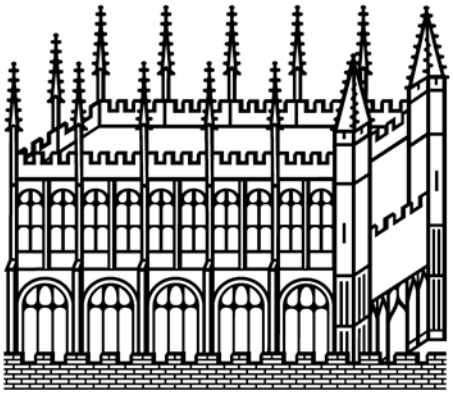

REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE COURT

OF THE

VICE CHANCELLOR OF ENGLAND,

DURING THE TIME OF

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

By HENRY MADDOCK, Esq.

BARRISTER AT LAW.

VOL. I.

LONDON:

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PREFACE.

THE following Reports are respectfully submitted to the Profession, with the hope that they will be found useful.

The Reporter has many acknowledgments to make. To the Learned Judge, he feels grateful, for the kind and essential Encouragement he has received. To the Bar, his thanks are due for the friendly assistance he has experienced. To the Solicitors also, he feels indebted, for their ready communication of Papers.

H. M.

11, Old Buildings, Lincoln's-Inn,
7th February 1817.

A

TABLE

OF THE

CASES REPORTED.

CASES

BEFORE THE

VICE-CHANCELLOR.

HOWELL *v.* GEORGE.

1815.

4th July.

Specific performance refused of an agreement, to sell an estate in fee, by one who supposed he was absolute owner of the estate, when he was only tenant for life, under a settlement, with a proviso empowering him to purchase "an estate in fee simple in possession, in some convenient place or places in England, *of equal or better value, and to settle the same to him in lieu of the settled estate, which was then to be his own."*

THIS was a bill for a specific performance; and prayed, That the agreement might be specifically performed; and that the defendant might be decreed to do and execute all acts necessary to be done on his part, for making a good title and conveyance in fee-simple of the premises, free from the land-tax and other encumbrances, to the plaintiff, his heirs and assigns, or as he should appoint.

The agreement was as follows:—"Be it remembered, "that it was agreed, this 21st day of March 1804, "between *John George*, of *Cherrington*, in the county of "*Gloucester*, gentleman, of the one part; and *Thomas* "*Howel*, of the *Bourne*, in the parish of *Stroud*, in the

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" said county, maltster, of the other part; as follows: " The said *John George*, for and in consideration of " the sum of one pound and one shilling, to him now " paid, and of the sum of 1,498*l.* 19*s.* and 5,000*l.* to " be paid at the time and in manner as hereinafter is " mentioned, with interest for the same from the 25th " day of March now instant, doth hereby, for himself, " his heirs, executors and administrators, covenant, " promise and agree to and with the said *Thomas* " *Howel*, his heirs and assigns, that he, the said *John* " *George*, his heirs, executors, administrators, or assigns, " shall and will, on or before the 25th day of March " 1805, by such conveyance and assurances, ways and " means in the law, as he the said *Thomas Howel*, his " heirs or assigns, or his or their counsel or solicitor, " shall reasonably advise, devise and require, and cause " all proper and necessary parties to join therein, well " and sufficiently release, convey and assure, unto the " said *Thomas Howel*, his heirs or assigns, or to such " person or persons as he or they shall direct or ap- " point, free from all encumbrances and the old land-tax, " all those several messuages, tenements or dwelling- " houses, &c. [describing the premises]: And that the " said *Thomas Howel* shall and may receive the rents " from all the premises from the 25th day of March " now instant. And the said *Thomas Howel*, for the " consideration before expressed, doth hereby, for him- " self, his heirs, executors and administrators, promise " and agree to and with the said *John George*, his " heirs and assigns, that he the said *Thomas Howel*, " his heirs, executors, administrators, some or one of " them, shall and will well and truly pay, or cause " to be paid, unto the said *John George*, his heirs or " assigns, the sum of 1,498*l.* 19*s.* on or before the

" 25th day of April now next ensuing; and the further " sum of 5,000*l.* on or before the 25th day of March " 1805, with lawful interest for the said sum of 5,000*l.* " from the 25th day of March now instant. (Signed) " *John George, Thomas Howel*; witness, *George Wa-* " *then:* one guinea having been paid in part."

By a Settlement made previous to the marriage of the defendant, the premises, in question, were conveyed by *Peter Leversage* the elder, since deceased, the father of the defendant's wife, to *Peter Leversage* the younger, and *William George*, and their heirs, to the use of said *Peter Leversage* the elder, and his assigns, till the marriage of defendant and his said wife: and after the solemnization thereof to the use of said *Peter Leversage* the elder and his assigns, for his life, with remainder to the use of said *Peter Leversage* the younger, and *William George*, and their heirs, during his life, to preserve contingent remainders; with remainder to the use of *Frances Leversage*, wife of *Peter Leversage* the elder (since dead), and her assigns, for her life; with remainder to the use of said *Peter Leversage* the younger, and *William George*, and their heirs, during her life, to preserve contingent remainders; with remainder to the use of defendant, and his assigns, for life; with remainder to the use of said trustees and their heirs, during the life of defendant, to preserve contingent remainders; with remainder to the use of *Elizabeth Leversage*, the wife of defendant, and her assigns for her life, with remainder to said trustees and their heirs, in like manner to preserve contingent remainders; with remainder to the use of the first and other sons of the body of the defendant and his said wife, severally and successively in tail general, with remainder to the use of

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all and every the daughter and daughters of the bodies of defendant and his said wife, as tenants in common in tail, with remainder, in default of such issue, to the heirs of the body of defendant's said wife; with remainder to the use of *John Leversage*, the grandson of said *Peter Leversage* the elder, his heirs and assigns for ever. And in the settlement was contained the following proviso: "Provided also, and it was thereby further declared and agreed, by and between all said parties to said indenture, that in case defendant, when he should be in possession of said premises by virtue of the limitations thereof thereinbefore made to him, should settle, convey, and assure other lands and tenements of an estate of inheritance in fee-simple, in possession, in some convenient place or places in England, of equal or better value than the said premises thereby granted and released, and in lieu and recompense thereof, unto and for such and the like uses, intents and purposes, and upon such and the like trusts, and under and subject to such encumbrances as the said premises were thereby settled and assured unto; and in such case, and at all times from thenceforth, all and every the uses, trust or trusts, estate and estates thereon, before limited, expressed, and declared of or concerning the same, should cease, determine, and be utterly void to all intents and purposes; and the same premises should from thenceforth remain and be to and for the only proper use and behoof of defendant, his heirs and assigns, for ever, and to and for no other use, intent or purpose whatsoever, any thing therein contained to the contrary notwithstanding."

The defendant at the time of the agreement was in fact only tenant for life in possession. His son, the issue of the marriage, attained twenty-one in December 1808

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and, together with the defendant's wife, refused to join in a recovery or conveyance. The defendant by his answer swore, that at the time he entered into the agreement for the sale of the estate, he erroneously conceived, (being altogether unacquainted with matters of law, and not having, to his recollection or belief, perused said settlement since his marriage, nor remembering the contents thereof), that defendant either had such an interest in the estate, or such a power over the same, as would enable him, with the concurrence of his wife, to sell the estate absolutely, without any restriction whatsoever.

Mr. *Hart* and Mr. *Fisher*, for the plaintiff, contended, that the defendant ought either forthwith to procure his son to suffer a recovery of the premises comprised in the agreement, in favour of the plaintiff, and to join himself, and procure his wife, and all other necessary parties, to join with his son in suffering such recovery, and in doing all other acts necessary for making a good title and conveyance to the plaintiff; or, that the defendant ought forthwith to exercise the power vested in him by the proviso, and make a settlement of other premises of equal value, in compliance with such proviso; and also to do any other acts which might be necessary on his part, and also procure all other necessary parties to concur in all acts necessary to enable him to make a good title and conveyance of the premises to the plaintiff, pursuant to the agreement. They cited *Barrington* v. *Horne* (*a*), *Withers* v. *Pinchard* (*b*), and *Hall* and *Hardy* (*c*).

(*a*) 2 Eq. Cas. Abr. 17.
(*b*) 7 Ves. 475.
(*c*) 3 P. Wms. 187.

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Sir *S. Romilly* and Mr. *Horne*, for the defendant, argued, that the agreement was made under a mistake as to the defendant's power over the estate; and that the Court should not by its decree, under the circumstances, compel the defendant, to procure his wife and son to join in a recovery, or to act under the proviso.

The VICE-CHANCELLOR:—

The defendant thought, when he entered into the agreement, he had an absolute power over the estate, but has since found he is only tenant for life, and his wife and son refuse to join with him in suffering a recovery, so as to enable him to perform his agreement. He is willing to convey as far as he can, and to compensate the plaintiff for any injury he may have sustained. It is contended, that the defendant ought to be compelled to procure his wife and son to join with him in a recovery; or, that under the proviso, he ought to acquire a fee in the lands in question, and convey them to the plaintiff.

It was not much pressed in argument that he ought to be decreed to procure his wife and son to join in a recovery. It could not be argued, that a man should be compelled to use his marital and parental authority to compel his wife and son to do acts which ought only to be spontaneously done. In *Hall* v. *Hardy* (*d*), the *Master of the Rolls* says, there have been an hundred precedents where if the husband, for a valuable consideration, covenants that his wife shall join with him in a fine, the Court has decreed the husband to perform his covenant; and in *Morris* and *Stephenson* (*e*),

(*d*) 3 P. Wms. 189. (*e*) 7 Ves. 474.

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a husband was, under the circumstances, decreed to procure his wife to join in a surrender of a copyhold estate; but, in *Emery* v. *Wase* (*f*), Lord *Eldon* reviews the cases, and expresses great doubt, whether under a contract by a husband to sell the estate of his wife, the Court will decree him to procure her to join (*g*). In *Davis* v. *Jones* (*h*), the Chief Justice of the Common Pleas, Sir *James Mansfield*, who was very conversant in the doctrines of a Court of Equity, thought nothing could be more absurd than to allow a married woman to be compelled to levy a fine through the fear of her husband being sued, and thrown into gaol, when the general principle of the Law was, that a married woman shall not be compelled to levy a fine. Those cases in which a husband was compelled to make his wife concur, have been, where he has agreed she should convey, and her consent might be supposed to have been previously obtained; but in this case there is no pretence that the defendant agreed that his wife and son should join in a recovery. None of the cases have gone so far as to say, a father can be compelled to procure his son to join in a recovery.

With regard to the second point, the compelling of the defendant to make a title, by means of the power given by the proviso, the case is entirely new. The difficulty of proceeding under the power is very great. By the terms of the proviso, he must find an estate of inheritance in *Fee Simple*, in some *convenient* place or places in England, of which he is to judge, and of *equal*

(*f*) 8 Ves. 505, on appeal from the determination at the Rolls, reported 5 Ves. 846.

(*g*) See Brick and Whelley, 9th Feb. 1721. Dom. Proc. Lord *Harcourt*, in his MS. Tables, thus states the result of that case:—"No agreement "of the husband to part with "the wife's inheritance shall "bind the wife, or be carried "into execution."

(*h*) 1 New Rep. 267.

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or *better value*. He may object, that he is unable, or unwilling to purchase an estate of *greater* value; and those interested in the present estate would object to his purchasing an estate of *less* value; so that the defendant must procure an estate of exactly *equal value*. Can the Court decree this, when it is so uncertain whether it can be performed during the plaintiff's life? Who is to look out for the estate? Who are to be consulted about the title? Then the estate is to be in a *convenient situation*. Is the Court to try this? Is it to be referred to the Master to say what is a convenient situation? If the defendant, from the pecuniary inability which he is now stated to be under, should forbear to make the purchase of another estate, when one answering all the necessary requisites has been found, is the Court to grant an attachment against him on account of that inability? Such a proceeding might be warranted if the defendant had expressly contracted to make such a purchase; but would it be equitable in the present case, where no such contract was made or intended? What a source of litigation might be occasioned by the necessity of applying to the Court to enforce the decree by attachment in every case in which the parties might differ as to the locality, value, or title of the new estate; and how difficult would it be to decide such questions satisfactorily, or to compel the purchase by a reluctant purchaser. The indefinite protraction of a termination of the suit during the pendency of those questions, and the consequential suspense of the rights of the parties, and the knowledge or enjoyment of their property in the meantime, together with the expense as well as delay of such proceedings, constitute additional objections to the proposed decree. These, and other difficulties that might arise, show the impropriety of decreeing a specific performance through the medium of this proviso.

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The Court has a discretion as to decreeing a specific performance (*i*); and no authority has been cited to show that the Court will decree a specific performance in a case circumstanced like this. The plaintiff is not without remedy. He may at law recover in damages a compensation for the injury he has sustained.

Five years have elapsed between the date of the agreement and the filing of the Bill. In excuse of that, it is said the plaintiff would not proceed till the son attained twenty-one, in hopes that he would join in a recovery.

There are many cases in which a specific performance has been refused, where the execution of the agreement would operate with *considerable hardship* on the defendant. *Fain* v. *Brown* (*k*), is a strong case of that description (*l*).

(*i*) White *v.* Damon, 7 Ves. 35.

(*k*) 2 Ves. 307.

(*l*) In Lord *Harcourt*'s MS. Tables there is the following passage: "*Equity will not carry unreasonable agreements into execution.* Bryan v. Wooley, 9 Feb. 1721, and Carrol & Chamberlain, 14 July 1721, and Top & Stanhope, 24 March 1720." The cases here cited were determined in the House of Lords. They are cited also in illustration of the same doctrine by the author of "Grounds and Rudiments," &c. p. 76, together with Green *v.* Green, Dom. Proc. 25 Jan. 1710, and Thomson *v.* Harcourt, Dom. Proc. 13 Feb. 1721. Moody & Stewart, Dom. Proc. 28 Feb. 1728. And see Vaughan *v.* Thomas, 1 Bro. C. C. 556. and Square *v.* Baker, Dom. Proc. 27 Feb. 1726.

The following case, of which the Reporter has a MS. is in conformity with the doctrine of the cited cases.

SOUTHWELL
v.
NICHOLAS & ABDY.

At the Rolls, 2 March 1732.

THE plaintiff's father having several houses in Spring Gardens, and the defendant Nicholas's brother having likewise some houses there, agree, by parol, jointly to purchase two old houses, and to pull them down, in order to make a passage for coaches into Spring Gardens. They appoint defendant Abdy to buy these

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A Court of Equity will not decree a specific performance of an agreement, when from the circumstances it

two houses, in trust for them, and afterwards treat by letters about a proper method to be taken in pulling down these houses, and making a passage. The houses were pulled down, and plaintiff's father paid his moiety of the purchase-money, and dies; defendant's brother dies, and being much in debt, his estates are sold by a decree for the payment of them.

Plaintiff now brings his bill for a specific performance of this parol agreement, that defendant Nicholas should pay his moiety of the purchase-money; that defendant Abdy should execute a deed of declaration of the trust; and that a passage should be made according to the said agreement.

For defendants, it was said, That as the houses which belonged to the defendant Nicholas were sold by a decree of this Court, it would be most unreasonable to carry this agreement into execution; for that he would now have no benefit by the making of this passage, nor would there be any consideration accruing to him for the expense he would be at, which would be a very hard case. It was likewise insisted upon, that, as no time was limited for the performance of this agreement, this Court would not decree a performance of it, and to that purpose cited a case in 2 Chan. Rep. fol. 17.

Master of the Rolls:—

The agreement appears by the defendant Nicholas's answer, as well as by the letters that passed, either of which would be sufficient for us to carry it into execution. But this case goes much farther: the agreement is in part executed; the houses are pulled down, the money paid, and with no other reason than for the opening of the passage: any of these facts would bring the case out of the Statute of Frauds & Perjuries. But then we must take care that this be a reasonable agreement: for we must not assist when the demand is against reason. And that he the plaintiff had been rather too hard in the contract, to make defendant pay for half of the two old houses, when his estate, that was to have the benefit of this passage, was much larger than the defendant's.

As to no time being mentioned for the performing this agreement, there had been many resolutions where this Court had decreed a performance in a reasonable time; so it is likewise in common law; and was clear that this objection would not make void the agreement. As to the defendant's having sold the estate, he owned that made the case somewhat hard; but he supposed the estate was sold accordingly.

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is doubtful whether the party meant to contract to the extent that he is sought to be charged (*m*). Did this defendant intend to contract to the extent he is sought to be charged? He never contracted to purchase another estate to enable him to convey the estate agreed to be sold.

It is competent to the Court, in the exercise of its discretion, as to decreeing a specific performance, to consider the circumstances under which the agreement was obtained (*n*). A *mistake* in a contract may be remedied. Here the party agreed under a mistaken notion that he was the owner of the fee. In *Costigan* v. *Hastler* (*o*), Lord *Redesdale* says, "When a person "undertakes to do a thing which he can himself do, or "has the means of making others do, the Court com- "pels him to do it, or procure it to be done, *unless the* "*circumstances of the case make it highly unreasonable* "*to do so.*" He then puts the case of a mortgagor agreeing with a tenant for a lease. The tenant, says he, has a right to say, "You shall either obtain the consent "of the mortgagee or redeem the mortgage; or, if you "complain of the hardship of this, you shall rescind the "contract. A court of equity," he continues, "may "not compel the mortgagor, if highly inconvenient, to

He seemed inclined to decree, that both parties should pay for the old houses in proportion to the value of their estates to be benefited by this passage: upon which it was agreed by the parties, that plaintiff should pay two thirds, and the defendant one; and that a passage should be made according to the agreement.

(*m*) Harnett *v.* Yielding, 2 Sch. & Lefr. 554.

(*n*) Marquis Townshend *v.* Stangroom, 6 Ves. 339.

(*o*) 9 Sch. & Lefr. 166.

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" pay off the mortgage for the purpose of giving effect " to the contract; but then he shall not enforce it " against the tenant, if the tenant does not wish to " abide by it. If the tenant will not give up the con- " tract, the Court might say, it should not be specifically " enforced against the landlord, under such circum- " stances; and leave the tenant to seek his compensation " in damages at law." This case is not exactly the present, but it comes very near it, and strongly applies.

The want of mutuality in a contract sufficient ground to refuse a specific performance.

The want of *mutuality* in a contract is a sufficient ground for refusing a specific performance (*p*). Was there mutuality in this contract? Could the defendant have insisted on the plaintiff's waiting till he could procure the estate by means of his power under the proviso? Certainly not.

This is not a case where a specific performance ought to be decreed. The plaintiff must be left to his remedy at law. The defendant was very blameable in not looking into his title before he made the agreement; but all the authorities are against a decree for a specific performance in a case circumstanced like the present.

The bill must be dismissed, but without costs.

Mr. *Horne* suggested the propriety of the Vice-Chancellor's suspending his direction as to costs, till the plaintiff agreed to do what was right, in regard to future proceedings; and read parts of the defendant's answer, and proposed to read a deposition, not read in the cause.

(*p*) Armiger v. Clarke, Bunb. 111.

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The VICE-CHANCELLOR :—

Wherever the consideration of costs can be introduced in the argument of the case, it is proper it should; for it is very inconvenient after a cause is decided, to go again into the merits of the case, to determine the question of costs. I think the question of costs ought not to depend on what the party will, or will not do, hereafter. If on the merits of the cause he is entitled to costs, I ought not to refuse them by way of punishment, because he objects to do what is considered as right in regard to future proceedings (*q*).

Answer, though not evidence in the cause, may be read as to costs.

The *answer*, though not evidence in the cause, may be read as to the point of costs; and I did read it for that purpose. The *deposition* cannot be read as to costs, not having been read as evidence in the cause. The bill must be dismissed, but without costs.

(*q*) His Honor, in the subsequent case of Thompson *v.* Leake and others, expressed himself to the same effect.

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21st July.

WEBBER *v.* HUNT.

On a decree against a mortgagee in possession to account, Rests cannot be made by the Master, unless directed by the decree.

A BILL was filed to redeem a mortgage, and the usual decree was made against a mortgagee in possession, viz. to take an account of what was due for principal, interest, and costs, and of what had been, or might have been received by rents and profits.

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Mr. *J. Martin* moved, under the circumstances of the case, to rectify the minutes of the decree, and for a direction, that the Master, in taking the account of rents and profits, should be directed to make *Rests*.

The VICE-CHANCELLOR :—

I have, upon inquiry, found a difference of practice amongst the Masters: some Masters make Rests without any specific direction in the decree for that purpose, and some do not, but merely totalise the principal, interest, and costs, and the rents and profits. The Master is not at liberty to make rests unless directed to do so by the decree. In *Robinson* v. *Cumming* (*a*), the decree particularly directed annual rests to be made. In *Gould* v. *Tancred* (*b*), Lord *Hardwicke* was of opinion, that exceptions to a Master's report, because he had not made annual rests, could not be sustained, the decree not having directed them; and lately, the Master of the Rolls, in *Davis* v. *May* (*c*), held, that rests cannot be made, unless specially directed by the decree. In *Fowler* v. *Wightwick* (*d*), before Lord *Eldon*, the Master made rests, though the decree did not direct them, which the Chancellor held to be wrong. In *Yates* v. *Hambly* (*e*), it appears, on consulting the Register's book, that the form of the decree was, "That an account should be taken of what shall be coming due on account of rents and profits, to be applied, in the first place, in payment of interest and principal, and in sinking the principal, and the Master to make annual rests; and in taking such account is to make all

(*a*) 2 Atk. 409, 410.
(*b*) 2 Atk. 533.
(*c*) 2 May 1815.
(*d*) A. D. 1810.
(*e*) 2 Atk. 362.

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just allowances." This is the proper form of the decree where rests are to be made, but rests can never be made by the Master unless specifically directed by the decree. In the present case annual rests are proper, and the minutes must be altered accordingly (*f*).

(*f*) In Lord *Harcourt*'s MS. Tables, there is the following passage: "Accounts to be taken with an annual rest; each year's account to carry interest, in cases where trustee has paid off encumbrances with his money; likewise in cases of arrears of annuities, and old mortgages. Bradshaw *v.* Ashley, 2 April 1717." Dom. Proc. S. C. 4 Bro. P. C. 505. Tom. Ed.

Ex parte LYNCH and another.

July 25th & 26th.

Prohibition refused, to Judge of the Prize Court, to enjoin him from proceeding in a case involving a question of Prize.

THIS was a Petition to the Chancellor, directed by Him to be heard by the Vice-Chancellor, praying, That a *Writ of Prohibition*, returnable in the Court of King's Bench, might issue, directed to the Right Honourable the Judge of the Admiralty Prize Court, to prohibit him from further proceedings, or holding plea before him in any manner touching or concerning the premises. The petition stated, That the British ship *Harmony* sailed from *Oporto* for *London*, on the 26th of February 1815, and was taken as prize by an American privateer on the 2d July following, off *Cape Finisterre*, and all the crew, except *John Nelson*, the mate, were taken into the privateer; and an American prize-master and one other American, with five Frenchmen, were put on board the prize, with directions to the prize-master to

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Ex parte LYNCH and another.

carry the ship into some port of the United States; and the prize-master shaped his course for that purpose. On the subsequent 24th of March, in latitude 42, 47 north, and longitude 28, 13 west, *Nelson* killed the prize-master (the Frenchmen not opposing him,) and brought the ship and cargo to *England*, where he arrived on the 7th April. Proceedings were instituted in the Admiralty Prize Court, by *Nelson*, in respect of this recapture, and by the owners of the ship and cargo, when she was first captured; and on the 6th of May the Court pronounced the ship and cargo to be British property, and to have been taken by the enemy, and retaken by *Nelson*; and that one tenth of the value was due to him for salvage, and accordingly condemned the ship for salvage and expenses; and directed that the ship and cargo should be restored to such owners on payment of salvage and expenses, which amounted to 1,390 *l.* and were afterwards paid. On the 26th of the same month of May, the Commander of the American privateer obtained a monition in the Court of Prize against *Nelson*, the re-captor, and the owners of the ship and cargo, to show cause why such ship and cargo should not be decreed to be released from the re-capture and seizure, as having been effected after the period specified in the Treaty of Peace between Great Britain and the United States of America (*a*). On the return of

(*a*) The Treaty of Peace with the United States, which was signed the 24th of December 1814, and finally ratified the 17th of February 1815, contains the following clause:

"III. Immediately after the ratification of this Treaty by both parties, as hereinafter mentioned, orders shall be sent to the armies, squadron, officers, subjects and citizens of the two powers, to cease from all hostilities; and to prevent causes of complaint which might arise on account of the prizes which may be

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the monition, an appearance was entered on the part of the petitioners, (the owners of the ship and cargo at the time of the capture) to save contumacy, but under protest; and they in their defence submitted, that the Prize Court had no jurisdiction to proceed to the cognizance of the matter, nor to try the question as to the re-capture of the ship; and that the Court, as a Court of Prize, had no jurisdiction to take cognizance of any seizures made upon the High Seas during Peace, but that its authority was limited by the King's commission to the entertaining questions of Prize, where captures or re-captures, as Prize, had been effected by British subjects during the continuance of hostilities; and that during hostilities between Great Britain and America no American subject could maintain any suit or action in any British Court; and that after the conclusion of Peace, no question of Prize of War between Great Britain and America could arise in respect of any seizure by the subjects of either nation after the Treaty of Peace, not being in the nature of Prize, nor cognizable as such by the Prize Court; and that whatever jurisdiction that Court might have of it had already been

taken at sea after the ratification of this Treaty, it is reciprocally agreed, that all vessels and effects which may be taken after the space of twelve days from the said ratification, upon all parts of the coasts of North America, from the latitude of 28 degrees north, to the latitude of 50 degrees north, and as far eastward in the Atlantic Ocean as the 30th degree of west longitude from the meridian of Greenwich, shall be restored on each side; that the time shall be thirty days in all other parts of the Atlantic Ocean, north of the Equinoctial Line or Equator; and the same time for the British and Irish Channels, for the Gulph of Mexico, and all parts of the West Indies.

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exercised; and that the Court had no power to reverse its decree; but that if any persons were injured, the High Court of Appeal was the court to resort to. The petition further stated, that notwithstanding the jurisdiction of the Prize Court, as to American Prizes, ceased with the war, and ended on the 17th February 1815, and had not been revived; yet, the Right Honourable the Judge of that Court was about to proceed to judgment in the cause, instituted by the American claimant.

Mr. *Hart*, Dr. *Lushington*, and Mr. *Heald*, for the Petition:—

We apply for this Prohibition, because the subject is not within the jurisdiction of the Prize Court. Neither the commission issued on the breaking out of hostilities with America (*b*), or the Prize Act 53 *Geo.* III. c. 63,

(*b*) The Commission was in the following terms:

In the Name and on the Behalf of His Majesty.

George, P. R.

GEORGE the Third, by the Grace of God, of the United Kingdom of *Great Britain* and *Ireland*, King, Defender of the Faith: To our right trusty and well-beloved Cousin and Chancellor, *Robert* Viscount *Melville*; our trusty and well-beloved *William Domett*, Esq. Vice-Admiral of the White Squadron of our Fleet; Sir *Joseph Sydney Yorke*, Knight, Rear-Admiral of the White Squadron of our Fleet; our right trusty and well-beloved Councillor *William Dundas*; our trusty and well-beloved *George Johnstone Hope*, Esq. Rear-Admiral of the White Squadron of our Fleet; our trusty and well-beloved Sir *George Warrender*, Baronet; and our trusty and well-beloved *John Osborn*, Esquire; our Commissioners for executing the office of Lord High Admiral of our said United Kingdom of *Great Britain* and *Ireland*, and Dominions thereunto belonging; and to the Commissioners for executing that office for the time being,

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referring to and adopting the 45th *Geo.* III. c. 72, authorize a jurisdiction in a case like the present. The

Greeting. Whereas we having taken into our consideration the injurious and hostile proceedings of the United States of *America*, as set forth in the Declaration of this date, issued by our command, We therefore having determined to take such measures as are necessary for vindicating the honour of our Crown, and for procuring reparation and satisfaction, did by and with the advice of our Privy Council order that general reprisals be granted against the ships, goods, and citizens of the United States of America, save and except any ships to which our License has been granted, and which have been directed to be released from the embargo, and have not terminated the original voyage on which they were detained and released, so that as well our fleets and ships, as also all other ships and vessels that shall be commissionated by Letters of Marque or general Reprisals, or otherwise, by you our Commissioners for executing the office of Lord High Admiral of our said United Kingdom of *Great Britain* and *Ireland*, and for the time being, shall and lawfully may seize all ships, vessels and goods belonging to the United States of *America*, or to any persons being citizens of or inhabiting within any of the territories of the United States of *America*, save as before excepted, and bring the same to judgment in any of the Courts of Admiralty within our dominions, which shall be duly commissioned: These are therefore to authorize and we do hereby authorize and enjoin you our said Commissioners, now and for the time being, or any three or more of you, to will and require our High Court of Admiralty of *England*, and the Lieutenant and Judge of the said Court and his Surrogates, and also the several Courts of Admiralty within our dominions, which shall be duly commissioned, and they are hereby authorized and required to take cognizance of, and judicially to proceed upon, all and all manner of captures, seizures, prizes and reprisals of all ships, vessels and goods already seized and taken, and which hereafter shall be seized and taken, and hear and de-

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commission did not entitle an American to make any claim under it. The authority of the Prize Court to condemn, ceases with the Treaty of Peace. Its authority does not continue one hour after the cessation of hostilities. There cannot be a seizure as Prize, except *flagrante belli*. If this American was entitled to the ship, and the re-capture illegal, he should have brought an action of *Trover* for it. It would be very inconvenient, if, after a lapse of years, and many alienations, a Prize Court should have authority to restore a ship re-captured. All the authority of the Prize Court is derived from the commission, which only authorizes the Judge to condemn, and not to restore. The doctrine of Lord *Coke* (*c*) is applicable to show that the American's remedy is in the Common Law Courts. The jurisdiction in the Prize Court (*d*) ought to be limited to a time of war, for it proceeds on principles not known to the

termine the same according to the course of Admiralty and laws of nations; and to adjudge and condemn all such ships, vessels and goods, as shall belong to the United States of *America*, or to any persons being citizens of or inhabiting within any of the territories of the United States of *America*, save as before excepted. In witness whereof we have caused our Great Seal of our United Kingdom of *Great Britain* and *Ireland* to be put and affixed to these presents. Given at our Court at *Carlton House*, the 15th day of October, in the year of our Lord 1812, and in the 52d year of our Reign.

(*c*) 4 Inst. 154.

(*d*) "The Judge of the Admiralty is appointed by a "commission under the Great "Seal, which enumerates "particularly, as well as generally, every object of his "judicial cognizance; but not "a word is contained of *prizes*. "To constitute that authority, "or to call it forth in every "war, a distinct commission "under the Great Seal issues to "the Lord High Admiral, to "will and require the Court of

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Common Law; and the King in Council has been said to have a Legislative Power over the Prize Court (*e*).

The *King's Advocate*, Dr. *Adams*, and Mr. *Cooke*, against the Petition:—

The argument, that the jurisdiction of the Prize Court immediately ends with the ratification of a Treaty

" Admiralty, and the Lieute-
" nant and Judge of the said
" Court, his surrogate or sur-
" rogates; and they are there-
" by authorized and required
" to proceed upon all and all
" manner of captures, seizures,
" prizes, and reprisals of all
" ships and goods that are, or
" shall be, taken; and to hear
" and determine according to
" the course of the Admiralty,
" and the Law of Nations. A
" commission issues to the
" Judge accordingly." 2 Wood. Lect. 452.

(*e*) I am not aware of any Judicial Authority, or Text Writer, laying down such a doctrine; nor is it to be found, I apprehend, in the Practice of the Prize Court. Possibly the following observations in an able tract were alluded to: " Royal instructions from the " time of their promulgation, " of course become Law to all " executive officers acting un-
" der His Majesty's commis-
" sion, so as absolutely to
" direct their conduct in re-
" lation either to the enemy,
" or the neutral flag. *Their*
" *legislative force in the Prize*
" *Court also, will not be dis-*
" *puted*; except, that if a royal
" order could be supposed to
" militate plainly against the
" rights of *neutral subjects*, as
" founded on the acknowledged
" law of nations, the Judge,
" *it may be contended*, ought
" not to yield obedience; but
" when the Sovereign only in-
" terposes to remit such belli-
" gerent rights as he might
" lawfully enforce, there can
" be no room for any such
" question; for '*volenti non fit*
" *injuria*;' and the captor can
" have no rights but such as
" he derives from the Sove-
" reign, whose commission he
" bears." [*War in Disguise*, &c. p. 23.]

It seems very clear, though stated doubtfully in the passage quoted, that the Judge of

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of Peace, and that it has no authority to restore, but only to condemn, is unwarranted. The warrant to the Judge of the Prize Court, in pursuance of the commission to the Lords of the Admiralty, directs him to proceed according to the course of the Admiralty, and the law of nations. Several decided cases show the practice of the Prize Court, and that the authority of that Court does not cease with hostilities, and that it has a power to restore, as well as to condemn. It may restore a cartel ship, or a neutral; that cannot be denied. The case of the *St. Helena* (*e*), the *Mentor* (*f*), the *Adolphus*

the Prize Court is bound to decide according to the Law of Nations; and that no Order in Council, which on the face of it appears clearly contrary to that law, would justify him in departing from it, unless such order was in relaxation or remission of belligerent rights. Sir *William Scott*, sitting in a Court of Prize, has thus expressed himself: "In forming "my judgment, I trust it has "not escaped my recollection "for one moment, what it is "that the duty of my situation calls for from me; "namely, to consider myself "stationed here, not to deliver "occasional and shifting opinions, to serve present purposes of particular national "interest, but to administer "with indifference that justice which the law of nations "holds out, without distinction to independent states, "some happening to be neutral and some belligerent. "The seat of judicial authority is indeed locally here, "in the belligerent country, "according to the known law "and practice of all nations; "but the law itself has no "locality; it is the duty of "the person who sits here "to determine this question "exactly as he would determine the same question "as if sitting at *Stockholm*." [*Maria*, Capt. *Paulsea*, 1 Rob. Rep. 349.]

See on this subject, the Debate in the House of Lords, 8th March 1807, on the Orders in Council respecting America.

(*e*) 4 Rob. Adm. Rep. p. 3.

(*f*) 1 Rob. 179.

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Frederick (*g*), which arose out of the war of 1747: the *Neustra Senora de Los Dolores* (*h*), and a decision, not reported, on the 8th of April 1809, where a case of plunderage was admitted, after costs and damages had been paid on a former sentence; are cases which show that the Prize Court may act after hostilities have ceased. So too in the case of *La Bouche Harriet Munster*, arising out of the Treaty of Utrecht in 1712. The Proclamation for the cessation of hostilities was on the 21st August, and the capture was on the 30th September, off Newfoundland; the ship was released at Newfoundland by ransom, the captor taking an hostage, but leaving all the questions of prize to be decided by the Prize Court. The hostage, on the 22d January, took out a monition, to inquire why he should not be released, and the ransom made void, reciting the events that had passed and the cessation of hostilities; and the Judge decreed the hostage, who was a Frenchman, to be released, and the ransom to be held null and void. So, likewise in the case of the *Oceano*, decided by the Master of the Rolls, and other Lords Commissioners of Appeal, in February 1811, where the ship was taken into the *Bermudas*, and condemned; and on appeal, on the ground that the ship was unwarrantably taken after the ratification of a Treaty of Peace, the Lords Commissioners gave relief and costs. These cases show what has for a century been the course of the Court. Capture and Re-capture are both determinable by the Prize Court; for Re-capture is capture. Wherever the seizure is made as Prize, the Prize Court has jurisdiction.

(*g*) Mentioned by Sir *William Scott*, in his judgment in the case of the *Elsebe*, 5 Rob. 189.

(*h*) 1 Edwards' Adm. Rep. p. 60.

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He must show a property, and that he took the ship *flagrante bello*. Can such inquiries be entertained by a Court of Common Law? The property may be a mixed property, and the legality of the capture must depend upon the construction of the Treaty, according to the law of nations. The jurisdiction of the Prize Court is stated in *Le Caux* v. *Eden* (*i*), and the concurrent doctrine of all the cases there cited, show the Prize Court has jurisdiction in cases like the present.

Another objection to this application is, that it is too late. The parties had time, during the last term, to apply to a Court of Law for the prohibition, and therefore cannot now apply here (*k*).

Reply:—In the case of the *Mentor*, and the *Oceano*, the question was not made; and in those cases, and the others in 1747 and in 1717, British owners were not personally concerned; they, therefore, are not in point.

The VICE-CHANCELLOR:—

I shall not now give my final judgment upon a case of such magnitude and importance; but I will state the opinion I have, at present, formed of this case. The objection, that the Courts of Common Law should have been applied to, there having been time for that purpose, and that it is too late to apply here, appears to me untenable. In applications of this nature the Court has no discretion whether or not it will hear the party. It is bound to grant the writ on a proper case being

(*i*) Dougl. 594.

(*k*) Blackborough v. Davis, 1 P. Wms. 43, and Anon. 1 P. Wms. 475, and see more particularly, Montgomery v. Blair, 2 Sch. & Lefr. 136.

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made. It has, even in Term Time, a concurrent jurisdiction with a Court of Common Law. But this objection needs not be more fully considered, since, I am of opinion, that on other grounds the writ ought not to be granted. If it were a doubt with me, whether the writ should be granted, I should be inclined to grant it, that a Court of Common Law might re-consider the question; but I have no doubt on this case. My decision will not preclude the parties from applying to a Court of Common Law, if they think proper.

With regard to the main question, two considerations arise: 1st, What is the jurisdiction of the Prize Court? 2dly, Whether this is a case falling within its jurisdiction, or, in other words, a question of Prize or no Prize? It is clear, from *Le Caux* against *Eden* (*l*), and *Key* and *Hubbard* v. *Pearce*, *Vanderwoodst* v. *Thompson*, and the able judgment of Lord *Mansfield* in *Lindo* and *Rodney*, all cited in *Le Caux* v. *Eden* (*m*), that the *Prize Court has a sole and exclusive jurisdiction in all cases of Prize.* This has been the received doctrine from the time of *Elizabeth.*

Is this then, 2dly, a case within the jurisdiction of the Prize Court? That must depend upon the circumstances of the case. The facts of this case are not disputed. The Treaty of Peace with America was signed on the 24th of December 1814, and ratified on the 17th of February following. The Treaty legalizes captures made

(*l*) Dougl. 594.

(*m*) See also what is said by the Judges in the case of Smart and others *v.* Wolfe, 3 T. R. 323.

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in certain places, within a given time after the signature of the Treaty. On the 2d of March the ship was hostilely captured by the American, who was not aware of the cessation of hostilities, and he continued in possession of the ship till the 24th. On the 24th, *Nelson*, the mate, by a gallant enterprize, re-captures the ship, brings it into a British port, and issues a warrant to arrest the ship, and the *quondam* British owner is called on to say why he should not have salvage. He was held entitled to salvage; and subject to the same, Restitution of the ship and cargo was ordered to the original owner. The American captor having heard of these proceedings, issues a monition, calling upon all the parties interested to bring this question into the Admiralty Prize Court for adjudication. This proceeding is sought to be restrained by prohibition. Is this then a question of Prize or no Prize? If the right of the American captor is questioned, on the ground that the capture was not within the time and place prescribed by the Treaty, that is a question of title *jure belli*, depending on facts, and involving many nice questions, as to which a Court of Common Law, in an action of Trover, could not so properly decide. Those Courts do not decide upon Treaties of Peace, or upon the *jus belli*. The Court of Prize only, can decide upon the construction of Treaties of Peace, as between nation and nation, grounding its decision upon the law of nations. Is a Court of Law to determine whether the capture took place before or after twelve o'clock at night? And, with respect to the longitude, and latitude, are we to determine that question upon affidavits, for a prohibition? A question may arise, whether, supposing the capture was good, and possession for twenty-two days, and in progress to an American port for condem-

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nation, a change of property took place. This must be decided by the Law of Nations (*n*). Another question may arise, whether the owner's right of re-capture was taken away by the capture, and a possession of twenty-two days, without a condemnation, there being a Treaty of Peace intervening while in its progress towards an American port? Does the Treaty do away the necessity of condemnation, in order to fix the property? These are questions arising upon the *jus belli* to be decided by the law of nations. The question is not, whether a Trial at Law would be more satisfactory to the British owner, but, whether it is not more satisfactory to foreign nations to have questions of this nature, between a foreigner and a subject of this country, decided in a Tribunal bound to decide according to the Law of Nations. Without, I trust, any improper bias in favour of the Prize Court, I do think that questions of this nature are more properly decided in that Forum. The consideration of re-capture is, equally with capture,

(*n*) As to this point, see Grotius De Jure Bell. & Pac. l. 3, c. 6, s. 3; & Bynkershoëk Quest. J. P. l. i. c. 4; 10 Mod. 79, 80; Burr. 694, 1208-9; Doug. 617. Sir *William Scott*, in his judgment in the case of the *Neustra Senora De Los Dolores*, says, "We know, "that in captures at sea, the "general law is, that bringing "*infra præsidia*, and even a "sentence of condemnation, is "necessary to convert the "property; and although, in "some instances, positive in-"stitutions have determined "that a possession of a certain "number of hours is sufficient, "yet this proceeds upon the "ground that a possession of "so many hours is an evidence "of firm possession." Edwards's Adm. Rep. vol. 1, p. 62. See also Brown's Civil Law and Law of the Admiralty, vol. 2, p. 251, where most of the authorities on this subject are adverted to.

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within the jurisdiction of the Prize Court. If this capture was legal, the re-capture may or may not be good, according to circumstances. The time of the re-capture —the place—the longitude and the latitude, must be considered according to the provisions of the Treaty of Peace. This is a proper matter for the Prize Court to determine. Is the *quondam* British owner by the re-capture remitted to his former right? This is a question *de jure belli*, and which, whatever weight may belong to it, is to be determined by the Law of Nations. It is impossible to say, therefore, that the Prize Court has not jurisdiction in this case. The Prize Act prohibits any mode of re-possession, but by adjudication. It has been argued, that the commission to the Prize Judge does not authorize him to establish the claims of an American to a British ship, as Prize; and that this is in the nature of an original proceeding on behalf of the American captor. But this is too narrow a construction of the commission, and contrary to the understanding and practice of the Prize Court. It is tying down its authority too much to say, it can only condemn and not restore. The cases cited show, according to the practice of a century, it has jurisdiction to restore, and it is proper it should have that power. The jurisdiction is over the act done; and the Court has power to do justice to all parties in a way which a Court of Common Law, in an Action of Trover, could not do. In *Turner* and *Cary* (*o*), the Ostender was relieved, though it was difficult to say the commission, in words, gave such a jurisdiction, but it necessarily arises from it.

(*o*) Reported, 1 Lev. 243, and 1 Sid. 367, and noticed in Mr. Just. Buller's Judgment in *Le Caux* v. *Eden*, Dougl. 582.

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Assuming the American capture to be good by possession, and the Treaty of Peace, the subsequent re-capture must be considered as the capture of an American ship brought into Court for condemnation, and a partial, not a general, adjudication of Prize, obtained behind the American's back. The American, therefore, was entitled to a monition, for in all cases the Court may call upon a reluctant captor to come in and have an adjudication. If the American captor had carried his capture into an American port, and obtained a condemnation, and on sailing out of port again it had been recaptured, there is no doubt he was entitled to a monition, and so, I think, he is in the present case. It has been the constant course, for a century past, at the end of every war, to institute proceedings on behalf of an enemy, having ceased to be an enemy, to be heard in a Court of Justice, to dispute the validity of a capture. In the case of the *Mentor*, the ship was taken in the year 1783, and destroyed after the cessation of hostilities, but, before notice of such cessation, and it is stated, I think, that after a period of eighteen years after the ship was destroyed, a Suit was instituted in the Prize Court for indemnification. What authority had the Court to entertain that suit? It was not a suit for condemnation of any ship—it was not a suit instituted by a British subject *against* a *quondam* enemy, it was *by* a *quondam* enemy seeking relief and indemnification in the Admiralty Court, after the ship was destroyed, in a proceeding *in rem*. The ship was destroyed and gone—There was no proceeding of the British subject to condemn, and yet, in that case, the Court felt no difficulty in assuming jurisdiction, and there was no attempt to stop it by a prohibition. It has been said, that the captain of a British ship of war may more readily yield

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to the jurisdiction of a Prize Court, because, if he does not, he may be deprived of his capture by an order from the Government to restore; but that observation fails in its application to that case, because the captain was in no danger of any thing of that kind; he might have been called upon for damages, and it was very much the interest of the party there to stop the jurisdiction of the Admiralty Court, because his only defence was length of time. If he could have succeeded in transferring it to a Court of Law, the Court of Law would have had no difficulty to apply the Statute of Limitations, and therefore it was his interest to institute such a proceeding, but no such proceeding was instituted. The Court decided against the claimant upon the ground of the lapse of time; and that if he could have any remedy, it must be by an application to Government, to give him some reparation for the injury he had sustained; but that a Court of Justice would not exercise its power after such a length of time.

In the year 1811 a question arose respecting the *Oceano*, which was a Spanish ship. The capture took place at or beyond the period of the cessation of hostilities. The vessel was condemned in the inferior Court of Admiralty, not knowing it was taken under circumstances that did not render it a lawful capture; but upon an appeal, the Master of the Rolls (*p*), and other Lords Commissioners of Appeal, decided, that the Prize Court had a Power to restore it to the *quondam* enemy, who presented his claim in that case, and They, accordingly, ordered the vessel to be restored.

(*p*) Sir William Grant.

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In the case of the *Hostage* in 1712, and in the case of the *Adolphus Frederick*, no want of jurisdiction was supposed. These are cases showing, that for a century past the Court of Prize has exercised jurisdiction over an act done after the cessation of hostilities. It is not necessary to determine how long the jurisdiction of the Prize Court continues after the cessation of hostilities. Undoubtedly, the Prize Court must, after the cessation of hostilities, have jurisdiction to determine upon captures made during the war. It must always happen that there are hostilities *de facto*, when they cease *de jure*, and Courts of Prize must have jurisdiction in all such cases of *bonâ fide* belligerent acts. It would be unfortunate if such cases were to be decided by the Municipal Courts. The passage cited from Lord *Coke* has not, in my opinion, any bearing whatever on the subject; nor does the Prize Act affect this question.

It remains now to consider whether the sentence of restitution put an end to the jurisdiction of the Prize Court. It was a Proceeding behind the back of the American captor. The only question made was, whether the re-capture was good; but a decision on this point would not conclude the American, he being an absent party. It is urged, as a great hardship, if after having paid salvage to the amount of 1,300*l.* on the re-capture, the ship should be taken away; and that if alienations had been made, it would operate most injuriously. It may be hard, but Courts must decide upon principle, whatever the effect may be. The claim of salvage might have been resisted. If the Party might and ought to have appealed, that is no ground of Prohibition. With regard to alienations, the Court cannot help Parties having a bad title. For these reasons, my

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present opinion is, that a Prohibition ought not to be granted.

Note.—Two days afterwards, the Vice-Chancellor said he had not changed his opinion either as to refusing the writ, or as to the reasons he had stated for such refusal. No costs were given.

WOOD *v.* DYNELEY.

26th July.

Full costs may be given on allowance of a demurrer, though application not made till three weeks after such allowance.

A GENERAL demurrer was allowed in this cause, and the usual order made for 5*l.* the common costs; and now the defendant, three weeks after the allowance of the demurrer, moved for *full costs*, on the ground, that the bill was *vexatious*.

The bill was filed for an injunction to prevent arbitrators making their award on subjects in dispute between the parties, one of the matters in dispute referred for arbitration, relative to some costs, not having been intended to be referred. The common injunction was obtained, but no affidavit was filed, nor was a special injunction afterwards moved for, a demurrer to the bill being allowed.

In support of the motion an affidavit was filed, showing, that the only material allegation in the bill, viz. the error in one of the subjects of reference, was false; and that the plaintiff wrote a letter, by which he agreed that the question of costs should be referred to the arbitrators.

Mr. *Hart*, Mr. *Leach*, and Mr. *Shadwell*, for the Motion:—

By the general order of Lord *Rosslyn* (*a*), it was ordered, that on allowing or over-ruling a plea or demurrer, the parties shall be in all such cases liable to such further costs as the Court shall think fit to award. This order has been often acted upon. In *Griffiths* v. *Wood* (*b*), where the now plaintiff was defendant, a demurrer was allowed, and the defendant, on application, was ordered full costs. So in the case alluded to in the argument of that case; there a plea put in by the now Plaintiff, was allowed, and Full Costs were, on his application, given. On the same principle, where *exceptions* were over-ruled, costs beyond the common costs have been given (*c*).

Sir *Samuel Romilly*, against the Motion:—

I do not consider it as the settled practice, that after a demurrer, which admits the allegations in the bill, a Party is entitled to enter into the Merits of the Case, for the purpose of obtaining Full Costs. Demurrers were formerly considered as a mode of speedily ending a Suit, but that would not be so, if the merits of each case are to be tried by affidavit, after a demurrer has been allowed.

If such a motion is in any case proper, it should be made soon after the demurrer is decided upon, when the case is fresh in the remembrance of the Judge, and not after a length of time, as in this case. They say nothing of

(*a*) 6 Feb. 1794. 4 Bro. C. C. 545.

(*b*) 1 Ves. & Bea. 307.

(*c*) Purcel v. Macnamara, 12 Ves. 166.

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the costs when the demurrer is decided, but taking an order for the Common Costs, afterwards apply for Full Costs. If the Court may give more than the common costs upon the decision of the demurrer, it cannot after a lapse of time. The Order of Lord *Rosslyn* is to be found in Mr. *Beames*'s book (*d*), a very useful work, with the advantage of a reference to the decisions on each order. He has there given some Cases obtained from the Register; but, in those cases, the further costs appear to have been given, when the demurrer was heard, except in the instance of *Griffiths* v. *Wood*.

Mr. *Shadwell* [in the absence of Mr. *Hart*, and Mr. *Leach*], in *Reply*:—

Lord *Rosslyn*'s Order does not specify any time for the Application. There is only an interval of three weeks in this case, since the decision of the demurrer. In the case of the plea over-ruled, and full costs given, the Application for Costs was after three months had elapsed from the allowance of the plea. In *Griffiths* v. *Wood*, the motion was made after a considerable length of time (*e*).

The VICE-CHANCELLOR:—

If this were a new Case, I should have entertained great doubts upon the subject. The order in 1794 was grounded on the insufficiency of 5*l*. costs, on

(*d*) "The General Orders of the High Court of Chancery," &c. p. 457, n. 2.

(*e*) In the Report of that case, 1 Ves. & Bea. 307, it does not appear when the application was made; but in Mr. Beames's Work, "Gen. Orders, &c." p. 457, n. 2, it is said, the application was made "some months after the "demurrer was argued and "allowed."

the allowance of a demurrer. The application in *Griffiths* v. *Wood* was supported by an affidavit, which has been shown me, by which it appears, the costs of the defendant amounted to 40 *l.* which evinces the propriety of Lord *Rosslyn*'s order. If this were *res integra*, I should have thought the application for Further Costs ought to have been made when the demurrer was over-ruled, and the order made for the common costs; and that there ought not to be two orders for costs. There is great inconvenience in allowing the merits of the Case to be decided by affidavit, and, probably, at a considerable Expense. In ordinary cases the Court does not allow its Discretion as to Costs, to be regulated by affidavits. It leads to extrinsic matters, and long inquiries. I am bound, however, by the Authorities; and, as affidavits have been permitted, I see no reason why, in this case, I should not be governed by the affidavit, which exhibits strong ground for granting the motion. If an Affidavit relating to vexation in another Suit, has been allowed, as it was in *Griffiths* and *Wood*, to increase the costs, surely it is allowable to show vexation in the same cause, as is amply done here. On the face of the Record, and without the aid of the affidavit, it appears a case of vexation. Following, therefore, the Authorities, I think this is a case where Full Costs should be given, and I shall also give the Costs of this Motion; but if it shall appear that the Costs of the Motion were not given in *Griffiths* v. *Wood*, I wish that point to be mentioned again.

Note. The costs of the Motion were given, as in *Griffiths* v. *Wood*.

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29th July.

Limitation by settlement of personal property "to next of kin in equal degree," passes the property to a surviving sister, in exclusion of children by a deceased brother.

——— *v.* ———

A QUESTION arose in this Cause, under a Settlement, whereby, in default of appointment, a sum of money was given after the death of the Settlor, "*To his next of kin of equal degree; and if more than one, share and share alike.*" The Settlor died, leaving a sister, and children by a deceased brother.

Mr. *Leach*, and Mr. *Heald*, contended, that the words "*of equal degree*" ought to be considered as omitted, in order to make the limitation sensible. That the Statute of Distributions (*a*) has defined who are next of kin, viz. the surviving sister, and the children of the deceased brother; and that the children must share equally with their aunt.

Sir *Samuel Romilly*, and Mr. *Wingfield*, *contra*:—

The Court is not justified in rejecting any words in the Settlement. By the words used, it was intended that the Next of Kin should take, as defined by the Statute of Distributions, meaning only to exclude representatives.

When there is a gift to *Relations*, that has been held to mean next of kin, according to the Statute of Distributions (*b*); but if the bequest be to the *nearest rela-*

(*a*) 22 & 23 Car. 2. c. 10. 29 Car. 2. c. 3.

(*b*) See Anon. 1 P. Wms. 327. Spring on dem. Titcher

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tion, that has been held to pass to a surviving brother, in exclusion of the children of a deceased brother. That was lately decided at the Rolls, in *Smith* v. *Campbell* (*c*). It was determined on principle, for the Master of the Rolls was not aware of a similar decision in *Marsh* v. *Marsh* (*d*).

The VICE-CHANCELLOR:—

The Settlor seems to have adverted to the distinction taken in the Statute of Limitations, between next of kindred, and persons legally representing their stocks, *pro suo cuique jure*. In several sections of that Act a distinction is taken between *kindred in Equal Degree*, and *Next of Kin taking by Representation*, showing that they do not mean the same persons. The case alluded to of *Smith* v. *Campbell* is not in point. We need not consider what construction is to be given to the words *share and share alike*; that question could only arise if more than one answered the description of next of kin in equal degree which is not the case here (*e*). The sister is alone entitled.

v. Biles, in note to 1 T. R. 118. Green v. Howard, 1 Ves. jun. 31. Wright v. Atkins, Cop. 118.

(*c*) 20 June 1815.

(*d*) 1 Bro. C. C. 293.

(*e*) The words "Share and share alike" have been held to have the same meaning as "equally to be divided." Phillips v. Garth, 3 Bro. C. C. 64.

1815.

2d August.

No authority in Bankruptcy on petition of equitable Mortgagee by deposit of deeds, to order sale of the estate, where there is a subsequent Mortgagee of the equity of Redemption who objects, and has not proved under the Commission; the proper Remedy being by Bill.

Ex parte TOPHAM,

THIS was a Petition in Bankruptcy for the usual order for Sale, on behalf of an equitable Mortgagee, by Deposit of Title Deeds of a Leasehold Estate, and that he might come in under the Commission for the deficiency. The Deposit was made in January 1812. Afterwards, in June 1813, before the bankruptcy, the bankrupt agreed to sell the estate to a Mr. *Ward*—received the purchase-money, and let *Ward* into possession—but did not execute a Conveyance.

Mr. *Heald* for the Petition.

Mr. *Horne* opposed it, on behalf of *Ward*; and contended, that no such order could be made, there being an Agreement for a Sale to *Ward* of the Equity of Redemption, who refuses to consent to a Sale, and has not proved under the Commission, and that a Bill must be filed.

The VICE-CHANCELLOR:—

This is a proper Case for a Bill. Even in the case of a legal mortgage the Commissioners are not authorized to order a Sale, unless in Cases where the Bankrupt has in himself the Equity of Redemption (*a*).

(*a*) In *Ex parte* Jackson, 5 Ves. 357, it was held the Chancellor has no authority in bankruptcy to compel a second Mortgagee, not claiming under the Commission, but resting upon his Security, to join in a Sale obtained by a

THOMPSON and Others *v.* LEAKE and Others. 1815.

5th August.

If on the Sale of a Ship, there is no Bill of Sale, or Indorsement of the Certificate of Registry, no Relief can be given in Equity, on the ground of accident or fraud.

THE Defendants, *John Leake*, *Thomas Bennett*, and *George Parker*, were the Owners of a ship called the *George*, of which the defendant, *Thomas Bennett*, was master. The ship, in December 1813, sailed on a voyage from *Ireland*, for *Santander* in *Spain*, and in the course of the voyage sustained great damage, but arrived at *Santander*. *Bennett* wrote to *Leake* and *Parker*, stating the damage to the ship, and requesting advice how to act. *Leake* and *Parker*, in answer, recommended the vessel to be sold, and to have her surveyed, and condemned, if the surveyors were of opinion she should be condemned. Surveyors were appointed, at the instance of *Bennett*, by the Tribunal of Justice at *Santander*, who reported, she was not sea-worthy, and that the costs of the repair would exceed the value; and

prior Mortgagee under the General Order of the 8th of May 1794.

Mr. *Christian* observes, "Where the second mortgagee will not consent to join in a sale, the assignees may request the Commissioners to call before them the two Mortgagees, which they have a power to do, and to examine them with respect to the principal and interest due upon their respective Mortgages, and then the Assignees might advertise the premises, subject to the two mortgages; and if there was any advance upon the aggregate of what is due, the assignees or the purchaser must redeem both. If there was no advance, the mortgagees would be left to their usual remedy, and the creditors would have no further interest in the premises." [2 vol. Christian's Bank. Laws, p.323–4.]

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thereupon *Bennett* petitioned the Court at *Santander* to receive his abandonment of the vessel, and direct her to be sold by public auction. Upon this petition, the Court ordered a Sale to be made by a Notary, and that a valuation should be taken of the hull, tackle, and appurtenances. A valuation was accordingly made on oath, and the ship was sold by public auction on the 29th March, 1814, at which Sale the Plaintiff, on behalf of himself and the Co-Plaintiffs, was the highest bidder, and declared to be the purchaser at the sum of 1,379 hard dollars. The money was paid, and a receipt given. After the sale, *Bennett* declared that he had lost the Certificate of the Registry of the Ship, and signed a paper, dated the 5th April 1814, in which the sale and preceding facts were stated, and the loss of the Certificate. The Plaintiffs repaired the ship, and sent her on a voyage to *London*, where she arrived.

Bennett afterwards found the Certificate of the Registry, and arrived in *England* about the time the vessel arrived there, and the Plaintiffs applied to him for the Certificate of Registry, and he sent it to the Counting-house of the Defendant *Leake*, from whence the Defendant *Parker* took it, and retained the same. Applications were then made by the Plaintiffs to the Defendants, to deliver up the Certificate, and execute a proper Conveyance of the Ship. The Bill prayed, "That the Defendants may be decreed to carry the Sale specifically into execution, and to execute a Bill of Sale of the said Ship, and to deliver up the Certificate of the Registry of the said Ship to the Plaintiffs, or as they shall direct, so that the said ship, and the legal title of the said Defendants therein, may be duly and effectually transferred and conveyed to the Plaintiffs, or as they shall direct; and

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that in the mean time the said Defendants may be restrained by Injunction from disposing of, or parting with, the said Ship, or the said Certificate of Registry, and from making any Sale of the said Ship, or executing any Bill of Sale relating thereto."

An Injunction was obtained for want of an answer. Answers were afterwards put in. The Defendants, *Leake* and *Bennett*, admitting the facts stated in the Bill, and submitting to act as the Court should direct. The Defendant *Parker* answered separately; and admitting the facts stated in the bill, contended, that the Proceedings in the Court at *Santander* were void, that not being a proper Tribunal, and not having authority to decree a Sale of the Ship, unless for the purpose of being broken up; and that the repairs of the ship, according to the estimate of two experienced shipwrights, did not cost more than 40 *l.* and admitted he took possession of the Registry of the Ship to protect his property as owner; and that he had received no part of the money for which the ship sold, and that he was the owner of *one half* of the ship, and that he stood insured only to the amount of 500 *l.* and that the underwriters refused to pay this insurance, insisting that the Sale was improper, and fraudulent; and insisted, that the Plaintiffs, being British subjects, had no right under the Sale, not having acted as prescribed by the Acts of Parliament, respecting the registry and transfer of property in British Ships (*a*); and that if the ship required so much as 200 *l.* to be spent in repairs, as represented, it must have amounted to more than 15 *s.* for every ton, and therefore such ship must be deemed a Foreign Ship (*b*).

(*a*) See 26 Geo. 3, c. 60, s. 17, and 34 Geo. 3, c. 68, s. 14.

(*b*) See 26 Geo. 3, c. 60, s. 2.

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The cause came on upon the Bill and Answers.

Mr. *Hart* and Mr. *Heald*, for Plaintiffs.

Mr. *Fonblanque* and Mr. *Cooke*, for Defendant *Parker*.

Mr. *Mascal*, for the other Defendants.

The VICE-CHANCELLOR:—

I have no doubts on this case; and shall therefore dispose of it immediately.

Independently of the Acts of Parliament, the Plaintiffs would be entitled to Relief, but we are here tied down by positive Acts of Parliament; and it would be repealing the Acts, by a Court of Equity, to give relief in this case. The words of the Act are quite clear. By the 34 *Geo.* III. c. 68, s. 14, it is enacted, "That no transfer, contract, or agreement for transfer of property in any ship or vessel, made or intended to be made after the 1st day of January 1795, shall be valid or effectual for any purpose whatsoever, either in law or equity, unless such Transfer, or Contract, or Agreement for transfer of Property in such Ship or Vessel, shall be made by Bill of Sale, or instrument in writing, containing such recital as is prescribed by the said Act."

In this case, the Transfer was by *Contract*, and not by the *Judgment* of the Court of *Santander*, such Court having no authority to decide, as was held in *Reid* v. *Darby* (*c*). No Bill of Sale was made in this case, containing such recital as is required by the Statute (*d*). The paper alluded to in the answer of *Bennett* was not a Bill

(*c*) 13 East, 145. (*d*) See 26 Geo. 3, c. 60, s. 17.

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of Sale. A bill of sale is not in all cases necessary, provided there be *an Instrument in Writing* (*e*); but here it was a *Sale by Auction*, and there was no instrument in writing. *Bennett* thought the sale by auction sufficient to transfer the Property. But suppose there was *an instrument in Writing*, there has not been any Indorsement of the Certificate of Registry as required by the Act (*f*). The Bill is founded on the doctrine, to which Lord *Eldon* seemed to incline, in *Mestaer* v. *Gillespie* (*g*), viz. That if the completion of the Contract is prevented by ***Fraud***, this Court will relieve; but this case differs much from that. In that case, the contract was, in the first instance valid, and the completion of it was prevented by palpable fraud. Here the contract was, from the beginning, incomplete. But even in cases of *Fraud*, it is doubtful whether relief could be given. In *Spelt* v. *Lechmere* (*h*), the Lord Chancellor, notwithstanding the strong inclination of his opinion in *Mestaer* v. *Gillespie*, speaks doubtfully of relief in cases of *Fraud*, but was clear that in no other case he could give relief. In cases of accident and mistake, the Court, in various instances, relieves; but will not in the case of a defective Title to a Ship. The Act of Parliament destroys the contract when not according to the prescribed forms; a man has not, as in other cases, a Contract to stand upon. In *ex parte Yallock* (*i*), Lord *Eldon* truly observes, "The Legislature will not be content with any other evidence than the Registry, and requires the great variety of things prescribed by the Acts. They go so far as to declare, that notwithstanding any Transfer, any Sale, or any Contract, if the purpose is not executed in the Mode and Form prescribed by the Act, it shall be void to all intents

(*e*) See 34 Geo. 3, c. 68, s. 14.

(*f*) 34 Geo. 3, c. 68, s. 15.

(*g*) 11 Ves. 626.

(*h*) 13 Ves. 588.

(*i*) 15 Ves. 66.

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and purposes." His Lordship has no where expressly decided, that relief could be given in these cases on the ground of *Fraud*. The opinion of the Master of the Rolls, as collected from what he said when called in to assist the Chancellor in *Mestaer* and *Gillespie*, appears to have been, that relief could not be given; and in a subsequent Case of *Barker* v. *Chapman* (*k*), where there was a gross fraud, by preventing the Ship's Register from being indorsed within the time prescribed by the Act of Parliament, after the return of the ship, His Honor the Master of the Rolls, with much reluctance, and after a year's delay of his judgment (in hopes the Parties would agree to a compromise), decided, he could not relieve. There was no Appeal from that Determination; it is, therefore, a considerable authority. It is the only express decision, that fraud is not in these cases relievable.

This, however, is not a Case of *Fraud*. It is, rather, a case of *Mistake*. There is no imputation on *Bennett*. The Certificate of the Registry was mislaid; and afterwards, without any design, delivered to *Parker*; nor was there any fraud in *Parker*, unless refusing to deliver up the Certificate is fraud, which, under the circumstances of the case, cannot be imputed. Here, therefore, there being no Bill of Sale, and Indorsement of the Certificate of Registry, it is impossible to relieve.

It is said, it is hard that *Thompson*, having paid his money, should not be entitled to the ship; but it was his own fault—he must be supposed to know the law of the country, and should have insisted on a complete Title before he paid his money.

Bill dismissed, but without Costs.

(*k*) 3 March 1812.

COTTON *v.* SCARANCKE.

1815.

5th August.

On a Limitation by Settlement "to the next of kin of the said Anne Parr *of her own blood and family, as if she had died sole and unmarried," the next of kin take as under the Statute of Distributions.*

ON a Petition in this Cause for payment of money out of Court, a Question arose upon the construction of a Settlement, made previous to the Marriage of *Anne Parr*, by which, in default of appointment by *Anne Parr*, a Limitation was made of personal property, "*to the next of kin of the said Anne Parr of her own blood and family, as if she had died sole and unmarried.*" The Question was, Whether these words passed the property to the next of kin of the *whole blood*, in exclusion of next of kin of the *half blood*?

The VICE-CHANCELLOR:—

This point is very clear. It is a question between the next of kin of the *whole* blood, and those of the *half* blood. This is a limitation of *personal* property, where whole and half blood are not distinguished. There is no mention of whole blood in the Deed. Those of the whole and half blood take together, as under the Statute of Distributions. The meaning of the Deed appears to have been, to exclude next of kin by marriage (*a*).

(*a*) See on this subject, Watt *v.* Watt, 3 Ves. 244. and Bailey *v.* Wright, 18 Ves. 49.

1815.

10th August.

An order for an Inquiry before Commissioners, or an Issue, to try whether a Debt proved was usurious, merely on a deposition of the Bankrupt as to the Usury, refused.

BURT, *Ex parte.*

A PETITION was presented by the assignees under a commission against *Benjamin Martindale*, praying, that the Proof of a Debt of 1,541*l.* 12*s.* 1*d.* by *T. Williamson* and his wife, admitted under the Commission, might be expunged.

The Commission issued on the 16th October 1812. On the 10th of November following, *Williamson* and his wife, who was the sole Executrix of *Meeson Scholey*, deceased, proved the debt as being due on a bond given by *Martindale* to *Scholey*, dated the 26th March 1812, for 1,500*l.* with interest; and a Promissory Note by *Martindale* to *Scholey* for 370*l.* with interest, of the same date as the Bond.

The assignees being informed, that the Bond and Note grew out of usurious transactions, caused the Bankrupt to be examined before the Commissioners on the 13th July 1814, and he deposed, that the Bond and Note were not given for any monies advanced at the time, but Sums which had been previously advanced by *Scholey*;—and, that fifteen years ago *Scholey* had advanced him, by different Sums, at different times, 4,000*l.* or thereabouts, which had been re-paid, with interest, leaving the balance, which was secured by the Bond and Note; but that for two or three years previous to the giving of the Bond and Note, he had paid *Scholey* at the rate of 10*l.* per cent. per annum

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BURT, *Ex parte.*

upon the Principal Monies due to *Scholey*. He also deposed, that the Accounts between him and *Scholey* were settled about Christmas in every year, and that particularly, to the best of his recollection and belief, such an Account was settled between them about Christmas, in the years 1808, 1809, and 1810, and was certainly settled between them on or about the 26th March 1812; and that in settling the balance of such last account, interest was allowed to *Scholey* upon the balance then found to be due, at the rate of 10 *l.* per cent. per annum, and which interest was included in, and formed part of the Bond and Note; and that, to the best of his recollection, similar Interest had been allowed upon each of the balances settled and found to be due in the years 1808, 1809, and 1810.

Mr. *Fonblanque*, for the Petition, admitted the Debt ought not to be expunged in the first instance, but thought it a case in which an inquiry ought to be directed before the Commissioners, or an Issue, to try the fact of Usury; and observed that no affidavit was filed in answer to the Petition.

Mr. *Cullen* opposed the Petition.

The VICE-CHANCELLOR:—

The Counsel for the Petition admits I ought not to expunge the Debt in the first instance. If the Facts stated by the Bankrupt could be proved by a competent Witness, this Debt would be expunged as founded on usurious transactions. The Bankrupt's evidence, he not having obtained his Certificate, and released his Interest, would not avail either before the Commissioners or a Jury; for it would be to increase his Estate; and

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BURT,
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would lead to great mischief. No objection was made to the Debt till the 13th July 1814, two years after the death of *Scholey*. After the death of the Creditor, it would be very easy for a Bankrupt to get rid of a Debt, if it were allowed to be done, merely upon his Deposition, that it was tainted with Usury. As there is no testimony, oral or written, to prove the usury, except the deposition of the bankrupt, who is not a competent witness, it would be an useless expense to direct an Issue. After the Examination of the bankrupt on the subject, the assignees, without any Order for that purpose, might have procured the Commissioners to summon the Representative of *Scholey* before them, and examine her as to the Transactions, and whether there were any Papers, Accounts, or materials in her possession, throwing any light on the subject. If she had objected to being examined, the Court might then, perhaps, have directed a further inquiry; or, if the Creditor were alive, and did not by affidavit give any answer to the charge of the bankrupt, further inquiry might be proper. But the Court will not direct an inquiry, where no prospect appears of prosecuting it with effect. When the Court directs an Issue, it sometimes orders the bankrupt to be examined, but not in a case like the present, where the Creditor is dead, and therefore cannot confront the Bankrupt. I think the Petition to expunge this debt ought not to be granted, nor an Inquiry or Issue directed; but, under the circumstances, I will not give Costs.

Ex parte BRYANT.

1815.

12th August.

Person arrested on his return from proving a debt at Guildhall, *discharged, with costs of application.*

Though an order be made on a petition in bankruptcy, directing costs to be paid to the petitioner, personally, this does not take away the lien of the solicitor for his costs.

WILLIAM List having been arrested upon his return from *Guildhall*, where he had been proving a debt, petitioned the Chancellor for his discharge out of the custody of the sheriffs of *London*; and that the sheriffs officers who arrested him, and the attornies who employed them, might pay the costs, charges, and expenses occasioned by the arrest. *The Lord Chancellor* ordered the plaintiff in the action to discharge *List* out of the custody of the sheriffs, and that the plaintiff, the sheriffs of *London*, the attornies, and the sheriffs officers, should pay *List* the costs, charges, and expenses occasioned him by the arrest, such costs to be taxed by the Master, in case the parties differed about the same; and that *List* be at liberty to proceed against any of such parties for the payment of such costs, as he should think fit (*a*).

Bryant, the present petitioner, was the attorney employed in presenting *List*'s petition, and obtaining the Order.

The Order was served on the parties named in it, and the Costs were taxed at 27*l.* 6*s.* 9*d.*, and payment demanded by *Bryant* of the parties named in the Order, but they refused payment.

(*a*) *List*'s case is reported 2 Ves. & Bea. 373, and in Rose's Cases in Bankruptcy, 2 vol. p. 24; and the same point was determined in *Ex parte* King, 7 Ves. 513, &c.

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BRYANT, *ex parte.*

Bryant being apprehensive that *List* was insolvent, sent a notice, dated the 30th April 1814, to the persons directed by the order to pay the Costs, not to pay them to *List*, or to any person on his account, or otherwise settle the amount of the bill of Costs, nor the amount of his expenses, in consequence of his having a Lien thereon for the amount of his bill against *List*, in respect of the business done for him therein.

List was a second time arrested at the suit of *Bardswell*, and being in custody, he on the 4th May 1814, in consideration of the plaintiff's withdrawing the action, and discharging him out of custody, and erasing his name from the Bills, in respect of which he had been arrested, executed a release to all the persons mentioned in the Chancellor's Order, of the Costs given by that Order.

Bryant, by his petition, after stating these facts, which were verified by affidavit, Prayed, That the Sheriffs of London, *Charles Bardswell*, the attornies, and the sheriffs officers, should forthwith pay to the Petitioner the sum of 27*l.* 6*s.* 9*d.* the amount of his Bill of Costs, and also the Costs of the present application, and that the Petitioner might be at liberty to proceed against any of the said parties for the payment of the same.

Sir *Samuel Romilly*, and Mr. *Rose*, for the Petition:—

The Lien of *Bryant* cannot be defeated in this manner. The doctrine as to the Lien of an Attorney is the same in Equity, and in Bankruptcy, as at Law, except that in Bankruptcy a Solicitor is not allowed to detain the proceedings under the Commission, from the great inconvenience it would occasion. In Mr. *Tidd*'s book, the

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BRYANT, *ex parte.*

doctrine of the cases is thus laid down: "He has a Lien on the money recovered by his client, for his Bill of Costs [3 Atk. 720, 4 T. R. 124, and see 2 P. Wms. 460. 2 Vez. 25. 2 Str. 1126. 3 Burr. 1313]. If the money come to his hands he may retain it, to the amount of his bill; he may stop it *in transitu* if he can lay hold of it. If he apply to the Court, they will prevent its being paid over till his demand is satisfied. [Dougl. 104. 1 H. Blac. 122.] And Lord *Mansfield* declared he was inclined to go still farther, and to hold, that if the attorney give notice to the defendant not to pay the money recovered by his client, till his bill be satisfied, a payment by the defendant after such notice would be in his own wrong, and like paying a debt which has been assigned after notice [Dougl. 238.] Accordingly it has been holden, that if the defendant's attorney pay to the plaintiff the debt and costs recovered after notice from the plaintiff's attorney not to do so till his bill has been first satisfied, the former is liable to pay over again to the latter the amount of his Lien on such Debt and Costs of the suit [6 T. R. 360] (*b*)."

Mr. *Leach*, and Mr. *Cullen*, against the Petition:—

In this case the order expressly directs that the Costs shall be personally paid to *List*. The Order was obtained by *Bryant*, as the Solicitor. The doctrine contended for is quite new.

Sir *Samuel Romilly*, in reply:—

Ex parte Rhodes (*c*) is in point. In that case Lord *Eldon* says, "It is clear that the Solicitor in a Cause has a clear Lien upon the Debt and Costs, which are ordered

(*b*) Tidd's Practice, 6th edit. p. 392.

(*c*) 15 Ves. 542.

1815.

BRYANT, *ex parte.*

to be paid to the Solicitor; and why should not th Solicitor in bankruptcy have a similar Lien? The mere form, that they are ordered to be paid to the party, should not interfere with it."

The VICE-CHANCELLOR:—

This is an attempt to deprive the Solicitor of his Lien for his Costs. These parties must be supposed to know, independent of the express notice given them, previous to the Release, that *Bryant* had a Lien for his Costs. Their conduct may be compared, as Lord *Mansfield* observes, to a debtor paying a debt after notice that it has been assigned. Though the order was personal, and the Costs directed to be paid to *List*, it was not meant, nor can it have the effect, to deprive him of his Lien. I do not wish to relax the doctrine as to Lien, for it is to the advantage of Clients, as well as Solicitors; for business is often transacted by Solicitors for needy Clients, merely on the prospect of having their Costs under the doctrine as to Lien.

This application has been made necessary by the conduct of the parties. I shall therefore grant the prayer of this petition, in which Costs are included. If the parties differ about the Costs, the same to be taxed by the Vacation Master.

Ex parte ALDERSON and another. 1815.

14th August.

J. R. before her bankruptcy, being pressed to discharge a debt, giving to her creditor a draft on the executor of a creditor of hers, which draft the executor promised to discharge on receiving Assets, is a good equitable assignment of the debt, and available against the assignees of J. R.

THE Petition in this case stated, that *Jane Row*, before she became bankrupt, and before the suing forth of the Commission against her, became indebted to the Petitioners in the sum of 525*l.* and upwards, for goods sold and delivered; and that *Jane Row* being a creditor of the estate of *John Fish*, Esquire, and not prepared to pay the Petitioners, gave them a draft on *Frederick Klein*, Esquire, the acting Executor of the deceased *John Fish*, expressed as follows:

"417*l.* 6*s.* 0*d.* *Sunbury*, 5 *Aug.* 1813.

"Please pay Messrs. *George* and *Thomas Alderson*, or order, four hundred and seventeen pounds six shillings, as part of the amount due to me for plumbers work done for the late *John Fish*, Esquire.

"*Jane Row.*

"To *Frederick Klein*, Esquire, Lower Tooting, Surrey, acting Executor of the late *John Fish*, Esquire."

The Petitioners on receiving the draft, immediately (by their Solicitor), presented the same to *Klein*, the Executor, but he not then being prepared with assets to discharge this class of debts, did not expressly accept the same payable at any certain period, but he retained the draft, to be paid when there should be funds for that purpose.

On the 17th November 1814, a Commission of Bankruptcy issued against *Jane Row*, under which she was declared a Bankrupt.

1815.

Ex parte ALDERSON and another.

The Petitioners (by their Solicitor), called on *Klein* on the 13th December 1814, for a return of the draft for the purpose of exhibiting and excepting the same on their proof of debt; and the Petitioner, *Thomas Alderson*, on the 17th December 1814, the day appointed for the choice of assignees, proved the debt of 530 *l.* 13 *s.* 6 *d.* due from the Bankrupt to the Petitioners, for Goods sold, but stated in his Deposition, that he held the Draft as a security, and had not received any other security or satisfaction.

The Petitioners, and *Thomas Alderson* and *James South*, were chosen assignees.

The Petitioners conceiving themselves entitled to receive the amount of the draft from *Klein*, or so much thereof as might be the balance due from the estate of *John Fish* to the said *Jane Row* at the time she drew the bill, applied again to *Klein* for payment, but he declined paying it without an Order of the Chancellor; and submitted to act as the Court should direct. The Petition then prayed, That the Petitioners might be declared entitled to the money so due to *Jane Row* from the estate of *Fish*, by virtue of the draft; and to order that *Klein* may be at liberty to pay the amount thereof to the Petitioners, the Petitioners in that case consenting that the proof of their debt should be reduced *pro tanto*.

Mr. *Hart*, for the Petition, considered the right of the Petitioners to the prayer of their Petition, as clear and unobjectionable. The draft amounted to an equitable assignment of the debt, and *Klein* was bound by the notice.

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Ex parte ALDERSON and another.

Sir *Samuel Romilly*, against the Petition:—

The draft in this case can only be considered as in the ordinary case of a draft on a banker, which has not been paid. So far from considering this draft as a payment, it appears by the affidavits, that after the draft was given the Petitioners arrested *Jane Row* for the *whole* amount of their debt. He cited *Yeates* v. *Groves* (*a*).

Hart, in reply:—

Yates and *Groves* is an authority in favour of the Petitioners. In that case the order to pay out of the purchase-money was not accepted, but the purchaser verbally gave notice to the party to attend when the deeds and money were ready; but in this case *Klein* took the draft, and promised to pay it when he should have assets for that purpose.

The VICE-CHANCELLOR:—

The question here is upon the effect of the draft on *Klein*, given by *Jane Row*. In her affidavit she admits that on application to her she gave the draft. Is this draft to be considered in Equity as an assignment of the Debt, which is a *chose in action*? And did not the executor bind himself to pay it? I think this was a good Equitable Assignment of the Debt; and that the Executor bound himself to pay it when in possession of sufficient assets. The subsequent Arrest did not affect the assignment. Whilst the party was in suspence, and uncertain whether the Executor would be enabled to pay the Draft, he might arrest his Creditor. If *Jane Row* had remained solvent the Petitioners might, by a Bill in Equity, have obtained the benefit of the assignment.

Order made according to the prayer of the Petition.

(*a*) 1 Ves. Jun. 280.

1815.

15th and 19th August.

Commissioners Fees under a Commission of Bankruptcy are payable by the Attorney to the Commission; and if not paid, he will, on petition, be ordered to pay them.

Ex parte GRIFFITH.

THIS was a Petition by one of the Commissioners named in and acting under five several Commissions, praying, That the clerk or solicitor under the said Commissions might be ordered to pay and discharge the petitioner's fees and disbursements due and owing to him under the several Commissions.

The petition stated, that the Petitioner had notice from the Solicitor to attend as *Quorum* Commissioner, for the purpose of opening the five Commissions. He accordingly attended at a place fifteen miles from his residence, and was present at several meetings under each Commission; and under each Commission a Bankruptcy was declared.

The petition further stated, that the whole of the Petitioner's fees and disbursements, in respect of his attendance under the several Commissions, had been applied for, but were unpaid, and that he had been informed, and believed, that the Solicitor had received divers sums of money belonging to the estate and effects of the several bankrupts, out of which his fees and disbursements ought to have been paid; and, in particular, he had been informed by the Assignee under two of the Commissions, that he had paid the specific sums due to the Petitioner for his fees and disbursements under these two Commissions, into the hands of the Solicitor, for the special purpose of being applied to the payment of the same.

The Solicitor, by his affidavit, admitted that the Petitioner had acted under the several Commissions as stated in his petition; and that he had received an account of the Petitioner's fees and disbursements under four of the Commissions, but not under the fifth; and that he did not pay the amount of such fees and disbursements, not having received from the estate and effects of the bankrupts under such four Commissions sufficient for that purpose, and for the discharge of other expenses incurred under those Commissions that had been paid and discharged; in which expenses so paid by him were included tavern expenses incurred by the Petitioner and others at the meetings held under the said Commissions, or some of them, all of which expenses, or the greater part thereof, were paid by him before he had received the bills of fees and disbursements of the Petitioner. The affidavit further stated, that he had made out his bills of costs under three of the Commissions, and given credit for the monies he had received, but such bills had not been paid; and that his bill of costs under the two other commissions had not been paid, nor had he received any monies under such Commissions; and that if he were to pay the Petitioner the amount of his fees and disbursements before the liquidation of his bills, he should be obliged to advance the same, or the greater part, out of his pocket.

Pippet, the Assignee, alluded to in the Petition, by his affidavit denied that he had paid the specific sums due to the Petitioner for his fees and disbursements under such Commissions into the hands of the Attorney, for the special purpose of being applied to the payment thereof; but what sums he did pay to the Attorney,

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were paid towards his general account in such Bankruptcies, who in his bills had given credit for such sums.

Sir *Samuel Romilly*, for the Petition:—

This is a new and important Case as it regards Proceedings in Bankruptcy. The Fees claimed are not a Barrister's Fees, but the Fees given by Act of Parliament. The Solicitor is the person to be applied against, for he ought to have paid the Fees. The Petition, so far as it regards *Disbursements*, goes, I admit, too far.

Mr. *Cooke*, against the Petition:—

No Act of Parliament, or decision, obliges the Solicitor to pay these Fees. The affidavits do not show he has received money to pay them. The Petitioner does not state the whole amount of the Fees and Disbursements he claims. It appears by the Attorney's affidavit, that this Commissioner incurred tavern expenses, which are contrary to the Act of Parliament (*a*). The monies received have been all applied. The petitioning creditors and assignees under these Commissions ought to have been made parties to this Petition.

Sir *Samuel Romilly*, in reply:—

The Acts of Parliament direct certain Fees to be paid, but are silent as to *who* is to pay them. The Solicitor is bound to pay them, whether he has received monies for that purpose or not.

(*b*) See 5 Geo. 2, c. 30, s. 42.

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19th August.
Ex parte
GRIFFITH.

The VICE-CHANCELLOR:—

This is a Petition by a Commissioner, a Barrister, to have his Fees and Disbursements under five several Commissions, in which he has acted as Commissioner, paid to him by the person who acted as Solicitor in the prosecution of these Commissions.

The first question to be considered is the measure of Fees to which a Commissioner is entitled. The Petitioner claims his *Fees* and *Disbursements*. The Act of Parliament (*b*) has settled the amount of the Fees to which he is entitled. The words of the Act are, "That there shall not be paid or allowed by the Creditors, or out of the estate, of the Bankrupt, any monies whatsoever *for expenses in eating and drinking* of the Commissioners, or of any other persons, at the times of the meetings of the said Commissioners, or of any other persons at the times of the meetings of the said Commissioners, or any of the Creditors; and if any Commissioner or Commissioners in any Commission shall order any such expense to be made, or eat or drink at any such meeting, at the charge of the Creditors, or out of the Estate of such Bankrupt, or receive or take above the *sum of* 20*s*. *each Commissioner, for each respective meeting*, every such Commissioner so offending shall be *disabled for ever* to act as a Commissioner in such or any other Commission founded on this Act, or any of the Statutes made concerning Bankrupts." If it had distinctly appeared that this Commissioner had violated this Act by *eating and drinking* at the expense of the Bankrupt's Estate, it is clear this Petition could not have been granted, and he would have been subject to the consequences prescribed by the Act.

(*b*) 5 Geo. 2, c. 30, s. 42.

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Though the Commission was executed at a distance from the Commissioner's residence he was not entitled to any greater Fee than 20*s.* on each meeting; that being the limit.

The Solicitor has mistaken the nature of his duty. Having undertaken to act under these five several Commissions he was bound to pay the Commissioners their Fees. Commissioners must attend—it is a duty upon them which they cannot refuse—they have no discretion—and have a right to the payment of their Fees at each meeting; and the hand for paying them must of necessity be the Solicitor; for the Petitioning Creditor, or the Assignees, are not necessarily present. It is the habit for the Solicitor to pay the Fees at each meeting, just as an Attorney pays a Special Jury. The Commissioners in the one case, or the Special Jurymen in the other, are not to be sent, seeking here and there, for their Fees. No persons would act as Commissioners if such difficulties arose. The Fees are to be paid on the spot to the Commissioners; and the Attorney ought not to summon them to meet unless he is prepared to discharge them. The Commissioners have no Lien on the proceedings, nor can they refuse attendance under the Commission; their only remedy, therefore, if not paid their Fees, is by Petition. Much to the honour of the Profession this is the first Case of the kind, and I trust it will be the last. Refer it to the Master, to ascertain what is due to this Commissioner in respect of his Fees under these five separate Commissions, and let Costs be reserved till the Master has made his Report.

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Where Ship sailed with Ballast from London *to* Jamaica, *and was sold on her Voyage there, and afterwards sailed from* Jamaica *to* London *with Goods Shipped, on a Contract with the Owners of the Ship at the time of the Shipping, the Creditors of the quondam Owners have no lien on the Freight due in respect of the Voyage from* Jamaica.

THE Petition stated, that in and previous to January 1811, Messrs. *Oliver* and *Townshend*, Mr. *J. Jones*, and Mr. *R. Marks*, were joint owners of the ship *Louisa*, in certain shares: About that time it was agreed between them that the ship should proceed to the *West Indies*, upon their joint account, in order to bring a cargo, or freight back, and that they should be jointly interested in the profits of such adventure, according to their shares in the ship; and, accordingly, the ship sailed, with *John Jones* as master, for the *West Indies*, about April 1811. Previous to the sailing of the ship, the Petitioners, *Hill* and Sons, repaired the same, and their bill for such repairs amounted to 327 *l.* 15*s.* 5*d.* The Petitioners, *Thomas Carlens*, *John Carlens*, and *Wm. Wilson*, between the months of December 1810, and September 1811, by the direction of *Oliver* and *Townshend*, made several insurances upon the ship for the voyage, on the joint account of the owners, and there remained due to them in respect of the same, 566 *l.* 11*s.* 4*d.* and several other persons also furnished stores and provisions for the outfit of the ship on the said voyage. During the absence of the ship on her voyage, *Oliver* and *Townshend*, on behalf of themselves and *Marks*, or they and *Marks*, about December 1811, agreed with *James Croft* to sell to him twelve sixteenths of the ship for the sum of 6,750 *l.*, to be paid in certain bills of exchange, then drawn by *Oliver* and *Townshend* upon and accepted by *Croft*, and a bill of sale was executed, dated the 23d January 1812, and the Transfer was completed on the Register, on the 27th June 1812, but

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Oliver and *Townshend*, at the same time, agreed to re-purchase the said twelve sixteenths of the said ship, and they gave their promissory notes, payable at distant dates, in payment of the price agreed upon for such re-purchase. Before any of the bills of exchange or promissory notes became due, and before the ship returned to *England* from her voyage, *Oliver* and *Townshend* were declared bankrupts, and the Petitioners, *William Wilson*, and *Israel Pitman*, were chosen assignees; and *James Croft* was also declared a bankrupt, and *Martin*, *Harden*, and *Rickman* were chosen assignees. The ship arrived at *Jamaica* later than was expected, and the cargo which was intended for her had been delivered to another ship; but the persons to whom the ship had been sent proposed to *John Jones* that if he would go on a voyage with the ship to *New Brunswick* and back, on Freight, they would, before his return, provide a Cargo for the ship on Freight, from *Jamaica* to *London*. The ship accordingly sailed to *New Brunswick* and back, and then, with the cargo provided for it, returned to *London* in June 1812, and remained in the hands of *John Jones*, on account of freight earned by the ship, amounting to 1,451 *l.* 8 *s.* 4 *d.* In consequence of claims thereon by the assignees of *Croft*, the 1,451 *l.* 8 *s.* 4 *d.* was paid into the hands of *Martin* and *Smith*, and remained in their hands on the joint account of Mr. *R. H. Martin*, as one of the assignees of *Croft*, and also in the name of *John Jones*, who insisted that the same ought first to be applied in discharge of debts which became due in respect of the ship, previous to and during her voyage from *London* until its return, the voyage being a joint or partnership undertaking. *John Jones* had since become bankrupt, and *Richard Powell* appointed assignee. The debts due to the Petitioners and others,

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in respect of the ship, far exceeded in amount the said sum of 1,451 *l.* 8 *s.* 4 *d.* and the Petitioners submitted they were entitled to have the said sum of 1,451 *l.* 8 *s.* 4 *d.* applied towards the discharge thereof, so far as the same may extend.

The petition prayed, that it might be declared, that the sum of 1,451 *l.* 8 *s.* 4 *d.*, being the produce of the said joint advance, is liable to the debts contracted for the repairs and outfit of the ship for such voyage and adventure; and for insurance on the same, and that an account may be taken of the debts due on such accounts to the Petitioners, and to the several other persons who should come in and seek relief, under the petition; and that a sufficient part of the sum of 1,451 *l.* 8 *s.* 4 *d.* might be applied in payment of the costs of the petition, and relating to the same, and the proceedings thereon, and that the residue might be applied in discharge of such debts, in proportion to the respective amounts thereof, or such other order as might seem meet.

The facts stated in the petition were verified by affidavits.

Sir *S. Romilly*, and Mr. *Bell*, for the Petition:—

The question, Whether owners by a sale of a ship, during her voyage, can destroy the Lien of Creditors on the profits of the voyage, arises now for the first time. The interests of *Oliver* and Co. in the ship must be considered as a Partnership interest; and the voyage a Partnership Adventure. *Oliver* and Co. though they might sell the ship whilst on its voyage, could not transfer the *profits* of the voyage arising from the Freight which she was earning, so as to disappoint these creditors

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of the Lien, or more properly, kind of Lien, (for it is not strictly a Lien) upon the profits of the voyage for the discharge of these debts. The present owners, not being owners when the ship was fitted out, the creditors can have no claim on them. There was certainly, according to a recent decision (*a*), no Lien on the ship; but these creditors had a Lien on the Freight, which could not be divested by a subsequent sale of the ship. The Register Acts do not affect this point, they leave the question as to Freight as it was before the Acts, and do not enable owners, by selling the ship and profits of the voyage to destroy the creditors Lien on the profits of the voyage. The ship was sent out in ballast to *Jamaica* to bring over a cargo from thence, and must be considered as earning Freight from the time she sailed from *England*. In *ex parte Young* (*b*), the Chancellor says, "I have no doubt that Freight is liable to the joint demands." It does not appear in that case whether the Freight was earned on the outward or homeward cargo.

Mr. *Hart*, and Mr. *Cullen*, against the Petition:—

The Freight belongs to the owners of the ship, and we are the owners. The creditors outfitting the ship had no Lien on the ship after the sale; and it would be singular to hold they have a claim on the Freight earned by the ship after the sale. No Freight was earned before the ship was sold: It is only earned when the ship arrives at the port of delivery. The owners of the ship, when the goods were shipped, had all the responsibility of the voyage, and they are entitled to the Freight.

(*a*) 2 Rose's Cases in Bankruptcy, 78 in note, S. C. 2 Ves. & Bea. 242, but not as to this point.

(*b*) See *Ex parte* Bland, 2 Rose's Cases in Bankruptcy, 91.

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except the *dictum* of Lord *Eldon*, in *Young*'s case, nothing is to be found in the books on the question. Several cases have decided that partners may agree among themselves in regard to the partnership property, so as to prevent any claim by creditors, in respect of such property (*c*).

Another objection is, that the Court has no jurisdiction in this case. These petitioners have not proved any debt, and are not entitled to be heard. They ought to have filed a bill. *Marks*, one of the original owners, is solvent, and answerable to these petitioners.

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

In regard to the objection as to the jurisdiction, the Court, under the general prayer for relief in the petition, may direct that these petitioners be allowed to prove their debts, though there is no express prayer for that purpose.

The VICE-CHANCELLOR,

After stating the facts of the case, observed: Two points are to be considered; 1. As to the Jurisdiction. 2. As to the merits of the case. With regard to the Jurisdiction, if the petitioners had made out their claims, I think I should have been warranted under the general prayer of the Petition, to have made an Order for proof. With respect to the merits of the case, it does not appear at what time the ship arrived at *Jamaica*, but that it was too late to take the cargo intended for it,

(*c*) *Ex parte* Ruffin, 6 Ves. 191; and see *Ex parte* Fell, 10 Ves. 347. *Ex parte* Williams, 11 Ves. 3.

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and that it was agreed she should go to *New Brunswick* and back on freight, and on her return from that voyage, she should proceed from *Jamaica* to *England*, with a cargo, which was to be provided for her. She takes the cargo, sails for *England*, and earns the freight in dispute. Before the time the cargo was taken in at *Jamaica*, *Croft* became owner of the Ship together with *Jones*; this fact, though it does not appear on the Petition, or Affidavits, is admitted. It is clear these Petitioners have no lien, as it is called, on the *Ship*, and if no Freight had been earned, their only relief could have been against the original Owners who employed them. If there had been no Sale, the Creditors would have had no lien on the *Ship*, because that was not joint Property; but the *earnings* of the Ship would have been joint Property, and liable to the joint Creditors; not from any doctrine peculiar to the earnings of a Ship, but on the general principle, applicable to the joint Property of every Partnership, its liability to the Joint Creditors. Is then, this Freight, the joint Property of *Oliver* and Co.? All the question turns upon the point, whose Property this Freight is. It arose out of a contract by the Owners of the Goods shipped at *Jamaica*, with the *then* Owners of the Ship, *Croft* and *Jones:* The Money due from the Owners of the Goods was payable to the Owners of the Ship, who were such when the Goods were shipped, and took upon them the Responsibilities of the Voyage. Those Owners might have refused to have taken the Goods, or might have agreed to take them to any other Country. They had an entire and exclusive dominion over the Ship. The Sum paid for Freight was in respect of the *homeward* voyage only, and no money was paid in respect of the Voyage from *England* to *Jamaica*.

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If there had been any Earnings by the Ship, in the Outward, as well as in the Homeward Voyage, there might have been an Apportionment of Freight; but in this Case no part of the Freight belonged to the original Owners. It wholly, and solely, and originally, belonged to *Croft* and *Jones*. Having determined in whom is the Property of the Freight, the Question is decided. The fallacy of the Petitioners consists, in considering the Voyage *from* Jamaica, as a continuity of the Voyage *to* Jamaica.

Petition dismissed.

Ex parte GALLIMORE.

16th August.

On Petition by Bankrupt to supersede his Commission, the Court, in a plain case, will order a Supersedeas, though the Petitioning Creditor desires an Issue or an Action.

IN this Case a Petition was presented by a Bankrupt, to supersede his Commission, supported by an Affidavit, which clearly showed that the Commission was invalid.

An objection was made, that the Commission could not in the first instance be superseded upon the Affidavit of the Bankrupt only, where, as in the present case, the Petitioning Creditor was desirous of an Issue, or an Action, to try the validity of the Commission.

The VICE CHANCELLOR:—

It would be vexatious to direct an Issue, or an Action, where the Court are clear the Commission ought to be superseded. In a Case, a note of which has been given me, *Ex parte Emery*, in 1812, the same objection by the

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Petitioning Creditor was made before the *Lord Chancellor*, and over-ruled; the Court, therefore, has power to refuse an Issue, or an Action, in a plain case; and thinking this to be one of that description, the Commission must be superseded, and with costs.

16th August.

Ex parte POWELL.

Bankrupt under a Joint Commission not entitled to an Allowance, though Joint Estate pays 10 s. *in the Pound, unless both joint and separate Creditors who have proved, are paid* 10 s. *in the Pound. If one Partner only has obtained his Certificate, no allowance given to the Partner who has obtained his Certificate, the Allowance being only jointly claimable.*

IN 1804 a Commission issued against *Samuel Castell* and *Walter Powell*, and they were declared Bankrupts. Distinct accounts were kept of their joint and separate Estates. The joint estate paid a Dividend of 11 *s.* 6 *d.* in the Pound (*a*), and *Powell*'s separate estate paid 4 *s.* in the Pound, and he obtained his Certificate. *Castell*'s separate estate paid a Dividend of 1 *s.* 9 *d.* in the Pound; and he died, without having obtained his certificate, and Letters of Administration were granted to *R. C. John Castell*. *Samuel Castell*, the Bankrupt, by his Petition stated these facts; and that the surviving Assignees were about to declare, and pay a final Dividend of the joint and separate Estates, without paying to, or reserving for, the Petitioner, any *Allowance* in respect thereof; and prayed, That the Assignees might be directed to pay to the Petitioner the whole of the Allowance in respect of the Dividends paid, and to be paid, out of the Joint Estate; and, that the Assignees might be directed not to make or pay any further Dividend out of such Joint Estate, without paying, or reserving for the Petitioner, the Amount of such Allowance.

(*a*) It was said at the Bar, and admitted, that 12 *s.* 6 *d.* in the pound had been paid by the Joint Estate.

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Mr. *Cooke*, for the Petition.

Sir *S. Romilly*, *contra* (*b*).

The VICE-CHANCELLOR:—

This is a new Case. Twelve shillings & 6*d*. in the Pound has been paid under the Joint Estate of *Castell* and *Powell*, but their separate Estates have only paid, the one, 4*s*. in the Pound, and the other, 1*s*. 9*d*. *Castell* died without obtaining his Certificate, but *Powell* has obtained his. Under these circumstances, two Questions arise; 1. Is an allowance claimable under the Act of Parliament (*c*), where the separate creditors proving under the Joint Commission, are not paid 10*s*. in the Pound? 2. Where, under a Joint Commission, 10*s*. in the Pound has been paid, and one of the Bankrupts has obtained his Certificate, and the other has not, the Bankrupt who has obtained his Certificate can claim any, and what, allowance; the whole, or a part? There are no Authorities in point. *Farlow*'s Case (*d*) has been cited as decisive of the present. It was a Decision after consideration by Lord *Eldon*; but that was the case of a *separate* Commission, under which joint Debts were proved, and where the *separate Creditors* received only 2*s*. in the Pound, and the Joint Creditors, 18*s*. in the Pound. In *ex parte Styles* and *Pickart* (*e*), a point was made similar to the present, but it was not decided. In that case, the Petitioners, having paid 10*s*. in the Pound under a Joint Commission, prayed an Allowance under the Act. A *separate* Creditor, who, by an Order,

(*b*) The Reporter was not present at the Argument.

(*c*) 5 Geo. 2. c. 30, s. 7.

(*d*) 2 Ves. & Bea. 209, and S. C. 1 Rose's Cases in Bankruptcy, 421.

(*e*) 1 Atk. 208.

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had proved under the Commission, opposed the Petition, on the ground, that the *separate* Estate had only paid 2*s.* 6*d.* in the Pound, and that the Bankrupts were not entitled to the Allowance till they had paid all their Creditors, Separate as well as Joint, 20*s.* in the Pound. It is a mistake of the Reporter to say 20*s.* in the Pound. Lord *Hardwicke* did not, however, decide the Case on this point, but considered the application as premature, no final Dividend having been made; before which time, any Creditor, whether joint or separate, would be admitted to prove. The only other Case which has been cited, is *ex parte Bate* (*f*), and from that Decision, which is binding on me, I conclude, that in determining the question of Allowance, the joint and separate Estate are not to be considered as distinct, and as if two Commissions had issued; but only *one* Allowance is made. You blend the two Estates, to consider, whether *one* Allowance is to be made. It further determines, that though the Estate of one Partner contributed much more than the other in making up the 10*s.* in the Pound, paid under the Joint Estate, yet that the Allowance is jointly claimable by both; such Allowance to be afterwards divided between them, according to the proportions their Estates have contributed. The Act of Parliament (*g*) makes the criterion of the Allowance to be, not an honest disclosure, but the *quantum* of the *Estate*, and the *quantum* of the *Debts*. The Statute says, there must be so much paid, "*to all the Creditors that have proved.*" *Ex parte Bates* shows that for the purpose of the Allowance, both the separate and joint Estate are to be considered, and that both contribute to the payment of it. All the Bankrupts

(*f*) 1 Bro. C. C. 452.

(*g*) 5 Geo. 2. c. 30, s. 7.

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Estate, both joint and several, passes to the Assignees under a Joint Commission. The Order to keep separate Accounts is a matter of equitable regulation, as under a Decree, for all the Estate is, by Law, in the Assignees. According to the Statute, therefore, all Persons who have proved Debts, whether joint or separate, must be paid 10*s.* in the Pound before the Bankrupts are entitled to claim an Allowance. Here, the separate Creditors have not been paid 10*s.* in the Pound; and if all the joint and separate Estate be put together, and all the joint and separate Debts, 10*s.* in the Pound would not be paid to the joint and separate Creditors.

The *whole* of the 5*l. per-cent.* Allowance must be given, or *none*. One of two Partners cannot claim the Allowance: if both are not entitled to it, one cannot. Though the joint and separate Creditors are paid 10*s.* in the Pound, yet if one of the Bankrupts has not obtained his Certificate, he who has, cannot claim an Allowance, or separate himself for that purpose, from his Partner. The allowance is joint—it must be claimable by both—they must take together, or not at all.

It is said, it is hard that one Partner should be affected by the misconduct or accident of the other. It is so; it may happen, in other instances: It is an evil incident to Partnerships; and it is sufficient for me to say, in answer to such objections, that such is the Law. In some Cases, one Partner is benefited, as in *Bate*'s case; for there *Henckel*, by conforming, was held entitled to a proportion of the Allowance, though it was *Bate*'s separate Estate, after payment of his separate Creditors, that enabled them to pay the Joint Creditors 10*s.* in the Pound. That case has decided that the

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Allowance is entire. Both Partners therefore must be entitled, or none. I feel for this Petitioner; but, for the reasons given, I must decide, That he is not entitled to the *whole*, or *any part*, of the Allowance.

Petition dismissed.

Ex parte ROBERTS.

Ex parte WELLS.

17th August.

A Bankrupt who has not surrendered, cannot Petition to supersede the Commission.

A Separate Commission will not be superseded at the instance of the Creditors under a Joint Commission, if the Joint Commission cannot be sustained.

THESE Petitions came on together. In *Ex parte Roberts*, the Petitioner prayed to have a Joint Commission, which had been issued against him and his Partners, superseded; but it appearing that he had not surrendered, the *Vice-Chancellor*, upon the Authorities (*a*), held, that he could not be heard; but, adverting to what was done in *Ex parte Jones*, He expressed his consent to let the Petition stand over, till the Bankrupt had surrendered; but on the Bankrupt's Counsel saying it was very improbable he would appear to the Commission, the *Vice-Chancellor* dismissed the Petition; and observed, this Case showed the wisdom of the Rule, that a Party must surrender before he can petition to supersede his Commission.

Sugar sold, payable for, by the Custom of the Trade, two Months after the Sale, does not create a debt to support a Commission, until the time of Credit has elapsed.

The Petition *Ex parte Wells* was presented by the Joint Creditors of *Roberts* and Co. to supersede a

(*a*) *Ex parte* Stokes, 7 Ves. 409, *Ex parte* Bean, 17 Ves. 405, *Ex parte* Jones, 8 Ves. 48.
328, *Ex parte* Jones, 11 Ves.

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separate Commission against *Roberts*, and was resisted on the ground, that the Joint Commission was invalid.

On the 23d March 1815, a joint Docket was struck against *Roberts* and Co. and was followed up by a Joint Commission, which issued on the 28th March 1815, under which *Roberts* and Co. were declared Bankrupts. The Debt of the Petitioning Creditor arose from a Sale on the 26th January 1815, at two months credit, of Raw Sugars, to the Bankrupts, who were Refiners; which credit would have expired on the 26th of March, but that day being Sunday, it expired, according to the custom of the trade, on the ensuing Saturday, the 1st of April.

The VICE-CHANCELLOR:—

This separate Commission, the validity of which is not impeached, is sought to be superseded, as it will be more convenient to take all the Accounts under the Joint Commission, and be a saving of Expense; and, certainly, this is an ordinary application. But before a separate Commission is superseded the Court must see that there is a valid Joint Commission; for if the Joint Commission is bad, it would be improper to supersede a good separate Commission.

The Act (*b*) requires an oath "*of the truth and validity*" of the Debt, to entitle the Creditor to a Commission. Here, the period for which credit was given had not elapsed; and the Creditor could not, with propriety, swear, that on the 23d of March the Bankrupt was *then* indebted to him, but only that he *would* be, on the First

(*b*) 5 Geo. 2. c. 30, s. 23.

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of April. No debt was due when the Docket was struck (*c*). Another objection is, that no Act of Bankruptcy appears to have been committed subsequent to the accruing of the Debt; which is another circumstance fatal to the Commission. On both points the Joint Commission cannot be supported. This Petition, therefore, must be *Dismissed*, and with *Costs*; for the invalidity of the Joint Commission appears on the affidavits filed in support of the Petition.

(*c*) See Hoskins *v.* Duperoy, 9 East, 498; Dutton *v.* Solomonson, 3 Bos. & Pul. 582. The Statute, 5 Geo. 2, c. 30, s. 22. applies only to Debts due on Bills, Bonds, Promissory Notes, and other personal written Securities of the like sort, payable at a future day.

17th August.

Petition to supersede a second Commission must be served on the Assignees under the first.

Ex parte IRVINE.

THIS was a Petition to supersede a Second Commission against an uncertificated Bankrupt, but the Petition had not been served on the Assignees under the 1st Commission.

The VICE-CHANCELLOR:—

When Creditors apply to supersede a Second Commission against a Bankrupt, Notice must be given to the Assignees under the 1st Commission. Such appears to be the course of the Court. It was so held in *Ex parte Rhodes* (*a*), and very lately, I understand, the Chancellor has adhered to this Rule. The Petition must stand

(*a*) 15 Ves. 542.

over, till the Assignees under the former Commission are served with this Petition.

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Ex parte IRVINE.

Mr. *Wetherell,* for the Petition.

Mr. *Cullen,* against it.

Ex parte WESTON.

18th August.

Bankrupt Petition, witnessed by the Agent of the Attorney who presented the Petition, not a sufficient compliance with the General Order requiring the attestation of the Attorney who presents the Petition.

THE Bankrupt Petition in this case was not signed by the Solicitor, as directed by the *General Order* of the 12th *August* 1809, but by a Person who was *Agent* of the Solicitor (*a*). The hearing of the Petition was objected to on this ground, and the *Vice-Chancellor,* thought the objection well founded; and, that the Petition must stand over till properly signed; but the Attorney and the Petitioner being in Court, they were permitted to sign the Petition, and the objection was then considered as obviated.

(*a*) The General Order directs, "That the Signature of each Person signing as a Petitioner shall be attested by the Solicitor actually presenting the Petition, or by some person, who shall state himself in his Attestation to be Attorney, Solicitor, or Agent of the Party signing in the matter of the Petition."

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19th August.

Order upon Assignees under 49 Geo. 3, *c.* 121, *s.* 19, *to deliver up Possession, and execute an Assignment, or Surrender of the Bankrupt's benefit in a Lease, where the Lease itself had been deposited in the hands of a third Person as a Security.*

Ex parte CLUNES.

THIS was a Petition by a Landlord, under the late Act (*a*), Praying, That the Assignees might be ordered to accept a Lease to the Bankrupt from the Petitioner, or to deliver up the same, and the Possession of the Premises, to the Petitioner, and the Rent accrued due and in Arrear to the time when they should deliver up the same. The Affidavits in support of the Petition stated facts to show that the Assignees had declined to take the benefit of the Lease; but Affidavits on the part of the Assignees were adduced to prove that they did not mean to take the Benefit of the Lease. Before the Bankruptcy the Lease had been deposited by the Bankrupt, with a Mr. *Fry*, as Security for a Debt.

Mr. *Parker*, for the Petition.

Mr. *Cullen*, against it.

The VICE CHANCELLOR:—

Before this Act passed, great inconvenience arose. A Lessor could not compel Assignees to determine, whether they would hold to a Lease made to the Bankrupt; and the Bankrupt, though dispossessed of all his Property, was held liable for Rent accruing due subsequent to his Bankruptcy (*b*). The act provides, that where the Assignees accept the Lease the Bankrupt shall not be liable for Rent accrued due after such acceptance, or

(*a*) 49 Geo. 3, c. 121, s. 19.

(*b*) See Mills *v.* Auriol, 1 H. Bl. 433, and confirmed by K. B. on a Writ of Error, 4 T. R. 94.

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for any breach of Covenants; and if the Assignees on application to them, decline to determine whether they will, or will not accept the Lease, the Lessor, his Heirs, Executors, Administrators, or Assigns, may apply to the Person or Persons holding the Great Seal, praying, that they may either so accept the same, or deliver up the Lease, or Agreement for the Lease, and the Possession of the Premises, demised or intended to be demised, who shall thereupon make such order as in all the circumstances of the case shall seem meet and just, and which shall be binding on all parties. The Case now before me does not appear to have been contemplated by the framers of this Act. The Lease being in the hands of *Fry*, by way of Deposit as a Security, the Assignees have no power over it, and cannot be ordered to deliver it up. *Fry* is no Party to this Proceeding. But though the Act does not in words extend to Cases where the Lease is in the hands of a *third* person; yet, I think, by an equitable construction of this Act, which was intended for the Benefit of Landlords, I have Jurisdiction.

His Honor then went into the facts of the Case, in respect to the adoption of the Lease, and observed upon the Decisions, saying, it was a very nice point whether the Lease was to be considered as adopted by the Assignees. If the Assignees have *accepted* the Lease, or have *declined* it, I have no Jurisdiction under this Act; it is only when Assignees will not decide on the subject, that a Jurisdiction is given.

[The Landlord, who was in Court, expressed a desire to do what the *Vice-Chancellor* might think proper; and his disinclination to proceed at Law; and readiness to give up his claim as to the Rent, to prevent further litigation.]

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Ex parte CLUNES.

The VICE-CHANCELLOR:—

I think you do right: It is a nice question, whether the Assignees are to be considered as having made their Election to take the Lease: Considering this then as a Case, where the Assignees have *suspended* their decision as to the Lease, I shall direct that the Assignees deliver up the Possession of the House to the Petitioner, and execute an Assignment, or Surrender to the Petitioner, of the Bankrupt's benefit in the Lease.

21st August.

Attorney, under the circumstances, ordered to pay the Costs of an improper Petition in Bankruptcy.

Ex parte CUTHBERT.

THE Petition in this Case, prayed, that a Charter-Party might be delivered up, and that the Commission might be superseded, as fraudulently obtained. No grounds appearing in support of the Petition, the question was, who should pay the Costs.

