsel they need not labour that point.

As to the other, the Defendant's counsel admitted it to be a case of great compassion, but not within the power of the Court to relieve: they agreed that the bare memorandum of an agreement put in writing and subscribed, was not within the statute of frauds, provided it be of a thing in certain, but that this was utterly uncertain of itself, and not capable of being reduced to a certainty, there being no evidence of the proposals to which it referred; and as to the suppressing a letter, they thought it very different from suppressing a deed, and hard that a man should suffer for not keeping all his letters by him.

Vernon cited two cases where the Court compelled the execution of proposals made by letters: in one, the father said he would give his daughter 3000*l.*; in the other case, the father said he would not give his daughter above 1500*l.*; but distinguished this case from both, because in them there is a sum certain named, but not in this.

Lee cited likewise several cases of great compassion where Chancery could give no relief. The case of the present Earl of *Lincoln*, which was thus: the last Earl of *Lincoln*, by several successive wills, gave his estate to the present, to whom the honour was to descend, but after the date of the last of those wills, he settled his estate in consideration of an intended marriage; now, though that marriage never took effect, nor consequently the settlement, yet, this being in law a revocation of the will, Chancery would not relieve.

Another case was this: trustees, out of the profits of the

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sire that his two natural children should be provided for, the testator bequeathed his whole estates, both real and personal, to six persons (including *Margaret O'Hara*), named

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the trust lands, purchased other lands; and though the proof was very full that they purchased those very lands with the same money they had received from the trust lands, yet Chancery would not make the purchased lands liable to the trust, money having, as it was said, no ear-mark.

The like case of a miller at *Uxbridge*, who had hid 500*l.* in a hole in a wall; the person that found it purchased lands with it, and died, leaving no assets; the Court could not decree those lands to the miller.

The LORD KEEPER.—I will go as far as I can for the Plaintiff. Let the Plaintiff search for precedents where Chancery has decreed reconveyances, and the Defendant attend me, that I may see what he will propose.

Afterwards, the Defendant agreed to settle all the estate he had to the widow of his son for life, and so the matter was compounded.—From Mr. *Cox*'s notes, Lord *Colchester*'s MSS.

GREGOR *v.* KEMP.

In CHANCERY. 29th *January* 1722.

A disposition in fraud of a covenant in marriage articles, to give a fourth part of the covenantor's real and personal estate at the time of his death, rescinded.

Joan Kemp, mother of the Defendant, on the marriage of her eldest son, *John Kemp*, with *Mary*, late wife of the present Plaintiff, among other things, in consideration of the marriage, covenanted by her last will, or otherwise, to give, grant, or devise to *John Kemp*, his executors or administrators, one full fourth part of all the real and personal estate she should be seised of or entitled to at the time of her death. The marriage took effect, but afterwards *John Kemp* and his daughter, the only issue of that marriage, both falling into a very bad state of health, the mother often declared her apprehensions that neither her son nor his child would long survive her, and therefore appeared much dissatisfied at the covenant entered

named as executors of his codicil, for the purpose of paying the legacies and annuities given by the will and codicil.

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tered into, because so large a portion of the estate was likely to go into the hands of strangers. Three days before her death, she sent for a friend of hers, told him that she had 1000*l.* in bags lying at Mr. *Hearle*'s, a banker hard by, and directed him to draw up an instrument or authority in writing, whereby she empowered him to give two of the bags, containing 200*l.*, to one of her daughters; two other bags, containing 200*l.* more, to another of her daughters; and the remaining 600*l.* to *Hawes* and *Pearce*, whom, she told him, she had made trustees in her will; and the 600*l.* were to be in trust for several of her grandchildren. Accordingly, an instrument in writing was prepared for the purposes aforesaid; and at the same time she signed an order to Mr. *Hearle* to pay the said sums to *Hawes* and *Pearce* for the use of the children. *Hearle* delivered the money to *Pearce* in 100*l.* bags, which *Pearce* sealed up, and wrote upon them, "for Mrs. *Hand*, Mrs. *Tomkins*, Mrs. *N. Kemp*," (the three daughters,) and then left them in the hands of *Hearle*, to be delivered when called for. Three days after this transaction *Joan Kemp* died; and in a short time *John Kemp*, the son, died, and by his will devised to his wife all his goods and chattels, real and personal estate whatsoever, and made her executrix. His daughter died, and *Mary*, the widow, married the Plaintiff, and died.

The Plaintiff, as administrator of *Mary*, and administrator *de bonis non* of *John Kemp*, filed a bill against *N. Kemp*, to have an account of the estate of *Joan Kemp*, and to have the full fourth part of her estate, and that the 1000*l.* disposed of as above might be charged upon the remaining three parts of the estate; insisting that the disposition was in fraud of the articles, that it was made in her last sickness, and but just three days before she died; that it was at best a *donatio causâ mortis*, and would have been alterable by a will made after, or in case she herself had recovered; that if this was so, it was like

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The bill further stated, that the testator died on the 7th of *August* 1787, leaving his widow, and his children named in his will surviving, and that his widow and *Margaret*

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the will of a freeman of *London*, which never had been allowed to defeat the customary shares of his widow or children after his death.

On the other side it was argued, that there could be no pretence that *Joan Kemp*, notwithstanding these articles, was not at liberty in her lifetime to have disposed of her personal estate as she thought fit; that she might have invested it in a purchase, or might have lived upon the principal; and if she had thought fit to spend and give it all away in her lifetime, the Plaintiff must have been content, and could have had no remedy; that this was not a *donatio causâ mortis*, but a *donatio inter vivos*; that the donation was followed by an actual delivery in her lifetime, and could never after have been recalled or revoked if she had recovered; that though 600*l.* of the money were given to the same persons whom she had named trustees in her will, yet that was only a description of the trustees she intended to take care of it for her grandchildren, and did not make it any part of her will, or in any sort dependent upon her will, and therefore the Plaintiff had no colour to impeach or call it in question.

The Lord Chancellor was of opinion, that the disposition was in fraud of the articles. He agreed, that notwithstanding the articles, Mrs. *Kemp* was not restrained from disposing of her estate any way in her lifetime, and had a full power over it, but with this single exception, (*viz.*) she was restrained from making a distribution on purpose to defeat the covenant, which it is here fully proved she did; for she was unwilling her estate should go to strangers; and the disposition is a plain fraud; it was the intent of the articles that it should be for strangers, for it is to him, his executors, &c.; therefore, if he should think proper to make his wife executrix, as he did, it was designed for her benefit. But supposing this disposition had not been with this avowed design to evade the articles, yet he should have thought it, as it is circumstanced,

Magaret O'Hara proved his will and codicil; that some time after his death it was discovered that the testator had made another will, bearing date on board the *Grenada*

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cumstanced, a *donatio mortis causâ*, and not good; for otherwise articles of this nature will signify nothing, if they are thus eluded by a disposition a day or two before death; and in this case she puts the greatest part of the money into the hands of the trustees named in her last will, so that it seems to have the air of a will. The Plaintiff, therefore, must have the full fourth part of the estate after debts paid; but this disposition is good to affect the remaining three parts of her estate, and must be satisfied out of it to the several Defendants. — MS.

" Whereupon, and upon long debate of the matter, &c., His Lordship declared, that although he was of opinion that the said *Joan Kemp* was not restrained, in her life-time, from disposing her estate, or doing any thing which was not professedly in breach of the said articles made on the marriage of the said *John Kemp*, her son, yet it manifestly appearing that the said *Joan Kemp's* disposing the 1000*l.* in the pleadings mentioned was not *bonâ fide*, but purposely done that the articles might not take place, it was a fraud, and ought not to stand against the Plaintiff *Gregor;* and doth therefore order and decree that the Defendants, the executors of the said *Joan Kemp*, and the other Defendants to the Plaintiff *Gregor's* bill, do come to an account with the said Plaintiff, before Mr. *Edwards*, one, &c., for what of the said *Joan Kemp's* estate came to their, or either of their hands, &c.; and the said Master is also to take an account of the debts of the said *Joan Kemp* which remained unsatisfied at the time of her death, and is to make an allowance thereof to the said Defendants, the executors, out of the estate of the said testatrix, and is also to make them all just allowances; and for the better taking the account, &c.; and what upon taking the said account shall appear to be personal estate of the said *Joan Kemp*, after her debts satisfied, and all other just allowances made to the said Defendants, the executors, as aforesaid, it is ordered and decreed that the

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Grenada packet, on her passage from *Grenada* to *London*, the 5th of *August* 1787, and thereby declared that his son *Peter Gordon* should be his sole heir, and appointed him,

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said Defendants, the executors, do pay one-fourth part thereof to the Plaintiff *Gregor*, with interest for the same, to be computed by the said Master from the end of the year after the death of the said testatrix; and do likewise, out of the three remaining fourths of the said *Joan*'s estate, pay unto the Plaintiff, *Gregor*, 250*l*., being fourth part of the 1000*l*. so disposed by the said *Joan* in fraud of the said articles; and do likewise pay interest for the said 250*l*. from a year after the death of the said testatrix *Joan Kemp*; but as to the other Defendants to whom the said 1000*l*. were given by the said *Joan Kemp*, His Lordship doth order that the matter of the Plaintiff *Gregor*'s bill do stand dismissed out of this Court, with costs, to be taxed, &c.; but such costs are to be repaid by the Defendants, the executors, who are also to pay the Plaintiff's own costs so to be taxed," &c. Reg. Lib. A. 1722. fol. 267—269.

GREEN *v.* SPARROW.

In CHANCERY. 25th *October* 1725.

Rent for a colliery commencing the first quarter day after a certain quantity of coal had been dug, ordered to be paid from the quarter day prior to which that quantity would have been dug, but for the fraudulent delay of the lessee.

The Plaintiff, in the year 1721, leased to the Defendant some coal mines, reserving a rent of 600*l*. *per annum*, the first quarter's rent to be paid at the next feast after the lessee should have digged 1000 stacks of coal; the lessee covenanted that he would dig or cause to be digged the said 1000 stacks of coal without delay, and in a reasonable time; and it was further covenanted between the parties that the Defendant might, upon six months' notice, determine and quit the said lease, paying all the rents due, and performing all the covenants contained in the lease. The lessee entered, and in 1723 gave six months' notice, according to the agreement, whereby he insisted that the lease was determined at *Christmas* 1723. The

him, together with *Benjamin Boddington* and *Thos. Boddington*, of *London*, his nephew *James Gordon*, and *James Gordon* the son of his nephew, executors; and bequeathed

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The Plaintiff preferred his bill, and set forth that the Defendant after entering into the lands at *Christmas* 1721, wrought in the mines; and having digged the 1000 stacks of coal about a week before quarter-day, wanting only a small quantity, employed his workmen in other works, telling some of them that he was not such a fool as to pay a quarter's rent for a few days' work; by which means the 1000 stacks of coal were not digged till after *Lady-Day*, whereas they might have been digged before, had not the Defendant himself prevented it; and insisted that the first quarter's rent therefore ought to have been paid upon *Lady-Day* 1721: and prayed that the Defendant might be obliged specifically to perform his covenants, and continue the lease for the twenty-one years; for not having performed his covenants, he insisted he could not determine it; for that the power to determine by notice was conditional, *viz.* on paying the rent and performing the covenants, by one of which he was obliged to dig the pits in a workman-like manner, and to level the pits with the gin-pit, (*viz.* the pit where the engine is to carry away the water,) which he had not done, whereby the pits were overflowed with water, and become of no service to the Plaintiff.

It was said for the Plaintiff that the Plaintiff's application was very proper in this Court, for the Defendant had made use of fraud and contrivance to prevent the commencement of the rent, and that he was entitled to insist on a specific performance of the Defendant's covenant, and continuance of the lease; for though there might be an action of law for breach of covenants, if he had not performed them, yet it is more just and reasonable in a court of equity to oblige the Defendant specifically to perform his covenants, than to drive the Plaintiff to an action of law to recover damages only for the breach of them.

For the Defendant it was said, that the bill ought to be dismissed, because the Plaintiff, if injured, might have his remedy at law; for if the

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bequeathed 2000*l.* to the plaintiff, and to each of his children, *James*, *Adam*, and *Hannah*, to be paid by *Peter Gordon* within two years after the testator's death, with interest; and declared *Peter Gordon* his residuary legatee. The

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Defendant had prevented the digging the 1000 stacks of coal by design, an action of covenant would lie against him at common law, since he covenanted that he would dig them without delay, &c. And as to the second point, if he has not performed his covenants, he cannot determine the lease; and then it still continues without the assistance of this Court; if he has performed them, he may determine it: and this is a proper fact for a jury to decide, and not for this Court.

King, Lord Chancellor, agreed that, as to the second point, it is proper to be tried at law, and in an action of debt; for if the Defendant has not performed his covenants, he cannot then determine the lease, and if that is still subsisting, which is a fact for a jury to try, an action lies for the rent. But as to the first point, though he might indeed have remedy by an action of covenant, upon the collateral covenant to dig the coal without delay, &c., yet here was fraud in preventing the digging before the quarter-day, in order that the rent might not commence so soon; and this fraud requires the interposition of the Court. Decree, therefore, the Defendant must pay the first quarter's rent due at *Lady-Day* 1721, and account and pay the rent to *Christmas* 1723, till which time he allows the lease continued; and the Plaintiff to have the costs against the Defendant so far as he has prevailed; and as to the other point, whether the lease is determined or no, it is properly cognizable at common law, and the bill must be dismissed as to that, and the Defendant, as to that matter, so far must have his costs.—MSS.

The following is the entry in the register relative to the question noticed in the preceding report:

"Upon debate, &c., His Lordship declared, that the said *George Sparrow* fraudulently delayed the getting the 1000 stacks of coal till after the quarter day, on purpose to keep off the commencement of the rent; and doth, therefore, think fit to order and

The bill then stated, that *Peter Gordon* died in *October* 1787 without issue and intestate, and upon his death the Plaintiff, who was thereby become heir at law of his father,

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and decree that the Defendant *Sparrow* do pay to the Plaintiff *Green* the first quarter's rent for the said colliery works, as due at *Lady-Day* 1721; and do continue to pay the rent for the same from *Lady-Day* 1721 to *Christmas* 1723," &c.—Reg. Lib. A. 1725. fol. 120—124.

SEAR *v.* ASHWELL. (*a*)

In CHANCERY. *March* 1739.

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The LORD CHANCELLOR. The first question is in respect of two demands made by two persons under two bonds given to each of them for 40*l.*, payable after the death of the testator's mother; and as to them, I am of opinion, that the legacy of 60*l.* a piece given to them in the will was in satisfaction of those two bonds, the legacies being greater than the bond debts, and made payable at the same time. The next question is as to the claim by the testator's younger children by his first wife, under the settlement 26 *February* 1720, which has been destroyed, but a draft thereof has been propuced and admitted by the Defendant's answer, which I make no doubt is a reasonable settlement. *Dimmock* devised his estate to *Atkins*, the testator, and his wife, and their heirs; *Atkins*, after his wife's death, intending to marry again, made a settlement to trustees for 500 years, in nature of a mortgage, with condition that if his heirs or executors paid 300*l.* to *Reileard* his eldest son, 200*l.* a piece to *John*, his younger son, and *Mary*, his daughter, then the term to cease. *Atkins* afterwards married *Elizabeth*, now his widow; the Defendant then sent for the former settlement and burned it, and a copy thereof is produced and proved; and the question is, whether younger children are entitled to the benefit of the settlement? and I am of opi-

(*a*) *Vide Bolton* v. *Bolton*, *post*, p. 414.

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father, proved his father's will in *America*, and began to receive the rents of his estates; but very shortly afterwards the Defendant, *James Gordon*, claimed the estates,

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nion they are entitled, and that the settlement will be good against the testator, and all claiming under him; for it was plainly a provision for younger children from whose mother or uncle *Atkins* had the estate, and younger children are to many purposes considered as purchasers; and being an absolute settlement, *Atkins* had no power to revoke it. It was admitted for the Defendant that if the settlement was now in being, they would at all events be intitled to the benefit of it, but that being always kept in testator's own custody, and never delivered to the trustees, and he having destroyed it, it should not now be set up again; and for this purpose the case of *Naldred* v. *Gillam* (*a*) has been cited, but I think that was different; there was a mere voluntary settlement in every respect, not only as to creditors, being a settlement by an aunt for the benefit of her nephew, which never was disclosed, but kept always in her possession, and made for a person for whom she was not obliged to provide; some body broke open her scrutoire, and the nephew clandestinely took a copy, and she afterwards destroyed the settlement; this Court would not suffer the copy to be set up, because it would not have it set up for any body else, not even in favour of an heir at law, but the person claiming under it, must take his chance, whether it should appear fraudulent or not. The present case is different, being a settlement for children otherwise unprovided for, and, therefore, as such they are entitled to set up this copy.

The question then is, how far they are entitled to have the benefit of it? And I think they are entitled as against all those claiming under the bill, but not against the specialty creditors; for being voluntary it will be considered as fraudulent against them, upon the statute of *Elizabeth* (*b*); for though in

(*a*) 1 *P. W.* 577.

(*b*) 13 *Eliz. c.* 5.

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estates, alleging that he was the real heir at law of the testator, by reason that both *Peter Gordon* and the Plaintiff were illegitimate, and not born after the testator

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some cases voluntary settlements have been held good, where there appear any badges of fraud, and a settlement is to commence after the death of the person who makes it, (as in the present case,) it has been always held such in a court at law; and if at law the creditors would be entitled against the settlement, there is no colour why in equity they should not be entitled: but this is only as to the bond creditors; those by simple contract cannot prevail against the settlement, because that was a prior charge upon the estate in favour of children, and against those, simple contract creditors will not be preferred, though they would against legatees. Indeed, even that was formerly otherwise; where debts and legacies were charged upon the estate, it has been decreed that they should be paid *pari passu*; but now it is settled that creditors always must take place.

The next question is as to the residue of the personal estate, and I should be inclined to think that it ought to be taken as a specific legacy, exempt from debts, in case the real estate was sufficient, which in this case it is not. The real estate is devised to trustees to sell the same for payment of all his debts, and for the maintenance of children to twenty-one, or day of marriage; and then the residue of the land to his eldest son; then he gives out of the personal estate several specific legacies; and then says, "Item, I give all the rest and residue of my money and personal estate unbequeathed to my wife;" and makes her executrix. Now where a personal estate is given as a residue, it is generally held to be liable notwithstanding, in the first place for the payment of debts; it must be something very particular to make it otherwise, and I think that particularity does occur here; because the real estate is before charged for payment of all his debts, and the residue of the personal estate unbequeathed is given to the wife; which shews the residue of the personal estate in that case was meant as a specific legacy, and the real estate (in

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testator and his wife were married; and he represented to the Plaintiff that he was provided with evidence to prove the Plaintiff's illegitimacy; and the Plaintiff,

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(in case it was sufficient) is charged therewith; and so it has been determined (*a*); and the only doubt remaining is as to the wife's being made likewise executrix; but I believe the cases cited at the bar were likewise where the residuary legatee was made executor, as in the case, so that circumstance is not material. But the real estate here not being sufficient, I think the creditors must come upon the personal estate. — MSS. Reg. Lib. *B.* 1739. fol. 437.

(*a*) 2 *Vern.* 718.

In CHANCERY. 5th *December* 1739.

BOLTON *v.* BOLTON. (*a*)

A voluntary deed executed in favor of children, without a power of revocation, is not revoked by a subsequent will.

A. settles his estate on himself for life, remainder to his wife for life, remainder to his first and other sons, in tail, and in default of such issue male, limits a term of 500 years to trustees, to raise 2000*l.* a piece to his daughters, remainder to his own right heirs.

A. having no children but daughters, and having the remainder to his own right heirs, executed a deed, by which (after reciting that he had promised to give to a gentleman, who had married one of his daughters, 3000*l.* and his estate, but that he had altered his mind) he charged his estate with 4000*l.* a piece for all his children, and gave some other legacies; and bound himself and his heirs, &c., in the sum of 25,000*l.* to his children, their executors, &c., if all his estate was not equally divided among them.

A. afterwards by his will disposed of his estate in a very different manner from the last deed; and the bill was brought against the devisees and trustees of the will, and to have the deed carried into execution.

The question was, whether

(*a*) *Vide Sear* v. *Ashwell, ante,* p. 412. *Worrall* v. *Jacob,* 3 *Mer.* 256.

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Plaintiff, in consequence of such assertions, and having seen a certificate of a public solemnization of a marriage between his father and mother subsequent to his birth, and

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the will was a revocation of the deed?

The LORD CHANCELLOR.

As this is a deed formally executed in the life-time of *A.*, and a voluntary settlement without a power of revocation, it will not be subject to a revocation by the will; for, if it was, there would be no difference between a deed with a power of revocation, and one without it.

The case of *Naldred* v. *Gillam* (*a*) is where an old woman executed a voluntary settlement of her estate, which she always kept by her, in favour of her nephew; a copy of this was surreptitiously got by the nephew's father; the old woman changed her mind and made a different disposition by will; and after her death, a bill was brought to set up the copy against the will, and the Master of the Rolls decreed the copy to be good, because the original was lost. But on an appeal to Lord *Macclesfield*, the decree was reversed; for as it was only a voluntary settlement and kept always by the party, it must be presumed she intended to have a power over it; and he refused to shew any kindness to a copy gained so fraudulently, or to a voluntary settlement under such circumstances; and decreed in favour of the will, because of the attendant circumstances.

As this deed is a provision for children, there is a kind of consideration for it, and it ought to take place of all other voluntary settlements, and, therefore, of the will, but not of debts or other settlements for a valuable consideration.

The Defendant's counsel urged that the 2000*l.* a piece secured to the daughters by the settlement were to be included, and make up a part of the 4000*l.*, and, therefore, what was not given to the daughters by the deed, was well devised by the will.

But the Lord Chancellor said, that *A.* must think that the 4000*l.* a piece to his five daughters would exhaust his whole estate, and lest it should, he bound himself in the 25,000*l.*, if all his estate

(*a*) 1 *P. W.* 577.

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and previous to that of the Defendant, *James Gordon*, was induced to believe his alleged illegitimacy; and under that impression, and in order to end the differences subsisting between him and *James Gordon*, who threatened legally to assert his claim, and solely under that persuasion, and without any consideration, articles of agreement were executed by the Plaintiff and the Defendant,

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should not be equally divided amongst his daughters.

Decree, account of the personal estate, and after payment of debts, &c., let the surplus be equally divided among the five daughters, the Plaintiffs, and also the real estate be divided amongst them as tenant in common.—From Mr. *Short*, Lord *Colchester's* MSS.

The ATTORNEY-GENERAL *v.* LAUNDERFIELD.

In CHANCERY. *Mich.* 17 *Geo.* 2. 1743.

An agreement between trustees of a charity and the next of kin of a testator for division of property, subject to a bequest for charitable purposes, established, after a report from the Master that it was beneficial to the charity.

A. by will devised all his estate, both real and personal, to the hospitals of St. *Bartholomew*, &c.; and it being a question whether this devise was within the late statute of mortmain, the governors of the hospitals, &c., and the next of kin came to an agreement that all the estates both real and personal should be sold, and the produce divided into four parts, one of which was to be for the next of kin, and the other three to be paid to the use of the corporations. The leasehold was 400*l.* a year, and the personal 4,500*l.* after debts paid. This agreement came now to be established in Chancery; but it not appearing what proportion the leasehold and personal estate bore to the real, the Court was unwilling to decree, till the Master should report whether this agreement was for the benefit of the charity; for, by the Lord Chancellor, it appears to be a proposal only, and no agreement; if the latter, I should think the agreement of so great a corporation of great weight with me; but these corporations are only trustees for the several charities, and cannot alien the lands or estates given to those uses, and these estates

fendant, *James Gordon*, dated the 31st of *March* 1790, whereby, after reciting a mortgage of the estates of the testator to *Boddington* and *Bettesworth* for 5559*l.*, and the

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tates are distinct from those which they are seised of as mayors, &c., of *London*. (*a*)

The agreement was afterwards established by a decree.

Note. — In this case the Attorney General argued, that as corporations could not be seised to an use at law, no more could they be trustees, but should have the lands to their own use, divested and freed from the trust. 1 *Co.* 122. *a*. *Chudleigh's* case. But the Chancellor would not let him go on; nothing being clearer than that corporations can be trustees.

HOOK *v.* KINNEAR and Sir JOHN PHILIPS.

Specific performance decreed at the instance of a person entitled to the benefit of an agreement, though not a party to it.

The two Defendants were tenants in common of certain lands; the Defendant *Kinnear* had taken a lease from Sir *John Philips* of his undivided moiety at a certain rent, but the rent being in arrear, the Defendant *Kinnear* entered into an agreement with Sir *John Philips*, by which he bound himself to execute to the Plaintiff such lease of the premises as Sir *John Philips* and the Plaintiff should agree upon, and that all the rent should be paid to Sir *John* until the arrears that were due to him from *Kinnear* should be discharged, but the Plaintiff was no party to the articles. Accordingly Sir *John Philips* agreed with the Plaintiff that he should have the premises at 30*l.* a year, and executed a lease to him of his part at 15*l.* a year; but

(*a*) Upon debate, &c., his Lordship doth think fit, and so order and decree, that it be referred to Mr. *Holford*, one, &c., to examine whether it is for the benefit of the charities mentioned in the will of the said *John Aldred*, that the proposal and agreement stated in the information, and submitted to by the answers of the said Defendants, *Smith* and *South*, be carried into execution; and the said Master is to state the whole matter, how he finds the same, to the Court, whereupon this Court will give further directions. — Reg. Lib. A. 1743, fol. 69.

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the wills and codicil of the testator, and the death of him and of *Peter Gordon*, it was agreed that the Plaintiff should continue in possession of the estates in *Grenada*, and

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the Defendant *Kinnear* refusing to execute any lease of his part, the Plaintiff brought this bill for a specific execution of the agreement.

Mr. *Wilbraham* objected, for the Defendant, that this Court never decrees a specific execution of an agreement, but at the instance of the party with whom the contract is made; consequently that this bill ought to have been brought by Sir *John Philips*, not by the Plaintiff.

The LORD CHANCELLOR.

I think the Plaintiff is the proper person to bring this bill, because I must take it that Sir *John Philips* contracted not only in behalf of himself, but also of the Plaintiff; for the agreement is that he should join him in making a lease to the Plaintiff; and it is certain that if one person enters into an agreement with another for the benefit of a third person, such third person may come into a court of equity and compel a specific performance; and there are many instances where stewards have made agreements, and yet the masters, for whose benefit they were made, have come into this Court, and obtained decrees. Indeed if Sir *John Philips* had made an unreasonable agreement with the Plaintiff, that would have been a proper defence; but he has not: therefore I must decree that the Defendant execute a lease of his moiety to the Plaintiffs upon the like terms as the lease executed by Sir *John Philips* to him of his moiety.—MS.

GASCOYNE *v.* CHANDLER.

31st *October* 1755.

Injunction to restrain proceedings in the Ecclesiastical Court to set aside a will, contrary to agreement.

The bill in this case was to set aside a deed suggested to have been obtained by the Defendant from the Plaintiff's wife before the marriage, by misrepresentation, imposition, and surprise; and it was also that a paper writing, purporting to be the will of the Plaintiff and Defendant's father, should be carried into execution so far as it went, and

and should, in consideration thereof, pay out of the profits the cultivation and management thereof, and the interest of the *5559l.*, and should also pay to Messrs.

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and that the Defendant, the administrator of the father, with this paper writing annexed, should account for, and make distribution of, the personal estate of the father left undisposed of by this writing. By the deed attempted to be set aside, it was agreed between the Plaintiff and Defendant, that the Defendant should take out administration to the father with this paper writing annexed, and it was agreed that the Defendant should pay to the Plaintiff certain sums of money therein mentioned, in discharge and satisfaction of all her right and interest in the father's estate. The Defendant, by his answer, denied that the deed was obtained by any imposition or surprise, or that the Plaintiff was prevailed upon to execute the same by any persuasion or misrepresentation; and swore that during the treaty between him and the Plaintiff previous to the execution of the deed, he gave her the best information he was able concerning the estate and condition of the affairs, and circumstances of the father at his death, and particularly concerning the nature, amount, and value of his personal estate; and insisted on the deed in bar to the Plaintiff's demands, and that he was not now accountable to the Plaintiff for such personal estate.

Exceptions were taken to the answer, for that the Defendant had not set forth the particulars of the personal estate of the father; and it being referred to a Master, he reported the answer sufficient, in regard he thought the Defendant not accountable for the personal estate till the validity of the deed was determined; and exceptions being taken to the Master's report, the Lord Chancellor was of the same opinion, and confirmed the report: but upon arguing the exceptions, the Lord Chancellor seemed to think that the paper writing which was taken for a will, ought not to have been considered as such, nor ought to have been annexed as a testamentary schedule to the letters of administration. It was only the incipitur of a will of the father's

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Messrs. *Boddington* and *Bettesworth* 1040*l.*, then due from the Defendant, *James Gordon*, to them, and to *James Gordon* or his assigns an annuity of 400*l.* for five years,

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father's own hand-writing, in which some legacies were given, particularly to the wife, and it began, I give and bequeath, &c., but had no conclusion, date, or signing, nor was any executor named in it.

Upon this, it being for the benefit of the Plaintiffs that this paper writing should be set aside as a will, they took the advice of several civilians upon it, who all concurring in opinion that the paper writing ought not to be considered as a will, or to have been annexed as a testamentary schedule to the letters of administration, a suit was commenced in the Ecclesiastical Court by the Plaintiff against the Defendant to bring in the letters of administration, praying that the same might be vacated, and that letters of administration without such testamentary schedule might be granted, as upon a total intestacy. This suit in the Ecclesiastical Court to set aside the will being inconsistent with the suit in this Court, the bill praying that it might be established and carried into execution so far as it went, and the Defendant's answer being replied to, the Plaintiffs moved for leave to withdraw the replication, and amend the bill, to make it agreeable to the case as it then stood; but some witnesses having been examined, the Lord Chancellor said the replication could not, by the practice of the Court, be then withdrawn (*a*), but that the Plaintiffs, if they had mistaken their case, must dismiss the bill with costs, and prefer a new bill. After this, the Defendant brought a cross bill to establish the deed of agreement, and suggesting that it was part thereof that this paper writing should be performed as the will of the father so far as it went, and that letters of administration, with this paper writing annexed as a testamentary schedule, should be taken out by the Defendants, it was therefore prayed that the Defendants thereto, who were Plaintiffs in the original bill, might be restrained by injunction from proceeding in the Ecclesiastical Court to set aside this paper writing as a will;

After witnesses have been examined the replication cannot be withdrawn.

(*a*) *Anon. Barn.* 222.

and

years, and in case *James Gordon* should be living at the end of five years, an annuity of 300*l.* during *James Gordon's* life; and it was also agreed that at the expiration

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and now, before any answer was put in to the cross bill, such injunction was moved for, on affidavit that the proceedings above were depending in the Ecclesiastical Court; and the Lord Chancellor was of opinion that the Defendants to the cross bill having agreed that this paper writing should be established as a will, they ought not in conscience to be permitted, at least for the present, to controvert this matter in the Ecclesiastical Court; nor at all, if finally at the hearing of the cause the agreement should be established which went to the question at the hearing; and therefore granted the injunction.

Note.—There was a case of this kind of *Sheffield* v. *Duchess of Buckingham* in this Court in *Michaelmas* term 1739, wherein the present Chancellor decreed a perpetual injunction against the Duchess to restrain her from questioning the validity of the will of the Duke her husband. (*a*)—From Mr. *Coxe's* MSS.

HOWARD *v.* OKEOVER and BAXTER.

LINCOLN'S INN HALL. 14th *January* 1778.

Lord Chancellor *Bathurst.*

The Plaintiff was occupier of a farm, and desirous of purchasing a contiguous farm belonging to the Defendant, Mr. *Okeover*, of *Okeover*; *Cowper*, the Plaintiff's agent, applied to *Baxter*, the Defendants' agent for this purpose. There was a correspondence between *Okeover* and his own agent *Baxter* upon the subject; and in a letter to *Baxter*, *Okeover* wrote, "If *Cowper* will give 2000 guineas, he shall have the estate." Mr. *Baxter* wrote upon this to Mr. *Cowper*, but added, "As I apprehend the estate is worth more, I must write again to Mr. *Okeover*."

(*a*) 1 *Atk.* 628.

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piration of ten years the Plaintiff should pay to the Defendant *James Gordon* 4500*l.*, and in the mean time secure the same in manner therein mentioned.

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Mr. *Cowper*, in answer, wrote to *Baxter*, "That between gentlemen, the agreement ought to stand."

The bill was filed stating this case, and insisting upon the correspondence as an agreement in writing for sale of the estate at 2000 guineas, and praying a discovery of the names and places of abode of all persons who had any interest in the estate, and that the Defendant *Okeover* might deliver an abstract of the title, and that the agreement might be performed.

To this bill the Defendants *Okeover* and *Baxter* demurred. They set forth the statute of frauds, and insisted that it appeared by the bill, that neither *Okeover* nor any person authorised by him signed any agreement in writing for sale of the estate to the Plaintiff.

The Solicitor-General, *Wedderburne*, for the demurrer. A defence by way of demurrer to a bill of this nature is certainly new. The statute of frauds is usually insisted upon by way of plea. But as to the form, there can be no objection; for whatever is good by way of plea, must be good as a demurrer, if the facts appear sufficiently by the bill. He cited *Bill* v. Sir *Arthur Lake* in the Common Pleas (*a*), *Plummer* v. *May* (*b*), and *Jenner* v. *Tracey* (*c*), which was the case of a demurrer to a bill to redeem, where it appeared by the bill that the mortgage had been in possession above twenty years.

Mr. *Madocks*, for the Plaintiff, insisted that the demurrer was a speaking demurrer; that it alleged a fact, the statute of frauds. The bill is against the Defendants for the specific performance of an agreement which the Plaintiff collects from written evidence. Whether this is, or is not an agreement to be carried into execution, is a question to be determined at the hearing of the cause. The question will then be upon the letters, whether what has passed amounts to a contract notwithstanding the statute of frauds; this depends on a

(*a*) *Hetley*, 138. (*b*) 1 *Ves.* 426. (*c*) 3 *P. W.* 287. n. B.

number

The bill further stated that, in pursuance of the agreement, the Plaintiff paid to *James Gordon* the annuity until *January* 1808, and 500*l.* part of the 4500*l.*, and interest

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number of circumstances, and it is therefore improper to determine the matter upon a demurrer.

Solicitor-General in reply.

The argument for the demurrer is, we admit the letters were written as stated in the bill, but we contend that they do not amount to an agreement in writing; and this is a matter which may well be determined on a demurrer. There must be a written agreement of one party to sell, and of the other party to buy. It may be by letter. But in the present case, take every part of the bill to be true, yet there is no contract. As to the objection, that this is a speaking demurrer because it alleges the statute of frauds, it is clearly not so. The statute of frauds is not alleged as a fact; it is the law of the land.

The Chancellor overruled the demurrer, thinking the letters imported so much as intitled the Plaintiff to an answer. — From Mr. *Mitford*'s Notes. Lord *Colchester*'s MSS.

CHILD *v.* COMBER.

In CHANCERY. 1723.

To a bill for specific performance, a plea that there was no agreement in writing, was overruled.

The Defendant was possessed, for the remainder of a lease for forty years from the Dean of *St. Paul's* (whereof about two years only were to come), of a very considerable estate, consisting in houses and land at *Shadwell*, and she was likewise seised and possessed of the market, and profits of the market there, which were no part of the Dean's lease. The Plaintiff came to an agreement with her for the purchase of her tenant right in the Dean's lease, in order to renew with the Dean, and likewise of her right and interest in the market, for 750*l.*, but this agreement was not in writing; but the Plaintiff, in order to his being better recommended to treat with the Dean for a new lease, desired the Defendant to give him a letter to the Dean for that purpose; and thereupon

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interest on the remainder; and also paid the debt of 1040*l.* to *Boddington* and *Bettesworth*; that the mortgage debt of 5559*l.* was afterwards paid by Messrs. *Lang*,

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the Plaintiff wrote the letter, which the Defendant signed, directed to Dr. *Godolphin* to this purpose. "Sir, I having agreed with Sir *Cæsar Child* for the purchase of all my right and interest in the lease which I hold of you for the remainder of the term, desire you will please to admit him to treat with you, which will oblige your humble servant, *Fra. Comber.*" Upon this the Plaintiff went to Dr. *Godolphin*, gave him the letter, and agreed with him for 15,200*l.* for a new lease for forty years, on a surrender to be made to him of the old lease; and the Dean thereupon wrote to Mr. *Gilbert*, his agent, acquainting him with the agreement he had made with the Plaintiff, and forbidding him to treat with any other person. In the mean time a draft was prepared for the defendant's assignment of the residue of her lease to the Plaintiff, and being left with the Defendant's counsel, several alterations were made in it by him; and at length the terms and draft were settled by counsel on both sides, and the Plaintiff gave 15 guineas to counsel on that occasion; but the Defendant insisted upon having 250*l.* more, in the whole 1000*l.*, before she would assign her interest to the Plaintiff; which he was forced to comply with, and this was one of the alterations made in the draft. After which, both the Dean and the Defendant being informed that their interest in the premises was much more valuable, refused to perform their agreement with the Plaintiff, who had provided his money for that purpose; upon which the Plaintiff brought two several bills, one against the Dean, and the other against the present Defendant, who both pleaded the statute of frauds and perjuries, and that there was no agreement in writing; but the Dean's plea was overruled upon the letter he had sent to Mr. *Gilbert* his agent, wherein he had taken notice of the agreement particularly, and how much he was to have for the new lease; and as to the Defendant's plea, that was ordered to stand for an answer with liberty to except, and

Lang, *Turin*, and Co., of *London*, who had in consequence a considerable claim on the estates, for securing the amount of which the Plaintiff conveyed them

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and the benefit of it saved to the hearing; both these being heard by the Master of the Rolls in the absence of the Chancellor.

The Defendant being dissatisfied, petitioned for a re-arguing of her plea, which now came on before the Chancellor. The principal objection was, that this letter not mentioning any of the terms of the agreement, would make way for all that perjury which the statute intended to remedy; that one might swear the agreement was for one thing, another for another thing; one that it was for so much money, another for less; and here it was plain the first agreement, whatever it was, was raised from 750*l.* to 1000*l.*; and the draft of the ingrossment of the conveyance could be no ways binding upon the parties to execute; that the agreement was not mutual, and if the Plaintiff had refused to have performed, the Defendant could have had no remedy to have compelled him to it; that this letter was written by the Plaintiff himself, and though the Defendant signed it, yet it was only as a letter of recommendation to introduce him to treat with the Dean; that this 750*l.* was to be paid for the interest in the market which the Dean had nothing to do with, as well as for the remainder of the Dean's lease, and no notice was taken or any distinction made in the letter concerning it; that the Plaintiff being at liberty to except, would certainly except to the plea, till they had an answer whether there was such agreement or not; and if the Defendant should be forced to own it, the Court might decree a performance of it, and so the benefit of the statute be wholly taken away from the Defendant.

On the other side it was argued, that letters written to third persons, and not to the party himself, had been frequently held to be a sufficient writing to take the case out of the statute; that if the terms of an agreement had been certainly expressed, that would have been the same as the agreement itself, and there would be no difference between an agreement and a memorandum of an agreement; that

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them to Messrs. *Arnold* and Co. of *Grenada*, in trust for sale, if the Plaintiff should make default in reducing the mortgage debt; and that the produce of the estates

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that its being written by the Plaintiff was nothing to the purpose, since the Defendant had signed it; and the drafts being settled by counsel on both sides, 15 guineas paid upon that occasion, and the purchase money provided by the Plaintiff, were as much an execution of it on his part, as where a man agrees by parol to let a lease, and suffers a lessee to go and build, and then refuses to make the lease. This Court has frequently assisted in that case.

The Lord Chancellor. This is barely a plea of the statute of frauds and perjuries, without any denial of the agreement: if, indeed, the plea had been as to so much as sought any discovery of an agreement, that there was nothing reduced into writing, and then the answer had denied the agreement, this had been directly a plea within the statute; but here it is plain there was an agreement, and the plea only goes to the not being compelled to an execution or a performance, being not reduced into writing, without any denial of the agreement. The primary intention of the act, and the principal object which the parliament had in view, was, that no action at law should be brought upon an agreement not reduced into writing, because they could not suffer or give way to the variety of evidence which might be given at law in that case; and where an action will not lie at law, it is reasonable no bill should be allowed in this Court: but this is not a general rule; as in case where the agreement is performed in part, on a contract for a building lease by parol, though the agreement is denied, yet this Court hath admitted parol evidence to prove it on the head of fraud; yet there the building does not in the least shew what the terms of agreement were, and therefore it lies as much open to fraud as the present case: but where there is any fraud this Court interposes; and is it not strange to say, I will not put it in issue, whether any agreement or not, but whether signed or in writing or not? But here is a note in writing, owning that she had agreed, and therefore

estates becoming insufficient to discharge the mortgage debt, the mortgagees, in *March* 1808, entered into possession of the estates.

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fore no colour to say that there was no agreement; but if by her answer she should deny that there was any agreement, it will then be proper to consider whether the Plaintiff shall be admitted to give evidence of it; and here the fees paid to the counsel, the drawing of the drafts, and ingrossing them, and the Plaintiff providing his purchase-money, are as much an execution of it on his part, as the laying out money on the buildings was in the other case; and the circumstances of his agreement with the Dean, are in consequence a proof of his agreement with the Defendant, which if she owns, where is the danger of perjury? Indeed, a note or memorandum of an agreement must mention the substance of the agreement in short, otherwise no action can be brought upon it at law; but where there is fraud this Court may interpose, though the agreement is not reduced to such a certainty; and it is proper for the Court to look into it.

The Chancellor therefore confirmed the order made by the Master of the Rolls; and said, though the Defendant could have no remedy perhaps against the Plaintiff on this agreement, for want of his having signed some writing or memorandum, that was not material; for the act does not say, unless both parties, or unless mutually signed, and therefore an action lies against the party who has signed.—From Lord *Colchester*'s MSS.

The bill was dismissed on the hearing, 14th *December* 1724. Reg. Lib. A. 1724. fol. 56.

In the EXCHEQUER. *Hil.* 12 *Geo.* 1. 1725.

CAREY *v.* STAFFORD.

The Plaintiff was the Defendant's servant at 50*s. per annum*, which was proved in the cause to be paid, and

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ot the property of the grantor, established against him, as an agreement
ey lands of equal value.

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The bill proceeded to state, that upon the death of the Plaintiff's father, the Plaintiff became entitled to certain estates in *America*, to which the Defendant *James Gordon*

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during her service the Defendant procured a deed to be drawn by an attorney, whereby lands of 22*l.* *per annum* were settled for life, with usual covenants to repair, and for quiet enjoyment, with a reservation of a pepper corn rent; and there was a receipt endorsed for 5*s.* as the consideration money, but blanks were left for the names of the parties.

The Defendant afterwards filled up the blanks with his own name, as the grantor, and the Plaintiff's name as the grantee; but it appeared after all to be a fiction, and that there were no such lands as were described in the deed; and it was proved in the cause, that when the Plantiff came to demand where the lands were, the Defendant laughed at her, and said they were in *nubibus*; whereupon the Plaintiff brought her bill to be relieved, and to compel the Defendant to convey lands for the same estate, and to the same value.

For the Defendant it was urged, that it appearing that the Plaintiff was a mere volunteer, she ought not to have the aid of a court of equity; that she did not come to be relieved against a fraud, by which he was deprived of any thing, but to force the Defendant to give her what he never intended. That it was *turpis causa*, and not to be favoured in equity.

Some proofs were then read to shew a criminal conversation between the Plaintiff and the Defendant, but not fully.

Curia of opinion that the Plaintiff ought to have relief; and that it should go to the deputy to see a good conveyance made to the Plaintiff of Defendant's lands to the same value, and to take an account of the rents and profits from the date of this fraudulent deed, as if such lands had been really conveyed by it; and *per*

Gilbert, Chief Baron. This is not within the case of volunteers, for here is nothing at all given, and, therefore, no remedy can be at law; but in the case of a volunteer where something is conveyed, damages may be recovered,

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Gordon also laid claim on the ground of the Plaintiff's illegitimacy, and the Plaintiff under that impression was prevailed upon to enter into another agreement; and articles

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recovered, at law, on the covenants, and, therefore, equity will not interpose.

Hale, Baron. If the consideration did arise, *ex turpi causa*, yet it is good in equity, where there is no creditor, &c.; and courts of equity, in such cases, will decree performance, and that as a punishment for the party; and the man in this case is more criminal, for it must be supposed the solicitation first came from him. From Mr. *Coxe's* MSS.

In the EXCHEQUER. 27th *April* 1792.

MORSE *v.* FAULKNER. (*a*)

Thomas Gyles on the 4th of *October* 1770 died a bachelor intestate, seised in fee of two several copyhold estates in *Great Coxwell* and *Little Coxwell*, and leaving two nephews, *Thomas Robinson* and *William Robinson* (children of his sister) and also *William Robinson* (who was a common soldier), the son of *Richard Robinson*, the second nephew of the intestate, and brother of the said *Thomas Robinson* and *William Robinson*, who died in his uncle's life-time.

Thomas Robinson, the eldest nephew, and the heir at law of the intestate, having gone to reside in *Ireland*, upwards of forty years before the death of his uncle, and *Richard* being then dead, *William*, the third nephew, took out administration to his uncle, and also entered into possession of the copyhold premises.

In *April* 1772, *William* the soldier, having then lately arrived in *England*, went to *Great Coxwell*, accompanied by his uncle *William*, and claimed title to the copyhold estates, alleging that he had been lately in *Ireland*, where he had been assured of the death of his uncle *Thomas* about two years before, without issue; and *William*,

(*a*) Shortly reported 1 *Anstr.* 11.

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articles for that purpose were executed between the Plaintiff and the Defendant *James Gordon*, dated the 10th of *February* 1805, whereby, after reciting that the testator

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liam, the uncle, alleged the same thing, and gave up the possession of the copyhold premises to *William*, the soldier, as heir at law of the intestate.

William, the soldier, declared his intention to sell the premises immediately, and sent for the steward of the manor, who lived thirty miles off, to take his admission, and his surrender to the purchaser. When the steward came, *William*, the soldier, sent for two or three persons to a public house at *Coxwell*, and about nine o'clock in the evening put up the premises to auction; *Richard Morse* and another person bade for them, and at the third bidding *Richard Morse* was declared the purchaser.

Richard Morse was accordingly admitted to part of the copyhold premises, and the other part was (by his direction) surrendered to the use of *William Morse*, his son; *Richard Morse* paid the purchase money to *William*, the soldier, and the court fees. He afterwards laid out a considerable sum of money in repairing the premises, and died in 1785.

It afterwards appeared that *Thomas Robinson*, the uncle, in fact, survived the intestate, and was living at the time of the sale to *Morse*, so that *William*, the soldier, had not then any title, whatever, to the premises. But *Thomas Robinson* afterwards, viz., in 1778, died without issue; and upon his death the premises descended upon *William*, the soldier. No act was done by *William*, the soldier, after the death of his uncle *Thomas* to confirm the surrender or sale to the *Morses*; and *William*, the soldier, died in 1781, leaving *John Faulkner*, *Mary Shade*, *Hannah Ward*, and *Ann Robinson*, his heirs at law.

In *Easter* 1788, actions of ejectment were brought by *John Faulkner*, *James Shade*, and *Mary* his wife, *Samuel Ward* and *Hannah* his wife, and *Ann Robinson*, against *Ann Morse*, who claimed her free bench in the part surrendered to *Richard Morse* and *William Morse*, to recover possession of these premises, on the

testator was possessed of or entitled to certain lands and tenements in *Pennsylvania*, and also to about 5000 acres of land in *Vermont*, it was agreed that if the Plaintiff should

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the ground that nothing passed by the surrender of *William*, the soldier, and that the copyhold premises, therefore, descended on the lessors of the Plaintiff, as his heirs at law.

A case was reserved for the opinion of the Court of King's Bench, and after great consideration, judgment was given for the lessors of the Plaintiff. (*a*)

Ann Morse and *William Morse* then filed the present bill against *Faulkner*, *Shade*, and wife, *Ward* and wife, and *Ann Robinson*, praying that they might be decreed to make a surrender to the Plaintiffs respectively of the several parts of the copyhold premises which were surrendered to *Richard Morse* and *William Morse* by *William Robinson*, the soldier, and that they might be quieted in the possession thereof, and that the defendants might be restrained by injunction from proceeding to extension upon the judgment in ejectment.

Partridge and *Cox* for the Plaintiffs. It is now settled by the judgment of the Court of King's Bench, that the Plaintiffs have not a legal title to the premises in question. They, therefore, come to a court of equity in the character of fair purchasers for a valuable consideration, to have that legal title made good to them by the heirs at law of the vendor. This is the common case of a purchaser coming to have an agreement specifically performed, or a defective conveyance supplied; and it is a species of relief which courts of equity are in the constant habit of giving, either against the vendor himself, or any claiming as heir or volunteer under him, whether the agreement for the sale remains wholly unexecuted, or is defectively executed, and whether the vendor had good title to the premises at the time of the sale, or whether such title accrued to him afterwards; and although the case at law turned upon the difference between freehold and copyhold premises, yet,

(*a*) *Goodtitle* v. *Morse*, 3 *T. R.* 365.

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should recover possession of the estates, he should sell them, and give notice thereof to *James Gordon*, and pay to him one-fourth of the money produced by the sale; and

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it is evident, that no distinction of that sort can arise here, for the claim of the Plaintiffs is to have a good legal title made to them by all necessary means; and indeed most of the cases on defective conveyances arose on copyholds. In *Wiseman* v. *Roper* (*a*) the Defendant was only presumptive heir to his brother, and agreed to settle certain lands to the uses of the marriage within one month after his brother's death; there the objection was taken that, at the time of this agreement, the Defendant had no interest whatever in the lands; but as they afterwards descended upon him, he was decreed to perform his agreement. In *Barker* v. *Hill* (*b*) the heir of the vendor was decreed to surrender the copyhold premises to a purchaser. So in *Patteson* v. *Thompson* (*c*) the heir of the mortgagor was decreed to surrender the copyholds to the mortgagee. In *Martin* v. *Seamore* (*d*) the bill was by mortgagee of copyhold, the surrender having been defective; and it was particularly argued in that case, that as the Plaintiff would have been clearly entitled to relief upon a bare agreement, he ought not to be in a worse place by having a surrender though defective. In *Clayton* v. *The Duke of Newcastle* (*e*) the heir sold in the life-time of the ancestor, and received the money, and when the land descended upon him he was decreed to convey; which case seems very like the present. In *Taylor* v. *Wheeler* (*f*) a surrender of copyhold by way of mortgage, not presented within due time, was made good in favour of the mortgagee, against the assignees under a commission of bankrupt against the mortgagor. That the Court will decree the performance of an agreement, although the vendor has no title until after the agreement, appears, by the constant form of the reference to the Master in all cases of

(*a*) 1 *Rep. in Cha.* 84.
(*b*) 2 *Rep. in Cha.* 115.
(*c*) *Rep. temp. Finch*, 272.
(*d*) 1 *Ca. in Cha.* 170.
(*e*) 2 *Ca. in Cha.* 112.
(*f*) 2 *Vern.* 564.

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and also, within twenty-four months after the same should be recovered, the farther sum of 63*l.*

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specific performance, viz., to inquire whether the vendor can make a good title to the premises, not whether he could at the time of the agreement make such title. This was settled upon great consideration in the case of *Langford* v. *Pitt* (*a*); and the Master of the Rolls there mentioned a remarkable case of *Lord Stourton* v. *Sir T. Meers*, where an act of parliament was necessary to make good the title, and yet the Court ultimately executed the agreement.

Lord Chief Baron. I have great doubts about the equity upon which the bill proceeds, and if I found it necessary in this case to lay down any general rule upon the subject, I should think the case deserved great consideration. It is true that when a man having a good title agrees to sell to another, this Court considers such an agreement as a lien upon the land, and will upon that ground decree the heir, or any volunteer under the vendor, to make good such agreement. It is also true that when a man not having a title at the time, agrees to sell, and afterwards such title accrues to him, the Court binds the conscience of the vendor himself, and compels him to make good the title at any future period, when he can; which was the case of *Clayton* v. *Duke of Newcastle*. But in this case the surrenderor not having any title whatever to the premises, at the time of the surrender, his agreement would not raise a lien upon the land; and although the present Plaintiffs might have been relieved if they had filed their bill against him in his life-time, that is after his title had accrued, yet it does not follow that therefore they can be relieved against his heirs. Neither the land itself, or the conscience of the present Defendants, is bound by this act of *William* the surrenderor; and I am not aware that on a bill filed for a specific performance against the heir of a person who sold without having any title at the time of the bargain, the Court has referred it to the Master to inquire whether

(*a*) 2 *P. W.* 629. *Wynn* v. *Morgan*, 7 *Ves.* 202.

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The bill then stated that the Plaintiff had recently discovered that a private marriage between his father and mother took place in *America*, long previous to

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the vendor had any title to the premises at the time of his death.

But really I do not think it necessary to go into the general question upon this occasion. This is not the sort of sale that it becomes this Court to take notice of. A common soldier goes down to a country ale-house, and late at night calls together two or three people, and offers to sell his estate; and then two persons bid for it, and the affair is all over. The transaction is not serious enough for this Court to interfere in; and the parties must take their course at law.

The bill was dismissed without costs. — From Mr. *Cox*'s notes, Lord *Colchester*'s MSS.

BACKHOUSE *v.* MOHUN, CROSBY, Sen. and Jun., and Others.

Pasch. 10 *Geo.* 2. 1736. In CHANCERY.

Specific performance of a contract not signed by the party enforcing it.

Bill to have a specific performance of an agreement made between the Plaintiff and *Mohun*, for the purchase of an estate of *Mohun*'s. The Plaintiff and he had treated about it, and written several letters relating thereto. The last letter from *Mohun* was in 1731, who said therein that the Plaintiff had offered a certain sum which *Mohun* accepted. But it did not appear whether the Plaintiff had done any thing to bind himself, for the Defendants produced none of the letters; but one *Harrison* swore that subsequently to the agreement between the Plaintiff and *Mohun*, he had proposed himself as a purchaser of this estate, and that he was in company with *Crosby*, senior, and the Plaintiff was sent for, and they entered into a conference concerning the estate, and the Plaintiff answered in the negative, but said not what words were used; that the Plaintiff said he would not go to law, but would rather write to *Mohun* before he entered into any controversy about it; a letter was accordingly sent, but not produced.

