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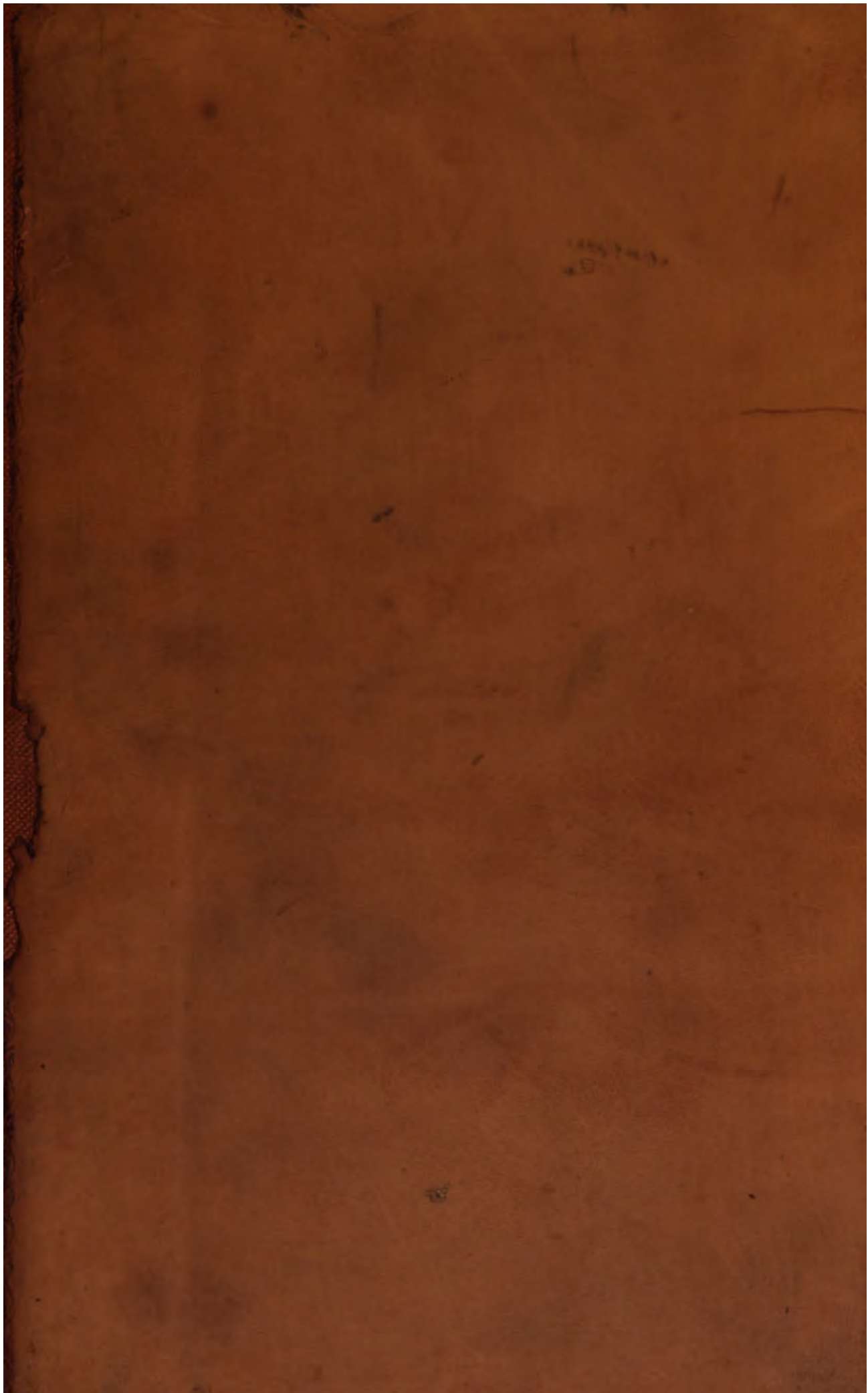
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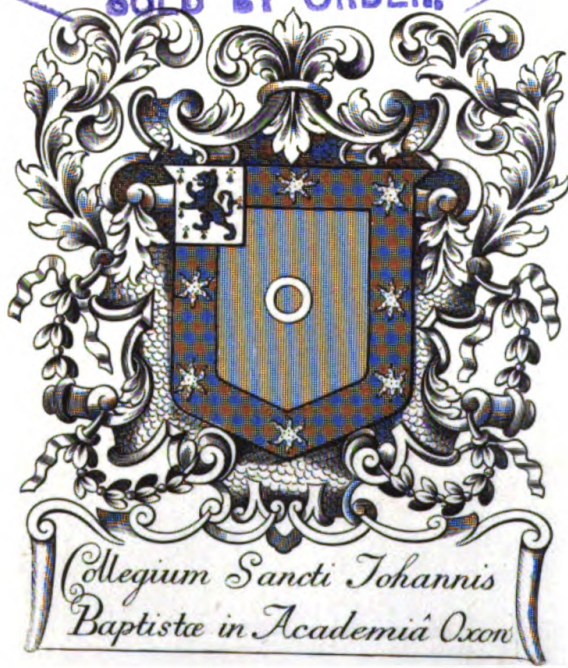
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REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE COURT

OF THE

VICE CHANCELLOR OF ENGLAND,

DURING THE TIME OF

THE R^T HON^{BLE} SIR THO^S PLUMER, KN^T.

By HENRY MADDOCK, Esq.

OF LINCOLN'S INN, BARRISTER AT LAW.

VOL. II.

LONDON:

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1818.



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near **Lincoln's-Inn Fields, London.**

LORD CHANCELLOR,

Lord Eldon.

MASTER OF THE ROLLS,

Sir William Grant.

VICE CHANCELLOR,

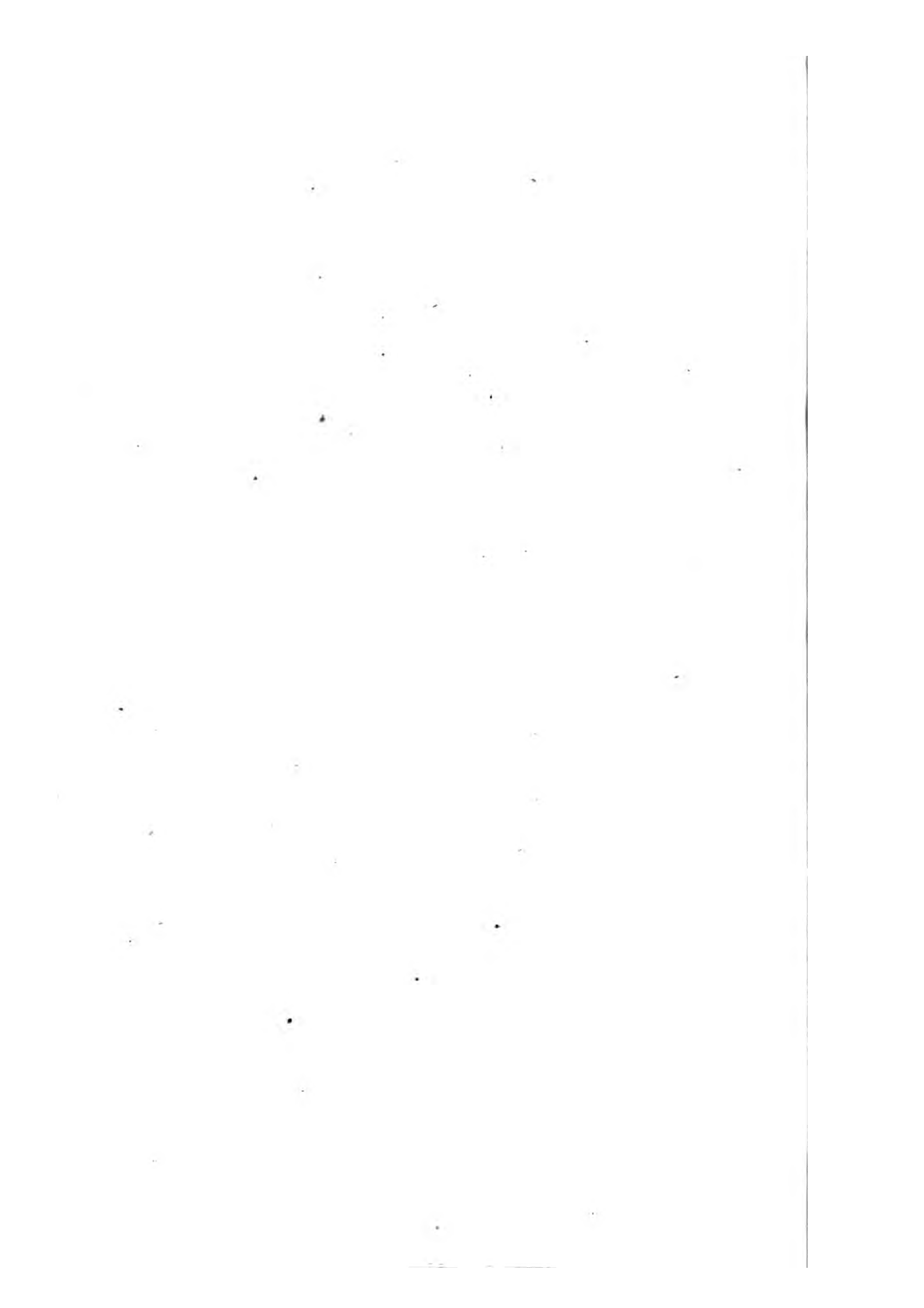
Sir Thomas Plumer.

ATTORNEY GENERAL,

Sir Samuel Shepherd.

SOLICITOR GENERAL,

Sir Robert Gifford.



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ERRATA.

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Page 11, note (o) read 2 Sch. & Lefr.

- 37, l. 9, for "Limitations," read "Distributions."
- 44, l. 8, after "the" read "Certificate of the."
- 53, l. 8, in marginal note, for "Creditor," read "Debtor,"
- 68, l. 16, for "Samuel Castell," read "Walter Powell."
- 215, l. 14, for "his" read "their."

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Page 20, l. 10, in marginal note, for "Vendee," read "Vendor."

- 64, in marginal note for "Petitioners," read "Plaintiffs."
- 112, l. 5, from the bottom, for "Plaintiffs," read "Defendants."
- 223, l. 4, for "Hart," read "Wetherell."

C A S E S

BEFORE THE

VICE CHANCELLOR.

Ex parte BUMFORD and others, *in re* MILLER
and another.

August 9th.

THIS was a Petition, by the Assignees of the Bankrupts, that the Commission might be superseded, and that the Bond given by the Petitioning Creditor to the Lord Chancellor, might be assigned to the Petitioners, for the benefit of themselves and the rest of the Creditors, and that a new Commission might be issued.

A Creditor aggrieved by the issuing of a fraudulent Commission, cannot, under the 5th Geo. II. c. 30, s. 23, call for an Assignment of the Bond given to the Lord Chancellor on the issuing of the Commission.

A clear Case was made for a Supersedeas of the Commission, and for a new Commission, and the only disputable point was, Whether the Bond could be assigned to the Petitioners?

Mr. Agar:—

This is a Case in which a Creditor has been greatly aggrieved, and *Smithey v. Edmondson* (a), is an Authority

(a) 3 East, 16.

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in re
HILLER
and another.

to show that, under the 5 Geo. II. c. 30, s. 23, the Bond may be assigned to a *Creditor* who has been aggrieved. The words of the Act are, that “ if it shall appear that such Commission was taken out *fraudulently* or *maliciously*, that then the *Lord Chancellor*, &c. shall and may, upon the Petition of the *Party* or *Parties* *grieved*, examine into the same, and order satisfaction to be made to him, her or them, for the Damages by him, her or them, sustained; and *for the better recovery thereof* may, in case there be occasion, assign such Bond or Bonds to the Party or Parties so petitioning, who may sue for the same in his, her, or their Name and Names; any law, custom, or usage to the contrary notwithstanding.” In the Case mentioned, *Lord Ellenborough* says, “ It is objected here, that the Plaintiff is not a *party* *grieved*; but he appears to be a *Creditor* of the Bankrupt; and every *Creditor* may be said to be a *party* *grieved* by the suing out of a *fraudulent Commission*, which may intercept or delay the just distribution of the Bankrupt’s Estate; and more particularly as this Plaintiff appears to be appointed Assignee under the subsequent Commission. No doubt, therefore, he is a party *grieved*, and as such, a proper Person to whom the Bond might be assigned.” *Mr. Justice Le Blanc* also says, “ The Person damnified may be either the Bankrupt, or a *Creditor*, as the Commission is malicious or fraudulent. It appears that the *Lord Chancellor* thought this a *fraudulent Commission* taken out with the connivance of the Bankrupt, and therefore that the *Creditors* were the parties *grieved*, and not the Bankrupt.”

Mr. Leach, and *Mr. Cullen*, *contra* :—

Can it be said that every or any *Creditor* who is aggrieved is entitled to petition for an Assignment of

the Bond? Nobody ever heard of such an Assignment, The Judges have, certainly, in the Case cited, thrown out an Opinion of that kind; but the Case did not require it. The Bond was properly assigned in that Case. It was assigned to *Smithey*, not as being a *Creditor* of the Bankrupt, but as *Assignee* of the Bankrupt under the second Commission against him. He represented the Bankrupt, and the Estate and Rights of the Bankrupt were vested in him, and therefore it was, he obtained the Assignment in right of the Bankrupt. The Order by which the Assignment was made states, that "for the purpose of recovering from him the Damages and Costs sustained by the Estate of Webb, in consequence of the said Commission having been sued out, and the said Application to supersede the same, I. A. Lord L. Lord High-Chancellor, &c., do therefore Assign, &c. unto the Plaintiff as *Assignee* as aforesaid, his Executors, &c., the Bond, &c." The Bond therefore was assigned to him, not as a Creditor who was aggrieved, but as *Assignee*, and as such entitled to the benefits of the Bankrupt, who had been aggrieved. The most that can be said of *Smithey* and *Edmondson*, is, that it contains *dicta* in favour of an Assignment of the Bond to a *Creditor*.

Mr. Agar, in Reply :--

A Creditor must be comprehended under the term, "party grieved," used in the Statute. When the *Lord Chancellor* made the Order assigning the Bond to *Smithey*, it must have been because he considered him, being a Creditor, as a party grieved. The Bankrupt was there a party to the fraudulent issuing of the Commission, and therefore *he* could have no right to petition for an Assignment of the Bond; and

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his Assignee, as representing him, and claiming in his right, could not be entitled. The only ground on which *Smithey* could petition for an Assignment of the Bond was, as an aggrieved Creditor. The Judges appear so to have considered the Order, and they were fully warranted in the Opinions they expressed.

The VICE-CHANCELLOR:—

This is a point of great importance, and my respect for the Opinions of the Judges in *Smithey v. Edmondson* is such, that I shall not finally decide upon this Case without further consideration. The point in question was not the immediate point in that Case: the Bond had been assigned to the Plaintiff, and the Pleadings admitted him to be the Assignee of the Bankrupt. The Bond being assigned to *Smithey* as *Assignee and Creditor* of the Bankrupt, if he was entitled to the Assignment as Assignee, though not as Creditor, still the Assignment was good. The Assignee stood in the place of the Bankrupt. The Bond could not be assigned to the Bankrupt, because it being in respect of Damages sustained by him, the Assignee was entitled to the benefit of the Assignment. The Prayer of the Petition was in the alternative—to have it assigned to *Webb* himself, the Bankrupt, or to his Assignee. *Smithey v. Edmondson*, therefore, cannot be quoted as an express Authority in favour of an Assignment of the Bond to a Creditor merely as such, though, certainly, it contains *dicta* to that effect. There being, therefore, no express Case in point, the Question must be determined on the words of the Statute.

It is not in the memory of any individual that the Bond has been assigned on the Petition of a Creditor

Not a day passes, in which Creditors are not aggrieved by fraudulent Commissions, and yet no instance can be produced where a Creditor has applied for an Assignment of the Bond. This is strong to show that no such Assignment can be made.

The words "*party or parties*" used in the 23rd Section of the Act, appear to me to mean *the party or parties made Bankrupt*; and when it speaks of the party or parties grieved, it means, I apprehend, the party or parties improperly made Bankrupt. The object of that Section of the Act appears to be, to protect persons from having Commissions issued against them, who are not Bankrupts, and does not look to the protection of Creditors. The Bond is given, conditioned to prove *the party* a Bankrupt, and then a remedy is given if *the party* is not proved to be a Bankrupt, by an Assignment of the Bond, upon a Petition of the *party grieved*: construing that clause of the Act by itself—looking at the preamble, and the words used, it can mean only the Bankrupt, by the term, party grieved. This construction is fortified by referring to the 24th Section of the Act, by which a provision is made in favour of the Creditors in cases where the Bankrupt acts fraudulently. In the Cases there put, the Debt is to be forfeited, and goes "in Trust for, and to be divided amongst, the other of the Bankrupt's Creditors, in proportion to their respective Debts." Where, therefore, the Act intends to provide for the security of the Creditors, the provision is in express terms. The Act was not meant to make a provision in favour of Creditors by the terms employed in the 23rd Section, otherwise it would have contained the explicit language in their favour which is

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used in the 24th Section. I think, therefore, the words used in the 23rd Section apply only to the Bankrupt.

If Creditors were to be considered as parties grieved under the 23d Section, great difficulties would ensue. One Creditor might be injured in one way, other Creditors, in another. There might be 10,000 Creditors. Is each entitled to an Assignment of the Bond, or only a few, or the first that applies? Is there to be a race amongst the Creditors; or is he who is the most aggrieved to have the Assignment?

This is my present impression upon this point; but such is my respect even of the *dicta* of such Judges, that I shall not now finally decide this Question.

N. B. At a subsequent day, the *Vice-Chancellor* said, He retained the Opinion he had expressed.

Petition dismissed.

STEFF *v.* ANDREWS and Ux.

August 22d.
An Award made on a reference of a Point of Law is binding, though the Arbitrator mistakes the Law.
A Plea stating no new matter in bar of the Suit, over-ruled.

THE Bill stated a dispute between the Plaintiff and the Defendants as to an Estate, upon the construction of a Devise, and that they had submitted the decision of that point to an Arbitrator, who made an Award in favour of the Defendants, as follows:—“ First, That the said Estates, Lands, and Premises, and the Right and Title thereto, belonged to and was the Property of said *James Andrews* and *Mary* his Wife—that is to say, that the said *James Andrews*, by virtue of his Inter-marriage with the said *Mary*, his Wife, is seised thereof, in right of his said Wife, in his demesne as of Freehold,

for the term of his natural life; and that the said *Mary*, his Wife, is seised in her own right of and in the Reversion of, in, and to the said Estates, Lands, and Premises expectant upon the determination of the said Life Estate of the said *James Andrews* in her Demesne as of Fee. *Secondly*, That the said *William Steff*, his Executors or Administrators, shall and do pay to the said *James Andrews*, his Executors or Administrators, on or before the first day of August next, the Sum of 100 l., the same to be considered and taken by way of compensation, not only for all Claims and Demands of the said *James Andrews* and *Mary* his Wife, or either of them, for or by reason of all Mesne Profits, Rents, or Proceeds of the said Estate and Premises, but also for a Compensation for any Allotment which may have been had by or made under any Inclosure Act, or otherwise, in right of the said Premises, or in lieu of any Commonable Rights belonging thereto. *Thirdly*, That the said *William Steff* shall and do pay, bear, and discharge all the Costs incurred by the said *James Andrews* and *Mary* his Wife, or either of them, by reason of the proceedings in Equity, the same to be taxed by the proper Officer; but that each party shall and do bear and pay their own Costs of the Action at Law above mentioned, or the proceedings had therein, in any Court of Law. *Lastly*, That each of the parties shall bear and pay his own Costs and Charges attending this reference, and shall equally bear and pay the Expenses of this Award."

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The Bill then stated, that the Arbitrator (not mentioning his Name), had in this Award mistaken a plain point of Law, and therefore, that the same ought to be set aside; and prayed, "That it might be declared that the said Award is illegal, and that the Arbitrator who

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made the same was mistaken in point of Law as to the true legal construction of the Will of *Thomas Bithrey*; and that his said decision in his Award against Plaintiff was founded upon such mistake in point of Law; and that the said Award might be set aside, and declared null and void, and Plaintiff released from the burthen and effect thereof; and that said Defendants might in the mean time be restrained, by the Order and Injunction of this Honourable Court, from in any way enforcing the same, or any part thereof, against Plaintiff; and that they and each of them may, in like manner, be restrained from proceeding upon the same, or in respect thereof, against Plaintiff in a Court of Law, and from commencing and prosecuting an Action or Actions at Law, or otherwise to compel Plaintiff to comply with the direction of the said Award, or to enforce the same, or any part thereof, or the payment of any Money, or the performance of any Act, by the said Award ordered and directed."

To this Bill, the Defendants by their Plea stated, 1st. The Arbitration Bond—the Condition therein—and the Agreement of the Parties that the Submission to the Award should be made a Rule of the Court of Common Pleas. 2dly. That *Baker John Sellon*, the Arbitrator, took upon him the Arbitration; and 3dly. The Award.

Mr. *Owen*, in Support of the Plea :—

If a Point of Law be referred to the decision of an Arbitrator, his Award is binding. It was so held in *Ching v. Ching* (a). Some doubt was thrown upon that Case in *Kent v. Elstob* (b); but Lord *Eldon*, in *Young*

(a) 6 Ves. 282.

(b) 3 East, 13.

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v. *Walters* (c), adhered to the opinion he had expressed in *Ching v. Ching*. In *Nicholls v. Chalie* (d), it was held, that where a submission had been made a Rule of a Court of Common Law, this Court has no jurisdiction.

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The Bill did not state the Name of the Arbitrator, his Name was therefore introduced by the Plea, and it is thus shown, that it was a Serjeant at Law to whom the Point was referred. The Bill also did not state that the Submission was agreed to be made a Rule of Court, and that fact therefore was introduced in the Plea.

Mr. *Temple*, *contra* :—

In *Ridout v. Payne* (e), Lord *Hardwicke* determined, that if an Arbitrator is mistaken in a Point of Law, this Court will relieve. If an Arbitrator states the reasons on which he founds his Award, and those reasons are not consonant to Law, the Court will relieve; though it is otherwise where he makes his Award without stating his reasons (f).

No new material matter is stated in the Plea. The Name of the Arbitrator, and the fact that there was a Submission to make the Award a Rule of Court, are immaterial facts. The Defendants, if right in saying the Award is good, should have demurred.

THE VICE-CHANCELLOR :—

If a point of Law be referred to the decision of an Arbitrator, the parties are bound by his decision, whether right or wrong; unless fraud or corruption is imputable.

(c) 9 Ves. 364.

(d) 14 Ves. 265.

(e) 3 Atk. 491.

(f) *Kent v. Elstob*,
3 East, 13.

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That was decided in *Ching v. Ching* (g); and notwithstanding what was said in *Kent v. Elstob* (h), Lord Eldon continued of the same Opinion, as appears from *Young v. Walters* (i).

With respect to the objection as to *form*, it is clear that if a Bill be open to a Demurrer, a Plea cannot be resorted to. A Plea to be good must state some new matter, which is a bar to the Plaintiff; but this Plea states no new matter in bar of the Suit. It states the Arbitration Bond and Award, but they were stated in the Bill. It states also the Name of the Arbitrator, and a Submission that the Award should be made a Rule of Court; but these statements are unimportant. It does not signify who was appointed Arbitrator: If parties chose to refer a point of Law to the decision of the Porter of Lincoln's-Inn, they might, and his decision would be binding; and a mere Submission to make an Award a Rule of Court is unimportant, unless it actually was made a Rule of Court; and if the Plea had stated that the Award had been made a Rule of Court, the Plea might have been considered as double, and therefore bad.

If made a Rule of Court, this Court could not Act; the Jurisdiction would be transferred to the Court in which the Submission was made a Rule (k); but if the Submission is not acted upon, no other Court acquires Jurisdiction—no Process of Contempt lies,—it is the same as if no such Submission has been made.

As this Plea, therefore, has stated no new matter in bar of the Suit, it must be overruled.

Plea over-ruled.

(g) 6 Ves. 282.

(h) 3 East 13.

(i) 9 Ves. 364.

(k) See *Gwinett v. Bannister*,
14 Ves. 530.

Ex parte HORSLEY and another, *in re* GREEN.

Ex parte GREEN, *in re* GREEN.

August 13th.

THERE were two Petitions, one by *Horsley*, and another to supersede the Commission issued by *Green*; and another by *Green*, to supersede the Commission issued by *Horsley* and another. On the 26th of October 1815, a Docket was struck by Petitioners *Horsley* and another against *John Green*, and a Commission issued on the 3d November following, in which the Bankrupt was described "of the Hedge House near Bromyard, Herefordshire, Dealer and Chapman." *A Commission will not be superseded on account of a mis-description of the Bankrupt, if he is well known, as described in the Commission.*

On the 1st November 1815, another Docket was struck by the Petitioner *William Green*, (the Father of the Bankrupt,) and a Commission issued on the 10th, in which Commission the Bankrupt was described "of the Parish of Tedstone Delamere, in the County of Hereford, Dealer and Chapman."

The only question upon which there was any doubt, was, whether the Commission issued by *Horsley* and another, contained a correct description of the Bankrupt; or, whether it was not so incorrect as to make it proper that that Commission should be superseded in favour of *William Green's* Commission, which it was said, contained the correct description of the Bankrupt.

Many Affidavits were filed on the part of the Peti-

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Ex parte
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another,
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GREEN.
in re
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tioners *Horsley* and another, to show that the Bankrupt was well known by the description given in their Commission; and on the other hand, Affidavits were filed to show that the description in *William Green's* Commission was the correct one, and that by which he was known.

Sir *Samuel Romilly*, and Mr. *Cullen*, in support of the Commission of *Horsley* and another:—

The description, in our Commission, was sufficiently correct. The description is merely to ascertain the identity of the Bankrupt; and if he is well known by the description given, that is sufficient, though it be a mis-description. But in fact, the description was correct. We have fourteen Affidavits stating that the Bankrupt was always described as in this Commission. His Letters were directed to him by that description; and he described himself in the same way. The second Docket was struck with a knowledge of the first, and the second Commission is invalid, unless the first Commission is superseded, which there are no grounds for doing. The second Commission may perhaps contain the most correct description, but the first contains the popular description, and by which he was best known.

Mr. *Hart*, and Mr. *Mountague*, *contra*:—

A right description of the Bankrupt's residence, in a Commission, is as necessary as a right name. The Bankrupt did not reside in the *Hedge House*, which was in the possession of another person, but at a place called the *Hedge House Gate*, which are different places. Many Witnesses swear that the Bankrupt occupied the *Hedge House Gate*, and that he was known as of that

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place. *In re Gordon*, and in *Ex parte Marsdon (a)*, the Commission was set aside on account of a *misdescription* of the Bankrupt. When a Commission is issued with a wrong description of the Bankrupt, the

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Two Cases
in which
a Commis-
sion was
superseded
on account
of a mis-
description
of the
Bankrupt.

(a) The Case *in re Gordon*, November 5th, 1813, as appears from Mr. *Montague's* note was thus: "A Commission issued against *John Gordon*, of *Copthall Buildings*, in the City of London. After the choice of Assignees, a Petition was presented by the Assignees, stating, that *John Gordon* carried on his business in *Copthall Court*, and not in *Copthall Buildings*; that *Copthall Buildings* adjoin to and lead from *Copthall Court*; but that the Counting-house of *John Gordon* was upwards of eighty yards from the point of junction; and praying a supersedeas, and that a new Commission might issue.

Sir Samuel Romilly for
Petitioner:—

Mr. *Montague*, for the Petitioning Creditor, consented, if the Chancellor thought it necessary, that a new Commission should issue; and so his Lordship did think, and a supersedeas was therefore directed."

Mr. *Montague's* Note, of the other Case, was as follows: "*Ex parte Marsdon*,

Lin. Inn Hall, July 22d, 1814, A Commission issued against I. Needham, of A—, in the Parish of *Hope*. Before it was opened, another Commission issued against I. Needham, of A—, in the Parish of *Tidswell*.

There was a person of the name of I. Needham, of A—, in the Parish of *Hope*, but he was not the person against whom the Commission was intended to issue. The real Bankrupt lived at *Tidswell*.

This was a Petition by the Petitioning Creditors under the second Commission, to supersede the first. Ordered with Costs.

Sir Samuel Romilly, and
Mr. *Montague*, for
Petitioners;—

No Counsel appeared on the other side.

The Chancellor expressed great disapprobation of the mode in which the Petitioning Creditor under the first Commission had sworn in different Affidavits to a wrong Parish."

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practice is to issue another Commission with a right description. The description in the second Commission is unquestionably correct, and that ought to stand. No Parish is named in the first Commission.

Mr. Cullen, [in the absence of Sir Samuel Romilly,]
 in Reply :—

When the name of a Bankrupt is mis-described, yet if it be *idem sonans*, the *Chancellor* has refused to issue another Commission, as in *Ex parte Smith (b)*, and other Cases.

In the MS. Cases produced by Mr. *Montague*, there was a flagrant mis-description of the Bankrupt, by which Creditors might have been misled, but here no Creditor could be misled ; all must have known who was meant.

The VICE-CHANCELLOR :—

I am not aware of any other Cases in which a Commission of Bankruptcy has been superseded on the ground of a *mis-description* of the Bankrupt, besides those which have been mentioned by Mr. *Montague*. There are several Cases as to the effect of a Commission issued in a *wrong Name* :—*Stephens v. Elizée (c)*, *In re Baldwin (d)*, *Ex parte Smith (e)*, and *Ex parte Schofield (f)*, are Cases of that description ; but here the objection is, that the Bankrupt's *place of abode* is wrongly described. Suppose the Parish was not rightly named, would that vitiate the Commission ? Where a person,

(b) 1 Rose's Cas. Bankruptcy, p. 25.

(c) Camp. N. P. Cases, 256.

(d) 1 Rose's Cases in Bankruptcy, p. 20.

(e) *Ib.* 26.

(f) *Ib.* 2 Vol. 246.

living in *London* is made a Bankrupt, the Parish is scarcely ever mentioned, but only the Street in which he lives. If the Bankrupt's name, place of abode, and Mystery is mentioned, that is sufficient. If, in this Case, the Bankrupt's place of abode is as well known, in popular acceptance, by the description used in the first Commission, of the *Hedge House, near Bromyard*, as by the description used in the second Commission, the first Commission must stand. The Plaintiff, *Wm. Green*, does not pretend he did not know him by that description. In the Case, *in re Gordon*, cited by Mr. *Montague*, there does not appear to have been much discussion. Certainly, *Copthall Buildings* was different from *Copthall Court*; it was a palpable mistake in the Place of Abode. The other Case, *Ex parte Marsdon*, was a stronger Case, there being two persons of the same name, and a false description of the Bankrupt's Place of Abode.

Many Witnesses swear this Bankrupt was known by the description used in the first Commission. If he had been described as in the second Commission, attempts would, probably, have been made to supersede the Commission upon the Affidavits of persons who knew him under the description contained in the first Commission. As no person could doubt the identity of the Bankrupt as described in the first Commission, I see no ground for superseding it. The Commission issued by *William Green* must be superseded, and his Petition dismissed; and the Costs of the second Commission, and of the Supersedeas, and application to supersede the same, and expenses occasioned by the Petition of *William Green*, must be paid by him to the Petitioners *Horsley*, and another, the same to be taxed by the Master.

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August 17th.

Husband and Wife assign a Reversionary Interest of the Wife in certain Trust Stock, as Security for the payment of an Annuity granted by the Husband. The Husband afterward takes the benefit of the Insolvent Debtors Act, and a general Assignment is made of his Property: The person on whose death the Wife was to take dies, and then the Husband dies, without having done any other act to reduce the Stock into Possession; held, that the Wife was entitled by Survivorship to the Stock, against both the particular and the general Assignee.

HORNSBY v. LEE and Others.

BY Indenture, 1st January 1774, between *Deacon* and *Collier*, Assignees of *Baptist Darwin*, a Bankrupt (the Father of the Plaintiff), of the first part; the said *Baptist Darwin* and *S. Darwin*, his Wife (the Mother of the Plaintiff), of the second part; and *Mary Petty*, *R. Petty*, *J. Elliott* and *G. Hooper*, of the third part; *Deacon* and *Collier* granted, &c. unto the said *M. Petty*, *R. Petty*, *J. Elliott*, and *G. Hooper*, 422 l. 6s. 3d. Four-per-Cents. together with the Dividends, to hold the same upon Trust, to apply the Dividends for the separate use of *S. Darwin* during her Life, and, after her Death, to apply the Principal and Dividends among all and every such Child and Children of the said *B. Darwin*, by the said *S. Darwin*, as should be then living, in equal Shares, payable at Twenty-one: but if either of the Children should die before his or their shares should become payable, the shares of him, her or them so dying, to be paid to the survivors; and if only one Child who should live to attain Twenty-one, then the Principal Sum and the Dividends to be paid to such only Child. By the same Indenture, *Deacon*, and *Collier* granted, &c. to the said *M. Petty*, *R. Petty*, *J. Elliott*, and *G. Hooper*, certain Shares in a Messuage, and all the Assignees Right, Title and Interest in and to the Real Estate late of *Richard Petty* (the Father of the said *S. Darwin*), and the Moiety, or half part of the Share and Proportion of them the said Assignees, of, in, and to a certain sum of 2,762 l. 11s. 3d. upon the same Trusts as were declared respecting the 422 l. 6s. 3d. Four-per-Cents.

The Plaintiff and *Anne Mary Darwin* were the only Issue of *Baptist* and *Sarah Darwin*. *Baptist Darwin* died in 1782. In 1787 the Plaintiff married *Nathaniel Hornsby*, without a settlement, and in February 1799 the Plaintiff and her Husband assigned over a Moiety of their Interest in the said Trust Funds upon the contingency of the Plaintiff surviving her Mother, unto the Defendant, *John Parker*, as a collateral Security for the due payment of an Annuity of 30*l.* granted by the Plaintiff's Husband, *Hornsby*, to *Parker* during his Life, in consideration of 200*l.* paid to *Hornsby*.

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In 1790 *Anne Mary Darwin* married *John Patten*.

In 1801, *Thomas Rolph* and the Defendant, *George Lee*, were appointed Trustees, and the Trust Monies, which then consisted of 1,453*l.* 15*s.* 6*d.* Three per Cents. were transferred to them.

Anne Mary Patten died in 1807, and *Sarah Darwin* (the Mother) died early in February 1814 (a).

The Plaintiff's Husband, *Hornsby*, was confined in the King's Bench Prison for Debt, and in January 1814 was discharged under the Insolvent Act, and his Estate and Effects vested in a Clerk of the Peace, and the same were by him assigned to the Defendant *John Seton*.

Hornsby afterwards, 16th February 1814, died without having instituted any proceedings, or done any act to reduce the Trust Fund into possession in the short interval, a few days only, between the Widow's death and his own.

Thomas Rolph died 24th March 1814.

(a) The particular day of her death did not appear on the Pleadings.

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The Bill, stating these facts, prayed, that the Trust Funds, with the Dividends, might be transferred to the Plaintiff; or, if the Court should be of opinion that the Defendants *Parker* and *Seton*, or either of them, were entitled to them, then, that the Plaintiff might be decreed to have a Settlement out of the same.

The Defendant *Parker*, by his Answer, insisted, that the Dividends and Interest of the moiety of the Trust Monies assigned to him, ought to be applied pursuant to the Trusts declared as to the same, in and by the Indenture of the 26th February 1799; and stated, that 314 *l.* 3 *s.* 6 *d.* was due to him for ten years and a half arrears of the Annuity, and claimed to be paid the same out of the Trust Monies.

The defendant *Seton*, by his Answer, submitted, that the Trust Funds ought to be transferred to him as the Assignee of the Estate and Effects of *Hornsby*, for the benefit of himself and the rest of the Creditors.

The Defendant *Lee*, the Trustee, submitted to act as the Court should direct.

Mr. *Cooke*, and Mr. *Richards*, for Plaintiff:—

The Plaintiff claims the whole of this Property, as having survived to her. This being a Reversionary Interest, the Husband could not reduce it into possession, or part with it before the death of *Sarah Darwin*, the Mother; and, after her death, a few days before his own, he did no act to reduce the Property into possession. Neither the particular Assignment to *Parker*, or the general Assignment under the Insolvent Act to *Seton*, operated as a reduction into possession. In *Mitford v.*

Mitford (b) it was determined, that the general Assignment in Bankruptcy had not the effect of reducing into possession a Legacy of Stock left in Trust for the benefit of the Bankrupt's Wife, and her right by Survivorship was established against the Assignees. The same principle must apply to *all* Assignments, whether under the Insolvent Debtors Act, or to a particular Assignee. They cited also *Wildman v. Wildman* (c), and *Woollands v. Croucher* (d).

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The Plaintiff by joining in the Assignment to Parker has not affected her Claim; for, being a married Woman, the Deed was inoperative as to her.

Mr. *Leach*, and Mr. *Dowdeswell*, for the Defendant,
Parker :—

The Assignment to *Parker* of this Reversionary Interest, as a Security for the payment of the Annuity granted to him, was valid. In *Wright v. Morley* (d), an Assignment by the Husband of his Interest, in right of his Wife, was held good, subject to the Wife's Equity to a Settlement. That, it is true, was a present Interest; but, whether the Interest to which the Husband is entitled in right of his Wife be *present* or *reversionary*, makes no difference; in both cases his Assignment is effectual, subject to the Wife's Equity to a Settlement.

Mr. *Trower*, for the Defendant, *Seton* :—

After the determination in *Mitford* and *Mitford*, I cannot contend that this Interest passed by the Assignment under the Insolvent Debtor's Act; but this Defendant, not having asserted any right to this Property, and

(b) 9 Ves. 87. See Mr. *Christian's* observations on this Case. 1 Vol. Bankrupt Law, p. 270. (c) 9 Ves. 174. (d) 12 Ves. 174.

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being made a party against his desire, ought to have his Costs.

Mr. *Shadwell*, for the Trustee, asked for his Costs.

The *Vice-Chancellor*—[After stating the facts of the Case]:—

Independently of Authority, let us consider, upon Principle, Whether the Husband's Assignment of his Wife's Contingent Interest is good? The Husband has a right to his Wife's *Choses in Action*, provided he reduces them into possession. Is a Deed, assigning a *Reversionary* Interest, a reduction into possession? It is impossible actually to reduce a *Reversionary* Interest into possession. Is it then a constructive reduction into possession? The Assignment puts the Assignee of the Husband in the same situation as the Husband; and if the Husband survives the Wife, the Assignee is entitled to the Property; but here the Husband died before the Wife, and the Assignee therefore is not entitled to the Property. This is the manner in which this Case strikes me, upon Principle.

According to *Mitford v. Mitford*, it is clear, that the general Assignment in *Bankruptcy* does not pass a reversionary Interest in the Wife, she surviving her Husband. It must be the same as to the Assignment under the *Insolvent Debtors Act*; nor do I see what answer can be given to the observation of Mr. *Cooke*, that a particular Assignee cannot be in a better situation than an Assignee under the general Assignment in *Bankruptcy*. The Case cited of *Woollands v. Crowcher* is strong to show the insufficiency of the Assignment to bar the Wife's claim in case she survives her Husband. On Principle and Authority, the Plaintiff is entitled to this Money.

The Decree was as follows :

“ Declare the Plaintiff is entitled to 1,453*l.* 15*s.* 6*d.* Three *per Cent.* Reduced Annuities, in the Pleadings mentioned, standing in the names of *Thomas Rolph*, in the Pleadings named, and the Defendant *George Lee*, in the Books of the Governor and Company of the Bank of England. And it is Ordered, that the Defendant, *George Lee*, do transfer the said 1,453*l.* 15*s.* 6*d.*, Three pounds *per Cent.* Reduced Annuities, unto the Plaintiff, with the Interest and Dividends which have accrued due thereon. And it is Ordered, that the Plaintiff do pay unto the Defendants *George Lee* and *John Seton* their Costs of this Suit, to be taxed by Mr. *Campbell*, one of the Masters of this Court, as between Solicitor and Client; and as between the Plaintiff, and Defendant *John Parker*, no Costs on either Side; and any of the Parties are to be at liberty to apply to this Court, as they shall be advised.”

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WALKER and others, v. BELL.

ON the 7th April 1814, a Commission of Sequestration issued against the Defendant, directed to certain Commissioners, commanding them, any three or two of them, to enter upon all the Messuage, Lands, Tenements and Real Estate of the Defendant; and to collect, take, and get into their hands, not only the Rents and Profits of the said Estate, but also all his Goods, Chattels and Personal Estate, and retain and keep the same under Sequestration in their hands until the Defendant should pay the sum of 2,889*l.* 6*s.* 7*d.* into the Bank, clear his

August 23d.
Sequestrators took possession of certain Mortgaged Estates. The Mortgagees, on Petition, obtained an Order to have the Rents and Profits of the Mortgaged Estates, in the hands of the

Sequestrators, applied towards payment of their Mortgage Money, &c. and Possession of the Mortgaged Estates to be delivered up to them.

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Contempt, and the Court should make an Order to the contrary.

The acting Commissioners seized into their hands the whole of the Defendant's Estates.

Petitions were presented by two distinct Mortgagees of the Estate; and, on the 20th April 1815, an Order was made, referring it to the *Master*, to inquire whether *Jonathan Fisher* and *James Birley*, and others, the Petitioners, were Mortgagees of any and what Messuages, Lands, Tenements, Hereditaments and Premises of the Defendant *Richard Bell*, situate, &c. sequestered and taken possession of by the Commissioners under the Sequestration, and what was due to them respectively for Principal and Interest upon such Mortgages; and whether all or any of the Lands, &c. comprised in the Mortgage to the Petitioner *Fisher*, were the same Land, &c. as were comprised in the Mortgage to the Petitioners *Birley* and others; and in case they were so, then it was ordered, that the *Master* should state the priority of the respective Mortgages.

The *Master* made his Report 11th June 1816, stating, there were two different Mortgages, of different parts of the Defendant's Estates, and the amount due for Principal to such Mortgagees respectively, and that the Sequestrators were in possession of such mortgaged Estates.

A Petition was then presented to confirm the *Master's* Report absolutely; and prayed that it might be referred back to the *Master* to take an Account of the Rents and Profits of the Estate and Premises so in Mortgage which had been possessed or received by, or which were in the hands of the Commissioners, or either of them, under or by virtue of the Commission of Sequestration; and that the *Master* might be directed to compute subsequent

Interest on the Mortgage, and tax the Costs of the Petition and of the former Petitions; and that the amount of the Rents and Profits of the Estate and Premises so in Mortgage, and which should appear on the taking of the Account to be in the hands of the Commissioners, or either of them, might be applied in the first place in payment of the Petitioners Costs when taxed, and afterwards in payment of the Monies so reported due to the Mortgagees for Interest on their Mortgages; so far as the same would extend for that purpose; and that the Sequestrators might be ordered to deliver up the Estate and Premises mortgaged, to the Mortgagees; or to make such other Order to enable the Petitioners to recover Possession of the mortgaged Estate and Premises, or otherwise, with reference to the matters aforesaid, as might be proper.

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Mr. *Gardiner*, for the Petitioner, *Fisher*.

Mr. *Phillimore*, for the Petitioners, *Birley* and others.

Mr. *Bell*, for the Plaintiffs.

Mr. *Girdlestone*, for the Defendant (a).

The VICE CHANCELLOR—[After stating the facts of the Case]:—

That part of the Petition which prays the Report may be confirmed absolutely, is of course. The only disputed point is as to the application of the Rents and Profits of the Defendant's Real Estate in the hands of the Commissioners. The Prayer of the Petition is opposed, on the ground that, the Rents received by the Sequestrators, prior to the *Master's* Report as to the Mortgages, ought not to be applied to pay the Mortgagees, the Sequestration being in the nature of an Exe-

(a) The Reporter did not hear the Argument.

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cution at Common Law. At this late hour (a) it would be inconvenient to enter, with particularity, into the Decisions relative to this Case, and I shall only mention them generally: They are, *Attorney General v. Coventry* (b), *Bligh v. Earl of Darnley* (c), *Wharam v. Broughton* (d), *Desbrow v. Crommie* (e), *Rowley v. Ridley* (f) which Case contains a learned statement by Mr. Dickens on the subject; *Simmonds v. Lord Kinnaird* (g), in which *Rowley and Ridley* is controverted; and, lastly, *Knight v. Young* (h). Lord Hardwicke, in *Wharam v. Broughton*, states the Principle upon which the Court acts in these Cases, the nature of the Process, and the proceedings upon it. The Rents and Profits in this Case, received by the Sequestrators, are not vested in the Plaintiff, but are *in custodia legis*; and there must be a further Order before they can be applied for the benefit of the Plaintiff; and if Parties in the mean time come in, as these Petitioners have done, and show to the Court, that the Estate is mortgaged to them, they are entitled to the Rents and Profits in part discharge of what is due to them upon their Mortgage, after paying thereout the Sequestrators their Costs, and the Costs of this Application; and the Sequestrators must give up the possession of the Estate to the Mortgagees.

The Order was,

“ That it be referred to the said *Master* to take an account of the Rents and Profits of the Premises com-

(a) It was nearly six o'clock.

(b) 1 P. Wms. 308-9.

(c) 2 P. Wms. 622.

(d) 1 Vez. sen. 180.

(e) Bunb. 272.

(f) 2 Dick. 622.

(g) 4 Ves. 735.

(h) 2 Ves. and Bea. 184.

prised in the said Indentures of Lease and Release, dated respectively the 19th and 20th days of October 1788, and the 4th and 5th days of March 1811, which have been received by the said Commissioners of Sequestration, or either of them, or by any other person or persons by their or either of their Order, or for their or either of their use; and also an account of the Rents and Profits of the Premises comprised in the Indentures of Lease and Release, dated the 15th and 16th days of August 1808, which have been received by the said Commissioners or either of them, or by any other person or persons by their or either of their Order, or for their or either of their use. And it is ordered, that the said Master do tax the Costs of the said Commissioners of Sequestration, incurred by them, in the execution of the said Commission; and also the Costs of the Plaintiffs of this Application, and to distinguish what part of the said Costs was incurred by the said Commissioners in respect of the Estate and Premises comprised in the said Indentures of the 19th and 20th days of October 1788, and of the 4th and 5th days of March 1811; and what part thereof was incurred in respect of the Estate and Premises comprised in the said Indentures of the 15th and 16th days of August 1808; and as to such of the said Costs as shall not be found to have been incurred in respect of either of the said Estates, or of any Money or Effects (other than the Rents and Profits of the said Estates, levied and received under the said Commission,) separately to apportion such last-mentioned Costs in proportion to the amount of the Rents and Profits received by the said Commissioners from each of the said Estates and Premises, and the amount in value of any other Money or Effects levied and received under the said Commission :

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and it is Ordered, that the said Commissioners of Sequestration be at liberty to retain their said Costs, so distinguished and apportioned in respect of the said Estates, and pay unto the Plaintiffs their said Costs so distinguished and apportioned in respect of the said Estates, out of the said Rents and Profits respectively, according to such distinction and apportionment thereof: and it is Ordered, that the said Master do also tax the Petitioner, *Jonathan Fisher*, his Costs of the proceedings on his behalf in this Cause, and of this Application: and it is Ordered, that the said *Robert Benson*, and *Peter Hodgson*, the Commissioners, do pay to the said *Jonathan Fisher*, the remainder of the said Rents and Profits of the said Estates and Premises comprised in the said Indentures of the 19th and 20th days of October 1788, and of the 4th and 5th days of March 1811, after retaining and paying thereout their said Costs, and the said Costs of the Plaintiffs relating thereto, according to such distinction and apportionment, to the said Petitioner, *Jonathan Fisher*, in satisfaction, as far as the same will extend, of the Principal and Interest due to him in respect of his said Mortgage, and of his said Costs: and it is Ordered, that the said Commissioners, the said *Robert Benson* and *Peter Hodgson*, do let the Petitioner, *Jonathan Fisher*, into Possession of the Estate and Premises comprised in the last-mentioned Indentures, and into the receipt of the Rents and Profits thereof, as a Security for what shall be due to him in respect of his said Mortgage: and it is Ordered, that the said Master do tax the Petitioners, *George Buckham*, *Michael Walker*, *James Birley*, and *Jane* his Wife, and *Isaac Williamson*, their Costs of the proceedings in this Cause, on their behalf, and of this Application: and it is Ordered, that the said *Robert Benson*, and *Peter Hodgson*,

the said Commissioners, do pay to the Petitioners *George Buckham, Michael Walker, James Birley, and Jane his Wife, and Isaac Williamson*, their said Costs, when taxed, out of the residue of what the said Master shall find due from them, the said Commissioners, for Rents and Profits of the Estate and Premises comprised in the said Indentures of Lease and Release of the 15th and 16th days of August 1808: and it is Ordered, that the said *Robert Benson* and *Peter Hodgson*, the said Commissioners, do pay to the said *George Buckham, and Michael Walker*, in trust for the said Petitioners, *James Birley, and Jane his Wife*, what will remain of the said last-mentioned Rents and Profits, after retaining and paying thereout their said Costs, and the said Costs of the Plaintiffs relating thereto, and so distinguished and apportioned as aforesaid: and also the amount of the said Costs to be paid by them to the said Petitioners, *George Buckham, Michael Walker, James Birley, and Jane his Wife, and Isaac Williamson*, in satisfaction, as far as the same will extend, of the Principal and Interest due to the said *George Buckham, and Michael Walker*, in respect of their said Mortgage, in trust, as aforesaid. And it is Ordered, that the said Commissioners, the said *Robert Benson, and Peter Hodgson*, do let the said *Isaac Williamson* into the Possession of the said Estate and Premises comprised in the said Indentures of the 15th and 16th days of August 1808, in Trust for the Petitioners, *George Buckham, Michael Walker, James Birley, and Jane his Wife*, as a Security for what shall be due in respect of the last-mentioned Mortgage: and for the better taking the said Accounts, the Parties, and the Petitioners and Sequestrators, are to produce before the said Master, upon Oath, all Books, Papers, and Writings, in their

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custody or power relating thereto, and are to be examined upon Interrogatories as the said Master shall direct, who in taking the said Accounts is to make unto the Parties, Petitioners and Sequestrators, all just allowances."

Original Bill, between THOMAS PALMER
 ACLAND, Esq. - - - - Plaintiff,
 And DAVID CUMING, Esq. (since de-
 ceased,) - - - - Defendant.

Bill of Revivor and Supplement, between JANE
 GAISFORD, Widow, - - - - Plaintiff,
 And the said THOMAS PALMER ACLAND
 and GEORGE CUMING - Defendants.

28th August.
When Purchase Money is agreed to be paid, and a Conveyance made at a given time, and disputes arise as to the Title, and the Purchaser proposes to the Vendee to lay out the Purchase Money in Exchequer Bills till it is wanted, but the Vendor returns no answer, and the Money is laid out in Exchequer Bills, the Vendee is at the risk, and is entitled to the benefit of such Purchase Money, with Four per Cent. Interest. When a Purchase is completed the Vendee is entitled to the Rents and Profits of the Estate till possession is given, and the Vendor to his Purchase Money, with Interest; and if, by the neglect of the Vendor, no Rents and Profits have been received, he will be liable for what he might have received, unless the Purchaser has taken possession.

THE *Original Bill* was filed 31st May 1809, by *T. P. Acland*, praying, that *David Cuming*, the Defendant, (since deceased,) might specifically perform his Contract to sell to the Plaintiff the Fee Simple of an Estate called *Stone and Stone Down*, at *Exford*, in *Somersetshire*; and that the Defendant might be decreed to allow the Plaintiff Interest on the Purchase Money,

2,900*l.* The Purchase Agreement was dated 4th June 1807, and the Purchase Money was agreed to be paid on or before the ensuing 25th March, if a tender of a proper Conveyance was made. The Estate was in the possession of one — *Pitts*, as Tenant to the Vendor, whose Tenancy expired at Lady-day 1808.

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On the 9th July 1812, a Decree was made by the *Master of the Rolls*, referring it to a *Master*, to see whether a good Title could be made to the Estate, and an Inquiry was directed, whether the Defendant, before the filing of the Bill, could make a good Title; and the consideration of Costs was reserved.

Before the *Master* made his Report, the Defendant, *David Cuming*, died.

Acland declining to file a Bill of Revivor, *Jane Gaisford*, the Executrix of *David Cuming*, filed a Bill of Revivor and Supplement against *Acland*, the Plaintiff in the original Bill; and also against *George Cuming*, the Brother and Heir at Law of *David Cuming*, deceased.

The Supplemental Cause was heard 18th March 1816, when it was decreed, that the former Decree, 9th July 1812, should be prosecuted between the present parties in like manner as was thereby directed as to the then parties, reserving further Directions and Costs.

On the 22d May 1816 the *Master* made his Report, which was afterwards confirmed, whereby he was of opinion that the late Defendant, *David Cuming*, could in his life-time; and that *George Cuming*, as Heir at Law of said Defendant, and the said *Jane Gaisford*,

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Widow, as his Executrix, could, at the time of the Report, make a good Title to the Estates; and he was also of opinion, that the late Defendant *David Cuming* could have made a good Title to the Estate before the filing of the original Bill.

This Report, which was obtained by *Jane Gaisford*, Widow, was absolutely confirmed.

The Cause now came on for further Directions, and as to Costs.

Mr. *Bell*, and Mr. *Horne*, for the Plaintiff in the Supplemental Bill.

Mr. *Benyon*, for the Plaintiff in the Original Bill, and Defendant in the Supplemental Bill.

Mr. ———, for *George Cuming*, the Defendant to the Supplemental Bill.

On the part of the Vendee, it was insisted, he was entitled to the Rents and Profits of the Estate from Lady-day 1808; and that an inquiry ought to be made what Rents and Profits he had received, or which, without his wilful default, he might have received. On the part of the Vendor, it was contended, that the Vendee was only entitled to such Rents and Profits as he had received, which, owing to the conduct of *Pitts*, who continued as Tenant after Lady-day 1808, were very deficient; and that possession of the Premises had been taken by the Vendee. It was denied, however, on the part of the Vendee, that he had taken possession. The Vendor also claimed the Interest which had been made on the Purchase Money, the same having been laid out in Exchequer Bills, though not with the consent of the Vendor.

The VICE-CHANCELLOR:—

The *Master* having reported that a good Title can be made to this Estate, and that *David Cuming*, deceased, the Defendant to the original Bill, could make a good Title before the filing of the original Bill, Mr. *Acland*, the Plaintiff in that Suit, must pay the Costs of it, and so much of the Costs of the Supplemental Bill as relate to the original Suit; but I shall not give any Costs in the Supplemental Suit. One question is, What Interest *Acland* is to pay on his Purchase Money? It has been contended that he should pay 5*l. per Cent.* on his Purchase Money, because he, in a Letter, stated in the original Bill, and admitted in the Answer to that Bill, applied to *Cuming* for his consent to lay out the Purchase Money in Exchequer Bills, to which *Cuming* returned no answer; but in fact, the Purchase Money was laid out in Exchequer Bills. This does not vary the general Rule. *Cuming* not having assented to the Purchase of the Exchequer Bills, *Acland* was alone subject to all the risk (*a*); and the Plaintiff in the Supplemental Bill cannot now claim the benefit of that Purchase; but *Acland* must pay his Purchase Money, with 4*l. per Cent.* Interest. Another Question that has been made, is, Whether the Decree should not go farther than in ordinary cases, and direct, in favour of *Acland*, an Account of the Rents and Profits of the Estates, *which were, or which, without his wilful default, might have been, received?*

I have not found any authority which determines what is to be done with the Estate during the interval when the Title is under dispute; during the suspension of an Executory Contract. In Equity, an Estate

(*a*) *Roberts v. Massey*, 13 Ves. 561.

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agreed to be purchased is considered as the Estate of the Purchaser from the time of the Contract, and the Purchase Money from that time is held to belong to the Vendor; but with respect to *Possession*, there is no change in the notion of Equity, until the Purchase Money is paid. The Vendor has a clear right to keep Possession until the Purchase Money is paid; if the Purchaser enters before he has paid his Purchase Money, he is a Trespasser (*b*). *Quoad* Possession, the Estate belongs to the Vendor—it is not the Estate of the Vendee for the purpose of Possession; for though in many cases the Purchaser is responsible, as if there be a Fire (*c*), still as to Possession, the right is in the Vendor, till his Purchase Money is paid.

What has been decided as to responsibility for the Purchase Money? If the Purchaser suffers the Money to lie dead, it is matter of indifference to the Vendor: Why? Because the Vendee having the Money, must take care to employ it. *Roberts v. Massey*, is an authority to show that the Vendor is entitled to his Purchase Money and Interest, though the Vendee has kept it at his Bankers unemployed. The Vendor, therefore, may call for Interest upon his Purchase Money, although the Vendee has suffered it to lie dead. Then, to pursue that principle, must not the Vendor, the legal Owner of the Estate, by a parity of reasoning, take care of the purchased Estate? He must. If he has received Rent, he must account for it; if he has suffered Tenants to run in arrear, he is responsible for the loss thereby occasioned. If Possession of the Estate was given, or any

(*b*) See *Crockford v. Alexander*, 15 Ves. 138.

(*c*) See *Paine v. Meller*, 6 Ves. 349; and *Poole v. Shergold*, 2 Bro. C. C. 118.

any Tender of Possession was made to the Defendant, or the Defendant exercised acts of Ownership over the Premises, that may make a difference. These facts are not now before me. If the parties wish, they must be inquired into.

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The Order on further directions, was,

“ That it be referred to the *Master* to compute Interest on the sum of 2,900 *l.*, the Purchase Money for the Estate and Premises comprised in the said Agreement, after the rate of 4 *l. per Cent. per Annum*, from the 25th day of March 1808, the time when the Purchase Money was to have been paid. And it is ordered, that the said *Master* do inquire and state to the Court whether any Tender of Possession of the said Estate and Premises was made to the Plaintiff at Lady-day, 1808; and if so, whether the same was accepted or declined; and whether the same Tenant continued in possession of the said Estate and Premises, and at the same Rent, and by whom and for whose use such Rent was received, and up to what time, and what arrears are due, and from whom and from what cause those Arrears have accrued, and whether any Notice was given of the said Tenant being in arrear; and whether the said *Thomas Palmer Acland*, the Purchaser, has, since the Agreement, exercised any acts of Ownership over the said Estate and Premises; and in case any special circumstance shall arise in making the said inquiries, the said *Master* is to state the same to the Court; and, for the better discovery of the matters aforesaid, the Parties are to produce before the *Master*, upon Oath, all Books, &c., and are to be examined upon Interrogatories as the said *Master* should direct;

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And it is Ordered, that the said *Master* do tax the Costs of the late Defendant, *David Cuming*; and also the Costs, to this time, of the said *Jane Gaisford*, the Executrix of the said late Defendant, so far as the same relate to the original Suit of *Acland against Cuming, &c.* And this Court doth not think fit to give any Costs on either side in the said Supplemental Suit of *Gaisford against Acland*; and this Court doth reserve the consideration of all further directions, &c." (c).

(c) The following MS. Case, as to the time when a Purchaser in the *Master's* Office is considered as Owner of the Estate purchased, has been thought worthy of publication.

Mackrell v. Hunt, 25th May
1749.

Purchaser under a Decree considered only as Owner of the Estate from the time he pays in his Purchase Money; and not from the confirmation of the Report by which he is declared the best Purchaser, he having taken objections to the Title.

This Matter came on by Petition to the Chancellor, on behalf of Mr. *Fludyer*, who had been reported the best Purchaser of a Messuage in *Basinghall Street*, of which he was the Tenant, at 110 *l.* a year Rent, and he was reported the best Purchaser at the price of 1000 *l.*, which Report was made absolute by an Order dated the 11th June 1747, and he paid the Purchase Money into the Bank, the 23d March 1748; and

now the question was, whether he should have a Conveyance upon paying the Interest of the Purchase Money from the date of the Order by which the Report was confirmed, or whether he should be charged with the Rent to Lady-day last.

On behalf of Mr. *Fludyer*, it was argued, that these kind of Purchases are as Contracts with the Court; and after the Report is absolutely confirmed, the Court, if a Title appears, will compel such Purchaser to complete his Purchase, and the party who is to convey is become but a Trustee for the Purchaser. The Estate from that time is his, and the Seller is at most entitled but to the Purchase Money and Interest to the time of its being brought into Court*. And it was

* *Ex parte Manning*, 2 P. Wms. 410.

further argued to be the more reasonable to be so in the present case, because the purchase being a House, it is a wearing, wasting Estate, and therefore that the Owner ought to have the benefit of it from the time of his Purchase. Supposing a man should be reported the best Purchaser of an Estate held for Lives, and before the Conveyance made one of the Lives should drop, he would nevertheless be compellable to complete his Purchase (b); and so on the other hand, if a man should be reported the best Purchaser of a Reversion, and that Report is confirmed, and before a Conveyance made the Reversion should fall in, he would nevertheless be entitled to the benefit of his Purchase (c), which must go upon the ground of his being in effect the Owner of the Estate from the time of the Report's being absolutely confirmed.

There was this further in the Case, and which had occasioned the delay in completing the Purchase, that Mr. *Fludyer* had brought his Bill in this Court against the Heirs at Law of one *Noah Bertin*, and also against the persons

who were to convey the House, in order to have the Conveyance made, and to establish the Will of *Noah Bertin*, and to perpetuate the testimony of the Witnesses to the execution of it; the Title to the Messuage in question depending upon the validity of the Will; which cause came on to be heard some time ago before the Master of the Rolls, who dismissed the Bill, but without prejudice to the Evidence for perpetuating the testimony of the due execution of the Will, and the Bill was dismissed with Costs as to the Heirs at Law, but no Costs were given to the other Parties; and now the question on this part of the Case was, whether Mr. *Fludyer* should be allowed the Costs he was at in this Suit out of the Purchase Money. And it was argued that he should, because it was necessary, in order to make out the Title, that the Evidence of the Execution of the Will should be perpetuated. That it appeared the Will was made at *Bengal*, in the *East Indies*; that the attestation, though by three Witnesses, did not express it to be with all the ceremonies which the Law requires touch-

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(b) 1 P. Wms. 61, 2.

(c) 2 P. Wms. 410.

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ing Devises of Lands; and further, because it appears that the Heirs at Law had in their Answer contested the Will, and the Sanity of the Testator, and had insisted that he had shot himself two days after the making of the Will. It being therefore necessary to perpetuate the Evidence of the Execution of the Will, in order to make good the Title, the expense of it ought to be borne by the Seller, and not by the Purchaser: and it was compared to the Case where a Man is reported the best Purchaser of an Estate in which it is necessary, to make good the Title, that a Fine should be levied, or a Recovery suffered, in which case there could be no doubt but that the expense of such a Fine or Recovery should be borne by the Seller; but it was agreed in all these Cases, the Conveyance is to be made at the Costs of the Purchaser.

But on the other side, it was argued, that there was no occasion for the proving this Will, it being dated so long ago as the year 1723, and an uninterrupted Possession had under it ever since; and that in the mean time there had been a Fine levied, and five years non-claim, which it was said would be a bar against

any pretence of Claim that might be set up by the Heirs at Law; and therefore that the proving the Will not being necessary to establish or make out the Title, the expense of doing it ought to be borne by Mr. *Fludyer* himself.

Lord Hardwicke, Chancellor:—

As to the first Question held, and so determined, that Mr. *Fludyer* was not entitled to have the Profits of the Premises till after the time for paying the Money into the Bank, and therefore that he was accountable for the Rent, and ought to pay it to Lady-day last. The bidding is general, and though the Report is confirmed, yet the Purchase is not completed till the Title is accepted, and the Money brought into Court; for till then, objections to the Title may avoid the bidding; and he said, he took this to be the constant and settled Rule of the Court. It may indeed be otherwise, when upon the Report's being confirmed, the Purchaser comes into Court, and to accelerate the Purchase, declares he is satisfied with the Title, and brings in the Purchase Money; but that is not the present Case; and there appears to be

no difference from the Purchaser's being the Tenant, or in the possession of Houses or Land. In the purchase of Lands, it may be to the prejudice of the Purchaser to give him the Profits, and oblige him to pay Interest for the Purchase Money, the Profits of Land not being equal to the Interest of Money, especially in these times, when there are so many public Funds in which Interest may be made of Money; and I cannot look upon Mr. *Fludyer's* bidding, and his signing the Particulars, and the Report's being confirmed, as sufficient from that time to call him the Owner of the Estate; and though I don't blame Mr. *Fludyer's* caution about the Title to this Estate, yet his postponing the completing of this Purchase was certainly owing to his doubt of the Title; and if eventually the Title had appeared defective, he would have come, and might have done it, to be discharged of his bidding; and therefore to call him Owner till he had accepted the Title, would be an absurdity.

But then as to the other Question; though I cannot say it was absolutely necessary to perpetuate the testimony of the Witnesses to the execution

of the Will, yet it appears reasonable to have been done, and the more so in respect of what was insisted on by the Heirs at Law in their Answer; and in these Cases the Court exercises a general equitable discretion; and therefore I think he ought to be allowed so much, but no more, of the Costs of that Suit as related to perpetuating the testimony of the Execution of the Will; but I lay no weight upon that clause of the Decree for the dismission to be without prejudice to the perpetuating the testimony of the Witnesses; for though I think the Decree was right in dismissing the Bill, yet I think this Clause should not have been added, but the Bill should have been dismissed generally, which would not have hurt the Evidence, for that might nevertheless have been at any time afterwards read, and the adding this Clause was improper.

Therefore Order, on Mr. *Fludyer's* declaring by his Counsel he is ready to accept the Title, that a Conveyance be made to him upon accounting for the Rent to *Lady-day* last, out of which he is to deduct so much of the Costs as he was at in proving the Will; and it being admitted that no Witnesses were examined in

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When a Bill to perpetuate testimony is dismissed, it is not necessary to state in the Decree, that it is to be without prejudice to the perpetuating of the Testimony.

Costs of perpetuating the Testimony of a Will allowed to a Purchaser.

2d Nov. 1816.

MAZARREDO v. MAITLAND.

Where the Defendant sets down a Plea, and upon its being called on, does not appear, the Plea will, on an Affidavit of the Plaintiff having been served with an Order to set down the Plea, be overruled; and if no such Affidavit is produced, the Plea will be struck out of the Paper.

Nov. 13th.

IN this Cause a Plea was put in, and set down for Argument, by the Defendant. When the Plea was called on, the Plaintiff only, appeared.

Mr. Bell, and Mr. Shadwell, for the Plaintiffs, contended, the Plea ought not merely to be struck out, but that it ought to be overruled.

The Vice-Chancellor had doubts whether the Plaintiff ought not to produce an Affidavit of Service upon him of the Order to set down the Plea, to entitle himself to have it overruled.

The Point was mentioned again on this day, when the Vice-Chancellor asked the Bar how they understood the Practice to be in such Case; but Sir S. Romilly, and other Gentlemen, stated, they had no recollection of any Case, or Practice, in point.

The Register, Mr. Croft, being referred to, thought such an Affidavit was necessary; and said there were

the Cause by the Heirs at Law, he is likewise to be at liberty to deduct such Costs as in this respect was payable to the Heirs at Law; and let it be referred to the Master to tax the Costs and settle the Conveyance, if the parties differ about the same.

instances where when the Plea was overruled such an Affidavit was made; but he found no instance in which the Plea had been over-ruled without such an Affidavit.

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The *Vice-Chancellor* said, it would be too much for Him to over-rule the Plea without such an Affidavit, there being no precedent for doing so. All He could do was to order the Plea to be struck out (a).

N. B. On a subsequent day, Mr. *Parker* moved that the Plea might be restored to the Paper, but the *Vice-Chancellor* refused to do so, unless an Affidavit was made by the Solicitor, accounting for his not being prepared when the Plea was called on.

Plea struck out, refused to be restored to the Paper, unless on an Affidavit accounting for the Party not being prepared.

(a) In *Adams v. Dowling*, the *Vice-Chancellor* expressed the same day, and in several other Cases afterwards,

himself to the same effect.

Original and amended Bill, between WILLIAM CORY,
(Administrator of ELIZABETH CORY, his late
Wife, deceased,) THOMAS LOWNDES, and JOHN
WEST - - - - - Plaintiffs.
And FREDERICK GERTCKEN - Defendant.

Bill of Revivor between JOHN WEST, (Adminis-
trator of said WILLIAM CORY deceased, and
Administrator, *de bonis non*, of ELIZABETH CORY,
his Wife, and also of the said THOMAS LOWNDES,
deceased) - - - - - Plaintiff.
And FREDERICK GERTCKEN - Defendant.

8th and 12th
November.

*A married In-
fant, by the soli-
citation of him-
self and his
Brother, an At-
torney, obtained
a Transfer of
Stock from Trus-
tees, a few
Months before he
came of Age, and
after coming of
Age, received a
Transfer of the
residue of the
Stock to which
he was entitled;
and then assigned*

THE original Bill in this Cause was filed 7th May
1802. The joint Answer of *Lowndes* and *West*, was
filed February 11, 1803. The facts which appeared
from the proofs in the Cause, were these :

By a Settlement, 18th February, 1774, made on the
Marriage of *Elizabeth Orton*, with *John Gertcken*, the
Sum of 750*l. Three-per-Cent.* Consols, which had been
previously transferred into the Name of *Nicholas Han-
cox*, a Trustee, and a Party to the Settlement, was
settled, in Trust to pay the Dividends thereof to *John
Gertcken* and *Elizabeth*, his intended Wife, during
their Lives, and the Life of the Survivor; and after
the death of the Survivor, to transfer the Principal to
such Children or Child of *Gertcken*, and *Elizabeth*, his
intended Wife, as should be living at the death of such
Survivor.

*all his Property to two Creditors, who had struck a Docket against him, they
agreeing not to prosecute the Docket; held, to be a fraud in the Infant; and
that he recognized the payment when of Age; and therefore, and because the
Agreement was contrary to the spirit of the Bankrupt Laws, such Assignees
held not entitled to call for a repayment of the Money paid during the Infancy.*

The Marriage took place, and there was issue a Daughter, who married the Plaintiff, *William Cory*.

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Hancox, the Trustee, died 28th February 1793, and appointed *William Hancox*, *John Leader*, and *Peter Rich*, Executors of his Will.

By an Indorsement on the Settlement, 28th February 1793, between *Gertcken and his Wife* of the 1st part, *Hancox*, *Leader*, and *Rich*, of the 2d part, and *Frederick Gertcken* and *John M'Donnell* of the 3d part, *Frederick Gertcken* and *M'Donnell* were appointed Trustees of the 750 *l.* Stock, in the place of *Nicholas Hancox*, the deceased Trustee, and the Stock was transferred into their Names.

Elizabeth Gertcken died in September 1793.

In the beginning of the year 1795, *William Cory* applied to *Frederick Gertcken* and *M'Donnell*, to sell out 300 *l.*, part of the 750 *l.* Stock, and pay the same to him; his Father-in-Law, *J. Gertcken*, having agreed to take him into Partnership: 60 *l.* being to be paid to *J. Gertcken*, and the rest necessary for *Cory's* other occasions. *Thomas Cory*, an Attorney, the Brother of *William Cory*, also applied to *Frederick Gertcken*, urging him to comply with *William Cory's* request, assuring him that he would not run any risk in so doing. The Trustees agreed to sell out the Stock; and *Thomas Cory*, shortly after, called upon *Frederick Gertcken* with a Power of Attorney for selling out 350 *l.* Stock, instead of 300 *l.*; but as the Power of Attorney was prepared, though as to the additional 50 *l.* without Authority, the Trustees signed it. On the 10th February 1795, the Stock was sold out, and produced after all

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expenses, 218 *l.* 4 *s.*; which, together with 22 *l.* 10 *s.* Dividends due, was paid into the hands of *Frederick Gertcken*, who paid 158 *l.* 4 *s.* to *William Cory*, and also the Dividends, 22 *l.* 10 *s.*; and 60 *l.*, the residue, was retained for *J. Gertcken*, who being indebted to *Frederick Gertcken* to a greater amount, he, *Frederick Gertcken*, with the consent of *William Cory* and *J. Gertcken*, applied the 60 *l.* in part payment of such Debt.

J. Gertcken died the 1st of August 1795, having made his Will, but naming no Executor, and leaving *Elizabeth*, the Wife of *William Cory*, (one of the Plaintiffs in the original and amended Bill), the only Child of the Marriage, him surviving.

Frederick Gertcken took out Letters of Administration to *J. Gertcken*, with the Will annexed, but his Property was insufficient for the payment of his Debts.

In September 1795, *Frederick Gertcken* transferred to *William Cory*, 400 *l.* Bank Annuities, the residue of the 750 *l.* Bank Annuities.

On the 7th March 1797, a Docket was struck by *Lowndes* and *West*, (two of the Plaintiffs in the original and amended Bill), against *William Cory*, but was not proceeded on, in consequence of an Agreement for that purpose, April 12th 1797, entered into between *William Cory*, and *Lowndes* and *West*, by which, *William Cory* assigned over all his Property, of whatever description, to *Lowndes* and *West*, to secure payment of a Debt due to them, from *W. Cory*, and the Costs of the proceedings

taken to make *William Cory* a Bankrupt, and empowering them to sue for and recover the same.

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Elizabeth, the Wife of *William Cory*, died 12th April 1798, and he, in the same year, administered to her.

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The original Bill prayed, that, the Defendant might be compelled to transfer the sum of 350*l.* Bank Annuities to the Plaintiffs *Lowndes* and *West*, and to pay the Dividends due thereon since the death of *J. Gertcken*: or in case it should appear that the same had been transferred and disposed of, then that the Defendant might be decreed to answer the value thereof, and of all the Dividends, and to pay the same to the Plaintiffs *Lowndes* and *West*.

A Cross-bill for a Discovery, was filed by *Frederick Gertcken*, against the Plaintiffs in the original Bill. *Lowndes* and *West* put in their Answers; but *William Cory* put in no Answer, and stood out Process of Contempt: and on the 24th July 1804, an Order was made "that the Plaintiff's Clerk in Court should attend at the hearing of the Cause, with the Record of the Plaintiff's Bill, in order to have the same taken *Pro Confesso* against the Defendant." On the 12th December 1804, an Order was made that *Frederick Gertcken*, the Defendant in the original Cause, and the Plaintiff in the cross Cause, be at liberty, on the hearing of the original Cause, to read the Cross-bill filed by *Frederick Gertcken* against *William Cory*; and liberty was also obtained by *Frederick Gertcken*, on the 14th November 1804, to read, at the hearing of the Cause, the Answer of *Lowndes* and *West*, to the Cross-bill filed against them and *William Cory*.

A Cross Bill, taken pro confesso ordered, on Motion, to be read at the hearing of the Original Cause.

1816. In September 1804, *William Cory* died Intestate, and
 in 1808, the Plaintiff *West* administered to him, and in
 November, 1814, took out Administration, *de bonis non*,
 to *Elizabeth Cory*, the Wife of *William Cory*.
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In 1807, or 1808, *Lowndes*, one of the Plaintiffs died;
 and in consequence of his death, and that of *William
 Cory*, a Bill of Revivor was filed 2d May 1814.

Mr. *Wetherell*, and Mr. *Collinson*, for the Plain-
 tiffs:—

The Trustees were not warranted in advancing the
 350 *l.* Stock to *William Cory*, it belonging to his Wife;
 and if *William Cory* was entitled to it, yet as he was
 then an Infant, as was also his Wife, it was a breach of
 Trust to pay it to him. It is not clearly evidenced that
William Cory received the Money; but whether he
 received it, or not, it was an improper payment; and
 these Assignees of *Cory*, under the Assignment of
 12th April 1797, are entitled to call for a re-payment.
 Supposing *William Cory's* absolute Assignment to
Lowndes and *West* was an Act of Bankruptcy, yet he
 being dead, that objection is not now available. A
 Docket being struck can have no effect, as it was not
 followed by a Commission.

Sir *Samuel Romilly*, and Mr. *Moore*, for the Defen-
 dants:—

[They proposed reading the Cross-bill which was filed
 against *Cory* and the other Plaintiffs, and taken *pro
 confesso* against *Cory*, and ordered to be read at the
 hearing of the Cause, as before noticed.]

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Mr. *Wetherell* objected, that a Bill merely for Discovery could not be read; and that the Order of the *Lord Chancellor* was, that the Clerk in Court should attend with the Bill at the hearing, to have the same taken *pro confesso*; not determining that it should be taken *pro confesso*, which is matter for consideration. It is not said in the Order whether it was a Bill for Relief, or for Discovery; and the Order to read it was, "saving just exceptions;" and therefore it was now sufficiently in time to object to the reading of it.

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The VICE-CHANCELLOR :—

The Act 45 *Geo.* 3. (a) enables the Court to take a Bill of Discovery *pro confesso* against a Member of Parliament, which shows such a Bill may be so taken. Is it to be done in no other Case? The parties had notice of the application. Whatever the weight of the objection may be, I think the Orders of the *Lord Chancellor*, directing the Bill to be taken *pro confesso*, and to be read at the hearing, are imperative upon me, and therefore that the Bill may be read as Evidence.

[Part of the Bill was accordingly read.]

Sir *Samuel Romilly*, and Mr. *Moore*:—

This Suit has been unnecessarily protracted. The Stock was sold before it was assigned to the Plaintiffs; and now, an ungracious claim is made for a repayment, upon the ground, that the payment to *Cory* was a breach of Trust. The Money is sufficiently proved to have been paid to *William Cory*, who was entitled to it in right of his Wife. The Trustee might have refused to pay it, unless *Cory*,

(a) C. 124, s. 5. In *Jones* to Bills of Discovery, but not
v. *Davis*, 17 *Ves.* 368, it was to Bills for Relief; but see
thought the Act only extends *ante*, 1 vol. p. 626.

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had made a Settlement on his Wife; but it was in his discretion to insist, or not, on such Settlement. The Infancy of *Cory* was unknown to the Defendant. One of the Witnesses swears *William Cory*, acknowledged to him, that in February 1795, he had received of the Defendant 350*l.* *Three per Cents.*, part of the 750*l.*; and said, "He (meaning the Defendant) does not know that I am a minor. If I have a mind to be a rogue I can oblige him (meaning the Defendant) to pay it over again." *Cory* having thus imposed himself as an Adult upon the Defendant, could not be permitted in a Court of Equity to avail himself of his fraud. The Plaintiffs are merely Assignees of a Chose in Action, and cannot stand in any better situation than *Cory*.

Another answer to the claim is, that after *Cory* was of Age he called for the remainder of the 750*l.* *Three per Cents.*, making no demand of what had been previously paid to him, or any observation upon it. This must be considered as an approval and confirmation of the previous advance. *Lee v. Brown (a)* applies to this part of the Case; as do also *Smith v. Lowe (b)*, and *Smith v. French (c)*. That an Infant is answerable for a fraud is clear. If an Infant, having a right to an Estate, permits or encourages a Purchaser to buy it of another, the Purchaser will be entitled to hold against the Person who has the right, although Covert, or under Age (*d*).

(a) 4 Ves. 362.

(b) 1 Atk. 490.

(c) 2 Atk. 243.

(d) Sugd. Vend. and Purch. 597-8, Ed. 4. The authority he cites as to a *Feme Covert* are, *Savage v. Foster*,

9 Mod. 35; and *Evans v. Bicknell*, 6 Ves. p. 174; and as to an *Infant*, *Watts v. Cresswell*, 9 Vin. 415; 9 Mod. 38. 96, 97; 4 Bro. C. C. 505 n.; *Clare v. Earl of Bedford*, 13 Vin. 536; *Chan. Cas.* 85, 123.

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Mr. *Wetherell*, in reply:—

If the Plaintiffs cannot succeed to the whole extent of their claim, they must at least be entitled to the 60*l.* which the Defendant retained out of the 350*l.* Stock sold out, together with Interest upon it. The Court will never sanction such a transaction.

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WILLIAM CORY
and others,
v.
F. GERTCKEN
and others.

The VICE-CHANCELLOR:—

What do you say, as to the Contract under which you claim, being founded on an Agreement to withdraw the proceedings on the Docket which was struck against *Cory*?

Mr. *Wetherell*:—

The Act 5 *Geo. II. c. 30*, does not apply, because no Commission issued.

The Evidence does not clearly establish that *Cory* received the produce of the Money sold out. If an Executor chooses to pay an Infant a sum of Money, the Infant may insist on a Repayment. An Infant may bind himself for necessaries, but he cannot borrow Money, though to buy necessaries, because he might waste the Money (*e*). No payment of Money to an Infant, can, under any circumstances, be supported.

There was nothing in this Case by which *Cory* can be considered as having confirmed the payment made during his Infancy. A Confirmation to be effectual should be by Deed.

(*e*) *Darby v. Boucher*, 1 386-7; and see *Marlow v. Salk*. 279. *Earl v. Peale*, *Ib.* *Pitfield*, 1 *P. Wms.* 559.

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The VICE-CHANCELLOR—[After stating the facts of the Case]:—

It was in contemplation to make *William Cory* a Bankrupt, and a Docket was struck against him by *Lowndes* and *West*, and they desist from proceeding on the Commission in consequence of the Agreement between *Cory* and them, 12th April 1797, by which all his Property is assigned to *Lowndes* and *West*; and on this Agreement, the prayer for relief in this Case is founded. The Agreement was not within the *letter* of the 5th *Geo. II. c. 30. s. 24 (f)*, no Commission having

(f) This Provision in the Act, runs thus:—“ That if any Bankrupt or Bankrupts shall, after issuing of any Commission against him, her, or them, pay to the Person or Persons who sued out the same, or otherwise give or deliver to such Person or Persons Goods, or any other Satisfaction or Security for his, her, or their Debt, whereby such Person or Persons suing out such Commissions shall privately have and receive more in the Pound in respect of his, her, or their Debt, than the other Creditors, such payment of Money, delivery of Goods, or giving greater or other Security or Satisfaction, shall be deemed and taken to be such an Act of Bankruptcy, whereby, on good Proof thereof, such Commission shall and may be superseded; and it shall be lawful for the Lord Chancellor, &c. to award to any Creditor, or Creditors, petitioning another Commission; and such Person or Persons so taking, or receiving such Goods, or other Satisfaction as aforesaid, shall forfeit and lose as well his, her, or their whole Debt, as the whole he, she, or they shall have taken or received; and shall pay back and deliver up the same, or the full value thereof, to such Person or Persons as the said Commissioners, acting under such new Commission, shall appoint, in Trust, for and to be divided amongst the other of the Bankrupt’s Creditors, in proportion to their respective Debts.”

issued; but, certainly, it is contrary to the spirit of the Act; and yet on the foundation of such a Deed I am called upon to give Equitable Relief!

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and others,

v.

F. GERTCKEN
and others.

William Cory was upwards of twenty years of age when he applied to the Trustees for the transfer of the 350*l.* Stock—he was a married Man—he employed his own Brother, a Solicitor, to persuade the Trustees to the transfer, and he represented there would be no risk, and made no disclosure of the Infancy of *William Cory*. If *William Cory* had been adult, he was entitled to the Money; but it is said, that being an Infant, it was a breach of Trust to pay it to him, and that it must now be repaid; and the principle on which this is rested, must extend so far as to determine, that if an Infant, twenty years and eleven months old, applies to Trustees for payment of Money, and conceals his Age, he is entitled to consider a payment to him as a breach of Trust, and to insist on a repayment.

In *Lee v. Browne* (*g*), the Legacy was certainly decreed to be repaid; but the advancement there to the Infant might have been on another account, and not in respect of the Legacy.

In *Phillips v. Paget* (*h*), where a Legacy was paid to an Infant of sixteen, and a Bill was filed to have it repaid, Lord *Hardwicke* at first refused to give relief; but the next day he expressed a doubt upon the subject, and the Case ended in a compromise.

Though in general a payment to an Infant may be bad, yet if the Infant practises a *fraud*, he is liable for the con-

(*g*) 4 Ves. 362.

(*h*) 2 Atk. 80, 1.

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sequences. At Law, an Infant is liable *in tort*, and cannot plead his Infancy; as where (a very strong Case) an Action of Assumpsit was brought against an Infant for Money embezzled by him (*i*).

In *Marlow v. Pitfield* (*k*), it was determined that if an Infant borrows Money, and applies it in payment for necessaries, though at Law, he is not liable to the Lender for the Money, yet, in Equity, the Lender stands in the place of the Creditor, who was paid for the necessaries, and may recover there, as the other might have done at Law. Infants, therefore, may, in some Cases, be liable in Equity, though not at Law.

In *Watts v. Cresswell* (*l*), a Tenant for Life borrowed Money, and his Son, who was next in Remainder, and an Infant, was a Witness to the Mortgage Deed, and the Court relieved on the ground of the fraud in the Infant, by not giving notice to the Mortgagee of his Title. That, certainly, was a very strong Case; for the young man did not *know*, but had only *heard* of the Settlement under which his Title arose; but Lord *Cowper* said, "If an Infant is old and cunning enough to contrive and carry on a fraud, he ought to make satisfaction for it."

In *Becket v. Cordley* (*m*), Lord *Thurlow* says, "If there was fraud of which the Infant was conusant, she would be bound as much as an Adult."

In *Cicil v. Lord Salisbury* (*n*), an Infant was held to

(*i*) *Bristow v. Eastman*,
1 Esp. N. P. 172.

(*k*) 1 P. Wms. 558.

(*l*) 9 Vin. 415. S. C. 2 Eq.
Abr. 515.

(*m*) 1 Bro. C. C. 358.

(*n*) 2 Vern. 224.

be bound by an offer made by him in his Answer, whereby the other side were delayed, the Infant not having immediately after his coming of age applied to the Court to retract his offer, and amend his Answer.

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In *Savage v. Foster* (o), the Court held that, in the Case of Fraud, "Infancy or Coverture shall be no excuse;" and the Court not only recognized the Case of *Watts v. Cresswell*, to which I have adverted, but also relied on *Clerc v. Bedford* (p), in which Case, *Clerc*, an Infant, and Clerk to an Attorney, had a Mortgage on his Master's Estate, and ingrossed a subsequent Mortgage of the same to another, without giving notice that the Estate was mortgaged before to him; and for that reason, on the ground of Fraud, his Mortgage was postponed.

Apply these principles to the present Case. Did not *William Cory*, who was nearly of Age, and married, conceal his Infancy?—It is clear he did. Did he not employ his Brother, an Attorney, to prevail upon the Trustees to transfer the 350*l.* Stock, under a representation that they ran no risk in doing so?—He did. Was not that a Fraud?—The concealment of his Infancy, under such circumstances, certainly was a Fraud, and precludes him, or his Assigns, who stand precisely in his situation, from calling for a repayment.

There is, however, another ground on which the Plaintiff's claim may be resisted. If the act of an Infant be merely voidable, and not void, and it is confirmed after he becomes adult, the act is unobjectionable. The authorities for that principle are numerous.

(o) 9 Mod. 35.

(p) 13 Vin. Abr. 536, 7.

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In the Case before adverted to, of *Lee v. Brown* (q), Lord *Alvanley* says, "The question is, whether the Plaintiff, after he came of Age, did any act showing that he was satisfied (r.)"—"Any thing affirming it (the payment) after he was of Age would be sufficient."—"I do not feel, that since he came of Age he has done anything to affirm this (s)." What did *William Cory* do? Being nearly of Age, he obtains, by the intervention of his Brother, the 350*l.* Stock; and a few months after, when he comes of Age, he calls for the remainder of the 750*l.* Stock. He does not call for the *whole* 750*l.* Stock; but only the *residue* after deducting the 350*l.* Stock; and it is transferred to him. Was not that a recognition of the previous transaction, a few months before?—It clearly was. He thus held out that he was satisfied, and he acquiesced for two years after; but falling into distress, he makes the Agreement with *Lowndes* and *West*. It does not, however, appear, that *Cory* ever asserted any right to the Money—he never answered the Cross-Bill.

On the ground, therefore, 1st. That the Agreement on which the Plaintiff's Equity is founded is contrary to the spirit of the Bankrupt Laws—2dly. That the Infant fraudulently concealed his Age—and 3dly. That he, when of Age, confirmed the Transaction—this Bill must be dismissed; but as the Trustees did not act with all the caution they should have done, I shall not give Costs.

Bill dismissed without Costs.

(q) 4 Ves. 365.

(r) Ibid. p.5.

(s) See p. 367, 8.

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ADAMS *v.* DOWDING, and another.

THE *Original Bill* in this cause stated, amongst other things, a Partnership Deed was entered into, 26th April 1804, between the Plaintiff and two of the Defendants, *Peter Dowding* and *John Prideaux*, as Japan Manufacturers, the Partnership to be carried on under the Firm of *Adams and Co.* for 14 years from the date of the Indenture, in equal Shares as to the Profits and Gains, and also the Loss thereof; and that various losses were sustained by the said Partnership; and that in the year 1806, and from that time until the month of May 1812, Plaintiff, by the direction, and with the knowledge or consent of Defendants, his Partners, had discounted several Bills and Notes, having the firm of *Adams and Co.* written or indorsed thereon with the other Defendants, *John Scandrett Harford* and the three other Defendants named in the Bill, who carried on the trade or business of Bankers, in Copartnership, at Bristol; and that on the 25th of July 1812, the Partnership between the Plaintiff and his Partners was dissolved; and that soon afterwards Defendants, *Peter Dowding* and *John Prideaux*, possessed themselves of all the Stock in Trade, Goods, Implements and other Chattels, and also of all the Accounts, Monies, Bills and other Securities of the said Partnership; and that in July 1816, the said *John Scandrett Harford* and Partners had, by the instigation of said other Defendants, *Peter Dowding* and

16th and 20th
December.

A Supplemental Bill stating facts, posterior to the Original Bill, but immaterial, e. g. facts which might be considered by the Master under the Decree to be made in the Original Suit; held to be demurrable.