The VICE-CHANCELLOR:—

This Petition has two objects; 1. The Delivery of the Charter-Party; 2. The superseding of the Commission. It is clear the first object of the Petition is not within the Jurisdiction of the Court; the Parties must resort to an Action, or a Bill.

With regard to superseding the Commission, the only ground laid for it, is, that the Petitioning Creditor is a near relation of the Bankrupt; and is the sole Assignee; and that the Attorney is a friend of his; and an Affidavit, that the Party *believes* the Commi s sion was fraudulently issued. This is not a sufficient

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ground upon which to supersede the Commission as fraudulent. Then as to the Question of Costs; Is the Bankrupt's Estate to pay the Costs of this unfounded Petition? That would be very hard upon the Creditors. Is the Petitioner to pay them? Ignorant of the Law himself, he has been guided by his Attorney. Is the Bankrupt to pay them; he has no means of doing so. Under the Circumstances, I think the *Attorney* must pay them. The Order of Lord *Eldon* in 1809 (*a*), obliging the Attorney who acts for a Petitioner, to sign his name to the Petition, was wisely made to prevent improper Petitions; and to enable the Chancellor to make the Attorney, where the case called for it, pay the Costs of such Petition (*b*). It appears from the Affidavit of the Attorney, that he had a claim of 50*l.* on the Charter-Party, and he applied to have it delivered up, and if not delivered up, he threatened that a Petition would be presented to supersede the Commission for Fraud: All this, the Attorney has, incautiously, sworn in his Affidavit. This, therefore, is more the Petition of the Attorney than of the Petitioner. The Petitioner did not know the Law; but the Attorney must have known that, as t one part of the Prayer of the Petition, the Court had no Jurisdiction; and that as to the other part of the Prayer in regard to which the Court has Jurisdiction, there was no ground established for superseding the Commission. An Attorney is not to be considered as guaranteeing the success of a Petition; for the facts may be misrepresented to him, and the Law may not be obvious; but

(*a*) General Order, 12th August 1809.

(*b*) In *Ex parte Titley*, MS. the Lord Chancellor said, the object of the Order was, "to have the pledge and responsibility of a Solicitor of the Court to the propriety of the Application."

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here, this unfounded Petition appears to have arisen out of the interested views of the Attorney, who claims a security on the Charter Party. It is not merely because the Petition is vexatious and frivolous, that I make him pay the Costs. The Petition, therefore, must be dismissed, and the Costs of it paid by the Attorney.

WALL *v.* STUBBS.

25th August.

Misrepresentation of the value of an Estate, a sufficient ground to resist a specific performance.

Query, whether, where Vendor entitled only under an Agreement, sells to another, such Vendee can object to a specific Performance, on the ground of the Statute of 32 H. 8, *c.* 9.

THIS was a Bill filed by the Vendor of an Estate, against the Vendee, for a Specific Performance of the Agreement to purchase. The Specific Performance was resisted, on the ground, that misrepresentation had been employed to induce the Vendee to purchase the Estate at a price much beyond its value; and a further objection was, that as the Vendor was himself only entitled to the Estate in virtue of an Agreement with the persons of whom he purchased, and no Conveyance had been made to him, or Possession taken, the Statute 32 *Henry* VIII. c. 9 (*a*), applied.

(*a*) By this Act, no one shall sell or purchase any pretended Right or Title to Land, unless the Vendor hath received the Profits thereof for one whole year before such Grant, or hath been in actual Possession of the Land, or of the Reversion or Remainder, on pain that both Purchaser and Vendor shall each forfeit the Value of such Land to the King and the Prosecutor.

The Defendant, in the first instance, pleaded this Statute; but the Plea not being put in,

A great deal of Evidence was adduced; by the Plaintiff, to prove that the Estate was of the value it had been represented to be; and by the Defendant, to show it was of much less value.

The VICE-CHANCELLOR entered into a very minute consideration of the Evidence; and thought there was proof, by persons best able to form a Judgment, of great misrepresentation as to the value of the Estate, which appeared to be worth 5,600*l.* less than it was represented to be; and considered that as a sufficient ground to refuse a specific performance; relying for Authority, upon *Buxton* v. *Lister* (*b*), *Howard* v. *Hopkins* (*c*), *Higginson* v. *Clowes* (*d*), *Ellard* v. Lord *Landaffe* (*e*), *Legge* v. *Croker* (*f*).

His Honor, also, further observed that, whether the misrepresentation be wilful or not; or of a fact latent, or patent (*g*), such misrepresentation may be used to resist a specific performance, unless the Purchaser really knew how the fact was (*h*). In this case the Plaintiff must be left to his Remedy at Law. In a Court of Law, on a proper case made, damages may be given, commensurate to the Injury the Plaintiff may have sustained; and such Court can better examine

on Oath, it was, on Motion, ordered to be taken off the File. 2 Ves. & Bea. 354.

(*b*) Prec. Chanc. 383, and see Williamson *v.* Joyce, 3 Ves. 168.

(*c*) 2 Atk. 371.

(*d*) 15 Ves. 516.

(*e*) 1 Ball & Bea. 241.

(*f*) Ib. 506.

(*g*) Duke of Norfolk *v.* Worthy, 1 Camp. 337, Loyes *v.* Rutherford, Sugd. Vend. and Pur. 245.

(*h*) Dyer *v.* Hargrave, 10 Ves. 515.

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into all the circumstances of a case like the present, in which there is contradictory Evidence. Money is all the Plaintiff seeks by his Bill, as is the case in all Bills by Vendors, and Money will be given him at Law, if he is found entitled to it.

The VICE-CHANCELLOR being of Opinion that the Bill must be dismissed, on the ground of misrepresentation, thought it unnecessary to consider the Objection arising out of the Statute of *Henry* VIII. (*i*).

Bill dismissed, without Costs (*k*).

(*i*) Mr. *Sugden*, in the last Edition of "The Law of Vendors and Purchasers," p. 389, says, "There was a very recent Instance in which it was attempted, but without success, to bring a Purchase within the Statute." But in *Hitchins* v. *Lander*, 2d Nov. 1808, a Plea of the Statute appears to have been allowed. There is a short Report of this Case in Cooper's Rep. p. 34.

(*k*) In *Cadman* v. *Horner*, 18 Ves. 10, it was determined, that misrepresentation of the value of a purchased Estate, though in a slight degree, disqualifies a Party from calling for the Aid of a Court of Equity.

In a recent Case in the House of Lords, Lord *Eldon* thus expressed himself: — "Even in chaffering about Goods, there might be such misrepresentations as would set aside the Contract. When the misrepresentations were made under such circumstances, and in such a way, that they took the confidence of the Purchaser, and induced him to act when otherwise he would not, this was a Fraud which would affect the Sale." [Sibbald *v.* Hill, Dow's Cases Ho. Lords, vol. ii. p. 264.]

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COPE *v.* PARRY.

31st October.

Answer ordered to be taken off the File, it purporting to be an answer to the Bill of Five Complainants only, when there were Six.

A BILL was filed by *Six* persons. In the Answer, it was stated to be an Answer "to the Bill of Complaint of, &c." naming only *Five* of the Plaintiffs. A year had elapsed since the Answer was put in, and there were no further proceedings.

Mr. *Parker* moved to have the Answer taken off the File, as being defective; observing, that no Indictment would lie for Perjury on such an Answer.

Mr. *Benyon, contra,* insisted, that after such a length of time, the Objection could not be taken.

The VICE-CHANCELLOR:—

This Motion must be granted, and a correct Answer put in. There is no Rule of Court limiting the period wherein such an Objection can be made. An Answer to a Bill of Five persons is no Answer to a Bill of Six; nor ought it to be permitted to stand, as such, on the Records of the Court.

SMITH *v.* LLOYD.

15th October.

Vendee in Possession, objecting to Title, must pay in Purchase-Money, or give up Possession.

AN Estate was agreed to be sold by the Plaintiff to the Defendant. The Defendant was let into Possession, and had continued so for Four years, but refused to pay the Purchase-Money, on the ground, that a good Title could not be made. The Plaintiff filed a Bill for a specific Performance of the Agreement.

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Sir *Samuel Romilly*, and Mr. *Stephen*, moved, that the Vendee, under the circumstances, should pay into Court the Purchase-Money, and cited *Clarke* and *Wilson* (*a*).

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

The objections to the Title are well founded; but we are very desirous of having the Estate, if they can be removed, and are willing to pay a Rent for the Estate for the Four Years we have been in Possession, which may be deducted out of the Purchase-Money, when the Title is cleared.

The VICE-CHANCELLOR :—

Either the Purchase-Money must be paid into Court, or the Possession delivered up.

Sir *Samuel Romilly* :—

We have no objection to having only, at present, the Four Years Rent.

The VICE-CHANCELLOR :—

Let it be so then.

(*a*) 15 Ves. 317.

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3d November.

MOODY & Ux. *v.* LEEMING.

A second application to enlarge Publication allowed, though Cause set down, the same being so far off in the Paper, that it was improbable it would be heard before the time for the enlarged Publication expired.

MR. *OWEN* moved to enlarge Publication for a month, the Cause being set down in the Chancellor's Paper, and one hundred off, and little probability of its being heard before the time to which the enlarged Publication would extend.

Witnesses had been examined, and Publication once before enlarged.

Mr. *Blake, contra,* contended, the Practice was, not to enlarge Publication in a Case like the present, where Witnesses have been examined, unless a special ground was laid for the application.

Mr. *Croft,* the Register, being referred to, said, Publication was permitted to be enlarged when the Cause was so far off, that it was not likely the Cause would be heard before the time to which the Publication was moved to be enlarged.

The VICE-CHANCELLOR:—

In the *Exchequer,* such a Motion would not be granted. If the Practice of this Court is to enlarge Publication in a case like the present, I must follow the Practice. Let the Publication be enlarged for a Fortnight.

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7th November.

BROOKES and another, *v.* LORD WHITWORTH, and others.

Demurrer, by a Defendant for multifariousness, the Bill being against several Purchasers and others, allowed.

THOMAS *Lloyd*, Esquire, by Indentures of Lease and Release, conveyed Lands to the Plaintiffs Upon Trust, to sell, either by public Auction, or private Contract, and pay off certain specified Incumbrances upon the same, and also what was owing to the Plaintiffs, and all Expenses attending the Sale, and pay the residue of such Trust Monies to the said *Thomas Lloyd*, his Executors, Administrators, and Assigns.

The Plaintiffs put up the Estate to be sold, in several Lots, and the Defendant *Fuller* became the Purchaser of one of the Lots. *Lloyd* having by various Conveyances entangled the Property, and the Trustees being unable to procure the necessary parties to join in Conveyances to the Purchasers, filed this Bill against various Incumbrancers on the Estate, and also against the several Purchasers, Six in number, praying, amongst other things, that an account might be taken of the several Incumbrances, and that the Sales to the Purchasers might be completed, and the remainder of the Purchase-Monies paid into Court, and applied according to the Trusts declared respecting the same; and that such parts of the Estate as had not been sold, might be sold; and that all proper Parties might be compelled to join the Plaintiffs in Conveyances to the several Purchasers; and that the Purchasers of such parts of the Estate as had been sold might be restrained from commencing Actions or Suits touching the Lots, or the Deposits.

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A *Demurrer* was put in to this Bill by the Defendant *Fuller*, one of the Purchasers, assigning for Cause of Demurrer, "The said Bill being exhibited against him and Twenty other Persons as Defendants thereto, for several and distinct, and independent, matters and causes that have no relation to each other; and wherein, or in the greater part whereof, this Defendant is in no way interested or concerned, and ought not to be implicated, &c."

Mr. *G. Wilson*, in support of the Demurrer:—

This Demurrer is put in on the ground that the Bill is filed against various Incumbrancers, and several Purchasers, with whom this Defendant has no concern, and is therefore multifarious. In *Reyner* v. *Julian* (*a*), Sir *Lloyd Kenyon*, sitting for the Chancellor, put this very case, "Suppose," says he, "an Estate is sold in Lots to different Persons, a Plaintiff could not include them all in one Bill for a specific performance; for each party's case would be distinct, and would depend upon its own peculiar circumstances; and there must have been a distinct Bill upon each contract." The case of a Bill against several Parishioners for Tithes is an anomalous Case. He cited also, *Wall*, and Duke of *Northumberland* (*b*).

On a Demurrer of this kind, it was formerly considered necessary, by answer, to deny combination (*c*),

(*a*) 2 Dick. 677. The marginal note to this Case is wrong.

(*b*) 2 Anstr. 469.

(*c*) Bull *v.* Allen, Bunb. 69, adopted in Sugd. Vend. and Purch. 188, 4th Edit. *Powell* v. *Arderne*, 1 Vern. 416, and Mr. *Raithby's* note. Lord Redesdale's Tr. Pl. 147, 3d Edit. See also Lansdown *v.* Elderton, 8 Ves. 526.

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but subsequent Cases have negatived that doctrine (*d*).

Mr. *Horne, contra* :—

The Plaintiffs, who are Trustees for the Sale of the Estate, part of which this Defendant has purchased, were desirous that their *Cestuis que Trusts*, and other Incumbrancers, should be compelled to make a Title to the Purchasers, and therefore, they and the Purchasers of the Estates have been made Defendants, by which means a multiplicity of Suits will be prevented, and great expense saved. What is cited from *Dickens* is merely a *dictum* of Sir *Lloyd Kenyon*. No Case has expressly decided that such a Bill will not lie against several Purchasers. I do not lay any stress upon the want of a denial, by the Defendant, of Combination.

The VICE-CHANCELLOR :—

For the purpose of deciding upon this Demurrer it is not necessary to detail the various particulars stated in this Bill. It is sufficient to say, the Estate was vested in the Plaintiffs, for the purpose of selling the same; and that part of the Estate was accordingly sold in Six different Lots, to Six different Purchasers, who, with several other persons, are made Defendants to this Bill; and that a separate Agreement had been entered into with

(*d*) See 1 Anstr. 82. "The denial of Combination, usually inserted as words of course at the close of an Answer, is a denial of unlawful combination; and it has been determined that a general charge of combination need not be answered. An Answer to a charge of unlawful combination cannot be compelled; and a charge of a lawful combination ought to be specific to render it material." [Lord Redesdale's Tr. Pl. 32, 33, 3d Edit. and see Coop. Tr. Pl. p. 183.]

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each Purchaser. Some of the Purchasers have not demurred. The Court is always averse to a multiplicity of Suits; but, certainly, a Defendant has a right to insist that he is not bound to answer a Bill containing several distinct and separate matters relating to Individuals with whom he has no concern. A decisive objection to this Bill is, that the Purchases of the different Lots are made by distinct persons, each Agreement being separate, and distinct. The circumstances attending the Sale of one Lot may be very different from those relating to other Lots; one may have objections, another has not. In the case cited by Mr. *Wilson*, Sir *Lloyd Kenyon* considers such a Bill as this to be multifarious, and demurrable; and other Books state it as a received doctrine. The Demurrer must be allowed.

Mr. *Wilson* moved for Costs beyond the Common Costs (5*l.*) but the Vice-Chancellor refused additional Costs.

TEMPEST and others, *v.* ORD and others.

7th November.

The Manager of a Colliery paying a Creditor on the Colliery with a Bill, which was not paid, the Colliery remains liable to the payment of the original debt.

PHINEAS Crowther made a Steam-Engine for a Colliery, part of the Estate of the Plaintiff, Lady *Frances Ann Vane Tempest*, and applied in May last to *Arthur Mowbray*, the Receiver or Manager (under an Order of the Court) of the Collieries of Lady *Tempest*, for Payment of the Sum of 800*l.* the price of the Engine. *Mowbray*, upon such application, gave *Crowther* a Bill of Exchange for 800*l.*, at Two Months, drawn by the Bank of *Durham*, in which *Mowbray* was a Partner,

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upon their House in *London*; and *Crowther* gave a Receipt, as for so much Money received, in discharge of his Demand.

Before the Bill became due, the Bank at *Durham*, and that in *London*, failed, and a Commission against the *Durham* Bank issued on the 22d of July last, and *Mowbray*, and the rest of the Firm, were declared Bankrupts; and Assignees were afterwards chosen.

Since the issuing of the Commission, the Bill of Exchange was returned to *Crowther* for Non-payment.

A Petition was now presented by *Crowther*, stating these Facts, and that the Petitioner had been informed, and believed, that *Mowbray* was passing his Receiver's Accounts before the Master; and that by means of his being enabled to take credit by virtue of the Petitioner's Receipt for the Sum of 800 *l*. *Mowbray* would appear to be a creditor for a considerable Balance due to him from the Infant's Estate; and prayed, that upon delivering up the Bill of Exchange, the Sum of 800 *l*. might be paid him out of the Monies remaining in the Name of the Accountant General, in Trust in the Cause, which would otherwise be applicable in Payment of the Balance due to *Mowbray*; and that in the mean time no Payment might be made to, or Money received by, *Mowbray*, or his Assignees, in discharge or reduction of such balance.

Mr. *Bell*, for the Petition, cited *Glossup* v. *Harrison* (*a*).

Sir *Samuel Romilly*, and Mr. *Montagu*, against it, cited, *Ex parte Hale* (*b*), as showing, no set-off would be allowed in such a case.

(*a*) Coop. Rep. 61. (*b*) 3 Ves. 304.

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The VICE-CHANCELLOR :—

The Justice of the case, independent of Authorities, is clear. *Crowther* has supplied Goods, and received a Bill, which turns out to be mere waste Paper, and ought not therefore to be considered as a payment.

Where a Bill of Exchange is given in payment of a debt, and the Bill is not paid, the Creditor, unless he has purchased the Bill out and out, has a right to resort to his original cause of action (*c*). So, if before a Bill becomes due, it is dishonoured, the creditor may resort to his original debt.

If *Mowbray* himself had been the original Debtor, *Crowther*, the Bill not being paid, might have resorted to him for payment of the debt.

The Order for the Engine was given by *Mowbray*, as Agent, and being known to be acting as Agent, he could not be liable himself to pay.

Having taken a bad Bill from the Agent, *Crowther* is entitled to call upon the Principal, for whose use the Engine was furnished.

If *Mowbray* had paid the 800 *l.* he might have recovered against Lady *T. V. Tempest*, for so much Money laid out and expended for her use; but as the Bill was returned unpaid, he could make no such charge against her.

The Receipt was not properly drawn. It should have been for so much Money when the Bill of Exchange was paid.

(*c*) Puckford *v.* Maxwell, 6 T. R. 52. Owenson *v.* Morse, 7 T. R. 64.

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This is not a case of Set-off, and therefore *ex parte Hale* is inapplicable.

The justice to all Parties is, that the Bill of Exchange must be given up to the Assignees, and the Colliery must pay *Crowther* his demand.

Petition granted.

Ex parte GREENHOUSE and OTHERS, Inhabitants and Parishioners of the Parish of St. Lawrence, Ludlow, and of the Parish of Bromfield, in the County of Salop.

7th *and* 15th November.

Breach of a Trust of a Charity, by pulling down a Chapel, and selling the Materials, and converting Burying-ground to other uses, relieved, and a Conveyance to new Trustees directed.

THIS was a Petition presented under the recent Act (*a*), in respect of the breach of a Trust, created for the benefit of a Charity.

Charles Foxe, of Bromfield, in the County of Salop, Esquire, made his Will, dated the 12th October 1590, as follows:—"And whereas I have lately begone a foundation to erect four Alms-houses, or Chambers, upon a piece of ground near the Chappell of St. Leonard, in Corve-street in Ludlow, in the said County of Salop; which ground, together with the said Chappell, I lately purchased to me and mine Heirs of one for the relief and maintenance of four poor and impotent persons, to be there from time to time kept and relieved, my Will, Intent, and Meaning

(*a*) 52 Geo. 3, c. 101, s. 12.

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is, that if I shall happen to decease out of this mortal life, at any time before the said Alms-houses be thoroughly finished and erected, then mine Executors, with so much of the Rents, Issues, Revenues, and Profits of my mortgaged Lands, and the Sums of Money thereupon and in Redemption thereof due, shall build up and finish the same in as short time as conveniently they may, according to the plot or foundation there already begone, and for and towards the relief and maintenance of the said four poor persons, as also for Divine Service to be had and maintained as shall be hereafter appointed, within the said Chappell of St. Leonard.— I do give and bequeath unto *Edward Foxe*, my brother, and the said *Edmund Foxe*, my son, two of the Executors of my last Will and Testament, and to their Heirs and Assigns for ever, all those four Messuages or Burgage, and all Lands, Tenements, and Hereditaments, with their Appurtenances, set, lying and being in the City of Worcester, and suburbs thereof, now or late in the tenure or occupation of one *Margaret Keene*, Widow, late Wife of *John Callowe*, for term of her life; all which, or the Reversion thereof, I lately purchased to me and mine Heirs, of one *John Phillipps*, of London, Gentleman, and which also the said *John Phillipps* before that time purchased of the said *John Callowe*, being now at the rent or value of eight pounds by the year, upon condition and to the end that the said *Edward* and *Edmond*, or their Heirs, shall, within the space of three years next after my decease (if in my life-time the same be not to those uses by me conveyed and assured), by their sufficient Deed, lawfully and duly executed, enfeoffe some three, four, or more, of my next name and kindred of my body descending; and, in default of them, some others, with them and their Heirs,

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of, and in the said Messuages, Lands, Tenements, Rents, Reversions, and Hereditaments in Worcester aforesaid, and suburbs thereof, to the Uses and Intents hereinafter limited, mentioned, and appointed, viz. that he or they to whom such Feoffement shall be made, and their Heirs, shall stand seised of the same Lands, Tenements, and Hereditaments, and out of the Rents, Issues, and Profits thereof, from time to time shall yearly pay unto the said four poor or impotent persons for the time being that shall be placed or allowed in the said new Hospital or Alms-houses, four pounds, to be equally divided between them quarterly, at four terms or times in the year; and, moreover, shall yearly pay unto the Curate or Chapleyn of Ludlow for the time being, or to some other sufficient Chapleyn or Minister, to read and say to the poor there Divine Service at certain times in the week as shall be appointed, forty shillings; and shall also pay and give yearly unto some sufficient and learned Preacher, for a Sermon to be made and preached in the said Chappell at St. Leonard's yearly, at some convenient time within the feast of Christmas, six shillings and eight-pence, and other six shillings and eight-pence for a like Sermon to be preached in the said Chappell yearly in the time of Lent, for the better edifying and instructing of the said poor, and such other people as shall then resort thither: and touching the residue of the said Rents of the Premises, shall remain, and be employed to and for the necessary repairing of the said Alms-houses and Chappell of St. Leonard from time to time, as need and occasion shall require; and for levying and gathering the said Rents yearly, and other necessary Charges; and that the said Feoffees, and their Heirs, and the Survivor and Survivors of them, shall yearly make account unto the Churchwardens of Bromfield

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aforesaid, howe the Profits and Revenues thereof have been defrayed, and what Surplussage remaineth to pay and deliver unto the Churchwardens of Bromfield aforesaid; and then Order to be taken how the same surplus, if any be, shall be employed and bestowed by the advice of the Vicar of Bromfield aforesaid for the time being. And I give also two Bells, which I have in my sellar at Bromfield, to be hanged up in the Steeple of the said Chappell, to ring unto Service when any is there said, and there to remain for evermore."

By an Indenture, bearing date the second day of April, in the thirty-fifth year of the reign of Queen *Elizabeth*, *Charles Foxe*, the eldest son of the said Testator, and the said *Edward Foxe* and *Edmund Foxe*, being the then surviving Trustees under the aforesaid Will, granted and conveyed the said Premises to *Henry Foxe*, and several other persons of that name and family in the said Indenture named, as Trustees thereof, upon the Trusts aforesaid; and certain Articles, Ordinances, and Orders, also bearing date the same second day of April, and made by the said *Charles Foxe*, *Edward Foxe*, and *Edmund Foxe*, were annexed to the said Deed, whereby, for the purposes aforesaid, it was ordered and declared, that when all the said three Survivors, except three, should decease, the said three Survivors should, within six months afterwards, convey and assure to the like number of the next of kin of the said *Charles Foxe* deceased, the said Lands, Tenements, and Hereditaments, to the use of such new Feoffees and such surviving Feoffees, their Heirs and Assigns, upon the Trusts aforesaid; and that the like Order should be kept from time to time for ever after by the Survivor of the new Feoffees for the time being, and his and their Heirs for

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ever, for and concerning the conveying the said Premises to other Feoffees, and their Heirs, for ever, upon the like Trusts as aforesaid; and none other, and upon no other consideration. And it was further ordered, that there should be continually for ever thereafter sustained, maintained, and kept within the said Messuages so mentioned to have been erected for an Alms-house, four poor persons, who should be from time to time appointed by the said *Charles Foxe*, *Edward Foxe*, and *Edmund Foxe*, and after their deaths by their Heirs male of the said *Charles Foxe*; and, in default of such Issue by the Heirs male of *Charles Foxe*, his father, and in default of such Issue by the Heirs male of said Testator; and that such four poor persons should daily serve God, and repair unto the said Chapel for hearing Divine Service and Sermons, as soon as such Service or Sermons should be there read or preached, as thereafter should be ordained. And it was further ordered, that when any of the rooms of the said four poor persons should become void by death or otherwise, then that any other poor person of one of the Parishes of Bromfield or Ludlow, should be elected there to continue during life. And it was further ordered, that out of the Rents of the said Messuages, situate in Worcester, there should be yearly, for ever, paid to the said four poor persons, the sum of four pounds, to be divided between them quarterly; and they thereby appointed *Humphry Maddox*, Clerk, to celebrate Divine Service in the said Chapel of St. Leonard's to the said poor people, and others that should resort thither; and also to execute the office of Curate and Minister during his life, as well by ministering of the Communion at such convenient times in the year as was commonly used according to the usages of the Church of England;

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also by ministering and reading Divine Service there every Wednesday and Friday throughout the year, in the Mornings of the said days, according to the usage of the Church of England, which order for celebrating Divine Service they appointed should be for ever thereafter observed and kept by such person or persons as should be thereafter appointed and chosen to supply the said room of the office of a Minister or Curate thereof. And further, that in consideration of such Divine Service there should be for ever thereafter yearly paid, out of the Rents of the said Messuages in Worcester, unto the Minister or Curate there for the time being, forty shillings at the times therein mentioned. And further, that the Minister there for the time being should also have, hold, and enjoy the said Land, Soil, and Ground belonging unto the said Chapel of St. Leonard's, and thereunto adjoining (except only one Parcel of the said Land to be inclosed by the said Testator's Executors, for a Garden or Gardens for the said four poor persons) during the time that he should exercise the office of Curate there, and that it should be lawful for the said Minister to take the Rents and Profits (except as before excepted), and convert the same to his own use as a further recompense for celebrating Divine Service there in manner aforesaid. And further, that there should be for ever thereafter paid yearly, out of the Rents of the said Premises, to a Preacher, for two Sermons to be preached in the said Chapel, six shillings and eight-pence for each Sermon, one during Christmas Holidays, and the other during Lent, for the better edifying and instructing of the said persons resorting there; and as touching the overplus and residue of the said Rents, they appointed that the same should be employed from time to time for ever,

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as necessity should require, in and upon the necessary reparations of the said Chapel and Alms-houses, and for receiving of the said Rents, the Receivers of which Rents should be appointed in like manner as the Curate or Minister as aforesaid. And that the said Feoffees for the time being for ever should yearly make account thereof to the Wardens of the Parish Church of Bromfield aforesaid, how, and in what manner, the Rents and Profits should be bestowed, and the overplus, if any, should pay to the said Churchwardens for the time being; and they, together with the Vicar of Bromfield aforesaid, to bestow the same towards the increase of the yearly stipends appointed as aforesaid, and limited to him that should be Chaplain or Minister of the said Chapel, or otherwise as to the discretion of the Vicar of Bromfield for the time being should seem meet.

New Trustees of the said family were thereafter from time to time appointed; and the said Chapel, Alms-houses, Messuages, Lands, and Hereditaments conveyed to and vested in them, upon the same Trusts as aforesaid. And the said Chapel was kept repaired from time to time.

By an Indenture, dated the first day of October 1684, between certain persons of the name of *Foxe*, reciting that the said Chapel *had been lately re-edified*, the surviving Trustees thereof, named in the said Indenture, did enfeoff to the persons therein named, and their Heirs, the said Chapel and Premises upon the Trusts aforesaid, and according to the charitable Intention mentioned and comprised in the said Articles and Ordinances.

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By an Indenture, dated the eighth day of October 1771, made between *James Foxe*, therein described as the surviving Trustee of the said Chapel, of the one part, and the Bailiffs, Burgesses, and Commonalty of Ludlow, of the other part; reciting the death of one *Henry Foxe*, on whose death the legal Estate in the Premises descended to Infants; and that *during their Infancy and residence abroad, the said Charity became neglected, and the Chapel and Alms-houses, and Houses in Worcester, got into decay*; and that the said Houses in Worcester were let on Building Leases, at small Ground Rents; and that from such Rents the said Alms-houses were repaired, and four poor persons therein maintained. And also reciting, that the said Trusts had vested in *James Foxe*, therein described, and he was the only surviving Trustee thereof, and that there were not known to be living any persons of the name or kin of the said *Charles Foxe*, the Testator, whereby to fill up a sufficient number of Trustees of that Family for the continuing and perfecting the aforesaid Charity; and that the Bailiffs of Ludlow aforesaid had applied to the said *James Foxe* to vest the said Chapel and Alms-houses, and the said Premises at Worcester, in them and their Successors for ever, upon the aforesaid Trusts and Ordinances: And also reciting, that the said *James Foxe* had signed and delivered an account to the said Bailiffs of the receipt and application of the Rents of the said Premises, It was witnessed, *that for the continuing and perpetuating the said charitable work*, and for establishing a sufficient number of Trustees for the performance of the said Charity, the said *James Foxe* did grant and convey unto the said Bailiffs of Ludlow aforesaid, and their Successors, for ever, In Trust, and for the support of the said Alms-houses, and four poor needy

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persons, to be paid, kept, and maintained therein, from the Rents and Profits of the said Premises, according to the original Intent of the said Charity, *and for such other charitable uses and purposes set forth in the aforesaid Indentures, Articles, and Ordinances*, the said Chapel, Alms-houses, Messuages, Lands, Tenements, and Hereditaments, and the said Premises at Worcester aforesaid. And the said Bailiffs thereby acknowledged that the said *James Foxe* had deposited with them the said Indentures, Articles, Ordinances, and the several Leases therein.

The maintenance and stipend of the Minister of the said Chapel for the time being had been further, at different times, augmented and provided for by various other persons, who had granted certain endowments thereunto, payable for ever, and which consist of an Annual Payment of one Pound out of a certain Estate situate in the parish of Ludford; an Annual Payment of one Pound out of a certain Estate situate in the parish of Ashford Bowdler; the Annual sum of fourteen shillings out of a certain Leasows, called Chapel Leasows; and the Annual Sum of twelve shillings out of Three Houses situate in Durham; which said several Sums passed with the Conveyance of the said Trusts into the Hands of the said Bailiffs of Ludlow aforesaid by the said Indenture of the 8th October 1771.

Upon the execution of the said Indenture of the 8th October 1771, the said Bailiffs and Corporation of Ludlow aforesaid entered upon and took possession of the said Chapel, Alms-houses, and all other the Messuages, Lands and Premises belonging to the said Charity, and entered into the receipt of the rents and

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profits thereof, and have ever since continued to hold the said Charity Premises; but that in the year 1773 the said Corporation, without any authority, gave directions and caused the said Chapel to be pulled down and destroyed, and sold, or applied for some other buildings, all the timber and materials thereof; and they received the produce arising from such Sale, amounting to a considerable sum; but that they did not apply such produce to the purposes and upon the trusts of the said Charity: and that soon after such sale the said Corporation granted a Lease of the Site of the said Chapel, and the Chapel-yard adjoining, to a Member of the said Corporation, for a term of 99 years, at the rent of 1 *l.* 15 *s. per annum:* and since the demolition of the said Chapel the Proprietor of the said Estate in the parish of Ludford refused to pay the aforesaid annual sum of 1 *l.* on the ground, that there being no Chapel existing, the said rent-charge for the Minister could not be claimed or demanded.

During the time the said Chapel stood, many of the Parishioners of the said Parish where the Chapel was situate used to resort thereto for the purpose of attending Divine Service; and the ceremony of Baptism and Burial was frequently performed there; but since the Chapel has been pulled down, and the Site thereof, and the Yard adjoining, let as aforesaid, the said Parishioners have been deprived of the said benefit, and all opportunity of resorting thereto; and have been prevented from using the said Chapel-yard for the purpose of Burials, which is attended with great inconvenience to the said Parish, as the burying-ground belonging to the said Parish of St. Lawrence, which is the only burying-ground in the said Parish, is infinitely too

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small for the purposes of Burial in the said Parish; and the bodies of deceased persons are often taken up before they ought to be, in order to make room for the bodies of others.

The Corporation have constantly elected poor persons of the said Town of Ludlow to fill up the vacancies which have occurred in the said Alms-houses, and have not elected any poor persons from the said Parish of Bromfield (except in one instance), since the said trusts came under their management. And the Trusts of the said Charity have been in numerous other instances mismanaged and neglected. When the said Chapel was kept in repair there were an excellent Pulpit, and many good Pews therein; and a very large Congregation always attended Divine Service there; and when the same was going into decay, several of the Inhabitants of Ludlow were about to make a Subscription for the repairs thereof, which was opposed by the then Rector of Ludlow, who stated, that he should be deprived of some Easter Dues if the said Chapel was repaired, the Rector of Ludlow having a small Glebe, but chiefly depending for his Income on his Easter Dues.

At the time the said Chapel was pulled down, in the year 1773, the Bell belonging to it was removed to the Market Cross, in the Town of Ludlow, where it has ever since been and is; and the Timber of the said Chapel was either wholly, or for the most part, sold; and part of the said Timber was used in building the House of one *William Feltow*, of the said Town of Ludlow; and the Stones of the Chapel were applied in building a new Bridge over the River Corve, in the said Town; and some of the Pews were removed from the said Chapel

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to the Parish Church of the said Town, and placed in Galleries of the Church.

The Chapel-yard had many Grave-stones in it, and was used as a Burying-ground for many years; and the Chapel, when it was pulled down, might have been repaired at a small expense, the side and end Walls being of great thickness, and quite sound; and the Timbers, consisting of the beams, summers, wall-platts, and rafters of the roofs, were also sound and strong; and the decay was only in the tiling of the Roof.

The Petition stated the foregoing Facts, and further, that there is only one Church in Ludlow, which is not sufficient to contain one fourth of the Inhabitants; that two or three families use one Pew; and that the Church nearest to it is not in the same County; and that the Rents and Profits of the said Trust Estates, when the said Leases have expired, will be much more than sufficient to answer all the purposes of the Charity, but the said Corporation have not rendered any account thereof to the Vicar or Churchwardens of Bromfield aforesaid, or to any other person, and what they have received they have retained, or in some manner misapplied; and that the said Corporation have omitted and neglected to register the said Charity, and the Purposes and Trusts thereof, in manner directed by an Act of Parliament passed in the fifty-second year of the Reign of His present Majesty, intituled "An Act for the Registering and Securing of Charitable Donations," as by the said Act they were bound to do; and that the Petitioners were desirous of preserving the said Charity, and of obtaining the Directions of the Court for that

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purpose; and of having the said Chapel-yard applied, as formerly, to the purposes of Burial, and the Funds of the said Charity, and the Materials of the said Chapel, duly accounted for, and the Produce thereof accumulated for the purposes of re-building the said Chapel.

The Prayer of the Petition was, that it might be referred to one of the Masters of the Court, to inquire into the Trusts of the said Charity, and to approve a proper scheme for the due regulation and management thereof; and that the Lease of the said Chapel-yard might be ordered to be cancelled, and the said Yard applied for the purposes of Burial. And that an account might be taken of the want of repairs to the said Chapel when the same was taken down, and what sum of money would have been sufficient to repair the same, and what sum of money it would now cost to re-build the said Chapel upon the same plan and dimensions as the said old Chapel. And that the said Corporation may be ordered to account for all the Rents and Profits of the said Trust Estates received by them, or by their order, or for their use; and also for the Timber, Pews, Stones, and other Materials of the said Chapel, converted and disposed of by them. And that the amount of what shall be found due from the said Corporation, upon taking the said accounts, may be paid into the hands of the Accountant General of this Honourable Court, in Trust for the said Charity. And that if what on taking the said accounts shall be found insufficient to re-build the said Chapel, the Corporation may be ordered to pay such further Sum of Money into Court, as will be sufficient to re-build the said Chapel,

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or put the same into the condition it was at the time it was taken down. And that proper persons may be appointed Feoffees or Trustees of the said Chapel and Charity Premises; and that the said Corporation may be ordered to convey the said Premises to such new Feoffees or Trustees upon the Trusts of the said Charity; and that proper directions may be given for registering the said Charity, according to the Provisions of the said Act of Parliament. And that the said Corporation may be ordered to produce, and leave with one of the Masters of the Court, for safe custody, all the Title Deeds, Papers, and Writings in their custody or power; and upon the Oath of their Treasurer, Secretary, Town-Clerk, or Agent, relating to the said Charity Premises.

Affidavits were filed, verifying the Statements made in the Petition. On the part of the Corporation, Affidavits were adduced to show the ruinous state of the Chapel, when the same was pulled down.

Sir *Samuel Romilly*, Mr. *Bell*, and Mr. *Heald*, for the Petition:—

This is a Breach of Trust, which probably would not have been brought before the Court, but for the facility of redress given by the late Act. It was a great Breach of Trust in pulling down the Chapel, and applying it, together with the Burial Ground, to profane Uses. The Corporation took upon them the Trust created by the Will of *Foxe*. If repairs were necessary, the Parishioners were compellable to contribute (*b*).

(*b*) 2 Inst. 489.

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The Lease to one of the Corporators was also a Breach of Trust. As the Lessee is not before the Court, the Lease cannot be set aside, but the Corporation must account before the Master, and convey to new Trustees at their Own Expense.

Mr. *Hart* and Mr. *Agar*, against the Petition:—

From the year 1773, to the time of this Petition, a period of forty-two years, no complaint was made of the mismanagement of this Charity. The Chapel was ruinous, and therefore taken down. By the Common Law, ruinous Buildings are not permitted to remain, which may endanger the safety of the Subject.

The VICE-CHANCELLOR,

After stating the Will and Deeds, and the parol Evidence, observed that, The only point controverted is, as to the state of the Chapel when it was pulled down; as to which several old persons have been examined. One of the Witnesses, Mr. *Harley*, who is eighty-four years old, states, that he well remembers the Chapel so far back as the year 1745, and for many years attended Divine Service in the Chapel, several days in each week, and, that the Chapel was in every respect in good Repair, and the Congregation very numerous, and he used to sit in a Pew belonging to his own House; and that Divine Service was regularly performed in the Chapel in the year 1765, and that in the year 1771 or 1772, a Subscription was proposed for the purpose of repairing the Chapel, which might have been repaired at a small expense; and that, on the proposal of such Subscription, the Reverend Mr. *Holland* offered to perform Divine Service, *gratis*, but that the Subscription was opposed by the Rector of St. Lawrence, upon

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the ground, that if Divine Service should be again performed in the Chapel of St. Leonard's, that a Diminution of his Easter Dues would be the consequence, and that such objection prevented the Subscription taking place. The same Witness also says, that he was present when the Corporation were put into the possession of the Chapel and Chapel-yard, by *James Foxe* (the surviving Trustee of the Chapel), who particularly desired the Corporation to repair the same, and Mr. *Baugh* (the then Town-Clerk), promised that the Corporation should repair the Chapel, and that Divine Service should be performed therein as usual. He also swears as to the Removal of the Bell and the Pews. The Evidence on the other side does not deny that Divine Service was performed in the Chapel, but only speaks of its great want of Repair.

The Probability is, that at one period, the Chapel was greatly dilapidated.

No misconduct is imputable to the Corporation in respect of that part of the Charity which relates to the support of four poor persons; it appears, indeed, they advanced, in that respect, something more than they were bound to do. The great subject of complaint is, as to the Chapel and the Burial Ground.

There is no clear account of what was the nature of this Chapel. Certainly it was an ancient Chapel, and existed for some length of time antecedently to the purchase of it by *Foxe*. It had a public Cemetery belonging to it—a Communion Table—Pews in right of Houses—and there were Christenings there—circumstances which, in addition to the Rector's objection to

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repairing the Chapel, on account of a Diminution of his Easter Dues, strongly show it was a Parochial Chapel. According to *Degg* (*c*), and *Kennett* (*d*), Baptism and Sepulture, are proofs of a Parochial Chapel.

In the absence of other Evidence this must be taken to be a Parochial Chapel. Though *Foxe* and others contributed to the Stipend of the Minister, yet probably that was only an addition to his Stipend. If it was a Public Chapel, it must have been consecrated, and by that solemn Rite dedicated to the Service of God, and separated from all unhallowed uses, and could not be unconsecrated, but by Parliament.

The Corporation took upon themselves the execution of this Charity. The Chapel was out of Repair, but the Parishioners were disposed to contribute to its Repair. It could not be very much out of Repair, because six or seven years before, Divine Service had been performed in it. They, who never ought to have been made Trustees, commit, as soon as they become such, the grossest and most indecorous Breach of Trust, by violating the Burial Ground, and pulling down the Chapel, without any Authority or Sanction! There is no pretence that it was necessary for the Public Safety. The Bell is carried to the Market Place, and the Pews to the Parish Church, and the Stones of the Church are used in Repairs of a Bridge! It is an enormous Breach of Trust, and such as could not be expected in a Christian Country!

In 1772 part of the Chapel was taken down, and in 1784 its destruction was completed. On the 13th of

(*c*) ch. 12, p. 1. (*d*) Paroch. Antiq. 590, 591.

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October in that year, the Corporation demise the Site of the Chapel to *Acton*, a Member of the Corporation, for ninety-nine years, at an Annual Rent of 1 *l.* 15*s.* when it is in Evidence, that it would have let for Garden Ground at 6*l.* a year! As *Acton*, the Lessee, is not before the Court, I cannot touch that Lease, or the Premises. Whether, if steps are taken to set aside the Lease, *Acton* can justify the granting of it, remains to be seen. If he knew the circumstances under which it was granted, it is impossible he can support it. So long as that Lease remains in operation, no Order can be made in respect of Works upon the Site of the old Chapel.

It is very clear, that this Corporation must no longer remain Trustees. They must, at their own Expense, convey to new Trustees. Though I cannot now direct this Corporation to put the Chapel and Burial Ground in the state it was, I will do what I can. They must account for the Materials of the Chapel—the Pews—the Bells—and pay the value; and let an Inquiry be made, what would be the Expense of restoring the Chapel and Burial Ground.

ANONYMOUS.

11th November.

Upon an Order that a Defendant shall be released from the Fleet on paying the Costs of his Contempt, or a Tender of the same, the Warden of the Fleet must release him on an affidavit of a Tender of the Costs.

THE Defendant was a Prisoner in the Fleet for a Contempt, in not putting in his Answer. He put in his Answer, and obtained an Order for his Release, on Payment of the Costs of the Contempt, or a Tender of the same.

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The Plaintiff refused to receive the Costs of the Contempt, contending, that the Answer was insufficient. An Affidavit was made of the Tender of the Costs, and produced to the Warden of the Fleet, but he refused to release the Defendant.

A Motion was now made upon this Affidavit, of the Tender of Costs, for an Order upon the Warden of the Fleet to discharge the Defendant; and it was observed, it had been decided, that the Defendant could not be detained till the sufficiency of the Answer was determined (*a*).

The VICE-CHANCELLOR:—

A further order is unnecessary. The Order was imperative upon the Gaoler, and, upon producing to him the Affidavit of the Tender of Costs, he ought to have discharged the Defendant. If he persists in his Refusal, you must move against him in respect of his Contempt.

(*a*) Anon. 2 P. Wms. 481; Dupont *v.* Ward, 1 Dick. Boehm *v.* De Tastet, 1 Ves. & Bea. 324; Coulson *v.* Graham, ib. 331; Hill *v.* Turner, 2 Ves. & Bea. 372. By refusing the Costs of the Contempt, if the Answer proves insufficient, the Plaintiff may proceed on the old process of Contempt, as appears by the cases cited.

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11th November.

Ex parte EMMETT.

Motion on Saturday the 11th, *the last day for presenting a Petition against a Bankrupt's Certificate, that a Petition prepared, but not properly signed, might be ordered to be received on Monday the* 13th, *and considered as presented on the* 11th, *refused.*

THE time for presenting a Petition against a Bankrupt's Certificate expired this day, Saturday the 11th. A Creditor, who lived in the Country, had sent up a Petition against the Certificate, on the ground of Fraud in obtaining it, together with an Affidavit in support of it; but the Petition was not properly signed.

Mr. *West* moved, that the Petition may be received on Monday the 13th, and considered as if lodged on the 11th.

Sir *Samuel Romilly*, [*Amicus Curiæ*] said, the Practice was against allowing such a Motion.

The VICE-CHANCELLOR :—

The Court is very strict on these occasions. The Creditor ought to have been prepared before with a proper Petition.

Motion refused.

Note.—Mr. *West* afterwards made the Motion before The Lord CHANCELLOR, who refused to grant it, unless a Precedent could be adduced. None was found.

Ex parte HENSON in the matter of ELIZABETH WATSON, THOMAS NELSON, GEORGE NELSON, and GEORGE COOKE, Bankrupts.

11th *and* 15th November.

Charge by a Bill Broker in the Country of 10 *s. per cent. Commission, in respect of a Bill payable in London, not usurious.*

IN and previously to the Month of April 1812, *Henson* carried on the Trade of a Bill-broker, in the Town of Nottingham, and had dealings with *Thomas Nelson*, of the same place, who carried on the Business of a Hosier, in Partnership with the other Bankrupts *Elizabeth Watson*, *George Nelson*, and *George Cooke*, under the firm of *J.* and *T. Watson*, *Nelson* and Co. in Love Lane, in the City of London.

In the said month of April *Henson* lent to the said *Thomas Nelson*, a Bill of Exchange for the Sum of 849 *l.* dated the 15th February 1812, and payable six months after date, and which Bill of Exchange the said *Thomas Nelson* procured to be discounted, and when due, the same was regularly paid.

In the month of May 1812 the said *Thomas Nelson*, in part payment of the said Debt, delivered to *Henson* a Bill of Exchange for the sum of 500 *l.* drawn by him upon his said Partners in London, the said Messrs. *J.* and *T. Watson*, *Nelsons* and Company, and accepted by them, payable at their House in Love Lane in the City of London aforesaid, six months after date, to Messrs. *John Heath* and Son, or order, who indorsed the same to *Henson*, for a valuable and full consideration.

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At the time of receiving the said last-mentioned Bill, *Henson* transacted business with Messrs. *Stephen Barber* and Sons, of London, Bankers, whom he employed as his Agents, and *Henson* at that time apprehended, and calculated, that it would be necessary for him to remit or transmit the said last-mentioned Bill to them, in order that they might present it, and receive the money due thereon when at maturity; and he likewise expected that agreeably to similar dealings with them they would charge him five shillings *per cent.* Commission, beside Postages, and he therefore claimed to have ten shillings *per cent.* Commission allowed him by the said *Thomas Nelson,* upon the said Bill of Exchange.

Before the said last-mentioned Bill was at maturity, *Henson* closed all his accounts with the said Messrs. *Barber* and Sons, and as he did not afterwards open any other account with any other Banker or Agent in London, he negociated the said Bill at Nottingham, with a Mr. *John Hawkesly,* then of the said Town, but since deceased, and to whom he upon that occasion paid or allowed so much money as he would have expended and been put unto in case his connection with Messrs. *Barber* and Sons had continued; and they had presented and received the amount of the said Bill for his use.

Thomas Nelson agreed thereto, and such Commission was allowed to *Henson* accordingly.

The Bill of Exchange when at maturity was accordingly duly presented for payment, to the Firm of *J.* and *T. Watson, Nelson* and Co., but the same was dishonored, and remained unpaid at the time of the Bankruptcy of that Firm.

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On the 12th day of January 1813 a Commission of Bankruptcy issued against *Elizabeth Mason, Thomas Nelson, George Nelson,* and *George Cooke,* and they were declared Bankrupts under the same; and Assignees were chosen.

Henson applied to the Commissioners under the Commission, and offered to prove the amount of the Bill of Exchange for 500*l.*, accepted by the Bankrupts, and remaining due and unpaid at the time of their Bankruptcy, but the Assignees resisted such proof, and the Commissioners rejected the same, upon the ground, that the allowance of ten shillings *per cent.* Commission upon the Bill, was usurious.

Since the application made by *Henson* to the said Commissioners to receive his proof of the Bill of Exchange, he received from *Heath* and Son a Dividend or Composition of ten shillings in the Pound, upon the said sum of 500*l.*, so that the sum of 250*l.* Principal Money only remained due and owing to him thereon.

The Petition, after stating these facts, which were supported by Affidavit, Prayed, That the Petitioner might be at liberty to prove the said sum of 250*l.* as a Debt under the Commission against *Watson* and Co. and that the Commissioners might be ordered to admit such Proof, and that the Petitioner might be paid Dividends thereon *pari passu* with the other Creditors.

Mr. *Cooke,* for the Petition:—

A Country Banker may take a Discount upon a Bill, and a Commission. A Bill-broker must be considered

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on the same footing as a Country Banker. The question is, whether the charge of 10*s.* was a colourable charge, or a *bona fide* transaction. Bankers vary in their charges for Commission,—some, charge more than 10*s.* and some less. He referred to *Aurioll* v. *Mills* (*a*); *Hammond* v. *Yea* (*b*); *Masterman* v. *Cowie* (*c*); *Baynes* v. *Fry* (*d*); and *Ex parte Jones* (*e*).

Sir *Samuel Romilly, contra*:—

The taking of this 10*s.* Commission is usurious. He exacts 10*s.* *per cent.*, though his own Banker only charged him 5*s.* *per cent.*; the Security is then taken for forbearance of a Debt, at more than 5 *per cent.* and is therefore usurious.

The VICE-CHANCELLOR:—

Many cases have decided, that if a Sum claimed for Commission is *bona fide* claimed, and not done colourably, with a view to avoid the Statute, it is not usurious. The case to the contrary, of *Benson* v. *Parry* (*f*), determined at *Nisi Prius* by Chief Justice *Eyre*, has been long over-ruled. If it is a Country transaction, and the Commission usual, and not unreasonable, it is not usurious. In *Baynes* v. *Fry* (*g*), and in *Ex parte Jones* (*h*), a larger Commission that than here claimed was allowed. In the late case of *Kensingtons*, in the King's Bench, the Jury did not consider the Commission charged as usurious, and the Court would not grant a new Trial. That was a Town transaction, but if it had

(*a*) 2 T. R. 52.
(*b*) 1 Bos. & Pull. 151.
(*c*) 3 Campb. 488.
(*d*) 15 Ves. 120.
(*e*) 17 Ves. 332.
(*f*) See 15 Ves. 120, where that case is alluded to.
(*g*) 15 Ves. 120.
(*h*) 17 Ves. 332.

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been a Country transaction there could have been no doubt.

The Bill, in the present case, was delivered to the Petitioner in part Payment of an antecedent Debt, and not in consequence of any contract for the loan of Money. The Bill was never paid by *Nelson*, nor the 10*s*. Commission; he only agreed to pay it. There was no loan of Money, nor any thing done colourably, and as a veil of usury; and therefore the prayer of this Petition must be granted.

Petition granted.

MARQUIS OF LANSDOWNE, and others, *v.* MARCHIONESS DOWAGER OF LANSDOWNE.

7th *and* 17th November.

Demurrer to a Bill against Representative of deceased Tenant for Life for an Account of Equitable Waste committed by him, and for Relief, over-ruled.

BY Indentures of Lease and Release and Appointment, dated respectively the 16th and 17th days of May 1794, the Release and Appointment being made between *William* then Marquis of *Lansdowne*, of the first part; the Right Honourable *John Henry Petty* since Marquis of *Lansdowne*, then commonly called Earl of *Wycombe*, the eldest son and heir apparent of said *William* Marquis of *Lansdowne*, of the second part; *John Cross*, Gentleman, of the third part; *John Eardley Wilmot*, Esquire, and Sir *Francis Baring*, Bart. of the fourth part; and the Right Honourable *Henry Richard* Lord *Holland*, and *Benjamin Vaughan*,

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Esquire, of the fifth part; IT was Witnessed, That in pursuance of the several Agreements therein recited, and for other the considerations therein mentioned, he, said *William*, then Marquis of *Lansdowne*, with the consent of said *John Henry* late Marquis of *Lansdowne*, did grant, &c. unto the said *John Wilmot* and Sir *Francis Baring*, their Heirs and Assigns, divers Manors, &c. therein particularly described; and all that capital Messuage or Mansion-house, called *Lansdowne House*, and other Lands therein particularly described: And also all that the Manor, Park, or late Park, called or known by the name of *Bowood Park*, and the Ground and Soil thereof, and the capital Messuage or Mansion-house thereon erected and built, and the Buildings thereto belonging: And also divers other Manors, Messuages, Farms, Lands, Tenements, and Hereditaments, situate, &c. in the County of Wilts, therein particularly mentioned and described, with the Rights, Privileges, &c. To have and to hold said Manors, Messuages, Farms, Lands, Tenements, and Hereditaments, &c. unto said *John Wilmot* and Sir *Francis Baring*, their Heirs and Assigns, subject as to certain parts of the said Hereditaments respectively comprised in certain Mortgages therein mentioned, to the Mortgages affecting the same, To the Uses, upon the Trusts, and to and for the Intents and Purposes therein and after mentioned, (that is to say) To the Use of said *Henry Richard* Lord *Holland*, and *Benjamin Vaughan*, their Executors, Administrators, and Assigns, for and during and unto the full end and term of five hundred years, to commence and be computed from the day next before the day of the date of said Indenture of Release of the 17th of May 1794, and thence next ensuing and fully to be complete and ended, without Impeach-

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ment of or for any manner of Waste, Upon the Trusts, and for the Intents and Purposes thereinafter mentioned, declared, or expressed concerning the same, and from and after the end, expiration, or sooner determination of said term of five hundred years; and in the mean time subject thereto and to the Trusts thereof, to the use of said *William* Marquis of *Lansdowne*, and his assigns, for and during the term of his natural life, but subject to Impeachment for Waste, except as therein mentioned; with remainder to the Use of the said *John Wilmot* and Sir *Francis Baring*, and their Heirs, for and during the life of said *William* Marquis of *Lansdowne*, upon Trust, to preserve the contingent remainders, but to permit and suffer said *William* Marquis of *Lansdowne*, and his Assigns, to have, receive, and take the Rents, Issues, and Profits, to his and their own use during his life; and from and after his decease, to the use of said *John Henry* late Marquis of *Lansdowne*, and his Assigns, for and during the term of his natural life, without Impeachment of Waste, with remainder to the use of said *John Wilmot* and Sir *Francis Baring*, and their Heirs, for and during the natural life of said *John Henry* late Marquis of *Lansdowne*, Upon Trust, to preserve the contingent remainders from being defeated or destroyed, but to permit and suffer said *John Henry* late Marquis of *Lansdowne*, and his Assigns, to receive and take the Rents, Issues, and Profits to his and their own use, during the term of his life; and from and immediately after the decease of said *John Henry* late Marquis of *Lansdowne*, to the use of said *Henry Richard* Lord *Holland*, and *Benjamin Vaughan*, their Executors, Administrators and Assigns, for and during the full end and term of eight hundred years, to commence and be computed from the decease of the

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survivor of them said *William* Marquis of *Lansdowne*, and *John Henry* late Marquis of *Lansdowne*, without Impeachment of Waste, upon the Trusts thereinafter mentioned, and subject thereto, To the use of the first and other sons of the body of said *John Henry* late Marquis of *Lansdowne*, severally and successively in Tail Male, and for default of such Issue to the use of Plaintiff, *Henry* Marquis of *Lansdowne*, and his Assigns, for his life, without Impeachment of Waste; with Remainder to the use of said *John Wilmot* and Sir *Francis Baring*, and their Heirs, during the life of Plaintiff, *Henry* now Marquis of *Lansdowne*, upon Trust, to preserve contingent remainders, but upon Trust to permit and suffer Plaintiff, *Henry*, now Marquis of *Lansdowne*, and his Assigns, to receive and take the Rents, Issues, and Profits for his life, for his and their own use and benefit; and from and immediately after the decease of *Henry* Marquis of *Lansdowne*, To the use of the first and other Sons of the body of said *Henry* Marquis of *Lansdowne*, severally and successively in Tail Male, with divers Remainders over; and the Trusts of said Terms of five hundred years, and eight hundred years, were declared to be to raise certain sums of money; and there was contained in said Indenture of Release and Appointment, a Proviso, empowering the Tenant for Life in Possession of said Premises, by virtue of the above-mentioned Limitations, in case of the death of said *John Wilmot* and Sir *Francis Baring*, or either of them, on resignation of said Trusts by them, or either of them, to appoint other Trustees, or another Trustee in lieu of them, or of either of them.

William Marquis of *Lansdowne*, died the 7th of

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May 1805, and thereupon said *John Henry* Marquis of *Lansdowne* came into Possession, or into the Receipts of the Rents and Profits of the aforesaid Hereditaments, by virtue of the Limitations aforesaid; and he continued in such Possession or Receipt during his life: And said *John Henry* Marquis of *Lansdowne*, at different times since the death of his said late Father, that is to say, during the winter of the years 1805, 1806, 1807, and 1808, cut down, or cause to be cut down, large quantities of Timber Trees, and other ornamental Trees, standing and growing near said capital Mansion-house at *Bowood*; and he also cut down divers young Trees and Saplings, which had been planted before the death of said *William* late Marquis of *Lansdowne*, and were growing for Timber upon the Lands of which said *John Henry* Marquis of *Lansdowne* was Tenant for Life, as aforesaid; and he sold and disposed of a large part thereof for large sums of Money; and same were received by him, or by his orders, or for his use; and particularly he cut down, or caused to be cut down, after the death of said *William* Marquis of *Lansdowne*, a large Avenue of Elm and Ash Trees, leading towards and up to said Mansion-house at *Bowood*, on the North-East Front thereof, and all the Trees on the Pleasure Ground and Lawn thereto belonging; and he also, since the death of said *William* late Marquis of *Lansdowne*, cut down, and caused to be cut down, divers Oak, Ash, and other *Tellers* and Saplings, standing and growing upon other parts of said Premises, of which he was Tenant for Life as aforesaid; and same were standing and growing for Timber; and same were in a thriving and improving condition; and they would have been good Timber Trees if they had been permitted to stand and grow; but same were

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so small as not to be measured as Timber according to the usage of Timber-merchants, and same were not fit to be cut down.

In consequence of such Waste, said *John Eardley Wilmot*, and Sir *Francis Baring*, in February 1809, filed their Bill against said *John Henry* Marquis of *Lansdowne*, and the Plaintiff, *Henry* Marquis of *Lansdowne*, by his then name of Lord *Henry Petty*, stating the foregoing Facts, and Praying, That an account might be taken by and under the direction of the Court, of the ornamental Trees, young Trees, and Saplings, so improperly cut down by said *John Henry* Marquis of *Lansdowne*, and of the value thereof: And that said *John Henry* Marquis of *Lansdowne* might be decreed to account and answer for the value thereof, or for the monies which had been received by him, or by his orders, or for his use, on account thereof; and to pay to the Plaintiffs in such Bill, or to the Accountant General of the Court, what should be found due from him on taking such account, for the benefit of the person who might become entitled thereto: And that the said *John Henry* Marquis of *Lansdowne*, his Agents, Servants, and Workmen, might be restrained from cutting any Timber or other Trees growing upon the said Premises, which were growing there for the shelter of the Mansion-houses, or for their ornament, or which were growing in Lines, Walks, or Vistas for the Ornament of the Lawns and Pleasure Grounds, and from cutting down Saplings and Trees not fit for the purposes of Timber, and from cutting down Timber Trees at unseasonable times, and in an unhusbandlike manner; And for general relief.

Upon the Bill being filed, together with Affidavits

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in support of the same, an Injunction was granted by the Court, according to the prayer of said Bill. *John Henry* Marquis of *Lansdowne* afterwards put in his Answer to the Bill, and counter Affidavits were filed by *John Henry* Marquis of *Lansdowne*; and an Application was made to dissolve the Injunction; but before any Order was thereupon made, or any further proceedings were had in the Suit, and on or about the 14th of November 1809, said *John Henry* Marquis of *Lansdowne* died, and thereby the Suit abated.

The present Supplemental Bill was filed after his death, stating the former proceedings, and that *John Henry* Marquis of *Lansdowne* died without Issue; and upon his death the Plaintiff, *Henry* Marquis of *Lansdowne*, became entitled as Tenant for Life in Possession to all said Manors, &c. subject to the Mortgages affecting same; and that *John Henry* Marquis of *Lansdowne* duly made and published his last Will and Testament in Writing, bearing date the 12th of April 1808, and thereby appointed certain persons his Executors, who renounced Probate thereof; and that Administration of his personal Estate and Effects, with his Will annexed, was granted to the Defendant by the Prerogative Court of the Archbishop of Canterbury; and also, that after the Issuing and Service of said Injunction, said *John Henry* Marquis of *Lansdowne* cut down or caused to be cut down divers other Trees, which were standing and growing on the Pleasure Grounds adjoining or belonging to said Mansion-house at *Bowood*, and same had been planted, and carefully preserved for ornament before the death of said *William* late Marquis of *Lansdowne*; and same were within view of said Mansion-house, or were in the immediate vicinity thereof; and the same were in a growing and thriving state, and unfit

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to be cut down; and that said *John Henry* Marquis of *Lansdowne* caused part of said last-mentioned Trees to be sold, and the money produced by the sale thereof was received by the said *John Henry* Marquis of *Lansdowne*, or by his orders, or for his use, or the same had, since his death, been received by said Marchioness Dowager of *Lansdowne*, or by her orders, or for her use; and that the remainder of such last-mentioned Trees, and also divers of the trees and saplings so cut down as aforesaid, before the issuing of said Injunction, were then lying upon the ground at *Bowood*; and insisted that the monies received by said *John Henry* Marquis of *Lansdowne*, or by his order, or for his use, from the sale of said Trees, ought to be repaid out of his assets. The Bill also stated, that *John Henry* Marquis of *Lansdowne* did not during his life repair or keep in repair said Mansion-house called *Lansdowne House*, or said Mansion-house at *Bowood*, or the buildings belonging to said Mansion-houses, but he suffered the same to become very much out of repair, and at the time of the death of the said *William* late Marquis of *Lansdowne* the same were in a state of complete repair, but at the time of the death of said *John Henry* Marquis of *Lansdowne* were greatly dilapidated and out of repair; and that the Plaintiff, *Henry* Marquis of *Lansdowne*, was obliged to lay out large sums of money in the necessary repairs of said Mansion-houses and buildings, and the Plaintiff, *Henry* Marquis of *Lansdowne*, insisted that the monies which he had so laid out ought to be repaid him out of the assets of said *John Henry* Marquis of *Lansdowne*. The Bill further stated that, at the death of said *John Henry* Marquis of *Lansdowne* the greatest part of the hereditaments so limited as aforesaid by said Indentures of Lease and Release, were held

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by Tenants under subsisting Leases that had been previously granted by virtue of leasing powers contained in said Indenture of Release, or in former family Settlements, or otherwise; and that Plaintiff, *Henry* Marquis of *Lansdowne*, hath since the death of said *John Henry* Marquis of *Lansdowne* received the rents and profits of said Premises, from the half-yearly rent-day next preceding the death of said *John Henry* Marquis of *Lansdowne*; and the Plaintiff, *Henry* Marquis of *Lansdowne*, insisted that he was so entitled to receive the same to his own use; but Plaintiffs stated, that divers parts of said Hereditaments were at the death of said *John Henry* Marquis of *Lansdowne* subject to divers Mortgages; and that said *John Henry* Marquis of *Lansdowne* was bound to keep down the Interest upon said Mortgages, but he suffered the Interest thereon to run greatly in arrear during his life; and at the time of the death of said *John Henry* Marquis of *Lansdowne* the sum of 2,000*l.* and upwards was due for Interest upon said Mortgages, which had become in arrear thereon since the death of said *William* Marquis of *Lansdowne*; and that the Plaintiff, *Henry* Marquis of *Lansdowne*, had, since the death of said *John Henry* Marquis of *Lansdowne*, paid said Sum of 2,000*l.* and upwards, in satisfaction of said arrears of Interest; and the Plaintiff, *Henry* Marquis of *Lansdowne*, insisted that what he had so paid ought to be repaid to him out of the Assets of said *John Henry* Marquis of *Lansdowne*. The Bill further stated, that the Plaintiff, *Henry* Marquis of *Lansdowne*, had lately married, and that he hath Issue, Plaintiff *William Thomas Petty*, commonly called Earl of *Wycombe*, his eldest Son; and Plaintiff, *William Thomas Petty*, commonly called Earl of *Wycombe*, is entitled to the first estate of inheritance in said Premises, subject

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to the said Mortgages. The Bill further stated, that said Sir *Francis Baring* died on or about the 11th September 1810; and that by Indentures of Lease and Release, bearing date respectively the 19th and 20th of November 1810, the Release being made between Plaintiff, *Henry* Marquis of *Lansdowne* of 1st part; said *John Eardley Wilmot* of 2d part; Plaintiff, Sir *Thomas Baring*, of the 3d part; and *Henry Smith*, of Drapers Hall, in the City of London, Esq., of the 4th part, Plaintiff Sir *Thomas Baring*, under and by virtue of the power contained in the said Indenture of Release and Appointment, of the 17th of May 1794, was appointed a Trustee for the purposes of said Indenture of Release and Appointment, in the room of said Sir *Francis Baring*; and that said *John Eardley Wilmot* was afterwards desirous to be discharged from the trusts reposed in him by said Indenture of Release and Appointment; and that by Indentures of Lease and Release, bearing date respectively the 2d and 3d days of March 1814, the Release being made between *Henry* Marquis of *Lansdowne* of 1st part; said *John Eardley Wilmot*, and Plaintiff, Sir *Thomas Baring*, of 2d part; and Plaintiffs, *James Abercromby*, and Sir *Thomas Baring* of the 3d part; and said *Henry Smith* of 4th part, the Plaintiff, *James Abercromby*, under and by virtue of said power contained in said Indenture of Release and Appointment of the 17th May 1794, was appointed a Trustee for the purposes of said Indenture of Release and Appointment, in the room of said *John Eardley Wilmot*. The Bill then stated that Defendant, *Maria Arabella* Dowager Marchioness of *Lansdowne*, hath, by virtue of said Administration, possessed and received the personal Estate and Effects of said *John Henry* Marquis of *Lansdowne*, to a great amount, and more than sufficient to answer and

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satisfy, all his just debts, and funeral and testamentary expenses, including what is due from his estate in respect of the several matters aforesaid. And prayed, that Defendant might answer the premises; and that said suit and proceedings so abated as aforesaid might be revived, &c.; and that the Account prayed by said original Bill may be taken; and that an account may be taken, by and under the direction of the Court, of all the ornamental trees so improperly cut down as aforesaid by said *John Henry* Marquis of *Lansdowne*, or by his orders, between the issuing of said Injunction and the death of the said *John Henry* Marquis of *Lansdowne*; and that the value of such part thereof, as was sold by *John Henry* Marquis of *Lansdowne* may be ascertained, or that an account may be taken of the monies which were received by him, or by his orders, or for his use, in respect thereof. And that an account may in like manner be taken of the dilapidations permitted by said *John Henry* Marquis of *Lansdowne* in and about said Mansion-house and Buildings at the time of his death, and of the sums of money that were necessarily paid and expended by Plaintiff, *Henry* Marquis of *Lansdowne*, in repairing said Mansion-houses in consequence of said dilapidations; and that an account might in like manner be taken of the Arrears of Interest due upon said Mortgages up to the day of the death of the said *Henry* Marquis of *Lansdowne*, and of all the sums of money paid by Plaintiff, *Henry* Marquis of *Lansdowne*, in discharge of said arrears: And that said Defendants may be decreed to pay what should be found due upon taking the aforesaid accounts; and that in case said Defendants shall not admit Assets of said *John Henry* Marquis of *Lansdowne* sufficient to answer what shall be found due from his Estate in respect of

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the matters aforesaid, then that an account may be taken of all the personal Estate and Effects of said *John Henry* Marquis of *Lansdowne* received by her, or by her order, or for her use, or which without her wilful default might have been so received; and that the same may be applied in a due course of administration; and that thereout the several sums which shall be found due upon taking the account aforesaid, may be paid; and that what should be found due in respect of said Repairs, and Interest of Mortgages, might be paid to Plaintiff, *Henry* Marquis of *Lansdowne*; and that what shall be found due in respect of said Timber and other Trees, might be paid into Court, and be laid out for the benefit of the Plaintiffs, *Henry* Marquis of *Lansdowne*, and *William Thomas Petty* (commonly called Earl of *Wycombe*), according to their interests therein: and that an account might also be taken of all sums of money received by said Defendant, or by her order, or for her use, in respect of the sale of any of said Timber or other Trees; and that she may be decreed personally to pay into Court what shall be found due from her, upon taking that account, and that same may in like manner be laid out for the benefit of the Plaintiffs, *Henry* Marquis of *Lansdowne* and *William Thomas Petty* (commonly called Earl of *Wycombe*): and that proper directions may be given for the sale of said Timber and other Trees so cut down as aforesaid, and then lying on the ground; and for the disposal of the monies to arise from the sale thereof.

To this Bill the Defendant put in the following Demurrer:

"Defendant by Protestation, &c. to so much and such part of said Bill as seeks any discovery from or

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against this Defendant, whether *John Henry late Marquis of Lansdowne* did not at different times since the death of his Father, (that is to say,) during the winters of the years 1805, 1806, 1807, 1808, or any, and which of them, or when in particular, cut down, or cause to be cut down, large, and what, quantities of Timber Trees and other, and what, ornamental trees standing and growing near the capital Mansion-house at *Bowood* in said Bill mentioned; and whether he did not also cut down divers, and what, young trees and saplings which had been planted before the death of *William* late *Marquis of Lansdowne*, and were growing for Timber upon Lands in said Bill mentioned, or how otherwise; and whether he did not sell and dispose of large, and what, part thereof for large and what, sums of money; and whether same were not received by him, or by his orders, or for his use; and whether particularly he did not cut down, or cause to be cut down, after the death of said *William Marquis of Lansdowne*, a large Avenue of Elm and Ash Trees leading towards and up to said Mansion-house at *Bowood*, on the North-east front thereof, and all or any, and which, of the Trees on the Pleasure Ground and Lawn thereto belonging, or otherwise; and whether he did not also, since the death of said *William* late *Marquis of Lansdowne*, and when, cut down, or whether he did not cause to be cut down, divers, and what, Oak, Ash, and other and what, Tellers and Saplings standing and growing upon some and what parts of said premises; and whether the same, or some, and which of them, were not standing, and growing for Timber; and whether same were not in a thriving and improving condition; and whether they would not have been good Timber Trees if they had been permitted to stand and grow; and whether same, or some

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and which of them, were not so small as not to be measured as Timber, according to the usage of Timber-merchants, or how otherwise; and whether, after the Issuing and Service of the Injunction in said Bill mentioned, and whether said *John Henry Marquis of Lansdowne* did not cut down, or cause to be cut down, divers other and what Trees, which were standing and growing on the Pleasure Grounds adjoining to said Mansion-house at *Bowood*; and whether same had not been planted and carefully preserved for Ornament before the death of said *William* late *Marquis of Lansdowne*: and whether same were not within view of said Mansion-house, or whether they were not in the immediate vicinity thereof, or how otherwise; and whether same were not in a growing and thriving state; and whether said *John Henry Marquis of Lansdowne* did not cause some, and what part, of said last-mentioned Trees to be sold; and whether the money produced by the Sale thereof was not received by said *John Henry Marquis of Lansdowne*, or by his orders, or for his use; or whether same hath not, since his death, been received by Defendant, or by her orders, or for her use; and whether said *John Henry Marquis of Lansdowne* ever, and when during his life, repaired, or kept in repair, the Mansion-house in said Bill called *Lansdowne House*, or said Mansion-house at *Bowood*, or either, or which of them, or any and which of the Buildings belonging to said Mansion-houses, or either and which of them; and whether he did not suffer same to become very much out of repair: And also, as to so much of said Bill as prays that an account may be taken, by and under the direction of the Court, of all the Ornamental Trees in said Bill alleged to have been improperly cut down by said *John Henry Marquis of Lansdowne*, or by his

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orders, between the issuing of said Injunction and the death of said *John Henry Marquis of Lansdowne*; and that the value of such part thereof as was sold by said *John Henry Marquis of Lansdowne* may be ascertained; or that an account may be taken of the monies which were received by him, or by his orders, or for his use, in respect thereof; and that an account may in like manner be taken of the dilapidations in Bill alleged to have been permitted by said *John Henry Marquis of Lansdowne,* in and about said Mansion-houses and Buildings at the time of his death; and that this Defendant may be decreed to pay what shall be found due upon taking the aforesaid Accounts: And that, in case this Defendant shall not admit Assets of said *John Henry Marquis of Lansdowne* sufficient to answer what shall be found due from his Estate in respect of the matters aforesaid, then that an account may be taken of all the personal Estate and Effects of said *John Henry Marquis of Lansdowne* received by this Defendant, or by her order, or for her use, or which, without her wilful default, might have been so received; and that same may be applied in a due course of administration; and that thereout the several sums which shall be found due upon taking the Accounts aforesaid, may be paid; and that what shall be found due in respect of the Repairs may be paid to said Plaintiff, *Henry Marquis of Lansdowne;* and what shall be found due in respect of said Timber and other Trees, may be paid into this Honourable Court, and be laid out for the benefit of said Plaintiff, *Henry Marquis of Lansdowne,* and *William Thomas Petty,* commonly called Earl of *Wycombe,* according to their Interest therein; and that an account may also be taken of all sums of money received by this Defendant, or by her order, or

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for her use, in respect of the Sale of any of said Timber or other Trees; and that she may be decreed personally to pay into this Court what shall be found due from her upon taking that account; and that same may in like manner be laid out for the benefit of said Plaintiffs, *Henry* Marquis of *Lansdowne* and *William Thomas Petty*, commonly called Earl of *Wycombe*—Doth Demur, and for cause of Demurrer, Showeth, That said Plaintiffs have not by their said Bill made such a Case as entitles them, in a Court of Equity, to any discovery or relief from or against this Defendant touching said matters, or any of them: Wherefore, and for divers good causes of Demurrer appearing in said Bill, Defendant doth demur to such part of said Bill as aforesaid; and Defendant prays the Judgment of this Court, whether she shall be compelled to make any other answer to such part of said Bill as is so demurred unto."

An *Answer* to other parts of the Bill accompanied the Demurrer.

Mr. *Leach*, and Mr. *Heald*, for the Demurrer:—

The principal question raised by the Demurrer to this Supplemental Bill, is, Whether the Representatives of the late Marquis of *Lansdowne* are bound to make good, out of his Assets, the claims made by the Plaintiffs in respect of Equitable Waste committed by the Marquis in his life-time, subsequent to the issuing of an Injunction to restrain him from committing such Waste?

It is a Rule at Law and in Equity, that a personal

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wrong dies with the party. In *Jesus Coll.* v. *Bloom* (*a*), Lord *Hardwicke* was of opinion, he ought not to entertain a Bill for a satisfaction for Waste after the Estate of the Tenant that cut down Timber was determined by Assignment, *or otherwise*; and he expressly states, that an account in respect of Waste is only given when a Bill is filed for an Injunction, and Waste has already been committed. The Relief given in *Pulteney* v. *Warren* (*b*), was grounded on the particular circumstances of that case; and the *Lord Chancellor* (*c*) there recognizes the doctrine of Lord *Hardwicke*, that a Bill does not lie for an account of Waste, where there is not a ground for an Injunction to restrain Waste (*d*).

The Dilapidations of *Lansdowne House* cannot be the subject of an Account after the death of the Marquis. The case of an Incumbent is an excepted case. In Lord *Castlemain* v. Lord *Craven* (*e*), it was held, that the Court never interposes in cases of *permissive Waste*. Another ground of Demurrer is, that the Supplemental Bill interrogates to matters interrogated to in the Original Bill, and answered by the Defendant to that Bill.

Sir *Samuel Romilly*, Mr. *Bell*, and Mr. *Shadwell*, against the Demurrer:—

In *Garth* v. *Cotton*, the Judgment in which case is given in *Dickens* (*f*), he states the grounds on

(*a*) 3 Atk. 262. See also what Lord *Hardwicke* says in Smith *v.* Cooke, 3 Atk. 381.

(*b*) 6 Ves. 73.

(*c*) Lord Eldon.

(*d*) 6 Ves. p. 89.

(*e*) 22 Vin. Abr. 523. S. C. 2 Eq. Cas. Abr. 758-9.

(*f*) 1 Dick. p. 183. S. C. 3 Atk. 751, & 1 Ves. 524, 546.

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which he decided *Jesus College* v. *Bloom*, and says, "It is true, that the general run of the cases is of Bills for an Injunction, because that is a preventive Suit, and the most remedial to the Party; but that affords no conclusive argument, that a Bill for such an Account cannot be maintained without praying an Injunction (*g*)." In *Lee* v. *Alston* (*h*), relief was given, though no Injunction prayed. Supposing it were true, that a Bill will not lie for an account of Waste, unless where an Injunction is prayed; yet here, by the original Bill, an Account and an Injunction was prayed; and if the late Marquis were alive, the Court by its Decree would have obliged him to account, not only for the Waste committed previous to the Injunction, but also in respect of the Waste committed afterwards, in breach of the Injunction, upon the same principle upon which the Court acts in Tithe Cases, where the account is carried on to the time of the Decree (*i*). It would be monstrous to say, that though a Party shall account for Waste committed before the Injunction, he shall not account for Waste done in breach of the Injunction. In *Bishop of Winchester* v. *Knight* (*k*), the *Chancellor* says, "It would be a reproach to Equity to say, where a man has taken my Property, as my Ore *or Timber*, and disposed of it in his life-time, and dies, that in this case

(*g*) 1 Dick. p. 211.

(*h*) 1 Bro. C. C. 194.

(*i*) In some cases, an Account of Tithes has been given, up to the time of the *Decree* [2 Atk. 136. Carleton *v.* Brightwell, 2 P. Wms. 463]; in others, to the time of the *Master's Report* [2 Atk. 137]; and in another case, it is said, an Account will be given "*as long as the Suit is depending between the Parties.* Bell *v.* Read, 3 Atk. 1.

(*k*) 1 P. Wms. 407.

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I must be without remedy." It may be considered as a general Rule, that where a Bill would lie against a Party when alive, it lies against his Representatives after his death; and in such cases, the Rule "*Actio personalis moritur cum personâ*" does not apply (*l*). From *Hambly* v. *Trott* (*m*), it is clear, that in a case of legal Waste the Representatives are liable, and the Maxim alluded to does not avail; and in analogy to the doctrine at Law, a Court of Equity will make the Representatives account for equitable Waste, there being no remedy at Law.

As to the objection that the Supplemental Bill contains Interrogatories as to matters inquired of by the former Bill, and answered, it must be admitted, that these Defendants have a right to insist on grounds of defence to the original Bill, not made use of by the late Marquis; so, the Plaintiffs on the other hand, may interrogate as to matters before inquired of by the original Bill; especially where, as in the present case, the Defendant died so soon after he had put in his Answer, that there was not time to take exceptions.

With regard to the Dilapidations, the Court will either order the House to be repaired, as in *Vane* v. Lord *Barnard* (*m*), or give the Plaintiffs a compensation. Supposing, however, this part of the Bill cannot be sustained, yet as the Demurrer extends not only to this part of the Bill, but also to the account of Waste committed after the Injunction granted, if it is bad as to the latter, it is bad as to the former; for a

(*l*) See what Lord *Hardwicke* says, 1 Dick. 215.

(*m*) 2 Vern. 738. S. C. Prec. Ch. 454.

Demurrer cannot be good in part, and bad in part; but if not altogether good, it must be over-ruled. Where part only of a Bill is demurrable, the Demurrer must be confined to that part; and if too general, it is bad (*n*).

Mr. *Leach*, in Reply:—

This is a case involving points of great importance. It would be to legislate in a Court of Equity, if the acknowledged maxim of the Law, *Actio personalis moritur cum personâ*, is here to be overturned. *Garth* v. *Cotton* was a case of Fraud, and on that ground relief was given. *Bishop of Winchester* v. *Knight* was a case as to Ore dug, which is a sort of Trade, and consideration was had there, of the tenure of the Estate; the digging of the ore, being by one who held customary lands of the Bishop, was considered as a breach of Trust.

If the late Marquis had been Tenant for Life, impeachable for Waste, and legal Waste had been committed by him, no Action could have been sustained against his Representatives, because there was no person *in esse*, or, at least, appeared, who had an Estate of Inheritance: so here, when this equitable Waste was committed, there was no Owner of the Inheritance *in esse*, Lord *Wycombe* being born since; and yet it is said, as to this Equitable Waste, the Representatives of the Marquis are liable; though had it been a case of legal Waste, they would not have been liable. The doctrine in *Hambly* and *Trott* was not new; it was agreeable to the old Authorities. In the case there put, the Action against the Representatives was held

(*n*) See as to this, Ld. Devonshire *v.* Newenham, Redesd. Tr. Pl. 174; and 2 Sch. & Lefr. 207.

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to lie. There, the Waste might, by Agreement, have been made good, but here, there were no Parties who could affirm the Waste—it was a wrong, incapable of being made right. The Infant Tenant in Tail was not born when this Waste was committed, and yet now claims a compensation as if he had been owner of the Inheritance when the Waste was committed. It is said, we have admitted that the Representatives of the late Marquis are compellable to account for the Waste committed before the Injunction; and there is no distinction between the Waste committed before and after the Injunction. I think not; and that the Demurrer might have been extended to an account of all the Waste committed by the Marquis, whether before or after the Injunction; but because the Demurrer does not extend as far as it might, it is not therefore bad so far as it does extend.

The VICE-CHANCELLOR:—

Upon this Demurrer, Two points are to be considered: 1st. How the case stood as to the deceased Marquis? 2dly. How the case stands as to his Representatives? The late Marquis was Tenant for Life, without Impeachment of Waste, and as such had a right at Law to cut Timber on the Estate, and had a property in the Trees, but having abused that Power by cutting ornamental Trees, and Trees not ripe for cutting, a Court of Equity says, he shall not do these things with impunity, but interposes to restrain the legal right; and Equity not only restrains him from doing further Waste, but directs an Account of the Waste done, and will not suffer the Individual to pocket the produce of the wrong, but directs the Money produced by such Waste to be laid up for the benefit of those who succeed to the Estate.

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A Bill was filed against the late Marquis, by *Wilmot* and *Baring*, the Trustees to preserve Contingent Remainders, and not by a person having the next Estate of Inheritance; no such person appearing; but there were Contingent Remainders, and the present Marquis, the next Tenant for Life, was entitled to the Timber cut, or the substitute for it. The late Marquis did not demur to that Bill. Many of the objections taken to this Supplemental Bill, would have applied to the Bill filed against the late Marquis. They obtained an Injunction, and thereby their competency to sustain the Suit was sanctioned; and *Garth* and *Cotton* (*n*), certainly, was a conclusive authority in support of that Suit. The Injunction would not have been granted if the Trustees had no right to file such a Bill. What is said in *Jesus Coll.* and *Bloom*, as to not entertaining a Bill after the Estate of the Tenant for Life is determined, applies only to cases where Legal Waste has been committed, and where the Party is liable at Law in respect of the Waste committed; but here it was Equitable Waste, as to which, a Court of Law gives no remedy. Lord *Hardwicke*, in that case, says, "the Party ought to be sent to Law;" which shows he was alluding to Legal Waste. The Party had for such Waste a remedy under the Statute of *Marlbridge* (*o*), or might have brought an Action of Trover; but the Court never sends a Party to Law in cases of Equitable Waste; they being exclusively of Equitable Cognizance. As against the late Marquis, therefore, a Bill might have been filed,

(*n*) The Judgment in this Case is given in 1 Dick. 183, from a copy of Lord Hardwicke's written Argument.

(*o*) 52 Henry 3. c. 23.

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though no Injunction were prayed. This Court will not permit a Man to commit Equitable Waste, and retain the produce of the injury, which is recoverable in no other Court. Relief is given for the benefit of those who come after. The case, therefore, of *Jesus College* and *Bloom* is distinguishable from the present. In *Garth* and *Cotton*, Lord *Hardwicke*, alluding to his decision in that case, says, "It affords no conclusive argument that a Bill for an Account of Waste cannot be maintained without praying an Injunction (*p*)." The Marquis died, after having sold, and converted to his use the Money produced by his wrongful act; and upon general principles, independent of decision, the Assets ought to be liable to pay in respect of his conduct, such Assets having been augmented by it.

It has been urged, that if the Marquis had committed *legal* Waste, and died, his Representatives would not have been answerable, it being a maxim, *Actio personalis moritur cum personâ*, and that the same doctrine applies, by analogy, to cases of *equitable* Waste. Let us see in what manner this maxim has been interpreted even at Law. In *Hambly* v. *Trott* (*q*), Lord *Mansfield* says "when the cause of Action is Money due, or a Contract to be performed, gain or acquisition of the Testator by the work and labour, or property, of another, or a Promise of the Testator, express or implied; where these are the causes of Action, the Action survives against the Executor. But where the Cause of Action is a *Tort*, or arises *ex delicto*, supposed to be *by force*, and *against the King's Peace*, there the Action dies, as battery, false imprisonment, trespass, words, nuisance,

(*p*) 1 Dick. p. 211. (*q*) Cowp. 376.

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obstructing lights, diverting a water-course, escape against the Sheriff, and many other Cases of the like kind. If it is a sort of Injury by which the Offender acquires no gain to himself at the expense of the sufferer, as beating, or imprisoning a man, &c. there, the person injured has only a reparation for the *delictum* in damages to be assessed by a Jury. But where, besides the crime, Property is acquired which benefits the Testator, there an Action for the value of the Property shall survive against the Executor. *As for instance, the Executor shall not be chargeable for the Injury done by his Testator in cutting down another man's Trees; but for the benefit arising to his Testator for the value or sale of the Trees, he shall.* So far as the Tort itself goes, an Executor shall not be liable; and therefore it is, that all public, and all private crimes die with the offender, and the Executor is not chargeable; but so far as the act of the offender is beneficial, his Assets ought to be answerable; and his Executor therefore shall be charged."

This I take to be a just exposition of the qualifications under which the maxim *actio personalis moritur cum personâ* is received at Law; and if Equity is to decide in analogy to a Court of Law, the question in the present case will be, Whether, by the Equitable Waste committed by the late Marquis, he derived any benefit; or, whether it was a naked injury, by which his Estate was not benefited? It is clear it was benefited; and as at Law if legal Waste be committed, and the Party dies, an Action for Money had and received lies against his Representative; so upon the same principle, in cases of Equitable Waste, the Party must, through his Representatives, refund in respect of the wrong he

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has done. "It would," says Lord *Cowper*, in *Bishop of Winchester* v. *Knight* (*r*), "be a reproach to Equity to say, where a man has taken my Ore or Timber, and disposed of it in his life time, and dies, that in this case I must be without remedy." It has been argued, that as when legal Waste is committed, and there are no persons in being, or appearing, who could authorize it, or bring an Action in respect of the Waste, the wrong is without remedy; so here, there being no persons *in esse*, or appearing, when the Waste was committed, who could authorize it, a Bill will not lie in respect of such Waste: but it signifies not, whether such person were *in esse* or not, for Waste of this description could not be authorized;—such destruction cannot be authorized;—the Court says it shall not be done. The produce of the Waste is laid up for the benefit of the contingent remainder-men (*s*). To adopt such an analogy to the Law, in a case where relief is given against the Law, would be singular.

Upon these grounds I think the Supplemental Bill for an Account by the new Trustees, the Tenant for Life, and Tenant of the Inheritance, was properly brought. The Trustees were the proper persons to file the Bill against the late Marquis, and the present Plaintiffs were the proper persons to file the Supplemental Bill, though one of the Plaintiffs was not *in esse* when the first Bill was filed, inasmuch as the Money produced by the Waste is not to be pocketed, but to be laid up for the benefit of those who in succession will take the Estate.

(*r*) 1 P. Wms. 407.

(*s*) Williams v. Duke of Bolton, mentioned in Mr. Cox's note 1 to Bewick v. Whitfield, 3 P. Wms. 268.

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I think the Demurrer objectionable on other grounds; but I decide this case upon the broad principle, that where Equitable Waste has been committed, which never could have been authorized, the Court has Jurisdiction to make the Representatives, of the Party committing such Waste, accountable.

Demurrer over-ruled.

Ex parte M^c^WILLIAMS, *in re* GRAHAM.

11th November.

Expense of a Provisional Assignment not allowed, except where an Extent is apprehended.

IN this case considerable expense had been incurred by appointing a Provisional Assignee, and the Commissioners on taxing the Solicitor's Bill had allowed the same.

A Petition was now presented, praying a Reference to the Master, to review the taxation of the Bill, and to inquire whether a Provisional Assignment was necessary.

Sir *Samuel Romilly*, and Mr. *Montagu*, for the Petition.

Mr. *Parker* against it.

The VICE-CHANCELLOR:—

A Provisional Assignment is not a matter of course, but is proper only in cases of necessity. It is only ne-

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cessary where an Extent is apprehended. Executions threatened do not make such an assignment necessary. There must be a taxation of this Bill, and an Inquiry whether a Provisional Assignment was necessary.

Note. It was stated, that in the *North*, it was very much a matter of course to have a Provisional Assignment; but the *Vice-Chancellor* expressed his disapprobation of the Practice.

HOWARD *v.* PAPERA.

17th November.

A Receiver will not be appointed merely because an Executrix is poor.

MOTION, for a Receiver, on a Bill filed against an Executrix for an Account, and that the Executrix might be restrained from receiving the Testator's Property. In the Affidavit in support of the Motion, it was sworn, that the Executrix, the Wife of the deceased, had no property whatever of her own, and, therefore, there was danger to the property of the Testator.

Mr. *Roupell* for the Motion.

Mr. *Parker* against it.

The VICE-CHANCELLOR:—

No misapplication or abuse of Trust is made out against this Executrix, and it would be too much to take the Administration of this Testator's Property out of her hands merely because she is poor; a circumstance

known to her Husband, the Testator, when he appointed her Executrix.

Motion refused (*a*).

(*a*) The Reporter has a note of a similar case before Lord *Eldon*.

GLADDON *v.* STONEMAN, 21st *March* 1808.

THE Testator died possessed of Freehold, Leasehold, and personal Property, having made his Will in 1793, appointing the Defendant, and his (the Testator's) Wife, Executor and Executrix, and Trustees.

The Will had not yet been proved.

Some time before the Testator died, the Defendant became a Bankrupt; but no Dividend had been made, nor had he obtained his Certificate.

Sir *Samuel Romilly* and Mr. *Shadwell* moved, under these circumstances, that a Receiver might be appointed of the Real and Personal Property, and for an Injunction to restrain the Defendant from receiving the Rents and Profits of the Real and Personal Estate.

Mr. *Hart*, on the other side, contended, no Receiver ought to be appointed, or Injunction granted, as the Testator must have known this man was a Bankrupt; and if he, notwithstanding that, chose to appoint him his Executor, he might, and the Bankrupt had a right to act.

Sir *S. Romilly*, in Reply:—

It is probable this Testator did not advert to the Will he had made, for he thereby constituted his Wife residuary Legatee, and his Wife died in his life-time. If he had adverted to his Will, surely this would have been altered.

The *Lord Chancellor*:—

Without saying a Person known by a Testator to be a Bankrupt, and yet appointed an Executor by such Testator, can be controlled here by the appointment of a Receiver, in this case, it is clear, that the Testator did not advert to the circumstance of this person being a Bankrupt. A Receiver must certainly be ap-

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Will held to be well attested, though one of the Subscribing Witnesses was Executor in Trust under the Will.

ON a Bill filed for a Specific Performance, the Defendant objected, that a good Title could not be made, the Will under which the Plaintiff made out his Title to the Lands, not being duly attested; and the following Case was, by an Order of the *Vice-Chancellor*, dated 31st March 1815, sent to the Court of *Common Pleas*, for the opinion of the Judges.

"*Israel Claringbould* the elder, of the Parish of *River*, in the County of *Kent*, Gentleman, deceased, when he was of sound mind, made his Will, bearing date the 11th day of June 1811; and thereby, after directing all his just debts to be duly paid by his Executors thereinafter named, he gave and bequeathed unto his Wife the use of his Dwelling-house and Furniture, and 50 *l.* a year, to be paid unto her out of the rents and profits of his real estates, for her life; and he thereby charged, and made liable to the payment thereof, all and every his real Estates and Effects: And after the decease of his Wife, he gave and bequeathed unto his son *Israel Claringbould*, the use and occupation, Rents and Profits, of and in all that his said Dwelling-house,

pointed of the Rents and Profits of the real and Leasehold Estates; and without prejudice to an application by the next of kin when the Will is proved, for a Receiver of the personal Estate; and in the mean time the Defendant to be restrained from selling the Leasehold Estates, and from receiving the Rents and Profits of the Freehold and Leasehold Estates.

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and Field thereunto belonging, and in which the said house was built and erected, called or known by the name of the Five-acre Field, during the term of his natural life: And after his decease, then the said Testator gave, devised, and bequeathed all the rest, residue, and remainder of his Real Estates and Effects, whatsoever and wheresoever, both real and personal, unto his Son *Richard*, and Daughter *Ann*, wife of *William Phipps*, to be divided between them equally, share and share alike, and to take as Tenants in Common, and not as joint Tenants, to them, their Heirs, Executors, Administrators and Assigns, for ever, in case such Remainder shall not exceed 1,000*l.*; but in case such Remainder should exceed 1,000*l.* then the said Testator thereby gave and bequeathed all such sum as should remain over and above the said sum of 1,000*l.* unto the Children of his Son *Israel*, to be laid out and expended upon them, in such way as his Executors should think fit. And after stating the sale by him to his son-in-law, the said *William Phipps*, of the two Bog Meadows adjoining the River, for the sum of 100*l.*; and he having lodged the said sum of 100*l.* into the hands of the said *William Phipps*, for the purpose therein mentioned; and after directing the payment of the said sum of 100*l.* as therein mentioned, the said Testator thereby appointed the Plaintiffs, *John Phipps* and *Thomas Chester*, and the survivor of them, Executors and Executor of his will: And the said Testator thereby further willed and ordained that his Executors, or the survivor of them, and the Executors or Administrators of such survivor, for and towards the performance of his said Will, and in order to raise money for the payment of his debts, and of all the several Legacies and Expenses attending the perform-

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ance of the things therein directed and ordained, should and might, with all convenient speed after his decease, bargain, sell, and alien in fee-simple, all his Freehold Lands, Houses, and Premises, except his Dwelling-house, and the Five-acre Field before mentioned; for the doing, executing, and perfect finishing whereof, the said Testator thereby gave his said Executors, and the survivor of them, and the Executors or Administrators of such survivor, full power and absolute authority to grant, alien, sell, convey and assure all the same Freehold Land and Premises to any person or persons, and their heirs, for ever, in fee-simple, by all and every such legal ways and means in the law, as to his Executors, or the survivor of them, or the Executors and Administrators of such survivor, or his or their Counsel should seem fit or necessary.

"That the said Will was signed and published by the Testator, in the presence of *Henrietta Rousseau*, *Mary Chester*, and *Thomas Chester*, who signed their names thereto, as attesting the execution thereof, in the presence of the said Testator, and at his request.

"That *Thomas Chester*, one of the subscribing Witnesses to the said Will, is the said *Thomas Chester* who is named in the said Will.

"That the said Testator died without having altered or revoked his said Will, leaving *John Claringbould* and *Israel Claringbould* his Heirs in Gavelkind, and who are still living, him surviving.

"That the said Plaintiffs, *John Phipps* and *Thomas Chester*, have duly proved the said Will, and taken upon themselves the Execution of the Trusts thereof.

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"That the said Testator was at the time of making his said Will, and at the time of his death, seised in fee-simple of certain Lands in the Parish of *River* aforesaid, not being part of the Dwelling-house or Five-acre Field, or of the said two Bog Meadows.

"That the personal Estate and Effects of the said Testator, not specifically bequeathed, were not sufficient for the payment of his Debts and Legacies, and Funeral and Testamentary Expenses; and therefore the said Plaintiffs, *John Phipps* and *Thomas Chester*, in execution of the Trusts of the said Will, entered into a contract with the said *Josiah Webb Pilcher* for the sale to him of a piece of Land, being part of the said Testator's Real Estate, but which did not form part of the said Dwelling-house, or Five-acre Field, or the two Bog Closes: And the Question is, Whether the said Plaintiffs, *John Phipps* and *Thomas Chester* can, as Devisees in the said Will named, or by virtue of any power in them by the said Will reposed, convey to the said *Josiah Webb Pilcher* the legal Estate and Interest in the said Lands so contracted to be sold to him as aforesaid."

The Case came on to be argued; and the Judges delivered the following opinion:

"We have heard this Case argued by Counsel, and are of opinion, That the Plaintiffs, *John Phipps* and *Thomas Chester*, can, by virtue of the power in them by the said Will reposed, convey to the said *Joseph Webb Pilcher*, the legal Estate and Interest in the said Lands contracted to be sold to him, as stated in the Case."

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Upon the coming on of the Cause again on this day, and the Certificate of the Judges stated, the *Vice-Chancellor* decreed a Specific Performance, without Costs.

Ex parte MARSH *in re* CARLILL.

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Mortgagee of Bankrupt's Estate, allowed, on Motion, to bid for the same, on a Sale of the mortgaged Estate.

THIS was a Petition, by the Mortgagee of Premises, mortgaged by the Bankrupt, and which had been ordered to be sold, for leave to bid at such Sale, and become the Purchaser, if no higher bidding should be made; the Premises being situate at *Hull*, and from the scarcity of money, no probability of there being many bidders. The Motion was supported by Affidavit.

Mr. *Cooke*, for the Petition:—

There is no express decision that a Mortgagee cannot purchase the Mortgaged Estate (*a*); but some doubts having been expressed, it was thought prudent to apply for the present Order. In Causes, such an Order has frequently been made, as was the case in the Estate called *Canons*, purchased by your Honor; and there

(*a*) The Reporter has a short note of a Case in Hilary Term 1806, in which it was decided, that under an Order in Bankruptcy for the Sale of a Mortgaged Estate, the Mortgagee may become the Purchaser, and come in under the Commission for so much of the Mortgage-money as was not raised by the Sale. See on this subject, *Webb* v. *Rooke*, 2 Sch. & Lefr. 673; and *Gubbins* v. *Creed*, ib. 218.

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seems no reason why such an Application should not be made in Bankruptcy.

Mr. *Agar*, for the Assignees:—

The *Lord Chancellor* made the Order for the Sale of this Estate. If your Honor has Jurisdiction to make the present Order, I see no objection, provided the Assignees are consulted on the Advertisements for Sale, and that the Conditions of Sale are properly prepared.

The VICE CHANCELLOR:—

I think I may make an Order of this description, though the Order for Sale was made by the Lord Chancellor.

There can be no objection to this Person being a Bidder; it is for the Interest of the Estate that there should be as many bidders as possible.

If there is any irregularity in the Advertisements for Sale, or the Conditions of Sale are not properly framed, the Parties may apply to the Commissioners to correct the irregularity.

Petition granted. The Costs of the Application to be paid out of the Estate.

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GARSTIN *v.* ASPLIN and another.

27th November.

Injunction to restrain Sheriff from executing a Fieri Facias *against the Furniture and Effects of the Defendant at Law, which, with a House and Land, had been let by him to the Plaintiff, who was in possession, refused.*

JONAS ASPLIN being owner and in possession of a Mansion-house and Land in *Essex*, and also of the Household Goods, Furniture and Effects in and upon the said House and Premises, and being desirous to let the same, and the Plaintiff being in want of a furnished House for his residence, together with Land thereto, the Plaintiff and *Asplin* entered into, and signed, the following Agreement:

"Memorandum of Agreement made the 9th of September 1815, between *Jonas Asplin*, &c. of the one part, and *John Bradstreet Garstin* of the other part, as follows:—The said *Jonas Asplin* agrees to let, and the said *John Bradstreet Garstin* agrees to take, the House and Premises called Little Wakering Hall, in the County of *Essex*, on the following terms, for three years, from the 24th of August last. The Rent for the House, Garden, Coach-house and Stable to be one hundred and fifty Pounds, payable half yearly, on the 24th of February and 24th of August; the Landlord to pay all taxes and rates whatsoever, except the window-tax, which is to be paid by the Tenant. The Rent for the Orchard to be twelve Guineas *per annum*, payable as above. The Rent for the Organ to be twelve Pounds *per annum*, and the Organ to be kept in the same state of repair it now is. Such part of the Meadow as shall be occupied by the said *John Bradstreet Garstin*, to be hurdled off from the rest, at his expense; and the rent to be at the rate of six Pounds *per acre*. A Room in the House to be always reserved for the man-servant

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(of the Landlord) and his wife; accommodation to be also reserved for the Lord of the Manor, Sir *John Tyrel*, his Steward, and a Friend, with a Bed for each of them, on the Court-day in Trinity-week in each year. The Furniture now in the House, and included in the Inventory hereto annexed, to be delivered up, in good order, at the expiration of the term; the House to be kept in good repair, and the outside to be whitewashed once in each year, at the Tenant's expense; the Garden to be kept in good order, and none of the Trees to be cut down without the Landlord's permission. No part of the Premises to be under-let without the like permission. To all which both Parties agree."

Garstin entered into possession of the Mansion-house and Premises, together with the Household Goods, Furniture and Effects, pursuant to the terms of the Agreement, and continued in the possession thereof.

Charles Asplin, Brother of the Defendant, *Jonas Asplin*, entered up a Judgment against *Jonas Asplin*, upon a Warrant of Attorney, and obtained a Writ of *Fieri Facias* against the Goods and Chattels of *Jonas Asplin*, to levy the money for which the Judgment was obtained, directed to the Defendant *Walford*, the Sheriff of the County of *Essex*; and the Sheriff issued his Warrant thereon, and the Household Goods, Furniture and Effects in and upon the Premises were, on the 23d November 1815, seized and taken under such Writ of Execution and Warrant, as the Goods and Chattels of *Jonas Asplin*, notwithstanding the said Lease or Agreement, and notwithstanding Plaintiff was in the actual possession of the Household Goods, Furniture and other Effects, under the said Lease or Agreement, and

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threatened to sell and dispose of the Household Goods, Furniture and Effects.

The Bill which was filed against *Charles Asplin* and *Walford*, the Sheriff of *Essex*, stating these facts, prayed, that the Defendants might be restrained by Injunction, from removing or selling the said Household Furniture, Goods and other Effects, or any part thereof, during the remainder of the said term so agreed to be demised to the Plaintiff.

The facts stated in the Bill were verified by Affidavit.

Mr. *Roupell* moved for an Injunction, assimilating this Case, to Cases of Waste, where the Court interfered to prevent irreparable mischief.

The VICE-CHANCELLOR:—

This is a legal contract for a Ready Furnished House, and Land, and the party has a Possessory Right. If his Possession is intruded upon, he has a Remedy at Law. The Sheriff has no right to seize. If he does seize, it may be very injurious to the Plaintiff, and it is to be regretted; but this Court cannot interfere where there is a Legal Remedy. The Right to take in Execution is a Question of Law. Injunctions would be applied for every day, where Executions were improperly issued, if the Court were to assume a Jurisdiction in such Cases. There is no Instance of stopping a Proceeding at Law under such Circumstances.

Injunction Refused.

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Specific Performance of a Purchase Agreement refused, no good Title being made to a part of the Estate, which thoughverysmall in proportion to the whole of the purchase, was essential to its enjoyment; and the Defendant, who was let into Possession, being afterwards turned out by the Plaintiffs.

THIS was a Bill, praying, for the specific performance of a Purchase Agreement; and that if the Defendant was not bound to take a part of the purchased Estate, called *Cole Nash*, then that it might be ascertained how much ought to be allowed the Defendant by way of deduction out of the Purchase-money in respect of such Premises, and allowed him accordingly.

The Plaintiffs being seised in Fee, in right of their Wives, of a Mansion-house and Premises, called *Nash Court*, situated in *Kent*, consisting of upwards of 700 Acres, advertised to sell the same in Three Lots, by Auction, on the 16th October 1811; but before any Sale, the Plaintiffs agreed, by private contract, to sell the Estate to the Defendant *Grueber*. The Purchase Agreement signed by the Parties, was as follows:

"Agreement made the 15th October 1811, between Sir *Edward Knatchbull*, of *Mereham Hatch, Kent*, Bart. and Dame *Mary* his Wife; *Henry Curson* of *Waterperry*, Oxfordshire, Esquire, and *Bridges* his Wife; *George de Billinghurst*, of Bulstrode-street, Middlesex, Esquire, and *Ann* his Wife; and *Henry Michael Goold*, of Hawkesworth Hall, Yorkshire, and *Eleanor* his Wife, of the one Part; and *Stephen Henry Grueber*, of Coleman-street, London, Tea-dealer, of the other Part; as follows: That the said Sir *Edward Knatchbull* and other Parties of the first Part have sold by private Contract to the said *S. H. Grueber*, for 52,000*l.* and the said *S. H. Grueber* hath agreed to purchase for that

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sum the Fee-Simple of Estates of the late Mr. *Hawkins*, advertised to be sold by Auction at *Feversham* on the 16th Instant, in Three Lots, including the Timber and Underwood, free from all Incumbrances, except the Quit Rents and Reliefs, the Land Tax, the existing Lease of *Stone Stile Farm*, and to the other Incumbrances set forth in the printed Particulars of the Sale. That the said *Stephen Henry Grueber* shall pay Mr. *John Humphries*, of 14, Clement's-inn London, the Agent of the Vendors, on the execution of this Agreement, as and by way of Deposit the sum of 5,000*l.* to be paid to the Vendors on the Title being approved of; the sum of 12,300*l.* to the Vendors on the 1st day of February next; the further sum of 17,300*l.* to the Vendors on the 1st day of August next; and the sum of 17,400*l.* being the remainder of the said sum of 52,000*l.* on the 29th day of September next, with Interest upon the unpaid Instalments from the date of this Agreement, until paid, after the rate of 5*l. per cent. per annum*. That *Stephen H. Grueber* shall have immediate possession of the Mansion-house, Gardens, and back Orchard at Nash; and also of the Wood Land and Marsh Land on hand, and shall receive the Rents of Stone Stile Farm, and of the Farm at Nash, and other parts of the Estates which are let, from Michaelmas-day last, to which time all Outgoings shall be paid by the Vendors; but the said Vendors shall retain Possession of the Title Deeds, until the above Consideration-money and Interest shall be fully paid, and the Purchase completed; and in the mean time the unpaid part of the Consideration-money shall stand charged and secured upon the said Estate; that taking the Possession and Receipt of the Rents shall not be considered as an acceptance of the Title; but the said *S. H. Grueber* shall

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notwithstanding have a good and marketable Title made out to him. That the Vendors shall, at their expense, forthwith furnish to the said *S. H. Grueber*, an Abstract of the Title to the said Estates, and make out a good and marketable Title to the same, free from Incumbrances as aforesaid; and this Agreement shall, on or before the 1st day of February next, be carried into execution by such Conveyances and Assurances as shall be advised by and on behalf of the said *S. H. Grueber*, and such part of the Purchase-money as shall remain unpaid shall be secured, according to the Intent of this Agreement, in such manner as shall be advised and approved by *Charles Butler*, of Lincoln's-inn, on the part of the said Vendors, and by *George Cooke*, of the Temple, on the part of the said *S. H. Grueber:* That the expenses of all Fines and Recoveries, if any necessary, and the making out the Title, and such other expenses as are usually paid by the Vendors upon Sale by private Contract, shall be borne by the Vendors; and the Expenses of the Conveyances, and of such other Deeds as shall be deemed necessary for securing the Payment of the said Instalments, shall be borne by the said *S. H. Grueber*. That the said *S. H. Grueber* shall, if he thinks proper, have the Furniture and Fixtures in and about the Mansion-house, upon paying for the same, according to valuation in the usual way, otherwise the said Furniture and Fixtures shall be forthwith removed from the said Premises: That the Sale of the aforesaid Estates shall take place as advertised; but the same shall be bought in on the part of the Vendors; and if any part is sold, such Sale shall be on the account, and at the risk, of the said *S. H. Grueber*, as well in respect of the said Auction Duty (if any shall be incurred), as in all other respects, except with regard to the

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Expenses already incurred by advertising, by Catalogues, and for the Commission of the Auctioneer; and if by any accident or oversight the Auction Duty for what is bought in shall become payable, it shall be referred to two Persons, one to be chosen by the Vendors, and the other by the said *S. H. Grueber*, to consider and decide by whom the said Auction Duty shall be borne, whether by the Vendors or the said *S. H. Grueber*; and in case they differ, the said Arbitrators shall choose an Umpire, whose decision shall be final. And that upon the delivering up of Nash Farm by the present Occupier, who is Tenant at Will, such part of the Stock and Crop as is usually taken by Landlords, shall be taken by the said *S. H. Grueber*, at a Valuation, according to the custom of the Country. That if the said *S. H. Grueber* shall neglect or fail in the above Agreement, the said Deposit of 5,000*l.* shall be forfeited, and the Vendors be at liberty to re-sell the said Estate, either by private Contract or public Auction, and the Deficiency of the aforesaid sum of 52,000*l.* on such Sale (if any), together with all Charges attending the same, shall be made good by the said *S. H. Grueber*. That in case the said *S. H. Grueber* shall sell either of the said Lots at the present Auction, the Auctioneer's Commission on such Lot or Lots shall be paid by him, the said *Stephen Henry Grueber*, and in that case, the said Vendors hereby agree to convey such Lot or Lots to the said *Stephen Henry Grueber*, or the Purchaser or Purchasers, on Payment to the Parties of the first part of the Sum or Sums of Money for which the same shall be so sold, in Payment *pro tanto* of the aforesaid Instalments. That the said Vendors shall join in all such Notices to quit, or to repair, as shall be required by the said *Stephen Henry Grueber* to be given to the Tenants of

the said Estate: As Witness the Hands of the above-named Parties, the day and year first above written."

The purchased Estates were afterwards, in pursuance of the Agreement, put up to Sale in Three Lots:—the first Lot comprised the Mansion-house, called *Nash Court*, with 314 Acres; the second Lot comprised the Manor Farm, called *Stone Stile Farm*, and sundry Woods, containing in the whole, 307 Acres; the third Lot consisted of 95 Acres of Meadow Land. 34,000*l.* was bid for Lot 1, but the Defendant bought it in. Lot 2 was sold to *James Wildman* for 10,550*l.* the Timber and Underwood to be taken at a Valuation, and was afterwards valued at 1,350*l.* There was a Bidding of 7,500*l.* for Lot 3, but that also was bought in by the Defendant.

On the 18th October 1811, the Defendant paid to the Agent of the Plaintiffs a Deposit of 5,000*l.* and immediately, by the authority of *Knatchbull*, entered into the Possession of the Mansion-house and Gardens, but not by way of Residence.

After several Applications on the part of the Defendant, some of the Abstracts of Title were delivered to him on the 26th December 1811; the remaining Abstracts were not sent to the Defendant until the 24th April 1812. Previous to this time, *Grueber* caused Notices to quit to be signed by Sir *Edward Knatchbull*, to be served on the different Tenants of the Premises comprised in Lots 1 and 3, it being doubtful whether they had been served with proper Notices.

Some delay took place in obtaining Opinions upon the Abstracts, and an Opinion was given on the 15th

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May 1812, that there was not a good Title to *Cole Nash*, a part of the Estate, consisting of not quite 12 Acres, unless certain queries and observations were satisfactorily answered. The Agent for the Plaintiffs endeavoured to obviate the objections to the Title, but his answers were not considered as satisfactory; and on the 13th June 1812, he wrote to the Defendant's Agents, saying, he was unable to throw any further light on the Title.