Harrison

to the birth of *Peter Gordon*; and charging that the Defendants, *James Gordon* and *R. B. Fisher*, and *S. Bourke*, (to whom *James Gordon* had assigned some portion

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Harrison acknowledged he had a previous discourse with *Crosby*, senior, about the affair; which *Crosby*, as it clearly seemed, was the real purchaser.

For the Defendants it was insisted that there was no reason they should be bound by *Mohun*'s letters, when *non constat* the Plaintiff was bound on the other side. But, secondly, supposing they were originally bound, yet the Plaintiff had waved the agreement; and that may be done by parol, *Goman* v. *Salisbury* (*a*), for it is only to rebut an equity.

Lord *Hardwicke*, Chancellor. The first question is, whether there is any agreement in writing between the Plaintiff and *Mohun*, for as it relates to lands and tenements, it must be in writing; and I think it sufficiently appears so, and that it is a complete absolute agreement to bind the Defendant *Mohun*. Many cases have occurred where agreements for lands appearing in writing under the hand of the party who was to be bound by it (which are the words of the statute of frauds), notwithstanding there was no writing of the other part, have been carried into execution; and I have known the objection often taken of its not appearing on the side of the purchaser, and as often overruled. But it may be taken as an ingredient to add weight to other objections. Besides here were letters from the Plaintiff to *Mohun*, which he does not think fit to produce, and the Plaintiff cannot. Therefore I think *Mohun*'s letter is sufficient evidence of an agreement in writing.

Effect of want of signature by the party seeking to enforce a contract.

Secondly, the question is, whether any act has been done on the part of the Plaintiff *Backhouse* to release or wave the agreement? The defence insisted on is of a tender nature, and to be received by a court of equity with great caution; for even the agreement to depart from a former agreement, is as much an agreement concerning lands and tenements as the first; and therefore, taking

(*a*) 1 *Vern.* 240.

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portion of his interest under the agreements with the Plaintiff,) had lately commenced an action in the Court of Session in *Scotland* against the Plaintiff, for the remainder of the sum of 4500*l.*; that the Plaintiff's father and mother were privately married in *America*, by a chaplain of the army, and that it was merely in consequence of a wish expressed by the friends of the Plaintiff's mother that they were afterwards publicly married; and

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When parol or implied waiver of contract constitutes a good defence in a suit for specific performance.

it originally, and abstracted from circumstances, ought as much to be in writing, and is equally within the statute of frauds: but, notwithstanding that, if it clearly appears that a Plaintiff in a court of equity insisting on such an agreement contained in letters, has by acts done, waved it, and thereby drawn in another to purchase, and complete his purchase, in such case it would be a good defence to be insisted on by the second purchaser, shewing that he proceeded *bonâ fide*, and consequently would rebut any equity of the first purchaser. But I think there is not sufficient evidence of such matter; it chiefly depends on the testimony of *Harrison*, who makes an extraordinary figure in the cause, and admits a previous consultation between him and *Crosby*, senior, who seems the effectual purchaser; and that objection, though I refused it as to his competency, yet goes to his credit. He says a letter was to be written to *Mohun* to prevent controversy. What occasion was there for that, if the Plaintiff had given up his purchase? The letter was written by the Plaintiff; if it had been produced, what he and *Crosby*, senior, said, might have appeared. But the letter from *Mohun* is produced, and imports directly the reverse of what *Harrison* supposes.

Decreed that the Plaintiff should have the benefit of his purchase. MS.

6th *May* 1736. — "His Lordship doth declare that the Plaintiff is entitled to the benefit of his agreement for the purchase of the estate at the sum of 315*l.*, and to have it carried into execution; and doth therefore think fit, and so order and declare that the agreement be performed, &c." — Reg. Lib. A. 1736. fol. 627, 628.

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and that in the register of the church of *Christ Church* and *St. Peter's* in *Philadelphia*, the Plaintiff's baptism is registered thus, " *Harry Gordon*, son of Captain *Harry*

PEMBROKE *v.* THORPE. (*a*)

Hil. 13 *Geo.* 2. 29th *March* 1740.

Lord *Hardwicke*, Chancellor, gave his opinion on the following case: This bill is brought for two purposes, first, for a division of leasehold lands, held by the Defendant from the late Earl of *Pembroke*, the Plaintiff's father, from freehold and copyhold of the Plaintiff, the boundaries of which were confounded by unity of possession; and for a specific performance of an agreement for building a house with the appurtenances in ; or, secondly, to have a performance of a subsequent agreement for the exchange of certain freehold lands of the Defendant, on which he has built a house, with other equal quantity of lands of the Plaintiff. As to the division and setting out of the lands, there is no dispute, but that the lands should be properly set out on both sides; but the great point is, as to the Courts decreeing a performance of either of the agreements. The bill is in the disjunctive, and prays that either the Defendant may be decreed to perform his agreement for exchange; or if not compellable to do that by the strict rules of law, that then he may be compelled to build a new house on Plaintiff's leasehold lands. On this two questions have been made; first, whether any agreement whatever, either for building a new house, or for making an ex-

(*a*) The proposition, that a specific performance may be decreed of a covenant to build, is supported by *Holt* v. *Holt*, 2 *Vern.* 322.; *Allen* v. *Harding*, 2 *Eq. Ab.* 17.; *City of London* v. *Nash*, 3 *Atk.* 515., 1 *Ves.* 12.; *Rook* v. *Warth*, 1 *Ves.* 461.; *Moseley* v. *Virgin*, 3 *Ves.* 184.; and opposed by *Errington* v. *Aynesly*, 2 *Bro. C. C.* 343.; *Lucas* v. *Commerford*, 3 *Bro. C. C.* 166., 1 *Ves.* jun. 235., 1 *Mer.* 265.; and *Flint* v. *Brandon*, 8 *Ves.* 159.; and see *Rayner* v. *Stone*, 2 *Eden*, 128.; *Whistler* v. *Mainwaring*, 3 *Wooddeson*, lect. 465. n.; *Hill.* v. *Barclay*, 16 *Ves.* 405.

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Harry Gordon and *Hannah* his wife, born the 4th of *October* 1761;" prayed that the agreements might be declared void, and be delivered up to be cancelled; an account,

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change, has been sufficiently proved; second, if it is, whether either of those agreements is such, as in the circumstances of the case, a court of equity will carry into execution? The first depends on the proofs in the cause; and I will consider them, first, as to the pulling down the old house and building the new, and, next, as to the subsequent agreement of exchange.

As to the first, the proof stands thus: it is proved by Mr. *Jerom*, steward to the Earl of *Pembroke*, that in 1731 a proposal was made to take a lease of a farm called *Moses'* farm, then lately purchased in *Foulston* and *Wilston*, where the late Earl had another estate lately purchased, and Mr. *Thorpe* a freehold estate. It appears the agreement about taking *Moses'* farm, was on 16th *August* 1731, on which there were an old house and malt-house, &c., very much out of repair, for which it was proved the Defendant was allowed 80*l.* for repairs; for notwithstanding another colour has been endeavoured to be given to it, it is clear it was for the repair of *Moses'* farm. The lease is dated 26th *August* 1731, and executed by the late Earl the 13th *December* following; the counterpart was laid by not executed till the 3d *October* 1732. Between the execution of the lease and the counterpart, this proposal was made by *Thorpe* for pulling down the house in *Moses'* farm, and new building it; and he desired *Gore* to write to the Earl about it, and the reason he gave was, he would hold another for his habitation on *Foulston* farm. *Gore* desired him to give a plan of the house he intended to build; the Defendant replied to be sure he would not build a worse than was thereon already; which amounted to an agreement to build as good a houseas that on *Moses'* farm; and upon that agreement, and no other, the Defendant was to pull down the tenement on *Moses'* farm. In *October* 1732 the Defendant began to pull down the house; and it is sworn and admitted, that the building cost 1000*l.* and upwards, and that he used the

account, and repayment by *James Gordon*, of the sums paid by the Plaintiff under the agreement; and an injunction.

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the old materials. That is the proof on the part of the Plaintiff.

The Defendant in his answer would represent that the proposal for pulling down the house was at the time of the lease, and he agreed that he would make other alterations on *Foulston* farm; but there is no proof of this: on the other hand it is contradicted by all the witnesses, and by *Gore*, who is witness to the proposal, who swears *ut supra*; it is contradicted also by the fact, which I take to be clearly established, that the 80*l.* were allowed for repairs of *Moses'* tenement; for it is then absurd that there should be a proposal at that time for pulling it down, which the Defendant insists upon in his answer.

It is said for the Defendant, in respect of the first agreement, that it is proved only by one witness (*Gore*) against the Defendant's answer, and by the rule of this Court that is not sufficient evidence to ground a decree on; and the rule is certainly so; but it is carried too far in this case: for supposing the Defendant's answer to be a full denial, yet it is supported by more than one witness; for it is corroborated by circumstances proved by other witnesses; so that it amounts to more than proof by one witness, and would be sufficient to found a decree on. But there is no occasion to resort to that argument, because the Plaintiff's charge is not denied by the Defendant. The Plaintiff says he promised to build him as good a house; and the Defendant only denies that he did, at the time, when he desired *Gore* to apply for leave to pull down *Moses'* tenement, or at any other time, propose that he would build or set up in the stead or place of the old house, on some part of the Earl's estate, a better and more commodious house for his habitation, and he insists that he made no other proposal than at the time of the lease, and that was only to make other improvements on the *Foulston* farm. This is no denial of the agreement; it may be of circumstances in the bill, but not of the equity of it; for the proof is, he promised

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The Defendant *James Gordon* by his answer, claiming to be the eldest legitimate son of Colonel *Gordon*, stated that in 1785, Colonel *Gordon*, when at *Portsmouth*,

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mised not to build a worse house; which may be, though he did not promise to build a better. Therefore the first agreement is fully proved, and not at all contradicted, nor clearly denied by the answer.

The proof as to the second agreement for the exchange is, the testimony of Mr. *Gore*, who is the only witness; and as to the particulars of that agreement he swears that about the latter end of 1732, the new house was begun to be built, and soon after, as they were about the foundation, the deponent was riding by and saw it was building on a different place than that agreed upon; upon which he inquired whether it was upon the Defendant's freehold or the Plaintiff's leasehold estate; and was informed that it was uncertain, and hard to distinguish the Defendant's freehold lands from the Defendant's leaseholds, which he held under Lord *Pembroke*, but that it was generally believed to be on part of the Defendant's freehold; the Defendant answered, he did not know which it was, but that if it proved so, he would exchange the ground on which the house was building for other equal quantity of land on *Moses'* farm; by which *Gore* apprehended the Earl was to have the fee of the Defendant's lands, and the Defendant the fee of the Earl's. *Gore* made further inquiries, but could get no better information as to the boundaries of the land; he, therefore, told the Defendant it would be better to make an exchange, and the Defendant told him that as he had before promised he would make the exchange at any time; and so the deponent told the Earl. The Defendant swears that he and *Gore* appointed Mr. *Day* to make the admeasurement of the ground, and met the 9th of *February* 1735, a long time after the new house was begun to be built, which was at the latter end of 1732. One *Spire* made the admeasurement, and said it would be better to take in about six luggs, and the Defendant said he would look out a piece of ground to be exchanged for the six luggs,

and

mouth, previous to a voyage to *Grenada*, wrote, with his own hand, an instrument, being a will or draft of a will, containing, among others, the following clauses: "First, to

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and bid *Spire* take it in. This fact is supported by *Spire*, who gives an account of a subsequent admeasurement, and that Mr. *Grant* was desired to join with the Plaintiff in the admeasurement; and that he asked *Spire* why the lands were to be measured, and asked the Defendant whether he had articled for the exchange of the lands? "No," said *Thorpe*, "but his word was as good." And this proof on behalf of the Plaintiff is not contradicted.

The second question is, whether one or other of these agreements is such as a court of equity will carry into execution? And I am of opinion here is not a sufficient ground to decree a performance of the agreement of the exchange. There are indeed very strong circumstances in the case to induce a private conviction; but all sorts of proofs which induce private conviction are not such as will found a decree in this Court. One objection is, that it is not in writing, but only a parol agreement about land and tenements, and so void by the statute of frauds. I answer, such agreements are not void, but may be taken out of the statute according to the rule of this Court, by having been in part performed; for in such case this Court will decree a total performance: but I see no ground to say there has been a partial performance; for as to the admeasurements, I do not look upon that as a performance of any part of the agreement; and so here is no certain proof as to any part of the agreement whereon to found a decree. *Gore* is uncertain as to the time when this agreement for the exchange was made, for no time is mentioned; he only says, that soon after the first agreement he was riding by when the foundation of the house was laying; but he does not say when he first conferred with the Defendant about this exchange. It is plain the agreement was not concluded on the first proposal; for he inquired first about the boundaries of the freehold and leasehold lands; and when the proposal or conclusion was, is quite uncertain; and that is a circumstance

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to my children by my wife *Hannah*, whom I married before the birth of my third son called *James*;" and, "seeing by the marriage of my said wife *Hannah* she becomes

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the more material, for this reason; had it appeared the agreement for the exchange was made during the course of the building, or before the house was built, or near built, then the Plaintiff's letting him go on might be taken as the consideration, and so part of the performance of the agreement as to the exchange, because the Plaintiff might have applied for an injunction in this Court to stop the building, upon suggesting it to be upon his lands; but the time of the agreement not being fixed, it might be after the new house was entirely built. The agreement is likewise uncertain as to the terms of it. The words of the deposition are, that he apprehended the Defendant was to convey the fee to the Plaintiff, and the term of ninety-nine years, and the Plaintiff was to convey the fee simple of other grounds to the Defendant; this was but his apprehension, and though it was reasonable, yet it is too general to found a decree of this Court; for it is uncertain what part of the lands of either was to be exchanged, or at what value, whether value for value, or whether any allowance to be made; and for a court of equity to make all these inferences is going further than ever this Court I believe has yet done. It does not appear when my Lord *Pembroke* came into this agreement for exchange, or when *Gore* acquainted my Lord with it; for *Gore* does not say whether he had any authority from the Earl, or whether my Lord ever agreed to it; in which case he would not be bound by it; nor was there ever any thing done in execution of the agreement; for the admeasurement was never completed. For on the 9th of *February* 1735 it was proposed that six luggs should be taken in and allowed, and then *Grant* was to make the final admeasurements. But then he put this thought into the Defendant's head, and so the admeasurement was never completed; though if this admeasurement had been completed, I should not think it such a partial performance of the agreement, as could be made the

Admeasurement not a partial performance of an agreement to exchange lands.

becomes entitled to a third interest of the value and price of the money arising from the sale of my estates above mentioned, my will is, that the said third be applied

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the foundation of a decree; for it was only a step towards the performance. Here ought to have been a parting with the interest in some measure, otherwise the Court cannot decree a performance. No stress, therefore, can be laid upon this, but to corroborate the proof that there was such an agreement.

Thus it stands as to the exchange; but I think the agreement for building the house ought to be carried into execution. One objection is, that it would be very hard to oblige the Defendant to build up a new house by applying to this Court, when the Plaintiff might have his remedy at law, and recover damages for the breach of the agreement; and that a court of equity will not decree a specific performance which will be attended with great hardships. But as to sending him to law, that will be no remedy at all, this not being an agreement in writing, which is necessary, because an agreement to build on land, and therefore relating to land; nor will the partial performance help him there, because that is a rule in the consideration only of this Court. Here is no hardship in this case of which the Court will take notice. There are some cases indeed where if the Court was to decree a specific performance, it would produce the ruin of the Defendant, where a jury would not give the Plaintiff 12*d.* damages. In such case a court of equity will not decree a performance. But this cannot be called a hardship, because it will put the Defendant to an expense, for it is merely through his own default, and this Court only compels him to perform his own agreement which he has entered into for valuable consideration; and it would be suffering him to take advantage of his own wrong, if he were not compelled. Nor will the statute of frauds be any objection as to this agreement, because it is plainly in part carried into execution by the Defendant; and the Plaintiff has done every thing on his part, by giving the old materials which are said to be worth 500*l.*, and the Defendant has, therefore, had the benefit of his agreement; and the Plaintiff done every

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plied in the purchase of stock in the 8 *per cents.* as above ordered, and the interest and yearly profits accruing from the said stock to be paid to my said trustees for

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thing on his part; and then the rule is, that if an agreement, though not in writing, is partly carried into execution, this Court will not suffer that party to take the benefit of the statute; but he is bound in conscience and in this Court to perform the whole: and the intent of the statute is answered in this case, because the inconvenience which it intended to remedy, as to perjury, is taken away where there is a performance in part.

Upon the whole there must be a decree for division of the lands, and a building of the new house, and the Plaintiff must have his costs as hitherto. I have not seen a clearer case where costs ought to be paid, and reserve the subsequent costs. MS.

HALHED *v.* MARKE.

December 1742.

An agreement confirmed, not impeached without clear proof of imposition.

Nathaniel Halhed (father to the Plaintiff), being a banker, married one of his daughters to the Defendant *Marke*, who was also bred a banker, and gave with her 500*l.*, but promised, as the Defendant said, for it did not appear in proof, to make her as good a fortune as any of the rest of his daughters. One of them being afterwards married, received 1000*l.* portion. The Defendant says that *Nathaniel Halhed* afterwards gave him 500*l.* more; and on the marriage of the third daughter he gave a bond to pay with her 1000*l.* after his death, having paid 1000*l.* in hand; so that the Defendant *Marke* said he was entitled to 1000*l.* on the death of *Nathaniel Halhed*. It appeared that between the father and son-in-law business had been transacted, by verbal agreements only, of great consequence.

Serjeant *Darnell* was indebted to *Nathaniel Halhed* in 9000*l.*, and he had two copyhold houses to dispose of. *Nathaniel Halhed* had agreed (as the Plaintiff alleged) with the lord of the manor to purchase no more within

for the behoof of my said wife *Hannah* during her life; and my will is, that the said principal money of a third part of the price of the sale of my said estates be divided at

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within that manor, under the penalty of paying a large fine; and therefore *Marke* was to purchase these two houses, in his own name, from Serjeant *Darnell*, in trust for *Halhed*; but there was no proof of such intention. In 1722 *Marke* purchased the two houses from Serjeant *Darnell* for 1000*l*., and paid the money, and produced in court a receipt from *Nathaniel Halhed* to the Defendant, (Received from *John Marke* the sum of 1000*l*. on account of *John Darnell*,) and was admitted into them immediately. *Nathaniel Halhed* let one of the houses to Mrs. *Seywell* for 30*l*. a year rent, the other *Marke* lived in; and the Defandant produced two receipts which were mentioned to be for rents, which were given by *Nathaniel Halhed* to *Marke*; and *Halhed* paid the taxes of both houses; but *Marke* alleged that *Halhed* agreed verbally to purchase one of these houses from him for 500*l*., but that *Marke* should continue to live in it, paying him the 30*l*. interest for the 500*l*., as long as he lived, which he said was the rent mentioned in the receipts. *Nathaniel Halhed* afterwards laid out 1600*l*. in re-building the house where *Marke* lived, which *Marke* accounted for by saying 1000*l*. of that 1600*l*. were the 1000*l*. which *Marke* was entitled to after *Nathaniel Halhed*'s death, as the additional portion; and that they agreed that *Halhed* might lay out that sum on the house, and that *Marke* should allow him 40*l*. *per annum* interest for it, until *Halhed*'s death, at which time *Marke*'s right to it commenced; and he said that when he perceived *Halhed* exceeded that sum, he told him that he did not propose to expend more upon it, and *Halhed* answered that he should be charged with the 1000*l*. only.

On the 5th of *February* 1728, *Halhed* made his will, and devised these houses to the Defendant *Marke*, paying 1200*l*. to his executor, the Plaintiff; and it appeared he had said when he was rebuilding the house, that he was doing it for his son Mr. *Marke*; and he surrendered two small parcels of copyhold

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at the death of my said wife among all my children, by her my said wife, legitimate and illegitimate, according to the above described proportions."

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hold land to Mr. *Marke*, which lay contiguous and convenient to his house. Mr. *Halhed* died some time afterwards, and the Plaintiff, his son and executor, having a meeting with Mr. *Marke*, told him if he was a rogue he might have cheated him of both the houses; and agreed that on account of Mr. *Marke's* surrendering the house called *The House of the Gate*, being one of them, to the Plaintiff, and for other valuable considerations, as Mr. *Marke* said, such as services, &c., the Plaintiff should release to Mr. *Marke* the 1200*l*. After this agreement, in 1782, a deed of release, (which recited, whereas *John Marke*, &c., was admitted into the said copyhold, &c., in trust for *Nathaniel Halhed*, yet, nevertheless, subject to certain agreements and terms between the said *Nathaniel Halhed* and the said *Marke*, and also in consideration of all the said *Marke's* right under the custom of *London*, and the surrender of the house aforesaid,) was executed by the Plaintiff to the Defendant of all demands, &c. The Plaintiff being at this time ignorant of the Defendant's being only a trustee for his father, brought his bill to set aside this release, and to have the 1200*l*., with the interest of it from the death of his father, paid to him.

The questions made by the counsel were two: first, whether *Marke* appeared to be a purchaser in his own right or in trust for *Nathaniel Halhed*? and, secondly, though he was, whether this release should be set aside? And *Chute* mentioned the case of *Standard* v. *Metcalf*, to prove that if a party does an act, though induced to it by fraud, yet if he afterwards confirms that act, the subsequent confirmation makes it valid and good. He cited also the case of *Cole* v. *Martin*, which was the first case determined by Lord *Talbot*, where a person who just came from sea went to seek refuge at a relation's house, and was kept without clothes to his back until he made a solemn release of his ticket for five or six pounds a year, and in six months afterwards he confirmed that release;

The Defendant also stated, that he understood and believed, and had no doubt to be able to prove, that Colonel *Gordon* and his wife had been married at *Wilmington*

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release; and Lord *Talbot* refused to relieve, though the first act was fraudulent, because of the subsequent confirmation.

Lord *Hardwicke*, Chancellor. This bill is to set aside an agreement, and a release founded on that agreement, on the head of fraud and imposition in obtaining it; and in all cases of the kind the fraud and imposition must be made out to the Court by proof; and it does not appear there was any actual fraud or imposition by either of the parties to this agreement and release; for they were both of full age and capable of transacting. So that all the fraud and imposition to impeach this fact must arise from the circumstances of the thing itself. The next consideration, therefore, is whether there is any fraud apparent on the circumstances of it? and both fraud and imposition may be as well proved from the circumstances as by direct proof. What is alleged for the Plaintiff is, first, that the Defendant set up a title in himself in these two houses, whereas in truth he was a trustee only; and in the next place, that he made his pretence of a claim under the custom of *London* a consideration for this release, when in fact the portion he got was far more than he could have under the custom. To be sure there is a great obscurity in this case, and that arises naturally from the near relation between the parties to it. Then taking it with such grains of allowance as may be expected from a transaction between persons so closely related, let us consider the merits of it.

First, upon the head of imposition, it is insisted that the estate is to be considered in trust only, and that it is proved by the release, which it is said amounts to a declaration of the trust; but it is by no means clear to me, that this purchase was originally in trust for *Nathaniel Halhed*. It appears that Serjeant *Darnell* was indebted to *Halhed*, and that this purchase money was paid to *Halhed* by the Defendant on account of Serjeant *Darnell*; and a receipt was taken by the

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mington in *America*, in *May* 1763, which was after the birth of the Plaintiff, and before the birth of the Defendant; and that the Defendant did not know or believe it

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the Defendant for it. Now on what account was that receipt, unless to discharge so much of Serjeant *Darnell's* debt, by the Defendant's paying the purchase money to *Halhed?* Thus it stood on the original transaction, and if it rested on that I should not think this a trust. But on the whole evidence I am of opinion there was some trust between the parties, though not on the original purchase; for Mr. *Halhed* took upon him to build one of these houses, and it is proved, on both sides, that he declared he built it for the Defendant; and he said it was on consideration that he should pay interest for the 1000*l.* during his life. It is true the receipts given to *Marke* were for rent; but I lay little weight on that, being a very common mistake to call interest, &c., rent in receipts. I believe *Nathaniel Halhed* intended that both the houses should come to *Marke* after his death; and afterwards when he comes to make his will he devises them to him, charged with the sum of 1200*l.*; and I believe the original of Mr. *Marke's* resentment, and saying if he was a rogue he might have kept both houses, proceeded from his thinking they were charged with too much, and that that brought on his agreement to release, &c.

Thus the case stands, and the doubts of it have arisen from this mutual confidence between the parties; for taking it either way there appears to be some: either if *Marke* purchased and laid out 1000*l.* in trust for *Halhed*, or if *Halhed* laid out 1600*l.* on the house, there was a confidence in *Marke;* but the greater probability seems to be that *Marke* purchased with his own money and for himself, and that the trust arose after on laying out 1600*l.* on the house.

Consider it next on the other parts of the case. *Nathaniel Halhed* makes his will, and after giving legacies to his children, says if they refuse to release their right under the custom of *London*, that it should be void; and after his death this release was executed. Then conside that this claim under the custom

it to be true, though lately asserted by the Plaintiff, that a private marriage was celebrated between Colonel *Gordon* and his wife, in *America*, sometime before the birth of *Peter Gordon* and the Plaintiff, that is to say, so long ago as the year 1755.

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tom was a plain demand against the Plaintiff. When I say a plain demand, I do not mean one whereby any benefit may arise, but a right to have an account taken; and on the whole complexion of the case, it looks as if the Defendant's wife had a less fortune than the rest of her sisters; and it appears that the Plaintiff had a very large estate left him; and whether the account would turn out to the Defendant's advantage or no, the expense of the inquiry might be an inducement to him to execute this release, and therefore it is not to be laid aside.

Then this will bring the case to the agreement in 1730, and the release in 1732; and though it was suggested that the agreement was immediately after the Plaintiff's father's death, and as if it was obtained by surprise, yet the release was on no circumstances of surprize, and I think it puts all supposition of surprize in the first agreement out of the case. Suppose the Plaintiff had been at first amused with what the Defendant said, had he not opportunity enough to recover his surprise in above a year's time? Also this very release recited the will of *Nathaniel Halhed*, and the trust as it is there set forth; and though the words are that he was admitted tenant, &c., in trust for, &c., yet I take that to be no more than the words of the scriviner which are usually thrown in. It was objected that the release goes farther than the agreement; for the agreement did not mention a word of the Defendant's claim under the custom of *London*; but the agreement has the words other valuable considerations, which takes off all the repugnancy, and it seems to me it might have been extremely reasonable in the Plaintiff to have acted thus; and if so, where there is no actual proof of imposition can the Court set aside these two solemn acts? Dismiss the bill with costs. MS.

Reg. Lib. A. 1742. fol. 85.

On

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On the part of the Plaintiff, *Benjamin West*, Esquire, deposed, that while he lived in *America* he knew *Hannah Gordon*, then *Hannah Meredith*, for many years; that in or about 1760, being about to depart from *America* for *Italy*, he went to the house of his father for the purpose of taking leave of his family and friends, and on that occasion he inquired of his brother, who was much attached to *Hannah Meredith*, where she then was, and was informed by him that she was then in *Philadelphia*, and married or about to be married to a Mr. *Gordon*; and the deponent was inclined to think, as far as his recollection assisted him, that his brother then told him that *Hannah Meredith* was married to a British officer of the name of *Gordon*; that about eighteen or twenty years after the deponent left *America*, Colonel *Gordon* and *Hannah* his wife were introduced to him in *London*, where they had lately arrived, as man and wife, and remained in habits of intimacy with the deponent until they left *London*; that they had several children with them, one of which, he believed, was the Plaintiff; and the deponent and his wife, and a respectable quaker, received Colonel and *Hannah Gordon* as man and wife, and their children as legitimate children; and none of the children was in any manner treated as illegitimate; that the deponent had never, till lately, heard that any of them were considered as illegitimate; and that neither himself nor his wife would have had any acquaintance with Colonel and *Hannah Gordon*, if they had not been fully persuaded that they were married, and that all their children where legitimate; and that the deponent's wife, a native of *Philadelphia*, frequently stated that Colonel *Gordon* and *Hannah Gordon* (when *Hannah Meredith*) were much respected in *America*.

Other witnesses testified the reception of Colonel and *Hannah*

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Hannah Gordon as husband and wife, and of all their children as legitimate.

The reverend Dr. *Hogg* deposed, that he became preceptor to Colonel *Gordon*'s family in 1773 or 1774, and was confidentially acquainted with Colonel *Gordon* from that time; that Colonel and *Hannah Gordon* began to cohabit together as husband and wife in 1756 or 1757, as the deponent had reason to believe from having heard so from the mother of Colonel *Gordon*, and others of the family; that he believed them to have been married before the birth of their eldest son, and had no suspicion of any of the children being illegitimate; that *Hannah Gordon* was a woman of the strictest virtue, deeply impressed with religious principles; that Colonel *Gordon* on different occasions informed the deponent that he had been privately married to his wife before the birth of *Peter Gordon*; and that the reason of the privacy of the marriage was his fear of his brother, Judge *Gordon*, on whom he then had considerable dependence, and who had recommended to him to marry otherwise; that Colonel *Gordon* died in *England*, immediately after landing from the *West Indies*, when the deponent accompanied *James Gordon* to *London* with a view to assist at the funeral, but it was over before their arrival; and on that occasion the deponent was present when *James Gordon* opened the trunks of Colonel *Gordon*, *James Gordon* having the keys in his possession, and no persons being present but him and the deponent; that the deponent proposed that more persons should be called in to witness the opening of the trunks, but *James Gordon* said it was unnecessary; that the trunk which contained Colonel *Gordon*'s papers appeared to have been previously opened, the ropes being loosely tied about it, and without a seal; that *James Gordon* took out, among other papers, and shewed to the deponent, a paper appearing to

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to have been a will of Colonel *Gordon* (but the subscription was torn off), dated in 1776, and containing a general destination of his property, first to his eldest son *Peter Gordon*, and then to his other sons in succession, burdened with bequests to his wife *Hannah Gordon* and to their younger children; that *James Gordon* then, for the first time, mentioned that his brothers *Peter* and *Harry* were illegitimate, that he had a title to his father's *West India* property, and was determined to take possession of it; that the deponent, then for the first time, mentioned to *James Gordon* the circumstance of his father's private marriage, which the deponent told him would be a bar to his claim, to which *James Gordon* replied the private marriage was of no consequence as the succession would be regulated by the public declaration of marriage; that as the deponent never entered into private matters with his pupils, he had never before thought it proper to mention the private marriage to *James Gordon*, nor did he mention it at all to the Plaintiff, conceiving that the agreement made in 1790 had ended all disputes between them; that the Plaintiff at the time of his father's death was in the *East Indies*, where he had been about twelve years, and he returned to this country only in 1789.

Miss *Gordon*, the sister of the Plaintiff, and of *James Gordon*, deposed, that she had been told by her mother that her parents began to live together as husband and wife just after the defeat of General *Braddock*, in 1755, or 1756; and that she never entertained any doubt of the legitimacy of all her brothers, or heard her father mention any private or public marriage between him and his wife, or any discussion on the subject; that on the return of *James Gordon* to *Scotland* (where his mother and the deponent then resided), about three weeks after his father's death, he asked his mother for leave

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leave to see her papers, and having obtained access to them, destroyed several, much against her will, and took others away with him; and the deponent saw him burn several: that in 1808, *James Gordon* threatening to take out a warrant against the Plaintiff, the deponent asked her mother how she could have had children before marriage? To which her mother answered, that she had not had children before marriage, for that she had been privately married before she had any, but that *James Gordon* had told her that the private marriage was of no avail; that her mother also on this occasion told her that she had been privately married by a military chaplain; that there were present Dr. *Adair*, an army physician, Mr. *Edwards*, her brother-in-law, and Miss *Peake*, and that she was so married in her own house in *Third Street*, in *Philadelphia*; that at the time of this communication her mother did not know of any difference between the Plaintiff and *James Gordon*, it having been purposely kept secret from her; that her mother told her that the marriage was private lest it might displease Judge *Gordon*, the brother of her husband; and that she had informed *James Gordon* of her private marriage after his return from *London*, and that he had desired her, and made her promise, not to mention it to any one, as it was not a legal marriage; that after learning the present dispute, and that the marriage was legal, she frequently said that had she known it to be legal she would have disclosed it long before, and on her death-bed, in 1811, she declared the Plaintiff to be her eldest lawful son.

General *Adam Gordon*, brother of the Plaintiff and *James Gordon*, deposed, that the first intimation he had of any doubt or question on the legitimacy of the Plaintiff, was in 1788, when the deponent was with his regiment in *Grenada*, and *James Gordon* arrived there to

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possess himself of his father's estate, of which the deponent was in possession, on behalf of the Plaintiff; that *James Gordon* then claimed the estate as lawful heir, insisting that the Plaintiff was illegitimate; but the deponent refused to part with the estate until the Plaintiff should come from the *East Indies*, and told *James Gordon* that he knew their father and mother were privately married before the public marriage, and that such marriage was good in the eyes of God and man; that *James Gordon* made a proposal to the deponent that they should sell the property under his management, and divide the proceeds between them, as the Plaintiff had the estate in *Scotland*, and must have made money in the *East Indies*; but the deponent rejected the proposal with indignation; that *James Gordon* shortly after returned to *England*, and the deponent continued in the management of the estate until 1791, when the Plaintiff arrived in *Grenada*; that the deponent then saw the Plaintiff for the first time during eighteen years, and never informed him of the private marriage of their father and mother, understanding that matters had been amicably settled between him and *James Gordon*; that the Plaintiff's mother told the deponent that after the death of Colonel *Gordon*, *James Gordon* had taken from her several papers which she considered of consequence, and she complained much of his having done so, and said she was sure he meant to make some bad use of them.

On the part of the Defendant, *Harriet Dunlop* deposed, that her mother was in some way related to Colonel *Gordon*, and that she had frequently heard her mother say that *Hannah Gordon* had a child or children by Colonel *Gordon* before their marriage.

Another witness deposed, that in the action commenced in *Scotland* by *James Gordon* against the Plaintiff,

tiff, the counsel of the Plaintiff alleged that no marriage had been celebrated between the father and mother of the parties, but that their marriage had been constituted by their living as man and wife, and being *habite* and *repute* so; and it was not till the 26th of *March* 1809, that an allegation was made of a private marriage between them in 1755.

The following letter from Mrs. *Gordon* to the Plaintiff, dated the 30th of *January* 1789, was read in evidence, on his behalf: "My Dear *Harry*, I am happy that *James* and you understand one another by this time; you distress me much to think I am not to be made acquainted with all that regards you and him, as I am the only survivor whom you have to blame; and could I atone with my life for it; and you are the innocent victim. I am afraid *James* has lost sight of all affection, or what can make him agreeable to an honourable man. God forgive him; and, my dear *Harry*, I hope you will forgive me for entailing slavery upon you and yours. I may say, with *Eve*, 'Curse me not, my son.' I must say, I erred not from the rules of honour in what I did, nor deviated from the path of virtue. Had I no child but *James*, I would publish to the world my life, and I am confident I shall be excused; but he has none, and none shall I ask of him; he has done his worst. May God forgive him! Take care of your health, for from you my support is to come, and your dear sister. We think *James* has dealt hardly with us. You cannot think we are happy when you wish to keep a thing that concerns you from me; that would distress me. I am well acquainted with sorrow, I can submit to all; let me only partake with you, and that will be my greatest comfort. I have not a secret that your sister does not know, and would you wish she should keep yours from me? That hurts me, my dear *Harry*."

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At the hearing of the cause before Sir *William Grant*, Master of the Rolls, on the 17th of *December* 1816, his Honor observed, that in the agreement between the Plaintiff and Defendant it was stated, that the Plaintiff was born before the actual marriage of his father with his mother, and that he entered into the agreement with the belief of his illegitimacy; but that it appeared, by the testimony of General *Gordon* and Dr. *Hogg*, that the Defendant was acquainted with a private marriage of his father and mother before the birth of the Plaintiff, and there was no proof that the Defendant, at the time of making the agreement, communicated that circumstance to the Plaintiff; the Defendant thus taking advantage of his own knowledge of it, and of the Plaintiff's ignorance. (*a*)

17th *December* 1816. "His Honor doth order, that the parties do proceed to trial at law in his majesty's Court of Common Pleas, at the sittings after next *Trinity* term, on the following issue, viz. Whether the Plaintiff is the legitimate son of Colonel *Harry Gordon* in the pleadings mentioned; and the Plaintiff in this court is to be the Plaintiff at law, and the Defendant in this court is to be Defendant at law, who is forthwith to name an attorney, accept a declaration, appear and plead to issue; and it is ordered, that it be referred to Mr. *Campbell*, one, &c., to settle the issue in case the parties differ; and his Honor doth reserve the consideration of all farther directions, and of the costs of this suit, until after the trial of such issue; and either of the parties is to be at liberty to apply to this court, as there shall be occasion." — Reg. Lib. A. 1817. fol. 387.

The preceding order was, on a rehearing, affirmed by the Master of the Rolls; and it was ordered, that the

(*a*) *Ex relatione.*

issue

issue should be tried at the sittings after the next term. 11th *December* 1817.— Reg. Lib. A. 1817. fol. 402.

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An order having been pronounced, that the deposition of Mrs. *Gordon* should be read at the trial (*a*), on the 27th *February* 1818 the issue was tried, and the jury returned a verdict in favor of the Plaintiff's legitimacy.

1818. *June* 23. *July* 1. 8.

An application on behalf of the Defendant was made to the Master of the Rolls for a new trial, and refused. The following cases were cited; *Standen* v. *Edwards* (*b*), *The Warden and Minor Canons of St. Paul's* v. *Morris.* (*c*), *Pemberton* v. *Pemberton* (*d*), *Dalrymple* v. *Dalrymple.* (*e*)

Nov. 9, 10. 13.

The case coming on for farther directions, was argued by Mr. *Wingfield*, Mr. *Heald*, and Mr. *Perkins*, for the Plaintiff, and by Mr. *Hart*, Mr. *Roupell*, and Mr. *Rose*, for the Defendant. The substance of the arguments appears in the farther proceedings.

The LORD CHANCELLOR.

1819. *Jan.* 18.

During my long indisposition I have considered this case with much attention, and I have informed myself fully of the view which the late Master of the Rolls took when he directed that it should be sent to an issue. Unquestionably he looked no further than this, I speak

(*a*) *Ante*, vol. i. 166.
(*b*) 1 *Ves.* jun. 133.
(*c*) 9 *Ves.* 155.
(*d*) 13 *Ves.* 290.
(*e*) Reported by Dr. *Dodson*, and 2 *Hagg.* 54.

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from his own authority, that if the jury upon the issue found for the illegitimacy of the Plaintiff, there was an end of the case; but he had not considered what was to be the effect of a verdict of legitimacy.

It appears that Colonel *Harry Gordon* died in the year 1787, seised of an estate in the island of *Grenada*, and having a claim also upon certain property situated in the United States of *America*, but which claim had not at that time been matured into a title. On his death a dispute arose in his family, which of his sons was the eldest legitimate son; the present Plaintiff, Mr. *Harry Gordon*, was his second son, legitimate or illegitimate; and he had an elder son of the name of *Peter*. The deceased Colonel *Harry Gordon* had made several wills, but by his last will he left the whole of his property, real and personal, subject to certain legacies, to his son *Peter*, constituting him generally his heir and executor. It is insisted by Mr. *James Gordon*, the present Defendant and third son of Colonel *Harry Gordon*, that his father and mother were not married at the time when *Peter Gordon* was born, or at the time when *Harry Gordon*, the present Plaintiff, was born; and that, consequently, *James* was the eldest legitimate son. If such was the case, *Peter*, who became entitled to the property under the will of his father, being on that supposition illegitimate, and having died intestate, and without children, neither of his brothers could be his heir, but the title to the estates would become vested in the crown. It happened, however, that at the time of *Peter*'s death, some gentlemen well known in the city, of the name of *Boddington*, had a mortgage upon the *Grenada* estate; and a question therefore would arise whether the legal estate being in the mortgagees, the equity of redemption of which *Peter Gordon* died seized would escheat to the crown, or whether the mortgagees

would be entitled to hold the property against the crown, the family of the *Gordons*, and all the rest of the world? It appears that, under the circumstances, the mortgagees very liberally agreed not to take advantage of their legal right, in case they had a legal right against the family; but that if the claim of the crown should not prevail, they would hold the property for those who were entitled to redeem it.

The first agreement could not have taken place without great investigation of the state of the family and the situation of the property. It happens, however, that the persons engaged in preparing that agreement, and who must have been instructed on all these facts, have not been examined.

It is represented, that on that occasion, *James Gordon*, the third son, assuming to be the eldest legitimate son, insisted that the marriage between his father and mother took place after the birth of *Harry* and *Peter*, whom, consequently, he stated to be illegitimate; and that he was the representative of the family. Now, even on that statement, *James Gordon* could have only a claim of favor upon either the crown or the mortgagees of the *Grenada* estate, to be preferred to an illegitimate son; although as this was a *Scottish* family, domiciled in *America*, the law of *Scotland*, by which children born before marriage become legitimate when marriage afterwards takes place between their parents, may, perhaps, have produced some question. If *Peter* was the heir of the family, the Plaintiff was entitled to the *Grenada* estate, and if he gives up that estate, it must be for some valuable consideration; but if it is supposed that *Peter* was illegitimate, the title to the *Grenada* estate, after the death of *Peter*, was not in *James Gor-*

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don, but in the crown, or in the mortgagees; it did not depend on *James* to give *Harry* a title to that estate, but on the mortgagees or the crown. I am at a loss, therefore, to conceive what consideration passed from *James Gordon* at the time of the agreement respecting that estate.

It appears, that about the year 1788, General *Adam Gordon* was in possession of the *Grenada* estate, as the agent of *Peter*; and he states in his evidence, which I have examined with great attention, that *James*, in the year 1788, came to the island of *Grenada* previously to the agreement of 1790, and insisted that *James* was entitled to the possession of the estate, and desired that General *Gordon* would give it up to him. This request on the part of *James*, grounded upon his assertion of the illegitimacy of *Peter* and *Harry*, was received with great indignation by General *Gordon*, who expressed his opinion of that request, and of the individual who made it, in terms which there is no occasion to repeat; and General *Gordon* then told *James Gordon*, that there had been a private marriage between his father and mother previous to the birth of *Peter*, and, consequently, previous to the birth of *Harry*, and that such private marriage was a good marriage, notwithstanding there had been a subsequent public marriage; the first marriage ceremony having been privately performed in order to keep the circumstance a secret from Judge *Gordon*, who had other views for Mr. *Harry Gordon*'s establishment. In conclusion, General *Gordon* declared that he held the estate in trust for *Harry*, and that he would not give up the possession.

I advert particularly to this conversation in the year 1788, on account of the subsequent agreement with respect to the *American* property, which did not take place

place until the year 1805, seventeen years after the period at which, as General *Gordon* states in his depositon, he being in possession of the *Grenada* estate as agent of *Peter*, treated the younger brother in the manner that has been described; and yet General *Gordon* states that he never informed his principal of the transaction, nor ever mentioned this conversation, which occurred in the year 1788, until the other agreement with respect to the *American* property had taken place in the year 1805. This is certainly a very extraordinary circumstance; it amounts almost to an improbability. There is, besides, among the papers in this case, a deed executed in 1788, to which General *Gordon* is himself a party, and in which he mortgages thirteen negroes to Messrs. *Boddington*, and the equity of redemption is expressly reserved to the legitimate or illegitimate children of Colonel *Gordon*; an acknowledgment, as it seems, by General *Gordon*, that there were children of both classes, legitimate and illegitimate.

The present bill is filed in the year 1809, four years after the agreement relative to the *American* property, and twenty-one years after the agreement relative to the *Grenada* estate; and the whole effect of the bill, as I collect, is this: after adverting to the mortgage on the *Grenada* estate, the bill states in *ipsissimis verbis*, the register of the birth of *Harry Gordon*, in which he is called the son of Captain *Harry Gordon*, and of *Hannah Gordon*, described as his wife; and not containing one word of spoliation of papers, it proceeds to state, that the Plaintiff being led to believe, but without saying by whom, that he was not the legitimate son of his father, and being confirmed in that belief by the assertion of *James Gordon*, executed the deed of the year 1790; and that he had no knowledge of the private marriage until after the agreement in 1805.

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In the course of this case the publication of the depositions *de bene esse* of the mother, Mrs. *Gordon*, who was still alive, was at first refused, and that question coming again before the Master of the Rolls, his honor permitted the publication; and on appeal I approved that decision; and I then expressed my opinion that if the Plaintiff chose to have the examination read, in other words, if he chose to have his mother examined as a witness, it would be extremely difficult both on the trial of the issue, and at the hearing of the cause, to receive the evidence of witnesses who spoke to the declarations made by the mother: for although it is clear that on questions of pedigree, if a parent is dead, evidence may be given of his declarations on the subject of the pedigree, and witnesses may be called to prove these declarations, yet it would be difficult to find any case in which witnesses were permitted to prove such declarations when the parent in question was living, and was personally examined. I therefore wish to know how far those witnesses were heard upon the trial of the issue, as to the declaration of a woman who was herself a witness.

In the view of the case which I now take, much of that evidence which went before the jury must necessarily be considered upon the hearing for further directions; and it must be considered with strict attention to the law of the Court, which says, that a man shall not be at liberty to prove upon a trial any thing he may think fit; that he is at liberty to prove only that which is put in issue. Now here is a great deal said about spoliation of papers, of which not a word is to be found in the bill or in the answer.

Supposing the question cleared from the difficulty about evidence, I have Sir *William Grant's* authority to say, that

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that his view of the case in directing the issue, went no further than this, that if the illegitimacy was found, there was an end of the matter; but he had not considered what was to happen in the other event, if the legitimacy was found. The case will now come to be discussed on two points; first, supposing all imposition out of the question, whether it is a case in which, upon the principles that guide the conduct of a court of equity, relief can be granted? and, secondly, whether, if there are any passages in the several depositions imputing imposition, there are in the bill any allegations, or in the answer any admissions, of imposition as a ground for relief?

Of the cases which have been quoted, *Stapilton* v. *Stapilton* (*a*), and *Cann* v. *Cann* (*b*), there is no necessity for me to say more, than that they fully establish a principle of which I can have no doubt, that where family agreements have been fairly entered into, without concealment or imposition upon either side, with no suppression of what is true, or suggestion of what is false, then, although the parties may have greatly misunderstood their situation, and mistaken their rights, a court of equity will not disturb the quiet, which is the consequence of that agreement; but when the transaction has been unfair, and founded upon falsehood and misrepresentation, a court of equity would have a very great difficulty in permitting such a contract to bind the parties.

Family agreements without fraud established, though founded in mistake.

In the present case it is for the Court to consider, first, whether the pleadings have sufficiently put in issue the fact of imposition? and, secondly, if they have, in what the imposition consists? I suppose the most prominent mode of putting the fact of imposition is this:

(*a*) 1 *Atk.* 2. (*b*) 1 *P. W.* 723.

that

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that *James Gordon* knew that there had been a marriage *de facto*; not that he knew the marriage was a legal marriage, but that a ceremony of marriage, whether valid or not, had been performed previous to the public marriage, and previous to the birth of *Harry*; that *James Gordon* was aware of this fact, and knew that *Harry* was not aware of it, and kept from him the knowledge of that fact. It was his duty to communicate the fact of the private marriage; and if *Harry* knowing it, had decided for himself that the ceremony was not valid, and treating it as not a marriage *de jure*, had chosen to enter into the contract, there would have been no ground for the suggestion of imposition, unless on evidence of spoliation of papers, of which I find no allegation.

When this case came before me at *Westminster* the point of spoliation of papers was adverted to; and it was said, that the evidence produced upon the issue afforded strong grounds for an inference contrary to the verdict on the question of the legitimacy. I lay all this entirely out of the question; but still I cannot think that the case has been argued to the bottom. I am clearly of opinion, that Mr. *James Gordon* has no right, at the present time, to argue from circumstances that *Harry Gordon* is illegitimate; on that subject he is concluded by the verdict: but he has certainly a right to say, of any particular circumstances, that they, at the time of the contract, induced him to believe that *Harry* was not legitimate; and the question would then be, whether this is not a case of mistake into which all parties might honestly fall? Before the Court declares a contract like this void, it ought to be fully satisfied that the contract was entered into under circumstances of wilful concealment.

I have thus explained my view of the case; and before

fore I pronounce a final decision I should wish to have it argued again by one counsel on each side.

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Mr. *Heald*, for the Plaintiff, requested that the cause might be heard on an early day.

Feb. 27.

The LORD CHANCELLOR.

When this case came before me upon the verdict, it was opened on the principle that the Plaintiff having established his legitimacy, was entitled to the relief prayed; but the order directing the issue has not provided for the event of a verdict of legitimacy, but proceeded solely on the principle that an opposite verdict would have been fatal to the Plaintiff's claim. I observe with surprise that, on the trial, not only the deposition of the mother was read, but witnesses were admitted to prove her declarations. Such a proceeding is certainly irregular; when she was a witness in the cause no evidence of her declaration should have been received from other witnesses. It is singular that such a practice should have occurred, after the elaborate discussions on the law of evidence applicable to declarations of pedigree, in the case of the *Berkeley* peerage. (*a*)

On a question of pedigree, witnesses cannot be received to prove the declarations of a relative whose deposition is read.

The cause was again argued.

June 29.

Mr. *Heald* for the Plaintiff.

In all the cases of family agreement which have been the subject of judicial decision except one, the contracting parties had among them a good title; if the claim of

(*a*) 4 *Campb.* 401.

one

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one was bad, by necessary consequence the claim of the other was good. Here, if *Peter* and *Harry Gordon* were illegitimate, the estate was the property of the mortgagees or of the crown, not of *James Gordon*. The agreement, therefore, which the Plaintiff now impeaches was without consideration. *Harry Gordon* sacrificed a part of his rights, in consideration of the title which *James* represented himself to have and to give; but it is clear that he had no title. He cannot be permitted to allege, that the agreement was founded on the probability that he might become the grantee of the crown.

The LORD CHANCELLOR.

Before the act of parliament introduced by Lord *Redesdale* (*a*), the crown could make no grants of estates escheated beyond leases for short terms of years or during lives (*b*); that act has enabled the crown to be more liberal. It may, however, be found, on examination, that the statute of *Anne* is not applicable to lands out of the kingdom. (*c*)

Argument for the Plaintiff resumed.

The conclusion is, that the agreement was voluntary, and this case is within the principle of those decisions in which agreements founded in misrepresentation, whether wilful or innocent, have been rescinded.

The LORD CHANCELLOR.

If the Defendant, *James Gordon*, when he entered into the agreement knew that there had been a private

(*a*) 59 & 40 *G.* 3. *c.* 88. *s.* 12.

(*b*) 1 *Ann. st.* 1. *c.* 7. 34 *G.* 3. *c.* 75.

(*c*) The words are, "manors, &c. within the kingdom of *England*, dominion of *Wales*, or town of *Berwick-upon-Tweed*, or any of them."

legal

legal marriage between his father and mother, it would require little time to dispose of this case; if he knew that there had been a ceremony of marriage, without knowing whether it amounted to a legal marriage, and omitted to communicate that fact to his brother, and enable him to decide for himself the effect of the ceremony in law, the consequence to *James Gordon* might be serious; but does the bill contain any charge even that *James Gordon* knew the fact of marriage? If not, a question will arise, whether evidence to that effect can be admitted at all; and if admitted, whether *James Gordon* is to be concluded by evidence which he has had no opportunity of answering.

My opinion is, that if *James Gordon*, prior to the agreement, knew that there had been a private ceremony of marriage, and conscientiously believing that it was not a legal marriage, omitted to communicate the fact to his brother, the Plaintiff would be entitled to relief; on the principle that, though family agreements are to be supported, where there is no fraud or mistake on either side, or none to which the other party is accessary, yet where there is mistake, though innocent, and the other party is accessary to it, this court will interpose.

Family agreements not supported if founded in the mistake of either party, to which the opposite party is accessary.

Argument for the Plaintiff resumed.

The bill contains no distinct allegation that the Defendant was apprised of the ceremony, but the statement in the answer, that the Defendant had been informed that neither *Peter* nor *Harry* were legitimate, is sufficient to introduce the evidence. But the objection is too late; the evidence was received on the original hearing, and cannot now be rejected, when the cause is heard for farther directions.

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Mr. *Hart* for the Defendant.

The fact that the deed was voluntary, affords no reason for rescinding it. The evidence manifests the existence of mutual doubts of the Plaintiff's legitimacy; and a compromise of rights originating in such doubts, is the very transaction which courts of equity support, in order to preserve the peace of families. On the supposed right of the crown it may be sufficient to refer to *Burgess* v. *Wheate*. (*a*)

In the course of the argument the following cases were cited: *Stockley* v. *Stockley* (*b*), *Stapilton* v. *Stapilton* (*c*), *Cann* v. *Cann* (*d*), *Pullen* v. *Ready* (*e*), *Cory* v. *Cory* (*f*), *Lansdown* v. *Lansdown* (*g*), *Bingham* v. *Bingham* (*h*), *Dunnage* v. *White*. (*i*)

The LORD CHANCELLOR.

I have never known a case in which it was more the duty of the Judge to make a covenant with himself not to suffer his feelings to influence his judgment.

It is obvious that the Plaintiff, if not legitimate, has no title to relief; the trial of the issue has decided, and I think properly, that the Plaintiff is legitimate; unfortunately it seems to have been taken for granted, when the issue was directed, that after a verdict of legitimacy no dispute could arise touching the relief to be decreed; but, in fact, the question still remains, whether, admitting the Plaintiff to be legitimate, the agreement was concluded under circumstances which entitle him to

(*a*) 1 *Black.* 123. 1 *Eden*, 177.
(*b*) 1 *Ves. & Bea.* 23.
(*c*) 1 *Atk.* 2.
(*d*) 1 *P. W.* 723.
(*e*) 2 *Atk.* 587.
(*f*) 1 *Ves.* 19.
(*g*) *Mos.* 564.
(*h*) 1 *Ves.* 126.
(*i*) *Ante*, vol. i. 157.

relief?

relief? I cannot avoid thinking that it would have been more prudent first to consider the effect of a verdict of legitimacy, lest the expense and time of the trial should be wasted. The case, however, has taken another course, and I am now to decide whether, after this verdict, and on these pleadings and this evidence, the Plaintiff is entitled to relief.

