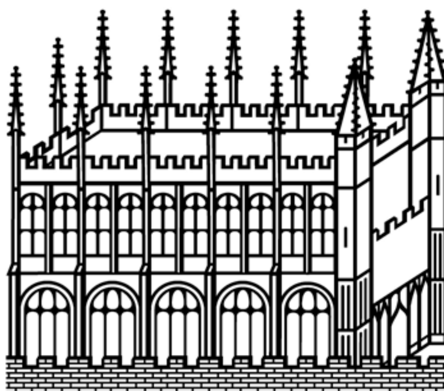

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REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE COURT

OF THE

VICE CHANCELLOR OF ENGLAND,

DURING THE TIME OF

THE RIGHT HON. SIR JOHN LEACH.

BY

H. MADDOCK AND T. C. GELDART, Esqrs.

OF LINCOLN'S INN, BARRISTERS AT LAW.

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ADVERTISEMENT.

At the suggestion of a Friend, the task of preparing for the Press the late Mr. Maddock's MS. Notes of Cases decided in the Vice-Chancellor's Court was gratuitously undertaken by the present Editor.

The following Reports of Cases occurring in the period between the publication of Mr. Maddock's Fifth Volume and the First Volume of Messrs. Simons and Stuart, are compiled, partly from his Notes, and partly from sources supplied by the kindness of friends. The completion of Mr. Maddock's Reports will be comprised in two Numbers, which, with that last published by himself, will form a Volume. The Editor regrets that he has not, in every instance, been able to give the Arguments of Counsel; but the Names of all the Cases cited are noticed, and references to the Registrar's Books are subjoined of all Cases in which entries could be found there.

Lincoln's-Inn,
13*th June* 1827.

A

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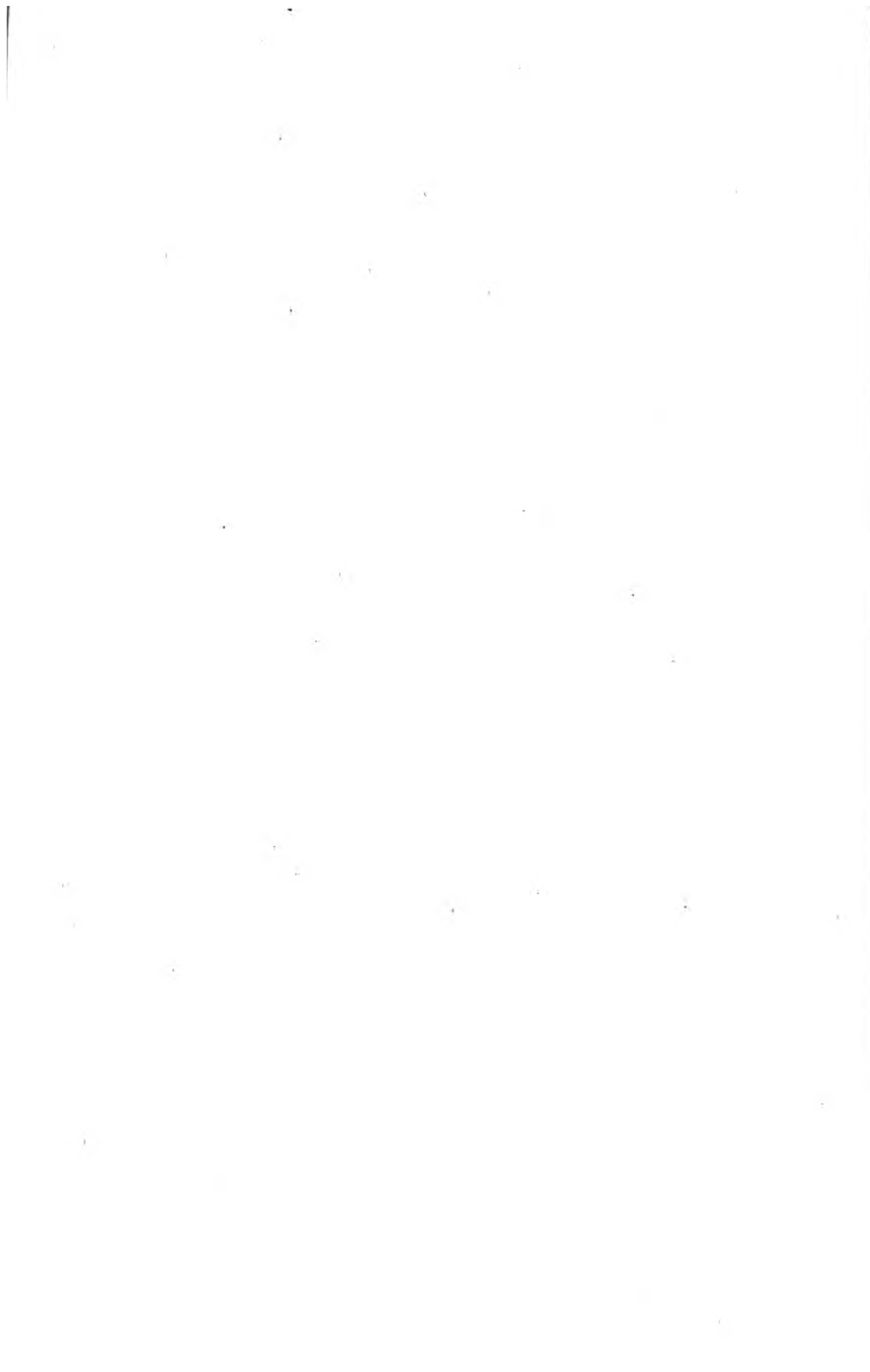
DIRECTIONS TO THE BINDER.

This Number, with the other one edited by Mr. Geldart, and the one last edited by Mr. Maddock, are to form a separate Volume, to be lettered " Maddock and Geldart's Reports." The Advertisement to the Second Number to be placed after the Title-page.



CASES

BEFORE THE

VICE-CHANCELLOR.

ROSS *v.* SHERER and others.

1821.
15th Jan.

The Bank having notice of a Bill, refused to permit a Transfer of Stock, though no Injunction. Ordered, that they should permit the Transfer on a certain day, unless Plaintiff obtained Injunction in the mean time.

THE Plaintiff filed his Bill against Husband and Wife, and the Trustees, to her separate use, alleging an interest by the Wife's appointment, and praying an Injunction to restrain the Transfer of the Trust Stock.

The Plaintiff never moved for the Injunction; but the Bank, having notice of the Bill, refused to permit the Transfer. The present application by the Defendants, who had some time since put in their Answer, was, that the Bank might be ordered to permit the Transfer.

The *Vice-Chancellor* made an Order that the Bank of England should permit the Transfer at any time after a certain day named, unless in the mean time the Plaintiff obtained an Injunction.

1821.
16 Jan.

SMITH *in re* HAY.

If Managing Partner draws out Monies, and conceals the fact, or disguises it in the Partnership Books, this is Fraud, and proof may be made against the Separate Estate. Otherwise, if the transaction is duly entered in Books.

THE question in this case was, whether the joint Estate should prove against the separate Estate.

The VICE-CHANCELLOR :—

If one Partner be intrusted with the entire management of the Partnership Concern, and he withdraws Monies for his separate use, which he duly and openly enters in the Partnership Books, this is not a fraud which will entitle the joint Estate to prove against the Separate ;— it would be otherwise, if by the entries in the Books he disguises the transaction, or wholly omits and conceals it.

1821.
17th Jan.

ROBINSON *v.* RIDLEY.

In estimating lasting Improvements, old Buildings pulled down, if incapable of repair, to be valued as old Materials only.

A SALE of an Estate made to the Solicitor in the Cause was sought to be avoided.—He had pulled down a part of the Buildings and erected new ones.

The *Vice-Chancellor* ordered that his Improvements should be valued, and the Estate put up for Re-sale at the improved value, and that he should be held to his bargain if no higher bidder; and declared, that in estimating the Improvements the old Buildings, if incapable of repair, should be valued as old materials; but otherwise as buildings standing.

WHITCOMB *v.* FOLEY.

1821.
23d Jan.

Further directions by Motion, when reference to Master is made on Motion.

BILL by Vendor for specific Performance.

The common Order of reference to the *Master* was made as to title, and his report was in favour of the Vendor. The Defendant took exceptions, which were heard before the *Vice-Chancellor*, and allowed.

The present application was on a Motion by the Defendant to dismiss the Vendor's Bill, with Costs.

The *Vice-Chancellor* ruled, that it was a proper case for further Directions by Motion, and made the Order accordingly.

FENNER *v.* TAYLOR.

1821.
26th Jan.

Where one Residuary Legatee is Plaintiff, and the other Defendant, Court will not tax Costs, as between Solicitor and Client, without Consent.

THE Plaintiff, one of two residuary Legatees, filed this Bill for an Account. The other residuary Legatee was Defendant: and now upon winding up the cause, on further Directions, the question was, Whether the Court should order Costs of Plaintiff and Defendant, residuary Legatee, as between Solicitor and Client, the Defendant not consenting thereto. After inquiry as to the Practice, the *Vice-Chancellor* held, that Costs could not be so ordered without the consent of the other residuary Legatee, the Defendant.

1821.
26th Jan.

HACHETT *v.* PATTLE.

By terms of French Contract, Rentes viageres, *for two Lives in succession, were after death of first Life payable with all arrears to Survivor. The Representative of first Life relieved against the loss of Arrears occasioned by the Revolution.*

THE late Mr. *Pattle* purchased a *Rente viagere* for Two Lives, one of which Lives was the Plaintiff's Wife; and in the Contract it was stated that she was to hold during her Life, for her own benefit, and that Mr. *Pattle* should have power, after her death, to dispose of the Interest during the surviving Life, by his Will; and the Contract provided that after the death of the first Life, the growing Payments, as well as all Arrears, were to be paid to the second Taker.

Mr. *Pattle*, by his Will, directed another *Rente viagere* to be purchased for Two Lives, one of which was to be the Plaintiff's Wife, who was to enjoy it for her own benefit for her Life, with remainder over. This Contract was in the same form as the first.

The *Rentes viageres* ceased to be paid in consequence of the Revolution in France, and Mrs. *Hachett* died before the Peace of 1815; and the question was, whether the Arrears during her Life, which were recovered in consequence of the Treaty of 1815, were to belong to her Representative, or to the Party entitled after her Death.

The VICE-CHANCELLOR:—

The terms of the Contract, as to the payment of the Arrears to the surviving Life, were to be considered as applicable only to such Arrears as resulted from *the mode adopted* by the French Government; but if it could be otherwise considered, he was of opinion that Mrs. *Hachett*'s Representative had a right to be relieved against the literal expression, in respect of the accident

of the Revolution, which had occasioned the Arrears, and against which no diligence or attention on her part could guard.

1821. HATCHETT v. PATTLE.

Mr. *Lomax* for the Plaintiff.

Mr. *Horne*, and Mr. *Bligh*, for the Defendant.

1821. 6th Feb.

BRAY v. FROMONT and others.

A Partner may give to a Third Person interest in his Share, but cannot make him a Partner.

THE three Defendants worked a Coach from London to Bath, each finding Horses for certain stages.

Smith, one of the Defendants, employed the Plaintiff to provide Horses for a part of his distance.

The present Bill was for an Account, and payment of a proportionate share of Profits.

The *Vice-Chancellor* held, that the Plaintiff, claiming under *Smith*, must be subject to the Account between *Smith* and the other Defendants, and could claim payment only out of any Balance due to *Smith*; but that it would be otherwise if the Co-Defendants had accepted him in the Concern in lieu of *Smith*.

1821. 8th Feb.

RAMSBOTTOM v. PARKER.

To form a Case for Relief on the ground of Oppression on the one side, and Distress on the other, the disadvantage of the Bargain must be within the view of the Parties.

THIS was a Bill by the Assignees in Bankruptcy of *Penfold* and *Springett*, late Bankers at *Maidstone*, to avoid a Contract of dissolution of Partnership, made nearly Two Years before the Bankruptcy, with the Defendant, upon the ground that it was oppressive, and that improper advantage was taken by the Defendant

1821.
8th Feb.

RAMSBOTTOM
v.
PARKER.

of his power over the Bankrupts, by means that they were largely his Debtors, and that he had Judgment against them.

In effect, the Defendant had been permitted to retire upon payment of a Sum of 1,131 *l.*; whereas it had been ultimately proved that his fair proportion of loss upon then existing Debts, would have amounted to 12,000 *l.*

The *Vice-Chancellor* observed, there was no head of Equity more difficult of application than the avoidance of a Contract upon the ground of advantage taken of distress; but that there could be no title to such relief where the advantage or disadvantage of the Contract was to be the result of future contingencies, and was not within the view of the Parties at the time: that it appeared to him, upon the Evidence, that at the time of the Contract there was no apprehension of loss to any such extent, in the minds of any of the Parties; and that the Bankrupts had entered into the bargain, not from the pressure of distress, but under the influence of false hopes.

A point incidentally arose in this Case, as to the legality of a Stock transaction.

The Defendant, Mr. *Parker*, had lent a sum of Stock to the Partnership, and had taken personal Securities from each of his Partners for their proportions of it. At the dissolution they had jointly covenanted to replace the Stock due, by Instalments. One Instalment was transferred, and a second was over-due; and then it was agreed that the transaction should be converted into a Money Loan, taking for the amount the money

price of the Stock when Mr. *Parker* lent, which was considerably higher than the existing price, and two or three years further time were given for the payment.

1821.

RAMSBOTTOM v PARKER.

The VICE-CHANCELLOR :—

The Agreement is clearly usurious. It was a present demand for so much Money as would actually purchase the Stock due; and the addition in Money made by the Agreement was for forbearance.

As to the Stock not due, there was a difference, because of the uncertainty of the price of Stock when it would fall due. I should have thought a Contract for a higher sum in Money than the actual value of the Stock at the time might have been good if there had been no additional forbearance; but the additional forbearance forming a part of the Consideration, brings the Case within the principle of the Instalment already due. He did not, however, take occasion to decide this point.

1821. 10th & 22d Feb.

FENWICK v. REED.

After thirty years, the handwriting of a Letter not necessarily proved, where the Letter affords intrinsic evidence of its authenticity. Where there is no existing direction to such a Letter, primâ facie, *it must be intended to have been written to the party amongst whose papers it was found. The Ejectment was afterwards tried at Law, and the Jury would not presume a Conveyance, and the Court supported the Verdict.* 5 Barn. & Ald. 232.

BILL for an Account of Rents and Profits received by Defendant, and those under whom he claimed, and for an Account of Debts and Interest originally due to Defendant's Ancestor, and purchased by him, and for the delivery of the Estate, and Payment of the Balance due on the Account.

The Defendant's Ancestor entered into Possession in the year 1752; and it was insisted by the Plaintiff, that

1821.

FENWICK v. REED.

he held Possession only to satisfy the Debts due to him, by perception of Rents and Profits, and that the Debts were now overpaid.

There was no evidence of any acknowledgment to that effect, or of any Accounts kept; and the Defendant insisted that a Conveyance in fee ought to be presumed.

The *Vice-Chancellor* was strongly of that opinion, but retained the Bill for a year, with liberty to the Plaintiff to proceed by Ejectment, the Defendant not defending himself at Law, upon the ground that the Debts were fully paid more than twenty years since, or were now unpaid.

In this Case, several points of Evidence were ruled.

1st. That a Letter appearing upon the face of it to be written by the Defendant's Ancestor, upon the subject of the suit, and coming out of the custody of the Representative of his Attorney, and dated in 1748, was admissible, without proof of the hand writing.—The contents of the Letter, like the contents of a Deed, affording intrinsic evidence in its favour.

2d. That such a Letter was found amongst the Papers of the Attorney was *primâ facie* evidence, that it was written to the Attorney, there being no address to it, the envelop being lost.

3d. That a Letter found amongst the papers of the Attorney, not addressed, but appearing by the contents to be written upon the subject, by a person employed as the London Law Agent of the Defendant's Ancestor, was also admissible in evidence.

ANON.

1821.
20th Feb.

Court will not order the Receiver of an Infant's Estate to keep down the Interest of a Mortgage Debt, unless the Master reports it is due.

MOTION, that Receiver of an Infant's Estate might be directed to keep down the Interest of two Mortgages.

The *Vice-Chancellor* refused to make the Order, because it would be an acknowledgment that the Mortgages were due, which the Court would not assume until after a *Master*'s Report; that the proper Order was for the *Master* to inquire into circumstances, and to state priorities.

DOLTON *v.* HEWEN.

1821.
22d Feb.

A Devise to the Testator's Wife, she paying his Debts, and 15l. to A. B. if so much can be spared, and the rest of the Estate to go to A. B. after her death, gives her the Fee and a Power of Sale.

THIS Bill sought a Decree, that the Defendant might surrender to the Plaintiff a Copyhold Estate, which he held under a Conveyance from *Elizabeth Young*.

Benjamin Young made his Will in the following words, *inter al.* " I give all that my House, &c. to *Elizabeth*, my Wife, whom I name sole Executrix, she paying my Debts and Funeral Charges; and also, I give unto *Samuel Dolton*, her Nephew (the Plaintiff) the sum of 15 *l.* when he shall attain twenty-one, if so much can be spared out of the Estate, and she leaving the rest of the Estate to the said *Samuel Dolton*, after

1821.

DOLTON v. HEWEN.

her decease. And further, my will is, that if the said *Samuel Dolton* shall depart this Life before he attains twenty-one, the said *Elizabeth* to have it to her will and disposal." *Elizabeth Young* sold this Estate to the Person from whom the Defendant derived it.

It was insisted, that under this Will *Elizabeth Young* was a Trustee for others, with a resulting Trust to herself for Life, with Remainder to Trustees, and that Defendant was therefore such a Trustee.

The *Vice-Chancellor* held, that the gift to her, she paying Debts and Funeral Charges, and 15 *l.* to the Plaintiff, was a plain Gift in fee to her; and that for these purposes she had a power of Sale; and that a Purchaser under a power of Sale for payment of Debts was not bound to inquire into the Debts; and that if the price of the Estate was more than would satisfy the Debts and Funeral Charges, and 15 *l.*, the Plaintiff's remedy was not against the Purchaser, but against *Elizabeth Young*, or her Representative.

1821.
24th Feb.

ANON.

Injunction not granted to restrain a Mortgagee from selling under Power in a Mortgage Deed; otherwise, where Trustee for Sale, if he proceeds precipitately, without notice to both Parties.

A MOTION was made by Plaintiff, a Mortgagor, to restrain the Defendant, the Mortgagee, from proceeding to a Sale of the mortgaged Premises, the Mortgage Deed containing a Power of Sale; it being alleged that due Notice had not been given so as to afford a fair probability of an advantageous Sale.

1821.
24th Feb.

ANON.

The *Vice-Chancellor* refused the Motion; considering, that if the *ex parte* Case were true, the Plaintiff might relieve himself by giving Notice to the Purchaser that he had filed a Bill to impeach the Sale; and that it was better to put him to the inconvenience of an additional Party to his Suit, than to risk a possible injury to the Mortgagee by interrupting the Sale.

On a subsequent mention of the Case it appeared that the Power of Sale was in a Trustee; and for this reason the *Vice-Chancellor* granted the Injunction, the Trustee not having apprised the Mortgagor of his intention to proceed to a Sale, and it being his duty to attend equally to the interest of both *Cestui que Trusts*, and to apprise both of the intention of Sale, so that each might take the means to procure an advantageous Sale.

PARKER *v.* CALCRAFT.
DUNN *v.* SAME.

1821.
28th Feb.

After Bill filed by second Incumbrancer, first Incumbrancer in possession cannot pay surplus Rents to Debtor.

THE late Mr. *Charles Strutt* granted an Annuity of 2,200 *l.* a year out of his Life Estate, with a power to the Annuitant to appoint a Receiver, who was appointed accordingly. He then granted a second Annuity to the Plaintiff.

In 1800 the Plaintiff filed his Bill against *Strutt*, and the first Annuitant, for an Account and Satisfaction after the Arrears paid, and for a Receiver.

The Plaintiff understanding that the first Annuity was in Arrear, did not proceed in his Suit, and in 1812 *Strutt* died.

1821.
28th Feb.

PARKER
v.
CALCRAFT.
DUNN
v.
SAME.

After his death, *Scott*, a general Creditor of *Strutt*, filed a Bill, to which he made the first Annuitant a party, alleging that he was overpaid, and this being admitted, the balance due from him was paid into Court in that Suit.

The Plaintiff learning this fact, filed a Supplemental Bill, to which he made the Executors of *Strutt* parties, and prayed that it might be declared that he had a lien for the Arrears of his Annuity upon the sum so paid into Court by the first Annuitant.

The VICE-CHANCELLOR :—

The Suit of 1800 was notice to the first Annuitant of the Plaintiff's title to the surplus Rents, after satisfying the first Annuity; and he could not afterwards safely pay the surplus Rent to *Strutt*, and consequently not to his Representatives. It is no Answer that the Suit was not prosecuted; the first Annuitant was bound by it until it was dismissed. It is true that an Incumbrancer before Possession has no title to Rents, but a Bill by an equitable Incumbrancer is equitable Possession.

1821.
1st March.

BYRCHALL *v.* BRADFORD.

Ordinarily, the Court, on a Bill for a Legacy of Stock, does not inquire whether the Stock Legacy could have been invested at an earlier period; but where the Executor is a Trustee also, and retains the Legacy without investing, he is liable for any loss occasioned by the non-investment.

IN this Case, an Executor was constituted a Trustee as to a Legacy of 1,200 *l.* He accounted for the residuary Estate, and retained the amount of the Legacy. The Will directed it to be invested in the Funds; and the question in the cause was, whether the *Cestui que Trusts* of the Legacy were now entitled to claim against the Executor as much Stock as the 1,200 *l.* would have produced, if invested at the time of the settlement with the residuary Legatee.

The Stocks had risen in the mean time, and the Executor had never invested the Legacy.

The VICE-CHANCELLOR:—

Generally speaking, this Court does not enter into the consideration whether the Executor could, or not, at an earlier period, have invested a Stock Legacy, but directs it to be invested by its Decree. But in the particular case, this Executor was in the situation of another Trustee, to whom a Legacy is paid upon Trust, to invest it. His retainer after accounting for the residuary Estate is equivalent to the Payment of another Trustee. If the *Cestui que Trust* sustained a loss by the Trustee neglecting his duty to invest, he has a right to charge the Trustee with the loss.—In this Case, however, it was suggested, that the *Cestui que Trusts*, who were all of age, had consented to the delay of Investment, and the *Vice-Chancellor* directed an inquiry as to that fact.

1821.
1st March.

CURTIS v. CURTIS.

After an Annuity for Life to Father of part of Dividends, and remainder as to the whole Dividends, subject to Father's Annuity, Gift to Children when they attained twenty one, is a Gift to all living when the eldest attains twenty-one.

THE residuary Bequest in the Will was, *inter alia*, in the following words: "I give to *A. B.* and *C.* my Executors, all the Residue and Remainder of my Estate, in Trust, to collect and get in the same with all convenient speed, and then in the first place to invest a Sum of 10,000 *l.* in the Public Funds, in their names, and in the name of my Son *T. C.*; and as to the Dividends and Interest thereof, in Trust, to pay and apply to my Son *T. C.* 250 *l.* a year during his Life, for his own use, and the remainder to accumulate for the use of his Children, until they shall attain their Ages of twenty-one years; and when they shall have respectively attained their Ages, as well Sons as Daughters, in Trust, to divide the Principal equally amongst them, share and share alike; but in case of the death of all my said Grandchildren, under age, I give the Interest, or so much thereof as my said Trustees shall deem necessary, for the use of my Grandson, the Son of my Daughter *Mary*, until his Age of twenty-one, and then in Trust as to Principal and Accumulation to him for his own Use and Benefit."

The *Vice-Chancellor* held, that the words, "the remainder to accumulate," carried the residue of the Dividends after paying *T. C.* 250 *l.* a year during his Life, and the whole Dividend after his death; and that all the Children of *T. C.* living when his eldest Child attained twenty-one, took vested Interests in the whole Principal Sum and Dividends, subject to the Father's Annuity.

1821.
1st March.

BENSON *v.* MAUDE.

Where Testator directs his Executors, as soon as they should think proper, after his decease, to sell as much Stock as would produce a Legacy of 12,000 l. the Legacy is not payable until the end of the year after the Testator's death.

THE Testator, in this Case, after expressing his intention to lay out a sum of 12,000 *l.* in Land during his Life, directs his Executors, if he should not accomplish it, as soon as they should think proper after his Decease, to sell out as much of his funded Property as would produce 12,000 *l.* and invest the same in Land, upon Trust, that his Executors should receive the Rents and Profits of the Land when purchased, and the Interest and the Dividend of the 12,000 *l.* until the Estate was purchased, and should pay the same, in equal Moieties, between his two Daughters, for their Lives, with Remainder over.

The question was, Whether the Daughters took the Interest of this 12,000 *l.* from the death of the Testator, or from the end of one year after his Death ?

Mr. *Bell*, Mr. *Shadwell*, Mr. *Loraine* and Mr. *Spurrier*, argued for the Parties interested, and cited *Gibson* v. *Bott* (*a*), *Fearnes* v. *Young* (*b*), *Stott* v. *Hollingworth* (*c*), and *Taylor* v. *Hibbert* (*d*).

The *Vice-Chancellor* held, that the Daughters were not to take the Interest until the 12,000 *l.* was raised by a sale of the Stock, and that this being to be done "as soon as the Executors should think proper after his Decease," amounted to the same thing as a direction to raise and pay a Legacy as soon as the Executors should find it convenient. That the Court adopted a year as the rule of convenience, and that the Legacy, therefore, could not be raised till the end of the year.

(*a*) 7 Ves. 89.
(*b*) 9 Ves. 549.
(*c*) Ante, 3 vol. 161.
(*d*) 1 Jac. Walker, 308.

1821.
5th March.

ELLIOTT *v.* LORD MINTO.

All questions respecting Real Estate belong to the Law of the Country where the Estate is situate.

THE Petitioner, who was heir of Tailzee, under a Settlement made by the late Right honourable *William Elliott*, of a Scotch Estate, filed a Bill to have his Estate exonerated from a heritable Bond by the application of Personal Estate in England.

The *Vice-Chancellor* observed, that the question, whether the Heir of Tailzee in Scotland had an Equity to be exonerated by the application of the Personal Estate, was, like every other question respecting Real Estates, to be determined by the Law of the Country where the Real Estate was situate, and could not depend upon the Law of the Country where the Personal Estate happened locally to be. That all which a Court here could do would be to refer it to the *Master*, to inquire what was the Law of Scotland to be applied to the Case; and that though such a Reference was frequently made in a simple case, it could not be conveniently done in a complex case of equitable circumstances.

It appearing that a Suit and Cross-suit were already commenced in Scotland, the *Vice-Chancellor* ordered this Case to stand adjourned until the determination there.

BIRCE v. BLETCHLEY.

1821.
6th March.

Where Letters are stated as the Agreement, no testimony aliunde *is admissible; otherwise, where stated as evidence of the Agreement only.*

ON this Case there were many objections to a Decree for a specific Performance.

The first was, that the Plaintiff had alleged a written Agreement by Letters, and the Letters alone did not explain the full terms of the Agreement; the Plaintiff insisted that the Letters were stated, not as constituting the Agreement, but as evidence of the Agreement, and that testimony *aliunde* might be given.

Upon reading the Pleadings, the *Vice-Chancellor* was of opinion that the Plaintiff had stated the Letters as constituting the Agreement, and dismissed the Bill (*a*).

COFFIN v. COFFIN.

1821.
8th March.

In equitable as in legal Waste, if one act of Waste be established, the Court will restrain equitable Waste generally.

THIS was a Motion to dissolve an Injunction granted to restrain the cutting of Trees planted or left standing for Ornament or Shelter, and also Saplings and immature Trees.

It was objected, that there was no complaint in the Bill as to Saplings or immature Trees, and therefore that the Injunction was at all events too extensive.

(*a*) This distinction is of great importance to the defence. If Letters constitute the Agreement, the Defendant may put his case upon the ground that they do not make out the Agreement stated. If the Letters are stated as evidence merely, then the Defendant may insist upon the Statute of Frauds.

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COFFIN v. COFFIN.

The *Vice-Chancellor* observed, that as to Waste at Law, if any act of Waste be established, the Court restrains, not only the particular act, but all Waste generally. So in the case of equitable Waste, if the Complaint be established as to one act, the Court will restrain all equitable Waste generally, and it will make no difference that other acts of equitable Waste were particularly restrained.

1821.
5th March.

REYNOLDS *v.* NELSON.

The Plaintiff agreed to take a House of the Defendant for two years. Afterwards on the 4th Sept. 1817, he agreed to buy the Estate of the Vendor, in consideration of 25 l. paid down, and of the further sum of 425 l. to be paid on the 25th December 1817, on or before which time the Conveyance was to be executed. An Abstract was delivered on the 20th October 1817, and afterwards a Draft of the Conveyance, with the Abstract, was sent to the Plaintiff, with a Note of the Defendant's Solicitor, stating that the Deeds were with him, and desiring to hear from the Plaintiff if any objections occurred; and many ineffectual applications were made to see the Plaintiff. A Notice was served on the Plaintiff on the 22d December 1817, that the Defendant would on the 23d, 24th and 26th, attend at the Plaintiff's House to execute the Conveyance, and, on default, he should consider the Plaintiff as refusing to proceed in the Purchase, and act accordingly. On the 2d April 1818, the Plaintiff returned the Abstract, with objections to the Title. On the 13th the Defendant distrained on the Plaintiff for Rent. On a Bill filed by the Vendee for a specific Performance, held, that the Vendor should have given notice that he considered the Agreement as at an end, and should have returned the 25 l.; and not having done so, the Court directed the usual reference as to the Title.

ON the 2d of September 1817, the Plaintiff agreed to take a House belonging to the Defendant for two years, at 21 *l.* Rent, and was let into possession. On the 4th of the same month the Plaintiff and the Defendant entered into the following Agreement:

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"1st. That the said *Henry John Nelson*, for the consideration of 25 *l.* of lawful Money of *Great Britain*, to him in hand paid by the said *John Edward Reynolds*, before the delivering of these Presents, and of the further sum of 425 *l.* to be paid as hereinafter is mentioned, doth hereby, for himself, his Heirs, Executors and Administrators, and every of them, by these Presents agree, that he the said *Heury John Nelson*, and all and every other Person and Persons whatsoever, claiming or to claim any Right, Title or Interest unto him, or any Person or Persons whatsoever, of in or to the two Houses and Lands therein belonging, now or late in the occupation of Mrs. *Mary Vale* and of Mr. *Thomas Wallis*, and the Premises thereunto belonging, situate, lying and being at *Acton* in the County of *Middlesex*, shall and will, at the proper Costs and Charges of the said *Henry John Nelson*, his Heirs or Assigns, on or before the 25th day of December next ensuing the date hereof, by such Conveyance, Assurances, ways and means in the Law, as he the said *John Edward Reynolds*, his Heirs or Assigns, or his or their Counsel learned in the Law shall reasonably devise or advise, and require, well and sufficiently grant, sell, release, convey and assure, to the said *John Edward Reynolds*, and his Heirs, or to whom he or they shall appoint or direct, all that the two Houses, Lands and Premises, situate at *Acton* aforesaid, and late in the tenure or occupation of Mrs. *Mary Vale* and Mr. *Thomas Wallis* as before mentioned, with proper Covenants to be therein contained, that the said *Henry John Nelson* at the time of such Conveyance is free from all Incumbrances, and all other fit and reasonable Covenants; in consideration whereof the said *John Edward Reynolds*, for himself, his Heirs, Executors, and Administrators and Assigns, doth covenant and agree with the said *Henry John Nelson*, his

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Heirs, Executors and Administrators, by these Presents, that he the said *John Edward Reynolds* shall and will well and truly pay or cause to be paid to the said *Henry John Nelson*, his Heirs, Executors or Administrators, the aforesaid sum of 425 *l.* at the time of executing the said Conveyances; and for the true performance of all and every the Covenants aforesaid, each of the said Parties bindeth himself, his Heirs, Executors and Administrators, in the penal sum of 200 *l.* In witness whereof the Parties aforesaid have hereunto set their hands the 4th day of September 1817.—Witness, *John Moore*. *Henry John Nelson*. *John Edward Reynolds*.—N. B. The Taxes to be clear unto next Michaelmas Day. *Henry John Nelson*."

The 25 *l.* was paid to the Defendant.

On the following 20th October 1817, the Defendant's Solicitor delivered an Abstract of the Title to the Plaintiff, together with a note as follows:—" Mr. *P.* presents his compliments to Mr. *Reynolds*, and by desire of Mr. *Nelson* sends herewith an Abstract of his Title to the Premises at *Acton*, purchased by Mr. *Reynolds*. Mr. *R.* is probably well acquainted with the Title; but if any thing occurs to Mr. *R.* on perusal of the Abstract, Mr. *P.* will be glad to hear from Mr. *R.* in the course of this week. The Deeds are with Mr. *P.*"

On the 29th of the same October, the Defendant sent a Draft of the Conveyance for the Plaintiff's perusal, and various applications were made to the Plaintiff respecting the completion of the Contract, but he never could be seen. On the 22d of the following December the Defendant served the following Notice on the Plaintiff:

"Sir; Take notice, that I shall attend you at, &c. to-morrow, the 23d, Wednesday the 24th, and Friday the 26th days of December instant, at twelve o'clock at noon, on each of those days, for the purpose of executing to you the Conveyance of the two Houses and Appurtenances, by you bought of me on the 4th day of September last, situate at *Acton*, in the County of *Middlesex*, pursuant to our signed Agreement of that date, and of receiving of you the sum of 425*l.* the residue of the Purchase-money for the same; on one of which days I hope it will suit you to complete the Purchase. And further take notice, that if you make default in the Premises, I shall consider you as refusing to perform your Agreement, and act accordingly

"Your's, &c. *H. J. Nelson.*"

The Defendant, and his Solicitor, Mr. *P.* called accordingly for that purpose on each day, but the Plaintiff was denied, or was not at home.

On the 2d of April 1818, the Plaintiff returned the Abstract to the Defendant's Solicitor, accompanied with a Note, stating, that from absence, and other avocations, he had been prevented from looking into it sooner, and expressing his dissatisfaction with the Title; and that when it was amended he would lay it before his Conveyancer. No Answer was returned to the Letter. On the 13th April 1818, the Defendant caused a Distress to be made for Half a year's Rent, treating the Plaintiff, who was in possession of part of the Premises, as Tenant under the first Agreement. Afterwards, also, several other Distresses were made, and on each Distress the Rent was paid, and the Plaintiff gave notice to the Broker not to pay over the Money to the Defendant. Under these circumstances, the Plaintiff, on the 22d

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March 1818, filed his Bill for a specific Performance of the Agreement of the 4th of September 1817, and for an account of what had been paid for Taxes, and of the Rents received by the Defendant, and the Money levied by the Distresses, and that the same might be deducted from the Purchase-money; and if it should appear the Defendant could not make a good Title, then that an account might be taken of the Expenditure on the Premises, and to take an account of what had been paid for Taxes, in the Bill mentioned, and of the Rent received; and to set a valued Rent on the Premises, and to compute Interest on the 25 *l.* paid; and that the Defendant might be decreed, in such last-mentioned case, to cancel the Agreement, and to pay what might appear due to the Plaintiff on such reference, and for an Injunction.

Mr. *Bell*, and Mr. *Parker*, for the Plaintiff:—

This is a Case in which the Court will decree a specific Performance. It is true, an Abstract was delivered, but a good Title was not shown. Owing to absence and other avocations of the Plaintiff, the Abstract was not returned, with objections, until the 2d of April 1818. The Defendant gave a Notice, that he would attend with the Conveyance on the time mentioned, but says, that if not completed "he should consider the Plaintiff as refusing to perform the Contract, and act accordingly;" he does not say he should consider the Agreement as at an end, nor does he return the 25 *l.* There is no case where mere silence has been held to put an end to a Contract. The Plaintiff, on the faith of the Agreement, has expended a considerable Sum in repairs.

Mr. *Heald* and Mr. *Maddock*, for the Defendant:—

We contend that the Defendant is not bound spe-

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cifically to perform this Agreement. The question raised by these Pleadings is, Whether or not time is essential in a contract for a Purchase? a point upon which there has been a diversity of opinions. At Law, it is clear the Plaintiff could have no remedy, though the Defendant might. Before the time of Lord *Somers* no specific Performance was decreed, unless where Damages had been recovered at Law, in respect of a breach of the Agreement. Afterwards it was held, that where the Plaintiff *might* have recovered Damages at Law, though none had been recovered, a Bill would lie; but it was laid down by Lord *Raymond*, that a specific Performance of an Agreement shall never be compelled for the non-performance of which, the Law would not give Damages (*a*). The rule is, perhaps, not so universal as it is there expressed; it has its exceptions. If, for instance, there be an Agreement to assign a *Chose in Action* at a given day, if the Assignment is not made, a Bill in Equity would lie, though no Action could be sustained at Law, as a Court of Law does not allow the Assignment of a *Chose in Action*. In general, however, it is true, that a Bill will not lie for the specific performance of an Agreement where the Plaintiff could not sustain an Action at Law for the non-performance. If that be a true test, the Plaintiff cannot succeed, for the Vendor has done every thing he could to complete the Agreement by the time stipulated for that purpose, but the Vendee did not do any thing. Certainly it has been held, that time is not, in this Court, considered as essential. Lord *Thurlow* expressed himself of that opinion in more than one case, influenced, probably, by some expressions reported to have been used by Lord

(*a*) *Dr. Bettesworth* v. *Dean and Chapter of St. Paul's*. Select Cases in Chancery, 68.

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Hardwicke in *Gibson* v. *Putterson* (*b*), which have since been shown to have been incorrectly reported (*c*). Lord *Kenyon* was the first who, in *Macknath* v. *Marlar* (*d*), expressed his disapproval of Lord *Thurlow*'s doctrine; and Lord *Rosslyn*, in *Lloyd* v. *Collett* (*e*), delivered a strong opinion in favour of a strict adherence to time in Contracts; his Judgment is shortly stated in *Brown*, but it is given fully in a Note to *Harrington* v. *Wheeler* (*f*). His Lordship's opinion seems to have been, that in Contracts for a Purchase, time is essential, and not merely that it may be made essential. Lord *Eldon*, however, has not gone so far; but has in several cases said, that time may be made essential, as in *Seton* v. *Slade* (*g*), and in *Levy* v. *Lindo* (*h*), and upon other occasions, but that, though time may be made essential, it may be waved by the conduct of Parties, and such was your *Honor's* opinion in *Hudson* v. *Bartram* (*i*). It would be a most useful doctrine, that in all Contracts for a Purchase, when a time is mentioned for their completion, it should be considered as essential; where no time is limited for the performance of the Contract, there the Court would have a greater discretion. According to Lord *Thurlow*'s doctrine, a Merchant having occasion for Money at a particular day, and selling an Estate for the purpose of raising the Money, may be ruined if the Money be not paid at the time agreed upon. Lord *Rosslyn*'s inclination of opinion might be most usefully adopted as a general rule. The Civil Law, and the Law of most other Countries, holds men strictly to their Contracts. Supposing, however, the rule to be that

(*b*) Atk. 12.

(*c*) See what Lord *Rosslyn* says of that Case in *Harrington* v. *Wheeler*, 4 Ves. 667. 686.

(*d*) 1 Cox, 259.

(*e*) 4 Bro. C. C. 469.

(*f*) 4 Ves. 690.

(*g*) 7 Ves. 273.

(*h*) 3 Meriv. 84.

(*i*) Ante, 3 vol. p. 440.

time is not essential in Contracts, but that it may be made so, is it not made so in this case? and, if so, has it been waved? It appears on the face of the Agreement that it was the meaning of the Parties that the time fixed for the performance of the Agreement should be strictly observed, not only because a time is specified by which it was to be completed, but a sum of 200 *l.* is stipulated to be paid, if the Agreement is not performed. This shows the anxiety to have the Purchase completed at the time agreed upon, as much so as if it had been expressly stated in the Agreement that time was to be considered as essential. The anxiety of the Defendant for the completion of the contract was evinced by his conduct. Has any thing been done by him since the 25th of December 1817, to wave the strict fulfilment of the Contract?—Nothing.—He never answered the Plaintiff's Letter when he returned the Abstract. It was not necessary he should give express notice that he considered the Contract as at an end. It was so by Law, and the Plaintiff needed no notice of the Law. The Defendant did not return the Deposit, because the Expenses he had incurred amounted to much more than the Amount of the Deposit. Shortly after the Letter of the 25th December 1817, the Defendant distrained on the Plaintiff, thereby showing he considered him as Tenant under the first Agreement, and not as a Purchaser. The Distresses have been continued from time to time as the Rent became due. The Defendant sold the Estate at an under-value, depending upon having his Money at the time specified in the Agreement. The Defendant's Title is good, and any difficulties would have been cleared up, if they had been stated at a proper time. If a specific Performance is decreed, the Plaintiff must be considered as having accepted the Title; but upon the whole, it is hoped the Court will not decree a specific Performance.

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REYNOLDS v. NELSON.

The VICE-CHANCELLOR :—

It may now be considered as the settled doctrine of the Court, that, by the terms of the Agreement, time may be made of the essence of the Contract. It has not, however, been decided, that where there is no special stipulation in the Contract, time may be made essential by subsequent notice that it will be so considered; and, in this case, I may leave that point untouched.

The notice given in this case was not that the Defendant would consider the Contract at an end if it was not completed within the time, but that he would consider its not being completed within the time as equivalent to a refusal to perform it, and would act accordingly; but whether he would act as if the Contract were abandoned, or would act by filing a Bill for a specific Performance, he leaves wholly in doubt; and it is to be observed, that he neither returned nor tendered the Deposit which he had received. There must, therefore, in this case, be the usual reference as to the Title.

1821.
5th March.

MORSE v. MEREST.

Where there is a Contract to sell at a valuation by A. B. *and* C. *the Court will compel the Vendor to permit the valuation. The time of valuation is of the essence of the Contract, but the Defendant cannot take advantage of it, if he improperly occasion the delay.*

THE Plaintiff and Defendant entered into a written Agreement for Sale by the Defendant to the Plaintiff of a considerable Estate at twenty-five years' purchase on an annual value to be set by *A. B.* and *C.* three persons named in the Agreement, on or before a certain day.

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The valuation had not been made accordingly; but it appeared in evidence that the Defendant had prevented the valuation being made on or before the day named.

Mr. *Trower*, Mr. *Bell*, and Mr. *Roupell*, for the Plaintiff, in the course of their Argument cited *Milnes* v. *Geery* (*a*), and a *dictum* in *Couth* v. *Jackson* (*b*).

Mr. *Horne*, and Mr. *Girdleston*, for the Defendant, cited *Crawshay* v. *Collins* (*c*).

The *Vice-Chancellor* held, that in the case of a reference time was as essential in Equity as at Law; but that in Equity a Defendant was not permitted to set up a legal defence which grew out of his own misconduct, and that this Agreement was now to be acted upon as if no time were limited, or the time was not passed. That a man who agreed to sell at a price to be named by *A. B.* and *C.* could not be compelled by a Court of Equity to sell at any other price; but it appearing that the Defendant refused to permit the Referees to come upon the land, the Court had jurisdiction to remove that impediment, and would decree that the Defendant should permit the valuation to be made according to the Contract; and if it were so made, then a supplemental Bill must be filed for a specific Performance upon the terms of their valuation.

(*a*) 14 Ves. 400.
(*b*) 6 Ves. 12.
(*c*) 1 Swan. 40.

1821.
9th March.

LUSHINGTON *v.* SEWELL and others.

Infant Defendants being out of the kingdom, a Commission was sent abroad for the appointment of a Guardian to put in their Answer. A supplemental Bill was filed, to which the same Infants, who continued abroad, were Parties. On Motion, an Order was made that the Guardian who put in their Answer to the original Bill might put in their Answer to the supplemental Bill.

THERE was an original and a supplemental Bill in this Case.

Several of the Defendants to the original Bill were Infants, and out of the Jurisdiction, and a Commission was sent abroad for the appointment of a Guardian to put in their Answers, and their Answers were accordingly put in. A supplemental Bill was filed, making the same Infants Defendants, and they continuing to be out of the Jurisdiction, a Motion was now made by Mr. *Pemberton* on behalf of the Defendants, the Infants, that the Guardian who put in the Answer to the original Bill might put in the Answer to the supplemental Bill, and he cited *Jongsma* v. *Pfiel* (*a*), in support of the Motion. Mr. *Blenman*, on behalf of the Plaintiffs, consented to the Motion, and the *Vice-Chancellor*, on the authority of the Case cited, made the Order.

1821.
Same day.

BELBEE *v.* BELBEE and another.

Tenants who had notice from the Plaintiff not to pay Rent to the Defendant's Trustees, and who had notice from the Trustees not to pay their Rent to the Plaintiff, ordered, on the motion of the Plaintiff, and on the consent of all Parties, to pay their Rent into Court. It was held, the Tenants themselves could not make such a motion.

THIS was a Bill filed against the Husband of the Plaintiff and her Trustees, in respect of her separate Property. The Plaintiff had given notice to the Tenants not to pay their Rents to the Trustees, and they

(*a*) 9 Ves. 357. In *Tappen* v. *Norman*, 11 Ves. 563, a similar motion was refused; but if the preceding Case in 9 Ves. had been cited, the Court, probably, would have made the order.

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BELBEE v. BELBEE and others.

had given notice not to pay the Rent to the Plaintiff. The Tenants being threatened with actions, applied by Motion in this Cause for leave to pay the Rents into Court.

Mr. *Barber*, for the Motion, urged, that by acceding to this Motion a Bill of Interpleader would be rendered unnecessary. Mr. *Maddock*, for the Plaintiff, and Mr. *Blenman*, for the Defendants, consented to the Motion.

The VICE-CHANCELLOR :—

These Tenants not being Parties to the Suit are not competent to make a Motion. Let the Motion be made on the part of the Plaintiff, and be consented to by the Defendants, and I will make the Order.

The Motion being accordingly so made, the *Vice-Chancellor* granted the Order.

1821.
9th March.

BUSK *v.* LEWIS and others.

An Attorney, a witness to a Deed, and in possession of the same, cannot be compelled to attend with the Deed at the hearing of the Cause, otherwise than by a Subpœna duces tecum.

MR. *Lovatt* moved, on the part of the Plaintiff, that Mr. *Evan Evans* might be ordered to produce, on the hearing of the Cause, a certain Indenture of Demise to the Plaintiff, described in the notice of Motion, in order that the same might be given in evidence in the Cause. The execution of the Indenture had been proved, and was in the possession of *Evans*, who was the Solicitor of the Defendant, and claimed a Lien upon the same in respect of his Costs for preparing the Lease. The Plaintiff, by his Affidavit in support of the Motion, stated it would be necessary that the Indenture should be produced, and given in evidence on his part, at the hearing of the Cause; that it was a Demise

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to him; and that he had offered to pay the Costs of preparing the Lease, but that *Evans*, who resided in *Wales*, had refused to say what was due to him, or to attend in London with the Lease, unless his expenses were first paid.

The VICE-CHANCELLOR:—

The right of the Solicitor to the possession of the Deed is altogether collateral to this Cause; and in this Suit I have no jurisdiction to compel him to produce it. You must treat him as you would treat any other witness in possession of a Deed.

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13th March.

If a Legatee for Life dies before the Testator, the Remainder has immediate effect; and it makes no difference that a Power of Appointment is given to the Legatee for Life. Where by Codicil a Legacy is substituted for a Legacy in a Will, it will have the same qualities; but where the Legacy is said to be given by a Codicil, because a Will has failed, this is not substitution, but motive.

CHATTERIS *v.* YOUNG.

THE Testator gave a Legacy to his Daughter, for Life, with a power to appoint the Principal, to take effect after her death; and if no Appointment, then to *A.* and *B.* The Daughter died in the life-time of the Testator.

The *Vice-Chancellor* held, that *A.* and *B.* took immediately upon the Testator's Death; that their Interest was postponed only for the sake of the Daughter; and that it made no difference that she might have defeated the Gift by Appointment, if she had survived the Testator, since *A.* and *B.* were to take, if no Appointment.

The Testator also gave a Legacy of 60,000*l.* to Trustees, upon trust, to pay to his Daughter 20,000*l.* for her separate use, and then to pay the Interest of the remaining 40,000*l.* to his Daughter for her Life, with Remainder to her Children. He concluded his Will by declaring that his Legacies thereinbefore mentioned were to be free of Legacy Duty.

The Daughter having died in the Testator's life-time, he made a Codicil to his Will, noticing her Death, and the lapse of the Legacies given to her; and instead thereof, he gave to his Daughter's Husband the sum of 20,000 *l.* The Question was, whether the Husband was entitled to this Legacy free of Legacy Duty?

Mr. *Hart*, Mr. *Agar*, and Mr. *Roupell*, for the Plaintiffs. Mr. *Trower*, Mr. *Bell*, Mr. *Horne*, and Mr. *Knight*, for the Defendants.

Cooper v. *Dale* (*a*), and *Crowder* v. *Clowes* (*b*), were cited as to the second point.

The *Vice-Chancellor* held, that the Husband was not entitled under the general direction in the Will, because that applied only to the Legacies given by the Will; and that he was not entitled by force of the Codicil itself, because the Legacy to the Husband was an original Legacy, given for reason that the Legacy to the Wife had failed; that it was in effect the same as if he had recited the Legacies to his Daughter, and had recited that they were to have been free of Legacy Duty; and had then said, these Legacies having failed, I give to her Husband 20,000 *l.* If he had said, I give to him the same Legacy, or the same Sum, it would have admitted of a different consideration; mere substitution being *primâ facie* attended with the same incidents: and that where a subsequent addition is made to a prior Legacy, the addition will have the same qualities.

(*a*) 3 Meriv. 15. (*b*) 2 Ves. Jun. 439.

1821.
13th March.

POOR v. MIAL.

Bequest of Leasehold Property, with a Condition to assign a Part to a Charity.

The Legatee takes, discharged of the Condition.

A TESTATOR made a general Bequest of Leasehold Property, upon condition that the Legatee should assign a certain Leasehold Estate, part of the Property, to a charitable purpose. It was contended, that as to the Leasehold given to the Charity, the Legatee was a mere Trustee, and the Trust being void, the Leasehold belonged to the next of kin.

Mr. *Bell*, Mr. *Glynn*, and Mr. *Oliphant*, were Counsel in this Case.

The VICE-CHANCELLOR:—

There is here, in the first place, an absolute Gift of the whole Leasehold Property, upon an illegal condition to assign a part; it is the same thing as if the illegal condition had been to pay a sum of Money to a Charity; in such case it is clear the Legatee would have retained the whole Leasehold Property, without payment of the sum of Money, and therefore he must retain the whole, without the Assignment of a part.

1821.
14th March.

JERNEGAN v. BAXTER.

Court will not receive the Consent of a Feme Covert to bar her Equity, until her Share is ascertained.

IN this Case the *Vice-Chancellor* ruled, that the Court will not receive the Consent of a Feme Covert, that Money should be paid to her Husband, until her share is ascertained; for though she may not think 500 *l.* the proper subject of a Settlement, she may think differently of 600 *l.* (*a*).

(*a*) See accordingly, *Sperling* v. *Rochfort*, 8 Ves. 164.

1821.
14th March.

CLIFFORD and others *v.* LEWIS and others.

The words, "I will and direct that my just Debts, Funeral and Testamentary Expenses, be paid and satisfied," in the introductory part of a Will, amount to a charge of the Debts upon the Real Estate.

THIS Cause came on for further directions upon the *Master*'s Report, by which it appeared that the Testator's Personal Estate was insufficient for the payment of his Debts; and the Question was, Whether the Testator had by his Will charged his Real Estate with the Payment of the Debts? The Will was thus:—"I will and direct that my just Debts, Funeral and Testamentary Expenses, be paid and satisfied. Whereas I have by Deed Poll, dated the 14th day of November 1812, under my hand and seal, in pursuance and exercise of a power given to me for that purpose in and by the last Will and Testament of my late Father *William Morgan Clifford*, deceased, limited and appointed certain Freehold Estates, called *Perristone* and *Snogsash*, the *Camp* and *Fockle*, situate in the Parishes of *Foy* and *Upton Bishop*, in the County of *Hereford*, with their Appurtenants, to the use of my beloved Wife *Sophia*, and her Assigns, for her Life, for her Jointure, and in bar of Dower: And whereas by virtue of the said last Will and Testament of my said late Father, my Mother is entitled to hold the said Estates for her Life-time; now, for making some more certain provision for my said Wife, I do hereby give to my said Wife, and her Assigns, an Annuity or clear yearly sum of 600 *l.* of lawful British Money, clear and above all taxes and deductions for Property Tax or otherwise, to be paid and payable to her my said Wife, and her Assigns, by four equal quarterly Payments, on four days of Payment in the year, the first Payment thereof to begin and be made on the Quarter-day next ensuing the day of my decease. And I hereby subject and charge all my Messuages, Farms, and Lands, situate in the Counties of *Monmouth* and

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Gloucester, to and with the payment of the said Annuity or clear yearly sum of 600 *l.* as aforesaid; and give to my said Wife, and her Assigns, full power to recover and compel payment of the same from time to time by Distress, as in cases of Distress for Rents in Arrear; provided always, and I do hereby will and direct, that when my said Wife or her Assigns shall become entitled to the possession of the said *Herefordshire* Estates so as aforesaid limited in Jointure to her, then the said Annuity of 600 *l.* shall cease and determine, and be no longer payable; and my said Estates in *Monmouthshire* and *Gloucestershire* shall be discharged from all future Claims or Payments on account thereof (except as to any part or parts thereof that may happen to be then unpaid). I also give and bequeath to my said Wife the sum of 1,000 *l.* to be paid to her within three months after my decease. I give and bequeath to my Daughter *Fanny Elizabeth Mary Clifford*, the sum of 6,000 *l.* Also, I give and bequeath to such other my younger Child or Children as may be living at the time of my decease, or with which my said Wife may be then *ensient*, the sum of 6,000 *l.* a-piece. And I hereby charge and make subject all my said Messuages, Farms and Lands, situate in the said Counties of *Monmouth* and *Gloucester*, to and with the payment of the said several sums of 6,000 *l.* to each of my younger Children; and will and direct that the same shall be payable to my younger Children upon their respective attainment of the age of Twenty-one years, or being a Daughter or Daughters, upon their attaining such age, or upon their respective days of marriage. And I will and direct that the said several sums of 6,000 *l.* a-piece, hereby given to such younger Children as I may have at my decease, or with which my Wife may be then *ensient*, shall bear and carry Interest at the rate of five per cent. per annum, until the said principal Sums

shall respectively become payable; and that my said younger Children shall be maintained and educated as their Trustees and Guardians shall think fit, by and out of such Interest Money; and that such parts of the said Interest Money as may not be expended in maintaining or educating them shall accumulate for the benefit of such younger Children respectively, I hereby nominate and appoint my valued friend *John Joseph Henry*, Esq. my Uncle *Richard Lewis*, Esq. and my Brother *William Clifford*, Esq. Guardians and Trustees of and for the Persons and Properties of all such younger Children as I may have at the time of my decease, or with which my Wife may be then *ensient*, and also Guardians and Trustees of and for the Person and Property of my Son *Henry Clifford*. And I hereby give to them the said *John Joseph Henry, Richard Lewis*, and *William Clifford*, their Heirs and Assigns, full power and authority to raise the said sum of 6,000 *l.* a-piece for my younger Children, as and when such Sums shall respectively become payable, together with the costs and charges of raising the same, by sale or mortgage of any part or parts of my said Messuages, Farms and Lands, in the Counties of *Monmouth* and *Gloucester*, or either of them. And I will and direct, that in case of any such sale or mortgage, sales or mortgages, the Receipt or Receipts of the said *John Joseph Henry, Richard Lewis* and *William Clifford*, their Heirs or Assigns, shall be good and effectual discharges and acquittances, &c. I also give and bequeath to my said Wife all my Household Goods and Furniture of every sort and kind, including Plate and Linen; also all Provisions and Liquors that may be in or about my Dwelling-house at the time of my decease, and my Carriage and Horses; and as to all my Messuages, Farms, Lands, Tenements and Hereditaments whatsoever, and wheresoever situate, and Estates and Interest therein or

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thereto respectively, and all my Monies, Securities for Money, and other Property and Effects not hereinbefore otherwise disposed of, I give, devise and bequeath the same unto my said Son *Henry Clifford*, his Heirs, Executors, Administrators and Assigns. And I hereby nominate and appoint the said *John Joseph Henry*, *Richard Lewis*, and *William Clifford*, Executors in Trust of this my last Will and Testament."

Mr. *Fonblanque* and Mr. *Wilbraham*, for the Plaintiff:—

The Debts and Legacies must be considered as being charged on the Real Estates. The Real Estate is devised to the Executors; they have a power to sell or mortgage, and are appointed Guardians of the Testator's Son, and it is they who are to pay the Debts. In *Powell* v. *Robins* (*a*), in which most of the Cases similar to the present are cited, the *Master of the Rolls* distinguishes the Cases. Speaking of *Brydges* v. *Landen* (*b*), *Williams* and *Chitty* (*c*), and *Keeling* v. *Brown* (*d*), he said, "They determine the present Case, upon the supposition that no Real Estate passed to the Executors. Here, I presume, the whole Real Estate was given to the Son." Speaking also of *Finch* v. *Hattersley*(*e*), he says, "The Case was furnished me by Mr. *Lloyd*— Mr. *Lloyd* says, 'The Devise (*Debts* must be meant) in that Case was (*were*) held to be a charge on the Real Estate. But there the Wife, the Executrix, was the Devisee of the Real Estate, so that she had the means of paying the Debts out of the Real Estate. Lord *Alvanley* in *Keeling* v. *Browne*, puts the decision upon that.'" In this Case, therefore, as the Devisees are

(*a*) 7 Ves. 209.
(*b*) Cited 3 Ves. 550.
(*c*) 3 Ves. 545.
(*d*) 5 Ves. 361.
(*e*) Stated by Mr. *Lloyd*, in *Powell* v. *Robins*, 7 Ves. 210.

Executors, there is an effectual charge of the Debts upon the Real Estate.

Mr. *Bell*, and Mr. *Buck*, *contra*:—

There is no Case in which a mere general direction by the Testator, that his Debts, Funeral and Testamentary Expenses should be paid, has been held to be a charge on the Testator's Real Estate. The Devise of the Real Estate in this Case is for a limited purpose; a power of Sale or Mortgage is given, but it is for the single purpose of raising the Portions of the Children. They have no Estate for any other purpose. The only Cases which come near the present, are *Finch* v. *Hattersley*, *Williams* v. *Chitty*, and *Powell* v. *Robins*. In the first Case, the Wife was absolute Devisee of the Real Estate, and Executrix, and thereupon it was held that the Debts were a charge on the Real Estate. In *Williams* v. *Chitty*, Lord *Loughborough*, it is true, on a Will, in which words were used similar to those in the present Case, held, that the Real Estate was charged with the Debts, but he founds his decision upon Lord *Godolphin* v. *Pennick* (*f*). There, the Debts were expressly charged on the Real Estate; the words of the Will being, "that all his Debts and Funeral Expenses should be first paid and satisfied," and then the Testator proceeds to devise his Estate. There, the intention was clear. Besides that, the Devisees were also Executors. In that Case Lord *Hardwicke* relies upon *Leigh* v. *Earl of Warwick*, (or rather, *Earl of Warrington* (*g*), in which Case, the Real Estate was expressly charged with the Debts.

In Mr. *Belt*'s Supplement to *Vesey*'s (sen.) Reports, p. 341, there is a MS. note of the judgment in *Leigh*

(*f*) 2 Ves. 271.

(*g*) 1 Bro. P. C. 511. Edit. by *Tomlins*.

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v. *Lord Warrington*, in which the words are, " I think the Personal Assets must first be applied as far as they will go; but to see how far the Real Estate is chargeable, we must consider the words of the Will. He wills, ' that his Debts be paid out of his worldly Estate;' and the words, worldly Estate, take in the Real as well as Personal Estate. Now, though there be a devise of several parts of the Real Estate, chargeable with the Annuity, yet that does not defeat the charge which was laid on it by the words, worldly Estate, which takes in every thing, as well Real as Personal. The Personal Assets must first be applied as far as they will go; then, in case of a deficiency, to come upon the Real." MSS.

Upon the whole, we insist the Debts were not charged upon the Testator's Real Estate.

The VICE-CHANCELLOR:—

In this Case the Testator begins his Will thus:— " I will and direct that my just Debts, Funeral and Testamentary Expenses be paid and satisfied;" and he then proceeds to dispose of his Real and Personal Estate.— The Question is, whether this expression, with which he has commenced his Will, imports a general and primary purpose, that the payment of his Debts, Funeral and Testamentary Expenses, should precede the subsequent dispositions which he has made of his Property. In *Finch* v. *Hattersley*, the Will began thus:— " First, I direct that my Debts, &c. be paid. " In *Lee* v. *Warrington*, " imprimis, I direct my Debts to be paid." Both these Wills may be read thus:—" In the first place I direct my Debts to be paid." This Testator has in fact, in the first place, directed his Debts to be paid, and I cannot attribute to him a different intention, because in the form of the expression he has not remarked that it was in the first place.

SHELMARDINE and another *v.* HARROP.

1821.
14th March.

Upon a Bill of Foreclosure, the Mortgagee having been robbed of the Title-Deeds, Payment of the Mortgage Money within a limited Time was decreed, and on Payment of the same a Reconveyance was directed, with a Bond of Indemnity.

JAMES HARROP, (since deceased) by Indenture of Demise, dated the 21st December 1808, mortgaged to *Peter Bailey* (since deceased) certain Freehold Premises, to secure 300*l.* and also executed a Bond as a further Security. By a Feoffment, dated the 5th February 1802, he further mortgaged the same Premises to *Bailey* for the sum of 100*l. Peter Bailey* filed a Bill of Foreclosure against the Defendant, the Heir at Law of the original Mortgagor, and amongst other things stated, " that on the night of the 12th February 1813, the Dwelling-house of the said *Peter Bailey* was broken open by robbers, who, amongst other Property of great value, carried away all his Title Deeds, Mortgage Deeds, Bonds, Bills, Notes and Securities for Money, and particularly, they carried away the several Indentures of Mortgage before stated, and the Title Deeds of the said mortgaged Premises, and he had never been able to recover them, or to discover where the same or any of them are, or what is become thereof; and that the Mortgagor, upon hearing of the loss of the said Mortgage Deeds, refused to pay any further Interest upon the Mortgages, and accordingly such Interest remained due from the 21st December 1813." The Bill then stated that the Plaintiff has in his possession the several Drafts from which the said Deeds were ingrossed, and charged that the Deeds are respectively exact copies or transcripts.

The Defendant by his Answer submitted, that a reasonable time ought to be allowed to him for raising and

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paying off the Mortgage Monies and Interest; and that upon the Defendant's paying off the same within such time, the Plaintiffs ought to be compelled to re-convey to the Defendant, or as he should direct, the mortgaged Premises, and indemnify the Defendant against the lost Bond, and to restore to the Defendant the Title Deeds, Evidences and Writings relating to or concerning the said mortgaged Premises, or to make to the Defendant some adequate compensation for the defect in the Title thereto, occasioned by the loss thereof, and prove that the same have been destroyed or really lost.

After the filing of the Bill, and the Answer thereto, *Peter Bailey* died, having by his Will devised the Mortgages to *Shelmardine* and *Hammett*, in Trust, and appointed them Executors. *James Harrop*, the Mortgagor, died also, whereupon *Shelmardine* and *Hammett* filed a Bill of Survivor and Supplement against the Defendant, the Heir of the Mortgagor.

The robbery, and the loss of the Mortgage Deeds and Bond, were proved.

The Cause came on to be heard before the *Vice-Chancellor*, on the 31st July 1819; and on the authority of *Stokoe* v. *Robson* (*a*), it was ordered that an account should be taken of what was due to the Plaintiff for Principal and Interest on the Mortgages in the Bill mentioned, and the *Master* was directed to inquire "what Title Deeds, Evidences and Writings, relating to the mortgaged Premises, were delivered to *Peter Bailey* the Mortgagee, by *James Harrop*, deceased, or by any other person or persons by his order; and what was

(*a*) 3 Ves. & Bea. 54; and afterwards 19 Ves. 385.

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become of the same," with the usual directions in such cases.

The *Master*, by his Report, ascertained what was due for Principal and Interest; and further stated what had been deposed as to the Robbery, and that none of the Title Deeds, &c. were found during the life-time of *Bailey*, or since his decease, but that he had not been able to ascertain what particular Title Deeds, Evidences and Writings, relating to the mortgaged Premises, were delivered by *Bailey* to *Harrop*, and that the same had been stolen.

The Cause now came on for further directions upon the *Master's* Report.

Mr. *Bell*, and Mr. *Gardner*, for the Plaintiffs.

The *Master* having reported that the Mortgage Deeds and the Title Deeds were stolen, and what is due upon the Mortgages, the Court will decree that the Money shall be paid within a limited time, upon a re-conveyance by the Plaintiffs, and an indemnity by Bond (*b*); and in default of the Money being paid, a Foreclosure. That was the course in *Stokoe* v. *Robson*, when it afterwards came on before the late *Master of the Rolls*, upon the *Master's* Report (*c*).

(*b*) The Bond of Indemnity given in *Stokoe* v. *Robson* was in the following form, "Whereas by Indenture of Lease & Release, bearing date respectively the 18th and 19th days of September, in the year 1771, and made, or mentioned to be made, between *Elizabeth Newton*, of the first part, *William Gibson*, and the above-named *Jane Gibson* his Wife, and *John Richley*, and *Mary* his Wife, of the second part, and

(*c*) 19 Ves. 385.

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The *Vice-Chancellor*, by the arrangement of the parties, made the same Order as was made by Sir *William*

Thomas Stokoe, therein described the (late husband of the above-bounden *Margaret Stokoe*,) of the third part, the said *Elizabeth Newton* (who was a Mortgagee of the Estate and Premises therein and hereinafter mentioned) did bargain, sell and convey, and the said *William Gibson* and *Jane* his Wife, and *John Richley* and *Mary* his Wife, (who were in right of the said *Jane Gibson*, and *Mary Richley* respectively, the owners of the same Premises, subject to the said Mortgage to the said *Elizabeth Newton*,) did ratify and confirm unto the said *Thomas Stokoe*, his Heirs and Assigns, all that Messuage, Tenement or Farmhold, and also all that Close of Arable Meadow or Pasture Ground, with the Appurtenances, called the *East Close*, situate at or near *Great Whittingdon*, in the County of *Northumberland*, then in the occupation of *Ralph Angus* as Tenant thereof, To hold the same unto the said *Thomas Stokoe*, his Heirs and Assigns, subject to redemption on payment of the sum of 99 *l.* with Interest thereon, as therein mentioned, to the said *Thomas Stokoe*: And whereas the said *John Richley* and *Mary* his Wife, afterwards borrowed the further sum of 101 *l.* from the said *Thomas Stokoe*, and thereupon executed a certain Indenture, bearing date the 7th day of May 1782, made or mentioned to be made between the said *John Richley* and *Mary* his Wife, of the one part, and the said *Thomas Stokoe*, of the other part, whereby they, the said *John Richley*, and *Mary* his Wife, charged the said *Mary Richley*'s Moiety of the said Premises, by way of Mortgage, in Fee-simple, with the payment of the said sum of 101 *l.* with Interest for the same to the said *Thos. Stokoe*, his Executors, Administrators or Assigns: And whereas the said *John Richley*, and *Mary* his Wife, afterwards sold and conveyed the said *Mary Richley*'s Moiety of the said Premises to the said *Wm. Gibson*, for the sum of 30 *l.* which sum of 30 *l.* was advanced and paid to them in the month of May, in the year 1788, by the said *Thos. Stokoe* on account, and by the desire of the said *William Gibson*, who thereupon executed some Deed or Instrument, the date of which is not known, whereby he charged the whole

Grant in *Stokoe* v. *Robson*, expressing at the same time a doubt whether it would not have been the best course

of the said mortgaged Premises, with the payment of such sum of 30 *l.* with Interest thereon: And whereas the said *William Gibson* afterwards departed this life, leaving the said *Jane Gibson*, his Widow, and *John Gibson*, his only or eldest Son and Heir at Law: And whereas some time in the month of October, in the year 1803, all the Deeds and Instruments, whereby the aforesaid several mortgage Charges were created, were stolen out of the Dwelling-house of the said *Thomas Stokoe:* And whereas the said *Thomas Stokoe* soon afterwards departed this life, having first duly made and published his last Will and Testament in writing, bearing date the 27th day of September 1803, which was duly executed and attested in the manner required by law for devising Real Estates of Inheritance, whereby, in order to enable the above-bounden *Marg. Stokoe*, his Wife, to reconvey all Messuages, Lands, Tenements, Hereditaments and Premises, conveyed to him, or in Trust for him, by way of Mortgage, he gave, devised and bequeathed the same to her the said *Margaret Stokoe*, her Heirs and Assigns; and he thereby appointed the said *Margaret Stokoe* sole Executrix of that his Will: And whereas the said *Margaret Stokoe* hath duly proved the said Will, and hath thereby become the only legal personal Representative of the said *Thomas Stokoe*: And whereas the said *Jane Gibson* and *John Gibson* some time since sold and conveyed all their Estates and Interest in the hereinbefore described Premises to the above-named *Lionel Robson*: And whereas the said *Margaret Stokoe* afterwards applied to the said *Lionel Robson* for payment of the Monies due on the aforesaid several mortgage Charges, but she not being able to produce the instruments whereby such Charges were created, the said *Lionel Robson* refused to pay the said Monies, and alleged that he could not safely pay the same; whereupon the said *Margaret Stokoe* exhibited her Bill of Complaint in the High Court of Chancery, against the said *Robson*, in order to compel payment of such Monies, to which Bill the said *Jane Gibson* and *John Gibson* were afterwards made Defendants; And whereas various

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for a Court of Equity, in such cases, to have made the usual Decree for redemption and reconveyance, leaving

proceedings were had in the said Cause; and the said *Lionel Robson* hath in pursuance of the Decree made in the said Causes, paid into the Bank of England, in trust, in such Cause, the sum of 297 *l.* 5 *s.* 6 *d.* being the account of the principal Monies due on the said mortgage Charges, with Interest thereon, as mentioned in such Decree; and such Sum hath been laid out in the purchase of 452 *l* 10 *s.* 10 *d.* Bank 3 per cent. Consolidated Annuities: And whereas, by a decretal Order, bearing date the 16th day of June 1815, and made on the hearing of the said Cause for further directions, It was ordered, that *Margaret Stokoe* should, at her own expense, execute to the said *Lionel Robson* her Bond, and that it should be referred to Mr. *Alexander*, one of the Masters of the said Court, to tax the Defendants in the Costs of this Suit; and it was further ordered, that the said *Lionel Robson* should be at liberty to retain the sum of 6 *l.* 6 *s.* 2 *d.* reported due from him on account of Interest upon the Mortgages in the Pleadings mentioned, in part payment of such Costs; and it was further ordered, that so much of the 452 *l.* 10 *s.* 10 *d.* Bank 3 per cent. Annuities, standing in the name of the Accountant General of the said Court in trust in the said Cause, as with the Dividends to accrue due on the said Bank Annuities, until the sale thereby directed, should be sufficient to raise so much of the said Costs as should remain after retaining the sum of 6 *l.* 6 *s.* 2 *d.* thereinbefore directed (the amount whereof was to be certified by the said *Master*) should be sold with the privity of the said Accountant General; and it was ordered that out of the Money to arise by such Sale, and any other Sum which might be in the Bank placed to the credit of the said Cause, what the *Master* should so certify to remain of the said Costs, should be paid to Mr. *Charles Constable*, the Defendant's Solicitor; and it was ordered, that the above-bounden *Marg. Stokoe* should, at her own expense, execute to the said *Lionel Robson* her Bond, to indemnify him the said *Lionel Robson* against any demand which might be made upon him in respect of the Mortgage Deeds hereinbefore recited; and it was ordered,

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it to the Mortgagor to bring an action of Trover for his Title Deeds.

that upon the due execution of the said Bond, (such execution to be certified by the said *Master*), the residue of the said Bank Annuities should be transmitted to the said above-bounden *Margaret Stokoe*, and that thereupon the above-bounden *Marg. Stokoe* should reconvey and reassign the said mortgaged Premises unto the said *Lionel Robson*, as he should direct, free and clear of and from all incumbrances by her, or any claims by from or under her, such reconveyance to be at the expense of the said *Lionel Robson*, therefore, in pursuance of the said decretal Order: Now the condition of the above-written Obligation is such, that if the above-bounden *Margaret Stokoe*, her Heirs, Executors or Administrators, or any of them, shall well and truly defend and keep harmless and indemnified the above-named *Lionel Robson*, his Heirs, Executors, Administrators and Assigns, from and against all and all manner of Losses, Damages, Costs, Charges and Expenses whatsoever, and of what nature or kind soever, which the said *L. Robson*, his Heirs, Executors, Administrators or Assigns, or any of them, shall or may lawfully and necessarily sustain, bear, or be put unto, in respect of any demand which may at any time hereafter be established by any person or persons, in respect or on account of the several principal sums of Money secured by the several Deeds or Instruments hereinbefore mentioned respectively, or by any or either of them, or in respect or on account of any part of such money, or in respect or on account of the Interest of said Money, or of any part thereof; then and in such case the above-written Obligation shall be void, or otherwise be and remain in full force and virtue. In witness, &c."

1821.
20th March.

LAVENDER *v.* STANTON.

Where Trustees for Sale are to apply produce for Infant, the power of giving Receipts to Purchaser is necessarily incident.

UPON a Bill for the specific Performance of a Contract for Sale, the question upon the Title was, Whether Trustees, who had sold, could discharge the purchaser? They were directed by the Will to sell, and to apply the Purchase-monies for the benefit of Children during their minorities.

The *Master* reported in favour of the Title, and the *Vice-Chancellor* confirmed his Report; stating, that the power of giving a discharge to the Purchaser was necessarily to be implied, because the Children were incapable of joining in the Receipts, and the power of Sale would otherwise be nugatory.

HILL *v.* REARDON.

1821.
22d March.

MR. *FONBLANQUE* moved that the Plaintiff might give security for Costs, it appearing by his Bill that he was resident in *Ireland*. The *Vice-Chancellor* made the Order.

WALKER *v.* WILDMAN.

1821.
23d March.

Privilege of Solicitor and Client extends to all Communications for professional Advice; but not to employment in matters not professional.

THIS was a Motion that the Defendant, Mrs. *Wildman*, might be ordered to produce Letters and Papers referred to in the Schedule of her Answer. Mrs. *Wildman* had stated in her Answer, that the Letters set forth in the Schedule from her and her Son, to Mr. *Le Blanc*, her Solicitor, had passed in confidence, and in the usual course of business between a Solicitor and Client.

Mr. *Bell*, and Mr. *Sugden*, for the Motion; Mr. *Heald*, Mr. *Combe*, and Mr. *Walker*, *contrà*. The Cases cited were, *Wilson* v. *Rashleigh* (*a*), *Ratcliffe* v. *Freeman* (*b*), *Stanhope* v. *Roberts* (*c*), *Mayer* v. *Wright* (*d*), *Rex* v. *Dixon* (*e*), *Cranstown* v. *Johnson* (*f*), *Richards* v. *Jackson* (*g*), *Phillips on Evidence*, tit. Privilege.

The *Vice-Chancellor* refused to make the Order; stating, that he considered the protection to extend not merely to communications made pending an Action or Suit, but to every communication made by the Client to Counsel, or Attorney, or Solicitor, for professional assistance. But that the protection did not extend to Cases where the Counsel, Attorney, or Solicitor was employed in matters not professional—as in a treaty for the purchase of an Estate. And he held, that the protection was the same whether the Client communicated directly with his professional Adviser, or through the intervention of

(*a*) 4 T. R. 756.
(*b*) 2 Bro. P. C. Toml. edit. p. 514.
(*c*) 2 Atk. 214.
(*d*) 6 Ves. 281.
(*e*) 3 Burr. 1687.
(*f*) 5 Ves. 179.
(*g*) 18 Ves.

1821.

WALKER v. WILDMAN.

a third Person. The Case in the House of Lords, where the Client was ordered to produce a Case stated for the opinion of Counsel, has been followed *in specie*, but not in principle.

1821.
23d March.

PINDAR *v.* SMITH and others.

An Issue, devisavit vel non, *was directed, to try the validity of a second Will. One of the Defendants, Anne Smith, interested under both Wills, but principally under the last, objected to being a party to the Issue, and to being included in the common Order for the production of Papers. Held, that though she declined being a party to the Issue, she should be at liberty to attend the Trial; and the usual Order was made that she should produce Books, Papers, &c. except such as she possessed as Mortgagee.*

ON the hearing of this Cause, the *Vice-Chancellor* directed an issue *devisavit vel non*, to try the validity of the second Will of the Testator, under which the Plaintiff claimed. One of the Defendants, *Anne Smith*, was interested under both Wills, but mostly under the second. She declined, however, to be a party to the Issue, and objected to being included in the common Order for the production of papers.

The *Vice-Chancellor* desired the Registrar, Mr. *Walker*, to search for precedents.

On this day, the *Vice-Chancellor* said the Registrar had furnished him with the following Cases, *Hughes* v. *Doulben*, 25th July 1776 (*a*). *Peacock* v. *M'Kercher*, East. Term, 1770, and *Blunt* v. *Swinnerton*, 15th July 1773; and that it followed from these precedents that *Anne Smith* (*b*), though she declined to be a Party to the Issue, was yet to be at liberty to attend the Trial by Counsel: but he made the usual Order upon *Anne Smith* for the production of Books, Papers and Writ-

(*a*) This Case is reported on another point in 2 Bro. Cha. Ca. 614.