On the 29th July 1812, after a consultation between Mr. *Butler* and Mr. *Cooke*, one of the Plaintiffs caused a Letter to be written to the Defendant, saying, "We have had a Consultation at Mr. *Butler*'s Chambers this morning, and both he and Mr. *Cooke*, are decidedly of opinion, that the Title to *Cole Nash* is irremediably bad, or at least, it is absolutely bad, unless further inquiries are made, and the result of these inquiries should turn out favourable. The parties think it would be extremely imprudent, as well as a useless loss of time, to institute any further inquiry, and propose, with a view to the speedy completion of the purchase, that they should either indemnify you, or take *Cole Nash* back at a fair Valuation, or relieve you altogether from the Purchase, which ever of these proposals is most acceptable to you." In consequence of this Letter, it was proposed, on the part of the Defendant, that pending inquiries, as to *Cole Nash*, *Wildman*'s Purchase of Lot 2, should be suspended for twelve months; and if the Title was not cleared within that time, to take the Title upon absolute Covenants. The Plaintiffs determined, that the Purchase of Lot 2, should stand still, till a final Determination was made by the Defendant, whether he would take the Estate. The Defendant

afterwards, by a Letter of his Agents, dated the 7th August 1812, stated he had no objection to *Wildman*'s Purchase proceeding, without prejudice to the Title of the other parts of the Estate, and consented to his Deposit of 5,000*l.* being appropriated in any way that suited the convenience of the Plaintiffs; and that he was willing to advance part of his Purchase-money; and was desirous of completing the Purchase; and that, if after diligent inquiries had been made, in order to perfect the Title, the result should not be favourable, he would then be willing to take such Title to *Cole Nash* as the Proprietors would be able to give him, upon having absolute Covenants and a Compensation. Lot 2 was afterwards conveyed to *Wildman* in Fee, and the Plaintiffs received the Purchase-money. On the 10th August 1812, *Humphries*, the Plaintiffs' Agent, wrote to the Defendant's Agents, mentioning some further inquiries as to the Title of a Mr. *Tappenden*, of *Feversham*, and enclosing his Letter; and on the 19th August 1812, he again wrote to the Defendant's Agents, urging the completion of the Purchase.

On the 26th September 1812, the Defendant's Agents, by a Letter to *Humphries* of that date, observed, that Defendant "expects the Vendor to make him out a good Title, and upon this being done he is ready to complete his Purchase."

On the 5th of October 1812, *Humphries* wrote to the Defendant's Agents, saying, that he had been directed to tender Mr. *Grueber* his Deposit, with Interest, and to demand from him that part of the Estate of which he was in possession, and that he should attend at *Grueber*'s house for that purpose. The Tender was

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accordingly made, but *Grueber* refused to accept the Money.

On the 12th of October 1812, one *Rutton* was directed by the Vendors, who gave him a written indemnity, to drive *Grueber*'s Live Stock off the Premises into the Farm Yard, lock the Gates, and turn him out of possession of *Nash Court Farm*. This Stock and the Crop, on the faith of the Contract being completed, had been, from necessity, purchased by *Grueber* in July 1812, of *Rutton*, who occupied the Farm called *Nash Court Farm*, comprising the greater part of Lot 1, for 5,500*l*. and, as it appeared, with the privity of Sir *E. Knatchbull*. *Rutton* was only a Tenant at Will, and had notice to quit at Michaelmas 1812. Orders also were given to the Tenants who rented part of Lots 1 and 3, not to pay their Rents to the Defendant.

On the 14th of October, an Interview took place between the Plaintiffs and Defendant's Agents; and a proposal was made by the Defendant's Agent, that if on the 25th March 1813, the Title was not cleared up, there should be a Reference to Mr. *Butler* and Mr. *Cooke*, upon what Indemnity or Compensation *Grueber* should take the twelve acres, if he determined to take them; and if he wished to decline his Purchase altogether by reason of the twelve acres, it should be referred to the same Gentlemen, Whether he was not bound to complete the remainder of his Purchase, the Vendor taking back the twelve acres upon a Compensation? and if the Referees disagreed, an Umpire to decide. And it was agreed, that the Parties should have till the 18th October, 1812, to determine upon such Proposal; and that in the mean time the Stock should be driven back on

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the Premises; and if such Proposal was not acceded to by that time, the *turn out* to be considered as in full force. The Stock was accordingly driven back.

The Plaintiffs would not agree to the Proposal, unless the Reference was to take place sooner; and on the next day, the 19th, the Stock was again driven off the Farm. Some negotiation afterwards took place as to the management of *Nash Court Farm*, but nothing was agreed upon; and the Farm, at a great loss, remained uncultivated, and the Defendant was obliged, at a disadvantage to sell his Stock.

On the same 19th of October the Defendant gave notice to the Plaintiffs, that they might have Possession of the Mansion-house and Gardens (the only part of the Estate left in the Defendant's possession), whenever they pleased, and Possession was accordingly delivered up; and the Defendant from that time continued altogether out of Possession of the Estate, except a Yard, in which some Stacks were, purchased by the Defendant of *Rutton*.

On the 28th of October 1812, *Humphries* wrote to the Defendant's Agents, proposing a Reference immediately of the Matters in dispute; and other subsequent letters were sent to *Grueber*, expressing a willingness to deliver up the Possession of the Estate, if the Defendant would complete his Contract; but after a subsequent Letter from *Grueber*, on the 22d of February 1813, all Treaty on the subject was discontinued.

A passage was read from the Defendant's Answer, in which he admitted, that having it in contemplation to sell the Marsh Land comprised in Lot 3, and part of the

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Premises comprised in Lot 1, in order to reduce his Purchase; and being desirous at the same time of ascertaining the value of other parts of Lot 1, (including *Cole Nash*), with a view to a more equal disposition of his Property by Will, he in the latter end of March 1812 gave orders to an Auctioneer to put up the same for Sale; but on the representations of his Solicitor he desisted from the Sale; and that at the time of such proposed Sale he had not obtained an opinion upon the Title.

It was also in evidence, that as *Grueber* was called upon for Taxes in respect of the Mansion-house, the Furniture remaining there, he requested of the Plaintiffs that the same might be removed, or that the Plaintiffs would pay the Taxes if it remained there; and in consequence, it was afterwards sold on the 6th July 1812.

Witnesses were examined on the part of the Plaintiffs, to ascertain the locality of *Cole Nash*, and to show that the Possession of *Cole Nash*, though a desirable appendage, was not essential to the enjoyment of the Purchase, *Cole Nash* being situated about sixty or seventy rods from the Mansion-house, and not within the Inclosure, nor forming part of the Park or Paddock which surrounds it, but detached and separated from it by the Turnpike-road, and not forming an object of sight or ornament to the Mansion-house, or to the Pleasure Grounds and Walks in and about the same, the Land being hidden by Shrubberies, and an Avenue of Chestnut Trees.

On behalf of the Defendants, witnesses were examined to prove that *Cole Nash* was essential, being

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nearly surrounded by other Lands, part of the *Nash* Estate, and contained Loam and Brick-Earth, which in the hands of a stranger would probably occasion a nuisance. *Rutton* in his evidence stated, that he had driven off the Stock by the Plaintiffs orders, as owners, they having given him notice to quit, and *Grueber* then standing in the situation of Under-tenant to him, and in order to enable him to give up Possession to the Plaintiffs.

Sir *Samuel Romilly*, Mr. *Bell*, Mr. *Roupell*, for the Plaintiffs :—

The Defendant professes a readiness to complete his Purchase if a good Title can be made. It is admitted a good Title cannot be made to *Cole Nash*, but we contend that this is a case for Compensation, the evidence showing, that these twelve acres, which are a very inconsiderable part of the Estate, are not essential to the Purchase; and supposing them essential, the Defendant has, by his conduct, precluded himself from making the objection. The doctrine as to Compensation, is laid down by the *Master of the Rolls* in *Dyer* v. *Hargrave* (*a*). The ancestors of the Plaintiffs lived 300 years upon the Estate, without feeling any inconvenience from the want of these twelve acres, which were only purchased in 1788, by the late owner, Mr. *Hawkins*. It was the duty of the Defendant, when he found the Title irremediable, to give up the Estate, according to *Fordyce* v. *Ford* (*b*). After the Defendant knew no good Title could be made, he suffers the Furniture of the Mansion-house to be sold, to the injury of the

(*a*) 10 Ves. 507. (*b*) 4 Bro. C. C. 494.

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Parties; he buys Stock, and does other acts, showing, that though no Title could be made to *Cole Nash*, he yet adheres to the Purchase, and did not consider *Cole Nash* as essential. It cannot be seen from the Mansion-house, being sheltered by a wood. Three months after the Abstract was delivered, he meditated the Sale of *Cole Nash*, employed an Auctioneer for that purpose, and would have put it up to Sale, had he not been dissuaded from doing so by his Solicitor. It was clear, therefore, he did not consider *Cole Nash* as essential to the enjoyment of his Purchase. He never affects to say, during the Treaty, it is essential, but asks only, if no good Title can be made, for absolute Covenants and a Compensation. He never considered *Cole Nash* as essential until he put in his Answer. The objection as to the locality of *Cole Nash* is obviated by the witnesses, who clearly ascertain its situation. The Purchase was originally a favourable one, as proved by the Sale, where 2,200*l.* more was bid for the Estate than what it was purchased for; circumstances, perhaps, have altered its value, and occasion his reluctance to complete the Purchase. It is impossible that the Plaintiffs can be put in the same situation they were. If it is referred to the Master to see if *Cole Nash* is essential to the Purchase, it should be added—regard being had to the conduct of the party.

Mr. *Hart*, Mr. *Wetherall*, Mr. *Horne*, and Mr. *Garratt*, for Defendant:—

The Court will not enforce this Agreement. This Estate was purchased for the residence of the Defendant, and not with a view to make a Profit of it; and *Cole Nash*, situated as it is represented to be, on the South Side of the Mansion-house, and opposite the

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Park Gate, is essential to the enjoyment of the Estate; but the locality of *Cole Nash* is not clearly ascertained. Suppose it to be where it is stated by the witnesses, opposite the Mansion-house; it might become a great nuisance, if a Brick-kiln were erected upon it, as would probably be the case from the brick-earth it contains, if it came into the hands of a stranger. The conduct of *Grueber* cannot be considered as a waver of his objections, he having all along asked for a Title. Besides, the Plaintiffs have themselves put an end to the Contract by turning the Defendant out of Possession. This is a conclusive Objection to the Plaintiff's demand of a Specific Performance.

Sir *Samuel Romilly*, in Reply:—

This seems to be one of those cases, so very numerous, of a Speculation in the Purchase of Land, which has failed, and the Defendant, therefore, wishes to relinquish his Purchase. There is no Case where the Court, in considering what is essential, or on the question of Compensation, has considered every possible use to which the Land may in future be applied. Where is that to end? In all Land, for instance, it is possible, there may be a Coal Mine, which would prove a nuisance. It is to be hoped the Court will not make such a Precedent.

The VICE-CHANCELLOR,

After minutely stating all the facts of the Case, proceeded to observe,—The first objection to the prayer of this Bill is, that no Title can be made to that part of the Estate called *Cole Nash*. This is admitted; and that no reference to the Master is necessary on that point. Degrees of Title, the probability, more or less,

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of any Claimant of the Estate appearing, are not considered in these cases. In answer to this objection of want of Title, it is said, that *Cole Nash*, consisting of not quite twelve acres, bears so small a proportion to the rest of the purchased Estate, amounting to 700 acres, that it is a case for compensation; but then, it is replied, that the situation and nature of *Cole Nash* is such as not to bring it within the doctrine as to Compensation; it being essential to the enjoyment of the Purchase.

At Law, it is clear, the Plaintiff could not enforce the Contract; the Law knows nothing of Compensation; but in Equity a different Rule has prevailed (whether wisely or not, it is now too late to consider,) and the Court will relieve, where Compensation can be made. Is this then a Case falling within that doctrine? Many Witnesses produced on the part of the Plaintiffs, long acquainted with the Estate, consider the possession of *Cole Nash* as not essential to the enjoyment of this Estate. On the other hand, Witnesses on the part of the Defendant swear that the possession of *Cole Nash* is essential; and that the Land, instead of being ornamental to the Premises, as it is at present, may in other hands become a Nuisance; it containing loam and brick-earth; and that any person buying these twelve acres with a view to profit, might render them worth 5,000*l*. Brick-kilns, and a row of Houses, might be built on the Land, which would prove a nuisance. Under these circumstances, the Defendant insists this is not a case for Compensation. There is no denial that *Cole Nash* contains brick-earth.

There is great difficulty in applying the doctrine of

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Compensation to a reluctant Purchaser. There is no standard by which to ascertain what is essential to a Purchaser. The motives for purchasing Real Property are very different in different persons. Tastes, opinions, ages, create different views. Some particularity, some whim, may have induced him to purchase. What is desirable to one is not so to another. One wants a Wood for Game—another desires it only as a beautiful object; one looks only to Agriculture—another dislikes Tithes; it therefore seems a little arbitrary to insist on a party taking compensation. Why am I bound to take what I did not mean to buy? You say you will give me compensation; but who is to judge of the compensation? Can you be sure it is a compensation? It is a difficult thing for a Master to ascertain what is essential to the enjoyment of the Estate, and what is a proper compensation. It is as difficult for the Court to decide, if, having all the *data* before it, it decides, as it is then proper to do, without sending it to the Master. Are you to look at the Land in its present state, or to consider in what state it may be in future? If the latter, some possible nuisance may, in every case, be suggested. In these cases, I admit, difficulties must not be founded on speculative conjectures of what may never take place; but in this case, the most profitable and most probable use of this Land by a Purchaser, who was not the Owner of this Estate, would be to apply it to building purposes; it is a purpose best adapted to the Land, and a Purchaser must forego his interest who did not so apply it. The nuisance here apprehended is not distant, fanciful and conjectural, but strongly probable; not merely what may happen, but what will probably happen.

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It is said, a Purchaser should communicate his motives for purchasing; if so, the Vendor might enhance the price. It is also said, that the Defendant's objection, that these twelve acres are essential, was an after-thought. Suppose it was; is a Court of Equity to say, no advantage can be taken of the objection? Though a Purchaser may not at first be aware of the essentiality of the Land to which no Title can be made, yet if he afterward finds it is essential, is a Court of Equity to say, he shall not avail himself of the objection?

It is then said, that if the twelve acres be essential to the enjoyment of this Estate, yet that the Defendant must by his conduct be considered as having waved the objection; and *Fordyce* v. *Ford* is cited. In that case, as soon as the Abstract was delivered, the objection appeared, and no further inquiry was necessary, and therefore the conduct of the parties afterwards was considered as a waver of the objection. Lord *Eldon* observes, upon that case, in *Drewe* v. *Hanson* (*c*), "Upon the conduct of the party this may differ materially from *Fordyce* v. *Ford*. In that Case, only Seven Acres were Freehold, and all the rest Leasehold; but the Abstract distinctly stated what was Freehold, and what was Leasehold. From the delivery of the Abstract, it was perfectly understood beyond dispute, without any ground for inquiry, that it was Leasehold unquestionably and irrevocably. The Purchaser receives the Abstract; treats upon it with full knowledge up to, and long after, the day on which the Contract was to be performed, not upon the nature of the property, but upon the Title;

(*c*) 6 Ves. 670.

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and the *Master of the Rolls* thought there was a clear waver. I doubt extremely, whether that will turn out to be the case here. Taking the representation in the conversation to be, that they believe it to be a *modus*, and supposing the Purchaser could have been off the bargain at that moment, which is very questionable, can it be said, from what passed afterwards, that he cannot now; having contracted under this representation, and learning no more afterwards than that they conceive it to be a *Modus*? That is not like the representation as to the Leasehold property, but one requiring a reasonable time for inquiry." In *Halsey* v. *Grant* (*d*), the late *Chancellor* (*e*), reviewing the Authorities, notices *Fordyce* v. *Ford*, and adopting the doctrine in that Case, and in *Drewe* v. *Corp* (*f*), and *Drewe* v. *Hanson*, says, that " where one Party would be foiled at Law, but the other may have the reasonable, substantial effect of his Contract, Compensation shall be admitted; not, where the effect will be to put upon him something constitutionally different from that for which he contracted." And in *Stapylton* v. *Scott* (*g*), he expresses a similar opinion.

The received doctrine of the Court, therefore, appears to be, as the *Master of the Rolls* expresses it, in *Drewe* v. *Corp*, " That where the Party gets substantially that for which he contracts, any small difference may be remedied by Compensation; but not when it extends to the whole Estate." What is substantially that for which a man contracts, must always be a very difficult question.

One objection made by the Defendant is, as to the

(*d*) 13 Ves. 73, S.C. MS.
(*e*) Lord *Erskine*.
(*f*) 9 Ves. 368.
(*g*) 13 Ves. 426.

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locality of *Cole Nash*; but that objection appears to me untenable; and if the Defendant's case stood upon that objection only, it would be very weak; for the evidence clearly fixes the situation of *Cole Nash*.

The next question is, Whether the Defendant has by his conduct precluded himself from insisting on a good Title to *Cole Nash*? It is said, that by meditating a Sale of *Cole Nash* he showed that he did not look upon it as essential to the enjoyment of the Estate; but the Defendant by his Answer, which, as to this, has been read as Evidence, says, that though he put it up to Sale, he did it only to ascertain its value, and not with a view of really selling it. The ratifying of the Sale to *Wildman*, purchasing the Stock, and agreeing as to the employment of his Deposit, after he was fairly informed by the Plaintiff's Solicitor, that the Title to *Cole Nash* could not be bettered by further Inquiry, are not conclusive circumstances to show he did not consider *Cole Nash* as essential to his purchase, because he is constantly asking for the Title to *Cole Nash*, and never appears to have lost sight of a good Title, but from first to last insists upon it. The Title was not, as in *Fordyce* v. *Ford*, incurable, but might have been rendered good, if certain Inquiries were satisfactorily answered; it was not absolutely, but contingently, bad. A man by going on to treat does not wave an objection he is continually insisting upon. If nothing had been said of *Cole Nash* after the Title to it was found defective, the objection might have been considered as waved; but here he is perpetually desiring to have a good Title. This Case, therefore, is like *Drewe* v. *Hanson*, where further inquiries being insisted on, the objection was not considered as waved. A Treaty cannot wave that

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which it treats about. There is nothing, therefore, in the conduct of the Defendant which precludes him from insisting on a Title to *Cole Nash*. If a man goes on treating, and then finds a particular piece of Land to which no Title can be made, is essential to his purchase, may he not, notwithstanding such Treaty, insist on the materiality of the Land? Surely, in Justice and common Sense, he may.

There is another part of this Case to which no satisfactory Answer has been given; I mean, the conduct of the Parties in turning the Defendant out of Possession. The Vendors wanting the Purchase-Money, and the Defendant refusing to give up the Estate, but insisting on a good Title, the Vendors take the Law into their own hands; they tender the Deposit of 5,000*l.* with Interest; insist on the Mansion-house being delivered up; and finally authorize *Rutton* (who is indemnified) to turn him out. They drive *Grueber* to the necessity of selling the live and dead Stock he had purchased in July, for 5,500*l.* on the faith of the Contract being performed. It is said that this was done to enable *Rutton* to give up Possession to the Plaintiffs, but that could not be; for the time when it was to be given up, Michaelmas, was past; it was not *Rutton*, but the Vendors, that turned him out, and indemnified *Rutton*. This was done to force *Grueber* to give up, or complete his Contract. They afterward offer him Possession again; but they were not to put him *in* and *out* of Possession as they thought proper. Having thus rescinded the Contract, are the Vendors, who can have no relief at Law, to come to a Court of Equity to enforce it! If this Contract were enforced, who is to be at the loss occasioned by the sale of the Stock, and the

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neglect of the Land? Much of the benefit which *Grueber* looked forward to in his Agreement, was destroyed by this conduct in turning him out. The Vendors themselves put an end to the Contract; nor was there any thing in the subsequent transactions to revive it.

Vendors ought always to examine their Title before they bring their Estate to market. It is owing to their neglect, in this respect, that so many Suits are occasioned. The fact, that no complete Title could be made to *Cole Nash*, should have been stated on the Sale of the Estate, and all this controversy would then have been prevented.

Bill Dismissed, without Costs.

6th December.

BURGESS *v.* ROBINSON and BURTON.

Legacy to three persons to be paid as soon as the Legatees should arrive in England, *or claim the same, provided they should arrive or claim the same within three years after the Testator's death; and if they should not, part of the amount of the Legacies to go over. The Legatee over, claiming the Legacy, a Reference directed to the Master, to inquire whether the three persons had arrived in* England, *or claimed the Legacy, within the three years.*

BENJAMIN BURGESS died on the 29th September 1811, and by his Will, dated 29th June 1811, he, amongst other things, gave and devised to the Defendant *Robinson* all that his Freehold Messuage or Tenement, &c.; and also, all that his Leasehold Messuage, &c.: To hold the same unto *Henry Robinson*, his Heirs, Executors, Administrators and Assigns, according to the nature or quality thereof respectively, subject never-

theless, and charged and chargeable to and with the payment of the Legacies or Sums of 200*l.* to each of his three Nephews therein named; (that is to say,) to his Nephew *George Burgess*, the sum of 200*l.*; to his Nephew *John Scott*, the sum of 200*l.*; and to his Nephew *William Scott*, the sum of 200*l.*; making together 600*l.* the same to be paid to them respectively as soon after his decease as they, or either of them, should arrive in *England*, or claim the same, provided such Claims should be made within the first three years next after his decease; and if two only of his said Nephews should arrive in *England*, or make their Claims within the times aforesaid, each of them should be paid the Legacy or Sum of 250*l.*; and if one only of his said Nephews should arrive in *England*, and make his Claim within the time aforesaid, he should be paid 400*l.*; and the Residue of the said sum of 600*l.*, in either case, should be considered and taken as part of the Residue of his Personal Estate; and if neither of his said three Nephews should arrive in *England*, or claim their Legacies within the time aforesaid, the sum of 500*l.*, part of the said three Legacies or Sums so given and bequeathed as aforesaid, should sink into and be taken and considered as part of his residuary personal Estate. And the said Testator, by his Will, (after giving and bequeathing sundry pecuniary and specific Legacies,) gave and bequeathed all the rest, residue and remainder of his personal Estate and Effects whatever and wheresoever, to the Plaintiff, his Wife.

The Defendants, *Henry Robinson* and *Thomas Burton*, were appointed Executors of the Will.

The Testator's Nephews, *George Burgess*, *John Scott*,

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and *William Scott*, went to Sea as common Sailors some years previous to the decease of *Benjamin Burgess*, the Testator, and did not appear in *England*, or claim the Legacy.

The Plaintiff, as residuary Legatee, claimed the 500*l.* but the Executors refused to pay it without the Indemnity of the Court. The Plaintiff thereupon filed her Bill against the Defendants, stating these facts, Praying, That the sum of 500*l.* and Interest, might be raised and paid by Sale or Mortgage of the whole, or a competent part, of the Freehold and Leasehold Lands and Premises.

The Executors, by their Answer, admitted that no claim of the Legacies had been made; and that they had advertised for the Nephews, but none of them had appeared.

Mr. *Wingfield*, for Plaintiff.

Mr. *G. Wilson*, for Defendants.

The VICE-CHANCELLOR:—

The Question is, Whether the event has taken place which entitles Mrs. *Burgess* to the 500*l.*? Before a Decree can be made for the payment of this residuary bequest, there must be a Reference to the *Master*, to inquire whether these Nephews arrived in *England* within three years after the Testator's death, or made any claim within that time. It appears pretty clearly by the Answers, that no claim was made; but it may turn out that they arrived in *England* within the three years, though they have not appeared, or claimed their Legacies.

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HART *v.* ASHTON.

9th December.

Cause set down to obtain a Decree Pro Confesso, *advanced in the Paper, on Motion.*

THE Defendant in this Cause had appeared, but had not put in an Answer, and the usual Process had issued to compel an Answer.

Mr. *Longley* moved, That this Cause, which was set down in order to obtain a Decree *Pro Confesso*, might be advanced in the Paper; and observed, that in *Bolton* v. *Glassford*, in 1813, the same thing was done. In that Case the Defendant appeared, but did not put in an Answer, and the usual Process issued. On a Motion at the Rolls, the Cause was ordered to be advanced from the bottom, to the head, of the Paper. An Application was afterwards made to the *Lord Chancellor* to set aside the Decree; and one of the grounds was, that the Cause had been improperly advanced in the Paper; but the *Chancellor*, after a conference with the *Master of the Rolls*, over-ruled the objection (*a*).

The VICE-CHANCELLOR:—

On the Authority of the case cited, You may take an Order.

Motion granted.

(*a*) Mr. *Bell* and Mr. *Shadwell*, who were in the Cause, vouched for the correctness of this statement.

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15th December.

COTTEEN *v.* MISSING.

A Settlement of "all and singular the two-third parts of all and every the whole of my Property, Goods, &c. belonging to me in the Empire of Great Britain, *and the* East Indies, *lately willed and devised unto me by Major* John Missing," *held to pass only two-thirds of such property as then remained, and did not extend to such parts of the property as had been spent previous to the Settlement.*

JOHN MISSING, late of the Isle of Man, Esq. deceased, on the 2d day of December 1811, made his Will, whereby, after giving certain Legacies, he gave the rest, residue and remainder of his personal Estate and Effects to *Ann Lee Missing*, and appointed the Defendants, *Richard William Missing* and *Joseph Paddon*, Executors of his Will, who proved the same.

The Testator died shortly after making his Will, and left *Ann Lee Missing* him surviving, and the Plaintiffs, *Claudius George Edwin Missing*, and *Ann Moriah Rose Missing*, the Children of the said Testator by *Ann Lee Missing*.

Letter to Executors expressing a Consent that a Sum of 500 l. was proper to be given to the Daughter of deceased Husband, held not to amount to a Gift of so much in their hands, the Gift not being perfected and carried into execution.

In the month of December 1813, a Marriage was in contemplation between *Ann Lee Missing* and the Defendant, *Daniel Lace*, Esquire, which Marriage afterwards took place in the month of June 1814. On the 2d day of December 1813, and before the said Marriage between *Ann Lee Missing* and *Daniel Lace*, *Ann Lee Missing* executed a Deed, as follows:—"Know all men by these presents, that I, *Ann Lee Missing*, of the Parish of Ballough, for divers causes and valuable considerations to me hereunto moving, but chiefly and especially for and in consideration of the natural love and affection, and peculiar regard which I have and do bear unto my two children, namely, *Claudius George Edwin Missing* and *Ann Moriah Rose Missing*; also in

consideration of five shillings British, to me in hand paid, and for and in consideration of the Reservations and Conditions hereinafter mentioned, have given, granted, gifted, aliened and settled, and by these presents do give, grant, alien, and for ever settle, unto and upon my before-named Son and Daughter, all and singular the two-third parts of all and every the whole of my property, goods, chattels and effects, of whatsoever denomination, nature and description, belonging to me in the Empire of *Great Britain*, and in the *East Indies*, lately willed and devised unto me by Major *John Missing*, lately in the parish of *K. K. Michael*, deceased: To have and to hold unto my said Son *Claudius George Edwin Missing*, and my said Daughter *Ann Moriah Rose Missing*, in equal and joint proportions, share and share alike, the said before-named recited Premises, whether in landed Property, the Funds, or Securities whatever, agreeable to the express purport, tenor, and meaning of the devise made in my favour by the said Major *John Missing*, the Father of the said Orphans, in and by his said last Will and Testament, when each of them severally arrives at the age of twenty-one years. And I, the said *Ann Lee Missing*, do hereby fully reserve to myself the Profits and Issues of the hereby settled and gifted Premises, for and during the time my said Son and Daughter are severally under the age of twenty-one years, towards their education, maintenance and tuition: And I do further direct and desire, that if any of my before-named Children shall happen to die before such Child arrives at the age of twenty-one years, the surviving Child shall enjoy and be entitled unto the deceased Child's part or proportion of the hereby granted and gifted Premises, as the survivor's indisputable right for ever: And in case my before-named Son and

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Daughter should both happen to die before they arrive at the age of twenty-one years, then and in that case, and not otherwise, the whole of the property hereby given and devised shall revert unto and become my own absolute property for ever, any thing to the contrary notwithstanding: And to the faithful performance of all and singular the before-written Deed of Gift and Settlement, I, the said *Ann Lee Missing*, do hereby firmly bind and oblige myself, and my heirs, executors, administrators and assigns, on the penalty of 10,000*l.* Sterling, to be levied and paid according to Law: As Witness my Subscription this 2d day of December 1813."

Daniel Lace, and *Ann Lee Lace*, heretofore *Ann Lee Missing*, after their said marriage, and on the 3d day of May 1815, executed a Deed, wherein, after reciting the Deed of the 2d day of December 1813, and that *Daniel Lace* and *Ann* his Wife, late *Ann Lee Missing*, had since intermarried, and that they were willing to have the matters contained in the said Deed carried into effect: The said *Daniel Lace* did thereby, with the consent and approbation of the said *Ann Lee Lace*, his Wife, fully and absolutely invest and empower the Plaintiffs, *Edward Cotteen* and *Patrick Townshend Lightfoot*, to proceed to the Trust and Management of the goods, chattels, credits, and effects, mentioned in the said Deed of Gift or Settlement, and to exert themselves, as soon as conveniently might be, for the recovery of the said Property, so that the same might be secured in the *Isle of Man* in such manner as the last-named Plaintiff should think proper, or in such other mode or manner as should appear to the said last-named Plaintiff to be most advantageous to the parties

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concerned therein: And the said *Daniel Lace*, and *Ann Lace*, his Wife, did thereby fully empower the said last-named Plaintiff to make use of such legal and equitable means as to them appeared most eligible, from time to time, for the recovery and management of the said Trust-property, in conformity with the express purport, tenor, and meaning of the said Deed of Gift or Settlement.

Richard Missing and *Joseph Paddon* did not, previously to the executing or signing of the Indenture of the 2d December 1813, account to *Ann Lee Missing*, afterwards *Ann Lee Lace*, for the whole of the clear residue of the said Testator *John Missing*'s personal Estate; but the said *Richard Missing* and *Joseph Paddon*, previously to the said 2d day of December 1813, paid to *Ann Lee Missing*, afterwards *Ann Lee Lace*, divers sums of money on account, or in respect of, the clear residue of the said *John Missing*'s personal Estate; and which sums of money were not equal in amount, or however did not exceed in amount, one third of the clear residue of the personal Estate belonging to the said Testator *John Missing*, at the time of his death, after payment of his the said Testator *John Missing*'s funeral and testamentary expenses, just debts, and legacies.

Richard William Missing and *Joseph Paddon* duly accounted for and paid to said *Ann Lee Lace* all Interest which accrued due upon, or in respect of, the clear residue of the said *John Missing*'s personal Estate, down to the time of the death of the said *Ann Lee Lace*.

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The Bill which was filed by *Edward Cotteen* and *Patrick T. Lightfoot*, and the *Cestuis que Trust*, *Claudius George Edwin Missing* and *Ann Moriah Rose Missing*, Infants, against *Richard William Missing* and *Joseph Paddon*, and also *Charlotte Missing*, stated the foregoing facts; and Prayed, that it might be declared that the Plaintiffs, *Claudius George Edwin Missing*, and *Ann Moriah Rose Missing*, were, under and by virtue of the Indenture of the 2d December 1813, entitled to two thirds of the clear residue of the personal Estate and Effects of and belonging to the said Testator, *John Missing*, at the time of his death, after payment of his the said Testator *John Missing*'s Debts, and the Legacies given by his Will, &c.

Richard William Missing and *Joseph Paddon*, by their Answers, admitted the facts stated in the Bill; and further stated, that the Defendant, *Charlotte Missing*, was one of the Daughters of the said Testator; and that the said Testator left the said *Charlotte Missing*, his Daughter, without any provision, except a Legacy of 100*l.* which he bequeathed to her by his said Will; and that after the death of the said Testator, Defendants represented to the said *Ann Lee Missing*, as the truth was, that the said *Charlotte Missing* was in distressed circumstances, and suggested to the said *Ann Lee Missing* the propriety of making some allowance to the said *Charlotte Missing* out of the property of the said Testator; and that the said *Ann Lee Missing* did accordingly consent to make some such allowance; and on or about the 15th day of July 1812, she wrote and signed, and sent to Defendant, a letter which contained the words, and was in part, to the purport and effect following (that is to say): "As to the money to be allowed to

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Charlotte, (meaning thereby the said *Charlotte Missing,)* when you ascertain what the Property is, whatever you and Mr. *Missing* (meaning thereby Defendant, *Richard Missing,)* think right that I should give her, I shall abide by." And that, in answer to that Letter, the Defendant, *Joseph Paddon,* with the concurrence and consent of the other Defendant, informed the said *Ann Lee Missing,* that Defendants thought it would be proper for her to give the sum of 500*l.* to *Charlotte Missing.* And that the said *Ann Lee Missing* afterwards wrote and signed, and sent to Defendant, *Joseph Paddon,* another Letter, bearing date the 12th day of August 1812, which contained the words, and was in part, to the purport and effect hereinafter mentioned (that is to say): "With respect to *Charlotte,* as you and Mr. *Missing* say she ought to be allowed 500*l.,* I will readily consent to it; I am willing to do any thing that is right." Their Answer further stated, that the said *Charlotte Missing* had not immediate occasion for the said Allowance, or sum of 500*l.*; and that the same was never actually appropriated to her, or distinguished from the residue of the said Testator's Estate; and, except as aforesaid, no correspondence in respect thereof took place between the said *Ann Lee Missing* and the Defendants; but that they considered the said sum of 500*l.* as given, or agreed to be given, to the said *Charlotte Missing* by the said *Ann Lee Missing*; and submitted whether the said *Charlotte Missing* did, or did not, become entitled to receive the same as the Gift of the said *Ann Lee Missing.*

Charlotte Missing, by her Answer, insisted she was entitled to receive the sum of 500*l.* under the circumstances mentioned in the Answer of the Executors, as the Gift of *Ann Lee Missing,* at the time of the date of

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the Letter of the 12th of August 1812; and that such Gift was not revoked, or made void, by the execution of the Deed of the 2d December 1813, or by the subsequent marriage or death of *Ann Lee Lace*.

Sir *Samuel Romilly*, and Mr. *Barber*, for Plaintiffs.

Mr. *Bell*, for Defendant, *Charlotte Missing*.

Mr. *Hart*, and Mr. *Perkins*, for the other Defendants.

The VICE-CHANCELLOR:—

Upon this Case, two Points arise: 1. As to the Construction of the Deed of 1813; and 2. As to the claim of the Defendant, *Charlotte Missing*.

With respect to the first point; the Infant Plaintiffs are undoubtedly entitled to two thirds of some Property, but of what Property is the question. Whether it be two thirds of the Property of the Testator, after Debts and Legacies paid, existing at the time of his decease, or two thirds of the Property of the Testator, which was in the hands of Mrs. *Missing* at the time of the Settlement made.

Mrs. *Missing* must certainly have meant two thirds of the Testator's Property in her hands at the time she executed the Settlement. The words in the Settlement are, "All and singular the two third parts of all and every the whole of my Property, Goods, &c. *belonging to me* in the Empire of Great Britain and the East Indies." If it had stopt there, it would have been clear that the 600*l.* of the Property which she had given away and spent,

would not have passed, because that was no longer her Property. Had it stopt there, it would have passed only two thirds of the whole of her Property she *then* had, and not her *quondam* Property; but then come the words, "lately willed and devised unto me by Major *John Missing*." But these words were meant only to restrain the latitude of the preceding words, not to augment the Gift, and to mark the particular Property she meant to give. She meant only to give out of her present property derived from her Husband, and not what was spent and gone; and it would contradict the words of the Gift, to make her liable in a retrospective account, as Debtor to her children. She sat down at the end of two years after her Husband's death, to settle two thirds of the property which remained of her late Husband. She reserves to herself the Profits and Issues of what she gives, during the minority of her Children, which shows, that at the time of the Settlement she was looking to her *present*, and not to her *past*, Property; for what Profits and Issues could there be of what was spent and gone. From every part of the Deed it is clear she meant only to dispose of two thirds of the *then* capital, which had been unapplied.

The second Question arises upon the circumstances stated in the Answer of the Executors, and insisted upon in the Answer of *Charlotte Missing*, with respect to the 500*l*.

In general, to entitle a Person to a Gift, it must be perfected and complete, or a Court of Equity will not interfere to compel a specific performance. If it rest *in fieri*, and is incomplete, Equity will not interfere. In

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Tait v. *Hibbert* (*a*), a Check given as a bounty to a Party, payable to Bearer, and also a promissory Note, were held not to be a sufficient Gift, sustainable in Equity, the Donor dying before they were paid. In *Antrobus* v. *Smith* (*b*), the Master of the Rolls says (*c*), "He meant a Gift. He says he assigns the Property. But it was a Gift not complete. The Property was not transferred by the act. Could he himself have been compelled to give effect to the Gift by making an Assignment? There is no case in which a Party has been compelled to perfect a Gift, which in the mode of making it he has left imperfect. There is *locus pœnitentiæ* as long as it is incomplete." How is it at Law? In *Taylor* v. *Lendey* (*d*), a Sum of Money voluntarily paid into the hands of A. for the benefit of a third person, was held to be a countermandable Gift so long as it remained in A.'s hands.

The Letters do not amount to a Declaration of Trust. The only case cited to show that these Letters amounted to a Declaration of Trust, in favour of *Charlotte Missing*, is *ex parte Dubost* (*e*), but that case is distinguishable. There, a Letter was written by the Testator to *Dubost*, in Paris, authorizing him to purchase in France an Annuity of 100*l.* for the benefit of *Marie Genevieve Garos*, for her life, and to draw upon him for 1,500*l.* on account of such Purchase. *Dubost* purchased the Annuity, but the Lady being married, and deranged, the Annuity was purchased in the name of the Testator.

(*a*) 2 Ves. Jun. 111.
(*b*) 12 Ves. 39.
(*c*) Ibid. p. 46.
(*d*) 9 East, p. 49.
(*e*) 18 Ves. 140.

Afterwards, on the 10th June 1808, the Testator sent to *Dubost*, at his desire, a Power of Attorney, authorizing him to transfer to *Marie Genevieve Garos* the Annuity. The Testator died in June 1809, and his death became known to *Dubost* in November 1809, and in ignorance of such death, on the 21st of October 1809, *Dubost* acted upon the Power of Attorney, and transferred the Annuity to *Marie Genevieve Garos*. Upon these Facts the *Lord Chancellor* says, "It is clear that this Court will not assist a Volunteer: yet, if the Act is completed, though voluntary, the Court will act upon it. It has been decided, that upon an Agreement to transfer Stock, this Court will not interpose: but if the party had declared himself to be a Trustee of the Stock; it becomes the property of the *Cestui que Trust* without more; and the Court will act upon it." He further observes, "Upon the Documents before me it does appear, that, though in one sense this may be represented as the Testator's personal Estate, yet he has committed to Writing what seems to me a sufficient declaration, that he held this part of the Estate in Trust for the Annuitant (*d*)." In that case, the Gift was complete; in this it is not.

To make a complete Gift, there must not only be a clear intention, but the intention must be executed, and carried into effect. In the first Letter to the Executors of the 15*th July* 1812, she says, "As to the Money to be allowed to *Charlotte Missing*, when you ascertain what the Property is, whatever you and Mr. *Missing* think right that I should give her, I shall abide by." The Gift, therefore, was then inchoate, the *quantum* of property not having been ascertained. In her second

(*d*) 18 Ves. p. 150.

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letter to *Paddon* of the 12th August 1812, she says, "With respect to *Charlotte*, as you and Mr. *Missing* says she ought to be allowed 500*l.* I will readily consent to it. I am willing to do any thing that is right." This Letter amounted to a declaration of the propriety of giving her 500*l.* and shows her approval of a Gift to that amount, but does not give effect to the Gift, and carry it into execution. Nothing is said as to who is to pay the Money, or when it is to be paid. The Executors were not warranted in paying it out of the Money in their hands. If they had done so, Mrs. *Missing* might have said, I meant to give the Money on Terms and Conditions, as to Marriage and Age. Nothing is said as to what part of her property this Money was to be raised out of; whether out of the Money in the Funds, or out of the Estate. Nothing is to be found in the Letters, but an intention to give; and therefore this case widely differs from the cases alluded to, where Acts were done carrying the Gift into execution. Here the Gift was not completed. Supposing it were any thing like an authority to an agent, the subsequent marriage of Mrs. *Missing* was a revocation of such Authority; as was, likewise, her Death. This was a mere inchoate, imperfect Gift, not carried into Execution, and which has, therefore, failed.

COLES *v.* GURNEY, and another.

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22d November.

Bill filed against Two Partners, and one being abroad, the Subpœna against him, on Motion, permitted to be served on the Partner here.

BILL filed against two Partners. One was abroad.

Mr. *Courtenay* moved, that the *Subpœna* against the Partner abroad, might be served on the Partner at home, and deemed good Service, citing *Carrington* v. *Cantillon* (*a*), as in point.

The VICE-CHANCELLOR:—

You may take the Order, on the Authority of the Case in *Bunbury*.

(*a*) Bunbury, p. 107.

DYOTT *v.* DYOTT.

12th December.

Security for Costs by Plaintiff refused, an Answer being, by mistake, filed, after the Defendant knew the Plaintiff was gone abroad, but sworn long before.

MR. *Spranger*, on the Part of the Defendant, moved, that the *Prochein Amy* of the Plaintiff might give Security for Costs, he having gone abroad subsequent to the filing of the Bill.

Mr. *Bligh, contra*:—

It is too late to apply, for since the Defendant knew the *Prochein Amy* was gone abroad, he has filed his Answer.

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Mr. *Spranger*, in Reply:—

The Answer was sworn, and sent to the Clerk in Court, before the Defendant knew the *Prochein Amy* was gone abroad, but by some mistake, the Clerk in Court kept it a considerable time in his office, and it was not filed till after the Defendant had notice, the *Prochein Amy* was gone abroad; but that step was taken without the knowledge of the Defendant, who supposed his Answer would be filed immediately after it was sworn.

The VICE-CHANCELLOR:—

This is a hard case, but the Practice of the Court must be adhered to, however harshly it may sometimes operate.

If a Bill be amended before the Answer is filed, though after it is sworn, the Answer is not sufficient, as it must answer the Amendments in the Bill. I remember a case of that kind, where the Defendant lived in the Country, which operated very severely. The Court does not consider the Answer to be such, till it is filed. If this Defendant had used his utmost diligence, he might have prevented the filing of the Answer by the Clerk in Court. The Application is too late.

Motion refused.

ARMITAGE *v.* WADSWORTH.

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15th December.

Plea, to an Ejectment Bill stating outstanding Leases and praying relief, that there are no such outstanding Leases, allowed.

THE Bill stated, That *James Armitage*, of, &c. was in his life-time, and at the time of his death, seised, or well entitled to certain Freehold Estates situate, &c. and was also seised, or entitled to divers other Estates, situate at some other places in *England*, or elsewhere, unknown to the Plaintiff; and being so seised, died on the 26th June 1812, Intestate and without Issue, leaving the Plaintiff, his second Cousin and Heir at Law, him surviving; who, as such, ought to have had Possession of all the said *James Armitage*'s Freehold Estates, and the Title Deeds, Evidences and Writings belonging thereto; but, that after his death, the Defendants, or some person on their behalf, set up a certain Paper Writing alleged to be the Will of *James Armitage*, and to be duly executed; and entered into and continue in Possession or Receipt of the Rents and Profits of the Freehold Estates of the said *James Armitage*, for their benefit, and obtained, and have possession of the Title Deeds, Evidences and Writings relating to such Freehold Estates.

The Bill then stated, that the Plaintiff had discovered that the pretended Will was never duly executed, the said *James Armitage* being, at the time when he is alleged to have executed the same, not of sound mind; and that if the said pretended Will was in fact signed by him, the same was fraudulently procured to be signed by him.

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The Bill then stated applications made to the Defendant to account for the Rents and Profits of the Estates, and to deliver up to him the Title Deeds, &c. relating thereto; and charged various Facts in support of the preceding Statements; and that all the said Estates having been Let by *James Armitage* on unexpired Leases, no Action of Ejectment could be maintained by Plaintiff against the Tenants of such Estates, until the expiration of their respective Interests; and that he was therefore unable to proceed with effect at Law to obtain Possession of such Real Estates. The Bill then insisted that the Plaintiff was, under the circumstances, entitled to Equitable Relief; and Prayed, a Discovery—an Issue *Devisavit vel non*; or that the Plaintiff might be at liberty to proceed in Ejectments—a Receiver—an Injunction—and that the Title Deeds, &c. might be deposited with the Master for safe Custody.

To this Bill the Defendants put in the following Plea:

"The Defendants, &c. for Plea unto said Bill, say and aver, that *James Armitage* in Bill named was, at the time of his death, seised in Fee in Possession of all the Real Estates whereof or whereto he was then seised or entitled; and the Defendants aver that none of said Real Estates of said *James Armitage* were or was let on Lease by said *James Armitage* to any Person or Persons, for any Term or Terms of Years which were or was unexpired at the time of the death of the said *James Armitage*; all which matters, &c."

Sir *Samuel Romilly*, and Mr. *Heald*, in support of Plea:—

This is an Ejectment Bill. The only ground of applying to Equity, in this case, is, the suggestion of outstanding Leases, which prevents the Plaintiff proceeding by Ejectment at Law; but this is expressly negatived by the Defendants Plea. A Negative Plea is good (*a*), as a Plea, for instance, of no Partnership. In *Hitchins* v. *Lander*, 2 November 1808, a negative Plea, that there was no outstanding mortgage term, was admitted. Title Deeds are not necessary to enable an Heir at Law to recover; he only need show a Seisin.

Mr. *Hart*, Mr. *Bell*, and Mr. *Phillimore*, *contra*:—

The Bill seeks the delivering up of a Will obtained by Fraud, and of Title Deeds, &c. A Court of Equity may order such a Will to be delivered up; nor will it first direct an Issue *Devisavit vel non*, unless the Defendant insists on the validity of the Will. The Plea, admitting all it does not controvert, must be taken to admit that the Will was fraudulently obtained, and that the Defendants have the Title Deeds; and therefore admits grounds of relief in Equity, and that the Plaintiff is entitled to have the Will and Title Deeds delivered up. There is an allegation in the Bill, that the Plaintiff does not know where all the Estates of the deceased were situated, and no Answer is given to the Inquiry on that subject. The Plea to be effectual, ought to have stated a new, substantive, direct Fact, which shows that the Plaintiff is not entitled to any of the relief prayed, which is not the case with this Plea. *Graham* v. *Gra-*

(*a*) Drew v. Drew, 2 Ves. and Bea. 161; and see on this subject Jones v. Davis, 16 Ves. 265. Evans v. Harris, 2 Ves. & Bea. 364.

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ham, and *Frewin* v. *Lewis*, Cases recently determined, but not reported, are Authorities in support of this Plea.

Sir *Samuel Romilly*, in Reply:—

The Plea only admits facts for the sake of argument; and here the Plea admitting the Will to be fraudulently obtained, shows, by denying that there are any outstanding Leases, that the Plaintiff may assert his rights at Law. There are only two cases in which a Bill for the delivering up of Title Deeds can be supported: 1. Where the Title is established at Law; 2. Where they are necessary to establish a Title at Law. In this case the Deeds are not necessary to enable the Plaintiff to proceed at Law.

The VICE-CHANCELLOR:—

The first point to be considered in this Case, is, whether the Bill contains any matter giving Equitable Jurisdiction, supposing the passage in the Bill relative to outstanding Leases were omitted? Without that passage, it would be a mere Ejectment Bill by an Heir at Law out of Possession, praying an Issue, stating no impediment to the assertion of his right at Law, and therefore not sustainable. The Bill, it is true, prays the delivery up of Deeds, and for the safe custody of them; but it does not state that those Deeds are necessary to support his Title, or to enable him to proceed at Law, nor does he pray an immediate possession of them.

A Bill will undoubtedly lie, in many cases, for the delivery up of Title Deeds, and it is a very ancient and important head of Equity. Lord *Redesdale* refers to a

Case of that description so early as in the time of *Edward* IV. (*b*). Where a Party is in the Possession of Property to which the Deeds relate, such a Bill may, in some circumstances, be very proper; but where, as Lord *Redesdale* observes, "the Title to the possession of Deeds and Writings, of which the Plaintiff prays Possession, depends on the validity of his Title to the property to which they relate, and he is not in Possession of that property, and the evidence of his Title to it is in his own power, or does not depend on the production of the Deeds or Writings of which he prays the delivery, he must establish his Title to the property at Law before he can come into a Court of Equity for delivery of the Deeds or Writings (*c*)."

The statement in the Bill, that there are Estates unknown to the Plaintiff, to which he is entitled, and praying a discovery of them, must have been answered, if the Bill were for discovery only; but this is not a mere Bill of Discovery, but for Relief also; and if the Plaintiff is not entitled to relief, he cannot have a Discovery.

The Bill would have been unquestionably demurrable, if it had not stated there were outstanding Leases; and upon that single averment the Plaintiff's Equity alone depends, the prayer for a Receiver, &c. being merely consequential to relief. That averment prevented a Demurrer. Is then, this Plea, negativing that averment, a good Plea? It is a point of some novelty. The Case of *Graham* v. *Graham*, the Brief of which I have

(*b*) Tr. Plead. 95, last Edit. (*c*) Redesd. Tr. Pl. 43, last Edit.

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seen, is not in point, the prayer of the Bill in that Case being limited.

It is no good objection to the Plea, that it is a negative Plea. Lord *Thurlow* expressed an opinion against a negative Plea (*d*), but he afterwards retracted it (*e*); and lately, in *Hitchens* v. *Lander* (*f*), the present *Lord Chancellor* held such a Plea to be good. That Case was very similar to this, it negativing the fact of an outstanding Mortgage stated in the Bill. Indeed, most of the Pleas to the Jurisdiction of the Court, or to the Person of the Plaintiff or Defendant, and in many other instances, are negative Pleas.

What is the proper case for a Plea? A Plea is a special Answer to a Bill, or some part thereof, showing and relying upon one or more things as cause why the Suit should be either dismissed, delayed, or barred (*g*), and must be such as reduces the Cause to a particular point. If a Demurrer had been filed, together with an Answer, it would have been what is called a Speaking Demurrer, for in the argument of the Demurrer, you must have admitted the outstanding Leases, which would have been fatal to the Demurrer. *Plummer* v. *May* (*h*), shows that a Demurrer in this case, supported by an Answer, would have been bad, and that a Plea is proper. Unless the Plea is good in this case, it must be laid down as a general proposition, that if any one point be stated in a Bill upon which the Court has Jurisdiction, though in other respects the remedy is at

(*d*) Newman v. Wallis, 2 Bro. C. C. 489.
(*e*) Hall v. Noyes, 3 Bro. C. C. 489.
(*f*) Coop. Rep. 34.
(*g*) Pract. Reg. 273.
(*h*) 1 Ves. 426.

Law, and though a Demurrer will not lie, yet a Plea cannot be put in to negative that only point which gives Jurisdiction! The right to stand in a Court of Equity is here reduced to one single point, and that Equity is denied.

Lord *Redesdale* puts a case which comes very near the present; expressing himself, however, with great caution. "If," says he, "the Jurisdiction was attempted to be founded on the loss of an Instrument, where, if the defect arising from this supposed accident had not happened, the Courts of ordinary Jurisdiction would completely decide upon the subject, perhaps a Plea, showing the existence of the instrument, and that it was in the power of the Plaintiff to obtain a production of it, ought to be allowed, though instances of this sort of plea may not occur in practice. For it seems highly unreasonable that a Plaintiff, by alleging a Falsehood in his Bill, should be permitted to involve a Defendant in the expense of a Suit in Equity, though the Bill may be finally dismissed at the hearing of the Cause, if the Defendant answers the case made by it, and enters into his defence at large. No Authority, however, occurs to support such a Plea (*i*)." The outstanding Leases, in this case, may be negatived in the same manner as the loss of the Deed may be negatived, in the case put by Lord *Redesdale*. An Answer would be of no use to the Plaintiff; he would be sent to Law to assert his legal right. Why then is not a Plea allowable to negative the point on which the Jurisdiction of this Court rests? The Bill would have been demurrable but for the statement of outstanding Leases; and

(*i*) Redesd. Tr. Pl. p. 181. last edition.

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as the Plea negatives the existence of such Leases, it is good; nor does it stand in need of any Averment by Answer.

Plea allowed.

END OF PART 1.

CASES

BEFORE THE

VICE-CHANCELLOR.

BOOTHBY *v.* WALKER.

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23d December.

Vendee in Possession, objecting to Title, ordered to pay Purchase Money into Court, though Possession not admitted by the Answer, and only shown by Affidavit.

THE Bill was filed against a Vendee, for the Specific Performance of a Purchase Agreement, dated the 30th August 1810, made on a Sale of Lands by Auction to the Defendant, in two Lots.

The Defendant, by his Answer, admitted the Agreement and the Deposit, and that an Abstract had been delivered to his Solicitor, and approved; but stated, he was advised, and believed, the Plaintiff could not make a good Title; and that on search he had found there were several outstanding Judgments and Annuities affecting the premises. The Answer was replied to, but no further steps taken.

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It was stated in the Bill, that Possession had been given of the two Lots to the Defendant on the 25th December 1810, according to the printed conditions of Sale, but the Answer was altogether silent as to the Possession stated in the Bill.

It was now moved, on the part of the Plaintiff, for a Reference to the Master, as to the Title; and that the Defendant might on or before the 15th January 1816 pay his Purchase Money into the Bank, with Interest from the 25th December 1810.

An Affidavit was produced in support of the Motion, verifying the Facts.

Mr. *Daniell, contra*:—

The Answer, to which no Exceptions were taken, does not admit Possession, and that omission cannot be supplied by Affidavit. When in this stage of a Suit Purchase Money is directed to be paid in, it is never with Interest.

The VICE-CHANCELLOR:—

The Reference to the Master, as to the Title, is not objected to, but the payment of the Purchase Money and Interest into Court is, because Possession is not admitted by the Answer; but in this case, I think, the Affidavit is admissible, to show the Facts relating to the taking of Possession.

These are collateral matters as to which an Affidavit may, after Answer, be filed. On a similar motion, yesterday, before the Lord Chancellor, an Affidavit was admitted as to the fact of Possession being taken, though nothing appeared on the subject, either in the

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Bill, or the Answer (*a*). Here, the Bill states that Possession was taken, and it is not denied by the Answer. The Agreement—the Deposit—the delivery and approval of the Abstract, are admitted; but the Defendant objects now to the Title, stating, *he believes*, that upon search it has been found there are outstanding judgments and annuities; but these, if they exist, are not so much an objection to the *Title*, as to the *Conveyance* (*b*).

Walters and *Upton*, cited in the note to *Freebody* v. *Perry* (*c*), is an authority to show that, where the Title is approved, and Possession taken, the Purchase Money should be paid in.

Let the Purchase Money be paid in, in six weeks, without prejudice to the Question as to Interest (*d*).

Ex parte RAY, in the matter of MAY, a Bankrupt.

23d December.

Settlement by a Lady about to marry, of her Property to Trustees, for "her own sole use, benefit, and disposition," gives a separate Estate.

BY an Indenture dated the 8th of September 1794, made between *Thurland Broke*, Spinster, of the first part; *Robert May* of the second part; and *Phillip Bowes Broke*, Esq. *Edmund Jenney*, Esq. *Thomas Kerrick*, Esq. and the Petitioner, the Reverend *Orbell Ray*, of

(*a*) See Burroughs v. Oakley, Merivale, p. 52, which appears to be the case alluded to.

(*b*) On this point, see Berkeley v. Dauh, 16 Ves. 331.

(*c*) Coop. 91.

(*d*) In Burroughs v. Oakley, Merivale, 52, the Purchase Money, *with Interest*, was, on a similar Motion, ordered to be paid into Court.

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the third part, being the Settlement made on the Marriage of the said *Thurland Broke* and the said Bankrupt: After reciting that the Portion or Fortune of which the said *Thurland Broke* was possessed in her own right, consisted of 3,490 *l.* Consolidated 3 *l.* per Cent. Annuities, and 1,600 *l.* 4 *l.* per Cent. Annuities Consolidated, April 6th 1780; and also of the sum of 1,200 *l.* in her own custody or power; and also reciting, that upon the Treaty for the said intended Marriage it was proposed and agreed between the said *Robert May* and *Thurland Broke*, that the said 3,490 *l.* and 1,600 *l.* Stock, and the said 1,200 *l.* should be assigned, paid, and remain vested in the said *Phillip Bowes Broke, Edmund Jenney, Thomas Kerrick*, and the Petitioner, *Orbell Ray*, upon the several Trusts after declared; it was witnessed, that in consideration of the said intended Marriage, &c. she the said *Thurland Broke*, by and with the privity, consent and agreement, direction and appointment of the said *Robert May*, her then intended husband, did bargain, sell, assign, transfer and set over, unto the said *Phillip Bowes Broke, Edmund Jenney, Thomas Kerrick*, and the Petitioner *Orbell Ray*, their Executors, Administrators and Assigns, as well the said 3,490 *l.* 3 *l.* per Cent. Annuities, as also the said 1,600 *l.* 4 *l.* per Cent. Annuities, and also the said 1,200 *l.*; and also all other sum and sums of Money whatsoever vested in or belonging to her the said *Thurland Broke*, or to which she the said *Thurland Broke* was in any manner entitled; To hold unto and to the use of the said *Phillip Bowes Broke, Edmund Jenney, Thomas Kerrick*, and the Petitioner *Orbell Ray*, their Executors, Administrators and Assigns, in Trust for the said *Thurland Broke*, her Executors, Administrators and Assigns, until the Solemnization of the said then intended Marriage; and

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after the Solemnization thereof, upon Trust, that the said Trustees should, with the consent and approbation of the said *Thurland Broke* in writing under her hand, continue, sell, or lay out and invest the same, or any part or parts thereof, on real or Government Securities, or Parliamentary Funds, which it should be lawful for the Trustees, with such consent and approbation as aforesaid, or otherwise, at his or their discretion, from time to time to alter and transfer, and stand possessed of the trust funds, in Trust, yearly and every year during the life-time of the said *Thurland Broke*, to pay and apply all the Dividends, Interests, Proceeds and Profits thereof, and of every part thereof, to the proper hands of the said *Thurland Broke*, to and for her own sole and separate use and benefit, or to such Person or Persons as she in writing, signed with her proper hand, should from time to time, notwithstanding her said intended Coverture, direct or appoint. And that the said *Robert May*, her said intended husband, should not nor would intermeddle therewith; neither should the same be subject or liable to his debts, control, or engagements; and the receipts of the said *Thurland Broke* were to be good discharges. And after her decease, that the said Trustees should, with the consent and approbation of the said *Robert May*, continue, sell, lay out and invest the same Trust Monies, or any part or parts thereof, on real or Government Securities, or Parliamentary Funds, which Securities or Funds it should be lawful for the Trustees, with such consent and approbation as last aforesaid, or otherwise, at his or their discretion to alter and transpose, and permit and suffer, or well and sufficiently authorize and empower, the said *Robert May* and his assigns, to have, receive and take the Dividends, Interest and Proceeds thereof, and of every part thereof, to

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and for his and their own use and benefit for and during the term of his natural life; and after the several deceases of the said *Robert May* and *Thurland Broke*, and of the survivor of them, in trust, to call in and make Sale of such Securities or Funds, and pay and apply the whole Money arising by such Sale or Sales, and which should be so called in, unto and amongst any one or more of the Child or Children of the said *Robert May* on the body of the said *Thurland Broke*, his intended wife, to be begotten, for such Estates and Interests, either absolutely or conditionally, in such shares and proportions, sort, manner and form, and with, under, and subject to such powers, provisoes, restrictions and limitations over, so as the same be for the benefit of some one or more of such Child or Children as she the said *Thurland Broke* alone, whether Sole or Covert, and notwithstanding her said intended Coverture, should from time to time, or at any time or times, by any Deed or Deeds, Writing or Writings to be by her signed, sealed and delivered in the presence of two or more credible Witnesses, or by her last Will and Testament in writing, to be by her signed and published in the presence of the like number of credible Witnesses, (which Deed, Writing or Will, she the said *Thurland Broke* was thereby, and by the said *Robert May* her intended husband, enabled, authorized and empowered, to make and execute, as to her should seem meet,) direct, limit or appoint; and in default of such Direction, Limitation or Appointment, and as to so much of the said Monies whereof no such Direction, Limitation, or Appointment should be made, In Trust to pay and apply the same unto and amongst all and every the Child and Children of the Marriage in manner therein mentioned; *and in default of Children, In Trust for the*

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sole use and benefit of the said Thurland Broke, the intended Wife of the said Robert May, her Executors, Administrators and Assigns; and did and should assign and transfer the said Stock, Monies, Funds and Securities upon which the same should be invested or secured accordingly. And after further reciting, that on the Treaty of the said intended Marriage it was proposed, consented to, and agreed by and between the said *Robert May* and *Thurland Broke*, that from and after the solemnization thereof, in case the said *Thurland Broke* should be or become seised or entitled to any Manors, Messuages, Lands, Tenements or Hereditaments, either Freehold, Copyhold or Leasehold, or possessed or entitled to any other personal Estate and Effects, over and above what she then was, that such Estate and Effects *should be and remain to and for the sole use, benefit, and disposition of her the said Thurland Broke*; it was witnessed, that the said *Robert May*, in consideration of the said intended Marriage, and in case the same should take effect, and for other the consideration therein and hereinbefore mentioned, " Did for himself, his Heirs, Executors and Administrators, and every of them, covenant, promise, declare, consent and agree, to and with the said Trustees, their Heirs, Executors, Administrators and Assigns, that in case the said *Thurland Broke* should, at any time or times after the Solemnization of the said intended Marriage, be or become seised or entitled in her own right to any Manors, Messuages, Lands, Tenements or Hereditaments, either Freehold, Copyhold or Leasehold; or be or become possessed or entitled to any other or further personal Estate or Effects whatsoever, over and besides what she the said *Thurland Broke* was then possessed or entitled to, that he the said *Robert May*, his Heirs, Executors, Admini-

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strators and Assigns, should not, nor would, in anywise have, claim, challenge, or demand any Estate, Right, Title, Possession, Property or Interest whatsoever, of, in or to, or in anywise intermeddle with any such real or personal Estate or Effects, or the rents, profits, interest or produce thereof, or of any part or parcel thereof, by reason of the said Intermarriage between the said *Robert May* and *Thurland Broke*; but that the same should at all times after the said intended Marriage be at the sole separate power, disposal, and free disposition and employment of her the said *Thurland Broke*, as by Deed, Will, or otherwise, to her should seem meet, notwithstanding her intended Coverture, to be by her executed and attested in manner as therein and hereinbefore mentioned, and as she should think fit to direct or appoint, to all intents and purposes; and that the same real or personal Estate or Effects should not be subject or liable to the debts, control, or engagements of the said *Robert May* her intended Husband; and that he the said *Robert May*, his Heirs, Executors or Administrators, should, at the request of the said Trustees, their Heirs, Executors, Administrators or Assigns, and by such ways and means as the said Trustees, their Executors, Administrators or Assigns, or their or any of their Counsel learned in the Law should devise, or advise or require, do, execute, and perform any further or other act or acts, deed or deeds, matter or thing for corroborating, ratifying, and confirming the same in manner as therein and hereinbefore mentioned."

The Marriage with *May* took place; but there were no Children of the Marriage.

Mrs. *Thurland May* (formerly *Broke*), made her Will, dated 23d August 1797, disposing of all her

Property; and a Codicil dated 14th March 1806; and died in the year 1809.

Several advances had been made to *May* out of the Trust Property in the life-time of his Wife, amounting to 3,412 *l.* 10 *s.* for which, on the 10th December 1806, he gave a Bond to *Kerrick*, and the Petitioner *Orbell Ray*, the then surviving Trustees, in a penalty of double amount.

On the 18th June 1812, *May*, being applied to for payment of the money due upon his bond, agreed to deposit in the hands of the Petitioner the Title Deeds and Writings of certain Estates, and agreed to execute a Mortgage of such Estates for the re-payment of the money; and the Title Deeds were deposited in the hands of two Solicitors to prepare the Mortgage. No Mortgage, however, was prepared, but the Deeds continued in the hands of the Attornies.

On the 31st October 1814 a Commission issued against *May*, and he was declared Bankrupt, and Assignees chosen.

Part of the Bankrupt's Estates was sold, and the Title Deeds delivered to the Solicitor of the Assignees, to enable them to complete the Sale, upon an agreement that the Purchase Monies should be impounded, and considered as subject to the Petitioner's Lien on them, provided such Lien was determined to be good; and a considerable part of the Estate, valued at 2,000 *l.* remained unsold.

The Petition, stating these facts, and that the Petitioner was the sole surviving Trustee, prayed, that the Peti-

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tioner, *Orbell Ray*, might be declared to have a Lien on the said Estates to the amount of the said sum of 3,412*l.* 10*s.*; and that he might be paid the same out of the proceeds of the Sale of the Estates, in order that such sum might, after the death of the Bankrupt, be applied according to the Trusts of the Settlement; or otherwise, that the Petitioner might be permitted to come in and prove the said sum of 3,412*l.* 10*s.* under the said Commission, and might receive a proportionable dividend in respect thereof; and that such dividend might be paid over to him, and be likewise applied, after the death of the said Bankrupt, pursuant to the said Settlement and the Trusts therein declared.

Mr. *Leach*, for the Petition:—

No question is made as to the Lien. The only question is, whether, in the events which have happened, Mrs. *Thurland May* had a power of disposing of this property, she having had no Issue. If she had no power, the property belongs to Mr. *May* as her administrator, and, through him, to his Assignees.

The words "*sole use*," certainly gave a separate Estate in the property to Mrs. *May*. There could be no doubt that if the words "sole and *separate* use" had been used, it would have given a separate estate. Does not "sole" mean separate? If not, it has no meaning.

Sir *Samuel Romilly*, and Mr. *Bell*, *contra*:—

Wherever, in this Deed, a separate Estate was intended to be given, great anxiety is shown fully to express the intention; and if the words "sole use," in that part of the Deed, disposing of the Property, in case there should be no children, was meant to pass a separate

Estate, the same anxiety would have been shown. Certainly, words like these were held lately, by the Master of the Rolls, in *Adamson* v. *Armitage* (*a*), to pass a separate Estate, but then there was nothing in the context of the Will to show a different meaning was intended. In *Johnes* and *Lockart*, 18th June 1793, a Legacy to a married woman, "to her own use and benefit," was held to pass a separate Estate (*b*). But here the context seems to show that a separate Estate was not intended.

The VICE-CHANCELLOR:—

The doubt arises, in this case, on the construction of words in a Settlement, and they must be explained, if necessary, by the context. All that this Lady had, she settled; and there appears an intention to exclude her intended husband. Taking the words "*sole use*" by themselves, they must have the same meaning as "separate use:" omitting the word *sole*, the Property would go to the husband; but I am not at liberty to reject that word. "Sole," means, solely hers,—for her sole benefit. It is an emphatic and operative word.

I admit that a husband's marital right cannot be taken away but by a clear intention (*c*); but here, I think, the intention is clear. The *Master of the Rolls* has decided on the effect of these words in the case alluded to, of *Adamson* v. *Armitage*, and that they pass a separate Estate.

(*a*) The case was quoted from memory, but is since reported, Coop. Rep. 283.

(*b*) Sir Samuel Romilly mentioned this case from a note formerly given him by Mr. Abbot (the Speaker). It appears to be the same case as is mentioned *arg*ᵗ in *Lumb* v. *Milnes*, 5 Ves. 520.

(*c*) *Lumb* v. *Milnes*, 5 Ves. 521.

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It is true, that in other parts of the Will, where a separate Estate is given, other words besides the word "*sole*" are used, but that is only a redundancy of expression.

The Courts have gone a great way in abridging the marital rights of the Husband. Money given to the Husband "*for the livelihood of the Wife* (*d*)," and money directed "*to be paid into her proper hands* (*e*)," has been held to pass as separate Estate.

This must be considered as the separate Estate of Mrs. *May*, and an Order made accordingly.

15th and 16th January.

CHEMINANT and others *v.* DE LA COUR and others.

Motion for a Commission to examine Witnesses abroad, before the Time for answering had expired, refused.

THE Bill in this case prayed a Discovery, a Commission to examine Witnesses abroad, and an Injunction to restrain proceedings in Actions in the mean time; the object being, to enable the Plaintiffs to defend themselves in two Actions which had been brought against them. No Answer was put in, and the time for answering had not elapsed.

Mr. *Raithby* now moved for a Commission to examine Witnesses abroad, and cited *Noble* v. *Garland* (*a*).

(*d*) Darley *v.* Darley, 3 Atk. 399. In Lee and Prieaux, 3 Bro. 383, 4, it was said, on consulting the Register's Book, this case was decided differently.

(*e*) Hartley *v.* Hurle, 5 Ves. 545.

(*a*) Cooper's Reports, 222.

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Mr. *Collinson, contra* :—

Before the time for answering has elapsed, this Motion cannot be made; but I admit, if the Defendants were in contempt for want of an Answer, or had moved for further time to answer, the Motion might be made in the same way as an Injunction is in such cases obtained. With regard to the Case of *Noble* and *Garland*, it appears on Inquiry of some of the Counsel in the Cause (*b*), that the time for answering had expired, and that further time had been obtained; so that *Noble* and *Garland* is no authority for the present Application.

Mr. *Raithby*, in reply :—

The printed report of *Noble* and *Garland* clearly warrants the present Application. It does not seem material whether the Answer is, or is not, put in. If the Answer renders a Commission unnecessary, the Plaintiff puts himself to an unnecessary expense in obtaining the Commission before the Answer, but does no injury to the Defendants. It is a great object in such a case as this to have a Commission as speedily as possible. I do not see the Principle upon which a Plaintiff is permitted to have the Commission if the time for answering has elapsed, and yet is not to have it before. In this case the Defendants know nothing of the Facts as to which the Witnesses are to be examined; their Answer, therefore, can be of no use to the Plaintiffs.

The VICE-CHANCELLOR :—

The Court in deciding on a point of Practice does not consider what ought to be, but what is, the Practice

(*b*) Mr. *Bell* and Mr. *Wray*.

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and is not guided by the Practice of other Courts. The Question here is, Whether, according to the Practice of the Court of Chancery, a Commission to examine Witnesses abroad can be obtained before the time for answering has expired? Let us consider the Question as if it were *res nova*, and independent of Cases. Can it be said, that immediately on filing a Bill of Discovery, and before an Answer, such a Motion might be made? If the object of the Bill were only to obtain a Commission for the Examination of Witnesses abroad, you might thus jump to it immediately. In ordinary Cases, except where an application is made to examine Witnesses *de bene esse*, the Plaintiff must wait till the Cause is at Issue, before a Commission can be moved for; and the reason is, that it may be known what facts are admitted or disputed. What difference does the residence of the Witnesses abroad make? Suppose the Witnesses were at home, could you apply for a Commission before the Cause was at Issue? The Court of *Exchequer* will not order a Commission before Issue joined (*c*). What is reported to be said by the Chancellor in *Noble* v. *Garland*, that, "in the Ex-"chequer, in Policy Cases, they are for equitable re-"lief," and therefore, "in those Cases, it may be "proper to wait for an Answer," never could, I think, have been said, because in fact, Relief is seldom prayed in those Policy Cases; and they are, generally, mere Bills of Discovery, and for a Commission to examine Witnesses abroad. In the two Cases, *Foderingham* v. *Wilson*, and *Yates* v. *Barker*, mentioned in the Note to *Noble* and *Garland*, it is clear, the Commission was moved for after the time for answering had elapsed, for Injunctions had been previously obtained for want of an Answer.

(*c*) See 2 Fowl. Exchequer, 95.

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In those Cases the Cause was not at Issue; and in that respect the Practice of the Court of Chancery differs from the Court of Exchequer, which, as I have observed, does not order a Commission till after Issue is joined. The Court of Chancery says, if a Party is indulged by having further time to answer, the Plaintiff shall not by such indulgence be prevented from examining Witnesses abroad. Though it is not stated in the Report of *Noble* v. *Garland* that the time for answering had elapsed, yet as the Chancellor alludes to, and seems influenced by, the Cases of *Foderingham* v. *Wilson*, and *Yates* v. *Barker*, where the time for answering had elapsed, it confirms what has been stated at the Bar, that in *Noble* and *Garland*, the time for answering had elapsed, for otherwise those Cases were not in point. This Motion, therefore, has no authority to warrant it. The Practice does not allow the Motion; and I see no great inconvenience resulting from it.

With respect to Costs; in general, when a Motion is irregularly made, the Party making it must pay the Costs; but as the Report of *Noble* v. *Garland* may have misled the Parties, I think this is not a Case for Costs.

JENNINGS *v.* HOPTON.

15 and 19 Jan.

On a Reference of Title on a Bill for a Specific Performance, the Reference may extend to all that concerns the Title, but not to other matters; it may be extended, therefore, to inquire, whether it appeared by the Abstract in the Pleadings mentioned, that a good Title could be made.

THIS was a Bill for the Specific Performance of a Purchase Agreement, to which an Answer was put in, and on Motion, a Reference had been made to the Master, to see if there was a good Title.

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Mr. *Treslove*, for the Defendant, now moved, that the Order for a Reference to the Master, to see if a good Title could be made to the Premises, might be extended, in case the Master shall be of opinion that a good Title could be made, to inquire and certify, whether it appeared in and by the Abstract in the Pleadings mentioned, that the Complainant could make a good Title.

Mr. *Dowdeswell, contra*:—

The only Reference to the Master in these cases, is a simple reference as to the Title, upon which no other inquiry can be grafted. The Court has often lamented that any reference in these cases should have been permitted; and will not go farther than the Cases have already gone. He cited *Gibson* and *Clarke* (*a*).

The VICE-CHANCELLOR:—

The Report of what is said by the *Lord Chancellor* in *Gibson* and *Clarke* is not so explicit as it might have been; and there are some passages in it I do not understand. I have conversed with the *Lord Chancellor* on the subject; and I am of Opinion, that where there is a reference upon the Title, the reference must be complete, and extend to all that regards the Title, but not to other matters. The Motion made will save expense, and is, I think, proper.

Motion granted, but *without Costs*.

(*a*) 2 Ves. and Bea. 103.

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In the Matter of MARTHA LAVINIA WOOLSCOMBE, an Infant.

24th January.

Guardian appointed to an orphan Infant, without property, to consent to her Marriage.

THIS was a Petition on behalf of the Infant, stating that her father died in December 1812, a widower, and Intestate, without having any Property, real or personal; and that Proposals of Marriage had been made to her by *John Hewett*, which the Petitioner and her friends considered very eligible; and praying, that *Robert Woolscombe*, her Brother, might be appointed her Guardian, for the purpose of giving a legal consent to her marriage with *John Hewett*.

The Petition was supported by the Affidavit of *Robert Woolscombe*, the brother, stating, the death of his Father Intestate, and a widower, leaving the Infant and four other children him surviving; and that the Deponent was the brother and nearest friend of the Infant; and that she was not entitled to any property, real or personal, to his knowledge or belief; and that the Infant was born in the month of October 1796, and was then in the 20th year of her age.

The Petitioner and her Brother appeared in Court.

Mr. *Parker* for the Petition.

Order made (*a*).

(*a*) A similar Order was made by the *Vice-Chancellor*, in the preceding Term, after looking into the Marriage Act.

ATTORNEY GENERAL,
at the Relation of JAMES BERNARD, Clerk, and others, *v.* MARY HAMILTON and others.

1st February.

There being on a Bill for a Partition, Infant Cestuis que Trust Defendants, conveyance respited until they attain twenty-one.

Semble, a Power to exchange does not warrant a Partition.

IN this Case, an Information was filed by the Relators, who were the Trustees of a Charity Estate, for the purpose of effecting a Partition of certain Estates, of which they were seised, in certain proportions, with the family of the *Carews*.

By the Decree made on the Hearing of the Cause on the 7th of February 1814, it was referred to the Master to inquire, what were the several Shares and Interests of the several Relators and Defendants in the Premises in the Pleadings mentioned.

The Master, by his Report, dated 19th August 1814, certified that the Relators were, as such Trustees as aforesaid, seised of or well entitled to all those undivided Parts or Shares of and in the several Hereditaments and Premises which he had thereinbefore set forth; and that the remaining undivided parts thereof stood settled upon the trusts and for the uses, intents and purposes expressed and referred to by a certain Indenture of Release, dated the 2d of July 1813.

The Cause came on to be heard for further Directions on this Report, before his Honor the *Vice Chancellor*, on the 26th of August 1814, who decreed, that a Commission of Partition should issue, to divide the Estates in

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question between the Relators and Defendants, according to their respective Shares and Interests, as ascertained by the Master's Report, and "that the Parties do execute mutual Conveyances of the Premises to each other, such Conveyances to be settled by the Master," &c.

In pursuance of this Decree, a Commission of Partition was sued out, executed, and returned. The Commissioner's Certificate was afterwards duly confirmed, and the Draft of a Conveyance left in the Master's Office.

The Master was of Opinion the Defendants the Trustees, had no power to make a Partition; and that it was necessary his *Cestuis que Trust*, who were Infants, should be made Parties, and the Conveyances respited till they were of age.

To obviate this objection, as the Decree on further directions was not drawn up, a Motion was made, to vary the Minutes of the Decree, by adding to the directions respecting mutual Conveyances, the words, "without making the Infants Defendants, who are interested in the said Estates and Premises, or any of them, Parties to such Conveyance, with the usual directions for appointing a day or days for the Infants, as they respectively attain twenty-one, to show cause against the Decree;" and to warrant this alteration, it was contended, that the Trustees, under the power to exchange, might make a Partition. The Deed, in which the power to exchange was given, was an Indenture of five parts, bearing date 8th December 1795, and made

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between the Rev. *George Warrington*, Clerk, and *Mary* his Wife, of the first part; *George Henry Carew*, then called *George Henry Warrington*, of the second part; *Daniel Hamilton* and *Mary* his Wife, of the third part; said *Mary Carew*, the Daughter, then *Mary Carew*, Spinster, now the Wife of said *George Henry Carew*, of the fourth part; and *James Bernard*, deceased, and *Francis Webber*, of the fifth part; being in the nature of a Deed of Covenant, or Articles of Agreement for a Settlement made and entered into previous to the Marriage then intended, and soon after solemnized, between the said *George Henry Carew* and *Mary* his Wife. After therein taking notice that a Marriage was then intended, and which was shortly afterwards had and solemnized, between the said *George Henry Carew*, then called *George Henry Warrington*, and said *Mary Carew* his now Wife; and that said *Mary Carew* was by virtue of an Indenture of 3d February 1766 entitled to such Share and for such an Estate as her said Mother should think fit to appoint to her, or in default of such Appointment, to one moiety of an Estate in Tail, of and in certain Hereditaments situate in the Counties of *Devon* and *Somerset*, expectant on the Death of her said Mother, to whom said Hereditaments and Premises were thereby limited during her life, comprising the Defendants Share of the Premises in question in this Cause. It was *(inter alia)* declared and agreed by the Parties thereto, and especially the said *Mary*, the then Wife of said *Daniel Hamilton*, in execution of the power given to her by the Settlement made previous to her Marriage with said *John Carew*, and for making some further provisions (than the provision therein before referred to) for said *Mary Carew*, her Daughter, did thereby declare

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and agree, that in case said then intended, and since solemnized, Marriage should take effect, the said *Mary Hamilton* should and would, in and by the Settlement to be made in pursuance of the Indenture then in recital, or by some other sufficient Deed or Instrument in writing, limit and appoint, from and after the Death of said *Mary Hamilton*, one moiety of said Hereditaments in the Counties of Somerset and Devon, to the use and for the benefit of the said *Mary Carew*, and the Issue of said then intended Marriage, in manner thereinafter mentioned and provided; and that the said *Mary Hamilton* would give no preference to her youngest Daughter, to the detriment of the said *Mary Carew*, but make an equal Division of the Premises between them. And it was by the said Indenture then in recital declared and agreed by the Parties thereto, and especially by said *Mary Hamilton*, *Mary Carew*, and *George Henry Carew*, that the said moiety of said Hereditaments should, by said then intended Settlement, or by some other Deed or Instrument in writing, be conveyed to and vested in said Trustees and their Heirs, upon Trust, to pay the Rents and Profits of said Premises to said *George Henry Carew*, then *G. H. Warrington*, and his Assigns, during his Life, *sans* Waste; and from and after his Death, in case the said *Mary Carew* should survive him, upon Trust to pay the Rents and Profits of said Premises to said *Mary Carew* and her Assigns, during her Life, *sans waste*, in increase of her Jointure; and after the several Deaths of said *George Henry Carew* and *Mary Carew*, to the use of all and every the Child and Children of said then intended Marriage (other than except an eldest or only Son, or an eldest Daughter, if there should be no Son) for such Estate or

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Estates, in such parts, shares, and proportions, and subject to such powers, provisions and limitations, as said *George Henry Carew* and *Mary* his Wife should, at any time or times during their joint Lives, by any Deed or Instrument in writing, to be by them jointly executed in the presence of and attested by two or more Witnesses, or as the survivor of them, by any such Deed, or by his or her last Will and Testament, executed in the presence of and attested by three Witnesses, give, dispose of, direct, limit or appoint the same, or any part thereof; and in default of such appointment, to the use of all and every the Children of said *George Henry Carew*, and *Mary Carew* (except an eldest or only Son, or an eldest Daughter, if no Son) to be equally divided between them, if more than one, Share and Share alike, as Tenants in Common, and not as Joint-Tenants, and of the several and respective Heirs of the Bodies of all and every such Children, except as aforesaid: And if one or more of such Children should die without Issue of his, her or their Bodies or Body, then as to the Share or Shares of him, her or them so dying without Issue, To the use of the survivors or survivor of them, except as aforesaid, Share and Share alike, to take as Tenants in Common, and not as Joint Tenants, and of the several and respective Heirs of the Bodies of such survivors or survivor, if all such Children but one, except as aforesaid, should die without Issue of their Bodies; and if there should be but one such Child (except as aforesaid) then to the use of such surviving or only Child, and of the Heirs of his or her Body for ever; and if there should be no such Child or Children of said *George Henry Carew* and *Mary Carew*, except an eldest or only Son, or an only Daughter, if no Son, or being such,

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and all of them should die without Issue of their Bodies, To the use of the right Heirs of said *Mary Carew* for ever. And it was by the said Indenture further declared and agreed, "That it should be lawful for *James Bernard* and *Francis Webber* (parties thereto) and the survivor of them, and the Executors, Administrators and Assigns of such Survivor, at any time or times thereafter, with the consent and approbation of said *George Henry Carew* and said *Mary Carew*, his then intended and now Wife, during their joint lives, and of said *Mary Carew* alone, in case she should survive said *George Henry Carew*, to sell and absolutely dispose of or convey in exchange for other Lands, the said moiety of said Hereditaments, and to be limited by said *Mary Hamilton*, from and after her death, unto or for the benefit of said *George Henry Warrington* and *Mary Carew* as aforesaid, and the Issue of said Marriage; and that the Money to arise by such Sale, or the Lands to be conveyed in Exchange, should from thenceforth be subject to the same Uses and Trusts, and for the benefit of the same persons as were thereinbefore expressed and declared concerning the said moiety of said Hereditaments and Premises."

Subsequent Deeds were executed, of the 8th and 9th April 1796, and of the 1st and 2d July 1813, but they referred to, and were dependant upon, and to carry into effect, the Deed of the 8th December 1795, and subject to the power therein given to the Trustees.

Mr. *Shadwell*, for the Motion:—

We contend that, the Trustees can make a good Title;

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and that it is not necessary that the Conveyance should be respited till the Infant *Cestuis que Trust* attain twenty-one. *Abell* v. *Heathcote* (*a*) is an authority to show that Trustees under a Power to Exchange may make a Partition. Lord *Eldon* does not overrule that Case in *M'Queen* v. *Farquhar* (*b*). It is true, there was some doubt expressed by the *Lords Commissioners* when *Abell* v. *Heathcote* came before them; but when it was afterwards brought before Lord *Loughborough*, he had no doubt. Lord *Eldon*, in *M'Queen* v. *Farquhar*, quotes a passage from *Touchstone*; but something more was, probably, said, connected with that quotation, than appears in the Report, because that passage applies only to Exchanges at Common Law, and not to Exchanges under a Power, as to which the doctrine is different. At Common Law, as appears in *Co. Litt.* (*c*) the Lands received in Exchange must be equal to those given, but that needs not be so in an Exchange under a Power. So, by the Common Law, if on an Exchange a party be evicted, he may enter again on the Lands exchanged, but it is not so under an Exchange in pursuance of a Power; Covenants for Title being always taken. A Power of Exchange is but something more than a Power of Partition, and includes it. If the Trustees might make a Partition, these Infant *Cestuis que Trust* are not necessary Parties, the Conveyance by the Trustees passing the interest. In *Lord Brooke* v. *Lord* and *Lady Hertford* (*d*), it was held that, on a Partition between Infant *Cestuis que Trust* the Conveyance should be respited till twenty-one; but

(*a*) 2 Ves. p. 98. S. C. 4 Bro. C. C. 278.
(*b*) 11 Ves. 467.
(*c*) Litt. S. 64, 5.
(*d*) 2 P. Wms. 518.

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that, probably, was on the ground that no person can take possession of an Estate who is not a party to the Conveyance (*e*), and therefore the Conveyance was respited. On a Bill to foreclose, a Decree may be made against an Infant, who has only a day to show cause (*f*).

Mr. *Bell, contra*:—

The Profession have always doubted the propriety of *Lord Loughborough*'s decision in *Abell* v. *Heathcote*; and *Lord Eldon*'s decision in *M'Queen* v. *Farquhar* destroys that authority. There is not the same strictness in an Exchange under a Power, as at Common Law, but it must be as near as can be. It is clear, from *Lord Brooke* v. *Lord* and *Lady Hertford*, this Conveyance must be respited till the Infants attain twenty-one.

The VICE-CHANCELLOR:—

The Decree in this Cause Directs, "That the Parties do execute mutual Conveyances to each other, such Conveyances to be settled by the Master." It is now proposed to vary the Minutes, by adding, after the word "Master," the following words, "without making the Infant Defendants who are interested in the said Estates and Premises, or any of them, Parties to such Conveyance; and that a day or days may be given for such Infants, after they shall respectively attain their age or ages of twenty-one, to show cause," in the usual manner. To enable the Court to decide upon this Motion, the Title Deeds have been produced, but, unless they

(*e*) Co. Lit. 231.
(*f*) Goodier *v.* Ashton, 18 Ves. 83.

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were in Evidence in the Cause, it would be improper to found the Decree upon them. Assuming, however, that they were in Evidence, and to have been regularly before me, I shall consider the propriety of the proposed variation in the Minutes.

The question arises upon the Deed of the 8th December 1795, in which a Power is given to the Trustees, "*to sell and absolutely dispose of or convey in Exchange for other Lands, the said moiety, &c.*" This is the material Deed, the subsequent Deeds being only to carry it into Execution. The Court is called upon by this Motion to declare, that this Power so clearly enables the Trustees alone to make *Partition*, as to render it unnecessary to make the Infant *Cestuis que Trust* parties to the Conveyance.

It is contended, That the Title can, without their concurrence, be so indisputably given as to make it fitting for the Master to be directed not to make them Parties. It is a motion of the first impression. The usual course is not for the Court to order who shall be parties to a Conveyance, but to leave that to the Master. To induce the Court to deviate from its ordinary course, and to direct beforehand the omission of the *Cestui que Trusts* as Parties, it must be shown to be a clear Case, and free from doubt; for otherwise to grant this Motion may expose the parties to the risk of a defective Title, and future Litigation. Independent of the Power in this Deed, the Infants must be made Parties, according to the decision in *Lord Brook* v. *Lord* and *Lady Hertford* (g), which

(g) 2 P. Wms. 518.

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was followed by *Lord Hardwicke* (*h*) and *Lord Thurlow* (*i*), and, but for the Power, must have governed the present case.

With respect to the construction of the Power, let us consider whether the point contended for is so clear upon principle, or so settled by authority, as that the Court may safely venture to act upon it in the manner prayed. A Partition and an Exchange are well known modes of assurance, perfectly distinct from each other, each having its own rules. A Power to make Partition would not warrant an Exchange. *Sheppard*, in his *Touchstone*, says "Jointenants, Tenants in Common, and Coparceners, cannot exchange the Lands they do so hold one with another, before they have made Partition (*k*)." On a Partition, each has his own Land, though he acquires a different interest in it; but on an Exchange, the Land is parted with altogether, and new Lands acquired; they approximate to each other, and have some things in common, but they are not the same. The rules applicable to the one, do not apply to the other. The Power here, is only to sell or exchange—to convey the moiety for other Lands. It has been urged that this power to sell or exchange affords the means of circuitously effecting a Partition, as the undivided Interest may be sold, and a divided Interest taken back by purchase. It is sufficient to say in answer that is not what is proposed to be done in the present instance. It

(*h*) See Tuckfield against Buller, Ambl. 197. S. C. 1 Dick. 240, and see Ld. Redesd. Tr. Pl. 97. Ed. 3.

(*i*) See Hobble v. Read, 23d April 1784, noticed in marginal note to 1 Dick. 243.

(*k*) Sheppard's Touchstone, p. 292.

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is said, that an Exchange under a Power, is not altogether like an Exchange at Common Law, and I admit it is not entirely so. But it is difficult to discover how in a Conveyance of this nature any new use can arise, unless the terms and limitations of the Power are observed according to the Contract. This is stated by the *Lord Chancellor*, with his usual accuracy, in *M'Queen* v. *Farquhar* (*l*). His words are, " I conceive, that, where there is a Conveyance by Lease and Release to Uses, with a power to alter the Uses by an Instrument, the terms and limitations of which are prescribed by the general Law, the new use will not arise except under the very circumstances in which it is contracted that it shall arise (*m*). In the ordinary Settlements of great Estates, Powers of Sale, Partition, Exchange, &c. are inserted. In the present Case an express Power to make Partition is given, as to the other moiety of the Estate. This doctrine, says *Lord Eldon*, was not disturbed by decision, though there were floating opinions until the case of *Abell* and *Heathcote*. Previous to that Case, therefore, it appears from the highest authority to have been at least a very doubtful question, whether a Power of Sale or Exchange would authorize a Partition.

The only ground then upon which this motion can be supported, if at all, must be upon the authority of *Abell* and *Heathcote* (*n*). That case arose upon a difficulty like the present. The words of the Power were, " to make Sale of and convey, surrender and assure, or convey in exchange for or in lieu of other Manors, Lands or Hereditaments, to be situate somewhere in *England*,

(*l*) 11 Ves. 467.
(*m*) Ib. p. 475.
(*n*) 4 Bro. C. C. 278. & S. C. 2 Ves. jun. 98.

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all or any of the said Freehold and Copyhold Lands, &c. thereby granted, for the best price, &c. in money, *or for such other equivalent in Manors, Lands or Hereditaments, &c.*" The Case came before the Lords Commissioners. The Lord Commissioner *Eyre* expressed an opinion, that under the word *sell*, a Partition might be made; the two other Lords Commissioners rested more upon the words, "*convey for an equivalent*;" these opinions, however, do not carry much authority with them; for the Lords Commissioners were so doubtful, that before they went out of office, they declined giving Judgment, and recommended another argument (*o*). The opinion thrown out by Lord Commissioner *Eyre* is overturned in *M'Queen* v. *Farquhar*, which expressly decides that a Power of Sale is not well executed by a Partition. It is due, however, to the memory of that great Judge to say, it appears he had not fully made up his mind upon the subject. The opinion of the other two Commissioners, if well founded, does not apply to the present Case, because the words upon which they relied are not in the present Deed. That Case came afterwards before Lord *Loughborough*, who thought, contrary to Lord Commissioner *Eyre*, a Partition was clearly in the contemplation of the Parties creating the Power. If it was, it is singular the word Partition should not have been mentioned in the Power. Lord *Loughborough* relies much upon the possession of the legal Estate, and the means thereby afforded of defending an Ejectment.

In *M'Queen* v. *Farquhar*, Lord *Eldon*, observing upon *Abell* v. *Heathcote*, says, "I doubt whether the language

(*o*) See 2 Ves jun. 99.

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two Witnesses, with the following Certificate, signed by a Mons. *Sensieur*, a Notary Public of *Paris*, with his Notarial Seal; "which I, Royal Notary in *Paris*, do certify; the French Law not allowing any Magistrate for that purpose. Witness my Hand and Seal, the 7th December 1815." There was also a Memorandum by *Sensieur*, stating that a Mr. *Guilloneau*, a Notary of London, was enabled to verify his Signature and Seal, if necessary.

The Accountant General refused to act upon this Power of Attorney; and supposing there must be some mistake, recommended it to be sent again to *Paris*, which was accordingly done, and was again returned in the former state, with a Letter from Mons. *Sensieur* to the Plaintiff, stating, in effect, "That all the demands which he had made to the Judges in order to obtain the Legislation that was desired, had been fruitless. He had not been more successful with the Mayor of his District, who had also refused. In this respect he could not dissemble to his Lordship, that what he wished was too contrary to French Customs to hope for it to be obtained."

Upon the Power being returned, the Plaintiff's Solicitor applied to Mr. *Guilloneau*, the London Notary, who under his Notarial Seal, certified on the 23d January, 1816, "That Mr. *John B. T. Sensieur*, whose Signature and Seal are set and affixed at the foot of the Paper Writing thereunto annexed (being the Power in question) is a Royal Notary, practising in the City of *Paris*, to me personally known, and with whose Signature and Seal I am well acquainted; and that to all Acts and Instruments by him signed and passed in that quality, full

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faith and credit are and ought to be given in Judicature."

The Plaintiff's Solicitor again applied to the Accountant General, to know, if he would act upon the Power thus verified, to which he answered, That he had no doubt of the accuracy of the Power, and the authenticity of the Signature of the Plaintiff, but that, from the custom that had prevailed in his office, for a great many years previous and subsequent to his filling it, of requiring all Powers of Attorney, executed in Parts abroad, being verified in the way he required, he lamented he could not act upon the power in question in its present shape, unless by the express Order of the Court of Chancery.

Mr. *Dowdeswell* now moved, on an Affidavit verifying the foregoing Statement, "That the Accountant General might be directed to dispense with the Chief Magistrate of the Place where the Letter of Attorney was executed by the Plaintiff, certifying, that the Person subscribing himself a Notary Public, is a Notary Public, and that due credit may be given to his Act and Deed; and that he may also dispense with the Chief Magistrate's affixing his Official Seal; and that he may be also directed to act upon the said Letter of Attorney, in the way it is now executed and verified."

The Motion was consented to on the part of the Defendant.

The VICE-CHANCELLOR:—

You may take the Order, on producing an Affidavit, that Mons. *Sensier*, is a Notary Public of Paris.

Order made.

1816.

19 Jan. 3 Feb.

Plea to a Bill, on the face of it demurrable, over-ruled.

BILLING, Assignee of BURKITT *v.* FLIGHT.

THE Bill stated, that previous to the month of November 1813, and up to the 1st of December 1813, *William Burkitt* carried on business as a Stock Broker, and was in the habit of contracting for the purchase and sale of Stock in the Public Funds, Scrip, Omnium, and other Public Securities, at a future day, when in fact it was not intended that such Stock or Securities should be transferred, but only that the difference between the price of such Stock or Public Securities on the day when the contract was made, and the day when the contract was to be performed, should be paid.

Previously to the 26th November 1813, *Burkitt* made a Contract with the Defendant for the purchase of a large quantity of Stock in the Public Funds, Scrip, Omnium, or other Public Securities, at the price which such Stock bore on the day when such contract was made, and which Stock, by the terms of the contract, was to be transferred on the 26th of November, but in fact, neither *Flight* nor *Burkitt* had, at the time of such contract, any Stock, Scrip, Omnium, or Public Securities, nor were they intended to be actually transferred, but the difference in value between such Stock, &c. on the day when the contract was made and on the 26th November 1813, was to be paid by *Flight* to *Burkitt*, or by *Burkitt* to *Flight*, according to the rise or fall in the price of the Public Stocks or Securities.

The difference in value of the Stock, &c. on the 26th November 1813, amounted to 481 *l.* 5*s.* in favour of

Flight, and was settled by him on the following day, by a checque on *Burkitt*'s bankers, which was paid.

Burkitt carried on also the trade of a coal merchant. On the 9th December 1813 a Commission of Bankruptcy issued against him, and he was declared a Bankrupt, and the Plaintiff was chosen Assignee, and had the usual Assignment made to him.

Burkitt surrendered under his Commission, but before his Examination left England, and went to the West Indies, where he died.

The Bill then stated, that on the 20th April 1815, being within six months after the contract made by *Burkitt* with *Flight*, the Plaintiff, as Assignee of *Burkitt*, commenced *an Action* against the Defendant, to recover the said sum of 481*l.* 5*s.*, which Action was at Issue; but that the Plaintiff was unable safely to proceed to trial in such Action, without a Discovery from the Defendant of the transaction; and the Bill, after particularly interrogating him as to the same, prayed a full Disclosure and Discovery.

To this Bill, the Defendant put in the following Plea: "This Defendant, by protestation, &c. Saith, he is advised, that the Complainant in and by his said Bill seeks a Discovery of the matters therein set forth from this Defendant, in order to enable the said Complainant to proceed to Trial in an Action at Law brought by the Complainant against this Defendant, and in the Complainant's said Bill mentioned; to which Bill and Discovery this Defendant doth plead; and for Plea saith, that the said Action at Law brought by the said Com-

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plainant against this Defendant is not an Action of Debt founded upon or according to the form of the Statute in that case made and provided, and passed in the 7th year of his late Majesty King George the 2d, and intituled, "An Act to prevent the infamous practice of Stock Jobbing;" and that this Defendant ought not to be compelled to answer upon oath the said Complainant's Bill, or to set forth any matter or thing whereby he may subject himself to any pain or penalty enacted by the said statute, or otherwise. And this Defendant doth plead the said statute, and doth aver that the said Action mentioned in the Complainant's said Bill, and brought by him against this Defendant, is an Action upon *Assumpsit*, and not such an action as is directed by the said statute: Wherefore this Defendant humbly demands the judgment of this honourable Court, whether he shall be compelled to make any Answer to the said Bill; and prays to be hence dismissed, with his Costs and Charges in this behalf most wrongfully sustained."

Mr. *Leach*, and Mr. *Heys*, in support of Plea:—

The Statute of the 7th Geo. 2d, ch. 8. s. 2, gives an Action of *Debt* to recover money paid on transactions of this nature, and provides that the Defendant shall answer a Bill of Discovery, though the Discovery may subject him to penalties. Here, however, an Action of *Assumpsit* has been brought, and as that is not the action in respect of which the Statute enables the Party to obtain a Discovery, the Statute does not apply, and the Party is not bound to answer, as his answer may subject him to penalties. If the Bill had stated that an Action of *Assumpsit* had been brought, it would have been demurrable; but as it only states, *an Action* has been brought, without saying what Species of Action, this Plea was necessary,

in order to state what sort of Action had been brought, and that it is an action, to support which, a Bill of Discovery will not lie.

The case of *Thistlewood* v. *Cracraft* (*a*) shows that the Form of Action must be such as the statute gives, in order to have the benefits given by the Act in support of the Action. In *Bullock* v. *Richardson* (*b*) Lord *Eldon* has given an opinion upon the Act.

Mr. *Cooke, contra* :—

This Court will not decide whether the Action upon the Statute ought to be Debt or Assumpsit. Though the Act mentions a particular form of action, it does not follow that that form of action must be exclusively adhered to. This Case falls within the 5th and 8th clauses of the Act, and in those clauses an Action of Debt is not mentioned, but the words " Bill, or Plaint, or Information," are used, which include *Assumpsit*. The plea ought to have averred that the Defendant would by answering subject himself to Penalties, and then the Court would have decided whether the Answer would subject him to Penalties. If the Action is brought on the first clause of the Act, there, no penalty is given, and the Defendant must answer.

Mr. *Leach*, in reply :—

The Court is bound to decide whether an Action of *Assumpsit* can be maintained on this Statute, and whether the Defendant is bound to discover.

The first section of the Act gives double Costs, and that is a penalty; so that if the Action is brought on that section the Defendant is not bound to discover, as

(*a*) 1 Maule & Selw. 500. (*b*) 11 Ves. 373.

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is clearly the case where the Action is brought on the 5th and 8th sections, under which this Case falls. As the statute is mentioned in the Bill, it was not necessary to mention it in the Plea; a Plea, merely stating that an Action of *Assumpsit* had been brought, was all that was necessary.

The VICE-CHANCELLOR:—

The Argument in support of this Plea was, that the right to a Discovery given by the 2d Section of the Act, was confined to the specific Action mentioned in the first Section, viz. the Action of Debt, and did not extend to an Action of *Assumpsit*, such as the Plea averred the present to be. The contrary was contended by the Plaintiff; and further, that the Plea was objectionable in form, not containing any averment of the liability to penalties, which would be incurred by making the Discovery. The answer given to the latter objection was, that the Court was bound to take notice of the Act of Parliament by which the penalties were imposed, and that it is only necessary to show this not to be a case in which Discovery is given by the Act, by introducing a fact, viz. the nature of the Action brought, which does not sufficiently appear by the Bill.

As to the first point, though the first Section of the Act, by declaring the Contract to be void, and that the money paid should be restored, seems to lay a foundation for an Action of Assumpsit, as well as Debt, yet the limitation of time for bringing the action to six months, and the other provisions respecting it being expressly confined to the Action of Debt, afford an inference that it was the intention of the Legislature that no other Action should be brought, because otherwise those provisions might be rendered nugatory.

These points, however, it will not be necessary to determine on the present occasion, because there are other grounds on which the Plea is objectionable. It proceeds on a mistaken construction of the Act as applied to a case such as is stated in this Bill. It is wholly built on the Assumption, which, if the Plea is allowed, must be adopted by the Court, that the resistance to Discovery in this Case is founded on the nature of the Action to support which the Discovery is sought, and that but for that circumstance the Discovery might have been enforced. But without determining whether, in that respect, the Plea would have been objectionable, the principle on which it is founded is erroneous. In a case such as is stated in this Bill, the protection against Discovery does not arise from the nature of the Action, but from its not being one to which the right to a Discovery given by the Statute extends. That right applies only to Cases which fall under the 4th section of the Act, which gives protection from penalties to the party making Discovery; but no such protection is given in cases like the present, which fall under the 5th and 8th Sections; nor in such cases is any Bill of Discovery given. The transactions stated in this Bill come under these latter sections; and consequently as to them there is nothing to deprive the Party of his general protection from Discovery by reason of his liability to the Penalties therein imposed. In neither Case, therefore, can it be material what is the Form of the Action in aid of which the Discovery is sought. In the one case, because no penalty can ever be incurred by making the Discovery; in the other, because no protection is given against the penalties; nor can a Discovery ever be enforced. This was the construction put on the Act by Lord *Eldon*, in the Case of *Bullock* and

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Richardson (*c*). In this view of the subject, the fact put in Issue by the Plea is wholly immaterial. The objections to Discovery appear on the face of the Bill; and the proper mode of resisting the Discovery was by a Demurrer. Upon these grounds, the Plea must be overruled.

Plea overruled.

(*c*) 11 Ves. 373.

19th and 24th January.

HEATHCOTE *v.* ALDRIDGE.

Plea of Title to a Bill by an Impropriate Rector for Tithes, over-ruled.

THIS Bill was filed by *Thomas Freeman Heathcote*, Esq. as Impropriate Rector of the Rectory of *Wellow*, situate partly in the County of Wilts, and part thereof, called *East Wellow*, and *Emley* otherwise *Embley*, in the County of Southampton, praying, an account of the Tithes of Corn and Hay of a Farm occupied by the Defendant, situate in that part of the Rectory of *Wellow*, which is in *East Wellow*. The Bill contained a Charge, "That the Defendant had in his possession or power some Books or Book of Account or Accounts, or Receipts, Entries, Memorandums, Papers or Writings, whereby, if produced, it would appear that the Tithe in kind of Corn and Hay was due and payable, or had in former times been rendered and paid by the Owners and Occupiers of the Farm and Lands, in the possession or occupation of the Defendant, to the Rector Impropriate for the time being of that part of the Rectory of *Wellow* which is in, or is called, *East Wellow*, or to a full and fair Compensation for the same, but refuses to discover the same; or Defendant has seen such Books, Accounts, Receipts, Entries, Memorandums, Papers and

Writings, and he knows in whose possession or power the same are, or what is become thereof, but refuses to discover the same."

To this Bill the Defendant pleaded "To the best of his information and belief, that in the month of March 1712, *Thomas Norton*, of Ixworth in the County of Suffolk, Esquire, deceased, and *Charles Norton*, of Winchester in the County of Southampton, were, amongst other Hereditaments, seised or well entitled, of or to the Farm, Lands and Premises, situate within *East Wellow*, in the County of Southampton, now occupied by Defendant, and in said Bill mentioned; and were also entitled in Fee Simple to all manner of Tenths and Tithes, of what kind soever, coming, growing, renewing and increasing, in, within or from the same, or part or parcel thereof, subject to two Mortgages, one whereof had been granted by the said *Thomas Norton* and *Charles Norton* to, and was then vested in, *Mary Turges*, of the City of London, Widow, for securing to her the sum of 3,300 *l.* with Interest; and the other whereof had been granted by the said *Thomas Norton* and *Charles Norton*, to, and was then vested in, *Richard Bateman* and *John Jacob*, for securing to the said *Richard Bateman* the sum of 300 *l.* with Interest; and that the said *Thomas Norton* and *Charles Norton* were at the same time in the possession or receipt of the Rents and Profits of the said Farm, Lands and Premises, and of all manner of Tenths and Tithes of what kind soever, coming, growing, renewing, and increasing, in, within, or from the same:— Saith to the best of his information and belief, that said *Thomas Norton* and *Charles Norton*, being so seised or entitled, and being in such Possession or Receipt, by certain Indentures of Lease and Release, bearing date respectively the 23d and 24th of said Month

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of March 1712, the Release being made of four parts, and made or expressed to be made between the said *Thomas Norton* and *Charles Norton* of the first part; the said *Mary Turgis* of the second part; the said *Richard Bateman* and *John Jacob* of the third part; and the Honourable *George Rodney Brydges*, of Avington in the said County of Southampton, Esquire, of the fourth part; In consideration of the sum of 3,424*l.* 3*s.* 6*d.* to the said *Mary Turgis* paid by the said *George Rodney Brydges*, and of 308*l.* 13*s.* 9*d.* to the said *Richard Bateman* paid by the said *George Rodney Brydges*, in full of all Monies due to them respectively on their said recited Mortgages, and in consideration of the further sum of 6,726*l.* 7*s.* 9*d.* to the said *Thomas Norton* paid by the said *George Rodney Brydges*; and also of 5*s.* to the said *Charles Norton* and *John Jacob* paid by the said *George Rodney Brydges*, they the said *Thomas Norton* and *Charles Norton*, and by the direction and appointment of the said *Thomas Norton*, the said *Mary Turgis* and *Richard Bateman*, and also the said *John Jacob*, by the direction and appointment of the said *Thomas Norton* and *Richard Bateman*, did grant, bargain, sell, alien, release, and confirm, unto the said *George Rodney Brydges*, and to his Heirs, amongst other Hereditaments, the said Farms, Lands and Premises now occupied by Defendant; and also, all and all manner of Tenths and Tithes of what kind soever, coming, growing, renewing, or increasing, in, within, or from the same, or any part or parcel thereof; To hold to the said *George Rodney Brydges*, his Heirs and Assigns, to the use of the said *George Rodney Brydges*, his Heirs and Assigns, for ever: Saith, to the best of his information and belief, that, by virtue of said Indentures of Lease and Release, upon the completion of the said Assurances, the said

George Rodney Brydges entered into Possession, or into the Receipt of the Rents and Profits of the said Farm, Lands and Premises, and of the other Hereditaments conveyed by the said Indentures of Lease and Release, and of all and all manner of Tenths and Tithes, of what kind soever, coming, renewing, or increasing in, within, or from the same, and every part or parcel thereof: And that the said Farm, Lands and Premises, and other Hereditaments, and the said Tenths and Tithes, by divers *mesne* Conveyances, and other good Assurances in the Law, became, and now are, vested in the most honourable *Richard* Marquis of *Buckingham*, for his Life, with certain Remainders over: Saith, that the said *Richard* Marquis of *Buckingham*, in or about the month of September 1813, did agree to demise the said Farm, Lands and Premises to Defendant, discharged from the payment of Tithes for a term of years from the 29th of September 1813, and that under such Agreement Defendant is, and from the said 29th of September, hath been, in possession and enjoyment of the said Farm, Lands and Premises: Saith, to the best of his information and belief, that said *George Rodney Brydges*, and those claiming under him, ever since the execution of the said Indentures of Lease and Release, have been, and that the said *Richard* Marquis of *Buckingham*, claiming under the said *George Rodney Brydges*, and under the Conveyances and Assurances aforesaid, now is in the Possession or in the receipt of the Rents and Profits of the said Farm, Lands and Premises, and the Tithes arising in, within, or from the same, without any claim, right, title or interest whatever, to or in the said Tithes, or to any part thereof, being made or set up by Plaintiff, or any other Person, until the filing of the present Bill, being upwards of one hundred years: All which matters and things De-

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fendant doth plead in Bar to said Bill; and prays the Judgment of this Honourable Court, whether he ought to be compelled to put in any further or other Answer thereto; and prays to be hence dismissed, with his Costs and Charges in this behalf sustained.

Mr. *Blake*, in support of Plea:—

The Plea in this Case is framed after that pleaded in *Doble* v. *Cridland* (*a*), except that in this Plea no Fine is mentioned. Enjoyment of a portion of Tithes for a series of years in pernancy, or under colour of Title, affords as good a defence in the Case of Tithes as Possession for a length of time does in other cases of Real Property. *Fanshaw* v. *Rotherham* (*b*), the Judgment in which Case I have, in Lord *Henley*'s Handwriting, *Scott* v. *Airey* (*c*), *Strut* v. *Baker* (*d*), the *dictum* in *Berney* v. *Harvey* (*e*), and *Dartmouth* v. *Roberts* (*f*). This Plea avers a Title in 1712, regularly deduced from thence to those under whom the Defendant claims.

Sir *S. Romilly*, Mr. *Bell*, and Mr. *Roupell*, *contra*:—

This is not a proper Case for such a Plea—it is not a Plea of Title, but of circumstances from whence a Title is to be inferred. Where Title is pleaded, the Conveyances stated in the Plea must show a clear derivable Title in the Defendant. Wherever a Defence is made upon presumptive Evidence, such Defence ought to be made by Answer. Possession of Land for a length of years gives a Title; but it is not so as to Tithes; no length of time bars a claim of Tithes; there may be reasons why it should have been originally determined

(*a*) 2 Bro. C. C. 274.
(*b*) This Case is reported in 3 Gwill. 1174.
(*c*) 3 Gwill. 1174.
(*d*) 2 Ves. jun. 625.
(*e*) 17 Ves. 119.
(*f*) 16 East, 334.

otherwise, but the doctrine is now settled. In a Plea of Title it is not sufficient to say by divers *mesne* Conveyances a Title is derived to those under whom the Defendant holds, but the Conveyances must all be stated. In *Burslem* v. *Burbage* (*g*), the Plea stated *mesne* Assignments; but there, the origin of the Title was stated, which is not the case in this Plea. The Plea also is bad in this; that it is only as to information and belief; whereas the Facts ought to have been positively averred. Another objection is, that as a Plea admits all it does not traverse, this Plea must be taken to admit the Statement in the Bill, that the Defendant has in his possession Books, Papers, &c. which show the Plaintiff is entitled to these Tithes. Supposing the Plea is otherwise good, it ought to have contained an Averment that there were no such Books, &c. and an Answer in support of such Averment. No Answer is given to the question, whether the Plaintiff is Impropriate Rector; or as to the particular Lands in respect of which an Exemption from Tithes is claimed.

