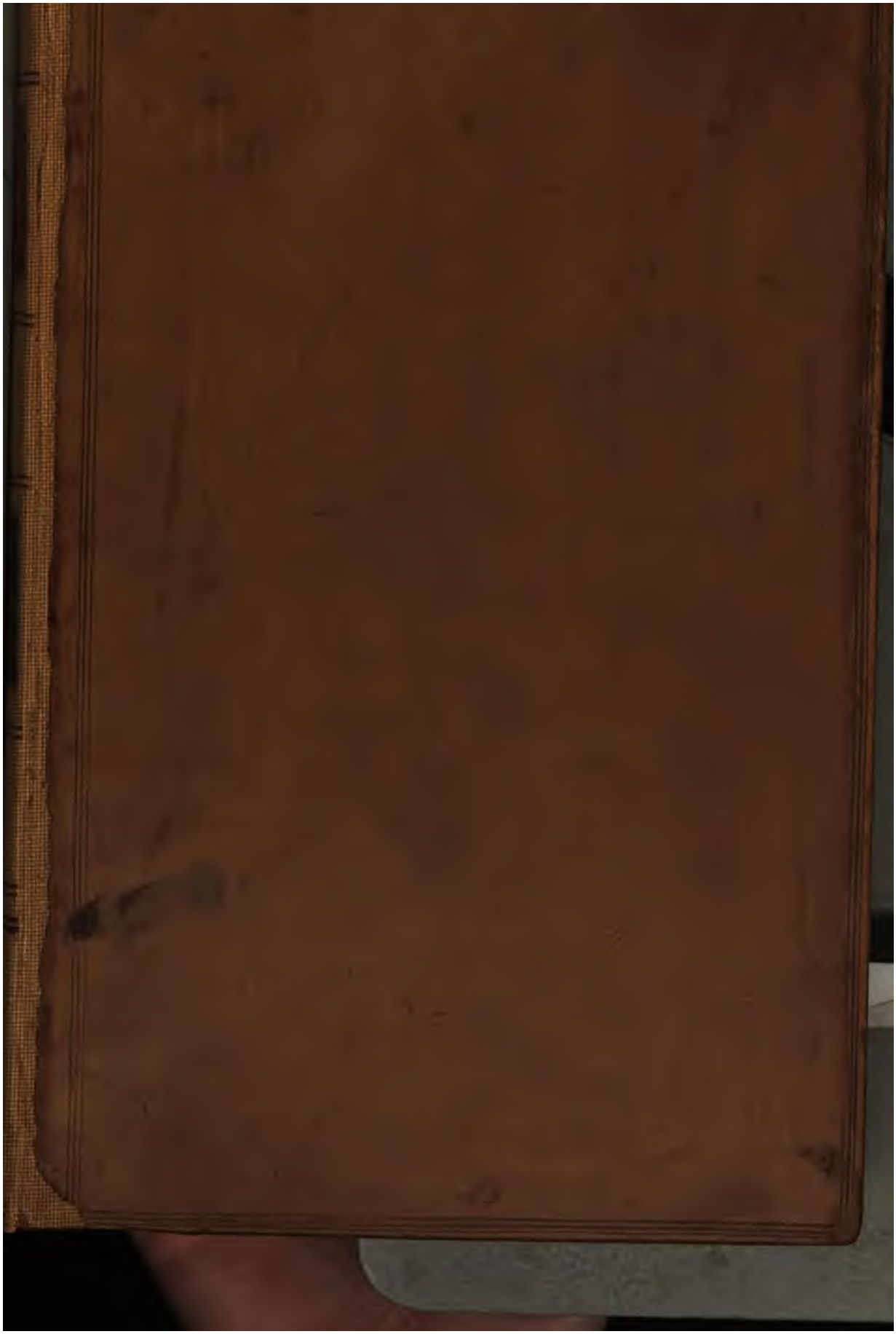

REPORTS

OF

CASES

ARGUED AND DETERMINED IN

THE COURT OF EXCHEQUER;

FROM

MICHAELMAS TERM, 34 *GEORGE III.*

TO

TRINITY TERM, 35 *GEORGE III.*

BOTH INCLUSIVE.

BY ALEXANDER ANSTRUTHER, ESQ.

Of Lincoln's Inn, Barrister at Law.

Second Edition.

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INDEX OF CASES

REPORTED IN

THE SECOND VOLUME.

A.

	PAGE.
ADAMS *v.* Colethurst - -	558
Anderson *v.* Tombs - -	568
Anonymous - 407, 453, 480,	564
Archer, Griffin *v.* - - -	478
Armitage, Govet *v.* - -	412
Athill, Baker *v.* - -	491
Atkyns *v.* Hatton - -	386
Atkyns *v.* Lord Willoughby - -	397
Atkyns, Lord Stawell *v.* - -	564
Attorney General *v.* Brewster -	560
Attorney General *v.* Lane -	589
Attorney General *v.* Richards -	603
Attorney General *v.* Lord Stawell -	592
Attorney General *v.* —— -	558

B.

Bailey, Thellusson *v.* - -	499
Baker *v.* Athill - -	491
Barber, Lea *v.* - - -	425 *n.*
Barlow *v.* Hall - -	461

PAGE.

Beckman *v.* Legrainge - - 359
Benton, Sawbridge *v.* - - 372
Birch *v.* Ellames - - 427
Blane, Cottin *v.* - - 544
Bolt *v.* Stanway - - 556, 569
Bovey, Bart. Longdale *v.* - 570
Bowsher v. Morgan - - 404
Bowen *v.* Webb - - - 361
Brassington *v.* Brassington - 369
Brewster, The Attorney General *v.* 560
Brewer *v.* Hill - - - 413
Bright *v.* Chapman - - 345
Bull *v.* Griffin - - - 561
Burdon, Newcomb *v.* - - 343
Burnham, Smith *v.* - - 525
Burrow, Stephani *v.* - - 346
Burslem, Lord Coventry *v.* - 567 *n.*
Button, Filewood *v.* - - 498

C.

Caillaud *v.* Estwick - - 381
Calliott *v.* Walker - - 495
Carter, Howes *v.* - - 500
Cavendish, Gabbit *v.* - - 547
Chapman, Bright *v.* - - 345
Chapman *v.* Lansdown - - 554
Christie, The King *v.* - - 586
Clarke *v.* Jennings - - 498
Colethurst, Adams *v.* 552
Collyer *v.* Howse - - 481
Connelly, French *v.* - - 454
Cook *v.* Cullen - - 500
Cooke *v.* Tombs - - 420

PAGE.

Cottin *v.* Blanc - - - - 544
Coventry (Lord) *v.* Burslem - 567
Cox, Spencer *v.* - - - 535
Crackenthorpe, The King *v.* - 412
Crew, Selby *v.* - - 504
Cullen (Goodtitle on dem.), Cooke *v.* 500
Cunningham *v.* Williams - - 344

D.

Davallon, Daubigny *v.* - 462
Daubigny *v.* Davallon - - 462
Davies, Philips *v.* - - - 572
Davis, Hudson *v.* - - 504
Dawson, Sellas *v.* - - - 458 *n.*
Dawson *v.* Princeps - - 521
Deane, The King *v.* - - 369
De Giou *v.* Dover - - 517
Deverall, Remington *v.* - - 550
Deverell, *Exparte* - - 483, 616
Dixon *v.* Edwards - - 356
Doe *v.* Robinson - - 574
Donne, Hyde *v.* - - 551
Dover, De Giou *v.* - - 517
Dragg, Woolley *v.* - - 551

E.

Edwards, Dixon *v.* - - 356
Edwards, Thomas *v.* - - 558
Ellames, Birch *v.* - - - 427
Estwick, Caillaud *v.* - - 381

F.

	PAGE.
Field, Flint *v.*	543
Filewood *v.* Button	498
Flint *v.* Field	543
Fluitt, Plumb *v.*	432 *n.*
Foster, Miller *v.*	387 *n.*
Fowler, Sir John Pechell *v.*	549
Franco, Newman *v.*	519
Frazer *v.* Thoburn	380, 413
Freeland *v.* Johnson	407
French *v.* Connelly	454
Fry, The King *v.*	368

G.

Gabbit *v.* Cavendish	547
Gabel *v.* Perchard	522
Gadd *v.* Worrall	553, 555
Gilbert *v.* Golding	442
Gilladum, James *v.*	552
Godbolt *v.* Watts	543
Golding, Gilbert *v.*	442
Goodman *v.* Purcel	548
Goodtitle on dem. Cooke *v.* Cullen	500
Govet *v.* Armitage	412
Griffin *v.* Archer	478
Griffin, Bull *v.*	561
Griffiths, Parry *v.*	480

H.

Hall, Barlow *v.*	461
Hamilton, Oliver *v.*	453

PAGE

Hatchett, Lloyd *v.* - - 525
Hatton, Atkyns *v.* - - 386
Hearle, Randal *v.* - - - 363
Hill, Brewer *v.* - - - 413
Hodgson, Hutchison *v.* - - 361
Hodgson, Maggridge *v.* - - 443
Howes *v.* Carter - - - 500
Howes, Collyer *v.* - - 481
Hudson *v.* Davies - - - 504
Hull *v.* Mathews - - - 444
Hurst *v.* Thomas - - 585, 591
Hutchison *v.* Hodgson - - 361
Hyde, Salisbury *v.* - - 523
Hyde *v.* Donne - - - 551

J.

James *v.* Gilladum - - 552
Jennings, Clarke *v.* - - 498
Johnson, Freeland *v.* - - 407
Jones, Matthews *v.* - - 506
Jones, Owen *v.* - - - 505

K.

The King *v.* Christie - - 586
The King *v.* Crackenthorpe - - 412
The King *v.* Deane - - 369
The King *v.* Fry - - 358
The King *v.* Young - - 448
The King *v.* ——— - - 525

PAGE.

L.

Lane, The Attorney General *v.* - 589
Lansdown, Chapman *v.* - - 554
Lea *v.* Barber - - - 425 *n.*
Legrainge, Beckman *v.* - - 359
Lewis *v.* Rogers - - - 579
Lidderdale, Stone *v.* - - - 533
Littledale, Earl of Lonsdale *v.* - 356
Lloyd *v.* Hatchett - - 525
Lonsdale (Earl of) *v.* Littledale - 356
Longdale *v.* Bovey, Bart. - - 570
Lygon *v.* Strutt - - 601

M.

Macmaster, Shoulbred *v.* - - 366
Markham *v.* Wilkinson - - 579
Marsh *v.* Robinson - - 479
Mathews, Hull *v.* - - - 444
Mathews *v.* Jones - - 506
Miller *v.* Foster - - 387 *n.*
Miller, Rutherford *v.* - - 458
Maggridge *v.* Hodgson - - 443
Moody *v.* Steele - - 386
Morgan, Bowsher *v.* - - 404
Munro, Vandam *v.* - - 502

N.

Newcomb *v.* Bourdon - - 343
Newman *v.* Franco - - 519
Northumberland, (Duke of,) Ward *v.* - 469

PAGE.

O.

Oliver *v.* Hamilton - - 453
Owen *v.* Jones - - - 505

P.

Parkinson, Rees *v.* - - 497
Parry *v.* Griffiths - - 480
Peach, Routh *v.* - - 519
Pechel, Bart. *v.* Fowler - - 549
Philips *v.* Davies - - 572
Plumb *v.* Fluitt - - - 432 *n.*
Pope *v.* Wood - - - 577
Price *v.* Vaughan - - 524
Princeps, Dawson *v.* - - 521
Purcel, Goodman *v.* - - 548

R.

Randal *v.* Hearle - - 363
Rees *v.* Parkinson - - 497
Remington *v.* Deverall - - 550
Richards, The Attorney General *v.* - 503
Robinson, Marsh *v.* - - 479
Robinson, Doe *v.* - - - 574
Rogers, Lewis *v.* - - 579
Routh *v.* Peach - - - 519
Rutherford *v.* Miller - - 438

PAGE.

S.

Salisbury *v.* Hyde - - 523
Sawbridge *v.* Benton - - 372
Saxton *v.* West - - - 479
Selby *v.* Crew - - 504
Sellas *v.* Dawson - - 458 *n.*
Shoulbred *v.* Macmaster - - 366
Smith *v.* Burnham - - 525
Smith *v.* Targett - - - 529
Spenser *v.* Cox - - 535 *n.*
Stanway, Bolt *v.* - - 556, 569
Stawell (Lord) *v.* Atkins - 564
Stawell (Lord,) The Attorney General *v.* 592
Steele, Moody *v.* - - 386
Stephani, Burrow *v.* - - 346
Stone *v.* Lidderdale - - - 533
Strutt, Lygon *v.* - - 601
Surrey *v.* Lord Waltham - - 531 *n.*
Sutton, Wilson *v.* - - 444

T.

Targett, Smith *v.* - - - 529
Tenant *v.* Wilsmore - - 362
Thellusson *v.* Bailey - - 499
Thoburn, Fraser *v.* - - 380, 413
Thomas *v.* Edwards - - 558
Thomas, Hurst *v.* - - 585, 591
Tombs, Cooke *v.* - - 420
Tombs, Anderson *v.* - - 568

PAGE.

V.

Vandam *v.* Munro - - 502
Vaughan, Price *v.* - - - 524

W.

Waltham, (Lord,) Surrey *v.* - - 531
Ward *v.* Duke of Northumberland - 469
Waters *v.* Weigall - - 575
Watts, Godbolt *v.* - - 543
Webb, Bowen *v.* - - - 361
West, Saxton *v.* - - - 479
Weigall, Waters *v.* - - 575
Wilkinson, Markham *v.* - - 579
Williams, Cunningham *v.* - 314
Willoughby de Brooke, (Lord,) Atkyns *v.* 397
Wilsmore, Tenant *v.* - - 362
Wilson *v.* Sutton - - 444
Windus, *Ex parte* - - 489
Wood, Pope *v.* - - - 577
Woolley *v.* Drage - - - 551
Worral, Gad *v.* - - 553, 555

Y.

Yea *v.* Yea - - 494, 589
Young, The King *v.* - - 448

INDEX OF CASES

CITED IN

THE SECOND VOLUME.

N. B. Those Cases which are *original*, having never before appeared in any Book of Reports, are marked by the letter (*o*) annexed to them. Of the other Cases cited, those only are inserted in this Index upon which any considerable Comments have been made from the Bench, or in Argument.

A.

	PAGE.
ADAMS *v.* Hewit - -	400, 401
Aistrup, Bateman *v.* -	501
Allan *v.* Hartley - -	450
Allott *v.* Wilkinson (*o*)	391, 394, 395
Angove, Dungey *v.* -	530, 531
Appleton, Robertson *v.* (*o*) -	375
Ashton, Blackwell *v.* -	449
Attorney General *v.* Philpot (*o*)	607
Austen, Waugh *v.* - -	459

B.

Bagenal, Whaley *v.* -	425
Balfour *v.* Weston - -	575

PAGE.

Barker, Rouse *v.* - - 392, 396
Barber, Lea *v.* - - 425
Barwick *v.* Read - - 536
Bateman *v.* Aistrup - 501
Beard, Bedle *v.* - - 378
Bedle *v.* Beard - - 378
Berkeley, Case of Lord - 595
Bevis, Whitchurch (*v*) - 425
Bishop *v.* Chichester - 400, 401
Blackwell *v.* Ashton - 449
Blackwood, Cathcart *v.* (*o*) - 537
Bradney, Hasselden *v.* - 379
Bramhall *v.* Cross (*o*) - 459
Bristol, City of, *v.* Morgan - 607
Brown *v.* Quilter - - 576
Burslem, Lord Coventry *v.* (*o*) 567
Butler, Davidson *v.* (*o*) - 460

C.

Carter, *Ex parte* - - 428
Cathcart, Blackwood *v.* (*o*) - 537
Chapman *v.* Smith - 399, 400, 402
Chichester, Bishop *v.* - 400, 401
Churchman *v.* Tunstal - 608
Clarke, Evans *v.* (*o*) - 413
Clavering, the Bishop of Durham *v.* (*o*) 392
Coulson *v.* White - 608
Coventry, Lord, *v.* Burslem (*o*) 567
Cox, Spencer *v.* (*o*) - 535
Cross, Bramhall *v.* (*o*) - - 458
Crowther, Tawney *v.* - - 423, 426
Cumberland, Case of the Earl of, 595

D.

	PAGE.
Davidson *v.* Butler, (*o*) - -	460
Dawson, Sellas *v.* (*o*) - -	458
Dundas, Sir Thomas, *v.* Dutemps	384
Dungey *v.* Angove - - 530,	531
Durant, Watts *v.* (*o*) - -	474
Durham, Bishop of, *v.* Clavering (*o*) -	392

E.

Edge v. Oglander - 399, 400,	402
Edie, Pray *v.* - -	360
Egremont, Winterton, *v.* Lord (*o*) -	392
Eling, Parquot *v.* - - -	359
Erving, Peters *v.* - -	367
Evans *v.* Clarke, (*o*) -	413

F.

Fitzgerald *v.* Whitmore - -	360
Flarty *v.* Odlum - -	536
Fluitt, Plumb *v.* (*o*) - -	432
Folliott *v.* Ogden - -	547
Foster, Miller *v.* (*o*) - -	387 *n.*

G.

Goddard, Smith *v.* - - -	375
Gosling *v.* Lord Weymouth -	357
Grainger v. Wyvil, (*o*) - -	534
Grimes *v.* Smith - -	378

H.

	PAGE.
Harrison v. Horne, (*o*)	476
Hartley, Allan *v.*	450
Hasselden *v.* Bradney	378
Hatch, Holford *v.*	419
Hewitt, Adams *v.*	400, 401
Hoare's Case	599
Holford *v.* Hatch	419
Hollis *v.* Whiting	423, 425
Horn *v.* Horn	384
Horne, Harrison *v.* (*o*)	476

J.

Jane, Paradise *v.*	575
Johnson, Newcastle *v.*	608

K.

Ketilby *v.* Ketilby, (*o*)	527

L.

Lawrence *v.* Yates (*o*)	493
Lea *v.* Barber	425
Lidderdale *v.* Duke of Montrose	533

M.

May, Woollacomb *v.* (*o*)	567 *n.*
Meadows, Smith *v.* (*o*)	579
Miller *v.* Foster, (*o*)	387 *n.*

PAGE.

Mocatta *v.* Murgatroyd - 435, 440
Montrose (Duke of,) Lidderdale *v.* - 533
Morgan, Goodtitle *v.* - - 435, 440
Morgan, City of Bristol *v.* - - 607
Murgatroyd, Mocatta *v.* - 435, 440

N.

Newcastle, Town of, *v.* Johnson - - 608
Nutt, Wright *v.* - - 546

O.

Odlum, Flarty *v.* - - - 536
Ogden, Folliott *v.* - - 546
Oglander, Edge *v.* - - 399, 400, 402

P.

Paradise *v.* Jane - - 575
Parquot *v.* Eling - - 359
Peters *v.* Erving, (*o*) - - 367
Philpot, The Attorney General *v.* (*o*) - 607
Pilkington, Mayor of York *v.* - - 395
Plumb *v.* Fluitt, (*o*) - - 432
Pray *v.* Edie - - 360

Q.

Quilter, Brown *v.* - - 576

PAGE.

R.

Rand, Tourle *v.* - - 437, 440
Read, Barwick *v.* - - 536
Robertson *v.* Appleton, (*o*) - 375
Rouse *v.* Barker - - 392, 396
Rowles, Ryal *v.* - - 435, 440
Rutland, Case of the Earl of - - 595
Ryal *v.* Rowles - - 435, 440

S.

St. Luke's *v.* St. Leonard's - 393, 395
Sellas *v.* Dawson (*o*) - - 458
Shelly, Walton *v.* - - 433
Smith *v.* Goddard, (*o*) - - 375
Smith, Grimes *v.* - - 378
Smith, Chapman *v.* - 399, 400, 402
Smith *v.* Meadows, (*o*) - - 579
Sowerby *v.* Warder, (*o*) - 456, 457
Spencer *v.* Cox, (*o*) - - 525
Surrey *v.* Lord Waltham, (*o*) - 531

T.

Tawney *v.* Crowther - - 423, 426
Tew *v.* The Earl of Winterton - 526
Tourle *v.* Rand - - 437, 440
Tunstal, Churchman *v.* - 608

W.

	PAGE.
Waltham, Lord, Surrey *v.* (*o*) -	531
Walton *v.* Shelly - -	433
Warder, Sowerby *v.* (*o*) -	456, 457
Watts *v.* Durant - -	474
Waugh *v.* Austen - -	459
Webb *v.* Conyers - -	391, 393
Weston, Balfour *v.* - -	575
Weymouth, Lord, Gosling *v.* -	357
Whaley *v.* Bagenal - -	425
Whitchurch *v.* Bevis - -	425
White, Coulson *v.* - -	608
Whiting, Hollis *v.* -	423, 425
Whitmore, Fitzgerald *v.* - -	360
Wilkinson, Allott *v.* (*o*)	391, 394, 395
Winterton *v.* Lord Egremont (*o*) -	392
Winterton, Earl of, Tew *v.* -	526
Woollacomb *v.* May (*o*) - -	567 *n.*
Wright *v.* Nutt - -	546
Wyvil, Grainger *v.* (*o*) - -	534

Y.

Yates, Lawrence *v.* (*o*) - -	493
York, Mayor of, *v.* Pilkington -	395

CASES

ARGUED AND DETERMINED

IN THE

COURT OF EXCHEQUER,

IN

MICHAELMAS TERM,

34 GEORGE III.

NEWCOMB *v.* BURDON.

Thursday, 7th November, 1793.

BILL by the plaintiffs, the children of —— *Newcomb*, deceased, against the defendant, his widow and administratrix. At the hearing of the cause this day, it appeared that an estate was given to the father for life, remainder to the plaintiffs in tail as tenants in common. The father prevailed upon the plaintiffs, who were illiterate and could not read, to sign an instrument, of which they did not know the real nature, and under the authority of which he levied a fine of the premises in their joint names. The money arising from this transaction he invested in the funds, where it still

A. tenant for life, with remainder to *B.* in tail, by fraud gets *B.*'s authority to levy a fine, he sells the land and invests the purchase money in the funds, where it is clearly identified; *B.* has no lien on this money against the other creditors of *A.*

remained, and was clearly identified. There being a deficiency of assets, the plaintiffs claimed a specific lien on this fund, considering the testator as trustee thereof for them. The Court held clearly, that as the testator had obtained their signatures to the fine fraudulently, he should be considered as a trustee to the amount; but as no agreement had been made, so as to make this particular fund answerable, it was to be considered as a general charge on the estate, not as a specific lien.

Graham and *Onslow* for the plaintiffs; *Burton*, *Plumer*, and *Scafe* for the defendant.

15th *November*.

CUNNINGHAM *v.* WILLIAMS.

One reported the highest bidder compelled to complete his purchase.

A. *B.* was reported by the Master, the highest bidder on a sale before him, of property in the cause. Having neglected to complete his purchase, it was moved by *Burton* and *Cooke*, last term, to confirm the Master's report, in order to compel him to complete his purchase. The Court hesitating as to the practice, the matter stood over to this day, when *Cooke* stated two cases, *Barker* v. *Holford*, July 1793, and *Egginton* v. *Flavel*, November 1787, in Chancery, where biddings were compelled to be completed; and that the practice in Chancery is to confirm the report, and then if the purchaser is supposed to be responsible, to get an

order to inquire whether the party can make out a good title, and if he can, to obtain an order upon the purchaser to complete his purchase: but if the purchaser is unable to complete his purchase, then, on the report being confirmed, it is moved to discharge him from the bidding.

Ordered, *nisi*, and no cause being shewn, this was afterwards made absolute.

BRIGHT *v.* CHAPMAN. *Monday, 18th November.*

BILL by husband, against trustees in articles of separation between him and his wife, for an annuity by those articles covenanted to be paid to him out of property of the wife assigned to them. The husband covenanted in the articles not to molest his wife, nor force her to cohabit with him; and the annuity was declared to be payable while he should leave her unmolested. The answer set up a defence of several instances of molestation by the plaintiff, by which he forfeited his annuity. The evidence of molestation containing contradictory accounts of low and vulgar contentions, the Court directed an issue to try the fact, whether the plaintiff had broken the covenant, by molesting his wife, or not. By directing this issue, the Court seem to have agreed, that by any breach of the covenant, the annuity was gone for ever; although it

was contended, on behalf of the plaintiff, that he was only liable to make a compensation in damages for the injury committed, and the annuity to stand as a security. The Court did not expressly declare their opinion on this point.

STEPHANI *v.* BURROW.

Bark imported in the rough state and pulverized here, is not entitled to the drawback on exportation.

THIS was an action against the defendant, as under searcher of the customs, for refusing to sign a debenture to entitle the plaintiff to the drawback on a quantity of Peruvian bark which he was then exporting. The jury found a verdict for the plaintiff, subject to the opinion of the Court on the following case:

The bark had been imported and paid duty in the rough state; had been pulverized by the plaintiff, and was about to be exported in that state. The question was, whether by this change it ceases to be entitled to the drawback. Bark is better pulverized in *England* than any where else. In the manufacture, the first process is to separate the bad particles from the good, by cutting off the former. In the course of the manufacture, about one fifth of the quantity is lost or thrown aside in bark of ordinary quality; in bad bark, a greater proportion. In pulverized bark other materials may be added, in a small quantity, without detection; but if there

is great adulteration, it will be perceived by the officers of the customs conversant in that article. Formerly a very small quantity of bark was exported in powder, and the commissioners of the customs then allowed the drawback upon it; but lately the quantity exported had been greater, and the commissioners refused to allow the drawback: it was always exported under the general term *bark*, and the commissioners never would allow a certificate in the words *powdered bark*.

The case was argued in *Michaelmas* Term by *Russell* for the plaintiff and *Leycester* for the defendant; and again in *Trinity* Term by *Pigott* for the plaintiff and *Burton* for the defendant.

(The entry of *Cortex Peruvianus*, in the schedule (A) 27 *Geo.* III. *c.* 13. is general: duty nine pence *per* pound, drawback six pence.)

Argument for the plaintiff.—Either this clause means to consider the pulverized and rough bark in the same light, or applies only to the latter; if it does not apply to pulverized bark, then that is liable only to the general duty charged on all non-enumerated articles, which is much lower than this duty; but, on the contrary, it has always been the policy of the country to put the lowest duty on the rough material, to encourage the home manufacture. Then, if this, being the general term, applies to bark whether pulverized or not, it does so both as to the duty and as to the drawback.

The legislature must be supposed, when talking of the article, to have had in contemplation the

state in which it is commonly used, at least as well as the rough state; and what strongly shews their meaning throughout the act is, that where they have intended any distinction between the different shapes of the same article, they have so expressed it: as, liquorice powder is charged higher than liquorice root; white sugar is distinguished from brown; but not sugar in lumps from the same in powder; the quality is distinguished, but not the shape. Camphire refined and unrefined are distinguished; brown and white sugar-candy are distinguished; hemp in the rough state, is distinguished from dressed; ostrich feathers dressed and undressed; hides rough and tanned, &c.; while other articles that are not distinguished are imported in either shape: as jalap, salop, rhubarb, mustard-seed, gum-arabic, gum guaiaci, cream of tartar, indigo, salpetre; and many of these are commonly manufactured here in the same manner as the bark, by pulverization, and have always received the drawback after manufacture*.

If this article in the schedule applies to bark, whether pulverized or not, the change between the times of importation and exportation can make no difference. It is the policy of the country to encourage the manufacture at home; but if that which is imported rough loses the bounty by manufacture, that is a discouragement to the manufacture, and an encouragement to export rough;

* The fact of any of these, or similar articles, receiving the drawback after a change by manufacture, except through negligence or fraud, was denied on the part of the defendant; and probably that question is settled by the present determination.

this therefore can never be presumed without express words in the act.

It cannot be said that the mere diminution in the quantity shall have that effect; for if one hundred pounds are imported, and the importer chooses to export fifty pounds of it, it never was doubted that he might have the drawback on the fifty pounds; but if he may export a part, it is in his option what part. In a chest of oranges imported, if he wishes to re-export the half, he need not take them indiscriminately, but may choose which half; the identity equally remains, however the division is made. Then if, after the separation of the good particles from the bad, and before pulverization, the plaintiff had chosen to export, he might have had the drawback; and the revenue is benefited by it, for it receives duty on the larger and pays drawback on the smaller quantity.

As the change of quantity can make no difference, neither can the change of shape by pulverization. Perhaps a manufacture, in which the article is mixed with others, may lose its identity; but if a change is produced in the shape, for the purpose of cleansing, package, or by friction in the carriage, or other means which do not make a difference for the purposes of revenue, it continues as to this purpose the same.

It is equally easy for the manufacturer to identify the article, whatever shape it may be in, and accordingly it is by his oath that it is to be done, (sec. 3.) The revenue officer can no more distin-

guish the identity, after a change of packages, than after manufacture. Then the only criterion is, whether the manufacture, by changing the shape, brings the article within a different legislative description; where it does not, as in bark, there is no material alteration.

For the defendant.—It is clear, that where there is a different duty and drawback on the manufactured article from the rough, it cannot be imported rough, and receive, after manufacture here, the drawback either as rough or as manufactured, because the change destroys the identity of the commodity. Then suppose the schedule had said, that for *Cortex Peruvianus* there shall be a certain duty and drawback; for *Pulvis Cort. Peruv.* there shall be the same duty and drawback; the circumstance of the same duty being put on both would not vary the case: the change would destroy the identity as much as if the duty were different. This schedule has included, under their generic name, two different species of bark, because the same duty was intended to be applied to both: this does not take away the distinction between their natures; and if a change by manufacture destroys identity in one case, it must in all.

Where the legislature has intended that the article imported rough and manufactured here should have the same or any drawback, it expresses it, as in sugars. If the importer can separate the good from the bad parts, as in oranges or bark before pulverization, and get the drawback on the good, he might equally do so on the bad. The duty is

laid on the article consisting of good and bad particles; if these are separated, it is no longer the same; the identity consisted in the combination; and if the refuse could be exported and obtain the drawback, it would in fact be diminishing the duty in that proportion. By the same rule of construction, one who imported mahogany might claim the drawback upon saw-dust; or it might be claimed upon the exportation of the fragments of broken china.

The mere change of shape often forfeits the drawback. *Russian* iron, imported in large bars, has always lost the drawback by being cast into smaller bars, as not being the same article as imported.

But in fact, pulverized bark is not included in this article at all. The generic name must mean the article in its original state, without additions or change; when manufactured, it has the addition of the manufacture to the denomination, as hides, and tanned hides. If then the powder can be imported, or have drawback at all, it must have it as one of the non-enumerated articles, (sec. 17.) and whether that is in a right proportion or not, is for the consideration of the legislature alone.

MACDONALD, Chief Baron.—It is very clear that the powder of bark, not being prohibited, may be imported, subject to some duty or other; and it rather appears to me at present to have been the intention of the legislature, that it should be subject to the same duty as the rough article, and of course 7th June.

to the same drawback; but the difficulty is, whether, supposing that bark may be imported and claim the drawback in either shape, it may also pay in the one shape, and receive drawback in the other; or whether it must be at both periods in the same shape, whichever that may be. Certainly it is the policy of this country to encourage the importation in the rudest state, and the strict letter of the act would allow the drawback on the pulverized bark; for the article continues abstractedly the same, and is not like broken china or saw-dust, in which, although some of the particles remain, the article itself is gone, and neither remains in the same nor in an altered shape. Yet I have great doubt if this can be called the same article within the sense and spirit of the act; the separation of particles makes an essential difference; I fear there can be no line drawn in the degree of manufacture which shall change the nature of an article. It will be necessary for the Court to deliberate upon the judgment to be given, as a general rule must be laid down for the direction of the officers of the revenue in similar cases.

In this term judgment was given by the Lord Chief Baron, to the following effect:

The Court are all of opinion, that the plaintiff in this action is not entitled to any drawback. It is true, that the particles of the commodity are the same as that which was imported, and which is found in the case to have paid the accustomed duty; but it appears, upon considering this act, that where the particles constituting the commo-

dity have changed their shape and appearance between the times of importation and exportation, the legislature did not intend to allow the drawback, because of the many frauds which could otherwise be practised without a possibility of detection; accordingly, in many other commodities, the particles which continue in every other respect the same, are considered by the legislature, after being manufactured, to constitute a different article. By a clause in the act, (sec. 3.) the real state of the commodity must appear by the entry; for the drawback is not to be allowed unless the goods are duly entered for exportation. The solicitude of the legislature respecting this circumstance, shews that they intended that the drawback should not be allowed, unless the entry for exportation and that upon importation were the same; or, in other words, unless the article remained unaltered.

The particles of flour are precisely the same with those of wheat, and all the difference between them is, that by the grinding and dressing, the figure is altered, and the coarser parts are taken away; yet wheat and flour are considered by the act as perfectly distinct articles. So, pearl-barley is made by taking off the husk of the barley by a mill; that does not even change its form, except by losing the outward covering; it is still the body of the grain, and is therefore a stronger case than the present, where the article is reduced to powder; yet pearl-barley is considered in the act as a different article from the grain in its natural state.

If the identity of any commodity was not changed until every particle of it was altered, articles of various appearances and properties, between which indeed there is as striking a diversity as between any preparations that can be made from the most heterogeneous substances, might be entered under the article quick-silver. Calcination effects a separation only, and not a change of particles, and has been considered as merely a chymical pulverization; and this process, employed upon quick-silver, produces, according to the different degrees of heat by which it is effected, sublimate, precipitate, or calomel.

The best snuff is merely rasped tobacco; yet as articles of commerce, they are not considered as having any affinity to each other. So laudanum is merely opium in a state of solution; but will it be said that it could be exported under its former name of opium?

If this had been reduced to a tincture by the addition of brandy, it is not pretended that the drawback could have been claimed: yet in that case there would still have been a given quantity of bark; and although, by the mixture with brandy, a medicine of a third description would have been produced, if what is contended for on behalf of the plaintiff be right, the exporter might in that case claim a double drawback, one for the bark, and the other for the brandy; for both are preserved although blended together.

But if for a substance, which has paid the duties upon importation, the owner is entitled to a drawback upon re-shipping for a foreign market, however different it may then be in appearance or quality, unless all the officers of the customs are deeply versed in natural philosophy, the revenue must be defrauded to a very great extent. In this case indeed it is found that the bark remained pure and unmixed; but we must give such a decision as may stand as a general rule of construction of this statute, and such as may prevent any attempts to defraud the revenue, and defeat the purposes of the act. It is found that powdered bark may be adulterated without danger of discovery, except from persons conversant in the commodity; the saw-dust of mahogany may be mixed with it, for the purposes of fraud, and so the public may be forced to give a drawback upon a thing of no value.

As to the conduct of the commissioners of the customs, it makes no difference the one way or the other; at the different times when their attention has been called to this subject, they have thought differently upon it; when the case but seldom occurred, and they had not given it much consideration, they allowed the drawback; but when the practice of exporting this article became more frequent, and the question of more importance to the revenue, they thought of it more seriously, and determined not to allow it. This alteration of their opinion was the natural consequence of having more fully considered the subject.

For these reasons we are of opinion that the plaintiff is not entitled to recover in this action.

Tuesday, 26th November.

DIXON *v.* EDWARDS.

The clerk of an attorney, defendant, may be bail for him.

DAUNCEY objected to one of the bail, as being a clerk to the defendant who was an attorney; and cited several cases to shew that the clerk of an attorney, as well as an attorney himself, had been held not competent to be bail.

THOMSON, Baron, said he understood the rule to be, that an attorney or his clerk should not be bail for their clients: that it was a rule introduced by the Courts to protect their officers, the attornies, from the constant demand the clients would otherwise make to become bail for them, and which their relative situation would often enable them to enforce; and therefore that the rule was not applicable to the present case, where the attorney himself was the defendant.

Accordingly the bail proceeded to justify, but were rejected upon other grounds.

Wednesday, 27th November.

EARL of LONSDALE *v.* LITTLEDALE, in Error.

A peer may be sued in the Court of King's Bench, by bill, as "having "privilege of "parliament."

THIS was an action on the case brought by Mr. *Littledale* against the Earl of *Lonsdale*, in which he sued by bill against the Earl, "having "privilege of parliament," and had judgment.

Williams argued, that the mode of proceeding against a peer by bill, was error; for the suit by bill in the Court of King's Bench, and the jurisdiction of the Court, was confined originally to trespass *vi & armis*, in which the defendant was arrested, and in the custody of the marshal. 3 Rep. 12. The same process was afterwards extended to other cases, by the fiction, that the defendant was already in the custody of the marshal in other suits. 4 Inst. 71. 3 Bl. Com. 42. But all fictions suppose that the thing is possible and legal. That a peer should be in the custody of the marshal is impossible. 9 Co. 49. Hob. 61. 6 Rep. 52. 1 Vent. 298. Lilly's Entries 21, *n.* And therefore a suit by bill against a peer is against law. The stat. 12 & 13 *W.* III. *c.* 3. leaves the manner of proceeding against peers, exactly as it was before that act. It only gives the same remedy in the time of privilege as at other times.

The authority of that Court to hold plea by bill in any case, cannot be questioned in the Exchequer Chamber.

Holroyd, on the other side, was stopped by the Court.

EYRE, Chief Justice.—The case of *Gosling* v. Lord *Weymouth*, Cowp. 844. is a decision directly in point, and as the judgment there given by the Court of King's Bench was acquiesced in, it becomes an authority in all Courts. It is there decided, that, by the practice of the Court of King's Bench, a peer, before the statute of King *William*, might, and still may, be sued by bill. Were it a question concerning the privilege of the peerage from arrests, we should hesitate before admitting that privilege to be infringed by any single decision, or by the

... here the privilege is
... question of practice as
... seems to be at rest by
... *mouth*'s case. If it can at
... whether the Court of King's
... to hold pleas by bill in the
... question, affecting the juris-
... could not be inquired into
... is an exception to our authority
... stitution of this Court*.

REX *v.* FRY.

IN this case two extents were issued to levy the debt due to the crown; the one directed to the sheriff of *Somersetshire*, the other to the sheriff of *Bristol*; they both levied to the whole amount. Upon the levy made by the sheriff of *Somersetshire*, the whole debt was paid, in order to get the goods out of the sheriff's hands. On a question whether the sheriff of *Somersetshire* should have his whole poundage, or only one half, and the sheriff of *Bristol* the other? the Court held, upon the authority of the cases cited, Salk. 332. Parker 177. Lane 74. Bunb. 305, that the sheriff of *Somersetshire* was equally entitled to poundage from the money being paid by the compulsion of his levy, as if he had raised it upon a *venditioni exponas;* and if

* 27 *Eliz. c.* 8. *s.* 2.

he is entitled to any poundage, he must have the whole, by the decision in the case of *Rex* v. *Caldwell*, last term.

BECKMAN *v.* LEGRAINGE. *Same day.*

A plaintiff residing abroad is not compellable to give security for costs in this Court.

A RULE was on a former day obtained by *Gibbs*, calling on the plaintiff to shew cause why the proceedings in this action should not be staid until the plaintiff should give security for the costs, upon affidavit that he resided in *America*.

Cause was this day shewn by *Laws*, who argued, that there being no precedents of similar motions in this court, was alone a sufficient objection; for in the case of *Chilton* v. *Harborne*, (*ante*, *p.* 240.) where a motion conformable to the practice both of the King's Bench and Common Pleas was rejected, one of the reasons assigned by the Court was, that the practice of this Court being otherwise, the motion could not be allowed until the rule should be altered. In this case it is still stronger, for although the practice of the King's Bench is to require security, yet formerly the rule of that Court was otherwise. 2 Burr. 1026. 4 Burr. 2105. Cowp. 158. And the Court of Common Pleas still adheres to the old rule, and has rejected motions similar to the present. *Parquot* v. *Eling*, 1 H. Bl. 106. The Court there did afterwards grant the motion, on an affidavit that the plaintiff had absconded to avoid

paying his debts: but that not appearing in this case, cannot avail.

Gibbs, on the other side, relied on the cases *Pray* v. *Edie*, 1 Term Rep. 267. *Fitzgerald* v. *Whitmore*, 1 Term Rep. 362, in which the old practice was considered and over-ruled; and it is only enforcing in particular cases the original intention of the law, by requiring real pledges instead of nominal. As the rule was never refused in the Exchequer, the practice here ought to be considered as undetermined.

MACDONALD, Chief Baron.—The practice of this Court being to allow a plaintiff abroad to sue without giving security for costs, it would be high injustice to the present plaintiff to alter the rule in his case; he has proceeded here without giving such security, or being immediately prepared to do so, upon the faith of the rule here, and he cannot be delayed or turned round by any alteration we may now chuse to make in the practice of the Court. The propriety of such a regulation in future, would be a different consideration. The rule must be discharged.

SITTINGS AFTER MICHAELMAS TERM, SERJEANTS INN HALL.

BOWEN *v.* WEBB.

9th *December*, 1793.

HALL moved, on behalf of *John Perryn*, one of the creditors who had proved, before the Deputy Remembrancer, his demand upon the estate in the cause, for leave to exhibit interrogatories to the plaintiff, to discover the demands due from him to the estate.

The motion was refused by the Court, because each creditor might claim the same privilege.

HUTCHISON *v.* HODGSON.

A SUIT at law being instituted by the defendant against the present plaintiff, he filed this bill, and obtained an injunction. Upon a full answer coming in, and the injunction being dissolved, the

parties proceeded to trial, but agreed, by advice of the Judge, to refer the matter to arbitration by rule of Court. In the arbitration-bond they submitted all matters in difference, and all suits in law and equity, and costs, &c. The arbitrator awarded *costs at law* to the defendant in equity, and that all suits in law and equity between the parties should be *discontinued*.

Romilly moved, on behalf of the defendant in equity, that the bill might be dismissed on the ground of this award, as the word *discontinuance* in suits at law, is analogous to dismissal in equity, and can only be so understood.

By the *Court*.—You have mistaken your remedy; we cannot act upon this award. If the plaintiff proceeds in his bill, your way is to move for an attachment in the Court of which the submission to arbitration is made a rule; so if he refuses to dismiss his bill, if that is the meaning of the award.

Motion refused.

Wednesday, 11th December.

TENNANT *v.* WILSMORE.

PEMBERTON moved for leave to amend the answer of the defendant after replication put in, upon affidavit that the defendant was informed

and believed he had a good defence, (*viz.* a modus, the bill being for an account of tithes,) and had not inserted it in his answer, not being able, at the time of putting in his answer, to set forth the modus with proper precision.

Burton objected, that the practice here is to give leave to put in a supplemental answer, not to amend the former, for the purpose of keeping them distinct; but even that is only allowed where new matter arises, or a sufficient reason is given for its not being inserted in the first answer.

Motion refused with costs.

RANDAL *v.* HEARLE.

A. entitled to the interest of money for life, with power of appointment as to the principal, receives for her support a part of the principal, and appoints to her husband. The husband cannot claim this part of the principal.

THE property of the testatrix *Elizabeth Dodd* being by the decree (see page 126) declared to belong to the plaintiff, *Randal*, under the appointment of his late wife, it was referred to the Deputy Remembrancer to take an account of the estate in the hands of the defendants, the executors of *E. Dodd*'s will, making all just allowances, &c. He reported, among other things, that the executors had paid to the wife of the plaintiff, for her use and support, 110*l.* over and above the interest of the fund to which she was entitled for her life. Not having allowed this sum to the executors they excepted to the report.

Burton and *Thompson*, in support of the exceptions.—The power of appointment in *Mary Randal* to any person she should think most deserving, makes it at her absolute disposal; she might be her own appointee; she might leave it to her executors to discharge her debts, or appoint in favor of another, paying to her creditor any sum out of it. This power then makes it subject to her debts where the appointee is a volunteer. Lord *Townshend* v. *Windham*, 2 Vez. 1. There a similar power of appointment is considered as part of the general assets of the appointor. Then this fund was subject to the debts of *Mary Randal*, and, as such, the demand of the executors must be allowed.

Being paid to the wife for her support, it is a demand upon the husband, who was bound to support her, and in whose exoneration it therefore went; but having been paid it once, he cannot claim it again.

Selwyn and *Richards*, contra.—The estate of *Mary Randal* in the fund clearly was for her life only; then, if the executors paid her any part of the principal, they did so in their own wrong; if they had a right to pay her a part of it, they might as well have paid her the whole, and it is to be considered as her property; but, if it was her property, the plaintiff should have sued by bill of revivor, as her representative, and not by supplemental bill, as appointee. The Court also have considered him as appointee only in making the legatees under *Mary Randal's* will parties, and in making *Randal* take, subject to these legacies, as part of the appoint-

ment. The claim of the plaintiff is not under her, but under *Elizabeth Dodd*, by which he is entitled to the principal sum.

MACDONALD, Chief Baron.—The present is as ungracious a claim as can come before a Court; and I am glad to find in my own mind a sufficient ground for rejecting it.

The general principle laid down by the counsel for the plaintiff is undoubtedly true, that where, under a will, one has the interest of a sum of money for life, with a general power of appointment, the appointee does not take under the appointer, but under the original will; the other is only the instrument to direct and convey the first testator's bounty.

But here the appointee has in fact received this part of the principal already. It is found to have been paid *for the support* of his wife, and is therefore a demand upon him; he has had the benefit of this payment, and therefore, however negligent the executors may have been in making it, he cannot take advantage of their negligence so as to call upon them to pay him the same sum over again. On these particular circumstances in this case, I think the sum so overpaid should have been allowed to the executors.

THOMSON, Baron.—Without going into the question, what would have been the consequence if the appointment had been to a stranger, it is sufficient to say, that the executors must be allowed

this against the husband of *Mary Randal;* he is debtor for the amount of the sums paid for the support of his wife.

The exception was allowed.

The report also stated that there had come to the hands of the executors of *Elizabeth Dodd*, the sum of 25*l.* found by them in a box in her house, which the executors in their answer stated that they believed to belong to several persons who were members of a club held at her house. This sum the plaintiff claimed as appointee of all the effects of *Elizabeth Dodd;* and it was argued that any claim by the members of the club was barred by the statute of limitations, and so the money sunk into her estate.

But the Court held clearly that this money was not a part of her estate, and should therefore be retained by her executors, subject to the claim of the members of the club.

Thursday, 12th December.

SHOLBRED *v.* MACMASTER, and Others.

Where an injunction against proceeding at law is obtained till the coming in of the answer of one defendant who resides abroad, the

THE defendants, four brothers, were joint owners of a vessel, one residing in *England*, the other three in *America;* the one in *England* insured with the plaintiffs; the vessel was captured by a *French* frigate in *America*, and although not condemned

by the Courts there, was condemned and sold by order of the *French* consul residing there. At the sale she was bought in for the defendants, by the captain, at a very small price. The defendants here having instituted a suit at law to recover from the insurers as for a total loss, they filed this bill for an injunction. The defendant in *England* having answered fully, the plaintiffs moved for and obtained an injunction, till the answers of the other three defendants should come in, on the usual affidavits of merits.

plaintiffs not compellable to bring the money into Court unless on special circumstances.