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John Prideaux, commenced an Action in his Majesty's Court of Common Pleas against Plaintiff and said *Peter Dowding* and *John Prideaux*, for 998*l.* due upon five Bills of Exchange and Promissory Notes which Plaintiff had in manner aforesaid discounted with them on account of said Partnership of *Adams and Co.*; and that in November following the Defendants, *Harford and Co.* had commenced a second Action in the same Court against Plaintiff and said *Peter Dowding* and *John Prideaux*, for 885*l.*, due upon several other Bills of Exchange and Promissory Notes discounted by them in manner aforesaid, on account of said Partnership of *Adams and Co.* and thereby praying, amongst other things, an Account of said Partnership Dealings and Transactions, and of the Stock and Effects belonging thereto, and also of all Money Dealings and Transactions between the Partnership of *Adams and Co.* and the said Defendants, *John Scandrett Harford* and his said Partners; and that the said Defendants, *Peter Dowding* and *John Prideaux*, or a proper person, might collect the Debts of said Partnership, and pay the Debts of said Partnership; and also in case the Defendants, *John Scandrett Harford* and his said Partners, had not received or been paid any part of the Sums for which they had brought said two Actions, then that the said Defendants, *Peter Dowding* and *John Prideaux*, might pay the Debt and Costs in each of the said Actions out of the Monies of the said Partnership of *Adams and Co.* in their hands; and that in the mean time the said Defendants, *John Scandrett Harford* and his said Partners, might be restrained by Injunction from proceeding in their said Actions commenced against Plaintiff and said two other Defendants, and for further Relief.

A *Supplemental* Bill was afterwards filed, stating the Original Bill as above, and that all the Defendants appeared to the said Bill; and that the Plaintiff obtained an Injunction until Answer and further Order; and that all the Defendants afterwards put in their Answers to the Bill, thereby admitting most of the matters stated in the Bill; and that said Defendants, *John Scandrett Harford* and his said Partners, in and by their said Answer, stated that they had brought their said two Actions, and had obtained two several Verdicts therein, and intended to enter up Judgment, and if said Injunction should be dissolved, to sue out Execution thereon.

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The Bill then stated, by way of Supplement, that the Order and Injunction was dissolved, and no defence was made on the trial of the said two Actions; and that Defendants, *John Scandrett Harford* and his said Partners, had obtained Verdicts in the said two several Actions against Plaintiff and said other Defendants, *Peter Dowding* and *John Prideaux*, for 1,117*l.* 11*s.* 9*d.* Damages and Costs; and for the Sum of 912*l.* 5*s.* Damages and Costs in the second Action, amounting altogether to 2,029*l.* 16*s.* 9*d.*;—that although said *John Scandrett Harford* and his said Partners, the Plaintiffs, in said two several Actions, had recovered Verdicts against said *Peter Dowding* and *John Prideaux* as well as against Plaintiff, and had in their Answer denied that they intended to sue out Execution against Plaintiff solely and separately, yet that they did so in manner after mentioned:—that in consequence of the dissolution of the said Injunction, Plaintiff, on the 28th of October 1813, rendered himself to his Majesty's Prison of the Fleet, in discharge of Plaintiff's Bail in both said Actions; and that said *John Scandrett Har-*

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ford and his Partners proceeded to charge Plaintiff in Execution, but not according to the course of Practice of his Majesty's Court of Common Pleas, in which said Actions were brought; and that, therefore, Plaintiff was on or about the 11th December 1813, discharged out of Custody of the Warden of the said Fleet Prison by virtue of a Writ of Supersedeas in each Action:—That on the 27th of July 1814, said *John Scandrett Harford*, and his said Partners, the Plaintiffs in said two several Actions, caused a Writ of *Fieri Facias* to be issued out of the Court aforesaid, in one of said Actions directed to the Sheriff of Gloucestershire, commanding him to levy of the Goods and Chattels of Plaintiff, and said other Defendants, *Peter Dowding*, and *John Prideaux*, 109*l.* 1*s.* for Damages, besides Costs; and that under and by virtue of such Writ, the Sheriff levied and made of the Goods and Chattels of Plaintiff 114*l.* 19*s.* 6*d.*; and on or about the 14th July 1814, made a return to said Writ to the purport last aforesaid; and said Sheriff also returned, as the fact was and is, that Plaintiff had no other or more Goods or Chattels in his Bailiwick; and that the said *Peter Dowding* and *John Prideaux*, or either of them, had not any Goods or Chattels in his Bailiwick whereby he could cause to be levied the residue of the Damages in said Writ mentioned, or any part thereof:—That the Writ of *Fieri Facias* in said Action so issued as aforesaid, was issued or caused to be issued by the said *John Scandrett Harford*, and his Partners, the Plaintiffs in said Action; and the levy and return therein levied and made by the Sheriff, was by the procurement, or by the instigation, or at the request of Defendants *Peter Dowding* and *John Prideaux*, or their Agents; and that the Sheriff was induced and prevailed upon by Defendants, *Peter Dowding* and *John Prideaux*,

or their Attornies or Agents, to levy said Sum mentioned in said Writ, on the Goods and Chattels of Plaintiff exclusively, and separately, and to make such return as aforesaid; and Defendants, *Peter Dowding* and *John Prideaux*, pretend that they did not interfere, or advise with, or instigate the said *John Scandrett Harford*, and his said Partners, in bringing said Actions, or in their proceedings thereon, or in causing said Writ of *Fieri Facias* to be issued, or the levy aforesaid to be made on the Goods and Chattels of Plaintiff alone; and that said Defendants, or either of them, had not any Goods or Chattels within the said Sheriff's Bailiwick in said County of Gloucester. Whereas the Plaintiff charged that said Return was not true in the latter part of it, so far as respects said two Defendants, *Peter Dowding* and *John Prideaux*; and that they the said Defendants had and have, and each of them had or has, and were or was, and are or is possessed of, interested or entitled to Goods, Chattels and other Effects within the said Bailiwick in the said County; and further charged, that so long as the said Partnership Accounts remain unsettled between Plaintiff and the said Defendants, *Peter Dowding* and *John Prideaux*, and until the transactions aforesaid are investigated by and under the directions of the Court, said last-named Defendants ought not to permit Plaintiff to be vexed or harassed at Law, or his Goods and Effects to be taken in Execution, in respect of any matters relative to the said Partnership, or of any matters mentioned in said Suit. The Bill then stated, that in Michaelmas 1814, Plaintiff dismissed his Bill against the said *John Scandrett Harford* and his said Partners, the other Defendants thereto; and also paid them their Costs of this Suit, which amounted to 47*l.* 9*s.* 3*d.*

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The Prayer of the Supplemental Bill was, that Defendants might answer the matters aforesaid; and that the Plaintiff might have the same relief against Defendants, *Dowding* and *Prideaux*, as was prayed by Plaintiff's Original Bill; and further, that in taking the said Accounts of the said Partnership, Plaintiff might be allowed the said two Sums of 114*l.* 19*s.* 3*d.* and 47*l.* 9*s.* 3*d.*, and such other Costs, Charges and Expenses as the Plaintiff had been put to in consequence of or by reason of the said two Actions brought against Plaintiff and the said Defendants, and prosecuted against the Plaintiff alone, and of the Execution levied in one of the said Actions as aforesaid, by the Plaintiffs therein, the said *John Scandrett Harford* and his said Partners.

To this Bill the following joint and separate Demurrer, by *Dowding* and *Prideaux*, was put in: "Defendants, by protestation, &c. and for cause of Demurrer, show that the said Supplemental Bill of Complaint doth not contain any matter to entitle the said Plaintiff to any such Discovery from these Defendants, or to any such Relief against them as is sought and prayed in and by the said Supplemental Bill; wherefore Plaintiffs do demur thereto, and pray the Judgment of the Court, whether Defendants ought to be compelled to put in any Answer to Plaintiff's Supplemental Bill."

Mr. *Roupell*, for the Demurrer:—

A Supplemental Bill was wholly unnecessary; all the advantage sought by it being attainable under the Original Bill. The Sums paid by the Plaintiff would be considered by the *Master* when the Accounts are taken under the Original Bill. Is every payment by a Partner, subsequent to a Bill against his Co-partners

for an Account, to be made the subject of a Supplemental Bill?

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Mr. *Heys*, *contra* :—

The facts stated in the Supplemental having arisen since the filing of the Original Bill, it was necessary to bring them before the Court by a Supplemental Bill.

The VICE-CHANCELLOR--[after stating the facts of the Case] :—

The Original Bill entitled the Plaintiff to have all the Accounts taken, and if no Supplemental Bill had been filed, an Account must have been taken, before the *Master*, between the Parties, as it stood at the time of the Account taken. The two Actions, and all the consequences, might have been considered by him. The Supplemental Bill only states Items of the Account. The levy upon *Adams's* Goods, and what he paid, and the Costs, might all have been considered under the usual Decree for Accounts which would be made on the Original Bill. The Statement in the Supplemental Bill of the dissolving of the Injunction, the Execution, and *nulla bona* returned, is collateral matter, and upon which the Plaintiff does not pray distinct additional relief. If merely relevant events happening subsequent to the filing of a Bill, makes a Supplemental Bill necessary, it is necessary in this Case; but it is not all relevant events posterior to a Bill, that render a Supplemental Bill necessary. It can seldom be necessary where the Bill is for an Account. When a Bill is filed for an Account of Tithes, an account is taken of Receipts posterior to the Original Bill, and it never

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was supposed that a Supplemental Bill was necessary, because tithable matter had been received subsequent to the filing of the Original Bill.

It may be asked, what limit is there? When is a Supplemental Bill necessary? Lord *Redesdale* has clearly shown that it is not merely because an event has happened posterior to the Original Bill, that a Supplemental Bill becomes necessary. He says, "When any event happens subsequent to the time of filing an Original Bill, *which gives a new Interest in the Matter in dispute to any person not a party to the Bill*; as the Birth of a Tenant in Tail," &c. (b), a Supplemental Bill may be filed. The proposition is qualified by the words, "*gives a new Interest*;" and in another passage, he says, "A Supplemental Bill must state the Original Bill and the proceedings thereon; and if the Supplemental Bill is occasioned by an event subsequent to the Original Bill, it must state that event, and the *consequent alteration with respect to the Parties* (c). Are there any new Parties brought forward by this Supplemental Bill? None.

If a Supplemental Bill is filed *before* a Decree on the Original Bill, both Bills are heard together; if *after* a Decree, then the Cause is heard upon the Supplemental Bill only. If this Supplemental Bill had been filed after a Decree, what other Decree could have been made, except what had already been made in the Original Suit?

Milner v. Harwood (d), is a decisive Authority to

(b) *Ib.* 48-9, and see p. 263. (c) Lord Red. Tr. Pl.

(d) 17 Ves. 144.

show that the mere circumstance of a relevant event happening subsequent to the Original Bill, is not sufficient to warrant a Supplemental Bill, unless such subsequent event *be material*. In that case the *Lord Chancellor* says (*e*), " If, however, this Bill, praying the benefit of this Supplemental Matter, is to be considered regular, the other ground, upon which it is resisted, appears to me tenable, viz. that this matter cannot upon just reasoning be represented as material and beneficial; and the Demurrer may therefore, upon that ground be supported." His Lordship then compared the new Matter with the Original Bill, to see if it was material, and being of opinion, it was not material, he allowed the Demurrer.

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It appears, therefore, that my *Lord Chancellor* agrees with *Lord Redesdale*, that where there is no alteration in the interest of the Parties, nor any particular circumstance requiring further discovery, but where only a fact has occurred which might be proved on taking the Account prayed by the Original Bill, and the relief is not varied by the Supplemental Matter, but the Plaintiff might have the relief prayed for by such Bill, under the Original Bill, a Supplemental Bill is improper.

If this Supplemental Bill were allowed, it would be a Precedent, in all Bills for an Account, to have every six Weeks a new Supplemental Bill.

Demurrer allowed (*f*).

(*e*) *Ib.* p. 148-9.

(*f*) See *Knight v. Matthews*, ante, 1 Vol. p. 566.

1817.

PRATT v. BRETT.

April 26th.
*Injunction
 granted to stay
 Waste, and from
 sowing Land
 with Mustard
 Seed, or any
 other pernicious
 Crop.*

MR. PEPYS moved for an Injunction to stay Waste on the usual Certificate of the Bill being filed, and an Affidavit of the Plaintiff verifying the Statements in the Bill. The Defendant was Tenant from year to year of the Plaintiff, of a Farm of 200 Acres, in *Norfolk*, at a Rent of 200*l. per Annum*; and being at Michaelmas last in arrear 300*l.* and upwards for Rent, the Plaintiff, in January, caused a Distress to be levied upon the Farm, but sufficient was not found to pay the Rent and Costs of the Distress; and at Lady-day last, a further Sum of 100*l.* became due for Rent which had not been paid. The Defendant, together with two of her Sons, in revenge for the Distress, proceeded to cut down Timber and Hedge-rows, and, contrary to her Covenants, to cultivate the Farm in an unhusbandlike manner, and threatened to plough up many Acres of ancient Meadow and old Pasture Land, and to sow the same with *Mustard Seed*, or other pernicious Seeds, for the purpose of injuring the Estate; and had sown upwards of fifty Acres of Arable Land, which had been ploughed up, with Mustard Seed; which Seed was very injurious to the Land, and required many years to eradicate; and while the same remains in the Land, which it will do for years, the Crops sown on the said Lands will be mixed with the Mustard, so as to be greatly retarded in their Growth, and much injured in their Produce.

Mr. *Roupell*, (*Amicus Curia*,) said, that in the case of a Farm in the *Isle of Ely*, the *Lord Chancellor* had granted an Injunction against sowing Land with *Mustard Seed*.

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The VICE-CHANCELLOR:—

You may take an Injunction.

The Injunction was as follows:—" This Court doth order, that an Injunction be awarded against the said Defendant *Sarah Brett*, to restrain her Servants, Agents, and Workmen, from pulling down, damaging, or destroying any of the Buildings upon the said Farm and Premises, and from cutting down, injuring or destroying any of the Timber or other Trees, Timber-like Trees, Bark Wood, or Underwood, Hedges or Fences, now standing upon the said Farm and Premises, and from ploughing up any of the ancient Meadow, or any of the old Pasture Land belonging to the said Farm; and from sowing any part of the said Farm and Lands with Mustard Seed, or any other pernicious Crop; and from removing from off the said Farm and Lands, any of the Hay or Straw, Dung or Manure produced or made thereon; and from doing any other Waste or Destruction to the said Farm, Lands, and Premises, or any part thereof, until the said Defendant *Sarah Brett* shall fully answer the Plaintiff's Bill, or this Court make other order to the contrary."

1817.

STONE and another, *v.* WISHART and others.

April 26th.
*The next Friend
 of Infant Peti-
 tioners, not per-
 mitted to act as*

THIS Bill was filed in the name of two Infants, by *J. Higgins*, their next Friend, for an Account against the Defendants as Executors. The usual Decree was obtained, and the *Master* was thereby directed, amongst other things, to appoint a proper person to be a Receiver of the Rents and Profits of the Real Estate of the Testator.

Mr. *Rose* now moved, on the part of the Plaintiffs, that *J. Higgins*, the next Friend, might be at Liberty to go before the *Master*, and propose himself to be the Receiver.

Mr. *Roupell*, on the part of the Defendants, consented to the Motion.

The VICE-CHANCELLOR:—

I cannot accede to this Motion, although it is consented to. It is the duty of the next Friend of these Infants to watch the Accounts and conduct of the Receiver, to be control over him. The two characters cannot be united ; they are incompatible.

Motion refused.

HOTCHKIN v. HUMFREY, and others.

1817.

20th April.

19th May.

THE Bill stated that, by a Settlement, 15th June 1765, between *Lebbeus Humfrey*, of the first part; *Anna Maria Smalley*, Spinster, of the second part; and *Robert Hotckin* and *Thomas Halford* of the third part; reciting an intended Marriage between *Lebbeus Humfrey* and *Anna Maria Smalley*, certain Lands were conveyed to *Hotckin* and *Halford*, to hold the same for the use of *L. Humfrey* for Life; then to his intended Wife for Life; and after the decease of the Survivor of them, to *Hotckin* and *Halford* for a Term of 500 years; and after the expiration thereof, to the use of the Heirs of the Body of *A. M. Smalley* by *L. Humfrey*, and for want of such Issue, to the right Heirs of *L. Humfrey* for ever. The Trusts of the 500 years Term were declared to be, " In case the said *Lebbeus Humfrey* shall leave one or more Daughter or Daughters, younger Son or Sons of his body on the body of the said *Anna Maria Smalley*, his then intended Wife, begotten, that shall be living at the time of the decease of the Survivor of them, the said *Lebbeus Humfrey*, and *Anna Maria* his intended Wife, that then the said *Robert Hotckin* and *Thomas Halford*, or the Survivor of them, his Executors, Administrators or Assigns, shall, out of the Rents, Issues and Profits of the said Lands, &c. so to them limited

By a Supplement before Marriage, whereby Lands given to Trustees for 500 years, in Trust, that if the intended Husband and Wife should leave one or more Daughter or Daughters, younger Son or Sons, that should be living at the time of the decease of the Survivors of them, the Trustees should raise, &c. 2,000l. for the Portion or Portions of such Daughter or Daughters, younger Son or Sons, the same to be paid to

such Daughter, if but one, and no younger Son, at 18 or Marriage; and to such younger Son, if but one, and no Daughter, at 21, with Allowance for Maintenance in the mean time, &c.; and if there shall be more than one Daughter or younger Son, then to be paid to such Daughter or Daughters at 18 or Marriage; and to such younger Son or Sons at 21 years, &c., held, that the Settlement did not vest any thing in Children who died before the decease of the surviving Parent.

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for the said Term of 500 years, or by leasing, mortgaging or selling the same, or any part thereof, for all or any part of the said Term, raise the Sum of 2,000 *l.* for the Portion or Portions of *such* Daughter or Daughters, younger Son or Sons, *the same to be paid to such* Daughter, if but one, and no younger Son, at her age of 18 years or day of Marriage, which shall first happen; and to such younger Son, if but one, and no Daughter, at his age of 21 years, if the same can so soon be raised, with such allowance for Maintenance in the mean time, not exceeding the Interest of his or her respective Portion, as the said *Lebbeus Humfrey* and *Anna Maria Smalley*, or the Survivor of them, shall by his or her last Will and Testament in writing, or by any other Deed or writing, to be by such Survivor duly executed under his or her Hand and Seal, declare or appoint, and in default thereof, with Interest after the rate of 4 *l. per Cent.* by the year, to be accounted from the decease of the Survivor of them, the said *Lebbeus Humfrey* and *Anna Maria* his intended Wife; and if there shall be more than one Daughter or younger Son, then to be paid to such Daughter or Daughters, at the age of 18 years or days of Marriage, which shall first happen; and to such younger Son or Sons, at the age of 21 years (if the same could be so soon raised,) in such proportion, and with such Allowance for Maintenance in the mean time, not exceeding the Interest of their Portions, as the Survivor of them, the said *Lebbeus Humfrey* and *Anna Maria Smalley*, by his or her last Will and Testament, or by any other Deed in writing, to be executed as aforesaid, shall direct and appoint, and for want of such Appointment, the said 2,000 *l.* to be equally divided amongst them at the times aforesaid, with Interest for the same at the rate of 4 *l. per Cent. per Annum*, to be accounted from

the time of the decease of the Survivor of them, the said *Lebbeus Humfrey*, and *Anna Maria* his intended Wife; and from and after the said 2,000*l.* and the Interest thereof, shall be fully satisfied and paid, and the Trustees reasonable charges defrayed; or in *case there shall be no such Daughter or Daughters, younger Son or Sons that shall live to receive the same*, then the said Term shall cease, determine, and be utterly void; provided always, that if the Person or Persons to whom the Reversion and Inheritance of the said Premises expectant on the said Term shall, by virtue of these presents appertain, do and shall well and truly pay, or cause to be paid, unto the said Daughter and Daughters, younger Son and Sons, the several and respective Portions, Maintenance and Maintenances hereinbefore appointed, then, or in case the said *Lebbeus Humfrey* shall in his life-time advance and prefer his Daughter or Daughters, younger Son or Sons, with Portions equal to what is hereby intended them, that then the said Term of 500 years shall attend the Reversion and Inheritance of the said Premises, or be assigned or transferred as the Person so paying the same shall direct, any thing herein to the contrary thereof in any wise notwithstanding." The Settlement then gave a Power of Appointment and Revocation to *Lebbeus Humfrey* and his Wife.

The Bill further stated, that the Marriage took place, and that there were five Children—*John Humfrey*, who died; the Defendant, *Lebbeus Charles Humfrey*; *A. M. Humfrey*; *Elizabeth Humfrey*, the Wife of *James Morpott*, who died; and *Hester Humfrey*, the Wife of *Hungerford Vowe*; that all the Children attained 21: That *Lebbeus Humfrey*, the Father, died in July 1792, leaving

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his Wife him surviving; that *Anna M. Humfrey*, the Daughter,) died, single, and appointed *Lebbeus Charles Humfrey* and *Hester Vowe* her Executor and Executrix, who proved her Will; that *Elizabeth Humfrey*, afterwards *Morpott*, died, and her Husband took out Letters of Administration to her; that *Hannah M. Humfrey*, (the Mother,) died in 1813, having survived the said *A. M. Humfrey*, her Daughter, and also the said *Elizabeth Morpott*, her Daughter, whereby the Defendants, *Lebbeus Charles Humfrey* and *Hester Vowe*, were the only Children of *Lebbeus Humfrey*, and *Anna Maria* his Wife, living at the death of the Survivor:—That no Appointment was made, or any Revocation of the uses of the Settlement:—That *Thomas Halford*, and afterwards *Robert Hotckin*, died; and that the latter, by his Will, appointed the Plaintiff his sole Executor, who proved his Will, and thereby the 500 years Trust Term became vested in him:—That the 2,000*l.* had not been raised, and that contradictory Claims having been made, the Plaintiff had been prevented carrying the Trusts of the Term into execution:—That *Lebbeus Charles Humfrey*, and *Hungerford Vowe* and *Hester* his Wife, claimed to be entitled to the whole of the said Sum of 2,000*l.* with Interest at 4*l.* per Cent., from the decease of *Anna Maria Humfrey*:—That *James Morpott*, as the legal Representative of his late Wife, claimed to be entitled to one fourth part of the 2,000*l.*, with Interest thereon; alleging, that in default of Appointment, all the younger Children of *Lebbeus Humfrey* and *Anna Maria Humfrey* took vested Interests in their Share of the 2,000*l.*, whereas the said *Lebbeus Charles Humfrey*, and *Hungerford Vowe* and *Hester* his Wife, contended, that according to the true construction of the Settlement, the whole of the 2,000*l.* was, on the

death of the said *Anna Maria Humfrey*, payable to each of the Children of the said *Lebbeus Humfrey* and *Anna Maria* his Wife, as were then living.

The Prayer of the Bill was, that it might be declared to whom the 2,000*l.* with the Interest due thereon, ought to be paid; and that directions might be given for raising the Money by Sale or Mortgage of the Estates comprised in the Term of 500 years.

The several Defendants, by their *Answers*, insisted on their claims in the manner stated in the Bill.

Mr. Heald, for the Plaintiff, said he was a mere Trustee, who submitted to act as the Court should direct.

Mr. Hart, and *Mr. Sugden*, for the Defendants, *Humfrey*, and *Vowe* and Ux:—

The question is, whether, under this Settlement the Representatives of Children who died before the decease of the surviving Parent, take; or, whether only such Children take as survived the surviving Parent? The only event in which the Portions are to be raised is, if younger Children are surviving at the death of the surviving Parent, so that if all the younger Children had died before the longest liver of the Parents, no Money could have been raised. Any other construction would be to make a new Settlement, and though two only have survived they alone are entitled. *Wingrave v. Palgrave* (a) comes very near this Case. If the Settlement is clearly and unequivocally expressed, as it is in this Case, the Court must abide by it. *Howgrave v. Cartier* (b).

(a) 1 P. Wms. 401.

(b) 3 Ves. and Bea. p. 79.
see p. 85-6. S. C. Coop. 66.

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Mr. *Trower*, and Mr. *Simpkinson*, for the Defendants, the Representatives of the deceased Children :—

By this Settlement the Parties intended to provide for all the younger Sons at 21, and Daughters at 21, or Marriage. A Daughter attained 21, and married, and died in the life-time of the Parents. It could not be meant that if a Daughter married and died, she should not be entitled to a Portion. We admit, that if all the younger Sons and Daughters had died before the surviving Parent, the Portions would not have been raisable; but here Children survived, and the Portions were therefore raisable, for the benefit of the deceased, as well as the surviving, Children. This construction was given in Case, *King v. Hase (c)*.

The passage in the Trust Deed, directing *payment* of the Portions, if there should be two or more Children, is general, it not requiring them to be living at the death of the surviving Parent. The word “such” is not used in that part of the Deed, so as to confine the payment to *Children before described*. The Court is always anxious in these Cases to include deceased Children, as appears from *Woodcock v. Duke of Dorset (d)*, *Hope v. Lord Clifden (e)*, and other Cases. In *Powis v. Burdett (f)*, where the Settlement resembled the present, the word *leave*, which is used in this Settlement, was construed *have*, so as to give a Portion to a deceased Child.

Mr. *Hart*, in Reply :—

The Court must look at the words of the Instrument,

(c) 9 Ves. 428.

(e) 6 Ves. 499.

(d) 3 Bro. C. C. 569.

(f) 9 Ves. 428.

and though it may incline to favour deceased Children, yet it will not feel at liberty to read the Instrument otherwise than it must be understood in common parlance. The deceased Children did not survive the surviving Parent, and cannot therefore take, the words of the Settlement being imperative, that only surviving Children should take. The Portions were *to be* raised out of an Estate, which distinguishes this Case from those in which there was a Fund *in existence* which must go somewhere, and where a greater latitude of construction might be admitted. Where Money is *to be* raised, it may not be the intention to burthen the Estate, unless in the express case provided for. Though the word "such" is omitted in the Clause directing the payment if there should be two or more Children; yet by the context it is clear that only surviving Children were meant. In *Woodcock v. Duke of Dorset*, the Report of which Case in *Browne* is corrected in a note to *Howgrave v. Cartier (g)*, the Money was already raised. *Powis v. Burdett* was determined upon the power given of advancement to the Children in the Settlement, but there is no such power here. In *Hope v. Lord Clifden*, the intent was clear in favour of deceased Children; but under this Settlement the intent is equally clear that they should be excluded.

His Honor, at the close of the Argument, said, that independent of the Authorities, he had no doubt; but he would look into them.

The VICE-CHANCELLOR [after stating the Case]:—
The Question is, whether the 2000*l.* vested in all

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(g) 3 Ves. and Bea. 83, and see S. C. Coop. p. 66.

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the four Children of the Marriage, or in the two only that survived the surviving Parent. In order to determine whether all the Children took vested Interests, it is important to consider *in what event* the 2000*l.* was to be raised. As to that, there is no ambiguity in the Deed. The words are, "In case the said *Lebbeus Humfrey* shall have one or more Daughter or Daughters, younger Son or Sons of his Body, on the body of the said *Anna Maria Smalley*, his intended Wife, begotten, *that shall be living at the time of the decease of the Survivor of them* the said *Lebbeus Humfrey*," then the Money is to be raised. If all the Children had died before the surviving Parent, the Fund could not have been raised. It was to be raised only on the contingency of one or more Children surviving the surviving Parent. The Deed then states *for whom* the Money was to be raised, "For the portion or portions of *such* Daughter or Daughters, younger Son or Sons, &c., and then the Deed states the *mode of payment*, "the same to be paid to *such* Daughter, if but one, and no younger Son, at her age, &c.; and to *such* younger Son, if but one, and no Daughter, at his age, &c." providing only in this part of the Deed for the payment to *one* Daughter, or one younger Son; but afterwards, the Deed provides for a plurality of Sons and Daughters; "and if there shall be more than one Daughter or younger Son, then to be paid," &c.; and if no Appointment, equally; thus making an entire provision, in all events, for all such Sons and Daughters as should survive the surviving Parent. And though in the Provision for *payment*, "if there shall be more than one Daughter or younger Son," the word 'such' is dropped; yet if that word is material, the words

“ more than one” are equivalent, it being only a completion of the sentence in which *one such* Daughter, and *one such* Son, are mentioned.

If the Children who died before the surviving Parent are to be considered as having taken vested Interests, it must follow, that a vested Interest was given in a contingent Fund. Can that be? When a Fund is contingent, the Shares to be paid out of it must be contingent. If all the Children had died before the surviving Parent, the Fund would not have been raisable, and therefore till such Parent's death it was uncertain and contingent whether it could be raised. The intention appears to me, therefore, to have been to provide only for such Children as should survive the surviving Parent. The usual argument in favour of vesting, from the great inconvenience arising to the Children, if no provision can be made for them during the Lives of both their Parents, whatever may be their Ages, their wants, and their most important Interests, cannot be used to assist the construction of a Deed like the present, the whole plan of which, in respect to the Fund in question, is exposed to that objection, and cannot by any interpretation be obviated, it being impossible to make any Provision out of this Fund during the Lives of both Parents for any Daughter or younger Child, however pressing the exigency, the Fund itself not being previously in existence, nor any certainty that it ever will be raised. The objection proves too much. It is not an argument against the construction of any particular expressions or parts of the Deed, but to the whole of it. It is the necessary and unavoidable consequence of the contingency on which the raising

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of the Fund is made to depend, that any prior disposition of any part of it in favour of any younger Child during the Lives of the Parents, however urgently demanded, cannot take place. If it be hard on the Children attaining Twenty-one, to be precluded from participation by not surviving their surviving Parent, would it not be still harder on all the younger Children to be precluded under similar circumstances? And it being impossible to deny such to have been the intention of the Parties to this Settlement in the latter Case, how can any presumption be raised from any general abstract principle, or conjecture, that such could not be the intention in the former? A partial exclusion of some cannot be more objectionable than a general exclusion of all under the same circumstances. The exclusion in both cases is the effect not of any conjecture or inference, but of the express and positive Forms of the Deed, and the whole Plan and Object, to which the provisions of it, in respect to this Fund, is directed.

Let us next consider how this Case is affected by the Authorities. *Wingrave v. Palgrave* was a clear Case. It is not necessary to go through the Cases, all of them having been brought together by the *Master of the Rolls*, with his usual ability, in *Howgrave and Cartier (h)*. The principle there laid down, is, that, "If the Settlement clearly and unequivocally makes the right of the Child to a Provision depend upon it surviving both or either of the Parents, a Court of Equity has no authority to control that disposition.

(h) 3 Ves. and Bea. 79. S. C. Coop. 66. p. 85-6.

If the Settlement is incorrectly or ambiguously expressed, if it contains conflicting and contradictory Clauses, so as to leave in a degree uncertain the period at which, or the contingency upon which, the Shares are to vest, the Court leans strongly towards the construction which gives a vested Interest to the Child when that Child stands in need of a Provision, usually as to Sons at the age of Twenty-one; and as to Daughters at that Age, or Marriage."

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Wherever, therefore, the intent can be clearly collected, that must govern; and in this Case, I think, there is a clear intent that the surviving Children were, exclusively, to take.

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25th, 29th April,
14th May.

THE *Bill* stated—A Settlement, 27th and 28th May 1757, by which certain Lands were settled for Life upon the Plaintiff, in case she survived her Husband, for her Jointure:—That Plans for the Improvement of the Port of *Bristol* were in agitation, and the attention of the Public called thereto; and that it would be difficult to execute the Improvement without the Lands so settled by way of Jointure on the Plaintiff:—That Sir *J. H. Smyth*, deceased, in the latter part of his Life made frequent applications to the

A Lease sought to be set aside, as having been obtained by Surprise and Fraud, but under the circumstances, the Bill dismissed.

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Plaintiff to give up her Jointure (a); but she always refused, although repeatedly urged so to do:—That Sir *J. H. Smyth* died 30th March 1802, and was buried 13th April:—That immediately on his Death the *Defendant prevailed on John Abbot* (in whose honesty and integrity at that time the Plaintiff placed the greatest confidence,) to make a Proposal to her to give up to the Defendant for the whole term of her Life, all her Jointure Lands, for a clear annual Rent of 500*l.*, which he considered as an adequate consideration, and stated large outgoings for repairs, and other outgoings affecting the same:—That no Settlement or valuation was made:—That the Plaintiff was totally ignorant of the value of the Lands:—That the Defendant and *Abbot* were well aware that 500*l.* was a very inadequate Rent:—That a Survey was then in contemplation, if not made, by *which it appeared* the Lands were of much greater value, exclusive of Coal:—That conceiving the Terms to be just, the Plaintiff consented to the Lease without the slightest examination on her part, and that she was *unfit and incapable of Business, from the recent loss of her Husband*:—That the Lease, dated 12th April 1802, was prepared and executed before the Interment of her Husband, and was not examined by the Plaintiff or any Professional Person; nor had she any counterpart of the Deed till about four Months previous to the filing of the Bill:—That *Indentures of Lease and Release*, dated 21st and 22d September 1804, were brought to her at *Weymouth*, for signature, by which it appeared 10,000*l.* was given for 45 Acres, part of the Jointure Lands:—That Plaintiff had lately instituted a minute inquiry,

(a) The passages in the Bill, upon by *His Honor* in the Answer and Evidence, put in statement of the Case. Italics, were laid a stress

and found that 412 Acres of Land, with several Houses, were worth, to be let, 1,200*l.* at least:—That the Lease was obtained under circumstances of *Surprise, Concealment, and Fraud*:—That she was *kept in ignorance of the Value of the Estates and Property included in the Lease*:—That the Lease specified none of the Parcels:—That she is entitled to have the Lease delivered up to be cancelled, and to have an account of the Rents and Profits:—That she was ignorant of the outgoings of the Estate, and of its quantity and value; consulted no Professional Man; had no copy of the Lease; and was in a bad state of Health.

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The *Prayer* of the Bill was, that the Lease might be declared to have been obtained from the Plaintiff by Surprise and Fraud, and that it might be delivered up to be cancelled, and an Inquiry directed as to the Sale in 1804, whether it was for her benefit; otherwise that it might be declared fraudulent as against her, and that the Defendant might make good all loss.

The *Answer* of Sir *H. Smyth*, stated the Plaintiff to be entitled to other Real and Personal Estate, besides her Jointure:—That *James Abbot* acted for thirty years in the capacity of Steward to the Family:—That he was employed by the Plaintiff as her Steward or Land Agent, and was *still* in that capacity:—That *Abbot* proposed, as an advisable arrangement, that the Plaintiff should dispose of her Life Interest in consideration of a clear yearly Rent; and that the Plaintiff having approved of the proposal, she referred to *Abbot* as to what would be a reasonable Annual Rent:—That he had every means of knowing the fair Value of the Premises, independent of unforeseen contingencies; and he fixed the value at 500*l.* a year:—*That the Rent was not fixed in consequence of any sugges-*

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*tion upon the part of the Defendant :—That Abbot, by the direction of the Plaintiff herself, prepared the Lease, and the Defendant consented thereto :—That it was not prepared by his direction, nor was Abbot in any manner influenced by him, but was left to act at his own discretion :—That Abbot was not more the Agent of the Defendant, than of the Plaintiff, and that he was accustomed to prepare Leases :—That he has regularly paid the annual Rent of 500*l.* without any deduction, and that the Rent was accepted by the Plaintiff up to the 29th of September last :—That he considered the Estate to have been let according to its value ; and that he had no knowledge it was of greater value after deductions for Repairs and other Outgoings :—That the Plaintiff resided within a short distance of the Lands, and was well acquainted with them :—That Abbot did not make out, or show to the Plaintiff, any statement or valuation of the settled Lands :—That he made no representations, nor did he believe that the Plaintiff was guided by the representations of Abbot, but that she was induced to accept the proposal from her own personal knowledge of the Estate :—That he believes the Lands would not have let for more than 500*l.* a year :—That in 1803, a Bill was passed for the improvement of the Harbour of Bristol :—That the Plan was unknown to him when he took the Lease :—That he and others expected the Lands would be deteriorated :—That during the last ten years the value of Land has been over-rated :—That the Plaintiff resided in the neighbourhood of Bristol, and near to the settled Estates, and had every opportunity of knowing the actual value of the Land, in each year since the granting of the Lease ; but never objected to the arrangements :—That Money has been expended, and Provisions made on the faith of the Lease :—That one part of the Lease was deposited with Abbot for her.*

The Defendant, in his *Answer* to the *amended Bill*, stated, that the settled and unsettled Lands lay together indiscriminately in different Farms; united in the same Inclosure, confused and indistinct, and could not be known or separated without difficulty:—That soon after the Lease a new Survey was made at considerable Expense:—That the Lands were re-let 25th March 1803, at advanced Rents:—That the settled Lands were of the same value as those unsettled:—That by the Lease *the Defendant had it in his power to divide the Land into well assorted and convenient Farms* for the occupation of the several Tenants, and also to secure possession for any time:—That Plaintiff was Tenant for Life without a power of leasing:—That no Coal Pits were opened:—That the Defendant, besides the 500*l.* Rent, was liable to the following charges in respect of the Land; viz. Land Tax, 32*l.* 12*s.* 3*d.*; Tithes, 53*l.* 2*s.*; Agency, 38*l.* 11*s.*; Property Tax, 77*l.* 2*s.*; making in the whole 201*l.* 7*s.* 3*d.* besides incidental expenses, and subject to losses by Fire, Tempest, and failure of Tenants, &c.

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The *Plaintiff* examined several Witnesses.

First, *Josiah Easton*, a Land Agent, who stated the yearly value of the Lands in 1803, to be 1,160*l.*, if let for seven or fourteen years; and 1,100*l.*, if let at Will:—That in 1812, the yearly value of the Lands on a seven years Lease, was 1,300*l.*; on a fourteen years Lease, 1,200*l.*; and if let at Will, 1,300*l.*; and that his calculation was formed on a comparison of the probable quantity of the produce of such Lands, and the market price of such produce at that time, and the present.

2dly. *Jeremiah Cruse*, a Land Agent, who computed the

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yearly value of the Lands to be, in 1802, on a seven or fourteen years Lease, 1,100*l.*; on a holding at Will, 1,050*l.* or thereabouts; and that in 1803, the Lands were worth a little more. That in 1812, the yearly value of the Lands, if let at Will, were worth 1,450*l.*; if let for seven years, 1,350*l.*; if for fourteen years, 1,250*l.*; and in the Summer of 1812 were worth yearly, 826*l.* 15*s.* 4*d.*

3dly. *John Keedwell*, Gentleman, stated, the Lands were in 1802, worth yearly, on a seven years Lease, 1,200*l.*; on a Lease for fourteen years, 1,260*l.*; on a Lease at Will, 1,167*l.* In 1812, they were worth about 1,500*l.* on a seven years Lease; about 1,400*l.* on a twelve years Lease; and on a Lease at Will 1,556*l.*, or thereabouts.

4thly. *James Mills*, a Land Surveyor, deposed that in 1802, the Lands, if let on Lease for seven or fourteen years, or at Will, were worth yearly, 1,173*l.* 5*s.* 3*d.*: That in 1803, they were worth 1,218*l.*; and in 1812, worth 1,564*l.* 7*s.*: That being Pasture Lands, there was no difference in the value for whatever time they might be let.

5thly. *Robert Maynard*, Gentleman, by his Deposition stated, that in 1802 and 3, the Lands were worth a yearly Rent on a seven years Lease, of 1,200*l.*; on a fourteen years Lease, 1,260*l.*; to hold at Will, 1,167*l.*; and were worth in 1812, on a Tenancy at Will, 1,556*l.*, and not quite so much if let on Lease; that he did not know or believe the Property was improved by alterations.

6thly. *Andrew Goss* deposed, he paid Rent at the rate of 4 *l.* per Acre for *Spitman's Mead*.

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7thly. *James Abbot* deposed, that for thirty years he had been acquainted with the Land:—That the Land was not let at any fixed price per Acre:—That it was let free from Land Tax, Great Tithes and Repairs:—That the Lettings in 1782, 1786, 1798, 1800, 1801, 1802, were free of Land Tax, Poor Rates, Vicarial Tithes, and Repairs:—That he frequently accompanied Sir *J. H. Smyth* in valuing and surveying the Lands:—That the net annual value was, in his judgment, 500 *l.* or thereabouts, in 1802, and 580 *l.* in 1803, or thereabouts:—That the value was not so great if the Lands were let by themselves; but he estimated the same to be of the value stated, because they were let with other Lands. They were worth 60 *l. per Cent.* more in value in 1812, than in 1803:—That *no communication as to his being Steward to the Defendant was made to him at the time he proposed the Lease, or as to Improvements, or the increased value of the Estate;* but shortly after the Funeral, the Defendant told him he meant to continue him:—That he suggested the Lease by reason of the scattered situation of the different Lands:—That the Plaintiff inquired of him, what, in his judgment, would be a fair Rent of this Estate; and having considered the same, he replied, he thought the annual Sum of 500 *l.*, clear of all deductions, would be a fair and equitable Sum between the Plaintiff and Defendant, and thereupon both Parties acquiesced in such Proposition:—That the Plaintiff immediately directed him to prepare a Lease, and to get the same completed as soon as he could. There was no previous communication with either.—That the Lease was executed after the Funeral:

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—That he considered himself acting as the Agent, and on the behalf, as well of the Plaintiff as of the Defendant:—That if let to solvent Tenants for twelve years in 1802, the Lands were worth a yearly Rent of 530*l.*; and in 1803, a Rent of 600*l.*:—That a Survey of the Lands was made by *Smith* and *Cruse* in 1803; and there was a rise in Rent of 150*l.*—*That the Plaintiff was in good health when she executed the Lease, and did not appear to be in any distress of mind.*

On the part of the *Defendant*, several Witnesses were examined.

First. *John Browne*, a Land Surveyor. He stated, that the Land was less valuable to let if separated, and occupied distinctly from the other Lands, by reason of their being so detached and separated, and less convenient for occupation, and were *inferior* in value to the unsettled Lands:—That a clear yearly Rent of 500*l.* might have been fairly offered to and accepted by a Tenant for Life, as a fair and full compensation, and satisfaction for her Estate therein.

2dly. *John M. Tucker*, a Land Surveyor, who deposed, that a deduction of 100*l.* should be made in the Rent, if the Lands were let separately, and if let by a Tenant for Life, without a power of leasing, a further deduction should be made of 53*l.*:—That 500*l.* was a fair Rent.

3dly. *Henry Browne*, a Land Steward, stated, that a deduction of 100*l.* ought to be made from the value of the settled Lands, if let by a Tenant for Life without a power of Leasing:—That a Rent of 500*l.* might have been fairly offered in 1802, for the settled Lands:—That

he believed the alterations for the Improvement of the Harbour of *Bristol* would lessen the value of the Lands, and that the Works would be injurious to them :—That *William Gore Langton* and *Paul Methuen*, who owned contiguous Lands, were of the same opinion.

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4thly. *James Abbot*, (who was examined also on the part of the Defendant,) deposed, that for 20 years before *J. H. Smyth's* death he was employed as his Steward :—That the settled Lands consisted of 416 Acres, and the unsettled Lands, 3,334 Acres, which with 250 Acres of Park and Demesne Lands, make 4,000 Acres :—That the Land was let together at one entire Rent from year to year :—That the Land was intermixed, and so as to render a separation difficult and inconvenient :—That by reason of such separation and distance, the settled Estates would have been less valuable to let if separated and occupied distinctly :—That a few days after the death of Sir *J. H. Smyth* he proposed the substitution of a net annual Rent of 500 *l.* without any previous communication whatever with the Defendant :—That his motive for doing so was from the intermixture of the Lands, and the difficulty, expense and trouble of dividing and inclosing the settled Lands anew, and the diminution in their value, if the same were let separately, and from his conviction that it was for the mutual interest both of the Plaintiff and Defendant :—That he made such proposals on behalf of both, and that the same was approved of by both :—That he was acquainted with the specific portions of the Estate settled on the Plaintiff; and that he did then, and doth now, believe that a clear annual Sum or Rent of 500 *l.* was at that time a fair equivalent to be offered for the Interest of the Plaintiff during her Life in the settled Estates :—That the amount of the Rent paid the

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late Sir *J. H. Smyth* for the settled Estate was 631*l.* from which was to be deducted, Repairs 27*l.* 10*s.*—Land Tax, 32*l.* 12*s.* 3*d.*—Great Tithes, 53*l.* 8*s.*—Poor Rates, 32*l.*—Vicarial Tithes, 6*l.* 10*s.*, making together 152*l.* 3*s.*, which deducted from the Rent left 478*l.* 19*s.* 9*d.*, the net Rent paid:—That the Land was re-let in 1803 at an advanced Rent, in consequence of a valuation by Messrs. *Smith* and *Cruse*:—That the advanced Rent amounted to 687*l.*, which, with a deduction for Land Tax, 32*l.* 12*s.* 3*d.* and for Great Tithes, 53*l.* 8*s.*, left a Rent of 600*l.* 19*s.* 9*d.*:—That the valuation including *Workington Brice*, which was let at 75*l.* on a Lease, and which was valued at 109*l.* 3*s.* a year, making a difference of 34*l.* 3*s.*:—That he prepared the Lease in question under the joint authority and directions of the Plaintiff and Defendant, and considered himself as intrusted on behalf of both:—*That he was desired by the Plaintiff to be expeditious, as she wished to settle all her affairs with the Defendant previous to her leaving Ashton Court*:—That he was employed by the Plaintiff as her Steward or Agent as to all her landed Estates:—That the Plaintiff left *Ashton Court* in June 1802, and hath continued to reside at *Redcliffe House*, Bedminster, near Bristol, in the centre of the several Estates, settled not above six miles from the extremest part thereof:—*That the Plaintiff was conversant in the transaction of matters of business*:—That he was hostile to the improvement of the Harbour, apprehending ill effects from it:—That *Clutterbuck*, the Steward of *Gore Langton*, Esq. was of the same opinion.

Sir *Samuel Romilly*, Mr. *Hart*, Mr. *Heald*, and Mr. *Allen*, for the Plaintiff:—

This Lease ought to be set aside, it having been

obtained without an adequate consideration, and by surprise. The Lease was obtained from the Widow, whilst her Husband lay dead in the house, at a time when she could not be in a state of mind enabling her to exercise any judgment. Such rapidity in obtaining the Lease is of itself a strong feature of fraud. No Rental was shown to her. No valuation was made of the Estate, nor any person consulted except *Abbot*. The Lease did not particularize the Land leased, but referred to the Settlement, and gave her no information of the property she was leasing. The Lease was represented to her as beneficial, but the fact was, as shown by the evidence, that the Rent reserved was not one half of the yearly value of the Lands. The grossness of the inadequacy is such, that fraud must be inferred. As the Lease was represented to be a beneficial one, and it turns out quite the contrary, the representation was fraudulent, and the Lease is not binding. Forty-four acres of this Land have been sold to the *Bristol Dock Company* for 10,000*l.* The joining in the Lease and Release to the *Bristol Dock Company*, in 1804, cannot be considered as confirmatory of the previous Lease. There was no express confirmation, nor can it be inferred, the Plaintiff being then ignorant, as she was when the Lease was granted, of the value of the Lands.

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Mr. *Leach*, Mr. *Bell*, Mr. *Wetherell*, and Mr. *Wilbraham*, for the Defendant:—

If it were shown that this Lease was fraudulently obtained, no doubt it might be set aside. From the granting of the Lease to the filing of the Bill 10 years and more have elapsed; and now, after the Lands have, at great expense, been much improved, (improvements the Plaintiff must have known, as she resided near the

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Lands,) and after joining in a Conveyance of part of the Lands to the *Bristol Dock Company*, applies to set aside the Lease. It is not pretended that the Plaintiff was poor, or ignorant, or without the means of advice. The great rise in the value of Land in 1812, and the improvement in the Harbour of *Bristol*, by which the leased Lands became much more valuable than they were at that time, occasioned, probably, the institution of this Suit. If there had been imposition or surprise, why not apply to rescind the contract before? The Lease proposed by *Abbot* was a prudent one, the settled and unsettled Lands being mixed, and the settled Lands incapable of being let to such advantage to any other person. *Abbot* was the confidential Steward of the Plaintiff's Husband, and was afterwards, and still is, the confidential Steward of the Plaintiff. He swears he proposed what he considered a fair Rent. He had no reason then to suppose that the Plan of the *Bristol Dock Company* would be carried into execution; and was apprehensive the Lands would be deteriorated by the proposed improvement of the Harbour. Her Neighbours, *Gore Langton* and others, were of the same opinion. If, in settling the Rent, *Abbot* acted *bonâ fide*, and it turned out (a fact by no means admitted) that he was mistaken in his judgment, that would be no ground for setting aside the Lease. If a mutual Friend is called in between a Tenant for Life and a Reversioner, to settle a Rent to be given on a Lease from the former to the latter, both parties depending on his judgment, though his judgment has mis-carried, this Court cannot relieve. An Award is not impeachable for want of judgment in the Arbitrator. When parties have chosen a Judge between them they must be bound by his judgment. When Sir *J. H. Smyth* died, the Land in question

was let to yearly Tenants, at a Rack Rent of 479*l.* a year. The Rent proposed by *Abbot* was therefore more than had before been received; she has a clear net Rent of 500*l.* a year, with no trouble, and subject to no contingencies, A net Rent of 500*l.* a year is preferable to 600*l.* to be paid by Tenants, considering all the trouble and contingencies which accompany it. The *Defendant* knew no more of the Property than the Plaintiff at the time the Lease was executed. *Cruse*, it is true, valued the Property soon after the Lease at 820*l.* but after all deductions for great Tithes and Land Tax, the net Rent would only be 600*l.* a year. In his valuation he did not take it into his consideration the dispersed nature of the Property, which, according to the evidence of *Henry Browne*, would make a difference in the Rent of the Lands, if let separately, of 100*l.* a year. Nor did he consider the insecurity of a Tenancy under the Plaintiff, who was only a Tenant for Life, without a power of Leasing. In his deposition, *Cruse* now thinks he undervalued the Property. Subsequent events, probably, altered his opinion; but the question is not what he thinks ought to have been his valuation many years ago, but what was his valuation at the time. If that valuation had been made before the Lease was granted, the Plaintiff would not have acted imprudently in making this Lease, considering the nature of the Property. Mere inadequacy, supposing it proved, is not sufficient to invalidate a Contract. Reverse the case; suppose it had turned out a losing bargain; could the Defendant have applied to rescind the Contract? Certainly not. Several Surveyors have sworn the Land might have been let for double the Sum reserved; but much weight cannot be laid on the opinion of Surveyors. Every day shows what great contrariety there is

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in their Surveys. This is a Bill to rescind a Contract, where the Court always requires a strong Case.

Sir *Samuel Romilly*, in Reply :—

The facts of this Case are not disputed. We do not impute fraud either to the Defendant or *Abbot*; but contend this was a Lease obtained by surprise. *Abbot* and the Defendant were probably under a mistake as to the value of the Lands when the Lease was made; but, is it according to conscience, to insist on a Contract made under a misconception of the value of Property? The Defendant ought to have given a greater Rent than any other person, for the Lands were indispensable to the Tenants of his own Lands. If the Plaintiff, instead of being Tenant for Life, had possessed the Fee, and sold the Lands, the Defendant would have found it his interest to give more than any other person. There is no evidence that the late Sir *J. H. Smyth*, obtained the utmost Rent he could get for the Lands. The joining in the Conveyance to the *Bristol Dock Company* can have no weight. The Deeds did not on the face of them show the value of the Lands. This case has been compared to another, as where two persons agree that an Estate shall be paid for at the valuation of a third person; and that if he is mistaken in his judgment there can be no relief. That is admitted; but we say, this is the Plaintiff's Lease; she fixed the Rent, and fixed it under a mistake, *Abbot* having untruly represented the Lease as beneficial for all parties.

The VICE-CHANCELLOR [after stating the Bill, the Answer, and the Evidence] :—

May 14.

This is not a Bill for the *specific performance* of a Contract, in which Case, the Court has often taken

great latitude in refusing it. It is a Bill, *to set aside a Lease*, after an acquiescence for ten years, during which time the Rent has been paid half-yearly down to the quarter-day preceding the filing of the Bill. When a Party, under no distress or incompetency, makes a Contract, it must be a very strong Case, to induce a Court to rescind it. The Bill states sufficient grounds for setting aside this Lease, if the statements had been supported by Evidence. *Surprise* or *Fraud*, provided there has been no Laches, may be shown, to invalidate a Contract. The charge of Fraud, made in this Bill, against the Defendant, is a serious one. What evidence is there of Fraud? Positive Evidence there is none; nor any Evidence of it, unless it is to be inferred from the time the Lease was granted, and the other circumstances attending the Grant. The Defendant was passive as to the proposal of a Lease. It is sworn he was ignorant of the proposal; it is so sworn by the Defendant, and by *Abbot*. Did the proposal import Fraud? The proposition of a certain Rent to be paid to a Widow, instead of the trouble and risk, and disadvantage of letting intermixed Lands, and that Rent greater than had before been paid by Tenants from year to year at a Rack Rent, does not carry Fraud on the face of it. *Abbot* swears he meant to do what was right. The Proposition was made for the advantage of the Plaintiff and the Defendant. The Defendant was benefited by being able to let the settled and unsettled Lands together; and the Plaintiff had the advantage of receiving a clear net Rent, without trouble, or risk, or the disadvantage of letting the Lands separately. No partiality is apparent in the conduct of *Abbot*. Though he might have entertained an hope of becoming Steward to the Defendant, yet considering

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how long he had been employed in the family before the Contract, it would be too much to attribute such perfidy and baseness to him, as to suppose he would, from interested views, name a lower Rent than what he knew ought to have been paid. I think, therefore, there was no Fraud imputable to the Defendant, or to *Abbot*. The only circumstance that might make the Bargain improvident, was the proposed improvement of the Harbour of *Bristol*; but *Abbot* took it into his consideration, and thought it would be prejudicial to the Lands; and such was the opinion of *Gore Langton*, *Paul Methuen*, and the Steward of *Langton*. Besides, the Plaintiff knew of the proposed Improvements, for she states in her Bill, that applications on the subject were made in her Husband's Life-time.

It is proved by *Abbot*, that after the proposal of the Rent, she inquired of him, what would be a fair Rent? To whom could she more properly apply? Who so likely, after his long service in the family, to give her good advice, and deal fairly with her? Every Landlord resorts to his Steward when he would fix a Rent. She only did that which was prudent. There is no Evidence that the Defendant knew the value of the Lands. If then both Parties relying on *Abbot*, on his ability and honesty, leave it to him to decide what is a proper Rent, and he fixed what he considered as a fair Rent, (as he swears he did), though he may have been mistaken, he was honestly mistaken, and the Parties cannot be relieved from their Contract. The Rent was something more than had been before received from yearly Tenants at Rack Rent; and more, probably, than could then have been obtained. It might have been more prudent if the Plaintiff had paused a little, and consulted other persons, before she

agreed to the Lease; but she was in haste to have the business concluded. There is no Evidence that she was incapable of business; *Abbot* swears she was capable; and certainly it was natural for a Woman in her situation, immediately to consider what was to be done, more especially as she was about to leave *Ashton Court*. If she had taken more time for consideration, she would probably have consulted *Abbot*, and at last have come to the same conclusion.

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But suppose there was a surprise upon the Plaintiff; she has acquiesced for ten years. What was there to prevent her getting over this surprise during so long an interval? She lived at the spot, except whilst at *Weymouth*. Why not, in 1804, when she was called upon to execute the conveyance to the *Bristol Dock Company*, apply to set aside the Lease, instead of joining in the Conveyance, and waiting till 1812, when she filed her Bill? It cannot be said she was surprised.

The preponderance of the Evidence is, that this was a disadvantageous Lease, though *Abbot* swears he thinks the Rent was sufficient. The Evidence, however, of Surveyors, as to the value of Land, more especially as to the value at a period long antecedent to their Survey, and when the Land has by events been greatly increased in value, must always be looked at with caution; otherwise three fourths of the Leases in the kingdom might be set aside on the evidence of Surveyors. Are we, at the instance of Lessors and Lessees, to call in Surveyors to say whether more or less Rent ought to have been given, and after ten years acquiescence and receipt of Rent, to rescind a Contract! Suppose the Defendant had found that he gave too much Rent,

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could he have had any relief? The Court cannot be too cautious when it is called upon to rescind a Contract. Inadequacy of value, *per se*, is not sufficient to set aside a Contract, otherwise, whenever a man has made a bad bargain he would be applying to Courts of Equity. If that were admitted, those courts would become nuisances. The inadequacy upon which Courts of Equity interfere, must be such, to use Lord *Thurlow's* expression, "as shocks the conscience." There may be cases of that description; but here no Fraud is shown, no gross inadequacy. If the Lease is set aside, it must be on the ground of mere inadequacy. *Abbot* was the Agent of both Parties, or the Agent of the Plaintiff, for settling the Rent. If he was the Agent of both Parties, and if the Plaintiff and Defendant agreed that he, a third person, should fix a Rent between them, and he does fix a Rent, both Parties are bound by the Rent he has fixed. "A man," (as was held in *Emery v. Wase (a)*), "may make use of the judgment of another upon whom he can depend; and the valuation of that person is his, if he chooses to adopt it."

Abbot swears he thought it a fair Rent, nor have any practical men, any Farmers been brought to show the Rent was inadequate, but only speculative persons, and it is in proof that the Defendant himself let them, after all deductions, at but a trifling additional Rent. It is impossible, therefore, to say that the Rent reserved was so inadequate as to shock the feelings, and of itself to evidence Fraud. The utmost that can be said, is, that it was a bad bargain.

If there were any ground for impeaching the Lease,

(a) 5 Ves. 85.

on a recent application, yet after such a lapse of time, the Court ought not to interfere, unless in a Case like *Purcel v. Macnamara* (c), where the Parties continued under the same undue influence and control as at the time of the Transaction. *Lady Smyth* was under no control ; she was not in distress, or at a distance, or ignorant. She says she has lately inquired into the subject, but why not before ?

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In *Willis v. Turnegan* (d), Lord *Hardwicke* says, “ It is not sufficient to set aside an Agreement in Equity, to suggest weakness and indiscretion in one of the Parties who has engaged in it ; for supposing it to be in fact, a *very hard and unconscionable bargain*, if a person will enter into it with his eyes open Equity will not relieve him upon this footing, unless he can show Fraud.” In *Gwynne v. Heaton* (e), Lord *Thurlow* says, “ If Parties are of full age, treating upon equal terms without imposition, and there is an inequality, even if it is a gross one, the Court in general has not set it aside.” The Party is not to be relieved against his own folly.

This case is distinct from those where *Fraud* or *Surprise* exists ; it is also distinguishable from the Cases of *young Heirs* (f).

This Bill must be dismissed.

Bill dismissed.

(c) 14 Ves. 91.

(d) 2 Atk. 251.

(e) 1 Bro. C. C. 2.

(f) See *Gowland and De Faria*, 17 Ves. 2.

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LINTON and Ux. v. HYDE and others.

J. S. in his Lifetime received Monies to pay Custom House Duties for H. and M., and there being reason to believe the Duties were not paid, H. and M. called upon the Administrator of J. S. to invest in the Funds, in the name of Trustees, a Sum sufficient to answer the Duties, if H. and M. should be called upon to pay them. Many years elapsed without any claim of the Duties, and the Plaintiff called for a re-transfer of the Funds, but no other relief was given, except a direction that the Dividends which had accrued on the Fund, should be paid to the Plaintiff.

THE Bill stated, That *James Stephenson*, deceased, the Father of the Plaintiff *Mary Linton*, late *Stephenson*, died 17th August 1800, Intestate, and that the Plaintiff *Mary Linton*, who was then unmarried, administered to her Father, and possessed Assets amounting to 2,479 *l.* 8 *s.* 1 *d.* after payment of his Debts:—That application was made to her by *Hyde*, the Defendants *Hyde* and *Marter* stating a claim they had upon the Assets of the Intestate for the Sum of 3,081 *l.* 19 *s.* 6 *d.* for Monies they alleged they had advanced to the Intestate for the payment of Customs of certain Wines cleared by the Intestate as their Agent from the Cellars of the East India Company, between the 25th February 1799, and the 14th August 1800; and which Customs the said *Hyde* and *Marter* alleged that the Intestate, from some differences respecting the payment thereof, omitted to pay; and they represented to the Plaintiff *Mary*, that by reason of such omission of the Intestate, they were themselves responsible for the payment; and delivered to the Plaintiff *Mary* an account of the Monies they alleged to have paid to the Intestate for the payment of the Customs:—That the Plaintiff *Mary* being a stranger to the transactions, requested the Defendants *Hyde* and *Marter* to furnish her with Evidence that the Intestate had not paid the Customs; but they produced no such Evidence, assigning prudential motives for not doing so:—That there were not any Papers left by the Intestate relating to the transaction, and she therefore declined paying the demand:—That *Hyde* and *Marter* promised, that if the Plaintiff *Mary*

would not part with the Assets until May 1805, that they would before the end of the Month obtain certificates of the non-payment of the Customs, and the Legality of their demand against the Assets of the Intestate:—That at the pressing instance of *Hyde* and *Marter*, the Plaintiff *Mary* invested the said Sum of 2,479*l.* 8*s.* 1*d.* in the Funds, in the names of the Defendants *Hyde*, *Marter*, *Johnson* and *Duff*; and the same, together with the Dividends, were to abide the event of the proof of the Debt by *Hyde* and *Marter*:—That the sum was accordingly laid out in *July* 1807, in the Purchase of 3,933*l.* *Three per Cent Consols*, in the joint names of the Defendants *Hyde*, *Marter*, *Johnson* and *Duff*, as Trustees for the aforesaid purposes, and the same now stands in their names, and they received the Dividends, and laid them out in the *Three per Cents*. upon the same Trusts:—That when the Trust Monies were so invested, it was agreed between the Plaintiff *Mary*, and the Defendants *Hyde* and *Marter*, that they should hold the same in Trust:—That in case they should, on or before the 28th May 1805, prove and make out their said alleged demand against the Assets of the Intestate, and the legality thereof, no Debt should be brought forward against his Estate, which the Plaintiff *Mary* would be first bound to pay in a due course of administration, the Bank Annuities, and the accumulated Dividends, should be transferred to *Hyde* and *Marter* for the payment of the Debt; but in case *Hyde* and *Marter* should fail to prove their said Debt on or before the 28th May 1805, the Bank Annuities and Dividends were to be transferred to the Plaintiff *Mary*, as the personal Representative of the Intestate:—That no proof was adduced by the Defendants *Hyde* and *Marter*, establishing their

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demand, although so long a period had elapsed:— That the Plaintiff *Mary* intermarried with the Plaintiff *William Linton*, and that they had requested *Hyde* and *Marter* to prove their demand, or join with the Defendants *Johnson* and *Duff*, in transferring to the Plaintiff *Mary*, as the personal Representative of her Father, the *Three per Cent. Consols*, and the accumulated Dividends. The Bill then *prayed*, that if the Defendants *Hyde* and *Marter* should not forthwith, to the satisfaction of the Court, make out by Evidence that the Money claimed against the Estate of the Intestate was legally due, or such as the Plaintiff *Mary* ought to pay out of his Assets, they and the other Defendants, *Johnson* and *Duff*, might be decreed to transfer and pay back to the Plaintiff *Mary* the 3,933 *l. Three per Cent. Consols*, together with the accumulated Interest and Dividends.

The Defendants *Hyde* and *Marter*, by their *Answers*, stated, that during the years 1800, and 1801, they were in the employment of the *East India Company*, and the Court of Directors had granted to them a Special Appointment and License to act on Commission for Individuals in the payment of Duties, and transacting all business in the different departments of the Revenue Offices, and they employed the said *James Stephenson*, (who was then a Clerk in the Custom House,) according to general practice, to pass all the Entries which in the course of such business it became necessary to make at the Custom House; and said *James Stephenson* computed and received all Duties, and transferred the Money for such Duties, with the proper Vouchers, to the different official Receivers of the same:—That on the death of said *James Stephenson*, they employed

R. J. Stephenson, his Son, in the same situation, and for the same purposes for which they had employed his Father, previous to his death; and the said *R. J. Stephenson*, about a twelvemonth after his Father's death, left his business suddenly, and without in any manner explaining to the Defendants, or either of them, the cause or reasons for such his departure; but shortly afterwards Defendants received a communication from said *R. J. Stephenson*, informing them, that at the decease of said *James Stephenson*, a considerable sum of Money remained in the hands of his Bankers, which had been received by him for the payment of Duties on Wine, but which he had retained, instead of applying the same to the payment of such Duties, although the Wine had been actually delivered to the respective Proprietors; and said *R. J. Stephenson* also informed Defendants, that the greatest part of the Assets of said Intestate consisted of monies which he, said Intestate, ought to have paid into the Treasury of the Customs, in discharge of Duties which he had been so employed to pay as aforesaid; and Defendants under the circumstances aforesaid, and considering that they, or the Individuals for whom they had been employed, might be called upon for the Duties which said *James Stephenson* had so neglected to pay as aforesaid, applied to Plaintiff, *Mary Linton*, then *Mary Stephenson*, to invest the Sum of 2,434 *l.* 4 *s.* 3 *d.* remaining of the Assets of said Intestate, as a security to Defendants against any claim or demand in respect of such Duties:—That in the year 1807, said Sum of 2,434 *l.* 4 *s.* 3 *d.* was invested in the Purchase of 3,933 *l.* *Three per Cent. Consols*, in the names of Defendants, and also of the Defendants *Johnson* and *Duff*, in Trust, to abide the event of any claim or demand from the Crown in

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respect of such Custom-house Duties as aforesaid: And Defendants undertook such Trust, in order that Defendants, or such Individuals for whom Defendants had acted as aforesaid, might be indemnified in case any claim or demand should be made against them, or either of them, in respect of such Duties; and Defendants have never paid or been called upon to pay any sum of Money in respect of such Duties, or on account of any of the matters aforesaid; and said Sum of 3,933*l.* *Three per Cent. Consols*, now remains in the names of Defendants, and said Defendants *Johnson* and *Duff*, in Trust, as aforesaid; and Defendants have at different times received several Dividends arising from the same; and they believe that all such Dividends so received by them, have been laid out in the Purchase of like Annuities, in the names of the same Trustees, except the last half year's Dividend received by Defendant, *William Marter*, amounting to the Sum of 65*l.* 3*s.* 3*d.* which now remains in his hands; and the said 3,933*l.* Bank Annuities, together with the accumulations arising from such Dividends, amount to the Sum of 4,826*l.* 17*s.* 10*d.* *Three per Cent. Consols*, which now stands in the names of said Trustees, and upon the Trusts aforesaid.

Sir *Samuel Romilly*, and Mr. *Horne*, for the Plaintiffs:—

From inadvertency, the Answer was not replied to. Seventeen years have nearly elapsed since the death of the Intestate, and no claim has been substantiated. After such a length of time the Court will conclude that there is no claim. How long is this Money to be locked up? Is it to be for 60 years, after which no claim can be made by the Crown? It was the duty of

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these Trustees to have ascertained before this whether any claim could be made.

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Mr. *Cooke*, for the Defendants:—

By not replying to the Answer the Defendants were unable to examine *Stephenson*, the Son, and the Answer must be taken to be true. From the Answer it appears very probable that the Duties were not paid. If the communication by *Stephenson* the Son was correct, and he must have known the facts, the Duties were not paid. The circumstance of so much Money being in the Bankers hands adds to the probability of the fact. The Crown may still make a demand upon *Hyde* and *Marter*. It is necessary, for their security, that the Money should remain locked up until there is satisfactory proof that the Duties were paid, or that the Crown has relinquished its claims. The Agreement alleged in the Bill, that unless the claim was effectuated before the 28th May 1805, the Fund should be transferred, is not admitted by the Answer, and is disproved by the facts, for the investment in the Funds was not made till July 1807. We have no objection to the Plaintiff, *Mary*, receiving the Dividends accrued due on this Money, but that is all we can consent to.

The VICE-CHANCELLOR—[after stating the facts]:— 14th May.

The large Sum of Money which was in the hands of the Intestate's Banker, and the Agreement by the Plaintiff, *Mary*, on the representations made to her, to invest this Money, as a Security against any claim, are very strong facts. If the Plaintiff had resisted giving a Security, the Defendants, *Hyde* and *Marter*, might have brought an Action for the Money, and supported

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it by the evidence of *Stephenson*, the Son. The Security given by the Plaintiff gives credence to the information communicated by *Stephenson*, the Son.

I desired the Solicitor to inform me as to the time when the Stock was in fact invested. I have seen the two receipts when the Money was invested, by which it appears that two Sums were invested in *Three per Cent. Consols*, in July 1807, as stated in the Bill. This fact, therefore, negatives the statement in the Bill of an Agreement between the parties that proof of the claim was to be made before the end of May 1805, or the Stock to be transferred. If there had been such an Agreement, it is not probable that two years after, the Plaintiff *Mary Linton*, would have invested this Money in the name of the Trustees. The Investment was made with the consent of the parties, the Money to be impounded as a Security against any claim in respect of Duties. A period of nearly 17 years has elapsed since the death of the Intestate, and this length of time, it is urged, without any claim, affords reasonable ground for the Court to say the Trust has been fulfilled. The Crown may demand the Duties notwithstanding this lapse of time. The Defendants stated in Court that they had made applications to the Treasury to know whether they might safely transfer this Fund. We must suppose a communication of all the circumstances was made to the Treasury. In Answer, they were informed that a reference had been made to the Customs, and that owing to the fire at the Custom House there were difficulties on the subject. The Defendants, therefore, *Hyde* and *Marter*, may be found liable to the payment of these Duties, the matter being still *sub judice* before the Commissioners of the Customs.

The time has not arrived when the Court can say the Money ought to be restored. The Defendants, *Hyde* and *Marter*, have disclosed to the Treasury the whole circumstances; they have admitted their liability in the first instance, and though there has been a destruction of Papers at the Custom House, they may yet possibly be called upon to pay these Duties.

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All I can do in this Case is to recommend that the Money be transferred into the Name of the Accountant General, to be laid out, and the accrued Dividends paid to Mrs. *Linton*, with liberty on both sides to apply to the Court if any satisfactory evidence is adduced, to establish or extinguish this claim; and that the Costs of the parties should be taxed and paid out of the Fund.

N. B. With the Consent of the Defendants, a Decree was made, as recommended by the Vice-Chancellor.

LOWE and another, Assignees of W^M. STEWART, a Bankrupt, v. WILLIAM FARLIE and others, Defendants.

May 14.

THE Bill stated, That *William Stewart*, the Bankrupt, had, prior to April 1796, dealings in business with his *A Testator appointed Persons residing in India and Scotland, his Executors. The Will was not proved in England. The Executors in India remitted a Sum of Money to their Agent in England, and a Creditor of the Testator filed a Bill against the Agent of the Executors, to whom the Money was remitted, praying an Account and Payment of the Money to the Accountant General, for Security. A Demurrer was put in to the Bill on the ground that no Personal Representative of the Testator was made a Party and the Demurrer allowed.*

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Brother, *Robert Stewart*, of Calcutta, whereby, at the Bankruptcy of the former, in April 1796, the latter was indebted to him in 5,064*l.* 11*s.* 8*d.*, which Debt was afterwards reduced, by consignments, to 3,919*l.* 2*s.* 5*d.*; that *William Stewart* afterwards died, and by his Will appointed several Executors who resided in Scotland, and other Executors who resided in India:—That the Executors proved his Will *in the proper Court**, and that *David Stewart* (who with the other Executors were made parties Defendants, but stated to be out of the jurisdiction of the Court) was the principal acting Executor in Europe:—That the Plaintiffs wrote to *David Stewart*, requesting payment of the Debt, but no Answer was returned:—That the Executors of *Robert Stewart* had remitted a Sum of 6,000*l.* and upwards, part of the Estate of the deceased *Robert Stewart*, to the Defendants, *Farlie* and others, and which was in their hands for the purpose of being paid and applied as the Executors of *Robert Stewart* should direct:—That all the Debts of *Robert Stewart*, except the Debt due to the Estate of *William Stewart*, had been long since paid, and that the Plaintiffs had applied to the Defendants, *Farlie* and others, to pay them the amount of the balance due to the Estate of the Bankrupt, which they refused to do. The *Prayer* of the Bill was, that an Account might be taken of what was due to the Bankrupt's Estate, and that the Plaintiffs might be declared to have a lien upon the Monies in the hands of the Defendants, *Farlie* and others, for what should be found due; and that, for the purpose of securing such balance, *Farlie* and others might be directed to pay the Monies in their hands to

* Notwithstanding this statement in the Bill, it was admitted the Will had not been proved in this Country.

the Accountant General, or might be declared to be personally responsible for the same to the Plaintiff; and in the mean time that they might be restrained by Injunction from paying away or parting with the Monies.

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To this Bill *Farlie* and others put in a *Demurrer*, “ and for cause of Demurrer show, that it appears by the said Complainants said Bill, that a personal Representative of *Robert Stewart*, the Testator, resident within the Jurisdiction of the Court, is a necessary party to the Bill; and yet that there is no personal Representative of the said Testator resident within the Jurisdiction of the Court a party to the Bill.”

Mr. *Bell*, and Mr. *Winthrop*, in Support of the Demurrer :—

It is indispensably necessary, that, on a Bill by a Creditor seeking to charge the Assets of a Testator, that the Representatives of the Testator should be parties. “ All Executors must sue and be sued.” In 1 *Equity Cas. Abr.* 73 (a book of great authority), *Moore v. Blagrove* (a), and several other Cases, are cited, confirming that proposition; and the same doctrine is strongly enforced in *Humphreys v. Humphreys* (b), in which Case, Lord *Talbot* says, “ There can be no Account taken of the personal Estate of Colonel *Lancashire*, without making his Executor or Administrator a party to the Bill : For aught appears to the contrary, there may be Debts due from Colonel *Lancashire*, which may take up great part of the Assets; and therefore the Administrator of the Colonel must be made a party, else no proper Ac-

(a) 1 Chan. Cas. 277.

(b) 3 P. Wms. 349.

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count can be taken ; and if any Account should in fact be taken, it may be overhauled again, when such Administration shall be taken out." The Bill, it is true, states all the Testator's Debts are paid except the Plaintiff's Debt, but the Court cannot take that to be the fact. No Decree could be made upon this Bill, for no Representative being before the Court there is no person to take the Account. The 38 *Geo. III. c. 87*, evidences the necessity of a personal Representative being a party to a suit in a Bill by a Creditor, by providing, that if at the expiration of 12 months from a Testator's decease, the Executor to whom Probate is granted shall not reside within the Jurisdiction of the Court, a Creditor may obtain a Special Administration from the Ecclesiastical Court which granted the Probate. It is true that in this Case the Executors not having proved the Will in this country, a Creditor has no relief under this Act ; it is *casus omissus* ; but still the personal Representative is a necessary party, as he was in the Case provided for by the Act.

Mr. *Parker*, in support of the Bill :—

No Administration could be obtained here under the Statute, because the Executors have not proved the Will in this country.

In *Moore v. Blgrave* the Executor was within the jurisdiction, and therefore could have been made a party ; but here, the Testator lived, and his Executors now live, out of the jurisdiction. In that case it did not appear that all the Debts were paid, but in this Bill it is stated they are all paid, with the exception of the Debt due to the Plaintiffs. I admit, the Accounts could not be taken under this Bill, unless the Executors come

within the jurisdiction; but the main object of this Bill is the Security of the Assets in the hands of the Defendants.

Mr. *Bell*, in Reply:--

We admit we are Stakeholders; but contend that there must be a Representative before the Court to sustain this Suit. The Court could not protect us from an Action for this Money by the persons who remitted it. If the Money is paid into Court it may remain there for ever. Where there is a dispute as to Probate in the Ecclesiastical Court, this Court will sometimes appoint a Receiver, as was done in *Ball v. Oliver (c)*, decided by your *Honor*; but the Court has never interfered in the manner proposed by this Bill.

The VICE-CHANCELLOR:—

The inconveniences felt before the Act are alluded to by Lord *Redesdale*. The Act does not however apply to this Case. They could not apply for an Administration under the Act, because the Will was not proved within the jurisdiction. The Cases quoted, and more particularly *Humphreys v. Humphreys*, show that, the Court cannot act in these Cases, unless a personal Representative is before the Court. Pending a Litigation for Probate, a Bill may be filed for an Account and a Receiver; but that is an excepted case. The Bill prays an Account; but how can an Account be taken without a personal Representative? Supposing the Debt to be a just one, it does not follow that the Plaintiffs have a lien on this Fund. The Debts may not be paid; or this Money so remitted, may be Money

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(c) 2 Ves. & Bea. 96; and p. 85, and Lord *Redesdale's* see *Atkins v. Henshaw*, ib. Tr. Pl. p. 146.

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which they have repaid themselves for what they have advanced on account of the Testator. If the Money is impounded, how is the Court to secure these Defendants from an Action by the persons who remitted the property? It cannot be ascertained upon this Bill who is entitled to the Money, or how it ought to be administered. It is an endeavour to arrest a sum of Money *in transitu*, in the manner of a *foreign Attachment*. There is no instance of such a Bill.

Mr. Parker then applied for leave to amend, by adding Parties.

The *Vice-Chancellor* said the Application was not of course, in a case like the present; but gave him a few days to state in writing what amendment he proposed to make, and He would consider whether it was fit to allow him to make the proposed Amendment.

N. B. No Application was afterwards made to amend.

LORD WM. GORDON, and Ux. v. MARQUIS of
 HERTFORD and Ux. and Others.

22d May.

On a Bill for a
*specific per-
 formance of an
 Agreement by
 several Persons
 to enter into several
 Bonds for
 1,500 l. parol*

Evidence permitted to be read to show that the Agreement was to give a joint Bond for 1,500 l. and not separate Bonds to that Amount.

THE Bill in this Case contained several statements not necessary to be mentioned, as no question arose upon them. The only statements material to the point agitated were, That the Plaintiffs were entitled, under the Will of *Samuel Sheppard*, deceased, to one Fifth Part of certain Estates and Property, the Defendants being

entitled to the other Four Fifths:—That by an Act of Parliament, 16 *Geo.* III. several Estates of the said *Samuel Shepherd* were vested in *Albany Wallis*, and another, as Trustees, to be sold, and for purchasing other Estates to be conveyed to the same uses as were declared by the Will of the said *Samuel Shepherd* concerning the residue of his Real and Personal Estates:—That the said *Albany Wallis*, as the surviving Trustee, had, in pursuance of the Act, sold the Estates comprised in the Act, being nearly four Fifth Parts in value, for the Sum of 156,500*l.*, and that the part of the Freehold Estates remaining unsold was valued at 48,500*l.* which the Plaintiffs, upon a treaty for Partition, proposed and agreed to purchase and take in lieu of their specific Allotments of the Estates directed by the Act to be purchased with the Money arising from the sale of the said *Samuel Shepherd's* Estates; and the Defendants being satisfied that the Sum of 48,500*l.* was a fair price for such unsold Estate, requested *Albany Wallis* not to sell the same, otherwise than to consider the Plaintiffs as the Purchasers at that Sum, which Sum being added to the Sum produced by the said Sale of the other part of the said *Samuel Shepherd's* Estates, made together the Sum of 205,000*l.*, to one Fifth Part whereof, 41,000*l.* the Plaintiff, *Lady Gordon*, was entitled: and, inasmuch as the said Estates agreed to be taken by the Plaintiffs in lieu of the Plaintiff, *Lady Gordon's*, Fifth Part, exceeded by 7,500*l.* the Share of the Plaintiff, *Lady Gordon*, the Plaintiffs agreed to give Security for such surplus value, which the Defendants agreed to accept. A Memorandum of which Agreement was afterwards, 25th June 1793, signed by the Parties:—That part of the Estates so agreed to be taken by the Plaintiffs consisted of the Rectory and Tithes of *Wickham-*

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brooke, in the County of *Suffolk*, and of the Manors of *Linwood* and *Market Raisin*, in the County of *Lincoln*, with their Appurtenances, and the Advowson of the Church of *Linwood*:—That all the Lands and Premises situate in the Parish of *Linwood* were taken and purchased by the Plaintiffs as not being subject to the payment of Tithes in kind, but only to the payment of certain Moduses, or Customary Money Payments in lieu of such Tithes, although the Rector or Incumbent of the said Parish of *Linwood* then claimed to be entitled to the Tithes thereof in kind:—That in pursuance of the said Understanding between all the Parties, a Memorandum was entered into between the Plaintiffs and Defendants as follows—“ Memorandum—It is agreed this 22d day of June 1791, between Lord Viscount *Beauchamp*, Lord *William Gordon*, *Hugo Meynell*, Jun. Esq. *Henry Hervey Aston*, Esq. and Sir *John Ramsden*, Bart. as follows: That the several Parties above named shall concur in all necessary Acts for conveying to Lord *William Gordon* and his Heirs, or as he shall appoint, the Estates of *Linwood* and *Market Raisin*, or in any place adjoining with the Manors of *Linwood* and *Market Raisin*, in the County of *Lincoln*, and their Appurtenances, and the Advowson of *Linwood*, which were late the Estates of *Samuel Shepherd*, Esq. deceased; in consideration whereof Lord *William Gordon* agrees to pay to the said Parties, in equal proportions, the Sum of 7,500*l.*; and also to concur in all necessary acts for conveying to Lord *Beauchamp*, Mr. *Meynell*, Mr. *Aston*, and Sir *John Ramsden*, or as they shall respectively appoint, all other the Manors, Lands, Tithes, Hereditaments and Estates whatsoever, Freehold, Leasehold and Copyhold, or of any other Tenure, in the several Counties of *Lincoln*, *Cambridge*, *Suffolk* and *Norfolk*, or any of them, which

were late the Estates of the said *Samuel Shepherd*, Esq. deceased, now under the receipt of *John Lund*; all such Conveyances to be executed, and the said Sum of 7,500*l.* paid, on the 5th April 1792; and from that time Lord *William Gordon* to be entitled to the Rents of the *Linwood* and *Market Raisin* Estates; and Lord *Beauchamp*, Mr. *Meynell*, Mr. *Aston*, and Sir *John Ramsden*, to be entitled to the Rents of all the other of the said Estates; until that time no Timber to be fallen, or other Waste committed, upon any part of the said Estates, except the annual or usual falls as now set out; all repairs now going on or under Mr. *Lund*'s directions to be charged to the general Account; all Rent and arrears of Rent up to Lady-day 1792, to be accounted for as if this Agreement had not been made: And whereas there is a dispute subsisting with respect to the Tithes of *Wickhambrooke*, part of the Estate agreed to be conveyed to Lord *Beauchamp*, Mr. *Meynell*, Mr. *Aston*, and Sir *John Ramsden*, which in the valuation of the said Estates have been estimated at 11,000*l.*, and it being the intention of the Parties to sell the same, it is agreed, that in case upon the sale the price should fall short of 11,000*l.*, then, that Lord *William Gordon* should contribute and pay to the other Parties One Fifth of such deficiency; but if the said Tithes should sell for more than 11,000*l.* then Lord *William Gordon* to receive One Fifth of such surplus; and Lord *William Gordon* is also to be at One Fifth of the Expense of any Suit that may be necessary to establish the right of the said Tithes in kind. Lord *Beauchamp*, Mr. *Meynell*, Mr. *Aston*, and Sir *John Ramsden*, agree each to enter into a Bond in the penalty of 1,500*l.* conditioned, that if the Incumbent of *Linwood* should at any time hereafter destroy the Moduses subsisting in lieu of Tithes, then

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*that each of the said Parties will make good One Fifth of the injury done to the Owner of the Estate by such destruction of the Moduses, the Owner of the Estate being at the same time considered as Patron of the Advowson; the amount of the Sum to be so paid as a Compensation to be settled by two indifferent Persons, one to be chosen by the Owner of the *Linwood* Estate for the time being, the other by the other Parties, or their Representatives, with a power for the said Arbitrators so chosen, in case they disagree, to choose an Umpire. If it should happen that the Deeds and Conveyances are not executed on the 5th of April 1792, Lord *William Gordon* to allow Interest for the said Sum of 7,500*l.* after the rate of 4*l. per Cent.* from that time."*

The Bill then stated, that the Rector of *Linwood*, in the year 1801, filed a Bill in the Exchequer, claiming Tithes in kind of Corn, Grain and Hay, and other matters, of certain Tenants in the Parish of *Linwood*; and on the 28th January 1803, obtained a Decree for such Tithes:—That the same Rector also, in the year 1807, filed a similar Bill against other Tenants of the same Parish, to which Suit no defence was made, the Tithes being agreed to be paid:—That the Moduses being destroyed, the Plaintiff, Lord *Wm. Gordon*, became entitled, under the Agreement of the 22d June 1791, to have the several Bonds executed by the Defendants, each and every of them, in the penalty of 1,500*l.* each, for indemnifying the Plaintiff against the said Tithes in kind, according to the Agreement, or payment in equal Fifth parts of such Sum of Money as should amount to the injury which the Plaintiffs or their Estate had sustained by the destruction of the Moduses.

The *Prayer* of the Bill was, that the Plaintiffs might

be declared entitled (amongst other things) to the benefit of the Agreement of the 25th June 1793, and that the same might be performed by the said Defendants; and that they might be decreed to answer and pay to the Plaintiff, Lord *William Gordon*, or to the Trustees of the Plaintiffs Marriage Settlement, in Trust, and upon the uses of the said Settlement, and for the benefit of such persons as should be entitled thereto, Four Fifth Parts or Shares of such sum of Money as shall appear to be the Damage or Injury sustained by the Plaintiffs by the deterioration in value of the said Linwood Estate, by reason of the destroying or setting aside the said Moduses or Customary Payments in the said Agreements mentioned, together with the same proportion of the sum of Money which the Plaintiff hath paid for Tithes, Costs, and Expenses, the Plaintiffs submitting to bear the remaining Fifth part thereof; and that it may be referred to one of the Masters of this Honourable Court, to ascertain what is the amount of such Injury, Damage, or Loss, which hath been incurred by the Plaintiffs, including the payment made by the Plaintiff, Lord *William Gordon*, in respect of such Tithes in kind, and for the Costs and Expenses in defending the said Suits in the Exchequer, relating to the said matters, or otherwise; and that an Issue *Quantum Damnificatus*, may be directed to be tried at Law, to ascertain the same; and that the said Defendant, the Marquis of *Hertford*, may be decreed to pay one Fifth part of what shall be so found to be due to the Plaintiff; and the said Defendant, Sir *John Ramsden*, one other Fifth part thereof; and that the said *Harriet Aston*, and *George Heron*, may pay one other Fifth part thereof, in respect of their said Testator *Henry Hervey Aston*, out of his Assets; and that the said

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Elizabeth Maynell may pay one other Fifth part thereof out of the Assets of the said *Hugo Meynell*; and that the last-named Defendants might respectively admit Assets of their said several Testators possessed by them, sufficient to answer and satisfy the said matters, or may set forth the usual account of their several Testators Assets, or Effects possessed by them respectively, and that the same might be applied in satisfying what should appear to be coming due from them respectively to the Plaintiffs as aforesaid; or that the said Defendants might be directed respectively to give the Plaintiffs such Indemnity by executing such several Bonds, in such Penalty to the Plaintiffs for such purpose, and in such manner, as by the said Agreement is stipulated and agreed upon; and that for the purposes aforesaid necessary and proper directions might be given.

The *Defendants*, by their *Answers*, insisted it was agreed that 1,500*l.* should be the Sum beyond which the Parties to the Agreement with the Plaintiffs were not to be liable in the whole, and in any event; and denied that the necessary import of the written Agreement is that each of them should execute a separate Bond in the Penalty of 1,500*l.*, but that all should execute one joint and several Bond without Penalty; or if it purports to be, or has a contrary effect, then that the word "*each*" was inserted *by mistake* in the Agreement.