Withholding my judgment on the effect of the evidence which has been read for the first time on this hearing for farther directions — I mean the mortgage deed, reserving the equity of redemption to Colonel *Gordon* and his children, legitimate and illegitimate, and some letters, I will proceed to observe on the rest of the evidence, and to point out in some degree what, as I conceive, must be the principles of decision.

The bill is filed by *Harry Gordon*, who must now be taken to be the eldest living legitimate son of Colonel *Gordon*, stating that his father died in 1787, seised of estates in *Grenada*, and claiming estates in *America*, having by his will devised his real estates to his son *Peter* and his heirs for ever. *Peter* was the elder brother, legitimate or illegitimate, of *Harry Gordon*; and *Harry* being found legitimate, *Peter* must be taken to be legitimate also; but while it could be asserted that *Harry* was illegitimate, it followed of necessity that *Peter* was illegitimate; and on the Defendant's shewing, therefore, this must be taken to be a case in which the father of several children, some legitimate and some illegitimate, has given an estate in fee to one of the latter class, who died intestate; and in which, by reason of his death, estates in the island of *Grenada*, subject to a mortgage in fee, are so circumstanced, if the law there is, as I believe it to be, the same as the law in *England*, that neither the Plaintiff nor the Defendant, *James Gordon*,

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have any title to them; because if the doctrine of escheat applied to those estates, the title was in the crown; if on the principles adopted in *Burgess* v. *Wheate*, the mortgagee might refuse to be redeemed by any one, neither the plaintiff nor *James Gordon* could disturb his enjoyment; the right being on one supposition in the crown, and on the other in the mortgagee. The crown was dealt with as is usual in these cases; that is, considerable care was taken that its officers should know nothing on the subject; the mortgagees appear to have acted in a manner highly creditable to them, and having a probable title themselves, consented to dispose of the estate according to the agreement entered into by the members of the family.

It has been contended, on the behalf of the plaintiff, that this case is distinguishable from *Cann* v. *Cann*, and other authorities of that class; and in general certainly the circumstances are such as have been represented; namely, a dispute about the title to an estate, which clearly belongs to one of the disputants, unless it belongs to the other: as where between two brothers, supposed to be both legitimate, or one legitimate and the other illegitimate, a compromise is effected, on the supposition of the illegitimacy of one who was found afterwards to be legitimate, the Court holding this to be a family agreement, would not disturb it, provided that there was honest dealing on both sides, and each withheld the communication of no circumstance proper for the consideration of the other; though one had been dealing for his birth-right, under an erroneous notion that he was illegitimate, he would be bound. But in every case it has been said, and it would be monstrous to hold otherwise, that if what one knows has been concealed from the other, who has been misled by that concealment, the Court would not sanction the agreement.

A family agreement concluded in honest error is binding.

Not if either parties has been misled by the concealment of material information.

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It is said that this case differs from those to which I have alluded in this respect, that here, on the hypothesis of illegitimacy, which was the foundation of the agreement, neither party was entitled. I doubt much whether that distinction is material, and I think the fair way of putting the case on that point is this: both parties had agreed to set out of question the title of the crown, the adverse title of the mortgagees was waived in favour of both, and both consented that, for the purpose of the arrangement, the estate should be considered as belonging to them; and I am of opinion, therefore, that if the dealing is honest, this case is within the principle of those decisions. But a difficulty arises here, partly from the manner in which the case is necessarily and properly pleaded, partly from the nature of the case as collected from what appears on the pleadings, contrasted with what in every way of estimating the due weight of the observations made, might have appeared there, if the parties thought proper.

A family agreement may bind the parties though neither of them had a valid title to the property in question.

The Plaintiff represents that in 1788, he returned from the *East Indies*, in consequence of his father's death; that on his arrival here he was taught to believe that his father had been only once legally married, subsequently to the Plaintiff's birth, and must be understood to state that he was not apprized of the fact of that private marriage, which is now to be considered as valid. The case on this point has more of complexity, because it appears that the parties looked to the law of *Scotland*, and may have confounded the law arising from Scottish and English domicil. In this state of ignorance, the Plaintiff concludes an agreement with *James Gordon*, in 1790, and afterwards in 1805. The bill also contains an allegation, in singular terms, that the defendant now knows the private marriage; not that he knew it at the time of the contract.

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The answer of *James Gordon* may be read in two ways; he denies his belief that there was a private marriage, and if he honestly believed, when he swore to his answer, supposing him to have known the private ceremony, that that ceremony did not constitute a marriage, his answer is strictly true; but then it is no answer to the case on which the plaintiff insists; and if it is a fair observation on the one hand, that the plaintiff might have charged much more in his bill, on the other hand it is obvious that *James Gordon* might have made an answer, which, if it truly stated all the circumstances of the case as he knew them, might have put an end to the suit.

Evidence not admitted of facts not alleged in the pleadings.

Of the evidence, I lay out of the question the circumstances to which more witnesses than one speak, I mean the conduct of *James Gordon* with regard to family papers, on the news of his father's death arriving in *Scotland;* the pleadings contain no allegation on the subject, and I must therefore know nothing of it. But supposing *James Gordon* to know, that though there had been a ceremony of marriage, the marriage was not valid, if he knew the fact of the ceremony and took on himself to determine its validity, and dealt with his elder legitimate brother without disclosing that fact, knowing that he was not otherwise apprised of it, he was wrong; when he entered into a contract with his elder brother as the heir at law of their father, while if that ceremony constituted a valid marriage he could not be heir, it was his duty, as an honest man, to state the fact of that ceremony, and his opinion that it was not valid. If the plaintiff so informed had thought proper to enter for himself into the consideration whether that ceremony did or not constitute a legal marriage, and had then dealt with *James Gordon*, this case would have been brought precisely within those decisions, in which the Court has refused

to

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to disturb family agreements. But here occurs a painful part of the case. Dr. *Hogg* positively swears, under circumstances indeed difficult to be accounted for, but which can never justify me in saying that he is perjured, that he communicated to *James Gordon* the fact which he had learned from his father, the private ceremony of marriage. The defendant requires me to believe that this clergyman, the tutor of the family, has solemnly deposed to a falsehood, so infamous as this statement, if false, must be. But the deposition is supported by the evidence of General *Adam Gordon*. It is difficult, indeed to understand, why neither Dr. *Hogg* nor General *Gordon* communicated these declarations to the plaintiff: but that difficulty will not authorize me in discrediting testimony, than which, if false, more profligate was never given.

It must be considered, therefore, as established, that before the agreement of 1790, *James Gordon* knew that there was a rumour at least of a private marriage; and I have no hesitation in saying, that whether there had been a private marriage or not, yet if *James Gordon* withheld from the plaintiff the information which he had received from Dr. *Hogg* and General *Gordon*, this bargain if speedily questioned, could not have stood in this Court. In contracts of this sort, full and complete communication of all material circumstances is what the Court must insist on.

Family agreements require communication of all material circumstances.

The fact of a private marriage is further established by the evidence of Mrs. *Gordon* and her daughter; and the difficulty of understanding the delay of Dr. *Hogg* and General *Gordon*, in communicating to the plaintiff circumstances so material, is not sufficient to discredit their testimony. The reason which they assign is, that the brothers having settled their differences by the agree-

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ment of 1790, the witnesses were anxious not to disturb the harmony of the family. It is remarkable also that General *Gordon* is party to the deed of mortgage, reserving the equity of redemption to the children legitimate or illegitimate of Colonel *Gordon*; he was aware, therefore, that some difficulty attended the question of legitimacy; the mortgagees reasonably required the deed to be so framed, that the question should not embarrass them. But much more is necessary before this evidence can be rejected.

The pleadings on the part of the plaintiff seem not so ample as they might have been, with reference to so singular a case; but it must be considered, whether the allegations of the defence have not opened a case within the statement of the bill, however general; and it must be recollected, that it was competent to the Defendant, by a cross bill to obtain from the Plaintiff an answer supplying all the defects of the record.

The case will finally turn on this point: at the time of the agreement, did *James Gordon* know that there had been a private ceremony of marriage, whether he thought it valid or not? If he did not know that there had been a private ceremony, had such a statement been made to him? Although he might not believe that statement, still he was bound to communicate it to his brother. If it can be shown that the Plaintiff had the same knowledge, the case will take another turn; but regard being had to the nature of the answer, and the fact that no cross bill has been filed, the probability is, that *James Gordon* knew, or had reason to believe, that there had been a private marriage, and that the Plaintiff possessed no such knowledge; and then the parties did not meet on equal terms. In that view, taking the case, as I wish to take it, as a case of mere non-disclosure, the

the Court, even at this late hour, will give relief. But if the Plaintiff had a knowledge of the fact, and exercised his own judgment on the legal effect of it, this case will be one of that class in which the Court, seeing that there has been full disclosure on all sides, and that the parties have thought proper by agreement and compromise to settle what each shall hereafter claim, supports the contract, though proceeding on mistake. If in this case, therefore, the Court refuses relief, the refusal will be grounded on the fact, that all parties acted in knowledge; if it grants relief, its interposition will suppose proof, that some material circumstance known to one party was not communicated to the other.

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July 27.

The following cases were cited on the admissibility of depositions beyond the allegations in the bill. *Ward* v. *The Duke of Buckingham.* (*a*) *Tennant* v. *Stubbing.* (*b*) *Clarke* v. *Turton.* (*c*)

Aug. 16.

The LORD CHANCELLOR.

The agreements which the bill in this case seeks to rescind were entered into, it must be admitted, after considerable deliberation on the subject. The chief difficulties of the case arise, unless I mistake its nature, from the infirmity of the pleadings on each side.

At the date of the agreement of 1790, recollecting that if *Harry Gordon* was illegitimate, *Peter Gordon*, as the elder brother, was necessarily illegitimate also, and

(*a*) 3 *Bro. P. C. ed. Toml.* 581. (*b*) 3 *Anstr.* 640. 644. (*c*) 11 *Ves.* 240.

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that by reason of his illegitimacy and intestacy, *James Gordon* could have no title to the estates, it is not easy, from any allegation in the bill or answer, to understand the views of the parties; but the arrangement seems to be explained by the conduct of the mortgagees, who kindly agreed to consider themselves as trustees for the family; and it is evident that the parties dealt with a knowledge that the crown might have a claim in the property, for the contract provides for the event of the crown establishing its claim.

This was originally opened at the bar as a case in which the Plaintiff having, by the event of the issue, established his legitimacy, nothing remained but to decree the relief which the bill prays; but in my opinion, although it is impossible that the Plaintiff should succeed if illegitimate, his mere legitimacy will not entitle him to success, and for this reason: I apprehend that if on the death of an individual seised in fee of an estate, a dispute arises who is his heir, and there is room for rational doubt as to that fact, and the parties deal with each other openly and fairly, investigating the subject for themselves, and each communicating to the other all that he knows, and all the information which he has received on the question, and at length adopt a resolution to distribute the property, under the notion that the eldest claimant is illegitimate, although it afterwards appears that he is legitimate, the Court will not disturb a family arrangement of that kind, merely because the fact is eventually found different from the supposition on which it was founded. I put the case of full and free disclosure, and where the transaction proceeds on a compromise, with reference to which no want of good faith on either side can be suggested.

Family arrangements not disturbed although founded in mistake.

On

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On the question of legitimacy the verdict is decisive, and I am bound to consider the Plaintiff as the legitimate son of Colonel *Gordon*; and the question now is, whether attending to the *allegata & probata* in this case, these agreements are to be impeached, and to what extent, and on what terms?

I lay out of the case the question of consideration; and I think myself justified by the authority of *Cann v. Cann* and other decisions, in holding, that if a dispute arises relative to the legitimacy of children, and the members of the family, to maintain their character in the world, arrange their rights among themselves, if the matter is fully before them, their agreement will not be disturbed, because it is founded on a supposition, which imputes the character of legitimacy to the illegitimate, or illegitimacy to the legitimate; but then there must not only be good faith and honest intention, but full disclosure; and without full disclosure honest intention is not sufficient.

Family arrangements not supported without full disclosure.

My view of this case, and I have not arrived at it without reluctance, is, that *James Gordon* knew that there had been some ceremony, which is called a private marriage. I cannot doubt that fact without imputing to several witnesses the most infamous perjury. I find no evidence that, at the time when the Plaintiff entered into the agreement of 1790, he was apprized of that ceremony; and I say that if *James Gordon*, knowing that fact, of which the Plaintiff was ignorant, dealt with him without disclosing it, whether the omission of disclosure originated in design, or in honest opinion of the invalidity of the ceremony, and of a want of obligation on his part to make the communication, the agreement cannot be sanctioned by the Court.

If

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If *James Gordon* had informed the Plaintiff of the fact of the private ceremony, and afforded him the opportunity of deciding, by his own judgment, whether that ceremony constituted a marriage, and the Plaintiff had consented to impute to himself the character of illegitimacy, when by the verdict it appears that the character of legitimacy belonged to him, I think, omitting at present the question of consideration, that the Court could not have interfered with the agreement.

It is not uninstructive to observe the different effect of the same evidence on different minds; the letters which have been read in proof that the Plaintiff acted with great deliberation, and knew the fact of the private ceremony, appear to me strong evidence that he never had that knowledge.

Many views of this case it is difficult to reach, considering the penury of allegation in the bill; but, after an attentive consideration of the bill, the answer, and the evidence, it appears to me that these agreements must be rescinded; on what terms is another question. If the deeds are declared void, the other parts of the arrangement must also be set aside.

I think that the Defendant is entitled to have a declaration inserted in the decree of the ground on which I proceed in holding the deeds void. Such declarations on the record are always useful, enabling the parties to deal with them as they think right.

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June 26.

The decree, stating that the cause now stood for judgment, and reciting the pleadings, and that the parties proceeded to a trial of the issue on the 27th *February* 1818, when the jury found that the Plaintiff

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Plaintiff was and is the legitimate son of Colonel *Harry Gordon*, proceeds thus: — " His Lordship doth declare that it is established by the verdict found in this matter that the Plaintiff is the legitimate son of his father; and His Lordship doth declare that *Peter Gordon*, his elder brother, must also have been legitimate, and, consequently, that the Defendant *James Gordon* was not the heir at law of *Harry Gordon* the elder, nor of the said *Peter Gordon;* and farther, that it appears that if *Peter Gordon* was not legitimate, yet if having survived *Harry Gordon* the elder, he became entitled in fee, in law or equity, to the estates in question, by virtue of his father's will, mentioned, in the agreement of 1790, to bear date the 5th day of *August* 1787, the Defendant *James Gordon* could not be entitled at his father's death, or at the death of *Peter Gordon*, to the estates of *Harry Gordon* the father, as his heir at law, or have any well-founded claims to the said estates, as such heir at law; that nevertheless the agreement of 1790 purports to be made between the Plaintiff *Harry Gordon* and the Defendant *James Gordon*, claiming to be the heir at law of the testator *Harry Gordon* the elder, and as such making certain claims upon the estates therein mentioned, over and besides the provisions made for him by the will and codicil of 1776, 1782, and 1787, recited in the said agreement of 1790, and which will and codicil are thereby by the said Plaintiff and Defendant admitted to have been made by the said *Harry Gordon* the elder; that it further appears, from the recitals of the said agreement of 1790, that if *Peter Gordon* had been illegitimate, and *Harry Gordon* the younger also illegitimate, and if the estates were vested in *Peter Gordon* by virtue of the said will of 1787, the said *James Gordon* could not, as heir at law of his father, or otherwise, by his contract, or by any other his act, authorise or give title to *Harry* the younger to enter upon the said estates, or empower him effectually to

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to require the mortgagees mentioned in the said agreement, to re-convey to him the said *Harry Gordon* the younger, upon payment of what was due to them, or vest in the said *Harry Gordon* the younger any interest in the said estates, save the said *James Gordon*'s interest as a legatee; that it also appears that the other agreement of the 4th day of *February* 1805, as well as the said agreement of 1790, was made between the parties thereto in consequence of the supposed illegitimacy of the Plaintiff, negatived by the before-mentioned verdict; and that the Defendant, if the Plaintiff was illegitimate, had no title to the lands in *America*, nor any right, for his own behoof, to hinder the Plaintiff from obtaining possession thereof, subject to the charges thereon, in case such lands, under the grant thereof, were vested in his father, and passed by his father's will to *Peter Gordon*; and His Lordship doth declare, that if the Plaintiff could not be relieved against the said agreements on the mere ground of mistake respecting his legitimacy, on the ground that the said agreements were entered into in consequence of mistake and misapprehension respecting such legitimacy, yet that the Plaintiff is entitled to be relieved against the same, as having been also entered into under a misapprehension and misunderstanding that the said *James Gordon* the Defendant had such right and interest in the said estate, as would enable him effectually to give and assure to the Plaintiff those benefits and interests which, for the considerations mentioned in the said agreements, are contracted or agreed to be given and assured to him by the said *James Gordon*; and inasmuch also as it is established, by the evidence in the cause, that, prior to the entering into the said agreement, the Defendant *James Gordon* had been informed and knew, that a ceremony of marriage had previously taken place between his father and mother before the birth of the Plaintiff, (being the marriage which, by the aforesaid

aforesaid verdict, has been established as a valid marriage,) and the said agreement having been entered into with such previous information on his part, and without such information being imparted to the Plaintiff, who might, if the said *James Gordon* had communicated to him that information, have been able by due inquiry to prove his legitimacy, as he has since proved the same, after he had discovered that such ceremony had previously taken place; His Lordship doth therefore declare the agreements in the pleadings mentioned, bearing date the 31st day of *March* 1790, and the 4th day of *February*, 1805, to be void, and doth order and direct that the same be delivered up to be cancelled; and it is further ordered that it be referred to Mr. *Dowdeswell*, to whom this cause stands referred, to take an account of all sums of money paid by the Plaintiff to the said Defendant *James Gordon*, or to any other person or persons by his order or for his use, in respect of the annuity mentioned in the agreement bearing date the 31st day of *March* 1790, and of the sums of 4,600*l.* and interest, and 1040*l.* in the said agreement also mentioned; and it is ordered that the said Master do compute interest on the respective sums paid by the Plaintiff to the Defendant *James Gordon*, from the respective times of paying the same; and for the better taking the said account, &c.; and it is ordered, that what the said Master shall find to be the amount of such sums and interest be paid into the Bank with the privity of the Accountant-General of this court, on the credit of this cause, subject to the further order of this court; and His Lordship doth reserve the consideration of costs, &c.; and this is to be without prejudice to any claims which the Defendant *James Gordon* may have or can establish against the Plaintiff, in respect of the estate or effects of *Harry Gordon* the elder deceased, or *Peter Gordon* deceased, or either of them, in any suit or proceedings which he may

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may be advised to institute against him, and other proper and necessary parties." — Reg. Lib. A. 1820. fol. 1984.

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ROLLS.
July 2, 3. 16.

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Under a bequest to trustees for investment in government life annuities, to be paid to *C.* during his life, the annuitant is entitled absolutely to the sum bequeathed; and in consequence of the inability of *C.* to attend at the public office, no investment having been made during his life, and an annuity which the testator paid to *C.*, and which he by a letter directed to be continued until his executors should be ready to make the investment, having been continued beyond that time until *C.*'s decease, the payments of the annuity are to be considered as payments on account of the sum to be invested, and the representatives of *C.* are entitled to receive that sum with interest, after deduction of those payments.

JAMES CRAUFURD, Esq. being possessed of considerable personal property in this country, where he resided, and in *Holland*, and having made a will dated 31st of *December* 1806, relating to his *Dutch* property, which he directed, after payment of his debts, to be remitted to *England*, afterwards on the 31st of *January* 1816, made another will, by which he confirmed the former, and directed that the balance should be paid to his executors in *England*, and should go into the mass of his effects here. By this will, after bequeathing certain legacies and annuities to his wife, he gave to the defendants *John Craufurd* and *Coutts Trotter*, the sum of 3000*l.* in trust, to be by them employed in purchasing in their names, upon the life of his brother *George Craufurd*, an annuity in the government life annuities of the value of 3000*l.*, to be by them received and paid to him in equal shares every six months during his life, upon condition of his renouncing in writing within eight days after receiving the notification of the testator's death, all demands and claims whatsoever upon the testator's estate, or upon any property of which he might die possessed, failing which, the present disposition in his favour to be null and void; and after bequeathing some other legacies and annuities, he further left, out of his remaining property, to *John Craufurd* and *Coutts Trotter*, the sum of 2000*l.*, in trust, to be by them employed

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ployed in purchasing in their names, and on the life of his brother *George Craufurd*, an annuity of the government life annuities of the value of the said 2000*l.*, to be received and paid by them to *George Craufurd*, in equal shares every six months; *John Craufurd* and *Coutts Trotter* being thereby authorized, if they thought it necessary, and for the advantage of *George Craufurd*, to dispose of the said 2000*l.* for his benefit, and with his consent, in any other manner which might appear to them most eligible; the whole upon condition only of his renouncing in writing, within eight days after receiving the notification of the testator's death, all demands and claims whatever on his estate, or upon any property of which he might die possessed, failing which, this disposition, as well as the preceding one of 3000*l.*, to be null and void; it being also understood that this sum of 2000*l.* should not be called for in any way before the expiration of one year after his death. The testator appointed *John Craufurd* and *Coutts Trotter*, and *Robert Elliott* and *Mary Craufurd*, the testator's wife, executors and executrix of his will. *John Craufurd* alone proved the will; the other executors and the executrix having renounced probate, and *Coutts Trotter* also having renounced the trusts.

During his life the testator had allowed his brother, *George Craufurd*, who resided in *Holland*, an annuity of 3200 guilders, being in value about 300*l.* sterling. On the 9th of *February* 1816, a few days before his death, he wrote the following letter to Messrs. *Ferrier* and Co., his agents at *Rotterdam*. "I have hereby to request and authorize you to continue to pay to my brother, Mr. *George Craufurd*, for my account, the sum of 3200 guilders *per annum*, in equal quarterly payments, in the event of my death, till such time as my executors shall have arranged my affairs, should they require some time for

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for that purpose; and this letter will be your authority with them, which will be confirmed to them by me; and you will observe that your Mr. *Ferrier* will have funds of mine, out of which the said payments to my brother will be found."

After the testator's death a paper was discovered of his handwriting, without date, in the following words:

"In order to provide for my brother's subsistence upon my death, before my executors may be enabled to make the necessary arrangements, I shall authorize Messrs. *Ferrier* and Co. to continue to advance to him the same sum of 3200 guilders *per annum*, which he now receives, and that so long after my death till my executors shall declare themselves ready to carry into effect the clause contained in my will respecting my brother; and I shall further authorize Messrs. *Ferrier* and Co. to pay themselves for such advances out of the money due to me by Mr. *Alexander Ferrier*; provided always, that before making any payments after my death, my brother comply with the stipulation concerning him contained in my will, which compliance or noncompliance will be communicated to Mr. *Ferrier*. By this manner of preventing my brother from suffering any inconvenience by my death, my executors will be the better enabled to make arrangements with the other legatees; and they are reminded that there are three years, namely, 1813, 1814 and 1815, of profits on the mines still to account for." Neither this paper nor the letter to Messrs. *Ferrier* were proved as testamentary.

In *February* 1816, the testator died; and *George Craufurd*, (within the time prescribed by the will,) duly renounced all demands upon the testator's estate. The executor *John Craufurd* at different times during the first year

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year after the testator's death, paid to *George Craufurd*, 1820*l.* on account of the legacy of 2000*l.*, and was prepared to invest the legacy of 3000*l.*, according to the directions of the will; but *George Craufurd* being prevented by ill health and other obstacles from coming to *England*, to present himself at the government annuity office, where his personal appearance was necessary previous to the purchase of an annuity, the 3000*l.* were in consequence never invested. In the meantime Messrs. *Ferrier* and Co. continued to pay to *George Craufurd* the annuity of 3200 guilders, till his death in *February* 1819, the payments amounting in the whole to about 1050*l.*

The suit was instituted by the executors of *George Craufurd* to obtain payment of the 3000*l.*, and of the remainder of the 2000*l.*

Mr. *Heald* and Mr. *Winthrop* for the Plaintiffs.

On the performance of the condition annexed to the gift of these sums, they became separated from the rest of the testator's estate. The bequest is absolute, and the will only directs in what manner the sums were to be applied for the benefit of the legatee; but if the annuity had been purchased, he might have sold it, or he might have had the sums paid to him instead of their being invested; *Bayley* v. *Bishop* (*a*), *Barnes* v. *Rowley*. (*b*) The right to the sums vested in him from the time of the testator's death. There is nothing in the letter to the *Ferriers*, or in the paper of instructions to the executors, that can restore this property to the testator's estate. The provision made by them was only to continue till the purchase of the annuity, and was not to defeat it. *George Craufurd* might, notwithstanding these documents, at any time have called for the investment of

(*a*) 9 *Ves.* 6. (*b*) 3 *Ves.* 305.

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the 3000*l.* But, strictly speaking, they are of a testamentary nature, and not having been proved as such, cannot be read in evidence.

Mr. *Hart* and Mr. *West* for the Defendants.

The letter and paper of instructions the Plaintiffs have made part of their bill, and they cannot now object to their being used in evidence; if it were necessary the Court would allow the cause to stand over to afford time for proving them. They are evidence of the testator's intention and serve to explain the will.

An intention is avowed both in them and in the will, that this sum (by contradistinction to the 2000*l.*, which might be laid out in any way that the trustee and legatee thought proper) should not be enjoyed except in the shape of an annuity as a personal provision; and the Court cannot apply it to a purpose different from what the testator intended. The trustees were ready with the sum, and the noninvestment of it arose merely from the neglect of the intended annuitant; can his representatives be allowed to derive benefit from his default? *George Craufurd* actually received during his life considerable sums more than he would have had if the annuity had been purchased. Thus he was in a better situation than the testator intended, and his estate cannot now be entitled to the capital sum in addition.

The Master of the Rolls.

With respect to the legacy of 2000*l.*, provision had been made by the testator, that it should be invested in the purchase of an annuity, or paid to his brother *George Craufurd*, at his election. Part of it, at his desire was applied in a manner settled between him and the executors.

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cutors. There remains due a sum of about 130*l.*, and to that his representatives are unquestionably entitled.

The legacy of 3000*l.* is differently circumstanced. As to that the executors had no option; they were expressly directed to invest that sum in the purchase of a government life annuity, which they were to pay half yearly to *George Craufurd*. It is admitted in the pleadings, that the noninvestment of that sum in the mode prescribed was occasioned by the inability of *George Craufurd*, who was then residing in *Holland*, to come to *England* and present himself in person at the proper office. Instead of this, the intermediate payments directed by the testator in the letter to the *Ferriers*, such as he had been accustomed to make during his life, were continued after his death, to the amount in all of about 1050*l.* *George Craufurd* died without the 3000*l.* having been invested in the purchase of any annuity. The bill is filed by his representatives, insisting that they are entitled to that sum, destined for *George Craufurd*, after deduction of the sums received.

First, to consider the question independently of these documents, the letter to the *Ferriers*, and the instructions. The cases of *Bayley* v. *Bishop* (*a*), *Yates* v. *Compton* (*b*), and *Barnes* v. *Rowley* (*c*), have established, that where money is bequeathed to be invested in the purchase of an annuity for the life of the legatee, and the legatee dies before it is laid out, or even, as in *Bayley* v. *Bishop*, before the fund is available, as during the life of the person after whose death the investment is to be made, yet still it is a vested legacy from the death of the testator; and that the legatee for whose benefit it

(*a*) 9 *Ves.* 6. (*b*) 2 *P. W.* 308. (*c*) 5 *Ves.* 305.

was

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was intended, having survived the testator, may elect either to take the sum, or have it laid out in an annuity. It would follow that in the present case the representatives of *George Craufurd* are intitled to this sum which was destined for him.

The only novelty in the case arises from these two documents, the letter and the instructions in the life of the testator, and the conduct of the parties since his decease, under this temporary provision made by the testator; and the question is, whether it can be considered that the legacy which had once vested on the death of the testator, was given up, by the acceptance of a substitute, or whether the inability of the legatee to attend in this country for the purpose of the investment, shall take this case out of the general principle? The letter and the instructions were intended to have only a temporary effect, to make a provision, till the executors should be ready to invest; it is admitted that they were ready, and that the investment was delayed by the circumstances of the legatee; but although for his benefit and for his convenience, the other provision was continued, this cannot operate to divest the legacy. If he had been living could he not have now claimed to have the annuity purchased? The only effect, therefore, of these transactions is to reduce the amount of the legacy.

The question is, in what manner the reduction shall take place? The legatee cannot receive both the intermediate annuity of 200*l.* a-year, and the legacy also. I think that it must be considered in the same manner as if he had elected to take the 3000*l.* in money. As he had a vested interest in this sum from the time of the testator's death, the Plaintiffs are entitled to it, together with

with the interest from the expiration of a year after that event, and they must deduct the amount of the payment made to *George Craufurd* in his life time.

1819.

PALMER v. CRAUFURD.

EDWARD ALDER, Plaintiff.
ROBERT FOURACRE, JOHN MACKAY, and the EARL OF MOUNT EDGECUMBE, Defendants.

1818. *August* 12, 15.

A deceased partner having contracted in his own name for a lease of premises to be employed in the partnership trade, the Court refused to restrain the landlord from granting a lease to his representatives, but restrained the representatives from disposing of the lease when granted, except for partnership purposes, and with the assent of the surviving partner.

THE bill stated an agreement between the Plaintiff and his late partner *R. Yeo*, whose executors were the defendants *Fouracre* and *Mackay*, for obtaining from the

ELLIOT v. BROWN. (a)

In CHANCERY, 25th *July*, 1791.

Motion by representatives of a deceased partner, to restrain the surviving partner from bringing ejectment, upon his title as surviving lessee of the partnership premises.

The case was, a lease to two persons partners in a farm; one partner dying, the other agreed to the division of stock with the representatives of his deceased partner, but insisted on holding the lease by survivorship.

The Chancellor thought by the joint tenancy the lease would survive; yet if turned by agreement into a partnership, it would not survive. The law is clear. The only question is of fact, whether there be such an agreement? Also if the purchase was by two with the money of both,

(a) 1 *Vern.* 217.

1818.
ALDER v. FOURACRE.

the Earl of *Mount Edgecumbe* a lease of certain premises, to be employed in their partnership trade, and an agreement between *Yeo* and the agent of the Earl for granting

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there would be no survivorship.

The *Solicitor General* cited, Bunb. 342. to shew it was otherwise in case of a lease, though purchased by two.

The Lord Chancellor. I must think the lease was accessary to the trade in which the parties were embarked. Injunction granted. — From Lord *Colchester's* MSS.

Injunction ordered against farther proceedings at law against the Plaintiffs in the action brought against them now depending, and also from commencing any other action at law against the Plaintiff touching the matter in question in this cause, until hearing or farther order. Reg. Lib. A. 1791, fol. 475.

WEBSTER v. WEBSTER.

In CHANCERY, 19th *May*, 1791.

Injunction to restrain surviving partners from using the name of a deceased partner in the firm of the trade, refused.

Mitford moved on the part of the Plaintiff, *John Webster*, an executor of *James Webster*, for an injunction to restrain the Defendants *David Webster* and *James Wedderburn*, the two other executors of *James Webster*, from using the name of the testator in the trade carried on by them in partnership.

The ground upon which this motion was made, was that the Defendants used the name of the testator in the trade, for the purpose of subjecting his estate to the consequence of the trade, under a pretended agreement made by the testator in his life time.

Lord Chancellor. It is impossible that using the testator's name in the trade, can subject his name to the trade debts.

Mitford. If it has not that effect it must be a fraud upon the public.

Lord Chancellor. The fraud upon the public is no ground for the Plaintiff's coming into this Court.— Motion refused. From Mr. *Romilley's* notes. Lord *Colchester's* MSS.

granting a lease: that the Plaintiff and *Yeo* entered into the premises with the consent of the Earl's agent, and expended large sums in building thereon: that the Plaintiff had lately discovered that *Yeo* had made the agreement in his own name alone: that since the death of *Yeo*, the Plaintiff, as surviving partner, had expended 1200*l.* on the premises; and that *Fouracre* and *Mackay* had lately applied to the Earl for a lease of the premises in their own names, and intended to dispose thereof as the separate estate of *Yeo*.

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The bill prayed that the Earl of *Mount Edgecumbe* might be restrained from granting, and *Fouracre* and *Mackay* from applying for or accepting, any lease of the premises.

Mr. *Joseph Martin*, on certificate of bill filed and affidavit, now moved for an injunction.

The LORD CHANCELLOR.

What equity is there for compelling the Earl of *Mount Edgecumbe* to take another lessee? The contract was made with the deceased alone, and unless there is evidence that the Earl knew that it was made on behalf of himself and his partner, that partner has no equity against the Earl. Possession might be given to both, but the contract was with one alone; unless a contract with both parties is established, Lord *Mount Edgecumbe* cannot be compelled to grant a lease to the survivor.

By altering the frame of the bill, the executors may be restrained from disposing of the lease, if the Earl grants one, except for partnership purposes; but no injunction can be obtained against the Earl.

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ALDER v. FOURACRE.

The bill was afterwards amended by the insertion of a prayer, that *Fouracre* and *Mackay* might be restrained from assigning or parting with or any way affecting the lease of the said ground, or their interest therein, when such lease shall be granted to them, pursuant to the agreement, except for the benefit of the co-partnership, and for co-partnership purposes, with the consent of the Plaintiff; and an injunction was granted.

"Whereupon, &c., His Lordship doth order that an injunction be awarded to restrain the Defendants, *Fouracre* and *Mackay*, from assigning, making over, or parting with, or in any manner affecting, the lease of the ground in the Plaintiff's bill mentioned, or their interest therein, when the lease shall be granted to them pursuant to the agreement in the pleadings mentioned, except for the benefit of the partnership, and for co-partnership purposes, and with the Plaintiff's assent," until answer or farther order. Rep. Lib. A. 1817, fol. 1732.

OLIVER HERRING, and CATHERINE LOWFIELD, Plaintiffs;

AND

ROLLS. 1819. *June* 14. 17.

The DEAN and CHAPTER of the Cathedral Church of St. PAUL, in *London*, Defendants.(*a*)

Chapter not being entitled to fell timber on the Deanery lands, except for the purpose of repairs, a lease granted by them of certain "woods, groves, hedge-rows, and springs," was construed not to include the right of felling timber, and a bill by the lessee for an account of timber felled during the lease by the lessors, was dismissed with costs.

THE bill stated an indenture of lease, dated the 24th of *July*, 1813, between the Defendants of the one part, and the Plaintiff *Catherine Lowfield* of the other

part,

part, by which as well in consideration that *Catherine Lowfield*, had surrendered to the Defendants a former lease, dated the 5th of *August* 1806, from them to her of

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(*a*) Bishop of WINCHESTER *v.* WOLGAR. (*b*)

Die Jovis, 25 Junii, Termino Trinitatis, Anno Regni. Car. Reg. quinto, 1629. Rich. *Episcopus Winton*, Quer. *William Wolgar. A. Anville*, Def.

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For as much as this Court was this present day informed by Mr. *Browne*, being of the Plaintiff's counsel, that the Plaintiff being seized in his demesne as of fee in the right of his church, of and in the manor of *Havant*, in the county of *Southampton*, whereof the Defendant claimeth an estate, without impeachment of waste, under a demise made unto Sir *Richard Cotton*, Knight, in the time of King *Edward* the *Sixth*, without any consideration appearing in the lease, except the rent reserved, by reason whereof the Defendant being assignee of the said tenement doth commit great waste, and spoil, and threateneth to cut down the woods and timber trees growing upon the said manor, wherewith it is replenished, from the doing whereof the several Lessors of the said manor have been restrained by an order made by his Majesty's Privy Council, regard being had of the common weal, and the commodiousness of the said timber for the maintenance of the shipping; in consideration whereof, and for that the said waste, if the Lord Bishop himself should commit any excessive waste or spoil of woods, the same ought to be prohibited and restrained by the law; it is thereupon ordered, that the Defendant be enjoined from felling any more trees until he can give good satisfaction to the Court for doing thereof; and an injunction to that purpose is awarded against him and his workmen inhabiting the same. Reg. Lib. A. 1628. fol. 1140.

Waste by a bishop the subject of prohibition.

(*b*) *Ante*, Vol. ii. p. 171. *a*.

3d *Nov.*

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of the woods, groves, hedge-rows, and springs thereinafter demised, to the intent that the said lease might be cancelled, and also in consideration of the yearly rent, covenants,

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3d *November*, 5 *Car.* 1629. Whereas by an order of the 25th of *June* last, for the reasons therein set forth, it was ordered that the Defendant should be injoined from felling any more trees, until he could give good satisfaction to this Court for the doing thereof, and an injunction was to that purpose awarded against him and his workmen, inhibiting the same; Upon opening of the matter this present day unto this Court by Mr. *Serjeant Bramston*, being of the Defendant's Counsel, and upon reading of the said order, as also of a letter from the Lords of the Council, directed to the High Sheriff of the County of *Southampton*; it was alleged that the lease by and under which the Defendant claimeth was made in the time of King *Edward* the Sixth, and confirmed by the Dean and Chapter, and is dispunishable of waste, and the Defendant claimeth as a purchaser for great and valuable consideration; it is therefore thought fit and so ordered by this Court, that if Mr. *Browne*, being of counsel with the Plaintiff, and who moved the former order, having notice thereof shall not on Saturday next shew to this Court good cause to the contrary, then his Lordship doth dissolve the said injunction, without further motion. Reg. Lib, A. 1629. fol. 75.

8th *Dec.* 5 *Car.* 1629. Upon opening of the matter this present day unto the Right Honourable the Lord Keeper, by Mr. Serjeant *Davenport*, being of the Plaintiff's counsel, and upon the shewing forth of an order of the 3d of *November* last, by which the Plaintiff was to shew cause on *Saturday* then next following, or else the injunction should be dissolved, and of other orders whereby further time was given to the Plaintiff to shew his cause; it was moved in regard as was alleged, the said Defendant hath already felled one hundred and fifty of the timber trees, and the matter is very difficult upon point of law, whether the Defendant upon the clause in

covenants, and agreements thereinafter referred and contained on the tenant's or lessee's part, and for other good and valuable causes and considerations, the Defendants demised

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in the lease, without impeachment of waste may cut down trees and make spoil at his pleasure in this case; it is ordered that the two Lord Chief Justices shall be attended, who are intreated together with Mr. Justice *Hutton*, and Mr. Justice *Whitelocke*, to take the matter into their consideration, and certify their opinion what they think fit to be done in such case, and then his Lordship will give further order; and in the mean time the aforesaid injunction is to continue and stand in force. Reg. Lib. A. 1629. fol. 215.

7th *June*, 1630. Upon opening of the matter this present day unto this Court by Mr. *Brampston* being of the Defendant's counsel, and upon reading of a former order of the 7th of *December* last, and showing forth of an affidavit by which it appears that the houses belonging to the manor in question are most of them down, and that part which is standing is much decayed and not habitable, and unless a speedy course be taken for the reparations they will all fall down, and therefore it was prayed that the Defendant may be at liberty to fell and cut down such timber trees as will necessarily serve to repair and build up the said houses, and for necessary bootes; now this Court, in the presence of Mr. *Mason*, being of the Plaintiff's counsel, doth order accordingly, unless the plaintiff shall upon Saturday next show unto this court good cause to the contrary. Reg. Lib. A. 1629. fol. 675.

14th *June*, 1629. The order, after reciting the last, proceeds thus: Upon motion this present day made by Mr. *Mason*, being of the Plaintiff's counsel, it is ordered that the said Defendant shall fell and cut down such timber only for his bootes and reparations as shall be assigned him by the Plaintiff's officer or officers, and not otherwise; which if the Defendant shall otherwise do, then the said Defendant shall be deemed to have broken the injunction of this Court. Reg. Lib. A. 1629. fol. 675.

Die

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demised and granted unto *Catherine Lowfield*, all those their woods, groves, hedge-rows, and springs, lying, standing, growing, or being, within, of or upon their manor, of *Heybridge*,

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Die Martis 2 *Dec. Termino Michis Anno Regni.* 10 *Car.* 1634. *Walterus Episcopus Winton, Quer. Willus Wolgar,* et *A. Anville,* Def.

Whereas by an order of the 25th of *June* A° 5° *Caroli Regis,* made in a suit then depending in this Court, between the Right Reverend Father in God *Richard* then the Bishop of *Winton,* Plaintiff, and the said *Wolgar* Defendant, upon the information of the said then Plaintiff's counsel, that he the said Plaintiff being seized in fee, in the right of his church, of and in the manor of *Havant,* in the county of *Southampton,* whereof the Defendant claimeth an estate, without impeachment of waste, under a demise made unto one Sir *Richard Cotton,* knight, in the time of King *Edward* the Sixth, without any consideration appearing in the lease except the rent reserved, by reason whereof the said Defendant, being assignee of the said term, did commit great waste and spoil, and threatened to cut down the woods and timber trees growing upon the said manor, wherewith it was replenished, from the doing whereof the several lessees of the said manor had been restrained by an order made by his Majesty's Privy Council, regard being had of the commonwealth, and the commodiousness of the said timber for maintenance of shipping; in consideration whereof, and for that the said waste, if the Lord Bishop himself should commit any excessive waste or spoil of woods, the same ought to be prohibited and restrained by the law, it was thereupon then ordered, that the said Defendant should be enjoined from felling any more trees until he could give good satisfaction to this Court for doing thereof; and an injunction was then awarded against him, and his workmen from inhibiting the same; after which injunction sued forth, and sundry other orders made in the said former cause, by an order of the 17th of *June,* seventh *Car. Regis,* it was ordered, that the said Defendant should fell and cut down such timber only for his

Heybridge, in the county of *Essex*, thereinafter severally named; that is, one wood called *Bromley Wood*, with two little grovets thereunto adjoining, one wood, called *Hawke's*

his necessary bootes and reparations, as should be assigned him by the then Plaintiff's officer or officers, and not otherwise, and if the said Defendant should otherwise do, then he should be deemed to have broken the said injunction; now forasmuch as the Right Honourable the Lord Keeper was this day informed by Mr. *Carter*, being of the said now complainant's counsel, that the said former suit being abated by the translation of the said late Bishop of *Winton*, to the Archbishoprick of *York*, and the now Plaintiff being since lawfully constituted Bishop of *Winton*, the Defendant as well in the vacancy of the same see, as since, hath felled and carried away a great number of timber trees and other trees lately growing upon the said manor, &c. without any assignment, part of which trees are still lying upon the demised premises, and that the Plaintiff for stay of the same waste, and preservation of the inheritance of the said Church, hath exhibited his bill of revivor against the Defendant, for reviving the said former suit and proceedings thereupon, as by a certificate from the Plaintiff's attorney appears; it was therefore humbly prayed by the Plaintiff's said counsel, that the said injunction might be revived and renewed, for prohibiting the said Defendant, his assignees, servants, and workmen, from felling or cutting any more timber or other trees, in or upon the said manor and demised premises, or to carry away or dispose of any the said timber or other trees already felled, except the timber only for his necessary bootes and reparations, as shall be assigned him by the now Plaintiff's officer or officers, according to the said order of the Fourteenth of *June*; which request his Lordship conceived reasonable, and doth order tha an injunction be awarded accordingly. Reg. Lib. A. 1634. fol. 241.

9° *Feb.* 10 *Caroli*, 1634.

Whereas by an order of the Second of *December* last, for the reasons therein contained, an injunction was awarded for prohibiting

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Hawke's Wood, with one grove, or hedge-row, adjoining at the east end thereof, one little grove at the west end of the said grove or hedge-row; two hedge-rows, or groves in the Upper Heathfield, whereof one extends, &c. within twelve rods of the south stile, in the common foot-path that leads through the same field to the heath, commonly called *Tiphee Heath*; and all the trees, woods, and

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prohibiting the said Defendant, his servants, workmen, and assigns from felling or cutting any more timber or other trees, in or upon the manor, and premises in question, or to carry away or dispose of any of the timber or trees felled, except such timber only for his necessary bootes and reparations as should be assigned him by the now Plaintiff's officer or officers: upon opening of the matter this present day unto this Court, by Mr. Serjeant *Brampston*, being of the Defendant's counsel, it was alleged, that the said manor being parcel of the possessions of the Bishoprick of *Winton*, was heretofore demised to Sir *Richard Cotton*, knight, for ninety-nine years without impeachment of waste, which lease being by mesne assignment, come to the Defendant, who by reason that the said manor house, and the out-houses belonging thereunto, are ruinous and fallen to decay, hath caused some timber to be felled on the premises, which he intended only to employ in reparations upon the premises, which if the Plaintiff's officers shall not assign unto him by reason of this restraint, the said houses must needs become ruinous; it is therefore ordered, that if the said Plaintiff, his solicitor having notice hereof, shall not at the first or second general seal after this term, show unto his Lordship good cause to the contrary, then the said Defendant, notwithstanding the said injunction, should have liberty to take such of the timber already felled, as shall be necessary to be employed upon the premises, only for reparations, and not to any other use; and the Plaintiff is to proceed with effect to bring the cause to hearing. Reg. Lib. A. 1634. fol. 410.

ACLAND

and underwoods, growing and being, or that thereafter should grow or be within and upon the said woods, groves, hedge-rows, and springs above named, and every

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ACLAND *v.* ATWELL. (*a*)

3d *December*, 1630.

Forasmuch as the Right Honourable Lord Keeper was this present day informed by Mr. *Noy*, being of the plaintiff's counsel, that the Defendant, being one of the prebends of *Dutton* in the county of *Devon*, whereof the Plaintiff is patron, the said Defendant committed diverse great waste and spoil upon the houses, lands, woods, and timber-trees of the said prebend; and therefore it was prayed that a writ of prohibition might be awarded against the Defendant, as also a writ of assistance unto the sheriff of the county where the said lands do lie, to see that the Defendant shall not commit any waste or spoil upon the houses, lands, woods, or trees, belonging to the said prebend; and the said Plaintiff's counsel now offered that he would show precedents in like cases, wherein such assistance had been granted; it is thereupon ordered by His Lordship, that a writ of prohibition should be awarded against the Defendant, inhibiting him thereby from doing or committing any waste or spoil upon the houses, lands, woods, or trees of the said prebend; and the said Plaintiff's counsel are to attend Mr. Justice *Powis* and Mr. Justice *Croke*, with a draft of the said writ of assistance unto the sheriffs, who are entreated by His Lordship to peruse the same, and see that the same be done according to the course of law, and then the said writ is to issue out accordingly.—Reg. Lib. A. 1630. fol. 136.

15th *Oct.* 1631.—Whereas by an order of this Court the 3d day of *December* last, a writ of prohibition was awarded against the Defendant, inhibiting him thereby from doing or committing any waste or spoil upon the houses, lands, woods, or trees of the prebend in question, upon

(*a*) 2 *Roll. Abr.* 815.

opening

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every of them; all which premises theretofore were in the tenure or occupation of *Edmund Percival*, Esq. or of his assigns or under tenants; except and always reserved

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opening of the matter this present day unto this Court by Mr. *Rolle* of the Plaintiff's counsel, and upon the reading of two several affidavits, the one of *G. G.* and the other of *R. G.*, it appeared that although the said Defendant had been personally served with the said writ of prohibition, yet he had committed waste upon the premises, by rooting up timber-trees growing upon the same; it is therefore ordered, that if the Defendant shall not, on the return of a subpœna to be served on him for that purpose, show unto this Court good cause to the contrary, then an attachment is awarded against the said Defendant, to bring him into this Court to answer the said contempt. — Reg. Lib. A. 1631. fol. 25.

20th *Nov.* 1631. After a recital of the preceding order, the Court being this day informed by Mr. *David*, being of the Defendant's counsel, that the Defendant caused but one timber-tree to be felled, which he appointed for the reparation of the house, and that the same was not felled in any contempt to the said prohibition, it is therefore ordered, that if the said Defendant shall, by the second return of the next term, make affidavit that he caused the same to be felled for no other purpose but for the reparation of the said house, then the said contempt and attachment are discharged, and in the mean time the same are suspended. — Reg. Lib. A. 1631. fol. 173.

2d *Dec.* 1631. After a recital of the preceding order, Upon opening the matter this present day before the Right Honourable the Lord Keeper by Mr. *Germin*, of the Plaintiff's counsel, and upon the reading of both the said former orders, it was alleged that the said tree was not employed about the said house, as by the defendant pretended, but that the same was sold, and that the Defendant had also felled other trees, contrary to the said prohibition; it is therefore ordered by His Lordship that the said Defendant making oath

reserved unto the defendants, their successors and assigns, upon every fall of the said woods, groves, hedgerows, springs, or any part or parcel thereof, twelve standells

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oath that he has felled but one timber-tree upon the premises, and that the same was employed in repairing the said house, then the said attachment is discharged; or if the Plaintiff shall make affidavit that the said tree was not employed about the said house, or that the Defendant has felled any other trees upon the premises since the said prohibition, then the Plaintiff may proceed with his attachment against the Defendant for the same. — Reg. Lib. A. 1631. fol. 192.

26th *Jan.* 1632. On oath that the Defendant has broken an order, an attachment is issued against him. — Reg. Lib. A. 1631. fol. 300.

13th *Feb.* 1632. After recital of the order of the 2d of *Dec.* 1631, Upon opening the matter this day by Mr. *Duke*, being of the Defendant's counsel, and upon the reading of the affidavit made by the Defendant, it was alleged, that notwithstanding affidavit was made on the Defendant's behalf, yet the Plaintiff did, nevertheless, take out process of attachment against the Defendant before the second return of this term, and caused the same to be served upon the Defendant on *Candlemas* day last; when, as the Defendant was burying the dead corpse of one *A.*, he had him violently carried into a house by two bailiffs, who did not suffer him to bury the said dead corpse, but kept and detained him in prison until he had given good bond for his appearance, by means whereof the Defendant did personally appear accordingly; it is thereupon ordered that the six clerks not towards the cause shall examine the same; and if they shall find the same, this Court will then give good costs against the Plaintiff. — Reg. Lib. A. 1631. fol. 338.

22d *Feb.* 1632. After recital of the preceding order, and of a certificate of the six clerk, attesting the accuracy of the former allegations, the Plaintiff being unable to make it appear that the attachment was duly obtained, the attachment was discharged, the Plaintiff was ordered to pay costs, and an attachment was

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standells, or storers, of oak, ash, elm, or hornbeam, that should be most likely for timber, for every acre of the woods, groves, hedge-rows, and springs, thereafter during the term; to hold the said woods, groves, hedge-rows, and springs, and all the before-mentioned demised premises, with the appurtenances (except before excepted,) unto *Catherine Lowfield*, her executors, &c. from the feast day of the nativity of St. *John* the Baptist, then last, for the term of twenty-one years, at the yearly rent of 50*s.*; with a power of re-entry for non-payment during twelve weeks after demand.

The lease contained a covenant by the lessee for maintaining the hedges and ditches about the woods, &c. and that she, her executors, &c. would at and upon any fall of the woods, groves, hedge-rows, and springs, or of any part or parcel thereof, during the term, leave standing in and upon the premises, to the use of the Defendants and their successors, in and upon every acre so to be felled, twelve good and sufficient standells and storers of oak, ash, elm, or hornbeam, most fit or convenient to be timber, according to the statute in such case made and provided; the same standells or storers to be appointed out in the manner and form following; the Defendants, their successors or assigns, should for every acre felled as aforesaid, first choose and appoint out four of the best trees that should happen to grow upon any acre so felled; then the said *Catharine Lowfield*, her executors, &c. should accept and take out to her and their

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ordered against the bailiffs.—Reg. Lib. A. 1631. fol. 396.

Directions were afterwards given for examination on interrogatories relative to the alleged contempt in the process of attachment, but no order on the merits has been discovered.

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their own proper use four other of the next best trees that should grow upon every of the same acres; and then thirdly, the Defendants, their successors, and assigns, should choose and appoint eight other trees upon every of the said acres, at their will and pleasure, for the making up of the said twelve standells or storers for every acre so to be felled as aforesaid; and that it should be lawful for the Defendants, their successors and assigns, the said trees, standells or storers, at any time after they should be so appointed out and left standing for their use as aforesaid, to have free ingress and regress unto and from the said woods, groves, hedge-rows, and springs, at their pleasure to fell, cut down, hew, square, and carry away, by all and every such way and ways as *Catherine Lowfield*, her executors, &c. should use to carry her and their own wood and trees, out of and from the said woods, groves, hedge-rows, and springs, or any of them; and also that the lessee, her executors, &c. would not convert the said woods, groves, hedge-rows, and springs, or any of them, to pasture, meadow, or arable ground, but maintain and keep the same as wood-grounds during the term, and at the end thereof would deliver up the same to the Defendants, their successors or assigns, of the several growths following; *Bromley* Wood of two years' growth; *Hawk*'s Wood of six years' growth; the hedge-rows adjoining to *Hawk*'s Wood, and the Grovet at the west end thereof, at five years' growth; and the woods, groves, and hedge-rows, in *Heathfield*, of one year's growth.

The bill then stated the execution of a counterpart of the lease by *Catherine Lowfield*, the surrender of the lease of 5th of *August*, 1806, and that the renewed lease was made to her in trust for the plaintiff *Herring*.

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The bill proceeded to state that at the time when the lease of the 24th of *July*, 1813, was granted, there were large quantities of timber-trees, and underwood, growing in and upon the woods, groves, hedge-rows, and springs, demised; and that in *May*, 1814, the Defendants by their agents cut down and sold divers of the said timber-trees, &c.

The bill, charging that a large fine was paid by *Herring* to the Defendants in consideration of the lease, and that former lessees had paid to them large fines in consideration of leases of the like tenor; that such fines were paid in the confidence that *Herring* and the other lessees should have the right of cutting all the timber-trees and underwood growing on the premises, except the twelve standells or storers reserved for the Defendants, and were calculated with reference to that right; and that the Defendants had not, during any former lease, (except in the years 1806 and 1813 some trees of small value cut during the absence of *Herring* from this country,) cut down any of the timber-trees on the premises, except the twelve standells or storers; prayed an account of timber-trees cut down and carried away from the said premises by the Defendants, and of the sums of money for which they were sold, and which have been received, or for which security has been taken by the Defendants, and payment, and an injunction.