Mr. *Blake* in reply:—

Title is not a Fact, but a Consequence of Facts; and this Plea states the Facts and Consequence. Length of time does not make a certain Title in any case, but is only evidence of Title. In the case of the Dean of *Windsor*, mentioned in Lord *Henley*'s Judgment in *Fanshaw* v. *Rotherham*, a Plea of Fine and Non-claim was allowed to a Rector's Bill; and if Possession for a length of time be in substance a good defence in the case of Tithes, as well as in the case of Land, why should it not be pleaded to a Bill for Tithe, as it certainly may, to a Bill

(*g*) 4 Gwill. 1324.

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for Land? Though the form of the Plea is as to information and belief, yet it is the Facts as to which he is informed and believes, that are put in Issue, and not merely his information and belief. Your *Honor* determined in *Drew* v. *Drew* (*h*), that a Plea as to information and belief was good. As to the objection, that we have not set forth the Lands which we claim to be exempted from Tithe, it is not necessary. If it were a Plea of a Modus, then the Land covered by the Modus must be stated; but that is not necessary where the Rector's Title to the Tithes is denied; on the contrary, such a statement would over-rule the Plea, and so would an admission that the Plaintiff was Rector (*i*). With respect to the objection as to not having stated particularly the mesne Assignments, if the Plea is replied to, it will then be necessary to prove the mesne Assignments. As to the charge respecting Books, &c. it is consistent with the Plea to admit that we have such Books, because the defence is not that Tithes for the Lands in question *never* were paid to the Rector, but that these Tithes are now severed from the Rectory; and the charge in the Bill is, that the Books prove either that Tithes now are payable, *or formerly were* rendered, to the Rector.

The VICE-CHANCELLOR:—

Jan. 24. I shall not now finally decide upon this Plea, but only state my present impression.

This is a common Bill by an Impropriate Rector, for Tithes, against a person holding Lands within the Rectory; and the Defendant, stating a demise to him of the Lands, free from Tithes, pleads a Title in his Landlord to

(*h*) 2 Ves. & Bea. 159.

(*i*) Blackett *v.* Langland, 4 Gwill. 1368.

the Tithes. Commencing with a period of more than a Century back, he states that from that time the Tithes and the Lands have been mortgaged and conveyed together; and that the owner of the Land has in this way enjoyed the Tithes, as well as the profits of the Land.

There are some points too well settled to admit of any doubt. The fact being admitted, that the Plaintiff is the Rector, and that the Lands lie within the Rectory, the right to an account of the Tithes subtracted follows of course, unless the Defendant can by his Plea show some valid ground for resisting it. The rule in this respect is the same in the case of a Lay as of a Spiritual Rector; and in neither case can a Prescription in *non decimando* be set up with success. Some attempt to question this, was made in *Strutt* v. *Baker*, by Lord *Loughborough* (*i*), but afterwards, in *Rose* v. *Calland* (*k*), his Lordship, finding what had been the course in the *Exchequer* (*l*), refused to compel a Purchaser to take a Title in opposition to it; and in *Watkins* v. *Macnamara*, in the Exchequer Sittings after *Michaelmas* Term 1804, the Court would not allow the point to be argued; and, indeed, the Counsel for this Plea has, very properly, not put his Case on that ground.

Another point, equally well settled, and to which it is very material in questions of this nature to attend, is the distinction between a mere Retainer and nonpayment of

(*i*) 2 Ves. jun. 625.

(*k*) 5 Ves. 186.

(*l*) See Nagle v. Edwards, 3 Anstr. 702. S. C. 4 Gwill. 1442; and Lord Petre v. Blencowe, 3 Anstr. 945. S. C. 4 Gwill. 1484; and see also the Aldermen and Burgesses of Bury St. Edmunds v. Evans, Com. 673; and Berney v. Harvey, 17 Ves. 127.

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the Tithes by the owner or occupier of the Land, and the actual pernancy and receipt of the Tithes, separate from, and independent of, any interest in, or connection with, the Land. The former may and always does exist, though the Claim be only to a prescription in *non decimando*; the latter cannot, except when there is a legal Title to the Tithes, of which therefore it is the characteristic criterion. It is not like the language of Deeds, which may be known only to the parties, but it is a visible and public Assertion of Title by the exercise of open and notorious acts of ownership, challenging all persons interested to dispute the validity of the Title upon which they are founded. This distinction is marked in all the Cases.

In *Scott* v. *Airey* (*m*) the *Chief Baron* observes, "the Tithes had for 170 years been the subject of Sales, Mortgages and Decrees, as other Property, and have been always considered in the same light as the other real property of the persons who from time to time have claimed them. They were capable of being enjoyed by the persons who have enjoyed them; and the question now is, whether a Court of Equity ought to interpose to take the possession from persons who have been in possession so many years with the knowledge of the Rector." Baron *Eyre* says, "The principal question in this Case is the defence set up by the *Aireys* against the *primâ facie* Title of the Rector, founded on a Title set forth in their Answer, and the indisputable fact of actual Possession, occupation and pernancy of the Tithes. The distinction between a Prescription *in non decimando*, and a Claim of a portion of Tithes, is

(*m*) 3 Gwill. 1174.

an essential distinction. A Prescription *in non decimando* is simply unlawful: no such Prescription can be maintained. If no Tithes have been paid, a Title founded upon mere nonpayment is simply a Prescription *in non decimando*. Evidence of length of possession the Court can pay no regard to, for the possession must have been unlawful; and the Court is therefore bound to decree in favour of the common right. No presumption can be admitted to support a mere simple Prescription *in non decimando*. If we depart from this rule, we overturn the whole Law upon the subject. But there is a great difference between a claim founded on mere nonpayment of Tithes, and a claim supported by evidence of actual enjoyment of the pernancy of Tithes. The title is not unlawful. A good Title may have been derived to the party in Possession. The Title therefore not being simply unlawful, long Possession is evidence of the Title. The Case of *Fanshaw* v. *Rotherham*, stated at the Bar, appears to me, from a note I have seen, to have been mistaken. The ground of that determination seems to have been, that, however doubtful the case stood, as to Title, there had been long Possession; the claim was of a portion of Tithes; the parties might have a good Title, and it was not right for a Court of Equity to disturb the Possession. The doctrine was good, applied to that or to this case. There is no difference between a Lay Impropriator and Rector. The Lay Impropriator becomes, as it were, a Spiritual Person; he holds in the same right. If it is not proper to disturb a Possession in favour of a Lay Impropriator, it is not proper to disturb it in favour of a Rector. The arguments at the Bar have run wild on the head of Presumption. We are not to presume so much as to destroy the whole Law: For if upon mere possession every thing

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is to be presumed to maintain that possession, there was no necessity for the Statutes of Limitation."

In no part of this Plea, in the present Case, is there any averment of enjoyment of Tithes, except by Retainer of the owner of the Land. There is not a single instance stated in which an actual pernancy of Tithes, either in kind, or by way of Composition, ever took place, as distinguished from nonpayment. The Tithes are conveyed along with the Land, and so far are treated as belonging to the Owner of the Land, and the Plea avers, that they did belong to him. But whatever might be the effect in point of evidence of these Deeds, coupled with this usage, to make out a valid Title to the Tithes, in opposition to the Common Law Right of the Rector, it is still only evidence of Title, and not the Title itself; and consequently the Plea is on that ground insufficient and bad. The length of time during which the enjoyment of the Tithes is stated to have prevailed, though it may strengthen the evidence, does not remove the objection. It does not in the case of Tithes constitute a valid Title in itself, though it may afford evidence of a Title, possessed immemorially by a partitionist, or by grant from one competent to make the grant.

It is no Answer to a Rector, to state in a Plea, that the Defendant is Owner of the Tithes, or that his ancestors, or those under whom he claims, were owners, if the Title be not carried up to a legal origin.

In the case cited, of *Blacket* v. *Langlands* (*n*), a Title to the Tithes was deduced from the Abbot and Convent of

(*n*) 4 Gwill. 1368.

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the Abbey of *Hexham*, a good legal Origin of the Title was stated, with subsequent *mesne* Conveyances; which is not done in this Plea. The Plea, which is set up as a Bar to the whole Discovery and Relief, resists a Discovery of Deeds, Papers and Writings, which, as the Bill states, are in the Defendant's possession, and would show that the Tithes claimed are due to the Plaintiff, and were "in former times" paid to the Rector Impropriate for the time being, in respect of the Lands in the Defendant's possession. This Plea must be taken to admit that fact. Then what becomes of the ground relied on in support of the Title from long Possession? If the Plea were traversed, the Defendant must go into Evidence of Possession; and must he not, therefore, discover what relates to the Possession? Is the fact of Possession to be inquired into, and yet the Defendant to be allowed to withhold a Discovery of books, &c. that relate to such Possession? A mere Plea, that a Defendant is a purchaser for valuable Consideration without notice, is not sufficient, if particular instances of notice are charged in the Bill; it being necessary that such charge should be answered. The defendant rests upon Possession, as his Title, and yet refuses to discover Books, &c. in his custody, which, as the Bill states, will directly negative the fact, and show he has not been in continual possession. The reliance in the Plea, on the Possession for 100 years, shows the materiality of this Discovery, and establishes the right to it. This, alone, is a fatal objection to the Plea. My present impression therefore is that the Plea must be over-ruled.

N. B. The same result was repeated by *His Honor* on a subsequent day.

Plea over-ruled.

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3d and 5th Feb.

The Court will, at its discretion, order Commissioners to accept the Surrender of a Bankrupt after the usual time for surrendering has elapsed, although the Assignees object.

Ex parte SHILES.

THIS was a Petition by the Bankrupt *Shiles*, whose time for surrendering under his Commission had elapsed, praying that the Commissioners might be directed to appoint a meeting to take the Bankrupt's surrender and disclosure of his Estate.

An affidavit of the Bankrupt was filed in support of the Petition, stating, that his intention being to petition to supersede the Commission, on the ground that no act of Bankruptcy had been committed, he, upon advising with his Solicitor, attended the Commissioners, and gave them notice of his intention to petition, and thought it unnecessary to surrender.

Sir *S. Romilly*, and Mr. *Horne*, for the Petition.

Mr. *Rose*, for the Assignees, *contra*:—

The Assignees under this Commission think it is their duty to support it, if possible; and as the object of the Bankrupt in surrendering, is, that he may be enabled to petition to supersede the Commission, they refuse their assent to this petition; and there is no instance of such a Petition being granted, unless the Assignees consent.

The VICE-CHANCELLOR:—

I think this is a case in which the Prayer of the Petition ought to be complied with. There does not appear a wilful intention of not surrendering, but that the Party acted upon mistaken advice, and under an idea, that his surrender was unnecessary; and in fact, he did attend the Commissioners, and give them notice he meant to petition to supersede the Commission.

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It is not necessary the Assignees should consent to the prayer of the Petition. There are several Cases of this kind reported (*a*). I have read all of them; and it does not appear in any of these cases, that the consent of the Assignees was considered as necessary. It is proper they should be served with the Petition, to state any objections they may have; but their consent is not necessary to the Order.

Where there was no fraudulent intention in not surrendering, and the Bankrupt's absence arose from ignorance or accident, *Lord Macclesfield* superseded Commissions, to prevent a prosecution for not surrendering in time (*b*); and though, in subsequent cases, such an Order as here prayed has been frequently made, yet such Order does not prevent a Prosecution, but operates only in such Case as an intimation of the Chancellor's Opinion that the Bankrupt did not keep out of the way fraudulently; and that it is a Case in which the Chancellor does not see reason to think that if prosecuted he would be convicted (*c*).

The Assignees do not even suggest, in this Case, there was any wilful intention of disobeying the Statute. There must be a wilful omission to surrender to constitute a felony (*d*). An Order must be made as prayed.

Petition granted.

(*a*) *Ex parte* Rodgers, Amb. 307. *Ex parte* White, 2 Bro. 47. *Ex parte* Grey, 1 Ves. jun. 195. *Ex parte* Fuller, 10 Ves. 183. *Ex parte* Higgenson, 12 Ves. 495. *Ex parte* Johnson, 14 Ves. 40. *Ex parte* Jackson, 15 Ves. 119.

(*b*) See *ex parte* Wood, 1 Atk. 222. *Ex parte* Jackson, 8 Ves. 533. *Ex parte* Lavender, 18 Ves. 18.

(*c*) See *ex parte* Rickets, 6 Ves. 445.

(*d*) See Amb. 307.

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Ex parte BINMER, and another.

5th and 6th Feb.

A Commission issued on a Denial, concerted by Bankrupt and his Sister the petitioning Creditor, superseded, with Costs.

THIS was a Petition, by a Judgment Creditor, to supersede a Commission of Bankruptcy issued against *John Chapman*, under which he was declared a Bankrupt, on the ground that the act of Bankruptcy was concerted between the petitioning Creditor and the Bankrupt.

The Concert was fully established in Evidence.

The effects of the Bankrupt were barely sufficient to pay the expense of the Commission.

Sir *S. Romilly*, for the Petitioners.

Mr. *Cullen*, for the Assignees, cited *Roberts* v. *Teasdale* (*a*), in support of the Commission.

Mr. *Owen*, for the Bankrupt.

The *Vice-Chancellor*, after minutely stating the facts of the case, and expressing, as his conclusion from them, that the act of Bankruptcy was clearly concerted between the petitioning Creditor and the Bankrupt, with the view of taking from the Petitioner the benefit of a Judgment he had obtained at Law, proceeded to observe that, There were Cases approximating to the present, in which a Commission was allowed to stand, though the act of Bankruptcy was in consequence of advice by a friend, as in the Case which had been alluded to by Mr. *Cullen*, of *Roberts* v. *Teasdale*. In

(*a*) Peake's N. P. Cases, 27.

that case *Lord Kenyon* does not deny that a Commission may stand, though the act of Bankruptcy is concerted with another, if it be not with the knowledge of the Creditors. In *Bamfield* v. *Baron* (*b*), the Court held that those who are privy to a concerted act of Bankruptcy cannot take advantage of it; and referred to a case of *Hooper* v. *Smith* (*c*), before *Lord Mansfield*. In *Menham* v. *Edmonson* (*d*) the Court determined that it is no objection to a Commission of Bankruptcy that it was sued out with an intent to defeat a previous Execution, if not taken out in collusion with the Bankrupt himself; and in *ex parte Bowes* (*e*), *Lord Eldon* held, there was no objection to such a Commission, "provided it is the Commission of a Creditor, and not that of the Bankrupt, which is always vitious." *Lord Erskine*, in *ex parte Arrowsmith* (*f*), was of the same opinion. It is clear, therefore, that a Commission may be taken out to defeat an Execution, provided there be no collusion with the Bankrupt, in which case it would be bad. Where a Commission has been taken out fraudulently, at the instance of the Bankrupt himself, it may be superseded, even though he has obtained his Certificate (*g*).

A Denial is not of itself an act of Bankruptcy, but only evidence of "keeping house, &c. to the intent or whereby his Creditors may be defeated, or delayed payment of their debts (*h*)," which is an act of Bankruptcy.

(*b*) Stated in Note, 2 T. R. 394.

(*c*) 1 Black. 441.

(*d*) 1 Bos. & Pul. 369.

(*e*) 11 Ves. 540. See also *Ex parte* Gardener, 1 Ves. and Bea. 48.

(*f*) 14 Ves. 209.

(*g*) *Ex parte* Moule, 14 Ves. 602.

(*h*) Vid. 1 Jac. 1. c. 15.

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Lord Mansfield doubted whether a concerted Denial amounted to evidence of an act of Bankruptcy (*i*); Mr. Justice *Foster* thought it did; but Lord Chief Justice *Lee* held it did not (*k*); and in *Calley* v. *Hopkins*, in 1785, Mr. Justice *Buller* decided, that a concerted Denial was not evidence of an act of Bankruptcy, unless in fact there was a Denial to a Creditor, who was not in concert (*l*).

In this case, the Denial was by concert and contrivance between the Bankrupt, and his Sister, the Petitioning Creditor; it appears clearly from the letters between him and his sister. It appears also, from those letters, that his Property was scarcely sufficient to pay the Expenses of the Commission; and that the Commission was taken out, not for the benefit of the Creditors, but to injure the Petitioner, by exhausting the Property. This, therefore, is not like the cases where the object in taking out the Commission was simply to defeat an Execution, for the benefit of the Creditors at large. The Commission must be superseded, and at the Expense of the Petitioning Creditor; and she must pay the Costs of the Petition.

Petition granted.

(*i*) In Hooper v. Smith, 1 Black. 441.

(*k*) Buller's Nisi Prius, 39.

(*l*) S. P. *Ex parte* Bourne, 16 Ves. 146, 7.

STRETCH *v.* WATKINS.

1816.

6th February.

James Stretch made his Will, as follows:—

" I, JAMES STRETCH, of Queens-head Lane, in the Parish of St. Mary, Islington, in the County of Middlesex, being of sound mind and memory, on the 8th day of May 1806, Do make my last Will and Testament.— First, I give to my dearly beloved Wife 100*l.* to be paid her immediately after my decease: I also give and bequeath to my dearly beloved Wife 200*l.* per annum (that is to say,) the Interest of 4,000*l.* of my 5-per-cent. Navy Annuities, during her Life, if she remains my Widow, but if she marry again, then to go to my Children, as hereinafter directed: I also give to my beloved Wife the Lease of my House, No. 9, Queens-head Lane, Islington, and the Furniture, and every thing appertaining to housekeeping, of which my Plate, Liquors, printed Books, &c. I consider as such. To my dearly beloved Daughter *Anna Stretch*, Daughter of my above-said Wife, I give and bequeath 120*l.* per annum (that is to say,) the Interest of 4,000*l.* of my 3-per-cent. Consolidated Annuities: It is my wish and Will, that the Interest, as it becomes due, be added to the Principal till she attains the age of twenty-one years, except 20*l.* per annum to find her Clothes, &c. To my Daughter *Mary Stretch*, Daughter of my aforesaid Wife, I give and bequeath 120*l.* per annum (that is to say,) the Interest of 4,000*l.* of my 3-per-cent. Consolidated Annuities: It is my wish and Will, that the Interest, as it becomes due, be added to the Principal, till she attain the age of twenty-one years, except 20*l.* per annum to find her in Clothes, &c. But if my said above Wife should die

An unlimited Bequest of the Interest of Stock, passes the Principal also.

Will, from its tenor, construed to give vested Legacies.

Maintenance allowed where Principal and Interest of a Legacy to a Child is vested, though Interest directed to accumulate till Legatee attains twenty-one.

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before my said above Daughters attain the age of twenty-one years, then 50*l.* per annum may be taken from their Annuities to maintain and bring them up to twenty-one years of age. To my Son *James Stretch*, Son of my aforesaid Wife, I give all the rest of my Estate and Effects, together with the above Annuities as they may fall, or I die possessed of; and it is my wish and Will, that all the Money that is owing to me be collected, and put into and added to my 3-per-cent. Consolidated Annuities, as soon as possible after my decease, and the Interest, as it becomes due, be added to the Principal, except 50*l.* per annum to bring him up to twenty-one years of age, and such Legacies as I may leave. To *Mary Wiggott*, who now lives with us, I give 100*l.* To each of my Executors I give 50*l.* It is my Will, that if my Son *James Stretch* should die before he attain the age of twenty-one years, then the whole of my Estate and Effects be equally divided between my aforesaid Daughters *Anna* and *Mary Stretch*, Daughters of my aforesaid Wife, as they attain the age of twenty-one years; or if either of them should die before she attain the age of twenty-one years, the Survivor of them to have the whole of my Estate and Effects. I appoint Mr. *W. Watkins*, of St. James's Street, St. James's, Optician; Mr. *W. Blake*, of Whitecross-street, Cripplegate, Watch-maker; and Mr. *W. Robson*, of Redcross-street, Cripplegate, Clock-maker, Executors of this my last Will and Trstament."

The Bill was filed by *Anna Stretch* the Widow, and *Anna Stretch* and *Mary Stretch*, Infants, by their Mother and next Friend, against *W. Watkins* and *W. Robson*, the Executors, and against *James Stretch*, an Infant, by *J. H. Peacocke*, his Guardian. The Bill prayed the usual Accounts, and that "the Sum of 4,000*l.*

five-per-cent. Navy Annuities might be transferred to the Accountant General, in order to secure the payment of the 200*l.* per annum bequeathed to said Plaintiff *Anna Stretch* for her Life; and that the Sum of 4,000*l.* three-per-cent. Consolidated Bank Annuities, might be transferred to the said Accountant General, for the benefit of said Plaintiff *Anna Stretch*; and that the like Sum of 4,000*l.* 3-per-cent. Consolidated Bank Annuities, may be transferred to the said Accountant General, for the benefit of said Plaintiff *Mary Stretch*; and that said last-named Plaintiffs may be declared entitled to the Dividends of the said Sums of 4,000*l.* and 4,000*l.* 3-per-cent. Bank Annuities, during their respective minorities; and that each of them might be declared to be entitled to the said Sum of 4,000*l.* 3-per-cent. Annuities when she should attain the age of twenty-one years; and that it might be referred to one of the Masters to approve of a proper Person or proper Persons to be the Guardian or Guardians of said Plaintiffs the Infants, and of the said Defendant *James Stretch,* during their respective minorities; and to inquire, and state to the Court, what will be proper to be allowed for the maintenance of aforesaid Plaintiffs the Infants, and of said Defendant *James Stretch,* for the time past, and for the time to come, and to whom the same ought to be paid," &c.

Sir *Samuel Romilly,* and Mr. *Agar,* for Plaintiffs.

Mr. *Hart,* and Mr. *Bell,* for Defendants.

The VICE-CHANCELLOR:—

The first point to be ascertained is, what is given by this Will.

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If the produce of Stock be given without limitation, it carries the Principal. I have a strong recollection of Cases to that effect. If the Rents and Profits of an Estate be given without limitation, it passes an absolute Estate. An unlimited gift of annual produce is a gift of the thing itself. The Legacies, therefore, to *Anna Stretch* and *Mary Stretch*, the Daughters, passed the Principal. One part of the Testator's property is given to his Wife, another part to his Daughters, and the residue to his Son; and he has not disposed of the Principal of all his Stock, unless it be in this way of an unlimited gift of the Interest.

The next point to be considered is, whether the Legacies to the Daughters were vested or contingent. It has been contended they have not a vested Interest in their Legacies (except as to 20*l.* given for Clothes) until they attain twenty-one.

The directing of accumulation till twenty-one, except as to the 20*l.* does not prevent its being a vested interest. If the Daughters were intended not to have taken vested Interests until they had attained twenty-one, the Will would have so expressed it. In the bequest of the residue to his Son, he says, if he "should die before he attain the age of twenty-one years, then the whole of my Estate and Effects to be equally divided between my aforesaid Daughters;" but there is no express gift over, in case the Daughters should die under twenty-one. He did not mean the same contingency to apply to the portions of the Daughters. Their Legacies, therefore, are vested.

It has been urged, that as in the gift to the Son he says, "I give all the rest of my Estate and Effects, together

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with the above Annuities, as they may fall," it could not have been intended to give vested Interests to the Daughters before twenty-one. When are the Annuities to fall? You cannot graft upon these words "as they may fall," the words, "if they die under twenty-one." The words used raise a suspicion, that in some event, he thought some Annuity might fall. One Annuity certainly would fall, namely, that given to his Wife, which goes over upon her death. That gives effect to the words, and is what was probably intended by the Testator. I think the Court ought not to extend the words of the Will, by raising a contingency beyond what is expressed. I cannot say, that if the Daughters died under twenty-one, leaving children, the Testator meant those children should not have any thing.

The word "*whole*," in the gift to the Daughters in case his Son should die under twenty-one, means, whatever was given to the Son, except what was specifically given to the Daughters; the whole, in addition to what they themselves had.

[It was suggested that the Question as to what should be allowed for maintenance had better come on upon Petition.]

The VICE-CHANCELLOR:—

The Decree, then, must be made according to the Prayer of the Bill, except as to what relates to maintenance, which will come on upon Petition. It is admitted, that though the Testator has expressly directed an accumulation of the Interest (except as to 20*l.*) arising out of the Daughters Legacies, until twenty-one, yet the Court, where the child has a vested interest in

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the Principal and Interest, will allow what is necessary for the Infant's maintenance (*a*).

9th. On this Day the *Vice-Chancellor* said, the cases he alluded to, as having determined that an unlimited Bequest of the Interest of Stock, passed the Principal, were *Phillips* v. *Chamberlaine* (*b*), and *Elton* v. *Shephard* (*c*).

(*a*) See Fairman *v.* Green, 10 Ves. 48.
(*b*) 4 Ves. 51. (*c*) 1 Bro. C. C. 532.

FRANCIS *v.* WIGZELL.

7th February.

On a Bill for a Specific Performance of a Purchase Agreement against Husband and Wife, in which there was a Statement, that the Wife had separate Monies and Property, of larger Amount than the Purchase Money, and an Interrogatory in support of such Statement, a Demurrer by her to such Discovery, allowed.

THIS was a Bill by *Robert Francis*, against the Rev. *Thomas Wigzell*, and *Mary* his Wife, praying, that they may be decreed specifically to perform their Agreement with the Plaintiff, for the purchase of an Estate, for the sum of 5,600*l.*

The Bill stated, that *Thomas Wigzell* and *Mary* his Wife, "which said *Mary Wigzell* has separate Monies and Property of her own, to a considerably larger Amount than the Purchase Money," authorized *Thomas Hawkes* as their Agent, to treat and agree for the Purchase on their Behalf, and that he, accordingly, entered into a written Agreement with the Plaintiff for the Purchase.

The Bill amongst others, contained the following Interrogatory: "And whether the said *Mary Wigzell* has not separate Monies and Property of her own, to a con-

siderably larger amount than the Purchase Money hereinbefore mentioned, or to some, and what amount."

By an Order, the Defendant *Mary Wigzell* obtained leave to demur, and answer separately from her Husband, and she demurred to part, and answered the residue of the Bill.

The Demurrer was, "As to so much of the Bill as seeks any Discovery from this Defendant, whether the Defendant *Wigzell* has not separate Monies and Property of her own, to a considerably larger Amount than the Purchase Money in the said Bill of Complaint mentioned, or to some, and what Amount, Defendant doth demur thereto; and, for cause of Demurrer, showeth, That the said Plaintiff hath not by his said Bill made such a Case as entitles him, in a Court of Equity, to call upon Defendant for any Discovery whatsoever, respecting the separate Monies and Property of the Defendant, *Mary Wigzell*. Wherefore," &c.

Sir *S. Romilly* and Mr. *Spranger*, for the Demurrer:—

The Husband is the only Person who can be bound by this Agreement. No Agreement is stated in this Bill, by which the Wife bound her separate Property; nor is there any Allegation in the Bill, that she intended to bind her Property. A Vendor has no right to interrogate as to the Property of the Vendee.

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

In general, a Vendor cannot, in a Bill for a Specific Performance, interrogate the Vendee as to his Property; but in this case, Mrs. *Wigzell* having contracted jointly

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with her Husband for the Purchase of this Estate, the Plaintiff is entitled to inquire as to her separate Estate. Many Cases have established the power of the Wife, in Equity, to deal in respect of her separate Property (*a*). We contend she has bound her separate Property by this Contract—the Bill alleges she has separate Property, and the Plaintiff, therefore, is entitled to interrogate respecting it.

Sir *S. Romilly*, in Reply:—

In the Cases cited, the Bill prayed the Application of the separate Property, but there is no such Prayer in this case. There is no Case of a Joint Contract by Husband and Wife, where the Wife's separate Property has been made liable, unless where the Husband was unable to perform the Contract. *Hulme* v. *Tenant* is inaccurately reported. In one part of the Report the Bond is stated to have been given by the Wife alone; and in another part it is said to have been a Joint Bond, by Husband and Wife. The Trustees for the Wife should have been made Parties. The Bill seeks a personal Decree against Husband and Wife, which cannot be as to the Wife.

Feb. 10th.

The VICE-CHANCELLOR:—

This is a Bill filed by the Vendor of an Estate against a Man and his Wife, the Vendees, to compel a Specific Performance of a Purchase Agreement, entered into by *Hawkes*, their authorized Agent, with the Vendor. The Bill states, in a Parenthesis, that the Defendant "*Mary Wigzell* has separate Monies and Property of her own, to a considerably larger Amount than the Purchase Money" for the Estate; and an Interrogatory is introdnced, "Whether the said *Mary Wigzell* has not sepa-

(*a*) As the cases cited, were noticed by His Honour in his Judgment, they are not here mentioned.

rate Monies and Property of her own, to a considerably larger amount than the Purchase Money for the Estate, or to some, and what amount?" The Defendant, *Mary Wigzell*, having obtained an Order to answer, separately from her Husband, answers the whole of the Bill, except as to the preceding Interrogatory, as to which there is a Demurrer, upon which I am now to decide.

It is admitted, that if a similar Interrogatory had been addressed to the Husband, as to his Property, or any other Party against whom a Specific Performance was sought, such an Inquisition into the Circumstances of the Defendant would not have been permitted: Is it then a proper question with regard to this Feme Covert?

In general, a Feme Covert cannot contract, and if made a Defendant, may demur to the whole of the Bill. To render her liable, it is necessary to show she has separate Property, and has contracted in respect of it.

A Feme Covert, having separate Property to her own use, may, generally speaking, dispose of it as a *Feme Sole*; but if the Instrument by which she acquires it, prescribes any particular mode in which she must part with it, her disposition of the Property must be according to the Terms of such Instrument (*b*).

The Question here is, not whether she might have made her separate Property responsible, but whether, as this Bill is framed, a negative or affirmative Answer

(*b*) See what is said by Lord *Eldon*, in Jones *v.* Harris, 9 Ves. 493, & 497.

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to the Interrogatory, would entitle the Plaintiff to the relief prayed. The Bill states she has separate Property sufficient to pay the Purchase Money; but it does not say, whether such Property is Real or Personal; whether Freehold, Copyhold, or Pin Money. Nothing is asked as to what power she has over it—who are the Trustees—or whether it may be made available to answer the Plaintiff's Demand. She cannot have separate Property, unless through the medium of Trustees. Suppose the Interrogatory were answered in the Affirmative, and she admits she has separate Property, is she, on that admission, bound specifically to perform an Agreement, made by an Agent appointed by her and her Husband, and to have a personal Decree against her, and her Husband, for such Specific Performance? There is no Case in which this Court has made a personal Decree against a Feme Covert. She may pledge her separate Property, and make it answerable for her Engagements; but where her Trustees are not made Parties to a Bill, and no particular Fund is sought to be charged, but only a personal Decree against her, the Bill cannot be sustained.

It will be found in all the Cases of this kind, that the Decree has been against the Trustees or Holders of the Fund, making that liable to her Debts and Engagements.

In *Hulme* v. *Tenant* (*c*), the Court went a great way, as Lord *Rosslyn* and Lord *Eldon* have observed (*d*); but not so far as is prayed by this Bill. The Bill in that

(*c*) 1 Bro. C. C. 16.

(*d*) See what Lord *Eldon* says, in Spurling *v.* Rochefort, 8 Ves. 175. and in Nantes *v.* Corrock, 9 Ves. 189; and Jones *v.* Harris, Ib. 497.

Case was against the Husband and Wife, and *her surviving Trustee*. Lord *Thurlow* said, "In respect to a Feme Covert, determined Cases seem to go thus far, that the general Engagement of the Wife shall operate upon her Personal Property—shall apply to the Rents and Profits of her Real Estate—and that her Trustees shall be obliged to apply Personal Estate, and Rents and Profits, when they arise, to the satisfaction of such general Engagement; but this Court has not used any direct Process against the separate Estate of the Wife, and the manner of coming at the separate Property of the Wife has been by Decree, to bind the Trustees, as to Personal Estate in their Hands, or Rents and Profits, according to the exigency of Justice, or of the Engagement of the Wife to be carried into execution." In a subsequent passage, he says, "I believe there is no instance of a personal Decree against a Feme Covert, for payment of any Sum whatever. Though her separate Property is liable, yet the Decree is to fetch forth her separate Estate, and make it liable to her Engagement (*e*)." Wherever a Feme Covert is sought to be charged in respect of her separate Estate the Bill must be directed against that separate Estate.

In the other cases that have been mentioned, the Decree was not against the Wife personally, but against the Fund. In *Norton* v. *Turville (f)*, *Stamford* v. *Marshal (g)*, a short case; *Briscoe* v. *Kennedy (h)*; *Ellis* v. *Atkinson (i)*; *Pybus* v. *Smith (k)*; and *Heatley*

(*e*) 1 Bro. C. C. 21.
(*f*) 2 P. Williams, 144.
(*g*) 2 Atk. p. 68.
(*h*) 1 Bro. C. C. 18. in Note.
(*i*) 3 Bro. C. C. 565.
(*k*) Ibid. p. 340.

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v. *Thomas* (*l*), which is but briefly reported, the Decree was against the *Fund*.

In *Nantes* v. *Corrock* (*m*), Lord *Eldon* says, " One of the greatest difficulties that has occurred in this Court, is, how to give any Execution against the Property of a married Woman; and in *Hulme* v. *Tenant*, Lord *Thurlow* went no farther than the Rents and Profits of her Estate; not as to the Estate itself; and clearly not against her Person. In this Case the Property is only Stock, and there is no instance of this Court giving Execution against Stock *eo nomine* upon which there is no *lien*." In *Jones* v. *Harris* (*n*), his Lordship was strongly of Opinion that, upon a mere Contract by a Man with a married Woman, the Court will not consider him, in all events, as contracting with her, not as a married woman merely, but as a married Woman having separate Estate; and relies for that upon *Williams* v. Duke of *Bolton*. As the Decree in Cases where a Feme Covert was held liable, has uniformly been against the separate Estate of the Feme Covert, and not against her Person; this Bill goes farther than any of the Cases, and cannot be supported. The Interrogatory, if answered in the Affirmative, would be of no use to the Plaintiff. Upon these grounds I am of Opinion, the Demurrer is well founded.

Demurrer allowed.

(*l*) 15 Ves. 604. (*m*) 9 Ves. 189.
(*n*) 9 Ves. 497.

COOKE *v.* WESTALL.

1816.

8th February.

An Answer, stated to be the joint and several Answers of two, but sworn only by one, ordered to be taken off the File, with Costs.

SIR *S. Romilly* moved, to have the Answer taken off the File, and for the Costs of the Motion. The Answer, purported to be the joint and several Answers of two Defendants, though it was only sworn by one. He cited *Harris* v. *James* (*a*), *Robson* v. *Clark*, in Exchequer 1810, and *Graham* v. ——— in Exchequer, 2 July 1813.

Mr. *Parker, contra.*

The VICE-CHANCELLOR:—

The Motion must be granted.

(*a*) 3 Bro. C. C. 399.

BELLINGHAM *v.* BRUTY.

12th February.

On Motion, after an Order to dismiss Bill for want of Prosecution, supported by Affidavit as to merits, &c. the Bill retained, on terms of paying Costs, &c.

ON the 25th January last an Order had been made in this Cause, to dismiss the Bill, for want of Prosecution.

A Motion, on Notice, was now made to discharge that Order, upon payment of Costs, supported by an Affidavit, as to Merits, and accounting for the delay.

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Mr. *Beames, contra*:—

If, after this lapse of time the Motion is granted, it must be on the same terms as in *Jackson* v. *Pownall (a)*.

The VICE-CHANCELLOR:—

You may take the Order, on the Plaintiff's undertaking to file a Replication forthwith, and speed his Cause to a Hearing; and paying the Costs of the Order of the 25th January, and of the present Application, according to the Case cited.

Motion granted.

(*a*) 16 Ves. 224; and see the form of the Order in that Case, 3 Ves. & Bea. 1. Note (*a*).

BOWMAN *v.* RODWELL.

12th February.

Witness objecting to an Interrogatory before the Examiner, must demur.

BENJAMIN Martindale, a Solicitor, had a Subpœna served upon him, to testify before the Examiner; but having neglected to attend, an Order, dated 19th December 1815, was made for his Attendance within four days, or to stand committed. He accordingly attended the Examiner, but conceiving himself not bound to answer certain Interrogatories put to him, objected to answering them.

It was now moved, that the Witness might be at liberty to go before the Examiner, and state his reasons for refusing to answer such Interrogatories; as he con-

ceived himself not bound to answer; and that the Examiner might deliver a Copy of such Interrogatories as the Witness refused to answer; and might certify the reason of such Refusal; and in the mean time that all Proceedings under the Order of the 19th December 1815 might be staid.

Mr. *Roupell*:—

The Books of Practice throw no light on this point; and Mr. *Dancer*, who has been long an Examiner, does not recollect a similar instance. It would be a great hardship, if this Witness is to be subject to punishment for a Contempt, in not answering improper Interrogatories; if it be the practice to put in a written Demurrer to the Interrogatories, it is necessary a Copy of such Interrogatories should be given to the Witness. He cited *Smithson* v. *Hardcastle* (*a*).

Mr. *Treslove, contra*:—

This is quite a new Motion, and would lead to great inconvenience, by prematurely exposing the points as to which the Plaintiff proposes to examine the Witness. On account of the obstinacy of this Witness, the Plaintiff has been twice at the Expense of a Motion to enlarge Publication. If the Witness can demur, he ought, as in the Case alluded to.

The VICE CHANCELLOR:—

It is admitted, that if the Witness conceives an improper Interrogatory is put to him, he must demur (*b*).

(*a*) 1 Dick. 96.

(*b*) See what is said by Mr. *Ambler*, at the end of his Report of Nightingale v. Dodd, Ambl. 583.

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Whether the Demurrer must be in Writing, or *ore tenus*, does not appear; but certainly he may demur; and then, according to the Case in *Dickens*, the two Senior Six Clerks, not concerned in the Cause, are to copy so much of the Interrogatories as are demurred to; and brought before the Court for its Consideration.

There is no necessity for stopping the Order of the 19th December 1815, for a Motion will be necessary, before the Witness can be committed for a Contempt of that Order, and then it will be open to the Court to consider whether, under the circumstances, he ought to be committed. Though the form of a Subpœna to a Witness, to give Evidence before an Examiner, is, "to *answer* concerning those things which shall then and there be objected to him," and the form of the Order made, where a Witness does not obey the Subpœna, is, to attend on a particular day, and "testify the truth, according to his knowledge," yet a Witness, I apprehend, may refuse to answer improper questions, in the same way, as in ordinary Cases of Subpœnas, in the Common Law Courts. If it were not so, the usual Subpœna and Order would require alteration, and the Witness be directed to attend, before the Examiner, to answer *or demur*.

Motion refused.

1816.

WHITE *v.* GODBOLD.

12th February.

Motion by Defendant to take Answer, defective in the Title, off the File, and to amend and re-swear it, allowed.

MR. *Roupell* moved, on the part of the Defendant, that his Answer might be taken off the File, altered and re-sworn, the Title of the Answer being incorrect.

Mr. *Treslove, contra* :—

This Motion is novel, and dangerous. There are contradictions in the Answer, and the Plaintiff has no Security, that when the Answer is taken off the File, it will not be altered in more than the Title. If taken off the File and not replaced, the Defendant could not be indicted.

The *Vice-Chancellor*, by consent, made an Order as prayed, the Defendant undertaking to re-swear the same Answer, after the Title was altered, and paying the Costs of the Motion.

QUARRELL *v.* BECKFORD.

17th January.
21st February.

Mortgagee in Possession holding over, after payment of his Principal and and Interest.

THIS Cause came on for further Directions and Costs.

In 1732, *Jonathan Barnett*, (since deceased) mortgaged an Estate, called *Catharine Hall*, in *Jamaica*, to *Peter Beckford*, the Grandfather of the Defendant *Wm. Beckford*, to secure 1,054 *l.* Sterling, with Interest, at 10 per cent. *Interest, charged with the Balance,*

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In 1736, a Mortgage was made by *Jonathan Barnett*, of the same Estate, for 3,192*l.* 9*s.* 7*d.* and Interest at 8 per cent. to *David Thompson*, as a collateral security for Money lent upon the Mortgage of another Estate to *J. Barnett*. *D. Thompson* assigned this Mortgage to the late *Peter Beckford*.

The Interest on these Mortgages was paid down to the 21st December 1762, but discontinued from that period.

On the 30th June 1769, *Wm. Beckford* (since deceased) the Son of *Peter Beckford*, and Father of the Defendant *Wm. Beckford*, filed a Bill of Foreclosure in *Jamaica*, against the *Barnetts*, and those *then* interested under them.

In 1770, *Wm. Beckford*, the Father, died.

In 1772, *Jonathan Beckford Barnett*, the Grandson of the Mortgagor, *Jonathan Barnett*, and who was entitled to the Equity of Redemption of the Mortgaged Estate, assigned the same to *Edward Wollery*, who afterwards assigned it to *John Jackson*, who took Possession, and who on the 4th May 1782 assigned to the Plaintiff *Quarrell*, and *Thomas Gray* and *R. Batty*, (both since deceased) on certain Trusts, and in particular, on Trust to pay the plaintiff *John Jarratt*, a sum of Money therein mentioned. They took Possession of the Estates, and under this Deed, the claims of the Plaintiffs arose.

The Suit remained abated from the death of *Wm. Beckford*, in 1770, until the 28th October 1781, when

it was revived by his Son, the Defendant *Wm. Beckford*, who at the death of his Father was a Minor. The same persons, with the exception of *Wm. Beckford* the Son, were Parties to the revived Suit, as were Parties to the original Bill.

On the 22d October 1783, the Cause was heard in *Jamaica*, and an Account directed, and on the 21st April 1784, a Foreclosure was decreed against all the persons who were Parties to the Suit. The Decree was not made absolute, nor were the Plaintiffs, or *Jackson*, Parties to it.

In consequence of this Decree, a Writ of Injunction first, and afterwards, a Writ of Assistance, put the Defendant *Beckford*, in 1784, into Possession of the Mortgaged Premises.

In 1796 *John Jackson* was declared a Bankrupt, and *Wm. Atkinson, Tho. Wagstaff*, and *Joseph Timperon*, were chosen Assignees of his Estate and Effects.

In 1796 the Original Bill in this Court was filed by the plaintiff *Quarrell*, the surviving Trustee under the Deed of the 4th May 1782, and by *Jarrett*, who was also interested under the same Deed, against *Wm. Beckford, Peter Robinson* the surviving Assignee of the separate Estate of *John Serocold*, a Bankrupt, who was a Co-partner with the before-mentioned *Jackson*, and against *Wm. Atkinson, Tho. Wagstaff*, and *Joseph Timperon*, the Assignees of the said *Jackson*, and against the said *Jackson* himself. This Bill, which was afterwards amended, stated the preceding facts; and charged that more Land was taken under the Writ of Assist-

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ance, than was included in the Mortgages; that the Decree of Foreclosure in *Jamaica* did not affect the Plaintiffs, as neither they or *John Jackson* were made Parties to the Suit, though the Deed of the 4th May 1782 was recorded in the Island, and the Plaintiff *Quarrell*, with his then Co-trustees, were, at the time of the Foreclosure, in Possession of the Estate; charging also, Collusion; and that the Defendant *Beckford* had been overpaid the Principal and Interest of his Mortgage, and praying, an Account, and Delivery up of the Possession of the Mortgaged Premises.

The Defendant *Beckford*, by his Answer to the original and amended Bill, insisted on his absolute right to the mortgaged Estates, under the Decree of Foreclosure in *Jamaica*—that the Plaintiff *Quarrell* had notice of the proceedings in *Jamaica* from the time of filing the Bill of Foreclosure by the Defendant's Father, and the reviving of the same after his death—that the Conveyance to the Plaintiff *Quarrell* and his Co-trustees was made pending the Suit to foreclose, and therefore, that they were not necessary Parties to that Suit—that no more Land was taken possession of under the Writ of Assistance than was comprised in the Mortgages, and denying collusion in regard to the procurement of the Foreclosure. He also insisted that no part of the Money certified to be due on his Securities, or for Interest, had been satisfied by the yearly income of the Mortgaged Estate, but that, on the contrary, such yearly income had not been sufficient to keep down the Interest of such Money, and the contingencies of conducting the business of such Plantation.

In 1799 a Supplemental Bill was filed, making *Geo.*

Bainbridge and *Wm. Ludlam* Parties, who had been chosen new Assignees of *John Jackson* in the room of *Thomas Wagstaffe* and *Joseph Timperon*, the former Defendants.

In 1802 a Bill of Revivor and Supplement was filed on the death of *Peter Robinson*, the Assignee of *Serocold*, against *Geo. Bainbridge* and *Wm. Ludlam*, who had been also chosen Assignees of the separate Estate of *Serocold*.

In the year 1783 the Cause came on before the Master of the Rolls, Sir *R. P. Arden*, who directed a Reference to the Master, to take an account of what was due to the Defendant *Wm. Beckford*, for Principal and Interest on the Mortgages, in the Pleadings mentioned, bearing date respectively the 31st day of May, and the 1st day of June 1732, and the 28th and 29th days of June 1736, and which by Indentures of Assignment, therein also mentioned, bearing date respectively the 17th day of June 1741, and the 14th and 15th days of September 1743, became vested in *William Beckford*, Esq. the late Father of the said Defendant, *and to tax the said Defendant his Costs of this Suit*, and also, to take an Account of what the said Defendant had laid out and expended in *necessary Repairs and lasting Improvements* upon the Estates and Premises in the Island of *Jamaica*, comprised in the aforesaid Indentures of Mortgage respectively, of which he took Possession, under and by virtue of the Writ of Assistance in the Pleadings mentioned, and compute Interest on what should appear to have been laid out in such lasting Improvements, after the Rate of Interest payable in the said Island of *Jamaica*; and that what should

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appear to be coming on the said Account for lasting Improvements, and such Interest thereof as aforesaid, and also what shall be coming on the said Account for Repairs of the said Estates and Premises, be added to what shall be found due to the said Defendant for Principal, Interest and Costs as aforesaid: And also to take an account of the *Rents, Produce and Profits of the said Estates and Premises comprised in the aforesaid Mortgages received by the said Defendant Wm. Beckford,* or by any other Person or Persons by his order, or for his use, or which, without his wilful default, might have been received thereout; and that the said Master in taking the said Accounts of Rents, Produce and Profits of the said Mortgaged Estates and Premises, do make annual Rests.

[Another Inquiry was directed as to the Lands taken possession of under the Writ of Assistance, which being afterwards abandoned, it is unnecessary to state.]

And his Honor reserved the Consideration of Interest, *and of the Costs of this Suit, not before provided for,* and of all further Directions, until after the said Master should have made his Report; and any of the Parties were to be at liberty to apply to the Court as they shall be advised.

From this Decree the Defendant *Beckford* appealed to the Lord Chancellor, and His Lordship affirmed the Decree.

On the 1st September 1815, The Master made his Report, and after taking the Accounts and making the Defendant all the Allowances directed by the Decree,

the result of the Master's Report, which particularized all the Charges and Discharges, was, that on the 31st December 1808, there was a Balance against the Defendant *Beckford* of 24,370*l.* 0*s.* 7*d.*

Sir *Samuel Romilly*, Mr. *Hart*, Mr. *Leach*, and Mr. *Heald*, for Plaintiff.

Sir *Arthur Pigott* for the Defendants the Assignees, in the same Interest with the Plaintiff.

Two Questions now arise in this Cause: 1st. As to the Interest with which the Defendant is to be charged in respect of the Balance found to be in his hands belonging to the Plaintiffs; and 2dly, As to Costs. With respect to Interest, as *Beckford* ought to have kept proper Accounts, and ought to have delivered up the Mortgaged Estate, when he had been paid his Principal and Interest out of the Rents and Profits of the Estate, he must now account for what he has been overpaid, with Interest. He knew, or ought to have known, that he was overpaid. A Mortgagee continuing in Possession after his Debt has been paid, must be considered as a Trustee for the Mortgagor, and must pay Interest. There is no Case on this point; but, on principle, it is clear the Mortgagee should pay Interest; for otherwise, a temptation would be held out to Mortgagees to retain Possession of Mortgaged Estates after they were paid. Under the circumstances, no more is asked than simple Interest on the Balances in his hands, at 6*l.* per cent. the present *Jamaica* Interest.

In regard to Costs, the Decree is rather ambiguous; but it seems, that Costs up to the Decree were all that

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were intended to be given, and that subsequent Costs were to be in the discretion of the Court, upon the result of the inquiries directed by the Decree.

The Defendant by his conduct rendered the Suit necessary; he must therefore pay the Costs. The Master in his Report has blended the Costs up, and subsequent to, the Decree, so that a Reference will be necessary to ascertain the amount of the Costs incurred subsequent to the Decree.

Mr. *Fonblanque*, and Mr. *Trower*, for the Defendant *Beckford*:—

Possession was taken in pursuance of the Decree of Foreclosure in *Jamaica*, in 1784. Till then the Defendant was not in Possession. No steps were taken to affect that Decree until the present Bill was filed in 1796. For twenty-two years previous to the Decree of Foreclosure, the Interest of the Mortgages was unpaid. After the Decree of Foreclosure the Defendant had good reason to believe the Estate was his own. There is no Case in which a Mortgagee has paid Interest on a Balance found to be due from him on the result of an Account; such Balance is at most but a Simple Contract Debt, upon which (*a*), no Interest is allowed; or like a claim of mesne Profits, which do not carry Interest either at Law or in Equity; much less, can *Jamaica* Interest be claimed. This Court, unless in a few Special Cases, charges Interest in the same manner as a Court of Common Law does.

(*a*) Creuze *v.* Hunter, 2 Ves. Jr. 157, & S. C. 4 Bro. C. C. 157 & 316.

The Question, as to Costs, is decided by the Decree of the *Master of the Rolls*, which gives the Defendant the Costs of the Suit, and not merely the Costs up to the Decree. If the latter only had been intended, the Court would have made a reservation as to Costs incurred subsequent to the Decree.

The VICE-CHANCELLOR:—

[After minutely stating the facts of the Case.]

Under these circumstances the first important Question which arises, is, as to *Interest*. It is admitted on both sides, that it is a perfectly new Question, and must therefore be decided on Principle.

The fact must be taken to be, that before this Suit was instituted in Trinity Term 1796, the Defendant *Beckford* was a Mortgagee in possession; fully paid the whole of what was due to him for Principal, Interest and Expenditure; and that he had 1,572*l.* in hand. That is the first fact, that I wish to observe as a *datum*, upon which I proceed in viewing this Case. That sum of 1,572*l.* therefore, had the Account been then taken, ought to have been paid over to the Mortgagor, a period of twenty years ago; from that time, every subsequent Receipt *de anno in annum*, ought to have been paid over, (with the deduction of what the current expenditure of each year was) up to the year 1807, had the Account been taken. We must recollect that this is the case of a Mortgagee, who has taken Possession of an Estate forfeited, and overpaid every thing before the Bill was filed. We are to strip it of the circumstance of Foreclosure, because the Foreclosure being irregular, it was invalid.

Considering the Case on Principle, the first Question

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to be asked, is, In what light is a Mortgagee considered in a Court of Equity, who is in possession of an Estate, after he is paid the Principal and Interest due on his Mortgage?

What is a Mortgage? Every body knows it consists of two things; it is a personal Contract for a Debt, secured by an Estate, and in Equity, the Estate is no more than a Pledge or Security for the Debt; the Debt is the Principal—the Estate is the Accident. Whether the Mortgagee is, or is not, in Possession of the Pledge, his right is precisely the same, with this difference, indeed, that he has never any right, in Equity, to the Estate, except as a Fund to pay him his Debt; for every other purpose, the Estate is the Estate of the Mortgagor, and when the Debt is paid, all the Mortgagee's right and interest in the Estate ceases; he has then the legal Estate only, and not a beneficial Interest in it. If the Mortgagee has chosen to take Possession and help himself, he becomes then a Bailiff, without Salary, and the Mortgagee is accountable for the Profits, which are applicable in the first instance to pay the Principal and Interest of his Debt, and all other allowances, to a Mortgagee; but he is bound to be an Accounting Party, taking the Estate in Possession upon the Principle, and upon the Obligation, to account with the Mortgagor, for all the Rents he receives. He is bound to keep the Account, and to be ready with it, to apply it regularly to pay his Principal and Interest, and to be ready to surrender up the Pledge as soon as it has answered its purpose. All the Cases treat the Mortgagee, as soon as he is paid, as becoming a mere naked Trustee, holding the legal Estate for the benefit of the *Cestui que Trust*, the Mortgagor.

In determining the Question, we have only to keep in view these principles, to decide, in what character a Mortgagee overpaid is to be viewed, when all the beneficial interest he ever had in the Estate is determined. He is merely a Trustee holding a legal Estate in the Estate of another person, with whom he is bound, by the nature of his Trust, faithfully to account.

In this view, the *Cestui que Trust* who was entitled to the balance of 1,572*l.* in the year 1796, files his Bill, demanding the Estate and the Balance, which on the taking the Accounts might appear to be due. What does the Trustee say? I will not part with the Estate; I am not paid; what I have received is not sufficient to keep down the expenses; and I insist on the Foreclosure in *Jamaica*, as a bar to your being permitted to redeem.

That Mr. *Beckford* set up a defence which he knew was not well founded, is not the point; it is enough that he was mistaken; he sets up a mistaken defence—he resists the right to redeem when he is bound to permit a Redemption—he insists upon that which is no Bar—he insists on the account being in a state which it is not. To say he has unfortunately been put into this situation, and involved in a mistake as to the effect of the Suit in *Jamaica*, is, certainly, only to apologize, and exonerate the Case from any imputation of fraud, or intentional misconduct on his part; but it cannot be received here, to say, that a Party who mistakes the effect of the Law, and of a Suit, gains to himself a right, to insist on a Bar he is not entitled to, a right, to insist on a Foreclosure against one who is no Party to

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the Suit, he having omitted to include such Party, so as to make it a Bar. A person must suffer, who mistakes the Law on subjects on which he ought to be advised. He ought to have known that the Decree could not operate as a Bar to the right of the Plaintiffs to redeem. He must take the consequence of being mistaken in supposing himself to have a right to an estate when he has only a qualified right. He had a right of Possession, undoubtedly, not by that Decree, but as Mortgagee, from the legal Estate being in him; but to any other purpose he cannot protect himself, though it may apologize for his not being ready with the Account, and for having treated the Estate as his own. I must, therefore, consider this as the case of a Trustee resisting the right of his *Cestui que Trust*, and who in the result receives, *de anno in annum*, very considerable sums and overplus, and ultimately in the year 1808 is found in possession of more than 24,000*l.* He had therefore in his possession for the last nine years 24,000*l.*, and a fraction, due to the Mortgagor, some part of which the Mortgagor ought to have received in the year 1795, and in every succeeding year he ought to have received what became due, for the purpose of applying it to his general purposes, or the purpose of keeping down the Interest of the second Mortgage. For a period of twenty years back he has been in the receipt of Money he was not entitled to, but which was due to the *Cestui que Trust*; and which Money he has employed as he thought fit, and is not now forthcoming. He does not say, I have kept it ready for you; but he insists on his right to retain it; he must therefore be taken to have enjoyed it for his benefit, and to have employed the whole of it.

Under these circumstances the case is assimilated to a Simple Contract Debt, which does not carry Interest; it is compared also to the case of mesne Profits, improperly received by a Trespasser; in which cases, it is clear, the Courts of Law and Equity are not in the habit of charging the Party with Interest. What analogy do those cases bear to the present? The main point here, does not exist in those cases, viz. a Sum due from a Trustee to a *Cestui que Trust*. The mesne Profits are received by an adverse holder, by a trespasser, where there is no privity between the one and the other; but here, the Profits are received under an implied Contract by the Mortgagee to account; that is not like the case of a trespasser receiving mesne Profits. This Mortgagee received the Rents as Trustee—he received them to pay himself first, and afterwards to account to the Mortgagor; he has therefore made himself liable to account. A relation is established as between Trustee and *Cestui que Trust*, and the moment the Mortgage is paid off, he is converted into the situation of a bare naked Trustee. All the money received from that time is money received by a Trustee, having a legal Estate in his hands, and receiving the Rents and Profits of such Estate, which he holds as Trustee for another.

Courts of Equity give Interest in many cases where there is no express Contract. In this very case the Mortgagee himself is allowed Interest which he was not entitled to by Contract, I mean, the Interest upon lasting Improvements, &c. Why is he entitled to it? Because a Court of Equity considers itself competent in this relation between Mortgagor and Mortgagee, to go beyond the Contract,—to consider what is just and equitable between Parties, standing in that relation;

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and because when the Trustee in Possession has been expending his own money to improve the Estate of the *Cestui que Trust*, it is not justice to say, you shall be repaid the very Money laid out, without any allowance for the same, with Interest. What Interest? Where is there any Contract? The Interest is Ten *per cent.* on one Mortgage, and Eight *per cent.* on another. Is he to have that? No; Six *per cent.* Why? Because it is equitable, that being an expenditure on the spot, by a Trustee, he shall have the current Interest of the Country, just the same as if he had lent so much Money. This, I say, is strong proof to show you are not to restrict a Court of Equity by the narrow principles applying to Simple Contract Debts, or mesne Profits, but that the Court looks at the Question as applying to Mortgagee and Mortgagor, and gives either party Interest, as justice requires; and indeed, that was the large view taken of it by the Counsel on both sides, who admitted, the Court must not be considered as tied down, but must look at the whole Case and say, is it reasonable or not, that the Mortgagee should be saddled with Interest. It is said that Mr. *Beckford* ought not to be charged with Interest, because there was a long period of time when he was kept out of the receipt of his Interest, viz. from the year 1762 to the year 1790, a period of twenty-eight years, during which he had imperfect and inadequate payments, towards satisfying him the Interest of his Mortgage; and prior to that year 1790, there was a considerable arrear. It is said, if on the one hand he gets no Interest for that arrear, why ought he to pay Interest for the arrear which after that period is found to have been in his hands? The answer is, that Interest does not in any case carry Interest; it is contrary to the clear established principle

of the Court to give it. A Mortgagee, it is known, can only enforce payment of Simple Interest, and he must take the remedies the Law gives to enforce it. He might have enforced those remedies in 1762; and if he chose not to do it he must take the consequence; the Law can only give him an account according to the regular course, unless a Case is made for it, and no Case is made for it here. The Plaintiffs say, in answer to this claim of Interest by Mr. *Beckford*, if you will on both sides permit Compound Interest to be calculated, you shall have it. If the Court were to depart from the strict rule of the Court, and adopt a general rule of Equity to give Compound Interest on one side, then it must give it on the other; but if you do not choose to do that, and that the Defendant prudently declines, then neither Party can expect more than Simple Interest.

In this Case, the Court that framed the Decree have decreed Annual Rests, and have reserved the question of Interest. I do not say that that has decided any thing on the subject, but it has put it in a course, and in a state, for the determination of the question of charging this Mortgagee with Interest, if it turned out to be that he was overpaid.

If there be no fixed Rule of the Court; if there be no authority in which the point was ever decided, one way or the other; if all the general Principles that govern a Court between a Trustee and *Cestui que Trust*, lead to one conclusion; if Justice and Equity lead to the same conclusion; *viz.* that one Party is not to keep another out of Possession for twenty years, applying to his benefit large balances, due to another, that other, embarrassed with Debts, without paying Interest, what

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is there of authority, principle, reason, justice, or equity, that should induce a Court not to say, that that conclusion must follow?

Upon these principles it is, I am of opinion, upon the first question, that the Mortgagor is in this Case entitled to charge the Defendant with Interest; and that it must be sent to the Master to compute that Interest.

The next point to be considered is, *from what period* the Interest is to be charged: With respect to that I am of opinion, it should be from the filing of the Bill, for at that period the demand was made, and ought to have been complied with, according to the justice of the Case. The Mortgagee was overpaid on the 31st December 1795, and in Trinity Term 1796, when the Demand was made, it ought to have been complied with; from that time he had a Balance, and annually increased that Balance, by the receipt of Money not due to him, and which ought to have been paid over. I think, therefore, from that period he must be charged with Interest.

The next question is, at what *rate of Interest* he ought to be charged. Now here we are again to examine it on principle. The rate of Interest ascertained by the Mortgages, was, in one instance, 10 *per cent.* in the other, 8 *per cent.* and the legal rate of Interest in *Jamaica* has since been reduced to 6 *per cent.* on West India Property. The rate of Interest is usually settled by contract; here there is no Contract; therefore Contract cannot guide us. The Decree has directed that 6 *per cent.* be paid in respect of what was laid out in Expenditures, but that I think ought not to decide,

because that was on an expenditure on the spot, where the rate of Interest is 6 *per cent.* and advances made there may fairly be considered as Money lent at the time; and though in the absence of contract, the Courts have adopted that Interest which the Law of the Country has fixed, yet here the Defendant is not called upon to account in the Island; he is not called upon to account where he might have been better enabled to have made out all the Expenditures, the Improvements, the Repairs, and other matters; and every body knows there must be difficulties attending the taking the account of a Person in Possession for many years, by positive proof, such as would be required to entitle him to charge. He may have grievously suffered; and I do not lay any stress on the length of time that has elapsed, or the Commissions sent out to *Jamaica* to procure Evidence; and though I think he ought to account for Interest, I do not feel warranted, by any principle, in saying, he should account otherwise than as Executors account, who have had balances long in their hands, and who, according to the usual course of the Court, and without any Contract, are made to pay Interest at the rate of 4 *per cent* (*b*). That Interest Mr. *Beckford* must pay. This is, undoubtedly, a considerable indulgence to the Defendant, who, if an Inquiry took place, what profit he made of these Funds in his hands, would no doubt have been found to have made more than 4 *per cent.* I do not therefore charge him vindictively. This disposes of the question of Interest.

The other Question respects *Costs.* I think I am in great degree relieved from entering into the consideration of that question, whatever might have been

(*b*) See *Tebbs* v. *Carpenter*, post, p. 290.

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said respecting the Defendant having created a necessity for the Suit, and resisting the right of the Mortgagor to redeem, and of so much of the Costs which had arisen from that. The fair construction of the words of the Decree, and which I am not at liberty to alter, directing the Master to take the Account, and to tax the Defendant the Costs of the Suit, must be considered, as directing him to tax the Costs, without limitation, without stopping at any part of the Cause. What are the Costs of the Suit? Costs up to the Decree? Certainly not. If so intended, it would have been said, Costs up to the Decree. If the Decree had reserved the question of subsequent Costs up to this time, that would have left the Court at liberty, on further Directions, to consider what ought to be done with the subsequent Costs; but I think as to that part of the Case the Decree is conclusive, and has given the Suit to the Defendant; and I am not disposed to cut down that, and restrain the Party from having the Costs of the Suit in the manner in which they have been taxed. The only observation upon that was, that the Decree reserved the subsequent Costs not provided for by the Decree; upon which it was observed, that if all the subsequent Costs were intended to be provided for, how could there be any unprovided for? As to which, the observation is, that there are other Defendants, and other Parties, which may satisfy these words; for the Costs of all the other Parties were not provided for. I am of opinion, therefore, that the Defendant is entitled to the Costs of the Suit.

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20th February.

A fourth Order made, for enlarging the Time for payment of Mortgage Money, under the Circumstances.

THE Bill filed in this Cause was for a Foreclosure; and on the 25th February 1814, the usual Decree was made for the payment of Principal, Interest and Costs, within six calendar Months after the Master's Report should be made, of what was due on that account, or that the Defendant should stand foreclosed.

On the 23d June 1814, the Master reported, there would be due, for Principal, Interest, and Costs, on the 23d December 1814, being six Months after the date of his Report, the Sum of 7,376*l.* 18*s.* 5*d.* which he appointed to be paid on that day.

On the 10th December 1814, the Defendant moved to enlarge the time for payment of the Mortgage Money, supported by an Affidavit of his Solicitor, that the Estate was worth 15,000*l.*; and that he had been using his utmost endeavours, to raise what was due, upon a Mortgage of the Estate; and thereupon, an Order was obtained by the Defendant, that on payment on or before the 23d December 1814, of 1,376*l.* 18*s.* 5*d.* the amount of Interest and Costs reported due to the Plaintiff, the time for redeeming should be enlarged six Months, with the usual directions.

On the 14th June 1815, the Defendant moved for further time, for payment of the Mortgage Money, upon an Affidavit of his Solicitor, repeating, that the Estate was worth 15,000*l.* and that he had not been able to raise the Money, but that he had good reason

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to believe he should be able to raise the same within six Months, by the Sale of an Estate, upon which there was a Mortgage for 8,100*l.* and upon payment whereof, the Defendant was bound to find Security for the same, and therefore intended to substitute the Premises in Mortgage, to the Plaintiff, as such Security, which would enable him to pay Principal, Interest, and Costs, due from him to the Plaintiff; and thereupon it was ordered, that on the Defendant paying the Sum of 153*l.* 3*s.* 6*d.* the amount of Interests and Costs reported due to the Plaintiff, within a Fortnight, the time for redemption was enlarged for five Months.

On the 16th November 1815, the Defendant again moved for further time to redeem, upon an Affidavit of his Solicitor, that since the last Application, part of the Estate mentioned in his former Affidavit, subject to a Mortgage of 8,100*l.* had been sold by public Auction for upwards of 9,000*l.*; and that the Purchasers were proceeding to complete their Purchases; and that the first Monies to arise by such Sale were intended to be applied in payment of the Plaintiff's Mortgage; and that he believed the whole, or a sufficient part of the said Purchases, would be completed within three Months; and thereupon, the Court ordered, that on payment of what was due for Interest and Costs, the period for redemption should be enlarged for three Months, *but that was to be peremptory.*

On this Day the Defendant moved, that the time for Redemption might be enlarged for three months longer, on an Affidavit of his Solicitor, that the Purchases of the Estates mentioned in his former Affidavits were not completed, owing to some Objections to the Title,

but that the Objections were satisfactorily answered; and that he verily believed he should be able to get such Sales completed within the space of three Months.

Mr. *Leach* and Mr. *Wingfield,* for Motion.

Mr. *Trower, contra,* objected such an Order was unusual, after the previous Orders for time, and that the last Order was expressed to be peremptory.

The VICE-CHANCELLOR:—

It requires a strong Case to induce the Court to make a fourth Order, enlarging the time for the payment of Mortgage Money, decreed to be paid. If the Defendant has done all he can to obtain the Money, and has been baffled in his purpose, by unexpected delays, and there appears a strong probability of the Money being raisable within three months, the Court would feel disposed to enlarge the time. It is sworn that the objections to the Title are satisfactorily answered, and the Solicitor also swears, he verily believes the Sales will be completed within three Months. The last Order does certainly purport to be a peremptory Order, but, I think, the Court has sometimes, in these Cases, given further time, notwithstanding that expression. Let the Defendant take an Order for three Months further time, on the usual Terms.

Motion granted.

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HILL *v.* SMITH, and others.

22d February.

Guardian appointed of an Infant, and his presence in Court dispensed with, on an affidavit of his inability to attend from illness.

THREE of the Defendants in this Cause were Infants. Two of them appeared in Court, and had a Guardian (their Mother) assigned, to put in their Answers; but the third, from illness, could not attend the Court.

Mr. *Courtenay* moved, on an Affidavit of the medical attendant of the Infant, as to his illness, that his Mother might be appointed his Guardian, to put in his Answer; and the presence of the Infant in Court, or a Commission, dispensed with.

The Register (Mr. *Bedwell*) being applied to, said, he remembered similar Applications having been allowed; upon which, *The Vice Chancellor* made the Order as prayed.

TEBBS, and others, *v.* CARPENTER, and others.

Bequest of residue, after death of Testator's Wife, to five of his Children, and to "the Son of my Son John Tebbs, or his other Children, that is living," held to pass Shares to Children of the Son, born after the Testator's death, and before the death of his Wife.

Executor charged with arrears of Rent unreceived, and Balances in his hands, together with Interest at the rate of four per Cent. and the Costs of the Suit, relating to such Arrears and Balances.

SIR *Benjamin Tebbs*, amongst other Bequests, gave to his Wife an Annuity of 600 *l.* a year; and directed that, after payment of his Debts, and Funeral Ex-

penses, " the Money arising from collecting my Rents, and after paying Lady *Tebbs'* Annuity, the Overplus shall be put out into the 4 *per cents.* until after the death of Lady *Tebbs*, then such Sum as may be found may and shall be equally divided among *Jane Tebbs*, *Elizabeth Hodgson*, and the Son of my Son *John Tebbs*, or his other Children that is living, to share and share alike. To my Son *William*, and *Susan Tebbs*, and to my Son *George Tebbs*, together with the above, share and share alike."

Lady *Tebbs*, the Testator's Widow, survived her Husband eleven years.

John Tebbs, the Son, had only two Children at the death of the Testator, *viz.* the Defendants, *John Searls Tebbs*, and *Eliza Ann Tebbs* (who afterwards died), but he had three other Children born after the death of the Testator, and before the death of the Testator's Widow, *viz.* the Plaintiffs *Henry Tebbs*, *Susan Tebbs*, and *Mary Ann Tebbs*.

Upon the death of Lady *Tebbs*, doubts arose whether the distribution of the Residue should be into six, or nine Shares; and thereupon the Plaintiffs, who were the Children of *John Tebbs*, born after the death of the Testator, but before the decease of his Widow, filed the Original Bill against *Collick* and *Carpenter*, the Executors, and also against the other residuary Legatees, praying, the usual Accounts against the Executors, and that the clear Residue might be ascertained; and a Declaration of the Rights of the Plaintiffs to three Ninth Parts or Shares of the Residue, &c.; and also praying, that the Defendants might answer for the Interest of

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such Part of the Residuary Personal Estate of the Testator, as had not been properly laid out and invested, &c. Before any Answer was put in, *Collick* died, and a Bill of Revivor was filed against his Representatives.

On the 9th of March 1810, the *Master of the Rolls*, by his Decree, declared that the clear Residue of the Testator's Personal Estate should be distributable among *Jane Tebbs, Elizabeth Hodgson, William Tebbs, Susan Mann, George Tebbs, and all the Children of the Testator's Son John, who were living at the time of the death of the Testator's Widow,* in equal Shares and Proportions. The Decree also directed the usual Accounts against the surviving Executors, and the Representatives of *Collick*, the deceased Executor; and all further Directions, and the Costs of the Suit, were reserved till the Master should have made his Report.

From this Decree, such of the Defendants as were residuary Legatees, appealed.

The Master made his Report on the 6th July 1811.

On the 8th February 1814, the Cause came on for further Directions, and also upon the Petition of Appeal, when the Decree was Affirmed, and the Costs of all Parties, including the Costs of the Appeal, were directed to be taxed as between Solicitor and Client, except the Costs of the Defendant *Carpenter* the Executor, and of *Jarvis, Blake,* and *Crohall,* the Executors of *Collick* the deceased Co-Executor, and such Costs, when taxed, were directed to be paid out of the Fund in Court. It was also further ordered, that the Master should carry on the Accounts of the Testator's Estate

against the Defendant *Henry Carpenter*, the surviving Executor of the Testator. And that the Master should inquire into the particulars of the *arrears of Rents* reported to be outstanding on account of the Testator's Estate, and to state from what time the same became in arrear; and the amount of the several annual Rents; and the nature of the several Tenancies of the persons reported to be in arrear. And it was ordered, that the Master should inquire what *Balances* were from time to time in the hands of the Defendants *Henry Carpenter* and *John Collick*, or either of them, or any other person or persons, by their or either of their order, or on their or either of their account, on account of the receipts and payments of the Testator's Estate, set forth in the first and second Schedules to his Report, containing such account, at the end of one year after the said Testator's death, and making annual rests. And it was ordered, that the Master should inquire, and state, what *investments* were from time to time, and when, made out of the residue or overplus of the Testator's Estate, by the said Defendant *Henry Carpenter*, and the said late Defendant *John Collick*, or either of them, in the purchase of Bank 4 *per cent.* Annuities, as directed by the Testator's Will. The consideration of the Costs of the Defendants *Henry Carpenter*, *Tho. Jarvis*, *Benjamin Blake*, and *Tho. Crockett*, and of further Directions, and subsequent Costs of the Suit, were reserved, until after the Master should have made his Report.

The Master, by his Report, stated the particulars of the Arrears (amounting to 1,500*l.*) of the Tenants, and the nature of their Tenancies and also the Balances in the hands of the Executors, which, in each year from 1797 to 1811, with the exception of the years 1803,

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1808, 1810 and 1811, were very considerable, and he also stated the Investments which had been made in the 4 *per cents.* but which still left considerable balances in their hands.

Sir *Samuel Romilly*, Mr. *Dowdeswell*, and Mr. *Shadwell*, for Plaintiffs.

Mr. *Leach*, and Mr. *Wingfield*, for such of the Defendants as were in the same interest with the Plaintiffs.

Doubts arose as to the construction of the Testator's Will; but it was clear, from the express directions of the Will, there was to be an accumulation for somebody, for such persons as the Court should decide were entitled to it. The question is, whether the surviving Executor, and the Representatives of the deceased Executor, are not chargeable in respect of the Arrears of Rent, amounting to 1,500*l.* and Interest, and also with compound Interest on the Balances in their hands, and the Costs of the Suit occasioned by their negligence. The Executors were bound to exercise the same reasonable diligence in regard to this Trust Property, as they would use in their own affairs; instead of that, they have been guilty of great negligence, by suffering Tenants, eleven in number, to be in arrear, and most of them several years, without taking any legal steps, by distress or otherwise, to recover the Rent, which probably might by such means have been obtained, since only one of these Tenants was in arrear in the Testator's life-time, and it appears they paid their parochial taxes. If the Rent were recoverable, they should have recovered it; if not recoverable, and legal proceedings useless, they should have got rid of the Tenants.

Many of them were only Tenants at will. The Executors offered no evidence to show that the Rents were not recoverable, though they might have done so if they could, before the Master. It is no excuse that they employed an Agent. They ought to have acted themselves. The Executors are bound not only to pay the Balances in their hands, but also compound Interest, as in *Raphael* v. *Boehm* (*a*). The *Lord Chancellor* directed the Account against these Executors to be taken with annual Rests, which shows he considered their conduct improper, and that compound Interest was to be charged. In this Case, as in *Raphael* v. *Boehm*, there was a direction in the Will to accumulate. With respect to Costs, wherever an Executor is charged with Interest on account of a Breach of Trust, he pays the Costs of the Suit, as laid down in *Seers* v. *Hind* (*b*), and approved in *Piety* v. *Stace* (*c*). These Executors ought therefore to pay so much of the Costs of this Suit as were occasioned by their negligence.

Mr. *Hart*, and Mr. *Roupell*, for the Defendant *Carpenter*; and

Mr. *Heald*, for the Representatives of *Collick*.

The Executors are, at most, only chargeable with negligence: it is not pretended that they acted with interested views, or that they have derived any benefit. Under the circumstances, their conduct is excusable. They appointed *Hodgson*, the Son-in-Law of the Testator, to collect the Rents. They trusted to him, he

(*a*) 11 Ves. 92. 13 Ves. 407. 590.

(*b*) 1 Ves. jun. 294.

(*c*) 4 Ves. 620.

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being one of the *Cestuis que Trust*, and interested in the due receipt of the Rents. There is no case in which an Executor suffering a *Cestui que Trust* to receive the Testator's property, has been held responsible. An Executor, like a Mortgagee, is chargeable only in respect of wilful default: No wilful default is here proved. The Houses were old ones, and it might have been advisable not to proceed to extremities with the Tenants. With respect to the Balances in these Executors hands, it appears that sometimes they paid during a year more than they had received, and they were justifiable in retaining them "to answer the exigencies of the Testator's affairs," to use the expression of Lord *Thurlow* in *Littlehales* v. *Gascoyne* (*d*).

The claim of compound Interest is extravagant. All they are entitled to, at most, can only be 4 *per cent.* Interest. In no case has compound Interest been given except in *Raphael* v. *Boehm*. In *Littlehales* v. *Gascoyne* (*e*), the Executors had Balances in their hands for thirty years, but compound Interest was not given. So, in *Piety* v. *Stace* (*f*), where a gross breach of trust had been committed, by calling in Money on good Security, and lending it to the Executor's Son, compound Interest was not given. In *Rocke* v. *Hart* (*g*), only 5 *per cent.* was given, though in that case there was contumacy, and a wilful breach of duty. *Raphael* v. *Boehm* affords no general Rule. The particular words of the Will formed the ground on which Lord *Loughborough* made the extraordinary Decree in that case, and of which Lord *Eldon*, in a subsequent stage of the Suit, ex-

(*d*) 3 Bro. C. C. 74.
(*e*) Ibid.
(*f*) 4 Ves. 620.
(*g*) 11 Ves. 58.

pressed his marked disapprobation. That case was not followed in *Ashburnham* v. *Thompson* (*h*). As to Costs, there is no pretence that these Executors should pay any Costs, except what relates to the inquiries as to their imputed misconduct. Even in *Raphael* v. *Boehm*, the Executors had their Costs, except as to some of the inquiries. That appears from the case when it came on in the subsequent stages (*i*). If Executors were always made to pay the Costs of the Suit where their conduct had not been strictly proper, it would be the interest of *Cestuis que Trust* to find some flaw in their conduct, and thus obtain Costs they themselves must, otherwise, have paid.

The Representatives of *Collick* cannot be liable in respect of any transactions after his death.

The *Vice-Chancellor* [after particularly stating the facts of the case] said, Three points have been raised. 1. As to the Arrears of Rent, and Interest upon them. 2. As to the Balances and Interest. 3. As to the Costs.

With respect to the *Arrears of Rent*, the question is, whether the Executors are to be charged with them, or a part of them, and with Interest. The Management of he Houses, which were old, was left to the Executors, and the Trust was troublesome and gratuitous. The surviving Executor, and the Representatives of the deceased Executor, have not produced any evidence in their exculpation; and I am under the necessity of deciding, in the absence of all Evidence on behalf of the Executors. It is possible there might have been great difficulties in

(*h*) 13 Ves. 412. (*i*) 13 Ves. 590.

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recovering *part* of the Rent, but is, therefore, the *whole* amount of the Arrears to be lost to the Estate? The impression on the Master's mind, as appears by his Report, was, that by using proper means, the whole of the Arrears might have been recovered. It cannot be admitted as an excuse that they devolved the care of this Estate to another; they must answer for his negligence.

I am anxious not to discourage persons from acting as Executors, by throwing difficulties in their way; and am willing to make every proper allowance; but I must not forget the established doctrine of this Court. If persons accept the Trust of Executors, they must perform it; they must use due diligence; and not suffer Infants to be injured by their negligence.

There are many cases in which Executors have been adjudged responsible for gross negligence, *crassa negligentia*. Where Executors had neglected to call in Money lent by the Testator, upon Bond, and the Obligee became a Bankrupt, the *Master of the Rolls*, though inclined to favour the Executors, held them to be responsible (*k*); and in a previous case of *Lowson* v. *Copeland* (*l*), an Executor was charged with a Debt, which had not been recovered, in consequence of his neglect.

If, therefore, there be *crassa negligentia*, and a loss sustained by the Estate, it falls upon the Executors. Here, for want of evidence, I cannot say that all this Rent could not have been recovered; and I am, reluctantly, obliged to assume, that no exculpatory evi-

(*k*) Powell v. Evans, 5 Ves. 839. (*l*) 2 Bro. C. C. 157.

dence could be produced, and, therefore, they must be charged with these Arrears. Interest upon the Arrears was but faintly pressed for, and ought not to be given. Interest was asked for in *Lowson* v. *Copeland*, but refused.

The next question to be considered, is, with respect to the *Balances* in the hands of the Executors. In 1797, the end of one year after the Testator's death, they had a balance in their hands of 790*l.* The Testator's Will directs, "that after my Executors paying my just debts and funeral expenses, the money arising from collecting my Rents, and after paying Lady *Tebbs*' annuity, the overplus shall be put out into the 4 *per cents.* until after the death of Lady *Tebbs*, then such sum as may be found shall and may be equally divided among, &c." That sum therefore of 790*l.* ought, according to the directions of the Will, to have been laid out in the 4 *per cents*, unless it could be shown that the exigency of the Testator's affairs required such a Balance to be kept in hand. The same observation applies to the balances, all of them considerable, received by the Executors in the subsequent years, except in the years 1803, 1808, 1810, and 1811. The argument that it was necessary to keep the Balance which they had in 1797, to answer the contingencies of the next year, would have had weight, if in fact it was necessary, and there were pressing demands which required it, but the current receipts were greatly more than sufficient to answer the current payments, and no evidence was adduced to show there was any necessity for keeping that Balance in their hands. The same remark applies as to the subsequent Balances in the succeeding years. Under these circumstances it is contended, that these Executors should not

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only be charged with these Balances, but also with compound Interest, as in *Raphael* v. *Boehm*; except that annual Rests are to be made by this Decree, instead of half-yearly Rests as in that case, it being said, that the Estate would have derived that benefit if the Executors had, according to the directions in the Will, laid out each yearly Balance in the 4 *per cents*. It is a point of great importance to Executors, that the Rule should be clearly ascertained.

The Decree in *Raphael* v. *Boehm* was made by Lord *Loughborough* in 1798. There is no Report of his Decision. The Cause came on afterwards, before Lord *Eldon*, upon Exceptions to the Master's Report (*m*); and before Lord *Erskine*, upon a Petition to re-hear the Decree of Lord *Loughborough* (*n*); and again before Lord *Eldon*, upon the Question of Costs (*o*). The Decree was founded on the very particular circumstances of that case. £.30,000 was given there, *in solido*, to be laid out. There could not be a more manifest violation of the Executor's duty; he did not lay out the Money as directed, but used it in his Trade. It was a wilful violation of the Will, which prohibited Retainer, and directed Accumulation. Lord *Loughborough*'s Decree was very severe, for he directed the account to be taken from the moment of the Testator's death, and Interest to be charged upon all the sums received; and Rests to be made half-yearly upon the Balance, including intermediate Interest, so that double compound Interest was given. Lord *Eldon* did not approve of the Decree, in that respect; and said, "it was expressed in terms that

(*m*) 12 Ves. 92.
(*n*) 13 Ves. 407.
(*o*) 13 Ves. 590.

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were never inserted, and which he hoped would never again be found in any Decree (*p*);" but he agreed in the propriety of giving compound Interest. When the Case came before Lord *Erskine*, he said, " the duty of this Executor does not depend upon the general rule, as it relates generally to the administration of Assets, but upon the special rule prescribed by this particular Will, by which accumulation is pointed out; and the Executor is told by the Will, that he is to derive no advantage from the Trust (*q*)." I have stated thus much as to *Raphael* v. *Boehm*, because it was the only Case cited in support of the present claim to compound Interest. No Case has been stated previous to *Raphael* v. *Boehm*, where compound Interest was given. Two Cases on the subject have subsequently occurred; one is, *Dornton* v. *Dornton* (*r*), and the other *Ashburnham* v. *Thompson* (*s*).

Dornton v. *Dornton* was a Case arising in Bankruptcy. The Will is not noticed in the Report; but I have consulted the Register's Book, and it appears, the Will directed the Executors, " to collect and receive the Rents and Profits arising from all the abovementioned Premises, (the Premises before mentioned in the Will), together with all the arrears of Salary due to me from Government, and all other my real and personal Effects, and dispose of the same, and every part thereof, in the most advantageous manner possible, immediately after my decease. And it is my desire, that the money from the same be vested in the Public Funds, in the joint names of the said *Thomas Dornford* and *Robert*

(*p*) 11 Ves. 111.
(*q*) 12 Ves. 127.
(*r*) 13 Ves. 402.
(*s*) 13 Ves. 412.

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Capper (the Executors), in Trust, to and for the sole use and benefit of my Nephew *James William Dornford*, the eldest Son of my eldest Brother *James Dornford*, of *London*; the Interest arising therefrom to be allowed, discretionally, by the above-named *Thomas Dornford* and *Robert Capper*, as a provision to complete the Education of my Nephew at Westminster School, and in the University of Oxford, until he attains the age of twenty-one years: And it is my request, that the Surplus (if any there be) of such Interest, be vested also in the Public Funds, with the principal Stock, in the joint names of *Thomas Dornford* and *Robert Capper*, as soon as the sum will purchase 50*l.*; and that as soon as my said Nephew shall attain the age of twenty-one years, that the above-mentioned principal Sum, together with all the other sums of money arising from the accumulated Interest, or otherwise, be laid out in the most advantageous manner, in the county of Kent, &c."

Upon this Will, the Master of the Rolls thought the direction to accumulate was as imperative as in *Raphael* v. *Boehm*. The precise Order made by the Master of the Rolls does not appear in the Report; but I have caused it to be extracted from the Register's Book:— "It is ordered, that the said Master do compute Interest on the Balances which were from time to time in the hands of the Defendant *Thomas Dornford*, the Bankrupt, from the end of two months after the death of the Testator, *Josiah Dornford*, to the time of Bankruptcy, such Interest to be computed in manner following, that is to say, after the rate of 5*l. per centum per annum*, on so much thereof as is equal to the Bond Debts reported due from the Testator's Estate, and after the rate

of 4 *l. per centum per annum* on the residue of such Balances."

Compound Interest, it is observable, was not directed. This was the first Case which followed *Raphael* v. *Boehm*, and the words of the Will were as strong as in that Case; but not being, in all the circumstances, exactly the same, His *Honor* did not adopt universally what was done in *Raphael* v. *Boehm*, The next Case was *Ashburnham* v. *Thompson*. It is reported by Mr. *Vesey*, and I have been furnished with a MS. note, by one of the Counsel (*t*) in the Cause. There, the Executors had kept a balance in their hands for twenty years, and had employed the Money for their own advantage. It was pressed, that compound Interest should be given in *Raphael* v. *Boehm*, and it was urged in Argument, that if the Executors had made compound Interest, and only 4 *per cent.* was charged them in respect of the Balances in their hands, they would be benefited nearly as much as the *Cestui que Trust*; but the Master of the Rolls said, "I think there is no ground for computing Interest upon the Balances out of the common way." Thus stand the Authorities since *Raphael* v. *Boehm*.

In none of the Cases previous to *Raphael* v. *Boehm* was compound Interest given. They are very numerous. In *Adams* v. *Gale* (*u*), Lord *Hardwicke* said, "An Executor may make use of Money which is perpetually coming in by Assets of the Testator, and turn it to his own advantage; and that it is not improper for an Executor to do it upon his own account, where he is a responsible man, and ready to answer Debts and

(*t*) Mr. Maddock. (*u*) 2 Atk. 106.

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Legacies when called upon;" and in a subsequent Case (*x*) he says, " I will not say but if an Executor had placed out Assets that were specifically devised, but the Court would oblige him to account for the Interest he may have made of those Assets; but there never was a Case in this Court where a Master was directed to charge Interest upon an Executor, who makes use of Assets come to his hands, in the way of Trade." More modern Cases have entirely overturned this extraordinary doctrine.

In *Perkins* v. *Baynton* (*y*), where an Administrator had kept Money five years in his hands, and mixed it with his own Money, Interest at 4 *l. per cent.* was charged. In *Newton* v. *Bennet* (*z*), the Executor had kept Money a long time in his hands, and used it in his Trade; and the Court said he must pay Interest—what Interest does not appear; but probably, the common Interest given by the Court, or the Reporter would have noticed it. In *Forbes* v. *Ross* (*a*), Trustees under a Will, directing them to lay out Money which should come to their hands " at the best and utmost Interest," were charged with 5 *l. per cent.* Interest. In *Littlehales* v. *Gascoyne* (*b*), an Executor was charged with Interest on Balances which had been long in his hands, but the Report does not state what Interest. In *Brown* v. *Southhouse* (*c*), an Administrator holding Monies in his hands was ordered to pay 4 *l. per cent.* Interest. In *Franklin* v. *Frith* (*d*), an Executor keeping

(*x*) Child *v.* Gibson, 2 Atk. 603.
(*y*) 1 Bro. C. C. 375.
(*z*) Ib. 359.
(*a*) 2 Bro. C. C. 430.
(*b*) 3 Bro. C. C. 73.
(*c*) Ib. 107.
(*d*) Ib. 433.

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Money in his hands was charged with Interest and Costs; the *Lord Chancellor* observing, that "he never could permit an Executor to keep 400*l.* of his Testator's Money dead in his hands; and that the keeping an equal Sum at his Banker's was no proof that he did not make Interest of it. With respect to Costs, it must depend on the conduct of the Executors; if kept to answer the exigencies of the Testator's affairs, it would be an excuse for not paying it over; but outstanding Demands, even on probable grounds, are no reason why the Executors should not lay their Testator's Money out. If they had laid it out in the 3 *per cents.* the Court would have affirmed their act." In *Seers* v. *Hind* (*e*), Executors who had kept Monies in their Hands, were charged with Interest. In *Piety* v. *Stace* (*f*), the Will directed the Executors to place the Money in the Public Funds, or upon Mortgages, or other good and sufficient Securities; but instead of doing that, they kept the Money, and the Court charged them with 5*l. per cent.* upon the balances in their hands, and the Costs of the Suit. In *Pocock* v. *Reddington* (*g*), it was determined, where an Executor had sold out Stock, and dealt with the Money, the *Cestuis que Trust* had an option to have the Stock replaced, or the Money produced by the Sales, with Interest at 5*l. per cent.* The last Authority, which I shall notice, is *Rocke* v. *Hart* (*h*), in which Case the Master of the Rolls states the result of all the Authorities. The Will is not stated in the Report, but I have consulted the Register's Book, and it appears, that the Testator, *Edward Ireland*, by his Will bequeathed the Interest of 500*l.* South Sea An-

(*e*) 1 Ves. jun. 294.
(*f*) 4 Ves. 620.
(*g*) 5 Ves. 794.
(*h*) 11 Ves. 58.

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nuities to *Ann Sampson* for Life, and after her death the Interest thereof, and the residue of his Estate, to be laid out, and the Interest to be paid to and among the Child and Children of his Nephew *John Rocke*, the Plaintiff's Father, until twenty-one, and then the whole to be paid to such Child or Children. The Executor, instead of laying out the balances, kept them in his hands. Upon this Case the Master of the Rolls directed the Executor to pay 4*l. per cent.* Interest on the balance in hand from the time he received the same; observing, "If it is true, that a direction, that an Executor shall pay Interest at 4*l. per cent.* only, would hold out a premium to Executors to keep Money in their hands, all the Decisions directing Interest at 4*l. per cent.* only for keeping the Money are wrong. Yet a great majority of the Cases are of that description; and even where the Court holds it altogether unjustifiable; as in *Perkins* v. *Baynton*, and *Browne* v. *Southhouse*, before Lord Thurlow; in both which Cases the Executor was not only held culpable for not laying out the Money, but he was supposed to have derived advantage himself."

It appears, therefore, from this view of the Authorities, that a distinction has been taken, as in every moral point of view there ought to be, between *negligence*, and *corruption*, in Executors. A special Case is necessary, to induce the Court to charge Executors with more than 4 *per cent.* upon the Balances in their hands. The obligation on Executors to lay out Balances not wanted for the exigency of the Testator's affairs, is now better understood, since it has been settled that they are indemnified against any loss in laying them out in the Fund, which the Court sanctions, the 3 *per cents.* If

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the Executor has Balances which he ought to have laid out, either in compliance with the express directions of the Will, or from his general Duty, even where the Will is silent on the subject, yet if there be nothing more proved in either case, the omission to lay out amounts only to a Case of *negligence*, and not of *misfeasance*.

Is this then a Case of Negligence, or of Misfeasance? Have these Executors made any use of the Money to their own profit or advantage?

The Employment of an Agent, who alone had possession of the Balances, though not any ground of Excuse, shows, they did not in fact derive any benefit or profit to themselves, nor act with that view. This, therefore, is a Case of Negligence, and like *Dornford* v. *Dornford*, *Ashburnham* v. *Thompson*, and *Rocke* v. *Hart*, where, though the Will directed the Money to be laid out, the Executors were charged only with 4 *l. per cent.* I think, therefore, no more than the usual Interest should be given. Considering, that the Trust was onerous, the Property difficult to manage, and the Agent employed was the Son-in-law of the Testator, named by him as a Trustee for another purpose in the Will, and a *Cestui que Trust* of his Property, it would be pressing these Executors beyond the Precedents cited, if, besides the arrears of Rent, and the Balances in their hands, with Interest, they were to be charged either with 5 *l. per cent.* or compound Interest.

The only remaining Question is as to *Costs*; as to which, I have looked into all the Cases. In *Seers*

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v. *Hind* (*i*), the *Lord Chancellor* says, "When I am obliged to give Interest against Executors as a remedy for a breach of Trust, Costs against them must follow of course." In *Newton* v. *Bennett* (*k*), the Chancellor went no farther than not to give the Executor his Costs. In *Raphael* v. *Boehm*, as strong a Case as could be, for Costs, the Executor received his Costs, except as to so much of the Decree as required the Master to state at what times the several Sums came to the hands of the Defendant, and directed him to make half-yearly Rests, and of the Order of the Court to make good the effect of the Inquiries to the Legatee, as to which, the Chancellor ordered that he should neither pay nor receive Costs. In *Ashburnham* v. *Thompson*, the *Master of the Rolls* does not accede to the general proposition laid down in *Seers* v. *Hind*. It does not therefore follow, that in all Cases where an Executor is directed to pay Interest, he must also pay Costs. If a Suit would have been proper, and the Executor a necessary Party, though the Executor had not misconducted himself, he ought not to pay *all* the Costs of such Suit, though in the course of the Suit it appears he has misconducted himself; but if the misconduct of the Executor was the *sole* occasion of the Suit, he ought then to pay the Costs. Apply this to the present Case. This Suit was necessary to determine what construction was to be given to the Will,—whether the residue was to be divided among the Nine, or among the Six claimants. The Expense, therefore, of so much of the Suit, as related to that point, and the Costs of the Appeal, ought not to be charged upon the Executors.

(*i*) 1 Ves. jun. 224. (*k*) 1 Bro. C. C. 362.

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The Decree upon the Appeal has provided for the Costs of all Parties, except the Executors, and directed them to be taxed as between Solicitor and Client, and paid out of a Fund in Court, and the Costs have been paid; therefore no question could have been reserved as to those Costs, but only as to the Executor's own Costs, and those must, I think, be allowed them; but the Costs of the subsequent Inquiries as to the Arrears of Rent, and Balances in their hands, being solely occasioned by their breach of Trust, must fall upon them.

Ex parte REW.

2d March.

Title of a Petition in Bankruptcy allowed to be altered, on paying the Costs of the day.

THIS was a Petition in Bankruptcy. It was objected, that the Petition ought to have been presented in the name of the Principal, who was abroad, instead of the Agent, in this Country. The objection was admitted to be a good one; and Mr. *Leach* and Mr. *Rose*, to save expense, moved for leave to change the Title of the Petition. Sir *Arthur Pigott*, and Mr. *Mountagu*, objected to this, and contended the Petition should be dismissed with Costs, and that the proposed alteration was unprecedented. They said, that perhaps this Agent was not authorized by his Principal to present this Petition. In Reply, it was said, it was clearly a mere mistake, and that the Title to a Petition had often been allowed to be altered; as, when a Petition to supersede a Separate Commission by Joint Creditors was by mistake intitled in the Joint Commission, instead of being, as it ought, in the Separate Commission.

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The VICE-CHANCELLOR:—

This is an evident Mistake in the Title of the Petition; and there appears no sinister object in the Petition. Let the Party be at liberty to amend the Petition, on paying the Costs of the day, without prejudice to the other Party, showing, if he can, that the Petition was presented by this Agent without the authority of his Principal.

MARGRAVINE of ANSPACH *v.* NOEL.

5th and 7th March.

Specific Performance decreed against a Purchaser, without a reference as to the Title; upon Possession; a correspondence—and no objection to the Title till two years after Abstract delivered.

THIS was a Bill praying a Decree for a Specific Performance of an Agreement to purchase several Houses, and for a Receiver until the residue of the Purchase Money was paid. The Agreement, executed by the Parties, was dated 22 August 1811, and was as follows:—" An Agreement, &c. between, &c. as follows: The said Margravine for herself, her Executors, &c. in consideration of the sum of 100*l.* paid to her by the said *Gerard Noel Noel* at the time of signing and executing thereof, and of the sum of 2,300*l.* to be paid as hereinafter mentioned, agreed to sell, assign, and convey unto the said *Gerard Noel Noel*, his Executors, &c. all that Leasehold Messuage or Dwelling-house, &c.; and that the said *Gerard Noel Noel* shall have Possession of all and singular the said Premises upon the 10th day of October next ensuing the date of these Presents; and all Taxes and other Assessments in respect of the said Premises shall be cleared up and paid by the said *Elizabeth* Margravine of Anspach, to that time;

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and the said *Gerard Noel Noel* for himself, his Executors, &c. agrees to purchase of the said *Elizabeth* Margravine of Anspach, her Executors, &c. all and singular the Premises, &c. at the price aforesaid, and to pay the said sum of 2,300*l.* to the said *Elizabeth* Margravine of Anspach, her Executors, Administrators or Assigns, within or at the expiration of one year from the date hereof, upon having a good and sufficient Assignment and Conveyance of the said Premises executed to him: And it is agreed, that the seller shall be at the expense of making a clear Title to the Premises, and that the expense of the assigning and conveying the Premises, shall be borne by the Purchaser. In witness, &c."

The 100*l.* was paid by the Defendant according to the Agreement, and he was let into Possession on the 10th October 1811; but the Defendant did not pay the remaining sum of 2,300*l.* as agreed.

On the 8th of November 1811 the Defendant's Attorney applied for the Abstract of the Title, and on the 28th it was delivered to the Defendant's Attorney, and no objection was taken to the same, until the 28th January 1814. The Defendant not only entered into Possession of the Premises, but also made alterations in the same, and let the Premises.

On the 4th of January 1813, the Defendant wrote to his Solicitor the following Letter, with a view of having the same communicated to the Plaintiff's Solicitor, which was accordingly done:—" I have been much vexed at myself for the delay which has happened about the payment of the Money for the Margravine's House, and

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am much gratified by the liberality and patience shown to me in this business. The case is, that I have been retarded in making Sales myself, from which source I looked for my supply. I should have been in a scrape had I given the Note purposed at first, and must have prayed further time; but if an immediate accommodation is wanted, I am willing to give a Bill at three months. Upon the Purchase being concluded, the Margravine wished the House should be let to a Lady, a friend of hers; I should be happy to do so whenever I let it at all. I fear these Houses cannot be in so good a state, as I have neglected them altogether, having been occupied in Rutlandshire as Sheriff." The Defendant also, in two other Letters to the Plaintiff's Solicitor, dated the 28th January and 5th February 1813, expressed his regret at not having been able to pay the Purchase Money, and promised to pay the same in a short time.

The Defendant, by his Answer, filed on the 15th March 1815, admitted the foregoing facts, but insisted, that the Title to the Premises in question had not been approved by his legal advisers, and that he was not bound to pay the remainder of the Purchase Money, until a good Title was made. He admitted, that he had more than once promised to pay the Plaintiff the residue of the Purchase Money, but that he did not intend to waive his right to have a good Title.

The Cause came on to be heard before *His Honor* the *Vice-Chancellor*, but the Defendant did not appear; and on an Affidavit being produced, of Service on the Defendant of a Subpœna to hear Judgment, a Decree was obtained.

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When Defendant does not appear at the hearing of the Cause, and on the usual Affidavit, a Decree is obtained, and it is afterwards moved to set down the Cause again, the Court will direct a particular day on which it is to be heard.

The Defendant being afterwards served with a Subpœna to show cause against the Decree, on the 24th February 1816 a Motion was made to the Lord Chancellor, "To set down the Cause again to be heard before *His Honor* the *Vice-Chancellor*, next *after the Causes already set down*, in order that the Defendant might show Cause against the Decree pronounced by *His Honor* the *Vice-Chancellor* in this Cause, upon payment of the Costs of the Defendant's default in not attending the Hearing; and that in the mean time all proceedings upon the said Decree may be stayed." Upon this Motion, *His Lordship* Ordered, "That upon the Defendant paying unto the Plaintiff the Costs of the Defendant's default in not attending the Hearing of this Cause, and of this Application, to be taxed by the Master, to whom this Cause stands referred, in case the Parties differ about the same, this Cause to be set down to be heard *on Thursday next* (*a*), to show cause against the said Decree, and hereof notice is to be given forthwith."

The Cause now came on, in pursuance of this Order. Some doubt was entertained whether the Plaintiff's or Defendant's Counsel were to begin; but the Plaintiff's Counsel consented to open the Bill, and the Defendant's Counsel stated the Answer.

(*a*) It was contended, on the authority of a passage in *Harrison's Chancery*, that in these Cases the Cause should be set down, after the Causes already set down; but the *Lord Chancellor* expressed his disapprobation of that Practice, as productive of delay and injustice, and made the Order as stated.

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Sir *S. Romilly*, and Mr. *Dowdeswell*, for Plaintiff:—

The Defendant, by keeping the Abstract so long without objecting to the Title, and writing the Letters he did, and exercising such acts of ownership over the Premises, must be taken to have approved of the Title, and cannot now object the want of Title. Unless an acceptance of Title must be in express terms, and can never be implied, this Title must be considered as accepted. The Case of *Fleetwood* v. *Green* (*b*) shows that a Party may, by his conduct, waive objections to the Title.

Mr. *Heald*, for Defendant:—

This Decree is informal. It directs the Defendant "to pay to the Plaintiff the sum of 2,300 *l.*, being the residue of his Purchase Money for the Premises comprised in the said Agreement, and upon such payment it is ordered, that the Plaintiff do execute an Assignment of the said Premises to the said Defendant, or to whom he shall appoint." This is not the usual form of such Decrees. The Conveyance ought to be made before the Purchase Money is paid. It also directs a Receiver, though no application had been made to pay the Purchase Money into Court, nor any suggestion of Insolvency; this, therefore, was not a Case where a Receiver should have been appointed.

With respect to the merits; the Defendant ought not to be considered as having accepted the Title. The Letters cannot be construed as an acquiescence. Taking possession, being in pursuance of the Agreement, cannot be considered as a waiver of objections to the Title.

(*b*) 15 Ves. 594.

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In the Answer, which has been partly read by the Plaintiff, the Defendant expressly swears, that when he wrote the Letters he never meant to waive his objections to the Title. *Fleetwood* v. *Green* does not apply, for there was a clear acquiescence in the Title. The Title should be referred to the Master.

7th March.

The VICE-CHANCELLOR:—[After stating the Case.] It is admitted that the Defendant, according to the terms of the Agreement, took Possession in October 1811, and that the Abstract of the Title was delivered on the 28th of the following Month, and no objection made to it, until the 28th January 1814, two years after.

In some Cases, taking Possession has been considered as an approval of the Title, but in this Case it cannot, because Possession was agreed to be given at a fixed day.

The alterations of the Premises, and the letting them, were acts strongly indicating an approval of the Title.

The Letter of the 4th January 1813, in which the Defendant expresses his vexation at being obliged to delay the payment of the Purchase Money, seems founded on his approval of the Title; for if the Title was objectionable, he could not accuse himself of delaying the payment of the Purchase Money; for till the Title was completed, the Plaintiff was not bound to pay the Purchase Money. In the same Letter he expresses himself much gratified by the "liberality and patience" shown to him; but if he considered the Title objectionable, he would not have thought the Plaintiff liberal and patient, in not insisting on the pay-

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ment of Purchase Money to which she was not entitled till the objections to the Title were removed. That Letter amounts to an admission that the Title was approved. There was a correspondence for ten months on the subject of this Purchase, and yet in none of the Letters does he intimate any objections to the Title; though it appears he had a legal adviser from the 8th November 1811. It is true, the Defendant by his Answer says, he did not mean to waive his objections to the Title; but if a Party acts in a manner from which it may be implied he does not mean to object to the Title, he cannot afterwards, at a distance of time, when evidence, perhaps, is lost, insist upon objections to the Title. Objections to a Title should be made with due diligence. Here there are many acts from which an implied consent to the Title might be inferred,—the correspondence—the alterations—and the letting of the Premises. *Fleetwood* v. *Green* is a strong Authority in favour of the Plaintiff.

The Decree which has been taken is not in the usual form, so far as respects the payment of the Purchase Money, and the Conveyance. The Payment and the Conveyance are two acts to be done interchangeably—they are simultaneous acts—and there should be a direction as to delivering up Deeds, Papers, &c.; the Decree must be altered in those respects, and made conformable to the usual form of Decrees in these Cases, as to which, I have spoken to the Registers.

With respect to the Direction as to a Receiver—it is not usual in Cases of this kind; and I see no reason for departing from the ordinary course. You have given the Defendant Possession, and it is on the ground of

that Possession, and of his conduct, that the Bill seeks a Specific Performance, without making any further Title; and it would be singular, if under these circumstances he was to be dispossessed by the appointment of a Receiver. The Plaintiff having obtained a Decree, must enforce payment of the remaining Purchase Money, not by means of a Receiver, but by acting upon the Decree. The Decree was right in directing the Defendant to pay the Costs of the Suit.

The Decree was in the following form:

"This Court doth Declare, that the Agreement in the Pleadings mentioned, bearing date the 22nd day of August 1811, ought to be specifically performed, and carried into execution; and doth Decree the same accordingly: And it is ordered, that it be referred to the said Master, Mr. *Cox*, to compute Interest after the rate of 4*l. per centum per annum* from the 22d day of August 1812, on the sum of 2,300*l.* the residue of the Purchase Money agreed to be paid by the Defendant for the said Estate and Premises, and to tax the Plaintiff her Costs of this Suit: and upon the Plaintiff her executing and delivering to the Defendant a proper Assignment of the said Estate and Premises, (such Assignment to be settled by the Master, in case the Parties differ about the same,) It is ordered, that the Defendant do pay unto the Plaintiff the said sum of 2,300*l.* together with what the Master shall certify to be due for Interest thereon, and her Costs of the Suit: And it is ordered, that the Plaintiff do deliver upon Oath, to the Defendant, or to whom he shall appoint, all Deeds and Writings in her custody and power relating to the said Estates; And any of the Parties are to be at liberty to apply to this Court, as they shall be advised."

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8th March.

Commissioners have power to adjourn Meeting for the choice of Assignees.

A COMMISSION issued against *Venables*, and he was declared a Bankrupt, and the usual Notice of the Adjudication, and of the times appointed for the first, second, and third Meeting of the Commissioners, was published in the Gazette.

On the second Meeting, 20th March 1816, the day appointed for the choice of Assignees, the Petitioners proved their Debts, the one, to the amount of 2,018*l.* 11*s.* 9*d.* and the other, for 315*l.* 9*s.*; and no other Creditor being prepared to prove, they chose themselves Assignees, and the usual Memorandum was entered on the Proceedings, and they signed their Acceptance of the Trust.

John Reddam, a Creditor, to the amount of 6,569*l.* 4*s.* being in *London*, but confined to his bed by illness, sent an Affidavit to the Commissioners, of his Debt, made in *London*, one of the Masters attending him at his House, for that purpose; and also a Power of Attorney to a Mr. *Bishop*, to vote in the choice of Assignees. The Commissioners rejected the Affidavit, it being a Rule, that if the Creditor is in *London* he must personally appear, and prove his Debt; but under the circumstances, the Commissioners refused to execute an Assignment of the Bankrupt's Estate to *Garland* and *Pratt*; and adjourned the choice of Assignees to the 9th March.

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The Petition, stating the foregoing facts, which were verified by Affidavit, prayed, that the Petitioners might be declared duly elected as Assignees, and entitled to have an Assignment to them, and that the Commissioners should be ordered to execute the same.

Mr. *Rose*, for the Petition:—

The Act of Parliament (*a*) imperatively directs, that the choice of Assignees shall be made at the second Meeting; and the Commissioners were not authorized to adjourn the Meeting. The Chancellor has authority to order an Adjournment, but the Commissioners, without his Directions, cannot adjourn.

From the 4th, 5th, 6th, 21st, 25th, 31st, 33d, and 35th Sections in the Act, it is clear, that the Legislature designed the choice of Assignees to be at the second Meeting, and that the choice should not then be adjourned at the discretion of the Commissioners. If they may adjourn for a Week, why not longer? At the third Meeting, an express power is given to the Commissioners to adjourn, and if they were to have the power of adjourning at the second Meeting, the Act would have given them a power to do so. He cited *Ex parte Simpson* (*b*), and *Ex parte Rashleigh* (*c*).

Mr. *Mountagu, contra*:—

It has been the constant practice of Commissioners to adjourn the choice of Assignees, if they think it expedient; and the most mischievous consequences would ensue if it were not so. The Cases cited do not support the Proposition contended for. It is true that

(*a*) 5 Geo. II. c. 30. (*b*) 1 Atk. 68.
(*c*) 1 Rose, 192.

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in *Ex parte Rashleigh* it was held, that the election of Assignees must be made by those Creditors, however few, who are in a condition to vote. But in that Case, there was a circumstance not mentioned in the Report; for there, the Commissioners determined not to proceed to the choice of Assignees until a Petition was decided, that had been presented to the Chancellor; and a Memorandum of this their determination appeared on the Proceedings. Such a Resolution was indefensible.

The VICE-CHANCELLOR:—

It is admitted, that it has long been the practice of Commissioners to adjourn the choice of Assignees; and that no direct Case, or even *dictum*, can be produced to show the practice is unwarranted or disapproved. The Act does not say they shall not adjourn; and a power to adjourn must be implied. If the Act gives no power to adjourn, I do not see what authority the Chancellor has to direct an adjournment, but that he has often done so, on Petition, is admitted. The reason why a power was so expressly given to adjourn the last Examination, was, from the severe penal Consequences attending the non-surrender of the Bankrupt. When there is a necessity for an adjournment, it is proper. All Courts have power to adjourn. The Quarter Sessions must be held on a fixed day, but it may be, and constantly is, adjourned. It is so obviously convenient that Commissioners should have a power of adjourning, and it has so long been the practice, that I am clearly of Opinion these Commissioners had power to adjourn.

Mr. *Mountagu* asked for Costs.

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Mr. *Rose*:—

The Petition was not served on *Reddam*; his appearance upon it, therefore, is voluntary, and he ought to pay his own Costs.

The VICE-CHANCELLOR:—

I think his not being served makes no difference, for if he had not appeared, the Court would have directed the Petition to stand over till he was served. I must therefore consider the question of Costs as if he had been served,—and as this is a novel attempt, contrary to a long established practice, I think the Petition must be dismissed with Costs (*c*).

(*c*) In the 1st Vol. of Mr. *Christian*'s Bankrupt Law, p. 252, he says, "The following Case occurred before our List. The Bankrupt having no property, no one would act as Assignee; *and having adjourned the choice once or twice*, without effect, we certified the fact to the Chancellor, and recommended that he would make an Order to supersede the Commission, if the Petitioning Creditor would not accept the office of Assignee. Lord *Eldon* made the Order, and the Petitioning Creditor became the Assignee."

ATTORNEY GENERAL *v.* WADDINGTON.

15th March.

Guardian appointed for a Defendant to put in his Examination.

MR. *Newland* moved, that a Guardian might be appointed for the Defendant to put in his Examination, and mentioned *Pryce* v. *Page* (*a*), a Case furnished him by

(*a*) *Pryce* v. *Page*, 28th November 1799. Motion that the 4-day Order might be discharged, and that a Guardian might be appointed for the Defendant *Page*, who was incapable of putting in his Examination. Mr. *Hollist* appeared for the Plaintiff, and did not oppose the Motion, upon

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Mr. *Walker*, the Register, where such an Order had been made.

The *Vice-Chancellor*, on the Authority of that Case, granted the Motion.

the Terms of *William Bell* the elder, and *William Bell* the younger, being appointed the Guardians, when it was ordered, that the 4-day Order should be discharged, and that *William Bell* the elder, and *William Bell* the younger, should be appointed Guardians for the above purpose. On the 16th December following, the Defendant moved the Court, that so much of the above Order, as directed the *Bells* to be appointed Guardians, might be discharged, which was ordered; and it was ordered, that the Defendant's Clerk in Court should put in his Examination.

20th March.

NOEL and others, *v.* WARD, BLUNT, and another.

Semble,—Bill does not lie by Purchaser from a contingent Remainder-man, for inspection of Title Deeds, in the hands of Tenant for Life.