The Plaintiffs examined *John Pemberton Heywood*, and his Deposition was, That the Plaintiff, Lady Gordon, and the Defendants, the Marchioness of *Hertford*, *Dame Louisa Susanna Ramsden*, *Harriet Aston*, and *Elizabeth Meynell*, being prior to, and in the year 1790, entitled

under and by virtue of the last Will and Testament of *Samuel Shepherd*, Esq. deceased, to equal and undivided Shares of and in very considerable Estates, situate lying and being in the Parish of *Linwood*, in the County of *Lincoln*, and elsewhere:—That said Defendants, the Marquis and Marchioness of *Hertford*, Sir *John Ramsden*, and *Dame Louisa Susanna*, his Wife, and *Harriet Aston*, and her late Husband, said *Henry Hervey Aston*, and said Defendant, *Elizabeth Meynell*, and her late Husband said *Hugo Meynell*, the younger, did, upon the recommendation of Deponent, (who was then advised with by the said last-named parties as their Counsel), in or about the said year 1790, make or cause to be made a proposal to said Plaintiffs for selling said Estates; and the said Plaintiffs or said Plaintiff, Lord *William Gordon*, having declined to comply therewith, and expressed rather to have the Share of said Plaintiff *Lady Gordon*, of and in the said Estates severed and conveyed to or in Trust for them; it was then proposed that said Estate, situate and being in the said Parish of *Linwood*, should be conveyed to or in Trust for them the said Plaintiffs, at the price at which the same had been valued (being more than the amount of the Share of said Plaintiff, *Lady Gordon*, of and in the whole of said Estates); and that said Plaintiff, Lord *William Gordon*, should pay over to the other parties so much of the amount at which said Estate at *Linwood* had been valued, as exceeded the Share of the said Plaintiff *Lady Gordon*, of and in the whole of the said Estates, and said Plaintiffs or said Plaintiff, Lord *William Gordon*, agreed to such proposal:—That after the terms of said proposal were, or seemed to be, finally settled and concluded upon, Mr. *Albany Wallis*, the then Solicitor of said Plaintiffs, and since deceased, or

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Mr. *John Lund*, the then Receiver and Steward of the said Estate, intimated that the Rector of the said Parish of *Linwood* had set up, or threatened to set up, a claim to Tithes in kind in respect of certain Lands situate and being within the said Parish, and part of the aforesaid Estate, for or in respect of which a *Modus* or Money Payment had been made in lieu of Tithes in kind; and the said *Albany Wallis*, or the said *John Lund*, did, for and on the part and behalf of the said Plaintiffs, claim to have an Indemnity given to said Plaintiffs in respect of the said Tithes in kind, in case said Rector should set up the said claim, and succeed in establishing the same; when Defendant, for and on the part and behalf of said Defendants, the Marquis and Marchioness of *Hertford*, Sir *John Ramsden*, and Dame *Louisa Susanna*, his Wife, and *Harriet Aston*, and her said late Husband, said *Henry Hervey Aston*, and said Defendant, *Elizabeth Meynell*, and her said late Husband, said *Hugo Meynell*, did object to the giving of an ultimate Indemnity to said Plaintiffs in respect of said Tithes; and Mr. *Francis Beresford*, the then Steward of said *Hugo Meynell*, also objected thereto; and accordingly, to the best of Defendant's now recollection, and as he believes, an Indemnity to the extent of 1,000 *l.* was proposed; and said *Albany Wallis*, or said *John Lund*, considering the same too small a Sum for such indemnity, it was at length finally concluded and agreed by and between Defendant, and said *Francis Beresford*, and said *Albany Wallis*, and *John Lund*, that same should be increased to the Sum of 1,500 *l.*; and that in no event whatever, the said Defendants, the Marquis of *Hertford*, and Sir *John Ramsden*, and said *Hugo Meynell*, and *Henry Hervey Aston*, should be altogether liable or responsible

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for more than the said Sum of 1,500 *l.* And it was also agreed or understood, by and between Defendant and said *Francis Beresford*, for and on the part and behalf of said last-named parties, and said *Albany Wallis*, and *John Lund*, for and on the part and behalf of said Plaintiff Lord *William Gordon*, that the said Defendants, the Marquis of *Hertford* and Sir *John Ramsden* and said *Hugo Meynell* and *Henry Hervey Aston*, should enter into and execute one Bond in one Penalty of 1,500 *l.* for indemnifying said Plaintiff, Lord *William Gordon*, against the Tithes of the aforesaid Lands, in case the Rector of said Parish of *Linwood* should afterwards succeed in destroying the aforesaid *Modus* or Money Payment, and establish his Right to Tithes in kind in respect of said Lands:—That it was not agreed by and between Deponent and said *Francis Beresford* and *Albany Wallis*, that the said Parties should enter into and execute a separate Bond each, respecting said Indemnity; nor was it so understood by Defendant, or (as he believes) by said *Francis Beresford* and *Albany Wallis* and *John Lund*, or any or either of them:—That said Agreement respecting said Indemnity was made, or did take place, some time in or about the Month of June 1791; but Defendant does not recollect, at this distance of time, whether any meeting took place or was had between him, Defendant, and said *Francis Beresford*, and *Albany Wallis* and *John Lund*, respecting the same, but that such Agreement was verbally made and concluded:—That he considered himself fully authorized in making said Agreement, as being concerned for or advised with generally by said Defendants, the Marquis of *Hertford*, and Sir *John Ramsden*, and *Hugo Meynell*, and *Henry Hervey Aston*; and he believes said *Francis Beresford* considered him-

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self as authorized to make or concur in the same as such Steward as aforesaid; and that said *Albany Wallis* considered himself as authorized for the like purpose as such Solicitor as aforesaid; and that said *John Lund* considered himself so authorized as such Receiver and Steward as aforesaid:—That the Terms of said Agreement were afterwards reduced into Writing, as part of a certain Memorandum of Agreement, bearing date the 22d of June 1791, and made between said Defendant, the Marquis of *Hertford*, then Lord Viscount *Beauchamp*, said Plaintiff Lord *William Gordon*, said *Hugo Meynell*, *Henry Hervey Aston*, and said Defendant Sir *John Ramsden*, stated or set forth in the Bill of Complaint in this Cause, and which Memorandum of Agreement was, as Defendant believes, prepared by, or by the directions of, said *Albany Wallis*, but under whose authority in particular, save as aforesaid, Defendant does not know:—That said written Agreement was afterwards executed or signed by said Defendant, the Marquis of *Hertford*, the said Plaintiff Lord *William Gordon*, and said *Hugo Meynell*, and *Henry Hervey Aston*, in the presence of Defendant, and, as he believes, by said Defendant Sir *John Ramsden*; and that in the judgment and opinion of Defendant, the terms of said verbal Agreement are not incorrectly stated in said written Memorandum of Agreement, unless it is to be considered or understood that each of said Defendants, the Marquis of *Hertford*, and Sir *John Ramsden*, said *Hugo Meynell*, and *Henry Hervey Aston*, did by said written Agreement agree to enter into and execute a separate and distinct Bond to said Plaintiff, Lord *William Gordon*; or that the amount of the Sum to be paid as a compensation for the injury done to the Owner of the said *Linwood* Estate, by the destruction

of the said Modus or Money Payment, should exceed the Sum of 1,500*l.*; but that (as Defendant verily believes), the terms of said Agreement would be incorrectly stated in the said written Memorandum of Agreement, and inconsistently with the intention of said Plaintiff, Lord *William Gordon*, and said Defendants, the Marquis of *Hertford*, and Sir *John Ramsden*, and said *Hugo Meynell*, and *Henry Hervey Aston*, at the time the said Memorandum of Agreement was executed or signed, if the effect of such Statement be to require each of them the said last-mentioned Defendants, and the said *Hugo Meynell*, and *Henry Hervey Aston*, to execute to said Plaintiff Lord *William Gordon* several Bonds in the Penalty of 1,500*l.* each, the intention of the said Parties being at that time, (as Defendant also verily believes) that the said Defendants, the Marquis of *Hertford*, and Sir *John Ramsden*, and said *Hugo Meynell*, and *Henry Hervey Aston*, should enter into and execute one Bond only to indemnify the said Plaintiff, Lord *William Gordon*, to the extent or amount of 1,500*l.* only altogether, in respect of the said Tithes; and that the statement in the said written Memorandum of Agreement touching the same ought to have been to that effect, it having been so agreed by and between Deponent and the said *Francis Beresford*, *Albany Wallis*, and *John Lund*, for and on the behalf of the said Parties as hereinbefore mentioned, and such being the basis of the said written Memorandum or Agreement."

This Evidence was objected to as inadmissible; but was read *de bene esse*, subject to the consideration of its admissibility.

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Sir *Samuel Romilly*, Mr. *Trower*, and Mr. *Murray*,
for Plaintiffs :—

The question in this Case is upon the construction of the Agreement of 1791. It is a clear Agreement that these parties should *each* of them enter into a separate Bond in 1,500*l.* Penalty, to secure the Plaintiff from the loss which might be occasioned by taking the Tithes in kind. It was a just and fair Agreement, and the Terms of it are clear. The Decree in the Exchequer, and the amount of Lord *William Gordon's* loss is proved and admitted. Parol Evidence cannot be allowed in a case like this, to show that the real Agreement was different from the written Agreement. It is true, that in cases for the specific performance of an Agreement for the Purchase of Land, a Defendant has been allowed to show by parol Evidence, there was Fraud, or a Mistake in the Agreement. Whether parol Evidence was wisely permitted in those cases, may be doubted; it was introducing a very dangerous doctrine, and it certainly ought not to be carried farther than the cases have already gone; but this is not that case. This Bill is for the payment of a Sum of Money, which we might recover at Law. We might bring an Action against each of these parties, and recover from each 1,500*l.*, except the last who was sued, who would not have so much as 1,500*l.* to pay, and then the other parties would file a Bill against him for a contribution; so that this Suit is to prevent a multiplicity of Suits. If parol Evidence is allowed to be read in this Case, it will be going farther than any Case has yet gone.

Mr. *Leach*, Mr. *Wetherell*, Mr. *Wingfield*, Mr. *Simp-
kinson*, and Mr. *Perkins*, for the Defendants :—

This is a Bill for a specific performance of an Agree-

ment to give separate Bonds for 1,500*l.* each. It is difficult to contend that the written Agreement imports only that a joint Bond should be given for 1,500*l.*, the words "each to enter into a Bond" being, certainly, inconsistent with such an interpretation of the words of the Agreement; but then we contend that parol Evidence is admissible to resist the specific performance of this Agreement, by showing, that the real Agreement between the Parties was, that a *joint* Bond should be given for the 1,500*l.*, and not separate Bonds to that amount; and therefore, that the written Agreement was mistakenly drawn. The Case of *Ramsbottom v. Gordon* (a) is expressly in point to show that such Evidence is admissible. If the Evidence of Mr. *Heywood* be admissible, as we confidently contend it is, there is an end of the Case; for it clearly shows that the intention of the parties was, that it should be a joint Bond.

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The VICE-CHANCELLOR—[after stating the facts]:—

Three questions are to be considered: 1. What is the true construction of the written Agreement of the 22d June 1791?—2. Whether parol Evidence can be read to contradict that Agreement?—3. What is the effect of the parol Evidence?

With respect to the first point, it is admitted that a loss will be sustained much beyond 1,500*l.*; but it is contended that the true construction of the Agreement is, that the Parties were only to be *jointly* liable to the Sum of 1,500*l.*; but it appears to me the Plaintiff is

(a) 1 Ves. and Bea. 165.

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entitled to call upon the Defendants to answer for what the Plaintiff would have been entitled to if *each* of the Parties had entered into a *separate* Bond for 1,500 *l.*; for the Agreement is, “*each* agree to enter into a Bond in the Penalty of 1,500 *l.* conditioned, &c.”; and that “*each* of the said Parties will make good one Fifth of the Injury done to the Owner of the said Estate by the destruction of the *Moduses*, &c.” Lord *William Gordon*, therefore, was warranted in filing this Bill to make each of the Parties separately liable to the amount of 1,500 *l.* subject, however, to an account as to what loss he has sustained. This is the justice of the Case, as well as according to the terms of the Agreement. Then, 2dly, can the Court in this Case receive *parol* Evidence? It is very dangerous to admit *parol* Evidence to contradict a written Agreement—it is an encouragement to perjury, and defeats the wholesome provisions of the Statute of Frauds. As a general rule, such Evidence is inadmissible, but there are exceptions; it being clearly established that where the specific performance of an Agreement is sought, the Defendant may rebut the Equity, and show, by *parol* Evidence, that the Agreement was obtained by *fraud*, or that there is a *mistake* in it. *Parol* Evidence in such cases may be received, as before the Statute of Frauds; the Statute not saying that a written Agreement shall in all cases be binding, but only that an un-written Agreement shall not bind (a). In *Clarke v. Grant* (b), the *Master of the Rolls* alludes to a Case of *Pember v. Matthews* (c), where Lord *Thurlow*, on a Bill for the specific *performance of an Agreement*, admitted

(a) See Lord *Redesdale* to same effect in *Clinan v. Cooke*, 1 Sch. and Lefr. 39.

(b) 14 Ves. 519.

(c) 1 Bro. C. C. 54.

parol Evidence on behalf of the Plaintiff, and decreed a specific performance on the ground of it. Sir *William Grant* doubts the propriety of that; but was clear that a *Defendant* to such a Bill was at liberty to show a parol promise, as a bar to a specific performance.

In *Clinan v. Cooke (d)*, Lord *Redesdale* takes pains to show that a *Plaintiff* cannot add to an Agreement by Parol, but says it may be used by a *Defendant*, “to rebut an Equity.”

The only other Case I shall notice is *Ramsbottom v. Gosden (e)*, which is in point. That was a Bill for the specific performance of an Agreement, and the Defendant adduced parol Evidence to show that the real Agreement was different from what the written Agreement imported, and it was admitted. There, as in this Case, the Witness thought the words of the written Agreement imported that which he swore was the real Agreement, and which the written Agreement was intended to import.

But then it is said, this is not a Bill for the specific performance of an Agreement; but what is the prayer of the Bill? It is, “that the Agreement may be performed, and that the Defendants may be directed respectively to give the Plaintiff such indemnity by executing such several Bonds in such penalty to the Plaintiff, for such purpose, and in such manner, as by the said Agreement is stipulated and agreed upon.” This, therefore, is a Case in which, according to the Authorities, parol Evidence is admissible.

What then, 3dly, is the effect of the Evidence? [His Honor here stated Mr. *Heywood's* Deposition.]—Mr.

(d) 1 Sch. & Lefr. p. 38, 9. (e) 1 Ves. and Bea. 165.

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Heywood is a Gentleman of respectability, but he deposes "to the best of his now recollection" as to a transaction between twenty and thirty years ago, without any thing to refresh his recollection in the interim. I have felt great difficulty how to act upon this Evidence. Unless such Evidence is admitted with caution, we shall have a constant occurrence of such Cases. The Witness says clearly what was the intent of those who employed him, but he cannot say what was the intention of the other Parties. Suppose both Parties mistook the terms of the Agreement; that might have the effect of not making it binding on either Party. Am I to bind all the Parties by the testimony of Mr. *Heywood*? These are considerations that have pressed me, and certainly the Case is one of great difficulty, but, upon the whole, I shall either dismiss the Bill, leaving the Plaintiff to his remedy at Law; or the Plaintiff may take a Decree for a joint Bond for 1,500*l.* to be executed by the Defendants—which Bond they have no objection to give—or, if he chooses, the Plaintiff may have an Issue, upon which Mr. *Heywood* may be examined. The Issue must be cautiously framed; for it is quite contrary to the habit of a Court of Law to examine Evidence as to a written Agreement. In *Pember v. Matthews*, Lord *Thurlow* directed an Issue to be tried, whether a promise was made on the day of the execution of a written Agreement; and in *Clarke v. Grant*, the *Master of the Rolls* seems to have thought that, if necessary, an Issue might have been directed. Let the Plaintiff consider what course he chooses to take.

N. B. The Plaintiff on a subsequent day, expressed his desire to have an Issue directed; but the Reporter was afterwards informed the Parties could not agree upon the Issue to be directed.

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WILSON v. TIMPSON.

22d May.

ON a Motion to dismiss this Bill for want of Prosecution, the Plaintiff appeared, and undertook to speed the Cause, and a Term afterwards elapsed without any proceeding on the part of the Plaintiff.

On an undertaking to speed the Cause, on a Motion to dismiss, the Plaintiff has only the Term, and not the Vacation also, to proceed.

Mr. Daniel, Jun. now moved that the Bill might stand dismissed, with Costs.

Mr. Heys, *contra*, insisted that on an undertaking to speed the Cause, the Plaintiff has the Term and Vacation after to proceed, and cited as an express authority, *Finlay v. Wood (a)*.

Mr. Wilson, as *Amicus Curix*, stated that, in *Turner v. Seddon*, about four years ago, the Lord Chancellor decided the Plaintiff was only entitled to the Term.

The VICE-CHANCELLOR:—

On a former occasion, in *Holtzaphell v. Baker (b)*, I looked into the Cases, and considered this point. The

(a) 1 Ves. and Bea. 499.

Plaintiff's Counsel opposed this Motion, as premature, as it ought not to have been made until the expiration of the Vacation.

(b) HOLTZAPHELL v. BAKER.

14th August 1813.

This was the second Application by the Defendant to dismiss the Plaintiff's Bill for want of Prosecution, and made shortly after the expiration of the Term allowed the Plaintiff by the Rules of the Court to speed his Cause after his undertaking so to do. The

The *Vice-Chancellor* decided, that the Defendant was entitled to make his Motion at the first Seal after the Term. The Plaintiff then submitted to take the usual Order, as upon a

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Case of *Mangleman v. Prosser*, cited from *Brown (c)*, in *Finlay v. Wood*, I found was inaccurately reported; and that in the Case cited of *Finlay v. Wood*, the *Lord Chancellor* was finally of opinion that, the Plaintiff was only entitled to the Term to proceed, and not also to the Vacation. The Point, therefore, is settled.

Motion granted (*d*).

16th, 18th May.
Devise of an Estate to A. J. subject to payment of 500l. to M. H. with Interest on her Marriage, or attaining 21, but if she dies before Marriage or 21, and there be no Child or Children of said R. H. (the Testator's Brother) then the 500l. to revert to A. J. M. H. died before Marriage, or attaining 21, and held that Children of R. H. born after the death of M. H. entitled.

Original and Amended Bill, Between, BELLENDEN B. HUTCHESON, an Infant by DIANA HUTCHESON, his Mother and next Friend - - - - - Plaintiff,

And

PHILIP JONES, and ANN his Wife - Defendants.

Supplemental Bill—Between BELLENDEN B. HUTCHESON, by the said DIANA HUTCHESON - - - Plaintiff,

And the said PHILIP JONES - - - Defendant.

EDITH HUTCHESON, being entitled to the Reversion of a Moiety of certain Freehold Estates in Herefordshire, expectant on the death of *William*

second undertaking, namely, that he should go to Commission that Vacation, procure Publication to pass in Michaelmas Term, and set down his cause for hearing in Hilary Term, or in default, that the Plaintiff's Bill should be dismissed with Costs for want of Prosecution without further Motion.

(*c*) *Mangleman v. Prosser*, 3 Bro. C. C. 191.

(*d*) The Reporter has a MS. Note of an *Anonymous Case* in 1749, in which Mr. *Fortescue*, *Master of the Rolls*, held, that if nothing is done within a Term after an Order to speed a Cause, the Rule is to dismiss the Bill for want of Prosecution. The same Point was

Hutcheson, her Father, made her Will as follows:—
 “ As I have now sunk the 900*l.* which I had in the *Three per Cent. Consols*, for an Annuity for my Life, and having nothing more in my own disposal than the Share of the Estate (meaning the Estate hereinbefore mentioned) left me by my Mother, on Will, and valued at 1,800*l.*, I do here give, devise, bequeath and will it to my Sister (the Defendant) *Ann Jones*, subjecting the same to the following payments:—First, to pay to her Husband (the Defendant) *Philip Jones*, the Sum of 150*l.*, Money which I borrowed from him, as I have given it under my own hand, that my Friend for whom I raised that Sum shall never be called upon after my decease for the same. The Sum of 500*l.* I also deduct out of the said part of my Estate, to my Niece *Maria Hutcheson*, Daughter of my Brother *Robert Kyrle Hutcheson*, to be paid whenever most convenient to my Sister *Ann Jones*, bearing Interest three months after my decease. Whenever this 500*l.* shall be paid by my Sister *Ann Jones*, I do require that it be put into Government or any other Security by her Trustee, *Philip Jones*, whom I appoint to act as such, shall think most to her advantage; and that the said *Maria Hutcheson* shall receive the said 500*l.*, with the accumulated Interest, either on the day of Marriage, or at the age of 21, as shall be thought best. *Should the said Maria Hutcheson not survive either of those periods, and there be no Child or Children of said Robert K. Hutcheson, then I would have the said Sum of 500*l.* revert to my Sister, Ann Jones; but in case of other Children of Robert Kyrle Hutcheson, I would have said Sum equally divided, share and share alike.*”

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determined by the present *Marriot v. Jumpson*, 14th and
Master of the Rolls, sitting 26th May 1812.
 for the *Lord Chancellor*, in

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The Testatrix died soon after the making of her Will, leaving her Brother *Robert Kyrle Hutcheson* her Heir at Law, *Wm. Hutcheson* her Father, *Maria Hutcheson* her Niece, and *Philip Jones*, and *Ann Jones* his Wife, her surviving.

Upon the death of the Testatrix, *Ann Jones* proved her Will. At the death of the Testatrix, her Father, *William Hutcheson*, was in possession of the Estate as Tenant for Life, and so continued till January 1804, when he died, and upon his death the Fee Simple in possession became absolutely vested in *Ann Jones*, subject to the payment of the 150*l.* to *Philip Jones*, and the Legacy of 500*l.* to *Maria Hutcheson*, and the other Children of *Robert Kyrle Hutcheson*. Immediately on the death of *William Hutcheson*, *Philip Jones* and *Ann* his Wife entered into possession of the Estate.

Afterwards (a), *Maria Hutcheson*, the Testatrix's Niece, died, under age, and unmarried; and after her death *Robert Kyrle Hutcheson* had a Son *William Hutcheson* the (Defendant), by *Sarah* his then Wife, the Mother of *Maria Hutcheson*. Afterwards, *Sarah*, the Wife of *R. K. Hutcheson*, died, leaving her Husband and her Son *William Hutcheson*, her surviving.

R. K. Hutcheson married again, and the Plaintiff *Bellenden B. Hutcheson*, born in January 1806, was the only Issue of that Marriage.

On the 1st April 1806, *R. K. Hutcheson* died, leaving *William Hutcheson* his Heir at Law, and the Plaintiff, *B. B. Hutcheson*, his only surviving Children.

(a) Where Facts are stated without dates, a blank was left in the Bill.

The Plaintiff, by his Original and Amended Bill, after making the foregoing statements, insisted that, on the death of his Father, the Legacy of 500*l.* and the Interest charged on the Estate, became absolutely vested in him and his half Brother, *William Hutcheson*, equally, and *prayed* that the Legacy might be raised.

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The *Defendants*, by their *Answer*, insisted that the Legacy never became payable.

The *Supplemental* Bill stated, that on the 1st March 1814, *Ann Jones* died, leaving her Husband, *Philip Jones*, and *William Hutcheson Jones*, her eldest Son and Heir at Law, now resident in India; and that *Philip Jones* continued in possession of the Estate as Tenant by the Curtesy; which facts, were admitted in the Answer of *Philip Jones* to the Supplement Bill.

Mr. *Leach*, and Mr. *Crosse*, for the Plaintiff.

Mr. *Wingfield*, for the Defendant, *Wm. Hutcheson*, in the same Interest as the Plaintiff:—

The question is, What was the intention of the Testatrix? Did she mean that none of the Children of *R. K. Hutcheson* were to take unless they happened to be alive at the death of the eldest Child? That is very improbable. The Will bears no such meaning. *Ann Jones* was only to take in the event of there being no Children of *R. K. Hutcheson*, and there being Children, they must take, there being an express Gift to them.

Mr. *Shadwell*, for the Defendants, *Philip Jones* and *William Hutcheson Jones*:—

The Plaintiff, *B. B. Hutcheson*, and the Defendant, *William Hutcheson*, the Sons of *R. K. Hutcheson*, not being alive at the death of *Maria Hutcheson*, they cannot

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take. *Ellison v. Airey (a)*, *Viner v. Francis (b)*, *Roberts v. Higman*, in Note to *Congreve v. Congreve (c)*, and *Bax v. Whitbread (d)*, approximate to the present Case; but what is said in *Godfrey v. Davis (e)* is conclusive. There an Annuity bequeathed over, upon the death of the Annuitant, to the eldest Child of A.; there being at the death no Child, an after-born Child was held not to be entitled. The *Master of the Rolls* says, in that Case, "It is clearly established by *De Visme v. Mello (f)*, and many other Cases, that where the Testator gives any Legacy or Benefit to any person, not as *persona designata*, but under a qualification and description at any particular time, the person answering that description at that time is the person to claim; and if there are any persons answering the description, they are not to wait to see whether any other person shall come *in esse*, but it is to be divided among those capable of taking where by the tenor of the Will he intended the property to vest in possession."

Mr. *Leach*, in Reply:—

The Cases cited are not disputed. Wherever the Court clearly sees that a period is fixed for the division of the Property, no Child can take who comes *in esse* after that period. In *Ellison v. Airey*, the *Lord Chancellor* says the Intention of the Testator in these Cases is the point to be considered. In this Case the Intention is clearly expressed, nor can it be supposed that this Testatrix intended *Ann Jones* to take, if her Brother had any Children. In the Cases cited the intention was plain that after-born Children should be excluded.

(a) 1 Vez. sen. 111.

(d) 3 Bro. C. C. 531.

(b) 2 Bro. C. C. 658. S. C.

(e) 6 Vez. 43.

2 Cox, 190.

(f) 1 Bro. C. C. 537.

The VICE-CHANCELLOR:—

It appears to me to have been the Intention of this Testatrix, that *Ann Jones* should not take, unless, according to the words of the Will, “ there should be no Child or Children of *R. Hutcheson* ;” nor can I say that this Money reverted to her on the death of *Maria Hutcheson*, unless I were to add to the words I have mentioned, the words “ born at her death ;” for there is nothing in any part of the Will evincing an intention to restrain the gift to such of the Children of *R. K. Hutcheson* as were born at the death of *M. Hutcheson*.

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Supposing, however, this to be the true construction on the face of the Will, still, it is argued that, according to the Authorities, those Children only who were born at the death of *M. Hutcheson*, can take.

The general wish of the Court is, if it can, to include all Children coming *in esse* before a determinate Share becomes distributable to any one (*a*). Where some Children are held to take in exclusion of others, it is only from necessity, and because a period is fixed at which a distribution is to be made. In *Whitbread v. Lord St. John* (*b*), Lord *Eldon* says “ The Court goes as far as it can to comprehend every one, until one attains the period at which that one can take a Share.” *Godfrey v. Davis* (*c*) was decided upon the principle, that a period being distinctly fixed when the distribution was to take place, the Children born after that period were not entitled. There are Cases where all the

(*a*) *Barrington v. Tristram*, 6 Ves. 348. (*b*) 10 Ves. 154.
 (*c*) 6 Ves. 43.

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Children whenever born, will take, as in *Shepherd v. Ingram (d)*, where the Bequest was of a Residue of Real and Personal Estate to the Children of *A.* equally, with a Bequest over, if *A.* should die without leaving Issue; and it was held, that the Children as they were respectively born, should take the accruing Interest equally. Apply these principles to the present Case: Are there any words in this Will fixing the time when a Share is to vest, so as to exclude after-born Children? The Property is not given on the Children attaining 21, or marriage; it is a reversionary Fund, which is a strong circumstance; and the Gift to *Ann Jones* is expressed in unambiguous terms. If the after-born Children are excluded, it must be in the teeth of the words of the Will, which only give it to *A. Jones* "if there be no Child or Children of said *Robert Hutcheson*." I am not aware of any Case where a Bequest like this, on a general failure of Issue, has been cut down to a failure of Issue at a particular limited time. There is nothing in this Will to confine the division, or mark the period when the Children are to take, so as to exclude after-born Children. The intention of the Testatrix is clearly in favour of after-born Children; nor is there any authority which interferes to disappoint that intention.

N. B. There being a want of Parties, the Cause was ordered to stand over, with liberty to amend the Bill.

(d) Ambl. 448.

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NAYLOR and others, v. MIDDLETON and
SAMPSON.

8th, 12th, and
15th May.

ON the 26th November 1816, a Bill was filed by the Plaintiffs, stating merits, and praying an Injunction against the Defendants, to restrain them from proceeding at Law in an Action brought by them in the name of the Defendant *John Sampson*, against the Plaintiff, *George Naylor*; or from bringing or proceeding in any other Action at Law against the Plaintiffs in respect of the matters mentioned in the Bill. The common Injunction was obtained until the Defendants should answer the Bill, which was afterwards, on the 10th February 1817, extended to stay Trial.

A Common Injunction was obtained against two Defendants, and afterwards extended to stay Trial. On the coming in of the Answer of one Defendant, an Order Nisi must be obtained, before a Motion can be made to dissolve the Injunction.

On the 12th April 1817, *Middleton* put in his Answer, which was excepted to; and on the 6th May 1817, a further Answer was put in.

On the 8th May following, the Defendant *Middleton* moved that the Injunction against both Defendants might be dissolved; and on the Motion, it was urged, that the Answer of *Sampson* was immaterial, and *Middleton* having fully answered the Bill, and consenting that his Answer might be read at the Trial, the Injunction ought to be dissolved against both.

Sir *Samuel Romilly*. and Mr. *Heald*, for the Motion, and Mr. *Bell* against it, differed not only as to dissolving the Injunction before *Sampson* had answered, but also as to the Practice, viz.: Whether when an Injunction is extended to stay Trial, the Defendant can

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immediately, when the Answer comes in, move to dissolve the Injunction, or whether there must not first be an Order *Nisi*.

The VICE-CHANCELLOR—[after stating the Case] :—

The question is, whether *Middleton* has taken the proper course to have the Injunction as to him, dissolved? If a common Injunction is obtained, and the Defendant moves to dissolve it on the coming in of the Answer, an Order *Nisi* is made, and the Defendant has eight days to consider whether he will except to the Answer—that nobody disputes—and I find that when the common Injunction has been first obtained, and afterwards extended to stay Trial, and then the Answer is put in, the Defendant must in like manner obtain an Order *Nisi* to dissolve the Injunction, and the Defendant has eight days to except to the Answer, and cannot on the Answer coming in move at once to dissolve the Injunction. Several Cases show this to be the Practice. In *Hernshaw v. Thornhill*, 7th February 1812, the common Injunction had been obtained, and afterwards extended to stay Trial; and the *Lord Chancellor* held, the Defendant, on putting in his Answer, must first obtain an Order *Nisi*, and not give a notice of Motion, to dissolve the Injunction, in the first instance. In *Anderson v. Fullerton*, 10th February 1816, the common Injunction had been obtained, and it was extended to stay Trial. Afterwards, on a Motion, with Notice, an Order was made to dissolve the Injunction. On application, that Order was discharged with Costs, because the Order *Nisi* had not been previously obtained (*a*).

(*a*) See also *Joseph v. Doubleday*, 1 Ves. and Bea. 497.

It is, therefore, clear, that if *Middleton* had been the sole Defendant, an Order *Nisi* was indispensable; and there being a *Co-Defendant*, *Sampson*, in this case, makes no difference.

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It is urged that the Answer of *Sampson* is immaterial, and that *Middleton* consents that his Answer shall be read at the Trial, and therefore that the Injunction ought to be dissolved against both; but that must be the subject of a separate Special Motion, as to which I do not now give any opinion. The first Motion must be for an Order *Nisi* to dissolve the Injunction. The present Motion is, therefore, irregular.

Motion refused, with Costs.

NASH v. NASH.

7th June.
THE *Original Bill* stated, that in July 1808, a Marriage was had between *William L. Nash*, and *Catharine Evans*; that no Settlement was made on the Marriage; but on the 23d November 1813, *David Evans*, Esq. the Father of *Catherine*, drew a *Cheque* on his Bankers, in favour of his Daughter, for 10,000 *l.* On that Day she presented the *Cheque*, and took from the Bankers a *Promissory Note*, payable on demand, for 10,000 *l.*, which Note she delivered to her
D. E. the Father of C. N. after her Marriage, drew a Cheque in her favour upon his Bankers for 10,000 l. The Bankers gave her a Promissory Note for the 10,000 l. 1,000 l. part of
the principal Money due on the Note was paid to Wm. L. N —, the Husband of C. N.; and he also received the Interest due on the Note up to the time of his death. Held that upon his death, C. N. was entitled to the Note as a Chose in Action which had survived to her.

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Husband :--That the Money remained in the hands of the Bankers during the life of *William Nash*, except 1,000 *l.*, which he applied for to the Bankers, and was paid by them, and for which he gave a Receipt; and that he received the Interest on the remaining 9,000 *l.* during his Life, and gave Receipts for the same :--That *William L. Nash*, by his Will, 8th December 1815, amongst other Bequests, gave the Plaintiff *L. Nash*, (his Mother), an Annuity of 40 *l.*; and appointed his Wife, *Catharine Nash*, and two other persons, Executors of his Will :--That he afterwards, on the 8th January 1816, died, leaving the said *Catherine Nash*, and the Plaintiff, *Ann Nash*, surviving :--That *Catherine Nash* alone proved the Will, and obtained possession of the Testator's personal Estate and Effects, including the Note for 10,000 *l.*, of which 9,000 *l.* so remained unpaid. The *Prayer* of the Original Bill was, that the 9,000 *l.* due on the Promissory Note might be declared to form part of the Testator's personal Estate, and that an account might be taken of what was due to the Plaintiff in respect of the Annuity given by the Testator's Will.

The *Defendant*, by her *Answer*, insisted that the 9,000 *l.* secured by the Promissory Note, was a *Chose in Action*, and that *William L. Nash* never having reduced the same into Possession, it did not form part of his personal Estate, but belonged to her; and that his Property, independent of that Money, was but sufficient for the payment of his Debts.

After the Bill was filed, and the Answer put in and replied to, *Ann Nash*, the Plaintiff in the Original Bill, died, and Letters of Administration were granted to *John Nash*, (the Plaintiff), who filed a *Bill of Revivor*.

Mr. *Wingfield*, and Mr. *Whitmarsh*, for the Plaintiff:—

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The 9,000*l.* remaining due on the Note must be considered as the Property of the deceased Husband. A Wife cannot acquire property during the Coverture; it belongs to her Husband. The Husband might alone have brought an Action upon the Note.

In *Lightbourne v. Holyday (a)*, the Plaintiff gave a Feme Covert a Promissory Note, and the Husband dying before answer to a Bill for Discovery of the Consideration, the Wife administered to him; and *Lord Chancellor* held, that as a Wife can have no separate Property, but whatever she gets during the Coverture vests in the Husband, the Property of this Note was wholly his, and that

(a) 2 Eq. Abr. 1. The following Report of this Case is from a MS. Note.

HOLLOWAY v. LIGHTBOURNE.
Easter Term, 12 Geo. II.
1739.

THE Bill in this Case was brought, suggesting Fraud and want of Consideration in obtaining a Promissory Note from the Plaintiff by the Defendant's Wife, setting out the Note to be in this form, "Received of Mrs. *Lightbourne*, 300*l.* for which I am to be accountable;" and prayed that this Note should be delivered up, and the Defendants restrained by the Injunction of the Court from any proceedings at Law upon it; and the

Defendants not answering in time, the common Order of course for an Injunction was made; and before any Answer came in, the Defendant *Lightbourne*, the Husband, died, on which it was moved that the Injunction might be dissolved, the Cause being abated; but on the other hand it was insisted, that here is no Abatement, for that the Note being given to the Wife, and she surviving the Husband, the Interest in the Note had vested in her, and would not go to the Executor of the Husband. But *Lord Hardwicke*, Chancellor, having taken time to consider of it, declared this to be an Abatement, and that the Interest in this Note,

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she had no Interest in it, but as representing her Husband; and that therefore by his death, the suit was abated. So in a Case in *Bunbury (b)*, it was held, that a Note given to a Feme Covert was upon her Husband's death to be considered as his Assets. The Husband in this Case received part of the Money due on the Note, and all the Interest from time to time up to the time of his death, which must be considered as a reduction into possession of the Note.

by the death of the Husband, vested in his Executor, and did not survive to the Wife. It is not like the Case of a Bond or Note given to a Feme Sole, who after marries and survives her Husband; in such case 'tis certain, if the Money be not received upon the Bond or Note, that it shall survive to the Wife, and shall not go to the Executor of the Husband; and if during the Coverture 'tis put in Suit, it can't be by the Husband alone, (3 Lev. 403. 1 Eq. Cas. Abr. 64. 1 Vern. 393;) but in such case, the Property being in the Wife, the Husband is rather joined for conformity than from the nature of the cause of Action. But where a Bond or Promissory Note (which is much stronger than the present Case, for here is no promise to pay to the Wife),

is given to a Feme Covert, it hath been held that the Interest in such Bond or Note immediately vests in the Husband, and that he may maintain an Action upon it in his own Name. So was *Howell's Case*, in 3 Lev. 403*; it was Debt on Bond to the Wife: the Husband sued alone, without naming the Wife; the Defendant having craved Oyer of the Bond, demurred, and the Plaintiff had Judgment, which shows that the Property of a Bond or Note generally which is given to a Feme Covert, is vested in the Husband. This Cause, therefore, is now abated, and the Injunction ought to be dissolved, but I will give the Plaintiff a Week's time to revive.

(b) *Hodges v. Beverley*, Bunb. 188.

* It is this Case, which seems to have been alluded to by Lord Chief Justice North, in *Beaver v. Lane*, 2 Mod. 217.

Mr. *Bell*, and Mr. *West*, for the Defendant:—

The Case in *Bunbury* cannot be relied upon. He is a Reporter of little authority. It is very clear that the Note for 500*l.* given in that Case, being intended for the separate use of the Wife, she might have insisted upon having it so settled. The Case cited from 2 Eq. Cas. Abr. is also from a Book of no estimation. Subsequent Cases clearly show that this *Chose in Action* survived to the Wife.

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In an Anonymous Case in *Atkyns* (c), a Bill was brought by Husband and Wife for a demand in right of the Wife, and the Husband died; Lord *Hardwicke* said, “it was in the nature of a *Chose in Action*, and survives to her, and the Cause does not abate by the Husband’s death.”

Although the Husband obtains a Judgment for a Debt due to his Wife, yet if he dies before Execution the Wife is entitled, and not the Representative of the Husband (d). So, in *Coppin v. ———* (e), Lord *King* held, that “if a Bond be given to Husband and Wife during *Coverture*, on the Husband’s dying first, it survives to the Wife, as all other joint *Choses in Action* do; though, it is true, the Husband may disagree to the Wife’s right to it, and bring the Action on the Bond in his own Name only; but till such disagreement, the right to the Bond is in both the Husband and Wife, and shall survive.” In a recent Case, *Philliskirk* against *Pluckwell* (f), a Question was made, Whether Husband and Wife may sue on a Pro-

(c) 3 Atk. 376.

(e) 2 P. Wms. 497.

(d) Bond v. Simmons, 3 Atk. 20.

(f) 3 Maul. and Selw. 393.

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missory Note made to the Wife during Coverture? Lord *Ellenborough* was of opinion they might; and says (g) " In Co. Litt. 120 (h), and 1 Roll Abr. Baron and Feme, H. pt. 6 and 7, a difference is taken between a thing that is not merely a *Chose in Action*, and one that is; and therefore in the case of a Bond made to the Wife, if the Wife dieth, the Husband shall not have it without taking Administration, because that is merely in Action. So here the note is made to the Wife: and it imports consideration, unless the contrary be shown;" and Mr. Justice *Dampier*, who concurred with Lord *Ellenborough*, cited "*Day v. Pargrave* (i), in which *Lee*, Chief Justice, said, that where a Bond is given to the Wife during Coverture, no Action will lie upon it by the Wife solely, but they may have a joint Action during their Lives, or the Husband may bring such Action during the Coverture in his own Name; yet if he does not, it survives to the Wife. There the Action was by the Husband as Administrator on an obligation to the Wife during Coverture; and it was resolved that it was well brought, *for it would have survived to her.*" This Case, therefore, is in point to show, that in the present Case the *Chose in Action* survived to the Wife. In *Wildman v. Wildman* (k), it was held, that Stock transferred into the name of a married Woman, as next of Kin of an Intestate, upon the death of her Husband, without having done any

(g) 3 Maul. and Selw. p.395.
(h) The Passage in Co. Lit. runs thus; " If a Feme Covert be seised of an Advowson, and the Church becometh void, and the Wife dieth, the Husband shall present to the

Advowson; but otherwise it is of a Bond made to the Wife, because that it is merely in Action."

(i) 3 Maul. and Selw. p.367.

(k) 9 Ves. 174.

act with reference to it, except signing partial transfers by her, survived to her. These Cases are opposed only by the Case in *Bunbury*, and in 2 *Eq. Cases* Abridged; Cases of slight authority.

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The VICE-CHANCELLOR:—

It appears to me that, this Note given by the Bankers to the Wife must be considered as a *Chose in Action* which has survived to her.

If immediately after the Checque was given the Husband had died, the Checque did not give a legal right to sue the Bankers, and if they refused payment, the Father could alone have recovered against them.

The Note given by the Bankers constituted a *Chose in Action*; it gave a right to recover; but it was merely a *Chose in Action*, and not like Money, or a Chattel. The receipt by the Husband of the 1,000*l.* and of the Interest from time to time till his death, was not a reduction into possession of the remaining 9,000*l.* it did not alter the nature of the Note; it still remained a *Chose in Action*; a Security for the remaining 9,000*l.*

Day and *Pargrave*, cited by Mr. Justice *Dampier*, in *Philliskirk v. Pluckwell* (*l*), is expressly in point. The Bond given in that Case to the Wife not having been reduced into Possession in the Husband's Life-time, the Judges held it survived to the Wife; and being a Specialty Debt in that case, and in this a Simple Contract Debt, makes no difference.

Wildman v. Wildman (*m*), in principle, applies to this Case. The Stock transferred to the Wife did not

(*l*) 2 Maul. and Selw. 396, 7. (*m*) 9 Ves. 176.

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only gave him a right, if he chose, to reduce it into Possession; but as he did not do so it survived to the Wife.

In the Case of *Philliskirk and Wife v. Pluckwell* (n), the Question arose, Whether the Husband and Wife may sue on a Promissory Note given to the Wife during Coverture? It was determined they might join in the Action. If the property had been absolutely vested in the Husband, there could be no reason for the Wife joining in the Action, but she joined, *because by survivorship she would become entitled.*

The Cases I have adverted to are modern Authorities, and appear to me decisive; but before I finally decide, I will look into the Cases cited from Second *Equity Cases*, and from *Bunbury*, books, certainly, of no great authority.

The *Vice-Chancellor*, the next day, said he remained of the opinion he had expressed.

(n) 2 Maul. and Selw. 393.

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Ex parte FELLOWS, *in re* DOUBLEDAY.

THE Petition in this Case, stated that *Doubleday* had for Three Years last past carried on the Business of a Lace Manufacturer, at *Nottingham*, and contracted a Debt with the Petitioner for 1,600 *l.* and upwards:—That the whole of the Debts contracted by *Doubleday* to Creditors at or near *Nottingham*, amounted to 3,000 *l.* (a) and upwards; the number of the Creditors being about thirty (b), and upwards:—That the Bankrupt appears to have been guilty of gross Fraud and Embezzlement.—That a Commission was issued on the 6th May 1817, by *William Bennett*, of *Codford*, in the County of *Wilts*, the Father-in-law of the Bankrupt, which was intended to be executed at *Warminster* in the County of *Wilts*, which Town is near to *Codford*:—That *Warminster* is 200 Miles from *Nottingham*, and there are no Creditors of *Doubleday* resident at *Warminster*, or in its neighbourhood, except the said *William Bennett*:—That it is of great importance to the Petitioner, and the Creditors of *Doubleday*, that the Assignees should be selected from the Creditors at *Nottingham*, where the relics of his Property remain, and that he should undergo a strict Examination regarding the disposal and concealment of such parts of his Property as have recently and suddenly disappeared:—That neither of these objects can be attained if the Commission is worked at *Warminster*, unless heavy charges are

7th June.
10th and 11th
June.

A Commission issued to a Place where there were only two Creditors, and distant 200 Miles from the great body of the Creditors, refused to be superseded on that account; but time enlarged for the choice of Assignees.

(a) An Affidavit stated the Debts to be 4,000 *l.* or upwards.

(b) In an Affidavit in support of the Petition, it was stated that such Creditors amounted to 50, and upwards.

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incurred by them either in travelling from *Nottingham* to *Warminster*, or by the preparation of distinct Affidavits of their Debts, and of separate powers of Attorney, authorizing some person or persons to vote in the choice of Assignees:—That the Petitioner, and the Creditors of *Doubleday* resident at *Nottingham*, believe the Commission taken out by *William Bennett*, was preconcerted between *Bennett* and *Doubleday*, for the purpose of screening the latter from a proper Examination about the concealment and disposition of his Estate and Effects. The *Prayer* of the Petition was, that the Commission taken out by *Bennett* might be superseded, and a new Commission ordered on the application of the Petitioner, to be directed to Commissioners resident at *Nottingham*, or that the Commission of *Bennett* might be directed to Commissioners residing at *Nottingham*.

The Petition was supported by the Affidavit of *Fellows*, and others.

William Bennett, the Petitioning Creditor under the Commission issued against *Doubleday*, stated, that the Bankrupt was indebted to him in 277 *l.* 10s. for Money lent and advanced:—That having received information from his Solicitor, that *Doubleday* could not continue business for want of further Credit, and that he was not able to make good his engagements to his Creditors; and being informed that he had executed a Warrant of Attorney with a stay of Execution till the 24th May, for 400 *l.* and upwards, he, by the advice of his Solicitor, issued the Commission, and thereby conceived he was acting for the benefit of the Creditors:—That the Commission was opened at *Warminster* on the 22d May,

and the Commissioners had appointed three Meetings, 16th and 17th June, and 8th July; but positively denied that the Commission was preconcerted, or issued for the purpose of screening the Bankrupt from an Examination, he being anxious that *Doubleday* should be strictly examined with respect to the concealment and disposal of his Estate and Effects.

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John Bennett, resident near *Warminster*, by his Affidavit, stated that *Doubleday* was indebted to him and his Co. Trustee, under a Settlement made by the Bankrupt on his Marriage, in the Sum of 1,000 *l.* for Money advanced by *John Bennett*, on Bond, to *Doubleday*, the Interest of which sum was to be to the separate use of the Bankrupt's Wife.

Thomas Lampard, the Attorney, who sued out the Commission, swore to the best of his knowledge and belief, it was not issued for the purpose of screening *Doubleday* from an Examination.

The *Bankrupt*, by his Affidavit, stated, that the Commission was not preconcerted to screen him from an Examination:—That his Debts amounted to about 3,000 *l.*; and his Effects to 1,000 *l.*:—That he had two Creditors in the neighbourhood of *Warminster*, whose Debts amounted to 1,377 *l.* or thereabouts:—and denied any Fraud, Concealment, or Embezzlement.

Mr. Hart, and *Mr. Heald*, for the Petition, contended the Commission should be superseded: 1st. On the ground of a concerted Act of Bankruptcy; 2d. On account of the Commission being to be executed at such a distance from the great body of the Creditors.

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Sir *Samuel Romilly, contra*, insisted, that a Commission could be only superseded for Fraud, and where it would be invalid at Law:—That there was no proof of a concerted Act of Bankruptcy. Where two Dockets are struck, the *Chancellor* has directed that Docket to be proceeded on which is most for the convenience of the Creditors; but when the Commission has issued, it never has been superseded on the ground of its inconvenience to the Creditors. The Great Seal has no authority to supersede it on such grounds; no instance of such a supersedeas can be mentioned. The Petition prays that the Commission may be superseded, or that the Commission issued may be directed to Commissioners at *Nottingham*; but there is no authority for doing either of these things.

Mr. *Hart*, in Reply:—

The Great Seal may, at its discretion, supersede a Commission of Bankruptcy. If it has a discretion when two Dockets are struck, it must equally have a discretion when the Commission has issued. Where there have been two Partners, and a Commission has issued against one, and afterwards a joint Commission has issued against both Partners, the Court has for convenience superseded the first Commission against one Partner. I admit I have not found any Case exactly in point; but a Case like this, never, perhaps, occurred before, where a Commission has been issued at a place where there are only two Creditors, and distant 200 miles from the great mass of the Creditors. If there were many Creditors at *Warminster*, the Petition could not succeed; but here there are only two, and those Relations of the Bankrupt. Suppose a London Tradesman

owing 100,000 *l.* has a Debt due to his Father-in-Law in the North, would it be permitted to him to have the Commission worked there? It might lead to the greatest injustice. I admit, no Fraud or Collusion is proved in this Case; but the Court sees sufficient to convince it that the Commission was concerted.

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The VICE-CHANCELLOR:—

This Commission cannot be superseded on the ground that there was a concerted act of Bankruptcy, no concert being made out. On the other ground, I am sorry I cannot supersede it; but there is no instance of superseding a Commission because it is directed to a Place at a great distance from the residence of the main body of the Creditors. I will, however, for the greater convenience of the Creditors, adjourn the period for the choice of Assignees, for ten days.

11th June.

Petition dismissed.

Mr. Hart:—

We must appoint an Agent to act for us at *Warminster*.

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GENERAL ORDER

In the Matter of Bankruptcy.

Wednesday, June 11, 1817.

LORD CHANCELLOR:—

It is Ordered, that from and after Monday the 16th day of June next, no Petition struck out of the *Vice-Chancellor's* Paper of Petitions on account of non-attendance, be restored to the Paper without an Order being made by his Honor, the *Vice-Chancellor*, upon Petition for that purpose, or be placed in the *Lord Chancellor's* Paper, except by Order made upon Petition.

RASHLEIGH v. DAYMAN.

1817.

14th June.

THIS was a Bill for a Foreclosure. On an *ex parte* Motion of the Plaintiff, the Cause had been ordered to be set down as a *short Cause*.

A Bill for a Foreclosure cannot be set down as a short Cause, unless by consent.

The Suit came on this day to be heard as a short Cause, and a question arose, Whether it could be set down as such, without consent?

Mr. *Pepys*, for the Plaintiff.

Mr. *Lovat*, for the Defendant, said, he had been informed that in a recent Case of *Williams v. Williams*, in the Exchequer, before *Chief Baron Richards*, it was held that, such a Suit could not be set down as a short Cause, unless by Consent (a).

The VICE-CHANCELLOR :—

Certainly it cannot. The Cause must be struck out of the Paper.

SANDERS v. FRANKS,

Same Day.

JOHN FRANKS, by his Will, 4th December 1800, bequeathed as follows :

A Power given to Testator's Wife to dispose of a moiety of a Leasehold

“ I give, devise, and bequeath to my Wife *Mary*

(a) Mr. *Simpkinson*, and for the correctness of the Mr. *Treslove*, who were opposed in this Cause, vouched

Estate by a Will, “ duly executed and attested ;” and in default of

appointment, the same was bequeathed “ unto the Executors or Administrators of her my said Wife, to and for his, her, or their own use and benefit.” A Will, neither signed or sealed, or attested, held not to be an execution of the Power ; and no Executor being named in the Will, the Administrator of the Testatrix was held entitled to the moiety of the Leasehold for his own benefit.

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Ann Franks, all that my Leasehold Estate, situate and being at *Bradsted Green*, in the Parish of *Farnborough*, in the County of *Kent*, which I purchased of *Barbard Beardsworth*, commonly called and known by the Name and Sign of the *Black Horse*, with the Outbuildings and Appurtenances, and about two Acres of Land thereto belonging, now in the occupation of *James Poynter*, together with the three small Tenements by me erected and now standing and being thereon; To hold the same unto her my said Wife and her Assigns, for and during the term of her natural life, she and they keeping the same in good and tenantable Order, Condition, and Repair, and observing and performing the Covenants, Conditions, and Agreements in the Lease or Leases thereof. And from and immediately after the decease of my said Wife, I give, devise, and bequeath one moiety or half-part of my said Leasehold Messuages, Grounds and Premises, with their Appurtenances, unto my Brother *Henry Franks*, of *Newington Butts*, Carpenter, his Executors, Administrators and Assigns, for and during all the then residue and remainder of my Estate and Interest therein, to and for his and their own use and benefit; nevertheless, if my said Brother *Henry Franks* shall happen to die in the life-time of my said Wife, then, and in such Case, from and immediately after the decease of my said Wife, I give, devise, and bequeath the said moiety or half-part of the said Leasehold Messuages, Ground and Premises, with the Appurtenances, unto and among such of the Children of my said Brother as shall be then living, Share and Share alike, if more than one, to take as Tenants in Common; and if but one Child, then to such only Child, his or her Executors, Administrators and Assigns; and as to the other moiety or half-part

thereof, from and immediately after the decease of my said Wife, I give, devise, and bequeath the same unto such person or persons, and in such parts or proportions, as she my said Wife shall, in and by her last Will and Testament in writing, *duly executed and attested*, or any Codicil to her last Will and Testament, give, bequeath, nominate, and appoint to have and take the same; and for want and in default of such gift, devise, nomination, or appointment of her my said Wife, I give, devise, and bequeath the said last-mentioned moiety, or half-part of my said Leasehold Estate, *unto the Executors or Administrators of her my said Wife Mary Ann Franks, to and for his, her, or their own use and benefit.*"

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Soon after the making of his Will, *John Franks* died, and his Wife proved his Will, and entered into possession and receipt of the Rents and Profits of the Leasehold Premises until the 5th of April 1812, the time of her death.

She made her Will, and thereby, after giving several Legacies, concluded her Will in the following words:—
“ *To my Brother-in-law Henry Franks, Carpenter, Newington Butts, Surry, I give the whole of my Estate standing on Bradsted Green, Farnborough, in the County of Kent.*”

This Will was not executed by the Testatrix, in the presence of, or in any manner attested by, any person, the same being neither signed or sealed, nor was any Executor appointed.

The Plaintiff, *John Sanders*, the Brother of the

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Testatrix, soon after her death, procured Letters of Administration, with the Will annexed. On the death of the Testatrix, her Brother-in-law, *Henry Franks*, the Defendant, entered into the Receipt of the Rents and Profits of the Leasehold Estate; the same being in the possession of two Tenants, at a Rent of 30 *l.* a year.

The Plaintiff, by his bill, stated the foregoing facts, and insisted, that the Power given by the Will of *John Franks* to his Wife, *M. A. Franks*, was not duly executed by her Will:—that he, as her Administrator, became entitled to the undivided moiety of the Leasehold Estate, to which the Power related; the other moiety belonging to the Defendant, *Henry Franks*; and *prayed*, an Account of the Rents and Profits of the Leasehold Estate received since the death of *M. A. Franks*, and that an undivided moiety of the Leasehold Estate, and a moiety of the Rents and Profits, might be declared to belong to the Plaintiff, as her Administrator.

The *Defendant*, by his Answer, claimed to be entitled to the moiety of the Leasehold Estate, over which *M. A. Franks* had a power of appointment.

Mr. *Heald*, and Mr. *Boteler*, for Plaintiff:—

The Will of *Mary Ann Franks* was not a good execution of the Power given to her by the Will of *John Franks* her Husband, as to a *moiety* of the Estate, and, in consequence, the Plaintiff takes as Administrator of *Mary A. Franks*.

There is no recital in the Will of the Power, nor does she in her Will allude to the moiety over which

she has a disposing Power, but she gives in general words, "the whole of my Estate standing in *Bradsted Green*," &c. to the Defendant; and the Will is not "duly executed and attested," as required by the Power, she not having signed or sealed the Will, nor any Witness to the same. There is no Case exactly like this. But where a Power has been to devise *Lands* by a Will duly executed, it has been held there must be three Witnesses to the Will. So where by a Power a Will of Personalty is directed to be attested by *three* Witnesses an Attestation by *two* is insufficient, unless in the favoured cases of a *Widow*, a *Child*, or *Creditors*, on whose behalf the Court will supply the defective Execution of a Power. - This Defendant is not one of those favoured Persons, and unless the words "duly executed and attested" are struck out of the Will, giving the Power, the Will of *M. A. Franks* cannot be considered as an execution of the Power. By the words "duly attested," one Witness, at least, becomes necessary to the Will. Where a Power has been given to be executed by a Deed duly attested, the signature of one Witness has been held sufficient; but it never was determined, that though the Deed was not attested by any Witness, the Power was well executed. The Will, it is true, has been proved in the Ecclesiastical Court, but that is not the Attestation rendered necessary by the terms of this Power, nor was ever considered as of any consequence in cases of this kind. If the words of the Power had been to bequeath by a Will "duly executed," there no Attestation might have been necessary; but the additional words, "and attested," make a Witness necessary, though this is Personal Estate, and but for the terms of the Power no Witness to the Will would have been necessary.

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Mr. Cooke, and Mr. Pemberton, for the Defendant:—

The Defendant claims the whole of this Property. To one moiety he is entitled as the Devisee of *John Franks*; of that there is no doubt. To the other moiety he makes claim under the Will of *M. A. Franks*.

Two Questions arise:—1. Whether it is a bare naked Power, or whether the effect of the Will of *John Franks* was not such, as to give *M. A. Franks* an absolute Interest in the Property? 2. Whether if not an absolute Interest, but only a mere Power, the Power has been well executed? The Testator gives the whole of these Leasehold Premises, which are Personal Property, to his Wife for Life, and after her death, gives a moiety unto such persons as she shall appoint by Will, “and for want of appointment, to her Executors or Administrators,” which has the same meaning as heirs, when applied to real Estate, and gives the absolute Interest. This amounts to an absolute gift of the moiety to her, as was the Case in *Anderson v. Dawson (b)*, which is similar. If for want of appointment, the property had been given to *next of Kin*, it would be different. The Testator could not mean to give this property in case of no appointment to an Administrator beneficially; a person he knew not, and who it was in the power of the Ecclesiastical Court to name; a Creditor, perhaps. If the Testator had named an Executor by a Will, without any Witness, that Executor would have taken, in case the Power was not executed; not, however, beneficially, but only as a Trustee, as may be inferred from *Riply and Waterworth (c)*. Then as to the Execution of the Power. Supposing it to be

(b) 15 Ves. 532.

(c) 7 Ves. 425.

a mere Power, it was well executed. The words "duly executed and attested," when applied to a Will of personal Property, means only such a Will as is sufficient to pass such Property, which this Will is. The Testator did not mean this Will of personal Property should be attested by the same number of Witnesses as is required in cases of *real* Property; nor does he say by what number of Witnesses it is to be signed. The Testator gives his Wife a power of disposing by a *Codicil*, as well as a Will; but he does not say that the Codicil must be "duly executed and attested," which shows that those words as applied by him to a Will, could only mean a Will sufficient to pass personal Property, or he would have used the same words in respect to the Codicil. It was not necessary to recite the Power in the Will, as she had no other Leasehold Property, and could therefore mean nothing else than to dispose of the Property over which she had a Power. There was no occasion to come here, the Plaintiff might have proceeded at Law.

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Mr. *Heald*, in Reply:—

The Court cannot get rid of the express words of this Will. The Testator has given one moiety of the Estate to the Defendant, absolutely; the other moiety to his Wife for Life, subject to a Power; he knew, therefore, the difference between an absolute Gift, and a Gift for Life, with a Power, and shows he could not have meant to give the moiety to his Wife absolutely. The Power is created in formal terms: to construe it an absolute Gift would involve great absurdities, and is quite inconsistent with the creation of the Power. The bequest is not, as argued, to her for Life, and as he should dispose, and if no disposition, to her Executors or

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Administrators, but it is "to her Executors and Administrators for his, her, or their own use and benefit."—

It is a beneficial Gift to them, in the event of no execution of the Power. Her Administrator, probably, would be her next of Kin; and an Executor could only be such, by her nomination, so that there is no great absurdity in the beneficial Gift to her Executors or Administrators. The Testator supposed, perhaps, his Wife, might marry again, and that her Will should be guarded, by requiring it to be witnessed. It is useless, however, to conjecture as to his meaning, since the words of the Will are clear and imperative. I do not admit that no Attestation was necessary if she had disposed of this property by a Codicil; I think under the terms of the Power, the Codicil must have been "duly executed and attested." This is a Bill by one Tenant in Common for an Account, and is proper.

The VICE-CHANCELLOR:—

I shall look into the Cases cited, but I will state my present impression. The Plaintiff, to succeed, must show that there was a Power, and not an absolute Gift; that there has been no appointment by *M. A. Franks*, and that he is her *Administrator*. He claims beneficially under the Testator's Will, as a person described by him to take, in case no appointment is made. The Power is given to the Wife in apt and proper words. She had a Life Estate in her moiety, with a Power of disposing of it by a Will "duly executed and attested." Is then her Will a due execution of the Power? I am not aware of any Case, (except in the favoured Cases alluded to, of which this is not one,) where, when any formality is required in the disposition of real or personal Property,

that formality can be dispensed with. If three Witnesses had been expressly required to her Will, there must have been three Witnesses, though it was only a Will of personal Property. If there had been one Witness to this Will, I should have considered it as a good execution of the Power; but it has no Witness, and, therefore, the Power is not well executed. In default of appointment, to whom is the Property to go? It is to go "unto the Executors or Administrators of her my said Wife *M. A. Franks*, to and for his or their own use and benefit." The bequest is whimsical, especially as an Executor might have been appointed by an unattested Will, who would have taken; but I must not be influenced by any absurdities that may follow, if the Will is plain. It is said that a Gift of personal Estate to *A.* his Executors or Administrators, is tantamount to a gift to *A.* and his Heirs of real Estate, and so it is—each disposition carrying the whole Intent; but here the bequest is to the Executors or Administrators, *for his, her, or their own use and benefit.* They take it therefore beneficially, and not as Trustees. A Gift to the Heir of *A. B.* of real Estate, is not a Gift to *A. B.*; nor can a Gift of Personalty to the Executors or Administrators of *A. B.* for his and their own use and benefit, be considered as a Gift to *A. B.* This is my present opinion.

N. B. The *Vice-Chancellor*, on a subsequent day, said he remained of the same Opinion.

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MOODIE v. REID.

IN this Case, which is reported *ante*, 1 vol. p. 516, a Case, with the following Question, was sent to *The Judges* of the Court of *Common Pleas*; viz:

“ Whether the Will or Appointment in the nature of a Will of the 4th day of February 1812, is a due Execution of the Power contained in the Settlement of the 4th May 1789?”

To this Case, *The Judges* on the 13th June 1817, returned the following *Certificate*:

“ We have heard this Case argued, and have considered it; and are of opinion that the above stated Will, or appointment in nature of a Will, of the 4th February 1812, is not a due Execution of Power contained in the said Settlement of the 4th May 1789.



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R. DALLAS.
J. A. PARK.
J. BURROUGH.

 KNATCHBULL v. GRUEBER.

UPON an Appeal from the Decision, in this Cause, which is reported *ante*, 1 vol. p. 153, the *Lord Chancellor*, on the 28th July 1817, *confirmed* the Decree.

—◆—
END OF PART I.
—◆—

C A S E S

BEFORE THE

VICE-CHANCELLOR.

PINK and others v. DE THUISEY.

LOUISA Frances Gabriella D'Alsace De Chimay, Vicomtesse De Cambis, made her Will (a) 26th January 1809, which was thus translated in the Bill:—"I give and bequeath unto Master *James England*, now in the sloop *Jasper*, of the British Royal Navy, the real Sum of 1000 *l.* Sterling, to be taken on the Stocks called *Three per Cent. Consolidated*, which I have in the Name of *Mr. Amable de Thuisey*. I make said Legacy under the condition hereinafter written, at the Article of my Testamentary Executor. I constitute by the present writing *Mr. Amable de Thuisey* my Testamentary Executor; and in case of his absence, or death of the

14th June.
Legacy held, upon the wording of the Will, to be Conditional, and the Condition not being performed, the Legatee not entitled to the Legacy.

(a) The Will was in *French*. as given in the Bill, but no Objections were made to some material difference was suggested. passages in the Translation, suggested.

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Marquis *De Thusey*, his Father, I request them (a) to give me the mark of friendship of accepting this charge, and in this quality, after my death, to take first upon the Money that I have placed in the Stock *Three per Cent. Consolidated*, under the Name of Mr. *Amable De Thusey*, the Sum and real value of 1000 *l.* Sterling, which I have just given to Master *James England*, and which I will have discharged before every thing; my intention being to make it a distinct and separate object, independent of my succession. I request also my Testamentary Executor to place this Sum in the manner he will think most advantageous, to give every year the Revenues of it to Mr. *James England*, and to give him the Principal only in case of an establishment or acquisition for him which seem advantageous to my Executor Testamentary, this disposition being an essential Condition of the Legacy I make to the said *James England*. I however leave my Testamentary Executor at liberty to give to said *James England* the said Sum of 1000 *l.* Sterling, if he found the thing proper, although there should be at the actual moment neither Establishment nor Acquisition for the said *James England*.”

The Testatrix died 27th January 1809, and *Amable De Thusey* proved her Will, and sold out so much of the *Three per Cent. Consols* as produced 1000 *l.* Sterling, which Sum was invested in the purchase of 1003 *l.* 15 *s.* 3 *d.* *Three per Cent. Navy Annuities*.

James England died in September 1813; and having considered himself as absolutely entitled to the Legacy given by the Will of *Vicomtesse De Cambis*, he, by his

(a) The Will is here literally followed.

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Will, 7th September 1813, bequeathed it amongst the Plaintiffs (*Pink* excepted), and appointed *James Pink* his Executor, who proved his Will.

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The Bill with these statements, prayed, that the Legacy of 1000 *l.* left to *James England*, or the Funds purchased with it, together with the Interest and Dividends due thereon, might be transferred to the Plaintiffs.

The Defendant, by his Answer, admitted he had been called upon by *James England*, in his Life-time, to pay to him the Legacy of 1000 *l.* but that he declined doing so, *England* not having obtained "an Establishment or Acquisition" which entitled him to demand the Legacy; and the Defendant not thinking it prudent to advance the 1000 *l.* unless there was such an "Establishment or Acquisition," it being, as he conceived, the Testatrix's intention to secure him a provision during his Life, and to avoid the danger of the Property being squandered, as she knew *England* to be a man of dissipated habits; and submitted, whether the Legatees of *England* were, under the circumstances, entitled to call for the Legacy.

Mr. *H. Martin*, and Mr. *Courtenay*, for the Plaintiff:—

The 1000 *l.* Legacy to *England* is to be separated from the rest of the Testatrix's Estate, and kept distinct from the succession of the rest of her Estate, which shows that she did not mean, in any event, that it should form part of the residue; the Executor, therefore, will take this Money if the Plaintiffs are not entitled. It is difficult to say what the Testatrix meant by "an Establishment and Acquisition." *England* was appointed Gunner of the *Jasper*; was not that "an Establishment or Acquisition?" The attaining of 21, and becoming *sui*

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juris, as he did, after the Will, may be considered as an Establishment. Though there was no Establishment or Acquisition, the Executor had a power to advance the 1000*l.* Is he at liberty, capriciously, to say, I will not advance the Money, and thus benefit himself? In this Case the Legatee was absolutely entitled, and might dispose of the Money.

Mr. *Bell*, and Mr. *Duckworth*, for the Defendant:—

If the Plaintiffs are not entitled, the Residuary Legatee will take the Money; *Cambridge v. Rous (b)*. The Legacy was given on a condition, which, as it was not performed, the Legacy was not claimable. The words “Establishment or Acquisition” must mean Marriage to a Woman of some fortune, or by being placed in some Trade or Business, or something analogous to that. It is true, the Executors have a discretion to advance the Money though no Establishment or Acquisition is obtained, but that does not give the Legatee a right to claim the Money against the consent of the Executor. Lately, in *Weller v. Weller*, at the Rolls, where the Testator gave his Son, who had been extravagant, a Sum of Money, with a power to the Executors to advance more, if they thought proper; the Creditors of the Son filed a Bill against the Executors to compel them to pay the additional Sum, but the *Master of the Rolls* thought the Bill would not lie. Afterwards the Creditors consented to take a composition from the Son, and upon that the Executors agreed to advance the Money. In this Case the Executor has an absolute power to advance the Money, or to refuse to do so. He might say,

“*Sic volo, sic jubeo, stet pro ratione voluntas.*”

The Executor is here put *in loco parentis*. The

(b) 8 Vcs. 12.

attainment of 21 never could have been the sort of Establishment intended by the Testatrix, otherwise she would have expressly given it to him at that period. He was a Gunner when the Testatrix made her Will.

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The VICE-CHANCELLOR :—

There are three Questions in this Case:—1st. Whether the Legacy to *England* was absolutely given, or upon condition?—2dly. If conditionally given, whether the condition has been performed?—3dly. Whether as the Executor had a power to give the principal Sum, if he thought proper, to the Legatee, *England* could claim it?

The Legacy, taking into consideration the whole Will, must be considered as given on condition. There is a prohibition to the Executor not to advance the Legacy, unless, “in case of an establishment or acquisition for him which seem advantageous to my Executor.” He was not entitled to claim the Legacy unless certain things occurred. The Interest was to be paid to him without any condition; but as to the Principal, a different purpose is shown; an intention not to give, unless on an acquisition or establishment such as might seem advantageous to the Executor. There is no ground, therefore, for considering this as an absolute Legacy.

Then, was the Condition performed? It has been urged, that the appointment of *England* to be a Gunner was such an *Establishment* as entitled him to claim the Legacy; but the Answer to that is, that he was a Gunner when the Testatrix made her Will, and so continued till her death. It has been argued, that by

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coming of Age, that must be considered as an Establishment; but the words of the Will are "an advantageous establishment or acquisition which may seem advantageous to my Executor;" so that merely coming Age cannot have been the establishment or acquisition meant by this Testatrix.

The remaining Question is, as to the effect of the following Clause in the Will; "I however leave my Testamentary Executor at Liberty to give the said *James England* the said Sum of 1000*l.* Sterling, if he found the thing proper, although there should be at the actual moment neither establishment or acquisition for the said *James England*." The Executor says, he did not think it proper to advance the Legacy. Nothing appears in the conduct of the young man which disqualified him from taking; but it would be quite contrary to the provisions of the Will to hold, that the power given to the Executor at his discretion to advance the Legacy, gave the Legatee a right to claim it absolutely. If that were so, the condition in the Will, upon which I have commented, and the power given to the Executor of dispensing with it, would be useless; the whole Will would be frustrated. Is the Court to decide upon the propriety of the Executor withholding the Legacy? That would be assuming an authority which is confided by the Will to the discretion of the Executor. It would be to make a Will for the Testatrix, instead of expounding it.

Then as to Authorities. No doubt, where the *object* is certain, the *Fund* certain, and the *event*, in which the party is to take, is certain, and there are words recommendatory or precatory, used by a person having

the power to command, they have in many Cases been considered as obligatory ; but those Cases are very distinguishable from this ; in them, an intention was expressed, though not in words of command, that the thing should be done ; but in this Case there is no intent expressed, that he should have the Legacy at all events. Decreeing the Legacy in this Case, instead of forwarding the intent of the Testatrix, would disappoint it ; it would be, in effect, to strike out of the Will all that relates to the Condition, and the discretion given to the Executor. Here, there was no fixed purpose to give at all events ; but it was left to the discretion of the Executor—to his judgment and control. The Authorities, therefore, are not in contradiction to what is the fair meaning and import of this Will. The Executor did not think fit to advance the Principal of this Legacy to *England*, and, therefore, he could not claim it, as absolutely entitled. The consequence is, the Bill must be dismissed.

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Bill dismissed.

CURRIE and others, v. GOOLD and Ux.

17th June.

ON this Cause coming on for *Further Directions*, it appeared, that a Legacy of 500*l.* was left to a married Woman, and after her death, in certain events, to her Children. The Executors, who were in *India*, where the Testator died, remitted the 500*l.* to one *Goold*, a Merchant, as their Agent, for payment of the Legacy. *Goold* paid the Interest on the Legacy from the 4th of *June* 1794, *Where the Agent of an Executor paid Interest on a Legacy for 17 years, without deducting the Property Tax, held, he could not afterwards deduct, out of future Interest due, the Amount of the Property Tax on such precedent Payments.*

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February 1795, until the 4th August 1812, without deducting the *Property Tax*. When the next payment of Interest became due, he insisted on deducting out of it the *Property Tax*, in respect of all the precedent payments; and the question was, Whether having paid this Interest so long without deducting the *Property Tax*, he could now claim the same, although he might properly insist on deducting future payments of the *Tax*, out of future payments of the Interest.

Mr. *Raithby* contended, he could make such deduction, and that it would be great injustice to oblige him to pay this *Property Tax* out of his own pocket.

Mr. *Treslove*, *contra*, insisted he could not make the deduction; and cited *Atwood v. Lamprey (a)*, where a Mortgage was made in satisfaction of Widow's Dower, on condition to pay her 20*l.* a year; and the Court refused to make the Annuitant refund in respect of the payments she had received tax free, and which the party paying had omitted to deduct. So, in *Bilbie* against *Lumley* and others (*b*), it was determined that, Money paid by one who has full knowledge (or the means of such knowledge in his hands) of all the circumstances, cannot be recovered back again on account of such payment having been made under an ignorance of the Law. He cited also, *Stevens v. Lynch (c)*, and *Nicholls v. Leeson (d)*.

(a) Mentioned in Note to *East v. Thornbury*, 3 P. Wms. 127.

(b) 2 East, 469, recognized by Lawrence, J. in *Lothian and Henderson*, *Dom. Proc.*

3 Bos. and Pul. 520; and see *Gomery v. Bond*, 3 Maul. and Selw. 378, and *Brisbane v. Dacres*, 5 Taunt. 143.

(c) 12 East, 38.

(d) 3 Atk. 572.

The *Vice-Chancellor* was of opinion, the authorities cited, were conclusive to show the deduction could not be made, although the doctrine established by those Cases might, in many instances, be a great hardship on the Party. Here, however, he observed, this Defendant was in Business, and, probably, made some advantage by the Capital being suffered to remain in his hands, instead of being paid into Court, as might have been insisted on, and that, probably, he made no claim of the Property Tax, as an inducement to leave the Money in his hands.

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ROSSITER v. PITT.

WHEN this Cause came on to be heard at the *Rolls*, the Will was proved as to the Personal Estate, but not as to the Real Estate, and leave was given by the Decree to exhibit Interrogatories to prove the Will as to the Real Estate. Witnesses were accordingly examined, but the *Examiner* thought he was not authorized to publish the Depositions without an Order of the Court.

21st June.

Leave given by a Decree to exhibit Interrogatories to prove a Will of Real Estate. The Examiner thinking he was not authorized to publish the Depositions, an Order was made that they should be published.

Mr. *Courtenay* now moved for an Order that the Depositions should be published.

Order made.

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MARSHALL and others, v. BOUSFIELD
and others.*By Original Bill, Bill of Revivor, and Supplemental Bill.*

24th June.

Devise to Testator's Wife S. D. for Life, and after her decease, that the Estate should be settled by Counsel, and go to and amongst his Grandchildren of the Male-kind, and their Issue in Tail Male, with remainder over. Only one Grandchild born in Testator's Life, but two born afterwards before the death of the Testator's Wife, and held, a Grandchild born after the death of the Testator, and before the death of his Wife took an Estate Tail Male.

THIS Cause came before the Court upon *Exceptions* to the Report of the *Master*, to whom it was referred to inquire into the Title to an Estate that had been the subject of a Contract made on the 11th of June 1810, between the late Mr. *Holloway*, and Mr. *Watkins*, the Trustee and Agent of *Nicholas Edward Fell*. A Bill was filed by *Holloway* for a specific performance of an Agreement to sell, and the only question was, Whether a good Title could be made to the Estate? Upon the reference to the *Master*, he was clearly of opinion a good Title could be made. To his Report, *Exceptions* were taken. The facts were, that *Susannah Donning*, by her Will, 15th December 1727, recited the Will of *Nicholas Donning*, 2d September 1721, and upon the latter Will the question arose, Whether one of his Grandchildren, of the name of *Nicholas Joseph Fell*, took an Estate for life, or an Estate Tail Male? The recital in the Will of *Susannah Donning* was the only account given of the Will of *N. Donning*, and by that recital it appeared that, *Nicholas Donning* devised "to his Wife *Susannah* and her Heirs, all and singular his Freehold and Copyhold Messuages, Cottage, Lands, Tenements and Hereditaments whatsoever and where-soever; and that he had also given and bequeathed to her all his Goods, Chattels, and Personal Estate of

whatsoever nature, kind or quality, in trust, thereout to pay his Debts, Funeral, and other Expenses, and then upon further trust, that she should enjoy the said Real and Personal Estates, for and during her natural Life, and after her decease, that the same, namely, the rest and residue both of the Real and Personal Estate, after payment of his said Debts, Funeral, and other Charges, should be settled by able Counsel, and go to and amongst his Grandchildren of the Male kind, and their issue in Tail Male, and for want of such Issue, upon his female Grandchildren which should be living at his decease; but the Testator did thereby declare his Will and meaning to be, that the Shares and Proportions both of his male and female Grandchildren, and their respective Issue, should be in such Proportions as his Wife *Susannah Downing* should by Deed or Will by her in writing signed and sealed in the presence of three or more credible Witnesses, limit, direct or appoint, and for want of such appointment, to the Testator's own right Heirs for ever." At the time of this Will, in the year 1721, there was only one Grandchild living, but he was not the Grandchild upon whose interest the question in this Cause arose. At the date of *Susannah Downing's* Will there were three Male Grandchildren, namely, *Nicholson Thomson Downing*, (who was the only Son of their late Son *Thomas Downing*,) and *Thomas Fell* and *Nicholas Joseph Fell*, the two Sons of their only surviving Daughter, *Mary*; there was also living one Grand-daughter. *Susannah Downing*, by her Will, after reciting the Will of *N. Downing* in the words, before stated, "devised, limited, and appointed all and singular the Freehold and Copyhold Estates to *Samuel Ballard*, his Heirs and Assigns for ever, upon trust, and to the intent and purpose following, that is to say, as to

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certain Freehold Messuages in *Hammersmith*, to the use of the Testatrix's, and her late Husband's Grandson, *Nicholas Thompson Donning*, and the Heirs Male of his body; and as to certain Copyhold Premises at *Hammersmith*, to the use of her Grandson *Thomas Fell* the younger; and then as to the Premises which were the subject of the present Suit, she gave them to the use of her Grandson *Nicholas Joseph Fell* (youngest Son of her Son-in-law, *Thomas Fell* the Elder,) and the Heirs Male of the body of the said *Nicholas Joseph Fell*, lawfully to be begotten." A Recovery was suffered by *N. J. Fell* in 1775.

Mr. *Hart*, and Mr. *Raithby*, in support of the Exceptions:—

If *S. Donning* had been by her Will disposing of her own Lands, an Estate Tail would clearly have passed by the Devise to *Nicholas Joseph Fell*, and the Heirs Male of his body; but the Devise being only in pursuance of the Power created by the Will of her Husband, *N. Donning*, it is necessary to consider the terms of the Power contained in his Will; under which, we contend, the Widow could only give an Estate for life to *N. J. Fell*, with remainder to his first and other Sons in strict Settlement; and that *N. J. Fell* being only Tenant for Life, did not by the Recovery suffered by him in 1775, acquire the Fee. The direction in the Will of *N. Donning*, is, that the Premises should, after the Wife's death, "be settled by able Counsel, and to go to and amongst his Grandchildren of the Male kind, and their Issue in Tail Male." This, therefore, is an Executory Trust, and the Court, in the execution of it, would direct the Limitations according to the intention of the Testator, without regarding the legal effect of the

words, so far as they contravene the Intention; and modelling the Limitations according to the intention, it must be held in this Case, that *N. J. Fell* took only an Estate for Life, with the remainder to the Issue in Tail Male as Purchasers. What need was there of the aid of Counsel, if an Estate Tail only was to be given to the Grandchildren? The Estate is to be *settled* by Counsel. The words in Tail Male are applicable only to the Issue of the Grandchildren, and not to the Grandchildren.

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Sir *S. Romilly*, and Mr. *Courtenay*, *contra* :—

A man cannot give an Estate for Life to a person not *in esse* at the death of the Testator, and an Estate Tail by Purchase to the Issue of such Tenant for Life. Nor can he effect that, by means of a Power; he cannot give by that means a greater power than he himself had. When a Power is executed, the Estate is considered as if it had been given by the Deed creating the Power. In a Case on the *Duchess of Marlborough's* Will, an important Case, not in print, Lord *Northington* says, "A man who is not by Law allowed to lock up Property, cannot by a Power give to another a key to lock it up." The words "in Tail Male" apply not to the Issue of the Grandchildren of the Testator, but to the Grandchildren.

This Case does not resemble *Papillon v. Voice* (a), and that class of Cases, for in them there was something to show that only an Estate for Life was meant to be given to the first taker.

In a recent Case, *Blackburne v. Staples* (b), a Case of an Executory Trust, the *Master of the Rolls* says,

(a) 2 P. Wms. 471.

(b) 2 Ves. and Bea. 370.

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“the Court must necessarily follow his (the Testator's) words, unless he has himself shown that he did not mean to use them in their proper sense; and have never said, that merely because the direction was for an Entail, they would execute that by decreeing a strict Settlement.” In this Will, as in that, nothing appears to show that the words were intended to have a different meaning from what the technical words import. The Case of *Dodson v. Grew* (c) was the Case which most influenced the *Master's* judgment.

Mr. Hart, in Reply:—

I admit a man cannot by means of a Power effect more than he himself could do. The question is, What was the intention of this Testator? We say, the Testator intended to give an Estate for Life to the Grandchildren, and an Estate in Tail Male to their Issue as Purchasers. It is said that an Estate for Life to a person not *in esse*, with a Limitation to his Issue Male as Purchasers, is bad, as being too remote; and I admit it is; and I say, that no Conveyance could have been devised by which such an intention could be effected. *Dodson v. Grew* does not apply, that not being the Case of an Executory Trust. This is, at least, so doubtful a Case, that the Court will not oblige a Purchaser to take an Estate so circumstanced.

The VICE-CHANCELLOR—[after stating the facts]:—

If *Susannah Donning* had power to limit the quantity of Estate that *Nicholas Joseph Fell* should take, and he afterwards in the year 1775, suffered a Recovery, there is no doubt the Vendor of the Estate could make a complete Title; but supposing, as the fact is, that *Susannah Donning* had no power to determine the

quantity of the Estate to be taken, but only to settle *the proportions* in which they were to take, then the question is, Whether the Grandchildren were to take an Estate for Life, with Remainder to their Issue in Tail Male as Purchasers; or, whether the Grandchildren were to take an Estate Tail Male? It is an Executory Trust, and the Court in executing it, does not strictly adhere to the formal words used by the Testator, but will modify them so as to effectuate the real intent. What then was the intent of this Testator? By the words of the Will the Estates are "to go to and amongst the Grandchildren of the Male kind, and their Issue in Tail Male." If Issue is to be construed a word of Purchase, the Grandchildren *and* their Issue, it might be contended, would take Estates Tail Male. If the Grandchildren were only to take Estates for Life, it must then be contended the words "in Tail Male" did not apply to them; but there are no words in the Will to show that only an Estate for Life was intended to be given to the Grandchildren. It is given generally to them in Tail Male; and no language is used, which has been held, in other Cases, as indicative of an intention to give only an Estate for Life. Unless the Grandchildren took an Estate Tail Male, the limitation, so far as respects the Grandson, *N. J. Fell*, who was born after the death of the Testator, would be void; for you cannot give an Estate for Life to a person not *in esse*, with a Remainder in Tail Male to his Issue as purchasers; nor could any Counsel, however able, frame a Settlement to effectuate such an intent. The only mode, in such case, of giving an Estate Tail Male to the Children, would be by giving an Estate Tail Male to the Parent, which, unless barred, would descend on his Issue. This appears to be the plain construction of the Will, and it is the only way

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by which this Executory Trust could be carried into execution. It is observable, that though the Testator in the limitation over to his Female Grandchildren has added no words to express what quantity of Estate they were to take, yet in the subsequent reference to this limitation he evidently supposes them to take an Estate of Inheritance to them and their Issue, which affords an argument in favour of a similar Interest in respect to his Male Grandchildren, and that "Issue Male" was intended as a word of Limitation, and not of Purchase.

In the Case of *Blackburn v. Stables (d)*, the words of the Will were not precisely the same as the present, the words there being "Heir Male," and here it is "Issue Male;" but the reasoning of the *Master of the Rolls*, is applicable. He says "It seems clear that this is an Executory Trust, and I know of no difference between an Executory Trust in Marriage Articles, and in a Will, except that the object and purpose of the former furnish an indication of intention which must be wanting in the latter. When the object is to make a provision by the settlement of the Estate for the Issue of a Marriage, it is not to be presumed that the parties meant to put it into the power of the Father to defeat that purpose, and to appropriate the Estate to himself. If therefore the agreement is to limit an Estate for life, with remainder to the Heirs of the body, the Court decrees a strict settlement in conformity to the presumable intention; but if a Will directs a limitation for life, with remainder to the Heirs of the body, the Court has no such ground for decreeing a strict settlement. A Testator gives arbitrarily what Estate he thinks fit; the subject being mere bounty, the intended

(d) 2 Ves. and Bea. 367.

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extent of that bounty can be known only from the words in which it is given; but if it is clearly to be ascertained from any thing in the Will that the Testator did not mean to use the expressions which he has employed in their strict proper technical sense, the Court, in decreeing such Settlement as he has directed, will depart from his words in order to execute his intention; but the Court must necessarily follow his words, unless he has himself shown that he did not mean to use them in their proper sense, and have never said, that merely because the direction was for an entail, they would execute that by decreeing a strict settlement." As in that Case the *Master of the Rolls* thought he was bound to give to the first taker an Estate Tail, so here I think myself equally bound to say, that the intent of the Testator was to give an Estate Tail Male to the Grandchildren, inasmuch as there is in this Case, what there was in that, an impossibility of giving, consistently with the rules of Law, an Estate for Life to an unborn Grandchild, with an Estate Tail Male, by purchase, to his Issue.

Another Case referred to in the Argument, was, *Doe on the Demise of Dodson v. Grew and others (a)*. There, the devise was expressed, to *George Grew*, for the term of his natural life, and after his decease to the use of the Issue Male of his body, lawfully to be begotten, and the Heirs Male of the body of such Issue Male;" consequently, there was the same term, "Issue Male" there, that creates the Argument in the present Case, and there was, in addition, an express Estate for Life given to *George Grew*; but notwithstanding that,

(a) 2 Wils. 322.

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the Court determined that *George Grew* should take an Estate Tail. *Lord Chief Justice Wilmot* said "The Testator had no Issue at the time of his Will; his intention is to be followed, provided it does not clash with the rules of Law:--the Statute of Wills gives a man a power to devise his lands, but he cannot by his Will create a perpetuity, nor restrain Tenant in Tail from suffering a Recovery, &c. &c. these being contrary to the rules of Law. The intention of the Testator clearly was to give *George Grew* an Estate for Life only; but his intention also clearly was, that all the Sons of *George Grew* should take in succession; both these intentions cannot take place; for, if the devisee *George Grew* took only an Estate for Life, his Sons could never have taken; and although it eventually happened that he had no Sons, yet we must consider this Case as if he had had Issue; therefore the Court must put themselves in the place of the Testator, and determine as he would have done. If he had been told that both of his intentions in the Will, by the rules of Law, could not take place, and had been asked which of them he desired should take effect and stand, as both could not, he certainly would have answered, "that so long as *George Grew* had any Issue Male the Premises should not go to the Lessor of the Plaintiff;" and if we balance the two intentions, the weightiest is, that all the Sons of *George Grew* should take in succession; and therefore, to enable them to take, *George Grew* must be adjudged to have been Tenant in Tail, for the Testator's great intention most clearly was, that the Lands should never go over to the Lessor of the Plaintiff in Remainder, but upon a failure of Issue of *George Grew*. He further adds, "the word *Issue* in a Will is either a word of purchase or of limitation,

as will best effectuate the intention of the Testator; it is a plural word, and takes in all the Sons of *George Grew*; and the words, "Issue Male of his body, and the Heirs Male of the body of such Issue" mean only that they were not all to take at a time, but in succession." The Opinion of *Lord Chief Justice Wilmot* applies to the present Case, which is stronger than that, no express Estate for Life being here given. It is perfectly consistent with the words used in this Will, to say that the Testator intended the Grandchildren to take Estates Tail Male; and the Court would, I think, if they did not adopt that construction, disappoint the intent of the Testator. Therefore, upon these authorities, as well as upon principle, I am of opinion, that it was the intent of *Nicholas Donning* to direct a Settlement to all his Grandchildren in Tail Male, the proportions to be named by *Susannah Donning*, and consequently that *N. J. Fell* having suffered a Recovery, enabled the Vendor to make a good Title to the Vendee. I do not impeach the Principle, that a Vendee is not bound to take a doubtful Title (*a*); but I think this is not doubtful Title, and that the *Master* was clearly right. The exceptions to the *Master's* Report must be overruled.

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Exceptions overruled..

(*a*) See *Sugden's Vendors and Purch.* 265, last edit. and the Cases there cited.

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June.

It is not impertinence to state by amendment of the Bill, part of the Answer, by way of pretence, and interrogate as to it.

Quære, whether one of two Partners, who has retired from an active concern in the business, can be compelled to look into the Partnership accounts, to state the result of them, as to particular transactions, which the acting Partner had transacted?

THE Original Bill, which was afterwards amended, stated that the Plaintiff was an Annuity Creditor of Major-General *Adam Gordon*, who died 22d February 1815, having by his Will, 2d December 1814, appointed his Sister *Hannah Gordon*, (a Defendant), his Executrix, who proved his Will:—That the Executrix was resident in Scotland:—That the Testator was entitled at his death to considerable Property in England, and in particular to a considerable Sum in the hands of the Defendants:—That the Executrix gave to *Harry Gordon* and *Ferdinand Lumsden*, (two other Defendants), a Power of Attorney to collect the property in England: That all the Testator's Property had been got in, except the Monies in the hands of the Defendants, and all the Testator's Debts were paid, except the Debt due to the Plaintiff, and there was a Surplus more than sufficient to pay the Plaintiff, which surplus had been paid into the hands of the Defendants *Boehm* and *Taylor*:—That the Plaintiff had applied to the Executrix to call upon *Gordon* and *Lumsden* to account for their Receipts, and also upon *Boehm* and *Taylor* for the Monies in their hands, and to pay the arrears of the Annuity, and secure the future payments. The *Prayer* of the Bill was for an Account, by the Executrix, of the Estate of Major-General *Adam Gordon*, and of the Receipts by *H. Gordon* and *F. Lumsden*, and an account from *Boehm* and *Taylor* of the Monies in their hands; an account of what was due to the Plaintiff, and payment to her of the arrears of the Annuity, and a Sum provided

to secure the future payments of the Annuity, and for an Injunction to restrain *Boehm* and *Taylor* from paying over the Monies in their hands to the Executrix, or to *H. Gordon* and *F. Lumsden*, and an Injunction to restrain them and the Executrix from receiving the same, or proceeding at Law for the recovery thereof.

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The Defendants, *Boehm* and *Taylor*, put in a joint and several Answer. The Defendant, *Boehm*, for himself, stated in his Answer, "that he had for some years past never personally interfered in the management of the business carried on in the joint names of himself and the other Defendant, *John Taylor*; and was quite a stranger to the several matters and things in the Bill mentioned, save as he had been informed by the said *John Taylor*;" and then *Taylor* for himself stated, and which the other Defendant believed to be true, that since and previous, &c. [stating the result of the account between General *Gordon* and *Boehm* and *Taylor*, by which nothing appeared due to the General.]

Upon this Answer being put in, the Plaintiff re-amended her Bill, stating as pretences on the part of the Defendants, the very words used by the Defendant *Boehm* in his Answer, thus; "and sometimes the said Confederate, *Edward Boehm*, alleges, and has alleged, that he has for some years past never personally interfered, &c." and charged, that the information given to *Boehm* was contrary to the fact; "and so it will appear to the said Confederate *Edmund Boehm* himself, if he will inspect his Co-partnership Books, in which, as the truth is, his and the said Confederate *John Taylor*'s accounts with the said Testator, *Adam Gordon*, and with the said Confederate *Hannah Gordon*, as the Executrix

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of the said Testator *Adam Gordon*, are entered. And your Oratrix charges, that the said Confederate *Edmund Boehm* ought to inspect such books before he answers that your Oratrix's Bill of Complaint; and ought to set forth in his Answer, whether he hath inspected the same or not." The re-amended Bill then interrogated in the usual way, as to these allegations and charges.

Upon the Bill being thus re-amended, a reference was obtained to the *Master* for Impertinence in the Bill, treating as such, the Amendments which stated the pretences in the words of the Answer, and the Charges and Interrogatories founded on them. The *Master* reported that, he did not conceive the same to be impertinent; an Exception was taken to his Report.

This Exception came on now to be argued.