The Defendants, by their answer, admitting that they had felled timber trees of the value of 1169*l.* 13*s.* 9*d.*, stated, that they and their predecessor had been accustomed to grant leases of the premises in terms similar to the present; that none of the former lessees had claimed a right to cut down any timber-trees thereon, but that they and their predecessors had from time to time felled and disposed of them for their own use; that the fine

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for the renewed lease of *July*, 1813, was 89*l.* 3*s.* 9*d.* being one year and a quarter's value of the property demised, including underwood, but excluding timber-trees; and they insisted that they were entitled to fell the timber-trees, and that the lease authorized the lessees only to cut the underwood according to their covenant.

Mr. *Hart*, and Mr. *Shadwell*, for the Plaintiffs.

The Dean and Chapter being tenants in fee, in right of their church, of the lands on which the trees in question grew, were entitled to fell, and, therefore, to grant the right of felling, timber. The lease to the Plaintiff is not a lease of the lands, which to a tenant for years would certainly not have conveyed more than the use of the timber during the term; but it is a lease of the timber itself. The terms of the grant, "woods, groves, hedge-rows, and springs," expressly include every species of wood, the latter word alone would have been sufficient to pass coppice and underwood: woods and groves unquestionably include timber.

The clause of exception confirms this construction; that clause must have been intended to preserve that which without the exception might have been taken; and it therefore implies, that the standells or storers which, upon every fall of the woods, &c. it secures to the Dean and Chapter, would otherwise have belonged to the lessee.

The covenant which upon every fall reserves to the lessors four of the best trees growing upon every acre, expressly entitles the lessee to take for her own use the four next best trees, without any restriction of age or growth. The subsequent reservation of eight trees to

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the lessors is inconsistent with the supposition that the whole of the timber was theirs.

Mr. *Horne* and Mr. *Sugden*, for the Defendants.

The lease appears on the face of it to have been granted in consideration of the surrender of a former lease; successive leases in the same form have been granted during many years, and the growth of timber has been maintained on the estate by means of the exceptions and covenants introduced in them. It is admitted that the lessee could not cut down the excepted standells during the term of each lease, and if the lessors suffered them to remain, the lessees would not be entitled to fell them after they had become timber, during the continuance of all the leases, which are in law but one lease; nothing being included in a renewed lease which had been excepted from a former lease.

The lease contains not the word timber; and the exception renders it manifest that by trees are meant the standells, which were not yet, but might become, timber. —The covenants regulating the mode of cutting the wood are evidently designed to provide a nursery for timber, and to carry into effect the provisions of the statute "for the preservation of woods (*a*)," from which the terms standells and storers are borrowed.

The lease could not either as a grant or a demise of the timber, entitle the lessee to fell and remove the timber, the subject demised; as a demise of lands would confer no right of carrying away the soil. In much more favourable cases, such a construction

(*a*) 35 *H.* 8. *c.* 17. made perpetual by statute 13 *Eliz. c.* 25.

has

has been rejected.—*Anon.* (*a*); and in a case cited in *Rolle* (*b*), it was held that land and trees being "demised, granted, and let" for years, the terms grant and let could not be severed; and, therefore, the trees were only "leased."—The opposite construction would introduce this absurdity, that part of the subject would be passed during the term only, and part beyond the term. Clearly whatever is comprised in the *habendum* of this lease, is passed only during the term.

In the year-book of *Edward* IV., cited by *Brooke* (*c*), the question is asked by *Brian*, if a wood in which there are only great trees is leased at will, can the lessee cut them? and answered in the negative by *Choke*; who adds, that the lessee shall have no profit but the grant. By a grant of woods, trees shall not pass where the cutting them would be waste. *Shephard's Touchstone.* (*d*)

A conclusive objection to the bill is, that the Dean and Chapter, though seised in fee, have no right to fell timber, except for repairs. *Wither* v. *The Dean and Chapter of Winchester.* (*e*) On the construction for which the Plaintiff contends, the lease is void. The enabling statute of *Henry* VIII. (*f*) expressly excepts leases without impeachment of waste; and such leases by a Dean and Chapter have always been considered within the equity of the restraining statute of *Elizabeth.*(*g*) *The Dean and Chapter of Worcester's case.* (*h*)

(*a*) *Dyer*, 374. pl. 18.
(*b*) 1 *Rolle Rep.* 100.
(*c*) 12 *Ed.* 4. 8. pl. 20. cited in *Bro. Ab. Waste*, pl. 126.
(*d*) *P.* 95.
(*e*) 3 *Mer.* 421.
(*f*) 32 *H.* 8. c. 28.
(*g*) 13 *Eliz.* c. 10.
(*h*) 6 *Co.* 37.

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The MASTER OF THE ROLLS.

This bill requires from the Dean and Chapter of St. *Paul's* an account of the timber which they have cut down since the execution of a lease granted by them to the Plaintiff *Lowfield*, as a trustee for the Plaintiff *Herring*; the Plaintiffs insisting, that according to the true construction of the lease, the Plaintiff *Lowfield* is lawfully entitled to fell timber trees on the demised premises, and dispose of them, and receive the produce of the sale for the use of the other Plaintiff. That proposition is denied by the Defendants. The Plaintiffs relying altogether on the terms of the lease, necessarily assume that the Dean and Chapter possess the right which they claim by virtue of the lease from them, the right of cutting down for their own use all timber-trees on the premises without regard to situation, age, or quality; and they insist, that the Dean and Chapter having by the lease transferred that right to the Plaintiffs, they are entitled to the profit derived by the Defendants from acts in derogation of that conveyance. The facts of the case are not controverted. It is admitted, that the present lease is drawn in conformity with those which preceded it; and that the Defendants have, since it was granted, felled timber to the amount of about 1100*l.* But it is contended by the Plaintiffs that they have fairly purchased the timber trees; for although the annual reserved rent is but fifty shillings, they say that a large fine was paid for the lease, and on the faith that the Plaintiffs should be entitled to that which they now claim. The Defendants maintain that the fine paid was only one year and a quarter's value of the coppice and underwood; that it did not include the value of the great trees; and that under the antecedent leases, the usage has been for the Dean and Chapter always to exercise the

the right of felling the timber-trees, and their lessees the right of cutting the underwoods and coppices alone.

The subject of dispute, therefore, resolves itself into three questions; first, whether the Dean and Chapter, prior to the execution of the lease, possessed the right of felling all the timber on the demised premises, and of converting it absolutely to their own use? Secondly, supposing them to have possessed that right, whether they intended to transfer, and have absolutely transferred it by the lease? Thirdly, if they both possessed and transferred the right, whether the contract is such as ought to be carried into execution by a court of equity?

On the first question, recollecting that this is property belonging to an Ecclesiastical Corporation, after the cases of *Jefferson* v. *The Bishop of Durham*. (*a*) and *Wither* v. *The Dean and Chapter of Winchester*. (*b*) no doubt can be entertained. Whatever question may exist respecting the Court which has jurisdiction to interfere in case of an abuse of the power possessed by Ecclesiastical Corporations over their estates, (which formed the principal subject of discussion in *Jefferson* v. *The Bishop of Durham*), it is clear that that power is not absolute but qualified, and that the timber growing on the estates is a fund for the benefit of the Church. In *Wither* v. *The Dean and Chapter of Winchester*, the Lord Chancellor expressed his opinion, that Ecclesiastical Corporations may fell the timber for repairs, and apply either the timber itself, or the produce of the sale, for that purpose; but so far only have they a power over the timber; it is the inheritance of their Church, and they have no authority to cut it down and divide the produce among themselves.

Timber on the estates of Ecclesiastical Corporations, is a fund for the benefit of the Church.

(*a*) 1 *Bos. & Pull.* 105. (*b*) 3 *Mer.* 421.

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In the present case it has been contended that the Defendants are competent to give to their lessee a power over the timber, without reference to any other property to be repaired by means of it, — a general right to cut down the timber for his own use, unencumbered by any obligation to apply it in repairs. No ecclesiastical body possesses any such right. To fell the timber on their estates in the manner for which the plaintiffs contend, is waste, and an ecclesiastical offence, and cause of deprivation (*a*); and the single question is, whether the offence is cognizable only in the ecclesiastical courts, or whether the temporal courts are not authorised to interfere?

Waste by ecclesiastics.

In one of the old cases (*b*), it was observed, that the statute (*c*), or treatise, as it is there denominated, intituled "Ne Rectores prosternant arbores in Cæmeterio," is declaratory of the common law. If it were clear, therefore, that the Defendants intended to convey, and in consideration of a fine, actually conveyed, to their lessee the power of cutting down all the timber trees on the estate demised, it would be a question whether such a contract ought to be carried into execution by a court of equity. Certainly, on such a question, the Court would expect that the terms, before such a construction is adopted, should be explicit.

In this case, all the topics extrinsic to the lease tend to an opposite result. The amount of the fine paid on the renewal of the lease, compared with the magnitude of the property, totally excludes the supposition that the lessors intended to convey the absolute interest in the

(*a*) *Corpus Jur. Can.* Caus. xii. quæst. 2. l. 52. Caus. x. quæst. 2. c. 7, 8. Lyndw. Prov. 148, 149. 2 *H.* 4. 3. 20 *H.* 6. 46. *a.* 11 *Co.* 49 *b*

(*b*) 11 *Co.* 49. *b.*

(*c*) 35 *Ed.* 1. st. 2.

timber.

timber. It cannot be supposed that they designed, for a fine of about 80*l.*, to dispose of property worth 1100*l.* or 1200*l.* It is not a very credible proposition, that an ecclesiastical corporation, whose known practice is to employ competent persons to make a strict estimate of their property, and to take as a fine generally a year and a quarter's rent, should commit such an error in computation, and be so ignorant of the value of their possessions, as the Plaintiff's argument implies. On the point of usage, there is no evidence of any entitling the lessee to the timber; and it is sworn that the usage has been inconsistent with that claim.

It remains to consider the terms of the lease. The subject comprises four distinct properties; *Bromley* Wood, with two grovets, *Hawk's* Wood, a little grove, and two hedge rows, or groves, and all the trees, woods, and underwoods, — every thing which was in the lease of *Percival*, the former lessee. Whenever woods are the subject of a lease, the first question is, What is the nature of the wood? It may consist only of great trees, or a mixture of great trees, coppice, and underwood, or of underwood alone; and different rules are applicable to each. As between an ordinary landlord and tenant it is settled, that if the wood consists of great trees only, the tenant enjoys not the property of the trees, but only the use of them. In the passage cited from *Bro. Abr.* (*a*), it is said that where a man leases twenty acres of wood at will, the lessee may cut the trees seasonably, but not the great trees.

It is clear, also, that if there is a demise of land on which trees are growing, or of a farm including the trees, though there is no express exception of the timber-trees,

(*a*) *Waste*, pl. 126.

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yet the law makes the exception, and the lessee for years has no right to cut them down. Why? Because by law he has only the limited use of the trees, not the property in them, which, as a part of the inheritance, remains in the landlord. This distinction is stated in *Lifford*'s case (*a*), where the subject was fully discussed; and it is supported by an earlier case in *Dyer* (*b*), already cited, and noticed in the argument of *Lifford*'s case, and in *Shephard*'s *Touchstone* (*c*), in which a majority of the Judges held, that under a demise of a farm and divers closes, with all timber, wood, underwood, and hedgerows, except the great oaks in a certain close, the trees not excepted did not pass by the grant, and the lessee could not fell them.

These are the general principles on this subject applicable to leases between laymen; and they are to be applied *a fortiori* to leases by ecclesiastical corporations, who have themselves not an absolute but a qualified property in the timber on their estates. The claim of the Plaintiffs to an unlimited right to fell trees, militates, first, with the particular fact that they derive title from landlords who have no such unlimited right; and next, with the general principles of the law, which allow to a tenant the use only of timber-trees, and not a power to fell them. What expressions in the lease are sufficient to establish so extraordinary a proposition?

The terms of the lease are general, and the first observation to be made on its contents is, that it is totally silent on the right of the lessee to fell a single tree; it is by inference only that the Plaintiffs attempt to collect from any part of it the grant of such a right. The words are, demise and grant; which Lord

(*a*) 11 *Co.* 46. *b.* p. 48. (*b*) P. 374. pl. 18. (*c*) P 95.

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Coke and *Shephard* agree in representing as proper terms of lease: it is a lease for 21 years, and under such an instrument whence arises the right to fell trees? Not from express words, nor from inference, unless the subject demised is such that the right to fell trees is only the fair exercise of the lessee's right to the use and profits during the term. Whether he has a right to cut down a single tree, depends, therefore, on the nature of the woods demised. If they consisted only of timber-trees, the lessee could have had no right to fell them. Whence then does he derive his right? From this alone, that the greater part of the wood appears, by the evidence of the lease itself, to be coppice and underwood. It was not necessary to give, by express words, the power of cutting coppice and underwood, which is part of the periodical profits of the tenancy. They must be cut from time to time; and the lessee has the right of cutting them, as he would have the right of taking the corn, or the grass, under a demise of arable or meadow land. But this includes no right of cutting timber-trees. The interest of the lessee in the woods is derived from the nature of the property; that alone both gives and limits it.

An examination of the language of the lease, warrants the same conclusion. The first words are general, but the exception ascertains the subject of the lease. The exception reserves to the lessors, on every fall, twelve standells or storers of oak, ash, elm, or horn-beam, that shall be most likely for timber, for every acre of the woods. The excepted articles are such as are not yet timber, but most likely to become such. The whole from which this part is excepted, must have been of the same description, trees not yet become timber.

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The lease afterwards provides a particular mode in which the twelve standells are to be chosen by the lessors, and reserves to them a right of ingress and regress to cut them down and carry them away.

It has been properly observed, that this exception refers to the statute 35. H. VIII. c. 17.; and that is another circumstance tending to ascertain the subject of the lease. The first section of that statute, which relates exclusively to coppice and underwood, employs the terms standells and storers (*a*) as they are employed in the lease; and the word fell, which has been considered as not applicable to falls of underwood, is there used in that very sense. The fair inference seems to be that the clause of reservation, which adopts the phraseology of the statute, refers to the same subject.

The covenant on the part of the lessee to leave the woods of a certain specified growth, one of the growth of two years, another of six, a third of five, and others of one year, is intelligible only in application to coppice woods, which are felled periodically; and the inference returns, that the subject of the lease was underwood, not timber.

Adopting this interpretation, the lease is no violation of the duty of the Dean and Chapter, for they have conferred on their lessee, not the right of felling timber, but the regular enjoyment of the profits of the underwood; it is conformable to the rules of law, intelligible in the reservation, and the reference to the statute, agreeable to

(*a*) A "standell" obviously denotes a young tree, left standing in order to become timber; and as increasing the "store" of timber, a standell is denominated a "storer." *Cowell*'s definition of "standell" will be correct if the word "oak" is expunged; but *Johnson* appears to have misapprehended the import of the term.

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the constant usage, and just to the tenant, who obtains all for which alone a consideration was paid. On the opposite construction, the lease would be a direct violation of the law, and certainly not a fit subject for the interposition of a court of equity.

In every view, therefore, of this case, and considering first, that the Dean and Chapter have not an absolute right to fell timber; secondly, that if they had, they have not transferred it to the Plaintiffs; and, thirdly, that such a transfer would not be a transaction fit to be carried into effect by a court of equity, I am of opinion that this bill must be dismissed with costs.

17th of *June*, 1819. "His Honor doth order that the Plaintiffs' bill do stand dismissed out of this Court with costs to be taxed," &c. Reg. Lib. A. 1818. fol. 1362.

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Under a proviso against assigning or charging or attempting to assign or charge a life interest, so as not to be entitled to the personal receipt and enjoyment of the property, an agreement to charge a debt on the estate in the event of the deficiency of another estate, a power of attorney authorising the receipt of the rents and payment in discharge of debts, and an authority to a creditor to receive future rents, for which anticipated receipts were given, were each declared sufficient to determine the life interest.

JOSHUA WILKINSON, by his will, dated the 30th of *April* 1790, after devising and bequeathing certain estates, legacies, and annuities, to his wife and daughters, devised and bequeathed all his other freehold and leasehold estates to *William Wilkinson*, and *Thomas Wilkinson*, and to their heirs, &c. upon trust to pay the annuities; and subject thereto in trust for his son *John Henry Wilkinson*, during his life, remainder to trustees to preserve contingent remainders, with remainder for the children of *John Henry Wilkinson*, living at his death, in equal proportions.

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The will contained the following clause: "provided always, and I do hereby declare, that the annuity of 500*l.*, before given to my said dear wife for her life, and the provision I have made for my said daughters, *Sarah Pearson* and *Elizabeth Cowdale*, for their separate use during their respective lives as aforesaid, and the estates given to my said sons for their lives, is and are upon this express condition, that in case they, my said wife, sons, and daughters, shall repectively assign, or dispose of, or otherwise charge the life estates, the annuities and provisions so made to and for them during their respective lives as aforesaid, so as not to be entitled to the profit, receipt, use, and enjoyment thereof, then and from thenceforth the annuity or life estate or interest of him, her, or them respectively, so doing or attempting so to do, shall from thenceforth cease, determine, and be void, to all intents and purposes whatsoever, and shall immediately thereupon descend to and devolve upon the person or persons who shall be next entitled thereto by virtue of the limitations aforesaid, in such manner as the same would have been done in case he, she, or they, was or were then respectively actually dead, any thing therein contained to the contrary notwithstanding."

The testator died in *December*, 1790; and after the death of his widow, *J. H. Wilkinson*, from the year 1796, by the permission of the trustee, received the rents of the premises devised to him.

On the 20th of *January* 1809, a commission of bankruptcy was issued against *J. H. Wilkinson*. The bill was filed by *Thos. Wilkinson*, one of the trustees under the will, against *J. H. Wilkinson* and his infant children, and the assignees under the commission of bankruptcy, and against *William Wilkinson*, the other trustee, stating, that *J. H. Wilkinson* had previously to his bankruptcy charged

charged his life estate for the payment of a debt due from him to *W. Wilkinson*, and suggesting the opposite claims of *J. H. Wilkinson*, his assignees and children; and the bill prayed that the rights of all parties might be ascertained.

By the decree made at the hearing of the cause, on the 1st of *July* 1813, before the late Master of the Rolls, it was referred to the Master to inquire, whether *J. H. Wilkinson* had disposed of, or otherwise charged or incumbered the life-estate, and provision by the testator's will made for him during his life, so as not to be entitled to the profit, receipt, use and enjoyment thereof; or whether he had attempted so to do.

The Master by his Report, dated the 27th of *June* 1814, certified, that he was of opinion, that the Defendant *J. H. Wilkinson* had by becoming bankrupt charged and incumbered his life-estate, so as not to be intitled to the profit, receipt, use and enjoyment thereof.

To this Report, exceptions were taken by the assignees, which were allowed, and by an order, dated the 6th of *June* 1815, it was referred back to the Master to review his Report; and it being alleged that the Defendants, the infants, had some additional evidence to produce, it was ordered, that the Master should receive such further evidence as might be laid before him by them: (*a*)

Upon the Master's Report, the following facts appeared:—

In *October* 1807, *J. H. Wilkinson* executed an assignment to himself, *Nunn*, and two other persons, as trus-

(*a*) *Wilkinson* v. *Wilkinson*, *Coop.* 259.

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tees for the payment of his debts.—The deed was not produced, nor any evidence offered of its present custody. The children of *J. H. Wilkinson* insisted, and his assignees denied, that it contained an assignment of his life-estate under his father's will; and on that point contradictory parol evidence had been received before the Master.

J. H. Wilkinson being indebted to *Thos. Bull* in the sum of 200*l.*, and *W. Wilkinson* having agreed to advance to him a like sum for the payment of two other creditors, upon his empowering *Bull*, then collector of the rents of his life-estates, to receive the rents, and pay them to *W. Wilkinson*, until the amount advanced by him was repaid; on the 8th of *October* 1798, *J. H. Wilkinson* executed a power of attorney to *Bull*, anthorizing him to receive the rents, and in the first place to reimburse to himself thereout all sums advanced by him to *J. H. Wilkinson*, and in the next place to pay them to *W. Wilkinson*, until his advances were repaid.—From the date of the power of attorney to the 29th of *Sept.* 1799, *J. H. Wilkinson* received no part of the rents and profits; and in some portion of that period, a person was employed by *Bull* to distrain upon certain tenants of the estates in which *J. H. Wilkinson* took a life-interest, for rent, which was afterwards paid to *Bull*.

In *May* 1808, *J. H. Wilkinson* being in want of money to pay a debt for which an execution was threatened, borrowed a sum of 396*l.* of *William Wilkinson*, and deposited the lease of a house at *Wandsworth* as a security; but it being understood that this lease was not of adequate value, he also signed the following memorandum: —

"This lease is to be a security to Mr. *William Wilkinson*, of *Ludgate Hill*, for the sum of 396*l.*, interest

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and expenses, advanced to me in money; and in case it shall not be sufficient, my life-estate to be chargeable for the deficiency in my father's estates. *J. H. Wilkinson, London, 26th May,* 1808."

The lease of the *Wandsworth* property had been estimated, after the agreement, at 320*l.*, and had subsequently become of no value.

In 1807 and 1808, *J. H. Wilkinson* had several times borrowed money on the credit of the rents by anticipation; and in *December* 1808, he borrowed a sum of 58*l.* 17*s.* 6*d.* from *Duppa Jenkins*, to whom he gave his receipts for rents, not then due, to that amount, together with the following memorandum:

" *London, Dec.* 17. 1808. I hereby acknowledge to have received of Mr. *Duppa Jenkins*, junior, of *London Road, St. George's Fields, Surry*, coal-merchant, the sum of 58*l.* 17*s.* 6*d.* for the rents stated at the end of this, and numbered, as per receipts, 1, 2, 3, 4.; and I hereby authorise him to collect the same, and to repay himself the said sum of 58*l.* 17*s.* 6*d.*, advanced to me; and for that purpose he has my receipts upon the parties so stated and numbered as at the end of this acknowledgement. I do authorise him to receive the same for his own use and benefit, without my having any claim whatever upon the said rents, they being his sole property for the advance so made to me. And I do hereby authorise and direct the parties on whom the receipts are, to pay the same to him, or any person that may be sent by him to receive the same, producing my receipts as before stated. And in case of default of payment by either of the said parties, this shall be full power for him to seize or distrain in my name for the said rents, or in the names of the trustees, under a power of at-

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torney given by them to me for that purpose, to receive the said rents from the broker so seizing or distraining, and apply the same to his own use; and this shall be a sufficient warrant and authority for any broker so seizing and paying over to the said *Duppa Jenkins*, junior, the monies so received. *J. H. Wilkinson.*"

"No. 5. *Walton Place, Blackfriar's Road.*"

£	s.	d.		
7	10	0	Mr. *Richardson, Moor's Alley, Norton Falgate*	1
5	0	0	Mr. *Kelly, Old-street Road* - -	2
7	0	0	Mr. *Exshaw, Austin Friars* - -	3
39	7	6	*Jackson* and *Dampier, Primrose-street* -	4
58	17	6		

The Master, by his report, dated 26th *July* 1817, certified his opinion that the Defendant *J. H. Wilkinson* had, by these various acts, assigned and disposed of, and otherwise charged and encumbered, the life-estate and provisions by the testator's will made to and for him during his life, so as not to be entitled to the profit, receipt, use, and enjoyment thereof.

To this report the Defendants, the assignees, excepted.

Mr. *Wetherel* and Mr. *Stephen* for the exception.

The deed of assignment, if it included the life-estate of *J. H. Wilkinson*, was certainly a violation of the prohibition; but the deed is not produced, and no proof has been offered of its loss to justify the Court in receiving parol evidence of its contents.

In considering the effect of the other acts, the Court will not incline to declare a forfeiture, and will strictly construe

construe so penal a proviso. The restraint of alienation is applicable only to alienation of the whole interest, on the same principle on which it has been decided, that an under-lease is no violation of a covenant by a lessee not to assign. Every charge or incumbrance is not within the prohibition, but such only as is inconsistent with personal receipt and enjoyment of the property.

The power of attorney was not contrary to the letter or the spirit of the proviso; — a mere appropriation of the rents by a revocable instrument for the payment of a debt; not an incumbrance, but a mode of enjoying the estate. The charge in favour of *W. Wilkinson* was contingent only, and never caused any exclusion from personal receipt; even an absolute mortgage would not have had that effect while interest was paid. That the mere anticipation of rent is not a violation of the prohibition, is established by the analogous decisions, that without an express restraint in terms, married women may anticipate the profits of property settled to their separate use.

They cited *Doe* v. *Carter* (*a*), *Dommett* v. *Bedford* (*b*), *Brandon* v. *Robinson* (*c*), *Shee* v. *Hale* (*d*), *King* v. *Robinson* (*e*), *Hulme* v. *Tenant.* (*f*)

Mr. *Hart*, Mr. *Horne*, and Mr. *Rose*, for the report.

The estate of *J. H. Wilkinson* was equitable only, and a power of attorney authorising the receipt of the rents, executed for a valuable consideration, is not revocable, and amounts to an alienation in equity. The deed of assignment must be presumed to have remained with

(*a*) 8 *T. R.* 57.
(*b*) 6 *T. R.* 684. 3 *Ves.* 149.
(*c*) 18 *Ves.* 429. 1 *Rose*, 197.
(*d*) 13 *Ves.* 404.
(*e*) *Wightw.* 585.
(*f*) 1 *Bro.* C. C. 16.

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the assignees, and to be withheld by them, because the production would be fatal to their claim. (*a*)

The Master of the Rolls.

The question here is, whether, upon the evidence stated in the report, it appears that *John Henry Wilkinson* has done any act within the description of the proviso in the will? It is insisted, on the part of the Defendants his children, that, by reason of the acts which he has committed, his life-estate has ceased; that proposition is denied by his assignees. The Court is now to decide whether the children have substantiated their title to this estate.

With respect to the validity of the proviso, it is clear that a testator may thus modify the estate he gives (*b*); for though, in a case which has been mentioned (*c*), it is stated as the opinion of a very great judge, that if an estate is given for life, the incidents to a life estate cannot be taken away, and though it is better, therefore, when such a limitation is intended, to give the estate until bankruptcy or alienation, and not first to give it for life, and then to prohibit the attempt to alien, yet this is answered by considering that, in a will, any condition or modification may be annexed which does not offend against any rule of law; and it is immaterial by what form of words the intention is executed, whether by a devise until the devisee shall have charged or encumbered it, or by a proviso with a limitation over upon such an event. Each mode is equally valid, and of the same effect.

(*a*) The substance of the argument in support of the report is contained in the judgment.
(*b*) *Ante* vol. 1. p. 481.
(*c*) *Brandon* v. *Robinson*, 18 *Ves.* 429. 1 *Rose*, 197.

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Cases respecting restraints on alienation have frequently arisen, and some are of considerable antiquity; they are to be found in *Dyer* (*a*), in *Anderson* (*b*), and in *Leonard* (*c*); the modern books are full of them; and although the Courts look with a jealous eye on such restraints, yet it is now clear that he who gives may annex such conditions to the gift. The principles applicable to this question are clearly explained by Lord *Kenyon* in *Doe* v. *Carter* (*d*), but the decision there, and in *King* v. *Robinson* (*e*), proceeded on a ground which has no application to the present case, namely, a distinction between acts done by the party voluntarily, and those which pass *in invitum*.

The question then here is chiefly a question of fact, whether the acts of *J. H. Wilkinson* are within the range of the clause of prohibition? The acts said to have caused a forfeiture, are four. One of them, if proved, would have at once put an end to all argument; I mean the deed executed by *J. H. Wilkinson* in the year 1807, by which he is said to have passed the life estate, which he took under his father's will, for the benefit of his creditors. The existence of that deed is admitted, but the assignees deny that it included the bankrupt's life estate. To determine that point, nothing is required but the production of the deed; and the question is, whether, so far as the deed is concerned, the fact is established by those who claim under the forfeiture? That the claim is made by an infant is wholly immaterial; the claim must be supported by legal evidence, and the rules of evidence are the same for infants as for adults. Is there any evidence on which the Court

(*a*) *Anon. Dyer* 6. *a.*
(*b*) *Anon.* 1 *And.* 123, 124.
(*c*) *Moor* v. *Farrand*, 1 *Leon.* 3. *Large's* case, 2 *Leon.* 82.
(*d*) 3 *T. R.* 57.
(*e*) *Wightw.* 387.

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can act judicially on the contents of this deed? Nothing can be clearer than the rule of law, that the best evidence, namely, the deed itself, must be produced. A difficulty in the way of the production affords no excuse for a departure from the rule. The existence of the deed being acknowledged, the single ground on which secondary evidence of its contents can be received, is the loss of primary evidence, either by loss of the original, or by refusal of the parties having it in their possession, after notice to produce it.

The loss of the deed is not proved; but there is proof of its existence subsequent to the bankruptcy. The witness *Newby* deposes that in 1819 the deed was given to him to be carried to *Guildhall*; that the deed was then in the possession of *Nunn*, for whose use it was deposited at *Watson*'s house, and was afterwards removed thence; there the evidence stops: by whom and when it was removed appears not. It is said that the court must presume that the deed was in the hands of the bankrupt. Why? On the bankruptcy of a trustee, the trust deeds should remain with the solvent co-trustee, not with the assignees of the bankrupt, who are strangers to the trust. Then it is said that the assignees withhold it, because it would be evidence against them; that assertion assumes the question; if not such as represented, the production would assist them; and what evidence is there that it ever reached their hands? It is alleged that *J. H. Wilkinson* delivered it on his bankruptcy, but no diligence has been employed to prove when or to whom. Why has not the bill addressed to the assignees an interrogatory on that subject? On the supposition that the deed is in the possession of the assignees, and that its contents are such as they have been represented, three years' litigation might have been prevented by a simple question, have you

you the deed, and what are its contents? If not made the subject of inquiry in the bill, yet when the late Master of the Rolls allowed the infant defendants to adduce additional evidence, they might by a short process have compelled the assignees to state whether the deed was in their custody. Parol evidence of the contents of the deed has been received; but if the objection had been taken, I cannot doubt that the Master would have rejected it.

If I considered myself, as I do not, at liberty to look into that evidence, my conclusion would be that this deed did not comprise the life estate, because I think that the parties were aware that forfeiture or cesser would be the consequence; and because I find from the correspondence, that when a creditor whose consent was solicited, objected that the deed had not conveyed the life estate, that objection was not removed. In his last examination also the bankrupt swears that it was not included, and his present statement is, not that the deed actually included it, but that such was the intention when the deed was executed. If the case depended on this question alone, it would deserve the consideration of the Court, whether some course ought not to be adopted for ascertaining the contents of the deed; and whether, notwithstanding the great neglect of those who should have furnished the Court with the deed, or accounted for its non production, an inquiry should not even now be directed. But there is little probability that the production would establish the fact of forfeiture or cesser.

The case then depends on the other three acts of the bankrupt, the power of attorney given to *Bull*, the agreement of *May* 1808, and the anticipation of rents in favour of *Jenkins* and others; and it is impossible to avoid

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avoid seeing that they are directly in violation of the testator's intention. The father was anxious that this son, who was in trade, should have the personal enjoyment of the property, and not in any way alien or incumber it; and it appears that from 1798, two years after he came into possession, to 1809, the son was struggling under embarrassed circumstances, and being aware of the prohibition imposed upon him, endeavoured to evade it by contriving modes of encumbering and hypothecating, which should not amount to a mortgage within the letter of the prohibition.

It has been properly argued, that in cases of this nature, the acts done must be contrary not only to the spirit and meaning of the prohibition, but to the letter; but there has been some fallacy in insisting principally on the words assign or dispose of, as referring to a complete assignment of the son's interest. The effect of such a construction would be, tha the might in effect deprive himself of the enjoyment during his whole life by partial dispositions of the rents and profits. But the words here are not merely assign and dispose of, but charge or incumber, or attempt so to do.

The latter phrase occurred in the case of the *King* v. *Robinson* (*a*), the decision in which proceeded on a ground foreign from this case.

The execution of the power of attorney to *Bull* is admitted; he was a creditor, and the power of attorney authorised him to receive rents for the purpose of paying himself and another creditor. It has been argued, that notwithstanding this instrument, the bankrupt's right to the property continued; that it was not essential for him

(*a*) *Wightw.* 385.

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to receive the rents *propriis manibus*; and that the testator's intention was satisfied, if he retained the dominion over them. But the answer is, that a power of attorney given to a creditor is not revocable. It is an equitable security, conferring a right to receive and withhold the rents until the debts are paid; and the bankrupt had no longer dominion over the property. What is a security by *vivum vadium*, but a power to receive the profits of an estate, and apply them in payment of the debt? It is a charge that for a time dispossessed him, and deprived him of the use and enjoyment of the estate.—The clause contrasts throughout his enjoying the estate himself, and pledging it as a security; and this is in fact a security, although not made in the ordinary mode. It is clearly a violation of the prohibition against charging and incumbering.

The agreement of the 26th of *May* 1808, although the operation of it was to be only conditional, was yet certainly an attempt to charge the life-estate. If the estate at *Wandsworth* was notoriously inadequate, it was in it's inception a direct charge, and at all events it was an incumbrance on both estates; both were made responsible by it. It is said, that this did not interrupt the use and enjoyment of the estate; but according to that reasoning, even a mortgage, if the mortgagor continued in possession, would not have been a breach of the proviso.

The last act is the anticipation of rent. It appears, that the bankrupt had given an authority to receive the rents, and to distrain in his name, and to appropriate the amount to the payment of a debt. The person to whom this authority was given was not to be accountable for what he received until after satisfaction of his debt. Thus the right of receiving the rents was parted with, and

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and transferred to another, for a valuable consideration. Comparisons have been made to the cases of bailiffs and stewards; but this is really analogous to a mortgage, for the right to the rent is transferred.

On the effect of bankruptcy no question arises, and I am surprised that it has been noticed; considered as a proceeding *in invitum*, it was not an act which could occasion a forfeiture under this proviso (*a*); and such must have been the opinion of the late Master of the Rolls, or he would not have allowed the exception, and referred the case again to the master.

Upon the whole I concur with the Master, and the exception must be overruled.

His Honor held the said exception to be insufficient, and doth, therefore, order that the same be overruled.—Reg. Lib. B. 1818. fol. 1724.

(*a*) See *Cooper* v. *Wyatt*, *5 Madd.* 482.

END OF THE THIRD PART.

REPORTS

OF

CASES

ARGUED AND DETERMINED IN THE

HIGH COURT OF CHANCERY.

Commencing in the Sittings before

HILARY TERM,

58 Geo. III. 1818.

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DREWRY v. THACKER. (a)

1818. *Dec.* 11.

1819. *Feb.* 25. 25. 27.

Whether on a bill filed for the administration of assets, the Court will restrain the legal proceedings of a creditor who had previously obtained a right of execution against the personal representative, *quære.*

THE bill was filed on the 13th of *November* 1818, by a creditor of *Robert Thacker*, who died intestate in *June* 1817, for the administration of his estate, against

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(a) PARKER v. DEE. (a)

27th *October*, 1674. 26 *Car.* 2.

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The cause between *Parker* and *Dee* came now to be reheard the fourth time upon this case. *Parker* sued *Dee* at law upon a note of 700*l.*, given by *Everard* the gold-

(a) 2 *Ca. in Cha.* 200. 1 *Rep. Temp. Finch*, 123.

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Ann Thacker, his administratrix, and other persons to whom she had assigned the intestate's interests in certain trades carried on by him, on trust to continue or dispose of them for the benefit of his creditors.

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smith, to whom *Dee* was administrator; *Dee* pleads a special *plene administravit*, and that he hath no assets *præter etc. quæ non* sufficient to satisfy certain recognizances. *Parker* exhibits a bill to discover; *Dee*, pending the bill, acknowledges several judgments upon bills and notes to the value of 12,900*l.*, after he had put to *Parker* to make his election, and so fixed him in Chancery.

At the hearing *Dee* appeared to have assets to the amount of 1400*l.*, and also to be a trustee of land for payment of debts. The Master of the Rolls allowed all payments before the bill, and all judgments after the bill obtained by coercion of law, but disallowed all obtained by confession, since the bill, for debts *in æquali gradu;* and so directed the accounts. The Lord *Bridgman, custos sigilli*, was assisted by Judge *Raynsford* upon the appeal. Judge *Raynsford* agreed with the Master of the Rolls. Lord *Bridgman* allowed all judgments confessed before the answer, but disallowed all judgments confessed since the decree for debts *in æquali gradu;* and as to judgments between the answer and decree took time to advise: so it hung.

Shaftesbury C., assisted by two judges, set aside all the judgments confessed after plea pleaded, but would allow the Plaintiff in equity no more than his proportion, *viz.* out of the personal estate, according to priority, and out of the trust without regard of priority.

I agreed with my Lord Chancellor to set aside all judgments confessed for debts *in æquali gradu* since the plea pleaded; for since they could not have prevailed against the plea, if it had been falsified at law, it was good reason that the falsification of that plea in equity should equally avail the Plaintiff; the rather because the Defendant forced the Plaintiff to elect, and so tied him to proceed here; but differed in this point, *viz.* that the Plaintiff should not be tied to

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On the 13th of *September* 1811, the intestate, together with his brother *Thomas Thacker*, executed two bonds, one to *Robert Wood* (since deceased) and *Richard Stanley*, in

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his proportion, but should recover the whole, for so he should have done at law, if he had falsified the plea there, and the falsifying here is as good; nor is this any prejudice to the rest of the creditors *in pari gradu*, for the Defendant must pay it out of his own purse if the personal estate be not sufficient, just as he ought to do at law; for if the judgments confessed after the plea be executed, and sweep away all the assets, yet in regard by the falsifying of the plea it appeared he had assets *jour de breve purchase*, this will amount to a *devastavit*, and draw the debt upon himself; not but that an executor who hath not assets to pay all may prefer whom he please, but that must be understood with these differences; first, before suit he may voluntarily pay whom he please; second, after suit commenced he can make no voluntary payments of any debt in equal degree, (that is to say), if the suit be commenced by originals; but if the suit be by *latitat* or *quo minus*, the executor may make voluntary payments till declaration delivered, for until then he is not bound to take notice of the cause of action. *Off. d'executors*, 208, 209. Third, yet after suit commenced by *A.* he may prefer a subsequent suit by *B.*, either by confession of his action, or by dilatory pleas, essoins, or imparlances to *A.*: but he must not delay or hinder *A.* of judgment by a false plea, which is a lie, as here, and then confess judgment to others; for it is a fraudulent proceeding, and will bring the debt upon himself at law, and ought so to do in equity; for after all this, to decree him only liable in proportion is an illusory and fruitless decree; it treats the executor at last as if he had never misdemeaned himself, puts him in a better condition, when his plea is falsified in equity, than he could have been if it had been falsified at law, and so at last protects a fraud in Chancery.

And the Defendant, hearing my opinion, presently agreed in open court to pay the Plaintiff 800*l.* within a week, and so the matter ended.

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in the penalty of 4000*l.* for securing the payment of 2000*l.* and interest, by two instalments, the latter of which became due on the 25th of *March* 1814; and the other

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ended. In the debate of this question I demanded of the Plaintiff's counsel why they did not presently pray judgment at law upon the plea of fully administered with *a cesset executio donec* assets *acciderint*; for this would have prevented all puisne judgments, and is warranted by *Mary Shipley's* case (*a*), which, for this very reason, was affirmed to be good law in parliament in *Noel* v. *Nelson*, 23 *Car.* 2. (*b*), contrary to *Dorchester* v. *Webb*, 10 *Car.* 1. (*c*), where it is held, a man must take issue upon the plea, or be barred by an implied confession of the truth of the plea, &c. Serjeant *Maynard* answered, that if he had prayed judgment he could have had no advantage but of such assets as should happen after the plea; for the prayer admits the plea true, and that there were no assets at the time of the plea; which I held to be a good answer; but the counsel on the other side argued that assets before the plea are assets after the plea, and so within the words *cum acciderint*, as a bond paid before the day is paid at the day; to which I replied, true it is, assets are always assets till aliened, but it lies not in averment by him who hath admitted the contrary upon record by his prayer. — Lord *Nottingham's* MSS.

Nov. 25th 1764. This cause having received many hearings in this court; first, by the Hon. the Master of the Rolls, then by the late Lord Keeper *Bridgman*, and afterwards by the Lord Chancellor the Earl of *Shaftesbury*, and there being diversity of opinions in the several orders pronounced upon these hearings, whereby the matter had been much intricated and perplexed; and the master to whom the accounts stood referred, having made a report *ex parte*, the same was confirmed, and a decree being

(*a*) 8 *Co.* 134

(*b*) 1 *Lev.* 286. 1 *Sid.* 448. 1 *Vent.* 94. 2 *Keb.* 606. 621. 651. 66. 671. 2 *Saund.* 226.

(*c*) *Cro. Car.* 372. *W. Jones*, 345. *Hutt.* 128.

thereupon

other to the same *Robert Wood* and *Samuel Lucas*, of the same tenor.

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Actions having been commenced against *Ann Thacker* on the bonds, she in each craved *oyer*, and pleaded *non est*

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thereupon drawn up upon that order to confirm the said report, thereupon the Defendant, who had not been fully heard touching the matters of the said report, and merits of his case, nor ever had any notice of the order for confirming the said report, before such decree was signed, entered a *caveat*, to the end he might be heard before any decree should pass, yet nevertheless the Plaintiff did, after such *caveat* entered, procure the decree to be signed, and afterwards, as appeared by the certificate of one of the six clerks of this court, enrolled; whereupon his Lordship, being made acquainted with the surprize, was satisfied thereof, and appointed the cause to be reheard; and the same coming to be reheard accordingly, in the presence of counsel on both sides, the substance of the Plaintiff's bill being to have satisfaction from the said Defendant, as administrator with the will annexed of *Charles Everard* deceased, of the sum of 700*l.* lent to the said *Charles Everard* by the Plaintiff in *August* 1665, with the interest thereon from that time, and to have a discovery of the estate of the said *Charles Everard* come to the said Defendant's hands; the said Defendant, by answer thereunto, set forth the whole estate of the said *Charles Everard*, and denied that he had any thing of *Everard's* effects to satisfy the Plaintiff, but that he had paid more to the creditors of the said *Charles Everard* than he had received, and that *Charles Everard's* estate was indebted to him 59*l.* and upwards; and further, that the estate of the said *Charles Everard* was not near sufficient to pay his debts by many thousand pounds, and the Defendant's counsel insisted that, before the first hearing of this cause, the letters of administration granted to the Defendant were repealed, and new letters of administration were granted to one *Charles Cornwallis*,

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est factum; and the causes being called on for trial at the sittings after *Hilary* term 1818, she, by her counsel *ore tenus*, pleaded, *puis darrein continuance*, three judgments

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wallis, Esq., to whom the Defendant had accounted in the prerogative court, and had delivered all the books of account and other things belonging to the estate of the said *Charles Everard* deceased, to the said *Charles Cornwallis*, so that the Defendant ought to be wholly discharged of and from all matters relating to the estate of the said *Charles Everard*, and of and from all attempts concerning the same; his Lordship thereupon, and upon full debate of the matter, and reading the proofs taken in the cause, and also upon reading the several orders made upon the former hearings, and upon due consideration of the whole matter, the Plaintiff's counsel not opposing the same, doth think fit and so order, that the matter of the Plaintiff's bill be and do henceforth stand clearly and absolutely dismissed out of this court, but without costs; and as touching the decree drawn up in this cause that was signed and enrolled, inasmuch as it appeared to his Lordship that the same was done by surprise as aforesaid, it is ordered that the said decree and enrolment be set aside and vacated, and that a *vacat.* be thereof made upon the record. (*a*) — Reg. Lib. B. 1674. fol. 64.

A decree obtained by surprise, an enrolled, vacated.

(*a*) On vacating decrees, see, among other cases, *Anon.* 1 *Vern.* 131.; *Price* v. *Solly*, *Dick.* 21.; *Kemp* v. *Squire*, 1 *Ves.* 205.; *Anon.* 1 *Ves.* 326.

PIGOTT v. NOWER. (*a*)

7th *December* 1677. 29 *Car.* 2.

Effect of judgments confessed by an administrator *pendente lite.*

The Defendant was administratrix to her husband *Daniel Nower*, who being bound in a bond of 6000*l.* for securing the Defendant's jointure, and another bond of 400*l.* which is since satisfied, and being also indebted to the Plaintiff in 500*l.*, the Defendant confessed judg-

(*a*) *Nels.* 183.

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ments recovered against her as administratrix, and that she had fully administered, except goods to the value of 10*l*. In *Easter* term the Plaintiffs at law replied, that the

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ments upon the two first bonds. The Plaintiff exhibited a bill to be relieved; whereupon it was decreed at the Rolls, that debts by judgment ought to be satisfied before the Plaintiff; but if any judgments were confessed *pendente lite*, the Master ought to report that specially. He reports that there was a warrant to confess judgment for debts, which were of no higher a nature than book debts; that this warrant did bear date 29th *January* 1671; that the Plaintiff's *subpœna* was taken out 25th *January* 1671, returnable 29th *January* 1671, but the Plaintiff's bill was not filed till 1st *February* 1671; and he reports further, that when those judgments were acknowledged, there was an agreement with the cognizees that they should take but 12*s*. in the pound, and that the residue should go towards satisfaction of the rest of the creditors.

I conceived, 1st, that a judgment after the *teste* of the *subpœna*, and before the return of it, or before the bill filed, is a judgment *pendente lite*; for when the *subpœna* is returned, it is depending from the *teste* of it, as all other originals are, and so much was implied in the resolution of *Burgh* v. *Francis*. (*a*) It was objected, that it could not properly be said *lis pendens* till the bill filed, because till then the true cause of suit is not known, the *subpœna* being only *quibusdam certis de causis*; but I regarded not this objection (*b*), because every *subpœna* is as certain as a *latitat*, and yet the common law allows a *latitat* to bind from the *teste*, and the Chancery will favor a *subpœna* more than a *latitat*; nay, perhaps it will control the common law in case of a *latitat*, as I have said before in *Parker* v. *Dee*. (*c*)

Lis pendens originates from the *teste* of the *subpœna*.

2. Yet the bringing of a *subpœna* does not hinder an executor or administrator to

(*a*) *Post*, p. 536.

(*b*) The objection may receive a different construction since the statute 4 *Ann. c.* 16. *s.* 22. And see *Anon.* 1 *Vern.* 318.

(*c*) *Ante*, p. 531.

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the Defendant had in her hands, at the commencement of the actions, assets unadministered beyond what she had admitted, and more than sufficient to satisfy the three

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prefer one creditor before another, by confessing judgment or pleading dilatory pleas, so he plead no false pleas, or make use of that fraud to delay, as *Parker* v. *Dee*'s case was.

3. Had the Plaintiff sued at law, and fully administered had been pleaded, and then he had come into equity, the judgment acknowledged for book debts *pendente lite* would have been set aside, as they were in *Parker* v. *Dee*'s case.

4. If a man foresee that *plene administravit* may be pleaded at law, and then come first into equity, as he may, why should not that avail him as much as if he had falsified such a plea? for a man is not bound to play an aftergame, and stay till he be hurt by a plea. It is no cause of demurrer to a bill for discovery of assets, that fully administered is not yet pleaded.

5. The judgments stood upon in this case are as bad as a false plea; for they demand the whole as due, whereas by agreement no more is to be paid than 12*s*. in the pound; for the other creditors, who have no judgments, cannot be let in for 8*s*. in the pound upon these judgments, unless the judgments were acknowledged upon a special trust for them; which before it be determined against them, they ought to be made parties.—Lord *Nottingham*'s MSS.

BURGH v. FRANCIS. (a)

9th *December* 1678. 25 *Car.* 2.

Mortgagor compelled, under the covenant for farther assurance, to supply a defect in a mortgage, against judgment creditors.

A mortgage in fee was defective for want of livery; the heir after the death of the father offers to pay the money, but upon view of the defect in the deed, retracts, and then is sued by his father's creditors as heir, and pleads *riens præter* the mortgaged lands; so the creditors by

(a) *Ante*, p. 535. *Rep. temp. Finch.* 28. *Nels.* 183. 1 *P. W.* 279.

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three judgments; issue was joined, and notice of trial given for *Trinity* term. Before the trial, the attornies of both parties signed a written agreement in the action by *Stanley*, that the Defendant should withdraw the pleas, and that the Plaintiff should take judgment for 4000*l.*, and that no bill in equity should be filed, or other proceedings taken for setting aside the judgment, or restraining the Plaintiff from levying execution thereon, or otherwise availing himself of the full benefit thereof; and the Plaintiff at law was not to take execution except in default of payment on the 22d of *August* 1818, of 1000*l.*, and the interest then due on the sum of 2000*l.* and the costs in the cause, and of the remaining 1000*l.* on the 22d of *November* 1818; and upon such payment the Plaintiff was to assign to *Ann Thacker* a judgment recovered by him, in *Easter* term, against *Thomas Thacker*, the co-obligor. A similar agreement (with the exception of the undertaking to assign a judgment) was signed in the action in which *Lucas* was Plaintiff.

The first instalment not having been paid at the time appointed, and propositions having been made, but not

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bond have judgments which relate to the first day of *Hilary* term 1670, but in truth were after the *teste* and service of a *subpœna*, though before the return of it. I decreed the heir to make a conveyance to the mortgagee according to his father's covenant for further assurance, and that he should hold, till redemption, discharged of those judgments; wherein I did not rely upon the legal notice of *lis pendens*, but held the heir in this case to be a trustee of the land descended, which was charged with the equity of the mortgage, but could not be incumbered by the heir; for a purchaser without notice of the trust may be free, but an incumbrance is not like a sale. — Lord *Nottingham*'s MSS.

accepted,

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accepted, for farther delay, writs of *fieri facias* on the judgments were sealed on the 28th of *August*, and sent to the attorney for the Plaintiffs at law, who, on the same day, received from the attorney for *Ann Thacker* two bills for 1000*l.* and 200*l.*, and an undertaking to pay 1000*l.* more in two months, which were accordingly paid on the 16th of *October*.

It was then proposed by the attornies of *Ann Thacker*, that as the estate of the intestate had thus paid his moiety of the sums secured by the bonds, the Plaintiffs at law should proceed to recover the other moiety due from *Thomas Thacker*, by means of the judgments obtained against him; but the proposal was declined.

By the decree made in the cause on the 19th of *November* 1818, it was, among other things, ordered that it should be referred to the master to take an account of what was due to the Plaintiff, and all other the creditors of the intestate *Robert Thacker* for their debts; and directions were given for the due administration of his effects.

On the 21st of *November* 1818, notice of the decree was served on *Stanley* and *Lucas*, and on the 24th of *November*, it was ordered by the Master of the Rolls, that upon the Defendant *Ann Thacker*, the administratrix, paying to *Stanley* and *Lucas* respectively, their costs at law up to the time they had notice of the decree, an injunction should be awarded to restrain them from all farther proceedings in the actions at law brought by them respectively, in the Court of Common Pleas, against *Ann Thacker*, as administratrix of the intestate; and notice of the order was on the 26th of *November* served on *Stanley* and *Lucas*.

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On the 24th of *November* a writ of *testatum fieri facias* was obtained in the action in which *Lucas* was Plaintiff, and sent by the general post to the under-sheriffs of *Leicester*, and received by them on the following day, and executed on the 26th of *November*.

On the 30th of *November* the attornies of *Ann Thacker* served on the attornies of the Plaintiffs at law, notices that if the execution was not withdrawn, application would be made for an attachment; and on the 1st of *December* notices that they were ready to pay the costs in the actions to the time of the notice of the decree.

On the 11th of *December* 1818 a motion was made before the Vice-chancellor, that the sheriff of *Leicester*, and his deputies or bailiffs, might be ordered forthwith to restore, deliver, and give up to *Ann Thacker*, possession of all goods, &c. of the intestate which had come to the hands of *Ann Thacker* as his administratrix, and which the sheriff had received or taken possession of by virtue of the writs of *fieri facias*; and that all further proceedings under the writs might be restrained.

The affidavit of *Ann Thacker* stated, that after the execution of the deed of trust, she had delivered to the trustees all the effects of the intestate in her possession, and accounted with them for her receipts, and had left the management of the intestate's affairs to them; and that not having assets to pay the debts for which the actions at law were brought, she left it to her solicitors to take such proceedings as might be most for the benefit of the estate of the intestate, and his creditors; and that the suit in equity was instituted without her knowledge.

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The Vice-chancellor made the following order: "This Court doth order that the said *R. Stanley* and *S. Lucas* do respectively sign an authority to the sheriff for the county of *Leicester*, for the delivery to the Defendant *Ann Thacker* of the goods, chattels, property, and effects belonging to the intestate *R. Thacker* deceased, taken in execution by the said sheriff under and by virtue of the two several writs of *fieri facias* issued out of the Court of Common Pleas against the said Defendant *Ann Thacker*, as the administratrix of the said *R. Thacker*, at the suit of the said *Stanley* and *Lucas* respectively; and it is ordered that the said sheriff do accordingly deliver up the said goods and chattels, property and effects, to the said Defendant *Ann Thacker*. upon being paid his costs and charges in respect of the said execution, and his costs of this application to be taxed, &c.; but this is to be without prejudice to any application which any of the parties may be advised to make as to the costs of this application, and as to the repayment of the said costs and charges which shall be so paid to the sheriff as aforesaid; and in case there shall be a deficiency of the estate of the said intestate to pay in full to the said *R. Stanley* and *S. Lucas*, the debts due to them upon the administration of the said estate by this event, it is ordered that the said *Stanley* and *Lucas* be at liberty to proceed at law against the said Defendant *Ann Thacker*, as if the said sheriff had returned *nulla bona præter* the sum received by the said *Stanley* and *Lucas* upon the administration of assets in this case; the said *Ann Thacker* by her counsel undertaking not to dispute the suggestion of such return in the writ at law." Reg. Lib. A. 1818, fol. 155.

A motion was now made to discharge this order. e case was argued by the Solicitor-general, Sir *Ar thur*

thur Piggott, Mr. *Hart*, Mr. *Garratt*, Mr. *Blake*, and Mr. *Stephen*.

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The following cases were cited: *Erving* v. *Peters* (*a*), *Terrewest* v. *Featherby* (*b*), *Paxton* v. *Douglas* (*c*), *Gilpin* v. *Lady Southampton*. (*d*)

In the course of the argument the Lord Chancellor inquired, whether the order for an injunction on payment of the costs of the action, was according to the usual form of injunctions, after a decree in a creditor's suit, and the registrar (Mr. *Walker*) answering in the affirmative, his Lordship observed, that the form was improper, inasmuch as the parties entitled to the injunction, if they were required to pay costs as a preliminary, might, from the situation of the estate, be unable to obtain it in time. The following observations were also made by

Form of injunctions after a decree in a creditor's suit.