Plea, covering too much, overruled.

THE Bill in this Case stated that, *Ferdinand Askew*, by his Will, dated 22d October 1782, gave certain Lands to his Wife, *Mary Askew*, for Life, without impeachment of Waste; remainder to his Daughter *Mary Blunt*, for Life, with remainder to the use of all and every the Child and Children of his Son-in-law *Henry Blunt*, and the said *Mary Blunt*, as should be living at the time of the decease of the Survivor of them the said Testator's Wife and Daughter, and to their Heirs and Assigns, as Tenants in common.

Mary Askew the Widow died in 1784, and *Henry Blunt* also died, leaving *Mary Blunt* surviving; and also Sir *Ch. Blunt*, Bart. who was the only surviving child of *Henry* and *Mary Blunt*, and who was stated

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to be in foreign parts, out of the jurisdiction of the Court; and seised, to him and his Heirs, of a contingent Remainder in Fee or in Tail, of the Lands expectant upon the death of his Mother *Mary Blunt*.

Sir *C. Blunt*, in November 1802, gave the Plaintiffs his Bond for Monies advanced; and, upon further advancements, did, by Indenture, dated the 30th of December 1802, convey to a Trustee, his Reversion or Remainder in Fee Simple, expectant on the decease of his Mother, in the event of his surviving her, upon Trust, that if the Money due to the Plaintiffs, or afterwards advanced, was, upon the Request of the Plaintiffs paid with Interest, then the Trustee was to re-convey to Sir *C. Blunt*; but if not paid upon such Request, then that the Trustee should, by public Auction, or private Contract, sell the Estate, and pay the Expenses, and what was due to the Plaintiffs, and the Residue to Sir *Ch. Blunt*.

The Bill charged, that Sir *C. Blunt*, before he left *England*, had been requested to pay the Debt due to the Plaintiffs, and on his omitting to pay them, they had requested the Trustee to sell the Estate, but that Defendant, *Mary Blunt*, the Mother, confederated with the Defendant *Ward*, (who urged, as the fact was, that no Sale of the Estates could be made, without a production of the Title Deeds) and that *Mary Blunt* had refused to produce, or allow the Plaintiffs to inspect, the Title Deeds; and on that account, the Plaintiffs were unable to proceed in a Sale of the contingent Reversionary Interest of Sir *C. Blunt*.

The Bill prayed, an Account of what was due to the Plaintiffs; and that *Ward*, the Trustee, might be

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decreed to sell the Reversionary Interest, and pay the Plaintiffs; and that the Defendant *Mary Blunt* might be decreed to produce all and every the Deed and Deeds, Writing or Writings, Evidence or Evidences, Muniment or Muniments, relating to the Estate, then in her custody, or in the custody or power of others, on her behalf; and that she might be directed to leave the same in the hands of the Clerk in Court, for the usual purposes.

The Bill was afterwards amended.

The Defendant *Mary Blunt* answered the original Bill; and also put in an Answer to the Amended Bill, but thereby insisted, that she was not bound, and ought not to be compelled, to produce or allow the Plaintiffs to inspect the Title Deeds, &c. or to leave them with the Clerk in Court, or set forth a Schedule of them. Exceptions were taken to that part of her Answer in which she refused to set forth a Schedule of the Deeds, and they were allowed by the Master. The Defendant *Mary Blunt* thereupon put in the following Plea, and further Answer. "The Defendant, &c. To so much or such part of the said Amended Bill, as require her, this Defendant, to set forth a List or Schedule of all and every the Title Deeds and Writings, now in her custody or power, or in the custody or power of any other Person, for her use, relating to, or in any manner appertaining to, the Estates and Premises in the said Amended Bill mentioned; and to set forth a full, true, and particular List or Schedule, of all and every the Deed or Deeds, Writing or Writings, Evidence or Evidences, or Muniments, relating to or in any wise concerning the said Estates and Premises in her custody, power,

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or possession, or in the custody, power or possession, of any other person or persons on her behalf, and to deliver the same unto her Clerk in Court, for the usual purposes; and also to so much and such part of the said Amended Bill, as prays, that this Defendant may be decreed to produce all and every the Deed or Deeds, Writing or Writings, Evidence or Evidences, Muniment or Muniments, relating to or in anywise concerning the said Estates and Premises, which are now in her custody, possession or power, or in the custody possession or power of any other Person or Persons on her behalf; and that this Defendant may be directed to leave the same in the hands of her Clerk in Court, for the usual purposes; this Defendant doth plead in Bar, That *Ferdinand Askew*, the Testator in the said Amended Bill named, duly made his last Will, dated 22d October 1782, and which was duly executed and attested in such manner as is by Law required for the passing of real Estates; whereby, amongst other things, he gave and devised unto and to the use of *Mary Askew*, his Wife, and her Assigns, for and during the term of her natural life, without Impeachment of or for any manner of Waste, all and singular his Messuages, Lands, Tenements, Hereditaments and Premises, not therein before devised to his the said Testator's Grandson, with their and every of their Rights, Members, Privileges and Appurtenances; and from and after the Decease of *Mary Askew*, his said Wife, he gave and devised the same Lands, Tenements and Premises, with their and every of their Rights, Members, Privileges and Appurtenances, unto and to the use of his Daughter, this Defendant, and her Assigns, for and during the term of her natural Life; and from and after the de-

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cease of the survivor of them, the said *Mary Askew*, and this Defendant, the said Testator gave and devised all and singular the same Messuages, Lands, Tenements, Hereditaments and Premises, with their and every of their Rights, Members, Privileges and Appurtenances, and all his Estate, Right, Title and Interest, of, in, and to every part thereof, unto and to the use of all and every the Child and Children of his Son-in-law *Henry Blunt*, Esq. and the said Testator's Daughter, this Defendant, as should be living at the time of the decease of the survivor of them, the said Testator's said Wife and Daughter, and to their Heirs and Assigns, as Tenants in common, and not as joint Tenants. And the said Testator, by his said Will, also declared that if no such Child or Children of this Defendant should be living at the Death of the Survivor of them, the said *Mary Askew*, and this Defendant, that then and in such case the said Testator gave and devised all and singular the same Messuages, Lands, Tenements, Hereditaments and Premises, with its Rights, Members, Privileges and Appurtenances, and all his the said Testator's Right, Title and Interest, of, in, and to the same, unto and to the use of his own right Heirs for ever, as in and by the said Will, reference being thereunto had when produced, will appear.

"And, for further Plea, the said Defendant saith, that the said *Mary Askew*, the Wife of the said Testator, hath long since departed this life; and that Sir *Charles Burrell Blunt*, Knt. one other of the Defendants to the said Amended Bill of Complaint, is the only surviving Child of the said *Henry Blunt*, and her the said Defendant, and that she the said Defendant is the only Daughter and Heiress-at-law of the said Testator.

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nd, for further plea, saith, she is advised, and be- hat under and by virtue of the said Will of the tor, the said Defendant, Sir *Charles Burrell* ot possessed of or entitled to any such Estate, erest in the Estates and Premises in the said ended Bill of Complaint mentioned, or any part thereof, as entitles him, or the said Complainants, or any or either of them, or any other person or persons, claiming by or under him, to any such discovery or relief respecting the said several matters as is prayed and sought after in and by the said Amended Bill of Complaint. All which matters and things she the said Defendant doth aver to be true, and is ready to prove as the said Court shall award; and therefore she doth plead the same to so much and such parts of the said Amended Bill of Complaint as aforesaid; and she prays the Judgment of the Court, whether she shall be compelled to make any further or other Answer to so much and such parts of the said Amended Bill of Complaint as are therein and thereby pleaded unto as aforesaid: And Defendant, not waiving her said Plea, but wholly relying and insisting thereon, and in aid and support thereof, for Answer to the residue of the said Amended Bill of Complaint not thereinbefore pleaded unto, saith, she admits it to be true that *Henry Blunt*, the late Husband of her the said Defendant, hath some time since departed this life."

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

This Plea is bad in form, and in substance. As to form, the Plea introduces no new fact, except the statement that, by the Will there was an ultimate Remainder to the Defendant *Mary Blunt*, a fact not stated in the

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Bill; but that additional fact is immaterial to the merits of the Case. If right on the merits, this Defendant should have demurred. Another objection is, that the Plea does not cover enough. If good at all, it was good to the whole of the Bill, and should have been so pleaded; but this Defendant has answered part, and thereby rendered her Plea invalid. *Blacket* v. *Langlands* (*a*) is an authority on this point.

With respect to the merits of the case, it is deducible from several authorities, that the Plaintiffs are entitled to inspect the Title Deeds in the hands of the Defendant *Mary Blunt*. *Smith* v. *Cook* (*b*). *Reeves* v. *Reeves* (*c*). *Ivey* v. *Ivey* (*d*). *Lempster* v. *Lord Pomfret* (*e*). I have found no Case where Purchasers from a contingent Remainder-man have applied for a sight of Deeds as prayed in this Case, but on principle there seems no difference between a vested or a contingent Remainder-man.

Sir *A. Pigott*, and Mr. *Combe*, in support of Plea:—

The Master, with submission to him, ought not to have allowed the exception to the Answer, but having allowed it, this Plea has been resorted to. A Demurrer would not do, because it was necessary to bring forward the fact, not stated in the Bill, that under the Will the Defendant *Mary Blunt*, as Heir at Law of the Testator, has the Inheritance vested in her until the Contingency happens, and would be entitled to the Estate in case her Son died before her, and consequently as there

(*a*) 4 Gwill. 1368.
(*b*) 3 Atk. 381.
(*c*) 2 Mod. 128.
(*d*) 1 Atk. 429.
(*e*) Amb. 154.

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are no Trustees to support the contingent Remainder, she might bar it. There is no Case where a Tenant for Life, so circumstanced, has, on the Bill of the Purchasers from a contingent Remainder-man, been compelled to suffer an inspection of Title Deeds. The consequences of thus permitting strangers to inspect the Title Deeds of Parties would be alarming.

The VICE-CHANCELLOR:—

I do not feel any doubt upon either of these questions. One regards the Substance, the other, the Form of the Plea.

With respect to the Substance of the Plea, the Bill does not ask merely that the Deeds may be taken care of, but that they may be inspected by the Plaintiffs, for the purpose of enabling them to sell this contingent Interest. One Tenant for Life is in existence, and it is uncertain whether her Son will survive her, so that the Remainder is clearly contingent; and if she survives, she would, as Heir at Law, take the Estate; and till the contingency is decided she has the Inheritance in her; so that this application is not against a mere Tenant for Life, but against a person having a present, and also a contingent, Estate of Inheritance. No authority has been produced, though much search appears to have been made, where a person having only a *contingent* Remainder has been permitted to call upon the Tenant for Life for an inspection of Title Deeds. In all the Cases cited there were *vested* Remainders. The Bill is filed by a Stranger, stating himself to be a Purchaser of Sir *C. Blunt*'s contingent Interest; Sir *Charles* himself being out of the jurisdiction of the Court, and no party to the Suit. Permitting such a Bill might lead to great inconvenience.

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If the Deeds were stated as likely to be destroyed, there might be ground for an application to preserve them; but this Bill seeks only for an inspection, not alleging any apprehension as to the security of the Deeds. This Defendant, indeed, could have no object in destroying the Deeds; for whether she takes under the Will, or as Heir at Law, it is equally necessary she should preserve the Deeds. The Will is proved, and out of her power. The Plaintiffs know the Title of Sir *C. Blunt*, for he derives it under the Will. All they want is an inspection of the Deeds, to enable them to take this contingent Interest to market.

If, therefore, I were to decide the Case upon the Merits, I should not allow an inspection of these Deeds; but, I think, the *Form* of the Plea is fatal to it. I have some doubt whether a Demurrer would not have been good; for though the Bill does not state that the Defendant had the ultimate Inheritance in case her Son died in her Life-time, yet, I think, it might be presumed she had, as she appears, by the Bill, to be Heir at Law of the Testator, and no Devise was stated in the Bill which gave it from her. But the main difficulty as to *Form*, is, that the Defendant has chosen to answer without any necessity for so doing. All the original Bill was answered, which was unnecessary, if she could have pleaded to it. After the Bill was amended, if she could plead at all, she might have pleaded to the whole of it; but, instead of that, she answers a part; refers to her former Answer; and refuses to answer the rest of the Bill. The Plea is therefore bad (*f*).

Plea over-ruled.

(*f*) Vide Ld. Redesd. Tr. Pl. 241, 2.

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21st March.

The Court, in Bankruptcy, will decide itself on the validity of an Equitable Mortgage, without a reference to the Commissioners; but when the Equitable Mortgage is established, a reference is made to the Commissioners to take an account of what is due upon it.

If Usurious Interest is not contracted for, the Security is not invalidated by subsequently taking Usurious Interest.

BY Articles of Agreement, 2d January 1811, *Dawson*, the Bankrupt, agreed to purchase from the Petitioner *Jennings*, the Lease of a House, granted 20th October 1792, for twenty-one years, and the Goodwill of a Business, for 4,200*l.*; the sum of 4,000*l.* being to be paid for the Goodwill of the Business, and 200*l.* for the Lease. *Dawson* also agreed to purchase the Stock, Fixtures and Effects on the Premises, for 3,128*l.* 13*s.* 3*d.* for which an Acceptance was to be given by *Dawson*. The 4,200*l.* it was agreed, should be secured by the Warrant of Attorney of *Dawson*, and a Judgment, and that the same, and also any further or other sum or sums, which then was, or should or might be due and owing to *Jennings* from *Dawson*, should be further secured by a Mortgage of the Leasehold Premises so assigned to *Dawson*, or if *Jennings* should so choose, by a deposit with him of such Lease and Assignment, and of any future or renewed Lease or Leases thereafter to be granted of the Premises; and by an Agreement to execute a Mortgage of the same Premises when requested by *Jennings*, his Executors, Administrators, or Assigns.

On the 4th May 1811, *Dawson* being indebted to *Jennings* in the sum of 3,188*l.* 13*s.* 4*d.* and also in the further sum of 3,421*l.* 6*s.* 9*d.* for Goods sold, and for Monies paid to his use, and also for Interest, amounting together to 6,550*l.* *Dawson* gave *Jennings* his Acceptance for 1,550*l.*; and for the remaining sum of

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5,000*l.* executed a Bond, dated 14 May 1811; and also executed a Warrant of Attorney, and confessed a Judgment.

The Bill for 1,550*l.* was paid; the Bond remained undischarged.

The Lease assigned to *Dawson* expired by effluxion of time, and another Lease was granted to him of the same Premises, by the *Master, Wardens, and Commonalty of Freemen of the Art and Mystery of Clothworkers,* for twenty-one years, from the 18th November 1813, at the Rent and with the Covenants contained in the former Lease, and in particular, containing a Proviso that the Lease should not be assigned without the assent of the Lessors.

In August 1815, *Dawson* was declared a Bankrupt. The Petitioner claiming to be entitled, under the Agreement of the 2d May 1811, to have a beneficial Interest in the renewed Lease, as a Security for what was due to him, and, with the assent of the Lessors, a right to call for an Assignment of the same by way of Mortgage, applied to the Assignees of *Dawson* for that purpose, who refused to make such Assignment.

The Petition, stating these Facts, prayed, that on the Petitioner's obtaining the License or Consent of the said Master, Wardens and Commonalty of the Clothworkers Company, the Assignees of *Wm. Dawson* might be ordered forthwith to assign the Indenture of Lease of the 18th day of November 1813, to the Petitioner, or to such person or persons as he should

appoint; and that the Petitioner might be at liberty to dispose of the beneficial Interest in such Lease by public Auction, and to apply the Proceeds thereof (after deducting the Costs of the Application and Sale, and incidental Expenses thereto) in reduction of the said Debt of 5,000 *l.* and Interest; and that the Petitioner might be at liberty to prove the residue of the said Debt and Interest under the said Commission, and to receive a Dividend, *pro rata*, with the other Creditors of the said Bankrupt; and that in the mean time the Petitioner might be at liberty to enter a Claim on the Proceedings under the Commission for the said sum of 5,000 *l.* and Interest.

The Affidavit of the Petitioner verified the Facts stated in the Petition.

Dawson, the Bankrupt, by his Affidavit, endeavoured to show that he had been induced to pay usurious Interest to *Jennings*; but his Affidavit was contradicted by *Jennings*, and strong facts, stated to show that no usurious transactions had taken place.

Sir *S. Romilly*, and Mr. *Cullen*, for the Petition.

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

The prayer of this Petition is not such as an Equitable Mortgagee can be entitled to. Where such a Mortgagee calls for a Sale of the Estate, he cannot be allowed to come in under the Commission for the deficiency. It is prayed, that the Assignees may assign to the Petitioner, for the purpose of selling; that is not the usual way of proceeding in these Cases; the Assignees sell.

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The Affidavit of the Bankrupt is very strong to show that usurious Interest has been received. It is true, it is denied by the Petitioner; but the Court will not be satisfied under such circumstances, but will refer it to the Commissioners to sift the transactions. The Court, in cases of Equitable Mortgages will act as is done under the General Order of Lord *Rosslyn* (*a*), in cases of Legal Mortgages; it will refer the matter to the Commissioners, to inquire whether the Petitioner is a Mortgagee, and for what consideration, and under what circumstances. Equitable Mortgagees cannot be in better circumstances than a Legal Mortgagee; and the Court, which in Bankruptcy acts as a Court of Appeal from the Commissioners, will not act in these cases as a Court of primary determination. The Court will not supersede the functions of Commissioners, and say, in cases of Equitable Mortgages, they shall not interfere. Nothing is more common than to refer Equitable Mortgages for the consideration of the Commissioners; and the Inquiries being at the instance of the Equitable Mortgagee, all the expenses attending them must be borne by him, as held in *Ex parte Garbet* (*b*.)

Here there is great contradiction in the Affidavits; and it is a proper Case for oral Examination of the Petitioner before the Commissioners; a mode of examination much more satisfactory than deciding upon Affidavits. If any doubt remains after Examination before the Commissioners, the Court will direct an Issue.

Sir *S. Romilly*, in Reply:—

The Affidavits on the part of the Petitioner remove

(*a*) 8 March 1794. (*b*) 2 Rose, 78.

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every imputation of Usury. The Court will act upon a clear denial of Usury, supported by Facts, where there is nothing but the Bankrupt's Affidavit as to the Usury. When a party has proved a Debt, and the Debt is sought to be expunged on an Affidavit of the Bankrupt as to Usury, if the Usury is positively denied by the Creditor, the *Chancellor* will act upon that denial, and will not direct an Inquiry, or an Issue. In the case of Equitable Mortgages the Court does not act as a Court of Appeal, but Itself decides upon them; it never directs an Inquiry before Commissioners, as is done as to Legal Mortgages, under Lord *Rosslyn*'s Order. Before that Order the Court decided upon Legal Mortgages, without a reference to Commissioners, as it now does as to Equitable Mortgages. If Usurious Interest was taken, yet as such Interest was not contracted for, the Securities would not be vitiated by subsequently taking usurious Interest; that was clearly laid down in *Ferrall* v. *Shaen* (*c*), and by the Authorities cited in the Notes to that Case. It is true that an Equitable Mortgagee pays all the expenses attending his application to the Court for relief; and that affords an additional reason why there should not be a Reference to the Commissioners, for he will have all the expense to pay, and it is sometimes enormous, of the Examination before the Commissioners, together with all the expense of an Appeal, if they should decide against his claim.

The VICE-CHANCELLOR:—

The Difficulties raised on this Petition have been more as to the Mode of proceeding, than as to the Merits. Where there is an Equitable Mortgage, a dif-

(*c*) 1 Saund. 295, and notes by Serj. Williams.

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ferent mode of proceeding is adopted than is used in other Cases. The Creditor applies, in the first instance, to the Court, and without having previously applied to prove his Debt before the Commissioners, as is the case of all other Creditors. The Court, in deciding upon the validity of the Equitable Mortgage, must, of necessity, consider the validity of the Debt, and every circumstance may be brought before the Court, by which the Debt may be impeached. The Court is not precluded from deciding, until an Examination has taken place before the Commissioners. Having all the means of deciding upon the validity of the Equitable Mortgage, it does not abdicate its authority, and send the matter for the Investigation of an inferior Tribunal. It decides the Law, and the Fact, and by doing so, in the first instance, saves the Party great expense. The validity of an Equitable Mortgage is never referred for the consideration of the Commissioners; the Court decides unequivocally upon that; and having decided that, it will, if necessary, refer it to the Commissioners to ascertain the amount of what is due upon such Mortgage, that being a matter of account. If the Court considers a Security to be good, and directs Commissioners to take an account of what is due on such Security, the Commissioners cannot examine and undo its decision, but have only to consider, as a matter of figures, what is due. There might be Cases where the Court, to assist its decision, and satisfy its own doubts, would direct an Inquiry, or an Issue; that must depend upon the circumstances of the Case. When, as in the present Case, the Security is said to be tainted with usury, the Court will, in the first instance, decide upon that.

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The Contract here, for an Equitable Mortgage, is admitted; nor is there any proof whatever, that when it was entered into it was affected with usury. It appears perfectly valid. If usurious transactions afterwards took place, they will not affect the previous Contract; that is very clear. If a Bond be given, securing Money, with 5 *l. per cent.* Interest, and 7 *l. per cent.* is afterwards agreed to be given, that is usurious; but the Bond is not invalidated; and the Obligee has a right to the Money secured by it, with 5 *l. per cent.* Interest. Inquiries are asked, as to the circumstances of the Contract. What Inquiries are to be made? Is it to be sent to the Commissioners, to enable the Assignees to take the chance of some new Case that may be made, to invalidate a Contract which is apparently good? If they had any Case to make, they should have brought it before the Court, upon this Petition. The Court having no doubt upon the validity of the Contract, will not send it to the Commissioners. It is not material now to decide whether any usurious transaction took place after the Security was given. The Commissioners will have to consider that, on taking the Account of what is due upon the Security.

It does not, however, appear to Me that there was any Usury. It has been endeavoured to show that Isinglass was forced upon *Dawson* at 4 *s.* in the Pound, when he ought to have paid but 3 *s.* 10 *d.*; and that the excess of 2 *d.* in the pound, which, on the whole Sale, amounted to 200 *l.* must be considered as usurious. That depends upon what was the market price of the Isinglass at the time it was sold. There is a printed document of the price of the article at that period, from whence it appears, that the price of Isinglass, at the time of

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the Sale, was from 4*s.* to 5*s.* a pound; and there is the Affidavit of the Petitioner to the same effect. The price, therefore, on that day, is ascertained, not merely by Affidavit, but is corroborated by the printed document, which cannot err.

The Allegations of a Bankrupt, as to Usury, must always be received with great caution, otherwise great mischiefs might ensue, Had *Dawson* remained solvent, he could not have been heard.

The Assignees have brought forward no Evidence, except the Bankrupt's Affidavit, which is contradicted, and with strong circumstances of probability. If the Commissioners find, on taking the Account of what is due on the Security for the 5,000*l.* that usurious Interest has been received, they will, of course, not allow it in the Account.

Petition granted.

The Order made, was as follows: "I do declare, That the Petitioner, *Richard Jennings*, is an Equitable Mortgagee of the Premises demised by the Indenture of Lease, of the 18th day of November 1813, in respect of the sum of 5,000*l.* due to the Petitioner, on the 14th day of May 1811; and secured also by a Bond of that date, executed by the Bankrupt; and let the Commissioners take an Account of the Principal and Interest now remaining due on the said sum of 5,000*l.* And let the said mortgaged Premises be sold before the Commissioners, who, for that purpose, are to cause due Notice to be given, in the London Gazette, and in such other of the public Papers as they shall think fit,

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when and where the said mortgaged Premises are to be sold before them, or by public Auction, at any other Place or Places, if they shall so think fit, and let such Sale be made accordingly; and let all proper Parties join in the Conveyance to the Purchaser or Purchasers, as the said Commissioners shall direct. And let the Monies to arise from such Sale be applied, in the first place, in payment of the Expenses attending such Sale; and then in payment and satisfaction of what shall be found due to the Petitioner for Principal and Interest; and let the Surplus of the said Monies, if any, be paid to the Assignees of the Estate and Effects of the Bankrupt. But in case the Monies to arise from such Sale shall not be sufficient to pay and satisfy what shall be so found due to the Petitioner, let the Petitioner be admitted a Creditor under such Commission, for such Deficiency, and receive a Dividend or Dividends thereon, out of the Bankrupt's Estate or Effects, rateably and in proportion with the rest of the Creditors seeking Relief under the said Commission. And let all Parties produce, before the said Commissioners, all Deeds, Papers, and Writings, in their respective custody or power, relating to the Estate or Effects of the Bankrupt, as the Commissioners shall direct."

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THE object of this Bill, and the nature of the Plea put in, are stated *ante*, p. 322.

Exceptions, under the circumstances, allowed to be taken nunc pro tunc, to the Master's Report, of insufficiency of Answer, though after such Report, a Plea and further Answer were put in, and Plea over-ruled.

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On this day, a Motion was made for leave to file Exceptions, *nunc pro tunc*, to the Master's Report, of the insufficiency of the Answer of the Defendant *Mary Blunt*.

Sir *A. Pigott*, and Mr. *Combe*, for the Motion:—

[They first argued on the Merits of the Case, as they had done in the Argument of the Plea.]

In this Case, the Defendant, instead of filing Exceptions to the Master's Report, when the Answer was reported insufficient, was advised to file a Plea; that Plea being over-ruled, the only way of objecting to a further Discovery, is, by filing Exceptions to the Master's Report of the insufficiency of the Answer, and thus be enabled to have the Opinion of the Court, whether this Defendant was bound to answer further than she has done. *Vallence* v. *Weldon* (*a*) which has been examined in the Register's Book, is a

(*a*) 1 Dick. 290. The Case, as extracted from the Register's Book by Mr. *Combe*, was thus, "Vallence, and others, on behalf of Creditors of Earl of Yarmouth, Plaintiff, and Thomas Weldon, and others, Defendants; and Thomas Weldon and G. Lane, by Bill of Revivor and Supplement, Plaintiffs, and Ann Ashley, and others, Defendants; Petition of Plaintiffs in Supplemental Cause, to the Master of the Rolls, to stay Decree for Sale of Estate. The Sale was before the Master, who reported Philip Price the best Purchaser at 92,700*l*. The Report was confirmed, and Purchaser let into Possession, and paid his Purchase Money. The Purchaser, having discovered Errors in the Particular of Sale, it was, by Order, referred back to the Master, to certify the amount of some out-goings on the Estate, and some other Matters therein stated; and what Allowance ought to be made to the Purchaser, in respect of such Errors. Master's Report, dated 2d August instant, whereby he reported,

clear authority in support of this Application. No Proceedings have taken place since the Report. We are willing to file the Exceptions immediately, and pay all Expenses.

that, by the Deposition of Defendant Bennet, who was examined on behalf of the Petitioner, and by subsequent Affidavit of the Defendant, he had found [certain facts therein stated] and no objection being made to such Evidence of the Defendant; and it thereby appearing [&c.] in respect whereof the Master conceived, that an Allowance [therein stated] should be made to the Purchaser. And the Master by his Report stated sundry other Inquiries and Allowances, which he had made in consequence thereof, entirely upon foundation of the Evidence of said Defendant, which is, throughout his said Deposition, confined to information and relief only, and such Evidence as given by the said Defendant, the Master has particularly stated as the foundation of all the said Allowances he has made to the said Purchaser. That no opposition was made before the said Master to such Evidence of the said Defendant being read; it being apprehended, on the behalf of the Petitioners, that the particular manner in which the said Master had, by his Report, stated the same, that therefore the Petitioners would have been entitled to the judgment of the Court upon such Evidence; and the Allowances made in consequence thereof. That the said Report is not yet confirmed, but the said Purchaser having offered his Petition to his Honor, for a Confirmation of the said Report, and to have the several Sums paid to him, which are allowed thereby; and the Court having ordered an Attendance by all Parties concerned in the matter of the said Petition; the said Petitioners, on their Briefs being delivered to Counsel, upon such Petition, were advised, that, notwithstanding the said Master had by his Report so particularly stated the Evidence upon which he has grounded the Allowances made to the said Purchaser, yet in regard as he has drawn a conclusion from such Evidence (slight as it is) by making Allowances to the said Purchaser, upon foundation thereof, and which the said Petitioners are advised he ought not to have done, yet

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Mr. *Wingfield*:—

The Case cited is contrary to the general Practice. It is too late to file Exceptions after having put in a Plea, and failed. It is of great importance that the Practice should be strictly adhered to.

that the said Petitioners are not at liberty to have the Judgment of the Court upon the matter of such Evidence or the allowances made upon foundation thereof; but that they are bound by such Report, as they ought to have taken Exceptions thereto. That the said Petition of the Purchaser stood first in his Honor's Paper for this day, and inasmuch as the said Petitioners, and many other of the Creditors of the said Earl of Yarmouth, will be great sufferers if the said Report is conclusive, and the several Allowances made to the said Purchaser confirmed; in regard the Estate, or the Money arising by Sale thereof, is likely to prove insufficient for payment of the said Earl's Debts; and therefore it was prayed, that the Petitioners might be at liberty to file Exceptions to the said Master's said Report, or that the Report might be referred back to the said Master, to review the same; and that the said Petition now depending before his Honor might stand over; and all Directions prayed thereupon be postponed until after the determination of such Exceptions or Review. Whereupon it was ordered, that the said Petitioner should be at liberty to move the matter of the said Petition at the same time as the Petition of the said Purchaser should come on to be heard before his Honor; and the Counsel for the Petitioners now moving the matter of the said Petition accordingly, in presence of Counsel for the said Purchaser. Upon hearing the said Report, two Affidavits, and what was alleged by the Counsel for the said Parties, his Honor doth order, that it be referred to the said Master to review his said Report; and that the Petitioner be at liberty to take Objections to the said Report, in order to file Exceptions thereto; and in the mean time it is further ordered, that the Petition of the Purchaser for confirming the said Report do stand adjourned over.

He then argued on the merits of the Case, pursuing the same line of Argument he had used in arguing the Plea.

The Vice Chancellor reiterated the Opinion he had given on the merits of the Case when the Plea was argued; and further observed, that the difficulty now was, whether, in a Case where the merits appeared so much in favour of the Defendant, and a Plea had been put in by mistake, she was precluded by the strict forms of the Court from being let in, to try, by means of Exceptions to the Master's Report, whether she was bound to answer further than she had done. He thought it reasonable, under the circumstances, that she should have that liberty, for otherwise, irremediable injury might ensue; and that *Vallence* v. *Weldon*, particularly as explained by the Register's Book, was a Case in point; if not exactly in circumstances, at least in principle. The great difficulty in maintaining the Exceptions to the Master's Report would be, upon the Cases in which it has been determined, that if a Defendant has answered *in part*, he must answer the *whole*, of the Bill; but, that in all those Cases, there was this feature belonging to them—they were all Bills, on which, if taken to be true, the Plaintiffs were entitled to relief; but in this Case, a Case certainly of great novelty, and worthy of grave argument, it appeared to him, the Plaintiffs were not on the face of their Bill entitled to relief; and that it might have been demurred to; and taking it to be a demurrable Bill, the question would be, whether having partly answered such a Bill, the Defendant was bound to answer the whole. I would by no means, said *His Honor*, encourage Motions of this description, which in ordinary Cases might lead to vexatious delay; and

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nothing but a very strong Case would have induced me to grant the Motion.

Motion granted.

23d, 27th March.

NOBLE *v.* GARLAND, and others.

The Plaintiff on a Bill of Discovery must pay all the expenses of the Defendant occasioned by resisting Motions made in the Cause by the Plaintiff.

A BILL of Discovery was filed, and Answers put in. Considerable Expense had been incurred on several Motions, which had been resisted; *viz.* a Motion to stay Trial—a Motion for Commissions for the examination of Witnesses abroad (*a*)—a Motion that Defendants might bring into Court all Books, &c. mentioned in the Defendants Answer.

The Defendants now moved, that the Plaintiffs might pay to them the Costs of this Suit, to be taxed by one of the Masters.

Mr. *Wingfield* for the Motion.

Mr. *Bell, contra,* contended that the Defendants were not entitled, as of course, to the Costs occasioned by the resistance of the Motion to stay Trial, and on the Motions for the Examination of Witnesses abroad, and to bring in Books referred to in the Defendant's Answer; but that the Court would exercise a discretion as to such Costs. It would be most grievous, if a

(*a*) See Noble *v.* Garland, Coop. 222; and the Observations on that Case in Cheminant *v.* De La Cour, *ante*, p. 208.

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Plaintiff, in a Bill of Discovery was obliged to pay all the Expenses of vexatious and unnecessary Proceedings, occasioned by the conduct of Defendants to such Bills.

Mr. *Wingfield*, in reply:—

The Bill of Discovery was filed merely for delay; no advantage has been derived to them by the Discovery. Though they obtained Commissions for the Examination of Witnesses abroad, they sent out no Commission; and after a delay of ten months the Injunction was dissolved. The Rule is general, that a Plaintiff must pay all the Costs of a Bill of Discovery.

The VICE-CHANCELLOR:—

No authority is cited, as to what is the practice of the Court on these occasions. Let the Motion stand over, and Inquiry be made as to the Practice.

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The Motion being mentioned again this day, Mr. *Bell* said, he had not been able to find any Case in his favour, though he had inquired of the most experienced Practitioners.

The VICE-CHANCELLOR:—

The Plaintiffs then must take their Motion.

Motion granted.

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5th & 27th March.

Ex parte PEAKE *in re* LIGHTOLLER, a Bankrupt.

Vendor has a Lien on Estate sold for his Purchase Money, though he has received Bills from the Vendee in payment of the same, and though the Vendee becomes Bankrupt.

IN this Case, a Petition was presented on the part of *Samuel Peake*, praying, That certain Premises might be sold before the Commissioners named and appointed in the Commission awarded against *Thomas Lightoller*, a Bankrupt, and that out of the Purchase Money arising by such Sale, the sum of 2,009 *l.* with Interest thereon, 5 *l. per cent.* might be paid to the Petitioner; and out of the residue thereof, that the Partnership Debts due by the Petitioner and *Thomas Lightoller* might be paid.

One Partner may agree with retiring Partner to give him a Sum for the Concern, though they know the Partnership to be insolvent, provided no fraud was intended.

The Petition stated, that the Petitioner and *Thomas Lightoller*, the Bankrupt, in the month of May 1814, agreed to enter into Co-partnership, as Calico-printers, and to purchase certain Bleaching Works and Premises situate in *Halliwell*, in the County of *Lancaster*, for the purpose of carrying on the same business, at the price of 5,050 *l.*; that these Premises were conveyed jointly to the Bankrupt and the Petitioner, in consideration of the sum of 5,050 *l.*, by Indentures of Lease and Release, bearing date the 27th and 28th of May 1814; and that the Petitioner and the Bankrupt entered into Possession of the Premises, and carried on the business as Co-partners, until the month of September 1814, when they agreed to dissolve; and accordingly dissolved their Co-partnership, and the Petitioner agreed to sell to the Bankrupt his Interest in the Premises.

The Petition then stated, that by Indentures of Lease and Release, bearing date respectively the 10th and

11th days of October 1814, made between the Petitioner of the first part, *Thomas Lightoller* of the second part, and *Thomas Hewit* of the third part, reciting the Indentures of the 27th and 28th of May then last, and that *Samuel Peake* and *Thomas Lightoller* became Partners together soon after the execution of that Indenture, and carried on the business at *Halliwell*; and that the Partnership was lately mutually dissolved by the Parties; and that *Lightoller* had repaid, or secured to be repaid, to *Samuel Peake*, all the Money and other Effects advanced by him to the Co-partnership Concern. And it was agreed, that the Premises should be released and conveyed as after mentioned. It was witnessed, that in pursuance of this Agreement, and in order to carry the same into effect, and for the consideration of 10s. paid by *Lightoller* to *Peake*, *Peake* granted, &c. unto *Lightoller*, his Heirs and Assigns, his undivided moiety, or equal half part of and in those Erections, Buildings and Works, lately used as Bleach Works, and the Closes, Fields or parcels of Lands mentioned and described in the Indentures of Lease and Release of the 27th and 28th of May then last, with the Appurtenances, To Hold said undivided moiety of him said *Samuel Peake* in the Premises, unto *Lightoller*, his Heirs and Assigns, to the use and behoof of such person and persons, and for such Estate and Estates, and in such parts, shares and proportions, manner and form, as he, *Lightoller*, by any Deed, or his Will, should direct; and for want of such direction, to the use of *Lightoller* and his Assigns. And in the same Indenture, *Peake* bargains, &c. unto *Lightoller*, his Executors, Administrators and Assigns, his (*Peake*'s) moiety or half part of and in the Implements and Utensils therein before particularly mentioned and described, and com-

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prised in the Indenture of Release of the 28th of May 1814, To hold the same to *Lightoller*, his Executors, Administrators and Assigns, absolutely for ever.

The Petition then stated, That the consideration for that Indenture was the sum of 2,009*l.*—That that sum was not paid; but that *Lightoller* gave his Drafts, payable at different dates—That on the first of such Drafts becoming due on the 14th December 1814, and which was given for the sum of 509*l.* 9*s.* as part of the Purchase Money, the same was dishonoured; and that the Petitioner then being alarmed for the safety of his Money, and insisting on a security for the same, *Lightoller* agreed, and did deposit the Deeds of the Premises in the hands of the Petitioner, as a Security for the whole of the Purchase Money; and directed him to borrow money on Mortgage upon Security of the Premises, to discharge his Debt; and which Deeds, the Petitioner stated, had ever since been, and were then, in his Possession. The remainder of the Bills became due, and were dishonoured, and returned to the Petitioner for non-payment.

The Petition then stated, That besides the sum of 2,009*l.* due to the Petitioner, a sum of 670*l.* or thereabouts, was due to the Creditors from the late Firm of *Peake* and *Lightoller*, which was to have been paid, according to the Contract at the Dissolution, by *Lightoller*, the Bankrupt, alone.

The Petition further stated, That on the 20th December 1814, after the Deeds had been deposited by *Lightoller*, and while they were in the hands of the Petitioner, the Bankrupt entered into and signed a Memorandum, as

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follows:—" Memorandum of an Agreement, made the 20th day of December 1814, between *Thomas Lightoller* and *Samuel Peake:* It is agreed, that on Sale or Mortgage of the Print Works of the Parties, occupied by them in their late Co-partnership Concerns, the Sum of 2,009*l.* owing to *Samuel Peake* by said *Thomas Lightoller,* shall be paid and discharged."

The Petition then stated, that in May 1815 *Lightoller* stopped payment, and in June following became a Bankrupt.

The Facts stated by the Petition were verified by the Affidavit of *Peake.*

The Assignees of the Bankrupt *Lightoller* opposed the Petition; and various Affidavits were made on the one side, and on the other.

The Affidavits by *Lightoller,* and other persons, in effect were, that upon examining the state of the Account in the months of September and October 1814, the Estate of the Partnership was at that time insolvent to a very considerable amount: That if the whole affairs had then been wound up, and examined into, it would have appeared, and did then appear, by examining their Books, that the Debts and Receipts at that period, and allowing even the value of these Premises to be part of the Partnership Property applicable to the payment of the joint Debts, there still would be a great deficiency of Debt exceeding Credit, to the amount of about Seven or Eight Thousand Pounds, according to one valuation of the Property; and certainly of several Thousand Pounds; and that, if the Partnership Accounts

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had been then settled, there would have been found to be between Three or Four Thousand Pounds, or between Four or Five Thousand Pounds of surplus Debt, which *Peake* was jointly liable to pay, if the Affairs had been then wound up, and all the Debts paid, and all the Effects applied to the payment of the joint Debts.

With respect to the Deposit of the Title Deeds, the Affidavits applied to show, that they were improperly obtained by *Peake*, out of the hands of *Cromshaw*, a person who was the Clerk, and had the care of them, and who was instructed to retain them only for the purpose of their being delivered to a person who was to raise Money on them; it being alleged, that *Peake*, in the absence, and behind the back, of *Lightoller*, possessed himself not of all, but of two of the Title Deeds, without the authority of *Lightoller*; and that with respect to the subsequent Agreement of *Lightoller*, he made it on account of being pressed for the payment of his Debt, and as a conditional Agreement, upon the express Promise, that the Deeds should be delivered up for the purpose of raising Money to answer the necessities of *Lightoller*, which never were complied with, the Deeds being afterwards demanded, and not delivered up.

Peake, in one of his Affidavits, denied the fact of the Insolvency of the Partnership at the time of the Dissolution; and insisted that there was enough of joint Property to pay the Debts, as he represents he understood them.

With respect to the Deposit of the Title Deeds, he swore positively, that they were fairly deposited with him; that it was by the authority of *Lightoller* he

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obtained them; and, that though there was an intention to raise Money, if it could have been raised, by means of them, yet that *Lightoller* had expressly, in the presence of Witnesses, acknowledged that he had deposited those Title Deeds as a Security for the Debt; and denied that there was any express Promise to deliver them up. He stated further, that he was always ready to co-operate in any means to raise Money upon them, but not in the way represented by *Lightoller*.

Sir *Samuel Romilly*, and Mr. *Heald*, for Petition:—

The claim of this Petitioner is clearly sustainable on three grounds;—1st, As a Vendor who has not been paid his Purchase Money; 2dly, As an Equitable Mortgagee, by Delivery of Title Deeds to him; and 3dly, Upon a written Agreement that the Estate should be a Security for the Debt.

Mr. *Leach*, Mr. *Bell*, and Mr. *Montagu*, *contra*:—

The Agreement made with *Peake* for the Purchase of the Estate on the Dissolution of the Partnership was invalid, and fraudulent, because the Partnership was at that time insolvent, and known by *Peake* to be so; and if the Accounts had been then wound up, it would have appeared that *Peake*, instead of receiving any thing, ought to have paid the sum of 3,000*l.* as his Share of Loss in the Partnership Concern. It was only by means of contracting new Debts in his separate concern, that *Lightoller* was enabled, after the Dissolution of the Partnership, to pay the Partnership Debts; and it was these disadvantageous Sales that occasioned his Bankruptcy.

The doctrine in *Anderson* v. *Maltby* (*a*) applies, which

(*a*) 4 Bro. C. C. 423, & S. C. 2 Ves. jun. 244.

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Case was lately sanctioned by the *Lord Chancellor*, on a Petition by the Executors of the late Sir *Stephen Lushington*.

Devaynes v. *Townshend*, MS. was also mentioned.

As to delivering the Title Deeds as a Security, the fact was, that they were only given to *Peake* to enable him to raise Money on Mortgage for *Lightoller*, and were not therefore given by way of Deposit.

The Agreement in Writing is not binding. *Peake* having obtained the Deeds from *Lightoller* on one pretence, and holding them on another, and *Lightoller* wishing to raise Money on the Estate, he did certainly sign the Agreement, in order to obtain the Deeds, but under such circumstances the Agreement cannot be binding.

Sir *Samuel Romilly*, in Reply:—

It has been stated, that further Inquiries of Mr. *Peake* before the Commissioners would be proper, but the fact is, though it has not been before mentioned, that *Peake* has already been examined, at great length, before the Commissioners, and in the presence of Counsel, who discovered no fraud in the transaction; a further Examination therefore is unnecessary. If his Examination would have shown any circumstances of Fraud, they would, after giving notice, have produced it. No Fraud appears from *Lightoller*'s Affidavit. *Anderson* v. *Maltby* was a Case of Fraud, and the Judgment proceeded solely upon that. In the Case mentioned of Sir *Stephen Lushington*, arising out of

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Boldero's Bankruptcy, the Lord Chancellor is said to have approved of the Case of *Anderson* v. *Maltby*; but, if I do not greatly misrecollect that Case, in which I was Counsel, nothing was decided; the Chancellor thinking it was a Case more proper for a Bill, than a Petition; and that nothing was said there confirming *Anderson* v. *Maltby*. In a Case respecting Mr. *Birch*'s House in Bond-street, not reported, Lord *Eldon* expressed great doubt upon the Case of *Anderson* v. *Maltby*. The Insolvency of the Partnership is not proved—there is contradictory Evidence; but if it was insolvent, *Peake* did not know it—and even if he knew it, he might withdraw from the Partnership; he could not get rid of his responsibility to the Creditors; but he might withdraw, unless in doing so he designed a Fraud, as in *Anderson* v. *Maltby*. But here was no contrivance; *Lightoller* states no case of Fraud, nor expectation of Bankruptcy, when *Peake* quitted the concern. There is no necessity for a Bill in this Case, in preference to a Petition. When a Petition is before the Chancellor, he sometimes directs a Bill, because his Judgment may then be reviewed, which cannot be when he decides upon a Petition; but *Your Honor*'s decision on Petition is liable to an Appeal, and therefore there is no reason for a Bill.

The VICE-CHANCELLOR:—

[After stating the facts of the Case.]

The ground of this Petition is, 1st. That *Peake* has a Lien on the Premises, as being the Vendor of them, and not paid the Purchase Money, and has, in that respect, a preference to be paid the Purchase Money, before all the other Creditors; 2dly. That he is an Equitable Mortgagee by the Deposit of Deeds; and

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3dly. That there was an express Agreement in Writing by the Bankrupt, in December 1814, by which he agreed that the Premises should be sold, and the 2,009*l.* paid.

Affidavits have been filed on the part of *Peake*, and on behalf of the Assignees of *Lightoller*; and if it were necessary to decide between the different statements, I should have thought it proper to have adopted some course for that purpose; but, I think, sufficient facts are admitted, to enable me to decide on the Question of *Lien*, without putting the Parties to any further expense.

It is not disputed that *Peake* was in September 1814 the Owner in Fee of one Moiety of the Estate in question, *Lightoller* being the Owner of the other Moiety—That they at that period agreed to dissolve the Co-partnership—And I will take it (though that fact has been disputed), that the two Partners were each cognizant at that period, that the Effects of the Partnership were greatly insufficient to pay its Debts; and that *Lightoller* chose separately to remain, conducting the Business, and to buy out the retiring Partner, there being no deception—no misrepresentation—no concealment—no fraud on the part of the retiring Partner. The first question is, Is it not competent to two Partners to make such a bargain, however advantageous or disadvantageous it may be to either party? May not one Co-partner dissolve publicly his Partnership with the other, he knowing the then state of it, but having a better opinion of it, or choosing, for his own advantage, to give a Sum of Money if the other will convey his Interest to him? They certainly might make such an Agreement,

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no fraud being practised, or intended. Suppose the Case of a Trade attended with great risk, one Partner despairing, the other confident, and willing to buy the share of his Partner, and agreeing to give him 2,000*l.* for it; on what possible ground could that contract be invalidated? The fact of the Contract is agreed, and *Peake* and *Lightoller* both concur, that on the 10th and 11th of October 1814, a Deed was executed by the Parties, by which *Peake* conveyed to *Lightoller* all his Moiety of the Estate in question for 2,009*l.* *Lightoller* does not say any advantage was taken of him in this transaction, but only says, that he was induced to enter into the Contract under an expectation that time would have been given by *Peake* gradually to pay the Money. Drafts were given for the Purchase Money, which were not paid; nor has any of the Money been paid.

In the next place, it is not disputed, that immediately after the Dissolution of the Partnership, *Lightoller* separately and ostensibly carried on the concern, *Peake* never interfering, and held himself out as the sole Owner of the Property, obtaining Credit with his different Creditors upon the Credit of the Property belonging to him, separately, and as his own Estate.

It next appears, that the Assignees of *Lightoller*'s separate Estate, he being alone a Bankrupt, and *Peake* solvent, claim this Property, which was before joint Property, responsible to the Joint Creditors, as the separate Property of *Lightoller*, applicable in discharge of his separate Debts. None of the *quondam* joint Creditors appear, at present, at least, to oppose this, but

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the opposition given to it, is on the part of the separate Creditors of *Lightoller*.

The first question is, Whether, upon these admitted Facts, there is, as between Vendor and Vendee, any thing to prevent the Vendor claiming a Lien upon the Estate? A great variety of Cases, from *Chapman* v. *Tanner* (*b*), and *Nairn* v. *Prowse* (*c*), to *Mackreth* v. *Symonds* (*d*), establish it as a clear Equity, that a Vendor has in all cases a Lien upon the Estate sold for his Purchase Money, unless there has been a special Agreement extinguishing that Equity. The taking the Drafts, which were subsequently dishonoured, does not affect the Lien; that clearly appears from *Hughes* v. *Kearney* (*e*), and *Gibbons* v. *Baddall* (*f*), which show, that taking a Draft or a Note for the Purchase Money does not, *per se*, deprive the Vendor of his right of Lien. It is equally clear this right of Lien applies also, where the Vendee becomes a Bankrupt, against his Assignees (*g*), they being in no better condition than the Bankrupt.

The ground on which the Assignees have endeavoured to defeat the Contract, is, upon an idea that they have a right to go back to the transaction in October 1814, and that finding the Partnership involved

(*b*) 1 Vern. 267.

(*c*) 6 Ves. 752.

(*d*) 15 Ves. 337. S.C. MS.

(*e*) 1 Sch. and Lefr. 136; and see Grant v. Milles, 2 Ves. and Bea. 306.

(*f*) 2 Eq. Cas. Abr. 682.

(*g*) See Grant v. Milles, 2 Ves. and Bea, 309; Bowles v. Rogers, Cooke's Bankrupt Law, 139, edit. 6; Cowell v. Simpson, 16 Ves. 278; Chapman v. Turner, 1 Vern. 267; but see what is said of that Case in Amb. 726.

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at that period, and the affairs not then wound up, they have a right to take the Account against *Peake*, and to make him responsible for part of the Joint Debts afterwards paid by *Lightoller*, those Debts being so paid by the Sale of Goods, furnished to *Lightoller* by the new Creditors; those Creditors having, it is contended, with respect to such joint Property, an Equity, which the Bankrupt himself had not. I admit, that if two Copartners enter into a Contract for the purpose of defrauding their Joint Creditors, the one agreeing to permit the other to withdraw Money out of the reach of the Joint Creditors, such a Contract is fraudulent, and invalid. That I take to be the principle upon which *Anderson* v. *Maltby* (*h*) was decided. It has been said, that Case has been shaken by the *Lord Chancellor*; however that may be, and whatever may be its authority, it does not appear to me to affect the present Case. In that Case there was strong ground to believe a fraud was intended; and it does not warrant me in declaring, generally, that the mere circumstance of the Partnership being at that time in such a state, that their joint Effects were not sufficient to pay their joint Debts, will, *per se*, be sufficient to invalidate a Dissolution of Partnership, made fairly between the Partners themselves. No Fraud was intended by *Lightoller*—he paid the Joint Creditors—there was, therefore, no contrivance with *Peake* to put the joint Effects into a state to benefit *Peake*. *Anderson* v. *Maltby*, therefore, does not apply.

Since *Anderson* v. *Maltby* there is a long string of Cases;—*ex parte Ruffin* (*i*); *ex parte Taylor* (*k*); *ex*

(*h*) 4 Bro. C. C. 423. S. C. 2 Ves. jun. 244.

(*i*) 6 Ves. 191.

(*k*) 14 Ves. 449.

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parte Fell (*l*); *ex parte Williams* (*m*); *ex parte Slow* (*n*), and *ex parte Rowlandson* (*o*); in which it is established, that Joint Creditors have no Equity as against the Joint Effects, but what they claim through the medium of the Partners themselves—that a Joint Creditor, if he does not take the remedy that the Law gives him by Action, and by proceeding to seize upon the joint Effects, has no Lien upon them; his Equity to have the joint Effects applied to the joint Debts, is through the medium of the Partner, and for the sake of the Partner, except in those cases where a Bankruptcy or a Death takes place, in which case the Equity operates through the medium of the deceased Partner, or the Partner who has become a Bankrupt—Then you arrange for the payment of the Debts by the joint Effects, and they become divisible in that way; but if joint Creditors do not interpose, the two Partners, if they make a fair Contract *inter se*; if they do actually dissolve the Partnership; if they fully effect a Dissolution, with a Contract for Division of the Property; if they make an actual Assignment by Deed; if possession is delivered upon that, and enjoyment makes it perfect; if all these circumstances take place, and there is nothing of fraud impeaching the transaction, then, of consequence, as is determined in all those Cases, the joint Property becomes separate Property, by virtue of that Contract, and the joint Property is throughout to be treated as separate Property, and the joint Creditors cannot follow it afterwards, but it becomes the separate Estate of the Partner remaining, and the retiring Partner has lost all his benefit from it, and the joint Creditors, although

(*l*) 10 Ves. 347.
(*m*) 11 Ves. 3.
(*n*) July 1782. Cooke Bank. Law, 539.
(*o*) 1 Rose, 416.

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they may undoubtedly proceed against the two Partners, (for their Agreement to dissolve does not deprive the joint Creditors of their right of applying for payment to those who are responsible to them,) but with respect to the Effects, they become from that moment the separate Property of the Party who has bought them, just as much as if he had acquired them in Market Overt of any Stranger.

These principles are all wrong, if this Contract is not good. How can the separate Creditors in June 1815 go back to the transaction in October 1814, and say, that the Contract then entered into was not good? They must claim and operate their Equity through *Lightoller* to invalidate it, and I have shown he had no Equity to impeach it. Upon what ground do these Assignees impeach it? They are the Assignees of the *separate* Estate. What right have the Assignees to this as *separate* Estate? If the Contract is good for nothing, it is joint Estate. All this Freehold Property, and all the Utensils, and every thing else, ought to be considered as joint Property, if this Deed is good for nothing. How can that possibly be? They receive it, and so did *Lightoller*; he obtained credit upon it as his separate Property—it is impossible to undo it after an interval from October to the June following, when he was held out as the sole Owner; when he acted as the sole Owner; when there was a Conveyance which put him in Possession as sole Owner.—They cannot be made joint Effects, but they must be the separate Property of *Lightoller*. Then you must apply that principle throughout. How do they become so? By virtue of this Contract. Then is not this Contract good? Can you in one breath say, I take it as separate Estate, and

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yet say the Contract is good for nothing, and I will not pay for the separate Estate I have thus acquired? But if they are willing to say, We abandon it, and take it as joint Property, they cannot do that, it has become separate Property; and if it has once become separate Property it must be treated so throughout. Then if it has become separate Property, what is the simple result? Why, that you must pay for it according to the ordinary case: You have bought an Estate, and have not paid for it—it has become yours; it is yours absolutely—it is to go as your separate Property, but subject to the Equity always attaching upon Property bought, to answer for the Purchase Money if it has not been paid. In that view of it, it appears to me a very simple Case, and that supposing the circumstances of the state of the Account at the time, and the manner in which it was bought, and the dissolution to be as stated, those facts make no difference, provided there be no circumstances of fraud, which are put out of question in this Case. The separate Creditors of *Lightoller* are bound to consider this (as they do consider it) as separate Property, and their Debts have been contracted upon the footing and faith of this being separate Property: to that extent they have a clear right to hold it as separate Property against the joint Creditors; but, upon the same principle that I secure to them all this Property as becoming the separate Property of *Lightoller* from the moment of this Contract, of necessity they must pay for the Estate, upon the principle that the Estate must pay for the Contract by virtue of which it has become separate Property.

With respect to the Equity endeavoured to be set up by the separate Creditors, because they have become so

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by the Sale of goods to *Lightoller*, and the Money arising from them has been applied to pay off antecedent joint Debts, that was an Equity which never was heard of. In such a case you cannot go back and inquire what was the Money for which the separate Debts were contracted, and so follow it as to undo the antecedent transactions. If, according to all the Cases, the joint Creditors have no Equity but through the medium of the Partners, much less can the separate Creditors of *Lightoller* take advantage of an Equity of the joint Creditors of *Lightoller* and the antecedent Partner, and say, that they are to have that sort of Equity which even the joint Creditors themselves could not have; that seems to me to be going one step farther than any of the Cases.

Viewing it in this way, it does not seem to me that any of the controverted facts in this Case are at all material to its determination; but it becomes a simple case of Vendor and Vendee, with the additional circumstance of the Vendor being in Possession of the Title Deeds, and of an Agreement that the Lien upon it should be satisfied. I think, by an Affidavit it appears that the Estate has been sold, and it is stated to have been sold with his concurrence, on a promise that it should be made responsible to the Lien, if it turned out to be a good Lien. It appears to me, that under the circumstances stated, there is no reasonable doubt that the Vendor of this Estate has a Claim to the extent of 2,009*l.*, to be paid out of the proceeds of the Estate.

With respect to the other part of the Case, that which relates to the application of the Purchase Money to

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pay off the joint Debts, to the amount of six hundred and odd pounds that remain due, I see no ground for it, because that is perfectly inconsistent with the whole principle of the Cases, for that is attempting on the part of the Petitioner to consider some Lien that the Creditors have, or he has, to apply the joint Property to the payment of the joint, in preference to the payment of the separate, Debts—that is directly impeaching the ground upon which he stands on the other part of the Petition, that it became, by virtue of the Dissolution, the separate Property of *Lightoller*. He cannot set up the Equity of it as a joint Property; he must take the whole of it together, and say, it has become separate Property, and is applicable to the separate Creditors. That part of the Prayer therefore he cannot succeed in, but the rest I think he is entitled to.

5th, 29th March.

BERESFORD and another, *v.* HOBSON and others.

On a Bill filed by the Assignees of a Bankrupt, to recover Money to which the Bankrupt was entitled in right of his Wife, the usual Reference was made, to consider Proposals for a Settlement on the Wife and Children. The Master having approved a Settlement of the whole *Property on his Wife and Children, Exceptions were taken to his Report, and allowed, and he was directed to review his Report.*

THIS was a Bill filed by the Assignees of *Robert Kenyon*, a Bankrupt, against *Hobson*, a Trustee, under the Will of *Mary Wagstaff*; and also against the said *Hobson* and *Reddish*, Trustees and Executors under the Will of *Agnes Wagstaff*; and against the said *Robert Kenyon*, the Bankrupt, who was stated in the

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Bill to be out of the jurisdiction of the Court, and *Agnes* his Wife, praying payment of the Legacies left to *Agnes Kenyon*, [the Wife of the Bankrupt] by the Wills of *Mary* and *Agnes Wagstaff*. By the Decree, on the Hearing of the Cause, 15th June 1812, a Reference was directed to the Master, to inquire, "Whether any Settlement or Provision was made on the Marriage of the Defendants, *Robert Kenyon*, and *Agnes* his Wife, on or for the said *Agnes*, and the Issue of the Marriage, of the Property to which she was entitled under the Will of the Testatrix *Agnes Wagstaff*; and whether such Settlement or Provision, if any, was a proper Settlement or Provision. And in case the said Master should not find that any such Settlement or Provision was made, or, if any, that the same was not proper, it was ordered, that the Master do approve of a Settlement on the said *Agnes*, and the Issue of the Marriage. And in either case, the said Master was to state the same, with his Opinion thereon, to the Court."

The Master, by his Report, stated, "That on or about the 30th April 1807, a Commission of Bankrupt, under the Great Seal of *Great Britain*, was awarded and issued against the said *Robert Kenyon*; that he was thereupon found and declared a Bankrupt; but that he never surrendered himself to be examined under the said Commission; and the Plaintiffs, together with *George Peele*, deceased, were chosen Assignees of his Estate and Effects.—That the said *Robert Kenyon* received with the said *Agnes* his Wife, the sum of 2,450 *l.* as her fortune, no part of which, nor any Property of the said *Robert Kenyon*, was ever settled on the said *Agnes* his Wife, or their Children:—That the said *Agnes Kenyon* has Children by the said *Robert Kenyon*,

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all of whom are now living: And that she has for many years past resided, and now resides, in a small House at *Manchester*, in the County of *Lancaster*, with several of her Children, whom she maintains:—That the said *Robert Kenyon* has, for several years, resided, and now resides, out of the jurisdiction of this Court, and does not contribute any thing whatever to the support of the said *Agnes Kenyon*, or their said Children:—That the said *Agnes Kenyon* has not any Property for the support of herself and her Children, except her Life Interest in a small real Estate, which was devised to the said *Agnes Kenyon*, by her Father, which real Estate was, prior to the Marriage of the said *Agnes* with the said *Robert Kenyon*, settled upon the said *Agnes*, for Life, for her separate use, and not to be subject to the Debts of her Husband; with Remainder to all the Children of the Marriage:—That the whole of the Share which the said *Agnes Kenyon* is entitled to, under the Will of her Aunt *Agnes Wagstaffe*, in her Estates which have been sold, amounts only to the sum of 776*l.* 19*s.* 7½*d.*; and that the whole of the Share of the said *Agnes Kenyon* of the Estates of the said *Agnes Wagstaffe* which remain unsold, will amount only to the sum of 100*l.* or thereabouts, out of which sums the said *Agnes Kenyon*'s Share of the Costs of the Suit will be to be paid. The said *Edward Hobson* and *John Reddish* therefore propose, that the whole of the Property to which the said *Agnes Kenyon* is entitled, under the Will of the said *Agnes Wagstaffe*, shall be conveyed to and vested in Trustees, upon Trust, to receive the Interest, Dividends, Rents, Produce and Profits thereof, and to pay the same to the said *Agnes Kenyon*, for her sole and separate use during her Life, so that the same shall not be liable to the Debts, Control or En-

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gagements of the said *Robert Kenyon*: And upon further Trust, upon the decease of the said *Agnes Kenyon*, to divide and pay the whole of the said Property, which shall be so conveyed to and vested in the said Trustees, equally amongst the said Six Children of the said *Agnes Kenyon* by the said *Robert Kenyon*, equally, share and share alike; as Tenants in common, the Shares of the Sons to be payable to them at their respective ages of twenty-one years; and the Shares of the Daughters to be payable to them at the respective ages of twenty-one years, or days of Marriage, which shall first happen, with benefit of Survivorship as to the Shares of such of the said Children as shall die under the age of twenty-one years without having been married. And the Defendants, *Edward Hobson*, and *John Reddish*, having also laid a state of facts and proposal before me, supported by two Affidavits of the said *Agnes Kenyon*, sworn the 2d February and the 17th October 1814, I find, that previous to the year 1807, *Robert Kenyon*, the person referred to on the Pleadings in this Cause resided at *Manchester*, in the County of *Lancaster*, and carried on the trade or business of a Muslin-manufacturer, to a considerable extent: That in the course of his trade and dealings he became indebted to the Complainant, and to divers other persons, in considerable sums of money: That in or about the year ...., the said *Robert Kenyon*, secretly and clandestinely left this Kingdom, without providing for the payment of his Debts, by which he committed an act of Bankruptcy: That *Agnes Kenyon* his Wife, and the rest of his Family, soon followed him, and resided with him for many years in *Ireland*, where he took up his abode: That the Creditors being informed, that the said *Agnes Kenyon* had, by virtue of

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the Will of *Agnes Wagstaffe*, of *Manchester* aforesaid, Spinster, became entitled to a considerable Property, and knowing that she had a valuable real Estate, which, previous to her Marriage with the said *Robert Kenyon*, was settled upon herself solely, and not liable to the Debts or control of her Husband, they the said Creditors, at a Meeting held by them for the purpose of considering and determining what was most proper to be done for their general benefit, in the present state of the affairs of the said *Robert Kenyon*, resolved, that it would be most proper to issue out a Commission of Bankruptcy against him, and to prosecute the same, for the purpose of enabling the Assignees to be chosen, to claim the Property left by the said *Agnes Wagstaffe* to the said *Agnes Kenyon* as aforesaid, and to which the said *Robert Kenyon* was entitled to in her right; and a Commission of Bankruptcy was accordingly applied for and issued, on the Petition of the Complainant *John Beresford*, bearing date at *Westminster*, the 30th day of April, in the year of our Lord 1807; and the Complainant, together with *George Peel*, since dead, were duly chosen Assignees of the Estate and Effects of the said *Robert Kenyon*, and the usual Assignment of the Bankrupt's Effects was duly made to them by the major part of the Commissioners, in and by the said Commission named and authorized: That the said *Robert Kenyon* the Bankrupt, was summoned at his place of residence, in *Ireland*, to surrender himself at the several Meetings appointed for taking his Examination, and submit himself to be examined, but he did not surrender at any of the Meetings, though the usual Proclamation was made at the Meeting appointed for his last Examination: That the said *Robert Kenyon* wrote several letters to the Solicitors to the said Commission, offering

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to give up to his Creditors the Property he was entitled to in right of his said Wife as aforesaid, if they would release him from their respective Debts, and they having assented thereto, Mrs. *Kenyon* came over from *Ireland* to *Manchester*, for the purpose of seeing the Money paid, and the business completed, she being very anxious for its being terminated upon those terms; and the Defendant *John Gaskell*, came over from his place of residence at *Warrington* to *Manchester*, with the Monies the subject of this present Suit, with the intention of paying the same to these Complainants, but was prevented paying the same by the interference of the Defendant *Edward Hobson*, who, it is believed, is alone the sole cause of the present litigation; and but for his intermeddling the Money would have been paid over long ago: That previous to the Marriage of the said *Robert Kenyon* with the said *Agnes* his Wife, a Settlement was made, by which several Estates, of which she was then seised in fee, were limited, settled, and assured to the separate use of the said *Agnes Kenyon*, free from the Control, Debts or Engagements of the said *Robert Kenyon* her Husband; and that she has been since the making of the said Settlement, and is now, in the actual receipt of the Rents and Profits thereof, which said Estates consist of a Messuage and Land, situate at *Bolton* in the county of *Lancaster*, called *Crow Nest*, of the annual value of ..... *l.* at the least; also of a certain Messuage and Land, situate in the township of *Denton*, in the county of *Chester*, called *Heyde*, of the yearly value of 40 *l.* at the least; also of a certain Messuage or Dwelling House, situate in *Bridge Street*, in *Manchester* aforesaid, let at the annual rent of 20 *l.* at least; and lastly, of a certain other Estate, called *Woobley*, situate in the county of *Chester*,

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in which she, the said *Agnes Kenyon*, is justly interested with other persons, of the annual value to her of the sum of 14 *l.* and upwards, and altogether of the annual value of 200 *l.* or thereabouts; the particulars of which will more fully appear if the said *Agnes Kenyon* will produce the said Settlement, and permit a fair valuation of the said several Estates to be taken: That at the date of the said Commission, and for many years afterwards, the said *Agnes Kenyon* resided with her Husband in *Ireland*, out of the jurisdiction of this honourable Court, who supported himself and his family by the Funds which he took away with him at the time of his absconding from his Creditors, and leaving this Kingdom: That the said *Agnes Kenyon* had, for two or three years last past, resided in a comfortable house, in the neighbourhood of *Manchester*, but had not six children to support, as all her children are able to support themselves; and that nearly the whole of them are settled in trade, and get their own living, and have done so for some time: That the said Complainants, or either of them, or any person for their use, have never received one farthing of effects under the said Commission; and that to pay the expenses thereof, and of this Suit, or any Dividend to the Creditors who have sought relief under the same, their sole reliance is on the Money they shall receive by virtue of the Decree herein: That it is submitted to this honourable Court, that the Estates settled upon the said *Agnes Kenyon*, to her sole and separate use, and of which she is now in the actual receipt of the Rents and Profits, are a very ample and sufficient maintenance for herself and such children as she has to support, exclusive of what she may receive from her said Husband (who still continues to reside in the kingdom of *Ireland*) or of the Property the subject of

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this Suit, which the Complainants have heard, and believe, is to the amount altogether of the sum of 870 *l.* or thereabouts; but that the sum of 766 *l.* 19 *s.* 7 *d.* only is now ready to be paid, for the share of the said *Agnes Kenyon*, the residue not being yet converted into Money.—I have considered of the said state of Facts and Proposal, and the Evidence in support thereof, and am of Opinion that there was no Settlement or Provision made on the Marriage of the said Defendant *Robert Kenyon* and *Agnes* his Wife, on or for the said *Agnes*, and the Issue of the Marriage, of the Property to which she is entitled under the Will of the said Testatrix *Agnes Wagstaffe*; I have, therefore, (pursuant to the directions of the said Decree) settled and approved of a Draft of Indenture of Settlement of three parts, purporting to be made between the Defendant *Edward Hobson*, and *John Gaskell*, surviving Trustees and Executors, named and appointed in and by the Will of the said Testatrix *Agnes Wagstaffe*, and which said Defendaut, *Edward Hobson*, is the surviving Trustee and Executor named and appointed in and by the Will of *Mary Wagstaffe*, of the first Part; the said Defendant, *Agnes Kenyon*, of the second Part; and *James Beard*, of *Manchester*, Esq. and *Edward Dakin*, of *Warrington*, Timber Merchant, of the third Part. And I have caused two Parts of the said Indenture of Settlement to be ingrossed on eight skins of parchment each: And in testimony of my approbation, I have signed my name to the allowance written in the margin of the eighth and last skin of the Ingrossment of the said Indenture of Settlement; and of the other part thereof; and also my Initials in the margin of every other skin of the Ingrossment of the said two parts thereof respectively. All which," &c.

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To this Report the Plaintiffs excepted:—

"For that the said Master has in and by his said Report stated, that he is of opinion, that there was not any Settlement or Provision made on the Marriage of the said Defendants, *Robert Kenyon* and *Agnes* his Wife, on or for the said *Agnes*, and the Issue of the Marriage, of the Property to which the said *Agnes* was entitled, under the Will of *Agnes Wagstaffe*, one of the Testatrixes in the Pleadings of this Cause named; and that he had, pursuant to the directions of the said Decree, settled and approved of the Draft of an Indenture of Settlement of three Parts, purporting to be made between the said Defendant *Edward Hobson*, and *James Gaskell*, of the first part; the said *Agnes Kenyon*, of the second part; and *James Beard* and *Edward Dakin*, of the third part; and that he had caused two parts of the said Indenture of Settlement to be ingrossed, and had approved of such Ingrossments as therein mentioned: Whereas the said Master ought (as these Exceptants are advised, and humbly insist) in and by his said Report to have stated, that the said *Agnes Kenyon* was not entitled to have a Settlement made upon her of the whole of the Property which she was entitled to under the Will of the said Testatrix *Agnes Wagstaffe*."

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

There is no Instance, where, on a Reference to the Master to consider of a proper Settlement out of the Wife's Property, the whole has been given to her against the Assignees of her Husband.

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

The Bankrupt has committed a Felony by not sur-

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rendering. He has abandoned his Wife, and lives in another country; and it is very clear that if he were solvent he would not be entitled to any part of this Property; nor can his Assignees be entitled, if he is not; for they stand in his situation. If the Husband commits a Felony, the Court would not give him any part of the Wife's property. Here, he has committed a Felony; and his Assignees are not entitled to any thing more than what the Bankrupt would have been entitled to (*a*).

Bond v. *Symonds* (*b*) was cited, as applying, in principle.

The VICE-CHANCELLOR:—

[After stating the Facts of the Case.]

This Cause now comes before me on Exceptions to the Master's Report. It is admitted, that by some mistake the Decree was wrong in not directing a proposal for a Settlement, in respect of what was claimed under the Will of *Mary Wagstaffe*, as well as in respect of what was claimed under the Will of *Agnes Wagstaffe*. As all Parties agree that that slip in the Decree shall be rectified, it is not necessary that the Cause should be re-heard, to correct that error. If the Master be right, and the Settlement approved by him is proper, the object of this Suit will be wholly defeated.

The Legacies left to *Agnes Kenyon* were posterior to her Marriage. There was a Settlement on her Marriage; which I have looked into; and I find the Master is correct in observing, that it does not affect Property

(*a*) Jacobson v. Williams, 1 P. Wms. 382.

(*b*) 3 Atk. 20.

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left to the Wife subsequent to her Marriage. He settles her real Estate to her separate use, and takes to himself the personal Property she then possessed; but the Settlement is silent as to any Acquisition of Property by his Wife subsequent to the Marriage.

Taking, as I suppose I must, the state of Facts to be correct, it appears, from the Affidavit of Mrs. *Kenyon*, that the Bankrupt offered to give up to his Creditors the Property he was entitled to in right of his Wife, if they would release him from his Debts, and they agreed to that offer; and Mrs. *Kenyon* was anxious to give effect to it, and that such arrangement was prevented only by *Hobson*, the Trustee, who refused to concur in it. It is singular that a Bill was not filed to carry that Agreement into effect, and obtain Mrs. *Kenyon*'s consent in Court, instead of resorting to the present Bill. When it is considered that Mrs. *Kenyon* is in Possession of a settled real Estate to the value of 200 *l.* a year,—that her Children are able to support themselves, and nearly all of them are settled in trade, and get their own living;—that she has lived in *Ireland* for several years with her Husband and Children, upon the Property of his Creditors, who have not received a sixpence under the Commission;—that she and her Husband agreed with the Creditors to give up their Legacies on their releasing him from their Debts;—it seems an extraordinary proposition that this Property is all to be settled on the Wife and Children!

It is said the Husband has committed a Felony by not surrendering, and that the Wife is separated from her Husband, and grounds of compassion are urged; but the Felony was subsequent to the Commission, and

the separation from the Husband was not constrained, and was long posterior to his Bankruptcy, when all the Husband's rights had vested in his Assignees; and as to compassion, it must be remembered, that it is due as much to the Creditors and their Families, as to Mrs. *Kenyon* and her Children.

Legacies given to a Wife, belong to the Husband in her right, provided he reduces them into Possession;—if he dies without reducing them into Possession, they survive to his Wife; but if she dies before him, they go to him. If the Husband is obliged to file a Bill for the Legacies, the Court requires that a Settlement shall be made on his Wife and Children, as the price of its assistance; an Equity, as the Master of the Rolls observes, in *Murray* v. *Lord Ellibank* (*c*), which stands "upon the peculiar doctrine of this Court;" and which, whatever may be its merit, was acted upon so early as in the time of the *Lord Keeper Coventry*. The same Equity applies against the Assignees of the Husband seeking the Property by Bill in this Court (*d*). A doubt was once entertained, whether the Equity could be enforced against Assignees of the Husband for a valuable consideration (*e*), but it never was doubted that the Equity applied against the Assignees of a Bankrupt Husband; they standing in precisely the same situation as the Bankrupt stood.

(*c*) 13 Ves. 6.

(*d*) Jacobson *v.* Williams, 1 P. Wms. 382.

(*e*) See Worrall *v.* Marlar, 1 Cox, 158; but subsequent Cases clearly establish that an Assignee of the Husband for a valuable consideration of all the Wife's Property, takes, subject to the Equity of the Wife. See Wright *v.* Morley, 11 Ves. 17. S. C. MS.

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The question, therefore, here, is not whether the Assignees of a Bankrupt are subject to this Equity, but to *what extent* it is to be carried as against them.

I have looked into all the Authorities; in no Case has the whole of the Property been settled on the Wife and Children. In *Sleech* v. *Thorington* (*f*), the Husband was gone abroad, leaving his Wife unprovided for, and yet all the Court appeared disposed to do, in conformity with a case there mentioned by the Master of the Rolls, was, to direct the payment of the Interest of the Money to her till he returned and maintained her. In *Bond* v. *Simons* (*g*), the Wife having brought the Husband a considerable Portion, of which no Settlement was made, and he afterwards filing a Bill for a Legacy left to her, the Court decreed a Settlement should be made, but he obstinately refusing to make a Settlement, and dying, it was held she was entitled to the Principal and Dividends.

In *Pryor* v. *Hill* (*h*), Creditors, under a general Assignment to them by the Husband, for payment of their Debts, were held entitled to the Life Interest of the Wife, on making a Provision for her. In *Burdon* v. *Dean* (*i*) the Assignees filed a Bill in respect of Property belonging to the Bankrupt in right of his Wife, and the Wife claimed a further Provision, she having been provided for before by Settlement; the *Master of the Rolls* said, "*It is impossible to give her the whole*; for

(*f*) 2 Ves. 560.

(*g*) 3 Atkins 20; and see Mitford v. Mitford, 9 Ves. 87. Wright v. Morley, 11 Ves. 17.

(*h*) 4 Bro. C. C. 139.

(*i*) 2 Ves. jun. 607.

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that would be to admit that a married woman is entitled to the whole of her separate Property to her separate use." He directed a Reference to the Master for a Proposal. In *Oswell* v. *Probert* (*k*), where Assignees claimed the Estate of the Wife, in right of her Husband, proposals for a Settlement were in like manner directed. In *Worral* v. *Marlar* (*l*), the Fund, on a claim by Assignees, was *equally divided* between the Assignees, and the Wife and Children of the Bankrupt. In *Browne* v. *Clarke* (*m*), half the Property was given to the Wife. In *Freeman* v. *Parsley* (*n*), and *Lumb* v. *Milnes* (*o*), the Assignees of a Bankrupt, claiming Property of the Wife in his right, were directed to make a Provision for the Wife. In *Like* v. *Beresford* (*p*), where a *Ward* of the Court had been run away with, the Court would not give the Husband any part of the Wife's Fortune. It has a discretion, in such cases, whether it will give the whole, or a part, to the Wife.

In *Goose* v. *Davis*, in 1794, not reported, but mentioned in the sixth edition of Mr. *Cooke*'s Bankrupt Law (*q*), the *Lord Chancellor* referred the Report back to the Master, to be attended by the Assignees, the Master having by his Report approved a Settlement of the *whole* Fund.

In *Jacobs* & *Ux.* v. *Amyatt* and others, before the Master of the Rolls, 14th November 1792, and 17th May 1793, Property was left to the Wife of the Bank-

(*k*) 2 Ves. jun. 680.
(*l*) 1 P. Wms. 459, in note by Mr. *Cox*. S. C. 1 Cox, 158.
(*m*) 3 Ves. 166.
(*n*) 3 Ves. 421.
(*o*) 5 Ves. 517.
(*p*) 3 Ves. 506.
(*q*) Edit. by Gregg, p. 287.

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rupt for Life, and claimed by the Assignees of her Husband, the Plaintiff, who was a Bankrupt; and the Master of the Rolls directed a Reference to the Master to receive proposals from *Jacobs*, the Bankrupt, for a Settlement on his Wife. The Bankrupt proposed that the *whole* should be settled on his Wife, and that Proposal was approved by the Master; no Exceptions were taken; and therefore the Court was not called upon to give its opinion upon the Report. There seems to have been a want of form in directing the Husband to lay proposals before the Master (*r*), because he, of course, would propose, that the whole should be given to his Wife, rather than any part to his Assignees. The Assignees must have consented to this arrangement (*s*).

(*r*) See on this point, Worrall *v.* Marlar, 1 Cox, 155.

Bequest of Residue of Real and Personal Estate unto L. J. *to be placed at Interest until twenty-one, or Marriage, and then the whole, with the Accumulation, to be paid to her, to and for her use during her Life, and after her decease unto the Heirs of her Body lawfully begotten, equally to be divided between them, share and share alike, and for default of such Issue, or in case of the Death of the said* L. J. *before twenty-one, or Marriage, such Residue to* J. C. *and his Heirs for ever; held to pass only an Estate for Life to* L. J. *in the Residue of the Personal Estate, and not to her separate use; and she being married, and her Husband a Bankrupt, Proposals were directed for a Settlement on her and her Issue.*

(*s*) The Case of *Jacobs & Ux.* v. *Amyatt* and others, appears, from the Register's Book, to have been thus:—*Ann Dyer*, by her Will, 9th February 1775, after several pecuniary Legacies, gave all the residue of her Estate, both real and personal, unto the Plaintiff, *Lucy Jacobs*, then *Cooke*, to be placed at Interest until her age of twenty-one years, or day of Marriage, and then the whole thereof, together with the Interest accumulating thereon, to be paid to her, to and for her use, during her Life; and from and immediately after her decease, unto the Heirs of her body lawfully begotten, equally to be divided between them, share and share alike; and for default of such Issue, or in case of the death of the said *Lucy* before her

In *Carr* v. *Taylor*, the Assignees of the Husband claimed Property, in right of the Wife, who had a Settlement on her Marriage, and, on the usual Reference, a proposal was made to the Assignees, that *half* should

age of twenty-one years, or day of Marriage, she then devised and bequeathed the said residue of her Estate unto her Brother, *John Cooke*, to hold the same unto the said *John Cooke* and his Heirs for ever.

Ann Dyer, died soon after the making of her said Will, leaving the Plaintiff *Lucy Cooke*, then an Infant, and *John Cooke*, her Executor, who proved her Will. The sum of 1,200 *l.* received by *Cooke*, was, with the consent of the Infant *Lucy*, laid out by him in 1,401 *l.* 11 *s.* 3 *d.* Three per Cents. in the names of the Defendants *James Amyatt* and *Robert Willing*, upon the Trusts of the Will. *John Cooke* died, leaving the Defendant *William Cooke* his Executor, who proved his Will.

On the 15th November 1791, a Commission issued against the Plaintiff *Samuel Jacobs*, and he was declared a Bankrupt, and the Defendants *Halton* and *Moody* were chosen Assignees, and the usual Assignment made.

At the time of the Bankrupt's Marriage he made no Settlement on his Wife, and she had no other provision than what she might be entitled to under the Will of *Ann Dyer*.

The Plaintiff, *Lucy Jacobs*, charged, she was entitled to have the Property bequeathed to her by *Ann Dyer* settled to her separate use, and claimed the Dividends of *Amyatt* and *Willing*, but they declined so doing without the Authority of the Court.

The Bill prayed, that the Defendants *Amyatt* and *Willing* might be decreed to transfer the said 1,401 *l.* 11 *s.* 3 *d.* into the name of the Accountant General, and that the Interest might from time to time be decreed to be paid to the Plaintiff *Lucy Jacobs* during her Life, for her sole and separate use, with liberty for the persons entitled thereto

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be settled on the Wife and Children, and the other half go to the Assignees, and that proposal was approved of by the Master.

to apply upon her death; and that the Interest already accrued due might, in the first place, be applied in payment of the Costs of the Suit, and that the residue might be paid to the Plaintiff, *Lucy Jacobs*, during her Life, for her sole and separate use, as aforesaid.

The Assignees, by their Answer, claimed, in right of the Bankrupt, the Money left by *Ann Dyer* to the Bankrupt's Wife, and particularly to the said sum of 1,200*l.* received and laid out as aforesaid.

The Cause came on before the *Master of the Rolls*, the 14th of November 1792, and on the 17th of May 1793, and it was declared, that on the construction of the Will of the Testatrix *Ann Dyer*, the Plaintiff *Lucy*, the Wife of the Plaintiff *Samuel Jacobs*, took an Estate for Life only in the Residue of the Testator's personal Estate, and ordered that 1,401*l.* 11*s.* 3*d.* Three per Cents. standing in the name of the Defendants *Amyatt* and *Willing*, be transferred into the name of the Accountant General, subject to the further Order of the Court. And it was referred to Mr. *Pepys* to inquire, whether the Plaintiff *Samuel Jacobs*, the Husband of the said *Lucy Jacobs*, had made or entered into an Agreement to make a Settlement on his said Wife, and the Issue of their Marriage; and in case he had not, or having made such, the said Master should not think the same proper, then that the said Plaintiff *Samuel Jacobs* was to lay proposals before the Master for a proper Settlement on his said Wife, and the Issue of their Marriage; and in either event, the said Master was to state the same, with his opinion thereon, to the Court.

The Master made his Report the 17th of July 1793, and stated, that proposals had been laid before him on the part of the Plaintiff *Samuel Jacobs*, whereby he had proposed that the said sum of 1,401*l.* 11*s.* 3*d.* Three per

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In *Wright* v. *Morley* (*t*), the present Master of the Rolls says, "When the Husband becomes a Bankrupt, and consequently incapable of maintaining his Wife, it is not held, that she is entitled to the whole of the Dividends of her Fortune, or of any Life Interest that she may have, any more than she is entitled to the whole of her Fortune consisting of a capital Sum;" and further observes, "If then, in this Case, instead of a particular Assignee for a valuable consideration, I had before me merely the general Assignees under a Commission of Bankruptcy, the Wife could not, as against them, set up a claim for the *whole* of the Dividends. I should think they dealt fairly, and even favourably towards her, if out of 260*l*., the produce of this Fund, they allowed her to retain 160*l*." This is a strong Authority to show, that even where the Husband has left his Wife, and gone abroad, she is not entitled to the *whole* Property.

In no Case has the Court given the whole to the Wife. The question, in most of the Cases, has been,

Cents. should be settled upon the Plaintiff *Lucy Jacobs*, for her Life, which proposal he had thought fit to approve.

The Defendants *Halton* and *Moody* appealed from the Decree, which Appeal came on the 31st of March 1794, and also upon the Master's Report; when the Chancellor affirmed the Decree; and it was ordered that the Cash in the Bank, after payment of the Costs directed, should be paid to *Lucy Jacobs*, for her sole and separate use, and the future Interest to grow due on the said sum of 1,401*l*. 11*s*. 3*d*. standing in the Accountant General's name, should be paid to the Plaintiff *Lucy Jacobs*, for her sole and separate use, during her life, and on her death, the Parties interested to be at liberty to apply.

(*t*) 11 Ves. p. 20, 21.

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how much the Wife shall have; and in determining that, the Court has exercised a discretion, and has not tied itself down to any precise Rule; but has never given the whole. The Exception must be allowed; and let the Master review his Report.

END OF PART II.

CASES

BEFORE THE

VICE-CHANCELLOR.

HAMPSON *v.* BRANDWOOD, and others.

12th Dec. 1815, 23d Jan. 1816.

Limitation in a Deed, declaring the Uses of a

Copyhold, to the use and behoof of the first Male Issue lawfully begotten by the Settler, which should attain to the age of 21, *and to the Heirs and Assigns of such Male Issue for ever, charged and chargeable, &c. and for default of such Male Issue, to the use and behoof of all and every the Daughter and Daughters of the Settler, lawfully begotten, and to their several Heirs and Assigns, for ever, to hold as Tenants in Common, discharged of any further or other Limitation over; and for default of such Issue, then over; held to vest a Fee in Three Daughters of the Settler, his only Children, and who died unmarried in his Life-time; and that Plaintiff was entitled as Heir at Law to them, in exclusion of the Devisees of the Settler.*

JOHN ABBS GORTON, the Brother of the Plaintiff, for settling and assuring certain Copyhold Premises, to such uses, intents, and purposes, as should be declared in and by a certain Indenture duly executed,

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and for a nominal Consideration of 5*s.* paid by *John Elton* (since deceased,) and *John Brandwood,* (one of the Defendants) on the 13th day of February 1778, surrendered into the hands of the Lords and Ladies of the Manor, a Messuage called *Hole House,* and certain Closes, &c. To the use of the said *John Elton* and *James Brandwood,* and their Heirs, and the Survivor of them, and the Heirs of such Survivor for ever, according to the Custom of the said Manor, to such uses, intents, and purposes, and subject to such Powers Provisoes, Limitations, and Appointments, as were mentioned, expressed, and declared by an Indenture, bearing even date therewith, and made between the said *John Abbs Gorton* on the one Part, and the said *John Elton* and *James Brandwood* on the other Part, and according to the purport, true intent and meaning of the said Indenture; and the said *John Elton* and *James Brandwood* were, at a Court held for the said Manor, on the 14th day of May in the said year 1778, duly admitted accordingly. By Indentures, bearing date also the 13th February 1778, and made between the said *John Abbs Gorton* of the one Part, and the said *John Elton* and *James Brandwood* of the other Part, (being the Indenture referred to in the said Surrender) It was witnessed, that for a nominal Consideration of 5*s.* and for settling and conveying the said Messuages, Lands, &c. he the said *John Abbs Gorton,* pursuant to the said recited Surrender, did grant, bargain, &c. and it was declared, and the said *John Abbs Gorton* did grant, bargain, &c. all and singular the said Messuages, Lands, &c. called the *Hole House* Tenement, mentioned and comprised in the said Surrender, with their Appurtenances, unto and to the use of the said *John Elton* and *James Brandwood,* and their Heirs, and the Sur-

vivor of them, and his Heirs, for ever, In Trust nevertheless to permit and suffer *Elizabeth Gorton*, Mother of the said *John Abbs Gorton* (and of the Plaintiff) to have and receive the Rents, Issues, and Profits of the said surrendered Premises for her Life; and from and after her Decease, that the said *John Elton* and *James Brandwood*, and their Heirs, and the Survivor of them, and his Heirs, should permit and suffer the said *John Abbs Gorton* and his Assigns, to receive the Rents and Profits of the said surrendered Premises during the term of his natural Life, if he should survive the said *Elizabeth Gorton*, his Mother; and from and after his decease to the use and behoof of the first Male Issue lawfully begotten by the said *John Abbs Gorton*, which should attain to the age of twenty-one years, and to the Heirs and Assigns of such Male Issue for ever, charged and chargeable as therein mentioned; and for default of such Male Issue as aforesaid, to the use and behoof of all and every the Daughter and Daughters of the said *John Abbs Gorton*, begotten, and to their several Heirs and Assigns for ever, to hold as Tenants in Common, and not as Joint Tenants, discharged of any further or other Limitation whatsoever: Provided, and it was thereby declared, that if the said *John Abbs Gorton* at the time of his Decease should leave one or more Male Issue to inherit as aforesaid, then and in such case it should and might be lawful, and should be construed, and the trust therein reposed, and the execution of the said Indenture was and were thereby declared to be upon this condition, that the said *John Abbs Gorton* did thereby reserve a power to himself, which he should have liberty and be fully empowered, in and by his last Will and Testament duly executed, or by any other his

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act and deed in Writing duly executed, to charge and make chargeable the said surrendered Premises with any and what Sum and Sums of Money to the use of all or any of his other Children lawfully begotten, which he should in and by such Will, or such other his act and deed in Writing, duly executed, direct, limit, and appoint; and for default or want of such Issue, to the use and behoof of the Plaintiff (then *Love Gorton*), during the Term of her natural Life, if she should be then living; and from and after her decease, (the said *John Abbs Gorton* being dead without Issue as aforesaid), to the use and behoof of all and every the Children of the Plaintiff, lawfully begotten, their Heirs and Assigns, for ever, as Tenants in Common, and not as Joint Tenants, share and share alike; and for default of such Issue to the right Heirs of the said *John Abbs Gorton* for ever.

John Abbs Gorton died on the 10th day of January 1811, having only had Three Daughters (*viz.*) *Elizabeth Gorton, Charlotte Gorton,* and *Eleanor Gorton,* who all died in his life-time unmarried.

John Abbs Gorton, in the year 1803, which was subsequent to the death of his Three Daughters, being advised that he had an absolute power of disposition over the Estate and Premises, in the event of his dying without leaving any Issue surviving him, subject to the Life Estate therein of the Plaintiff, and subject also to such other uses of the said Settlement, if any should take effect after her decease, surrendered the Estate and Premises to the use of his Will; and by his Will, dated 10th August 1809, and his Codicil, dated the 9th January 1811, devised the said Estate in favour of the Defendants,

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(*Brandwood* excepted). The Plaintiff, upon the death of the surviving Daughter of the said *John Abbs Gorton*, was the Heir at Law of the said Three Daughters of the said *John Abbs Gorton*, and Heir according to the Custom of the Manor of which the said Premises were held. The Plaintiff, by her Bill, insisted, that upon the death of *John Abbs Gorton* she became entitled to the said surrendered Premises and Hereditaments in Fee Simple in Possession, as Heir to the Daughters of the said *John Abbs Gorton*, the Nieces of the Plaintiff, and prayed, that the Defendant *James Brandwood* the surviving Trustee, might be decreed forthwith to surrender to her, or as she should direct, the Copyhold Estate and Premises.

The Defendant *Brandwood*, the Trustee, by his Answer insisted, the Defendants the Devisees were entitled, but submitted to act as the Court should direct.

The other Defendants, the Devisees of *John Abbs Gorton*, claimed to be entitled to the Interests devised to them under his Will; and insisted, that by virtue of the Limitation of the Indenture of 13th February 1778, and in consequence of the Events which took place, the ultimate Reversion in Fee of the Copyhold Premises, was vested in *John Abbs Gorton*; and that, subject to such Estates and Interests as were given by that Deed, he had a right to dispose thereof, and had effectually disposed of the same by his Will; and that the Plaintiff as Heir at Law, or Customary Heir of the Daughters of *John Abbs Gorton*, or otherwise, was not entitled to the Premises.

Sir *Samuel Romilly*, Mr. *Heald*, and Mr. *Perry*, for the Plaintiff.

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Mr. *Leach*, Mr. *Bell*, and Mr. *Blenman*, for the Defendants (*a*).

The VICE-CHANCELLOR:—

The Question is, What is now the right of the Plaintiff, *Love Hampson*? That depends upon the Words of the Deed of 13th February 1778. Being a Deed to declare Uses, it ought to receive a liberal interpretation, according to the intention of the Settler, consistently with the words he has used.

After some Recitals, the Deed proceeds to the Limitation, the Construction of which is now in question.

The Defendant, the Trustee, by his Answer, insists that the Limitation of the Copyhold Estates to the Daughters of *John Abbs Gorton* was not a vested, but a contingent, Limitation; and that the Fee Simple was not vested in the Plaintiff as Heir at Law of the Daughters, but continued in *John Abbs Gorton*; and that he had an absolute power of Disposition over the Premises, in the event of his dying without having any Issue surviving him, subject to the Life Estate therein of the Plaintiff; and subject also to such other Uses of the Settlement, as, if any, should take effect after her decease.

It was, certainly, a Contingent Limitation in Fee Simple to the Daughters; but on their coming into existence, and dying, the Contingent Limitation of the Inheritance to them, descended on their Heirs (*b*); it being a

(*a*) The most material Arguments being stated and observed upon in the Judgment, they are not here noticed.

(*b*) Vick v. Edwards, 3 P. Wms. p. 371. Weale v. Lower, Pollexf. 54.

Rule, that a Contingent Remainder of Inheritance is transmissible to the Heirs of the person to whom it is limited, if such person chance to die before the Contingency happens, except where the existence of the Devisee of the Contingent Interest, at some particular time, may by implication enter and make a part of the Contingency itself upon which such Interest is intended to take effect (*c*). Here the Daughters to whom the Contingent Limitation of the Estate was made, came into existence, and therefore, on their deaths, it descended on their Heirs. It was a double Limitation, first to the Sons in Fee, and for want of Sons there is a substitutional Limitation to the Daughters in Fee.

Whether the Estate thus vested in the Daughters on their birth, would have opened again in favour of an after-born Son, it is not necessary to decide.

It has been argued, that the first Limitation to the Sons was too remote, and therefore bad, and that, consequently, the subsequent Limitations were bad—that the words, " First Male Issue lawfully begotten by the said *John Abbs Gorton*, which should attain twenty-one years, and to the Heirs and Assigns of such Male Issue," means, Male Descendants; and that, as the first Son might have lived till twenty, and died, leaving a Son, who might also have died under twenty, leaving a Son, and so on, the Estate might have been rendered unalienable beyond the period allowed by Law; and *Davenport* v. *Hanbury* (*d*), *Freeman* v. *Parsley* (*e*), and *Leigh* v. *Norbury* (*f*) have been cited, to show, that the

(*c*) Fearne on Contingent Remainders, p. 364, Butler's Edit.

(*d*) 3 Ves. 257.

(*e*) Ib. 421.

(*f*) 13 Ves. 340.

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word *Issue*, is construed to mean, *Descendants*. It is true, that *primâ facie* the meaning of the word *Issue*, is, *Descendants*; but wherever, in a Deed or a Will, the Intention appears to be, that the word *Issue* was not intended to mean *Descendants*, but *Children*, the Courts give it such a construction; as in *Sibley* v. *Perry* (*g*), where the word *Issue*, was construed *Children*. In the present case, to interpret the word *Issue* to mean *Descendants*, would be to render the Deed a mere nullity. A Deed, if possible, must be interpreted so as to be effectual—*ut res magis valeat*. If in this case the words *Male Issue* are construed *Sons*, the Deed is good and effectual, because it must be known at his death whether or not he has Sons. If *Issue* here means *Descendants*, we must reject the words "begotten by the said *John Abbs Gorton*." No Case has been found where Issue "begotten by" the Settler, has been held to mean other than Children. The word *Issue* in this Deed is used synonymously with *Children*, and not *Descendants*. It was used in the same way in his Father's Will, which he might have had in his recollection.

The Provision in the Deed, that if Male Issue were born, the Father should have a power of providing for his other children, strongly shows that by Male Issue, was meant, Sons. Where he speaks of Issue, generally, he means Children. He first gives to his Male Issue, and in default, to his Daughters; thereby contrasting them with his Sons, whom he denominated under the term *Male Issue*. He discovers no intention to provide for remote Descendants, except through their Parents.

There are difficulties, I admit, in construing the words

(*g*) 7 Ves. 522.

"Male Issue" to mean "Sons;" for, according to this Deed, if he had two Sons, and his eldest Son died in his life-time, leaving a Son, such Son would not take, but the second Son, on attaining twenty-one during the minority of his Nephew, would take, in exclusion of the Son of the eldest Son. But if the words "Male Issue" are to be construed "*Descendants*," difficulties would equally occur; for if having only Daughters, say seven, and one had a Son, that Son on attaining twenty-one, would take, in exclusion of his Mother, and of all the other Daughters.

In default of Male Issue the Estate is given to the Daughters, "discharged of any further or other limitation whatever;" in these latter expressions, following, probably, the words used in his Father's Will, and meaning, that they should take without being subject to the power reserved in case there should be Male Issue which took, and without the necessity of arriving at twenty-one before they could take, as in the Limitation to the Male Issue. The power reserved in case there was Male Issue was natural, that younger Sons and Daughters might be provided for; but if there were only Daughters, the Estate was to go to them equally, and the reservation of such a power was unnecessary.

It is said, the words after the limitation to the Daughters, "for and in default of such Male or Female Issue to the use of *Love Gorton*," cut down the Fee which would pass by the words previously used in the Limitation to the Daughters, to an Estate Tail. It is not said, "in default of Issue *of the body*," &c.; and if by Issue he meant Children, as I have endeavoured to

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show, it only means, that if he has no Children, then the Estate is to go to *Love Gorton*, the next object of his bounty.

To construe the words as giving an Estate Tail, would be contrary to the plain meaning of the language used in the Limitation to the Daughters, which gave a Fee "without any further or other Limitation;" but taking Issue to mean Children, every part of the Instrument is capable of effect.

It was urged, that in *Lee* and *Brace*, reported in Lord *Raymond* (*h*), the words "*for want of Issue*," were held to cut down a previous Fee which had been given, to an Estate Tail; but that case appears to have been misreported in *Raymond*, and that the words were, "for want of Issue *of the body*, &c." as appears by the Report of the same case in *Modern Reports* (*i*), and in *Carthew* (*k*); that was a strong expression, indicating a clear intention.

The case which approaches nearest to the present is *Doe* v. *Perryn* (*l*). "In the first place then," says Lord *Kenyon*, "do these words confer an Estate Tail, or a Fee, in *Dorothy*'s Children? The words are, 'To all and every the Children of *Dorothy*, begotten or to be begotten on her body by *James Comberbach*, and *their Heirs for ever*; and *for default of such Issue*, &c. then over." Now words more emphatical cannot be used to create a Fee, than to '*A*. and his Heirs for

(*h*) Ld. Raymond, 101.

(*i*) 5 Mod. 266.

(*k*) Carth. 343. The same Case is reported in Holt, 668, where the words are "for want of Issue of him."

(*l*) 3 T. R. 484.

ever.' Undoubtedly these words may be controlled by subsequent ones; and were properly so in *Ives* v. *Legg*, cited by the Defendant's Counsel; because there the Limitation was to his Daughter, and the Children of her body begotten, and their Heirs, and afterwards to a person who might by possibility have been Heir to those Children. That sufficiently explained the Intention of the Devisor, because there could not be a failure of Heirs general while the Remainder-man, or any of his Descendants were living. But that case differs from the present, because there the Limitation over was 'in default *thereof*,' namely, *Heirs*; and here, 'in default of *Issue*,' which is referrible to *Children*."

It has been argued, that this Testator contemplated that he might have no Children, or that they might die in his life-time, and that under that idea, and for default and want of Issue, he limited over the Estate to the Plaintiff for Life, and to her Children in Fee, and for default of such Issue to his own right Heirs; and that the words "for default and want of Issue," mean, "in default of Issue living at my death;" but the words, "in default of Issue" are not construed to mean "in default of Issue living at my death," unless in cases of *personal* Estate, as was stated by Mr. Justice *Buller* in *Doe* v. *Perryn* (*m*).

I do not find any words in this Settlement expressive of an Intent that if the Settler had Daughters in his life-time, who should die, that the Estate should go over;

(*m*) 3 T. R. 494. *Lord Kenyon* appears to have been of a different opinion in Porter v. Bradley, 3 T. R. 143; but *Lord Eldon*, in Cooke v. De Vandes, 9 Ves. 197,203, concurs in the opinion of Mr. *Justice Buller*.

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but he appears to have meant, first, that his Male Issue, his Sons, should take a Fee, and if there were none, then that his Daughters should take a Fee.

The Plaintiff, therefore, must have a Decree according to the Prayer of her Bill.

With respect to the Costs, I wish to hear what the Counsel have to say.

23d January. The question as to Costs was now spoken to.

Mr. *Leach*, Mr. *Bell*, and Mr. *Blenman*:—

The Trustee must have his Costs, he having acted according to the opinion of an eminent Conveyancer, who thought the Defendants were entitled to the Estate. Then, how are his Costs to be paid? He has a lien on the Trust Estate for them. The Plaintiff must pay his Costs, and thereby redeem the lien on the Estate; or the Court may order the Estate, or part, to be sold, to pay them. It may direct the Trustee to sell, and the Plaintiff to join in the Sale.

Then, as to the Costs of the Infant Defendants. They were necessary parties; they could not disclaim. In the case of a Will, if the Testator has so expressed himself that a doubt arises as to his property, and he has an Estate beyond the subject of the suit, such Estate pays the Costs of litigating his Will; if no such Estate, then the property in dispute pays the Costs.

The same principle applies to Deeds. The doctrine is clear as to Personal Estate, and why is it not to extend to Real Estate? In the *Angell* Case, the

Defendant's costs were ordered to be raised by Sale or Mortgage of the Estate. Those who take under a Gift, take the Estate subject to the expense of litigating doubtful questions arising out of such Deed of Gift.

When a Trustee files a Bill to have the opinion of the Court upon the Construction of a Trust Deed, the Court gives the Trustee and *Cestuis que Trust* their Costs out of the Trust Property; and Bills of this sort are often filed, because, if the *Cestuis que Trust* filed the Bill, and it was dismissed, they would have to pay the Costs.

Sir *Samuel Romilly*:—

Angell v. *Angell* bears no analogy to this Case. Here are no Trusts to be executed. It was a very strong case. There, the Costs of Ejectments were apportioned.

The Trustee must have his Costs from the Plaintiff, but the Plaintiff is entitled to have them over against the other Defendants. There is no equity or justice in making a successful Plaintiff pay the Defendant's Costs. If the Trustee had surrendered to these Defendants, and an Ejectment had been brought, they must have paid the Costs on both sides. It being a Trust Estate makes no difference in regard to Costs. It is very different where doubts arise on the Construction of a Will.

The VICE-CHANCELLOR:—

[After stating the nature of the Suit and the Decree, observed,]

This suit has arisen in consequence of claims by adverse Litigants, to an Estate in the hands of a third person, a Trustee; the question, whose Estate it is,

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depending upon the Construction to be placed on the words of a Deed.

The Court has a discretionary authority on the subject of Costs, but, in general, it makes the unsuccessful Party pay them, unless there are particular circumstances which induce the Court not to give any Costs; but it is not the course of the Court to order the Costs of the unsuccessful party to be paid out of the contested property. In all Bills for the recovery of an Estate, the question must arise upon the Construction of some Instrument, and the parties litigate at the peril of Costs.

The Deed, which gave rise to this Suit was so darkly framed as to occasion fair doubts as to its Construction, and therefore there is ground to excuse the Defendants from paying Costs; but the Court will not compel the successful party to pay the Defendant's Costs out of the recovered Estate. No Case goes so far as that.

Costs of a Litigation, in the course of administering a Will, are given out of general Assets, or, in case of deficiency, out of the Fund; but that is a very different case from the present; and if the analogy hold, the general Assets of the person creating the dispute must be resorted to, not the Estate in litigation.

The case of *Angell* v. *Angell*, which is not reported, does not apply. The Defendant's Costs in Equity were not given out of the Estate, but only his Costs at Law, and that, as it has been admitted, was going farther than any case had gone before. There, the Costs at Law paid by one individual, were directed to be borne contributively, because all parties were interested in the

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steps taken at Law, which were for the preservation of the property in dispute. That case, therefore, bears no analogy to the present.

According to the doctrine contended for, it must be laid down as a general rule, that if a person devises or grants an Estate, so as to give occasion for litigation on a doubtful question, the Estate must pay the Costs on both sides. No Case, no *Dictum* has been cited, to warrant such position.

The Trustee must have his Costs. Those Costs the Plaintiff does not object to pay. The other Defendants are excused from paying Costs, but are not to receive them.

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21st, 22d Dec. 1815.

A Mortgage of a Ship at Sea (the Forms required by the Registry Acts being observed), held to be valid; and an Injunction granted to prevent an improper Indorsement on the Certificate of the Registry of the Ship.

WILLIAM LLEWELLYN being the Owner of One Third Part or Share of a Ship, called the *Eliza Frances*, belonging to the Port of London, which Ship was then at Sea, in order to indemnify the Plaintiffs against the payment of certain Bills of Exchange which they had indorsed for the benefit of *Llewellyn*, *Grant*, and others, executed to the Plaintiffs, on the 3d of December 1811, a Bill of Sale, or Assignment, of such One Third Part or Share of the Ship, to hold the same unto the Plaintiffs, their Executors, Administrators and Assigns, for their own use, and as their proper Goods and Chattels from thenceforth for ever; with a Power of Attorney therein contained, empowering the Plaintiffs

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for him, and in his name, on the return of the Ship to Port, to make and subscribe all such Memorandums and Instruments on the Certificate of the Registry of the Ship, and to do such other acts and things as should be requisite and fit, to confirm and complete the Sale and Conveyance by such Bill of Sale intended to be made of such One Third Part or Share of the Ship, he the said *William Llewellyn* thereby ratifying and confirming, and agreeing to ratify and confirm the same.

Previous to this Bill of Sale, and unknown to the Plaintiffs when the Bill of Sale was made in their favour, *Llewellyn* had executed a Bill of Sale of his Interest in the Ship, dated the 26th of March 1811, to *Hasket Smith*, for securing the payment of 856 *l.*

Hasket Smith then was, and at the filing of the Bill continued to be, Agent for the Owners of the Ship; and in January 1809 the Ship was hired on behalf of his Majesty, by the Commissioners for managing the Affairs of the Transport Service, and the Agreement was made with *Hasket Smith*, and by the Charterparty the Freight of the Ship was payable to him alone, and he received considerable Sums in respect of Freight, and more Freight was becoming due, the Ship being still at Sea, and in the Service of Government.

Hasket Smith was by *Grant*, at the instance of the Plaintiffs, satisfied his Debt for which the Bill of Sale was given to him as a Security; but he refused to give up, cancel, or assign the same; and by another Bill of Sale dated the 17th of March 1812, he

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re-assigned to *Llewellyn*, the One-third Part or Share of the Ship.

Previous to any of these Bills of Sale, the Ship *Eliza Frances* was duly registered at the Custom-House in the Port of London, and the usual Certificate was granted; and the Ship being at Sea with the Certificate on board, prior to the 26th of March 1811, and ever since, the Bill of Sale of that date, and the subsequent Bills of Sale of the 3d of December 1811 and 17th of March 1812, had not been, nor could be, indorsed on the said Certificate; but Memorandums were entered in the Registry Book at the Custom-House of such several Bills of Sale.

In May 1812 *Llewellyn* was declared a Bankrupt, and the Defendants, *Hooper* and *Nicholls*, were chosen Assignees.

The Sum of 2,122 *l.* remained due to the Plaintiffs, in respect of what they had been called upon to pay, as Indorsees, and as a Security against which payments, the Share in the Ship had been assigned to them.

The Bill, stating these facts, Prayed, that the Defendants might be restrained by Injunction from taking out of the hands of the Master of the Ship or Vessel the *Eliza Frances*, and from receiving from him or any other person, the Certificate of the Registry of such Ship or Vessel, and from indorsing or causing to be indorsed thereon, the Bills of Sale of the 26th of March 1811, and 17th of March 1812, or either of them, or any Memorandum of the same, or of either of

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them, and from doing any act to prevent or hinder the Plaintiffs from procuring to be indorsed on said Certificate, the said Bill of Sale of the 3d of December 1811, until they, or some or one of them, should have fully paid and satisfied the money remaining due to the Plaintiffs on the Security of the Bill of Sale of the 3d of December 1811; and that the said *H. Smith* might be decreed to pay to the Plaintiffs One Third part of the amount of the several sums of money which had been received, or should be received by him from Government for the Freight of the said Ship or Vessel, or so much of the same as should be necessary to satisfy the demands of the Plaintiffs.

The Answers of the Defendants *Smith*, *Llewellyn*, and of *Hooper* and *Nicholls*, his Assignees, admitted the before-mentioned facts, but the Assignees resisted the Relief sought by the Bill.

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

We have a clear equitable Title to this One Third of the Ship; no legal Title could be acquired till its return. If *Llewellyn* had paid *Smith*, he was entitled to have *Smith*'s Bill of Sale delivered up; and the Plaintiffs having in them *Llewellyn*'s interest, were entitled to have *Smith*'s Bill of Sale delivered to them when his Mortgage was paid off. No case has decided that an Equity of Redemption in a Ship cannot be assigned. The Bankruptcy of *Llewellyn* does not affect the Plaintiffs rights. It was a fraud in *Smith* to assign to *Llewellyn*, after notice of the Plaintiffs Bill of Sale. All that the Register Acts require has been done by an

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entry of the Bill of Sale at the Custom-House. The Assignees of *Llewellyn* can be considered only as Trustees for the Plaintiffs of the Bill of Sale made by *Smith* to *Llewellyn*.

The inclination of the Chancellor appears strongly in favour of Relief where the Indorsement on the Certificate within the ten days is prevented by Fraud; but here the Ship has not arrived, and our application is to prevent a fraud.

Mr. *Leach*, Mr. *Cooke*, and Mr. *Matthew*, for the Defendants:—

After the Conveyance by *Smith* to *Llewellyn* he became the apparent Owner. Since the Register Acts there can be no such thing as an equitable Title to a Ship; and in several cases, Courts of Equity have refused to give effect to an equitable Title. The property in the Vessel, though at Sea, vested in *Smith* by the Bill of Sale to him; and though he was afterwards paid, yet as no Re-conveyance had been made by *Smith* to *Llewellyn* before the Bill of Sale to *Thompson* and *Brymer*, the Transfer to them was ineffectual and invalid in Law and Equity, and the subsequent Assignment by *Smith* to *Llewellyn* vested the legal Estate in him; and his Assignees are now entitled. The Title must be in them whom the public documents designate as Owners.

It is clear from *Newnham* and others, Assignees of *Bland* and others v. *Graves* and others, Assignees of *Dawson* and another; and from *Barker* v. *Chapman* (*a*),

(*a*) These two Cases were stated by Mr. *Cooke*, from his MS. Notes, and he has favoured the Reporter with the use of them. In *Newnham* and others, Assignees of Bland

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determined by the Master of the Rolls, that this Court has no jurisdiction to relieve in cases of Fraud relating to

and another *v.* *Graves* and another, Assignees of *Dawson* and another, 23d April 1808, it appears, *Dawson* and his Partner, for a valuable consideration, assigned to *Bland* and his Partner, a ship, called the *Venus,* by a proper Bill of Sale. The vessel was then at sea. A Copy of the Bill of Sale, with notice, was duly sent to the Commissioners of the Customs, according to the Act 34 Geo. III. c. 68.

In May 1808 *Bland and Co.* became Bankrupts, and the Plaintiffs were appointed Assignees.

In the same month, *Dawson and Co.* became Bankrupts, and *Graves* and another were chosen Assignees.

On the 31st July, 1808, the Vessel arrived in London, to which Port she belonged. The Plaintiffs immediately took actual possession, and applied to the Captain for the Certificate of the Registry, to get it indorsed within the ten days after the arrival of the ship, as required by the Act, but the Captain acting in collusion with the Assignees of *Dawson,* delivered it to them, and it was admitted, that application had been made to the Assignees of *Dawson* to direct the Captain to deliver the Certificate within ten days, and that they refused to do so, conceiving they were not bound to do any act to assist the Plaintiffs in making perfect their Title. The *Master of the Rolls* was of Opinion, that the Registry Act precluded the Court from giving any relief, and dismissed the Bill, but without Costs.