(*b*) 2 Ves. & Bea. 375, 6.

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and others.

ings, except such as she happened to hold in a distinct character as Mortgagee, stating, that the Court had power over every Party in the Cause who was interested in the question to be tried at law, to compel such production as was necessary for a complete trial; and that it made no difference in this respect, that *Anne Smith* declined to be a Party to the Issue.

Mr. *Bell*, and Sir *G. Hampson*, for Plaintiff.

Mr. *Agar*, and Mr. *Wray*, for Defendants.

1821.
24th March.

STITWELL *v.* WILLIAMS.

Where upon the Answer there is strong presumption against the Title of the Defendant impeached by the Bill, the Court will grant a Receiver.

THIS was a Bill to set aside a Sale made by the Plaintiff's Ancestor, to the Deviser of the Defendants, on the ground of Imposition, and advantage taken of ignorance and distress. The Defendants admitted in their Answer that the Conveyance was made to the said Deviser in consideration of 250 *l.* and an Annuity of 52 *l.* 10 *s.* a year for the Wife of the Vendor; and that in 1809, the Estate was of the annual Value of 194 *l.* The Sale took place in 1804, and the Plaintiff's Ancestor died in 1809. The present application was for a Receiver.

The VICE-CHANCELLOR:—

One of the heads of Jurisdiction in a Court of Equity is to protect property pending litigation in a Court of Law; and it necessarily follows, that upon a proper Case, a Court of Equity will protect property pending litigation before itself. Here the admission in the Answer of the Defendants founds a strong presumption against the Title. A Receiver must be appointed.

1821.
27th March.

NOEL *v.* WESTON.

Upon Sales in Court the Vendor will be compelled to surrender a Copyhold in Person, if it can be conveniently done.

UPON a Sale of a Copyhold Estate in Court the Vendor had surrendered by Power of Attorney; and now, Mr. *Sugden*, for the Purchaser, moved, that he might surrender in Person.

Mr. *Hart, contrà.*

The *Vice-Chancellor* held, that although at Law a Surrender by Power of Attorney cannot be questioned, yet as it in truth imposes a greater difficulty of proof of Title upon the Purchaser, and may expose him to a question, whether the Power of Attorney had not been revoked, this Court, where the Vendor comes for its aid in the Sale, will compel the Vendor, if it can conveniently be done, to make the Surrender in Person.

1821.
27th March.
4th April.

FRENCH *v.* LEWSEY.

It is a Motion of course to enlarge Publication where no witnesses have been examined.

PUBLICATION in this Cause passed by Rule in Hilary Term 1818.

On the 4th April 1818, the Plaintiff obtained an Order to enlarge Publication until the last day of Trinity Term, with liberty to take out a Commission for the examination of Witnesses.

On the 9th November 1818, the Plaintiff obtained an Order to enlarge Publication until the last day of

Michaelmas Term, with liberty to take out a Commission for the examination of Witnesses.

A notice of Motion was given to discharge the last-mentioned Order, with Costs, for irregularity; but the Plaintiffs applied to stay the Motion, which the Defendant agreed to do, upon the Plaintiff consenting to wave the Order, and take no proceedings under it.

The Cause stood in the paper of Causes before the *Master of the Rolls* for hearing on the 21st February 1821, but in consequence of an application by the Plaintiff, the Defendant agreed that the Cause should be adjourned until the first day of Causes in Easter Term.

On the 8th of March the Plaintiff, by Motion of course, obtained an Order for enlarging Publication till the first Seal before Easter Term.

A Motion was now made on behalf of one of the Defendants, that the Order of the 8th of March 1821, for enlarging Publication, &c. might be discharged, with Costs, for irregularity.

Mr. *Spence*, in support of the Motion:—
The Order to enlarge Publication made on the 8th March 1821, was irregular, because it was obtained on a Motion of course, whereas it ought to have been a Special Motion on Notice. He cited "*Coulthard* v. *Halstead*." (*a*)

Mr. *Heald*, and Mr. *Swanston*, *contrà*:—
The Order was regular, no Witnesses having been examined previous to the Order. Publication may be

(*a*) Ante, vol. 3. p. 429.

1821.

FRENCH v. LEWSEY.

enlarged on a Motion of course, where no Witnesses have been examined, though Publication has passed. If indeed Witnesses have been examined, there must be a Special Motion to enlarge Publication: here no Witnesses had been examined when the Order was obtained. The practice is established in many instances. In *Yate* v. *Bolland* (*a*), or more correctly *Yates* and *Bolland* v. *Goodwin*, Publication was twice enlarged on a Motion of course by the Petitioner, as appears by the Registrar's Book. Reg. Lib. B. 1773, fol. 478; and there are various other cases in which the same Motion was allowed. In *Coulthard* v. *Halstead*, Witnesses had been examined (*b*), and therefore a Special Motion was necessary.

The VICE-CHANCELLOR [after speaking to the Registrar, Mr. *Crofts*]:—

The *Registrar* confirms my impression that it is a Motion of course to enlarge Publication where no Witnesses have been examined. The *Registrar* will however make further inquiry into the practice.

4th April.

On a subsequent day, 4th April, the *Vice-Chancellor* said, that the *Registrar* had certified to him, that it was a Motion of course to enlarge Publication where no Witnesses had been examined.

Motion refused.

(*a*) 2 Dick. 495. (*b*) Reg. Lib. A. 1818, fol. 201.

COOK *v.* BUTT.

1821.
28th March.

The Ordinary is a necessary Party, Defendant to a Bill for establishing a Modus.

On Demurrer, the *Vice-Chancellor* held the Ordinary to be a necessary Party, Defendant to a Bill for establishing a Modus, because he has a temporal Interest in a lapsed Presentation; and because his presence in the Suit protects the right of the Church against collusion.

POWELL *v.* POWELL.

1821.
29th March.

No Objection to a Sale in Court in Execution of a Will, that there are Infants interested under the Will, who cannot join in the Conveyance.

An Estate was devised to one in Fee, with an Executory Devise over to two Infants, charged with the payment of Legacies. The Decree in the Cause directed the Sale of the Estate for payment of the Legacies, and the Estate was sold accordingly. The Purchaser now objected to the Title, upon the ground that he could have no Conveyance from the Infants.

The Vice-Chancellor:—

I must over-rule this Objection. In such Cases, the Court sells the Estate of the Deviser; and the only Title to be inquired into is his Title. The Parties claiming under his Will are or must be all Parties before the Court, and are bound by the Orders of the Court; and where such Parties are under disability to make a present Conveyance, it is of necessity that a Purchaser must accept the Order of the Court for a future Conveyance as a sufficient Security.

1821.
29th March.

EMERY *v.* GROCOCK.

A Term was created in 1711, for raising Portions. There was no Evidence of the Portions being satisfied, but a Settlement of the Estate took place in 1744, and a Recovery was suffered; and there was a Covenant that the Estate was free from Incumbrances. No Assignment appeared to have been at any time made of the Term. On an Objection to the Title by a Purchaser, held, that a Surrender of the Term must be presumed; and that in matters of presumption, the Court will bind a Purchaser, where it would give a clear Direction to a Jury.

THE *Master*, on a reference as to Title, reported that a good Title could be made if a Term created for raising Portions for Daughters, by a Settlement on the 12th March 1711, was assigned to a Trustee for the Purchaser. The Question was, Whether a Surrender of the Term could be presumed? A Cesser of the Term was provided in the event of the Trusts never arising, but not in the event of their arising and being satisfied. There were several Daughters, in whose favour the Term for creating the Portions was raised, but no evidence of their being satisfied. A Settlement of the Estate was made in 1744, and a Recovery suffered; and Lord *Gower*, the then Tenant for Life of the Estate, and one of the Settlers, covenanted that the Estate was free from Incumbrances; no Assignment or Disposition appeared to have been made, at any time, of the Term.

Mr. *Benyon*, Mr. *Sugden*, and Mr. *Temple*, in support of the Exceptions:—

After this lapse of time the Portions could not be claimed, and a Surrender must be presumed. A Jury would be directed to presume a Surrender, *Doe* v. *Syborn* (*a*), and *Doe* v. *Hilder*, in the Court of *King's Bench*, lately (*b*). It is not like a Trust Term which has been assigned to attend the Inheritance; such a Term may endure for ever; but this Term was never so assigned, nor has been acted upon for upwards of a century. The Deed of 1744 is seventy-six years old,—

(*a*) 7 Term Rep. 2.

(*b*) 1 Barn. & Ald. 782.

the Children had all time to claim. There is an irresistible presumption that the Portions had been paid previous to the Settlement and Covenant in 1744. In *Doe* v. *Hilder* the Term was assigned to attend the Inheritance,—an infinitely stronger Case than this. In a Case like that, the Court would probably pause, as the *Lord Chancellor* has expressed his doubts as to that Decision; but in this Case the Term was never assigned. In *Doe* v. *Wright* (c), a Case previous to *Doe* v. *Hilder*, a Term was assigned to secure an Annuity, and, subject thereto, to attend the Inheritance, and the Court presumed a Surrender.

The probability there, that the Term had not been assigned, was not so great as in this Case, and yet a Surrender was presumed. In *Hillary* v. *Waller* (d), the Court presumed a Reconveyance after a considerable lapse of time. Here, for a century, the Term has never been disturbed, and Conveyancers have treated the Estate as an Estate in Possession. All the Cases point out this as a Case where a Surrender is to be presumed.

Mr. *Hart*, and Mr. *Preston*, *contrà*:—
It is clear the Term did exist, and no evidence is produced to show it does not still exist. There was no provision for a Cesser of the Term when the Portions were raised. They were not to be raised until the death of Lord *Gower*, which took place in 1754. There is no security for the Purchaser; he may lose his Estate. A Cesser of the Term was not provided for where the Portions were raised. It is said, that it must be presumed that the Parties were paid, and the Term surrendered. In common Cases, where parties have an

(c) 7 Term Rep. 2. (d) 12 Ves. 239.

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interest in keeping alive evidence of Money due, presumptions of payment, after a lapse of time, may be made; but they are dangerous in the case of great families, who often do not pay off Portions, but only the Interest on them, and not unfrequently sell Portions of their Estate, with Covenants against Incumbrances, with which Purchasers are satisfied, without very critically ascertaining the fact, whether there really are Incumbrances or not. In the Deed of 1744, the Covenant is the mere usual Covenant against Incumbrances. The probability is that the Term is still outstanding. *Doe* v. *Hilder* has been impugned by the *Lord Chancellor* and Mr. *Baron Richards* (e).

In another instance the Purchaser took a Conveyance from the *Stafford* Family, with a Covenant against Incumbrances, and it was afterwards necessary to have an Act of Parliament, in respect of an outstanding Term. A good title cannot depend upon presumption or probability only. Time alone is not sufficient to raise a presumption, unless other facts fortify it. The *Master* thought he could not act upon the presumption contended for.

The VICE-CHANCELLOR :—

It is proper, in these Cases, that the *Master* should advert to the doctrine of Presumptions; but I doubt whether the *Master* thought himself at liberty to enter into that consideration in this Case.

(e) See discussions by Mr. *Sugden* of the principles laid down in *Doe* v. *Hilder*, in a Tract, intituled, "*A letter to Charles Butler, Esq. on the doctrine of presuming a Surrender of Terms assigned to attend the Inheritance.*" 4 Ed.

Counsel continued:

A Purchaser may get in this Term, and use to our prejudice. *Lord Oxford*'s Case affords a lesson on the subject (*f*).

The *Vice-Chancellor*:—

In this Case the question on a matter of Title is, Whether the Surrender of a Term created for Portions is to be presumed? There is no evidence of the Portions paid; but the Parties entitled attained their ages of 21, about 60 years since, and are all dead; and it appears by the Abstract, that the Family has long dealt with the Estate as if there were no Term, and no Portion due. A Court of Equity will not compel the acceptance of a Title where there is reasonable doubt in Law or in Fact. In Law, strictly speaking, there is no doubt; but, practically, there is often a doubt as to the application of settled principles. In matter of fact there is doubt, where the Testimony is direct; because it may be given *malâ fide*; or if *bonâ fide*, by mistake: there is still more doubt where matter rests in presumption, for all presumptions may be answered. In assuming the jurisdiction of a specific Performance, Courts of Equity are compelled to grapple with these difficulties; and the only rule that they can adopt in cases of presumption like the present seems to be, that if the Case be such, that sitting before a Jury, it would be the duty of a Judge to give a clear direction in favour of the fact, then it is to be considered as without reasonable doubt; but if it would be the duty of a Judge to leave it to the Jury to pronounce upon the effect of the Evidence, then it is to be considered as too doubtful to conclude a Purchaser.

(*f*) See *Doe* v. *Scott*, 1 East, 478.

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There is here, first, a clear presumption that the purpose is satisfied: next, there is presumption that the necessary Term was surrendered, because it is not subsequently noticed in the transaction of the Family: and, lastly, there is the absence of all Evidence that this Term was ever applied to any new purpose. In this Case, I should consider it my duty to give a clear direction to the Jury, that they were bound to find the Term surrendered; and, I must therefore hold that there is no sufficient doubt to entitle the Purchaser to be relieved from his Contract.

MEMORANDUM.

1821.
5th April.

IT is not to be considered as a Motion of course to obtain a Judge's Report of a Trial at Law previous to a Motion for a new Trial of an Issue, directed out of the Court of Chancery, it having been determined, on a Conference between the *Lord Chancellor*, and the *Master of the Rolls*, and the *Vice-Chancellor*, that they would not call upon the learned Judge who tried the Cause at law to make his report, until they were satisfied that there were reasonable grounds for entertaining the Motion for the new Trial.

In a Case which occurred on this day, the *Vice-Chancellor* acted upon the statement of Counsel who attended the trial at law, without requiring an Affidavit of the facts, which were represented to have passed at the Trial.

FOSTER *v.* DEACON.

1821.
9th April.

An Assignee of an Interest in a Suit cannot be a Party without a Supplemental Bill. He may petition to secure the fund.

THE Petitioner was the Assignee, for a valuable Consideration, of the unascertained Interest of the Defendant *Deacon*, and his Wife, in the Suit; and he prayed to be admitted to take part in the Suit as a Party Defendant.

The VICE-CHANCELLOR :—

This Petitioner may if he pleases make himself a Party to the Suit by a Supplemental Bill. All that the Court does by Petition is to make an Order that the Assignor shall not take Property out of Court without notice.

Petition dismissed.

PROSSER *v.* WATTS.

1821.
2d May.

THIS Cause came on upon Exceptions on the *Master's* Report as to Title.

A Conveyance, dated in the year 1753, and under which there had ever since been an undisputed Possession, recited certain prior Deeds as matter of Title. The Vendor had not in his possession or power, the Deeds recited, or any Copies of them, and was unable to give any evidence as to what was become of them. The Purchaser for this reason objected to the performance of his Contract, alleging, that the recital affected him with constructive notice of the contents of the Deeds; and that he could not safely

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complete his Purchase without seeing that the Deeds confirmed the Title.

Mr. *Wingfield*, and Mr. *Roupell*, for the Exceptions.

Mr. *Phillimore*, *contrà*.

The VICE-CHANCELLOR:—

There is no dispute that the recital of a Deed is constructive notice of its contents; but to say that a Purchaser is not to complete his Contract unless he has the actual inspection of every Deed of which he has constructive notice by recital, would lead to a practical inconvenience which would be manifestly absurd. In some families Title Deeds are preserved for centuries; and if the earliest of those Deeds recites a former Instrument, made five hundred years since, but not now existing, it would be absurd to say that a Contract is not to be enforced against a Purchaser because that Deed cannot be produced.

There must of necessity, therefore, be some practical limit to the operation of this objection; and the true Inquiry seems to be, in every Case, whether the absence of the Deed recited throws any reasonable doubt upon the Title of the Vendor. *Primâ facie*, it is to be presumed that the Purchaser in the ancient Conveyance had actual Inspection of every Deed recited, and was satisfied with their contents; and further, it is to be observed, that it is not probable that a Vendor would recite Deeds which afforded evidence against his Title. When there is no circumstance to repel the effect of these general presumptions, and when the Title under the Conveyance which contains the Recital is fortified by sixty years undisputed Possession, I think it a good

practical Rule to hold, that the loss of a Deed recited throws no reasonable doubt upon the Title of the Vendor, and that the Purchaser must complete his Purchase.

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Over-rule the Exception.

1821. 2d May.

SANDERS v. KING.

SANDERS *v.* KING.

THIS was a Bill for an Account of the Dealings and Transactions of a Partnership, in which the Defendant, *King*, was alleged to have been concerned; and the Defendant, *King*, pleaded to the whole of the Discovery and Relief, that he was no Partner.

Mr. *Roe*, in support of the Plea:—

It is now clearly established that negative Pleas may be filed. A Plea that the Plaintiff is not Heir was allowed by Lord *Thurlow*; he afterwards altered his opinion. But in *Gun* v. *Prior* (a), it was established to be a good Plea. There are other instances of negative Pleas, as in *Hitchen* v. *Launder* (b), and *Armitage* v. *Wadsworth* (c), and Lord *Redesdale*, in the last edition of his *Treatise on Pleading*, says, "A Plea, that the Plaintiff is not the Person he pretends to be, or does not sustain the character he assumes, and therefore is not entitled to sue as such, though a negative Plea, is good in Abatement of the Suit." (d)

A Plea of no Partner is therefore good. In *Dolder* v. *Lord Huntingfield* (e), Lord *Eldon* observes, "Modern Cases have said, that if the Defendant denies some sub-

(a) 1 Cox, 197. Forest.
(b) Coop. 34.
(c) Ante, 1 vol. p. 189.
(d) P. 187.
(e) 11 Ves. p. 293.

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stantive Fact, which if admitted would give relief, until the truth of that Fact is disposed of, no further Answer shall be compelled;" and in *Shaw* v. *Ching* (*f*), his Lordship seems of opinion, that a Plea negativing an imputed Partnership, is sustainable; and that an Answer to that effect would be improper. In *Drew* v. *Drew* (*g*), a Plea of no Partner was held to be good.

If a Plea of no Partner be good, it cannot be necessary to answer as to any Facts charged in the Bill in proof of the Partnership.

Mr. *Whitmarsh*, *contrà* :—

It is not sufficient to plead that the Defendant is not a Partner; he must answer the Facts charged in the Bill, as evidencing the Partnership. Those Facts may be essential to the proof of the Partnership, and may be only in the Defendant's knowledge. In *Evans* v. *Harris* (*h*), it was held, that where the Relief rests on one Material Fact, as evidence of which several Collateral Facts are charged, it is not sufficient to deny, by Plea, the Substantive Fact; the Defendant must answer to the Collateral Facts.

The VICE-CHANCELLOR :—

Upon this Plea, the Issue between the Parties is, whether a Partnership did, or not, exist. And the Plaintiff objects, that although the Defendant does by his Plea affirm upon his Oath that there was no Partnership, yet he is not thereby to deprive the Plaintiff of that right to a Discovery, which the principles of a Court of Equity give to every Suitor as to the matter in Issue between the Parties; and, that notwithstanding

(*f*) 11 Ves. p. 305.
(*g*) 2 Ves. & Bea. 159.
(*h*) 2 Ves. & Bea. 361.

his Plea, the Defendant is therefore bound to answer to all Facts and Circumstances stated in the Bill, which may afford Evidence to disprove the truth of the Plea.

It is very singular that this Question does not appear ever to have distinctly arisen before.

In the Case of *Drew* v. *Drew* (i), Sir *Thomas Plumer* decided generally, that a Plea of no Partner was a good Plea; but the present point was not taken.

It is stated by Lord *Redesdale* (j), in the last edition of his Treatise, as the result of several Authorities, that if a Plea in Bar be disproved at the hearing, the Plaintiff is not to lose the benefit of his Discovery; but the Court will order the Defendant to be examined upon Interrogatories, to supply the defect. This necessarily refers to Discovery, as to the other matters of the Suit, and not as to the truth of the Plea, which is already disposed of; but it marks the care of the Court to maintain for the Plaintiff that advantage of Discovery which is the peculiar province of a Court of Equity.

The Discovery which a Court of Equity gives is not the mere Oath of the Party to a general Fact, as Partnership, or no Partnership; but an Answer upon Oath to every collateral Circumstance charged as Evidence of the general Fact.

Where a Defendant, therefore, pleads the general Fact as a bar to the whole Discovery as well as Relief, either the Plaintiff in the particular Case must lose the

(i) 2 Ves. & Bea. 159. (j) P. 244.

equitable privilege of Discovery, or some special Rule must be adopted, by analogy, in order to preserve to him that privilege.

If a Plaintiff comes into Equity to avoid a legal Bar, upon the ground of some alleged equitable Circumstances, as in the Case of a Release, the Defendant is not permitted to avail himself of his legal Defence, so as to exclude the Plaintiff from a Discovery as to the alleged equitable Circumstances. He may, indeed, plead his Release; but he must in his Plea generally deny the Equity charged in the Bill, and must also accompany his Plea with a distinct Answer, and Discovery as to every equitable Circumstance alleged.

In such a Case, the Issue tendered by his Plea is not the Fact of his Release; for that fact is admitted by the Bill; but the Issue is upon the equitable matter charged. Yet, inasmuch as the principles of a Court of Equity entitle the Plaintiff to a Discovery from the Defendant upon the matter in Issue, here we find, that notwithstanding the Defendant pledges his Oath, that there is no truth in the equitable matter charged, he is nevertheless compelled to accompany his Plea by an Answer and Discovery as to every Circumstance alleged as Evidence of the Equity.

This practice seems to afford a very strong analogy for the present purpose. There the Defendant affirms upon his Oath that there is no equitable matter to destroy the legal Bar of the Release; yet he is nevertheless bound to accompany his Plea with an Answer, and Discovery as to every circumstance charged as evidence of that Equity. Here the Defendant affirms

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upon his Oath that there is no Partnership; and, by analogy, it seems to follow, that he is nevertheless bound to accompany his Plea with an Answer, and a Discovery as to every circumstance charged as evidence of the Partnership.

Adopting, therefore, this analogy for the present purpose, it furnishes this rule, that a Plea which negatives the Plaintiff's Title, though it protects a Defendant generally from Answer and Discovery as to the subject of the Suit, does not protect him from Answer and Discovery as to such matters as are specially charged as evidence of the Plaintiff's Title.

According to this rule, this Plea being unaccompanied by an Answer and Discovery as to the circumstances specially charged as evidence of the Partnership, should be over-ruled; but, being a new Case, the Defendant must be at liberty to amend his Plea.

YORKE v. FRY.

1821. 1st March. 3d April.

THIS Case, which was argued by Mr. *Bell*, in support of a Plea of no Partner, and by Mr. *Pemberton*, *contrà*, substantially involved the same point as in the preceding Case, and was considered as decided by that Case.

1821.
30th March.
2d May.

A Mortgage Term was created in 1720, for one thousand years. The Executors of the Mortgagee took an Assignment of another Mortgage Term on the same Premises, created in 1725, for five hundred years, and assigned both the Terms to the Trustees of a Lady who was entitled to them, under Anne Egerton's *Will. Held, that the Term for one thousand years, was merged in the Reversionary Term for five hundred years.*

STEPHENS *v.* BRIDGES.

THIS Case came on upon exceptions to the *Master*'s Report as to Title, and on further directions. A Mortgage term of one thousand years, which had been created in 1720, and on which was due a sum of 3,315 *l.* 15 *s.* 11 *d.* became vested in *Anne Egerton*, in 1757.

In 1780, the Executors of *Anne Egerton*, being possessed of this Term of one thousand years, took an Assignment of another Mortgage Term of five hundred years upon the same Premises, which had been created in 1725, and on which was then due a Sum of 2,296 *l.*

In 1785, the Executors of *Anne Egerton* assigned both these Terms to the Trustees under the Marriage Settlement of a Lady who was entitled to them by *Anne Egerton*'s Will; and this Settlement contained a general power of Sale of the Trust property. The Trustees put up the Property to Sale, as an absolute irredeemable Term of one thousand years. The Purchaser objected to the Title. On a reference to the *Master*, he reported in favour of the Title. His Report was excepted to.

Mr. *Bell*, and Mr. *Sugden*, in support of the Exceptions. Mr. *Treslove*, *contrà*.

The VICE-CHANCELLOR:—

The Argument in this Case, on both sides, assumes that these Trustees had an irredeemable Interest in the mortgaged Premises; and under the power in the Settlement, the mortgaged Premises were put up to Sale by Auction, not as a redeemable Interest, upon payment of the Mortgage Monies, but as an absolute irredeemable Interest, for a Term of one thousand years.

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The Purchaser objects, that the Trustees are not able to make him a good Title to a term of one thousand years; because by the union of that term with the subsequent term of five hundred years in the same persons, the term of one thousand years is merged at law, and the term of five hundred years is the only legal subsisting term. Whether in Equity it can be considered that a Mortgagee for a term of years, buying in a second Mortgage, subsequently secured by a Term, thereby destroys his own prior security, is not now the question. Nor is it the question, whether there be any actual computable difference in value, between a term of five hundred years, and a term of one thousand years; or whether an unwilling Purchaser will, by the force of such an objection, escape from his Contract. This Purchaser submits to the Court that the Vendors here have not that legal term of one thousand years which they have undertaken to sell, and he is entitled to the Judgment of the Court upon that point.

When the Mortgagor had granted the term of one thousand years, he remained seised of the Reversion, subject to that Term. He had power to grant his rights as a Reversioner to be enjoyed by his Grantee, either absolutely, and for ever, or for any limited portion of time; and the term of five hundred years, which he afterwards created upon the second Mortgage, legally invested the second Mortgagee with the rights of the Reversioner during the period of five hundred years, and entitled him to the immediate possession of the mortgaged Premises, if the prior term of one thousand years should happen to determine at any time during the term of five hundred years, by forfeiture, or surrender.

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It is a clear principle that a Term merges by union with the Reversion, and that the right to the Term, and the right to the Estate, subject to the Term, cannot separately subsist in the same person.

It is settled by authority that there is no difference in this respect, whether the party is entitled to the absolute interest of the Reversion, or to an Interest in the Reversion for a limited time.

The Trustees who are the present Vendors have united in them the original Term of one thousand years, and the right to the Reversion for a Term of five hundred years. By Law, therefore, the Term of one thousand years is merged in the Reversionary Term; and whatever may be the future considerations which apply to this Case, I must declare that the Trustees have not a Title to a legal Term of one thousand years.

Exceptions allowed (*a*).

1821. May 1.

KILLING *v.* KILLING.

Orders set aside because previous similar Motions for the same Orders had been refused, with Costs, and those Costs not paid.

MR. *WAKEFIELD* moved to discharge two Orders; one, an Order *nisi*, to dissolve an Injunction; the other, an Order to dissolve the Injunction absolutely for want of cause shown; and grounded his Motion on the circumstance, that Costs had been given on two previous applications to dissolve the Injunction, which were refused, with Costs, and such Costs had not been paid.

The Motion was not opposed.

Order made (*b*).

(*a*) See 3d vol. Preston on Conveyancing, p. 182, where all the Cases on the subject are collected and observed upon.

(*b*) See Bellchamber *v.* Giani, *ante*, 3d vol. p. 150. If the Costs are not taxed, nonpayment is no objection *Anon*, before *V. C.* 20 June 1821, MS.

BLACKBURN v. STACE.

1821.
1st May.

Purchaser taking possession without the consent or privity of the Vendor, ordered on Motion, before Answer, to pay the Purchase Money into Court.

THIS was a Bill for the specific Performance of a Contract for Sale. A Motion was made by Mr. *Bell*, and Mr. *Palmer*, on the part of the Plaintiff, that the Defendant, the Purchaser, might pay his Purchase Money into Court, he being in possession of the Premises, and having obtained that possession without the consent or privity of the Vendor; and they cited *Gibson* v. *Clarke* (*a*), *Burroughs* v. *Oakley* (*b*), *Dixon* v. *Astley* (*c*), *Bonner* v. *Johnson* (*d*), *Cutter* v. *Symonds* (*e*), *Boothby* v. *Walker* (*f*), *Cutler* v. *Broughton* (*g*), *Bramley* v. *Teal* (*h*). It was objected, on the part of the Defendant, by Mr. *Sugden*, that such an Order could not be made before Answer, unless the Defendant thought fit to file Affidavits so as to bring the merits before the Court, which in this Case he had not done.

The VICE-CHANCELLOR :—

It is not argued on the part of the Defendant, that the rule is, that as to the question, whether a Purchaser in possession shall or not pay his Purchase Money into Court, his Answer is to be considered as the only evidence; but merely that the Order shall not be made before Answer, unless the Defendant thinks fit to submit the merits of the Case to the Court by Affidavit. But if the Case may be made against such a Defendant by Affidavit, it is difficult to find a

(*a*) 1 Ves. & Bea. 502.
(*b*) 1 Meriv. 52.
(*c*) 1 Meriv. 133.
(*d*) 1 Meriv. 133.
(*e*) 2 Meriv. 103.
(*f*) Ante, 1 vol. 97.
(*g*) Ante, 3 vol. 95.
(*h*) Ante, 3 vol. 219.

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principle why the Plaintiff is to wait for this relief until the Defendant thinks fit to put in an Answer, or why an option should be given to such a Defendant to meet, or to decline to meet, the Case by Affidavit. Neither can I find any authority for this proposition on the part of the Defendant. In *Burroughs* v. *Oakley* (*i*), the Defendant had put in an Answer in the Suit, but no Answer as to the object of the Motion; for the fact of the Possession of the Defendant was not even stated in the Bill, but was brought before the Court by Affidavit. In *Dixon* v. *Astley* (*k*), there was no Answer, and no such point was made. In *Bonner* v. *Johnson* (*l*), the *Lord Chancellor* declined to make the order, not because the Defendant had not answered, but because the Defendant was in possession as Tenant at the time he entered into the Contract of Purchase, and his Possession, therefore, not being derived from his character of Purchaser, formed no sufficient reason why he should not retain his Money until the Contract was completed. Here, the Defendant, in his character of Purchaser obtains the Possession from the Vendor's Tenant, without the consent or privity of the Vendor; and it is not reasonable that he should retain both the land, and the price of the land. He must pay his Money into Court.

(*i*) 1 Meriv. 52.
(*k*) 1 Meriv. 133.
(*l*) 1 Meriv. 372.

IN RE PARTINGTON.

1821.
5th May.

When an Order to pay Costs is made on a Person not a Party to the Suit, a Motion for a Four-day Order or Commitment requires Notice.

AN Order was made upon a Person who was not a Party to the Suit, to pay certain Costs. The Costs were not paid according to the Order, and now, upon a Motion for a Four-day Order, and Commitment thereupon if not paid, the question was, whether it was a Motion of course, or must be upon Notice.

The *Vice-Chancellor*, after consulting with the Registrar, held, that the Practice required a Notice of the Motion.

WAITE *v.* WEBB.

1821.
8th May.

Testator directed real Estate to be sold, and the produce applied, with so much of the personal Estate as should be necessary, to secure an Annuity of 30 l. for the life of A. B., and after his death, to go to a Charity. The Estate sold for 250 l. Held, the charitable Bequest was void as to the 250 l. but good as to the rest of the sum required from the personal Estate to secure the Annuity.

THE Testator directed a freehold to be sold, and the produce applied, together with so much of the Personal Estate as should be necessary, to secure an Annuity of 30 *l.* a year for the Life of *A. B.*, and after the death of *A. B.* the Principal to go to a Charity.

The Estate sold for 250 *l.* The question was, whether the Bequest to the Charity was void, not only as to the 250*l.* but as to what was necessary to be added from the personal Estate to make up the Annuity. The Cases cited were *Chapman* v. *Brown* (*a*), *Attorney-General* v. *Davis* (*b*), *Attorney-General* v. *Goulding* (*c*).

The *Vice-Chancellor* held the charitable Bequest void as to the 250 *l.* but good as to the rest of the sum required from the Personal Estate to secure the Annuity.

(*a*) 6 Ves. 410.
(*b*) 9 Ves. 535.
(*c*) 2 Bro. C. C. 413.

1821.
9th May.

BRAY v. WOODRAN.

When a Cause is set down, and a Subpœna to hear Judgment is served, and afterwards a bill of Revivor is filed, no new Subpœna to hear Judgment is necessary.

THIS was a Bill asserting a personal demand against the Defendants. The Cause was set down, and the Subpœna to hear Judgment served; afterwards, the Plaintiff died, and the Suit was revived by his personal Representative; and at the distance of two years the Cause came on to be heard. One question was, whether there ought to have been a new Subpœna to hear Judgment, after the Bill of Revivor.

The *Vice-Chancellor,* after inquiring into the Practice, held it not to be necessary that there should be a new Subpœna.

1821.
12th May.

WILLIAM COLEGRAVE, Esq. Plaintiff, AND HARRIET MARIA MANBY, Defendant.

Whether a renewed Lease is a Revocation of a previous Will, depends on the intention apparent in the Will.

FRANCIS MANBY, Esquire, being possessed of certain Leasehold Estates, he, previous to his then intended Marriage, by Indenture of Assignment, bearing date the 10th day of April 1761, and made between himself of the one part, and *Charles Stonor* and *Edward Ingram* of the other part, for the considerations therein

Query. *If a Bequest of "the Manor and Hospital Lands which he held by Lease," passes a renewed Lease?*

A Tenant for Life of a Hospital Lease, who was directed to lay by, out of Rents and Profits, for the purpose of paying the Fine on Renewals, not having renewed, and the Lease having been renewed by the Remainder-man, after his Death, a Reference, on a Bill against his Executrix, was made, to ascertain what was a reasonable Sum to be paid for the Renewal; the same to be paid by the Executrix.

mentioned, bargained, sold, assigned, &c. unto the said *Charles Stonor* and *Edward Ingram*, the Manor and Hospital of *Meere*, in the county of *Lincoln*, with the Lands and Hereditaments thereto appertaining, being about eight hundred acres, which by Lease, bearing date the 11th day of August 1755, were demised by the then Dean of Windsor to the said *Francis Manby*, his Executors, Administrators and Assigns, for twenty-one years, to hold the same unto the said *Charles Stonor* and *Edward Ingram*, their Executors, Administrators and Assigns, for the residue of the said Term, upon Trust, to pay the Rents reserved, as well in the Indenture of Lease as in any future Lease or Leases thereafter to be obtained; and upon Trust by and out of the clear money to arise from the Rents, Income and Profits of the said Leasehold Premises, as should then remain, to raise and collect a competent sum for renewing the said Lease from time to time as should be customary and requisite, and accordingly from time to time to renew the same, and take a new Lease of the said Manor, Hospital and Premises, and for that purpose to make the necessary surrenders, and do other proper acts requisite in that behalf; and subject thereto, then to stand and be possessed of and interested in the said Leasehold Premises, with the Appurtenances, during the then and all subsequent terms respectively, In trust to pay over the remaining Rents and Profits thereof to the said *Francis Manby* and his Assigns, for and during so many years and such time as he should live; and after his Decease, then to stand and be possessed of and interested in the same Leasehold Premises, with the Appurtenances, in case there should be no Son of the said Marriage, In trust for him the said *Francis Manby*, his Executors, Administrators and Assigns, and for his and their only proper use and benefit, and to and for no other Trust,

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intent or purpose whatsoever. The said *Francis Manby* also, for settling his Freehold Estates, by an Indenture of Settlement, bearing date the 3d day of May 1774, and made between himself of the one part, and the Honourable *George Perrott* and *John Tempest* the Younger of the other part, limited and appointed the same to the use of *Thomas Manby* for his Life, and after his Decease to *John Manby* for his Life, and after his Decease to the use of *Francis Manby* his Nephew for his Life, and after his Decease to the use of the first and every other Son and Sons of the body of the said *Francis Manby*, respectively and in remainder, and the several and respective Heirs Male of the body of such Son and Sons lawfully issuing, the elder of such Sons to take and be preferred to the younger of such Sons, as they should be in priority of birth respectively. The said *Francis Manby* also by his Will, dated on the same day as the preceding Deed, viz. on the 3d day of May 1774, gave and devised unto the said *Charles Stonor* and *Edward Ingram*, their Executors, Administrators and Assigns, his said Manor, Hospital Lands and Hereditaments situate in the County of the City of *Lincoln*, held by a Lease from the Dean of Windsor, In trust nevertheless, as far as the rules of Law and Equity would permit, for the use and benefit of such person or persons, and for such Estates and Interest as his Freehold Manors, Lands and Hereditaments, stood limited and settled in and by the said Indenture bearing date with his said Will. And his Will was, that the said *Charles Stonor* and *Edward Ingram*, and the Survivor of them, his Executors and Administrators, should have such and the same power as in his Marriage Settlement was mentioned, that is to say, in the first place, from and out of the Rents, Income and Profits of the said Leasehold Manor, Hospital Lands and Premises, to pay the yearly

Rents and Reservations respectively due and payable for or on account of the same, from time to time, when and as such Rents and Reservations respectively should accrue and become due; and also to perform the Covenants contained, as well in the then Lease, as in any future Lease or Leases thereafter to be obtained, on the Lessees or Assignees part and behalf to be done and performed; and in the next place, by and out of the clear money to arise from the same Rents, Incomes and Profits, as should then remain, to raise and collect a competent sum for renewing the said Lease from time to time, as should be customary and requisite; and accordingly from time to time to renew the same, and to take a new Lease of the said Manor, Hospital Lands and Premises, and for that purpose to make the necessary Surrenders, and do the other proper acts in that behalf and subject thereto; then to stand and be possessed of and interested in the said Leasehold Premises during the then and all subsequent terms therein respectively, in Trusts for the several uses, intents and purposes thereinbefore directed and mentioned for and concerning the same. And the said Testator thereby appointed his Wife, *Mary Manby*, sole Executrix of his said Will. The said *Francis Manby* died on the 25th day of March 1780, without Issue, and without revoking or altering his said Will, and his Executrix duly proved the same; and of the said Leasehold to the said *Thomas Manby*, who thereupon entered, and was possessed during his life, and he dying in June 1786, the said *John Manby* thereupon entered, and became possessed of the said Leasehold Premises during his life, and he dying on the 5th day of January 1819, the Plaintiff became entitled to the same, as Tenant in Tail under the same Will and Testament, and he

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entered thereupon, and is now possessed thereof accordingly. The said *Charles Stonor* and *Edward Ingram* did not accept the Devise of the said Leasehold Premises to them, or act under the said Will, or perform the Trusts thereof, and are now respectively dead; but the said several Tenants for Life of the said Leaseholds renewed the same accordingly, save, that the said *John Manby* did not renew the same after the 2d day of February 1805, but he received the whole of the Rents and Profits thereof, and applied the same to his own use and benefit. The said *John Manby*, by his last Will and Testament, in writing, appointed *Harriett Maria Manby*, now his Widow, his sole Executrix, and she proved the same, and possessed sufficient of his Assets to answer his Debts. The Plaintiff having renewed the said Leaseholds, on the usual terms, on the Trusts of the said Will, at or for the Fine or Sum of 9,247 *l.* and Interest thereon, from the 15th day of July to the 23d day of February, amounting to 281 *l.* 4 *s.* 1 *d.*; the Plaintiff, by his Bill, submitted that the same, (with some small exception thereform, being the proportion of one ninth of a proper Fine, which would have been paid if the said Leaseholds had been duly renewed,) ought now to be paid to the Plaintiff by the said Executrix. The Prayer of the Bill was, that an Account might be taken, under the Decree of this Court, of all Sums of Money paid by the Plaintiff for the Renewal of the said Lease, under or by virtue of the said Will as aforesaid, and that the said Defendant should pay to the Plaintiff such proportion thereof as the Court should direct, with Interest, and Costs of this Suit, the Plaintiff undertaking and submitting to be charged with his proportion of the said Fines and Expenses attending the renewing of the said Lease, as this Court shall

direct; and that the said Defendant might either admit Assets of her said Testator to pay his Debts, or duly account for the same.

The *Defendant*, by her Answer, stated, that by a Lease, bearing date the 6th day of January 1778, and made between the then Warden of the said Hospital of *Meer* of the one part, and the said Testator, *Francis Manby*, of the other part, the said Warden did demise the said Premises to the said Testator, *Francis Manby*, for a new Term of Years, and she, the Defendant, submitted to the Judgment of the Court, whether such Renewal of the said Lease was not a Revocation of the Devise or Bequests of the said Premises, contained in the said Will of the said Testator *Francis Manby*. And the Answer further stated, that the said *John Manby* did not renew the said Leaseholds after the 2d day of February 1805. And saith, she has heard, and believes it to be true, that soon after the expiration of the said first seven years of the Lease granted to the said *John Manby*, dated the 2d day of February 1805, the said *John Manby*, or his Agents on his behalf, applied to the then Warden of the said Hospital of *Meer*, for a Renewal of the said Lease, and that the said Warden refused to renew the same, unless he received a Fine or Premium for so doing of 4,414 *l.*; and the said *John Manby* having paid a Fine of only 300 *l.* on the Renewal of the said Lease, on the 2d day of February 1805, conceived the demand of so considerable a Fine as 4,414 *l.* as a virtual refusal to renew, more particularly, as on application to his Agents, particularly Mr. *John Cragg*, his Steward, an eminent Surveyor, who is now the Agent and Steward of the said Plaintiff, the said *John Manby* was advised that the said Fine was in the highest degree exorbitant, and ought

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not to be paid. And the Defendant hath heard, and believes, that the Rev. *Richard Prettyman* being afterwards appointed Warden of the said Hospital, the said *John Manby*, by his Agent, the said *John Cragg*, applied to him for a Renewal of the said Lease, and in answer to such application the said *John Cragg* received a Letter from the said *Richard Prettyman*, in the words following: (that is to say)

" *Hambleton*, near *Stamford*, July the 20th 1817.
Sir; In answer to your Letter, which has been forwarded to me, I beg to inform you that I must decline renewing Mr. *Manby*'s Lease of *Meer Hall* Lands; but I am ready to enter into treaty for the purchase of Mr. *Manby*'s present Interest in them. I am, Sir,
Your obedient Servant, *R. Prettyman*."

And believes that under the before-mentioned circumstance the said *John Manby* did not renew the said Lease, the said Warden not being compellable to renew the same; and admits it to be true, that the said *John Manby* did receive the whole of the Rents and Profits of the said Leasehold Premises, and did not apply such parts thereof as were from time to time applied in Fines for Renewals, and in the improvement of the said Leasehold Premises, for his own use and benefit; but she insists, that the said *John Manby* did thereout, or out of his general Income, lay out, to the best of the Defendant's belief, the sum of 10,000 *l.* and upwards, on the Hereditaments comprised in the said Settlement of May 1774, and the benefit of which is now enjoyed by the said Plaintiff: And saith, that the said *John Manby* did duly make and publish his last Will and Testament, in writing, bearing date the 16th day of June 1815, and did appoint the Defendant sole Executrix

thereof; and that the said *John Manby*, by his said Will, gave and devised his Copyhold Fields and Closes, in front of his Mansion House, containing about Fifty Acres, to the said Plaintiff, his Heirs and Assigns, subject to a certain Mortgagee then subsisting thereon; and also subject to and charged and chargeable with the payment of 500 *l.* to the Defendant, with lawful Interest from the time of his the said Testator, *John Manby*'s Death; and saith she thereby submits that the Devise in the said Will contained of the said Copyhold Lands, in favour of the said Plaintiff, was meant and intended by the said Testator, *John Manby*, as a compensation to the said Plaintiff for the said Lease not having been renewed.

Mr. *Bell*, and Mr. *Sugden*, for the Plaintiff:—
The first point to be considered, is, whether the Will was revoked? We insist it was not; for it is apparent from this Will, that the Testator intended to give, not merely the actual Interest he had in the Lease when he made his Will, but any future Interest he might acquire by subsequent renewals. That he might do, it being a Chattel Interest. If it had been merely a Gift of the Lease he had when he made his Will, a subsequent Renewal of the Lease would have been a Revocation, but by this Will the Interest in the Lease is, in effect, given. The apparent intention of the Testator, in this Case, is to give the Lease he might have at his Death. Most of the Cases are referred to in Mr. *Roper*'s *Book on Legacies* (*a*), and also in *James* v. *Dean*, first decided by Sir *William Grant* (*b*), but afterwards reversed on appeal (*c*); and such reversal confirmed on a rehearing (*d*),

(*a*) 1 vol. p. 35.
(*b*) 11 Ves. 383.
(*c*) 11 Ves. 388.
(*d*) 15 Ves. 236.

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Carte v. *Carte* (*e*). An additional circumstance in this Case, is, that by the Settlement the Testator was bound to renew the Lease. The Wife was alive when the Will was made, and is mentioned in it; and the Trusts of the Settlement were in continuance. The Interest the Testator took under the Settlement would therefore pass under the words in his Will.

Mr. *Hart*, and Mr. *Blake*, for the Defendant:—

The words used in this Will are merely words of description, and cannot be held to pass the renewed Lease. A Will, in the case of real Chattels, must be construed to speak only from the time when the Will is made. *Abney* v. *Miller* (*f*), *Rudstone* v. *Anderson* (*g*), *Hone* v. *Medcraft* (*h*), and the before-mentioned Case of *James* v. *Dean*. In *Rudstone* v. *Anderson*, the *Master of the Rolls*, Sir *John Strange*, says, " I own I cannot see any real distinction between the words in this Will, ' *all* my *Tythes at Westow*,' and if it had been ' *all my Lease or Interest in that Lease at Westow*,' because that must refer to the Interest she had at the time of making the Will." That is putting a much stronger Case than the present. Upon the whole, we contend the Will was revoked.

Mr. *Bell*, and Mr. *Sugden*, for the Plaintiff:—

The next question is, Whether, as *John Manby* ought to have renewed the Lease in his life-time, the Expense of the Renewal since his death ought not to be paid out of his Estate? By the Will a sufficient part of the Rents and Profits of the Estate were to be reserved

(*e*) 3 Atk. 174, noticed also in 2 Ves. 419.

(*f*) 2 Atk. 593.

(*g*) 2 Ves. 418.

(*h*) 1 Bro. C. C. 261.

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by the Trustees for the payment of the Fine, payable on the Renewal, and they were bound so to apply them. *John Manby* took possession in 1805; he died January 1819. He should have renewed in February 1812, for seven years. The next Renewal would be in 1819, for seven years. He died in 1819, about a month before the period when the Renewal should have taken place: The Lease was afterwards renewed by the Plaintiff, at an expense of 9,247 *l.* The expense of that Renewal ought to be borne by the Representatives of *John Manby*, who was bound to set apart so much of the Rents and Profits as would have paid the Fine on the Renewal. *Mountford* v. *Lord Cadogan* (*i*), and *Lord Viscount Milsington* v. *Lord Mulgrave* (*k*). Though he might not be able to renew, he could not, in prejudice of the Remainder-man, pocket the Money applicable to such Renewal. We ought to be placed in the same situation as if there had been a Renewal in 1812, and are entitled to so much of the Rents and Profits to answer the next Renewal in February 1819, as ought to have been put by out of the Rents and Profits previous to the death of *John Manby*, for the purpose of a Renewal in 1819.

Mr. *Heald*, and Mr. *Blake*, *contrà*:—

On the 16th of January 1778, the Testator, *Francis Manby*, obtained a new Lease for twenty-one years, on a Surrender of the former Lease. In 1780 the late *Thomas Manby* entered as Tenant for Life, and there were several Renewals of the Lease, the last being on the 2d February 1805, for seven years. In 1806,

(*i*) 17 Ves. 485. S. C. on Appeal, 2 Meriv. 3.

(*k*) Ante, 3 vol. 491; and see S. C. ante 5 vol. p. 471; and see *Milles* v. *Milles*, 5 Ves. 761.

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Thomas Manby died, and on his Death the late *John Manby* entered as Tenant in Tail, and lived until January 1819, but did not renew the Lease, which expired in February 1812. The Plaintiff renewed soon after the Death of *John Manby*, for twenty-one years, on payment of a Fine of 9,247 *l.* with Interest, amounting to 284 *l.* 4 *s.* 1 *d.* and hence the present question arises. In 1812 application was made to renew, but the Fine asked was so exorbitant, that in effect it amounted to a denial to renew. The evidence shows the extravagance of the Fine demanded. We were not bound to renew on any terms, however oppressive, but only on fair terms. The Sum proposed by the then Warden, was 4,414 *l.* a most exorbitant Sum. To use the words of Mr. *Cragg*, an eminent Surveyor, whose Letter to Mr. *Manby* is in evidence, "The Fine was in the highest degree exorbitant."

The then Warden died, and afterwards proposals were made for a Renewal to Mr. *Pretyman*, who succeeded as Warden: he refused to renew. Under these circumstances we contend, that as Mr. *Manby* was not bound to renew on exorbitant terms, and as he could not afterwards renew, he was discharged from the obligation to renew; and that the Money which would have been applicable to a feasible Renewal, if feasible, cannot now be claimed against his Representatives. In *Richardson* v. *Moore*, and others, not reported, decided by the late *Master of the Rolls*, on the 1st of May 1817, a Crown Lease ought to have been renewed out of Rents and Profits, in pursuance of a Trust, but the late Act relating to Crown Property made it impossible to obtain a beneficial Lease, and the *Master of the Rolls* refused to make a Compensation to those in Remainder, out of the Rents. The same point was

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determined by the *Lord Chancellor*, in *Tardiff* v. *Robinson*, January 1819, a Cause which grew out of the former Case of *Richardson* v. *Moore* (*l*). If the Court should be of opinion that a Sum ought to have been set apart out of the Rents and Profits of every year, after the Renewal in February 1805, for the payment of the Renewals which should have been in 1812 and 1819, how was the amount of what was to be set apart each year to be ascertained? On the Renewal in 1805, a Fine of 300 *l.* only was paid. It might be supposed, therefore, that if 40 *l.* were laid by out of the Rents each year, that, with the Interest which would accrue, would be sufficient to pay the Fine on the Renewal in 1812; but instead of 300 *l.* Fine, a Fine of 4,414 *l.* was demanded! Is that difference, and the difference in the Fine on the Renewal in 1819, to be sustained by Mr. *Manby*'s Representatives? The Rent is now only 800 *l.* a year, so that the Fine of 4,414 *l.* if there had been a Renewal in 1812, would probably have exhausted the whole Rent received in the preceding seven years.

The VICE-CHANCELLOR:—

It is clear, that if a Testator simply bequeaths a Lease of which he is possessed at the making of his Will, and afterwards renews that Lease, the Legatee is not

(*l*) The Case of *Richardson* v. *Moore*, is stated in *Tardiff* v. *Robinson*. In the latter Case, a Lease of Crown Lands, settled, in Trust, to pay certain Annuities, and the surplus Rents to *T.* for his life, and a Fund for Fines on Renewal was directed to be reserved out of the Rents. A Renewal of the last Lease from the Crown became impracticable, and it was held, that as no Renewal could be obtained, no accumulation of the Rents for Fines could take place, and that the Annuities should be paid, and the surplus Rents to *T.* for life, for so much of the Residue of the Lease as remained.

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entitled to the benefit of the new Lease, (*Marwood* v. *Turner* and *James* v. *Dean*)(*m*), for the new Lease is not given to him, but the old Lease only, which is adeemed and gone. It is equally clear that a Testator may, if he pleases, in the case of a Chattel Lease, give not only the actual Lease of which he is possessed at the making of his Will, but such renewed or other Lease of the same Premises as he happens to be entitled to at the time of his death. In every case, therefore, where the Lease has been renewed by the Testator, after the making of his Will, the true inquiry is, whether it appears upon the Will to have been the Testator's intention that the Legatee should take, not merely the actual Lease if it subsisted at his death, but any renewed or other Lease of the same Premises which he might then happen to be possessed of. Here the Testator gives not the Lease, but the Manor and Hospital Lands which he held by Lease; and if it is important to the decision of this Case, I should have thought it deserved a good deal of consideration, whether the words, which he held by Lease, were more than words of description, and whether a gift of his Manor and Hospital Lands was not a gift of his interest in his Manor and Hospital Lands; and whether in the case of a real Chattel, as in the case of a personal Chattel, the Will is not to speak at the death; and whether, therefore, in effect, this is not a gift of such interest in his Manor and Hospital Lands as he should be possessed of at his death. I admit, however, that *Rudstone* v. *Anderson* (*n*), and *Hone* v. *Medcraft* (*o*), and *Coppin* v. *Fernyhough*(*p*), are authorities that a general Gift of Lands where the Testator has a Chattel Interest

(*m*) See *Marwood* v. *Turner*, 3 P. Wms. 163; *James* v. *Dean*, 15 Ves. 238.

(*n*) 2 Ves. 418.

(*o*) 1 Bro. C. C. 261.

(*p*) 2 Bro. C. C. 291.

is *primâ facie* a Gift of such interest in those Lands as the Testator was possessed of at the making of his Will, and not as he should be possessed of at his death; but in *Carte* v. *Carte* (q), *Lord Hardwicke* appears to have expressed a different opinion; as this Case, however, will not turn upon this point, it is not necessary to pursue it farther. This Testator directs the Trustees to whom he gives this Lease to renew it from time to time out of the Income of the Estate, and to stand and be possessed of the Premises during the present and all subsequent Terms therein, upon the Trusts mentioned. The subsequent Terms to which he expressly and literally refers are subsequent Terms to be acquired by the Renewal of the Trustees; but it might be difficult upon this expression to resist the inference, that this Testator, by a general Gift of his Manor and Hospital Lands, meant to give not the mere subsisting Term, the interest which he had at the making of his Will, but such renewed Term or Interest which should happen to exist at his death. Let it, however, be assumed that a Gift of the Testator's Manor and Hospital Lands is, *primâ facie*, a Gift of his Interest in those Lands at the making of his Will, and not at his death; and that there is nothing in this Will to qualify that construction; then the question is, what was the Testator's interest in this Manor and Lands at the making of his Will? By his Marriage Settlement in 1761, he had assigned this Leasehold interest to the same Trustees who are named in his Will upon Trust to renew the Lease from time to time, and to pay the surplus Rents and Profits to him for Life, with Remainder to the Sons of the Marriage, and if no Son of the Marriage then the Reversion to himself. At

(q) 3 Atk. 174.

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the time of his Will there was no Son of the Marriage; but his Wife was living, and the Trusts of the Settlement were therefore subsisting. The Trustees had permitted him to renew the Lease in his own name; but though legally possessed of the Lease at the making of his Will, he was in Equity a Trustee for the purposes of the Settlement. The interest which at the making of his Will he substantially had in the Manor and Hospital Lands was an interest for his Life in the Rents and Profits during the subsisting and renewed Leases, subject to the charges of Renewal, with an absolute Title to such Lease as should happen to be subsisting at his death, in case he should die without leaving a Son. All the interest in the Manor and Hospital Lands which he could therefore dispose of by his Will, was this contingent right to the Lease which should happen to be subsisting at his death, and this contingent right would pass by his Will upon the principle of *Rudstone* v. *Anderson*, and the other Cases before referred to.

It is next argued on the part of the Defendant, that Mr. *John Manby* could not renew during his Life, and that his Assets ought not therefore to be answerable in respect of any future Renewal; and the Cases of *Richardson* v. *Moore*, and *Tardiff* v. *Robinson*, are cited in that respect. I think it not material to inquire whether, in point of fact, Mr. *John Manby* could or not renew. The Plaintiff actually renewed so as to make up the term of Twenty-one years, within a few days after Mr. *John Manby*'s death. By the terms of the Testator's Will, the Rents and Profits of this Estate during Mr. *John Manby*'s Life were for the benefit of the Remainderman, to be subject to a deduction for the charges of Renewal; and admitting that it was the fault of the Lessor, and not of Mr. *John Manby*, that the

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Renewal was not made during his Life, can I for that reason permit his Estate to retain what, according to the intention of the Testator, belongs to the Plaintiff, and not to him? I cannot, however, bind Mr. *John Manby*'s Estate by the Amount of the Fine actually paid by the Plaintiff; it may have been, on his part, an improvident payment. I shall refer it to the Master, to inquire what, on the 2d February 1819, would have been a reasonable sum to be paid for the Renewal of the Lease for a further Term of Fourteen years; and the Master must inquire what deduction ought to be made from the amount of such Fine, in respect that the Testator died on the 5th January 1819; and I shall reserve the consideration of Interest and Costs.

The Decree was ;—

"This Court doth declare, that it was the duty of the Trustees to have received out of the annual Rents of the Premises in the Pleadings mentioned, held under the Warden of *Meer Hospital*, a sufficient Sum to provide for the Renewal of the Premises: And this Court doth order that it be referred to Mr. ———, one of the *Masters* of this Court, to inquire what would have been a reasonable Sum to have been paid as a Fine for such Renewal of the Lease of the Premises, for a further term of Seven Years, provided it had been renewed on the 2d day of February 1812: And it is ordered, that the *Master* do inquire what would have been a reasonable Sum to have been paid as a Fine on the 2d day of February 1819, for a like Renewal of the Lease for the further Term of Seven Years, provided it had been renewed on such 2d day of February 1819: And the said *Master* is to consider what would have been a reasonable Sum to have been deducted on account of the Testator having died on the 5th of January 1819, before

1821.

Colegrave v. Manby.

the time for the aforesaid second Renewal: And it is ordered, that the same be deducted out of what the said *Master* shall find would have been reasonable Sums to have been paid for such Renewals: And in case the Defendant shall not admit Assets of the Testator *John Manby* to pay what shall be coming due on the said account, this Court doth order and decree, that she do come to an Account before the said *Master* for the said Testator's Personal Estate come to her hands, or to the hands of any other person or persons by her order, or for her use. And for better taking the said Accounts, and discovery of the Matters aforesaid, the Parties are to produce before the said *Master* all Books, Papers and Writings in their Custody or Power relating thereto, and are to be examined upon interrogatories as the said *Master* shall direct, who in taking of the said Accounts is to make unto the Parties all just allowances: And this Court doth reserve the consideration of Interest, and of all further directions, and the Costs of this Suit, until after the said *Master* shall have made his Report; and any of the Parties are to be at liberty to apply to this Court as there shall be occasion."

1821.
13th March.

HUNTER and others *v.* RICHARDSON.

If the Defendant has a good case against one of the Plaintiffs who hold a joint Office, though not against the others, Court cannot make a Decree in that Suit for the Plaintiffs.

THE Plaintiffs, three Assignees of a Bankrupt, filed a Bill to compel the specific Performance of a Contract for Sale of the Bankrupt's Real Estate.

Two of the Plaintiffs had executed the Conveyance, which had been delivered to the Defendant, who had paid or accounted for the Money to the Solicitor under the Commission, who was the Brother of one of the two, and had become insolvent.

The *Master* reported that one of the two had verbally authorized the Solicitor to receive the Purchase Money from the Defendant.

The *Vice-Chancellor* considered, that the payment by the Defendant being thus good against one of the Plaintiffs at least, though bad as to the third, he could not in this Suit order the re-payment of the Money, and therefore dismissed the Bill, but without Costs, and without prejudice to a new Suit by the third Plaintiff.

1821.
13th March.

COLSTON *v.* MORRIS.

A LEGACY was given to a Father, on condition that he did not interfere with the education of his Daughter.

On a Bill by the Father for the Legacy, the Court required from him Security to that effect, to be approved by the *Master*, and directed the Costs of the Proceedings to be paid out of the Legacy.

1821.
15th March.

Quære, whether Husband has a right to throw Wife's Funeral Expenses upon her separate Estate.

GREGORY *v.* LOCKYER.

THE separate Estate of a Feme Covert was by the Decree directed to be applied in payment of her Debts and Funeral Expenses. The Husband having actually paid them, claimed before the *Master* to have the Money repaid by her Executor.

The *Vice-Chancellor* made the Order, considering himself as bound by the Decree; but expressed a doubt whether, generally, the Husband has a right to throw the Wife's Funeral Expenses upon her separate Estate.

1821.
17th March.

Where it is a term of the Trust that each Trustee shall receive and be answerable only for a Moiety, this Court does not extend the liability.

BIRLS *v.* BETTY.

A HUSBAND selling his Estate was advised by his Friends to make a provision out of the Purchase Money for his Wife.—He consented to settle 400 *l.* and applied to the Defendant, *Betty*, who refused to accept the Trust unless another Person were named with him, and the Trust Money divided between them, so that each should be responsible for a Moiety only. This was accordingly done, and the Trust Money divided equally, by the direction of the Husband and Wife. The Trust Deed was however in the common form, and one of the Trustees becoming insolvent, the Wife, by her next Friend, filed this Bill, to charge the solvent Trustee with the whole sum.

The Settlement was for the separate use of the Wife with the Remainder to the Children.

The *Vice-Chancellor* dismissed the Bill, with Costs, considering that the division of the Trust Money was a term in the creation of the Trust.

1821.
17th March.

HARVEY *v.* HARVEY.

Creditor who proves, may have Costs under special Circumstances.

THE *Vice-Chancellor*, held, that a Creditor, who proves before the *Master*, has generally no Costs. But that if his proof is beneficial to the Estate, as where he saves by it the expense of a Suit, and there are extraordinary Costs, the Court will give them on Petition.

1821.
17th March.

EVANS *v.* TRIPP.

If a Testator gives a Sum in Stock standing in his name, and has not the Stock described, nor any other Stock, the Legacy fails. The Court sends it to the Master to inquire what the Testator intended, as well where there is a misdescription of the Fund as of the Legatee.

THE Testator gave the Sum of 5,000 *l.* Three per Cent. Consols, standing in his name. It being suggested that he had no such Stock, the *Vice-Chancellor* referred it to the *Master*, to inquire whether he had at the making of his Will any such Stock; or whether he had any other Stock, which he intended to pass by that description. The *Master* reported that he had no such Stock, nor any other which he intended to pass; but that he intended to buy such Stock, though he never did.

Against the *Master*'s Report was cited *Selwood* v. *Mildmay* (*a*); and further, it was objected, that the reference to the *Master* went too far. That it ought only to have been referred to him to inquire whether the Testator had any such Stock, or any other Stock; not to draw the conclusion whether he intended to pass any other Stock.

The *Vice-Chancellor* thought otherwise; because possibly other circumstances than his mere Possession

(*a*) 3 Ves. 30.

1821.

EVANS v. TRIPP.

of other Stock, might afford evidence of his intention to pass other Stock; and he likened it to the case of a misdescription of a Legatee, where the Court always sends it to the *Master* to inquire who was intended.

Nothing passed by this Gift. A Gift of my grey Horse will pass a black Horse, which is not strictly grey, if it be found to have been the Testator's intention that it should pass by that description; but if the Testator has no Horse, the Executor is not to buy a grey Horse.

1821. 20th March.

ATTORNEY GENERAL *v.* LLOYD.

Where the purchaser of Charity Land, with notice, expends Money in Buildings, is he entitled in Equity to Compensation? Quære.

THE late Mr. *Herbert Lloyd* purchased Charity Lands, with notice, and afterwards expended 2,000 *l.* in building two new Houses upon the Site. Upon an Information originally being filed against him, and continued against his Devisees, restoration of the Land was about to be decreed, and the question was, whether any Compensation was to be made for the Money expended.

The Counsel for the Attorney General consented to a Reference to the *Master*, upon the principle of Compensation by way of Lease, as had been done in former Cases where a Grant or Lease from the Trustees of the Charity had been avoided as a breach of Trust.

The *Vice-Chancellor* expressed a doubt, whether, without such Consent, the Order could be made. In the former cases referred to, the Title of the Defendant was good in Law, but bad in Equity, and there, the Attorney General coming for Equity must do Equity. In the present case, the Title of the Defendant was equally bad at Law and in Equity.

HICKS *v.* WRENCH and another.

1821.
20th March.

A Person made Party to a Suit only for Protection of Trustees, entitled to his Costs out of Trust Fund.

BILL filed by Trustees for the direction of the Court in the application of a Trust Fund. The dispute was between the two Defendants, whether one of them was illegitimate. The *Master* found he was legitimate. A question arose as to Costs.

The *Vice-Chancellor* held, the other Defendant entitled to his Costs out of the Trust Fund, because he had made no claim before Suit, and because in the Suit he only said he did not know whether the Co-Defendant was or not legitimate. His conduct therefore had in no respect occasioned the expense of any proceeding, and being made a Party only for the protection of the Trustees, the whole Costs of the Suit must fall upon the Trust Fund.

CHAMPERNOWN *v.* SCOTT.

1821.
24th March.

Solicitor has a Lien on Papers delivered to him in that character, for all Professional Business, but no Lien as a Solicitor on Papers delivered to him as Steward.

A MOTION was made, that the Defendant might deliver up Books and Papers. The Defendant was a Solicitor, and insisted that he had a Lien upon them, and his Answer stated that he received them in his capacity of Steward of a Manor, and not as Solicitor.

The *Vice-Chancellor* held, that though a Solicitor had a Lien upon all Papers delivered to him in that character, not only for professional business in the matter of the Papers, but for all professional business whilst they remained in his hands, yet, that he had no Lien, as Solicitor, on Papers which he received as Steward.

TURNER *v.* DOUBLEDAY.

1821.
27th March.

Plaintiff, the Residuary Legatee of B. who was Residuary Legatee of A. may, in one Bill, pray account of both Estates.

BILL by the Residuary Legatee of *B.* for an Account of the Estate of *B.* and also for an Account of the Estate of *A.* of which *B.* was residuary Legatee.

The *Vice-Chancellor* held it no cause of Demurrer for multifariousness by the Executor of *A.*; for though it was true that he had no concern with the Estate of *B.* yet, that the Demand of the Plaintiff for the Estate of *B.* necessarily involved this Account.

EXETER COLLEGE *v.* ROWLAND.

1821.
28th March.

It is multifarious for Rector and Vicar to join in a Suit for the Tithes respectively due to them.

EXETER College being the late Lay Rector of the Parish in question, and entitled to the Great Tithes, and the *Warden of the College* being the Vicar, and entitled to the Small Tithes, the College and the Vicar joined as Plaintiffs in the Suit, praying, that the Defendants, occupiers in the Parish, might account to them for the Tithes respectively due to them. The Defendant demurred for multifariousness.

The *Vice-Chancellor* allowed the Demurrer, because the Plaintiffs prayed for an Account of the Tithes respectively due to them, which were distinct matters; but observed, it might have been otherwise if the Plaintiffs had alleged that they, together, were entitled to all the Tithes, and had prayed a general Account.

1821.
28th March.

PIGGOTT *v.* WILLIAMS.

A Solicitor files his Bill for Foreclosure of an Estate pledged as a Security for Costs. The Client files a Cross Bill, alleging the Costs demanded to have been occasioned by negligence and want of skill; Demurrer over-ruled on ground of equitable set-off.

A SOLICITOR filed a Bill against his Client, to give effect to a Security for Costs on a Copyhold Estate.

This was a Cross Bill by the Client, alleging that nothing was due, and that the Estate ought to be re-surrendered; for that the Costs claimed would have been avoided if the Solicitor had conducted himself with integrity, skill and attention.

To this Bill the Solicitor demurred, on the ground that the claim of the Client against the Solicitor for negligence or want of skill could only be tried in an Action at Law.

The VICE-CHANCELLOR:—

A Demurrer will hold only, where, if the matter alleged be taken as true, the Plaintiff has no title to relief. Taking the matter here charged to be true, the Plaintiff has a clear Title to restrain the Defendant from proceeding to enforce his Security against the Copyhold Estate, leaving the Plaintiff's demand for Damages unsatisfied. The course which the Cause would probably take, in this case, would be to retain this Bill until an Action for Damages were tried; but there is here, taking the facts to be true, a clear case of equitable Set-off.

Demurrer over-ruled.

1821.
31st March.

GRANTLEY v. GARTHWAITE and others.

When a Master is to raise a charge by Sale or Mortgage, he cannot compel Parties interested to insure a Life for better security of Mortgage, but must sell.

A WILL gave a Leasehold Estate for Life, with Remainder over, to the Defendant absolutely, and directed the Tenant for Life to renew, with power to charge the Fine by Mortgage.

The Tenant for Life did renew, and the Fine was raised and paid by *A. B.*; but no actual Mortgage was made. The Tenant for Life was dead, and at the Hearing, the *Vice-Chancellor* directed that the Fine should be raised by Sale or Mortgage. It appeared before the *Master*, that the Term now unexpired was held by a single Life, and that the Fine could not be raised by Mortgage only; and the *Master* therefore approved of a proposal that the Defendants, by way of Security to the Mortgagee, should insure the Life upon which the Lease was held. One of the Defendants excepted to the *Master*'s Report in this respect; and the *Vice-Chancellor* held that the Defendant being absolutely entitled, if the Money could not be raised by Mortgage the *Master* must sell, and had no authority to enforce an Insurance.

1821.
4th April.

JERVOISE v. CLARKE.

Leases may be granted for the Sale of an Estate directed by a Will to be sold.

THE Testator directed his Estates to be sold. It was referred to the *Master*, to inquire whether it would be for the benefit of the Parties interested that Leases of Mines under the Lands should be granted; and the *Master* reported that it would be beneficial.

The *Vice-Chancellor* doubted at first the propriety of this Reference and Report; but ultimately confirmed it, as the Leases were also to be sold, and were only auxiliary to the Sale of the Estate.

1821.
JERVOISE v. CLARKE.

ANON.

1821.
5th April.

Rule, that there must be Schedule before Court will order production of Deeds and Papers, applies only in cases of Discovery.

THE Defendant, a Trustee, admitted in his Answer that the Title Deeds of the Trust Estate were in his Possession.

The Plaintiff moved that he might deliver them into the *Master's* Office. It was objected, that no Order should be made, because he had not set out a Schedule, and the Court could not know if its Order were complied with.

The VICE-CHANCELLOR:—

This Rule applies only to Cases of Discovery. The common Form of a Decree is to produce, upon Oath, all Books, &c. and the Court is in the constant habit of making interlocutory Orders to the same effect.

Motion granted.

STEVENS *v.* STEVENS.

1821.
6th April.

Court will not direct inquiry, whether Suit is beneficial to an Infant, unless upon a strong case of no benefit, or improper motive.

THIS was a Motion for a Reference to the *Master*, to inquire if a Suit instituted on behalf of an Infant was for his benefit.

1821.

Stevens v. Stevens.

The Vice-Chancellor :—

It is essential for the protection of Infants that Suits on their behalf should not be discouraged; and such an Inquiry ought never to be directed unless there be a strong Case of no Benefit, or improper Motive.

Motion refused.

1821. 6th April.

PEACHAM v. DAW.

Where Defendant makes admissions which would entitle Plaintiff to Decree, you cannot for that reason move for payment of Money into Court.

BILL against Defendant, insisting that Money claimed by her as a Gift from the Testator shortly before his Death, continued to be part of his Assets.

The Plaintiff now moved that the Defendant might pay the Money into Court, on the ground that she admitted circumstances in her Answer which made it clear that it was Part of the Testator's Assets.

The Vice-Chancellor :—

Your proper course is in such a Case to set down the Cause on Bill and Answer. It is Matter of Decree.

Motion refused.

1821. 10th April.

ANON.

As to construction of Friendly Society Act in case of Bankruptcy.

A BENEVOLENT Society made an Order, that Stock, standing in the Names of Three Trustees, should be sold, and the Produce re-invested in a different Stock.

They all executed a Power of Attorney to a Broker to sell, which the acting Trustee remitted to him, and by the direction of the acting Trustee the Broker sold at different times, and paid the Produce at a Banker's in

London, into the joint Account of the acting Trustee and his Partner in Trade.

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ANON.

The acting Trustee being a Bankrupt, this was a Petition in the matter of the Society, for payment of the Produce of the Stock by his Assignees.

The *Vice-Chancellor* doubted whether the Petition ought not to have been entitled only in the Bankruptcy; considering that the Act, Sec. 10, (a) making a Debt of this sort a primary demand upon the Bankrupt's Estate, the demand must be enforced by Petition in Bankruptcy, in the ordinary course of the Administration of a Bankrupt's Estate.

The Eighth Section, which gives the Courts of Equity, &c. jurisdiction, does not apply to this Case, because this Case was not in contemplation in that section, and also not necessary to give such a Jurisdiction; and because it would be to give Jurisdiction in Bankruptcy to the Welsh Courts, and to the Courts of Session in Scotland. But considering, that unless the Act could be held to extend to cases of Bankruptcy, larger expenses would be thrown upon these Societies. The *Vice-Chancellor* thought the better way would be, as this point had not been before made, that the Petition should be entitled as well in the Bankruptcy as in the matter of the Society.

It was then objected, that here the solvent Trustees might be liable, and therefore, no relief could be given under the Act.

The VICE-CHANCELLOR :—

In the absence of the other Trustees, I cannot enter into the consideration of their liability. I cannot hold,

(a) 33 Geo. III. cap. 54.

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ANON.

that these Societies should have no relief under this Act, where other Persons might be liable, without first ascertaining their Claims, by Bill against such Persons.

Order made.

1821.
19th May.

WEBB *v.* LORD SHAFTSBURY.

Lands were vested in Trustees in Trust, out of the Receipts and Profits, to make certain payments, and lay out the Surplus upon Mortgage or Government Security, with a view to Accumulation; with a Bequest of such Accumulations. On a Petition, a real Estate contiguous to the real Estate of the Testator was permitted, under the circumstances, to be purchased, the same to be considered as personal property.

SIR *John Webb*, Baronet, devised certain Estates to *Edward Arrowsmith*, in Fee, upon Trust, to set, let and manage the same as he should think proper; and out of the Rents and Profits, after certain Payments, to place out and invest, in his Name, or in the Names of the Testator's Daughter or Grand-daughter, the clear Surplus of the Rents and Profits of his Real Estate, upon, or by way of Mortgage on Real Estates, or on Government Securities, and to receive the Interest and Dividends arising therefrom; and place out and invest the same during the Lives of the Testator's Daughter and Grand-daughter, and the Life of the Survivor of them, in the like or any other Real or Government Securities; it being his intention, that during the Lives of his said Daughter and Grand-daughter, and the Life of the Survivor of them, all the Rents and Profits of his said Real Estate should accumulate for the Person or Persons thereinafter named. The Testator afterwards by his Will disposed of such Accumulations. By a Decree in the Cause the Trusts of the Will were directed to be carried into execution.

A Petition was now presented by *Edward Arrowsmith*, the Trustee, stating, that a sum of 111,818 *l.* 2 *s.* 10*d.* Three per Cents. the amount of Accumulations, was standing in the Name of the Accountant General, in

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WEBB v. Lord SHAFTSBURY.

Trust, in the Cause; and further stating, that a large Estate of a Mr. *Churchill*, about to be sold, was contiguous to some of the Testator's Estates, and would be convenient to be held therewith; and it would be very advantageous to the Persons who might be entitled to the Estates, that the Estate, (Mr. *Churchill's* Estate,) should be purchased; and therefore praying a Reference to the *Master*, to inquire whether it would be for the benefit of all persons who might be entitled to the Estate of the Testator, and to the Accumulations, that Mr. *Churchill's* Estate should be purchased by the Petitioner, (in case Parliament should authorize the Investment of the Trust Funds in the purchase of Real Estates) and upon what Terms; and in case the *Master* should be of opinion that it would be proper for the Petitioner to purchase the said Estate, then that he might inquire and state whether it would be for the benefit of the said Parties that an Act of Parliament should be applied for to enable the Petitioner to purchase the said Estate out of the said Accumulations.

Mr. *Wingfield*, in support of the Petition, cited *Ashburton* v. *Ashburton* (a), and submitted that a Reference might be made; and that if the Purchase was approved by the *Master*, an Order of the Court would be sufficient to enable the Trustee to purchase, without an Act of Parliament.

The VICE-CHANCELLOR:—

I have Jurisdiction to make the Order, without the Act of Parliament; for if the Estate be conveyed with a Declaration of Trust, that the character of the Personal Estate should remain unchanged, that in substance would be the Investment of the Accumulations in Real

(a) 6 Ves. 6.

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Security. In the event of the Estate being purchased, it is proper to declare, generally, it shall be considered as Personal Estate, without saying until the Infant should attain twenty-one, as at that period he might be a Lunatic, and other inconveniences. At twenty-one he may, if he pleases, consider it as Real Estate.

The Order made was,—"That it be referred to Mr. *Harvey*, the *Master*, to whom these Causes stand referred, to inquire whether it will be proper and for the benefit of all Persons who may be entitled to the Estates of the Testator, Sir *John Webb*, in the County of *Dorset*, and Town and County of the Town of *Poole*, and to the Accumulations thereof, that the Estate of *William Churchill*, Esq. in the Petition mentioned, should be purchased by the Petitioner, and upon what Terms. And in case the said *Master* shall be of opinion that it will be proper for the Petitioner to purchase the said Estate, then he is to inquire whether a good Title can be made thereto: And the said *Master* is to state the same, with his Opinion thereon, to the Court. And after the said *Master* shall have made his Report, such further Order shall be made as shall be just. And this Court doth declare, that in the event of the Estate being purchased, the same is to be considered as Personal Estate."

1821. 19 & 25 May.

CANDLER v. PARTINGTON.

Where the Plaintiff before Answer obtains an Injunction, and when the Answer is put in excepts to the same, he cannot move to refer the Exceptions instanter. *Counsel's name must be signed to Exceptions.*

THE Plaintiff had obtained an Injunction before Answer; on the Answer coming in Exceptions were taken, and an Order was obtained to refer the Exceptions *instanter*.

1821.

CANDLER
v.
PARTINGTON.

Mr. *Wakefield*, for the Defendant, moved to discharge the Order, as being irregular; and further objected, that the Exceptions were irregular, not being signed by Counsel, and ought therefore to be suppressed.

Mr. *Agar, contrà*, cited *Yates* v. *Hardy*, 5th December 1820 (*a*), contending, that in no case, except that cited, had it been held, that the Exceptions must be signed by Counsel; the draft of the Exceptions was signed; as to the other points, the practice is to refer Exceptions, in cases like the present, *instanter*; besides, any objection must be considered as waved, for the Defendant attended the Exceptions before the *Master*; sixty-two Exceptions were allowed; and it is not till after the *Master*'s Report that this Motion is made. It is too late, therefore, to object any informality in the Exceptions.