Douglas and *Scafe* now moved, that the plaintiffs might be ordered to pay into Court the amount of the demand at law, on affidavit that some of them were in insolvent circumstances, and relied on the case of *Peters* v. *Erving* and another, before Lord *Thurlow**, in which two co-obligees, the one residing here, the other in *America*, brought an action here on the bond; a bill was filed for an injunction, and, after answer of the defendant here, and an injunction obtained till the coming in of the answer of the one in *America*, it was moved to have the money brought into Court, and Lord *Thurlow* granted the motion.

Burton and *Steele* on the other side.

MACDONALD, Chief Baron. The granting the present motion would materially affect and change the practice of the Court. The plaintiff here is regular, and has obtained the injunction in the or-

* See this case, as to another point, 3 Bro. R. 54.

dinary manner, by affidavit of merits, with which by the practice, the Court is satisfied till the coming in of the answer. If indeed the plaintiff, after the answer's coming in, requests further indulgence, we can only grant it subject to such conditions as will put the defendant out of danger, by payment of the money into Court. There is no general rule, that where one of the defendants resides abroad, the plaintiff, desiring an injunction till the coming in of his answer, must pay the money into Court; and although it may be an inconvenience to the other defendants who have answered, yet that is no sufficient reason why the plaintiff who is regular should be put in a worse situation by that circumstance. As to the case of *Peters* v. *Erving*, unless we were more accurately informed of the circumstances upon which it was grounded, we cannot act upon it, as the general rule is otherwise.

Hart, amicus curiæ.—In that case there appeared, from the circumstances, to be a great probability that if the money was not paid in then, it never would; and besides, the defendant who had answered, took upon himself to know every circumstance of the transaction, and negatived the whole equity of the bill; so that, unless he was perjured, the answer of the other defendant could be of no use to the plaintiff.

Nothing was taken by the motion.

BRASSINGTON *v.* BRASSINGTON.

PEMBERTON moved that one of the defendants, who was incapable of managing his own affairs, although, being a poor man, no commission of lunacy had been taken out, might answer by guardian. A doubt arose whether a particular guardian ought not to be named in the motion; and *Hollist, amicus curiæ*, saying that that was the practice in the Court of Chancery, the Court directed *Pemberton* to move again, naming the guardian.

A motion for leave to answer by guardian, must name the guardian.

The KING *v.* DEANE.

Saturday, 14th December.

THE defendant, receiver-general of the land-tax for *Berkshire*, having become indebted to the crown in a large sum, an extent issued against him on his bond to the crown; upon which the sheriff levied the said debt with his own poundage, and all the costs, and also an allowance made to him by the Deputy Remembrancer for his trouble, over and above his poundage.

Where a collector of revenue has given a bond to the crown, the penalty is a security against all the expences of process and execution against him.

The *Attorney General* moved to confirm the report.

Haywood and *Abbot* took exceptions to it, and contended that these allowances ought not to be

made, but that the debt alone should be levied by the extent. The sheriff originally was not entitled to any fees or poundage on levying in execution. By the 29 *Eliz. c.* 4. the sheriff, upon levying in execution, is entitled to poundage *of and for* every twenty shillings levied; and accordingly the sheriff is entitled to levy his poundage over and above the debt. 2 Jones, 185. 2 Term Rep. 148. That statute however relates only to executions at the suit of private persons. The poundage on prerogative executions is regulated by the 3 *Geo.* I. *c.* 15.; the words there are materially different: the third section gives twelve pence *out of* every twenty shillings levied: and the sheriff is prohibited, by section 13, from taking any money or fee from the person on whom such levy is made, for or on pretence of levying such or collecting, except the sum of four pence for an acquittance. The act also permits additional fees to be allowed by the Court of Exchequer to the sheriffs, for extraordinary service to the crown. It cannot be intended that the debtor is to pay for extraordinary diligence used against him. It appears that all these allowances are to be made to the sheriffs *upon their accounts*, section 3; clearly implying that the allowance is to be made from the crown, with whom the sheriff's account is. Bunb. 305. Hard. 178. The whole costs therefore are properly payable by the crown; but in particular, the extra allowance can by no construction fall on the party.

The circumstance of the debt here being secured by bond, makes no difference; the bond does not create the debt, and the levy being only of the debt, and the poundage out of that levy, nothing

further can be demanded. On levying the debt, the party was entitled to, and probably obtained an acquittance, on paying the four pence; it would be absurd to say, that after a discharge and acquittance from the principal debt, the security should still remain.

The *Attorney General*, contra, admitted, that where the levy is made on the original debt itself, nothing more can be taken, and the expences of levy fall on the crown; but here, by the agreement of the parties, the defendant has bound himself to discharge his debt to the crown, without putting them to the expence of process against him, and has made himself liable for all the expences incurred by a breach of that obligation; and accordingly the constant practice has been to issue the extent for the amount of the debt and costs. The extra allowance to the sheriff is in the same situation with the other expences of the levy, being payable, by the order of the Court, to the sheriff, without the consent of the crown.

Macdonald, Chief Baron.—The rule laid down by Mr. *Attorney General* I always considered as the law when in that office, and continue still of the same opinion. Where there is a fixed and limited debt of the crown, nothing beyond that debt can be levied; but here, by the contract of the parties, an ulterior fund is created by the penalty of the bond, out of which all costs, poundage, and other expences are to be taken. By creating that ulterior fund, the crown has entitled itself to a complete

indemnity; and therefore the cases cited, where no such fund existed, do not apply.

The report was confirmed.

SAWBRIDGE, Clerk, *v.* BENTON.

The consent of the ordinary to composition real may be presumed from length of time.

THE plaintiff, rector of *Thundersley* in *Essex*, brought his bill for an account of tithes of lands there in the possession of the defendant.

A composition of twenty shillings yearly out of the profits of T. Manor, in lieu of tithes of T. Park, is good.

The defendant claimed to be discharged of tithes, under a composition real of twenty shillings for all tithes arising in *Thundersley Park*, of which the premises in question composed the greater part; the whole park being 360 acres, of which the defendant was in possession of 292.

The patronage of the church of *Thundersley* (together with a pension of twenty-four shillings out of the profits thereof) was formerly in the priory of *Prittlewell;* which was an alien *French* priory; and, as such, its claim to present to the rectory devolved to the king during his *French* wars; and king *Ed.* III. did on that ground present to this living from 1328 till 1362. The priory afterwards presented till 1408. In *May* 1374 that king granted letters of denization to the priory;

on the 6th of *July* in the same year letters patent were granted by that king to the rector, which were now insisted upon as proof of a composition having then taken place; the existence of these letters patent was proved by an *inspeximus* granted to the rector, upon his request, in the 20th *H.* VIII. notifying that letters patent had been granted by *Ed.* III. in these words: "*Edwardus* "*Dei gratia, &c. Sciatis quod nos de gratia nostra* "*speciali et in recompensionem decimarum quas per-* "*sona ecclesiæ de Thundersle in Com. Essex solebat* "*percipere tanquam pertinentes eidem ecclesiæ de* "*terris quas infra parcum nostrum de Thundersle* "*fecimus includi concessimus pro nobis et hæredibus* "*nostris eidem personæ viginti solidos percipiendos* "*singulis annis sibi et successioribus suis a die quo* "*terræ prædictæ primo inclusæ fuerunt infra par-* "*cum nostrum prædictum in perpetuum ad terminos* "*Paschæ et St. Michaelis per equales portiones de* "*exitibus manerii nostri de Thundersle per manus* "*ballivorum præpositorum sive firmarionum ejus-* "*dem manerii qui pro tempore fuerint. In cujus* "*rei testimonium, &c.*" The park was separated from the manor by a grant 1547, and the manor granted to another person in 7 *Ed.* VI. 1553, and have continued separate ever since. King *H.* VIII. was not patron at the time of granting the *inspeximus*. The twenty shillings had always been paid and received till the grant of the manor in 7 *Ed.* VI. but never afterwards; and no tithe in kind had ever within memory been paid for the park.

Burton and *Graham* for the defendant, insisted that king *Ed.* III. had acted as patron, the priory

being alien, and being also supreme ordinary, his letters patent were, when accepted, an agreement of all necessary parties. Although the right as supreme ordinary is not now held good, yet formerly it was; and there is no instance in ancient times of grants by the kings, or compositions entered into by them, being sanctioned by the consent of the bishop.

But supposing him only to act as proprietor of the land, yet after so long acquiescence, all solemnities and consent of parties is to be presumed. The consent of the patron and bishop may have been by some other instrument, the existence of which the court will presume at such a distance of time as the rule is laid down as to all deeds and grants by *Buller* Justice, in *Read* v. *Brookman*, 3 Term Rep. 151. The consent of the parson, and the ampleness of the recompence, appear from his successor in 20 *H.* VIII. having been solicitous to obtain the *inspeximus* in confirmation of his right. Although a composition real differs from a modus in this, that having its commencement within time of memory, such commencement must be shewn, yet the actual deeds under which the composition took place need not be shewn.

If there is any doubt on the validity of the composition, at least the Court must grant an issue to ascertain the fact.

Plumer and *Fonblanque* for the plaintiff.—The king having granted letters of denization in *May*

1374, could not treat the priory as alien enemies, and consider himself therefore as patron in *July* following. The idea of the king's being the supreme ordinary, and acting as such, is contrary to the old, as well as the present doctrine; Co. Litt. 96. a. 344. a. 2 Inst. 398. And without the consent of the patron and ordinary, the composition was a mere agreement between the crown and the rector, as the letters patent purport to be; and not a binding composition. A modus presumes the consent of all parties, but in a composition real it must be shewn. *Chapman* v. *Monson*, 2 P. Wms. 573. S. C. 1 Eq. Ca. Abr. 367. Fitzg. 119. where it is said that in a modus such consent is presumed, as being necessary to make the composition binding. Though the doctrine of the production of deeds has been relaxed, yet evidence of a composition having actually existed is still required; *Bury St. Edmund's* v. *Wright*, Com. R. 643: where the Court lays down the principle expressly, that a composition real is not to be presumed; and *Ekin* v. *Pigot*, 3 Atk. 298.

If presumption from long acquiescence were allowed to support a composition real, a payment too rank for a modus, would be evidence of a composition: but in *Robertson* v. *Appleton*, at *Serjeants Inn*, 22d *February* 1777, where, on a composition real being set up, all the evidence went to prove a modus, it was rejected by this Court as not leading to a presumption of any actual agreement within time of memory. So *Smith* v. *Goddard*, 1777.

Here the payment is to be made from the profits of the *manor*, not of the park. Suppose the payments had in fact been always made by the owner of the rest of the manor, the argument from presumption goes the length of proving that the tenants might, from mere non-payment of tithes, set up a right *de non decimando*. And in all cases of a prescription *de non decimando* claimed, the court might equally well presume a rent or lands to have formerly been given, as a composition for the tithes. But the letters patent set up a composition void upon the face of it; the payment is not to be from the manor or park, but from the *profits* of the manor. There may be no profits, and the composition is therefore void for the precariousness of the recompence. It seems to be a mere voluntary grant from the bounty of the king, in recompence of the tithes the parson had lost by the inclosure of the park about ten years before. And it is material that the subsequent grants and conveyances of the manor, take no notice of this as a charge upon it; and there was no payment of the twenty shillings after the year 1547, when the park went into other hands. This is a question of mere law, and therefore the Court ought not to direct an issue, as the general inclination of juries to decide against the claim of tithes, would not leave the plaintiff a fair prospect of justice.

Serjeants Inn Hall. 15th *December*, 1793.

MACDONALD, Chief Baron, this day delivered the opinion of the Court. After stating the case—

The plaintiff, the rector of the parish, rests upon his common law right of tithes, and accord-

ingly the *onus* of proving something contrary to that right, is thrown upon the defendant. To establish a composition real, he has not been able to produce the deeds executed by the parties at the time, but has shewn evidence from which it may be inferred that such deeds did once exist. The grant from *Ed.* III. is not now extant, but is proved to have existed from the letters patent of *H.* VIII. It is also proved, that that grant was followed by acts of parliament, and by writs out of this court, to pay up the arrearages to the rector. The stoppage of payments after 1547, is naturally accounted for: upon the dissolution of the monastery, the king in their right became entitled to the pension of twenty-four shillings yearly, and therefore the rector would not call for an account where the balance was against him. Then the question is, whether there is here sufficient evidence for the court to presume that a composition for the tithes in question took place upon a solid and legal foundation.

In the 20 *H.* VIII. the rector claimed an *inspeximus* to confirm the former grant; this proves the composition to have been then advantageous to him. It was an application by a simple individual for mere justice against the crown, and we must presume, that he did not succeed in that application, without fully proving the right. We have here then two of the necessary parties to a composition real.

It is also highly probable that the king either was patron at the time, or took upon himself to

act as such; the priory being alien, their right of patronage devolved to the crown during war with *France*. It is not clear whether the two countries were not at that time in a state of war, the historians differing as to the exact time of the pacification; but we rather incline to think that a war then actually existed, as stated by *Rapin;* and certainly a war had existed a very short time before. It is natural and probable to suppose that the temporalities of the alien priory were not immediately restored; the more so, because it is in evidence that the king did, about the same time, present to another living, of which the patronage was also in this priory. Here then is the consent of another necessary party to the composition; and it is no objection to say, that the consent of all the parties is not by the same deed, That is by no means necessary: and in the case of the king, who consents by letters patent, it never can take place.

The production of the deeds by which all the parties consented, is not necessary. In the case of the crown itself, letters patent have often been presumed from length of time. Cowp. 109. So, in *Bedle* v. *Beard*, 12 Co. 4, a grant of the king was presumed an order to support an ancient impropriation; and Lord *Ellesmere,* admitting the objections to the apparent title, yet held that after long possession the title should be presumed. So very unwilling was that great Judge *quieta movere.* So the case of *Grimes* v. *Smith*, 12 Co. 4. in establishing an endowment of a vicarage. Common recoveries are often supported, though the right of the tenant to

the præcipe does not appear. 1 Vent. 257. 2 Str. 1129. and the case of *Hasselden* v. *Bradney*, cited by *Buller*, Justice, 3 Term Rep. 159.

How the consent of the ordinary was applied does not so immediately appear. It has been argued that the king had acted as supreme ordinary also upon this occasion, and that is the more probable, because it is certain that the pope very often did usurp the place of the particular ordinary, and was considered as having a right so to do, from his supreme authority, being styled the apostle.

Where the king, *Ed.* III. entered into a composition real as owner of the land and as patron of the church, he may also be presumed to have taken upon himself to act as supreme ordinary. *Semb.*

But by whomsoever the consent of the ordinary had been given, we are now bound, after so long a time, to presume *omnia solemniter esse acta*, according to the decisions I have already cited; and as a legal foundation for this claim must have been proved in the application in the time of *H.* VIII. the granting the *inspeximus* in that case is an admission and ratification of it.

The rector here stands in a very unfavourable point of view; he comes here to disturb the quiet of the parish, after an acquiescence of 400 years by his predecessors, and of 33 years by himself, in the exemption now established against him. The bill must be dismissed with costs.

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4 GEORGE III.

FRAZER *v.* THOBURN.

. decree in this cause, the Court had ...ded the debt claimed, with costs of suit; ...ff took out an attachment for the debt ... which

... now moved to set aside as improper, in ...ing the demand into two attachments.

Wilcox, contra, stated the reason of the attachment to be, that the defendant was insolvent and likely to abscond before the costs could be taxed.

By the *Court*.—When a second attachment is taken out for the costs alone, it will be time enough to take the opinion of the Court as to the propriety of splitting the demand; the smallness of the sum hitherto demanded is no ground of complaint*.

* *Vide post*, at the Sittings after this Term.

CAILLAUD *v.* ESTWICK.

Friday, 7th February.

THE defendant brought an action of trespass in the Court of King's Bench against the present plaintiff; *Caillaud* justified under a *fieri facias*, at the suit of one *Townsend* against Lord *Abingdon*, directed to him as sheriff of *Oxfordshire; Estwick* claimed the goods under a deed, dated 19th *May* 1784, between Lord *Abingdon* of the first part, *Barbara Harvey* of the second part, and *Estwick* of the third part; by which, (after reciting that Lord *Abingdon* was indebted to *B. Harvey* in 2194*l.* 6*s.* which was secured by a bond and a judgment entered up in *Michaelmas* Term 1782, and that he was also indebted to certain other persons enumerated in a schedule thereto annexed,) Lord *Abingdon* (who was tenant for life, but not so stated in the deed) granted and demised, for ninety-nine years, if Lord *Abingdon* should so long live, and *B. Harvey* confirmed, the mansion-house at *Rycot*, park and pleasure-grounds, together with the deer and cattle, and the dead stock, &c. to *Estwick*, in trust to receive the rents and profits, and with the money, first, to pay, the expences of the trust; secondly, to pay, from time to time, to Lord *Abingdon*, one moiety of the entire surplus, for his own use and benefit; and thirdly, to pay the other moiety to *B. Harvey* and the other creditors mentioned in the schedule. *Estwick* took possession of the whole, and received the rents and profits, with which he paid Lord *Abingdon* one moiety, &c. and Miss *Harvey's* debts, and some of the other scheduled credi-

A. executed a deed, by which he conveyed chattels to *B.* in trust, as to one moiety for certain scheduled creditors, as to the other for *A.*'s own benefit. *C.* a creditor not in the schedule, sued *A.* and recovered and took out execution against the chattels in the hands of *B. B.* sued the sheriff's officer, and recovered at law. Bill for an injunction, on the ground that the deed was void against creditors for the moiety. The Court refused the injunction; for there can be no execution against goods in the hands of a trustee.

tors. Five years after this deed was executed, *Estwick* re-demised the mansion-house to Lord *Abingdon* at an annual rent. Lord *Abingdon* sometimes made presents of some of the deer; and when any of the horses (comprised in the deed) were sold by auction, or were to run at *Newmarket*, they were entered as the property of Lord *Abingdon*, which (it was proved) was done in order to give them a name, and was with *Estwick*'s consent, who received the produce of those that were sold, and a certain sum for those that were entered at *Newmarket*. Lord *Abingdon*'s name also remained on some of the carts, but they were never used after the execution of the deed. *Townsend*'s demand arose from his father's having built a house for Lord *Abingdon* about the year 1770; and it did not appear that he ever demanded this debt in his lifetime from Lord *Abingdon*. Some time before the deed was executed, Lord *Abingdon* offered *Townsend* (as executor of his father) the materials of another house, by way of satisfying this debt, and a treaty for this purpose subsisted some time, but was at length broken off. But it did not appear that *Townsend* ever threatened to sue Lord *Abingdon* for this debt before the deed in question was executed; nor did it appear that Miss *Harvey* or the other scheduled creditors knew of *Townsend's* debt before. At the trial, at the last *Oxford* assizes, *Grose*, Justice, left it to the jury to consider, first, whether the deed was made to secure the rents and profits, and the goods, &c. for the benefit of Lord *Abingdon*, and to deceive his creditors; secondly, whether this were a fraudulent transaction between Lord *Abingdon*, Miss *Harvey*, and the scheduled credi-

tors, with intent to defraud and delay the other creditors of Lord *Abingdon* in general, or *Townsend* in particular; or whether it were a fair transaction between them, without meaning to defraud those other creditors. The jury found a verdict for *Estwick*, the plaintiff at law, with 650*l.* damages. A motion was made in the Court of King's Bench, to set aside this verdict on two grounds; first, that the deed was void in itself by the statute 13 *Eliz. c.* 5.; secondly, on account of misdirection of the Judge.

The *Court* discharged the rule, and the verdict stood.

This bill was brought for an injunction; to continue which, after the coming in of the answer, cause was now shewn on the merits, by

Burton.—This deed, if not void *in toto*, by the 13 *Eliz.* at least must be void as to that share reserved to Lord *Abingdon* as against his creditors. Hob. 14. Style, 428. So, if a marriage settlement is made with remainders over, the deed is valid against creditors, so far as relates to the wife and children, but no farther.

The decision of the Court of King's Bench considers the creditors as entitled to the surplus; that must be understood to mean the share reserved to Lord *Abingdon*; and so *Estwick* stands as trustee for the scheduled creditors, as to one moiety; and as trustee for the other creditors, as to the other moiety; and equity will enforce the latter trust,

raised by the law, as well as that expressed in the deed. *Lewkner* v. *Freeman*, 1 Eq. Ca. Abr. 149. Prec. in Ch. 105. The trustee cannot therefore set up this trust-deed against us. Considering our claim upon this fund as a trust, equity is the only proper tribunal, and the action at law determined nothing; and where the ground of complaint is equitable, a Court of Equity will interfere to make good an execution which cannot be had at law, as against stock. Vide *Horn* v. *Horn*, Ambl. 79, and the note thereto.

Plumer and *Richards*, contra.—The whole of this case is properly decided in a Court of Law. If there were any fraud to vitiate the deed, the decision of the jury, and of the Court of King's Bench, would have been otherwise. After that decision, nothing remains to be discussed. *Caillaud* has no interest in this property, unless the execution has given it him, and the Court of King's Bench has decided that it has not. If this property could not be taken on an execution at law, a Court of Equity never can interfere to assist a legal execution. So stock, which cannot be taken on a *fieri facias*, will not be taken by any process of equity to assist the execution; and it was so held by Lord *Thurlow*, in the case of Sir *Thomas Dundass* v. *Dutemps*, Trin. Term 1790, where he declared his opinion, that the note at the end of *Horn* v. *Horn*, in Ambler, is not law.

MACDONALD, Chief Baron.—I remember applying on behalf of the crown, to have the assistance of equity, in aid of an extent, to get at stock in the funds, and it was refused.

The defendant here rests upon two grounds: first, that the deed is void by the statute; secondly, that the fund in the trustees hands is subject in equity to the debt.

As to the first point, the question is completely decided already at law. The existence of any fraud on the face of the deed is excluded by the decision of the Court of King's Bench, when that question came before them on the motion for the new trial: actual fraud is negatived by the finding of the jury.

As to the other point, there are different situations in which an execution cannot reach: first, from the nature of the property, as stock in the funds; secondly, from the hands in which it is, as a trustee's. Here *Estwick* held the property in trust for certain creditors and Lord *Abingdon*. If he had converted it, or suffered it to be taken, to any other purposes, it would have been a breach of trust in him: his action seems therefore to have been properly brought. Courts of Equity have never granted an injunction on a similar case.

The other Barons concurring, the injunction was dissolved.

Friday, 7th February.

MOODY *v* STEELE, Administratrix.

On a bill for an injunction, the Court will not grant a commission to examine a witness in *India* without a full affidavit of materiality.

THE plaintiff had been employed by *Steele*, the intestate, in settling his affairs in *India*; the administratrix arrested the plaintiff for the supposed balance. This bill was for an injunction and account, and for a commission to examine a material witness in *India*.

Abbot now applied to the Court for the commission on the common affidavit.

Pemberton, contra.

THOMSON, Baron.—Your bill states the affairs to have taken place in *India;* your affidavit must verify that, and shew in what manner this testimony is material. We cannot put off a trial for two years on the affidavit required to delay it a term: you must come again with a full affidavit.

Monday, 10th February.

ATKINS Clk. *v.* HATTON Bart. and Others.

A commission to settle the boundaries of a manor, or of a parish, ought

THE plaintiff, rector of *St. Michael's* parish in *Longstanton*, brought this bill principally for an account of tithes, and to have a commission to

settle the boundaries of the parish and the glebe. As to a farm of 900 acres of sheep-walk, called *Burgoyne's flock*, the defendants set up a modus of forty shillings in lieu of the tithes of wool and lamb.

not to be granted by a Court of Equity, where the interests of all parties who may probably be concerned, is not before the Court.

To disprove this modus, the plaintiff offered in evidence a paper purporting to be a terrier of this parish, found in the charter-chest of *Trinity College* in *Cambridge*, who were land-holders in the parish.

A terrier cannot be received in evidence, unless it comes from the proper repository, the registry of the diocese, or a copy from the parish registry, if the original cannot be found.

Burton, for the defendants, objected to this evidence, as not coming from a quarter that could give it authenticity. The proper place is the bishop's register office.

Richards.—The original is always lodged there, but as the register has been inspected and the original cannot be found, the copy becomes evidence. The college is interested to preserve it; and it is not therefore to be considered as in the hands of a stranger, but in a proper repository.

Burton.—The proper repository for the copy is the parish chest.

The evidence was rejected*.

* MILLER v. FOSTER and Another, at *Warwick*, Summer Assizes 1794, *coram* MACDONALD, Chief Baron.

See post. Oct. T. 1795

This was an issue directed, by a late inclosing act, to try whether the plaintiff's land was exempt from tithes when in the manurance of the proprietor; the defendants, Mr. *Foster* and ——— one of the prebendaries of *Litchfield*, in right of his prebend, were seised by moieties of the rectory. The plaintiff's

A payment set up *in answer* as a modus, *or* composition real, is not bad for the uncertainty.

The counsel for the plaintiff insisted that the exemption set up as a modus *or* composition real, was bad for the uncertainty; but the Court held, that as it was stated to have been immemorially paid, there was sufficient certainty for a defence; although, had it been a bill to establish a modus, greater accuracy might have been required.

The Court thought the modus proved, and decreed that the bill should be dismissed as to that

counsel offered in evidence a paper, purporting to be a terrier of the parish, found in the registry of the dean and chapter, and argued, that as that was the proper repository for the muniments of the prebend, it was admissable. His Lordship mentioned the case of *Atkyns* v. *Hatton*, as deciding that the proper repository was the bishop's register office; and that, if found elsewhere, it could not be admitted in evidence.

Percival then contended, that as it could not be considered as a terrier, from not being found in the proper repository, it was merely to be treated as an old paper found among the muniments of the prebendary, kept by the chapter as a memorial of their rights, and therefore evidence against them.

MACDONALD, Chief-Baron.—A terrier is an instrument well known in the law. By the canons it is directed that an inquiry shall be from time to time made of the temporal rights of the clergyman in every parish, and returned into the registry of the bishop, the proper guardian of those rights, for his information. That return is called a terrier, and has authenticity from being found in the proper place. Then this paper, purporting to be an instrument taken notice of in the law, must stand or fall according as it has the requisites of such instruments to render it authentic. This has not; and therefore cannot be received in any other light: it is a terrier, or nothing.

A new trial has since been granted by the Court of King's Bench, upon the ground that this evidence ought to have been received.

part, unless the plaintiff choose to have an issue upon the modus.

As a ground for obtaining the commission, the plaintiff shewed, that there are two parishes in *Longstanton, St. Michael's* and *All Saints;* of the former the plaintiff is rector, of the latter the *Hatton* family are impropriators, another defendant vicar, and the *Hatton* family and other defendants are land-holders in both parishes. The two parishes were so mixed and confused in their boundaries, as not to be distinguishable; and this confusion had probably been increased by the circumstance of several rectors of *St. Michael's,* the plaintiff's predecessors, having leased their glebe and tithes to the *Hatton* family, who had not kept them quite distinct from their own property; but the defendants Sir *Thomas Hatton* and Lady *Hatton* appeared to have done every thing in their power to rectify this impropriety, and to have given up either the original possessions of the rectory of *St. Michael's,* or an equivalent in every particular. The witnesses agreed that throughout all the lands that lie confusedly, the mode of tithing each parcel was known and fixed by custom, although in many parts tithes were taken by each rector from land which to all other purposes was considered as lying in the other parish.

The Court expressing a doubt whether a commission to settle the boundaries could with propriety be directed;

Graham and *Richards*, for the plaintiff, contended that it was necessary to grant a commission to reach the justice of the case; by the negligence of the *Hatton* family, who ought to have kept the boundaries distinct, and by the negligence of the parish, whose duty it is by perambulations from time to time to avoid all confusion, the rights of the plaintiff are become confused. No process at law can do him justice except for the particular spot of ground for which each action may be brought: so the ordinary remedy of an issue can only ascertain whether the particular close mentioned in the issue belongs to the plaintiff or not. A principal ground of the application also is the total want of evidence of our right arising from the confusion introduced by the negligence of the defendants. It is therefore necessary that a further remedy be applied. If we had proved the land to be clearly within our parish, although asserted to be otherwise by the defendants, we should have had a decree; so if there had been a difference of testimony as to the locality of any particular piece of ground, it is the common practice of a Court of Equity to grant an issue to try whether the spot contested is within the parish or not. But it would be absurd to say, that each disputed case may be the subject of an issue: and yet, when both parties admit that the whole bounds are confused, and it is the interest and the right of each to have them settled, a Court of Equity cannot grant them relief.

A commission is granted in equity to save multiplicity of suits; it is a cheaper and more expedi-

tious way of settling the boundaries than any other; and it is not more conclusive in establishing the rights, as to any other purposes, or against any other parties, than an issue would be. No objection therefore as to parties can avail against granting a commission more than against an issue.

It is particularly necessary for the defendants to have a commission; for they set up a modus to cover their lands in this parish, and it is essentially necessary, to establishing a modus, that the land covered by it shall be clearly distinguished, which it cannot be till ascertained by a commission.

In the case of *Allott* v. *Wilkinson*, 1779, a commission was granted to ascertain the bounds of the parish where confusion had taken place; that indeed was by consent, but it shews that Courts of Equity consider themselves to have this power where necessary; for if they had not this jurisdiction, they would not exercise it even by consent.

Although the patron of *St. Michael's* and the parishioners are distinctly interested, and not before the Court, yet that objection would equally hold against commissions to settle the boundaries of manors, which are frequently granted at the suit of the lords, without making the tenants parties; yet they are interested in respect of the wastes and commons and other privileges.

PERRYN, Baron.—In *Webb* v. *Conyers**, Lord *Northington* refused a commission to settle the boundaries of a manor.

* See this case, cited 1 Bro. R. 41.

THOMSON, Baron.—I remember a case of *Winterton* v. Lord *Egremont*, where the parties came, by an amicable bill, to settle the bounds of two manors, and Lord *Thurlow* refused to entertain jurisdiction.

For the plaintiff was then cited, the case of *Rouse* v. *Barker*, 3 Bro. P. C. 180. where this Court refused to ascertain the boundaries of the freeholds and copyholds in a manor: and the House of Lords reversed their decree, and a commission issued for that purpose.

Ainge said, he remembered a case of the Bishop of *Durham* v. *Clavering*, where Lord *Thurlow* did grant a commission to ascertain the boundaries of a manor.

Burton and *Simeon*, for the defendants, contended that a commission ought not to issue. A commission, or an issue, may be granted to establish and settle some right claimed against common law, as a customary mode of paying tithes; but if t were used to try a right to tithes or glebe, it would be to usurp the office of the Courts of Law.

The plaintiff would not be entitled to an issue without at least raising a doubt of some parcel of glebe, or portion of tithes being withheld; but here he cannot point out any spot now in the hands of any other person which properly belongs to his rectory: nor can he shew that, upon the whole, he formerly had more than he has now.

The commission could be of little or no service, for even if it were found that some of the land now

considered as belonging to *All Saints* parish, in fact lies in *St. Michael's;* yet, as it is proved that the tithes are taken by a certain and known division of the lands, each rector would continue to take the same tithes, as a portion of tithes in the other parish, which he now takes as being within his own; and this with the more reason, because each now enjoys considerable portions of tithes in the other parish by immemorial custom in the village.

The commission could have no effect beyond the present suit; for the patron of *St. Michael's* not being a party, the rights of the church cannot be bound, as was settled in the case of *Carr* v. *Henton.* (Vide *ante, page* 313. *n.*)

A commission is a proceeding so contrary to the spirit of the common law, that it ought never to issue unless upon grounds much more weighty than those now produced. Rep. Temp. Finch, 17. ibid. 239. *Metcalfe* v. *Beckwith*, 2 P. Wms. 376. R. Temp. King, 60, 61. *St. Luke's* v. *St. Leonard's*, 1 Bro. 41. and *Webb* v. *Conyers*, there cited. *Bishop of Ely* v. *Kenrick*, Bunb. 322.

In the case 3 Bro. P. C. the confusion was fraudulently created to deprive the lord of his fines on admission. *Allott* v. *Wilkinson* was by consent, and after the quantity of the land had been ascertained by an issue*.

Graham, in reply.—The rule as to parties, laid down in *Carr* v. *Henton*, applies only to the case of

* See the case, upon the trial of the issue, 7 Bro. P. C. 518.

a dispute between a rector and vicar, where the bill seeks to establish the right; there the patron must be a party; for the vicar may be unable alone to stand the contest, and the patron is interested in the suit immediately. Here the commission is prayed only collaterally: the rector seeks tithes of certain lands; the defence is, that they are in the other parish. This point also occurred in the case of *Abbott* v. *Wilkinson*. In settling the original dispute between these two claimants of tithes, an issue was directed to try whether *Wilkinson* then had the same quantity of glebe land which he was entitled to. Then *Trinity College* came in and claimed against both 100 acres of glebe land, and a moiety of the rectorial of two out of the three parishes now consolidated; a commission issued to ascertain the ancient bounds; the commissioners returned the evidence instead of the fact, and the return was set aside: after. *Nelson* then lodged a claim to another share of the tithes, and it was not till after setting aside the first commission, that the crown, as patron of the vicarage was made a party. This was by consent of the parties; but the present argument would go the length of saying, that those parties could not consent, and that the Court had no jurisdiction.

The cases cited against us have all gone upon the propriety of trying the right at law. Here the case states a total want of evidence upon the subject, which makes it impossible for us to establish our right at law; and as the confusion has arisen through the negligence of the defendants, we are entitled to this as the only mode of redress against them.

MACDONALD, Chief Baron.—The plaintiff here calls upon the Court to grant a commission to ascertain the bounds of the parish, upon the presumption that all the land which should be found within those boundaries would be titheable to him. That is indeed a *prima facie* inference, but by no means conclusive; and there is no instance of the Court ever granting a commission in order to attain a remote consequential advantage. It is a jurisdiction which the Courts of Equity have always been very cautious of exercising. In the case of *St. Luke's, Old street*, v. *St. Leonard's*, Lord *Thurlow* expressed great doubts as to the decision of the *Mayor of York* v. *Pilkington*, and concurred in Lord *Hardwick's* first opinion upon that case. I was in the case of *St. Luke's* v. *St. Leonard's*, of which the note in Brown is by no means full; it was upon a bill brought by the parish of *St. Luke's* to avoid confusion in making their rates, and prayed a commission to fix their boundaries for that purpose: a number of houses had been built upon land formerly waste, and it was doubtful to which parish each part of the waste belonged. Lord *Thurlow* refused to interfere, and observed, that the greatest inconvenience might arise from doing so; for if that commission were granted, and the bounds set out by the commissioners, any other parties, on a different ground of dispute, might equally well claim another commission; these other commissioners might make a different return, and so, in place of settling differences, endless confusion would be created.

The case of *Allott* v. *Wilkinson* was the case of parishes consolidated for every other purpose except tithes, so that no other person could have an in-

terest in fixing the ancient bounds except those who were before the Court.

The case in 3 Bro. P. C. 180. *Rouse* v. *Barker*, is not in point; there it was admitted that lands of the one description had been confused among the others, and it appeared that that confusion was introduced with a fraudulent view. Here there is no proof of the manner of tithing being wrong, although some confusion has arisen by the negligence of both parties in not keeping their rights distinct.

Whether the bounds of the parish correspond to the manner of tithing, is not determined; it rather appears indeed that in some places tithes have been taken by each rector in the parish of the other; but that may well be, by each having a right to portions of tithes there. The parcels of land upon which it has taken place may have been glebe land, or may have been detached pieces belonging to proprietors of farms in the other parish, who would naturally desire to have the whole titheable to the same rector; and the reciprocity of these customary rights to tithes, makes it extremely probable that some agreement for that purpose has formerly taken place, and that the custom is well founded. However, if the plaintiff chooses, he is entitled to an issue to try the right of the defendants to tithes in those parcels of *St. Michael's* parish. The bill must be dismissed with costs, so far as relates to the commission to set out the boundaries.

A commission is also prayed to set out the glebe land. It appears that the plaintiff has a full equivalent for every piece of glebe that ever belonged

to the rectory; so that if the exact metes and bounds are unknown, he has already the full effect of a commission: if they are known, and any part not delivered up to him, his remedy is at common law: he has made no case for our interference. As to this also, the bill must be dismissed with costs.

ATKYNS *v.* Lord WILLOUGHBY DE BROOKE and Others. *Same day.*

THIS was a bill filed by the same plaintiff against others of his parishioners; and as it also prayed a commission to ascertain the boundaries of the parish, for the same purpose, and upon similar grounds to those in the other case, they were both heard before the Court gave their decision in either. Their Lordships this day decreed the bill in this case also, so far as related to the commission, to be dismissed with costs.

The Court will not decree against a *farm modus* on the ground of rankness.

Whether notice is necessary to determine a composition where a modus is insisted upon, *Quære.*

The defendants, Lord *Willoughby* and his tenant *Goodcheap*, set up an *immemorial payment, due and payable by the owners* or *occupiers of those lands*, by way of modus or composition for the small tithes of their land; it consisted of 340 acres, and was stated to be an ancient farm settled by a parliamentary entail on the family of Lord *Willoughby* in the 37 *H.* VIII. No evidence was produced of any

actual agreement for a composition having been ever made. The existence of the payment, as far back as could be traced, was clearly proved. Sir *Thomas Hatton*, lessee of the rectory, under the plaintiff, had received this composition. The plaintiff himself never did, nor did *Goodcheap*, the occupier of the farm, ever pay it, having come into possession but a few months before the bill was filed. He insisted on the payment, as being at least good as an annual composition, to determine which no notice had been given.

Graham and *Richards*, for the plaintiff, contended, that this modus was not set forth with sufficient certainty: it was pleaded as a *modus or composition*; whereas the claim of exemption set up, being against common right, must be accurately defined.

The payment is said to be due from the owners *or* occupiers. This leaves the clergyman uncertain to whom he shall resort for the recompence he is to receive for his tithes; each may shift it off upon the other. As a modus, this payment is rank. By the survey in Domesday, it appears that the two parishes, which consist of about 2000 acres, were then valued at 8l. This defence set up, supposes, that within 116 years afterwards, at the time of memory, the small tithes of 340 of those acres were valued at 4l. Of these, the greatest portion, 211 acres, are arable land in the common field, where hardly any small tithes could arise; the other 129 acres are stated to be meadow and pasture land. And it must be maintained that, after deducting all hay-tithe, the other tithes arising from those 129

acres, were compounded for before the time of memory at 4l. That would be nearly a fair composition now; but on a moderate calculation, the value of money was then eight times as much as it is now; so that it is equal to a composition for 32l. at present.

If the payment be clearly greater than can be supposed to have been a fair composition before the time of memory, the Court will over-rule the claim, without sending it to a trial at law. *Chapman* v. *Smith*, 2 Vez. 514. *Bishop* v. *Chichester*, 2 Bro. R. 163. *Ekin* v. *Pigot*, 3 Atk. 298.

The claim of the tenant to have this considered as an annual composition, totally fails; for it appears that *Goodcheap* never paid this composition; so that it is not a personal contract with him. And it cannot be considered as running with the land, for his landlord, Lord *Willoughby*, does not set up such a claim.

The plaintiff never accepted this composition, and therefore any agreement of his predecessors, or of his own lessee, can have no effect to bind him, or to make notice necessary. They are wholly void.

Besides, the tenant as well as his landlord have set up an adverse title, a modus, and have therefore, agreed to consider themselves as not holding by annual agreement under the rector. Notice is held necessary, by analogy to the case of landlord

and tenant from year to year; and their setting up an adverse title is held a waiver of notice to quit possession.

Burton and *Steele*, for the defendants.—The cases where the Court have decided a modus to be rank without sending it to a jury, have all been where a modus has been set up for a specific thing, as a sheep, the price of which is easily ascertainable; for it cannot be supposed, that any man would agree to pay more than the value for every sheep or cow that he or his posterity should ever have on the land. But a farm modus is not so easily computed or ascertained; the difference of cultivation may throw more or less of the produce into the small tithes at different times; a landlord, wishing to improve, may have given more than the exact value; or a pious owner may have chosen to settle a considerable annuity out of his land upon the church. In *Chapman* v. *Smith*, this distinction is taken, by Lord *Hardwicke*. So in *Edge* v. *Oglander*, Hil. Term 1691, cited in Bunb. 301, a modus of 8l. for a farm of the value of 80l. a-year was allowed.

The defendant *Goodcheap* is entitled to the benefit of this composition, being a running contract with the rectors, continued after the plaintiff became rector, and paid to his lessee. That notice was necessary to determine it, notwithstanding the modus set up, is decided in the Kensington case, *Adams* v. *Hewitt*, 1782, and *Bishop* v. *Chichester*, 2 Bro. 161.

Graham, in reply.—The *Kensington* case was, where an actual agreement had been entered into between the clergyman and the parishioners, and they insisted on it as a composition during the incumbency. The Court held otherwise, that it was only good from year to year, but that notice was necessary to dissolve it; for that was not a denial of the clergyman's right; it was not an adverse claim, but a claim under him for a longer term.

MACDONALD, Chief Baron.—I believe the question of notice in that case originated with Lord MANSFIELD in the House of Lords; it had not been taken notice of in this Court, nor in argument there.

Graham.—In the case of *Bishop* v. *Chichester*, the rector, by giving an irregular notice, admitted the necessity of a notice; and probably there had been some agreement between them, or an acceptance of the payment, which supposed an agreement; it is expressly founded on the *Kensington* case. Lord *Thurlow* declaring that he decided contrary to what he should have conceived to be the law, as being unable to distinguish it from that case, and bound by it. Then if, in fact, the case of *Bishop* v. *Chichester* was not distinguishable from the *Kensington* case, it has not carried the rule beyond it, and is to be considered merely as a confirmation of it; if it was distinguishable, then the reason of the decision fails, and it is to be considered as a misapplication of the old rule, not as the adoption of a new. The present clearly is dis-

tinguishable from the *Kensington* case; for here the defence set up is a modus, a title paramount and inconsistent with any agreement or composition with the plaintiff; both parties contending that no agreement exists; then a notice to determine it must be superfluous.

As to rankness; if the arguments relied on are admitted, no modus can ever be set aside on this ground; for it is impossible to define how far the benevolence of the former proprietors may have led them in granting beneficial contracts to the clergy. The cases relied upon do not establish any thing like the distinction contended for between farm moduses and others. The case of *Chapman* v. *Smith* went on the peculiar situation of *Romney Marsh*, where the prospect of great improvement by draining might lead the proprietor to agree for more than the existing value. In *Edge* v. *Oglander*, the modus was so large that the vicar probably agreed to take it as the full value of the tithes, and the decree must then have been by consent, as in *Bates*'s case, cited 2 Vez. 513.

MACDONALD, Chief Baron.—To the modus set up in this case several objections have been taken: First, it has been argued, that it is not laid with sufficient certainty to found a decree; and if this were a bill to establish these moduses, that might be the case; but in an answer, such strictness is not requisite; if it appears that there is a good defence, that is sufficient. The second objection is the rankness of the modus, and the Court is desired, on that ground, to over-rule the defence.

But it has properly been stated, that a very material difference subsists between a farm-payment and one for a particular species of produce. In the former many reasons may have prevented the tithes from being agreed for at their proper price. The owner may have meant a bounty to the clergyman; or he may have wished to pay for an exemption from tithes for the sake of improvements. Besides, it is hardly possible to ascertain the comparative value of the land, or of the produce, in former times; and the Court should not be nice in judging of the value or the goodness of the bargain, where, by any probable circumstances, the modus may have been a real agreement between the parties before time of memory. More especially ought the Court to be extremely cautious in deciding such a question without the intervention of a jury, if the least doubt arise as to the fact of rankness. *Edge* v. *Oglander*, *Chapman* v. *Smith*, *Pole* v. *Gardiner*, 1 Bro. P. C. 214*. Under these circumstances, the Court will not decree for the plaintiff, against the modus set up; but if the rector desire an issue, undoubtedly he must have it.

* See S. C. 9 Vin. 18. pl. 47. 2 Eq. Ca. Abr. 734. pl. 1.

BOUSHIER and Others *v.* MORGAN.

When a bill is filed for an account of tithes against one who had a lease of his own and the other tithes in the parish, and the whole question in the cause turns upon the validity of the lease, and of the notice given to determine it, this Court will not proceed till those points are settled at law.

THIS bill was brought by the plaintiffs, impropriate rectors of the parish of *Garway*, for an account of tithes growing on the lands in the possession of the defendant there, and of tithes or compositions for tithes received by the defendant from the other tenants in the parish, as lessee of the tithes under the plaintiffs, the *Berkleys*. The uncle of the defendant had been for many years lessee of these tithes from year to year, and on his death the defendant succeeded him in the possession thereof, and continued tenant till the year 1789, when the plaintiff *Boushier* obtained a lease of the tithes from the *Berkleys*, for twenty-one years. *Boushier*, on his becoming tenant, gave the defendant a notice, dated the 25th *March* 1789, to deliver up the possession of the tithes "at the "end of the present year." *Morgan* held the tithes from *Lady-day* to *Lady-day*. After this notice, the defendant came, with the other farmers, to a meeting called by *Boushier* to settle compositions for tithes; he there heard him agree with the other farmers for their tithes, made no objection, and offered a composition for his own, which was rejected.

Plumer, *Lewis*, and *Leach*, for the plaintiffs, insisted that the lease to the defendant, being by parol, conveyed nothing, even in the tithes of his own lands, Cro. Jac. 137. and the other cases cited in 3 Bac. Abr. 337, 338.; but much less, as to the tithes of the other lands, ibid.; as to which, the

general conclusion drawn in *Bacon* is this: "Herein "all the books agree, that if a person lease his "tithes, even for a year, to a stranger, it must be "in writing, and if it be not, it will be absolutely "void;" and as the rent is entire, if the lease is bad in part, it must be bad *in toto*. Even if he had a good lease from year to year, it is determined. The notice is perhaps bad, but the irregularity is waived by the acquiescence of the defendant, in treating for a new composition, and hearing the agreements of the other tenants without making any objection; for by such conduct he has led both the plaintiff and the tenants to make agreements on the faith of his lease being dissolved, and has also prevented the plaintiff from giving a fresh notice, which he might have done if the first notice had not been apparently accepted.

Burton and *Johnson*, contra.—The bill having stated a notice to quit at the end of the then current year, thereby admits the defendant to have been a tenant, and to have required notice; the validity of the demise is not therefore in issue, and cannot be questioned: but a parol agreement for a composition for the lands in the defendant's occupation is good by every day's experience. As to the other tithes, the conclusion drawn in 3 Bac. Abr. 339. from all the cases is, that the point is unsettled; and it may be good as between the parties to the agreement, although bad as against the tenants, by its passing no interest. If the notice is bad in part, it is bad in the whole. Bunb. 15.

The notice is not waived; a new agreement or lease would be a virtual surrender of the old, but a treaty for it is not; and as the plaintiff had manifested a design to determine the lease, it was natural for the defendant to treat for a new agreement when the former should end, without acknowledging that it was then ended.

Here the only dispute is as to the title, which ought to be established before the account can be entered upon; and on a disputed title, especially between two laymen, the proper tribunal is a Court of Law: against a possession for forty years, under this title as tenant, Equity will not interfere in the collateral shape of an account.

Plumer, in reply.—The bill is for an account, which is the proper jurisdiction of a Court of Equity. The matter of title is introduced by the defendant's answer, and is not substantiated. The defendant, by setting up a fictitious claim of title, cannot defeat the plaintiff of his suit.