The LORD CHANCELLOR.

The question which this important motion presents to the Court must be considered with reference both to the bill filed here by a creditor, and to the situation in which the administratrix has placed herself by her pleading at law. If the administratrix has so defended herself at law as to take under her protection not only herself but all the other creditors, that is one case; but if, on the other hand, she has pleaded falsely, or admitted assets when she has them not, it will be necessary to consider many cases in which the Court has held that it could not stop the legal proceedings of creditors. It has, indeed, been long settled, that when this Court has taken into its hands the administration of assets, it will stay

The Court having undertaken the administration of assets, stays proceedings against them at law.

(*a*) 3 *T. R.* 683.
(*b*) 2 *Mer.* 480.
(*c*) 8 *Ves.* 520.
(*d*) 18 *Ves.* 469.

proceedings

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proceedings against them at law (*a*); but the question is, whether the conduct of an executor or administrator never can be such that the Court will decline to act on that principle? I am sure that cases have occurred in which an executor or administrator, having made himself personally liable at law, has been protected in this court, only on the terms of paying to the extent of his legal liability. The present application is made by a creditor; and the question is, whether a creditor can protect the administratrix, and whether the Court should stop proceedings to which she would become liable at law, if certain intermediate proceedings had been first taken, by stopping those intermediate proceedings?

If the Plaintiff at law has established a right to an execution against the goods of the representative, in the event of a deficiency of the goods of the deceased, it may be assumed as clear, that at some day such execution may be taken; and if this Court interposes at all, must not the representative be required to state the amount of assets? (*b*) The first question, independent on the specialties of the case is, whether, if judgment is recovered against the administratrix in such circumstances that she would not be permitted at law to dispute assets, she can obtain an injunction here on an affidavit denying assets?

(*a*) *Morrice* v. *The Bank of England, Ca. temp. Talb.* 217.; 2 *Bro. P. C.* ed. *Toml.* 465.; 10 *Ves.* 57. For a fuller report of Lord *Talbot's* judgment *vide post*, Appendix. *Martin* v. *Martin*, 1 *Ves.* 211. *Douglas* v. *Clay*, *Dick.* 393.; 10 *Ves.* 40. *Brooks* v. *Reynolds*, 1 *Bro. C. C.* 183.; *Dick.* 603. *Goate* v. *Fryer*, 3 *Bro. C. C.* 25.; 2 *Cox*, 201. *Hardcastle* v. *Chettle*, 4 *Bro. C. C.* 165. *Kenyon* v. *Worthington*, *Dick.* 668.; 10 *Ves.* 40. *Paxton* v. *Douglas*, 8 *Ves.* 520. *Gilpin* v. *Lady Southampton*, 18 *Ves.* 469. *Farnell* v. *Smith*, 2 *Ball & Beat.* 337.

(*b*) *Cleverley* v. *Cleverley*, cit. 8 *Ves.* 521. *Paxton* v. *Douglas*, 8 *Ves.* 520. *Gilpin* v. *Lady Southampton*, 18 *Ves.* 469.

If

If the representative, being Defendant at law, consents to an execution *de bonis propriis*, the Plaintiff at law might be directed to assign to the representative a certain portion of his claim to the assets; but is there any instance in the history of the court, where, after a judgment at law *de bonis testatoris et si non de bonis propriis* of an executor, and execution issued, on a decree subsequently obtained for administration of the assets, the proceedings at law have been restrained? At law the administratrix is liable to the deficiency returned by the sheriff; the question is, whether this Court will interpose to render her liable for the deficiency returned on the Master's report?

The doctrine of courts of law on judgments against executors and administrators *de bonis propriis* has fluctuated so much, that a judge in equity may without dishonor acknowledge his ignorance. (*a*)

At the close of the argument judgment was given as follows.

The LORD CHANCELLOR.

This application involves questions which have not been the subject of decision. The order of the Vice-chancellor is subject to two difficulties; first, if the administratrix is liable at law, it renders her liable to a much greater extent; next, it is not at present within my recollection that this Court, when it takes into its hands the administration of the estate of a testator or intestate, for the protection, in some sense, of the personal representative, and in another sense of creditors, is accustomed to qualify the effect of a judgment at law,

(*a*) See 2 *Saund.* ed. *Williams*, 336. *Fielden* v. *Fielden*, 1 *Sim. & Stew.* 255.

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by staying the proceedings there for the present, but with an intimation that a period will arrive in the course of the suit, in which the parties will be permitted to make the most of them. At the same time I will not assert that there is no such case.

After a decree for the administration of assets, no creditor is permitted to proceed at law. Reason of that practice.

It is fully settled, though not from a very ancient time, that if this Court once takes on itself the administration of the assets of a testator or intestate, a creditor seeking, and not having yet obtained, satisfaction at law, shall not be suffered to proceed there; it being impossible, while the decree is considered as a proceeding for the benefit of all the creditors, to permit some of them to proceed elsewhere. That doctrine has been much enlarged even in my time; for it was first determined by Lord *Thurlow*, that such relief might be obtained, not only by a creditor but by a residuary legatee. (*a*) It is now an universal rule, that after a decree for the administration of assets, those who make a demand which they have yet to recover against those assets, must come in under that decree. The rule is intended for the protection of creditors, and of executors and administrators; but that it has been the occasion of enormous frauds there can be no doubt. The use made of it is very often this: that persons who have more interest in forbearing than in urging their demands against the personal representative, either omit to institute a suit for the administration of the estate, or, when instituted, so manage it, as to leave the representative in almost as undisturbed enjoyment of the assets as before the bill was filed. The circumstances of this case, though I am not disposed to represent any party as acting otherwise than honestly, illustrate the use that may be made of the rule of court.

(*a*) *Brooks* v. *Reynolds*, 1 *Bro. C. C.* 185. The report of this case in *Dickens*, 603. erroneously represents the suit to have been instituted by a creditor.

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Two creditors having brought actions, the administratrix put in pleas, which amounted to an admission of assets; the pleas were afterwards withdrawn, and the instruments called *cognovits* executed, by which the creditors were allowed to take judgment, with a stay of execution, on terms of making certain payments at times specified, and an express agreement, in the most comprehensive words, that no bill in equity should be filed or proceedings adopted to restrain the Plaintiffs at law from enforcing their judgment. The first instalment due under that agreement having been paid, on the 13th of *November*, the bill is filed by a creditor, stating his debt to be about 65*l.*; the amount of debt is not material, but the effect of the suit will be very different if it is the suit of the administratrix and not of a creditor. The bill represents, according to the common allegation, that the administratrix has possessed assets adequate to the payment of all the creditors; that she has appointed certain persons, who are co-defendants, her attornies to collect the estate; and that it has been accordingly collected under a deed to which I shall not give much attention, because I think that those Defendants, having submitted to this decree, are in such a situation, that if they ever intended to act on the deed, it may now be considered as laid aside. Probably, if the Master of the Rolls had seen not only what is stated concerning that deed in the bill and answer, but the deed itself, he would have hesitated before he granted the injunction as a matter of course.

On the 19th of *November* a decree is pronounced; the answer of the administratrix submitting to account, but containing no statement relative to the situation of the testator's estate at the time of his death, or the subsequent transactions. Speaking without application to this case, I have often observed with surprise the con-

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duct of solicitors in amicable suits of this nature; it is their duty to bring the personal representative before the Court in the manner most beneficial for the creditors whom they represent, and on whose behalf they have instituted the suit; and should a case arise of assets wasted by a personal representative from their neglect, it will not be for want of repeated caution from this place, if they are not prepared for the responsibility which they have incurred.

The order made by the Master of the Rolls on the 24th of *November* for an injunction, was grounded on an affidavit of the administratrix, stating only that the creditors at law threatened to issue execution, and her belief that she had not assets adequate to pay them; but omitting all mention of the circumstances attending the actions at law. I agree, that it is not an absolute rule of this court to refuse an injunction, unless there is an affidavit stating the assets in the hands of the personal representative; but I will never grant the injunction without using my best endeavours to know the state of the assets. In many cases those endeavours might fail to obtain the information sought; but if ever a case required it, it is one in which all these solemn engagements have passed before the application for an injunction. On a full explanation of the facts there might have been a difficulty in granting that application; the order, however, has been made, and must be obeyed: but on an application against persons guilty of a breach of it, the Court would forget its duty, if it did not give to them the benefit of the fact that the order ought not to have been made.

No injunction after a decree for the administration of assets without information of their state.

Persons violating an order, are entitled to the benefit of the fact that the order ought not to have been made.

This application is founded not only on the decree pronounced, but also on an alleged breach of the injunction; and it is necessary for the Court to consider both

both the creditor restrained, and the personal representative on whose behalf the restraint was imposed; and in these views this motion is as important as almost any that I recollect in the course of my professional or judicial life. Although the Court has said, that when it takes the administration of assets into its hands, it will protect the personal representative from pressure at law; yet it is always careful not to exclude creditors proceeding at law from the benefit of that due diligence by which they have established a right to be satisfied, either out of the assets of the deceased, or *de bonis propriis* of the representative, a right which, in some cases, the conduct of the representative will confer on them, and in others their own activity; and will not indulge creditors who have lain by, to the extent of depriving the diligent of the fruits of their diligence. My memory furnishes me with the recollection of no case in which the Court has interposed as in this order; that is, considering the proceedings at law effectual for some purposes, to be carried into execution at a future time, when the fruits to be collected from them have been ascertained by the result of certain proceedings in equity.

With respect to the cases of levying execution *de bonis propriis*, the Court can labour under no difficulty; because if, in those cases, *bona propria* are at law to be applied in payment of debts, so *bona defuncti* are to be applied in equity; and there may be a third case; and in reference to levying *de bonis propriis*, I doubt whether there was any representation that the judgment was or was not *de bonis propriis*, so as to introduce the distinction to which I advert. The judgment in this case is represented as a judgment against the assets of the intestate, but such that the Defendant at law must be considered as having confessed assets; and if the sheriff, therefore, could not collect goods of the intestate sufficient

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cient to pay the debt, it would be of course for him to levy on the goods of the representative; but as *bona propria* are not to be resorted to until there is a deficiency of the goods of the intestate, and as those are to be administered in this court, the question arises what is to be done where a creditor has acquired a right to proceed against *bona propria?* What is to be the effect, as soon as it is established conclusively at law, that there has been a *devastavit*, and that the representative is subject to pay the debt out of his own property? There is thus an intermediate case; for as in some cases the remedy is against the *bona propria* of the representative originally, and in others against the *bona defuncti* only, there may also be a judgment originally *de bonis testatoris, et si non de bonis propriis*, even for costs alone; and the Court must determine what is to be done on such a judgment. It becomes matter of very serious consideration, whether it shall be possible for a body of creditors, or a personal representative, after having permitted a creditor at law to proceed until he has obtained an admission of assets, which in this court could never be retracted, unless a case of mistake were most clearly established, then upon the representative here denying assets, to delay that creditor, having a right to take immediate execution against the goods of the representative; whether it is competent to the Court, in such a state of circumstances manifested by the sheriff's return, to enjoin the legal diligence of the creditor, until, at some unknown period, it shall be ascertained what proportion of the assets is to be paid to that creditor; and that he shall then be at liberty, not by any order of this Court, to call on the sheriff to make a return that there were no *bona defuncti præter* what was paid into his hands under the decree of the Court of Chancery, and to take his chance of recovering the rest.

Admission of assets not retracted, except on clear mistake.

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There is another difficulty, arising perhaps from a mere slip, that this administratrix, if entitled to protection at all, must be entitled to protection beyond what is given to her by this order; because, if the Court has authority to compel a creditor having a legal right to lay his hand on all the goods of the deceased, that the sheriff could find, to take so much only of those assets as he should be found entitled to on taking the accounts in this Court, it seems extremely difficult for the Court to proceed on this principle, that the creditor thus proceeding at law shall be restrained from taking more than his proportion of the assets at present, that proportion to be ascertained by the decree on farther directions, and restrained at the instance of another creditor, who has never, perhaps, made any demand at law or otherwise, until he filed his bill, after execution had been taken out: but that the administratrix shall be liable, not only as she would have been liable if the execution had proceeded, which would be against the assets of the testator in the first instance, and for the deficiency according to the sheriff's return against the goods of the representative, but to the extent to which the goods of the testator are insufficient to satisfy the debt, upon a proportionate distribution among all the creditors on the account in this Court. The consequence would be, that the Court would give to a whole body of creditors a relief to which either conjunctively or separately they could have no claim.

I cannot, therefore, at this moment, assent to the notion, that this order can in all respects remain; and I will not undertake to say that this case is very easy of solution, putting all these difficulties out of view; but where the case at law affords an ulterior resort, the *bona propria* of the representative, if this Court is so to arrange its proceedings, as to take care, that while it destroys

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one remedy it does not affect the other, it seems to me, that a course must be adopted somewhat different from that of the present order. (*a*)

(*a*) *Lord* v. *Wormleighton, Jac.* 148.

May 15. 22.

BOUGHTON *v.* PIERREPOINT.

A motion to suppress the depositions of witnesses examined on behalf of the Defendant, after a conversation by him with one of the Plaintiff's witnesses on the subject of his testimony, refused, the conversation not having been communicated to his solicitor before the Defendant's interrogatories were prepared; but without costs; communications between witnesses and parties being disapproved.

A MOTION was made, on behalf of the Plaintiff, for the Defendant to shew cause why the deposition of *William Hopkinson*, and all other depositions taken since the 3d of *May* 1819 before the examiner in this cause should not be suppressed, or why the examiner should not be ordered not to deliver out the same, or any copy thereof; and also why the Defendant should not be restrained from examining any other witnesses in this cause.

In support of the motion, the solicitor of the plaintiff made an affidavit, stating, (in addition to some alleged neglect of the defendant's solicitor to procure the attendance of his commissioners for the examination of witnesses,) that *John Ullett* was a material witness examined on the part of the Plaintiff; and that the deponent had been informed by *Ullett*, since his examination, that the Defendant came to *Ullett*'s house, shortly after the execution of the commission, for the purpose of conversing with him upon the evidence given by him, and of learning the nature and substance thereof; that *Ullett* informed the deponent, that, not knowing there was any impropriety in his so doing, he acquainted the Defendant with the whole tenor and substance of the evidence which he had given upon the execution of the commission, and that the Defendant expressed himself

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to be much vexed at the nature thereof, and told *Ullett* that it was very different from what the Defendant had always considered *Ullett* would give, and that he would obtain a fresh commission for the examination of witnesses, and should expect *Ullett* to attend it, and be examined again; and that the Defendant particularly inquired of *Ullett* the names of the other witnesses who were examined on the execution of the commission; that upon receiving this information from *Ullett*, the deponent asked him to make an affidavit thereof, but could not prevail upon him so to do, although he declared that it was strictly true, and that he would swear it, if compellable; but he intimated to the deponent that he was a tenant of the Defendant, renting a farm under him, and that although he would speak the truth if legally called upon, yet that he did not like to offend the Defendant by making any voluntary affidavit.

In opposition to the motion, the solicitor of the Defendant made an affidavit, in which, (after exculpating himself from the alleged neglect,) he stated, that *Ullett* was a tenant of the Defendant, and a material witness in his behalf, and had frequently, previously to the day on which he was examined, declared to the Defendant, and also to the deponent, the evidence which he intended to offer on behalf of the Defendant; and on the morning of the day of examination *Ullett* called on the deponent, and informed him that he had been summoned to give evidence on behalf of the Plaintiff, at which the deponent expressed his surprise, but said nothing more: that the deponent had not since held any conversation with *Ullett* respecting the cause, or his evidence therein, or any matter relating thereto, and had not in any manner interfered with any of the witnessess of the Plaintiff, nor in any manner, directly or indirectly, endeavoured to obtain any information of the

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nature of the evidence given by them, nor was he acquainted with the evidence given by the Plaintiff's witnesses on the execution of the commission, or any thing relating thereto; that he had had no communication with the Defendant respecting the evidence given by *Ullett* under the commission, on the part of the Plaintiff, nor did the Defendant or any other person inform or communicate to the deponent, the nature and substance of the evidence of *Ullett*, or of any other witness of the Plaintiff.

The *Solicitor-General* and Mr. *Pepys* for the motion.

It is an established rule of courts of equity, that the contents of depositions shall not be disclosed before publication; that no party shall be allowed to examine witnesses, who knows what the witnesses against him have deposed. The Defendant having obtained from a principal witness for the Plaintiff the substance of his testimony, proposes to examine witnesses in contradiction.

They cited *Geast* v. *Barber* (*a*), and *Ridley* v. *Obee.* (*b*)

Mr. *Heald* and Mr. *Roupell* against the motion.

No order of court restrains witnesses from disclosing their testimony, nor do they take an oath of secrecy; the disclosure is usual, and often necessary for the proper conduct of the cause.

The LORD CHANCELLOR.

I know no order prohibiting witnesses from communicating their testimony; but cases may arise in

(*a*) 2 *Bro. C C.* 1 (*b*) 3 *Pri.* 26.

which

which the Court would interfere. Even if there were an order, I should not suppress depositions on an affidavit of mere information; but such an affidavit requires an answer.

An affidavit was made by the Defendant, stating, that he was absent from *England* in *August* when the commission was executed; that shortly after the commencement of the suit, and before he put in his answer, he had a conversation with *Ullett*, a considerable farmer there, but who occupied a few acres of land only belonging to the Defendant, regarding the situation of the land in the pleadings mentioned, at which time *Ullett* informed the Defendant that a subdivision fence which runs through a part thereof had not been made until seven years or thereabout after the inclosure of the common and waste ground of *R.* and *B.*; that *Ullett* did not then inform the Defendant that such fence had been made by *Ullett* at the expense of the then owner of the lands, but the Defendant understood and believed that the same had been made by *Ullett* merely as a tenant's hedge, and for the convenience of his own occupation; that in *October* last, the Defendant accidentally met *Ullett* upon the high road, when *Ullett* stopped the Defendant, and without any allusion being made by the Defendant to the cause or the matters in question therein, *Ullett* voluntarily stated to the Defendant that there had been a meeting at *Stamford* since the Defendant's absence from *England*; that the Defendant not being informed of the issuing of the commission for the examination of witnesses, inquired of *Ullett* the nature of the meeting, and what persons attended it; that *Ullett* then mentioned the names of some persons who had attended the meeting, and also informed the Defendant that he had been subpœnaed as a wit-

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a witness by the Plaintiff to give evidence touching the subdivision fence upon a part of the estate; whereupon the Defendant said to *Ullett*, of course you have given them the same information respecting it as you have previously given to me; that *Ullett* immediately replied, they wanted me to say that the fence was a substantial one, but I told them I could not say any such thing, but that it had been made seven years after the inclosure, and that I would not have taken the land unless a subdivision fence had been made; and *Ullett* also informed the Defendant, that he stated to the commissioners that he was in consequence permitted to make the fence by the then owner, and to deduct the expenses of making it out of his rent; that he considered that the statement made by *Ullett* to the commissioners varied in some measure from the account which he had formerly given to the Defendant, and the Defendant mentioned to *Ullett* the difference between the statements, and remarked to *Ullett* that he did not consider the variation to be of any importance in the issue of the suit, yet that he was desirous of *Ullett* mentioning the subject thereof to Mr. *T.*, the Plaintiff's solicitor, or to Mr. *H.*, the solicitor of the Defendant, and particularly to Mr. *T.*, in order that no imputation might fall upon the Defendant from the apparent difference between the statement, regarding the hedge in the Defendant's answer, and the evidence of *Ullett*; that he never had been in the house of *Ullett* since the commencement of the suit, nor had at any time since the execution of the commission, except as before stated, spoken to or conversed with *Ullett* respecting the evidence which he had given in the cause, or with any other person or persons who have been examined as witnesses on behalf of the Plaintiff, or with any other persons whomsoever, touching the evidence given on behalf of the Plaintiff; that *Ullett* had not at any time informed the Defendant of

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of the tenor and substance of the evidence which he had given under the commission other than as before mentioned; and the Defendant denied that he ever told *Ullett* that the testimony which he had given on behalf of the Plaintiff was different from what the Defendant had always considered *Ullett* would give, save as before mentioned; that he never said to *Ullett* that he would obtain a fresh commission for the examination of witnesses, and should expect *Ullett* to attend and be examined again; he denied that he inquired of *Ullett*, save as before mentioned, the names of the other witnesses who were examined on the execution of the commission; and said, that being ignorant of the issuing of any commission for the examination of witnesses, the Defendant was induced to make the inquiries of *Ullett* from curiosity, and not with a view of availing himself thereof, for any purpose in the suit; and that he had not at any time communicated to the said Mr. *H.* what passed between *Ullett* and the Defendant, nor had he spoken to or communicated with any other person respecting what so passed, until he gave instructions for preparing this affidavit.

The LORD CHANCELLOR.

I think that this affidavit is satisfactory: The motion is founded on the information of *Ullett*, who makes no affidavit. The principal question in the cause appears to relate to a subdivision fence. The Defendant states a conversation with *Ullett* which was natural, *Ullett* being his tenant, and competent to give him information. On the Defendant's return from abroad, a farther communication takes place between him and *Ullett*, the particulars of which he states, and he expressly denies the most important suggestions in the affidavit on which the motion proceeds; and concludes with

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with a positive denial of having communicated what passed to his solicitor, or to any other person.

It would be too much, on such an affidavit, to exclude the Defendant from examining witnesses on interrogatories prepared by his solicitor, to whom no communication of the conversation with the witness had been made; at the same time it would be better for parties not to communicate with witnesses. I dismiss the motion, but without costs.

Mr. *Heald* and Mr. *Roupell* applied for the costs of the motion, which they represented as novel, and founded in misapprehension of the practice.

The LORD CHANCELLOR.

I refuse costs, because I think it important to prevent these communications between witnesses and parties.

June 30.

JOHN SPILLER and WILLIAM SPILLER, Plaintiffs;

HENRY SPILLER, ROBERT BUNSCOMBE, and HENRY WAKELY, - - Defendants.

Injunction to restrain the vendor of copyhold premises, after delivery of possession and receipt of part of the purchase money, from surrendering them to persons other than the purchasers.

IN *November* 1816, the Plaintiffs and *Henry Spiller* signed an agreement for the sale to the Plaintiffs of certain copyhold lands, the property of *Henry Spiller*, held under the honor of *Taunton Dean*, in the county of *Somerset*, at the price of 900*l.* Possession of the premises was delivered to the Plaintiffs, and 300*l.*, part of the purchase money, were paid, the remainder being payable upon a surrender; and the Plaintiffs, accompanied by the vendor, applied to the deputy steward of the manor for the purpose of obtaining a surrender, but were informed

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formed by him that the steward was dead, and that he could not take the surrender until he had received an appointment from the new steward. *Henry Spiller* afterwards becoming involved in pecuniary embarrassments, executed a conveyance and assignment of all his property, real and personal, to the other Defendants as trustees, and refused to surrender the copyhold premises to the Plaintiffs. The bill prayed specific performance of the agreement, and an injunction to restrain *H. Spiller* from surrendering the copyhold premises to the other trustees.

A motion was now made, on certificate of bill filed, and affidavit, for an injunction.

Mr. *Buck* for the motion.

The LORD CHANCELLOR.

The Plaintiffs are, under the circumstances, entitled to an injunction; but I wish it to be understood as my opinion, that, in general, on a bill for the specific performance of an agreement to sell, the Plaintiff is not entitled to restrain the owner from dealing with his property: a different doctrine would operate to control the rights of ownership, although the agreement was such as could not be performed. (*a*)

In general, during a suit for specific performance, the Court will not restrain the owner from dealing with his property.

"His Lordship doth order that an injunction be awarded to restrain the Defendant *Henry Spiller* from surrendering the copyhold premises to the Defendant *Robert Bunscombe* and *Henry Wakely*, until the said Defendants shall fully answer the Plaintiffs' bill, or this Court make other order to the contrary."—Reg. Lib. B. 1818. fol. 1243.

(*a*) See *Echliff* v. *Baldwin*, 16 *Ves.* 267. *Curtis* v. *The Marquess of Buckingham*, 3 *Ves. & Bea.* 168.

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ROLLS.
June 1.
July 14. 20.

MORRIS *v.* CLARKSON. (*a*)

The purchaser of a copyhold estate, devised subject to payment of debts, in trust for sale, and sold, during the infancy of the heir, under the usual decree, is not entitled to have a portion of the purchase money retained in court, as a provision for defraying the expense of the fine which would become payable on the death of the heir before a conveyance.

SAMUEL MORRIS by his will, in the first place, directed all his just debts and funeral expenses to be fully paid and satisfied by his executor; and, after a specific bequest of his household furniture, gave and devised to his executor *James Clarkson*, his heirs, &c. all the testator's copyhold, leasehold, and other estates, and all the residue of his effects, upon trust, within six months after his decease, to sell the same, and to divide the money arising from the sale among the testator's sons and daughters.

The testator died in 1807, seised of a copyhold estate of inheritance which he had not surrendered to the use of his will. A suit having been instituted against the heir of the testator, and his executor, for executing the trusts of the will, and, on the death of the heir, having been revived against his infant daughter *Amelia Morris*, the heiress of the testator, on the 16th of *May* 1808, the following decree was pronounced: "His Honor doth declare, the will of *Samuel Morris*, in the pleadings named, well proved, and that the same ought to be established, and the trusts thereof performed and carried into execution, and doth order and decree the same accordingly; and the said testator not having surrendered the copyhold estate devised by his will, his Honor doth declare that the defect of such surrender ought to be supplied, and it is ordered that the Defendant *Amelia Morris*, the infant, be admitted to the said copyhold estate; and it is ordered that when she shall attain her age of

(*a*) 1 *Jac. & Walk.* 604. n.

twenty-

twenty-one years, she do surrender the same to the use of the will of the said testator." And, after directing the usual accounts of the testator's personal estate, and of the rents and profits of his leasehold and copyhold estates, the decree proceeds thus: "And it is ordered that the said testator's leasehold and copyhold estates be sold, with the approbation of the Master, to the best purchaser or purchasers that can be got for the same, to be allowed by the said Master; and it is ordered that all proper parties do join in such sale as the Master shall direct; and in order thereto, it is ordered that all deeds in the custody or power of either of the parties be produced before the Master upon oath; and it is ordered that the Defendant *Amelia Morris* do also join in such sale of the said copyhold estate, when she shall attain the age of twenty-one years, unless she, on being served with a subpœna to show cause against this decree, shall, within six months after she shall have attained her said age, show unto this Court good cause to the contrary; and in the mean time it is ordered that the said purchaser of such estates do hold and enjoy the said copyhold estate as against the said *Amelia Morris* and her heirs; and it is ordered that the purchase money be paid into court," &c. — Reg. Lib. B. 1817. fol. 801.

The copyhold estate was sold according to the decree, the purchase money paid into court, and the purchaser admitted into possession on his own petition.

The legatees now petitioned to have the fund in court paid out and distributed. It was insisted on the part of the purchaser, that a sufficient sum ought to be left in court to indemnify him from payment of the additional fine, which would become payable if *Amelia Morris*, the infant, should die under age.

Sir

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Sir *A. Piggott* and Mr. *Roupell* for the petitioners.

Mr. *Barber* for the purchaser.

July 14. *The* MASTER *of the* ROLLS observed, that it was a very general and important question, whether in judicial sales before the Master, the purchaser can retain the the money in court and prevent the distribution of it, because the heir is an infant not competent to convey the legal estate; and, not having been referred to any authorities on the subject, he desired that the case might be again argued before him by one counsel on each side.

July 20. Mr. *Barber* for the purchaser, cited *Noel* v. *Weston* (*a*), where one of the necessary parties to the conveyance of an estate being absent beyond the jurisdiction, the Lord Chancellor would not compel the purchaser to accept the equitable title, but allowed him the option of abandoning the contract. Here the estate being copyhold, if the infant should die, the purchaser cannot compel her heir to be admitted, and by default of admission a forfeiture will be incurred, *Clayton* v. *Cookes*. (*b*) At least admission cannot be compelled without payment of the fine; an expense with which the purchaser certainly ought not to be charged. In the case of freehold property, the heir being a mere trustee, may be compelled to convey; there is no third party interested, as the lord here, nor any expense of a fine.

It may happen that several deaths of successive heirs may take place before the purchaser can be admitted, and on each death the lord will be entitled to a

(*a*) *Coop.* 158. (*b*) 2 *Atk.* 149.

fine.

fine. The purchaser here, however, will be content with impounding a sum sufficient for one fine. He cited also *Grant* v. *Astle.* (*a*)

Mr. *Roupell* for the petitioners.

The objection, if valid, would prevent the distribution of any part of the purchase money; for it is possible that the whole may be exhausted by successive fines. The purchaser here has all that he bargained for; and, according to the established practice on judicial sales of the estates of infants, must take the estate under the decree to enjoy during the infancy. *Chandler* v. *Beard* (*b*), and the case under Lord *Waltham*'s will. (*c*)

Mr. *Cooper*, for the heir, cited stat. 9 *G.* 1. *c.* 29. enabling the lords of manors to obtain payment of fines during the infancy of the heir, by the effect of which in this instance, not only was the legal estate outstanding, but the equitable estate might be charged with an incumbrance.

The MASTER *of the* ROLLS.

I have bestowed considerable time and attention in the examination of this question, but have not been successful in my search after authorities on the subject. It is necessary, therefore, to proceed upon principle, and decisions in analogous cases.

The facts of the case are, that the estates of which the testator died seised in 1806, having by his will charged them with the payment of his debts, were, by

(*a*) *Doug.* 722.
(*b*) 1 *Dick.* 392.
(*c*) *Sugden's Law of Vendors*, 518. The remaining arguments in support of the petition may be collected from the judgment.

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the decree pronounced in 1808, directed to be sold. He left his eldest son, *Samuel Morris*, his heir at law, an adult, and if the suit had proceeded to maturity during his life, no difficulty could have arisen. After his death, in 1807, the suit was revived against *Amelia Morris*, his only child; and by the decree of *May* 1808, the defect of surrender of the copyhold was supplied, and a sale was directed in the usual terms. (*a*)

It appears that the first sale was made in *April* 1809. The biddings were afterwards opened, and a resale took place in *July* 1809. The advertisements announced that the sale was under the decree of the Court, and it was effected at the public sale-room. The present purchaser was afterwards, at his own instance, substituted for the highest bidder at the sale. It is evident that the purchase was made with perfect knowledge that the sale was a judicial sale, under a decree of the Court; and at that very time a receiver was in possession of the premises. The purchaser had full notice of the decree, and it must be supposed that he was acquainted with all its contents; he had ample opportunity of becoming acquainted with them. He must be considered to have known that the estate which he purchased was the copyhold estate of an infant, who was to convey at twenty-one; and in the mean time the purchaser was to hold and enjoy under the direction of the decree.

On the 20th of *July* 1813, the purchaser obtained the Master's report of his being the best bidder, and afterwards the confirmation of that report, knowing as he must have done, that till that confirmation he was not absolutely fixed as the purchaser. He then applied for liberty to pay in the purchase-money, and to be let into

(*a*) *Ante*, p. 558.

pos-

possession, and declared himself satisfied with the title. He accordingly obtains possession; and all this is done with full notice that the title was of an imperfect nature, and that the legal estate could not be immediately obtained.

It is after this series of proceedings, that in the next stage, when the fruit of the decree is sought to be obtained by the application of the purchase-money to the purposes to which it was destined, the objection is for the first time taken by the purchaser, that he may eventually incur the risk of the expense of an additional fine. If the infant should die under age, there will be a necessity for the next heir to be admitted, and upon that admission a fine must be paid. There may thus be several successive deaths and several fines; and the danger, therefore, is not limited to the amount of one fine only, but of indefinite extent, and a considerable sum may be exhausted. The purchaser will never be free from hazard till some adult heir has been admitted and surrenders it to him. In these circumstances, the purchaser insists that, to the extent of one fine at least, the purchase-money ought to be compounded.

In considering this question I shall first advert to the case of freehold property, and then inquire whether the same rule extends to copyhold.

On the sale of a freehold estate, the property of an infant heir, the purchaser may be subject to additional expense and inconvenience. Some time may elapse before he obtains a marketable title. The infant heir at law may die during minority, and the legal estate may descend to a feme covert, in which event it would become necessary to incur the expense of a fine, or to a

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person beyond the jurisdiction, from whom a conveyance could not be compelled; or it may escheat for want of heir, and difficulties may arise in obtaining a grant from the crown. Yet, although, as between party and party, it would be unreasonable to subject a purchaser to this contingent expense and inconvenience, it is admitted that such is the practice in the case of a judicial sale of freehold estate; and the practice is founded on the necessity of it for accomplishing the purpose of the sale, and administering the estate of the deceased, and providing for the payment of creditors. It is a known exception to the general rule which protects a purchaser from paying the purchase-money until he has obtained a conveyance.

A judicial sale is regulated by peculiar principles. It takes place under the guarantee of the Court, and it is upon the direction in the decree to hold and enjoy that the purchaser relies. To the inconveniences which have been mentioned, the transaction having been completed by the confirmation of the Master's report, the purchaser is not permitted to object; because he purchased with a full knowledge of his situation, and pays a price which is regulated by all the circumstances of the sale.

The established course of the Court, on sales of freehold property, is to direct the immediate distribution of the purchase-money; not a single instance can be found in which any portion has been sequestered. In *Blatch* v. *Wilder* (*a*) a similar decree was made as in the present case; the same doctrine is found in *Uvedale* v. *Uvedale*. (*b*)

(*a*) 1 *Atk.* 420. (*b*) 3 *Atk.* 117.

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It appears, therefore, to be the constant practice of the Court to distribute the purchase-money *instanter*; and of this practice the purchaser, as it was said by Lord *Eldon* in *Noel* v. *Weston* (*a*), has no reason to complain, because he purchases with notice of the infancy of the heir, and offers a proportionate price. The rule and the reason are equally applicable to sales of copyhold estates.

If it had been stated to the purchaser before the sale, that the money was to be immediately distributed, although the infancy of the heir prevented an immediate conveyance to him, could he then have urged this objection? Though that statement was not made *totidem verbis*, yet he bought with full notice of the fact, and it cannot be expected that the Court should now for the first time relax its rule. The very object of the decree, the payment of the debts, would be frustrated by detaining the money. Suppose infancy after infancy or absence from the kingdom; there would be no limit to the suspension of the benefit of the sale for payment of the debts; and this in favor of a purchaser who bought with notice of the fact of infancy, and of the established course of proceeding. There is inconvenience on both sides, but a change in the practice of the Court would introduce greater evils than it would prevent.

The rule being thus settled in judicial sales of freehold property, the question is, whether it applies to sales of copyhold? The risk and the inconvenience are certainly greater; the necessity of admittance, and the liability to a fine on being admitted, are peculiar to that species of property. The effect of the rule is to impose on the purchaser the obligation of paying the fine, without

(*a*) *Coop.* 132.

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which he could never procure a surrender and admittance. Upon that payment the heir may, under the decree of the Court, be compelled to be admitted, and to surrender. It is, therefore, a question of expense. In the case of copyhold the expense may be greater; but that can never afford a practical distinction: the principle applies to both. The purchaser bought with notice. He certainly incurred the hazard of paying an additional fine, if the infant dies before admittance; but on the other hand, if he himself should die in the mean time, the fine that would have been payable if he had been admitted will be saved. In this respect there is risk against risk; and if the life of the infant is better than his, the advantage is on his side. But in all events he has that which he bought.

The objection is properly an objection to title. It was so alleged in the case under Lord *Waltham*'s will (*a*), and was there overruled. Here the purchaser has accepted the title, and what right can he have after that to claim indemnity against a risk of which he had notice before acceptance? If dissatisfied with the title, he should have objected to it. He cannot both hold possession of the estate and reserve a part of the purchase-money as a guarantee against further contingencies. In the ordinary case between vendor and vendee, the purchaser might, as in *Noel* v. *Weston* (*b*), have the option of declining the purchase, but he cannot claim, while he takes the whole of the estate, to impound a portion of the price. A purchaser buying with notice has no right to such an interposition of the Court. It must be presumed that, in the price given for the estate, allowance was made for the infancy of the heir. How can the

(*a*) *Sugd. Law of Vendors*, 318. (*b*) *Coop.* 136.

Court

Court now ascertain that fact, or determine what the estate would have produced had the heir been adult?

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On general principles, I think that no distinction can be made between purchases of freehold and of copyhold estates, but that both must rest on the same foundation. In both, the purchasers rely on the decree of the Court; they must be supposed to be conusant of all the circumstances on which the decree is founded; and they cannot interfere to stay the distribution of the purchase money among the creditors, for whose benefit the sale was ordered. I have no inclination to make a precedent of impounding part of the purchase money. The principle which could justify such a measure would require the whole proceeding to be suspended until the purchaser obtained a marketable title.

The order directed distribution of the fund in court among the parties entitled under the testator's will. —Reg. Lib. B. 1818. fol. 1536.

The Princess of WALES *v.* The Earl of LIVERPOOL.

June 29, 30.
July 26.

THE promissory note described in the order of the 17th of *March* 1818 (*a*) not having been produced, the Defendants now moved that the bill might be dismissed with costs.

After an order that the Defendants should have a fortnight's time to answer, after the Plaintiff had produced an instrument stated in the bill, fifteen months having elapsed without production, the Plaintiff was ordered to produce the instrument on or before a day named, and production not being made, the bill was dismissed with costs.

(*a*) *Ante*, vol. i. pp. 114. 580.

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The Princess of WALES v. The Earl of LIVERPOOL.

The *Solicitor-General*, Sir *Arthur Piggott*, and Mr. *Heald*, in support of the motion.

Since the last proceeding in this cause, the time has elapsed which would entitle the Defendants, if they had answered, to dismiss the bill for want of prosecution. Under the order of *March* 1818, it was incumbent on the Plaintiff to enable the Defendants to answer, by making the production which that order requires, and which is the necessary preliminary of an answer. The want of an answer is, therefore, imputable to the Plaintiff; and this case, although the Defendants have not answered, is within the principle which entitles a Defendant, after answer, to dismiss a suit not duly prosecuted. The mischief which that principle remedies exists in the present case; the pendency of this suit prevents the administration of the assets of the Duke of *Brunswick*. The Defendants have filed a cross bill to which they have not obtained, nor possess any means of compelling, an answer.

Mr. *Martin* and Mr. *Shadwell* against the motion.

An order so novel as that which has been pronounced in this case cannot be enforced by the summary process which the Defendants propose. The terms of the order were not mandatory on the Plaintiff, and imposed no peremptory obligation to produce the instrument. The Defendants should have required production within a limited time; not the dismission of a bill which they have not answered. The Defendants have the option of answering, and may then compel the prosecution of the suit at the peril of dismission, in the ordinary course. The order prayed would not much facilitate the administration of the assets; a new bill, which the Plaintiff may file immediately, will produce the same effect as the present. There has been no time for communication with

with the Plaintiff since the service of notice of this motion.

The LORD CHANCELLOR.

This motion arises on a bill filed by her Royal Highness the Princess of *Wales*, stating herself to be a creditor of her late brother the Duke of *Brunswick*, against the Earl of *Liverpool* and Count *Munster*, as executors of the Duke, and praying payment out of his assets of a sum of money, alleged to be secured to her Royal Highness, by two different instruments described in the bill. Shortly after the institution of the suit, an application was made by the Defendants, in support of which Count *Munster* filed an affidavit, questioning the reality of the debt, (which might be questioned without any imputation on the Plaintiff,) and arguing on the nature and contents of the instruments, to the conclusion that there was no real debt; and stating, that for reasons there assigned, the executors could not prepare their answer till the instruments had been produced. It was then alleged, that the instruments were not in this country, and the application was, that the Defendants might not be compelled to answer the bill, until a certain time had elapsed after the production of the instruments required.

In one sense, undoubtedly, that application was novel; and as no duty is more imperative on an *English* Judge than this, that he shall look on all persons suing in his court merely as subjects of his Majesty, the motion could receive no other consideration than must have been given to a similar motion in any other case of the same nature. I remembered no instance of such a motion; and it was then stated to me, and the statement was supported by my own recollection of the practice, that it is not usual, on motion, to require a plaintiff, by the

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the production of documents, to aid a Defendant in the preparation of his answer. I satisfied myself on principle, and the authority of text writers, that where a Defendant pledges himself by his oath, assigning reasons fairly affecting the judgment of the Court, that he could not answer the bill, as it his duty to answer it, as well for himself as for those in whose behalf he is entrusted with the distribution of the property, unless the Plaintiff produces instruments stated in the bill, he is entitled to compel from the Plaintiff that production which was necessary to the preparation of a full answer; and I had the less difficulty in the present case, because the instrument of which production was required was one of the securities on which the demand was made, and the Court would not make a decree for payment of that demand, until all the securities were delivered up, and would not allow a duplicate to remain in the hands of any but the Defendants. On this principle the order was made.

It has been mentioned, and I refer to it merely for the sake of stating that I pay no particular attention to it, that the executors have filed a cross bill to compel a statement of the nature of the demand and the securities, and that no answer has been put in; but on that I do not lay much stress in my view of the case.

When I have stated that I thought it my duty to produce the order, in the absence of precedent, though I explained the principle on which I proceeded, it follows that I cannot state the practice of the Court relative to such an order. A motion arising out of an order which is justified, I think, by principle, but not sanctioned by authority, must itself be decided rather by principle than by precedent.

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The rule of the Court unquestionably is, that if the Plaintiff takes no step during three terms after the Defendant has placed himself in a situation to require the Plaintiff to proceed, the bill may be dismissed for want of prosecution. It is true that in this case the Defendants are not in the ordinary situation in which a Defendant applies for a dismission of the bill; but the distinction between the two situations is not substantial; they are entitled to require the Plaintiff to proceed; and the question then is, whether the Plaintiff is not bound to proceed within the time, and under the circumstances, in the same manner as in the ordinary course?

At the same time, it must be recollected, that the want of a known rule of practice may have occasioned some mistake. I shall therefore order the instrument to be produced on or before the third seal, or the bill to be dismissed with costs; but with liberty to the Plaintiff to make, at the first or second seal, an application founded on affidavit, for an enlargement of the time. Considering the importance of this case as a precedent, I shall pronounce the order in that form.

The LORD CHANCELLOR. *June* 30.

I retain the opinion which I expressed yesterday, and which I think confirmed by the circumstance that the cross bill has not been answered.

The order, after reciting the order of *March* 1818, and an affidavit that the deponent on the 15th of *June* instant, with Mr. *R. W.*, the clerk in court for the Defendants, applied to Mr. *B.*, the clerk in court for the Plaintiff, and inquired of him whether the promissory note or instrument in writing bearing date the

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the 24th day of *August* 1814, in the bill and in the said order mentioned, was in the hands of Mr. *B.*, or had at any time since the date of the order been deposited in his hands; and that the deponent and Mr. *W.* were informed by Mr. *B.* that the promissory note or instrument in writing was not in his hands, and that it never had been produced or left with him since the date of the order; proceeded thus: "This Court doth order that the Plaintiff, Her Royal Highness *Caroline Augusta* Princess of *Wales*, do produce and leave with her clerk in court, on or before the third seal after this term, the promissory note dated, &c.; and in default thereof that the Plaintiff's bill be dismissed out of this Court, with costs to be taxed, &c.; but the Plaintiff is to be at liberty in the meantime to make an application to this Court, founded upon an affidavit, for farther time to produce the same."— Reg. Lib. B. 1818. fol. 1290.

July 26. The *Solicitor General* stated that no affidavit had been filed, and applied for an order that the bill might be dismissed.

The Lord Chancellor declared that the Plaintiff must have the benefit of the whole seal; but Mr. *Shadwell* intimating that no affidavit would be filed, an order was pronounced, dismissing the bill with costs. (*a*)

(*a*) The principle of the order for production by the Plaintiff of documents constituting the foundation of the demand, before the Defendant can be compelled to answer, seems to have been recognised, though not, under the circumstances, applied, in *Pickering* v. *Rigby*, 18 *Ves.* 484., and *Micklethwait* v. *Moore*, 3 *Mer.* 292.

APPENDIX.

MORRICE *v.* The Bank of ENGLAND. (a)

IN CHANCERY, MICH. 1736.

The priority of creditors by decree over subsequent judgment creditors, established.

THE Lord Chancellor began by saying that it would be more agreeable to natural equity and justice to have the assets distributed *pro rata*, as one debt is as much a debt in conscience as another; and that he could have been glad that all the creditors would have had temper enough to consent to so equitable a rule, but that not being consented to by some creditors who thought they had the advantage, he considered it a defect in the law, that it should not be in the power of either a court of equity or a court of law to inforce a distribution of assets *pro rata*, among the creditors, without consent. This Court, in the distribution of legal assets, follows the rule of law that allows a preference to creditors who have made use of legal diligence in getting in their debts. Here, courts of equity and courts of law have concurrent jurisdictions; a legal creditor may bring a bill for a discovery of assets; and the more ancient way might be to bring a bill for a discovery alone, but now bills are brought for a discovery and a satisfaction too: only in a court of equity there is this advantage, that the parties may have the oath of executor with respect to the distribution of

(a) *Vide ante*, p. 542.

assets,

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assets, which cannot be had at law, and an account may be more conveniently taken in this Court; and in cases of debt or account against an executor, this Court has a concurrent jurisdiction with courts of law; but if this Court should not follow the same rules in the administration of legal assets as courts of law, there would be the utmost confusion, and executors would not know how to act. In the present case, these assets are legal not equitable.

The 1st question will be, whether any of these creditors who stood upon an equal footing at the death of Mr. *Morrice*, have gained a preference by what has happened since?

2d. What will be the consequence?

3d. Whether the executrix can have any, and what relief in this Court?

In the present case some are simple contract creditors, others are creditors by judgment, and others by decree, and the general question which has been so much spoken to at the bar is, whether a decree of this Court is equal to a judgment at law? And in the consideration of this point several gentlemen have gone into the antiquity and extent of jurisdiction of the several courts of equity and law; but questions of this kind are, I think, greatly to be avoided, unless they are required to give some light to the matter in dispute. The contentions that have been between the several courts are now, happily, laid asleep, and I have no desire to revive them: but I cannot see why a decree of this Court is not equal to a judgment at law. This Court does not review judgments, nor does a court of law review decrees; yet when a judgment at law is obtained, and the party who ob-

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tains it would make an ill use of it against conscience, this Court will then interpose. Judgments are in their nature equal till they are reversed, in what court soever they are obtained; a judgment in a court of record by grant, is equal to a judgment in a court of record by prescription; and a judgment in a court of pièpoudre is equal to a judgment in any of the superior courts.

This is an evident demonstration, that, in consideration of law, it is not the antiquity or extent of jurisdiction of any court that will determine the rank wherein judgment creditors may stand; but in decrees and judgments the obligation upon the party to perform is the same. A judgment of law is executed by a writ of *capias ad satisfaciendum*; and cannot a man in this Court be taken upon an attachment, for not performing a decree? A judgment at law may be executed by a *fieri facias* or *elegit*, given by statute. So may a decree of this Court by a sequestration; only in this respect this Court is more effectual in its execution than a court of law; for if the party remains in prison for non-performance of a decree, his goods and lands may be sequestered at the same time; but at law, the party having once made his election to take the body in execution, could not have recourse to the land.

Some decrees in this Court bind lands, as in *Lord Carteret* v. *Paschal* (*a*), which case, as far as is material to the present, is as follows. The lady, by articles before marriage, was entitled to an annuity of 500*l*., out of the intended husband's estate, but the husband died without executing the articles, leaving several large incumbrances on his estate. After his death the lady brought her bill against the heir to compel an execution

(*a*) 3 *P. W.* 197. 2 *Bro. P. C.* ed. *Toml.* 10.

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of these articles, and the several incumbrances being before the Court, it appears that the estate was so entangled that she could not have a settlement made in pursuance of the marriage agreement; therefore it was decreed, that the lady, if she was minded, might redeem the incumbrances, and that she should hold the land till she should be satisfied what she should advance in paying off the securities, and all arrears of her annuity, and that she should be let into possession of the lands; and it was referred to the Master to take an account of the debts, &c. But before the Master had made his report she married Dr. *Herbert*, who assigned the profits to a third person, and he dying, and she too some time after, then the dispute lay between the administrator of the wife and the assignee of the husband; and the decree was to hold till her representative was satisfied; which was similar to the estate or interest of a tenant by *elegit*.

This shews that decrees of this Court are similar to executions of law. Decrees and judgments are equally conclusive upon the parties till reversed, and therefore I cannot see why they should not stand on the same footing, though I am at the same time apprised, that the uniform judgments of courts of law have been otherwise. If an action of debt be brought upon a bond, a decree of this Court is not pleadable; this opinion hath obtained for law, but this Court hath been of another opinion with regard to its own decrees. In the case of *Searle* v. *Lane* (*a*), this Court, in justice to its own decrees, was of opinion that a decree was equal to a judgment at law, and the filing a bill in this Court equal to the filing of an original at law, to prevent the alien-

(*a*) 2 *Vern.* 37.

ation

ation of assets. So, in *Shafto* v. *Powell* (*a*), in the Exchequer, which was said at the bar to be an impartial Court, as being both a court of law and equity; *Bishop* v. *Godfrey* (*b*), *Sims* v. *Murrey*, and *Harding* v. *Edge*. (*c*) And it is not to be wondered at that this Court hath found means to enforce its own decrees. If this Court hath a jurisdiction, a decree must have the same lien on the assets as a judgment; if it should be otherwise, either the parties must be ruined, or a subsequent judgment must in effect be a reversal of a former decree. The case of *Joseph* v. *Mott* (*d*) is in point; that a prior decree must be preferred to a subsequent judgment. The case was, a man made his will, and died indebted to several persons by bond, more than his personal estate would pay. A bond creditor of the testator brought a bill against the executor to have a discovery and account of the personal estate, and satisfaction for his debt; at the hearing the executor made default, and there was a decree against him for an account and satisfaction out of the assets *nisi*. Before the decree was made absolute, another bond creditor of the testator brought an action of debt against the executor upon a bond, who, because he could not plead this decree at law, suffered judgment to go against him by default; and the account being carried on before the Master, the question before him was, whether he should allow this judgment in the account; and he being in doubt reported the matter specially to the Court for their direction. The Master of the Rolls was of opinion that the decree must be preferred; and it coming on to be reheard before the Lord Chancellor, he was of the same opinion.

(*a*) 3 *Lev.* 355.
(*b*) *Prec. in Cha.* 179.
(*c*) 1 *Vern.* 143.
(*d*) *Prec. in Cha.* 79.

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In *Abbis* v. *Winter* (*a*) the bill was brought by the bottomry creditors against the executor, and the contention was between creditors under two decrees; it was

(*a*) ABBIS and Others, Creditors of WINTER, *v.* WINTER, the Executors.

16th *July* 1733.

Creditors under successive decrees, are entitled to payment according to their priorities.

Winter was a supercargo to *Buenos Ayres;* the Plaintiffs creditors by bottomry bonds. The bill prayed discovery of assets and payment. The Defendants, by answer, admitted the bonds; set forth an account of the estate, which was not near sufficient to pay the debts, and submitted to account.

The decree directed an account of assets, and of debts due to the Plaintiffs, and that they should be paid in a course of administration.

In *Moore* and others, creditors of *Winter*, the bill prayed an account and reference to Master; and the decree was made 30th *July* 1731.

8th *June* 1732. The Master made his report in both causes, and certified the debts due to the Plaintiffs in both; and the assets, the same to be paid to the Plaintiffs and their administrators; but that the monies specified to be remaining in the Defendant's hands are the same estate of the testator which the Master had mentioned in his report of even date in a cause of *Moore* v. *Winter*.

2d *May* 1733. The executors took exceptions to both reports.

The *Lord Chancellor*. At law, after an action is brought, executors cannot pay any debts of an equal nature; it is no plea that he hath not assets *præter* sufficient to satisfy a debt of equal nature; therefore, by suing out a writ, the Plaintiff obtains preference to all other creditors of an equal nature, and is to be paid before them, according to a legal course of administration; serving a subpœna and filing a bill are equivalent in equity to writ and declaration; and as equity follows the law, it must give the like preference to the Plaintiffs as an action doth at law to all debts of like nature. Therefore, the Plaintiffs having first filed their

was held, that the executor was to be charged but once, and the creditors who had obtained the first decree were to be paid first, and that the executors were not to

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their bill, as the decree is to be paid out of assets in the course of administration, are entitled to be paid before other creditors of an equal degree; for that is the legal course; and therefore the decree hath determined what is now disputed.

After a judgment by confession, an executor is even excluded to say he hath not assets to pay that judgment; neither can he set up any debts of what nature soever to postpone or hinder the Plaintiff from a satisfaction. The law gives no opportunity of setting up a debt of a superior nature to that of an inferior, except before a plea pleaded; because the Plaintiff may reply *per fraudem*, &c., but could never otherwise controvert the debt; and if a court of equity should give time for an executor after a decree to set up a debt, not only of a superior nature, but equal, which in no case by law can be done, it would open a large gap for frauds.

2d *May* 1733. Between *James Abbis, John Chanwell, Anthony Lubier, Mary Hanger* and *Elizabeth Hanger*, executrixes of *John Hanger*, esq., *Henry Lapostre, John Salter, Thomas Lane, Robert Brooke, Thomas Salter, Thomas Claphamson*, and *Jonathan Hooper*, creditors of *Nehemiah Winter*, deceased, upon bottomry bonds, Plaintiffs; *Phœbe Winter*, widow, and *John Cook*, gentleman, executors of the said *N. Winter*, Defendants.

Between *Ambrose Moore*, esq., *Charles Brime, James Goodchild, John Merry*, and *James Farnaby*, creditors of the said *N. Winter*, deceased, on bottomry bonds, Plaintiffs, and the said *Phœbe Winter* and *J. Cook*, executors of the said *N. Winter*, and others, Defendants.