The VICE-CHANCELLOR:—

The Title of the Plaintiff to refer Exceptions *instanter* in Injunction causes, and so to deprive the Defendant of his ordinary right to put in an Answer, at any time within eight days, without going before the *Master*, is given to him to protect him from delay, where he will obtain the Injunction upon the allowance of the Exceptions. The same right of Reference *instanter* is given to the Defendant, where, by overruling the Exceptions, he will dissolve the Injunction. But here the Plaintiff is in possession of the Injunction, and the special reason for the reference *instanter*, has no application to the present case, and the Order is therefore irregular, and must be discharged. Upon a former occasion, I

(*a*) The case was before the *Vice-Chancellor*. I have a MS. note of that case, to the effect as stated. Mr. *Fonblanque* and Mr. *Treslove* were the Counsel opposed on that occasion.

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thought as I now think, that although no Order can be produced as the origin of the practice of signing the name of Counsel to Exceptions, it is sufficient for its support that it is found to be established. Let the Plaintiff be at liberty to add to the Exceptions the name of the Counsel who signed the draft of the Exceptions.

CRUIKSHANK *v.* ROBARTS.

1821. 25th May.

THE late Mr. *A. Robarts* was one of the Executors of *Lewis Cuthbert*. He had been a Surety for Mr. *Cuthbert*, and an Estate in *Scotland* was conveyed to him for his indemnity, with a Power of Sale. After the death of Mr. *Cuthbert*, Mr. *Robarts* sold the Estate, and then raised an Action of Multiple Poinding in *Scotland* for distribution of the surplus Produce. A Decree was made for distribution accordingly, and large Sums paid under it; but before final Distribution, it appeared probable, from the result of a Suit in the *West Indies*, that further demands might be made on Mr. *Robarts*, as Surety for *Cuthbert*, in respect of which he would be entitled to be repaid from the produce of the *Scotch* Estate, and he thereupon obtained an Order from the Court of Session to suspend the further distribution under its Decree.

The present Suit was instituted by one of the Creditors who had been ranked under the Decree in *Scotland*, for Satisfaction out of the general Personal Estate of *Cuthbert*, against the Executors of Mr. *A. Robarts*, who was dead.

In the Answer of the Executors, they admitted they had a Balance in their hands, including the Produce

unapplied of the *Scotch* Estate, of 21,000 *l*. The present application was for the payment of that Sum into Court.

When the Proceeding in *Scotland* was in activity, an Application to the same effect had been refused there.

The VICE-CHANCELLOR :—

This Sum is not in the hands of these Defendants, as a part of the general Personal Estate of the Debtor. The Court of Session in *Scotland* being a Court of competent Jurisdiction, has assumed the distribution of this Fund, and has proceeded to Judgment upon it. This Court has no Authority to disturb the Rights of those who are declared entitled to it by the Decretal Order in *Scotland*; and all further Proceedings with respect to this subject must be in the Court of Session there. If the forms of proceeding in the Court of Session in *Scotland* afforded no means of securing Property pending litigation there, and it so happened that the Parties and the Property were found here, I think this Court, upon a Bill filed for the specific purpose of securing the Property pending the litigation in *Scotland*, might probably find a principle which would sustain such a jurisdiction. But that is not the nature of this Bill; and there is no reason to doubt that the Court of Session in *Scotland* has full power to protect and secure all Money which is the subject of Administration there. The only Order which I can make is for Payment into Court of such Sum as is admitted by the Answer of the Defendants to be part of the general Personal Estate of the Testator *Cuthbert*.

1821.
26th May.

WRIGHT *v.* HOWARD.

After a Replication and Subpœna to rejoin, the Plaintiff cannot amend his Bill unless on a special application, showing, that using all reasonable diligence on his part, he was not in a condition to apply sooner.

THIS was an application by the Plaintiff to amend his Bill after Replication, and a *subpœna* to rejoin.

The VICE-CHANCELLOR:—

When a Plaintiff has put his Cause completely at issue by the *subpœna* to rejoin, he is not to be at liberty to expose the Defendant to further delay by amending his Bill, without a special and sufficient cause. I have read the amendments which are proposed in the present Bill; and although the Plaintiff does not mean to change the principle of his Case, yet, in fact, the Bill is wholly recast, and much additional matter introduced, and the Defendant will necessarily be obliged to answer at large, and the Suit will substantially re-commence after having already endured for ten years. The Plaintiff does not allege that he has discovered any new matter which could not be introduced in an earlier stage of the Cause; but the Pp ers having got into new hands, in consequence of the death of the original Plaintiff, the present Plaintiff, who claims with him, is advised that the best possible use has not been made of the old materials, and he desires therefore to re-form the case; but the want of attention or diligence on the part of those who were formerly consulted by the original Plaintiff, if such be really the case, can form no reason why the Defendant should be exposed to the mischief of the further protraction of this Suit. The opportunity of further delay which is now sought ought never to be granted to a Plaintiff, unless he can make out, that with all reasonable diligence on his part, and

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consequently on the part of those employed by him, he could not have been in a condition to bring forward at an earlier period the matter of the proposed amendments. This Motion must therefore be refused, with Costs.

MOODIE *v.* BAINBRIDGE.

1821. 7th July.

A Legacy to R. L. was, by an Order, directed to be paid to him; he died, leaving an Executrix and two Executors; the Executrix died, leaving an Executor; the Accountant General refused to pay the Legacy under a Power of Attorney from the surviving Co-Executors of R. L. without a discharge from the Executor of the deceased Executrix. On an application to the Court, an Order was made to pay the Legacy to the surviving Executors.

BY an Order made in this Cause on the 12th August 1820, the Accountant General was directed to pay Mr. *R. Langley*, or his personal Representative, the Sum of 124 *l.* 4 *s.* in respect of a Legacy bequeathed to him by Dr. *Fothergill*, the Testator in the Cause. *R. Langley* died, leaving his Widow his Executrix, and two other Executors. A Power of Attorney from the surviving Executors to Messrs. *A.* and *H.* to receive the Legacy, was prepared in the usual way, and was executed by the surviving Executors, and returned to the Accountant General's Office, with the usual Evidence required, by the Accountant General, of the death of Mr. and Mrs. *Langley*, and of the identity of the other Executors. The Clerk, however, who prepares the checques, objected to paying the Legacy without a discharge from the Executor of Mrs. *Langley*, that being the Rule of the Office.

Mr. *Bickersteth* observed upon the absurdity of the Rule, and moved, that the Accountant General might be directed to pay the Legacy to the surviving Executors; and the *Vice-Chancellor* made the Order.

1821.
7th July.

MARSACK *v.* REEVES.

A Motion to dissolve an Injunction restraining an Action on a Post Obit, refused, with Costs, such case being an exception to the general rule, that the Costs of a Motion for an Injunction, or to dissolve an Injunction refused, are Costs in the Cause.

A GENTLEMAN of the Name of *Marsack*, eighty-two Years of Age, had three Sons, between thirty and forty Years of Age, who being in want of Money borrowed 1,000 *l.* of the Defendant, and gave a Bond to pay 2,500 *l.* on the Death of their Father, provided one of the three Sons should survive him.

The present Bill was filed to have the Bond delivered up, upon Payment of the Principal Money, with Interest, and for an Injunction to restrain Proceedings at Law.

An *ex parte* Injunction was obtained, on Payment of 1,000 *l.* and Interest, into Court.

A Motion was now made, upon the coming in of the Answer, to dissolve the Injunction.

Mr. *Agar*, and Mr. *Newland*, in support of the Motion, observed, there was no Fraud in the Transaction: That the Sons were of an age to judge for themselves: That mere inadequacy is not sufficient to set aside a Contract: That the principle and policy of the Rules laid down, as to expectant Heirs and Reversions, have been questioned: And that it was unconscientious in the Sons to run the chance of dying before their Father, and on his death to turn round upon the Purchaser; treating the Bond as valid or invalid, according to circumstances, and as best suited their Interests. They cited *Whalley* v. *Whalley* (*a*), and *Shelly* v. *Nash* (*b*).

(*a*) 1 Mer. 436. (*b*) *Ante*, vol. iii. p. 232.

Mr. *Heald*, and Mr. *Keene*, *contrà*.

The VICE-CHANCELLOR:—

It has long been a settled principle of Courts of Equity, that those who deal with Persons who have no present Property, and only Expectations from Persons living, possess so much advantage over those with whom they deal, that this Court will not permit a Party so dealing to recover, unless he has given the actual Value of the Thing which he has purchased. Some late Cases have extended this doctrine to Reversions (*c*); although Reversions are as much Property as Property in Possession. If any doubt belongs to this doctrine as applied to Reversions, it does not touch this Case, for this is a Case of mere Expectations: it is out of all question here that the Sum paid was not the actual Value of this Bond, and these Plaintiffs are therefore entitled to sustain the Injunction.

Counsel for the Plaintiff:—

The Motion being refused, we are entitled to the Costs.

The VICE-CHANCELLOR:—

If the Defendant had succeeded in the Motion, the Costs would have been Costs in the Cause; but having failed in the Motion, it admits of a different consideration. In a Case of *Marshall* v. *Lloyd*, which came on yesterday, I had occasion to consider the point; and I desired the Registrar to ascertain the practice in such cases. I have a Paper from Mr. *Crofts*, in which he states it to be the understanding of the Registrars and Clerks in Court, that on a Motion for an Injunction

(*c*) See *Peacock* v. *Evans*, 16 Ves. 512; *Gowland* v. *De Faria*, 17 Ves. 20.

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refused, and on a Motion to dissolve an Injunction refused, the Costs, as a general rule, are Costs in the Cause; but that on special occasions the Court deviates from that rule, and orders Costs to be paid by the Party that makes the Motion.

Counsel for the Defendant:—

Bills, like the present, are always considered, in effect, as Bills to redeem, and the Plaintiff pays the Costs of the Suit.

The VICE-CHANCELLOR:—

It is for that reason that I am disposed to give the Costs of this Motion to the Plaintiff. Unless specially given to the Plaintiff, the Defendant will receive them as Costs in the Cause; but it is not reasonable that the Plaintiff should pay the Costs of a Motion improperly made by the Defendant. The Motion must be dismissed, with Costs.

WAITE *v.* WAITE.

1821. 10th July.

ON a Petition, presented in this Cause, supported by Mr. *Koe*, the *Vice-Chancellor* held it to be a general Rule that Creditors and next of Kin, going in before a *Master* to establish their Claim as such, pay the Expenses of so doing; but that if after having established their Claims they are permitted to mix in the Cause as if they had been Parties, then in respect of such Proceedings they may be entitled to their Costs.

ATTORNEY-GENERAL *v.* FELLOWS.

1821.
11th July.

MR. *Bell* moved to restore a Cause under the following circumstances. On the Motion of the Defendant, the Bill was dismissed for want of Prosecution. The Defendant's Solicitor had, two days before the Notice of the Motion to dismiss was served, instructed his Clerk in Court to file a Replication, which he had omitted to do. An Affidavit was made of this fact; and the *Vice-Chancellor*, considering that it was by a slip that the Replication had not been filed, granted the Motion, on the usual terms, when a Cause is restored.

FOX *v.* WRIGHT.

1821.
11th July.

Post Obit Bonds of W. *a young Man, put up to sale by him, without reserve, relieved against.*

THIS was a Bill to be relieved from certain *Post Obit* Bonds. The circumstances of the Case are mentioned in the following Judgment:

The VICE-CHANCELLOR:—

The true effect of the Case of *Shelley* v. *Nash* is, that every Purchaser at a Sale by Auction of a Reversion is not necessarily bound to establish that he purchased at a full Price. That he may purchase under circumstances which make it as equitable that he should have the benefit of his Bargain, without such proof, as if he had bought not a Reversion but an Estate in Possession. The question is, whether the present Defendant purchased this *Post Obit* Bond under such cir-

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Fox
v.
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cumstances. The Particulars of Sale disclose, that the Vendor was a young Man, about to raise a Sum of 40,000 *l.* upon *Post Obit* Bonds, payable at the Death of his Father, and that the Sale of these Bonds was to take place without reserve, that is, without any bidding on his part. Those who attended this Auction, necessarily, therefore, knew that the Vendor was a young Man in distress; that he was so much pressed for Money, that he undertook, with those who thought fit to be Bidders, that he would not have recourse to those precautions by which every provident Seller at an Auction protects himself against an inadequate Price; and I have to ask myself, in the language of the Case of *Shelley* v. *Nash*, whether it can be considered, that such a Vendor is not, in some sense, in the power of those who deal with him. And whether a Sale by Auction, under such circumstances, affords fair Evidence of the Market Price. At all events, the question in this Cause is of too much importance to be decided incidentally, upon this Motion; and I must continue this Injunction till the hearing upon the terms of the Plaintiff bringing into Court the Auction Price, together with Interest, at Five per Cent. from the time of Payment.

Ex parte LEARMOUTH *in re* WALKER.

1821.
26th July.

Judge's Notes not Evidence.

A PETITION was presented to set aside a Certificate. On a former Petition, the validity of the Certificate was directed to be tried at Law.

Mr. *Wingfield* applied to the *Vice-Chancellor* to obtain the Notes of the Judge who had tried the Cause, not for the purpose of a new Trial, but in order that they might be used as Evidence of facts which had transpired at the Trial.

The VICE-CHANCELLOR :—

I cannot use the Judge's Notes as Evidence of such facts; they must be brought before the Court by Affidavit.

HAYWOOD *v.* OVEY and another.

1821.
7th August.

Bill against principal Obligor and the Representatives of another Obligor, a Surety in a joint and separate Bond. The principal Obligor was insolvent, and so stated in the Bill, but held he might be made a Party, and was not entitled to his Costs.

THIS Cause now came on for further Directions, and a question arose as to Costs.

The Bill was filed against the principal Obligor, and also against the Representatives of another Obligor, a mere Surety in a joint and separate Bond. The principal Obligor was insolvent, and so stated in the Bill.

Mr. *Cooper*, on behalf of the principal Obligor, insisted, that as he was insolvent he ought not to have been made a Party to the Suit, and was entitled to his Costs; and he cited *Collins* v. *Griffiths* (*a*), and *Madox* v. *Jackson* (*b*).

(*a*) 2 P. Wms. 333. (*b*) 3 Atk. 405.

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HAYWOOD *v.* OVEY.

Mr. *Horne*, and Mr. *Pepys*, *contrà*.

The VICE-CHANCELLOR:—

The Case in Peere Williams, if it could be considered as furnishing the present Rule of the Court, does not profess to decide that the Obligee in a joint and several Bond may not sue both Obligors, but that he may, if he pleases, sue one only, as at Law. The Case in Atkyns is open to an observation of the same nature. The Defendant is not entitled to his Costs (*a*).

1821. 1st & 3d Nov.

CREAK *v.* CAPELL.

If a Sum be reported due, and Exceptions are taken to the Report, the Money will not, on Motion, be ordered to be paid into Court.

THE *Master* reported a Sum of Money to be due from the Defendant to the Plaintiff.

The Report was excepted to.

Mr. *Roupell* moved that the Defendant might be ordered to pay into Court the Money reported due; and cited *Gordon* v. *Rothby* (*b*), where, upon the Report, Money was ordered to be paid in; and also *Fox* v. *Macreath* (*c*), where Money appeared due on the Parties Examination, and the same was directed to be paid into Court; but he acknowledged he had not been able to find any Case, where on a Report excepted to, Money had been ordered to be paid in. If, he observed, the Court thinks that the Exception to the Report prevents the Payment of the Money into Court, it may be right to direct the Exceptions to be at the Head of the Paper of Exceptions.

(*a*) See the Cases on this subject, 2 Madd. Prin. and Pract. 193, 2d Ed.

(*b*) 3 Ves. 572.

(*c*) 1 Ves. jun. 69.

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CREAK *v.* CAPELL.

The VICE-CHANCELLOR :—

Where the Debt is ascertained, though the Court can only order payment by Decree, it will secure the Money in Court upon interlocutory application. Thus the Court will direct the payment of a Balance into the Name of the Accountant General, which the Defendant admits upon his Examination, or in his Answer; and in like manner a Balance, reported to be due by the *Master*, after the Report is confirmed; but, pending Exceptions to the *Master*'s Report, the Balance is not considered to be ascertained. Where it is evident that an Exception is taken merely for delay, the Party may make an Application to the Court for the immediate hearing of the Exception.

Motion refused.

PARKER *v.* LEIGH.

1821. 2d & 3d Nov.

If an original Bill is filed in the Court of Exchequer, a Cross Bill may be filed in the Court of Chancery.

A BILL had been filed in the Court of Exchequer by *Leigh*, as Rector, claiming certain Tithe of Hay as due from *Parker*. *Parker* filed the present Cross Bill in this Court, praying a Discovery as to the Title of the Defendant to the Tithe.

To this Bill, the Defendant put in the following Demurrer: "The Defendant, by protestation, &c. doth demur, and for cause of Demurrer showeth that the Discovery sought by the said Complainant's Bill of Complaint, and Amendments thereof, as it appears by the said amended Bill, is sought for the purpose of aiding the said Complainant's Defence to a suit instituted in a Court of Equity, which has competent Juris-

1821.

PARKER v. LEIGH.

diction and Authority to compel the Discovery sought by the said Complainant's said amended Bill. And for further cause of Demurrer to the said Bill, this Defendant saith, that the said Complainant hath not in and by his said Bill made or stated such a case as doth or ought to entitle him to any Discovery from this Defendant in this Honourable Court; wherefore, and for divers other good causes of Demurrer appearing on the said Bill, this Defendant doth demur thereto, and prays the Judgment of this Court, whether he should be compelled to make any further or other Answer thereto."

Mr. *Fonblanque*, and Mr. *Spence*, in support of the Demurrer:—

A Bill of Discovery cannot be filed in this Court in aid of a Defence to a Bill filed in the Court of Exchequer; the Cross Bill ought to have been filed in the same Court where the Original Bill was filed; many reasons of convenience require it should be so, in order that the same Court should have both Suits under its control.

A Defendant to a Cross Bill is not bound to answer until an Answer has been given to the Original Bill; but how can this Court enforce an Answer to the Bill in the Exchequer? In other respects it might be very inconvenient (a). It has been held (b) that a Cross Bill will not lie in

(a) When a Cross Bill is filed in the same Court in which Original Bill is filed, the former may be advanced so as to be heard with the latter, and a Decree will be made in both Causes; but when the Bills are filed in different Courts, that would be impracticable. There may be a distinction, perhaps, between Cross Bills praying Discovery and Relief, and Cross Bills which pray Discovery only. As to the latter Bills, it does not seem of much importance in which Court they are filed.

(b) 1 Atk. 288; and see Anon. 2 Vez. 451.

this Court in aid of a Defence to a Suit in the Ecclesiastical Court.

Mr. *Agar*, *contrà*:—

A Cross Bill in this Court, in aid of a Defence to a Suit in the Court of Exchequer, is frequently resorted to, and it was never doubted that such a Bill could be filed. In this case too they cannot now put in such a Demurrer. It is too late; for there was a Demurrer on another point, and leave was given to amend the Bill, and to that amended Bill they put in their Demurrer.

The VICE-CHANCELLOR:—

It might be more convenient that the Cross Bill should be filed in the same Court with the original Suit, but I have always considered the practice to be, that the Party has an option to file his Cross Bill in this Court. The Case cited from *Atkyns* is distinguishable. The Ecclesiastical Court has the power to enforce Discovery in Suits instituted there; and does not therefore require the aid of Courts of Equity. With respect to the difficulty suggested as to enforcing an Answer to the Original Bill before the Cross Bill is answered, I do not see much weight in it, because the Court in which the Cross Bill is filed, would take care that an Answer should be put in to the Original Bill before it enforced an Answer to the Cross Bill. According to my present impression the Demurrer must be overruled; but I will mention it again.

The next day, the *Vice-Chancellor* said he had spoken to the *Lord Chancellor* on the Subject, who concurred in opinion with him, that the Cross Bill might be filed in this Court.

Demurrer overruled.

1821.
5th Nov.

MEREST *v.* JAMES.

An Equitable Estate Tail in a Copyhold does not merge by the accession of the legal Fee.

A QUESTION arose, on a Petition in this Cause, whether, when one has an Equitable Estate Tail in a Copyhold, with a Remainder expectant on such Estate Tail, and the legal Fee descends to him, the Equitable Estate Tail is merged in the latter, and the expectant Remainder defeated?

Mr. *Benyon* contended that the equitable Estate Tail was merged in the legal Fee, and cited *Challoner* v. *Murhall* (*a*), *Fletcher* v. *Tollett* (*b*), and *Phillips* v. *Brydges* (*c*).

Mr. *Shadwell*, and Mr. *Sugden*, *contrà*:—

Challoner v. *Murhall* proceeded on the principle that the Copyhold being extinct by the Enfranchisement, if that did not operate as an Extinguishment of the Entail, it must exist for ever. *Fletcher* v. *Tollett* was decided under its peculiar circumstances, the Court holding that a Decree after forty-six years should not be disturbed. Neither of those cases determines the point. In *Phillips* v. *Brydges* (*d*), the *Master of the Rolls* says, "Another position was maintained in a latitude that would create infinite confusion; that where there is in the same Person a legal and equitable Interest, the former absorbs the latter. I admit that where he has

(*a*) 2 Ves. jun. 524.

(*b*) 5 Ves. 3.

(*c*) 3 Ves. 120. See also on this point, *Dunn* v. *Green*, 3 P. Wms. *Grayme* v. *Grayme*, 1 Watk. Copyh. p. 9. 3d Edit. by Vidal, and Mr. Preston's Treatise on Conveyancing, vol. 3, p. 29, which work Mr. *Butler* terms "*A complete and profound Treatise on the abstruse Doctrine of Merger.*"— See Harg. and Butler's Co. Litt. 338. n. 4. last edit.

(*d*) 3 Ves. in p. 126.

1821.

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the same Interest in both, he ceases to have the equitable Estate, and has the legal Estate, upon which this Court will not act, but leaves it to the rules of Law. But it must be understood always with this restriction, that it holds only where the legal and equitable Estate are co-extensive and commensurate; but I do not by any means admit, that where he has the whole legal Estate, and a partial equitable Estate, the latter sinks into the former, for it would be a disadvantage to him." In this case, then, are the legal and equitable Estates commensurate? Certainly not. *Phillips* v. *Brydges* therefore is an authority against the merger contended for. Estates Tail, upon an equitable construction of the statute *de donis*, never merge.

Mr. *Benyon*, in reply:—

In this Court an Equitable Estate Tail is considered as equivalent to the Fee; and is considered as co-extensive and commensurate with the legal Fee.

The *Vice-Chancellor* held, that in order to operate a Merger, the equitable or legal Estate must be of the same quality, and that an Estate Tail or a Fee Simple were not of the same quality.

JAMES HEARNE *v.* THOMAS WIGGINTON.

1821. 15th Nov.

A QUESTION arose on the following Will, whether the Plaintiff was, under the Bequest to him, entitled only to the Residue of the Testator's *Goods*, or, whether *Money* in the Funds passed to him?

Testator gives by his Will 19 *l.* *to* J. H. *and after specific Bequests of certain of his Goods to different Persons, bequeathed to said* J. H. *thus:* "*All my other Effects I will to* J. H. *&c. to be sold for his Benefit;*" *held, that all the Residue of the Testator's Property, including Money, &c. passed to* J. H.

1821.

HEARNE
v.
WIGGINTON.

The Will was thus :—

" I, *George Legg*, do will and bequeath as follows :— To *Mary Hearne*, the Daughter of *William* and *Sarah Hearne*, one feather-bed, bolster and pillow, two pair of sheets, one quilt ; and ditto, to *Elizabeth Hearne*, Daughter of the said *William* and *Sarah Hearne*; and to *Thomas Wigginton*, one feather-bed, two pair of blankets, two pair of sheets, one quilt ; and to *James Hearne*, Brother of *William* and *Elizabeth Hearne*, the Sum of 10 *l.* ; and to the aforesaid *Mary* and *Elizabeth Hearne* the Sum of 25 *l.* each ; and to the aforesaid *Thomas Wigginton* the Sum of 25 *l.* And I do will and bequeath all my wearing Apparel to *John Bowson*, and 5 *l.* to apprentice him. And also to *Rebecca Payne* I do will and bequeath all the wearing Apparel of the late Mrs. *Legg*. And to (*a*) *William* and *Sarah Hearne* two large table silver spoons, one silver cream jug, six tea spoons, one pair silver buckles. And all my other Effects I will to *James Hearne*, Brother of *William* and *Elizabeth Hearne*, to be sold for his benefit. I do will and bequeath that the aforesaid *Thomas Wigginton* be my Executor at my decease, and that he does divide carefully what I have aforementioned to the several Persons; and that he does also have the management of my Funeral, and to see that I do lay by the side of my Wife. The Mark + of

George Legg."

The Bill was filed by the Plaintiff for an Account, considering himself as residuary Legatee, against the Defendant, as Executor of the Will.

The Defendant, by his Answer, submitted, " whether the Plaintiff is, or not, entitled, as residuary Legatee of

(*a*) The Will is given *verbatim* from the Brief.

the Testator, to such Surplus, inasmuch as Defendant well knew, from the communication of the said Testator to Defendant, that the Testator did not intend, by his said Will, that the said Plaintiff should have, or be entitled to, any other Residue than that of the Goods and Effects of the said Testator of the same nature and description as those mentioned in the preceding part of his Will; and that the Money possessed by the said Testator at the time of his Death was not intended to pass, and did not pass, by the Will of the said Testator; but such Money, as this Defendant is advised and submits, according to the true meaning and construction of the said Will, does not belong to the said Plaintiff, but is the property of and belongs to the next of Kin of the said Testator."

Mr. *Harrison*, for the Plaintiff:—

The words "all other my Effects I will to *James Hearne*," did not mean Effects *ejusdem generis* with those before disposed of, but all his other Effects, including all his personal Property not before given.

Mr. *Horne*, and Mr. *Ching*, *contrà*:—

The words mean only Effects *ejusdem generis*, viz. Goods, and did not include Debts, and Monies the Testator had in the Funds; such Debts and Money belong to the next of Kin. He would hardly give this Legatee 10*l*. *part* of his personal Estate if he had meant to give him the *whole*. It is on that ground that an Executor having a Legacy is held a Trustee of personal Estate undisposed of. None of the Cases are exactly like this, but several come very near to it. In *Woodscombe* v. *Woodscombe* (*b*), the Bequest was "all other Goods belonging to my Parsonage House;" and it

(*b*) 3 P. Wms. 111.

1821.

HEARNE v. WIGGINTON.

was held, that Money and Bonds in the Parsonage House did not pass. In *Simewell* v. *Perkins* (c), the Testator bequeathed "whatever I have or shall have at the time of my death, as Plate, &c.;" and it was held that Money and Notes did not pass. In *Trafford* v. *Berrige* (d), the Bequest was of "Goods and other things in his House;" and Money was held not to pass. In *Rawlins* v. *Jennings* (e), the word "Effects" was held to mean Articles *ejusdem generis* with those previously mentioned. Here too, the Testator directs all his other Effects to be sold; he could not mean that Monies and Securities for Money should be sold.

The VICE-CHANCELLOR:—

This Case would have admitted of no Argument if in the Gift to *James Hearne* "of all his other Effects," the Testator had not directed them to be sold for his Benefit. He had before given Money, as well as Household Furniture and Wearing Apparel; and if the sense of the Word "Effects" were to be referred to his former expressions, it would comprehend Property generally. The real question is, whether a general residuary Gift is to be limited and qualified to Property which is the subject of Sale, because the Testator has added, that his residuary Property is to be sold for the benefit of his residuary Legatee? It is uncertain, at the making of the Will, what the Testator's Property may consist of at his death, and the direction to sell implies only a general intention on the part of the Testator that his residuary Property shall be converted or collected for the Benefit of his residuary Legatee.

(c) 2 Atk. 103.

(d) 1 Eq. Abr. 201.

(e) 13 Ves. 39.

CURTEIS *v.* CANDLER.

1821.
15th Nov.

A Trustee seeking the direction and indemnity of the Court, as to the execution of his Trust, is, whether Plaintiff or Defendant, entitled to his Costs; unless the act required to be done leads to no responsibility, and the motive of the Trustee is obviously vexatious.

ON a Suit by a Trustee, for the execution of the Trust under the direction of the Court, a Question arose as to the Costs of the Plaintiff.

The VICE-CHANCELLOR:—

Let it be supposed that the Trustee had been made a Co-Defendant, and had expressed his readiness to act as the Court should direct; admitting that, on being applied to by the Plaintiff, he had declined to execute the Trust without the direction and indemnity of the Court—Would the Court in such a case have said that the Trustee was not justified in thus seeking the protection of the Court, and that he ought therefore to pay the Costs of a Suit which he had improperly occasioned? I think not; and that so far from it, the Court would in that case have given to this Trustee the Costs of the Suit. It is a general principle, that a Trustee has a right to the protection of the Court in the execution of his Trust; there are exceptions where the act required to be done leads to no responsibility, and the motive of the Trustee is obviously vexatious.

If this Trustee would have been entitled to the assistance of the Court as a Defendant, I cannot deny him that assistance because he asks it as Plaintiff. It must be remembered, that it is for the advantage of those who make the objection, that he should rather be Plaintiff than Defendant. To have made him a Defendant would have considerably increased the Costs of the Suit, which must fall upon the Trust Fund, to the residue of which those who make the objection are entitled.

1821.
6th & 7th Dec.

PRENDERGAST and another *v.* DEVEY and others.

Liability of Sureties.

THIS was a Bill by Sureties, to restrain an Action against them upon a Surety Bond, and to have the Bond delivered up, upon the ground, that the Creditors had given time to the principal Debtors without the Sureties consent. Upon the Cause coming on in Hilary Term last, it was suggested, that the merits would be tried at Law, upon a Demurrer to the Plea of the Defendants there (the Plaintiffs in Equity), who had, amongst other Pleas in Bar, pleaded the instrument alleged to be a Discharge of their Liability, and the Cause stood over.

The Demurrer at Law being allowed, and the Plea overruled by the Court of K. B., the Cause was now put again in the Paper.

The facts appearing in the Pleadings, and by a further statement agreed upon between the Parties at the request of the Court, were these:

In September 1818, the Plaintiffs, as Sureties for two Persons of the name of *Prendergast*, Coal Merchants, became bound to the Defendants, who supplied the *Prendergasts* with Coals wholesale, in a Penalty, conditioned to be void if the Plaintiffs should *within one Month after Demand on them* pay such Balance or sum of Money not exceeding 500 *l.* as should become due to the Defendants upon Settlement of Accounts between them and the *Prendergasts.*

In June 1819, it being alleged a Balance of 1,099 *l.* was due from the *Prendergasts* to the Defendants, the latter, without communicating with the Plaintiffs, took

from the *Prendergasts* a Warrant of Attorney for the Amount, with a stay of Execution if they should discharge the Debt by Instalments of 100 *l.* a Month, and on default, Execution was to issue for the whole.

The first Instalment under the Warrant of Attorney having fallen due on the 21st of July, and not being paid, the Defendants, on the 7th of August following, made a demand on the Plaintiffs according to the terms of the Bond, and in the succeeding Michaelmas Term brought the present Action, which the Bill sought to restrain.

Mr. *Wilson*, and Mr. *Roots*, for the Plaintiffs, relied upon the known principle, that a Creditor dealing with the Debtor without the concurrence of the Surety, released the latter, and cited *Rees* v. *Berrington* (*a*), and *Boultbee* v. *Stubbs* (*b*).

Mr. *Hart*, and Mr. *Rose*, for the Defendants, not disputing the general principle, insisted that the merits of the Case had been already fully gone into at Law; but it being stated from Notes of what passed at Law, that the Judgment of the Court there had proceeded in a great degree upon technical Grounds, they then submitted, that as by the Condition of the Bond the Plaintiffs were only to pay within a Month after Demand made on them, it must be understood, that until Demand upon them the Creditors might make such terms with the Debtors as they thought proper, provided, when the Demand was made, there was nothing to interfere with the Sureties recourse back to the principal Debtors.

The *Vice-Chancellor* expressed his Opinion that the Warrant of Attorney certainly gave time, which might

(*a*) 2 Ves. jun. 540. (*b*) 18 Ves. 20.

1821.

PRENDERGAST and another v. DEVEY and others.

have discharged the Sureties if they had been affected by it; but that here the Sureties liability not arising till Demand, and previous to the Demand default having been actually made by the Debtors, so that Execution might have instantly issued for the whole debt, the Agreement made by the Warrant of Attorney was at an end, and the Defendants were no ways injured, as there was nothing to interfere with their immediate recourse to the principal Debtors.

The *Plaintiffs Counsel* then pressed upon the Court, that although the Sureties were to have a Month after demand to pay in, yet the substantial Agreement was, that they were to guarantee the Creditors from Loss by the *Prendergasts,* and therefore the character of Sureties, and of course the rights of Sureties, belonged to them equally from the date of the Bond, whether demand was made on them or not; or if otherwise, still, that as the time of making the Demand was entirely in the option of the Creditors, it was unjust they should be permitted, while withholding it, to deal with the Debtors as they thought proper, until the Sureties recourse to the Debtors might be defeated in effect, although not legally gone: but *His Honor* thought the terms of the Engagement, though singular and improvident, bound him to the construction he had put upon it, and dismissed the Bill. He did not, however give Costs, because the point, that at the time the Demand was made on the Sureties the Agreement for time made in the Warrant of Attorney was at an end, had not been made, either in the Answer, or raised by the Defendants at Law, which point he declared was the fact upon which his Judgment entirely rested.

ORD *v.* NOEL.

1821.
17th Dec.

To entitle a party to file a Supplemental Bill in the nature of a Bill of Review, it is necessary that the new Matter should be discovered after the Decree, or at least after the time when it could have been introduced into the Cause; and the Matter should not only be new, but material, and such, as if unanswered in point of fact, would clearly entitle the Plaintiff to a Decree, or would raise a question of so much nicety and difficulty, as to be a fit subject of Judgment in a Cause.

THIS was a Petition for leave to file a Supplemental Bill in the nature of a Bill of Review. The circumstances of the Case are mentioned in the Judgment.

The VICE-CHANCELLOR:—

In this Case, the Plaintiff being the Purchaser at a Sale by Auction of a certain Estate, conveyed by the Defendant, Mr. *Middleton Noel*, to the other Defendants, the Trustees, for the purposes of Sale and Payment of Debts, filed his Bill to compel a specific Performance of the Contract. The Plaintiff in his Bill suggested, that the Defendants pretended that the Contract ought not to be performed because the Premises were sold in one Lot, and the Auctioneer had no authority for that purpose; and the Bill charged that the Auctioneer had full authority to sell in one Lot; and that all the Defendants, until the filing of the Bill, treated the Contract as a valid and subsisting Contract; and the Bill set forth, amongst other things, a Letter from the Defendant, Mr. *M. Noel*, to the Plaintiff, requesting, as a matter of favour and kindness, that the Plaintiff would give up the Contract.

The Defendant, Mr. *M. Noel*, in his Answer, insisted that the Contract ought not to be performed, because the Sale was advertised to be made in ten Lots, and was actually made in one Lot, without any previous notice to that effect, and when no person was present, except the Plaintiff, who was able or willing to bid for the same in one Lot: and he also insisted that the Auctioneer had not authority to sell in one Lot.

1821.

ORD
v.
NOEL.

It is unnecessary to refer further to the Answers of the Defendants, the Trustees, than that they expressed themselves ready to act as the Court should direct.

At the hearing of the Cause on the 8th March 1820, a doubt occurred, whether Messrs. *Coutts* and Co. had not such an interest in the question as made them necessary Parties to the Suit; and the Cause stood over with a view to inquiry upon that head. It was afterwards stated to the Court, as a fact admitted by both Parties, that Messrs. *Coutts* and Co. had released their interest in the Estate. And the Cause was finally heard on the 6th and 7th Dec. 1820.

It appeared by the evidence on the part of the Plaintiff that the Sale was advertised to be made in ten Lots. That on the morning of the Sale, Sir *Gerard Noel*, the Father of Mr. *M. Noel*, appeared at the place of Sale, and publicly forbad the same; insisting that the Trustees, under whom the Auctioneer acted, had no right of Sale.

That the Auctioneer afterwards attempted a Sale by Lots, according to the Advertisement, but could find no Bidders, and therefore determined, in concurrence with the Clerk of the Solicitor to the Trustees, to put it up for Sale in one Lot, and that the Plaintiff was the only Bidder. And this Clerk to the Solicitor stated in his evidence, as the reason for his concurring in this Sale, under these circumstances, that the Trustees were extremely desirous of realizing the Property for the benefit of the Creditors, without loss of time, and even at a sacrifice. I was of opinion that there was so much improvidence on the part of the Agents of the Trustees, in proceeding to a Sale under the circumstances stated, that this Court would not lend its assistance to the performance of the Contract, to the prejudice of Mr. *M. Noel*, the *cestui que*

Trust, who was entitled to the surplus produce of the Sale, after the Creditors were paid; and I dismissed the Bill.

The present proceeding is a Petition on the part of the Plaintiff, that he may be at liberty to file a Supplemental Bill, in the nature of a Bill of Review, in order to bring before the Court new matter, which, he insists, would have entitled him to a Decree, according to the prayer of the Bill, if it had made part of the Cause at the original hearing.

The new matter consists of certain Deeds, to which Mr. *M. Noel*, and the Trustees, and other Persons, were Parties. And it may be stated, as the material effect of those Deeds, that being made for general purposes, they refer to the Sale to the Plaintiff, and treat it as a valid and subsisting Contract.

The Petition alleges, and the Affidavits of the Plaintiff, his Solicitor and Agent, support that allegation, that they respectively were ignorant of the contents of those Deeds until after the Cause was first called on to be heard.

I presume, though it does not distinctly appear, that they became acquainted with the particular nature of those Deeds in the interval between the first and second time of the Cause being called on.

The Petition, supported by the Affidavit of the Plaintiff, as to his belief, alleges, that at the respective times of the execution of these Deeds Mr. *M. Noel* was informed of all or most of the circumstances attending the Sale in question. And the Petition insists, that Mr. *M. Noel*, having thus dealt with this Contract in the Deeds referred to, with a knowledge of the cir-

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cumstances of the Sale, is not at liberty to dispute the Plaintiff's claim to a specific Performance; and the Petition therefore prays that the Plaintiff may be at liberty to file a Supplemental Bill, in the nature of a Bill of Review, to introduce those new facts. It is to be observed, that neither the Petition nor the Affidavit affirm that Mr. *M. Noel's* knowledge of the circumstances of the Sale, at the respective times when it appears that these Deeds were executed, is a new discovery.

The only new discovered fact is the existence of the Deeds.

In order to entitle a Party to file a Supplemental Bill in the nature of a Bill of Review, it is necessary that the new matter should be discovered after the Decree, or at least after the time when it could have been introduced into the Cause. Because a Party is not to be permitted to amend his Case after the hearing, in respect of matter which was before in his power.

If this Plaintiff had applied after he had discovered the contents of these Deeds, and before the Cause was finally heard, to have the benefit of this discovery at the hearing, I think the Court would have then found the means to render him that Justice.

It is probable that neither he nor his advisers at that time entertained the same sense of the importance of these Deeds; but I will not in this Case press this point to the extent of stating that the present Application is therefore too late.

It is not enough that the Matter should be new; it must also be material.

The sense which is to be given here to the word material is of the highest importance; and the true Rule is, I think, to be collected from the Case of *Norris* v. *Le Neve* (*a*).

The new Matter must be such as if unanswered in point of fact would either clearly entitle the Plaintiff to a Decree, or would raise a Case of so much nicety and difficulty, as to be a fit subject of Judgment in a Cause.

The new Matter here is, that Mr. *Noel* has in his dealings and deeds between him and his Trustees and other Persons, treated the Contract with the Plaintiff as valid and subsisting. At first sight it is not obvious how it is to be considered that these dealings and deeds, to which the Plaintiff was neither party nor privy, can give the Plaintiff a Title against Mr. *M. Noel*.

I apprehend, however, that the Argument of the Plaintiff is to this effect: that Mr. *M. Noel* has by his dealings and deeds with his Trustees given them a right to insist that the Contract with the Plaintiff shall be performed. That the Trustees have an Interest in the performance of this Contract, because they are subject to an Action at Law for the non-performance of it; and inasmuch as the Trustees have both a right and interest in the performance of this Contract, therefore Mr. *M. Noel* cannot resist the Plaintiff's Claim to the performance of it, though the Plaintiff has, personally, no Title to that performance—I cannot follow this reasoning—If the Trustees have both right and interest to compel the performance of this Contract by Mr. *M. Noel*, they must judge for themselves whether they will assert that right.

(*a*) 3 Atk. 26.

1821.

ORD
v.
NOEL.

They are Parties to this Suit, and in their Answers assert no such right, and it cannot be permitted to the Plaintiff to raise the question for them.

It is said that Messrs. *Coutts* and Co. the other Parties to these Deeds, also acquired an Interest in the Plaintiff's Contract, which entitled them to insist upon its performance: I answer, first, I must take it for granted that whatever Interest these Deeds gave to Messrs. *Coutts* and Co. they have since released it; because both Plaintiff and Defendant have admitted that they were now no necessary Parties to this Suit. If they had not released the Interest in the Contract which these Deeds may be supposed to have given to them, and had been Parties to the Suit, and had not insisted upon that Interest, could the Plaintiff have raised the question for them? Suppose they had been Parties to the Suit, and had thought it for their advantage not only to wave any right which they had to insist upon the Contract, but to join with Mr. *M. Noel* in his resistance to the Contract, could the Plaintiff have raised the question against them? The more it is examined, the more it will be found that these newly-discovered deeds and dealings with third Persons, in which the Plaintiff was neither Party nor Privy, cannot be material to the Plaintiff's Case, and cannot affect the Decree.

I am therefore bound to dismiss this Petition; and I must dismiss it with Costs.

NEWDIGATE and another *v.* HELPS.

1821.
17th Dec.

A Bill, to compel a Rector to resign in favour of another, in pursuance of Covenant for that purpose, entered into when the Rector was presented, will not lie.

THIS was a Bill, calling upon the Court to compel a Rector to resign his Living in favour of one of the Plaintiffs, in pursuance of a Covenant to that effect, which the Rector entered into upon being presented. The Patron joined as Plaintiff in the Suit.

The VICE-CHANCELLOR :—

This is a Case of the first impression. In matters of real Property, or Property which partakes of realty, this Court exercises its authority to put a Purchaser in the actual possession of the subject of his Purchase, considering that damages for the non-performance of the Contract, which are all that the Law can give, are not always an adequate Compensation. It is argued, that the present Case is within that principle.

The Right of Presentation to a Living is mere matter of Property, but the actual possession of a Living is not a mere matter of Property, but depends upon the discretion of the Ordinary.

The Ordinary has an important duty to exercise, first in the acceptance of a proffered Resignation, and next in the acceptance of a new Presentee.

Over the Ordinary, this Court has no Jurisdiction; nor has this Court the power to enter into those considerations which may fitly induce the Ordinary to refuse the Surrender of the Defendant, or the Presentation of the Plaintiff.

1821.

NEWDIGATE v. HELPS.

For these reasons the Court has no means of securing to the Plaintiff the possession of the Living, and no means of determining his fitness for that possession.

I am of opinion, therefore, that a Court of Equity ought not in any manner to interfere in the execution of such a Contract, and that the Parties must be left to seek in a Court of Law such redress as they may be entitled to.

I give no opinion whether in this Case there be a legal remedy.

1821. 18th Dec.

TROWER *v.* KNIGHTLEY.

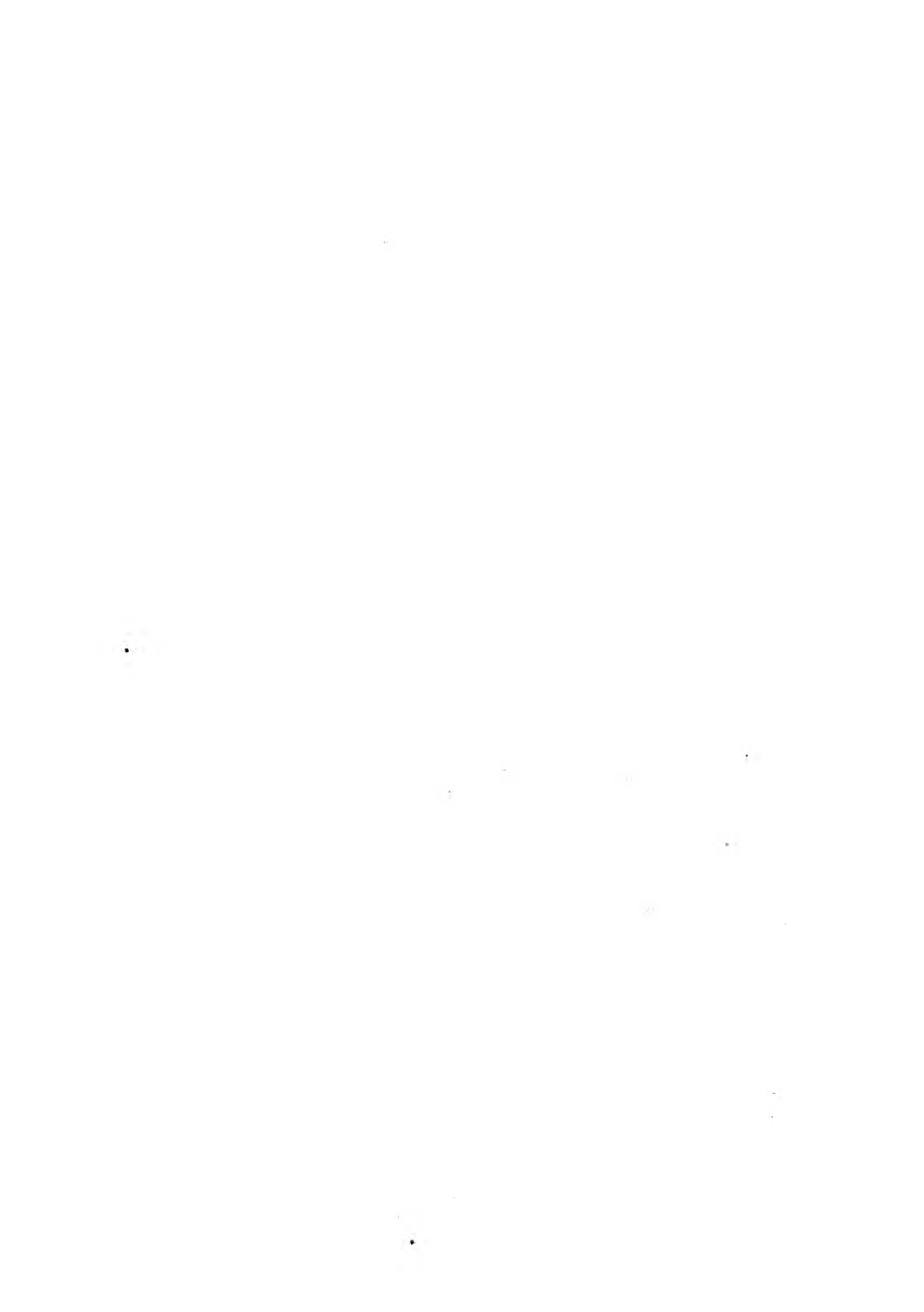
Where an Estate is devised in Trust for two Daughters for life, with Remainders in each Moiety for their Children at Twenty-one, and a Power of Sale is given to the Trustees, the Power of Sale subsists, though one Daughter is dead, and her Children have attained Twenty-one.

THIS was a Bill for the specific Performance of a Contract for Sale. The *Master* having reported in favour of the Title, the Defendant took Exceptions to his Report. The Sale was made to the Defendant by Trustees, under a Power to sell in a Will. The Estate in question was devised to the Trustees in Fee, in Trust as to one Moiety for the Devisor's Daughter *A.* for Life, with Remainder for her Children at twenty-one; and in Trust, as to the other Moiety, for his Daughter *B.* for Life, with Remainder for her Children at twenty-one. The Power to sell was given to the Trustees for the time being, during the continuance of the Trust.

The Daughter *A.* was dead, and her Children had attained twenty-one; they were all desirous that the Sale should be effected, but the Purchaser, Sir *Charles Knightley*, insisted that the Power of Sale was gone, and that the infant Children of *B.* would not be bound by it.

The *Vice-Chancellor* held, that the Trust, as to one Moiety, necessarily continued until the Children of *B.* attained twenty-one, for all purposes; and that if the Children of *A.* could call for a present Conveyance of their Moiety, it would have the effect of depriving *B.* and her Children of the Benefit of the Power of Sale, and also of the Leasing Power given to the Trustee; for that an undivided Moiety could not advantageously be sold or leased; and that the Testator must have meant to continue those Powers of Ownership to the Trustees until there were Owners competent to deal with the whole Estate.

END OF PART I.



CASES

BEFORE THE

VICE-CHANCELLOR.

JONES *v.* BROMLEY.

1821.
14th November.

A Testator having devised his property in trust for his wife during widowhood, on condition that she should, neither directly, nor indirectly, keep or have any concern or interest in a pubilc or licensed Victualling House, or any other kind of business;

Held, that the keeping and taking care of a Public House belonging to other Persons, as their Servant, and at regular wages, and in the Profits or Emoluments of which she had no interest, was not such a Breach of the Condition as to create a forfeiture.

RANDALL JONES, by his Will, dated the 2d August 1816, after giving to his Wife, *Martha Jones*, one of the Defendants, all his Household Goods and Furniture, Plate, Linen, and China, for her own use, bequeathed unto the Defendants, *J. Bromley*, *J. Williams*, and *R. Pearce*, (whom he made his Executors,) their executors, and administrators, all the Residue of his Estate and Effects, (consisting of Money in the Funds, and other Personal Property,) in Trust, after payment of his Debts, to permit and suffer his Wife, *Martha Jones*, to receive and take the Interest, Dividends, and Profits, of his Funded and other Property, during her natural Life, if she should so long continue a Widow,

1821.

JONES v. BROMLEY.

and should, during that time, neither directly nor indirectly *keep, or have any concern or interest in a Public or Licensed Victualling House*, or *any other kind of Business*; and after the Decease of his Wife, or Intermarriage, or her entering into or keeping, or having any concern or interest whatsoever, either directly or indirectly, in any Public or Victualling House, or other Business, or any of those events, upon Trust, to sell the Trust Property, and after payment of certain Legacies, to divide the Residue among all the Testator's next of Kin, except *John Jones* the younger, to whom he had given a Legacy.

The Testator died in May, 1818, leaving his Widow, *Martha Jones*, him surviving.

The Bill filed by the Legatees, and next of Kin of the Testator, against his Widow and Executors, among other things, stated, that since the Death of the Testator, his Widow, *Martha Jones*, had become or been concerned and interested in a Public or Licensed Victualling House; and that from the month of September 1818, after the Testator's decease, until the month of June 1819, had kept the Public or Licensed Victualling House, called the *Roman Eagle*, at *Deptford*, and insisted that thereupon the said Trust property, after payment of the several Legacies, became divisible between the Plaintiffs, *John Jones* the elder, and *Edward Jones*, as the Brothers and next of Kin of the said Testator. The Prayer of the Bill was for the usual accounts of the Testator's property; and that it might be declared, that in the events which have happened, the Plaintiffs, *John Jones* the younger, *John Edwards*, and *Robert Evans*, were become entitled to be paid the

several Legacies given to them respectively by the Testator's Will, and that the same might be decreed to be paid to them accordingly; and that it might also be declared, that the Plaintiffs, *John Jones* the elder, and *Edward Jones*, as the Brothers and next of Kin of the Testator, were entitled severally to their Legacies, and to have the Residue of the Testator's Estate paid to and divided between them; and that the same might be decreed accordingly.

The Defendant, *Martha Jones*, by her Answer, stated, that the Testator carried on the Trade or Business of a Publican, at and for some time previous to his Death; but such business was chiefly managed and conducted by her; and that having had such experience in carrying on the business of a Publican, and being desirous of having employment, she, after the Testator's Death, and in the Summer of 1818, applied to Messrs. *Taylor and Co.*, Brewers, who are the owners and Proprietors of several Public Houses, and stated her desire to be employed as their Servant, in keeping open and taking care of any Public House belonging to them and remaining unoccupied, until they could procure a regular Tenant. That in October 1818, Messrs. *Taylor and Co.*, in consequence of that application, sent to the Defendant, and informed her that a Public House belonging to them, called the *Roman Eagle*, at *Deptford*, was then unoccupied; and offered to pay or allow her Wages after the rate of One Guinea a week, to take care of and keep the said Public House for them, as their Servant, until they could procure a regular Tenant, which she agreed to do; and accordingly did, for the time mentioned in the Bill, but merely and only as their Servant, and at such Wages as aforesaid; and that she

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JONES v. BROMLEY.

was not paid or allowed, nor did she receive, directly or indirectly, any Property, Emolument, or Income, whatsoever, for keeping open the said House, except the Wages aforesaid; and the said Defendant denied, that since the Death of the said Testator she had been concerned or interested in any Public or licensed Victualling House; and insisted, that under the circumstances, she could not be considered as keeping the said Public House, or carrying on the Business of a licensed Victualler.

On the 16th of June, 1820, it was ordered (by consent), that it be referred to the Master, to inquire and state to the Court whether the Defendant, *Martha Jones*, was then entitled to receive the Income of the Residuary Estate of the Testator, *Randall Jones*; for the better discovery whereof the Parties were to produce before the Master, upon Oath, all Books, Papers, and Writings, relative thereto, in their custody or power, and were to be examined upon Interrogatories, as the Master should direct (*a*).

The Master having made his Report in favour of the Defendant, *Martha Jones*, Exceptions were taken to it.

Mr. *Teed*, for the Plaintiffs.

Mr. *Lovat*, for the Defendant, *Martha Jones*.

Mr. *Andrews*, for the other Defendants.

The VICE-CHANCELLOR:—

In order to work a Forfeiture, the act complained of must be not only within the letter but within the spirit

(*a*) Reg. Lib. A. 1819. fol. 1658.

1821.

JONES v. BROMLEY.

and intention of the Prohibition. In a sense this Person kept a Public House, but the keeping which this Testator must have contemplated was a Keeping on her own Account, which would have exposed to the hazards of business the Provision which he had made for her Maintenance. She did ostensibly, but not substantially keep this Public House. In a sense she had a concern or interest in this Public House, but the concern or interest which this Testator must have contemplated was a concern or interest which would have led to the same consequences to his Property as if she had been substantially the Keeper of the House—a Concern or Interest as a Partner. My Opinion therefore is that the Widow is still entitled to her Life-Interest in the Testator's Residuary Property, and that the exception must be overruled.

CANDLER v. CANDLER.

1821. 7th & 22d June.

An Attorney having died and bequeathed all his Property to his widow; his eldest son, for the mixed consideration of the good-will of the business, the advancement of money for carrying it on, and family affection, enters into an agreement with his mother to continue the business, and to account to her for a moiety of the profits during the Minority of his younger Brothers and Sisters. This arrangement is not contrary to the policy of the St. 22 *G.* 2. c. 46, *s.* 11.

THE Father of the Defendant, *Henry Candler*, practised as an Attorney at *Tadcaster*. By his Will, he gave and devised all his Real and Personal Property unto his Wife *Mary Candler*, her Heirs, Executors, and Administrators, and died in October 1815, leaving his Wife, the Defendant *Henry Candler*, his eldest Son and Heir, and several younger Children, him surviving. By

1821.

CANDLER
v.
CANDLER.

an Indenture of the 25th October 1815, between the Defendant, *Henry Candler*, of the one part, and the said *Mary Candler* of the other part, after reciting, among other things, that *Henry Candler* the Father, for many years previous to and up to the time of his Death, had exercised and carried on the profession or business of an Attorney, or Solicitor and Conveyancer at *Tadcaster*, and had formed many connections, and established a considerable business there. *Henry Candler*, Party thereto, from the love and affection which he bore towards his Mother and family, and in compliance with the wish and hope expressed by his Father, and also under a due sense of the influence which his Mother and family would retain with his Father's clients and connections, agreed with the said *Mary Candler* that he would carry on the business of an Attorney and Solicitor and Conveyancer at *Tadcaster*, and would account with her for one moiety of the clear net profits of the business so long as all or any of his younger Brothers and Sisters should be unmarried, and under the age of twenty-one years, and in consideration thereof it was agreed that the said *Mary Candler* should supply the said *Henry Candler* with money sufficient for carrying on the said business. Covenants were mutually made by the parties for effectuating such purposes.

Mary Candler died in March 1819, having devised her Property upon certain Trusts for the benefit of her Children, and appointed the Defendant *Henry Candler* and two other persons Executors of her Will.

The Bill filed by the younger Children of *Mary Candler* stated to the effect aforesaid, and that at the time when the Defendant *Henry Candler* entered on the

said business, considerable sums of money were due from various persons to the Estate of his Father for business done by the Father in his profession of an Attorney, and that the Defendant was employed by *Mary Candler* to collect and get in the same; and that the Defendant had both prior to and subsequent to the Death of *Mary Candler* collected and got in very considerable sums of Money which were due to her in such right as aforesaid, for business done by the Father. That there was in the hands of the said Defendant a considerable sum of Money which had been lent to him for carrying on the said business, in pursuance of the said Indenture, and that the said Defendant had made considerable profits by carrying on the same; and prayed that the Defendant might be restrained from receiving any part of the Personal Estate of *Henry Candler* the elder, or of *Mary Candler*, and also from collecting or receiving any Debts or sums of Money due in respect of the business carried on by the Defendant *Henry Candler* as an Attorney or Solicitor between the 25th of October 1815 and the month of June 1819; an account of such Profits, and for a Receiver.

Mr. *Wingfield* for the Plaintiffs.

Mr. *Heald*, and Mr. *Wakefield*, for the Defendants, cited 22 Geo. 2. c. 46. s. 11.

The VICE-CHANCELLOR:—

It appears by the preamble to this Clause that the mischief which the Legislature had in view was, that unqualified persons, by the assistance or connivance of regular Attornies, were enabled to act and practise as Attornies to the prejudice of His Majesty's subjects and

1821.

CANDLER v. CANDLER.

the scandal of the Profession; when, therefore, it is provided, that an Attorney shall not permit or suffer his name to be in any way made use of upon the account or for the profit of any unqualified person, the plain purpose is, that he shall not by any shift or contrivance enable an unqualified Person to act or practise in his name. The Deed in question does not enable any unqualified Person in any manner to act or practise as an Attorney. It is simply a grant of a moiety of the profits made by the sole acting of the Attorney himself during a certain period, for the mixed consideration of the good will of the Business, the advance of Money, and family affection, and is neither within the mischief nor the words of the Statute. In the Case of *Tench* v. *Roberts* which was before me on Demurrer, on the 18th May 1819; the Plaintiff, who was not an Attorney, but described himself as a Writer, entered into an Agreement with the Defendant, who was an Attorney, to become an Assistant to him in his Business, on condition that he received one third of the profits in lieu of Salary, but not to be considered as a Partner; I held, that in point of law this was a Partnership, and that by the necessary effect of this Agreement, *Tench*, an unqualified person, was enabled to act or practise as an Attorney, and to use the name of *Roberts* upon his account, and for his profit. (*a*)

" This Court doth order that it be referred to Mr. *Courtenay*, one, &c, to appoint a proper person to receive the Rents and Profits of the real Estates in the Pleadings of this Cause mentioned, and to collect and get in the

(*a*) The *Vice-Chancellor* having granted an Injunction in the principal case, a Motion was made before the *Chancellor* to dissolve it, but without success.—1 Jac. 225.

outstanding personal Estate and Effects of *Henry Candler* the elder, and *Mary Candler*, the Testator and Testatrix in the Pleadings of this Cause respectively named, and also to collect and get in the Debts due and owing for business done by the said *Henry Candler* the elder, deceased, in his life-time; and by the Defendant *Henry Candler*, since the decease of the said *Henry Candler* the elder, &c. (*a*)"

Reg. Lib. A. 1820, fol. 2456.

1819.
18th May.

(*a*) TENCH *v.* ROBERTS.

An Attorney who forms a Partnership with an unqualified Person is within the provisions of the 22 Geo.2. c. 46. s.11. An Agreement to share Profits constitutes a Partnership.

The Bill stated, that *Roberts* was an Attorney, and that the Plaintiff was his Clerk, and that they had entered into the following Agreement:—"Mr. *Gregory Roberts* and Mr. *James Tench* agree as follows,—Mr. *James Tench* to become an Assistant to Mr. *Roberts*, and to take one third part of the Profits of the Business, by way and in lieu of a Salary, not to be considered as a Partnership. Mr. *Roberts* agrees to allow Mr. *Tench* the above for his Share as an Assistant.—Dated 20th June, 1815." That pursuant to this Agreement the Plaintiff was in the Service of *Roberts* from the 20th June 1815, till the 2d January, 1817. The Prayer of the Bill was for an Account of Salary, and Payment thereof; and, if necessary, for an Account of Profits of the Business, and for general Relief.

To that Bill the following Demurrer was put in:—This Defendant, by Protestation, &c. does demur to the whole of the Discovery and Relief sought by the said Bill, and for Cause of Demurrer to the whole of the Discovery sought by the said Bill, showeth that he ought not to be compelled to discover or set forth any Matter or Thing which does or may subject him to any Pains, Penalties, or Forfeitures whatsoever; and therefore as the said Discovery sought by the said Bill doth and may by the known Laws of this Realm subject and make this Defendant liable to several Penalties, Pains, and Forfeitures, this Defendant does demur to the whole of such Discovery. And for

1819.
16th July.

PETTYT *v.* JANESON.

Partnership Articles direct a yearly Settlement on 25th March, and if a Partner die his Estate is to share in no Profits subsequent to the last yearly Settlement. The last Settlement is on the 5th November, 1811, and a Partner dies in February, 1813. His Estate shares in Profits up to the 5th Nov. 1812.

UPON a Partnership formed between the Plaintiff's Testator and the Defendant, it was agreed by covenant in writing, that the Partnership account should be stated and settled upon every 25th March. And it was further agreed, that if either of the Partners should die during the continuance of the Partnership, which was for a term of Years, that his Interest in the concern should be regulated by the last Yearly Settlement; and that he should have no concern with Profit or Loss from that time; but his Executors should from that time receive Interest at five per cent. on the sum due to

cause of Demurrer to the Relief sought and prayed for by the said Bill, this Defendant showeth that the Complainant has not by his said Bill made such a Case as entitles him in a Court of Equity to the Relief sought by the said Bill; and therefore, and for other Errors, &c.

Mr. *Wakefield,* in support of the Demurrer, referred to 22 Geo. 2. c. 46. s. 11.

Mr. *Horne* and Mr. *Temple, contra.* As between themselves, this is only a mode of regulating the Amount of a Clerk's Salary.

The *Vice-Chancellor.* If an Attorney forms a Partnership with an unqualified Person, he permits his name to be used upon his account and for his profit to the extent of his share of the profit. Here the agreement was that the unqualified Person should take one third share of the Profits, which substantially constituted a Partnership*; and the necessary and legal effect of this Agreement, and the policy of this Statute, cannot be escaped by the declaration of the Party that a Partnership should not be constituted.

Demurrer allowed.

* Vide Ex parte Hamper, 17 Ves. 404.

him at the last Yearly Settlement. The Plaintiff's Testator died on the 13th February 1813, before the expiration of the Partnership Term. The Partnership accounts were for several years duly settled on the 25th March in each year; but for many years before the Testator's death that practice had been discontinued, and the Settlements were made at uncertain periods, and sometimes after an interval of sixteen or eighteen months.

1819.

PETTYT v. JANESON.

In one instance a Settlement was made a few days before the expiration of a Year from the preceding Settlement.

The last Settlement before the death of the Testator was made on the 5th November 1811.

The Defendant had begun to take steps with a view to a further Settlement in October 1812, but the Plaintiff's Testator then refused to come to a Settlement.

The question in the Cause was up to what time the Testator's Estate was to share in the Profits of the Trade.

The Plaintiffs insisted that they were to share in the Profits up to his Death, there being no annual Settlement according to the Articles.

The Defendant insisted that the Account of Profits was to cease with the last actual Settlement on the 5th November 1811.

1819.
16th July.

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v.
JANESON.

The *Vice-Chancellor* observed, that the Articles had two plain intentions,—That there should be an Annual Settlement; and that the Estate of a deceased Partner should receive no Profits for the fraction of the year since the last Annual Settlement: That the Settlement of the 5th November 1811 was to be considered as a Settlement substituted by the Agreement of the Parties in the place of the Settlement stipulated for in the Articles: That if the Testator had died on the 1st October 1812, it could not have been contended that his Estate was to take Profits subsequent to the 5th November 1811, being the last Settlement within a year of the Death; and if this were to be treated in that case as a Settlement within the spirit of the Articles against the Testator's Estate, it must be equally considered as a Settlement for the Testator's Estate, as a Settlement on the 5th November 1811, which bound each Party to come to the next Annual Settlement on the 5th November 1812. That the Court must act upon that which ought to have been done as if it had been done, and must declare the Testator's Estate entitled to a share in the Profits up to the 5th November 1812, being the day which ought to have been the last Annual Settlement before the Testator's death.

Reg. lib. B. 1818, fol. 2011, 2013.

LUSHINGTON *v.* BOLDERO.

1819.
26th July.

To be proved by conduct whether Timber left standing for ornament or shelter. Timber so left standing not to be cut, though decayed or injurious to adjoining Trees, unless removal essential to intended purposes of ornament or shelter.

THE Court had in this case referred it to the *Master* to inquire whether Timber cut by the Defendants had been planted or left standing for Ornament or Shelter (*a*); and whether such Timber was decayed, or injured the growth of adjoining Trees. Exceptions to the *Master's* Report being overruled.

The *Vice-Chancellor* observed, that the principle of the Court was, that where an Estate for Life unimpeachable of Waste was given, with a Remainder over, the intention of the Testator was presumed to be, to preserve entire the Succession of the Estate, but to give to the Tenant for Life the full profit that could be derived from a fair course of enjoyment.

That the destruction of Timber which the Testator had either planted or preserved for Ornament or Shelter was inconsistent with the fair enjoyment which he intended, and with the preservation of the Succession. That the fact of planting for Ornament was capable of being easily ascertained; but the fact of preserving for Ornament was less obvious, and was to be collected from circumstances of the conduct in the Testator. That the leaving Trees standing beyond the usual and provident period of cutting, the clearing out of Trees, and surrounding them by Pleasure-walks and Seats, and other circumstances from which an inference arose

(*a*) 5 Aug. 1815. Reg. Lib. B. 1819. fol. 765.

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26th July.

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that the Testator regarded the Trees with other views than as mere subjects of Profit, were to be considered as *prima facie* evidence, that Trees were left standing for Ornament and Shelter, and more especially when actually connected with those objects from their situation.

That the Court could not act upon the subsequent inquiry when the Trees were decayed, or injured the adjoining Timber, because Trees most essential for ornament or shelter, and best entitled to the protection of the Court, might be decayed, and might injure the Trees adjoining.

His *Honour* referred it to the *Master* to inquire whether any and which of the Timber and other Trees so cut and sold, injured or impeded the growth of any other Trees adjoining thereto, which were of so much importance to the purposes of ornament or shelter intended by the Devisor, that the removal of the Timber or other Trees so cut and sold was essential to such purposes of ornament or shelter.

Reg. Lib. B. 1819. fol. 765-767.

LIMBREY *v.* GURR.

1819.
26th July.

Grant of Land void under 9 G. 2. c. 36. where there is a resulting trust for the Grantor during his Life.

Where the principal Charity fails the accessary fails with it.

A several Charity is good though connected with a Charity that fails in some cases of administration not of the essence of the Charity. Where a residue is given to a valid purpose, it will fail with the prior void purpose, if not capable of being ascertained except by the actual execution of that purpose.

THE Testator being possessed of Land on a Lease for 991 years, did some time before his death, exceeding twelve calendar months, assign such Lease to Trustees upon Trust, that they would within one Year after his death, at the expense of his Estate, erect Almshouses thereon, to be occupied and enjoyed in the manner therein stated. By his Will he gave a sum of 7,000*l.* Stock upon Trust, to pay his funeral expenses, and the expenses of his Monument, and the building of Eight Houses on the Land in question, and the residue to be applied to the Trusts directed with respect to another sum of 8,000*l.* He then gave a further sum of 8,000*l.* Stock to Trustees, upon Trust, to pay certain sums weekly out of the Income, to certain poor Persons, who appeared to be the same that were intended to reside in the Almshouses; then to give a Quartern Loaf of Bread to twenty other Persons weekly; then to pay the Ground-rent, Taxes, and all Repairs and Charges of the Almshouses: and the residue of the Income to be applied upon the Trusts after mentioned, with respect to a further sum of 7,000*l.* Stock; then he gave a further sum of 7,000*l.* Stock upon Trust, to apply the Income in the distribution of Bread in the manner therein mentioned. He appointed the same persons Governors of all these Charities, calling them several Charities; and these Governors had the nomination of the objects of charity. He directed that a Clerk should be appointed at a Salary of 20*l.*, for conducting the business of all the Charities, and should transact the business in a Room

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to be built with the Almshouses, and called the Committee Room.

In a subsequent Testamentary Paper he made an Estimate of the Expenses of his Funeral and Monument, and the Building of the Almshouses, and calculated that a sum of 1,600 *l.* would remain to be applied to the purposes of the 8,000 *l.*; but at the same time he declared that the Residue would be wholly uncertain, not only in respect of the uncertain price of Stocks, but because he left, with respect to the prior Expenses, an absolute discretion in his Executors.

The *Vice-Chancellor* held first, that the Trust of the Lease during the Life of the Testator not being declared in the Deed of Assignment of the Lease resulted to the Grantor, and, consequently, that the Assignment was void by the 9 Geo. 2, c. 30, s. 1., not being "To take effect in possession for the charitable use intended immediately from the making thereof."

2. That the Gift of the 7,000 *l.* was void, except as to the Funeral Expenses and the Building of the Monument, because the Almshouses could not be built; and because the Gift of the Residue of the 7,000 *l.*, notwithstanding the calculation of the Testator in his subsequent Testamentary Paper, failed by reason of its uncertainty, inasmuch that by reason of the discretion left with the Executors it was only capable of being ascertained by the actual execution of the prior purpose.

3. That the gift of the 8,000 *l.* failed as far as it was to be applied for the benefit of Persons residing in he Almshouses, because there could be no such per-

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sons; and also as to the Residue, because that was incapable of being ascertained except by the actual execution of the prior purpose.

4. That the Gift of the 7,000*l.* Stock, and the Gift of as much of the 8,000*l.* as was intended for the distribution of Bread, did not fail, being several Charities from the Almshouses, and not inseparably connected with them, either by the circumstance that the Governors were the same Persons, holding as they did by a distinct appointment, or by the direction that the business of all the Charities should be transacted by one Clerk, and in the Committee Room of the Almshouses.

That these purposes of the same Clerk, and the same Committee Room, were mere incidents collateral to the Charity, and not essential to it.

Reg. Lib. B. 1818, fol. 2059–2063.

WATSON *v*, TOONE.

1820. 10th March.

Purchase by an Executor rescinded after 20 Years by Remainderman. The transaction having taken place under circumstances of disguise and concealment.

THE Plaintiff was Tenant in Tail in remainder after the death of the Defendant, his Mother, of Lands to be purchased with the Residue of his Grandfather's Personal Estate.

His Father and Mother had, a few years after the Grandfather's death, instituted a Suit, to which the Plaintiff, then an Infant, was a party, Defendant, against the Executors for an Account of the Grandfather's Estate. The acting Executor, Mr. *Toone*, the Testator

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WATSON v. TOONE.

of the Defendant *Toone*, upon his Examination in that Suit, represented, that wanting a sum of Money to pay a particular Debt of the Grandfather, he had at a particular time stated, sold certain Canal Shares, part of the Grandfather's Assets, at sums there mentioned, with which he debited himself. It appeared in Evidence in this Case, that the Debt in question had not been paid for a year after the Sale of the Canal Shares; and that the Canal Shares had been transferred by the Executor, Mr. *Toone*, to two persons as Purchasers, who at the end of a year had declared themselves to be Trustees for him: That Mr. *Toone* the Executor was the Clerk and Treasurer of the Canal Companies: And that the Canal Shares were at the time of the alleged Sale increasing in Value.

The Plaintiff came of Age in 1803, and filed his Bill in 1806. The alleged Sale took place about 1790; and the Examination of Mr. *Toone* the Executor was in 1796. He died in 1805.

There was Evidence that the Father of the Plaintiff, who was dead, was at the time acquainted with the real transaction, and it was therefore insisted for the Defendant *Toone* that there was no intention of fraud; and that the Court under such circumstances would not relieve against a Purchase by the Executor after such a length of Time.

The VICE-CHANCELLOR:—

If an Executor, ignorant of the Rule of this Court, openly purchased Assets of his Testator with the full approbation of the Parties then presently interested, the Court would not in that case press the equitable rule

against him after such a length of time. But in this Case the Transaction was concealed, and disguised in a manner which imported fraudulent intentions; and admitting the Father to have been acquainted with the real circumstances, his knowledge and approbation of the transaction cannot conclude either the Mother or the Son.

The Shares which continued part of Mr. *Toone's* Estate were decreed to be sold, and the Dividends, from the Death of the Father, to be accounted for, giving Credit for the Price paid, and Interest.

PARRY *v.* WARRINGTON.

1820.
28th March.

Where a Testator directs a Purchase with all convenient speed, and interest in the mean time to accumulate, and Trustees neglect the Purchase, 12 Months is to be considered as a reasonable time within which the Purchase might have been made.

THE Testator by his Will gave a Legacy of 50,000*l.* to Trustees, with a Direction to Invest it with all convenient speed in the Purchase of Land, which he limited to *A.* for life, with Remainder over. And he directed, that until the Purchase was made the Dividends on the 50,000*l.*, which was in the *interim* to be laid out in Stock, should accumulate.

By his Codicil he directed all his Legacies to be paid at the end of twelve months from his death.

The Testator died the 6th April 1816. The Bill to carry the Trusts of the Will into execution was filed in February 1818, and the Answer of the Trustees on the 12th March 1818. They admitted the Receipt of the

1820.

PARRY v. WARRINGTON.

50,000*l.* at the end of the year from the Testator's death, but did not allege that they had taken any measures for the Purchase of Land.

The question now upon further directions was, whether the whole Interest which had accrued due from the end of the year after the Testator's death, or rather the whole Dividends, for it had been invested in Stock, should be added to the principal Fund for Purchase, or whether the Tenant for Life should take any part of such Dividends?

The case of *Elwin* v. *Elwin* (*a*) was principally relied upon against the Tenant for Life.

The *Vice-Chancellor* was of opinion, that inasmuch as the Trustees had not proceeded to invest the Legacy in the Purchase of Land with all convenient speed after the Legacy was paid, the Interests of the Tenant for Life ought not to be prejudiced by their omission of their duty. That the Tenant for Life was by the intention of the Testator entitled to the Income of this Property as soon as with reasonable diligence the Trustees could have invested it in Land.

That the Will had expressly provided, that until the Trustees, using all convenient speed, could find a Purchase, the Income should accumulate, and this was not therefore a Case in which a Court of Equity could consider the thing to be done at the moment when the Trustees were enabled to do it. The Testator had foreseen and provided for some interval which must

(*a*) 8 Ves. 547.

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PARRY
v.
WARRINGTON.

arise if all convenient speed were used by the Trustees. The Trustees not having used convenient speed, the Court was now unavoidably compelled to adopt some time as the period within which, with all convenient speed, the Purchase might have been effected. That it would be in vain to inquire into the circumstances of each particular Case, in order to fix in that Case what the period might have been; and some general Rule must be adopted to apply to all such Cases, as the Court had fixed twelve months for the time within which an Executor, with reasonable diligence, might wind up the Affairs of a Testator.

That it appeared to him, having regard to the time of the investigation of the Title, twelve months was as suitable a period as any other for such a purpose; and he therefore directed that the Tenant for Life should receive the Dividends from the end of the twelve months after the Trustees had received the Legacy, observing, that if in any such Case the Trustees were enabled to find a Purchase sooner, it would be open to the Tenant for Life to contend, that his Interest should commence from the time of the Conveyance. And that where Trustees proceeding with all diligence did not complete a Purchase within twelve months, it would be equally open to the adverse Party to contend that the Tenant for Life should only take from the time of the Conveyance.

See *Walker* v. *Shore*, 19 Ves. 387.

1820.
9th May.

BIRCH *v.* BYGRAVE.

A sequestration of Tithes during a vacancy is subject to the Jurisdiction of this Court.

If he is himself an Occupier he must account for the fair value.

BILL by the new Incumbent against the Sequestrator, during the Vacancy, for an Account.

The Sequestrator was the Churchwarden of the Parish, and the Occupier of a large Farm in the Parish. The Sequestration continued for three years, and the Defendant received from the Occupiers, in each year, a pecuniary Composition, which had shortly before his death been made by the last Incumbent, with the Parishioners.

It was insisted that this Composition was of an inadequate value, and in particular, that the Defendant's Composition was only 180 *l.* a year, and the value of his Tithes was 700 *l.* a year. The litigating Patron, who ultimately established his Right, gave Notice to the Defendant to take the Tithes in Kind, and there was an agreement or understanding between the Defendant and the other Occupiers that he should be indemnified if he were made accountable beyond the Composition.

It was objected on behalf of the Defendant, that the Court had no Jurisdiction, and that the Sequestrator was only to account in the Spiritual Court.

The *Vice-Chancellor* held, that by reason of the general Jurisdiction of this Court in matters of Trust, the Sequestrator was answerable here for a Breach of Trust; and referred it to the Master to inquire what would have been, at the time of the Appointment of the Seques-

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trator, a fair Annual Composition for the Tithes of the Parish, to endure during the time of the Sequestration. The *Vice-Chancellor* relied principally upon the circumstance, that Defendant had betrayed his Duty, with respect to his own Tithes.