Mr. *Hart*, and Mr. *Wilson*, in support of the Exception:—

The Plaintiff has by amendment stated part of the joint and several Answer of *Boehm* and *Taylor*, and this, it is conceived, is impertinence. The facts introduced in the re-amendment were put in Issue by the previous Answer, and by replying to it, the Defendants must have proved the facts. The Plaintiff has no right to call upon *Boehm* to look into the Partnership Books. He has retired some years from an active concern in the business. *Gordon's* affairs with the house were transacted by *Taylor*. *Boehm* knows nothing of them. He swears as to the information he has received from *Taylor* and, that is all he is bound to swear to. The Bill states a balance due from the Defendants, not from *Boehm* separately. It is not necessary to have

his individual judgment obtained by an inspection himself of the accounts, as to the balance. The Court in determining the question of impertinence, can look only to the Bill. The Bill is altogether founded on a wrong principle, for this Plaintiff cannot call upon third persons for Money in their hands. The Executrix is alone liable to be called upon. *Boehm* and *Taylor* are liable only to the Executrix.

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Mr. *Leach*, and Mr. *Bell*, in support of the re-amended Bill:—

The Plaintiff has a claim upon the Assets of General *Gordon*; the Executor is stated to be abroad; and the Plaintiff calls upon the Defendants to answer whether they have not a balance in their hands, part of the General's Estate, insisting upon applying it in discharge of her claim. The Plaintiff charges, the information given to *Boehm* is incorrect, and so it would appear if he himself looked into the Partnership Books. Is this irrelevant, impertinent matter? The *pretence* was necessary to be introduced in order to found the Interrogatories upon it. It is stated in the words of the Answer, because it could not be more briefly or pointedly stated. It is said, that by replying to the Answer, the facts stated in it must have been proved. That is true; but that would occasion delay, and intolerable expense; and a Plaintiff has a right to avoid that, by obtaining an explicit answer in the first instance.

The VICE-CHANCELLOR — [after stating the facts] :— 19th June.

The Plaintiff not being satisfied with the joint and several Answer of *Boehm* and *Taylor*, has re-amended her Bill, stating by way of pretence, a quotation from

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the Answer, and negating it, insisting that the facts will appear differently, if *Boehm* will look into his accounts. The re-amendment is relevant to the subject matter of the Bill. *Boehm* by looking into his books may find that *Taylor* is mistaken, and that a considerable Sum is due. The amendment is not, therefore, impertinent. If not impertinent in this view, it is not so merely from using the words in the Answer. It is urged, that the Court in deciding as to Impertinence in the Bill, cannot look at the Answer; if so, then there does not appear to be any Impertinence in the Bill. Suppose the Defendants had stated a Release from General *Gordon*, surely the Plaintiff would be entitled to amend, stating the pretence of a Release, and making inquiries respecting it.

It is said the Bill is founded on a wrong principle, *Boehm* and *Taylor* being accountable only to the Executrix; if that be so, the Defendants should have demurred; but that Demurrer could not have been supported, if the Bill contained specific charges of collusion and confederacy between the Defendants and the Executrix.

Upon the principal question, whether *Boehm* is compellable to look into the Partnership accounts, it is not now necessary to decide. The Bill, no doubt, may ask what is the result of his own personal inspection of the books; and it will be for *Boehm* to consider, whether he will satisfy, or resist, the inquiry. *Boehm* may choose to answer it. If he resists the inquiry, then the question must be decided. Till then, it would be premature to determine that point.

Exceptions overruled.

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JONES v. TAYLOR, and others.

THE following Motion came on at first before the Lord Chancellor, but he directed it to be moved before the Vice-Chancellor.

25th July.
Motion to advance a Demurrer to a Bill for an Injunction and Receiver, refused, on account of the delay in the filing of the Bill.

The Motion was, that a Demurrer might be advanced in the Paper, the Bill being for an Injunction, and a Receiver, which could not be obtained until the Demurrer was decided upon.

Mr. Agar, in support of the Motion:—

Several authorities show that, in Cases thus circumstanced, the Court is in the habit of advancing a Demurrer; an anonymous Case in *Atkyns (a)*, and *Humphreys v. Humphreys (b)*. In the present Case, it is stated in the Bill, and sworn to, that there is a considerable Sum of Money in the Defendant's hands; that there is a dispute in the Ecclesiastical Court as to Probate; and that there is danger that the Money will be lost.

Mr. Bell, and Mr. Barber, contra:—

It is in the discretion of the Court whether or not it will accede to a Motion of this description. Is this a Case, where to the injury and delay of other Suitors, this Demurrer ought to be advanced? The Testator died in 1814. This Bill was not filed till 1817; and

(a) 2 Atk. 113.

(b) 3 P. Wms. 395.—The Cases cited from *Atkyns* and P. Wms. were Cases of *Pleas*,

but the same rule holds as to *Demurrers*. See *Cousins v. Smith*, 13 Ves. 164.

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no account is given by the Affidavit why the Bill was not filed sooner. The Affidavit states, that these Defendants have received Assets, but does not state there are any outstanding Debts; if there are none, a Receiver is unnecessary, for a Receiver cannot take Money out of the Parties hands. There is a positive Affidavit that Probate was granted to these Defendants, in the Ecclesiastical Court; that there was an appeal to the Delegates, on which the former Decree was confirmed, but another Caveat was entered on the ground that there were not proper parties to the former proceedings.

The VICE-CHANCELLOR:—

The Court is in a distressing situation in these Cases, It is hard upon Suitors to have particular causes advanced before theirs: they, have no opportunity of objecting, though their Cases, perhaps, are equally pressing. Much time, too, is consumed in discussing such Motions.

I shall always expect a very strong Case to induce me to advance a Cause. I admit, that wherever an Injunction Bill is impeded by a Demurrer, the Court will feel inclined to advance the Demurrer, where pressing reasons are shown for doing so; but here the Party died in 1814, and the Bill is filed so long after as in June 1817. Why not institute the Suit sooner? Such delay, unaccounted for, affords a reason, *in limine*, why the Demurrer should not be advanced.

Motion refused.

POWELL v. WALLWORTH.

29th July.

THIS was a Creditor's Bill, filed against the Defendant as Administratrix, on which a Decree was made 28th February 1814, and *James Otterton*, a Creditor, was, on a Motion by the Plaintiffs, restrained from proceeding at Law against the Defendant as such Administratrix. A Motion was now made by *Mr. Agar*, on behalf of *Ottertton*, for leave to prosecute the Suit, upon an Affidavit, that since the Decree, though made so long ago, no Interrogatories had been filed to examine the Defendant as to the Monies in her hands, so as to have them paid into Court.

Leave to prosecute a Suit, given to a Creditor, a Decree made some years before, not having been prosecuted.

Mr. Temple, contra:—

The Interrogatories are prepared, and we will undertake they shall be filed immediately.

The VICE-CHANCELLOR:—

The delay in filing the Interrogatories is not accounted for. The Motion is proper.

Motion granted.

1817.

Ex parte SPARROW.

5th July.

Affidavits on Petitions in Bankruptcy may be filed after the Petition day, but the Petition in such Case stands over to give time to answer them.

AN objection was made by Mr. *Leach*, when this Petition came on, to reading Affidavits filed after the Petition Day, and he cited the rule of Practice in Bankruptcy, as mentioned by Mr. *Rose* (a).

Sir *Samuel Romilly* observed, if any such Rule had ever been made, it had not been adhered to, such Affidavits being constantly received.

The VICE-CHANCELLOR :—

The Affidavits may be used; but as they have not had time to answer them, let the Petition stand over.

Petition ordered to stand over.

DAWSON and others v. BUSK and another.

14th and 21st July.

When several Exceptions are taken to an Answer, and the Master reports the Answer suf-

ficient, and one general Exception is taken to his Report, and some of the Exceptions to the Answer are allowed, some not, and others waved, the Court, in its discretion, may order the Deposit to be divided.

IN this Case ten Exceptions had been taken to the joint and several Answer of the Defendants, but the Master reported the Answer sufficient. An Exception was taken to the Master's Report, " For that the said Master hath in and by his said Report certified that the said Defendants Answer is sufficient in all the Points

(a) See 2 *Rose*, p. 161.

excepted thereunto; whereas the said *Master* ought not to have so certified, but he ought to have certified that the said Defendants Answer was insufficient in all the Points excepted thereunto. Wherefore, &c.”

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On arguing the Exceptions to the Report, some of them were allowed, some disallowed, and others waved. The *Vice-Chancellor*, on application for the Deposit, thought it ought to be divided; but it was urged, on the part of the Plaintiffs, it was not according to the Practice of the Court in such case to divide the Deposit, but that the Exception to the *Master's* Report being only one Exception, and some of the Exceptions to the Answer being allowed, the Plaintiffs were entitled to the Deposit; and they cited *Parker v. Prout (a)*. On the other hand, it was said, *Parker v. Prout* had not been followed, and that it was in the discretion of the Court to say what was to be done with the Deposit.

The VICE-CHANCELLOR:—

I desired a search to be made as to what had been done in similar cases, and the *Register (b)* has furnished me with the following Cases:

21st July.

In *White v. Williams*, before the *Lord Chancellor*, 4th March 1803 (c) *Fifty-one* Exceptions were taken by the Plaintiff to the sufficiency of the Defendant's Answer. *Thirty-six* Exceptions were taken by the Defendant to the *Master's* Report, some of them were allowed, some overruled, and others overruled in part. The 5*l.* deposited with the Register by the Defendant, was ordered

(a) 4 Bro. C. C. 1.

(b) Mr. Croft.

(c) Reg. Lib. B. 1802,

p. 248.

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to be paid back to the Defendant, and the consideration of the Costs of the Plaintiff respecting the Exceptions, was reserved until after the Defendant should have put in a further Answer.

In *Erskine v. Garthshore*, 8th August 1810, before the *Lord Chancellor (c)*, One Exception was taken by the Defendant to the *Master's* General Report. His Lordship referred it back to the *Master* to review his Report, (without allowing or overruling the Exception), and ordered the 5*l.* deposited with the Register, on filing the Exception, to be divided between the Exceptant and two persons who appeared by Counsel, but were not parties to the Suit, otherwise than as Executors of a Creditor of the Testator; this being a Creditor's Suit.

In *Bedford v. Bedford*, before the *Lord Chancellor*, 17th April 1812, One Exception was taken, by a Purchaser of a Lot, to the *Master's* Report of Title. The Exception was overruled, and the 5*l.* deposited with the Register ordered to be paid to the *Plaintiff* and *Defendant* in equal Moieties (*d*).

In *Messenger v. Tennant*, 4th May 1812, before the *Master of the Rolls*, Three Exceptions were taken by the Defendant to the *Master's* General Report. One was allowed, one overruled, and the other allowed in part. The 5*l.* deposited with the Register was ordered to be divided between Plaintiff and Defendant (*e*).

(c) Reg. Lib. A. 1809, fol. 1362. (e) Reg. Lib. B. 1811, fol. 866.

(d) Reg. Lib. A 1811, fol. 5-1.

In *Williams v. Jones*, 15th February 1810, before the *Master of the Rolls*, One Exception was taken by one set of Defendants to the *Master's General Report*. The Exception was overruled, and the 5*l.* deposited with the Register ordered to be divided between the Exceptants, and another set of Defendants. The Plaintiffs do not appear to have been interested in the question (*f*).

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I may mention also, some Cases which occurred before me; though they are not of equal authority with those I have mentioned.

In *Blyth v. Elmhirst*, 6th April 1815, Two Exceptions were taken by the Defendant to the *Master's Report of Title*. One of the Exceptions was allowed, and the other overruled. The Deposit was ordered to be divided (*g*).

In *Newman v. Hammona*, 19th March 1814 (*h*), Six Exceptions were taken by the Plaintiff to the sufficiency of the Defendant's Answer, which were allowed by the *Master*. One Exception was taken by the Defendant to the *Master's Report*. Three of the Exceptions taken to the Answer were allowed, and three overruled. The Deposit was ordered to be divided between Plaintiff and Defendant.

In *Edwards v. Pope* (*i*), 1st April 1814, Three Exceptions were taken by the Plaintiff to the sufficiency of the Defendant's Answer. One Exception taken to the Report. The Deposit was ordered to be divided.

(*f*) Reg. Lib. B. 1807, fol. 756. (*h*) Reg. Lib. B. 1813, p. 698.
 (*g*) Reg. Lib. A. 1814, fol. 27. (*i*) Reg. Lib. A. 1813, fol. 522.

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It is clear, therefore, in this Case, that I have authority to direct the Deposit to be divided. Let the Deposit be divided.

CATHERINE CLOUGH v. ANNE SOBIESKI WYNNE, CHARLES WYNNE, JOHN WYNNE, JULIUS WYNNE, JAMES OGILVIE, and ANNE his Wife, and EMMA WYNNE.

24th July.

Bequest of the Interest of the Remainder of Personal Estate, after payment of Debts and Legacies to A. S. W. for Life, and at her decease, to C. C. ; passes an absolute Interest to C. C. subject to the prior Life-Interest of A. S. W.

WATKIN WYNNE, by his Will, 14th June 1811, after giving pecuniary Legacies to several persons, and in particular, a Legacy of 2,000 *l.* to his Brother *Charles Wynne*, bequeathed “*The Interest of (a) the Remainder (after all my just Debts may be paid) I give and bequeath to my Mother, A. S. Wynne (one of the Defendants), for her Life, and at her decease, to Miss Catherine Clough, of, &c.*” the Plaintiff.

No Executor being named in the Will, the Defendant, *A. S. Wynne*, the Mother of the Testator, took out Letters of Administration, with the Will annexed.

The *Bill*, stating these facts, *prayed*, that it might be declared that the Plaintiff was entitled to the Principal of the residue of the Testator's Personal Estate and Effects, subject only to the payment of the Interest and Dividends to the Defendant, *A. S. Wynne*, during her Life :—That the usual accounts might be taken :—That the residue might be ascertained, and laid out, invested, and secured, so that the Defendant

(a) The words, ‘*The Interest of,*’ were interlined in the Will.

A. S. Wynne might receive and be paid the Interest and Dividends thereof during her Life, and that the Plaintiff might receive and be paid the Principal thereof after her death.

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v.

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and others.

The *Answer* of *A. S. Wynne* stated, she had expended on account of the Testator more than she had received from his Assets; but that when all the Assets were received, there would be a considerable residue, after the payment of the Testator's Debts and pecuniary Legacies; she, however, insisted, that according to the true construction of the Will, the Plaintiff was entitled only to a *Life Interest* in the residue of the Testator's Personal Estate and Effects, expectant on the death of her the said *A. S. Wynne*; and that such residue, subject to her Life Interest, and that of the Plaintiff's, was distributable amongst the Testator's next of Kin, *viz.* her the said *A. S. Wynne*, and the other Defendants, his Brothers and Sisters.

The *Answers* of the other Defendants claimed the residue, subject to the Life Interests of *A. S. Wynne* and the Plaintiff, to belong to them and *A. S. Wynne*, as the next of Kin of the Testator.

Mr. *Hart*, Mr. *Bell*, and Mr. *Roupell*, for the Plaintiff:—

This was the Will of a military Man on the eve of a Battle; the meaning is clear. He has added no words of restriction to the Limitation over. If the Interest of Money is given to one for life, and then to another without restriction, it carries the Principal to the last taker, just as a gift of Rents and Profits of a Real

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and others.

Estate passes the Estate; *Elton v. Shephard* (b), and
Philips v. Chamberlaine (c).

Mr. *Parker*, for the Defendant *A. S. Wynne*.

Mr. *Perry*, for the rest of the Defendants, next
of Kin.

The words "the Interest of" interlined in this Will, show, that an Interest for Life only in the residue was intended to be given to *A. S. Wynne*, and the Plaintiff, and unless those words are struck out of the Will, which cannot be, the Plaintiff cannot be absolutely entitled to the residue on the death of *A. S. Wynne*.

The VICE-CHANCELLOR :—

I am not surprised that a Will made by an Officer in Camp should be a little inaccurate. He appears to have sat down to dispose of all his personal Property. He gives his Brother *Charles Wynne*, one of his next of Kin, 2,000*l.* absolutely; and by the Will, as at first framed, he gives the remainder of his Property, first to his Mother for life, and then to the Plaintiff. If, luckily, he had left the Will in that form, there would have been no doubt; but he afterwards inserts the words, "the Interest of," which words apply to the Remainder given to the plaintiff, and must be read, "the Interest of the Remainder to my Mother for her Life, and at her decease, the Interest of the Money to the Plaintiff," Giving the Interest of personalty without limitation, passes the whole Interest, unless there are words used

(b) 1 Bro. C. C. 532.

Page 1. *Leapingwell*, 18 Ves.

(c) 4 Ves. 52, and see
Fairman v. Green, 10 Ves. 48,

463. *Stretch v. Watkins*, ante,
1 vol. p. 253.

to confine it to a Life Interest. There is nothing in the context of the Will to show a Life Interest only was intended to be given to the Plaintiff. The Testator knew how to give a Life Interest to the Plaintiff, if he meant to do so. The Defendant's construction of the Will would have the effect of making the Testator die intestate as to part of his Property. Who are the next of Kin? One of them is his Brother, *Charles Wynne*, to whom he has given a Legacy, and another, his Mother, to whom he has given a Life Interest; and it is not very probable, that having given them express Legacies, he meant them also to take as next of Kin. I think it must be understood from his Will, he meant to give his Mother an Interest for Life in the residue, and after her death, an absolute Interest in the Property, to the Plaintiff.

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v.
WYNNE,
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MEMORANDUM.

On this day, the Motions by such of the King's Counsel who were in Court, having been disposed of, the Gentlemen without the Bar began to make their Motions. Soon afterwards, a King's Counsel came in, and claimed a right to make his Motions. This was objected to, as the Motions had commenced without the Bar.

19th July

The *Vice-Chancellor* said, he understood, the *Lord Chancellor* had laid it down as a Rule, that when the King's Counsel present, had made their Motions, and the Motions were without the Bar, a King's Counsel could not come in and move, until the Motions without the Bar were disposed of; and this Rule he must follow.

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Ex parte AIKEN in re ASPINALL and ASPINALL.

21st July,
Bill lodged in a
Banker's hands,
to be applied
for a particular
purpose, but not
so applied,
claimable on the
Banker's becoming
Bankrupt.

THE Petition stated, that previous to the Commission against *John and James Aspinall, of Liverpool, Bankers*, they were employed as the Bankers of the Petitioner:—That the Petitioner in the course of his dealings was accustomed to accept his Bills, payable sometimes at the Banking House of the *Aspinalls*, and at other times at the *London Bankers of the Aspinalls*:—That in or about the Month of April 1816, the Petitioner had accepted various Bills to the amount of about 732*l.* payable on the succeeding 26th of June, at the *London Bankers of the Aspinalls*, and the Petitioner gave the usual notices of such acceptances to them, who debited the Petitioner with the amount:—That on the 22d June 1816, the Petitioner paid into the Banking House of the *Aspinalls*, Bills to the amount of about 612*l. 6s. 6d.* for the particular and special purpose of providing for such acceptances when they became due:—That amongst the Bills so paid in was a Bill for the Sum of 80*l.* which became due on or about the 19th September 1816:—That as the acceptances before mentioned became due they were dishonoured by the *Aspinalls*, and had since been paid by the Petitioner:—That on the 24th of June 1816, the *Aspinalls* suspended their payments; and on the 27th of June following a Commission issued against them, under which they were declared Bankrupts, and Assignees chosen:—That at the time of issuing the Commission the Bill for 80*l.* was in the Banking House of the *Aspinalls*, and was then in the possession of, or the amount thereof had

since been received by, their Assignees :—That the Petitioner had applied to the Assignees to deliver up the Bill to him, or the amount, which they refused :—That the Petitioner had already proved under the Commission against the *Aspinalls*, the Sum of 867*l.* 5*s.* 5*d.*, and had reserved a right to prove a further Sum ; but the Petitioner had not included in his proof the amount of the Bill for 80*l.* The *prayer* of the Petition was, that the Assignees of the *Aspinalls* might be ordered to deliver to the Petitioner the said Bill for 80*l.*, if the same remained in their possession, or the amount thereof, if they had received the same, and that they might pay the Costs of the application.

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The statements in the Petition were verified by the Affidavit of the Petitioner.

On the part of the Assignees of the *Aspinalls*, an Affidavit was made by *James Aspinall*, one of the Bankrupts, in which he stated, it was the Custom of the Deponent and his Partner in their banking Business to give credit generally for all Bills and Cash paid into the Bank, in one and the same column, and to debit the Customer with Bills and Cash paid to him in the same manner ; but there was no column for short Bills ; nor did the Deponent or his Partner in any one instance enter a short Bill :—That if any Bill was paid into their Bank which they did not approve of, they then refused to credit it, and deposited the same in their drawer, and sometimes advanced a Sum on the Security of such Bill to the person bringing it :—That when Bills were paid into their Bank, and the amount was credited to their Customers, from that moment they, to whom the Bills in all such Cases were indorsed, conceived they had

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the absolute control and disposition thereof, and did consequently in the course of their Business frequently pay away such Bills to other persons, and received the value thereof:—That such control and disposition arose from the Bills being actual payments to Deponent and his partner, and from the right of the person paying the same to call on them either in Cash or in other Bills, whether the Bills so paid into the Bank were due or not:—That the Petitioner did certainly give notice to the Deponent of several of his acceptances, amounting to 732*l.* falling due in London about the time mentioned in the Petition, and that the Defendant in consequence of such notice, debited the Petitioner in account with the amount of such acceptances as paid, although they were not then due, which was the regular course of dealing:—That the Petitioner paid into the Bank of the Deponent and his Partner, about the 22d June 1816, Bills to the amount of 612*l.* 6*s.* 6*d.*, which he believed were paid in for the purposes stated in the Petition, and that the Petitioner understood at the time that the Deponent would so apply such Bill, although Deponent did not expressly say he would do so; but Deponent admitted that he certainly did intend to remit for, and take up such acceptances when due, and with that view he wrote to the *London* Bankers, advising them of the same acceptances, and when they would be due:—That he did not take up the acceptances, or any of them, so that the amount thereof hath been credited in account with the Petitioner:—That the Bill for 80*l.* was one of the Bills so paid into Deponent's Bank by the Petitioner, on the 22d June 1816, which Bill remained in the hands of Deponent and his Partner at the period of their Insolvency, and the amount thereof had since been received by their

Assignees:—That at the time of the failure of the Deponent and his Partner, they were in advance for the Petitioner, in Cash payments, upwards of 4,000*l.*; but the Bills paid into their Bank by the Petitioner, which were at the time running, exceeded in amount 4,000*l.*, and have been since paid, so that there is now due from the Estate of Deponent and his Partner to the Petitioner, a Sum of 1,200*l.* or thereabouts, part of which, namely, 867*l.* 5*s.* had been proved under their Commission, with a right reserved to prove a further Sum.

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Sir *Samuel Romilly*, and Mr. *Montague*, for Petitioner:—

The Bills were delivered to the Bankrupts for a special purpose, the payment of his Acceptances. All the Bills were discounted by the Bankrupts except one, the Bill for 80*l.*, which the Petitioner seeks to have delivered up. From various Cases determined in the Bankruptcies of *Brickwood*, *Devaynes*, *Kensingtons*, and *Boldero*, it is settled, that Bills paid into Bankers for a particular special purpose, do not pass under the Bankruptcy, but are claimable by the persons depositing the same. In *Ex parte Peyron* (a), the same point was determined. The Entries of these Bankers in their books cannot affect the right of the Petitioner.

Mr. *Solicitor General*, and Mr. *Rose*, for the Assignees of the *Aspinalls*:—

If there had been a specific appropriation of these Bills, the Assignees would have no claim to them; but the question is, Whether there was a specific appropriation? The course of dealing with these Bankers

(a) 2 *Rose*, 366.

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was to consider all Bills paid into their Bank as Cash. In *Bent v. Puller (b)*, the mode of dealing was as in this Case, and there it was held to be a general banking account, and that the Bills could not be recovered as specifically appropriated.

If a balance had appeared against the Petitioner, he, certainly, could not have claimed these Bills. This Case does not fall within the decision in *Giles v. Perkins*; there it was expressly found that the balance was in favour of the Customer; but the balance was against the Customer in this Case at the time of the Bankruptcy.

This, therefore, cannot be considered as a specific appropriation of the 80*l.* Bill. *Ex parte Peyron* was a transaction as to one Bill only. Here the Bills were generally transferred. If the Bills had been entered as short Bills, then the Property in them would not have been divested until paid. These Bankrupts never entered any Bills as short Bills, but put suspicious Bills, which were not entered as Cash, in a drawer by themselves; whether entered as short Bills, or put in a drawer by themselves, in either case it would be evidence they were not intended to be adopted, and would remain the property of the person who sent the Bills. Here, however, the Bills were not put in the drawer, but entered generally as Cash. If the Bankrupts did not mean to adopt the Bills, they would have placed them in the drawer.

It is important to have this Point decided, as there are in this Bankruptcy, many other Bills similarly circumstanced.

(b) 5 Term Rep. 494.

Sir *Samuel Romilly*, in Reply :—

The Case depends upon the mere question of fact, whether the Bills were deposited for a special purpose : The Affidavit of the Petitioner states, the Bills were paid in for a special purpose. The Affidavit of the Bankrupt admits they were so paid in. The Bankrupt did not expressly say they should be so applied ; but whether he said so or not, he was bound to apply them to the purpose for which they were paid in. It does not signify how the Bankers chose to enter the Bills in their Books ; their entry could not alter the nature of the transaction. I do not dispute the authorities. It depends entirely upon how the Bills are paid in. In *Bent v. Puller*, it is said by Lord *Kenyon*, “ The Plaintiffs are not entitled to recover these Bills on the ground that the particular purpose for which they were deposited has not been answered, *because it does not appear that they were deposited to answer that particular purpose ;*” but in this Case, it is clear, the Bills were deposited for a special purpose. If the terms of this Deposit of the Bills had been reduced into writing, the Bankers could have made no pretence for appropriating the Bills. The entries in their books cannot affect the Petitioner.

The VICE-CHANCELLOR :—

This is not a question of Law, but of fact. No doubt, if there be a specific appropriation of Bills, the party is entitled to them. That is admitted. Was there then a specific appropriation in this Case ? There is a positive Affidavit of the Petitioner, that he deposited the Bills for a specific purpose, and that is not denied in the Affidavit of the Bankrupt. If it had been considered as contrary to the usual course of the Bankrupts dealings

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to take Bills thus specifically appropriated, they should have objected to taking them in that manner; not objecting, there was a tacit acquiescence in the purpose for which the Bills were delivered. Their mode of entering the Bills cannot decide the purpose for which they were deposited. If a Banker is expressly directed to apply Bills to a particular purpose, he must so apply them, or express his dissent. The fact of a specific appropriation of the Bill, by the Petitioner, is established, and the Law is clear.

Petition granted, with Costs to be paid out of the Bankrupts Estate.

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July.

On one of two Partners retiring from Trade, it was left to Arbitrators, to determine, amongst other things, what was to be paid to the retiring Partner for the Good-will of the

Trade; and they, on an understanding that the retiring Partner would not set up the Trade in the same Street, or its vicinity, awarded 500 l. as the Share of the retiring Partner for the Good-will, which was paid; but no mention was made in the Award as to the retiring Partner not carrying on the Trade in the same Street or its vicinity. Afterwards, he having set up the Trade in the same Street, a Decree made, on Parol Evidence of the understanding on which the Award was made, enjoining him, on the ground of Fraud, from carrying on the same Trade in the same Street, or its vicinity.

IN the year 1806, the Plaintiff and Defendant agreed to become Partners in the Business of Cheesemongers, in *Fore Street*, for seven years, and Articles of Partnership, 4th of October 1806, were accordingly executed. The Partnership was carried on until dissolved by Articles of Agreement, 7th August 1813. In the Articles of Agreement it was recited, amongst other things, "That the Plaintiff and Defendant had mutually agreed not to renew the said Co-partnership, or

to continue together as Co-partners for any further term; but that they had not fully agreed which of them should remain in the occupation of the Premises in which the said Trade had hitherto been carried on, upon what terms, or for what consideration either, and which of them, the said late Co-partners should retire from the said Concern;" and further reciting "there were debts and engagements then outstanding to a very considerable amount, to which the said Co-partners were jointly liable; and they were jointly entitled to Real and Personal Estate more than sufficient to meet or satisfy all such engagements; but that for the reasons therein mentioned it had been considered advisable that one of the said late Co-partners only should have the exclusive superintendance and administration of the Assets and Funds of the said late Co-partners, until the debts and engagements were finally liquidated, or until the Arbitrators hereinafter named and appointed should have made their Award between the Parties, upon giving security to the other of the said late Co-partners for the due application of such Assets and Funds;" and further reciting "that it had been agreed between them the said late Co-partners, that it should be referred to the Arbitrators thereinafter named, to award and determine, as well which of the said Co-partners should have the superintendance and administration of the said Assets and Funds; and also what security such Co-partner should give and execute to the other for the due application of such Assets and Funds; and also in what manner the dissolution of the said late Co-partnership should be publicly announced, and which of the said late Co-partners should continue and remain in the possession and occupation of the Premises, Stock in Trade, Effects and Business, and upon what terms, and whether he

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should give any and what security ; and also to cause a valuation of the said Real and Personal Estate, and direct what Conveyances, Releases, and Assurances should be made and executed by either of the said Co-partners to the other, and in what manner the balance should be struck between them, and the same paid, and what Interest, not exceeding legal Interest, either of the said Co-partners should pay or allow the other;" and further reciting, " that it had been agreed between the said parties, that all and singular the matters herein and hereinbefore mentioned should be referred and submitted to the Award, Arbitrament, and final Determination of *James Millar*, of &c. and *Thomas Harris*, of &c.; and of such other person, as they should in writing under their hands, to be indorsed upon the said Indenture, nominate and appoint, before they should begin to execute the Trusts and Powers thereby reposed in them." The Deed further contained mutual Covenants between the Partners to fulfil the Award, provided the Arbitrators should make their Award in writing, of and concerning the temporary managements and directions of the Assets and Funds of the Co-partnership, and of the security to be given within five days after the date of the Deed, and so as they should make their final and general Award concerning all the other matters and concerns of the Co-partnership, on or before the 29th of September then next; and it was agreed that the Submission to the Award should be made a Rule of Court.

Millar and *Harris*, on the 28th September 1813, made their Award, whereby they awarded that the whole of the Cash and Book Debts of the Co-partnership should be vested in the Plaintiff, and that he should be authorized to collect in the outstanding

Debts, and pay all the Claims upon the Co-partnership; and after reciting that there appeared to be a balance of 3,376*l.* 4*s.* 4*d.* in favour of the Co-partnership, which, when equally divided, would make the Sum of 1,688*l.* 2*s.* 2*d.* due to each party, they awarded that the Complainant should pay the Defendant on account of his Share, 1,000*l.* in Cash within twenty-one days from that time, and the remaining Sum of 688*l.* 2*s.* 2*d.* by his Promissory Note, at two months, subject to a renewal of one half at two Months longer, in case of need; and that in consideration of 2,000*l.* to be paid by the Plaintiff, the Defendant should assign over the Freehold Premises wherein the Co-partnership Trade was carried on, with the House adjoining, and also the Leasehold House opposite the same to the Plaintiff, with the good Will of the Trade, to the sole use and benefit of the Plaintiff; and they awarded that the said Sum of 2,000*l.* should be paid to the Defendant by four promissory Notes of 500*l.* each, at three, six, nine, and twelve Months, from the date thereof, and that the Deeds and Conveyance relating to the Premises should be deposited, as therein mentioned, until such four Notes were paid, and then to be given to the Plaintiff; and they further awarded, that the Rent and Taxes of the Premises should be paid, one half by each party, up to the 29th September; and that the Defendant should be at liberty to remain in the House wherein he then resided, until Christmas then next, without being charged any Rent; and that the Plaintiff should render an account of the Book Debts esteemed doubtful, amounting to 1,338*l.* 4*s.* 1*d.* every three Months, and pay the Defendant one moiety of his receipts on that account.

The Bill then stated that, a short time previous to

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the making the Award, the general substance and effect of which had been previously concurred in and agreed upon between the Plaintiff and Defendant, *Thomas Harris* was particularly requested by the Plaintiff and *James Millar* to confer with the Defendant upon the subject of his carrying on business in the neighbourhood, and particularly in *Fore Street*; and it was suggested, and wished by *Millar*, the Arbitrator on the part of the Plaintiff, that a restrictive clause on the subject should be inserted in the Award; but the Defendant made some objection thereto, but at the same time most solemnly pledged himself, and gave *Harris* an assurance, that he would not set up in the same line of business again, either in *Fore Street*, or its immediate vicinity, and that such assurance was reported to the Plaintiff, and *Millar*; whereupon the Plaintiff and *Millar* relying upon the promises and assurances of the Defendant, and being desirous of winding up the concern amicably, did not press or insist upon the introduction of such proposed restrictive clause into the Award; that not only was the Sum of 1,000 *l.* allowed in the account as a specified consideration for the Goodwill of the Trade, but that the whole of the Contract, as well for the Freehold Premises as for the Stock in Trade, was essentially founded upon the principle and idea that the Plaintiff was to be left in the undisturbed possession of the Trade, without the molestation of the Defendant by his setting up the same Trade or Business in the said Street or its vicinity, the Good-will of the Trade principally consisting of Retail in an open Shop in a populous neighbourhood. The Bill then charged, that the Defendant, in direct violation of the said Contract, and the understanding between him and the Plaintiff at the time of entering into such Contract,

lately purchased and fitted up certain Premises in *Fore Street*, and situated within sixteen doors of the Plaintiff, wherein he has opened a Shop with a new Stock, and commenced business as a Cheesemonger, whereby the Plaintiff's business has already, and is likely hereafter to be, materially injured and affected. The Bill then stated, that the whole of the Monies awarded had been paid to the Defendant, and *Prayed*, an Injunction to restrain the Defendant from carrying on the said business of a Cheesemonger in the said House in *Fore Street*, or any where else in the immediate vicinity thereof; and also from permitting any other person or persons to carry on the same business for him, or on his Account, in the said Street or its vicinity, or from selling or disposing of the said Premises to any other person for the purpose of carrying on the same or the like Trade.

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The *Defendant*, by his *Answer*, admitted the Co-partnership, the Articles of Agreement, and the Award, and admitted, "that it was suggested by *Millar*, that a restrictive Clause should be inserted in the Award to prevent the Defendant carrying on the business of a Cheesemonger either in *Fore Street*, or the neighbourhood thereof; but that, to the best of his recollection and belief, he never pledged himself, or gave the Plaintiff, or *Millar* or *Harris*, such or any such Assurance as in the Bill alleged; and that if any such restrictive Clause had been introduced into the Award, the same, or so far as related to such Clause, would have been bad, and not binding." The Defendant further admitted to be true he had taken a house as stated in the Bill, and that he himself daily attended, and is usually seen in such Shop, which is an open Shop, and that he

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uses his best endeavours to procure customers and increase his business; and has no doubt that persons who purchase Cheese of him would purchase Cheese of the Plaintiff, if Defendant had not set up the Business; and that the Business is materially detrimental to the Plaintiff, and may hereafter be still more so; and further stated, "he denies that he ever contracted or agreed, or promised he would not set up business again in *Fore Street*, or the vicinity thereof, as a Cheesemonger."

Exceptions were taken to the Answer of the Defendant, and he put in a further Answer, in which he denied, "that he ever solemnly, or in any manner, pledged himself, or gave the said *Thomas Harris* an assurance to the purport or effect in the said Bill, in that behalf, mentioned, or any other assurance or pledge respecting the not carrying on the said business, as by the Bill alleged:" "that he never did or would consent to be precluded from carrying on the business of a Cheesemonger, in the vicinity of *Fore Street*, or even in *Fore Street* itself; and that he doth not believe it to be true, that the Sum of 1,000*l.* in the Bill mentioned, was allowed in the account as a specific Consideration for the Good-will of the Trade, or that the whole of the Contract for the Stock in trade was essentially, or in any degree, founded upon the principle or idea that the Plaintiff was to be left in the undisturbed possession of the said Co-partnership trade or business, without the molestation of the Defendant, by his setting up the same trade or business of a Cheesemonger in *Fore Street*, or even its vicinity; and denied, "that to his knowledge and belief, the Sum of 1,688*l.* 2*s.* 2*d.* or the Sum of 2,000*l.* by the said

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Award directed to be paid by the Plaintiff, was in any manner for the Good-will of the said Trade or Business, or that the Good-will of the said Trade or Business formed any part of, or was included, or considered as included, in the Consideration for which the Defendant was to pay the Money which he was ordered to pay, or any part of such Money, or that the Money which was to be paid by the Plaintiff, or any part of such Money, was regulated or fixed upon any principle, understanding, or idea that the Plaintiff was to have the sole and exclusive enjoyment of all the benefit arising from the situation of the Premises, and of the Defendant's not again engaging in or carrying on the same line of business, even in the same street or its vicinity, or that the Defendant ever knew or understood that such as in the said Bill in that behalf mentioned, was the principle or idea upon which the Money to be paid by the Plaintiff, as by the said Bill, in that behalf alleged, was regulated or fixed; but on the contrary thereof, he, Defendant, always considered that he was to be at full liberty, and not to be restricted from setting up the business of a Cheesemonger in *Fore Street*, or wherever else he might think fit."

The Plaintiff examined the Arbitrators, *Harris* and *Millar*. *Harris*, by his Deposition, stated, " that discussions took place between the Plaintiff and Defendant, and the Arbitrators, previous to their Award relative to the exclusion of the Defendant, or preventing him from carrying on the business of a Cheesemonger in *Fore Street*; and that at a Meeting, on the 27th September 1813, held at the house of the Plaintiff, between the Plaintiff and Defendant, *Millar* proposed that the Defendant should not set up or carry

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on the trade or business of a Cheesemonger in *Fore Street*, or in the neighbourhood thereof; and that the Defendant should or was to receive a Compensation from the Plaintiff for the Good-will of their said Co-partnership Trade, or in other words, in effect for his the said Defendant's not so setting up or carrying on the said Trade or Business in or in the neighbourhood of *Fore Street* aforesaid:—That the Plaintiff and Defendant then did, in the presence of the Deponent and *Millar*, calculate the value of the Freehold and Leasehold Estates belonging to the Partnership, and of the Horses, Carts, Chaise, and all the Utensils and Fixtures belonging to the Partnership, and of the Good-will of the Trade, to the Partner continuing to carry on the business, which together amounted to the Sum of upwards of 4,000*l.* but which, with the privity and consent of the Plaintiff and Defendant, was settled or agreed to be considered as 4,000*l.* which said Sum was, as Deponent then understood, and now verily believes, calculated and made out in the following manner; that is to say, Freehold and Leaseholds 2,500*l.*; Horses, Carts, Chaise, and all Utensils and Fixtures in Trade, 500*l.*; and the Good-will of the Partnership Trade, 1000*l.*; and it was agreed that a moiety of these several Sums should be paid by the Plaintiff to the Defendant:—That on *Millar's* drawing up the Account, and therein introducing, “with the Good-will of the Trade,” *Millar* observed, he did not know whether such words were or were not strong enough to embrace and convey the true meaning of the Parties interested in the Award relative to the Defendant's not setting up or carrying on the trade of a Cheesemonger in *Fore Street*, or in the neighbourhood thereof, so as to injure the Plaintiff. Upon which he, Deponent,

took the intended Award aside, and desired the Defendant to read the same, and particularly to observe or mark the wording thereof, and particularly the said words, "with the Good-will of the Trade;" and Defendant perused it, and expressed himself satisfied therewith.

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The Deposition further stated, that at a Meeting of the Parties on the 28th September 1813, and immediately preceding the signature of the Award, *Millar* observed to the Plaintiff and Defendant, "Now mind, it is understood that Mr. *Gardner*, meaning the Defendant, is not to set up or carry on the business of a Cheesemonger within a few doors of or near the said Premises, so as to injure the Plaintiff;" to which there was not any reply made by any person:—That it was clearly understood and agreed, between Deponent and *Millar*, that the Defendant was to be excluded from the said Partnership Trade, and prevented from carrying on the Business of a Cheesemonger in *Fore Street*, or in the vicinity: That Deponent and *Millar* did by their Award, allow the Defendant the Sum of 2,000*l.* for his Interest or Half Share in the Freehold and Leasehold Property belonging to the Partnership, for his Half Share in the Horses, Carts, Chaise, and the Utensils and Fixtures in and belonging to the Partnership, and his Half Share or moiety of the Good-will of the Trade; that is, as a Compensation to the Defendant for leaving the said Trade or Business to be carried on by the Plaintiff, to and for his own use and benefit; and for him, the Defendant, not to set up and carry on the Trade or Business of a Cheesemonger in *Fore Street* aforesaid, or in the neighbourhood thereof."

The Deposition of *Millar* stated, "that a discussion

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did take place between this Deponent and the aforesaid *Thomas Harris*, as such Arbitrators as aforesaid, in the presence of the said Complainant, previous to the time of this Deponent and the said *Thomas Harris* making their Award relative to the exclusion of the said Defendant, preventing him from carrying on the business of a Cheesemonger in *Fore Street*, in such Pleadings likewise mentioned:—That it having been agreed between the Plaintiff and Defendant, that the Defendant should altogether withdraw himself from the Partnership which had subsisted between the Plaintiff and Defendant as Cheesemongers; and that such Trade should be continued by and for the sole use and benefit of the Plaintiff; this Deponent and the said *Thomas Harris*, as such Arbitrators as aforesaid, did, in the evening of the 28th day of September 1813, set about making their Award as to the terms and conditions on which the said Dissolution of Partnership was to take place:—That he, this Deponent, commenced the drawing out or preparing the said Award; and as soon as this Deponent had written down to that part thereof which related to the Defendant assigning over (amongst other things), to the Plaintiff, the Good-will of the Trade, for the sole use and benefit of the Plaintiff, the said *Thomas Harris*, as the Arbitrator appointed by and on the behalf of the Defendant, observed to the Deponent, in the presence of the Plaintiff, that the said *Thomas Harris* did not know whether the said Defendant would submit or agree to be limited or restricted from carrying on Business in *Fore Street*, or the immediate neighbourhood thereof; whereupon this Deponent then stated to the said *Thomas Harris*, that he, Deponent, and said *Thomas Harris*, having, as such Arbitrators, allowed 1000*l.* for the Good-will of the

said Partnership Trade, it was indispensably necessary to ascertain whether the Defendant thought himself at liberty to set up or carry on the Trade of a Cheesemonger in the immediate neighbourhood of the said Partnership House of Business; for if the Defendant did, that he, Deponent, should insist upon striking out the Sum of 500*l.* allowed to the Defendant in the aforesaid Award, as a Compensation for Defendant's share or Half Part of the value of the Good-will of the said Partnership Trade :—That the said *Thomas Harris* then said, that he would go and consult the said Defendant upon that point :—[That *Thomas Harris* soon afterwards returned, and said, that he had consulted the Defendant on such point; and that the Plaintiff and this Deponent might rely upon it, that the Defendant would not ever set up in the said Trade of a Cheesemonger in *Fore Street* aforesaid, or the immediate Neighbourhood thereof; and that the Defendant had said, he thought he should take a house in *Newgate-street* or *Holborn* :] (*a*) And Deponent thereupon asked the Plaintiff, in the presence and hearing of said *Thomas Harris*, whether the said Defendant's word might be taken or relied on in that respect; to which the Plaintiff replied, he thought it might; or the said *Thomas Harris*, this Deponent, and the Plaintiff did, on the occasion aforesaid, express themselves to each other to such or the like effect :—That it was then fully agreed between this Deponent and said *Thomas Harris*, as such Arbitrators as aforesaid, that the said Sum of 1000*l.* should remain as the value of the Good-will of the said Partnership Trade; and this Deponent verily believes, that the said

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(*a*) This passage in the De- rejected as hearsay Evidence.
position was objected to, and See *post*.

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Defendant has accordingly received the said Sum of 500 *l.* of and from the Plaintiff, as his the said Defendant's portion or share of the Good-will of the Partnership Trade."

On his *Cross Examination*, *Thomas Harris* deposed, that the Defendant did, previously to the making of the said Award, tell the Deponent, that he objected to any clause being introduced into the Award, to restrain or prevent him from carrying on the Business of a Cheese-monger in *Fore Street*, or elsewhere, or to that effect; but that at other times the Defendant appeared to Deponent to be quite indifferent as to the matter.

Sir *Samuel Romilly*, Mr. *Fonblanque*, and Mr. *Wingfield*, for the Plaintiff:—

A Sum of 500 *l.* has been received by the Defendant for the Good-will of the Trade, and it was clearly understood, that the Defendant was not to set up the Trade in *Fore Street*, or its vicinity; but the Defendant has set up the same Trade, sixteen doors off; and, as he admits in his Answer, it is greatly detrimental to the Plaintiff; it is a Case, therefore, for an Injunction, as prayed by the Bill. The Defendant suffers the Arbitrators to make their Award in terms, as they supposed, sufficient to prevent him carrying on the Trade in *Fore Street* and its vicinity; and then, having received the Consideration for the Good-will, he turns round and says, the Award does not in terms prevent him carrying on the Trade in the Street. It is a Fraud upon the Plaintiff, who, from the solemn promise of the Defendant, that he would not so carry on the Trade, did not insist on stronger words being used in the Award. It is like the case of one on his death-bed

expressing a desire to give a Legacy, and the Residuary Devisee telling him it is unnecessary to be at that trouble, as he will take care it shall be paid. If afterwards he refuses to pay it, it is considered as a Fraud on his part, and the intended Legatee may enforce payment of the Money.

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[Upon Sir *Samuel Romilly's* proposing to read the Evidence of *Harris* and *Millar*, it was objected by the *Defendant's* Counsel, that Parol Evidence could not be read to *add* to an Award, as this Bill sought to do; for in the Submission or in the Award no mention was made of any restriction in carrying on the Trade.]

The VICE-CHANCELLOR:—

Let the Evidence be read *de bene esse*.

[The Evidence of *Harris* and *Millar* (with an Exception as to so much of *Millar's* Evidence, which was Hearsay, stating merely what *Harris* was told by the Defendant, not in the presence and hearing of the Deponent), was read.]

Mr. *Wetherell*, and Mr. *Lovat*, for Defendant:—

The Prayer of the Bill is singular; not only to restrain the Defendant, but to prevent him selling his House to any other person for the purpose of carrying on the same or the like trade. No Injunction was applied for on the filing of the Bill. The Bill is quite novel—it is to execute an Award, and add terms to it. The Award does not say that the Defendant shall not carry on the same Business in *Fore Street*, or its vicinity. Parol Evidence is not admissible to add to, vary, or explain an Agreement. If there was a mistake in the Award, a Bill should have been filed, to set it aside

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on that ground. The Award, it is said, ought to have contained a prohibitory clause; if that be so, there is a mistake in the Award; but the Award cannot be acted upon as a perfect Award, and as if the prohibition had been contained in it. Neither the Submission to the Award, or the Award itself, make mention of a prohibition as to carrying on the trade. The Arbitrators could not have introduced such a restriction into the Award, it not being authorized by the Submission. It was known that the Defendant would not submit to such a restriction being introduced into the Award. There might have been an expectation, that the Defendant would not carry on the Trade in the same Street, or its vicinity, but the Court cannot found a Decree upon such expectation. What is the meaning of *vicinity*? What boundaries is it confined to? All general restraints on trade are bad. Money was awarded to the Defendant for the *Good-will* of the Business; but the sale of the Good-will of a Shop does not prevent the Vendor setting up the same business in the same Street, where the Shop is. In *Shackle v. Baker (b)*, Lord *Eldon* says, "If a man sell the Good-will of a Trade, the Vendor will be at liberty to set up the same trade in any other situation." In *Crutwell v. Lye (c)*, his Lordship expresses a similar opinion. Suppose this to be a Case in which Parol Evidence is admissible, what is the amount of the Parol Evidence? *Millar's* Deposition does not show that the Defendant ever agreed or promised that he would not carry on the Trade in *Fore Street* or its vicinity. As to what he heard from *Harris*, that has been rejected by your *Honor*, as Hearsay Evidence. There is nothing, therefore, in his Evidence. How

(b) 14 Ves. 468.

(c) 17 Ves. 335.

then does it stand on the Evidence of *Harris*, the Plaintiff's Arbitrator? He does not show it was the clear understanding of the Parties that there should be a restriction, or any undertaking on the part of the Defendant not to carry on the business. Besides, his Evidence is met by the strong and positive denial of the Defendant that such a prohibition was ever agreed to, or would have been concurred in. The rule is clearly established, that the Evidence of a single Witness, not corroborated, is not sufficient against a positive Denial by the Answer, *Cooke v. Clayworth (d)*. If the Parol Evidence is of no avail, then clearly there is no foundation for the Bill; the Submission and Award being totally silent as to any restriction on the Defendant, as to trading.

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Sir *S. Romilly*, in Reply :—

The ground of this Bill is, the Fraud practised by the Defendant upon the Plaintiff. If a man, supposing he has a Lease, makes improvements, the Owner seeing them, and knowing the misconception, he will be bound to grant a Lease (e). Here the Defendant knew, it was supposed, he would not carry on the Trade in the same Street; and it is fraudulent to set up this Shop, which he admits is injurious to the Plaintiff. I do not dispute the Cases determined on the sale of a Good-will; but here the Defendant, at the time he is selling the Trade, and upon a confidence that he will not carry on the Trade in the Street, is meditating a Fraud. Strictly speaking, this is not an Award, but merely ascertaining the Value of the Good-will, &c. In *Shackle v. Baker*, the restriction was against trading in *London, Middlesex, or Westminster*; that was too general; but this is only

(d) 18 Ves. 12.

(e) See on this subject *Pilling v. Armitage*, 12 Ves. 78.

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a restraint of trading in a particular Street or its vicinity. What is the exact Boundary prescribed by the word *Vicinity*, may be doubtful; but there can be no doubt that a Trade in the next Street would be in the vicinity. That word is as explicit as the word *Ornamental*, used in Injunctions to prevent the cutting of Timber. In *Shackle v. Baker*, the Lord Chancellor says, the Sale of a Good-will of a House does not prevent the setting the setting up the same Trade “*in any other situation.*” Now this Trade is set up in the same, not in another, situation. An Injunction could not have been obtained on the filing of the Bill, because the only relief sought by the Bill is an Injunction.

Then as to the Evidence, it is clearly admissible to prove the deception practised on the Plaintiff; and the Evidence greatly preponderates in point of credibility, over the Denial, by the Answer, of the Defendant.

The VICE-CHANCELLOR :—

The Arbitrators were not like Arbitrators in general, to decide disputed matters, but to arrange terms, adjust accounts, and determine on subjects upon which they must first consult the Parties. It was an Arbitration of a mixed nature. They did not call in a third person, as they might have done.

This is a Retail Trade, in a populous neighbourhood, and the Defendant admits, by his Answer, he has set up the same trade sixteen doors from the Plaintiff's Shop, and that it is injurious to his Trade; and insists he has a right so to do: positively denying he agreed to any restriction as to trading. The ground of the Plaintiff's Bill is, that the Defendant held out an expectation and promise, that he would not set up the

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Trade in *Fore Street*, or the Neighbourhood; that that was the clear understanding of the Parties and of the Arbitrators, and that on that understanding the Award was made, though the Submission and the Award are silent as to any restriction on the Defendant's trading. From the evidence of *Harris*, it appears, that in the evening of the 27th of September 1813, the Plaintiff and Defendant arranged and settled the accounts; and it was finally agreed that the Defendant should retire from the business, (a parol Agreement independent of the written Instrument):—That the Plaintiff should receive the Debts, and that in consideration of the Plaintiff paying to the Defendant the Sum of 2,000*l.*, the Defendant should assign the Freehold and Leasehold Property, with the *Good-will* of the Trade, for the sole use and benefit of the Plaintiff. At the same Meeting it was proposed by *Millar*, that the Defendant should not set up or carry on the Trade in *Fore Street*, or in the Neighbourhood, and the Defendant to have a compensation for the Good-will of the Trade, or in other words, as *Harris* says, for not setting up or carrying on the Trade in, or in the Neighbourhood of *Fore Street*. This Evidence I consider as admissible, because it shows the foundation on which the Award was made. Upon this Agreement and Proposal the Arbitrators proceed to calculate the value of the Freehold and Leasehold Property, Horses, Utensils, &c. and Good-will, calculating the Good-will at 1000*l.*, and proceeded to draw up their Award accordingly. *Millar* afterwards doubted whether the words "with the Good-will of the Trade" were sufficient to express the true meaning of the Parties as to the Defendant's not carrying on the Trade in *Fore Street*, or the Neighbourhood, upon which *Harris* desired the Defendant to look at

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the words, and he expressed himself satisfied. The Meeting on the 27th was adjourned to the next day, when all the Parties met; and before the Award was signed, *Millar* observed to the Plaintiff and Defendant, and to *Harris*, " Now mind, it is understood that Mr. *Gardner*, meaning the Defendant, is not to set up or carry on the Business of a Cheesemonger within a few doors, or near the said Premises, so as to injure the Plaintiff;" to which observation, no reply was made. And *Harris* further says, he and *Millar* did, in their Award, allow the Defendant the Sum of 2000 *l.* for his Interest or Half Share in the Freehold and Leasehold Property belonging to the Partnership, and for his Half Share of the Horses, &c., and his Half Share or moiety of the Good-will of the Trade, that is, as a compensation to him, the Defendant, for leaving the Trade to be carried on for the sole use of the Plaintiff, and for not carrying on the Trade in *Fore Street*, or in the Neighbourhood." *Millar*, the other Arbitrator says, a discussion took place between him and *Harris* in the presence of the Plaintiff, as to the restriction upon the Defendant as to trading; and that when he had proceeded in drawing up the Award, and to the introduction of the words " the Good-will of the Trade for the sole use and benefit of the Defendant," *Harris* said, " he did not know whether the Defendant would submit or agree to be limited or restricted in carrying on Business in *Fore Street*, or the immediate Neighbourhood thereof; whereupon he, *Millar*, observed, that as he and *Harris* had allowed 1000 *l.* for the Good-will of the Partnership Trade, it was indispensably necessary to ascertain whether the Defendant thought himself at liberty to set up or carry on the Trade of a Cheesemonger in the immediate neighbour-

hood of the Partnership House of business; for if the Defendant did, he, *Millar*, should insist upon striking out the Sum of 500*l.* allowed to the Defendant for his Share of the Good-will of the Trade. Upon which *Harris* said, he would go and consult the Defendant upon that point; and he then states what *Harris* said when he returned from the Defendant; but as *Harris* was the best Evidence as to what was said by the Defendant, I did not think that what *Millar* heard from *Harris* ought to be received in Evidence. *Harris* further says, on his Cross Examination, that the Defendant did, previously to the Award, object to any Clause being introduced into it to restrain or prevent him from carrying on the Business of a Cheesemonger in *Fore Street*, or elsewhere; but that at other times the Defendant appeared to be quite indifferent as to the matter.”

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It is certainly true, that if there be only one Witness, and his Evidence is contradicted in positive terms by the Answer of the Defendant, and there are no circumstances giving superior weight to the testimony of the Witness, no Decree can be made on such Evidence. Lord *Eldon* says, in *Evans v. Bicknell* (e), “ A Defendant in this Court has the protection arising from his own conscience in a degree in which the Law does not affect to give him protection; if he positively, plainly, and precisely, denies the assertion, and one Witness only proves it as positively, clearly, and precisely, as it is denied, and there is no circumstance attaching credit to the assertion overbalancing the credit due to the denial, as a positive denial, a Court

(e) 6 Ves. 184.

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of Equity will not act upon the testimony of that Witness." Taking this to be the Rule, let us see how this Case stands. A serious Charge is made by this Bill against the Defendant, not only of a Breach of Faith, but of Fraud, by receiving Money not to do that, which he afterwards does. He was therefore called upon to answer whether he did not hold out inducements to make the Plaintiff and the Arbitrators believe that he did not intend to carry on the Trade in *Fore Street*, or its Neighbourhood. That the subject was started on the 27th, is clear from *Harris's Evidence*, and the Defendant, in his first Answer, admits that the general substance and terms of the Award were previously agreed upon between the Plaintiff and Defendant, and says, "*it may, for any thing this Defendant knows to the contrary, also be true that the said Thomas Harris was positively requested by the Plaintiff and Millar to confer with the Defendant upon the subject of the Defendant carrying on Business in Fore Street, and the immediate vicinity, as a Cheesemonger. He then states, " he positively objected to any Clause being inserted in the Award which could have the effect of preventing him carrying on the Business of a Cheesemonger either in Fore Street, or in the Neighbourhood thereof." But that was not to the point. Did he give the Parties any reason to believe he would not carry on the Trade in Fore Street, or its neighbourhood? That was the material point as to which he should have answered. As to this, he says, that "to the best of his recollection and belief, he never pledged himself, or gave the said Complainant, or the said James Millar, or Thomas Harris, such or any assurance as in the said Bill in that behalf alleged." It is very extraordinary that in this part of the Answer he can only speak but*

to his *belief* on so important a particular, as to which his attention had been so strongly drawn. It is true, that in a subsequent part of his first Answer, "he denies he ever contracted, or agreed, or promised he would not set up Business again in *Fore Street*, or its vicinity, as a Cheesemonger." The Answer does not, I think, when the whole of it is considered, amount to that clear denial, in opposition to the testimony of the Witness, which Lord *Eldon* requires, to render the Evidence of one Witness of no avail.

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Taking, however, both the Answers of the Defendant to be a clear denial of the facts sworn to by the Witness, let us then consider what is the effect of the Sale of the "Good-will" of the Shop, which it was clear was valued at 1000*l.* What is the "Good-will" of a Retail Shop in a populous neighbourhood? "Good-will," is defined by Lord *Eldon* to be "the probability that the old Customers will resort to the old Place (*f*).". A person, not a Lawyer, would not imagine that when the Good-will and Trade of a Retail Shop were sold, the Vendor, might the next day set up a Shop within a few doors, and draw off all the Customers. The Good-will of such a Shop, in good faith and honest understanding, must mean, all the benefit of the Trade, and not merely a benefit of which the Vendor might the next day deprive the Vendee. The authorities however, are strong to show that the Sale of a *Good-will* does not import restraint, and that a person selling the Good-will of a Business, for however large a consideration, is not prevented setting up the Trade. In *Shackle v. Baker* (*g*), it was held that the sale of a *Good-will* leaves the Vendor at liberty to

(*f*) *Crutwell v. Lye*, 17 Ves. 346. (*g*) 14 Ves. 468.

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set up the same Trade *in any other situation*. But here the Trade is carried on in the same situation. That Case is somewhat similar to the present. There, upon an Agreement to sell the Good-will of the Trade, the Plaintiff proposed that a Covenant should be entered into, that the Defendant and his Wife should not carry on, or use, or permit any other person to carry on or use the Trade in *Middlesex, London, or Westminster*; but that Covenant was objected to by the Defendant as an impeachment of his honour, and was waved upon the undertaking of the Defendant and his Wife not so to use the Trade. Afterwards the Sister, at the instance of the Defendant and his Wife, set up the Trade in the neighbourhood, and took some of the Customers of the Plaintiff. The Defendant brought his Action at Law for the Money agreed to be given for the Good-will. The Plaintiffs thereupon filed their Bill for an Injunction to stay the Proceedings at Law, and on the filing of the Bill, moved for an Injunction, but the *Chancellor* refused it, giving the Plaintiff leave to move again when the Answer was put in; observing, "Considering the Covenant which this Plaintiff proposed to have, as having been kept out by bad faith, yet if I now enjoin before Answer, or any default of appearance, I must give the same effect to the Agreement as I should give at the hearing, if the Covenant had been contained in it, upon the ground of Fraud." In *Cruttwell v. Lye (h)*, Lord *Eldon* says, "with regard to conduct, a man might stand by and give encouragement, generating a confidence that he would not engage in such a Trade, inducing others to involve themselves; on the ground of which conduct this Court might interpose."

(h) 17 Ves. 385.

The ground on which I decide this Case, is, upon the good faith and understanding when this Money was awarded to the Defendant for the Good-will, that he would not carry on the Trade in *Fore Street*, or its vicinity, which good faith and understanding was the occasion that the Award was silent on the subject. It is clear such an understanding did exist.

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It is positively proved by *Harris*, that before the Award was signed, and when all the Parties were present, the Plaintiff, the Defendant, and the other Arbitrator, that *Harris* made this Declaration, "Now mind, it is understood that Mr. *Gardner* (the Defendant), is not to set up or carry on the business of a Cheesemonger within a few doors, or near the said Premises, so as to injure the Plaintiff;" to which no reply was made. If the Defendant intended to reserve a liberty to carry on the trade near the Premises, why did he not object to this Declaration by *Harris*? The Evidence of both the Witnesses, *Harris* and *Millar*, proves that such was the understanding of all the Parties. The Declaration of *Harris*, and the silence of the Defendant, when it was made, is not denied by the Answer.

It is said this is a novel Bill, it being to carry an Award into execution, with an addition by parol Evidence. It is not so. It is a Bill for an Injunction on the ground of Fraud, by receiving 500*l.* for not doing, what he afterwards does do; and resembles the Case put in the Argument, of a Testator intending to give a Legacy, which the residuary Legatee says is unnecessary, as he will pay it. When in such Case a Bill is filed for the Money so intended to have been given as a Legacy, it is not a Bill to carry the Will

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into execution with an addition furnished by parol Evidence, but it is a relief sought in respect of the Fraud upon the intended Legatee.

Suppose there was no dispute as to the facts stated in the Bill, but that they were admitted, it is clear the Court would relieve. Then, how is the fact? The Answer says, there was no such Agreement not to Trade, but that is clearly contradicted by the Witnesses. Suppose only the Evidence of one Witness, *Harris*, could be read, still, under the circumstances, more credit I think is to be given to his testimony than to the contradiction of it in the Answer; all the circumstances afford strong grounds for believing his testimony. I must believe what *Harris* says. The Defendant is interested; the Witness is disinterested and impartial, with nothing to bias him. It never could have been the intention that the Plaintiff should pay 500 *l.* for nothing. The Arbitrators had no idea that the Defendant was to be allowed to carry on the Trade in *Fore Street*. Their award was made upon an understanding that it should not be so carried on. The Defendant's memory must be impaired, or affected, by his Interest. If it were left to a Jury to decide which was most entitled to credit, the Witness *Harris*, or the Defendant's Answer, no Jury, I think, would decide in favour of the latter.

In a Case, however, of so much importance to the Parties, I will not preclude the Defendant from having an Issue, if he chooses. An Issue has been directed in some cases where an Answer is opposed to the testimony of a single Witness; but the defendant must take the Issue at the peril of Costs. The Issue must be, Whether at or before the time of the Award, it was or was not

promised, or agreed, or understood, that the Defendant should not carry on the Trade in *Fore Street*, or its vicinity?

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Mr. Hart:—

We will take a day or two, if your *Honor* pleases, to consider whether we shall take an Issue.

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THOMAS ROBERTSON, by his Will, 7th of May 1812, amongst other Bequests, bequeathed as follows:—"To *Richard Mann*, my Servant, I bequeath an Annuity of 10*l.* per Annum, during his natural life; to be paid out of the Rents arising from an Estate of a House situated in *Colmer Lane*, in the Parish of _____, in the County of *Devon*, should he be in my service at the time of my decease. There being a Deed existing between me and my Brother, whereby I gave up all Right and Title to my Interest in the House aforesaid, which I have requested him by letter to cancel. These deeds are now in the possession of *William Jacobson*, Esq. Attorney at Law, *Plymouth*, in the County of *Devon*. It is my desire, provided the said Deeds are not cancelled, that the Sum of 200*l.* shall be secured from the Sum of 2,000*l.* Five per Cents. Navy, in Trust, for the said *Richard Mann*, during his Life. I also give the said *Richard Mann* all my Clothes and Linen; and I constitute and appoint *John Copland*, &c. Executors of my Will."

31st July.
Upon the words of the Will, Legacy decreed, though the Fund out of which it was directed to be paid, failed.

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The Will was not executed and attested so as to charge or affect Real Estates.

The Testator died, 8th May 1812.

Copland alone proved the Will.

The Plaintiff continued in the service of the Testator until his death; and by his Bill, insisted that he was entitled to the Annuity of 10*l.*; to have 200*l.* Navy *Five per Cents.* set apart to secure the same; and that if the Testator had no Navy *Five per Cents.* at the time of his death, that the Defendant ought to purchase 200*l.* in the said Annuities, for the purpose of answering and securing the Plaintiff's Annuity. And the *Prayer* of the Bill was accordingly.

The *Defendant* by his *Answer* stated, that the House in the Will mentioned, was a certain Freehold House, to which the Testator and his Brother were entitled as Tenants in Common, and that the Deeds mentioned in the Testator's Will, were Deeds by which the Testator agreed to give up his right to his Brother, in consideration of an Annuity; and that some differences arising as to the operation of the Deed, it was agreed to rescind the same; and the Deed being in the hands of *Jacobson*, an attorney, the Testator wrote to his Brother the letter in the Will mentioned, and that the latter went to *Jacobson*, and desired him to cancel the Deed; and that the Testator received a moiety of the Rent of the House from that period, up to his death:— That the Testator had not at his death any Navy *Five per Cents.* and submitted the Plaintiff was not entitled to the Legacy.

Mr. *Fonblanque*, and Mr. *Parker*, for the Plaintiff:—

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The first object of the Testator was to make the Rents and Profits of the House liable to the payment of the Annuity; but that object has failed, the Will not being executed so as to effectuate a charge upon the Freehold Estate. But the Legacy does not therefore fail; for in fact, the Deeds mentioned in the Will were not cancelled. Though the Testator had no Navy *Five per Cents.* at his death; yet as this is not a specific Legacy, 200*l.* Navy *Five per Cents.* must be purchased as a Security for the payment of the Annuity. In *Ashton v. Ashton (a)*, Lord *Talbot* says, “ had the Testator when he made his Will, had no Stock at all, the whole might have been to be made good out of the rest of the Personal Estate ” (b).

Mr. *Bickersteth*, for the Defendant:—

The condition on which the Personal Estate was to be charged, was, if the Deeds relating to the House were not cancelled. It should be shown whether the Deeds were or were not cancelled; but nothing is stated as to that fact, either in the Bill or the Answer. There is no Case like this, in which, where a Legacy of Stock is given out of a larger Sum of Stock, and there is no such Stock standing in the Testator's name, that an Executor has been decreed to buy so much Stock as will answer the Legacy.

Mr. *Fonblanque*, in Reply:—

If they meant to insist that the Personal Estate was not liable to make good this Legacy, they should have

(a) 3 P. Wms. 383, S. C. MSS. (b) *Ib.* p. 386.

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shown that the Deeds were not cancelled. The intention is clear that the Legatee was to have his Legacy; and though there were no Navy *Five per Cent.* Annuities standing in the Testator's name at his death, the Legacy does not fail.

The VICE-CHANCELLOR :—

I think upon this Will the Claimant is entitled to the Legacy. The intention is clearly marked to give him a Legacy of 10*l.* a year during his life, if he was in the Testator's service at the time of his death. That he was in his service at the time of the Testator's death, is admitted. He gives him all his Clothes and Linen. The Testator first gives the Annuity of 10*l.* and then proceeds to say out of what it is to be paid; first, the Real Estate, if it exists, and next, the 5*l. per Cents.*; but the Legacy may stand, though the Fund out of which it is directed to be paid does not exist. The Legacy is not so specific and so connected with the Fund as to fail if there is no such Fund, it appearing there was a fixed, independent, separate, distinct, intent to give the Legacy; the particular property out of which it was to be paid being a secondary thought.

It is singular that it was not stated in the Bill, whether or not the Deed was cancelled. It is clear the Deed was executed; and if it was not cancelled, it rather lies upon the Defendant to show that. At the time of the Will the Testator had no Navy *Five per Cents.*; and, therefore, the Legacy cannot be considered as a specific Legacy out of such *Five per Cents.* A specific Legacy cannot be given out of what does not exist. It is evident, however nonsensically expressed, that he meant to give 200*l.*

out of his Personal Estate, to be set apart as a Fund for the payment of this Legacy. In the absence of Authorities to the contrary, I think there must be considered a positive intent to give this Legacy; and though the mode by which the payment was to be secured, fails, he is yet entitled to have it made good out of the Personal Estate.

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Original Bill, Between THOMAS BINKS, Plaintiff,
 and
 The Right Honourable MORRIS Lord ROKEBY,
 FREDERICK TURNER, and PHILIP MAC-
 FARLAN - - - - Defendants.
Supplemental Bill, Between RICHARD BINKS
 and others, - - - - Plaintiffs,
 and
 MORRIS Lord ROKEBY, THOMAS BINKS, and
 ANN his Wife, FREDERICK TURNER, and
 PHILIP MACFARLAN - - Defendants.

13th June, and
 16th July.

A DECREE had been made in the first-mentioned Cause for the Sale of certain Estates. *Richard Carter* was the Purchaser, and the Report of his Purchase was confirmed. The Purchaser paid his Purchase Money into Court, and obtained a reference as to the Title. He objected to the Title, but the *Master*, to whom

Mortgage Debt and Premises were assigned by the Mortgagee to Trustees, with power to sue and give acquittances, and all

the same Powers as the Mortgagee had. The mortgaged Estate was sold under a Decree, and the Purchase Money paid into Court. Held, on an exception to the Title, because the scheduled Creditors were not parties to the Bills, but only the Trustees; that the Trustees could make a good Conveyance; and that the exception ought not to have been made to the Title, but to the Conveyance.

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and others.

the consideration of the objections was referred, reported, a good Title could be made. To this Report *Carter* excepted. The Exception was, "For that the said *Master*, by his said Report, hath certified that he is of opinion that a good Title can be made by the Vendors to the Hereditaments in the said Report mentioned; whereas the said *Richard Carter* is advised that the said *Master*, by his said Report, ought to have certified, that he is of opinion that a good Title cannot be made by the Vendors to the Hereditaments in the said Report mentioned, *inasmuch as the Trustees and Creditors of the said Thomas Binks, &c. Parties to the Deed of the 10th March 1810, stated in the Abstract of the Title to the said Hereditaments, are not made Parties to the said Suits, or by any means brought before this Honourable Court; and it doth not appear that they consent to the payment of the Purchase Money into the Bank.*"

The facts of the Case were these :

By Indentures of Lease and Release, 19th and 20th December 1804, the Release quadrupartite, between *Thomas Appleton* and *Eleanor* his Wife, of the first part; the Right Honourable *M. Lord Rokeby*, of the second part; *George Snowdon*, of the third part; and *G. Fielding* and *Samuel Girdlestone*, of the fourth part; reciting the Contract of *Lord Rokeby* with *J. Appleton*, for the purchase of the Premises; and that *Lord Rokeby* had paid to *J. Appleton* 3000*l.* in part of the Purchase Money, and that it had been agreed the remaining 3000*l.* should remain on Mortgage of the Premises; it was witnessed, that in consideration of the Agreement, and of 3000*l.* paid to *J. Appleton* by *Lord Rokeby*, *J. Appleton*, by the direction of

Lord *Rokeby*, bargained, &c. to *George Snowdon*, his Heirs and Assigns, the Premises in question; to hold to him, his Heirs and Assigns, to the use of *J. Appleton*, his Heirs and Assigns, for 1000 years, without impeachment of Waste, subject to a Proviso for Redemption, on payment by Lord *Rokeby* to *J. Appleton* of 3,150*l.* and Interest, in manner therein mentioned; and from and after the expiration of the said Term of 1000 years, and subject thereto, to the use of said *Fielding* and *Girdlestone*, their Heirs and Assigns, for ever, and for the uses and purposes therein-after mentioned; with a Declaration that *Fielding* and *Girdlestone* should stand seised of the Inheritance, subject to the Term of 1000 years, upon trust for Lord *Rokeby*, his Heirs and Assigns, and to permit him to enjoy the same until default made in payment of the 3000*l.* as therein mentioned; and if no default in payment, then, upon Trust to convey the Premises to Lord *Rokeby* and his Heirs, or as he or they should direct or appoint.

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 v.
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 and others,

By Indentures, 30th April and 1st May 1806, between *G. Fielding* and *Samuel Girdlestone*, of the first part; *James Appleton*, of the second part; Lord *Rokeby*, of the third part; *Thomas Binks*, of the fourth part; *Frederick Turner* and *Philip Macfarlan* of the fifth part; reciting the Indentures of the 19th and 20th December 1804; and further reciting, there was due from Lord *Rokeby* to said *Thomas Binks* the Sum of 1,597*l.* and 2,190*l.*; and that Lord *Rokeby* had applied to said *Thomas Binks* to advance him 3,145*l.* to enable him to discharge the Mortgage Debt, Interest, and Costs due to *J. Appleton*; and had proposed that the payment of those Sums, making together 6,932*l.* with Interest, should be secured to said

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Thomas Binks and his Executors, by an Assignment of said mortgaged Premises for the remainder of the said term of 1000 years, and by a Conveyance of the Fee Simple thereof to said *Turner* and *Macfarlan*, in Trust; the Estates in question were accordingly conveyed by *Fielding* and *Girdlestone*, at the request and by the direction of *J. Appleton* and *Lord Rokeby*, and at the nomination of *T. Binks*, to *Turner* and *Macfarlan*, their Heirs and Assigns, to hold to them, their Heirs and Assigns, and to their use, subject to the term of 1000 years, and the Trusts in the Deed mentioned. And *J. Appleton*, at the request of *Lord Rokeby*, bargained, sold, and assigned, &c. unto said *Thomas Binks*, his Executors, &c. the Premises in question, to hold to said *Thomas Binks* for the residue of the term of 1000 years, discharged from the aforesaid Proviso for Redemption, but subject to a Proviso between said *Thomas Binks*, on the one part, and said *Lord Rokeby* on the other part, that on payment to said *Thomas Binks*, his Executors, &c. of 6,932*l.* with Interest, said *Thomas Binks* should re-convey, &c. with a Declaration that *Turner* and *Macfarlan*, and their Heirs, should stand seised of the Premises in case default should not be made in payment of said Mortgage Money and Interest, in Trust for *Lord Rokeby*, his Heirs and Assigns; but if default should be made, in Trust, at the request of said *Thomas Binks*, his Executors, &c. and without the concurrence of *Lord Rokeby*, his Heirs or Assigns, to sell the said Premises; and that the Receipt of the Trustees should be a sufficient Discharge to the Purchaser, who should not be obliged to see to the application thereof, nor obliged to inquire into the necessity of making the Sale; with a Proviso, that the Trustees should be possessed, &c. as well of the Monies to arise by the said Sales, as the Rents and

Profits of the Estates; upon Trust, to reimburse themselves all their Costs, Charges, &c.; in the next place to pay said *Thomas Binks*, his Executors, &c. in discharge of said Principal Sum and Interest, so far as same would extend; and upon Trust to pay the residue, if any, unto Lord *Rokeby*, his Executors, Administrators, and Assigns.

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By Lease and Release, 19th and 20th March 1810, the Release being of two parts, between *Thomas Binks* and *Ann* his Wife, of the first part; and *Richard Binks*, of *Hull*, *Anthony Steel*, and *William Walton*, of the other part; reciting, that said *Thomas Binks* was indebted to sundry persons, mentioned in the Schedule annexed to the Release, in several Sums of Money, secured by Mortgage, Bonds, and Judgments, and also upon Notes and other simple Contracts; and reciting, that said *Thomas Binks* was seised of several Messuages, &c. in the County of *York*, therein described in Fee Simple, in Possession, &c. and was entitled, as Mortgagee in possession of an Estate at *Hutton Rudby*, County of *York*, for 6,932*l.* and a considerable Arrear of Interest for the same; and the said *Thomas Binks* being desirous of making provision for the payment of the said several Sums of Money due from him on the Mortgages, Bonds, &c. which were mentioned in the Schedule annexed to the Release, and Interest to become due, and also to other Creditors whose Debts were not scheduled, had proposed and agreed to convey the several Messuages, &c. whereof he was so seised as aforesaid, and also to assign and assure said 6,932*l.*, and the Premises whereon same was so secured, unto and to the use of said *Richard Binks*, *Anthony Steel*, and *William Walton*, their Heirs and Assigns, upon Trust, that they or the

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Survivor of them should and did, by and out of the said 6,932 *l.* and Interest thereof; and by Sale or Mortgage of said Premises, &c. of which he was seised, or of a competent part thereof, levy and raise a sufficient Sum of Money for the purpose aforesaid; and by and out of the Money to arise, pay off and discharge said Sums of Money so due from said *Thomas Binks*, and the Interest to become due: He accordingly conveyed an Estate at *Bowes*, not the Estate in question, upon certain Trusts; and also conveyed to them, their Heirs and Assigns, the Estate in question, called *New Close*, in *Hutton Rudby, York*; to hold the same unto said *Binks, Steel, and Walton*, their Executors, &c. for and during all the remainder of said term of 1000 years, and for and during all other the Estate of said *Thomas Binks*, his Heirs, Executors, &c. therein, upon the Trusts mentioned therein, and all and every said 6,932 *l.* and the Interest thereof, due under the Deeds of 30th April and 1st May 1806, and all the Securities, &c.; to hold the same upon Trust, to enforce, compel, recover, and obtain, by all lawful or equitable ways or means as Counsel should advise, the payment of the said 6,932 *l.* and Interest, and all and every other Sum and Sums of Money secured by, and due or recoverable upon or by virtue of said Indentures of Lease and Release of 30th April and 1st May 1806, and all and singular other the Sum or Sums of Money thereinbefore mentioned to be thereby assigned of and from said Lord *Rokeby*, his Heirs, Executors, &c.: and for the better effectuating the purposes aforesaid, said *Thomas Binks* nominated said *R. Binks, A. Steel* and *W. Walton*, and the Survivors and Survivor of them, his Executors, &c. his Attorney or Attorneys, &c. in his name, or in the names of the said *R. Binks, A. Steel* and *W. Walton*, &c. or other-

wise; but upon the Trusts thereafter mentioned concerning the same, to ask, demand, sue for, recover and receive the same, of and from all and every person and persons liable and intrusted to pay the same; and to give acquittances, and to make and execute any other Release or Discharges for the same, or any part thereof; and further to do and execute all other acts and things which should be necessary to be done in the premises as fully and effectually, to all intents and purposes, as he the said *Thomas Binks* might or could have done if personally present; with a Declaration that said *R. Binks*, *A. Steel*, and *W. Walton*, and the Survivors and Survivor of them, should stand possessed of and interested in the Monies to arise by Sale or Mortgage of such Estates first and secondly mentioned, and of said Sum or Sums of Money, and Premises last mentioned, upon Trust, that said *R. Binks*, *A. Steel*, and *W. Walton*, &c. should by, with, and out of the Money by such Sales, &c. in the first place, pay the Costs, &c. of the Trustees, and then to pay off the Mortgage mentioned in the Schedule; and in the next place to pay the Judgments, then the Bonds, and afterwards the simple Contract Debts mentioned in the Schedule, to the several persons therein named, and all other the Creditors of *Binks*, though not mentioned in the Schedule; and to pay the residue, after such payments, to said *Thomas Binks*, his Executors, &c. for his own use.

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A Bill was filed, the *Original Bill*, in this Cause, by *Thomas Binks*, against *Lord Rokeby*, *Turner* and *Macfarlan*, to compel payment of the Mortgage Money due in respect of the Deeds of 30th April and 1st May 1806; and by the Decree, 8th July 1811, it was directed, amongst other things, that,

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it should be referred to the *Master*, to take an account of what was due to the Plaintiff, *Binks*, for Principal and Interest under the Mortgage Deed; and that so much of the Estate and Premises in the Indenture mentioned, as would be sufficient to raise what the *Master* should so find due to the Plaintiff for such Principal and Interest, &c. be sold before the *Master*; and that the Money arising by such Sale be paid into the Bank, with the privity of the Accountant General of the Court, to the Credit of the Cause, subject to the further Order of the Court; and that out of the Money to arise by such Sale, when so paid in, what the *Master* should find due to the Plaintiff (*Thomas Binks*), for Principal and Interest, be paid to him; and in case more Money should be raised by such Sale than would be sufficient to answer such payment to the Plaintiff, the Surplus to be paid to the Defendants *Turner* and *Phillips*, upon the Trusts of the said Indenture of 1st *May* 1806. By the *Master's* Report, 8th of August 1812, he certified there was due from the Defendant *Lord Rokeby*, to the Plaintiff, *Thomas Binks*, 8,781*l.* 2*s.* 7*d.* In pursuance of the Decree and Report, the Estate was sold, 12th of November 1812, and purchased by Mr. *Richard Carter*, the Exceptant, for the Sum of 6,650*l.*

Upon this Title being laid by *Richard Carter* before a Conveyancer, he was of opinion that, as by the Deed of the 10th March 1810, the Money secured to *Thomas Binks*, by way of Mortgage, by *Lord Rokeby*, and also the Term of 1000 years, were assigned to *R. Binks* and others, for the benefit of the Creditors of *Thomas Binks*, the Purchaser could not safely complete his Purchase, unless the Trustees and Creditors, parties to such Deed of the 10th March 1810, were by some means brought

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before the Court, and consented to the payment of the Purchase Money into the Bank.

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In consequence of this objection, the *Supplemental Bill* was filed, in which *Richard Binks*, *Anthony Steel*, and *William Walton*, the Trustees in the Deed of 10th March 1810, were Plaintiffs, and *Thomas Binks*, and *Ann* his Wife, *Lord Rokeby*, *Frederick Turner*, and *Philip Macfarlan*, were made Defendants; but, to avoid expense, the scheduled Creditors of *Thomas Binks* were not made Parties.

By the Decree on the Supplemental Bill, 17th August 1814, it was ordered, that the former Decree and Orders be carried on and prosecuted between the present Parties, in like manner as the same were directed as to the then Parties.

The Question now was, as expressed in the Exception, Whether the two Bills contained all the necessary Parties?

Mr. *Bell*, and Mr. *Shadwell*, in Support of the Exceptions:—

This Estate was purchased under the Decree on the Original Bill, and the objection of the Purchaser is, that no good Title can be made to him, because the scheduled Creditors were not Parties either to the Original, or Supplemental, Suit. Mr. *Butler*, in an able note to *Co. Litt. (a)*, has well expressed the doctrine as to scheduled Creditors. This Sale, being behind the backs of the scheduled Creditors, is not binding upon them; and

(a) 290 b. n. 1. 12 Sect.

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the Sale might be set aside. The Trustees being Parties to the Supplemental Bill is not sufficient; their *Cestuis que Trust*, or at least some of them (since *Adair v. New River Company*) (b), ought to have been Parties; but here none of them are Parties. The Court will not saddle a Purchaser with a Title to an Estate purchased under a Decree, unless there are all the proper Parties to the Suit under which the Decree for a Sale was made. The Trustees were not authorized to give a Receipt, unless they actually received the Money; it would be a fraud in them to give a receipt without receiving the Money. Here the Purchase Money is not paid to these Trustees, but is paid into the Bank under the Decree of 8th July 1811. The Money is thus invested in a Cause under which the scheduled Creditors have no control. That is not a payment to them, nor would they be justified in giving a Receipt. *Lloyd v. Baldwin* (c), is in point.

Sir Samuel Romilly, *contra* :—

Carter is an unwilling Purchaser. I say that, because he refused to advance the Exceptions.

The *Master* is right in reporting there is a good Title. The objection is confined to the Deed of 1810. The Exception is, because the *Trustees* and Creditors are not Parties to the Suits; but that is not wholly true; for certainly the *Trustees* are Parties to the Supplemental Suit. It is said that some of the scheduled Creditors should have been Parties to the Suit. The Trustees are sufficient Parties; for the Deed of 1810 gives them a full Power of Attorney to recover the Money and to give Acquittances. The same Power

(b) 11 Ves. 429.

(c) 1 Ves. Sen. 173.

is given to the *Trustees*, as *Binks* possessed. The Trustees might give Acquittances, though they did not receive the Money, if there was no Fraud. It would be an enormous inconvenience, if every one of these scheduled Creditors was a necessary Party. *Lloyd* and *Baldwin* is not in point. There, the Decree directed the Estate to be sold, and applied in payment of Debts; and a Report was made, ascertaining the Debts by Schedule. The Trustees mortgaged, and in the Mortgage there was a recital of the Bill, and the Proceedings thereon. The Trustees did not pay the Creditors; and it was held, the Purchaser was bound to see the Creditors were paid. The Court there proceeded on the effect of the Decree in favour of the Creditors (*d*).

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If Money is ordered into the Bank for the benefit of the Trustees, it must be considered as the Money of the Trustees, and as a Receipt of the same by them. The Trustees under the Deed of March 1810 were not Parties to the Original Bill, and therefore the Purchaser properly objected; but by the Supplemental Bill those Trustees were made Parties, and all the necessary Parties are now before the Court. Strictly speaking, the objection made, is not to the Title, but to the Conveyance.

Mr. *Bell*, in Reply:--

Though the Trustees may have the same Power as

(*d*) It appears by the Decree, as extracted from the *Register's* Book, that Mr. *Vesey* has not exactly stated the terms of it; the Decree was, that "the Estate, or a sufficient part thereof, should be sold, &c. and the Money arising from such Sale paid into Court; and reserved further directions." See *Belt's* Supplement to *Vesey*, sen. p. 102.

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Binks himself had, still, I contend, the *Cestuis que Trust* ought to have been before the Court.

The Power to the Trustees to give Acquittances, is not equal to a provision "that the Purchaser shall not be bound to see to the application of the Purchase Money;" a provision, which is not contained in this Deed.

The VICE-CHANCELLOR—[after stating the several Deeds, &c.] :—

16th July.

The question is, Whether under the Original and Supplemental Bills, sufficient Parties are brought before the Court, to enable the Court to direct a good Conveyance to the Purchaser, *Carter*? I am of opinion, that as the Trustees under the Deeds of the 1st May 1806, and of the 20th March 1810, are before the Court, and ready to convey, a good Conveyance can be made to *Carter*; and that the scheduled Creditors, mentioned in the Deed of March 1810, are not necessary Parties. No doubt, where an Estate is to be sold for the payment of Debts generally, the Purchaser is not bound to see to the application of the Purchase Money; but where the Debts are scheduled, the Purchaser is bound to see to the application, unless the Deed, from the terms of it, exonerates him from that duty. Is this Purchaser then, by the Deeds, exempted from the necessity of seeing to the application of the Purchase Money? The Deed of May 1806 contains an express Clause, that the Receipt of the Trustees should be a sufficient Discharge to the Purchaser, and that he should not be obliged to see to the application of the Purchase Money, nor obliged to inquire into the necessity of making the Sale: and in the Deed of March 1810, a

Power, as full as can be, is given to the Trustees. It not only giving them power to sue and make Acquittances, but to act as effectually, to all intents and purposes, as *T. Binks* might or could have done; so that this Purchaser is clearly not bound to see to the application of his Purchase Money; more especially, as by the Deed of March 1810, other Creditors, besides the Scheduled Creditors, whose Debts are not specified, are to be paid out of the Purchase Money. The Deed of March 1810 only puts the Trustees and Creditors in that Deed in the same situation as the Trustees under the Deed of May 1806; under which, the Purchase in question took place; and by which Deed the Purchaser was clearly exonerated from seeing to the application of the Purchase Money; and whatever power *Binks* had is expressly given to the Trustees under the Deed of March 1810. The payment of the Purchase Money into the Bank, under the direction of the Court, is for the security of all Parties; it is safer there than in the hands of the Trustees; and must be considered as a Payment made to the Trustees. The Court will take care that it is properly applied. The Case of *Lloyd v. Jackson* establishes a point very different from that for which it was cited; for, from what Lord *Hardwicke* says, it is clear, even in a Case where the Purchaser is bound to see to the application of the Purchase Money, he may apply to the Court to have the Purchase Money paid into the Bank, and not to be taken out without Notice to him. That Case, therefore, cannot be urged to show that this Money being paid into the Bank affects the security of the Purchaser. After all, however, the objection made by this Purchaser is an objection to the *Conveyance*, and not to the *Title* (e). The

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(e) See *Lewis v. Loxam*, 1 Mer. 179.

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Title is perfectly good; the Sale was warranted; and the only question made is, Whether other Parties, not Parties to the Original or Supplemental Bill, should not join in the Conveyance. This of itself would be a sufficient Answer to this Exception. The *Master* was right in reporting that there was a good Title.

Exception overruled.

Between JOHN PILKINGTON, RICHARD
PILKINGTON, and WILLIAM MOSS, Plaintiffs,
And
RICHARD WIGNALL - - Defendant.

31st July.

An Original Bill was filed, to redeem a Mortgage, and an Answer put in, showing the Plaintiff had no Title to call for a Redemption. THE *Original Bill* was filed 9th June 1815, by *John and Richard Pilkington*, and *James Moss*, against the Defendant *Wignall*, to redeem certain mortgaged Premises, the Equity of Redemption being therein stated to have been in *James Moss*, who had assigned it to the *Pilkingtons*. The Defendant put in his Answer 9th May 1815, denying the Plaintiffs right to redeem, as the Plaintiff, *James Moss*, was not the Heir at Law of the Mortgagor.

Afterwards, a Right to redeem was purchased, and the Bill amended.

Demurrer to the amended Bill allowed, and on application, full Costs given.

After the filing of the Bill, and the Answer put in, it was discovered that the Equity of Redemption had never belonged to the Plaintiff, *James Moss*, but to *William Moss*; whereupon the *Pilkingtons* purchased the Equity of Redemption of him, and then amended the Bill, striking out the name of their Co-Plaintiff, *James Moss*, and substituting *William Moss* as a Co-

Plaintiff; and also by striking out other parts of the Original Bill, and adding new matter, shaped the Bill according to the then state of things. To this Bill the following Demurrer was put in.

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“ Defendant by protestation, &c. doth demur thereto, and for cause of Demurrer saith, that the Indentures of Lease and Release in the said Bill mentioned to bear date respectively the 15th and 16th days of July 1816, the Release to be made between the said Plaintiff, *William Moss*, of the one part, and the said Plaintiffs, *John Pilkington* and *Richard Pilkington*, of the other part; and to be a Conveyance of the Equity of Redemption of the Premises therein mentioned, and by the said Bill sought to be redeemed, appear by the said Bill to bear date after the filing of the Original Bill of Complaint, of which the said Bill of the said *John Pilkington*, *Richard Pilkington*, and *William Moss*, purports to be an Amended Bill: Wherefore, and for divers other good causes of Demurrer appearing in the said Bill of the said *John Pilkington*, *Richard Pilkington*, and *William Moss*, the Defendant doth demur thereto; and he prays the judgment of this Honourable Court, whether he shall be compelled to make any further or other Answer to the said Bill of the said *John Pilkington*, *Richard Pilkington*, and *William Moss*; and that he humbly prays to be hence discharged, with his reasonable Costs in this behalf sustained.”