Monday, 10th February.

MACDONALD, Chief Baron.—(After stating the case.)—The plaintiff insists that the notice he has given, is either originally good, or that the defect is cured by the defendant's having waived the irregularity. Whether it be so or not, is a pure question at law, and not a proper foundation for a suit in this Court. So the question whether the lease itself was void or no, is a question proper to be tried in a Court of Law. These are the real questions in the cause, and the account sought is only

consequential on the title being established. The Court are therefore of opinion that the bill be retained for a year, with liberty for the plaintiff to proceed at law, in the mean time, for the establishment of his title, as he shall be advised.

——— *v.* ———

Tuesday, 11th February.

GRIMWOOD moved that proceedings should be stayed till the plaintiff, who, since filing the bill, was become bankrupt, should give security for costs.

This was refused, as not being supported by the practice of the Court in any instance.

FREELAND *v.* JOHNSON.

THE former plea having been over-ruled, (*vide ante, p.* 276,) the defendant put in a new plea, of the release alone, to so much of the bill as sought discovery of transactions prior to the agreement, and to the whole relief sought; accompanied by an answer denying the whole equity charged as to the manner of obtaining the agreement and release.

The plea was over-ruled on a ground of form. The defendant pleaded the same matter again more formally. This is irregular. *Semb.*

Johnson moved that this plea and answer might be taken off the file, as being irregular, and contrary to the former order of the Court in overruling the plea.

Against this rule, cause was this day shewn by

Graham and *Hollist*, who argued that the filing the present plea was not inconsistent with the former order, being less extensive than the former plea. After plea over-ruled, a demurrer, even on the same grounds, has been admitted. *Tweddell* v. *Tweddell*, Mitford, 191. And so in the case of the *East India Company* v. *Campbell*, 1 Vez. 246. a demurrer was allowed after a plea over-ruled, upon the ground that the rule of not pleading twice only applies to dilatories, and though a demurrer is a dilatory, a plea is not, being a bar to the relief sought. In general cases, a plea is accompanied with an answer to some parts of the bill; if the plea is over-ruled, and the exceptions to the answer, for not answering the things covered by the plea, are of course allowed, the order of the Court is, that the defendant answer as to those points; and of course no further plea can be admitted, because that would not be a compliance with the order; but here there was no answer at all, and therefore no such order made. This is not a dilatory, but a substantial defence, which the Court will regard in their practice, and not allow its effect to be lost by any slip in form.

Johnson, on the other side.—The question is on the regularity of making this defence a second time in this shape. If this plea is taken off the file, the

defendant may insist on the same defence by way of answer, and therefore no real hardship is thrown upon him by it; and this is the reason why double pleas are not allowed in equity as at law, 1 Bro. 417.; for at law, unless they plead each defence, they lose the benefit of it totally. But if it were allowed, to plead one plea after another, it might as well extend to a third or a fourth; and this would, in effect, be pleading double, with the additional disadvantage of delay, from all the pleas not being heard and determined at once as at law.

The intent of a plea, is to reduce the question to a single point; so that the defendant may avoid the making unnecessary discoveries, and the parties be freed from the delay and expence of taking issue on all the averments in the bill; but if the defendant could split his answer into a number of consecutive pleas, the expence and delay would be infinitely increased instead of being diminished.

The doctrine in *Mitford* is not supported by any cases, but the principles and authorities are all the other way. If a plea is over-ruled, you may move for a re-hearing, or for leave to amend, on paying costs, Prac. Reg. 283.; but who would move for a re-hearing, or amend, on payment of costs, if it is open to them to plead another plea? and it is expressly said, ibid. 284, if outlawry or other matter is pleaded, the defendant cannot plead another plea, but must answer. It is indeed said in another place, p. 275, that only one plea to the jurisdiction is allowed; from which it might be inferred, that the rule of pleading singly did not ex-

tend beyond dilatories; but it rather appears by the other cases that this expression is only intended to shew, that a plea to the jurisdiction was the principal case there referred to, without meaning to limit the rule to that case.

MACDONALD, Chief Baron.--The attempt which has given rise to the present motion, is of such a nature as must, if allowed, very materially affect the general practice of the Court. After the first plea being over-ruled, a second, accompanied with an answer, has been put upon the file. If this be agreeable to the rules of the Court, it is pretty singular that no one practitioner in the Court can recollect a similar instance. Among the number of pleas over-ruled on points of form, one would imagine that some attempts to rectify those mistakes must have been made; and if the filing another plea is a matter of course, as it is the most obvious remedy, there must have occurred many cases where that has been done. No one being able to recollect an example of it, is a strong proof that it is contrary to rule.

But it appears to me also to be contrary to the nature and principles of pleading, that this should be allowed. The meaning of a demurrer or plea, is to intercept, in an early stage, a cause which must ultimately end in nothing: a demurrer, by something in the bill; a plea, by matter *dehors*. If a plea could be repeated, it would not do its office, it would not have the effect of saving litigation, but would encourage defendants to try it as a daily experiment to save time.

The giving leave to amend pleas, where the justice of the case requires that indulgence, is lodged in the discretion of the Court: and under that controul, is a very useful practice on particular occasions. If this plea is in effect an amendment of the former, it cannot be pleaded without leave to amend; if it is a new and distinct plea, it is within the rule against pleading double.

But it has been urged that the Court should have regard to the defence of the party, and not compel him, upon a slip in form, to open a settled account and disclose all the circumstances and items of it, after a release given by the plaintiff. Laws, whether for the government of kingdoms, or for regulating the practice of a Court, can only be made for the generality of cases. The establishing a fixed rule will always have the effect of bearing hard in particular circumstances; that occasional hardship is the price paid for the advantage of having a fixed general rule; to relax that rule, at the discretion of the Judge, is a very dangerous precedent; it becomes no longer fixed and certain.

As the officers in this Court and in Chancery concur that they cannot recollect any precedent, I think the practice, as well as the principle, is against the attempt.

The other Barons doubting, the case stood over, and was never mentioned again.

Serjeants Inn Hall. *Wednesday, 26th February, 1794.*

GOVET *v.* ARMITAGE.

IT appeared that the plaintiff was an uncertificated bankrupt, and the assignees not before the Court; and therefore it was argued that the bill ought to be dismissed; but it being admitted that the assignees had failed in an ejectment, brought by them to recover the premises now in question, by not being able to prove the petitioning creditor's debt, the Court retained the bill till proper parties should be added, if necessary: the plaintiff paying the costs of the day.

1st *March.*

The KING *v.* CRACKENTHORP.

THE sheriff, besides his poundage, charged five *per cent.* for an auctioneer to sell the malt taken under this extent.

The Court disallowed the charge.

FRAZER *v.* THOBURN.

Vide ante, p. 380.

THE plaintiff took out an attachment against the defendant for the money awarded by the decree, without adding the costs, which were not then taxed: he took out a second for the costs when taxed.

Cooke now moved to set aside the latter as irregular, and cited the case of *Evans* v. *Clark*, in this Court 1772, where this practice was held irregular.

Simeon, contra.

The *Court*, on consulting the officers, held the practice regular, and refused the motion.

BREWER *v.* HILL.

1st *March*.

THIS was a bill for an account of tithes on the lands in the defendant's possession, in the parish of *Hemel Hempstead*, *Herts*. The plaintiff claimed to be lessee of these tithes, under a demise from Sir *James Peachy*, in the year 1781, to *Thomas Trott* for twenty-one years; *Trott* in 1789 underleased to *Thomas Patrick* for twelve years; in 1790 *Patrick* demised the same to the plaintiff for five years. The defendant claimed to be discharged from payment of tithes in kind, and set forth an agreement made in 1783 between his lessor of the lands in question, *Christopher Tower*, and *T. Trott*, the then lessee

Lessee of tithes agreed with the owner of lands, for certain collateral considerations, not to take tithes in kind from the tenants of the lands for twelve years but to accept a reasonable composition not exceeding 3s. 6d. *per* acre; and thereto bound himself and *his assigns*. His under-lessee sued (in the

name of a trustee to whom he had nominally again under-leased) for tithes in kind against the tenant of the land, and had a decree. Such an agreement is void for the uncertainty of the sum to be paid.

The lessee of the land cannot claim to hold discharged of tithes under any covenant with his lessor.

An under-lessee is not an assign within the meaning of the covenant: nor can the tithes be bound by such a covenant of the lessee.

A lease of *tithes*, or other matter which lies in grant, for all the time the lessor should continue vicar, is good, and conveys a freehold.

of the tithes, by which *Trott* in consideration of *Tower*'s having demised to him certain other lands, did "for himself, his executors, administrators, "and assigns, covenant, promise, and agree, to "and with the said *Christopher Tower*, his heirs "and assigns, that he the said *Thomas Trott*, his "executors, administrators, or assigns, shall not "nor will at any time or times during the said term "of twelve years, take the tithes in kind from any "present or future tenant or tenants of him the "said *Christopher Tower*, in the said parish of "*Hemel Hempstead*, but shall and will accept and "take of and from all and every the present and "future tenant and tenants a reasonable composi-"tion for the same, not exceeding 3*s*. 6*d*. an acre "for the said tithes:" then followed a proviso, that upon non-payment of the composition at each half-year, or within thirty days after, the tithes should be taken in kind. The defendant also proved, that the plaintiff's lease from *Patrick* was only colourable, and that he was to be considered as agent or trustee for *Patrick*. The defendant became tenant to *Tower* of the lands in question in 1790, and claimed to be discharged of payment of great tithes in kind on paying the composition at the rate of 3*s*. 6*d*. *per* acre. The title of Sir *James Peachey* (through whom the plaintiff claimed) to the small tithes, was a demise from the vicar "for all the time the said "Dr. *Bingham* should continue vicar."

Plumer and *Grimwood*, for the plaintiff, contended that the plaintiff was not bound by the agreement with *Trott*. The covenant is not, that no tithes shall be demanded, but only that *Trott*, his executors, administrators, or assigns, should not

take such tithes. The plaintiff is not within this description, he is not an assign. The distinction between an assignee and an under-lessee is very strongly marked. *Crusee on dem. Blencoe* v. *Bugby*, 3 Wils. 234. *Kinnersley* v. *Orpe*, Doug. 56. *Holford* v. *Hatch*, Doug. 174.

This covenant does not run with the tithes, it is merely personal, 5 Rep. 16, a. Those covenants only run with the land which are made by the original lessor, not those which his lessee makes. And besides, it is from its nature collateral to the tithes; it is not a demise of part, or an agreement to retain, but merely a covenant to come to a reasonable agreement each year, not exceeding 3*s*. 6*d*. *per* acre. Then there can be no privity between the present parties, and the covenant has no force between them.

Even between the original parties it could not operate as a lease of this portion of tithes, for there is no certain rent reserved so as to make it a lease. The same uncertainty makes it void as a covenant, for there must be mutual remedies in a valid covenant; but here the composition being unfixed, *Trott* could demand nothing in certain.

At most it was only a personal covenant between them, which might have been enforced in equity. But as the plaintiff is a *bonâ fide* purchaser for valuable consideration without notice, the equity does not run against him.

Burton and *Allcock*, on the other side.—It appears from the statement of the plaintiff's case, that

he has not brought the proper parties before the Court. *Brewer* holds in trust, as to the greater part or the whole of the tithes, for his nominal lessor, *Patrick*. The *cestui que trust* must be a party. In a similar case, *Stafford* v. *The City of London*, 1 P. Wms. 428, the bill was dismissed for want of joining a material party. It appears also, that if the plaintiff succeeds in his demand, the defendant will have his remedy against *Tower*, and he against *Trott*. These, therefore, are material parties to the suit, and ought to have been joined in the bill.

The agreement with *Tower*, in fact, operates as a demise. A covenant with a stranger, that he shall have the tithes, is a lease as much as if it had been of lands; and so if made with the tertenant, it is a right of retainer in the nature and with all the qualities of a demise, and if made by deed is good. *Hawkes* v. *Brayfield*, Cro. Jac. 137. And to constitute such an instrument, no form of words is essential. 3 Bac. Abr. 419.

The rent is certain if considered at 3*s*. 6*d*. *per* acre, as the tenant has done. If this is considered as a demise or retainer of the tithes, it is a grant of part of the thing itself, and no posterior grant can be good against it; but if only considered as a covenant, yet it shall bind the covenanter, and all claiming under him. The cases cited, all relate to collateral covenants; as where the lessee of *White-acre* covenants to build a house upon *Blackacre*, that covenant runs not with the land, and his assignee shall not be bound by it. But the present covenant immediately relates to the tithes themselves, and cannot be collateral.

The plaintiff is within the covenant, for he is an *assign* of part of the interest of *Trott* in the premises; even if not named, he would be bound by reason of the privity of estate. *Bally* v. *Wells*, 3 Wils. 25.

As to the small tithes, the lease is bad: it is for so long a time as the lessor should continue vicar; and therefore void for the uncertainty. Shep. Touchst. 274-5. Co. Lit. 45. b. Plowd. 273. b. If it were good at all, it would convey a freehold; but for that purpose a livery of seisin would have been necessary.

MACDONALD, Chief Baron, this day delivered the opinion of the Court, and after stating the case, proceeded to the following effect:

The defendant insists on the agreement between *Trott* v. *Towers*, as discharging the land in his occupation from payment of tithes in kind, on rendering the composition of 3*s*. 6*d*. *per* acre; and as to the small tithes, he also objects to the title of the plaintiff, that the lease from Dr. *Bingham* is void for the uncertainty of its duration.

The plaintiff insists that he has the legal title in him, and that having purchased without notice of any agreement with the landholders, they can set up no equity against him.

To this the defendants have given two answers: first, that the agreement entered into between *Trott* and *Towers*, amounts to a lease of this portion of tithes from the former: and secondly, that if not a

lease, it is a covenant running with the tithes, and good against the plaintiff.

It is true, no specific words are necessary to create a lease; but there must be words shewing the intent to demise. Here there is no certain rent reserved. *Trott* agrees to accept a reasonable composition, not exceeding 3s. 6*d*. *per* acre. Suppose he had claimed this sum of 3*s*. 6*d*. *per* acre from the tenant, would the tenant have been obliged to pay it? He, clearly, might have either preferred to pay tithes of kind, or have tendered the reasonable value of the tithes, under that sum. Then the sum reserved is not certain, and cannot be called a rent.

This is also an agreement, not that *Towers* himself shall pay the rent and take the tithes, but only in favour of his tenants in the premises. *Towers* is to enjoy nothing, nor to pay any rent. It cannot be a demise to him. The tenant is not a party or privy to the transaction; it cannot therefore be a demise to him. It can, at the utmost, amount to no more than a mere covenant with *A*. that *B*. shall enjoy, and creates no lease to either. This is decided in *Littleton* v. *Perne*, 1 Leon. 136; and in *Porry* v. *Allen*, Cro. Eliz. 173, it is expressly so ruled by *Anderson*, Chief Justice.

Even if this had been a direct covenant with the tertenant, it could only have amounted to a covenant, that he should retain the tithes and pay a composition, or render tithes in kind; for the proviso gives him that option. By such a disjunctive covenant no interest passes.

From the whole of this clause taken together, with the proviso that accompanies it, I am clearly of opinion, that this can only be considered as a covenant, and not a demise.

But it has been argued, that it is such a covenant as runs with the tithes, and binds them in the hands of the plaintiff. This is the case of a covenant not contained in the original lease of Sir *James Peachy*, but entered into by his under-lessee. The case of *Holford* v. *Hatch*, Doug. 184, establishes the rule, that an under-lease is a new substantive contract, independent of the other between the original lessor and lessee, whereas an assignee is one put in the place of the original lessee, and who becomes lessee to the original lessor. Then this covenant of the lessee could not bind the land in the hands of his under-lessee, as an *assign*, according to the words of the covenant; and as no notice has been proved, the plaintiff is not affected with any equity from this personal covenant of his lessor.

As to the vicarial tithes, the rule laid down in Shep. Touchst. 274-5. Co. Lit. 74. b. as to the certainty of the term, is this, that such a lease for years, of land, is void. To this passage in Co. Lit. Mr. *Hargrave* has subjoined a note, in which he is well warranted, that in such cases, if a livery of seisin is made, the lease is good as a lease for life determinable on the particular event. But of rents or other things which lie in grant, the mere delivery of the deed has the same force as livery has in the case of land; and therefore any demise of uncertain duration, gives an estate for life deter-

minable on the particular event. Then, if in the principal case there had been a vicarage house or glebe demised, and the tithes had only passed as parcel of the vicarage, the whole would have been bad for want of livery: but here the whole matter demised lies in grant, and the demise is therefore good, as an estate for life during the time that Dr. *Bingham* shall continue vicar.

There must be an account for both great and small tithes; but I cannot avoid observing that the defendant fails, not from any want of equity or conscience in his case, but from the necessary application of a rule of law against him; and probably he will be entitled to his remedy over against *Trott*, through whose bad faith he has been led into this mistake.

Same day.

COOKE *v.* TOMBS.

Bill for a specific performance of an agreement for the sale of lands and chattels. Plea, the statute of frauds. The defendant, during the negociation, delivered a particular of the whole signed by him. The agreement was afterwards made at a less price. Both parties gave instruc-

THE bill was brought to compel specific performance of an agreement made between the parties. It stated that the defendant, a ship-builder, being possessed of certain freehold premises and stock in trade, principally consisting of docks and timber for ship-building, and some houses, in the beginning of *August* 1792 offered to sell the same to the plaintiff for 24,000*l*. The price not being then agreed upon, the defendant, on the 12th of *August*, came to the house of the plaintiff and delivered to him a particular of the premises and pro-

perty to be sold, and the terms or conditions of the sale, all in his own hand-writing, and signed by him; and it was then agreed that the plaintiff should have till the 25th of *August* to consider of the purchase, as he still objected to the price. On the 25th the plaintiff and the defendant agreed that the purchase should take place, and that one *Clarke* an attorney should be employed by both to prepare a proper contract to be executed by them; and in order to settle the terms, they went together to *Clarke*, and in his presence the bargain was concluded for 22,000*l*. *Clarke* was then instructed by them both to prepare a formal deed according to those terms; and the plaintiff, at the request of the defendant, delivered over to *Clarke* the particular above-mentioned, as instructions for preparing the conveyance. It was then also agreed that the parties should meet on the *Tuesday* following to execute the deed. On that day the plaintiff accordingly went to *Clarke*, but was informed by him that he was prevented from finishing the conveyance (which he had begun) by the defendant's having taken away the particular from which he was to prepare it. The defendant still declaring his intention to abide by the contract, *Clarke* again had instructions to prepare it, and on the 4th of *October* he brought a draught of it to the parties, who read over and approved of it, and agreed to execute the same whenever a fair copy could be written out. The defendant however refused to fulfil his part of that agreement.

tions to an attorney to prepare the conveyance; and the defendant delivered to him the particular, as instructions for the deed, which was prepared. This is not sufficient to take it out of the statute, and being void as to the lands, is void *in toto*.

The bill having charged, that the defendant had written letters to the attorney, who was to prepare the conveyance, in which the agreement was admitted; he must answer to that fact.

The bill also charged that the defendant had sent several notes and letters to *Clarke*, (after he was

employed as their common agent,) in which he acknowledged the existence and terms of the said agreement, and a discovery of such correspondence was accordingly prayed.

The defendant pleaded, that by the 29 *C.* II. it is enacted, that no action should be brought whereby to charge any person upon any contract for sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement on which such actions should be brought, or some memorandum or note thereof, should be in writing, signed by the party to be charged therewith, or by some other person by him thereunto lawfully authorized; and that no such agreement, note, or memorandum had ever been signed.

Graham and *Stratford*, for the plaintiff.—If the defendant admits a parol agreement, equity relieves, because the reason of the statute, the danger of perjury, ceases. So here, by refusing to answer or deny, he has admitted that this contract was reduced into writing by his agent, and read over and approved of by him; then the danger of perjury is equally done away as if he had admitted the whole.

The agreement being executory, was good as to the stock in trade; then that part at least is not barred by the plea.

It appears here also that the agreement was signed by the defendant, for the particular of the estate and terms signed by him was delivered to *Clarke*

as instructions for a formal deed; and although that was signed before the final agreement, yet the subsequent delivery to *Clarke* is a republication, and gives it effect as a note of the agreement then made.

If not formally executed, it has been prevented from being so by the fraud of the defendant in taking away from *Clarke* the particular by which he was to prepare it; and therefore shall have against him the force of the most formal execution. *Per* Lord *Thurlow*, in 2 Bro. 565.

It apears also by the case of *Hollis* v. *Whiting*, 1 Vern. 151. that where it is part of the agreement that the contract shall be reduced into writing, it is not within the statute.

The execution of that part of the agreement by *Clarke* having prepared the conveyances, is also a part performance, and entitles the plaintiff to have the whole carried into execution. To this charge of performance the defendant has not pleaded nor answered, and therefore it stands confessed with regard to the plea.

The charge of admissions of the agreement in letters, by a production of which the case might be substantiated, is not negatived; and the plea is therefore bad. *Tawney* v. *Crowther*, 3 Bro. R. 161. 318.

Partridge, *Richards*, and *Pemberton*, for the defendant being desired by the Court to confine their

arguments to the last point, contended that it appeared by the bill that Mr. *Clarke* was solicitor to the defendant, and not employed as agent by the plaintiff, except for the mere purpose of preparing the conveyances; and therefore the letters of the defendant, written in confidence to Mr. *Clarke* as his solicitor, could not be produced against him.

Serjeant's Inn Hall. 1st *March.*

MACDONALD, Chief Baron, stated the bill and plea. Two questions have been raised by the plaintiffs; first whether the particular signed by the defendant, be a note of the agreement within the meaning of the statute; and secondly, whether there has been a part performance of the contract.

As to the first, it is evident that the particular was at first made out and delivered, not as evidence of any agreement, for no agreement had then been made, but merely as a list or catalogue of the matters for sale, to enable the purchaser to form a proper estimate of their value: as this was the original nature of the particular, nothing which has happened since could possibly alter it; it was delivered into *Clarke*'s hands for the same purpose, as an enumeration of the things under sale, to serve as instructions to him in making out the description of them in the conveyance. The signing this particular could have no other effect than to give it authenticity as a true list of the items then offered for sale.

Besides, this was delivered in as the foundation for a sale for 24,000*l.* The sale which took place was for 22,000*l.*; as the price has been altered, so

the parcels to be sold, and other particulars of the sale, may have been changed; and this catalogue can be no evidence of the terms of the second contract, or even of its existence.

The second part of the case made for the plaintiff, also fails him. The instructing an attorney to draw conveyances, and his doing so, is no part performance. To take the case out of the statute, there must be a part execution of the substance of the agreement itself. *Hawkins* v. *Holmes*, 1 Wms. 770. The case of *Hollis* v. *Whiting*, in Vern. which seems contrary to this rule, was never so decided; and the *dictum* there reported has been often overruled, as is observed by Lord *Thurlow* in the case of *Whitchurch* v. *Bevis*, in 2 Bro. 564. In the latter case, as well as in another case there cited with great approbation by Lord *Thurlow*, of *Whaley* v. *Bagenal*, 6 Bro. P. C. 45. the circumstances of part performance were infinitely stronger than here, yet were held insufficient to get over the statute.

The agreement being void as to the land, must be void also as to the personal property which was to be sold with it; it is one entire contract, and the whole must stand or fall together. It never could be the intention of the parties that the stock should be sold apart from the premises, as most of it was of little comparative value separately*; and besides,

* *Lea* v. *Barber*.—*Warwick* Assizes, Summer 1794.—*Coram* MACDONALD, Chief Baron.—Action for breach of contract.

the agreement being for one entire sum, we cannot sever it.

The plaintiff has, however, also charged in his bill, that a correspondence took place, from which, if produced, the agreement may be proved: it is settled, by the case of *Tawney* v. *Crowther*, that such a correspondence may have that effect; and until we are acquainted with the nature of these letters, we cannot say that they have not. The plea must therefore stand for an answer, with liberty to except as to that particular.

The agreement was to take an assignment of certain leasehold premises, a brick-ground, at 100*l.* and to buy the stock, which was of much less value, consisting chiefly of half made bricks, sheds, &c. at a valuation to be fixed by arbitrators. The arbitrators afterwards settled the price; but the defendant refused to complete the purchase. There being no memorandum of the contract it was admitted to be void as to the land; but the plaintiff's counsel claimed to recover as to the personal property; it was ruled, on the authority of *Cooke* v. *Tombs*, that the agreement, being in its nature entire, could not be severed; and being void as to the land, was void *in toto*. The plaintiff was nonsuited.

BIRCH *v.* ELLAMES and GORST, surviving Assignee of TOWSEY, a Bankrupt. *Same day.*

JOHN TOWSEY, the bankrupt, in the year 1776 contracted for the purchase of certain premises in *Chester*, and being obliged to borrow the purchase money, 350*l.* from the plaintiff's testator Dr. *Peploe*, placed the title deeds in his hands as security for re-payment, giving at the same time a bond, with two sureties, for the sum. Being, in the year 1790, very much embarrassed in his circumstances, and indebted to the defendant *Ellames* in a considerable sum of money, he executed a mortgage of the same premises to him. The plaintiff could not prove any actual information of his claim having been given to the defendant prior to the execution of this mortgage. The defendant in his answer did not pretend to have made any inquiries after the title-deeds before he took the security, and admitted, that *upon executing* the mortgage he inquired for them, and was informed of their being in the hands of Dr. *Peploe;* but that he understood them to be so for safe custody only: he received this information from *Jonathan Tushingham*, who was his brother-in-law, and who had prepared the mortgage, and appeared as his agent at the time of the execution of it. The mortgage bore date the 4th of *January* 1790; in fact it was not executed till the 5th of *February;* and on the evening of the same day *Towsey* committed an act of bankruptcy.

The title-deeds of an estate were deposited with the plaintiff as a security for his demand. The defendant fourteen years afterwards, upon the eve of a bankruptcy of the mortgagor, took a mortgage, antedated; he had notice of the deposit, but avoided inquiring the purpose for which it was made. The Court decreed for the plaintiff.

Burton, *Plumer*, and *Richards*, for the plaintiff, insisted that the deposit of title-deeds with Dr. *Peplue* amounted to an equitable mortgage, and should prevail, unless against a subsequent purchaser without notice. *Russel* v. *Russel*, 1 Bro. 270. *Featherstone* v. *Fenwick*, 1784. *Hurford* v. *Carpenter*, 1785. ibid. (*n.*) A prior mortgagee without title-deeds, is postponed to a subsequent purchaser who has them. So here, the not inquiring for the title-deeds, is of itself a strong badge of fraud, and distinguishes the present from those cases where a purchaser has been imposed upon, and his diligence defeated by misrepresentation. In some of those cases the non-production of the title-deeds has been held not conclusive evidence of notice, because sufficiently accounted for; here it stands unexplained. The defendant admits notice *upon executing* the mortgage, which might be immediately before as well as immediately after it. The notice was at the same meeting, and part of the same transaction. Notice of a deposit is sufficient to put the defendant upon making further inquiries into the nature of the transaction which occasioned it. Thus, if *A.* mortgages two estates to *B.* by separate conveyances, and afterwards sells one of them to *C.* without informing him of the mortgage of the other estate, yet as *A.* could not redeem the one estate without redeeming the other, so neither shall *C.*; for notice of the one mortgage to *B.* is constructive notice of the whole equity, which by proper inquiries, he ought to have made himself acquainted with. *Ex parte Carter*, Ambl. 733.

The information of the title-deeds being in Dr. *Peploe's* hands, was given at the time of the mortgage, by his agent, who must therefore have known it before. This amounts to notice to the principal.

The circumstances of the mortgage to the defendant being ante-dated, and purporting to be for value then paid, whereas in fact, it appears to have been for securing an old debt, shew this transaction to have been fraudulent both as against the plaintiff and the other creditors, in order to give the defendant an undue priority.

Partridge and *Pemberton*, for the defendant *Ellames*.—The claim of the plaintiff is founded on a presumption that he has an equitable mortgage; but a deposit has been held to amount to an equitable mortgage only where accompanied with an agreement to perfect the conveyance afterwards, and then it amounts to a part performance of the agreement; here no such agreement has been proved, and on the contrary it appears that the personal security of *Towsey* and his sureties in the bond was principally depended upon, and the deeds only left in Dr. *Peploe's* hands as a collateral security.

But supposing his equity established, still the legal right of the defendant *Ellames*, being obtained without fraud, must prevail.

The cases where a second mortgagee, having the title-deeds, has been preferred to the prior mort-

gagee, who had not, went upon the ground of fraud, in giving the mortgagor an opportunity of imposing on such subsequent purchaser; that reason will not apply to this case, where the equitable claim was prior, in point of time, to the legal estate of the defendant; and it is now settled, that where no fraud is proved, the rule does not hold. *Tourle* v. *Rand*, 2 Bro. 650. It does not appear that *Tushingham* knew for what purpose the deeds were left with Dr. *Peploe*, and therefore his knowing the fact of the deposit amounts to nothing; it is not notice to him, nor to his principal, of the nature of the transaction between *Towsey* and Dr. *Peploe*.

The same sort of constructive notice was attempted to be established in the case of *Plumb* v. *Fluitt*, in this Court 1791, but without success. That case cannot be distinguished from the present. The defendants in both have taken the best security they could get from debtors whose circumstances they distrusted. This ought to be considered as that was, a plank seized in a wreck; and although no great diligence has been exerted in either case to sift the state of the security, yet that may well be omitted without any fraudulent intention by a man who knows he must take this or nothing, as was observed by the Court in that case. Here the laches of the plaintiff is much greater than in *Plumb* v. *Fluitt*; for Dr. *Peploe* not only omitted to get a mortgage executed to him when he might have done it, if such was the agreement, but has lain by since the year 1776 without calling for a completion of the contract. Equity always leans

against the stale demands. Earl of *Deloraine* v. *Browne*, 3 Bro. 633. *Smith* v. *Clay*, ibid. (*n*)

MACDONALD, Chief Baron, this day delivered the opinion of the Court, and after stating the case, spoke as follows.—The deposit of title-deeds as security for a debt, is now settled to be evidence of an agreement to make a mortgage, and that agreement is to be carried into execution by the Court, against the mortgagor, or any who claim under him with notice, either actual or constructive, of such deposit having been made. From all the circumstances, we are of opinion that the present is a case of that description. 1st *April.*

It is evident that both *Towsey* and *Ellames* knew themselves to be engaged in a fraudulent transaction, of which they dared not disclose the truth. In order to make the pretended ignorance of the plaintiff's equity appear more plausible, the mortgage is recited to be for money then advanced upon the security of the premises; it turns out that no money was advanced. It is ante-dated a month, to prevent the appearance of having been done on the eve of the bankruptcy.

The defendant swears, that *upon executing* the mortgage, he had notice of the title-deeds being in the plaintiff's hands, and seems, under the ambiguity of the expression, to shelter himself from being fixed with notice prior to his taking the security. Upon this information he cautiously avoids asking the reason of the deposit. Upon all the circumstances, we are clearly of opinion that he

avoided acting in the usual way on purpose to have a pretence of want of express notice. If this defence can be sustained, no equitable title can ever be made good against a subsequent purchaser.

We shall, for these reasons, decree the defendant *Ellames* to pay the demand of the plaintiff, or stand foreclosed, and convey, &c.

The Reporter has been favoured with the following Note of the Case of

PLUMB *v.* FLUITT.

In the Exchequer, 27th *January*, 1791.

Title deeds were deposited as a security for money; the defendant, a creditor of the mortgagor, fearing his immediate insolvency, took a conveyance of the same premises, without notice of the incumbrance: this was held good.

IT was a bill brought for a sale, in order to obtain payment of two mortgages made by one *Basnett* of the lands in question, and to restrain the defendant from proceeding at law to recover possession of the premises.

It appeared that about the beginning of the year 1779, *Basnett* being indebted to *Pattison Ellames*, and then obtaining a further loan from him, amounting together to the sum of 316*l.* delivered to him the title-deeds of one of the premises in question, called *Massey's Lodge*, as a security, and signed a memorandum stating himself to have done so, and binding himself to mortgage the same to *Ellames*, for his further security, when requested. Being

about the same time indebted to the plaintiff *Plumb* in the sum of 12,000*l.* he deposited with him the title deeds of the other premises in question called *Massey's Office,* or *The Warren,* as a security for that sum. The bill also charged an undertaking to complete this security by a mortgage, when required: but no memorandum to that effect was entered into.

About the month of *June* 1779, *Basnett* appearing to be in declining circumstances, and then indebted to the defendant *Fluitt* in 530*l.* was pressed by him for payment or security of that sum; and accordingly, on the 2d of *July* in that year, executed to him a mortgage to that amount of both the estates above-mentioned.

The circumstances of this transaction were disputed. The plaintiff endeavoured to fix the defendant with actual notice of the deposits, and for that purpose read the testimony of *Basnett*, who swore that he had informed the defendant of the deposits of the title-deeds before the execution of the mortgage.

Partridge, on behalf of the defendant, objected to this evidence, as tending to invalidate his own instrument, and relied on *Walton* v. *Shelley*, 1 Term Rep. 296.

Eyre, Chief Baron.--Here the witness is not to invalidate or destroy the instrument he himself made, as in the case of *Walton* v. *Shelley*, but merely to explain a collateral circumstance which

eventually affects the operation of the instrument in arranging the rights of the other parties.

The evidence was admitted.

On the other hand it was sworn in the answer, and confirmed by the son of the defendant in his evidence, that on the mortgage being proposed, the defendant, on the 25th of *June*, sent his son to *Basnett* to get the title-deeds; *Basnett* said he could not give him them, but promised to bring them in a few days: on the 2d of *July*, when the mortgage was to be executed, he again excused himself for not bringing the title-deeds with him, but promised to send them next day. On the 4th of *July*, after the execution of the mortgage to the defendant, he first informed the defendant's son of the title-deeds being deposited as a security for debts.

About the beginning of the year 1780, the defendant went to *Ellames* to inspect the title-deeds, but it did not sufficiently appear, that *Ellames* and the plaintiff knew of the defendant's mortgage.

On the 2d and 12th of *February* 1780, *Ellames* and the plaintiff got from *Basnett* mortgages of the premises of which they had the title-deeds respectively.

On the 23d of *February*, the defendant gave notice to *Ellames* and *Plumb* not to advance money on the security of the premises.

On the 8th of *October* 1780, the plaintiff *Plumb* took an assignment of *Ellames*'s mortgage.

In *June* 1781, *Basnett* became a bankrupt.

Lloyd and *Stanley*, for the plaintiff.--Where title-deeds are deposited as security for a debt, it is evidence of an agreement to mortgage, and amounts to an equitable mortgage against the debtor, and all subsequent purchasers from him with notice of the deposit. *Russell* v. *Russell*, 1 Bro. R. 269, and the cases of *Featherstone* v. *Fenwick*, and *Hurford* v. *Carpenter*, Ibid. (note).

If the testimony of *Basnett* is credited, the defendant had actual notice of the deposit of the title-deeds of *Massey*'s lodge with *Ellames*.

There is other evidence to shew a constructive notice of both the deposits. Mr. *Fluitt*, an attorney, must have known that a mortgage without the title-deeds is nugatory, because liable to be postponed to any subsequent mortgagee having them. *Hobbs* v. *Norton*, 1 Vern. 136. *Peter* v. *Russell*, 1 Eq. Ca. Abr. 321. *Mocatta* v. *Murgatroyd*, 1 P. Wms. 393. *Head* v. *Egerton*, 3 P. Wms. 280. And this general doctrine is recognized in *Ryal* v. *Rowles*, 1 Vez. 360, and in *Goodtitle* v. *Morgan*, 1 Term Rep. 762. For if there is no sufficient excuse for not requiring title-deeds, it is considered as fraudulent, in order to enable the mortgagor to get money on the credit of those title-deeds.

Accordingly, the defendant inquired for the deeds on the 25th of June; he could not get them; *Basnett* promised to bring them to *Chester*, where the mortgage was to be executed; he broke that

promise; the defendant does not seem to have required, or *Basnett* to have given, any reason for not producing them. The fact seems to be, that the defendant having no other chance for getting payment of his debt, took this security, either knowing of the prior incumbrance, or purposely avoiding to make any inquiry from which he might have been fixed with such knowledge. But it is impossible this voluntary ignorance can screen him. *Smith* v. *Low*, 1 Atk. 490. *Moore* v. *Bennet*, 2 Ch. Ca. 246. *Mertins* v. *Jolliffe*, Ambl. 311.

Partridge, *Plumer*, and *Pemberton*, for the defendant.—Notwithstanding the decision of the Court, admitting the testimony of *Basnett* to be read, at least that testimony cannot have much weight when it tends to prejudice the defendant by proving a fraud committed by the witness himself. It has been held that a fact, positively denied in the answer, should be held not to be proved unless sworn to by more than one witness. 1 Vez. 66, 97, 125. *Pember* v. *Mathers*, 1 Bro. R. 52. Here the defendant's son contradicts the testimony of *Basnett*, and is supported by the evidence arising from the transaction itself. It must therefore be taken that the defendant had no actual notice of the deposits.

As to constructive notice, the argument goes upon a presumption that it is absolutely necessary for a mortgagee to get the title-deeds; that is not true. The old cases, where a prior mortgagee not having the title-deeds was postponed, all went upon actual fraud proved in him, or such gross and wil-

ful negligence as was considered to be evidence of a fraudulent intention. It has indeed been said, in a late case in the Court of King's Bench, *Goodtitle* v. *Morgan*, 1 Term Rep. 755, that the not getting the title-deeds from the mortgagor, alone amounts to that case of negligence; but that *dictum* was unnecessary to the decision of the case, and it proceeds on a supposition that the rule had been so established in the Courts of Equity: whereas Lord *Thurlow*, in the subsequent case of *Tourle* v. *Rand*, 2 Bro. R. 650, says, there is no such rule in equity, and accordingly decided that case in favour of the first mortgagee, who had not the title-deeds. Here the defendant was deceived by the mortgagor, who pretended to be able to produce the title-deeds; he was induced to trust to these representations, because he had already advanced the money on the personal credit of *Basnett*, and was glad to get any additional security. This cannot be held a case of gross or fraudulent negligence, and therefore the legal title ought to prevail against either the prior deposit, or the subsequent mortgage. On the other hand, the plaintiff and *Ellames* are by no means clear of blame; they ought to have taken a conveyance originally, and not have trusted to their equitable title: it is calling upon the Court to do that for them, which a careful man would have done at first for himself.

The deposit with the plaintiff, seems merely to have been intended as a pledge; for there is not any allegation of a promise to mortgage; and if there had, such a promise, not being in writing, would have been void by the statute of frauds.

EYRE, Chief Baron.—The legal estate being in the defendant, the question is, whether the plaintiff can raise a trust upon his estate, so as to gain priority for his own demand?

It is now fully settled, that a deposit of title-deeds, as a security for a debt, does amount to an equitable mortgage. If the plaintiff can prove actual or constructive notice of the deposit in the defendant, it raises a trust in him to the amount of that equitable mortgage. As to the evidence of actual notice, the testimony of *Basnett* alone, unsupported and opposed, is too weak to found a decree or even to direct an issue upon it. Swearing to the fraudulent intention of his own deed, he can expect little credit in a Court of Equity.

A great deal has also been said about constructive notice. Constructive notice I take to be in its nature no more than evidence of notice, the presumptions of which are so violent that the Court will not allow even of its being controverted. Thus, if a mortgagee has a deed put into his hands which recites another deed which shews a title in some other person, the Court will presume him to have notice, and will not permit any evidence to disprove it.

The only reason that can raise in this case a notion of constructive notice is, that the deeds were not forthcoming.

But is it possible that this circumstance can, of itself, be notice of the hands into which they are

fallen, or the purpose to which they have been applied? at the utmost it can only be a circumstance of evidence, to shew that there was reason for further inquiry; but being unsupported by any other circumstances, it proves nothing.

It is said, no man will advance money upon an estate without seeing the title-deeds, unless with a fraudulent intention.

I wish I saw, in a Court of Equity, some solid distinction established between a consideration which is an old debt, and a sum advanced *de novo;* there certainly is a great difference: in the one case the creditor jumps at any security he can get; he takes the deed of conveyance now, and trusts to getting the title-deed afterwards: but till such a distinction is established, it is difficult to apply the reasoning which would belong to it.

The person who takes the legal estate without the deeds, in a case like this, appears to me, unless there be fraud, to be less blameable than he who takes the deeds without the estate.

Upon all the circumstances, I can see nothing in the case that amounts to constructive notice.

With respect to the general question, the effect of leaving the title-deeds in the hands of the mortgagor, the most intelligible rule, and in my opinion the most agreeable to justice, would have been to say, that if a man takes, as his security for his mortgage, a single deed, and leaves the other deeds

in the hands of the mortgagor, so as to enable him to commit a fraud, that he shall, in all such cases, be postponed, without reference to the quantity of pains or diligence which he exercised to obtain the deeds; for whether the pains be more or less, the mischief is the same; and if I had found the rule so laid down, I should have been perfectly satisfied. But it has been decided otherwise in the late cases, *Beckett* v. *Cordley*, *Penner* v. *Jemmat**, and *Tourle* v. *Rand*, which establish the rule that nothing but fraud, or gross and voluntary negligence in leaving the title-deeds, will oust the priority of the legal claimant. As for the case of *Goodtitle* v. *Morgan*, the mortgagee must always risk there being an outstanding term, in which case the legal estate is out of him. The opinion of Justice *Burnett* in *Ryal* v. *Rowles*, when taken altogether and explained by the context, is not contrary to the rule that is now established.

The case of *Mocatta* v. *Murgatroyd* is a strong case: but I find no one that goes the length of saying, that a failure of the utmost circumspection shall have the same effect of postponing a mortgagee as if he were guilty of fraud or wilful neglect.

In the present case, all the negligence, or all the activity in the world would have left the defendant in exactly the same situation in which he now is. He took this mortgage as the only security he could get; if it was already mortgaged, he was only where he was before: he seizes it as a plank to

* 2 Bro. R. 652. (*n.*)

save something: for as a second mortgage it was worth something.

The plaintiff having therefore failed in making out his case of fraud, either by actual or constructive notice, and the general proposition not being supported, which, if established, must apply to purchases as well as to mortgages, the bill must be dismissed with costs.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF EXCHEQUER;

IN

EASTER TERM,

34 GEORGE III.

Monday, 19th May.

GILBERT *v.* GOLDING.

BILL to redeem a mortgage. The usual decree referring it to the Deputy Remembrancer to take an account of principal, interest, and costs; he finds, by his report, that the defendant had been over-paid out of the profits of the estate, although he had insisted that a considerable sum was still due to him. Upon this report it was contended for the plaintiff, that instead of paying, he should receive costs, as the bill had been rendered necessary by the unconscientious conduct and fraudulent accounts of the defendant.

Per Curiam.—That objection comes too late now; you have suffered the decree to be taken in the usual manner, including costs: the report is in conformity to the decree, and must be confirmed.

MAGGRIDGE *v.* HODGSON. *Saturday, 24th May.*

BILL for an account.—*Richards* moved for leave to file a supplemental answer, on affidavit of new matter being discovered since the replication.

Upon discovery of new matter in an account, the Court will permit a supplemental answer after replication.

Abbott, contra.—That has only been done where the defendant has applied before replication, unless upon a mistake in the engrossing. Pract. Reg. 11. Ambl. 292. 2 Eq. Ca. Abr. 59. There is indeed a case of *Philips* v. *Gwynne* cited in Mitford, p. 261. to the contrary; but he adds, that it has been refused in later cases.

MACDONALD, Chief Baron.—It is a proper general rule, but not applicable to a case like this, where there can be no danger of perjury; the different parts of the account being independent of one another.

PERRYN, Baron.—I have known many cases where this has been allowed, and if it were not, it would only lead to a second bill for account; if there were no precedent, the Court should make one.

Same day.

HULL *v.* MATHEWS.

BILL for account of tithes. Motion, before answer, that defendant be at liberty to pay into Court 39*l.* as being the full value of the tithes, and the costs already incurred, and the plaintiff to proceed at the peril of costs.

By the *Court*.—Till the answer, and discovery obtained from it, the plaintiff cannot know whether this is the whole or not, nor whether he ought to accept the money paid in.

Hood, for the motion; *Bell*, against it.

2d *June*.

WILSON *v.* SUTTON.

If one bushel of corn is shipped in time to get the bounty, with intention to ship the rest afterwards, the whole put on board is entitled to the bounty.

THIS was an action against the Searcher of the Customs, for refusing to give the plaintiff a certificate to entitle him to the bounty on the exportation of corn, under the 31 *Geo.* III. *c.* 30. At the trial of the cause it appeared, that the plaintiff gave notice to the defendant, on *Saturday* 6th *October*, that he was going to ship a quantity, (1100 quarters,)of British wheat; on that day the new average price was to be hung up at the Custom-house from the returns of the week, and a consider-

able rise in the price was expected to appear. A few hours after this notice, the new average price was fixt, which was such, that the exportation of corn was merely permitted, but no bounty demandable upon it. Before the new price was fixed, the plaintiff had only put on board one bushel. He had only 989 quarters, which was the whole quantity on which he claimed the bounty. He had freighted a vessel only half an hour before giving notice of the intention to export; and the freighting was conditional, if the corn could be exported with the bounty. The ship was not then in a situation to receive the whole quantity, being under repair. The rest of the corn was not put on board till ten days afterwards. On this evidence, the Lord Chief Baron, before whom the cause was tried, left it to the jury to determine, whether this was a *bona fide* beginning to ship the corn with intent to ship the rest at a subsequent time. The jury found a verdict for the plaintiff, to set aside which, a rule *nisi* was obtained, and was supported by

The *Attorney General*, *Newnham*, *Burton*, and *Leicester*; who argued, that this was not a commencement of the shipping of the corn. The meaning of the act, in permitting the merchant to have the bounty although the prices rise before the whole corn is actually put on board, is because of the expence he has been put to in freighting and lading, and which it would be hard he should lose: these expences incurred are a security to the revenue, that the corn is really to be exported; for otherwise they are entirely thrown away. Here the plaintiff had incurred no expence, the corn was not put on

board, and the ship was freighted only conditionally.

The quantity entered was 1100 quarters. In fact, the plaintiff then had only 989. It was evidently a random entry, meant to cover any quantity which might be shipped; but the shipping one bushel out of a quantity of 1100 quarters, is not a shipping of any part of a different quantity, of 989 quarters.

The Searcher is to certify that there was a beginning to ship the article entered. If the whole is not in the vessel, at least, he must see that they are proceeding to put the whole on board, and that the quantity shipped is in the course of so doing. But from seeing one bushel put on board, and no further steps taken to ship the rest for ten days, and when the vessel was not in a situation to receive a lading, it was impossible to certify that this was done in the course of shipping any larger quantity. And if there were not at that time sufficient evidence of this being a beginning to ship the whole quantity, the subsequent conduct of the plaintiff cannot explain it; for that may have depended upon the subsequent variations in the price; and it clearly was open to him to proceed in the exportation or not. The jury ought then to have been informed, that there was no evidence at the time of shipping the one bushel of any intention to ship the rest.