PRICE *v.* STRANGE.

1820.
1st May.

Legal Representatives to be understood Executors and Administrators, unless controlled by intention upon the whole Instrument. Purchaser not compelled to take a doubtful Title

WILLIAM HUMPHRIES by his Will devised his real Estate to Trustees, upon trust, to pay the Rents to his Wife during her Life, if she should so long continue his Widow, and after her death, or second Marriage, to sell the same. The Will then proceeded thus:—

" And in case the death, or Second Marriage of my said Wife shall not happen until the youngest of my Children (whether he or she, shall be living at my death, or born in due time afterwards) being a Son, shall have attained his Age of twenty-three years, or being a Daughter, shall have attained that Age, or be married with the consent and approbation of my said Wife and Trustees, or the Survivor of them, then my will and meaning is, that my said Trustees, and the Survivors or Survivor of them, shall immediately after the receipt of the Money arising by Sale of my said real Estates, pay to and equally divide such Money amongst such of my said Children as shall be then living, *and the legal Representative or Representatives of him her or them as shall be then dead,* share and share alike; and in case such death, or second Marriage of my said Wife, shall happen

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during the Minority of any of my said Children, then I will and desire my said Trustees, or the Survivors or Survivor of them, to pay an equal share and proportion of the same Money unto such of my said Children as shall at that time be entitled to have or receive their, his, or her, share or shares of my Personal Estate agreeable to this my Will, in case he she or they shall be then living, *and if dead, then to his her or their legal Representative or Representatives,* and to place out the share and proportion, or shares and proportions of such of my said Children as shall not by reason of their age be so entitled, at Interest, upon Government or some other good Security, for the benefit of such last-mentioned Children, and to pay or tranfer the same to them, him, or her, at the same time that he she or they shall become entitled to payment or transfer of their his or her share or shares of my Personal Estate."

By the Testator's Will the shares of the Personal Estate were payable to the Children at twenty-three, or in the case of Daughters, upon their Marriage, with such consent as aforeasaid.

One of the Sons became a Bankrupt, and his share in the produce of the Real Estates expectant upon the death, or second Marriage of his Mother, who was still living, and a Widow, was put up to Sale by his Assignees, and purchased by the Defendant.

The Bill was for a specific performance of this Contract, and the Defendant objected to the Title upon the ground that the Children did not take a Vested Interest during the Life of their Mother; and that if

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a Child died during the Life of the Mother, its share in the Real Estate went to persons designed as substitutes, by the term "Legal Representatives."

Or at all events there was so much doubt in the question, that a Purchaser ought not to be compelled to take the Title.

The Cases relied on were *Evans* v. *Charles* (*a*), where, if *A*. died in the life-time of the Testatrix, the Legacy was to be paid "to his Personal Representatives." And the Court of Exchequer held that his Administrator took beneficially.

And *Bridge* v. *Abbott* (*b*), where, if *A*. died in the life-time of the Testatrix the Legacy was given "to his Legal Representatives;" and Lord *Alvanley* held that the next of Kin were entitled.

The VICE-CHANCELLOR:—

It is difficult to yield assent to *Evans* v. *Charles*, that the Personal Representative took beneficially. It might have been better to have held that the Personal Representative was to take it upon trust, to administer it as a part of the Testator'sEstate. Perhaps the same conclusion would have been best also in *Bridge* v. *Abbott*; but that decision is less objectionable than *Evans* v. *Charles*; the next of Kin, in a sense, legally represent a person as to his Personal Estate. In the Statute of Distributions (*c*), the term "Legal Representatives," means Descendants, and not next of Kin; as for example,

(*a*) 1 Anstr. 128.
(*b*) 3 Bro. 224.
(*c*) 22 & 23 *Ch*. 2. c. 10. s. 6.

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a son of an intestate is dead, leaving a Widow and Child.

The Widow takes nothing, and the Child the whole of its Father's share; yet the Widow, though not strictly one of the next Kin, is in the same sense as the Child a legal Representative of the Personal Estate of the Father. I do not collect whether Lord *Alvanley*, in *Bridge* v. *Abbott*, adverted to the case of a Widow, and would have included her in his sense of legal Representatives.

Neither *Charles* v. *Evans*, nor *Bridge* v. *Abbott*, strictly apply to the principal Case. In both, the question was, who was intended to be substituted by the Testator in the event of the death of the Legatee in his Life; who was to take at the death of the Testator. Here there is no doubt who is to take at the death of the Testator; the Children living at his death, or born in due time afterwards. But the question is, whether the interest of the undoubted Legatees vests at the death of the Testator, or upon attaining twenty-three, or Marriage, if a Daughter, with consent; or upon the second Marriage, or death of the Widow.

The Defendant's objection is, that the interest of the Bankrupt, who has attained twenty-three, is still in contingency until the second Marriage, or death, of his Mother.

In *Evans* v. *Charles*, and *Bridge* v. *Abbott*, the word "Representatives" clearly meant Substitutes; and the question was, who were the Substitutes intended; but the single question here is, whether the word "Repre-

sentatives" is a term of substitution or of limitation, expressing the quantity of interest intended for the Legatee.

It is a sound rule of construction to understand words in their ordinary sense, unless controlled by a different intention appearing upon the whole Instrument. The ordinary sense of legal Representatives, is Executors or Administrators; and reading the words in that sense, in the first passage, makes it equivalent to a direction to pay the Produce of the Estate at the death of the Widow to the Children, their Executors or Administrators; or, in other words, gives a vested interest to the Children; and the question is, whether this ordinary sense is controlled by a different intention appearing upon the whole Instrument.

This first passage applies to the case of all the children having attained twenty-three, or being Daughters, having married with consent, in which case an immediate division of the whole property is to take place.

The next passage supposes the case of Children who have not attained twenty-three, or being Daughters, have not married with consent; and it provides that the shares of the Children who are entitled to or have received their proportions of the Personal Estate, by which is meant those who have attained twenty-three, or being Daughters, have married with consent, shall be paid to them if then living; and if dead, then to his, her, or their legal Representative or Representatives.

This raises a question whether the Representatives of any deceased Child are to take, unless such Child had

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attained twenty-three, or being a Daughter, had married with consent; but it is not necessary to discuss that question in this Case, for the Bankrupt has attained twenty-three. To his legal Representatives his proportion is payable; and understanding the words in the sense of Executors and Administrators, then, as in the first passage, it is during the Life of his Mother, a vested interest in him.

Then follows a direction to place out the shares of Children, who by reason of their age are not entitled to receive them; and it is to be observed, that this direction is in terms which give a present vested interest to such Children not depending in contingency, until they attain twenty-three; or being daughters, are married with consent. Upon the whole, therefore, using the words "Legal Representatives" in their ordinary sense, a vested interest is given to these Children, at least on their attaining twenty-three; or being Daughters, on their marriage with consent; and I find nothing in the Will to control this sense, and this intention to give a vested interest to Children attaining twenty-three, or being married with consent, is much more consistent with common prudence than an intention which would leave the Children, whatever their ages might be, or the wants of their families, or the necessities of their situation, wholly without certain provision during the life of their Mother.

The strong inclination of my opinion therefore is, that the Plaintiffs, the Assignees of the Bankrupt, can make a good Title to his Share. But having regard to the proposition, that a Purchaser is not bound to take a doubtful Title, without undertaking to determine pre-

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cisely the limit and extent of that rule, I am of opinion that this case is, within the sense of that proposition, a doubtful Title.

In attempting to lay down a rule upon this subject, I should say that a Purchaser is not to take a property which he can only acquire in possession by litigation and judicial decision; and

That the Trustees here could never be advised, after the case of *Bridge* v. *Abbott*, to divide the property in question without the direction of a Court; and to compel the Purchaser therefore to take this Title would be to compel him to buy a Law Suit.

Reg. Lib. B. 1819. fol. 920.

EDNEY *v.* JEWELL.

1821. November 25.

A Power of Attorney to institute a Suit in the name of the Plaintiff, having been stated in the Bill; proof thereof not required at the Hearing, but the Master, before taking the accounts, prayed to inquire into that fact.

THIS was a Bill filed in the name of one Partner against another, for an Account, under a Power of Attorney, authorizing the institution of the Suit by a third person, which power of Attorney was stated in the Bill, but no proof thereof was offered at the Hearing.

Mr. *D. Parker*, for the Plaintiff.

Mr. *Agar*, and Mr. *Duckworth*, for the Defendants, objected to the want of Proof of the Power of Attorney.

The *Vice-Chancellor* said it was quite unnecessary to to state the Power of Attorney in the Bill, but as that

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EDNEY v. JEWELL.

statement had been made, he would direct the *Master* to inquire, whether the persons who had instituted this Suit were at the time of the institution thereof, and still were, authorized to prosecute the same in the name of the Plaintiff; and in case they were so authorized, then the *Master* was to proceed to take the usual Accounts.

Reg. Lib. A. 1821. fol. 783.

TAUNTON *v.* PEPLER.

1820. 2d March.

THE Bill was filed by the next of Kin, against the Defendant, as Administrator of the Intestate, for an Account.

The Defendant pleaded a Release.

Mr. *Phillimore* objected to the Plea of the Release; first, because it was founded only on the Receipts of the Administrator, as they then stood; and, secondly, because the Release was only said to be "sealed and delivered," without also saying "signed"; and cited *Blackstone* (a), who says a Deed must be signed as well as sealed and delivered.

Mr. *Koe, contra.*

The VICE-CHANCELLOR:—

The Release states that the Administrator had received *all* the Property belonging to the Intestate; I cannot

(a) Blackstone's Com. 305. *Blackstone*'s words are "It is requisite that the Party whose Deed it is should *seal*; *and now, in most cases, I apprehend, should sign it also.*"

therefore assume that he has received anything since. There is no authority for saying that a Release to be effectual, must be signed as well as sealed and delivered.

The Plea must be allowed.

1821.
26th May.

Between the Right honourable AUGUSTA POULETT commonly called Lady AUGUSTA POULETT, Spinster, an Infant, by the Honourable GEORGE POULETT her Brother and next Friend; and the Honourable VERE POULETT, and EDMUND BASTARD, Esquire, - - - - - - Plaintiffs,

and

The Right honourable JOHN EARL POULETT, - - - - - - - - - - - - - Defendant.

A term of years having been limited to Trustees for the purpose of raising a Sum of Money for the Maintenance and Education of the younger Children of A, in such shares and proportions, and such manner and form, as A should direct, and in default of any direction, to be applied for the benefit of such Children equally, the same to be paid to or for them respectively until their respective portions, provided for them out of other property, should be payable and paid.

A, *by his Will appointed a certain portion for the Plaintiff, to be vested in her at the age of Twenty-one Years, or on Marriage, and directed that a certain part of the Interest and Dividends thereof should be applied towards her maintenance and education, but did not make any appointment, or give any directions relative to the sum of money raiseable for that purpose under the said term. Held, upon the construction of the Settlements, that the Plaintiff was entitled to have her share of the Money provided by the term, raised for her benefit, until the period when her portion should become payable; that it is not improbable that it should be the intention of Parents to provide a larger fund for the education of Children than the mere Income of their future portions—the portions of younger children of great families being seldom large, although they have universally the same expensive Education as the eldest Child.*

THIS Cause came on to be heard upon Bill and Answer, for the purpose of obtaining the opinion of the Court upon the construction of certain Deeds.

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The Bill, filed on the 26th July 1820, stated that, by an Indenture of the 22d July 1782, made between *Vere* late Earl *Poulett*, since deceased, of the first part; *John* late Earl *Poulett*, then *John* Viscount *Hinton*, of the second part; Sir *George Pocock*, and *Sophia* Countess *Poulett*, then *Sophia Pocock*, spinster, of the third part; *J. P. Bastard* and *G. Byng* of the fourth part; (being the Articles made on the Marriage of the said *John* late Earl *Poulett*, and the said *Sophia* Countess *Poulett*), the said *Vere* Earl *Poulett* and *John* late Earl *Poulett* covenanted to settle the Manor and Lordships of *Hinton Saint George*, and divers other Manors and Lordships, Lands and Hereditaments therein mentioned, and situate in the counties of *Somerset*, *Devon* and *Dorset*, after the determination of certain Estates (since determined) to the use of the Trustees, their Executors and Administrators, for a term of 300 years, to be computed from the day next before the day of the decease of the Survivor of the said *Vere* Earl *Poulett*, and *John* late Earl *Poulett*, upon certain Trusts, and after the expiration or sooner determination of the said term, and subject thereto, to the use of the first and other Sons of the said *John* late Earl *Poulett*, and the said *Sophia* Countess *Poulett* in tail-male, with divers Remainders over.

The Trusts of the said term of 300 years were thereby declared to be for raising Money for the Maintenance and Education of the younger Children of the said Marriage, that is to say, if there should be but one such Child, besides an eldest or only Son, the yearly sum of 200*l.* for the Maintenance and Education of such Child; and if there should be two such Children, the sum of 400*l.*; and if three such Children, the sum of 600*l.*, for the like purpose; and if there should be four

or more such Children, then the Sum of 1000*l.* for the Maintenance and Education of such four or more Chilren, the same yearly Sums in any of the cases last mentioned, if there should be two or more such Children, to be paid and applied in such parts, shares, and proportions, and in such sort, manner, and form, as the said *John* late Earl *Poulett* should, in manner therein mentioned, direct and appoint; and in default of any such Direction and Appointment, in Trust, to pay and apply the same to or for the benefit of such Children, except an eldest or only Son, equally; the same to be payable to or for them respectively until their respective Portion or Portions thereinafter agreed to be provided for them respectively should be payable and paid: And upon further Trust, to permit the Persons for the time being entitled under the limitations to be contained in the Settlement, to be made in pursuance of the said Articles, to the immediate Reversion or Remainder of the Premises contained in the said Term, to receive the Rents, Issues, and Profits thereof, over and above so much as should, from time to time be paid and applied for the Maintenance and Education of such younger Children.

And by the same Indenture the said Sir *George Pocock* covenanted to secure by Bond the payment of 20,000*l.*; and until the payment thereof, the yearly Sum of 1000*l.* to the said *J. P. Bastard*, and *G. Byng*, their Executors or Administrators: And it was agreed, that in the intended Settlement it should be declared that such Trustees should stand possessed thereof, subject to the Life Interests of certain Persons since deceased; and, subject to certain contingences since determined, in Trust, to pay the Interest thereof to the

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first Son of the Bodies of the said *John* Earl *Poulett*, and *Sophia* Countess *Poulett*, until he should attain the age of twenty-one years, or die under that age, without leaving Issue Male; and if such Son should attain the age of twenty-one years, then upon Trust to convey and assign the said Annuity, or yearly Sum of 1,000*l.* to such first Son, his Executors, Administrators, or Assigns.

And the said Sir *George Pocock* thereby further covenanted to secure by another Bond the payment of a further Sum of 20,000*l*,, and until the payment thereof the yearly Sum of 1,000*l.* to the said *J. P. Bastard*, and *G. Byng*, their Executors or Administrators; and it was declared and agreed, that the said second Annuity or yearly Sum of 1,000*l.* should, except as to such parts thereof as might fall in before, in the events therein mentioned, commence from the time of the decease of the longer liver of the said Sir *George Pocock*, and his three Sisters therein named (all of whom died in the life-time of the said *John* late Earl *Poulett*); and that in the intended Settlement there should be inserted a clause, declaring that the last-mentioned yearly Sum of 1,000*l.* should continue payable until the said Sir *George Pocock* should pay, or secure to be paid, unto the Trustees thereof, their Executors or Administrators, the further sum of 20,000*l.*; and also a declaration that such Trustees should stand possessed of the said second yearly Sum of 1,000*l.*; and of the said Sum of 20,000*l.* agreed to be paid for the Redemption thereof, upon Trust, to pay the same yearly Sum of 1,000*l.* until the said Sum of 20,000*l.* should be paid for the redemption thereof as aforesaid; and after payment of such Sum of 20,000*l.*, upon Trust, to invest the same at

Interest, upon real securities, and to pay the yearly Interest and Produce thereof to the said *John* late Earl *Poulett*, if he should be then living, during his Life; and after his decease, in case the said *Sophia* Countess *Poulett* should survive him, in Trust, to pay the same unto the said *Sophia* Countess *Poulett*, during her life; and after the death of the Survivor, in Trust, for all and every the Child or Children of the Body of the said *John* late Earl *Poulett*, on the Body of the said *Sophia* Countess *Poulett* to be begotten, (except an eldest or only Son), in such parts, shares, and proportions, and to be vested and payable at such ages, days, or times, and with such Remainders or Limitations over, being for the benefit of some or one of the said Children, (except an eldest or only Son); and upon such conditions, and under such restrictions, and in such sort, manner, and form, as the said *John* late Earl *Poulett*, by any Deed or Deeds, with or without power of Revocation, or by his last Will and Testament in writing, or any Codicil thereto, to be executed and attested as therein mentioned, should direct or appoint, and in default of such direction and appointment, to be divided and paid equally between and amongst such Children.

The Bill further stated that the said *Vere* Earl *Poulett* was long since dead, and that *John* now Earl *Poulett* attained his Age of twenty-one years before the month of July 1805; and that by Indentures of Lease and Release of the 22d and 23d days of July 1805, the Release made between the said *John* late Earl *Poulett*, and *Sophia* Countess *Poulett*, of the first part; the said *John* now Earl *Poulett*, then *John* Viscount *Hinton*, (the eldest Son of the said *John* late Earl *Poulett*, by the said *Sophia* Countess *Poulett*), of the second part; *Mary* Countess Dowager *Poulett*, of the third part; *John*

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Dunning and *John Tyndale Warre*, Esq. of the fourth part; *John* Lord *Rolle*, and *John* Lord *Bertingdon*, of the fifth part; *Charles* Marquis of *Winchester*, and *George Pocock*, Esq. of the sixth part; and the Plaintiffs, *Vere Poulett* and *Edmund Bastard*, of the seventh part (being the Settlement made in pursuance of the aforesaid Marriage Articles). After reciting, among other things, that it had been agreed between the said *John* late Earl *Poulett*, and the said *John* now Earl *Poulett*, that certain Estates therein mentioned (comprising certain of the Hereditaments comprised in the aforesaid Articles); and also certain Estates agreed to be brought into Settlement by the said *John* late Earl *Poulett*, as therein mentioned, should be settled in the family of the said *John* late Earl *Poulett*, and so as that an immediate Provision should be made thereout for the said *John* now Earl *Poulett*; and that in consideration of such Provision the said *John* now Earl *Poulett* was desirous of assigning and making over the first therein and hereinbefore mentioned Annuity of 1000*l*. and the principal Sum of 20,000*l*. to be paid for the Redemption thereof, to which he would be entitled under the Trusts of the said Articles upon the death of the said *John* late Earl *Poulett*, upon such Trusts, and for the benefit of all and every other the Child or Children of the said *John* late Earl *Poulett* by the said *Sophia* Countess *Poulett*, as by the said Articles were expressed and declared of and concerning the aforesaid second Annuity of 1000*l*., and the principal Sum of 20,000*l*. to be paid for the Redemption thereof, after the death of the Survivor of the said *John* late Earl *Poulett*, and *Sophia* Countess *Poulett*; the Hereditaments comprised in the aforesaid Articles (except certain parts therein mentioned), and also divers other Hereditaments situate in the counties of Somerset and Dorset, were con-

veyed and limited in use, (from and after the determination of certain prior Estates, which have since determined, comprising a Rent-charge of 1,000 *l.* thereby limited to the said *John* now Earl *Poulett* during the joint Lives of himself, the said *Mary* Countess Dowager *Poulett*, and the said *John* late Earl *Poulett*) to the Plaintiffs *Vere Poulett* and *Edmund Bastard*, their Executors, Administrators, and Assigns, for the term of 300 years, to be computed from the decease of the said *John* late Earl *Poulett*, upon the Trusts therein after expressed, and after the determination of the said Term, and subject thereto, unto the said *John* now Earl *Poulett*, and his Issue Male, with Remainder over.

And it was thereby declared, that the said Term of 300 years was limited upon the same Trusts for the Maintenance and Education of the Children of the said *John* late Earl *Poulett*, by the said *Sophia* Countess *Poulett*, (except an eldest or only Son), as by the said Articles of the 22d of July 1782, were expressed and declared of the Term of 300 years, thereby directed to be limited as aforesaid.

And by the same Indenture the said *John* now Earl *Poulett*, in consideration of the Settlement thereby made, and of the natural love and affection which he had for his Brothers and Sisters, covenanted with the said *John Dunning* and *J. T. Warre*, their Executors and Administrators, to assign unto such Persons as the said *John* late Earl *Poulett* should appoint, the aforesaid first mentioned Annuity of 1,000 *l.*, and the said principal sum of 20,000 *l.* to be paid for the Redemption thereof; and to which he was or would be entitled under the Trusts of the aforesaid Articles of the 22d July 1782,

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upon the death of the said *John* late Earl *Poulett*, upon such Trusts for the benefit of all and every the Child or Children of the said *John* late Earl *Poulett*, and *Sophia* Countess *Poulett*, as in and by the aforesaid Articles of Agreement were expressed and declared of and concerning the aforesaid second Annuity or yearly Sum of 1,000*l.*, and the principal Sum of 20,000*l.* to be paid for the Redemption thereof, after the death of the Survivor of the said *John* late Earl *Poulett*, and *Sophia* Countess *Poulett*.

The Bill further stated, that by an Indenture of the 13th March 1809, made between the said *John* now Earl *Poulett*, then *John* Viscount *Hinton*, of the first part, the said *John* late Earl *Poulett*, of the second part, the said *John Dunning* and *J. T. Warre*, of the third part, and *J. P. Bastard*, Esquire, and *G. B. Tyndale*, Esquire, of the fourth part; the said *John* now Earl *Poulett* assigned unto the said *J. P. Bastard* and *G. B. Tyndale*, their Executors, Administrators, and Assigns, the Sum of 20,000*l.* to which he was under the aforesaid Articles entitled, subject to the Life Interest therein of the said *John* late Earl *Poulett*, upon Trust, that they should immediately after the decease of the said *John* late Earl *Poulett* receive the same; in Trust for all and every the Children or Child of the said *John* late Earl *Poulett*, by the said *Sophia* Countess *Poulett*, other than and except the said *John*, now Earl *Poulett*, (or the eldest or only Son for the time being) in such and the same or the like shares and proportions, and subject to such and the same powers of appointment by the said *John* late Earl *Poulett*, to be paid and payable to, and become vested in, such Child or Children respectively, at such and the same or the like days or

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times, and with such or the like powers, provisoes, restrictions, declarations, and agreements, and in the same manner in all respects as were declared and expressed by the aforesaid Articles of the 22d day of July 1782, concerning the said other Principal Sum of 20,000*l.* so secured for the benefit of the younger Children of the said Marriage as aforesaid.

The Bill further stated, that *John* late Earl *Poulett*, by his Will dated the 17th August 1816, executed and attested in the manner required by the Articles for the execution of the power of appointment thereby vested in him, after noticing the Trusts then subsisting of and in the said two annual Sums of 1,000*l.*, and the said two sums of 20,000*l.* to be paid in Redemption of the same and reciting, as the fact was, that he had appointed one eighth part of the said two Annuities of 1,000*l.*, and of the said two Sums of 20,000*l.* to be paid for the Redemption thereof respectively, unto *Sophia* Viscountess *Barnard*, his eldest Daughter by the said *Sophia* Countess *Poulett*; and that he had appointed one fourth part of the same two Annuities, and of the same two Sums of 20,000*l.* unto *George Poulett*, his second and only younger Son (then living) by his said Wife; and reciting, that he had Issue by the said *Sophia* Countess *Poulett* five Children, namely, *John*, now Earl *Poulett*, *George Poulett*, the said *Sophia*, Viscountess *Barnard*, Lady *Mary Poulett*, and the Plaintiff, Lady *Augusta Poulett*, then living; and reciting, that he was desirous of directing and appointing the remaining five eighth parts of and in the said Sums of 20,000 *l.* and 20,000 *l.* respectively, in Trust, for the said Lady *Mary Poulett*, and for the said Plaintiff, Lady *Augusta Poulett*, his only other younger Child-

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ren, in equal moieties, under the provisoes thereinafter mentioned and contained, the said Testator, pursuant to the power to him for that purpose given by the said Indenture of the 13th March 1809, and the said Indenture or Articles of the 22d of July 1782, respectively, directed and appointed that the said unappointed five eighth parts or shares of or in the said several sums of 20,000*l.* and 20,000*l.* and the Stocks, Funds and Securities, upon which the same respectively should be laid out and invested, should, from and immediately after the decease of the said Testator go in Trust for the said Lady *Mary Poulett,* and the said Plaintiff, in equal shares, as Tenants in common, the share of the said Lady *Mary Poulett* to be an Interest vested in her immediately upon the decease of the said Testator, and the share of the said Plaintiff to be an Interest vested in her on her attaining the Age of twenty-one years, or marrying, in case the same should happen after the said Testator's decease, with clauses of Survivorship between the said Plaintiff and the said Lady *Mary Poulett,* as to certain portions of the shares thereby appointed to them. And the said Testator thereby directed, that in the mean time, after his decease, until any portion of the Plaintiff of the said five eighth parts or shares of the said Annuities of 1,000*l.* and 1,000*l.*, and the said Sums of 20,000*l.* and 20,000*l.*, to be paid for the Redemption thereof respectively should become payable; the sum of 300*l.* part of the Dividends, Interest and Annual Income of such the said Plaintiff's expectant portion, from the day of the said Testator's death, should be paid to the Guardian (the Plaintiff, *George Poulett,* thereinafter appointed) of the said Plaintiff, in order that the same might be applied by such Guardian for and towards the said Plain-

tiff's Maintainance and Education, and the Residue of the said Interest, Dividends and Annual Income, was to accumulate for the benefit of the said Plaintiff, by way of compound Interest, and to be paid when the said Plaintiff should have attained a vested Interest in the Funds from which it should have resulted.

The said *Sophia* Countess *Poulett* died some time before the making of the said Will; and the said *John* late Earl *Poulett* died the 14th of January 1819, without having revoked or altered the said Will, or the Appointments thereby made, leaving *John* now Earl *Poulett*, and his several other Children by the said *Sophia* Countess *Poulett* in the said Will named, him surviving. The two Sums of 20,000*l.* had been secured to be paid by a Mortgage upon the Estates of the said Sir *George Pocock*, in the County of *Durham*; and the Portions of all the younger Children, except the Plaintiff, who was an Infant and would not be of age until the year 1822, had been paid.

John late Earl *Poulett* did not make any Appointment of the yearly Sum or Sums by the said Articles of the 22d of July 1782, and the Indenture of the 3d July 1805, directed to be levied for the Maintainance and Education of the Child and Children of himself and the said *Sophia* Countess *Poulett*, besides an eldest or only Son, and to be paid and applied for the benefit of such Children, if more than one, equally, and to be payable to or for them respectively, until their respective Portions by the said Articles agreed to be provided for them should be payable and paid.

The Plaintiffs being advised, that the said Testator having left four Children by the said *Sophia* Countess

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Poulett, besides the Defendant *John* now Earl *Poulett,* his eldest Son, the yearly Sum of 250*l.* became, under the said Trusts, raisable and payable for the Maintenance and Education of the Plaintiff Lady *Augusta Poulett,* until her Portion appointed by the said Will should be payable and paid, and prayed a Decision of the Court to that effect.

The Defendant *John* Earl *Poulett,* by his Answer admitted the several facts alleged in the Bill, but submitted to the Judgment of the Court, that, under the Trusts declared of the said Term of 300 years by the said Indentnre of the 22d day of July 1782, the Sums thereby directed to be raised for the Maintenance and Education of the younger Children of the said *John* late Earl *Poulett* were, according to the true construction of the said Trusts, to be raised and paid only until the said Children became entitled to Maintainance out of the Income of the sum of 20,000*l.* by the said Marriage Articles provided for the Portions of such younger Children; and that the said *John* late Earl *Poulett* had by his Will provided a Maintenance for the Plaintiff Lady *Augusta Poulett,* not only out of the said Sum of 20,000*l.* but also out of the said further sum of 20,000*l.* which he, in manner in the said Bill mentioned, purchased from this Defendant for the benefit of his younger Children, and that therefore the said plaintiff was not entitled to a double provision for Maintenance.

Mr. *Horne,* and Mr. *Sugden,* and Mr. *Tinney,* for the Plaintiffs.

Mr. *Bell,* and Mr. *Lynch,* for the Defendants.

The VICE-CHANCELLOR:

The object of all construction is to give effect to the intention of the Parties as it is to be collected from the whole Instrument. A particular expression, however clear it may be, when taken alone, may have its immediate meaning, qualified or even overruled by the force of other parts of the Instrument. But if a plain and clear expression is consistent with the sense of every other passage in the Instrument, then to control or overrule the obvious Intention, upon the ground that it is not a probable or prudent Intention, would not be to construe an Instrument, but to make a new Instrument.

In the Case of *Hope* v. *Clifden* (a), and the other cases of that class which have followed, it is admitted that the presumed intention in favour of a vested Interest in a Child during the life of its Parents, must yield to clear and consistent expression.

This Principle is distinctly stated by Sir William Grant in *Howgrave* v. *Cartier* (b).

In the present Case, it is declared that the Maintenance provided by the Term of 300 years is to continue until the Portions, which are the subject of a further Clause in the Articles, are payable and paid; by which must be understood, until the younger Children became entitled to receive those Portions. The Plaintiff will not become entitled to receive her Portion until she attains Twenty-one or Marriage, and she therefore claims her Maintenance under the Terms until one of those events happens. It is not contended that there is in

(a) 6 Ves. 499. (b) 3 Ves. & Bea. 82.

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these Articles any other passage which in its terms admits of a different sense. But it is said that by the Provisions of the Articles the younger Children might have, and that the Plaintiff actually has, a present Income for Maintenance out of her Portion, although she is not yet entitled to receive it; and that it could not be the intention of the Articles to make a double provision for Maintenance; and that a Court is therefore to construe the Articles as if the expression had been, not that the Maintenance under the Term is to continue until the Portions are payable and paid, but that the Maintenance under the Term is to continue until the younger Children derive some Income from the Portions which are the subject of the further Clause in the Articles. If I thought it as improbable as the argument supposes, that it could be the intention of these Articles to continue the Maintenance under the Term, after a younger Child derived any Income from the sum provided for its portion, I could not from such mere improbability collect an intention no where expressed, and which was at variance with the force of clear and consistent expressions. But I do not find that improbability in the expressed intention which the argument assumes. Why is it improbable that it could be the intention of Parents to provide a larger fund for the education of younger Children than the mere Income of their future Portions? The Portions of younger Children of great families are seldom large; but such younger Children have universally the same expensive education as the eldest Child of the family. It is further to be considered that the distribution of the 20,000*l.* amongst the younger Children was absolutely at the discretion of Lord *Poulett*; he might have given to a younger Child any share not illusory, say 100*l.* The

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argument for the Defendant would necessarily exclude such younger Child from the possibility of any Maintenance except the 5*l.* a year, which is the Interest of 100*l*,; but where is the improbability that it might be the intention of these Articles to enable Lord *Poulett* to exclude a younger Child from an equal participation in the Principal Sum of 20,000*l.*, and yet to provide an adequate Maintenance for such Child. It is not however necessary to push considerations of this nature any farther. By the clear expressed intention of the Parties to these Articles, as it is to be collected from the whole Instrument, the Plaintiff is entitled to Maintenance from this term until the period when her Portion is payable, and the Decree must therefore be made accordingly.

HODLE *v.* HEALEY.

1819.
27th November.

Acknowledgment of Mortgage Title within 20 years of Bill filed maintains the Equity of Redemption.

IN 1777, the Defendant *Healey* contracted to purchase from those who then represented the Interest of the Plaintiff the Premises in question, which were subject to two Mortgages, and afterwards, but before 1782, he paid off these Mortgages, and took Assignments to himself.

In 1782 the Vendors filed a Bill against him for a specific performance of his Contract, and in his Answer he insisted that the Vendors could not make a good Title. On the 22d January 1784 an Agreement was entered into between the Vendors and the Defendant, whereby the Vendors agreed to dismiss their Bill, and the Defendant engaged not to proceed against them

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personally for the Costs of the Suit; but it was stipulated, that if the Vendors should prove to be the Persons entitled to the Equity of Redemption, that the Defendant should be allowed in his Account of Rents and Profits the Costs of such Suit, and that the Premises should not be redeemable without the payment of such Costs, as well as of the Money due on the Mortgages.

In the year 1786, there being then about 800 *l.* due to the Defendant, the Premises were put up to Sale, and there being bid for them only the sum of 640 *l.* no Sale was had.

By Indentures of Lease and Release, bearing date the 21st and 22d of September 1787, *Sarah Smith*, one of the Vendors, claiming to be entitled to a Moiety of the Premises, conveyed or released her Equity of Redemption to the Defendant; and in the Release the Agreement of January 1784 was recited, and the subsequent attempt at Sale, when the 640 *l.* was bid; and the Release proceeded upon the ground that the Money due to the Defendant exceeded the Value of the Property.

Elizabeth Hodle, the Sister of *Sarah Smith*, who claimed to be entitled to the other Moiety of the Equity of Redemption, and was a Party to the Agreement of January 1784, was at this time dead, leaving an Infant Daughter, one of the Plaintiffs, to whom her Title, if any, had then descended.

In the month of June 1804, the Plaintiff, *Hodle*, who had been the Husband of *Elizabeth Hodle*, and was Father of the Plaintiff, the Daughter, and who claimed an Interest as Tenant by the curtesy, wrote to the

Defendant, requesting that he would come to an Account for the Rents and Profits of the Mortgaged Premises, and the Defendant answered such Letter in the following words:

"Mr. *George Hodle*:—Sir, Mr. *Harrox* says, the 12th Instant you called on him, and said you did not know of any Promise or Agreement you had made for your Daughter to sign. I always understood it was requested, from the Agreement made by you, your Wife *Elizabeth, Sarah Smith*, and myself, the 22d January 1784, where you agree to withdraw all proceedings in the Suit in Chancery, and ordered me to dismiss such suit. If your Daughter's Husband, or his Father, wants to know particulars more than you can tell them, if they will favour me with a line, I will send them, or if there is any one in *York* they would like to see the Agreement I have no objection. When I last saw you, your Wife and Daughter, I thought we had fixed what was to be done after she was of Age; but if her Father has any one here more likely to serve her than me, I will advise with them, as it may be in my power to inform them how things really are here with them.

York, 15th June 1804. Signed, *George Healey*."

The Bill was for a Redemption, which, as to a Moiety, was excluded by the Deeds of 1787, which were unimpeached by Evidence; and as to the other Moiety, the Question was, whether the Letter of 1804 prevented the Defendant insisting upon the length of Possession.

The VICE-CHANCELLOR :—

A Court of Equity acts with equitable Rights by analogy to the Statute of Limitations in the cases of

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Ejectment, and holds that twenty years possession by a Mortgagee, under certain circumstances, is equivalent to twenty years adverse Possession at Law. There is however, this material difference between adverse Possession at Law and the Possession of the Mortgagee; adverse Possession at Law is inconsistent with the Title of the true Owner, but the Possession of the Mortgagee is consistent with the Equitable Title of the Mortgagor: twenty years adverse Possession gives therefore absolute Title to the Possession at Law, but twenty years Possession of the Mortgagee does not in itself give Title against the Mortgagor. If for twenty years the Mortgagor has suffered the Mortgagee to hold as if he were the true Owner, without acknowledgment of the Mortgage Title, and if for twenty years the Mortgagee has considered himself as the true Owner, and kept no Accounts as Mortgagee, a Court of Equity holds that this negligence of the Mortgagor shall protect the Mortgagee from the difficulty which, in such circum stances, would attend the Mortgage Account: but if within the twenty years the Mortgagee has acknowledged the Mortgage Title, a Court of Equity imputes no negligence to the Mortgagor; or if within the twenty years the Mortgagee has kept Accounts, or otherwise dealt with the Property as Mortgagee, a Court of Equity sees no such hardship in the Case of the Mortgagee as ought to protect him from the Account in respect of the Mortgagor's negligence. The single Question here is, whether the Letter of the 15th June 1804, being within twenty years of the filing of the Bill, is an acknowledgment of the Mortgage Title. It is to be observed, that the Defendant had expressly acknowledged the Mortgage Title by the Deeds of 1787, and that at the time of writing this Letter the De-

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fendant had no ground upon which he could allege, in Answer to the application made to him for the Account, that the Equity of Redemption was barred; and he does not so allege. The case he makes is an express admission that the Equity of Redemption, as to the Moiety of the Mother, still remained in the Daughter; and he claims to have this Equity of Redemption released by the Daughter, in consequence of some promise made to him by the Father and the Mother. He has made nothing of this alleged promise from the Father and the Mother; and as the Case now stands upon the length of Time, this Letter is a clear acknowledgment of the Mortgage Title.

I fully admit the Doctrine in the Cases cited (*a*), that such acknowledgment is not to be inferred from equivocal expressions; but it may be observed, that the force of the expressions used may in some degree depend upon the time when they are used. In all the Cases referred to, the twenty years had actually passed before the expressions were used; and the Question was, whether their effect was to revive a Right then lost to the Mortgagor. The Question is very different when the Inquiry is, whether what passes is not an admission of a Right which, at the time, was clearly vested in the Mortgagor.

(*a*) *Whiting* v. *White*, Coop. 1. *Reeks* v. *Postlethwaite*, Ib. 162, and *Barron* v. *Martin*, Ib. 189.

1820.
6th July.

ANN MARIA GREGORY - - - - - Plaintiff,
and
CHARLES BESSELL, DANIEL SHORTMAN, and
THOMAS CRODEN - - - - - Defendants.

Bessell, on the advance of 300 l. by Gregory, gives her a Promissory Note for that Sum, and Interest, indorsed by Shortman and Croden, as a further security for the Money. The Note becomes due, is presented, and dishonoured, and Bessell being unable to discharge it, agrees to sell to Gregory Household Goods, &c. for 580 l. and to take back the Note, with the Interest due on it, in part of Payment. Possession is given to Gregory of the Household Goods, &c. and the Note is delivered up to Bessell, and destroyed. Afterwards a Commission of Bankruptcy is issued against Bessell, and there being an act of Bankruptcy previous to the sale of the Household Goods, &c. to Gregory, they are demanded by the Assignees, and delivered up to them. Gregory demands payment of the Note from the Drawer and Indorsees, and on refusal files a Bill against them; an Account was directed of what was due on the Note for Principal and Interest, with the Costs of the Suit, as against Shortman and Croden, and the Bill dismissed without Costs, as against Bessell, the Plaintiff undertaking to prove the Note under the Commission for the Benefit of Shortman and Croden.

BESSELL, a Victualler, being in want of a Loan of 300 *l.* for five months, obtained the same of the Plaintiff, and by way of Security *Bessell* drew and signed a Promissory Note in favour of *Shortman*, for 300 *l.* with Interest, dated 4th May 1816, and payable five months after date, which Note, as an additional security, was indorsed by the Defendants, *Shortman* and *Croden*, and given to the Plaintiff on the advance of the 300 *l.* to *Bessell.*

The Note was presented when it became due, but not paid; and *Bessell* being incapable to discharge it, he agreed with the Plaintiff, on the 25th October 1816, to sell to her all his Household Goods, Furniture, and Stock in Trade, for 580 *l.*; and it was agreed that the

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Note of the Defendant *Bessell*, so indorsed as before mentioned, together with the Interest due thereon, should be taken by him in part payment of the purchase-money. The Plaintiff was accordingly put into possession of the Household Goods, Furniture, and Stock in Trade, and she delivered up to *Bessell* the Promissory Note for 300*l.*

On the 4th of November 1816, a Commission issued against *Bessell*, under which he was declared a Bankrupt, and Assignees were chosen, who demanded of the Plaintiff the Household Goods, Furniture, and Stock in Trade so sold as aforesaid to the Plaintiff, an Act of Bankruptcy having been committed by *Bessell* before the same were sold and delivered to the Plaintiff; and the Plaintiff finding the Sale to her could not be supported, she delivered up Possesion of the Household Goods, &c. to the Assignees.

Under these circumstances the Plaintiff applied to the Defendants for payment of the Note, and on their refusal filed the present Bill, the Prayer of which was, that the Defendants, or some or one of them, might be decreed to re-deliver the said Note to the Plaintiff, in the state in which it was immediately before the Plaintiff delivered the same to the Defendant *Bessell*, in order that the Plaintiff might recover the monies thereby secured, by Action at Law, against the Defendants, *Shortman* and *Croden*, or one of them; and in case the said Note shall have been lost or destroyed, then that an account may be taken of the amount of the Principal and Interest due to the Plaintiff upon the said Note, and that the Defendants might be decreed to pay to the

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Plaintiff what should be found due upon the taking of such Account.

The Defendants, by their Answers, stated, that the Note when delivered back to *Bessell* was destroyed; that the Household Goods, &c. exceeded the value of the Note; and they submitted, that by the delivery of the Note to the Drawer of it, the Indorsers, who were mere sureties, were discharged.

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

Mr. *Grant,* and Mr. *Whitmarsh,* for the Defendants.

The *Vice-Chancellor* stated, that the Sureties could not be discharged by the fraud of the Principal, and that the case was the same as if the Principal had paid by forged Bank-notes, or false coin.

The Decree was as follows:—

"This Court doth order and decree, that it be referred to Sir *John Simeon,* Bart. one, &c. to take an account of what is due to the Plaintiff, for Principal and Interest on the Promissory Note, in the Pleadings mentioned, dated the 4th day of May 1816, and to tax the Plaintiff her costs of this suit. And, by consent of the Plaintiff, it is ordered that the Plaintiff do go in under the Commission of Bankruptcy awarded against the Defendant, *Charles Bessell,* and prove what the said *Master* shall find due to the Plaintiff for Principal and Interest in respect of the said Note, and for the said Costs, as a Debt against the Estate of the said *Charles Bessell.* And it is ordered, that the Defendants, *Daniel*

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Shortman and *Thomas Croden* do pay to the Plaintiff what shall remain due to her in respect of the said Principal, Interest, and Costs, after deducting therefrom what she shall receive from the Estate of the said Defendant, *Charles Bessell,* upon her proof of the said Defendant's Debt. And for the better taking the said Account [*usual directions*]. And this Court doth not think fit to give any Costs as between the Plaintiff, and the Defendant *Charles Bessell.* And any of the Parties are to be at liberty to apply to this Court as there shall be occasion."

CUTHBERT *v.* CREASY.

1821. 7th February.

On Demurrer the Court is bound by Plaintiff's Allegation of Fact, but not of Law.

THE Bill alleged that it was necessary for the Plaintiff, in order to assert his legal Title, to proceed by Writ of Intrusion. On Argument of a Demurrer, ruled that the Court could not assume this necessity.

That it was partly an Allegation of matter of Law, and did not bind the Court. That the Facts ought to be stated from which the necessity arose.

1821.
3 November.

COLLARD *v.* COOPER.

The Defendant having appeared, Motion for an Injunction in respect of Waste, without notice, *was refused.*

A MOTION was made for an Injunction in respect of Waste. The Defendant had appeared, but no Notice of the Motion was served upon him. Mr. *Newland* cited *Harrison* v. *Cockerell* (*a*), observing, that though not expressly decided, it was to be inferred from what is there said that Notice was not necessary.

The VICE-CHANCELLOR :—

If where the mischief is imminent, it might be permitted to move without Notice, though the Defendant has appeared, yet in this Case Notice could not be dispensed with, there being no apprehension of immediate Waste.

Motion refused.

1821.
7th December.

HOSTE *v.* BLACKMAN.

A, being entitled to Two Freehold Houses, and having a power of Appointment over certain Lands, and Money to be laid out in Lands, the same, in default of Appointment, to go over, by her Will devises "all and every her Freehold Messuages, Lands, Tenements, and Hereditaments," to Trustees, for Sale. Held, that the Two Freehold Houses were sufficient to satisfy the Words of the Will, and that the power of Appointment was not executed.

THE Testratrix in this Case, *Mary Towers Allen,* had power to dispose of certain Lands, and Money to be laid out in Land; and in default of execution of the Power the same to go over.

(*a*) 3 Meriv. 1.

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HOSTE *v.* BLACKMAN.

By her Will she devised "all and every her Freehold Messuages, Lands, Tenements, and Hereditaments" to Trustees, to sell, and the Produce to be considered as part of her personal Estate. She gave several Legacies, and bequeathed the Residue over.

At the time of her Will, and of her Death, she had Two Freehold Houses. The personal Estate, and the Produce of the Two Freehold Houses, were insufficient to pay the Legacies, and the Question was, whether the Power was well executed? Mr. *Horne* and Mr. *West* contended it was not; that the words of the Will were satisfied by the Two Freehold Houses that were the Property of the Testatrix. Mr. *Bell, contra,* contended it was well executed, and insisted that the words "Freehold Messuages, Lands, Tenements and Hereditaments," must have meant more than the Two Freehold Houses, which could not be called Lands; and strongly insisted that the words used must have been meant in Execution of her Power, and ought to be considered as an execution, and in consequence, that the deficiency in payment of the Legacies must be made good out of the Land, and Money to be laid out in Land over which she had a power.

The VICE-CHANCELLOR:—

The Two Freehold Houses will satisfy the terms "Messuages, Lands, Tenements, and Hereditaments;" and I cannot infer from her use of the Terms that she meant to execute the Power.

1821.
7th December.

P. S. having Two Daughters, named Selina and Mary Ann, A. bequeathed a Legacy to Sophia, Still, daughter of P. S. There was Evidence to show that Selina was the Person meant; but the other Daughter being an Infant, a reference was directed to the Master, to inquire who was the Legatee intended by the description in the Will.

STILL *v.* HOSTE and Others.

A TESTATRIX by her Will, amongst other Legacies, bequeathed the Sum of 100*l.* "unto *Sophia Still,* the Daughter of *Peter Still,* of *Russell Square.*" *Peter Still,* at the death of the Testatrix, had only two Daughters, one named *Selina Still,* and another named *Mary Ann Still.*

Selina Still filed a Bill for her Legacy, considering herself as meant by the Legacy to *Sophia Still.*

It was proved that *Peter Still* had only such two Daughters as before stated, and that *Selina Still* was the god-daughter of the Testatrix; and the Attorney who made the Will, and another, Person proved beyond doubt that *Selina Still* was the Daughter meant, and that the mistake was probably owing to the Person who copied the Will.

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

Mr. *Horne,* and Mr. *West,* for the Defendant.

The VICE-CHANCELLOR:—

There can be little doubt that *Selina Still* is entitled to the Legacy; but the other Daughter being an Infant, let it be referred to the *Master,* to inquire who was the Legatee intended by the description in the Will of the Testatrix.

Reg. Lib. B. 1821, fol. 403, 407.

RATCLIFFE *v.* GUNSON.

1821.
16th January.

WHERE a Creditor who has proved is fully paid by the Surety, he cannot afterwards sign the Certificate (*a*).

Query. If not at the request of the Surety?

SMITH *v.* WELLS.

1821.
7th June.

UPON a reference to Mr. *Croft*, the Registrar, the *Vice-Chancellor* noted, that where the Defendant sets down the Cause for Hearing, he is only bound to serve the Plaintiff, and that it is the duty of the Plaintiff to serve the Defendants (*b*).

(*a*) Nor can a Party who has proved a Debt, and afterwards assigned it, sign the Certificate without the authoty of the Assignee. Ex-parte *Taylor*, in re *Herbert*, 1 G. & J. 399.

(*b*) *Clarke* v. *Dunn*, 5 Mad. 474.

1821.
16th May.

Construction of an obscure Will.

Between EDMUND ROBINSON - - - Plaintiff,
and
ELIZABETH SMITH and Others - - Defendants.

GEORGE MOSTYN, late of *Ashtead*, in the County of *Surrey*, Esq., by his Will, dated the 29th day of August 1819, devised and bequeathed as follows:—"I give in Trust to my Executors, Miss *Elizabeth Smith*, now of *Ashtead*, and *Edmund Robinson*, Esquire, (the Plaintiff) as much Three per Cent Consols as shall bring in 500*l.* a-year, after paying every Legacy Duty, to be applied to the will and pleasure of *Daniel Ince*, Esq., that is, 500*l.* per annum; and if he has Children in Marriage, to apply the 500*l.* per annum to the use of the eldest-born, and in case of his or her death, to the second-born, and so on; and if he shall have no Children in Marriage, to apply the 500*l.* as hereafter directed. I give to Miss *Anne Smith*, as much as shall bring her in 200*l.* per annum, provided that she will sign the proper legal Instrument, that in case she marries, that she shall give my Legacy to my Residuary Legatee, or her share in the House and Grounds situated at *Ashtead*, to her Sister, Miss *Elizabeth Smith*; and I give as much Consols as will bring in 200*l.* per annum to Miss *Frances Diana Smith*, exactly on the same conditions as my Legacy to her Sister, Miss *Anne Smith*. I give to *Nathaniel Smith*, now in the *East Indies*, as much Consols as will purchase 200*l.* per annum after paying Legacy Duties. I give to *George Smith*, Midshipman, in His Majesty's Service, being my God-son, now also

in the *East Indies*, as much Consols as will purchase 200*l.* a-year. I give to *Felix Smith*, his Brother, now also in the *East Indies*, and to *Sarah Smith*, Sister to the above, each 200*l.* a year, after paying the Legacy Duty; and I give to *Hester Smith*, Sister to the above, any Prints or Books now in my possession she shall choose, 500*l.* year, or as much Three Per Cent Consols as shall produce, after paying the Legacy Duty; likewise the 500*l.* a-year which may accrue from Mr. *Ince*'s Legacy, in case he has no Children by Marriage, on his death; in case he should have, then as follows: and I give to my Executor, *Edmund Robinson*, Esq. 500*l.* I give all my remaining Property of any kind to Miss *Elizabeth Smith*, under the following restrictions, the Interest of as much Consols as will produce 200*l.* per annum, after the Legacy Duty is paid, to her free pleasure; of course she will give it, or *Ashtead*, to her Sisters, if she marries, and they marry not; and provided Mr. *Ince* should marry, and should have Children, she will give as much Consols as will produce 500*l.* per annum to her Niece, *Hester Smith*, and afterwards divide the remaining Property, and my Estates which I shall leave her by Codicil, among the Three Brothers and Two Sisters, share and share alike, unless any one shall be afflicted with Vice or Prodigality, in her own opinion, not in that of any one else, let him or her not have a Shilling of what she can leave him or her. I should have expressed more clearly my meaning, that neither *Nathaniel Smith*, *George Smith*, *Felix Smith*, *Hester Smith*, or *Sarah Smith*, shall be entitled to any Legacy till they shall attain the Age of Twenty-five; and I give my Executors authority for that purpose, and particularly over the Capital. *Hester Smith*'s Legacy, 500*l.* a-year to her first-born, 300*l.* a-year to her

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second-born, and 200*l.* a-year to her third-born. I absolutely annul every former Will."

The Testator made a Codicil to his Will, dated the 29th August 1819, which was as follows:—"I, *George Mostyn*, make this Codicil to my Will, not being able now to adjust it in the manner I had proposed to myself. I give to Mr. *William Dance*, Uncle to the *Miss Smiths*, 1,000*l.* I give unto the Treasurer for the time being, of the British and Foreign Bible Society, formed in London, in the year 1804, the Sum of 100*l.*, to be paid for the purposes of the Society, for which the Treasurer's Receipt shall be a sufficient Discharge, To Professor *Wyttenback*, of *Berne*, 200*l.* to be distributed in Bibles, in the Cantons of *Switzerland*, and 100*l.* for himself. To the Philanthrophic Society 200*l.*; and if Miss *E. Smith* shall think fit, from the state of their Funds and Debts, &c. to give from 300*l.* to 500*l.* to the Lancasterian mode of education, free for all sects, apply to Mr. *Allen*, Chemist, but not otherwise; all Duties on the above Legacies to be paid by Miss *E. Smith*, my Residuary Legatee; likewise the Legacy Duty on 500*l.* to my Executor Mr. *Robinson*, more especially as the Interest of all the Legacies not payable to *Nathaniel Smith, George Smith, Felix Smith, Hester Smith, Sarah Smith*, till they are respectively Twenty-five Years of Age, will merge into the general Residuary Property, and be disposed of as directed by the Will; dated September 4th 1819. *George Mostyn.*

The said Testator also made another Codicil to his Will, dated the 4th day of September 1819, and thereby gave and devised all his Lands, Tenements, and Here-

ditaments, both Freehold and Copyhold, situate at *Mickleham*, or elsewhere in the County of *Surrey*, unto the said *Elizabeth Smith*, by the description of *Elizabeth Smith*, of *Ashstead* aforesaid, Spinster, to hold the same unto the said *Elizabeth Smith*, her Heirs, Executors, Administrators, and Assigns, absolutely for ever.

By a Third Codicil to his Will, dated the same 4th day of September 1819, the Testator gave and bequeathed certain Legacies to his servants therein named.

The Testator died on the 14th October, 1819.

Doubts having arisen as to the construction of the Will, the Plaintiff, one of the Executors, filed the present Bill, to have the Right of the Parties ascertained.

On the Hearing of the Cause before the *Vice-Chancellor*, on the 12th May 1820, the usual Accounts were directed, and the *Master* was directed to inquire whether the Testator had any Interest in the House and Goods situate at *Ashtead*, in the Will mentioned; or whether they were not the absolute Estate of the Defendants, *Elizabeth Smith*, *Ann Smith*, and *Frances Diana Smith*, and the *Master* was directed to inquire what Freehold and Copyhold Lands the Testator was seised of at his death, and particularly in the County of *Surrey*.

The *Master*, by his Report, amongst other things, stated that the House and Goods situate at *Ashstead*, were the absolute Estate of *Elizabeth Smith*, *Ann Smith*, and *Frances Diana Smith*, and that the Testator had not any Interest in the same; and he further stated, that the

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Testator was at his death seised of an Estate in the Parish of *Mickleham* in *Surrey*, partly Freehold and partly Copyhold; the Freehold consisting of 8 A. 1 R. 7 P. and the Copyhold part consists of 26 A. and 26 P., but not of any other Estate.

The Cause now came on for further Directions.

The Point principally argued was upon the construction of the Residuary Gift to Miss *E. Smith*, and as to the 600*l.* to *Hester Smith*, and the division mentioned in the Residuary Clause of the Will among the Three Brothers and Two Sisters. The Question being, whether the Will created a Trust for them, or left a discretion in Miss *E. Smith*.

The VICE-CHANCELLOR :—

There is no doubt that the Residuary Legatee has an absolute Discretion to exclude any, and perhaps all of her Brothers and Sisters, from any share in this Property; but the words of this Will give to the Three Brothers and Two Sisters a vested Interest, until divested by exclusion. This Case differs nothing from an Interest vested in the Brothers and Sisters, subject to be defeated by a Power of Appointment in the Residuary Legatee. Unless the Power of Appointment in the one Case, or Power of Exclusion in the other, be exercised, the Brothers and Sisters will take; and the Fund must in the mean time be secured.

Sir JOHN BECKETT, Bart. - - - - Plaintiff,
and
THOMAS MICKLETHWAITE, JONATHAN LUPTON, and OBADIAH BROOK, - - Defendant.

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26th January.

Mortgage by Jas. W. to B. & D. to secure 2,500 l. and Interest, and as an additional Security a Mortgage by Jos. W., M. purchased the Premises mortgaged by Js. W., subject to the Mortgage. Bill of Foreclosure against M., and the Representatives of Jos. W. to Foreclose, the two Mortgages. It was decreed that in case M. should redeem the Plaintiff, and the premises mortgaged by Jas. W. should be conveyed to M., and those mortgaged by Jos. W. to the representatives of Jos. W. But in case the representatives of Jos. W. should redeem the Plaintiff the Premises comprised in each of the Mortgages should be conveyed to them, and in case of failure by M., or the representatives of Jos. W. to redeem, that to the parties should stand foreclosed as to all the mortgaged Premises.

BY Indentures of Lease and Release, dated the 9th and 10th March 1792, between *James Whitely* (deceased) and his Wife, of the one part, and *Robert Coghan*, of the other part, in consideration of 2,500 *l.* certain premises were mortgaged to *Coghan*, redeemable on paying the 2,500*l.* and Interest, at a time fixed.

The Mortgage was not paid off at the time agreed upon.

The Plaintiff and *Henry Duncombe* (since deceased) having in their hands, as Trustees, the sum of 2,500 *l.* to be placed out at Interest, agreed to pay off the Mortgage to *Coghan*, upon having a Conveyance to them by way of Mortgage of the Lands conveyed on Mortgage to *Coghan*, and as an additional security, a Conveyance by one *Joseph Whitely*, by way of Mortgage of an Estate to which he was entitled. Accordingly, on the 29th and 30th May 1793, the Plaintiff and *Duncombe* paid off *Coghan*, and a Conveyance was made by *James Whitely* to *Beckett* and *Duncombe*, of the Lands and Premises previously in Mortgage to *Coghan*, with a

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proviso for Redemption on payment by a fixed day of the Principal and Interest; and *Joseph Whitely* also, by Indentures of Lease and Release of the same date, conveyed his Estate, by way of Mortgage, in the same manner *James Whitely* had done, for securing the said sum of 2,500*l.* and Interest.

The 2,500*l.* and Interest was not paid by *James* or *Joseph Whitely* at the time fixed for the payment thereof.

James Whitely died, and devised his mortgaged Estate to his two Sons, *William* and *James Whitely*.

On the 21st February 1811, a Commission of Bankruptcy issued against *William* and *James Whitely*, and the Defendants, *Micklethwaite*, *Lupton*, and *Brook*, were chosen Assignees, and the Estate mortgaged by *James Whitely*, the Father, was sold, subject to the Mortgage. *Micklethwaite* becoming the Purchaser, the Equity of Redemption was conveyed to him.

In October 1814, the Plaintiff and *Duncombe* applied to *Micklethwaite* to pay off the Mortgage, and he proposed as an additional security to give, and did on the 15th October 1814, execute, to the Plaintiff and *Duncombe* a Bond, in the Penalty of 5,000*l.* for payment of the principal Sum and Interest due on the Mortgage. The Money secured by the Bond not being paid at the stipulated time, the Plaintiff and *Duncombe* brought an Action against *Micklethwaite*, and obtained a Judgment, and an Estate of *Micklethwaite* was sold, and the produce, 1,400*l.*, was applied in part payment of the Mortgage by *James Whitely*.

Micklethwaite not keeping down the Interest due on the Mortgage, the Plaintiff requested the Tenants of the Estate mortgaged by *James Whiteley*, the Father, to pay their Rents to him, and various sums were received from the Tenants.

Joseph Whiteley died on the 8th May 1815, and the Premises mortgaged as before mentioned by him became vested in the Defendants, *Lupton* and *Brooks*, as Devisees.

Duncombe died 10th April, 1818, whereby Plaintiff became the surviving Trustee under the Trust-Deed aforesaid.

The Bill, after stating the foregoing facts, prayed for an account of what remained due to the Plaintiff; and that *Micklethwaite, Lupton,* and *Booth,* or some or one of them, might pay what should appear to be due upon the Mortgages, and the Costs of the Proceedings at Law, by a time to be limited, or that the Defendants and all claiming under them, or either of them, might be foreclosed.

The Defendant, *Micklethwaite,* by his Answer admitted the facts stated in the Bill.

The Defendants, *Lupton* and *Brooke,* by their Answers, stated the Mortgage executed by *James Whiteley,* and submitted that the Defendant, *Micklethwaite,* ought therefore to pay off the Mortgage Debt and Interest, and the Costs incurred by this Suit, or otherwise, and procure for the Defendant *Lupton* and *Brooks,* a Re-conveyance of the Premises formerly belonging to *Joseph*

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Whiteley; and that the Plaintiff, upon being satisfied the said Mortgage Debt, Interest, and Costs, ought to execute such Conveyance; and in default of the other Defendant redeeming the said Mortgage, the Defendants submitted to redeem the same, and to pay what shall be found due to the Plaintiff; and thereupon to have a Re-conveyance extended to them by all proper Parties; and that they will be entitled to have a Re-conveyance, and also a Conveyance or Assignment of the mortgaged Premises formerly belonging to *James Whiteley*, freed from all Equity of Redemption in *Micklethwaite*, or any person claiming under him, and to have the benefit of the Judgment, and all other Securities which the Plaintiff hath for the payment of the mortgaged Debt and Interest, and to have the same assigned to them accordingly.

Mr. *Hart*, and Mr. *Barber*, for the Plaintiff.

Mr. *Bell* and Mr. *Meggison*, for the Defendants.

The VICE-CHANCELLOR:—

I had lately occasion to consider the proper form of Decree in a Case of this kind, and the Registrar will follow the precedent then settled.

The Decree was as follows:—

"This Court doth order and decree, that it be referred to Mr. *Stephen*, one, &c. to take an account of what remains due to the Plaintiffs for Principal and Interest in respect of his Mortgage of 2,500*l.* in the Pleadings mentioned, secured by the several Indentures therein set forth, bearing date respectively the 29th and 30th days of May 1793, and the same 29th and 30th

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days of May, and the Bond from the Defendant *Thomas Micklethwaite*, in the Pleadings mentioned, bearing date the 16th October 1814, and to tax the Costs of the Plaintiff in this Court and at Law. And it is Ordered, that the said *Master* do take an Account of the Rents and Profits of the mortgaged Premises comprised in the Indenture first stated in the Plaintiff's Bill, dated the 30th day of May 1793, received by the Plaintiff and the said *H. Duncombe*, deceased, 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, or which without their or either of their wilful default might have been received thereout. And it is Ordered, that what on taking the said Accounts shall appear to have been received for the Rents and Profits of the said mortgaged Premises be deducted from what the said *Master* shall find due to the Plaintiff for Principal, Interest, and Costs as aforesaid; and upon the Defendant, *Thomas Micklethwaite*, or the Defendants, *Jonathan Lupton* and *Obadiah Brook*, paying unto the Plaintiff what shall be remaining due to him for Principal, Interest, and Costs as aforesaid, within six calendar months after the said *Master* shall have made his Report, at such time and place as the said *Master* shall appoint, it is Ordered, that the Plaintiff do convey the mortgaged Premises in the manner following, viz.— In case the said Defendant, *Thomas Micklethwaite*, shall redeem the Plaintiff as aforesaid, that the Plaintiff do convey the mortgaged Premises comprised in the Indenture first stated in the Plaintiff's Bill, bearing date the 30th day of May 1793, free and clear of and from all Incumbrances done by him, or any claiming by from or under him, and deliver up all Deeds and Writings in his custody or power relating to the said mortgaged

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Premises, upon oath, to the Defendant *Thomas Micklethwaite*, or as he shall appoint. And it is Ordered, that the Defendant do also convey the mortgaged Premises comprised in the Indenture secondly stated in the Plaintiff's Bill, bearing date the same 30th day of May 1793, free and clear, &c. and deliver up all Deeds and Writings in his custody or power relating thereto upon Oath to the said Defendants, *Jonathan Lupton* and *Obadiah Brook*, or as they shall appoint. But in case the said Defendants, *Jonathan Lupton* and *Obadiah Brook*, shall redeem the Plaintiff as aforesaid, then it is ordered, that the Plaintiff do convey the mortgaged Premises comprised in each of the said several Indentures of the 30th day of May 1793, free and clear, &c. and deliver up all Deeds and Writings in his custody or power relating thereto, to the Defendants, *Jonathan Lupton* and *Obadiah Brook*, or as they shall appoint. But in default of the Defendant *Thomas Micklethwaite*, or the Defendants *Jonathan Lupton* and *Obadiah Brook*, paying unto the Plaintiff what shall be remaining due to him for Principal, Interest, and Costs as aforesaid, by the time aforesaid, the said Defendants are from thenceforth to stand absolutely debarred and foreclosed of and from all Right, Title, Interest, and Equity of Redemption, of in and to all the aforesaid mortgaged Premises; and for better taking the said accounts all parties, &c. [usual directions] and any of the Parties are to be at liberty to apply to this Court as there shall be occasion."

Reg. Lib. A. 1820. fol. 871.

ENGLISH *v.* HENDRICK and others.

1821.
1 June.

Service of Subpœna on persons who in one instance had acted as Agents of the Defendant, who resided in Ireland, ordered.

AN Injunction was obtained by the Plaintiff on the filing of the Bill and Affidavit, restraining the Defendant and her Agents until answer from receiving or getting in any of the Debt or Effects of her Brother, *Charles Lucas Kendrick* deceased, and a copy was served on the Solicitors of the Commissioners of the Victualling Board, together with a Notice not to pay any Monies due to the Deceased; and a copy of the Injunction was also served upon Messrs. *Slade and Co.* who however, refused to receive a Subpœna.

A Motion was now made that Service of the Subpœna on Messrs. *Slade and Co.* might be deemed good service on the Defendant *Catherine L. Hendrick*, who resided in *Ireland*, upon an Affidavit, which stated that *Slade and Co.* as Proctors of Mrs. *Hendrick*, had obtained Letters of Administration for her to her Brother's Estate; and that they had applied to the Clerks of the *Victualling Office*, on behalf of Mrs. *Hendrick*, for a Victualling Bill for 181*l.* 15*s.* 3*d.* mentioned in the Plaintiff's Bill, and that the Plaintiff had applied to them to receive the Subpœna, who had refused to receive the same.

Mr. *Newland*, in support of the Motion, observed that acting as Proctors for Mrs. *Hendrick* in obtaining the Letters of Administration, and also as Agents, in the Application to the Victualling Office, the Motion was proper; and he cited *Hales* v. *Sutton* (*a*), and *Smith*

(*a*) 1 Dick. 26.

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v. *Hibernian Mine Company*, (*b*). He observed he had searched for *Hales* v. *Sutton* in the Register Book, but could not find it.

The VICE-CHANCELLOR:

As Messrs. *Slade and Co.* have not merely acted as Proctors in obtaining Administration for the Defendants, but also as Agents in the Application made to the Victualling Board, you are entitled to your Order.

Motion granted.

1821.
16th November.

The Warrant of Committal of a Bankrupt being by mistake dated the 2d March instead of the 2d February, held that this is not such an error as can be amended under the 18th section of G. 2, c. 30.

Ex parte M'GEE *in re* M'GEE.

THE Bankrupt was brought up in pursuance of a Writ of Habeas Corpus.

The Warrant of Commitment stated that the Bankrupt had attended on the last Examination, which was afterwards adjourned to the 2d of February 1813. That on that day, having given unsatisfactory Answers to the Questions which had been put to him, both which were set out in the Warrant in the usual manner, the Commissioners had committed him. The Warrant of Commitment was by mistake dated the 2d of March instead of the 2d of February.

Mr. *Eden*, for the Bankrupt, contended that this case did not come within the 18th section of the 5 Geo. 2, c. 30 by which, if it merely appear to be an insufficiency

(*b*) Sch. & Lefr. 238.

1821.

M'GEE *in re* M'GEE.

in the *form* of the Warrant, the Judge is empowered to re-commit. That in the present Case there was no criterion by which the Judge could amend the inconsistency apparent on the face of the Warrant; that it was a defect in substance, and not in form; or if a defect in form, it was a defect of such a nature as the Court had no power to remedy. His Honor declaring himself to be of that opinion, the Bankrupt was discharged.

SYMONS *v.* SYMONS and POWELL.

1821.
2d May.

Under a parol demise from year to year, by a Tenant for Life, with power to Lease by Deed, &c., and under written Agreements for Leases not exceeding 3 Years, signed by the Lessees, but not by the Tenant for Life, though witnessed by his Agent, the Interest of the Lessees determines with the life of the Lessor, and the rents are apportionable.

By Indenture of Lease and Release, dated the 25th and 26th days of November 1814, certain Estates were settled to *Thomas Symons* for Life, with Remainder to the use of the Plaintiff for Life, with Remainder to the First and other Sons of the Plaintiff, with Remainders over; with a Proviso that it should be lawful for the said *Thomas Symons*, during his Life, and after his decease, to and for Plaintiff and the other Persons therein mentioned, when by virtue of the Limitations therein contained they respectively should be in the actual Possession of or entitled to the Rents, Issues, and Profits of the said Manors and other Hereditaments thereinbefore granted, released and confirmed, and thereby limited to Uses in strict Settlement, by any Deed or Deeds, Writing or Writings, to be sealed and delivered by them the said *Thomas Symons* and Plaintiff, and the other Persons therein mentioned, in the presence of and to be attested by two or more credible Witnesses; and either referring or not referring to the said Power, to limit or appoint by way of Lease or Demise, all or any

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part or parts of the said Manors and other Hereditaments thereinbefore granted, released, and confirmed, and thereby limited to Uses in strict Settlement to any Person or Persons for any term or number of years absolute, not exceeding twenty-one years, to take effect in Possession, and not in Reversion, or by way of future interest, so that there should be reserved in every such Limitation or Appointment, by way of Demise or Lease, payable during the continuance of the Use or Estate thereby created, the best or most improved yearly Rent or Rents to be incident to the immediate Reversion of the Hereditaments so to be limited by way of Demise or Lease, that could or might be reasonably had or gotten for the same, without taking any Fine, Premium, or Foregift, for the making thereof; and so that there should be therein respectively contained a clause in the nature of a condition of Re-entry for the non-payment of the Rent or Rents to be thereby reserved, by the space of twenty-one Days after the time to be thereby appointed for the payment thereof; and so that the Person or Persons named therein as Lessee or Lessees did execute a Counterpart or Counterparts thereof respectively, and did thereby covenant for the due payment of the Rent or Rents thereby to be respectively reserved; and should not, by any Clause or words, therein to be respectively contained, be made dispunishable for Waste, or exempted from punishment for committing Waste.

Thomas Symons, the Father of the Plaintiff, enjoyed the Estates during his Life. He died on the 6th day of November, 1818, having by his Will bequeathed all his Personal Estate to the Defendant *Powell*, upon certain Trusts, and thereby appointed the Defendants, *Symons*

and *Powell*, his Executors. At the Death of *Thomas Symons* the Estates were in the Occupation of Tenants from year to year, under Agreements in Writing signed by the Tenants, and witnessed by the Agent of *Thomas Symons*, but not signed by *Thomas Symons* himself. These Agreements were differently expressed: also under Agreements by Parol, or under written Agreements with *Thomas Symons*, signed by the Tenants, but not by *Symons*, for Terms of Years, none of them exceeding Three Years from the commencement. The greater part of the Tenancies commenced on *Candlemas-day*; and the Rents were reserved half-yearly, upon *Lammas* and *Candlemas-day*. Some of the Tenancies commenced at *Christmas*, and others at *Midsummer*; and the Rents of the latter Tenancies were reserved half-yearly upon *Midsummer* and *Christmas-day*.

Certain Tithes also, included in the Settlement, were let by *Thomas Symons*, the Father, to certain Persons, from year to year, at yearly Rents or Compositions, under parol or written Agreements signed by the Tenants only; and such Tenancies commenced at *Michaelmas* in such year, and the Rents or Compositions were reserved payable yearly at *Michaelmas*.

All the Lettings were at the best Rents, and no Fine was in any instance received.

The Plaintiff by his Bill insisted that the several Lettings were in Equity a good Execution of the power to lease or demise; and that the Rents are incident to the Reversion; and that the Plaintiff, as Tenant for Life in Possession, was entitled to receive the Rents without apportionment from the last day on which the same

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became due, in the Life-time of *Thomas Symons* the Father, to the first day of payment occurring next after his death; and the Bill prayed a Declaration accordingly; and that the Defendants might be decreed to permit the Plaintiff to use the Defendants names, if necessary, to enable him to recover and receive such Rent, upon their being indemnified against such Proceedings. The Defendants, by their Answer, submitted that the several Agreements entered into with the Tenants were not a good execution of the power; that the Rents were not incidental to the Reversion; and that they were entitled, as Executors and Trustees of *Thomas Symons*, to a proportion of the Rent for the period from the last day on which the same became due and payable during the Life of *Thomas Symons*, to the day of his death.

Mr. *Bell*, and Mr. *Wilbraham*, for the Plaintiffs:— The Question is, whether these parol and written Agreements for Leases, some of them from year to year, and others for three years, could in Equity be considered as enforceable against the Remainder-man under the power given to the Tenant for Life to lease and demise? If they were, the Plaintiff is entitled to the Relief prayed by his Bill.

In an Opinion given by Lord *Kenyon*, when at the Bar, (in which Lord *Ashburton*, then at the Bar, and Mr. *Maddocks*, concurred), he was of opinion, that under a power like that in the present case, Leases by parol constituted the Tenants purchasers for a valuable consideration; and that a Court of Equity would effectuate the Leases against the Remainder-man, and consequently, that on the death of the Tenant for Life, the Remainder-man was entitled

to all the Rent from the Rent-day next preceding the death of the Tenant for Life (*a*).

In *Clarkson* v. Ld. *Scarborough* (*b*), when there had been Leases by parol and by agreement in writing that opinion is attended to; and certainly the Decision in that Case is in opposition to it, but the reasons on which it was founded are not given. The principle on which Lord *Kenyon* rested was, that this Court would enforce against a Remainder-man, a letting from year to year, as being a bargain for a valuable consideration by a Party having a power to make it effectual by a due execution of his power. After the Case of *Clarkson* v. Lord *Scarborough* and the subsequent Case of *Ex parte Smyth* (*c*) the case of a parol Agreement, it is in vain to contend that the parol Leases in this case would be effectuated; but it is different as to the written Agreements for Leases from year to year, and for three years. In *Clarkson* v. Lord *Scarborough* it was certainly held that the written Agreements for Leases were invalid as against the Remainder-man, but the reason of the Decision is not given.

In *Shannon* v. *Bradstreet* (*d*) an Agreement to grant a Lease by the Tenant for Life, with a power to lease, was held binding on the Remainder-man. If in this Court such written Agreements for Leases were good as against the Remainder-man, they might by Bill have been enforced, and as a consequence the Remainder-man is entitled to the Rent as if the Lease had actually been

(*a*) This opinion is printed in a note to ex parte *Smyth*. 1 Sw. 351.

(*b*) 1 Sw. 354.

(*c*) 1 Sw. 337.

(*d*) 1 Sch. & Lef. 52.

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made according to the Power, more especially as the Lessees have been in possession, and the Remainder-man has confirmed the Leases.

The written Agreements for Leases were signed by the Tenant, though not by the Tenant for Life; but they were witnessed by his Agent, (the Agency can be proved), and that witnessing by the Agent must be considered as tantamount to a signing by the Tenant for Life. In *Wilford* v. *Beazely* (*e*), a signing as a Witness was held binding on the Vendor; and in *Coles* v. *Trecothick* (*f*), Lord *Eldon* seemed strongly impressed that the signature of an Agent as Witness to a Contract would bind his Principal. In this Case there could be no reason for the Agent signing as a witness, unless for the purpose of giving effect to the Agreements.

Mr. *Wetherell*, and Mr. *Sugden*, contra:—

It is admitted that the parol Leases cannot be sustained; nor can the written Agreements for Leases. The Tenant for Life did not sign those Agreements. It is said his Agent signed as Witness; but it may be doubted whether that Signature is sufficient. It was not decided in *Coles* v. *Trecothick*. Abstractedly it is not sufficient; and it is not proved that the Witness was an Agent, and that he was authorized to sign the Agreements. In *Blore* v. *Sutton* (*g*) it was held that a Memorandum in Writing, entered in the Book of an authorized Agent, signed, not by the Agent himself, but by his Clerk, although in Evidence to have been approved by

(*e*) 1 Ves. 7. S. C. 3 Atk. 503.

(*f*) 9 Ves. 234.

(*g*) 3 Meriv. 237.

him, and according to the usual course of business, was not a sufficient Agreement in writing.

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Mr. *Bell.*—It can be proved that the Witness signed as an authorized Agent. He was the Solicitor of the Tenant for Life, and signed all his Papers for him.

Counsel for Defendant continued.—

Assuming this Witness was the Agent for the Tenant for Life, and authorized to sign the Agreements, there are still insurmountable objections to the Plaintiff's Claim. The Leases were not binding on the Remainder-man. The Cases of *Clarkson* v. *Lord Scarborough*, and *Ex parte Smyth*, are in point. These Leases are not according to the power; there is no Clause of Re-entry. The Remainder-man had no power to re-enter. In a late Case in the House of Lords (*h*), Lord *Eldon* and Lord *Redesdale*, alluding to *Shannon* v. *Bradstreet*, observed, that if a man has a power to grant for ten Years, and he grants for twenty-one, the Lease, although bad for the twenty-one, will be good for the ten; because there, both Parties have before them a written Instrument which gives the Power; but that it was difficult to deal with a Case where the Contract itself does not furnish the means to determine what Lease is either to bind theLessor, or those to come after him, as personal Representatives, or as real Representatives.

Mr. *Bell*, in reply:—

The Cases on Apportionment of Rent are collected by Mr. *Swanston* (*i*). Since no binding Leases could

(*h*) Case of the Queensbury Leases, 1 Bligh, 437.

(*i*) Ex parte *Smyth*, 1 Sw. 337, *n*.

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SYMONS v. SYMONS and POWELL.

be made except under the Power, it must be presumed that it was the intention that the Leases should contain the Covenants required by the Power; and also presumed that the witnessing of the Agent was intended to give effect, as Agent to the Agreement.

THE VICE-CHANCELLOR :—

The Authorities cited appear to me to establish that none of the Agreements in question can be considered as equitable executions of the power of the Tenant for Life, even if the written Agreements are to be taken to be his Act, which I do not decide. The Bill must be dismissed, but without Costs.

Reg. Lib. B. 1820, fol. 1184.

1821. 14 December.

BADDELEY v. HARDING and Others.

The mere circumstance of the Plaintiff being imprisoned does not entitle the Defendant to call for a security for Costs.