Mr. Agar and Mr. Duckworth, in Support of the Demurrer to the Amended Bill:—

The Equity of Redemption was obtained from *William Moss* by the Plaintiffs, the *Pilkingtons*, subsequent to the filing of the Original Bill, and the Answer

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to it, and they could not state that fact, upon which all their Title arises, by way of *Amendment*. When the Original Bill was filed, the Plaintiffs had no Title; and if the Cause had been heard on that Bill it must have been dismissed with Costs. If the Plaintiffs were to die before the Costs of the Original Bill are taxed, the Defendant would lose them; for he could not saddle the Estate with the payment of those Costs. The Security given for Costs on striking out a Plaintiff's name is merely nominal.

In *Browne v. Higden* (a), a Bill was filed against Mrs. *Higden*, as Administratrix of *A.* and her Husband. Before the Cause was heard, Mrs. *Higden* died, and her Husband took out Letters of Administration *de bonis non* of *A.*; upon which the Plaintiff amended his Bill, stating those facts. A Demurrer was put in to the amended Bill, on the ground, that any matter which happens subsequent to the Original Bill cannot be put into the Original Bill; and the Demurrer was allowed, because the Husband, who was joined for conformity only before, had now an interest.

In Lord *Redesdale's* Treatise (b), it is said, "If a Bill is amended by stating a matter arisen subsequent to the filing of the Bill, and which consequently ought to have been the subject of a Supplemental Bill, advantage may be taken of the irregularity by way of Plea, if it does not sufficiently appear on the Bill to found a Demurrer; but if the Defendant answers, he

(a) 1 Atk. 291.

(b) Tr. P. 230, 2d edit.;
 and see p. 234-5 of 3d edit.

waves the objection to the irregularity, and cannot make it at the hearing."

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Mr. *Heys*, in support of the Amended Bill :—

This Demurrer is a singular one, It is not a general Demurrer, but rather a speaking Demurrer. It states facts in the Bill, which by demurring are admitted to be true. It is informal. A Demurrer should be on a short point; upon which it is clear, that if the Bill were brought to a hearing, it would be dismissed (c). In Lord *Redesdale's* Work, he says, "A Demurrer is an Allegation of a Defendant, which, admitting the matters of fact alleged by the Bill to be true, shows, that as they are therein set forth, they are insufficient for the Plaintiff to proceed upon, or to oblige the Defendant to answer; or that for some reason apparent on the face of the Bill, or because of the omission of some matter which ought to be contained therein, or for want of some circumstance which ought to be attendant thereon, the Defendant ought not to be compelled to answer." None of these grounds for demurring appear in this Case.

In *Knight v. Matthews* (d), your Honor allowed an Amendment as to a fact, which occurred subsequent to the filing of the Bill; and in *Adams v. Dowding* (e), your Honor thought a Supplemental Bill, as to facts which occurred there after the Bill filed, was improper.

Mr. *Duckworth* :—

This Demurrer was drawn according to a Precedent of

(c) *Brooke v. Hewitt*, 3 Ves. 253. (e) *Ante*, p. 53.

(d) *Ante*, Vol. i. p. 566.

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a similar Demurrer drawn by Lord *Redesdale*, when at the Bar.

The VICE-CHANCELLOR—[after stating the facts]:—

This Demurrer is objected to in substance and in form. If the Original Bill, without any Amendment, had been heard, it must have been dismissed with Costs, because the Plaintiffs had no Title to redeem. Instead of filing a new Bill, they, two months after the Answer put in, purchase the Equity of Redemption from *William Moss*, and on the 20th January 1817 amend the Bill. They could not graft the new facts, by way of Amendment, upon the Original Bill, and entitle themselves to the Costs of the Original Bill, which was clearly unfounded. Two of the same persons are Plaintiffs in the Amended Bill as were Plaintiffs in the Original Bill; and there is the same Defendant in the Amended Bill as in the Original Bill; but the Title obtained from *James Moss*, under which the Plaintiffs claimed in the Original Bill, is quite different from the Title procured from *William Moss*, under which they claim in the Amended Bill; a Title, obtained after the filing of the Original Bill, and the Answer to it. If an event happens subsequent to the filing of the Bill, by which a Title arises, that cannot be introduced by amending the Original Bill in which no Title was shown. Here a new event, posterior to the Bill and Answer, has given a right. Then, as to the *form* of the Demurrer. This is a general Demurrer, in form and substance; it is not a Demurrer for want of Equity, but was necessarily in the form it is, from the circumstance of its being a Demurrer to an Amended Bill. It is not a speaking Demurrer; it only mentions matter *in* the Bill, not matter *out* of it,

In *Knight and Matthews*, a fact which occurred subsequent to the Bill was stated in the Answer, but incorrectly, and therefore the Plaintiff amended his Bill, stating the fact correctly; and such Amendment I thought was proper, to put the fact properly in issue. In *Adams v. Dowding*, the facts which occurred subsequent to the Bill were such as might have been considered by the *Master* under a Decree on the Original Bill, and therefore I thought them not properly the subject of a Supplemental Bill. Those cases were decided under very different circumstances from the present. The Demurrer must be allowed.

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Mr. *Agar* and Mr. *Duckworth* asked for full Costs, and cited *Wood v. Dyneley (f)*.

The VICE-CHANCELLOR :—

I think this is a Case where full Costs ought to be given.

Demurrer allowed, and full Costs given.

HOWLING v. BUTLER.

IN this Case, the plea filed by one of the Defendants had been ordered to stand for an Answer, with liberty to except. The Order was expressed in the following terms (being as the Registers stated, the form constantly employed):—"This Court doth order that the said Defendant's said Plea, do stand for an Answer, with liberty for the Plaintiff to except thereto; and the

6th August.
When a Plea is directed to stand for an Answer, with liberty to except, the Plaintiff is entitled to Costs.

(f) Ante, vol. i. p. 32.

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benefit thereof is hereby saved unto the said Defendant, until the hearing of this Cause." A difficulty having arisen in obtaining a Subpcena for payment of Costs, in consequence of a doubt entertained whether the Plaintiff was entitled to Costs, the Case was this day mentioned to the Court by Mr. *Swanston*, and the following authorities being cited, *Gilb. For. Rom.* 94; *Pract. Reg.* 330; *Hinde*, 224; *Harrison*, 233; His Honor declared the Plaintiff entitled to the usual Costs.

ATTORNEY GENERAL v. DAY.



August 8th, and
19th.

When parties neglect to propose a Receiver before the Master, Quære, Whether the Master can propose one, or whether an application ought not to be made to the Court?

A Stranger cannot propose a Receiver.

*In this Case, the neglect of Parties to propose being accounted for, the Master was directed to re-
view his Report, and receive their proposal of a Receiver.*

THE Petition in this Cause, stated, a Devise 21st of June 1709, by *William Worts*, of *Cambridge*, to Trustees, for certain charitable Purposes; and a Decree, 1st of August 1718, establishing the Will:—That the Petitioners had become the Trustees of the Charity:—That by a Decretal Order, 19th of February 1799, it was referred to *Master Simeon* to appoint a Receiver:—That the Reverend *John Davies* was appointed Receiver:—That *John Davies* is dead:—That by an Order, 22d of April 1817, it was again referred to *Master Simeon* to appoint a Receiver of the Trust Estate, which was very considerable:—That the Petitioners, on the 12th of May 1817, carried in a Proposal of a *Mr. C. Pemberton*, to be appointed Receiver; but the *Master* objected to him, as he was *Receiver General* for the County of *Cambridge*:—That on the 6th of June, the Petitioners Solicitors attended the *Master*, and endeavoured to remove his objections to

Pemberton, and expressed an intention to apply to the Court for its opinion and direction:—That on the 10th of June, a Proposal was left with the *Master*, by the Reverend *Walter Gee*, whereby he proposed Mr. *R. Gee*, of *Cambridge*, as Receiver:—That two of the Petitioners (the other Petitioner being then absent from *Cambridge*), on being acquainted with the Proposal of *Gee*, addressed, on the 12th of June, the following letter from *Cambridge*, to the *Master*:—

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“ SIR,

“ As two of the three surviving Trustees of the late Mr. *Wort*'s Estates, we beg to inform you, that it was not till this morning we were informed of your having objected to our proposal of Mr. *Pemberton* as Receiver of the Estates in question; a Gentleman who has been known to us all for more than Twenty years, and whose pursuits in life particularly qualify him for the appointment, having had the entire management of very large Estates for the last Fifteen years; and we believe, no one who knows him will doubt the great respectability of his character. He has just informed us, that the reason you have assigned for objecting to appoint him, arises from his being Receiver-General for this County. We now understand from him, that your objection was made known to him some time ago; and he has stated to us, that having after much inquiry ascertained that your objection was never made before, he felt very confident it would, upon further consideration, be waved; for which reason he delayed communicating it to us. It is with the utmost surprise we this morning received intelligence, that the Reverend Mr. *Gee*, of *Sidney College* has carried in a proposal for the appointment of his Brother, and that to-morrow is fixed for taking

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this proposal into consideration. Under the circumstances stated, we cannot for a moment doubt you will be pleased to appoint Mr. *Pemberton* Receiver, or permit us to deliver in another proposal within one week from this time, that we may not be precluded from proposing another Gentleman for Receiver, as the Receiver of this Estate has always been proposed by the Trustees, and the appointment has hitherto been made accordingly. Had Mr. *Pemberton* sooner apprised us of your objection, we should certainly have made an earlier application to you upon the subject.

We have the honour to be,

Sir, your most obedient Servants,

J. Turner, D. D. Master of *Pembroke Hall*,

P. Douglas, D. D. Master of *Bennet College*."

That a Warrant was taken out to proceed on the 17th June, on the Proposal of *Walter Gee*, which was attended by the Petitioners Solicitors, who requested the *Master* to allow the matter to stand over, until the Petitioners could by a Petition to the Court ascertain whether it would dispense with the objection to *Pemberton*, or that he would proceed upon another Proposal of the Petitioners, which should be left, if desired, that day, or the following morning; but the *Master* stated he would not take into consideration any other Proposal until the Proposal of *Gee* was disposed of for fitness or unfitness; and that he should certainly appoint *Gee*, if it was not shown that he was an unfit person:— That the Petitioners, on the 21st of June, left a new Proposal, whereby they proposed the Reverend *Thomas Veasu* to be such Receiver, accompanied by an Affi-

davit of two of the Petitioners, stating that they were unacquainted with the objections to *Pemberton* until the 11th of June; and that they were desirous, in consequence of such objection, to propose some other fit and proper person to be the Receiver; and also stating the absence of the other Petitioner from *Cambridge*:—That the *Master* refused to enter upon the consideration of such Proposal:—That by the *Master's Report*, 11th of July, he certified, “that in pursuance of the said Order, bearing date the 22nd day of April 1817, he had been attended by the Solicitor for the Petitioners, and for the Trustees under the Will of *William Worts*, Esq. deceased, the Testator in the said Order named; and that a state of Facts and Proposal had been laid before him by the Solicitor of the said Trustees, on the 12th day of May 1817, whereby they proposed Mr. *Christopher Pemberton* to be appointed Receiver of the said Trust Estates; but it being admitted before him that he was Receiver-General of the County of *Cambridge*, he did not think fit to approve of him to be such Receiver, but requested the Trustees would, by their Solicitor, propose another person for his approval:—That after the lapse of some weeks, no other Proposal having been brought before him, but the fitness of the said *Christopher Pemberton* having been still insisted upon, he had himself inquired for a fit and proper person to receive the Rents of the said Trust Estates; and having had a very satisfactory recommendation of Mr. *Robert Gee*, of *Cambridge*, for ability, diligence, and integrity, after a proper service of Warrants upon the Solicitor for the Trustees, who appeared before him upon the first Warrant, but made no objection to the fitness of Mr. *Gee*, nor had any been since made, he had thought fit to approve of the said Mr. *Robert Gee*

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(who, he certified, was a total stranger to him, except by character), as Receiver of the said Trust Estates; and that he had also approved of *Joseph Gee*, Bookseller, and *James Gotobed*, Brewer, both of *Cambridge*, aforesaid, as his Sureties; and had prepared a Security to be entered into by the said *Robert Gee*, *Joseph Gee*, and *James Gotobed*, for his the said *Robert Gee*'s Securities, well and truly, duly and annually, accounting for what he should so receive in respect of such Rents and Profits, and pay the same as this Honourable Court had already directed, or should thereafter direct, which Security is by recognizance, wherein the said *Robert Gee*, *Joseph Gee*, and *James Gotobed*, stood jointly and severally bound unto The Right Honourable Sir *William Grant*, Master of the Rolls, and himself, in the Penalty of *l.* with a condition as thereunder written; and in testimony of his having approved of the said Recognizance, he had signed his name to the allowance written in the margin of the Ingrossment thereof, and which Recognizance was to be acknowledged by the said *Robert Gee*, *Joseph Gee*, and *James Gotobed*; and when the same was duly acknowledged by them respectively, he should appoint him, the said *Robert Gee*, Receiver of the Rents and Profits of the said Trust Estates."

The Petitioners left the following objections to the said Report, which were disallowed by the said *Master*; "For that the said *Master* hath on the Proposal of the Reverend *Walter Gee*, of *Sydney College*, in the said University, M.A. who is no party, or in any manner interested, in this Cause, nor authorized by His Majesty's Attorney-General in that behalf, certified that *Robert Gee*, Junior, of *Cambridge*, Gentleman, is a fit

and proper person to be the receiver in this Cause; whereas in case the said *Master* was of opinion that *Christopher Pemberton*, Esq. who was proposed on the behalf of the said Reverend *Joseph Turner*, D. D. the Reverend *Robert Towerson Cory*, D. D. and the Reverend *Philip Douglas*, D. D. was not a proper person for such Receiver, inasmuch as he was Receiver-General of the County of *Cambridge*, he ought, under the circumstances mentioned in the Affidavit of the said *Joseph Turner* and *Philip Douglas*, to have received and taken into consideration the further Proposal of the said *Joseph Turner*, *Robert Towerson Cory*, and *Philip Douglas*, by which they proposed the Reverend *Thomas Veasey*, of *Saint Peter's College*, in the said University, Clerk, to be the Receiver, and to have decided thereon, and to have approved of the said *Thomas Veasey*; or in case he ought not to have been approved of, yet, that before any stranger should have been allowed to make a Proposal, if in any case such a Proposal ought to be received, the matter ought to have been submitted to His Majesty's Attorney-General, and he ought to have been requested to propose a fit and proper person to be Receiver of the Trust Estates in this Cause mentioned."

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The Petition *prayed* that the approbation of *Robert Gee* by the *Master*, might be rescinded, and that the *Master* might be directed to approve of *Thomas Veasey*, to be appointed Receiver upon his giving proper Security, to be approved of by the *Master*; or that it might be referred back to the *Master*, to consider the Proposal of your Petitioners of *Thomas Veasey* to be such Receiver; or, that the Petitioners might be at liberty to except to the said Report.

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Sir *Samuel Romilly*, Mr. *Bell*, and Mr. *Abercromby*, for the Petition.

Sir *A. Pigott*, and Mr. *Horne*, *contra* (a).

The VICE-CHANCELLOR :—

The question now is, What is to be done upon the Report of the *Master*, of the 11th July?

It being a question of great importance, as relating to the appointment of a Receiver, which is of general occurrence, and being unwilling to determine the Case upon abstract principles, I thought it proper to acquaint myself with all the Cases upon the subject. I have communicated also with the *Masters*, and in particular with the *Master* who made this Report; but they have not been able to furnish me with any precedent of a proceeding such as this. I have looked into the printed Cases on the subject, and have been furnished by the Register with a MS. Case. The earliest Cases, I believe, referred to, in print, are *Hamilton v. Frankland*, and *Shepherd v. Mills* (b). Another leading Case is *Crewys v. Bishop of London* (c). The next Case is *Thomas v. Dawkins* (d), more fully reported in *Vesey* (e). Then comes *Garland v. Garland* (f). The next Case is *Bowersbank v. Collasseau* (g), which was much considered; and in which it was settled, that a Consignee is considered in the same light as a Receiver. The next is an *Anonymous* Case (h); then follows, *Wilkins v.*

(a) The Reporter did not hear the argument.

(b) Cited in *Crewys v. Bishop of London*, 2 Bro. C. C. 255.

(c) 2 Bro. C. C. 253.

(d) 3 Bro. C. C. 508.

(e) 1 Ves. jun. 452.

(f) 2 Ves. jun. 137.

(g) 3 Ves. 164.

(h) 3 Ves. 515.

Williams (i), which is followed by *Tharpe v. Tharpe* (k); and there is a MS. Case on the subject, *Egginton v. Flavell*, in 1781. I have obtained the *Master's* Report and the Exceptions, in all these Cases, but in none of them was any question raised like the present. In none of them does it appear the Master originated the proposal of a Receiver; but in all these Cases the Proposal was made by a *Party interested*, and it was a competition between Persons proposed by Parties interested. In those Cases, the Master approving or disapproving of the person proposed as Receiver, the Parties applied to the *Lord Chancellor*. [His Honor here stated the Report and Exceptions in each of the Cases.] When the *Master* has approved one of two persons proposed, the Court will not disturb the *Master's* choice, unless the person he chooses is shown to be unfit, but does not enter into the more or less of fitness in the competitors. From the Report of *Thomas v. Dawkins*, in *Brown*, it does not appear who proposed *Franklyn* as Receiver; but according to *Vesey's* Report of that Case, it appears that *Franklyn* was proposed by a Party interested in the Suit. The language of the *Master's* Report in all these Cases, is, that he has been attended by the Solicitors of the Parties, and that a state of facts and a *proposal of a Receiver* has been laid before him, and his approval of one, and of his Sureties; and that when the Recognizance is duly acknowledged, he will appoint that person as Receiver. In *Crewys v. Bishop of London*, the choice of the *Master* being objected to, Sir *L. Kenyon*, *Master of the Rolls*, referred it back to the *Master*, to review his Report, and state his reasons for preferring one of two persons who had been proposed as Receiver. Upon

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(i) 3 Ves. 588.

(k) 12 Ves. 317.

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this, *Master Greaves* made a special Report, stating, amongst other things, that in twenty-five years experience, he remembered only two instances of a contest for the office of Receiver, but not in the least insisting upon, or intimating, any right in the *Master* to originate the proposal of a Receiver.

I have not found any one contested Case in which the Receiver was a Nominee only or the *Master*, exclusive of the Persons interested; though some of the *Masters*, certainly, say, they are entitled, if the Parties interested neglect to propose, to make such nomination. This, however, is a special case, and one in which it is not necessary to decide upon the rights of the *Masters*. The present *Master* is a very honourable man, and no doubt meant well. It is the Case of a Charity, which is not so much attended to as in Suits between Party and Party. The *Attorney General* may attend, to watch the Proceedings before the *Master*, but he seldom or ever does. The *Master*, therefore, acted very properly, in being mindful who was appointed Receiver, and in taking care that the Trustees of the Charity did not propose an improper person. Ever since the Decree in 1718, establishing this Charity, the Trustees have been in the habit, from time to time, of applying to the Court to appoint a Receiver. Upon these occasions the Trustees have always proposed the person who was appointed Receiver. In the present instance, the *Master* received their proposal of Mr. *Pemberton* as Receiver, but did very right in afterwards rejecting him, upon finding he was Receiver General for the County of *Cambridge*; for having given, as such, Security to the Crown, if he were to become indebted to the Crown and to the Charity, the Crown might, by its Prerogative Process, sweep away all his property.

Receiver General of a County cannot be appointed a Receiver.

This was an objection obvious to a Lawyer, though not to these Trustees, who might think that being Receiver General was a recommendation, an additional proof that he was trust-worthy. The *Master* on the 12th May very properly desires the Trustees to propose another person as Receiver. A lapse of some weeks takes place, during which no proposal is made by the Trustees; their Agents, (not, however, with their knowledge,) still insisting on the appointment of Mr. *Pemberton*. On the 10th of June, *Walter Gee*, a Scholar of the University, but not otherwise a Party interested, leaves a Proposal with the *Master*, that his Brother, *Robert Gee*, should be appointed. On the 12th June, before any thing had been concluded upon the Proposal of *Gee*, the Trustees write to the *Master*, stating their recent knowledge that *Pemberton* had been rejected, apologizing for their silence, by observing that, from neglect, no communication had been made to them, until the 11th June, of the rejection of *Pemberton*, (which fact they afterwards swear to) and requesting, in case *Pemberton* was considered as an unfit person, to be permitted, within one week, to propose another. They thus account why no step was taken by them between the 12th of May and the 12th of June. On the 17th June, a Warrant is taken out to proceed on the Proposal of *Gee*. The Agent of the Trustees attends, and requests the *Master* to postpone proceeding on *Gee's* Proposal, and that he will proceed upon another Proposal by the Trustees, which would be left, if desired, that, or the following day; but the *Master* stated he would not take into consideration any other Proposal, until the Proposal of *Gee* was disposed of, for fitness or unfitness, and that he should certainly appoint *Gee*, if it was not shown that he was an unfit person. On the

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23d of June, the Trustees leave a Proposal of another person with the *Master*, the Reverend *Thomas Veasey*. This Proposal was made before the Report was settled on the Proposal of *Gee*, but the *Master* refused to proceed upon it. On the 11th July, the *Master* by his Report states, that when *Gee's* Recognizances are duly acknowledged, he should appoint *Gee* as Receiver. The Warrants were taken out on the Proposal by *Walter Gee*, of his Brother *Robert Gee*, but the Report does not state that; but that, owing to the lapse of time, without any proposal of another person as Receiver, he the *Master*, had himself inquired for a proper person to be Receiver. The Case, therefore, assumes a shape in the Report, different from the fact. Is it according to the regular course of the Court, for a person not interested, to propose a Receiver? If so, persons from all quarters would besiege the *Master's* Office—great strugglings and competitions would ensue. There is no colour for saying that strangers can, in such case, come in before the *Master*—it would lead to indefinite importunity. The Report as it originally stood, stated the Proposal by *Walter Gee*, of his Brother, but that was struck out afterwards; and, probably, because the *Master* was aware, such a mode of proposing was improper. The *Master* states, he looked out for a Receiver, because weeks had elapsed without any Proposal being made by the Trustees. The question is, whether, under the circumstances, it was fitting that the Trustees should have had an opportunity given to them of proposing another person. It is an invidious thing for a *Master* to appoint, even in extreme cases. He must always feel reluctant to do so, from the peculiar situation of a Receiver, who is to account to, and be superintended by, the *Master*. Policy and justice require they should be distinct. This

Master, I have no doubt, meant what was right; but it is necessary not only that justice should be purely administered, but that it should be administered in such a way, as to be beyond the reach of suspicion. The right to propose belongs, in the first instance, to the Parties interested in the Suit. If they neglect to propose, and there is a lapse of time, in such case, it is contended, the *Master* is to propose and appoint. Is that so? Is *he* to judge what is a lapse of time? If it were so, it might draw suspicions on the administration of justice. I will not say that a Case may not arise where the *Master* should propose, or where an application should be made to the Court. It is not now necessary to determine that. If, however, a Receiver is to be proposed by the *Master*, in case of a default in the Parties interested, and a lapse of time without a Proposal on their part, a reasonable time must always be given to the Parties to propose, before the secondary appointment by the *Master* can take place. The question here is, Whether it was not proper, in this Case, to have considered the Proposal of the Trustees? Was it right, because a Month had elapsed without a Proposal (a lapse, accounted and apologized for by the Trustees,) that the *Master* should propose? He does not say to the Trustees, if you do not propose a person, I will; but some weeks having elapsed, he refuses to consider their Proposal. It must be referred back to the *Master*, to review his Report, and give the Trustees an opportunity of making their Proposal. Before I conclude, I would just notice, as matter of general history, that on the Impeachment of Lord *Macclesfield*, one of the Articles of Impeachment, the twenty-first, was, for removing a Receiver of an Infant's Estate, nominated by his Testamentary Guardian, and approved by the

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Master, and appointing another himself, who became insolvent, with Monies in his hands. In answer to this, Lord *Macclesfield* stated, that the *Master* had appointed a Receiver; that Exceptions were filed; that the Exceptions were argued, and Affidavits read, to show that the Receiver appointed was an improper person to be such; and upon the Proposal in Court of the Uncle of the Infant, who was also Executor of the Father's Will, he appointed the Receiver complained of, on giving Security to be approved of by the *Master*. Here the *Lord Chancellor* himself appointed the Receiver, referring it only to the *Master* to approve of a Security. The Managers dropped this part of the Impeachment (*l*).

REW v. DIXON.

5th and 14th
August.

Motion on last Seal after Trinity Term to dissolve an Injunction, and that a day might be named in the Vacation for making the Order absolute; but held, the Defendant was only entitled to an Order Nisi.

MR. *Munro* moved, at the last Seal after *Trinity Term*, to dissolve an Injunction *Nisi*, and on the authority of *Robinson v. Wardell (a)*, prayed, that a day might be named in the Vacation, for making the Order absolute, unless Cause shown, as otherwise the Injunction would be continued until the Seal before *Michaelmas Term*.

Sir *Samuel Romilly* opposed the Motion, stating, that *Robinson v. Wardell* was incorrectly reported, the Motion there being, not for an Order *Nisi*, as in this Case, but that the Order for dissolving the Injunction

(*l*) State Trials, vol. 16. (a) 5 Ves. 552.
p. 782, 798, 1st edit. by Howell.

might be made *absolute (b)*: and as upon that Motion it is usual to indulge the Plaintiff with a short time for showing Cause upon the merits, the Court permitted Cause to be shown during the Petitions.

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Mr. Munro :—

As that Case is misreported, I shall only ask for the usual Order *Nisi*.

Order *Nisi* made.

Ex parte BELLOTT *in re* LINGARD.

THE Petition in this case was signed by *Stephen Bellott*, the Petitioner, and the signing was attested by *Charles Wood*, Agent to *Mr. Leigh*, Solicitor for the Petitioner. This Attestation not being considered such as was required by the *Lord Chancellor's Order (a)*, the Attorney for the Petitioner, who, though he had not seen the Petitioner sign, knew his hand-writing, added to the Attestation of the Agent, these words, "Authenticated by *Thomas Leigh*, Solicitor to the Petitioner."

15th August.
A Petition attested by the Agent of the Attorney for the Petitioner, and authenticated by his Attorney, is a sufficient Compliance with the General Order of the 12th of August, 1809.

(b) In the Register's Book, under the name of *Robinson v. Walcott*, Reg. Lib. B. 1799, p. 952. It appears, an Order *Nisi* had been obtained on the 24th of July, and that the Application on the 2d of August (the Application to which the

Report applies) was to make the *Order absolute*, unless cause was shown that day, which was the last Seal.

(a) General Order, 12th of August 1809. See *Ex parte Weston*, ante, 1 vol. 75.

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Mr. *Hart*, and Mr. *Montagu*, against the Petition, contended, this was not such an Attestation as was required by the Order, it being only by the Agent of the Attorney to the Petitioner, who could not be considered as the "Attorney, Solicitor, or Agent of the Party signing in the matter of the Petition," and the subsequent Authentication by the Solicitor, of the Petition, who did not witness the Signature, did not remedy the original defect in the Attestation. Since the Order of the 12th of August 1809, the *Lord Chancellor*, on the 6th February 1816, made a Declaration, which was stuck up in the Office of the Secretary of Bankrupts, "That in future, the Attestation of the Signature of Petitioners is to be strictly according to the directions of the Order of the 12th August 1809, and that no attesting Witness is to be described as Solicitor's Clerk."

Sir *H. Pigott*, and Mr. *Rose*, for the Petition, cite *Ex parte Titley (b)*, where it was decided, that the Signature of the Petitioner, "authenticated," not "attested," by his Solicitor, who had not witnessed the signing, but put his Name to it from a knowledge of the Petitioner's Hand Writing, was a sufficient compliance with the spirit of the Order.

Mr. *Hart*, in Reply :—

The Case cited was in August 1814, previous to the Declaration of the *Lord Chancellor* in February 1816, which requires a strict adherence to the terms of the Order in 1809.

(c) 2 *Rose*, 83.

The VICE-CHANCELLOR:—

I think *Ex parte Titley* decides this Case, and that the Declaration of the *Lord Chancellor* in 1816 was not meant to alter the Rule laid down in that Case.

Mr. *Hart* then applied for time to answer the Affidavit of the Petitioner; observing, that, under the persuasion that the Petition would be deemed informal, they had not filed any Affidavits in Answer, conceiving it to be unnecessary.

Sir *A. Pigott* and Mr. *Rose*:—

Though Respondents may have formal objections to a Petition, still they ought to be prepared for the discussion of the merits, if the objection as to form is over-ruled. They ought to have filed their Affidavits before. It would lead to great expense and delay if a Respondent, having a formal objection to a Petition, was allowed to argue the objection as to form, and then have further time to answer the merits. If it stands over, they must pay the Costs.

The VICE-CHANCELLOR:—

The Respondent should have filed his Affidavits before; and in case the objection as to form was over-ruled, he should have been prepared to meet the merits of the Case. I will, however, give you time to file Affidavits in Answer, but you must pay the Costs of the Petition standing over, to be taxed by the Master, if the Parties disagree.

Mr. *Hart*:—

Suppose we name 40*s.* Costs, that will save the expense of going before the *Master*.

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A Party having an objection of Form to a Petition, ought to be prepared to answer the merits, if the objection is overruled; and if it is necessary that the Petition should stand over, to enable him to file Affidavits, he pays the Costs.

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Sir. A. Pigott and Mr. Rose :—

We cannot agree to that, as we cannot say exactly what the Costs are.

The VICE-CHANCELLOR :—

If you cannot agree upon a Sum, the Costs must be taxed.

Ex parte GELLER and HONISCHER *in re* SILL and WATSON.

16th August.

A Creditor having joint Property of Bankrupts in pledge, and selling the same, after the Bankruptcy, may notwithstanding prove the Remainder of his Debt, under the separate Estates of the Bankrupts, if there is no other joint Property.

ON or previous to 11th March 1809, the Bankrupts, Sill and Watson, entered into an Agreement with W. P. Hutchinson, to purchase, on their joint account, 125 Casks of *Mariagalante* Coffee, which Coffee, when purchased, was to be placed in the hands of some foreign Merchant, to be exported for Sale, on the account of Hutchinson and the Bankrupts. It was further agreed, that an advance of Money should be obtained from such foreign Merchant, on the credit of the Coffee, to assist in providing for the payment of the same; and that the Bankrupts should have the sole management of the business respecting the purchase and shipment of the Coffee, and the payment of the same.

Watson, on the said 11th of March 1809, accordingly purchased on behalf of himself, and Sill and Hutchinson, of Greaves and Co., one hundred and twenty-five Casks of Coffee, for 3,026*l.* 6*s.* which Sum was agreed to be

paid by the acceptance of *Sill* and *Watson*, at Four Months.

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On the 3d April 1809, *Sill* applied, on behalf of himself, and *Watson* and *Hutchinson*, to the Petitioners, foreign Merchants, to ship the Coffee to *Malta*, and sell the same, by their Agents there, for and on the account and risk of *Sill*, *Watson*, and *Hutchinson*; and requested the Petitioners to advance a Sum of Money on the Credit of the Coffee, to assist them to meet the Acceptance *Sill* and *Watson* had given to *Greaves* and Co.; and he also requested them to pay the Freight of the Coffee to *Malta*, and other Charges attending the Exportation and Sale of the Coffee, and of remitting and importing the Proceeds to *England*; and in consideration of doing so, he proposed and agreed, that the Petitioners should receive a certain Commission on the Net Proceeds of the Sale abroad, and on the Sale of the Goods remitted home.

In pursuance of this Agreement, 125 Casks of Coffee were delivered to the Petitioners; and on the 7th April 1809 they gave to *Sill* and *Watson* a Bill of Exchange for the Sum of 2,150*l.* on the Credit of the Coffee, which Bill was afterwards paid.

In *May* following, the Petitioners shipped the Coffee to *Malta*, consigned to their Correspondents there, and paid the Insurance thereon, and other Charges attending the shipping, which amounted to about 380*l.* 17*s.* 9*d.*

The Coffee arrived at *Malta*, and was sold for other Goods; but arriving when the Market was bad, a considerable Loss was incurred.

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The Petitioners Correspondents paid the Freight and other Charges, which amounted to 639*l.* 18*s.* 11*d.* British Money, and remitted the rest of the Proceeds of the Coffee to the Petitioners, in Bills of Exchange and *Valonia*.

The *Valonia* arrived at *Liverpool*, and was delivered to the Petitioners, who paid the Freight, Insurance, and other Charges, amounting to 2,348*l.* 8*s.* 6*d.* or thereabouts.

On the settlement of Accounts respecting the transaction relative to the Coffee, there was a balance of 1,174*l.* 15*s.* 8*d.* due from the Bankrupts and *Hutchinson*.

On the 29th October 1810, a Commission issued against *Hutchinson*, upon which he was found a Bankrupt.

On the 6th November 1810, a Commission issued against *Sill* and *Watson*, under which they also were declared Bankrupts.

The Commissioners acting under the Commission against *Hutchinson*, having refused to permit the Petitioners to prove their Debt of 1,174*l.* 15*s.* 8*d.* under his Commission, they petitioned the *Lord Chancellor* for leave to prove the same; and on the hearing of the Petition, 5th August 1812, they were declared entitled to prove the same; and the Petitioners accordingly proved their Debt, and received two Dividends, amounting together to 572*l.* 14*s.* 2*d.* leaving a Balance of 602*l.* 1*s.* 6*d.* due to the Petitioners.

The Petition stated the foregoing circumstances; and further, that there were not any joint Effects of the Bankrupts *Hutchinson, Sill, and Watson, to be divided* under either of the Commissions of Bankrupt; and that the Petitioners had applied to prove under the Commission against *Sill and Watson*, the Sum of 602 *l. 1s. 6d.* and to have a Dividend out of both of their separate Estates, *pari passu*, with the other separate Creditors; but such proof was not allowed. The *prayer* of the Petition was, to be allowed to prove the Debt under the Commission against *Sill and Watson*, against their separate Estates.

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An Affidavit of the Petitioner *Geller*, verified the facts stated in the Petition.

On the part of the Assignees of *Sill and Watson*, an Affidavit was filed, from which it appeared, that at the periods of the Bankruptcy of *Hutchinson*, and of *Sill and Watson*, the Petitioners had in their possession a large quantity of *Valonia* unsold, which was the joint Property of *Sill, Watson, and Hutchinson*, received by the Petitioners in barter for 34 Casks of Coffee, part of the 125 Casks, which *Valonia* was sold after the Bankruptcy of *Hutchinson*, and the larger part thereof after the Bankruptcy of *Sill and Watson*, and the Proceeds applied in reduction of the Petitioners Debt. It appeared also that the Petitioners, in return for the 125 Casks of Coffee, received Bills from *Malta*, which the Deponent swore, he believed did not become due, nor were paid, until some months after the Bankruptcies of *Hutchinson, Sill, and Watson*.

Mr. *Bell*, and Mr. *Montagu*, in support of the Petition:—

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The Property in the hands of the Petitioners at the time of the Bankruptcy was a *Pledge*; and it was determined, in *Ex parte Hill* (a), that having joint Property in hand as a *Lien*, does not prevent the Party proving against the separate Estate. "Joint Effects," says Lord *Eldon*, in that Case, "means such as are under the administration of Assignees to distribute; not as in this Case, where the only joint effects are those pledged to the Petitioner for more than the amount." It is not pretended there was any other joint Property. The *Lord Chancellor* allowed the Proof against *Hutchinson's* separate Estate, who stood in precisely the same circumstances as *Sill* and *Watson*. These Petitioners are clearly entitled to prove.

Mr. *Agar*, and Mr. *Rose*, *contra* :—

It is clear there were joint Effects outstanding at the time of these Bankruptcies; and it is settled, that where there are joint Effects, however small, the Creditor cannot come upon the separate Estate. In the Case cited, it does not appear whether the Rum was sold before or after the Bankruptcy. If before, the Creditor might undoubtedly prove.

A Creditor having a *Pledge*, cannot, after the Bankruptcy, sell it, without first applying to the Commissioners, who will superintend the Sale. If he sells it without such application, he is not entitled to prove his Debt. Here they sold this *Valonia* for what they pleased, without any control over them, before they applied to prove their Debt—without any communica-

(a) In a note to *Willett v. Pringle*, 2 Bos. and Pull. N. R. p. 191.

tion with the Commissioners, or the Assignees of the Bankrupts. The Affidavit in support of the Petition is only, that "there are no joint Effects *to be divided*," not that there were no joint Effects at the time of the Bankruptcies.

Mr. *Bell*, in Reply:—

It never was determined, nor ever will be, that a Creditor selling his Pledge, without applying to the Commissioners, is not entitled to prove his Debt. It cannot be supposed they would sell the *Valonia* at an under value. It was their interest to get their Debt reduced as much as possible. In the Case of *Ex parte Hill*, the Rum must have been sold after the Bankruptcy. No question could have arisen if it had been sold before.

The VICE-CHANCELLOR:—

The Proof was directed by the *Lord Chancellor* under *Hutchinson's Commission*; and if allowed in that Case, it must be admitted in this; for the question is the same in this Case as in that. *Ex parte Hill* is a clear decision, that a *Pledge* of joint Property does not prevent Proof upon the separate Estates of the Bankrupts, if there is no other joint Property. The selling of the Pledge, without applying to the Commissioners, does not destroy the right to prove. If any Fraud, it might be made the subject of inquiry; but no Fraud in the Sale is proved, or suggested. The Petition must be granted.

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Ex parte
GELLER,
and another
in re
SILL
and another.

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17th and 18th
August.

Legacies of 1,400l. and 11,000l. Bank Stock held not to pass an additional Capital given by the Bank subsequent to the Will, and before the Testator's death, in respect of the Stock, under the power contained in the 56 Geo. III. c. 96.

J. B. Tenant for Life, Remainder to W. B. for Life, Remainder to J. B. in Fee. During Life of J. B. Houses on the Estate, insured by him,

were burnt down, and Insurance Money paid to J. B. which was placed in the Funds in his name. J. B. by his Will devised the Estate to R. S. W. in Fee, and his Personal Estate to W. B. W. B. applied part of the Insurance Money in repairing a House upon the Estate. The Insurance Money unapplied remained standing in J. B.'s name. W. B. by his Will, stated the circumstances, as to the Fund so standing in his Brother's name, and bequeathed the residue of his Personal Property: Held, that the Insurance Money unapplied was subject to the uses of the Settlement, and passed to R. S. W. the Devisee of J. B.

Tenant for Life died at nine o'clock at night, on the 29th September, and held that, he was not entitled to a quarter's Rent due on that day.

NORRIS and others, v. HARRISON and others.

THE Reverend William Bell, by his Will, May 1815, amongst other Bequests, willed as follows:—"Whereas I am sole Executor under the Will of my Brother John Bell, Esq. late of Fludyer Street, Whitehall, deceased, and there is standing in his name in the Books of the Governor and Company of the Bank of England, the Sum of 1,159*l.* 16*s.* 7*d.* Four per Cent. reduced Bank Annuities, I hereby inform my Executors, and Sister Mrs. Lucy Bell, that the said Sum of 1,159*l.* 16*s.* 7*d.* is part of, and belongs to what was the Real Estate of the said John Bell, of which Real Estate I am now possessed as Tenant for Life, under the limitations of the Settlement made on the Marriage of my said Brother, and which Estate, after my decease, is settled on my only surviving Sister Lucy Bell, for her life, (who afterwards died in the Testator's life-time), and after her decease, is by the Will of my said Brother John Bell, devised to his Grandson, Robert Smith Webb, second Son of Philip Smith Webb, late of, &c. deceased; and I do further declare, for the information of my Executors, and others whom it may concern, that

the said Sum of 1,159*l.* 16*s.* 7*d.* *Three per Cent.* reduced Bank Annuities, is the Balance or Remainder of Monies paid by the Sun Fire Office to the said *John Bell*, for Houses belonging to his said Real Estate, which were burnt down in the life-time of the said *John Bell*, and were not rebuilt by him; and which Monies so paid to the said *John Bell*, were by him laid out in the purchase of 2,817*l.* 5*s.* 7*d.* *Three per Cent.* reduced Bank Annuities, out of which last-mentioned Sum, after the decease of the said *John Bell*, when the House No. 128, in *Leadenhall Street*, then belonging to me, was burnt down, I took the Sum of 1,657*l.* 9*s.* *Three per Cent.* reduced Bank Annuities, and with the produce of that Sum, added to the Sum of 1,125*l.* Sterling, which I received from the Hand-in-Hand Insurance Office for the said House, I built the present House, No. 128, in *Leadenhall Street*, to the great improvement of the said Estate, and the particulars of the expense of building that House will be found stated in my book of the receipts from and payments on account of my said Brother's Estate." And whereas, under the Will of my said Brother *John Bell*, I am empowered to give and dispose of the several capital Sums of 1,400*l.* &c. which said several Sums are now standing in the books relating to the said several and respective Stocks in the name of the said *John Bell*. Now I do hereby give and bequeath the said several Sums of 1,400*l.* Bank Stock, &c. unto *John Norris*" upon certain Trusts mentioned in the Testator's Will. In another part of his Will the Testator bequeathed as follows:—" I give and bequeath the Sum of 11,000*l.* Capital Bank Stock, now standing in my name in the Books of the Governor and Company of the Bank of England, unto *W. N. Tonge, Esq.*" the Dividends,

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Interest, and Proceeds thereof, to and for his own proper use and benefit, for and during the term of his natural Life, and subject thereto, In Trust, to pay, assign, and transfer the said 11,000*l.* Bank Stock, unto, between, and amongst all and every the Child and Children of him the said *William N. Tonge, &c. &c.* The Testator, after various other Legacies, gave all the rest and residue of his Personal Estate to his Trustees, upon Trusts expressed in his Will.

Under a Marriage Settlement in 1753, the Testator's Brother *John Bell*, was Tenant for Life of the Estates, with Remainder to *William Bell* for Life, Remainder to *John Bell*, in Fee. *John Bell* being thus Tenant for Life in possession, with Remainder to *William Bell* for Life, by his Will, 1st of August 1796, devised the Estate to the Defendant *Webb*, in Fee; and bequeathed all his Personal Property to the Testator, *William Bell*. In 1794, when *John Bell* was in possession as Tenant for Life, some Houses on the Estate which had been insured by him, were consumed by fire. The Insurance Money was paid, and laid out by *John Bell* in the purchase of 2,817*l.* 5*s.* 7*d.* Three per Cent. reduced Annuities. *John Bell* did not rebuild the Houses, but let the Site, on which the Houses stood for a Timber Yard. After the death of *John Bell*, his Brother *William Bell*, who was in possession as Tenant for Life of the Estate, applied part of the 2,817*l.* 5*s.* 7*d.* Three per Cents. which were standing in the name of his Brother, *i. e.* 1,657*l.* 9*s.* Three per Cents. in rebuilding of a House which formed part of the Estates. The Remainder of the 2,817*l.* 5*s.* 7*d.* Three per Cents. stood in the name of *John Bell*, at the decease of his Brother *William Bell*. *William Bell*'s Will notices this Fund in his Will, in the manner before stated.

By the Settlement in 1753, a power was given to the Tenants for Life to grant Leases, &c. so as upon every such Lease there should be reserved *quarterly* in every year the best improved Rent. The Testator, *William Bell*, granted several Leases to different persons of different parts of the Estate, dated at Christmas, with Rents reserved quarterly upon Lady-day, Midsummer-day, Michaelmas-day, and Christmas-day, in every year. At the time of his decease, on the 29th of September 1816, at nine o'clock at night, there were two quarters Rent due from the several Tenants.

The Testator also was at the time of making his Will, possessed (amongst other Property) of 11,000*l.* Bank Stock, which then stood in his own name in the Books of the Governor and Company of the Bank of England; and there was also standing in the name of his Brother, 1,400*l.* Bank Stock, together with other Property.

In June 1816, the Bank of England, under and by virtue of an Act of Parliament, 56 Geo. III. c. 96 (a),

(a) The third Section of this Act runs thus:—" And be it further enacted, that in consideration of the said advance of Three Millions for the Public Service as aforesaid, the Capital Stock of the said Governor and Company be, and the same is hereby increased and extended from the Sum of Eleven Millions Six hundred and Forty-two Thousand Four hundred Pounds, of which the same now consists, to the Sum of Fourteen Millions Five hundred and Fifty-three Thousand Pounds, making an increase or addition of Two Millions Nine hundred and Ten Thousand Six hundred Pounds Capital Stock; and that the said Sum of Two Millions Nine hundred and Ten Thousand Six hundred Pounds Capital Stock shall be appropriated and divided

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caused an addition of *Twenty-five per Cent.* to be made to the Capital of every Proprietor of Bank Stock, whereby the 1,400*l.* Bank Stock standing in the Testator's Brother's name, was increased to 1,750*l.*, which Sum was standing in the Testator's Brother's name; and the 11,000*l.* Bank Stock standing in the Testator's name at the time he made his Will, was increased to the Sum of 13,750*l.* which last-mentioned Sum was standing in his name at the time of his death.

Upon this Will, and the circumstances, three Questions arose;

amongst the several Persons, Bodies Politic and Corporate, who were Proprietors of Bank Stock on the Twenty-third day of *May* One Thousand Eight Hundred and Sixteen, at the rate of Twenty-five Pounds for every One hundred Pounds of Bank Stock which such Persons, Bodies Politic and Corporate, were then respectively Proprietors of, or had standing in their respective names, in the Books kept by the said Governor and Company for the entry and transfer of such Stock, and so in proportion for a greater or less Sum; and such division and appropriation shall be placed to the credit of the respective names of such persons, Bodies Politic and Corporate, in the Books of the said Governor and Company accordingly; and all such Persons, Bodies Politic and Corporate, shall from the time of such division and appropriation, be lawfully entitled to the additional Sum of Bank Stock so placed in or to the credit of their respective names, and shall respectively be entitled to be paid the same rate of Dividend thereon, and to possess and enjoy the same Profits, Privileges, and Advantages in respect thereof, in like manner, to all intents and purposes, as they were entitled to be paid, possess, and enjoy in respect of the Bank Stock which stood in their respective names on the said Twenty-third day of *May* One Thousand Eight hundred and Sixteen."

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1st. Whether the Sum of 2,817 *l.* 5 *s.* 7 *d.* *Three per Cent.* reduced Annuities, invested under the circumstances mentioned in the Testator's Will, did not become subject to the Trusts of the Settlement and will of the Testator; and whether the Defendant, *R. S. Webb* was not entitled to have the 1,657 *l.* 9 *s.* *Three per Cents.* expended by the Testator, replaced in reduced Annuities, and to have the whole thereof, together with the Interest of the whole since the death of the Testator, transferred to him?

2d. Whether, as the Testator died at nine at night on the 29th September 1816, the Defendant *Webb* was not entitled to two quarters of Rent due on that day, *viz:* the Quarter due at Midsummer, and that due at Michaelmas?

3d. Whether the additional Capital given by the Bank, in pursuance of the Act, after the Testator's Will, passed to the Legatees of the 1,400 *l.* Bank Stock standing in the Testator's Brother's name; and, whether the additional Capital given in like manner in respect of the 11,000 *l.* standing in the Testator's name, passed to the Legatees of that Stock?

Sir *Samuel Romilly*, and Mr. *Daniel*, for Plaintiffs, the residuary Legatees of the Testator *William Bell*:—

John Bell, the Testator's Brother, might have been compelled by the Testator to lay out in Buildings, the Money paid by the Insurance Office, but not having done so, the Defendant *Webb*, the Devisee of *John Bell*, has no claim to the Money. It formed part of the Personal Estate of *John Bell*, which Personal Estate

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was bequeathed to the Testator *William Bell*, under whose Will, the Plaintiffs claim as residuary Legatees. The Will of *William Bell* proves nothing to the purpose. It only states what Money has been received, and what laid out, leaving it to be decided to whom the Money belongs. If the Remainder-man, *Webb*, is entitled to the 1,159*l. Three per Cents.* there is no pretence for saying he is entitled also to the Sum of 1,657*l. 9s. Three per Cents.* which was applied in the improvement of the Estate. The 1,159*l. Three per Cents.* belongs to the Residuary Legatees.

With respect to the quarter's Rent due on the day when the Testator died, that also is claimed by the residuary Legatees, as part of the Testator's Property.

The residuary Legatees are clearly entitled to the additional Capital given in respect of the 11,000*l.* Bank Stock bequeathed by the Testator, the same having accrued after the Testator made his Will. It was so much distinct Stock acquired after the making of the Will; and though it arose in respect of the Stock which he had bequeathed, it does not pass by the Bequest of that Stock. It may be different as to the bequest of the 1,400*l.* Bank Stock standing in the name of the Testator's Brother, over which the Testator had a power of disposing, as the Testator expresses an intention of giving the whole of his Brother's Property, and there is no residue given as to that Property.

Mr. *Leach*, Mr. *Wetherell*, and Mr. *Wilbraham*,
for the Legatees of the Bank Stock :—

The Will was made 11th of May 1815. In June 1816, the Bank added a Capital of *Twenty-five per*

Cent. On the 29th of September 1816, the Testator died. The additional Capital must be considered as an accretion to the Original Stock, and as passing with the *corpus* of the Stock. It was not a purchase by the Testator of additional Stock, in which case it would not have passed. If instead of Bank Stock these had been *Three per Cent. Annuities*, any Dividends accrued due after the Will would clearly have passed. The Bequest of the 11,000*l.* Bank Stock must be considered as the Bequest of so much of the Capital in a great Partnership concern, which the Bank is, and the additional Capital given by the Bank must be considered as Profits in that concern in respect of the 11,000*l.* Capital; the consequence is, that by bequeathing so much Capital, the profits afterwards declared in the shape of additional Capital in respect of such Capital, must pass to the Legatee. If this additional Capital had been declared the day after the death of the Testator, the Legatees would have been entitled, and what difference can it make, that the additional Capital was given before he died?

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Mr. Sugden, and Mr. Richards, for the Defendant
Webb :—

On the part of the Defendant *Webb*, we claim the 2,817*l.* 5*s.* 7*d.* *Three per Cents.* being the Insurance Money received in respect of the Houses burnt on the settled Estate. This was not the Case of a Tenancy for Life, with Remainder in Fee, without any interposed limitation, for there was a Remainder to *William Bell* for Life. This Money received from the Insurance Office must be considered as Real Estate, and subject to the uses of the Settlement in 1753. The moment after the Insurance Money was received, the Remainder-

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man for Life, *William Bell*, might have filed a Bill, and obliged his Brother *John Bell*, to lay out the Money upon the Estate. *John Bell* could not elect to take the Money as Personal Estate, unless with the concurrence of *William Bell*, the Remainder-man for Life. *John Bell* did not dispose of it in his Will as Personal Estate, nor did *William Bell*, by his Will, consider it as Personal Estate to which he was entitled under the Will of his Brother; but from the mention made of this fund in his Will seems to have considered it as belonging to the Real Estate devised to defendant *Webb*. *John Bell* was not justified in applying part of the Insurance Money in rebuilding other Houses, though on the settled Estate. If entitled at all to employ the Money upon the Estate, it must have been to build new Houses on the Site of those burnt down. With respect to the Rent, the Defendant *Webb* is clearly entitled to the last quarter due at Michaelmas, the Testator having died before midnight, viz. at nine o'clock at night, on the 29th of September. That is established by several authorities; by *Clun's Case* (b), *Duppa v. Mayo* (c) *Lord Rockingham v. Penrice* (d), *Cutting v. Darby* (e), *Lestley v. Mills* (f).

Sir *Samuel Romilly*, in Reply:—

The Holder of Bank Stock cannot be considered as a Partner with the Bank. If that were so, a Bill might be filed against the Bank for an account of Profits made from day to day. It would lead to the most involved and perplexed questions. But suppose

(b) 10 Rep. 127. b.

(c) 1 Saund. 287.

(d) 1 P. Wms. 177.

(e) 2 Black. 1075.

(f) 4 T. R. 173.

it a Partnership; suppose a Share is given in a Joint Stock concern, it would not pass profits accruing after the making of the Will. If the Bequest were of the whole of a Man's Interest in a Partnership Concern, that might pass Profits which accrued after the Will. Suppose before the Act of Parliament, instead of giving additional Capital, the Bank had given a *Bonus* in other Funds, 1000*l.* *Three per Cents.* for instance, or an additional Dividend of *Twenty-five per Cent.* this would not have passed to the Legatee of 11,000*l.* Bank Stock; he would not be entitled to that, and also to the 1000*l.* *Three per Cents.* or the increased Dividend. Here sixteen Months only elapsed between the Will and the Death of the Testator; but suppose twenty years had elapsed, could the Legatee have claimed all the advantages in respect of the Stock which had accrued posterior to the Will? Suppose a Female Slave is bequeathed by Will, and she has afterwards a Son, who grows up to a Man, and then the Testator dies, does the bequest of the Mother pass her Son? So if a Mare be bequeathed, which afterwards has a Foal that grows up to a Horse, and then the Testator dies, does the Gift of the Mare pass also the Horse? Surely not.

With respect to the quarter's Rent due at Michaelmas, it is difficult to contend, after the authorities, that the residuary Legatees are entitled to it, but they are clearly entitled to the quarter's Rent due at Midsummer; they are entitled also to the 1,659*l.* 9*s.* *Three per Cents.* In respect of the Insurance Money unapplied, received by *John Bell*, the Will of *William Bell* does not affect the Question as to this Sum; he only states how the fact was, leaving it to be determined who was entitled to the Money.

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The VICE-CHANCELLOR:—

With respect to the 1,159*l.* 16*s.* 7*d.* *Consols*, claimed by the Defendant *Webb*, as Insurance Money received by the Testator, in respect of a House burnt on the Estate of which the Testator was then Tenant for Life, with Remainder to the Testator *William Bell* for Life, with an ultimate Remainder to *John Bell* in Fee, and which the latter by his Will devised to the Defendant *Webb* in Fee, and bequeathed all his Personal Estate to the Testator *William Bell*, I think he is clearly entitled to it. The Testator, *William Bell*, appears by his Will to have thought so, for he conscientiously states the circumstances; he appears to set apart the Money, as belonging to the Remainder-man, describing it, “as part of and belonging to what was the Real Estate of his Brother *John Bell*.” Nothing could more strongly show the Testator’s abandonment of all claim to this Money, as Personal Property of his own. If the House had been rebuilt, it would have gone to the persons successively entitled. The Insurance was for the benefit of all parties. The money was not laid out, but set apart to ameliorate and restore the Real Estate. Those who claim under the Testator cannot dispute his abandonment of any Claim on this Fund. It is evident that both *John*, and the Testator *William Bell* considered this Money as liable to the uses of the Settlement. I think it quite clear, therefore, that the Fund belongs to the Defendant *R. S. Webb*; but as to the Money laid out by the Testator *William Bell*, I think the Defendant *Webb* has not any claim to that, as it was laid out on the Estate for the very purpose to which it was originally destined.

The last Quarter's Rent from *Michaelmas* to *Christmas* goes, without doubt, to the Defendant *Webb*.

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With respect to the Legacy of 11,000*l.* Bank Stock, standing in the Testator's name, it appears, that in the interval between the Date of his Will and the Testator's death, a *Bonus* of 25 *per Cent.* was given by the Bank, under the 56th Geo. III. c. 96, s. 3.—[His *Honor* here stated the third Section of the Act (a).]—The Bill states, that the additional Capital given by the Bank under this Act, increased the Sum of 11,000*l.* Bank Stock to 13,750*l.* and the question is, whether the Legacy of 11,000*l.* Bank Stock passed also the addition Capital given upon it by the Bank. There are many Cases, as to the effect of a *Bonus*, and of an increased Dividend, given by the Bank. The *Bonus* has been considered as an accretion to the Capital, but the increased Dividend has been held to belong to the Tenant for Life. The Cases are all referred to in *Barclay v. Wainwright* (g), the last Case on the subject; in which the *Lord Chancellor* considered the additional Dividend as belonging to the Tenant for Life. I mention these Cases to show I have not been inattentive to them; but they have but a distant bearing upon the present Case; for this is not a question arising between a Tenant for Life of Stock, and a Remainderman.

It is clear that the Capital was only 11,000*l.* Bank Stock at the time the Testator made his Will. That Sum is specifically given by the Testator. It has all

(a) Stated *ante*, p. 271, in note. (g) 14 Ves. 66.

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the characteristics of a specific Legacy ; it is a Gift of “ *the Sum of 11,000*l.* Capital Bank Stock, now standing in my Name* in the Books of the Governor and Company of the Bank of England.” Suppose the Testator had died the next day, only that precise Sum standing in the Testator’s Name could have passed. He does not bequeath *the whole* of his Bank Stock, but only the Stock “ *now standing in my Name.*” Did then this Legacy prospectively pass the new acquisition of Capital Stock in June following? It is said that this 11,000*l.* Share of Bank Stock must be considered as a Partnership Share of so much in the Capital of the Bank ; and that the subsequent addition of Capital, in respect of the 11,000*l.*, belongs to the Legatee of that Sum, as in the nature of Profit, and follows as an appendage to the 11,000*l.*, Bank Stock given by the Will. Comparisons require to be watched ; they often mislead. This is not like a Share in a Partnership concern, where each Partner has a right to call for an account. It does not appear here when the Profits accrued to the Bank, in respect of which the additional Capital was given. Before the Act passed, it was illegal in the Bank to create an additional Capital ; they were prohibited from increasing their Capital. Though the Testator had foreseen that some advantages would accrue in respect of his Capital, yet he could not foresee that it would arise in the shape of additional Capital, for the Act which enabled the Bank to give an additional Capital, passed subsequently to his Will, the Will being in May 1815, and the Act afterwards passing in June 1816. Whether the Testator acquired the additional Capital under the Act of Parliament, or by Gift, the effect would be the same ; it could not pass

under this Legacy. The specific Legacy is of 11,000 *l.* Bank Stock; and it cannot be said that 13,750 *l.* Bank Stock, passes under a Legacy of 11,000 *l.* Bank Stock. There are no words in the Will to pass the additional Capital to the Legatee. On the same principle, the Legatees of the 1,400 *l.* Stock, standing in the name of the Testator *John Bell*, are entitled only to that Stock.

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and others,

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and others.

Ex parte —.

A PERSON, stating himself to be a Creditor, but who had not sworn to any debt under the Commission, or in support of the Petition, petitioned that a Commission might be superseded; but the *Vice-Chancellor* said, a Creditor, who had not shown himself to be such, could not present such a Petition.

21st August.
Creditor who has not proved, cannot petition to supersede a Commission.

Mr. for the Petition.

Mr. *Wetherell*, *contra*.

Ex parte —.

A PETITION was presented by an Equitable Mortgagee, to have his Pledge sold, and to be allowed to prove for the remainder; and that the Costs of the Petition might be paid out of the Bankrupt's Estate, as it was owing to his conduct, that a regular Mortgage had not been made: but the *Vice-Chancellor* held, the Petitioner must pay the Costs of the Petition; and that this Case ought not to form an exception to the general rule.

Same day.
Equitable Mortgagee not entitled to Costs on application for Sale of pledge, &c. though it was owing to the Bankrupt that no regular Mortgage was made.

1817.

Ex parte ELDER in the Matter of WILLIAMS.

19th and 22d
August.

On Marriage of W. W. then in good circumstances, he gave a Bond to Trustees for 4000 l. conditioned to pay to them 2000 l. within one Month after demand, and for payment to them in the mean time of Interest upon the 2000 l. by half-yearly payments upon such Trusts as were contained in an Indenture of Settlement. By the Settlement it was provided that the Trustees should not call in or demand payment of the 2000 l. or any part thereof, during the Life of W. W. The Interest of the 2000 l. was several years in arrear. W. W. afterwards became Bankrupt, never having consented to a demand upon him for the 2000 l. Held, the 2000 l. was proveable against the separate Estate of W. W.

WILLIAM WILLIAMS, prior to and in consideration of his Marriage with *Martha Davies*, executed a Bond, dated 4th Nov. 1803, to *George Rees* and *Thomas Palmer*, in the penal Sum of 4,000*l.* with a Condition for payment to them of 2,000*l.* within one Month after demand, and for payment to them in the mean time of Interest upon the 2,000*l.* by equal half-yearly Payments, on the 4th May and 4th November in every year, upon such Trusts as were contained in an Indenture of Settlement of even date. By the Settlement, after reciting the Bond, it was declared that *Rees* and *Palmer* should, when the 2,000*l.* should be received, invest the same in Stocks or Funds, and pay the Dividends to *Martha Davies*, for her separate use, during the joint Lives of her and *Williams*; and in case she should survive him, to pay the Dividends to her during her life, and in case *Williams* should survive her, to pay the Dividends to him during his life; and after the death of the survivor, to divide the Funds among the Children of the Marriage equally. The Settlement then contained a Proviso, that the Trustees *should not call in or demand payment of the 2,000 l. or any part thereof, during the Life-time of Williams, without his consent;* and that until payment of the 2,000*l.* the Trustees

should receive the Interest secured by the Bond, and stand possessed thereof, upon the Trusts before mentioned, concerning the Dividends of the Stocks or Funds directed to be purchased with the 2000 *l.* when the same should be received.

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Ex parte
ELDER, in the
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WILLIAMS.

On the 26th March 1811, a Commission of Bankrupt issued against *Williams* and his Partner, *Chamberlayne*. The Petitioners, separate Creditors of *Williams*, proved Debts under their Commission, to the amount of 900 *l.* upon the separate Estate of *Williams*. *Rees* and *Palmer* also, the Trustees in the Bond and Settlement, were permitted to prove as separate Creditors, to the amount of 2000 *l.* against the separate Estate of *Williams*, upon the Bond, 4th November 1803, given to them upon the Trusts declared by the Indenture of Settlement before-mentioned.

The Petition stated, that, at the date of the Bond and Settlement, and up to the date of the Commission, no notice was given to *Williams*, nor was any demand made on him by the Trustees to pay the 2000 *l.*, nor had he paid any Interest thereon, nor did *Williams* at any time agree with the Trustees, or in any manner consent to their calling in the 2000 *l.* The *Prayer* of the Petition was, that the Proof of the Debt might be expunged, and that the Dividend declared on the separate Estate of *Williams*, in respect of the 2000 *l.* might be stayed until the Petition was heard, and that the Assignees might, out of the separate Estate, pay the Costs of the Petition.

The Petition was supported by an Affidavit, and Affidavits were made on the other side.

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Matter of
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Mr. *Bell*, and Mr. *Montagu*, for the Petition :—

The Bond refers to the Settlement, and both must be read together; and it must be clear they were intended as a Fraud on Creditors. The Bankrupt received no fortune with his Wife, and had not 2000*l.* when he made the Settlement. No demand was made, nor was any necessary; for the Trustees were not to demand payment of the 2000*l.* unless with the consent of *Williams*. In the Matter of *Murphy (a)*, a Bond was given by a Trader, previous to his Marriage, to a Trustee; and by Marriage Settlement of the same date it was covenanted, that the Sum mentioned in the Bond was to be payable only in the event of the Wife surviving the Husband; and it was also covenanted, that in case of the Husband failing in his circumstances, but not otherwise, the Trustee should sue on the Bond; the Husband failed, and it was held by Lord *Redesdale* that the Trustee could not be admitted a Creditor. The same point was so determined by the same Judge, in *Ex parte Henecy (b)*. This is only doing the same thing in another form. In *Higginson v. Kelly (c)*, Lord *Manners* says, “ a Trader cannot on his Marriage settle his Property in such a manner, that in the event of his Bankruptcy his Wife shall be entitled to it in prejudice of his Creditors.” This is such a Settlement; for unless Bankruptcy was apprehended, it cannot be supposed this man, who was in trade, would ever consent to have a demand made upon him for 2000*l.* If the Bond had been given payable immediately, or in six Months, upon demand made by the Trustees, it might

(a) 1 Scho. and Lefr. 44.

(c) 1 Ball and Beatty, p.

(b) Mentioned Arg. Ib. 252.

p. 46.

have been proved, Marriage being a good consideration for the Bond; but this Case is very different; the Money not being demandable, unless with the consent of *Williams*. This Bond and Settlement must therefore be considered as a Fraud on the Bankrupt Laws, and the Debt ought to be expunged.

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Mr. Treslove, contra:—

It is proved by Affidavits, that *Williams* possessed double the amount of the Sum for which the Bond was given when he married. The Bond and Settlement were executed in 1803, and the Bankruptcy did not take place till 1811, so that Bankruptcy was not in the contemplation of the parties.

There was a breach of the condition of the Bond many years previous to the Bankruptcy; and that circumstance, according to *ex parte Winchester (d)*, which Case is sanctioned in the Case cited of *ex parte Rowlat (e)* renders the Debt proveable. The Affidavits on the part of the Petitioners state, that no Interest was paid on the Bond. Affidavits, therefore, on the part of the Respondents, as to that fact, were unnecessary. In *ex parte King (f)*, where a Bond was given to replace Stock, and pay the Dividends, Lord *Eldon* says, "If the Bond had been forfeited, either as to the Capital or the Dividend, it would have done; as if though the Bankruptcy was previous to the time at which the Stock was to be replaced, a forfeiture had been incurred by not paying the Dividend; and the Petitioner might, in either case, have proved." Here,

(d) 1 Atk. 117.

(e) 2 Rose, p. 416.

(f) 8 Ves. 335. See also
ex parte Day, 7 Ves. 301.

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therefore, as no Interest was paid, and the Bond was forfeited at Law, the Debt was proveable. If the Bond had not been forfeited by the non-payment of Interest, then, I admit, according to *ex parte Alcock (g)*, the Debt could not be proved.

The object in making this Money payable only on a demand made with the consent of the Bankrupt, was, to prevent the Trustees incurring any responsibility by not making a demand; for if the Money had been payable simply on a demand made by the Trustees, they would, for their own safety, have made the demand immediately, as is observed in *ex parte Alcock (h)*. In the Cases in *Schoales* and *Lefroy* there was a clear design to defraud Creditors.

Mr. *Bell*, in Reply:—

This is certainly an important Case; if this Debt can be proved, the doctrine in the Cases cited from *Schoales* and *Lefroy* might as well be expunged. Here the Parties never designed that the Interest should be paid, nor could it have been recovered, the Husband living with and supporting his Wife and Family (*i*). If he

(*g*) 1 Ves. and Bea. 176.

(*h*) Ibid. 179.

(*i*) In several Cases it has been held, that where the Husband has been permitted by his Wife to receive the income of his Wife's separate Estate, she, on an account prayed against him, shall not have the account carried back, *beyond a year*. It was so held in *Townsend v. Windham*,

2 Ves. senr. 7. *Peacock v. Monk*, ib. 190; and such appears to be the opinion of *Lord Chancellor Eldon*, *Parkes v. White*, 11 Ves. 225. In a Case also (not, I believe, in print,) of *Burdon v. Burdon*, at the Rolls, 5th July 1773, Sir Thomas Sewell held, that where the Husband for many years receives the separate Estate of the Wife, and they

had died, the Arrears only for one year could have been claimed. Even at Law, I apprehend, the Arrears could

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appear to have lived well together, and the Husband dies, his Personal Estate shall not be wholly discharged from what he received, but that she shall have an allowance there-out *for one year's amount of the separate Estate*. He said there was no difference between Pin Money, which may come out of the Husband's Estate, or what may be settled for the separate use of the Wife out of her own Estate; and it was said, that *Lord Camden* had made a like Decree.

There are, however, other Cases in which it has been held, that no account can be taken against the Husband, *not even for one year*, as in *Powell v. Hankey*, 2 P. Wms. 84, where the Rule is thus ably, and generally stated by *Lord Macclesfield*: "As to the case of separate maintenance, the Court took notice that the Husband's maintaining the Wife, barred the Wife's claim in respect thereof; so if there should be a provision for the Wife's separate use for clothes, if the Husband finds those clothes, the Wife's claim will be thereby barred;

that in case of the Wife's separate maintenance, if this be not demanded by her, she will be concluded, even where she has no other person to demand it of but her husband, which probably she might be afraid to do; but that the principal case was not so strong, in regard there the Wife might have demanded it from her own Trustees; neither was it material, whether the allowance or maintenance Money was provided out of that Estate which was originally the Husband's, or (as in the principal Case) out of what was the Wife's own Estate, for that in both Cases, the Wife's not having demanded it for several years together, should be construed a consent from her, that the Husband should receive it."

So, in *Squire v. Dean*, 4 Bro. C. C. 326, where, the Husband had received Dividends of the Wife's separate Property in the Funds, and applied them to the general purposes of the Family, and the Wife survived the Husband, *Lord Loughborough*, refused to give her representatives an account of the Divi-

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not have been recovered, and it would have been presumed, that the right to demand them was given up.

dends, against the Representative of the Husband. The Case is shortly reported, without any argument, or a statement that any Cases were cited. This Case was followed by *Smith v. Lord Camelford*, 2 Ves. junr. 716, in which the same Judge, held, "Though the Property was settled to the Wife's separate use, yet if she permitted him to spend the Income, he is not accountable; next, *he is her personal representative.*" In that case, therefore, it was not material to insist on an account for one year, as the Husband was the personal representative of the Wife. The next Case is *Dalbiac v. Dalbiac*, 16 Ves. 126, where *Sir William Grant*, M.R. held, that the account of by-gone Dividends could not be taken farther back than from the Husband's death; but the Report does not state any argument on the point, nor does it appear that any Case was cited. The Reporter refers to *Parks v. White*, 11 Ves. 209, before alluded to, but it was held there, that the Court would give the account *for one year.*

The authorities, it thus appears, are conflicting upon

this point. The Reader will decide where the preponderance lies. If the Husband is permitted to receive the Wife's separate Estate, and he applies it in the support of the family, why should he be accountable even *for one year?* The reason why an account was given for one year in the Cases cited, does not appear; perhaps it was from this consideration, that if the Wife has differences with her husband, and files a Bill for an account, or if the Husband dies, she might be without any *present* subsistence, unless she could claim an account for a year past.

In *Fowler v. Fowler*, 3 P. Wms. 354, the Rule is thus expressed, "Where Pin Money is secured to the Wife, and it appears that the Husband notwithstanding provides the Wife with Clothes and other necessaries, this, *during such time as the Wife is so provided for by the Husband*, will be a bar to any demand for her arrears of Pin Money." This, though a sensible distinction, does not appear to have been followed in previous, or subsequent, Cases. The Cases fully establish there

We say this is a Fraud on Creditors; a contrivance to enable the Trustees, with the Bankrupt, whenever in danger of becoming a Bankrupt, to secure this demand. I admit *Winchester's Case*; that was a *bonâ fide* transaction, but this is not; the Money was only demandable with the consent of the Bankrupt; it is an ingenious scheme, adopted with a view to evade the decisions in *Schoales* and *Lefroy*. Suppose *Williams*, knowing he must be a Bankrupt, had consented to a demand upon him for the Sum of 2000 *l.* that would have been a Fraud on the Creditors. In *ex parte Alcock* the Claim did not depend upon the Bankrupt's will.

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The VICE-CHANCELLOR—[after stating the facts 22d August.
of the Case]:—

The question arising out of these facts, is, Whether the Debt of 2000 *l.* is proveable under this Commission? Is there any legal Debt? It is clear there is. The Bond was conditioned for the payment of Interest during the Life of *Williams* the Bankrupt, and the Petition states there was an Arrear of Interest. The Bond was clearly forfeited, and might have been recovered at Law. Being thus forfeited before the Bankruptcy, the Certificate would have been a Bar. When once a Bond is forfeited before Bankruptcy, though there may be a right in Equity to prevent proceedings at Law, upon the Bond, still, in case of Bankruptcy, Equity will not restrain the Obligee from proving, unless on equitable grounds. The case *Ex parte Winchester (k)* is not disputed. Lord *Hardwicke* expressly says, "If a Husband becomes Bankrupt after a breach of payment to Trus-

is no difference between Pin (k) 1 Atk. 117.
Money, and other separate
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tees (which is the present case), they have always been admitted Creditors upon equitable terms." If there had been no Forfeiture at Law, the Debt then would not have been proveable, as determined by Lord *Hardwicke* in *ex parte Groome (m)*. So, in Bonds to secure an Annuity, if the Bond is forfeited, the party proves the value of the Annuity, and the Certificate is a bar in regard to any claim in respect of the Annuity (*n*). In *ex parte Rowlat (o)*, the principle acted upon in *ex parte Winchester* was followed. This was an undoubted Debt at Law; but the great difficulty arises from the reference of the Bond to the Settlement; in which it is provided, that "the Trustees should not call in or demand payment of the 2000 *l.* or any part thereof, during the Life of *Williams*, without his consent. Two Cases in *Schoales* and *Lefroy* have been cited. The present Case does not fall within the application of the principle, upon which those Cases were decided. In those Cases, the right to prove arose only, *in case of Insolvency*, and therefore could not be supported. Here it is not the Insolvency which is insisted upon as giving a right to prove, but the forfeiture of the Penalty of the Bond previous to the Insolvency and Bankruptcy. This Bond and Settlement were not made in contemplation of Bankruptcy; nor is any provision made for that event. The object appears to have been a very natural one; to enable *Williams*, a Trader, to use the Money in his Trade. He gives the Interest of the Money to his Wife for her life, and after his and her

(*m*) 2 Atk. 114.

(*n*) See *Wyllie v. Wilkes*, Dougl. p. 501. As to the manner in which an Annuity is

valued in Case of Bankruptcy. See *Ex parte Whitehead*, 1 Merr. 10, 127, 724.

(*o*) 2 Rose, 416.

death, the Capital goes to the Children; but the design appears to have been, that the Capital should not be paid till his death, because, until that event, it could not be demanded without his consent. It is like the Case *ex parte Winchester*. It has been argued, that on the eve of Bankruptcy he might consent that a demand should be made upon him; that might be considered as fraudulent; but here he gave no such consent to a demand; it is so stated in the Petition. It would be too strong to hold that this man, in good circumstances when the Bond and Settlement were executed, could not have executed them but in contemplation of Bankruptcy. The Assignees have no Equity to restrain this proof; by so restraining them the Parties would entirely lose their debt. *Ex parte Alcock* is not in point. Here there was no power in the Trustees alone to call in the Money, but a power in the Bankrupt to delay payment. Had *Williams* been solvent, they could not have compelled him to pay the Money. The Bond and Settlement were not fraudulent, or in contemplation of Bankruptcy. The Petition must be dismissed, with costs to be paid to the Trustees; their Costs, and those of the Assignees, to be paid out of the separate Estate.

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Petition dismissed.

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Ex parte CRUNDWELL *in re* SLATER.

22d August.
A Creditor of the Bankrupt was, without his privity, named a Commissioner under the Commission, but declined acting as such, and afterwards was chosen as assignee. On the Petition of a Creditor, he was restrained from acting as Commissioner.

THIS was the Petition of a Creditor under the Commission against *Slater*, stating, the Commission 4th January 1816, which was directed, as usual, to five Commissioners, one of them being *George Mant*, Esq. a Creditor of the Bankrupt:—That at the Meeting for the choice of Assignees, *George Mant*, with two other persons, were chosen Assignees; and *prayed*, that *Mant* might be discharged from being one of the Assignees, and that a Meeting might be directed for the choice of an Assignee in his stead, and that *Mant* might be directed to deliver up to the two other Assignees, and the new Assignee to be chosen, the Estate and Effects of the Bankrupt in his hands, together with all Books, &c., and account before the Commissioners for what had come to his hands; and that the Costs of the Meeting for the choice of the new Assignee, and of taking the Accounts, and of the present application, might be paid by *Mant*; and that he might be restrained from acting as Commissioner under the Commission.

The Petition was supported by the Affidavit of the Petitioner, and of the Bankrupt.

By the Affidavit of *Mant*, it appeared, that his name was inserted in the Commission without his knowledge, and upon being informed he was named as a Commissioner, he, being a large Creditor, declined to act under the Commission, but consented, at the solicitation of his Co-Assignees, to act as Assignee.

Mr. *Farrer*, in Support of the Petition:—

The situation of Commissioner and of Assignee are incompatible. As well might a *Master* be chosen as Receiver. When he voted in the choice of Assignees, he knew he was named as a Commissioner. The Prayer of the Petition is proper.

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Mr. *Cooke*, and Mr. *Heald*, contra:—

Certainly, *Mant*, being a Creditor, ought not to have been named as a Commissioner; but he was so named without his knowledge or concurrence, and probably with a view to prevent him exercising his rights as a Creditor. He has not acted as Commissioner under the Commission, or qualified. The Commission issued a year and a half ago. Why not petition before? Under these circumstances he cannot be displaced from his situation as Assignee. The *Lord Chancellor* has made a General Order, which will be published in *September* next, and prevent the recurrence of a Case of this description.

The VICE-CHANCELLOR:—

The question is, Whether *Mant*, who is named a Commissioner under this Commission, can also sustain the situation of Assignee? The Petitioner does not state that it was with *Mant's* privity that he was named a Commissioner; and *Mant* swears that he was named without his privity, and when he knew it he declined to act. On looking at the proceedings, it does not appear that he has acted as Commissioner. Certainly the office of Commissioner and that of Assignee ought to be distinct—the one being intended as a control upon the other. That part of the Petition which prays that *Mant* may be restrained from acting as Commissioner, must be granted, and dismissed as to the rest.

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ATTORNEY GENERAL (at the Relation of the Reverend W. R. DARNELL, Clerk) v. MOSES, JACKSON, and others.

19th April 1816,
and 26th
August 1817.

Information and Bill to set aside three Leases, one for 999 years, and two for 1000 years, granted by a Vicar and Vestrymen under an unlimited Power to Lease given by an Act of Parliament; and held, that the Attorney General ought not to have been made a Party, and that the Leases were valid.

THE *Information and Bill* stated, that by an Act of Parliament, 12th Anne (*a*), intituled, "An Act for making the Chapelry of *Stockton*, in the County of *Durham*, a distinct Parish," it was, amongst other things, enacted, That all said Chapelry of *Stockton*, consisting of the Borough Town and Township of *Stockton*, and of the several Villages or Townships of *East Hartburne* and *Preston*, according to the usual and known Boundaries thereof, should from the 24th June 1713 for ever be a distinct Parish of itself, and be called by the name of the Parish of *Stockton-upon-Tees*; and that there should be a Vicar to have the care of the souls of the Inhabitants thereof, and a perpetual succession of the Vicars there, who should have capacity and succession by the name of the Vicar of the Parish Church of *Stockton-upon-Tees*; and that the Parsonage, Donation and Collation of the Vicar thereof, should appertain and belong to, and was thereby solely vested in, the *Lord Bishop of Durham*, and his Successors for the time being; and for the better provision and maintenance of the said Vicar and his Successors, it was thereby further enacted, that it should and might be lawful to and for the said *Lord Bishop of Durham* for the time being, by himself, or by his Steward of his Halmote or Copyhold Court for the Manor of *Stockton*, from time to time to grant, without any Fine to the said Vicar and his Successors, all that Parcel of Waste Ground lying between the Almshouses in *Stockton*, and the House of

(*a*) Private Act. 12 Anne, Stat. 1, c. 8.

William Peacocke, therein named, as the same was then marked or doled out, and abutting upon the Great Pavement leading to the Church on the West, and extending from thence Eastward 160 yards, or thereabouts, containing in breadth 40 yards, or thereabouts, being of the yearly value of 20*l.* or thereabouts, to be held by said Vicar and his Successors, according to the custom of the said Manor, at the yearly Rent of One Penny, and no more; and the Steward of same Court was thereby required to grant the same accordingly:— That by virtue of the aforesaid Act of Parliament, the said Chapelry of *Stockton* became, and has ever since been, and now is, a separate and distinct Parish, and that same has ever since been and now is called or known by the name of the Parish of *Stockton-upon-Tees*; and the care of such Parish has been from time to time discharged by such Persons as have respectively, since the passing of the Act, been duly collated, instituted, and inducted to and into the Vicarage and Parish Church of said Parish:—That by another Act of Parliament, 1 *Geo. I.* (*b*) intituled, “ An Act for explaining and making more effectual an Act, passed in 12 *Anne*, intituled, &c. (being the Act before mentioned), after reciting certain parts of the aforesaid Act, and particularly such part thereof as related to the Grant by said *Bishop of Durham*, of the Waste Ground therein mentioned; and further reciting, “ that forasmuch as said Waste Ground might be let for a considerable yearly Rent, provided the Lessees or Persons farming the same might have a certain Term and Interest therein, for sufficient number of years, for their encouragement to build upon and improve the same; but there being no power given by the Act aforesaid to said Vicar, or to any other Person,

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(*b*) Private Act, 1 *Geo. Stat.* 2, c. 42.

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to grant or demise the Premises, said Ground had, ever since the making of the said Act, laid waste, and very little profit or advantage had been made, or could be made of same, without such power of granting Leases as aforesaid; for remedying of which inconvenience, and for the more effectually providing and securing to the Vicar and his Successors the benefit and augmentations intended by the said former Act, it was enacted, that it should and would be lawful to and for the Vicar of said Parish of *Stockton-upon-Tees* for the time being, at all or any time or times after granting such Waste Ground to him or them as aforesaid, or any other Waste Ground thereafter to be granted to him or them by virtue of said Act aforesaid, by and with the consent and approbation of the Vestrymen of said Parish for the time being, or the major part of them, to be testified by some Writing under their hands, *to grant or demise such Wastes or Waste Ground, or any part thereof, to any Person or Persons whomsoever, for such term or number of years, at and under such Rent, Reversions or Payments, as to him and them should seem meet; provided that the yearly Rent so to be reserved for the said Wastes or Waste Ground, or any part thereof, be the highest that could be got for the same, and that no Fine be taken for the making of any such Grant or Demise; and in case any difficulty should arise between said Vicar and Vestrymen about letting to farm the Waste Grounds aforesaid, then the matter in dispute shall be referred to be determined by the Lord Bishop of Durham for the time being.*—That on or about the 27th June 1716, the aforesaid piece or parcel of Waste Ground in said two Acts of Parliament described, was duly granted by or on the behalf of the then *Lord Bishop of Durham*, to the Reverend *George Walker* (since deceased), who then was the Vicar of said Parish

of *Stockton-upon-Tees*, and his Successors; to hold the same to said *George Walker* and his said Successors, Vicars of *Stockton-upon-Tees*, under the yearly Rent of One Penny; and said *George Walker* was thereupon duly admitted Tenant of said Premises, by the then Steward of said Halmote or Copyhold Court of said Manor of *Stockton*; and by virtue of said Act of Parliament, and of said Grant and Admittance, said Premises became and have ever since been part and parcel of the Possessions of the Vicar of said Parish for the time being:—That by Indentures of Lease of three parts, 4th March 1719, between Reverend *G. Walker*, Vicar of the aforesaid Parish, of the first part; *Cuthbert Hodshon*, therein described, of the second part; and the Vestrymen of said Parish, therein respectively named, of the third part; and which was duly executed by all the Parties thereto: It was witnessed, that in consideration of the Rents, Covenants, Provisoos, Conditions, and Agreements, thereafter reserved and mentioned, said Vicar, by and with the consent and approbation of said Vestrymen, demised, &c. unto said *C. Hodshon*, his Executors, &c. all that Piece or Parcel of Ground in the Town of *Stockton* aforesaid, as the same was then erected and built upon by said *C. Hodshon*, containing, &c. [describing the Waste Ground,] which said thereby demised Premises were part of that Parcel of Waste Ground called *Thistle Green*, which in the Act 12 *Anne* was described; to hold the same unto said *C. Hodshon*, his Executors, &c. from the 1st August then last past, for the term of 999 years, yielding and paying yearly and every year during said term, unto said Vicar, and his Successors Vicars of *Stockton* for the time being, the yearly Rent or Sum of 2 *l.* 7 *s.* 6 *d.* at the respective times therein mentioned; and in said

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Indenture was the usual Power of Distress, in case of the Rent being in arrear; and amongst others, a Covenant on the part of said *C. Hodshon*, his Executors, &c. to keep in repair the Dwelling House, &c. then standing upon said demised Parcel of Ground; with a Proviso that it should be lawful for said *C. Hodshon*, his Executors, &c. to make such alterations in all or any of said Houses, &c. as he should think fit, so as such alterations tended not apparently to be lessening or impairing of the yearly value thereof; it being the true intent and meaning of said Presents, and of the Parties to the same, that there should be kept up and maintained upon said Premises, from time to time during said Term, so much Housings and Buildings as by the Rents thereof said Vicar and his Successors might be answered and well secured said reserved yearly Rent: And lastly it was agreed by and between all the said Parties, that said *C. Hodshon* should bear and defray his and their said Share of the Charge in putting the Watercourse into the middle of the *North Street*, near the *Alms-houses*, which runs under said Great Pavement, after the rate of 2*l.* 7*s.* 6*d.* proportionably with the rest of the Purchasers of said Waste Ground, the whole being computed at the yearly Rent of 51*l.* 8*s.* or thereabouts:—That by another Indenture of Lease, 20th April 1719, between said *George Walker*, Vicar, &c. of the first part; *John Cock*, of the second part; the Vestrymen of said Parish therein respectively named, of the third part; and which was duly executed by the several Parties thereto: it was witnessed, that in consideration of the Rents, Provisoes, &c. thereafter reserved, said Vicar, by and with the consent and approbation of said Vestrymen, demised, &c. unto *J. Cock*, his Executors, &c. all that Parcel of Ground, with the

Dwelling Houses and Shops then in the occupation of the said *John Cock* and his Tenants, and other Edifices lately erected and built upon the same by said *J. Cock* or his Assigns, situate in *Thistle Green*, within the Town of *Stockton* aforesaid, as the same was then lately inclosed and built upon [describing it], which said thereby demised Premises were part of that Parcel of Waste Ground mentioned in the Act 12 *Anne*; to hold the same unto the said *J. Cock*, his Executors, &c. from the 1st August preceding, for the term of 1000 years, paying to the said Vicar, and his Successors for the time being, the yearly Rent of 31 s. at the respective times therein mentioned; and in said Indenture were contained such or the like Covenants as were contained in the Lease to *C. Hodshon*:—That by another Indenture of Lease, 27th August 1716, between the said *G. Walker*, Vicar as aforesaid, of the first part; *David Douthwaite*, of the second part; and the Vestrymen of said Parish, therein respectively named, of the third part; and which was duly executed by the several Parties: it was witnessed, that in consideration of the Rents, Covenants, &c. the Vicar, with the consent and approbation of said Vestrymen, or the major part of them, demised, &c. to *D. Douthwaite*, his Executors, &c. all that, &c. [describing the Premises], which said Premises were part of the Parcel of Waste Ground mentioned in the Act 12 *Anne*, with the Appurtenances; to hold the same for the term of 1000 years, paying the yearly Rent of 6l. 2s. in which Indenture were contained such or the like Covenants as in the before-mentioned Indentures of Lease, and a Covenant on behalf of *D. Douthwaite*, his Executors, &c. within seven years from the date of the Lease, to lay out 61 l. at the least, in erecting and building Dwelling Houses, &c. in and upon the de-

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mised Land:—That by virtue of the several Indentures of Lease, the Lessees entered into possession of the Premises demised, and that they, and those claiming through them, have ever since continued in possession of the same, or in the receipt of the Rents and Profits; and that *D. Douthwaite*, in pursuance of his Covenant, laid out 61 *l.* in making Erections and Buildings upon the Premises demised to him, and which are still standing upon the Premises:—That the Premises demised to *C. Hodshon* for some time past, and then were vested in *Thomas Moses*, of *Stockton* (a Defendant), for the residue of the said term of 999 years, and that the Premises demised to *J. Cock* for some time past, and then were vested in *Richard Jackson* (another Defendant), and that certain parts of the Premises demised to *David Douthwaite*, for some time past, and then were vested in *Robert Pallister* (another Defendant), and other parts of such Premises were then vested in *Thomas Simpson*, *Richard Jackson*, and *John Page* (three other Defendants, the Assignees of the Estate and Effects of *Robert Wilkinson*, a Bankrupt, for the residue of said term of 1000 years, granted therein as aforesaid; all which said Defendants claimed to be entitled to the same for the residue of the said several terms respectively; and that they have respectively received the Rents and Profits of said Premises respectively, to a considerable amount, and appropriated the same to their own respective use:—That the aforesaid several Leases amount in effect to a complete alienation of the Premises therein comprised; and that the same, *though good at Law*, ought to be set aside in Equity, as Plaintiff is advised and submits:—That the Term usually granted in Building Leases is 60 years; and that regard being had to Sums of Money laid out upon the Premises by

said Lessees respectively, and to the several Covenants aforesaid, said Lessees, and those claiming through or under them, have respectively received, by their subsequent enjoyment of said Premises, a full and ample remuneration in respect of such respective Sums of Money:—That some time in or about the 13th September 1815, Plaintiff was duly collated by the *Lord Bishop of Durham* to the Vicarage and Parish Church of *Stockton-upon-Tees* aforesaid, and Plaintiff has ever since been and now is the true and lawful Vicar thereof; and Plaintiff is advised and submits, that, under the circumstances aforesaid, the aforesaid Leases ought to be declared void, and that same ought to be surrendered to Plaintiff, as such Vicar as aforesaid; and that Plaintiff ought to be restored to the possession of said Leasehold Premises; and that Defendants ought respectively to be compelled to account with the Plaintiff for the Rents and Profits of the Premises from the time Plaintiff became such Vicar as aforesaid. The Information and Bill then *charged*, that the Defendants, previous to or at the time that said Leases were respectively assigned to them, had notice, either actual or constructive, that the said Premises belonged to the Vicar of *Stockton* for the time being, and had been demised to the aforesaid Lessees, by virtue of the aforesaid Power; and more particularly, as in all said Original Leases, said Premises were respectively described as being Parcel of the Waste Ground granted to said Vicar as aforesaid, and the Rents reserved by the said respective Leases were made payable to said Vicar and his Successors:—That Premises have been some time since and then were under-let to certain Persons, for certain long terms of years, at large improved Rents; but the particulars of such alleged under-leases, or to whom same have

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been respectively made or granted, Defendants refuse to discover. The *Prayer* was, that the aforesaid several Leases might be declared, under the circumstances, to be fraudulent and void, and that the same ought to be delivered up to be cancelled, or otherwise surrendered to the Plaintiff; and that the Plaintiff might be let into the possession of the Premises; and that the Defendants might respectively account with the Plaintiff for the Rents and Profits of the Premises from the time that the Plaintiff became Vicar of the Parish.