In *Barker* v. *Chapman* and others, Assignees of *Robson,* 3d March, 1812, the Bankrupt, *Robson,* had executed a Bill of Sale of the ship *Bacchus* to the Plaintiff, and made an Indorsement on the Registry in the presence of two Witnesses, and sent the Instrument to the Broker, but from inadvertence or design, the Witnesses had not signed the Attestation, and it was sent back to *Robson* to get the proper Attestation, but he detained the same till he became Bankrupt, and the Assignees refused to deliver up the Bill of Sale. The Master of the Rolls dismissed the Bill, so far as related to the ship *Bacchus,* but without Costs.

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the Registry of Ships. If it could interfere in cases of Fraud, why not in cases of Accident?

There can be no such thing as an Equity of Redemption in a Ship since the Register Acts.

The Plaintiffs have permitted *Llewellyn* to be the visible Proprietor, and the Act, 21 Jac. I. c. 19. sec. 11. applies.

Sir *Samuel Romilly*, in reply:—

The two MS. Cases cited by Mr. *Cooke* do not apply, for in those cases the ten days after the return of the Ship had elapsed, and no Indorsement was made on the Certificate of Registry. Here the Forms have been observed as far as they could be. If *Llewellyn* had remained solvent, and tendered the money lent by *Smith*, this Court would have ordered *Smith*'s Bill of Sale to be delivered up. We stand in the situation of *Llewellyn*.

The VICE-CHANCELLOR:—

21st December.

The utmost effect of the Cases hitherto decided on this Subject has been, that when the question is, whether the Forms prescribed by the Registry Acts shall prevail, or the Equitable Title be made good, the Forms must prevail.

In the Case determined by the Master of the Rolls of *Barker* v. *Chapman*, there was direct Fraud, but he held it not to be relievable. The Court, he thought, could not dispense with the Forms on equitable grounds, or acknowledge any Title not clothed with the legal forms prescribed by the Acts; but in this case, those Forms have been observed, in letter and spirit. *Thompson*

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has entered his Bill of Sale at the Custom-house; he has form and substance—the legal and equitable right. Why then are not the Plaintiffs entitled to the relief they pray? As against *Llewellyn*, if solvent, his right would be clear, and his Assignees can be in no better situation. Putting out of the way the entanglement of the question by these Registry Acts, the case would only be the ordinary one between Mortgagor and Mortgagee. *Smith's* was the only Mortgage previous to the Plaintiffs; and when that was paid, the right of the Plaintiffs was clear. The whole fallacy of the Defendants case arises from applying the Decisions in Cases where the Forms prescribed by the Register have *not*, to a case where the Forms *have*, been observed. When those forms are observed, the rights of parties must be determined on general principles.

It has been said, there can be no such thing as a valid Mortgage of a Ship; and that there has not been one since the Registry Acts which passed nearly thirty years ago! What authority is there for so strange a proposition? Every day there must be instances of such Mortgages; and a variety of Cases have occurred both in Law and Equity, where they have been recognized. The Acts only invalidate Contracts without the proper Forms.

It was once argued, that under these Acts, *part* of a Ship could not be transferred; but it was determined, it might, as before the Acts (*b*). A power of mort-

(*b*) Underwood *v.* Miller, 1 Taunt. 387. In that case *Chief Justice Mansfield* said, "where the Act of Parliament contemplates a Transfer of the whole Ship, it uses the expression 'all my [or our] right, share and interest;' and it is

gaging Ships existed before the Acts, and they have not taken that power away. The Acts were designed to prevent Foreigners acquiring an interest in Ships of which British Subjects were the apparent Owners; but there is nothing in the reason, the letter, or the spirit of them, which prevents a Mortgage of a Ship, provided the proper Forms are observed. A Mortgage of a Ship is just as good as the Mortgage of any other Chattel.

The Bill of Sale of One Third of the Ship to *Hasket Smith* in March 1811, for securing 856*l.*, passed only a partial Interest, the remaining Interest being in *Llewellyn*; and the subsequent Bill of Sale to the Plaintiffs in December 1811, passed the Interest which remained in *Llewellyn*, to *Thompson*, the proper Forms being observed. *Smith* being paid his 856*l.*, assigns his Bill of Sale to *Llewellyn*, but that gave *Llewellyn* no new Interest, he having before parted with all his Interest to *Thompson*, subject to the claim of *Smith* in respect of his 856*l.* A Mortgagor cannot set up a legal Interest in opposition to his Mortgagee (*c*).

The Plaintiffs resort to Equity to prevent *Smith* committing a Fraud, and to enable them to perfect their Bill of Sale. It is but justice; and there is nothing in the Acts which cripple the arm of a Court of Equity.

plain that the persons who penned the Act omitted to provide for the case of the Sale of a *part*; but the Legislature only meant that the Indorsement should show what was the Interest conveyed; for it would be impossible literally to follow this Act, and to say "all my Interest," when the Vendor meant to convey a part only, p. 389.

(*c*) See Goodtitle *v.* Bailey, Cowp. 601, 2.

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Is it to be said that a Court of Equity can have nothing to do with Ships; or that the Statutes, by declaring that without certain prescribed Forms, no Sale of a Ship shall be valid, have established, conclusively, the Validity of every Sale in which these Forms are observed, however fraudulent or objectionable it may be on other grounds? As well might it be said, that the Act which provides that no Will of Real Estate shall be good without three Witnesses, has made every Will good which has three Witnesses. The Register Acts decide nothing between two Parties who have obeyed the Forms required by the Acts, and this Court must abdicate its power were it not to prevent these Defendants doing an act which must be fatal to the rights of the Plaintiff. The question is not what relief could be given if the ten days had elapsed—or if there were no Bill of Sale—or no Entry at the Custom-House.

With respect to the objection as to the Statute of *James*, there is no evidence that *Llewellyn* had the ordering and disposition of the Ship after the Bill of Sale to the Plaintiff. There is no weight therefore in that objection.

This is the opinion I have at present formed upon the Case; but I shall give my final Judgment To-morrow.

The VICE-CHANCELLOR:—

22d Dec. 1815.

The Facts of this Case are not disputed. In order to determine the question, it is proper to consider, 1st. How the case would stand supposing the Register Acts were out of the question. 2dly. What is the effect of those Acts.

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1. The Mortgage of a Ship is like a Mortgage of any other Chattel, and subject to all the principles laid down in Courts of Law and Equity, relative to such Mortgages. *Llewellyn* was bound to give validity to the Bill of Sale to the Plaintiffs, and this Court would not suffer it to be defeated by the Conveyance from *Smith* to him. When *Smith*'s Mortgage was paid off the Plaintiffs were entitled to call upon *Llewellyn* to complete their Title, by clothing their equitable, with the legal, Interest. There was a valuable Consideration for the Mortgage to the Plaintiffs; and *Llewellyn* ought not to have taken an Assignment from *Smith* when his Mortgage was paid off; but *Smith* ought to have conveyed to the Plaintiffs, his Mortgage having been paid off by *Grant* on behalf of the Plaintiffs. The Assignees of *Llewellyn* stand in no better situation than *Llewellyn* himself; it would, therefore, have been clear, independent of the question raised on the Register Acts, that the Plaintiffs would have been entitled to the relief they pray by their Bill, both on general principles, and the express Covenant contained in *Llewellyn*'s Bill of Sale to *Thompson*.

2. How does the Case stand under the Register Acts:

It is admitted that *Thompson*'s Bill of Sale was accompanied with all the requisites which the Acts prescribe, on the Transfer of a Ship at Sea. His Bill of Sale duly recited the Certificate; a copy was transmitted to the Custom-House; the Entry on the Oath, and the Memorandum in the Register, were duly made, and notice given to the Commissioners. One form remains to be complied with when the Ship re-

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turns to Port, viz. to indorse the Bill of Sale on the Certificate. The object of the Bill is to secure this form for the true Owner, and to prevent its being fraudulently intercepted by those who are under a positive obligation to do all acts necessary for the completion of his Title. What is there in the Register Acts to deprive the Plaintiffs of this manifest Equity?

The difficulties in all the Cases hitherto have arisen, as in *Hibbert* v. *Rolleston* (*d*), from the Forms required by the Act not having been attended to. In such case the Statute nullifies the Sale, both at Law and in Equity. In *Mestair* v. *Gillespie* (*e*), the ten days had elapsed without an Indorsement, which had been prevented by a palpable Fraud, a Fraud so very gross, that the *Lord Chancellor* felt a strong inclination to relieve; and the *Master of the Rolls*, though rather inclined to think the Court could not relieve, concurred so far with the *Chancellor* as to allow an Issue to be directed to ascertain the Facts relating to the Fraud, and the Cause was afterwards compromised. *The Master of the Rolls*, in the cases mentioned by Mr. *Cooke*, determined, that Fraud in such cases was not relievable. In a recent case, however, the *Lord Chancellor*, I understand, continued to express a doubt whether Fraud might not form a ground for Relief. In the cases alluded to in Bankruptcy, *Yallop* (*f*), and the others, the Forms not being attended to, the Bill of Sale was not recognized, and the want of such Forms was held fatal.

What is there in the Act which makes void the

(*d*) 3 Bro. C. C. 571.
(*e*) 11 Ves. 626. S. C. MS.
(*f*) 15 Ves. 60, and see Curtis v. Perry, 6 Ves. 739.

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Plaintiffs Bill of Sale? Their Title was communicated to the Public. All was done that the Act requires to be done; they could do no more, so long as the Ship was at Sea. All the Parties in this respect stand *in pari jure*. The Plaintiffs, being fearful that the only remaining form to be observed on the return of the Ship to complete their Title would be prevented by the activity of the Assignees of *Llewellyn*, file this Bill; and I see nothing in the letter or the spirit of the Act to disappoint their claims to the assistance of the Court; the Act not having, between Claimants who have equally attended to the Forms of the Act, taken away the equitable Title to Relief, which in other respects one may have against the other.

I was struck by the assertion, that since the Registry Acts there can be no valid Mortgage of a Ship; that such Mortgages are merely made upon honour, the Bill of Sale in such cases being absolute and without any defeazance, and the Mortgage of a Ship not being considered as capable of being enforced in Law or Equity. It seemed to me an alarming position, that if a Ship, worth 10,000 *l.* was mortgaged for 100 *l.* there is no other than an honorary engagement to return the Ship, on repayment of the 100 *l.* and, therefore, if in such case the Mortgagee becomes Bankrupt, his Assignees may claim the absolute right to the Ship! Before the Registry Acts, Ships might have been, and constantly were, mortgaged, and the free Transfer of Property has always been encouraged. The Registry Acts were intended for the benefit of the British Owners, and of Trade and Commerce; but if it be true that they operate to deprive the Owners of their former right of raising money by Mortgage, the consequences to Commerce would be most

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injurious and alarming. Such a proposition, publicly stated, calls for immediate reprobation; it is totally without foundation. The Acts only meant to confine the Ownership of Ships to British Subjects, and were not intended to have any effect on the right of mortgaging. A Transfer, by Mortgage, made known to the Public, and confined to British Subjects, is within the Spirit of the Acts, nor is there any thing in the Letter to confine the Transfer to an absolute Sale. Ever since the passing of the 7th and 8th William, and the more recent Statutes, it appears from many cases in Law and in Equity to have been admitted, that a Ship may be mortgaged, and no doubt has ever been suggested on the subject (*g*). In *Hibbert* v. *Rollestone* (*h*), and in *Mestair* v. *Gillespie* (*i*), there were Mortgages of the Ship, and no objection was made in that respect. In the late case of *Wilson* v. *Heather*, in the Common Pleas (*k*), the Court considered the Mortgage of a Ship as valid, provided the Forms required by the Register Acts are attended to.

Are we then, in the absence of all Authority, and in the teeth of decided Cases, without even a *dictum* to the contrary, and without any thing either in the letter or spirit of the Acts, to decide, that a Ship cannot be mortgaged?

It is said Mortgages of Ships are prevented by

(*g*) In King v. King, 3 P. Wms. 360, mention is made of a Decree of Lord Harcourt, on the Mortgage of a Ship at Sea, which Ship was taken, and the Executors of the Mortgagor were decreed to pay the money for which the Ship was mortgaged.

(*h*) 3 Bro. C. C. 571, and in 3 T. R. 709.

(*i*) 11 Ves. 626.

(*k*) 5 Taunt. 642.

the difficulties raised at the Custom-House upon the Register Acts, the Custom-House refusing to register a Mortgage; and that the Registry Acts prescribe a certain form of Entry to be made at the Custom-House which is incompatible with a Mortgage; and that the Acts have thus indirectly prohibited Mortgages. If all equitable Titles in Ships are put an end to, what is the meaning of the words "*Contract and Agreement*?" The Act (*l*) says, "No Transfer, *Contract* or *Agreement* for Transfer of any property in any Ship or Vessel, made or intended to be made after the 1st day of January 1795, shall be valid and effectual for any purpose whatsoever, either in Law or Equity, unless such Transfer, *Contract* or *Agreement* for Transfer of property in such Ship or Vessel shall be made by Bill of Sale, or Instrument in Writing," containing such recital as prescribed by that clause. To say there cannot be an equitable Title to a Ship is to contradict the very words of the Act. It is correct to say there cannot be an equitable Interest in a Ship not notified at the Custom-House; because if there might be an absolute Bill of Sale registered, and a separate Deed of Defeazance not registered, the Act would be baffled, and Foreigners might be secretly possessed of the Ownership of the Ship.

Thinking this Question to be of extreme importance, I have taken some pains to collect all the knowledge I could on the subject. I have seen the Officers engaged in this Department at the Custom-House, and certainly, there seems to have prevailed a very strong notion, there, as well as in the Profession, that some difficulties occur in consequence of the prescribed Form of Indorse-

(*l*) 34 Geo. III. c. 68. s. 14.

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ment in the 34 Geo. III. c. 68. s. 15, which is in the following terms :—

" Form of Indorsement on change of Property."

" Be it remembered, That [I, *or* We] [*Names, Resi-*
" *dence, and Occupation of the Persons selling*] have
" this day sold and transferred all [my *or* our] right,
" Share or Interest in and to the Ship or Vessel [Name
" of the Ship or Vessel] mentioned in the within
" Certificate of Registry, unto [Names, Residence,
" and Occupation of the *Purchasers*]. Witness [my
" *or* our hands] this [date in words at full length]."

" Signed in the presence of
" [Two Witnesses]."

This Form is adapted only to a total and absolute Sale, and will not apply to a Transfer by Mortgage, the Mortgagor not being properly within the term " Seller;" nor can he truly declare that he has sold " all his right, share, or interest in and to the Ship or Vessel"; nor is the Mortgagee properly a Purchaser. At the Custom-House the Officers will not permit any Entry but according to this prescribed Form, the Statute not having provided for a deviation from it in any case; nor allowing any Sale to be valid without a strict observance of it.

The consequence has been that where a Ship is mortgaged, the practice, I find, has sometimes been to have two Instruments; one, an absolute Conveyance of the Ship; the other, a Deed of Defeazance; the former only being registered at the Custom-House: In such a case a difficulty arises in enforcing, in a Court of Justice,

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the Mortgagor's Right of Redemption, by setting up the unregistered Deed in opposition to the registered; and from thence has proceeded the idea, that, since the Register Acts no Transfer of Property in a Ship could be made, except by way of absolute Sale; and, consequently, that no valid Mortgage of a Ship could be made, since these Acts. But this course of reasoning is founded in mistake. If the fact were established, that the Form of Register prescribed by the Acts were applicable only to the case of an absolute Sale of a Ship, and could in no way be suited to a Transfer by way of Mortgage, still it would not follow, as a consequence, that no other than an absolute Sale was intended to be allowed, but merely that the Provisions of the Act should be deemed to apply only to an absolute Sale, leaving all other Transfers of Property untouched by the Acts, to be governed by the same rules and forms which prevailed before the Acts were passed, there being nothing either in the letter or spirit of the Acts unfavourable to the continuance of the Mortgage of Ships; and it being utterly unreasonable that such Mortgage should be rendered invalid merely from the non-compliance with a Form of Register, which, according to the hypothesis, could in no way be adapted to it. It is impossible not to see that the greatest inconveniences would arise if either of these alternatives prevailed—if any prohibition or restraint were imposed on the right of Mortgaging Ships—or if the guards provided by the Register Acts against Foreigners acquiring an Interest in British Ships did not extend to this mode of Transfer of Property. It is therefore of great importance to have it clearly understood, that for neither of these positions is there any foundation. The contrary of both is assumed in the late case of *Wilson* v. *Heather*, decided by the unanimous

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Opinion of the Court of Common Pleas, without any doubt on either point; and in that Opinion I entirely concur. I have no doubt that the power of Mortgaging a Ship exists as fully since the Register Acts as it did before, provided the requisites prescribed by the Register Acts are observed. I think there is no difficulty in effectuating this. The Mortgage will be made by the usual Bill of Sale of the Ship, containing in the same Instrument a Defeazance, or Condition of Re-transfer on payment of the Mortgage Money. This Bill of Sale must contain the Recital of the Certificate, as the Act directs; and must be fully indorsed on the Certificate of Registry, if the Ship be in Port; or if at Sea, a full copy of it must be transmitted to the Custom-House. The form of Indorsement will be the one prescribed by the Act, but with the addition of the Defeazance, to express the true nature of the Contract between the Parties, whenever it becomes material to resort to evidence of it. There is nothing in the Act to prevent such an addition being made to meet the exigency of the case. A greater deviation from the Form prescribed by the Act was sanctioned by the Court of Common Pleas, in the case of a partial Transfer of the Interest in a Ship (*m*); and an ingenious living Writer (*n*) has well observed, that the Act seems to require a similar deviation in the case of a mere Contract for the Sale of a Ship, which the Act directs to be registered, but which cannot be, in the exact words of the Form prescribed. A liberal interpretation of the Act must be adopted to make Form give way to Substance. In the subsequent Forms to be observed at the Custom-House, the Defeazance

(*m*) See ante, 402, note b.

(*n*) Mr. (now Mr. Justice) Abbott, on Merchant Ships, &c. p. 44, and note (*y*.)

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will probably not be noticed either in the Entry indorsed, or the Oath, or in the Memorandum made in the Book of Registers, but adhering simply to the form prescribed by the Act, it will be registered as an absolute Bill of Sale. But neither the Mortgagor nor Mortgagee can suffer by that omission. The Statutes invalidate the Transfer only in the event of a neglect of the prescribed requisites *by the Parties*, not for any mistake or neglect by *the Public Officers*. And in the event of any dispute of the Title in a Court of Justice, the proper evidence of Title will be the original Documents themselves, not any imperfect Abstract made of them at the Custom-House. By that Abstract, the Mortgagee will, it is true, appear the sole and absolute Owner, and so he is, *pro tempore*, till redemption; but the Mortgagor's right to call for a Re-transfer will appear from the Bill of Sale, fully indorsed on the Certificate, if the Ship be in Port, or if at Sea, by a full copy transmitted to the Custom-House; and I see no ground on which that right can be resisted. It is a mistake to suppose that the Owner of a Ship cannot make any Transfer of Property without parting entirely and irredeemably with all his Interest. The right to redeem, if it be the Contract of the Parties, (as it was in the present Case between *Llewellyn* and *Smith*), even though not noticed at the Custom-House, still continued to exist, and passed by the second Bill of Sale from *Llewellyn* to *Thompson*, by which *Thompson* stood in the place of *Llewellyn*, and acquired against him and his Assignees the right which he seeks to enforce by this Bill, of possessing himself of the Certificate when the Ship returns to Port, for the purpose of indorsing thereon, within the ten days, his Bill of Sale. To secure the attainment of that right, the Plaintiffs

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are, I think, clearly entitled to the assistance of a Court of Equity, and to prevent the infraction of it, which cannot take place without the breach of an express Contract, and the violation of every principle of Equity and Justice. On these grounds, I think the Prayer of the Bill is proper; and as the Ship has by consent been sold, subject to the Decision of the Court, the Purchase Money must be paid to the Plaintiffs; but as it is a Case in which there was great doubt, I give no Costs.

25th February. 4th March.

A Voluntary Settlement in favour of Strangers, by one not indebted at the time, nor meaning a Fraud, good against subsequent Creditors.

On the Hearing of the Cause, an Inquiry will not be directed before the Master, unless a ground for it is laid in the Pleadings.

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THIS was a Creditor's Bill, filed against the Executors of *S. H.* and also against the Trustees, and *Cestuis que Trust*, under a Voluntary Settlement made by her, praying an account against the Executors; and that if it should appear that her Estate was insufficient for the payment of her Debts, the deficiency might be made good out of the Property of which the voluntary Settlement had been made, and that a competent part might be sold for that purpose.

S. H. by her Will, 29th April 1809, gave all her Real Estate, &c. to the use of *M. Lewis* (since deceased), and the Defendant *John Millard*, their Heirs and Assigns, in Trust to sell the same, and apply the produce in aid of her Personal Estate, in discharge of her Debts, &c. and gave the residue to *F. T. Lewis* and *Millard* were appointed Executors.

By a Settlement, dated 22d of December 1810, *S. H.* after reciting that she was entitled as one of four Co-heiresses to a fourth part of certain Estates,

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estimated at the value of 170,000*l.*, parts of which Estate had been contracted to be sold, she covenanted and agreed with the Trustees *Lewis* and *Millard*, that, out of her share of the monies to be produced by the Sale of the Estates, she would pay them 36,000*l.* Sterling, upon Trust, to invest the same in Government Securities, and apply the Dividends as she should appoint, and for want of appointment to pay the same to her for her life, and after her decease, then upon the Trusts mentioned in the Deed, in favour of the Defendants, the *Cestuis que Trust*. By a Codicil, 5th March 1811, *S. H.* confirmed her Will, and the Settlement. The 36,000*l.* was afterwards paid to the Trustees, and they invested the same in Government Securities, and applied the Dividends and the Principal according to the Trusts of the Settlement.

The Bill did not state that the Deceased was indebted at the time she made the voluntary Settlement; but charged that it was made in favour of an illegitimate Child, and others, and that the whole was voluntary, and made without good or valuable Consideration, and void against the Plaintiffs, who were Creditors subsequent to the Settlement.

Mr. *Leach*, and Mr. *Abercromby*, for the Plaintiffs:—

The Assets of *S. H.* are insufficient for the payment of her Debts; the Question, therefore, is, whether the voluntary Settlement made by her, can stand against Creditors subsequent to it. The Settlement being in favour of a natural Child is the same as if made in favour of a Stranger; and we contend, that a voluntary Settlement in favour of *Strangers* is always bad, as against future Creditors, even though the Settler was not indebted at the time the Settlement was made,

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The distinction is laid down by Lord *Hardwicke* in Lord *Townshend* v. *Windham* (*a*). "There is no Case where a Person indebted makes a Conveyance of a Real or Chattel Interest for the benefit of a Child, without the consideration of Marriage, or other valuable consideration, and dying indebted afterwards, that that shall take place. There is certainly a difference between the Statutes of Fraud of the 13th *Eliz.* which is in favour of Creditors, and the 27th *Eliz.* which is in favour of Purchasers. But that difference was never suffered by way of general rule to go farther than this. On the 27th *Eliz.* every voluntary Conveyance made, where afterwards there is a subsequent Conveyance for valuable Consideration, though no fraud in that voluntary Conveyance, nor the Person making it at all indebted, yet the determinations are that such mere voluntary Conveyance is void at Law by the subsequent purchase for valuable Consideration. But the difference between that and the 13th *Eliz.* is this; if there is a voluntary Conveyance of Real Estate or Chattel Interest by one not indebted at the time, though he afterwards becomes indebted, if that voluntary Conveyance was for a Child, and no particular evidence or badge of fraud to deceive or defraud subsequent Creditors, that will be good; but if any mark of fraud, collusion, or intent to deceive subsequent Creditors appears, that will make it void; otherwise not, but it will stand, though afterwards he becomes indebted. But I know no Case on the 13th *Eliz.* where a man indebted at the time makes a mere voluntary Conveyance to a Child without consideration, and dies indebted, but that it shall be considered as part of his Estate for the benefit of his Creditors." From these passages, it must

(*a*) 2 Ves. sen. 10.

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be inferred, that a voluntary Settlement, though made by one not indebted at the time, is not good against future Creditors, unless made in favour of a Wife or Child. If it were not so, great frauds might be practised, and a person would be enabled to secure his property against all the accidents of life.

By this voluntary Settlement, the Settler reserves to herself a Life Interest, which in some Cases has been considered as a badge of Fraud, as in *Russell* v. *Hammond* (*b*), and *Stileman* v. *Ashdown* (*c*).

If it should be thought, that in order to defeat this Settlement it is necessary to show she was indebted at the time of making it, the Court, in this Case, which is a Creditor's Bill, will refer it to the *Master* to inquire whether this Lady was indebted at the time of making the Settlement.

Mr. *Hart*, Mr. *Wyatt*, Mr. *Wingfield*, Mr. *Barber*, and Mr. *Garrat*, for the Defendants :—

This voluntary Deed is good against the Plaintiffs, who are subsequent Creditors, it not being charged in the Bill that this Settler was indebted at the time of the Settlement. A man must be indebted, and largely so at the time, to render such a Settlement invalid; mere trifling debts which a person of fortune, in the course of housekeeping must unavoidably incur, would not be sufficient. In *Lush* v. *Wilkinson* (*d*), the *Master of the Rolls* thought the Settler must be insolvent when he made a voluntary Settlement, in order to render it null as to Creditors. There being no charge in the Bill

(*b*) 1 Atk. 13.
(*c*) 2 Atk. 481.
(*d*) 5 Ves. 384.

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that this Lady was indebted at the time of the Settlement, the Plaintiffs are not entitled to an Inquiry before the *Master*, as to that fact.

The VICE-CHANCELLOR:—

Two Questions have been made in this Cause; 1st. Whether a voluntary Settlement by one not indebted, in favour of an illegitimate Child, and others, can be impeached by Creditors subsequent to the Settlement; and 2dly. Whether the Plaintiff, though he has not stated in his Bill that the Settler was indebted when she made the Settlement, is entitled to an Inquiry as to that fact, the Bill being a Creditor's Bill.

With respect to the first point, it appears, that *S. H.* being entitled to 42,500*l.*, makes a Settlement to the extent of 36,000*l.* It is a pure voluntary Settlement in favour of Strangers (for the illegitimate Child cannot be considered otherwise than as a Stranger), without pecuniary Consideration, or consideration of Blood, by one not indebted at the time. It has been strongly insisted that, though a voluntary Settlement by one not indebted, is good against future Creditors, if made in favour of a Wife or Child; yet, that if made in favour of Strangers, as in this Case, it is not effectual against future Creditors.

It was not from any doubt on this point, but only from its general importance, and in deference to the Argument, that I thought it right to look into the Cases.

Let us first see how it stands independent of Authority. The word "*voluntary*" is not to be found either in the Statute of the 13th *Eliz.* c. 5, (upon which the present Question arises), or in the 27th

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Eliz. c. 4. The 13th *Eliz.* is pointed only against "*fraudulent*" Conveyances, as appears from the Preamble; and such Conveyances only are thereby invalidated. Fraudulent Conveyances are such, to use the words of the Preamble, as are "devised and contrived of malice, fraud, covin, collusion, or guile, to the end, purpose, and intent, to delay, hinder, or defraud Creditors." This Conveyance is not one of that description. It is not fraudulent merely because it is voluntary. A voluntary Conveyance may be made of Real or Personal Property, without any Consideration whatever, and cannot be avoided by subsequent Creditors, unless it be of the description mentioned in the Statute. If a Person having 1,000*l.* a year, and not indebted at the time, gives away 500*l.* a year, the Gift is not fraudulent, unless it were made with an intent to defeat subsequent Creditors. Its being voluntary is *primâ facie* evidence, where the Party is loaded with Debt at the time, of an intent to defeat and defraud his Creditors; but if unindebted, his disposition is good. There is no suggestion in the Bill that this Settler was indebted at the time; she was not in Trade; and the Settlement did not include all her Property; 6,000*l.* being left unsettled. She was culpable in becoming the Parent of such a Child, but the Child being born, it was her duty to protect and provide for it. A voluntary disposition, even in favour of a Child, is not good, if the Party is indebted at the time (*e*).

A *Dictum* of *Lord Hardwicke*, in *Townshend* v. *Windham* (*f*) has been much relied on. Supposing

(*e*) Fitzer v. Fitzer, 2 Atk. 511. Taylor v. Jones, 2 Atk. 600.

(*f*) 2 Ves. Sen. 10.

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Lord *Hardwicke*'s words to be correctly reported, they only amount to this, that he is speaking affirmatively, when a voluntary Deed will be good, and so far the proposition is true; but it is not thence to be inferred, that every voluntary Conveyance not in favour of a Child is bad against subsequent Creditors. If, in that passage, the words "*for a Child*" had been omitted, still the proposition would have been correct, and I have Lord *Hardwicke*'s authority for saying so, as will appear from some Determinations of his, which I shall notice. In *Walker* v. *Burroughs* (*g*), his Lordship says, "It has been said, all voluntary Settlements are void against Creditors, equally the same as they are against subsequent Purchasers under the Statute 27th *Eliz.* c. 4; but this will not hold; for there is always a distinction upon the two Statutes (the 13th *Eliz.* c. 5, and the 27th *Eliz.* c. 4.) It is necessary, on the 13th *Eliz.* to prove at the making of the Settlement, *the person conveying was indebted at the time, or immediately after the execution of the Deed,* or otherwise it would be attended with bad consequences, because the Statute extends to Goods and Chattels, and such construction would defeat every provision for Children and Families, though the Father was not indebted at the time." In another passage in the same Case, he says, "Where a man has died indebted, who in his life-time made a voluntary Settlement, upon application to this Court to make it subject to his Debts as real Assets, the Court have always denied it, unless you show he was indebted at the time the Conveyance was executed." Now here, you observe, the proposition is laid down generally, that a voluntary Settlement by one not indebted, is good against subsequent Creditors;

(*g*) 1 Atk. 93. The Reporter has seen a *MS.* Note of this Case, which agrees with the printed Report.

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and it is not said, that to be good such voluntary Settlement must be made in favour of a Child. In *Russell* v. *Hammond* (*h*) Lord *Hardwicke* expresses himself in the same manner. In that Case it was also determined, that where a Father took back an Annuity to the value of the Estate comprised in the Settlement, it was tantamount to a continuance in possession, and a circumstance of fraud; and he relieved the Creditors against the Settlement; but it does not therefore follow that every Interest taken back for Life is to be considered as fraudulent, but only where it is so reserved for the purpose of defeating future Creditors. The meaning, therefore, of what Lord *Hardwicke* said in *Townshend* v. *Windham*, is clearly ascertained by what he said in the other Cases to which I have alluded. In *Lush* v. *Wilkinson* (*i*), a Bill by a Creditor subsequent to a voluntary Settlement made by one not indebted at the time, seeking to impeach the Settlement, was dismissed; and in *Kidney* v. *Coussmaker* (*k*), a voluntary Settlement was held to be fraudulent only against such as were Creditors at the time. In *Sykes* v. *Hastings*, recently determined at the *Rolls* (*l*), the same Rule was acted upon, though the Settlement was made under very extraordinary circumstances. It is clear, therefore, from the Authorities, that a voluntary Settlement of Real or Personal Property, by a person not indebted at the time, nor meaning a Fraud, is good against subsequent Creditors.

With respect to the second point, I am of opinion the Plaintiffs are not entitled to a Reference to the *Master*, to inquire whether the Settler was indebted at the time she made this voluntary Settlement. No

(*h*) 1 Atk. 15.
(*i*) 5 Ves. 384.
(*k*) 12 Ves. 155.
(*l*) A. D. 1814.

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ground for such an Inquiry is laid in the Pleading The Bill does not allege she was indebted at the time, but it is filed on the broad principle, that whether she was indebted or not at the time, the Settlement was bad. In *Lush* v. *Wilkinson*, the *Master of the Rolls* was pressed to direct such an Inquiry, but he refused it, though the fact, whether she was indebted, was put in Issue by the Bill. There, the fact, that she was indebted being alleged in the Bill, but not proved, further Inquiry was refused. In *Kidney* v. *Coussmaker* a further Inquiry was directed; but the *Master of the Rolls* distinguishes that case from *Lush* v. *Wilkinson*. He says, " It is said, as the Creditors have not proved, that the Testator was indebted at the date of the Settlement, that is not now to be made a subject of Inquiry. The case of *Lush* v. *Wilkinson*, cited in support of that proposition, does not resemble this Case. In that Cause the Bill was filed for the express purpose of affecting the Settlement, upon the ground, that the Settler was insolvent at the time it was made. There was no Evidence in support of the Bill; there was Evidence to the contrary produced by the Widow. The only reason for surprise therefore is, that Lord *Alvanley* did not absolutely dismiss the Bill, instead of giving liberty to file another. But in this instance the Creditor, not apprised of the Settlement, filed the Bill to affect all the Devisees; and this Settlement came out in the Answer, which led to Inquiry." Here, the Plaintiffs were apprised of the Settlement, and, as in *Lush* v. *Wilkinson*, the Bill was filed for the express purpose of impeaching it, but no ground is laid for the Inquiry, in the Bill; that Case, therefore, and *Kidney* v. *Coussmaker*, are clear Authorities for refusing the Inquiry. The Bill, so far as

regards the Defendant *F. T.* and the other Parties interested in the Settlement, must be dismissed with Costs; and the usual Decree taken for an Account against the Representatives of *S. H.*

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22d March.
1st April.

Plea of Bankruptcy, to a Bill by Bankrupts seeking a Discovery in aid of their Defence to an Action, and Payment of the Balance found due to them on the taking of the Accounts, and an Injunction in the mean time, overruled.

THE Plaintiffs were Bankrupts, and the Defendants claimed to be Creditors; but instead of seeking Relief under the Commission, they brought an Action against the Plaintiffs.

The present Bill was filed by the Defendants in the Action at Law, stating various Accounts between the Parties, and that on the taking of the Accounts a Balance would be found due from the Defendants; and the Bill stated, that the Plaintiffs "being desirous to have the said Accounts settled, and the Balance paid to them, had applied to the Defendants to come to and concur in a Settlement of the said Accounts, and to pay the Balance which should appear to be due from them on the taking thereof." The Prayer of the Bill was, that an Account might be taken of all the Dealings and Transactions between the Plaintiffs and the Defendants, and between them and any other Person or Persons on joint Account or otherwise; and in case the Plaintiffs should be found liable to the Payment of the Sum of 136*l.* 18*s.* 7*d.* (the Sum for which the Action was brought), that the Defendants might have Credit in Account with the Plaintiffs for such Sum; and that the Monies due to the Plaintiffs from the said Defendants

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on such Dealings and Transactions, might be set off and allowed against the said Sum of 136*l.* 18*s.* 7*d.*, and that all Accounts between the Plaintiffs and the Defendants might be settled," with the usual Prayer for an Injunction in the mean time.

The Defendants pleaded the Commission against the Plaintiffs, and the Proceedings thereunder, as a Bar to the Suit.

Mr. *Bell*, in support of the Bill:—

If a Bankrupt has not obtained his Certificate, and is sued at Law on a Bond or a Note, he is clearly entitled to file a Bill of Discovery, to obtain proof that such Bond or Note was fraudulently obtained. So here, it is contended by these Plaintiffs, that on taking the Account it will be found that nothing is due to these Defendants who are suing the Plaintiffs at Law; and a Bill of Discovery is sustainable.

The Plaintiffs could not plead their Bankruptcy, or defend themselves at Law.

Mr. *Horne*, in support of Plea:—

The transactions stated in the Bill were all antecedent to the Bankruptcy. We have brought an Action, as we had a right to do. Admitting that these Bankrupts might file a mere Bill of Discovery to enable them to defend themselves at Law, this Bill goes farther, and prays, not merely a Discovery, but an Account and Payment to them, which cannot be, as their Assignees are entitled to whatever Balance may be found due to them. The Discovery is sought as ancillary to a relief which they are not entitled to, and, therefore, the Plea is good.

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The VICE-CHANCELLOR:—

If the Plaintiffs were solvent, there is no doubt a Bill for a Discovery, and for Payment of the Balance that might appear due to them on the taking of the Accounts, and for an Injunction in the mean time, would be proper. It is equally clear, and it is admitted, that a Bankrupt may file a mere Bill of Discovery in aid of a Defence at Law; and that this Bill would have been good if it had not prayed Relief. It is clear the Plaintiffs are not entitled to that part of the Relief which seeks the Payment to them of what may appear due on the taking of the Accounts, for that belongs to their Assignees, who are not Parties to this Bill; but I think they are entitled to so much of the Relief prayed, as prays, that the Accounts may be taken; for, in complicated Accounts, as these appear to be (and the Plea must be taken to admit the Statements in the Bill), they have a right to say they will not be satisfied by the mere Answer of the Defendants. They have a right, not only to a Discovery by the Defendants Answers, but also to have the Accounts taken, for they could not be taken at Law. This is not an objection for want of Parties, nor do I think such an objection would have been available.

This is my present impression, but I will look into the Pleadings.

His Honor, on this day, re-stated his Opinion, which, he observed, had been confirmed by looking more particularly into the Pleadings. April 1.

Plea over-ruled.

N.B. On Appeal to the *Lord Chancellor*, 24th July 1816, *His Honor*'s Decision was Affirmed.

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Ex parte KEY, in the Matter of JOSEPH KERNOT, a Bankrupt.

9th April.

Where the Grantor of an Annuity secured by Real Property becomes a Bankrupt, and arrears of the Annuity become due after the Bankruptcy, the Real Security will, on the Petition of the Grantee, be ordered to be sold, and the produce applied in satisfaction of so much of the arrears and value of the Annuity, as the same will extend to satisfy, and the Grantee be allowed to prove the residue under the Commission.

THE Bankrupt, previous to a Commission of Bankruptcy issued against him, dated 28th of December 1810, assigned to the Petitioner certain Real Property, to secure the payment of an Annuity of 330*l.* granted to the Petitioner; and also executed a Warrant of Attorney, as an additional Security.

The Annuity was not in arrear previous to the Bankruptcy; but at the time of presenting this Petition, the Sum of 399*l.* 9*s.* 5*d.* was due in respect of Arrears.

The Petition prayed, that the Premises so charged with the Annuity might be directed to be sold, and that the money arising from the Sale might be paid to the Petitioner, in satisfaction of so much of the arrears and value of the said Annuity as the same would extend to satisfy; and that the Petitioner might be at liberty to prove the residue under the Commission.

Mr. *Hone* for the Petition.

Mr. *Cullen, contra,* insisted, that such an Order could not be made;—1st, because so long a period had elapsed since the Bankruptcy; and 2dly, because Lord *Hardwicke,* in *ex parte Artis* (*a*), appears to have been of opinion, that where an Annuity is secured by Real

(*a*) 2 Ves. sen. 489.

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Estate, it cannot be proved under a Commission; and he contended, that the 49 *Geo.* III. c. 121, sec. 17, does not apply to Annuities so secured. In this Case there were no arrears previously to the Bankruptcy, nor any Penalty then incurred, which distinguishes this Case from *ex parte Whitehead* (*b*), as to which Case I have been informed by one of the Counsel in the Cause that the Security on the Real Estate was given up, and that no point turned upon that.

Mr. *Hone*, in reply:—

The Act is general in its terms, and without any exception. Recently, in *Ex parte Naylor in re Newmarsh*, 18th Aug. 1815, where Freehold and Copyhold Lands had been assigned as a Security for the due payment of an Annuity, the *Lord Chancellor* made an Order according to the Prayer of a Petition like the present (*c*). According to the Report of *Ex parte Whitehead*, the Annuity was secured by Real Estate, and it is not stated that the Securities were given up. There is no Limitation of the time within which a Proof is to be made.

(*b*) Merivale, p. 10. 127.

(*c*) The Order made in that Case was, to inquire, whether the Petitioner had a valid Annuity secured on Freehold and Copyhold Premises and Estates, and to set a value on it, and sell the Premises, and apply the produce in satisfaction of the value; but if not sufficient, the Surplus to be proved; and if it was found the Petitioner had not a good Annuity, to take an account of the Sum advanced for the purchase thereof, and Interest at 5 *per Cent.*, and deduct payments received on account of the Annuity, and the Petitioner to be at liberty to prove the Balance.

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The VICE-CHANCELLOR:—

It is the course in Bankruptcy, when the Penalty for securing an Annuity is forfeited before the Bankruptcy, the Annuity is valued, and proof is made accordingly; but it has been contended that was never done but in the case of a mere *Personal Annuity*, and not when the Annuity was secured on *Real Property*, and *ex parte Artis* before Lord *Hardwicke*, is referred to. He only says how the proof is where it is a Personal Annuity, but it is not thence to be inferred that a different Rule prevails where the Annuity is secured by Real Estate; nor has any Case been cited to establish that distinction. The 49th *Geo.* III. c. 121, s. 17, is framed in general terms, and applies as well to Annuities secured by Real Estate, as to mere Personal Annuities; and it is provided that the Certificate shall be a discharge of the Bankrupt, "against all Demands whatever in respect of the Annuity, and the Arrears and future Payments thereof (*d*)." Prior to the Bankruptcy the

(*d*) The words of the 17th Section of the 49 *Geo. III.* c. 121, are, "And be it further enacted, by the Authority aforesaid, That it shall be competent to *any Annuity Creditor of any Person* against whom a Commission of Bankrupt issues after the passing of this Act, whether the same shall be secured by Bond or Covenant, or Bond and Covenant, *or by whatever Assurance or Assurances the same shall be secured*, and whether there shall or shall not be, or have been, any arrears of such Annuity, at or before the time of the Bankruptcy, to prove under such Commission, as a Creditor for the value of such Annuity, which value the Commissioners shall have power, and are hereby required, to ascertain; *and the Certificate of every Bankrupt under whose Commission such proof be or might have been made, shall be a discharge of such Bankrupt* against all Demands whatever in respect of such Annuity, and the arrears and future Payments thereof, in the same manner as such Certificate

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Creditor had a Personal and a Real Security, but now, after the Bankruptcy, and a Certificate, he loses his Personal Security. If the Certificate is by the Act to bar his Personal Claim, surely the Creditor is to be allowed to prove. In the Case mentioned at the Bar, *Ex parte Naylor*, the *Lord Chancellor* made such an Order as is here prayed; and, in *Ex parte Whitehead*, the question, how such an Annuity as this was to be valued, underwent great consideration; but not a doubt was suggested whether it was a Case where the Annuity ought to be valued; and it does not appear in the Report that the Real Security was given up. This Annuity Creditor is not, therefore, precluded by the nature of his Annuity from making this application; nor does the circumstance that there were no arrears due before the Bankruptcy make any difference, the words of the 49 *Geo.* 3, being general.

The delay in making the application is of no importance. If the Creditor comes in under the Commission, it must be in respect of the Debt as it stood at the time of the Bankruptcy; and whether he comes in immediately, or ten years after the issuing of the Commission, is unimportant. This Creditor must, of course, account for what he has received in respect of the Annuity since the Bankruptcy; he cannot prove the value of the Annuity, as it was at the time of the Bankruptcy, and retain what he has received subsequent to the Bankruptcy.

would discharge the Bankrupt with respect to any other Debt proved, or which might have been proved under the Commission."

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Mr. *Hone*:—

If we are to account for what has been received since the Bankruptcy, we had rather have the Petition dismissed.

The VICE-CHANCELLOR:—

That is for your Consideration. Then let the Petition be dismissed.

N. B. A Petition was afterwards preferred, on the 15th of August, with the same Prayer as in the former Petition; the Petitioner, on consideration, being desirous of proving his Debt, though he should be obliged to give up what he had received since the Bankruptcy. The Case was re-argued by Mr. *Cullen* and Mr. *Hone*; and the *Vice-Chancellor* expressed himself to the same effect as on the former Petition, and directed the Costs of the Petition to be paid by the Petitioner.

8th, 11th, 23d, April.

Under a Bequest by an unmarried Man "to my Children the Sum of Pounds Sterling 5000 each," Parol Evidence allowed to show who the Testator considered in the Character of Children, and they, having obtained a Name by Reputation, admitted to take as a Class, though Illegitimate, and not named in the Will.

SAMUEL BEACHCROFT, MARGARET BEACHCROFT, WILLIAM BEACHCROFT, (since deceased), ELIZA BEACHCROFT, and GEORGE BEACHCROFT, Infants, by HENRY HAKE SEWARD, their next Friend—Plaintiffs.

MATTHEWS BEACHCROFT, and THOMAS SEWARD BEACHCROFT (since deceased), RICHARD ROCHE, and JOHN HARVEY DANBY, and His Majesty's ATTORNEY-GENERAL —Defendants.

SAMUEL BEACHCROFT, resident in the East Indies, made his Will, dated 24th of March 1805,

containing the following Bequest:—" As to the worldly Effects I may stand possessed of at the time of my death, I dispose of them as follows:—It is my will and desire that all my lawful Debts be first satisfied. Out of the residue I give and bequeath as follows: to my Children, the Sum of Pounds Sterling 5000 each; to the Mother of my Children the Sum of Sicca Rupees 6000, which I request my Executors will secure to her in the most advantageous way. To *John Henry Guinard*, employed in my Office, Sicca Rupees 2000. And the residue to be divided equally amongst my surviving Brothers and Sisters. Finally, I constitute and appoint *Richard Roche*, and *John Harvey Danby*, Esqrs., my true and lawful Executors in Bengal, and *Matthews* and *Thomas Seward Beachcroft*, Esqrs., my true and lawful Executors in England."

The Testator died a Bachelor, on the 20th of March 1806, leaving the Plaintiffs, as the Bill charged, his only natural Children by a native Woman, alluded to in his Will, as the Mother of his Children, who also survived the Testator.

The Bill containing these statements, and also stating that the Defendants *Roche* and *Danby* were resident out of the Jurisdiction of the Court, prayed payment of the Legacies to the Plaintiffs—an account, if Assets were not admitted—the appointment of Guardians, and an allowance for maintenance.

The Defendants, *Matthews Beachcroft*, and *Thomas Seward Beachcroft*, by their joint and several Answers, admitted Assets; but insisted the Plaintiffs were not entitled to the Legacies they claimed.

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After these Answers were put in, the Defendant, *Thomas Seward Beachcroft*, died. Exceptions were taken to the Answers; and a further Answer was put in by *Matthews Beachcroft*.

After Publication had passed, the Plaintiff, *Eliza Beachcroft*, died at the age of sixteen, and thereupon a Bill of Revivor was filed against the *Attorney-General*, who by his answer claimed such Interest as His Majesty might appear entitled to.

From the written and Parol Evidence in the Cause, it was clearly proved that the Plaintiffs, *Samuel, William*, and *Margaret Beachcroft*, were acknowledged by the Testator as his Children, and took his name; that they were sent from India to the Defendants, *Matthews Beachcroft*, and *Thomas Seward Beachcroft*, for Education. It was in proof also, that the Plaintiffs, *Eliza* and *George Beachcroft* were born previous to the Testator's Will, and sent after his death to England. The Evidence also, from the correspondence between the Testator and the Defendants *Matthews Beachcroft*, and *Thomas Seward Beachcroft*, clearly showed, that the Testator felt all the tenderness and anxiety of a Parent for the Plaintiffs, *Samuel, William*, and *Mary Beachcroft*.

Mr. *Hart*, and Mr. *Phillimore*, for the Plaintiffs; and Mr. *Mitford*, for the Crown, in the same Interest with the Plaintiffs.

From the whole Will taken together, it is clear that future legitimate Children were not in the Testator's contemplation.

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It is evident, that present, existing Children, were meant by the Testator, and being a Bachelor he must mean his illegitimate Children; and as the Evidence has clearly shown that the Plaintiffs were his illegitimate Children, and acknowledged as such, they are entitled to the Legacies. It was not necessary to name the Children to enable them to take, Evidence being admissible to ascertain them. On this point, *Gordon* v. *Gordon* (*a*), *Earle* v. *Wilson* (*b*), and *Wilkinson* v. *Adam* (*c*), are Authorities. In *Blundell* v. *Dunn* and the *Attorney-General*, before the *Master of the Rolls*, 5th and 8th of July 1808, the Testator, by his Will, 24th of November 1796, gave certain Money in the Funds to Trustees, "In Trust, to pay my Wife, or reputed Wife, *Sarah*, the Sum of 40 *l.* Yearly, for her Life;" and his Trade, Stock, and Implements; and directed his Executors "to educate my Children in the way they think proper;" and after some Legacies, gave the residue and remainder of his Estate and Effects to his Executors, "In Trust, to divide the Interest among my Children that are now living, and also the Child or Children that my Wife is now ensient with, at their respective ages of twenty-one years; and also to divide the Principal at their respective Ages of twenty-one years, Share and Share alike;" and died, leaving his Wife, or reputed Wife, and three Children, the youngest of whom she was ensient with; and the Plaintiff and others, his next of kin. His *Honor* Decreed, that the residue was divisible into three equal parts, and that the part of one of the Children, who died, vested in the Crown. This Case comes very near the present, and shows, that

(*a*) Merivale, p. 141.
(*b*) 17 Ves. 528.
(*c*) 1 Ves. and Bea. 423.

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illegitimate Children may take under the description of Children. So far from being a provision in favour of a future Wife and Children, Marriage and the Birth of a Child, would have revoked the Will.

Sir *Arthur Pigott*, and Mr. *Shadwell*, for the Defendants:—

There are not all the proper Parties to this Suit. All those interested as residuary Legatees, some of whom perhaps are Infants and Femes Covert, ought to have been made Parties.

Undoubtedly, the Court will feel disposed, if it can, to decree in favour of these Plaintiffs; but the Law must be administered on system and principle, however harshly it may operate.

This is a Case depending on the Construction of a Will, and no Case warrants the admission of Evidence to influence such Construction. Here is no *ambiguitas latens*, but only *ambiguitas patens*. No Case has occurred where the word Children in a Will has been held to mean other than legitimate Children. Whenever illegitimate Children have been allowed to take under a Will, they have been clearly designated on the face of the Will. The Bequest is "to my Children" only—no name—no mother—no number, mentioned—no description. It is not said, "now living with me," or, "at such a School," but simply, "to my Children." If the Mother had been named, and the Money was given to the Children of that Mother, there would have been more of certainty. The Law acknowledges no Children but those born in Marriage. An illegitimate Child may be made an object of bounty, provided he is clearly de-

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signated on the face of the Will, but can not take under a Bequest, "to my Children." When a Testator in his Will, uses the word Issue, Heirs, or Children, he is taken to mean, legal Issue, legal Heirs, and legal Children. Suppose this Testator had married after the making of his Will, and had Children, would not those Children take under this Will? Suppose the Testator cohabited with more than one Woman, are his Children by each Woman entitled; or is Evidence to be admitted to show what Children were intended? It would introduce great inconvenience if that were allowed. When this Testator gives "to his Children," and has no Children at the time, the Bequest must be considered as prospective, and as meaning Children in case he should be married. If a Will is capable of two Constructions, such Construction must be given as is consistent with Law.

No doubt an illegitimate Child, if he has acquired a name by reputation, may take, as appears from Lord *Coke* (*d*), and *Blodwell* v. *Edwards*, there referred to, which Case is best reported in *Cro. Eliz.* (*e*); but in this Bequest no Children are mentioned by name. Lord *Coke*'s words are, "*Qui ex damnato Coitu nascuntur inter liberos non computentur*; and, as *Littleton* saith, a Bastard is *Quasi nullius Filius*, and can have no name of reputation as soon as he is born. So it is if a man make a Lease for life to *B.*, the remainder to the eldest Issue Male of *B.* to be begotten of the Body of *Jane S.*, whether the same Issue be legitimate or illegitimate. *B.* hath Issue a Bastard on the Body of *Jane S.*, this Son or Issue shall not take the Remainder; for by the name of

(*d*) Co. Litt. 3. b. (*e*) Page 509.

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Issue, if there had been no other words, he could not take; and a Bastard cannot take but after he hath gained a name by reputation, that he is the Son of *B.* &c.; and therefore he can take no Remainder, limited before he be born; but after he be born, and that he hath gained by time a reputation to be known by the name of a Son, then a Remainder, limited to him by the name of the Son of his reputed Father, is good: but if he cannot take the Remainder by the name of Issue at the time when he is born, he shall never take it."

Wilkinson v. *Adam* (*f*), *Cartwright* v. *Vawdry* (*g*), *Godfrey* v. *Davis* (*h*), and *Swaine* v. *Kinnersley* (*i*), are Authorities to show that illegitimate Children cannot take under the word Children, unless, as Lord *Alvanley* says, they are clearly designated on the face of the Will.

Marriage and the birth of Children would not have revoked this Will, the Will having made a provision for Children; that was determined in *Kenebel* v. *Scrafton* (*k*).

In *Earle* v. *Wilson* (*l*), a Bequest to a Child "of which *A. B.* is ensient *by me*," was held bad, as leading to indecent Evidence. So in this Case, if Evidence is to be allowed, it will lead to indecent Evidence.

The Case alluded to of *Blundell* v. *Dunn* and *Attorney-General*, does not appear to have been much argued. It is distinguishable from the present. The

(*f*) 1 Ves. and Bea. 422.
(*g*) 5 Ves. 530.
(*h*) 6 Ves. 43.
(*i*) 1 Ves. and Bea. 469.
(*k*) 2 East, 530. S. C. 5 Ves. 663.
(*l*) 17 Ves. 523.

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Will on the face of it plainly showed illegitimate Children were meant. The Testator was not married; and the Gift was to "my Children that are *now living*, and the Child or Children my Wife is *now ensient* with," clearly showing he did not mean, prospectively, Children he might have by Marriage.

The VICE-CHANCELLOR :—

23d.

[After stating the Case, and the written and parol Evidence, observed,]

The Evidence unquestionably proves that the Testator had five illegitimate Children, and that three of them, *Samuel*, *Margaret*, and also *William Beachcroft*, (who is since deceased), were recognized by him as his Children in India, bore his Name, and were committed to the care of the Defendant *Beachcroft*, in this country, and recognized in letters by the Testator. It appears also clear, that the Plaintiffs, *Eliza* and *George*, were born previous to the Will.

Parol Evidence is certainly admissible to show the state of the Testator's Family, when he made his Will. In *Goodinge* v. *Goodinge* (*m*), a Rule laid down by *Holt*, *C. J.* was urged; viz. that the intention of the Testator is not to be collected from collateral and foreign circumstances; upon which, Lord *Hardwicke* said, "That Rule is laid down much too large by *Holt*; for in several Cases it is admitted that it must be allowed, viz. where the description or thing is uncertain, (not only where two of the same name) it must be admitted to show that the Testator knew such a person: as where the Testator described a Legatee by

(*m*) 1 Ves. Sen. 231.

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a wrong name, which she never bore, parol Evidence was allowed by the *Master of the Rolls* to show, that the Testator knew such a person, and used to call her by a nick-name. Although parol Evidence cannot be read to prove instructions of the Testator, after the Will is reduced into writing, or declarations whom he meant by the written words of the Will; yet that is different from reading it to prove that the Testator knew he had such relations; to establish which fact it may be read; but not to go any farther. And though this is a nice distinction, yet is it a distinction in the reason of the thing; nor can any mischief arise from admitting it." In *Crone* v. *Odell* (*n*), Lord *Manners* says, "An Argument has been urged by the Counsel for the Defendant, (with a view to exclude the consideration of the state of Testator's Family) that the Court cannot travel out of the Will for that purpose. The contrary, however, has been held to be Law, from the time of *Wild*'s Case, (1 Co. 16,) to the present time. In *Goodinge* v. *Goodinge* the same Argument was urged, and over-ruled by Lord *Hardwicke*; and his opinion upon that point has been confirmed by the uniform decision of Courts of Equity ever since."

The Case to which Lord *Hardwicke* alluded in *Goodinge* v. *Goodinge* must have been *Beaumont* v. *Fell* (*o*), where a Legacy was given to *Catharine Earnley*, no person of which name claimed the Legacy, and Evidence was admitted to show he meant *Gertrude Yardley*. That was an exceedingly strong Case.

Where there is a latent ambiguity in the Will, Parol

(*n*) 1 Ball and Bea. 481. (*o*) 2 P. Wms. 140.

Evidence is admissible to prove the Identity of the thing devised; or, the Identity of the Person intended to take; and whether an Individual, or a Class of Children, are the objects of the Testator's Bounty, it is equally a Case for Parol Evidence. In construing a Will, the intention is the Polar Star, and to discover that, the words and context of the Will must be considered; but if there is a latent ambiguity, evidence is admissible to show who the Testator was in the habit of considering in the character described in his Will. I know of no Rule which prevents illegitimate Children claiming under a class or description, as well as any other Stranger. Such Children are not prohibited from taking, as by the Civil Law; and I see no reason to prevent them taking under a general description. It is immoral to become the Father of such Children, but having them, it is a duty to provide for them; it would be an aggravation of the Father's fault not to do so; and, indeed, by several Statutes (*p*), a Putative Father is compellable to provide for them.

The Evidence then of the state of this Testator's Family being admissible, what is the result of it? When he made his Will, he was unmarried, and had five natural Children. Three of the Children appear to have been objects of his solicitude—he owns them as his Children—gives them his Name—sends them for an expensive Education to this Country, a distant Country, where they would be totally destitute, unless he provided for them. It was natural to expect he would provide for them by his Will; for, whatever the Law may say,

(*p*) 18 Eliz. c. 3. 7 Jac. I. c. 4. 3 Car. I. c. 4. 13 and 14 Car. II. c. 12. 6 Geo. II. c. 31, and see Show. 184.

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Nature is the same, and interests a Father on behalf of his Children, of whatever description they may be. On reading the Will, the first Bequest, after Payment of his Debts, is, "to my Children, &c." What Children? If he had said, "to my *present* Children," they might certainly have taken as a Class, to be ascertained by Evidence; and, being unmarried, he must have meant his illegitimate Children; such as were reputed as his Children; for there is no imperative rule that by the term Children, must always be meant, legitimate Children. In *Wilkinson* v. *Adam* (*q*), Lord *Eldon* says, "Upon the question, whether he could give to natural Children, as a Class, whatever might have been my opinion, if this were *res integra*, the Case of *Metham* v. *The Duke of Devon* (*r*), which has determined that a Testator may give to natural Children, as a Class, has never been disturbed; and if it is to be now disturbed, this is not the place for that." In *Blodwell* v. *Edwards*, best reported in *Cro. Eliz.* (*s*) it was held, a Remainder to an unborn illegitimate Child was not good. The passage cited from *Co. Litt.* (*t*) is very strong to show that where illegitimate Children have acquired a Name by Reputation, they may take under a *Deed*. Why not therefore take under a *Will?* In *Metham* v. *Duke of Devon*, it was held, natural Children might take, as a Class, under an Appointment, "to all the Children of his Son by Mrs. *Heneage*." There is, therefore, the Authority of this Case, and of *Wilkinson* v. *Adam*, where the Bequest was "to the Children which I may have by *Ann Lewis*," to show that illegitimate Children may take as a Class, though not named, if they have obtained

(*q*) 1 Ves. and Bea. 467.
(*r*) 1 P. Wms. 529.
(*s*) p. 509. S. C. Moore, 430. Noy, 35. 2 Roll. Abr. 43.
(*t*) Co. Litt. 3, b.

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a Name by Reputation; and notwithstanding all the difficulty attending the Inquiry as to whose Children they were.

When certain words have acquired a fixed technical sense, they must, when used, unless otherwise explained in the Will, be taken in that sense, but from the time of *Elizabeth* the word *Children* has had a primary and a secondary sense; in one sense, meaning legitimate Children; and in another, illegitimate Children.

No Case has been found where, when the word Children has been used in the Will of a Putative Father who has no legitimate Children, it has been held that illegitimate Children cannot take. In *Cartwright* v. *Vawdry* (*u*), the Testator had legitimate as well as illegitimate Children; and there, no doubt, under the term Children, legitimate Children must be supposed to be meant; and the word taken according to its primary sense. The same observation applies to *Swaine* v. *Kinnersley* (*x*), and *Godfrey* v. *Davis* (*y*). The question in those Cases was, *utrum horum*; and wherever there is a conflict between the two claims of existing legitimate and illegitimate Children, under a Bequest "to Children," the Will must be taken to mean legitimate Children. *Gordon* v. *Gordon* (*z*), and *Earle* v. *Wilson* (*a*), do not apply; the question in those Cases being, whether afterborn illegitimate Children can take, they not having obtained a Name by Reputation—that is not the case here.

(*u*) 5 Ves. 530.
(*x*) 1 Ves. and Bea. 469.
(*y*) 6 Ves. 43.
(*z*) Merivale, 141.
(*a*) 17 Ves. 523.

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Blundell v. *Dunn* is another Case in which illegitimate Children were allowed to take, as a Class, under a bequest to Children. There the *Master of the Rolls* held there was a sufficient *designatio personarum*. The Cases, therefore, incontestably prove, that illegitimate Children may take under a Bequest to Children, where the intention is clear that they were intended to take. In *Wilkinson* v. *Adam*, and *Blundell* v. *Dunn*, the intention appeared on the face of the Will. In this Case, it is said there is no intention in favour of the Plaintiffs apparent on the face of the Will—nothing to show what Children were meant. This is, certainly, the difficult part of the Case; for though no person can doubt from circumstances *dehors* the Will, who were intended, yet the Court must decide upon the Will itself. "We may conjecture," says Lord *Eldon*, in *Wilkinson* v. *Adam* (*b*), "that he meant illegitimate Children, if he did not marry: yet notwithstanding that may be conjectured, the Opinion of the Court was, as mine is, that where an unmarried Man, describing an unmarried Woman as dearly beloved by him, does no more than make a provision for her and her Children, he must be considered as intending legitimate Children, as there is not enough upon the Will itself to show that he meant illegitimate Children; and my Opinion is, that such intention must appear by necessary implication upon the Will itself." This passage is very strong against these Plaintiffs. In another passage the same great Judge says, "With regard to that expression, "necessary Implication," I will repeat what I have before stated from a note of Lord *Hardwicke*'s Judgment in *Coriton* v. *Hellier*, that in construing a Will,

(*b*) 1 Ves. and Bea. p. 465.

Conjecture must not be taken for Implication: but necessary Implication means, not natural Necessity, but so strong a Probability of Intention, that an Intention contrary to that which is imputed to the Testator cannot be supposed (*c*)." This passage is admonitory to Judges.

Every word of this Will must be looked into. I have already considered what would have been the effect of a Bequest to " my *present* Children." The Testator does not appear on the face of the Will to be unmarried; there is a latent ambiguity; and Evidence is admissible to find persons to fit the description. All the Authorities lead to that conclusion. The word *present* is not introduced in this Will. Can then " my Children" be construed in the same manner as if the words were " to my present Children?" It has been argued, that this Testator looked forward to future legitimate Children, and therefore there is nobody to compete with these Plaintiffs, respecting the meaning of the words, " my Children." He meant, it is said, to provide prospectively for future legitimate Children, and that the Case is not like a provision for " my *present* Children."

Taking into consideration the state of the Testator's Family at the time of making his Will, it is impossible to doubt in which of the two senses he meant to use the term, Children. The general presumption is, that a Man sitting down to make his Will designs a benefit to some existing object; he seldom looks only to the future. It is extravagant to suppose, that this

(*c*) 1 Ves. and Bea. p. 466.

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Testator had only future possible Children in view, disregarding wholly, and leaving destitute, those whom he was in the habit of denominating and treating as his Children,—that he should manifest a parental solicitude for Children who did not yet exist, and at the same time exhibit none for those who did, who were known to, and tenderly beloved by him. Giving to each a definite portion, 5000*l.*, and the ultimate residue to his collaterals, shows, that he had a definite number in view; and that he recognized his legitimate Relatives as having a preferable Title to a part of his Fortune. That is rational enough if he was providing for illegitimate Children; but is very unlikely if he was providing for future legitimate Children. "My Children" imports, Children he then had. For all these reasons, I think it is reasonable to interpret the words "my Children" in the same way as if he had said, "my present Children." But this Construction of the Will does not depend merely upon the first Clause of it; for the next Clause clearly shows what was meant. "To the *Mother* of my Children, the Sum of Sicca Rupees 6,000, which I request my Executors will secure to her in the most advantageous way." Was that a Provision proper for the intended Wife of a Man of his Fortune? Is it probable, that after giving one whom he thought fit to be his Wife so small a Sum, he should think it necessary that his Executors should secure it for her? Did any body ever describe his Wife by the term, "*Mother* of my Children? If she had no Children she would not have taken under this Bequest. This second Clause of the Will is explanatory of the first; for when once it is understood, he therein meant to describe some person who had already become the Mother of his Children he then had, he must, under

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the term "Children," have comprehended Children already born, and, consequently, as he was unmarried, his illegitimate Children; and he must be supposed to have used the same word Children in the preceding Clause in the like sense. I think, therefore, it is clear, that existing persons were meant, and that they take, as in the Case of *Wilkinson* v. *Adam*, as designated persons. This applies to the three Children, *Samuel*, *Margaret*, and *William*; and though the two last, *Eliza* and *George*, have not the same Evidence to distinguish them as recognized by the Testator as his Children, that will not prevent their having the benefit of the same course of reasoning; for it being ascertained that the Testator meant living Children, it must be referred to the *Master* to inquire what persons answer the description of his Children; as, where a bequest is made to "Grand-Children," it is referred to inquire who answer that description. They fall under the same Class.

These are the circumstances which have led me, after much consideration, to decide in favour of the Plaintiffs. I am far from intending to sacrifice Principles for the sake of a particular Case; but, after examining this Case according to established Principles and Authorities, I think, *ex visceribus* of the Will, the Legatees whom this Testator must have intended to describe, were not the possible Progeny of a future Marriage, but existing Persons, Children already born; uniformly designated and recognized by him in that character.

8th April.

Ex parte KINGDON *in re* SNELL.

Solicitor on his own Behalf presenting a Petition in Bankruptcy, Attestation dispensed with.

A PETITION was presented in Bankruptcy, by a Solicitor, and as he could not attest his own Signature to the Petition, they refused at the Bankrupts Office to receive the same, without an Order of the Court, there being no signature, as required by Lord *Eldon*'s General Order (*a*).

Mr. *Pepys* applied, under the circumstances, that the Petition might be ordered to be received without an Attestation; and the *Vice-Chancellor* made the Order.

24th April.

BROWN and another *v.* DOWTHWAITE.

Annuity granted in Consideration of a reversionary Interest in Stock need not be enrolled under Stat. 17 Geo. III. c. 26.

Residuary Legatees not necessary Parties to a Suit against an Executor.

ARABELLA TEMPLE, since deceased, being entitled to 700*l.* 3 *per Cents.*, standing in her Name, and desirous of increasing her yearly Income, agreed with *Simon Temple* that he should pay her an Annuity of 35*l.*, in consideration of which she agreed to assign to him the said 700*l.* 3 *per Cents.* so as to become his Property at her Death; she to receive the 35*l.* Annuity, and the Dividends of the 700*l.* during her Life. This Agreement was carried into effect by a Deed of Three Parts, dated August 1, 1795, between *Simon Temple* of the First Part, *Arabella Temple* of the Second Part, and *Thomas Zouch*, and *James Newsham*,

(*a*) 12 Aug. 1809. See Order ante, p. 75. in Note (*a*).

as Trustees, of the Third Part, by which *Simon Temple* granted the Annuity of 35*l.* to *Arabella Temple*; and she assigned to the Trustees the 700*l.* 3 *per Cents.* in Trust, to pay her the Dividends during her Life, and after her Death to transfer the 700*l.* 3 *per Cents.* to *Simon Temple*.

Arabella Temple received the Annuity and the Interest of the 700*l.* during her Life, and she by her Will appointed the Defendant her Executor, and he proved the Will.

The 700*l.* 3 *per Cents.* had not been transferred into the Trustees Names, but at the Death of *Arabella Temple*, in 1811, stood in her Name in the Books of the Bank.

Simon Temple on the 19th July 1811, was declared a Bankrupt, and Assignees were chosen, which Assignees, together with the Bankrupt, assigned all the Real and Personal Estate of the Bankrupt to the Plaintiffs.

The Bill stating these Facts, prayed, That the Defendant might be decreed to transfer the 700*l.* 3 *per Cents.* to them, and the Dividends accrued thereon since the Death of *Arabella Temple*, or, that if the Indenture of the 1st of August 1795 was null and void, prayed an Account of the payments made in respect of the Annuity, and payment thereof, by the Defendant, &c.

The Defendant by his Answer admitted the Facts stated in the Bill; and stated that the Residuary Legatees of *Arabella Temple* had claimed the 700*l.* 3 *per Cents.*

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Mr. *Bell*, and Mr. *Raithby*, for the Plaintiffs :—

They cited *Jackson* v. *Lever* (*a*), and *Crespigny* v. *Wintenoom* (*b*), from which Cases they concluded, that a Memorial of the Annuity was unnecessary.

Mr. *Roupell*, for the Defendant, argued that, there being conflicting claims on the Fund, the Executors thought it proper to act under the directions of the Court. The Residuary Legatees of *Arabella Temple* ought to have been made parties to the Suit; especially as it may be necessary to take an Account of the Estate of the Testatrix, *Arabella Temple*.

The Question here arises upon the *Annuity Act* (*c*). The Sale of this Stock must be considered as a Money Consideration for the granting of the Annuity, and being so, a Memorial of it ought to have been registered, which was not done in this Case, and therefore the Contract became null and void to all intents. The Stock was convertible into Money immediately, and must be considered as Money. This Case does not fall within the exceptions in the Act.

Mr. *Bell*, in reply :—

It was not necessary that these Residuary Legatees should have been made Parties; it is sufficient to bring the Executor before the Court; that has been repeatedly decided.

(*a*) 3 Bro. C. C. 605.
(*b*) 4 T. R. 790.
(*c*) 17 Geo. III. c. 26. sec. 8. This Act is repealed by 45 Geo. III. c. 141, except as to Annuities granted before the passing of the Act.

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The VICE-CHANCELLOR:—

This is an ungracious attempt to set aside the Annuity after an Enjoyment of it by *Arabella Temple* for sixteen years. Nothing is stated to show unfairness in the Transaction. This Case is decided by *Crespigny* v. *Wintenoom*, which is, in principle, the same. Nothing was immediately paid to the Grantor. Because the Stock might have been immediately sold, it is not therefore to be considered as Money. No Memorial was necessary.

The Objection as to the want of Parties is untenable.

Bill dismissed with Costs.

ADNEY *v.* FLOOD.

27th April.

Amendment of Bill after Exceptions to Answer allowed, does not prejudice an Injunction previously obtained.

MR. WYATT moved for leave to amend the Bill, without prejudice to an Injunction which had been obtained, Exceptions having been taken to the Defendant's Answer, and allowed, but not yet answered.

The VICE-CHANCELLOR:—

You may take the Order to amend. The words in your Notice of Motion, "without prejudice to the Injunction" were unnecessary; for in this Case, your Amendment will not affect the Injunction.

Motion granted (*a*).

(*a*) If Exceptions had been taken, and before the argument of them the Motion had been made, it would have been necessary to have made it a Term of the Motion, that the Amendment should be without prejudice to the Injunction. *Dixon* v. *Redmond*, 2 Sch. and Lefr. 515: and see Edwards v. Johnson, 1 Price, 204.

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Where a Legacy is left to a Feme Covert, and the Assignees of the Husband agree with the Executors, on a Claim made for a Settlement, to take only a part of the Legacy, and the Feme Covert dies, leaving a Child, such Child is entitled to the residue of the Legacy, under the Contract.

The Child of a Feme Covert, a Legatee, has no Equity to insist on a Settlement, after the death of the Mother, unless there is a Contract, or a Decree for a Settlement, in the Lifetime of the Mother.

DAVID JONES, by his Will, 29th September 1798, bequeathed to *David Lloyd*, *Eleanor Lloyd*, *Evan Lloyd*, and *Mary Lloyd*, 500 *l.* each, to be paid them at twenty-five, with benefit of survivorship in case any of them died under that Age, without leaving any lawful Issue. He also gave to them, in the same manner, the residue of his Property, after payment of some other Legacies; and appointed *Thomas Williams*, *David Lewis*, and *Samuel Pride*, his Executors.

The Testator died on the 18th January 1799, and the Executors proved the Will. *Lewis* and *Pride*, two of the Executors, soon after died, without having possessed themselves of any part of the Testator's Estate.

David Lloyd, one of the Legatees, attained twenty five, on the 24th September 1803.

Evan Lloyd died before he had attained twenty-five.

Mary Lloyd married the Defendant *David Johnstone*, and attained twenty-five on the 15th March 1808.

Eleanor Lloyd attained twenty-five on the 8th March 1810.

On the 5th February 1807, a Commission of Bankrupt issued against *David Johnstone*; and the Defendants, *Parkes* and *Watson*, were chosen Assignees.

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An Agreement was made between the Assignees and *Williams*, the Executor, whereby, in consideration of a Sum to be paid to the Assignees, a Settlement was to be made upon *Mary Johnstone* and her Children, out of the Legacy of 500 *l.*; and in pursuance of this Agreement, a Release, dated the 20th June 1808, was executed by the Assignees to the Executor, *Williams*. No Settlement was made in pursuance of the Agreement.

Johnstone the Bankrupt obtained his Certificate in the Life-time of his Wife.

Mary Johnstone died leaving a Daughter, *Diana Lloyd Johnstone*.

The Bill was filed by *David* and *Eleanor Lloyd*, against *Thomas Williams*, the surviving Executor; *David Johnstone* the Bankrupt, against *Diana Lloyd Johnstone*; and also against *Parkes* and *Watson*, the Assignees of *Johnstone*, praying, an Account against *Williams*, and that the respective rights of the Parties might be declared.

David Johnstone, by his Answer, insisted, that having obtained Letters of Administration to his Wife, he was, under the Release by the Assignees and Creditors, entitled to the balance of the Legacy of 500 *l.* and the One-Fourth Part of the Residue given to his Wife, and to her surviving Share in the Legacy of 500 *l.* left to *Evan Lloyd*, and also to her, by reason of the decease of *Evan Lloyd*.

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Diana Johnstone, the Infant, by her Answer, claimed to be entitled to all such Right and Interest as she would have had if a Settlement had been made.

The Assignees answered separately. *Parkes* claimed to be entitled to *Mary Johnstone*'s Share of *Evan Lloyd*'s Legacy of 500 *l.*, and to her share of *Evan Lloyd*'s Fourth Part of the residue of the Testator's Personal Estate. *Watson*, the other Assignee, made no claim.

Sir *Arthur Pigott*, and Mr. *Parker*, for Plaintiff:—
The claims of the Plaintiff cannot be resisted, and an Account must be directed as prayed. The only points in dispute are between the Defendants, with which we have no concern.

Mr. *Cooke*, and Mr. *Maddock*, for the Defendant, *Diana Johnstone*, the Infant:—
There can be no doubt, that as to the 500 *l.* Legacy, and the One-Fourth Part of the Residue given to *Mary Johnstone*, after the payment to the Assignees, included in the Release of the 20th June 1808, the Infant is entitled to it. The Agreement and Release made by the Assignees was in consequence of the claim of the Bankrupt's Wife to a Settlement on her and her Issue, and the Bankrupt's Wife being dead, the Infant is entitled. We also insist, that, as what accrued due in respect of *Evan Lloyd*'s death was intended to have been included in the Release, that also ought to be settled on the Infant; but supposing the Assignees have a claim to that as not being, in fact, included in the Release, the Infant

is, nevertheless, entitled to a Settlement out of it; there being an Equity which entitles the Infant to a Settlement out of the Share of the Mother in this surviving Legacy, though her Mother is dead. There are several Authorities which countenance this claim of the Infant. *Grosvenor* v. *Lane* (*a*), *Cockell* v. *Phipps* (*b*), *Rowe* v. *Jackson* (*c*). In *Murray* v. Lord *Ellibank* (*d*), the *Master of the Rolls* says, "The Question has been made, whether the Children have any substantive and independent right to claim a Settlement after the death of their Mother, if a Settlement was not directed during her Life. In the case of *Hearle* v. *Greenbank* (*e*), Lord *Hardwicke* appears to state that as a doubtful point; and, that he conceived there was no Case determining that the Children have such right. His Lordship seems not to have recollected the Case that was before him, *Grosvenor* v. *Lane* (*f*), in which he took notice of such a Decree; though the Question before him was not upon the point. That was the case of the second Husband endeavouring to reduce his Wife's fortune into possession; and the Court directed a Settlement upon the Child: the immediate point in the Cause before Lord *Hardwicke* turning upon the right of the Child absolutely to the whole Legacy, in consequence of an appropriation of it by the second Husband. In a subsequent Case, *Scriven* v. *Tapley* (*g*), Sir *Thomas Clarke*, as a matter of course, taking it as the ordinary Equity, directed a proposal by the representative for a Settlement upon

(*a*) 2 Atk. 179.
(*b*) 1 Dick. 391.
(*c*) 2 Dick. 604.
(*d*) 13 Ves. 7.
(*e*) 3 Atk. 695; see p. 717.
(*f*) 2 Atk. 180.
(*g*) Amb. 509.

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the Child, the Wife being dead. That part of the Decree, it is true, was reversed by Lord *Northington*; but the Opinion, that the Children have that Equity in their own Right, and independent of any claim through the Mother, prevailed so much, that, notwithstanding that reversal, in a year and a half afterwards Sir *Thomas Sewell*, in *Cockell* v. *Phipps* (*h*), made precisely the same Decree. Every one knows how intimately Sir *Thomas Sewell* was acquainted with the practice of the Court. There is therefore a great deal of Authority in opposition to that decision by Lord *Northington* in *Scriven* v. *Tapley* (*i*); all weighing strongly in favour of the Right of the Children claiming under a Decree in favour of their Mother; for, if their Right to come with an original Demand for a Settlement upon them, their Mother having died without demanding any Settlement, is established, *a fortiori*, if she has claimed, and the Court has directed a Settlement, the Children must be entitled. As to that, there are very few Cases: but all are one way. The Doctrine, as far as there is any Memorial of it, is uniform; and it is upon the uniform, habitual, Doctrine of the Court that you are least likely to find Cases; and in the Cases that have occurred the Court has interposed, not upon any controversy between the Parties, but upon its own Doctrine. In *Martin* v. *Mitchell* (*k*), the Husband claimed the Fund, and the Court would not permit him to take it; but directed the former order for a Settlement upon the Wife to be prosecuted. In *Rowe* v. *Jackson* (*l*), a similar application appears to

(*h*) 1 Dick. 391.
(*i*) 1 Amb. 509.
(*k*) Stated 10 Ves. 84.
(*l*) Ibid.

have produced a similar refusal; and both these Cases were before Lord *Thurlow*. No ground is laid, upon which I should be induced to depart from the established Doctrine. We can look no where but to the practice of the Court for the Extent of that Doctrine. Here we find it. There is no instance in which the Husband has succeeded in getting Money out of Court without making a Provision for the Children." This is a clear, reasoned opinion, in favour of the Infant's Equity.

Sir *Samuel Romilly*, and Mr. *Roupell*, for the Defendant, *David Johnstone*:—

With respect to the 500 *l.* Legacy, and the Fourth Part of the Residue, included in the Release of the 20th June 1808, no claim, certainly, can be made; but with respect to the Interest which survived to *Mary Johnstone* in the Legacy left to *Evan Lloyd*, and his Fourth Part of the Residue, the Bankrupt is entitled, the Assignees making no Claim (*m*).

Where a Legacy is left to the Wife, and she dies, her Issue cannot, as against her Husband, or his Assignees, claim any part of the Legacy. The Wife, no doubt, in her Life-time, is entitled, if she chooses, to a Settlement out of the Legacy; but after her Death there is no Equity entitling her Issue to a Settlement. That was expressly decided in *Scriven* v. *Tapley*, by Lord *Northington*, on an Appeal from the Rolls. When *Murray* v. *Ellibank* was before the *Lord Chancellor*, he

(*m*) The Assignees and the Bankrupt had agreed to share in certain proportions, if the Decree should be in his favour.

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appears to have had no idea, nor was it contended in argument, that the Issue had an Equity to a Settlement after the Death of the Mother; all that was contended for them was, that proposals having been laid before the *Master* for a Settlement, the Death of the Wife in such case did not prevent the claim of the Issue. If the Issue had any claim independent of the Wife, it could not be given up by her consent; but it is clear, that if the Wife consented to give up her claim, the Issue have no right to insist on a Settlement. *Grosvenor* v. *Lane* is not in opposition to *Scriven* v. *Tapley*, for in that case Lord *Hardwicke* relied on an appropriation which had been made of the Legacy in favour of the Child.

Mr. *Shadwell*, for the Assignees, said they now made no claim to any part of the Legacy.

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

30th April.

The first point to be considered is, the effect of the Agreement of the 20th June 1808, between the Assignees of *Johnstone* and *Williams* the Executor. It is contended on the part of the Infant, that she is entitled to what her Mother would have been entitled to under that Agreement, and as if a Settlement had been made on the Mother and her Issue; and on the part of the Husband, it is said he is entitled to the Property, he having survived and administered to his Wife, and his Assignees making no claim against him. *Johnstone* and his Wife were not Parties to the Contract; but it recites that *Mary Johnstone* had made a claim on behalf of herself and her Issue. This Contract did not embrace what accrued by survivorship to the Wife on the Death of her Brother *Evan Lloyd*, but only what

remained due to her in respect of her Legacy of 500*l.* and her One-Fourth of the Residue; and as to the Mother's surviving Share in the Legacy left to *Evan Lloyd*, the question is, whether, the Wife being dead, her Child has any claim.

If a Bill had been filed against *Williams* for payment of the Legacy, it has long been settled the Assignees are not entitled to the whole Legacy, but must make a Settlement on the Wife and her Issue; it being quite clear, that if any Settlement is made, it must be on the Wife *and* the Issue. When the Assignees claimed the Legacy from *Williams*, the claim to a Settlement was urged—it was a well-founded claim, and formed the basis of the Contract by which the Assignees agreed to take 140*l.* in lieu of all their claims upon the Legacy.

I am therefore of Opinion, that by this Contract *Williams* became a Trustee for the Wife and Children, as to so much of the Legacy as was given up by the Assignees, and that *Williams* had no option, but might have been compelled to settle it on the Wife and Children; and the Death of the Mother cannot disappoint the claim of the Child. The Infant, therefore, is entitled to so much of the original Legacy of 500*l.* to *Mary Johnstone*, as remains unpaid, and to her One-Fourth Part of the Residue.

With respect to the claim of the Infant to the Share which survived to her Mother, on the Death of *Evan Lloyd*, that falls under a different Consideration.

The Mother died without having claimed any right to this survived Share, or to a Settlement out of it;

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but the Infant claims a Settlement out of it, as having an Equity.

This claim arises between Co-Defendants,—between the Infant, and the Father and his Assignees. It should, properly, be the subject of a Bill; but as these Parties, to save Expense, are desirous of my Opinion, it must be decided as if a Bill were filed by the Infant.

The Counsel for the Infant have, very properly, rested her claim upon Authority, and not on Principle; contending, there is a preponderance of Authority in favour of the Infant's claim, and that as there is an Equity on behalf of the Wife to a Settlement, so on her Death an Equity survives to her Issue.

It is difficult to discover the ground of the Wife's Equity, and still more difficult to discover on what foundation the Child's Equity rests. Something may be said on behalf of the Wife's Equity, the Property being left to her, and having no Settlement; but what Title has the Child?—it was not the Child's Property—the Child, therefore, calling upon its Parent for a Settlement is an anomalous Equity. The Law gives the Parent a right to dispose of his Property, a power of disinheriting his Children; and, therefore, how a Child can come into Court to claim a Settlement out of its Parent's Property, it is not easy to comprehend. The Wife might have disappointed the claims of the Child even after a Decree for a Settlement on her and her Issue. She might have come into Court and have consented to give up the Property, and her Issue would have been remediless. If the Equity could not be set up against the Mother, on what ground can

it be supported against the Father, after the death of the Mother. The Infant is no more entitled to a Settlement out of this survived Legacy, than she would be out of any other Property which devolved to her Father. It is very clear, therefore, that this claim of the Infant is not founded on Principle. When it was stated to rest on Decision, I felt that nothing but very strong and clear Authority could induce me to countenance so extraordinary a claim. I do not wonder that the Counsel should insist so much on Authority, since that eminent Judge, the present *Master of the Rolls*, in the passage quoted at the Bar, from *Murray* v. Lord *Ellibank*, has intimated an opinion in favour of a substantive, independent, Right in the Child. In justice, however, to this excellent Judge, it must be observed, it was not the very point in the Cause; and that the main question there decided, conformably to several Authorities, was, that after a Decree for a Settlement on the Wife and her Issue, and the Wife dies, the Infant is entitled. I thought it my duty to look into the Cases upon which the *Master of the Rolls* founded his Opinion in favour of the Infant, and have consulted the Register's Book, and in the Result, I am fully satisfied that there is no material contradiction in the Cases, and that the Right of the Child can arise only out of *Contract*, or under a *Decree*.

Grosvenor v. *Lane* (*n*) is the Case most relied upon as showing a substantive, independent Right in the Infant. It came on upon Exceptions, and Lord *Hardwicke* declared, "That the Sum of 1,599*l.* which was originally the Share of Susan Lane, the Mother, hath been well

(*n*) 2 Atk. 180.

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appropriated, and doth, in Equity, belong to the Plaintiff, the Infant.

I have looked into the Decree in this Cause by Lord *King*, in 1732, mentioned by Lord *Hardwicke*, and from the Bill and Proceedings which appear in the Register's Book, *Lib.* B. 1732, p. 175, it is clear, the Decree was founded on a Deed which was in Evidence, and particularly mentioned in the Decree, executed by *Lane* and his Wife, settling the Property to which Mrs. *Lane* was entitled under the Will of her Father, Mr. *Phipps*. The point, therefore, under consideration was not raised in that case. In *Milner* v. *Colmer* (*o*), a Case which occurred a short time previous to the Decree of Lord *King*, to which I have been adverting, his Lordship thought it extraordinary that this Court should interpose against the Husband in Cases where the Law gives him a Title to the Wife's personal Estate; and doubted, experience had shown, that such interposition, unless where the Husband has appeared to be a profligate or extravagant Man, had been the occasion rather of mischief than good. This shows the inclination of Lord *King* on this subject. He therefore, in *Grosvenor* v. *Lane*, went upon the Assignment by *Lane* and his Wife. No adverse claim was set up by *Peake*, the second Husband; and when the Cause came before Lord *Hardwicke*, two Letters of his were read, in which he expressed his opinion that *Catherine Lane* should have what was claimed; and upon those Letters Lord *Hardwicke* considered the Money as appropriated. Such appropriation was in pursuance of the Deed executed by *Lane* and his Wife. This Case, therefore, of *Grosvenor* v. *Lane*, is not an

(*o*) 2 P. Wms. 641.

Authority for the position, that the Daughter has a substantive, abstract, Right.

In *Phipps* v. *Anglesea*, cited from MS. in Mr. *Fonblanque*'s Notes on the *Treatise of Equity* (*q*), the Fund was in Court, and a Decree that it should be secured for the benefit of the Wife and her Issue till the Husband made a Settlement. The Husband died, and the Wife, having survived, was held entitled to the absolute Property, though there was Issue of the Marriage. In *Packer* v. *Wyndham* (*r*), it was held that Money in right of the Wife, paid into Court, might be detained till the Husband made a Provision: "but the Wife," says the *Lord Chancellor*, "being now dead, and no Children to be provided for, the reason of their keeping the Money from him is at an end; and then, *Equitas sequitur legem*, and must give it to the Husband's Representatives, to whom by Law it belongs." In *Hearle* v. *Greenbank* (*s*), Lord *Hardwicke* says, "It is insisted, as Mr. *Winsmore* had made no Provision for his Wife, or the Issue of the Marriage, that his Assignees shall not be permitted to touch this till they have made some provision for the Issue of the Marriage, and so it was held in two Cases before Lord Chancellor *Cowper*; and I was also clearly of the same Opinion in the Case of *Jewson* v. *Moulson*, but I can find no Case where the Court have done it in the Case of Assignees of a Bankrupt after the death of the Bankrupt's Wife: and here too the Issue of the Marriage is so well provided for, that I am of Opinion the Court ought not to make this the first Precedent of it, whatever they might do in a Case not so circumstanced."

(*q*) 1 Vol. p. 97.
(*r*) Prec. Ch. 418.
(*s*) 3 Atk. 717.

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If Lord *Hardwicke* is supposed to have meant that the Infant after the death of its Mother stood in the same situation as its Mother, and that he was of that Opinion in *Jewson* v. *Moulson*, he was incorrect, because in that Case no such point was determined (*t*). If in *Grosvenor* v. *Lane*, Lord *Hardwicke* had given an opinion in favour of the Child's Equity, the Mother being dead, he would not in this Case of *Hearle* v. *Greenbank* have said "there was no Precedent of it." He was certainly right in saying there was no Precedent —no such thing had been decided in *Grosvenor* v. *Lane*, as I have shown; and *Hearle* v. *Greenbank*, therefore, is a strong Authority to show there is no such Equity.

The next Decision I shall mention, is, the *Anonymous Case*, in *Vesey* (*u*). There, on a Bill by the Husband to obtain Personal Estate in right of his Wife, the Husband was directed to make a proper Settlement, and *Proposals* for that purpose were laid before the *Master*, signed by the Husband and Wife, by which he was to settle an Estate in *Jamaica* in strict Settlement; but before it was absolutely concluded on, they went to

(*t*) *Hearle* v. *Greenbank* is also reported in 2 Ves. sen. 298. and the language of the Report as to this point in p. 308, varies from *Atkyns*. "Next as to the Aunt's Personal Estate, a question has been started, whether, if the Assignees are entitled thereto, (the Husband gaining a Matrimonial Right which survives to him, and cannot be affected by the power of Appointment), they can claim it in Equity without being obliged to make a Provision for the Daughter? In *Jewson* v. *Moulson* I was of Opinion that the Assignees have been compellable to make a Settlement for *a Wife*, where the Husband had made none. But I can find no Case where it has been done for a Child: I do not say it cannot; but there are reasons here why it should not."

(*u*) 2 Ves. sen. 671.

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Jamaica, where they staid six years, and now preferred a Petition, there being no Children living, and insisted on not being bound by the Proposal, the Wife saying she should be contented with her Dower; but Lord *Hardwicke* would not grant it, observing, " though the Wife might give up her Interest in this Money if she pleased, yet nobody could consent for the Children which *may be*. *The Proposal was binding*; and if the Husband had died before he came home, and left Children, under these Articles there would be a right to have it carried into execution; and the Court has laid hold of a circumstance much less strong than so formal an Agreement as this was, to refuse what is now desired."

The next Case is *Scriven* v. *Tapley* (*x*), determined by Lord *Northington*. The Note of it in *Ambler* is short; but I have consulted the Register's Book, and the result is stated correctly in the Report. There, the Husband had survived his Wife six years, and had not reduced into possession the Legacy given to her; and on a Bill filed, *The Master of the Rolls*, Sir *Thomas Clarke*, decreed to him the Legacy, subject to a Provision for his Daughter. *Ambler* says, the Wife died, leaving *Children*; but that is not correct, she only left a Daughter. This was the first declaration of the right of a Child to a Provision in these cases, the Wife being dead; but this Decree was appealed from, to Lord *Northington*, and he reversed it; saying, as appears in *Ambler*, " The compelling Settlements at first arose upon the Husband coming here for assistance. *It is personal to the Woman*. If carried further it would be attended with ill consequences to

(*x*) Ambler, 509.

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Creditors." This Case has been recognized in subsequent Decisions. Though, as Lord *Northington* says, "the compelling Settlements at first arose upon the *Husband* coming here for assistance;" yet the Court has gone further, for on a Bill filed by the *Wife*, they have given her a Settlement. No Case has trenched upon *Scriven* v. *Tapley*; from that time the Decisions have uniformly been according to that Case.

The next Authority is *Cockel* v. *Phipps*, which, from the Report in *Dickens* (*y*), appears to be a Case in favour of the Infant; but on consulting the Register's Book, the matter is explained. In that Case, *Phipps*, the Testator, had four Children—two Sons, and two Daughters. One of the Daughters died in his Life-time. To the remaining Daughter he gave 1,500*l.* if she married with the consent of his Executor in Writing; but 1,000*l.* only, if she married without consent, and the remaining 500*l.* to the Executor. She married without any express consent, and the 1,000*l.* was paid, and then she died. Her Husband filed a Bill for the remaining 500*l.*, and Sir *Thomas Sewell* considered it as a condition subsequent, and that the Plaintiff was entitled to the 500*l.*, and referred it to the *Master*, as reported by *Dickens*, to see if any Settlement had been made on the Issue of the Marriage; but why? because before the Marriage the Husband had entered into Articles by which it was agreed, that he should have the 1,500*l.* for his Life, and after his death it should go to the Issue of the Marriage; and the Husband had confessed a Judgment in order to secure the Money to the Children after his death, and therefore, it was, that a Reference was made to the *Master* to see if the Husband had made a Provision for

(*y*) 1 Dick. 391.

the Issue by his late Wife, and if not, or the Provision not proper, to make proposals for a Provision before the *Master*. The *Master* reported, that the Husband had confessed a Judgment in 3,000*l*., and that was held to be a good execution of the Agreement, and upon that Report, the *Master of the Rolls* ordered the 500*l*. to be paid to the Husband. Thus explained by the Register's Book, the matter is clear; and, indeed, it would have been surprising if so correct a Judge as Sir *Thomas Sewell*, should, so soon after the decision in *Scriven* v. *Tapley*, have acted in direct contradiction to it. That Case, therefore, is no Authority, upon the present Question, in favour of the Infant's claim.

The next Case is *Martin* v. *Mitchell*, before Lord *Thurlow*, in 1779, which is stated by Mr. *Alexander* in the argument of *Murray* v. Lord *Ellibank* from the Register's Book (*z*), where, after a Decree for a Settlement and a *Proposal* by the Husband, the Wife dying before a Settlement made, the Husband was held to be bound by the proposal.

Rowe v. *Jackson*, in 1783, next occurred. The Case is reported in *Dickens* (*a*), and is mentioned in the argument of *Murray* v. Lord *Ellibank* (*b*), and I have looked into the Register's Book. Lord *Thurlow* held, that, there having been a *Decree* that the Husband should lay proposals before the *Master*, the Death of the Wife before proposals carried in, did not prevent the Claim of the Issue to a Settlement. Here, it is observable, the right of the Issue is held to arise out of

(*z*) 10 Ves. 85, 89.
(*a*) 2 Dick. 604.
(*b*) 10 Ves. 85, 91.

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the *Decree*, and Lord *Eldon* puts it upon that (*c*). If the Child had an abstract right independent of any Decree, what need was there of insisting so much on the effect of a Decree? All the argument of the Counsel for the Infants, in *Murray* v. Lord *Ellibank*, is founded on the effect of the *Decree* in that Cause, directing Proposals for a Settlement, and saying nothing as to any abstract right in the Infants; nor was such a right ever so much as hinted at in any of the Cases adduced in the Argument of that Case.

In *Macaulay* v. *Phillips* (*d*), there is an able Judgment by Lord *Alvanley*; and so little did he imagine there was any abstract right in the Issue, he was of Opinion, on great consideration, that after a Decree for a Settlement, and a Proposal by the Husband, yet, as he died before a Settlement, the whole survived to the Wife, and that if after a Proposal the Wife had died, the whole would have survived to the Husband. He did not, however, advert to *Rowe* v. *Jackson*, nor to the *Anonymous* Case I mentioned from *Vesey* (*e*); and in the Case before him, there were no Children.

The last Case is *Murray* v. Lord *Ellibank* (*f*), where we find the Opinion of Lord *Eldon*, which, from his profound knowledge, is entitled to the utmost respect; and after a consideration of all the Cases, there is not a hint of, or the remotest allusion to, any right in a Child, unless what is derived under a Decree. "The principle," says Lord *Eldon*, "must be, that the Wife obtained a Judgment for the Children, liable to be

(*c*) 10 Ves. p. 92.
(*d*) 4 Ves. 15.
(*e*) 2 Ves. sen. p. 671.
(*f*) 10 Ves. 92.

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waved, if she thought proper: otherwise, to be left standing for their benefit at her death." This is the true principle, and excludes all idea of an abstract right in the Children, independent of a Decree. This Case being of great importance, I thought it necessary to consider all the Authorities; and though the Cases, as printed, are contradictory, yet on consulting the Register's Books, they are all found reconcileable, and all concur in showing, that the Children have no right, independent of Contract, or a Decree.

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24—26th May.

A Residue of Personal Estate was directed by Will to be divided equally amongst the Testator's Sons, I. L., E. P. L., B.L., and G. L., Share and Share alike, as Tenants in Common, and to the Issue of their several and respective Bodies lawfully begotten; but in case of the Death of any or either of them without Issue lawfully begotten living at the time of his or their respective Deaths, then the Part or Share of him or them so dying to go to the Survivors and Survivor equally, Share and Share alike, and to the Issue of their several and respective Bodies lawfully begotten. Held, that the Bequests to the four Sons passed absolute Interests, but that on the Death of one of such Sons without Issue, his Share survived to his Brothers.

BENJAMIN LYON, by his Will, 12th August 1776, amongst other Devises, upon which no question arose, gave to his Executrix and Executors, and their Heirs, all his Estates in Jamaica, in Trust, to sell and dispose of the same, and the Monies arising from the Sale to lay out and apply as the Testator thereby directed, as to the Residue of his Estate, it being his intent and that the Monies arising by such Sale should be considered as Part and Parcel of the Residue of his Estate; and the Testator gave all the rest of his Estate Real and Personal whatsoever and wheresoever, and of what nature or kind soever, unto his Executrix and

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Executors, upon Trust, to pay certain Legacies to his Daughters and an Annuity to his Wife, and the Residue he directed "to be divided equally amongst his Sons, *John Lyon*, *Edmund P. Lyon*, *Benjamin Lyon*, and *George Lyon*, and such Son and Sons as his Wife should or might be *ensient* of at the time of his Death, or at any time during his Life, if such Son and Sons should be born alive, Share and Share alike, as Tenants in Common, and to the Issue of their several and respective Bodies lawfully begotten; but in case of the Death of any or either of them without Issue lawfully begotten, living at the time of his or their respective Deaths, then the Part or Share of him or them so dying should go to the Survivors and Survivor equally, Share and Share alike, and to the Issue of their several and respective Bodies lawfully begotten;" and the Testator appointed several Executors, but the Defendant *Mitchell*, and *Robert Cooper Lee*, alone proved the Will.

The Testator died in 1776, soon after the making of his Will, leaving six Children, viz. two Daughters and the four Sons before mentioned. The Testator's Widow and Daughters were living. *George*, one of the Testator's Sons, died 9th Jan. 1799, intestate, unmarried, and without Issue; and Letters of Administration of his Estate were granted to the Plaintiff. *John*, the eldest Son, died in 1806 or 1807, leaving a Son, *George Benjamin*, who died under age, and Letters of Administration of his Estate, and of the Estate of his Father, were granted to *Edmund Pusey Lyon*. *Benjamin* died 5th Sept. 1800, intestate, leaving two Children, viz. *John P. Lyon*, and *George Edward Lyon*, who both died; and Letters of Administration were taken out to *Benjamin Lyon* and his two Sons by the Plaintiff,

their Mother, the Widow of *Benjamin*. *Edmund P. Lyon* was living, and one of the Defendants. In 1783, a Bill was filed in *Jamaica*, by *Benjamin Lyon*, one of the Testator's Sons, the Husband of the Plaintiff *Mary Lyon*, against the Executors, and an Account was rendered, and a Release was afterwards executed by the Testator's four Sons, his Wife and Daughters, to the Executors, such Sons considering themselves as the only Persons interested in the Residue, bequeathed by the Testator, subject to the Legacies and the Annuity.

Robert Cooper Lee, the Executor, died, leaving the Defendant *Lee* his Executor, who proved his Will.

Under these circumstances, the Bill was filed by the Plaintiff, claiming to be entitled to One Third Part of the Residuary Estate of the Testator.

Mr. *Hart*, Mr. *Bell*, and Mr. *Heald*, for Plaintiff.

Mr. *Leach*, Mr. *Trower*, Mr. *Courtenay*, and Mr. *Shadwell*, for the other Defendants (*a*).

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

There seems to be a doubt whether some parts of the Plantation Estates were actually sold when the Account was settled with the Executors, and which was followed by the Release to them; and

(*a*) The Arguments and Cases cited being fully noticed in the Judgment, it was thought unnecessary to state them here.

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as to them, an Account must be taken; for, supposing the Release good, and every thing concluded up to that time, still an Account is required by this Bill, and must be given, of what has been received from this Estate, by the Defendants *Mitchell* and *Lee*, since the former Account was rendered. The next point to be considered, is, whether the *Release* is a bar to any further Account; and that depends upon the Question, whether the four Sons took absolute Interests in the Personal Property, or only Life Estates, and afterwards to go to their Children. The Administratrix, *Mary Lyon*, claims under *George*; and she contends, that, supposing he was a party to the Release, and that the Account was wound up at the time of the Release, she is entitled to what was due to *George*. It is insisted, that what was given to *George*, who died in January 1799, intestate, became the property of his surviving Brothers, *John*, *Benjamin*, and *Edmund*, and that the Words of the Will provided for that event; the Will directing, "that if either of the Brothers should die without Issue lawfully begotten, living at the time of his or their respective Deaths, then the Part or Share of him or them so dying should go to the Survivors equally, Share and Share alike." Whatever, therefore, becomes of the other Question, it is insisted, on the part of the Plaintiff, that at all events an Account must be rendered of *George*'s Share, or such Portion as she is entitled to from the Release in 1794, supposing the Remainder over is good, in the event of *George*'s dying without Issue. With respect to that Remainder, it is sufficient to observe that, in this Case, the words "dying without Issue," are restricted to Issue "living at the Death," and therefore the Remainder to the surviving Brothers is clearly good; and, indeed, that was not

disputed. The Plaintiff, therefore, as the Administratrix of *George*, is clearly entitled to an Account of what was due to *George*, and to her proportion.

The great Question in this Cause is, whether, upon the true Construction of the Words of the Will, the four Brothers took *absolute Estates*, or whether the Words, "*the Issue of their respective bodies*," are to be considered as words of *Purchase*, and not of *Limitation*, and that the four Brothers are to be considered as entitled only for Life, with Remainder to their Issue, as Purchasers, or the Issue to take as Purchasers along with them, as Tenants in Common.

The Plaintiff contends the Issue take as Purchasers; if that be right, the Construction put by the Family on this Bequest is wrong; and now, after forty years—after Accounts have been taken in a Suit against the Executors in *Jamaica*—after a Release executed by the Testator's Widow, his Sons and Daughters, to the Executors, and a Division of the Property, another Account is required to be taken; and, certainly, if there has been a mistake, and the true Construction of the Will is such as the Plaintiff contends, the length of time, and other circumstances, will not bar her claim.

The Question is an important one. The Testator directed his Real Estates to be sold, and the produce to constitute part of the Residue of his Property. The Produce therefore of the Real Estates became Personal Property. No Son was born after the making of the Will; so that no Question arises in that respect.

In the Construction of this Will, there are two con-

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siderations which must be kept distinct; the one, the effect of the Bequest over; and the other, the effect of the Will in favour of the four Sons, in case the Bequest over did not take place. These two considerations have been improperly mixed in the Argument. The validity of the Bequest over depends upon the Question whether, or not, the event in which the Property is given over, is too remote. The duration and extent of the prior Estate, supposing the contingency upon which it is to go over does not take place, is a perfectly distinct Question. I have already disposed of that part of the Case which relates to the Bequest over, and shown, that it not being a Bequest over after an indefinite failure of Issue, but on the failure of Issue living at the Death, it is good, and within the limit allowed by Law; the alienation of the Property not being indefinitely suspended. The surviving Brothers, therefore, took whatever Interest had arisen upon that contingency, which only arose with respect to *George*; the two Brothers, *Benjamin* and *John*, having died, leaving Issue, and *Edmund* being still living, and having Issue.

Having thus divided the subject, I shall consider the effect of the first Bequest. The words "Share and Share alike, as Tenants in Common," immediately follow the Persons named to take, and before the words relating to their Issue, as if determining who were the Persons to take. The Testator says, they shall take "as Tenants in Common, Share and Share alike." One would rather suppose that there terminated the immediate persons who were to take; because, if it had been intended that the Issue were also to take with their

Parents, the natural course would have been, to have given the Property "to *John, Edmund, Benjamin,* and *George, and their Issue,* to take as Tenants in Common, Share and Share alike," but by interposing the words, "Share and Share alike," between the Persons who are named, and the Issue, it seems more natural the first Persons named, viz. the four Sons, are the Persons who are to take "Share and Share alike, as Tenants in Common;" and all that follows is only to express, by words of Limitation, the *quantum* of Interest they are to take. It appears, that the four Sons, when the Will was made, had no Issue; they were Minors, I believe; certainly they had then no Issue; if, therefore, the Bequest to the Issue of the Sons, is by words of Purchase, it is in favour of Persons not existing; if they were words of Limitation, it is in the natural order of things to give it in the manner stated, to regulate the *quantum* of Interest intended to be given to the four Sons. The word *Issue* is generally used in a Will, as a word of Limitation. It may be used as a word of Purchase, if such appears to be the intention of the Testator; but unless such intent appears, it is usually construed as a word of Limitation. If the word, Issue, is here to be considered as a word of Purchase, it must be used, either for the purpose of making the Issue Tenants in Common with their Parents, or to enable them to take in Remainder. If it was intended to make them Tenants in Common with their Parents, in the first place, as I have already observed, it comes after the description of who are to be Tenants in Common; and in the next place, see what the consequence would be, if "the Issue of their several and respective bodies," that is, the Issue of all the Four, were to take as Tenants in Common, with their four Parents.

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Suppose there were Children and Grand-Children of the Four, are they all under the word "Issue," to take as Tenants in Common with their Parents? Suppose one of them had ten Children, and the other three had none, are the ten of the one to take as Tenants in Common with their Parents, and the other three? Whatever disproportion in the number of Children each may have, some leaving Children and some none; some having many, and some few; some Sons, and some Daughters; is it to comprehend and blend promiscuously all the Issue to take in Common with their Parents, without regard to the number, or whose Children they are, and including all the Grand-Children, supposing the word *Issue* is to be extended in the usual way, to comprehend Grand-Children, and to any that come into *esse* during the Life of these different persons? So, if they are to take in Remainder, there will be the same difficulty of fixing upon the claims of Individuals that are to take under it, and all the uncertainty of the *quantum* to be taken by each, arising from whom may happen to come within the description of Issue; and so with respect to all the difficulties that would arise from intermediate Deaths; upon the Death of any Child born at any time, if they all took as fast as they were born as Tenants in Common, their Representatives would be let in, or the words that carry it over, in case of the Death of either of them without Issue, would carry the Interest of a deceased Child over, not to its own Representative, but to all the Survivors and their Issue, supposing Issue in this latter member of the Will is to be construed with the same generality, to make another division among that number of persons who may represent and fill the character of Issue.

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It is a general rule, that whenever the Words of a Will, used in a Bequest of Personal Property, would, if applied to Real Property, give an Estate Tail, they pass an absolute Interest in Personalty, unless the Testator shows a clear intention that they shall not be so construed (*b*). There can be no doubt that the words in this Will, would, if they had been applied to Real Property, have given an Estate Tail to the four Sons. Is there then any apparent intention in this Testator that the words of this Will should not have the effect of passing absolute Interests to the Sons? This is not the Case of a *Chattel Real*, if any distinction in that respect could arise; it is the case of mere Personalty. It is not the case of a Will giving the Property to four Persons, *for Life*, but with one continued sentence (broken, at least, only by the words, as I have stated, "Share and Share alike, as Tenants in Common,") to them, and to the Issue of their several and respective Bodies. There are no words descriptive of the *quantum* of Interest that the Four are to take; no words that import an intent that they should only take it for Life. It is given to them generally, and to the Issue of their several and respective Bodies, in one continued sentence; it is not therefore a Case in which there is an *implied Estate Tail*. It is an express Estate Tail. Words that would, as applied to a Freehold, pass an express Estate Tail, and not by Implication. None of the observations applicable to such Cases, apply to this. The Property is given to four Persons and to the Issue of their several and respective Bodies; given in words that convey a direct, express, Estate Tail, without any Limitation or Qualification of any kind whatsoever. It is given not by a Settle-

(*b*) See Fearne on Contingent Remainders, &c. p. 461, 463, 478, 480, 490. Edit. 6.

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ment, but by a Will, to these four Sons of the Testator; and given, likewise, as I have observed, at a time when no Issue of those Sons was living. The general Principles I have stated are so clear that it is hardly necessary to cite particular Cases. The Principles and the Cases are well stated, in the learned Work of the late Mr. *Fearne*, *On Contingent Remainders and Executory Devises.*— Amongst others, he mentions (*c*) the Case of *Seale* v. *Seale* (*d*), where one devised, that all his Money in the Government Funds should be laid out in the Purchase of Lands, and settled on his eldest Son *A*, and the Heirs Male of his Body, Remainder to the second Son *C*, and the Heirs Male of his Body; and bequeathed the rest of his Personal Estate to *A*, and the Heirs Male of his Body, Remainder over, in the same manner. The *Lord Chancellor* held, that the Personal Estate (viz. the Residue after what was to be laid out in the Purchase of Lands), could not be entailed, but the whole vested in the eldest Son. So where Long Exchequer Annuities for ninety-nine years were given by Will to Trustees for the residue of the term, in Trust for *E*, for so many years as she should live, afterwards to the Plaintiffs for so many years after the said Term, as they or the Survivor of them should live, and after the decease of the Survivor, in Trust for the Heirs of their Bodies lawfully begotten, for all the Residue of the said Term, and for default of such Issue, in Trust, for the Defendant; *Lord Chancellor King* held the Remainder over to be void, and that the whole vested in the Plaintiffs to whom the Limitation was for Life, with Remainder to the Heirs of their Bodies. In *Butterfield* v. *Butterfield* (*e*) the Testator directed that 400*l.*

(*c*) P. 463, Ed. 6.
(*d*) Prec. Chan. 421.
(*e*) 1 Ves. sen. 133, 154.

should be put out on good Security for his Son *T.* that he might have the Interest of it for his Life, and for the lawful Heirs of his Body; and if it should so happen that he should die without Heirs, it should go to his youngest Son *I. B. Lord Hardwicke* decreed, that the whole vested in the first taker, and the Limitation over was too remote. In these Cases, you observe, the double proposition is stated; not only that the Limitation over is too remote, but that the whole vests in the first taker; and in the great Case of *Daw* and *Pitt*, which was so much discussed, having first been decided by the *Master of the Rolls*, that the whole vested in the Daughter, in the person first described, although it is observable that was Personal Property—Dividends given during *her Life*, and after her Decease, to the Heirs Male of her Body lawfully begotten, and for want of such Issue, over; and though there was an express Limitation for Life, with a Remainder to the Heirs of her Body, the *Master of the Rolls* was of Opinion the whole vested absolutely in the Daughter. That Decision was reversed by the *Lords Commissioners*, but upon an Appeal to the House of Lords, the *Master of the Rolls'* Decree was established; and that is a leading Decision, which has ever since been considered as conclusive upon this subject, and has been followed in a variety of Cases (*c*). These are instances to show, that where a Bequest of Personalty is in this manner, it vests absolutely in the first taker; and that proposition is stated in *Chandless* v. *Price* (*d*),

(*c*) No Report has yet been printed of that Case, when it was before the *Master of the Rolls*. At the end of this Case I have given from a MS. Note a Report of the Case of *Daw* v. *Pitt*, or rather *Tothill* v. *Pitt*, before Sir *Thomas Sewell*. It was ably argued.

(*d*) 3 Ves. 99; but more fully stated in 13 Ves. 479, in Note.