THE Plaintiff filed his Bill against the Defendants as personal Representatives of *Thomas Timmis*, deceased, claiming a sum of 200*l.* as due to him under the Testator's Will, and also a Share of 500*l.* covenanted to be paid by the Testator.

The Cause was heard upon Bill and Answer, and the usual Decree was made for an Account, and proceedings were had in the *Master*'s Office.

The Defendants now applied that the Plaintiff might give Security for Costs, not merely to the Amount of 40*l.*, but for such Amount as the *Master* should ap-

1821.

BADDELEY
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and Another.

prove, and that all proceedings should be stayed in the mean time, upon an Affidavit that the Plaintiff had been sentenced to be transported for seven years, under the 52 Geo. 3, c. 130, s. 2, for Poaching; and that the Testator had not left Assets sufficient for the payment of his Debts.

It was admitted that the Plaintiff had not sailed to the Place to which he was to be transported, but that at present he was in a penitentiary place of confinement.

Mr. *Agar*, and Mr. *Lowndes*, contended this was a Case where security for Costs, such as the *Master* should approve, ought to be given, before any further proceedings were had. They cited *Harvey* v. *Jacob* (*a*), as an analogous Case at Law, where security was directed for all Costs retrospectively and prospectively, the Plaintiff in the Action having after issue joined been convicted of felony, and received sentence of transportation; he cited also *Seilaz* v. *Hanson* (*b*).

The VICE-CHANCELLOR:—

If this Court is to follow the Rule at Law, the Case cited has no application to the present, because this Plaintiff is not on his way to transportation, nor has he incurred any forfeiture of his Goods, being under sentence for a misdemeanor only, and not for a felony (*c*).

Reg. Lib. A. 1820, fol. 136.

(*a*) Barne & Ald. 159.

(*b*) 5 Ves. 261.

(*c*) See, in addition to the Cases cited, Anon. 2 Taunt. b. 1, where the Court observed, "The accident of a Person being in prison does not take away his right to sue, were it for 10,000 *l.*"

1821.
2 June.

POWELL *v.* MOUCHETT: and LICHFIELD, *v.* MOUCHETT.

Equity cannot correct Wills upon the head of Mistake, but follows the Rule of Law, that a Devisor is to be taken to mean what he has expressed; but the Court may direct an issue, to inquire whether a particular expression found in the Will forms part thereof.

IN this Case a Devisor, after a Will made, dated the 3d September 1807, executed a second testamentary Instrument, dated the 18th May 1813, for a partial purpose, but with an express Clause of Revocation. It was alleged that he was incompetent at the time of the second Instrument, or if not incompetent, that the Clause of Revocation was introduced without any such intention on his part.

The Question was, How the Issue or Issues should be framed to try both these points?

The *Vice-Chancellor* observed, that in the Case of a Deed drawn by the mistake of an Attorney against the Intention of the Parties there was contract and consideration, but that a Devisee was a volunteer for whom a Court of Equity would not interfere.

That at Law, Evidence was not admissible that the Devisor did not mean that which he had expressed, and the Rule must be the same in Equity. But Evidence was admissible, to show that a particular expression was not his Will, as in the obvious case of interpolation after the execution of the Instrument.

That it appeared to him there must be two Issues.

1st. *Devisavit vel non,* as to the whole of the second Instrument.

2d. *Devisavit vel non,* as to the Clause of Revocation.

It appears from the Registrar's Book that an Issue was tried in the above Causes before the Lord Chief Justice of the Court of Common Pleas, when on the first Count of the said Issue the Jury found that the Testator *William Lichfield* did not devise in manner and form set forth in the paper writing of the 18th May 1813. On the second Count, that the said Testator at the time of the making and signing of the said paper writing was not of sound mind. On the third Count, that the said paper writing was executed according to the directions contained in the Statute of Frauds. And on the fourth Count, that the whole and every part of the said paper writing was not the true Last Will and Testament of the said *William Lichfield*; and, at the same time, delivered in a paper writing in the following words, "The former Will good; and the last Will can only be considered as a Codicil, thereby leaving out the Revocation Clause." It being thought that the above findings were inconsistent, and that the true question to be tried was not sufficiently put in issue, the Causes came on for Re-hearing on the 2d June 1820, when it was ordered that the Parties should proceed to a Trial at Law upon the following issues:—First, whether *William Lichfield* did, in and by a certain paper writing, bearing date the 18th May 1813, devise in manner following, that is to say, "I give, devise and bequeath, unto *Abraham John Mouchett,* his Heirs, Executors and Administrators, so much of my real and personal Estate as will be sufficient to raise and pay to my Brother *John Lichfield,* the Sum of 100*l.* a-year, and which Sum I direct the said *A. B. Mouchett* to pay to him by quar-

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POWELL *v.* MOUCHETT: and LICHFIELD *v.* MOUCHETT.

terly payments, &c.; and I give and bequeath to the said *A. B. Mouchett* 200 *l.* for his trouble in the execution of my Will, and I constitute and appoint him my Executor." Secondly, Whether the words following, that is to say, "And I hereby revoke and make void all other Wills," which are contained in the said paper writing, the 18th May 1813, are part of the last Will and Testament of the said *William Lichfield*; and in case upon the Trial any special circumstances should arise, the same were to be indorsed upon the *postea*.

Reg. Lib. B. 1820, fol. 1553.

MOORE *v.* HUDSON.

1821.
17 July.

Writs of ne exeat regno, *granted against Husband and Wife Executrix, the Plaintiff undertaking not to serve more than one of the Writs.*

THE Bill was filed by the Plaintiff for the payment of a Sum of Money due to him from the Estate of *George Simpson*, deceased.

By an order of the 16th July 1821, it was ordered that *Michael Egan* and *Theodosia* his Wife, (two of the Defendants) should, within a fortnight, transfer into the name of the Accountant-general, in trust in the Cause, a sum of 1,167 *l.* 17 *s.* 6 *d.* Three per cent Consolidated Bank Annuities, the Property of the Testator *George Simpson*, then standing in the names of *J. B. Hudson*, deceased, and *Theodosia Egan*, the Executrix, and formerly the Wife of the Testator. An application was now made for Writs of *ne exeat regno* against the Defendants, *Michael Egan* and *Theodosia* his Wife, which was sup-

ported by an Affidavit of the Plaintiff's Attorney, stating that a Reference having been made to the *Master* to take an account of what was due to the Plaintiff from the Estate of the Testator, the Plaintiff had taken in his charge, and that the *Master* had allowed the same to the amount of 600 *l.* but had not yet made his Report. That upon inquiry at the Bank, the Deponent found that the said Sum of 1,167 *l.* 17 *s.* 6 *d.* had been sold out; but this was not known to the Deponent before the 16th July, (the day before this Application) and the Plaintiff was residing at *Reading* in the County of *Berkshire.* That *Michael Egan* and *Theodosia* his Wife had quitted their residence at *Bath,* and the Deponent believed that the former was about to leave this Kingdom, if he had not already left it; and that his Wife, after making some necessary arrangements, was about, in a few days, to join her Husband: That the Deponent verily believed that the said Sum of 600 *l.* allowed by the *Master* was justly due to the Plaintiff; and that it was the intention of the Defendants in going abroad to defraud the Plaintiff of what was due to him.

Mr. *Bell* opposed the Application, objecting, that no Writ of *ne exeat regno* was prayed for by the Bill. A Writ may be obtained against a Wife who is Executrix or Administratrix, where her Husband is out of the Kingdom; but here it is not clear that he is abroad, or if abroad, that he is not there for temporary purposes only.

Mr. *Moore, contrà*:—

It is not necessary, though usual, that the Bill should pray for the Writ. In *Collinson* v. ——— (*a*) Lord *Eldon*

(*a*) 18 Ves. 353.

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MOORE
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says, "When this Prerogative Writ came to be applied as a civil Process it would have been an extraordinary exercise of Jurisdiction to refuse it, merely as not prayed in a stage of the proceedings when there was no pretence for praying it. If when the Bill was filed the Defendant did not intend to leave the Kingdom, it would have been highly improper to pray the Writ. A groundless suggestion that the Defendant means to abscond would press too harshly; and would also operate to create the very mischief, which the Court, permitting the Motion without notice, means to prevent. The omission to pray the Writ therefore forms no objection.

The *Vice-Chancellor* said he would grant the Writ, although he had some doubts upon it.

The Order directed Writs of *ne exeat regno* against *Michael Egan* and *Theodosia* his Wife to be marked in Security for the Sum of 600 *l.* the Plaintiff undertaking not to issue more than one of the Writs.

Reg. Lib. B. 1820, fol. 1295.

BRAIN *v.* BRAIN.

1821.
28 June,
11 August,
8 November,
17 December.

JOB BRAIN being, among other Hereditaments, seised in Fee Simple of an Estate called *Perrys*, and *Baths*, made his Will, duly executed so as to pass real Estates, dated the 10th *January* 1814, and thereby gave and devised unto his Son *Samuel Brain* and his Heirs, the Messuage or Dwelling-house, with the Garden, and six several closes or pieces of Land thereunto adjoining, commonly called or known by the name of *Perrys* and *Baths*, with the Appurtenances, to hold the same unto his Son *Samuel Brain*, and his Assigns, for Life, with Remainder to the use of the Child, if only one, and if more than one, then of all the Children of his Son *Samuel Brain*, equally between them if more than one, as Tenants in common, and the Heirs and Assigns of the same Child or Children respectively, with benefit of Survivorship; and if all the Children of the said *Samuel Brain* should depart this life under the age of twenty-one years, without leaving Issue, then as to one undivided moiety, to the use (disposing of the Fee) of the several persons in the said Will mentioned; and as to

A Testator seised in Fee of an Estate disposes of it by Will. After making his Will, having occasion to borrow a sum of Money, he conveys the Estate by way of security for the Money to Trustees in Fee; and there is a proviso in the Deed of Conveyance, that if the Mortgage Money was paid at the time fixed, the Trustees were to reconvey the Estate to him, his Heirs and Assigns, or to such persons or persons, and for such Estate and Estates, and to and for such lawful trusts intents and purposes, as the Testator, his Heirs and Assigns, should by any Deed or Instrument in writing direct limit or appoint; *held, that the direction of the additional words, to convey to such person or persons, &c. gave no new power of Conveyance to the Testator beyond what he would have acquired without them, as the necessary consequence of the conversion of his legal into an equitable Fee, and consequently, that the Conveyance being as a mere security for Money, operated only as a Revocation of the Will,* pro tanto.

1821.

BRAIN v. BRAIN.

the other moiety thereof, to the use of his Daughter, *Hannah Brain*, and her Assigns for life, with Remainder (disposing of the Fee) to the use of the several persons in the said Will mentioned.

And the said Testator, after reciting in his said Will that he had, on or about the 31st day of *August* then last, contracted for the Purchase of two several pieces or parcels of Land called *Bull Halls*, directed, that upon the completion of such Purchase, the Estate whereof such Purchase should be completed should become part of his Residuary Estate in the said Will mentioned; and as to all the rest, residue, and remainder of his Real Estates not thereinbefore given and devised, and all such parts of his Real Estates as were therein directed to become part of his Residuary Estate, the Testator devised the same unto his Sons *Samuel Brain* and *Richard Brain*, as Tenants in common, and their Heirs, subject to the payment of his Debts.

After the date of his Will the Testator completed the Purchase of the pieces of Land called *Bull Halls*, except that he left a small part of the Purchase-money thereof unpaid, and which remained due to the Vendors at the time of filing the Bill, and thereupon by Indentures of Lease and Release of the 23d and 24th of *June* 1814, the pieces of Land called *Bull Halls* were conveyed and assured to the use of such person and persons, and subject to such power of Revocation and new Appointment, and other powers, as the said Testator, *Job Brain*, by any Deed or Deeds, Instrument or Instruments in writing, to be sealed and delivered by him in the presence of and to be attested by two or more credible Witnesses, should direct, limit or appoint; with

Remainder to the use of the said Testator for his Life; with Remainder to the use of *Richard Hall*, his Heirs and Assigns, during the Life of the said Testator, upon trust, for the said Testator and his Assigns; with Remainder, in default of such Appointment, to the use of the said *Job Brain*, his Heirs and Assigns for ever.

After the date of the said Will, and the said last-mentioned Conveyance, the Testator had occasion to borrow the Sum of 800 *l.*; and *Elizabeth Prout* agreed to advance and lend him that Sum, upon having the repayment thereof with Interest, secured upon the said Messuage, Lands and Hereditaments, called *Perrys* and *Baths*, and *Bull Halls*, which the said Testator agreed should be done in the manner hereinafter mentioned; and in pursuance of that Agreement, by Indentures of Lease and Re-lease, dated the 16th and 17th of *October* 1814, it was by the said Re-lease witnessed, that in pursuance of the said Agreement, and in consideration of the Sum of 800 *l.* paid by the said *Elizabeth Prout*, the said Testator absolutely and irrevocably directed, limited and appointed, that all and singular the said Hereditaments and Premises called *Perrys* and *Baths*, and the pieces of Land called *Bull Halls*, should be and enure to the uses hereafter mentioned; and for better conveying and assuring the said Hereditaments and Premises unto and to the use of *Moses Davis* and *George Wittington*, (parties thereto,) and their Heirs, the Testator, by the direction of *Elizabeth Prout*, granted, re-leased and confirmed unto and to the use of the said *Moses Davis*, and *George Whittington*, and their Heirs, the said Hereditaments and Premises called *Perrys* and *Baths*, and the said Pieces of Land called *Bull Halls*, upon trust, that they and the Survivor of them, and the Heirs and Assigns of such

1821.

Brain. v. Brian.

Survivor, should permit the said Testator, his Heirs and Assigns, to occupy and enjoy the said Hereditaments and Premises until the 17th of *April* then next, the time appointed for the payment of the said Sum of 800*l.* and Interest; and from the payment of the same, then upon trust, upon the request of the said Testator, his Heirs or Assigns, to convey and assure the said Hereditaments and Premises unto and to the use of the said Testator, his Heirs or Assigns, or unto and to the use of such other person or persons, and for such Estate and Estates, and to and for such lawful trusts, intents and purposes, as the said Testator, his Heirs or Assigns, by any Deed or Deeds, Instrument or Instruments in writing under his or their hand, or respective hands, should direct, limit or appoint, and that clear of and from all intermediate charges and encumbrances whatsoever. And the said Testator covenanted that he would pay the said *Elizabeth Prout* the said Sum of 800*l.* with Interest, on the said 17th of *April* then next; and in case the said Sum of 800*l.* or any part thereof, or the Interest thereof, should be in arrear on the said 17th *April*, and should not be paid within forty days then next following, the said Trustees should, as soon as conveniently might be after the expiration of the said forty days, or any time thereafter, sell and dispose of and convey the said Hereditaments and Premises, or such Parts thereof as they should deem expedient, without the concurrence of, or any further power or authority from the said Testator or his Heirs, either absolutely, or by way of Mortgage in Fee Simple, or otherwise, either together or in parcels, and by public Sale, or private Contract, at their discretion, and for such price as to them should appear reasonable; and that the Trustees should, out of the Money to be received by any such

Sale or Mortgage, after payment of the Expenses thereof, retain and pay unto the said *Elizabeth Prout* the Sum of 800*l*. or so much thereof as should then remain unpaid, and Interest; and then in trust, that the said Trustees should pay the Residue (if any) of the Money to arise by such Sale or Mortgage, and convey and assure such part or parts of the said Hereditaments and Premises as should then remain undisposed of, unto the said Testator, his Heirs or Assigns, or otherwise, as he or they should direct or appoint, free from encumbrances; and in the mean time, and until such Conveyance and Assurance should be made, should stand seised and possessed thereof, in trust, for the said Testator, his Heirs and Assigns. The Deed contained a declaration that the Receipts of the Trustees should be sufficient discharges to the Purchasers; and a Covenant, that if required by any Purchaser or Mortgagee of the said Hereditaments and Premises, the Testator would join in a Conveyance thereof.

The Testator died on the 8th *April* 1815, without having revoked his said Will, (except so far as the same might be revoked by the said Mortgage Conveyance,) and without having paid off the said Mortgage Money, and the same, at the time of filing the Bill, remained charged on the said Hereditaments and Premises called *Perrys* and *Baths*, and *Bull Halls*.

Mr. *Bell*, and Mr. *Koe*, for the Heir at Law of the Testator, insisted that the Testator's Will was revoked as to the Estates called *Perrys* and *Baths*, and *Bull Halls*.

There can be no difficulty as to the Estate called *Bull Halls*. The Conveyance of the 23d and 24th *June* 1814,

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to such uses as the Testator should appoint, and in default of Appointment to uses to bar dower, operated as a Revocation as to that Estate; it must follow the Case of *Ward* v. *Moore* (a) determined by your Honor (b).

Then as to the Estate, *Perrys* and *Baths*, we contend that the direction, that the Trustees under the Mortgage Conveyance should, upon Payment of the Principal Money and Interest, re-convey the Estate to the use of the Testator and his Heirs, or to the use of such Persons as he should by Deed appoint; or in case of Sale of any part thereof, should re-convey the Residue unsold to the Testator, his Heirs or Assigns, or otherwise as he or they should direct or appoint, gave the Testator a new Power over the Estate, and consequently operated as a Revocation.

Mr. *Horne*, and *Fearnley*, *contra*:— for those interested in the said Estates under the Will.

The following Cases were cited, *Thorne* v. *Thorne* (c), *Perkins* v. *Walker* (d), Earl of *Lincoln*'s Case (e), *Tickner*

(a) 4 Mad. 368.

(b) By a decree of the 28th June 1821, it was declared that the conveyance of the Estate called *Bull Halls*, by the indentures of lease and release of the 23d and 24th days of June 1814, was a Revocation of the said Testator's Will, as to that Estate, and that the same descended to the Testator's heir-at-law. The principal discussion was on the Revocation as to the Estate called *Perrys* and *Baths*.

(c) 1 Vern. 141. S. C. Ibid. 182.

(d) Ibid. 97.

(e) 1 Eq. Ab. 411. S. C. Shaw, P. C. 154.

v. *Tickner* (*f*), *Kenyon* v. *Sutton* (*g*), *Williams* v. *Owen* (*h*), and *Harwood* v. *Oglander* (*i*).

The VICE-CHANCELLOR:—

The Question in this Case is, whether the Will of *Job Brain* was revoked by a subsequent Deed. After the Will, the Devisor borrowed a Sum of 800*l.* of *Elizabeth Prout*, and conveyed the Premises in question to two Trustees in Fee, by way of Security, with a Power to sell in certain events, and a direction, that upon re-payment of the Money the Trustees should re-convey to the Devisor and his Heirs, or to the use of such other Persons, and for such Estates and Interests, as he should by any Deed or Instrument under his hand appoint. It is admitted, that if the direction had been simply upon re-payment of the Money the Trustees should re-convey to the Devisor and his Heirs, that there would have been a Revocation *pro tanto* only; but because it is added, that they are to re-convey also to his Appointment, that he requires a new Estate with new Powers, and that the Conveyance, though only a Security for Money, is a total Revocation.

The true question therefore is, whether, by the addition of the words which follow the direction to re-convey to the Devisor and his Heirs, he does, in fact, acquire any new Estate or Power; or, whether these subsequent words do not leave him with the same Estate

(*f*) Cited in *Parsons* v. *Freeman*, 3 Atk. 741. Amb. 117. & 1 Wils. 308.

(*g*) Cited in *Williams* v. *Owen*, 2 Ves. jun. 601. *Harwood* v. *Oglander*, 6 Ves. 207, & S. C. 8 Ves. 115.

(*h*) 2 Ves. jun. 595.

(*i*) 6 Ves. 199. S. C. 8 Ves. 106.

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and the same Powers as he would have had if they had not been used. It is plain, that he who has a right to call upon Trustees to convey to himself and his Heirs, has a right, by any Instrument under his hand, to direct the same Trustees to convey to the use of any other Person, and for any Estates and Interests at his pleasure. The authority to make such direction by any Deed or Instrument under his hand is the necessary consequence of this conversion of his legal Estate into an Equitable Interest; and the subsequent words are the mere "*expressio eorum quæ tacitè insunt.*" I am of opinion, therefore, that the Conveyance in question, being by way of Security for Money, is a Revocation *pro tanto* only. I am unable to say whether this opinion does or does not interfere with the Case of *Kenyon* v. *Sutton*, for want of knowing accurately the facts of that Case; but it certainly does not interfere with the Case of *Tickner* v. *Tickner*, where a new Power to appoint to uses was acquired.

1822.
26 April.

Between THOMAS CALVERLEY - - - Plaintiff,
and
EDWARD TUFTON PHELP, JOHN JAMES BEDINGFIELD, WILLIAM CLUTTON, ALEXANDER M'CLEOD, and STAFFORD O'BRIEN - - - - - - - - - Defendants.

The Equity of Redemption of a Mortgage in Fee having been conveyed to Trustees, upon trust, to sell and pay off Incumbrances, and divide the surplus among persons specified in the Deed, which contained a proviso that the receipt of the Trustees should discharge the purchasers, held that this did not enable the Trustees alone to defend a Bill of Foreclosure, but that the cestuis que trust *were necessary parties to the suit.*

THIS was a common Bill of Foreclosure, and the only Question was, whether there was not a defect of Parties.

James Phelp, and *Edward Tufton Phelp,* his Son, having power to dispose of a certain Estate, subject to a Mortgage in Fee for securing 11,000*l.*, and Interest, for the purpose of paying off this Mortgage, borrowed of the Plaintiff, *Thomas Calverley,* 11,000*l.* upon Security of the same Estate; and thereupon, by Indentures of Lease and Release, of the 17th and 18th of February, 1808, the former Mortgages being paid off, joined in a Conveyance of the Estate to the Plaintiff and his Heirs, for the purpose of securing the Re-payment of the 11,000*l.* and Interest; two Terms comprising the Mortgaged Premises were assigned to a Trustee for the Plaintiff for the same purpose. The Mortgage Money was not paid at the time appointed.

By Indentures of Lease and Release, dated the 20th and 21st of Dec. 1811; the Release made between *James Phelp* and *Eleanora* his Wife, and *E. T. Phelp,* his Son, of the first part; *Samuel Miles,* of the second part, and *Alexander M'Cleod,* and *Stafford O'Brien,* of the third part, certain Estates, including the Mortgaged Estates, were conveyed (subject to the Mortgage, to the Plaintiff,

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and also subject to a Mortgage to *J. J. Bedingfield*, and *William Clutton*, for securing a Sum of 2,783 *l.* 8*s.* 6*d.* and to another Mortgage to them, for securing another Sum of 1,400*l.*) to *Alexander M'Cleod*, and *Stafford O'Brien*, (two of the Defendants,) and their Heirs, upon trust, with the consent of *James Phelp*, and his Son, *E. J. Phelp*, or the survivor, to sell the same, and to stand possessed of the Monies to arise from the Sale, to satisfy the Monies due on the several Mortgages, and Interest, and to stand possessed of the Surplus of such Monies, upon certain trusts, for the benefit of the said *James Phelp* and *Eleanora* his Wife, and *Edward Tufton Phelp*, and the younger Children of the said *James Phelp* and *Eleanora* his Wife. There was a provision in the Deed, that the Receipts of the Trustees should be a discharge to the Purchaser. *James Phelp* died in *June* 1814, and his Interest in the mortgaged Premises ceased at his death; but his Widow and several younger Children survived him.

Mr. *Swanston*, as Counsel for the Defendant *M'Cleod*, objected, that the Widow and younger Children of *James Phelp* were necessary parties to the Suit, as beneficially interested in the Equity of Redemption;—The general rule is, that *cestuis que trust* are necessary Parties to a Suit against Trustees relative to the Trust Property. Without a Clause declaring the Receipt of the Trustees a sufficient discharge, the *cestuis que trust*, must be Parties to a Bill for specific performance of a Contract of Sale by the Trustees:—That Clause enables the Trustees to represent the *cestuis que trust* for the purpose of a Sale, not for the different purpose of a Foreclosure. It is true, that Lord *Redesdale* in one passage says, " that persons having demands prior to the creation of Trusts

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for the payment of Debts or Legacies, or other Incumbrances, may enforce their demands against the Trustees without bringing before the Court the Persons interested under the Trust, if the absolute disposition of the Property is vested in the Trustees;" but he adds, " if the Trustees have no such power of disposition as in the case of Trustees to convey to certain uses, the Persons claiming the benefit of the Trust must also be Parties." In this Case, the special proviso in the Deed enabling the Trustees to give a receipt for the Purchase Money, does not extend the power of the Trustees beyond the particular purpose for which it was created; consequently the *cestuis que trust* must be made Parties.

Mr. *Hart*, and Mr. *Wilbraham*, in support of the Bill, observed that there had been a fluctuation of opinion as to the necessary Parties in these Cases; that formerly a subsequent Incumbrancer was not a necessary party. But that was not the Rule now; even a subsequent judgment-creditor, it has been held, is a necessary Party (*a*). Here, however, the Trustees sustain the Interests of the *cestuis que trust*. The *cestuis que trust* could not have filed a Bill to redeem. The present Parties are sufficient.

They cited, in illustration of their Argument, Lord *Redesdale*'s Treatise (*b*), *City of London* v. *Richmond* (*c*), and *Adair* v. *The New River Company* (*d*).

(*a*) *Bishop of Winchester* v. *Beaver*, 3 Ves. 315. & *Forth* v. *Duke of Norfolk*, 4 Mad. 503.

(*b*) P. 142, 3; Ed. 3.

(*c*) 2 Vern. 421, affirmed in the House of Lords, 1 Bro. P. C. 516. ed. Tom.

(*d*) 11 Ves. 429.

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The VICE-CHANCELLOR:—

The general Rule of the Court is, that all Persons having an Interest in the Equity of Redemption must be made Parties to a Bill of Foreclosure; and the question here is, whether, inasmuch as the Trustees for Sale have a power to discharge a Purchaser by their Receipt for the Purchase Money, an exception is to be made to the general Rule, and the Mortgagee may foreclose the Equity of Redemption in the absence of the persons entitled to the produce of the Sale, and who are the only persons who have a beneficial Interest in the Equity of Redemption. The Author of the Trust has declared that in case of a Sale the presence of the Parties beneficially interested in the Produce of the Sale shall not be necessary; and he had a right to deal as he pleased with his own Property; but this declaration has no application to a Bill of Foreclosure; and the general Rule must prevail, that all Persons interested in the Equity of Redemption shall be Parties to the Suit for Foreclosuıe.

1822. 5 March.

DEVIS *v.* TURNBULL.

A Defendant at Law having refused his consent to a Commission for the Examination of a Witness resident abroad, a Bill was filed by the Plaintiffs at Law to obtain a Commission for that purpose, the Defendant at Law having retired from the jurisdiction of the Court. Service of the Subpœna, to appear to the Bill, on his Attorney at Law, ordered to be good service.

AN Action at Law having been commenced by the Plaintiffs in Equity in this Suit against the Defendants, this Bill was filed for the purpose of obtaining a Com-

mission for the Examination of a Witness resident at *Gibraltar*; and Mr. *Parker*, on behalf of the Plaintiffs, now made an application to the Court, that Service of the Subpœna for the Defendant *Peter Evans Turnbull*, to appear and answer the Plaintiff's Bill, on the Attorney at Law of the said Defendant, might be deemed good Service on the said Defendant. The application was supported by an Affidavit by the Plaintiff's Solicitor, stating that the Plaintiffs had commenced an Action in the Court of King's Bench against the Defendants, *Peter Evans Turnbull*, and *Alexander Turnbull* (who were Co-partners), to recover the Amount of the Proceeds of a Bill of Exchange for 500*l.*; that *Alexander Turnbull* resides abroad, and that *P. E. Turnbull* refused to appear for him in the said Action, and therefore the Plaintiffs proceeded to Outlawry against *Alexander Turnbull*, and had since caused a Declaration to be delivered against *P. E. Turnbull*, stating that fact, and that *P. E. Turnbull* had pleaded the General Issue, and Issue had since been joined in the said Action; and Notice of Trial had been given, that *John Relph* will be a material Witness for the Plaintiff on the said Trial; and the Plaintiffs cannot, as the Deponent is advised, and verily believes, safely proceed to Trial without the benefit of his Evidence; and that *John Relph* being resident at *Gibraltar*, or elsewhere beyond the Seas, the Deponent, on behalf of the Plaintiffs, applied to the Attorney of *P. E. Turnbull*, and requested him to consent to a Commission to be issued from the Court of King's Bench to examine the said *John Relph de bene esse*, but he refused to consent thereto; and in consequence of the refusal of the said *P. E. Turnbull* (*a*),

(*a*) A Rule or Order for this purpose cannot be obtained without consent; Tidd's Prac. 860. Ed. 8.

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and of the absence of *John Relph* from this kingdom, the Plaintiffs are in danger of being deprived of his Testimony on the Trial of the said Action, without the assistance of this Court; and that application was made at the Residence of *P. E. Turnbull* for the purpose of serving him with a Subpœna to answer the Plaintiff's Bill, when it was discovered that he had left this Country and gone to *Marseilles*; and that he is still abroad out of the Jurisdiction of this Court; and this Deponent thereupon applied to his Attorney at Law, and requested him to appear to such Subpœna for him; to which application his Attorney replied that *P. E. Turnbull* had left this Country and that he was without authority to appear for him in any Suit; and that the Plaintiffs were thus prevented from obtaining the Evidence of *John Relph*, without the Assistance of this Court.

Mr. *Parker* had not been able to find any Precedent in support of his application, nor could the Registrars find one.

The VICE-CHANCELLOR:—

I have read the Affidavit in this Case. A Plaintiff at Law, as well as a Defendant, has a right to the assistance of this Court for the Purpose of obtaining Evidence. If the Plaintiff at Law retires from the Jurisdiction, the Court directs service of the Subpœna upon his Attorney at Law to be good service; and as either Party may file a Bill, why, upon principle, should not a similar Order be made as to the Defendant at Law?

Order made.

Reg. Lib. A. 1821. fol. 1089.

RICHARD BYRCHALL and ANN his Wife, and Another - - - - - - - - - - - - Plaintiffs,

and

JAMES BRADFORD, WILLIAM FARMER, GEORGE SHRIMPTON and HANNAH his Wife, and Others - - - - - - - - - - Defendants.

1822. 7 March.

A sum of 2000 l. was bequeathed to an Executor, who was also a Trustee under the Will, upon trust, for Investment in the Public Funds. He retained it in his own hands, paying interest to the cestuis que trust *for many years, under a representation that the Legacy had been invested according to the trusts. Held, that this was such a breach of trust, as entitled the* cestui que trust *to have purchased by the Executor so much stock as the sum of 2,000 l. would have purchased at the time he first had assets sufficient for Investment.*

IT appears from the Registrars' Books that *John Richmond Webb*, by his Will, dated the 3d of May, 1802, after devising his real Estates to the Defendants *James Bradford* and *Richard Farmer*, their Heirs and Assigns, upon certain Trusts therein mentioned, (among other things) gave and bequeathed to the said *James Bradford* and *Richard Farmer* the sum of 2,000*l.* upon trust, that they and the survivor of them, and the Executors, Administrators and Assigns of such survivor, should place out and invest the same in the Public Stocks or Funds, in their or his own name or names, and should pay the Interest or Dividends arising from the Funds or Stocks, as they should become due and be received, unto *Hannah Reeves*, now *Hannah Shrimpton* (one of the Defendants) for her Life, and after her Decease, in trust, to pay and apply the Interest and Dividends of the said Stocks or Funds unto the Plaintiff *Ann Byrchall*, then *Ann Reeves*, the Daughter of the said *Hannah Shrimpton*, if she should survive her Mother, and should not have then attained the Age of 21 years, for her Maintenance and Education, and as soon as she should have attained the Age of 21 years, in case the Mother should be then dead, upon trust, that the said Trustees and the survivor of them, and the Executors, Administrators and Assigns of

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such survivor, should pay the said Stock or Principal Sum of 2,000*l.* or transfer or assign the Security or Securities taken for the same, unto the Plaintiff *Ann Byrchall*, for her own use and benefit. And the said Testator declared, that if the Money to arise by the Sale which he had directed of certain parts of his real Estate, should, together with his Personalty, not be sufficient, after payment of his Debts and Funeral Expenses, for the payment of the Legacies given by his Will, that all other his Freehold, Copyhold and Leasehold Estates should be charged therewith, and that his Trustees should raise the deficiency by a Sale or Mortgage, or by the Rents and Profits, of his said other Freehold, Copyhold and Leasehold Estates, proportionate and according to the respective values thereof, and appointed *Ann Richmond Webb*, *Eliza Richmond Webb*, and the Defendants, *James Bradford*, and *Richard Farmer*, Executors of his Will.

The Testator died on the 17th February 1805, and his Will was proved by *James Bradford* and *Richard Farmer*, only. The said Sum of 2,000*l.* was not invested according to the Trust of the Will, but was, without the knowledge of those persons beneficially interested in it, retained by *James Bradford* in his own hands, and Interest was regularly paid thereon. This circumstance being made known to the Plaintiffs in the year 1818, they filed their Bill, praying that an account might be taken of the Personal Estate and Effects of the said Testator, and that the same might be applied in a due course of Administration; and that so much of the three per cent Consolidated Bank Annuities might be purchased by the said *James Bradford* and *Richard Farmer*, upon the Trusts in the said Testator's Will declared, of the Stocks

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or Funds to be purchased with the said Legacy of 2,000 *l.* as might, at the time when the said *James Bradford* and *Richard Farmer* had got and received Assets of the said Testator sufficient for the same, have been purchased with the sum of 2,000 *l.*; and in case the Personal Estate and Effects of the said Testator, should not be sufficient to answer and satisfy the said Legacy or Sum of 2,000 *l.* then, that an Account might be taken of the Rents and Profits of the said Testator's Estates (meaning those first directed to be sold) received by the said *James Bradford* and *Richard Farmer*, or by their or either of their order, or for their or either of their use, or which they or either of them might have received; or if the Money received from the sale and disposition of the said Testator's said Estates, and in case the said Personal Estate and Effects, and Rents and Profits, and Money last mentioned, should not be sufficient for the same, then that the said Testator's said Estates directed to be sold as aforesaid, or such parts thereof as then remained unsold, or a competent part thereof, might be sold for that purpose; and in case the said Personal Estate and Effects, Rents and Profits, and Money last aforesaid, and the Money to be produced by sale of such last-mentioned Estates, should not be sufficient for the purpose aforesaid, then that the said other Estates of the said Testator, or a competent part thereof, might be sold for the same.

1820.
1 May.

The Cause coming on to be heard this day (*a*), it was referred to the *Master* to inquire (among other things) whether the Defendant *George Shrimpton* and *Hannah* his Wife, and the Plaintiff *Richard Byrchall* and *Ann* his Wife, or any, and which of them, were at any time, and

(*a*) Ante, p. 13.

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when, respectively apprised that the Defendant *James Bradford* had the said sum of 2,000*l.* in his own hands, and for the better discovery thereof the Parties were to produce upon Oath, all Deeds, Papers and Writings in their custody or power relating thereto, and were to be examined upon Interrogatories as the said *Master* should direct.

The *Master*, by his Report, dated the 14th *August* 1821, (among other things) stated, that *James Bradford* and *Richard Farmer* (since deceased) alone proved the said Will, and that the said *James Bradford* had principally acted in the execution thereof; and on or before the year 1807, possessed themselves of sufficient Assets for the purchase of Stock sufficient to answer the said Legacy of 2,000 *l.*, as directed by the said Will; and that the said Legacy of 2,000 *l.* was not invested in the Purchase of three per cent Consolidated Bank Annuities until some time in the month of March 1819; and he found by the several and respective Answers and Examinations of the said Plaintiffs, *R. Byrchall*, and *Ann* his Wife, and of the Defendant, *Hannah Shrimpton*, to Interrogatories exhibited before him pursuant to the said Decree, they severally and respectively deposed, that they were apprised some time in the month of January 1818, as well as they could recollect, and not before, that the said Legacy or Sum of 2,000 *l.*, was retained by the said *James Bradford*, in his own hands, and not placed out and invested by him; and the said *James Bradford*, and *Ann* his Wife, also deposed, that upon, or shortly after being apprised thereof, they, in conjunction with the said other Plaintiff, promoted the Institution of this Suit; and he found that the said Defendant *G. Shrimpton*, by his answer and examina-

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tion to Interrogatories also exhibited before him, that he was apprised, upon being applied to to put in his Answer to the Bill filed in this Cause, as well as he could recollect, and not before; and that he had considered of the state of Facts and Examination aforesaid, and found that the Plaintiffs, *Richard Byrchall*, and *Ann* his Wife, and the said Defendant *Hannah Shrimpton*, were apprised some time in the month of January 1818, and not before: and the said *George Shrimpton* was apprised, on the application made to him to put in his Answer to the Plaintiff's Bill, and not before, that the said Legacy or Sum of 2,000 *l.*, was remaining in the hands of the said Defendant *James Bradford*, and not invested or laid out.

1822.
7 March.

The Cause coming on to be heard on further directions,

Mr. *Bell*, Mr. *Sugden*, and Mr. *Meggison*, for the Legatees.

It is found by the *Master's* Report that the Legatees had no notice of the Breach of Trust until the year 1818. The annual Sum of 100 *l.* was paid by *James Bradford*; and he represented that the sum of 2,000 *l.* was invested according to the Trusts, which was a gross Breach of Trust.

Mr. *Hart*, and Mr. *Roupell*, for the Defendant *James Bradford*.

No Case has gone so far as to say that an Executor, who was directed to lay out Money in Stock, and has not done so, shall be charged at the accidental Price of

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Stock when it should have been laid out. It never could have been considered that the Money was invested in Stock, the Receipts are given as for Interest; and the Sum paid Annually is the exact Interest upon 2,000*l.* at Five per Cent per Annum.

The VICE-CHANCELLOR:—

Where in the Administration of an Estate this Court decrees the payment of Legacies which by the Will are directed to be invested in Stock, it never enters into consideration whether the Executor might or might not have been able, with reasonable diligence, to have provided for the Legacies at an earlier period, in order to fix him with such amount of Stock as at the earlier period might have been purchased with the Legacy. And the reason probably is, because the difficulty and expense which would attend such an Inquiry in the case of an Executor, makes it more convenient in Practice that the Legacy should be provided for in Money at the time of the Administration by the Court, without reference to the Price of Stocks. But where a Legacy is given by a Will to a Trustee, who is not an Executor, and he is directed to invest it immediately upon receiving it in the purchase of Stock, and he receives it from the Executor, and in the place of such Investment he keeps it in his own hands, his conduct is a plain Breach of Trust, and he is clearly answerable to his *cestui que Trust* for any Loss by a subsequent rise in the Price of Stock. There is in such a case no difficulty or inconvenience in ascertaining the extent of the Loss.

When an Executor, who happens also to be named a Trustee, of a Legacy to be laid out in Stock, has fully administered the Estate, and assented to the Legacy,

and retains the Legacy in his hands, not as Assets of the Testator, but as Trustee of the Legacy, then the principles which would apply to another Trustee must apply to him. He is no longer clothed with the character of Executor, but is, as to the Legacy, a mere Trustee.

Such is the Case of this Defendant *Bradford;* and having failed in his attempt to establish that it was by consent of the *cestui que Trust* that the Legacy was not invested in Stock, he must now transfer as much Stock as the Legacy would have purchased when he ceased to hold the Legacy as Executor, and become a Trustee. And if the Parties do not agree as to that period it must be referred to the *Master* to inquire into that fact.

The Parties afterwards agreed, in order to save the reference to the *Master* that the Price of Stock should be computed at a day stated. The Decree was as follows;

"This Court doth declare, that the Legacy or Sum of 2,000*l.* given by the Will of the said Testator *John Richmond Webb,* as therein mentioned, ought to be invested in the Public Stocks or Funds. The Defendant, *James Bradford,* possessing Assets of the said Testator sufficient to answer the said Legacy; and it being admitted that the said Defendant possessed Assets sufficient for that purpose on the 1st February 1808, It is ordered, that the Defendant *James Bradford* do purchase as much Bank 3*l.* per cent Annuities as the sum of 2,000*l.* would have purchased according to the mar-

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ket price such Annuities bore on the 1st February 1808. And it ordered, that the *Master* do ascertain the price such Annuities bore on that day, in case the Parties differ about the same. And it is ordered, that the Sum of 2,564*l.* 2*s.* Bank three per cent Annuities, already purchased by the said Defendant *James Bradford*, be taken in part of the Annuity hereinbefore directed to be purchased. And it is ordered, that the *Master* do tax the Plaintiffs, and all the Defendants, except the said *James Bradford*, their Costs of this Suit, and what shall be taxed for the said Defendants Costs be paid by the Plaintiffs. And it is ordered, that all the said Defendants Costs be added to the Plaintiffs Costs; and it is ordered, that such Costs be paid by the Defendant, *James Bradford*; and any of the Parties are to be at liberty to apply as there shall be occasion."

Reg. Lib. A. 1821. fol. 1060.

It appears by the Registrars' Books, that this Cause was re-heard before his Honor the *Vice-Chancellor* on the 8th *June* 1822, when the above Decree was varied, by ordering that *James Bradford* do transfer into the name of the Accountant-General, in trust, in this Cause, so much Bank three per cent Annuities as the Sum of 2,000*l.* would have purchased according to the market-price such Annuities bore on the 1st of February 1808; the Sum of 2,564*l.* 2*s.* already purchased by the said Defendant, *James Bradford*, which is now standing in the name of the said Accountant-General, to be taken in part of the Annuities directed to be purchased.

Reg. Lib. A. 1821, fol. 1550.

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From a Petition afterwards presented in this Cause to the Master of the Rolls it appears that Stock was purchased by *James Bradford* pursuant to the Decree.

Reg. Lib. A. 1821. fol. 2195.

1822. 16 March

JOHN MAITLAND - - - - - - - Plaintiff,
and
MATTHEW CHALIE, JOHN SHUTE DUNCAN, JOHN ARNOLD, and HENRY SKRINE,
Defendants.

Bequest of 25,000 l. 3 per cents to Testator's Daughter S. C. for Life, and after her decease, one moiety to the Testator's next of kin, in equal degree, other than and except any Child or Children of S. C.; and as to the other moiety to go unto and amongst all and every the Child and Children of S. C., equally to be divided between them at their respective ages of 21 years, if more than one, Share and Share alike, and if but one, then to such only Child at his or her age of 21 years. The Will afterwards contained a proviso, that in case S. C. should die without leaving *any Child or Children of her body, or leaving any such Child or Children, such only Child, or all such Children, should die before attaining the age of 21 years, then the last-mentioned moiety should be paid among all the next of kin of the Testator, in equal degree, who should be living at the time of the death of the longer liver of them his said Daughter and her said Children* so dying before having attained the age of 21 years, *as aforesaid. Determined that, two Daughters of S. C. having attained the age of 21 years, but died in the life-time of their Mother, took vested interests in the last-mentioned moiety.*

MATTHEW CLAREMONT, by his Will, dated the 26th February 1772, bequeathed as follows:—"And as to all my temporal Estate wherewith it hath pleased God to bless me, I dispose thereof as follows, (that is to say), I name, constitute, and appoint my worthy Friend and

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CHALIE
and others.

Partner, *John Nicholas Linwood*, Esq., my Friend *Francis Douroure*, of *Kensington*, in the County of *Middlesex*, Esq., and my faithful Book-keeper, *Mark Cephas Tutet*, Executors of this my Will; and it is my will, and I do hereby order and direct that my said Executors do and shall, as soon as conveniently may be after my decease, set apart, out of my Estate, or purchase with a sufficient part thereof, a Capital of 25,000 *l.* in such of the Parliamentary Funds, or Government Securities, carrying Interest at the Rate of 3 per cent per annum, as they my said Executors shall think fit; which said Capital or Fund of 25,000 *l.*, when so set apart or purchased, I will shall be transferred to and taken in the joint names of my Executors, unto whom I give and bequeath the same, upon the several Trusts, and to and for the several uses, intents and purposes hereinafter mentioned, expressed and declared of and concerning the same, (that is to say), in trust, to pay all the Interest, Dividends, and Yearly Produce of the said Capital or Fund of 25,000 *l.*, as the same shall arise and become payable, unto my Daughter *Susanna Chalie*, the Wife of *John Chalie*, of *London*, Merchant, for and during the term of her natural Life, for her sole and separate use, and upon her own single and separate receipt, &c.; and from and after the decease of my said Daughter *Susanna Chalie*, then in trust, to transfer and assign one moiety or half part of the Capital or Principal of the said 25,000 *l.* unto and equally amongst all and every my own next of kin, in equal degree, (other than and except any Child or Children of my said Daughter) who shall be living at the time of the death of my said Daughter; and in trust, to transfer and assign the other moiety or half part of the said Capital or Principal of the said 25,000 *l.* unto and amongst all and every the Child or Children

on the Body of my said Daughter, lawfully begotten or to be begotten, equally to be divided between them, at their respective Ages of twenty-one years, if more than one, share and share alike; and if but one, then to such only Child at his or her Age of twenty-one years, upon trust, in the mean time, and until such Child or Children shall respectively attain his her or their ages of twenty-one years, to pay and apply so much and such part of the Interest, Dividends, and Yearly Produce of the said last-mentioned moiety or half part of the said Capital or Funds of 25,000*l.*, as they my said Executors, or the survivor of them, or the Executors or Administrators of such survivor, shall in their discretion think proper, for and towards the Maintenance and Education of such Child or Children of my said Daughter respectively, and in trust, to lay out and invest the Surplus, Interest, and dividends, (if any) of the last-mentioned moiety or half part of the said Capital or Fund of 25,000*l.*, as the same shall from time to time become due and payable, in the purchase of the same species or sort of Funds as the last-mentioned moiety or half part shall or may consist of; or in the purchase of such other Parliamentary Funds, or Government Securities, carrying interest at the rate of three per cent per annum, as they my said Executors, or the survivors or survivor of them, or the Executors or Administrators of such survivor, shall think fit; which Funds or Securities, in or upon which such Surplus, Interest, or Dividends, shall be laid out and invested, shall be taken in the names of my said Executors, and be added to and go in increase and augmentation of and be applied in the same manner as is hereby directed concerning the last-mentioned moiety or half part of the said Capital or Fund of 25,000*l.*; and

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in case any of such Children, there being more than one, shall happen to die before he she or they shall have attained the said Age of twenty-one years, then upon trust, to transfer and assign the share or shares of him her or them so dying of and in the said last-mentioned moiety or halfpart of the said Capital or Fund of 25,000*l.*, and of and in all the increase thereof (if any), unto the survivors or survivor of such Children, equally to be divided between them, at their respective Age of twenty-one years, if more than one such survivor, share and share alike; and if but one survivor, then to such surviving Child at his her or their Age of twenty-one years; but in case my said Daughter *Susannah Chalie* shall happen to die without leaving any Child or Children of her body lawfully begotten, or leaving any such Child or Children, and such only Child, or all such Children, shall happen to die before any of them shall have attained his her or their said Age or Ages of twenty-one years, then in trust, to transfer, assign and pay, the Capital or Principal of the said last-mentioned moiety or half part of the said 25,000*l.*, and all the increase thereof (if any), unto and amongst all and every my next of Kin, in equal degree, who shall be living at the time of the death of the longer liver of them, my said Daughter and her said Children so dying before having attained the said Age of twenty-one years as aforesaid."

Matthew Claremont, the Testator, died, leaving his Daughter *Susannah Chalie* surviving, and after his death his Will was proved by *John Nicholas Linwood Francis Duroure*, and *Mark Cephas Tutet*.

Soon after the death of the said Testator, *John Nicholas Linwood, Francis Duroure*, and *Mark Cephas*

Tutet, appropriated a certain part of the said Testator's personal Estate, and invested the same in the purchase of 25,000*l*. three per cent Consolidated Bank Annuities in their names, upon the Trusts of the said Will.

Susannah Chalie had issue only two Children, viz. *Marianne Chalie*, and *Jane Sarah Chalie*.

Marianne Chalie having attained twenty-one, intermarried in 1784 with *Henry Skrine*, and upon their marriage a Settlement was executed, whereby, after reciting the Will of *Matthew Claremont*, and that the said *Marianne Chalie* having attained her age of twenty-one years, had, as one of the two Children of the said *Susannah Chalie*, become entitled to a vested reversionary interest in one half part of the moiety of the said sum of 25,000*l*. Stock, which was bequeathed to the Children of the said *Susannah Chalie*, such moiety was settled upon the Trusts therein mentioned, for the benefit of the said *Henry Skrine* and *Marianne* his Wife, and the issue of the said marriage.

In the year 1788 *Marianne Skrine* died, leaving *Henry Skrine*, her Husband, and one Child, the Defendant, *Henry Skrine*, her surviving.

Jane Sarah Chalie having attained her age of twenty-one years intermarried in 1794 with *William Garthshore*, and a Settlement was made previous to their marriage, dated the 21st of May 1794, whereby, after reciting the Will of the said *Matthew Claremont*, and that the said *Jane Sarah Chalie* had attained her age of twenty-one years, and was become entitled to the reversion expectant on the death of the said *Susannah*

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Chalie her Mother, of the sum of 6,250*l.* three per cent Consolidated Bank Annuities, one half part of the said moiety of the sum of 25,000*l.* by the Testator's Will bequeathed to the Children of the said *Susannah Chalie* as aforesaid, subject to be reduced on the contingency of the said *Susannah Chalie* having other Children who should live to attain the age of twenty-one years; and, after other recitals, it was provided, that the fortune of *Jane Sarah Chalie* should be respectively transferred, assigned, and vested upon certain Trusts thereinafter mentioned, for the benefit of the said *William Garthshore* and *Jane Sarah Chalie*, and the issue of the intended marriage.

Jane Sarah Garthshore died in the lifetime of her Mother *Susannah Chalie*, without issue, and intestate; and upon her death Letters of Administration of her Effects were granted to her Husband *William Garthshore*.

William Garthshore died soon afterwards, intestate, and Letters of Adminstration of the Goods, Chattels, and Effects of the said *William Garthshore* were granted to his Father, *Maxwell Garthshore*, and, as such Administrator, said *Maxwell Garthshore* obtained Letters of Administration *de bonis non* of the said *Jane Sarah Garthshore*.

Maxwell Garthshore died several years after, having appointed the Plaintiff one of the Executors of his Will.

Letters of Administration *de bonis non* of the said *Jane Sarah Garthshore* were granted to the Plaintiff as Executor of *Maxwell Garthshore*.

Susannah Chalie received the Dividends and annual Produce of the Sum of 25,000*l.* during her life, and she died in March 1821.

John Nicholas Linwood, Francis Duroure, and *Mark Cephas Tutet* died, and *Matthew Chalie, John Shute Duncan,* and *John Arnold,* were appointed the Trustees of the Sum of 25,000*l.* three per cent consolidated Bank Annuities, and the same stood in their names in the Books of the Bank, and they received the Dividends accrued thereon since the death of the said *Susannah Chalie.*

The Bill stating the foregoing facts further stated that the Plaintiff, as Administrator *de bonis non* of the said *Jane Sarah Garthshore,* is entitled to receive and have transferred into his name one fourth part or share of the Sum of 25,000*l.* consolidated Bank Annuities to which the said *Jane Sarah Garthshore* became entitled on attaining her age of twenty-one years.

The *Prayer* of the Bill was, that the Plaintiff, as the personal Representative of said *Jane Sarah Garthshore,* might be declared entitled to receive one fourth part or share of the said 25,000*l.* three per cent consolidated Bank Annuities standing in the names of said *Matthew Chalie, John Shute Duncan,* and *John Arnold,* and one fourth part of the Dividends thereon, which had accrued due since the death of *Susannah Chalie*; and that said *Matthew Chalie, John Shute Duncan,* and *John Arnold,* might be decreed to transfer into the Plaintiff's name such one-fourth part or share, and to pay him one fourth part of such Dividends.

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The Defendant, *Henry Skrine*, by his Answer, insisted, that as sole next of Kin of the Testator, living at the death of *Susannah Chalie*, he was entitled to the whole of the 25,000*l*. three per cent consolidated Bank Annuities, and to all the Dividends accrued thereon since the death of *Jane Sarah Chalie*.

Mr. *Bell*, Mr. *Sugden*, and Mr. *Pemberton*, for the Plaintiff.

Mr. *Hart* for the Defendants.

The Cases cited were *Willis* v. *Willis* (*a*), *Harrison* v. *Foreman* (*b*), *Jefferson* v. *Reynous* (*c*), *Smither* v. *Willock* (*d*), *Schenk* v. *Legh* (*e*), *Randall* v. *Metcalfe* (*f*), *Powis* v. *Burdett* (*g*), *King* v. *Hake* (*h*), *Howgrave* v. *Carter* (*i*), *Woodcock* v. *Duke of Dorset* (*k*), and *Sturgess* v. *Pearson* (*l*).

The VICE-CHANCELLOR.

In this Case a clear vested Interest is in the first place given to the Children of a Daughter attaining twenty-one. If in the Clause which gives the property over on failure of Children of the Daughter, the word "having" be read for "leaving," the whole Will will express a consistent intention to that effect. I feel myself bound by the Authorities to adopt this Construction. *Woodcock* v. *the*

(*a*) 3 Ves. 51.
(*b*) 5 Ves. 207.
(*c*) Cited 9 Ves. 311.
(*d*) 9 Ves. 234.
(*e*) 9 Ves. 300.
(*f*) 3 Bro. P. C. 318.
(*g*) 9 Ves. 428.
(*h*) 9 Ves. 438.
(*i*) 3 Ves. & Bea. 79. S. C. Coop. 66.
(*k*) 3 Bro. C. C. 569.
(*l*) 4 Madd. 411, and see also *Perfect* v. *Lord Curzon*. 5 Mad. 442.

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Duke of Dorset was much stronger; there the expression was "That if the said Lord *John* and Lady *Frances* should leave at the death of the Survivor any Child or Children of their two bodies, then the sum of 5,000*l.* was to be raised and paid to such Child or Children upon their attaining the Age of twenty-one Years." Yet Lord *Thurlow* there held that a Child who had attained twenty-one, but died in the lifetime of Lady *Frances*, took a vested Interest. So in the Case of *Powis* v. *Burdett* a Portion provided for younger Children whom the Parent should leave at his death, to be paid at twenty-one, was raised for a Child who having attained twenty-one died in the lifetime of the Parent. I must therefore declare that the two Daughters having lived to attain twenty-one took vested interests.

Reg. Lib. B. 1821. fol. 1172. 1176.

DAVENPORT *v.* DAVENPORT.

1822.
22d March.

When a Bill is referred for Scandal, dnd found Scandalous, a Motion cannot be made for an Injunction until the scandalous matter is expunged.

MR. *Heald* and Mr. *Fisher* moved, on Notice, for an Injunction, and a Receiver upon Bill filed, and Affidavit.

Mr. *Maddock* opposed the Motion, stating, that the Bill had been referred for Scandal; that the *Master* had reported it scandalous; and that an Order was obtained for expunging the scandalous matter; and observed, that when an Injunction has been obtained a Defendant cannot upon putting in his Answer move to dissolve the Injunction if the Answer is referred for Imperti-

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nence (*a*), because it is not ascertained what the Answer is; so here, it cannot be known what the Bill is until the scandalous matter is expunged; till then the Defendant is unable to answer it; until the Bill is perfected, the Motion cannot be made.

The *Vice-Chancellor* said, that until the Scandal was expunged it was not ascertained what the Bill was, and could not be answered, and therefore dismissed the Motion.

1822. 16th April.

In re HARDY and DALE.

A Motion cannot be made to adjourn a Petition in Bankruptcy: a Petition in the Bankruptcy is necessary for hat purpose.

MR. *AGAR* moved, that the hearing of a Petition by *Hardy* and *Dale*, to supersede a Commission of Bankruptcy against them, might be adjourned until after an Action commenced by them against the Messenger shall have been tried.

Mr. *Cullen, contrà:*—

The *Vice-Chancellor* refused the Motion, stating, that the Application must be made by Petition in the Bankruptcy.

(*a*) *Goodinge* v. *Woodhams*, 14 Ves. 534.

CUTLER *v.* CREMER.

1822.
16th April.

Publication enlarged under the circumstances.

MR. *CHING* moved to enlarge Publication to the last day of next Easter Term, and that the Plaintiff might be at liberty to sue out a Commission to examine further Witnesses in the country; and that the Defendant might name two Commissioners, and join in the Commission; or that in default thereof the Plaintiff might have such Commission directed to his own Commissioners.

The Bill was filed in 1816, and the Commission to examine Witnesses issued in Michaelmas Term 1820, and Publication passed by rule in Hilary Term 1821, but no further Proceedings took place. The Cause was not set down.

In support of the Motion, an Affidavit by the Plaintiff's Solicitor was filed stating "That at the time the Commission for the examination of Witnesses in this Cause issued, and at the time of the examination of the Witnesses on the part of the Plaintiff, under the same, he, this Deponent, was not advised, and therefore did not know that it would be necessary for the Plaintiff to prove the Marriage of the Plaintiff's grandfather, and where he died, which facts, this Deponent has since been advised it is essential to the Plaintiff's interest in this Cause for him to do, the question in this Cause principally depending on the pedigree of the Complainant. And this Deponent further saith, that for the

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reasons assigned, no Witnesses were produced on the part of the Plaintiff to prove such facts. And this Deponent further saith, he hath been advised, and verily believes, that he cannot proceed with safety to the hearing of this Cause, without proving the aforesaid facts, and which, this Deponent believes, none of the Witnesses already examined are enabled to do. And this Deponent further saith, that he verily believes the Witness intended to be examined in this Cause, in case this honourable Court shall be pleased to permit a renewed Commission to issue for the examination of Witnesses, will be able to prove such Marriage, and the place of such death, by proving in the usual manner the Copies or Certificates of the entries in the Parish Registers of the Marriage of the said Plaintiff's said grandfather, and of his Burial.

Mr. *Roupell, contrà,* stated the danger of allowing another examination of Witnesses.

The VICE-CHANCELLOR:—

As the Cause is not set down, and the fact to be proved is only a Title by Representation, I cannot do any injury by granting this Application. Take the Order, on paying the Costs of this Application, and of the Commission.

EDWARDS *v.* EDWARDS.

1822.
17th April.

A BILL was demurred to, and the Demurrer allowed, with liberty to amend the Bill.

Mr. *Pemberton* moved for leave to dismiss the Bill, on payment of 5*l.* the Costs of the Demurrer; and the *Vice-Chancellor* made the Order.

KING *v.* TURNER.

1822.
16th April.

Amendment of Bill allowed without prejudice to an Injunction which had been obtained on the merits.

MR. *PEMBERTON* moved for leave to amend the Bill, without prejudice to an Injunction that had been obtained on the Merits.

Mr. *Newland, contrà,* said the Motion was without precedent.

The *Vice-Chancellor* [after speaking with Mr. *Crofts*, the Registrar,] was of opinion, that the Motion was according to the Practice (*a*).

Order made.

Reg. Lib. A. 1821, fol. 1193.

(*a*) See accordingly Prac. Reg. 210. *Turner* v. *Bazeley*, 2 Ves. & Bea. 331.

1822.
18, 19th April.

PATON v. ROGERS.

If on a Bill for a specific performance by the Vendor, a good Title can be made before or when the cause comes on upon further directions, a specific performance will be decreed.

A REFERENCE was made in this Cause as to Title. The *Master* reported a good Title could be made, except as to so much of the Estate as a Widow was entitled to in respect of her Dower, she refusing to join in the Conveyance to the Purchaser. The Cause came on for further directions, and the Vendor then represented, that the Widow had agreed to join in the Conveyance.

Mr. *Sugden* and Mr. *Roupell*, for the Plaintiff.

Mr. *Hart* and Mr. *Pepys*, *contra*, contended, that as no good Title could be made at the time of the Report, the Vendor, now that the Cause came on upon further directions, could not insist on the Vendee's performance of his Contract, by reason that the Doweress now consented to join in the Conveyance.

Mr. *Sugden*:—

Previous to the *Master*'s Report she consented to join in the Conveyance; we can bring an Affidavit of that.

The *Vice-Chancellor* stated, that if at the hearing on further directions the Vendor was prepared to cure the objection to the Title which was reported by the *Master*, that he was in time to do so, but he required an Affidavit that the Widow was ready to release (a)

(a) See on this subject *Langford* v. *Pitt*, 2 P. W. 630. and *Mortlock* v. *Butler*, 10 Ves. 315.

The Decree was grounded upon an Affidavit that the Widow agreed to join in the Conveyance; and that the Defendant undertook to procure her to join in such a Conveyance.

Another question arose as to the Costs of the Suit, and Interest on the Purchase-money.

Mr. *Hart* and Mr. *Pepys* contended, that as no Title could be made until the Widow consented to join in the Conveyance, which, as they insisted, was not the case, until the Cause came on for further directions, the Plaintiff ought to pay the Costs of a Suit occasioned by his deficient Title, and that Interest on the Purchase-money ought to be given from the time when it was shown a good Title could be made.

The *Vice-Chancellor* said, that under the circumstances the Defendant should not pay the Costs of the Suit. That as to payment of the Purchase-money, it was a general, but not an universal rule, that when a specific performance is decreed the Vendor is entitled to his Purchase-money, with four per cent interest from the time when the money was contracted to be paid, and the Purchaser is entitled to the Rents and Profits from the time when Possession was to be delivered. Sir *William Grant* seems to have considered the rule as universal; but I have held, that where the Vendor has improperly delayed the execution of the Contract, and refused to give Possession, he ought not to be benefited by the delay he has occasioned.

1820.
3d May.

Death, without leaving issue, is as to real Estate a general failure of issue, and is not restrained to Issue living at death by words of limitation superadded to Issue of Tenant for Life.

FRANKLIN *v.* LAY.

THE Testator devised her moiety or half part in a certain Estate to her Grandson, *John Franklin*, and to the Issue of his Body lawfully to be begotten, and to the Heirs of such Issue for ever; but if her said Grandson should die without having any Issue of his body lawfully begotten, then she gave and devised the said moiety unto her Nephew *W. B.*, and to his heirs for ever.

John Franklin suffered a recovery, and contracted to sell the moiety to the Defendant; and a doubt arising as to the extent of his Estate, the Bill was filed for a specific performance, and having stated the Will, the Defendant put in a general Demurrer.

The Parties desired that the question should be decided here, and not sent to law.

It was insisted for the Plaintiff, that he took an Estate-tail by force of the limitation over being on a general failure of Issue.

The Defendant insisted, that having regard to the prior limitation to the Issue of the body, the words "leaving Issue" were to be construed as leaving Issue living at his death.

The Cases cited by the Plaintiff were,

Wright v. *Pearson* (*a*), where the limitation was to the Heirs-male of the body of the Tenant for life, and their Heirs, and for default of such Issue-male, over.

King v. *Burchell* (*b*), where the limitation was to *J. H.* for life, remainder to the Issue of *J. H.* his and their Heirs, and for want of such Issue, over.

Denn v. *Puckey* (*c*), where the limitation was to *A.* for life, without impeachment of waste, and after his decease, to the Issue-male of his body, and the Heirs and Assigns of such Issue-male for ever, and for default of such Issue-male, over.

Frank v. *Stovin* (*d*), where the limitation was to *A.* for life, remainder to the Issue-male of *A.*'s body and their Heirs, and in default of such Issue, over.

For the Defendant were cited,

Crooke v. *De Vandes* (*e*).

Dansey v. *Griffiths* (*f*), where the Devise was to *R. D.* and his Heirs; and if *R. D.* should die, and leave no Issue, then over.

Held an Estate-tail, and not an executory Devise, and favourable therefore to Plaintiff.

Doe dem. *Gillman* v. *Elvey* (*g*), where the Devise was to *A.* and the Issue of his body, his her or their Heirs,

(*a*) 1 Eden, 119.
(*b*) 1 Eden, 424.
(*c*) 5 T. R. 299.
(*d*) 3 East, 548
(*e*) 9 Ves. 197.
(*f*) 4 M. & S. 61.
(*g*) 4 East, 313.

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equally to be divided if more than one; and if *A.* have no Issue of his body *living at his decease*, then over.

Gretton v. *Howard* (*h*), where the Devise was to the Testator's Wife *A.*, of all his real and personal Estate, she first paying his debts and funeral expenses; and after her decease to the Heirs of her body, share and share alike, if more than one; and in default of Issue to be lawfully begotten by him, to be at her own disposal. There being Children of the Testator by his Wife, held that the Wife took only for life, with remainder to the Children as Tenants in common in fee.

This decision not held by the Bar to be satisfactory.

The *Vice-Chancellor* stated, that no authority would warrant him in construing the words "Leaving Issue," as meaning Issue living at the death. That leaving Issue, as applied to real Estate, imported a general failure of Issue, and brought the Case within the authorities cited by the Plaintiff.

That taking the intention to be, that the Estate should only go over upon a general failure of the Issue of the Grandson, the whole Will would be reconciled by construing the word Heirs of such Issue, as Heirs of the body, and then not even the particular intent would be sacrificed to the general purpose.

That the words, "dying without leaving Issue," might of course be restrained by other expressions in

(*h*) 6 Taunt. 94.

1820.

FRANKLIN v. LAY.

the Will, to Issue living at the death. As the general words, " in default of Issue," might also be, but not by words of limitation superadded to the Issue.

Reg. Lib. A. 1819. fol. 1035.

BASKETT *v.* TOOSEY.

1822. 10th May.

Commission for examination of Witnesses directed to Bencoolen *in India, notwithstanding the* 13 *Geo.* 3. *c.* 63. *s.* 44.

THE Plaintiff, resident at *Bencoolen* in the *East Indies*, brought an Action here against the Defendant, and filed a Bill for a Commission for the Examination of Witnesses at *Bencoolen* in support of his Action.

Mr. *Hinde* now moved for such Commission upon the usual affidavit of the materiality of the Evidence sought.

Mr. *Bell* opposed the Motion, upon the ground, that under the Statute of the 13 Geo. 3. c. 63. s. 44, it was competent to the Court of Law where the Action was brought, to award a Writ in the nature of a Mandamus or Commission to the Chief Justice and Judges of the Supreme Court of *Fort William*, or the Judges of the Mayor's Court of *Madras*, *Bombay*, or *Bencoolen*, to take the Examination of Witnesses.

Mr. *Hinde*, in reply:—

By the 42 Geo. 3. c. 29, the Settlement at *Bencoolen* was reduced, and made a Factory, subordinate to the Presidency of *Fort William*, and there is now no Mayor's Court at *Bencoolen*, which place is distant 1800 miles from *Fort William*: and it would be impossible or, at least, very difficult, and create an enormous expense, to

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BASKET v. TOOSEY.

bring the Witnesses such a distance to *Fort William* to be examined. It was thought proper therefore, to apply to this Court for a Commission to be directed at once to *Bencoolen*.

The *Vice-Chancellor* granted the Motion.

Reg. Lib. A. 1821, fol. 1366.

1822. 4th May.

COX *v.* CHAMPNEYS.

The Defendant being in contempt for want of an Answer, afterwards put one in, and an order for his discharge was obtained upon payment or tender of the Costs of Contempt.—The Costs were tendered but not accepted. Afterwards the answer was excepted to and referred, and after Warrants to proceed before the Master, the Defendant submitted to answer the exceptions. The Plaintiff did not proeed immediately upon the former process of Contempt, but waited for an answer to the Exceptions. Held, that an Order for time to answer the Exceptions obtained by the Defendant, was regular.

THE Defendant was in Contempt for want of an Answer, and was taken into custody. He afterwards put in an Answer, and on the 12th *March* 1822, an Order was made for his discharge on payment or tender of the Costs of his Contempt, (Reg. Lib. A. 1821, fol. 851.) and he was discharged accordingly. But the Costs of his Contempt were not accepted by the Plaintiff.

On the 22d *March* 1822, Exceptions were taken to the Answer, and the same were on the 3d *April* following referred (Reg. Lib. A. 1821. fol. 928). After Warrants before the *Master*, the Defendant undertook to answer the Exceptions, and to put in his Answer at the next Seal, being the 16th *April*; but on the 16th, in-

stead of putting in his Answer, he obtained an Order for a month's time to answer the Exceptions. (Reg. Lib. A. 1821. fol. 1046).

1822.

Cox v. Champneys.

On the 27th *April* Notice was given of a Motion to discharge the Order of the 16th *April* for irregularity, and Mr. *Pemberton* now moved to discharge the Order for time, insisting that the Plaintiff had a right to resume the former process of Contempt, as the Costs of the Contempt had not been accepted, and the Answer was insufficient, Exceptions having been filed and submitted to; and he cited *Hill* v. *Turner* (*a*), and the cases of *Boehm* v. *De Tastet* (*b*), and *Colson* v. *Graham*. (*c*)

Mr. *Wakefield, contrà*:—

After the Answer was put in, and the Costs were tendered, the Defendant was not in Contempt, but was entitled to move for time to answer the Exceptions.

The Vice-Chancellor:—

On the Exceptions being submitted to, the Plaintiff might have resumed the former process of Contempt, but having consented to wait for a further Answer, he waved that right; and he cannot be considered as waving that right conditionally only until the 16th *April*; the Defendant was therefore entitled to the ordinary time allowed for answering exceptions.

Motion refused.

(*a*) 2 Ves. & Bea. 372.
(*b*) · Ves. & Bea. 324.
(*c*) 1 Ves. & Bea. 331.

1822.
13th June.

EDWARD JENNEY and JANE HUMPHREYS (Widow of *Henry Humphries*), *v.* CHARLES ANDREWS, JOHN NEWMAN, CHRISTOPHER TADDY, and JOHN TULLOCK.

A Bankrupt having a power of appointment over money, to be executed only by Will, made his Will, disposing of the Property, and then became bankrupt; and afterwards obtained his Certificate, and died without revoking his Will. Held that the Appointee by the Will is a Trustee for the Creditors of the Bankrupt, who became such after he had obtained his Certificate.

BY a Settlement in *April* 1808, made previously to the Marriage of *Henry Humphries* and *Jane* his Wife, a moiety of 5,599*l.* 12*s.* 9*d.* three per cents became vested in trust, for such uses (if there should be no Children of the Marriage,) as *Henry Humphries* should by his last Will and Testament in writing, or any writing in the nature of a Will, or any Codicil or Codicils executed by him in the presence of and attested by two or more credible Witnesses, direct, limit, or appoint, and for want of such direction, limitation, and appointment, in trust, for the Plaintiff *Jane Humphries*, her Executors and Administrators. *Henry Humphries* being indebted to the Plaintiff *Edward Jenney*, in the Sum of 4,500*l.*, assigned or appointed his Interest to *Jenney*, by Indenture, 21st *August* 1815, as a security for the Debt. On the 15th *November* 1815, a Commission of Bankruptcy issued against *Henry Humphries*; the Defendants, *Taddy* and *Tullock*, and *Newman*, were chosen Assignees; and *Andrews* and the Plaintiff *Jenney*, the Trustees under the Settlement, proved a Debt under the Commission, on account of a Bond given to them by the Bankrupt, for securing a Sum of Money, as part of the Trust Funds of the Marriage Settlement; and received a Dividend, which was added to the Trust Property, a moiety of which the Bankrupt had power to appoint by his Will.

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JENNEY and Another v. ANDREWS and Others.

Henry Humphries, in order more effectually to secure *Jenney*, on the 29th *August* 1815 made his Will in the presence of two Witnesses, and thereby appointed his Interest in the Trust Monies to *Jenney*, his Executors, Administrators, and Assigns, in trust, to raise the said Sum of 4,500*l.* and Interest, and subject thereto, in trust for the Plaintiff *Jane Humphries*.

Henry Humphries died on the 10th *May* 1820, without Issue, having previously obtained his Certificate, and *Jane Humphries*, the Plaintiff, proved the Will. The Plaintiff *Jane Humphries* claimed the absolute Interest in the Money and the Prayer of the Bill was accordingly. On the other hand, the Assignees of *Humphries* the Husband claimed the Money.

Mr. *Horne* and Mr. *Roupell*, for the Plaintiffs:—
The Bankrupt had a Power of Disposal only by Will; and the Property appointed could not therefore be Assets till after his death. But as the Bankrupt obtained his Certificate, this Property, acquired subsequently, cannot pass to the Assignees.

Mr. *Sugden* for the Assignees:—
The Certificate is not mentioned in the Pleadings, and was never heard of till now. The Bankrupt meant to execute the Power by his Will; and although a Will is ambulatory, and not consummated till the death of the Testator, yet the Power is sufficiently executed to create a Trust for Creditors; and the Will for this purpose is operative from the moment it was executed.

The VICE-CHANCELLOR:—
Where there is a general Power of Appointment by

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Will, and an Appointment is made, the Appointee is a Trustee for Creditors; but it is not for Creditors at the time of the execution of the Will, but at the death of the Testator. The Certificate of the Bankrupt deprives the Assignees of all Claim for the Benefit of the Creditors under the Commission.

Reg. Lib. A. 1821, fol. 2514.

1822. 15th June.

RICHARDSON *v.* WARD.

Receiver, allowed the Costs of his application, to be discharged.

AN Application was made by Mr. *Spence* on behalf of *Christopher Swale*, the Receiver appointed in this Cause, that upon passing his Accounts before the *Master* the Recognizance entered into on being appointed Receiver might be vacated, and that the Costs of and incidental to this Application might be retained by him out of the Balance in his hands.

Mr. *Parker* objected only to that part of the Application respecting the Costs thereof. It appeared from an Affidavit of *Christopher Swale*, and his Medical Attendant, that he had consented to be appointed Receiver early in the year 1820, at the urgent request of two of the Defendants, and had acted in that capacity since that time; that late in the same year his Eyesight became affected, and he had entirely lost the use of one Eye, and was unable to read or write; that he was subject to giddiness in the Head, which impaired his Memory, and that such affection was increased by the anxiety arising from his situation as Receiver.

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RICHARDSON v. WARD.

It was, among other things, ordered that the *Master* do tax the said *Christopher Swale* his Costs of this Application, and incidental thereto, and the amount thereof be allowed on passing his Accounts.

Reg. Lib. B. 1821. fol. 1933.

CHERVET *v.* JONES.

1822. 20th June.

Bill founded on a Letter not stamped. Decree made, but directed not to be delivered out until the Letters stamped were produced to the Registrar. Whether the answer of one Defendant can be read against a co-Defendant as to Costs. Qu. Such answer will clearly ground an inquiry before the Master as to the fact.

THIS was a Bill against the Defendants, as Executors, to establish, by a Letter, a demand against the Assets. It was objected the Letters were not stamped. The *Vice-Chancellor* directed the Cause to go on, but that before the Decree was delivered out the Letters should be produced to the Registrar, stamped.

It appeared that *Ebenezer Jones*, one of the Executors, who was also Residuary Legatee, was at first desirous of paying the Plaintiff's demand, but his Co-Executrix, *Mary Jones*, the other Defendant, refused, and as the Assets stood in their joint names, he was unable to pay the same.

It was admitted, as to Costs, that the Plaintiff must have a Decree for them against both the Defendants, out of the Assets, but *Ebenezer Jones*, who was desirous of paying the Debt, insisted the Executrix *Mary Jones* ought to repay the Costs of the Suit to him, as her refusal to pay the Debt occasioned the Suit; and contended his Answer might be read, to show that he was

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CHERVET v. JONES.

willing to pay the Debt, but that the other Executrix refused. On the other hand, it was contended that an Answer of one Defendant cannot be read even on the subject of Costs against another Defendant.

The VICE-CHANCELLOR :—

There being no issue joined between the Defendants, you cannot read the Answer of one Defendant against another even as to Costs, other than as a suggestion upon which the Court may direct an inquiry before the *Master.*

Mr. *Heald,* and Mr. *Koe,* for the Defendant *Mary Jones.*

Mr. *Combe,* for the Defendant *Ebenezer Jones.*

The Decree, so far as related to Costs, after directing the Costs of the Suit to be taxed by the *Master,* and to be paid by the Defendants out of the Estate of the Testator, proceeded thus: " Let the said *Master* inquire and state to the Court, whether any and what application was made by the Plaintiff, *Catherine Chervet,* to the Defendant, *Ebenezer Jones,* in respect of the demand in the Bill mentioned, and what was the conduct of the said Defendant upon such application; and let the said *Master* be at liberty to state any matter specially at the request of either Party, and for the better taking the accounts, &c. [usual directions], and reserve the consideration of all further directions, and of the Costs of the said Inquiry; and also upon whom the Costs of the Suit shall ultimately fall, until after the said *Master* shall have made his Report, and any of the said Parties shall

be at liberty to apply to the Court as there shall be occasion; and it is ordered that the Costs of these applications shall be considered as Costs in the Cause."

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CHERVET v. JONES.

Reg. Lib. A. 1821. fol. 2518.

1822. 22d June.

HALL v. DE TASTET.

The Court cannot extend the time mentioned in a Commission for the examination of Witnesses.

A COMMISSION for the Examination of Witnesses returnable on a day certain expired on the morrow, and as all the Plaintiff's Witnesses had not been examined, Mr. *Cooke* moved that the Return of the Commission might be extended until the Seal before next Michaelmas Term, and cited several instances where it had been done; and mentioned that it was a common practice, and that the Clerks in Court considered it as such.

Mr. *Bell* opposed the Motion, as being unprecedented.

The *Vice-Chancellor* said, it did not appear that the point was contested in the Cases alluded to by Mr. *Cooke*, that where the Commission was returnable on a day certain an order could not be made to extend the time.

Motion refused, without Costs.

1822.
22d June.

MUDDLE and others v. FRY and others.

The words Worldly Estate *held to pass real and personal Estate.*

An Heir at Law is not entitled to have a Case sent to Law, if the construction of a Will be clear.