The Defendants put in General Demurrers for want of Equity.

These Demurrers came on now to be argued.

Mr. *Leach*, and Mr. *Horne*, for the Demurrers:—
 This is not a Case in which the Attorney General ought to have been a party. The Legislature gave an unlimited power of leasing. This does not, therefore, resemble the Charity Cases, in which long Leases have been considered as a Breach of Trust. It is not shown that more Rent could have been obtained than was reserved. Near a century has elapsed since the Leases, without any objection. During that period, the Property has passed from one to another by derivative Titles, and much Money has been expended on the Lands, by Buildings and otherwise.

There is a ground of Demurrer, which we may urge, *ore tenus*, viz. that the Leases in question are distinct Leases to distinct persons; each Lease, therefore, ought to have been the subject of a distinct Bill. The Bill is multifarious.

Mr. Bell, and Mr. Simpkinson, *contra* :—

These Leases could not perhaps be set aside at Law, unless it was shown, that the Rent reserved was not the highest Rent that could be obtained; but here the Vestrymen, with whose consent the Leases were to be granted, must be considered as Trustees, designed to check and control the Vicar in the granting of Leases; and it was a Breach of Trust in them to consent to such unreasonable Leases, which amount in effect to a complete alienation. These Leases ought to be set aside, upon the principal acted upon in *Attorney General v. Green (a)*, *Attorney General v. Backhouse (b)*, *Attorney General v. Brooke (c)*.

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Where Persons are appointed to protect the rights of the Public, whether Vestrymen or other persons, and they do not execute their Trust, this Court will give relief.

The Legislature could not have meant to enable the Vicar and Vestrymen to make such Leases as these. The Preamble of the second Act shows what was intended. If they could make such Leases, they might, on the same principle, have made them of a still greater duration. The length of time which has elapsed is no bar to the relief prayed. Length of time has no effect in these cases, unless in the case of a Purchaser for a valuable consideration, without notice of the Charity. If persons will take a defective Title, and lay out Money, it is their folly.

With respect to the objection, that the Bill is multi-

(a) 6 Ves. 452.

(c) 18 Ves. 319.

(b) 11 Ves. 288.

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farious, the Answer is, that each Lease depends upon the same Title, and the same objection applies to each Lease, so that they may, to save expense, be the subject of one Bill.

Mr. *Leach*, in Reply:—

No doubt, if Trustees of a Charity Estate make long and improvident Leases, they may be set aside; but this is not a Charity Estate, and the power to lease given by the Act of *Geo. I.* gave an unlimited power of leasing. It is admitted the Leases were good at Law, if so, they are not bad in Equity; for that which at Law is a good execution of a power to lease, must be equally good in Equity.

The VICE-CHANCELLOR:—

It is a novel and a serious question, and deserves consideration.

26th August.

The VICE-CHANCELLOR—[after stating the Pleadings]:—

I am sorry, owing to the great press of business, this Case has remained so long undecided. It is, certainly, an important Case.

The first point to be considered is, whether this is a proper Case for an Information and Bill? It is an assertion of a mere private right of a Vicar, who is calling for the restoration of part of his Glebe. What has the *Attorney General* to do with such a Claim? A Vicar sues alone for Tithes, and alone asserts his right against a wrongful Claimant. I do not remember any instance of the *Attorney General* joining in such a Suit. In this Case the Vicar might alone have filed a Bill.

The *King* or his *Attorney General* have no other Interest in a Suit like the present, than that of vindicating the rights of the Church; but that Interest is the same in regard to Tithes subtracted, in which case the *Attorney General*, as I have observed, never joins in a Suit for the recovery of them. The *King* has not in this Case any Interest as Patron, the Patronage being vested in the *Bishop of Durham*. I do not therefore see the propriety of resorting to an Information on this occasion.

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Supposing this Case was free from other objections, it is objectionable on the ground that the Defendants have several and distinct rights. Three distinct Cases are made, arising out of three distinct Leases, granted at different times, to different persons, on different terms. Can all these be joined as Defendants in one Information and Bill? They do not hold in common. Twenty distinct Cases, the proper subject of twenty distinct suits, might thus be brought before the Court in one Information and Bill. Tithes claimed against several Occupiers of Land, may be enforced against several Defendants, and may be the subject of one Bill, but that is an excepted Case. This Information and Bill is therefore multifarious. Each Party only ought to have been called upon, by a separate Suit, to defend his separate right. These objections would have deserved consideration, if I were not of opinion, that on the principal question no relief can be given. How does the Case stand? In Queen *Anne's* Reign, in 1713, an Act passes, by which the Chapelry of *Stockton* is made a distinct Parish; and as some little provision for the Vicar, the *Bishop of Durham* is enabled to grant a certain specified marked portion of Waste Land, about an Acre and a half, part of the Manor of *Stockton*, which is stated in

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the Act to be of the annual value of 20*l.* The Bishop accordingly makes a Grant of this Land. In the second Act, however, made in the first year of *Geo. I.* it is recited that this Waste Land had, since the Act of Queen *Anne*, continued Waste Ground, and that very little profit had been or could be made of it; probably, therefore, at the passing of the first Act, the Waste Land was not, as recited in that Act, of the yearly value of 20*l.* The second Act was passed to give a power to let this Waste Land on Building Leases. [His *Honor* here stated this Act, which is set forth in the Information and Bill.]

Before the Act of *Geo. I.*, respecting this Ground, passed, the restraining Statutes (*d*) prevented the granting of a long Lease. By the Act of *Geo. I.*, in order to make this Waste Ground available in the most profitable manner, a power is given to the Vicar, with the consent and approbation of the Vestrymen, *to grant or demise the same, as to them should seem meet.* The Lease to *Hodshon* for 999 years was a long one, but it was with the concurrence of the Vicar and Vestrymen; they were Parties to the Lease. The Land produced little or nothing before the Leases. By the Leases to different persons of this small Piece of Waste Land, the Vicar acquired a permanent Revenue of 51*l.* 8*s.*, which at thirty years Purchase would have sold for upwards of 1,500*l.* £.51. 8*s.* a century ago was equal to a much larger Sum than at present. Suppose it only equal to five times as much as now, there was then a Sum equal to 250*l.* at this day, for the Vicar. That was a great deal to

(*d*) 13 Eliz. c. 10, explained, and enforced by the Statutes, 14 Eliz. c. 11, 14. 18 Eliz. c. 11, and 43 Eliz. c. 29.

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get, and was a bargain, which on the face of it has nothing fraudulent in it. The high Rent reserved on the Leases was probably owing to the length of time for which they were granted; possibly, nobody could then be found to take a Building Lease, unless for so long a term. It is not stated in the Information and Bill, that the same Rent could have been obtained on a Lease of shorter duration. The Act of *Geo. I.* gives an unlimited power of leasing; and on the faith of this Act, with the concurrence of the Vicar and Vestrymen, *C. Hodshon* is induced to take the Lease. The same observations apply to the other Leases. Are we then, after this length of time, upwards of a century, during which no complaint has been made by the successive Bishops, Vicars, or Vestrymen, to set aside these Leases in a Court of Equity? The Information and Bill presume the Leases to be good at Law; if so, the power to grant them must have been well executed; for if a power is exceeded, the Lease is bad at Law as well as in Equity. The Bill is contrariant: in one passage the Leases are stated to be good at Law, and in another it seeks to set them aside in Equity, as an excessive execution of the power, which it could not be, if the Lease was good at Law. Though the *Preamble* of the Act of *Geo. I.* states, "that forasmuch as said Waste Ground might be let for a considerable yearly Rent, provided the Lessees or Persons farming the same might have a certain Term and Interest therein, for a sufficient number of years, for their encouragement to build upon and improve the same," &c. yet the *enacting* part is full, and gives an indefinite power to lease "to any Person or Persons whomsoever, for such term or number of years at and under such Rents and Payments as to him or

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them should seem meet," &c. (d) The Lease was according to the letter and spirit of the Act. It was a Legislative Power, indefinitely to grant a Lease, and therefore the Leases are valid. If there was an implied limitation of the power of leasing, and the power had been exceeded, it would be bad at Law; but the Information and Bill admit, and it was conceded in argument, they were good at Law, which they could not be, if contrary to the letter and spirit of the Act. The fallacy in this Case is, in the assimilating of these Leases to Leases of Charity Lands. Long Leases of *Charity Estates* are, by a series of decisions, from *Attorney General v. Green* (e), followed by *Attorney General v. Owen* (f), *Attorney General v. Backhouse* (g), and lastly by *Attorney General v. Brooke* (h), determined to be bad. All these Cases proceed on a Breach of Trust by Trustees. In those Cases, the Court has considered whether there had been a prudent and provident execution of the Trust, and if not, has held the Lessee to be a Trustee; but those Cases do not apply to the present. This is not the Case of a Charity, it is the Case of a Vicar and Churchwardens exercising a right to lease under an Act of Parliament, whose power is questioned. No Case has been cited where, under an unlimited power to lease by Act of Parliament, a Lease has been set aside as too long. There is no instance, before the restraining Act of *Eliz.* of a Lease by ecclesiastical persons having

(d) "If the *Enacting* part [of an Act of Parliament] will bear only one interpretation, the *Preamble* shall not confue it." *Mason v. Armitage*, 13 Ves. 36, and see to the same effect in *Lees v. Summersgill*, 17 Ves. 511.

(e) 6 Ves. 452.

(f) 10 Ves. 553.

(g) 17 Ves. 288.

(h) 18 Ves. 319.

been set aside on account of the length of time for which it was granted. If such relief had been given, the restraining Act would have been unnecessary. If the "long and unreasonable." Leases mentioned in that Act could have been set aside in Equity, what need was there of the Act? All the authorities show, that before that Act such Leases were unimpeachable.

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Suppose, by Deed, an indefinite power of Leasing is given to a Tenant for Life, could he be prevented from making a long Lease? *Cujus est dare ejus est disponere.* And cannot the Legislature give an indefinite power of Leasing? The Information and Bill do not state any Fraud intended by the Vicar on his Successors, nor any selfish object. The attention of all Parties, of the Bishop, the Vicar, and the Churchwardens, must have been drawn to these Leases when made under the newly-created power; but no objection was urged at the time, or ever since, till in the present instance. The great length of time which has elapsed since the Leases is a strong additional argument against the relief prayed. The 51 *l.* 8*s.* reserved by the Leases has been enjoyed for a century past by the successive Vicars. They have received upwards of 5,000 *l.* and is this Vicar to say, after this long enjoyment, I am entitled to take possession of these Buildings? If the Lease is not good at Law, let this Vicar go to Law. If good at Law, it is not a Case for Equity to give relief, and to declare the Leases null and void; it is not a Breach of Trust in Equity.

Demurrer allowed.

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FARTHING and others v. ALLEN, and others (a).
[12th November, 1816].

Estates devised in Trust to sell, and the produce together with the Personal Estate, the Trustees were directed to pay and divide unto and between Testator's Son, J. A. and his Daughter, A. S., Wife of B. S., in equal Moieties, Share and Share alike, the Share of the Daughter to be for her sole use; and in case of the death of either of them, leaving any

Child or Children, to stand possessed of the Moiety so given to J. A. and A. S., to and for the use and benefit of such Child and Children when they should attain twenty-one, equally to be divided between them, if more than one; and if only one, &c.; and until they attain twenty-one, the Money to be invested in the Funds, and Interest applied for maintenance; and if either J. A. and A. S. should die without Issue, the Survivor to take; Held, that J. A. and A. S. were only Tenants for Life of the Property, with such Limitations over as in the Will mentioned.

JOHN ALLEN by his Will, duly executed to pass Real Estate, 9th June 1810, amongst other Bequests, devised to his Executors, *J. H. Farthing* and *James Allen*, (a Defendant under the name of *James Allen Farthing*, he having added the name of *Farthing* under a License for that purpose after the Testator's death), their Heirs and Assigns, "all the Freehold Messuages or Tenements, Lands and Hereditaments, of which I shall be seised, possessed of, or entitled unto, at the time of my decease; upon trust, that they, or the Survivor of them, his Heirs and Assigns, shall, as soon as conveniently may be after my decease, sell and dispose of the same, either by public Sale or private Contract, for the most Money that can be obtained, and to pay, apply, and dispose of the Monies to arise therefrom, in like manner, and upon such and the same trusts, and to and for the use of such persons, and for the same ends, intents, and purposes, as are hereinafter mentioned, expressed, and declared, of and concerning my Personal

(d) The Reporter has mislaid his Notes of the Argument and Judgment in this Case, but thought the Case and Decree would be acceptable to the Profession.

Estate and Effects. I also give and bequeath unto the said *J. H. Farthing* and *J. Allen*, their Executors and Administrators, all my Money, &c. and all other my Personal Estate, of what nature or kind soever, upon the Trusts, and to and for the intents and purposes following, (that is to say,) upon trust, to collect, get in, and recover all such Monies and Effects as may be outstanding at my decease, as and when the same shall become due and payable; and upon receipt or recovery thereof, then upon trust, as to all such Monies, Estate, and Effects whatsoever, to pay and divide the same unto and between my Son *John Allen*, &c. and my Daughter *Ann Smith*, Wife of *Benjamin Smith*, in equal moieties, Share and Share alike; and my will and meaning is, that the Share or Moiety so given to my Daughter shall be for her own sole use, &c.; and in case of the death of either of them the said *John Allen* or *Ann Smith*, leaving any Child or Children, lawfully begotten, him or her surviving, then upon trust, that my said Trustees, and the Survivor of them, his Executors or Administrators, shall stand possessed of the said Moiety, Half Part, or Share of my said Estate and Effects so given and bequeathed to him or her the said *John Allen* and *Ann Smith* as aforesaid, to and for the use and benefit of such Child or Children, as and when they shall attain their several age or ages of twenty-one years, equally to be divided amongst them if more than one; and if one only, then to such Child wholly, with benefit of Survivorship in case of any of such Children (if more than one) dying under such age of twenty-one years; and in the mean time, and until such Child or Children shall attain his her or their age or ages of twenty-one years, upon further trust, to lay out and invest the same Moiety, Half Part, or Share, at Interest in some one of the Public Funds or Government Secu-

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rities in *Great Britain*, and to pay and apply the Interest, Dividends, and Proceeds as and when the same shall be received, for and towards the maintenance, education, and bringing up or putting out into the world of such Child or Children, until they shall attain his or their respective ages of twenty-one years as aforesaid; and in case of the death of either of them the said *John Allen* and *Ann Smith*, leaving no Issue lawfully begotten, then, upon trust, as to the Moiety, Half Part, or Share of him or her so dying, to and for the use and benefit of the Survivor of them the said *John Allen* and *Ann Smith*, and to pay the same to him or her accordingly, and to and for no other use, intent, or purpose whatsoever."

The Testator died in July 1814. At the time of his death, the Plaintiff, *Ann Smith*, had two Children, Infants, the Defendants, *John Smith* and *Joseph Smith*, and had another Child, *Anne Smith* the Defendant, born since the death of the Testator; but the Plaintiff *John Allen* is a Bachelor, and without any Child.

Upon the Testator's death, *J. A. Farthing* alone proved the Will, and possessed the Testator's Personal Estate, and sold his Real Estates, and the produce after the payment of Debts, &c. is 1,338*l.* 1*s.* 8*d.*

The *Prayer* of the Bill was, that the Will might be established, and the Trusts thereof carried into execution; and that it might be declared, that the Bequest to the Plaintiffs *John Allen* and *Ann Smith* was an absolute Bequest, and that they were entitled to have the said Sum of 1,338*l.* 1*s.* 8*d.* paid over to them in equal Moieties, Share and Share alike, to and for their own respective use and benefit, and that the same might

be paid over to them accordingly; but in case the Court should be of opinion that the Bequest to the Plaintiffs was not an absolute Bequest to them, then that the said Sum of 1,338 *l.* 1 *s.* 8 *d.* might be laid out and invested in the Public Funds, and the Interest and Dividends paid to the Plaintiffs in Moieties, during their respective lives.

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The Defendant, *James Allen Farthing*, by his *Answer*, submitted, whether the Bequest to the Plaintiffs *John Allen* and *Ann Smith* was or was not an absolute Bequest to them; or, whether they were entitled to the Interest only of the 1,338 *l.* 1 *s.* 8 *d.* for their lives; or, whether the Defendants *James Allen Farthing* and *John H. Farthing* do not stand possessed of the Capital of the said Sum of 1,338 *l.* 1 *s.* 8 *d.* as Trustees to and for the use of any Child or Children which the Plaintiffs, or either of them, have or may have, and which may be living at the time of their respective deaths.

The other Defendants, *both Infants*, answered by their Guardian, submitting their Interests to the protection of the Court.

By the Decree it was declared, "that according to the true construction of the Will of the Testator *John Allen*, the Plaintiffs *John Allen* and *Ann Smith* are Tenants for Life only of their respective shares of the Testator's Property, with such limitations over as in the Will mentioned. And it is ordered, that it be referred to Sir *John Simeon*, Bart., one of the *Masters* of this Court, to tax all parties their Costs of this Suit, as between Solicitor and Client: And it is ordered, that the same be paid out of the Sum of 1,338 *l.* 1 *s.* 8 *d.* admitted by the Defendants the Executors to be the

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clear residue or surplus of the said Testator's Estate remaining in their hands: And it is ordered, that the residue thereof, including the Sum of 200*l.* given to the said *Ann Smith* in her Life-time, as in the said Testator's Will mentioned as part thereof, be divided into two equal moieties: And it is ordered, that the one moiety thereof be paid into the Bank with the privity of the Accountant-General of this Court, on the Credit of this Cause, and to the account of the Plaintiff *John Allen*, subject to the contingencies in the Will of the said Testator concerning the same: And it is ordered, that the same when so paid in, be laid out in the purchase of Bank *Three Pounds per Cent.* Annuities, in the name and with the privity of the said Accountant General, in trust, in this Cause, to the like Account, and the said Accountant General is to declare the trust thereof accordingly, subject to the further order of this Court: And it is ordered, that the Interest to accrue on the said Bank Annuities when so purchased, be from time to time paid to the Plaintiff *John Allen*, during his Life, by half yearly payments: And it is ordered, that the residue of the said Sum of 1,338*l.* 1*s.* 8*d.*, (which, with the Sum of 200*l.* given by the said Testator's Will to the Plaintiff *Ann Smith*, will be equal to the sum directed to be paid into the Bank to the Account of the Plaintiff *John Allen*) be paid into the Bank with the privity of the Accountant-General of this Court on the credit of this Cause, and to the Account of the Plaintiff *Ann Smith*, subject to the contingencies in the said Testator's Will mentioned concerning the same, &c."

—◆—
END OF PART II.
—◆—

C A S E S

BEFORE THE

VICE-CHANCELLOR.

Ex parte MAUNDRELL *in re* DARK.

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5th July.

THE Petition stated, a Lease, 24th March 1815, between the Pétitioner of the one part, and *Stephen Dark*, the Bankrupt, of the other part; whereby a Farm was leased to *Dark*, to hold from the 25th March 1815, for nine years, at a yearly Rent of 95*l.* payable quarterly: —That *Dark* occupied the Premises from the time of the Lease until the 11th March 1817, when a Commission issued against him, and *Jeffreys* and *Hulbert* were chosen Assignees, and the usual Assignment made to them: —That applications had been made by the Petitioner

Covenant in a Lease, "that the Lessee shall and may have and take a going-off Crop from two third parts of the Arable Lands, &c. on the effluxion of the Lease, or sooner determination of the said Term."

Lessee became a Bankrupt, and his Assignees, on a Petition, under Stat. 49 Geo. III. c. 121. s. 19, refused to accept the Lease; held they were entitled to the off-going Crop, paying Rent up to the time when Possession of the Premises and Lease should be delivered to the Landlord."

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to the Assignees, either to accept the Lease, or deliver up the same, and the possession of the Premises, to the Petitioner; but the Assignees declined to determine whether they would or not accept the Lease, and declined to deliver up to the Petitioner possession of the Premises. The Petition therefore *prayed*, that the Assignees might either accept the Lease, or deliver it up, together with possession of the Premises.

The Lease contained, amongst others, the following Covenant:—"That he the said *Stephen Dark*, his Executors and Administrators, shall and may have and take a going-off Crop from two third parts of said Arable Lands, and shall also be at liberty to occupy one moiety of the said Messuage, Tenement, or Farm House, Barns and Stables, Outhouses, Yards and Premises, *from the end or other sooner determination of the said Term*, for fifteen months afterwards; the next succeeding Tenant having possession of the other moiety thereof on 25th day of March 1824, or sooner determination of the said Term."

Affidavits were filed in support of the Petition; and Counter Affidavits on the point, whether the Assignees had or had not refused to accept the Lease.

Sir *S. Romilly*, Mr. *Agar*, and Mr. *Matthews*, for the Petitioner.

Mr. *Hart* and Mr. *S. Cullen*, for the Assignees, observed, they had not yet said whether or not they would accept the Lease; nor were they now prepared to say whether they would accept it. Before they determine on doing so, they wish to know from the Court what

would be the effect of their acceptance of the Lease; whether, by accepting it, they would during the term become liable to all the covenants in the Lease. If so, though the Lease were worth 10,000 *l.* they could not be advised to accept the same. Then there would be a Petition to the Chancellor, stating they had refused to accept so valuable a Lease, and praying they might be ordered to accept it. What could be done on such a Petition? They are therefore, entitled to ask, what will be the consequence of accepting the Lease? We have paid Rent up to *Lady-day*, and though we refuse to accept the Lease, we are entitled to the off-going Crop, according to the custom of the country, and the Covenant with the Bankrupt. The delivering up of the Lease under the Act (*a*) must be considered as a determining of the Lease. In *Ex parte Nixon* (*b*), the question was agitated, on a Covenant that the Lessee should, at the end or sooner determination of the Term, leave upon the demised Premises the hay, straw, fodder, dung, &c. and the Assignees declined to take the Lease;—whether the Assignees were bound to leave the hay, straw, &c. The Court directed a Case upon the construction of the Covenant; but how the Case terminated does not appear. Here, as in that Case, there is a Covenant as to the fodder, and also a Covenant as to the off-going Crop. We are ready to give up the Lease, upon having Security for the off-going Crop, and the advantages to which a Tenant is entitled on the determination of a Lease.

Sir S. Romilly:—

This is a Petition under the Act, that the Assignees may be put to their election. They will not say whether

(a) 49 Geo. III. c. 121, s. 19. (b) 1 Rose, 445.

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or not they will elect to take the Lease. The Court is not bound to say what will be the effect of accepting the Lease; whether bound by all the Covenants and for all the Rent during the Term. Suppose the Court should say they were not so liable, it would be an extrajudicial opinion, and would not prevent our recovering at Law, if we are entitled under the Act. If the Lease is beneficial, the Assignees are bound to take it. The question under the Act would be, whether the Assignees could accept the Lease, get the Crops, and then assign to an insolvent person, so as to get rid of their liability for Rent. That might be a question, and will soon come on to be tried before your Honor (c). I submit that would be a Fraud upon the Lessor; as the Act has discharged the Bankrupt, where the Assignees accept the Lease, from all liability to the Lessor. The only question now is, whether or not the Assignees will accept the Lease. They cannot delay deciding whether they will take the Lease till they have taken off the Crops. The Court will fix a time within which they must decide whether they will accept the Lease. In *Ex parte Scott* (d), ten days were allowed for that purpose.

THE VICE-CHANCELLOR:—

This is clearly a Case where the Assignees have suspended their decision, whether they will accept the Lease. It is true the Court cannot be called upon to give a premature opinion; the Assignees are bound to say, whether or not they will accept the Lease; but waiving the point of form, I will state my opinion, whether, if the Assignees refuse to accept the Lease,

(c) See post, p. 330. *Onslow* (d) 1 *Rose*, 446, note a. v. *Corrie*.

they are entitled to the off-going Crop? The great struggle is as to this Crop; the Assignees being desirous of giving up the Lease, if by so doing they will be entitled to the Crop. A large proportion of this Farm, 310 Acres, consists of Arable Land; and therefore, before the month of *March* 1817, when the Lessee became Bankrupt, he must have put a Crop into the ground.—(*His Honor here read the Covenant in the Lease before stated.*)—The words in this Covenant are not merely, “the end of the Term,” but also “other sooner determination of the Term.” That provides, therefore, that whenever the Lease determines, the Tenant is to be entitled to the off-going Crop. Then in case of Bankruptcy, are the Assignees, refusing to accept the Lease, entitled to the off-going Crop? It would be injustice to the Tenant who sowed the Crop, not to be entitled to the benefit of it; more especially as the preceding Tenant was allowed to take the off-going Crop. The words “or other sooner determination of the Term,” in case of Bankruptcy, have already received a construction. I find, on inquiry, that the Case granted in *Ex parte Nixon (e)*, came on before the Court of *King’s Bench*, in *Hilary Term* 1814. The circumstances of that Case were these:—Upon hearing the Petition on the 19th of August 1813, the *Lord Chancellor* ordered that the Assignees should deliver Possession of the Premises to the Petitioner, and be restrained from carrying off the hay, straw, litter, fodder, dung, manure and compost then being, or hereafter to be made, or grow on the Premises, and that a valuation should be made of the same without prejudice. And he ordered that a Case should be made, stating a Demise to *A. of Black Acre*, by Lease, con-

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(e) 1 Rose, 446.

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taining the same Covenants as the Lease to the Bankrupt; and the determination of the Lease by effluxion of time; an admission of the Possession of hay, straw, litter, fodder, dung, manure and compost, of the value of 50*l.* by the Lessor; and a question, whether under the Covenants, the Lessee is entitled to be paid for them, or any, and which of them. The same Case also to state a Demise to *B.* of *White Acre*, under the like Covenants, and the determination of this Lease by an Order of the *Lord Chancellor*, on a Petition in Bankruptcy, under the Statute of 49 *Geo. III.* c. 121; a like admission of the Possession of hay, straw, litter, fodder, dung, manure and compost, of the value of 50*l.*; and a question, whether the Assignees are entitled to be paid for them, or any, and which of them?

The Case being argued, the Judges delivered their Certificate, dated 13th February 1814, which was thus:—
 “ We have heard this Case argued by Counsel, and
 “ are of Opinion, on the first Question, that under the
 “ Covenants stated, the Lessee is not entitled to be
 “ paid for the hay, straw, litter, fodder, dung, manure,
 “ and compost, in that Question contained, or for any
 “ of them.”

“ On the second Question, we are of Opinion, that
 “ under the Covenant contained in the Lease mentioned
 “ in the Question, the Assignees of *B.* are not entitled
 “ to be paid for the said hay, straw, litter, fodder,
 “ dung, manure, and compost, or for any of them.”

“ *Ellenborough,*

“ *S. Le Blanc,*

“ *J. Bayley,*

“ *H. Dampier.*”

That is an express decision, that a determination of the Lease by Assignees, is a determination within the words of the Covenant. These Assignees, therefore, may determine the Lease, and take the off-going Crops from two-thirds of the Arable Land. The Assignees, by refusing to elect whether they would take the Lease, became subject to the Rent up to the time when they make their Election, and deliver up Possession. So long as they suspended their decision, the Landlord could not put in another Tenant. It may be a question, whether as the Assignees have suspended their decision until they have entered into a new year, they are not under an obligation to pay that year's Rent; but I think it sufficient to say, they must pay the Rent during the time they have held Possession, and they must have the off-going Crop according to the Terms of the Lease; my Opinion being, that upon this determination of the Lease by the Assignees, each party is to have the benefit of the Covenants provided for in the Lease. The Assignees must deliver up the Possession of the Farm, and of the Lease; and I recommend that the Crop should be valued; the amount deducted from the Rent due, and the Stock sold.

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DARK.

Mr. Hart:—

It would be very inconvenient to take away all the Stock at a day's notice; but perhaps the Court will allow a reasonable time to retain possession till the Stock is sold off.

Mr. S. Cullen:—

The Landlord, I am told, is willing to purchase the Stock.

The VICE-CHANCELLOR:—

Let the matter, then, stand over a few days, to see what is best to be done as to the Stock.

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Ex parte
MAUNDRELL,
in re
DARR.
 17th July.

On a subsequent day, 17th July, Mr. *Hart* observed, the Landlord refused to purchase the Stock or the Crop, and therefore it would be necessary to retain part possession of the Premises, according to the Covenant, till the Crop was taken off; but that as to the rest of the Premises, they were ready to quit them in a week or ten days.

The VICE-CHANCELLOR:—

I meant that Rent should be paid by the Landlord up to the time when Possession of the Land and the Lease was delivered, not up to the time when the Crops are taken off.

VAUGHAN and others, v. WORRALL.

22d August.
Defendant
under the cir-
cumstances,
allowed, after
the Examination
of Witnesses, but
before Publi-
cation, to have a
Commission to
examine Wit-
nesses as to the
fact, whether
Witnesses ex-
amined by the
Plaintiff were not
interested in the
Suit.

A MOTION was made on the part of the Defendant, that he might be at liberty to exhibit fresh Interrogatories for the examination of the Plaintiffs Witnesses, as to their having any Interest in the Suit.

From the Affidavit of the Solicitor Mr. *Blower*, the Agent in London, made in support of the Motion, it appeared, that the Cause being at issue, a Commission issued for the Examination of Witnesses, and several Witnesses had been examined under the same on behalf of the Plaintiffs and Defendants, and that the Commission was then returnable:—That Publication had been enlarged until the first day of *Michaelmas* Term next, and that no Depositions had been published:—That since the examination of the Witnesses for the Plaintiff, it had been ascertained that there was great reason to

believe that some of such Witnesses were interested Parties in the Suit. In another "Affidavit in support of the Motion, it was sworn by *James Leman*, the Solicitor for the Defendant, that he knew several of the Witnesses who had been examined on the part of the Plaintiffs; and that he had been informed, and believed such Witnesses were interested in the event of the Suit:— That he did not know or learn that any of the Witnesses were so interested until after the execution of the Commission issued for the examination of Witnesses in this Cause, and that no Interrogatories were therefore exhibited to any of the Plaintiffs Witnesses to enquire whether they were interested in the event of this Suit."

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 and others,
 v.
 WORRALL.

At the desire of the *Vice-Chancellor*, further Affidavits were made by *Worrall* the Plaintiff, and his Solicitor *Leman*, in which they stated, "That they had not heard or been informed or had any suspicion previous to the opening of the Commission for the examination of the Witnesses in this Cause, when the Interrogatories on the part of the Defendant had been ingrossed and exhibited to the Commissioners named in the said Commission, nor until some time afterwards, that the said *Jeremiah Osborne*, and *Thomas Whippie*, or any of them, or that any other of the Witnesses produced by the Plaintiffs, were interested in the event of the Suit:— That if they had known, or been informed that the said *Jeremiah Osborne*, or that any of the other Witnesses produced by the Plaintiffs, were so interested, they would have added the Interrogatories:— That they are now desirous of exhibiting Interrogatories, in addition to those which had been already exhibited on the parts of the Defendants:— That they are totally ignorant of the

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and others,
v.
WORRALL.

Evidence which has been given by any of the Witnesses, and that they would have greatly preferred putting in the Interrogatories which they now wish to exhibit, at the same time with their other Interrogatories:—That about the time of the close of the said Commission, Deponent *Worrall* received information from several persons of credit and respectability, (and which information he communicated to this Deponent *James Leman*,) that many of the Witnesses who had been examined by the Plaintiffs, had at that time entered into a subscription to defray the expenses of prosecuting this suit against this Deponent *Samuel Worrall*; and that the said *Jeremiah Osborne* was in effect the Solicitor for the Plaintiffs in this Suit, and that the same was brought at the instigation of the said *Jeremiah Osborne*; and that he had engaged or undertaken to expend 100*l.* in the Cause, or to advance 100*l.* towards defraying the expenses of this Suit, and to give all his Attendances and personal labour in conducting the same, without making any Charges for the same:—That they believe the said information above mentioned, and the facts detailed therein, to be true:—That Deponent *James Leman* saith, that upon being apprized thereof, he wrote to his Agents in town to state the same to his Counsel, and to take immediate steps for having the Plaintiffs Witnesses examined to the said facts:—That Deponents are very anxious that this Suit should be brought to a speedy determination:—That the answer of Deponent *Samuel Worrall*, was put in as soon as it could be prepared, and they immediately proceeded to the taking out a joint Commission for the Examination of Witnesses, without interposing any delays:—That Deponent *James Leman* saith, that in consequence of an application made to Deponent by the said *Jeremiah Osborne*, very early in

the month of June last, and before the said Commission was sealed, to consent to have the said Cause set down before the *Master of the Rolls*, before Publication passed, and when the Commission should be executed and returned, to consent to the passing of Publication immediately:—That Deponent *James Leman* communicated the same to Deponent *Samuel Worrall*, and to which he the said *James Leman* received in writing, from the said *Samuel Worrall*, the following answer, dated 7th June 1817:—“ I have no objection to facilitate on my part all the proceedings in the Cause of *Vaughan v. Worrall* :” —That Deponent *James Leman* communicated the same to the said *Jeremiah Osborne*, and on the same day directed his Agents to consent to the setting down the Cause accordingly, and to pass Publication as soon as ever the Commission should be returned:—That Deponents verily believe, that if they had merely taken the ordinary rules for time, they would have obtained the information they are now in possession of, before the Examination of the Witnesses had commenced; and they would have added the Interrogatories which they are now applying for to their original Interrogatories:—That they have used every possible dispatch:—That this Motion was intended to have been moved at the Second Seal, but was deferred till the Third Seal, in order to give the Plaintiffs notice; and that it was afterwards put off to the Fourth Seal, at the request of the Plaintiffs:—That the Interrogatories which Deponent *Samuel Worrall* has applied for leave to exhibit, are confined to a general enquiry, whether the Witnesses are interested, and [to particular enquiries, whether they have entered into a subscription to defray the expenses of the Suit; and as to the said *Jeremiah Osborne*, to examine him, whether he is the

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Solicitor for the Plaintiffs, or has in any manner conducted the Cause; and whether he has agreed to give up any of the usual Fees and Emoluments of a Solicitor in this Suit; and whether he has made any offer to contribute any Sum towards the Expenses of this Suit; and whether the said Suit was brought at his instigation.

Mr. Romilly, in support of the Motion, cited *Needham v. Smith* (*f*), *Scott v. Fenwick* (*g*), *Stokes v. M'Kerral* (*h*), *Wood v. Hamerton* (*i*), *Perigal v. Nicholson* (*k*), *Kirk v. Kirk* (*l*), *Sandford v. ———* (*m*), and *Moorehouse v. Passon* (*n*), *Carlos v. Brooke* (*o*), *Mill v. Mill* (*p*), *Greenaway v. Adams* (*q*).

Mr. Wilbraham, *contra* :—

There is no instance where, when Witnesses have been examined and cross-examined, and the Commission closed, that a Defendant has been allowed to exhibit an Interrogatory, as to the fact whether they were interested. The Cases cited do not prove that proposition.

The VICE-CHANCELLOR :—

22 August.

As this Motion had some novelty in it, and is of importance in regard to the Practice of the Court, I thought it proper to look into the Cases. It is not proposed to examine as to the merits of the Cause, or as to any point in issue; it is merely a motion, before Publication, to exhibit an Interrogatory, as to whether

(*f*) 2 Vern. 463.

(*g*) 3 Gwill. 1255.

(*h*) 3 Bro. C. C. 228.

(*i*) 9 Ves. 145.

(*k*) Wightw. p. 6.

(*l*) 13 Ves. 180.

(*m*) 1 Ves. junr. 398.

(*n*) Coop. 300.

(*o*) 10 Ves. 50.

(*p*) 12 Ves. 406.

(*q*) 13 Ves. 360.

the two Witnesses, who are named, are not interested in the Suit, upon Affidavits by the Defendant, his Solicitor, and Agent, that they are ignorant of the Depositions. The Evidence being taken by Commissioners in the country, renders this Motion necessary. If the Witnesses had been examined in *London*, the Examiner might, without any Motion for the purpose, have examined them as to their being interested.

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A clear distinction is taken as to the examination of Witnesses, to credibility or to competency, after Publication. Mr. *Just. Powell*, in *Needham v. Smith* (r), appears to have thought, that after Publication an examination might be had, either as to credibility or competency; but Lord *Hardwicke*, in *Callaghan v. Rochefort* (s), was of opinion it was not allowable in general to examine to the competency of a Witness after Publication; but that it was allowable even in that stage of the Cause, where the objection to the competency arose from a matter that came to the knowledge of the Party after the examination. In *Purcell v. Macnamara* (t), leave was given, after Publication passed, to exhibit Articles as to the credit of a Witness.—“With respect to *Competency*,” says Lord *Eldon*, “it is the fault of the party complaining; for there may be a general Interrogatory to every Witness, whether he has any Interest.” Those Cases were followed by *Wood v. Hammerton* (u), and *Carlos v. Brook* (x). In the latter Case, Lord *Eldon* thus expresses the Rule: “The Rule is, that in general Cases the Cause is heard upon Evidence given before Publication; but that you may

(r) 2 Vern. 463.

(s) 3 Atk. 643.

(t) 8 Ves. 324.

(u) 9 Ves. 145.

(x) 10 Ves. 49.

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and others,
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examine after Publication, provided you examine to credit only, and do not go into matters in issue in the Cause, or in contradiction of them, under pretence of examining to credit only." It is clear, therefore, you cannot, in general, examine as to competency after Publication. Here, the Evidence has not been published, and it was owing to an oversight that the Witnesses were not examined as to their competency.

The point now is, not, what will be the effect of the Examination, but whether these Parties may not address an Interrogatory as to the competency of the opposite Witnesses. In *Stokes v. M'Kerrall*, a Witness had been examined; and it was afterwards suspected he was interested, and the *Master of the Rolls* thought he might order an Interrogatory to be exhibited to him in the nature of a *voir dire*. The Defendant could not know what Witnesses would be brought, or whether they were interested. I think it would be too much to refuse this Defendant an opportunity of addressing fresh Interrogatories to the Witnesses *Jeremiah Osborne*, and *Thomas Whippie*, as to whether they were interested. The other side may bring Witnesses to show they are not interested. The expense of this Motion, and of the Commission, must be paid by the Defendants.

Motion granted.

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Ex parte HATHERWAY, *in re* HATHERWAY.

THE Petitioner paid Mr. *Bennett*, as his Solicitor, for superseding the Commission against him, the sum of 399*l.* but no Bill of Costs had been delivered. On Petition, *Bennett's* Bill of Costs was referred to the *Master* to be taxed, the Petitioner offering to pay what should be found due. *Bennett* produced his Bill of Costs before the *Master*, amounting to 580*l.* The *Master*, on taxation, reduced it to 365*l.* 16*s.* 11*d.*

8th Nov.
One-sixth of a
Bill of Costs, in
Bankruptcy,
delivered to the
Master to be
taxed, being
taken off, the
Solicitor ordered
to pay the Costs
of the Taxation.

The Question now was, who was to pay the Costs of the Taxation of the Bill?

Mr. *Montagu* for the Petitioner:—

The Bill of Costs delivered to the *Master* amounted to 580*l.*, and it being reduced more than one-sixth by the *Master*, the Rule is clear, that *Bennett* must pay the Costs of the Taxation.

Mr. *Leach*, *contra*:—

The Sum agreed to be taken by *Bennett* for his Costs, and which was paid to him, was 399*l.* The Petitioner then prayed to have the Bill referred. The Bill delivered to the *Master* amounted to 580*l.*, being an addition claimed for Costs, beyond the Sum paid for such Costs, of 181*l.* The *Master* certified the Costs due to *Bennett* to be 365*l.*, which was only 33*l.* and a fraction less than the sum of 399*l.* originally claimed and paid, and is not more than one-twelfth and a fraction of the Costs paid, when the Petition was presented. The Petitioner, therefore, ought to pay the Costs of the Taxation.

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Ex parte
HATHERWAY,
in re
HATHERWAY.

The VICE-CHANCELLOR was very clear, that as more than one-sixth was deducted from the Bill of Costs delivered to the *Master, Bennett* must pay the Costs of the Taxation.

Between ARTHUR ONSLOW, Esq. - Plaintiff,
and
THOMAS CORRIE and ABRAHAM MELLIN,
Defendants.

8th and 18th
November.

Assignees of a Bankrupt Lessee though by accepting the Lease they discharge the Bankrupt from any Claim upon him for Rent, may assign the Lease to an insolvent Person, to exonerate themselves from future Claims for Rent.

THE Facts in this Case, as stated in the Bill, and admitted by the Answer, were these:—

By a Lease, 26th February 1808, between the Plaintiff, of the one part, and *Robert Buchanan*, of the other part, the Plaintiff demised to *Buchanan*, his Executors, Administrators, and Assigns, a Messuage in *Clayton-Square, Liverpool*, with the Appurtenances, and two Seats or Pews, to hold to *Buchanan*, his Executors, Administrators, and Assigns, from the 1st of March then next, for the term of seven years, at an annual Rent of 120*l.* payable half-yearly; and *Buchanan* covenanted with the Plaintiff, that he, his Executors, Administrators, or Assigns, would pay to the Plaintiff said Rent of 120*l.* and that he, his Executors or Administrators, should not nor would set, let, assign, alien, demise, or exchange said Premises, or any part thereof, for all or any part of the said Term, to or with any Person or Persons whomsoever, without the consent of Plaintiff, his Executors, Administrators, or Assigns, first had and obtained in writing for that purpose:—*Buchanan*

occupied said Messuage from the time of the date and execution of the Lease until the beginning of 1811; and during that time paid to the Plaintiff the Rent reserved. In the month of February 1811 a Commission of Bankruptcy issued against said *Buchanan*, and he was declared a Bankrupt; and the Defendants, *Thomas Corrie* and *Abraham Mellin*, were chosen Assignees, and the usual Assignment of the Estate and Effects of *Buchanan* was made to them. Soon after *Corrie* and *Mellin* had so become Assignees, a Letter was sent to the Plaintiff by Messrs. *Statham* and *Hughes*, as the Solicitors of *Corrie* and *Mellin*, dated the 26th day of February 1811, wherein the Plaintiff was informed, that *Buchanan* had become a Bankrupt, and that they were desired by the Assignees to inform the Plaintiff, that possession of the demised Premises, together with the Indenture of Lease, would be given up to the Plaintiff on the 1st day of March 1811. This Letter was received by the Plaintiff in London, on the last day of February 1811, previous to which time the Plaintiff had not received any notice or intimation of the issuing of the Commission against *Buchanan*; and having reason to believe that such Commission had been issued at *Buchanan's* own instance, he, soon after receiving said Letter, sent a Letter to *Statham* and *Hughes*, signifying his refusal to accept of the Lease, or of the possession of the demised Premises, and informing them that the Bankruptcy of *Buchanan*, even if the Commission were lawfully issued, did not discharge him from his Covenant in the Lease, unless the Assignees should themselves accept of the Lease, for the benefit of the Bankrupt's Estate. *Corrie* and *Mellin* afterwards determined to accept the Lease; and in the Spring of 1811, *Statham* and *Hughes*, as the Attornies of the

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Assignees, wrote to their Agent in *London*, desiring him to call upon and inform Plaintiff, that if he would not take a surrender of the Lease, the Assignees must and would accept of the same; and accordingly such Agent called upon Plaintiff, and showed him the Letter, or part thereof, to the effect aforesaid; and *Buchanan*, on the 6th August 1811, wrote to the Plaintiff, informing him that his, *Buchanan's*, Assignees, had accepted the Lease, and that he, *Buchanan*, was authorized by them so to inform the Plaintiff. *Corrie*, as one of the Assignees, in May 1811 paid to the Plaintiff 60*l.* half a year's Rent for the Premises, which became due on the 1st day of March in that year. On the 19th August 1811, the Defendants assigned the Lease to one *Flood*, a Prisoner for Debt in the Gaol of *Liverpool*, who afterwards took the benefit of the *Insolvent Debtors Act*, and went abroad. The Plaintiff brought an Action at Law against the Defendants for the Rent claimed by the Bill, but failed in such Action. The Plaintiff, stating these Facts, by his Bill insisted, that *Corrie* and *Mellin* having accepted the Lease for the benefit of the Bankrupt's Estate, the Plaintiff became entitled to receive from them the Rent reserved by the Lease, until a legal Assignment should be made by them of such Lease to a real and *bonâ fide* Purchaser, or some proper Purchaser who would accept of such Assignment, and would be capable of answering and paying the Rent for the Premises; and which Assignment had not hitherto been made by *Corrie* and *Mellin*, nor had they hitherto paid to the Plaintiff any Money for or in respect of the Rent reserved by the Lease, which had accrued due from the 1st of March 1811 to the 1st of March 1812, the Plaintiff having soon after that time resumed possession of the Premises, which were then deserted and abandoned;

and that *Flood* was an unfit and improper person to be the Tenant of the Premises, or to be the Assignee of said Lease; and that the Assignment to him was merely colourable and fictitious, and made to exonerate *Corrie* and *Mellin* from all liability to pay any future Rent to the Plaintiff, and to deprive and defraud Plaintiff of every benefit and advantage of the Covenants contained in said Indenture of Lease, on the Lessee's part. The *Prayer* of the Bill was, that the Defendants might be declared to be liable in Equity to pay to the Plaintiff the Rent reserved by the Lease for the year ending 1st March 1812, and that the Defendants might be decreed to pay the same.

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The Defendants by their *Answer*, admitting all the material statements in the Bill, submitted, that by means of the Assignment to *Flood*, they were discharged from all liability to the Plaintiff for Rent which accrued due after such Assignment.

Sir *Samuel Romilly*, and Mr. *Barber*, for Plaintiff:—

The Assignment of the Lease in this Case, by the Defendants, was a manifest Fraud upon the Plaintiff. Undoubtedly, before the 49th *Geo. III. c. 121, s. 19*, an Assignee of a Lease might, to exonerate himself, assign to another; but since that Act, Assignees of a Bankrupt, who have accepted a Lease, cannot afterwards assign, as in this Case, to an insolvent person; it is a Fraud in them to do so. The Assignees had an option whether or not they would take the Lease: they elected to take it; and by so doing, they, according to the provision of the Act, exonerated the Bankrupt, the original Lessee, from his liability to his Landlord the Plaintiff. Having thus, by voluntarily accepting the

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Lease, exonerated the Bankrupt from all claims of his Landlord upon him, they were bound, if they assigned the Lease, to assign it fairly and *bonâ fide*; but the plain object of these Defendants was, first to get the Landlord's consent to take a surrender of the Lease, and failing in that, accept the Lease themselves, exonerate the Bankrupt, and then assign to an Insolvent in gaol, leaving the Landlord without any claim upon them, or the original Lessee, in respect of Rent accrued due after the Assignment. They would not have accepted the Lease but for the purpose of thereby exonerating the Bankrupt, and afterwards exonerating themselves, by assigning to a Beggar. This is a Fraud, new indeed in specie, but relievable on principles long acknowledged in this Court. Several Cases show, that a fraudulent Assignment by an Assignee of a Lease, does not exonerate such Assignee. *Philpot v. Hoare* (a), best reported in *Ambler* (b), *Treackle v. Coke* (c).

Mr. *Bell*, and Mr. *Roupell*, for the Defendants:—

If this were a fraudulent Assignment, why did not the Defendants use that objection to it on the Action at Law brought by the Plaintiff against the Defendants for a year's Rent, claimed of them as having accrued due subsequent to the Assignment? The Plaintiff, though he might have shown the invalidity of the Assignment at law, forgoes that opportunity, and having failed in his Action, now seeks relief in Equity, and precisely on the same grounds on which he might have had relief at Law, provided the Case he makes of Fraud, had any foundation.

(a) 2 Atk. 219.
(b) *Ambler*, 480.

(c) 1 Vern. 165.

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It is very clear, that before the Statute of the 49th of the King, an Assignee of a Lease, might at any time, by assigning, though to a Beggar, exonerate himself from any claim for Rent after such Assignment. In one of the Cases, *Valliant v. Dodomede (d)*, a premium was given to an Insolvent in prison to take the Assignment, and yet it was held good. In the Case cited of *Philpot v. Hoare*, the reason why the Assignment was held invalid was, because in fact it was a mere nominal Assignment; the Assignment being to the Servant of the Assignor, and the Assignor receiving the Rent of the Premises. If in this Case the Defendants, after having assigned to *Flood*, received the Rent of the Premises, then they would be liable; but after the Assignment, they had nothing to do with the Premises.

An Assignee of a Lease is only liable as such, and the moment he assigns, his liability ceases; he takes the Assignment upon that understanding. Suppose a Bankrupt has goods in his house that cannot be immediately sold, or conveniently removed, and the Assignees accept the Lease, and after a time sell the Goods, and then offer to surrender the Lease to the Landlord, who refuses to accept it, and they, to exonerate themselves from future Rent, assign to a Beggar, are they not entitled to do so?

The Clause in the Act is not accurately penned; but it never could have been intended by the Legislature, that Assignees of a Bankrupt by accepting a Lease, were to be incapable of assigning it, though to a Beggar, if they found it onerous.

(d) 2 Atk. 546.

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It is said that the Act having exonerated the Bankrupt, the original Lessee, from all claims upon him by the Landlord, therefore, it was a Fraud in the Defendants to accept the Lease and then assign to a Beggar. What could the Plaintiff have got from the Bankrupt? Is an Issue to be directed to ascertain what loss the Plaintiff suffered, by the Defendants accepting the Lease and exonerating the Bankrupt? a Jury would be puzzled to ascertain the loss. If an Assignment was good before the Act, are there any words in the Act rendering it invalid in this Case? The Act exonerates the Bankrupt, if his Assignees accept the Lease; but it does not shift his liability upon the Assignees, and in the absence of express words to that effect, it would be to legislate in Equity, to take away the rights they previously had.

Sir *Samuel Romilly*, in Reply:—

Upon the Bankruptcy, the Assignees offered to surrender the Lease, wishing thereby to have the Bankrupt exonerated. The Plaintiff suspected the Commission was fraudulently taken out, and refused to accept the surrender, determining to retain the Bankrupt's liability, unless his Assignees chose to accept the Lease. Upon this, the Assignees accept the Lease, and why? not because they expected any advantage from the Lease, for they had before offered to give it up, but because the Landlord did not choose to relinquish his claim upon the Bankrupt. They accept the Lease merely for the purpose of exonerating the Bankrupt. Is not that a Fraud? An Assignment, though to a Beggar, merely to exonerate Assignees from onerous Covenants, is valid, as in the Cases cited: there is no Fraud in that; the Landlord had still his claim upon the original Lessee;

but here, acts are done not merely to exonerate the Assignees, but also the original Lessee. The Cases I cited, show as a general principle, that an Assignment may be set aside for Fraud. Here then there is Fraud, though such a species of Fraud as could not have existed before the Act. If the Defendants had assigned the Lease *bonâ fide*, the Assignment would have been good. The Act was introduced by me, but the Clauses following the Clause which provides that the Act shall not extend to Scotland, were added to the Act in the House of Lords, where, after laying some time, it was returned amended with other Bills, just on the eve of a Prorogation, when, owing to the press of business before the House of Commons, there was no time to consider the Amendments.

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The VICE-CHANCELLOR:—

The facts of this Case are very nearly agreed upon. 18th November.
 A Landlord is certainly entitled to every fair assistance; and on the other hand, the Defendants who are Assignees of a Bankrupt, have a claim to every fair protection which the Court can give them. The subject matter in dispute is one year's Rent, which accrued during the time when the Premises remained unoccupied; and the question is, whether the loss of that Rent is to fall upon the Plaintiff the Landlord, or upon the Defendants the Assignees of the Bankrupt? It is not disputed that the Defendants had not possession of the Premises during the period for which the Rent is claimed:—That there was an actual Assignment to Flood:—That the Defendants have not had any benefit from the Premises:—That the House was out of repair:—That the Rent was 120*l.* a year:—That all the

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benefit the Assignees could have, would be by re-letting the Premises, and that they could not let them at that Rent. Prior to the acceptance of the Lease by the Assignees under the general Assignment to the Assignees of the Bankrupt's Estate and Effects, in which there was no exception as to this Lease, the Assignees and the Bankrupt offered to surrender the Lease to the Bankrupt; and afterwards these Defendants the Assignees, very unguardedly accept the Lease, and in consequence the Plaintiff contends, they became liable to the Rent, even after their Assignment to *Flood*; the Act of Parliament 49 *Geo. III. c. 121, s. 19*, having, in consequence of the acceptance by the Assignees of the Lease, exonerated the original Lessee the Bankrupt, from all claims upon him by the Landlord.

The Plaintiff admits by his Bill, that he has no claim at Law:—That he brought an Action against the Assignees for the Rent, which was determined in favour of the Defendants:—That they pleaded the Assignment to *Flood*, and that such Assignment was considered at Law, as a complete bar to the claim made by the Plaintiff; and the Bill states that the Plaintiff cannot obtain relief at Law, although he by his Bill states the Assignment of the Lease by the Assignees, was fictitious and fraudulent. Has the Plaintiff, then, any Equity? Are the Defendants to be considered as liable to the Rent after they have ceased to be Assignees, or in possession; after the character of Assignees of the Lease has ceased, in which character alone they became liable to the Rent? They have renounced that character, and abandoned possession, and yet the Plaintiff claims the Rent, though he admits the Assignment was good at

Law; and upon this ground, that since the late Act of Parliament, the liability of Assignees may cease at Law, but not in Equity. If the Defendants are to pay this Rent, is it to be out of their own pockets, or out of the Bankrupt's Estate? The Bill does not state they have any effects of the Bankrupt's in their hands. Suppose there were effects, are they to pay this Rent out of their own pockets, or out of those effects? Would it be right that they should themselves pay when they have received no benefit from the House, and have already paid 60*l.* for Rent, without any advantage in return? Is there then any Equity to call upon these Assignees to pay this Rent? The Plaintiff re-took Possession of the House in 1811; by whose consent, does not appear, and he has since let the Premises. He has endeavoured himself to put an end to the Lease for the last three years of the Term, and having done that, and received the 60*l.* from the Defendants, he tries at Law to recover this year's Rent, and had in that Action an opportunity of replying Fraud to the Plea of the Assignment to *Flood*; instead of which, he demurs to the Plea, and thus admits the Assignment to *Flood*. He might, by replying Fraud in the Assignment, have made the same Case he makes here. The Plaintiff was estopped at Law by his Demurrer, to say the Assignment was not good; nor could he afterwards have urged that objection in another Action. At Law, the Assignment was held to be a valid Assignment, and a bar to the claim of any Rent against the Defendants subsequent to the Assignment. If a Court of Equity relieves, it must undo the decision at Law, and determine the Assignment was invalid. If the Assignment was colourable and fictitious, it was a ground of objection at Law; but the

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Plaintiff admits the Assignment was good at Law, and that no Relief could be had there. Is the Plaintiff then, after a defeat at Law, to be allowed to ask Relief in Equity, as if no Assignment to *Flood* had ever taken place? Let us then consider how the Case would stand in Equity previous to the 49 *Geo. III. c. 120, s. 19*, and how it stands since that Act? Prior to the Act, Assignees of a Lease were liable so long as they continued such, and in possession; but were not liable when their character of Assignees ceased, and they ceased to have Possession. All the Cases are to that effect. Why is the Assignee liable to the Landlord? Because of the *privity of Estate*. The original Lessee is liable in respect of the *privity of Contract*. The liability of an Assignee of a Lease, begins and ends with his character of Assignee. In him there is no personal confidence by the Lessor. Ever since the Case of *Pitcher v. Toovey (g)*, it has been held that, by an Assignment, an Assignee exonerates himself from all claims in respect of Rent, even though he assigns to a Beggar. An Assignee may, whenever he pleases, assign again; and the moment he divests himself of the character of Assignee, he also shakes off his liability for Rent. It is very different as to the original Lessee, for he, in all cases, before the late Act, remained liable to his Covenant to pay the Rent, notwithstanding his Assignment, and

(g) *Carthew*, 177. S. C. Dougl. 764, and *Adell v. Wake*, 3 Compt. N. P. 394. These Cases established the Law; but see 1 *Ventr.* 329, 3 *Lev.* 295, and 1 *Show.* 340. *Le Caux v. Nash*, Str. 1221, 331. T. *Raym.* 303. T. *Jones*, 109, *contra*. and see *Chancellor v. Poole*,

whoever might be the Assignee; but an Assignee is only liable by privity of Estate, which ceases when he ceases to be Assignee, and loses that character. Equity, however, gives relief to a Landlord for his Rent in cases of Assignment; first, where the Assignment is merely colourable and fictitious, the Possession remaining with the Assignor; or secondly, where though there be a real Assignment, yet it has been made for the purpose of depriving the Landlord of his legal remedies for Rent due, or breaches of Covenant incurred previous to the Assignment. The Covenant by the original Lessee not to assign without License, does not affect the Defendants, who are Assignees by Law under the Bankruptcy (*h*).

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This being the general Law on the subject as to an Assignment, how does the Case stand upon an Assignment by the Assignees of a Bankrupt? Such Assignees are Trustees for the Creditors of the Bankrupt. If in general an Assignee of a Lease is not liable to Rent after an Assignment, I see no ground whatever for saying Assignees of a Bankrupt's Estate should be in a worse condition than other Assignees of a Lease.

In *Treackle v. Coke* (*i*), it was held in Equity, that the Assignee of a Lease, who has assigned over, shall be liable in Equity for the Rent during the time he enjoyed the Land; for though in strictness of Law there is no privity of Estate to charge the Assignee, yet in Equity he is chargeable for such time as he received the Profits. In that Case the Assignee had enjoyed the Land for six years before he assigned. In the present Case, no claim is made in respect of Rent due during the Pos-

(*h*) Vide *Brummell v. Macpherson*, 14 Ves. 173. (*i*) 1 Vern. 165.

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session of the Defendants, and previous to their Assignment. That was paid. In *Gilbert's Lex Prætoria* (k), it is said, "Where a Lessee covenanted for payment of Rent and Repairs, and for building on the Premises, and the Term was afterwards extended, and sold for debt, and such Assignees finding the Term not worth their having, offer to resign to the Lessor, and he refusing, they assigned to a Beggar, the Question was, whether this was a Fraud that a Court of Equity would relieve against? and the Court took this distinction: That if the Assignees had continued long in possession, and the Premises had been worse and become ruinous under their hands, or by their means, then the Assignment would be considered to be a Fraud to get rid of the damage that they ought to answer: But if they assigned immediately after their coming into possession, there was no reason to relieve, because the Assignee was not chargeable at Law, and the Lessor had his original security against the Lessee and his Executors, as he had before, unimpeached; and the Assignee being under no obligation to hold it, there was no Fraud in making such Assignment." In the printed Edition of the *Lex Prætoria*, no Cases are cited in support of the passage quoted; but in a MS. Copy of that Work, in the possession of Mr. Maddock, which I have seen, two MS. Cases are cited, apparently from *Gilbert's Note Book*, *Sainbury v. Lampree*, and *Grameer v. Loveday*; but I have not been able to find these Cases anywhere in print. The passage quoted from the *Lex Prætoria*, is embodied in the *Treatise of Equity* (l), and some able and useful notes are made upon it by Mr. Fonblanque. In a MS. note of a Case

(k) P. 362.

(l) First vol. p. 361, 2.

in *Michaelmas* Term, 12 *Geo.* II. furnished me by Mr. *Maddock*, Mr. *Fazakerly* cited a Case which was before Lord *Chancellor Couper*, in which it was agreed, that when a Lease is assigned to one, and he assigns to a third person, that though the Lessor hath strictly no Remedy against the first Assignee, the privity of Estate being determined; yet, that if it appears, as it did in that Case, that the second Assignment was made in order to exonerate and discharge the Assignor of *Rent due* to the Lessor, that this Court will look upon it as a Fraud, and oblige such Assignor to pay the Rent *incurred in his time*, notwithstanding the Privity of Estate being determined, and there being no Covenant from such second Assignor. The next Case is *Philpot v. Hoare*, reported in *Atkyns (m)*; but best reported in *Ambler (n)*. In that Case it was determined, that a Covenant by a Lessee not to assign without License, does not bind the Assignee of the Lessee under a Commission of Bankruptcy in case he makes a fair Assignment; and that, in that case the Assignment was fraudulent, and that the Assignee under the Commission continued liable to the Rent after he had assigned. The Fraud there was, that Mrs. *Hoare*, the Assignee, had made a sham Assignment of the Premises, having assigned to an Agent of her own, and received the profits of the Premises. Lord *Hardwicke* says, "If it had been proved that the Rent reserved had been too great, or that Mrs. *Hoare* had offered to surrender the Lease to the Landlord, it would have gone a great way with me." In *Atkyns (o)*, it is said that the Defendant was not only decreed to answer the Rent, but the fraudulent Assignment was set aside. In the present

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(m) 2 *Atk.* 249.

(o) *P.* 220.

(n) *P.* 480.

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Case, an offer was made to the Plaintiff to give up the Lease, and there is an undoubted Assignment to *Flood*; in that case Possession was kept for Mrs. *Hoare*; in this Case, it is clear, after their Assignment, the Defendants did not keep Possession. That Case, therefore, is no authority for the Relief prayed in this.

The Case of *Valliant v. Dodomedé (p)*, is very strong to show how the Law stood before the Act of Parliament. It was there determined that, as at Law, an Assignee of a Term might assign, and thereby get rid of his subsequent Rent, and the Covenants which run with the Land, *à fortiori* he might do it in Equity. In that Case the Assignee, *Dodomedé*, offered the Landlord to give up the Lease, but he refused to take it; and thereupon he prevailed upon *Lascelles*, a Prisoner in the Fleet, for four guineas, to take an Assignment, and *Dodomedé* assigned to him. Lord *Hardwicke* held *Dodomedé* to be liable in Equity for the Rent due previous to the Assignment, but not for Rent due after. *Lascelles* in that Case was quite as unfit an Assignee as *Flood* in this. It was evident *Dodomedé* assigned merely to exonerate himself from future Rent; and though he assigned to such a person, and paid him four guineas to accept the Assignment, Lord *Hardwicke* held, that the Assignor had discharged himself in respect of claims for Rent accrued subsequent to the Assignment. *Valliant v. Dodomedé* is referred to as an authority in *Le Caux v. Nash (q)*.

The next Case is *Taylor v. Shum (r)*, in which it was decided, that there is no Fraud in the Assignee of a

(p) 2 Atk. 546.

(q) 2 Str. 1221.

(r) 1 Bos. and Pull. 21.

Term assigning over his Interest to whom he pleases, with a view to get rid of a Lease, although such person neither takes actual Possession, nor receives the Lease. In that Case, *Lord Chief Justice Eyre* says, "The real Question is, whether the Defendants could assign to whom they pleased, so as to destroy their own liability? If you have no remedy against the Assignee, you must lose your Rent, and get possession of the Premises as soon as you can. The only case in which a question of Fraud could arise, is, where the Assignor has kept possession of the Premises, of which he makes a profit, and has made an Assignment to prevent responsibility. But even there, if the Possession be profitable, there will always be something on the Premises for the Landlord to distrain; so that I doubt whether there can ever be such a thing as a fraudulent Assignment, and whether an Issue on such a point can ever be well taken. It is clear that there is no Fraud in assigning to a Beggar, or to a person leaving the kingdom, provided the Assignment be executed before his departure. The Defendants had a right to divest themselves of the Interest, by the mere form of an Assignment, which drives the Plaintiff to take possession." It is quite clear, therefore, at Law and in Equity, that the Assignment to *Flood* is valid, and exonerates the Defendants from the claim of Rent made by the Plaintiff, unless the Act of the 49th *Geo. III. c. 121, s. 19*, makes any difference; and this brings me to the consideration of that Act. It is said that Act, where Assignees accept a Lease made to the Bankrupt, exonerates the Bankrupt from any claim upon him for Rent, and therefore such Assignees, if they assign the Lease, are bound to assign to a responsible person, and that it is a Fraud in them to assign to a Beggar.

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Before the Act, it was clear they might assign to a Beggar. The Legislature must have known that, but they do not provide for such a case. If it were intended to alter the Law in that respect, the Legislature would have expressed it, and have put Assignees of a Bankrupt on their guard. It is not contended, that having accepted the Lease, they cannot assign, but that they must assign to a *bonâ fide* responsible Assignee. It is difficult to say who would answer that description, and in what way the character and responsibility of such an Assignee is to be estimated. The Act is silent on the subject, and must be taken to leave the Law as it was in regard to the right of assigning.

This Clause of the Act was founded on obvious principles of justice. A Bankrupt deprived of all his property ought to be relieved from claims upon him. He has the Lease and all his Property taken from him, and it is but justice that he should be exonerated from the Rent. Lord *Mansfield*, in *Wadham v. Marlow* (s), cites, with approbation, an observation made by Mr. Justice *Yates*, in *Mayor v. Steward* (t); viz. "As the Act divests him of his whole Estate, and renders him absolutely incapable of performing the Covenant, it would be a hardship upon him if he should remain still liable to it, when he is disabled by the Act of Parliament from performing it." In that Case of *Wadham v. Marlow*, it was decided, that *Debt* does not lie against a Bankrupt on the *reddendum* of a Lease for Rent accruing after the Commissioner's Assignment; the

(s) See this Case in note in note (c) to *Boot v. Wilson*,
(a) to *Mills v. Auriol*, 1 H. 8 East, 314.
Black. 437, but best reported (t) 4 Burr. 2443.

Lessor's assent to such Assignment being virtually included in the Act of Parliament authorizing the Assignment of the Bankrupt's Estate. It was, however, afterwards determined, in *Mills v. Auriol* (u), that the Bankruptcy of the Defendant could not be pleaded in bar of an Action of *Covenant* for Rent; and in a subsequent Case, *Boot v. Wilson* (x), it was held, he was liable in *Assumpsit*. The Law could not remain thus; and it was but justice that it should be provided, as this Act provides, that if the Assignees accept the Lease, the Bankrupt should be exonerated from all future claims upon him for Rent; but such Assignees have still the same right of assigning over as they had before the Act. They derive no benefit by accepting the Lease; if they find it an onerous Lease, *damnosa hereditas*, they have a right, and it is a duty they owe to the Bankrupt's Creditors, to assign it. The Bill must be dismissed; but as the point arising out of the late Act of Parliament, is new, I shall not give Costs.

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Bill dismissed, without Costs.

(u) 1 H. Black. 433, and (x) 8 East, 311.
Judgment Affirmed in K. B.
4 T. R. 94.

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PILKINGTON *v.* WIGNALL.

November 10th,
and 23d.

*The usual form
of the Order when
full Costs are
given on the al-
lowance of a
Demurrer.*

THE Order drawn up in this Case, (reported ante p. 244,) was, that the Demurrer be allowed, "and that the Plaintiffs do pay unto the said Defendants the Costs of the said Demurrer, beyond the sum of 5*l.* the usual Costs of a Demurrer, to be taxed, &c."

Mr. *Agar* now moved, that the Order might be altered, and that payment of the full Costs of the Suit might be directed; for that the *Master*, in taxing the Costs, would not perhaps consider himself at liberty to tax the Costs of the Suit, but only the Costs of arguing the Demurrer. There is a difference of practice on this subject in the *Masters Offices*. Lord *Rosslyn*, he contended, in his *General Order (a)*, meant, by full Costs, that the Party, if the Court thought proper, should order the Costs of the Suit, as well as of the Demurrer.

The Motion stood over, and afterwards,

23d Nov.

The VICE-CHANCELLOR said, I am informed that the Order made on the over-ruling of the Demurrer with full Costs, is according to the form that has been used ever since the making of Lord *Rosslyn's* Order. I must, therefore, adhere to that form. In what manner the *Master* will act upon the Order is more than I can say.

Motion refused.

(a) 6 February 1794. Vide *Beames's Orders, &c.* p. 456, and the Cases cited in note 2 to page 457.

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MALCOLM and others v. O'CALLAGHAN and others.

11th and 26th
November.

THIS was a Petition, founded on the *Master's Report* made in this Cause, 31st July 1817, praying, amongst other things, that it might be confirmed; and that the rights of *Christian Wyatt*, under her Father's Will and Codicil, might be declared.

By Will, the Principal of certain Legacies was given to two Daughters, to be paid on Marriage with the consent of the Executors; and on the death of either, without having married with consent, her Legacy to go to the Survivor.

William Stopford (the Father of *Christian Wyatt*, late *Christian Stopford*), by his Will, 15th day of Nov. 1792, amongst other Bequests, gave and bequeathed unto his two Daughters, *Christian Stopford*, now the Wife of the said *B. D. Wyatt*, and *Elizabeth Stopford*, the sum of 2,000*l.* to be paid to them on their respective day or days of Marriage, provided such Marriage should be had with the consent and approbation of *James O'Callaghan* (the Defendant) and *Henry Lysaght* (since deceased) his Executors thereafter named, or the survivor of them, his Executors or Administrators; and he directed that they the said *James O'Callaghan*, and *Henry Lysaght*, or the survivor of them, his Executors or Administrators, should as soon as conveniently might be after his decease, lay out and invest the said two sums of 2,000*l.* and 2,000*l.* upon Government or other good and real Security or Securities, in the names of them the said *James O'Callaghan* and *Henry Lysaght*, or the Survivor of them, his Executors or Administrators, and should pay and apply the Dividends, Interest, and Annual Produce thereof,

By a Codicil, it was provided that, if either of the Daughters died before twenty-five, or Marriage with consent, the Legacy of such Daughter should go to the Survivor. One Daughter married before twenty-five, without consent; held

she was not entitled to the Legacy.—Query, Whether a second Marriage with consent would entitle her to the Legacy.

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for or towards the maintenance and education of his said two Daughters, *Christian Stopford* and *Elizabeth Stopford*, until their respective Marriage with such consent as aforesaid; and it was his Will, and he did also order and direct, that if either of his said two Daughters should depart this life before she should be married with such consent as aforesaid, that the Part or Share of her so dying, together with the Interest and Dividends thereof, should go to and be paid unto the Survivor of them, in the same manner and at the same time as he had thereinbefore directed the original Bequests to her to be paid; and in case both said Daughters should die without being married with such consent as aforesaid, then he ordered and directed that the said two Sums of 2,000 *l.* and 2,000 *l.*, and the Stock, Funds, or Securities in which the same should be laid out and invested, should sink into and become a part of the residue of his personal Estate.

James O'Callaghan and *Henry Lysaght* were appointed Executors of the Testator's Will.

The Testator made a Codicil to his Will, 21st May 1798, immaterial to state. He also made another Codicil, 9th July 1796, and thereby, amongst other things, gave to his two Sons *William* and *Philip* severally, the Sum of 3,500 *l.*, after deducting from each Legacy such sum of Money as he might have expended in the purchase of their Commissions severally; such Legacy to be in lieu of the provision made for them by his said Will: And he thereby confirmed the Legacies given to his said two Daughters *Christian* and *Elizabeth Stopford* by his Will; and directed that the Legacies which he

had bequeathed to the above two Sons and two Daughters by his said Will and that Codicil, should go and be possessed by the Survivor of such of his Sons who should die before the attainment of twenty-five years, and of such of his Daughters who should die before such Age, or Marriage with the consent of the Trustees mentioned in his Will and Codicil.

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The *Master*, by his Report, stated that *Christian Stopford* (now *Wyatt*) married without the Consent of the Trustees and Executors; but that soon after the Marriage, the Trustees and Executors approved of the Marriage, and became Trustees of a Settlement made after such Marriage.

Sir *Samuel Romilly*, and Mr. *Bell*, in support of the claim of *Christian Wyatt* to the Legacy:—

The Marriage of *Christian Stopford*, though, not an improper match, was certainly without Consent; the question is, Whether under the Will and second Codicil, she was not entitled to the Principal of the Legacy, she having attained twenty-five. To the Interest of the Legacy during her Life, she is clearly entitled. It is difficult to contend under the Will alone, that having married without Consent she is entitled to the Principal of this Legacy; but taking the Will and second Codicil together, which partially revokes the Will, by a Bequest inconsistent with the terms of the Will, she must be considered as entitled to the Principal of the Legacy, by having attained twenty-five.

The Will directed the sum of 2,000*l.* to be paid to the two Daughters on their Marriage, with the consent

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of the Testator's Trustees and Executors, or the Survivor of them; and the Interest of the Legacy is in the meantime to be applied for their education and maintenance; and if either of the Daughters died before Marriage with Consent, the Legacy of such so dying was to go to the Survivor; but by the second Codicil, the Testator directs that the Legacies given to the Daughters should go to the Survivor of such of his Daughters who should die before twenty-five, or marry with Consent. This amounts to a new Bequest, and entitled her to the Principal of the Legacy when she should marry with Consent; or when, marrying without Consent, she should attain twenty-five. These Conditions in restraint of Marriage are always considered as odious; and the Court will endeavour, if possible, so to construe a Will as to avoid a Forfeiture. One of the Daughters (*Elizabeth Stopford*), who is unmarried, and attained twenty-five has had the Principal of her Legacy paid to her. If the Court considers the Will as unaffected by the Codicil, still the condition may be performed, for she has all her Life to perform it; and if her present Husband dies, and she marries again with Consent, she will be entitled to the Legacy.

The *Solicitor General*, and *Mr. Mitford*, *contra*:—

It is true that Conditions of this nature are not favoured; but when a Legacy is given over in case of a Marriage without Consent, the Legatee over has an equal claim to the care of the Court, with the conditional Legatee. It is admitted, that under the Will *Christian Wyatt* cannot claim this Legacy; for a Marriage with Consent was a condition precedent, which she was bound to perform before she could be entitled. To the In-

terest and Dividends of the Legacy she is entitled during her Life, but no more. Then as to the second Codicil:—it confirms the Will; nor has it introduced a new period at which the Legacy is to be paid. The Codicil provides for an event not mentioned in the Will, on the happening of which it was to go over, *viz.* dying under twenty-five. Under the Will, it was given over on the event of dying without having married with consent; but by the Codicil, it is also to go over on dying before twenty-five, without having been married with Consent. The time prescribed by the Will when the Legacy is to be paid, is not at all affected by the Codicil. Possibly, if she had remained unmarried, she would, on attaining twenty-five, have been entitled; and it may become a question, whether, if she marries again, and with Consent, she is entitled to the Legacy; but the question *now* is, whether she is at present entitled to the Legacy. Clearly, she is not.

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The VICE-CHANCELLOR:—

Upon the words of this Will, Mrs. *Wyatt* cannot claim the Legacy. If there had been no Bequest over, the restriction would have been void; but there being a Bequest over, on failure of the performance of the condition on which the Legacy is given, the condition must be performed to entitle her to claim the Legacy. The intent is clear. Marriage with Consent was a condition precedent, to be performed before the Legacy became payable. A Consent subsequent to the Marriage does not satisfy the words of the Will.

The second Codicil shows throughout the Testator still entertained the same idea he expressed in his Will

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as to a Marriage with Consent. He expressly confirms his Will, and could not therefore mean to revoke it. If it were true that the Codicil gives the Legacy at twenty-five, though there was a previous Marriage without Consent, that would *pro tanto* be a revocation of the Will instead of a confirmation. The Will and Codicil must be construed together. In either of two events the Legacy is to go over; but in one event only can she claim the Legacy; if she dies under twenty-five unmarried, it goes over; if without marriage with Consent, it goes over; if she married with Consent, she was to be entitled. The gift over in the Codicil, if she died before twenty-five, was not tantamount to a gift to her in all events, on attaining twenty-five. The intention of the Codicil was to keep alive the Condition on which the Legacy was given in the Will.

It is not necessary to decide whether a second Marriage with Consent, would be a performance of the Condition; it is sufficient to say, she is not *now* entitled, not having performed the Condition on which she was to take the Legacy. She is entitled to the Interest of the Legacy for her Life, but not to the Principal.

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HUTCHINSON v. MARKHAM.

AN order *Nisi* had been obtained to dissolve an Injunction upon the coming in of the Answer, and Exceptions were shown as Cause. The *Master* reported the Answer sufficient.

13th November.
When an order *Nisi* is obtained to dissolve an Injunction, on the coming in of the Answer, and Exceptions are shown for cause, and the Master reports the Answer sufficient; the Injunction is thereupon dissolved, and no further Motion necessary.

Mr. *Tinney* now moved to dissolve the Injunction absolutely; referring to *Hinde's Practice* (a) to show the Motion was necessary.

Mr. *Trower*, *contra* :—

The Motion was unnecessary. Upon the *Master's* reporting the Answer sufficient, the Injunction was immediately dissolved, without further Motion.

The VICE-CHANCELLOR :—

I apprehend the Practice to be that, the Injunction is dissolved, in consequence of the Report, and that a further Motion is unnecessary.

N.B.—Mr. *Walker*, the Registrar, being referred to, confirmed *His Honor's* Opinion as to the Practice.

Motion refused (b).

(a) P. 598.

Lord *Hardwicke*, in *Peyto v.*

(b) S. P. determined by *Hudson*, March 1754.

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The VAUXHALL BRIDGE COMPANY
v. GEORGE JOHN EARL SPENCER and
Others, Proprietors of Battersea Bridge, and the
GOVERNOR and COMPANY of the BANK.

1st December.
*Securities given
in consideration
of withdrawing
an opposition to
a Bill in Parlia-
ment, are, on
grounds of public
policy, illegal;
and on a Bill to
have such Secu-
rities delivered
up, and Stock,
&c. transferred
to Plaintiffs, a
Demurrer being
put in, the same
was over-ruled.*

THE Bill stated, that in 1806 it was proposed, for the public convenience, to build a Bridge across the *Thames*, from or near *Vauxhall* Turnpike to the opposite Bank of the River, and to make Roads; and accordingly divers persons entered into a Subscription for that purpose, to build such Bridge, to be called the *Vauxhall Bridge*:—That the Subscribers appointed a Committee, with power to apply for an Act of Parliament to carry the plan into execution:—That they applied to Parliament in 1806 and 1807 for leave to bring in a Bill:—That leave was given, and a Bill introduced into the House of Commons in March 1807:—That after the first reading of the Bill, Petitions were presented against the same by *George John* Earl of *Spencer*, and others, who were then the Proprietors of *Battersea Bridge*:—That in consequence of such opposition, and before the second reading of the Bill, several Meetings took place between the Committee acting on behalf of the intended *Vauxhall Bridge* and the Proprietors of *Battersea Bridge*, or their Agents, in order to arrange some plan by which the interests of the Proprietors of *Battersea Bridge* might be secured; but before any arrangement was finally agreed upon, a dissolution of Parliament took place, whereby the Bill was lost for that Session:—That in the next Session of Parliament, in 1807 and 1808, the Committee on behalf of the intended *Vauxhall*

Bridge again applied for leave to bring in a Bill, but considerably altered from the former Bill, in order to obviate the objection then made; and that such Bill so altered was read a first and second time, and was referred to a Committee; and that great opposition being still made to the passing of the same, on the part of the Proprietors of *Battersea Bridge*, during the time the Bill was passing through the Committee, and great delay being occasioned thereby, the Committee on behalf of the intended *Vauxhall Bridge* introduced into the Bill Clauses for indemnifying the Proprietors of *Battersea Bridge* for all such losses as should be sustained by them by the building of *Vauxhall Bridge*:—That such Bill so altered went through the Committee, and passed the House of Commons, and was carried up to the Lords and read a first time; but on application being made to have the same read a second time, several noble Lords entertained objections to parts of the Bill, and especially to the Clauses which had been inserted for providing an indemnity to the Proprietors of *Battersea Bridge*, on the ground that such a Contract was illegal and contrary to public policy, being founded on an improper principle, and was likely to operate as a bar to the general improvement of the country:—That in consequence of such objection, the Bill was withdrawn; but the Proprietors of *Battersea Bridge* then declared their intention to oppose the passing of said intended Act, unless a sum of Money was paid or secured to them, as an inducement to withdraw their opposition: whereupon it was agreed between the said Committee of Subscribers to the intended *Vauxhall Bridge*, and the Proprietors of *Battersea Bridge*, that the latter should withdraw their opposition to the Bill; and that in consideration thereof, the said Committee should enter into

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their joint and several Bond to the Proprietors of *Battersea Bridge*, to secure the payment to them of the sum of 5,000 *l.* the same to be paid to certain Trustees on or before the 1st of March 1810, and to be laid out by them in the purchase of Stock, to accumulate until the intended Bridge should become passable, and to be then paid over to the Proprietors of *Battersea Bridge*; and that the Committee should also agree to secure to the Proprietors of *Battersea Bridge* the repayment of 250 *l.* which, as they alleged, had been expended by them in their opposition to the said Bill:—That accordingly a joint and several Bond, dated 16th May 1809, was executed by *William Robert Brown* and others, Members of the Committee of Subscribers, whereby they became bound to the Defendants, *J. H. Tritton*, *J. Jortin*, and *James Auriol*, the Trustees appointed by and acting on the behalf of the Proprietors of *Battersea Bridge*, in the sum of 10,000 *l.* with a Condition for payment of 5,000 *l.* on 1st May 1810, with a defeasance or proviso, that in case the Act should not pass into a Law during the then present Session of Parliament, the Bond should, at the end of such Session, be delivered up to the Obligors to be cancelled; but if the Act should pass into a Law during that Session of Parliament, the said Bond should be in full force:—That in pursuance of such arrangement, the Obligors executed an Indenture or Deed of Covenant, of the same date as the Bond, between the Obligors of the one part, and the said Trustees of the other part, whereby, after reciting the Bond and Defeasance, the Trustees covenanted, on the receipt of the 5,000 *l.* to lay out the same in the *Three per Cents.* in the joint names of four Trustees, two to be nominated by the *Vauxhall Bridge Company*, and two by the Proprietors of *Battersea Bridge*; and that

such Trustees should stand possessed of the said *Three per Cents.* upon Trust, to accumulate the Dividends until the same should, by virtue of the Trusts thereafter contained, become transferable; and when and so soon as the said intended Bridge should be completed for the passage of horses and carriages, upon Trust to transfer the *Three per Cents.* with all Accumulations, unto the Proprietors for the time being of *Battersea Bridge*, or to such Persons as they should appoint; but in case the intended Bridge should not be built within the time prescribed by the then intended Act for building the same, or within any further period of time to which liberty should be given by Parliament for building the same, or the completion of said Bridge should be wholly abandoned by the intended *Vauxhall Bridge Company*, then the Trustees to stand possessed of such *Three per Cents.* and accumulations thereof, in trust for the said *Vauxhall Bridge Company*, and to transfer the same accordingly: And it was further agreed, that upon the investment of the 5,000*l.* in the purchase of *Three per Cents.* a Declaration of Trust should be executed by the Trustees:—That in further pursuance of the aforesaid arrangement between the said Committee of Subscribers and the Proprietors of *Battersea Bridge*, a certain other Bond, dated also the said 16th May 1809, was executed by the said Trustees, whereby they became bound to the said *John Henton Tritton, John Jortin, and James Auriol*, in a penal Sum conditioned for the payment of 250*l.* on the 1st day of November then next:—That the only Consideration for the execution of said Bonds and Deed of Covenant was the engagement made and entered into by or on behalf of the said Proprietors of *Battersea Bridge*, not to oppose the said intended Act of Parliament for the building of *Vauxhall Bridge*;

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and that in order to prevent any objection that might arise from the before-mentioned arrangement, it was stipulated and agreed that the same should be, and was in fact, concealed from the knowledge of the Legislature: That after the execution of the said Bonds and Deed of Covenant, and in consequence thereof, the Proprietors of *Battersea Bridge* discontinued their opposition to the said proposed *Vauxhall Bridge*, and a Bill was accordingly, in the Session of Parliament ending in 1809, introduced, and passed into a Law, under the Title of "An Act for building a Bridge across the River *Thames*, from or near *Vauxhall Turnpike*," &c. The Bill then set forth the provisions of this Act of Parliament, in which was stated the Money to be raised, the mode of raising it, and the manner in which it was to be applied; but in which no Sum was appropriated in satisfaction of the Claims of the *Battersea Bridge Company*. The Bill then stated, that the Committee appointed under the powers of the Act for managing the affairs of the Company, acting under an erroneous conception of the powers granted to and the duties imposed on them by such Act, and thinking themselves bound to carry into effect the arrangement made with the Proprietors of *Battersea Bridge*, caused the Sum of 250*l.* secured by Bond hereinbefore secondly mentioned to be paid to or for the use of the said Earl *Spencer*, *T. Cobb*, &c. the said Proprietors of *Battersea Bridge*, on or about the 27th Nov. 1809, out of the Monies raised under the authority of the said Act; and also caused the further Sum of 5,000*l.* further part of the Monies raised under the authority of the said Act, to be invested in the purchase of 7,117*l.* 8*s.* *Three per Cent.* Annuities, in the names of the said *John Henton Tritton* and *James Auriol*, the Trustees named an

appointed by the Proprietors of *Battersea Bridge*, and *Henry Thornton*, then of *Battersea Rise*, in the County of *Surrey*, Esquire, and *Henry Buckley*, of *Lambeth*, in the same County, Esquire, Trustees named and appointed by Plaintiffs; and that thereupon a certain Deed or Indenture, 14th day of May 1810, was executed by the said *Henry Thornton*, *Henry Buckley*, *John Henton Tritton*, and *James Auriol*, declaring the Trusts upon which the said Trustees and the Survivors and Survivor of them, and the Executors and Administrators of such Survivor, were to stand and be possessed of the said Sum of 7,117*l.* 8*s.* *Three per Cent. Annuities*, and which Trusts were conformable to the provisions hereinbefore stated to be contained in the said Deed of Covenants:—That shortly after the said Act was passed, the Committee thereby appointed proceeded to carry the said undertaking into effect, and the Bridge is now erected:—That the said *Henry Thornton*, one of the four Trustees, in whose name the same Stock was invested for the purpose aforesaid, died, leaving the said *Henry Bulkley*, *J. H. Tritton*, and *James Auriol*, his Co-Trustees him surviving:—That the Dividends on the Sum of 7,117*l.* 8*s.* *Three per Cent. Annuities*, so invested as aforesaid in the names of the said four Trustees, and the accumulations thereof, were from time to time laid out in the purchase of the like Stock during the life-time of the said *Henry Thornton*; and such accumulations, together with the said original Sum, amounted, at the time of the death of the said *Henry Thornton*, to the Sum of 8,597*l.* 15*s.* 11*d.* *Bank Three per Cent. Annuities*; which sum is now standing in the Books of the *Governor and Company of the Bank of England*, in the joint names of the said *John Henton Tritton*, *James Auriol*, *Henry Thornton*, and *Henry*

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Bulkley; and the Dividends which have accrued on the said last-mentioned Sum, and on the accumulations thereof, since the death of the said *Henry Thornton*, have been laid out in the purchase of the Sum of 585*l.* 8*s.* 4*d.* in the same Stock, and such last-mentioned Sum is now standing in the names of the said surviving Trustees, *John Henry Tritton*, *James Auriol*, and *Henry Buckley*, in the said Books of the *Governor and Company of the Bank of England*, and that no part thereof has been sold out by the said Defendants, *George John Earl Spencer*, *John Henton Tritton*, &c. who are now the only Proprietors of *Battersea Bridge*; but that they threaten and intend to apply to the said surviving Trustees to transfer the said Stock to them, or to sell the same, and apply the produce thereof to their use:— That the Proprietors of the said *Battersea Bridge* will not receive any injury or damage whatever from the building or using of the said *Vauxhall Bridge*; or if otherwise, such injury or damage will not amount to any thing so large a Sum as 5,000*l.*:—The Plaintiffs they were advised and insist that, under the circumstances aforesaid, the Agreement entered into by and between the said Committee of Subscribers and the Proprietors of *Battersea Bridge*, for the purpose of inducing the said Proprietors of *Battersea Bridge* to withdraw their opposition to the said Act of Parliament, was and is a Fraud upon the Legislature, and contrary to public policy and that the application of the money raised under the authority of the said Act, to the performance of such an Agreement, was directly contrary to the provisions and intentions of the said Act; and submitted that the said Deed of Covenants and Declaration of Trust, and the said Bonds, having been obtained under the circumstances aforesaid, are not binding upon them, and that

therefore the said Deed of Covenants and Declaration of Trust ought to be delivered up to be cancelled; and the aforesaid Stock and all accumulations thereof ought to be transferred to Plaintiffs; and that the aforesaid sum of 250 *l.* ought to be repaid to Plaintiffs, with lawful Interest thereon from the time when the same was paid, as before mentioned.

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To this Bill a general Demurrer was put in.

Mr. *Hart*, and Mr. *Heald*, in support of the Demurrer:—

Lord *Spencer* and his Co-owners of *Battersea Bridge* intended to oppose the *Vauxhall Bridge* Bill; they claiming a Compensation in respect of the probable injury the *Battersea Bridge* Proprietors would suffer from the erection of the new Bridge. A Compensation was considered as reasonable in the House of Commons, and a Clause was there introduced to secure it; but when the Bill went to the House of Lords, some noble Lords, as the Bill states, but not naming them, on the second reading objected to the Clause for Compensation. Upon this, to prevent delay in the passing of the Bill, or the possible rejection of it, nine individuals, forming the Committee of the Subscribers, agree to pay a sum of Money to Trustees, upon the Trusts stated in the Bill. - The Act afterwards passed. Now, the *Vauxhall Bridge* Company say, the Money so deposited is the Money of the Contributors, and ought not to have been so applied. Suppose, in so applying the Money, there was a breach of Trust, yet that does not entitle these Plaintiffs to call back the Money. The Defendants had nothing to do with the rights of those who

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made the Agreement. If they did wrong, they are liable to their *Cestuis que Trust*; the remedy is against them. Nothing can be more unprincipled than the claim of this Money. Suppose it was a corrupt Agreement, yet having paid the Money, they cannot recal it. The Agreement was executed twelve years ago, and acquiesced in ever since. It is the first time that this Court has been called upon to redress Frauds upon the Legislature. If there was any Fraud, they are *particeps criminis*, and the maxim *melior est conditio possidentis* applies.

Sir S. Romilly, Mr. Bell, and Mr. Wingfield, in support of the Bill:—

The Agreement in question was, to do that which the House of Lords thought ought not to be done. It is a Fraud on persons executing a public Trust, who supposed the Claim of the *Vauxhall Bridge* Proprietors had been fairly withdrawn; instead of which, a secret Agreement is made to pay a sum of Money for withdrawing the objections. It is a transaction contrary to public policy, and such as this Court will rescind. The Legislature has directed how the Money levied on the Public by way of Toll is to be applied; and it would be a misapplication to apply any part of it in payment of this 5,000*l.* The Agreement was not made known to the Legislature, but was studiously concealed, and in that consists the vice of the Contract. As to *particeps criminis*, it does not apply to the Plaintiffs. The present Plaintiffs are not the persons who made the Agreement; but if they were, it would not be an objection; for in cases of this description, persons concerned in the transaction may set it aside. In *Neville v. Wil-*

kinson (a), Lord *Thurlow* cites several Cases to show that relief will be given to a party who was *particeps criminis*; and his Lordship expresses it as a general rule, that in all cases where Money is paid for an unlawful purpose, the party, though *particeps criminis*, may recover it back again. There are various Cases in which Contracts have been set aside as contrary to public policy; *Morris v. M'Culloch (b)*, *Hannington v. Du-Chatel (c)*, and the Cases of Marriage Brocage Bonds.