The matter of the several exceptions taken by the Defendants, *Winter* and *Cook*, to two several reports made in these causes by Mr. *Allen*, one of the masters of this Court, dated respectively the 8th of *June* last, coming this present day to be argued before the Right Honourable the Lord High Chancellor of

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to be liable to the demand of the creditors further than the assets would extend. This confirms me in the notion that a decree binds the assets from the time of pro-

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Great Britain, in the presence of counsel for the said Defendants and Plaintiffs in both causes, and the first and second exceptions to both the said reports being opened, upon debate of the matter, and hearing an order of the 11th of *October* last for setting down the exception taken by the said Defendants in both causes to be heard at the same time; the decree in the cause *Abbis and others* v. *Winter and others*, dated the 16th day of *July* 1731; the decree in the cause *Moore and others* v. *Winter and others*, dated the 30th *July* 1731; the Master's report made in the cause *Abbis* v. *Winter*, dated the 8th of *June* 1733, and the schedules thereto; the objections taken by the Defendant to the said Master's report; the bill exhibited by the Plaintiffs, *Abbis and others*, against the Defendants; and the bill exhibited by Sir *John Eyles and others* against the Defendants, read; and what was alleged on both sides; His Lordship held the first and second exceptions to both the said reports to be insufficient, and doth order the same to be overruled: and the two third exceptions taken by the said Defendants to both the said reports being opened, and the said Defendants' third exception to the report made in the cause wherein the said *Moore* and others are Plaintiffs, being for that the said Master hath certified that the money reported to be remaining in the Defendants' hands, and to be liable to the Plaintiffs' demands in that cause, is the same money which he hath mentioned in his report made in the said *Abbis*'s cause, and to be liable to the Plaintiffs' demands in that cause, whereas the said Master should have certified that the said money ought to be applied in satisfaction of what was reported due to the Plaintiffs in each of the said causes, the said money not being near sufficient to discharge what is found due to the Plaintiffs in the said other cause alone, which is prior to the cause wherein the said *Moore* and others are Plaintiffs, and by reason

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pronouncing it. There is a case mentioned by Mr. *Green*, of *Jones* v. *Bradshaw* (*a*), 4th *May* 1661, where an executor had paid a sum of money, pursuant to a decree of this Court, and upon a plea of *plene administravit* they would not permit him to give that payment in evidence at law; but the Court decreed that it should be allowed; decrees and judgments, therefore, in the administration of legal assets, must stand on an equal footing; that which is prior in time, be it a judgment or a decree, must be first satisfied out of the assets.

The next thing to be considered under this head is, what is said by the judgment creditors, that though in fact the decrees were prior in time to the judgments, yet the judgments having relation to the first day of the preceding term, must in contemplation of law be con-

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reason thereof the said Defendants are in danger of being doubly charged with the same sum, upon debate of the matter, and hearing the decree made in the cause wherein the said *Moore* and others are Plaintiffs, and *Winter* and others Defendants, and the report made in the cause wherein the said *Moore* and others are Plaintiffs, read, and what was alleged on both sides, His Lordship held the third exception taken by the said Defendants to the report made in the said *Abbis*'s cause, to be insufficient, and doth order that the same be overruled; and held the third exception taken by the Defendants to the report in the said *Moore*'s cause, to be sufficient, and doth order that the same do stand and be allowed; and that the Plaintiffs, *Abbis* and others, have the 5*l.* deposited by the Defendants with the registrar, on filing the said exceptions to the report made in that cause, and that the Defendants do take back the 5*l.* deposited by them on filing the exceptions to the report made in *Moore*'s cause. — Reg. Lib. A. 1732. fol. 294.

(*a*) 2 *Freem.* 153. 3 *Rep. in Cha.* 2. *Nels.* 74.

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sidered to be signed on that day, and then they will be before the decree. But certainly this Court must attend to the truth of the fact; into which even the courts of law may examine; *Prodger's* case (*a*), *Co. Litt.* 150., *Anon.* (*b*) In the first case the Court interposed to prevent the doctrine of relation from working an injury; and it is a maxim in law, in *fictione juris semper subsistit equitas.* Courts of law admit of relations to substantiate their own judgments, but do not admit of them when they become injurious. Why may not a court of equity do the same with regard to its own decrees? Shall a judgment *ex post facto* by relation take away those very assets which before were bound by a decree? It would be absurd; and no fiction of law ought to be admitted to give priority among creditors. But it is said that these decrees were obtained *per fraudem*, and by collusion between the parties, in order to give an undue preference to such creditors as the Plaintiff chose to favour. Whatever is done by fraud is to be sure a nullity; and nobody ought to be injured by it. It must be owned that Mrs. *Morrice* put in her answer before she was, by the rules of the Court, obliged to do it. That her answer is an admission of the bill; that she appeared gratis without a subpœna to hear judgment; and I could wish that the decrees had been obtained in a more adversary manner. But suppose these are decrees by confession, what will be the consequence? Will the consequence be that fraud has been made use of in obtaining them? When a judgment at law is confessed, is the confession of it evidence at law of a fraud? Was such evidence ever allowed? If not, why should a decree by consent be thought so? And as this cannot be admitted as evidence of a fraud,

(*a*) *Sid.* 432. (*b*) *Gilb. Rep. in Eq.* 142.

2dly,

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2dly, The consequence of all this is, that the demands of all creditors under the two decrees must be established, and that those who have performed the decrees may oblige Mrs. *Morrice* to perform them.

As to the 3d question, whether the executrix can have any and what relief, as Mrs. *Morrice* is bound to perform the decree, so also she is liable to the judgment, unless this Court interpose. It has been said, and it is true, that bills brought by executors that there should be a rateable distribution among creditors, though anciently allowed, are not now countenanced, the Court having no right to take away the preference that one creditor gains over another by his legal diligence; besides such bills may be made use of to keep people out of their money: but in this case the executrix cannot be said to give preference, but wants to have it determined who hath gained a preference according to the rules of law and equity. Mrs. *Morrice* comes here for protection, and if this Court does not protect her, she will be liable to make a double satisfaction, first to pay the assets to the judgment creditor; and it is certainly proper for the executrix to come to be protected by this Court when she finds herself embarrassed by yielding obedience to the decrees of it. But then it is said, on the other hand, that she hath brought herself into this dilemma, and therefore ought not to be relieved; yet, with regard to the law, it must be owned that what she hath done is strictly legal, that is, that an executor might confess judgment to one, pay him, and plead that judgment in bar of another's demand; and the original foundation for such a liberty might be given, to prevent an executor being liable to two demands, when the assets were sufficient to pay only one of them. By parity of reason, an executor may confess decrees. This Court hath never controuled

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parties in that liberty, nor hindered the executor from retaining, if he insisted upon it. As this hath not been condemned in equity, what Mrs. *Morrice* hath done is neither contrary to the rules of law nor equity; and though it had been much clearer had these decrees been obtained in a more adversary manner, yet as they are just debts, they must be paid according to their priority.

But then again it is said the Court will not take away the benefit of the law; but that rule takes effect where the demands and the equities are of an equal value; and in this case the debts were equal before the decrees, the creditors standing then upon an equal footing; but as soon as the decrees were made the assets were bound; as in *Taylor* v. *Wheeler* (*a*), where a surrender of a copyholder in fee was void in law for want of a presentment, yet the surrender was a lien and bound the land in equity, though a defective conveyance. The equity of the judgment creditors is to be paid out of the assets. Mrs. *Morrice*'s equity is to pay no more than so far as the assets will extend; and as it is impossible for her to pay any more, and as the assets were first bound by the decrees, her equity must prevail against that of the judgment creditors.

Therefore an account must be taken of what is due to the several creditors, both by decrees and judgments, and also an account of what is due to the other creditors who have not obtained either decrees or judgments. An account must also be taken of the personal estate of *H. Morrice* come to the hands of the Plaintiff, or any other person for her use; and let the same, together with what shall come to her hands thereafter,

(*a*) *Salk.* 449. 2 *Vern.* 564.

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be applied in the first place to pay what shall be found due to the several Plaintiffs under the decree of 25th *January* 1731, and then to pay what shall be found due to the several Plaintiffs under the second decree of the 2d *February* 1731; and after payment of what shall be found due upon the said decree, let the residue of the assets be applied to the payment of the several judgments according to their priority; and if any thing should remain, to be paid in a course of administration. —Lord *Colchester*'s MSS.

COOK *v.* FOUNTAIN. (*a*)

THE bill prayed that the Defendant might be compelled to deliver all the deeds, evidences, and writings concerning the estate of *John Cook* deceased, and that the Plaintiffs might be relieved against several actions at law brought, and distresses taken by the Defendant upon a rent-charge, and two leases of *F.* and *M.* granted to him by *John Cook*; and that the rent-charge and leases, and all other leases and estates made to him by *John Cook* might be surrendered and delivered up to be cancelled.

1st *July*, 27 *Car.* 2. 1672. In the case between *Cook* and *Fountain*, which was largely heard this day, the Defendant took two exceptions against the evidence of *Guavas* for a witness.

When the executor of the grantor is a competent witness to prove the trust of a term.

(*a*) *Vide ante*, pp. 296. 297. n. The following references comprise, it is believed, the principal passages in the printed authorities connected with this case. 1 *Vern.* 413. 1 *Eq. Ab.* 227. 1 *Vent.* 347. 9 *Mod.* 187. 2 *Vern.* 645. *Lords' Journals*, xiv. 55. 79. 356. 407. 409. 425. 449. 462. 464. *Bac. Abr.* tit. *Lease* R.

1. The

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1. The suit was to avoid a rent-charge of 1000*l.* *per annum*, and a lease of *Farnam* royal, granted by *Cook* the testator on pretence of a trust: now *Guavas*, who would prove this trust, was an executor to *Cook*, and so endeavours to make this liable to debts: but this was overruled; because the lease will not be assets however, for the legal estate being in a stranger upon a trust to attend the inheritance, the Chancery will not make this assets in equity; but if such a term had vested in the executor, and so been assets in law, the Chancery would have severed the attendancy, and not taken away assets in law until debts paid, &c.

2. The lease had a covenant that Mr. *Fountain* should quietly enjoy, and there were six shillings and two-pence more to be paid to the king than Mr. *Cook* had reserved to himself to discharge it with, so there was a likelihood of damage to be made good by the executor; but the executor having no assets beyond 4000*l.* which he has paid out, this was overruled; although it was replied that an executor without assets is liable to be sued, though not to pay; for notwithstanding this objection he was heard at law.

Then it was further urged that *Guavas* sues *Fountain* in the Exchequer for all the money he received from the testator, and would make that a trust too; to which it was answered, that this does not make him an incompetent witness, though it shows him to be an earnest one, unless he had recovered there, and then that money would be assets; in the mean time six shillings and two pence *per annum* seem no such great matter as should bias the witness. Lord *Nottingham*'s MSS.

24th *May*, 28 *Car.* 2. 1676. In the great case between *Cook* and *Fountain*, the Court did this day deliver their opinion.

The

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The Defendant was declared trustee of two leases, but entitled to the beneficial interest in a rent-charge.

The Lord Chief Justice *North* began, and held the leases to be a trust; for if they were intended as a bounty to Mr. *Fountain*, why were they not a present bounty in the enjoyment? It is plain all the evidences of enjoyment went with Mr. *Cook*, and ought to prevail as evidence of a trust; for the kindness between Mr. *Cook* that died and Mr. *Fountain*, rather fortifies than weakens the presumption of a trust; for men usually trust them most whom they love best: uses at common law were nothing else but secret confidences; but then it is observable that the law did not put the proof of the trust upon him who claimed the secret confidence, but it put the proof upon him who claimed the estate, to show for what consideration he held it, else a use did arise to the donor. The rent-charge, he said, stood upon other measures, for there a bounty was intended, and Mr. *Fountain* is not to be blamed that he did not sue for it in Mr. *Cook*'s lifetime; for to commence a suit against his benefactor had been ungrateful; and the Plaintiff's counsel admits it was a gift at first, but would have it afterwards a trust to be discharged by other provisions; wherein he distinguished what he believed from what he would advise; he seemed to believe it might be so, for else he could not choose but wonder why Mr. *Fountain* never brought the rent to account, why Mr. *Cook* should be so very preposterous in his bounty, as thus to encumber his estate and his person, why *Fountain* made privy to all the diminutions of the security, why the letter to provide for *Andrew Fountain*, &c. did not mention the rent-charge, why the grand settlement did not expressly save it; for it was a considerable question whether he, being a party to the conveyance, and taking an estate to uses, had not extinguished his rent-charge, though now it be adjudged that he has not; why the money raised by sinking the value of the land charged, should be given to *Fountain*, if

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if it was not intended that the rent-charge itself should be dissolved into money; why did *Fountain* in his answer in the Exchequer say *Cook* meant him 20,000*l.*, for it is natural to believe this a satisfaction; why did *Fountain* send a complaining answer when Mr. *Cook* sent for the deed; but this cannot well be examined, unless *Guavas*, who was Mr. *Cook*'s executor, was party, and then if it should be made to appear that Mr. *Cook* intended to redeem it by the payment of 20,000*l.*, though Mr. *Fountain* did not intend it, yet surely he must refund the money to the heir, and cannot have it double; why did not Mr. *Fountain* commence a suit in Mr. *Cook*'s lifetime, that so *Cook*'s answer might appear (*a*)? But if an account could be taken, and there were proper parties for it, lying still so long would be some evidence of an agreement to take a compensation for it.

Lord Chief Justice *Raynsford* agreed that the leases were a trust, and not a bounty; for the grant of the rent charge was presently after the father's death, and two years before the leases, when no cause of additional bounty appears: and as to the rent-charge, he also agreed that it might grow up into a trust afterwards, if money was given in recompence; but that could not be examined now for want of apt parties.

I said, this case has long depended in court; it had great agitation when I was at the bar, and it has waited for judgment a great part of the time since I came to the bench. The deliberation has been very necessary, for there were once some hopes of a compromise, and when they ceased I appointed a rehearing before the two Lord Chief Justices now present, who were not here

(*a*) "*Note.* This question *North* himself answered before." — Orig.

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at the first debate; and now it appears to be the greatest case in court. It is great in value, great in expectation, and greatest of all, in the consequence of it; it is a case of great variety in the proofs, and of very new circumstances; it is a case wherein the Court may be in danger of taking too much or too little latitude for the future, according to the event of this precedent. In short, it is a case so full of argument on both sides, and has been so elaborately pressed at the bar, that a man who shall err in his judgment, shall do it at least very excusably. In the delivery of my opinion, I shall endeavour to make it appear to you that all which has been said on each side, has been sufficiently considered and ruminated upon, as far as my meditations were able to carry it.

The matters in question are two, the leases, and the rent-charge; and the point controverted is, whether all, or any, or none of these, be in trust for the plaintiff, who is cousin and heir of the grantor? The Plaintiff contends for all; the Defendant would keep all: the truth lies between them.

1st. To avoid repetition of matter of fact, I will first take notice of such general proofs as go to *both* leases and rent-charge, and tell you my opinion of them; 2d, then I will observe the particular proofs and circumstances, wherein the leases and the rent-charge are not distinguished; 3d, lastly, I will state the several and clear differences between them.

The Defendant has taken pains to prove these things in general: 1st, that Mr. *Cook*, the grantor, had great kindness for the defendant, and a settled and constant intention to advance him; 2d, that there were great reasons for these intentions, and great merit in the Defendant and his father by many acts of friendship; 3d, so

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3d, so great, that the Defendant tells him plainly in a letter, if you have given *Andrew* sixpence, he has gained you eighteen pence for it; and it is not hard to guess what was meant by that expression; 4th, he proves many kind letters and sayings of Mr. *Cook*; once to the Defendant's father, you need not take care of your son, I will provide for him; another to *Guavas Daubb*, your care in the settlement is, that if any trouble *Andrew*, his estate may be forfeited; and at another time he said, as *Andrew* has had part of the sour, so shall he have some part of the sweet; together with a multitude of fond and familiar letters; 5th, the continuance of this kindness, in a great measure, till within few days of his death; during all which time he continued Mr. *Cook*'s executor; and upon this account it is, that the Defendant excuses his not contesting with Mr. *Cook*, but suffering him to do several acts which carried with them the badge of ownership; 6th, and lastly, he has endeavoured to insinuate that Mr. *Cook* had no extraordinary concern for his next heir, but had always an extraordinay care to conceal his bounty.

These things make a mighty show on the Defendant's side, especially when the weight and eloquence of the counsel at the bar come to declaim upon them; but I, for my part, have little or no regard of any such kind of proof in this case; and the reasons why I do not regard it are these: 1st, because it proves too much, for it goes as well to the leases as to the rent-charge; now, I that hold a manifest difference between the two cases, stand obliged not to ground my opinion upon any proof or reasons that are common to both; 2d, because *Fountain* is Defendant, and in possession of an estate given him by deed under hand and seal, and he that is so need not bring proofs to keep his estate, it is the Plaintiff must bring proofs to take it from him; 3d, the Defendant's

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fendant's case is never to be favoured in Chancery, and so all general proofs of equitable circumstances are vain; if he were Plaintiff and needed the relief of this Court, he ought to be dismissed, for his title being only *donum gratuitum* must take its fortune at law, and cannot be assisted here; and when he is Defendant, he must keep nothing which the Plaintiff has any equity to demand against him; and for these reasons, I throw all these general proofs quite out of the case.

I should now come to particulars, and consider where and in what part of the case a general or a qualified trust may be found, and where the case stands free and clear from being affected with any kind of trust at all; but before I do this, I hold it necessary to lay down some rules and distinctions touching trusts, which I must keep to, and by which I must govern myself in all cases whatsoever.

Classification of trusts.

All trusts are either, first, express trusts, which are raised and created by act of the parties, or implied trusts, which are raised or created by act or construction of law; again, express trusts are declared either by word or writing; and these declarations appear either by direct and manifest proof, or violent and necessary presumption. These last are commonly called presumptive trusts; and that is, when the Court, upon consideration of all circumstances presumes there was a declaration, either by word or writing, though the plain and direct proof thereof be not extant. In the case in question there is no pretence of any proof that there was a trust declared either by word or in writing; so the trust, if there be any, must either be implied by the law, or presumed by the Court. There is one good, general, and infallible rule that goes to both these kinds of trusts; it is such a general rule as never deceives; a general rule

Nature of presumptive trusts.

daughter; if the estate was her own already, why did she confess the trust to the tenants, and why did her husband speak of it to strangers?

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II. Having shown you what proofs I do not regard, and what rules I must ever proceed by, I come now to the several parts of the case, and will examine the proofs upon which they stand, and the presumptions which may arise upon those proofs.

First, then, for the leases. I am clear of opinion that Mr. *Fountain* has no estate in the leases but what this Court ought to presume to be in trust for Mr. *Cook*; for it is impossible to be otherwise, when a man considers the several badges of ownership, and how Mr *Cook* acted all along as lord and proprietor of this estate, notwithstanding the Defendant's conveyance. 1. No possession ever went with this lease; 2. Mr. *Cook* kept the courts, his steward granted the copyholds; 3. the Defendant sold woods in Mr. *Cook*'s name, and in his name took security for the money; 4. the rents and monies for wood sales were always received by Mr. *Cook*; 5. Mr. *Cook* repairs the houses, gives directions to new build, sends down surveyors, and is encouraged so to do by the defendant; 6. the tenant desired of Mr. *Cook* a new lease, and was refused, because he intended to build there; 7. yet the Defendant did afterwards promise to procure him a lease upon security; why so, if he alone had power to make one? 8. when *Richardson* intruded upon part of the manor, the defendant advised Mr. *Cook* to bring ejectments in his own name; 9. Mr. *Cook* and those in the remainder by the grand settlement had power to commit waste, and make jointures of the lands demised; 10. Mr. *Fountain* sealed no counterpart, and yet there were some covenants on his part to

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perform; 11. the lease of *Farnam* was no part of Mr. *Fountain*'s particular when he treated a marriage; 12. it was made seven years before Mr. *Cook*'s death, yet the Defendant never entered till after, viz. after *August* 1671; 13. and upon the lease *Milam*, Mr. *Cook* reserved a less rent than he was to pay to the king.

I do not mention the proposal of a new lease at Mr. *Raymond*'s chamber, which implies he had not before, because it may be answered; but all the rest of the circumstances are unanswerable, and if it were left to a common jury, they ought to presume a surrender in this case, and doubtless they had been directed so to do when it was tried before my Lord Chief Justice *Hale*, but that they and all the Court thought that the Chancery would presume a trust; and now it would be very strange if the Defendant should escape a verdict for a surrender because of the presumptive trust, and escape a decree for the trust here, because of the presumptive surrender. Therefore I make no difficulty to declare the Defendant's estate in the lease to be a trust attending the inheritance.

I come now to the rent-charge of 1000*l. per annum*, and herein will observe, 1. how many of those circumstances which are found in the lease, are likewise found in the rent-charge; 2. how many more circumstances there are tending towards a presumptive trust; 3. what are the true reasons and differences by which they are distinguished.

1. The case of the rent-charge agrees with the leases in these particulars; 1. there was never any possession of it; for that which is pretended by Mr. *Fountain* to be had by the payment of himself when he received the rents, will not do for several reasons; 1. because it was a pos-

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a possession not given but stolen, and accompanied by surprise, for Mr. *Cook* never knew it nor took notice of it; 2. it was not possible for him to take notice of it, for the rent-charge was neither brought to account nor demanded as an allowance, but the sums received were extinguished by the bounty of a general release; 3. the nature of the release shows that there could be nothing in it like a claim or possession of the rent-charge, for then Mr. *Fountain* should have given, not taken a release; II. the rent-charge was no part of Mr. *Fountain*'s particular upon his treaty with his first wife; III. Mr. *Fountain* never sealed a counterpart, yet it was by indenture; IV. the differences between *Cook* and *Fountain* happened in 1669, yet the Defendant never offered to enter till two years after, viz. *August* 1671, when *Cook* died; V. Mr. *Cook* and those in the remainder had a power by the grand settlement to make jointures of the land charged, viz. *Minster* level, and a power to make leases at what rent they pleased, and to this settlement Mr. *Fountain* was party and privy to the directions concerning it.

II. There are other circumstances in the case of the rent-charge which are not found in the case of the leases, and yet have a farther tendency towards a presumptive trust; viz. 1. in *July* 1663 *Fountain* accepts an authority from Mr. *Cook* to contract for estates in *Minster* level, part of the land charged, and he does so by reducing 280*l.* *per annum* to 80*l.*, by taking a fine of 1200*l.* which was secured by a re-demise to Mr. *Cook*, to which *Fountain* was a witness, and Mr. *Cook* received the money; 2. in *January* 1664 Mr. *Fountain* took a lease for life in the name of *William Pawlett*; 3. Mr. *Fountain* took the assignment of a lease for forty years of *Flitcham* to himself, which was also a part of the land charged, and works a suspension; so by the

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first act the value of *Minster* level abated; by the last, in *Flitcham* the rent-charge was suspended; so there remained only *Apleton* of 80*l. per annum* to answer 1000*l. per annum*; 4. *Wheeler*'s re-demise to *Cook* was assigned to Mr. *Fountain* for the residue of ninety-eight years, so there is another suspension in *Minster* level, and this suspension was pleaded by the Plaintiff in bar of Mr. *Fountain*'s avowry, and it is not enough to say, that however the arrears will charge the reversion; for, as Mr. Attorney says well, where the suspension is by act of the parties, there the rent ceases *pro tempore*, and does not run on in arrear; and who that was in his wits would put off his money so long, if it was not a trust? 5. Mr. *Cook*, when he thought Mr. *Fountain* well enough settled, writes to have the deed of the rent-charge delivered up, and Mr. *Fountain*'s first answer seemed to promise it, at least did not refuse it; and this has weight in it.

Under a suspension of a rent-charge by act of the parties, the rent ceases *pro tempore*.

III. It remains now to be considered, what are the circumstances which differ the case of the rent-charge from that of the leases, and what grounds and reasons the Court has to make a different decree. It cannot be denied that the arguments used to make the rent-charge a trust or a security are very considerable; and though advocates may think themselves obliged to give some kind of answer to every argument, the Judge who holds the scale is not so; for the lightest scale has always some weight in it; but the duty of a Judge is to cast the balance on that side which ought to preponderate. This will best be done by observing the differences between the case of the leases and the rent-charge, which are these: I. the rent-charge was expressly given, and given with great deliberation, and with many preparatory circumstances; the leases were no otherwise given than every estate which is conveyed in trust is given,

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given, that is, by sealing and delivery of the deed. II. The circumstances in granting the rent-charge were these three: 1. a letter sent to Serjt. *Fontayn*, with directions to draw a deed with a blank for the sum; 2. the filling up the blank with his own hand, when the deed was drawn by another, finding it agree with his directions as to parcels; 3. the strict and unusual clause in the deed, viz. not only a distress, but a re-entry and retainer of the profits without account till the rent-charge be satisfied; and after all, a covenant on Mr. *Cook's* part to pay the rent-charge constantly: nothing of all this can be found in the lease. III. Again, the testimony which arises from the nature of the thing. Leases are often made upon trusts to indemnify sureties, and for other like purposes, but who ever heard of a rent-charge created *de novo*, and then granted in trust? Certainly nothing can be more unnatural and unusual. Had it been a right *in esse* granted over, a trust might have been averred, but to grant a rent *de novo* in trust, or upon security, is foolish; for the trust or the security will be better served by fixing it upon the land itself. IV. The weight of these reasons is such, that the counsel for the Plaintiff have all along confessed that the rent-charge was not originally a trust, as the leases were; but they have endeavoured to urge that the rent-charge should be a temporary security, till a competent provision was made for Mr. *Fountain*, and after that it became a trust; and, without doubt, if there be any reason to take this rent-charge for a security, the consequence is infallible, that it must be a trust, after satisfaction; so that the Plaintiff's counsel had great reason to employ all their skill in pressing the Plaintiff's case in this manner. V. But then to show that this surmise can have no place, these things are to be observed; 1. the case is not so laid in the bill, nor charged in the pleadings, nor offered at in the proofs, but the wit of

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counsel has found out this invention at the bar, only to solve the phenomena, and to make the case consistent with itself, and so confess and avoid the Defendant's proofs; 2. no intention of Mr. *Cook* to re-purchase the rent can turn an estate into a security, no, nor make *Fountain* accountable for the money given, unless Mr. *Fountain* was privy to the intent, and consenting to it, and yet there is no proof of any such intention in Mr. *Cook*, much less of Mr. *Fountain*'s agreement to it; all is but fancy and conjecture; 3. the Plaintiff's counsel did not go this way at the first hearing, but insisted generally upon a presumptive trust, and laboured to show some kind of practice in obtaining it, which they could not make out; indeed at the second hearing this notion was taken up, and the state of the case varied; 4. if the rent-charge was only intended as a security until a competent provision made, then I ask these six questions, 1. What was the sum intended to be secured? was it 20,000*l.*, as adequate to the rent-charge, and suitable to the Defendant's answer in the Exchequer, if you have not yet had, I will make it up 20,000*l.*? This is mere conjecture, for that answer did not relate to the rent-charge, but to Mr. *Cook*'s releases of accounts. 2. Why did not Mr. *Cook* limit his own bounty in the deed itself? 3. Why did not Mr. *Cook* direct Serjeant *Fontayn* to add such a proviso to the deed, for it is usual to grant rents or annuities until a man be convenably promoted? 4. Why did not Mr. *Cook* take account from time to time what he had done towards it? why did he give Mr. *Fountain* releases by way of provision, and take none from him to show how far the matter was advanced? 5. Why a rent-charge by way of security without defeasance, why not rather an estate upon part of the land, or a mortgage? 6. Lastly, whether, if this rent-charge had been but 100*l.* a year, any man would think fit to make a strain and turn it to a security,

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a security, then how can the quantity of the rent alter the quality of it? VI. If I should leap over all these difficulties, and make a strain for the Plaintiff by supposing it a security for 2000*l.*, yet there can be no decree for the Plaintiff, without decreeing him to pay the money; for there is no proof in this case of one penny satisfied, all the receipts proved, are proved to be disbursed again, and all that is released is questioned in the exchequer; so there is no uncontroverted provision in the case. VII. Therefore, to turn a fixed estate into a security, in hopes that it may end in a trust upon account, is more than I dare do without some better ground for it than conjecture and inferences. God forbid that such proofs which are not convincing, should take away any man's estate. VIII. All this while you see I lay no weight upon the testimony of Mr. *Raymond*, though I hold him to be a very valuable person, nor upon the discourse at his chambers, where no trust nor security was mentioned; and yet if *Guavas*, who was no friend to *Fountain*, had ever heard of such a thing, it is likely it would have come out then. IX. Again, I lay no weight upon it, that the Defendant in his answer has sworn there was neither fraud, trust, nor security in the matter, and that the Defendant has in a manner waged his law upon this point, and brought six witnesses along with him, who swear the same thing; the reason is, because the discourse at Mr. *Raymond*'s chambers, and the Defendant's answer and witnesses, may as well be applied to the leases as the rent-charge, between which I hold a manifest difference. X. On the other side I am not much moved with it, that Mr. *Cook* required his deed again and his letter, and that Mr. *Fountain* at first sent a wary and a suspicious answer; for though some weight be laid upon it, yet as Mr. *Cook*'s own letter cannot make himself a title, so neither can Mr. *Fountain*'s cautelous answer turn an estate into a trust or a security; and,

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beside, if sending for writings could make a trust suspicious, the not insisting further on it clears the suspicion again: and it is evident there did not remain a kindness between them ever after that letter. XI. Nor am I moved with the several suspensions, for let them prevail at law as far as they can, yet they are no argument in equity to prove the rent-charge a security satisfied, and consequently a trust; for the first suspension was within a year after the grant, when no satisfaction can be pretended. XII. Though this rent-charge be neither a trust nor a security, yet I do not see that Mr. *Fountain* is like to be much the better for it: for 1., he pretends to no arrears while Mr. *Cook* lived, and that is fit to be decreed; 2. the arrears since are not leviable in law, if there be a suspension in the case; 3. Mr. *Fountain* is never to have any relief in equity, if he need it as Plaintiff; 4. therefore, if the land be suffered to lie fresh, this Court will never oblige Mr. *Cook* to put a distress upon it, as sometimes in other cases it has been done; 5. it will always be in the power of Mr. *Cook* to defeat this rent-charge for a time, by making such jointures and leases as shall be according to the powers in the grand settlement. XIII. If after all this a man will still suppose that there was a secret trust, security, or agreement between the parties to repurchase this rent, which no bill charges, no proof can make out, and the defendant denies upon oath, then it must be such a trust, security, or agreement as is only between a man and his confessor. With such a conscience as is only *naturalis et interna*, this Court has nothing to do; the conscience by which I am to proceed is merely *civilis et politica*, and tied to certain measures; and it is infinitely better for the public that a trust, security, or agreement, which is wholly secret, should miscarry, than that men should lose their estates by the mere fancy and imagination of a chancellor. The rule

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of *nullus recedat a cancellariâ sine remedio*, was never meant of *English* proceedings, but only of original writs, when the case would bear one; and so the Chancellor in 5 *Hen.* 7. understood it (*a*); for otherwise says he, no man need to be confessed.

Therefore, upon the whole matter, I am ready to make any decree for the Plaintiff which will consist with these three propositions; 1. all the leases are in trust; 2. the rent-charge is not so, nor yet a security; 3. yet no arrears incurred in the life of Mr. *Cook* shall be levied; and the Plaintiff ought to have his costs, because he is relieved for part though not for all.—Lord *Nottingham*'s MSS.

"His Lordship declared, as to the two leases of *F.* and *M.*, that there appeared a full and clear evidence of a trust therein for the said *John Cook*, his heirs, and assigns, and doth therefore think fit and so order and decree, that the Defendant do forthwith surrender and deliver up unto the Plaintiff *Robert Cook*, those two leases last mentioned, and all his estate, terms, and interest therein, and in and to the lands respectively thereby demised; and it is further ordered and decreed, that the said *R. C.*, and all other persons to whom the freehold and inheritance of the same lands and premises shall come or descend by virtue of the said settlement made by the said *John Cook*, shall and do quietly hold and enjoy the same lands and premises against the Defendant, and all other persons claiming under him since the bill exhibited; but as to the rent-charge, his Lordship declares that the same not appearing to be either a

(*a*) The passage intended seems to be 4 *H.* 7. 4 & 5, *pl.* 8., where may be found a curious dialogue on the maxim cited, but not precisely to the effect represented in the text.

trust,

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THORN *v.* NEWMAN. (*a*)

14th *November*, 25 *Car.* 2. 1673.

IN this case a point was moved: *Baker* lessee for years in trust for the Plaintiff, married a wife to whom an estate of freehold was limited of the same land; this was said to be a merger of the term, because a freehold in *auter droit* cannot stand with a term in his own right, though it may *è converso*, where the term is in *auter droit*; according to the difference, 1 *Inst.* 338.

A trust term is not merged in equity by the marriage of the trustee to a woman entitled to the freehold.

I said the difference was not clear in law, nor founded upon solid reason, for both parts of the difference have been otherwise resolved; but whatever the law be, it ought to be no merger in equity.—Lord *Nottingham*'s MSS.

(*a*) *Post*, p. 608.

PRIVY COUNCIL.

BLAD's Case.

21st *November*, 25 *Car.* 2. 1673.

PETER BLAD, a *Dane*, seized an estate of *English* subjects in *Iceland* as confiscate for fishing there in derogation of letters patent granted to him by the King of *Denmark*, and then comes into *England*, and is arrested and forced to put in bail. He petitions the Council to have all proceedings staid, and would make this a case of state. The *English* insisted upon it, that they had a right of fishing there, which they had used for fifty years before the seizure in 1668, and ever since; and

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goods of the Defendants for trading in *Iceland*, contrary to certain privileges claimed there by the Plaintiff and others. The Defendants insisted that this was no cause of state, and was *ergo* dismissed from the council table; that the injuries they had suffered were great, and such as were done with some kind of affront to and contempt of the *English* nation; that they had a most undoubted right of trade in *Iceland*, and by the articles of peace with *Denmark*, were to use their commerce with the subjects of *Denmark* without molestation; that if the King of *Denmark* had granted any patents of privilege contrary to the freedom of trade, they were illegal, and a breach of the treaty in question; and if the patents were of ancienter date, they had been dispensed with by the contrary practice, which had suffered *English* to trade there, and so invited the Defendants; that, however, the Plaintiff had already had all the benefit of this Court which he could reasonably expect, for he obtained an injunction till he had examined his witnesses, and now having perfected his proofs, whatever could avail him here, would also avail him at law; wherefore they prayed leave, that now, at last, they might go to their trial at law.

I said never was any cause more properly before the Court than the case in question; first, as it relates to a trespass done upon the high sea, which though it may seem to belong to the cognisance of the admiral, yet I took this occasion to show that the Court of Chancery hath always had an admiral jurisdiction, not only *per viam appellationis*, but *per viam evocationis* too, and may send for any cause out of the Admiralty to determine it here; of which there are many precedents in *Noy's MSS.* 88; and in my little book, in the preface, *de officio Cancellarii*, sect. 18.; and in my parchment book in octavo,

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octavo, tit. *Admiralty* (*a*); secondly, as it had relation to articles of peace, all leagues and safe conducts being anciently enrolled in this court. That it is very true this cause was dismissed from the Council Board, being not looked on there as a case of state, because for ought appeared to them, it might be a private injury, and unwarrantable, and so fit to be left to a legal discussion; but now, the very manner of the defence offered by the Defendants had made it directly a case of state; for they insist upon the articles of peace to justify their commerce, which is of vast consequence to the public; for every misinterpretation of an article may be the unhappy occasion of a war; and if it had been known at Board that this would have been the main part of their case, doubtless the Council would not have suffered it to depend in *Westminster Hall.* But in truth this pretence of articles of peace must needs fail the Defendants; for the articles of free trade are reciprocal, and are understood on both sides, with exception to the laws and customs of each kingdom. Put the case then that a *Danish* ship should trade to the *Barbadoes*, or any other of his majesty's foreign plantations, and were thereupon taken and seized, or should break in upon the privileges granted by his majesty to the *East India* Company, and were there arrested at *Bantam* or *Fort St. George*, doubtless this were no breach of the treaty on our part; and if any of his majesty's subjects who seized that ship at the *Barbadoes*, or judges, should be then molested and prosecuted in *Denmark*, in a private action, for what they did in obedience to the laws of their king and country, it would look like such a breach on their part as might well occasion a further rupture on ours. *Ergo*, to come now to the present case, certainly no case was ever

(*a*) *Post*, p. 664.

better

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better proved; for the Plaintiff hath proved letters patent from the King of *Denmark* for the sole trade of *Iceland;* a seizure by virtue of that patent; a sentence upon that seizure; a confirmation of that sentence by the Chancellor of *Denmark;* an execution of that sentence after confirmation; and a payment of two thirds to the King of *Denmark* after that execution. Now, after all this, to send it to a trial at law, where either the Court must pretend to judge of the validity of the king's letters patent in *Denmark*, or of the exposition and meaning of the articles of peace; or that a common jury should try whether the *English* have a right to trade in *Iceland*, is monstrous and absurd.

Wherefore the whole state of the case appearing now before me, as much as ever it can do in any other place, I thought fit to put an end to it, and decreed that the Plaintiff should have a perpetual injunction to stay the Defendant's suit at law; and that satisfaction should be acknowledged upon that judgment which the Plaintiff had acknowledged to the Defendants as a temporary security till the hearing of the cause.—Lord *Nottingham's* MSS.

COOK *v.* BAMFIELD. (*a*)

10th *February*, 26 *Car.* 2. 1673–4.

THERE are three sorts of bills of review to reverse decrees: 1. Such as are grounded upon new matter discovered since the decree: 2. Such as seek to reverse a decree, as being partly for the Plaintiff and partly against him, and so not large enough; if either

Bills of review classed. After a demurrer to a bill of review for error overruled, the decree is reversed without further hearing.

(*a*) 1 *Ca. in Cha.* 227.

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either of this kind of bills be demurred to, and the demurrer overruled necessarily, the Defendant is to answer, because fact is in issue: 3. Such as assign errors in the body of the whole decree; if this bill be demurred to and the demurrer overruled, the decree is reversed, and the errors allowed, and no further answer or hearing needs, *ver course de Court.* But some object, that as a bill of review of this kind may be answered at first, why not after a demurrer overruled? Solution, because no answer can be but *in nullo erratum.*—Lord *Nottingham*'s MSS.

NURSE *v.* YERWORTH. (*a*)

28th *July*, 26 *Car.* 2. 1674.

An infant *in ventre sa mere*, under a devise to heirs of the body of the devisor begotten and to be begotten, cannot take by purchase the legal fee, the terms of description not amounting to a legal designation of him; but is entitled in equity, by virtue of the apparent intention, to the trust of a term attendant on the inheritance, though merged at law.

THE case of *Nurse* and *Yerworth*, which upon the 22d *November* last was directed to be stated, came now to be argued, and was thus: *Richard Yerworth* senior, was seised in fee of *Snowston*, and other lands in *Leicestershire*; and upon his marriage with the Plaintiff *Mary*, daughter of the other Plaintiff, *Thomas Nurse*, settles them on himself for life, remainder to his wife for a jointure, remainder to his own right heirs; but this marriage settlement, supposed to be made 1st *May* 1649, was out of the case, and waved, because not extant nor proved; so the case arose upon the subsequent matter, and was this: *R. Yerworth* senior, being seised in fee, 1st *March* 1649, makes a lease to the Defendant for ninety-nine years, in trust for such persons as he by his will should appoint, and 9th *March* 1649,

(*a*) *Rep. Temp. Finch.* 155. 2 *Mod.* 8. See *Trower* v. *Butts*, 1 *Sim. & Stu.* 181.

makes

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makes his will, and limits the profits for twenty years, to go towards debts and legacies; and after twenty years, to the use and behoof of the heirs of my body on the body of *Mary*, my now wife, begotten and to be begotten, for ever; and for lack of such issue to the Defendant in fee: and upon the 24th *March* 1649 the testator died, leaving his wife *grosment enceint* of a son, which within one month after was born, and named *Richard Yerworth.*

Differences happening, and an award being made, that the deeds and writings should be delivered to the Defendant, and also the possession of all the child's lands when he died; after this the child comes of age, and in *May* 1671 suffers a recovery, and by his will devises to the Plaintiff for life, with several remainders over: then *R. Yerworth* jun. dies; the Defendant enters upon the lands not in jointure, but to aid trial the Plaintiff exhibits a bill, and confesses a judgment in *eject. firm.* with a *cesset executio* till hearing in Chancery; but by his answer claimed only the residue of the term for ninety-nine years, whereof the legal estate was in him, and seemed to rely upon the award and bond for possession; but at the hearing his counsel claimed the fee simple, and insisted, that *R. Yerworth* junior had no estate to devise, but that the will of *R. Yerworth* senior was void, wherein were these questions: 1. Whether an infant, born within a month after his father's death, can take by the will of *B. Yerworth* senior, of 1649, as it is penned?

It was agreed, that at common law a devise to an infant *in ventre sa mere* was good of customary lands. (*a*) The doubt since the statute of 32 *H.* 8. *c.* 1. is, because

(*a*) 11 *H.* 6. 13.

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The consequence whereof is, that seeing the contingency did not happen at the time of the testator's death, at which time the will ought to take effect, *ergo* for want of an heir of the body then in being, the remainder in fee to the Defendant vested presently by purchase, which no after-born son could devest; and of this opinion I was.

2. What should become of the term for ninety-nine years? It was said for the Defendant that this term was merged in law by the accession of the remainder in fee to it; and that by the original trust this term was to attend the inheritance, so that upon both these accounts the defendant ought to keep it, the rather, because the Defendant's case, as to this point, was much better in equity by being Defendant, and not Plaintiff; and especially by being Defendant at the suit of *Nurse*, and not at the suit of *R. Yerworth* junior, who, as it appears, enjoyed it all his life, and now by his will hath given it away from the family; and it was farther pressed, that to set up this term in equity against the Defendant were contrary to the testator's will, who appointed that after his death, without issue, it should remain to the Defendant, which accident hath now happened.

I said that so long as the Plaintiff had a good opinion of his title in law to the inheritance which should attract the term, it was in vain to enter upon the second question, and *ergo* to the law I would leave him; but supposing, as I do, the law to be against him, then there would arise two questions in equity; first, whether if *R. Yerworth* junior were alive and Plaintiff, this Court would suffer him who had lost the inheritance by rigor of law, to lose the trust of the terms in equity? secondly, whether the Plaintiff has not the same equity which *R. Yerworth* junior had? for as to the merger

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Cheney's case (*a*), where it is held that if a man have two sons *John*, and devises to his son *John* generally, this shall be capable of an averment that he meant the youngest, and it shall be good evidence to prove that averment, that the testator thought his eldest son dead, because long absent. Surely it had been more just to adjudge the will void for the uncertainty, on purpose to prevent that disherison which it is evident the testator did not intend.

Now to return to the principal case, it is plain the testator when he made his will was not ignorant that he had a child *in ventre sa mere*, for it was born within a month; and it is as plain he meant to provide for it when he gave his lands to the heirs of his body begotten or to be begotten. It falls out in law that this is no sufficient description to work by way of executory devise to an infant *in ventre, &c.*; which kind of resolution hath now obtained, though it might fairly have been adjudged otherwise. But then the trust of the term, as far as equity hath power over it, ought not to attend the inheritance, where it is carried away by a rigorous construction for want of a legal expression of his intent, but ought, in conscience, to go to the child according to the true and natural meaning of the testator; for equity may mitigate, but shall never assist, an unintended disherison.

As for the second part of the question, the Plaintiff surely ought to stand in the place of *R. Yerworth* junior; for since the law of this Court hath severed the inheritance and the term, and *R. Yerworth* junior did by deliberate acts dispose all that lay in his power, it is fit the disposition which it seems cannot be good for the

(*a*) *5 Co.* 68.

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whole, as he thought it would, should at least remain good for so much as was in his power, viz., the trust of the term.

3. The award to deliver the writings and possession to the defendant, and bond to perform it, change not the case, for equity will not suffer a suit upon that award and bond, which when it is performed and the writings delivered, yet the writings which ought to follow the title may be again recovered in equity; for that were a mere circuit of action.

Hereupon the Plaintiff took time to advise whether he would try the law first, and resort afterwards to equity, or rest only upon equity.

16th *December*, 26 *Car.* 2. 1674.

The case of *Nurse* v. *Yerworth* had been at reference, and the parties not agreeing, it now came back to equity, the Plaintiff being unwilling to try the point of law. And this day I delivered my opinion solemnly and upon argument.

First, I observed, that as to the *Gloucestershire* lands, *Longhope* and *Cowley*, there could be no question, for *Longhope* was conveyed away, and *Cowley* was not comprized in the recovery by *Richard Yerworth* the younger; so it stood only upon the father's will, of which the words are these: "*Item*, if at my decease I have no issue, I give my *Gloucestershire* lands to my executors in fee;" which words are not capable of any dispute; so far, therefore, the evidences must either be brought into Court, or delivered to the Defendant, he first confirming the jointure.

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The main controversy rises upon the *Leicestershire* lands, *Snowston*, &c. for which the case is this. There were two *Richard Yerworths*, viz. the father and the posthumous son; the father having married the daughter of *Nurse*, the Plaintiff, 1st *March* 1649, demised *Snowston*, &c. to *Christopher Yerworth*, the Defendant, for ninety-nine years, in trust for such as he by will should appoint; and 9th *March* 1649, by his will appoints the profits for twenty years for debts and legacies; then to the use of the heirs of the body of *Mary*, my now wife, begotten or to be begotten, for ever; and for want of issue, remainder to the Defendant in fee; 24th *March* 1649, the father died; *April* 1650, the posthumous son, *Richard Yerworth*, is born. During his minority differences arose, and an award was made, that when the child died, the writings and the possession of the child's land should be delivered to the Defendant. So long since hath the Defendant reckoned upon this estate, for I do not take it (as Mr. Attorney pressed it,) to be a contentedness in the Defendant to let the heirs enjoy, but a perfect ignorance of his own strength till now.

In *Michaelmas* term 1671, *R. Yerworth*, the posthumous son, being twenty-one, suffers a recovery, and devises all to the plaintiff, *Thomas Nurse*, his grandfather, for life, with several remainders over to *Yates*, his brother-in-law, by his mother's second husband; and dies. No wonder he was so willing to defeat the Defendant's expectation, who though he were not his heir but his cousin, yet had appeared so forward to succeed, and so careful to provide for it. The Plaintiff exhibits a bill and demands a conveyance of the leases as attendant upon the inheritance, whereof he seems secure; the Defendant, as despairing of the inheritance, contends to keep the lease, wherein he hath a legal

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estate; both are like to be deceived. In this case I make five questions; one of law, four of equity.

1. Whether the will in 1649 did pass any thing to the infant then in *ventre sa mere*, as it is now penned? And this is a question of law.

2. If not, then whether the remainder in fee vesting in the Defendant by purchase, and so vesting, that no after-born son could devest it; the term be not now so extinct, that no further consideration can be had in equity?

3. If the Court may consider of the term still, then whether if *R. Yerworth*, the posthumous son, were alive and Plaintiff here, the Court might not relieve him as to the term? Of which point there are two branches, 1. What relief the son would have had if his father at the time of this will had been *cestui que trust* in fee? 2. What relief he must have, had his father been *cestui que trust* of the term only?

4. Whether the Plaintiff have not the same equity which the posthumous son had?

5. What the award and bond work in this case?

These questions, such as they are, were never stirred in twenty-two years; the family thought it a good will, and acquiesced under it; no man dreamt that by limiting a remainder to the Defendant, the father had disinherited his only son, nor did the bill or answer look that way; but the wit of counsel at the bar hath raised these new and unexpected questions.

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For the first point, whether the devise in this case do carry any thing to the infant *in ventre sa mere?* There seems to be no need of debating that at this time, because the Plaintiff admits the law against him. But yet, for the better opening of those reasons upon which I ground my opinion in equity, it will be necessary for me to observe by what degrees the law came to be settled in this point, and upon how hard terms it stands at this day.

By the ancient simplicity and integrity of the common law, there was no doubt that a devise of customary lands to an infant *in ventre sa mere* was good enough, 11 *H.* 6. 13. When the statute of 32 *H.* 8. *c.* 1. enabled a devise to any person or persons, then the lawyers began to introduce subtlety, and to refine upon these words, and said an infant till born is not *in rerum natura*, and so not within the word person or persons. Presently the books begin to wrangle, 14 *El.* (*a*). A devise to his four sons, and if the fifth *in ventre* be a son, he to have a fifth part, was held void as to the fifth son; yet this, one would think, were a sufficient description; in 24 *El.* (*b*) on a devise to a child *in ventre*, *Mead* and *Periam* say it was resolved good, only the doubt was, whether the new born son should take jointly or in common; 17 *El.* (*c*), it is admitted a devise to an infant *in ventre* is good, but there no infant was born; 37 *El.*, *Church* v. *Wyatt* (*d*), a devise to an infant *in ventre* held void, unless it be by way of remainder; 13 *Jac. B. R. Simson* v. *Southern* (*e*), the devise of a copyhold to an infant *in ventre* held void; yet that devise depends not on the statute, but is merely a declaration of the use

(*a*) *Dyer*, 305, 304.
(*b*) *Anon.*, *Moor*, 177. *pl.* 312.
(*c*) *Dyer*, 340.
(*d*) *Moor*, 637.
(*e*) *Cro. Jac.* 376. 1 *Rolle*, 109. 137. 253. 2 *Bulstr.* 272.

of

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of a surrender. This was a little too strict and too gross to hold long; and hereupon readers have made it a moot point in their cases, and held it *pro* and *con* as it pleased them.

Therefore, in 1656, C. B., in *Basset*'s case, when Justice *Hale* sat there, and in 17 *Car.* 2. C. B., *Skelton* v. *Bide* (*a*), the Judges came to this resolution; that a devise to an infant *in ventre* is good if it be by words of clear description; for then it works by executory devise without inconvenience, because in the interim the land descends. For all this, in 20 *Car.* 2. B. R. *Snow* v. *Cutler* (*b*), the Judges were divided again.

But the resolutions of the *C. B.* were just and good, if the Judges would not be too strict in expounding words of description, but would suffer any reasonable description to work by way of executory devise; for in *Skelton* v. *Bide* they would not allow the words *procreat. et procreand.* to be a sufficient description; which goes a great way toward ruling the case in question, if it were left to the common law.

II. Admitting the law so to be, and that in consequence hereof the term for ninety-nine years is merged by the accession of the fee simple to it, whether any further consideration can be had of it in equity? I conceive there may; for, by the equity of the common law, estates extinguished are still *in esse* to some purposes. *Lillington*'s case. (*c*) But Chancery suffers no extinguishment; as, for example, lessee for years in trust marries a wife who hath the freehold, and so becomes seised of a freehold *in autre droit*, which is

No merger in equity.

(*a*) *Bannister's Rep. temp. Bridgman*, 390.

(*b*) *Vide ante*, p. 610.

(*c*) 7 *Co.* 37.

utterly

utterly inconsistent with a term in his own right; yet in *25 Car. 2.*, *Thorn* v. *Newman*, ruled no merger. (*a*)

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III. If the case be free for the Court to consider, notwithstanding the pretended merger of the lease, then let us see what relief the son would have had if he had been plaintiff.

And herein, by way of preparation to what is to follow, let us first consider if *R. Yerworth*, the father, had been *cestui que trust*, whether *R. Yerworth*, the posthumous son, could have come into this court to have execution of this trust, notwithstanding such a will? And I think clearly he might, for very many reasons.

1. Because the construction of law to make this will void to an infant *in ventre* for want of apt words of description, is of an infinite rigour and extremity, and, *ergo*, ought never to be followed in a court of equity.

2. It is contrary to the reason and equity of the common law in all other cases of wills. What is become of that legal compassion due to all dying men, who are *inopes consilii*, if once we come to criticise upon their words, where the intent appears? To support the intent of the testator, the law will put words into the will which the testator never spoke; *ergo*, upon a devise to heirs male, the law adds, of the body begotten; a devise to heirs, and if he die without issue, remainder over, the law adds still, of the body begotten; a devise to the son after the death of the wife, the law adds a whole sentence, I give it to my wife during her life. Only in this case the law holds the testator to

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(*a*) *Ante*, p. 605.

exact

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exact words of description, and for want of such words makes him disinherit his son before he is aware.

3. This kind of rigorous construction is against natural and universal justice, and would be laughed at in any other part of the world.

4. It is contrary to piety and good manners; for whereas every man is bound to provide for his own, this construction makes a good Christian die worse than an infidel.

Distinction between *privement* and *grosment enceint.*

5. The difference is rational and just, where the wife is *privement enceint*, and where *grosment enceint*; if the embryo be not yet *partus formatus*, there ought to be words of clear description to include him; and that, because the testator may reasonably be presumed not to intend any thing to him he knew nothing of. But where the wife is *grosment enceint*, there, unless the words of description do expressly exclude the child, a little matter ought to serve to include him.

6. For this reason, though the common law be never so strict, yet it shall only prevail in cases where a common law inheritance is in question; but where a trust in fee simple is in question, this Court shall make any words with a presumptive intent a sufficient description to make the will work by way of executory devise, rather than establish a disherison in equity.

For, as it was well said at the bar by Mr. *Stedman*, less artificial words will serve to direct a trust than an estate.

7. In cases of accidents unforeseen, this Court hath power to govern and dispose of trusts according to the pre-

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presumptive intent, against the express declaration of the party; *à fortiori*, it may assist and explain a doubtful declaration, *Fitz. Subpœna*, 23. A sick man appointed his trustees to convey to his daughter; a son is born, and he dies without other declaration; adjudged the trustees should be compelled to convey unto the son. 5 *Car.* 1. *Jones* J. cited this case; the testator made his daughter executrix, and died; a son was born; the spiritual court granted administration to the son, notwithstanding this will, upon the presumptive intent, and no prohibition could be obtained. So the court of conscience and the court christian seem to be agreed in this point; and so is the court pagan too, as may appear in the case put by *Tully* in his book *De Oratore*.(a)

So that I take it to be without scruple, that the posthumous son should have been relieved for the whole, if the father had been *cestui que trust* in fee simple.

The greater doubt is because the father was tenant in fee simple of the reversion, and *cestui que trust* of the term; so that now if the posthumous son be relieved, the will must work by fractions; viz. it must be a good will in equity for the term by executory devise, and a void will in law for the reversion; and another consequence of this is, that the term which was created to attend the inheritance shall now be severed, and become a term in gross. I think these consequences so far from being absurd, that I hold them both to be just and necessary.