Plumer and *Dauncey*, for the plaintiff.—The statute has provided for the circumstance which has happened. It says, that where there is a beginning

to ship, the bounty may be claimed; but to prevent frauds, they have fixed on a criterion to determine whether the beginning to ship is *bonâ fide* or not, *viz.* the shipping being completed within twenty days. Here it appears that the plaintiff had purchased the wheat long before, and had been delayed for want of a vessel. It also appears, that it is customary, on freighting a vessel, to put a part, however small, on board, to bind the bargain. This takes away all suspicion of fraud in the transaction.

MACDONALD, Chief Baron, this day delivered the opinion of the Court. This cause appeared to me at the trial, to be a mere race of this trader to entitle himself to the bounties, and the only question is, whether he has been able so to do? The bounty is meant to encourage exportation when corn is under a certain price, and when, but for the bounty, exportation would not take place to the same extent. The getting the bounty, is considered by the act, as a fair object to the trader in determining whether he will export or not, and it is not necessary that he should appear to have had an intention of exporting independent of it. Here the trader has made that a condition in freighting the vessel; he exports if he can get the bounty, not otherwise. This seems perfectly fair, and the very intention of the act of parliament. Then the question is, whether he has been in time to do so. It is admitted, that the shipping one bushel, if done in the course of shipping the whole, would be a good commencement within the meaning of the act. But the having the rest ready to follow immediately, is only a circumstance of evidence

to shew the intention with which the first bushel is put on board. The intent to ship the whole quantity at a subsequent period, may equally well appear from other circumstances; and if it does, a shipping at any subsequent time, or at detached times, within twenty days, is good. I left it to the jury to decide whether the first bushel was put on board with an intention of shipping the rest of the corn at a subsequent time, and as a commencement of that shipping. The Court concurs with me that that decision was right. The jury have found that it was so shipped, and we are all of opinion that the evidence warranted the conclusion drawn by the jury.

The rule was discharged.

Same day.

The KING *v.* YOUNG and GLENNIE.

Sci. fa. against two defendants on a joint and several recognizance of four persons, without averring the other two to be dead. This is bad, and may be taken advantage of without a plea in abatement; and is not cured by pleading over.

THE defendants were joint sureties with *A. Cuthbert*, who had been before sued on the same recognizance. (*Vide ante*, *p.* 193.) The declaration in *Sci. fa.* and plea thereto were the same as in that case; but the crown did not demur in this suit, but replied. To the replication a demurrer was put in, and the replication was admitted to be bad. The question arose on the validity of the plea, and of the declaration.

Marryatt, for the defendant, admitted that after the decision in the *King* v. *Marsh*, the plea must have been held bad if demurred to specially; but argued that the defect was matter of form only, and cured by pleading over, by the 4 *An. c.* 16. the 24th section of which extends the relief to suits of the crown concerning its revenue. It has been said indeed, in the case of the *Attorney General* v. *Launcelot*, Parker 1. that that clause was meant to extend only in behalf of the crown, but not against its interests: but that is only as to pleading double; whereas the present question is exactly within the scope of that clause, in which the act is classed among the statutes of Jeofails. But without the aid of that statute it would be cured by pleading over, or on general demurrer. Lutw. 1355. Salk. 497. Hob. 233.

But the declaration is bad; it states that four persons became jointly bound by recognizance to the king, and without averring the others to be dead or outlawed, two only of the four are joined in this *Sci. fa.* As it was a joint and several recognizance, the crown might proceed against all jointly, or against each separately; but not against two out of four. This, where it does not appear on the declaration, must be pleaded. Saund. 291. and the cases cited in 3 Bac. Abr. 698. But in the case of *Blackwell* v. *Ashton*, Allen 21. where the declaration was, as here, upon a recognizance to the crown, entered into by four persons, and only three of them were sued, without shewing the fourth to be dead, the Court held the declaration bad.

A bond may purport to have been made by four persons, though executed only by three of them; and therefore a plea in abatement is necessary, in order to put upon the record the fact of its having been executed by all the four: but a recognizance is itself conclusive evidence of having been acknowledged by all those whom it mentions as parties thereto, and being introduced in the declaration, without accounting for the other cognizors not being jointly sued, a plea averring that fact, which is already on the record, would be superfluous or bad.

In the case where *Allan* and others, assignees of *Marlor*, with *Down* were plaintiffs, and *Hartley* was defendant, it was ruled that where there were three partners and a joint commission was taken out against two of them, (the other being abroad,) it was bad; for though the commission might be several against each, or joint against all, yet it could not be against two upon a debt of three. Cooke's Bankrupt Laws, 5. (2d Edit.)

Lowndes, for the crown, insisted that the plea was bad in substance, and therefore the defect might be taken advantage of on general demurrer, or after pleading over. *Ellis* v. *Bucks*, All. 72. As to the declaration being bad—It is true, that if a deed is executed by four, and only three are sued, it is bad; but that can be taken advantage of only in one way, by plea in abatement. *Abbott* v. *Smith*, 2 Blackst. R. 950. *Rice* v. *Shute*, 5 Burr. 2614.*

* But see the case of *Horner* v. *Moor*, there cited.

In a plea in abatement, it is necessary to allege not only that it was executed by another person jointly with the defendant, but that that other is alive. *Sayer* v. *Chayton*, Lutw. 696; *Osborne* v. *Crosberne*, 1 Sid. 288. *Cabell* v. *Vaughan*, 1 Saund. 291. Then the fact of the other cognizor being still alive, must appear upon the record, in order to repel the claim of the plaintiff; and as it does not appear in the declaration in this case, a plea in abatement was necessary, to introduce it on the record.

Lowndes also stated the uniform practice of the officers of the Court to be, that where there is a joint recognizance of several to the crown, one joint *Scire facias* issues against all those of the cognizors who live in the same county, in order to save expence, and argued that this was a beneficial practice for the cognizors; as, if they are severally sued, each is liable to the amount of the whole penalty; but where two are jointly sued, only one penalty can be recovered.

The case in Allen, 21. seems to have been upon some other record produced to the Court, from which the writ varied, and on that variance it was determined.

MACDONALD, Chief Baron.—The ground of the demurrer in this case is a very clear and material variance in the replication, from the dates mentioned in the declaration, and would certainly entitle the defendant to judgment. But it appears

that the plea itself is also bad, on grounds similar to those in the case of the *King* v. *Marsh*.

The defendant, however, rests on an objection to the declaration, that two of those jointly bound in the recognizance, are sued without the rest, and without averring that the others are dead; and it is clear that this is a valid objection to it; but it has been contended that the objection should have been taken by a plea in abatement.

That rule holds where the fact does not appear upon the declaration; but where it already appears on the declaration that others ought to have been joined and are not, no plea is necessary. This is clear from the cases cited in 5 Burr. and that in Alleyn, which corresponds very accurately with the present.

A distinction has been attempted to be taken between the case of the king and that of a subject in their pleading, and the practice of the officers here has been relied on. If such a practice has obtained, it seems to be unfounded in principle; for no solid distinction can be shewn between the crown and a subject in a case like the present. The writ must be quashed,

ANONYMOUS. *Same day.*

DEVISE of land to *A.* in tail, and of money to trustees, to be laid out in land in the same manner. *A.* suffered a recovery of the land, and now prayed that the money might be paid over to him.

The *Court* refused to make this order; it must be laid out, and then you may suffer a recovery of the land; till then, those in remainder are entitled to the chance of your neglecting to do so.

OLIVER *v.* HAMILTON.

MOTION to appoint a receiver of partnership stock and debts, in a suit by one against the other partners for embezzling.

The *Court* thought that a receiver of the stock of a subsisting partnership, while the trade is going on, could not be appointed; unless upon the very grossest abuse; for it must destroy the trade.

Plumer and *Cooke* for the plaintiff; *Anstruther* and *Alexander* for the defendant.

Serjeants Inn Hall. 5th *June*. 1794.

FRENCH and Others *v.* CONNELLY and Another.

Bill for discovery of fraud in a policy of insurance, to defend an action at law, and that the policy might be declared void, and be delivered up to be cancelled. Demurrer thereto overruled.

THIS was a bill brought by the underwriters of a policy of insurance, on which the defendants had commenced actions at law against them as for a total loss, charging fraud in the policy as to the value, and a fraudulent loss. The bill therefore prayed a discovery, and that the policy might be declared fraudulent and void, and that the same might be cancelled, or the names of the plaintiffs struck out. It also prayed a commission to examine witnesses in *Ireland*, and that the plaintiffs might have the benefit of the same testimony on the trial of the action, in case the defendants should be permitted to proceed therein; and also on the hearing of the present suit, if necessary; and prayed an injunction in the mean time.

The defendants demurred generally, both as to the discovery and relief.

Plumer and *Pemberton*, in support of the demurrer, insisted that relief being sought upon a matter only proper to be tried at law, and the discovery as incidental to that relief, the whole bill was bad, although the plaintiff might have been entitled to the discovery. *Price* v. *James*, 2 Bro. R. 319.

Abbott, contra, contended that on the subject of policies of insurance, Courts of Equity have con-

current jurisdiction with Courts of Law; and formerly had the principal cognizance of such matters. In the case of *Goddard* v. *Garrett*, 1 Eq. Ca. Abr. 371. the Court decreed the policy to be delivered up, although, on the case appearing by the discovery, the plaintiff at law could not have recovered. So *Whittingham* v. *Thornborough*, Prec. in Ch. 20. *Da Costa* v. *Scandret*, 2 P. Wms. 170. On these authorities it is impossible to say that the Court will now deny relief, and even discovery where relief is prayed, on a subject where they have before granted both. The remedy being now more efficacious at law than heretofore, does not oust the jurisdiction of the Courts of Equity; and it is every day's practice to order instruments to be delivered up, of which a bad use might be attempted to be made at law, although they could not even there entitle the holders to recover.

But at all events, we are entitled to the discovery, for it is put in the disjuncture, either to assist us in this suit, or at law, if not entitled to the relief, and for discovery. The cases where it has been ruled otherwise, are, where the discovery has been merely incidental to the relief. Then the demurrer covers too much.

Plumer, in reply.—If the plaintiffs are not entitled to relief here, the whole bill is bad. There is a marked distinction between bills for relief, and for discovery; in the latter, the plaintiff is entitled to the discovery as of course, on shewing an interest, and must always pay costs; where he seeks relief, and discovery as incidental to it, he obtains

his discovery without paying costs, and may afterwards use it as he pleases. If this were allowed, no bill could be dismissed; for by praying the discovery with a double aspect, as applicable to other matters, as well as to the relief sought by the bill, he would of course be entitled to it; and the distinction established between a bill of discovery, and discovery incidental to relief, would be rendered nugatory.

The relief here cannot be granted; for supposing the jurisdiction of the two Courts concurrent, the Court of Law has priority of suit, and is therefore entitled to retain it. This does not appear to have been the case in the authorities cited, and establishes a clear distinction from them.

Hollist, amicus Curiæ, mentioned the case of *Sowerby* v. *Warder*, in this Court 26th of *January* 1791, where, on a bill similar to the present, after action brought on the policy, the Court over-ruled the demurrer, and afterwards decreed the policy to be delivered up.

Plumer observed, that in that case the sole ground of argument of the counsel for the defendant was, the want of equity; and that the priority of the suit at law was not at all taken notice of as a circumstance in the case.

Mr. *Plumer* this day mentioned this case to the Court, and the earnest wish of his client for a decision upon the plea.

The Lord Chief Baron said, that the case of *Sowerby* v. *Warder* appeared to him to be decisive, and he believed the other judges inclined to the same opinion; but in their absence he could not positively deliver any judgment.

The defendant withdrew his demurrer.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF EXCHEQUER;

IN

TRINITY TERM,

34 GEORGE III.

Wednesday, 25th June.

RUTHERFORD *v.* MILLER.

If a defendant in equity becomes bankrupt, the plaintiff cannot therefore dismiss his own bill without paying costs; it is no abatement.

PARTRIDGE moved, that the plaintiff might be at liberty to dismiss his own bill without costs, the defendant having become bankrupt, and all hopes of obtaining the end of the bill being thereby defeated; and argued, that the bill abated by the bankruptcy. *Sellas* v. *Dawson*, in Chancery, 8th December 1790*.

* *Sellas* v. *Dawson*, in Chancery, 8th *December* 1790. The bill was filed in 1788, the answer in *February* 1789. The plaintiff became a bankrupt in *March* 1789, and in *December* following the defendant obtained an order, as of course, to dismiss the bill with costs, for want of prosecution. The plaintiff now moved to discharge that order for irregularity, considering it to be such a bar at present as prevented the assignees from filing a supple-

Cooke, contra, cited the case of *Bramhall* v. *Cross*, 1789, and *Davidson* v. *Butler*, 28th April 1793, in

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mental bill. Lord *Thurlow* doubted whether he should discharge an order which seemed to be originally a mere nullity, because the plaintiff, being a bankrupt, could not continue the suit, and therefore could not be made to pay costs for not doing it.

At the third seal this was mentioned again, and the case of *Bramhall* v. *Cross* was cited, and *Waugh* v. *Austen*, 3 Term Rep. 437. in which it was held, that a suit does not abate by the bankruptcy of the plaintiff, and he was suffered to proceed to take out execution.

Lord *Thurlow* was of opinion that it would abate in any stage prior to the judgment, and that the bankruptcy of a sole plaintiff so far put an end to the suit, that the assignees could not add to the suit by a mere supplemental bill, but must file another original bill, in the nature of a supplemental bill. *Harrison* v. *Ridley*, Com. R. 589. Mitf. 62. His Lordship admitted, however, that in the case of an injunction, the defendant may move that the assignees of a bankrupt-plaintiff may file their bill within a limited time, or else the injunction to be dissolved.

14th *January* 1791, *Abbot* renewed his application to have the order of dismissal discharged.

Lord *Thurlow* said, he could not make an order to discharge the former order, because that would acknowledge that there could be any order made after a bankruptcy, and when the suit, as he conceived, was abated. He thought it was abated by analogy to abatement at law, which always takes place on a bankruptcy before judgment either final or interlocutory; *Monke* v. *Morris*, 1 Mod. 93. He added, that notwithstanding the Exchequer precedents, this was an improper order to have been made originally, and improper to be noticed now, and that it was a mere nullity. His Lordship stated it as a general rule, that bankruptcy before judgment or decree, was equally an abatement in equity and at law; and observed that the case in 1 Atk. 209. where Lord *Hardwicke* is made to say, that it was no abate-

which this Court decided, that proceedings did not abate by bankruptcy of the plaintiff, and the bills were dismissed with costs for want of prosecution.*

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ment, is ill reported, and that the order, which had been examined, did not warrant the report. He added, that the assignees should now file their supplemental bill, which would take up the proceedings from the very date of the bankruptcy, and so totally oust this intermediate order.

The motion, to discharge the order for dismissing the original bill for want of prosecution, was accordingly refused.

Bankruptcy of the plaintiff does not abate a suit in equity, and the bill may therefore be dismissed with costs for want of prosecution.

* This case of *Davidson* v. *Butler* was by some accident omitted in its proper place. It was a bill for an injunction against proceeding at law, on a promissory note; and to have it delivered up.

Abbot moved to dismiss the bill with costs, for want of prosecution.

Cooke shewed for cause, against this motion, that the plaintiff was become bankrupt since the filing of the bill, and relied on the case of *Sellas* v. *Dawson*.

Abbot cited the case of *Bramhall* v. *Cross*, and another late case in the Exchequer, where similar orders were made.

MACDONALD, Chief Baron.—I should have no doubt upon the subject, but for the opinion of Lord *Thurlow* in *Sellas* v. *Dawson*; that case is founded on an idea that bankruptcy of the plaintiff abates a suit; but in this Court the rule is clearly established the other way; and that accounts for the difference of practice here in dismissing bills in this situation. It is clear that at law there is no abatement; and the same rule ought to be followed in Courts of Equity; for the right to have a bill dismissed with costs, for want of prosecution, is the only protection to a defendant from being harrassed by suits that are afterwards aban-

MACDONALD, Chief Baron.—I remember those cases very well. It was formerly held otherwise; but the point has been fully gone into. Indeed, it seems to me impossible, that where a plaintiff files a groundless bill, he should be at liberty to escape without paying costs.

BARLOW *v.* HALL.

JOHNSON moved to discharge the defendant out of custody, on affidavit that he was taken and confined without any writ; and that the writ of *quo minus* was sued out and served upon him while so detained.

If a defendant is seized illegally, and served with process while so detained, the Court will discharge him unconditionally.

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doned; and the practice of this Court has always been accordingly.

THOMSON, Baron.—I take the constant practice to be, that the assignees of a bankrupt, in order to take advantage of a suit commenced by him, file a supplemental bill, and not a bill of revivor; but if the suit was abated, it would be necessary to revive. If the assignees think the suit beneficial, they may take it out of his hands; if they decline doing so, there is no reason why the defendant should not have his costs. In this case the assignees have nothing to do with the suit. It will be time enough for them to litigate the claim of the defendant when he offers to prove it under the commission.

Cooke then offered to undertake to speed the cause, to prevent its being dismissed. This the Court refused; and the bill was dismissed with costs.

Bailey shewed for cause that the action was for a transaction approaching to swindling. It is in the discretion of the Court to grant this motion unconditionally, or to impose terms on the parties. If the defendant gets rid of the arrest under the writ of *quo minus*, on account of the tortious confinement, he ought not to have a recompence in damages also for that injury. He therefore desired the Court to put the defendant on terms of not bringing an action.

Per Cur.—All that we have to look to is, to prevent our process being abused. The defendant has been seized illegally; that illegal confinement is continued under the sanction of our process; he must be discharged. This is not like the case of a mistake; there we might impose such terms as should appear equitable.

DAURIGNY and Others v. DAVALLON and Others.

Plea of alien enemy is good to a bill for discovery.

Such a plea stating this nation to be at war with the government of *France*, and that the plaintiffs

THIS was a bill for discovery of goods received by the defendants as agents for the plaintiffs, stating such discovery to be necessary for supporting actions at law intended by the plaintiffs to be brought for recovering the value of the goods. The defendants severally pleaded, "that at and "before the time of exhibiting the said bill of

"complaint, there was and still is an open war between our lord the now king, as king of this realm, and the persons now exercising the powers of government in *France*; and that the plaintiffs are *Frenchmen*, alien enemies of our lord the king and his crown of *Great Britain*, and now are, or lately were, resident at *Lyons*, or some other part of the dominions of *France*, under the obedience of the persons so exercising the powers of government there; and that those persons, as well as the plaintiffs, are alien enemies of our lord the king, and his crown of *Great Britain*."

are *Frenchmen*, *aliens*, and *enemies* of the king, is sufficient.

Plumer, *Johnson*, and *Pemberton*, for the different defendants, argued in support of these pleas.

By the original common-law of this country, no alien had a right to sue in the King's Courts. This disability is now confined to alien enemies, 2 Str. 1082.; but as to them, holds as strongly as ever. *Wells* v. *Williams*, 1 Ld. Raym. 283. *Anthon* v. *Fisher*, Doug. 650. (*n.*) He cannot even sue for a discovery; for discovery is only granted where the plaintiff shews an interest; but here, notwithstanding the discovery, he cannot recover; and the discovery would therefore be useless. By the statute 34 *Geo.* III. *c.* 9. s. 7. it is even penal to pay him any demand, as residing in *France*.

Pigott and Steele, for the plaintiffs.—The case in Douglas, determined by the Judges in the Court of Exchequer Chamber, relates merely to suits for relief, and is confined to the case of a right claimed to be acquired by an alien enemy in actual war, as

a ransom-bond; and does not apply to the case of discovery, or of rights acquired in commercial transactions before the war. The right of alien enemies to sue can, at most, only be suspended during the war: when the war ends, they will be entitled to relief; and, with licence from the king, they may sue now; the discovery sought is not therefore immaterial. In 3 Burr. 1741, Mr. *Dunning* cited a case where Lord *Hardwicke* over-ruled a plea of alien enemy to a bill for an account.

In point of form the plea is defective. Pleas in equity are to be taken as strictly as at law; especially in this case; for here the plea can only be valid as shewing matter that would be a bar to the relief at law, and if it would not be a bar at law, it is bad. The forms of pleas in bar, of this kind, universally contain an averment that the plaintiff was born at some place in the territories of another state, and out of the allegiance of the king. *Calvin's* case, 7 Co. Str. 1082. The term *alien* is an inference of law from certain facts, and it is necessary to plead the facts and not the inference. The birth, as being the most material fact to prove alienage, is averred in all the precedents. The plaintiffs may be *Frenchmen*, as stated in the plea, and yet not aliens; as, if born in *France* of *English* parents. The fact of being an alien enemy is an inference of law of many facts which are not here stated.

It is not averred that they owe allegiance to any prince or state at war with this country, nor that they adhere to the king's enemies: it is only said, that they now do or lately did reside at some place

in *France* under the obedience of the *French* government. Perhaps they are there by force, or in prison; it is no averment of adhering to that power; then the whole rests upon the general averment of their being alien enemies, on which, as being an inference of law, no issue can be taken.

On the act of this session nothing can turn; that act points out a particular mode of stopping suits of men residing in *France*, namely, by application to a Judge, who is enabled to stop the proceedings on such terms as he shall think fit; sec. 7. That was attempted here, and refused; if granted, it probably would be on the terms of giving a full discovery and security.

MACDONALD, Chief Baron.—I refused to stop the proceedings in this suit, because I was not satisfied of the question, whether a bill of discovery is within the meaning of the provisions of the legislature, or of the general disability of alien enemies. There appeared to me to be a great difference between suits for relief, and those which only aim at obtaining evidence, and are preparatory to the real suit.

Plumer and *Johnson*, in reply.—The disability to sue is general,—that no alien enemy shall have the benefit of the King's Courts; and the distinction was never taken between these suits for obtaining evidence and any other. If a discovery might be obtained, the rule would be nugatory; for the enemies might obtain a discovery here, and afterwards, by means of that discovery, sue for relief in

foreign courts where the king's subject has property, and so make this Court subservient to their remedy. It is admitted, that the right to sue is suspended during war; but a bill of discovery is the commencement of a suit, and therefore will not lie. The case cited by *Dunning* is certainly wrong: if a suit for an account lies, the general order for payment of the balance must be made upon it, and the distinction of an alien enemy is at an end.

As to the point of form, it is not true that a plea in equity must observe the same strictness as at law. At law, many of the facts, as the place of birth, may be under a *videlicet*, and therefore need not be proved. In equity, the plea is sworn to be true, and is therefore only to contain the essential parts which are to be proved.

The word *Frenchman* implies that the plaintiff is by birth one of that nation, and the additional averment of alienage negatives the possibility of his being born of *English* parents. It is not averred that the plaintiff adheres to the king's enemies; but it is said that he lives under the obedience of the king's enemies, and is himself an enemy of our lord the king, which is tantamount to such an averment. The substance therefore is the same as in the preeedents at law, and the same technical expressions have never been expected in equity.

Tuesday, 8th July.

MACDONALD, Chief Baron, this day delivered the opinion of the Court.—Objections have been taken to this plea in point of substance, as well as

to the form in which it is pleaded. It has been insisted that the plea of alien enemy applies only to those suits in which relief is sought, and not to mere bills for discovery.

However the law may originally have stood, it is now settled that alien friends have a right to institute suits in the King's Courts for recovery of their rights; they come into this country either, as was formerly the case, with a letter of safe-conduct, or under a tacit permission which presumes that authority. So, if they continue to reside here after a war breaks out between the two countries, they remain under the benefit of that protection, and are impliedly temporary subjects of this kingdom. But if the right of suing for redress of the injuries they receive were not allowed them, the protection afforded would be incomplete, and merely nominal.

This claim to the protection of our Courts does not apply to those aliens who adhere to the king's enemies. They seem upon every principle to be incapacitated from suing either at law or in equity.

A doubt had at first arisen, whether suits for discovery were not in their nature an exception to this rule; but we are now satisfied that no real distinction exists. The disability to sue is personal: it takes away from the king's enemies the benefit of his Courts, whether for the purpose of immediate relief, or to give assistance in obtaining that relief elsewhere. Perhaps the discovery obtained here may be made available by a suit abroad; the

same reason therefore applies against the auxiliary as against the principal suit.

In Stamford Prerog. 39. Dyer 2. b. the rule is laid down in general terms as to all suits. The case cited by Mr. *Dunning*, as decided by Lord *Hardwicke*, is too loose a note to deserve much attention; it might be decided upon other grounds, or upon restrictions which do not appear. We do not know enough of that case to rest any thing upon it.

The objection in form is, that the plea does not state the plaintiff to have been born out of the liegeance of the king, and within the liegeance of a state at war with us. The precedents certainly are in that form; Rast. 405. a. 252. 1 Show. 349. and it seems of the essence of the plea, that these facts should appear. But the question is, whether these facts are not in substance sufficiently averred in this plea. They are stated to be *Frenchmen, aliens, and enemies to the king;* now the word *alien* is a legal term, and amounts to as much as many words; an alien must be *alien né.* Litt. s. 198. It implies being born out of the liegeance of the king, and within the liegeance of some other state. The word *Frenchmen* shews that they are the subjects of a nation stated to be at war with our king; and the averment, that they are enemies of our lord the king, is the same thing as if the plea had said that they adhere to his enemies. These three words, therefore, *Frenchmen, alien, enemies,* seem to contain every material alteration necessary

in such plea, although perhaps it would have been better not to depart from the precedents in the books. The Court being of opinion that the plea is sufficient upon this ground, it becomes immaterial to consider the effect of the late statute upon the present case.

WARD and Another *v.* The DUKE of NORTHUMBERLAND and the EARL of BEVERLEY. 9th *July.*

THE bill stated, that the late Duke of *Northumberland*, being seized in fee of a colliery called *Flatworth* in the county of *Northumberland*, entered into an agreement with the plaintiffs, that they should work the colliery for 21 years, and should sell the coals worked from it, for the use of the Duke, and that the Duke should allow the plaintiffs the sum of 6*l.* 15*s. per* ton for every ton of coals which they should get from the colliery and vend at the colliery; and the Duke accordingly demised to the plaintiffs the use of the engines, &c. for working the coals, and the liberty of getting coals for 21 years, at the yearly rent of a pepper-corn; and the plaintiffs covenanted that they would at their own expence every year during the said term, get and deliver from the collieries at least 800 tons of coals, and that they should not in any one year exceed the quantity of 1000 tons; and the Duke covenanted to pay them the sum of 6*l.* 15*s.* for every ton of coals so delivered. The

The plaintiff was tenant to the father of the defendants of a colliery under a lease and subsequent agreements; on the father's death he continued to hold under the defendant, the heir, on the same terms. He filed this bill against the two defendants as executors of their father, and against the one as heir, for an account under the agreement, both in the lifetime of the father and since his death. The defendants demurred separately as being improperly joined in the suit. The pe murrers were allowed.

bill then went on to state that the plaintiffs began to work the colliery under this lease, but that the Duke of *Northumberland* having entered into an agreement with the owners of collieries near *Newcastle*, not to sell more than a certain quantity of coals in each year, directed the plaintiffs not to get from the colliery more coals than they should from time to time be restrained to by a committee appointed by the different owners of collieries; that in order to induce the plaintiffs to observe such directions, he assured them he would make them an allowance for such quantities of coals as they should be restrained from working below the stipulated quantity of 1000 tons; and that some time afterwards, an express agreement was entered into between the Duke and the plaintiff, as to the amount of the allowance to be made to them. That the plaintiffs went on under this agreement, working the colliery, and were every year restrained from working the full stipulated quantity of 1000 tons, and in some years they were restrained from getting even the 800 tons, which according to the terms of the lease they were bound to get; that on the 6th *June* 1768, the said *Hugh* Duke of *Northumberland* died, leaving his two sons, the defendants his executors, and the defendant the Duke his heir at at law; that the defendant the Duke the eupon became seized of the colliery in fee subject to the lease; that soon after the death of the said late Duke, the plaintiffs settled their accounts with the defendants, as executors of the late Duke, of all the coals got during his life-time, and which they had sold for the Duke, deducting the 6*l.* 15*s.* *per* ton, which they were entitled to, but no allowance was made to them in respect of the restric-

tion which had been imposed on them in working the colliery; that the plaintiffs went on working the colliery under all the old agreements subsisting in the time of the late Duke, and they were from time to time restrained by the present Duke from working so much as 1000, and in some years so much as 800 tons a year; that the account in the time of the present Duke had never been settled, but the plaintiffs were willing to account for and pay to him the money which they had received, by vending the coals they had wrought, after deducting the 6*l.* 15*s.* *per* ton; and likewise such allowance as they were entitled to, in respect of the said restriction: the bill therefore prayed, that an account might be taken of all the sums of money that became due to the plaintiffs in the life-time of the late Duke, in respect of the said restriction, and that both the defendants might be decreed to pay the said plaintiffs what was due on that account, and for that purpose should admit assets, or that an account might be taken of the late Duke's personal estate; and that an account might be taken of the coals wrought and vended from the colliery since the death of the late Duke, and of the sum of money which had become due to the present Duke for and in respect thereof; and in making that account all just allowances for and in respect of the said restriction should be made, plaintiffs offering to pay what should be found due, &c.

To this bill two separate demurrers were put in.

The Duke of *Northumberland*'s demurrer was in

these words: " For that the complainants, in and " by the said bill of complaint, have made a de- " mand against both the defendants jointly, as ex- " ecutors of the late most noble *Hugh* Duke of " *Northumberland,* and have also thereby sought " relief against this defendant *Hugh* Duke of *Nor-* " *thumberland* personally upon a separate and dis- " tinct claim, to which as executor of the late " Duke of *Northumberland,* if at all, he is not " liable; wherefore and for divers other errors," &c.

Lord *Beverley*'s demurrer was as follows: " For " that the said bill contains in itself parties which " have no relation to, or dependance upon each " other, whereby the said bill is drawn to unneces- " sary length, and this defendant, if he should be " compelled to make answer thereto, will be put " to unnecessary expences, contrary to the con- " stant practice of this honourable court; where- " fore," &c.

These two demurrers were set down, and stood next to each other in the paper; the demurrer of the Duke was argued first, and supported by the Attorney General and *Simeon*; that of Lord *Beverley* by *Burton* and *Campbell.*

They contended that in this bill the different parts were wholly distinct, and the circumstance of the present Duke being in different characters interested in both, the only point of connexion between them. With the account subsequent to the late Duke's death, with the suit at law, and the

injunction prayed, his representatives can have no concern. The estate of the late Duke is not to be burthened with the expence of a bill, the greater part of which relates to wholly different transactions. Then if Lord *Beverley* can demur, of course the Duke can also. The want of connexion must be mutual. At law you cannot join two causes of action against the same person, if the one be in *proprio jure*, the other against him as executor, for the judgment is different. Suppose the assets of the late Duke in Lord *Beverley*'s hands: the injunction would stop the suit of the present Duke until Lord *Beverley* should pay the debt of their father. The joining different parties in the one bill is only to be allowed where they have a joint interest, or where complete justice cannot be otherwise attained.

Plumer and *Romilly* for the plaintiffs.

The circumstances of this case are so united, that it is hardly possible to separate them. It is one agreement continued, though between different parties, and in a court of equity the connexion of the subject matter is sufficient to join parties who are not joint in interest. Thus if a bill is brought to redeem against a first and second mortgagee; there is no unity of interest, yet they may be joined in the suit, and are only severed in taking the accounts. *Purefoy* v. *Purefoy*, 1 Vern. 29. One kept out of possession of an equitable estate which he is entitled to, may sue by one bill to have an account against the different tenants who have successively possessed his estate. A rec-

tor sues for account of tithes against several tenants who make similar objections to his claim, although no one is interested in the demand upon the other. In partnerships an account may be prayed by one bill against the surviving partner, for transactions since the death of the other, and also against him and the representatives of the other partner for the transactions before his death; they are separated in taking the account. *Draper* v. *Jason*, R. T. Finch 240. *Newland* v. *Champion*, 1 Vez. 105. *Mayor of York* v. *Pilkington*, 1 Atk. 282. 1 Vern. 416. 463. *Watts* v. *Durant*, in this Court, 8th of *February* 1

Where the same transactions are to be inquired into in both subjects of dispute, there is the danger of perjury in the second suit, as the testimony may be taken after publication in the first; the rule is therefore founded in policy to unite causes of suit arising from the same transactions.

At all events the demurrer of the Duke cannot be allowed. Suppose he had been sole executor, there can be no doubt this bill would have lain against him in both capacities; but as we have charged him with having assets, and his demurrer admits that fact, he is answerable *de bonis propriis*, and this becomes his own debt. In arguing the demurrer of the Duke, the fact of Lord *Beverley* having any assets cannot be attended to; we have a right to consider the Duke alone as having the assets, and Lord *Beverley* as merely a formal party. Then this brings it to the same situation as if the Duke were sole executor.

Besides, in order to state the case against the Duke, and the transactions subsequent to the death of his father, every word of this bill is necessary. No new agreement was ever entered into, we must therefore state the old. The adding the prayer of an account against the estate of the late Duke, makes an addition to the bill too inconsiderable to be mentioned, and it does not belong to the Duke to object that another is joined with himself in bearing the expences of the suit.

If Lord *Beverley* had not chosen to demur, the Duke could have had no pretence so to do, and the Court cannot, in arguing the demurrer of the one defendant, take notice of the existence of the other demurrer. The demurrer of Lord *Beverley* may be over-ruled on matter of form, or may be abandoned; and then the Duke has no grounds to demur. If it is allowed, that may be introduced into the record by the Duke in the form of a plea; at present it cannot be taken notice of.

Mr. *Attorney General* in reply.—If Lord *Beverley* has a right to demur, so must we. If we were turned round to take advantage of the demurrer of Lord *Beverley* by way of plea, it would then appear to the Court, that one of the executors was not a party in the cause which sought an account against the estate of the testator, and of course it could not proceed against the other alone. But, if there is such a want of connexion as gives the representatives of the late Duke a right to object to being joined in it, there must exist the same reason for not proceeding against the present Duke

in his own character, on a bill which joined other parties and interests improperly.

The case of a sole executor does not apply. If one man carries on three branches of business, you may sue him for an account in every one of them jointly; but if he is a sole trader in one business, has one partner in a second, and two partners in the third, you cannot join your demands against the three houses in one bill. So where two plaintiffs were jointly concerned in two transactions in the bill, but quite unconnected in two others, on a demurrer the Court were of opinion against the bill. *Harrison* v. *Horne*, this Term, by the Master of the Rolls sitting for the Chancellor.

Romilly.—That case is not yet decided.

Mr. *Attorney General.*—The plaintiffs do not now hold under the contract with the said Duke, there is therefore no entirety of contract to connect the two subjects of dispute; they have continued to hold under the present Duke on the same or similar terms. But if two strangers choose to take my contract as a pattern of theirs, I am not therefore to be implicated in any litigation that may arise upon it.

Wednesday, 2d July. The *Court* took time till this day, when their opinion was delivered upon both demurrers jointly, by

MACDONALD, Chief Baron.—To this bill the two defendants have demurred separately. Lord

Beverley very justly objects to being joined in a suit, a considerable part of which relates merely to the private concerns of the present Duke, and has no connexion with the estate of their testator. As to the demurrer of the Duke, he is indeed interested in every part of the bill, but in different characters; in the one, he can only be sued jointly with his co-executor, in the other, he is perfectly distinct from him. The two demands against the Duke are indeed of a similar nature, but perfectly distinct and unconnected. As one of the executors of his father, he has a right to object to that estate being implicated in litigation concerning his own affairs. The account and the injunction prayed against him, have no relation to his character of executor in which he is sued in the other part of the bill. The cases cited of unconnected parties being joined in a suit, are where there is one common interest among them all, centering in the point in issue in the cause. The present bill blends matters which have not any other connexion than that of the Duke being a party in them all.

The demurrer must be allowed.

Wednesday, 2d July.

GRIFFIN *v.* ARCHER, MOORE, and Others.

ARCHER and the other defendants, the assignees of *Moore*, having commenced an action at law against the plaintiff for money due from him to *Moore* before the bankruptcy, this bill was filed against the assignees and the bankrupt jointly, to obtain a discovery of the transactions, for defence in the action at law, and to have an injunction in the mean time.

The defendant *Moore* demurred, as having no interest, and as being capable of being examined as a witness.

Cooke for the demurrer.

Grimwood, in support of the bill, relied on Mitford's statement of the practice, page 143.

The *Court* thought it very clear that the bankrupt might be examined as a witness to diminish the fund; and therefore thought it improper that he should be harassed by a suit in which he could have no interest.

Demurrer allowed.

MARSH *v.* ROBINSON.

THE defendant put in his answer on affirmation without oath, as being a Quaker.

Hollist, for the plaintiff, obtained a rule to shew cause why it should not be taken off the file, on the ground of his not being a Quaker.

Piggott shewed cause against this rule, and was proceeding to prove the fact of his client being a Quaker——

Per Cur.—It is unnecessary; by filing his answer as a Quaker without oath, he undertakes that he is a Quaker; if he were indicted for perjury upon it, he would not be permitted to contradict this assertion.

SAXTON *v.* WEST.

THE sheriff being ruled to return the writ in this cause, and not being in time, an attachment went against him.

Baldwin moved to set it aside, on affidavits of the defendant not having been seen in the county, and

that the return of *non est inventus* was only one day too late, through a mistake in the clerk of the under-sheriff, who supposed it in time. The attachment was taken out by the plaintiff, who knew the return was then made.

Laws, contra, contended that the attachment should stand as a security for the debt.

The attachment was discharged without costs on either side.

Same day.

PARRY *v.* GRIFFITH.

WIGLEY moved, on the 33 *Geo.* III. c. 68. to remove this cause from the Great Sessions in *Wales* to this Court. A doubt arose by what process the statute intended that it should be removed. The *Court* issued a *certiorari* directed to the Justices.

Same day.

——— *v.* ———

AINGE junior moved for an issue in this cause. The other party consented. The *Court* thought it irregular to direct an issue on a motion, and rejected the application.

SITTINGS AFTER TRINITY TERM.

COLLYER Clk. *v.* HOWSE and READ.

Serjeants Inn Hall. 26th *July* 1794.

Where, by the usual mode of husbandry, clover-hay is not made into cocks at all, the farmer may set out the tithes in the swathe.

Grass cut and given green to the beasts of the plough shall not pay tithe.

THIS was a bill for tithe of clover-hay, to determine the mode of setting out that species of tithe; the vicar insisting that it ought to be set out in cocks or heaps, as common hay; the defendants, that it ought to be set out, as they had done, in the swathe. No custom was proved to exist in the parish for setting out the tithe of clover in cocks; and it appeared by the testimony of farmers that clover-hay is not in that neighbourhood made into cocks at all, in the ordinary course of husbandry, unless in wet or uncertain seasons. The plaintiff also claimed tithe of grass cut and given green to the cattle employed in husbandry upon the farm, insisting that the exemption in favour of such cattle extended only to agistment.

Partridge and *Richards*, for the plaintiff, argued that clover-hay was to be considered in exactly the same light as common hay. The general rule of law is, that tithes shall be set out at that period when they can first be severed from the nine parts, and the farmer is in no case, unless by special custom, bound to labour the commodity any further.

As to hay it is settled, that in general it shall not be set out in the swathes, but in cocks, which is an ulterior process. Wats. Cler. L. 554. 1 Roll's Abr. 644. pl. 1, 2. This then amounts to a determination, that in the former stage, while in the swathe, it is not in a fit situation to be severed; that rule must equally apply to clover.

As to the other point, they argued that the grass, when cut down, was immediately titheable, as hay is, without adverting to the future use to which it is to be applied; the cases Cro. *Car.* 393. and Cro. *Eliz.* 139. are authority for this rule, as a special custom was in both cases thought necessary to support the contrary. So, turnips eaten off the ground by cattle of the plough, pay no agistment-tithe; but if pulled, tithe is immediately due, although they may be intended for the same cattle.

Burton, *Hollist*, and *Plumptre*, for the defendant. —The reason why common hay is set out in cocks is, because that is the best and established mode of cultivating the commodity, and the most proper period in that process for accurately dividing the ten parts; but as there is no such process in clover, without loss to the farmer, the rule cannot extend to it. As to the grass cut and given to the cattle of the plough, they relied on the cases of *Hayes* v. *Dowse*, Bunb. 279. 1 Roll's Abr. 645, 646, 647.

Macdonald, Chief Baron.—The principal point in this case is, in what manner the tithe of clover ought to be set out. It can never be supposed that for any purpose of tithing the farmer shall be com-

pelled to introduce any uncommon or disadvantageous mode of agriculture; but here it is proved that clover is not customarily put into any shape analogous to grass-cocks, and that in most seasons such a process would be hurtful to the commodity. We cannot therefore make any decree which would compel the farmer to adopt this inconvenient mode of making his clover-hay. The only other way of tithing clover-hay, seems to be in the swathe, which must therefore be taken as the proper method. But as the point is new, let the bill as to this be dismissed without costs.

As to the point of grass newly cut and eaten by agricultural cattle, the law is so clearly against its being titheable, that as to this, the bill must be dismissed with costs.

N. B. This case now stands for re-hearing. *Vide post*, *Baker* v. *Athill*, p. 491.

Ex parte DEVERELL.

RICHARDS moved on behalf of Mr. *Deverell*, filazer, and one of the clerks in court, in the Treasurer's Remembrancer's office in this Court, for a rule on the other clerks to shew cause, why he should not be confirmed in those offices, they having obstructed him in the enjoyment of the profits.

The Treasurer's Remembrancer in appointing the clerks in his office, is limited to those who have served a clerkship in the office.

Burton and *Plumer* shewed for cause, on behalf of the other clerks, that Mr. *Deverell* never had served a clerkship in the office to any of the sworn clerks; they admitted that the Treasurer's Remembrancer Sir R. *Heron*, who appointed Mr. *Deverell* to these offices, had a right of appointment thereto; but produced several affidavits of the other officers of the court, to shew, that his right of appointment was usually confined to such persons as had served a clerkship to some of the sworn clerks.

They relied also on an old writ, a copy of which was produced from the office, Rot. 26 *H.* VI. which recites, that certain *sad* men, by the good old usages, were brought up to the business of the Court of Exchequer, and directs the Barons to continue them in their offices.

The 2 *Geo.* II. *c.* 23. and 22 *Geo.* II. *c.* 46., which make a clerkship necessary before being admitted an attorney, in other cases expressly excepts this, and only requires, that the clerks in these offices in the Court of Exchequer, shall be appointed at they have usually be[illegible]eretofore. The legislature could not mean, that those attornies who are employed in the public business for the revenue, should be less regularly educated in the knowledge of their business, than those who are employed in private disputes; besides, an attorney in one court may practise in the name of an attorney of any other. The legislature could not intend that Sir R. *Heron* should alone have the power of admitting as attornies whomsoever he may think proper. The clause in these statutes therefore must refer to the custom

proved by the officers of the Court to exist; and the legislature must be considered as there establishing a clerkship among other attornies, similar to that which custom had before rendered necessary in this department. In the Office of Pleas, the Pipe Office, and the King's Remembrancer's Office in this Court, the clerks of which are also excepted in these statutes, a custom prevails similar to that now contended for by the clerks of this office; a clerkship has always been necessary there. The strong affinity between the different departments of the Court gives great light as to the validity of the customs in each. If Mr. *Deverell* has any claim, he ought to try it at law; he states himself to be in possession, —then if he has a good title, an action for money had and received to his use, will lie to recover the profits. An office in which the public has an interest, by the recovery of the public revenue being entrusted to these clerks, ought to be decided in the most solemn way by action, and not by a summary application.

Richards in support of the rule.—The first statute which regulates the appointment of attornies, is the 4 *H.* IV. which requires an examination to prove them fit persons for that situation. The 2 *Geo.* II. makes the having served a clerkship necessary, but expressly excepts this, and some other offices, where the officers act as attornies. Then if there is any affinity between these and other attornies, the only qualification for these still continues, as formerly it was for all attornies, that of being fit persons. Accordingly the writ of privy seal, which requires the Treasurer's Remembrancer to appoint clerks in

court, mentions this as the only restriction on his choice, that they shall be fit persons. To the actual fitness of Mr. *Deverell* to fill this situation, no exception has been taken.

Among the officers excepted in these statutes, that of solicitor to the excise is also contained; any argument to shew that the legislature considered the having served a clerkship in the office now in question, will apply equally to that office; yet it is at present filled by a barrister who never served any clerkship.

It is true that these clerks in court have usually been appointed from among those who have before served a clerkship to some sworn clerk in the office. So it is usual to appoint the head clerks in the treasury, from among those who have gained experience in the subordinate situations; but that custom is not a necessary nor an universal rule. But if by swearing to its being the usual practice, they mean to establish a prescriptive rule to guide the choice of Sir R. *Heron;* there are sufficient instances of exceptions from this practice to defeat their design. On 12 *December* 1765, a question arose whether Mr. *Mayhew*, who had been appointed by the Remembrancer, or another, who had been articled in the office before him, was entitled to this appointment; it was determined in favour of Mr. *Mayhew*. No other objection was then taken to the validity of Mr. *Mayhew's* nomination, except the seniority of the other. But in fact he had only served a clerkship under a Mr. *Barber*, who had never served a clerkship at all, and therefore, according to the pre-

sent argument, was not legally a clerk in court: yet Mr. *Barber* enjoyed unmolested that office during his life. If he was not legally a clerk, he could not communicate that character, and the being articled to him, could not give Mr. *Mayhew* any right as having served a clerkship under him; yet when his right was disputed, this objection was not taken, as it certainly would have been, if the other officers had then thought any such prescription existed. By that case of *Mayhew* it also appears, that the Remembrancer has an election, and is not bound to choose the senior in the office; yet that also had usually been done, otherwise there could have been no pretence to dispute the appointment.

Before the abolition of feudal tenures, the quantity of business made it necessary to have many clerks in court in this office; generally sixteen were named. Now the Remembrancer rarely appoints more than four. He is answerable for the fitness or the persons he appoints, and therefore ought not to be shackled in his choice. These circumstances seem to shew, that the appointment is wholly in his discretion, with no other restriction than that mentioned in the writ—to choose fit persons to fill the office. The decision in *Mayhew*'s case also proves, that the present mode of application is proper. This Court is the proper tribunal to regulate every thing that relates to its officers. To send the matter to a trial at law, can answer no end but that of multiplying expences.

Burton in reply.—The case of Mr. *Barber* passed *sub silentio*, his appointment being of very incon-

siderable value, and nobody interested to contest it. Mr. *Mayhew* served his clerkship under him, who was then *de facto* a clerk in court, and therefore no objection could be taken to it. So, if one serves his clerkship to an attorney who has been actually, although irregularly admitted, the clerkship would be good. The fitness of Mr. *Deverell* is not admitted; it is the subject now in dispute. We contend that those only are held in law to be fit, who have regularly been instructed in the business by serving a clerkship.