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Mr. *Hart*, in Reply:—

Cases of Marriage Brocage Bonds, or of Money given for Appointments to public Offices under Government, stand on different grounds from this Case. It was never determined that such an Agreement as this was contrary to public policy, or such as ought to be set aside.

The VICE-CHANCELLOR:—

If any relief can be obtained upon this Bill, the Demurrer cannot be sustained.

The Proprietors of *Vauxhall Bridge* are incorporated under the name of the "*Vauxhall Bridge Company*;" and the object of this Bill is, the restoration of Money placed in Trustees hands, and to prevent its being paid to the Proprietors of *Battersea Bridge*. The Act appropriates the Money to be received by Toll from the

(a) In Appendix to 1 Bro. (now Lord Redesdale) who
C. C. p. 547. The Report of gave it to Mr. Brown.
this Case was by Mr. Mitford (b) Ambl. 432.
(c) 1 Bro. C. C. 125.

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Bridge to certain purposes, and when such purposes are answered the Toll is to cease. The Public, therefore, have a great interest in this concern; and it was important that the Subscribers and the Legislature should be fully apprised of the manner in which the Money to be raised by the Toll should be applied. The Act is silent as to any remuneration to the Proprietors of *Battersea Bridge*. The Subscribers, therefore, to the *Vauxhall Bridge* are justified in representing that their Money is about to be applied for a purpose not sanctioned by the Act. The *Vauxhall* Company acting upon the Agreement with the Proprietors of *Battersea Bridge*, made before the Act passed, pay the 5,000 *l.* to the Trustees; in so doing, they considered perhaps what they were bound to do as gentlemen, rather than what they were under a legal obligation to do; but the Plaintiffs represent that they do not consider themselves as bound by that Agreement, and insist on the Money being applied to its proper and legitimate purpose, according to the directions of the Act. The Agreement was secretly made during the pendency of the Bill in Parliament, and that secrecy is the great ground of objection to it. If the *Battersea Bridge* Proprietors considered themselves as entitled to compensation, they should have submitted their claims to the Legislature, which would have decided the great question, whether it were proper to compensate persons who might suffer from the building of a new Bridge, a great work for the public benefit. The Bill, when it passed the House of Commons, contained a Clause for the remuneration of the *Battersea Bridge* Proprietors; but that Clause was objected to on the second reading of the Bill in the House of Lords, and in consequence the Bill was withdrawn. The Agreement in question is then secretly

entered into, and the Clause being struck out, the Bill passed. In all Bills, whether of a public or private nature, when a recompence is to be made to individuals, it is always provided for in the body of the Act, and for two reasons : one, that the matter may be publicly discussed ; the other, that Parliament may supply a fund, out of which the recompence is to be given. The Legislature and the Public must have supposed the claim of compensation was given up, and that the Money to arise from the Tolls was to be applied as the Act directs, and not in discharge of the Money secured by this secret Agreement. If the Compensation had been publicly insisted upon, the Legislature might have passed the Bill without regarding the Claim, or if they thought it a proper Claim, might have refused to pass the Bill, on the ground that the satisfaction of the Claim would be too great a burthen upon the undertaking. The object of the Agreement was to prevent an opposition to the Bill in Parliament, and it was to be concealed from the Legislature. Such an underhand Agreement was a Fraud upon the Legislature, and contrary to principles of public policy. The Contract was invalid. It falls within the principle of the Cases that have been cited. This, therefore, being a Case in which it is probable relief will be given at the hearing, the Demurrer cannot be sustained.

Demurrer over-ruled.

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13th and 19th
December.

A Power to appoint a Sum of Money in such Shares as the Appointor shall think proper, amongst his Children; the Money so appointed to be paid to Sons at twenty-one, and to Daughters at that age or Marriage, if the Appointor should be then deceased; or if living, three months after his death. Two of the Children having attained twenty-one, died before the Appointor; and held, that no Interest vested in them.

BY Articles of Agreement, in contemplation of Marriage, 27th December 1779, between *Robert M'Ghie* (since deceased) of the first part, *Elizabeth Pomeroy Bruce* (his intended Wife) of the second part, and Trustees of the third part, it was, amongst other provisions, agreed by *Robert M'Ghie*, that within one year a Term for 1000 years in certain Freehold Estates should be conveyed to the Trustees; the uses of which Term, amongst other uses, were declared to be, "that in case there should be one or more Child or Children of said intended Marriage, then that the Trustees, their Executors or Administrators, should, either in the lifetime of said *Robert M'Ghie*, with his Consent or otherwise, but not till after his decease, by demise, sale, or mortgage of the Premises, or any part or parts thereof, or by such other ways and means as they should see fit, raise and levy such portion or portions for the Children of said Marriage, as thereafter mentioned; (that is to say) if there should be but one Child of the said intended Marriage, and such only Child should be a Son, the sum of 6,000*l.*; and if such only Child should be a Daughter, the sum of 3,000*l.* for the portion of such only Child, to be paid to such only Child, being a Son, at his age of twenty-one years, and being a Daughter, at that age or on the day of her Marriage, which should first happen, if the said *Robert M'Ghie* shall be then dead; but if he be living, then within three calendar months next after his decease; and if two or more Children, then the sum of

x x

6,000 *l.* for their portions, to be paid, shared, and divided amongst such two or more Children, in such parts and proportions, manner and form, as he the said *Robert M'Ghie* (deceased), or the said *Elizabeth Pomeroy Bruce* (in case she shall survive him, and before the Children of the said intended Marriage shall attain to the age of twenty-one years, being Sons or being Daughters at that age or day of Marriage) by any Writing or Writings under his or her Hand and Seal, and attested by two or more Witnesses, or by his or her last Will and Testament in writing, to be by him or her signed, sealed, and published, in the presence of the like number of Witnesses, should direct, limit or appoint, and to be paid them, being Sons, at their respective ages of twenty-one years, or, being Daughters, on their attaining to the said age, or on their Marriages respectively, which should first happen, if said *Robert M'Ghie* should be then dead; but if he be then living, then at the end of three calendar months next after his decease; and in default of such appointment, then said 6,000 *l.* to be paid to and be equally divided amongst them, share and share alike, at the times aforesaid; and in case any of such Children should die before his her or their attainment as aforesaid, then the portion or portions, share or shares, of him, her or them, so dying, should go and remain to the Survivors or Survivor of them, share and share alike; but nevertheless, no one Daughter of the said intended Marriage should have more than the sum of 3,000 *l.* for her portion; and if all such Children should die before their attaining their respective ages or days of Marriage as aforesaid, then their respective portions to cease, and not be paid: And upon further Trust, that the Trustees, their Executors or Admini-

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strators, should, out of the Rents and Profits of said Premises to be settled, raise and levy, after the decease of said *Robert M'Ghie*, such yearly Sum and Sums for the maintenance and education of such Children, in the meantime and until their portions should become payable respectively, as to the Trustees should seem meet, such yearly maintenance not exceeding Interest on the portions of such Children respectively, after the rate of *5 l. per Cent. per Annum*.

The intended Marriage took place; and by Indentures of Lease and Release, 26th and 27th December 1781, (being a Settlement expressed to be made in pursuance of the Articles) a Term of 1000 years was limited to Trustees, upon Trusts in some respects differing from the Articles; but as it was agreed that so far as the Settlement differed from the Articles it was untenable, and that in taking the opinion of the Court, its decision must be founded on the rights given by the Articles, it is unnecessary to state the terms of the Settlement.

There was Issue of the Marriage, the Plaintiffs, *James M'Ghie, W. M'Ghie, T. M'Ghie, and J. P. M'Ghie*; and the Defendants, *R. M'Ghie, C. W. M. M'Ghie, J. R. M'Ghie*, and also *John M'Ghie and H. B. M'Ghie*, who both died in the lifetime of their Father *Robert M'Ghie*, but who severally lived to attain the age of twenty-one years and married; and there were other Children, all of whom died under age.

John M'Ghie and H. B. M'Ghie, who, as before stated, died before their Father, left, the one his Wife and also a Son named *R. M'Ghie*, and resident out of the

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jurisdiction of the Court; and the other, a Daughter *Elizabeth M'Ghie*, and the Plaintiff *Ann M'Ghie* his Widow, who took out Letters of Administration.

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Robert M'Ghie the Father, by his Will, 27th September 1814, executed and attested in the presence of two Witnesses; after reciting that by said Indentures of Settlement a Power was reserved, enabling him to dispose of said 6,000*l.* directed to be raised by the Trustees therein named, amongst his Children, attaining respectively, being Sons, the age of twenty-one years, or being Daughters, that age or day of Marriage, which should first happen. He said Testator, in pursuance of said Power, appointed that the sum of 2,000*l.* part of said 6,000*l.* so to be raised as aforesaid, should, when the same should be raised, together with the Interest to accumulate and become due thereon, at and after the rate of 5*l.* per Cent. per Annum, to be calculated from the time of his decease, be paid to his Daughter said Defendant *Janet Pomeroy M'Ghie*, on her attaining the age of twenty-one years, or day of Marriage, which should first happen, the Interest to go for her maintenance, education, &c. as her Mother should direct; and that the residue of said 6,000*l.* should be equally divided amongst all his other Children living at the time of his decease, who being a Son or Sons should attain his or their age or ages of twenty-one years, or being a Daughter or Daughters, her age of twenty-one years, or day of Marriage, which should first happen; if more than one, share and share alike.

At the Testator's death, the Plaintiff *James M'Ghie*, and the Defendants *Robert M'Ghie* (the Son) and *C. W. M. M'Ghie*, had attained twenty-one years, but

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the other Children, then living, were under that age.

The Bill *prayed*, that the rights of the Plaintiffs and the other Children of *Richard M'Ghie*, deceased, and of the Plaintiffs *Richard B. Ward* and *Anne M'Ghie*, in right of said *Jonathan M'Ghie* and *Hugh B. M'Ghie* respectively, to and in said sum of 6,000*l.* to be raised and applied under the Trusts of the Term, might be adjudged and determined; and particularly that the Appointment made by the Will of *Robert M'Ghie*, deceased, might be declared void; and that it might be declared that the said sum of 6,000*l.* ought to be paid and divided to and amongst the Plaintiffs and the other Children aforesaid (or such of them as should attain vested Interests therein) and the Plaintiffs *R. B. Ward* and *Ann M'Ghie*, in right of said *Jonathan M'Ghie* and *Hugh B. M'Ghie*, in equal shares and proportions.

The Defendant *J. P. M'Ghie* an Infant, in her Answer by her Guardian, insisted on the validity of the Appointment under the Will of her Father *Robert M'Ghie*.

The Trustees, by their Answer, submitted the point to the consideration of the Court.

Mr. Hart, and Mr. Wilbraham, for the Plaintiffs:—

This Case must be argued on the effect of the Articles made prior to the Marriage of *Robert M'Ghie* the Father, as the subsequent Settlement made after the Marriage, if not according to the Articles, could not be supported. The question is, Whether the Will of *Robert M'Ghie* the Father, 27th September 1814, was

according to the substantial meaning of the Power contained in the Articles? The Will affects to appoint the whole 6,000*l.* amongst certain of the Children of the Marriage; but we contend that the Testator could not exclude the representatives of deceased Children, *viz.* two Sons, who attained twenty-one before their deaths, and were married. The Cases which will, probably, be relied upon, are *Boyle v. Bishop of Peterborough* (a), and *Butcher v. Butcher* (b); but the Power reserved by these Articles differs materially from what was the Power in those Cases. In them, the Parent had a Power to fix the period at which the Children were to be entitled to their Portions; they were "to vest at such time" as the Parent should direct; and the period when the Portions were to vest was fixed only in case the Power should not be executed; but here, the Power is not so worded; the portions are vested in the Children on attaining twenty-one, and the Power only enables the Parent to say what proportion of the Money they shall have. Every Son attaining twenty-one, or Daughter attaining that age or marrying, in the Parent's lifetime, took a vested Interest in such Sum as should be appointed to them, or left unappointed, payable three months after the Parent's death. Every such Child was entitled to have some share of the Money. They took vested Interests, subject to be divested to the amount of the inequality of the Sum appointed amongst them; but here, the whole Sum is appointed amongst the surviving Children, nothing being given to the deceased Children or their Representatives, or left unappointed, and consequently the whole Appointment is void.

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(a) 1 Ves. jun. 299, S. C. (b) 1 Ves. and Bea. 79-3 Bro. C. C. 243.

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Mr. *Wetherell*, and Mr. *Cross*, for the Defendant the Infant, and Mr. *Cooper* for the Defendants the Trustees :—

It is admitted, the Articles only can be reasoned upon; the Settlement varies from them; but such variance cannot be regarded, it being unwarranted. It is true the Power does not, in express terms, say that the Appointor is to name the time when the Portions are to vest; but it is clear, from the wording of the Articles, that was to be in the discretion of the Appointor. In *Hope v. Lord Clifdon* (c), Lord *Eldon*, alluding to a Case of *Cholmondeley v. Meyrick* (d), says, “ a very material circumstance in that Case is, that the Father might have appointed by Will. It might have been argued, that those who were to take for want of appointment, were the objects of appointment. The difficulty was, that as he had the power of appointing by Will, the Children to take could not be determined till he was dead. It might, therefore, have been contended, that it did not mean Children unless they survived, so as to be the objects of such an appointment.” To say, here, that something vested at twenty-one, or Marriage, would be to abridge *pro tanto* the power of appointment; and the inconvenience would follow, that if a Share becomes thus vested, it puts the Child out of the controul of the Parent. Nor is this the only inconvenience; for a Child attaining twenty-one, or marrying and dying without Issue, their Representatives, perhaps the Parent himself, would take his Share. The construction contended for is contrary to the intention of the Articles, and cannot be supported on principle or authority.

(c) 6 Ves. 499.

(d) P. 508.

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Mr. *Hart*, in Reply:—

If the Articles are clear, the Court will decide according to them; but if there is any doubt as to their meaning, the Court will incline to such a construction of them as will favour deceased Children. This is very old doctrine, and well expressed in a late Case. In *Howgrave v. Cartier (e)*, the *Master of the Rolls* says, “ If the Settlement clearly and unequivocally makes the right of the Child to a provision depend upon its surviving both or either of the Parents, a Court of Equity has no authority to controul that disposition. If the Settlement is incorrectly or ambiguously expressed, if it contains conflicting and contradictory clauses, so as to leave in a degree uncertain the period at which, or the contingency upon which the Shares are to vest, the Court leans strongly towards the construction which gives a vested Interest to the Child, when that Child stands in need of a provision; usually as to Sons at the age of twenty-one: and as to Daughters, at that age or marriage.” It has been urged that there might be great inconvenience if the argument we used prevailed. I admit there might be the inconvenience suggested, but greater inconvenience would result on the other side, for several Children might die, having married and having large families unprovided for. *Boyle v. Lord Peterborough*, and *Butcher v. Butcher*, would not have been decided as they were, if the power in those Cases had not enabled the Appointors to fix the time when the Portion was to vest. It is clear, in *Butcher v. Butcher*, that Lord *Eldon* was not satisfied with the decision in *Boyle v. Peterborough*, though he followed it, not wishing to disturb a settled rule.

(e) 3 Ves. and Bea. 85, 6.

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The VICE-CHANCELLOR — [after stating the Case] :—

It appears to me to admit of doubt, whether the Articles give either the Husband or the Wife a power of appointment after the Children had attained twenty-one or marriage. It is said that the restriction applied only to the Wife, and not to the Husband, and that the latter had an unlimited power of appointment during his life, and such, certainly, is the tenor of the Settlement made in pursuance of the Articles. If the Articles were meant to give a power of appointment to the Husband, if *all* the Children had not attained twenty-one or marriage, then the objection will not hold; for in this Case, when the appointment was made, *some* of the Children had not attained twenty-one, or married. As, however, the question I have suggested upon the wording of the Articles was not observed upon by the Counsel on either side, it is probable, they thought it better to waive the discussion; but if they wish to be heard on that point, I will give them an opportunity.

Note.—The Counsel waived the Argument of the Point mentioned by *His Honor*.

The VICE-CHANCELLOR :—

9th Dec.

The first objection made to this Appointment is, that it did not include the two Children, who having attained the age of twenty-one, died before the Appointment. If they had been included, the Appointment in that respect would have been bad, it having been long settled by *Maddison* and *Andrew (f)*, that in such a Case no Appointment can be made in favour either of the Persons who, by death, has ceased to be an object of the Power, or to his Representatives. The Child is excluded in such

(f) 1 Ves. sen. 57.

Case, not by the act of the Donee of the Power, but by death, to which, as an implied condition, every Power must be subject.

The next objection is, that as those two Children had, by living to the age of twenty-one, acquired vested Interests, the Appointment amongst the Survivors ought not to have exhausted the whole Sum of 6,000*l.*, but that a sufficient portion should have been left unappointed, to be divided as such amongst all the Children living or dead who had attained, or should attain, the age of twenty-one, at which age it was the intention of the Author of the Power they should acquire vested and transmissible Interests; and, on this head, the difference was pressed between this Case and *Boyle* and the *Bishop of Peterborough* (g), the period of time being here fixed at which the Children were to take, without any power over the time, as there was in that Case. But when properly considered, this does not furnish any substantial ground of difference between the two Cases, so as to warrant a different effect on the power of Appointment. In both, the vesting must be considered to be qualified, not absolute, subject to be divested by an Appointment. In both, the vesting is only in the unappointed Shares, that is, in case the whole or any part of the Sum over which the Power extends, should remain unappointed. In the appointed Shares there cannot previously be any vested Interest, because, prior to the Appointment, there must, as to any Share to be taken under it, be three Contingencies, from the uncertainty, 1st, whether the Donee of the Power will choose to execute it, and whether in the whole or in part; 2dly, of being excluded by death from continuing to be an object of the Power; 3dly, as to the quantum

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(g) 1 Ves. jun. 299. S. C. 3 Bro. C. C. 243.

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of Share which may be given: on which latter ground alone Lord *Hardwicke*, in *Maddison and Andrew*, and Lord *Thurlow*, in *Boyle v. Bishop of Peterborough*, thought there could be no vesting in Shares to be appointed prior to the Appointment.

In both, the words of the Articles in this Case, “to be paid at twenty-one,” &c. apply only to the Share that may be appointed, and in the very terms it is made contingent, by the words subjoined, “in case the Parent should be then dead; but if not, then in three months after his death.” But any right to be derived under a clause necessarily presupposing Appointment, and dependent on it, must of course fail to have any effect in favour of those who, by their previous death, have ceased to be the objects of the Power, and are thereby, under the operation of a fixed Rule of Law, necessarily excluded from deriving any benefit under it.

The Rule established by *Boyle v. Bishop of Peterborough*, is, that the Death of one of the Class over whom the Power extends, even where there is no power of Exclusion, does not prevent an Appointment amongst the Survivors of the whole Sum to the full extent of the Power. In *Butcher and Butcher (h)*, Lord Chancellor *Eldon* states, that that Case ought now to be adhered to, and it is of consequence to the stability of property that it should not be allowed to be shaken upon minute shades of difference, when in principle the Cases are the same.

I think, therefore, this ground of objection to the Appointment, as well as the other, cannot be supported.

(h) 1 Ves. and Bea. 79.

USBORNE v. BAKER.



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17th and 23d
Nov.

ON the 1st of November 1814, the Plaintiff exhibited his Original Bill against the Defendant *Charlotte Baker*, stating that, the Plaintiff had contracted with the Defendant for the purchase of her Interest in Remainder or Reversion, expectant on the death of her Brother *Richard Baker*, esq. without issue Male, in the Manor of *Orsett*, and other Hereditaments in the Bill mentioned, for the sum of 23,500 *l.*; and that certain Articles of Agreement in writing, 31st July 1813, for the said Purchase and Sale, were entered into by the Plaintiff and the Defendant; and further stating, that the Plaintiff had paid to the use of the Defendant the sum of 2,000 *l.*, part of the Purchase Money; and *praying* that the Defendant might be compelled specifically to perform the Agreement, &c.; and that in the meantime the Defendant might be restrained by Injunction from selling or disposing of the Reversion or Remainder, or any part thereof, to the said *Richard Baker*, in the Bill named, the Brother of the Defendant, or to any other person.

Supplemental Bill of Discovery held, on Demurrer, to be good, it enquiring as to material facts which occurred subsequent to the filing of the Original Bill.

A *Supplemental Bill* was filed, stating the foregoing facts, and that the Defendant put in her Answer, thereby insisting that the 23,500 *l.* was not a fair price for the said Remainder or Reversion, but that the same is worth 60,000 *l.* at least, and that therefore she is not bound to perform the Contract:—That Issue hath been joined in the Cause, and some Witnesses examined, but publication hath not passed:—That since the filing of the Bill the Defendant contracted to sell her said Interest, in Remainder or Reversion, to her Brother the

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said *Richard Baker*, at a less price than the sum of 23,500 *l.*; and that some time before the year 1813, the said *Richard Baker*, through a *Mr. Worthington* and a *Mr. Silverlock*, or one of them, made some Proposal in Writing to the Defendant for the purchase of her Interest in Remainder or Reversion; and that, by that proposal, the said *Richard Baker* offered to give to the Defendant for her said Interest a less sum than 23,500 *l.*:—That the Defendant rejected the proposal, but not because the Sum offered was too small:—That some Letters were written by the said *Mr. Worthington* and *Mr. Silverlock*, and the said *Richard Baker*, relative to the Proposal; and that since the filing of the Bill the Defendant got into her possession the aforesaid Letters, or some of them, or some Copy or Copies thereof, and the said Proposal or some Copy thereof; and that Defendant now hath or lately had in her possession or power the said Proposal or some Copy thereof, and the said Letters or some of them, or some Copy or Copies thereof, and, in particular, a Letter from the said *Mr. Silverlock* to the said *Mr. Worthington*, dated Serjeants Inn, 24th July 1812; a Letter from the said *Mr. Worthington* to the said *Mr. Silverlock*, dated Belle-vue Cottage, 31st July 1812; a Letter from the said *Mr. Worthington* to the Defendant, dated, Belle-vue Cottage, and dated or written some time in the month of July 1812, or in August in the same year; a Letter from the said *Richard Baker* to the said *Mr. Worthington*, dated Orsett Grays, 23d July 1812; and a Letter from the said *Mr. Worthington* to the said *Richard Baker*, dated Belle-vue Cottage, 31st July 1812, or some Copy or Copies thereof:—That some Correspondence hath passed between the said *Richard Baker* and the Defendant, or between them or one of them, or some other person or persons, relative to the said Defendant's late

Contract, to sell her Interest in the said Remainder or Reversion to her said Brother; and that the Defendant hath now or lately had in her possession or power divers Letters, Copies of Letters, Memorandums, Papers, and Writings relating to the said Contract; and if the said Proposal or Copy thereof, and the several Letters, Copies of Letters, Memorandums, Papers and Writings, were produced, the truth of the matters aforesaid would appear. The *Prayer* of the Bill was, that the Defendant might set forth a List or Schedule of all such Letters, Copies of Letters, Memorandums, Papers and Writings relating to the said late Contract, and the said former Proposal, as are now or ever have been in her possession or power:—That Defendant might produce and leave such of them as are now in Defendant's possession or power in the hands of Defendant's Clerk in Court for the usual purposes, and might set forth what is become of such of them as are not now in her possession or power, and where and in whose possession the same respectively now are; and whether, if the said Proposal or a Copy thereof, and the said several Letters, Copies of Letters, Memorandums, Papers and Writings were produced, the truth of matters would not appear; and whether the said Defendant is not well able to produce the same, or set forth what is become thereof, and whether Defendant did not refuse to produce the same or any of them; and that Defendant might set forth what is become thereof.

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To this Bill, the Defendant put in a *General Demurrer*.

The *Solicitor General*, and Mr. *Wilbraham*, in Support of Demurrer:—

There are two objections to this Supplemental Bill;

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1st, That the Discovery sought is immaterial; and 2dly, That if material, it is not the proper subject of a Supplemental Bill. If the Discovery sought is immaterial, a Demurrer will lie, as in *Milner v. Lord Harewood* (a), and *Adams v. Dowding* (b). It is immaterial whether the Defendant did or did not agree to sell this Reversion or Remainder to her Brother *Richard Baker*, for a less sum than 23,000 *l.* If she so agreed, it was either from ignorance of the value of the Estate, or from motives of affection to him. Besides, mere inadequacy of Price is not sufficient to invalidate a Contract. The offer of *Baker* to purchase the Estate in 1813, and the Correspondence, is interrogated to in the Original Bill, and they have obtained an Answer as to those facts; and he cannot, therefore, now, by a Supplemental Bill, call for an Answer to facts which occurred before the Original Bill, and were interrogated to by that Bill. The Contract between the Plaintiff and Defendant was good, or bad, at the time it was made. If good, nothing subsequent can affect it. The Discovery is much less material than that sought in *Milner v. Lord Harewood*, and yet there, for want of materiality in the Discovery sought, a Demurrer to the Supplemental Bill was allowed.

This is a Supplemental Bill, and not merely for Discovery: it states the proceedings in the Cause in the usual form of a Supplemental Bill. If it were merely for a Discovery, the Defendant, on putting in his Answer, would immediately be enabled to apply for his Costs—an advantage the Defendant would not be entitled to on putting in an Answer to this Bill; but there can be no such thing as a Supplemental Bill of Dis-

(a) 17 Ves. 144.

(b) Ante, p. 53.

covery ; or if there can, it could be filed only by the special leave of the Court. There are passages in Lord *Redesdale's* Treatise, in which he mentions a Supplemental Bill of Discovery ; but the Cases he cites do not warrant what he says ; nor is it in the remembrance of any Practitioner that such a Bill was filed. If the Answer to the Original Bill was insufficient, they ought to have amended their Bill, or excepted to the Answer within proper time ; but having omitted to except, they cannot now file a Supplemental Bill to remedy that omission. They say in the Supplemental Bill, that *since the filing of the Bill* they have been informed, &c. ; but they should have stated that, *since Issue joined* in the Cause, they were so informed, for a Supplemental Bill can only be filed as to matter occurring or discovered since Issue joined in the Cause.

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Mr. *Bell* and Mr. *Shadwell*, in Support of the Supplemental Bill :—

Can the Court say that the facts, respecting which a Discovery is sought by the Supplemental Bill of Discovery, are so clearly immaterial, that an Answer to them can be of no use, when all the question in this Cause is as to the adequacy of Price ? Inadequacy of Price is immaterial in many Cases ; but in Sales of *Reversions* it is important, for it has been decided in *Peacock v. Evans* (c), and *Gowland v. De Faria* (d), that those who deal with an expectant Heir relative to his Reversionary Interest, must show that a full and adequate Consideration was given. If it were evidence clearly immaterial, and which must of course be rejected as soon as tendered, then the objection of immateriality would apply. Surely,

(c) 16 Ves. 517.

d 17 Ves. 20.

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the correspondence between her and her Brother, as to the sale of the Estate, may be important Evidence. If it should show that she was bargaining with him for the utmost value of the Estate, and that the Parties then considered it as worth less than 23,000 *l.*, it would be important Evidence, proving what she then considered the value of the Estate.

The Court cannot on this Demurrer look at the Original Bill and Answer, but only to the Supplemental Bill. If the Bill had referred to the Original Bill and Answer, and had said, that by reference to them such and such facts "would more fully appear," then the Original Bill and Answer might be looked into; but this Bill has no such reference. Certainly, in *Milner v. Lord Harewood*, the Lord Chancellor did look into the Original Bill and Answer; but there the Supplemental Bill had these words, "as in and by the said Bill and Answer will more fully appear;" words, which are wanting in this Bill, and those words were relied upon by the Lord Chancellor.

There is no authority for saying, there cannot be a Supplemental Bill of Discovery, which this Bill is, though there is no modern instance in which it has been resorted to. Suppose an important Deed, decisive of the point in dispute, is, after the filing of the Bill, discovered to be in the possession of the Plaintiff, might not a Bill of Discovery be filed to obtain that Discovery? *Lord Redesdale* says (e), "If the Plaintiff thinks some discovery from the Defendant, which he has not obtained, is necessary to support his Case, he may file a *Supple-*

(e) Tr. Pl. 263, 3d edit.

mental Bill to obtain that discovery." He says, also (f), in express terms, " a Supplemental Bill may be filed to obtain a further Discovery from a Defendant," &c. Whenever a new fact occurs after the filing of the Bill, it must be the subject of a Supplemental Bill; for though you may amend a Bill before Issue is joined, the Amendments can only be as to facts which occurred before the filing of the Bill. The farthest in which the Rule has been carried, is in *Knight v. Matthews* (g), where the Defendant having, by his Answer, stated facts which occurred subsequent to the filing of the Bill, your Honor allowed the Plaintiff to amend his Bill, stating the facts more fully.

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The VICE-CHANCELLOR:—

What I principally relied on in that Case, was, that as the Amendments became part of the Original Bill which had been answered, the Defendant could not plead or demur to matter as to which he had answered.

Mr. Bell, and Mr. Shadwell:—

It is said that the fact enquired of must arise or be discovered after Issue joined, and that this Supplemental Bill of Discovery ought so to have stated it; but *Milner v. Lord Harewood*, is an authority to the contrary; for Lord Eldon says (h), " Where, either conversation or admission of the Defendant becomes material after Answer or Replication, or, as in this Case, after examination of Witnesses in the Original Cause, or if a new fact happens after Publication, which is material to have before the Court in Evidence, when the Original Cause is heard, it is much better that the examination of Witnesses, if required, should be obtained upon a special

(f) Tr. Pl. p. 48, 9, 3d edit.
 (g) Ante, vol. 1, 566.
 (h) 17 Ves. p. 148.

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application for the opportunity of examining, and that the depositions may be read at the hearing; or if Discovery is required, that the Party should file a Bill for that purpose merely, and if Relief is required, that the Answer comprehending the Discovery should be read at the hearing of the Original Cause." Here the fact lies only in the knowledge of the Defendant, and therefore a Bill of Discovery was proper, and the Bill being called a Supplemental Bill is not material if the fact be, as it is, that it is a mere Bill of Discovery. On the Answer being put in to the Bill, the Defendant was entitled to her Costs. It is not necessary that a Supplemental Bill should state that the facts enquired of, arose or were discovered before Issue joined, though till Issue joined the Bill may be amended; but such Bill only states, that the fact arose or was discovered after the filing of the Bill. If a fact exists before the Bill is filed, but is not discovered until after Issue is joined, the Supplemental Bill must so state it; but if the fact happened after the filing of the Bill, it is sufficient to state that the fact so happened, and such is the constant form of these Bills. It is true that the Original Bill states, generally, a Contract entered into with *Baker*, and there are Interrogatories as to that fact; but this Bill states a Contract entered into subsequent to the filing of the Original Bill; and this Bill also states, that since the filing of the Original Bill, the Defendant has got into her possession the correspondence of the Defendant with *Worthington* and *Silverlock*, respecting the proposed Purchase by *Baker* in 1813, and that the Defendant *now* has the proposal for the Purchase and the Letters, five in number, in her possession. If the Defendant objected to answer matter which she had already answered, she should have demurred to so much of the Bill.

The *Solicitor General*, in Reply :—

This is a new Case. Nothing conclusive has been said to shew the materiality of what is sought to be discovered. Suppose the fact to be true, she offered to sell this Estate to *Baker* her Brother, for less than 23,000 *l.* it is immaterial. If she thought she was selling the Estate for its full value, she was mistaken; she recovers from her mistake, and now finding the Estate to be worth 60,000 *l.* she is at liberty to resist a Bill for a specific performance of a purchase for nearly one-third only of the real value of the Estate. The treaty for the purchase by her Brother, is stated in the Original Bill, and an Answer given, and by proper Interrogatories they might have obtained all the information they now seek. It is said that we might have answered such parts of this Bill as stated new matter or matters discovered since the filing of the Bill, and objected to answer to such facts as were answered before; but it is a rule, that if a Defendant answers at all, he must answer fully, so that that objection could not have been taken by answer. It is admitted that no Instance can be adduced of a Supplemental Bill of Discovery.

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The VICE-CHANCELLOR—[after stating the facts of the Case]:—

23d Nov.

It is objected, that a Supplemental Bill of Discovery is unprecedented; but if that be so, the most distinguished Pleader of modern times (Lord *Redesdale*) has fallen into a considerable error; for he states in two passages of his Book on Pleading, in page 59, and more distinctly in p. 263, that such a Bill may be filed. I take it to be clear, that a Supplemental Bill of Discovery may be filed wherever a Discovery is necessary and it cannot be obtained by an Amendment of the Original Bill.

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Some doubt has been expressed whether this is a Supplemental Bill only, or a Supplemental Bill for Discovery; and whether, on determining this Demurrer, the Court can look into the Original Bill and Answer. The Bill prays no relief; it is merely for a Discovery. In *Milner v. Lord Harewood*, the *Lord Chancellor* looked into the Original Bill and Answer, and I think I am warranted in doing so in the present Case. It is admitted, that if the Discovery sought is material to the decision of the Cause, that the Demurrer cannot be sustained; but how can I judge of the materiality of the Discovery, unless I look into the Original Bill and Answer? I think, considering the matters put in Issue by the Original Bill and Answer, the Discovery sought, may be material, and that the objection of immateriality cannot be sustained.

My principal difficulty during the Argument, was, whether the form of the Bill was exactly proper, inasmuch as the Bill only states, that since the filing of the Bill, not since Issue joined, the Supplemental matter has arisen or been discovered; which renders it uncertain whether the facts enquired of, have not been already answered.

The Original Bill only states, generally, a Contract with *Baker*; but the Supplemental Bill states a Contract made since the filing of the Bill, and that since the filing of the Bill, the Defendant has obtained possession of the Letters, and I think that is sufficient, for on looking into the Precedents, I cannot find one different in form from this. It is the uniform course to state in a Supplemental Bill, that the Supplemental matter has occurred since the filing of the Original Bill. You

cannot introduce, by way of Amendment of a Bill, any fact arising subsequently to the filing of the Original Bill; such fact can only be made use of by means of a Supplemental Bill. In this Case, the period for amending the Bill was elapsed, Witnesses have been examined, and the Plaintiff had no means of interrogating as to the facts, a discovery of which are sought by this Bill. Some Answer may have been given by the Answer to the Original Bill to some of the facts enquired of in this Bill; but it does not follow that they have been sufficiently answered, and the Bill states that a Contract was made, and that the Letters, &c. came into her possession after the filing of the Bill. This Demurrer must be over-ruled.

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Demurrer over-ruled.

AGAR v. GURNEY and others.

THREE Exceptions were taken to the Answer in this Cause, and a further Answer was put in, which was referred for insufficiency on the former Exceptions. One exception was allowed. The *Master* prepared the Draft of his Report in the following form:—"In pursuance of an Order bearing date the 18th day of November 1817, made in this Cause on the application of the Plaintiff, I have in the presence of the Solicitor for the Plaintiff, and of the Counsel and Solicitor for the Defendants *Samuel Guerney, Kirk Root, James Agar and John Bentley*, looked into the Plaintiff's amended Bill filed in this Cause, the Plaintiff's Exceptions taken to the sufficiency of the Answer of the Defendants, and into the first and further Answer of the said Defendants, and do conceive the said

19th Dec.

A Motion cannot be made for the opinion of the Court, to obviate difficulties of the Master, as to the form of his Report.

When some Exceptions to an Answer are over-ruled, and others allowed, the Master should report as to which Exceptions are allowed, and which disallowed.

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GURNEY.

Defendants further Answer to be sufficient in the first and second Exceptions, but insufficient in the third and last Exception. All which, &c." The *Master*, however, had some doubt whether his Report should be in this form, or whether he should certify, *generally*, "that the Answer was insufficient." In consequence of this doubt, Mr. *Pepys* by Motion, asked for the Opinion of the Court, in which form the Report ought to be, in order that the *Master* might act upon it.

In support of the Motion, it was observed, that in *Rowe v. Gudgeon (a)*, the *Lord Chancellor* admitted that the Practice was to report generally that the Answer was insufficient, though he thought it an inconvenient Practice. No general order was made, in consequence of that Case, to vary the old Practice, and therefore it stands as it was. The *Masters* differ in their Practice, some adhering to the old Practice, others following the new Practice supposed to be established by *Rowe v. Gudgeon*. This application is made to save expense and delay.

Mr. *Lovat*, *contra*, was stopped by—

The *Vice-Chancellor* observing, that a Motion of this kind to obtain the opinion of the Court as a guide to the *Master*, was very unusual; the proper course being, that he should act according to his own judgment, and if his Report is considered as objectionable, to except to it. To permit such an application as this would lead to great inconvenience.

If it were necessary to give an opinion on the subject, I should certainly be governed by what the *Lord*

(a) 1 Ves. and Bea. 331.

Chancellor says in *Rowe v. Gudgeon*; "My Opinion is, that the Suitor has a right to the *Master's* Judgment upon each of the Exceptions (b)." This course, whatever may have been the ancient Practice, appears to Me the most convenient.

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v.
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HAWKER and another, v. BUNCOMBE and another.

IN the drawing up of the Decree in this Cause, a mistake was made in the names of the Defendants; and in consequence, the *Accountant-General* had entered an Account in the Cause, in wrong names.

26th Nov.

A Mistake being made in a Decree, by misnaming the Defendants, and the Accountant General having, in consequence, entered an Account in wrong Names, an Order was made, that the Register should alter the Decree, and that the Accountant General should also alter the Account in his Books.

Mr. *Pepys* now moved, that one of the Registers or Deputy Registers might be directed to alter the Decree, by properly naming the Defendants, and that the *Accountant-General* might be directed to alter the Title of the Account in his books, accordingly.

The Motion was supported by an Affidavit, as to the Mistake.

The *Vice-Chancellor* said, he saw no objection to the Motion.

Motion granted.

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NOEL v. KING.

27th Nov.
*The Plaintiff in
 an Original Bill,
 by amending the
 same, after a
 Cross Bill filed,
 loses his right to
 an Answer before
 he answers the
 Cross Bill; but in
 order to stay pro-
 ceedings on the
 Original Bill,
 until an Answer
 is put in to the
 Cross Bill, an
 Order must be
 obtained to stay
 such proceedings.*

ON the 23d April 1817, the Plaintiff filed his Bill against *King* and five other persons, for Relief, and an Injunction: which Bill was amended by Order, 26th April 1817.

On the 6th of June 1817, the Defendant *King* filed a Cross Bill against the Plaintiff and his Wife.

On the 10th of October 1817, the Plaintiff dismissed his Bill against four of the Defendants (not including *King*), with Costs.

On the 1st November 1817, the Plaintiff obtained another Order to amend his Bill against *King*, which was served on the 4th, and on that day the amended Bill was filed.

On the 8th November 1817, *King* appeared to the amended Bill.

On the same day the Plaintiff obtained six Weeks time to answer the Cross Bill, and a Commission to take his Answer.

On the 18th November 1817, an Attachment was issued against *King* for want of an Answer; and on the same day the common Injunction to stay execution was moved for and ordered, and issued on the 22d November.

On the 24th November 1817, *King* gave Notice of a

Motion to stay Proceedings till the Plaintiff and his Wife should answer the Defendant's Cross Bill.

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On the same day *King* also gave another Notice of Motion that the Injunction issued might be set aside for irregularity.

This last Motion came on now to be argued.

Mr. *Solicitor-General*, and Mr. *Wakefield*, for the Motion :—

The Plaintiff, before he amended his Bill, had a right to have an Answer to it, before the Defendant could call upon the Plaintiff to answer his Cross Bill; but by amending his Bill, the Plaintiff lost his priority, and the Defendant was entitled to have his Cross Bill answered before the Plaintiff could insist on the Defendant's answering the Original Bill. *Stewart v. Roe (a)*, *Long v. Birton (b)*, *Johnson v. Freer (c)*, *Harrison's Chancery Pract. (d)*. As, therefore, the Plaintiff had no right to call for an answer to his Bill, until he had answered the Defendant's Cross Bill, the Attachment for want of an Answer, and the Injunction founded upon it, were improperly issued, and ought to be set aside.

Sir *S. Romilly*, Mr. *Bell*, and Mr. *Heald*, *contra* :—

It is true that a Plaintiff, by amending his Bill after a Cross Bill filed, entitles the Plaintiff in the Cross Bill to have an Answer to that Bill before he is bound to answer the Original Bill. The Cases cited only prove that. But the Amendment must be material; which these Amendments are not: and where there is a mate-

(a) 2 P. Wms. 435.

(c) 2 Cox, 371.

(b) 2 Atk. 218.

(d) P. 82.

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rial Amendment, the Defendant in the Original Bill must move that all Proceedings on the Original Bill should be stayed until the Plaintiff has answered the Defendant's Cross Bill; for, until such an Order is obtained, the Plaintiff has a right to proceed on his Original Bill. Merely amending his Bill does not operate as a stay of further Proceedings by the Plaintiff on such Bill, till he has answered the Defendant's Cross Bill. Here no such Order was obtained; we were therefore entitled to the Attachment, and, as a consequence, to the Injunction.

The *Solicitor General*, in Reply:—

Some of these Amendments are material; but it is not necessary, according to *Johnson v. Freer*, that the Amendments should be material. If the Plaintiff in any way amends his Bill, he loses his right to call for an Answer to his Bill before he answers the Defendant's Cross Bill (e).

The VICE-CHANCELLOR:—

It is certainly true that the Plaintiff in the Original Bill, by amending it after the filing of the Cross Bill, lost his priority—his right to an Answer to his Bill before he answered the Cross Bill: this, the Cases cited fully prove; and, according to *Johnson v. Freer*, it is not necessary the Amendment should be material, to have this effect. But the Proceedings on the Original Bill are not stayed merely by the Amendment; but upon such Amendment it is necessary the Plaintiff in the Cross Bill should move for an Order that the Proceedings in the Original Bill should be stayed, until the Plaintiff shall have fully answered the Cross Bill. Such

(e) Harrison, Newl. ed. p. 82.

Motions are frequent. No such Order having been obtained in this Case, the Plaintiff was warranted in issuing an Attachment for want of an Answer, and in afterwards moving for an Injunction, founded on the Attachment.

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Motion refused.

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AN Order had been obtained that the Plaintiff should elect whether he would proceed at Law or in Equity.

Afterwards a Motion was made by Mr. *Heald*, that the Order to elect might be discharged; stating, that upon such a Motion, it was always usual to refer it to the *Master*, to see if the Action and Suit were for one and the same Cause, without stating any reasons to the Court to induce it to make such reference. A reference was accordingly directed.

Sir *S. Romilly* now moved to set aside the Order of Reference; observing, that the Court would not direct a reference upon such a Motion, if facts appeared before the Court, sufficient to convince it that the Action and Suit were not for one and the same thing; and that facts appeared in this Case sufficient to convince the Court that the Plaintiff ought not to be put to an election. He cited *Milles v. Fry (a)*.

27th Nov.
Upon an Order being made on the Plaintiff to elect whether he will proceed at Law or in Equity, and a Motion afterwards to discharge that Order, the Court will, if there are sufficient Facts before it, decide whether the Party ought to be put to an Election, without a reference to the Master.

(a) 3 Ves. and Bea. 9.

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Mr. *Heald* reiterated his former observations, and cited *Boyd v. Heinzelman* (b).

The VICE-CHANCELLOR :—

Independently of authority, it seems very reasonable that the Court should itself, if there are sufficient facts before it, form an opinion whether the Plaintiff ought to be put to an election. The two Cases cited, are, as reported, contradictory. In *Boyd v. Heinzelman*, Lord *Eldon* is reported to say, that the Court does not in these Cases decide, but always refers it to the *Master*. In the last Case, however, *Mills v. Fry*, Lord *Eldon* says, “ If upon that application [to discharge the Order to elect,] it appears that they [the Suits] are not for the same matter, the Court does not refer it to the *Master*.”

As the two Cases are irreconcilable, I communicated with the *Lord Chancellor* on the subject, and I am warranted in saying, that what is promulgated in *Mills v. Fry* is the true Rule ; and that upon such a Motion as this, the Court will itself, if there is fact enough before it, decide whether it be a Case of election or not, without sending it to the *Master*.

(b) 1 Ves. and Bea. 381.

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Between JOHN CROW and SARAH his Wife,
 (formerly SARAH MYHILL,) JONATHAN
 TOWNSEND and MARY his Wife, (formerly
 MARY MYHILL) and JOHN SURRIDGE,
 Plaintiffs;

and

Sir JOHN TYRELL, Bart. - - Defendant. 12th and 21st
 December.

THE *Bill* filed 26 November 1816, stated, That *Edward Sulyard* deceased, being in his life-time and at the time of his decease, seised in Fee Simple, or otherwise well entitled to certain Hereditaments and Premises, by his Will of 21st of February 1690, (amongst other things) gave, devised and bequeathed unto *Dorothy Sulyard*, Daughter of his Brother *Augustine Sulyard*, all those his three Messuages or Tenements, and Farms, &c. situate in the Parishes of *Runwell* and *Downham*, in *Essex*, or elsewhere in the said County; and which said Premises were therein more particularly described, to hold to *Dorothy Sulyard* and her Heirs for ever, to her and their own use and uses for ever:—That the Testator died in 1692, without altering or revoking such Will, and upon or soon after his decease, the said *Dorothy Sulyard*, then *Dorothy Parker*, (she having previously intermarried with *Charles Parker*) late of *Runwell*, in the County aforesaid, deceased, together with her said Husband, entered into possession of the said real Estates so devised to her as aforesaid:—That the said *Dorothy Parker* died in 1711 or 12, intestate, leaving a Son, *Charles Parker*, her only Child, her surviving, in whom the said Real Estates were, upon

Plea founded on the Stat. 32 H.8. c. 2, to a Bill of Discovery overruled, though good in substance, because no specific Answer given by it to certain statements in the Bill.

Afterwards, on crossMotions, the Plaintiff was allowed to amend his Bill on terms, and the Defendant to make a new Defence.

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her decease, vested ; and took possession thereof as her Heir at Law :—That the said last-mentioned *Charles Parker* died in 1753 intestate and without Issue, and without having in his life-time disposed of the said Real Estates so devised as aforesaid ; whereupon the same descended to and became vested in *Frances Marler* and *Maria Valentine Marler*, since deceased, as Sisters and Co-heirs at Law of the said *Dorothy Parker*, and the said last-mentioned *Charles Parker*, *ex parte Materna*, the said *Frances Marler* and *Maria Valentine Marler* being the Daughters and only Children of *John Marler*, late of *Downham* aforesaid, Esquire, deceased, who was eldest Son and Heir at Law of *John Marler*, late of *Downham*, Esquire, deceased ; and which said last-mentioned *John Marler* was the eldest Son and Heir at Law of *John Marler*, Esquire, deceased, and *Anne* his Wife ; which said *Anne Marler* was formerly *Anne Sulyard*, Sister of the said Testator *Edward Sulyard*, and Aunt of said *Dorothy Parker*, and whose descendants were the only persons who partook of the blood of the said Testator *Edward Sulyard* and said *Dorothy Parker*, when the said last-named *Charles Parker* died :—That upon or soon after the decease of the said last-named *Charles Parker*, *John Tyrell*, late of *Hatfield Peverell*, in the County aforesaid, deceased, entered into the possession of the Real Estates of which the said last-named *Charles Parker* died seised, and which descended to him from his said Mother *Dorothy Parker*, as aforesaid, and continued to hold the same by the permission of and as Tenant to the said *Frances Marler* and the said *Maria Valentine Marler*, until the decease of the said *Maria Valentine Marler* ; but upon or soon after her decease assumed and took upon him the absolute Ownership of the said Real Estates, which so descended and

were vested in the said *Frances Marler* and the said *Maria Valentine Marler*, in her life-time, as her Co-heir as aforesaid:—That the said *Frances Marler*, in her life-time, intermarried with *Thomas Myhill*, of *Finchingfield*, in the County aforesaid, Esquire, deceased, and that she departed this life in or about the year —, leaving *Marler Myhill*, late of *Finchingfield* aforesaid, deceased, the late Father of Plaintiffs *Sarah Crow* and *Mary Townsend*, her eldest Son and Heir at Law her surviving, in whom one undivided Moiety of the said Real Estates which descended to said *Frances Myhill*, as such Co-heir as aforesaid, became vested:—That the said *Marler Myhill*, the late Father of said last-named Plaintiffs *Sarah Crow* and *Mary Townsend* died, the year 17— intestate, and without having disposed of his Interest of the said undivided Moiety of the said Real Estates which so descended to him as aforesaid, leaving said last-named Plaintiffs his only Children and Co-heirs at Law him surviving, and as such entitled to the said undivided Moiety of the said Real Estates, which descended to and was so vested in the said *Marler Myhill* as aforesaid:—That Plaintiff *Sarah Crow*, formerly *Sarah Myhill*, some time since intermarried with Plaintiff *John Crow*, and Plaintiff *Mary Townsend* has also intermarried with *Jonathan Townsend*; and said Plaintiffs *John Crow* and *Jonathan Townsend* are respectively now entitled, in right of their said Wives respectively, to such Right and Interest as is claimed by them in said Real Estates:—That the said *Maria Valentine Marler* in her life-time duly intermarried with *John Surridge*, of *Runwell*, in the County of *Essex*, Farmer, deceased, and that the said *Maria Valentine Surridge* departed this life in or about the year 1786, intestate, leaving *John Surridge*,

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late of *Runwell* aforesaid, Farmer, deceased, the Plaintiff deceased, *John Surridge's* late Father her only Son and Heir at Law her surviving, and in whom one undivided Moiety of the said real Estates, which descended to the said *Maria Valentine Surridge* as such Co-heir as aforesaid, became vested:—That the said *John Surridge*, said Plaintiff's late Father, departed this life in or about the year 1787, intestate, and without having done any Act to dispose of his Interest in the said undivided Moiety of the said Real Estates which descended to him as aforesaid, leaving said Plaintiff *John Surridge* his only Son and Heir at Law him surviving, in whom the said undivided Moiety of the said Real Estates is now vested; and said Plaintiffs *John Surridge*, and *Sarah Crow* and *Mary Townsend*, or Plaintiffs *John Crow* and *Jonathan Townsend* their said Husbands, in their right, are now the only persons entitled to the said Real Estates:—That the said *John Tyrell*, when he so entered into possession of the said Real Estates as aforesaid, possessed himself of all the Title Deeds and Writings relative thereto; and after the decease of the said *Maria Valentine Surridge*, formerly *Maria Valentine Marler*, refused to give up possession thereof, or of the said Estates, or to acknowledge the right or title of any other person or persons thereto, pretending that he was absolutely entitled to the said Real Estates, by reason of some Gift or Devise to him thereof made by the said last-named *Charles Parker*, deceased, or some other person or persons absolutely entitled to the said Real Estates, although he refused to discover the same: And the said *John Tyrell*, in order to establish his pretended right to the said Real Estates, imposed upon the persons entitled thereto, by giving out and pretending that

William Marler, the Brother of the said *John Marler*, the Father of the said *Frances Marler* and *Maria Valentine Marler*, married the said *Dorothy Parker*, formerly *Dorothy Sulyard*, and that she never married or had issue by the said *Charles Parker*, but that she had issue an only Daughter, *Mary Marler*, by her alleged Husband, the said *William Marler*; which said *Mary Marler* intermarried with him the said *John Tyrell*, and that the said Real Estates vested in him in right of his said Wife; which pretences the said *John Tyrell* knew at the time were, as the fact is, altogether false and unfounded; but the said *John Tyrell* and his Descendants, persisting therein, have retained possession of the said Real Estates; and the Defendant Sir *John Tyrell*, Bart. now holds and enjoys the same in exclusion of the Plaintiffs, who are justly entitled thereto as aforesaid; and in order to give colour to such pretences, and such alleged Title to the said Real Estates, a Tomb or Gravestone has been put down over the remains of the said first-named *Charles Parker*, by the order or direction of the said first-mentioned *John Tyrell*, or by some or one of them claiming under him, stating the name of the Wife of the said *Charles Parker* to have been *Ann* instead of *Dorothy*, which was her real name; and a Tablet or Monument has also, by the order and direction of the said first-mentioned *John Tyrell*, or by some or one of them claiming under him, also been placed near the body of the said *Edward Sulyard*, stating the said *Edward Sulyard* to have been the last of his house and family; whereas the family of the said Testator *Edward Sulyard*, are now extant in the persons of Plaintiffs *Sarah Crow* and *Mary Townsend* and *John Surridge*, who are his right Heirs at Law, and as such entitled to the said Real Estates; and

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the said *John Tyrell*, or some of his descendants, have also caused or procured the Registers of the said Parishes of *Runwell* and *Downham* aforesaid, which contained an account of the family and descent of said last-named Plaintiffs, to be taken away and concealed, or otherwise disposed of, in order so as to prevent Plaintiffs from establishing their right to the said Real Estates :—That the said *John Tyrell* died in 1786, leaving *John Tyrell* his only Son and Heir at Law him surviving, who as such Heir at Law, and under colour of such pretences as aforesaid, entered into and possessed himself of all the said Real Estates to which Plaintiffs are so entitled as aforesaid; and he the said last-mentioned *John Tyrell* in his life-time, as it is alleged, made his Will, and thereby gave all the Real Estates to which Plaintiffs are so entitled as aforesaid, unto his two Sons *Charles Tyrell* and *John Tyrell*, now Sir *John Tyrell*, Bart. and their Heirs for ever :—That the said *Charles Tyrell* died, as it is alleged, in the life-time of the said Sir *John Tyrell*, a Batchelor, and intestate; and the intirety of the said Real Estates to which Plaintiffs are so entitled as aforesaid, was there-upon and now are possessed by the said Sir *John Tyrell*, and enjoyed by him in exclusion of Plaintiffs; and he claims the same under colour of such pretences as aforesaid, either as Heir at Law of his late Father and Brother respectively, or as such Devisee thereof as aforesaid, as Heir at Law thereof of his said late Brother :—That Plaintiffs lately, and within six years last past, discovered that such Frauds as aforesaid respecting the Title to the said Real Estates, and the possession thereof, have been practised to defeat the rightful claim of Plaintiffs, and the several persons respectively, who were previously entitled thereto;

and that although ever since the death of the said *Charles Parker*, and the decease of the said *Maria Valentine Surridge*, formerly *Maria Valentine Marler*, who the said first-mentioned *John Tyrell* repeatedly acknowledged and treated as the Owner of the said Real Estates, or as entitled thereto as one of such Co-heirs as aforesaid, the said Real Estates were constantly claimed by Plaintiffs *Sarah Crow* and *Mary Townsend*, and since their Marriage, by their Husbands in their respective Rights, and by Plaintiff *John Surridge* and their Ancestors, and a discovery of the Title of the said first-mentioned *John Tyrell* and his descendants sought by them; yet since such discovery as hereinbefore mentioned has been made, Plaintiffs have frequently of late, by themselves and otherwise, applied, &c. The Bill then charged, that the last-mentioned *John Tyrell* frequently recognized and acknowledged the Right and Title of the said *Frances Myhill*, formerly *Frances Marler*, and the said *Maria Valentine Surridge*, formerly *Maria Valentine Marler*, to the said Real Estates as such Co-heirs as aforesaid, and that he had no right to occupy, possess, or enjoy the same, except by permission of them or one of them, who he confessed were or was the person or persons lawfully entitled thereto. The *Prayer* of the Bill was, that the said *Sir John Tyrell* might leave such of the said Title Deeds, Evidences and Writings belonging or in any way relating to the said Real Estates as are now in his custody, possession or power, in the hands of his Clerk in Court, for the inspection of Plaintiffs, their Solicitors and Agents, with liberty for them to take Copies thereof, or extracts: and that the said *Sir John Tyrell* might also set forth an account of all the said Real Estates to which Plaintiffs are so

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entitled as aforesaid, and which were and are now so fraudulently retained by the said last-mentioned *John Tyrell*, and the said Sir *John Tyrell*, the present possessor thereof, together with the names of the Places and Parishes in which the same are respectively situate, and the yearly Rents at which the same are let, and the particular quantities and numbers of Acres of Land of which the said Real Estates consist, and the particular kinds and species of such Land, and the quantities of each kind: and that the said Sir *John Tyrell* might make a full and true Disclosure and Discovery of and concerning the several matters aforesaid, so as to enable Plaintiffs to take such proceedings as they may be advised are necessary for recovering possession of the said Real Estates.

To this Bill, the Defendant put in the following Plea.

This Defendant by Protestation, &c. doth plead to the said Bill, and for Plea saith, that to the best of his this Defendant's knowledge, information and belief, *Charles Parker*, secondly in the said Bill named, was not, nor were nor was *Frances Marler* and *Maria Valentine Marler* in the said Bill named, or either of them, nor were, nor was any others or other of the Ancestors of the said Complainants, *Sarah Crow*, *Mary Townsend*, and *John Surridge*, by, from, through or under whom the said Complainants, in right of the said Complainants *Sarah Crow*, *Mary Townsend*, and *John Surridge*, by their said Bill, claim or make title to the Hereditaments and Premises therein mentioned, seised of such Hereditaments and Premises or any part or parts thereof, within threescore years next before the filing of the said Bill of Complaint; nor had they, or any or

either of them, within that period, possession of the said Hereditaments and Premises, or any part or parts thereof, either by themselves, himself, or herself, or by *John Tyrell*, first in the said Bill named, or by any other Person or Persons as their, his, or her Tenant or Tenants, or otherwise howsoever; wherefore, &c.

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Mr. *Garratt*, in support of the Plea:—

This Plea is founded on the 32 *Henry VIII.* c. 2. (a). It follows the words of that Statute. The Act extends to proceedings at Law, and in Equity. The filing a Bill is the making of a claim. The proper mode of defence was by Plea. Lord *Redesdale* says (b), “If the Plaintiff’s Case is not such as entitles a Court of Equity to assume a Jurisdiction to compel a Discovery in his favour, though he falsely states a different Case by his Bill, so that it is not liable to a Demurrer, the Defendant may by Plea state the matter necessary to show the truth to the Court.” Such is the present Case; the Plaintiff has shown a *prima facie* right to relief; this Plea, therefore, is proper.

(a) By this Act it is provided, that “No person shall sue, have or maintain any Writ of Right, or make any Prescription, Title or Claim, to or for any Manors, Lands, Tenements, Rents, Annuities, Commons, Pensions, Portions, Corodies or other Hereditaments, of the possession of his or their ancestors or predecessors; and declare and allege any further seisin or possession of his or their ancestor or

predecessor, but only of the seisin or possession of his ancestor or predecessor which hath been, or now is, or shall be seised of the said Manors, Lands, &c. or other Hereditaments, within sixty years next before the *teste* of the same Writ, or next before the said prescription, title, or claim so sued, commenced, brought, made or had.”

(b) Tr. Pl. p. 228, 3 edit.

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A Plea to a Bill of Discovery showing the legal Title is not in the Plaintiffs, was held to be good in *Cholmondeley v. Clinton* (c).

Mr. *Hart*, and Mr. *Willis*, in support of the Bill:—

The Plea is bad in form and in substance. There is no mode of obtaining a discovery and production of the Deeds, unless by Bill. The Bill must be considered as a Bill for relief. The prayer is, "That the Defendant may answer all and singular the Premises, and further to stand by and abide such Order and Decree, &c." The Plea is not *ad idem*; it does not answer the specific facts stated in the Bill. Lord *Redesdale* says (d), "In pleading there must in general be the same strictness in Equity as at Law, at least in matter of substance. A Plea in bar must follow the Bill, and not evade it, or mistake the subject of it." This Plea affects to meet the Bill; but it does not. The Bill states the death of *Charles Parker* in 1753, and the entry of *Tyrell* soon after *Charles Parker's* death, as Tenant to *Frances Marler* and *Maria Valentine Marler*, the Ancestors of the present claimants, and that he continued as such Tenant until the death of *Maria Valentine Marler*. We have, therefore, a right to a specific Answer as to this fact, for if it be true that he did enter on the Estate at that time as Tenant, and so continued until the death of *Maria Valentine Marler*, his possession was the possession of his Landlords, and the sixty years adverse possession has not elapsed. In the case of long building Leases, a trifling Rent is frequently reserved, and the Lessor may not receive it for a long period of time, but if the Lessee claims the Estate, he is entitled to

(c) 2 Merriv. 71.

(d) Tr. Pl. p. 237, edit. 3.

a Discovery. But the Plaintiffs have in this Case stated acts of Fraud, taking down a Tombstone and putting up another, and taking possession of the Deeds, which, if true, would entitle them to relief, though Centuries had since elapsed; and as these Acts are not denied by the Plea, they must be considered as admitted. In *Bond v. Hopkins* (e), Lord *Redesdale* says, this Statute is not operative in cases of Fraud. If the Bill is to be considered as for Discovery only, they cannot resist that Discovery by pleading the Statute. *Dean and Chapter of Westminster v. Cross* (f), *Baillie v. Sibbald* (g).

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Mr. *Garratt*, in Reply :—

This is a mere Bill of Discovery. The words quoted from the Prayer are mere words of course, and always used in Bills of Discovery. If *Tyrell* held the Estate as Tenant within sixty years, the Defendant must be perjured, as the Plea positively states that neither *Charles Parker* or *Frances Marler*, and *Maria Valentine Marler*, or any of the Ancestors of the Plaintiff, were seised of the Estate within sixty years; which was not true, if *Tyrell* was Tenant to the Ancestors of the Plaintiffs within that period. If *Tyrell* was so in possession as Tenant, the Plea might have been replied to. The fact is, that *Tyrell* died before *Frances Marler* and *Maria Valentine Marler*, so that if the Plea be defective, the Court will allow us to amend it. With respect to the Fraud relied upon, as this is not a Bill for Relief, but for Discovery only, the Defendant was not bound to answer as to the imputed Fraud. The Statute is general, and does not except cases of Fraud. It has been argued the Statute cannot be pleaded to a Bill of

(e) 1 Sch. and Lefr. p. 430.

(g) 15 Ves. 185.

(f) Bunb. 60.

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Discovery. There is a Case in *Bunbury* to that effect, but I searched for the Plea, and could not find it. Nothing on that subject was determined in *Baillie v. Sibbald*. In that Case, as there was an acknowledgment of the Debt stated in the Bill, it was held, a Plea of the Statute of Limitations was not sufficient, but that the stated acknowledgment must be answered.

The VICE-CHANCELLOR :—

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This must be considered as a mere Bill of Discovery, no relief being prayed. The Prayer that the Defendant may set forth a List of Title Deeds, &c. and that they may be placed in the hands of the Clerk in Court for Inspection, is incidental to the discovery, and does not make it a Bill for Relief.

The Court never gives a Discovery unless the Plaintiff shows himself entitled to it, and that he will be benefited by it.

The Plea states that certain persons named in the Bill, nor their ancestors have had seisin or possession of the Premises within sixty years before the filing of the Bill; but it does not state that the Plaintiffs have not had seisin or possession within sixty years; that omission, however, is not fatal to the Plea, as the Plaintiffs by their Bill admit they have not had seisin or possession within sixty years.

If a Person enters as Tenant by permission of the rightful Owner, and continues so for a great length of time, though without paying Rent, the Owner would still be considered as in possession by means of his Tenant. The Bill states that *Tyrell* entered as Tenant

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to *Frances* and *Maria Valentine Marler*, and so continued as Tenant till 1786, when *Maria Valentine Marler*, then *Maria Valentine Surridge*, died, which constitutes a seisin and possession within thirty years, and that *Tyrell* recognized the *Marlers* to be Co-heirs. If that be so, and the Pedigree stated in the Bill be correct, the Plaintiffs show a Title to Relief. The Plea does not state a seisin and possession for sixty years in the Defendant, but only negatives the seisin and possession of those through whom the Plaintiff claims, and negatives generally the fact stated in the Bill, that *Tyrell* entered as Tenant, and kept possession as such, till the death of *Maria Valentine Marler*; but that is not the mode in which the facts stated in the Bill ought to be met. It is not sufficient generally to deny the inference drawn from facts. The Bill says, *Tyrell* entered as Tenant to *Frances Marler* and *Maria Valentine Marler*: the Plea says nothing as to that. The Bill states, *Tyrell* acknowledged the Tenancy; but as to that, the Plea is silent. The Plea is good in substance, but not in form, as it avoids answering, otherwise than generally, the specific facts I have mentioned, which are stated in the Bill.

Plea overruled.

Mr. *Garratt* then applied for leave to amend the Plea, and Mr. *Wills* applied for leave to amend the Bill, by making it a Bill for Relief; but the *Vice-Chancellor* said these applications required consideration, and that the matter ought to be the subject of a distinct application.

On this day, Mr. *Hart*, and Mr. *Willis*, moved that 15th December. the Plaintiffs might be at liberty to amend the Bill, by

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making it a Bill for Relief, or otherwise as they should be advised; and Sir *Samuel Romilly*, and Mr. *Garrat*, moved that the Defendant might be at liberty to withdraw his Plea, and plead *de novo* to the whole of the Bill, or to such part as he should be advised. Some discussion took place, and in the result, *His Honor* directed that the Plea should be overruled without Costs, and the Plaintiffs should be at liberty to amend their Bill as they should be advised, without Costs, if the Amendments did not require a new Engrossment, they amending the Defendant's Copy of the Bill; but in case such Amendments should make a new Engrossment necessary, then the Plaintiffs to pay the Costs of such Amendments, to be taxed by the *Master*, and the Defendant to be at liberty to make a new Defence.

23 Dec. 1817.
 3d Jan. 1818.

COPIS and others v. MIDDLETON and others.

A Purchase for a valuable consideration (the adequacy of which was disputed) by a Nephew, from his Uncle, who (unknown to the Nephew) was insolvent, and died soon after the purchase; held not to be impeachable by Creditors of the Uncle, and that a Mortgagee of the Purchaser ought to have been a Party to the Suit.

THIS was a Creditor's Bill, and, in substance, stated, that *John Knott* and *William Knott* were indebted, by specialty and simple contract, to the Plaintiffs:—That *Wm. Knott* died 22d July 1786, seised of various Freehold and Copyhold Estates, and by Will devised some of them to his Son *John Knott*, chargeable with the payment of his debts; and other of his Real Estates he devised to his Son *Thomas Knott*, for life, with remainder to his Children; and after several Legacies gave the remainder of his Personal Estate to his Son *John Knott*, and appointed him his Executor:—That *John Knott* proved the Will and took possession of the Uncle, and that a Mortgagee of the Purchaser ought to have been a Party to the Suit.

Real Estates devised to him, and sold part of them, and also possessed the whole of the Testator's Personal Estates:—That he became insolvent, and previous to his death, “ he, in a clandestine manner, sold and conveyed to his Nephew, the Defendant *John Knott*, part of the devised Premises, called *Stoney Farm*, &c. for 2,000 *l.* which he applied to his own use, but that the premises were worth a great deal more money; and that said Sale was fraudulent as against the Creditors of *John Knott*, and ought to be set aside and made void:”—That *Thomas Knott* took possession of the Estates devised to him for life, with remainder to his Children, and is still in possession, and has three Children, three of the Defendants:—That *John Knott* died, and by his Will devised such of the Real Estates devised to him, as were unsold, and also other of his Real Estates:—That some of the Real Estates were devised to his Brother *Thomas Knott*, subject to the payment of his debts; and that he gave to him the residue of his Personal Estate, and appointed him Executor of his Will:—That *Thomas Knott* renounced the Executorship, and Letters of Administration, with the Will annexed, were taken out by *Middleton, Willer* and *Gruggin*, three other of the Defendants:—That *William Knott* entered into possession of the Estates devised to him:—That *Gruggin*, one of the Defendants, since the death of *John Knott*, administered to *Wm. Knott*. The Prayer of the Bill was, that the Wills of *William* and *John Knott* might be established, and for an Account by their Representatives; and that the Real Estates of the Testator's, charged with the payment of debts remaining unsold, might be decreed to be sold; and if that should not be sufficient, then that all, or a competent part of the Testator's other Estates, might be applied in satisfaction of the debts; and that the Conveyance made by the Testator *John Knott*, to his

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Nephew, the Defendant *John Knott*, of part of said devised Estate, might be set aside; and that there might be a re-sale of that Estate, and an Account of the Estates of *William Knott* sold by *John Knott*, &c.

John Knott, by his Answer, stated, "That Testator *John Knott* entered upon and took possession of all the Real Estates and Premises devised to him, and (*inter al.*) those devised to him, subject to payment of Testator's debts; and said *John Knott* continued in possession thereof till his death, and of the Rents and Profits of such as were not sold in his life-time; and believes, he publicly advertised *Great Broad Leaze* Estate; but 3,600*l.* only being bid for same, it was not then sold, but he afterwards sold same to *John Peachy, Esq.* a *bonâ fide* Purchaser, for 4,000 guineas; but how he applied the money Defendant does not know:—That said Testator *John Knott*, about a month before his death, sold and conveyed to Defendant *Stoney Farm* and the Messuage, Watermill, Windmill, Buildings, and Lands in Bill mentioned, for 2,000*l.*; except that said Testator, about six months before his death, gave Defendant a small slip of ground, containing fourteen rods or thereabouts, parcel of said last-mentioned Premises, of little or no value, for the purpose of Defendant's building a malt-house thereon, and on which he did build a malt-house, at the expense of between 400*l.* and 500*l.*, but denies such Sale was made in a clandestine manner, or with intent to defraud said Testator's Creditors; Defendant having been informed by a friend in the neighbourhood, who had land adjoining, and skilful in valuing lands, that 2,000*l.* was the full value thereof, and part thereof being subject to a perpetual Rent-charge of 30*l. per Annum*, payable out of same to Defendant *Newman Knott*:—That from what he had

heard since Testator *John Knott's* death, he believes, at time of said Sale, he was in insolvent circumstances; but Defendant, at time of said Sale, did not understand there was any demand outstanding against the Estate of Testator *William Knott*; on the contrary, Testator *John Knott* was considered by Defendant, and persons in general, to be a man of property, and worth much more than he owed; and so far from considering said Premises cheap, Defendant thought himself hardly treated by said *John Knott.*"

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Many Witnesses were examined on behalf of the Plaintiffs, as to the value of the Estate sold to the Defendant by his Uncle *John Knott*; one, valued the Estate, when sold, at 5,912 *l.*; another, at 4,272 *l.*; another at 4,032 *l.*; another, at 4,000 *l.*

Amongst other Witnesses produced on the part of the Defendant, *Hannah Knott*, by her Deposition, stated:—
 " She understood Defendant *John Knott* became Purchaser of *Stoney Farm* and said other Premises, shortly after Michaelmas preceding the death of Testator *John Knott*:—That said *John Knott*, in July next before such Purchase, gave up to Defendant a piece of Ground, part of said Premises, being Parcel of the Gateway there adjoining to the Road, for the purpose of erecting a Malt-house, but of what dimensions Deponent cannot set forth, but believes the same not to be more than half-a-quarter of an acre, and which was of little or no value:—That Defendant *John Knott* immediately afterwards erected a Malt-house and Wood-house there, at the expense of near or quite 500 *l.* as she has reason to believe, being, during the time of erecting these Buildings, on the spot, and seeing and hearing what was doing there by the workmen and those concerned:—That

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Paunett Knott, the Father of Defendant *John Knott*, was Deponent's Husband, and died about fourteen years ago; and said *Paunett Knott*, about sixteen years before his death, occupied, as Tenant to his Father *William Knott*, the said Mills and Buildings, and, during such occupation, laid out considerable sums of Money in repairs and improvements of said Mills and Buildings, particularly of the House, by taking down same and new building it, and new-tiling the Watermill, and adding a new pair of stones thereto, and thoroughly repairing the wheels thereof, and putting in a new pair of stones to the Windmill, and a new round beam (all said Mills and Buildings, when said *Paunett Knott* took them, being in a very ruinous state:)—Says that *Paunett Knott's* inducement to lay out such Money was, that Testator *William Knott* told him he should make all said Premises convenient to himself, as he, Testator, bought them for him, and meant to give him same; and whenever said *Paunett Knott* applied to said Testator respecting any repairs of said Premises (which Deponent has frequently been witness to), said *William Knott* told him he should do what he pleased without troubling him, as said *Paunett Knott* should consider the Premises as his own:—That after decease of said *Paunett Knott* (in the lifetime of Testator *William Knott*), said *William Knott* frequently told Deponent, he had, by his Will given all said Premises to Deponent's Children:—That for about eleven years after *Paunett Knott's* death, Deponent occupied said Mills and Premises (except *Stoney Farm* and Cottages in *St. Pancrass*), and carried on the business thereof for the benefit of herself and Children, and during that time expended considerable sums of Money about the repairs and improvements thereof, to 100*l.* and upwards; and her reason was, because said *William Knott* had promised said Premises to her Family, and she

has had no allowance whatever for said Monies so laid out:—Says that Testator *John Knott*, on opening the Will of Testator *William Knott*, after his decease, and immediately after reading same, took Deponent into a room in said *William Knott's* house, (where his Relations were assembled to hear said Will read,) and declared to Deponent, that notwithstanding said *William Knott* had not given said Mills and Premises to Deponent's Family, yet the said Mills and Premises should be the Property of Defendant *John Knott*, and of Deponent's Family; and said Testator *John Knott* would give the same accordingly, for such was his Father's intention; and Testator *John Knott* often repeated such promise, and often added, she might make herself perfectly easy, as her family would be well provided for; and requested her to take care of their education."

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The Defendant produced no Witnesses as to the value of the Estate, when the same was sold to him by his Uncle *John Knott*.

By the Decree made in the Cause 25th November 1796, it was amongst other things ordered, " That the *Master* should inquire and state to the Court, whether the Farm called *Stoney Farm*, and the Messuage, Watermill, and other Premises, in the Pleadings of this Cause mentioned to have been conveyed by the Testator *John Knott*, to his Nephew the Defendant *J. Knott*, or any and what part thereof, were or was, at the time of such Conveyance, subject to any and what Annuity or Yearly Rent-charge, and to whom payable: and it was ordered, that the said *Master* should also inquire, whether *Paunett Knott*, the Father of the Defendant *John Knott*, is become Tenant to the said Testator *William Knott*, the Father of him the said *Paunett Knott*, of any and

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what part of the Real Estate of the said Testator *William Knott*, in the Pleadings mentioned; and at and for what time, and upon what terms and conditions; and whether, after the death of the said *Paunett Knott*, *Hannah* his Widow continued in the occupation of such part of said Real Estates as had been occupied by said *Paunett Knott*; or any and what part of the Real Estates of the said Testator *William Knott*, in the Pleadings mentioned; and at and for what time, and upon what terms and conditions; and whether, after the death of the said *Paunett Knott*, *Hannah* his Widow continued in the occupation of such part of said Real Estates as had been so occupied by said *Paunett Knott*, or of any other, and what part of such Real Estates, and how long, and upon what terms and conditions; and in particular, whether such occupation of the said *Paunett Knott*, and the said *Hannah* his Widow, was by or under any Lease or Leases, and under any and what Covenants, or only by Parole as Tenants at Will, at any stipulated or fixed Rent, or how otherwise; and what Rent, up to any and what time, was paid by them, or either of them, and to whom; and whether any and what receipt was given for such Rent, and by whom; and whether any and what Timber or Trees growing on such Real Estates, have been cut or felled by the said *Paunett Knott* and *Hannah Knott*, or either of them, and which of them, with the particulars thereof, and to what amount or value: and in case it shall appear that the said *Paunett Knott* and *Hannah Knott*, did not hold or occupy such parts of the said Real Estates, by or under any Lease or Leases thereof, or otherwise, at any fixed Rent, then it was ordered, that the said *Master* should also inquire and state to the Court, what was the true yearly Rent or value of the Premises so occupied by the said *Paunett Knott* and *Hannah Knott*, respectively as

aforesaid, during the time they respectively occupied the same; and the said *Master* was also to inquire and state to the Court, whether any and what sums of money were laid out or expended by the said *Paunett Knott*, and by the said Defendant *John Knott*, and the said *Hannah Knott* respectively, before the said Premises were conveyed to him the said Defendant *John Knott*, in or about any repairs or improvements of the said Premises, and the nature of such Repairs and Improvements, if any, were in any and what degree rendered more valuable, by means of such Repairs and Improvements, at the time when the same were conveyed to the said Defendant *John Knott*; and it was ordered, that the said *Master* should also inquire and state to the Court, whether the Monies which were so paid or advanced for or in respect of the said Repairs, were the proper Monies of the said *Paunett Knott* and *Hannah* his Widow, or of the said Defendant *John Knott*, or of any other Person or Persons: and the said *Master* was also to inquire, whether the sum of 2,000*l.*, agreed to be given by the Defendant *John Knott*, to his Uncle the Testator *John Knott* for the Estate in the Pleadings mentioned, was wholly paid by the said Defendant to his said Uncle, and in what manner, &c. with a reservation of Costs till after the Report."

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The *Master* by his Report, amongst other things, stated, "That he had not found any evidence, that the Farm called *Stoney Farm*, or the said Messuage, Watermill and Premises, were subject to any Annuity or yearly Rent-charge; but he found that one full undivided fourth or one part, (the whole into four equal parts to be divided,) of the said Estate, was by a certain Indenture of Settlement, bearing date the 9th day of

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August 1776, made between the said *William Knott*, (under whom the said Testator *John Knott* derived his title) and his Son *Newman Knott*, of the 1st part; *George Parham* and *Lucy Caffin*, Spinster, Daughter-in-law of the said *George Parham*, of the 2nd part; the said Testator *John Knott*, and *James Wheatley*, of the 3rd part; and *John Freeland* and *Stephen Austin*, of the 4th part, previous to and in contemplation of a Marriage then intended to be had, and which was afterwards solemnized between the said *Newman Knott* and *Lucy Caffin*, for the considerations therein mentioned, conveyed and assured by the said *William Knott*, unto the said *John Knott* the Testator, and *James Wheatley*, and to their heirs, to the uses in the said Marriage Settlement particularly mentioned, with the ultimate use to the said *Newman Knott*, his heirs and assigns, for ever. That he found, from a state of facts laid before him on behalf of the Defendants *Thomas Knott*, *Thomas William Knott*, *Maria Knott*, and *Henry John Knott*, the Infants, by the said *Thomas Knott* their Guardian, and *John Knott*, *Newman Knott* and *William Knott*, and admitted on behalf of the Plaintiffs, that *Paunett Knott* was for 13 or 14 years before his death, Tenant to his Father, the said Testator *William Knott*, of the House, Watermill and Windmill, and a small Croft, (formerly two Crofts) of Meadow Land adjoining, containing one acre, and of the run of *Paunett Knott's* Horses in the Meadow Lands of *Stoney Farm*, at a Rent of 35*l.* 14*s.* per annum; and after the death of said *Paunett Knott*, the said *Hannah Knott* rented the same, except the run of Horses on *Stoney Farm*, at a Rent of 31*l.* 10*s.*, and she continued to rent the same up to the time the same was sold with *Stoney Farm*, by the Testator *John Knott*, to the Defendant *John Knott*; and that both the afore-

said holdings were by parole only ; and that one receipt only for the said Rent can now be found, which receipt is as follows, " 1792, October ; Received of Mrs. *Knott* the sum of 31 *l.* 10 *s.* for one year's Rent, for the two Mills and Crofts, due this day, by me *John Knott.*" And that no Timber or Trees of any value were cut upon the said Premises by the said *Paunett* and *Hannah Knott* ; and he further certified, that no evidence had been laid before him to prove that any sums of money were expended in repairs or improvements of the said Premises, by the said *Hannah Knott* or the said *John Knott* ; but it appears to him, by the evidence produced, that various sums of money were expended by the said *Paunett Knott*, to the amount, in the whole, of the sum of 450 *l.*, or thereabouts ; and he conceived that said Premises were rendered more valuable by such repairs or improvements, at the time when the same were conveyed to the said Defendant *John Knott*. That the sum of 2,000 *l.*, agreed to be given by the Defendant *John Knott* to his Uncle, the said Testator *John Knott*, for the Estate in the Pleadings mentioned, was not wholly paid by the said Defendant to his said Uncle, but that the same was paid in manner following, (that is to say,) That the said Defendant *John Knott*, by the direction of the said Testator *John Knott* his Uncle, paid to *Charles Tapner*, since deceased, Clerk to Messrs. *Griffiths, Caldecott* and *Drew*, the sum of 1,414 *l.* 15 *s.* 4 *d.* in discharge of the principal and interest, on a Bond from the said Testator *John Knott*, to the said Messrs. *Griffiths, Caldecott* and *Drew* ; and that the sum of 600 *l.*, (being 14 *l.* 15 *s.* 4 *d.* more than the residue of the said sum of 2,000 *l.*) was paid by the said Defendant *John Knott*, to the said Testator *John Knott.*"

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Mr. *Bek* and Mr. *Wingfield*, for the Plaintiffs :—

This is the Case of a man indebted, selling an Estate a month before his death, at a great under-value, to his Nephew and Heir at Law. These facts are sufficient to show that the sale is fraudulent, as against Creditors. Where Creditors are not concerned, persons may part with their property as they please; but such a Conveyance as this is void as to Creditors, who may set aside Contracts, which the Party himself could not. The 13 Eliz. c. 5, invalidates such a Conveyance as this: it would be an evasion of the Statute to hold this Conveyance valid. If this Conveyance had been for natural love and affection, it could not have been supported; so neither can it be supported where the Price was so greatly inadequate; only one half of the value being given, according to the lowest estimate of the Witnesses. In *Heathcote v. Paignon*, an Annuity was set aside for inadequacy of Price (a). In *Herne v. Meeres* (b), a purchase of an Estate from a Tenant for Life, was set aside in favour of Creditors, the purchase being made at an under-value. In *Partridge v. Gopp* (c), Lord *Northington* says, "I think no man has such a power over his own property, to dispose of it so as to defeat Creditors, unless for consideration. It is the motive of the giver, not the knowledge of the acceptor, that is to weigh."

In *Mathews v. Feaver* (d), an assignment of personal Property for an inadequate consideration, was considered as fraudulent against Creditors, under the 13th of Eliz.

(a) 2 Bro. C. C. 167.

(c) Ambler, 596.

(b) 1 Vern. 465. S. C. mentioned in note to *Heathcote v. Paignon*, 2 Bro. C. C. 176-7.

(d) 1 Cox, 279.

So in *Cadogan v. Kennett* (e), Lord Mansfield says, "If the transactions be not *bonâ fide*, the circumstance of its being done for a valuable consideration, will not alone take it out of the Statute."

Mr. *Wetherell* and Mr. *Blake*, for the Defendant
Knott :—

There is no instance of setting aside a Purchase, on the mere circumstance of its being a disadvantageous bargain, unless the price given be so grossly incommensurate with the real value, as to evidence a fraud; and if a Purchase is sought to be set aside under the Stat. of Eliz. as a fraud against Creditors, a fraudulent intention must be shown. Suppose it true in this Case, that one half only of the value is given, that is not *per se*, a sufficient ground to set aside a Purchase, either at the instance of the Vendor, or of his Creditors (f). The

(e) Cowp. 434.

(f) In a MS. Case of *Maskeen v. Cole*, Trin. T. 8 Geo. 2nd, 1733, Lord King appears to have been of opinion, that a Sale for one-half of the value might be set aside. Such certainly was the Rule of the *Civil Law*; but none of the modern Cases, that I am aware of, establish it as an abstract proposition, that a Sale for one-half of the value is invalid. In an early Case, *Nott v. Hill*, 2 Chy. Cas. 121, Lord Nottingham observed, "By the Civil Law, a Bargain of double the value shall be avoided, and I wish it were so

in England;" plainly intimating, that such was not then the Law. The Case of *Maskeen v. Cole*, came on upon an Appeal from the Rolls, and according to the MS. in my possession, was thus;

"The Plaintiff was entitled to a Legacy of 500 *l.* in case he survived the Testator's Widow, payable to him or his Children, share and share alike; but if he died without Issue, living the Widow, then the 500 *l.* to go to her. The Plaintiff being very necessitous, assigns the conditional Legacy to the Defendant for 100 *l.* to be paid by 5 *l.* a

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Cases of *Bassett v. Noseworthy (g)*, *Barwick v. Wood (h)*, *Stevens v. Olive (i)*, *Walker v. Burroughs (k)*, *Bullock v. Sadler (l)*, show, that even where inadequacy has been proved; Creditors have not been able to set aside Pur-

(g) Finch, 102.

(i) 2 Bro. C. C. 90.

(h) 1 Atk. 260, S. C.

(k) 1 Atk. 93.

Ridgway, 260.

(l) Ambl. 764.

year, after which, the Widow dies, and the Plaintiff knowing the Legacy then became vested in him by his Deed, confirms the Assignment of the 500 *l.* to the Defendant. A Bill is now brought to have this Contract or Assignment set aside, as being an unreasonable bargain, and without a valuable consideration."

"LORD-CHANCELLOR:—

" There is a difference between Cases where the Agreement or Sale wants the aid of this Court to carry it into execution, and where the legal Estate is absolutely in the Vendee; in the former Case, this Court is more ready to relieve; and as this is a *Legacy which cannot be recovered at Common Law*, the *present Case* is plainly within the first part of this distinction. Then it comes to this single question, whether *Cole* was a fair Purchaser for a valuable Consideration; or

whether there is such a fraud in it as this Court ought to relieve. This was a Legacy payable upon a Contingency, in case he survived the Testator's Widow; he was about twenty-four years of age, she about sixty-four; then what is the real value of 500 *l.* under this Contingency? In all events, her life must be run out before he could be paid, so that that takes away one-third of the value, according to the computation of this Court; and as to the other chance, it is just equal, whether he or the Widow survived, so that one must be taken away under this Contingency; and if you deduct one-third, and then one-half of 500 *l.*, there remains about 166 *l.* Then what is the Consideration here given for that which is valued at 166 *l.*? It is 5 *l.* per annum, for twenty years, which can't be reckoned at more than 50 *l.*; so that under this consideration, I

chases; but in this Case no inadequacy is proved. The valuation was of the whole Estate, but it turns out that the Vendor had no title to one-fourth of the Estate; what the value of three-fourths of the Estate was, is unascertained. Before the Court can decide upon the adequacy of the Consideration, there must be a re-valuation.

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The VICE-CHANCELLOR:—

This is a Bill by Creditors, calling for an account of Real and Personal Estate, and seeking to set aside a Sale to the Defendant *John Knott*, for fraud, as between the Vendor, *John Knott* deceased, and the Vendee, the Defendant *John Knott*. The Bill was filed so long ago as 1793, the Sale being twenty-five years ago. I have carefully looked into all the Pleadings,—the Evidence,—the Decree,—the Master's Report,—and all the circumstances of the case. The first question to be considered, is, whether this Bill has brought all the necessary Parties before the Court. According to the Answer of the Defendant *John Knott*, it appears, that he mortgaged the Estate, the purchase of which, this Bill seeks to set aside, to Dr. *Sanden*, for 2,000*l.*, which Mortgage remains undischarged; and that the Title Deeds of the Estate are in the hands of Dr. *Sanden*. Dr. *Sanden*

should have made no difficulty in relieving the Plaintiff, as not having received one-half of the value of this Legacy. But then what does he do afterwards? —With his eyes open he agrees to this Contract he had made, and offers to do any other thing to ratify it; and then confirms it by a new Deed;

and that after all the Contingencies had happened, supposing he had given away this 500*l.*, shall Equity give it him again? I am of opinion, he has tied himself so fast we can't relieve him."

Decree for dismissal of Plaintiff's Bill confirmed.

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then is greatly interested in supporting the Title of his Mortgagor, the Defendant *John Knott*. All the Title Deeds are in his custody. It does not appear whether they were produced or proved on the hearing of the Cause. *Sanden* ought to have been made a Party. It was necessary to see the Title Deeds, in order to decide the point between the Parties.

Supposing, however, all proper Parties are before the Court, the next question is, whether this Bill contains proper Charges. The Vendor nor the Vendee complain of the Contract, but only these Creditors; and the only mode in which they can invalidate the Contract, is upon the Stat. of the 13th of Eliz. c. 5.