THE Testator, *William Fry*, by his Will, after some religious passages, more lengthened than is usual in Wills, and directions as to his funeral, proceeded thus:— "As to my *worldly Estate*, I will and positively order that all my lawful Debts be paid first; I give and bequeath unto the four Children of my late Brother, *Thomas Fry*, of the Parish of *Lingfield*, in the County of *Surrey*, the sum of 25*l.* of lawful money of Great Britain, to be equally divided between them. Also I give and bequeath unto the Daughter of my Nephew *William Fry*, Son of my Brother *John Fry*, the sum of 10*l.* of like lawful money; likewise I give and bequeath unto my said Brother *John*'s Daughter, *Clare*, the sum of 5*l.* of like lawful money. I also give and bequeath unto her Sister *Mary*'s Child, the sum of 5*l.* Also I give and bequeath unto *Thomas Fry*, Son of my Brother *John Fry*, the sum of 10*l.* of like lawful money. Also I give and bequeath unto *Mary* and *Sarah*, Daughters of *Robert Fry*, the sum of 5*l.* each. I also give and bequeath unto my three Sisters Children and Grandchildren the sum of 100*l.*, to be equally divided among them. Also I give and bequeath unto by Brother *Edward Fry*, senior, the sum of 40*l.* of like lawful money. Also I give and bequeath unto my Nephew *Edward Fry*, junior, the sum of 100*l.* of like lawful money. It is further my will, that the Daughter of the said *William Fry*, and the Daughters of the said *Robert Fry*, shall not receive their money until they shall have attained the age of twenty-one years. Lastly, I do nominate, constitute, and appoint *Edward Fry*, senior, of the Parish of *Mayfield*, in the County of *Sussex*, and *Edward Fry*, junior, of the Parish of *Ulcomb*, in

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MUDDLE and others v. FRY and others.

the County of *Kent*, to be my Executors to this my last Will and Testament. And I do hereby utterly revoke, disallow, and disannul all former *bequeathes* (*a*), Wills, and Legacies by me heretofore in any wise left or made, declaring, ratifying, and confirming this and no other to be my last Will and Testament. In witness whereof I have hereunto set my Hand and Seal, this 28th day of March, in the year of our Lord 1807. And it is further my will, that in case there should be any bad Debts, (that is to say,) not recoverable, then each person shall receive in proportion according to such loss; and if my worldly Estate should amount to more than here bequeathed, then it is my will that each person shall receive his proportion according as heretofore bequeathed."

The Will was attested by three Witnesses.

The Testator died seised of Freehold Estates in the County of *Kent*, and unmarried.

The Bill was filed on behalf of the Legatees, for the usual Accounts of the personal Estate, and in case the same was insufficient for the payment of his Debts, funeral, and testamentary expenses and Legacies, that the deficiency might be supplied by the Rents and Profits, and a Sale of the real Estates; and in case of a surplus, that the same might be divided amongst the Legatees in proportion to their Legacies; and that if the Court should be of opinion that the real Estate was not liable to the payment of such part of his Legacies as his personal Estate was insufficient to discharge, then that so much of the personal Estate as was applied in payment of the Debts might be decreed to be raised by Sale or Mortgage of the real Estate.

(*a*) So in the Will.

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MUDDLE and others v. FRY and others.

The Defendants, the Heirs in Gavelkind, or claiming under them, insisted by their Answers, that the real Estate was not charged by the Will with the payment of Debts.

The personal Estate was sufficient for the payment of the Debts, but not of the Legacies.

Mr. *Hart*, and Mr. *Barber*, for the Plaintiffs.

The *Vice-Chancellor* desired to hear the Defendants Counsel.

Mr. *Sugden*, and Mr. *Blenman*, for the Defendants:— The real Estate is not affected by this Will. The Legacies given are merely money Legacies. The words " Worldly Estate," as used in this Will, do not include real Estate, and if they did, it amounts only to a charge of the Debts upon such Estate. " Worldly Estate," in the first part of the Will, must have the same meaning as those words have in the latter part of the Will, which apply only to personal Estate. Those words are used in the same sense as worldly affairs contrasted with spiritual affairs, to which the Testator has adverted at so unusual a length in the introduction to his Will. In those cases where the words " Worldly Estate," have been held to pass real Estate, there has been some other mention of real Estate, showing an intention to operate upon such real Estate. In *Doe* dem. *Spearing* v. *Buckner* (*b*), the Testator, in the commencement, expressed his intention to dispose of his Estate and Effects both real and personal, and by a residuary clause gave " all the rest of his Estate and Effects of what nature soever to *A*. and *B*. their Executors and Administrators, upon trusts applicable only to personal

(*b*) 6 T. R. 610.

Estate and the Court held, that seeing there was nothing in the residuary Clause to pass the Estate, and that seeing there was nothing in the Will to make it necessary for the Trustees to take to perform any trust in them, the Heir-at-law stands intrenched in his right as Heir, and cannot be removed from it.

The Defendants being Heirs-at-Law have a right to a Case, we are therefore desirous, without proceeding in the argument, to have a Case sent to Law.

The VICE-CHANCELLOR :—

It is wholly in the discretion of the Court whether a Case shall or not be sent to a Court of Law, and subject to any further argument you may use ; the point appears to me so clear that I am not willing to send it to Law.

Defendant's Counsel continued.

In *Newland* v. *Marjoribanks* (c) there was a devise of all the rest, residue and remainder of the Testator's Estate, and the question was, whether the devise was restricted to personal Estate by directions applicable to personalty only. In that case the real Estate was devised to trustees and their heirs for a term of ten years. The Court held that the heir was entitled; and the determination shows how very clearly the intention must be expressed in order to disinherit an heir.

In Doe dem. *Hurrell* v. *Hurrell* (d), the Testator, after payment of his just debts, funeral, testamentary, and other incidental expenses, gave and bequeathed *all the rest and residue of his estate and effects whatsoever and wheresoever*, unto his Brother, his Executors, Administrators, and Assigns, upon certain trusts ; and it was held that the real Estate did not pass under the Will.

(c) 5 Taunt. 268. (d) 5 Barn. & Ald. 18.

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MUDDLE and others v. FRY and others.

The provision in the Will, that the daughter of *William Fry*, and the daughters of *Robert Fry*, shall not receive their money until they attain twenty-one, and as to bad debts, shows, that he had personal Estate only in contemplation. The intention must appear plainly, much plainer than appears on this Will, before the Court can disinherit Heirs-at-Law.

The VICE-CHANCELLOR:—

The words " My Worldly Estate," unless qualified by other expressions, necessarily comprise both real and personal Estate, and there is nothing in this Will which amounts to such a qualification.

1822. 25th June.

RAYNER *v.* OASTLER.

THIS was a Bill to redeem a Mortgage. The Defendant set up a twenty years Possession. The Plaintiff proved by parol evidence acknowledgments of the Mortgage within twenty years.

The *Vice-Chancellor* re-stated the principles he had laid down in *Hodle* v. *Healey* (*a*), and decreed a Redemption.

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

Mr. *Agar*, and Mr. *Treslove*, for the Defendant.

(*a*) Ante, p. 183.

BALL v. TUNNARD.

1822.
26th June.

THIS was a Motion, supported by Mr. *Bell*, Mr. *Heald*, and Mr. *Pepys*, to dissolve an Injunction which had been obtained against Trustees.

Mr. *Sugden* and Mr. *Bickersteth* appeared for the *cestuis que trust*, to oppose the Motion, though they were not Parties to the suit, and cited, as an authority for so doing, *Creagh* v. *Nugent* (*b*).

The VICE-CHANCELLOR :—
The *Cestuis que Trusts*, being no Parties to the Suit, cannot be heard upon this Motion; the Case cited was under very special circumstances, and has no application here.

INGHAM v. BICKERDIKE.

1822.
26th June.

The Court cannot remove a testamentary Guardian, but will appoint a proper person to superintend the maintenance and Education of the Infant.

UPON an application to remove Testamentary Guardians, and for a reference to appoint others.

The VICE-CHANCELLOR,
Said, The Court will not make an order to remove a Testamentary Guardian; but a proper Case being made, the Court will refer it to the *Master* to appoint some other person to superintend the Maintenance and Education of the Infant. The order made was as follows:

"This Court doth order, that it be referred to Mr. *Dowdeswell*, one, &c. to approve of a proper person to superintend the person and education of the Plaintiff, *Theophilus Hastings Ingham*, instead of the Defendants

(*b*) Mos. 354.

J. H. and *J. C.*; and it is ordered, that the said *Master* do state upon what evidence he approves of any particular person to act as such Guardian; and it is ordered, that the said *Master* do approve of a place for the maintenance and education of the said Infant, and he is to state the same, with his opinion thereon, to the Court; and it is ordered, that the said *J. H.* and *J. C.* be restrained from interfering with the person of the said Infant Plaintiff or his Estates (*a*).

Reg. Lib. A. 1821, fol. 1841-2.

1822.
26th June.

ANON.

A Writ of Ne exeat regno *cannot be obtained upon an Affidavit made before the Bill is filed.*

MR. *TRESLOVE* moved to discharge an Order that had been obtained by Mr. *Wakefield* for a Writ of *Ne exeat regno.* He grounded his application on the circumstance that the Writ was obtained upon an Affidavit

(*a*) The following cases may be consulted on the superintendance of the Court of Chancery over testamentary Guardians. *Anon.* 1 Sid. 424. *Foster* & *Denny*, 2 Ch. C. 327. S. C, 1 Eq. Ab. 261. *Bedell* v. *Constable*, Vaug. 180. *Morgan* v. *Dillon*, 9 Mod. 135, reversed in the H. L. 4 Br. P. C. 306. Ed. Toml. *Duke of Beaufort* v. *Berty*, 1 P. Wms. 704. *Eyre* v. *Countess of Shaftesbury*, 2 P. Wms. 106. *Roach* v. *Garvan*, 1 Ves. 160. Where Lord *Hardwicke* observes, "The Court sometimes, though rarely, removes a testamentary Guardian; but if he behaves not to the satisfaction of the Court, orders regulating his conduct are frequently made upon him." *Spencer* v. *Earl of Chesterfield*, Amb. 146. *O'Keefe* v. *Casey*, 1 Sc. & Lef. 106. Ex parte *Earl of Ilchester*, 7 Ves. 381. See also *Treatise on Equity*, Ed. 5. *Fonb.* 2d. vol. 298 *n.* Vin. Abr. art. *Guardian.* 2 Com. Dig. 521, and 1 Woodeson's Lect. 461.

sworn before the Bill was filed; and observed that the Affidavit not being in a Cause the Deponent could not be prosecuted for perjury; and the Court would not issue a process affecting the liberty of the subject without an Affidavit upon which the Party could be indicted if he has sworn falsely. He cited *Ex parte Brunker* (*a*), where Lord *Talbot* says, "In all my experience I never knew this Writ of *Ne exeat* granted, or taken out, without a Bill in Equity first filed." The Writ therefore cannot be obtained unless on a Bill filed, and cannot of consequence be obtained upon an affidavit filed before the Bill is filed. It was not known to your *Honor* that the Bill was not filed; if it had, the Writ would not have been granted.

Mr. *Wakefield, contrà.*

The Bill is now filed, and though Lord *Talbot* appears to have said what is mentioned in the Case cited, yet in a note to that Case the Reporter seems to have questioned the propriety of the decision, and cites the case of *Lloyd* v. *Carter* from *Precedents in Chancery* (*b*), where the Writ was granted, though no Bill was filed; which report, he says, is warranted by the Registrar's Book. On bringing at Action at Law the Affidavit is not made in, but introductory to, a cause. So a Commission of Bankruptcy is founded on an Affidavit made previously to the issuing of the Commission.

Mr. *Treslove* in reply :—

In the Cases at Law, and of a Commission of Bankruptcy, the Affidavit is a necessary preliminary to an Action, or a Commission, but an Affidavit is not necessary to warrant a Bill for a *Ne Exeat*.

(*a*) 3 P. Wms. 311. (*b*) P. 171.

1822.

ANON.

The VICE-CHANCELLOR:—

The Writ of *Ne exeat regno* is given in aid of an equitable demand, but it must previously appear by a Bill filed, that there is an equitable demand. And the Affidavit is in support of the Bill.

Order made as prayed, with Costs.

1822.
4th July.

BUNYAN *v.* MORTIMER.

Bill against Husband and Wife in respect of a demand against Wife as Executrix. Husband a Bankrupt and abroad, and Attachment had issued against him for want of an Answer. Such an Attachment will not be granted against the Wife, until an order has been obtained that the Wife should answer separately, and the Wife must have notice of the Motion for that order.

THE Bill was filed against Husband and Wife, in respect of a demand on the Wife, as Executrix of a deceased person. The Husband, who was a Bankrupt, had appeared for himself and his Wife, and had gone abroad, and an Attachment had been issued against him for want of an Answer.

Mr. *Bickersteth* moved for leave to issue an Attachment against the Wife for not answering, the Parties being unwilling to issue the same without the sanction of the Court. I have not found any Case exactly in point, but *Bell* v. *Hyde* (*a*) applies in principle.

The VICE-CHANCELLOR:—

The proper course is, first to move that the Wife may answer separately, and Notice of that intention must be given to the Wife.

(*a*) Precedents in Chancery, p. 328.

BRYDGES *v.* STEPHENS.

1821.
4th July.

Bill will lie to restrain a Tenant for Life from cutting down of Underwood of an insufficient growth.

APPLICATION was made by Mr. *Bell* and Mr. *Ellis*, on the coming in of the Answer, to dissolve an Injunction granted by the Vice-Chancellor, to prevent the cutting of Underwood by a Tenant for Life otherwise than according to a due course of husbandry.

Mr. *Sugden* proposed to read Affidavits in Answer to the Motion. It was objected that Affidavits could not be read after an Answer put in, but the Vice-Chancellor over-ruled the objection.

The Motion then stood over to give an opportunity to the Plaintiff to file counter Affidavits.

On this day the Motion was renewed.

Mr. *Bell*, and Mr. *Ellis*:—
There is no instance of an Injunction to restrain the cutting of Underwood; no case, unless of destruction, as by grubbing up Underwood, where the Court had interposed; and it appears, from our Affidavits that this the Underwood was of a proper growth for cutting.

Mr. *Sugden*, *contra*, contended from the Affidavits that the Underwood was not of a proper growth to be cut.

The VICE-CHANCELLOR.
Upon the same principle on which the Court restrains the cutting of Timber of insufficient growth, it will re-

1822.

BRYDGES v. STEPHENS.

strain the cutting of Underwood of insufficient growth (*a*). But in this case the weight of Evidence is in favour of the sufficiency of the growth of this Underwood according to the custom of the Country; and the Injunction must be dissolved.

(*a*) See also the opinion of the *Lord Chancellor* in *Hampton* v. *Hodges*, 8 Ves. 105.

1822. 5th & 10th July.

A Surety under an Annuity Deed, having redeemed the Annuity after the Bankruptcy of the Grantor, sued the Grantor upon a Bond of Indemnity, and obtained Judgment for Arrears since the Bankruptcy, and the price of redemption, (3 B. & A. 186.) *This Court will not restrain him by Injunction from suing out Execution for the Arrears:* quære, *as to the price of Redemption.*

WATKINS *v.* FLANAGAN.

THIS was a Motion by the Defendant to dissolve an Injunction obtained by the Plaintiff for want of an Answer. The Plaintiff showed Cause on the Merits.

In this case the Plaintiff, *Watkins*, had by a Deed, dated 5th March 1811, granted an Annuity of 300*l.* to a person of the name of *Martin*. The Defendant *Flanagan* joined in that Grant, as a surety for *Watkins*. The Deed contained a Proviso, enabling Plaintiff or Defendant to redeem on payment of 2,175*l.* and all Arrears; at the same time *Watkins* gave *Flanagan* a Bond of Indemnity.

In 1812, *Watkins* became Bankrupt. At that time a small Arrear was due in respect of the Annuity.

(*a*) S. C. *Flanagan* v. *Watkins*, 3 B. & A.

In *April* 1813 *Flanagan* agreed with *Martin* that he (*Martin*) should prove under *Watkins*'s Commission for the Value of his Annuity, and should assign the proof to him, *Flanagan*; and then that *Flanagan* should redeem the Annuity. *Martin* accordingly proved; *Flanagan* paid the Redemption Money and Arrears; and *Martin* by Deed assigned his proof to *Flanagan*.

In 1819 *Flanagan* sued *Watkins* on his Bond of Indemnity. He alleged three Breaches: first, that he, *Watkins*, had not indemnified him in respect of Arrears previously to 5th *March* 1813; secondly, in respect of Arrears between 5th *March* 1813, and the time of the Redemption; thirdly, in respect of Money paid by *Flanagan*, for Redemption. *Flanagan* obtained Judgment on the second Breach for Arrears between 5th *March* 1813, and time of Redemption; and on the third Breach for the sum of 2,175*l*.

The Judgment in this last Breach was said to have been entered up by tacit consent of Parties, but it appears to have been warranted by the reported Judgment in the Court of King's Bench.

The present Bill was filed to restrain *Flanagan* from taking out Execution.

The VICE-CHANCELLOR.

Before 49 Geo. 3. c. 121, (*a*) usually called Sir *Samuel Romilly*'s Act, if an Annuity was secured by a Bond only, and that bond was forfeited previously to the Bankruptcy, the Annuitant was entitled to prove under the Commission upon his Bond, for the value of the

(*a*) Repealed by 6 G. IV. c. 16.

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Annuity. If the Annuity was secured by a Covenant also, the Annuitant might elect to prove under the Commission for Arrears due at the Bankruptcy, and to proceed by Action against the Bankrupt for future Arrears notwithstanding his Certificate. I am not aware that any Case is reported as to the right of the Annuitant against a Surety, where the Annuitant had proved under the Commission by virtue of a forfeited Bond; but, in principle, it is clear that he could not sue the Surety for the value of the Annuity proved, but could only proceed against the Surety for past and accruing Arrears; and if he recovered such Arrears from the Surety he would have been a Trustee for the Surety in respect of all sums to be received by way of Dividend upon his Proof. And if such Dividends had happened to exceed the amount of all Arrears which had or should become due, then the Excess would belong to the Bankrupt's Estate. If such was the law before Sir *Samuel Romilly*'s Act, then the Question is, How has that Act affected the Point? By the decision of the Court of King's Bench, in *Flanagan* v. *Watkins* (*b*), a Surety for an Annuity, who makes payments after the Bankruptcy, has only proof under the Commission, by virtue of the eighth Section, in respect of Payments made for Arrears of the Annuity due at the time of the Bankruptcy; and as to all other Payments made by the Surety, the Bankrupt remains liable to the Surety, notwithstanding his Certificate. It may be doubted whether the purpose of the Legislature for the relief of the Bankrupt, is not therefore in some degree disappointed (*c*). With respect to the Annuitant himself, the seventeenth Section of the Act, which gives him proof under the Commission for the value of

(*b*) 3 B. & A. 186.

(*c*) Since remedied by 6 G. IV. c. 16. s. 55.

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the Annuity, expressly declares that the "Certificate of any Bankrupt, under whose Commission such proof shall be or *might* have been proved, shall be a Discharge of such Bankrupt against all demands in respect of such Annuity, in the same manner as the Certificate would discharge the Bankrupt with respect to any other Debt which might have been proved;" as, according to the decision in the Court of King's Bench, this seventeenth Section has no application to the Case of the Surety, it necessarily follows, that as to all payment made by the Surety, and not comprised within the 8th Section, the Surety is at liberty to proceed against the Bankrupt as if the Act of the 49th *George* the Third, had never been passed; and consequently in respect of payment made by him for Arrears which have accrued due subsequent to the Bankruptcy, he is entitled to sustain his Action against the Bankrupt, and upon that ground the Injunction in this Case cannot be supported.

The Court of King's Bench seems to have been of opinion that the Plaintiff could maintain his Action also for the amount of the Redemption Money; and this was not disputed in the Argument of Counsel; yet it is to be observed that the Surety could not have been compelled to redeem; and that the accruing Arrears were the only Debt due, or which might ever become due.

In the Case of *Welsh* v. *Welsh* (*d*), Lord *Ellenborough* is reported to have stated, that the Surety cannot compel the Annuitant to prove for the value of the Annuity under the Commission of the Bankrupt. That point does not arise in this Case; for here the Annuitant has

(*d*) 4 Maule & Selwyn, 333.

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proved the value under the Commission; and I consider it to be clear, that the Annuitant is to be deemed a Trustee as to the Dividends payable under such proof, for the Surety, to the extent which the Surety is damnified; and if the Annuitant had not actually proved under the Commission, I should have thought that the Surety had an Equity to compel such proof (e).

1822. 6th & 11th July.

BARBER and another *v.* CRAWSHAW and others.

A Party in contempt who obtained an order for a Commission to take his "Plea, Answer, or Demurrer," may put in a Plea.

Quære—*If the Commission had been merely to take his answer, whether he could have put in a Plea.*

A BILL of Revivor and Supplement was filed on the 14th *February* 1822.

On the 19th of *April* 1822, an Order for a month's time to answer was obtained by *C. Attwood* and *T. C. Smith*, two of the Defendants.

On the following 14th of *May*, an Order was obtained on their behalf for three weeks further time to answer.

On the 15th *June* following, an Attachment issued against them for want of an Answer, and *C. Attwood* only was taken into Custody; but the Sheriff of Surrey returned that both *C. Attwood* and *T. C. Smith* were attached, and that he had their Bodies.

On the 25th of *June*, *C. Attwood* filed a Plea; and on the 28th of *June*, *T. C. Smith* also filed a Plea, which was taken under a Commission to *Brighton*, to take the Plea, Answer or Demurrer of the Defendants.

(e) This is now expressly provided by 6 Geo. IV. c. 16. s. 55.

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A Motion was now made that the Pleas might be taken off the file for irregularity.

Mr. *Barber*, in support of the Motion :—

After a Party is in Contempt for want of an Answer, he cannot put in a Plea.

In *Newton* v. *Dent* (*a*), Lord *Hardwicke* set aside a Plea filed by a Defendant who had been attached for want of an Answer. In *Curzon* v. *De la Zouch* (*b*), a Demurrer and Answer filed by a Defendant, who had been attached for want of an Answer after orders for time to plead, answer or demur, not demurring alone, was ordered to be taken off the file. In *Broughton* v. *Jones* (*c*), your Honor determined that after an Attachment for want of an Answer, the Defendant can only answer; if an Answer were put in and were insufficient, we might proceed in the process of Contempt already issued; but if a Plea be put in, and over-ruled, and then an insufficient Answer is put in, we cannot resort to the previous process of Contempt.

Mr. *Bell*, and Mr. *Garratt*, *contrà* :—

In *Newton* v. *Dent* an Order for time to answer only had been obtained, and therefore it was held a Plea was irregular. But in *Roberts* v. *Hartley* (*d*) it was held, that on an Order for time to answer, a Plea might be put in, it being upon *oath*, and not considered as a dilatory proceeding. The same doctrine had been previously held in an anonymous case in *Peere Williams* (*e*), and is

(*a*) 1 Dick. 234.
(*b*) 1 Swan. 185.
(*c*) 3 Madd. 42.
(*d*) 1 Bro. C. C. 56. S. C. 2 Dick. 554.
(*e*) 2 P. Wms. 464.

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stated *arguendo* in *Jones* v. *Earl of Strafford* (*f*). *Curzon* v. *De la Zouch*, and *Broughton* v. *Jones*, were Cases of Demurrer, which are not allowed to be put in by a Defendant, who is in contempt. A Plea therefore may be filed under an Order for time to answer only, and the being in Contempt can make no difference. In this case a Commission was obtained after the Party was in Contempt, to take the Plea, Answer, or Demurrer of the Defendants, and the Plaintiffs joined in the Commission. The Terms of the Order for a Commission expressly authorized the putting in of a Plea.

The *Vice-Chancellor* desired the Registrar to inquire as to the Practice.

July 11th.

On this day the Registrar stated the result of his inquiry to be, that the Plea was regularly filed; and the *Vice-Chancellor* observed, that his only doubt was, whether, after a Party was in Contempt, he was entitled to a Commission, to take "his Plea, Answer, or Demurrer;" or whether it ought not to be merely to take his Answer; but as the Commission in this Case was granted to take the Defendant's "Plea, Answer, or Demurrer," they were clearly authorized in putting in a Plea; no objection having been made to that Order; but his Honor desired not to be understood as giving an Opinion, that if the Commission had been merely to take the Defendant's Answer, they could have put in a Plea.

(*f*) 3 P. Wms. 80.

END OF PART II.

CASES

BEFORE THE

VICE-CHANCELLOR.

COATES *v.* COATES.

1821.
18th December.

A Person having in Articles of Partnership covenanted not to do certain acts after a specified period of time. The Court will not, before the arrival of that period, grant an Injunction to restrain him from acting in breach of his Agreement, nor for mischief, which is no breach at law of the Covenant between the Parties.

PARTNERSHIP Articles for fourteen years were entered into between two Brothers who practised as Surgeons, Apothecaries and Man-midwives. A power was given to either to dissolve the Partnership at the end of seven years, but it was provided that the party so dissolving the Partnership should not be at liberty to practise as a Surgeon, Apothecary or Man-midwife, except as a Physician, within a certain distance of Salisbury, where they resided, under a penalty of 2,000*l.*, to be recovered in an action in which it should only be necessary for the Plaintiff to prove the fact of Practice in breach of the Agreement.

The Defendant, one of the Brothers, gave notice to the other, the Plaintiff, that he would dissolve the Partnership at the end of the seven years, which would expire on the 1st of January 1822.

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COATES
v.
COATES.

The Bill was filed on the 31th November 1821, for a Decree to restrain the Defendant from practising in Breach of his Agreement, and for an *interim* Injunction to the same effect, and also to restrain the Defendant from soliciting business for himself, and from endeavouring to dissuade persons from employing the Plaintiff. The Bill alleged general Notice given by the Defendant, that he meant to continue his Practice as Surgeon, Apothecary and Man-midwife, and that he had solicited persons to employ him in that character when the Partnership should expire, and not so to employ the Plaintiff.

To this Bill there was a general Demurrer.

Mr. *Bell*, and Mr. *Wray*, in support of the Demurrer, cited *Collins* v. *Plumb* (*a*), *Fletcher* v. *Dych* (*b*), and *Woodward* v. *Gyles* (*c*).

Mr. *Horne*, and Mr. *Tinney*, *contrà*.

The VICE-CHANCELLOR:—

The only relief which this Bill seeks is an Injunction to enforce the Defendant's Covenant, but the time is not yet arrived when this Covenant is to operate; the suit, as far as it seeks to restrain the Defendant's practice, is brought therefore, not for relief against an existing wrong, but for relief against the possibility of a future wrong. It is very true, that the conduct of the Defendant, as stated in the Bill, affords a high probability that this future wrong will be committed; but it may be prevented, either by accident, or because the Defendant hereafter may be better advised. If the

(*a*) 16 Ves. 454. (*b*) 2 T. R. 32. (*c*) 2 Vern. 119.

Court is to act prospectively upon the possibility of future wrong, when the Bill is filed two months before the wrong can actually happen, it must equally act prospectively two years before the time of possible wrong, if the conduct of the Defendant furnish reasonable grounds for the apprehension of injury.

I am of opinion therefore, that this Court will not entertain a suit upon the mere speculation of possible mischief, which may never happen at all, and which cannot happen until a certain future period.

But it is said, that this Bill seeks not merely to restrain the Defendant's Practice contrary to his covenant after 1st January 1822, but to restrain him, in the mean time, from soliciting persons to employ him, and not to employ the Plaintiff after that period; and that this is an immediate and not a possible mischief. I agree wholly with the proposition that this conduct on the part of the Defendant is a mischief, and a present mischief; but the question is, whether it is a mischief against which he has so guarded himself by his contract with the Defendant, that he has a right to complain of it in a Court of Justice. In other words, whether this conduct on the part of the Defendant is a Breach of Covenant. If it be no Breach of the Defendant's Covenant at Law, then this Court cannot interfere, for it is to execute and not to make Agreements for Parties. I am of opinion, that the mere solicitation of future business not followed by actual practice after the 1st of January 1822, would be no Breach of the Defendant's Covenant at Law; and that it is therefore no ground of present relief in equity.

Demurrer allowed.

1821.
1st June.

REYNOLDS v. NELSON (a).

After a Decree for a specific Performance against a Defendant, he cannot proceed by Action at Law on the Contract for Damages.

THE Defendant after a Decree for Specific Performance of a Contract for the Purchase of an Estate, to which he submitted, brought an Action at Law against the Plaintiff in Equity for Damages in not completing his Contract within the time specified; and the Plaintiff in Equity now applied for an Injunction to restrain the Proceedings at Law.

The VICE-CHANCELLOR:—

My Decree proceeds upon the ground that the Defendant had dispensed with the time stated in the Contract. If the Plaintiff in Equity had before the Decree applied for an Injunction to restrain the Defendant from proceeding in an Action at Law to recover Damages, I should, upon the same principle, have then granted the Injunction; and *à fortiori*, I must grant it now. The Proceeding at Law is inconsistent with the Decree in Equity.

(a) The facts of this Case are stated ante, p. 18.

1821.
14th December.

LINGEN v. SIMPSON.

The Court will make interlocutory Orders for production, only for Security or Discovery, and will not anticipate the Decree.

A MOTION was made on behalf of the Plaintiff, that, without prejudice to any exceptions the Plaintiff might be advised to file to the Answer of the Defendant, the Defendant might in a week leave with his clerk in court the Reference Book No. 2, admitted by his Answer in this Cause to be in his custody; with liberty for the Plaintiff, his Clerk or Agents, to inspect or refer

1821.

LINGEN v. SIMPSON.

to the same for the purpose of the said Plaintiff's Trade; or that the same might be deposited in the hands of a third person in the town of *Birmingham* for the joint use of the Plaintiff and Defendant, with liberty for the Plaintiff, his Clerk, or Agents to inspect the same for the purposes of the Plaintiff's Trade; or that the said Book might be restored to the possession of the Plaintiff, with liberty for the Defendant to inspect and refer to the same, as the Court shall direct.

Mr. *Hart*, in support of the Motion, cited *Nutbrown* v. *Thornton* (a), and *Fells* v. *Read* (b).

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

The whole object of the suit and prayer of the Bill are, that the Plaintiff might be declared entitled to a copy of this Book for the purposes of his Trade.

The *Vice-Chancellor* refused the Motion, stating that the Court made Interlocutory Orders for Production only upon two principles; Security pending Litigation, and Discovery for the purposes of the Suit; and that the present Application sought an anticipated Decree.

Reg. Lib. B. 1821, fol. 242.

(a) 10 Ves. 159. (b) 3 Ves. 70.

1821.
14th March.

An Illegitimate Child may take, by particular description, before its Birth.

DAWSON v. DAWSON.

THOMAS CLARKE, by his Will, dated the 11th November 1817, devised and bequeathed as follows:—"I give, devise and bequeath all my Real Estates in the parishes of *Leybourn* and *Great Carlton*, unto my two Natural Children, *Mary Ann Simpson*, and *Thomas Simpson*, their Heirs and Assigns for ever, as Tenants in common and not as Joint Tenants; and I do hereby charge the same with an Annuity of 20*l.* to *Ann Simpson*, the Mother of my Natural Children, to be paid to her by equal half-yearly Payments, to be made immediately after my decease: And whereas the said *Ann Simpson* is in the family-way, and it is my will and desire, and I do hereby give and bequeath unto the Child or Children with which she may be *ensient* at the time of my decease, all the rest, residue and remainder of my Personal Estate, to hold to him her or them, and their Assigns, to and for their Use and Benefit; and in case of the decease of the said last-mentioned Child or Children during his or their Minority, I give and bequeath the same unto and to be equally divided between my surviving Natural Child or Children."

The Testator died on the 19th November 1817, two days after the date of his Will, without having altered or revoked it, leaving his said two Natural Children, *Thomas Simpson* and *Mary Ann Simpson*, him surviving.

Ann Simpson, mentioned in the Testator's Will as the Mother of his Children, was an unmarried woman, and

was *ensient* at the time of the Testator's Death; and on the 23d January following was delivered of two Children; one of them the Infant Plaintiff, *Simpson Clarke Simpson*, and the other born dead (*a*).

The Question was whether *Simpson Clarke Simpson* took under the Will.

Mr. *Treslove*, for the Infant.

Mr. *Parker*, *contra*, said that if the Testator had not died before the Birth of the Child, and *Ann Simpson* had afterwards married, and been *ensient* at his death, such legitimate Child would have taken under the Will, and therefore the Plaintiff could not take.

The Cases cited were *Cartwright* v. *Vawdry* (*b*), and *Gordon* v. *Gordon* (*c*).

The VICE-CHANCELLOR held that the obvious intention of the Testator was to give to the Child with whom *Ann Simpson* was then *ensient*, if born after his death, and that the Child took therefore by particular description.

(*a*) Reg. Lib. A. 1820, fol. 940.

(*b*) 5 Ves. 530.

(*c*) 1 Mer. 141.

1822.
1st February.

LEE *v.* RYDER and others.

When it is disputed whether a Defendant is, from infirmity of Mind, incompetent to answer, it will be referred to the Master to inquire as to the fact.

A MOTION was made on behalf of the Plaintiffs to discharge an Order obtained on the 10th November last, for a Commission to assign a Guardian to an aged Person of infirm memory for the purpose of answering the Plaintiff's Bill.

The Affidavit in support of the Motion disputed the fact of Infirmity.

Mr. *Bell*, and Mr. *Longley*, in support of the Motion.

Mr. *Whitmarsh, contrà.*

The VICE-CHANCELLOR made the following Order:

"This Court doth order, that it be referred to Mr. *Cross*, one, &c. to inquire whether the Defendant *John Taylor* is competent to answer the Plaintiff's Bill, without the appointment of a Guardian for that purpose; and for the purpose of such inquiry, it is ordered that the Defendant *John Taylor* do attend the said *Master* from time to time as he shall direct. And the said *Master* is to be at liberty to call in such medical assistance as he may think necessary in making such inquiry; and the said *Master* is to state the result of the said inquiry, with his opinion thereon to the Court, whereupon such further Order shall be made as shall be just.

Reg. Lib. B. 1821, fol. 435.

1822.
5th February.

MARSH *v.* HUNTER.

Where Trustees may invest in Stock, or on real Security, and they lend on Personal Security, they shall be answerable for the principal Money only, and not for the value of the Stock which might have been purchased.

IN this Case, the *Vice-Chancellor* ruled, that if Trustees may invest in Stock or on real Security, and they lend on personal Security, and thereby the Money is lost, they shall be answerable, not for the amount of Stock, which might have been purchased, but for the principal Money lost. If real Security had been taken, the principal Money only would have been forthcoming to the Trust, and the want of real Security is all that is imputable to the Trustees.

9th February.

BROUGHTON *v.* PITCHFORD.

Money paid into Court upon an Injunction, and laid out, is Security, and not Payment.

THE Bill was for an Injunction to stay proceedings at Law, and for an Account. The Injunction was granted on the terms of paying into Court the Amount of the legal demand, and the Sum was invested in the purchase of Stock, and the Dividends accumulated.

In the result of the Account the Plaintiff was found not to be indebted to the extent of the legal demand.

The VICE-CHANCELLOR considered the Money paid into Court as Security only, and directed so much of the Stock to be sold as would raise the Sum found due to the Defendant, with Interest up to the time of Pay ment, and directed the Residue of the Stock to be transferred to the Plaintiff.

His *Honor* gave Interest to the Defendant from the time the Money was paid into Court, because it had produced Interest.

1822.
6th February.

ASBEE *v.* SHIPLEY.

Suit not revived against the Administrator of a Party named, who did not appear, nor was served with a subpœna, nor can the Plaintiff have the benefit of former Proceedings against such an Administrator.

THE original Bill was filed by a party claiming an Annuity out of certain Trust Property under a grant from the late *Colonel Shipley*, who was *cestui que trust* for life. The Plaintiff claimed in priority to certain Defendants either directly, or indirectly as standing in the place of prior Annuitants paid off with his Money. The object of the Bill was to have satisfaction out of the Trust Fund, according to the Plaintiff's priority, and it prayed also Personal Payment from *Colonel Shipley*, who was named as a Party, but was alleged to be out of the jurisdiction. After the other Defendants had answered, and the Plaintiff had filed a Replication, and examined Witnesses in the Cause, but before further Proceedings took place, *Colonel Shipley* died abroad without having been served with a *subpœna*, and Intestate, and letters of Administration of his Goods and Chattels were taken out by an Administrator resident in *England*. *Colonel Shipley* left three Children, who succeeded by his death, by force of the Trust Deed, to certain Interests in the Trust Property.

The Plaintiff now filed a Bill against the Administrator and the three Children, whose succession to their Interest was stated by way of Supplement, praying that as against the Administrator, the Suit, which was alleged to be abated by the death of *Colonel Shipley*, might be revived, and that he might have the benefit of the Proceedings had in the Cause, and the same relief against the Administrator and the three Children, as he was entitled to have against *Colonel Shipley* at his death.

To this Bill a general Demurrer was put in by the Administrator, upon the ground that the Plaintiff was not entitled to revive the Suit, nor to have any benefit of the Proceedings against him.

Mr. *Bell*, and Mr. *Tinney*, in support of the Demurrer:

A Bill of Revivor and Supplement is only against Representatives of a Party in the Cause, but *Colonel Shipley*, though named in the original Bill, was not a Party, he having been, as stated in the Bill, abroad, and never having appeared. Suppose *Colonel Shipley* had returned to *England*, a *subpœna* must have been served upon him, and he must have answered, and might have entered on his defence, and examined Witnesses, but being abroad he could not. His Representatives claim now the right of making a Defence; they may be able to prove an usurious Contract. The Bill should have been a Supplemental Bill, in the nature of an Original Bill (*a*).

Mr. *Hart*, and Mr. *Parker*, in support of the Bill,

Admitted that if the Admininistrator could not put in a Defence the Bill was wrong in point of form. The original Defendants, except *Colonel Shipley*, put in their Answers, and then he dies abroad; the Bill of Revivor and Supplement enables the Administrator to answer, and enter on a Defence to the original Bill, although by the form of the present Bill we do not ask for an Answer.

Mr. *Bell*, in Reply, said that the Registrar on a former occasion had told him that where a Defendant had not appeared there could be no Revivor.

(*a*) *Lloyd* v. *Johnes*, 9 Ves. 37; Redesd. 56.

1822.

Asbee v. Shipley.

The Vice-Chancellor:—

Colonel Shipley not having appeared, nor been served with the *subpœna*, his death was no abatement of the Suit, and consequently there could be no Revivor; nor could the Plaintiff have the benefit of the Proceedings in the Suit against the Administrator, for the Intestate was never an effective Party to the Suit, nor bound by the Proceedings. If he had returned to this country, or appeared to the Suit, he would have been at liberty to enter into a full Defence, unaffected by all which had passed between the other Parties in his absence.

The Bill therefore was, strictly speaking, original as to the Administrator of *Colonel Shipley*, though supplemental as to the other Parties, and must require the Administrator to answer the original Bill as well as the supplemental matter, and pray the distinct Relief to which the Plaintiff considered himself to be entitled against the Administrator. The same as to the Children, as to whom it would have been an original Bill in the nature of a supplemental Bill, if *Colonel Shipley* had appeared to it.

Demurrer allowed.

1822.
13th February.

CLAUGHTON *v.* HADWELL.

Upon Demurrer being overruled, the Plaintiff must, out of Term time, wait for the next Seal day to move for an Injunction.

UPON overruling the Demurrer the question was whether an Injunction to stay Proceedings at Law was immediately to be had. Upon consulting with the Registrar, Mr. *Walker*, and upon the form of an Order in *Rashleigh* v. *Buller*, 11 June 1752 (*a*), the *Vice-Chancellor* held, that a Demurrer overruled was considered as a dilatory, and placed the Defendant in the same situation as default of appearance or time to answer, and entitled the Plaintiff to move for an Injunction. But that such a Motion could only be made according to the usual course of the Court, which was on any day in Term time, or on a Seal-day out of Term. And that here the Plaintiff must wait for his Injunction until the Seal.

(*a*) Forasmuch as this Court was this present day informed by Mr. *Robinson*, being of the Plaintiff's Counsel, that the Plaintiff having exhibited his Bill in this Court, against the Defendants, the said Defendants, *Buller and his Wife*, put in their Demurrer thereto, which Demurrer, upon arguing, has been overruled, and yet the said Defendants prosecute the Plaintiff at law for the matters in the Plaintiff's bill complained of. It is therefore ordered, that an injunction be awarded against the said Defendants, *Buller and his Wife*, for stay of the proceedings at law against the Plaintiff for and touching of the matters here in question, until the said Defendants shall fully answer the Plaintiff's bill, and this Court shall make further order to the contrary; but the said Defendants are in the mean time at liberty to call for a plea, and proceed to trial therein, and for want of a plea to enter up judgment, but execution is hereby stayed.
Reg. Lib. B. 1751, fol. 497.

1822.
25th February.

WRAY v. FIELD.

The Legatee will take two legacies by different instruments, unless substitution be evidently intended from the character of the 2d instrument, or the expressions used, or the same Sum be twice given, and the same motive expressed in both instruments.

WILLIAM WAINMAN, by his Will, dated the 24th March 1814, directed his Executors and Trustees to raise a Sum of 4,000*l*. and to invest it in certain Securities, and to pay the proceeds thereof to his Daughter *Catherine Wainman*, during her life for her separate use, and after her decease to stand possessed thereof in Trust for her children, in such proportions as she should by Deed or Will appoint, and in default of appointment, in trust for, all and every her Child and Children, in equal Shares, if more than one, with benefit of Survivorship, and if but one, then for such one Child; and to be transferred as soon as convenient after the decease of his said Daughter to such as should have attained the Age of Twenty-one, or have married in her life-time, and if under the age of Twenty-one, or unmarried at her death, then to Sons at their respective ages of Twenty-one years, or sooner, for his or their benefit, preferment or advancement in the world respectively, as the Trustees should think proper, and to Daughters at their respective ages of Twenty-one years or Marriage; and if there should be no Child or Children of his said Daughter, or being such, they should die under the age of Twenty-one years and unmarried, then upon Trust as to the said Sum of 4,000*l*. for the other persons therein mentioned.

In September 1816, after the date of the Will, *Catherine Wainman* married, and in October 1818 she died, leaving the Infant Plaintiff, her only child.

Before his Daughter's Marriage, the Testator, by a Codicil directed the 4,000*l.* to be raised out of his Real Estates, and after the death of his Daughter, by a second Codicil to his Will, dated the 3d April 1818, he bequeathed to his Grandson, the said Infant Plaintiff, the Sum of 6,000*l.* when he should attain the age of Twenty-one years, but not sooner; and he directed and desired his Executors to spend annually such Sum as they should think fit and proper, during the Minority of his Grandson, for and on account of his Maintenance and Education and advancement in the world, not exceeding in any one year the Sum of 250*l.* The Testator died soon after the date of this Codicil, leaving several Children.

The Question in the Cause was, whether the Infant Plaintiff was entitled to both Legacies.

Mr. *Bell,* Mr. *Horne,* and Mr. *Barber,* for the Plaintiff.

Mr. *Shadwell,* Mr. *Bickersteth,* Mr. *Spence,* and Mr. *Walker,* for the Executors and Residuary Legatees.

The Testator must have considered the Legacy given by the Will as Personal to the Daughter, and failing with her, and meant, therefore, the 6,000*l.* in the second Codicil as a substituted provision for her Child, and that this more plainly appeared from the power given in that Codicil to advance 250*l.* a year for maintenance, education and advancement, which was inconsistent with the power of the advancement of the whole 4,000*l.* given by the Will at the discretion of the Trustees.

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The Cases cited and commented upon were *Duke of St. Albans* v. *Beauclerk* (*a*), *Benyon* v. *Benyon* (*b*), *Allen* v. *Callow* (*c*), *Hurst* v. *Beach* (*d*), *Attorney General* v. *Harley* (*e*).

The Vice-Chancellor:—

The Question is, not what may be conjectured to have been the intention of the Testator, but what is his expressed intention. I agree that in reading the second Codicil, we may properly supply a fact which was necessarily present to the Testator's mind—the loss of his Daughter—and we may read it as if the Plaintiff had been there described as the Son of his deceased Daughter. But the gift of 6,000*l.* by his second Codicil to the Son of his deceased Daughter, is no expression of intention that such Son is not also to take the 4,000*l.* provided for him by the Will. It is argued that the annual provision of 250*l.* for the maintenance, education and advancement of the Plaintiff by the second Codicil, is inconsistent with the power given by the Will to apply the whole 4,000*l.* during his minority for the benefit, preferment or advancement of the Infant. I cannot find such inconsistency in these two Provisions, as would appear to justify me in coming to the conclusion that he could not have intended that both should take place—though he had given a power to his Executors to advance during his minority the capital of the first Gift, he might well limit their discretion in the second Gift to the Interest only. Substitution may be inferred from the character of the second Instrument, or from expressed intention, or

(*a*) 2 Atk. 636.
(*b*) 17 Ves. 34.
(*c*) 3 Ves. 289.
(*d*) 5 Madd. 351.
(*e*) 4 Madd. 263.

because the second Gift is the same Sum for the same motive (*f*).

Reg. Lib. B. 1821. fol. 1081.

1822.

WRAY v. FIELD.

(*f*) Cases in chronological order, where legacies by different instruments have been held accumulative.

Wallop v. *Hewitt*, 2 Ch. Rep. 37.
Windham v. *Windham*, Finch. 267.
Newport v. *Kynaston*, ib. 295.
Pitt v. *Pidgeon*, Cha. Cas. 301.
Cliffe v. *Gibbons*, 2 Raym. 1324.
Masters v. *Masters*, 1 P. Wms. 423.
Foy v. *Foy*, 1 Cox, 163.
Wright v. *Englefield*, Amb. 468.
Hooley v. *Hutton*, 1 Bro. C. C. 398, n.; S. C. 2 Dick. 461.
Redges v. *Morrison*, 1 Bro. C. C. 389.
Curry v. *Pile*, 2 Bro. C. C. 225, (same instrument.)
Baillie v. *Butterfield*, 1 Cox, 392.
Hodges v. *Peacock*, 3 Ves. 735.
Benyon v. *Benyon*, 17 Ves. 34.

Cases in chronological order, where legacies by different instruments have been held not accumulative.

Duke of St. Alban's v. *Beauclerk*, 2 Atk. 636.
Greenwood v. *Greenwood*, 1 Bro. C. C. 30, n.
Garth v. *Meyrick*, ibid.
Campbell v. *Earl of Radnor*, ibid. 271.
Cooke v. *Boyd*, 2 Bro. C. C. 521.
Jackson v. *Jackson*, 1 P. Wms. 423, n.; S. C. 2 Cox, 35.
Moggridge v. *Thackwell*, 3 Bro. C. C. 517.
James v. *Semmens*, 2 H. B. 213.
Allen v. *Callow*, 3 Ves. 289.
Barclay v. *Wainwright*, ibid. 466.
Holford v. *Wood*, 4 Ves. 76.
Osborne v. *Duke of Leeds*, 5 Ves. 369.
Benyon v. *Benyon*, 17 Ves. 34.
Currie v. *Pye*, ibid. 46.
Attorney-General v. *Harley*, 4 Madd. 263.
Hurst v. *Beach*, 5 Madd. 351.
Gillespie v. *Alexander*, 2 Sim. & Stu. 145.

1822.
25th February.

Fletcher Partis *having purchased certain Lands and Hereditaments, they were by his direction, by indenture of Bargain and Sale, conveyed by the Vendor to Trustees for charitable uses.*

The Indenture was enrolled in the Court of Chancery within six calendar months, but Fletcher Partis *died within twelve calendar months after its execution. Held that the Conveyance was void, under the statute of 9 Geo. 2, c. 36. Held also, that certain pecuniary bequests in* Fletcher Partis's *Will, depending on the validity of the said Indenture, had failed.*

Between Sir CHARLES PRICE, Baronet, WILLIAM BROWN RAMSAY, CHARLES LOWDER, the Reverend PETER GUNNING, the Reverend CHARLES CROOK, the Reverend C. A. MOSEY, the Reverend T. WILKINS, Sir THOMAS B. L. LETHBRIDGE, Baronet, CHARLES BOWDLER, and THOMAS SPURR - - - Plaintiffs,

and

WILLIAM SILAS HATHAWAY, ANN PARTIS, THOMAS LEIR, JOHN AUDREY, and HIS MAJESTY'S ATTORNEY GENERAL, Defendants.

BY an Indenture of Bargain and Sale, dated the 21st July 1820, and made between the Defendant, *John Audrey*, of the first part, the Defendant, *Thomas Leir*, and *Jane*, his Wife, of the second part, *Fletcher Partis*, of the third part, and the Plaintiffs, of the fourth part, in Consideration of the Sum of 815 *l.* to the said *Thomas Leir*, paid by the said *Fletcher Partis*, certain Lands and Hereditaments therein described, the Property of the said *Thomas Leir*, were, at the request and by the direction of the said *F. Partis*, bargained, sold, appointed and conveyed unto and to the use of the Plaintiffs, their Heirs and Assigns for ever, upon Trust, that the Plaintiffs, and the Survivors and Survivor of them, and his Heirs, and the Trustees or Trustee for the time being of those presents, should permit and suffer a competent part of the said several Pieces or Parcels of Land or Ground to be used as the Site of Thirty Dwelling Houses and a Chapel to be erected thereon, and built and finished as near as might be, according to

a Plan and Elevation to be approved of by the said *F. Partis*, and *Ann*, his Wife, or the Survivor of them; and should permit and suffer such Houses to be occupied and enjoyed from time to time, and at all times thereafter, by thirty Females, who should be of the age of Fifty Years and upwards, and the Widows or unmarried Daughters of Clergymen, Professional Men in Law, Physic and Divinity, and Merchants of irreproachable Character, and Members of the Church of England, and who had seen better days, and been reduced from affluence to a state of comparative indigence; and should permit the residue of the Pieces of Land and Ground to be used as Gardens and otherwise, for the benefit of the Occupiers of the said Almshouses; and that the said Trustees should in the mean time, and until such Almshouses should be built and finished, permit and suffer the said Pieces or Parcels of Ground to be held and applied to such charitable purposes as the said *F. Partis* during his life, and after his decease, the said *Ann*, his Wife, and after their deaths, the Trustees for the time being, should think fit, and by any writing under their hands order, direct or appoint. And it was thereby declared that the said *F. Partis* did direct and appoint that the Expense of Building the said Almshouses and Chapel should not exceed 15,000*l.*, and that the Expense should be defrayed out of the Monies which the said *F. Partis* should from time to time in his life, advance for that purpose, and should be contributed or subscribed by any person or persons.—This Deed was enrolled in the Court of Chancery, on the 25th July 1820.

The said *Fletcher Partis*, by his Will, dated the 25th July 1820, after reciting the said Indenture, conveying

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the said Lands and Hereditaments, and the Trusts thereof, and reciting that he was desirous to bequeath a competent Sum of Money for the purpose of maintaining and supporting the same as a public Charity for ever, requested that the said Trustees would with all convenient speed after his death elect from among themselves four Persons, in whose Names the Money intended to be bequeathed by his Will might be invested in the Public Funds, and communicate their Names to his Executor and Executrix, and he directed his Executor and Executrix, within a year after his death, to transfer the capital Sum of 30,000 *l.* 3 per Cent Consolidated Bank Annuities into the Names of such four Persons, upon Trust, to permit the dividends to be, as to the receipt and disposal thereof, under the control of the Trustees for the time being of the said Indenture, and of the Hereditaments thereby bargained and sold, upon the Trusts in the said Will particularly mentioned, for the Payment of an Annual Stipend to the Clergyman officiating in the said Chapel, and the Sustentation of the Almshouses, and the residue thereof, to be divided into thirty equal Parts for the Almswomen inhabiting the same.

And the said Testator declared and directed, that in case the said Chapel and Almshouses, with the Gardens, Walks and Hedges for inclosing the same, should not be finished in his life-time, that a Sum of 15,000 *l.* sterling, part of such his personal Estate as should consist of money, or so much of the said Sum as should not have been expended for those purposes in his life-time, (the amount of such Expenditure to be determined by the said Trustees,) should be applied for the purpose of erecting, finishing and maintaining such Chapel and

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Almshouses; and in case all or any part of the Property intended for charitable purposes should fail of effect, then he gave and bequeathed the Property intended for charitable purposes, or so much thereof as should fail of effect, unto his said Wife, discharged from all Trusts whatsoever, and without any obligation at Law or in Equity to conform to the distribution he had intended for charitable purposes:—and after directing the Dividends of 6,000 *l.* Stock to be paid to certain Persons during their lives, he directed the said Sum after their deaths to be transferred to the Trustees of the said Sum of 30,000 *l.* Stock upon the same charitable trusts; and the Testator gave similar directions as to three several sums of 3,000 *l.* 1,000 *l.* and 2,000 *l.* Stock; and all the rest residue and remainder of his Estate and Effects, after Payment of the several Bequests mentioned, the Testator bequeathed to his Wife, and appointed his Wife, and the Defendant, *William Silas Hatherley*, Executrix and Executor of his Will.

The Testator died on the 31st of August 1820, without having revoked or altered his said Will, and his Executor and Executrix duly proved the same, and possessed themselves of personal Estate more than sufficient for the payment of the Testator's Debts, Legacies, and charitable Bequests.

On the 15th of March 1821, the Plaintiffs elected from among themselves Sir *Charles Price, W. B. Ramsey, Charles Lowder*, and *Peter Gunning*, as the four Persons in whose names the Money bequeathed by the said Testator might be invested in the Public Funds, and their names were thereupon made known to his Executor and Executrix:—No part of the Sum of 15,000 *l.* ster-

ling was expended by the Testator in his life-time for the purposes in his Will mentioned.

The Bill, after stating the above Facts, alleged that an application had been made to the Executor and Executrix for a transfer of the said Sum of 30,000 *l.* Stock, and Payment of the said Sum of 15,000 *l.* and that they, combining with the other Defendants, refused to comply therewith, alleging, that by reason of the death of the said Testator within twelve months after the date of the said Indenture, the same became void, and that the foundation of the said Charity therefore failed, and the Bequests contained in the said Will consequently became void; and that *Thomas Leir* claimed to retain the Lands and Hereditaments without repayment of the Purchase Money, whereas the Plaintiffs charged the contrary to be true, and that the Consideration Money for the Lands conveyed by the said Indenture was duly paid by the said Testator prior to the date thereof, and that the same was a *boná fide* purchase; and that the Testator never had any Estate or Interest in the said Land, and therefore the said Indenture did not become void; and charged that the Trusts of the said Will, and of the said Indenture, with respect to the establishment of the said Charity, ought to be executed, and prayed a Declaration of the Court to that effect.

The Defendants, Executor and Executrix, by their Answer admitted the several facts above stated, and that the Purchase was a *boná fide* Purchase, and the Consideration Money thereof paid at the time of the Execution of the said Indenture, but insisted that the Conveyance thereby made was invalid, as not being to

take effect in Possession immediately from the making thereof for the charitable uses intended, but being to permit and suffer Dwelling Houses and a Chapel to be erected according to a Plan to be approved of by the Testator and the Defendant, *Ann Partis*, or the Survivor, and in the mean time be applied to such charitable purposes as the said *Francis Partis* during his life, and after his death, the said *Ann Partis*, and after her death, the Trustees for the time being should think fit; and these defendants submitted that no charitable Use attached till something further was done, either by the approbation of a Plan or the Appointment of a Charity; and that the said *Francis Partis* could not be considered during his life-time to have approved of any Plan, or appointed any Charity, and that the Conveyance of the Land was not good as a charitable Use; and these Defendants insisted that the said *Francis Partis* ought to be considered as the Donor or Grantor in the said Transaction, within the meaning of the Statute 9 Geo. 2, c. 36, and that the Conveyance of the Lands being void, the Bequests in the Will in respect of them failed, and belong to the Defendant *Ann Partis*, but these Defendants were willing to act in the Trusts of the Will, and to transfer the charitable Bequests thereby intended, in case this Court should be of opinion that the same ought to be established, on being indemnified, and paid their expenses.

Mr. *Horne*, and Mr. *Preston*, for the Plaintiffs:—

If this Case be not within the construction of the Act of Mortmain (*a*), these gifts to the Charity are good; the object of the Statute is as stated in the

(*a*) 9 Geo. 2, c. 36.

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Preamble to prevent "improvident Alienations or Dispositions made by languishing or dying Persons to uses called Charitable Uses, to take place after their deaths to the disinherison of their lawful Heirs." But here the Grantor or Donor, *Francis Partis*, never took any Estate or Interest in the Lands purchased, which could descend to his Heir; by his direction the Lands were conveyed to Trustees for an immediate charitable purpose, and there is no clause in the Indenture of Revocation and new Appointment by which *F. Partis* could have obtained an Estate or Interest in them for his own benefit. The Deed amounts to an absolute and irrecoverable destination to a charitable purposes. The trusts are sufficiently declared by the Deed, and if there be any doubt about them, the Bill has sufficiently established them, and provided against their failure. Had *Partis* not died within twelve calender months of the date of the Indenture, its validity could not be disputed. But this event is provided for by, and this Case falls within the Exception of the second Section of the Act, which declares ,that it shall not extend to any Purchase of Lands made really and *bonâ fide* for a full and valuable consideration actually paid at or before the making such Conveyance. It is not denied in this Case that the Consideration Money was paid at the Execution of the Indenture, which distinguishes it from *Attorney-General* v. *Day* (a). The Second Section contemplates the possibility of the same Person who is the Donor or Grantor within the meaning of the first Section being a Purchaser within that of the second Section; and although the Act will not allow him, within twelve calendar months of his death to convey his own Land to charitable Uses, to the dis-

(a) 1 Ves. 218.

inherison of his Heir, it enables him to purchase other Lands to take effect in Possession for the charitable Use intended.

Mr. *Shadwell*, and Mr. *Phillimore*, for the Defendants, *W. S. Hathaway* and *Ann Partis* :—

This Deed is void. The Act has two objects; first, to prevent the Disinherison of Heirs; secondly, to prevent Lands from becoming inalienable. There can be no difference in principle whether a man conveys his own Land, or purchases Land, and directs the Persons to whom it is conveyed to hold it in Trust for Charities; both modes are equally within the mischief intended to be prevented by the Statute. The object of this Act, and of the second Section in particular, is declared by Lord *Hardwicke*, in *Attorney-General* v. *Day*. "The first Clause was intended to relate to Gifts or Conveyances to a Charity by way of Donation. And it is plain that the Legislature did not intend absolutely to forbid all kinds of Purchases of Lands for the benefit of a Charity, but has put them under some restrictions. The Proviso was inserted in the *House of Lords*, upon mention of the Case of the Charity of *Queen Anne*'s Bounty; which could not otherwise have gone on, as the method of executing it is, that the Money arising out of that Fund is laid out in the purchase of Real Estate for the Augmentation of poor Vicarages; another consideration was, that this was not intended to prevent the Execution of Charities already established, in several of which the Funds are vested in Trustees, with intent to lay out in Lands, particularly Doctor *Ratcliff*'s Charity, but to leave them open, restraining the increase of such Donations *in futuro*."

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Mr. *Pemberton*, for the Defendants *Thomas Leir* and *John Audrey*.

The additional Cases quoted were *Vaughan* v. *Farrer* (*a*), *Adlington* v. *Cann* (*b*), *Doe d. Burdett* v. *Wright* (*c*), *Doe d. Wellard* v. *Hawthorn* (*d*), *Mackintosh* v. *Townsend* (*e*).

The VICE-CHANCELLOR :—

The clear expressed intention of the first section of the Statute of the 9th Geo. 2. c. 36, is, that it shall not be lawful for any person within twelve calendar months before his death, to give any land or money to be laid out in land for any charitable use whatsoever. It is argued, that it is the meaning of the second section of that Act to qualify the general expressions of the first section, and to leave every person at liberty within twelve months before his death to give to charitable uses any land which within the twelve months he has purchased for a full and valuable consideration. The object of the Act is to prevent the mischief of improvident alienations or dispositions made by languishing or dying persons, whereby land becomes inalienable. Is the mischief less because the grantor, by whose improvident disposition the land becomes inalienable, had not been the owner of it for twelve months complete: or could it be the intention of the Legislature that a languishing or dying person should not be permitted to give his own Land, or his own Money to be laid out in land, but might be permitted himself to lay

(*a*) 2 Ves. 182.
(*b*) 3 Atk. 154.
(*c*) 2 B. & A. 710.
(*d*) Ibid. 97.
(*e*) 16 Ves. 330; and see the cases collected in Evans's Statutes, 1 vol. 334, notes to 9 Geo. 2, c. 36.

out the same Money in the purchase of other Land, and to give the Land so purchased. To attribute such a sense to the second section would be utterly repugnant to the whole scope and purpose of the Statute. There can be little doubt that the object of this second section of the Statute is correctly stated by Lord *Hardwicke* in the *Attorney-General* v. *Day* (*a*), that it was suggested by the case of *Queen Anne*'s Bounty and other existing Charities, where Money was from time to time to be laid out in Land, and was meant to protect such purchases. It seems to have been thought that the vendors in such cases might be considered as Grantors within the first Section, and meant merely to remove that doubt. The Trust in question therefore is clearly void.

"This Court doth declare that the Deed in the Pleadings mentioned, bearing date 21st day of July 1820, is void; and that all the Bequests for charitable Purposes depended on the validity of the said Deed contained in the Testator's Will, in the Pleadings also mentioned, have therefore failed, and by virtue of the said Will now belong to the Defendant *Ann Partis*, absolutely. And it is ordered, that it be referred to *Master Cox*, one, &c. to inquire and state to the Court who is the Heir at Law of *Francis Partis*, the Testator in the Pleadings named. Usual directions for that purpose, further directions, and costs, reserved."

Reg. Lib. B. 1821. fol. 633.

(*f*) 1 Ves. 222.

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2d March.

COX *v.* CHAMPNEYS.

If Plaintiff obtain an order to amend without Costs, amending the Defendant's office copy, and the amendments require a new ingrossment, he may amend, without a new order, paying the 20s. costs.

THE Plaintiff, after Appearance and before answer, obtained an order to amend without Costs, amending Defendant's Office-copy; the Amendments made by the Plaintiff under this order rendered a new ingrossment necessary, and, without obtaining a new Order he paid 20*s*. Costs for his Amendments, which were accepted by the Defendant's Clerk in Court. The Plaintiff issued an Attachment for want of answer to the amended Bill, and Mr. *Wakefield*, on behalf of the Defendant, now moved to discharge that Attachment for irregularity, upon the ground that the Plaintiff's Amendment of the Bill was irregular without a new Order to amend upon Payment of 20*s*. Costs; he stated that the Defendant had already paid 7*l*. for an Office-copy of the Bill, and that an Office-copy of the amended Bill would Cost 10*l*. more; and that he understood that on taxation, Costs for one Office-copy only were allowed (*a*).

The *Vice-Chancellor* refused the Order, stating that it was the settled Practice to amend in such a Case without a new Order.

(*a*) By N° 29 of the New Orders of the 3d April 1828, where the Plaintiff is directed to pay to the Defendant the costs of the Suit, the costs occasioned to a Defendant by any amendment of the bill shall be deemed part of such Defendant's costs in the cause (except as to any amendments made by special leave of the Court, or which have been rendered necessary by the default of such Defendant,) deducting therefrom the sum paid by the Plaintiff at the time of amendment.

TOMKINS *v.* HARRISON.

1822. 2d March.

Motion of course to examine de bene esse, *a Witness above 70, or in a dangerous state, or the only Witness.*

THE *Vice-Chancellor* stated that the Motion to examine a witness *de bene esse* is of course where the Witness is above seventy (*a*), or the only Witness (*b*), or in a dangerous state of health; but not in a case of mere infirmity (*c*). That the course is to give three days notice to the other side of the intention to examine, and the *Vice-Chancellor* refused to shorten the time, although it was stated that the other Witness lay dying, as the other Party lived at a distance, and could not attend at an earlier day.

(*a*) *Rowe* v. ——, 13 Ves. 261.

(*b*) *Shirley* v. *Earl of Ferrers*, 3 P. Wms. 77; *Brydges* v. *Hatch*, 1 Cox, 423.

(*c*) *Bellamy* v. *Jones*, 8 Ves. 31.

EDWARDS *v.* LANE.

1822. 12th March.

Order for payment of Money to the Solicitor of the Party refused.

MR. *TINNEY* moved, in the name of the Defendant, that a sum of Money in Court belonging to him might be ordered to be paid to the Defendant's Solicitor, the Suit having been compromised.

The *Vice-Chancellor* said it was not usual in such Cases to order Money to be paid to the Solicitor, but to the Party himself; who if he chose might authorize the Solicitor by Power of Attorney to receive it.

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Where a Letter contains the entire terms of an Agreement for Purchase of Lands, it is not necessary for the Plaintiff to prove that he accepted the terms. If it require the Plaintiff to supply a term in the Agreement, there must be a special acceptance in writing supplying that term, in order to take the case out of the Statute of Frauds.

THE Bill in this Case was for the specific performance of an Agreement for the Purchase of Lands, alleged to be contained in Three Letters. It stated that at the Sale in 1815 of the Barracks at *Ashford*, the Plaintiff was the Purchaser of one of the Lots, which consisted of the Hospital and other Buildings part of the said Barracks, and a piece of Freehold Land containing one acre and a quarter, whereon the same were erected. That before any Title had been made out, or any Conveyance executed to the Plaintiff, the Defendant, who then resided in a Freehold House of his own contiguous to the said Lot, proposed to the Plaintiff to purchase the piece of Freehold Land whereon the Hospital and other Buildings stood (it being the Plaintiff's intention to pull down and remove the Hospital and other Buildings), and that in consequence of such Proposal the following Correspondence took place.

"Sir, *Ashford*, March 3d 1816.

"Although I am by no means anxious for the immediate Possession of the late Hospital Field, I nevertheless wish if possible to ascertain by to-morrow week whether I shall become Purchaser at all, having fixed that day with a Mr. *Moss*, a Surveyor at *Canterbury*, to come to *Ashford* to arrange a Plan with respect to my Offices opposite the Field, in case I cannot agree with you for the Purchase; and after such Plan is fixed on, the Field will be of considerably less value to me; besides, if I accept the Title as it now stands, I need not be at any expense whatever in supplying myself with attested

Copies of all the Deeds you mentioned, and which are necessary to make a clear and marketable Title, and are now deposited in our Office by a Client; but as on the 6th of *April* my Partnership with Mr. *B.* will be dissolved, and as I shall then relinquish the Business in his favour, if, after that time, Copies should be required, it of course must be done at a considerable expense, as the Deeds will then be in Mr. *B.*'s possession, and I am not aware that the Barrack Board will or ought to be at the expense of furnishing such copies; some of the Deeds are very long, particularly Mr. *G.*'s Settlement, and the Conveyance to him from Dr. *R.* mentioned in the List: under all these circumstances I am induced to make another and last Offer, and instead of Pounds, will say Guineas; viz. 315 *l.* for the Field, (including of course the Pump and Well therein), and will also agree to take such Bricks as may remain after the Hospital is removed, by a Valuation of two Persons, and if they cannot agree to call in a third, as usual. To give you till the 1st of January next to remove the Hospital, to take possession and pay the Money at that time, provided that in case the Hospital should be removed before then, the Field to be conveyed to me, the Valuation made, and Possession given within fourteen days after such removal; at which time of course the Purchase Money and the amount of the Valuation to be paid by me. If you accede to these terms you may request your Solicitor to prepare an Agreement accordingly, (which of course must be paid for between us), and if you or they will send me the Draft, I will have it written on a Stamp for Execution. A Line between this and the 11th instant will at all events oblige,

" *R. G. Ayerst.*"

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In Answer to the above, the Plaintiff wrote to the Defendant a Letter dated the 6th day of March 1816, informing him that he never thought of taking less than 400 *l.* for the Land, including the Well and Pump, together with all the Hospital Chimnies, Cess-pools, Ash-pit, Drains and Privies, the Brick Pavement of the Wash-house, and Cooking-house and Chimnies, with all the Foundations and Cross-walls of the Buildings, and all the Paving-stones, at which Sum of 400 *l.* the Plaintiff agreed and offered to sell the same to the said Defendant, or otherwise that he should take the Land only at 340 *l.*

The Defendant then wrote the following Letter to the Plaintiff:—

"Dear Sir, *Ashford,* March 8th 1816.

"As I shall probably be able to make use of many, if not all the Bricks you now offer me, with the Land, I am willing to accede to the first proposal in your favour received yesterday, and agree to give you 400 *l.* for the Land, including the Well and Pump, together with all the Bricks of the Hospital Chimnies, Cess-pools, Ash-pit, Drains and Privies, the Brick Pavement of the Wash-house and Cooking-house and Chimnies, with all the Foundations and Cross-walls of all the Buildings, and all the Paving-stones—to pay for my own Conveyance, and for you to be at the expense of the Title; the Agreement, as usual, to be paid between us—to pay the 400 *l.* and take Possession within a fortnight after the Hospital is removed—to give you such time for the removal of the Buildings as you may deem necessary, and as you may instruct your Solicitors to insert in the Agreement. If you will be so good as to instruct

Messrs. *Twopenny* & *Co.* to prepare an Agreement according to the above, and send it to me for my perusal, I will have two parts written on proper Stamps, and send them to your Solicitors, one signed by myself, the other to be returned to me when signed by you."

R. G. Ayerst.

" P. S. As it is now agreed between us for me to have the Land, there will be no necessity for Copies of such Deeds as I have in my possession, and belong to me as relating to my House and Premises, but Copies only of such Deeds as are deposited in our Office belonging to a Client, and relate to a Field adjoining the Hospital Field. If, (as I presume) it is Mr. *L.* of *Bapchild*, who is one of the Solicitors to the Barrack Board, I am well acquainted with him, and I am very sure no difficulty can possibly arise when our Agreement is signed; if it should be necessary I can write to him on the subject."

The Plaintiff then instructed his Solicitors to prepare a written Agreement for the Defendant to sign, on the Terms of the last Letter, whereupon his Solicitors wrote to the Defendant as follows:

" Sir, *Rochester*, 12th March 1816.

Mr. *Boys* has referred to us your Letter of the 8th inst., but before we can prepare the Agreement between you it is necessary that we should know precisely which of the questions on the Title you will be able to wave, we therefore send you on the other side an Extract from our Letter to the Solicitors of the Barrack Board, showing what questions are unsatisfied. We will thank you to inform us which of them

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you can dispense with, in order that we may state it in the Agreement, and know which we must continue to insist on."

The Extract referred to merely contained a List of Deeds and Attested Copies relating to the Freehold in question, which the Plaintiff's Solicitors presumed would be delivered to him as Purchaser.

The Defendant wrote the following Answer:

"Gentlemen, *Ashford*, March 13th 1816.

"The only Deeds that I shall require on completing the Purchase with Mr. *Boys*, will be *Baldock's* Conveyance to *De Lancey*, dated August 1st 1813, and *Rutton's* Conveyance to *Gorse*, dated the 13th and 14th February 1795. I presume the original Deed of August 1st 1813 will be given up, as I do not imagine, indeed I am almost certain, it related to no other Land than that on which the Hospital is built, the whole of which Mr. *Boys* has purchased, and is to be conveyed to me. The remainder of the Land on which the Barracks was built is Leasehold, and has been given up to the Parishioners who were the Lessors. If it is shown, however, that this Deed relates to other Property of more value, then I should require an attested Copy, and a Covenant to produce it. I should also expect the original Deeds of 13th and 14th of February 1795, as I know it relates only to the Field in question, and to about an acre originally belonging to it, which Mr. *Baldock* in 1803 sold off, the Purchaser whereof had a Copy of the Deed, Mr. *Baldock*, keeping the Original, and which I have no doubt was given up by him to Government, if not, it certainly ought to have been,

and if they have not the Original it must have been left by mistake with Mr. *Starr*, of *Canterbury*, as the Copy came from his Office when the Conveyance of the Acre sold off was made. The Marriage Settlement of the 1st August 1796, I have, with my Title Deeds relating to the House wherein I now reside, which I purchased of the late Mr. *Baldock*. This, therefore, with the Deeds of the 2d and 3d days of August 1797, of course I shall not require Copies of, having all the Originals. I have heard from Messrs. *Burley, Moore* and *Lake*, and thought the best Answer I could give them on the subject would be to send them a Copy of my present Letter to you, which I shall do by this day's Post." *R. G. Ayerst.*

" *Allen*'s Covenant of the 13th July 1795, should also be with the Barrack Board. If they do not find it, however, I can supply it by a Duplicate I have in my Office."

On the 30th March 1816 the Plaintiff's Solicitors sent to the Defendant the Draft of an Agreement, on the Terms of the Letter of the 8th March, for his perusal and signature; and on the 30th April following the Defendant returned two ingrossed Instruments, one signed by himself, and the other for the signature of the Plaintiff. The only material difference between the Agreement sent to the Defendant and that returned by him was, that the latter specified some paving Stones, and a certain Timber Fence, Gate, and Wicket, surrounding the Freehold, which the Defendant alleged was appurtenant thereto, and included in the Agreement. In consequence of this alteration the Plaintiff wrote to the Defendant on the 6th April 1816, stating, " I have not returned

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you the Agreement between you and me, as there is some little mistake in it; the stone Steps and Landing at the Door, and the Hearth Stones, and Fire-places in the Hospital, and the Timber Fence, were not to be included, which appears by the Alteration in the Draft to be so."

And subsequently at an interview between the Plaintiff and Defendant on the 11th of the same month, the Plaintiff refused to sign the Counterpart of the Agreement signed by the Defendant, on account of the Articles in dispute being included; whereupon the latter was destroyed by the Defendant.

The Bill alleged, and it was shown by the Evidence of the Plaintiff's Solicitor, that the Plaintiff had abandoned certain Questions and Objections before made to the Title of the Freehold, except such as it was necessary to insist on in order to furnish the Defendant with such Title as was required by his Letter of the 13th March 1816; and that on the 29th March he had paid the Purchase Money, and taken a Conveyance of the Land; and prayed that the Defendant might be decreed specifically to perform the Contract and Agreement as expressed and set forth in the Letters of the 3d, 8th, and 13th March; and that it might be declared that the Timber Fence, Gate, and Wicket, were not included in the Contract; and also declared that the Defendant was not entitled to call upon the Plaintiff to produce and deliver up to him certain specified Indentures, or any Copies thereof, or to call upon the Plaintiff for any other Title to the Ground in question than such as is required by or is consistent with his Letter of the 13th March 1826.

Mr. *Wingfield*, and Mr. *Wray*, for the Plaintiff.

Mr. *Sugden*, and Mr. *Haslewood*, for the Defendant.

The Cases cited were, *Fowle* v. *Freeman* (*a*), *Coleman* v. *Upcot* (*b*), *Gaskarth* v. *Lord Lowther* (*c*), *Welford* v. *Beazely* (*d*), *Kennedy* v. *Lee* (*e*), *Stratford* v. *Bosworth* (*f*).

The VICE-CHANCELLOR :—

It has long since been the settled Rule of a Court of Equity to decree specific Performance of an Agreement which has been signed by the Party sought to be charged with it, although it be not signed by the Plaintiff in the Suit, and he be not equally bound by it. It may be matter of surprise that it should have been so settled, because, although such an Agreement may satisfy the words of the Statute of Frauds (*g*), yet a Court of Equity does not generally lend its assistance to enforce Agreements which are not mutual. It is now, however, too late to question this doctrine. The language of the Statute of Frauds is, that the Agreement, or some memorandum or note thereof, must be in writing, and signed by the Party sought to be charged, or some other Person by him duly authorized. It is immaterial therefore what the form of the writing is, which expresses the agreement, and a Letter is as effectual for the purpose as a Deed. It is immaterial too what the form of the language is. It is necessary

(*a*) 9 Ves. 351.
(*b*) 5 Vin. Abr. 527, pl. 17.
(*c*) 12 Ves. 107.
(*d*) 3 Atk. 503.
(*e*) 3 Mer. 441.
(*f*) 2 Ves. & Bea. 341; and see Sugd. Vend. & Purch. p. 75. Ed. 7.
(*g*) 29 Ch. 2, c. 3.

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only that the writing should evidence all the terms of the engagement by which the Defendant consents to be bound, and which the Court is called upon to execute.

A Plaintiff seeking the aid of a Court of Equity to enforce an entire Agreement signed only by the Party sought to be charged with it, is not put to prove that he accepted it, the filing of the Bill *primâ facie* sufficiently shows his acceptance. But the Defendant is at liberty to repel the Claim of the Plaintiff by showing that at the time he declined to accept it. If however a letter or other writing do not in itself evidence all the terms of the engagement by which the person signing it, consents to be bound, but it require from the other Party not a simple assent to the terms stated, but a special Acceptance which is to supply a further term of the Agreement, then it is obvious that such special Acceptance must be expressed in writing, for otherwise the whole Agreement will not be in writing within the Statute of Frauds.

To apply these observations to the present Case. The Letter in question, containing all other terms of the Agreement, proposes, as to the Purchase Money, that the Defendant will be ready to pay it within a fortnight after the Plaintiff shall have removed a certain building on the premises; and that the Plaintiff shall himself name the time within which he will engage to remove the building, which time is to be inserted in a formal Agreement which he requests the Plaintiff to have prepared. This part of the Letter therefore is not an Agreement that the Defendant will pay the Purchase Money within a fortnight after the building should

have been removed by the Plaintiff whenever that might happen, but an engagement that he will pay the Purchase Money within a fortnight after the building shall have been removed, on condition that a certain time for that purpose shall be stated in the Agreement, the Plaintiff being left at liberty however to name that time. This Letter therefore required from the Plaintiff more than a simple assent to the terms stated; it required the Plaintiff to supply a further term of the Agreement, namely, the time within which he would engage to pull down the building, and such term not being supplied in writing, the entire Agreement was not in writing, and there was no Agreement within the Statute of Frauds. It has been said in argument, that it is not necessary to state in an Agreement the time for the Payment of the Purchase Money, and therefore the Term to be supplied here was not material. It is very true that an Agreement would be executed here which did not express the time of Payment of the Purchase Money, because the Law implies, where there is no express stipulation, that the Purchase Money is to be paid when the Conveyance is to be executed. But where there is express stipulation, as in the present Case against the implication of Law, it is surely an essential term of the Contract. The Letter in question is for these reasons not an Agreement in writing within the Statute of Frauds.