First, because every man's will ought to hold as far as it may, if it cannot hold as far as the testator would

(a) *Vide ante*, p. 612.

have

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have it. Now it is plain the testator knew he had a child very near its birth, and it is as plain he meant to provide for it, by the words begotten or to be begotten, and for want of issue, remainder, &c. It is true it hath obtained in law that these words are no sufficient description of an infant *in ventre sa mere*, though it might fairly enough have been adjudged otherwise; but then let the law take place upon the estate at law, but as to the trust of the lease this Court will admit no such construction; for 2. though the term were originally to attend the inheritance, yet where the inheritance is carried away by a rigorous construction, the term shall not follow it, but is instantly severed by the law of equity, and becomes in gross.

So that the lease and reversion are not a twisted estate, as Mr. *Pemberton* called it, but the term is untwisted from the inheritance by act of law, the law of this Court; and *ergo*, though equity revive this term, notwithstanding the merger, yet it cannot revive it as attendant, as he for his client would fain have had it.

The attendancy of terms on the inheritance is regulated by the discretion of the Court.

3. The attendancy of long leases upon the inheritance is always governed and controlled by the conscience of this Court; as where there are debts to pay, the lease shall not attend the inheritance, till debts satisfied; now what greater cause can there be for this Court to sever them, than to mitigate and allay an unintended disherison?

4. Though the words of the will are only applicable to the inheritance, and do not seem to be intended to work upon the term as a separate estate, as was objected by Mr. *King*, yet there is no doubt that a term may be devised by such words, though it were a term in gross; then if the testator use such words as he thought proper

to

to pass the whole in law, these words shall not hinder the operation of equity upon the term, if no more than the term can pass in equity.

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5. It is said, however, that the term is entailed, and that entail spent, and the Defendant next in remainder; but if the law of equity have made this a term in gross, then the remainder in tail is void, which was limited by the father's will. And yet perhaps the limitations and remainders of this term, made by the posthumous son, will be good, though there be never so many remainders in tail, because he disposed of it as a term attending his inheritance, and did not think he had a term in gross, so it was no affectation of a perpetuity, nor like the common cases of a term in gross.

IV. Whether the Plaintiff have the same equity the posthumous son had? I think the Plaintiff hath the same equity, and ought to stand in the son's place, for it is according to natural equity for every man to dispose of his own, and it is to take away from the posthumous son his property to dispose it otherwise. It is confessed the Defendant hath no equity if he were Plaintiff; I think the Plaintiff hath good equity against him, especially in this case; for I differ much from Mr. Attorney, who said there were no circumstances of equity for the Plaintiff, if the law were against him; and I differ much more from Mr. *Peck*, who thinks the Plaintiff to be in ill circumstances; for, I think, there are many good circumstances in this case, which make the Plaintiff's case very favorable.

1. Here is no fraud or practice alleged, or possible to be proved, in the Plaintiff procuring this will from the son; for the Plaintiff was absent; so that if the son may lawfully

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lawfully dispose his own, the Plaintiff, for aught appears, came innocently and honestly by it.

2. Here is no heir male disinherited, no title of honour or dignity unsupported or made less valuable by it.

3. The Defendant claims by a voluntary disposition of the father; the Plaintiff claims by a voluntary disposition of the son; so in this they are both equal.

4. Again, the Defendant hath gotten irresistibly all the *Gloucestershire* estate after the death of the jointress, and all the *Leicestershire* estate after the expiration of the term; and all this by a nicety in law, and picking holes in the settlements; so that accidental mistakes have made a kind of arbitrement between the parties, and given the Defendant more than was ever meant him.

5. The long admittance of the father's will, and the great acquiescence under it for twenty years together, without any question upon it, is very considerable. So that when the posthumous son disposed of the whole, which is more than he could do, it ought to be good *pro tanto*, viz. the trust of the term.

V. Lastly, no weight can be laid upon the award and bond, for since the Plaintiff hath right to the term and equity, this Court will not suffer a suit upon that award, which when it is performed and the writings delivered, yet the writings may be again demanded by the Plaintiff during the term, and so a mere circuity of action.

So I decreed, 1. an assignment of the term to the Plaintiff, according to the will of *R. Yerworth*, the son; for

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for this is sufficiently warranted by the bill, though it be not particularly prayed; for the whole fact is disclosed, and a general relief prayed. 2. The *Leicestershire* evidences to lie in Court for the security of the reversioner.

What particular relief can be granted under the prayer for general relief.

3. The *Gloucestershire* evidences to be delivered to the Defendant, he confirming the jointure, else to be brought into Court. 4. A perpetual injunction against all suits upon the award or bond.

5. But no costs *propter difficultatem casus.* — Lord *Nottingham*'s MSS.

VANDEBENDE *v.* LEVINGSTON.

3d *November*, 26 *Car.* 2. 1674.

A bill of review may be sustained by the party in whose favour the decree is made, and who enrolled it.

RESOLVED, 1. The Plaintiff may have a bill of review, to review a decree made for himself, if it be less beneficial to him than in truth it ought to have been.

Both the trustee and the assignee are responsible to the *cestuique trust* for profits subsequent to an assignment in breach of trust.

2. To charge the assignee of a trustee who comes in by breach of trust alone, or to charge both assignor and assignee with the profits respectively received, is error; for both ought to be liable to the *cestuique trust*, and the assignor must answer the whole if the assignee be a beggar.

3. Though the Plaintiff enrol the decree, yet he may have error; for he can have no error till it be enrolled, and perhaps the Defendant will never enrol it.

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of this injunction to quiet the possession against legal force, and in aid of justice. I said this was the worst of all; for trying of titles by sessions law, that is, by views and convictions of forcible entry, and arbitrary changing of possessions, was become an ill practice, and ought to be reformed; and it is well for the subject that the courts in *Westminster* sit to control the sessions; but, as to this court, the case is much worse, for this pretence puts it in the power of the sessions to dissolve all injunctions to quiet possession or to make them fruitless, for they may always pretend an entry, or at least a detainer by force, and so remove the possession of the party intended to be quieted. Wherefore I overruled all the exceptions, and ordered Mr. *King* to stand committed.—Lord *Nottingham's* MSS.

BEAK *v.* BEAK. (*a*)

2d *March*, 27 *Car.* 2. 1674–5.

A partnership in trade is continued for some purposes after a dissolution.

IT was ruled, 1., that if two merchants trade in partnership, and one dies, yet the partnership continues until the debts are paid and received, and until the cargoes are brought in and returned, and until things can be separated; 2. that all compositions of debts after death, and until separation, are for the benefit of the partnership; 3. that where alteration of books is suspected, the Defendant is to answer interrogatories, if the Master sees cause for it; 4. that if a stated balance is found, the Master is to begin thence.—Lord *Nottingham's* MSS.

(*a*) *Ante*, vol. i. p. 507.

I decreed the money to the administratrix for these reasons:

First, where the condition of the fee-simple mortgage mentions neither heirs nor executors, there the money ought to be paid to the executors; for so is *Littleton*'s text (*a*), and *Goodal*'s case (*b*); and the reason is, because the money came first out of the personal estate, and so naturally returns thither again.

Secondly, when both are mentioned, but disjunctively, there if the mortgagee pay the money precisely at the day, he may elect to pay it to the heir or executor as he pleases.

Thirdly, where the precise day is past, and the mortgage forfeited, there all election is gone in law; for in law there is no redemption.

Fourthly, though equity do still give the mortgagee a power of redemption, yet equity will not revive the power of election which was once gone, because of the inconvenience; for if it should be revived to the mortgagor, he would delay payment as he pleased, and at last force a composition, and play the money into the hand which would use him best; and if the Court should exercise that power, and take upon them to elect to whom they would give the money, it might be too arbitrary.

Fifthly, there ought so to be some certain rule; and the best rule is to come as near the rule and reason of the common law as may be: now the law always gives the money to the executor or administrator if no person

(*a*) Sect. 339. (*b*) 5 *Co.* 95.

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be named; and when the election to pay either heir or executor is forfeited, it is all one in law as if neither heir nor executor had been named.

Sixthly, to inquire whether the executor or administrator have assets or not assets, is not the measure of justice in this case; it is a proper inquiry when the Court will exercise an arbitrary disposition of the money, but otherwise it is not reasonable to hinder the mortgage money from returning to the personal estate, whence it came, only because the executor is thought to have enough already; for in natural justice and equity the principal right of the mortgagee is to the money, and his right to the land is only as a security for the money; wherefore when this security descends to the heir of the mortgagee, charged with an equity of redemption, as soon as the mortgagor pays the money, the land belongs to him, and only the money to the mortgagee, which is merely personal, and so accrues to the executor or administrator.

Seventhly, although when the mortgagor covenants with the mortgagee, the case of the mortgagee's executors and administrators be so much the stronger for that personal covenant, yet without such a covenant the case is strong enough; and if the right of the money should depend upon these or the like circumstances, it might prove *casus pro amico*, which were not convenient.

Eighthly, it is not inconvenient nor absurd, that the heir who loses the land should also lose the money which comes in lieu of the land; for, as hath been said, the land is no more in equity but a security; and upon this ground it is that in *London*, mortgages in fee simple are always reckoned as part of the personal estate, and divided, according to custom.

Then

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Then I proceeded to consider the precedents. The first was 16th *June*, 11 *Car.* 1. *Saint John* v. *Wareham.* (*a*) The defendants, for 3000*l.*, conveyed the lands to Sir *Richard Grobham* and his heirs; Sir *Richard* made a lease to *Wareham*, rendering to him and his heirs 280*l. per annum*, and this lease was for seven years, with a *nomine pœnæ* distress and clause of re-entry, and a proviso, that if *Wareham* and his heirs should within seven years be desirous to repurchase, and signify the same to Sir *Richard Grobham*, his heirs and assigns, and pay them 3000*l.*, then he and they to assure to *Wareham*. Lord *Coventry*, *Richardson* Chief Justice, and *Crook*, decreed the money to the heir of Sir *Richard G.*, and not to the plaintiff, *Saint John*, who was his executor, and justly; for this was not the case of a mortgage, but of an absolute purchase; for the proviso could not turn it to a mortgage, but was a mere collateral agreement, for which there was no remedy in equity after the seven years. And so it was ruled in this court, 16 *Car.* 2., *Cage* v. *Sir Ralph Bovy*; and again, *T.* 24 *Car.* 2., in *Isaac Cottington* v. *Lord Cornbury*, where the covenant was to reconvey, upon the repayment of the purchase-money within seven years. But if the purchase-money had not been near the value of the land, that and such like circumstances might have made it a mortgage.

Distinction between a purchase with a covenant to repurchase, and a mortgage.

The next precedent was 27th *October*, 12 *Car.* 2. *Tilly* v. *Egerton* (*b*) where the plaintiff, having purchased from the mortgagor in fee his equity, and agreed with the mortgagee to pay 6*l. per annum* for ten years, upon a suit for this redemption after the death of the mortgagee, was decreed to pay that money to the heir of the mortgagee, and not to his administrator, because no

(*a*) Cited 1 *Ca. in Cha.* 88. 2 *Freem.* 196

(*b*) 1 *Rep. in Cha.* 96. 3 *Rep. in Cha.* 55. 2 *Freem.* 125.

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Clarendon C. and the Master of the Rolls. They went upon these grounds; the executors wanted no assets; the heir had no other provision, but was disinherited; the gift of the personal estate would not carry a fee simple mortgage to executors. This precedent I could not approve, though I were of counsel with the heir in obtaining the decree and dismission; for the decree was obtained by the precedent of *Tilly's* case, and when there was no executor to contest it. The dismission of the executors was obtained because the Court was already engaged in a former decree, but the reasons of it are not very strong; for assets or not assets is not the measure of justice to executors, but a pretence for favour to the heir, who either ought to have the money, though there be no assets, or not to have it, though there be assets; disherison of the heir an argument of compassion, not of right; and the gift of the personal estate by the will cannot make the case of the executors the worse, whose title was good without that bequest; for a stronger case for executors can never happen, the defeasance of the mortgage, the covenant, and the bonds, all speaking for the executors.

The fourth precedent was 21st *October*, 20 *Car.* 2., between the Lord *Gorges* and Sir *Robert Dillington.* (*a*) Sir *William Lisle* mortgaged in fee to Sir *Robert*, proviso to be void on payment of the principal and interest to Sir *Robert*, his executors and administrators, and covenants to pay the money accordingly. Sir *Robert* dies before the principal is due; but after forfeiture for non-payment of interest, leaving Sir *Robert*, the defendant, his son and heir. Decreed by Lord *Bridgman*, *Custos*, that the plaintiff, as administrator should have the money, and the defendant the heir should convey

(*a*) 1 *Rep. in Cha.* 147.

the

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within one year after the death of *Nethersole's* wife, upon notice thereof given by the grantee or his heirs, pay unto the said *Nethersole* or his heirs the sum of 240*l.*, then the rent shall cease; the wife dies, and the money is paid to the executors; the question is, whether the rent do cease or no? which depends upon this, whether the rent were a purchase, or only a security for money; for if it were in the nature of a mortgage, then the rent ceases, because the mortgage-money ought to be paid to the executors, though the inheritance mortgaged descend to the heirs. It was said, that this could not be looked on as a security for money,; 1. because it was most plainly a provision for a jointure for *Nethersole's* wife; and it would be a strange kind of security for money which must stay for payment till after the death of the jointress, who might live fifty or sixty years; 2. because this kind of security would depend wholly on the pleasure of the grantee, whether it should ever be redeemed or no; for he may refuse to give notice of the death of the jointress within the year. But I held it to be clearly a security for money, and in the nature of a mortgage; for 1. though 20*l. per annum* be not the true interest of 240*l.*, as money then went, at 10*l. per cent.*, yet it is between 8 & 9 *per cent.*, and exceeds all the rates of purchases; so that a man may well desire a proviso to call back such an estate again, though he suffer it to lie out for a jointure; but if the rent had exceeded the annual rate of 10*l. per cent.*, then to construe it a security were to make it an usurious contract, which were a hard case, but still the same. 2. No mortgage can be redeemable on one side only; but however it be penned the law will still imply a liberty to the other side to foreclose that redemption, and this the grantee might do in this case by bill in this Court; and by like reason the grantor may redeem, though after the year,

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here *Edmond*, the mortgagee in fee simple, did not die seised in possession; and because *Edmond*, by his will, left two other mortgages in fee simple to his heir, *ergo*, he did not conceive the third would go to him.

I said, I was still of the same opinion, that the money due upon a forfeited mortgage in fee simple ought to be paid to the executor of the mortgagee; as was held in *Thornborough* v. *Baker*, *Stokes* v. *Verrier* (*a*), and *Ballard* v. *Ballard*; for by the judgment of the common law, if a feoffment in mortgage be made upon condition to pay money generally, without saying to whom, the common law gives it to the executors; or if it be to pay money to the mortgagee, his heirs, or executors, if the mortgagee die before the day, the mortgagor at the day has election to pay either to heir or executor, as *Littleton* says (*b*); but after the day, when the mortgage is forfeited, there is an end of all by the common law, and no room left for any farther election. Now, though by the law of Chancery, an equity of redemption does still subsist after forfeiture, the question is, in what manner it shall subsist, and upon what terms? And, first, it were most unreasonable for the Chancellor to give the mortgagor an election to pay the heir or executor; for though there be no great inconvenience in such an election at the common law, seeing it is to be executed and determined at a precise and certain day, yet it were intolerable to allow the mortgagor such an election in equity, where there is no certain time of redemption fixed, but the mortgagor may bring his bill to redeem when he pleases, and in the mean time may agree to play the money into the hands of the heir or executor,

(*a*) *Ante*, p. 634.

(*b*) The proposition cited occurs not in the text of *Littleton*, but in *Coke's* commentary. *Co. Lit.* 210 *a*.

accord-

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according as he can best make his bargain with them; and it were yet worse to leave such a power of election in the Court itself; for that were to make every redemption of a mortgage *casus pro amico*, and is too great a latitude to trust a Chancellor with. Since, *ergo*, some certain rule is necessary, what better rule can be given than to come as near the rule and reason of the common law as is possible; and that is always to give the money to the executor, where it is left to construction to whom it should be given. But, because this has been long a controverted point, and was never fully settled till my time, as appears by *Thornborough* and *Baker's* case, and the precedents then cited, *ergo*, it is not fit to look too far backwards, or to give occasion for multiplying suits; for God forbid men should search the register's files to find out how many decrees have been made for payment of mortgage money to the heir, and then stir up the executors or administrators to sue the heir for it again; nevertheless, I had so much respect to the length of time, as to excuse the heir from paying any interest or costs." Lord *Nottingham's* MSS.

Sir FRANCIS HOLLES *v.* Sir ROBERT CARR.(*a*)

10th *February*, 28 *Car.* 2. 1676.

Specific performance decreed against an heir in tail in possession, of an agreement, during the life of the tenant for life to levy a fine.

THE Defendant prayed a commission to examine witnesses to prove the contents of some deeds, which his mother, the Lady *Carr*, a few days before her death, had partly burned, and partly cut, defaced, and embezzled, without which he should not be able to

(*a*) *Rep. temp. Finch.* 261. 2 *Mod.* 86. 2 *Freem.* 3.

make

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make his defence. This I was ready to grant; but the Plaintiff, rather than put off his hearing, did consent that those witnesses should be examined *viva voce* at the hearing, and that for the preservation of their testimony for the future, a schedule of interrogatories should be exhibited into the office, and there the witnesses be examined again: and upon this rule, by consent, the cause came now to hearing.

Examination of witnesses *viva voce* at the hearing, by consent.

The bill demanded 6000*l.* portion due to the Plaintiff in right of his first wife, who was the daughter of old Sir *Robert Carr* and his Lady, and the sister of the now Defendant. That demand is founded upon articles bearing date 22d *August* 1661, between the Lord *Holles* and Sir *Francis* his son on the one part, and old Sir *Robert Carr* and Dame *Mary* his wife, and the Defendant by the name of *Robert Carr*, Esq. on the other part; these articles recited a marriage intended between Sir *Francis* and Mrs. *Letitia Carr*, and the Lord *Holles* and Sir *Francis* covenant to settle a jointure within six months; and old Sir *Robert Carr* and his Lady, and the Defendant, covenant to pay the portion within eighteen months; and then the articles recite further, that whereas a fine is intended to be levied by the *Carrs*, the use thereof is declared to be for securing the portion of 6000*l.* These articles were sealed by the Lady *Carr*, without her husband, who was looked on as *non compos*; and upon her sealing only the marriage proceeded; and after the marriage, the Defendant coming from *Cambridge* to town, was also persuaded to seal, but hath endeavoured to prove that the inducement for his sealing was a promise from Sir *Francis Holles* to settle an additional jointure, which was never done, or which is worse, was preconveyed before it was done, as the Defendant alleged; and to show that the additional jointure was the consideration of Sir *Robert Carr*'s sealing the articles,

wife's jointure, his own legacies, and his daughters' portions, if two, 2500*l.* a piece; there was in it a power of revocation, and a further clause, that when his issue male came to be twenty-one, the trust should determine; and upon the 2d and 3d of *December* 1636, a settlement was made by way of lease and release, to the use of the Defendant's father in tail, remainder to *Rochester Carr* in fee; but in this settlement some parcels of land were omitted, which by the act of parliament are vested in Sir *Richard Temple*, &c. for 500 years, namely, *Monk Thorp*, or *Monk's Warmouth*, and *Steeple Hill*; so that those parcels cannot pretend an exemption by the saving, because they are not comprised in any settlement; and the Defendant did further offer, that while the main jointure was delayed to be settled, the 6000*l.* had been raised, and by direction of Mr. *Cook*, a trustee for Sir *Francis Holles*, was left in the hands of Mr. *Cox*, where it miscarried; and this they would have to be a payment in equity. Also the Defendant read some proof of unkindness in Sir *Francis Holles* to his former wife; which was improper, and not pertinent to this case.

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And the case being thus opened in the presence of Mr. Justice *Wyld*, and Mr. Justice *Wyndham*, whom I called to my assistance,

Mr. *Attorney* said for the Defendant; first, no portion was due in equity from Sir *Robert Carr*, who sealed only in contemplation of the additional jointure, which was never made, and which Sir *Francis Holles* had disabled himself to make; secondly, if it were ever due, it is paid; for payment to *Cook* and *Fleetwood*, who were trustees to receive this money, had been good payment, but payment to *Cox* by their direction is payment to themselves; and some monies have been paid to the Lady *Holles* to supply her in her extreme necessity;

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thirdly, if all due and unpaid, yet there is no remedy here; against the person, clearly none, nor yet against the estate by way of execution of a trust: for, first, the lease for sixty years is out of the case, for the trust of that is determined, and now it attends the inheritance; and as to the inheritance, whereof the settlement is preserved by the saving, the Plaintiff hath no better case than this; the issue in tail in the life of the father joins with his mother, a feme covert, in articles; this could not bind the estate in the land, for the son had then no estate in it, and equity respects the commencement, at which time there was no real lien.

Mr. *Keck* added, that if Sir *Robert Carr* had been sued in the life of his father, he could not have been compelled to join in any assurance to the trustees, because it would have been vain for the Court to decree an act which would be illusory, and might have been defeated again; and cited *Allen* v. *Wentworth*; and showed further that the Defendant ought to be looked on as a surety, for the marriage proceeded without his sealing, as not then thought necessary, and he was drawn in afterwards; and he observed the hardness of the case, for the 6000*l.* and interest swell now to 10,000*l.*, and though 2000*l.* have been paid, that will only be accounted interest; and it ought not to be objected to the Defendant, that he paid some part of the money upon these articles; for all those payments were in his father's name, and by his order, and not one penny paid since his father's death in 1667.

Serjt. *Maynard*, Sir *J. Churchill*, and Sir *J. King* for the Plaintiff, said, there is a debt of 6000*l.*, as appears by the articles, and the act of parliament which confirms the articles, and is an evidence of the continuing agreement. The bill justly seeks to enforce the execution;

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cution; for my Lady *Carr* acted as a feme sole, managed all, and upon the confidence of her and her sons joining the marriage was had; and though the settlement be admitted, and within the saving, (for it is in vain to object here to the saving, because that is at law,) yet if an issue in tail will seal articles declaring that a fine is intended to be levied to secure the portion, if the land come afterward to him by descent as heir in tail, he ought to make it good; for if tenant in tail upon a marriage agreement make a defective surrender of a copyhold or other assurance, the heir, though no party, shall be obliged to make it good; *à fortiori*, where he is party to the articles: and they denied *Cook* and *Fleetwood*'s directions to pay the money to *Cox*, or that he had any power to give such directions; and though Sir *Robert Carr* could not have been decreed to join in the fine, yet his person might have been decreed to pay the money, and the land would have been bound by that decree when it came to him.

Justice *Wyld* said, that as these articles are penned, which declare an intent that a fine shall be levied to secure the portion, no action of covenant lies for not levying the fine; I said I doubted that, because it amounted to an agreement under hand and seal that a fine shall be levied, and upon every agreement under seal a covenant lies.

And I put the case, that Sir *F. Holles* had sued in his wife's lifetime, could he have had a decree without settling the additional jointure? The counsel for him said No, and the Court took time to advise.

Note, — These things are clear, and without dispute. 1. There is 6000*l.* principal money due by the articles; 2. it remains still due, for the money deposited in *Cox*'s

it is at present, when there is no cause for any additional jointure, and when the estate tail is actually descended from him, who was no party to the articles, to him that sealed them; for if the plaintiff have timed his case well by not exhibiting his bill sooner, he ought not to fare the worse for having followed good advice. 1676. Hollis v. Carr.

To come, *ergo*, to the main question, whether lands which descend upon the issue in tail shall be made liable in equity to the performance of those articles which the issue sealed in the life of his father,

First, I observe, there is no necessity at all of this suit in equity, for the Plaintiff hath a clear remedy at law by action of covenant to enforce the Defendant to levy a fine of those lands of which, when levied, the articles have declared the use to be for securing the portion; for to an action of covenant the word covenant is not necessary, but a perfect agreement under hand and seal, which is here; for the articles are entitled Articles of Agreement, and that word agreement goes quite through, and governs that very clause which says a fine is intended to be levied to secure the portion, and turns that into an agreement for which an action lies.

Secondly, yet there is no impropriety, and there may be great convenience, in commencing such a suit in equity, not only in respect of the difficulties which arise at law upon doing the first act, and tendering of the charges, but in respect of the precedents of the Court; for this Court hath often decreed fines to be levied according to agreement, when the lands are to be specifically enjoyed, as here they ought to be, till the portion levied or paid; and it is not fit to turn the Plaintiff to a personal remedy, which may fail by death and want of

Specific performance of an agreement to levy a fine.

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assets, when the Court may decree a fine to be levied, which is a real remedy.

Thirdly, but then the doubt is, whether the Plaintiff have any such prayer in his bill, which seeks only to enforce the trustees to execute their trust, or to compel the Defendant to pay the money; for the general prayer of relief perhaps will not serve.

Fourthly, if the Court go about to affect the lands entailed merely by the articles, then they put themselves upon these considerations: 1. How far the son had been bound if the father alone had sealed and died, and the issue had come in *per formam doni*; 2. How far the issue in tail, in the life of his father, can bind the land wherein he had nothing, or charge or incumber it with any equity merely by sealing of articles, and by conveyance make articles stronger than a fine levied by the issue, which though it may bar the entail so as to let in his father's incumbrances, yet he himself can neither alien nor charge the entail by such a fine; points not necessary, and very difficult to be resolved; whereas to decree the issue to levy a fine according to his agreement, is attended with no difficulty at all. *Sed de his amplius deliberandum.*

22d *April*, 28 *Car.* 2. 1676.

In the case of Sir *Francis Holles* and Sir *Robert Carr* the Court this day delivered their opinion.

Justice *Wyndham* thought the Court not bound to do any more than to decree the trustees to execute their trust as far as the act warrants it. Justice *Wyld* agreed so far, and observed the right of the Plaintiff was not remediless, for he might have debt or covenant for the money,

money, and he had no real remedy against the land by the articles; because nothing in the articles amounted to a covenant to levy a fine, but only declared an intention to levy a fine, and then this Court never decrees an execution *in specie* where there is no covenant to sue at law.

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I was of opinion, as before, 1. that the duty was clear; 2. that it remained unsatisfied; 3. that for a sum certain due by specialty the remedy is at law, and it cannot be decreed here, if that demand stand alone; 4. that the trustees may be decreed to transfer the estate for 500 years vested by the act in Sir *Richard Temple*, &c.; and this, as to *Monk Thorp* and *Steeple Hill*, will pass the legal estate, because these parcels are not in the Defendant's settlement, and by consequence are out of the saving; and, as to the rest, will convey to the Plaintiff all their equity; 5. but the articles themselves cannot directly and immediately affect the entailed lands, which the Defendant claims by settlement, and the saving in the act, because the Defendant's father, who was tenant in tail, never sealed, and the son, who sealed in the father's life, had not the estate tail in him to encumber with an equity, and if he could so encumber it during his own life, yet it may be doubted whether the issue of the son would be bound by it; 6. but the articles may affect the land by consequence, if they oblige the person to levy a fine of these lands unto such uses as may secure the portion; and if this be so, then all other points are unnecessary, and out of the case.

Now herein I confess I differ from the Judges; for I cannot but think these articles do amount to a covenant to levy a fine, for neither the word covenant nor the word agreement is necessary to an action of covenant,

An agreement under hand and seal is a covenant.

1676.

Noble
v.
Cass.

but a deed under hand and seal, testifying an agreement (*u*); *ergo*, if rent be reserved to a stranger, covenant lies; nay, covenant lies upon a bond. Here it is stronger; for the title is, Articles of Agreement, which word agreement goes quite through; and the first articles covenant to pay the money and to secure it in manner following; now there is no other manner following, but that of levying a fine, *ergo*, that is covenanted for; and when both parties recite, whereas it is intended a fine shall be levied, this declares an agreement to levy, and accordingly the use is declared to be for the securing the portion, which couples it to the manner following in the first article. Wherefore I said, the cause hitherto was only ripe for this kind of decree: 1. that Sir *Richard Temple*, &c. should transfer their estate to the plaintiff, *ad ea quæ sequi possunt*; 2. that the Plaintiff, notwithstanding that, be still at liberty to pursue his remedy against the person by action; but before the remedy could be carried further against the rest of the lands in equity these points were to be spoken to: 1. whether these articles in the frame and purport of them do give an action of covenant for levying a fine; 2. if they do, whether this Court be bound in justice to decree a specific performance, or may leave the Plaintiff to his action; of which the consequence may be, that the Plaintiff shall have no better remedy to enforce a fine than he hath for payment of his portion, viz. damages; and if the Defendant dies, assets may fail; whereas a decree to levy a fine according to the covenant, if it be obeyed, affects the land in law; if it be disobeyed, affects it in equity, and saves a great many formalities in law, precedent to the action of covenant; 3. whether the bill, which prays relief generally, do sufficiently warrant such

What particular relief may be granted under the general prayer.

(*u*) *Pidman* v. *Wood*, Rolls, Trin. 1678.

a decree

a decree by a special remedy? which it seems to do; because it discloses the whole nature of the case, and mentions that once a caption of a fine was prepared; 4. supposing a fine levied, whether it can enure to the use of *Coe* and *Fleetwood* for 500 years, to secure the portion, a new term of 500 years being given by the act to Sir *Richard Temple*, &c. of the same lands? But that will not be material; because if it do not, however, the old entail is barred, and the new lease good. But above all points, I recommended it to Mr. *Attorney* and Sir *John Churchill* to mediate an agreement.

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5th *June*, 28 *Car.* 2. 1676.

Sir *Francis Holles* v. Sir *Robert Carr*. It was now urged for the Plaintiff, by Serjt. *Maynard*, that the articles, being taken all together, did amount to a covenant to levy a fine; and he cited *H.* 13 *Car.* 1. *Mannors* v. *Norwood*; the Defendant agreed to pay 500*l.*, and the true intent of the parties is, that he shall give bond for it; adjudged a covenant. So a termor for ninety-nine years, &c. if three *vies* live, recites his interest, and that one life is in being, and assigns his term; adjudged a covenant that the life continued. — *P.* 11 *Car.* 1. 221. *Best* v. *Brett*, and 1 *Roll. Abr.* 518, 519.

Mr. *Attorney* for the Defendant confessed, that where a writing under hand and seal testifies an agreement or undertaking, it amounts to a covenant; as in an apprentice's indenture, matrimony shall not contract, shall not embezzle, &c., are all covenants; here it amounts only to a declaration of uses, if a fine be levied, not to a covenant to levy a fine; for such a covenant were useless as a personal security, because a covenant to pay the money is as good.

I said

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I said the point in law was not necessary to be precisely debated; for though I was of opinion it amounted in law to a covenant to levy a fine, yet if it were but an agreement in equity to levy a fine, it ought equally (if not more) to be decreed, the rather because the late act doth expressly enact the articles to be performed. Wherefore I recommended it to the Plaintiff to accept security for the principal at 4 *per cent.*; and if the Defendant would not consent to give it, left the Plaintiff to draw up his decree according to this and the former debates. — Lord *Nottingham*'s MSS.

A bill was afterwards filed against the persons to whom Sir *Robert Carr* had devised his estates in trust to pay his debts, reciting a decree made on the hearing of the original cause: "That if Sir *Robert Carr* should fail to pay to the Plaintiff, at a day therein expressed, what a Master of the Court should certify to be due, then he should levy a fine of the said manors and lands, and the Plaintiff should have, hold, and enjoy the same, during the residue of the said term of 500 years;" and stating that the Master certified due to the Plaintiff, on the 1st of *March* 1678, 10,360*l.* 9*s.*, and that before payment, fine levied, or possession delivered, Sir *Robert Carr* died; by whose affected delay in the suit the original debt exceeded the value of the lands, the subject of the decree in the first suit: the bill prayed that the devisees might pay the 10,360*l.* 9*s.* with interest and costs, or raise, out of the remaining estates of Sir *Robert Carr*, what was due to the Plaintiff, beyond what the said lands would raise. The bill was dismissed 3d *February* 1685. Reg. Lib. A. 1685. It seems that on a rehearing relief was decreed. 1 *Vern.* 431. 1 *Eq. Ca. Ab.* 139.

1676.

Serjeant MAYNARD *v.* OSWALD MOSELEY.(*a*)

3d *May*, 28 *Car.* 2. 1676.

When eviction entitles a purchaser to relief.

THE Plaintiff exhibited his bill to be repaid 600*l.* upon this case. Sir *Edward Moseley* devised the *Leicestershire* lands unto his wife, the now Lady *North*, for life; remainder to the 1st, 2d, 3d, 4th, 5th, and 10th son of his sister *Maynard* (wife of *Joseph Maynard* the Serjeant's eldest son) in tail; remainder to *Nicholas Moseley*, the father of *Oswald*, for life; remainder to *Oswald Moseley* in tail; with other remainders over; and died in *October* 1665. The Serjeant goes down into *Lancashire*, peruses all the writings, (makes agreements with Mr. *Edward Moseley* on behalf of his son not to contest the will, and to discharge a lease for eleven years, and thereupon hath 10,000*l.* debt secured by judgment, all which agreements his son flies off from, and tries the will, &c.) and perceiving that if the will stood, (as he believed it would do, having examined all the witnesses upon the place,) then it would be in the power of my Lady *North*, by joining with *Nicholas* and *Oswald*, to bar all the contingent remainders to his daughter's children, who at that time had none, and so the *Leicestershire* lands, worth 600*l. per annum*, would be lost; in *December* 1665 comes to an agreement with *Nicholas* and *Oswald* to buy their remainder or possibility in the *Leicestershire* lands for 600*l.*, and pays it down; and the manner of the further assurance was to be thus: *Nicholas* and *Oswald* were to procure the Lady *North* (without whom it could not be done) to join with them in a common recovery before the end of three

(*a*) 2 *Freem.* 1. *Rep. temp. Finch.* 288.

years;

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years; and to secure this, *Nicholas* and *Oswald* gave a bond of 1200*l.* to the Serjeant, conditioned, that if no recovery be suffered within three years, whereby the estates of *Nicholas* and *Oswald* may be sufficiently barred, then upon the reconveyance of the premises, to repay 600*l.* After this Mrs. *Ann Moseley* sets up a title to the *Leicestershire* lands by virtue of a will of Sir *Edward Moseley*'s father, found in loose sheets among the evidences, and supposed to be suppressed by the son; upon which title she exhibited a bill in this Court, and obtained a decree for the *Leicestershire* estate; notwithstanding which eviction, the recovery was suffered within the three years by the Lady *North*, and *Nicholas* and *Oswald Moseley*, in due form; and now the Serjeant demanded the 600*l.* in equity, because no reconveyance of the premises could be made within three years, in regard the title was evicted, and the recovery did him no good.

But I dismissed the bill; for I saw no reason, as this case was, to amend the Plaintiff's security in equity, or to give him a better remedy for his money in Chancery, than he had provided for himself by the condition of the bond which he took; 1st, for there was no fraud in the defendants at the time of the sale, but the nature of their title was better known to the Plaintiff than to themselves, for the Plaintiff had perused and studied all the evidences of the family; 2dly, their estate was very valuable at the time of the sale, and might have been sold for more to another, and had it not been for this eviction, the Plaintiff had now gained 600*l. per annum* for 600*l.*; 3dly, the condition of the bond is literally performed, if not, go to law; if so, why should the Defendants, who have performed the condition of their bond, forfeit their bond in equity? 4thly, the Plaintiff was not disabled to sue at law, because he could not reconvey

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reconvey the premises for want of a title, for the word reconvey implies no more than convey back what was conveyed before, be the title what it will; 5thly, but that which disables him to sue at law, doth also disable him in equity, and that is, that in truth no reconveyance ought to be made, but in default of recovery within three years, which hath been had, and then no money being to be repaid but upon a reconveyance, what ground hath the Plaintiff for this demand? 6thly, to offer now to reconvey is nothing, for the Defendant is not bound to take it in equity, if he be not bound in law; nor was he bound to take it though it had been offered within the three years, if a sufficient recovery were suffered before; 7thly, if the Defendant had not sold his interest, then the loss of this eviction must have fallen upon the Defendant; shall the loss fall upon the Defendant, too, when he hath sold it without any covenants or warranties, and without any other conditions than what are performed? *Caveat emptor* is a very needless advice, if the Chancery can establish another rule instead of it, by declaring that equity must suffer no man to have an ill bargain; 8thly, if the Defendant had been Plaintiff to recover 600*l.*, he had no equity to recover it after eviction, nor hath the Plaintiff equity to be repaid contrary to the terms of his own agreement.

Serjeant MAYNARD *v.* OSWALD MOSELEY.

27th *June*, 28 *Car.* 2. 1676.

THE cause, which was heard before, and dismissed, came now to be reheard at the Plaintiff's importunity, who pressed earnestly for a decree; but I continued of the same opinion in substance, and caused the reasons of that opinion to be specially entered by the registrar in manner following.

His

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His Lordship declared, that as this Court suffers no man to overreach another, so it helps no man who hath overreached himself without any practice or contrivance of his adversary; that it was most plain in this case there was no fraud nor concealment in the Defendants at the time of the sale of their remainders, but all things were more open and better known to the Plaintiff than they were to the Defendants; for the Plaintiff had been upon the place, and perused the evidences of the family, and the Defendants did not solicit the Plaintiff to buy, but the Plaintiff importuned the Defendants to sell their remainders, and had reason so to do, for otherwise, as things then appeared on all hands, the Defendants, with the concurrence of the Lady *North*, might have disinherited the issue male to be begotten on Mrs. *Maynard* of all the *Leicestershire* estate, worth 600*l. per annum*. Accordingly the Plaintiff covenants with the Defendants for their title for 600*l.*, which was much short of what it was then worth in all appearance; and the Plaintiff draws his own assurance, and pens the defeasance of that bond upon which he now sues in equity to have back the 600*l.* and interest; by which very bill the Plaintiff admits that the Defendants can no way be charged with the bond at law. It remains, *ergo*, to be considered, what grounds there are to charge them in equity; for the Defendants, who made no corrupt or fraudulent agreement at first, insist upon it that they have literally performed that agreement which they made, and for which they took their money; *ergo*, that the Defendants should now be forced in equity to pay back their money and interest, and be put into the same plight in effect as they would have been if they had broken their agreement, seems hard.

And the more, because all the reasons which are used to enforce such a decree do arise either from the eviction by

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by Mrs. *Ann Moseley*, or from the supposed defective and illusory performance of the agreement by the Defendants, or from some other circumstance in the case, which hath disabled the Plaintiff to sue his bond at law; and yet no arguments are drawn from any of these heads strong enough to support this bill.

For, first, as to the eviction; although after the bond and the agreement the lands were evicted by Mrs. *Ann Moseley*, so that the Defendants may now seem to retain the 600*l.* for nothing, yet he that purchases lands without any covenants or warranties against prior titles, as here, where the Defendants sold only their own title, if the land be afterwards evicted by an eigne title, can never exhibit a bill in equity to have his purchase-money again upon that account; possibly there may be equity to stop the payment of such purchase-money as is behind, but never to recover what is paid; for the Chancery mends no man's bargain, though it sometimes mends his assurance; and it cannot be truly said that the Defendants keep the money for nothing, since they have done all which was agreed to be done for it; but if the Plaintiff had bought that which falls out to be worth nothing, he can complain of none but himself.

Different consequence of eviction before and after payment of purchase-money.

Then as to the manner of the Defendants' performance of their agreement, the objections are four: 1st, They delay performance as long as was possible; for *November* 1668 was the last term within the three years wherein any recovery could be had; but still they do perform in time; and since the Plaintiff might at any time after the three years have enforced the Defendants to suffer a recovery, but the Defendants could not after that time have forced the Plaintiff to accept of a recovery, it is enough for them they performed so soon.

Secondly,

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For whereas the Plaintiff supposes himself disabled to go to law in regard the Defendants are not obliged to repay without a reconveyance, which cannot now be made in regard of *Ann Moseley*'s eviction, his Lordship conceived this to be only a pretence; for whether the title be good or bad, the Plaintiff may still proceed to reconvey what was preconveyed, and then assign the breach in not suffering a recovery if he think good.

And the Plaintiff might as reasonably have prayed a decree heretofore that the Defendants might not perform their agreement, as pray a decree now that they may be never the better for it if they have performed it.

Wherefore, upon the whole matter, though if the Defendants had been Plaintiffs for the money, his Lordship would hardly have decreed for them, as they are Defendants and in possession of money upon an agreement executed, his Lordship saw no cause to decree against them.

But yet I did not absolutely dismiss, but decreed, 1. if Plaintiff go to law, Defendants to admit a reconveyance, and not to take advantage of eviction here; 2. if Plaintiff release, Defendants to make further assurance. — Lord *Nottingham*'s MSS.

1677.

JEWON and his Wife *v.* GRANT.

26th *October*, 29 *Car.* 2. 1677.

Legatee when liable to refund.

THE Plaintiff's wife was formerly the second wife of the Defendant's father, by whom she had several children; but the Defendant was a son by the first venter. The Plaintiff's wife, upon her first marriage with the Defendant's father, caused him to enter into a bond of 1000*l.* to secure a provision for the children she should have by him. The Defendant's father by his will gave the Defendant a legacy of 600*l.*, and made his wife, the Plaintiff's wife, executrix; she comes to an agreement with the Defendant to pay him his legacy, so as he would release his right to the real estate, and give bond of 4000*l.* not to disturb; he does so, and executes the release by fine; then she gives him a bond of 600*l.* for payment of his legacy; and afterward, in satisfaction of that bond, grants him a rent-charge of 80*l.* *per annum* during his life. This continued to be paid for seventeen or eighteen years together: but now of late the bond of 1000*l.* is put in suit against her for the benefit of those children she had by *Grant*; and the bill doth suggest that this bond will swallow up all the assets which *Grant* left, and that if it had been known at the time of the payment of this legacy, nothing ought to have been paid; and *ergo* prays that the payment of the 80*l.* *per annum*, which came in lieu of the legacy, may at least cease for the future, the Plaintiff being content not to demand repayment of what is past.

I said this bill did rightly presuppose a rule of equity, that whensoever a legacy is paid by an executor, and afterward an unknown bond appears when the assets are gone, the executor hath equity in this case against the legatee to make him refund, though he have no equity.

1676.

GORING *v.* GORING.

17th *December*, 28 *Car.* 2. 1676.

An injunction to restrain a lessee from ploughing pasture lands, which had remained unploughed during the continuance of the lease for thirty years, but were ploughed within six years prior to its commencement, refused.

LESSEE for years, determinable on lives, during the last aged life begins to plough, and an injunction was prayed.

1. Before the statute of *Gloucester* if lessee for years, whose estate was created by act of the party, had ploughed up meadows and pastures, no account of waste lay, not so much because it was doubted whether it was waste, as because it was the folly of the party that he did not provide for his own security by covenant; for otherwise it was of estates created by act of law, as tenant in dower and tenant by the courtesy, &c. 2. In those days we meet with no injunctions granted in equity to amend the common law. 3. But now, in imitation of the law, it hath obtained that if a jointress go about to deface a seat, or if lessee for years would make any considerable destruction, this Court usually grants an injunction, and stays the ploughing of meadows or of ancient pastures. 4. Here the pastures had been ploughed within six years before the lease began, and *ergo*, though the lease have continued thirty years, during all which time the pastures have been unploughed, yet that will not make them ancient pastures within the rule of this Court; for as to the lessee himself who took these pastures subject to the liberty of ploughing, they remain still so, notwithstanding this forbearance; otherwise if they had been so long out of lease: besides, it was said that the pastures being grown lean, and running to fern and moss, the ploughing would be an improvement. Wherefore I granted an injunction only as to the meadows, but not as to the pasture. — Lord *Nottingham's* MSS.

1677.
DENEW v. STOCK.

Admiral of *England* hath; but all sentences in the High Court of Admiralty are reformed by appeal to the King in Chancery, and a commission under his Great Seal delegating some persons to review; and so it ought to have been here, for there is no doubt but the king's commission will go to the Cinque Ports, though his ordinary writs do not; and this way of review is evident to be a part of the common law, by the statute of 25 *H.* 8. touching appeals in ecclesiastical proceedings, which says, as hath been used in cases of the admiralty. 2. The consequence of this is, that the commission of review, and all proceedings thereupon, and the reversal of the first sentence, are not only informal, but utterly null and void. 3. The consequence of that consequence is, that now the first sentence at *Dover* is become the final sentence, for non-performance whereof the bond is forfeited. So judgment was given for *Stock* at law.

And now, for equity, it was urged, that *Denew* was in effect but bail for *Coleman*; that his title was grounded on a sentence at *Villa Franca*, which is presumed to be just, for the contrary sentence at *Dover* was manifestly erroneous, though a right way were not taken to reverse it; and the very possession of a prize for twenty-four hours alters the property, without a sentence. So that if an *Englishman* retake that prize, he may retain it against the first *English* proprietor, as our law books say. The defendant said the justice of the cause was not examinable here; if it were, it would manifestly appear that the capture was a downright piracy, without any pretence of a *Dutch* commission, except one dated the 24th *March*, which plainly was sent for after the fact done; for this could never warrant a capture in *Italy* upon the 1st *April*. And it is a strange kind of equity to say the sentence was unjust when a man hath bound himself to perform it; for by this the justice of all inferior courts

some additions and improvements from the Judges and the civilians. (*a*) And the counsellors at the bar cited another case in the King's Bench this very term, where the same point being specially found, was so likewise adjudged upon argument; which I was glad to hear of; but said, if they had adjudged it otherwise, I should not have altered my opinion.

1678.
Ash
v.
Abdy.

(*a*) No one of the popular conjectures concerning the history of this celebrated statute refers its origin to Lord *Nottingham*. That fact seems placed beyond doubt by the account in the text; and there may have been some foundation for the tradition, that Sir *Matthew Hale* and Sir *Leoline Jenkins* assisted in its preparation. See *Gilb. Rep. in Eq.* 171.; 1 *North, Life of Guilford*, 209.; 1 *Burr.* 418.; *5 East*, 17.

Lord HOLLES *v.* HUTCHINSON.

24th *May*, 31 *Car.* 2. 1679.

ON rehearing, it appeared, that there had been two decrees in the case; one in the time of the Lord *Bacon*, when the fines were ascertained at two years' value, upon an alienation, and a year and a half's value upon a descent or alienation to wife or children; another in the time of the Lord Chancellor *Bromley*, which was to explain the former decree, upon a complaint that the lord took upon himself to judge the values, whereupon the Chancellor issued out a commission to survey the value of every tenement; and upon the return of that commission a decree was drawn up, by consent, to make this survey the binding and perpetual measure as to the values.

Copyhold fines were ascertained at two years' value, and a commission was issued to ascertain the value of the tenements issued under a decree by consent, the principle of which was disapproved.

The Plaintiff urged, that the second decree could not be binding for ever; for, 1. the survey to which the

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Lord Holles v. Hutchinson.

uncertain as to the quantity, though not as to the measure; 2. but then the second decree, which came into this case by way of explanation, was altogether improper and unnecessary; for by pretending to ascertain the values of every tenement it changed the whole nature of the case, and would make fines in themselves uncertain, to be fines certain for ever; and this was attended with manifest inconvenience: for the values of land being subject to a perpetual variation, it was absurd to settle them at a perpetual certainty; and it might be as reasonable to settle a perpetual value of tithes, which ought to rise and fall with the land itself; and if there had been no such explanatory decree, the law would still have kept these uncertain fines, within the certainty of a reasonable measure; yet it cannot be denied that this decree was by consent; 3. there are many precedents in this Court whereby fines uncertain have been reduced to a reasonable estimate or value, but this second decree is the first precedent whereby uncertain values were made certain and perpetual by a survey; 4. it is manifest that the execution of this survey is become in part very difficult, insomuch that the Defendants themselves do offer some amendment of the decree in these particulars; so that there is an evident necessity of some kind of variation; 5. the main end of the decree is peace, and if that cannot be attained by it, some other course must be thought of; but here can be no avoiding of suits while this decree stands, that is plain: for the lord hath no remedy for any fine; for if he demand it according to the survey, the lord cannot prosecute the tenants upon the decree, for want of a copy of the survey which the tenants now show, but the lord hath it not, and *ergo*, must be forced to exhibit a bill to discover the survey; and if the lord would enter for a forfeiture for non-payment of the fine, he cannot do that because the duty is uncertain; or if he could, a suit in equity

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equity by the tenants, grounded upon this decree, would follow: since, *ergo*, suits are unavoidable during this decree, it were better to leave the lord and tenants to the common rules of law in such case, than to entangle and perplex both sides by such a decree; 6. for the survey produced is manifestly defective in regard it doth not appear it was ever subscribed by *Malin*, as the decree required, so that the decree of itself neither helps nor hurts without the aid of this Court; and if the tenants were Plaintiffs, they ought to pray this Court to supply the defect of this decree, but being Defendants, how can they hinder the reformation of it? 7. and especially since it is become in a great measure impracticable; as for example, it appears by the survey that *William Morgan*'s tenement is subdivided in such manner, that several copyholders inhabit the same messuage; and if one die, what fine shall be taken to conclude the rest, unless it be such a fine as shall be ascertained upon trial at law? So likewise when lands are subdivided, or the kind and nature of the lands altered; 8. for it is no answer to say that the memory of the ancient nature of the lands, together with the abuttals and boundaries of it, is preserved in the recitals of the copies; for the survey and decree ought to be complete in themselves, and not to depend upon the diligence of the steward to amend their imperfections, because if the decree be not perfect throughout, the sooner it is set aside the better, for time, which hath already made great alterations in part, will still make more and more; 9. nor is it greatly material to say this decree hath been found practicable, and submitted to for eighty years last past; since, for more than forty of those years, the manor hath been in the hands of successive mortgagees who were lords *pro tempore*, and they being accountable for no more than what they received, were not concerned to dispute; 10. the only difficulty which remains

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mains with me is, that the bill doth not pray to vacate the decree, or to set it aside, but only to amend the defects of the survey, and that a new commission may be awarded to that purpose; that to open a new survey, the true state and value of all the tenements may be known: now, though this kind of remedy will be necessary to be renewed every thirty or forty years, yet since no decree can go beyond the prayer of the bill, I awarded such a commission, and will consider of the further settlement at the return of that commission.—Lord *Nottingham*'s MSS.

REX *v.* CAREW. (*a*)

12th *October*, 34 *Car.* 2. 1682.

Letters of marque vacated.

MEMORANDUM, that in *Easter* term last, though hitherto not reported, there was a *scire facias* brought against *Carew*, to repeal certain letters of marque and reprisal, which he had obtained *anno* 1665 against the *Dutch flagrante bello*, and still insisted upon, notwithstanding the treaty at *Breda*, whereby all pretences of this kind were amortized, and notwithstanding several orders of the council board to forbid all proceedings upon those letters, and a proclamation under the great seal to recall them: his pretences were, 1. that letters of marque are the subject's remedy against foreign injuries; and when they are once granted, the king cannot determine that remedy in prejudice of the subject till satisfaction be obtained. 2. The rather, because there was an express clause inserted in those letters, that no future peace should derogate from them: and

(*a*) 1 *Vern.* 54.

his

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his counsel, after a week's time given them to argue these points, prayed longer time, that they might study this case a little better, as the novelty of it deserved.

I said this case was of great concernment to the kingdom, and that peace or war with *Holland* did depend upon the resolution of it, and made it necessary to be speedily determined; wherefore I would not grant them any further day, for I had thoroughly considered the case. And first I observed, that this cause was properly in Chancery upon many accounts, not only as it was a *scire facias* to repeal letters patent, but as it was a cause of state; and likewise as it was a marine cause, and did concern depredations on the sea, in which cases the Chancery as well as the Admiralty hath a clear jurisdiction, and this appears by what was said in *Peter Blad*'s case (*a*), and by many records and precedents cited in my Parliament MSS., tit. *Admiralty*, and tit. *Chancery*; and is most expressly so settled and enacted in a statute not printed; viz. 31 *H.* 6 *Rot. Pl.* No. 68. (*b*)

Jurisdiction of the Court of Chancery.

Secondly, it is a considerable question whether these letters of marque were ever good, because they were granted *flagrante bello*, at which time the previous conditions, of letters of request, &c. could not be observed.

Thirdly, if they were never so well granted at first, yet they are now very clearly determined. Wherein, first, it is to be considered, that all letters of marque and reprisal are in their own nature determinable at the pleasure of the prince or state which granted them, and that, without any wrong or injustice at all to the person to whom they are granted; for they are and must always be subject to that supreme law of *salus populi*; and if

(*a*) *Ante*, p. 603, 604. (*b*) 5 *Rot. Parl.* 268.

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it were otherwise, it would be quite out of the power of any government to preserve their subjects in peace, but all treaties of accommodation must be forborne until he who had letters of marque would consent, which were most absurd; and *ergo*, the clause in these letters that no future peace should derogate from them, as it is new and of a strange nature, so it is utterly void in itself; for the king's prerogative in matters of peace and war is absolute and unlimited, nor can the king put it out of his power to make a peace, or enable any subject to dispute his sovereignty in this point.

Secondly, this point is most clear by the constant practice of all ages and all nations. And, first, it is plain that a truce, which is less than a peace, doth supersede all letters of marque for that time. This appears by 10 *H.* 6. *Rot. Pl.* No. 34. (*a*), where the Commons, in their petition for reprisals against *Denmark*, say there was a statute made in 4 *H.* 6. that if the subject be spoiled contrary to the tenor of any truce, for want of mentioning therein that letters of marque should cease, the persons grieved should have reprisals. In the next place a safe conduct, which is less than a truce, doth likewise supersede all letters of marque; and so it was ruled in the parliament of *Paris* against the merchants of *Montpellier*, who would have executed their letters of marque against the subjects of *Genoa*, upon such as came thither by safe conduct, as appears, *Papon's arrets*, 284.; and the like appears by the judgment of the parliament 2 *H.* 5. *pl.* 1. *Rot. Par.* No. 34. (*b*), where some citizens of *London* who had letters of marque against the *Genoese*, petitioned the king, that he would be graciously pleased hereafter to grant them no safe conduct in prejudice of those letters of marque. And be-

(*a*) 4 *Rot. Parl.* 402. (*b*) 4 *Rot. Parl.* 50.