Is this then a Case within that Statute? What is it that is charged and put in issue in this Case? The Bill stating certain facts, charges, that *John Knott* deceased, after the decease of his Father, publicly advertised for sale the Estate, *Great Broad Leaze*, part of the Estate devised to him by his Father; and that the same was sold to a *bonâ fide* Purchaser. That Sale is not impeached, but the Plaintiffs call for an account of the proceeds. That Estate was not sold by Public Sale, since only 3,600 *l.* being bid, it was not then sold, but was afterwards sold by Private Contract for 4,000 *l.* *John Knott* deceased, had reason therefore to conclude, that he could sell more advantageously by Private Contract, than by Public Sale. He afterwards, in 1792, sells *Stoney Farm* to the Defendant. The Bill states it was sold, "in a clandestine manner, for 2,000 *l.*, which he applied to his own use; but that the Premises were worth a great deal more money; and that said Sale was fraudulent, as against the Creditors of the said *John Knott*, and ought to be set aside." The Plaintiffs there-

fore rely upon Relationship, Insolvency, and inadequacy of Price, as grounds upon which they seek to set aside the Contract. It does not appear that *John Knott*, the Vendor, expected his death when he sold the Estate, and though in fact he did die soon after the Sale, it does not appear how he died, whether by accident, or otherwise. The Bill is loosely drawn. If the fact were, that the Sale was made in contemplation of a speedy dissolution, that fact should have been charged in the Bill. It is then said he was his *Nephew*. Is there any fraud in selling to a Nephew?—He might sell to him. If on account of his Relationship, he sold it for less than he would have done to another, it might be material; but if he treated with him as he would have done with a stranger, the Contract is valid. Where the Deed states, as in many Cases, the consideration to be love and affection, that is material; but it is not charged or put in issue, that the circumstance that the Vendee was his Nephew, had any effect upon the Contract. The Estate had been let to the Father of the Nephew, and afterwards, his Widow held it for fourteen years; and they improved it, the Estate being dilapidated when they took it. The Buildings and Mill, &c. were repaired by the Father and his Wife, and on the faith and expectation held out that the Estate would finally become theirs. They were disappointed by the Will, by which it was given from them; and it was natural they should wish to become the Purchasers. The Vendee was the customary Heir of the Vendor, but not his general Heir. By the Will of the Vendor, the favourite object of his bounty appears to have been his Brother, and there is no proof that the Vendee was any particular favourite. Fraud cannot be imputed, merely by stating that a man has sold to his Nephew. But then it is said, the Vendor

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was insolvent. There is no charge that he knew he was insolvent, and that he made the Sale on that account. A person may be insolvent without knowing it. Was this Vendor known to be in a state of Insolvency? Did the Nephew know it? By his answer he swears he did not know of his Insolvency. The Will of the Vendor, as stated in the Bill, was made after the Sale to the Defendant, and is not like the Will of an insolvent person. The Bill states that *John Knott*, "being well entitled to said devised Estates remaining unsold by him, and being seised of other Real Estates, and possessed of a considerable Personal Property, duly made his Will, &c." By this Will, made after the Sale, he disposes of his Real Estates to his Brother, and makes other dispositions, as a man of Property would do. But then at his death, it seems, he was found to be insolvent. If he was so, he kept it a secret, at least it was not known to his Nephew. It is then said, the Estate was sold at a great inadequacy of Price. Is the mere selling an Estate for less than its value, to be considered as a fraud upon Creditors? That would be an alarming doctrine. Most Vendors of Estates are indebted, and from necessity are often obliged to sell for the most they can get. If such a Sale were void, as against Creditors, a Purchaser ought not only to have an Abstract of the Vendor's Title, but an Abstract of the Vendor's circumstances; and he must be examined like a Bankrupt. All that is stated in the Bill, is, that the Estate was worth "a great deal more money than it was sold for." Can Creditors say, "you sold by Private Contract, but if you had sold by a Public Sale you might have got more; and therefore the Sale as to us is void." That cannot be a ground for setting aside a Contract. It cannot be allowed to Cre-

ditors, especially after a great lapse of time, to make such an objection. Was it known to the Vendor and Vendee, that the Estate was worth considerably more than it sold for?—The Bill has no such charge, but merely states, that the Property “was worth a great deal more than it sold for.” Suppose he had sold it by Public Auction, it might still have been bought for less than its value. Merely selling an Estate for less than its value, can never of itself be considered as a Fraud, though, under some circumstances, it may be considered as evidence of Fraud. There is the evidence of Land Surveyors, as to the value of the Estate when sold, showing, that the Estate was worth much more than it sold for; but every body knows how easy it is to obtain such exaggerated valuations. These then are the circumstances under which it is sought to set aside this Sale upon the 13th of Eliz. c. 5. The Preamble of that Act is, “For the avoiding and abolishing of feigned, covinous and fraudulent Feoffments, &c., as well of Lands and Tenements, as of Goods and Chattels, &c. devised and contrived of malice, fraud, covin, collusion or guile, to the end, purpose and intent to delay, hinder or defraud Creditors and others of their just and lawful Actions, Suits, Debts, &c. not only to the let or hinderance of the due course and execution of Law and Justice, but also to the overthrow of all true and plain dealing, bargaining, and chevisance between man and man, without which, no Commonwealth or civil society can be maintained or continued.” A Conveyance therefore, to be affected by this Act, must be shown to be “feigned, covinous and fraudulent,” and made with “an intent to delay, hinder, or defraud” Creditors. But if this Case were held to be within the Statute, it would be “the overthrow of all true and plain dealing, bar-

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gaining, and chevisance between man and man;" for as a Purchaser cannot know the circumstances of the Vendor, it would prevent "all dealing, bargaining, and chevisance between man and man," and counteract the object of the Statute. The Statute, in order to prevent this inconvenience, has, by the sixth section provided, That the Act shall not extend to any Conveyance upon good Consideration, and *bonâ fide* to any person, not having at the time of such Conveyance or Assurance, any manner of notice or knowledge of such Covin, Fraud or Collusion. A Conveyance therefore cannot be invalidated by this Act, if there has been a *bonâ fide* Purchaser. The Bill states Insolvency, Relationship and Inadequacy, but does not expressly charge that the Defendant is not a Purchaser for a valuable Consideration. To bring the Case within the Statute, the Purchase must not have been *bonâ fide* and without notice. This Cause went to issue, and Witnesses were examined. What was the evidence as to the value of the Estate? The Surveyors only state their opinion. They state, that in 1792, the Land was worth, to rent, 50*s.* or 52*s.* an acre; that is a pretty large Rent for Land near *Chichester*. They say, the value of the Land is increased by irrigation, occasioned by the overflowing of the water used by the Mill; but there is no proof that the water would overflow, if the Mill was properly used. They calculate the value of the Land at thirty-two years Purchase, but that is an extravagant calculation. There is no proof that the Land could have been sold at so many years Purchase. Then the Mill, &c. were valued in the improved state they were, without any consideration of what had been expended on them. The Vendee, it is proved, laid out 500*l.* They ought to have been valued in the condition they were in when the Sale

took place. The Decree only directs an inquiry of Expenses on the Land previous to the Sale. It turns out, on the *Master's* Report, that the whole Valuation of this Land proceeded on a mistake, for the fact appears to be, that the Vendor was only entitled to three-fourths of this Estate. There is therefore no evidence, what three-fourths of the Estate were worth. But then it is said, though the Conveyance turns out to be invalid, as to one-fourth of the Estate, yet that is proof a fraud was intended; since the Purchaser, if he intended to make a *bonâ fide* Purchase, would have looked into the Title, and not doing so, evidences the Fraud in the transaction. If that were evidence of Fraud, it should have been charged in the Bill, and the attention of the Vendee drawn to it; and he might have given a satisfactory answer. The facts which have transpired, have taken away all the effect which the evidence might have had, as to Value. If the Court were to proceed, it must be upon fresh evidence, as to the Value of the Estate. Is then the Court, at the distance of twenty-five years, to direct the *Master* to inquire what was the value of three-fourths of this Property? Length of time is certainly no bar to a Fraud, and the delay in the Suit might have been avoided by the Defendant, if he had urged it on, but he stood only on the defensive, and it was the duty of the Creditors to accelerate the Suit. I think I should not do right, after such a lapse of time, to direct an Inquiry before the *Master*. It is difficult to say what was the object of the Decree in 1796. The Inquiries directed are not easily to be explained. It is said, that whatever the result of the Inquiries, directed to be made before the *Master*, were, the Sale was void; but would the Court have made such a Decree, if in all events, the Sale was to be considered as void?—

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It has been much pressed as an abstract point, that an insolvent Person selling to a Relation for an inadequate price, is a Fraud, and that the Conveyance is in all such Cases void, under the Stat. of the 13th *Eliz.* c. 5.

I have already observed somewhat on that point. The Stat. 13th *Eliz.* c. 5. was made in favour of Creditors, the Stat. of the 27 *Eliz.* c. 4. in favour of Purchasers. Under both Statutes the Owner of Lands has a qualified, not an absolute right. He may sell, but he cannot give; he must, according to a common proverb, "be just before he is generous." A volunteer for a meritorious Consideration, for love and affection, is not sufficient. The expression, "*good Consideration*," in the Statute, means a valuable Consideration (*m*), as Money, Marriage, &c. To constitute fraud, as against Creditors, it is sufficient to prove that the gift was voluntary. The Statute does not deprive a man of the power of selling his Estate, or doing what he pleases with the Purchase Money. It was the Creditors fault that they did not proceed against their Debtor. If on the one hand there is a fair Sale, out and out, it is valid. In *Upton v. Bissett* (*n*), *Owen, J.* said, "he was at the making of the Statute of *Eliz.* wherein special care was taken that there should not be any words which should extend to Purchasers." The difficulty, in most cases, has been, to say what is a sufficient Consideration within the Statute. The Court has not been very particular as to the sufficiency of the Consideration, if the contract was *bonâ fide* (*o*). In *Stephens v. Olive* (*p*), it was held, a Deed of Separation, in which the Trustees indemnified the Husband against the Wife's

(*m*) See *Twyne's Case*, 3 Rep. 81 b.

(*n*) *Cro. Eliz.* 444.

(*o*) Vide *Nunn v. Ladbrooke*, 8 T. R. 521.

(*p*) 2 Bro. C. C. 90.

future Debts, was a valuable Consideration, and took the Case out of the Statute. It was uncertain what the Debts, if any, would amount to, but still it was considered as a sufficient Consideration to answer the words of the Statute.

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In *King v. Brewer*, cited in the note to *Stephens v. Olive* (q), the same doctrine was acted upon. In those Cases the Court thought the mere liability of the Trustees to pay the future Debts of the Wife, was a valuable Consideration.

In *Doe v. Routledge* (r), there was a gross Fraud. Lord *Mansfield* says, "The Consideration of 200*l.*, which is to support it as a Deed for a valuable Consideration, compared with the real value of 2000*l.*, shows it to have been no purchase at all, but a gift. *It was a gross fraud.*" Mr. *J. Aston*, an excellent Lawyer, says, in that Case, "A great deal has been said upon the construction of the Statute 27 *Eliz.* c. 4, whether there should be a *full* as well as a *bonâ fide* consideration. It has been said, that a *bonâ fide* consideration is not sufficient—but it is; and the Consideration need not be full; for a Mortgage is a good Consideration, though never a full one."

In *Mathews v. Feaver* (s), the *Master of the Rolls* says, "If the Conveyance had been made without any Consideration, it would certainly have been void under the Statute; and I am of the same opinion where the Consideration is *entirely inadequate.*" In that Case, the

(q) *Ib.* p. 93, in note.

(s) 1 *Cox*, p. 278.

(r) *Cowp.* 705.

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inadequacy was excessive, and the Conveyance held to be fraudulent.

In *Jones v. Marsh* (t), the *Lord Chancellor* thought the adequacy of the Consideration ought not to be nicely scrutinized.

In *Basset v. Nosworthy* (u), the *Lord Chancellor* says, "In Purchases, the question is not whether the Consideration be adequate, but whether 'tis valuable, for if it be such a Consideration as will make the Defendant a Purchaser within the Statute of *Eliz.* and bring him within the protection of that Law, he ought not to be impeached in Equity."

In *Herne v. Meers* (x) there was great under-value, and young *Cox* was outlawed and had absconded. Only between three and four years purchase for the Estate was given, and the Purchaser was a Trustee of the Estate, and knew of the outlawry and absconding, and purchased at that under-value, *pendente lite*. That Case, therefore, is no authority in favour of the Plaintiff.

Mere Inadequacy of Price to invalidate a Contract, must, *per se*, be so excessive, as to be demonstrative of Fraud. In *Griffith v. Spratley* (y), a Sailor indebted, contracted with a Broker for an Annuity for a very inadequate Consideration; and Chief Baron *Eyre* expresses, with great ability, his view of the effect of Inadequacy of Price. He says, "The Case has been much

(t) Forr. 64. S. C. MS.

(u) Finch, 102.

(x) 1 Vern. 465.

(y) 1 Cox, 383. And see *Collier v. Browne*, ib. p. 4.

rested upon this, that the satisfaction received is so grossly inadequate to the real value, that it is impossible to resist the inference of Fraud which arises on that inadequacy; or, if possible, to make inadequacy of Consideration of itself a distinct principle of relief in Equity; but I know of no such principle. The Common Law knows no such. The Consideration, more or less, supports the Contract. Common sense knows no such principle. The value of a thing is what it will produce, and admits of no precise standard. It must be in its nature fluctuating, and will depend upon ten thousand different circumstances. One man in the disposal of his property may sell it for less than another would; he may sell it under a pressure of circumstances, which may induce him to sell it at a particular time. Now, if Courts of Equity are to unravel all these transactions, they would throw every thing into confusion, and set afloat all the Contracts of mankind. Therefore, I never can agree that inadequacy of Consideration is *in itself a principle* upon which a Party may be released from a Contract which he has wittingly and willingly entered into. It may indeed be a strong *evidence* of Fraud where the transaction is such as to be inconsistent with the sober manner of a man's conducting his affairs."

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Lord *Eldon*, also, the greatest Judge in this country, says, in *Coles v. Trecothick (a)*, "Unless the Inadequacy of Price is such as shocks the conscience, and amounts in itself to conclusive and decisive evidence of Fraud in the transaction, it is not itself a sufficient ground for refusing a specific performance." In *Underhill v. Harwood (b)*, he reiterates the same doctrine.

(a) 9 Ves. 246. S. C. MS. (b) 10 Ves. 219. S. C. MS.

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On these grounds, I am of opinion the Plaintiffs have not made out a Case to set aside this Contract, which was executed so long ago. This would be my opinion if there were all the necessary Parties to this Suit, which there are not.

Bill dismissed, without Costs,

MEMORANDUM.

The following Cases, decided by the *Vice-Chancellor*, were unavoidably omitted to be reported in chronological order, but are thought to be of sufficient importance to be presented to the Profession.

ROBINSON v. ANN WILSON and W. LARKINS,

[19 Dec. 1814.]

Semble. *A Surety who pays off a Specialty Debt, is to be considered as a Specialty Creditor of his Principal.*

IN December 1791, *William Wilson*, late of *Alnwick, Northumberland*, since deceased, became engaged as the Agent of the *Paisley Union Bank Company*, and thereupon, a Bond for 8,000*l.*, dated 29th Dec. 1791, was entered into by the said *William Wilson* and *William Younghusband*, since deceased, as a Surety for *Wilson*, conditioned, that if *William Wilson* should render just accounts, and pay Balances which might be found due from him, then the Bond to be void.

Wilson acted as such Agent from December 1791 to December 1793, when he died intestate, leaving the

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Ann Wilson administered to her Husband. At the time of *Wilson's* decease, there was 4,092*l.* 17*s.* due from him as Agent to the Company; and his affairs being very unsettled, the Company called upon *Younghusband*, the Surety, to pay the same. He paid several Sums, and reduced the Debt to 2,030*l.* 0*s.* 6*d.*, and in 1798 gave his Bond to the Company for 2,000*l.* and Interest; and one *Robert Foster* joined with him in such Bond as a Surety; and *Foster*, in the year 1801, paid off the Bond.

William Younghusband died in October 1802, and by his Will appointed *Robert Foster* and the Plaintiff *Robinson* his Executors; and the Plaintiff *Robinson* was the surviving Executor.

Robert Foster died 16th Nov. 1803, leaving a Will, and Executors, who proved his Will.

In November 1805, the Plaintiff, as such surviving Executor of *Younghusband*, paid out of his Assets, to the Executors of *Robert Foster*, the amount of what was due to his Estate, in respect of what he had paid as Surety for *Younghusband* to the Company; so that the whole of what was secured by Bond from *Wilson* and his Surety *Younghusband* to the Company, had been paid out of the Estate of *Younghusband*, the Surety.

The Defendant *Ann Wilson*, the Administratrix of *William Wilson*, possessed herself of *Wilson's* personal Estate; and as the Agent of *G. S. Wilson*, the Heir at

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Law of *William Wilson*, received the Rents and Profits of a Freehold Messuage of *William Wilson*, which descended to *G. S. Wilson*, until his Bankruptcy.

On the 2d March 1814, a Commission of Bankruptcy issued against *G. S. Wilson*, and he was declared a Bankrupt; and the Defendant *Larkins* was appointed sole Assignee, and a Bargain and Sale executed to him; and he thereupon entered into possession, and into the receipt of the Rents and Profits of the said Freehold Messuage of which *William Wilson* died seised.

The Plaintiff, stating these facts in his Bill, claimed to be entitled, as the personal Representative of *William Younghusband*, to stand in the place of the *Paisley Union Bank Company*, as a Specialty Creditor against the Estate of *William Wilson*, and prayed, an Account of what was due to him for Principal and Interest, as the surviving personal Representative of *Wm. Younghusband*, from the Estate of *William Wilson*; and an Account of *Wm. Wilson's* personal Estate possessed or received by the Defendant *Ann Wilson*; and in case the same was insufficient for payment of the Plaintiff's demand, that it might be declared that the Real Estates which *William Wilson* died seised of, are liable to make good such deficiency; and for an Account of such Real Estates and the produce; and that, if necessary, a sufficient part of such Real Estates might be sold to pay the Plaintiff; and that all proper Parties might join in such Sale.

To this Bill the Defendant *Larkins* put in a general Demurrer.

Mr. Trower, in support of the Demurrer.

Mr. *Bell*, *contra*, contended that where a Surety pays off the Bond of his Principal, he is, in Equity, a Specialty Creditor on the Principal's Estate, and that it had been determined at the Rolls in *Hotham v. Stone*, 1810, on the authority of *Gayner and Royner* determined by Sir *Thomas Sewell* in 1777, that where a Surety joined in a Bond, accompanied with a Mortgage by the Principal, and the Surety was called upon to pay the Bond, he has a right to call for an Assignment of the Mortgage. He also mentioned *Parsons v. Prid-dock (a)*, where a Surety who had paid the Debt was held entitled to an Assignment of a Bail Bond, there being an implied Contract between the Principal and the Surety, that if the latter pays the Debt, he shall have in Equity, the same Remedies as the Creditor had.

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Mr. *Trower*, in reply, observed, that *Hotham v. Stone* was appealed from, and that the Appeal was in the *Lord Chancellor's Paper*; whereupon the *Vice-Chancellor* directed the Demurrer to stand over till that Case was determined; but observed, that he had examined the Case of *Gayner v. Royner* in the Register's Book, which he considered as in point, Sir *Thomas Sewell* having decided in that Case, that where a Surety pays off a Specialty Debt, he should be considered as a Specialty Creditor of the Principal (b).

(a) 2 Vern. 608. S. C. 1 Eq. Cas. Abr. 93.

(b) The Appeal to the Lord Chancellor in *Hotham v. Stone* has not yet been decided upon,

FANE v. SPENCER.

[March 23d—Sept. 5th, 1815.]

Exception to the Master's Report in favour of the Title of the Vendor of a Bishop's Lease, on the ground of the non-production of the Bishop's Title, overruled.

THIS was a Bill filed for the specific performance of an Agreement by the Defendant, to buy a Church Lease from the Plaintiff.

On the coming in of the Answer, the usual Order was obtained for a Reference on the Title. The *Master* reported a good Title could be made. The Defendant excepted to the *Master's* Report.

From the Abstract of the Plaintiff's Title, which was referred to in the *Master's* Report, it appeared that the Title commenced by a Lease granted by the *Bishop of Bath and Wells* in 1763, and was regularly deduced to the Plaintiff by Conveyances, Wills, and new Leases granted upon the surrender of former Leases.

The ground of the Exception to the *Master's* Report of the Title was, that "the Plaintiff cannot have a perfect Conveyance, Lease or Assignment of the Estate and Premises, according to the terms, true intent and meaning of the said Agreement, unless the *Bishop of Bath and Wells*, who granted the original Lease of the said Estate and Premises, and under which the same are held, as referred to by the said Agreement, had good Right and Title to grant such Lease; and because the Plaintiff has not shown, by the Abstract of her Title laid before the said *Master*, or otherwise, that the said *Lord Bishop of Bath and Wells* had a right to make such

Lease, or in any manner showed before the said *Master* that the Defendant had precluded himself from inquiry into the Plaintiff's Title."

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Mr. *Wray*, in support of Exceptions.

In *Keech v. Hall* (a), and in *Waring v. Mackreth* (b), the right of a Lessee to examine the Title Deeds of the Lessor appears to have been established, and an Assignee of the Lessee must have the same right; and the *Lord Chancellor* appears to have been of that opinion in *White v. Foljambe* (c). Though he there says, that if ever the question came before him he would call in the Judges to his assistance. Upon what principle is the case of a Bishop to be distinguished? The Titles of Corporations are not unimpeachable.

Sir *S. Romilly*, and Mr. *Trower* :—

The objection made in this Case was never heard of before. Leases from a Bishop are distinguishable from Leases by other persons, and that is the ground we rely upon. If this Exception were allowed it would shake the Title to half the property in the kingdom. Lessees of the Crown—of the *Prince of Wales*, as Duke of Cornwall—would all claim the same right to look into the Title of the original Lessors. No claim of that sort has ever been made. Upon a purchase of Copyhold Land, was it ever required that the Title of the Lord of the Manor must be shown? By what means are we to compel the Bishop to show his Title? In *Deverell v. Lord Bolton*, decided 19th March, 1810, a Reversionary Lease was granted by a person authorized

(a) Dougl. 21.

(c) 11 Ves. 337.

(b) Forest's Ex. Rep. 129.

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only to grant Leases in possession. Lord *Eldon* refused a specific performance, and said, where Leases are granted from man to man, it must be inquired in what character the Lessor grants the Lease, whether as Tenant in Fee or having a limited Interest; and therefore his Lordship would not say that a Lessee might not have a right to call for the Lessor's Title; but no such ground exists in this Case: if the Bishop is seised, no doubt can arise of the nature of his Estate. In this Case clear proof exists of Possession by the Bishop, in right of his See, during 52 years.

The VICE-CHANCELLOR:—

The novelty of the objection, and the great value of the property to be affected by it, has induced me to pause before I pronounced a Decision.

The question is, whether the Abstract has shown a good Title, as reported by the *Master*.

It has been argued that, when a Lessee sells a Lease, and the Contract is silent as to the Title of the Lessor, the Lessee must show the Lessor's Title to grant the Lease. On that point there is no express Decision. In *White v. Foljambe*, the *Lord Chancellor* expressed himself as undetermined upon the point. There seems no sound distinction as to the evidence of Title between the Sale of a Lease for Lives and of an Estate in Fee. The point, however, must be considered as undecided. In my view of the present Case, it does not appear to me necessary to determine upon that question, this Case being determinable on a different point.

This is a purchase of a Lease for Lives held under a Bishop. It is said, the Vendor of this Lease ought to

show the Title of the Bishop who granted the original Lease in 1763, and not merely the Title of the *present* Bishop who granted the Lease in 1807; and the question therefore is, whether a Purchaser has a right to call for the Title of the Bishop, there being no express condition in the Contract to preclude him.

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No Case has been cited in support of the Objection, although Bishops Leases constitute so great a part of the property of the Country. No instance is to be found, or even any hint in any book, where the Title of the Bishop has been thus called for; and the novelty and danger of the Objection makes it necessary to be very careful how the Court gives way to it.

Leases of Bishops are distinguishable from those granted by private persons. The Right of a Bishop to grant a Lease depends not on Title Deeds, but on the Statute Law of the Land—the Restraining Act of *Elizabeth*. Before that Statute, Bishops might, by the Common Law, lease for any length of time; but that Act, as every body knows, restrained that power of alienation within certain bounds. If the Lease made by the Bishop in 1763 had not been made according to the Statute, it was not binding on his Successor, who might have avoided it. It is clear the Lease had all the requisite formalities. It is said the Bishop might possibly have granted a Lease of Lands which did not belong to the See: that is possible, but no surmise of that kind appears on the Abstract. The Premises in question have been granted by successive Bishops for nearly sixty years, and nothing is suggested to show that the Leases were voidable or void. The only Objection to the Bishop's Title can be, that the Property so leased was

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not annexed to the See, for if it was annexed, there is no doubt whatever of the Bishop's right to grant. What then is sufficient Evidence to show the Tenure, that the Premises belonged to the See? How do you prove Land to be Copyhold Land?—By a Copyhold Conveyance, *i. e.* admission in the Lord's Court. So if a Grant be made under an Episcopal Seal, the thing granted is supposed to belong to the Bishoprick. We cannot suppose that a Bishop a Public Functionary, has fraudulently put his Episcopal Seal to any public Instrument, or that he has acted under a mistake, and granted what did not belong to the See. The subsequent surrender to the succeeding Bishop, and the renewal, was founded on the Right of his Predecessor to grant the Lease. The Lease was a matter of notoriety, and the Tenant undertook to do Suit and Service. Surely this is sufficient *primâ facie* Evidence in any Court of the validity of the Lease, and the *onus* is thrown upon the Party objecting to the Bishop's Title, to show that the Lands thus granted did not belong to the See. The Lands have been granted by repeated successive Grants, and there has been a quiet enjoyment for upwards of fifty years; which in my opinion affords abundant proof that the Estate belonged to the Bishop's See, and that this Title is good, and such as a Purchaser ought to be satisfied with.

Exceptions overruled.

DUNKLEY and another, *v.* SCRIBNOR and another (*a*).

[July 27th, 1815.]

BY an Order, dated the 22d July 1806, the Defendant *William Scribnor* was directed to pay the Sum of 138*l.* 8*s.* 4*d.* into the Bank with the privity of the Accountant-General, on the Credit of the Cause, without prejudice to any question in this Cause, with the usual directions.

Order to let a House and Land in possession of a Sequestrator, on a Contempt for not paying Money into Court.

By an Order, dated the 20th December 1814, it appearing that an Attachment having issued against the Defendant *William Scribnor* for non-payment of 138*l.* 8*s.* 4*d.* pursuant to an Order directed to the Sheriff of *Hertfordshire*; and by the Return of the Sheriff, that he was a prisoner in his custody: it was ordered that an *Habeas Corpus cum Causis* should issue, directed to the said Sheriff, at the Return thereof to bring the Defendant *William Scribnor* to the bar of the Court to answer his said Contempt, &c.

By another Order, dated the 14th January 1815, it was ordered that the said Defendant should be committed to his Majesty's prison of the Fleet, and there remain until the said Defendant should pay the said Sum pursuant to the said Order, and clear his Contempt, &c.

(*a*) Ex relatione.

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By another Order, dated 20th January 1815, it was ordered, that a Commission of *Sequestration* should issue, directed to certain Commissioners to be therein named, to sequester the said Defendant *William Scrib- nor's personal Estate*, and the Rents, Issues and Profits of his real Estate, until he should pay the said Sum of 138*l.* 8*s.* 4*d.* into the Bank, pursuant to the said Order of the 22d day of July 1806, &c.

In pursuance of this Order, a Commission of *Sequestration* issued, and the Defendant's Property was sequestered. The Defendant, as the Plaintiff swore, continued in Prison, and refused to sell or mortgage his House and Land, and would do nothing but what the Law obliged him to do.

On the 24th May 1815, a Motion was made by the Plaintiffs that the Commissioners might be at liberty to sell the personal Property belonging to the Defendant, and the *Crops on West Field* (particularized in the Notice of Motion): an Order was made for the Commissioners to sell the personal Property and the *Crops (b)*.

On the 21st July 1815, it was moved, that the Commissioners under the *Sequestration* might be at liberty to let an uninhabited *Copyhold Messuage or Tenement*, with its appurtenances; and also a certain *Field*, commonly called *West Field*; all which said Premises belonged to the said Defendant, and were situate at *Flamstead* in the County of *Herts*, and now in their possession, to *Willam Garner of Flamstead* aforesaid, Farmer,

(b) See *Cavil v. Smith*, 3 Bro. C. C. 362.

at a Rent of *Fourteen Pounds per Annum*, the said *William Garner* being ready and willing to pay such Rent for the same to the said Commissioners, by half-yearly Payments, or at such other time as the Court should direct; and being also ready and willing to sign an Undertaking, as the Court should direct, to deliver up the Possession of the said Premises whensoever the said Defendant *William Scribner* should pay the Sum of 138*l.* 8*s.* 4*d.* into the Bank, with the privity of the *Accountant General*, on the Credit of this Cause (which by the Order of the 22d day of July 1806, he was directed to do,) or at such other time as the Court should direct; and that the Commissioners, or any two of them, might also be at liberty to pay the Rents and Profits of the said Premises into the Bank with the privity of the *Accountant General*, in Trust in this Cause; and that the Money so to be paid into the Bank, as and when the same should amount to a competent Sum, might be by the said *Accountant General* laid out in the purchase of Bank *Three per Cent. Annuities* in Trust in this Cause; and that the Interest and Dividends to arise on such Bank Annuities when purchased, and all accumulations thereof, might in like manner be laid out in the purchase of like Bank Annuities.

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and another,
v.
SCRIBNER
and another.

This Application was supported by an Affidavit of two of the Commissioners, stating their knowledge of the Premises, and that the proposed Rent was as much as the House and Lands were worth to be let to a yearly Tenant, and was as great a Rent as could be obtained. *William Garner* also, the proposed Tenant, swore, he was willing to pay the Rent of 14*l.* a year, which was as much as the House and Land could be let for; and that in case the Court permitted him to become Tenant,

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he was ready and willing to sign an Undertaking to cultivate the Land in an husbandlike manner, and according to the usual course of husbandry in the neighbourhood, and to do any other act the Court might think proper for him to do during such time as he should continue in possession.

The Clerk in Court for the Defendant *William Scrib-
nor* was served with the Notice of the Motion, and also the Defendant in person.

Mr. *Wyatt*, in support of the Motion, admitted there was no Case exactly in point.

The *Vice-Chancellor* made the Order as prayed.

RICHARD CROCKETT and BRIDGET his Wife,
v. GEORGE BISHTON and THOMAS BISH-
TON.

[March 10th, 1815.]

*In an Affi-
davit by Plaintiff
in a Cause, it is
not necessary to
state his
Residence.*

MR. *Joseph Martin*, for the Plaintiffs, moved to extend the Injunction to stay Trial.

Mr. *Fisher*, for the Defendants, took the following Objection to the Affidavit which the Plaintiff *Richard Crockett* had made in support of the Motion.

The beginning of the Affidavit was in these words:—
“ In Chancery, between *Richard Crockett* and *Bridget*
“ his Wife, Plaintiffs, and *George Bishton* and *Thomas*

“ *Bishton*, Defendants. The above named Plaintiff
 “ maketh oath and saith, that he did, on behalf of him-
 “ self and of this Deponent’s Wife *Bridget Crockett*,
 “ heretofore *Bridget Singleton*, Spinster, on or about
 “ the 3d day of February instant, exhibit their Bill of
 “ Complaint,” &c. &c.

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 v.
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 and another.

Mr. *Fisher* objected that the Place of Abode and Addition of the Plaintiff *Richard Crockett*, who swore the Affidavit, ought to have been inserted in it; and, for this, cited *Wyatt’s Edition of Prac. Reg.* p. 9, and *Hinde*, 451, there referred to, and the Rule of the Court of *King’s Bench* of Mic. 15 Car. II. whereby it was ordered that the true Place of Abode and the true Addition of every Person who should make Affidavit in that Court, should be inserted in such Affidavit. He cited also *Impey’s Practice K. B.* 7th edit. p. 134.

Mr. *J. Martin* contended, there was no need of the Plaintiff’s being particularly described in an Affidavit in Chancery, inasmuch as his Place of Residence was to be found in the Bill of Complaint.

Mr. *Fisher*, in reply, submitted, that even supposing that the present Affidavit was to be construed with reference to the Bill of Complaint, yet that in this Case it happened that even the Bill was deficient in this respect; that although the Place of Residence of the Plaintiff *Richard Crockett* appeared in the Bill, still there was no Addition, he being described in the Bill as follows:—“ Humbly complaining, show unto your
 “ Lordship, your Orator and Oratrix *Richard Crockett*,
 “ of *Shussions* in the County of *Stafford*, and *Bridget*
 “ his Wife, that,” &c.; and Mr. *Fisher* produced the

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and another.

Office Copy in Court, to show that the Description was thus deficient.

But His Honor the *Vice-Chancellor* said, there had been many Affidavits made by Parties in Causes, without any other Description of themselves than merely that they were Plaintiffs or Defendants in the Cause; and *His Honor* overruled the Objection, and granted Mr. *Martin's* Motion.

Mr. *Fisher* also objected, that not only the Name and Addition of the Deponent *Richard Crockett* ought to have appeared in the Affidavit, but that he ought also to have been described, *one of the above named Plaintiffs*, and not, *the above named Plaintiff*, there being two Plaintiffs.

But *His Honor* thought, that it sufficiently appeared by the Context of the first sentence, that the Plaintiff *Richard Crockett* was the Person who deposed.

EDES and another, v. ROSE.

[July 1815.]

*Separate
Report allowed
as to Costs.*

A DECREE had been made at *The Rolls* in this Cause, whereby *His Honor* directed, amongst other things, several inquiries to be made by the *Master*, and also decreed the Costs of all Parties to be taxed as between Solicitor and Client, and to be paid to the respective Solicitors; and the consideration of further Directions

and subsequent Costs was reserved until the *Master* should have made his Report.

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The Parties being desirous that the Costs should be forthwith taxed and paid, without waiting for the *Master's* general Report, Mr. *Fisher*, for the Plaintiffs, moved, that the *Master* might be at liberty to make a separate Report as to Costs; which was ordered accordingly, Mr. *Rose* consenting for the Defendant.

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[29th March—3d April 1816.]

THE Petition stated that, *George Dudley*, Esq. by his Will, 12th July 1774, amongst other Bequests, gave and bequeathed to *Mary Dudley Rogers*, to *George Rogers*, to *Francis Rogers*, to *John Rogers*, Jun. and to *Hester Hudson Rogers*, Sons and Daughters of his Nephew and Niece *John* and *Hannah Rogers*, to each of them 1,000*l.*, payable in Three Months after his Decease to such of them as should then be of Age, and as to those under Age, the Money to be paid at the same time for their use to their Father and Mother, and to the Survivor of them, until they should attain the Age of Twenty-one years; and the said Testator, as to all the rest and residue of the Estate, of what nature or kind soever, which he was then or at the time of his decease should or might be possessed of, interested in, or entitled to, he gave, devised and bequeathed the same to said *John* and *Thomas Misenor*, their Executors and Ad-

Children, by Implication, held to be entitled to a Legacy-

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ministrators, upon Trust to lay out and invest the same in the Public Funds, and to pay the Interest to Defendant *J. Rogers* during the Life of his Wife, Defendant *Hannah Rogers*, and to her only if she should survive him, subject to deduction from the Principal for the Maintenance, Education and Advancement of the Children of said *John* and *Hannah Rogers*; and after the decease of said *Hannah Rogers*, to pay and apply the same to and amongst all and every the Child and Children of said *Hannah Rogers* who should be then living, and to be paid at his or her age of Twenty-one years; and if but One Child be living at the time of the decease of said *Hannah Rogers*, then to such only Child; and of his Will appointed *John Misenor*, *Thomas Misenor*, and *John Rogers*, Executors.

By a Codicil, 18th August 1775, the Testator thus expressed himself: "Whereas, by my last Will and Testament before mentioned, I have bequeathed to my Niece *Mary Dudley Rogers*, of *Mile End*, 1,000*l.*, but she having since indiscreetly married, I mean to withdraw that Legacy out of her power to dispose of it, or out of the power of her husband to do so; and therefore I order and direct that my Executors do secure to her, my said Niece, the Annual Interest of the said 1,000*l.* independently of her said Husband, by placing out that said Sum in the Public Funds or Government Securities, in Trust for her my said Niece, she to enjoy the Interest or Dividends during her natural Life; and at her decease, without Child or Children, the Principal Sum, with all Interest due thereon, to go and be divided between such of her Sisters as may be living at the time of her Decease, share and share equally alike."

The Testator died in December 1777.

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By the Decree made on the 12th July 1779, it was ordered, that it should be referred to Mr. *Ord* to take an Account of the Testator's personal Estate in the usual manner, and it was thereby declared, that in case Testator's personal Estate should not be sufficient to pay his Legacies (which proved to be the case) the Legacies should abate in proportion to their respective Legacies.

The *Master*, by his Report, 14th June 1781, amongst other things, certified that there was due, in respect of the Principal of said *M. D. Rogers*, the Wife of *John Stover*, Legacy of 1,000*l.*, the Sum of 858*l.* 3*s.* 11*d.*; and there was then due to her in respect of the Sum of 108*l.* 10*s.* 11*d.* the Remainder of the Interest of that Legacy, 93*l.* 3*s.* 1*d.*; making together the Sum of 951*l.* 7*s.*, without being deducted the Sum of 2*l.* 16*s.* 8*d.* for her proportion of Abatement on 20*l.* paid her on account of Interest by Defendant *John Rogers*, there remained 948*l.* 10*s.* 4*d.*

By an Order, 3d of July 1781, it was, amongst other things, ordered, that 93*l.* 3*s.* 1*d.*, being Interest, part of the 948*l.* 10*s.* 4*d.* so reported due in respect of said Legacy given to *Mary Dudley*, then the Wife of *J. Stover*, be paid to her for her separate use; and it was ordered, that 855*l.* 7*s.* 3*d.* the Residue of said 948*l.* 10*s.* 4*d.* should be placed out in the purchase of *Bank Three per Cent. Annuities*, in the Name and with the privity of the *Accountant General*, on the Credit of these Causes, and to the Account of said *Mary D. Stover* and her Children; and it was further ordered,

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that the Interest to become due on said *Bank Annuities* should be paid to the said *M. D. Stover* during her Life, and on her Death any Person then entitled to the Capital of said *Bank Annuities* was to be at liberty to apply to this Court concerning the same.

Hannah Rogers died 17th April 1801, leaving the Petitioner *John Rogers*, said *M. D. Stover*, and *Hester Hudson Chambers* the Wife of *William Chambers*, her only Children her surviving.

The aforesaid 855*l.* 7*s.* 3*d.* was invested by the *Accountant General* in the purchase of 1,494*l.* 1*s.* 8*d.* *Three per Cent. Bank Annuities*, and the same 1,494*l.* 1*s.* 8*d.* *Three per Cent. Bank Annuities*, together with 20*l.* 3*s.* 5*d.* in Cash, being Dividends which accrued due thereon on 5th January 1816, were standing in his Name.

John Stover died 27th October 1815, leaving said *M. D. Stover* him surviving, having by Will bequeathed the whole of his Property to her, and appointed said *M. D. Stover* his sole Executrix. *M. D. Stover* died 12th November 1815, intestate, before she had proved the Will of said *J. Stover*.

M. D. Stover left only Two Children and next of kin her surviving, namely, *Samuel Rogers Stover* and *Hester Dann* the Wife of *Hugh Hardy*.

Since the death of said *M. D. Stover*, Letters of Administration of her Estate and Effects, and also of the Estate and Effects of said *John Stover*, were granted to Petitioners. The Prayer of the Petition was, that the

Accountant General might be directed to pay to the Petitioners 20*l.* 3*s.* 5*d.* being said Dividends which accrued on 5th January last; and that he might be directed to transfer to the Petitioners said 1,494*l.* 1*s.* 8*d.* *Three per Cent. Bank Annuities.*

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Mr. *Beames*, for the Petition:—

By Implication, the Children must be considered as equally entitled, under the Will, to this Money. *Crowder v. Clowes (a)*, *Wainwright v. Wainwright (b)*.

Mr. *Roupell*, for the Residuary Devisees:—

No Gift was made to the Children of *M. D. Rogers*, and the Residuary Legatees are entitled to the Money.

The VICE-CHANCELLOR:—

The Bequest, as it stood in the Will, was free from doubt; the difficulty in this Case arises from the Codicil.

3d April.

The object of the Codicil was not to deprive his Niece *Mary Dudley Rogers* of the Legacy left to her by the Will, but only that the Annual Interest of the 1,000*l.* should be secured to her during her Life, independent of her Husband. The Codicil says, "I have bequeathed to my Niece *Mary Dudley Rogers*, of, &c. 1,000*l.*, but she having since indiscreetly married, I mean to withdraw the Legacy out of her power to dispose of it, or out of the power of her Husband to do so; and therefore I order and direct that my Executors do secure to her my said Niece the Annual Interest of the said 1,000*l.*, independent of her said Husband, by

(a) 2 Ves. Jun. p. 449. (b) 3 Ves. 558.

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placing out that said Sum in the Public Funds or Government Securities, in Trust for her my said Niece, she to enjoy the Interest or Dividends during her natural Life." If the Codicil had stopped there, the question would have been, whether she was absolutely entitled to the Legacy, with an Interest independent of her Husband during her Life, so as to prevent the Husband claiming it; but the Codicil says further, "and at her decease, without Child or Children, the Principal Sum, with all Interest due thereon, to go and be divided between such of her Sisters as may be living at the time of her decease, share and share equally alike." If *Mary Dudley Rogers* had died without Children, the 1,000*l.* would have gone to her Sister *Hester H. Chambers*. The Codicil says nothing as to the Residue, or what was to be done with the 1,000*l.* if *M. D. Rogers* had Children. There is only a negative on her taking any part of it.

The 1,000*l.* on the Death of *M. D. Rogers*, must belong either—Firstly, to her personal Representatives, which these Petitioners, her Children, are; or—Secondly, to the Children as such; or—Thirdly, it must fall in as part of the Residue. The question, therefore, is between the Children and the Residuary Legatees.

The Residuary Legatees cannot take, because the Residue only, after the payment of this Legacy, was given to them. It could not go to *Hester Chambers*, because she was only to take if *M. D. Rogers* died without Children. As the Testator did not mean to give it to the Residuary Legatees, and as he did not mean to die intestate as to any part of his Property, to whom could it go but to *M. D. Rogers* or her Children? Why mention Children if he did not mean them to take? The

existence of Children was considered as material; so much so, that if there were any, the Legacy was not to go over. By necessary Implication, the Children must be considered as entitled to the 1,000*l.*

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Unless the intention be manifest, the Court cannot act; and though the intention of the Testator may appear to the Judge to be different from what he has said, yet the Court, as in *Denn v. Bagshaw* (c), must decide according to the Words he has used; it must not make a Will for the Testator, but only construe it: but there are many Cases in which, where the Bequest has been ambiguously worded, the Court has given effect to a clear implied intent. As where, in cases of Real Property, an Estate has been devised to *B.* upon the Death of *A.*; there, by Implication, a Life Estate has been held to pass to *A.* So in Cases of Personal Property, the Court have acted upon an implied intent, as in *Crowder v. Clowes* (d), and *Wainwright v. Wainwright* (e), which were cited, and in *Harman v. Dickenson* (f). In the first of these Cases, the Testator gave his Niece 1,000*l.* to be paid immediately after his decease, in case she should happen to be then married, but if not then married, then to take the Interest for her Life, or till she should be married; and if she died unmarried, then the 1,000*l.* to go over. The Testator, by a Codicil to his Will, gave his Niece "the further Sum of 200*l.* in addition to what I have given her by my within written Will." She was single at the Testator's death, but afterwards married, and she and her Husband claimed the 200*l.* The *Master of the Rolls* thought that by an unavoidable Implication, she was meant to have the 200*l.* when she married,

(c) 6 Term Rep. 512.

(e) 3 Ves. Jun. 558.

(d) 2 Ves. Jun. 449.

(f) 1 Bro. C. C. 91.

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and directed the Legacy to be raised. In *Wainwright v. Wainwright*, the Testator gave the Residue of his Estate to his Executors, and directed that the Interest, not exceeding 20*l.* a year, should be applied for the maintenance of his Great Nephew *Thomas Wainwright*, until he should attain Twenty one, with liberty to advance 200*l.* for his Benefit and Advancement before Twenty-one; and if the Interest Produce of such Surplus should not all be laid out in any one year for the Maintenance of his Great Nephew, what so remained was to be applied for the benefit of his Great Nephew and his Family, as the Executors judged proper; and in case his Great Nephew died before Twenty-one, then the Legacy to go over. The Great Nephew attained Twenty-one, and the *Master of the Rolls* held there was a necessary Implication that if he attained Twenty-one, he should have the Residue. In *Harman v. Dickenson*, there was a Bequest to Two Daughters of the Testator, and if one should die without Issue, then to the surviving Daughter and her Issue. One of the Daughters married and died leaving Issue, and then the unmarried Daughter died; and it was held, that the Money went to the Issue of the married Daughter, although she did not survive her Sister. In these Cases, though there was not in words an express gift to the Individuals, yet the Court held that, by a necessary Implication, they were entitled. Applying the principle of these Cases to the present, I feel justified in saying the Children are entitled to the Legacy. Declare the Two Children of *M. D. Stover* entitled to the Legacy in *Moietiés*; one *Moiety* to be paid to the Petitioner *Hugh Hardy* and Wife, the other *Moiety* to be carried to the Account of *Charles Stover* (now in the East Indies), and let Mrs. *Chambers* have her Costs.

ROE v. POGSON.

[9th April 1816.]

A PETITION was presented in this Cause, stating Transactions for upwards of Sixty Years, and praying various Relief.

Power to charge a Sum in gross, implies a Power to give Interest.

The *Vice-Chancellor* doubted the propriety of bringing the Questions before the Court upon a Petition, but, in the course of his Judgment, expressed his Opinion to be—Firstly, that where, under a Settlement, a Power is given to charge a Sum in gross, it implies a Power to give Interest; and cited *Lewis v. Freke (a)*;—Secondly that an Incumbrancer on an Estate is entitled to Arrears of Interest in respect of his Incumbrance, and to charge the Estate with the same, as against a Remainder-man, though there may have been neglect or laches on his part in not making, for many years, a claim of Interest against the Tenant for Life; and cited *Loftus v. Swift (b)*.

Incumbrancer entitled to arrears of Interest against Remainder-man, though by Laches he omitted to obtain Interest from the Tenant for Life.

Mr. *Treslove*, for the Petition.

Mr. *Heald*, contra.

(a) 2 Ves. Jun. 512.

(b) 2 Sch. and Lefr. 642.

PREVOST and others, v. CLARKE and others.

[31st May 1816.]

*Words of
entreaty in a
Will, held, to
raise a Trust.*

ANNE Prevost, by her Will, 20th September 1809, after several Legacies, gave the Residue of her Property, which consisted of Personalty, to be equally divided between her Sons, *Sir George, James, and William Prevost*, and her Daughter *Anne Clarke*, "and to guard against any unforeseen Accident, and for the purpose of leaving to my dear Daughter the Property I bequeath her in this my Will, my intention and Will are, that what comes to her share shall be vested in Public Securities in the names of such Trustees as she and her Husband will appoint; that, declaring moreover, that it is my intention and Will that the Property of the said Stock, and the free disposal thereof, save the Prayer to *Mr. Clarke* contained in this Will, to either of the Survivors upon the demise of *Mr. and Mrs. Clarke*."

The Testatrix afterwards used the following words:—
"Convinced of the high sense of honor, the probity and affection of my Son in Law, *Edward Clarke*, I entreat him, should he not be blessed with Children by my Daughter, and survive, that he will leave at his decease to my Children and Grandchildren the share of my Property I have bestowed on her."

The Bill was filed by the Children and Grandchildren of the Testatrix, against *Mary Clarke*, and her Husband *Edward Clarke*, and the Executors, and prayed, "That Defendants *Edward Clarke* and *Ann* his Wife might

set forth what Right and Interest they have in said last mentioned Fourth Part or Share of the Residue of Testator's personal Estates and Effects, and in what manner they make out same; and that the Rights and Interests of all Persons in the aforesaid Part or Share of said Residue of said Testatrix's personal Estates and Effects (to which Defendants *Edward Clarke* and *Ann* his Wife claim to be entitled as aforesaid) may be forthwith settled and ascertained by the Decree of the Court; and more particularly, that it might be Decreed, that according to the true meaning and construction of said Will, Defendants *Clarke* and *Wife* do not, nor doth either of them, take an Absolute Interest in said last-mentioned Fourth Part or Share of said Residue, except only in the event of their having Children, as in said Will provided; and that, in the event of their having none, such Plaintiffs, and Defendant *James Prevost*, if they shall be living at the death of the Survivor of said Defendants *Edward Clarke* and *Ann* his Wife, and if not, such of Testatrix's Grandchildren as shall be then living, will be absolutely entitled to such last-mentioned Fourth Part or Share of such Residue, or to the Stocks or Funds in or upon which same shall be invested or secured; and that, if necessary, all proper Directions may be given by the Court for the purpose of ascertaining the amount of such last-mentioned Fourth Part or Share of the said Residue; and that same may be forthwith accounted for and paid by Defendants *James Prevost* and *Charles De Constant*, or by said Defendant *James Prevost*, as the only Executors of said Testatrix now in this Country; and when so sold, may be laid out in the purchase of Three per Cent. Bank Annuities, in the names of such Persons as shall be nominated and appointed by Defendants *Edward Clarke*

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and others.

and *Ann* his Wife, to be Trustees thereof; and that such Trustees, when so appointed, might be directed to execute all proper and necessary Deeds for duly declaring the Trusts of said Stocks or Funds of the said Trust Monies or Funds."

The Defendants *Edward* and *Ann Clarke*, insisted, by their Answer, that the Bequest of the Fourth Part of the Residue to *Ann Clarke*, was an absolute and unconditional Bequest, clear of any Trust or Contingency.

Sir *S. Romilly*, and Mr. *Phillimore*, for the Plaintiffs:—

There can be no doubt that by the words of this Will, there is a Gift to the Children and Grandchildren of the Testatrix, in case *Mary Clarke* should have no Children by her Husband. The word "entreat" raises a Trust, and is, according to many cases, imperative. A question may possibly arise between Children and Grandchildren; but that it is not now necessary to decide.

Mr. *Hart*, for the Executors, submitted to act as the Court might direct.

Mr. *Leach*, and Mr. *Wingfield*, for the Defendants *Clarke* and his Wife:—

This was an absolute Bequest to *Ann Clarke*. The Testatrix entreats her Son in Law, in case he should survive her Daughter, to leave his share of the Residue "to her Children or Grandchildren." A power of Selection is given. The Court, in some cases, has construed the word *or* as "*and*," but it cannot in this case, a power of Selection being evidently intended. The Court cannot say it is a Trust for the Children only, or

the Grandchildren only; and as *Clarke* made no Selection, no one could claim the Property. In *Harland v. Trigg (a)*, Leasehold Estates were bequeathed to “*John Harland for ever, hoping he will continue them in the Family;*” upon which words the *Lord Chancellor* said, “I had a doubt whether the Family could not claim some Interest in the subject; but, when I came to consider, I take the Rule of Law to be this, that two things must concur to constitute these Devises, the Terms, and the Object. *Hoping* is in contradistinction to a direct Devise; but, whenever there are annexed to such words, precise and direct Objects, the Law has connected the whole together, and held the words sufficient to raise a Trust; but then the Objects must be distinct:—where there is a choice, it must be in the power of a Devisee to dispose of it either way; if he had sold these Leaseholds, the Family could not have taken them from the Vendee, or if he had given them to any one part of the Family, the others could have no remedy. The Will does not import a Devise, as the words do not clearly demonstrate an Object.”

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Sir S. Romilly, in reply:—

The Argument as to a power of Selection was used in *Browne v. Higgs (b)*, but without effect. That case went to the House of Lords, and is decisive of the present.

(a) 1 Bro. C. C. 142. peal to Lord Chancellor,
(b) Heard by Sir R. P. 8 Ves. 561, and, afterwards
Arden, 4 Ves. 708, and re- on appeal to the House of
heard by him, 5 Ves. 495. Lords.
and Decree affirmed on ap-

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The VICE-CHANCELLOR:—

I cannot distinguish this case from *Browne v. Higgs*, which appears to me a direct Authority, and supersedes all reasoning on the subject. In that case, as in this, there was a power of Selection.

HOLMES v. BARKER.

[7th August 1816.]

*Bequest of
"the whole of my
Property, of
whatever de-
scription, Free-
hold, Leasehold,
&c. of which I
may be in pos-
session of at the
time of my
decease," held to
pass real Es-
tates, agreed to
be purchased by
the Testator.*

WILLIAM Holmes, made the following Will:—
"I declare this to be my last Will and Testament, written with my own hand, this 2nd day of January, in the year of our Lord 1816. A Will lays in my Safe now, but it is not to my mind; Mr. *Pearse* the Attorney has another of later date, but not signed, and it is also much to my dissatisfaction: this hasty Will I therefore now make, lest the Almighty should please to call for my life before I can get one better arranged. The lowness of my finances must plead my excuse in leaving so little in Legacies. I give and bequeath to *Thomas Nicholls*, now residing with me, 100*l.*; and if he dies before me, that 100*l.* shall sink into the rest of my Estate. I give and bequeath unto my Friends and Brothers in Law, Mr. *Thomas Edward Barker* of the Panorama, and Mr. *George Miller*, Tea Dealer, of the Strand, the whole of my Property, of whatever description, Freehold, Leasehold Personal, Real, or by whatever name it may be called, *of which I may be in*

possession of at the time of my decease (a), except the 100l. mentioned for Nicholls, but which will fall in as part of my Property if Nicholls dies before me, In Trust, and for the following Persons: my dear Wife shall enjoy the whole during her Life, and at her decease the whole shall be divided between all my Children that shall be then alive; and if any one or more of my Children shall be dead at the time of the decease of my Wife, and leave any legitimate Children living, such Child or Children shall be entitled to the portion of my Property which their Father and Mother would have enjoyed had they been alive at the time of my Wife's decease. If it shall appear by my Ledger that I am indebted in a sum of Money to my Son William John, I desire it to be understood, that that Debt so due by me shall be thrown in, or sunk in hotch potch, before any division of my Property takes place, as I do not mean him to have one farthing more than each of my other Children. If my dear Wife survives all my Children, and all their Children, I mean the whole of my Property to be at her disposal; and if she dies without making a Will, I desire my Property may be equally divided between my Three Sisters, Mary Parker, Phoebe Maxwell, and Faith Barker, or such of them as may be alive at the decease of my said Wife; and if one or more of those Three Sisters be dead at the decease of my said Wife, my desire is, that any portion of my Property that would have fallen to the lot of such Sister, had she been living, may go to her Child or Children, if any. I appoint my before mentioned Brother in Law, Mr. Thomas Edward Barker, and

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(a) The words in Italics at the time of the execution were inserted by the Testator of the Will.

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Mr. *George Miller*, Trustees to this my last Will and Testament; and the said *Thomas Edward Barker*, and *George Miller*, Executors, with my dear Wife *Sarah*, Executrix; and I empower them to sell or let any part, or all my Property or Estates; but I direct that any Lease they may grant shall cease and determine when I have no Child alive under Twenty-one years of age."

The Testator died 18th *February* 1816, leaving him surviving, the Defendant *Wm. John Holmes*, his eldest and only Son by his first Wife, and his Heir at Law; and the Plaintiffs, *Joseph Holmes*, *Sarah Holmes* the younger, *Charlotte Holmes*, *Louisa Holmes*, and *Mary Jane Holmes*, his only Children by his second Wife, *Sarah Holmes*.

The Defendants, *T. E. Barker*, *G. Miller*, and *Sarah Holmes* the Widow, proved the Testator's Will, and took possession of the Real and Personal Estate of the Testator.

The Bill, stating these facts, further stated, that some years since a Lease of a House in the *Strand*, in which the Testator resided at his death, was granted to the Father of the deceased, which was unexpired; and upon the death of the Testator's Father, his Widow and Executrix granted an Underlease of the Premises to the Testator at an increased Rent; and subsequently the Testator procured a reversionary Lease of the Premises to be granted to him by the then Ground Landlord, for a further Term of Ten years, to commence from the determination of the former Lease; and in 1814 the Widow and Executrix of the Testator's Father died,

and the Testator purchased of her Executors the Interest in the Lease granted to his Father, and thus became entitled to the Residue of the term of years in the Lease to his Father, and for the reversionary term of Ten years granted to the Testator:—That in the year 1813, the Testator entered into a Contract for the Purchase of the Fee Simple of a House in the *Strand* in which the Testator resided, and of which he had Leases as before mentioned; but owing to difficulties, the Purchase was not completed.

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The Testator also entered into another Contract for the Purchase of the Fee Simple in Lands at *Lewisham* in *Kent*, which Purchase was not completed at his death. The Bill charged, that the Personal Estate possessed by the Defendants, the Trustees and Executors of the Testator, ought, if a good and satisfactory Title to such Premises could be made by the Vendors, to be completed by the Defendants, the Executors and Trustees, and the Messuages and Lands therein respectively comprised ought to be conveyed to the Defendants, the Executors and Trustees, upon the Trusts of the Will of the Testator.

The *Prayer* of the Bill was, that the Will of the Testator might be established, and the Trusts of the same carried into Execution, and for the usual Accounts; and that the several Purchases in the *Strand* and at *Lewisham* might be decreed to be carried into effect, and the Purchase Monies paid out of the Personal Estate of the Testator; and that the Plaintiffs, the Children of the Testator, might be declared entitled to the benefit of such Contracts when completed, in equal shares with the Defendant *William John Holmes*, sub-

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ject to the Life Estate of the Defendant *Sarah Holmes*, the Widow, therein; or in case the Court should be of opinion that the benefit of such Contracts did not pass by the Will, but that the same ought to be completed by and out of the Testator's personal Estate, for the benefit of the Defendant *William John Holmes*, as the Heir at Law of the Testator, then that Defendant *William John Holmes*, might be put to his Election, whether he would take as Heir at Law of the Testator, or take the benefit given him by the said Will; and that the Rights and Interests of the Petitioners in the Real and Personal Estate and Effects of the Testator might be declared, secured, and improved for their respective uses and benefit; and that, if necessary, the Freehold and Leasehold Estates of the Testator might be sold, and the produce laid out and improved for the benefit of the Persons interested therein, &c.

The Defendant *William John Holmes*, in his Answer, put in by his Guardian, he being an Idiot, insisted the Purchases ought to be completed and paid for out of the Personal Estate of the Testator; and that such Purchases did not pass under the Testator's Will; and that he is entitled to such Purchases.

Mr. *Hart*, and Mr. *Girdlestone*, for Plaintiffs:—

The Devise to the Trustees and Executors passed all the Real and Personal Property of the Testator, the Leases, and the Estates contracted to be purchased.

Mr. *Swanston*, for the Trustees, and the Widow:—

From the time of the Contract to purchase, the Vendor became a Trustee for the Vendee. In *Capel v. Girdler (b)*, the Contract to purchase was after the

(b) 9 Ves. 509.

making of the Will, and therefore the Lands did not pass; but the *Master of the Rolls* there says, "Having contracted for the purchase of the Inheritance, he became complete Owner of the whole Estate; for it is clear in this Court, a Party who has contracted for the purchase of an Estate, is equitable Owner. The Vendor is a Trustee for him. If he had by his Will afterwards disposed of all his Lands, this Estate would have passed by that Will.

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The insertion of the words was to give to his Will a prospective effect; the words are not, of which I may be in possession, but, of which I may be in possession at the time of my decease. As a question of Intention, the conclusion is clear, from the expressions in his Will, relative to his eldest Son, that he should only take an equal share with his other Children, and from the indirect evidence arising from the unfortunate situation of the Son, an Idiot.

Mr. Perkins, for the Defendant *J. W. Holmes*, the Heir at Law:—

The Testator devises only the Estates "of which he might be in possession of at the time of his decease." These words explain the Bequest before made, and the Estates contracted for do not pass, he not being in possession of such Estates; and the Heir at Law is therefore entitled to the Estates contracted for.

The VICE-CHANCELLOR:—

The intention of this Testator, apparent throughout his Will, is to dispose of all his Property. He did not mean to die intestate as to any part of his Property. He gives by his Will, to his Trustees and Executors

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“ the whole of his Property, of whatever description, Freehold, Leasehold, Personal, Real, or by whatever name it may be called, of which he may be in possession at the time of his decease.” This comprehends all his Property. He did not mean any Property to descend to his Heir, who is an Idiot. He directs, “ if it shall appear by his Ledger that he is indebted in a sum of Money to his Son *William John*, he desires it to be understood, that debt so due by him should be thrown or sunk into *hotchpot* before any division of his Property should take place, *as he did not mean him to have one farthing more than each of his Children.*” The Testator could not mean that his personal Property, in exclusion of his other Children, should be applied in payment of the Estates contracted for, and that they should descend to his Heir. That would be to contradict what he had said before, viz. that his eldest Son should not have one farthing more than his other Children. He does not limit the Devise by giving Estates *now* in my possession, but all his Estates in his possession at the time of his death. He was in possession of the equitable Estate in the Estates agreed to be purchased. He had the present Ownership; he was as complete an Owner in Equity as ever he could be, and might, by his Will, dispose of the Estates agreed to be purchased. If he had before his death acquired the legal Estate, it would not have been a revocation of his Will^(a). He is entitled to the Rents. He has, in the consideration of a Court of Equity, the present possession of the Estates. It is clear he meant to pass the Leasehold in the *Strand*, in which he resided, for he mentions Leasehold Estates in his Will, and had no other Leasehold Estate. He could not mean to give the Leasehold to

(a) See *Rawlins v. Burgess*, 2 Ves. and Bea. 382.

one, and the Freehold to another. The Estates contracted for passed under his Will. He had a virtual legal constructive possession of the Estates contracted for, and they pass under the Will (b).

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HUBBARD v. HEWLETT.

[11th July 1817.]

THE Plaintiff having put in an insufficient Examination to Interrogatories, it was, on Motion, referred to the *Master*, to whom the Cause stood referred, to look into the Interrogatories, and the Examination of the Plaintiff. This the *Master* accordingly did, and reported the Examination insufficient.

The Master reported that the Plaintiff had put in an insufficient Examination to Interrogatories. Held, on Motion, that Defendant was entitled to a reference to tax the Costs in respect of such insufficient Examination.

Mr. *Spence* now moved, that it might be referred back to the *Master* to tax the Defendant, her Costs, in respect of the Plaintiff's insufficient Examination. He observed, that if a Defendant is under an Order to put in an Answer, or in default a *Serjeant at Arms* to go against him, and he puts in an insufficient Answer, a Motion may be made that a *Serjeant at Arms* go against him; and on the same principle, it was held, in *Weston v. Jay* (c), where a Defendant was under an Order to put in an Answer to Interrogatories within four days, or a *Serjeant at Arms* to go against him, and the Defendant put in an insufficient Answer, an Order was made, on

(b) See *Cave v. Cave*, 2 vol. Lord Northington's Reports, p. 180. (c) *Ante*, 1 Vol. p. 527.

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Motion, that a Serjeant at Arms should go against him. So if an insufficient Answer to a Bill is put in, and reported such, the Plaintiff may move to obtain his Costs in respect of the insufficient Answer; and on the same principle, he contended, a Party was entitled to Costs occasioned by the reported insufficiency of an Examination to Interrogatories. He observed, that the Register, Mr. *Raynesford*, had seen precedents of such an Order. He also cited *Bonus v. Flack (b)*.

The VICE-CHANCELLOR :—

You may take the Order.

(b) 18 Ves. 287.

Ex parte BIGNOLD and KENT, Assignees of
ROBERT LEEDS, a Bankrupt, *in re* SAMUEL
CHARLES.

[4th Nov. 1817.]

*Sum paid by
mistake by an
Assignee of one
Bankruptcy to
Assignees under
another Bank-
ruptcy, and
divided amongst
the Creditors, by the latter, directed to be paid out of future Effects.*

THE Petition stated, that on the 10th July 1814, a Commission of Bankruptcy issued against *Robert Leeds* and that the Petitioners, together with the said *Samuel Charles*, were chosen Assignees :—That *Samuel Charles* received divers Sums belonging to the Estate

An Assignee becoming Bankrupt with Monies in his hands, his Estate is not entitled to any Dividend on the proof made by him under the Estate of which he was Assignee, until full reimbursement of the Money which such Assignee had in his hands.

of the Bankrupt *Robert Leeds*, to the amount, altogether, of 526*l.* 3*s.* 5*d.*:—That in collecting the said Sum he incurred an expense of 27*l.* 19*s.*; but that he retained the Sum of 498*l.* 4*s.* 5*d.*, being the residue of the said Sum of 526*l.* 3*s.* 5*d.* in his own hands; and that, at the time of his Bankruptcy, that Sum was due from him to the Estate of the Bankrupt, *Robert Leeds*:—That, on the 20th April 1815, a Commission issued against said *S. Charles*, and Assignees were chosen:—That since the Bankruptcy of *S. Charles*, no other Assignee of *Robert Leeds* had been appointed; and that the Petitioner *Kent*, for himself, and the Petitioner *Bignold*, had proved the said Sum of 498*l.* 4*s.* 5*d.* as a Debt due from the Estate of *S. Charles* to the Estate of the Bankrupt *R. Leeds*; and that the Petitioner *Kent* had received two Dividends, of 5*s.* 6*d.* and 2*s.* in the Pound, upon the said Sum of 498*l.* 4*s.* 5*d.*, which amounted to 186*l.* 16*s.*:—That said *Samuel Charles*, before his Bankruptcy, had proved a Debt of 820*l.* 11*s.* 5*d.* against the Estate of the Bankrupt *R. Leeds*; and that on the 1st of August 1815, a Dividend of 2*s.* in the Pound on the Estate of *R. Leeds* was declared; which Dividend on *S. Charles's* Debt amounted to 82*l.* 1*s.* 1*d.*:—That the residue of the said Sum of 498*l.* 4*s.* 5*d.*, due from the Estate of *S. Charles*, after deducting said Dividend of 82*l.* 1*s.*, amounts to 416*l.* 3*s.* 4*d.*; which is greater than said Sum of 186*l.* 16*s.*; received by Petitioner *Kent* as aforesaid, from the Estate of *Charles*, by the Sum of 229*l.* 7*s.* 4*d.*:—That *J. S. Greenwood*, one of the Assignees of *S. Charles*, applied to Petitioner *Kent*, for payment of the Dividend declared of the Estate of *R. Leeds*, upon the said Sum of 820*l.* 11*s.* 5*d.*; and that *Kent*, being ignorant that the same ought not

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to be paid, inadvertently consented to pay the same; and not being at that time aware of the exact amount of such Dividend, the Petitioner *Kent* gave a Check, which was afterwards paid, for 90*l.*, part of the Estate of Bankrupt *Robert Leeds*, to *J. S. Greenwood*; the Petitioner *Kent* at the same time observing, that the difference between the said Sum of 90*l.*, and the real amount of said Dividend, might be adjusted when another Dividend should be declared of the Estate of *R. Leeds*:—That said Sum of 90*l.* hath been carried to the Estate of said *S. Charles*, but that same was erroneously paid by Petitioner *Kent*; and that the Assignees of *S. Charles* were not, and are not, entitled to receive any Dividend of the Estate of the Bankrupt *R. Leeds*, until they have paid unto the Petitioners said Sum of 498*l.* 4*s.* 5*d.*, which was divisible among the Creditors of said *Robert Leeds*, after deducting from the same the Dividend of said *Robert Leeds's* Estate, in respect of the said Debt of 820*l.* 11*s.* 5*d.*; and that the Petitioners have applied to the Assignees of *S. Charles*, and requested them to repay said 90*l.*, which they have refused to do. The *Prayer* of the Petition was, that said Assignees of *S. Charles*, might be ordered to repay said Sum of 90*l.*, and all future Dividends of the Estate of *S. Charles*, in respect of said Sum of 498*l.* 4*s.* 5*d.*, without any deduction, until Petitioners shall have received from the Estate of *S. Charles* the amount of said Sum of 498*l.* 4*s.* 5*d.*, minus the Dividends of the Estate of said *Robert Leeds*, to which the Assignees of said *Samuel Charles* are, or may be, entitled in respect of said Debt of 820*l.* 11*s.* 5*d.*; and that the Costs of the Petition might be paid out of the Estate of the said Bankrupt *S. Charles*.

The Petition was supported by an Affidavit of the Petitioners, verifying the statements in the Petition.

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The Affidavit, in answer, of *J. S. Greenwood*, stated, that the 90*l.* was paid to him without any objection by *Kent*, and that he placed it to the account of the Estate of *S. Charles*; and that the same, together with other Monies, has been appropriated to the partial payment of the Second Dividend, of 2*s.* in the Pound, under the Estate of *S. Charles*:—That in making up his Accounts, as acting Assignee to the said last-mentioned Estate, up to the Meeting for the Second Dividend, sundry Bills of Exchange, not due, were included for the purpose of making such Dividend as large as possible; but that, owing to some such Bills having been since dishonoured, the Money at present in the hands of the Assignees is insufficient to cover the said Second Dividend, of 2*s.* in the Pound, to the whole of the Creditors of *S. Charles*; and that it was uncertain when the outstanding Debts would be received.

Mr. *Bell*, and Mr. *Bickersteth*, for Petition.

Mr. *Phillimore*, contra.

The VICE-CHANCELLOR:—

This Sum of 90*l.*, the Petitioners state, was paid by Mistake. The objection made to the repaying it, on the part of the Assignee of *Charles*, is, that he has distributed the Funds, and has no Assets now in hand; on the contrary, after satisfying all the Creditors their Dividend of 2*s.* in the Pound, which has been declared, if they repay this 90*l.*, it must be out of their own Pockets. If there were any mistake, it was one of *Kent's*,

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he having put it in the course of distribution in that way. In order to get rid of that difficulty, it is proposed, on the part of the Petitioners, not to interfere with the Dividend already declared, nor to disturb any thing done; but to postpone the repayment till after all the Creditors have been paid the Dividend of 2 s. in the Pound, and to come upon the future Effects, if there be any, to repay this Money, if improperly paid; and to that remedy I think the Petitioners are fully entitled. There being a clear Debt belonging to the Estate of *Leeds*; he (*Charles*) being the Assignee of that Estate, having received this Sum of 526*l.*, out of which certain expenses were deducted, leaving a balance of 498*l.* 4 s. 5 d.; and owing that Debt as Assignee to the Estate, he was bound, upon the principle of *ex parte Graham (a)*, and *ex parte Rough*; and therefore must pay that Sum before his Assignees can receive any Dividend. It was an unfortunate mistake in not adverting to these Decisions; but when we find that there is such a mistake it is certainly proper to put it right, by directing that, out of the future Effects, after the Creditors of *Charles* have been paid 2 s. in the Pound in the first instance, then that 90*l.* be repaid to the Estate of *Leeds*, before any Dividend be paid to the Creditors of *Charles*; and that the Estate of *Charles* should not come upon the Estate of *Leeds* for any further Dividend till this Debt, which is due to that Estate, be paid. This is the clear result which is to be drawn from the principle acted upon in *ex parte Graham* and *ex parte Rough* (which is not reported.) It would be too narrow a construction of those cases, to hold, that as this deposit was not made with a

(a) 3 Ves. and Bea. 130. S. C. 2 Rose, 74.

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Banker, that therefore those cases do not apply; but whether a Banker or not, can make no difference. The principle is clear, that a man cannot come as a Creditor upon an Estate to which he is a Debtor. With respect to Costs, I do not think that any should be paid; it is a mistake of this Person, which he applies to set right, and which it is fit should be set right; but he cannot impose Costs upon others.

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14. A creditor of the bankrupt was, without his privity, named a commissioner under the commission, but declined acting as such, and afterwards was chosen as assignee. On the petition of a creditor he was restrained from acting as a commissioner. [*Crundwell ex parte*] 292
15. Covenant in a lease "that the lessee shall and may have and take a going-off crop from two-thirdparts of the arable lands, &c. on the effluxion of the lease or sooner determination of the said term." Lessee became a bankrupt, and his assignees, on a petition

- under 49 Geo. III. c. 121. s. 19. refused to accept the lease. Held, they were entitled to the off-going crop, paying rent up to the time when possession of the premises and lease should be delivered to the landlord. [*Maundrell ex parte*] 315
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BARON AND FEME.

1. Husband and wife assign a reversionary interest of the wife in cer-

- tain trust stock, as security for the payment of an annuity granted by the husband; the husband afterwards takes the benefit of the insolvent debtors act, and a general assignment is made of his property; the person on whose death the wife was to take, dies, and then the husband dies without having done any other act to reduce the stock into possession. Held that the wife was entitled, by survivorship, to the stock, against both the particular, and the general, assignee. [*Hornsby v. Lee and others*] - - - - 16
2. D. E., the father of C. N., after her marriage, drew a cheque in her favour, upon his bankers, for 10,000*l.* The bankers gave her a promissory note for the 10,000*l.*; 1,000*l.*, part of the principal money on the note, was paid to Wm. L. N. the husband of C. N., and he also received the interest due on the promissory note up to the time of his death. Held that, upon his death, C. N. was entitled to the note as a chose in action which had survived to her. [*Nash v. Nash*] - - - - 133

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DEVISES AND BEQUESTS.

1. Devise of an estate to A. J. subject to the payment of 500*l.*, with interest, to M. H., on her marriage or attaining twenty-one, but if she dies before marriage or twenty-one, and there be no child or children of R. H. (the testator's brother) then the 500*l.* to revert to A. J.; M. H. died before marriage or attaining twenty-one; and held, that children of R. H. born after the death of M. H. were entitled. [*Hutcheson and another v. Jones*] - - - - 124
2. Devise to testator's wife S. D. for life, and after her decease that the estate should be settled by counsel, and go to and amongst his grandchildren of the male kind, and their issue in tail male, with remainder over. Only one grandchild born in testator's life, but two born afterwards, before the death of the testator's wife; and held, a grandchild born after the death of the testator, and before the death of his wife, took an estate tail male. [*Marshall and others v. Bousfield and others*] - - - - 166
3. Bequest of the interest of the remainder of personal estate, after payment of debts and legacies, to A. S. W. for life, and at her decease to C. C., passes an absolute interest to C. C., subject to the prior life interest to A. S. W. [*Clough v. Wynne and another*] - - - 188
4. Estates devised in trust to sell, and the produce, together with the personal estate, the trustees were directed to pay and divide unto and between testator's son J. A. and his daughter A. S. wife of B. S. in equal moieties, share and share alike, the share of the daughter to be for her sole use; and in case of the death of either of them, leaving any child or children, to stand possessed of the moiety so given to J. A. and A. S., to and for the use and benefit of such child and children when they should attain twenty-one, equally to be divided between them if more than one, and if only one, &c.; and until they attain twenty-one the money to be invested in the funds, and interest applied for maintenance; and if either J. A. or A. S. should die without issue, the survivor to take. Held that J. A. and A. S. were only tenants for life of the property, with such limitations over as in the will mentioned. [*Farthing and others v. Allen*] - - - - 310
5. Words of entreaty in a bequest create a trust, although there be a power of selection amongst children

- or grand children. [*Prevost v. Clarke*] - - - - - 458
6. Bequest of "the whole of my property of whatever description, freehold, leasehold, &c. of which I may be in possession of at the time of my decease," passes real estate agreed to be purchased by the testator. [*Holmes v. Barker*] - 462

DEMURRER.

1. A supplemental bill, stating facts posterior to the original bill, but immaterial, *e. g.* facts which might be considered by the Master under the decree to be made in the original suit, held to be demurrable. [*Adams v. Dowding and another*] 53
2. A testator appointed persons residing in India and Scotland his executors. The will was not proved in England. The executors in India remitted a sum of money to their agent in England, and a creditor of the testator filed a bill against the agent of the executors to whom the money was remitted, praying an account and payment of the money to the Accountant General for security. A demurrer was put in to the bill, on the ground that no personal representative of the testator was made a party; and the demurrer allowed. [*Lowe and another v. Farlie and others*] - - - - 101
3. An original bill was filed to redeem a mortgage, and an answer put in,

- showing the plaintiff had no title to call for a redemption. Afterwards, a right to redeem was purchased, and the bill amended. Demurrer to the amended bill allowed, and, on application, full costs given. [*Pilkington v. Wignall*] - - - 240
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EQUITABLE MORTGAGE.

See BANKRUPTCY, 12.

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When some exceptions to an answer are over-ruled, and others allowed, the Master should report as to which exceptions are allowed, and which disallowed. [*Agar v. Gurney and others*] - - - - - 389

FRAUD.

1. A married infant, by the solicitation of himself and his brother, an attorney, obtained a transfer of stock from trustees a few months before he came of age, and after coming of age received a transfer of the residue of the stock to which he was entitled, and then assigned all his property to two creditors who had struck a docket against him, they agreeing not to prosecute the docket;

- held to be a fraud in the infant, and that he recognized the payment when of age, and therefore, and because the agreement was contrary to the spirit of the bankrupt laws, such assignees held not entitled to call for a repayment of the money paid during the infancy. [*Cory and others v. Gertcken and others*] 40
2. A lease sought to be set aside as having been obtained by surprise and fraud; but, under the circumstances, the bill dismissed. [*Smyth v. Smyth*] - - - - - 75
3. J. S. in his life time received money to pay custom-house duties for H. and M., and there being reason to believe the duties were not paid, H. and M. called upon the administrator of J. S. to invest in the funds, in the names of trustees, a sum sufficient to answer the duties if H. and M. should be called upon to pay them. Many years elapsed without any claim of the duties, and the plaintiff called for a re-transfer of the funds, but no other relief was given except a direction that the dividends which had accrued on the fund should be paid to the plaintiff. [*Linton and Ux. v. Hyde and others*] 94
4. On one of two partners retiring from trade, it was left to arbitrators to determine (amongst other things) what was to be paid to the retiring partner for the good-will of the trade, and they, on an understanding that the retiring partner would

- not set up the trade in the same street or its vicinity, awarded 500*l.* as the share of the retiring partner for the good-will, which was paid, but no mention was made in the award as to the retiring partner not carrying on the trade in the same street or its vicinity. Afterwards, he having set up the trade in the same street, a decree was made, on parol evidence of the understanding on which the award was made, enjoining him, on the ground of fraud, from carrying on the same trade in the same street or its vicinity. [*Harrison v. Gardner*] - - - 198
5. A purchase by a nephew, from his uncle, who (unknown to the nephew) was insolvent, and died soon after the purchase, for a valuable consideration, the adequacy of which was disputed; held to be unimpeachable by creditors of the uncle. [*Copis and others v. Middleton and others*] 410

INFANT.

See FRAUD, 1.

INJUNCTION.

- Injunction granted to stay waste, and from sowing land with mustard seed, or any other pernicious crop. [*Pratt v. Brett*] - - - - 62

INSURANCE MONEY.

- J.B. tenant for life, remainder to W.B. for life, remainder to J. B. in fee.

During life of J. B., houses on the estate, insured by him, were burnt down, and insurance money paid to J. B., which was placed in the funds in his name. J. B. by his will devised the estate to R. S. W. in fee, and his personal estate to W. B. W. B. applied part of the insurance money in repairing a house upon the estate. The insurance money, unapplied, remained standing in J. B.'s name. W. B. by his will, stated the circumstances as to the fund so standing in his brother's name, and bequeathed the residue of his personal property. Held, that the insurance money unapplied was subject to the uses of the settlement, and passed to R. S. W. the devisee of J. B. [*Norris and others v. Harrison and others*] - - - 268

LANDLORD AND TENANT.

See BANKRUPTCY, 15, 17.—INJUNCTION.

LEASE.

See POWER, 2.

LEGACY.

1. Legacy held, upon the wording of the will, to be conditional; and the condition not being performed, the legatee not entitled to the legacy. [*Pink and others v. De Thuissey*] 157
2. Upon the words of the will, legacy decreed, though the fund out of which

it was directed to be paid, failed. [*Mann v. Copland*] - - - 223

3. Legacies of 1,400 l. and 11,000 l. Bank Stock, held not to pass an additional capital given by the Bank subsequent to the will, and before the testator's death, in respect of the stock, under the power contained in the 56th Geo. III. c. 96. [*Norris and others v. Harrison and others*] 268

4. By will, the principal, of certain legacies, was given to two daughters, to be paid on marriage with the consent of the executors, and on the death of either without having married with consent, her legacy to go to the survivor. By a codicil it was provided, that if either of the daughters died before twenty-five or marriage with consent, the legacy of such daughter should go to the survivor. One daughter married before twenty-five, without consent. Held, she was not entitled to the legacy. *Quære*, Whether a second marriage with consent would entitle her to the legacy. [*Malcolm and others v. O'Callaghan and others*] - - 349

MISDESCRIPTION OF BANKRUPT.

See BANKRUPT, 3, 4.

MISTAKE.

See PAROL EVIDENCE.

ORDER IN BANKRUPTCY.

See BANKRUPTCY, 1.

PARTIES.

See POWER, 2.

PARTNERS.

See FRAUD, 4.

Quere, Whether one of two partners, who has retired from an active concern in the business, can be compelled to look into the partnership accounts, to state the result of them as to particular transactions which the acting partner had transacted, and given an account of by his answer. [*Seeley v. Boehm* and others] 176

PLEA.

1. A plea, stating no new matter in bar of the suit, over-ruled. [*Steff v. Andrews* and Ux.] - - - - 6
2. Plea, founded on the stat. 32 Hen. VIII. c. 2., to a bill of discovery, overruled, though good in substance, because no specific answer given by it to certain statements in the bill. Afterwards, on cross motions, the plaintiff was allowed to amend his bill on terms, and the defendant to make a new defence. [*Crow* and others v. Sir *John Tyrell*, bart.] 397

PROPERTY TAX.

Where the agent of an executor paid interest on a legacy for 17 years, without deducting the property tax,

held, he could not afterwards deduct, out of future interest due, the amount of the property tax on such precedent payments. [*Currie* and others v. *Goold* and Ux.] - - 163

PAROL EVIDENCE.

See FRAUD, 4.

On a bill for a specific performance of an agreement by several persons, to enter into several bonds for 1,500 *l.*, parol evidence permitted to be read, to show that the agreement was to give a joint bond for 1,500 *l.* and not separate bonds to that amount. [*Lord William Gordon* and Ux. v. *Marquis of Hertford* and Ux. and others] 106

PORTIONS.

By a settlement before marriage, lands were given to trustees for five hundred years, in trust, that if the intended husband and wife should leave one or more daughter or daughters, younger son or sons, that should be living at the time of the decease of the survivors of them, the trustees should raise, &c. 2,000 *l.* for the portion or portions of such daughter or daughters, younger son or sons, the same to be paid to such daughter, if but one, and no younger son, at eighteen or marriage, and to such younger son, if but one and no daughter, at twenty-one, with allowance for maintenance in the mean time, &c.; and if there should be more than

one daughter or younger son, then to be paid to such daughter or daughters at eighteen or marriage, and to such younger son or sons at twenty-one years, &c. Held, that the settlement did not vest any thing in children who died before the decease of the surviving parent. [*Hotchkin v. Humfrey and others*] - - 65

POWER.

1. A power given to testator's wife to dispose of a moiety of a leasehold estate, by a will "duly executed and attested;" and in default of appointment, the same was bequeathed "unto the executors or administrators of her my said wife, to and for his, her or their own use and benefit." A will, neither signed, or sealed or attested, held not to be an execution of the power; and no executor being named in the will, the administrator of the testatrix was held entitled to the moiety of the leasehold for his own benefit. [*Sanders v. Franks*] - - - - - 147
2. Information and bill to set aside three leases, one for 999 years, and two for 1,000 years, granted by a vicar and vestrymen under an unlimited power to lease, given by an act of parliament. Held, that the Attorney General ought not to have been made a party, and that the leases were valid. [*Attorney General v. Moscs and others*] - - 294
3. A power to appoint a sum of money,

in such shares as the appointor shall think proper, amongst his children; the money so appointed, to be paid to sons at twenty-one, and to daughters at that age or marriage, if the appointor should be then deceased, or if living, three months after his death. Two of the children having attained twenty-one, died before the appointor; and held, that no interest vested in them. [*M'Ghie v. M'Ghie*]

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PRACTICE.

1. Where the defendant sets down a plea, and upon its being called on does not appear, the plea will, on affidavit of the plaintiff having been served with an order to set down the plea, be over-ruled; and if no such affidavit is produced, the plea will be struck out of the paper. [*Mazarredo v. Maitland*] - - - - 38
2. Plea struck out, refused to be restored to the paper, unless on an affidavit, accounting for the party not being prepared, - - - - *Ib.*
3. A cross bill, taken *pro confesso*, ordered, on motion, to be read at the hearing of the original cause. [*Cory and others v. Gertcken and others*] 43
4. On an undertaking to speed the cause, on a motion to dismiss, the plaintiff has only the term, and not the vacation also, to proceed. [*Wilson v. Timpson*] - - - - 123
5. A common injunction was obtained

- against two defendants, and afterwards extended to stay trial. On the coming in of the answer of one defendant, an order Nisi must be obtained before a motion can be made to dissolve the injunction. [*Naylor and others v. Middleton and another*] - - - - - 131
6. A bill for a foreclosure cannot be set down as a short cause, unless by consent. [*Rashleigh v. Dayman*] 147
7. Leave given by a decree to exhibit interrogatories, to prove a will of real estate. The examiner, thinking he was not authorized to publish the depositions, an order was made that they should be published. [*Rossiter v. Pitt*] - - - - - 165
8. It is not impertinence to state, in amendment of a bill, part of the answer by way of pretence, and interrogate as to it. [*Seeley v. Boehm and Taylor and others*] - - 176
9. Motion to advance a demurrer to a bill for an injunction and receiver, refused, on account of the delay in the filing of the bill. [*Jones v. Taylor and others*] - - - - - 181
10. Leave to prosecute a suit given to a creditor, a decree made some years before not having been prosecuted. [*Powell v. Walkworth*] - - - 183
11. When several exceptions are taken to an answer, and the Master reports the answer sufficient, and one general exception is taken to his report, and some of the exceptions to the answer are allowed, some not, and others waved, the Court, in its discretion, may order the deposit to be divided. [*Dawson and others v. Busk and another*] - - - - 184
12. When a plea is directed to stand for an answer, with liberty to except, the plaintiff is entitled to costs. [*Howling v. Butler*] - - - 245
13. Motion, on last seal after Trinity term, to dissolve an injunction, and that a day might be named in the vacation for making the order absolute; but held, the defendant was only entitled to an order Nisi. [*Rew v. Dixon*] - - - - - 258
14. Defendant, under the circumstances, allowed, after the examination of witnesses, but before publication, to have a commission to examine witnesses as to the point, whether a witness, examined by the plaintiff, was not interested in the suit. [*Vaughan and others v. Worrall*] 322
15. The usual form of the order when full costs are given on the allowance of a demurrer. [*Pilkington v. Wignall*] - - - - - 348
16. A motion cannot be made for the opinion of the Court, to obviate difficulties of the Master as to the form of his report. [*Agar v. Gurney and others*] - - - - - 389
17. A mistake being made in a decree, by misnaming the defendants, and the Accountant General having, in consequence, entered an account in wrong names, an order was made that the Register should alter the decree, and that the Accountant General should also alter the account

- in his books. [*Hawker* and another v. *Duncombe* and another] - - 391
18. The plaintiff in an original bill, by amending the same after a cross bill filed, loses his right to an answer before he answers the cross bill; but in order to stay proceedings in the original bill until an answer is put in to the cross bill, an order must be obtained to stay such proceedings. [*Noel v. King*] - - 392
19. Upon an order being made on the plaintiff to elect whether he will proceed at law or in equity, and a motion afterwards to discharge that order, the Court will, if there are sufficient facts before it, decide whether the party ought to be put to an election without a reference to the Master. [— v. —] - - 395
20. The Master reported that the plaintiff had put in an insufficient examination to interrogatories. Held, on motion, that defendant was entitled to a reference to tax the costs in respect of such insufficient examination. [*Hubbard v. Hewlett*] 469
21. Where a bill to perpetuate testimony is dismissed, it is not necessary to state in the decree that it is to be without prejudice to the perpetuating of the testimony. [*Mackrell v. Hunt*] - - - in note, 37
22. When an order *Nisi* is obtained to dissolve an injunction, on the coming in of the answer, and exceptions are shown for cause, and the *Master* reports the answer sufficient, the injunction is thereupon dissolved, and

no further motion is necessary. [*Hutchinson v. Markham*] - - 355

PUBLIC POLICY.

Securities given in consideration of withdrawing an opposition to a bill in parliament are, on grounds of public policy, illegal; and on a bill to have such securities delivered up, and stock, &c. transferred to plaintiffs, a demurrer being put in, the same was over-ruled. [*The Vauxhall Bridge Company v. Earl Spencer and others*] - - - - - 356

REFERENCE.

See AWARD.

RENT.

Tenant for life died at nine o'clock at night on the 29th September; and held that he was not entitled to a quarter's rent due on that day. [*Norris and others v. Harrison and others*] - - - - - 268

RECEIVER.

1. The next friend of infant petitioners not permitted to act as receiver. [*Stone and another v. Wishart and others*] - - - - - 64
2. When parties neglect to propose a receiver before the Master, *quære*, whether the Master can propose one, or whether an application ought not to be made to the Court. A stranger cannot propose a receiver. In this

case the neglect of parties to propose being accounted for, the Master was directed to review his report, and receive their proposal of a receiver. [*Attorney General v. Day*]

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3. Receiver General of a county cannot be appointed a receiver. [*Ibid.*]

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SEQUESTRATION.

Sequestrators took possession of certain mortgaged estates. The mortgagees, on petition, obtained an order to have the rents and profits of the mortgaged estates in the hands of the sequestrators applied towards payment of their mortgage money, &c. and possession of the mortgaged estates delivered up to them. [*Walker and others v. Bell*] - 21

SETTLEMENT.

See BANKRUPTCY, 13.

SUPERSEDING OF COMMISSION OF BANKRUPTCY.

See BANKRUPTCY, 3, 4, 5, 11.

SUPPLEMENTAL BILL.

See DEMURRER, 1, 4.

SURETY.

Semble. A surety who pays off a specialty debt is to be considered as a specialty creditor of his principal.

[*Robinson v. Ann Wilson and another*] - - - - - 434

VENDOR AND VENDEE.

See FRAUD, 5.

1. When purchase money is agreed to be paid, and a conveyance made at a given time, and disputes arise as to the title, and the purchaser proposes to the vendor to lay out the purchase money in exchequer bills till it is wanted, but the vendor returns no answer, and the purchase money is laid out in exchequer bills, the vendee is at the risk, and is entitled to the benefit of such purchase money, with 4*l.* per cent. interest. When a purchase is completed, the vendee is entitled to the rents and profits of the estate until possession is given, and the vendor to his purchase money, with interest; and if, by the neglect of the vendor, no rents and profits have been received, he will be liable for what he might have received, unless the purchaser has taken possession. [*Gaisford v. Acland and another*] - - - 28
2. Purchaser under a decree considered only as owner of the estate from the time he pays in his purchase money, and not from the confirmation of the report, by which he is declared the best purchaser, he having taken objections to the title. [*Mackrell v. Hunt*] - in note, 34
3. Costs of perpetuating the testimony of a will allowed to a purchaser. [*Ibid.*] - - - - - 37

4. Mortgage debt and premises were assigned by the mortgagee to trustees, with powers to sue and give acquittances, and all the same powers as the mortgagee had. The mortgaged estate was sold under a decree, and the purchase money paid into court. Held, on an exception to the title, because the scheduled creditors were not parties to the bills, but only the trustees, that the trustees could make a good conveyance; and that the exception ought

not to have been made to the title but to the conveyance. [*Binks v. Lord Rokeby* and others] - - 227

5. Exceptions to the Master's report, in favour of the title of the vendor of a bishop's lease, on the ground of the non-production of the bishop's title, overruled. [*Fane v. Spencer*]

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WASTE.

See INJUNCTION.

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 END OF THE SECOND VOLUME.
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