Bill dismissed, with Costs.

1822.
18th March.

HARGREAVES *v.* MICHELL.

Time does not run against a creditor after the death of the testator in case of a trust or charge for the payment of debts.

JAMES MICHELL died in the West Indies, in July 1806. By his Will, dated the 29th September 1803, executed and attested so as to pass Real Estates, he directed that all his just Debts and Funeral Expenses should be paid by his Executors, and charged all his Estates Real and Personal with the Payment thereof. The Testator by a letter of the 11th June 1803, acknowledged himself to be indebted to the Plaintiff on a Balance of Accounts, in the Sum of 1,039 *l.* 1 *s.* 7 *d.*, payable with Interest.

The Question was whether this Debt, which was not barred by the Statute of Limitations at the death of the Testator, became barred by the lapse of more than Six Years, without any Demand after his death; and whether in questions of this nature a Charge was equivalent to a Trust for the Payment of Debts. The Cases cited were *Ex parte Dewdney* (*a*), *Ex parte Roffey* (*b*), and *Burk* v. *Jones* (*c*).

The VICE-CHANCELLOR :—

The Statute of Limitations (*d*) does not run against a Trust, and a Charge is a Trust to be executed by the Devisee or Heir. The Case of *Burke* v. *Jones* appears to me to rest upon satisfactory principles; a Trust for the Payment of Debts in aid of the Personal Estate is necessarily a Trust only for the Payments of such Debts

(*a*) 15 Ves. 479.
(*b*) 19 Ves. 470.
(*c*) 2 Ves. & B. 275.
(*d*) 21 Jac. c. 16.

as the Personal Estate, if sufficient, would be bound to pay, but the Personal Estate is not bound to pay Debts barred by the Statute of Limitations.

Reg. Lib. A. 1821. fol. 1703.

WHITE *v.* STOCK.

1822.
19th March.

A Testator devised his Copyhold Estate to his Wife for life, with Remainder to his two Sons as Tenants in common in fee; the eldest Son and customary Heir was, by an arrangement between himself, his Mother and Brother, admitted to the Copyhold in Fee, and executed by Deed a Declaration of Trust to the uses of his Father's Will. The Brothers became Bankrupts, and their Assignees sold their Reversion to the Plaintiff; Held that the Plaintiff, though as against the Assignees, a Purchaser of a legal *Reversion was not, as against the Tenant for life, entitled to compel such a Surrender as would give him the* legal *Reversion.*

STEPHEN GOWER having an equitable Interest by a Contract of Purchase in a Copyhold Estate devised it to his Wife for Life, with Remainder to his two Sons, as Tenants in common in Fee. After his death the eldest Son, who was the Customary Heir, was, upon the surrender of the Vendor, admitted to the Copyhold in Fee by arrangement with his Mother and Brother, and he therefore executed by Deed a Declaration of Trust to the Uses of his Father's Will. Both the Sons became Bankrupts, and their Assignees put up their Reversion for Sale, not mentioning it to be a mere Equitable Reversion. The Purchaser filed this Bill against the eldest Son, the Mother, and the Assignees, to compel such a Surrender as would give to him the legal Reversion.

Mr. *Hart*, and Mr. *Preston*, for the Plaintiff,

Contended that the Plaintiff had purchased a legal, not an equitable, Estate, and that he had a right to have a legal Estate conveyed to him. The Tenant for Life could not insist upon the legal Estate remaining

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in the Bankrupt, and thereby become subject to his Forfeiture; she had no right to object to the division of the Inheritance in the way proposed. The Declaration of Trust not appearing on the Rolls of the Manor the Plaintiff might be deprived of his Estate by another Purchaser, without Notice.

Mr. *Bell*, Mr. *Tinney*, and *Mr. Cullen*, Jun. for Mrs. *Gower*, the Tenant for Life, and the Assignees.

All the *cestuis que trust* having agreed that the legal Estate should be vested in the way in which it now is, for their mutual benefit, it cannot be altered by any one of them without the consent of the others. This equitable Remainder cannot be displaced without a pecuniary prejudice to the Tenant for Life; at present the whole Fee being in the Trustee, in case of his death the fine on Admission would be apportioned between her and those in Remainder, but if there were a Trustee for her life only, in case of his death she must pay the whole fine, and might not survive him more than a day. With regard to the apprehension of another Purchaser without notice, the Commission of Bankruptcy is notice to all the world; he could not therefore purchase any Interest beneficially in the Bankrupt, since he has legal notice that such Interest, if any, passed to his Assignees, and if he purchased of the Bankrupt as Trustee, then he would become a Trustee in his place.

The VICE-CHANCELLOR:—

This Reversion being sold without qualification in the description, the Plaintiff has a right to consider himself as contracting for a legal Reversion; and if the Assignees, though they have not in fact the legal Rever-

sion, have a right to call in the legal Reversion, the Purchaser is entitled to compel them to do so. The Assignees stand in the place of the Bankrupts, and the Inquiry should be, whether at the Bankruptcy the Bankrupts had a right to clothe their equitable Reversion with the legal Estate. By arrangement between the Mother and two Sons, and with a view to their common advantage, the eldest Son was vested with the whole legal Fee upon the Trusts of the Will. The principle is the same as if a Stranger had been created a Trustee by their common consent; such a Trustee cannot be permitted afterwards to deal with the Trust Estate against the intention, and to the prejudice of any one of his *cestuis que trust*. A Surrender to the Use of the Mother for Life, with Remainder to the Purchaser in Fee, would be plainly prejudicial to the Mother by making an immediate Admission and Fine necessary, and a Surrender to the Use of the Purchaser in Remainder, subject to the Life Estate of the Mother, would be also prejudicial to the Mother, because then, if the Son should happen to die, living the Mother, inasmuch as he was simply a Trustee for her Estate, she would be obliged to procure a new Admission at her sole Expense; whereas if he had continued a Trustee of the whole Fee, then the Expense of a new Admission would have been apportioned between the Owners of the whole Fee. I am of opinion, therefore, that the Bankrupts had not at the time of the Bankruptcy a right to clothe their equitable Reversion with the legal Estate, and, consequently that the Assignees have no right to call in the legal Estate, and could not therefore sell a legal Reversion; the necessary consequence is, that the Plaintiff being to be considered as having contracted for a legal Estate, is at liberty, if he does not think fit to accept

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the equitable Reversion, to retire from his Purchase. If however the Plaintiff should determine to take from the Assignees the equitable Reversion, then it may come to be considered whether any equitable Terms can be suggested with respect to the Mother's Interest, which would induce a Court of Equity to new model the legal Estate at the request of the Owner of the Reversion, and if such Terms can be suggested, as all the Parties interested are before the Court; this Plan might possibly be effected in this Suit; but before these considerations can be entered upon, the Plaintiff must determine whether he will accept the equitable Reversion, for it is only in the character of Owner of that Reversion that he can raise any Equity against the Mother.

1822. 26th March.

BARKER *v.* LEA.

If the Wife insists upon her Equity as against the Assignees in Bankruptcy of her Husband, it attaches for the benefit of her Children, and she cannot afterwards release it in favour of her Husband.

THE Wife being entitled to a considerable Sum in Court, the Husband became a Bankrupt; the Bankrupt purchased of the Assignees their Interest in the Money, subject to the Wife's Equity, which was computed in the Sale at one half of the Property. The Bankrupt, with his Wife, now petitioned for payment of the whole Sum to him, with the consent of his Wife.

The VICE-CHANCELLOR:—

The Wife must be taken to have claimed her Equity against the Assignees and Creditors of her Husband, and they selling only a Moiety to the Husband, must

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be considered as having conceded the other Moiety to her equitable Claim; and upon that concession it became equitably vested in her for the benefit of herself and her Children.

If after this arrangement she could still be at liberty, before an actual Settlement to wave her Equity, and defeat her Children, it must be by undoing the arrangement with the Assignees, and abandoning the Money to the Creditors. If she does not release the Equity to the Assignees, then it attaches unalterably for the Benefit of the Children, and is no longer within her power.

1822.
March 15, 16.
April 23.

HUME v. RUNDELL.

The defective execution of a power, aided in favour of an eldest against younger Children, also provided for; Probate held not to be conclusive proof that Instruments so far as they affect real Estates, are of a testamentary Character.

BY Indenture of Settlement made upon the Marriage of *James John Hume* with *Catharine Randolph*, a certain Estate was settled to the use of *J. H. Hume* for Life, Remainder to the use of the intended Wife for her Life; and after the decease of the Survivor, to the Use of Trustees for a term of 500 years, Remainder to the Use of the first and other Sons of the Marriage in Tail Male, Remainder to the use of the first and other Sons of the Husband by any after-taken Wife in Tail Male, Remainder to the Use of the Daughters of the Marriage as Tenants in Common in Tail, Remainder to the Daughters of the Husband by any after-taken Wife, as Tenants in Common in Tail, Remainder to the Husband in Fee. And the Trusts of the term were declared to be, if there was any Child or Children of the Husband by *Catharine Randolph*, or any after-taken Wife, other

than an eldest or only Son, then after the decease of the Survivor of the said *James John Hume* and *Catharine Randolph*, or in their lifetime, or of the Survivor of them, if they, he or she, or any such future Wife, should so direct, by any Deed or Writing signed and attested by two Witnesses, to levy and raise the Sum of 5,000*l.* for the Portions of such Child or Children respectively, to be a vested Interest at such Ages, and in such manner, and in such Shares and Proportions as the said *J. J. Hume* should by any Deed or Instrument, to be sealed and delivered by him in the presence of and attested by two Witnesses, or by his last Will and Testament, or by any Codicil thereto, to be by him signed and published in the presence of and attested by three or more credible Witnesses, direct or appoint, and for want of such appointment, to Sons at twenty-one, and to Daughters at twenty-one or Marriage; and to be paid to him or her at the same age, day or time, if the same should happen after the decease of the Survivor of them the said *J. J. Hume* and *Catharine Randolph*, or any after-taken Wife; but if the same should happen in the lifetime of them the said *J. J. Hume* and *Catharine Randolph*, or any after-taken Wife, or in the lifetime of the Survivor of them, then immediately after the decease of such Survivor.

There was a Clause of Survivorship between Children in case of the death of any before their Interest vested; and a Power given to the Trustees at any time after the death of the Survivor of the said *J. J. Hume* and *Catharine Randolph*, or such future Wife, or in the lifetime of them, or the Survivor of them, in case they, he or she, should so direct, by any Writing under their, his or her, hands, to levy or raise all or any part of the Por-

tions so given, notwithstanding the Interest should not then be vested. And further, that the Trustees after the death of the Survivor of the said *J. J. Hume* and *Catharine Randolph*, or any after-taken Wife, should, out of the rents and profits, levy and raise such yearly Sums for Maintenance as the said *J. J. Hume* should by any Writing, to be sealed and delivered by him, and attested by three Witnesses, direct and appoint, not exceeding the Interest of the Portions; and in default of Appointment, then such yearly Sums, not exceeding such Interest as aforesaid, as the Trustees should think fit; such yearly Sums to be payable quarterly on the days therein mentioned; and the first quarterly Payment to be made on such of those days as should first happen next after the decease of the Survivor of them the said *J. J. Hume*, *Catharine Randolph*, or such future Wife as aforesaid.

There was also a Power for *J. J. Hume* by Deed or Will to jointure any after-taken Wife out of the settled Estate, to the extent of 100*l.* per annum.

Catherine Randolph died, leaving only one Child, *Catharine Anne Hume*; and *J. J. Hume* married a second Wife, by whom he had living at the time of making his Will, three Sons and one Daughter.

J. J. Hume, made his Will. After reciting his Marriage Settlement, before referred to, and the state of his family, he proceeded thus: "Now, therefore, by virtue and in pursuance and in exercise and execution of the said power or authority given, limited and reserved to me in and by the said Settlement made on my Marriage with my said late Wife, I do by this my

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last Will and Testament in writing, signed and published in the presence of and to be attested by three credible Witnesses, direct and appoint [usual words]." And he then gave the Sum of 4,000*l.* part of the 5,000*l.* to the Daughter of the first Marriage, to be a vested Interest at twenty-one or Marriage, and the remaining 1,000*l.* to the younger Children of the second Marriage, and the Income of the several portions to be in the mean time, applied for the maintenance and education of the Children. And he afterwards proceeded to exercise his power of jointuring in favour of his second Wife, to the extent of 100*l.* a Year, and then disposed of all other his Real and Personal Estate, and named Executors and Guardians of his Children.

The usual form of dating, signing, sealing and attesting, was written at the end of the Will, but the Will was, in fact, neither signed, sealed, attested, nor dated.

The Testator afterwards, and in the same year, as it appeared, made a Codicil in the following words :—" I *James John Hume*, of *West Kington*, in the County of *Wilts*, do hereby appoint the Rev. *C. H. Hume*, A.M. Canon Residentiary of *Salisbury*; the Rev. *Hubert Randolph*, D.D. Rector of *Letcombe Basset, Berks*; *John Kidd*, M.D. of *Oxford*, and *Lydia Hume*, my Wife, Guardians of my Children, and my Executors. A Paper purporting to be my last Will and Testament, but not signed, will explain all my Affairs; and I desire that *John Coulson*, Esq. of *Bristol*, who drew up that Paper, may be employed and well paid as Agent in the Sale of whatever Properties my Executors may think

proper to make, signed by me *James John Hume*, this 26th October 1816, in the presence of us, *Daniel Rose Godfrey*, Curate of *Nettleton, Wilts*, and *Edward Salway*, Yeoman, *West Kington, Wilts*."

The Ecclesiastical Court granted Probate of both Instruments, and now, upon a Bill filed by the Daughter of the first Marriage, several Questions arose;

1. Whether the Will was to be considered in respect of the reference in the Codicil, as being substantially signed by the Testator in the presence of two Witnesses, and the defect in its not being attested by three Witnesses, therefore to be made good in favour of the Daughter of the first Marriage.

2. If not to be considered as signed or attested, whether the whole defect would be made good in favour of a Child.

3. Whether the Probate was to be received as conclusive Evidence that the first Instrument was a Will.

4. Admitting that the two Instruments together were a good execution of the Power, then, whether the Testator had power to give maintenance out of the 5,000*l.* during the life of the second Wife.

Mr. *Wingfield*, and Mr. *Wraithby*, for the Child of the first Marriage.

Mr. *Bell*, and Mr. *Barber*, for the Children of the second Marriage.

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Mr. *Sugden*, and Mr. *Beames*, for the Heir-at-Law.

Mr. *Spence*, and Mr. *Cockerill*, for the Trustees.

Cases cited on the 1st and 2d Questions—*Smith* v. *Ashton* (*a*), *Bradley* v. *Bradley* (*b*), *Wilkes* v. *Holmes* (*c*), *Mac Adam* v. *Logan* (*d*), *Bowman* v. *Mathews* (*e*).

Cases cited on the 3d Question—*Carey* v. *Askew* (*f*), *Habergham* v. *Vincent* (*g*), *Doe d. Cook* v. *Danvers* (*h*), *Wagstaff* v. *Wagstaff* (*i*), *Jervoise* v. *Duke of Northumberland* (*k*).

The VICE-CHANCELLOR:—

The first question is, whether the Power of Appointment in the Testator is to be considered as well executed by the two Testamentary Instruments which have been proved in the Ecclesiastical Court. The first Instrument, taken by itself, is plainly imperfect, the Testator sets out by professing his intention that it should be signed, and published and attested by three Witnesses; and the necessary forms are added to the Instrument for those purposes. But it is left incom-

(*a*) Finch, 273; Eq. Ca. Ab. 345.

(*b*) 2 Vern. 163.

(*c*) 9 Mod. 485; S. C. 1 Dick. 165, cited as good law, *Shannon* v. *Broadstreet*, 1 Sch. & Lefr. 60.

(*d*) 3 Bro. C. C. 310.

(*e*) For. Exch. Rep. 163; and see Sugden on Powers, chap. 6, where all the cases on this subject are collected.

(*f*) 1 Cox, 244; S. C. cited and stated on this point, 8 Ves. jun. 492.

(*g*) 2 Ves. jun. 230.

(*h*) 7 East, 299.

(*i*) 2 P. W. 258.

(*k*) 1 Jac. & Walk. 570.

plete without signing, publishing, or attesting, and in itself could have no operation—the Codicil, however, referring to it as a Paper which will explain all the Testator's affairs, demonstrates that although not complete in point of form, it was still the Testator's intention that it should govern the distribution of his Property, and upon this ground the Probate of this Instrument must have been admitted in the Ecclesiastical Court; the Codicil was signed by the Testator, and attested by two Witnesses. And a question has been made whether the Will is not to be considered by the reference to it in the Codicil as having substantially the same signature and attestation.

I am disposed to think that the Will is by that reference made part of the Codicil, and is to be considered as substantially signed by the Testator, in the presence of, and attested by, two Witnesses. But I do not give all the importance to this question which it has received at the Bar. The Settlement requires that the Will which is to execute the power of appointment should be signed by the Testator, in the presence of and attested by three or more creditable Witnesses; the Codicil, though signed by the Testator, was attested only by two Witnesses. But it is admitted that the defective execution of the Power in this respect will be supplied here in favour of the Daughter of the first Marriage. I am of opinion, that if the Will were not to be considered as incorporated into the Codicil but as a Testamentary Instrument, wanting wholly the forms of signature and attestation, that this Court would still supply the defective execution of the Power; there can be no difference in principle between the defect in form of one Witness or of two Witnesses, or of three Witnesses,

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or between the defect in form of the sealing or the signing. And the case of *Ashton* v. *Smith* is in this respect an authority in point. If the Instrument be of the character required, and there be a clear intention that it should operate as an appointment, this Court, in favour of a Child, will supply all defects in the form of the Instrument.

The next consideration is, whether this Court is to receive the Probate as conclusive Evidence that the Instrument in question has a Testamentary character.—The jurisdiction of the Ecclesiastical Court is confined to Goods and Chattels, it has no power of Administration over other Property, strictly speaking, therefore, the Probate merely establishes that the Instruments received are competent to the disposition of Goods and Chattels. In *Carey* v. *Askew* (*l*) the Probate was received here as evidence that the Instrument was a Will which would pass Copyholds; and in *Doe d. Cook* v. *Danvers* (*m*) the Court of King's Bench appears to have received the Probate as evidence that the Will was an Instrument which would pass customary Estate. But in neither of these Cases was the Probate objected to in that respect. If the objection had been taken, I think it must have prevailed. It is true that every instrument of which Probate is duly granted by the Ecclesiastical Court will pass Copyhold or customary Estate. And that no Instrument can amount to a Will so as to pass copyhold or customary Estate, unless Probate would be granted of it in the Ecclesiastical Court if it affected Goods and Chattels. The decision of the Ecclesiastical Court in granting Probate amounts,

(*l*) 1 Cox, 244. (*m*) 7 East, 299.

therefore, to the judgment of a competent Court, upon the very points in question as to a Will which is to pass copyhold or customary Estate; but it can bind only those who claim an Interest in the Goods and Chattels to be administered by the Ecclesiastical Court; because, as to all other Persons, it is *res inter alios acta*. Those who claim the copyhold or customary Estate are not, nor can be, Parties to the Judgment, for as to them the proceeding in the Ecclesiastical Court is *coram non judice*. I rather think, therefore, that notwithstanding the Cases to which I have referred, if a question were now made in any Court of Law or Equity, whether the Probate is conclusive Evidence, that the Instrument is a Will so as to pass copyhold or customary Estate, that the objection to the Probate as conclusive Evidence must prevail, for the reasons which I have stated.

It would necessarily follow that the Probate could not be received as conclusive evidence in this case, that the instrument was a Will so as to operate as a sufficient execution of the power, because this being in effect a power to charge Lands was clearly *coram non judice* in the Ecclesiastical Court. Inasmuch therefore as the Defendants who are interested against the decision of the Ecclesiastical Court are Infants, I feel myself bound not to conclude them by the Probate. And as there is no Evidence in the Cause directed to this point, it appears to me to be the most proper course to send it to the *Master* to inquire, whether the two instruments of which the Probate has been granted are Testamentary Instruments, with liberty to the *Master* to state any circumstances specially: at the same time it is not to be expected that the interest of these Infants will be much advanced by this inquiry,

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for if it be once ascertained that the first instrument is the Will referred to in the Codicil, which may readily be known from the testimony of Mr. *Coulson*, it cannot, I think, be doubted that the Ecclesiastical Court have come to a sound decision upon the point.

Until the *Master*'s report has established the Will I cannot proceed to the Question of Maintenance upon which I have already intimated my opinion; but the Question has so much nicety in it, that I shall not be sorry to have it re-argued (*n*).

1822.
14th June.

HENNA *v.* DUNN.

The Court leaves it to the discretion of the Master to determine, under the usual order for production of books, whether they are to be merely produced from time to time or to be deposited with the Master.

ON a Bill to take Partnership Accounts the usual Decree was made for an Account containing, amongst other things, the common direction that "for the better taking of the Account, the parties are to produce before the *Master* upon oath, all Books, Papers and Writings in their custody or power relating thereto, and are to be examined on Interrogatories as the *Master* should direct (*a*)." Under this Decree the Plaintiff served the usual warrant on the Defendant to produce the Books, &c. in his possession, before the *Master*, in obedience to which Warrant the Defendant left in the *Master*'s Office an Affidavit setting forth, by way of Schedule, the several Books and Documents which were in his possession; and on a subsequent Warrant he attended before the *Master*, and produced the several Documents

(*n*) See the Judgment on this point, *Hume* v. *Rundell*, 2 Sim. & Stu. 177.

(*a*) Reg. Lib. A. 1821. fol. 686.

referred to in his Affidavit, and offered not only to produce them as and when the Plaintiff should require them, but also offered to permit an inspection of them, at the office of his (the Defendant's) own Solicitor, when and as often as the Plaintiff or his Solicitor should choose to make it. This however was not considered sufficient, and it was insisted that the Books should be *deposited.*

The *Master* intimated his opinion to be that the Defendant was bound to deposit the Books in his Office; and that the production from time to time was not a sufficient compliance with the Decree; and he accordingly granted the certificate of their non-production; upon which an Order was obtained by Mr. Clayton for the production of the Books within four days, and in default, for a Serjeant at Arms against the Defendant (*b*).

Mr. *Lovat* now moved that the latter Order might be discharged.

The mere production from time to time will satisfy the words of this Decree, in which there is no direction for a deposit of the Papers in question, nor any ground laid for such a direction.

Mr. Clayton *contrà.*

The VICE-CHANCELLOR held the manner of production by leaving, or otherwise, to be in the discretion of the *Master*, and he having certified the contempt, refused to interfere.

(*b*) Reg. Lib. A. 1821, fol. 1288.

1822.
24th January.

GORDON *v.* BOWDEN,

An Investment at Calcutta in the Company's Bonds, for securing an Annuity for life, under a Will, does not discharge the Testator's Estate, if the Company lower their Interest.

A TESTATOR charged all his Property with 1,500 *l.* a year to his wife, for her life. The Executors in *Calcutta* invest in the *East India Company* Bonds there, then producing an Interest of 8 *l.* per cent, as much money as would produce 1,500 *l.* a year; the Bonds were payable upon sixty days notice. This was in 1808. At that time in 1808, there still subsisted the Bonds which had been granted by the Company for ten years, at 10 per cent, bearing the name of the Decennial Loan, the term of ten years not being expired. In 1811 the Company lowered their interest to six per cent, and paid off the 10 per-cent Bonds, and granted new ones at 6 per cent. It was in evidence, that before the Decennial Loan the Company's Bonds had borne an interest of 12 per cent; the question was, whether this Investment by the Executors bound the annuitant, so as to discharge the testator's Estate, and to leave her to sustain the loss of income occasioned by the reduction of interest.

Mr. *Bell* for the annuitant.

Mr. *Hart*, and Mr. *Shadwell*, for the Executors and Residuary Legatees.

The VICE-CHANCELLOR held that these Bonds, not being in their nature a permanent Fund, could only be considered an application of part of the Testator's Estate by way of security for the annuity, and not as a discharge of that estate; and he observed that it would

be a different question, whether executors acting in this respect, in conformity to any usage in India, and distributing the residuary property, would be personally liable for the deficiency of an annuity by the fall of the Company's Interest.

VAUCHAMP v. BELL.

1822. April 17, 19, 23.

The literal and technical force of words in a Will to be counteracted by rational implication.

THE Testator, after appointing Executors, empowered them, or such of them as should prove his Will, to sell an Estate *A*; and he directed that the Monies arising by the Sale, and the Rents and Profits in the mean time, "should be applied for and towards discharging all such Debts as he should owe at his decease." And he also empowered them to sell an Estate *B*; and directed that the Monies arising by the Sale, and the Rents and Profits until Sale "should go in aid of his Personal Estate, and be applied for and towards discharging such Debts as he should owe at the time of his decease, as soon after his decease as conveniently might be." And he also empowered his Executors to sell an Estate *C*; and thereout to pay a Charge of 1,300*l.*, and to apply one third of the surplus to the separate use of his Daughter *Susannah*; and the two other third parts of the surplus he willed and directed should "sink into his Personal Estate, and go in aid thereof." He devised a *fourth* estate to the Use of his two Daughters, *Tabitha* and *Susannah*, and the Survivor of them, for life, with limitations over in fee. He devised a *fifth* Estate to one of his Executors and another person, and their Heirs, upon trust, for the separate use of his Daughter *Tabitha*, for her life; and from and imme-

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diately after the death of his Daughter *Tabitha* he empowered his Executors to sell such Estate, and to apply the Monies arising by the Sale, and the Rents and Profits in the mean time from the death of his Daughter "for and towards discharging all such Debts as he should owe at the time of his decease." He devised a *sixth* Estate to one of his Executors and another person, and their heirs, upon trust, for his two Daughters and the Survivor of them, for life; and after the death of the Survivor of his two Daughters he empowered his Executors to sell such Estate, and directed that the Monies arising by the Sale, and the Rents and Profits in the mean time from the death of the Survivor of his Daughters, "should be taken as part of his Personal Estate, and such part thereof as necessary applied for and towards discharging all such Debts as he should owe at the time of his decease."

He made no Gift of his residuary Personal Estate by his Will, but on the next day executed a Codicil, duly attested so as to pass land, and thereby gave and bequeathed, in manner therein mentioned, "the residue of his Personal Estate, if any should remain after payment of such Debts as he should owe at the time of his decease, and such Legacies as he had given by his Will, or should give by any future Codicil." The Executors in the lifetime of the two Daughters sold the Estate *A*, and applied a portion of the produce in payment of a Mortgage charged on that Estate, but the residue of the purchase-money continued in the hands of one of the Executors until after the death of both the Daughters. The Personal Estate was greatly insufficient for payment of the Debts, but the Debts being principally Mortgage-debts, were not called for, as ap-

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peared by the *Master's* report, during the lives of the Daughters, nor was any estate sold during their lives except the Estate *A*. It was admitted, that by the effect of the first, second, and fifth devises, taken literally and alone, the Estates comprised therein would be merely charged with Debts in case of the deficiency of the Personal Estate and of the Estate comprised in the sixth devise; but it was contended, that upon the whole context of the Will it was manifestly the intention of the Testator that the whole produce of the Estates to be sold were to become a part of his general Personal Estate, and would pass as such by his Codicil. And it was on the other side contended that the Estate *A*. was improperly sold by the Executors, and continued, therefore, real Estate, charged with Debts as between the real and personal representatives of the two Daughters.

Mr. *Bell*, Mr. *Horne*, Mr. *Sugden*, Mr. *Preston*, Mr. *Pepys*, Mr. *Blake*, Mr. *Beames*, and Mr. *Pemberton*, for the different parties interested.

The following Cases were cited, *Robinson* v. *Taylor* (*a*), *Attorney-General* v. *Milner* (*b*), *Durour* v. *Motteux* (*c*), *Oxenden* v. *Lord Compton* (*d*), *Hooper* v. *Godwin* (*e*).

The VICE-CHANCELLOR:—

The principal question is, whether the produce of the

(*a*) 2 Br. C. C. 589.
(*b*) 3 Atk. 112.
(*c*) 1 Ves. 320.
(*d*) 2 Ves. jun. 69; S. C. 4 Br. C. C. 231.
(*e*) 18 Ves. 156; and see Lord Eldon's celebrated argument in *Ackroyd* v. *Smithson*, 1 Br. C. C. 506, Ed. Belt.

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Estates comprised in the first, second, and fifth devises, is to be considered as converted out and out into Personal Estate, or whether it continued Real Estate subject only to a charge for Debts in aid of the deficiency of the Personal Estate. It is admitted that if these devises stood alone, the words used would import only that the Estates comprised were to be charged with Debts in aid of the Personal Estate; but it is contended that upon the whole Will it is plain he did not mean that restriction which the words he has used would literally import; but that he intended that the produce of all the Estates which he has empowered his Executors to sell, should become a general fund applicable to all the purposes of his Personal Estate, and mixed with it. It is not disputed that he had this intention with respect to the Estates comprised in the *third* and *sixth* devises.

If by giving to the words which a Testator has used their literal and technical effect, inconsistent and absurd conclusions must necessarily follow; and if by understanding such words more largely the whole Will would be rendered rational and consistent, the Court which departs from the literal and technical sense of the words does not adopt conjecture as opposed to expressed intention, but has recourse to a sound rule for collecting what is the intention which is really meant to be expressed—to apply that principle to the present Will.

If the words of the first and second devises are to be taken according to their literal and technical effect, then this consequence would follow, thus the Court must declare it to have been the intention of this Testator that

the estates firstly and secondly-devised should not be sold for payment of his Debts, unless the produce of the estates sixthly-devised, and thirdly-devised, should prove insufficient for that purpose in aid of his Personal Estate. Now the plain meaning of the Testator was, that the sixthly-devised estate should not be sold until after the death of the survivor of his daughters; and it is equally plain, that his meaning was that the first and secondly-devised estates should be sold and applied in payment of his Debts immediately after his death. The payment of his Debts is the first and only direct purpose which he has in view with respect to these estates. The rents and profits from the time of his death are to be applied for that purpose; and in the second devise he happens to use the expression, that the produce of that estate is to be applied in payment of his Debts as soon as conveniently may be after his decease: The literal and technical force of the expressions in question in these first and second devises is therefore plainly inconsistent with his clear expressed purpose as to those estates in other respects. And it is furthermore absurd, because, with the anxiety with which this Testator appears to have considered the payment of his Debts, it cannot be thought he meant to postpone that payment until the uncertain time of the death of the survivor of his two daughters. The creditors appear also to have been specialty creditors, and could not be postponed at his pleasure. It is admitted that the words used in the third devise amount to a conversion out and out, and no reason can be assigned why the Testator should have a different purpose with respect to the produce of this estate, and the produce of the firstly and secondly-devised estates, which were in like manner to be immediately

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sold by the Executors. It is admitted, that the words used in the sixth devise amount to a conversion out and out, and no reason can be assigned why the Testator should have had a different purpose with respect to the produce of this Estate, and the produce of the fifthly-devised Estate, in which he had in like manner given a previous life-interest.

The construction of the Codicil is the same as if it had made part of the Will. The object of it is to complete the disposal of his Property; but if his purpose were not to convert the devised Estates in question into Personal Estate, his Codicil operates nothing, and he dies intestate as to the great bulk of his property. My conclusion therefore is, upon the whole of this Will and the Codicil taken together, that it is the expressed intention of this Testator that the produce of the five Estates which his Executors are empowered to sell, should be equally applicable to all the purposes of his Personal Estate, and become a part of it, and that the different form of his expressions did not aim at any distinction; and was the mere result of accident and ignorance.

1821. 24th Nov.

ROBINSON v. BRANSBY.

Where a Testator recites that a Legatee is indebted in a certain Sum, that recital binds the Legatee, except in case of a clear Mistake of Figures.

THE Testator in this Case having a Daughter, who was married to one of the Defendants, *Wm. Banister*, and two Sons, recited in his Will that he had advanced and

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lent to his Son-in-Law *William Banister*, several sums of Money, which, with the Interest thereon, then amounted to the Sum of 2,100*l*., and that it was his intention that his three Children should have his Property, in equal Shares, except his Son *John*, in regard to the Dwelling-house and other Property given him by his Will, and which he thought him entitled to as a Compensation for his Services;—and for that purpose he acquitted and discharged the said *William Banister* from the payment of the said Sum of 2,100*l*.; and he directed his Trustees to stand possessed of his Property, (which he had directed to be converted into Personalty) in Trust, to pay his Son *James Robinson* the Sum of 1,200*l*., so as to make his Son *James*'s Share equal to his Son-in-Law *William Banister*'s, which sum of 1,200*l*., with the value of the Buildings thereby devised to his Son *James*, estimated by the Testator at 900*l*., would make together the Sum of 2,100*l*.; and in the next place to retain the Sum of 2,100*l*. for his Son *John Robinson*, and to divide the residue of his said Property for the benefit of his said three Children respectively, or their Families.

The Defendant *William Banister* insisted that he was not indebted to the Testator at the time of making the Will in the Sum mentioned; and that an Account ought therefore to be taken of his Debt; and that he should be paid out of the Assets so much as, with his Debt, would make up 2,100*l*. He entered into Evidence, the nature of which was to show that many Advances made to him by the Testator were Gifts, and not Loans.

The Plaintiffs gave in Evidence an Account signed by *Banister* about the time of making the Will, which stated the Debt according to the Will (*a*).

(*a*) See *Clark* v. *Guise*, 2 Ves. 617.

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The VICE-CHANCELLOR was of opinion that, *primâ facie*, the Debt must be taken according to the Statement of the Testator, and that the Legatee could not enter into Evidence to repel that Statement, by proving that what the Testator thought fit to regard as a Debt, was in truth a Gift: That the Legatee was at liberty to elect either to take under or against the Will: That possibly a Legatee might be relieved in a case of clear mistake of Figures, as where the Testator referring to a settled Account called the Balance Two Thousand Pounds, which was in fact but One.

Reg. Lib. B. 1821. fol. 274.

1822.
6th March.

DENT *v.* PEPYS.

One Name may be substituted for another in the construction of a Will, where it is manifest, not only that the Name used was not intended, but that a certain other Name was necessarily intended.

THE Testator, after payment of his Debts, Funeral and Testamentary Expenses, bequeathed the residue of his Estate to Trustees, upon Trust, " as to two fifth parts thereof to and for the use and benefit of the children of his eldest Sister *Mary*, deceased, formerly the Wife of *George Dent*, and afterwards of *Nathan Cansick*, namely, between *Elizabeth*, *George*, and *Nathan*, or their respective Families, in the following proportions: viz. for the Family of my eldest Nephew, (there being four Children now living,) to whom I will and direct that one twelfth part of the two fifth parts be first apportioned equally amongst the said four Children of my said Nephew *William Dent*; and subject thereto I will and direct that the residue of the two fifth parts be divided and equally distributed amongst the four Families or Children of my *said Nephew William*." The Testator then bequeathed the

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remaining three fifth parts of the residue of his Estate among various persons, but not including the Children of his Sister *Mary*.

The Question was, whether the Name of the Testator's Nephew *William* was not inserted by mistake in the bequest of the Residue of the two fifth parts after deducting one twelfth part for that of the Testator's Sister *Mary*.

Mr. *Agar* and Mr. *Swanston* contended that there was nothing inconsistent in the bequest of one twelfth of the two fifths to the Children of *William* by Name, and a subsequent bequest of the residue of the two fifths to the Children or Families of the same person; that they might take the former bequest *per capita*, and the latter *per stirpes*, which distinction sufficiently accounted for the Testator's giving them first a part, and then the residue; and cited *Del Mare* v. *Rebello* (*a*).

Mr. *Bell*, *contrà*.

The VICE-CHANCELLOR:—
However absurd the literal expressions of a Will may be, a Court cannot be at liberty to correct them by conjecture, nor can it substitute one Name for another, unless it plainly appear from the context of the Will, not only that the Name used was not intended by the Testator, but that a certain other Name was necessarily intended. In this Case, the Testator begins the Clause in question by declaring his purpose to divide two fifth parts of his Residuary Estate amongst the four Children or Families of his deceased Sister *Mary*, in the following

(*a*) 3 Br. C. C. 446; S. C., 1 Ves. jun. 412.

proportions: he then directs that in the first place, one twelfth of the two fifth parts is to be apportioned to the Family of his eldest Nephew *William*, one of the four Children of his Sister *Mary*, and then that the residue of the two fifths is to be distributed equally between the four Families or Children of his said Nephew *William*. It is manifest that the Name of his Nephew *William* could not have been intended to be inserted in the latter part of the Clause, because that would be to give the whole of the two fifth parts to the Family or Children of *William*, in opposition to his declared purpose, which was to apportion the two fifth parts in some manner amongst the four Families or Children of his Sister *Mary*; and next, because it would be utterly inconsistent with his Gift of one twelfth of the two fifth parts, in the first instance. to the Family or Children of *William*; for why should he first give one twelfth of the two fifth parts to the same persons, who were at the same time to take the whole of the two fifth parts? If it be manifest that the Name of the Nephew *William* was not intended to be inserted in this latter part of the Clause, it is equally manifest that the Name of his Sister *Mary* was intended to be inserted. The declared purpose of the Clause was to apportion the two fifth parts amongst the four Families or Children of his Sister *Mary*, and for this purpose it is essential that her Name alone should be found there inserted. Declare therefore that the residue of two fifth parts, after deducting the one twelfth, is divisible amongst the four Families or Children of his Sister *Mary*.

"This Court doth declare, that the said Testator, by the Bequest in his Will of the remaining two fifths of the residue of his Estate, after deducting one twelfth, intended

to give the same to the four Families or Children of his Sister *Mary*, and not to the Family or Children of his Nephew exclusively; and doth declare that the said remainder of the two fifth parts ought to be divided between the plaintiff *Elizabeth Blenkinson*, the Daughter of the said Testator's Sister *Mary Dent*, afterwards *Cansick*, and three deceased Children of the said *Mary Dent*, that is to say, *William Dent*, *George Dent*, and *Nathan Cansick*, living at the Testator's decease; and that their Children are entitled, *per stirpes*, to such shares as their Parents would have taken if living."

Reg. Lib. A. 1821, fol. 1027.

RIGDEN *v.* PIERCE.

1822.
25th April.

Where Articles stipulate for a Division of the Partnership Property at the end of the Partnership a Sale is intended.

THE Articles of Co-partnership in a Brewery provided that at the end or sooner determination of the Partnership, a general Account should be taken by the Parties of all and every the Stock and other things in Partnership, and that the Debts which should be owing by the said Parties on account of the said Partnership should in the first place be paid or satisfied, and the Stock which should then belong to the said Partnership should be fairly and equally divided between the said Parties, according to their respective Rights and Interests therein; then followed a provision, that the Parties were to account to each other for the Debts due to the Partnership which they should respectively receive.

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The Partnership Property consisted of Freehold and Leasehold Public-houses, and of Stock and Utensils in Trade, and Debts due to the Trade. One of the Partners, the Plaintiff, was individually the owner of the Brewery and of certain other Public-houses, which had been used for the benefit of the Partnership during the continuance thereof, the other partner paying a fixed sum in respect of his share of the Rent.

The Partnership being now dissolved, the Plaintiff insisted that the true construction of the articles was, that the Partnership Property should not be sold, but divided *in specie*.

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

Mr. *Shadwell* and Mr. ——— for the Defendant.

The VICE-CHANCELLOR :—

This, like every other question upon the construction of articles, is a question of intention. It is not a very probable intention that a specific division of the articles of property was meant, and not a conversion into money; because this division of the property must necessarily reduce its value, and must be particularly injurious to the Partner, who not being the owner of the Brewery, does not continue in the concern. But it is plain from the expressions used that this could not be the intention. The Partnership Property is first to be applied in payment of the Debts due from the Partnership, and it is the residue which is to be equally divided, now the payment of the Partnership Debts necessarily requires a conversion into money. My opinion therefore is that the Defendants have a right to insist upon a Sale

of the whole of the Partnership Property. The Case of *Featherstonhaugh* v. *Fenwick* (a), is, in this respect, in point.

Reg. Lib. B. 1821, fol. 1013.

KENNEY *v.* WEXHAM.

1822.
April 29, 30.
14th May.

The Court will decree a specific performance of a Contract for Sale of a Life Annuity, though the Annuitant be dead at the time of the Decree.

THE Plaintiff being in right of his Wife entitled to an Annuity for the Life of a Mr. *M'Donald,* issuing out of the Estate of the Defendant, entered into a written Agreement, dated the 18th April 1818, which was signed by the Plaintiff and Defendant, to sell the said Annuity to the Defendant for the sum of 280*l.*, which was to be paid on or before the 1st January 1819; a first instalment of 200*l.* was to be paid in the October preceding: there was no express stipulation as to the time when the Purchaser was to become entitled to the Annuity.

The VICE-CHANCELLOR held the Purchaser entitled to the Annuity from the time of payment of the last, and not from that of the first, Instalment of the price.

It appeared that a difference having arisen upon the point, as to the time when the Purchaser would be entitled to the Annuity, the performance of the Contract was delayed. And in the month of October 1820 the Purchaser wrote a Letter to the Plaintiff, stating his claim to the arrears from the time of the Agreement,

(a) 17 Ves. 298.

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and expressing his readiness immediately to complete upon those terms. Mr. *M'Donald* the Annuitant died a few days after the date of this Letter.

The *Vice-Chancellor* held this Letter conclusive Evidence of a Contract depending, and not abandoned.

It was next urged for the Defendant, that there could in this Case be no Decree for specific performance of the Contract, because the subject of the Contract was gone; that the Plaintiff's claim was for the price only, and that he might have recovered this at Law; and therefore no Bill in Equity would lie for it. And it was said, that the Court had refused to make a Decree in a Bill for the specific performance of an Agreement for a Lease, where the extended Term had expired before the Cause came to a hearing.

Mr. *Sugden,* and Mr. *Temple,* for the Plaintiff.

Mr. *Bell,* and Mr. *Simpkinson,* for the Defendant.

The Cases cited were, *Lewis* v. *Lechmere* (*a*), *Jackson* v. *Lever* (*b*), *Coles* v. *Trecothick* (*c*), *Paine* v. *Mellor* (*d*), *Cass* v. *Rudele* (*e*), *Denton* v. *Stewart* (*f*), *Greenaway* v. *Adams* (*g*), *Gwillim* v. *Stone* (*h*), *Hoyle* v. *Livesay* (*i*), *Western* v. *Pim* (*k*), *Nesbitt* v. *Meyer* (*l*), and *Mortimer* v. *Capper* (*m*).

(*a*) 10 Mod. 506.

(*b*) 3 Br. C. C. 604.

(*c*) 9 Ves. 246.

(*d*) 6 Ves. 349.

(*e*) 2 Vern. 280; and see 1 Br. C. C. 156, n. Ed. Belt.

(*f*) Reported in note to *Todd* v. *Gee*, 17 Ves. 276.

(*g*) 12 Ves. 395.

(*h*) 14 Ves. 128.

(*i*) 1 Mer. 381.

(*k*) 3 V. & B. 197.

(*l*) 1 Sw. 223.

(*m*) 1 Br. C. C. 156; and see *Sugden*'s Vendor and Purchaser, c. 5, s. 2, p. 251.

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14th May.

The VICE-CHANCELLOR:—

It may now be considered as the settled Law of the Court, by the Cases of *Mortimer* v. *Capper*, and *Jackson* v. *Lever*, and the reported *dicta* of Lord *Eldon*, especially in the Case of *Coles* v. *Trecothick*, that if the price of Property be an Annuity for the life of the Vendor, his death before the conveyance will form no objection to the specific performance of the Contract. The Vendor agrees to sell for a contingent price, and those who represent him cannot complain that the contingency has turned out unfavourably. The same principal necessarily applies to a case where the Life Annuity is not the price, but is the subject of the Sale. If the Annuitant happens to die before the Annuity is legally transferred to the Purchaser, the death of the Annuitant can form no objection to the specific performance of the Contract. The Purchaser agrees to buy an interest of uncertain duration, and he cannot complain that the contingency is unfavourable to him. But it is said, that by the death of the Annuitant a Legal Transfer of the Annuity is no longer necessary to the Defendant; and the only act to be done is the payment of a Sum of Money by the Defendant to the Plaintiff; and that the Plaintiff ought therefore to have proceeded at Law, and not in Equity.

A Court of Equity entertains a Suit for specific performance by a Purchaser, in order to give him the very subject of his contract. And although the demand of a Vendor be merely for a Sum of Money, it will entertain a similar Suit for him, upon the principle that the remedies ought to be mutual. If the death of a Life Annuitant were to happen at such a time that a Purchaser in effect took no benefit under his contract,

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which might well happen, where his Title was to commence at a future time; there it might be made a question, whether, as at the time of the Bill filed a Purchaser could file no Bill in Equity, the principle of mutual remedy could enable the Vendor to file such a Bill. But that is not this Case, here the Purchaser has an equitable Title to the arrears of the Annuity between the time of his Purchase and the death of the Annuitant, which would, in principle, now support a Bill on his part for specific performance, although the facts of the case would not make such a Bill advantageous to him. I consider this Case, therefore, strictly a case of mutual remedy so as to entitle the Vendor to a Bill for specific performance. And it appears to me to make no difference in principle, that the Annuity being charged upon the Estate of the Purchaser himself, he could practically satisfy his demand for Arrears, by Retainer, without the necessity of a legal grant.

Reg. Lib. A. 1821, fol. 1553.

1822. 25th April.

BROOKE v. LEWIS.

Where a Testator gives to Legatees who shall be living at the time of actual Distribution, the Court will fix a Year as the proper period.

THE Testator gave all his Real and Personal Estate to Trustees upon trust, to convert it into Money, and thereout to pay certain Legacies, which he directed to be paid within six months after his decease; and to divide the residue between certain Persons named, or such of them as should be living at the time the same should be distributed. And he directed his Trustees to divide his Residuary Estate as soon as conveniently might be after satisfying the Legacies; and that the

Trustees should, from time to time, after satisfying the Legacies as they should respectively receive Monies, lay out and invest the same at interest, until the whole of his Residuary Estate should be distributed.

The Trustees converted all the Property, as appeared by the *Master*'s Report, within eleven months after the Testator's death, but had made no division of it at the time when the Bill was filed.

Mr. *Bell*, Mr. *Agar*, Mr. *Wyatt*, and Mr. *Beames*, for the persons in different interests.

The VICE-CHANCELLOR:—

This Testator annexes to the gift of his Residuary Estate the condition, that the Legatees shall be living at the period of distribution. It is plain, he did not consider the term of six months, when his Legacies are to be paid, as being necessarily that period, because he directs the Monies to be received from time to time, after that period, to be invested for the purpose of accumulation until distribution. The Testator therefore had in his view the period of actual distribution. In such cases Courts of Equity consider the period of actual distribution within the intention of the Testator, to be that period at which a distribution might be made, if the Trustees act with reasonable diligence; and for convenience have adopted, as a rule, in cases which bear an analogy to this, that a year after the death of the Testator is the period within which his property might with reasonable diligence be administered. I must therefore declare, that the Testator's Residuary Property is to be divided amongst the Legatees named, who were living at the end of one year after his death.

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It is clear, in this case, that the actual distribution might have been made at this time, for the *Master* reports that the Property was actually converted into Money at the end of eleven months (*a*).

MYLER *v.* FITZPATRICK.

1822. 6th May.

A mere Agent of the Trustee may not be accountable to the cestui que trust; *but otherwise with respect to a substituted Trustee, who accounts to nobody.*

BILL by an Assignee of the late Lord *Warwick* for an Account of his Trust Estates against the Representatives of the Trustees, and Mr. F., the solicitor, who had been employed by the Trustees.

The Bill alleged that the Trustees had in fact abandoned the execution of the Trusts to Mr. *F.* and Mr. *J.* another Defendant, who was Receiver of the Trust Estates; and that they had possessed the Trust Monies, and employed them for their own use, and had never accounted for them.

The Defendant, Mr. *F.* as to so much of the Bill as sought to affect him in respect of his transactions with respect to the Trust Estate and Monies, put in a general Demurrer.

Mr. *Sidebottom,* in support of the Demurrer, insisted that the Solicitor was a mere Agent to the Trustees, and ought not to have been made a Party in that respect.

The VICE-CHANCELLOR :—

A mere Agent is to account to his Principal only, but according to the allegations of this Bill, which for the

(*a*) *Gaskell* v. *Harman*, 11 Ves. 480, was cited; and see *Parry* v. *Warrington*, ante, 155.

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purpose of this Demurrer are to be received as true, Mr. *F.* cannot be considered as a mere Agent; he is a delegated Trustee, employing the Trust Monies for his private profit, and rendering no account to any body (*a*).

The Demurrer was overruled.

Reg. Lib. B. 1821, fol. 1122.

BRADDICH *v.* MATTOCK.

1822. 2d May.

It makes no difference in supplying a Surrender, that the Custom requires a Surrender to Trustees to the Uses of the Will; or, that the only provision is an Annuity issuing out of the Copyhold itself.

THE Testator, *Richard Blackmore*, being seised of a Copyhold Farm in the Manor of Woodland, devised it to Trustees, upon trust, to pay his Wife fifty Guineas a year for her Life, and subject thereto, upon trust for his Daughter *Mary Blackmore*, in fee.

By the custom of the Manor Copyholds were not devisable, but the custom required that a Surrender should be made to Trustees, upon trust, for the purposes declared in the Will. And by the custom of the Manor the Wife was the customary Heir.

In this Case there had been no previous Surrender to Trustees, and the question in the cause was, whether the Court would supply the Surrender in favour of the Daughter. It was objected for the Wife, that her Interest was in the nature of Free-bench, and that a Surrender was not supplied against Free-bench. That

(*a*) See *Pollard* v. *Downes*, Ab. Ca. Eq. p. 6. 2 Cha. Ca. 121.

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the Court would not supply such a Surrender to Trustees. And lastly, that the Court would not supply a Surrender, where the only provision for the Wife was an Annuity out of the Copyhold itself.

The Cases cited were, *Pike* v. *White* (*a*), *Church* v. *Mundy* (*b*), *Hinton* v. *Hinton* (*c*).

The VICE-CHANCELLOR :—

It is true that a Husband cannot by Devise defeat the Free-bench of his Widow; and the first question is, whether the interest which the Widow takes by the custom of this Manor stands, in this respect, upon the same footing as Free-bench. It is admitted, that if the Husband here had made a previous Surrender to Trustees, upon the trusts of his Will, that his Devise would have prevailed against the interest of his Wife, and necessarily, therefore, this interest stands not upon the footing of Free-bench, but upon the footing of that right which descends to the customary Heir. Taking it, therefore, that in this Case the Court would have supplied against the Wife the common Surrender to the use of the Will, the next question is, whether the Court will supply the special Surrender to Trustees which the custom of this Manor requires. The Court supplies the common Surrender to the use of the Will; and declares the Heir to be a Trustee for the purposes of the Will, because it considers the Devise to be the Substance, and the previous Surrender but a form. But is the Devise less the Substance, or the previous Surrender less a form, because in the one case the custom requires

(*a*) 3 Br. C. C. 286.

(*b*) 12 Ves. 426, and 15 Ves. 396.

(*c*) 2 Ves. 631, S. C.; Ambl. 277, Ed. Blunt, where the Cases are collected.

that the Surrender should be immediately to the use of the Will, and in the other, the custom requires that it should be to Trustees to the use of the Will? I cannot find a rational principle of distinction between the two cases. The last objection is, that the Widow, who stands here in the place of the Heir, is unprovided for, except by an Annuity of fifty Guineas for life, issuing out of the Copyhold itself. This Court will not supply a Surrender against the Heir unprovided for; but it considers the Parent as the best judge of the provision of that Heir, and will not examine the sufficiency of the provision, unless, perhaps, in a Case in which it may be challenged as illusory. If this same Annuity were given to the Widow by the Will from any other Property, it must be admitted that the amount of it would form no objection to the Court's supplying this Surrender. And in the absence of all Authority to this effect I am not prepared so say that it can make any difference to the equity of this Court, whether the provision for the Widow, being of the same amount, comes out of this Estate or another.

WENTWORTH *v.* COX.

1822.
29th April.
14th May.

A devise of all my Real Estate will carry Copyhold surrendered, and if no Freehold, will, for favoured objects, carry Copyhold not surrendered.

THE Testator had a Farm consisting of different pieces of Land dispersed over the open Fields of the parish of *Long Crendon*, consisting principally of Freehold land, but having some Acres of Copyhold. He had no other Real Estate. He devised his Freehold Messuage and Lands at *Long Crendon* to his Wife in fee. And all the rest and residue of his Real Estate and his Money in the Funds, and the residue of his Personal Estate, of what nature or kind soever, he

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WENTWORTH v. COX.

gave to his Wife absolutely. The Copyhold was not surrendered.

The VICE-CHANCELLOR:—

The Copyhold at *Long Crendon* passed by the Residuary Devise to the Wife. A general Gift of all my Estate, *primâ facie* passes such Estate only as the nature of the instrument is calculated to pass. But if the Testator had no such Estate, then he must have meant to pass his only Estate, the Copyhold. Here he had no other Residuary Real Estate, and the Copyhold, therefore would pass. A general Devise of all Real Estate passes Copyholds surrendered.

Reg. Lib. B. 1821, fol. 1093.

CLARKE v. MAYNARD.

1822. 15th May.

Access is not to be presumed between Man and Wife on account of the mere possibility of its occurrence.

UPON a Claim to the benefit of a Settlement, the *Master* reported against the legitimacy of the Children, and exceptions were taken to his Report. The Mother lived with a Man, and assumed his name, and the Children were born during such cohabitation, and took the name of the Man. But during all this time the Husband was alive and lived either in *London*, where the Wife resided, or in the neighbourhood.

The Case of the *King* v. *Luffe*, (a) was relied upon; and it was insisted that there was not in this Case that impossibility of legitimacy which within

(a) 8 East, 193.

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the principles of that Case would bastardize the Issue.

The VICE-CHANCELLOR:—

The manner in which this Case is argued would in effect revive the old principle of *extra quatuor maria*. Now, access like any other important fact must be sarisfactorily established, but access is not to be presumed because the Parties were within such distance that access was possible. I cannot encourage an issue, but I will not refuse it to the Children, if they desire it.

GIBSON *v.* LORD CRANLEY.

1822. 7th June.

By original and supplemental Bill. *an Agreement is made a Rule of Court, which determines all matters in difference in the Suit, but reserves the question of Costs. A Petition dismissed which prayed the direction of the Court as to Costs. The Court enters into the question of Costs only as incidental to its decision upon the merits of the Cause.*

LORD *CRANLEY* contracted to sell to the Plaintiff, Mr. *Gibson*, an Estate for the Sum of 100,000*l*. Before completing his Contract, Mr. *Gibson* entered into an Agreement with Mr. *William Clarke*, a Defendant to the Supplemental Bill, for Re-sale to him of the Estate at a much larger Sum. *Gibson* filed the original Bill against Lord *Cranley* for specific performance of the Contract before his under-sale to *William Clarke*; he afterwards filed his Supplemental Bill to compel the performance of both Contracts.

Certain Proceedings were had in the said Suits, and amongst others, a reference to the *Master* as to Title, and a report in favour of it, and exceptions as to that report.

Afterwards an Agreement was come to between the Parties, by which the exceptions were to be withdrawn, and the Contract completed upon the terms stated;

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and the Agreement was to be made an Order of the Court upon the application of either Party. But the question of the Costs of the Suits was reserved.

The Agreement was accordingly made an Order of Court. And now *Gibson* and Lord *Cranley* preferred cross Petitions, praying the direction of the Court with respect to the Costs.

The VICE-CHANCELLOR declined to entertain these Petitions, because the Court can only determine the question of Costs when the whole matter is before the Court at a Hearing, and as incidental to the merits of the cause. And the Agreements of the Parties having prevented the proceeding to a Hearing in the Cause, the question of Costs was not before the Court (*a*.)

The Petitions dismissed.

1822.
19th June.
8th August.

ESDAILE v. STEPHENSON.

When a necessary Party to a Title, is neither in Law or Equity under the control of the Vendor, the Master ought to report against the Title, unless there is produced to him a legal or equitable obligation on the part of the Stranger to join in the Conveyance.

THE *Master* reported that a good Title could be made if a Widow would release her Jointure, which was secured by a Term;—Exception, for that the *Master* ought to have reported that the Vendor could not make a good Title. The vendor undertook, by parol before the *Master*, to procure the Widow to release.

The VICE-CHANCELLOR stated, that he had con-

(*a*) See *Roberts* v. *Roberts*, 1 Sim. & St. 39.

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ESDAILE *v.* STEPHENSON.

sulted with the Lord *Chancellor* upon this subject, with a view to settle a general rule, and that the Lord *Chancellor* concurred in opinion with him. That where a necessary Party to the Title was neither in Law nor Equity under the control of the Vendor, but had an independent interest, unless there was produced to the *Master* a legal or equitable obligation on the part of the stranger to join in the sale, the *Master* ought to report against the Title, otherwise, where a necessary Party to the Title was under the legal or equitable control of the Vendor, as a Mortgagee, there the *Master* might well report, that upon payment of the Mortgage a good Title could be made. That if the *Master* should report against the Title, and at the hearing, upon further directions, the Vendor had cured the defect, the Court would then compel the Purchaser to take the Title, although it would not suspend the Contract with a view to a future proceeding to perfect the Title; that if the fact, whether the Vendor could at the hearing cure the defect were in question, it must be then sent back to the *Master*, to review his Report with the additional circumstances (*a*).

1822. 19th June.

BURTON *v.* WOOKEY.

No Partner who owes a Duty towards another can place himself in a situation which gives him a bias against the discharge of that Duty.

THE Plaintiff and Defendant entered into Partnership together, to deal in *lapis calaminaris*. The Defendant, who was a Shopkeeper, was to take the active part in the concern, and to purchase the *lapis calaminaris* from the Miners in whose neighbourhood he lived. Many

(*a*) See Sugd. Vendor and Purchaser, 7th ed. p. 207, where this Case is stated.

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of the Miners were, before the Partnership, in the habit of dealing at his Shop, and continued so for some years after the Partnership, receiving from the Defendant ready money for the *lapis calaminaris*, and paying for their shop-goods afterwards as they would have done to any other shopkeeper; but in the year 1817 or 1818, owing, as the Defendant alleged, to the distress of the times, a new course of dealing took place between the Defendant and the Miners; in the place of paying them for the *lapis calaminaris* with money, he paid them with shop-goods, and in his account with the Plaintiff he charged him as for cash paid to the amount of the price of the goods.

The question was, whether he could justify this charge, or whether he must not divide the Profit made by him on the sale of the Goods with the Plaintiff.

The VICE-CHANCELLOR:—

It is a maxim of Courts of Equity that a person who stands in a relation of trust or confidence to another, shall not be permitted in pursuit of his private advantage to place himself in a situation which gives him a bias against the due discharge of that trust or confidence. The Defendant here stood in a relation of trust or confidence towards the Plaintiff, which made it his duty to purchase the *lapis calaminaris* at the lowest possible price; when in the place of purchasing the *lapis calaminaris* he obtained it by barter for his own shop-goods he had a bias against a fair discharge of his duty to the Plaintiff. The more goods he gave in barter for the article purchased, the greater was the profit which he derived from the dealing in store-goods, and as this profit belonged to him individually,

and as the saving by a low price of the article purchased, was to be equally divided between him and the Plaintiff, he had plainly a bias against the due discharge of his trust or confidence towards the Plaintiff. I must therefore decree an account of the Profit made by the Defendant in his barter of goods, and must declare that the Plaintiff is entitled to an equal division of that Profit with the Plaintiff.

Reg. Lib. A. 1821, fol. 2601.

BIGNALL *v.* ATKINS.

1822.
6th May.

Where new Parties are brought before the Court by Supplemental Bill, the original Defendants need not be Parties to the Supplemental Bill, unless they have an Interest in the Supplemental Matter.

THE Testator, *Robert Wetherell*, by his Will, gave to the Plaintiff the monies belonging to him, which should at his death be in the hands of his Merchant and Consignees, *John* and *Abraham Atkins*. The Bill stated that Messrs. *Atkins* claimed to deduct from those Monies the loss that they had sustained on a consignment of Quassia Wood which was in their possession at the death of the Testator, but being then unsold was not brought to account. And the Bill prayed, *inter alia*, that if the Court should be of opinion that Messrs. *Atkins* were entitled to the deduction which they claimed, that the amount might be made good to the Plaintiff out of the Testator's general Assets.

It appeared by the Answers of the Defendants, that the only acting Executor under the Testator's Will, who was named a Defendant, was out of the jurisdiction of the Court, and that *Abraham Atkins* had become a bank-

1822.

BIGNALL v. ATKINS.

rupt before the filing of the Bill, and that his Assignees were not before the Court.

Upon objection at a former hearing for want of Parties, the Cause was ordered to stand over, with liberty to the Plaintiff to file a Supplemental Bill. The Plaintiff afterwards procured a limited Administration under the 38 Geo. 3, c. 37, to be granted to one *John Allen*, and then filed a Supplemental Bill against *John Allen*, and also against the Assignees of *Abraham Atkins*, and the Cause now came on for hearing on the Original and Supplemental Bills.

Mr. *Agar*, and Mr. *Beames*, the Counsel for the Defendant *John Atkins*, objected, that he ought to have been a Party to the Supplemental Bill, and cited *Jones* v. *Jones* (*a*).

Mr. *Hart*, and Mr. *Barber*, for the Plaintiffs.

The Case stood over for consideration.

The VICE-CHANCELLOR :—

The Defendant, *John Atkins*, desires to increase the delay and expense of this Suit, by insisting that he ought to have been made a Party Defendant to the Supplemental Bill. However much this objection may be regretted, where the sum in dispute is of such small amount, yet, if the omission of this gentleman as a Defendant to the Supplemental Bill can in any manner prejudice his interest, the objection must prevail. The purpose of the Supplemental Bill is to bring new parties before the Court, who have an

(*a*) 3 Atk. 217.

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BIGNALL *v.* ATKINS.

interest in the matter of the Original Bill; there are no new facts except those which show the relation of the new parties to the subject of the suit; that *Abraham Atkins* became a bankrupt, and that the new Defendants, *Kymer* & *Jackson*, are his Assignees; and that the Defendant, *John Allen*, is the limited Administrator of the Testator. If any purpose of justice requires that *John Atkins* should be at liberty to join issue with the Plaintiff upon these Supplemental facts, then it is fit that he should be made a Defendant; it cannot be useful to him to join issue with the Plaintiff upon the facts of the bankruptcy of *Abraham Atkins*, and the alleged choice of Assignees, because in his Answer to the Original Bill he makes the same statement; nor can it be useful to him to join issue upon the fact of the limited Administration to *John Allen*, for that fact can only be proved by the Letters of Administration, and is conclusively proved by that production. My opinion, therefore, is, that the Defendant *John Atkins*, has no such interest in the Supplemental facts as makes it necessary for him to be a party to the Supplemental Bill.

RENVOIZE *v.* COOPER.

1822. 12th June.

Gift of a Mortgage Security for Money will pass the Fee, if the Estate be mortgaged in Fee.

WILLIAM TIMMINS, after certain devises of his Real Estate, gave and devised all the rest, residue and remainder of his Freehold Lands, Messuages, Tenements and Hereditaments whatsoever and wheresoever, and of what nature or kind soever, unto his Wife, *Hannah Timmins*, her heirs and assigns, to sell and dispose of as she pleased. And after certain pecuniary

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Legacies, " as to all the rest, residue and remainder of his Estates, Book Debts, Bills, Bonds, *Mortgages*, and other Securities for Money, funded Property, and Effects whatsoever and wheresoever, and of what nature and kind soever the same should or might be or consist, he bequeathed the same, and every part thereof, unto his said Wife, *Hannah Timmins*.

And he appointed *Peter Renvoize, John Grove* the younger, *James Jenney*, and his Wife *Hannah Timmins*, Executors and Executrix (*a*).

Certain Estates were mortgaged in Fee to the Testator for securing Sums of Money, which were not paid at the time stipulated, (and which was previous to the date of the Will) in the Mortgage Deeds. And the Question in the Cause was, whether the Fee in these mortgaged Estates passed by the Testator's Will to his Wife, so as to make his Heir an unnecessary Party to the Conveyance of them.

The point was argued by Mr. *Tyrell* and Mr. *Phillimore*, and the Cases cited were *Crips* v. *Grysil* (*b*), *Wilkinson* v. *Merryland* (*c*), *Timewell* v. *Perkins* (*d*), *Whitelock* v. *Heddon* (*e*), *Lord Braybrook* v. *Inskip* (*f*).

The VICE-CHANCELLOR :—

It may be that the mortgaged Fee will not pass to the Wife by the residuary Devise of the Freehold Estate,

(*a*) Reg. Lib. B. 1818, fol. 1540.

(*b*) Cro. Car. 37.

(*c*) Cro. Car. 447, 449. Sir William Jones' Rep. 380; 6 Mod. 108.

(*d*) 2 Atk. 103.

(*e*) 1 Bos. & Pul. 243.

(*f*) 8 Ves. 417; and see *Coote* on Mortgages, c. 4, p. 566, where all the Cases on this point are collected and considered.

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because, having no Mortgage for years, the subsequent gift of Mortgages to the Wife marks this Testator's intention that it should not pass by that Devise. But if this be so, I am of opinion that the mortgaged Fee will pass to the Wife by the subsequent gift of Mortgages, and other Securities for Money, though coupled with Personal Property. In substance, Money secured by a Mortgage in Fee is Personal Property, and a gift of a Mortgage Security for Money is a gift of all the Testator's interest in the Money and Security, and will therefore pass the Fee.

Reg. Lib. B. 1821, fol. 2022.

1822. 19th July.

BOSWELL v. MENDHAM.

The Father, Vendor, claimed the Estate by Purchase from his Son; the Purchaser is entitled to Evidence of the fairness of the Transaction.

EXCEPTION to the *Master's* Report of a good Title. The Plaintiff was Tenant for Life of the Estate in question, with remainder for Life to his Wife *Rhoda*, and with remainder to his eldest Son in Tail; and upon the eldest Son attaining 21 he joined with the Plaintiff, and the Wife *Rhoda*, in suffering a Recovery, and thereupon subject to an annuity of 150 *l.* a year to the eldest Son for his Life, the Estate was limited to such uses as the Plaintiff and his Wife *Rhoda* should appoint, and for want of appointment, to the Plaintiff for Life, remainder to his Wife *Rhoda* for Life, remainder to Plaintiff in Fee. The Deeds treated the transaction as a purchase from the Son by the Father, in consideration of a present annuity of 150 *l.*, and for a debt stated to be due from the Son to the Father of 2,050 *l.* The Defendant, the Purchaser, insisted that the Plaintiff was bound to produce Evidence that the Debt was due, and

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BOSWELL v. MENDHAM.

of the fairness of the transaction; but the *Master* thought otherwise.

The *Vice-Chancellor* was of a different opinion, and allowed the Exception.

Reg. Lib. A. 1821, fol. 1880.

1822. 29th July.

ANSON v. TOWGOOD.
SHEPHARD v. TOWGOOD.

After a Decree for the administration of a Trust, the Court will stay Proceedings in a second Suit for the same objects, but not if the second Suit has a further purpose, as removing the Trustees for Default.

MOTION in the first Suit to stay Proceedings in the second. Both Bills were for the Administration of the same Trusts, arising out of a Conveyance for the benefit of Creditors; and there was a Decree in the first Suit, directing the Trusts of the Deed to be carried into execution. The second Bill differed from the first, inasmuch as it prayed that the Trustees might be changed for wilful default in their duty, and personally charged with the loss thereby occasioned (*a*).

The VICE-CHANCELLOR:—

If the second Suit had sought only the same Decree as the first, the Court would have interfered to protect the Trust Estate from unnecessary expense, having the means to secure to the second Plaintiff the same advantage, under the first Decree, as if he had himself obtained a Decree. But this second Suit has a further object, and the Plaintiff may be entitled to a very different Decree (*b*), and the prior Degree is therefore no reason why the second Suit should not be prosecuted.

(*a*) See *Shepherd* v. *Towgood*, 1 Russ. & Turn. 379, where the facts connected with the suits are fully stated.

(*b*) See the decree accordingly of Sir *Thomas Plomer*, M. R. 1 Russ. & Turn. 393.

ARTHUR CHICHESTER, Esq. *v.* The MARQUIS and MARCHIONESS of DONEGAL.

1821.
4th August.

If, in an Ecclesiastical Court, a Party is cited as resident within the Jurisdiction, and appears and pleads without Objection, he cannot afterward put that fact in issue.

And in such a case, an Intervener is not at liberty to raise an Objection to the Jurisdiction on that ground.

THIS was an application on behalf of *Arthur Chichester*, Esq. for a Writ of Prohibition, directed to the Judge of the Consistorial Court of *London*, to restrain him from proceeding in a Suit of Nullity of Marriage, instituted by the Marquis of *Donegal* against the Marchioness of *Donegal*, who was described in the Proceedings as *Charlotte Anna May*, falsely calling herself Marchioness of *Donegal*. The Suit was instituted for the purpose of ascertaining the validity of the Marriage between the Marquis of *Donegal* and the Marchioness.

The Writ of *Citation* issued on the 12th May 1821 against the Marchioness of *Donegal*; it described her as resident within the Parish of *Saint James, Westminster*; and it called on her to answer the Suit of the Marquis for a sentence of Nullity of Marriage. The Citation was served on Mr. *Blake* as her Proctor, and Letters Missive left with him on the 14th May. He undertook to accept service of them for the Marchioness, and to appear and defend the Suit; and accordingly on the 18th of May 1821, the second Session of Easter Term, the Citation was returned and an Appearance entered for her, and a Libel prayed.

On the third Session of Easter Term, a Libel was given in on behalf of the Marquis; it pleaded, that *Charlotte Anna May* was illegitimate at the time of her Marriage with the Marquis, and was a Minor; and was

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married by License, with no other consent than that of her putative Father, and prayed a sentence pronouncing the Marriage null and void, by reason that a putative Father was incompetent to give that consent which was required by the Marriage Act then in force, to render valid the Marriage of a Minor by License.

The Marchioness in her Answer confessed the Marriage as pleaded in the Libel; but gave in an Allegation, setting forth the facts on which she relied to establish the validity of her Marriage; viz. that she was a Major at the time of her Marriage, notwithstanding her supposed minority, and consequently that she was capable of contracting lawful Matrimony by License without any consent at all, and prayed that the Marriage might be pronounced good and valid.

At the time when the Libel was prayed for, at the instance of the Proctor of the Marchioness, a decree to see proceedings in the Cause was directed to issue against *Arthur Chichester*, Esq., the Presumptive Heir to the Honours and Estates of the Marquis, in case the Marriage sought to be impeached should be pronounced null and void; and prayed that Dame *Elizabeth May* and *Mary Hyde Munday* might be examined *de bene esse.*

Mr. *Arthur Chichester*, by his Proctor, appeared under Protest to the Jurisdiction of the Court, which he said he should be ready to extend by the next court-day, and prayed, that no examination *de bene esse* might take place in the mean time. The Court refused this application for delay, and an examination *de bene esse* took place on the Allegation of the Marchioness and on

Interrogatories on behalf of the Marquis, and on a subsequent day the validity of the Protest of Mr. *Arthur Chichester* was argued.

It set forth that he was unduly cited to appear in the Cause; that there was no precedent of any person, under similar circumstances, having been either cited to see proceedings of this description, or having been made a Party to such a Suit; that as no Remainder-man can institute this species of Suit for his own benefit, so neither is he compellable to become a Party to it for the benefit of any body else; and that neither the Proceedings nor the Sentence pronounced in the Suit would be binding on him. The Protest further stated, that the Suit was collusive between the Marquis and Marchioness; that they had not separated, but still continued to live together as Husband and Wife, and that the object of the Suit was by contrivance and management to obtain a decree in favour of a pretended Marriage; that though the invalidity of the Marriage became matter of public notoriety in the year 1809, yet no steps were taken to try the validity thereof previously to the institution of this Suit.

This Protest was severally replied to by the Marquis and Marchioness. She denied that the proceedings were collusive, or that it was the object of the Suit to obtain a decree in favour of a pretended Marriage; that it was instituted by the Marquis, and defended by her, for the purpose of ascertaining the legal state and condition of themselves and of their issue; and that it was essential to the purposes of justice, that the validity of the Marriage should be examined by a Court of competent jurisdiction, in the lifetime of persons capable of

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giving testimony of material facts respecting the same, some of whom were advanced in age, and in very precarious health; and that she was desirous that the Proceedings and the Examination of the Witnesses should be had with the privity and in the presence of Mr. *Arthur Chichester*, and others interested in the Marriage, and for that purpose she had prayed the Citation which had been issued against them.

The Reply of the Marquis denied all collusion, and alleged that doubts having arisen respecting the validity of the Marriage, measures had been taken to try the same, or questions depending on its validity; viz. that bills had been filed in Chancery by his eldest Son, the Earl of *Belfast*, as Tenant in Tail of certain Estates possessed by the Marquis in *England*, in 1819, 1820(a), in *Ireland* in 1820 and 1821; and that Mr. *Arthur Chichester* had been requested to become a party to these proceedings, and had refused so to do; and that this Suit was instituted for the purpose of trying the validity of the said Marriage.

A Rejoinder was put in by Mr. *Arthur Chichester*, which set forth, as evidence of collusion, that *Charlotte Anna May*, falsely calling herself Marchioness of *Donegal, had been continually for upwards of four years last passed and still was resident in Ireland* (b); that the

(a) See the Earl of *Belfast* v. *Chichester*, 2 Jac. & Walk. 439.

(b) This fact was supported by Affidavit, which was not contradicted; but it appears to be stated more with a view to prove collusion, than as a distinct and substantive ground of objection to the Jurisdiction of the Court: it was, however, agreed by both parties, that the informality in the form of pleading should be waived, and

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Citation in this Cause issued on the 12th of May 1821, and that on the 14th of the same month Letters Missive were shown by the Officer of the Court to the Proctor of the Marchioness, who undertook to accept service of them for her; and on the 18th, before the process could have been served on her in *Ireland*, an appearance was entered for her.

The validity of the Protest was argued before Lord *Stowell*(c) who overruled the objection to the Jurisdiction, but did not decide as to the liability of Mr. *Arthur Chichester* to be called upon to see Proceedings.

From this decision Mr. *Arthur Chichester* immediately appealed to the Court of Arches, the next superior Court to the Consistory Court of *London*; and also made the present application for a Writ of Prohibition to restrain the Judge of the latter Court from proceeding in the Suit.

Mr. *Wetherell*, Dr. *Lushington*, Dr. *Dodson*, and Mr. *Blake*, for Mr. *Arthur Chichester*:—

Mr. *Chichester* is deeply interested in this Application, as he will succeed to the Title of the Marquis of *Donegal*, and to his Estates as Tenant in Tail in Remainder, in case the present Marquis should die without Children. We maintain that the real object of the Suit in the Ecclesiastical Court, is, by fraud and collusion, to establish a Marriage between the Marquis and Marchioness, and that Mr. *Chichester* is cited as

that the fact should be taken as if regularly pleaded as an objection to the Jurisdiction.

(c) See same Case, 3 Phill. 586.

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an Intervener in order that he may be bound by these proceedings.

Our objections are,

1. That the Marchioness is not resident within the jurisdiction of, and consequently that this Ecclesiastical Court is not competent to determine the validity of the Marriage:

2. That the proceedings are founded in fraud and collusion, with a view to prejudice at some future period the rights of Mr. *Chichester*:

The libel describes the Marchioness as resident within the parish of *St. James, Westminster*; whereas, it is sworn in the affidavit of *Robinson*, and not contradicted, that for the last four years she has been constantly resident in *Ireland*. This proceeding is therefore directly in violation of the Statute of Citation (*d*). The object of this statute, as appears by the preamble, was to prevent the citation of persons out of the Diocese where they reside, to answer to surmised and feigned causes which have been sued more for malice and for vexation than for any just cause of suit; and it enacts, that no person shall be cited to appear before any Ordinary or Judge Spiritual, out of the Diocese where he shall be dwelling at the time when such Citation is issued, upon pain of forfeiture by the Ordinary of double Damages and Costs to the person aggrieved; and the better to enforce obedience to this Act, the Ordinary is subject to a forfeiture of 10*l*., recoverable by any person,

(*d*) 23 Hen. 8. c. 9.

even a stranger to the Suit, on a *qui tam* action. And this was a wise provision, to prevent Parties in collusion from going before some petty Tribunal to obtain a Sentence in favour of an invalid Marriage. The 94th Canon also, and *Gibson*, in his Codex, 1008, declares that no Dean of the Arches, nor Official at the Archbishop's Consistory, nor any Judge of the Audience, shall, *ex officio*, or at the instance of any Party, cite any one which dwelleth not within the peculiar Diocese of the Archbishop, to appear before him without leave of the Diocesan first obtained, except in the Cases enumerated by the Statute of the 23d Hen, 8. c. 9; and if any Judge shall offend therein, he shall for every such offence be suspended from the exercise of his office for the space of three whole months.

The Residence of the Marchioness in *Ireland* is stated, not merely with a view to show collusion, but also as an objection to the Jurisdiction. It is evident that this Suit is collusive, and that its covert object is to establish the validity of the Marriage. The Marquis has, in Bills on the file of this Court, asserted the validity of the Marriage; yet in this Libel, which describes himself of the Parish of *Mary-la-Bone*, and the Marchioness of the Parish of *St. James, Westminster*, he asserts that she was a Minor at the time of the Marriage; that there was no Guardian competent to give consent; and calls upon the Court to pronounce a Sentence declaring the invalidity of the Marriage.