MACDONALD, Chief Baron, delivered the opinion of the Court.—It appears that the practice in the Pipe Office, and in the Office of Pleas, which are offices analogous to this, is, that no one can be admitted a clerk, unless he has been articled and has served his clerkship. This makes strongly against Mr. *Deverell's* claim. Then, with regard to the acts of parliament, that of 2 *Geo.* II. says, that all clerks shall be articled, without any exception; the 22 *Geo.* II. although it excepts the clerks in this, and in the Pipe and Plea Offices, yet says that they shall be appointed as they were used to be before the passing that act; and we find that so far from sanctioning irregular admissions, the immemorial practice in those offices has been, that the clerks have been admitted as their articles successively expired, with the single exception of *Barber's* case, in this court. A solitary case will have no weight where the general practice and the reason of the thing are so strongly against it; more especially when it is recollected, that that case was uncontested and passed *sub silentio*.

The expediency of suffering the Remembrancer to exercise an arbitrary discretion in the appointment of the sworn clerks, is very questionable. It is within possibility that he might delegate this trust to very unfit persons, and thereby occasion essential injury to the suitors of this court; and it is nothing to say that the injured parties might have redress against him for such abuse of his discretion; he has a freehold for three lives in his office, and it would be difficult to point out the redress which can be had against him: it is better therefore that this Court should interpose in the first instance, and restrain the Remembrancer in the indiscriminate exercise of his power of appointment. The rule must be discharged, but without prejudice to any other mode of application that may hereafter be adopted by Mr. *Deverell.*

N. B. This question was heard again in Trinity Term 1795. *Vide post.*

Ex parte WINDUS.

5th *July.*

MR. *Windus,* one of the side clerks in the King's Remembrancer's office, applied to the Court to have the name of Mr. *Donne,* now standing on the roll prior to Mr. *Windus's* name, struck out.

It appeared that Mr. *Donne* had been articled to Mr. *Fowler,* one of the sworn clerks, while very

young, and had not actually served a clerkship in the office; at the expiration of five years from the time of his being articled, his name was placed upon the roll.

The *Court* were clearly of opinion that there should be a *bonâ fide* service of five years clerkship, and ordered Mr. *Donne*'s name to be struck out.

Richards for the motion; *Abbot* contra.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF EXCHEQUER;

IN

MICHAELMAS TERM,

35 GEORGE III.

Mr. Baron THOMSON was unable to attend the Court during this Term.

BAKER Clk. *v.* ATHILL.

Friday, 7th November.

Clover-hay is titheable in the swathe.

THIS was a bill for tithes; the principal point in dispute was, the mode of setting out the tithe of clover-hay, whether in cocks, or in the swathe, the plaintiff insisting on the former as the custom of the place. Some of the witnesses swore, that it was the practice to set it out in cocks; others, that it was more usual, in fine weather, to set it out in the swathe; and that to avoid the injustice of taking every tenth swathe, where the field was irregular in shape, the practice was to set out the tithe by pacing.

Partridge and *Grimwood*, for the plaintiff, stated, that the case of *Collyer* v. *House* was to be reheard, and was therefore not a decided authority: and they insisted that the custom set up in the present case, distinguished it from that, even if it were considered as establishing the general rule.

Burton and *Richards*, on the other side, rested on the case of *Collyer* v. *House*, as determining the question: to the custom set up they answered, first, that it was not established in fact by the evidence; secondly, that clover, being of modern introduction into the kingdom, could not be the subject of a custom.

Where a tithe-able article has been introduced into a parish within time of memory, but the mode of tithing it has always been uniform, the Court will support the established practice. *Semb.*

MACDONALD, Chief Baron.—If we saw that from the time when this commodity was first cultivated in this neighbourhood, one uniform mode of tithing had prevailed, I think it would be reasonable to derive a sanction from such practice, analogous to that which a custom gives, in those things which are properly capable of prescription; but here no such uniform practice has been proved. The case falls therefore within the rule adopted in the case of *Collyer* v. *House*, last term. It has been suggested that a rehearing is intended to be applied for in that case; and certainly, from the novelty and general importance of the question, no case can be more proper for the most solemn consideration; till the final determination of *Collyer* v. *House*, we should not wish finally to decide the present case; but while it stands unreversed, we must adhere to it. We have therefore thought it expedient to pronounce a decree at present to dismiss the bill as to

this point, without costs; but the decree not to be made out till the final determination, or abandonment of the rehearing of *Collyer* v. *House*, with liberty to the plaintiff to apply to the Court, in case of a reversal of that judgment.

It is sufficient in an answer if it gives the plaintiff notice of the general nature of the case to be made against him.

In this cause objections were taken to the answer, as being too loose; it insisted on a modus, without averring it immemorial, and admitting that the defendant did not know how long it had subsisted. It was not stated at what time the modus was payable. The modus was stated to be for cows, milk, and calves; agistment-tithe was admitted in another part of the answer to be due, which was therefore insisted on as contradictory to the modus set up.

MACDONALD, Chief Baron.—If this were a bill by the landholder to establish the modus, we should tie him down to an accurate statement of his claim; for he is bound to know it before he brings it into Court: but in an answer, the tenant is brought within a limited time to answer whether he has any defence to make, and if he gives such a statement as will inform the plaintiff of the general nature of the case to be made against him, it is sufficient. The objections were over-ruled.

A trivial incorrectness in setting out the tithe of wool, and for which amends had been tendered, and the non-payment of Easter dues, which were never demand-

Some trifling impropriety had taken place in setting out the tithe of wool, for which the defendant had offered to make amends; the plaintiff claimed to retain his bill for that, and for Easter offerings, which had never been demanded nor paid. *Burton* cited the case of *Lawrence* v. *Yates*, in this Court, 7th *May* 1727, where the bill being dismissed as to

ed, are not sufficient to prevent a bill from being dismissed.

all other matters, the claim of Easter offerings was held too trivial to be the subject of a suit in equity, and the bill was dismissed.

MACDONALD, Chief Baron.—And besides, I apprehend it is always expected that a demand should be made for such articles.

Tuesday, 11th November.

YEA *v.* YEA.

On taxation of costs, the Court cannot make the attorney pay the costs of the taxation, unless for improper items in the bill amounting to a sixth.

LADY *Yea* obtained an order to tax the bill of her solicitor, Mr. *Chater;* on the taxation less than one sixth was taken off; a rule had been granted against the solicitor for the costs of the reference on the ground of delays, and other improper conduct in him. The present motion was to set aside that rule.

Per Cur.—On a reference to the Master to tax costs, the statute gives a discretion to the Court to give costs, where more than a sixth is taken off, but in no other case. The order must be set aside.

Where an attorney has been seven years without getting his bill taxed after an order so to do, and they are lost in the mean time in the Master's office, the Court will not allow it to go again to the Master.

It was also a part of the motion to refer back to the Master some of the bills of costs for taxation; it appeared that ten bills of costs were delivered into the Master's office for taxation, about seven years before. The solicitor neglected to get them taxed, or to proceed upon the order till lately; upon the taxation it appeared, that the Master had only taken notice of four of the bills; five were missing, and

another had been unobserved in the Master's office. This motion was for the purpose of having these bills taxed. The Court thought the motion reasonable as to the bill which was in the office. As to the others, the delay was objected; it was answered that to refer the motion, would only drive this party to his action, which would probably bring it at last to be ascertained by the same person, as no jury is competent to decide upon the items.

Per Curiam.—In the particular case a hardship may arise in sending the parties to an action; but we must consider the general utility; this statute is meant to give the suitors an easy and expeditious remedy; if delays such as the present are permitted, the end of the statute will be completely evaded. These parties who have been so far from complying with the spirit of the statute, ought not to be permitted to take the benefit of it; it is hoped that the inconvenience they are put to may deter others from similar delays. Motion refused.

CALIOT *v.* WALKER.

11th *November.*

PLUMER and *Simeon* shewed cause on the merits against dissolving the injunction in this case. The defendants had sued at law for a balance, which appeared by their answer to be made up in this way; they acted as bankers, and at the end of

A custom in Liverpool for the banker to strike a balance every quarter, and send the account to the merchant, and

then to make that balance carry interest as principal for the next quarter, is not usury.

every quarter struck a balance, in which was included the principal money advanced by them, all interest then due upon it, and a commission of five shillings for every 100*l.* advanced; this balance was at the end of every quarter converted into principal, and carried interest; this the plaintiff contended to be usury.

Burton and *Hollist contra*, shewed that the commission of five shillings per cent. was according to the custom of the place (Liverpool). The striking the balance every quarter is also customary there, and confirmed by the mode of dealing between the parties. As the balance when struck was always sent to the plaintiffs, and they never objected to such dealing, but continued to do business with the defendants for several years; they therefore contended that this was not a case of usury.

The *Court* declared themselves strongly of opinion that this case was not usurious. The statute allows interest, not merely of 5*l.* per cent. for a year, but after the rate of 5*l.* per cent. Half-yearly payments of interest, or the discounting bills at the beginning of the time they have to run, have both been argued to be usurious, as being a greater profit than 5l. per cent. for a year; but both these cases have been held to be legal, because they are after the rate of 5*l.* per cent. So here, the payment of interest quarterly is not illegal, and the custom of the place, and practice of the parties being to strike a balance at those periods, brings it to the case of a fresh agreement, at the beginning of each quarter, to lend the sum then due. So the commission claimed

may be a fair value for the trouble of the defendants, and unless it appeared to be a mere colour for usury, we should be very unwilling to decide against the general custom of the place. But we are not at present called upon to give any determination of the principal question; you come here for discovery; you have had it: if you have any merits, they will be a defence at law, which is the proper tribunal for questions of this sort.

The injunction was dissolved.

REES *v.* PARKINSON. *Same day.*

JOHNSON moved to restrain the plaintiff from proceeding at law. The plaintiff, a mortgagee, had got possession by an ejectment, had brought an action at law on the covenant to repay, and was proceeding in this suit to foreclose; he argued that the proceeding of the plaintiff in three suits for the same money, was highly vexatious; that the Court might, by 7 *Geo.* II. *c.* 20. *s.* 2. exercise their discretion, as if the cause were come to the hearing; and that the present was a case proper for the exercise of their discretion.

The plaintiff, as mortgagee, got possession of the estate, sued at law on the covenant for non-payment, and brought this bill to foreclose; this is regular, and the Court will not stop the proceedings at law, unless the defendant brings in the money.

Per Cur.—The plaintiff is regular in his proceedings; we cannot deprive him of the benefit of his action, unless the defendant will bring in the money.

Friday, 14th *November.*

FILEWOOD *v.* BUTTON.

Horses kept on one farm for its cultivation, and used *occasionally* on another farm, in a different parish, shall not pay agistment-tithe; otherwise, if *habitually* so used.

THIS was a bill for tithes. The only point made was for the agistment-tithe of horses; it appeared that the horses in question were kept by the defendant within the parish for the cultivation of his farm there, but were occasionally also sent to work at another farm of the defendant's in an adjoining parish.

The *Court* said, they would have found some difficulty in deciding the case if the horses had been *habitually* so used; but as their being sent to the other parish was only *occasional*, they clearly were within the general exemption in favour of cattle used in husbandry.

Tuesday, 25th *November.*

CLARKE *v.* JENNINGS.

BILL for tithes. The answer set up a modus, for a place described not by metes and bounds, but by a map annexed to the answer, in lieu of all tithes, or at least of tithe-hay.

Burton objected that the answer was too uncertain.

The *Court* over-ruled the objection, and directed two issues, the one as to a modus for all tithes, the other as to a modus for tithe-hay.

THELLUSSON *v.* BAILLIE.

Wednesday, 26th November.

THE defendant having demurred merely for delay, in order to get over the term; *Giles* now moved for a *consilium* on *Friday* the last day of Term.

The paper-books must be delivered to the Judges before a *consilium* can be moved for.

The *Court* said, that they could not dispense with the practice which required a four-day-rule.

He then moved for a *consilium* on the first day of next Term.

HOTHAM, Baron, objected that paper-books were not delivered to the Judges.

Edmunds, one of the officers of the Court, stated the practice to be, that the paper-books were not delivered till two days before the day appointed for the *consilium*,

But the *Court* held the practice to be otherwise; for by seeing the paper-books before the day for the argument is named, the Court know what day will best suit the length and importance of the case.

Same day.

GOODTITLE on Dem. of COOKE *v.* CULLEN.

On an issue of last Term, although no notice of trial is given, the defendant may enter up judgment as in case of a nonsuit, for not proceeding to trial.

A RULE had been obtained for judgment as in case of a nonsuit for not proceeding to trial. The present motion was to set aside that rule, on the ground of irregularity; the issue being only of last term, and no notice of trial given.

The *Court*, on consultation with the officers, held the practice regular, and therefore refused to set aside the rule, except on paying costs, and undertaking to try the cause at next assizes.

Thursday, 27th November.

HOWES *v.* CARTER.

Sheep kept *principally* for the sake of folding, if sold out of the parish before shearing time, shall pay agistment-tithe.

THIS bill was principally for tithe of agistment for sheep. The sheep in question had been less than a year in the parish, had been brought in before shearing time in one year, and sold before shearing time in the next.

The demand was resisted by *Newnham* and *Richards* for the defendant, on the ground, that the farmers in that neighbourhood find it necessary to keep a certain number of sheep, and to fold them on their grounds to manure it; that they consider the increase in the crop, by this practice, as the principal gain from the sheep; and as the rector

has his share of this profit, he is not entitled to any other tithe; they are to be considered like beasts of the plough, which pay no other tithe except in the increase of the crop which is produced by their labour.* It was also insisted that the other profit arising from the sheep, the wool, had paid tithe; and that as they had not been in the parish a year, and had paid tithe of a year's wool, that was a discharge for the whole year.

Plumer and contra, relied on the case of *Bateman* v. *Aistrup*, as deciding the present question.

MACDONALD, Chief Baron.—As far as I understand the rule adopted in the decision of *Bateman* v. *Aistrup*,† the present case seems to fall directly within it; and if so, it would border upon presumption in this Court to listen to any arguments in opposition to the authority of that case. I confess, if it had not been so decided, the arguments for the defendant appear to me, upon the reason of the thing, to have great weight.

HOTHAM, Baron.—Supposing the year in tithing sheep to be a definite period, from shearing time to shearing time, as in grain or hay the year runs from harvest to harvest, the present question will be perfectly clear; the defendant paid wool-tithe for last year; he has kept the sheep for half of another year, and has paid no tithe; then the tithe of agistment must be paid for that time.

* See the case of *Ellis* v. *Saul*, p. 337-8. *ante*.

† See this case in Rayner, p. 658.

PERRYN, Baron.—The case of *Bateman* v. *Aistrup* is directly in point, and we cannot go into that question again after the decision of the House of Lords upon it.

Friday, 28th *November*.

VANDAM *v.* MUNRO and Others.

On a bill for a discovery and injunction, the defendant (plaintiff at law) admitted himself to be a mere agent for the other defendants, and ignorant of the transaction; the other defendants lived abroad: an injunction was moved for as of course; but there appearing a danger of losing other material evidence by the delay, it was refused.

THE plaintiffs were underwriters of a policy of insurance, on which the defendant *Monro* had brought an action as for a total loss. The plaintiffs filed this bill for discovery whether the ship, which was stated to have sprung a leak and foundered within a day after sailing from *Jamaica*, was sea-worthy at the time of her departure. The defendant *Monro*, the plaintiff at law, admitted, as the bill had charged, that he was wholly ignorant of the matter, being only an agent, and that the owners, the other defendants, lived at *Jamaica*.

The plaintiff now moved, on an affidavit supporting the charges of the bill, for an injunction till the answer of the other defendants should come in; and it was contended by *Burton* and *Steele* that as this injunction must have gone as of course, if the policy had been made, and the action brought in the names of the owners at *Jamaica*, so when it appears by the answer of the plaintiff at law, that he is only agent, and sues as trustee for them, the same rule should prevail; otherwise they gain

an advantage by suing in the fictitious name of their agent. The only reason why, upon the coming in of the answer of the defendant who sues at law, and before the other defendants have answered, the Court refuse to grant an injunction, is, because of delaying the claim of him who has answered; but here the defendant, who has answered, does not claim any interest.

This application was opposed by *Pigot* and *Simeon*, on affidavits, that the master and mariners, who could prove the state of the vessel at her departure, were now in *England*, but that if the trial were delayed, the plaintiff at law probably might, from the nature of their employment, be unable to produce them at a future time.

The *Court* were of opinion that, from the circumstances of the case, this was a sufficient objection to granting the injunction, as the answer of the defendants probably could not be so decisive, nor had they equal access to know the situation of the vessel, as the master and mariners, who were on board of her, both at the time of her departure, and when the loss happened.

The injunction was refused.

Serjeants Inn Hall. *Tuesday*, 16th *December*.

HUDSON *v.* DAVIS.

BILL for discovery and relief, on 9 *Ann.* for penalties against the winner of more than 10l. at play. The plaintiff did not state himself to have been the loser, nor that three months had elapsed before the bill filed, which is required by the statute before a suit can be instituted by a common informer.

A demurrer was allowed.

Same day.

SELBY *v.* CREW and Others, Assignees of —— a Bankrupt.

A debtor of a bankrupt, sued at law by the assignees, filed a bill for discovery, whether they had not signed his certificate on consideration of his giving evidence in the action: a demurrer was allowed.

THE assignees having brought an action against the plaintiff on account of some transactions with the bankrupt; this bill was filed for a discovery, whether the creditors had not signed the bankrupt's certificate, upon his agreeing to give evidence for them upon the action.

The defendants demurred.

Hollist insisted that this was an unfair mode of obtaining testimony.

The *Court* allowed the demurrer; for if you mean to impute subornation of perjury, you cannot ex-

pect an answer; if, on the other hand, what is charged was merely a mode of getting over a technical objection to evidence, by removing the interest of the bankrupt, the signing his certificate and getting a release from him is a common, and by no means an improper transaction; in which case the discovery is immaterial.

OWEN *v.* JONES. 19th *December.*

RICHARDS offered to read from the bill a will, under which the defendant claimed; the will was admitted in the answer, and nothing turned upon it.

Hollist objected that the defendant had, in his answer, referred to the will for certainty, and was therefore entitled to have it read, and stated the practice to be accordingly.

The *Court* thought it sufficient to read it from the bill, where nothing turned upon the construction of the will.

BETWEEN

JAMES MATHEWS A. M. Plaintiff,

AND

20th *December.* JOHN JONES, ALICE M. JONES Widow, and JANE HOWELL, Administratrix of DAVID HOWELL, Defendants.

The devisee aliens; the land is not subject to the specialty debts of the devisor.

Estates are settled on *A.* and *B.* on their marriage, in strict settlement; provided, that if the wife should, when requested by her husband, refuse to settle her estates in a particular manner, the settlement of the other estate should be void. The husband and wife join in a different settlement of her estate, proceeding however on the foot of the former covenant as if it had been performed; this is no avoidance of the settlement.

THIS was a bill of revivor and supplement. It stated that the plaintiff, as personal representative of *Thomas Pardoe* deceased, in 1775 filed his original bill against *David Jones* and *Mary Jones*, to recover the amount of a bond for 400*l.* given to his testator by *Owen Jones*. He charged *Mary Jones* as widow and executrix of the obligor, and *David Jones* as heir or devisee of his real estates. *Owen Jones* devised the estates in question to his brother and heir *Rees Jones*, for life, remainder to his brother *Evan Jones* in fee; after the death of *Owen Jones*, *Rees Jones* also died, by which the estate came to the possession of *Evan Jones*, who was then also heir at law of *Owen Jones*. The defendant thereto, *David Jones*, was heir at law of *Evan Jones*, and also of *Owen Jones*.

In the original suit, a decree was obtained in 1775, for satisfaction of the bond, first out of the personal estate, and on failure of assets, by sale of the real.

In 1785, *David Jones* died, leaving the defendant *John Jones* his son and heir at law, and the defendant *Alice M. Jones* his widow, and *David*

Howell, his personal representatives. The present bill also stated that the personal estates of *Owen Jones*, of *Rees Jones*, and of *Evan Jones* had all failed; that the personal property of *David Jones* was possessed by the defendants *Alice Jones* and *Howell*; and that *Alice Jones* and *John Jones* were also in possession of his real estate which had come to him from *Owen Jones*.

It appeared by the answers, that the personal estate would be very insufficient.

The defendants *John* and *Alice Jones* claimed to hold the real estate discharged from this claim, by reason of the marriage settlement of *Alice Jones*. By that settlement, made in the year 1766, *Evan Jones* covenanted to convey the estates in question to trustees, in trust for *David Jones* and *Alice* his then intended wife, for their lives and the life of the survivor, and after their decease to the use of the heirs of the body of *Alice* by the said *David Jones* to be begotten, and in default of such issue, to the heirs of *David Jones* in fee. In the said articles was contained a proviso that the limitation of the said estate should be void, in case *Alice* (then a minor) after she attained the age of twenty-one years, on proper request made to her, should for nine months refuse to do any reasonable act, required of her by the said *David Jones*, or the issue of the marriage, or other person interested in the settlement, for the settling and securing certain other estates therein mentioned, for the purposes in the said articles after-mentioned, to wit, To the said trustees, in trust for *Rachael Philips* the mother

of *Alice* for life, remainder to the said *David Jones* and *Alice*, for their lives and the life of the survivor, remainder to the heirs of their bodies lawfully begotten, and in default of such issue, remainder to *Alice* in fee; and the mother of *Alice* covenanted that she would when of age, or within nine months after request made to her, convey and secure the said premises accordingly.

To do away the effect of this settlement, the plaintiff charged, that in 1778 *David Jones* and *Alice* levied a fine of *all* the premises contained in the settlement. The declaration of uses was, to such person as the husband *David Jones* should by deed or will appoint, and for want of such appointment, to *Alice* for life, remainder to the heirs of the body of *Alice* by *David Jones* to be begotten, with remainder to the right heirs of *David Jones* in fee.

The defendant *Jane Howell* claimed the benefit of a mortgage, secured to her late husband by *David Jones* by virtue of the power of appointment given him in the deed of uses, and also of a bond due from him to her husband.

This case was argued by *Plumer* and *Owen* for the plaintiffs, and by *Richards* and *J. Williams* for the defendants.

It was contended for the plaintiff, that his bond was to be paid out of the estate of the obligor. It is clear that in the hands of *Rees Jones* and *Evan Jones* the devisees, the possession of the estate made

them liable to pay this demand, by 3 *W.* and *M.* *c.* 14. *s.* 2, 3. and that statute also extends the remedy against all purchasers under them. For it is there provided, that all devises of land shall, as against specialty creditors, be *clearly, absolutely, and utterly void, frustrate, and of none effect.* But it is evident that if the devisee *Evan Jones* had, as against us, nothing by the devise, neither could he convey any thing.

The case of a devisee is put, by this statute, in a very different situation from that of an heir. The heir was, by common law, bound to pay specialty debts, but such claims had no operation to *make null* the descent to him; he inherited, subject personally to the debts; the consequence of his having this legal right to the inheritance, was that he might, and still may, alien the estate; and by such alienation, not only the alienee took discharged from all claims against the ancestor, but the heir also, having no longer any assets in his hands, was discharged. To remedy the latter inconvenience, section 5. enacts, that after alienation, the heir shall continue personally liable, but still the land shall be discharged.

The situation of the devisee before this statute, was better than that of the heir; for neither he nor the estate were liable to any demands against the devisor. The statute has made him also subject to specialty debts; but by different means; it avoids his title, as against the creditor: accordingly, the distinction is kept up throughout the statute. In section 5, where the heir is ren-

dered personally liable after alienation, the legislature thought it necessary to add a saving of the right of the *bona fide* alienee; in section 7, the same personal responsibility is annexed to the devisee after alienation; and his title had, by section 2, been also declared null and void. If therefore the legislature had intended to protect the estate in the hands of his alienee, it became much more necessary to introduce an express saving of his right, than of that of the alienee of the heir: as no such saving is made, the inference is very strong, that the two cases were considered as perfectly different; that the avoidance of the title of the devisee against creditors, is transferred to his alienee.

The cases therefore, which apply only to the alienee of the heir, do not at all affect the present question: and no case has ever occurred, where the avoidance of the devise, introduced by this statute, has been circumscribed in its operation.

It is material to observe, that these articles were only executory; and this is not like the cases, where it has been held, that marriage articles should prevail against subsequent judgments: for here the claim of the plaintiff is prior to the articles, and therefore should prevail against them.

But these articles are avoided; they contained a proviso to be void, in case of *Alice* refusing for nine months to ratify them by making proper conveyances: by the fine she has levied, it becomes impossible for her so to do, and this amounts to a refusal to ratify the articles. And if this effect is

done away, the defendant *John Jones* is in as heir, and liable to pay the specialty debts of his ancestor *Owen Jones*.

Argument for the defendant.—It is very clear, that *David Jones* was liable to this demand; but we are purchasers from him for valuable consideration, and therefore, as notice is not charged against us, we are not affected by any demand against him. Supposing him to be in as devisee, his conveyance, or covenant to convey by the marriage articles, leaves only a personal remedy against him for the debt.

Before the statute of 3 *W.* and *M.* a devisee took wholly discharged from all debts of the devisor; and that statute has always been considered as bringing him into the same situation with the heir. The words in section 2, avoiding and annulling the devise, are only "as against the specialty cre- "ditor;" they cannot therefore have a literal meaning, for otherwise it would enure to the benefit of the heir also. But suppose you take the liberal meaning of the words; the effect of avoiding a devise, is to let the estate descend; then the avoiding the devise, "as against the specialty cre- "ditors," means, that they shall have the same benefit as if it had descended; that benefit extends to give them a personal remedy against the heir or devisee, but no charge upon the estate in the hands of a purchaser.

Section 7 makes the devisee, after alienation, "liable and chargeable in the same manner as the "heir at law." But how is the heir chargeable?

He continues personally liable, but the estate is discharged in the hands of the alienee. Then if the devisee is personally liable like the heir, and the estate continues likewise chargeable, from which charge he is of course to indemnify the purchaser, he is liable and chargeable in a manner perfectly different from the heir. The clause must be construed to give the remedy against the person, instead of the estate, in both cases.

If it were otherwise, this statute would give a greater benefit to the creditor upon a devise, than if the estate had remained in the hands of the debtor or his heir; for a purchaser from either of them is protected: the whole purview of the statute is to prevent a devise operating as an injury to the creditor; it does not intend to give any additional benefit.

The cases indeed have all been upon purchasers from the heir; but they have gone upon the general ground that specialty creditors have no lien on the estate, *Parslow* v. *Weedon*, 1 Eq. Ca. Abr. 149.; but if they can follow it in the hands of a purchaser from the devisee, they have a lien. It has accordingly been the uniform practice of the profession to consider this as a certain and established principle. A purchase from the devisee has always been held perfectly secure from all specialty creditors, and the overturning that opinion now would introduce the utmost confusion.

But in fact, the defendants are not entitled to consider themselves as purchasers from a devisee. They take under a conveyance from *Evan Jones*,

who was heir of the devisor *Owen Jones*. As soon as the particular estate to *Rees Jones* determined, and the fee vested in possession in the person who was then heir, he is to be considered as in by descent, his best title, and not by purchase under the devise.

It has been argued that the articles were avoided by *Alice* levying the fine; and that this amounts to a refusal to convey the estate according to the intent of the settlement. But such refusal is only to have that effect, if continued for nine months after request made. No such request is stated, nor in fact could ever have been made.

Then if the articles discharge the estate in the hands of those who take under them, it is clear that the benefit of them neither has been nor could be waived.

Such articles are binding upon the wife, though then an infant, *Drury* v. *Drury*, 5 Bro. P. C. 570. *Durnford* v. *Lane*, 1 Bro. R. 106. and are to be carried into execution in strict settlement. *Trevor* v. *Trevor*, 1 P. Wms. 622. The fine levied by the husband and wife could therefore have no effect to defeat the settlement; for they had only life estates.

But if the fine could convey the fee to the husband, he would then claim, not as heir of *Evan* or *Owen Jones*, but as a purchaser from those entitled under the settlement, and therefore would stand exactly in their situation.

Devise for life to *A.* (the heir of the devisor) remainder in fee to *B.* who upon the death of *A.* is heir of the devisor; whether he is in by descent or purchase; *Quære?**

Plumer, in reply.—At the time of *Owen Jones*'s death, his heir at law was *Rees Jones*, who took only an estate for life under the devise; the remainder in fee vested at the time of the death of the devisor, and the remainder-man, *Evan Jones*, not being then the heir, took the fee as a purchaser; no subsequent event could change the nature of his estate.

Then, if he took as devisee, we contend that as against us his title, and of course the title of all claiming under him, is void, according to the statute.

MACDONALD, Chief Baron--Certainly the doubt which has been raised lets in a discussion of the greatest importance upon the true construction of this statute. The general impression upon my mind has always been, that the statute has put the heir and devisee in exactly the same situation; making them personally responsible, after alienation of the estate, as if they still held it; and discharging *bonâ fide* purchasers under them from all liability. It is rather singular that no case has ever occurred on the subject with respect to the devisee: probably the cases upon alienation by the heir have been considered as putting both questions at rest, no distinction having ever before occurred. But as this is a matter of very great general importance, it is proper that we should weigh it well before giving any decision.

* *Vide* Hob. 30. 1 Lord Raym. 728. 1 Rol. Abr. 626. *Preston* v. *Holmes*, where the remainder-man is heir at the time of the devise.

MACDONALD, Chief Baron, this day delivered the opinion of the Court.

Serjeants Inn Hall. *Saturday*, 20th *December*, 1794.

The only difficulty in this case arises from the settlement. It has indeed been attempted to raise another question upon the construction of the statute of *William* and *Mary*, to shew that as against creditors a devise is wholly void; and therefore different from the case of lands descended: it is clear that no such distinction exists. Before that statute, the only remedy of a creditor was against the heir to the amount of the assets descended. A devise effectually defeated his claim; the statute therefore extends the remedy against the devisee; but in this case, as well as in that of the heir, it is clearly the intent that the land should not be charged in the hands of a purchaser, and accordingly in both cases the heir or devisee continue personally answerable for the debt after they have parted with the estate in respect of which they became chargeable.

It has also been insisted that the provisions in the marriage settlement have not been complied with, and that therefore its force is gone; that the fine amounts to a refusal on the part of the wife to settle the lands according to those provisions. It certainly was not so considered by the parties: the fine, instead of being a retraction of the articles, and a refusal to comply with them, proceeds upon that very settlement. Whether those articles would have been carried into execution in strict settlement or no, certainly the fine considers the wife

as having an estate tail under that settlement, and cannot therefore be taken as repudiating it. Then whoever claims under that settlement holds as a purchaser for valuable consideration, and cannot be affected by any personal equity against those from whom the title is derived.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF EXCHEQUER;

IN

HILARY TERM,

35 GEORGE III.

DE GIOU *v.* DOVER.

Tuesday, 27th *January,* 1795.

If the plaintiff is nonsuited by mistake of a witness in the most material part of the cause, a new trial ought to be granted.

THIS was an action against the owner of a stage-coach, for the loss of the plaintiff's goods above the value of five pounds, which were entered to go by the coach. The coach set out from the *Swan with Two Necks* in *Lad-Lane*, at which there is a board stuck up to give notice, that the proprietors will not be responsible for any parcel above the value of five pounds, unless entered and paid for accordingly. The goods were entered at the *Gloucester* coffee-house in *Piccadilly*, which is a receiving house for this and many other coaches. No intimation was given to the plaintiff that this was not the original office of the coach. The book-keeper of the *Gloucester* coffee-house swore at the trial, that there was not in his office any no-

tice similar to that in *Lad-Lane.* A verdict was accordingly found for the plaintiff.

Plumer and *Dauncey* moved for a new trial, on an affidavit of the book-keeper, that he had been mistaken at the trial, and that such notice had been fixed up in his office.

Piggot and *C. Moore* objected that this would be a new trial merely to supply a defect in the evidence, which the defendant ought at first to have provided against.

Saturday, 31st January.

MACDONALD, Chief Baron.—Since the argument of this case, we have consulted with Lord KENYON and several of the other Judges as to the practice, and we find, that where an evident mistake has happened, it is usual to grant a new trial.

An affidavit was then produced on the other side, that the notice at the *Gloucester* coffee-house was so small, and so obscurely placed, as to be scarcely discernible.

The *Court* however thought that this point, being the most material in the cause, ought to go to the jury.

NEWMAN *v.* FRANCO.

Action on bills of exchange: bill to have them delivered up, as being given on a gaming transaction: a demurrer was over-ruled.

THIS was a bill for an injunction, and to have certain bills of exchange, upon which an action had been commenced at law, delivered up; having been given for money won at play.

The defendant demurred, on the ground that the relief was at law, and therefore a bill praying relief as well as discovery was void *in toto*. *Price* v. *James*, 2 Bro. R. 319. *Collis* v. *Swaine*, 4 Bro. R. 480. *Thrale* v. *Ross*, 3 Bro. R. 57.

For the plaintiff, the cases of *Rawden* v. *Shadwell*, and *Baker* v. *Williams*, Ambl. 269. were relied upon to shew a title to relief in equity.

The *Court* over-ruled the demurrer.

Hollist and *Wear* for the plaintiff; *Plumer* and *Pemberton* for the defendant.

ROUTH *v.* PEACH.

Tuesday, 10th *February*,

The bill stated an award, and that no provision was made for a particular event which had

THE bill stated that the plaintiff and defendant were partners in trade, and agreed to dissolve their partnership; that to settle their accounts ami-

upon two arbitrators. Their certain persons to collect the effects debts, and to pay over the surplus between the plaintiff and the defendant. stated that the receiver had collected but that there was still a deficiency, not being all discharged; that several had been enforced against the plaintiff, he called upon the defendant to contribute. The bill also prayed that an account might be taken of the effects of the partnership, and the debts.

To the bill the defendant pleaded the award.

Vonblanque, for the plaintiff, contended that the award was no bar to the claim of the plaintiff. The award supposes a balance in favour of the partnership; a deficiency has taken place; the arbitrators have not provided for this contingency; of course, in such an event, the award is not final, where it has made no provision. The supposed balance was to be divided; but no mention is made of apportioning the deficiency. The plaintiff has been called upon by the creditors, and ought to be reimbursed.

Plumer and *Short*, contra.

The *Court* thought that the bill ought to have specified the objections to the award as a final settlement of the account. It ought to have set forth the deficiency, and what debts in particular the plaintiff has been called upon to discharge; till

these specific objections are made to the award, it must be considered as final.

The plea was allowed.

This plea is set down for re-hearing.

DAWSON *v.* PRINCEPS.

Same day.

An injunction cannot reach one who is not a party to the suit.

AN action was brought by the holder of a bill of exchange against the plaintiff the acceptor; he filed a bill for an injunction against proceeding at law in that action, and for want of an answer, the injunction was granted. The plaintiff in the original action at law, then returned the bill of exchange to his indorser, who commenced a fresh action against the plaintiff.

Hart now moved for an injunction, as being virtually within the former order.

Sutton objected that the second plaintiff at law not being in the cause, nor any injunction prayed against him, could not be called before the Court by a motion. Had the injunction extended to restrain the assigning the bill, there might have been some ground for a motion.

case of waste, where an in-
ted on motion, on fear of
out being prayed in the bill.

refused.

GABEL *v.* PERCHARD.

This was an action against a sheriff for an escape
a person arrested at the suit of the plaintiff,
whom the sheriff's officer had permitted to go
at large without putting in bail.

Plumer moved that the proceedings might be
stayed on payment of the sum sworn to and costs.

Cause was shewn by *Gibbs* and *Laws*, that the plaintiff was entitled to hold the sheriff as his security for all the debt he could prove above the sum sworn to; otherwise he is a loser by the negligence of the sheriff.

The *Court* were clearly of opinion that the plaintiff was entitled to proceed against the sheriff for the whole sum due to him from the original defendant.

The rule was discharged.

The KING *v.* ———

Same day.

DAUNCEY moved that part of a fine estreated might be allowed for payment of the expences of the prosecutor. He said that in Mr. *Jolliffe's* case in the Court of King's Bench, a part of the fine had been returned.

This Court cannot apply a fine estreated to pay the expences of the prosecution.

THOMSON, Baron.—That must have been done by the Court of King's Bench by virtue of a warrant under the Privy Seal before the fine was estreated.

The Court of Exchequer may remit a part of a fine estreated, but cannot direct the application of it.

SALISBURY *v.* HYDE.

Same day.

MOTION to compound a *qui tam* action brought for the penalty for not having proper stamps upon indentures of apprenticeship. The action was brought in consequence of a quarrel between the parties, and was not taken up by the stamp-office.

It was objected that the *Attorney General* or the *Solicitor* for the stamp-office should have had notice.

upon consideration, thought this ... but that there must be an affida... compounded for, that the Court ... what was to be paid into Court for ... the crown.

There being no such affidavit, the motion was ...

PRICE *v.* VAUGHAN and Another.

THIS was a bill by an infant legatee against two executors for an account; only one had proved the will; the other in his answer denied having proved, or having possessed any effects of the testator; and no evidence was gone into to the contrary.

Short argued that as against him the bill must be dismissed with costs; the circumstance of a stranger thinking proper to name any person executor to his will, who does not choose to take upon him the burthen, can be no reason for his being brought before a Court, and made subject to the expences of a suit, or of an account.

He stated that in the preceding week the Master of the Rolls dismissed a bill of the same kind on this ground.

Richards, contra.—Whether he has possessed assets or no, can only appear on taking the account; he may prove the will when he chooses; he may have proved it since his answer was put in; he may act without proving it at all; since the answer, assets may have come to his hands. An adult legatee might waive an account against him if he thought proper; but the *prochein ami* of an infant would be guilty of great negligence in suing only one executor.

The *Court* decreed the account against both the defendants.

LLOYD *v.* HATCHETT.

A mortgagee had also a bond, on which the interest due exceeded the penalty; the mortgagor conveyed the equity of redemption for the use of his creditors, paying this bond first. Nothing beyond the penalty can be claimed.

HATCHETT, mortgagee in possession for thirty-three years, brought his bill to foreclose. *Lloyd* and other creditors of the mortgagor, having obtained from him a conveyance of the equity of redemption for the use of the creditors at large, filed a bill to redeem. At the hearing it was, among other things, referred to the Deputy Remembrancer to take an account of what was due to *Hatchett* upon a bond from the mortgagor of nearly equal date with the mortgage. The Deputy Remembrancer reported the whole principal, and interest for thirty-three years, to be due thereon. An exception was taken to this report, that the sum reported due exceeded the penalty of the bond.

Burton, *Plumer*, and *Richards*, argued from the case of *Tew* v. the Earl of *Winterton*, 3 Bro. Rep. 492. that a Court of Equity would compute nothing beyond the penalty of a bond; any interest beyond that must be a mere simple-contract debt, and cannot in any case be recovered, except against the obligor himself. The heir not being liable to simple-contract debts, as against him interest beyond the penalty can never be tacked to a mortgage. The original mortgagor and purchasers are in a better place than the heir; for as against them even specialty debts cannot be tacked to a mortgage.*

Partridge and *Alexander*, contra.—The full interest is the sum due, and may be recovered at law, in the shape of damages. This is not like the case of marshalling assets. The mortgagor, or the persons who stand in his place, can only be permitted to redeem, on paying the whole that is due in conscience.

The Court having referred it to the Deputy Remembrancer to take an account of what is due on the bond, it is too late to object that the bond has no preference; and of course the whole that is in conscience due upon the bond must be paid.

MACDONALD, Chief Baron.—I observe the conveyance for the use of the creditors directs this bond debt to be first paid.

* Vide *Coleman* v. *Winch*, 1 P. Wms. 776. *Morret* v. *Parke*, 2 Atk. 53. *Archer* v. *Snatt*, Str. 1107.

THOMSON, Baron.—I remember being counsel in a case of *Ketilby* v. *Ketilby*, before Lord *Bathurst*, where there was a devise for payment of debts. Simple-contract debts, even for seventy years standing, were renewed by this devise, and were paid with full interest; but the bond-debts were only allowed interest to the amount of the penalty, and were therefore in a worse situation than those upon simple contract.

The case stood over to this day, when the *Court* gave their opinion that *Hatchett* could claim nothing beyond the penalty of the bond; and therefore the exception was allowed. *Thursday, 26th February.*

SMITH and Another *v.* BURNAM.

Friday, 27th February.

THE plaintiff *Waldo* sold an estate by auction; the defendant was the highest bidder; by the terms of the sale a certain sum was to be deposited immediately, and the rest of the purchase-money to be paid, or security given, by a certain day, on a good title being produced. The deposit was made with plaintiff *Smith* the auctioneer. On the day fixed, *Waldo* did not produce his title, but did a few days afterwards; the defendant did not then object to the delay, but took the abstract of the title, and examined it. Upon inspection he found that the premises were the subject of a suit then

By the terms of an auction the title deeds were to be produced by a certain day; they were not then ready; but the purchaser received them afterwards without objection; he cannot afterwards, on disliking the title, object to the delay.

Burton, ...ased to comp...te his pur-
case of *Tr*... ...ction against ... plaintiff,
that a C... ...er the deposit ...he present
beyond ... injunction to ...strain pro-
that ... ...tion, and to obtain specific per-
no... ...greement.
o...

...ow moved for an injunction, on the ... the agreement was still subsisting in ... and therefore, although the purchaser ...over at law, the title not having been pro... ...on the day fixed by the terms of the pur..., yet in equity he ought not to be allowed to ... that advantage. In equity the time is never ...sidered as of the essence of a contract; and be...des, his conduct in examining the title without any objection as to the time, waives that pretence. Then, any defect of title he may pretend to have discovered, is a question to be determined at the hearing; till the validity of his objection to it is determined, he cannot be judge in his own cause, and rescind the contract. The proceeding to take advantage of his strict legal right would have that effect.

Fonblanque, contra.—The defendant in his answer says, he would not have taken any objection to the delay if the title had been good; he found it bad, and does take the objection on the ground of the delay; this can never be considered as a waiver of his right to consider the agreement as at an end. It is expressly declared in *Pincke* v. *Curteis*, 4 Bro. R. 332. that on sales by auction, if the vendor does not comply with the terms of sale

the day fixed, the vendee may consider the agreement as concluded, and demand his deposit. Besides, it appears here that the title is bad upon the face of it; the abstract admits the validity of the title to depend on the event of a suit. A Court of Equity will never compel a bidder to complete his purchase where he buys a law-suit with it. *Cooper* v. *Denne*, 4 Bro. R. 80.

MACDONALD, Chief Baron.—The defendant did not make any objection as to the delay, when the abstract was presented to him; by proceeding to examine it he goes on in pursuance of the agreement, and waives the objection. The validity of the title cannot be determined in this stage of the cause; nor can the defendant determine that question. To allow him to proceed on the action would be to let him rescind the contract.

The *Court* granted the injunction on the deposit being paid into Court.

SMITH *v.* TARGET and Others.

Same day.

SMITH was lessee from year to year under *Target* of a public house, at the rent of 10*l.* a year. *Target* held under *A. B.* Some disputes arising, and *Target's* landlord claiming a right to determine his holding, leased the same premises to the

A tenant, though threatened with suits at law on a title adverse to his landlord's cannot make them interplead. *Semb.*

Such a bill, if the whole rent actually due is less than 10l. will be dismissed.

other defendants *Hodgson* and Co. who gave notice to the plaintiff to pay over his rent to them as landlords. He accordingly paid them the rent for that year. *Target* brought an action for that and four other years rent, then also due to him. The plaintiff paid into court the first four years rent, and filed this bill to protect himself from the payment of the last; praying, that the defendants might interplead as to the right to that year's rent and the future rent of the premises. The defendants did interplead, and the cause now came on to be heard.

Plumer and *Stanley*, for the defendant *Target*, insisted, that the plaintiff had shewn no title to make them interplead. It is against the general policy of the law, that a tenant should in any shape be allowed to call in question the title of his landlord, and accordingly he cannot compel him to interplead. *Dungey* v. *Angove*, 2 Vez. junior, 304. An interpleader can only be where two persons claim the same debt or duty from a third; then the future rents can only become the subject of such a bill when they become due.

The rent paid to the defendants *Hodgson* and Co. cannot be the subject of an interpleader; for they have received, and therefore do not claim it.

Besides, the rent is only 10*l.* in the whole, the tenant deducting the land-tax from it; then the sum actually in dispute is less than 10*l.* and below the dignity of the court.

Scafe, for the plaintiff, and *Burton* and *Agar* for the defendants *Hodgson* and Co. argued, that the titles of the parties interpleading ought to be gone into.

The objection as to the smallness of the sum is done away by the future title being in dispute; and as the subsequent rents up to this time are, or ought to be, paid into court, that is a fund more than sufficient to retain the bill on that account. So in tithes, the most minute demand is decided where the right is disputed.

The two parties interpleading, both claim the same thing, a compensation for the use and occupation of these premises; and the payment to one of the defendants under a mistake, if it shall so turn out, cannot put the plaintiff in a worse situation than he was before. Here the plaintiff claims no right to the premises, and prays the decree of the Court touching the rights of other persons, to protect himself from danger. He is within the general definition of a party entitled to file an interpleading bill. Mitford, 32.

Dungey and *Angove* was decided principally on the ground of very gross fraud and collusion. No general rule is established to prevent a lessee from calling his landlord to interplead. Com. Dig. tit. Chancery (3 T). Gilbert's Chancery *Forum Romanum*, p. 48.; and *Surrey* v. Lord *Waltham*, in Chancery, 28th February 1785*. The objection

* This appears (from the register's book 1784. B. p. 248.) to have been as follows:

The plaintiffs shewed for cause against dissolving the injunction

to his questioning his landlord's title does not apply; for, to the answer to an interpleading bill, no exception lies, and the landlord therefore is not required to discover more of his title than he thinks proper.

MACDONALD, Chief Baron.—If this case were of sufficient importance, I should perhaps consider it a little more before giving an opinion upon it. At present I am strongly inclined to think, that such a bill by a tenant against his landlord will not lie. It would be extremely mischievous, if he were allowed, in his own right, or that of others, to call in question the title of the person under whom he holds.

It is said, that he need not disclose his title, because no exception lies to his answer.

This is a mere fallacy. No exception lies, because it is his own interest to set forth his title in

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which they had obtained to restrain Lord *Waltham* from proceeding at law, that the late *Herman Olmius* devised sundry estates in *Essex* among his children in certain proportions. Lord *Waltham* being in receipt of the rents of the whole estate, and representing himself to be entitled to grant leases thereof, demised to the plaintiffs; that the other defendants claimed the said estate; and that several suits had been instituted and were still depending concerning the same; that the different defendants all claimed the rent from the plaintiffs, and threatened to distrain or sue for the same, or bring ejectments; that the plaintiffs had exhibited this bill to make the defendants interplead.

Lord *Waltham*'s answer admitted the pendency of the suits.

The injunction was continued to the hearing, on the plaintiffs paying the rents into Court.

a sufficient manner; if he does not, the judgment on the interpleader will be against him.

But the trifling sum for which the suit is brought prevents us from entering further into that question.

The bill was dismissed with costs.

STONE *v.* LIDDERDALE and Others.

An assignment of the half-pay of an officer in the army is bad in equity, as well as at law.