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ing books without the consent of the proprietor; not giving any right, but supposing that it already existed. That law expired in 1692; it dropped in respect of the licensing clauses, and not from the acknowledgment of property in authors. In this time several bye-laws were made by the Stationers' Company, and confirmed by the Chancellor, settling penalties on those violating the right of the owners. In 1694 bye-laws were made to remedy what was lost by the expiration of the act, but they were ineffectual. The principle of ownership is received as a ground of property, 18 *Car.* 2. The Stationers against the patentees, about the printing of *Roll's Abridgment.* (*a*) 29 *Car.* 2. *The Company of Stationers* v. *Seymour.* (*b*) There *Pemberton* argued from the principle of property in the author, and it was admitted on the other side; and the Court said that almanacks might belong to the crown, because there was no particular author. The world has entertained the same notion; they buy and sell, settle, pay debts, and make provisions. The Defendants admit it, and, therefore, cannot contradict the right of authors antecedent to the statute of *Anne.* If any other proof were wanted, the preamble to that statute supplies it.

2. Whether the act has accumulated remedies to secure a prior right violated, or to take it away? The act took its rise from a private petition of booksellers, asserting, as a thing uncontroverted, that they had the right in the copies, and prayed a confiscation of what had been printed, the provision by action on the case not being effectual. The preamble is to encourage authors; taking away copyright would not do it; it is not done; but they give, during a certain time, pe-

(*a*) *Carter*, 89. (*b*) 1 *Mod.* 256.

argument, the injunction was granted and acquiesced under.

1732. Tonson v. Walsall.

4. *Austin* v. *Cay*, 17th *May* 1739. A demurrer, because the discovery would expose the party to penalties, was over-ruled, the remedy in equity being upon the original right; beside, there is no proceeding for the penalties until entry in the books of the Company; but the want of entry is no impediment here, the Court proceeding on the property, and the objection has been repeatedly over-ruled. If the term is expired, the Court does not refuse to interpose. *Sir Joseph Jekyl*, who sat in parliament when the act passed, made a precedent, 9th *June* 1735.

5. *Anon.* (a) A bill for an injunction against the Defendant, for printing the Whole Duty of Man, upon an assignment of property by the author of it; the work having been printed in 1657, was not within the statute of *Anne*, an injunction was granted and acquiesced under. The author was only guessed at, but it was presumed that the person who first brought it to the press, had the property of it assigned to him.

6. —— v. *Balkner*, 28th *November* 1735 (b), by Lord *Talbot*. The bill was filed by the assignee of *Pope's* Letters for an injunction, and to restrain their being printed in *Ireland*. Several of the pieces were printed in 1701 and 1702, and 1708, so that the term of twenty-eight years was expired. Lord *Talbot* granted an injunction to restrain the printing of the whole; and that was acquiesced under.

(a) Probably *Eyre* v. *Walker*, 9th *June* 1735, cit. 4 *Burr.* 2325. 2 *Bro. P. C.* ed. *Toml.* 138.

(b) *Motte* v. *Falkner*, cit. 4 *Burr.* 2325. 2 *Bro. P. C.* ed. *Toml.* 138.

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7. *Walker* v. *Walker*, 27th *June* 1736. (*a*) The bill was to restrain the printing of *Nelson's Festivals*, a book first printed in 1703. Sir *Joseph Jekyl* granted the injunction, which could not have been unless the property had continuance beyond the term limited by the act, and it was acquiesced under.

8. *Tonson* v. *Walker*, 5th *May* 1739. (*b*). The bill claimed property in *Milton's* Poems, and the notes of the commentators; on certificate of bill, and reading affidavit and assignment, an injunction was granted *ex parte*, and acquiesced under.

No one application was refused. This is, at least, sufficient for granting an injunction till hearing; especially where the Defendant has acquiesced in former instances, and has added what he has clearly no right to, as *Newton's* notes. Public utility makes one wish the law could be thus; and that consideration weighs in cases doubtful.

The objections are not true in fact, or grounded on narrow principles. That it will make books dearer; manifestly it will not. The public is interested to have good editions, and cheap. If the property is not secured, there can be no fine editions of new books, while they may be printed worse, on a worse paper; if they have property it may be done, because they may wait for time to supply the charge by a number. As to cheap editions, less than 500 copies will not reimburse them; it is their interest then to make such an edition as will be sold universally. This is a scandalous edition; the

(*a*) *Walthoe* v. *Walker*, cit. (*b*) Cit. 4 *Burr.* 2325. 4 *Burr.* 2325. 2 *Bro. P. C.* ed. *Toml.* 138.

paper

paper and the printing bad. The principle is narrow; books are the production and property of man's ingenuity; the property in them, is the only encouragement of letters.

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The LORD CHANCELLOR.

If this case comes to be heard, I shall be inclined to send a case to the judges, that the point of law may be finally settled, for I do not know that it has been judicially determined; but Dr. *Newton's* notes come within the statute of *Anne*; and this edition mixing his notes with the rest, cannot go on unless they can answer that. I should therefore be glad to hear the Defendant's counsel on that point.

Mr. *Clark* for the Defendant.

There are two questions: 1. the nature of the work, and the ingredients of it; 2. the Plaintiff's right to the ingredients, and whether what the Defendants have done is an infringement of his right?

The ingredients are said to be the text, and the notes of various editions by *Fenton*, *Bentley*, and *Newton*; there are other ingredients to which the Plaintiff has no right, from the comment of *Hume*, *Addison*, *Pearse*, *Richardson*, *Warburton*, *Benson*, *Upton*, and the essay on *Milton's* Imitation. The Defendant, *Merchant*, is a man of learning, and an admirer of *Milton*. Dissatisfied with the text and notes, he planned a new edition from various sources.

The LORD CHANCELLOR.

I shall not determine the general question, either at law or on the effect of the statute; but I desire to know

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how you show that Dr. *Newton*'s notes are not within the statute.

Mr. *Clark*.

There are several works not within the statute; as a dictionary, like *Stephens*'s Thesaurus. If another writer were to compile another dictionary, and take considerable portions of the former, if not done evasively, there would be no violation of the act. No more is a fair abridgment. As in *Gyles* v. *Davis*, 1741 (*a*), the bill was filed to restrain the publication of an abridgment of *Hale*'s Pleas of the Crown. The objection was the sameness of the work, and a reference was directed on that point; but your Lordship declared that a fair abridgment is not within the act. In *Cogan* v. *Cave*, 26th *July* 1743, the bill prayed an injunction to stay the editor of a magazine publishing the parts of the Unfortunate Young Nobleman; the injunction was dissolved on the merits.

The Lord Chancellor.

Before I give an opinion, I will have ascertained the number of the original notes of *Merchant*. If a critic publishes an edition *cum notis variorum*, I think that a republication is within the act. It is a work of which the property is in the author, and protected by the act. So is a dictionary. That brings it to the question whether the alterations make it a new work, or are intended evasively to colour a new edition. In the case about *Partridge*'s Almanack (*b*), originally before Lord *Cowper*, a case was directed for the Court of King's Bench, and I believe it was never determined.

(*a*) *Gyles* v. *Wilcox*, 2 *Atk.* 141. 3 *Atk.* 269. *Barnard.* 368. 2 *Bro. P. C.* ed. *Toml.* 138.

(*b*) 7 *Mod.* [illegible] 4 *Burr.* 2408.

The

1752.

TONSON v. WALKER.

The Attorney-General.

Cited *Read* v. *Hodges*, 19th *May* 1740 (*a*), to stay the republication of a history of the Czar of *Muscovy*.

The LORD CHANCELLOR.

I thought it an evasive abridgment, and therefore allowed the injunction. In *Gyles* v. *Wilcox*, the abridgment contained 95 sheets, the original 275; it was referred to award, and held a fair abridgment, and not within the statute.

30th *April* 1752.

It appeared that there were 28 notes by *Merchant*, and that the rest were 1500.

The LORD CHANCELLOR.

I entertained no doubt from the first whether I should grant an injunction, but how far, and to what extent; 1. in regard to this book, whether the property was sufficient to maintain it? 2. To what extent it should go, as to vending this edition.

It is not necessary or proper to determine the first question, but if the case is doubtful, that may be a ground to grant an injunction until the matter can be considered at the hearing; thus in waste, not a clear right, but probability of right, may be, and is, a ground for an injunction (*b*). In *Partridge's* case, Lord *Cowper* and Lord *Harcourt* both thought the right doubtful; but the first granted an injunction till the hearing; the latter

Probability of right is sufficient to sustain an injunction.

(*a*) Cit. 2 *Bro. P. C.* ed. *Toml.* 157. 2 *Atk.* 142.

(*b*) Of the cases on this point, some, at the first view, appear inconsistent with the doctrine of the text.

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directed a case, not saying that the injunction should be continued; but I take it that is done of course; because making a case is a kind of continuation of the hearing, by taking in the assistance of the court of law.

It is immaterial whether the question arises on letters patent or general property: both are to convey a right or claim. I will only say that there is no determination of the general point. Cases of pirating copies from unpublished books do not come up to the present case; they were never made *publici juris*, but are as much the author's as any thing else in his closet. Such are the cases of Mr. *Webb*, Mr. *Forester*, and Dr. *Burnett's* treatise *de Statu mortuorum* in Lord *Macclesfield's* time. (*a*) The strongest thing is, what is said by the judges in *Seymour's* case (*b*), arguing on the general right.

In cases on grants by the Crown of exclusive publication of particular books, as Bibles, Prayer-books, acts of parliament, and year-books, the general argument in favour of the patentee has been, that the books were made at the expense of the Crown, and, therefore, the property is in the Crown. And these cases are used as tending to prove a general right in the author.

Arguments from public utility may be urged on both sides; but if this were more doubtful, still it is clear that the injunction ought to be granted, because the notes are colourably abridged or taken from *Newton*, and only twenty-eight added by Mr. *Merchant*. What right could he give to *Walker* to print Dr. *Newton's* notes? To say that he had the same right to publish *Newton's* notes, as *Newton* had to publish those of others, is not defence, but recrimination.

(*a*) *Burnett* v. *Chetwood*, 2 *Mer.* 441, 442. n. (*b*) 1 *Mod.* 256.

A fair

A fair abridgment would be entitled to protection; but this is a mere evasion.

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TOYSON v. WALKER.

Therefore let an injunction be issued till the hearing, and let the Plaintiff speed his cause.

"His Lordship doth order that an injunction be awarded to restrain the Defendants, their servants, agents, and workmen, from printing, reprinting, publishing, or exposing to sale any copy or edition of a certain book or poem, entitled *Paradise Lost*, composed by *John Milton*, or of the life of the said *John Milton*, or of the notes of various authors upon the said poem, compiled by Dr. *Thomas Newton*, until the hearing of this cause; and it is further ordered, that the Plaintiffs do speed their cause." Reg. Lib. B. 1751. fol. 322.

IN CHANCERY.

WRIGHT *v.* FEARRIS. (a)

15th *March* 1791.

THOMAS WRIGHT, previous to his marriage with *Mary Wright*, entered into and executed a bond or obligation in writing, dated the 8th *May* 1767, to *John Parker* and *Thomas Matton*, in the penal sum of 2000*l.*, for securing the sum of 1000*l.*, being the marriage portion of the said *Mary Wright*, the interest of which was to be paid to her for her life, in case she survived him, and after her death the principal to be divided among the children of the marriage, in equal shares and

A bond for marriage portion to secure a life interest to the wife, is not satisfied by a distributive share of the husband's estate to a larger amount.

(a) *Goldsmid* v. *Goldsmid*, *ante*, vol. i. 211.

pro-

1791. WILMOT v. LENNARD.

proportions. *Thomas Wright* died intestate, and left more than the amount of the bond, as the distributive share of the wife.

The MASTER *of the* ROLLS. It is not a condition that he would leave to her at his death. In this case he has not satisfied the debt. — Lord *Colchester's* MSS.

IN THE EXCHEQUER.

WILMOT *v.* LENNARD. (*a*)

1st *March* 1792.

Where a Plaintiff at law is nonsuited for want of evidence withheld by the Defendant, he shall be relieved in equity, and the Defendant shall pay the costs of the suit which he cannot file general demurrer.

DEMURRER to a bill, which stated that the Defendant had come upon premises belonging to the Plaintiff, under the pretence of an execution, and spoiled fruit trees, &c.; and afterwards an action being brought by the Plaintiff, she was nonsuited for want of being able to identify the goods on account of the death of her father, in the mean time; and that the Defendant, who had been applied to for the purpose, refused to produce the inventory.

Johnson for the demurrer objected, that there was no ground for any relief in this case.

Hollist, contrà.

Eyre, Chief Baron, said, The only doubt which is raised in my mind is upon the circumstances attending this nonsuit. But I take it to be clear, that if a party

(*a*) *Field v. Beaumont, ante*, vol. i. p. 209.

is

is nonsuited at law for want of evidence which the Defendant has in his power, and withholds from him, that he may come to a court of equity, and he shall have not only discovery but relief, and the Defendant shall be made to pay the costs of the nonsuit. If it is not true that you refused to let him have the inventory, you may answer to that part, and demur to the rest. And certainly the demurrer is informal (as Mr. *Hollist* has observed) in stating that the Plaintiff is not entitled to either discovery or relief. It should have said, that forasmuch as Plaintiff is not entitled to the discovery and relief in the bill prayed. Demurrer over-ruled.—Lord *Colchester's* MSS.

1733. Where an Executor.

IN THE EXCHEQUER.

COSSERAT v. TOLLETT. (a)

Mich. 13 *G.* 2.

Where a Plaintiff at law is nonsuited for want of evidence which is held by the Defendant, he shall be relieved in equity.

THE bill in this case was filed in *Trinity* term last, and on the 15th of *August* the Defendant tendered a general demurrer to the whole bill, which was refused to be received by the Plaintiff's clerk in Court, insisting that as the Defendant was in contempt by not answering in time, according to the rule of the Court, which is eight days, he had lost the privilege of demurring to the bill; and this term the Plaintiff sued out an attachment against the Defendant for want of an answer: and it was now moved to discharge this attachment for irregularity, urging that the Defendant was at liberty to demur alone, till he was in actual contempt by an attachment

After the time for answering is expired, Defendant cannot file general demurrer.

(a) *Carton* v. *De la Touch*, ante, vol. I. p. 185.

1740.
COSSERAT v. TOLLETT.

tachment being sued out against him, for that he is not properly in contempt till he is put into contempt by the Plaintiff in suing out an attachment; that in this case the Defendant had never prayed time to answer, or any commission to take his answer, and, therefore, though after a prayer of time to answer, or a commission to take his answer, the Defendant is not entitled to demur alone, yet here not having prayed either, he ought to have that liberty; and to show that he is not to be deprived of this benefit till after an attachment, or till time or a commission prayed, it was said to be the practice in the office as soon as the eight days are expired, (which is the time allowed to every Defendant to make what defence he can,) to seal an attachment to prevent a demurrer.

But *per Curiam*. No Defendant who is in contempt, shall be permitted to put in a demurrer; and every Defendant is in contempt, who does not put in his answer within the eight days; and *per Carter*, Baron. The attachment is not that which makes the contempt; the contempt is precedent, and that follows it as a punishment for the contempt. No order made.

Mich. 13 *G.* 2.

After an attachment for not answering, the Court allowed the Defendant to file an answer and demurrer.

Afterwards in this case the Defendant demurred to part of the bill, and answered as to the residue; and this answer and demurrer was refused in the office to be received and filed, insisting, that by the former order it appeared that no Defendant in contempt could demur; whereupon it was moved, that the Defendant might file his answer and demurrer upon clearing his contempt, which was allowed by the Court, and so ordered. — From Mr. *Coxe*'s MSS.

1789.

IN THE EXCHEQUER.

MEDWIN *v.* SANDHAM. (*a*)

2d *March* 1789.

JUDGMENT. The Lord Chief Baron. This is a bill to reform a lease, and bring it within the power, the lessor being no longer alive, nor any person capable of exercising this power; and the relief is asked against the reversioner.

A court of equity will not, against the reversioner, reform a lease executed under a power where it contains covenants not warranted

The power is to lease for not more than twenty-one years, inserting usual covenants; the lease made is with a covenant, "that, in case of fire, the lessor shall rebuild, or the lessee may quit."

The question is, whether this is a usual and reasonable covenant? An ejectment has been brought, and the lessee is evicted, on the ground that this is a covenant not usual and reasonable. (*b*)

Were the question open, it might be said, that if reasonable, though not usual, yet equity will support such a covenant; but we have no such jurisdiction, the question being precluded by the judgment at law; and there is no equity to interpose against the reversioner.

One case has been decided, viz. *Campbell* v. *Leach* (*c*), where the term was mistaken, and made longer than the power. I submit to the authority, but I cannot ex-

(*a*) 1 *T. R.* 705. *ante*, vol. i. p. 553. (*b*) 1 *T. R.* 705. (*c*) *Amb.* 740.

1789.

MEDWIN v. SANDHAM.

tend the principle of the case, not agreeing to it or understanding it: though if the principle was clear, the consequences should certainly be pursued; and I understand the propriety of equitable relief in case of wives, children, and creditors, in many instances.

But this is not such a case; this is the case of a purchaser, with notice of the power under which the lease was granted, against another purchaser, viz. the reversioner: this is not like a case of forfeiture. If we are to interpose to expunge the objectionable covenant (being in truth a part of the very contract originally made), there is no instance to be put in which we ought not to relieve against the wrong execution of a power. Perhaps there may be a right to compel a grantee to amend his own act, but not to prevent a reversioner from taking advantage of his legal title. Bill dismissed with costs.

Penton said *Campbell* v. *Leach* was to relieve lessees who had laid out great sums on the demised mines; and the Court there proceeded on prior authorities.—Lord *Colchester*'s MSS.

1785.
MERWIN
v.
BANNHAM.

IN CHANCERY.

NICOL v. STOCKDALE and Others.

15th *January* 1785.

A voyage of discovery having been executed, and a narrative of it prepared under the orders of the crown, the narrative is the property of the crown; but on a bill by a publisher, authorised by the secretary to the board of admiralty to publish such a narrative, the profits remaining at their disposition, an injunction restraining publication by a stranger was dissolved.

THE bill stated, that the Plaintiff, by virtue of a paper set out in the bill, and signed by Mr. *Stephens*, secretary to the Board of Admiralty, was possessed of the whole interest in a work intituled "A Voyage to the *Pacific Ocean*, undertaken by command of His Majesty, and performed under the Directions of Captains *Cooke*, *Clerke*, and *Gore*;" the Lords of the admiralty, who, as the bill stated, were the sole proprietors of this work, appointing and authorising the Plaintiff to print and publish it. The bill then stated, that the Defendants had published another edition of the same work, and prayed that they might be restrained by injunction from selling it. The Lords of the Admiralty and the Attorney-General, on the part of the Crown, were made Defendants, as claiming some interest in the work.

An injunction was issued upon the filing of the bill before the Defendant's appearance.

Scott now moved that the injunction might be dissolved, upon three grounds; 1. that the Plaintiff had not in the work any interest which could entitle him to such an injunction, he having no interest which is described in the statute of Queen *Anne*. He does not pretend to be the author, nor is he the assignee of the author or proprietor. The Lords of the Admiralty appointed him to print it, but for aught appears, and as it is most natural to suppose, the Lords of the Admiralty meant to make a present of the work to the public, through

1795.
NICOL
v.
STOCKDALE.

through the Plaintiff; 2. that the injunction issued irregularly, being before appearance of the Defendant, and no precedent can be found of such an injunction being granted before the Defendant had appeared; 3. that the work printed by the Defendant was not the same with that printed by the Plaintiff, but an abridgment of that, and an entire new work; that it was unnecessary to say any thing about the prints published in the work, because they are not mentioned in the bill, and the injunction does not extend to them; nor indeed could it, because, by the statute 8 G. 2. c. 13. the exclusive right is given to none but the original designer, and not to any proprietor who becomes such by purchase.

The LORD CHANCELLOR.

When the first bill in this cause was filed it was in the name of the Attorney-General, and the interest in the work was stated to be in the Crown. Upon that occasion I thought that it did not appear that the Crown meant to make any profit by the work, or that it was printed with any other view than that of giving it to the public completely; but it was afterwards said, that the work was published by the direction of the Crown, for the benefit of the widows of the officers and men who had perished in the expedition. It then appeared clear to me, that when the Crown directs a voyage of discovery to be made, and afterwards directs a narrative of the voyage to be drawn up, and gives all the benefit of that work to any individual, that person is entitled to every benefit which can be derived under the statute of Queen *Anne;* but that for that purpose it must be clearly vested by the Crown in some person, either for his own benefit, or in trust for others. In the present bill, the Plaintiff states that he is employed by the Board of Admiralty, under the direction

rection of the King, to make this publication, and the profits arising from the publication are to be at the disposition of the Lords of the Admiralty. So that so far from establishing any right to this monopoly in himself, he states the use of it to be in the Defendants, the Lords of the Admiralty. By the affidavit, indeed, on which the injunction was granted, the charitable purpose for which the publication was made appears; but as it does not appear in the bill, and as the injunction ought to be warranted by what appears in the bill, and not in the affidavit, I think the injunction was improperly granted, and that it must be dissolved.

1785. NICOL v. STOCKDALE.

It is not true, as has been urged, that the Court must determine upon the answer of the Defendant. I might refer it to the Master to see whether the work complained of is an original work or not; so that if the injunction could have been maintained at all, the answer would not have been a ground for dissolving it; but as the matter stands the injunction must be dissolved. From Mr. *Romilly's* Notes. — Lord *Colchester's* MSS.

IN CHANCERY.

NEWMAN *v.* BATESON. (*a*)

July 13th, 1786.

A SUM of 20,000*l.* was given by the testator *Newman* to his natural daughter, with directions that so much of the interest should be applied in her maintenance as his executors should think proper.

On legacies to a natural child of the testator, with directions to apply a competent part of the interest for maintenance, interest is payable from the testator's death.

(*a*) *Ante*, vol. i. p. *553*.

1786.

Newman v. Barrow

The Master of the Rolls for the Lord Chancellor, said, that although the daughter was a natural child, yet the testator having given maintenance expressly to her, it came within the common rule of a legacy given to a child, and directed interest from the time of the testator's death. From Mr. *Cox's* notes. — Lord *Colchester's* MSS.

BRUMMELL *v.* CLAVERING. (*a*)

Mich. 1722.

Persons in possession under an agreement for a lease of part of an estate in strict settlement by the tenant for life, were relieved in equity after his death, during the minority of his son, the tenant in tail, the guardianship of whom he had devised to his mother, a control over the minor's estate being incident to the power of appointing a testamentary guardian; and inquiries were directed for modifying the agreement to the advantage of the minor.

SIR *John Clavering* being tenant for life, with remainder to his son, the Defendant *James*, now Sir *James Clavering*, who was then an infant of about two years old, of certain lands contiguous to the river *Derwent*, and very necessary for the landing of coal from several pits thereabout to the river, in order to be shipped for *London* and other places, entered into articles with the Plaintiffs for granting to them a lease of a waggon way over the said lands for nineteen years, by which time, as he seems to have computed, his son, the Defendant, would be of full age; and this lease was to be at a very considerable reserved rent, and the Plaintiffs, who by the articles were to be at the charges, had laid out several thousand pounds in making waggon ways, staiths, and other things necessary in such cases, and had for several years paid the rent without any lease made to them; and some years since Sir *John* died, and the Defendant, Sir *James*, his son, was now about fourteen years of age.

(*a*) *Ante*, p. 99.

Sir

1722.
Brummell
v.
Clavering.

Sir *John* by his will had devised the guardianship of his son till he should come to the age of twenty-one years to the Defendant, the Lady *Clavering*, his mother, and wife of Sir *John*. It was admitted by the Defendants *Brummell* and others in the cross cause, who were Plaintiffs in the original cause, that they had notice that Sir *John* was but tenant for life of these lands, but that in respect of the necessity they were under of having a waggon way over the said lands, and of the great advantage it was to the estate of Sir *John* and his son, by reason of the rent and other great profits out of the coal, they were determined to run the hazard of Sir *John*'s life for their term, but now Sir *John* being dead, the Defendant and his mother had pulled down great part of the way, sunk pits in it, and threatened not only to make it entirely useless to the Plaintiffs, but also to bring their ejectment and turn the Plaintiffs out of possession. It did not appear in the cause that any lease was made to the Plaintiffs, but they held under the articles, and had not only paid the reserved rent, and been at such charges as aforesaid in the lifetime of Sir *John*, but had also, for some time after his death, paid the said rent to the Lady *Clavering*; but being in a manner defeated of the way, and threatened with ejectment, they brought this bill to be quieted in the enjoyment thereof from the nature and necessity of their case, and the great benefit arising thereby to the estate of the Lady *Clavering* and her son.

In answer to which, all that seemed to be insisted on by the Defendants was, that they could have a much greater rent for the lands to be used as a waggon way, and that other landowners thereabout made much more of their estates when leased for such purposes, and that Sir *John* being only tenant for life, if he had actually made a lease, it would have determined by his death,

1722.
BRUMFELL & CLAVERING.

and no acceptance of the rent after could have set it up again; and that if the Defendants had the law on their side, a court of equity ought not to interpose to take it from them.

But the Lord Chancellor said, though he could not decree the lease to be good, which was determined by the death of the tenant for life, nor decree the Defendants to make a new lease, yet he was of opinion, that as the father had power by the statute to devise the guardianship of his son till he was twenty-one years, and he had in this case devised the guardianship to his mother till that age, this by consequence gave him some power over his son's estate till that age, since otherwise the guardianship would in effect be frustrated and defeated, and the power of devising it given to him by the statute be in some sort eluded. Therefore, he said, though he could not establish the lease or articles, yet he would, and did accordingly order, that if the Defendants brought an ejectment, they should not be at liberty to give the settlement in evidence during the minority of Sir *James*, whereby the estate was settled on his father for life, with remainder to his son in tail.

At the hearing the following decree was made, 7th *November* 1722: " Whereupon, &c., and whereas upon arguing the plea" (of the settlement under which he claimed) " put in by the Defendant Sir *James Clavering* to the said original bill, upon the 3d of *August* 1720, and the Plaintiffs then consenting to pay, if this Court should think fit, such advanced rent for the benefit of the Defendant Sir *James Clavering* for the waggon way in, on, and over his ground for leading coal, for such time past as well as to come as the Court at this hearing should direct, and to let the Defendant Sir *James Clavering* make use of the way for leading coal without paying

1722.
BAUMGELL
v.
CLAVERING.

paying any rent, paying a proportion of the repairs of the way; it was ordered that the said plea should stand for an answer, and that the benefit thereof should be saved to Sir *James* at the hearing, as by the said order now likewise read appears; and the Plaintiff *Cotesworth*, now present in court, consenting that if the old way lease may be ratified, he will quit the 6*s.* 8*d.* per ton by the proposal agreed to be to him paid by Sir *James Clavering*, and will quit the restraint on Sir *James Clavering* from leading more than the quantity of 800 tuns, so as the like restriction may likewise be taken from him the said *Cotesworth*; and also offering, if the present term in the Plaintiffs' said way-lease shall be enlarged for a reasonable time after the Defendant Sir *James Clavering* shall come of age, if Sir *James* shall, within six months after he comes of age, require the same, and agree to enlarge his term for the same time, His Lordship doth thereupon think fit and so order and decree, that it be referred to Mr. *Holford*, one, &c., to look into the new agreement mentioned in the said Sir *James Clavering*'s bill to have been made in writing, by some of his friends on his behalf, with the said *A. H.* and *B.*, and see whether the same can be made effectual or not; and if he shall find it can so be, then to see what advantages will accrue to Sir *James Clavering* thereby, and also what disadvantages he may be liable to by reason thereof, and what expense it has been or will be to him, in making and finishing the said new way, and staiths, and other appurtenances belonging thereto; and the said Master is also to see whether the said old way be or can be made effectual or not; and if the old lease should be ratified and confirmed consistently with what is now consented to and offered by Mr. *Cotesworth*, what advantage and what disadvantage it will be to Sir *James Clavering*; and to state which of the said two ways is most to his advantage,

1722.
BROMWELL v. CLAVERING.

and the particulars wherein; and if any difficulty shall arise before the said Master, he is to state the same specially for the farther direction of the Court; and the said Master is also to consider what advanced rent, if any, is reasonable to be paid by the plaintiffs in the original cause to Sir *James Clavering*, in respect of the said old ways lying over so much of Sir *James Clavering*'s lands, more than any of theirs, or in respect of the situation of the said lands respectively; but His Lordship doth reserve the consideration, whether any and what allowance shall be made in respect thereof, and likewise reserves all farther directions, &c., with liberty to apply, &c.; but in the meantime the said Sir *James Clavering* is to be at liberty to make use of the said new ways to bring what coal he pleases from his collieries within his own grounds, Mr. *Cotesworth* now consenting thereto; and if in the meantime any dispute shall arise, or obstruction be made in the use or enjoyment of either of the said ways, either party is to be at liberty to resort to the Court touching the same." — Reg. Lib. A. 1722. fol. 333—336.

LINCOLN'S INN HALL.

PAGET *v.* GEE. (*a*)

4th December 1753.

Rent paid to the remainderman by lessees of a tenant in tail, after his death, apportioned.

A TENANT in tail made leases of the lands, reserving rent half-yearly, and died seven days before the day on which half a year's rent became due.

(*a*) The following note of Ld. *Hardwicke*'s judgment, found among Mr. *Coxe*'s MSS., corrects the printed report in the point on which the editor had ventured to question its accuracy. *Ante*, vol. i. p. 341.

Upon

Upon his death without issue the person in remainder entered upon the lands, and the tenants paid the whole half year's rent to him, amounting to about 150*l.*, and now the bill is by the executors of the tenant in tail against the remainder-man to be paid a proportion of the rent, viz. all except for the seven days. 1752. PASCH. 6 GEO.

For the Plaintiff it was insisted that this was a case within the statute 11 *G.* *c.* 19. *s.* 15. It was admitted on all sides that, if this is not a case within the statute, there was no remedy against the tenants, except by the remainder-man, for the last seven days; and that though actions at law for the use and occupation of land have of late been encouraged, yet such actions cannot be maintained where there is a lease or special contract; and it was admitted, that there was no case at law, before the statute or since, where a tenant for life died, and the under tenant held by no lease or particular contract, that the executor of the tenant for life was allowed to bring an action against the under-tenant upon the permission of the testator to hold the lands.

For the Defendant it was insisted that this was not a case within the statute, for that the statute was for tenants for life only, and this was the case of a tenant in tail. But in answer to this it was said that the under-tenants having paid their rents, the question arose, on their having declined to take the advantage they might have done, whether the Defendant should not account, he being plainly no way entitled but for the rent of the seven days; and that the statute being for the benefit of the subject, the Court should be industrious to enlarge the remedy. The lease of a tenant in tail under the statute of *Hen.* 8. is good only against the issue in tail, and was never attempted to be supported against a remainder-man.

1752. Lord HARDWICKE Chancellor.

PAGET v. GEE.

I do not find that there is any precedent to go by in the present case; but the Plaintiff's equity is to me so strong that I shall not at all scruple to make a precedent. There are two grounds on which the Plaintiff founds his equity; first, the act of parliament, and, second, the tenants having submitted, and having actually paid the rents.

The inconvenience before the statute was, that if a lessee died a day or two before the half-year or quarter-day on which the rent was payable, there could be no recovery against the tenant; which was a great injustice that the statute designed to remedy. The objection upon the statute is, that the preamble of the clause mentions tenants for life only; but the enacting part is at large, which is more proper to be followed, and especially to obtain justice upon it; and though it is objected that a tenant in tail is more than a tenant for life, yet courts of law have often considered a tenant in tail to many purposes but as a tenant for life; and I know no better rule of equity than to follow the law; and I cannot in the present case but consider the tenant in tail as tenant for life, for the present purpose of relieving the Plaintiff. And even in this Court, a tenant in tail is considered the tenant for life only to some purposes; as in the cases where injunctions have been allowed against destructive waste and the cutting down ornamental trees; and I should have no doubt that a tenant for ninety-nine years, determinable on lives, would be a tenant for lives within the statute; so a tenant in tail after possibility of issue extinct; so of an estate tail in a woman *ex provisione viri*; and there are cases wherein this Court follows the law by analogy, and even goes further. On the statute of forcible entries the courts at law proceed in a summary way to remove the

1753.

PAGET v. GEE.

the force *brevi manu*, and the party may come here for a decree to quiet his possession.

Upon the whole, if there was nothing more in this case than the statute, I should incline to relieve the Plaintiff upon it; but what I shall ground my decree on is, that the tenants have submitted, and held themselves bound by equity and conscience to pay their rents; and there are many cases where a sum of money has been paid as a debt due in conscience for which no remedy could be had either at law or in equity, where this Court has, after such payment, interposed, and decreed the same to be accounted for and distributed according to equity. I consider the payment of these rents, therefore, as a payment of what in conscience ought to have been paid, and therefore ought now to be apportioned according to equity.

Decree for the Defendant to pay the apportionment to the Plaintiff, but no costs on either side. — Mr. *Coxe's* MSS.

"His Lordship doth order and decree that the Defendant do pay unto the Plaintiff such proportion of the rent of the premises in question which has been received by him from the tenants of the said premises, for the half-year ending at *Lady-day* 1746, as was equal to such part of that half-year during which the said *Samuel Gee* was living, both sides having all just allowances; and it is hereby referred to Mr. *Bennett*, one, &c., to settle such proportion if the parties differ about the same; and no costs are to be paid on either side to this time; but His Lordship doth reserve the consideration of subsequent costs," &c. — Reg. Lib. B. 1753. fol. 68, 69.

1791.

LINCOLN'S INN HALL,

BULLOCK *v.* BULLOCK.

May 6th, 1791.

An injunction to restrain a suit in the Exchequer for the same matter was refused, but granted to prevent the parties from disposing of the fund until the rights in Chancery were determined.

THERE was a settlement on marriage, limiting the interest to the father for life, remainder to the children; on failure of issue, part of the premises absolutely to the father. The mother being dead, the father filed a bill in the Exchequer, suggesting a failure of issue, and praying that the fund might be transferred to him. In the mean time a bill was filed in this Court by one claiming to be issue of the marriage.

Scott, Solicitor-General, now moved to restrain the Defendant here from proceeding in his suit in the Exchequer.

Richards contrà.

The Lord Chancellor refused to stay the suit, but made an order to restrain the trustees from transferring the fund.

N. B. The bill here was more large, as applying to the whole fund; that in the Exchequer, only to the portion limited eventually to the father; on that account the Chancellor recommended the latter to be dismissed, and the parties to go on here.—Lord *Colchester's* MSS.

IN CHANCERY.

DORAN et UX. *v.* WILTSHIRE and Others.(*a*)

May 14th, 1792.

THE bill was filed against the Defendant *Wiltshire* for specific performance of an agreement for sale of a real estate. The other Defendants were the trustees under the marriage settlement of the Plaintiff, and their infant son. The premises were settled in the usual way on the Plaintiff *Doran* for life, without impeachment of waste, then on the other Plaintiff his wife for her jointure, and so on the issue, with power for the Plaintiffs in their lifetime to sell the premises with the consent and approbation of the trustees, signified under their hands and seals; the trustees to receive the purchase money, and to lay it out again in lands to the uses of the settlement, and till that was done, to invest it in government funds, &c. The bill then stated the agreement for the sale, which included the timber on the estate, the produce of which the Plaintiff *Doran* claimed to appropriate to his own use.

A tenant for life without impeachment for waste, with power to sell, if he sells is not entitled to the produce of the timber on the estate.

Where the purchase money is to be laid out again by the trustees generally, the purchaser need not look to the application.

Trustees, whose consent was required to the exercise of a power of sale by tenants for life, submitting to act under the direction of the Court, on a bill for specific performance of a contract to sell, an inquiry into the propriety of the contract was ordered.

The Defendants, the trustees, said they were willing to execute the trusts, &c. but did not say that they had signified their consent in writing under their hands and seals.

The Defendant, the infant, submitted to the Court that the money produced by the sale of the timber ought to be paid to the trustees, and to be laid out by

(*a*) *Ante*, v. ii. p. 149.

them

1792.
DORAN
v.
WILTSHIRE.

them in the same manner as the rest of the purchase-money.

Scott, Solicitor-General, for the Defendant *Wiltshire*, resisted the bill on several grounds.

1st. He urged that no good title could be made to the Defendant, because there was no clause in the settlement which said that the receipt of the trustees should be a good discharge to the purchaser.

But as to this he seemed to urge it, not so much on principle as on the prevailing opinion and practice among conveyancers, who uniformly held such a clause to be necessary.

2dly. It appeared that there was a subsisting mortgage on the estate for 1000*l.*, which the Plaintiff *Doran* had covenanted to discharge with his own monies; but had not so done, and in fact appeared not to have the money.

3dly. There was this doubt respecting the timber, which made it unsafe for the purchaser to go on, and which would make it necessary to go before the Master, if the infant was entitled to have the produce laid out. Then there was a difference as to the mode of valuing the timber. The advertisement was, that timber and timber trees were to be taken at a fair valuation, down to 1*s.* per stick inclusive. This *Christie* (the auctioneer) explained afterwards to be 1*s.* per stick "to fall," which is always valued at less than if valued "to grow;" if to grow, it is reckoned at four times the value. Then they have not delivered possession at the time which they stipulated.

The

The LORD CHANCELLOR. That can only operate as a waiver; if you can make it to be that, it may be material, but it can go no further.

1709. DORAN v. WILTSHIRE.

Scott. It will become material as to the costs; for the fact is, that the Plaintiff having insisted on more money for the timber than he was entitled to, and the Defendant refusing to come into it, the Plaintiff upon that sowed the ground with black oats, and otherwise injured the estate. If the refusal to deliver possession is wilful and malicious, it will be a reason why the Plaintiff should pay the costs of the suit. At any rate the Defendant ought not to pay them. No title can be made out without paying off the mortgage. And there was such doubt on the other points that they could not execute the contract without a suit in this Court: they have acted unfairly. If they could not, the Defendant ought not to be subject to the expense of it.

The LORD CHANCELLOR said, he thought, as to the produce of the timber trees, the Plaintiff *Doran* could not be entitled to it. There is a great difference between a tenant for life cutting down timber for which he is not impeachable while he actually occupies the land; and his executing a power to sell. In the latter case he is not to have the value for himself. As to the power which the trustees have of giving a discharge, it is true, that when land is to be sold, and a particular debt is to be paid with it, the purchaser is bound to see to the application of the purchase-money. But in cases where the application is to a payment of debts generally, or to a general laying out of the money, he knew of no case which lays down, or any reasoning in any case which goes the length of saying that a purchaser is so bound; and, therefore, he conceived that the receipt of the trustees would be a good discharge in this case. Then he should

1793.
DORAN
v.
WILTSHIRE.

should refer it to the Master, to inquire whether it was a proper purchase, and to report upon the value and other particulars.

Mansfield, for the Plaintiff said, it was not usual to make a reference to the Master as to the propriety of a purchase, where the parties had a power to sell given to them by the marriage settlement.

The LORD CHANCELLOR. True, but it cannot hurt; and the trustees have submitted to act under the direction of the Court, in which case I take it to be a matter of course to make such a reference.

Ordered accordingly.

From Mr. *Le Meurier's* Notes. — Lord *Colchester's* MSS.

"His Lordship doth order and decree, that it be referred to Mr. *Holford*, one, &c., to inquire and state to the Court, whether the contract, bearing date the 18th day of *February* 1790, is proper to be carried into execution by the defendants, *P.* and *S.*, the trustees; and that he do also state to the Court what was the condition of the estate at the time of the contract, and what is the condition of it at this time; and it is ordered, that the said Master be at liberty to state to the Court any other matter he thinks material; and for the better discovery, &c." — Reg. Lib. A. 1791. fol. 620.—622.

1792.

PRIVY COUNCIL.

NATHANIEL BAYLEY, - - Appellant.
BRYAN EDWARDS, - - Respondent.

14th *March* 1792.

IN 1776 *Nathaniel Bayley* filed a bill in the Court of Chancery in *England* against *Bryan Edwards*, and several other persons, for an account from *Bryan Edwards* of the personal estate of the testator, *Zachary Bayley*, and of the produce of *Zachary Bayley's* real estates during his possession for five years under the testator's will; subsequent to which term of five years, *Nathaniel Bayley* and *Bryan Edwards* were entitled in moieties to estates of inheritance in this property.

1. A suit pending in *England* is not a good plea in bar to a subsequent suit in the plantations for the same matter.

2. A Defendant after a decree to account, though called an actor in the suit, yet is not prevented becoming Plaintiff in another suit for the same matter.

In 1777 and 1782 a reference took place as to some branches of the account, and an award was made upon inspection and investigation of papers and accounts in *Jamaica*.

In 1784 a decree to account was made in *England*, but not prosecuted.

In 1787 *Bryan Edwards* and *Nathaniel Bayley*, being both in *Jamaica*, *Bryan Edwards* filed a bill in the Court of Chancery there, touching the same property, praying *inter alia* to have the account adjusted on the footing of the balance awarded, and for an injunction to restrain *Nathaniel Bayley*, who had bought in some outstanding debts of the testator, from suing *Bryan Edwards* pending the suit in *Jamaica*.

To

1792.

BAYLEY v. EDWARDS.

To this bill *Nathaniel Bayley* pleaded the decree in *England*, and averred that it was pending, and for the same matters. The plea was overruled by the Chancellor of *Jamaica*, and the Defendant appealed.

This case stood over several times, Lord *Camden* conceiving the question to be of great importance to the jurisdiction of the mother country and colonies.

For the Appellant, *Hardinge* and *Sewell* cited *Cann* v *Cann* (*a*), *Johnson* v. *Northey* (*b*), *Levington* v. *Woton* (*c*), and *Roberts* v. *Hartley*. (*d*)

They insisted, 1. that setting down the plea to be argued admitted the two suits to be for the same purpose, or else it should have been replied to and referred to the Master; *Urlin* v. *Hudson*. (*e*) And 2. that the *English* suit was pleadable in bar of the *Jamaica* suit, upon the authority of *Wells* v. *Lord Antrim*, cited in *Foster* v. *Vassal* (*f*), which in the register's book stands thus:

Wells et Ux. v. *Earl of Antrim*, 16th *December* 1717. The matter upon the plea put in by the defendant to the plaintiff's bill coming this present day to be argued before the Right Honourable the Lord High Chancellor, &c., in the presence of counsel learned on both sides, and the defendant's plea being, that the plaintiffs, in *January* 1714, did exhibit their bill in the Court of Exchequer in *Ireland* against him and *Dennis Dalley*, and *Thomas Windham*, for a discovery and relief, touching the same matters for which the plaintiff hath brought

(*a*) 1 *P. W.* 725.
(*b*) 2 *Vern.* 407. *Prec. in Cha.* 134.
(*c*) 1 *Rep. in Cha.* 28.
(*d*) 1 *Bro. C. C.* 56.
(*e*) 1 *Vern.* 332.
(*f*) 3 *Atk.* 588.

his

his bill in this court, and that the defendant, the Earl of *Antrim*, hath put in his answer to the said bill exhibited in the Court of Exchequer in *Ireland*, and the cause is now depending in the said court, and undetermined; on which the defendant insists in bar to the discovery and relief sought by the bill exhibited by the plaintiff in this court; upon debate of the matter, and hearing what was alleged on either side, his Lordship held the said plea to be good and sufficient, and doth order that the same do stand and be allowed; but his Lordship nevertheless reserved a power to give directions for the plaintiff to proceed in this court, in case the Lord *Antrim*, or any other of the defendants to the bill brought in the Court of Exchequer in *Ireland*, shall make it impracticable for the plaintiff to proceed in the said suit; and it appearing that *James Blake*, Esq., *James M'Donnel*, and *Peter Cottingham*, Gents., had, pursuant to an order of the 26th of *August* last, entered into a recognizance to his Honor the Master of the Rolls, and Sir *Thomas Gery*, Knight, one, &c., in the penalty of 6000*l*., conditioned that the defendant, the Earl of *Antrim*, should, on or before the 23d of *October* then next and now last past, return by commission, and put in, his plea or answer to the plaintiff's bill; it is thereupon further ordered, that the Master who allowed the said security, do see whether the condition of the said recognizance hath been performed or not; and if it shall appear that the condition of the said recognizance hath been performed, then the said recognizance is to be vacated. (a)

1702.

BAILEY v. EDWARDS.

Mitford and *Abbot* for the Respondent. The plea of the former suit and decree in *England*, is bad as a plea to the whole of the subsequent bill in *Jamaica*. If the

(a) *Reg. Lib.* B. 1717. fol. 44.

1792.

BAYLEY v. EDWARDS.

suits are for the same purposes, yet in point of jurisdiction the one suit is not pleadable in bar of the other; and this is in substance a direct plea to the jurisdiction of the islands. And in either view, the Court itself was competent to decide the question upon argument, and without referring it to the Master, for the question of identity is apparent on the plea itself, which states the former suit; and on the equity side of the *Exchequer* in *England*, the Court pronounces without the intervention of the Master; and though the course of the Court of Chancery is to refer it; yet that is not for want of competency, but for ease only. The other question of jurisdiction is a pure question of law, and will be conceded to be such as the Court alone should decide upon.

Upon the first head. The matters are not the same, because the second suit seeks relief upon the foot of the balance awarded after the filing of the first bill, a matter not then in issue. And also it seeks an injunction upon the *quia timet*, to prevent the Plaintiff lying in gaol during the whole account, which might otherwise happen, though the ultimate decree were in his favour; this also could not possibly be had in the former suit. The parties and their situations are different and independent of the collateral parties, of whom there are twelve in one suit, not included in the other; and the principal parties are in different capacities, the Plaintiff in the first, is Defendant in the second suit. But the precedents of such a plea are all where both suits are brought by the same plaintiffs. As at law *Sparry's* case (*a*), and in equity *Crofts* v. *Wortley* (*b*), *Bell* v. *Read* (*c*), *Foster* v. *Vassal* (*d*), *Urlin* v. *Hudson*. (*e*)

(*a*) 5 *Co.* 61.
(*b*) 1 *Ca. in Cha.* 241.
(*c*) 3 *Atk.* 590.
(*d*) 5 *Atk.* 587.
(*e*) 1 *Vern.* 532.

And

And though it is said that, after the decree to account in the first suit, all parties are equally actors, yet it is not within the principle of a double vexation. The difference is, that a defendant who never has proceeded under such a decree, cannot be said to have sued there, merely because he might have sued. The former decree never was prosecuted by any party, how then can Mr. *Edwards*, the Defendant there, be said to have been a Plaintiff in it, either nominally or substantially?

Therefore the two suits are not *ad idem*.

Upon the second head. If the suits are substantially the same, yet the first is not pleadable in bar of the second, in point of jurisdiction.

1. The form of the plea is itself bad, being a mixture of a plea of a former suit pending, and of a former decree made, and, therefore, improper. A decree to be pleadable in bar, must be final, *Senhouse* v. *Earl* (*a*), *Child* v. *Gibson* (*b*); and if it be not signed and inrolled, it can only be insisted upon by way of answer, *Kinsey* v. *Kinsey*. (*c*)

2. A suit in *England* pending, cannot be pleaded in bar of a suit in *Jamaica*. Upon the authorities. No direct authority is to be found for the plea, and there are authorities by analogy against it. For the plea is cited, *Wells* v. Lord *Antrim*, before Lord *Cowper*, 6th *December* 1717, which was the plea of a bill pending in *Ireland*; but Lord *Hardwicke* disapproved it (*d*), and it was not allowed to bar, but only to suspend the second suit; and Lord *Cowper*'s own proviso applies

(*a*) 2 *Ves.* 450.
(*b*) 2 *Atk.* 603.
(*c*) 2 *Ves.* 577.
(*d*) 3 *Atk.* 589.

 here,

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here, viz. that the second suit was to proceed whenever the first became impracticable, which is the very case here, from the situation of the parties and property.

Also by the register's book, it appears 6th *August* 1717, that the same Plaintiff here as in *Ireland* prayed a *ne exeat regno* against Lord *Antrim*, who happened to be over here; the writ was awarded, and the security was given accordingly, by which it appears that Lord *Cowper*'s order was merely to relieve Lord *Antrim*, who had been caught in a recognizance.

Against the plea the authorities stand thus: judgments here and in the courts of *Jamaica* are as foreign judgments to each other, *Walker* v. *Witter* (*a*), *Messin* v. *Lord Massareene.* (*b*)

Then this *English* decree, as a foreign judgment in *Jamaica*, can carry no conclusive title, nor conclusive bar to any party. *Otway* v. *Ramsay* (*c*) at law shews, that a judgment in *England* is not a conclusive ground of action in *Ireland.* Lord *Hardwicke* says (*d*), that a judgment in a foreign country will not make a conclusive title or bar to a party suing here, it not being obligatory, but matter of evidence examinable here. So *Dupleix* v. *De Roven* (*e*) in equity, *Gage* v. *Bulkley.* (*f*)

But also here, even between courts themselves concurrent, nothing short of a final decree bars, *Lord Newburgh* v. *Wren* (*g*), *Coysgarne* v. *Jones* (*h*), *Batten* v. *Batten* 1771, *Bullock* v. *Bullock* 1791. (*i*)

(*a*) *Dougl.* 1.
(*b*) 4 *T. R.* 493.
(*c*) 2 *Str.* 1090. 14 *Vin.* 569. *pl.* 5.
(*d*) 3 *Atk.* 589.
(*e*) 2 *Vern.* 540.
(*f*) 3 *Atk.* 215. *Ridgeway*, 265.
(*g*) 1 *Vern.* 220.
(*h*) *Amb.* 613.
(*i*) *Ante*, p. 698.

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Upon the justice of the case. To hold up the *English* decree in bar of the *Jamaica* suit is to defeat justice by setting up an ineffectual against an effectual suit; and if the suit is impracticable, it comes even within *Wells* v. *Lord Antrim.* It is ineffectual, because the parties are not amenable here upon interrogatories, and because the property is not within reach of *English* process.

No ejectment lies in *England* for land in the plantations, *Dict.* in *Crispe* v. *The Mayor, &c. of Berwick* (*a*), because the king has no sheriffs there to execute the judgment at law. And though it was formerly said, that equitable process would go to *Ireland* or the plantations, viz. in Sir *John Fryer* v. *Bernard* (*b*), yet that was a single case, and only a *dictum*, and not a judicial act. And, contrà, no commission for partition lies to *Ireland*, *Cartwright* v. *Pettus* (*c*), *Lord Arglasse* v. *Muschamp* (*d*), sequestration was refused. So in *Fryer* v. *Vernon* (*e*), said to be impossible, and the case of *Richardson* v. *Hamilton*, *Reg. Book*, 8th *June* 1732, was denied as not warranting a sequestration out of the realm.

And the plantations are not under the jurisdiction of Chancery; *St. Christopher*, *Robardeau* v. *Rous* (*f*), *Maryland*, *Penn* v. *Lord Baltimore* (*g*), *Isle of Sark*, *Toller* v. *Carteret* (*h*), *Isle of Man*, *E. Derby* v. *D. of Athol* (*i*), the *English* Chancery acting only upon the person, which being absent, its decrees are ineffectual.

The consequence in general is, that after any suit here, the Plaintiff in the island should file a supple-

(*a*) *Vent.* 59.
(*b*) 2 *P. W.* 261. See the report of this case, 9 *Mod.* 124. *Sel. Ca. in Cha.* 5.
(*c*) 2 *Ca. in Cha.* 214. *Vide ante*, vol. ii. p. 323. n.
(*d*) 1 *Vern.* 135.
(*e*) *Sel. Ca. in Cha.* 5.
(*f*) 1 *Atk.* 544.
(*g*) 1 *Ves.* 444. *Ridgew.* 332.
(*h*) 2 *Vern.* 494.
(*i*) 1 *Ves.* 202.

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mental bill to enforce the execution of the first decree, according to the case from *Wales, Morgan* v. *Halford.* (*a*) Or if the Plaintiff omits this, the true course is, for the Defendant to insist on the prior decree by answer, not to the whole of the subsequent suit, but only so as to have the effect of the first decree allowed *pro quanto* it may extend. (*b*)

LORD CAMDEN C. It is impossible to maintain this plea.

I. It is a plea to the jurisdiction, and the nature of it is so treated in *Sparry*'s case. (*c*) The Plaintiffs in *England* attempt to set up the suit here in bar of the jurisdiction of *Jamaica*, but the causes for allowing the plea of double suits are all where the suits are in courts here; while this is of a second suit in a court, which is a foreign court; inasmuch as this country has no process to enforce its decree in the islands.

In *Gage* v. *Bulkely*, Lord *Hardwicke*'s reasons go a great way to shew the true effect of foreign sentences in this country. And all the cases shew that foreign sentences are not conclusive bars here, but only evidence of the demand.

In the colonial court the question is not, whether those courts had original jurisdiction, for they had clearly, because the property itself lay there; but here the court, on a principle of personal compulsion, drew to itself a jurisdiction, as in the case of *Penn* v. *Lord Baltimore*, proceeding only in personam.

(*a*) 1 *Atk.* 408. *Dougl.* 6.
(*b*) See *King* v. *Brownlow*, 1 *Ca. in Cha.* 233.
(*c*) 5 *Co.* 61.

If

If the first suit had been instituted in *Jamaica*, would the Court of Chancery here have allowed such a plea? Certainly not: *à fortiori*, the Court in *Jamaica*, which is the more apt jurisdiction, could not be expected to allow it.

As to the inconvenience, considering the difficulties of administering justice between parties occasionally living under the separate jurisdictions; I think the parties ought to be amenable to every court possible, where they are travelling from country to country, and we must then endeavour to correct the mischief of these double suits as much as we can, by allowing in each country the benefit of all the other proceedings in the other part of the king's dominions; and this should be introduced by supplemental bill, or insisted upon by answer, according as the occasion may require.

As to authority, there is no case in support of this plea but Lord *Antrim*'s, and that is no authority at all, not even to shew that the instituting of the first suit in one country should be pleadable in bar to a second; on the contrary, the plea is not really allowed, and Lord *Cowper* keeps the second suit before him, that the parties may proceed upon the same bill, if the former suit became impracticable.

II. As to the form of the plea.

1. The Plaintiff in a suit here being Defendant there, cannot, as I think, plead it, because there is not the same plaintiff in both causes. And although, after a decree of account the Defendant becomes an actor, it does not therefore follow that he is a Plaintiff, because he might become a Plaintiff.

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The Master of the Rolls. 1. A Defendant after a decree to account is only an actor, *qua tenus* the account, but not entitled as an original Plaintiff to other relief; and, therefore, not within the case of pleading double suits.

2. A foreign sentence, though not strictly pleadable, yet has been lately held by Lord *Kenyon* to be conclusive evidence, and only to be falsified by shewing error apparent. — Lord *Colchester's* MSS.

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