This Citation against the Marchioness was issued on the 12th of May; on the 14th, Letters Missive were served on Mr. *Blake*, as her Proctor; and on the 18th, four days after, before an Answer could have been re-

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ceived from her in *Ireland*, or the Process even served there, an Appearance was given for her. In her Answer, she asserts the validity of the Marriage: she says, that though supposed to be a Minor, and that a License was obtained, her putative Father consenting, she was, in fact, an Adult:—That she was born on the 10th of March 1774, and married on the 8th of August 1795. and afterwards in 1796, and was therefore 21 years and some months old at the time of the Marriage sought to be impugned.

It is a singular feature of this Case, that, notwithstanding doubts were entertained of the validity of the Marriage so long ago as the year 1809, yet no attempt till now has been made to set it aside, and the Parties have constantly been resident together as Man and Wife.

Mr. *Chichester* may be seriously injured by this collusive Suit, and his interest requires that it should be stayed by the prohibition of this Court. A collusive Suit, as in the Duchess of *Kingston's* Case (*e*), will not determine the validity or invalidity of the Marriage; if, therefore, as Intervener, he should succeed in obtaining a Decree in his favour, this would still leave him open to vexation at some future period, before some other Tribunal; or if the Parties found at any stage that they were not likely to attain their object, the Marchioness by asserting the want of Jurisdiction might stop its further progress. If, on the other hand, he is not compellable to appear as an Intervener, and would not be bound by the proceedings, still he may be injured by

(*e*) How. St. Tr. v. 20. 544.

having Evidence calculated to affect his rights at some future day, placed, through collusion, on the Records of a Court without Jurisdiction. In every point of view, therefore, he has an interest in obtaining this Prohibition.

The Citation against Mr. *Chichester* is unusual and extraordinary: he appears under Protest, objecting, 1st, that the Suit is collusive; 2d, the want of Jurisdiction. Can the Marchioness by her appearance affect the rights of a third person? Can Mr. *Chichester* be cited for his Interest, and yet not be allowed to show that the Suit is collusive? The Proceedings are altogether irregular and inconsistent. They cite him before the Ecclesiastical Court for his Interest, yet in this Court object that he has not such an Interest as entitles him to a Prohibition. But any Stranger may apply for a Prohibition. In *Gibson*'s Codex, p. 1027, it is said the Plaintiff as well as Defendant may have Prohibition to stay his own Suit, so may a mere Stranger; and it may be granted on a surmise of some fact or matter not appearing on the Libel. Nor can it be objected that Mr. *Chichester* has barred himself from this remedy by any acquiescence or delay. He appeared under Protest in the first instance, with an objection to the Jurisdiction, which was overruled; from this decision he immediately appealed, and at the same time applied for this Prohibition; nor does it affect this application that it is made pending the appeal, for the time and mode of objecting to the Jurisdiction varies where the want of Jurisdiction appears on the face of the Record, and where it depends, as here, on some fact or matter which does not appear on the Libel.

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There is no want of authority on these points. *Comyns*, in his Digest, v. 6. p. 109, referring to 2 Inst. 109, says, where the Court has no jurisdiction, a Prohibition may be granted on the request of a Stranger as well as the Defendant himself; also, that it is a sufficient cause of prohibition if the Ecclesiastical Court exceeds its jurisdiction. So *Oughton*, tit. 14, "*Tertius invenire potest pro interesse suo in omni causâ quæ tangit bona aut personam suam. In isto casu, iste tertius potest sistere processum contra reum, oportet tamen hunc tertium specificè allegare dictam collusionem, et causas ob quas reus removendus est.*" *Bacon*, in his Abridgment, vol. 5. p. 663, says, "It is clearly agreed, that in all cases where it appears upon the face of the Libel that the Admiralty, Spiritual Court, &c. have not a Jurisdiction, a Prohibition may be awarded, and is grantable as well after as before Sentence; for the King's superior Courts have a superintendency over all inferior jurisdictions, and are to take care that they keep within their due bounds. But where the Court has a natural Jurisdiction of the thing, but is restrained by some Statute, as by 23 Hen. 8. c. 9, for citing out of the Diocese, there the Party must come before Sentence; for after pleading, and admitting the Jurisdiction of the Court below, it would be hard and inconvenient to grant a Prohibition." And to the same effect is *Godolphin*, Rep. Can. c. 11. s. 29: "If a man be sued out of his own Diocese, and then answers without taking Exception thereunto, and afterwards Sentence be given against him, he shall not have a Prohibition for that he did not take Exceptions to the Jurisdiction before, but affirmed the Jurisdiction. If it appear on the Libel that a Court hath not Jurisdiction of the Cause, a Prohibition lies after Sentence; but otherwise, if it doth not so appear on the face of the Libel, but by

averment." And he observes, "generally, if a Suit be in the Ecclesiastical Court, and Sentence there given for the Plaintiff, and thereupon the Defendant appeals, and after pray a Prohibition, no Prohibition is to be granted, although if he had come before Sentence it ought to be granted; for that it is inconvenient, after so much expense, and no Exception taken to the Jurisdiction, then to grant a Prohibition." And *Gibson*, in his Codex, v. 2. p. 1029. *n.* lays down the Law to the same effect; which is confirmed also by the Case of *Gardner* v. *Booth* (*f*). From hence appears the propriety of applying for a Prohibition, pending Mr. *Chichester's* appeal to the Court of Arches; any delay might have been construed into a waiver of all objection to the Jurisdiction, but it cannot be held that arguing the question of Jurisdiction in the Court below, under Protest, and then appealing from its decision, is such a submission as to preclude him from his right to a Prohibition. There is no instance of a Person being bound by his Appearance, except where he has gone to Sentence without objection to the Jurisdiction. Under all the circumstances, whether the Court looks to the Statute of Citation, or the Common Law on which that Statute is founded, or the Citation of Mr. *Chichester* as an Intervener, or his Interest independently of that Citation, he is entitled to a Prohibition.

Dr. *Phillimore*, Dr. *Jesse Addams*, Mr. *Sugden*, and Mr. *Stephen*, for the Marchioness of *Donegal*:—

The charge made against this noble family, of attempting through fraud and collusion to injure the contingent rights of Mr. *Chichester*, is unsubstantiated; and

(*f*) 2 Salk. 548.

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this vexatious application is but a continuance of that unjust opposition which Mr. *Chichester* has made to every attempt of the Marquis and Marchioness to ascertain, through the medium of a competent Tribunal, the legal condition of themselves and their Children. They have now, as they suppose, been married for more than twenty-five years, and have seven Sons; and is it not natural, therefore, that they should be desirous of investigating, before a competent Court, the doubts which exist respecting the validity of their Marriage, by raising the question in the lifetime of persons capable of giving important testimony on the subject? For this purpose Bills have been filed in the Court of Chancery here and in *Ireland*; and to these proceedings Mr. *Chichester* has been invited to become a Party for the protection of his supposed Rights. He has thrown every obstacle in the way of bringing the question to an issue; and has driven this noble family, who are laudably anxious to have the question decided before the best Evidence is lost, to the only mode in which it can be determined in their lifetime, a Suit for a Sentence of nullity of Marriage. Does it look like collusion for any unfair purpose, that the Suit is instituted in a Court over which a Judge presides so eminent for legal ability and integrity as Lord *Stowell?* or that, at the instance of the Marchioness, those most interested in setting aside the Marriage are cited to become Parties to the Suit? Had the Suit been instituted in a Court of less reputation,—in the Court of *Fermanagh*, as they suggest it ought to have been, or some other Court in *Ireland* out of the Jurisdiction where Mr. *Chichester* resides, there might have been some ground for this imputation. But Prohibitions are not granted on the ground of collusion, the Spiritual

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Court can take cognizance of that; neither is Mr. *Chichester* entitled to a Prohibition under the Statute of Citation.

In argument sufficient attention has not been paid to the distinction between Prohibitions granted under that Statute, and Prohibitions granted because the Ecclesiastical Courts had no cognizance of the subject-matter of the Suit. The authorities which have been referred to are principally applicable to the latter Cases. The Statute of Citation was made for the benefit of the individual, to protect him from the inconvenience and expense of being compelled to appear before a distant Tribunal, out of the Diocese wherein he resided; a benefit, however, which he was at liberty to waive if he thought proper so to do. This clearly appears from the Case of *Vanacre* v. *Spleen* (*g*), which is cited as authority in *Gibson*'s Codex, 1006:—"After Sentence given in the Spiritual Court a Prohibition was moved for, upon the suggestion that the person was cited out of the proper Diocese; but the Prohibition was denied, because by pleading to the Libel, he had admitted the Jurisdiction of the Court; and the Statute doth not take away the Jurisdiction of all matters arising out of the Diocese, but only gives him who lives out of the Diocese a new privilege of pleading to the Jurisdiction; which benefit of pleading if neglected, and the Party suffers a Sentence to be given against him, will not serve him for a Prohibition afterwards to that Court whose Jurisdiction he hath already admitted." The Marchioness herself has waived all objection to the Citation by appearing and pleading to the Libel; and it is clear that where a Court has Jurisdiction over the

(*g*) Carthew, 33.

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subject-matter of the Suit, that if a Party comes in upon a Citation which is imperfect, the want of regularity is cured by appearance. *Ayliffe*, in his Parergon, 176, says, " A Citation that is not valid produces no effect, nor does it constitute any one to be *in morâ*, and is, as it were, no Citation at all; but it is otherwise if the Party appears on such a Citation of his own accord, for then an invalid Citation receives force and strength by his appearance, since the presence of the Party without any Citation at all is sufficient, because a person present regularly cannot be cited." So *Shower* (h):—In case one be cited out of the Diocese no Prohibition is to be granted after Plea, for thereby the Defendant hath owned the Jurisdiction of the Court.

It is absurd to contend that she could now sue for the penalties under the Statute of Citation. The Marchioness then making no objection to the Suit, what right has Mr. *Chichester* to complain of its being determined in a Court within the district where he is resident, a Court too of the highest reputation, least of all others fitted for parties whose object is, if the charge be true, to attain their end through misrepresentation or collusion? The Case of *Catchside* v. *Ovington* (i), which has been relied upon, is not applicable; for there, as Lord *Mansfield* observed, it appeared upon the face of the proceedings that the Spiritual Court had no Jurisdiction. The object of the Suit was to falsify an Inventory at the Suit of a Creditor, which the Spiritual Court is not competent to do. If the Suit in this Spiritual Court were inconvenient to the Intervener, he might have some ground of complaint; but the Intervener is not incon-

(h) *Anon.* 2 Sh. Rep. 155. (i) 3 Burr. 1922.

venienced, because the Jurisdiction applied to is in the Diocese where the Intervener lives. Here the Court has Jurisdiction over the subject-matter, and that distinguishes this from the Cases cited. If the Court should grant the Prohibition, it will prevent the examination of Witnesses who can give material evidence, and who may die pending the delay, whereas no injury can be done to any one by refusing this application (*k*).

Mr. *Bell* for the Marquis of *Donegal*.

The VICE-CHANCELLOR :—

This is an Application on the part of Mr. *Arthur Chichester* for a Writ of Prohibition, directed to the Judge of the Consistorial Court of *London*, to restrain him from proceeding in a Suit for a sentence of nullity of Marriage, instituted by the Marquis of *Donegal* against the Marchioness.

It is a Case undoubtedly which, from its great importance, well deserves mature deliberation; but I am disposed to give my opinion now. First, because from the advanced age of the Witnesses, any delay would expose the Parties to the risk of losing the benefit of their testimony; next, because the Case has been so minutely and ably discussed by the Counsel on both sides, that it must be the fault of the Judge if he does not now

(*k*) The following Cases were referred to in the course of the arguments on each side: Godb. Rep. 121; Gib. Cod. v. 2. 1004. 1006; Canons, 105, 106. 108; 3 Burn's Ecc. Law, 227. *n.* 7th ed.; Aylif. Parergon, 176; *Smith* v. *Executors of Poynder*, Cro. Car. 97; *Shotter* v. *Friend*, 3 Mod. 283; *Bannister* v. *Hopton*, 10 Mod. 12; Hetley, 19; *Full* v. *Hutchins*, Cowp. 422; *Paxton* v. *Knight*, 1 Burr. 314; *Anon.* 1 P. W. 475; *Clarke* v. *Andrews*, 1 Sh. Rep. 9.

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take a correct view of the subject; and lastly, because the result of the elaborate arguments which have been so properly addressed to the Court, have induced me to think that the real question in this Cause lies within a very narrow compass, and which may, I think, be embraced without further delay.

In the month of May last, the Marquis of *Donegal* applied to the proper officer of the Consistorial Court of the Bishop of *London,* to issue a Writ of Citation against the Marchioness of *Donegal,* and the Writ of Citation lies before me; it describes the Marchioness of *Donegal* as resident in the Parish of *Saint James, Westminster,* and it calls on her to answer to the Suit of the Marquis of *Donegal* for a sentence of nullity of Marriage. Now if upon the face of this Citation, it had been represented that the Marchioness of *Donegal* was resident in *Ireland,* and out of the Jurisdiction of this Consistorial Court, then it would have been perfectly clear, on a settled and sound principle, that whatever this Court might have done in the Suit, it might at any time, and after any sentence, have been reversed, in respect of the want of Jurisdiction apparent on the face of the Record; but on the face of this Citation there is no difficulty whatever; the fact stated there is, that the Marchioness of *Donegal* is resident within the Parish of *Saint James, Westminster,* and therefore, that she is within the Jurisdiction of the Court.

To this Citation the Marchioness appears upon the 16th of May, two days after the Citation issues; and she not only appears to the Suit, but she pleads to the Suit; and she states the nature of her Case and of the Evidence by which she endeavours to maintain it;

namely, that she is the lawful Wife of the Marquis of *Donegal*. By this Appearance therefore, and by thus pleading what the nature of her Case is, she in fact admits that she is resident within the Parish of *Saint James, Westminster*; that she was not resident there, was a fact within her own knowledge, and she does not take advantage of that misdescription; and by taking no notice of it, and appearing, she admits that she is properly described as being resident within the Parish of *Saint James*, and consequently within the local Jurisdiction of the Court.

After having so appeared and pleaded, she is instructed by her legal advisers, that this Suit does not effectually determine a question so important to herself and children; as between her husband and herself it would determine the question; but the family estates and the family dignities will, if there be no legal issue of this Marriage, descend to Mr. *Arthur Chichester*; and taking therefore the fact of the Libel to be a fact of great importance to be tried, it was her interest to try it, not merely with her Husband, but with that Gentleman who might afterwards dispute it with her and her issue, as he claimed in respect of this being no valid Marriage, and as the Heir to the Estates of this Family.—She was instructed that, according to the form of proceeding in the Ecclesiastical Court, she had a right to call him before that Court, for the purpose of trying it as a question, which involved in it a question, to which he was a Party interested; and that as a Party so interested he was to come before the Court; and under those instructions, (which must be taken to be correct in point of Law, whether the point of fact does depend on Mr. *Arthur Chichester*'s interest or not,) she issues a Citation, calling

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on Mr. *Arthur Chichester* to appear to the Suit, in order that she may against him, as well as against her Husband, establish the important fact of her Marriage.

Mr. *Arthur Chichester* on receiving this, appears, but he appears under Protest; and he alleges by his Protest, first, that he has no such interest in the question as ought to induce the Marchioness of *Donegal* to summon him as a Party to the Suit; next, that this is a collusive Suit, and that for this reason he ought not to be made a Party to it.

An Answer, as it is called, is put in to his Protest; and in that Answer it is alleged, that he ought to be a Party, and that he has that interest in the subject, which makes it fit that he should be cited in this Suit; and it is also alleged, that no collusion existed or took place between these Parties, but that the Suit is instituted for the purpose of fairly trying the question at issue between them.

Mr. *Arthur Chichester* replies to that Answer; and in his reply he introduces these facts: first, he says, in the Answer given to my Protest, it is alleged that there is no collusion; now in point of fact, the Marchioness of *Donegal* was resident in *Ireland* at the time of the institution of this Suit, and had been so resident in *Ireland* for four years; and this Citation to her was on the 14th May, and she is made to appear on the 16th of May; and therefore, without collusion, it is impossible that a Party resident in *Ireland* could appear in *London* in a Suit only instituted two days before.

The general Case was argued before the Judge of the Consistorial Court; it appears, however, without entering

into the general view of the argument, as to whether Mr. *Chichester* was properly cited with respect to his interest, there was a point, which if decided according to his allegation, would make all further consideration of this unnecessary, namely, a point arising out of his allegation, that the Marchioness of *Donegal* at the time that this Suit was instituted was resident out of the Jurisdiction of the Court.

Though it is and must be admitted, that it was not very regularly pleaded with a view to raise the point; and although it must be seen by reading the papers, that it was rather introduced as an argument to show collusion between the Parties, than as a substantive fact on which the Parties relied, with a view to the principal question; yet still it was considered to meet the general convenience of the Parties in this Suit, that all informality as to the form of the pleadings should be waived, and that they should be taken as regularly pleaded, for the purpose of enabling the Judge to determine whether it did constitute an objection which would prevent all further prosecution of this Suit.

The learned Judge (*l*), in exercising his judgment on the question, has decided that it formed no objection to the further prosecution of this Suit, and to that decision Mr. *Arthur Chichester* has lodged an appeal to the next Superior Court—to the Consistorial Court of the Bishop of *London* (*m*).

The learned Judge has pronounced a judgment on it; and although in all cases the authority of a judgment

(*l*) Lord *Stowell*. *Donegal* v. *Donegal*, 3 Phil. 586.

(*m*) *Chichester* v. *Donegal*, 1 Addams, 5.

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ought to weigh considerably; yet I am rather to trust to my own imperfect view of the subject treated before me, as it has been, on reasoning and upon general principle, than on the weight of any authority whatever; though if any authority could influence me against the effect of my own views, certainly no higher authority could be stated than that of the learned Judge (*n*) who has made this decision.

The first question stated was, that Lady *Donegal* herself, notwithstanding the steps she had taken in the Suit, was still at liberty to allege the want of Jurisdiction in the Court, and that if she was at liberty to allege the want of Jurisdiction of the Court, of necessity it was supposed to follow, that Mr. *Arthur Chichester* would be at liberty to allege also the want of Jurisdiction; and it was further stated, and stated I believe principally from the Court itself, that although it might turn out in examinations of authorities and principles, that Lady *Donegal* herself was no longer at liberty to state an objection to the Jurisdiction of the Court; that it did not therefore necessarily follow that Mr. *Arthur Chichester* might not still be at liberty to take that objection; for it would be a very serious and a very important question, how far any submission to the Suit, or any admission on her part of the facts stated in that Suit, could conclude the rights of Mr. *Arthur Chichester*, who was not only an intervening Party, but an intervening Party against his consent.

Now the first and most important question is, whether Lady *Donegal* would be now precluded, if she thought

(*n*) Lord *Stowell*.

fit, from taking an objection to the question of Jurisdiction; the question of Jurisdiction is of two sorts, the want of Jurisdiction as to the subject of the Suit, which never can be acquired, and the want of Jurisdiction as to the locality of the Parties in the Suit. It is material to see what steps are had in the Inferior Court: if it appears on the Record that the Inferior Court had never any Jurisdiction on the subject, no proceeding in that Court, and no acquiescence of Parties ever can maintain the Judgment. But the want of Jurisdiction may proceed, not from the nature of the subject, but because one of the Parties is not locally within the Jurisdiction of the Special Court; and although the Court then may have full Jurisdiction of the subject, it has not Jurisdiction over the Party, in respect of the absence of that Party from the local district; that is the nature of this objection. It being admitted here, that on the subject itself, the validity of the Marriage between Lord and Lady *Donegal*, the Court has full Jurisdiction; but the objection is, that at the institution of the Suit, Lady *Donegal* was not locally within the district, and therefore not properly before the Court. It appears to me on the plainest principles of Common Law, that it hardly admits of a question, that a Court of limited Jurisdiction (I mean limited as an ordinary Court is, perhaps to an Archdeaconry, or a Bishoprick, or an Archbishoprick) can never on a mere assertion of interest, have Jurisdiction beyond its own local limits. I conceive that it is not the Statute of the 23 of Hen. 8, that created this objection; the objection is inherent in the nature of a limited Jurisdiction. The 23 of Hen. 8 seems to me to have had in view only to enforce the principle of the Common Law, by imposing a penalty and forfeiture against those who should act against its

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principles. It seems by the recital of the Statute itself, that it had become necessary in respect of the practice which had been adopted by the Archbishop and others of drawing within their Superior Jurisdiction persons who were not locally resident there, I take that Statute to be merely affirmative of the general principle of the Common Law, and to give aid to that principle of the Common Law by the enforcement of the penalty and the forfeiture; the Common Law considers it in the same way; namely, that he who in respect of an office which has a limited and local extent as to judicial Jurisdiction is necessarily limited in that Jurisdiction according to the extent and locality of his office; therefore, not placing any great value on any observation that arises out of the Statute, but considering it as a general principle, I shall proceed to state the facts of the Case.

Now that Lady *Donegal* might if she pleased, when this Citation was served on her, that she might have appeared without waiving her objection to the Jurisdiction, is plain; because although there are not the same modes of pleading in the Ecclesiastical Court as there are in the Courts of Law, yet the principle to some extent must prevail; and this Party therefore must appear for the very purpose, or rather may appear (whether they must appear is a proper phrase I do not stop to inquire), but that a Party may appear without waiving an objection to the Jurisdiction is quite certain, because she may appear, as Mr. *Chichester* has done, under Protest with respect to that Jurisdiction. Lady *Donegal* might therefore, if she pleased, have taken the objection when she was served with a summons, in which it was represented that she was resident in the Parish of *Saint James, Westminster*, as it seems now

she was not; she might have stated, "that this Suit is most improperly instituted against me in the Consistorial Court in *London*—I am not resident within the district of that Court; it is very true your Citation alleges that I am locally resident therein, but that is not the fact. I protest against your Jurisdiction, being a person not resident in the Parish of *Saint James, Westminster,* but being a person resident within the Kingdom of *Ireland,* at *Dublin* or elsewhere." Lady *Donegal,* however, does not think fit to take that objection; she appears, not for the purpose of stating the objection, but she appears for the purpose of proceeding with the Case and entering into the merits of the Suit; and it is, in fact, an admission on her part that she is properly described as being resident within the Parish of *Saint James, Westminster,* and is within the Jurisdiction of this Court in which the Plaintiff desires to entertain the question.

Now it must be considered what the nature of the admission is,—it is an admission by her of a fact which brings the Case within the Jurisdiction; but it is said, notwithstanding, that she admits the fact which gives the Court Jurisdiction; and although she proceeds to the length not only of pleading and submitting her Case to the consideration of the Court, yet she has a right to retire from that admission at any time before sentence pronounced; and that Lady *Donegal* in this Case is not concluded, because sentence on the merits of the Case not being pronounced, still she has a right to retire from the Suit. If I had found that question concluded by authorities, whatever I might have thought of the reasons which had led to that conclusion, I must have been bound by them. There is nothing so dangerous

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to the administration of Justice as to disregard the authority of Cases because the principle which induced the Judge so to decide them, is not at the moment presented to the mind of the Judge before whom they are cited. But I am bound to say, that no authority which has been cited to me to-day, at all, as I consider it, touches essentially this question, that Lady *Donegal* or any other Party, who, admitting the fact which gives the Jurisdiction to the Court, has a right to retire from an admission of that fact at any time before Sentence. No authority appears to me to go that length; there are expressions in that Case in *Carthew* (o), which would be consistent with such a statement of facts; but when you come to weigh all the expressions there used, my opinion is on that Case, that the weight of authority is the other way, and that what the Court there means to decide, is not that a party may retire at any time before sentence, but that a party can never retire who has pleaded and submitted to the Jurisdiction.

Taking this, therefore, as a question not prejudiced by authority, I am to consider it as a Case standing on principle only. Now in a Court of Law, and also in a Court of Equity, though we have not precisely this point addressed to our consideration, yet every day we have the point upon which necessarily the same principle comes to be decided; I state without exception, as a general principle, that in Courts of Equity as well as Courts of Law, a Party admitting a fact which gives Jurisdiction to a Court, and appearing and submitting to that Jurisdiction, upon general principles, and upon all analogies known to us, can never recede, or as it is

(o) *Vanacre* v. *Spleen*, Carth. 33.

called in the Scotch Law, *resile* from those facts and withdraw that admission.

My opinion therefore is, that Lady *Donegal* is conclusively bound from any objection as to the want of Jurisdiction, by the course she has taken in this Cause. If therefore the right of Mr. *Arthur Chichester* to object to the question of Jurisdiction is to depend upon the right of Lady *Donegal*, it will necessarily follow to be my opinion, that as Lady *Donegal* is concluded from the objection, so Mr. *Arthur Chichester* must be concluded equally from the objection. But then this very important question must be considered, whether because Lady *Donegal* has concluded herself, she has therefore concluded Mr. *Arthur Chichester*, the intervening Party?

Now at first sight this objection appeared to me to be of very great weight; and it appeared to me to be of great weight for this reason:—Lady *Donegal*, like any other Party, may admit if she pleases facts against her own interest, and by that admission may transfer the Jurisdiction from a Court to which it does not correctly and legally belong; she may certainly if she pleases do that. The provisions of the Law are made with a view to her benefit, and it is for the benefit of the suitors out of the Jurisdiction that the Law prevents inferior Courts from exercising that Jurisdiction beyond its own limits, that persons may not be harassed by being called to contest questions out of the limits of their own local residence. If a Party thinks fit to remove this advantage which the principle of the Law, the Canon Law, the Common Law and the Statute Law give her, she is at liberty to do so. But then if she chooses on her part to remove that advantage, can

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that prejudice the rights of a third Person? It therefore at first appeared to me to be very important to consider, whether, Lady *Donegal* having waved this objection for herself, Mr. *Arthur Chichester*, a third Person, could be prejudiced from availing himself of that objection by her act. Now if it could be made out that Mr. *Arthur Chichester* would be prejudiced by her waving that objection, the conclusion that first struck my mind would necessarily follow; for it is utterly impossible, if she thinks fit to wave a benefit which the Court gave her, that her acts could be permitted to work an injury to third Persons.

When we consider the subject, the difficulty is to understand how the waver on her part can in any manner injure Mr. *Arthur Chichester*. If I could fancy any possible case in which the interest of Mr. *Arthur Chichester* would be prejudiced by this question being tried within the local Jurisdiction of *London*, rather than a local Jurisdiction where this Lady was resident in *Ireland*, that would go a great way to determine my opinion in this Case. But I cannot conceive, on principle, any prejudice which can arise to Mr. *Arthur Chichester* from this objection; and therefore it appears to me, on the best consideration which I can give the subject, that Mr. *Arthur Chichester*, as the intervening Party, cannot relieve himself by that objection. The Jurisdiction of the Ecclesiastical Courts does not depend on the locality of the subject; if the Jurisdiction of the Ecclesiastical Courts depended on the locality of the subject, then it is very plain that a Party might be materially prejudiced from having a subject removed from one Jurisdiction to another; and it would be infinitely more convenient to a Party, with respect to the

nature of the Case, and the testimony he could bring thereon, that the Suit should be instituted in the Diocese of *A.* rather than in the Diocese of *B.* If therefore Lady *Donegal,* in such a Case, transferred the Jurisdiction from the Diocese of *A.*, where the Court had local Jurisdiction in respect of the nature of the subject, to *B.*, I should be clearly of opinion that the intervening Party could not be affected by her acts. It is perfectly plain, that the Ecclesiastical Court has no Jurisdiction with respect to the locality of the subject, but it depends entirely on the locality of the Person. Now if it depends entirely upon the locality of the Person, I am to ask myself, whether Mr. *Arthur Chichester* can be prejudiced in respect of this Case, if this question is to be tried in *London* rather than in *Ireland*; whether he can possibly be prejudiced by this being tried where he is himself locally resident within the Jurisdiction? for otherwise the objection would be on him, and he would not have to state that this Suit is not to proceed because Lady *Donegal* is out of the Jurisdiction, but that this Suit is not to proceed because he was out of the Jurisdiction. But Mr. *Arthur Chichester* is within the Jurisdiction of the Diocese, and therefore that objection is not open to him; it being, as I have stated, a Case in which the Jurisdiction depends, not on the subject, but on the locality of the Person.

So far from being an inconvenience to Mr. *Arthur Chichester* that this Suit was instituted here, where he is locally resident, it may be convenient to him, rather than that it should be tried elsewhere, where he is not locally resident. Without entering therefore further into the considerations which have been addressed to me on this subject, and confining my present view to the two

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present points; I must declare, that neither on authority nor upon principle, can I hold that Lady *Donegal* is now at liberty to withdraw that admission of the fact on which the Jurisdiction of the Court is founded; and I am further of opinion that Mr. *Arthur Chichester*, the intervening Party, is bound by this admission to that Jurisdiction, and that he cannot be prejudiced by submission to it; and if his interests are in any manner affected, it is to his convenience and advantage, and not to his prejudice. The Citation founds itself, and he cannot make an objection to the Jurisdiction, if the Parties litigant have submitted to it (*p*).

Petition dismissed without Costs.

(*p*) All doubts as to the validity of this Marriage are removed by the late Marriage Acts, 3 G. 4. c. 75, and 4 G. 4. c. 76. See Note of Dr. Addams in his Report of this Case, 1 Addams Rep. 28.

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See PRACTICE, 38.

APPOINTMENT.

A bankrupt having a power of appointment over money, to be executed only by will, made his will, disposing of the property, and then became bankrupt, and afterwards obtained his certificate, and died without revoking his will. Held, that the appointee by the will is a trustee for the creditors of the bankrupt, who became such after he had obtained his certificate. [*Jenney* v. *Andrews*] - 264

ATTORNEY.

1. An attorney having died and bequeathed all his property to his widow; his eldest son, for the mixed consideration of the good will of the business, the advancement of money for carrying it on, and family affection, enters into an agreement with his mother to continue the business, and to account to her for a moiety of the profits during the minority of his younger brothers and sisters. This arrangement is not contrary to the policy of the st. 22 Geo. 2. c. 46. s. 11. [*Candler* v. *Candler*] - 141
2. An attorney who forms a partnership with an unqualified person is within the provisions of the 22 Geo. 2. c. 46. s. 11. An agreement to share profits constitutes a partnership. [*Tench* v. *Roberts*] 145

See SOLICITOR.

BANKRUPTCY.

1. If managing partner draws out monies, and conceals the fact, or disguises it in the partnership books, this is fraud, and proof may be made against the separate estate. Otherwise, if the transaction is duly entered in books. [*Smith* in re *Hay*] - - - - 2
2. As to construction of Friendly Society Act in case of bankruptcy. [*Anon.*] - - - - - - - 98
3. *Bessell*, on the advance of 300*l.* by *Gregory*, gives her a promissory note for that sum and interest, indorsed by *Shortman* and *Croden*, as a further security for the money. The note becomes due, is presented, and dishonoured, and *Bessell* being unable to discharge it, agrees to sell to *Gregory* household goods, &c. for 580 *l.*, and to take back the note, with the interest due on it, in part of payment. Possession is given to *Gregory* of the household goods, &c. and the note is delivered up to

Bessell, and destroyed. Afterward a commission of bankruptcy is issued against *Bessell*, and there being an act of bankruptcy previous to the sale of the household goods, &c. to *Gregory*, they are demanded by the assignees, and delivered up to them. *Gregory* demands payment of the note from the drawer and indorsees, and on refusal files a bill against them; an account was directed of what was due on the note for principal and interest, with the costs of the suit, as against *Shortman* and *Croden*, and the bill dismissed without costs, as against *Bessell*, the plaintiff undertaking to prove the note under the commission, for the benefit of *Shortman* and *Croden*. [*Gregory* v. *Bessell* and Others] - - - - 187

4. Where a creditor who has proved is fully paid by the surety, he cannot afterwards sign the certificate. [*Ratcliffe* v. *Gunson*] - - 193

5. The warrant of committal of a bankrupt, being by mistake dated the 2d March, instead of the 2d February, held that this is not such an error as can be amended under the 18th section of Geo. 2. c. 30. [*Ex parte M'Gee* in re *M'Gee*] - - - - - - - 206

See Annuity.—Feme Coverte.—Practice, 45.

BILL OF REVIEW.

To entitle a party to file a supplemental bill in the nature of a bill of review, it is necessary that the new matter should be discovered after the decree, or at least after the time when it could have been introduced into the cause; and the matter should not only be new, but material, and such as if unanswered in point of fact, would clearly entitle the plaintiff to a decree, or would raise a question of so much nicety and difficulty, as to be a fit subject of judgment in a cause. [*Ord* v. *Noel*] - - 127

CHARITY LANDS.

1. *Quære*, Where the purchaser of charity land, with notice, expends money in buildings, is he entitled in equity to compensation? [*Attorney-General* v. *Lloyd*] - - 92

2. Grant of land void under 9 Geo. 2. c. 36, where there is a resulting trust for the grantor during his life.

Where the principal charity fails, the accessory fails with it.

A several charity is good, though connected with a charity that fails in some cases of administration, not of the essence of the charity.

Where a residue is given for a valid purpose, it will fail with the prior void purpose, if not capable of being ascertained except by the actual execution of that purpose. [*Limbrey* v. *Gurr*] - - - 151

COMMISSION.

See PRACTICE, 40, 46, 49.

CONDITION.

A testator having devised his property in trust for his wife during widowhood, on condition that she should, neither directly nor indirectly, keep or have any concern or interest in a public or licensed victualling house, nor any other kind of business: Held that the keeping and taking care of a public-house belonging to other persons, as their servant, and at regular wages, and in the profits or emoluments of which she had no interest, was not such a breach of the condition as to create a forfeiture. [*Jones* v. *Bromley*] - 137

CONVEYANCE.

No objection to a sale in court, in execution of a will, that there are infants interested under the will, who cannot join in the conveyance. [*Powell* v. *Powell*] - - 53

CONSTRUCTION.

By terms of French contract, *rentes viageres* for two lives in succession were, after the death of first life, payable, with all arrears, to survivor. The representative of the first life relieved against the loss of arrears occasioned by the Revolution. [*Hatchett* v. *Pattle*] 4

COPYHOLDS.

1. Upon sales in court, the vendor will be compelled to surrender a copyhold in person, if it can be conveniently done. [*Noel* v. *Weston*] - - - - - - - - - 50
2. It makes no difference in supplying a surrender, that the custom requires a surrender to trustees to the uses of the will, or that the only provision is an annuity issuing out of the copyhold itself. [*Braddick* v. *Mattock*] - - - - 361
3. A devise of all my real estate will carry copyhold surrendered, and if no freehold, will, for favoured objects, carry copyhold not surrendered. [*Wentworth* v. *Cox*] - - - - - - - - 363
4. A testator devised his copyhold estate to his wife for life, with remainder to his two sons as tenants in common in fee; the eldest son and customary heir was, by an arrangement between himself, his mother and brother, admitted to the copyhold in fee, and executed by deed a declaration of trust to the uses of his father's will; the brothers became bankrupts, and their assignees sold their reversion to the plaintiff. Held that the plaintiff, though as against the assignees a purchaser of a legal reversion, was not as against the tenant for life entitled to compel such a surrender as would give him the legal reversion. [*White* v. *Stock*] - - 327

COSTS.

1. Where one residuary legatee is plaintiff and the other defendant, court will not tax costs as between solicitor and client, without consent. [*Fenner* v. *Taylor*] - - 3
2. A person made party to a suit only for protection of trustees, entitled to his costs out of trust fund. [*Hicks* v. *Wrench* and another] 93
3. A motion to dissolve an injunction restraining an action on a *post obit*, refused with costs, such case being an exception to the general rule, that the costs of a motion for an injunction, or to dissolve an injunction refused, are costs in the cause. [*Marsack* v. *Reeves*] - - - - - - 108
4. Bill against principal obligor and the representatives of another obligor, as surety in a joint and separate bond, the principal obligor was insolvent, and so stated in the bill; but held he might be made a party, and was not entitled to his costs. [*Haywood* v. *Ovey*] 113
5. A trustee seeking the direction and indemnity of the court, as to the execution of his trust, is, whether plaintiff or defendant, entitled to his costs, unless the act required to be done leads to no responsibility, and the motive of the trustee is obviously vexatious. [*Curteis* v. *Candler*] - - - 123
6. The mere circumstance of the plaintiff being imprisoned does not entitle the defendant to call for a security for costs. [*Baddeley* v. *Harding*] - - - - - - 214
7. Under the circumstances, receiver allowed the costs of his application to be discharged. [*Richardson* v. *Ward*] - - - - 266

See Creditor. — Demurrer. — Bankruptcy. — Practice, 13, 18, 21, 23, 44, 55.

CREDITOR.

1. Creditor who proves may have costs under special circumstances. [*Harvey* v. *Harvey*] - - - 91
2. This court will not order the payment of monies admitted by the answer to be in the executor's hands, which are the produce of the sale of a Scotch estate, pending an action by the executor of multiple-poinding in Scotland for distribution of the produce. [*Cruikshanks* v. *Roberts*] - - - 104
3. Creditors going in before the Master pay their own costs; but if after having established their claim, they are permitted to mix in the cause as parties, they may be entitled to costs in respect of such proceedings. [*Waite* v. *Waite*] - - - - - - - - 110

CROSS-BILL.

If an original bill is filed in the Court of Exchequer, a cross-bill may be filed in the Court of Chancery. [*Parker* v. *Leigh*] - - 115

DEBTS.

The words "I will and direct that my just debts, funeral and testamentary expences, be paid and satisfied," in the introductory part of a will, amounts to a charge of the debts upon the real estate. [*Clifford* v. *Lewis*] - - - - - - - 33

DEMURRER.

1. A solicitor files his bill for foreclosure of an estate pledged as a security for costs; the client files a cross-bill, alleging the costs demanded to have been occasioned by negligence and want of skill. Demurrer over-ruled, on ground of equitable set-off. [*Piggott* v. *Williams*] - - - - - - 95
2. On demurrer, the Court is bound by plaintiff's allegation of fact, but not of law. [*Cuthbert* v. *Creasy*] 189
3. Upon demurrer being over-ruled, the plaintiff must, out of term time, wait for the next seal day to move for an injunction. [*Claughton* v. *Hadwell*] - - - - - 299

DEVISE.

1. A devise to the testator's wife, she paying his debts and 15*l.* to A. B., if so much can be spared, and she leaving the rest of the estate to A. B. after her death, gives her the fee, and a power of sale. [*Dolton* v. *Hewen*] - - - - 9
2. Equity cannot correct wills upon the head of mistake, but follows the rule of law, that a devisor is to be taken to mean what he has expressed; but the Court may direct an issue, to inquire whether a particular expression found in the will forms part thereof. [*Powell* v. *Mouchett*] - - - - - - 216
3. A testator, seised in fee of an estate, disposes of it by will; after making his will, having occasion to borrow a sum of money, he conveys the estate, by way of security for the money, to trustees in fee; and there is a proviso in the deed of conveyance, that if the mortgage money was paid at the time fixed, the trustees were to re-convey the estate to him, his heirs and assigns, or to such person or persons, and for such estate and estates, and to and for such lawful trusts, intents and purposes, as the testator, his heirs and assigns, should, by any deed or instrument in writing, direct, limit or appoint. Held, that the direction of the additional words, to convey to such person or persons, &c. gave no new power of conveyance to the testator beyond what he would have acquired without them, as the necessary consequence of the conversion of his legal into an equitable fee; and consequently, that the conveyance, being a mere security for money, operated only as a revocation of the will *pro tanto*. [*Brain* v. *Brain*] - - 221
4. Death without leaving issue, is as to real estate a general failure of

issue, and is not restrained to issue living at death by words of limitation superadded to issue of tenant for life. [*Franklin* v. *Lay*] - 258

5. The words "worldly estate" held to pass real and personal estate. An heir at law is not entitled to have a case sent to law, if the construction of the will be clear. [*Muddle* v. *Fry*] - - - - 270

6. Gift of a mortgage security for money will pass the fee, if the estate be mortgaged in fee. [*Renvoize* v. *Cooper*] - - - - 371

EQUITABLE RELIEF.

1. To form a case for relief on the ground of oppression on the one side, and distress on the other, the disadvantage of the bargain must be within the view of the parties. [*Ramsbottom* v. *Parker*] 5

See COPYHOLDS.—PARTNERSHIP, 2.

2. Purchase by an executor rescinded after 20 years by remainder-man, the transaction having taken place under circumstances of disguise and concealment. [*Watson* v. *Toone*] - - - - - - - - 153

EVIDENCE.

1. After 30 years, the hand-writing of a letter not necessarily proved, where the letter affords intrinsic evidence of its authenticity.

Where there is no existing direction to such a letter, *primâ facie*, it must be intended to have been written to the party amongst whose papers it was found. [*Fenwick* v. *Reed*] - - - - - - 7

2. Judge's notes not evidence of facts proved at the trial; they must be brought before the Court by affidavit. [Ex parte *Learmouth*, in re *Walker*] - - - - - - 113

3. Motion of course to examine *de bene esse* a witness above 70, or in a dangerous state, or the only witness. [*Tomkins* v. *Harrison*] 315

4. Probate held not to be conclusive proof that instruments, so far as they affect real estates, are of a testamentary character. [*Hume* v. *Rundell*] - - - - - - - 331

5. Where letters are stated as the agreement, no testimony *aliunde* is admissible; otherwise, where stated as evidence of the agreement. [*Brice* v. *Bleichley*] - 17

See PRACTICE, 10, 11.

EXCEPTIONS.

Where the plaintiff before answer obtains an injunction, and when the answer is put in excepts to the same, he cannot move to refer the exceptions *instanter*.

Counsel's name must be signed to exceptions. [*Candler* v. *Partington*] 102

EXECUTOR.

See TRUSTEES.

FEME COVERTE.

1. Court will not receive the consent of a *feme coverte* to bar her equity,

until her share is ascertained. [*Jernegan* v. *Baxter*] - - - 32

2. If the wife insists upon her equity as against the assignees in bankruptcy of her husband, it attaches for the benefit of her children, and she cannot afterwards release it in favour of her husband. [*Barker* v. *Lee*] - - - - - - - - 330

See SEPARATE ESTATE.

FORECLOSURE.

Mortgage by *James W.* to *B.* and *D.*, to secure 2,500 *l.* and interest, and as an additional security, a mortgage by *Joseph W.* *M.* purchased the premises mortgaged by *James W.*, subject to the mortgage. Bill of foreclosure against *M.* and the representatives of *Joseph W.*, to foreclose the two mortgages. It was decreed, that in case *M.* should redeem the plaintiff, the premises mortgaged by *Joseph W.* should be conveyed to *M.*, and those mortgaged by *Joseph W.* to the representatives of *Joseph W.*; but in case the representatives of *Joseph W.* should redeem the plaintiff, the premises comprised in each of the mortgages should be conveyed to them, and in case of failure by *M.* or the representatives of *Joseph W.* to redeem, that the parties should stand foreclosed as to all the mortgaged premises. [*Beckett* v. *Micklethwaite*] - - - - - - - 199

See MORTGAGE.—PRACTICE, 39.

FRIENDLY SOCIETIES.

As to construction of Friendly Society Act in case of bankruptcy. [*Anon.*] - - - - - - - 98

GUARDIAN.

The Court cannot remove a testamentary guardian, but will appoint a proper person to superintend the maintenance and education of the infant. [*Ingham* v. *Bickerdike*] 275

ILLEGITIMATE CHILD.

1. An illegitimate child may take by particular description before its birth. [*Dawson* v. *Dawson*] 292

2. Access is not to be presumed between man and wife on account of the mere possibility of its occurrence. [*Clarke* v. *Maynard*] 364

INDIAN BONDS.

An investment at Calcutta in the Company's bonds for securing an annuity for life under a will, does not discharge the testator's estate, if the Company lower their interests. [*Gordon* v. *Bowden*] 342

INJUNCTION.

1. The Bank having notice of a bill, refused to permit a transfer of stock, though no injunction. Ordered, that they should transfer on a certain day, unless plaintiff obtained injunction in the mean time. [*Ross* v. *Sheerer*] - - 1

2. Money paid into court upon an injunction, and laid out, is secu-

rity, and not payment. [*Broughton* v. *Pitchford*] - - - - - - 295

See DEMURRER. — MORTGAGE. — PARTNERSHIP.—PRACTICE, 41, 43.

INFANT.

See PRACTICE, 10, 29.

INTERPLEADER.

See PRACTICE, 9.

INTERVENER.

If, in an Ecclesiastical Court, a party is cited as resident within the jurisdiction, and appears and pleads without objection, he cannot afterwards put that fact in issue.

And in such a case, an intervener is not at liberty to raise an objection to the jurisdiction on that ground. [*Chichester* v. *Donegal*] - - 375

ISSUE.

See DEVISE.—PRACTICE, 14.

LEASES.

See APPORTIONMENT.—PRACTICE, 27.

LEGAL REPRESENTATIVES.

Legal representatives to be understood executors and administrators, unless controlled by intention upon the whole instrument.

Purchaser not compelled to take a doubtful title. [*Price* v. *Strange*] 159

LEGACY.

1. After an annuity for life to a father of part of dividends, and remainder as to the whole dividends, subject to the father's annuity, to children when they attained twenty-one, is a gift to all living when the eldest attains twenty-one. [*Curtis* v. *Curtis*] - - - - 14

2. Where testator directs his executors, as soon as they should think proper after his decease, to sell as much stock as would produce a legacy of 12,000 *l.*, the legacy is not payable until the end of the year after the testator's death. [*Benson* v. *Maude*] - - - 15

3. If a legatee for life dies before the testator, the remainder has immediate effect, and it makes no difference that a power of appointment is given to the legatee for life. Where, by codicil, a legacy is substituted for a legacy in a will, it will have the same qualities; but where the legacy is said to be given by a codicil, because a will has failed, this is not substitution, but motive. [*Chatteris* v. *Young*] - - - - - - - 30

4. Bequest of leasehold property, with a condition to assign a part to a charity. The legatee takes, discharged of the condition. [*Poor* v. *Mial*] - - - - - - - - 32

5. A legacy was given to a father, on condition that he did not interfere with his daughter's education. On a bill for payment by the father, the Court will require security to that effect. [*Colston* v. *Morris*] - - - - - - - 89

6. If a testator gives a sum in stock standing in his name, and has not

the stock described, or any other stock, the legacy fails. The Court sends it to the Master to inquire what the testator intended, as well where there is a misdescription of the fund as of the legatee. [*Evans* v. *Tripp*] - - - - - - - 91

7. A legacy to R. L. was, by an order, directed to be paid to him; he died, leaving an executrix and two executors; the executrix died, leaving an executor; the accountant-general refused to pay the legacy under a power of attorney from the surviving co-executors of R. L., without a discharge from the executor of the deceased executrix. On an application to the Court, an order was made to pay the legacy to the surviving executors. [*Moodie* v. *Bainbridge*] - - - - - - - 107

8. Bequest of 25,000 *l.* three per cents to testator's daughter S. C. for life, and after her decease, one moiety to the testator's next of kin, in equal degree, other than and except any child or children of S. C.; and as to the other moiety, to go unto and amongst all and every the child or children of S. C., equally to be divided between them at their respective ages of 21 years, if more than one, share and share alike, and if but one, then to such only child at his or her age of 21 years. The will afterwards contained a proviso, that in case S. C. should die without leaving any child or children of her body, or leaving any such child or children, such only child or all such children should die before attaining the age of 21 years, then the last mentioned moiety should be paid among all the next of kin of the testator, in equal degree, who should be living at the time of the death of the longer liver of them, his said daughter and her said children so dying before having attained the age of 21 years, as aforesaid.

Determined that two daughters of S. C. having attained the age of 21 years, but died in the lifetime of their mother, took vested interests in the last mentioned moiety. [*Maitland* v. *Chalie*] - - - 243

9. The legatee will take two legacies by different instruments, unless substitution be evidently intended from the character of the second instrument, or the expressions used, or the same sum be twice given, and the same motive expressed in both instruments. [*Wray* v. *Field*] - - - - - - - 300

10. Where a testator recites that a legatee is indebted in a certain sum, that recital binds the legatee, except in case of a clear mistake of figures. [*Robinson* v. *Bransby*] 348

11. Where a testator gives to legatees who shall be living at the time of actual distribution, the Court will fix a year as the proper period. [*Brooke* v. *Lewis*] - 358

See TRUSTEES.

LIMITATION.

1. The jury would not, under the circumstances, presume a conveyance in fee to a person who had entered into possession of estates in 1752, to satisfy debts due to him by perception of the rents and profits. [*Ramsbottom* v. *Parker*] 6
2. Time does not run against a creditor after the death of a testator, in case of a trust or charge for the payments of debts. [*Hargreaves* v. *Michell*] - - - - - - 326

See MORTGAGE, 4.

MAINTENANCE AND EDUCATION.

A term of years having been limited to trustees for the purpose of raising a sum of money for the maintenance and education of the younger children of A., in such shares and proportions, and such manner and form as A. should direct, and in default of any direction, to be applied for the benefit of such children equally, the same to be paid to or for them respectively, until their respective portions, provided for them out of other property, should be payable and paid. A., by his will, appointed a certain portion for the plaintiff, to be vested in her at the age of 21 years, or on marriage, and directed that a certain part of the interest and dividends thereof should be applied towards her maintenance and education, but did not make any appointment, or give any directions relative to the sum of money raisable for that purpose under the said term. Held, upon the construction of the settlements, that the plaintiff was entitled to have her share of the money provided by the term raised for her benefit, until the period when her portion should become payable; that it is not improbable that it should be the intention of parents to provide a larger fund for the education of children than the mere income of their future portions, the portions of younger children of great families being seldom large, although they have universally the same expensive education as the eldest child. [*Poulett* v. *Poulett*] 167

MERGER.

1. A mortgage term was created in 1720 for 1,000 years, the executors of the mortgage took an assignment of another mortgage term on the same premises, created in 1725, for 500 years, and assigned both the terms to the trustees of a lady who was entitled to them under *Ann Egerton*'s will. Held, that the term for 1,000 years was merged in the reversionary term for 500 years. [*Stephens* v. *Bridges*] - - - - 66
2. An equitable estate tail in a copyhold does not merge by the acces-

sion of the legal fee. [*Merest* v. *James*] - - - - - - - - 118

MORTGAGE.

1. Injunction not granted to restrain a mortgagee from selling under power in a mortgage deed; otherwise where trustee for sale, if he proceeds precipitately, without notice to both parties. [*Anon.*] 10
2. Upon a bill of foreclosure, the mortgagee having been robbed of the title deeds, payment of the mortgage money within a limited time was decreed, and on payment of the same a reconveyance was directed, with a bond of indemnity. [*Shelmardine* v. *Harrop*] 39
3. When a Master is to raise a charge by sale or mortgage, he cannot compel parties interested to insure a life for better security of mortgage, but must sell. [*Grantley* v. *Garthwaite* and others] 96
4. Acknowledgment of mortgage title within 20 years of bill filed, maintains the equity of redemption. [*Hodle* v. *Healey*] - - 181
5. Gift of a mortgage security for money will pass the fee, if the estate be mortgaged in fee. [*Renvoize* v. *Cooper*] - - - - 371

See LIMITATION, PRACTICE, 4.

MORTMAIN.

1. Testator directed real estate to be sold, and the produce applied, with so much of the personal estate as should be necessary, to secure an annuity of 30 *l.* for the life of A. B., and after his death to go to a charity. The estate sold for 250 *l.* Held, the charitable bequest was void as to the 250 *l.*, but good as to the rest of the sum required from the personal estate to secure the annuity. [*Waite* v. *Webb*] - - - - 71
2. *Fletcher Partis* having purchased certain lands and hereditaments, they were by his direction, by indenture of bargain and sale, conveyed by the vendor to trustees for charitable uses. The indenture was enrolled in the Court of Chancery within six calendar months, but *Fletcher Partis* died within twelve calendar months after its execution. Held that the conveyance was void under the statute of 9 Geo. 2. c. 36. Held also that certain pecuniary bequests in *Fletcher Partis*'s will, depending on the validity of the said indenture, had failed. [*Price* v. *Hathaway*] - - - - - - 304

See LEGACY, 4.

MULTIFARIOUSNESS.

It is multifarious for rector and vicar to join in a suit for the tithes respectively due to them. [*Exeter College* v. *Rowland*] - - - 94

MULTIPLE-POINDING.

See CREDITOR.

NE EXEAT REGNO.

1. Writs of *Ne exeat regno* granted against husband and wife executrix, the plaintiff undertaking not to serve more than one of the writs. [*Moore* v. *Hudson*] - 218
2. A writ of *Ne exeat regno* cannot be obtained upon an affidavit made before the bill is filed. [*Anon.*] 276

PARTIES.

See PRACTICE, 17, 39, 56.

PARTNERSHIP.

1. If managing partner draws out monies and conceals the fact, or disguises it in the partnership books, this is fraud, and proof may be made against the separate estate. Otherwise, if the transaction is duly entered in books. [*Smith* in re *Hay*] - - - - 2
2. To form a case for relief on the ground of oppression on the one side and distress on the other, the disadvantage of the bargain must be within the view of the parties. [*Ramsbottom* v. *Parker*] - - 5
3. A partner may give to a third person interest in his share, but cannot make him a partner. [*Bray* v. *Fromont*] - - - - - - 5
4. Partnership articles direct a yearly settlement on the 25th March, and if a partner die, his estate is to share in no profits subsequent to the last yearly settlement. The last settlement is on the 5th November 1811, and a partner dies in February 1813. His estate shares in the profits up to the 5th November 1812. [*Pettyt* v. *Janeson*] - - - - - - - - - 146
5. A person having in articles of partnership covenanted not to do certain acts after a specified period of time, the Court will not, before the arrival of that period, grant an injunction to restrain him from acting in breach of his agreement, nor for mischief which is no breach at law of the covenant between the parties. [*Coates* v. *Coates*] 287
6. Where articles stipulate for a division of the partnership property at the end of the partnership, a sale is intended. [*Rigden* v. *Pierce*] 353
7. No partner who owes a duty towards another can place himself in a situation which gives him a bias against the discharge of that duty. [*Burton* v. *Wookey*] - 367

See ACCOUNT.

PLEA.

To a bill for an account of the dealings and transactions of an alleged partnership, it is not sufficient to put in a plea of no partnership, without answering to all the facts and circumstances stated in the bill which may afford evidence to disprove the truth of the plea. [*Sanders* v. *King*. *Yorke* v. *Fry*] 61, 65

POST OBIT BONDS.

Post obit bonds of a young man, put up to sale by him, without reserve, relieved against. [*Fox* v. *Wright*] 111

See Costs, 35.

POWERS.

1. Where an estate is devised in trust for two daughters for life, with remainders in each moiety for their children at twenty-one, and a power of sale is given to the trustees, the power of sale subsists, though one daughter is dead, and her children have attained twenty-one. [*Trower* v. *Knightley*] 134
2. A., being entitled to two freehold houses, and having a power of appointment over certain lands, and money to be laid out in lands, the same, in default of appointment, to go over, by her will devises "all and every her freehold messuages, lands, tenements and hereditaments," to trustees for sale. Held that the two freehold houses were sufficient to satisfy the words of the will, and that the power of appointment was not executed. [*Hoste* v. *Blackman*] - - - 190
3. The defective execution of a power, aided in favour of an eldest against younger children, also provided for; probate held not to be conclusive proof that instruments, so far as they affect real estates, are of a testamentary character. [*Hume* v. *Rundell*] - - - 331

See Appointment.

PRACTICE.

1. Where a bill prays an injunction to restrain the transfer of stock which is not moved, the Court will, after answer, make an order that the Bank of England shall permit the transfer at any time after a certain day, unless in the mean time the plaintiff obtain an injunction. [*Ross* v. *Sheerer*] - - 1
2. Further directions by motion, where reference to Master is made on motion. [*Whitcomb* v. *Foley*] 3
3. Where one residuary legatee is plaintiff, and the other defendant, Court will not tax costs as between solicitor and client without consent. [*Fenner* v. *Taylor*] - - 3
4. The Court will not order the receiver of an infant's estate to keep down the interest of a mortgage debt, unless the Master reports it is due. [*Anon.*] - - - - - 9
5. After bill filed by second incumbrancer, first incumbrancer in possession cannot pay surplus rents to debtor. [*Parker* v. *Calcraft*] - 11
6. All questions respecting real estate belong to the law of the country where the estate is situate. [*Elliott* v. *Lord Minto*] - - 16
7. In equitable, as in legal waste, if one act of waste be established, the Court will restrain equitable waste generally. [*Coffin* v. *Coffin*] 17

8. Where letters are stated as the agreement, no testimony *aliunde* is admissible; otherwise where stated as evidence of the agreement only. [*Birce* v. *Bletchley*] 17

9. Tenants who had notice from the plaintiff not to pay rent to the defendant's trustees, and who had notice from the trustees not to pay their rent to the Plaintiff, ordered on the motion of the plaintiff, and on the consent of all parties, to pay their rent into Court. It was held, the tenant themselves could not make such a motion. [*Belbee* v. *Belbee*] - - - - 28

10. Infant defendants being out of the kingdom, a commission was sent abroad for the appointment of a guardian to put in their answer. A supplemental bill was filed, to which the same infants, who continued abroad, were parties. On motion, an order was made that the guardian who put in their answer to the original bill might put in their answer to the supplemental bill. [*Lushington* v *Sewell*] - - - - - - - - 28

11. An attorney, a witness to a deed, and in possession of the same, cannot be compelled to attend with the deed at the hearing of the cause, otherwise than by a *subpœna duces tecum*. [*Busk* v. *Lewis*] 29

12. Court will not receive the consent of a *feme covert* to bar her equity, until her share is ascertained. [*Jernegan* v. *Baxter*] 32

13. Security for costs ordered, where the plaintiff was in Ireland. [*Hill* v. *Reardon*] - - - - - - 46

14. An issue *devisavit vel non* was directed, to try the validity of a second will; one of the defendants, *Ann Smith*, interested under both wills, but principally under the last, objected to being a party to the issue, and to being included in the common order for the production of papers. Held, that though she declined being a party to the issue, she should be at liberty to attend the trial; and the usual order was made that she should produce books, papers, &c. except such as she possessed as mortgagee. [*Pindar* v. *Smith*] 48

15. Upon sales in Court, the vendor will be compelled to surrender a copyhold in person, if it can be conveniently done. [*Noel* v. *Weston*] - - - - - - - - - - 50

16. It is a motion of course to enlarge publication where no witnesses have been examined. [*French* v. *Lewsey*] - - - 50

17. The ordinary is a necessary party, defendant to a bill for establishing a modus. [*Cook* v. *Butt*] 53

18. Bill founded on a letter not stamped. Decree made, but directed not to be delivered out until the letters stamped were produced to the registrar. Whether the answer of one defendant can be read against a co-defendant as to costs, *quære*. Such answer will

clearly ground an inquiry before the Master as to the fact. [*Chervet* v. *Jones*] - - - - - - - 267

19. On a motion for a new trial of an issue, the Court will not call for the report of the Judge who tried the cause at law, without being satisfied that there are reasonable grounds for entertaining the motion. [*Memorandum*] - 58

20. An assignee of an interest in a suit cannot be made a party without a supplemental bill. He may petition to secure the fund. [*Foster* v. *Deacon*] - - - - - 59

21. Orders set aside, because previous similar motions for the same orders had been refused, with costs, and those costs not paid. [*Killing* v. *Killing*] - - - 68

22. Purchaser taking possession without the consent or privity of the vendor, ordered on motion, before answer, to pay the purchase money into Court. [*Blackburn* v. *Stace*] - - - - - - - - 69

23. When an order to pay costs is made on a person not a party to the suit, a motion for a four-day order or commitment requires notice. [*In re Partington*] - - 71

24. When a cause is set down, and a subpœna to hear judgment is served, and afterwards a bill of revivor is filed, no new subpœna to hear judgment is necessary. [*Bray* v. *Woodran*] - - - - - 72

25. If the defendant has a good case against one of the plaintiffs, who hold a joint office, though not against the others, Court cannot make a decree in that suit for the plaintiffs. [*Hunter and others* v. *Richardson*] - - - - - - 89

26. Plaintiff, the residuary legatee of *B.*, who was residuary legatee of *A.*, may in one bill pray account of both estates. [*Turner* v. *Doubleday*] - - - - - - - - 94

27. Leases may be granted of an estate directed by a will to be sold. [*Jervoise* v. *Clarke*] - - - 96

28. Rule, that there must be a schedule before Court will order production of deeds and papers, applies only in cases of discovery. [*Anon.*] - - - - - - - - 97

29. Court will not direct inquiry whether suit is beneficial to an infant, unless upon a strong case of no benefit, or improper motive. [*Stevens* v. *Stevens*] - - - 97

30. Where defendant makes admissions which would entitle plaintiff to decree, you cannot for that reason move for payment of money into Court. [*Peacham* v. *Daw*] 98

31. After a replication and subpœna to rejoin, the plaintiff cannot amend his bill unless on a special application, showing, that using all reasonable diligence on his part, he was not in a condition to apply sooner. [*Wright* v. *Howard*] 106

32. Where replication has not been filed through mistake, the bill will be restored notwithstanding an order to dismiss. [*Attorney-General* v. *Fellows*] - - - - - - 111

33. The Court will not use the Judge's

notes as evidence of facts; they must be brought before the Court by affidavit. [*Ex parte Learmouth in re Walker*] - - - - - 113

34. If a sum be reported due, and exceptions are taken to the report, the money will not, on motion, be ordered to be paid into Court. [*Creak* v. *Capell*] - - - - 114

35. A power of attorney to institute a suit in the name of the plaintiff having been stated in the bill, proof thereof not required at the hearing; but the Master, before taking the accounts, prayed to inquire into that fact. [*Edney* v. *Jewell*] - - - - - - - - 165

36. The defendant having appeared, motion for an injunction in respect of waste, without notice, was refused. [*Collard* v. *Cooper*] - 190

37. Where the defendant sets down the cause for hearing, he is only bound to serve the plaintiff; and it is the duty of the plaintiff to serve the other defendants. [*Smith* v. *Wells*] - - - - - - - 193

38. Service of *subpœna* on persons, who in one instance had acted as agents of the defendant, who resided in Ireland, ordered. [*English* v. *Hendrick*] - - - - - 205

39. The equity of redemption of a mortgage in fee having been conveyed to trustees, upon trust, to sell and pay off incumbrances, and divide the surplus among persons specified in the deed, which contained a proviso that the receipt of the trustees should discharge the purchasers; held, that this did not enable the trustees alone to defend a bill of foreclosure, but that the *cestuis que trust* were necessary parties to the suit. [*Calverley* v. *Phelp*] - - - - - - - - 229

40. A defendant at law having refused his consent to a commission for the examination of a witness resident abroad, a bill was filed by the plaintiffs at law to obtain a commission for that purpose, the defendant at law having retired from the jurisdiction of the Court. Service of the subpœna, to appear to the bill, on his attorney at law, ordered to be good service. [*Devis* v. *Turnbull*] - - - 232

41. When a bill is referred for scandal, and found scandalous, a motion cannot be made for an injunction until the scandalous matter is expunged. [*Davenport* v. *Davenport*] - - - - - - - - - 251

42. Publication enlarged under the circumstances. [*Cutler* v. *Cremer*] 253

43. Amendment of bill allowed without prejudice to an injunction which had been obtained on the merits. [*King* v. *Turner*] - 255

44. After demurrer allowed, with liberty to amend the bill, the plaintiff may have his bill dismissed on payment of 5*l.*, the costs of the demurrer. [*Edwards* v. *Edwards*] 255

45. A motion cannot be made to adjourn a petition in bankruptcy; a petition in the bankruptcy is ne-

cessary for that purpose. [In re *Hardy* and *Dale*] - - - - 252

46. Commission for examination of witnesses directed to *Bencoolen* in *India*, notwithstanding the 13 Geo. 3, c. 63, s. 44. [*Baskett* v. *Toosey*] 261

47. The defendant being in contempt for want of an answer, afterwards put one in, and an order for his discharge was obtained upon payment or tender of the costs of contempt. The costs were tendered but not accepted. Afterwards the answer was excepted to and referred; and after warrants to proceed before the Master, the defendant submitted to answer the exceptions. The plaintiff did not proceed immediately upon the former process of contempt, but waited for an answer to the exceptions. Held, that an order for time to answer the exceptions, obtained by the defendant, was regular. [*Cox* v. *Champneys*] - - 262

48. The Court cannot extend the time mentioned in a commission for the examination of witnesses. [*Hall* v. *De Tastet*] - - - 269

49. Bill against husband and wife in respect of a demand against wife as executrix. Husband a bankrupt and abroad, and attachment had issued against him for want of an answer; such an attachment will not be granted against the wife, until an order has been obtained that the wife should answer separately, and the wife must have notice of the motion for that order. [*Bunyan* v. *Mortimer*] 278

50. A party in contempt, who obtained an order for a commission to take his "plea, answer or demurrer," may put in a plea. *Quære*, if the commission had been merely to take his answer, whether he could have put in a plea. [*Barber* v. *Crawshaw*] - - - - - 284

51. The Court will make interlocutory orders for production only for security or discovery, and will not anticipate the decree. [*Lingen* v. *Simpson*] - - - - - 290

52. When it is disputed whether a defendant is from infirmity of mind incompetent to answer, it will be referred to the Master to inquire as to the fact. [*Lee* v. *Ryder*] - - - - - - - 294

53. Order for payment of money to the solicitor of the party refused. [*Edwards* v. *Lane*] - - - 315

54. The Court leaves it to the discretion of the Master to determine, under the usual order for production of books, whether they are to be merely produced from time to time, or to be deposited with the Master. [*Henna* v. *Dunn*] 346

55. An agreement is made a rule of Court, which determines all matters in difference in the suit, but reserves the question of costs. A petition dismissed, which prayed the direction of the Court as to costs; the Court enters into the question of costs only as inci-

dental to its decision upon the merits of the cause. [*Gibson* v. *Lord Cranley*] - - - - 365

56. Where new parties are brought before the Court by supplemental bill, the original defendants need not be parties to the supplemental bill, unless they have an interest in the supplemental matter. [*Bignall* v. *Atkins*] - - - - - - 369

57. After a decree for the administration of a trust, the Court will stay proceedings in a second suit for the same objects, but not if the second suit has a further purpose, as removing the trustees for default. [*Anson* v *Towgood*] 374

See EVIDENCE.—LEGACY, 2, 4.—SOLICITOR.—RECEIVER.—COPYHOLDS.—CONVEYANCE.—PLEA.—CREDITOR.—MULTIFARIOUSNESS.—MORTGAGE.—EXCEPTIONS.—COSTS.—CROSS-BILL.—ADVOWSON.—WILL.—NE EXEAT REGNO.—BANKRUPTCY.—DEVISE.—GUARDIAN.—VENDOR AND PURCHASER.—INJUNCTION.—REVIVOR.—DEMURRER.—AMENDMENT.

PUBLICATION.

See PRACTICE, 16, 42.

RECEIVER.

1. Where upon the answer there is strong presumption against the title of the defendant impeached by the bill, the Court will grant a receiver. [*Stitwell* v. *Williams*] 49

2. Receiver under the circumstances allowed the costs of his application to be discharged. [*Richardson* v. *Ward*] - - - - - - - 266

RENEWAL OF LEASES.

Whether a renewed lease is a revocation of a previous will depends on the intention apparent in the will.

Quære, If a bequest of "the manor and hospital lands which he held by lease" passes a renewed lease.

A tenant for life of a hospital lease, who was directed to lay by out of rents and profits, for the purpose of paying the fine on renewals, not having renewed, and the lease having been renewed by the remainder-man after his death, a reference, on a bill against his executrix, was made, to ascertain what was a reasonable sum to be paid for the renewal; the same to be paid by the executrix. [*Colegrave* v. *Manby*] - - - - 72

RENT.

See APPORTIONMENT.

RENTES VIAGERES.

See CONSTRUCTION.

REPLICATION.

See PRACTICE, 31.

REVIVOR.

Suit not revived against the administrator of a party named who did not

appear, nor was served with a subpœna; nor can the plaintiff have the benefit of former proceedings against such an administrator. [*Asbee* v. *Shipley*] - - - 296

See PRACTICE, 24.

REVOCATION.

See WILL, 2.

SCANDAL.

See PRACTICE, 41.

SCOTCH ESTATES.

See PRACTICE, 6.

SEPARATE ESTATE.

Quære, whether husband has a right to throw wife's funeral expenses upon her separate estate. [*Gregory* v. *Lockyer*] - - - - - - 90

SEQUESTRATION.

A sequestrator of tithes during a vacancy is subject to the jurisdiction of this Court. If he is himself an occupier, he must account for the fair value. [*Birch* v. *Bygrave*] 158

SOLICITOR.

1. Privilege of solicitor and client extends to all communications for professional advice; but not to employment in matters not professional. [*Walker* v. *Wildman*] 47
2. Solicitor has a lien on papers delivered to him in that character, for all professional business, but no lien as a solicitor on papers delivered to him as steward. [*Champernown* v. *Scott*] - - - - 93

STATUTES.

Limitation. — *See* EQUITABLE RELIEF.—MORTGAGE.

9 Geo 2. c. 36.—*See* CHARITY.

22 Geo. 2. c. 46. s. 11.—*See* ATTORNEY.

Bankrupt's Committal, 2 Geo. 2. c. 30. s. 18.—*See* BANKRUPTCY.

Commission, 13 Geo. 3. c. 63. s. 44. —*See* PRACTICE, 46.

Charities, 9 Geo. 2. c. 36. — *See* MORTMAIN.

STOCK.

See USURY.—TRUSTEE.

SUPPLEMENTAL BILL.

An assignee of an interest in a suit cannot be a party without a supplemental bill. He may petition to secure the fund. [*Foster* v. *Deacon*] - - - - - - - - - 59

SURETIES.

Liability of sureties. [*Prendergast* v. *Devey*] - - - - - - - - 124

TIMBER, ORNAMENTAL.

To be proved by conduct, whether timber is left standing for ornament or shelter. Timber so left standing not to be cut, though decayed or injurious to adjoining

trees, unless removal essential to intended purposes of ornament or shelter. [*Lushington* v. *Boldero*] 149

TRUSTEE.

1. Ordinarily, the Court, on a bill for a legacy of stock, does not inquire whether the stock legacy could have been invested at an earlier period; but where the executor is a trustee also, and retains the legacy without investing, he is liable for any loss occasioned by the non-investment. [*Byrchall* v. *Bradford*] - - - - - - - 13
2. Where it is a term of the trust that each trustee shall receive and be answerable only for a moiety, this Court does not extend the liability. [*Birls* v. *Betty*] - - 90
3. Lands were vested in trustees, in trust, out of the receipts and profits to make certain payments, and lay out the surplus upon mortgage or government security, with a view to accumulation, with a bequest of such accumulations. On a petition, a real estate contiguous to the real estate of the testator, was permitted, under the circumstances, to be purchased, the same to be considered as personal property. [*Webb* v. *Lord Shaftesbury*] - - - - - - 100
4. Where a testator directs a purchase with all convenient speed, and interest in the mean time to accumulate, and trustees neglect the purchase, twelve months is to be considered as a reasonable time within which the purchase might have been made. [*Parry* v. *Warrington*] - - - - - - - 155
5. A sum of 2,000 *l.* was bequeathed to an executor, who was also a trustee under the will, upon trust, for investment in the public funds. He retained it in his own hands, paying interest to the *cestuis que trust*, for many years, under a representation that the legacy had been invested according to the trusts. Held, that this was such a breach of trust as entitled the *cestuis que trust* to have purchased by the executor so much stock as the sum of 2,000 *l.* would have purchased at the time he first had assets sufficient for investment. [*Byrchall* v. *Bradford*] - - 235
6. Where trustees may invest in stock or on real security, and they lend on personal security, they shall be answerable for the principal money only, and not for the value of the stock which might have been purchased. [*Marsh* v. *Hunter*] - - - - - - - 295
7. A mere agent of the trustee may not be accountable to the *cestui que trust*; but otherwise with respect to a substituted trustee, who accounts to nobody. [*Myler* v. *Fitzpatrick*] - - - - - - 360

See COSTS, 2.—MORTGAGE, 1.

USURY.

Covenant to replace stock by instalments; one instalment was trans-

ferred, and a second became over due; it was then agreed that the transaction should be converted into a money loan, taking for the amount of the money the price of stock when first lent, which was higher than the existing price, and further time given for payment. Held usurious as to the instalment over due. *Quære*, as to the future instalments. [*Ramsbottom* v. *Parker*] 6

VENDOR AND PURCHASER.

1. In estimating lasting improvements, old buildings pulled down, if incapable of repair, to be valued as old materials only. [*Robinson* v. *Ridley*] - - - - - - - - 2
2. The plaintiff agreed to take a house of the defendant for two years. Afterwards, on the 4th September 1817, he agreed to buy the estate of the vendor, in consideration of 25 *l.* paid down, and of the further sum of 425 *l.* to be paid on the 25th December 1817, on or before which time the conveyance was to be executed. An abstract was delivered on the 20th October 1817, and afterwards a draft of the conveyance, with the abstract, was sent to the plaintiff, with a note of the defendant's solicitor, stating that the deeds were with him, and desiring to hear from the plaintiff if any objections occurred; and many ineffectual applications were made to see the plaintiff. A notice was served on the plaintiff on the 22d December 1817, that the defendant would, on the 23d, 24th and 25th, attend at the plaintiff's house to execute the conveyance, and on default, he should consider the plaintiff as refusing to proceed in the purchase, and act accordingly. On the 2d of April 1818 the plaintiff returned the abstract, with objections to the title. On the 13th the defendant distrained on the plaintiff for rent. On a bill filed by the vendee for a specific performance, held that the vendor should have given notice that he considered the agreement as at an end, and should have returned the 25 *l.*; and not having done so, the Court directed the usual reference as to the title. [*Reynolds* v. *Nelson*] - - - 18
3. Where there is a contract to sell at a valuation by A., B. and C., the Court will compel the vendor to permit the valuation. The time of valuation is of the essence of the contract, but the vendor cannot take advantage of it, if he improperly occasions the delay. [*Morse* v. *Merest*] - - - - 26
4. Where trustees for sale are to apply produce for infant, the power of giving receipts to purchaser is necessarily incident. [*Lavender* v. *Stanton*] - - - - - - - - 46
5. A term was created in 1711 for raising portions, there was no evidence of the portions being satisfied, but a settlement of the estate took place in 1744, and a recovery

was suffered, and there was a covenant that the estate was free from incumbrances. No assignment appeared to have been at any time made of the term. On an objection to the title by a purchaser, held that a surrender of the term must be presumed, and that in matters of presumption the Court will bind a purchaser, where it would give a clear direction to a jury. [*Emery* v. *Grocock*] 54

6. It is not a valid objection to a title, that the vendor cannot produce deeds referred to by recital, where the loss of the deeds recited throws no reasonable doubt upon the title of the vendor. [*Prosser* v. *Watts*] - - - - - 59
7. Purchaser taking possession without the consent or privity of the vendor, ordered on motion before answer to pay the purchase money into Court. [*Blackburn* v. *Stace*] 69
8. If, on a bill for a specific performance by the vendor, a good title can be made before or when the cause comes on upon further directions, a specific performance will be decreed. [*Paton* v. *Rogers*] 256
9. After a decree for a specific performance against a defendant, he cannot proceed by action at law on the contract for damages. [*Reynolds* v. *Nelson*] - - - - 290
10. Where a letter contains the entire terms of an agreement for purchase of lands, it is not necessary for the plaintiff to prove that he accepted the terms. If it require the plaintiff to supply a term in the agreement, there must be a special acceptance in writing supplying that term, in order to take the case out of the statute of frauds. [*Boys* v. *Ayerst*] - 316
11. When a necessary party to a title is neither in law or equity under the control of the vendor, the Master ought to report against the title, unless there is produced to him a legal or equitable obligation on the part of the stranger to join in the conveyance. [*Esdaile* v. *Stephenson*] - - - - 366
12. The father vendor claimed the estate by purchase from his son; the purchaser is entitled to evidence of the fairness of the transaction. [*Boswell* v. *Mendham*] 373

See Annuity.—Copyholds.—Practice, 8.

WASTE.

1. In equitable, as in legal waste, if one act of waste be established, the Court will restrain equitable waste generally. [*Coffin* v. *Coffin*] - - - - - - 17
2. Bill will lie to restrain a tenant for life from cutting down of underwood of an insufficient growth. [*Brydges* v. *Stephens*] - - 279

WILL.

1. The words "I will and direct that my just debts, funeral and testamentary expenses, be paid and satisfied," in the introductory part of a will, amount to a charge of the debts upon the real estate. *Clifford* v. *Lewis*] - - - - 33
2. Whether a renewed lease is a revocation of a previous will, depends on the intention apparent in the will. [*Colegrave* v. *Manby*] - 72
3. Testator gives by his will 19*l.* to J. H., and after specific bequests of certain of his goods to different persons, bequeathed to said J. H. thus: "all my other effects I will to J. H., to be sold for his benefit." Held, that all the residue of the testator's property, including money, passed to J. H. [*Hearne* v. *Wigginton*] - - - - 119
4. *P. S.* having two daughters, named *Selina* and *Mary Ann*, *A.* bequeathed a legacy to *Sophia Still*, daughter of *P. S.* There was evidence to show that *Selina* was the person meant; but the other daughter being an infant, a reference was directed to the Master, to inquire who was the legatee intended by the description in the will. [*Still* v. *Hoste*] - - 192
5. Construction of an obscure will. [*Robinson* v. *Smith*] - - - 194
6. The literal and technical force of words in a will to be counteracted by rational implication. [*Vauchamp* v. *Bell*] - - - - 343
7. One name may be substituted for another in the construction of a will, where it is manifest not only that the name used was not intended, but that a certain other name was necessarily intended. [*Dent* v. *Pepys*] - - - - 350

See LEGACY.—CONDITION.

THE END.

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