W. BENYON, in consideration of 120*l.* paid by him to the defendant *Lidderdale*, obtained from him an annuity of 20*l.* for the defendant's life; and for securing the payment thereof, the defendant assigned to him all right or interest which he had, or might have, to half-pay as a reduced officer in the army; and thereby granted to him a power of attorney, irrevocable, for receiving the same. This annuity and security were assigned by *Benyon* to the plaintiff. The defendants, the paymasters of the forces, had refused to pay over to him the half-pay of the defendant *Lidderdale*, in consequence of a countermand of the letter of attorney, and an action brought against their predecessors, the Duke of *Montrose* and Lord *Mulgrave*, by the defendant *Lidderdale*, to obtain payment of the half-pay to himself; in which action he recovered. *Vide* 4 Term Rep. 248 This bill was filed to have the effect of this assignment as a security for the annuity.

Plumer, *Stanley*, and *Fonblanque*, for the plaintiff, argued, that the assignment, although it could not be inforced at law, as being no certain right, but depending on the gratuitous bounty of his Majesty, was yet good in equity. A transfer of any valuable contingency or possibility, if made for good consideration, is affirmed in equity. Thus, the chance of a presumptive heir to outlive his ancestor, and inherit his estate, may be sold. *Hobson* v. *Trevor*, 2 P. Wms. 191. So the sale of an expectancy of a legacy by the will of a person then living is binding. *Beckley* v. *Newland*, 2 P. Wms. 182. And it is adopted as a general rule in equity, that a possibility may be assigned. *Wright* v. *Wright*, 1 Vez. 409. And the same rule is confirmed by the case of *Jones* v. *Roe*, 3 Term Rep. 93.

Accordingly, it was held in *Crouch* v. *Martin*, 2 Vern. 595. that the future wages of a seaman were assignable; and this receives a legislative confirmation with regard to the pay of the navy, by the 1 *Geo.* II. *st.* 2. *c.* 14. which enacts, that, for the future, such assignments shall be void. The same determination has been adopted both at law and in equity, as to the assignments of the half-pay of officers in the army. The case of *Grainger* v. *Wyvill**, heard twice before Lord *King*, first in *August*, and again in *October* 1728, was an application to sequester the half-pay of an officer in the hands of the treasurer of the navy. The Chancellor, after much deliberation, granted the application: he said, the first time that money had been sequestered in the hands of the public officers, was

* This case was cited from Mr. *Hargrave*'s MSS.

in a case before the Master of the Rolls, who ordered half-pay in the hands of the treasurer of *Chelsea Hospital* to be sequestered; and accordingly Lord *King* laid it down as a rule that half-pay should be considered liable to sequestration. This negatives the existence of any rule in equity to retain the half-pay unalienably to the officers.

So, in *Stuart* v. *Tucker*, 2 Bl. R. 1137. an assignment of half-pay of an officer was held good. In the case of *Gomez* v. *Graham* there cited, Lord *Hardwicke* established the same point, and reversed the decree of the Master of the Rolls to the contrary. The case of *Yates* v. *Elliott*, also cited in the case of *Stuart* v. *Tucker*, was ruled in the same manner by Lord *Mansfield*. And in the case of *Spencer* v. *Cox* and *Drummond** 1773, Lord *Bathurst* affirmed a decree of the Master of the Rolls upon the same principle.

* In that case the plaintiff had bought an annuity from an officer on full pay, secured by bond and judgment, and by an assignment of his pay, with notice to the defendants, the agents of the regiment, to pay it over to the plaintiff accordingly. The assignor being abroad on service in *West Florida*, the plaintiff demanded payment of the arrears from the defendants. They objected till they should hear from the regiment that he had not taken up his pay abroad. The plaintiff filed this bill. The defendants proved, that by the rules of the army the officers are at liberty to take up their pay from the regimental pay-master abroad, and that the agent is answerable over to him. His Honour, however, decreed, that they should pay the money in their hands in discharge of the arrears, and also the growing payments of the annuity out of such monies as they should receive on account of the assignor.

The Chancellor varied the decree, by ordering them to discharge the annuity only out of what should remain in their hands after the demands of the pay-master.

These decisions in the Courts of Equity, where the point has come fairly before the Court, have never been weakened by any contrary decisions in those Courts; and such established authorities ought not to be overturned upon any fanciful speculations of public policy; which, as is observed by Lord *Loughborough*, 1 H. Blackst. 327. are more proper for the consideration of the legislature than of a Court of Law.

The cases which have since been determined at law, and which seem to contradict these decisions, may easily be distinguished from them. The first is that of *Flarty* v. *Odlum*, 3 Term Rep. 681. Upon the assignment of the effects of an insolvent debtor under the Lords act, it was held that the half-pay should not pass by the assignment; neither would any other mere possibility, such as the probable inheritance of a son to his father, or the prospect of a legacy, pass by such assignment; it must be some *vested* interest upon which the assignment under the Lords act can take effect. The same answer may be given to the case of Captain *Kennedy*, a bankrupt, which is there cited.

Besides, an assignment of a chose in action is always bad at law; as each payment becomes due, it is merely a chose in action, and cannot in law be assigned; much less can the possible future right in it be the subject of legal assignment. This is a sufficient answer to those cases, and also to that of *Barwick* v. *Read*, 1 H. Blackst. 627. (which was never argued), and the case determined between the present parties in the Court of King's Bench, 4 Term Rep. 248. in which this is taken notice of

by the Court as a principal ground of the determination. If, in the decision of these cases, the Courts have not confined themselves to those grounds of law which were fully sufficient to warrant the judgments given, but have also given their opinion upon the general effect of such assignments, supposing them not shackled by those rules of law, such opinions must be considered as extrajudicial; and however respectable the authorities may be, they cannot be opposed to the express determination of Judges of the Courts of Equity. They may stand upon the other ground consistently with those cases, and therefore should not be considered as clashing with them.

The plaintiff stands upon the strongest equitable claims; he has given a valuable consideration, supposing the security good. The instrument purports to be a letter of attorney irrevocable; perhaps at law, it must from its nature ever continue revocable; but to revoke it in contradiction of an express agreement is such a fraud as a Court of Equity should never allow to succeed.

Romilly, for the defendant.—It seems formerly to have been the opinion of the Courts that half-pay was assignable, and while that opinion remained, no distinction was ever taken between the rule of law and equity. By *Stuart* v. *Tucker* it appears that if assignable at all, it is equally so in both Courts; and accordingly the subsequent decisions restraining such assignments have never hinted at any such distinction. The first case so decided was that of *Cathcart* v. *Blackwood*, upon an appeal from

the Court of Session in *Scotland* to the House of Lords, 25th of *February* 1765. The question was, whether a certificate under an *English* commission of bankruptcy was void, the bankrupt having omitted to insert his half-pay in the schedule of his effects upon his examination. It was held, both below and in the House of Lords, that the half-pay was not assignable under the bankruptcy, and therefore that the certificate was valid. In the case of *Flarty* v. *Odlum*, the sole ground of decision was the illegality of such assignments, on the score of public policy. Similar cases are there cited in the Courts of Common Pleas and Exchequer. The principle is followed in the case of *Barwick* v. *Reade*, in the Common Pleas, and is again expressly recognized and adopted in the decision of the action at law between the present parties. Whether any other ground of decision might have been adopted in these cases, it is useless to inquire. The only question that remains is, Whether the principle there established is equally applicable in equity as at law? The ground of public policy is in general a good ground of defence in equity, whether it is so at law or not; as in marriage brokage bonds, bonds in fraud of marriage settlements, cases on *offices* not included in the 5th and 6th *Ed.* 6., and many others.

Half-pay is granted for the purpose of keeping experienced officers in such a situation as not to be compelled to turn themselves to other pursuits, nor be by any circumstances reduced to extreme poverty. The allowing it to be assigned defeats this purpose. Accordingly, Lord *Bathurst*, when he decided in favour of such an assignment, lamented

that the authorities did not warrant a contrary determination. These authorities have since been found, and his opinion is to be considered as against the assignment, when so supported.

MACDONALD, Chief Baron.—The principle of policy upon which the late cases have gone, does not seem liable to the objections that have been raised against it. To discuss the question of public convenience before establishing the common agreements between man and man, would lead to endless confusion. But in this case the public is immediately interested; the subject of litigation is a grant from them to their servants; the nature of that grant, and the conditions to which it is subject, may well be ascertained from considering the ends of public policy in making the grant, without admitting the same principle of decision in cases of a merely private nature. But the case is of considerable consequence, and the decisions appear contradictory; the Court will look into them.

The judgment of the Court was this day delivered by the Chief Baron. *Saturday, 28th February.*

He stated the case.—

For the plaintiffs, it has been argued as a general principle, that a matter in expectancy, although not assignable at law, may be assigned in equity. The cases of *Hobson* v. *Trevor*, *Wright* v. *Wright*, and all that class of cases, have been cited to prove this position; and certainly, as a general rule, it must be admitted to be true.

Then they argue, that the present case is no exception to that rule, and rely on the act 1 *Geo.* II. *st.* 2. *c.* 14. as proving the pay of the navy to have been assignable before that time.

The only case upon the subject prior to that act, was the case of *Crouch* v. *Martin*, 2 Vern. 595. There the Court held, that a seaman's wages were assignable for valuable consideration; and the ground of the decision was, that the consideration given was in reality a payment by advance of the wages, and that therefore they were not to be paid over again. It does not appear that the Court there took at all into consideration the intention of the legislature upon the subject.

The statute referred to does not seem to have had this decision in contemplation. It is not confined to pay only, but extends to every other claim of the seamen, and provides against their being defrauded of the rights which had accrued, or might afterwards accrue to them. The purview of the statute is to guard them from frauds of every kind. No inference can therefore arise of the opinion of the legislature as to this particular question.

The cases of *Stuart* v. *Tucker*, in *Blackstone's* Reports, and *Gomez* v. *Graham*, there cited, are more directly in point. The cases of *Grainger* v. *Wyvil*, and *Spencer* v. *Cox* and *Drummond*, have also been cited.

The three last are cases of whole pay. In that of *Stuart* v. *Tucker*, the distinction is taken between whole and half-pay: and it is observed by the

Chief Justice, that if whole pay is assignable, *a fortiori* half-pay must. In *Granger* v. *Wyvil*, Lord *King* was at first against the sequestration, although by the nature of the application that could only relate to pay then actually due; he at last granted it with reluctance. In the case of *Spencer* v. *Cox* and *Drummond*, Lord *Bathurst* shewed equal reluctance to break through the rules of public policy, and doubted much before giving his decision.

Half-pay is intended by the state to provide decent maintenance for experienced officers, both as a reward for their past services, and to enable them to preserve such a situation that they may always be ready to return into actual service.

It materially differs, therefore, from the general case of expectancies, which certainly may in equity be assigned. By such assignment no public interest is thwarted. Thus a pension is equally uncertain as half-pay; but as no future benefit is meant to arise to the state from granting it, a material distinction arises between them.

The case of *Stuart* v. *Tucker* seems to consider half-pay only in one point of view, as a reward for past services; but that evidently appears not to be the real intent of the legislature. In that case, Mr. Justice *Gould* refers to the case of *Oliver* v. *Ennfonne*, in *Dyer*; it is not there said for what purpose; but when we recollect, that the same Judge concurred in the contrary decision of *Barwick* v. *Read*, H. Blackst. 627, and again cited the same case from Dyer in corroboration of the latter judg-

ment, for which it is a strong authority, we cannot hesitate in seeing that it must have been cited by him on the former occasion as raising a doubt of the judgment then given.

That case in Dyer, and the decisions in both the other Courts, in questions similar to the present, fix the true principle of law upon the subject. The Courts of Justice are not indeed to enter into any general abstract notions of public policy in their decisions, in opposition to the express intention of the parties; but in deciding upon the nature of a public grant, the great object of public policy in making that grant, is to be attended to. The general intent pervades the whole; each yearly payment is subject to it; perhaps it may be more strong where the gratuity is annual, as in the present case.

The cases of *Flarty* v. *Odlum*, *Lidderdale* v. the Duke of *Montrose*, and *Barwick* v. *Read*, decide the present.

As in the case put in Dyer, the annuity granted to a man on his being created a Duke, for support of his dignity, could not be granted over; so the half-pay, being given for a similar reason of public policy, cannot be transferred; to use the words of my Lord Dyer, "it is incident to the cause for "which it was granted," and cannot be separated from it.

The plea was allowed.

FLINT *v.* FIELD.

Saturday, 28th February.

The plaintiff's equity must appear in the stating part of the bill.

THE bill prayed an account of rents and profits of certain premises; it stated the plaintiff to be entitled thereto as heir at law, and the defendant to be in possession. The bill then suggested that the defendant pretended to claim under some fine and demise, and charged that if any such existed, the testator was insane at the time; which the defendant at other times admitted, &c.

The defendant demurred.

The *Court* held the bill to be bad. The whole equity of the case consists in the pretences, the charges in answer to those pretences, and the admissions; there ought first to be a case averred, and then the pretences and charges are properly introduced to support it.

The demurrer was allowed.

GODBOLT *v.* WATTS.

The defendant sued at law on an indemnity-bond; the plaintiff filed this bill for an injunction,

THE bill stated that the plaintiff agreed for the purchase of certain premises, and in order to raise the money to complete the same, the defendant joined with him as security to one *Ramie*, who

without offering to make any recompence for the damage actually sustained; the bill was dismissed.

advanced the money, the plaintiff giving the defendant a bond of indemnity. After a variety of other circumstances, the bill stated that *Ramie* sued and arrested the defendant for the money, who was obliged to confess a judgment to him, and to deposit in his hands the title-deeds of an estate belonging to the defendant. The defendant brought an action on his indemnity-bond. The bill, upon several charges of fraud in the course of their mutual transactions, prayed an injunction, and to have the bond delivered up to be cancelled. No offer was made in it to indemnify.

The defendant demurred.

The *Court* thought the want of an offer to make satisfaction, where it appeared the defendant had really suffered inconvenience and loss, was fatal.

The case is most proper for a decision of law, and must have been sent there at last on an issue of *quantum damnificatus*, if the bill had been so framed as to admit of it.

COTTIN *v.* BLANE and Others.

The plaintiff was guarantee to the owner of an *American*

THE bill stated, that the defendant *Blane* was agent in *London* for the defendant *Macauley*, an *American* merchant, owner of a vessel then in the

Thames. The defendant *Changeur*, as agent for the house of *Changeur* and Co. at *Bourdeaux*, freighted this vessel for *Bourdeaux*, and to take in a cargo there. The plaintiff guaranteed the due performance of *Changeur*'s agreement and charter-party. The ship arrived at *Bourdeaux* on the 30th of *August* 1793, at which time an embargo was subsisting upon all neutral vessels there, by order of the government of *France*. The vessel was detained under the said embargo until the 23d day of *March* 1794, when the agents of *Changeur* at *Bourdeaux* discharged her.

ship, for a merchant who freighted her to *Boudeaux*; she was detained there by an embargo, and dismissed by the freighter. The *French* government having declared themselves bound to indemnify all neutral owners for the effects of the embargo, and the plaintiff (an *English* subject) not being able to take advantage of that order, the defendant must endeavour to get an indemnity in *France*, before he can sue the plaintiff.

By a decree of the National Convention, it was resolved, that the *French* nation ought, in justice, to grant reasonable indemnity to all foreign owners, whose interests were injured by the said embargo. It was therefore ordered, that the sum of 800,000 livres should be advanced to the captains of such vessels, on account of their indemnity, in proportion to their wants.

The bill stated, that the master of the vessel had received some portion of this indemnity.

The *Changeurs* becoming bankrupt, and the freight not being paid, the defendant *Blane* brought an action against the plaintiff.

The bill was filed, to discover whether any indemnity had been obtained, and to compel the defendant *Macauley* to proceed to procure from the government of *France*, all such compensation, for the detention of the ship, as could be obtained, before he should call on the plaintiff for payment; and prayed an injunction in the mean time.

The defendant *Blane* put in his answer, by which he denied that any compensation had been made by the *French* government to him, or to his owners, within his knowledge.

Macauley had not answered, being abroad.

Burton, *Graham*, and *Hollist*, now moved for an injunction, relying on the case of *Wright* v. *Nutt*, 1 H. Blackst. 136. *Folliott* v. *Ogden*, ibid. 123.

Plumer and *Stanley*, for the defendants, took the distinction, that in those cases there was a fund provided, from which the creditor might have had redress if he chose to resort to it. Here there is only a vote of what ought to be done, but no steps have as yet been taken in consequence of it. By the same reasoning it might be argued, that in every case where an injury is committed by any state to neutral property, no action will lie against those who have guaranteed the safety of the vessel, till redress is demanded and refused by the offending state.

MACDONALD, Chief Baron.—The case is peculiar. Undoubtedly the injury done by the *French* to neutral vessels, ought in justice to be repaired by them. They say, they will do so. This promise takes it out of the case of a mere unadmitted claim upon their justice. It strikes me, that a court of equity is to look for the performance of such a promise by the government of *France*, and not to presume a direct refusal of a right which they admit to exist. But we shall look further into the cases which have been cited.

MACDONALD, Chief Baron.—As the existing government of *France* have promised to indemnify the neutral owners, we are to presume that that promise will be fulfilled. Probably it has already been so in part; but whether any compensation either has or can be received, cannot be known till the coming in of *Macauley*'s answer, who alone was capable of claiming it. The injunction must be granted, the plaintiff bringing the money into court. 28th *February.*

GABBIT *v.* CAVENDISH. *Same day.*

THE defendant being sued as executor, admitted to have in his possession certain books, containing the accounts of the estate. He was ordered to deposit them in the hands of the Deputy Remembrancer, for the inspection of the plaintiff. It was afterwards referred to that officer to take an account of the estate. The defendant, in order to make out such account, applied to be allowed to inspect and take copies of the books. This was refused at the office, unless he would pay for office-copies.

Cooke now moved that the defendant might have this liberty as his right.

The motion was allowed.

Same day.

GOODMAN *v.* PURCELL.

ON marshalling the assets, a question arose, whether bail in error, who had been obliged to pay the bond on which the action was brought, and costs, were specialty creditors, or not?---The *Court* this day delivered their opinion, that the demand of the bail was clearly a simple contract debt.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF EXCHEQUER;

IN

EASTER TERM,

35 GEORGE III.

Sir JOHN PECHEL, Bart. *v.* FOWLER and Others. *Friday, 24th April.*

On a trust to sell, a suggestion in the bill of improper conduct of the trustees in not giving sufficient notice of the sale, is not a ground for an injunction to stop the intended sale.

THE plaintiff filed this bill against the defendants, stating certain mortgages, and a conveyance of his estate to the defendants, in trust to sell; that the defendants had advertised the premises for sale; that the notice of the intended sale was much shorter than usual; and several circumstances, which tended to shew, that, by the sale, if made, the plaintiff would sustain great loss.

As soon as the bill was filed, *Plumer*, for the plaintiff, moved for an injunction to restrain the sale, upon an affidavit verifying the facts stated in the bill, and stating, that the sale was to be made next day.

The *Court* refused the injunction, as not being one of the cases in which, on account of irreparable injury to the plaintiff, the Court proceeds in this summary way. If the trustees shall be guilty of a breach of trust, in making the proposed sale, they will be answerable to the plaintiff for the damage sustained.

Same day.

REMINGTON *v.* DEVERALL.

UPON a motion for an injunction to stay proceedings at law, it appeared, that the defendant had agreed to purchase an estate from the plaintiff for 100*l.*, and for an annuity for her life; but it was not specified what security should be given for the annuity: and the question now made was respecting this security, the defendant offering his bond and judgment as sufficient.

The *Court* decided, that it should be secured by being charged upon the purchased estate, as well as by the bond and judgment of the defendant.

Stratford for the plaintiff; *Giff. Wilson* for the defendant.

WOOLLEY *v.* DRAGE.

Same day.

BILL to redeem a mortgage. It was referred to the Deputy Remembrancer to take the usual accounts. The principal money lent, carried *5 per cent.* interest. The mortgagee being in possession, had advanced money for fines on renewals of leases, under which the premises were held. Upon these sums the Deputy Remembrancer allowed only *4 per cent.* interest. Exceptions being taken,

Money disbursed by a mortgagee shall carry the same interest as the original sum.

The *Court* allowed the exception. The interest upon the advances must be regulated by the interest payable upon the money originally lent.

Shuter and *Short* for the plaintiffs; *King* for the defendants.

HYDE *v.* DONNE.

Tuesday, 28th April.

THIS was a petition praying for a rehearing, or for leave to file a bill of review. The decree having been signed and inrolled, the prayer of a rehearing was irregular. The Court refused leave to file a bill of review because of the uncertainty in the prayer of the petition. The party must pray a specific remedy.

Plumer for the petition; *Onslow* against it.

Friday, 1st May.

JAMES *v.* GILLADAM.

SIMEON moved to stay proceedings upon a bill filed, till the plaintiff or his solicitor should deliver to the defendant a note of the residence of the plaintiff, he being an uncertificated bankrupt, and not being found at the place where the bill described him to reside.

The *Court* doubted whether they could grant this order, and the case standing over,

Tuesday, 5th May.

Simeon, on a subsequent day, moved for a rule to shew cause why the plaintiff should not give a note of his place of abode, or security for the costs.

This rule was granted, and no cause being shewn, was afterwards made absolute.

Friday, 1st May.

ADAMS *v.* COLETHURST.

MARTIN moved that the plaintiff might be ordered to give security for costs, upon affidavit that he was about to leave the kingdom.

The *Court,* on the authority of *Beckman* v. *Legrainge,* refused to make the order; but gave leave to mention it again.

The application was not renewed.

The cause was on the equity side of the Court.

GADD *v.* WORRAL. *Friday, 8th May.*

AN injunction obtained on the original bill, was dissolved on the coming in of the answer. The plaintiff filed a supplemental bill, and the eight days time for answering was expired; but the defendants were not in contempt.

Plumer and *Lewis* moved for an injunction on the merits disclosed in the supplemental bill, and sworn to by affidavits.

Stratford for the defendant.

The *Court* rejected the application, the defendant not being in contempt.

Same day.

CHAPMAN *v.* LANSDOWN.

A plea of outlawry ought to be set down for argument by the defendant.

THE defendant pleaded the outlawry of the plaintiff. *Short* obtained an order on the 28th of *April*, to discharge the plea on the informality of the practice, the plea not being set down for argument on the first day of this term, although entered more than eight days before.

Cox moved on the 6th of *May*, and again this day to discharge that order. He insisted that the rule which compels the defendant to set down the plea for argument, does not extend to those cases where the plea is of a matter of record, which does not admit of any reply, and upon which the law does not suppose that any argument can be. If, however, the plaintiff wishes to take advantage of any informality in the plea, he may set it down for argument; otherwise it is allowed of course. Pract. Reg. in Ch. 277. 282. Lord Clarendon's Orders, 97. Other pleas, if not set down, would remain for ever undisposed of.

Short, for the plaintiff, relied on the practice of this Court being general for all pleas to be set down by the plaintiff. Rules and Orders of Exch. 92. N. 10. and the opinion of all the officers accordingly.

Cox.—The officers agree that no instance has occurred. They have therefore no data upon which to form an opinion.

The *Court* were of opinion that the plea ought to have been set down by the defendant; but as the practice of the Court of Chancery is different, and the party had been misled by that, and by the obscurity of the rule here, he had leave to set it down for argument.

GADD *v.* WORRALL. *Wednesday, 13th May.*

THE defendant having brought an action against the plaintiff, the original bill was filed, and an injunction obtained. The defendant afterwards commenced actions against the servants of the plaintiff, for acting according to his orders in the same matter which had been the subject of the former suit and of the original bill. The plaintiff, by supplemental bill, stated those facts, and

Plumer now moved an affidavit to extend the injunction to these actions.

Stratford objected that these parties were not before the Court.

The motion was refused.

BOLT *v.* STANWAY.

Saturday, 16th *May*. and *Monday*, 18th *May*.

An injunction against proceeding at law, extends to prevent suit against the sheriffs, for not paying over money levied in the originalsuit, before the injunction issued.

THE defendant having recovered at law, had taken out execution, and the sheriff had levied before the injunction obtained by the plaintiff issued. The sheriff refused to pay over the money levied, and the defendant commenced an action against him for money had and received to his use. *Burton* had moved for an attachment against the defendant for this proceeding, as a breach of the injunction.

Plumer shewed cause against the rule. The sheriff is not a party, nor does the bill pray any injunction as to proceeding against him; this therefore comes within the rule in *Gadd* v. *Worrall*.

They are too late to stop us; for the sheriff having levied, is bound immediately to pay over; he has received for us.

MACDONALD, Chief Baron.—The words of the injunction are only against proceeding in the action against *Bolt;* but the clear meaning of it is to prevent the defendants having any benefit of that suit while the injunction subsists. The proper mode of compelling the sheriff to pay over the money levied, is by a rule against him; had that been done, it would clearly have been a breach of the injunction. The circuitous and improper mode of suing the sheriff in a fresh action, cannot give the defendant

a better claim. This seems protected by the clear intent of the injunction granted.

HOTHAM, Baron.—This proceeding is, in sense and spirit, a violation of the injunction.

PERRYN, Baron, of the same opinion.

THOMSON, Baron.—In *Gadd* v. *Worrall*, the defendants to the second action were mere strangers to the first. But a sheriff levying goods is not a stranger to the suit. The writ under which he levies, and the return he makes to it, are parts of the suit; and any mode of compelling the sheriff to make such return, or to complete the execution, seems in sense a proceeding in the action within the meaning of this injunction.

Plumer suggested, that as the plaintiff was secure from the effects of the judgment by the execution, the money was now in the hands of the sheriff without interest, and at the hazard of the defendant.

The *Court* ordered, that the sheriff should be at liberty to pay the money into Court, and the defendant not to proceed against him. (*Vide post*, in Trinity Term.)

Saturday, 16th May.

THOMAS *v.* EDWARDS.

DAUNCEY moved to stay proceedings in this action, on payment of the money due on the judgment upon which the action was brought, and costs.

Williams objected that the defendant had absconded for seven years since the judgment, and therefore interest ought to be allowed.

By the *Court.*—If you proceed in your action, you cannot get interest.

The rule was made absolute.

Wednesday, 13th May. Monday, 18th May.

The duty on spirits attaches upon the wash before distillation, by 24 *Geo.* III. *c.* 73.

The ATTORNEY GENERAL *v.* ———

IN this case, the defendant, a distiller, had put a quantity of wash into the still, after it had been guaged: the still burst, and the wash was lost. This information was filed for the duty: the *Attorney General* insisting, that it had attached on this wash, and that no subsequent loss could divest it.

A verdict having been given for the Crown, *Shepherd* moved for a new trial; and cause was this

day shewn by the *Attorney General*, who rested on the 24th *Geo.* III. *c.* 73. *s.* 1. by which the duty is laid upon the fermented wash.

Shepherd, in support of the rule. It is true the statute takes that period of the manufacture for ascertaining the quantity to be charged with the duty; and perhaps the duty did then attach upon it. But in order to charge the defendant, he must be shewn to have been within the situation of the person liable to pay.

The duty is laid upon the preparation for extracting *spirits* from the malt. It is payable by the *maker or distiller thereof.* This must mean the maker or distiller of the spirits, for of the wash there can be no *distiller*, that being a period of the manufacture prior to distillation. Throughout the whole act, the person charged is described as " the " maker or distiller of low wines or spirits;" and in this first section, the meaning of these words must be the same as in the other parts of the act; but, in the present case, the wash never was made into spirits: then no *maker or distiller thereof* exists, and there is no person liable to the duty.

If a contrary construction holds, we are by this accident made subject to several penalties in the act; for instance, under the *s.* 21, for not working off the contents of the still in proper time.

The tax on malt cannot be taken back, although it is afterwards consumed by accident, before being used in brewing or distillation; because, as malt, it

complete article. Here the wash is not a complete article; it cannot find a price till it has been manufactured into spirits.

MACDONALD, Chief Baron.—The 1st section says, that certain duties shall be *charged* for every gallon of wash. The word *charged*, means, that the owner shall be debited with that sum.

I believe it is a very general rule now adopted in making these revenue acts, to avoid providing for contingencies of this kind. It opens a great door to fraud; and where a real misfortune happens, by a proper application to the Treasury, from the liberal manner in which these matters are conducted, a party is sure of relief.

The rule was discharged.

Same day.

The ATTORNEY GENERAL *v.* BREWSTER and MORTON.

A concealment of soap in violation of the 1 *Geo.* I. *st.* 2. *c.* 31. may be in an entered place, and by mixing with other soap, and although done with the privity of the inferior attending officer.

THIS was an information for the penalty of 500l. for hiding and concealing soap, on 1 *Geo.* 1. *st.* 2. *c.* 31.

When the manufacture was surveyed in the morning, the soap in the boilers was in a considerable degree of forwardness, and the soap-frames were mostly

full of cold soap. The officer, suspecting fraud, came again in the evening. In the mean while, a certain quantity of soap had been drawn from the boilers, and put into the frames, and slabs of cold soap laid on the top of the hot soap in each frame.

On the part of the Crown, it was admitted, that the soap could not have been drawn from the boilers without the privity of the inferior attending officer. The witnesses for the Crown proved, that putting cold soap upon hot is unknown in the trade, and could only be done for the purpose of concealing the latter.

A verdict being found for the Crown, *Rous* moved to set it aside, on two grounds:

1*st*, That the soap being taken out and put in the frames with the privity of the officer appointed to inspect the manufacture, and in an entered place, could not be said to be hid or concealed within the meaning of the statute.

2*d*, That this was another distinct penalty under the statute, *viz.* mixing together soap charged and soap not charged.

The *Solicitor General*, *Newnham*, and *Ridley* shewed cause against the rule.

Rous and *Dauncey* in support of it.

MACDONALD, Chief Baron.—The jury have in effect found, that this soap was in truth concealed

from the officer, and that the contrivance was for that purpose. It is very clear, that a concealment may be in an entered place, as well as in any other; and the jury, with whom I perfectly concurred, have found it attempted here. A concealment may be by mixing with other soap, although if the mixing alone appears, without an attempt to conceal, the remedy is under another clause.

As to the privity of the officer who first surveyed, that cannot alter the case. An inferior officer cannot give a licence to conceal from all the others. Such a doctrine is too dangerous to the revenue to be listened to for a moment. Then if he could not licence concealment, the only question is, whether any has been attempted. The jury have properly disposed of that question.

The rule was discharged.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF EXCHEQUER;

IN

TRINITY TERM,

35 GEORGE III.

BULL *v.* GRIFFIN.

Friday, 5th June.

A Complaint was made to the Court, that *Barnard*, one of the defendants, and solicitor for the rest, put in answers, signed with the name of Mr. *Allen* as counsel, who appeared this day in his place at the bar, and stated, that he had not signed any papers in the cause, nor given any authority for that purpose. The Court issued an attachment against *Barnard*, for not appearing to answer this complaint, after an order to do so, and were proceeding to order the answers to be taken off the file; but it being suggested by *Plumer*, that the case was set down for hearing, and that the plaintiff would be the sufferer if the answers should be taken off the file for the irregularity, they were

ordered to stand, and the cause to proceed; for the Court, in punishing a breach of its rules, ought to take care that an innocent party shall not suffer.

ANONYMOUS.

DAUNCEY moved to justify bail. Notice was given two days before, that fresh bail would be added, and justify this day.

Per Curiam.—You should have added the bail first, and then given two days notice that they would justify. You cannot give notice of both at once.

Monday, 8th, and *Tuesday*, 15th *June*.

Lord STAWELL *v.* ATKINS.

A bill to establish a farm-modus, setting out the abuttals of the farm, and stating that the modus had immemorially been paid for the said farm, is good, without stating it expressly to be an ancient farm.

THIS was a bill to establish a modus.—*Burton* objected, that the modus was not properly set out, being pleaded as a farm-modus, and the farm not stated to be ancient, and to have immemorially consisted of the same parcels as at present. These averments he contended to be necessary, and that they had often been so declared by Mr. Baron *Perrot*. The defendant is not bound to pick out the meaning of the plaintiff by any inferences. The bill must state expressly the case, to be answered.

Partridge and *Plumer*, for the plaintiffs, argued, that the bill contained every necessary allegation. It set out the farm, with all its parcels, the number of acres, and the abuttals of each close, and averred, that the modus had immemorially been paid for the said farm. This allegation can only be supported by proving, that the farm is ancient, and has immemorially continued the same as it is now.

MACDONALD, Chief Baron.—This seems to me to be in sense a sufficient averment of its being an ancient farm. If it had not immemorially continued the same, the modus could not have immemorially been paid for the same farm. The exclusion of any other supposition seems a sufficient averment of the fact.

HOTHAM, Baron.—It is very true, that in bills to establish a modus, it is necessary to set forth with certainty the case which the defendant is to answer; but here he must see, that the antiquity of the farm is a necessary part of the plaintiff's case, as stated in the bill. No precise form of words seems necessary if the meaning be clear.

PERRYN, Baron.—Mr. *Burton* has stated very correctly the opinion of the late Mr. Baron *Perrot*. In a bill to establish a modus, the plaintiff must state his case clearly, and can only recover according to his allegations. The being an ancient farm is a necessary part of the present case, and ought to be distinctly averred, not left to be drawn as an inference from other averments; and the practice has always been accordingly.*

* Mr. Baron THOMSON was absent.

The point being reserved upon this difference of opinion, this day

PERRYN, Baron, said, that, upon further consideration, he acquiesced in the opinion of the other Barons.

Partridge, *Plumer*, and *Trower*, for the plaintiff, produced evidence of the existence of the modus, and shewed, that an action had been brought by one of the defendants, the lessee of the tithes, for subtraction of tithes in kind.

The defendants were the tenant for life and his lessee, and the remainder-man of the impropriate rectory.

If an action is brought by the *lessee* of tithes for subtraction, it is a sufficient ground for filing a bill to establish a modus.

Burton, for the lessee, and *Hollist*, for the remainder-man, contended, that this bill did not lie to establish a modus. Such a suit is in the nature of a bill of peace, which can be brought only in three cases:

1*st*, Where the party is harassed by repeated suits.

2*dly*, Where several persons claiming under a general right threaten to bring separate suits, as in parochial or manerial rights disputed.

3*dly*, Where a bill for tithes has been instituted in the same court. The bill to establish a modus is in this case only considered as a cross bill, to furnish the defence which is set up in the original

suit, and to give the farmer the benefit of his defence against future attempts to invade his right.

In a bill of peace, a threat to sue is an equally good ground of equity as an action commenced; as where a devisee is threatened by the heir with a second action of ejectment, after nonsuit in the first, he may bring his bill to establish the devise, without waiting for the commencement of the second suit. But it was determined in the case of Lord *Coventry* v. *Burslem*, in this Court 25th *April* 1788,* that although the defendant, in his answer, admitted

* This was a bill against the rector and patron to establish moduses. No bill had been filed by the rector, nor any suit instituted by him for tithes in kind. The defendant, the rector, in his answer, claimed to be entitled to tithes in kind, and said he intended to sue for them, and had refused to accept the modus.

A bill to establish a modus will not lie, where the parson has not sued for tithes in kind.

The case was argued by *Burton*, *Kenyon*, *Scott*, and *Reade* for the plaintiff; and by *Selwyn*, *Arden*, and *Scafe* for the defendants.

For the plaintiffs were cited the cases of *Roe* v. The Bishop of *Exeter*, Bunb. 57. *Geale* v. *Wyntour*, Bunb. 211. and the case of *Woollacomb* v. *May*, in this Court 30th of *June* 1783, which was a bill by the landholders to establish moduses; the rector had never sued for, nor claimed tithes in kind; he said in his answer he did not believe the validity of the moduses, but that he was not desirous of disputing it, and was therefore willing to rest satisfied with the former payment.—The Court there directed issues on the moduses, which were not opposed, and therefore taken *pro confesso*.

The *Court* thought the bill in the present case was improperly brought; but as the case of *Woollacomb* v. *May* had tended to mislead the plaintiff, they did not dismiss the bill, but allowed him to amend, by striking out the prayer of relief, thus making it a mere bill to perpetuate testimony.

that he always had claimed, and intended to sue for, tithes in kind, yet that was no ground for a bill to establish a *modus*. So here, the single suit commenced by the lessee of the tithes is no ground for supporting such a bill. The landlord has never claimed tithes in kind, and it is dangerous that the lessee should be allowed, by any conduct of his, to bring the title to the inheritance in question.

The *Court* did not expressly decide upon this objection, but thought it expedient for all parties to try the right in an issue; which the defendant, the lessee, agreed to take; and although the other defendants did not consent, the decree was made generally for an issue.

Saturday, 13th June.

ANDERSON *v.* TOMBS.

THE plaintiff was proceeding at law and in equity. On an order to elect, he elected to proceed in equity. He had at that time undertaken peremptorily to try the action.

Serjeant *Clayton* moved for judgment as in case of a nonsuit for not proceeding to trial.

Dauncey objected, that the plaintiff could not proceed to trial, being restrained by the order in equity.

By the *Court.*—If you elect not to proceed at law, you must abide by the consequences of such election.

BOLT *v.* STANWAY.

THE Court having last Term made an order to allow the sheriff to pay the money into Court, and to restrain the defendant from proceeding against him in the mean time (*Vide ante, p.* 557.) the plaintiff obtained another order, on the 21st of *May*, to allow the Deputy Remembrancer to receive the money. On the 4th of *June* the defendant gave notice of trial in the action against the sheriff.

Burton having obtained an order *nisi*, for an attachment, cause was this day shewn against it by

Plumer, on the ground that the money not having been paid in by the sheriff, he was not entitled to any benefit under the former order. Not being a party in the present suit, his interest is only protected by considering him as acting for the plaintiff; as against the plaintiff the payment of the money into Court was the ground and condition of extending the injunction; but there is no way of compelling payment by the sheriff, but by going on to trial.

Burton, contra, relied on the contempt, in proceeding contrary to the former order.

By the *Court*.—The spirit of that order was, that you and the sheriff should be protected on paying in the money levied; if you appear for the sheriff in part, you must throughout, and pay the money for him.

It was ordered, that unless the money should be paid in within two days, the defendant should be at liberty to proceed.

Monday, 22d June.

LONGDALE *v.* Sir THOMAS CRAWLEY BOVEY Bart. and Others.

A. devised to his wife the dividends of 4000*l.* bank stock for life, and on her decease to be *transferred*, and the *produce* thereof 500*l.* he gave to the plaintiff, *the other* to be divided among the defendants; the plaintiff is entitled only to 500*l.* not to 500*l.* stock.

DR. *John Lloyd* by his will gave to his wife "the dividends which should become payable on four thousand pounds capital bank stock "now standing in my name: and on her decease, to "be transferred, and the produce thereof five hundred pounds I give to *R. Longdale*," (the plaintiff,) "the other to be divided equally between the defendants."

The plaintiff claimed 500*l.* bank stock under this clause.

The defendants insisted that he was only entitled to 500*l.* out of the produce of the stock when sold.

Burton and *Richards*, for the plaintiff.—The words of the will seem to direct, not a sale of the stock, but a transfer into the names of the persons entitled to the distribution. The testator clearly meant the fund to continue in its first shape during the life of the wife. No good reason can be assigned for his wishing a sale of it on her death, and accordingly he has used no words that necessarily imply a sale; the word *transferred* negatives such a construction. He would naturally have directed a sale in express words if that had been his meaning. The testator, after giving the 500*l.* to the plaintiff, gives "the other" to the defendants. This is an expression that could never occur to any man in a bequest of money to be raised by the sale of stock; but if he is considered as giving part of the stock to the plaintiff, the words "the other" properly apply to the remainder of the stock. The word "*produce*" is ambiguous, but may fairly be explained to mean the share upon the division of the stock.

Plumer and *Stratford* for the defendants.

MACDONALD, Chief Baron.—There certainly is an ambiguity in the expression; it occurred to me at first, that *transferred* implied a transfer of the stock itself; but it is to be so transferred as to beget a produce; that must be a transfer to a purchaser, a sale; the legacy is of five hundred pounds; where he means to give so much stock, he describes it as such.

HOTHAM, Baron.—The word "*produce*" cannot be satisfied without changing the stock into money; the other words are all reconcileable to this explanation.

PERRYN, Baron, of the same opinion.

THOMSON, Baron.—In a subsequent part of the will, the testator gives a legacy of 300*l.* *East India* stock. Where he means to give a legacy of stock, he knows how to express such intention.

Tuesday, 23d June.

PHILIPS *v.* DAVIES.

Action to try a right of way, which was stated to be from a certain highway leading *from* the parish of *L.* to *B.* The highway was proved to be, at that part, *within* the parish of *L.*; this is no variance.

THIS was an action on the case, to try a right of way. The way was described in the declaration to be "from a certain public highway leading "*from* the parish of *L.* to *B.* into, through, and "over the defendant's close," &c. At the trial of the cause before Mr. Baron THOMSON, at the last assizes for *Gloucestershire*, it appeared, that the highway stated as the abuttal of the way claimed was, at that part where this private way joined it, *within* the parish of *L.* This was objected at the trial, by the defendant's counsel, as a variance, the word "from" being exclusive, and therefore not supported by the evidence. The judge directed a verdict for the plaintiff, with liberty to move the

Court for a nonsuit on the point reserved. A rule to shew cause why the verdict should not be set aside, and a nonsuit entered, having been obtained, cause was this day shewn by

Milles and *Russell*.—In describing the way claimed, or in indicting a way, the most scrupulous exactness is requisite, and every technical rule of setting it forth must be complied with. But where a way is mentioned collaterally in pleading, as the abuttal of the principal subject, the same precision is not necessary. *Harrison* v. *Rooke*, Palm. 421. In such cases, it is sufficient if the Court can see from the evidence, that it is the same highway with that stated in the declaration. To describe the highway at full length, it should be stated to be "in, through, and from the parish of *L.*;" but any part of that description which ascertains the identity of the road is a sufficient description of an abuttal.

Plumer and *Lane*, contra.—It is immaterial to inquire whether the plaintiff was bound to set forth the *termini a quo et ad quem* of the highway. He has undertaken to do so, and therefore must do it accurately. *Rouse* v. *Bardin*, 1 H. Blackst. 354. *R.* v. *Gamlingay*, 3 Term Rep. 514. *Bristow* v. *Wright*, Doug. 667-8. But it has always been held, that "from," in the description of a way, is exclusive of the *terminus a quo*. *R.* v. *Gamlingay*, and the cases there relied on by the Court. Then the evidence, that the highway is *within* the parish of *L.* is a variance from the declaration. This cannot be the same highway as that stated to lead *from* the parish.

MACDONALD, Chief Baron.—I cannot bring myself to entertain a doubt upon this subject. There is a great fallacy in resting solely on the word "from" in this case. In strict technical language, "from" is generally held to be exclusive: but, in common discourse, a way "*leading from*" a parish, may well be partly in it. If pursued, the road will *lead* a traveller *from* the parish. This does not necessarily mean, that it commences at the extremity of the parish. The plaintiff has undertaken to describe the highway, but this must be understood with reference to the subject, with such certainty as is requisite in describing an abuttal. The defendant has here a sufficient notice what he has to oppose, and that is all that he can require.

The other Barons being of the same opinion,

The rule was discharged.

Same day.

DOE *v.* ROBINSON in Error.

CLARKE moved for interest by way of damages in affirmance in error. The action was for mesne profits.

The Court granted a rule to shew cause, which was afterwards made absolute, no cause being shewn.

WATERS *v.* WEIGALL.

Thursday, 25th June.

THE plaintiff was tenant of a house under the defendant. By the lease, the plaintiff covenanted to keep the premises in repair, "and to deliver up the same to the defendant at the expiration of the term, in good and sufficient repair, accidents by fire and tempest excepted." The house being damaged by a tempest, and in want of immediate repair, to prevent further injury, the plaintiff repaired it, and claimed to be allowed out of the rent what he had expended upon it. The defendant refused to make such allowance, and brought an action for the rent. This bill was filed by the plaintiff, to be allowed to retain the amount of the repairs out of the rent.

Where a landlord is bound in law or equity to repair in certain cases, and the tenant is obliged from a sudden accident to make those repairs to prevent further mischief, the tenant may set it off as money paid to the use of the landlord, against an action for rent, and therefore a Court of Equity will not interfere.

The defendant demurred.

Toller, in support of the bill.—In a Court of Law the landlord is entitled to recover his whole rent, even although the tenant is prevented from any enjoyment of the premises, *Paradise* v. *Jane*, Al. 27. even if it arises from the default of the landlord, as where the premises are burnt down, and the landlord neglects to rebuild according to his covenant, *Monk* v. *Cooper*, 2 Str. 763. L. Raym. 1477. *Balfour* v. *Weston*, 1 Term Rep. 310. There is no express covenant in the lease that the landlord shall repair in the case that has happened; it is only a saving, to excuse the tenant from an action for not repairing; this does not give him

a cross action against the landlord; and he is without remedy at law; even if he had a cross demand at law, circuity of actions is a good ground of equity, *Brown* v. *Quilter*, Ambl. 621. It is decided in that case that an exception in the covenant of the lessee to repair, in case of fire, amounts to an exemption from payment of rent upon destruction of the house by that accident, and that a bill in equity lies to protect him. If the house sustain lesser damage, the nature of the relief must vary according to the circumstances. Here the house required immediate repair, which dispenses with the necessity of previous application to the landlord. Had the repairs been delayed, the damage would have been increased, and then, according to the case of *Brown* v. *Quilter*, the rent would not have been at all demandable till the landlord had rebuilt the premises so as to be inhabitable.

Romilly for the demurrer.

MACDONALD, Chief Baron.—I do not see how you entitle yourself to the interposition of this Court. If the landlord is bound in law or equity to repair in consequence of the accident that has happened, and you were right in expending this sum in repairs for him, it is money paid to his use; and may be set off against the demand for rent. If you fail in making out these points, your ground of relief is destroyed in equity, as well as at law.

The other Barons being of the same opinion,

The demurrer was allowed.

POPE *v.* WOOD.

In an action on a promissory note, the plaintiff became a bankrupt; the assignees gave the defendant notice, after judgment, not to pay the debt recovered to any but their order; the attorney sued out a *fi. fa.* in the name of the bankrupt, the note having been deposited with him since the beginning of the action, to secure a debt due to him from the bankrupt; a rule to set aside the *fi. fa.* was discharged.

PENDING this action, and before trial, the plaintiff became bankrupt. The suit went on, and a verdict was obtained in his favour. The assignees gave notice to the defendant not to pay the debt to any person without their order. The attorney for the plaintiff afterwards sued out a *fieri facias* in his name. *Partridge* having obtained a rule to shew cause why this *fieri facias* should not be discharged, and the attorney, Mr. *Roberts*, pay the costs, cause was this day shewn by

Plumer.—It is clear, that the suit does not abate by the bankruptcy of the plaintiff. It may go on in his name, and therefore the *fieri facias* is, *prima facie*, regular. If the assignees chuse to take the benefit of the suit, and stand in the place of the bankrupt, they must bring a *scire facias* on the judgment for that purpose. If they mean to change the attorney, they must move the Court, and can only obtain leave to do so on satisfying the demand of the present attorney for his costs. He has another lien on the papers in the cause, the note upon which the action was brought having been deposited with him to secure a sum of money advanced to the bankrupt. To the extent of that security the bankrupt's name is only used as trustee for Mr. *Roberts*. The notice from the assignees, to have any effect, should have been given to the bankrupt, or his attorney. They need not take notice of any

thing that passed between the assignees and the defendant.