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and in *Bruncker* v. *Bagot* (*e*), a recent Case before the *Master of the Rolls*. In the former case *Lord Rosslyn* says, "In *Daw* v. Lord *Chatham*, the whole contemplation of the Argument, in support of the Decree of the *Lords Commissioners* was, that the Rule in *Shelly's* Case (*f*) could not apply to a Bequest purely of Personal Property—the reason of it does not connect itself with Personal Property." In *Daw* v. Lord *Chatham* it was a Question respecting an Estate for Life in Personalty, expressly given, by the application of the Rule, in *Shelly's* Case, taking the Heirs of the Body to unite with, and enlarge the Estate for Life, and going much farther than in the present Case; and Lord *Rosslyn* says, "the whole Argument was, that it could not apply to a Bequest of pure Personal Property. The distinction taken by Lord *Talbot* in *Atkinson* v. *Hutchinson* (*g*), that where the words would give an *express* Estate Tail, the Construction of Law must obtain, but where only an *implied* Estate Tail, it should not, was very much laboured in *Daw* v. Lord *Chatham*; for in that Case there was, manifestly, an express Estate for Life, and there were circumstances to show how anxiously the Testator endeavoured to restrain it to an Interest for Life." Then mark these words of Lord *Rosslyn*, "From the manner in which the Question was left to the Judges, and from some Notes, I have concluded, that distinction is exploded, and that it is to be taken as a general Rule, that where the words would raise an Estate Tail in Real Estate, they will give the absolute Property in Personalty; and if there is no distinct expression to restrain it to the time the Law allows, the consequences must prevail, what-

(*e*) 1 Merrivale, 271.
(*f*) Co. 9.
(*g*) 3 P. Wms. 258.

ever is the intention." We see, therefore, that even in so unfavourable a Case as an *implied* Estate Tail, the general Rule prevailed; but in this Case there are direct words—an unbroken chain of words, that would create an Estate Tail in Real Property, and consequently, according to the general Rule, as stated by Lord *Rosslyn*, it would give the absolute Property in this Personalty, unless you can show any circumstances that lead to a different conclusion. *Prima facie* the words give an absolute Interest; and the *onus* lies upon the other side to show circumstances that lead to a different conclusion. What are the circumstances relied on in this Case, as leading to a different conclusion? It has been argued, that, as in the Executory Bequest over, the words being "dying without Issue living at the time of the death," the Bequest over is good, and has the effect of showing that the word "Issue" was meant to be used as a word of Purchase; but I do not concur in that, or see how it necessarily follows, that because the Estate was to go over in the event of the Party dying without Children, (supposing "Issue" is to be so construed), that if he has Children he is not to have the absolute Interest in it; the two Propositions are perfectly separate and distinct. Surely it is competent to a Testator to say, if my Sons leave Children, I mean that they shall have an absolute Interest in all my Personal Property; but if it ultimately turns out that they leave no Children at the time of their death, or if any one of them should not, I give it over in the way I propose. If it could be shown that the two propositions were incompatible—that to give an absolute Interest in one event, was incompatible with giving it over in a contrary event, then, undoubtedly, proving the second proposition,

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would prove the first; but if the two propositions may stand together, viz. that he should give it absolutely to the Sons in one event, and give it over in another event, how does it at all advance the Argument, or show that, because in the event of the Sons leaving no Children he has given it over, that tells us what is to be done, if the Son has Children? There is a great deal of fallacy in the Argument, arising from confounding these two Questions. The validity of the Devise over, in all these Cases, undoubtedly, depends upon the nature of the contingency, whether it is a general contingency, on failure of Issue, or a limited one; but when the contingency has not happened, and there were Children, the Question, whether the Parent or the Child is to take, and what Interest they are to take, is a perfectly separate and distinct Question; and any words that describe what is to be done in one event, do by no means necessarily determine what is to be done in a contrary event. You must look at the words applied to each event. Suppose the Testator to say distinctly, I mean if my Sons should have Children, that the Parents should have the disposition of the Property absolutely; but if they have no Children, it is to go over; surely, the two propositions are compatible, consequently there is nothing that leads one, because there is such a Bequest over, to infer, necessarily, that the Parent could not be meant to have an absolute Interest.

It is very material to advert to the vital principle on which an Executory Devise depends. It is not to take effect like a Remainder expectant on the regular termination of the prior Estate; if it were so, then, certainly, the Remainder taking effect would regulate the *quantum*

of the first Estate; but the very principle of Executory Bequests, is, that a Contingency, if properly limited, is to arise, the effect of which is to defeat the prior Estate—to interrupt it in its intended extent—to terminate it—to raise a new use—a thing that could not be done formerly; for where you had once disposed of the absolute Interest in it, you could not, formerly, have made any subsequent disposition of it; that is the whole effect of Executory Devises and Bequests; to provide for the contingencies of a Family, after you have given the Fee or absolute Interest, in a certain event, it is to be defeated, and to give way to, open, and let in, a new use—it is the whole doctrine of Uses and Executory Devises and Bequests, and arises on a principle that is to defeat, destroy, and interrupt, and give a new course to the prior Estate. The prior Estate being absolute in one event, does not at all prevent its going over in another event. The Questions, therefore, are perfectly distinct. It is perfectly immaterial what is the duration of the first Estate, or in what words it is given; and it is quite manifest that it must be so; because, how does it in any respect signify whether the absolute Estate is given, if there are Children, to the Parent or the Child, or whether it is first given to 500 persons absolutely, with a certain contingency? That contingency being within the proper limits, is to undo that Estate, whether the Parents or the Child's Estate. It is a perfectly distinct Question. The validity and extent of the first Estate is to be governed by the words that give it, and not by the words of Limitation over, unless where they bear upon, and unite with, and tend to affect, the construction of the prior words, and which in many Cases may enable us to come to a conclusion respecting it.

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It is quite immaterial to the second point, therefore, what is the extent and limit of the first Bequest, and who is to take under it. If the Bequest had been "to the Legatee and his Heirs," generally, or "to my Son absolutely for ever," it would not have signified, provided you cut it down by a contingency, whereby, in a given event it was to go away from that Son. There are many Cases of that description; as where, after an absolute Bequest, the words were, "if he dies under twenty-one"—"if he marries without consent," or other words of that kind; a contingency to arise within a Life in being, or twenty-one years after. The first Estate being absolute, and the Limitation over being good, are two distinct propositions; and yet a great deal of the Argument in the present Case has arisen entirely from the Limitation over being confined within a Life or Lives in being; as to which, I own, I cannot see how that has any bearing, to convert the word Issue into a word of Purchase, rather than a word of Limitation. It certainly has the effect of suspending the power of the Parent to dispose of the Property in his Life-time. What then? that is the effect of every Contingency that rides over an absolute Interest—to all other purposes an Estate in Fee, but subject to the contingency. That is the effect of all Executory Devises, notwithstanding the Estate is of a nature that would otherwise give the power of alienation. Suppose the Interest to be given to the Issue, either in Remainder, or as Tenants in Common, they would be deprived of the power of alienating just as their Parents would, because it would depend upon their leaving Issue at the time of their death, whether they were to take or not; therefore, the suspended power of Alienation for a given period, must be the necessary con-

sequence of the contingency, whether you construe Issue to be a word of Limitation, or a word of Purchase.

The Cases relied upon on the part of the Plaintiff, are, in the first place, *Peacock* v. *Spooner* (*h*), a Case decided in 1696; and *Dafforne* and *Goodman* (*i*), which was determined upon that Authority. Supposing *Peacock* v. *Spooner* to be perfectly good Law, it is not a Case like the present; for, first, it arose upon *a Marriage Settlement*, and the Court are always disposed to favour the Children under Marriage Settlements, as it may be reasonably enough inferred that they were the principal objects of it; and, in the next place, the Bequest there was expressly for Life. *Lord Chancellor Jefferies* determined that the whole vested in the Wife, but the *Lords Commissioners* decreed, that the Heirs *of the Body took by Purchase*, and that it did not vest in the Mother; and the *House of Lords*, on Appeal, affirmed the *Lords Commissioners* decision—that Case, however has undergone considerable observation since. In the *House of Lords* the Judges were six to two against the decision of the *Lords Commissioners*. *Dafforne* v. *Goodman* went upon the Authority of *Peacock* v. *Spooner*, the words being nearly the same. The case of *Webb* v. *Webb* (*k*), decided by Lord *Harcourt*, was like *Peacock* v. *Spooner* in some circumstances, but the Case was decided differently. In *Theebridge* v. *Kilburne* (*l*) Lord *Hardwicke* says, "*Peacock* v. *Spooner* was laid weight upon, and indeed if that is taken to be an Authority throughout, it is a very strong one. I have a Copy of the Minutes of the Judges in the House of Lords, which were six against two, viz. *Atkins*, *Gregory* (who reported

(*h*) 2 Vern. 43, 195. 2 Freem. 124.

(*i*) 2 Vern. 362. 2 Freem. 493.

(*k*) 1 P. Wms. 132.

(*l*) 2 Vez. Sen. 233.

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the opinion of Lord Chief Justice *Holt*), *Rokeby*, *Powel* and *Turton*, for the Decree of Lord *Jefferies*, and *Lechmere* for that of the *Lords Commissioners*, so that it was a Judgment contrary to the Opinion of a great majority of the Judges, which plainly accounts for the doubt always expressed on the mention of that Case, and why the Court resorts to another reason. It was, besides, a Case on *Marriage Settlements* of a Term."

In the great Case, also, of *Garth* v. *Baldwin* (*g*) Lord *Hardwicke* says, " *Peacock* v. *Spooner* is so particular, has had so much said upon it, and has been so varied from, that I shall not go upon that. Lord *Harcourt* has said, the Court would not go upon that Case, unless on that in *specie*, and no other. It is true it was so determined in the *House of Lords*, but with great variety of opinion among the Judges, and no Peer in the House was of the profession of the Law; and there was something particular by reason of the Limitation to the Heirs of the Body of the Wife; but that is a single Case, and this is not that in specie. *Webb* v. *Webb* was directly to the contrary, and has stood ever since, and allowed to be rightly determined, as not being the same in *specie* with *Peacock* v. *Spooner*." *Webb* v. *Webb*, says Mr. *Fearne* (*h*), " appears to have been the ruling Authority ever since, in Cases of like nature; and that of *Peacock* v. *Spooner*, it seems, is only attended to in Cases exactly the same in specie with itself, as was that of *Dafforne* v. *Goodman*." *Peacock* v. *Spooner*, therefore, the first Case cited on behalf of the Plaintiff, arose out of a Marriage Settlement, not a Will; and there was an express Estate for Life. It is

(*g*) 2 Vez. Sen. 660.

(*h*) Contingent Remainders and Executory Devises, 493 Edition 6.

not, therefore, in *specie*, the present Case, which resembles more the Case of *Webb* v. *Webb*, the leading Authority in Cases of this kind.

In the Case of *Lyde* v. *Lyde* (*i*), the Court considered the words, "die without Issue," as meaning "dying without Children;" and that the Limitation over was good, it not being after an indefinite failure of Issue. That Case does not bear upon the present.

The Case of *Lampley* v. *Blower* (*k*) is not an Authority in favour of the Plaintiff. In that Case, however, Lord *Hardwicke* says, "If it stood barely upon the words to *A*. and her Issue, or to *A*. and the Heirs of her Body, the first taker would have the whole; but it is not meant in that sense." Now, if this is Law, it decides the present Case; because those are the very words in the present Case. Here, the Personalty is given to the four Sons and the Issue of their Bodies.

Lampley v. *Blower* itself is not an Authority in favour of the Plaintiff, because the terms of the Will are very different; there being in that Case a manifest intent to use the word Issue as a word of Purchase; and it could not possibly be interpreted in any other sense, consistently with the object of the Will; but Lord *Hardwicke* prevents a general inference being drawn, that in every Case that will be the construction, by putting a Case like the present, and stating that there, the construction would be different. This Case of *Lampley* v. *Blower* is an Authority therefore directly in favour of the Defendants, and not against them.

(*i*) 1 T. R. 593. (*k*) 3 Atk. 396.

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The next Case referred to was *Clare* v. *Clare* (*m*). That Case went upon the particular wording of the Will, and has been much shaken by subsequent Cases. It is difficult to reconcile it with *Stanley* v. *Leigh*, which is reported in *Peer Williams*, and of which Case, as well as of *Clare* v. *Clare*, I have seen a good MS. Note, in a valuable Collection of MS. Cases in the possession of Mr. *Maddock*. Speaking of the former Case, in *Phipps* v. Lord *Mulgrave* (*n*), Lord *Rosslyn* says, "I have taken it to be most perfectly understood that *Clare* v. *Clare* was destroyed by *Sabbarton* v. *Sabbarton* (*o*)."

The next Case relied upon was *Knight* v. *Ellis* (*p*). Whether that is, or not, a right decision, it is not a determination to govern the present, the wording of the Wills being different.

Another Case referred to, was, *Read* v. *Snell* (*q*); but the Authority of that Case is overruled by the decision in *Garth* v. *Baldwin* (*r*).

The next Case cited by the Plaintiff was *Jacobs* v. *Amyatt* (*s*); but that Case was determined upon the peculiar language of the Will.

In the Case of *Doe* on the demises of *Blandford* and Wife, and *Elias Dymock* v. *Applin* (*t*), the words were very nearly similar to those used in *Jacobs* v. *Amyatt*, and yet Lord *Kenyon* determined the direct contrary; he held that the party took an absolute In-

(*m*) Forr. 21.
(*n*) 3 Ves. Jun. 316.
(*o*) Forr. 245.
(*p*) 1 Bro. C. C. 570.
(*q*) 2 Atk. 642.
(*r*) 2 Ves. Sen. 646.
(*s*) 4 Bro. Ch. C. 542, and see S. C. ante, p. 376 in Note.
(*t*) 4 T. R. 82.

terest: it shows how extremely nice the distinction in these Cases is. There is only one Case more that was mentioned, *Warman* v. *Seaman* (*u*), but that Case is not at all in point, and affords no assistance in deciding the present.

Upon a review of all the Authorities that have been cited, I think myself perfectly warranted in deciding that the four Sons took an Absolute Interest in this Property. There are Releases up to 1794, and an Account from that time is quite of course.

Mr. *Shadwell*:—

There was a Release also in 1796—the Plaintiff agrees to admit both the Releases; it is a mere matter of form.

The VICE-CHANCELLOR:—

I think you cannot differ now that you have got the Principle.

[The Minutes of the Decree, were, "*Cur.* Declare, that *John Lyon*, *Edmund P. Lyon*, *Benjamin Lyon*, and *George Lyon*, the four Sons of *Benjamin Lyon*, the Elder, the Testator, in the Pleadings named, took an Absolute Interest in the clear Residue of the Real and Personal Estates of the said Testator, with benefit of Survivorship, in case any or either of his said Sons died without Issue living at their Death respectively; and *George Lyon*, one of the said four Sons of the said Testator having died without Issue living at the time of his the said *George Lyon*'s Death, Declare, that the Plaintiff, *Mary Lyon*, the Widow, and Administratrix of the Goods and Effects of

(*u*) 2 Cha. Cas. 309.

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the said *Benjamin Lyon*, who was one of the surviving Sons of the said Testator *Benjamin Lyon*, is entitled to One Third Part of the said Residue, having regard to the Releases, dated the 26th February 1794, and the 25th May 1796; and that the Defendant, *Edward Pusey Lyon*, the Elder, who is the only surviving Son of the said Testator, in his own right, and as Administrator of the Goods and Effects of *John Lyon*, the other of the Sons of the said Testator, is entitled to the remaining Two Third Parts of the said clear Residue of the said Testator's Real and Personal Estates, &c. &c."]

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Before Sir *Thomas Sewell*, 27th June 1766.

Bequest of Personalty to A. for Life, and after A.'s decease to the Heirs Male of A.'s Body lawfullybegotten, for ever; and for want of such Issue to B. for Life, &c. A. takes the absolute Interest, and Devise over to B. is void.

R. TOTHILL, Esq. being seised of divers Leasehold Estates, and possessed of 4,000 *l.* Bank Stock, and divers Exchequer Annuities, amounting to 148 *l. per Annum*, made his Will, dated 27th June 1750, and thereby gave to Sir *Wm. Pynsent* the Dividends of 4,000 *l.* Bank Stock during his Life; and directed, that if any Dividends should be made of any part of the Capital, the same should be laid out in the Purchase of more Stock; and also gave the Yearly Income of the Exchequer Annuities to Sir *William Pynsent* during his Life; and gave to *Leonora Ann Pynsent*, the Daughter of Sir *William Pynsent*, his Dwelling-House and Estate at Oveney Green, in Kent, with all the Furniture therein, with his Stock of Husbandry there, and also all other his Real Estates in his Will mentioned; and likewise his Leases of several Houses in Red Lion Street during his Life, on condition

that she lived in the House in Kent Three Months in every Year, and kept all the Buildings in Repair. And after the Death of Sir *William Pynsent* he gave to the said *Leonora Ann Pynsent* the Dividends on the 4,000 *l.* Bank Stock, and the Payments growing due on the above Annuities during her Life: and then gave her two Estates at Putney to keep, sell or dispose of, as she pleases. And after her Decease he gave all the aforesaid Lands, Houses, Bank Stock, and Exchequer Annuities, to the *Heirs Male of her Body, and for want of such Issue* he gave all the said Estates, Bank Stock, and Annuities to the Plaintiff, by the name of *William Daw*, during his Life, on Condition to take and use the Name of *Tothill*, and to his Heirs Male for ever: and the Testator gave all his Personal Estate, not before given, to his Friend Sir *William Pynsent*, and appointed him Executor.

Robert Tothill, the Testator, died 13th February 1753; soon after which, Sir *William Pynsent* proved the Will, and entered into the receipt of the Dividends and Income of the Bank Stock and Exchequer Annuities, and continued in the Receipt thereof to his Death. And *Leonora* entered on the Freehold and Leasehold Estates devised to her—suffered a Recovery of the Freeholds, and claimed an absolute Property in the Leaseholds and other Chattels devised to her.

October 12, 1763, *Leonora Ann Pynsent* died, unmarried, and without Issue, in the Life-time of Sir *William Pynsent*, her Father, having made her Will, and appointed Sir *William Pynsent* her Executor.

The Bill charged, that upon her Death, the Plaintiff became entitled to the Leasehold Estates, and also to

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the Bank Stock and Exchequer Annuities, expectant upon the death of Sir *William Pynsent*; but that the same were claimed by Sir *William* in right of *Leonora*, and as her Executor. That *Sir William Pynsent* died 12th January 1765, having devised all his Real and Personal Estates to the Defendant, *Pitt*, and appointed him his Executor, whereby he also became Executor of *Robert Tothill*, the first Testator. That the Plaintiff had applied to him for a Transfer of the Bank Stock and Exchequer Annuities, and also to deliver up the Leasehold Premises, which the Defendant having refused to do, claiming a right therein under the Will of Sir *William Pynsent*, therefore the end of the Bill was, that the Defendant might be decreed to transfer and deliver up to the Plaintiff the Bank Stock and Exchequer Annuities, and also the Leasehold Premises, and all such other Personal Rights as the Plaintiff should appear entitled to under the Will of *Robert Tothill*; and to account with the Plaintiff for all the Dividends and annual Payments of the Bank Stock and Annuities, and the Rents and Profits of the Leasehold Premises, from the time the Plaintiff became entitled thereto.

To this Bill the Defendant put in his Answer, admitting the Will of *William Tothill*, and that he left such Stock and Leasehold Estates as in the Bill; and insisted, that by virtue of the Will of *Robert Tothill*, the absolute Right and Property in the Leasehold Houses and Furniture, and also in the Bank Stock and Exchequer Annuities, was vested in *Leonora Ann Pynsent*, and that Sir *William Pynsent* being now dead, he, the Defendant, became entitled thereto as Executor and Residuary Legatee of Sir *William Pynsent*, who

was Executor and Residuary Legatee of *Leonora Ann Pynsent*; and therefore insisted, that the Plaintiff hath not under the Will of *Robert Tothill* any Interest, Right, or Title whatsoever in or to all or any of such Particulars.

The Answer was replied to, but no Witnesses were examined on either side; and on the 6th June 1766, the Cause came on to be heard before the *Master of the Rolls*, Sir *Thomas Sewell*, who thinking it necessary that *Maximilian Weston* should be made a Defendant, the Cause stood over for that purpose; and he having been made a Defendant, and having put in his Answer, the Cause came on to be heard again upon the 27th June 1766, when His *Honor* was pleased to dismiss the Bill, but without Costs.

Mr. *Coxe*, for the Plaintiff, observed, that the general Question is, Whether in the Event that has happened the Plaintiff is entitled to claim any thing, and what, under the Will of Mr. *Tothill*.

The Intention is plain. Courts will be industrious to support the Intention. But the Bequests of the Leaseholds and Stock being different, it will be material to consider them distinctly. With regard to the Leaseholds, the Devise is immediate to *Leonora* during her Life, on condition, &c.; and after her death, to the Heirs Male of her Body, and for want of such Issue, to the Plaintiff.

It must be admitted to have been an ancient Rule adopted in this Court, that where the words of a Will in the case of Real Estate are sufficient to give an

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Estate Tail, there the same words when applied to a Term for Years, will convey the entire Interest in such Term. But this Rule is not to be understood in its utmost latitude; and it appears now to have been so greatly relaxed and pared down as to be reduced to the single Case of a *Strict Estate Tail*, which is only where Lands are devised or given to a Man and the Heirs of his Body, which was a Conditional Fee at Common Law, and the Statute *De Donis* creates no Estates Tail but of such Estates as were anciently Conditional Fees.

It is true that there are great variety of other Estates Tail that have been created by Implication and Construction in aid of the Intention of the Donor; and here great latitude has been taken in order to support the intention either to create an Estate Tail, or to reduce the Bequest to an Estate for Life.

In the present Case, it is plain that the first words carry only an Estate for Life Conditional; but then come the words in another part of the Will, "and after her decease to the Heirs Male of her Body," which words, though they may be said, as to the Freehold, to enlarge the Estate for Life, and to create an Estate Tail; yet this is by Construction only, and therefore leaves the consideration of the Chattel Interest open, to be judged upon according to the intention of the Testator, and the direction of the Court. And in the Case of Lord *Glenorchy* and *Boswell* (*a*), in Lord *Talbot*'s time, it appears that the reason why a Devise or Gift to a Man for Life, and after to the Issue of his Body, is by Implication an Estate Tail, is from the necessity of the thing, for otherwise how could the Issue take.

(*a*) Forr. 20.

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In *Forth* v. *Chapman*, 1 Will. 663, a Man possessed of a Term, devised it, together with some Freehold Estates, to *A.* and *B.*; and if either of them died and leave no Issue of their respective Bodies, then to *C.* *A.* and *B.* left no Issue at their death, and the Devise over was held good; viz. that as to the Freehold, the construction should be, if *A.* and *B.* died without Issue generally, and so to create an Estate Tail; and with respect to the Leasehold, that the same words should be intended to signify their dying without leaving Issue at their death, which would make both the Devises good; and Lord *Macclesfield* said it was reasonable it should be so, *ut res magis valeat*; and he said, if the words of a Will can bear two senses, one whereof is more common and natural than the other, it would be hard to say a Court should take the Will in the most uncommon meaning, to do what?—to defeat the Intention and to destroy the Will.

But, to consider the Case more particularly. There are many Cases where the intent of the Party shall control the legal sense of the words. In *Lisle* v. *Grey* (*a*), *John Lisle* covenanted to stand seised to *A.* for Life, Remainder to his 2d, 3d, and 4th Sons in Tail Male, and to all and every the Heirs Male of the Body of *A.*; and held, that *A.* took only an Estate for Life, to serve, as the Book says, the Intent of the Parties. This is much stronger than the present Case, it being a Freehold, which properly admits of a Limitation in Tail.

But to mention some Case upon Terms for years.

(*a*) T. Jones, 114. 2 Lev. 223, explained in Legate *v.* Sewell, 1 P. W. 90.

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In *Peacock* v. *Spooner* (*b*), a Term was assigned in Trust for Baron and Feme, for their Lives, Remainder to the Heirs of their Body; and the words Heirs of the Body were held to be words of Purchase, and that the Heir of the Body should take, and not the Executors of the Wife, who survived the Husband.

This Case underwent different determinations. Lord Chancellor *Jefferies* first decreed, that the words Heirs of the Body ought to be taken as words of Limitation, and consequently decreed for the Executor. Afterwards the *Lords Commissioners* reversed this Decree; and upon an Appeal to the Lords, assisted by the Judges, affirmed the Decree of the Commissioners. There was a like Case of *Dafforne* v. *Dafforne* (*c*), wherein Lord *Cowper* held that the Case of *Peacock* v. *Spooner* must govern; and said, that upon view of that precedent, he had lately decreed accordingly in another Case, and that it would be to no purpose to make a Decree in order to be reversed.

In *Ward* v. *Bradley* (*d*), the Trust of a Term was limited to one *Cole* for ninety-nine years, if he should so long live; Remainder to the Heirs of his Body begotten of his Wife. *Cole* disposed of the whole Term, and died, leaving Children, who brought their Bill, and had a Decree in their favour.

In *Hodgson* v. *Bussey* (*e*), 5th December 1740, *Edward Bussey* assigned a Term to Trustees, in Trust, to permit *Grace*, his Wife, to receive the profits during her Life, and after her Death to permit him to receive the profits during his Life; and after both their decease, in

(*b*) 2 Vern. 43. 195.
(*c*) 2 Vern. 362. S. C. Prec. Cha. 96.
(*d*) 2 Vern. 23.
(*e*) S. C. 2 Atk. 69.

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Trust, for the Heirs of the Body of *Grace*, by him (*Edward*) their Executors, &c.; and for want of such Issue, in Trust, for the Plaintiff. *Edward* died without Issue by *Grace*, and on a Bill brought to have the Writings produced, it was held by Lord *Hardwicke* that *Grace* was entitled for Life only, and that the Limitation over to the Plaintiff was good, and consequently that the Plaintiff was entitled to have the Deeds secured; and decreed accordingly.

In the Case of *King* v. *Melling* (*f*), there is a Case cited by *Hale*, Chief Justice, of a Devise to a Man for Life, *et non aliter*, which it was held turned the subsequent words, Sons of the Body, into words of Purchase. So in the Case of *Backhouse* v. *Wells* (*g*), a Limitation for Life *only* turned the subsequent words, Issue of the Body, into words of Purchase. There are no such particular words here; but the general words import the Negative. Many other Cases might be cited of this nature, the Books are full of them; both ancient and modern.

Webb v. *Webb* (*h*), seems at first view to encounter *Peacock* v. *Spooner*; but Lord *Harcourt* having distinguished it from that Case, said he did not therefore look upon himself as bound by it.

Having often heard the Case of *Peacock* v. *Spooner* questioned, and that the Judges differed in their Opinions upon it, I some time ago got a Copy of the Minutes upon it in the Lords Journal, where it stands thus:

(*f*) 1 Vent. 231.
(*g*) 1 Eq. Cases Abr. 184.
(*h*) 1 P. Wms. 132. 2 Vern. 668.

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"February 17, 1691, Ch. Baron *Atkins* of Opinion for the Plaintiff, the Administrator, that the Term belonged to the Administrator of the Wife; and that the Limitation to the Heirs of the Body was not good. *Neville*, Justice, of a contrary Opinion; he said, the Estate to *Mary* the Wife, and the Children, was good, being in consideration of the Marriage. Next, *Gregory*, Justice, was against the last Decree: he said, had it been *a Limitation to a Man and his Issue, the whole would be in the first Person, for otherwise it would be a Perpetuity*; and declared his Opinion that this Limitation over is not good. Baron *Lechmere* differed from *Gregory*; he said, the Cases mentioned do not come up to this; this is a singular Case; the Husband would run away with the whole substance of his Wife's Family. *Peacocke*, the Administrator, had not a good Title. *Rokeby*, Justice, next said, I differ from my Brother that spoke last; the Wife had the whole, and therefore the Husband comes in, so that he was of Opinion for the Plaintiff. *Powell*, Baron, was of the same Opinion, that the Decree of Lord *Jefferies* was right. *Turton*, Justice, was of the same Opinion. The major part were of opinion that the Administrator of the Wife was well entitled; but notwithstanding, the Decree of the *Lords Commissioners* was affirmed."

The use which I make of this is to show, that the Resolution depended merely, and only, upon the Construction of the Limitation, and not upon any extrinsic circumstance whatever; and though it may be said to clash with some legal reasonings, yet it is plainly agreeable to the reason of the thing, as following the intention; and has now the greatest Authority to support it.

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Besides, in the Case of *Atkinson* v. *Hutchinson* (*i*), it was held, that where the words of a Devise of a Leasehold would make an express Estate Tail in the Case of a Freehold, there a Devise over of such Leasehold is void, *Secus*, if the words in the Devise would in the Case of a Freehold make an Estate Tail only by Implication. The Case itself was this; Devise of a Term to *A*. for Life, Remainder to the Children *A*. shall leave at his death; and if the Children of *A*. die without Issue, then to *B*. The Children of *A*. die without Issue, this is a good Devise over to *B*.

But the Question upon this is not very material in point of value to the Parties, for it appears by the Defendant's Answer, that the Leasehold Houses have been sold by him for 750*l*., which he submits to account for, if it should be taken that he had not a right to sell them.

And the great Question between the Parties, in point of value, is with respect to the 4,000*l*. Capital Bank Stock, and the Exchequer Annuities, to the amount in the whole of 148*l*. a year. And here there is a very great and material difference in the Devise; the Leaseholds are given immediately to *Leonora* for her Life, and after her Decease, to the Heirs Male of her Body, and for want of such Issue, to the Plaintiff, *Daw*, on consideration to take and use the name of *Tothill*, and to his Heirs Male, and for want of such Issue, to the Defendant *Western*; but the Bequest of the Bank Stock and Exchequer Annuities is very different. Here the Testator carefully distinguishes between the Principal and the Interest; he devises to Sir *William*

(*i*) 3 P. Wms. 259.

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Pynsent the Dividends of the 4000 *l.* Bank Stock during his Life; and directs that if any Dividends should be made of any part of the Capital, the same should be laid out in the Purchase of more Stock, in which he appears carefully to distinguish between the Dividends which may be said to be the Produce of the Stock, and the Capital of the Stock itself; and with respect to the Annuities, he gives only the yearly Income thereof, distinguished from the Capital, to Sir *William Pynsent* during his Life; and when he comes to the Bequest to *Leonora*, he still keeps up the distinction, and gives her only the Dividends of the Stock, and the payments growing due on the Annuities after the Decease of Sir *William Pynsent*, during her Life; and after her Decease, he then takes up the disposition of the Stock and Annuities to the Heirs Male of the Body of *Leonora*, and for want of such Issue, to the Plaintiff; and *Leonora* having died before Sir *William Pynsent*, and consequently having nothing vested in her, either in the Stock or the Annuities, two Questions arise upon this: 1. Whether a Bequest of the Dividends, Interest, or Produce of Stock, or other Personal Chattel, can be extended in any Case to take in a Bequest of the Capital or Principal; and, 2. Whether, as in this Case nothing ever vested in *Leonora*, and as she died without Issue, in the Life-time of Sir *William Pynsent*, and so the Contingency never happened by which she, or her, or any Issue of her, could ever take or claim under this Bequest, it can be said to influence, control, or make void the Bequest over to the Plaintiff.

As to the first of these Questions, nothing can be clearer than the intention of the Testator to distinguish between the Capital and Produce of the Stock and

Annuities; and there are many Cases that in support of the Intention have maintained this distinction.

Smith v. *Cleaver* (*k*), is directly in point to this purpose. Here the Interest of Money was devised to *A.* for Life, and if he died without Issue, then the Principal to go over to another, and the Remainder over was held to be good. The Bill was brought by the Plaintiff, *Smith* and his Wife; setting forth, that the Remainder over to *Cleaver* and *Farmer*, expectant on the Plaintiff *Ann*'s dying without Issue, was void in Law, being of a Personalty; and that the whole Interest of this Personal Estate was well vested in the Plaintiff *Ann*, and therefore prayed, that the Trustees might be directed to deliver the Securities, and to pay the Money to the Plaintiffs; but the Bequest over was held good, and the *Master of the Rolls* observed, that the Testatrix had carefully distinguished between Principal and Interest; and nothing passed but barely the Use, until she comes to the Remainder over, and then she devises the Principal. The like distinctions were made by Lord *Hardwicke*, in the Case of *Fonereau* v. *Fonereau* (*l*), and in *Excell* v. *Reade*, 22d June 1751, on an Appeal from the Rolls.

Fonereau v. *Fonereau* was in Easter Term 1745, before Lord *Hardwicke*. Mr. *Claude Fonereau* having nine Children, devised 54,000*l.* to Trustees to invest in the Funds, and to pay the Interest to his Children equally during their Lives, and on their respective Decease, to divide their several Shares, being 6000*l.* amongst their respective Issue, at twenty-one, with Survivorship on

(*k*) 2 Vern. 38. 59. (*l*) S. C. 3 Atk. 315.

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the Death of any before twenty-one; and if all the Issue of any Child should die before twenty-one, then such Share to be divided amongst the Testator's other Children, or their Children. *Peter*, one of the Testator's Children, died without Issue; and the Question was, what should become of his Share. The Bill was by the Executor of *Peter*, claiming the 6000*l.* as a continuing vested Interest in *Peter*, no Case having happened upon which it was to go over. But held, that the Capital being in the Trustees, and nothing being given to *Peter*, but his proportion of the Interest, that his Executor could have no right to the Capital.

The other Case before Lord *Hardwicke*, of *Excell* v. *Reade*, was 22d June 1751, on an Appeal from the *Rolls*, where a like distinction was made between the usufruct and the thing itself. A Leasehold Estate was assigned on a Marriage to Trustees, to permit the Husband and Wife to receive the Rents, and after the Death of the Survivor, then to assign the Lease to the eldest Son, and if no Son, to the Daughters equally; the Husband died, and there was Issue a Son and Daughter; the Son died; and the Question was, whether it was a vested Interest in the Son, and held not; for Lord *Hardwicke* said, in the wording of this Settlement, there is a plain difference between the Trust for the Father and Mother and that for the Son; as to the Father and Mother, it is upon Trust to permit and suffer them to receive the Rents and Profits; but as to the Son, it is then to assign the term to him; and this different penning shows the intention of the Parties that nothing should vest; and no person could call on the Trustees for an Assignment during the Lives either of the Father or Mother.

These Cases are sufficient to show that the Devise of the Interest and produce of the Funds is to be considered as different from a Devise of the Funds themselves.

Then, to show that nothing having ever vested in *Leonora*, the Limitation to her shall not prevent or avoid the Bequest over; and there are many strong Cases to this purpose.

In *Vachell* v. *Vachell* (*m*), *Thomas Vachell* devised the use of his Paintings and Prints, Books, &c. to his Wife for Life; and if she be with Child of a Son, then after her Decease to such Son; but if his Wife be not with Child of a Son, or if the same Son shall die without having Issue Male of his Body, then after the Death of his Wife and such Son, to *Thomas Vachell*. Lord Keeper *Bridgman* declared he had advised with the Judges; and being assisted with Justices *Rainsford* and *Wild*, decreed, that the Wife of the Devisor not being with Child of a Son, so that the Contingency upon which the Limitation over was made never happened, the Devise to *Thomas Vachell* was good.

In the present Case if there had been Issue of *Leonora* to have taken, there can be no doubt but the Limitation over would have been void; but as she never had any Issue, the Devise over depended only upon two Lives in being.

There is another Case much stronger in support of this than that of *Vachell* v. *Vachell*, which was also before Lord Keeper *Bridgman*, assisted by Judges *Twisden* and *Rainsford*, I mean the Case of *Wood* v.

(*m*) 1 Cha. Cas. 130.

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Saunders (*n*), where the Trust of a long Term was limited to the Father for 60 Years, if he so long lived, then to *John* and his Executors, if he survived his Father and Mother; and if he dies in their Life-time, leaving Issue, then to his Issue; but if he dies without Issue, living the Father and Mother, then the Remainder to *Edward*. *John* did die without Issue in the Life-time of his Father and Mother. *Bridgman*, Lord Keeper, assisted by *Twisden* and *Rainsford*, Resolved, that the Remainder over to *Edward* was good, for the whole Term had vested in *John* if he had survived; yet the Contingency never happening, and so wearing out within the compass of Lives in being, the Remainder over to *Edward* might well be limited upon it.

The Case of *Jones* v. *Westcombe* (*o*) is also full to show that a Contingent or void Devise that never takes effect, shall not defeat a Devise over. The Case was, a Man devised a beneficial Term to his Wife for Life; and, after her Death, to the Child she was *ensient* of; and if such Child died before 21, then over; the Wife was not *ensient* at all, and the Devise over was held good.

Supposing, then, as the Devise of the Dividends and Income of the Bank Stock and Annuities never did or could take effect as a Devise to *Leonora*, or to the Heirs of her Body, the Will must be considered as if it contained no such Devise, and then the Case would be no more than this:—A Bequest of the Dividends and Income of the Stock and Annuities, to Sir *William*

(*n*) Pollexf. 35.

(*o*) Eq. Cas. Abr. 245, and in 2 Str. 1092, by the Name of Andrews and Fulham.

Pynsent for Life; and after his Death then the Principal to the Plaintiff, which would certainly be good.

Besides the late Cases of *Stanley* v. *Leigh* (*p*), *Sabberton* v. *Sabberton* (*q*), and *Gore* v. *Grosvenor*, Michaelmas 1740, also put this matter out of all doubt, that an Intermediate Limitation which never vested, cannot prevent a Limitation or Devise over from taking effect.

In *Stanley* v. *Leigh*, one possessed of a Term devises it to *A*. for Life, Remainder to his first, &c. Son in Tail successively, Remainder to his Daughter; and if *A*. shall have neither Son nor Daughter, then to *J. S.* *A*. dies having never had a Son or Daughter, the Devise over to *J. S.* is good.

So in the Case of *Sabberton* v. *Sabberton*, where, on a like Limitation over of a Personal Estate, a Case was made by Lord *Talbot* for the Opinion of the Judges of B. R. who certified the Limitation to be good; and Lord *Hardwicke*, in Michaelmas 1739, decreed accordingly thereto.

In *Gore* v. *Grosvenor*, before Lord *Hardwicke*, Michaelmas 1740, Sir *Richard Grosvenor* devised his Real Estates to his next Brother, *Thomas*, for Life; Remainder to his first and other Sons in Tail Male; and for want of such Issue, in like manner to his Brother *Robert G.*; and gave his Library of Books, Plate, and Furniture to go as Heir-Looms, as far as they could by Law, to the Heirs Male of his Family successively, as his Real Estate was thereby settled. Sir *Thomas*, the first Devi-

(*p*) 2 P. Wms. 618.

(*q*) Forr. 55. The Reporter has a MS. Note of this Case.

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see, died without ever having any Issue, and held, that the Library, Plate, and Furniture, belonged to Sir *Robert*, the Estate Tail in the Sons of Sir *Thomas* having never vested.

Upon the whole here are two Questions: The first relating to the Leaseholds, and the other with respect to the Bank Stock and Annuities, which is the material Question between the Parties.

As to the Leaseholds, the Question is of little value, and depends singly upon this, whether the apparent intention of the Testator is inconsistent with any principle or Rule of Law; for if it is not, nothing can be more certain than that it ought to take place, and the great variety of Cases that have been upon this head, plainly evince it. But be the consequence of this as it may, the other Question, which is the main point in the Cause, seems clear for the Plaintiff beyond a doubt.

Here is a Bequest of the Interest and Dividends arising from the Bank Stock and Annuities, distinct and plainly different from the Capital of the Stock and Annuities themselves; or in other words, it is a Devise of the usufruct distinct from the substance of the thing itself; and it would be strange and contrary to all notions of Law and Equity to suppose, that the usufructuary Interest of a Chattel may not be distinguished from the thing itself, and separated in point of Property; and here the Testator has so carefully distinguished between the Principal and the Interest arising from it, that there cannot be a doubt of his Intention; he appears so carefully to distinguish this, that he

actually provides what should become of any part of the Capital in case it should be paid off during the Life of Sir *William Pynsent*, or *Leonora* his Daughter. Sir *William Pynsent*, therefore, had clearly but a pernancy of the Profits during his Life, and the same is given after his Decease to *Leonora*; and as she died in his Life-time, and without Issue, nothing can be said to have ever vested in her so as to enlarge her Interest for Life, by the disposition of the Principal to her Issue; and as she never had any Issue, the Devise over to the Plaintiff must be good, which is what we principally contend for in this Case, and must submit it to the judgment of the Court.

Mr. *Yorke*, for the Defendant, Mr. *Pitt*:—

The general Question is, whether *Leonora Pynsent* took an absolute Interest in what is devised to her, or not; if she did, it is plainly transmitted to the Defendant.

The only objects of the Testator's Bounty were his Friends, and his Wife's Relations, for he had no Heir or next of Kin to himself; and his Wife's Relations, and particularly the Plaintiff, are plainly the second, and not the first, objects of his Bounty; and, when we come to judge of his Intention, we ought not to set up ambiguous expressions as evidence of an intention which can only be guessed at from doubtful equivocal words, and much less ought such ambiguous expressions to be taken to control the legal sense and meaning of words.

Here are three Questions made: 1. On the Leaseholds. 2. On the Bank Stock and Annuities; and 3. Whether

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the Contingencies mentioned in the Will happening or not happening can make a difference.

As to the first, the Cases of late years fully show that the Rule in Equity is the same, as to the Trust of a Term, as it is at Law in Cases of a Freehold; so that wherever upon a Limitation of a Freehold, a Man by Fine or Recovery can bar his Issue, if there is the same Limitation in Trust of a Term; in that Case also the Party may dispose of the whole Term.

This reasoning is fully confirmed in the Case of *Webb* v. *Webb* (*r*); and *Collier*'s Case in *Coke* is a further confirmation of the Rule. But then it has been made a great head of argument, that the Testator has distinguished between the Leasehold, and the Stock and Annuities—that he has given the Leaseholds as an absolute immediate Interest—and that with regard to the Stock and Annuities, he there gives only the Interest and Profit.

But the Rule of Law is, that if a Man gives the Profit of a thing, he gives the thing itself. In *Carter*'s Reports (*s*), it was laid down by Sir *Orlando Bridgman*, Chief Justice, that where the Profits or Rents of Land are devised, it passes the Land itself; for what is the Land but the Profits and Rents thereof; and in *Raymond* v. *Gold* (*t*), it was held that a Devise of the Profits of a Term is a Devise of the Term itself; and that an Estate for Life cannot arise out of a Term for Years. So, in *Price* v. *Vaughan* (*u*), it was held that a Devise

(*r*) 1 P. Wms. 132.
(*s*) P. 27.
(*t*) Mo. 635.
(*u*) Aleyn, 45.

of the Profits gives an Interest in the thing itself. The Profits of a Term is the thing itself. All which was strongly confirmed in the Case of *Garth* v. *Turner* in July 1755, before Lord *Hardwicke*. And in *Love* v. *Wyndham* (*x*), where a Trust of a Term was devised to *N.* for Life, and if he dies without Issue, the Remainder to *B.*; it was argued to be an Executory Devise to *B.* upon the Contingency, if no Issue; but it was adjudged, that this Remainder to *B.* was void, and that a Devise to one and his Issue, Remainder over, is all one with a Devise to one for Life; and if he dies without Issue, then to another, for the Remainder of a Term shall not depend on a possibility so remote (*y*).

The MASTER OF THE ROLLS:—

The old Principle is, that no Limitation can be of a Chattel after an Estate for Life.

Mr. *Yorke*, [continued]:—

The Case of *Vachell* v. *Vachell* (*z*), was founded on a mistaken notion of Lord Keeper *Bridgman*, and goes too far, as being contrary to the many determinations of the Judges, that a Devise of the Profits of Lands is a Devise of the Lands themselves, and the Reasonings in that Case are such as will not hold now.

Lisle v. *Gray* (*a*) was so plain upon the intent, that the Court said the Sons should all take, though three or four only mentioned. The Case of *Peacock* v. *Spooner* (*b*), is evidently distinguishable from the present

(*x*) 1 Sid. 450.

(*y*) Vin. Devise, p. 99. There are in Viner several references to other Reports of this Case.

(*z*) 1 Chan. Cas. 130.

(*a*) T. Jones, 114.

(*b*) 2 Vern. 43. 195.

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Case; and though it appears to have been strongly confirmed by the Case of *Dafforne* v. *Dafforne* (*c*), yet it is clear from the Case of *Webb* v. *Webb*, that the Lawyers were greatly disgusted with the determination, and the Case of *Webb* v. *Webb* was decreed according to the old Rule.

In the Case of *Hodgson* v. *Bussey*, the foundation of the Judgment was on the superadded words, their Executors, &c., as explaining the intent.

So in all the five Cases that have been mentioned, of *Forth* v. *Chapman*, *Lessingham* v. , *Pinbury* v. *Elkin*, *Fonereau* v. *Fonereau*, and *Reade* v. *Excell*, they all depend either upon particular or superadded words.

The MASTER OF THE ROLLS:—

In *Pinbury* v. *Elkin*, the words, "after her Death," were taken to confine the Bequest to the time of the Death.

Mr. *Yorke*:—

The ground of my distinction, whether right or wrong, is upon the Cases determined on the general Rule, and the Cases that have depended upon particular words; and when there are no particular words, the Court ought to take it on the general Rule; and so it seems to have been in the Cases of *Sabberton* v. *Sabberton*, *Gore* v. *Grosvenor*, and *Stanley* v. *Leigh*, in all which Cases there were words which were directly words of Purchase; and it was agreed these sort of Cases might be taken in one of the two ways, either on the special Words, or upon the general Rule.

(*c*) 2 Vern. 362.

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Consider then the Specialty of this Case. We apprehend the Testator has used the word Dividends, as meaning the Stock itself, because he gives some Annuities to be paid by the owner of the Stock, and it is made a charge on whoever had the Fund, and there is no room to make a distinction what Miss *Pynsent* should take; the Bequest is to the Plaintiff for Life, and if she marry and have Issue, to such Issue, which shows a difference in the two Limitations which might make a condition.

Mr. *Solicitor General*, Mr. *Willes*, and the other Counsel for the Defendant, insisted, that this Case does not depend on Authorities, but on Principles; and that therefore it would be in vain to run through and answer all the Cases that had been cited. It is clear that an Estate Tail passed in the Real Estate, which helps the Construction on the Chattels to show the intention of the Testator.

Sir *Thomas Sewell, Master of the Rolls*:—

I had some doubt at first upon this Case; but I am now very clear that the Plaintiff has no just foundation to support what he prays by his Bill. Both sides have relied on Principles, and both sides have argued for the intention of the Testator; and there is no doubt but that the Intention ought to prevail, if it can be enforced without breaking in upon any Rule of Law; and this resolves itself into a Question of Construction; but the Rule, that words which would give an Estate Tail in a Freehold, are to be considered, in the case of Chattels, as giving the thing absolutely; for that no Chattels can be limited over after a dying without Issue; this Rule is too strong to be got over, and the several Cases that

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have been cited to the contrary plainly depended upon particular words or circumstances.

The Cases of *Peacocke* v. *Spooner*, and *Dafforne* v. *Dafforne*, were certainly controlled by the Cases of *Webb* v. *Webb*, and *Sawbridge* v. *Kilburne*.

As to the distinction made by the Testator between the Capital and the Dividends of the Stocks, he was under a necessity for making the distinction, because he designed to charge the Dividends with the payment of different Annuities. The Bequest of the Furniture and other things plainly distinguishes the Case from *Forth* v. *Chapman*. The Cases cited rather show the inaccuracy of Testators, than form any Rule to go by.

Pinbury v. *Elkin*, and *Smith* v. *Cleaver*, are very different from the present Case.

The Bequest of the Diamond Ring strikes very strong that no person named in the Will should be the Testator's Heir; for he directs it to be locked up till it is apparent who should by virtue of his Will have a right to his Estate; so that the Testator by the subsequent words explains what he had said before, and shows his Intention to make such a perpetuity as the Law will not suffer. Therefore, to follow the words, the Court must either cross the Intent, or be inconsistent with the Rule of Law; and the words here would create an express Estate Tail, and not an Estate Tail by Implication.

Upon the whole, therefore, I must dismiss this Bill, but without Costs.

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[*N. B.* This Decree of the *Master of the Rolls* was appealed from; and, 23d of June 1770, the Lords Commissioners of the Great Seal, Reversed the Decree, and Decreed an Account against Lord *Chatham* (to which Title Mr. *Pitt* had been advanced) for the Bank Stock, &c. Whereupon Lord *Chatham* appealed to the House of Lords, and the Decree of the Lords Commissioners was reversed.

The Case, with the Reasons of the Appellant, and of the Respondent, and the Decision of the House of Lords, reversing the Decree of the *Lords Commissioners*, is to be found in 7 vol. Bro. P. C. 453, Ed. by Tomlins.]

CLARK *v.* GIRAUD (*a*).

30th May.

THIS was a Bill filed by the Plaintiff, *Henry Clark*, against the Defendant, *Richard Hervé Giraud*, praying, amongst other things, that a Bill of Exchange, for the recovery upon which, with Interest, the Defendant had commenced an Action against the Plaintiff, might be declared usurious, illegal, and void; and for an Injunction to restrain further Proceedings at Law in respect thereof.

C. being indebted to G. in 1,000 *l. agreed to transfer, within a given time,* 100 *l. per Annum, Long Annuities, at the then price, and in the mean time pay G. the Dividends, and that the Debt of* 1,000 *l. should*

The Defendant stated, by his Answer, that the Plaintiff, who owed him 1,000 *l.*, proposed, in August 1813, that he, the Plaintiff, should engage to transfer to the

constitute part of the Purchase Money. The Stock was not purchased at the time, and there was a rise in the Price of the Stocks. The Agreement held not to be usurious, or within the Stock-Jobbing Act, and Motion for an Injunction refused.

(*a*) Ex Relatione.

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Defendant, within a given time, 100 *l. per Annum*, Bank Long Annuities, at the then Price thereof, and in the mean time pay the Defendant the Dividends thereon: That the Debt of 1,000 *l.* should constitute part of the Purchase Money:—and that for the government of the Parties the then Price of Bank Long Annuities should be ascertained by their mutual Friend, Mr. *Smethurst*. The Answer further stated, that the completion of the Business stood over till January 1814, when Long Annuities had risen in price, the Benefit of which Rise the Plaintiff claimed, but which the Defendant resisted, as contrary to the spirit of the Agreement of August 1813: That the Plaintiff and Defendant mutually agreed to refer the Matter to Mr. *Smethurst*, whose opinion, in reference to the price of Long Annuities in August 1813, and January 1814, was, that the Defendant ought to pay the Plaintiff 1,476 *l.* 17 *s.* 6 *d.*, whereupon the Defendant paid 476 *l.* 17 *s.* 6*d.*, and the Plaintiff then executed a Bond engaging to replace 100 *l. per Annum* Bank Long Annuities within Three Months: That in March 1815, in consequence of another mutual reference to Mr. *Smethurst*, the latter adjusted the Sum to be paid by the Plaintiff to the Defendant on account of the transaction; and the Plaintiff proposed to give three Acceptances for the Amount, at four, eight, and twelve Months after date, which were accordingly taken, the Bond being given up; and that the two first Bills were paid, but the last dishonoured, for which the Defendant had brought his Action.

The Plaintiff insisted by his Bill, that the original Agreement was corrupt and usurious, and that the subsequent acts were a continuation of the Usury.

The Defendant, by his Answer, denied the Usury, and negatived the Equity of the Plaintiff's Bill.

Mr. *Wray* moved, for the Injunction, on the Merits: The Answer contains a sufficient Admission, that a less Sum was paid by the Defendant in January 1814 than ought to have been, considering the Rise in the Funds. The Transaction is not only usurious, but also contrary to the Stock-Jobbing Act (*b*), and the Exception therein contained; for, if a Person has it in contemplation to take an Halfpenny more than the legal Interest, the Contract is usurious; and in the Case of *Steers* v. *Lashley* (*c*), Lord *Kenyon* held, that Bills given in consequence of an Arbitration as to Stock-Jobbing Transactions were void. The Party giving Bills afterwards does not alter the Case; for in illegal Transactions the Vice attaches to all new or substituted Securities; and an Arbitration cannot change the nature of the Transaction, which, in the present Case, was usurious, and the Bills were therefore void.

Mr. *Bell* and Mr. *Hone* opposed the Motion.

The Defendant has completely denied the Usury; and the Stock-Jobbing Act has nothing to do with the Case. This was a Bargain made in August 1813, for the Sale and Transfer of Stock at the then Market Price: If the Plaintiff's Case is good, he has his remedy at Law; for Mr. *Smethurst* (who was the mutual Friend of the Parties, and not only present at the making of the original Agreement, but called in as an Arbitrator on all subsequent occasions) is alive, and can be called as a Witness on the Trial at Law. The Case of *Steers* v. *Lashley* has nothing to do with a Transaction like this,

(*b*) 7 Geo. 2. c. 8. (*c*) 6 T. R. 61.

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for the Stock-Jobbing Act only applies to Time-bargains. In the present instance there are no usurious Items; but if there were, the Party would be allowed to strike them out. However, all the Transactions of August 1813, January 1814, and March 1815, were quite fair on the part of the Defendant, and there is no ground for the Suit, or this Motion; for if a Case like this could be impeached there would be an end to all faith between Man and Man.

Whether this was Usury, or within the Stock-Jobbing Act, is shown in *Maddock* v. *Rumball* (*d*), which is quite analagous to the present Transaction: There, a Creditor had agreed to give his Debtor time, upon an Engagement to pay the Debt at a future day, by a Transfer of so much Stock as the Debt would have purchased if it had been paid immediately, and paying in the mean time a Sum equal to the Dividends. The Plaintiff in that Action declared upon a Bond, conditioned to be void if the Defendant should, on or before a given day, purchase and make good Bank Annuities, and transfer them to the Plaintiff, and in the mean time pay all such Monies as would have become due for Dividends thereon, in case the Stock had, at the date of the Bond, stood in the Name of the Plaintiff. The Defendant pleaded, that the Bond was usurious, which the Plaintiff by his Replication denied. The Jury found a Verdict for the Plaintiff; but, on a Motion for a new Trial, it was contended for the Defendant, that the Consideration of the Bond was usurious upon the face of it. The Court, however, agreed that it was not Usury, as the Amount to be paid depended upon a Contingency, and that it was no more Usury than an Agreement to replace Stock lent; and

(*d*) 8 East, 304.

nothing appeared to impeach the fairness of the Transaction. It was then contended that it was a Transaction within the Prohibition of the Stock-Jobbing Act, on which the Judgment ought to be arrested, for that the Plaintiff was not before possessed of any Stock which could be the subject-matter of a Loan, but *per Curiam*, this was in effect a Loan of Stock. The Plaintiff would have purchased Stock, if he had received his Debt at the time the Bond was given; but he was contented to take his Debt in Stock to the same Amount at a future Day, which was the case with every Contract for the replacing of Stock.—The Rule was refused.

The conduct of the Defendant in the present instance was perfectly equitable; but had it been ever so much against conscience, the Plaintiff bound himself, by submitting to refer the Matter to Mr. *Smethurst*, thus confirming every part of the Transaction, and leaving no room for the interposition of the Court, which the Case of *Cole* v. *Gibbons* (*e*), and another there mentioned to have been decided by Lord Chancellor *Cowper*, fully prove.

Mr. *Wray*, in Reply:—

This Case hinges on the strict Letter of the Law, which brings it within the Stock-Jobbing and Usury Acts.

The VICE-CHANCELLOR:—

Lending Money on a Contract, like the present, for the Transfer of Stock, is not Usury; and it is quite clear, that this was not a Stock-Jobbing Transaction. It was that kind of Contract which, if there be no Pre-

(*e*) 3 P. Wms. 289

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mium or Bonus, any Party might make. It was not a Time-bargain; nor were there any differences to be adjusted; nothing could be more fair or honourable than the first Reference, to a Person who not only knew all the facts, but was likewise the friend of each Party; and as it does not appear that there was any thing at all like Usury in his Determination, credit must be given to him for having acted properly. In March 1815, the Plaintiff requests to have time, upon which there is a new mutual Reference to the same Person, and in consequence of this Reference the Plaintiff gives three Bills, and the old Security is done away. Two of the Bills are paid without the Transaction being called in question by the Plaintiff; nor does he raise any objection till the Defendant calls upon him for payment of the third, when he files a Bill, supposing it a fit Case for Equity. He has now got the discovery—there is no legal objection to the Transaction; and can it be said, after this double Reference, that there is an equitable one? Under all the circumstances of this Case, I see no ground whatever for a Court of Equity to interfere.

Motion refused, with Costs.

24th May.
2d June.

Husband not entitled to have a defective Execution of a Power in his favour, by his Wife, supplied.

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THE Plaintiff, previous to his Marriage with his late Wife, *Sarah Moodie,* joined with her in a Settlement

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of her Property, on certain events, which happened, "In Trust, as to one Moiety thereof for the Plaintiff, his Executors, &c.; and as to the other Moiety thereof for such Person and Persons, and for such Estate and Estates, Intents, and Purposes, and subject to, with, and under such Charges, Conditions, Provisoes, Restrictions and Limitations, and in such manner as *Sarah Crowther*, (afterwards *Mary Moodie* deceased, the Wife of the Plaintiff), by any Deed or Deeds, Instrument or Instruments in Writing, to be by her sealed and delivered in the presence of two or more credible Witnesses, *or by her last Will and Testament in Writing, or by any Writing or Appointment in nature of a Will, to be by her signed and published in the presence of, and attested by, two or more credible Witnesses*; and which Deed and Writings, and Will, or Writing in nature of a Will, notwithstanding her then intended Coverture she was thereby empowered to make, should direct or appoint, and in default of such Direction or Appointment, or in case any Direction or Appointment should be made; and also as to so much and such Parts and Shares thereof as should not be completely or entirely disposed of, as thereby is mentioned, subject to incomplete Disposition or Appointment, upon Trust, for the Person or Persons who would have been entitled thereto in case the said *Sarah Crowther* had died sole and unmarried intestate, and possessed thereof, and did and should transfer the same accordingly."

Quære—
Whether, when a Power is given to be executed by a Will, "signed and published in the presence of, and attested by, two or more credible Witnesses," a Will signed by the Testatrix, and attested, generally, thus, "Witness B. H. and J. H." is a good Execution of the Power.

Sarah Moodie made her Will, dated 4th May 1812, bequeathing to her Husband, the Plaintiff, the Property over which a power was reserved to her by the beforementioned Settlement. The Will concluded with these

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words, " Signed by me, this 4th day of February 1812, *Sarah Moodie*;" and the Will was attested thus, " Wit- " ness, *Betty Headington, Jane Headington.*"

The Defendants who were entitled to the Property in case the Power was not executed, insisted the Power was not well executed.

Evidence was adduced by the Plaintiff, proving, by the attesting Witnesses to the Will, that the Testatrix signed and subscribed her name to the Paper Writing produced; and that from what the Testatrix said in the presence and hearing of the Witnesses, they understood it to be her Will, and that they set and subscribed their Names thereto, in the presence of the Testatrix, and in the presence of each other.

The Question was, whether this Will, so signed and attested, was a good Execution of the Power; or, if it was a defective Execution, whether the Court would supply the defect in favour of the Plaintiff.

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

This Power must be considered as well executed. The Power to be well executed by Will must be " signed, and published in the presence of two or more credible Witnesses:"—Now, this is a Will, and it is signed, and published in the presence of two Witnesses; and the word " Witness" in the Attestation Clause, must be taken as witnessing the Signature and Publication. *Wright* v. *Wakeford* (*a*) differs from this Case, for there

(*a*) 17 Ves. 454, and 4 Taunt. 213.

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the Power was to be executed "with the consent of *T. Wood* the elder, and *Thomas Wood* the younger, testified by any Writing under their hands and seals, attested by two or more credible Witnesses." The Power had been executed with the proper consents, but the Attestation contained the words *sealed* and *delivered* only, and without saying *signed*, from whence it might be concluded they had not seen the Parties *sign*. The Judges differed even in that Case, whether it was a good Execution of the Power. The *Lord Chief Justice* held it was; but the three other Judges were of opinion it was not. But here the word *Witness* is general, and must be taken to mean a witnessing what it was necessary they should witness, viz. the signing and publishing of the Will. If, however, what they witnessed is not sufficiently clear on the Attestation, it is made perfectly so by the Evidence.

Supposing this Power must be considered as defectively executed, yet it is a Case where Equity relieves; for in the case of Powers, and of Copyholds, a defective execution of the one, or the want of a Surrender in the other, is aided in Equity. All the Cases are alluded to in *Sugden* on Powers (*b*); and a *Husband*, which this Plaintiff is, is there stated as one of the favoured Persons, whom, in such Cases, a Court of Equity relieves.

Mr. *Blackburne*, for the Defendants, the Trustees.

Sir *Samuel Romilly*, and Mr. *Combe*, for the other Defendants:—

To be a good Execution of the Power, it was necessary the Witnesses should, in the Attestation, express

(*b*) P. 275-6.

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that the Will was signed and published in their presence. Here they only say "witness," without saying what they witnessed. This Case does not fall within the late Act (*c*), that Act remedying only the want of an attestation as to the *Signature*.

Supposing this Power to be defectively executed, it is not a Case where this Court will relieve. Mr. *Sugden* is mistaken in supposing the Court relieves in these Cases in favour of a Husband. The Case he cites, is *Sergison* v. *Sealey* (*d*); but there the defect was supplied because there was the valuable consideration of Marriage; and Lord *Hardwicke* expressly puts it upon that. There is no Precedent where, in a Case like the present, the Husband has been relieved. The 54 *Geo.* III. does not apply to a Case of this description.

Mr. *Hart*, in Reply:—

Suppose this were the Case of a Real Estate devised, with three Witnesses attesting the Will in the way this Will is attested, it would pass the Estate, and the Witnesses might be examined as to what they witnessed. So, in this Case, if any thing is wanting in the Attestation the Evidence has supplied it.

There is as good reason for supplying a defect in the Execution of a Power in favour of a Husband, as of a Wife and Child.

2d June.

The VICE-CHANCELLOR:—

In the Argument of this Case, two Questions have

(*c*) 54 Geo. III. c. 168. (*d*) 2 Atk. 412.

arisen; 1st. Whether the Power is well executed; 2d. Whether, if the Execution is defective, it can be relieved against in Equity. If the second Question is answered in the affirmative, it is unnecessary to consider the first. I am of Opinion, that if the Power is not well executed, a Court of Equity cannot relieve. The Court has already gone a great way in these Cases, and I am not disposed to go beyond the Decisions. The Court has supplied a defective Execution of a Power, in favour of a Wife, a Child a Purchaser, and Creditors; but not beyond that. It is too late to consider whether the Court was justified in going so far, but, certainly, it goes no farther; it does not extend to any other Persons, and if the Court were to go farther, it would not know where to stop.

Sergison v. *Sealey* (*e*) is not an Authority to show that the Court will, on behalf of a *Husband*, relieve against a defective Execution of a Power; though in an able and ingenious publication (*f*) it is cited as an Authority for that proposition. In that Case, the Husband was a *Purchaser* by Marriage; and it was because he was considered as a Purchaser that Lord *Hardwicke* gave relief. The Power in this Case was given by a Marriage Settlement, but the execution of it was a mere voluntary Act, and this Plaintiff cannot be considered as a Purchaser. I remember no Case, nor do the Counsel appear to be aware of any, where a Husband, merely as such, has set up such an Equity; and if there is no such Case, I am not at all disposed to make a Precedent.

Is this then a due Execution of the Power?

(*e*) 2 Atk. 412. (*f*) Sugden on Powers, 344. Ed. 2.

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Undoubtedly, this is to be considered as the *Will* of *Sarah Moodie*—it throughout purports to be such; for she uses the words "I proceed to *bequeath*," &c. "I now by this Writing *bequeath*," &c.—"These my last *bequests*," &c. The Will was signed by her. "Signed by me this 4th day of February 1812, *Sarah Moodie*. Witness *Betty Headington, Jane Headington*." Though in the Attestation Clause it is only said "Witness," and not, "signed and published in the presence of, &c.;" yet, if any further evidence of signature and publication be necessary, may it not be proved by extrinsic Evidence? The publication of a Will stands as it was by the old Law, and is not affected by the Statute of Frauds. The Will is expressed to be her Will in the body of it; and as to every other purpose than as the Execution of a Power, if there had been three Witnesses it would certainly be a good Will, and sufficient to pass Real Estate, and Publication might be proved, if necessary, by the Witnesses. It is not necessary that the Attestation to a Will of Real Estate should contain a written Memorandum of the performance of all the ceremonies prescribed by the Statute (*g*) on the Execution of such a Will. The Statute requires that such Will shall be "attested and *subscribed* in the presence of the Devisor by three or more credible Witnesses;" but it has been held, that the attesting Witnesses need not express in the Memorandum of Attestation, that they *subscribed* their Names in the presence of the Testator, although it is a matter to be left to a Jury, whether they did so subscribe in the Testator's presence, or not (*h*). If, therefore, the Question was, whether this was a good

(*g*) 29 Car. II. c. 3. s. 5.

(*h*) Brice *v.* Smith, 1 Willes, 1. Hands *v.* James, Comyns, 531. Croft *v.* Pawlet, 2 Str. 1109. Trimmer *v.* Jackson, 4 Burn Ec. L. 130.

Will, of Real Estate, supposing there had been three Witnesses, and not whether it was a good Execution of a Power, I should have considered it as a good Will. But a Will, to be a good Execution of a Power, must be exactly according to the terms of the Power; and the Question here is, whether, as the Attestation is general, and there is no written Attestation of the Signature and of the Publication, that is sufficient.

In *M'Queen* v. *Farquhar* (*i*), it was held that, where the Witnesses are not required to attest the Facts, a written Attestation by them, containing only the words "sealed and delivered," does not exclude the presumption that it was also *signed* in their presence.

In *Wright* v. *Wakeford* (*k*), where a Case went to the *Common Pleas* (*l*), it was held by three Judges, against the Opinion of the Lord Chief Justice, that a Power to Trustees, with the consent of the *Cestuis que Trust*, testified by writing, *under their hands and seals*, attested by two or more credible Witnesses, to make Sale of Lands, was not well pursued, the Attestation being only as to the *sealing* and *delivery* in the presence of the two Witnesses, omitting, to mention the *signing*. That Case was unlike the present, for there the Attestation was not general, as in the present Case, but specific; mentioning the *sealing and delivery*, but not the *signing*: and the maxim, *expressio unius est exclusio alterius*, was applicable; that Case has been followed by *Doe* (*m*),

(*i*) 11 Ves. 477.

(*k*) 17 Ves. 454. 2 Maul. and Selw. 576.

(*l*) See 4 Taunt. 213.

(*m*) In that Case, "a Power to two Persons was required to be exercised by any Deed or Writing under both their Hands and Seals, to be by them duly executed, in the

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and *Peach*, in K. B. Easter Term, 1814, and by *Wright* v. *Barlow*, in K. B. 28th November 1814, a Case directed by the *Master of the Rolls* (*n*), where

presence of, and to be attested by, two or more credible Witnesses." The body of the Deed executing the Power, stated, that it was "under the Hands and Seals of both the Donees, attested by, and duly executed in the presence of, the two credible Witnesses, whose Names are thereupon endorsed as Witnesses thereto." The Attestation contained the words sealed and delivered only, but the Witnesses, by a subsequent Attestation, certified that the Deed was signed as well as sealed in their presence. The Court of King's Bench held that the Power was badly executed. [2 Maul. and Selwyn, 576. And see Sugden on Powers, p. 236, Ed. 2.]

(*n*) In this Case, the Power was by "Deed or Deeds, Writing or Writings, under her Hand and Seal, *attested* by two or more credible Witnesses, or by her last Will and Testament in Writing, or any Writing purporting to be her last Will and Testament, to be by her signed, sealed, and published, in the presence of three or more credible Witnesses," to charge the Estate with 4,000 *l.* to be paid as the Donee "by the same Deed or Deeds, Writing or Writings, or last Will and Testament, or any Writing purporting to be her last Will and Testament," should appoint. And, for more effectually securing the Charge, she was authorized "to limit and appoint" the Estate (generally) to Trustees for a Term. The Deed was signed by the Donee of the Power in the presence of the Witnesses, but the word *signed* was not contained in the Attestation. The Case was directed by the *Master of the Rolls*. Lord *Ellenborough*, upon the general point being pressed, stated that the Court would, if it were wished, turn the Case into a Special Verdict, so that it might come before the twelve Judges; and his Lordship said, that he could not tell to what decision the Court might come with the assistance of the other Judges. The Court of King's Bench, on the 2d Feb. 1815, certified that "they were of Opinion that the aforesaid Power given to the said

there was a want of Attestation as to the signature, and in that Case the Court of King's Bench said, if the Parties chose to put it in a way to have the Opinion of all the Judges, they might, but if not, they must decide according to the last Case, *Doe* v. *Peach*.

The 54 *Geo.* III. c. 168 (*o*), does not apply to this Case. That Act is *retrospective* only, and reciting that *doubts* had been entertained, allows Parties to supply, by Evidence, the fact of the *signing*, if the Witnesses have omitted to state it in the Attestation of Instruments

Eliz. Barlow was not duly and effectually executed by the said Indenture of the 20th Jan. 1781." The Certificate was signed by *Lord Ellenborough*, *C. J.* Mr. *Justice Le Blanc*, and Mr. *Justice Bailey*. The Case will probably be carried further." [See Sugden on Powers, p. 336, 7. Ed. 2. The same Case is reported 3 Maul. and Selw. p. 512.

(*o*) By this Act it is provided that, deeds *already made* with the intention to exercise any Power, Authority, or Trust, or to signify the Consent or Direction of any Person whose Consent or Direction may be necessary, shall (if duly signed and executed, and in other respects duly attested) be of the same validity and effect as if an Attestation of Signature had been subscribed. By the second Section the Act is extended to Deeds *already made* in exercise of Powers, Authorities, and Trusts, &c. but the Act provides, that it shall not extend to revive Deeds already avoided, or to interfere with Claims released within six Months after the passing of the Act. It is important to observe that this Act has no *prospective* operation; and, therefore, in order to render Deeds hereafter made, valid, (especially after the Cases that have been decided) it will be proper, in the Attestation, to say, *signed, sealed, and delivered*, instead of the common practice, which gave rise to the Act, of only inserting the words, *sealed and delivered*, in the Attestation.

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of Appointment and Revocation made in exercise of powers in Deeds, Wills, and other Instruments. The Question raised in this Case is new, and of importance, and I think it proper to have the Opinion of a Court of Law.

N.B. A Case was sent to the Court of Common Pleas (*a*).

BARING and others, *v.* PRINSEP and others.

15th June.

Exceptions, nunc pro tunc, may be filed to an Answer to a Bill of Discovery.

THIS was a Bill for a Discovery, and an Answer was put in. An Order had been obtained that Exceptions should be received, *nunc pro tunc.*

Mr. *Raithby* now moved, that this Order might be discharged for irregularity, with Costs, and cited *Hewart* v. *Semple* (*b*) to show, that on a Bill for a Discovery, the Defendant has only eight Days to file Exceptions to an Answer; and observed, the eight Days had long elapsed; and that if such Exceptions were allowed, it would be a mode of evading the Payment of the Costs of such an Answer, which are payable when the time for excepting has expired (*c*).

Mr. *Duckworth, contra,* contended, there was no such Rule; and said, that on Inquiry he found there was no

(*a*) See Doe *v.* Pearce, a Case on this subject, recently published, 6 Taunt. 402.

(*b*) 5 Ves. 86.

(*c*) See Lord Redesdale's Tr. Pl. 164.

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difference as to the Time allowed for Exceptions on a Bill of Discovery and a Bill for Relief. The Defendants did not apply for Costs on putting in their Answer.

The Motion stood over to inquire into the Practice; and afterwards, *The Vice-Chancellor* said, he had directed Inquiries to be made of the Registers, and He found there was no Distinction, as to the Time for Excepting, between Bills for Discovery and Bills for Relief.

Motion refused.

WESTON v. JAY.

20th June.

An Order was made, that Defendant should, within four days, put in an Answer to Interrogatories, or in default a Serjeant at Arms to go against him. He put in an insufficient Answer, and upon Motion, the Serjeant at Arms was directed to take him.

AN Order was made on the 6th May 1816, that the Defendant, *William Eagle*, should, within four days after personal Notice, put in his Answer to Interrogatories, or in default, a Serjeant at Arms to go against him. The Defendant put in an Answer, which was reported insufficient; and it was now moved on an Affidavit of Service of the Notice of the Order, and the *Master*'s Certificate of the insufficiency of the Answer, that the Order of the 6th May should be made absolute, and the Serjeant at Arms directed to apprehend the Defendant.

Mr. *White*, for the Motion:—

It is established by several Cases, that when such an Order is obtained for want of an Answer to a Bill, and the Defendant puts in an insufficient Answer, such an Order as now prayed, is made, as appears from *Broom-*

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field v. *Chichester* (*a*), *East India Company* v. *Dacres* (*b*), *Waters* v. *Taylor* (*c*), *Boehm* v. *De Tastet* (*d*). I cannot adduce any Case where the same doctrine has been applied to Answers to Interrogatories, but the Principle must be the same.

The VICE-CHANCELLOR:—

On Principle, it is certainly the same, and I see no objection to the Motion.

Motion granted.

WALKER and others, *v.* WILD and others.

20th June.

The Recognizance of a Surety for a Receiver being estreated, and an Action brought against such Surety, an application was made by him for a reference to see what was due, and an Order for Payment by Instalments, and for an Injunction to stay Proceedings at Law. An Order, by Consent, was made accordingly, on paying the Costs of the Application, and of Proceedings consequent on the Order.

THE Receiver in this Cause, though duly summoned, had not passed his Accounts, but absconded with a considerable Sum in his hands. Upon application to the *Master of the Rolls*, his Recognizances were estreated, and an Action was brought against the Sureties.

One of the Sureties now applied for an Order, that it should be referred to the *Master* to see what was due from the Receiver, and that he might be ordered to pay into the Bank of England, to the Credit of the Cause, such Sum as should be reported due, by Instalments, at three, six, and nine Months, after first deducting the Costs of, and attendant on, this Application, and all subsequent Proceedings to be taken in consequence

(*a*) 1 Dick. 379.
(*b*) 1 Cox, p. 343.
(*c*) 16 Ves. 417.
(*d*) 1 Ves. and Bea. 124.

thereof, so as such Sum did not exceed the amount of his Recognizance; and that all Proceedings in the Action at Law might be restrained.

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Mr. *Cross*, for the Motion.

Mr *Heald* consented to the Motion, except so far as it prayed that the Costs of the Motion and of subsequent Proceedings should be deducted.

The VICE-CHANCELLOR:—

The Surety must pay the Costs of this Motion, and of the subsequent Proceedings in consequence of it; in other respects, the Motion is regular.

Motion granted.

ANGELL *v.* HADDON.

20th June.

Creditor allowed, on Motion, to prove his Debt under a Decree upon a Creditor's Bill, though Money apportioned amongst the Creditors, and transferred to the Accountant General; on paying the Costs of the Motion, and of re-apportioning the Funds.

MR. *Barber* moved on behalf of a Creditor, to be allowed to prove his Debt under the Decree in this Cause, which was upon a Creditor's Bill. The Creditor swore he was not aware of the Decree.

Mr. *Wyatt* opposed the Motion, on the ground that it was too late, the Money having been apportioned amongst the Creditors (the Assets being deficient) and the Money transferred to the Accountant-General to pay them, and the Costs in the Suit. If such a Motion is allowed, it must be on paying the Costs of the Application, and the Expense of re-apportioning the Funds amongst the Creditors.

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The VICE-CHANCELLOR:—

The Creditor must pay the Costs of this Application, and the Expense incident to the same in recasting the Apportionment of the Property amongst the Creditors.

CONST and others, *v.* EBERS.

12th, 27th June.

The Costs of insufficient Answers are provided for by a general Rule.

When Defendant is in Custody for a Contempt for not putting in an Answer, and he puts in an Answer, which the Plaintiff accepts, he cannot recover his Costs under the Process of Contempt, and, it seems, he loses them.

A MOTION was made, that it might be referred to one of the *Masters*, to tax the Plaintiffs their Costs of, and relating to, the contempt of the Defendant in not putting in an Answer to the Plaintiffs Bill; and also their Costs of, and relating to, the four several insufficient Answers afterwards put in by the Defendant to the Plaintiffs Bill; and that such Costs, when taxed, might be paid by the Defendant, to the Plaintiffs or their Solicitor.

The Bill was filed the 3d February 1814. The first Answer was put in 7th June 1814, after Process of Contempt for not answering had issued. The Answer was excepted to, and the Exceptions allowed. The Defendant did not immediately put in another Answer, being advised by his Clerk in Court, that, before a further Answer could be enforced by Process of Contempt, he must be served with a Subpœna to put in a further Answer; but that was a mistake as to the Practice, and he was taken into the Custody of the Serjeant at Arms for want of an Answer. To emancipate himself from Prison, he immediately, 23d November 1814, put in a short Answer, which was referred upon the original Exceptions to the first Answer; and

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the second Answer was 9th December 1814, reported insufficient, and on that day, he put in a third Answer. That Answer was referred and reported insufficient; and on the 1st February 1815, he put in a fourth Answer, which was referred for Insufficiency; but before the *Master* made his Report, a fifth Answer was put in on the 18th February 1815, and the *Master* finding the Plaintiffs had taken an Office Copy of such Answer, he declined proceeding on the Exceptions to the fourth Answer.

Mr. *Hart*, for the Motion.

Mr. *J. Martin, contra*, contended, that, by accepting the fifth Answer, the Plaintiffs had waved their right to an immediate payment of the Costs occasioned by not putting in a sufficient Answer, and that according to a Case in *Vesey* (*a*), those Costs must be considered as Costs in the Cause, to be decided upon when the Cause is heard.

Mr. *Hart*, in reply:—

The Case only shows, that by accepting the Answer, the Plaintiff waved his remedy for these Costs, by the Process of Contempt, but does not preclude an Application like the present. These Costs must be paid, though, on the hearing, the Plaintiffs Bill is dismissed, and are not on the same footing as other Costs in the Cause, which will be given according to the Merits of the Case,

The VICE-CHANCELLOR:—

I cannot accede to this Motion.

(*a*) Anon. 15 Ves. 174.

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The Costs of the *insufficient Answers* are provided for by a clear Rule. For the *first* insufficient Answer in a Town Cause, the Defendant pays 40*s.* Costs; for a *second*, 60*s.*; for a *third*, 4*l.*; for a *fourth*, 5*l.*; and to obtain these Costs the Plaintiff sues out a *Subpœna*, and if not paid, an Attachment issues (*b*). For the Costs, therefore, of the insufficient Answers, it was not necessary to apply to the Court.

With respect to the Costs occasioned by the *Process of Contempt*, the Plaintiff by accepting the fifth Answer waved his right to obtain his Costs by means of the Process of Contempt; and, I think, I cannot now on Motion order them to be paid. Whether the Plaintiff will be able to obtain them on the Hearing, as Costs in the Cause, appears to me very doubtful. I rather think he has lost them.

Motion refused.

HARFORD and others, *v.* PURRIER.

27th June.

A Vendee, before a Conveyance, having agreed with a Tenant, that if he had a Conveyance by a given time, the Tenant should quit at that period, and the Tenant misconstruing the Agreement, quitted before a Conveyance was made, so that the Land was untenanted and deteriorated, the Loss held to fall upon the Vendee, it being occasioned by his Agreement with the Tenant.

Vendor not making a Title when Bill filed, pays the Costs up to the Report of a good Title.

ON the 3d May 1814, this Bill was filed for a specific Performance of an Agreement, 17th June 1813, to purchase certain Lands in Fee. By the Agreement,

(*b*) Harrison Edit. Newl. Orders, &c. p. 182-3. p. 200; and see Beames's

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500*l.* was to be paid immediately, and was paid; and the remainder of the Purchase Money was to be paid with Interest, by Instalments; and it was agreed that the Defendant, *Purrier*, should be entitled to the Rents and Profits of the Estate from the 24th day of June 1813, and that the Plaintiffs should within six Months from the date of the Petition, deliver a full Abstract of their Title to the Estate.

An Abstract of the Title was, within the prescribed time, delivered to the Defendant's Attorney, and on the 12th November 1813, it was returned, with objections, requiring further Abstracts and Information; and further Abstracts were afterwards delivered.

On the 28th May 1814, a Motion was made by the Plaintiffs, before the Defendant had answered, to refer it to the *Master*, to see if a good Title could be made, and the Defendant consenting to the Reference, an Order was accordingly made, and the consideration of Costs reserved till after the Report (*a*).

The *Master*, by his Report, 5th May 1815, certified, that the Plaintiffs could not make a good Title.

Exceptions were taken to the Report; and on the 11th July 1815, an Order was made that it should be referred back to the *Master*, to see whether the Plain-

(*a*) An Order had been obtained by the Plaintiff, to refer the Question of Title, though the Defendant did not appear and consent to the Motion; but the Registrar objecting to draw up the Order without such consent, the consent was afterwards obtained. Vid. *contra* Balmanno *v.* Lumley, 1 Ves. and Bea. 224; but that Case has often been considered by the Bar as unsatisfactory, and the Report is corrected, by *Lord Eldon*, in Bonner *v.* Johnstone, 1 Merivale, p. 372.

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tiffs could make a good Title to the whole, or what part, of the Premises; and in case the *Master* should find the Plaintiffs could not make a good Title to the whole, he was to state the grounds on which he formed his Opinion; and whether the part to which the Plaintiffs could not make a good Title was essential to the enjoyment of the Premises to which a good Title could be made.

The *Master*, by his Report, 20th February 1816, stated, that the Plaintiffs having laid before him certain additional Abstracts and Evidence in support of the same, he was of Opinion a good Title could be made to the *whole* of the Premises. That Report was confirmed. On the 28th September 1813, the Defendant entered into an Agreement with *Prew*, the Tenant of the purchased Estate, that he should quit, at a certain time, if a Conveyance was made. No Conveyance was made by that time; but *Prew*, misconstruing the Agreement, quitted the Premises.

The Plaintiffs now, by their Petition stating the foregoing facts, and that the Purchase Money and the Interest, after deducting the 500*l.* deposit, remained unpaid, prayed, that the Defendant might be ordered forthwith to complete his Purchase, and pay the Remainder of the Purchase Money, with Interest at 5 *per Cent.*, from the date of the Agreement; and, that to ascertain such Interest, it might be referred to the *Master*, and that the *Master* might proceed to settle the Conveyances from the Plaintiffs, and all necessary Parties, in case the Parties should differ about the same.

Affidavits were filed on both sides, and Mr. *Cameron*,

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the Defendant's Solicitor, swore, that when he, on the part of the Defendant, consented to a Reference as to the Title, he did not suppose that by such consent he waved any right he then had, or might have; and that he was not then aware that there was any other reason for not completing the Contract besides the objection to the Title; and that at the time when the Agreement to purchase was made, the Farms and Premises therein mentioned were in the occupation of a Tenant under a Lease, which was not expired, at an Annual Rent of 400*l.*, and under a Covenant for the due and proper Cultivation of the Premises; but that, since the Execution of the Agreement, the Tenant had quitted the Farm and Premises, and the same had been ever since untenanted, and in consequence, the value of the Premises had been materially deteriorated.

In the Affidavit of *John Kudwell*, a Surveyor, it was stated, that the purchased Estate, by being untenanted, had become very considerably depreciated and reduced in value.

On the part of the Plaintiffs, an Affidavit was produced, of *John Fowler*, who swore that he had been employed since June 1814, in looking after the Estate, the same being untenanted, in consequence of which, the House and Buildings had been much injured by the weather; but that the Hedges, Gates, Mounds and Fences, belonging to the Estate, were then in better condition than when the same was in the occupation of *Prew*, the late Tenant.

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

This Petition is regular. An Order of Reference as

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to the Title is considered as equivalent to a Decree (*b*); and on a Report of a good Title, the Cause may be brought on by Petition for further directions (*c*). The usual Decree for a specific Performance must be made.

Mr. *Leach*, and Mr. *Shadwell*, for the Defendant:—

This proceeding by Petition is certainly the proper course, and there must be the usual Decree for a specific Performance; but two Questions are to be considered: 1st. As to the Costs; and 2dly. As to Compensation, the Estate having been deteriorated subsequently to the Agreement for the Purchase.

Though in general, on a Bill of this sort, if the Plaintiff succeeds, he is entitled to his Costs; yet if the Plaintiff did not, when the Bill was filed, give an Abstract, showing a good Title, though he afterwards makes a good Title, he is not entitled to Costs, except from the time when the Title was completed. That was lately decided by the *Lord Chancellor* in a Case not reported, In this Case, therefore, the Plaintiff must pay the Costs of the Suit up to the period of the second Report, when the *Master* reported a good Title could be made. Then, 2dly, As to the Compensation claimed. The Purchaser calculating upon having a good Title, on the 24th December, enters into a conditional Agreement with the Tenant, that if he has a Conveyance by that time, the Tenant is to quit the Premises. This Agreement he made, as he might, without any Communication with the Vendors. The Tenant, without any warrant for so doing, quits the Farm. As no Conveyance was made by the Vendors by the

(*b*) See Balmanno *v.* Lumley, 1 Ves. and Bea. 224. Paton *v.* Rogers, Ib. 351. Brisco *v.* Brett, 2 Ves. and Bea. 378.

(*c*) See Pynam *v.* Walters.

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24th December, the Tenant ought not to have quitted. It was the Vendors duty to see that the Tenant did not quit the Farm and neglect the Lands. The Defendant had nothing to do with the Estate, until it was conveyed to him; and the loss occasioned by the misconduct of *Prew*, the Tenant, ought to fall upon the Vendors. Seven Crops had been taken by them. As the Vendors are entitled to 5*l. per Cent.* on the Purchase Money, so they must account for the Rents and Profits of the Farm from the time when Possession was to be delivered, and as if 400*l.* a year, the Rent the Tenant paid, had been paid by such Tenant to the Vendors; and it should be referred to the *Master* to inquire what deterioration there has been of the Estate in consequence of the conduct of the Tenant, and a deduction in respect of the same made out of the Purchase Money.

Sir *Samuel Romilly*, in Reply:—

Nothing was stated in the Contract as to the time when the Sale was to be completed, but only by what time the Abstract was to be delivered. Interest was stipulated to be paid on the Purchase Money at 5 *per Cent.*, which was exactly equal to what the Tenant paid as Rent for the Premises.

The Agreement made by the Tenant with the Purchaser was very absurd; but the Vendee is responsible for any ill consequences arising from the Tenant's misconception of the Agreement, and quitting of the Premises. The Purchaser entering into such an Agreement with a Tenant, after receiving the Abstract, amounted to an Acceptance of the Title; but it is not now necessary to insist on that, as the *Master* has reported there is a good Title. In *Paine* v. *Meller* (*d*),

(*d*) 6 Ves. 219.

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it was held, that in case of a loss by Fire after an Agreement to Purchase, it falls upon the Vendee. Here, if the Vendee had not made this Agreement with the Tenant, no loss would have happened; and therefore he must be responsible for it.

27th June.

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

This Cause comes before the Court on a Petition, in the nature of further Directions.

The first point to be considered is as to the further Directions and Costs. The Title being reported good, the Purchaser must pay his Purchase Money, and Interest at 5 *per Cent.*, according to the Agreement, and have a Conveyance; but no good Title having been made when the Bill was filed, nor at the period of the first Report, the Plaintiff, though he has a Decree for a specific Performance, must, as in the Case alluded to by Mr. *Leach*, pay all the Costs up to the second Report, which was grounded on the production of an additional Abstract.

With respect to the *Compensation* contended for, I shall first consider the point generally, and then advert to the particular circumstances of this Case.

It is the established Doctrine of Equity, that if a Contract to purchase is to be completed at a given period, and the Title is finally made out, the Parties continuing in Treaty, and the Purchaser not by any Acts released from his Bargain, the Estate is considered as belonging to the Purchaser from the Date of the Contract, and the Money from that Time as belonging to the Vendor. Ever since the 17th June 1813, therefore, a good Title having been made, the Estate must

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be considered as the Estate of the Defendant, and he has a right to an Account of the Rents and Profits from that time; and the Vendor is entitled to the Purchase Money, with 5 *l. per Cent.* Interest, according to the Contract, from the same period; and the consequence is, that if after the Contract the Estate be improved in the interval, or if the value be lessened by the failure of Tenants, or otherwise, and no fault on either side, the Vendee has the Benefit, or sustains the Loss. If there is a loss by Fire after the Contract, and before the completion of it, if neither party is in fault, the loss falls upon the Vendee, as was held in *Paine* v. *Meller* (*e*), and admitted in the later Case of *Spurrier* v. *Handcocke* (*f*), though there, the Bidding not being confirmed by a Report, the *Lord Chancellor*, on the Authority of the *Attorney-General* v. *Day* (*g*), held, the Vendor was responsible for the loss. The gain or loss on an Estate falls upon the Person to whom the Court holds the Estate to belong. If a Reversionary Interest is agreed to be purchased, and Lives drop before the Conveyance, the Vendee has the Benefit (*h*). The same Rule prevailed in the Civil Law: *Cum autem emptio et venditio contracta sit, (quod effici diximus simul atque de pretio convenerit, cum sine scriptura res agitur,) periculum rei venditæ statim ad emptorem pertinet, tametsi adhuc ea res emptori tradita non sit. Itaque, si homo mortuus sit, vel aliqua corporis læsus fuerit, aut ædes totæ, vel aliqua ex parte, incendio consumptæ fuerint, aut fundus vi fluminis totus vel aliqua ex parte, incendio consumptæ fuerint, aut fundus vi fluminis totus vel aliqua ex parte ablatus sit, sive etiam inundatione aquæ, aut arboribus turbine dejectis, longe minor aut de-*

(*e*) 6 Ves. 349.
(*f*) 11 Ves. 559.
(*g*) 1 Vez. Sen. 221.
(*h*) White v. Nutt, 1 Wms. 62; and see Ex parte Manning, 2 P. Wms. 410.

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terior esse cæperit, emptoris damnum est, cui necesse est, licet rem non fuerit nactus, pretium solvere (*i*). But though, generally, a Loss falls on the Vendee, there may be circumstances arising out of the conduct of the Vendor, in delaying the completion of the Title, which may exonerate the Vendee from the Loss. But is any such special case here made out? Here, the Loss was occasioned by the Agreement which the Tenant so improvidently made with the Vendee, and which the former certainly misconstrued; for, according to the strict construction of his foolish Agreement, he was not entitled to quit the Premises at the time he did. But for that Agreement, the Tenant would not have quitted; and therefore the Vendee by entering into the same, without the knowledge of the Vendors, was the innocent cause of the Loss occasioned by it. Soon after the Tenant quitted the Farm, the Vendor, to prevent injury to the Estate, proposed that an intermediate possession should be given to some person, without prejudice to the matters in dispute, but that proposal was rejected; and afterwards the Vendors put a Person in Possession; and an Order of the Court was obtained to sell the Crops, without prejudice to the rights of the Parties.

This, therefore, is not that clear Case which calls upon me to say, contrary to the general Rule, the Vendor must sustain the Loss which has happened. It must fall upon the Vendee.

(*i*) Inst. III. xxiv. 3; and see Domat. lib. I. s. 7.

END OF PART III.

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DOWLING *v.* MILL.

28th June.
2d July.

A Voluntary Agreement indorsed on a Lease by one not a Party to it, but only a Remainder-man, not binding.

Quære, *Whether on a Covenant in a Lease for* 99 *Years, determinable on three Lives, that upon the Death of either of the Lives, &c. on Request, and Payment of* 20*l. &c. to grant a new Lease for another Term of* 99 *Years, determinable with the Life of a new Person to be named, under the same Yearly Rents, Covenants, &c. the Lessee is entitled to a Covenant for Renewal in such new Lease.*

SIR *RICHARD MILL*, Bart. by his Will, 26th October 1765, devised certain Estates, including the Premises in question, unto his first and every other Son in Tail Male, with Remainder to his Brother *John Hoby Mill*, for Life, with Remainder to his first and other Sons in Tail Male; with Remainder to his Brother *Henry Mill*, for Life; Remainder to his first and other Sons in Tail Male; with Remainder to his Brother *Charles Mill*, for Life, Remainder to his first and other Sons in Tail Mail; with Remainder to his right Heirs.

The Testator died 20th March 1770, without Issue, leaving his Brothers *John Hoby Mill*, *Henry Mill*, and *Charles Mill*, surviving.

By an Indenture, 12th May 1777, made by Sir *John Hoby Mill*, *Henry Mill*, and *Charles Mill*, the Premises in question were demised to *John Dowling*, the Father of the Plaintiff, his Executors, Administrators, and Assigns, for ninety-nine years, determinable on three Lives therein mentioned; and the said Sir *John Hoby Mill*, *Henry Mill*, and *Charles Mill*, thereby covenanted that they, their Heirs or Assigns, "shall and will, from time to time, and at all times hereafter, at the Costs of the said *John Dowling*, his Executors, Administrators, or Assigns, upon the death of either of the Lives by which the said Premises hereby demised now are or shall be held, on request to be made to him or them, and of payment of 20*l.* within the space of three months next after the death of any one

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such Life as aforesaid, grant a new Lease of the same Premises for one other Term for ninety-nine years, to be determinable with the Life of such additional Person, to be named, under the same yearly Rent, Covenants, Conditions, and Agreements, as are hereinbefore mentioned."

Sir *John Hoby Mill*, and *Henry Mill*, died without Issue, and *Charles Mill*, then Sir *Charles Mill*, became entitled to the Premises in question, for Life, with Remainder to his first and other Sons in Tail Male. He had Issue a Son, the Defendant, who attained twenty-one, in 1786, and in 1790 they suffered a Recovery of the Premises, and the uses of the same were declared to be to Sir *Charles Mill*, for Life; with Remainder to such Persons, and for such Estates, as the Defendant, in case he should survive his Father, should appoint, with Remainder to the said Sir *Charles Mill*, the Father, in Tail general; with Remainder to the Survivor of them the said Sir *Charles Mill*, the Father, and the Defendant, and the Heirs and Assigns of such Survivor.

Four years after the Recovery in 1790, Sir *Charles Mill*, the Father (in consideration of 20*l.* paid to him, by *John Dowling*, the Father), demised to him, his Executors, Administrators, and Assigns, the Premises in question, to hold the same from the Expiration of the before-mentioned Lease, two of the Lives being still living, for the Term of ninety-nine years, if *Thomas Dowling*, a Son of the said *John Dowling*, aged 17 years, should so long live, at the Rent of 19*s.*; and in this Lease was contained a Covenant for a

Renewal of the Lease, in the same terms as were used in the preceding Lease of the 12th May 1777.

A Memorandum, of the same date as the Lease, was indorsed upon the Lease, in the following words: "I *Charles Mill*, of, &c. Son and Heir Apparent of the within-named Sir *Charles Mill*, do hereby give my free Consent to the Grant of the within-written Indenture of Lease, and the Premises therein mentioned, for the Term therein likewise mentioned. Witness my hand, the day of the date within mentioned."

Sir *Charles Mill*, the Father, died 27th July 1792, leaving the Defendant, his eldest Son and Heir at Law, who soon after his Father's death executed an Appointment of the Estates in Question to himself in Fee.

John Dowling, the Father, died 28th February 1815, having previously made his Will, 20th December 1814, whereby he appointed the Plaintiff his sole Executor, who proved the Will, and the Plaintiff applied to the Defendant to have a new Lease, containing a Covenant of Renewal as in the two former Leases, and tendered the 20*l.*; but the Defendant refused to grant a new Lease, and threatened to bring an Ejectment, to recover Possession of the Premises in question.

The Bill, stating the foregoing facts, prayed, that the Defendant might be decreed specifically to perform the Covenant of Renewal contained in the Lease of the 20th November 1790, and to execute to the Plaintiff a new Lease of the said Estate and Premises comprised in such Lease, for the Term of ninety-nine years, determinable upon the old Lives then in being, named in the said Leases of the 12th May 1777, and

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of the 20th November, 1790, and of the new Life to be named by the Plaintiff, under the same yearly Rents, Covenants, Conditions, and Agreements, as were contained in the Lease of the 20th November 1790; and that it might be declared, that the Plaintiff was entitled to have the same Covenant of Renewal inserted in such new Lease, as was contained in the last-mentioned old Lease; and that such Covenant of Renewal might be accordingly directed to be inserted in such new Lease; and that in the mean time the Defendant might be restrained by Injunction from bringing an Ejectment, or any other Action, against the Plaintiff, or any other Person, to recover the Possession of the Premises, or any part thereof contained in the said Lease of the 20th November 1790.

The Defendant, Sir *Charles Mill*, by his Answer, admitted the Facts stated in the Bill, (except as to the threat of an Ejectment), and expressed his consent to execute a Lease to the Plaintiff of the Premises in question, for the Term of 99 years, determinable with the Lives now in being, contained in such Leases, and a new and additional Life to be named by the Plaintiff, under the same yearly Rents, Covenants, and Agreements, as were contained in the preceding Leases, "*save and except, and with the exclusion of a Covenant for Renewal similar to that contained in the said Lease of 20th November* 1790;" and submitted he was not bound by the Memorandum indorsed upon the last-mentioned Lease. The Defendant further stated by his Answer that, as the Proprietor of said Premises contained in said Lease, he paid in respect thereof an annual Sum of 4*l.* unto the chief Lord of the Fee of the Premises; and that he received only 13*s.* a year from the Lessee thereof, which left a certain annual outgoing of

3*l.* 7*s.*; and that from the time of the Grant of the Lease in 1777, only 20*l.* has been received for a Renewal, that is to say, on the granting of the Lease of the 20th November 1790, so that the Estate in Question had proved rather an encumbrance than a benefit to the family of Defendant.

Mr. *Fonblanque*, and Mr. *Newland*, for Plaintiff:—

The principal Question is, as to the effect of the Indorsement upon the Lease. It will, perhaps, be contended that it is voluntary, and not binding; but there was a consideration, viz. 20*l.* paid to the Defendant's Father, who was a Party to the Deed, and that consideration was sufficient to make the Indorsement binding upon the Defendant. If the Defendant had been a Party to the Deed, it would have bound him; and the Memorandum puts him in the same situation as if he had been a Party. It is fraudulent to stand by and see the Father execute the Lease, and then confirm it by the Memorandum, and afterwards object to granting a Lease.

With respect to the Covenant of Renewal, the Cases of *Bridges* v. *Hitchcock* (*a*), *Furnival* v. *Crewe* (*b*), (which went to the House of Lords), and *Cook* v. *Booth* (*c*), are Authorities in point to show, that the Plaintiff is entitled

(*a*) 1 Bro. P. C. 522. Most of the Cases on this subject previous to 1794, are stated and illustrated from MS. Notes by Mr. *Hargrave*, with his usual ability, in his Argument for the Earl of Inchiquin on an Appeal to the Irish House of Lords. Vide Hargr. Jurisconsult. Exercitations, 3 vol. p. 178. See also *Harnett* v. *Yielding*, 2 Sch. and Lefr. 556.

(*b*) 3 Atk. 83.

(*c*) Cowp. 819.

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to such a Covenant in the new Lease to be granted. That such a Covenant was intended is plainly shown by the construction given to the Covenant of Renewal in the first Lease; for in the Lease afterwards granted, and which was a Renewal of the preceding Lease, the Covenant for Renewal was repeated; such Covenant for Renewal ought therefore to be introduced into the Lease now to be granted; but suppose *Furnival* v. *Crewe*, to be over-ruled by subsequent Cases, and that a Covenant to renew a Lease must be construed a Lease with Covenants, exclusive of a Covenant to renew, yet here the intention, that there should be a Covenant of Renewal in the new Lease, is plain from the language in which the Covenant is couched; and this Case has an additional circumstance in its favour, for here, on the Renewal of the Lease, a *Fine* is payable, which was not the case in *Furnival* and *Crewe*; a provision which plainly evidences the intention, that, in each renewed Lease there should be a Covenant for a further Renewal. If it should be thought that this circumstance does not afford sufficient reason to entitle the Plaintiff to a Covenant for renewal, there is still ground to contend, upon the Authority of *Russell* v. *Darwin* (*d*), that the Plaintiff is entitled to a Renewal so long as any of the old Lives in the last Lease are in existence.

Mr. *Leach*, and Mr. *Bell*, for Defendant:—

According to the last Lease, a new Lease was to be granted on the falling in of a Life, if Application made within three Months, but it is not stated in the Bill, or proved, that any such Application was made.

(*d*) Reported in Note to *Tritton* v. *Foote*, 2 Bro. C. C. 639.

Mr. *Fonblanque*:—

There is an Admission, in Writing, that Application was made within three Months.

Mr. *Leach*, and Mr. *Bell*:—

If so, that Objection is answered. Then, as to the Memorandum signed by the Defendant, it was merely voluntary, and can give no right enforceable here. It does not make the Defendant a party to the Lease; for if so, no Injunction would have been necessary, as prayed. No Consideration is given to the Defendant, nor did he sign this Memorandum in Consideration of the 20*l.* paid to the Father, for the Father, by Agreement, was entitled to that. This young Man, for he was only 23 when he executed the Agreement, cannot be held to such a mere voluntary engagement; nor can it be considered as a Fraud in thus resisting the Plaintiff's demand. If the Father had affected to convey Property which he knew he could not, and the Son stood by and countenanced his pretence of conveying, it would be a Fraud in the Son; but here, no such charge is made; the Lessee knew the infirmity of his Title, and sought by this Memorandum to make it good. But, suppose the Memorandum is effectual, yet, in its terms it does not entitle the Plaintiff to a Lease containing a Covenant for Renewal, as is clear from *Iggulden* v. *May* (*e*); but it is not necessary to insist at length on this part of the Case, as on the other ground it cannot be supported.

Mr. *Fonblanque*, in Reply:—

The Memorandum on the Lease by the Defendant, agreeing to confirm the Lease, must have meant to confirm all the Covenants contained in the Lease, one of

(*e*) 9 Ves. 325. S. C. 7 East, 237.

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which was, a Covenant for Renewal. As to the Consideration, if *A.* and *B.* agree with *C.* in respect of a Consideration paid to *A.*—both *A.* and *B.* are bound to perform the Agreement with *C.* No attempt has been made to set aside this Contract.

The VICE-CHANCELLOR—[After stating the Facts]:—

The Question is, whether the Defendant is bound to grant a new Lease containing a Covenant for Renewal.

If I thought it necessary to decide whether a new Lease should contain a Covenant for Renewal, I should, after the conflicting decisions on this subject, think it proper to take the Opinion of a Court of Law, as was done in *Iggulden* v. *May*, which was a very strong Case. But it is not necessary to determine that point; for the first question to be decided here is, whether the Defendant was a Party to the last Lease; and I am of Opinion he cannot be so considered. The Indorsement on the Lease did not make the Defendant a Party to it; the Indorsement was subsequent to the execution of the Lease, and must be considered distinct from it, and as if written on a separate Parchment. If it was to be read as a Deed, it was not admissible Evidence, it not being stamped. It is not an Agreement; it is only an expression of the Defendant's consent to a grant of the *Term* mentioned in the Lease. What Term? A Term for 99 Years, determinable on three Lives. That is all that is done by the Memorandum. He does not agree that when that Term ends he will grant a similar Lease with similar Covenants, but limits his consent to the Grant for the *Term* mentioned in the Lease. If the Court is averse to compelling the insertion of such a

Covenant, which is, in fact, a Covenant for perpetual Renewal, and will only do it on the clear Agreement of the Parties, this is not a Case in which the Court would enforce the insertion of such a Covenant.

There was no Consideration given to the Defendant for this Indorsement. His Father was bound to grant a new Lease, if required to do so within a given time, and payment of a Fine of 20*l.*, and the Father received the 20*l.* The Defendant does not claim through his Father, nor do the Covenants and Obligations of the Father in this Lease bind the Defendant, who is a Remainder-man. There is no mutuality in the Memorandum—no Covenant—no Parties—no Engagement. It has been said, that, by signing this Memorandum the Defendant induced the Lessee to suppose he should have a new Lease at the end of the Term, and therefore it is now fraudulent in the Defendant to disappoint expectations he had raised; but there is nothing in the Lease showing such an expectation; and if any such idea had been entertained and encouraged, the Lessee would have procured the Defendant to join in the Lease; instead of which, he first takes the Lease, and then gets this Memorandum, which must be construed according to the words of it, and amounts merely to a voluntary, gratuitous consent, to the Lease. No Case is made, which warrants me in Decreeing what is prayed by this Bill.

The Defendant professes his readiness to grant a new Lease, provided the Covenant for a Renewal is not contained in it; and I should have felt some difficulty in saying the Plaintiff was not, after that admission, entitled to such Lease, but as the Defendant does not

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wish to have a Lease unless it contains a Covenant for Renewal, it is not necessary to consider that point.

Bill dismissed, without Costs.

20th June.
2d July.

STEPHENS *v.* NEALE and others.

A Motion for time to put in an Answer, made on the same day an Attachment is sealed, is irregular; the Attachment being considered as sealed the first moment of the day on which it issues.

THE Defendants time for Answering being out, they, on the 11th of June, severally applied for an Order for time to Answer, and obtained Orders for six weeks time to Answer.

On the same day, an Attachment was issued against the Defendants for want of an Answer.

Mr. *Bell* now moved, that the two Orders for time might be discharged, with Costs, as having been obtained on a false Allegation; viz. That the Defendants were not in contempt.

Mr. *Horne, contra,* contended, the Question must be, whether the Motion for time was made before the Attachment was sealed—if before, it was regular, if after, bad; and produced an Affidavit, that *on or before* 11th June, Notice was given to the Plaintiff's Solicitor, that Motions would be made for Orders for time.

The VICE-CHANCELLOR:—

2d July.

This is merely a Question of strict Practice.

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STEPHENS v. NEALE and others.

I have directed inquiry to be made amongst the most experienced Persons, and I have made inquiries Myself, and in the result I find, that when an Attachment issues, it is considered as issued on the first moment of the day on which it issues; and therefore a Motion for time on the day on which the Attachment issues, cannot be sustained; and the Allegation on such Motion, that the Defendants are not in contempt, must be considered as untrue.

An Answer put in the same Day on which an Attachment for want of Answer issues; the Attachment has precedence.

In a Case, with which I have been furnished, of *King* v. *Harrison*, in 1810, an Answer was filed at eleven o'clock in the morning of the day on which the Attachment issued; the Attachment was held to have precedence, and the Answer considered as irregularly put in. This is not, in circumstances, exactly the same case as the present; but, in principle, it applies.

It is sworn that Notice of an intended Application for time was given to the Plaintiff's Solicitor *on or before* the 11th June; but Notice of an intended Application makes no difference, even though it were previous to the 11th, which is not positively sworn to—It has no effect.

Motion granted, but without Costs.

HOLMES *v.* AILSBIE.

2d July.

Where a Lease and Release were made to create a Tenant to the Præcipe in a Recovery, and the Lease was lost, held to be a Case to which the Relief given by the 14 *Geo. II. c.* 20. *s.* 5. *applies.*

THE Plaintiff being entitled in Fee to a Messuage and Land, agreed to sell the same to the Defendant,

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and upon her refusing to complete the Purchase, the present Bill was filed for a specific Performance.

The Defendant by her Answer objected, that the Plaintiff could not make a good Title, inasmuch as his Title depended on the validity of a Recovery suffered in 1746, the Tenant to the Præcipe being stated to be made by Lease and Release of the 23d and 24th May 1746, *but no Lease was produced*; and insisting, that to complete the Title a Recovery must be suffered by the present Tenant in Tail.

The Answer was replied to, but afterwards, to save expense, the Parties agreed to certain admissions, which reduced the point in the Cause to the mere Question, Whether the Non-production of the Lease for a Year, of the 23d May 1746, was a valid objection to the Title?

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

Sir *Samuel Romilly*, Mr. *Bell*, and Mr. *Shadwell*, for the Defendants,

Contended, this was a Case not provided for by the 14 *Geo.* II, c. 20, s. 5, though, probably, if it had been foreseen, the Legislature would have provided for it. The Case provided for by the Statute is where "the Deed or Deeds for making the Tenant to the Writ should be lost, or not appear." The Lease and Release, in this case, constituted the Deeds for making the Tenant to the Præcipe; and though, if both the Lease and Release had been lost, the Statute would have applied; yet as here the Lease only is lost,

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and such Lease alone was not a Deed making a Tenant to the *Præcipe*, it is not a Case provided for by the Act.

If the Deeds to make a Tenant to the Præcipe be imperfect, the Act does not apply. If a Bargain and Sale was not enrolled, or a Release were not executed by proper Parties, the Act does not apply, though the Bargain and Sale, and Lease and Release be lost. Here, perhaps, no Lease for a Year was executed. If an Ejectment were brought by the Persons in Remainder, and it was proved by the Solicitor who transacted the Recovery, that no Lease was executed, the Act would not apply; the Recovery would be bad, though twenty years had elapsed. Here the Lease not being produced, which is not of itself a Deed making a Tenant to the Præcipe, if relief is given, it can only be on the ground that the Deeds making the Tenant to the Præcipe are *imperfect*, which forms no ground of relief under the Act. The Act takes away the previous rights of Parties, and ought to be strictly construed.

Mr. *Leach*, in Reply:—

The Statute is remedial, and ought to be liberally construed. The Release recites the Lease for a Year; and it would be strange to say, that though if both Lease and Release were lost, the Act applies, yet if the Lease for a Year be lost, the Act does not relieve.

The VICE-CHANCELLOR:—

I have no doubt upon this Point. The Question is not, as in the Cases put in the Argument, whether a Bargain and Sale without enrolment, or a Release without

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Parties—an *imperfect* Deed lost—can be relieved against under the Act; but the Question here is, whether, if one of two Deeds creating a Tenant to the Præcipe be lost, it is not a Case within the Act of Parliament. In all Cases where a Deed is said to be lost, or does not appear, it might be urged that it never existed, and the Act would be of no use if that suggestion were available.

It would not be unreasonable to presume, in a Case like the present, where the Lease is recited in the Release, and the Parties are thus apprized of the necessity of the Lease, that there was a Lease; but the Act certainly applies to this Case. It provides, that a Recovery shall, after twenty years, be effectual, if it appears 1st. That there was a Tenant to the Writ. 2dly. That the Persons joining in such Recovery had a sufficient Estate and Power to suffer the Recovery; and 3dly. That the Deed or Deeds for making the Tenant to such Writ should be lost, or not appear. Now these three things concur in this Case. A Lease and Release to make a Tenant to the Præcipe was a common mode of Conveyance when the Act passed; and it could not have escaped the Framers of the Act, that a plurality of Deeds might be necessary to make a Tenant to the Præcipe; and it would be too narrow a construction of the Act to say it applies only to a general loss of Deeds, and not to a partial loss of one Deed. The words are "the Deed or Deeds for making the Tenant to such Writ," and this Lease falls within that Description. Cases of this kind must have occurred before, but no Case has been cited where such an objection was made.

Bill dismissed, but without Costs.

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PENNINGTON *v.* LORD MUNCASTER, and Others.

3d July.

Exceptions allowed to be taken to a Report, though no Objections before the Master while the Report was in the Draft, and the Report confirmed Nisi; a Special Case being made.

IN this Cause, the *Master* made his Report, 1st June 1816, and on Motion, it was confirmed *Nisi*.

Mr. *Wakefield* now moved for liberty to file Exceptions to the Report, upon an Affidavit of the Solicitor, that he had laid the Report before Counsel, who advised that Exceptions should be taken to it, and that on applying at the *Master*'s Office to be informed as to the time and manner of filing such Exceptions, he was informed that he ought to have carried in Objections to the Report before the *Master* had signed the same; and that he had neglected to do so from not being aware that it was necessary to object to the Report in the Draft, in order to enable him, on behalf of his Clients, to file Exceptions.

Mr. *Hall* objected that, after the Report had been confirmed *Nisi*, it was too late to make this Application, and cited the *Practical Register* (*a*), in which it is said, "After a Report is confirmed, the Court will not easily, if at all, stir it upon pretence of an omission or mistake; for the Parties had sufficient time to except to it, and if they will not mind their Business, it is their own fault."