Partridge, in support of the rule.—It is very true that a suit does not abate by the bankruptcy of the plaintiff. The assignees may take the benefit of it; and if their right accrues before judgment, they cannot have a *scire facias*, but must proceed in his name. From the moment that they gave notice of their intention to stand in the place of the bankrupt, his interest in the suit is transferred to them, and no further steps can regularly be taken except by authority from them. The defendant is harassed by this proceeding of *Roberts* without the authority of the assignees, while their order protects him from the claim of the bankrupt. The attorney has a lien on the papers for his costs; he is not compellable to deliver them up without payment, but this does not entitle him to proceed in the cause, if the client chooses to settle it otherwise. The lien claimed for money advanced, appears to have taken place subsequent to the commencement of the suit, and can therefore make no difference in the situation of the parties with regard to the defendant.

The rule was discharged, with costs.

MARKHAM *v.* WILKINSON.

Serjeants Inn Hall. *Wednesday*, 8th *July*.

STANLEY moved for a sequestration against the defendant, who was in the custody of the sheriff of *Yorkshire*, upon an attachment, for not paying the arrears of tithes pursuant to the decree in this cause.

THOMSON, Baron, objected,—that a sequestration only goes where the party is in the custody of the warden of the *Fleet*, not of a sheriff, and mentioned the case of Sir *Sidney Smith* v. *Meadows*, where it was so ruled by Lord *Bathurst*.

Stanley accordingly moved for a *Habeas Corpus*, in order to have him committed to the *Fleet*.

LEWIS and his Wife *v.* ROGERS.

Serjeants Inn Hall. *Friday*, 19th *December*, 1794.

A. tenant for life, with remainder to *B.* in tail, commits a forfeiture. *B.* in consideration of an annuity for the life of *A.*

BY the marriage-settlement of the plaintiff, Mrs. *Lewis*, with the defendant's late father, the estates in question were settled in trustees, for the husband and wife, for their respective lives, remainder to the first and other sons in tail. The

releases. The release is not against the heir of the body of *B.* and *B.* is therefore bound to make a good conveyance for the life of *A.* although the release contained no covenant for further assurance.

husband and wife levied a fine by the uses of which they took back estates for life to themselves, an estate for life to the defendant, (the eldest son,) with remainders over. The defendant, after his father's death, and the second marriage of his mother, brought an ejectment. The action was compromised; and the defendant, by an indenture then entered into, in consideration of an annuity of 60*l.* a year, *remised and released* to the plaintiff, all his right to the lands during the life of his mother. The defendant afterwards brought another action of ejectment for the premises. This bill was filed for an injunction, and to have a legal conveyance, according to the former agreement.

Richards, for the plaintiffs, insisted, that the estate for life of the wife being gone by the fine, there was nothing in her upon which the release could operate, and therefore, as the plaintiffs had given a valuable consideration, they were entitled to a legal conveyance.

Owen, for the defendants.—By the fine, the estate for life was not wholly gone, but might be avoided if the defendant chose to take advantage of the forfeiture; he has released his right so to do. That is the best legal conveyance; it operates to strengthen the possession of the plaintiffs, which was before valid against all the world but himself; a further conveyance would therefore be superfluous.

A doubt was suggested by Mr. Baron THOMSON, whether the issue of the defendant might not enter in case of his dying before his mother.

Owen.—They can only enter for conditions broken in their own time; against them the plaintiffs will hold as of their original life estate.

The *Court* was clearly of opinion with the defendant upon the other grounds; but seeing a doubt upon this point, desired the case to be argued again.

This cause coming on again;

Serjeant's Inn Hall. 8th *July*, 1795.

Richards relied on the case 1 Rolle's Abr. 855. (L) 2. 857. (R) 4. to prove that the issue of the defendant might claim the forfeiture incurred by the plaintiff, notwithstanding the release.

Owen.—The case cited was, where the ancestor released for the purpose of enlarging the estate of the tenant for life. At the time of the release, the remainder-man in tail in that case could claim no forfeiture, for none had then been incurred: then his release could not have the effect to bar the right of claiming the forfeiture; for a release does not bar a mere possibility, Shep. Touchst. 321, 324. In the case cited, if the tenant for life had committed a forfeiture after the release, a right of entry would have resided in the tenant in tail, during his life, and the release would only have had the effect of estopping his claim; but as soon as the estoppel was removed by his death, the right

of claiming the forfeiture might well be exercised by the heir. Here, on the contrary, the ancestor, the defendant, does not by his release enlarge the estate of the tenant for life; it merely operates to release the right of entry for the forfeiture, and therefore leaves the tenant for life in his original situation. But although a release which operates to enlarge an estate, may be for life or years, a release of a right of action or entry for one hour, is good for ever. Sheph. Touchst. 331. 2 Co. Litt. 280. *a*.

The release would clearly have barred the issue if the estate had been a fee simple, or a conditional fee before the statute *de donis*. That statute merely defends the estate from any attempt of the ancestor to "disherit" the issue; but a release of a right of entry for a forfeiture does not tend to disherit the issue, nor can be assimilated to it in principle. The statute gives a particular remedy to the heir in tail, upon alienation by the ancestor, the writ of *formedon;* this remedy cannot be shewn to have ever been applied in a case like the present, and we are therefore to presume that it does not extend to it. A right of entry is not given expressly by the statute to the heir against the deed of his ancestor, and therefore is not to be given by implication. Co. Lit. 233. b. The common-law remedy of entry for the forfeiture, is barred by the release; and therefore the heir has no mode of enforcing it.

Even if the heir could claim, the plaintiffs have no equity to be relieved against that hazard; they have purchased this title, such as it is, and there is no covenant for further assurance. There is no

necessary presumption that the release was meant to extend beyond the life of the son; and no parol evidence of the nature of the agreement can be admitted to contradict the effect of the release, nor to establish a different contract.

He also argued, from the inadequacy of the consideration, that the plaintiffs had no equity to have their estate secured.

Richards, in reply.—The present release operates in the same manner as every common lease and release. In the common conveyance the lease is made merely to give a possession in law upon which the release may operate: here the plaintiffs had actual possession, which superseded the necessity of a lease; then it operates as a lease and release to enlarge the estate as far as the releasor has power to do so: and this is in truth a question, whether by lease and release a tenant in tail can bar his issue of any right under the gift. By the forfeiture the estate for life was gone, but the possession remained, and can only be avoided by entry. The defendant has barred himself from entering, but he cannot restore the estate for life, nor bar his issue from entering, when the estate descends to them, unless by the usual modes of fine or recovery.

Although there is no covenant for further assurance, the same intent may be collected from other parts of the deed; for the annuity to the defendant, the consideration of the release, is to be paid, during the life of the wife to him or his executors.

MACDONALD, Chief Baron.—The clear intent of the parties to this transaction, was, that Mrs. *Lewis* should enjoy the estate for life, as if no forfeiture had been incurred; and the annuity which is granted as a remuneration for it, is properly made commensurate in duration. Then the intent of the parties being clear, and there appearing no fraud nor inadequacy of consideration to vitiate the transaction, the only question is, whether this intention has already been carried into execution?

The argument for the defendant would involve this absurdity, that while the ingenuity of the profession has been exercised for centuries, in devising the proper means to bar entails, and only three kinds of bar have hitherto been known, fine, recovery, and collateral warranty; a fourth, more obvious and simple than either, by release, has escaped their observation.

Since the statute *de donis*, the privity between the ancestor and the heir is hardly more than between a tenant for life and the remainderman. Except as to the power of leasing, of committing waste, of barring by fine or recovery, and some other particular privileges of a tenant in tail, he may be considered as a mere tenant for life. The release operates to convey all the interest of the releasor, and no more. The heir will inherit *per formam doni*, not at all affected by any contracts of the ancestor.

As the release does not convey all the interest in this estate which the parties have bargained

for, the defendant must execute such conveyances as will have that effect.

HOTHAM, Baron.—I am of the same opinion.

PERRYN, Baron, concurred in the same opinion.

THOMSON, Baron.—I am of the same opinion. The want of a covenant for further assurance is of no consequence. If a tenant in tail conveys by lease and release without such a covenant, yet he is decreed in equity to make a valid conveyance.

HURST *v.* THOMAS.

Thursday, 9th July.

If an injunction is granted for want of an answer, and the defendant afterwards demurs, and the demurrer is allowed, yet the injunction cannot be dissolved without the previous order.

THE bill was for a discovery and account, and for an injunction. The defendant taking an order for time, the injunction went. He afterwards demurred to the prayer of an injunction, and answered. The demurrer was allowed.

Simeon, for the defendant, insisted, that, on the allowance of the demurrer, the injunction ought immediately to be dissolved, as it appeared to the Court that the injunction ought never to have been obtained.

Martin contended, that by the practice, the injunction could not be dissolved, without a previous

order for that purpose, and undertook to shew cause next day.

The *Court*, on consulting with the officers, found this to be the practice; and it was so ordered, although they thought the reason of the thing strongly the other way.

Vide post, page 591.

Friday, 10th *July*.

R. *v.* CHRISTIE.

If an auctioneer's bond to the crown under 19 *Geo.* III. *c.* 56. *s.* 7. is forfeited, the penalty is due, and is not merely a security to compel an account.

THE defendant, as auctioneer, had given a bond to the Crown, as required by 19 *Geo.* III. *c.* 56. *s.* 7. and did not, within 28 days after each sale, deliver in the account required by the bond, according to the directions of the act.

The bond being put in suit, and judgment by default thereupon, *Rous* and *Fonblanque* moved, that the proceedings might be stayed, on payment of the principal, interest, and costs. They produced an affidavit, that from the multiplicity of Mr. *Christie's* business, it was impossible for him to have all the accounts and vouchers required by *s.* 12. ready to produce at the day, and that the accounts had since been delivered. They argued, that this was like the common case of a penalty in a bond to

enforce payment of money, which is always considered as a security only. In equity, wherever the matter is capable of a money compensation, it is done, and the penalty never insisted on. Non-payment, or non-accounting at the day, is most particularly a subject for compensation in common practice. The crown is bound to do the same equity which prevails between individuals.

The *Attorney General.*—The reason of requiring regular and short accounts is very obvious. If they are allowed to be behind one month, they may for five years, and the security arising from speedy investigation is lost. The revenue is raised for specific purposes, and is for the most part appropriated to services within the year, which depend upon the punctual payment of each branch of the revenue. The giving in an account at a subsequent period can never satisfy this intention of the legislature.

The consideration, how far the revenue of the Crown is to be treated in the same manner as the affairs of private men, would be an important question; but even between individuals, if I bind my steward to render monthly accounts, so as to shew my intent to consider the time of accounting as essential in the agreement, an account at the end of a year will not satisfy it.

MACDONALD, Chief Baron.—This application becomes of importance, from the infinite consequences which might ensue, if it were allowed. If we relieve the defendant, it must be on the universal ground, that where a statute gives a branch

of revenue, to be paid periodically, and imposes a penalty on failure of such payment, it is sufficient if the money is discharged at any subsequent time. This proposition cannot be supported. The revenue is periodical, to satisfy periodical expenditure. The time of payment becomes therefore essential. The case of auctions is particularly clear. It is considered as a ready-money transaction, and an immediate account is therefore required. The provisions of the act clearly and anxiously limited the time to 28 days. We cannot say that any subsequent account and payment will satisfy this clause. The multiplicity of Mr. *Christie's* business is no excuse, where his duty is clearly defined.

HOTHAM, Baron.—The possibility of a compensation does not arise in a case like the present. The army and navy must be paid. If the revenue is behind, their payment stops, but no compensation is made to them. Paying interest to the Crown is not therefore a compensation for the whole evil.

PERRYN, Baron, and THOMSON, Baron, were of the same opinion.

The rule was discharged.

N. B. This case now stands for argument in the House of Lords, upon an appeal.

The ATTORNEY GENERAL *v.* LANE.

RICHARDS moved for issues to try some facts in the cause. Being consented to by the *Attorney General*, the motion was granted without any objection being made.*

YEA *v.* YEA.

ON referring, for taxation, the bill of costs of the solicitor for the plaintiff, Lady *Yea*, about one-seventh was taken off.

Where the solicitor was guilty of great delay in bringing in his bills, the Court will not give him his costs of the taxation, although less than one-sixth part is taken off.

Partridge and *Hart* moved, that the solicitor might pay the balance due, and the costs of the taxation. They shewed great delays on his part, in giving in his bills; and that, by the report, it appeared, that the balance was against him from the sums he had received. They insisted, that the Court had a discretion over the costs, unless where more than one-sixth is taken off: that this was a summary mode of getting payment of the balance really due, instead of suing at law. Where a suit at law is brought, the plaintiff, upon proving a

* *Vide ante*, page 480.

balance in his favour, has costs. So this proceeding should follow the nature of that for which it is substituted.

Plumer and *Simeon*, on the other side, argued, that the Court had no discretion as to the costs. A solicitor is of course entitled to all the costs he is put to in the suit, unless where he is punished for personal misconduct, by personally paying them. As to taxing bills, the degree of misconduct which shall incur this penalty is defined by the legislature—an overcharge of one sixth part. Even if the Court had discretion over the costs in other cases, that must be exercised on proper grounds, for some exceptionable *items* in the account itself, not for delay, or other general misconduct in the cause. Here the taxation has been so rigorous, as to disallow several sums paid by the solicitor, fees to counsel, and others, which the Master thought unnecessary; yet the bill is only reduced one-seventh.

The *Court* thought the conduct of the solicitor not such as to deserve being punished by payment of costs, nor so pure as to entitle him to costs from Lady *Yea*.

HURST *v.* THOMAS.

Saturday, 11th July.

MARTIN shewed for cause against dissolving the injunction, that the answer was referred for impertinence. He insisted, that this was sufficient cause; for if exceptions are taken to the answer, that waives a reference for impertinence. Then we cannot except till this is disposed of; and as the exceptions, when taken, may be shewn for cause against dissolving the injunction, all proceedings necessarily previous to the filing exceptions must also be sufficient cause. The practice of the Court of Chancery is accordingly.

Vide ante, p. 585. The answer being referred for impertinence is a good ground to continue an injunction.

Simeon, for the plaintiff, contended that a reference for impertinence is no cause to continue an injunction. It is not as yet pretended, that the answer is not full; perhaps it never will be excepted to. He stated the practice of the Court of Chancery not to warrant this attempt.

THOMSON, Baron, read a case in this Court, 7th *November* 1787, in which a reference for impertinence was allowed as cause for continuing the injunction.

Richards, being asked by the Court, declared his opinion of the practice in the Courts of Chancery to be as stated by Mr. *Martin*; but did not recollect any case in point.

Johnson, *amicus curiæ*, mentioned a case in Chancery where it was so decided.

The injunction was continued.

Saturday, 11th July.

The ATTORNEY GENERAL *v.* Lord STAWELL.

By a grant to a ranger of a forest of *all wood blown or thrown down by the wind, and all dead wood, and the boughs and branches of trees, and wood in the said forest cut off or thrown down*, branches cut from trees felled for his majesty's use do not pass.

THIS was an information against Lord *Stawell*, as lieutenant or keeper of the forest of *Alice Holt* and *Woolmer* in *Hampshire*.

The grant of the office was by letters-patent, by which his Majesty granted, for a term of years, to trustees for the defendant, "a fee farm "rent of 31*l.* 2*s.* 11*d.* out of the manor of *W.*, "and the office of lieutenant or keeper of the forest "of *A. H.* and *W.*, to hold the same, with all of- "fices, liberties, privileges, wages, fees, rewards, "and other profits and commodities thereto be- "longing, with power to appoint a deputy or "deputies, and so many foresters or keepers as "heretofore were appointed, for the safe custody "of the said forest, and to have all manner of *wood "blown or thrown down by the wind, and all dead "wood, and the boughs and branches of trees and "wood in the said forest, cut off or thrown down, "and house-bote and fire-bote*, for himself and the "foresters and keepers."

By the covenants of the trustees in the grant, the defendant was bound "to repair the lodges, fences, "and inclosures, at his own expence; to pay the "salaries, stipends, and wages of the foresters, "keepers, and officers of the forest; to preserve "the game, and also the woods, timber, and other "trees, from cutting, chopping and spoil; and "so preserved, to leave the same at the end of the "term."

The ancient grants had been to the same effect: "Ac omnes et omnimod. boscus vento prostrat. "sive prosternend. et boscos mortuos, necnon "ramos et frondes quorcunq. arbor. et boscor. in- "fra forest. predict. et ear. utrampue *succis.* sive "*prostrat.* et in poster. duran. termin. predict. "succidend. sive prosternend." *&c.*

The former grantees, during the present century, had been accustomed to take the *lops*, *tops*, and *boughs* of all wood cut down by order of his Majesty, or otherwise, within the forest, or to have a compensation in lieu thereof. But this was sometimes disputed by the officers of the Crown. The compensation varied. Bark also was, in some cases, claimed, and allowed. It was plain throughout, that the officers of the Crown had paid little or no attention to the letters-patent, or to the nature of the right claimed under them.

Lord *Stowell* insisted, that he was entitled to the lops, tops, and boughs of all wood cut down within the forest, by order of his Majesty, or other-

wise, and admitted that he had taken them accordingly.

The *Solicitor General*, *Campbell*, and *Alexander*, for the Crown, contended, that the claim ought to be confined to the boughs and branches cut or thrown down from trees standing in the forest. The word *frondes* plainly relates to standing trees only. The expression in the *English* grants will bear no other signification. "*Cut off* or thrown "down" must relate to the branches, not to the trees. This is also an explanation of the *Latin* grants, in which the words *succis. sive prostrat.* are to be read, *succis*os *sive prostat*os, not *succis*orum *sive prostrat*orum.

The grant gives, in the *first* place, all *wood* thrown down by the wind, whether whole trees or branches. It cannot be understood to give, in the *second* clause, the branches of trees thrown down, for the whole tree was given by the *first* clause.

All the other emoluments granted to the keeper are precarious. Beasts taken in the forest, waifs and strays, honey and wax, right of fishing, fines and amerciaments, *&c.* and still more strongly the other emoluments arising from the trees, are all trivial and precarious. *Noscitur a sociis.* We cannot suppose that this clause means to give all the branches, which are the most valuable part of the whole wood.

If the Crown chose to cut down the trees in the forest, and carry them out entire, before severing the branches, the claim would be nugatory; but there cannot be a claim of right against the Crown, the benefit of which depends upon the pleasure of its officers.

If the lops, tops, and boughs go to the keeper, the Crown has only the main trunk of the tree. If any repairs or palings are wanted, for which the branches are proper, they must be bought from the keeper, and the Crown would be a loser by the forest, as in fact it has been. But the Court will not construe this grant so absurdly, as to pass the whole beneficial interest in the forest to the person appointed to preserve it for the Crown.

If there is an ambiguity, it is to be taken most strongly against the grantee, especially in the case of timber in a forest, which has always been carefully guarded, as one of the most useful parts of the royal demesnes, and over which the prerogative is particularly extensive. The Earl of *Rutland*'s Case, 8 Co. 56., establishes this general rule of interpretation of grants from the Crown, in the strongest manner. So the Earl of *Cumberland*'s Case, 8 Co. 167.; the Lord *Berkeley*'s Case; Plowd. 243, a. 2 Rolle's Abr. 194. 126.

Usage cannot be admitted to add to the grant, where the meaning is sufficiently clear without it; and here the usage is clearly usurpation on the one hand, and negligence on the other; for bark

also was allowed to the keepers, which is not now claimed.

Graham, *Plumer*, and *Ray*, for the defendant.

The grant of the Crown is to be construed like other grants, where the meaning is clear, and no forced construction can be admitted to overturn the plain and liberal sense of the words. In the forest laws, the principal view was always the preservation of the game. As to the other emoluments of the forest, the Crown has in general given the greatest share to the keepers; and these offices, being meant as beneficial grants, are to receive a liberal construction; not such as will bring it to a doubtful balance of profit and loss between the Crown and its grantee.

If the words of the grant are read "succis*orum* "sive prostrat*orum*," there is no doubt in the case: and this seems to be most consistent with the rest of the grant. In the former clause, all *wood* thrown down *by the wind* is given. Then it would be absurd to give afterwards the branches thrown down by the wind, for they passed before. But if it is understood that, in the first clause, all wood thrown down by the wind is given, and that the second clause includes the branches of all trees, whether *cut down*, or *thrown down*, by whatever means, the whole grant is consistent.

But supposing the words to be "succisos sive "prostratos," the meaning will be nearly the same.

It is then a grant of the branches cut off or thrown down from all trees in the forest. There is no expression limiting it to the branches of standing trees. The words *arborum et boscorum* imply the generality of the grant "of all *living or dead* trees." In the former clause, where only trees blown down were given, the word *boscos* alone is used.

But if there were any doubt, the usage is certainly a strong evidence, at least, of what the *Latin* words were, which, by the contractions in the writing, are now ambiguous. The usage has been of sufficient duration to bar in a writ of right.

The *Court* thought it perfectly clear, that the grant meant only to give the branches cut off or thrown down from trees standing in the forest. Trees "in the forest," are trees growing there.

The usage is said to have been otherwise; but there does not appear to have been any settled usage upon the subject. It is clear, that the grant has never been attended to on either side, and therefore their conduct can have little or no weight in explaining it.

Grantee for years of the rangership of forest is not entitled to estovers as a tenant for years

Another question upon this information related to hay-bote, cart-bote, and plough-bote, claimed and taken by the defendant, and house-bote and fire-bote, taken without being assigned by the regarder, or any officer for the Crown. No regarder had been appointed in the forest for thirty years.

The hay, cart, and plough botes were claimed by him as incident to the nature of the office. Hay-bote is for keeping up the inclosures, which the lieutenant is bound to do, and therefore shall be presumed to have every thing necessary for that purpose. So cart-bote and plough-bote are incident to this grant. Here the keeper is to be considered as having a term in the forest, for which he pays a very high render, the salaries of the officers, repairs of the premises, and preservation of the game and timber. The land that is the subject of the grant must be subject, like all other land, to the common rights of tenants for years, among which rights these estovers are. Dyer, 19. b. Co. Litt. 41. b. So, by the same case, the particular botes given do not exclude the rest, for it is only an affirmation of what the law gave him before.

The having the wood assigned for fire-bote and hay-bote is not necessary, 4 Inst. 300. It is there said, the regarder should, in convenient time, afterwards have notice. But, in the present case, there was no regarder; and therefore the want of having the timber assigned, or of notice afterwards, is not the fault of the defendant. He is not to lose the benefit of estovers, because the Crown neglects to appoint a regarder.

It is in evidence, that these profits have been taken by the former keepers, as far as memory can reach; and there is no evidence of their ever having been withheld, or not enjoyed by the keeper. Then we are entitled to claim under the general

words in the grant, of all *liberties, privileges*, &c. belonging to the office.

For the Crown, it was insisted, that the claim should be limited to the words of the grant. This is not in the nature of a demise. The possession of a forest remains in the Crown, and the keeper is only the officer who is to preserve it. If no estovers had been given, none could have been claimed; and whatever the keeper is bound by his covenants to perform, he must do at his own expence.

The rule, that the timber in the forest shall not be cut down without the view of the regarder, is established in 4 Inst. 297, 299. *Hoare's* Case in Sir W. Jones, 269. Manwood's Forest Laws, 371, 372. By all which cases it appears, that even the woods of a subject within the forest cannot be cut down, without view of the forester or regarder, lest the game should lose the necessary cover.

If the Crown neglects to appoint a regarder, no right arises to the keeper, or others, to cut the timber at their pleasure; for no laches are imputable to the Crown. It was the duty of the defendant, as having the general superintendance of the forest, and as being obliged to pay the salaries, to see that the offices were filled up. Having an interest in the subject, he should have applied to the Crown to appoint a regarder; and we are to presume, that the Crown would have done what was right.

MACDONALD, Chief Baron.—The nature of the defendant's interest in the profits of the forest, is

marked by the letters-patent, where they describe it as an *office* to be held by him. This, *vi termini*, imports, that it is held by him, not for his own benefit, but for that of the Crown. He has a certain salary and emoluments allowed him, for which he is to pay the salaries of all the inferior officers, and to keep the premises in repair.

It is clear, that the grantee can be entitled to no other benefit than what the grant expressly gives, or can be clearly inferred from it. It is not a demise of the forest, and therefore the right of the tenant on a demise of land does not apply to the case.

But it is insisted, that, by the practice which has obtained in the forest, these estovers may be claimed under the general words, as customary emoluments of the office. But the evidence proves a great deal too much. They say the practice has been, to take timber for all the estovers, without stint, and without any assignment. This is not claimed by the defendant; and the amount of the evidence is, therefore, no more than this, that the officers of the Crown, who ought to have protected its rights, have long been in the habit of neglecting their duty. The taking has been clearly illegal, being without assignment or notice, and therefore cannot be evidence of a right. By the passages cited from *Manwood*, it is perfectly clear, that a private person having woods within a forest, cannot cut them for estovers, without view of the officers; *a fortiori*, this cannot be done by the defendant, who has no personal interest in the

forest, and is appointed to preserve it for the Crown.

The circumstance of there being no regarder cannot avail him. He has not used the proper diligence to get that office filled; and if he had, even that could not have given him a right to take the timber at his own pleasure. Had he, in such a case, used his utmost endeavours to have the interests of the Crown protected, by the view of its other officers in the forest, it would have been hard to have directed an account against him; but no such circumstances can be shewn in his favour.

The ranger cannot cut timber for estovers without the view of the regarder, even if that office is vacant, where he has taken no pains to have it filled.

The defendant had cut down green wood, and exchanged it for seasoned timber, to repair the house. He had also added *new* buildings, and enlarged the old, upon the premises, and fenced a new inclosure, with wood taken from the forest. As to these also, the *Court* held it perfectly clear, that an account must be taken against him.

To cut green timber and exchange it for old for repairs, is not within the right of estovers.

LYGON *v.* STRUTT.

11th *July*,

THIS was a suit for tithes of common lands, inclosed by a late act of parliament, lying in the forest of *Duffield*, in the county of *Derby*. The plaintiff, the impropriate rector, derived his title from the College of *Newark*. The defendants

A book found in the herald's office, purporting to be an account of the possessions of a monastery, is not admissible evidence of that fact.

4. Cr. J. 540.

insisted, that the place was extra-parochial, and that the tithes of the forest had formerly belonged to the Abbot of *Tutbury*, had come to the crown on the dissolution of that monastery, and had since been granted to the tertenants. They produced an ancient manuscript, found in the herald's office, purporting to enumerate the possessions of the monastery, and giving an account of the title to these tithes. The counsel for the plaintiff protested against their right to produce this evidence, but consented to admit it.

In giving judgment in the cause, the *Court* said that this book could not have been received in evidence, but by consent.

Where a title to tithes in a lay-man is clearly made out, though not supported by possession, the Court will decree an account without an issue.

The Court, upon the whole case, thought it perfectly clear, from the ancient documents, as well as from a great preponderance of modern circumstances, and of evidence of reputation, that the place in question was within the parish and rectory of *Duffield*; and although the land-tax for this part of the parish was separately assessed; although there were many instances of refusal of tithes, and no continued or clear possession; and although there was some contradictory evidence as to reputation; yet the Court decreed in favour of the plaintiff without an issue, and directed an account.

The Attorney General *v.* Richards.

Where a nuisance and purpresture in a harbour are committed, an information in equity lies to abate it.

THIS information stated, that by the royal prerogative, the sea and sea-coasts, as far as the sea flows and reflows, between the high and low water-marks, and all the ports and havens of the kingdom, belong to his Majesty, and ought to be preserved for the use of his Majesty's vessels, and others, and that his Majesty has the right of superintendency over them, for their preservation.

It then stated, that the defendants, in 1784, erected a wharf or key, two docks, and other buildings, between high and low water-mark, in *Portsmouth* harbour, adjoining to *Gosport*, so as both to prevent the boats and vessels from sailing over that spot, or mooring there; and also to endanger further damage to the harbour, by preventing the free current of the water to carry off the mud. The information therefore prayed, that the defendants might be restrained from making any further erections, that those made might be abated, and the harbour restored to its ancient situation.

The defendants claimed to hold the soil of the place in question, under letters-patent, 14th *July*, 4 *Ch.* I. These letters-patent recited, that a commission had issued to the sheriff of *Hampshire*, and other persons, to examine all the mud-banks and sea-marshes, within a certain district, on the coast; and, by a legal inquest, to inquire and report, whether any, and what part of them, might be reco-

vered from the sea, without injury to any person. They made a return, certifying, that certain mud-lands, and lands covered with the sea, around the town of *Gosport*, might be recovered from the sea, to the great benefit of the nation, and without injury or damage to any person. The letters-patent on the foot of this return, and in consideration of the services of the grantees, and of the money to be by them expended in recovering from the sea the lands granted; of the special favour, certain knowledge, and mere motion of the King, did grant to *Mary Wandesford* and *William Wandesford* certain mud-lands, and lands overflown with the sea, (among others, certain lands overflown with the sea, on each side of *Gosport*, and there fully described,) and also discharged the same from all claim of tithes from the Crown, during seven years from the date of the lands being recovered and embanked from the sea, rendering a rent of 4d. *per* acre for every acre recovered till the year 1630, and from that period, the rent of 1s.

Two of the defendants also pleaded possession of the place in question for more than sixty years.

It was much disputed, upon the evidence, whether the place in question was included within the grant, or not? The defendants did not produce the conveyances, and the deduction of title from the *Wandesfords*, to the persons from whom they derived immediately their claim. They only produced the conveyance of this parcel of mud-land to themselves, by persons stated in the conveyance to be entitled under the letters-patent.

It was admitted, that the defendants, or those under whom they claimed, had had possession of a piece of mud-land adjoining to the piece in question, for upwards of sixty years. The ground in question had never been recovered from the sea, till the erections complained of by the bill, and which were made after notice of the intention to dispute the right; but the defendants had had possession, by keeping floats of timber moored there, for some time before.

It was proved, that the embankment was highly prejudicial and dangerous to the harbour, and that it was peculiarly hurtful to the town of *Gosport*, by preventing boats from coming immediately up to the town, on that side, as formerly.

This case was argued during the term by

The *Attorney General* and *Solicitor General*, *Alexander*, *Campbell*, and *Percival*, for the Crown. The *prima facie* right of the Crown to all ports and arms of the sea, and to the soil thereof, is clearly established. The nature of that right is explained by Lord *Hale*, in his treatises *De Jure Maris* and *De Portibus Maris**. It is there shewn, (p. 12.) that the King has the soil of the sea-coast and havens, and entitled to the profits thereof as a *jus privatum*; and so far as it is considered in that light merely, he may grant it away. But he has also (p. 81. 83. 88, 89.) another right in the arms of the sea, the right of a free passage for all his subjects, and

* See Mr. *Hargrave*'s Law Tracts.

others, and of having all havens, and branches of the sea, preserved from nuisances, for that purpose. This is a right similar to the King's property in highways, a mere *jus publicum* vested in the King for the use of the subjects. This, by its nature, is unalienable, and shall prevail against any claim set up against it. Lord Hale, *De Jure Maris*, 12. *De Jure Portibus*, 85.

Where any invasion of the *jus privatum* of the Crown, in arms of the sea, or ports, takes place, by encroachment on the soil, it is a purpresture. Glanville, l. 9. c. 11. Spelm. Gloss. Purpresture. Where the *jus publicum* is violated, it is a nuisance; and it frequently happens, as in the present case, that a nuisance in a port is accompanied with a purpresture, or encroachment on the soil of the Crown.

All nuisances may be abated by the mere act of any individual; but in the case of the Crown, the more proper and decorous mode of proceeding, is by information in a court of justice, for ascertaining the right. This may be done by information in equity, as well as at law; and the nuisance may be decreed to be abated.

In the case of a purpresture, the same mode of proceeding has been held proper. In case of a decree for the Crown, an inquiry is directed, whether it be most beneficial for the Crown to abate the purpresture, or to suffer the erections to remain, and be arrented. Where the purpresture is also a nuisance, the Crown has not this election; for it cannot sanction a nuisance.

In the case of the *Attorney General* v. *Philpot*, in this Court, 8 *Ch.* I. the information stated the Crown to be seized of the river *Thames* where navigable and an arm of the sea, for the use of the ships resorting there; and that the Crown was also seized of the soil between high and low water-mark: that the defendants had lately encroached upon the soil of the King, and had thereby stopped the course of the river, and rendered it less convenient for shipping, and for their mooring in the pool. The information therefore prayed, that the encroachment might be declared a purpresture, and be abated as such. The defendants set up a defence, that they had had the leave of the High Admiral, and that their encroachment was no damage to the shipping. The Court declared, that purprestures on navigable rivers ought to be abated. They accordingly directed a commission to inquire, whether the fact complained of was a purpresture. The Commissioners returned that it was, and the encroachment was abated.

So in the case of *the City of Bristol* v. *Morgan*, cited in Lord Hale's treatise *De Portibus Maris*, p. 81. The bill stated the benefit of navigable rivers for commerce, and the right to have all purprestures therein abated. It was proved, that the defendants had erected houses on the banks of the *Avon*, so as to strengthen the river, and to incommode the passage to and from the shipping to the shore: that these houses also intercepted the commerce to the town, and tended to defraud the revenue. The encroachments were ordered to be abated, on the ground of the damage to the city;

but were never destroyed, some composition having probably been entered into. A similar case is there cited to have been determined between *the town of Newcastle* and *Johnson*, relative to *the* right of towage on the river *Tyne*.

In *Churchman* v. *Tunstal*, Hard. 162., the plaintiff sued by bill, as tenant of an ancient ferry under the Crown, to suppress a new ferry set up in the neighbourhood, to the damage of his ancient ferry, and to obtain an injunction against renewing it. The Court there dismissed the bill, as seeking to establish a monopoly; but another bill being afterwards filed for the same matter, the Court, on 7th *April*, 14 *Ch.* II. (Lord *Hale* presiding in it,) decreed, that the new ferry should be suppressed, and that the defendants should not have liberty to use any ferry-boat, to the annoyance of the plaintiff's ancient ferry*.

So in the anonymous case, 3 Atk. 750., where it was moved to issue an injunction against building a small-pox hospital in *Cold Bath Fields*, Lord *Hardwicke* lays it down, that, in the case of a public nuisance, an information by the Attorney General is the proper remedy. He was then sitting in equity, and must be understood to mean an information in a court of equity. Besides, he refused the injunction in that case, upon the want of merits, not from any doubt of his jurisdiction. So *Coulson* v. *White*, 3 Atk. 21., establishes the authority of equity to abate nuisances. *Ryder* v. *Bam-*

* See the Minute Book, 1668, p. 181.

tham, 1 Vez. 543. Sir *Lister Holt*'s case, 2 Vez. 193.

The grant is bad on another ground. The King, in his *jus publicum*, had possession of the soil covered with the sea, by the passage of his subjects in ships over it. But there was no possession of the soil under the *jus privatum;* and the right to enjoy it being then only a possibility, when it should be recovered from the sea, could not be granted to a subject. The *Attorney General* v. Sir *Ed. Fermer*, 2 Lev. 171. Sir T. Raym. 241. Much less could one subject transfer this right to another; for, between them, there is not even a colour of possession. It is within the rule against buying pretended titles.

The grant can at most give only a right of entry; but if I convey an estate, and die before entry by the purchaser, the right of entry is gone. So here, the right of entry could only be during the life of King *Charles* I.

The nature of the grant shews, that it was to be reduced into possession within a reasonable time, if at all. The grant proceeds on a surmise of the public benefit to accrue from embanking the mud-lands. The tithes were not to be demandable for seven years after the embankment. The rent from 1630 was to be increased. Then the embanking within a reasonable time, was considered as a condition annexed to the grant, and has not been complied with during 150 years. The non-payment of the rent during that period proves, that there was no possession, actual or constructive.

But even if this passed by the grant, the grantee has since thrown it open for the public use, by allowing it to continue an open passage for ships during so long a period. The King has acquired a new right to it, by the possession of his subjects in passing and repassing over it for 150 years. A place thrown open to the public, as a highway, cannot, after long enjoyment, be shut up.

The possession of another part, under the letters-patent, during 60 years, cannot inure to give possession of the whole; nor can entry upon any part, under the grant, be considered as entry upon this land which remained overflowed. If there is a conveyance of *Blackacre* and *Whiteacre*, entry upon *Blackacre*, in the name of both, is good. But this supposes that the entry upon *Whiteacre* was also possible. But if *Whiteacre* was then held by a disseisor, so as that the feoffee could not enter, the entry upon *Blackacre* does not inure to both. Here the entry upon this parcel of land was impossible, till recovered from the sea. Besides, the King, by the passage of his subjects, has had actual possession of it, so that the entry upon the other parts of the grant cannot be extended to this.

The defendants, in order to avail themselves of the letters-patent, must either deduce to themselves a regular title against the Crown, or must shew, that the subject was once severed from the Crown, and that they are in possession, which presumes all the mesne conveyances. The defendants do neither. The deduction of title, under the letters-patent, to the persons under whom the defendants imme-

diately claim, is not shewn. It is clear these persons never had any possession of this spot. Then there is no privity, either by title or by possession, between them and the grantees, and the defendants may be wholly strangers to the letters-patent.

Even if they claim under the letters-patent, yet these erections must be abated; for it is clear that the King cannot permit a public nuisance, as this is proved to be. *De Port. Mar.* 85.

Piggott and *Richards*, for the defendant.—It is clear, that as far as the *jus privatum* of the Crown is concerned, a grant of the soil of the sea-coast, or of a harbour, is good. But, if the argument be true, that no possession could ever be taken of the soil while overflown, no grant or feoffment of land covered with water could ever be good.

But on the contrary, Lord *Hale* says, (*De Port. Mar.* p. 85.) that there are a thousand instances of licence from the King to build new wharfs or keys, in which licence the right to the soil, within high and low water mark, or beyond, is necessarily included.

It is agreed, that a great part of the lands granted have long ago been embanked; but possession of a part is possession of the whole; and we are therefore entitled to hold by length of possession, in corroboration of the grant.

This is a grant of lands to be afterwards recovered from the sea. It implies, throughout, that

immediate embankment of the whole was not expected; and, as no time is limited, it is still open to us to take advantage of it. Our title is sufficiently made out; for the soil being once granted away from the Crown, mere possession is evidence of the right of the person entitled. To produce the whole conveyances is impossible; for this is a small parcel out of an extensive grant, and we are not entitled to the possession of the deeds under which the whole lands granted are held. It appears, that the land immediately adjoining has been embanked for more than sixty years, and floats of wood used to be moored over the place in question, long before the erections now complained of. This was a possession; for it prevented the free passage over that part of the harbour. Then the mode of trying the right to the land, when the possession was in the subject, is by suit at law. As to this point, it is in the nature of a mere ejectment bill.

Besides, the information does not pray that the soil may be declared to belong to the King, which would be the proper prayer, if the right to the soil were in question. It merely prays, that the erections may be abated, which is the proper prayer on a complaint of nuisance, if at all; and as a nuisance is charged in the bill, the only matter in issue must be that which relates to and supports the prayer of the bill. But as to the question of nuisance, the title to the lands is perfectly immaterial, and therefore our possession, not being properly put in issue, remains unimpeached.

As to the question of nuisance, that is a matter completely foreign to the jurisdiction of a Court of Equity. It is a breach of the general police of the kingdom, and as such is considered as a crime, and to be prosecuted in the criminal courts. But a Court of Equity cannot hold cognizance of any criminal matter. It never was attempted to prosecute a suit in equity, to remedy any other public mischiefs—as to prohibit rope-dancing, plays, &c. or to abate a nuisance or purpresture on the highway. That is exactly like the present case, and is every day prosecuted in the ordinary criminal courts. Questions of nuisance are particularly improper to be discussed in equity, because the remedy at law is complete.

It is true, that in the precedents cited, such informations have been allowed in the case of purprestures; but these were in the time of *Ch.* I. when the right to trial by jury was not so firmly established as it now is. Besides those were, in part at least, suits as to a civil right, and therefore gave a colour to the jurisdiction. Lord *Hale* expressly declares, (p. 85) that the question of nuisance is a question of fact, and not of law: that is, that it ought to be decided by a jury, not by the court. In the cases relied upon on the other side, the court directed a commission to enquire into the fact. The mode now adopted in Courts of Equity is to direct an issue in such case, instead of granting a commission; and those authorities, therefore, entitle us to expect, that the Court will not decide against us, without an issue.

11th *July*. MACDONALD, Chief Baron, this day delivered the opinion of the Court, (after stating the case,) to this effect.

It is clear that the right to the soil, between high and low water mark, is *prima facie* in the crown. Then the *onus* of proving an adverse title is thrown upon the defendants.

This they attempt to do, under the letters-patent: but upon the whole evidence, as far as we can now trace the meaning of the grant, this spot does not seem to have been included in it. The return of the inquisition finds that the embanking the lands granted would be of no detriment to any person. But that is not consistent with the evidence here, that the embanking this land would hurt the harbour, and prevent the passage of boats up to the town of *Gosport;* then the inquisition and grant must have related to other lands; and the grant, in describing the parcels, gives the mud-lands on each side of *Gosport*, studiously passing by the town; so that it does not appear that this land was ever meant to be granted from the Crown.

But the grant appears also to have been made for the sake of the public interest, in having this land brought into cultivation. The exemption from tithes for seven years shews the intent to have been, that it should be put into a state capable of producing titheable matter. The rent also proves the embankment, and regaining from the sea, to have been the condition and spirit of the grant. That has not been complied with.

But the defendants do not deduce their title from the grantees: they shew a title under *A.* and *B.*, who, they aver, were entitled under the grant; but the *onus* of establishing their claim being upon them, they must shew how *A.* and *B.* derived that right. At present it appears to be the conveyance by mere strangers. The lease and release from them recites the releasors to be entitled under the grant; but this is no evidence of the fact.

They next went on the evidence of possession. But it appears, that instead of their having possession, the Crown has, by its subjects, had possession of the place in question; and its being open as a public passage from 1629, precludes any right now to question the title of the Crown. If the grantees ever had any title, it has been abandoned. It would be extremely inconvenient if old dormant grants of the Crown could be enforced in this manner, when the evidence of their nature and extent is lost by lapse of time. Upon the whole, we are of opinion, that the defendants have not made out any title to the soil of the place in question.

Where there is a grant from the Crown of land to be recovered from the sea, and it is left unembanked for a long space of time, as a common passage for ships over it, the right of the Crown revives by the length of possession by its subjects.

But it is argued, that the prayer of the bill being to abate the erections as a nuisance, the Court can only consider that question, as alone supporting the relief prayed; and it is contended, that this Court cannot give such a decree, or at least not without the intervention of a jury, the question of nuisance being, as laid down by Lord *Hale*, a question of fact, and not of law. That may be, where the question is of nuisance only, and the evidence doubtful. But the cases cited, and those which

Lord *Hale* has given us, in the treatise *De Portibus Maris*, clearly prove, that where the king claims and proves a right to the soil, where a purpresture and nuisance have been committed, he may have a decree to abate it. The case of *the River Thames*, and the *Bristol* and the *Newcastle* cases, cited by Lord *Hale*, are all authorities for this proposition. The case in Hardr. 162, was at first determined otherwise; but the reporter doubts its authority, as it was afterwards overturned. It is objected that these cases were in the time of *Ch.* I.; but it must be remembered, that Lord *Hale* determined some of them, and approved the rest. Supported by such authority, we do not hesitate to declare, that the soil is the property of the Crown; and of course, to decree, that these buildings be abated.

Deverell's Case.

Vide ante, p. 483.

The Court having declared their opinion against the application of Mr. *Deverell*, a second application, in the same matter, was made on behalf of Sir *Richard Heron*, the treasurer's remembrancer, to be heard *pro interesse suo*. The *Court* said, that they had not entertained any such doubt, on the first argument, as would lead them to wish a second; but as Sir *Richard Heron* was materially interested, and had not been heard, and upon his offering to

undertake not to proceed in any other shape, the matter was again heard.

In addition to the former evidence, the following were produced: first, an order, 6 *Ed.* II., by the Court, for the payment of the salaries of the two remembrancers; *to the treasurer's remembrancer forty marks for him and his clerks.* Secondly, an ordinance of the Treasurer and Barons of the Exchequer, 19 *E.* II., whereby it was recited, that the business of the treasurer's remembrancer required him to retain two other clerks, and an addition of salary was granted him for that purpose. Thirdly, a manuscript in the British Museum, written in 1572, intitled, "The "Offices and Officers' Names of the Court of "Exchequer, and of whose gift they be." Of the Queen's gift, &c. "Of the Queen's Remem- "brancer's gift,—the attorneys and clerks of "the Queen's Remembrancer's Office." "*Of* "*the Treasurer's Remembrancer's gift—the at-* "*torneys and clerks of the Treasurer's Remem-* "*brancer.*" A minute was produced in the minute-book, 2 *J.* II. by which the Court ordered, that no foreigner should be admitted a clerk in the office, when there was any one who had served a clerkship ready to take the office. This minute appeared obliterated in the book, a pen being drawn across it. A copy of the minute, not obliterated, was produced from the papers of Mr. *Madox*, who was one of the clerks in this office. No such order was to be found in the order-book of that date.

The case was now argued by Serjeant *Adair*, *Partridge* and *Richards*, in support of the application. They contended, that the clerks were originally the mere servants of the remembrancer, and were still to be considered, for this purpose, in the same light. The documents produced shew that their salaries were received from him, and not from the public. Mad. Hist. of Exch. 716. The oath of the remembrancer is taken in Court, to serve the King faithfully in the office. The oath of the clerks is taken privately in the office, " to behave dili- " gently and truly as clerks in the office, under the " master of the same, in all that appertains to them " as clerks in the said office; and if they shall " know any thing done or imagined to the hurt of " the master of the said office for the time, they " shall do him thereof to wit," &c. This is the oath of a servant to his master.

The manuscript in the British Museum implies that the remembrancer has the absolute appointment of these clerks; they are said to be of his " gift." That was probably taken on the occasion of the orders established by Queen *Elizabeth*, for this office, which are recited in 1 *J.* I. *c.* 26. That statute, proceeding on the foot of these orders, enacts, that breach of the same, by the remembrancer or his deputy, *his* or *their* clerks, the remembrancer shall forfeit 20*l.* So, in the 23d section, he is made responsible " for himself and the clerks " of his office." These clerks he is bound, by 2 *H.* VI. *c.* 10., to appoint; and his being responsible for them shews that the appointment was under his absolute control. So, by 5 *R.* II. *c.* 15., he

swears to the faithful discharge of the whole duty.

If it is admitted, that the remembrancer may judge of the fitness of the person for whom he is to be responsible, it follows, that he has the power of rejecting persons unfit: but the office is not to be vacant; he must therefore have the power of appointing other persons to fill it. It frequently happens that one has a power of appointing a deputy, or other officer, whom he cannot afterwards remove, though the appointment is arbitrary, 1 Sid. 74. Therefore the circumstance of these clerks having a freehold in their offices is immaterial.

If the remembrancer himself is unfit, or appoints unfit deputies or clerks, the Court may reject the appointment; Hardr. 130. Therefore the public is in no danger.