If this application is granted, it must be on payment of the Costs of the Motion.

(*a*) Ed. by Wyatt, p. 380.

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PENNINGTON *v.* Lord MUNCASTER, and others.

Mr. *Wakefield*, in Reply:—

The passage cited admits a special Application may be made, and this is such.

With respect to Costs, from a passage in the same page in the *Practical Register*, it appears, the Court gives in these Cases such Costs as it thinks fit.

The VICE-CHANCELLOR:—

I think the Motion must be granted; but 20 *s.* Costs is not sufficient, they must pay the Costs of the Application.

N. B. To prevent the expense of Taxation it was agreed that 5 *l.* should be paid for Costs.

BRUCE *v.* ALLEN.

3d July.

After time obtained to Answer only, a Motion will not be granted for leave to Demur, unless under special circumstances, as surprise; merits only not being a sufficient ground for the Application.

AN Order had been obtained for time to Answer only. It appeared a Demurrer would be proper, and Mr. *Horne* now applied for leave to Demur, and stated the circumstances of the Case, to show a Demurrer was proper.

Mr. *Wilson* objected to the Motion, stating that there must be a special Case to entitle a Party to such an Order; and cited *Taylor* v. *Milner* (*a*), and *Dolder* v. Lord *Huntingfield* (*b*).

Mr. *Horne*, in Reply:—

We have shown a special Case.

(*a*) 10 Ves. 444. (*b*) 11 Ves. 283.

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BRUCE v. ALLEN.

The VICE-CHANCELLOR:—

In a special Case, the Court will grant such a Motion as this. By a special Case, I mean, some peculiar circumstance, as surprise, it not being sufficient on such a Motion as this to show, on the merits of the Case, that a Demurrer was proper; for it appeared proper in the Cases cited, though in them the Motion was denied. In the present instance no such special Case is shown as will justify the Motion.

Motion refused, but without Costs.

ANONYMOUS.

July 12.

A Demurrer in the Vice-Chancellor's Paper cannot be directed by Him to be heard at an earlier day than the Paper mentions, but may be advanced to the head of the Paper of that day.

A BILL in this Case was filed for an Injunction, and a Demurrer put in.

It was moved, that an early Day might be appointed for the Argument of the Demurrer, as no Injunction could be obtained, until the Decision upon the Demurrer had taken place.

The VICE-CHANCELLOR:—

I am governed by the Paper, which fixes the Day when the Demurrer is to be heard; I cannot alter it. The day fixed for the hearing of Demurrers is the 30th. I can advance the Demurrer to the head of the Paper on that Day; but if you wish it to be heard sooner, you must apply to the *Lord Chancellor*.

MATTHEWS *v.* L—E.

2d August.

Bill against an Executrix to enforce a parol Agreement by her Testator, when single, to settle an Annuity on the Plaintiff, a married Woman, separated from her Husband, who had lived with the Testator. General Demurrer allowed.

THE Plaintiff separated from her Husband, and a Deed of Separation was executed by them, in which the Husband gave up all claim to any Property the Plaintiff might acquire. After this Separation, the Plaintiff was induced to live with a Mr. *L—e*, and lived with him for several years; when *L—e* being about to marry, communicated his intention to a Friend of the Plaintiff, a Mrs. *W.*, requesting her to break the matter to the Plaintiff, and expressing an intention to settle upon her 100*l.* a year. *L—e* wrote afterwards to the Plaintiff enclosing her 25*l.* which he said, "I look "upon as a quarter of the Annuity I intend securing to "you for your Life, which shall be regularly paid at "the four usual Quarters. I shall send you 50*l.* in the "course of a few days, and will send you the same "Sum at Christmas, to purchase what you may have "occasion for to make you comfortable."

In consequence of the proposal of the Annuity, it was finally agreed between the Plaintiff and *L—e*, that the connection should cease, and that the Plaintiff should not in any respect impede or endeavour to prevent the intended Marriage with the Defendant; and that the Plaintiff should in future live a retired, chaste and virtuous Life, and should so conduct herself as in no respect to interfere with the connection by way of Marriage which *L—e* was about to form; and *L—e*

promised or agreed to settle upon the Plaintiff 100*l.* *per Annum* for Life.

The Bill, stating these circumstances, further stated, that in pursuance of such Arrangement and Agreement, the connection with *L—e* and the Plaintiff ceased; the Marriage took effect; and that the Plaintiff had conformed to the Agreement; and that the Annuity was regularly paid by *L—e* until his Death; but that he did not secure and settle the same upon the Plaintiff, otherwise than as before stated; and that the Plaintiff, confiding in the promise of *L—e*, that the Annuity would be continued to her during her Life, expended the whole of her Income, and made no savings.

The Bill then stated the Death of *L—e*, and the appointment of his Wife, the Defendant, his Executrix, who proved his Will, and paid the first quarter of the Annuity, which became due after the Death of *L—e*, but refused to make any further payments.

The Bill, amongst other facts, charged, that the Defendant "has now, or lately had, in her possession or power, some Deed or Instrument, whereby the said Annuity was settled upon the Plaintiff; or some written Direction or Papers, Letters or Memorandum, or Accounts relative thereto, would appear, and that the said Testator in his Life gave some directions to the said Defendant relative thereto, but which Deeds, Papers, Letters, or Writings, she refuses to discover."

The Prayer of the Bill was, for an Account of the Arrears of the Annuity, and that a sufficient part of the Personal Estate of the Testator might be set apart

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and invested to secure the future payments of the same during the Life of the Plaintiff, and that such Annuity might be settled to the separate use of the Plaintiff, &c.

To this Bill, a General Demurrer was put in by the Defendant.

Mr. *Bell*, and Mr. *Shadwell*, in support of the Demurrer:—

The Bill merely states a Promise to settle an Annuity, which Promise was not carried into execution, and in this respect resembles *Cotteen* v. *Missing* (*a*), lately determined by your *Honor*, where an unexecuted intention was of no avail. A mere voluntary Agreement cannot be enforced in a Court of Equity (*b*). In this case, the Promise was voluntary. There was no consideration, which the Law acknowledges, in support of the Promise. The Plaintiff was a married Woman at the time of the connection; and if an Annuity Deed had been actually executed, it might have been set aside as *nudum pactum*, upon the principle laid down in *Priest* v. *Parrot* (*c*), viz.: the bad example to married Persons, and the encouragement to people to enter into Agreements of this kind. In that Case, the Woman was of good character before she entered into the Family, and was seduced by the Husband; but still, even in that aggravated Case, Lord *Hardwicke* refused to give effect to the Security.

(*a*) Ante, p. 176.

(*b*) Colman v. Sarrell, 1 Ves. Jun. 50; S. C. 3 Bro. 12.

(*c*) 2 Ves. Senr. 160.

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Mr. *Wetherell*, and Mr. *Pepys*, *contra*:—

The Plaintiff sues *in forma Pauperis*. The Bill alleges a Promise to settle an Annuity upon the Plaintiff. The Letters stated in the Bill prove the Promise, and the Demurrer admits it. There was a moral obligation in *L—e* to provide for the Plaintiff, she having no means of support. A promise, to pay a Debt barred by the Statute of Limitations, or a Debt barred by a Certificate, or to pay for the nursing of an illegitimate Child, has been held good, on the ground of the previous moral obligation to discharge the Debt. This Promise, therefore, was good, it being founded on a previous moral obligation to make some provision for the Plaintiff. He pays the Annuity during his Life; and she, relying upon it for her support, lays up no Provision.

The Bill charges, that the Defendant has in her possession some Deed by which the Annuity was settled upon the Plaintiff, or some written Direction, or Papers, Letters or Memorandums, or Accounts relative thereto; and that the Testator in his Life gave some directions to the Plaintiff relative thereto, and this charge must be answered. The Demurrer admits the statements in the Bill. Some of these Papers may be testamentary. The Ecclesiastical Court goes great lengths in the admission of Papers as testamentary. Though, therefore, it were true, that the Promise of the Party might not be sustainable, yet a Will in favour of the Plaintiff, would. The Papers may show that the Defendant promised her Husband that she would continue the Payments of the Annuity, and in such Case the Court would consider the promise as binding on her. The Defendant is residuary Legatee, as well as Executrix,

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and is therefore interested in resisting a disclosure. The Plaintiff has a right to an Answer as to this Charge.

There is no Case, except *Priest* v. *Parrot*, in which it has been held that the circumstance of one of the Parties being married, puts it out of the power of the Man to make a Provision for the Woman. That Case is distinguishable from this; there, the Woman caused a separation between the Husband and Wife—Here, the Woman was separated from her Husband before the connection took place; and if not a *Feme Sole*, was as nearly so as could be, a Deed of Separation having been executed between her and her Husband. In Lady *Cox*'s Case, the Man was married, but the Bond given by him was not declared void, but was considered as a voluntary Bond, and postponed against Creditors (*d*). In this Case the Demurrer admits Assets. In *Hill* v. *Spencer* (*e*), Lord *Camden* determined that a Security given by a Man to a Woman with whom he had lived was good, though the Woman, before she lived with him, was a common Prostitute. Why may not an Adulteress have a provision made for her as well as a common Prostitute. A Security given to induce an adulterous connection would be bad; but if given on the relinquishment of such a connection, it is not. It would promote vice, if it were held that a Woman on ceasing such a connection could have no provision made for her. She would use every effort to continue her intercourse, or would, from want, be driven to other vicious courses. The Plaintiff avers by her Bill she

(*d*) The Reporter has a MS. Note of this Case under the Name of *North* v. *Spencer*, and others, which agrees with the Report in P. Wms.

(*e*) Amb. 41.

performed the conditions on which the Annuity was agreed to be given. She has since lived chastely, and threw no impediments in the way of *L—e*'s marriage.

Mr. *Bell*, in Reply:—

The Letters only express an Intention to settle an Annuity, but that intention was not carried into Execution. No action could have been sustained at Law upon the Agreement. There was no good or valuable Consideration for the Promise; it was merely voluntary. If in Lady *Cox*'s Case there had been an Agreement only, to give a Bond, and no Bond given, this Court would not have enforced that Agreement; and it may be doubted, whether, after *Priest* v. *Parrot*, if an Annuity had been actually settled in this Case, it might not have been set aside on grounds of public policy, the Woman being married. Her being separated from her Husband, makes no difference, for still they might have been united again. Her living chastely afterwards, and not impeding the Marriage, was only acting as she ought to do, and cannot affect the Case.

With respect to the Charge as to Papers, &c. in the Defendant's Possession, the whole Bill, and the Prayer, is founded on the supposition that there was no Security given; it proceeds solely on the ground of a mere Promise.

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

This Bill states only an Agreement to secure an Annuity, and that Agreement was not founded on any good, meritorious, or valuable Consideration; it was

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therefore voluntary, and I take it to be a clear Rule in this Court, that a Bill does not lie to enforce a voluntary Agreement. It has been contended that, there was a moral obligation to provide for this Woman. Did that moral obligation arise in respect of the past adulterous intercourse? Certainly not. Though separated from her Husband, she was not absolved from her marital obligation to live chastely; and her connection with *L—e* was a high offence by the Divine Law, as well as against Society.

Whether, if any Annuity had been settled, the Court would take it from her; or whether the Court would refuse her any assistance, as in *Priest* v. *Parrot*, it is not necessary to consider.

The cessation of the adulterous connection cannot be considered as a consideration for the Promise. She was bound to discontinue the intercourse, more especially as the Man was about to marry. Nor was her abstaining from raising any obstacles to the Marriage, a consideration. There might be a worldly feeling that some provision was proper, but there was no consideration which a Court of Equity can recognize. There are many Cases of imperfect obligation, such as Gratitude, or Friendship, where the moral obligation may be great, but they do not, in the eye of the Law, form a sufficient consideration for a Promise. Put the strongest Case, that of a Man saving the Life of another, yet that is not, in Law, a sufficient consideration to support a Promise. With respect to her relying on this Promise, and therefore not laying up a Provision, it does not strengthen the Case. If a Man promises

another to leave him 10,000*l.*, and in consequence he omits to labour for a Provision, and the Man dies without leaving him any thing, no claim can be made on his Representatives.

It is then urged that, there is a Charge in the Bill that the Defendant has, or lately had, in her Possession or Power, some Deed or Instrument, whereby the Annuity was settled on the Plaintiff, *or*, some written Direction or Papers, Letters, &c. relative thereto, which she refuses to discover. A Demurrer only admits what on a strict view of the Pleadings as against the Pleader, is well pleaded; and, connecting this charge with the statement in the Bill, " that he did not secure or settle the Annuity upon the Plaintiff," the Demurrer can only be taken to admit there were some Directions or Papers, Letters, &c. relating to the Annuity. It is not stated or charged in the Bill that these Papers, &c. were of a testamentary nature; they can be considered, therefore, as relating only to the Promise to settle an Annuity, mentioned in the Bill. This objection, therefore, is not sustainable.

Demurrer allowed.

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KNIGHT *v.* MATTHEWS.

2d August.

The Defendant in his Answer stated Facts which had occurred since the filing of the Bill; upon which the Plaintiff amended his Bill, stating the Facts more fully; upon which the Defendant pleaded as to part, demurred as to other part, and answered the rest of the amended Bill. Plea and Demurrer overruled.

THE original Bill in this Case was filed 27th July 1815, for the specific Performance of an Agreement by the Defendant, to purchase a Freehold Messuage and Premises. The Bill was amended by Order, dated 19th December 1815, and the following Amendments, amongst others, introduced: "And Plaintiff, although he admits that said Defendant did, on or about the 9*th Nov.* 1815, send the Key of the said Premises to Plaintiff's present Solicitors, charges, that they refused to receive the same." The Original Bill stated, that an Action had been commenced against the Plaintiff, to recover back the Sum of 1,000*l.* paid by the Plaintiff in part of the Purchase Money, with Interest, &c.; and in another Amendment of the Bill, a Charge was introduced, "That said Action came on to be tried at the last Assizes for the County of Gloucester, before Mr. *Baron Wood*, who thought the said Contract, being kept alive by the Parties mutually dealing therein, had not been rescinded; and that the said Defendant, the Plaintiff therein, was entitled only to nominal Damages; and his Lordship directed the Jury to find 1*s.* Damages, which they did."

To this amended Bill the Defendant demurred as to part, pleaded to other part, and answered the rest.

The Demurrer and Plea were as follows: "This Defendant, &c. as to so much and such part of the said Bill as seeks to discover whether the said Complainant's Solicitors refused to receive the Key of the Premises in

the said Bill mentioned, this Defendant doth demur, and for cause of demurring saith, that it appears upon the face of the said Bill, that the original Bill of Complainant was filed on the 27th day of July 1815, and that the same is now amended by virtue of an Order of this Honourable Court, dated the 19th day of Dec. 1815; and that the said Complainant admitting, in his amended Bill, that this Defendant did, on or about the 9th of Nov. 1815, send the Key of the said Premises to the said Complainant's present Solicitors, charges, that they refused to receive the same; and, therefore, if such facts of refusal be true, the same doth, of the said Complainant's own showing, appear to have happened since the time of the filing of the said original Bill; and this Defendant saith, that the said Complainant's amending his said original Bill, and charging a fact arising subsequent to his said original Bill, is, as this Defendant is advised, contrary to the known Rules and Practice of this Court; therefore, and for divers good causes of Demurrer in the said amended Bill appearing, this Defendant doth demur to so much, and such part, of the said Bill as aforesaid; and doth humbly pray the Judgment of this Honourable Court, whether he is bound to make any further or other Answer thereto; and as to so much and such part of the said amended Bill as seeks to discover, whether the Action at Law in the said Bill mentioned did not come on to be tried at the last Assizes for the County of Gloucester, before Mr. *Baron Wood*; and whether his Lordship did not think as in the said Bill is suggested; and whether his Lordship did not direct the Jury as in the said Bill is suggested, this Defendant doth plead in bar, and for Plea, showeth, that the said Complainant's original Bill of Complaint was filed on the 27th day of July 1815; and

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that the same was amended by virtue of an Order of this Honourable Court, dated the 19th day of Dec. 1815; and that the last Assizes for the County of Gloucester, in the said amended Bill mentioned, were held and took place on the 29th day of July 1815; and, therefore, if the facts herein pleaded to, are true, the same have happened since the time of the filing of the said original Bill. And this Defendant saith, that the said Complainant amending his said original Bill, and charging facts arising subsequent to his said original Bill, is, as this Defendant is advised, contrary to the known Rules and Practice of this Court: and this Defendant doth therefore plead the Matters aforesaid, in bar to so much and such part of the said Bill as aforesaid; and doth humbly pray the Judgment of this Honourable Court, whether he is bound to make any further or other Answer thereto, and as to the Residue of the said amended Bill, &c."

The Demurrer and Plea were separately set down for Argument. The Plea was first argued.

Mr. *Treslove*, in support of the Plea:—

In *Harrison's Practice* (*a*) it is laid down that, "Where new Matter happens pending the Suit, and before or after Replication, which Matter is necessary to be set forth to the Court, it cannot be done by way of Amendment; but you may, of course, file a Supplemental Bill, which must be a distinct Bill, reciting briefly the former proceedings, and then the new Matter." This Rule is well known. *Harrison* cites no Authority; but Authorities are not wanting; for, in *Brown* v. *Higden* (*b*), Lord *Hardwicke* says, "I take it to be the constant

(*a*) Harr. Newl. Ed. 66. (*b*) 1 Atk. 291.

Rule, that Matter subsequent to the original Bill must come by way of Supplemental Bill." So, in *Hayter* v. *Stapylton* (*c*), the same Judge says, "The Plaintiff could not properly amend his original Bill by filing new Matter which has arisen since the Original Bill, but ought to have brought a Supplemental Bill; but then the Defendant should have taken the advantage of this defect in form by a Demurrer; and it is too late to make the objection after they have answered." In a recent Case of *Milner* v. Lord *Harewood* (*d*) the subject is considered.

In this Case, the amended Bill states, that the Action mentioned in the original Bill came on to be tried before Mr. Baron *Heath*, at the Gloucester Assizes; and the Plea states, that the Assizes were held the 29th July 1815, so that the Trial was two Days subsequent to the filing of the Original Bill, which was on the 27th July 1815, and being an occurrence subsequent to the filing of the Original Bill, it could not be introduced by Amendment.

Mr. *Benyon*, and Mr. *Richards*, *contra*:—

Blackstone, in his *Commentaries* (*e*), says, a Plaintiff may amend his Bill *before Replication*, "but, *afterwards*, if new Matter arises which did not exist before, he must set it forth by a Supplemental Bill;" from which it may be inferred, that if new Matter arises before Replication, the Plaintiff may introduce it by Amendment, and is not driven to a Supplemental Bill. The doctrine as laid down by Lord *Redesdale* (*f*), is,

(*c*) 2 Atk. 137.
(*d*) 17 Ves. 144.
(*e*) 3 Vol. 447. and see Pract. Reg. 44.
(*f*) Ld. Redesd. Tr. Pl. 49. Ed. 3.

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"When any event happens subsequent to the time of filing an original Bill, *which gives a new Interest* in the matter in dispute to any Person not a Party to the Bill, as the Birth of a Tenant in Tail, or a new Interest to a Party, as the happening of some other Contingency, the defect may be supplied by a Bill, which is usually called a Supplemental Bill;" and, in support of this doctrine, he cites the Case of *Brown* v. *Higden*. In that Case a new Interest had arisen, the Defendant, an Administratrix, having died subsequent to the filing of the Bill. Lord *Redesdale*, therefore, seems to confine the necessity for a Supplemental Bill, to Cases where some new Interest has arisen; but what new Interest has arisen in this Case? Half the story is told in the original Bill; and all that is sought by the Amendment is, that the whole story may be told. In the original Bill it is stated an Action was brought, and by the Amendment, we state, the result of that Action.

The Defendant answered, as to the Statement in the Original Bill, that an Action had been brought; and also, stated the fact, that a Verdict had been obtained by him: and it may be contended, that having put in an Answer on the subject, it over-rules the Plea. When the Bill is amended, the Amendment is considered as part of the original Bill.

Mr. *Treslove*, in Reply:—

It is difficult to contend that an Answer filed six Months before a Plea, as is the case here, can overrule the Plea.

Matter occurring subsequent to the filing of the

original Bill must be introduced, not by way of Amendment, but by a Supplemental Bill. Suppose a Release given after the filing of the original Bill, it could not be stated by way of Amendment. In some Cases, which form exceptions to the general Rule, circumstances occurring subsequent to the filing of the Bill may be introduced by way of Amendment, as when Administration is taken out after the Bill filed (*h*) by an Administrator; or where an Agreement is afterwards stamped (*i*). With these Exceptions, there is no Case where Matter subsequent to the Bill has been allowed to be added by way of Amendment; and if it were feasible, great inconvenience would be the consequence.

The VICE-CHANCELLOR:—

Let me hear the Demurrer before I determine upon the Plea.

Mr. *Treslove*:—

The Demurrer arises out of another part of the Amendments relative to the Key, in which it is said, that, on the 9th of Nov. 1815, the Key was sent to the Defendant, a fact which took place subsequent to the filing of the Bill. As the time when the Key is said to have been sent is mentioned in the Amendment, we have demurred to that part of the Bill; but as the time when the Cause was tried was not stated in the Bill, we were under the necessity of pleading to that part of the Bill, to introduce the fact, that the Trial was on a day subsequent to the filing of the Bill. The Plea and the Demurrer both depend upon the same reasoning. Both are good, or both bad.

(*h*) See 3 P. Wms. 351, sed vid. 1 Atk. 291.

(*i*) Davidson v. Foley, 3 Bro. C. C. 604.

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The VICE-CHANCELLOR:—

This is a mere contest as to the Form of Pleading, for it is admitted that, if the Facts in question cannot be introduced by way of Amendment, they certainly may by a Supplemental Bill.

The Plaintiff when he filed his Bill, stated the Matters as they then stood. The Answer was put in on the 14th Nov. 1815. In the interval many circumstances might have occurred, and the Defendant, when he puts in his Answer, must state the facts as they *then* are; and if circumstances are introduced in the Answer which occurred subsequent to the filing of the Bill, the Plaintiff must be allowed to make Amendments to the Bill, so as to show that such new circumstances mentioned in the Answer are not of the colour he represents them, and so as to obtain a complete Answer as to such circumstances. The Defendant, by his Answer, says that, "the Action came on to be tried at the last Assizes held for the County of Gloucester, when Defendant recovered a Verdict therein;" and as to the Key, he says, "he afterwards sent the Key of the House to Messrs. *Bateman* and *Jones*, the Solicitors of the Plaintiff." Upon this Answer, which states two facts which occurred subsequent to the filing of the Bill, the Plaintiff could not go into Evidence as to the ground on which the Defendant obtained a Verdict, or to prove that the Key, when sent, was not accepted, those facts not being in Issue. Is it not then competent to the Plaintiff to introduce, by Amendment, a Statement which will put those facts in Issue, and afford the means of explaining those circumstances which are so relied upon by the Defendant in his Answer? There must be some mode of meeting that defence. It is said, it can only be done

y a Supplemental Bill. Would not that occasion Bills without end?—for then, all facts occurring between the Bill and Answer must be stated by Supplemental Bill, and thus, fresh facts occurring, many such Bills might be necessary. A Defendant generally states the facts as they are at the time of filing his Answer, but no instance is stated where that has occasioned a Supplemental Bill. The Defendant has in his Answer alleged facts posterior to the filing of the Bill; and all the Plaintiff wants is an opportunity of explaining those facts. A Bill when amended is considered only as one original Bill; how then can the Defendant plead and demur as to Matter to which he has answered? This Case steers clear of the Cases cited in favour of the Plea and Demurrer. This is the Opinion I have formed, looking at the Case upon Principle; but as no express Authority is cited on the part of the Defendant, I shall not immediately decide.

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The *Vice-Chancellor*, on a subsequent day, stated, he remained of the Opinion he had expressed.

3d July.

Plea and Demurrer over-ruled.

Ex parte ANDREWS *in re* EMETT (*a*).

August 7th.

THE facts, and material Arguments in this Case, appearing in the Judgment of the Court, renders any further Statement unnecessary.

Husband and Wife assign to two Creditors of the Husband a Contingent Interest, to which the Wife would be entitled if she survived a particular Person. The Creditors insure the Wife's Life. She dies before the Contingent Interest fell in, and the Creditors receive the Insurance Money. The Husband being a Bankrupt, the Creditors only allowed to prove the Amount of what was due to them after deducting the Money received from the Insurance Office, minus *the Sum paid for the Insurance and Expenses.*

(*a*) Ex Relatione.

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Ex parte ANDREWS, *in re* EMETT.

The VICE-CHANCELLOR:—

Stephen Emett, the Bankrupt, being indebted to each of his Brothers, *Charles Emett* and *Thomas Emett*, in 1814, in order to cover the Debts due to them, executed an Assignment to each of them of a contingent Interest, to which he was entitled, determinable on the Death of his Wife *Margaret*.

In January 1815, each of the Brothers insured his Interest in the Life of *Margaret E.*; and on her Death, in March of the same Year, received from the Insurance Office 200 *l.* Under the Commission subsequently issued against the Bankrupt, each of the Brothers proved the whole of his Debt, without deducting the Sum received from the Insurance Office. The Question is, whether so much of the Proof should be expunged.

Upon the Argument, I thought it right to be furnished with the Deeds of Assignment. They are both dated 29th Oct. 1814, made by the Bankrupt and his Wife, of the one part, and *Charles Emett* and *Thomas Emett* respectively, of the other part. The first Deed assigns Three Fourths of the Interest to *Charles*, the second, One Fourth to *Thomas*, upon Trust, in the first place to reimburse themselves all Costs, Expenses, &c.; next, to retain their Debts respectively, and then to pay the Overplus to *Stephen Emett*.

Upon the Argument, this Case was assimilated to that of *Godsall* and *Boldero* (*b*), of which it is the converse. Here the Party has recovered, not his Debt, but the Sum insured by his Policy. But it is said, that inasmuch as in that Case the transactions were blended, and what was paid by the Executors absolved

(*b*) 9 East, 72.

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the Office, so payment by the Office discharges the Debt. It may be argued, however, that it does not necessarily follow, that the Court, deciding that the Party having been paid by the Executors, could not recover from the Office, would have decided, that having been paid by the Office, he could not recover from the Executors. The Contract with the Insurance Office must be a Contract of Indemnity; it would be legal only as an Indemnity commensurate with the Interest of the Party. The Contract is to Indemnify from Loss, but there was no Loss. That Case, therefore, though it bears on this question, does not conclude it. But another point arises on the Assignments, which must decide this Case. The Assignments have placed *Charles* and *Thomas Emett* in the situation of Trustees. The Bankrupt and his Wife have conveyed their contingent Interest to them, as Trustees, to act for them, with Indemnity against Expenses, Covenant not to interfere, and express devolution of their whole Right and Title.

From the date of this Contract the Bankrupt and his Wife could not themselves have insured in respect of their Property—having assigned it to a Trustee, they no longer had an Insurable Interest.

The Trustee then acting in part for himself, in part for them, does an act beneficial to both Parties; at his own Expense meliorating the Property; laying out Money for the benefit of himself and his *Cestui que Trust*. The result of the act is, that the Estate is benefited 200*l*. Shall he be allowed to appropriate this benefit?

It is clear, that a Trustee never can use for his own

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If a Trustee renews a Lease, the Cestui que Trust *has the benefit of such Renewal.*

benefit the Property committed to his Trust, as in the common instance of a Renewal of a Lease. Although it appears that the Lessor would not have renewed with the *Cestui que Trust*, yet the Trustee making a Contract for himself, and with his own Money, cannot set up a Title adverse to that of his *Cestui que Trust*, and holds the renewed, as he held the old Lease (*c*).

That is not precisely the present Case, because here the Insurer had an insurable Interest. He insured his Interest: but he acts subject to all the jealousy with which the Court regards a Trustee acting on the Property for his own benefit.

The Trustee never could have insured unless the Property had been assigned to him; the means, therefore, of acquiring the Sum received from the Insurance Office, originates with the Bankrupt and his Wife; they divest themselves of all dominion over it by committing it to a Trustee.

It appears extremely difficult to maintain, that the Trustee being allowed his Payments, is not to account for what he has received for an advantage made of Property committed to him as Trustee; for Property acquired partly by his own act, partly by the Assignment, the act of the Bankrupt.

Being enabled by the act of the Bankrupt to obtain part of his Debt, he cannot prove the whole.

(*c*) Vide 1 Chan. Cas. 190; 484; Ambl. 719; Ib. 734; Ib. vol. ii. p. 207; 1 Vern. 1 B. and Bea. 46.

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I have had considerable doubt on the question; but think that the Party must account (being allowed what he has expended, including the premium) and the surplus must be deducted from the Proof.

Mr. *Wingfield*, for the Petition.

Mr. *West*, against it.

Ex parte HUCKEY, in the Matter of YOUNG (*a*).

Set-off, and joint Proof allowed, in Bankruptcy, under the circumstances.

MESSRS. *HUCKEYS* were Bankers at *Bridgewater*, and also Partners in two other Banking Concerns, carried on, the one at *Taunton*, the other at *Bristol*. The Firms of the three Houses were different, and they formed distinct Co-partnerships; but they all had dealings with Messrs. *Young*, the Bankrupts, who were Bankers at Dulverton. It was stated to be the course and practice of their respective dealings, for the Bankrupts to lay by all the Notes of the Petitioners under the said different Firms, and to Exchange them at convenient periods, for Notes of the Bankrupts own, taken by either of the Petitioners Firms without distinction, who in like manner respectively laid by all the Bankrupts Notes they accidentally took in Business, and kept them for the purpose of such Exchange. At the time of Messrs. *Youngs* Bankruptcy, the Petitioners under the said three several Firms had collected, and were the Holders of, Notes of the Bankrupts to the Amount of 276 *l.*, and the Bankrupts had taken Notes of the Petitioners said several Firms, amounting in the whole to 189 *l.*; but one *Sadler*, a Clerk of the Bank-

(*a*) Ex Relatione.

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rupts, just before the Commission issued, possessed himself of the whole of those Notes, with other Property of the Bankrupts, to the Amount altogether of 450*l.*, and absconded with it; however, after Assignees were chosen, they compromised with *Sadler*, and received 100*l.* to release him entirely.

The Petition was presented as the united Petition of Messrs. *Huckeys*, and their Partners, in the said three several Firms, stating the above facts, and claiming to be allowed to set off the 189*l.*, the Amount of their Notes received by the Bankrupts, against the 276*l.*, the Amount of the Bankrupts Notes of which they were the Holders, and to be allowed to make a joint proof upon the Bankrupts Estate for the Residue, alleging, that it was impossible for them to distinguish the Notes of their respective Firms, so as to ascertain the particular set-off to which they might respectively be separately entitled.

Mr. *Leach*, and Mr. *Cooke*, for the Petition, urged, that if the 189*l.* of the Petitioners Notes had been found in the possession of the Assignees, it would have been a clear Case of set-off; and that, although the Notes had been withdrawn by *Sadler* upon the Commission being issued, still, as he was undoubtedly responsible for the Amount to the Assignees, and the Assignees, instead of compelling him to refund, had thought proper to make terms of Compromise with him, and release him without the privity or consent of the Petitioners, for whom it was contended the Assignees were to be considered, with regard to that Debt, as in the light of Trustees, that it followed, the Assignees must be liable to the Petitioners for the whole Amount of the Notes that ought to have been returned to them.

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Sir *Samuel Romilly*, and Mr. *Wilson*, for the Assignees, insisted, that none of the Cases in Bankruptcy had gone the length of the demand made by the Petition to be allowed to set off Notes never in the actual possession of the Assignees, nor made available to the Bankrupts Estate; and contended, that no part of the Property could be said to be recovered, since more than the 189*l.* in question remained due from *Sadler* to the Bankrupts Estate, after deducting the 100*l.* he had paid: And it was also insisted, that the Petitioners being three distinct Firms could not be permitted to make a joint proof; and that, if under the circumstances they were unable to make out the particular set-off to which they were separately entitled, the Bankrupts Estate must have the benefit of their Misfortune, as neither the Assignees nor the Bankrupt had made the difficulty.

Mr. *Leach*, in Reply, contended, that the habit and practice of the Bankrupts dealing with the several Firms of the Petitioners, according to the Affidavits on both sides, had in effect gone the length of entitling them to be considered as only one Firm, with regard to the Bankrupts. And upon the other point, he contended, that, if the Assignees, after the Compromise they had taken upon them to make with *Sadler*, without the Petitioners consent, were not to be held responsible to the Petitioners for their whole Claim, still that the Petitioners must be entitled in some way to the benefit of that Compromise; and that at any rate they must be allowed so much of the 100*l.* received from *Sadler*, as the proportion that their Claim of 189*l.* bore to the whole 450*l.*, in respect of which such Compromise was made.

The *Vice-Chancellor* assented to Mr. *Leach*'s latter

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Mr. *Fonblanque*, Mr. *Leach*, and Mr. *Roupell*, for the Petition, insisted on the facts stated in the Affidavit of *C. Sadler*, as showing, *primâ facie*, he was the Heir at Law of *William Sadler*, and being so, he was entitled to the Prayer of this Petition, that his claim might be fully investigated. The Jurisdiction of the Court in these Cases is clear from the Decision in *Ex parte Webster* (*a*).

Sir *Samuel Romilly*, and Mr. *Hall*, contended, that, no Evidence that could be attended to was adduced to show that the Petitioner was the Heir of *Sadler*. The only Affidavit is that made by the Petitioner. To support such a Petition as this, the Affidavits of other Persons ought to be produced in corroboration of it. On our Part, there are several Affidavits contradicting that made by this Petitioner, and showing that he is not the Heir. No Case, therefore, is made in support of this Petition. Supposing he was Heir, yet he would be merely a Trustee, the beneficial Interest in the Estate being in *Gretton*, and he would be bound to convey to him.

The *Vice-Chancellor* considered *Ex parte Webster* as a Decision, that the Court has Authority to allow a Traverse, the Case appearing to have been determined after consideration, though the grounds of the Judgment were not stated. But *His Honor* expressed a doubt, whether a Person claiming, as in this Case, merely as a bare Trustee, ought to be allowed to traverse. He commented upon the Affidavits and the Deeds which were produced; and concluded from them that no *primâ facie* Case was made out, showing the Petitioner to be the Heir at

(*a*) 6 Ves. p. 809.

Law of the deceased *Sadler*. There was only his own Oath, which was by no means conclusive, and was besides contradicted.

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Petition dismissed.

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15th August.

Order for Goods by two Partners; afterwards Partnership dissolved; a Bill drawn on the two Partners, but accepted only by one, who carried on a separate Trade, and the Goods delivered to him, no claim can be made on the other Partner.

On a Dissolution of Partnership, the retiring Partner sells the concern, with the Partnership Property, to the other, but some of the Partnership Property remains in the Partnership Names, and in the order and disposition of both. They afterwards become Bankrupts, and separate Commissions issue against them. There being Property outstanding in the Partnership Names, the joint Creditors cannot prove under the separate Commission against the retiring Partner.

PRIOR to, and in the Month of October 1814, *Harris*, and others, the Petitioners, carried on the business of Wine Merchants, and had a house at *Oporto*.

In the same Month of October 1814, *Thomas Christopher* and *John Reay*, who then carried on the Business of Wine Merchants, in Copartnership, gave an Order to the Petitioners to supply them with One Hundred Pipes of Port Wine, which Order, on the 18th of the same Month, was forwarded to their House of Business at *Oporto*, and on the 24th of January 1815, the Wine was shipped at *Oporto* for England, and consigned to *Christopher* and *Reay*, the Bills of Lading being forwarded to them; and the Wine arrived in the *Thames* in March following.

In the Month of December 1814, *Christopher* and *Reay* agreed to dissolve their Partnership on or from

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the 31st of that Month, and Notice of such Dissolution was inserted in the *London Gazette*. The terms of the Dissolution were, that *Christopher* should receive 10,000*l.* in Stock, Cash, and Bills, in discharge of all Claims and Demands on the Partnership Property, and that *Reay* should receive and pay all the Debts due and owing to and from the said Co-partnership, and release and indemnify *Christopher* therefrom; and a Memorandum in Writing to that effect was drawn up and signed by *Christopher* and *Reay*. Afterwards, in pursuance of this Agreement, the Sum of 10,000*l.* was paid to *Christopher*; and, from the time of the Dissolution of the Partnership, *Reay* continued in the House of Business where the Partnership had been carried on; sold and disposed of the *quondam* Partnership Property as he thought proper; continued the Trade on his own separate Account, and contracted Debts and Engagements in his sole Name: *Christopher* also carried on the trade of a Wine Merchant, in another place, on his separate Account.

On the shipping of the Wine at *Oporto*, the House there drew a Bill of Exchange, dated 1st January 1815, for the Sum of 4,200*l.*, the Amount of the Wines, on *Christopher* and *Reay*, payable at Twelve Months date to the Order of the Petitioners. Upon this Bill being presented for acceptance at the house of *Christopher* and *Reay*, *Reay* refused to give a joint Acceptance, and accepted the Bill, in his own name only. The Wines were delivered to *Reay*, in March 1815.

On the 31st July 1815, *Reay* was declared a Bankrupt.

On the 22d August 1816, *Christopher* was declared a Bankrupt.

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On the 29th August 1816, the Petitioners applied, but were not permitted, to prove their Debt under *Christopher*'s Commission.

Under these circumstances a Petition was presented, praying, that the Commissioners might be directed to admit the Proof, or, if the Petitioners were not allowed to prove their Debt against the separate Estate of *Christopher* until the whole of the separate Creditors were fully paid and satisfied, then that the Commissioners might be directed to enter a Claim for the Petitioners on the Proceedings under the Commission, for the amount of their Debt; and in case there should be any surplus of the separate Estate, after paying the separate Creditors in full, that such surplus, or a sufficient part, might be paid to the Petitioners.

Mr. *Cullen*, in support of the Petition:—

There being no solvent Partner, nor any Partnership Effects, this Petitioner is entitled to prove under *Christopher*'s separate Commission. By the Agreement on the Dissolution of the Partnership, all the Partnership Effects became the sole and separate Property of *Reay*. He acted upon it as such, and carried on the Trade on his separate Account, and contracted Debts.

Mr. *Cooke*, *contra*:—

It is true, there is no solvent Partner, but there certainly are Partnership Effects, and therefore these Petitioners are not entitled to come upon *Christopher*'s separate Estate. The Agreement on the Dissolution of the Partnership was as stated, but there is Partnership

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Property, the possession of which was not delivered to *Reay*. The Debtors to the Partnership of *Christopher* and *Reay* had Notice that the Partnership was dissolved, but they had no Notice that the Partnership Debts were assigned to *Reay*, consequently the Debts remained "in the order and disposition" of *Christopher* and *Reay*, and under the 21 *Jac.* c. 19, must be considered still as Partnership Property. At the time of the Dissolution of the Partnership, and at the Bankruptcies of *Reay* and *Christopher*, there was also some Port Wine of the Partnership standing in their Names in the London Docks, without any Notice having been given of any alteration of the Property. This, therefore, under the Statute of *James* (*a*), must be considered as Partnership Property, it remaining "in the order and disposition" of *Christopher* and *Reay*.

There is another fundamental objection to this Petition. The Debt of the Petitioners must be considered as the separate Debt of *Reay* only. The Order for the Wines, it is true, was in the joint Names, but before the Delivery of them the Partnership was dissolved, and the Petitioners had Notice of the Dissolution. The Petitioners drew a Bill for the Wines on *Christopher* and *Reay*, but when it was presented at the house where the Partnership had formerly been carried on, and where *Reay* carried on his separate concern, *Reay* refused to accept the Bill in the Partnership Firm, and accepted it only on his own separate Account, and in his own Name, and the Wines were afterwards delivered to *Reay*. It must, therefore, be considered as a Delivery

(*a*) 21 Jac. I. c. 19.

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of the Goods to *Reay* only, and on his separate Account; a Debt of his; nor did the Petitioners think of making any Demand on *Christopher* until it was found that *Reay* was insolvent.

Mr. *Cullen*, in Reply:—

The Statute of *James* operates only to *vest* the Property in the *Bankrupt* who gained, or might have gained, a false Credit by it. The Statute has nothing to do with Property possessed by *other* persons. If, therefore, it remained *apparently* the Property of some other person than the Bankrupt, it does not apply. This is a Case not within the mischief intended to be prevented by the Act, and it does not apply. The Wines and the Debts must be considered as the sole Property of *Reay*, and not as Partnership Property.

Then as to this being the separate Debt of *Reay*. It is admitted that the Order for the Wine was on the joint Account; nor did the subsequent conduct of *Reay* exonerate *Christopher* from his liability in respect of such Order.

The VICE-CHANCELLOR:—

Two Questions arise out of this Petition; 1st, Whether the Petitioners Debt is to be considered as the separate Debt of *Reay*? and 2dly, Whether, supposing it a Partnership Debt, there are any outstanding joint Effects; for if there are, it is very clear the Petitioners cannot prove against the separate Estate of *Christopher*.

With respect to the first question, it is said, that though the Wines were originally ordered by both, they

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were only delivered to *Reay*. The joint Order was on the 14th October 1814, to send one hundred Pipes of Port Wine from *Oporto*; and Notice was given by *Christopher* and *Reay* to the Petitioners, on the 31st December 1814, that they had dissolved their Partnership. After this Notice, the Bill for the Wines was drawn from *Oporto* 1st February 1815, before, as it is admitted, Notice had reached the House there, of the Dissolution of the Partnership. The Bill was drawn in the same manner as Bills had before been drawn, on the Partnership, such Bills having before been accepted in the joint Names. When this Bill for 4,300*l.* was presented to *Reay*, he refused to accept in the joint Names, and would only accept it separately, and on his individual account. The Petitioners not then having delivered the Wines, might have refused to do so, unless a joint Acceptance was given; but instead of doing so, they take the separate Acceptance of *Reay*, and afterwards, in March, deliver the Goods to *Reay* alone. It is sworn also, that the Petitioners had other transactions in the way of business, with *Reay* alone, and also bought Goods of him in his separate Trade; and it is only when *Reay* became a Bankrupt, that they make any intimation of their claim upon *Christopher*. The Petitioners do not swear they delivered the Goods to *Christopher* and *Reay*, upon the joint Credit of the two; and it is sworn by *Christopher*, that he did not consider the Wines as his. If this Case went before a Jury, I think they would have no doubt that this was the separate Debt of *Reay*; and such is My conclusion, from the Affidavits. This puts an end to the Petition.

With respect to the other point, there is no Case

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where an Agreement between two Partners, on a Dissolution of the Partnership, has been held to convert the Partnership Property into separate Property, unless where, according to the nature of the Property, there has been a change of Possession in pursuance of the Agreement. *Ex parte Ruffin* (*c*), *Ex parte Fell* (*d*), and other Cases (*e*), determine, that two Partners may, *bonâ fide*, agree to dissolve their Co-partnership, and that what was before the Property of the two, shall become the separate Property of one; but those Cases do not decide that such an Agreement is complete, though Possession of the Partnership Property is not given according to the Contract. To render such Agreement complete, Possession of the Partnership Property must be given by the retiring Partner to the other. If no change of Possession follows the Agreement, agreeably to the Contract, the Property, in case of Bankruptcy, is considered as Partnership Property; the *quondam* Partners continue the visible Owners, and it is within the Statute (*f*), it being in their order and disposition; and in case they become Bankrupts, it is not the separate Property of the one Partner, but must be considered as Partnership Property, and divisible amongst the Partnership Creditors. In this Case, there was no change of Possession as to the Wines, or the Debts. The Wines remained at the Docks in the Names of *Christopher* and *Reay*; they appear there as joint Property; no Possession of them was given according to the Contract. These Wines, therefore, were

(*c*) 6 Ves. 119.
(*d*) 10 Ves. 347.
(*e*) See *Ex parte Williams*, 11 Ves. 3.
(*f*) 21 Jac. I. c. 19.

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" in the order and disposition" of *Christopher* and *Reay*; and being so, the Statute of *James* applies, and they must be considered as outstanding Partnership Property. On both points, therefore, this Petition is unfounded.

Petition dismissed, with Costs.

MARPLES and others *v.* BAINBRIDGE and others.

24th and 29th August.

The Testator bequeathed to A. M. " should she survive, and continue unmarried, all his Goods, Chattels, Estate, and Effects, at the time of his Death, to use, occupy, and possess the same during the Term of her natural Life, and from and immediately after her Death," he disposed of the same. A. M. married. The Condition held to be only in terrorem.

THOMAS MARPLES, by his Will, 11th January 1805, bequeathed to his Wife, *Anne Marples*, " should she survive and continue unmarried, all his Goods, Chattels, Estate, and Effects at the time of his death, to use, occupy and possess the same during the term of her natural life, and from and immediately after her death," he disposed of the same. The Testator also bequeathed to his Wife the Tenant Right of his Farm at S——, and appointed *Bainbridge*, and another, Executors of his Will; but *Bainbridge* alone proved the Will.

The Testator died, 15th January 1805. *Anne Marples*, the Testator's Widow, entered into Possession of the Farm, and of the Testator's Property; and afterwards, 7th April 1806, married the Defendant *George Andrew*.

The Plaintiffs, some of them Legatees, and all of them next of Kin of the Testator, now filed their Bill against *Bainbridge*, the Executor, and also against *George Andrew*, and his Wife *Anne Andrew*, late *Ann Marples*, insisting, that by the second Marriage,

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George Andrew became entitled, in right of his Wife, only to such Interest in the Farm as the Testator had at his Death; and that the Legacies became payable; and that the residue of the Testator's personal Estate became distributable amongst the Plaintiffs, the next of Kin; and the Bill prayed an Account—payment of the Legacies—and that the Residue should be ascertained and divided amongst the Plaintiffs.

To this Bill a Demurrer was put in, but overruled, on the ground that, supposing it to be true that no Forfeiture was incurred by the second Marriage, nor any present Distribution to take place, yet the Plaintiffs were entitled to an account of the Residue.

The Defendants afterwards put in their Answers; and *Andrew* and his Wife, insisted, that no Forfeiture was incurred by the second Marriage; and that the Legacies had not become payable, or the Residue distributable.

Mr. *Leach*, and Mr. *Parker*, for the Plaintiffs.

Mr. *Fonblanque*, and Mr. *Benyon*, for the Defendants, contended, that the Condition was such as the Law will not allow. A Condition, that if the Testator's Widow should marry during her infancy the Property should go over, would be good; but a Condition, generally, in restraint of any future Marriage, is not good, which was the Rule in the Civil Law, as appears from the *Digest* (*g*).

(*g*) Lib. 35, tit. 1. c. 62. s. 2.

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There is no Gift over, on the event of the second Marriage, but only, on her *death:* Supposing, therefore, this Condition were such as the Law allows, yet, being a Bequest of Personal Property, and there being no immediate Bequest over, on breach of the Condition, the Condition must be considered *in terrorem* only. *Fry* v. *Porter* (*i*), *Pullen* v. *Ready* (*k*), *Harvey* v. *Aston* (*l*), and *Scott* v. *Tyler* (*m*).

Mr. *Leach*, in Reply:

A Bequest during Widowhood, or until a second Marriage, is good. This cannot properly be considered as a Condition; it is a Bequest to her so long as she continues unmarried. The Interest in this Property upon the second Marriage, and until the Wife's Death, devolves upon the Plaintiffs, the next of Kin, it not having been disposed of.

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

The Cases are numerous on this subject. When there is a Bequest, like the present, of Personal Property, upon a Condition subsequent, and no Bequest over on breach of the Condition, the Condition is considered only *in terrorem*. It has been argued, that this is not a Condition, but a Bequest till the second Marriage; but that is too refined a distinction; nor will the Court feel disposed to put such a construction on the Will, as will occasion a Forfeiture. The language imports a Condition, just as much as if the words

(*i*) 1 Ch. Cas. 168; 1 Mod. 86, 300; 2 Ch. Rep. 26.
(*k*) 2 Atk. 187.
(*l*) 1 Atk. 375.
(*m*) 2 Bro. Ch. Ca. 488.

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used, were, *if*, or *provided*, she continue unmarried. It must be considered as a Condition subsequent. The Testator's Wife, therefore, is entitled to this Property during her life, but the Plaintiffs must have an Account, and are entitled to have the Property secured.

ANNESLEY and another, *v.* MUGGRIDGE and another.

27th August.

Auctioneer, on Motion of Vendor, ordered to pay Deposit into Court, minus *his Charges and Expenses; and Vendee restrained by Injunction from proceeding in his Action against the Auctioneer for the Deposit; in which Action he had obtained a Judgment for the whole Amount of the Deposit.*

A BILL was filed, 1st June 1816, by the Assignees of a Bankrupt Vendor, against *Muggridge*, a Purchaser of two Houses from the Bankrupt; against *Scott*, the Auctioneer, who sold the Houses, and also against *Marsh*, who was Heir at Law of the Testator, under whose Will the Vendor claimed, praying a specific performance of the Agreement to Purchase by *Muggridge*, and that *Scott* might pay to the Plaintiffs the Deposit paid on the Sale of the Houses, and that *Muggridge* might be restrained from proceeding in his Action against *Scott* to recover his Deposit, and that *Scott* might be restrained from paying such Deposit to him; and that *Marsh* might either join in Conveyances to the Purchaser, or admit the Will of Sir *Charles Marsh*, the Testator, under whom the Vendor claimed as Devisee.

The Defendant, *Muggridge*, by his Answer, insisted, the Plaintiff could not make a good Title; and that, under these circumstances, he was justified in bringing an Action for the Recovery of his Deposit; and stated,

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that he intended suing out Execution against *Scott*, upon the Verdict he had obtained against him for his Deposit, unless restrained.

On the 11th July 1816, an Order was obtained from the *Vice-Chancellor*, to restrain *Scott* from paying over the Deposit Money, 414*l.* to *Muggridge*, and directing *Scott* to pay such Deposit into Court, (he having consented so to do); the same to be paid in ten days; and upon such payment into Court, *Muggridge* was restrained from proceeding in the Action against *Scott*; and *Muggridge* and *Scott* were restrained from commencing any other Action or Actions against the Plaintiffs, touching the Matters; and a Reference was directed to the *Master*, to see if a good Title could be made to the Estate in question.

On the 22d August following, an Application was made to vary the Minutes of the preceding Order.

Mr. *Wakefield*, for the Defendant *Scott*, insisted, that he ought to be at Liberty to retain out of the Deposit Money ordered to be paid into Court, the Sum of 76*l.*, the Amount of the Expenses of the Sale; and requested the time for the payment of the Money into Court might be extended to the 11th of November.

Mr. *Moore*, on the part of the Defendant *Muggridge*, urged, that he had recovered a Verdict against *Scott*, for the full amount of the Deposit—that if the Title proved defective, he had a right to claim such Deposit —and that the payment into Court was ordered for the

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Security of the Party who should appear eventually entitled to the Deposit; but if *Scott* was allowed to make the deduction he claimed, the Security to *Muggridge* would, *pro tanto*, be lessened. *Scott* must look for his remuneration to those who employed him to sell. There is no Case on this point.

Mr. *Wakefield*, in Reply:—

An Auctioneer is always considered as entitled to deduct the Expenses of the Sale out of the Deposit. He has paid the Duty on the Sale. The Suit may exist for years; and is the Auctioneer to lay out of his Money all the time? In a similar Case, of *Humphrys* v. *Hollist*, January 1814, *The Lord Chancellor* directed the Auctioneer to pay in the Deposit, *after deducting his Charges and Expenses.*

Mr. *Treslove* [*Amicus Curiæ*]:—

I was in that Cause. Mr. *Roupell* and myself settled the Minutes according to what we considered the usual course in these Cases; other points were much discussed; but there was no Argument upon the Auctioneer's right to retain.

The VICE-CHANCELLOR:—

The Purchaser has obtained a Judgment which entitles him to the whole amount of the Deposit in the hands of *Scott*, the Auctioneer; nor did *Scott* insist on any set-off, or on any right to retain; *Muggridge*, therefore, has strong ground for insisting, if an Injunction is granted, it ought, at least, to be accompanied with an Order for the payment of the full amount of the Deposit Money into Court. On the other hand, the Auctioneer may reasonably urge that he has a lien on the Deposit in his hands, for his charges and expenses.

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Pending the dispute as to the Title, all the risk respecting the Deposit rests with the Vendor:—For though the Auctioneer is, to a certain degree, a Stakeholder for Vendor and Vendee, yet so far as respects any risk as to the Deposit, the Auctioneer is considered as the Agent only of the Vendor. I lately had occasion to consider this subject, on a Question made, as to Interest upon a Deposit (*a*). The Deposit is the Vendor's Money; and the risk belonging to it is his; and if the Vendor moves to have the Deposit paid into Court (which on large Purchases it is always prudent to do for the sake of security, and to obtain Interest on the Deposit), there is good ground for the Auctioneer insisting to have his Costs and Expenses first deducted; and not, as in a Case circumstanced like this, be compelled to wait the termination of, possibly, a protracted Law Suit of many years continuance. The Case which has been cited of *Humphrys* v. *Hollist*, shows what has been done by the Court in circumstances like the present. When the matter was mentioned before, I desired the Cases might be looked into. No Case but that has been found. The Order there seems reasonable. The only difference between the Cases, is, that in this, a Judgment at Law has been obtained; but that makes no difference. I must, therefore, order *Scott* to pay in the Deposit, *minus* his charges and expenses. I admit this may operate hardly upon the Purchaser, if the Contract is not established; but I think it proper to follow the Case to which I have adverted.

(*a*) See *Smith* v. *Jackson*, post. p. 618. That Case, and some others, owing to the want of Papers, have not been presented in chronological order.

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JEUDWINE *v.* ALCOCK and another.

27th August.

After a Report, which was confirmed in favour of a Title by one Master, *another* Master, *in another proceeding, made a Report, by which the Title was affected. On Motion to refer the Title back to the* Master *who had reported there was a good Title, an Order was made for that purpose.*

ON the 18th April 1815, a Bill was filed by the Plaintiff for a specific performance of a Purchase Agreement. The Defendants put in Answers; and afterwards, on Motion, an Order was made, 21st July 1815, referring it to *Master Alexander*, to see if a good Title could be made. The *Master* reported, 22d March 1816, in favour of the Title. No exception was taken to the Report; and on the 14th May 1816 it was absolutely confirmed.

On the 18th July 1816, the Defendant presented a Petition, supported by Affidavit, praying a Reference back to the *Master* as to the Title; and stating, that on the 17th June 1816, the Defendant received Notice from *Charles Browning*, Esq., the Committee of the Person and Estate of *Louisa Browning*, a Lunatic, who claims the Estate in question; enclosing a Report of *Master Harvey*, dated 7th May 1816, in which he stated, that in pursuance of an Order made in the Lunacy, 24th July 1815, whereby he was directed to inquire, whether it would be proper, and for the benefit of the Lunatic and the Estate, that any, and what, steps ought to be taken, or proceedings had, to recover possession of the Estate and Premises mentioned in the Order (the Premises purchased by the Defendant): and that the *Master* was of Opinion, under the circumstances, it would be proper to file a Bill for the Recovery of the Estate. An Affidavit was filed by the Defendant and his Solicitor, in which they negatived any

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knowledge of the proceedings before *Master Harvey*, till after the Report was absolutely confirmed.

The objection to the Petition was, that the Report being confirmed, the subsequent proceedings before *Master Harvey* could not affect it; but on the other side it was said that, there ought to be a Reference back to *Master Alexander*, as to the Title, as the Report of *Master Harvey* afforded strong reason to believe a good Title could not be made; and the *Vice-Chancellor* was of that Opinion; and that under the circumstances the Title ought to be referred back to *Master Alexander* to report again upon it.

Sir *Samuel Romilly*, and Mr. *Wilson*, for the Petition.

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

Ex parte SHAW and another.

29th August.

A Creditor who assents to and acts under an absolute Bill of Sale for the Benefit of Creditors, but does not sign the Deed, cannot afterwards sue out a Commission against the Debtor on the ground that the absolute Bill of Sale was an Act of Bankruptcy.

THIS was a Petition to supersede a Commission of Bankruptcy against *John Taylor*, on two grounds: First, that the Debt of the Petitioning Creditor, *Ling*, arose from so much Money received by the Bankrupt as Clerk or Book-keeper to *Ling*, in the course of his Employment, and as to which *Ling* had sworn, before a Justice of the Peace, that the Bankrupt had fraudulently and feloniously embezzled the same; which if true, it was Felony (*a*), and in consequence, the civil rights

(*a*) Vid. 39 Geo. III. c. 85.

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of *Ling* were merged, and therefore he could not sue out a Commission. Secondly, That the Act of Bankruptcy was founded on an absolute Bill of Sale, executed by the Bankrupt to the Petitioners, for the benefit of his Creditors; and that the Petitioning Creditor, *Ling*, had assented to the same, and could not therefore insist upon it as an Act of Bankruptcy.

Mr. *Bell*, and Mr. *Montagu*, for the Petition.

Mr. *Cullen*, *contra* :—

The VICE-CHANCELLOR :—

This Commission is sought to be superseded on two grounds, 1st. That there was no legal Debt to support the Commission; and 2dly. That there was no Act of Bankruptcy.

It is not disputed that the Bankrupt was indebted to the Petitioning Creditor in a Sum of 120*l.*; but it is said that the civil remedies for the Recovery of this Debt were merged in the Felony. Was this a Felony within the Act? To render it such, there must be a fraudulent Concealment and Embezzlement. What is Embezzlement? Not merely receiving Money as a Clerk and Book-keeper. It is said *Ling* made a Charge of Felony, before a Justice of the Peace, against the Bankrupt; but that does not preclude him from insisting on his Civil Rights for the Recovery of the Debt. When he made the Charge, he might suppose a Felony had been committed. It appeared to the Magistrate to be a disputed Matter of Account, and not a Case for a Prosecution. *Ling*, by preferring the Charge, under a mistaken idea that the Bankrupt had committed a

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Felony, did not lose his civil remedies for the recovery of the Debt.

With respect to the Act of Bankruptcy, it appears the Bankrupt executed an absolute Bill of Sale to the Petitioners. No Trust is stated on the face of the Deed; but from the Affidavits of the Petitioners it appears that the Deed was executed for the Benefit of all the Creditors. Then has this Petitioning Creditor *Ling*, by subsequently assenting to the Bill of Sale, and acting under it, made himself a party to it? If he has, he cannot resort to a Commission founding the Act of Bankruptcy upon that Bill of Sale (*a*). That would be against good faith. It is clear from the Affidavits that he was cognizant of the Deed, though not a Party to it, and agreed to receive payment of his Debt under it. He urged the Auctioneer to sell, and approved of the Sale. He called for an Account of the Produce of the Sale; and only complained that his Debt had not been discharged. After thus by his conduct becoming a Party to this Bill of Sale, he cannot sue out a Commission on the ground that the Bill of Sale was an Act of Bankruptcy. The Commission must be superseded.

Petition granted.

Ex parte BIRCH.

30th August.

A Petition to prove a Debt, and to stay a Bankrupt's Certificate, allowed, the delay in proving being accounted for.

IN 1812, *Richard Scarratt*, being considerably indebted to *Birch*, the Petitioner, executed a Warrant of

(*a*) *Bamford* v. *Barret*, 2 T. R. 594; and see *Spottiswoode* v. *Stockdale*, Cooper, 105, 106; and *Ex parte Crawford*, 1 Christ^{n}. Bank^{t}. Law, p. 97.

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Attorney as a Security for what was due, and for future advances. In Hilary Term, 1815, Judgment was entered up upon the Warrant of Attorney for 1,700*l.* and 4*l.* Costs. On the 10th February 1815, a Writ of *Fieri Facias* was issued upon the Judgment, indorsed to levy 1,700*l.* and upwards, and delivered to the Under Sheriff for the County of *Stafford*, to execute the same. At the request of *Scarratt* the Writ was thrice renewed, and the last Writ was delivered to, and executed by, the Sheriff on the 10th May 1815. On the preceding day, (9th May,) *Scarratt* absconded, and on the following 23d of May a Commission issued against him, and he was declared a Bankrupt, the Act of Bankruptcy being founded on the absconding. *Evans*, the Brother-in-Law of *Scarratt*, was the Petitioning Creditor under the Commission; and *Birch*, believing the Commission to have been concerted between *Scarratt* and *Evans*, directed the Sheriff to proceed to a Sale of the Goods and Property of *Scarratt*, which had been taken in Execution under *Birch's Fieri Facias*, which was, accordingly, done. The Assignees brought an Action against the Sheriff for the Goods, and on the 16th March 1816, at the Assizes for *Stafford*, a Verdict was obtained by the Assignees for the amount of the Property taken under the Execution. Pending these Proceedings, *Scarratt* procured his Certificate to be signed by the requisite number of Creditors, and by the acting Commissioners, and the same was before the *Lord Chancellor* for his Allowance. The Debt of *Birch* was equal to the amount of all the Debts proved under the Commission. Under these circumstances, the Petition of *Birch* prayed for an Order, that he might be at liberty to call a Meeting of the acting Commissioners, and prove his Debt; and that in the mean time the

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Allowance and Confirmation of the Certificate might be stayed; and that the Petitioner might be at liberty to assent to or dissent from the Allowance of the Certificate; and for that purpose, that the Certificate might be sent back to the Commissioners to re-certify the same to the *Lord Chancellor*. The Petition was supported by an Affidavit of *Birch*, verifying the facts stated in the Petition; and further stated his belief, "until the time that such Action was tried, that the said Execution was a valid Execution, and that he should have recovered the Amount levied under the same."

Mr. *Heald*, and Mr. *Richards*, for the Petition.

Mr. *Leach*, *contra*, contended, that no Case had been made in support of the Petition. Unless the Petitioner was prevented proving his Debt, by circumstances not under his control, the Court, though it will allow him to prove his Debt, will not stay the Certificate. This Petitioner thought proper to defend an Action in which he was unsuccessful; and his delay, on that account, in proving his Debt, did not now entitle him to stay the Certificate.

Mr. *Heald*, in Reply, observed, there was good ground for defending the Action, and nothing vexatious or dilatory on the part of the Defendant. Admitting it to be true, that to obtain such an Order as is here prayed, the delay in proving must be from circumstances not under the control of the Party, this is precisely that Case, and falls within the principle relied on.

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The VICE-CHANCELLOR:—

Under the circumstances of this Case, the absconding being the day before the Execution, and the Petitioning Creditor, the Brother-in-Law of the Bankrupt, I think there were sufficient grounds to induce the Petitioner to defend the Action at Law; there was nothing to blame in his conduct; he has sufficiently accounted for not applying sooner; the Petition, therefore, must be granted.

Petition granted.

Ex parte ALSOPP and others, *in re* DICKEN.

4th and 7th May.

Assignees not justified in delaying payment of Dividends, on the ground, that Notice has been given them by a third Person of a claim upon the Dividends, no Petition having been presented by such Claimant within a reasonable period after such notice of a claim.

THIS was a Petition by Creditors who had proved a Debt of 10,669*l.* 7*s.* under the Commission, against *Dicken*, praying an Order upon the Assignees for payment of the Dividends upon their Debt, together with Interest from the time when the Dividend ought to have been paid.

By the Affidavit of the Assignees, it appeared that *J. B. Scott* claimed a right to these Dividends, under an Agreement with the Petitioners, and on the 9th August 1815, gave notice of their claim to the Assignees, and not to pay over the Dividends, which amounted to 1,600*l.* 8*s.*, to the Petitioners.

The Assignees placed the Dividends in a Banker's hands, and afterwards, at the request of *Scott*, laid them out in Exchequer Bills.

No further steps were taken.

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The Assignees submitted to act as the Court should direct.

Sir *S. Romilly*, and Mr. *Duckworth*, for the Petitioner, cited *Ex parte Graham* (*a*), and *Ex parte Whiteside* (*b*), to show, that the Assignees were not justified in detaining the Dividends.

Mr. *Leach*, and Mr. *Wingfield*, for the Assignees, urged, that the Petition ought to have been served upon *Scott*, and that the Court ought not to make an Order unless he was brought before the Court to discuss his claim with the Petitioners.

The VICE-CHANCELLOR:—

When a Debt is proved, the Assignees cannot resist payment of the Dividends; that was decided in the Cases cited. If they have objections to the Proof, they must Petition to expunge it. A Proof is in the nature of a Judgment, and before the late Act (*c*), a Petition might have been presented, or an Action brought (*d*), for the Dividends, and on such Petition or Action, the Assignees could not object to the Proof. The Question now is, whether these Assignees, having had notice of a Claim made by a third Person to these Dividends, are warranted in delaying the payment of them; and, whether, on a Petition by the Creditor to have the Dividends paid to him, it is open to them to object

(*a*) 1 Rose, 456.
(*b*) Ib. 319.
(*c*) 49 Geo. III. c. 121. s. 12.
(*d*) See *Browne* v. *Bullen*, Dougl. 392; but Lord *Redesdale* would enjoin a Party proceeding by Action to recover Dividends, *Gardiner* v. *Shannon*, 2 Sch. and Lefr. 288.

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that the third Person who has given notice of his claim to the Dividends, ought to be served with the Petition.

A Person merely giving notice to the Assignees of a claim upon the Dividends, without stating the nature of his claim, or stating a claim which on the face of it is frivolous, cannot justify Assignees in retaining the Dividends. If that were permitted, Assignees would constantly be setting up such excuses for retaining Dividends, and the Creditor would be put to the expense of a Petition, and the Costs of the Assignees, if the Claimant should be insolvent.

Before the late Act, as I have observed, an Action might have been brought against the Assignees for the Dividend; and the Assignees could not insist, by way of defence, that a notice had been given them of a claim to the Dividends by a third Person. A Bill of Interpleader must have been filed by them. The Act was intended to facilitate the claims of the Creditor; but if the doctrine urged be true, it would occasion an additional inconvenience. It seems to me proper to consider a Petition under the Act as a substitution for an Action, and that the language of Assignees to third Persons claiming the Dividends, ought to be, "We can do nothing—the Order of Dividend is imperative upon us. If you have any claim upon the Dividends you must Petition the Court." An Assignee is not a mere Stakeholder—he has no option—he is bound to pay the Dividend.

Here the Assignee had notice on the 9th August 1815, and yet no Petition has since been presented by the Claimant to get his right adjudicated; and at this

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moment no Petition or Bill is filed, though this Petition was presented and answered so long ago as the 29th November 1815. This Case, therefore, falls within the principle on which the Cases cited were decided.

Under these circumstances, I think it was unnecessary to make this Claimant a Party to the Petition. If made a Party, he might have disclaimed. The Assignees after waiting a reasonable time after Notice of the Claim, were wrong in detaining the Dividend. This is my present impression.

The VICE-CHANCELLOR:—

7th May.

I retain the Opinion I before expressed. The Assignees must pay to the Petitioner the Dividends, with Interest, and the Costs of the Petition, which, as the Assignees do not appear to have intended any thing improper, must be paid out of the Estate.

CLARKE *v.* ELLIOTT.

9th May.

A Vendor permitting the Vendee to take Possession, before the completion of the Title, without any stipulation as to the Purchase Money, cannot, on Motion, have the Purchase Money paid into Court.

A PURCHASER, under a Decree of the Court in this Cause, having been permitted to take Possession, before the completion of the Title, and a Conveyance to him, Mr. *Hazlewood* now moved, that he might pay his Purchase Money into Court; observing, that the taking of Possession had been considered, in some Cases, as a waver of the Title, but that he did not insist upon that, but only desired, as the Purchaser was in Possession, that the Purchase Money should be paid into Court, to await the decision on the Title.

Mr. *Wray, contra,* contended that the Party was let into Possession by the Vendor, during the Negotiations as to the Title; and being a Possession taken by curtesy, it could not be considered as a waver of the Title, or as imposing an obligation to pay the Purchase Money into Court.

The VICE-CHANCELLOR:—

There is great difficulty in saying what is to be done in a Case like the present, in the interval between the period when Possession is permitted to be taken, and the Title completed.

If the Vendor thinks proper, voluntarily, to let the Purchaser take Possession, without any Agreement as to the Purchase Money, it was his folly in doing so, before the Title was determined. What Terms can the Court impose? Where the Party was let into Possession under a mutual Idea that the Title would be speedily settled, and the delay in the completion of the Title was occasioned by the Vendee, the Court interposed (*a*); but whether wisely or not, may be questioned, since it was the imprudence of the Vendor in letting the Vendee into Possession before the questions upon the Title were disposed of. No Case of that kind is made here, and there is great difficulty in determining what is to be done. Can the Court make a Contract for the Parties? Is the Court to say, "You, the Vendee, must pay your Purchase Money into Court, or deliver up Possession again?" There is difficulty in ordering the Purchase Money into Court, for when that is done, the Vendor may relax in his exertions to complete the Title. As to the delivery up of Possession again, that may lead

(*a*) Gibson v. Clarke, 1 Ves. and Bea. 502.

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to great inconvenience and injustice. Suppose the Vendor on delivering up Possession to the Vendee, has sold off his Stock, and removed to a new Farm, in a distant situation, what favour is it to a Man, so circumstanced, to have Possession of the Estate returned upon him? The Rule, therefore, laid down in *Clarke* v. *Wilson* (*b*), cannot, I think, be considered as an universal Rule. Is the Court to set an Occupation Rent? In what way is that to be ascertained? A Vendee, who is uncertain whether a good Title will be made, and who may be liable to be turned out of the Estate, cannot use it in that profitable manner he would do if he had a certain Possession; and it would be injustice to make him pay a Rent equal to what might be expected from one who had a certain interest in the Premises, a Possession incapable of being disturbed.

But then it is said he should pay Interest on the Purchase Money. In this there is difficulty. Suppose the Title should turn out to be bad, and the Vendor has received this Interest for three or four Years, and his Bill is ultimately dismissed, he being unable to make a good Title; is the Purchaser to be put to the inconvenience and risk of recovering back in an Action at Law, the Interest so paid?

Each Case must depend upon its circumstances. There are no circumstances in this Case to induce me to make the proposed Order. The bare act of taking Possession, by consent, before the Title is completed, does not, in my opinion, entitle the Vendor to have the Purchase Money paid into Court.

Motion refused.

(*b*) 15 Ves. 317.

SIMPSON and others *v.* GUTTERIDGE and others.

25th April, 6th and 9th May.

If there be a Settlement of a Rent-charge upon an Adult Female before Marriage, in lieu of Dower, a Purchaser from the Husband of other Lands than those charged is not entitled to look into the Husband's Title Deeds to see whether he had a good Title to the Lands out of which the Rent-charge was granted.

It is no Objection to a Title that two Fee Farm Rents,

THIS Cause came on upon Exceptions to the *Master*'s Report. The Exceptant, Dr. *O'Brien*, was the Purchaser of an Estate sold under the Directions of the Court in this Cause. The *Master* reported, that a good Title could be made. Five Exceptions were taken to the Report. The second and fifth Exceptions involved only questions of fact, which it is unnecessary to notice. The first Exception was, "Because it does not appear that the Most Honourable Lady *Mary Emily*, Marchioness of *Salisbury*, is barred of her Title to Dower in and out of the Premises, except by a Jointure Annuity, limited to her by Indenture of Settlement, dated the 20th Day of September 1782, made pursuant to Articles executed previous to her Marriage with the Most Honourable *James* Marquis of *Salisbury*, bearing date the 19th Day of July 1773, and which Settlement was in and by an Act of Parliament, passed in the Forty-first Year of the Reign of his present Majesty, declared to be a Satisfaction of the Covenant of the said Marquis contained in the said Articles, notwithstanding the doubt entertained therein, as in the said Act is expressed; but which said Jointure Annuity, it is con-

created by Letters Patent by James I. are not shown to have been extinguished, it being proved that no Claim had been made by the Crown of the Rents from the Year 1706, *and no Proof of any previous Claim.*

No Objection to a Title that an Assignment of a Term was executed by one Executor only, though the Deed was prepared as an Assignment by two Executors; one Executor being competent to assign.

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ceived, would not preclude the said Marchioness of *Salisbury* from resorting to her Title to Dower in case of her being evicted from her Jointure by reason of any defect in the Title of the said Marquis to the Lands charged with the said Annuity, and which Title has not been disclosed to the said *Bernard O'Brien*."

Mr. *Roupell*, and Mr. *Scriven*, in support of the Exception:—

Notwithstanding the Act of Parliament confirming the Settlement made on the Marchioness in pursuance of Articles before Marriage, if the Trustees were evicted from the Lands on which the Rent-charge was attached, the Marchioness, under the Stat. 27th *Henry* VIII. c. 10, s. 7, would have a right to Dower out of the Lands purchased by *O'Brien*. We are therefore entitled to a Fine from the Marchioness, or an Inspection of the Marquis's Title Deeds, to see if he had a good Title to the Lands so settled by him in lieu of his Wife's Dower. There is the following Note by Mr. *Hargrave* to his Edition of *Co. Litt.* (*a*): "*Philips* in his Reading holds, that if the Wife be attainted, and then the Husband purchases Land and aliens it again, and then the Wife is pardoned, she shall have Dower of the Land which was purchased and aliened during the time she was not dowable. And he cited *Maunsfield*'s Case, adjudged 28 *Eliz.*: In that Case a Jointure was conveyed to the Wife before the Coverture, and during the Coverture the Husband purchased other Lands, and aliened them again, and died, the Land which the Wife had in Jointure was evicted, and the Wife had Dower of the Land which was purchased and aliened by her Husband at the time when she was barred of her Action of Dower. So if Wife elopes, and Husband purchases Lands and

(*a*) Co. Litt. 33 a. Note 8.

aliens them, and then the Wife is reconciled, she shall have Dower of those Lands. MS. *Comment. on Litt. penes editorem,* supposed to have been written before the publication of Lord *Coke's Commentary* (*a*)."

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

The Court cannot compel a Husband to procure his Wife to levy a Fine. A Rent-charge is an Hereditament, and when settled before Marriage on an intended Wife in lieu of Dower, is a bar of Dower, within the Stat. 27 *Hen.* VIII. If Friends of the Wife, before Marriage, agree that a Sum shall be settled on the Wife in bar of Dower, that is a good equitable bar, though not a legal bar within the Statute. *Carruthers* v. *Carruthers* (*b*) is in point to show that this Contract before Marriage with the Marchioness, she being of Age, is a bar of Dower. The Note quoted from Mr. *Hargrave*'s edit. of *Co. Litt.* is only the Observation of some unknown Person, stating merely what was said in a Reading by *Philips,* and cannot be relied upon.

The Private Act was obtained to render the Settlement on the Marchioness, by the Deed of 19th July 1772, effectual; for by that Deed the Marquis had settled an encumbered Estate to secure a Rent-charge, and therefore it was not a good Execution of the Agreement made before Marriage, which was to settle an unencumbered Estate. To remedy that defect, and to enable the Marquis to dispose of other Estates, that Act was obtained. No such Objection as this was imagined, or the Framers of the Act would have provided against it; for if this Objection obtains, one of the main purposes of that Act would be defeated.

(*a*) See on this subject Menvill's Case, 13 Rep. 22, 3.

(*b*) 4 Bro. C. C. 500.

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Mr. *Roupell*, in Reply:—

All the effect of the private Act was to make good the Deed of the 19th July 1772, and to establish it as a good Execution of the Articles before Marriage. It did not take away any Right the Marchioness had in respect of Dower, in case of Eviction of the Lands conveyed to secure the Rent-charge; nor did it make the Title of the Marquis to the Lands settled any better than it was before the Act. Suppose the Agreement was fraudulently obtained from the Marchioness before her Marriage, or suppose it improvident, would she be bound by it? It may be laid down as a general proposition, that unless there be an outstanding Term, a Married Man cannot convey without a Fine; and in support of this it is only necessary to cite the 27th *Henry* VIII.

The VICE-CHANCELLOR, as to this first Exception, said:—

This Objection, if it prevails, puts an end to the Contract, for the Marquis of *Salisbury* cannot be compelled to make the Marchioness levy a Fine; and the Marquis, probably, would be unwilling to have his Title Deeds inspected.

It is a novel Objection, and affecting almost all the Titles in the Kingdom. Its novelty is a strong Argument against it.

There is no instance from the time of *Henry* VIII. of such an Objection. The *Practice* is uniformly against it. Mr. *Fearne*, and the late Mr. *Shadwell*, thought a Fine unnecessary; and such appears to be the present understanding of Conveyancers (*c*).

(*c*) See Sugden's Vendor and Purch. 282, last edit.

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Lord *Alvanley*, in *Carruthers* v. *Carruthers* (*d*), was clearly of opinion, that a Contract by an *adult Female* before Marriage, in lieu of Dower, was effectual, though he was always very zealous in protecting the rights of Married Women. He says, "I do not say that if she had been *adult* she might not have bound herself. She might have taken a Provision out of the Personal Estate; or she might have even taken a chance, in satisfaction for her Dower, acting with her eyes open; but an *Infant* is not bound by a precarious Interest." Here the Marchioness being adult, and agreeing before Marriage to accept a Rent-charge in lieu of Dower, she cannot afterwards claim Dower. She was bound when she made the Contract to see that there was a good Title to the Lands charged with the Rent-charge. She holds out to the world that she has no claim of Dower. The subsequent Deed of the 20th Sept. 1782, made in pursuance of the Proviso contained in the Articles of Settlement, was objectionable, but the Act of Parliament gave it validity. I have no doubt that the Marchioness must be considered as barred from all Claims of Dower; but if the fourth Exception is untenable, it will not be necessary to decide upon this first Exception, for then, it is admitted, a Fine is unnecessary; I shall, therefore, reserve my final Opinion upon this Exception.

The *third* Exception, was, "Because, by the Abstract of Title, it appears that the Premises comprised in the said Lot 3, are subject, with other Estates, to the respective Yearly Fee Farm Rents of 20*l.* and 48*l.* or to one of the same Yearly Fee Farm Rents against which

(*d*) 4 Bro. C. C. 500.

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the said *Bernard O'Brien* is required to accept of an Indemnity, but which he objects to do."

Mr. *Roupell* and Mr. *Scriven*, in Support of Exception:—

It appears that the Premises purchased by the Defendant are subject to Yearly Fee Farm Rents of 20*l.* and 48*l.*, claimable by the Crown, under Letters Patent of *James* I. by which the Premises in question, together with other Premises, were granted to the Ancestor of the present Marquis of *Salisbury*.

When these Premises were purchased by *John Worrall*, in 1797, the Marquis of *Salisbury* gave a Bond to indemnify the Purchaser against this Claim, and this Bond would not have been given unless there was some ground for the Claim. This Purchaser is not bound to rely on that Indemnity.

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

Whatever Claim the Crown had under the Letters Patent, it appears to have been since extinguished; probably, the Rents were purchased of the Crown. It is clear that they did not exist in 1706, inasmuch as it appears upon Affidavit that a search has been made in the *Auditor*'s Office, and no traces appear of these Rents, which, if payable, must have appeared there. The great length of time which has elapsed without any payment or demand of these Rents, must be considered as sufficient proof that they do not exist. The Indemnity Bond given by the Marquis was merely to satisfy a scrupulous Purchaser, and is no Proof of the existence of the Rents.

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The VICE-CHANCELLOR, as to this Exception, said,

It is clear these Rents existed in the time of *James* I., but there is no proof of their subsequent existence. For 160 Years nothing appears respecting the Rents but what is stated in the Indemnity Bond of the Marquis, which affords no proof of the existence of the Rents. There is an Affidavit of Mr. *Rudlen*, of the *Auditor*'s Office, by which it appears that Accounts were made up and rendered by all the several Collectors or Receivers of the Rents belonging to the Crown from the Year 1706 to 1814, both inclusive, and that no such Rent-charges as those in question appear to have been received by the Crown during that period. This is strong Evidence negativing the existence of any such Claim. By the 9 *Geo.* III. c. 16 (*e*), the Claims of the Crown are limited to sixty Years before the commencement of the Suit or Proceeding for the Recovery of the Estate claimed, with an exception, amongst others, as to Fee Farm Rents which have been paid within sixty Years (*f*). This Exception must be over-ruled.

The *fourth* Exception was, "Because the Title to a Term of 1,000 Years, created by an Indenture dated the 17th Day of July 1718, and stated to have been assigned to *Thomas Barnes* and *Isaac Hindley*, by an Indenture, dated the 6th Day of Feb. 1779, upon Trust, to attend the Inheritance, is not satisfactorily deduced, the said last-mentioned Indenture purporting to be an Assignment of the said Term by *Walter Shirley*

(*e*) Usually called "The *Nullum Tempus Act.*"
(*f*) Sec. 7.

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and *John Lloyd*, the Executors of Lady *Frances Shirley*, then deceased; whereas the said *Walter* did not execute the same Indenture of Assignment."

Mr. *Roupell*, and Mr. *Scriven*, in Support of Exception:—

This Term is not satisfactorily deduced. The Assignment of the 6th February 1779, purports to be an Assignment of the Term by *Lloyd* and *Shirley*, the Executors of Lady *Shirley*, but it was executed only by *Lloyd*. As the Deed professed to be an Assignment by the two Executors, the Term did not pass by the Execution of one only; though it might have passed from one Executor only if the Deed had been framed for that purpose. In an Opinion given by Mr. *Booth*, the celebrated Conveyancer, he considered it as necessary, in a Case like the present, that both Executors should execute (*g*).

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

The objection raised by this Exception is more properly a question of Conveyance rather than of Title. It is clear that one of the Executors might have assigned this Term; and *Lloyd*, by executing the Conveyance, effectually conveyed it.

The VICE-CHANCELLOR, as to this Exception, observed,

9th May. That, where one of several Joint-Tenants, or Tenants in Common, executes a Deed, it passes only the Share of the Party so executing; but several Executors are considered only as one, and a Gift, Sale, Surrender, Payment, Release, or Judgment confessed, by one Executor, is as effectual as if all of them had joined. In

(*g*) 1 Vol. Cases and Opinions, 399.

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Dyer (*h*) it is said, " If two Executors have a Term, and one grants to a Stranger all that belongs to him, the whole Term passes, inasmuch as each of them has an entire Authority and Interest in the Term as Executor; but of other Joint-Tenants of a Term it is otherwise; so there is a diversity." This doctrine has been constantly recognized. Each Executor has an entire Interest in the Term. If any thing passed by the Deed, it must have been the entirety of the Term, the Executors not being entitled in Moiety or Parts. What then is the effect of one Executor only executing the Deed? If only one executes, it must be considered as his Deed only; but the question, what passes, must depend upon the words of the Deed; upon what it purports to convey. This Deed purports to convey the entirety of the Term, and, therefore, that passes. In *Touchstone* (*i*) it is said, " If there be divers Grantors, Obligors, &c. named in a Deed, and one of them only do seal the Deed, this is a good Deed as against him that doth seal, and void as to all the rest that do not seal. And if divers enter into Covenants by a Deed severally, and the Seal of one of them is broken from the Deed, in this case the Deed is good still as to all the rest, but void as to him." Here each Assignor had the entire Interest, and being a good Deed by *Lloyd*, it passed the entire Term.

It is not very probable that a Party would pay 7,000*l.* to the Executors of *Shirley*, when this Term was assigned by *Lloyd* only, if he had not considered it as a complete Assignment; nor is there any thing in the Books to show the Assignment was invalid, except the Opinion of Mr. *Booth*, which is no Authority. Con-

(*h*) 23, b. (*i*) p. 71. See also 5 Rep. 23, a.

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sidering this as a good Deed, the whole Interest in the Term passed to the Trustee to attend the Inheritance; and as it is admitted this Term has been assigned in favour of these Purchasers, it does away all the Objections raised in the first Exception, it being clear that no Claim of Dower can be made against this Purchaser. I still, however, retain the Opinion I expressed as to the first Exception.

Exceptions over-ruled.

9th April.
11th May.

On a Motion by a Vendor against a Vendee in Possession, for a Reference to set an Occupation Rent, the Title not being completed, an Order was accordingly made, and that Interest, at 5 l. per Cent., upon the Deposit, should, under the circumstances, be deducted out of such Rent.

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IN this Case, part of an Estate, being Lot I. was sold by public Auction, on the 7th June 1811, to *Thomas Jackson*, for 10,500 *l.*; and by the Conditions of Sale the Purchaser was to pay down immediately a Deposit of 15 *l. per Cent.* in part of the Purchase Money, and sign an Agreement for payment of the Remainder on or before the 10th October 1811, on having a good Title;" and Possession was to be given of the parts of the Estate not Let; and the Rents and Profits of the part Let to be received from Michaelmas 1811. A Deposit was accordingly made of 1,575 *l.*, and an Agreement signed. On the 17th August 1811, *Jackson* assigned his Interest in the Agreement to the Defendant *Lloyd*, and Notice of this Assignment was given to the Plaintiff.

The Abstract of the Title was delivered to *Lloyd*, and afterwards, at Michaelmas 1811, *Lloyd* was let into

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Possession of the Premises Unlet, and into Receipt of the Rents and Profits of those that were Let.

The Defendant being dissatisfied with the Title, this Suit was instituted to compel a specific Performance.

In October 1815, an Order was, on the Motion of the Plaintiff (*k*), made, referring it to the *Master* " to set an Occupation Rent, for the Estate and Premises, in the Pleadings of this Cause mentioned, for the time during which the Defendant had been in the Possession of the said Estate and Premises, in case the Parties differed about the same: and let the Defendant, *Alfred Lloyd*, pay unto the Plaintiff such Occupation Rent, but this is to be without prejudice to any question in the Cause; and, by consent, refer it to the *Master*, to see if the Plaintiff can make a good Title to the said Estate and Premises; and, for that purpose, the said Parties are to produce, before the said *Master*, upon oath, all Deeds, Books, Papers, and Writings in their custody, or power, relating thereto, as the said *Master* shall direct; and reserve the Consideration of all further Directions, and of the Costs of this Suit, until the said *Master* shall have made his Report; and let any of the Parties be at liberty to apply to this Court as there shall be occasion."

A Motion was now made that the Minutes might be varied, by introducing the words, " *Deducting therefrom Interest at and after the Rate of* 5 *l. per Cent. per Ann. upon the Sum of* 1,575 *l., the Deposit Money paid on the Sale of the said Estate,*" immediately after the words " in case the Parties differ about the same."

(*k*) See ante p. 83.

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Sir *Samuel Romilly*, for the Motion.

Mr. *Leach, contra*, said, that the Deposit Money was locked up in the hands of the Auctioneer till the Sale was completed; and, as it was of no use to the Vendor, the Interest ought not to be deducted.

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

This Motion renders it necessary to consider in what light a Deposit is to be viewed; whether as part Payment of the Purchase Money to the *Agent* of the Vendor, or as Payment to a *Stakeholder*, to be paid to the Vendor on the completion of the Purchase.

A Deposit is peculiarly circumstanced. If the Auctioneer pays it to the Vendor, he does it at his peril; and if the Purchase is not completed, the Purchaser may recover it from the Auctioneer, as appears from *Burrough* v. *Skynner* (*l*), and *Maberley* v. *Robbins* (*m*).

If then the Auctioneer cannot pay over the Deposit to the Vendor, is he to be considered as his Agent? The Vendor is responsible for the Loss, if any, occasioned by the Auctioneer; that was determined in *Fenton* v. *Browne* (*n*), in which Case, *the Master of the Rolls*, says, "Upon a Sale by Auction the Vendor determines who is to receive the Deposit. The Auctioneer is not a Stakeholder of the Purchaser; at least not of his choice. If he were a Stakeholder for both Parties, either would have a right to propose to change such Stakeholder; and the Party refusing takes upon himself the Risk."

(*l*) 5 Burr. 2639. (*m*) 5 Taunt. 625. (*n*) 14 Vez. 150.

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It is considered as reasonable, that the Vendor should be chargeable with any loss of the Deposit received by the Auctioneer, because he might, by agreement with the Auctioneer, have had the Money laid out at Interest, or by making the Auctioneer a Party to a Bill for a specific Performance against the Vendee, obtain an order for payment of the Deposit into Court, and have it laid out at Interest, which the Vendee could not oblige the Auctioneer to do, unless with the consent of the Vendor. If, therefore, the Vendor takes no such steps, and the Deposit is lost, the loss falls upon the Vendor. The Deposit is considered as part payment of the Purchase Money; that appears from two Cases, *Ambrose* v. *Ambrose* (*e*), and *Doyley* v. *Powis* (*f*), in the Reports lately published by *Master Cox*. In *Poole* v. *Rudd* (*g*), the same point was determined; and it is there said, that Sir *Thomas Sewell* "had made several such Orders." Is it justice, then, that the Vendee having thus paid part of his Purchase Money, should not have an allowance for it, in settling what is to be paid as an Occupation Rent? If the Contract is completed, the Vendor receives the Deposit, with Interest; if it is not completed, the Purchaser may certainly bring an Action for the Deposit and Interest, though some doubts have been entertained as to the Form of the Action (*h*).

It is stated in the Bill, and confirmed in the Answer, that the Deposit was advanced to the Auctioneer in part payment of the Purchase Money; and by the Answer, it is said to have been paid the Auctioneer, "as the Agent of

(*e*) 1 Cox, 194.

(*f*) Ib. 206, and S. C. 2 Bro. C. C. 32.

(*g*) 3 Bro. 49.

(*h*) See 3 Campb. 258; and see Maberley *v.* Robbins, 5 Taunt. 625.

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the Plaintiff." I do not discuss the Question agitated in several Cases, whether the Auctioneer is to be considered as the Agent of the Vendor, or of the Vendee, or of both; for here the Conditions of Sale were, not that the Deposit should be paid to the Auctioneer, but that the Vendee should " pay down immediately a Deposit of 15 *per Cent. in part of the Purchase Money.*" It was therefore considered on both sides, that the Deposit was a part payment of the Purchase Money to an Agent of the Plaintiff. I consider it in that light, independently of the Affidavit of Mr. *Hall*, that a considerable part of the Purchase Money was in fact paid over to the Vendor. I do not found myself on that Affidavit, but upon the Principle, that so much Purchase Money has been paid, in the form of a Deposit. I think, therefore, that in the interim provision, to be made, before the Contract is completed, by ordering payment of an Occupation Rent, an allowance must be made of Interest at 4 *per Cent.* on the Purchase Money, so advanced in the form of a Deposit.

Ex parte HORNE.

13th May.

Equitable Mortgagee praying a Sale of Mortgaged Estate, pays the Costs of the Petition, and of the Assignees appearance to it, not out of the produce of the Mortgaged Estate, but personally; but if the Assignees oppose the Petition on frivolous or mistaken grounds, they pay the Costs occasioned by such opposition.

A PETITION was presented by an equitable Mortgagee, on a Deposit of Deeds, and a written Memorandum as to the purpose of the Deposit, praying a Sale of the Premises, and in case of a Deficiency, that he might be allowed to prove the same under the Commission.

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Mr. *Montagu* for the Petition.

Mr. *Cullen* opposed it, on the ground, that the written Memorandum was not stamped at the time it was signed.

Mr. *Montagu*, in reply :—

It is now stamped, and we have paid the Penalty. It was not necessary it should be stamped when signed.

The VICE-CHANCELLOR :—

As it is now stamped, that is sufficient.

Mr. *Cullen* then asked for Costs; and said, that an Equitable Mortgagee must personally pay all the Costs attending the Petition, and that such Costs are not paid out of the Produce of the mortgaged Estate.

Mr. *Montagu* :—

The Petitioner must pay all the Costs of the Petition; but I apprehend he does not pay the Costs personally, but that they are paid him out of the Produce of the mortgaged Estate; and though the Petitioner thus pays the Costs of the Petition, yet if the Assignees set up a frivolous opposition, as in this Case, they are not entitled to their Costs.

The VICE-CHANCELLOR :—

No doubt, it is a general rule that the Petitioner in these Cases pays the Costs of the Petition, including the Costs of the Assignees appearing on the Petition, it being his fault in taking an incomplete Security; but if the Assignees raise objections on frivolous or mistaken grounds, they must pay so much of the

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Expense as is occasioned by their improper opposition (*a*). Lord *Eldon* appears to have been of that opinion (*b*). The Petitioner's Costs must be paid by himself, personally, and not out of the Produce on the Sale of the mortgaged Estate, for that would be paying himself Costs, occasioned by his own negligence, to the disadvantage of the other Creditors.

Ex parte VYPOND.

24th, 27th May.

On a Petition by a Person found a Bankrupt, to supersede his Commission, on the ground that he has not committed an act of Bankruptcy, the Court, though there is no Affidavit on the other side, in support of the Commission, or Notice that the Proceedings would be produced, will look into the Proceedings to see if there is an act of Bankruptcy.

THIS was a Petition by one who had been declared a Bankrupt, to supersede the Commission, upon his Affidavit, that, to the best of his information and belief, no act of Bankruptcy had been committed.

Mr. *Leach*, and Mr. *Cullen*, for the Petition.

Sir *Samuel Romilly*, and Mr. *Pollock, contra*, were about to argue from the Proceedings under the Commission, that there appeared to be a good act of Bankruptcy; but Mr. *Leach*, and Mr. *Cullen*, objected to this, as no Affidavit had been filed in opposition to the Petition, or any Notice given that the Proceedings would be produced; and urged, that upon this Petition and Affidavit the Commission must be superseded.

The VICE-CHANCELLOR:—

We must presume that the Commissioners have acted rightly, unless the contrary is shown. All the

(*a*) *His Honor* again expressed himself to this effect, in *Ex parte Wentworth*, 14th May 1816.

(*b*) See *Ex parte* Garbet, 2 Rose, 97.

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Petitioner swears, is only as to knowledge and belief; but he may have committed an act of Bankruptcy, though he is not aware of it. The Court, I think, is not precluded from looking into the Proceedings; but as that depends upon the Practice, which has been disputed, let the Petition stand over.

27th.

On a subsequent day, *His Honor* said, it was the habit of the *Lord Chancellor*, on these sort of Petitions, to inspect the Proceedings. The Commissioners are Officers of the Court, and if a Party complains of an unjust proceeding on their part, it becomes necessary for the Court to look into the Depositions. Suppose nobody had appeared against the Petition, the Court must have inspected the Proceedings: but, though the Court looks at the Proceedings, it does not suffer the Bankrupt to see them. If that were permitted, we should always have these sort of Petitions, to enable the Bankrupt to see the Proceedings, though that is not permitted when he brings an Action at Law.

If the Court, on looking into the Depositions, finds, that no act of Bankruptcy has been committed, it will of course supersede the Commission. I have communicated with great Authority on this subject, the Practice in these Cases being important.

After carefully perusing these Proceedings, I am of Opinion it is a proper Case for an Issue.

Issue directed.

LOGAN *v.* GRANT, M.P.(*a*)

25th May.

A Bill against a Member of Parliament, praying Relief, may be taken pro confesso, *under the* 45 *Geo.* 3, c. 124; *which Act is not confined to Bills of Discovery only.*

THIS was a Bill against the Defendant, as Executor, for an Account. He put in his Answer, to which Exceptions were taken, but omitted to put in a further Answer, and in consequence a Sequestration issued, and afterwards an Order was obtained, to take the Bill *pro confesso*, under the Act of Parliament (*b*).

Mr. *Rose* now moved to have that Order discharged, on the ground, that the Act applied only to mere Bills of Discovery, and cited *Jones* v. *Davis* (*c*).

Mr. *Courtenay* contended the Act extended to all Bills, and was not confined to Bills of Discovery only.

The *Vice-Chancellor* [after looking into the Case cited] thought there must be some misapprehension of what the *Lord Chancellor* had said; and that it could not govern the Practice; there being no reason why the construction of the Act should confine the relief given by it to Bills of Discovery only; and, therefore, refused the Motion.

(*a*) *Ex relatione.*
(*b*) 45 Geo. III. c. 124, s. 5.
(*c*) 17 Ves. 368.

WAINEWRIGHT *v.* ELWELL.

14th, 27th May.

The Devisee of a Copyhold, who has not been admitted, cannot devise the same.

EDWARD ELWELL being seised of a Copyhold Estate, and having surrendered the same to the use of his Will, did by his Will, dated 13th March 1809, devise the same, with other Estates and Premises, unto his Daughters, *Elizabeth Elwell*, and *Nelly* the Wife of *William Elwell*, and their Heirs, as Tenants in Common, subject to the yearly Payment, by each of his Daughters, of 20*l.*, to his Wife for her Life.

Edward Elwell, the Testator, afterwards died, leaving *Elizabeth* and *Nelly Elwell*, and his Wife surviving, and also *Edward Elwell*, his eldest Son, and Heir at Law.

Soon after the death of the Testator, *Elizabeth Elwell* entered into Possession of an undivided Moiety of the Copyhold Estate, and its Rents and Profits, and continued in Possession until her death.

In 1811, *Elizabeth Elwell* conveyed, by way of Mortgage, the Moiety of the Freehold Estates devised to her by the Testator, to *Benjamin Willetts*, to secure 3,000*l.* and Interest; and in the Conveyance covenanted for herself and her Heirs, that she would in due form, according to the Custom of the Manor, surrender her Share of the Copyhold Estate as a further Security for the re-payment of the Mortgage Money; and that in the mean time the said Copyhold should be charged therewith; and that the Deeds and Writings

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belonging thereto should remain with *Willetts*, and his Heirs and Assigns, as a Security for the re-payment of the Mortgage-Money.

On the 24th August 1811, *Elizabeth Elwell* made her Will, whereby, after devising to her Brother *William* a certain Freehold Estate, part of the Property devised to her by her Father, she bequeathed "all other her Freehold, Copyhold, and Personal Estates whatsoever and wheresoever, unto her friends *Thomas Wainewright* and *Edward Smallwood*, their Heirs and Assigns, for ever, upon Trust, as soon as conveniently might be after her Decease, and when he or they, in his or their discretion, should think fit, sell and dispose of all her said Freehold, Copyhold, and Personal Estate and Effects, either by public Auction or private Contract, and by and with the Money arising from such Sale or Sales, pay off and discharge the Sum of 3,000*l.* due to said *Benjamin Willetts* on Mortgage, which she had advanced to her Brother *William*, and all other her Interest, Debts (except a Debt therein mentioned, for which she was guarantee), Funeral Expenses, and the Costs, Charges, and Expenses of that her Will, and the Trusts thereof; and pay, distribute, and divide the same, in manner following (that is to say); to her friend *Dorothy Stubbs*, Spinster, 500*l.*; to her Sister *Nelly*, 1,000*l.*; and as to all the residue thereof, she gave the same unto and amongst her Brothers and Sisters (that is to say) *Edward Elwell*, *William Elwell*, and *Nelly Elwell*, equally, Share and Share alike, they paying to her Aunt, Mrs. *Plant*, 10*l. per Annum* during her natural life. And she further willed, that inasmuch as she had directed the Trustees to pay said 3,000*l.* to the said *Benjamin Willetts*, she desired that the Sum of

750*l.* should be deducted out of her Brother *William*'s Share of the Residue, and be considered as Money on Account of his Share of the residue thereof. And her Mind and Will further was, and she did thereby expressly declare, that in case her said Brother, *Edward Elwell*, (the Defendant) should have or claim all or any part of the Copyhold Estate left to her under her late Father's Will, then and in such Case she willed and directed that the full value thereof should be deducted and retained by her said Trustees out of his Share of the said Residue so bequeathed to him as aforesaid, and to be divided among the other residuary Legatees." The Bill prayed, that the Defendant might be decreed to surrender one undivided Moiety of the said Copyhold Estate to the Lord of the Manor of *Walsall*, according to the custom of the said Manor, to the use of the Plaintiffs, to hold to them and their Heirs, according to the Custom of the said Manor.

Edward Elwell, by his Answer, insisted, that the legal Estate of the undivided Moiety of the Copyhold Estate, devised to *Elizabeth Elwell*, was vested in him, *Elizabeth Elwell* having never surrendered the same to the use of her Will; and stated, that the Plaintiffs had sold the Freehold Estates of the late *Elizabeth Elwell*, and thereout, and out of her other Property, had paid *Willett*'s Mortgage, and all her other Debts; and that the Surplus arising from the Sale of the Freehold Estate and her other Property, exclusive of the Copyhold Estate, was more than sufficient to pay all her Legacies; and submitted whether he ought to be called upon to make his Election concerning the same, until the Plaintiffs should have come to an account for the

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other Property and Effects of the Testator, and the amount thereof shall have been ascertained.

Sir *Samuel Romilly*, and Mr. *Heald*, for the Plaintiffs (*a*):—

It has hitherto been undecided, whether, in a Case like the present, the Heir at Law is compellable to surrender. No doubt the Moiety of *Elizabeth Elwell* passed in Equity, though not at Law; but it has never been decided that the Heir at Law is not, in a Case like this, bound to surrender. A Devisee, unlike an Heir at Law, has no Estate until Admittance. She was not admitted; and did not, nor could, surrender to the use of her Will; her Will, therefore, did not pass the legal Interest in the Copyhold; and it is necessary that the Defendant, the Heir at Law, should surrender, to give effect to her Bequest.

Mr. *Bell*, and Mr. *Belt*, for the Defendants:—

Elizabeth Elwell had an equitable Interest, which she could have passed by Assignment, and the Assignee might have compelled the Heir at Law to surrender; but it does not follow, that where there is a Devise of the equitable Interest, in favour of a volunteer, the Court will oblige the Heir at Law to surrender. The Heir at Law is always favoured; and it is only in certain Cases where the want of a Surrender is supplied; but it has never been supplied in favour of a Devise to Persons who are mere volunteers, such as these Plaintiffs are. Here the Devisor was not admitted, and no surrender was made to the use of her Will. If she had

(*a*) The Arguments *Ex relatione.*

been admitted, the Court would not have supplied the want of a Surrender to the use of the Will, much less will it interfere when both Admittance and a Surrender are wanting. *Vernon* v. *Vernon* (*b*) shows, that the Devisee of a Copyhold Estate which had been surrendered to the use of a Will, having died before Admittance, her Devisee, though afterwards admitted, cannot recover in Ejectment, his Admittance having no relation to the last legal Surrender. They cited also *Floyd* v. *Welstead*, 3d December 1777 (*c*), where Sir *T. Sewell* refused to assist a Devisee, a volunteer, against the Heir.

Sir *Samuel Romilly*, in Reply:—

The Case is certainly new. *Vernon* v. *Vernon* did not decide it. In that Case, Mr. *Justice Lawrence* says, "It may be considered in Equity, that the Heir at Law of Earl *Thomas* is a Trustee for the Devisee of Lady *Harriet*; and Equity may in that Case oblige the Heir to surrender to such Devisee, and then the Title will all appear regular; but in order to ascertain whether the Devisee has an Equity, he must apply to a Court of Equity."

Suppose an Agreement to purchase a Copyhold, and the Vendee dies, after having devised the Copyhold, surely the Devisee might compel the Heir at Law of the Vendor to surrender. The Heir at Law must be considered as a Trustee, and compellable to surrender.

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

The question here is, whether the Plaintiffs, Devisees

(*b*) 7 East, 8.

(*c*) See this Case stated from a MS. note in 5 East, p. 137.

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of *Elizabeth Elwell*, upon the Trusts stated in her Will, can compel the Defendant to be admitted, and surrender this Copyhold. The Prayer of the Bill is, that he may be decreed to surrender; but as he has not been admitted, he must not only surrender, but be admitted. It is a new and important Question.

It appears from the Authorities, that a Surrenderee may, in some cases, before admission, and though there is no Surrender to the use of his Will, pass his equitable Interest; and, in other cases, he cannot. A Purchaser of a Copyhold, to whom a Surrender has been made, but who has not been admitted, may devise his equitable Interest, or, more properly speaking, his right to the Copyhold (*c*); and in *King* v. *King* (*d*) it was determined, that an Equity of Redemption of a Copyhold may be devised, without a Surrender to the use of the Will; and in many cases it has been held, that a *Cestui que Trust* of a Copyhold Estate may devise without a Surrender to the use of his Will (*e*); but an Heir at Law cannot, before Admittance, devise a Copyhold descended to him (*f*).

Elizabeth Elwell, the Testatrix, took merely as a volunteer, under her Father's Will, and not as Heir at Law, or as a Purchaser for a valuable consideration, and she, thus circumstanced, and not having been admitted, devises the Copyhold to strangers, mere

(*c*) Davies *v.* Beversham, 2 Freem. 157; S. C. Nels. 76, and in 3 Ch. Rep. 76; Greenhill *v.* Greenhill, 2 Vern. 679.

(*d*) 3 P. Wms. 358; and see Macnamara *v.* Jones, 1 Bro. C. C. 481.

(*e*) Carr *v.* Ellison, 3 Atk. 74.

(*f*) Smith *v.* Triggs, 1 Str. 487.

volunteers. It is not a Case, in which a Court of Equity will supply a Surrender, as in the Case of a Purchaser, a Wife, a Child, or Creditors; these Devisees are pure volunteers, who cannot be assisted against the Heir at Law.

It is clear, from *Vernon* v. *Vernon* (*h*), that this Testatrix, not having been admitted, could not, according to the opinion of the Judges in that Case, pass, by her Will, a legal Estate in the Copyhold, whatever might be the Relief which a Court of Equity would give.

The Testatrix, here, not having been admitted, took nothing under her Father's Will, though he surrendered to the use of his Will; for as Lord *Coke* says, "Admittance is the life and perfection of the Copyholder's Estate, and before Admittance the Tenant is not a perfect Copyholder (*i*)." Till Admittance the Title is in progress, inchoate and incomplete, like a Bargain and Sale without Enrolment, a Feoffment without Livery of Seisin, or a Presentation without Induction. In the Case of Miss *Jefferies* (*k*), a Copyhold in Fee was devised to her, by one who had surrendered the same to the use of his Will, and she not having been admitted, and attainted of Felony, and hanged, the question was, whether her Interest in the Copyhold was such as to entitle the Lord by Forfeiture, and the Court strongly inclined against the Lord, but did not absolutely decide the question.

An Heir at Law before Admittance may do many

(*h*) 7 East, 8.
(*i*) Suppl. to Coke's Copyh. sect. 4.
(*k*) 2 Wils. 13, 16.

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acts, which a Devisee before Admittance cannot do. A Devisee before Admittance has no Estate in the Copyhold; it remains in the Devisor; she has neither *jus in re,* or *in rem,* a phrase borrowed from the Civil Law, and importing, that there is no right to Possession, or any right of Action. A Devisee not admitted, having no Estate, she cannot give an Interest she has not. Not being recognized as Tenant on the Rolls of the Manor, by Admittance, she cannot do any valid act in the disposition of the Copyhold. This was the situation of *Elizabeth Elwell* when she made her Will; and therefore it is clear that nothing passed by Law under her Will. During her life she might at any time have been admitted under the Surrender made to the use of her Father's Will; but not being admitted, there was, after her Father's death, and during her life, no Tenant to the Lord, and no Fine paid him; and all this was owing to her negligence and laches in not perfecting her incipient, inchoate, right to the Copyhold. This is not the Case of a good Tenant to the Lord, actually admitted and clothed with a Trust; nor is it the Case of an Heir at Law, but of an individual having no Estate before Admittance, and only an incomplete legal Title.

It is quite clear that she had no equitable Title, distinct from her incomplete legal Title. It is not every one who has an incomplete legal Title that has therefore an equitable Title. A Purchaser not admitted has a right to the Estate; but this Testatrix had nothing to constitute an Equity, independent of her incomplete legal Title. Her will passed nothing,—it had nothing to operate upon—she had no Estate whatever in the

Copyhold. The Defendant, the Heir at Law, is entitled to be admitted either as Heir at Law of the Surrenderor, or as Heir at Law of the Surrenderee, in virtue of the devise to *Eliza Elwell*, and her Heirs. He is entitled to the full legal Title, and he takes it by Descent (*l*), from his Father. The Heir's Title being indefeasible at Law, on what ground are the Plaintiffs entitled to relief in Equity? If the Court were to give relief in this Case, it must in all Cases of a common-law Conveyance of the Equity give relief, as well as in every Case of a Devise; and the Lord might thus be deprived of his Fines, and the Party have all the privileges of a Tenant, without performing a Tenant's duties, or being liable to forfeiture.

If relief is to be given in Equity in this Case, why did not the Plaintiff in *Vernon* v. *Vernon* (a Case similarly circumstanced), prosecute his claim in this Court?

In a modern Publication, it is laid down, generally, that "a Surrenderee is now regarded as having such an Interest in the Premises as may be the object of a Devise, or Assignment (*m*)." He is right in saying, it may be assigned, but the Cases he cites do not warrant him in saying, generally, it may be devised; for *Davis* v. *Beversham* (*n*), there cited, was the Case of a *Purchaser*, who, dying before Admittance, might clearly Devise his equitable Interest, because, by the Contract, he instantly acquired a right to the Copyhold, and the Vendor became a Trustee for him of the Estate (*o*).

(*l*) 5 Burr. 2764.

(*m*) Watkins on Copyholds, p. 102.

(*n*) 2 Freem. 157. S. C. 9; and also in Nels. 76, and 3 Ch. Rep. 4.

(*o*) See Woolams *v.* Clapham, 1 T. R. 601, 2, 9.

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There, the Lord had a Tenant on the Rolls. The same point was determined in *Greenhill* v. *Greenhill* (*p*). But, though a Purchaser to whom a Copyhold is surrendered, has an Equity which he may devise, it does not follow that every Surrenderee has an Equity which he can devise.

Smith v. *Triggs* (*q*), a Case much considered, has decided what I before mentioned, as to the Heir taking in this Case the legal Estate, by descent from his Father, the Will in favour of *Elizabeth Elwell* not having taken effect for want of Admittance. In that Case, *Jane Day* surrendered a Copyhold to the use of her Will, and devised it to her Daughter *Jane Day*, who, before Admittance, devised it to the Defendant *Triggs*, and died without any Surrender or Admittance; and it was held that *Triggs* had no Title for want of an Admittance by *Jane Day*, and also for want of a Surrender to the use of her Will.

In *Wilson* v. *Weddall*'s Case (*r*), it was decided, that if a Copyhold be surrendered to *J. S.*, it is of no effect until he is admitted Tenant; and if before Admittance *J. S.* surrenders to another, a Stranger, who is admitted, yet nothing passes to the Stranger by this Admittance.

In *Shewen* v. *Wroot* (*s*), it was determined, that until the Admittance of the Surrenderee of a Copyhold upon

(*p*) Preced. Cha. and S. C. 2 Vern. 679. This appears to be the settled doctrine; but see 2 Dick. 403, and 15 Ves. 391, in Note.

(*q*) 1 Str. 487.

(*r*) Yelv. 144, and mentioned in Suppl. Coke's Copy. 20.

(*s*) 5 East, 132.

Mortgage, the Surrenderor continues the legal Tenant, and he cannot devise the Equity of Redemption even after the Surrender made, without a new Surrender to the use of his Will; but the legal Estate on his Death descends to his Heir at Law. I mention this Case, to show that the Mortgage made to *Willetts* by the Testatrix, is of no importance, even if she had been admitted, and had surrendered to him; because to give effect to her Will, she must, notwithstanding, have made another Surrender to the use of her Will. The same point was determined in *Kenebel* v. *Scrafton* (*t*), and also in *Floyd* v. *Aldridge*, which is quoted from a MS. in the Argument of *Shewen* v. *Wroot* (*u*), where Sir *Thomas Sewell* held, that the Mortgagor not having surrendered to the use of his Will, the Estate did not pass at Law, and Equity would not assist a Volunteer against the Heir.

These, I believe, are the only Authorities applicable to this Case.

I have thus endeavoured to show, on Principle and Authority, *Elizabeth Elwell* had not such an Estate in the Copyhold, that she could pass it by Will, without a Surrender, and her Devisee being a mere Volunteer, and the Copyhold not wanted for Debts, the Plaintiffs are not entitled to call upon the Defendant to surrender.

I shall not, however, dismiss the Bill, for *Elizabeth Elwell* seems to have thought that the Bequest of the Copyhold might be disputed; and in case it was disputed by the Defendant, she directs the full value of the Copy-

(*t*) 8 Ves. 30. (*u*) 5 East, 137.

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hold should be deducted from his Share of the Residue bequeathed to him; and as he insists that he ought not to be put to his Election until the Accounts have been taken, and the amount of the Residue ascertained, an Account must be directed.

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