These are not properly attornies, in the legal sense of the word. They are merely put in place of the accountants to the King, in passing their accounts; as a letter of attorney authorizes any person to act in the place of another, in ordinary affairs. And it appears, from several gentlemen at the bar being clerks in the office, that they are not regular attorneys. The statutes which require attorneys to be articled five years, *2 Geo.* II. *c.* 23. *s.* 27., and *22 Geo.* II. *c.* 46. *s.* 9., expressly except the clerks in this office. No other statute has made it necessary that they shall serve five years; and it is evident, that in the original nature of this office, no particular qualification of that sort was required.

The order 2 *J.* II. had probably never been finally made by the Court; perhaps pronounced, and revoked before the rising of the Court. The appearance of such an order erased, seems to indicate that, upon the consideration of the subject, the Court had not agreed to that opinion, and had therefore refused to make the order.

Then the only ground of objection to the claim of Mr. *Deverell*, is the practice sworn to. But two instances to the contrary of that practice, in the cases of *Barber* and *Mayhew*, (*Vide ante*, page 486.) contradict that universality of practice, which alone can give it any binding force.

Burton and *Plumer*, on behalf of the other clerks. —The responsibility of the remembrancer does not necessarily imply an absolute control over the appointment. *Humphreys* v. *Paget*, 1 Keb. 689. If it did, it must also extend to enable him to dismiss or pass over, in promotion, one before admitted into the office, if the remembrancer thought he could no longer depend upon him; but that is not contended, and is negatived by the cases.

Fitness for an office is seldom vague, and to be determined by the mere discretion of the person appointing. It is generally defined, and the power of appointment limited by the legal rule as to fitness. In offices which concern legal proceedings, experience is the general requisite; and even the King cannot appoint, in many instances, where this sort of fitness is wanting. Co. Litt. 3, b. 2 Roll. Abr.

153. And such appointment may be rejected by the Court. Dyer, 150. b. Hob. 148. 2 Anders. 118.

They act in a capacity incompatible with the character of mere clerks of the remembrancer. Upon any suit between the Crown and a subject in this office, one of them acts for the Crown, another against it. If they are the clerks of one master, he is attorney on both sides.

MACDONALD, Chief Baron.—The Court here granted a second hearing of this case, upon the earnest desire of a very high officer of the Court, to be heard by his counsel upon the subject, and not from any doubt that we ourselves ever entertained upon the subject. 11th *July.*

As a reason for the re-argument, it was suggested, that new circumstances of proof, and new arguments, would be adduced, which had not before been offered. We have accordingly gone through the case again, but have heard nothing new of any weight, at least from that side which makes the application.

In giving a second time the opinion of the Court, in a case so long and circumstantial, I shall confine myself to those points which have not before been disposed of, and to the additional arguments now adduced.

The counsel for Mr. *Deverell* have endeavoured to degrade this office into that of a mere servant to

pears to have been recognized and adopted by the Court of Common Pleas; and, in both these cases, it was adhered to, in opposition to contrary appointments by the Crown itself. And so in this Court, the general opinion, and the general practice of this and of the other offices of the Court, have been conformable to the same doctrine.

It has been argued, that no usage can have effect to bind this question, unless such as could be legally set up as a prescription. I cannot agree to this argument. In offices in every Court, new customs and new usages grow up, and get firm root by continuance much short of legal prescription. Thus, in the Court of Chancery, since Lord *Northington's* time, the register's clerks have uniformly succeeded to be registers in regular rotation. The office itself is probably within the time of legal memory, and this practice has only prevailed since the time which I have mentioned; yet I apprehend it is now too firmly established to be shaken, and the Duke of *St. Albans*, in whose gift the office is, would hardly venture to break through the succession.

The violations of the practice in this office have not been such as can establish a contrary rule. *Mayhew's* case was where he claimed to be admitted as the only person then capable of holding the office. The Court were of opinion that he had not made out his claim, and that opinion seems well founded; for *Mayhew's* claim allowed the remembrancer no choice at all. He may have a right to wait till there shall be a fit person to take the place. Perhaps

there may be no want of a clerk, and then it does not appear that the Remembrancer is bound to admit any one to the office. The Court therefore determined that the claim, in that case, was not substantiated; but they did not determine, that where there are many fit persons, out of whom the choice of the Remembrancer may be made, he is entitled to pass by them all, and choose a stranger.

Barber's case was never properly discussed; it was rather settled by accommodation among the parties, than determined by the Court; and accordingly no general rule can be drawn from it.

Upon the whole, it appears that a strong analogy subsists between all the offices of this Court, and that the same analogy pervades the other Courts of *Westminster-hall*. The practice of this Court has been clear and uniform, with the single exception of *Barber*'s case, which cannot be considered as a precedent. We therefore see no reason to retract the opinion which we formerly pronounced.

The order was refused.

INDEX

TO THE

PRINCIPAL MATTERS

IN THE SECOND VOLUME.

A.

Abatement.

1. SCIRE *facias* against two, on a joint and several recognizance of four to the Crown, without averring the others to be dead. This may be objected to without a plea in abatement. *Aliter* on a bond.
   The King v. *Young.* Page 443
2. Bankruptcy of the plaintiff does not abate a suit in equity.
   Davidson v. *Butler.* 460 *n.*
3. But see *contra, Sellas* v. *Dawson.* 458 *n.*
4. If a defendant in equity becomes bankrupt, it is no abatement.
   Rutherford v. *Miller.* 458

Account.

See EXECUTOR 2.

Agent.

1. On a bill for discovery and injunction, the defendant, plaintiff at law, admitted himself to be a mere agent for the other defendants, and ignorant of the transaction; an injunction was moved for as of course, till the coming in of the answers of the other defendants, who lived abroad; but there appearing a probable danger of losing other material evidence by the delay, it was refused.
   Vandam v. *Munro.* Page 502

Agreement.

1. An agreement for the sale of lands and chattels, if void as to the land by the statute of frauds, is void *in toto.*
   Cooke v. *Tombs.* 402
   S. P. *Lea* v. *Barber.* 425. *n*

Alien.

1. Plea of alien enemy to a bill of discovery is good.
Daubigny v. *Duvallon*. Page 462
2. In such a plea it is sufficient to state the war subsisting with *France*, and that the plaintiffs are *Frenchmen*, *aliens*, and *enemies* of the king.
Ibid. 462

Amendment.

See ANSWER 1. PRACTICE (in Equity) 4.

Annuity.

See SECURITY 1.

Answer.

See PRACTICE 5.

1. The Court will not allow an answer to be amended in any case, nor a supplemental answer, unless on new matter arising, or a sufficient reason appearing for its not being inserted originally.
Tennant v. *Wilsmore*. 362
2. In an answer to a bill for tithes, it is sufficient if the plaintiff has notice of the general nature of the defence.
Atkyns v. *Lord Willoughby*. 402
S. P. *Baker* v. *Athill*. 493
3. Upon discovery of new matter in an account, the Court will permit a supplemental answer after replication.
Moggridge v. *Hodgson*. Page 443
4. If one puts in his answer without oath, as being a quaker, the Court will not enquire whether he is such; for he is concluded from denying that fact on an indictment for perjury in the answer.
Marsh v. *Robinson*. 479
5. An answer, insisting on a modus (for a place described only by a map annexed) in lieu of all tithes, *or* at least of tithe-hay, is good.
Clarke v. *Jennings*. 498

Appointment.

1. A feme covert, entitled to the interest of money for her life, with power of appointment as to the principal, receives a part of the principal for her support, and appoints to her husband; he cannot claim this part of the principal.
Randal v. *Hearle*. 363

Arrest.

See PRACTICE (at Law) 4.

Attachment.

See COSTS 3.

Attorney.

See LIEN 3.

Auction.

See VENDOR AND VENDEE 2.

Auctioneer.

See BOND 4.

Award.

1. All matters in difference in law and equity being referred to arbitration, and made a rule of Court in K. B., the award directed that all suits between the parties should be discontinued; the defendant in equity thereupon moved that the bill might be dismissed. This was refused, for the Court cannot act on the award.
Hutchison v. *Hodgson.* Page 361
2. The bill stated an award between the parties, and that it had not provided for a particular event by which the plaintiff was damnified, viz. by the partnership fund proving deficient, and the plaintiff being compelled to make up the deficiency. Plea, the award. The Court thought the award should be considered as final, unless specific payments by the plaintiff to creditors had been stated, and allowed the plea.
Rowth v. *Peach.* 519

B.

Bail.

1. The clerk of an attorney defendant may be bail for him.
Dixon v. *Edwards.* 356
2. Bail in error, paying the bond on which the judgment was obtained, with costs, &c. are only simple-contract creditors.
Goodman v. *Purcel.* Page 548
3. Notice of added bail must be a separate notice from that of their justifying.
Anon. 564

Bankrupt.

1. An uncertificated bankrupt filed a bill without the assignees being parties. On circumstances which raised a doubt as to the validity of the commission, the bill was retained, with liberty to add parties.
Govet v. *Armitage,* 412
2. Bankruptcy of the plaintiff does not abate a suit, and the bill may therefore be dismissed with costs, for want of prosecution.
Davidson v. *Butler.* 460 *n.*
3. But see *contra, Sellas* v. *Dawson.* 458 *n.*
4. Bankruptcy of the defendant does not abate the suit, and the plaintiff cannot therefore dismiss his own bill without costs.
Rutherford v. *Miller.* 458
5. In a suit against the assignees, the bankrupt may be examined as a witness, and therefore ought not to be joined as a party.
Griffin v. *Archer.* 478
6. The assignees, signing the certificate of a bankrupt, and getting a release from him, in order to produce him as a witness to prove a debt to his estate, is a fair transaction.
Selby v. *Crew.* 504

7. In an action on a promissory note, the plaintiff became bankrupt; the assignees gave the defendant notice, after judgment, not to pay the debt recovered to any but their order; the attorney sued out a *fieri facias* in the name of the bankrupt, the note having been deposited with him since the beginning of the action, to secure a debt due from the bankrupt. A rule to set aside the *fieri facias* was discharged.
Pope v. *Wood.* Page 577

Bark.

Bark imported in the rough state, and pulverized here, is not entitled to the drawback on exportation.
Stephani v. *Barrow.* 346

Baron and Feme.

See PENALTY 1. MARRIAGE ARTICLES 1.

1. A feme covert, entitled to the interest of money for her life, with power of appointment as to the principal, receives a part of the principal for her necessary support, and appoints to her husband. He cannot claim this part of the principal from the trustees.
Randal v. *Hearle.* 363

Bill (in Equity).

See BANKRUPT 1, 5. EQUITY 3, 4. POLICY OF INSURANCE 1. JOINDER IN SUITS 1. EVIDENCE 4. DISCOVERY 1. GAMING 1. AWARD 2.

1. The plaintiff's equity must appear in the stating part of the bill.
Flint v. *Field.* Page 543
2. The defendant sued at law on an indemnity bond; the plaintiff filed this bill for an injunction, without offering to make any recompence for the damage actually sustained. The bill was dismissed.
Godbolt v. *Watts.* 543

Bill of Exchange.

See GAMING 2. INJUNCTION 4.

Bond.

1. Where a collector of revenue has given a bond to the Crown, the penalty is a security for all the expences of process and execution against him.
The King v. *Deane.* 369
2. A mortgagee had also a bond, on which the interest due exceeded the penalty. The mortgagor conveyed the equity of redemption in trust for his creditors, paying this bond first; nothing beyond the penalty can be claimed.
Lloyd v. *Hatchett.* 525
3. Devise for payment of debt revives simple-contract debts, even of 70 years standing, with full interest; but bond creditors can claim nothing beyond the penalty.
Ketilby v. *Ketilby.* (cited). 527

4. If an auctioneer's bond to the Crown, under 19 *G.* 3. *c.* 56. *s.* 7. is forfeited, the penalty is due, and is not merely a security to compel an account.
The King v. *Christie.* Page 586

Bounty.

1. If one bushel of corn is shipped in time to get the bounty on exportation, with intention to ship the rest afterwards, the whole put on board is entitled to the bounty.
Wilson v. *Sutton.* 444

C.

Commission.

1. A commission to settle the boundaries of a parish, or of a manor, ought not to be granted, where all parties who may probably be interested are not before the Court.
Atkyns v. *Hatton.* 386
2. S. P. *Winterton* v. *Lord Egremont* (cited). 392

Composition (for Tithes.)

1. Whether notice is necessary to determine a composition, where a modus is insisted upon. *Quære?*
Atkyns v. *Lord Willoughby.* 397
2. An agreement to accept a reasonable composition, not exceeding 3*s.* 6*d. per* acre, is bad for the uncertainty.
Brewer v. *Hill.* 413
3. An agreement with a laudlord to accept a composition from his tenant, is not binding.
Brewer v. *Hill.* Page 413

Composition (real.)

1. The consent of the ordinary to a composition real may be presumed from length of time.
Sawbridge v. *Benton.* 372
2. A composition of 20*s.* yearly out of the profits of *T.* manor, in lieu of the tithes of *T.* park, is good.
Ibid. 372
3. Where King *Edward* III. entered into a composition real, as owner of the land and patron of the church, he may also be presumed to have taken upon himself to act as supreme ordinary. *Semb.*
Ibid. 379
4. A composition real insisted on as a defence, is not supported by evidence of immemorial payment.
Robertson v. *Appleton* (cited). 375

Condition.

1. Estates are settled on a marriage in strict settlement, provided that if the wife should, when requested by her husband, refuse to settle her estates in a particular manner, the settlement of the other estate should be void. The husband and wife join in a different settlement of her estate, proceeding, however, on the foot of the former covenant, as if it had been performed; this is no avoidance of the settlement.
Mathews v. *Jones.* 506

Corn.

See BOUNTY 1.

Costs.

1. A plaintiff residing abroad is not compellable to give security for costs in an action in this Court.
Beckman v. *Legrainge*. Page 359
2. A plaintiff (in equity) becoming bankrupt, will not be compelled to give security for costs.
Anon. 407
3. Decree for debt and costs, separate attachments for each were held good.
Frazer v. *Thoburn*. 381, 413
4. Bill to redeem. Decree referring it to the master to take the account, and to tax costs, &c.—The report finds the mortgagee overpaid; it is too late to object to his having his costs.
Gilbert v. *Golding*. 442
5. On taxation of costs, the Court cannot make the attorney pay the costs of the taxation, unless a sixth is taken off.
Yea v. *Yea*. 494
6. Where an attorney has been seven years without getting his bills taxed, after an order so to do, and they are lost in the mean time in the master's office, the Court will not allow it to go again to the master.
Ibid.
7. An insolvent plaintiff, not residing where he is described by the bill, will be compelled by the Court to give a note of his residence, or security for costs.
James v. *Gillidam*. 552
8. Motion that the plaintiff (in equity) should give security for costs, on affidavit that he was about to leave the kingdom, refused.
Adams v. *Colethurst*. Page 552
9. Where a solicitor has been guilty of great delay in bringing in his bills, the Court will not give him the costs of taxation, although less than one sixth is taken off.
Yea v. *Yea*. 589

Covenant.

1. Lessee of tithes covenanted for himself and his assigns not to take tithes in kind from the other party, (the owner of lands in the parish,) nor from his tenants, but to accept a reasonable composition not exceeding 3*s*. 6*d*. *per* acre. His under-lessee is not an assign within the meaning of the covenant.
Brewer v. *Hill*. 413
2. The tithes are not bound by such a covenant of the lessee.
Ibid.
3. The tenant of the lands cannot take advantage of such a covenant entered into with his landlord, to which he himself is no party.
Ibid.

Counsel.

See PRACTICE (in Equity) 23.

Custom.

See USURY 1.

1. Where a titheable matter has been introduced into a parish within

time of memory, but the mode of letting it has always been uniform, the Court will support the practice by analogy to customary modes of tithing. *Semb.*
Baker v. *Athill.* Page 492

D.

Debt.

1. A bond on which judgment is recovered, and which is paid by the bail in error, is not a specialty debt in their hands.
Goodman v. *Purcel.* 548

Defeazance.

See CONDITION 1.

Deposit.

1. A deposit of title-deeds, as a security for money, is an equitable mortgage, and shall prevail against a subsequent mortgage with knowledge of the deposit.
Birch v. *Ellames.* 427
2. But where a creditor takes a mortgage hastily, in fear of the insolvency of his debtor, and under promises of getting the title-deeds, the legal estate shall prevail against a prior deposit.
Plumb v. *Fluitt.* 432

Devise.

1. Devise of the dividends of 4000*l.* bank stock to *A.* for life, and on her decease, to be *transferred*, and the *produce* thereof, 500*l.* to *B.* the *other* to be divided between *C.* and *D.*; *B.* is entitled only to 500*l.*, not to 500*l.* stock.
Longdale v. *Bovey*, Bart. Page 570

Discovery.

See ALIEN 1. PLEAS (in Equity) 2.

1. A bill for discovery of matters which must be either criminal or immaterial, is bad.
Selby v. *Crew.* 504

Drawback.

Bark imported in the rough state, and pulverized here, is not entitled to the drawback on exportation.
Stephani v. *Burrow*, 346

E.

Equity.

See LANDLORD AND TENANT 1. NUISANCE 1.

1. Equity cannot assist a legal execution, so as to reach money in the hands of the trustee.
Caillaud v. *Estwick.* 381
2. Where the whole case rests on the validity of a lease of tithes, and of a notice to determine it, equity will not interfere till those points are settled at law.
Bousher v. *Morgan.* 404

3. A bill in equity lies to have a policy of insurance delivered up as fraudulent, although the discovery obtained would be a defence at law.
French v. *Connelly*. Page 454
4. A trivial incorrectness in setting out the tithe of wool, for which amends had been tendered, and non-payment of *Easter* dues, which were never demanded, are not sufficient to save a bill from being dismissed.
Baker v. *Athill*. 493
5. A bill, seeking to have bills of exchange delivered up, as given on a gaming transaction, is good.
Newman v. *Franco*. 519
6. An interpleading bill, by a tenant against two claimants of the inheritance, where the whole rent actually due is under 10*l*. will be dismissed, as beneath the dignity of the Court.
Smith v. *Targett*. 529

Error.

1. The authority of the Court of King's Bench to proceed by bill against a peer, cannot be questioned in the Court of Exchequer Chamber.
Earl of Lonsdale v. *Littledale*. 356
2. On affirmance of a judgment, in an action for mesne profits, interest was given.
Doe v. *Robinson*. 574

Escape.

1. If a sheriff suffers a person, taken on mesne process, to escape, he is answerable for the debt which shall be proved, not merely for that sworn to.
Gabel v. *Perchard*. Page 522

Estate.

See TENANT IN TAIL 1.

Estovers.

See FOREST 1, 2.

1. To cut green timber, and exchange it for old, for repairs, is not within the right of housebote.
The Attorney General v. *Lord Stawell*. 601

Estreat.

See PRACTICE (at Law) 12.

Evidence.

See INJUNCTION 2.

1. A terrier cannot be received in evidence, unless it come from the proper repository, the registry of the diocese, or a copy from the parish registry, if the original cannot be found.
Atkyns v. *Hatton*. 387
2. But a contrary decision was adopted in the Court of King's Bench.
Miller v. *Foster*. 387 *n*.
3. One who deposited title-deeds of an estate with his creditor, as a

security, and afterwards mortgaged the premises to another, is competent to prove that the mortgagee had notice of the deposit.
Plumb v. *Fluitt.* Page 432 *n.*

4. In a suit by a creditor against the assignees of a bankrupt, the bankrupt may be a witness, and therefore ought not to be joined as a defendant.
Griffin v. *Archer.* 478

5. The assignees of a bankrupt signing his certificate and getting a release from him in order to get his testimony to prove a debt due to the estate, is a proper mode of obtaining testimony.
Selby v. *Crew.* 504

6. If the plaintiff is non-suited, through the mistake of his witness in a material circumstance, a new trial ought to be granted.
De Giou v. *Dover.* 516

7. A book found in the herald's office, purporting to be an account of the possessions of a monastery, is not admissible evidence of that fact.
Lygon v. *Strutt.* 601

8. The purchaser of a share of a grant from the Crown must either deduce the whole title from the original grantees, or must shew possession in those under whom he immediately claims.
The Attorney General v. *Richards.* 615

Exchequer.

1. The authority of the Court of King's Bench to proceed by bill against a peer, cannot be questioned in the Exchequer Chamber.
Earl of Lonsdale v. *Littledale.* 358

2. The treasurer's remembrancer, in the appointment of clerks in his office, is limited to those who have served a clerkship there.
Deverell's Case. *Page* 483, 616

3. But if, upon the death of a clerk, there is only one in the office who has served a clerkship, he cannot compel the remembrancer to appoint him.
Mayhew's Case (cited). 486, 624

4. In the King's remembrancer's office, there must be a *bona fide* service of five years before one can be a clerk.
Ex parte Windus. 489

Excise.

1. By 24 *G.* 3. *c.* 73. the duty on spirits attaches on the wash before distillation.
The Attorney General v. ——. 558

2. A concealment of soap, in violation of the 1 *G.* 1. *st.* 2. *c.* 31. may be in an entered place, and by mixing with other soap, and although done with the privity of the inferior surveying officer.
The Attorney General v. *Brewster.* 560

Execution.

See EXTENT 2. EQUITY 1.

Executor.

See JOINDER IN SUITS 1.

1. An infant legatee sued for an account against two executors; one

of them had not proved, and denied having received any assets; the account was directed against both.
Price v. *Vaughan.* Page 524

Extent.

1. Two extents issued into different counties, and both sheriffs levied to the whole amount. Upon the levy of the one, the debt was paid. This sheriff is entitled to his full poundage.
The King v. *Fry.* 358
2. The sheriff, besides his poundage, charged 5 *per cent.* for an auctioneer to sell malt; the charge was disallowed.
The King v. *Crakenthorpe.* 412

F.

Forest.

See GRANT 1.

1. Grantee for years of the rangership of a forest, is not entitled to estovers, as a tenant for years.
The Attorney General v. *Lord Stawell.* 597
2. The ranger cannot cut timber for estovers, without the view of the regarder, even if that office is vacant, where he has taken no steps to get it filled.
Ibid. 601

Forfeiture.

See RELEASE 1.

France.

See INDEMNITY 1.

Fraud.

1. A tenant for life, with remainder to *B.* in tail, by fraud gets *B.*'s authority to levy a fine, and convey the land to a purchaser: he invests the purchase-money in the funds, where it is clearly identified. *A.* is chargeable as a trustee to the amount, but *B.* has no lien on the particular fund.
Newcomb v. *Burden.* Page 343

Fraudulent Conveyance.

1. A conveyance to *A.* and *B.* in trust, as to one moiety, for scheduled creditors, as to the other, for the debtor, is good against general creditors.
Caillaud v. *Estwick.* 381

Frauds (Statute of)

1. Both parties giving instructions to an attorney to prepare a conveyance of land, and the vendor delivering to him a particular of the estate, assigned by himself as instructions for the deed, which was accordingly prepared, does not take the case out of the statute.
Cooke v. *Tombs.* 420
2. A paper, signed by the vendor on the first treaty, will not take the case out of the statute, where the bargain was concluded upon a

subsequent treaty, and for a different price.
Page 420

3. An agreement for land and chattels, if void as to the land by the statute of frauds, is void *in toto*.
Ibid.
S. P. *Lea* v. *Barber*. 425 *n.*

G.

Gaming.

1. A bill against the winner of more than 10*l.* at play must state the plaintiff to be the loser, or that three months have elapsed since the offence.
Hudson v. *Davis*. 504
2. Action on bills of exchange: a bill was filed for an injunction, and to have them delivered up as being given on a gaming transaction; a demurrer was overruled.
Newman v. *Franco*. 519

Grant.

1. By a grant to a ranger of a forest of "all wood blown or thrown "down by the wind, and all "dead wood, and the boughs and "branches of trees and wood in "the said forest cut off or thrown "down," branches cut from trees felled for his Majesty's use do not pass.
The Attorney General v. *Lord Stawell*. 592
2. Grantee for years of the rangership of a forest is not entitled to estovers as tenant for years.
Ibid.
3. A grant of lands to be recovered from the sea, proceeding on the public benefit of such embankment, must be reduced into possession in a reasonable time.
The Attorney General v. *Richards*.
Page 614
4. If such land is left unembanked for a long time, covered with the sea, and a common passage for ships, the right of the Crown revives by the length of possession by its subjects.
Ibid. 615

Guardians.

See PRACTICE (in Equity) 5.

H.

Half-pay.

See OFFICER.

I.

Injunction.

1. Where an injunction is obtained till the coming in of the answer of one defendant, who resides abroad, the plaintiff is not compellable to bring the money into Court, unless on special circumstances.
Shoulbred v. *M'Master*. 366
2. Where an injunction subsists, the Court will not grant a commission to examine a witness in *India*,

without a special affidavit of materiality.

Moody v. *Steele*. Page 386

3. On a bill for discovery and injunction, the defendant (plaintiff at law) admitted himself to be a mere agent for the other defendants, and ignorant of the transaction; an injunction was moved for as of course, till the coming in of the answers of the other defendants, who lived abroad; but there appearing a probable danger of losing other material evidence by the delay, it was refused.

Vandam v. *Munro*. 502

4. An injunction cannot be extended to reach one who is not a party to the suit.

Dawson v. *Princeps*. 521

5. On a trust to sell, a suggestion in the bill, verified by affidavit, of improper conduct of the trustees, in not giving sufficient notice of the sale, is not a ground for an injunction to stop the intended sale.

Pechel, Bart. v. *Fowler*. 549

6. After an injunction on the original bill, dissolved on the coming in of the answer, the plaintiff cannot have an injunction on an amended bill, though supported by affidavits, unless the defendant is in contempt.

Gadd v. *Worral*. 553

7. An injunction cannot be extended to protect one who is not a party in the suit in equity.

Gadd v. *Worral*. 555

8. An injunction extends to prevent a suit against the sheriff, for not paying over money levied by him in the original action before the injunction issued.

Bolt v. *Stanway*. 556

9. But in order to bring himself within the protection of the order, the sheriff must comply with the terms of it, by bringing the money into Court.

Bolt v. *Stanway*. Page 569

10. After injunction obtained, a demurrer to the prayer of injunction is allowed; yet the injunction cannot be dissolved without the previous order.

Hurst v. *Thomas*. 585

11. The answer being referred for impertinence is a good ground for continuing an injunction.

Ibid. 591

Indemnity.

See BILL (in Equity) 2.

1. The plaintiff, a *British* subject, was guarantee to the owner of an *American* ship, for a merchant who freighted her to *Bourdeaux*. She was detained there by an embargo, and dismissed by the freighter; the *French* government having declared themselves bound to indemnify all *neutral* owners for the effects of the embargo, and the plaintiff not being able to take advantage of that order, the defendant must endeavour to get an indemnity in *France*, before he can sue the plaintiff.

Cottin v. *Blane*. 544

Interest.

See BOND 2, 3. USURY 1. MORTGAGE 7. PRACTICE (at Law) 15. ERROR 2.

Joinder in Suit.

See EVIDENCE 4.

1. The plaintiff was tenant to the father of the defendants in a colliery, under a lease and subsequent agreements. On the father's death, he continued to hold under the defendant, the heir, on the same terms. He filed his bill against the two defendants, as executors of their father, and against the one as heir, for an account under the agreement, both in the lifetime of the father, and since. The defendants demurred separately, as being improperly joined in the suit. The demurrers were allowed.
Ward v. *Duke of Northumberland.* Page 469

Issue.

See PRACTICE (in Equity) 15, 16. TITHES 8.

Jurisdiction.

See ERROR 1.

Interpleader.

1. A tenant, though threatened with suits at law on a title adverse to his landlord's, cannot make them interplead. *Semb.*
Smith v. *Target.* 529
2. But see *contra*, *Surrey* v. *Lord Waltham.* 531 *n.*

K.

King's Remembrancer.

See EXCHEQUER 2, 4.

L.

Landlord and Tenant.

See INTERPLEADER 1, 2. MODUS 6.

1. Where a landlord is bound, in law or equity, to repair in certain cases, and the tenant is obliged, by a sudden accident, to make those repairs, to prevent further damage, he may set it off as money paid to the use of the landlord, against an action for rent; and therefore equity will not interfere.
Waters v. *Weigal.* Page 575

Lease.

1. An agreement to accept a reasonable composition for tithes, not exceeding 3*s.* 6*d. per* acre, is not a lease of the tithes, for the uncertainty of the render.
Brewer v. *Hill.* 414
2. A lease of tithes, or other matter which lies in grant, for so long time as the lessor shall continue vicar of *A.*, is good, and conveys a freehold.
Ibid.
3. Where the whole case rests on the validity of a lease of tithes, and of a notice to dissolve it, equity will not interfere till those points are settled at law.
Bowsher v. *Morgan.* 404

Length of Time.

See GRANT, 3, 4.

Lien.

1. *A.* tenant for life, with remainder to *B.* in tail, by fraud gets *B.*'s authority to levy a fine, and convey the land to a purchaser. He invests the purchase-money in the funds, where it is clearly identified. *B.* has no lien on this money against the general creditors of *A.*

Newcombe v. *Burdon.* Page 343

2. Specialty creditors have no lien on the estate, and therefore the alienee of a devisee shall hold the land discharged.

Mathews v. *Jones.* 506

3. In an action on a promissory note, the plaintiff became bankrupt; the assignees gave the defendant notice, after judgment, not to pay over the debt recovered to any but their order; the attorney sued out a *fi. fa.* in the name of the bankrupt, the note having been deposited in his hands since the beginning of the action, to secure a debt due from the bankrupt; a motion to set aside the *fi. fa.* was discharged.

Pope v. *Wood.* 577

M.

Marriage Settlement.

1. Estates of the husband are settled on the marriage, provided that if the wife shall, when requested by her husband or the issue of the marriage, refuse to settle her estates in a certain manner, the settlement of the husband's estate should be void. The husband and wife join in a different settlement of her estate, proceeding, however, on the foot of the former covenant, as if it had been performed. This is no avoidance of the settlement of the husband's estate.

Mathews v. *Jones.* Page 506

Modus.

See COMPOSITION (REAL) 2.

1. The Court will not decree against a farm modus, on the ground of rankness.

Atkyns v. *Lord Willoughby.* 397

2. In laying a modus in an answer, it is sufficient if it give the plaintiff notice of the general nature of the defence.

Ibid.

3. S. P. *Baker* v. *Athill.* 493

4. The answer insisted on a modus, (for a place described only by a map annexed to the answer,) in lieu of all tithes, *or* at least in lieu of tithe-hay. This is sufficient.

Clarke v. *Jennings.* 498

5. A bill to establish a farm modus, setting forth the abuttals of the farm, and averring that the modus had immemorially been paid for *the said* farm, is sufficient, without expressly averring it to be an ancient farm.

Lord Stawell v. *Atkyns.* 564

6. If an action is brought by the *lessee* of tithes for subtraction, it is a sufficient ground for filing a bill to establish a modus.

Ibid.

7. A bill to establish a modus, will not lie, where there has been no suit for tithes in kind.
Lord Coventry v. *Burslem.* Page 567 *n.*

Mortgage.

See COSTS 4.

1. A deposit of title-deeds, as security for money, shall prevail against a subsequent mortgage, with notice of the depo-it.
Birch v. *Ellames.* 427
2. But where a creditor takes a mortgage hastily, in fear of the insolvency of the mortgagor, and under the promises of getting the title-deeds, it shall prevail against a prior deposit.
Plumb v. *Fluitt.* 432
3. A failure of the utmost circumspection and diligence shall not, in such case, postpone him who gets the legal estate.
Ibid. 440
4. The nature of constructive notice explained.
Ibid.
5. Mortgagee got possession of the estate, sued at law on the covenant for repayment, and brought this bill to foreclose; this is regular, and Equity will not stop the proceedings at law, unless the defendant brings in the money.
Rees v. *Parkinson.* 497
6. A mortgagee had also a bond on which the interest due exceeded the penalty; the mortgagee conveyed the equity of redemption for the use of his creditors, paying this bond first; nothing beyond the penalty can be claimed.
Lloyd v. *Hatchett.* Page 525
7. Money disbursed by a mortgagee shall carry the same interest as the original sum.
Woolley v. *Drag.* 551

N.

New Trial.

See PRACTICE 10.

Notice.

See COMPOSITION FOR TITHES 1. EQUITY 2.

1. The nature of constructive notice explained.
Plumb v. *Fluitt.* 438

Nuisance.

1. Where a nuisance and purpresture are committed in a harbour, an information in Equity lies to abate it.
The Attorney General v. *Richards* 603

O.

Office.

See EXCHEQUER 2, 3, 4. GRANT 1, 2. FOREST 1, 2.

1. Offices in the Courts of Justice are bound by practice, though not immemorial.
Deverell's Case. Page 624
2. Experience in the office is a general criterion of fitness in those offices in the Courts which require knowledge of the business.
Ibid.

Officer.

See REVENUE OFFICER.

1. An assignment of the half-pay of an officer in the army is bad in equity as well as at law.
Stone v. *Lidderdale.* 533

P.

Partners.

1. The Court will not appoint a receiver of the effects of a subsisting partnership trade, unless on the grossest abuses of some of the partners.
Oliver v. *Hamilton.* 453

Payment of Money into Court.

1. In a suit for account of tithes, the defendant cannot pay money into Court before answer.
Hull v. *Matthews.* 444

Penalty.

See BOND 1, 2, 3, 4.

1. In article of separation, the husband was to receive a certain annuity out of the wife's estate, while he should leave her unmolested. Upon molestation the annuity is gone.
Wright v. *Chapman.* Page 345

Pleas and Pleadings (in Equity.)

See JOINDER IN SUITS 1.

1. The plea was over-ruled on a ground of form. The defendant pleaded the same matter again more formally. This is irregular. *Semb.*
Freeland v. *Johnson.* 407
2. Plea of alien enemy to a bill of discovery is good.
Daubigny v. *Davallon.* 462
3. A plea averring this nation to be at war with *France*, and that the plaintiffs are *Frenchmen*, aliens, and enemies of the king is good.
Ibid.
4. A plea of outlawry ought, like other pleas, to be set down for argument by the defendant.
Chapman v. *Lansdown.* 554

Pleas and Pleading (at Law.)

1. *Sci. Fa.* against two on a joint and several recognizance of four to the Crown, without averring the others to be dead. This is

bad, and may be taken advantage of without a plea in abatement, and is not cured by pleading over.
The King v. *Young*. Page 448

Policy of Insurance.

1. A bill in equity lies to have a fraudulent policy delivered up, although the discovery obtained would be a good defence at law.
French v. *Connelly*. 454

Power.

See APPOINTMENT 1.

Practice (in Equity.)

See COSTS. INJUNCTION. PLEAS (in Equity.)

1. One reported the highest bidder before the Master was compelled to complete his purchase.
Cunningham v. *Williams*. 344
2. A creditor who proves before the Master against the estate of an intestate, cannot exhibit interrogatories to the plaintiff, to discover the balance between him and the estate.
Bowen v. *Webb*. 361
3. All matters in law and equity being referred to arbitration, and a rule of Court made in the *King's Bench*, the award directed, that all suits between the parties should be discontinued. The defendant moved thereupon, that the bill might be dismissed. This was refused, for the Court cannot act on the award.
Hutchinson v. *Hodgson*. Page 361
4. The Court will not give leave to amend an answer after replication, nor to file a supplemental answer, unless on there appearing sufficient reasons why the matter could not be inserted in the first answer.
Tennant v. *Wilsmore*. 362
5. A motion for leave to answer by guardian must name the guardian.
Brassington v. *Brassington*. 369
6. Decree for debt and costs. An attachment for the debt alone, before taxation of costs, and another for the costs when taxed, were both held good.
Frazer v. *Thoburn*. 381, 413
7. On a bill for an injunction, the Court will not grant a commission to examine a witness in *India*, without a special affidavit of materiality.
Moody v. *Steele*. 386
8. Bill to redeem. Decree referring it to the master to take the account, and to tax costs, &c. The report finds the mortgagee overpaid. It is too late to object to his having his costs.
Gilbert v. *Golding*, 442
9. Upon discovery of new matter in an account, the Court will permit a supplemental answer after replication.
Maggride v. *Hodgson*. 443
10. A plaintiff becoming bankrupt will not therefore be compelled to give security for costs.
Anon. 407
11. On obtaining an injunction till the coming in of the answer of one defendant who resides abroad, the other having answered, the plaintiff is not compellable to bring the money into Court, unless on special circumstances.
Sholbred v. *Macmaster*. 366

12. The plea was over-ruled on a ground of form. The defendant pleaded the same matter again more formally. This is regular. *Semb.*
Freeland v. *Johnson.* Page 407
13. In a suit for an account, the defendant cannot pay money into Court before answer.
Hult v. *Matthews.* 444
14. The Court will not appoint a receiver of the assets of a partnership, unless on the grossest abuse.
Oliver v. *Hamilton.* 453
15. The Court will not direct an issue on motion.
Anon. 480
16. But see *contra.*
The Attorney General v. *Lane.* 589
17. Mortgagee in possession proceeded at law on the covenant for re-payment, and filed this bill to foreclose. The Court will not stop the suit at law, except on bringing in the money.
Rees v. *Parkinson.* 497
18. A will, admitted in the answer, under which the defendant claims, and where nothing turns upon it, may be read from the bill, although the answer refers to the will for certainty.
Owen v. *Jones.* 505
19. A defendant ordered to deposit books in the hands of the Deputy Remembrancer for the inspection of the other party, and afterwards ordered to account, in doing which he must refer to these books, is not obliged to pay the fees of the office in taking copies.
Gabbit v. *Cavendish.* 547
20. A petition for re-hearing, *or* for leave to file a bill of review, is bad for the uncertainty.
Hyde v. *Donne.* 551
21. If the defendant is insolvent, and does not reside where the bill describes him, the Court will compel him to give a note of his place of abode, or security for costs.
James v. *Gilludam.* Page 552
22. Every plea ought to be set down for argument by the defendant.
Chapman v. *Lansdown.* 554
23. Where the counsel's name to an answer has been forged, the Court will not take the answer off the file, if an innocent plaintiff is likely to suffer by it.
Bull v. *Griffin.* 563
24. A sequestration only goes where the defendant is in custody of the warden of the *Fleet*, not of a sheriff.
Markham v. *Wilkinson.* 579

Practice (at Law.)

See COSTS. ERROR.

1. A peer may be sued in the Court of *King's Bench* by bill.
Earl of Lonsdale v. *Littledale.* 356
2. A plaintiff residing abroad is not compellable to give security for costs in an action in this Court.
Beckman v. *Legrainge.* 359
3. The clerk of an attorney defendant may be bail for him.
Dixon v. *Edwards.* 356
4. If a defendant is seized illegally, and served with process while so detained, the Court will discharge him unconditionally.
Barlow v. *Hall.* 461
5. An attachment against the sheriff for not returning the writ was discharged on affidavits that the defendant was not seen in the county, and that the return of *non est inventus* was made one

day too late by a mistake of the clerk, who supposed it in time.

Saxton v. *West*. Page 479

6. To remove a cause from the great sessions of *Wales* to this Court, under 33 *Geo.* III. *c.* 68. the proper course is by *certiorari*.

Parry v. *Griffiths*. 480

7. Where an attorney has been seven years without getting his bills taxed after an order so to do, and they are lost in the mean time in the Master's office, the Court will not allow them to go again before the Master.

Yea v. *Yea*. 494

8. The paper-books must be delivered to the Judges before a *concilium* can be moved for.

Thellusson v. *Bailey*. 499

9. On an issue of the preceding term, although no notice of trial is given, the defendant may enter up judgment as in case of a nonsuit for not proceeding to trial.

Goodtitle on dem. Cooke v. *Cullen*. 500

10. If the plaintiff be nonsuited by a mistake of a witness in a material circumstance, a new trial ought to be granted.

De Giou v. *Dover*. 517

11. If a sheriff suffers a person arrested on mesne process to escape, he is answerable for the debt that shall be proved, not merely for that sworn to.

Gabel v. *Perchard*. 522

12. The Court cannot apply a fine estreated in payment of the expences of prosecution.

The King v. ———. 523

13. A motion to compound a *qui tam* action on the stamp acts, not supported by stamp office, need not be on notice to them.

Salisbury qui tam v. *Hyde*. 523

14. Such motion must specify the sum at which it is compounded.

Salisbury qui tam v. *Hyde*. Page 523

15. Action on a judgment may be stayed on payment of the sum recovered, and costs, without any interest, although the defendant absconded for seven years since the judgment.

Thomas v. *Edwards*. 558

16. Plaintiff at law having peremptorily undertaken to try the cause, on an order to elect, elected to proceed in equity. On his not going on to trial, the defendant may sign judgment as in case of a nonsuit.

Anderson v. *Tombs*. 568

17. In an action on a promissory note, the plaintiff became bankrupt; the assignees gave the defendant notice, after judgment, not to pay the debt recovered to any but their order. The attorney sued out a *Fi. Fa.* in the name of the bankrupt, the note having been deposited with him during the action, to secure a debt due from the bankrupt. A rule to set aside the *Fi. Fa.* was discharged.

Pope v. *Wood*. 577

Prerogative.

See EXCHEQUER 2, 3, 5, 6.

Prescription.

See MODUS 9, 10.

Privilege.

See EXCHEQUER 4.

1. A peer may be sued in *K. B.* by bill.
Earl of Lonsdale v. *Littledale.* Page 356

Purpresture.

1. Where a nuisance and purpresture are committed in a harbour, an information in equity lies to abate them.
The Attorney General v. *Richards.* 603

Purchaser.

See VENDOR and VENDEE.

1. The alienee of a devisee shall hold discharged from the demands of specialty creditors of the devisor.
Matthews v. *Jones.* 506

Q.

Quaker.

1. If one puts in his answer without oath as being a quaker, the fact of his being such cannot be questioned, for he is concluded from traversing it on an indictment for perjury.
Marsh v. *Robinson.* Page 479

R.

Receiver.

See PRACTICE (in Equity) 14.

Release.

1. *A.* tenant for life, with remainder to *B.* in tail, commits a forfeiture. *B.* in consideration of an annuity for the life of *A.* releases. The release is not good against the heir of the body of *B.*, and *B.* is therefore bound to make a good conveyance for the life of *A.*
Lewis v. *Rogers.* 579

Revenue Officer.

See EXCISE 2.

1. Where a collector of revenue has given a bond to the Crown, the penalty is a security for the expences of process and execution against him.
The King v. *Deane.* 369

S.

Security.

See LIEN 3.

1. On a sale of an estate, part of the consideration was to be an annuity, but it was not settled how it should be secured. The Court directed it to be by security on the estate, as well as by bond and judgment. *Remington* v. *Deverall.* Page 550

Sequestration.

See PRACTICE (in Equity) 24.

Soap.

See EXCISE 2.

Specialty Debts.

See LIEN 2. DEBT 1. BAIL 2.

Spirits.

1. The duty on spirits attaches on the wash before distillation. *The Attorney General* v. ——. 558

Stamps.

See PRACTICE (at Law) 13, 14.

Statutes.

1. Bark imported in the rough state, and pulverized here, is not entitled to the drawback on exportation, under 27 *Geo.* III. *c.* 13. *Stephani* v. *Burrow.* Page 346
2. If one bushel of corn is shipped in time to get the bounty, with intention to ship the rest afterwards, the whole put on board is entitled to the bounty, under 31 *Geo.* III. *c.* 30. *Wilson* v. *Sutton.* 444
3. By 24 *Geo.* III. *c.* 73. the duty on spirits attaches on the wash before distillation. *The Attorney General* v. —— 558
4. A concealment of soap in violation of 1 *Geo.* I. *st.* 2. *c.* 31. may be in an entered place, and by mixing with other soap, and although done with the privity of the inferior surveying officer. *Attorney General* v. *Brewster.* 560

STATUTES *commented upon or explained.*

27 *Eliz.* c. 8.	358
29 *Eliz.* c. 4.	370
3 *W.* & *M.* c. 14.	509
4 *Ann.* c. 16.	449
9 *Ann.* c. 24.	504
1 *Geo.* I. *st.* 2. *c.* 31.	534
3 *Geo.* I. c. 15.	370
1 *Geo.* II. *st.* 2. *c.* 14.	534
2 *Geo.* II. *c.* 23.	484
7 *Geo.* II. *c.* 20. *s.* 2.	497
22 *Geo.* II. *c.* 46.	484
19 *Geo.* III. *c.* 56.	586
24 *Geo.* III. *c.* 73.	559

27 *Geo.* III. *c.* 13. Page 347
33 *Geo.* III. *c.* 68. 480
34 *Geo.* III. *c.* 9. 463

T.

Taxes.

See STATUTE 1. EXCISE 1, 2. BOND 1, 4.

Tenant in Tail.

1. Devise of money to be laid out in land to the use of *A.* in tail, with remainders over. The Court will not direct the money to be paid to *A.*

Anon. 453

Terrier.

See EVIDENCE 1, 2.

Tithes.

See MODUS. COMPOSITION. COMPOSITION REAL. LEASE 1, 2, 3. COMMISSION 1.

1. Where by the usual mode of husbandry clover-hay is not made into cocks at all, the tithe may be set out in the swathe.

Collyer v. *Howes.* 481

2. S. P. *Baker* v. *Athil.* 491

3. Grass cut and given green to beasts of the plough shall not pay tithe.

Collyer v. *Howes.* 481

4. Where a titheable article has been introduced into a parish within time of memory, but the mode of tithing it has been uniform, the Court will support the established practice. *Semb.*

Baker v. *Athil.* Page 492

5. A trivial incorrectness in setting out the tithe of wool, for which amends had been tendered, and the non-payment of *Easter* dues, which were never demanded, are not sufficient to prevent a bill from being dismissed.

Ibid. 493

6. Horses kept on one farm for its cultivation, and used *occasionally* on another farm in a different parish, shall not pay agistment tithe. Otherwise, if habitually so used.

Filewood v. *Button.* 498

7. Sheep kept *principally for the* sake of folding, if sold out of the parish before shearing time, shall pay agistment tithe.

Howes v. *Carter.* 500

8. Where a title to tithes in a layman is clearly made out, though not supported by possession, the Court will decree an account without an issue.

Lygon v. *Strutt.* 601

Treasurer's Remembrancer's Office.

See EXCHEQUER 2, 3.

Trust.

See FRAUD 1. BARON and FEME 1. TENANT IN TAIL 1.

1. Money in the hands of a trustee cannot be affected by legal execution, nor can equity interfere.
Caillaud v. *Estwick*, Page 381

V.

Variance.

See WAY 1.

Vendor and Vendee.

See STATUTE OF FRAUDS. SECURITY 1.

1. One reported the highest bidder at a sale before the Master was compelled to complete his purchase.
Cunningham v. *Williams*. 344
2. By the terms of an auction the title deeds were to be produced by a certain day. They were not then ready, but the purchaser received them afterwards without objection. He cannot afterwards, on disliking title, object to the delay.
Smith v. *Burnam*. 527

U.

Usury.

1. A custom in *Liverpool* for the banker to strike a balance every quarter and send the account to the merchant, and then to make that balance a principal to carry interest to the next quarter, is not usury.
Calliot v. *Walker*. Page 495

W.

Way.

1. Action to try a right of way, which was stated to be from a certain highway *leading from* the parish of *L.* to *B.* The highway was proved to be at that part within the parish. This is no variance.
Philips v. *Davies*. 572

Witness.

See INJUNCTION 2.

END OF THE SECOND VOLUME.